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INTRODUCTION

Though the constitutional structure of enumerated powers was intended to limit the scope of federal power to certain specifically-described domains, Congress has passed a number of laws under the Commerce Clause that are, at best, only tenuously related to its power to regulate interstate commerce. The Supreme Court has often approved such laws on the grounds that the problem they regulate "substantially affects" interstate commerce; however, in doing so, the Supreme Court has given the impression that Congress' power under the Commerce Clause is logically limitless. The Court tried to dispel this impression in its most recent major Commerce Clause case, *United States v. Lopez*.[1] However, the limits imposed by *Lopez* are demonstrably untenable and under-inclusive. The Court will again take up the issue of Congress' commerce power this term in *Brzonkala v. Virginia Polytechnic Institute and State University*,[2] in which the Court will presumably decide the constitutionality of a civil rights remedy in the Violence Against Women Act of 1994.[3]

The "substantial effects" test and *Lopez* share an infirmity that is present in all of the Supreme Court's Commerce Clause jurisprudence to date—the Court's formal tests have failed to incorporate factors that truly govern the outcome of the decision. A close examination of case law reveals that Commerce Clause cases are decided according to certain formally unarticulated factors that have been consistently present throughout all of the superficial changes in Commerce Clause doctrine. These factors reflect a struggle between two imperatives: the need to permit the federal government enough power to handle important commerce-related social issues, and the need to limit that same power.

Unfortunately, Commerce Clause cases to date have failed to strike a balance between these two imperatives. Cases seeking to limit the commerce power have formulated under-inclusive distinctions that, if faithfully applied, would prevent the federal government from solving important commerce-related problems only it can solve. Meanwhile, cases expanding the commerce power have formulated over-inclusive rules for which no limit on federal power is thinkable. The "substantial effects" test is an example of an over-inclusive rule whose breadth is illusory unless the factors that really drive the decisions are taken into account. By the same token, *Lopez* formulates an under-inclusive rule whose narrowness is also illusory.

A corollary to the Court's over- and under-inclusive rule-making is that the Court has never adequately described the parameters of Congress' commerce power. The

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1. 514 U.S. 549 (1995).

2. 169 F.3d 820 (4th Cir. 1999), *cert. granted sub nom.* U.S. v. Morrison, ___ S. Ct. ___, No. 99-5, 1999 WL 459152 (Sept. 1999).

3. 42 U.S.C. § § 13931-14040 (1994) [hereinafter VAWA].

root cause of this problem is the Court's failure to formally adopt rules of decision which reflect factors that really determine the outcome of the Commerce Clause cases. This article identifies four factors that explain the outcome of the Commerce Clause cases more consistently than the rules the Court ostensibly applies. These factors constitute a four-prong test by which, this article contends, Commerce Clause cases have always been decided. An evaluation of case law reveals that this four-prong test describes Congress' commerce power more accurately than the doctrines thus far formulated by the Court. Brzonkala promises to be no different.

To remedy the confusion and inconsistency which have resulted from poor formulation of Commerce Clause rules, this article proposes that the Court formally adopt the four-prong test that has governed its Commerce Clause jurisprudence from the start. Under the test, where a statute does not fall squarely within Congress' power to regulate the channels and instrumentalities of interstate commerce, then 1) the regulation must have a nexus to the Commerce Clause; 2) the regulation must address a serious exigency; 3) the exigency must necessitate a national solution; and 4) the regulation must not upset the proper balance between federal and state governments.

Although formally employing this test would present problems regarding how to administer it, such a test is ultimately workable and its benefits would make the difficulties worthwhile. The test would put Commerce Clause jurisprudence on a reasonable and tenable footing by bringing to light the considerations which actually drive Commerce Clause jurisprudence.

Part I illustrates the inadequacy of the Commerce Clause rules the Court has formulated to date. Part II shows that Commerce Clause jurisprudence is best explained by reference not to these flawed rules but to the four-prong test identified above. Part III shows how this four-prong test should be formally adopted, and Part IV evaluates the propriety of replacing the current rules of decision with the proposed test. Part V concludes the paper with an application of the proposed test to the VAWA, in anticipation of how *Brzonkala* is likely to be decided.

I. THE PROBLEM WITH COMMERCE CLAUSE JURISPRUDENCE

Since Congress' power "[t]o regulate Commerce . . . among the several States . . . ."[4] was granted in 1787, the Commerce Clause has been used to effectuate a sundry array of federal laws: prohibition of lottery tickets moving across state lines,[5] setting of minimum hour and wage laws,[6] environmental regulation,[7] prohibition of race discrimination in public accommodations and restaurants,[8] regulation of wheat grown for personal use,[9] prohibition of loansharking,[10] the

4. U.S. CONST. art. I, § 8, cl. 3.
5. *See* Champion v. Ames, 188 U.S. 321 (1903).
6. *See* United States v. Darby, 312 U.S. 100 (1941).
7. *See* Hodel v. Virginia Surface Mining and Reclamation Ass'n, 452 U.S. 264 (1981).
8. *See* Heart of Atlanta Motel, Inc., v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964).
9. *See* Wickard v. Filburn, 317 U.S. 111 (1942).
10. *See* Perez v. United States, 402 U.S. 146 (1971).

creation of a civil rights remedy for violent acts against women,[11] and many others. Though the sphere of Congress' power under the Commerce Clause may seem boundless, the Supreme Court has occasionally declared certain Congressional enactments to exceed that power.

An investigation of Commerce Clause cases shows that two competing imperatives underlie the law in this field: the need to permit the federal government enough power to handle important commerce-related issues and the need to limit that power. In favoring one or the other imperative, the Court has consistently erred on the side of over- or under-inclusiveness, never arriving at a test which properly describes the dimensions of the commerce power. This problem has been extant since the Commerce Clause first became a subject of federal court cases but has found its most recent expression in *Lopez*, in which, for the first time in sixty years, the Court invalidated a federal law as being beyond Congress' commerce power. The Court will again address the issue of Congress' commerce power when it decides *Brzonkala*.[12]

A. *Cases Limiting Congress' Commerce Power Have Devised Under-inclusive Rules*

As Justice Souter makes clear in his *Lopez* dissent, cases purporting to limit the commerce power have engaged in "untenable jurisprudence."[13] *Lopez* itself is no exception, but deserves a special discussion which is deferred to the end of this section. For the moment, it is sufficient to illustrate that the Supreme Court has never articulated a viable test curbing Congress' commerce power:[14] its rules have all proven under-inclusive.

The Court decided the first major case limiting Congress' power under the Commerce Clause in 1895. In *United States v. E.C. Knight Co.*,[15] Congress had attempted to avert the creation of a monopoly among certain sugar refineries. In holding that such regulation was beyond Congress' power, the Court found that a distinction between manufacture and commerce was "vital" to maintaining state autonomy, which depended on the states' ability to exercise police power regulations to the exclusion of federal government.[16] The Court again employed the distinction between manufacture and commerce in *Carter v. Carter Coal Co.*,[17]

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11. *See* VAWA, 42 U.S.C. § 13981 (1994).

12. 169 F.3d 820 (4th Cir. 1999), *cert. granted sub nom.* U.S. v. Morrison, ___ S. Ct. ___, No. 99-5, 1999 WL 459152 (Sept. 1999).

13. United States v. Lopez, 514 U.S. 549, 608 (1995).

14. An exception is *Gregory v. Ashcroft*, 501 U.S. 452 (1991), in which the Court employed the Tenth Amendment to prevent application of the Federal Age Discrimination in Employment Act to state judges and other state appointees on a policymaking level. Aside from *Lopez*, *Gregory v. Ashcroft* represents the only doctrinal limit on the commerce power that has not been overturned or abandoned; however, its applicability is extremely narrow in light of *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), which permits federal regulation only of non-policymaking state employees.

15. 156 U.S. 1 (1895).

16. *See id.* at 11-13.

17. 298 U.S. 238 (1936).

invalidating the Bituminous Coal Conservation Act of 1935,[18] which was meant to stabilize the bituminous coal industry.[19]

Less than a year after *Carter*, the Court abandoned the manufacture/commerce distinction. In *National Labor Relations Board v. Jones & Laughlin Steel Corp.*,[20] the Court sidestepped *Carter* despite a fact pattern which invited its application and upheld labor legislation which protected collective bargaining by preventing companies from discharging employees who were active in unions.[21] *Carter* and *E.C. Knight* have been obsolete ever since.

Other cases attempting to limit federal power have suffered the same fate. In *Hammer v. Dagenhart*,[22] the Court invalidated the Child Labor Law. The government had claimed it could regulate child labor because the goods made by children flowed in interstate commerce.[23] Although precedent permitted Congress to prohibit "noxious articles" that cross state lines,[24] the Court distinguished such articles because the goods made from child labor were themselves harmless.[25] *Hammer*, however, was expressly overruled in *United States v. Darby*,[26] in which the Court upheld the Fair Labor Standards Act of 1938[27] on the grounds that the labor conditions the Act sought to ameliorate had a "substantial effect" on interstate commerce.[28]

In *Schechter Poultry Corp. v. United States*,[29] the Court originated yet another limiting rule that later cases left by the wayside. In *Schechter*, the Court disallowed prosecution under the Code of Competition for the Live Poultry Industry, which set wage and hours restrictions in the chicken industry.[30] The Court ruled that the Commerce Clause could not reach the defendant's business because the business was conducted almost exclusively within New York.[31] *Schechter* also employed a "direct/indirect effects" test, concluding that whatever effect defendant's business practices may have had on interstate commerce, those effects were too indirect to fall under the commerce power.[32]

Neither of the *Schechter* rationales would find currency in today's Commerce Clause jurisprudence. Under *United States v. Perez*[33] and *Wickard v. Filburn*,[34] Congress can touch behavior that is within a class of activities having a substantial

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18. Act of Aug. 30, 1935 ch. 824 § § 1-23, 49 Stat. 991, *repealed by* Act of Apr. 26, 1936, ch. 127 § 20(a), 50 Stat. 90.

19. *See Carter*, 298 U.S. at 278.

20. 301 U.S. 1 (1937).

21. *See id.* at 49. (the Court upheld the National Labor Relations Act of 1935, 29 U.S.C. § § 151-169 (1994)).

22. 247 U.S. 251 (1918), *overruled by* United States v. Darby, 312 U.S. 100 (1941).

23. *See id.* at 271.

24. *See id.* at 271-72; Champion v. Ames, 188 U.S. 321 (prohibition of interstate transportation of lottery tickets); Hipolite Egg Co. v. United States, 220 U.S. 45 (prohibiting interstate transportation of bad eggs).

25. *See Hammer*, 247 U.S. at 272.

26. 312 U.S. 100, 117 (1941).

27. 29 U.S.C. § § 201-219 (1994).

28. *See Darby*, 312 U.S. at 120-21.

29. 295 U.S. 495 (1935).

30. *See id.* at 524.

31. *See id.* at 542-43.

32. *See id.* at 546.

33. 402 U.S. 146 (1971).

34. 317 U.S. 111 (1942).

effect on commerce, even if the specific activity in question neither has an effect on commerce nor has any particular connection to movement across state lines.[35] Hence, wage and hours restrictions on a purely local business would be upheld because the activity is in a class of activities affecting commerce.

Another now-abandoned curb on the commerce power was put forth in *National League of Cities v. Usery*,[36] a Tenth Amendment case. The Court invalidated the 1974 Amendments to the Fair Labor Standards Act of 1938,[37] which extended the Act to almost all employees of state and local government, because the Amendments impinged on an area of governance in which the states had traditionally exercised complete sovereignty.[38] *National League of Cities* was overturned in *Garcia v. San Antonio Metropolitan Transit Authority*.[39]

B. Cases Affirming Federal Power Have Articulated Over-inclusive Rules

While cases seeking to limit the federal commerce power have not devised lasting tests, cases affirming federal power under the Commerce Clause have suffered another infirmity—they have no logical stopping point. The "substantial effects" test, by which Congress can regulate activities having a substantial effect on interstate commerce, has been in use ever since *National Labor Relations Board* and *Darby*.[40] But many commentators have pointed out that it provides no limitation on the powers Congress can exercise through the Commerce Clause.[41] Since this point has been made exhaustively, there is no need to repeat it in detail. Suffice it to say that, except for *Lopez*, this test has grown ever more inclusive in the modern era.[42] The thinking that springs from the modern pre-*Lopez* cases could permit Congress to "regulate any activity that it found was related to the economic productivity of individual citizens" and could even reach areas such as marriage, divorce and child custody, for example.[43] As the *Lopez* majority points out, "it is difficult to perceive any limitation [under the substantial effects test], even in areas

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35. *See infra* notes 135-44 and accompanying text.

36. 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

37. 29 U.S.C. § § 201-219 (1994).

38. *See National League of Cities*, 426 U.S. at 852.

39. 469 U.S. 528. The majority overruled *National League of Cities* because it found the test unworkable. *See id.* at 546-47. The dissenters in *Garcia* claimed the majority had severely misread the *National League of Cities* test. *See infra* note 161.

40. Precise illustrations of the evolution of the substantial effects test are available in other sources. *See, e.g.*, United States v. Lopez, 514 U.S. 549 (explained throughout the majority opinion); Judge Louis H. Pollack, Symposium: *Reflections on* United States v. Lopez: *Forward*, 94 MICH. L. REV. 533 (1995); Rachel Elizabeth Smith, Note, United States v. Lopez: *Reaffirming the Federal Commerce Power and Remembering Federalism*, 45 CATH. U. L. REV. 1459 (1996). Consequently, I will not repeat the task here.

41. *See, e.g.*, United States v. Lopez, 514 U.S. 549, 564-65 (1995) (majority opinion); *id.* at 593 (Thomas, J., concurring); Donald H. Regan, Symposium: *Reflections on* United States v. Lopez: *How to Think About the Federal Commerce Power and Incidentally Rewrite* United States v. Lopez, 94 MICH. L. REV. 554, 559-562 (1995); Smith, *supra* note 38, at 1503-06; Barry C. Toone & Bradley J. Wiskirchen, *Great Expectations: The Illusion of Federalism After* United States v. Lopez, 22 J. LEGIS. 241, 257-59 (1996).

42. *See* Regan, *supra* note 39, at 561. Precise illustrations of the evolution of the substantial effects test are available in other sources. *See supra* note 38 and accompanying text.

43. *Lopez*, 514 U.S. at 564.

such as criminal law enforcement or education where States historically have been sovereign."[44]

C. *Lopez Also Fails as an Effective Check on Federal Commerce Power*

Lopez was supposed to have stemmed the tide of the expanding "substantial effects" test. After sixty years of deference to expansions of federal power under the Commerce Clause, *Lopez* invalidated a federal statute on the grounds that Congress had exceeded its bounds. This decision triggered much scholarly debate over whether *Lopez* would prove historically significant as a limitation on the commerce power.[45] However, in the words of Donald H. Regan, *Lopez* has "not so much changed the situation as confused it."[46]

In *Lopez*, the Court considered the validity of the Gun-Free School Zones Act,[47] which made it a federal crime for a person to "knowingly . . . possess a firearm at a place that [he or she] knows . . . is a school zone."[48] The *Lopez* Court invalidated the Act, but its stated reasons no better provide a logical limit to the commerce power than previous Commerce Clause cases. The first grounds on which *Lopez* invalidated the Act is that Congress had made no findings that guns-in-schools substantially affects interstate commerce.[49] This grounds was criticized by the dissenting Justices, who made a fair case that Congress at least had a "rational basis" for finding that, by degrading quality of education, the presence of guns in school zones reduces the future productivity of America's youth and hence substantially affects interstate commerce.[50]

Although the *Lopez* opinion is often regarded as requiring a stricter inquiry than the "rational basis" test, the issue of findings ignores the real problem, which is that almost everything in the modern world can be found to substantially affect commerce—divorces, availability of parking or public transportation in cities, slow or inefficient state bureaucracies, local zoning ordinances, poor education, ineffectual snow-removal from roads, burglary and car-theft. It seems that whether or not Congress goes to the trouble of actually documenting the substantial effects of these activities on commerce should not make a difference whether they are regulable.[51]

The second grounds on which *Lopez* purported to limit the commerce power is in making a distinction between regulation of commercial activity and noncommer-

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44. *Id.*

45. *See* Douglas W. Kmiec, *Wising Up: Supreme Court Restores the Constitutional Structure*, CHI. TRIB., May 2, 1995, at 17; Richard Lacayo, *The Soul of a New Majority: In Most of the Supreme Court's Significant Rulings This Year, The Combination was Five Right, Four Left*, TIME, Jul. 10, 1995, at 46. *But see* Pollack, *supra* note 38, at 553; Toone & Wiskirchen, *supra* note 39, at 241 (both articles argue that *Lopez* is not such an important decision after all).

46. *See* Regan, *supra* note 39, at 559. *Lopez* also inspired at least two symposia on the topic. *See* Symposium, *The New Federalism After* United States v. Lopez, 46 CASE W. RES. L. REV. 633 (1995); Symposium, *Reflections on* United States v. Lopez, 94 MICH. L. REV. 533 (1995).

47. *See Lopez*, 514 U.S. at 551.

48. *Id.* (citing 18 U.S.C. § 922(q)(1)(A) (1988 ed., Supp. V)).

49. *See id.* at 563.

50. *See id.* at 618-625.

51. *See* Regan, *supra* note 39, at 562-63.

cial activity.[52] In striking down the civil rights remedy provision of the VAWA, the Fourth Circuit in *Brzonkala* relied heavily on this commercial/non-commercial activity distinction.[53] Donald H. Regan terms this distinction a "highly tendentious" gloss on previous Commerce Clause cases[54] because, though not inconsistent with them, there is nothing in those cases to suggest that the focus be on the commercial nature of the regulated activity rather than on the activity's effect on commerce.[55] More importantly, however, Regan points out that "it is easy to think up cases in which Congress's power to regulate noncommercial local behavior under the Commerce Clause should be obvious."[56] As examples, Regan cites private sport-hunting of migratory birds, drunk driving on interstate highways, or backyard incinerators that emit airborne toxins found to accumulate hundreds of miles away.[57] In short, concludes Regan, *Lopez* "is not only offering a gloss on existing doctrine" but it is an "unacceptable gloss."[58]

Lower courts, and perhaps the Supreme Court itself, have recognized the untenability of *Lopez*'s commercial/non-commercial distinction. For instance, in a challenge to the Endangered Species Act,[59] the Court of Appeals for the District of Columbia Circuit rejected the distinction outright. That decision, written by Judge Patricia Wald, claimed support from a 1997 Supreme Court case which permitted Congress to regulate charitable organizations even though they are not organized for profit.[60] The Ninth Circuit has also upheld a post-*Lopez* challenge to the Eagle Protection Act.[61]

Further, *Lopez*'s purported limitations on Congress' commerce power can easily be circumvented by adding a jurisdictional nexus to the Gun-Free School Zones Act. By requiring that the Act only apply to guns moving in interstate commerce, the Act could pass Constitutional muster because the issue of substantial effects would then be moot. *Perez* would probably make it unnecessary that the particular gun in question have actually moved in interstate commerce; it would be sufficient that the gun was part of a general category of things (guns) that move in interstate commerce. In any event, most guns move in interstate commerce so the effect of the Act would be much the same despite a jurisdictional nexus.

In fact, Congress attempted just this maneuver. On September 30, 1996 it passed a revised version of the Act that was different by only twelve words. Congress merely modified the phrase, "It shall be unlawful for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to

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52. *See Lopez*, 514 U.S. at 551, 561-62.

53. *See Brzonkala*, 169 F.3d at 830-36.

54. *See* Regan, *supra* note 39, at 564. Regan also points out an amusing irony: Lopez was being paid to act as a courier for delivering the gun to someone else, and hence was engaged in commercially motivated behavior. *See id.* n.46 (citing Brief for the United States at 7, United States v. Lopez, 115 S. Ct. 1624 (1995) (No. 93-1260)).

55. *See* Regan, *supra* note 39, at 564.

56. *Id.*

57. *See id.*

58. *Id.*

59. 16 U.S.C. § § 1531-1544 (1994).

60. *See* National Ass'n of Home Builders v. Babbitt, 130 F.3d 1041, 1050 (1997) (citing Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine, 117 S. Ct. 1590, 1602 (1997)).

61. *See* United States v. Bramble, 103 F.3d 1475 (1996).

believe, is a school zone," by requiring that the firearm be one "that has moved in or that otherwise affects interstate or foreign commerce."[62]

It is clear then that insofar as *Lopez* maintains the substantial effects test, it is over-inclusive. Insofar as it draws a distinction between commercial and non-commercial activity, it is under-inclusive.

D. The Problem with Commerce Clause Jurisprudence Restated

Although, with the exception of *Lopez*, modern cases have consistently permitted expansion in federal power, these cases have never abandoned the notion, extant since the earliest days of Commerce Clause jurisprudence, that Congress' power under the Commerce Clause is somehow bounded.[63] Even the four dissenting justices in *Lopez* claim their position would not lead to a limitless federal power.[64]

The problem with Commerce Clause jurisprudence is thus apparent: "On the one hand, we have a collection of doctrinal rules that, if we take them seriously, allow Congress to do anything it wants under the commerce power. On the other hand, we continue to pay lip service to the idea the Congress's power is limited."[65] As was demonstrated earlier in this paper, the "substantial effects" test provides no true check on the commerce power. It was also shown that even *Lopez* fails to provide such a constraint. Nevertheless, the Courts have not abandoned the notion that the federal government's commerce power is limited. If this notion is to be taken seriously, as it should be, then there must be another way.

II. THE TRUTH ABOUT COMMERCE CLAUSE JURISPRUDENCE

The problem of over-and under-inclusiveness is a result of the Court's failure to incorporate into its rules the factors that truly determine the outcome of the cases it decides. This accounts for the fact that despite its failure to articulate a rule capable of corralling federal power, the Court nevertheless insists that federal power is somehow limited. The Court's failure to devise a plausible doctrine shows that the rules the Court has formulated must be regarded ultimately as rationalizations of *a priori* decisions, rather than as lines of thinking by which the Court has reached its conclusion. In other words, the Court creates these rules after its decisions are made. Hence, Commerce Clause cases are not entirely decided according to the rules articulated by the Court, but according to factors that remain in the shadows.

The question then to ask is, what are the factors by which the Court formulates its Commerce Clause rules? They are four: 1) the nexus to interstate commerce; 2)

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62. 18 U.S.C. § 922(q)(2)(A) (1994 & Supp. 1996).

63. *See* United States v. Lopez, 514 U.S. 549, 584 (1995) (Thomas, J., concurring) ("We *always* have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power; our cases are quite clear that there are real limits to federal power.").

64. *See id.* at 624 (Breyer, J., dissenting) ("To hold this statute constitutional is not to 'obliterate' the 'distinction between what is national and what is local.'").

65. Regan, *supra* note 39, at 554. Regan points out that some scholars advocate abandoning the idea of limits altogether. *See id.* at 559. However, since not even the dissenters in *Lopez* have gone this far, I do not find it necessary to refute these arguments. *See generally* WILLIAM WINSLOW CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES (1953) (arguing that even as a matter of Constitutional history, the federal government was never intended to be limited in any significant degree).

the seriousness of the exigency with which Congress is faced; 3) the necessity that the regulation or law in question be national rather than state or local; and 4) the balance between the federal and state governments (concerns about federalism). Deciding the exact parameters of these factors for purposes of formally applying the four-prong test will be discussed in section three. For now, the aim is to demonstrate that theses factors are more descriptive of Commerce Clause jurisprudence than the Court's own rules of decision.

The Court has in fact employed a version of the four-prong test throughout the history of Commerce Clause jurisprudence, but has presented only the first "nexus" prong as its rule of decision. Indeed, the Court has essentially attempted to collapse all four factors into one "nexus" test. To see this, the reader must mentally impose the four-prong test onto the case law. The nexus prong corresponds with the test as the Court has formally articulated it. For instance, regulation of the channels and instrumentalities of interstate commerce can be thought of as having a strong nexus to the Commerce Clause, since the Court has allowed regulation of such activity almost without exception. The substantial effects test should also be thought of as providing a nexus to interstate commerce. However, in the substantial effects test, the unarticulated factors in the four-prong test determine how strong a nexus the Court will require. This is why the Court's test is better thought of as a "nexus" test than a categorical device.

In requiring a nexus to the Commerce Clause, the Court has occasionally considered whether or not a regulation comports with the purpose for which the Commerce Clause was created—maintenance of free trade among the states. If a regulation is far from this purpose, it has been accompanied by the strong presence of the latter three factors in the four-prong test. Conversely, if the purpose of the Commerce Clause has been directly served by the regulation, the Court will validate the regulation even if the other three factors have made a weaker showing.

As to those other three factors, the requirement that there be a serious exigency facing Congress means that Congress must be addressing some real problem requiring government action. In *Lopez*, for instance, we see evidence that the problem Congress faced was not thought to be a serious one and that in fact the Court believed Congress was grandstanding rather than facing a crisis. The absence of this factor in *Lopez* helps explain why the Court was willing to invalidate the Gun-Free School Zones Act.

The third requirement—that the exigency faced needs a national solution—means that the states must be separately unable to handle the problem Congress seeks to solve. Whether because of collective action problems or mere state incompetency, a national solution has been necessary in all the cases in which the Court has expanded the commerce power (i.e., permitted a weaker nexus to the Commerce Clause). In cases where the exercise of commerce power has been denied, the need for a national solution has been less clear.

Finally, the federal/state balance factor revolves around federalism. The Court has been more restrictive in allowing an exercise of the commerce power when it has believed that the exercise threatens the system of federalism. Conversely, the Court has been more willing to permit the exercise of the commerce power where such exercise has not been perceived as threatening the federal/state balance.

Mentally imposing the four-prong test on the case law, the reader will find that the Court's formal test—which only encompasses the "nexus" prong of the four-prong test by which the Court actually decides Commerce Clause cases—has evolved in response to the other three factors of the four-prong test. Indeed, changes in the Court's formal test are best explained not as logical extensions of then-current doctrine, but in terms of the four-prong test.

Hence, where the Court has demonstrated less concern with the problem Congress seeks to solve and where the Court has shown concern for the federal/state balance, the Court has required a stronger nexus to interstate commerce. Conversely, where the Court has taken seriously the problem Congress is addressing, where the problem requires a national solution, and where the Court has shown little concern about upsetting the federal/state balance, it has allowed a looser connection to interstate commerce, oftentimes devising unprecedented categorizations that seem to expand Congress' commerce power in an overly broad manner.

We will see that the modern "substantial effect" nexus to interstate commerce has proven especially responsive to the other three factors, which have not been incorporated into the Court's formal analysis. Thus, the Court has accepted a more tenuous nexus to interstate commerce when Congress seeks to address a serious exigency requiring national action whose regulation will not upset the federal/state balance. Conversely, we will see that in *Lopez*, the Court's decision is best explained by the absence of a demonstrated serious problem needing a national solution, and by the presence of concerns about the federal/state balance. Hence, the seeming overbreadth of the substantial effects test is attributable to the fact that it has been applied only where there is a serious exigency requiring national action that the Court believes will not upset the federal/state balance.

Surprisingly, language in the cases themselves provides substantial support for the proposition that the four-prong test actually governs the commerce power. The Court consistently mentions the seriousness of the exigency facing the government, the need for a national solution, and a concern for federalism, even though according to its formal test these factors should not matter to its decision. The recurrence of such language throughout the case law indicates the existence of a doctrine underpinning and indeed shaping the formal rules of decision.

Thinking of the commerce power cases in light of the four-prong test leads to the same results as the formal doctrine. Further, these factors synthesize the cases in such a way that eliminates seeming contradictions among them. Hence, Commerce Clause doctrine is clearer and easier to understand by reference to the four-prong test than to the doctrine as formally articulated.

A. *How the New Test Explains the Court's Holdings in the Early Cases*

Gibbons v. Ogden,[66] the Court's first major pronouncement on the Commerce Clause, involved an act of the New York legislature granting Robert R. Livingston and Robert Fulton monopoly rights for using steamboats on all navigable waters within the state. Thomas Gibbons, with a federal license to carry on coastal trade,

66. 22 U.S. 1 (1824).

sought to use New York's waters in violation of Livingston and Fulton's monopoly.[67] The issue was whether New York law or the federal license prevailed.

In *Gibbons*, Chief Justice Marshall strongly affirms the power of the federal government to regulate the nation's navigable waters: "[T]he power to regulate . . . is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than those prescribed in the constitution."[68] This passage has since been cited to justify significant expansions in the commerce power;[69] however, by reading *Gibbons* in terms of the four-prong test, one finds that Marshall's language should be thought of more narrowly.

The activity being regulated in *Gibbons* was commercial in nature and took place on a channel of commerce, so the nexus to Congress' power was very strong. Further, as Regan points out, the necessity of national action was indisputable.[70] Protectionist legislation such as enacted by the New York legislature threatened interstate commerce and could not be dealt with by any power other than a national government. A serious exigency also faced Congress: such protectionist legislation could significantly impede free trade among the states.

Perhaps the most important factor in this decision was Marshall's concern for the federal/state balance. At the time *Gibbons* was decided, the role of the federal government in the Constitutional scheme was unsettled and states retained a great deal of power.[71] Marshall was concerned with the long term viability of the federal government to meet the demands that faced the nation.[72] Marshall's concern about striking an improper federal/state balance seems to have been at the heart of his decision.

Language from *Gibbons* gives credence to the proposition that the Court actually employed a four-prong test. Marshall states that "[t]he 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."[73] This statement implies that Congress' commerce power was only meant to be used where the States found mutual benefit and thus suggests a test that hinges on the necessity of federal action.

Other parts of Marshall's opinion also suggest a "necessity of federal action" prong. Marshall writes that the commerce power should not extend to concerns "which are completely within a particular State, which do not affect other States, and with which it is not *necessary* to interfere . . . ."[74] Another passage from *Gibbons* also bears this out:

> It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect

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67. *See id.* at 2.
68. *Id.* at 196.
69. *See Lopez*, 514 U.S. at 594 (Thomas, J., concurring); Perez v. United States, 402 U.S. 146, 151 (1971); Wickard v. Filburn, 317 U.S. 111, 120 (1942).
70. *See* Regan, *supra* note 39, at 573.
71. *See* BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 48-49 (1993).
72. *See id.* at 38-39, 47-49.
73. *Gibbons*, 22 U.S. at 195.
74. *Id.* at 195 (emphasis added).

> other States. Such a power would be inconvenient, and is certainly *unnecessary*.[75]

The next major Commerce Clause case came in 1895. In *United States v. E.C. Knight Co.*,[76] the defendant owned a number of sugar refineries and had been charged with violating a law prohibiting conspiracies "in restraint of trade and commerce among the several states."[77] The Court ruled that because Congress was seeking to regulate manufacture, rather than commerce, its Act was not permissible under the Commerce Clause.[78]

Although it seems clear that the national government was faced with a problem only it could handle—preventing monopolies among nationwide businesses—the other prongs of the test were not satisfied here. The Court mentions nothing of the seriousness of the exigency at hand; indeed, *E.C. Knight* took place just as monopolistic business practices were only beginning to be recognized as problematic.[79] Further, the nexus to the commerce power was more questionable than in *Gibbons*. To the Court, the fact that this involved manufacture and not trade gave Congress' enactment a dubious connection to the commerce power.

As in *Gibbons*, *E.C. Knight* is best explained as a function of the Court's concern for the system of federalism. The Court stated:

> It is vital that the independence of the commercial power and of the police power, and the delimitation between them, however sometimes perplexing, should always be recognized and observed, for while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the States as required by our dual form of government.[80]

Justice Harlan's dissent in *E.C. Knight* also expresses concern for the vitality of federalism. Even though he voted for allowing the exercise of federal commerce power, he acknowledged that "[u]ndoubtedly, the preservation of the just authority of the States is an object of deep concern to every lover of his country. No greater calamity could befall our free institutions than the destruction of that authority, by whatever means such a result might be accomplished."[81]

For Harlan, however, federalism concerns weighed in less heavily than the need for the national government to address issues within its unique competence. He wrote:

> the preservation of the just authority of the General Government is essential as well to the safety of the States as to the attainment of the important ends for which that government was ordained by the People of the United States; and the

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75. *Id.* at 194 (emphasis added).
76. 156 U.S. 1 (1895).
77. *Id.* at 2.
78. *See id.* at 12.
79. *Cf.* The Sherman Anti-Trust Act of 1890, 15 U.S.C. § 1 (1988) (national legislation aimed at curbing monopolistic abuses).
80. *E.C. Knight*, 156 U.S. at 13.
81. *Id.* at 19.

> destruction of *that* authority would be fatal to the peace and well-being of the American people.[82]

Both the majority and dissent in *E.C. Knight* suggest the use of the four-prong test.

Champion v. Ames,[83] decided in 1903, represents a significant permutation of Congress' commerce power that is also best explained in terms of the four-prong test. Congress had passed an "act for the suppression of lottery traffic through national and interstate commerce . . . ."[84] Rejecting arguments that Congress' Act was a prohibition of commerce and not a regulation of it,[85] *Champion* was the first major Commerce Clause case to permit an enactment that did not protect or facilitate interstate commerce.[86] As such, it is not a necessary extension of then-current doctrine, especially given the purpose for which the Clause was originally created.

Since the regulation in *Champion* is essentially one of police power, it can be thought of as having a questionable nexus to the commerce power. But the Court nevertheless permitted Congress' regulation because (in the eyes of the Court) Congress was facing a very serious exigency that only Congress was capable of meeting. The Court stated that the "pestilence of lotteries . . . infests the whole community; it enters every dwelling; it reaches every class; it preys hard upon the earnings of the poor; it plunders the ignorant and the simple."[87] Deeming lottery tickets an "evil of . . . appalling character," the Court stated that "[w]e should hesitate long before adjudging" that such an evil "cannot be met and crushed by the only power competent to that end."[88] The Court then upheld Congress' Act because "Congress alone has the power to occupy . . . the whole field of interstate commerce."[89] Even though consideration of the unique competence of a national power to solve the problem of lotteries does not find its way into *Champion*'s formal doctrine, it is apparent the Court gave it countenance.

Also, the Court was not concerned with upsetting the balance between the federal and state governments because most if not all of the states had already legislated against lottery tickets.[90] Hence, the Court was careful to state that Congress had not "assumed to interfere with the completely internal affairs of any State" but merely "supplemented the action of those states."[91]

Shreveport Rate Cases,[92] decided in 1914, is another change in doctrine that is most sensible when viewed in terms of the four-prong test. In *Shreveport Rate Cases*, an action by the Interstate Commerce Commission was challenged because it sought to regulate railroad rates set entirely within one state. Texas railways had been setting "higher rates from Shreveport [, Louisiana] to points in Texas than

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82. *Id.* at 19.
83. 188 U.S. 321 (1903).
84. *Id.*
85. *See id.* at 354.
86. *See id.* at 353.
87. *Id.* at 356.
88. *Id.* at 357-58.
89. *Id.* at 358.
90. *See id.* at 357; Regan, *supra* note 39, at 576.
91. *Champion*, 188 U.S. at 357.
92. Houston, E. & W. Tex. Ry. V. United States, 234 U.S. 342 (1914).

were in force from cities in Texas to such points under substantially similar conditions and circumstances."[93] The ICC's order imposed a duty on the rail companies not to discriminate against interstate transportation.

The Court upheld the ICC's order, declaring that Congress' authority extended to matters having a "close and substantial relation" to interstate commerce.[94] But this is the first instance in which this test had been used. Indeed, the *Shreveport Rate* decision is hard to justify in terms of precedent because of the previous emphasis on the interstate/intrastate distinction.

However, in terms of the four-prong test, this case is easily comprehensible. The nexus to commerce is fairly strong since this is the kind of protectionism which the Commerce Clause was meant to overcome. The suppressive effect of discriminatory rate setting on interstate commerce could not be denied. A last hook into the Commerce Clause is the fact that these companies were interstate carriers.

Further, that states alone could not deal with discriminatory rate setting is evident—states were essentially posed with a "race-to-the-bottom" problem of collective action. Hence, only a national power could deal with this problem. The Court was aware of this: "unjust discrimination against interstate trade arises from the relation of intrastate to interstate rates as maintained by a carrier subject to the act. Such a matter is one with which Congress alone is competent to deal . . . ."[95] The necessity of a national solution is also referenced regarding the reason the commerce power was created: "to provide the *necessary* basis of national unity by insuring 'uniformity of regulation against conflicting and discriminating state legislation.'"[96]

The Court also regarded discriminatory rate setting as posing a serious problem. It referred to Congress' ability to correct an "evil"[97] which was engendered by the "rivalries of local government" and threatened to "destroy[] or impede[] interstate trade."[98] That Congress must have the power to meet these serious exigencies was clear to the Court, which stated, "the authority of Congress is at all times adequate to meet the varying exigencies that arise . . . ."[99] Finally, concerns for federalism are not strong in *Shreveport Rate Cases* since the states, by incorporating the Commerce Clause into the Constitution, had agreed to relinquish control over protectionist economic policies.[100]

A gloss of purposiveness is also justified by language in *Shreveport Rate Cases*. The Court stated, "Interstate trade was not left to be destroyed or impeded by the rivalries of local governments. The purpose was to make impossible the recurrence of the evils which had overwhelmed the Confederation . . . ."[101] The Court had a

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93. *Id.* at 347.
94. *Id.* at 351.
95. *Id.* at 358.
96. *Id.* at 350 (quoting County of Mobile v. Kimball, 102 U.S. 691, 697 (1880)) (emphasis added).
97. *See id.*
98. *Id.*
99. *Id.*
100. *See* Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432, 481-94 (1941); Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1114 (1986).
101. *Shreveport Rate Cases*, 234 U.S. at 350.

sense that Congress' regulation was consistent with the purpose for which the Commerce Clause had been adopted.

Four years after *Shreveport Rate Cases*, the Court decided *Hammer v. Dagenhart*.[102] This case is another example of a formal rationale that is inadequate to the results. Recall that in *Hammer*, the Court considered whether Congress could enact child labor laws and concluded that because the goods made by children were in themselves harmless, the manufacture of those goods was not subject to the commerce power even though the goods traveled in interstate commerce. This unprecedented test later gave way in *Darby*.

Hammer's under-inclusive rule becomes understandable with reference to the four-prong test. The Court did not characterize child labor as presenting a serious problem. Although the states were separately incompetent to act—the legislation was aimed at eliminating the problem of states gaining competitive advantage over others by permitting what were deemed unacceptable labor conditions—the Court's interest in federalism took paramount importance in this case. The Court was concerned that "all manufacture intended for interstate shipment would be brought under federal control to the practical exclusion of the authority of the states."[103] The Court then stated that the grant of power to Congress was not meant to:

> give it authority to control the States in their exercise of the police power over local trade and manufacture.
>
> The grant of authority over a purely federal matter was not intended to destroy the local power always existing and carefully reserved to the states in the Tenth Amendment and the Constitution.[104]

Hence, the Child Labor Act[105] failed to pass the fourth prong of the test, that of federal/state balance.

For Justice Holmes, who dissented in *Hammer*, the other factors were more important than his concerns about federalism. Holmes was concerned with the seriousness of the problem Congress faced and stated "if there is any matter upon which civilized countries have agreed . . . it is the evil of premature and excessive child labor."[106] His reference to "self-seeking" states[107] also implies that national action was necessary to fix the problem. Holmes' dissent uses the same analytical factors as the majority opinion, but arrives at a different result.

In *Schechter Poultry*,[108] Congress was faced with a "grave national crisis"[109] implicating a serious exigency, but the enactment in question failed to satisfy the other factors of the test. Congress had enacted a wage and hour regulation which the government sought to apply to a company that conducted business almost entirely within a single state. The *Schechter* Court found the legislation to be invalid and stated that "[t]he distinction between direct and indirect effects of intrastate

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102. 247 U.S. 251 (1918), *overruled by* United States v. Darby, 312 U.S. 100 (1941).
103. *Id.* at 272.
104. *Id.* at 273-74.
105. Act of Sept. 1, 1916, ch. 432, 39 Stat. 675.
106. *Hammer*, 247 U.S. at 280 (Holmes, J., dissenting).
107. *See id.* at 281.
108. 295 U.S. 495 (1935).
109. *Id.* at 528.

commerce must be recognized as a fundamental one, essential to the maintenance of our constitutional system."[110]

Schechter's unprecedented and under-inclusive distinction, which is no longer good law, makes sense when viewed in light of the four-prong test. The government had argued that a federal solution was necessary because the "national crisis demanded a broad and intensive cooperative effort by those engaged in trade and industry, and this necessary cooperation was sought to be fostered by permitting them to initiate the adoption of codes."[111] But the "necessity" argument was not strong enough to overcome the Court's concern for the federal/state balance. "If the Commerce Clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce," wrote the Court, "the federal authority would embrace practically all the activities of the people and the authority of the state over its domestic concerns would exist only by sufferance of the federal government."[112] Thus, the Court concluded that a distinction between direct and indirect effects was "essential to the maintenance of our constitutional system."[113] Otherwise, stated the Court, "there would be virtually no limit to the federal power."[114] Note, too, that the nexus to the commerce power in *Schechter* is weaker than in other cases since the regulated activity took place wholly within one state.

In the last of the premodern cases, *Carter v. Carter Coal Co.*,[115] the Court decided that the Bituminous Coal Conservation Act of 1935[116] could not be upheld under the Commerce Clause because the Act sought to regulate manufacture rather than commerce. However, this distinction proved under-inclusive and need not have been made had the Court formally articulated factors truly relevant to its decision.

The *Carter* Court was again faced with a serious problem only the national government could solve. The government emphasized "the evils which come from the struggle between employers and employees over the matter of wages . . . ."[117] The coal industry operated nationwide and the Act, which sought to place an excise tax on mining bituminous coal and to create labor standards for coal mines, could not have been undertaken by the states alone. However, the *Carter* Court rejected the argument that "the power of the federal government inherently extends to purposes affecting the Nation as a whole with which the states severally cannot deal or cannot adequately deal."[118] Instead, the Court claims that this proposition has been frequently offered and just as frequently discredited, indicating that all prongs of the four-prong test must be satisfied.

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110. *Id.* at 547 (the *Schechter* court struck down the National Industrial Recovery Act, Act of June 16, 1933, ch. 90, 48 Stat. 195, 196).

111. *Id.* at 529.

112. *Id.* at 546.

113. *Id.* at 548.

114. *Id.*

115. 298 U.S. 238 (1936).

116. Act of Aug. 30, 1935 ch. 824 § § 1-23, 49 Stat. 991, *repealed by* Act of Apr. 26, 1936, ch. 127 § 20(a), 50 Stat. 90.

117. *Carter*, 298 U.S. at 308.

118. *Id.* at 291.

In *Carter*, as in *Schechter*, federalism concerns were the decisive factor in the decision. "The determination of the Framers Convention and the ratifying conventions to preserve complete and unimpaired state self-government in all matters not committed to the general government is one of the plainest facts which emerge from the history of their deliberations."[119] The Court added:

> [S]ince every addition to the national legislative power to some extent detracts from or invades the power of the states, it is of vital moment that, in order to preserve the fixed balance intended by the Constitution, the powers of the general government be not so extended as to embrace any not within the express terms of the several grants or the implications necessarily to be drawn therefrom.[120]

Once again, the federalism prong is the decisive factor in this pre-modern case.

*B. Modern, Pre-*Lopez *Cases*

The watershed cases of *National Labor Relations Board v. Jones & Laughlin Steel Corp.*[121] and *United States v. Darby*[122] provide the best circumstantial evidence of the Court's willingness to alter existing Commerce Clause doctrine according to the presence or absence of the factors in the four-prong test. In *Jones & Laughlin Steel*, the Court considered the validity of the National Labor Relations Act of 1935,[123] which guaranteed the right of laborers to organize and engage in collective bargaining by prohibiting companies from discharging employees for union activity.[124] The Court refused to distinguish between manufacture and commerce, hence side-stepping the *Carter* test that would have limited the exercise of federal power. The *Jones & Laughlin Steel* Court instead ruled, in a precursor to *Darby*, that the "close and intimate relation" of steel manufacturing to commerce justified federal rules on collective bargaining.[125]

Jones & Laughlin Steel departed significantly from precedent, as the dissenting justice and three concurring justices pointed out.[126] Like most of the other modern cases, this departure is best explained with reference to the seriousness of the exigency faced by Congress, the inability of the states to deal with it, and the Court's lack of concern about a threat to federalism. The Court recognized that the "[r]efusal to confer and negotiate has been one of the most prolific causes of strife. This is such an outstanding fact in the history of labor disturbances that it is a proper subject of judicial notice and requires no citation of instances."[127] Here, the Court notes the serious nature of the problem before it. It is clear as well that

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119. *Id.* at 295.
120. *Id.* at 294; *see id.* at 294-298.
121. 301 U.S. 1 (1937).
122. 312 U.S. 100 (1941).
123. 29 U.S.C. § § 151-169 (1994).
124. *See Jones & Laughlin Steel*, 301 U.S. at 43.
125. *See id.* at 37.
126. *See id.* at 76 (McReynolds, J., dissenting).
127. *Id.* at 42.

individual states could not deal with such problems since the industries were organized "on a national scale."[128]

The Court also considered the federalism issue but did not find it decisive. The Court, citing *Schechter*, stated:

> 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.[129]

The Court took care not to employ a test that threatened the "maintenance of our federal system."[130] Hence, the regulation in question passed the fourth prong of the test.

Four years later, in *Darby*, the Court originated the "substantial effects" test which is in use today[131] and which justified application of federal law to the manufacture of products made by child labor. Not only did *Darby* deviate from *Carter*'s manufacture/commerce distinction; it also overruled *Hammer v. Dagenhart*,[132] which held that Congress could only regulate items of interstate commerce which in themselves were "harmful or deleterious".[133] Indeed, this significant and over-inclusive departure from precedent is hard to explain in conventional terms since, as Justice Thomas points out in his concurring opinion to *Lopez*, the substantial effects test has questionable support in the text or structure of the Constitution.[134]

Hence, the four-prong test best makes sense of *Darby*. As in *Jones & Laughlin Steel*, the Court notes the seriousness of the exigency with which Congress dealt: "the evils aimed at by the Act are the spread of substandard labor conditions through the use of the facilities of interstate commerce for competition by the goods so produced with those produced under the prescribed or better labor conditions."[135] The fact that states had economic incentives to maintain lower labor standards than their neighbors means that states were separately incompetent to administer laws which would improve the overall conditions of workers. The problem required a national solution.

The *Darby* Court also quoted a passage from *Munn v. Illinois*[136] emphasizing its finding that national action was necessary in this circumstance. The passage indicates that at the heart of the establishment of national government is its necessity: "when it was found *necessary* to establish a national government for

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128. *Id.* at 41.
129. *Id.* at 37.
130. *Id.* at 41.
131. *See* United States v. Darby, 312 U.S. 110, 118 (1941).
132. 247 U.S. 251 (1918), *overruled by* United States v. Darby, 312 U.S. 100 (1941).
133. *Darby*, 312 U.S. at 116.
134. *See* United States v. Lopez, 514 U.S. 549, 584-602 (1995).
135. *Darby*, 312 U.S. at 122.
136. 94 U.S. 113 (1876).

national purposes . . . a part of the powers of the States and of the people of the States was granted to the United States . . . ."[137]

Such thinking as is found in *Darby* is also apparent in the other modern decisions, all of which except *Lopez* upheld federal exercise of the commerce power and all of which articulate rules that, if viewed aside from the factors that gave rise to them, seem over-inclusive. In *Wickard v. Filburn*,[138] the defendant was a farmer whose regulated activity, making flour for home consumption,[139] had nothing to do with trading across state lines or even selling to others. The only connection to interstate commerce was the fact that, in the aggregate, growing wheat for home consumption had a substantial effect on the demand for wheat[140]—demand which Congress sought to regulate. The Court therefore granted Congress the power to prohibit home consumption of wheat.

In *Wickard*, the significant expansion of Congress' commerce power and its weaker nexus is appropriately explained by the necessity of federal intervention and the seriousness of the problem at hand. The Court noted that all of the four largest wheat exporting countries had undertaken programs for the relief of growers, and that "[s]uch plans have generally evolved toward control by the central government"[141] so that "[i]n all of them wheat regulation is by the national government."[142] The Court also recognized that:

> The wheat industry has been a problem industry for some years. Largely as a result of increased foreign production and import restrictions, annual exports of wheat and flour from the United States during the ten-year period ending in 1940 averaged less than 10 percent of total production, while during the 1920's they averaged more than 25 per cent. The decline in the export trade has left a large surplus in production, which in connection with an abnormally large supply of wheat and other grains in recent years, caused congestion in a number of markets; tied up railroad cars; and caused elevators in some instances to turn away grains, and railroads to institute embargoes to prevent further congestion.[143]

Katzenbach v. McClung[144] demonstrates a similar posture. This case allowed Congress to use the Commerce Clause as a means of enacting public accommodations provisions in civil rights legislation. Ollie's Barbecue, the respondent, procured 46 percent of its meat from a local supplier who, in turn, had procured it from out-of-state sources.[145] Therefore, the Court concluded that Congress had the power to prohibit race discrimination at that restaurant. This was the first time the Court had permitted Congress to reach practices at an establishment that *received* goods from interstate commerce, rather than one that merely manufactured or produced them.

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137. Carter v. Carter Coal Co., 298 U.S. 238, 294 (1936) (emphasis added).
138. 317 U.S. 111 (1942).
139. *See id.* at 114.
140. *See id.* at 129.
141. *Id.* at 126.
142. *Id.* n.27.
143. *Id.* at 125.
144. 379 U.S. 294 (1964).
145. *See id.* at 296.

Viewed in isolation from other factors influencing this decision, *McClung* represents a significant and seemingly boundless expansion of the commerce power. However, *McClung*'s over-inclusive rule should be interpreted as a reaction to the serious problem of racial discrimination in the United States and to the well-known recalcitrance of Southern states to correct that problem. Since the problem required national action, the second and third prongs best make sense of *McClung*'s weak nexus to the Commerce Clause.

Heart of Atlanta Hotel, Inc. v. United States[146] also can be explained this way since it involved similar facts and was decided on the same day as *McClung*. In that case, the Court permitted Congress to enact civil rights legislation reaching hotels and motels. However, the Court noted that 32 states had already enacted public accommodation laws.[147] Hence, the Court considered the impact of this legislation on the federal/state balance and did not find it prohibitive.

Perez v. United States,[148] decided in 1971, is also explicable by reference to the four-prong test. Petitioner was a small-time loansharker prosecuted under the Consumer Credit Protection Act.[149] The Court ruled that the Act could reach him as an exercise of the commerce power because the petitioner's loansharking was in a class of activities that had a substantial effect on commerce. However, Perez' loansharking had no demonstrated connections to organized crime[150] and hence did not in itself affect commerce. Nevertheless, application of the Consumer Credit Protection Act to Perez was found valid.

In *Perez*, the strong presence of the second and third prongs of the test explain the Court's willingness to expand its definition of the commerce power into previously uncharted territory. Recognizing that Congress was faced with a serious problem, the Court found that loansharking provided vital support for organized crime which, in turn, had a leech-like effect on the nation's commerce.[151] The Court cites a finding by Congress that "[o]rganized crime . . . is directly responsible for murders, willful injuries to person and property, corruption of officials, and terrorization of countless citizens . . . ."[152] The Court found that loansharking is inextricably linked with organized crime and is "one way organized interstate crime holds its guns to the heads of the poor and the rich alike and syphons funds from numerous localities to finance its national operations."[153]

Moreover, the Court recognized that the problem needed a national solution.[154] The Court noted the comments of Senator Proxmire upon approval of the "loan shark" provision of the Act: "If we are to win the battle against organized crime we must . . . give the Justice Department additional tools to deal with the problem. The problem simply cannot be solved by the States alone. We must bring into play the

146. 379 U.S. 241 (1964).
147. *See id.* at 259.
148. 402 U.S. 146 (1971).
149. 18 U.S.C. § § 891-96 (1998).
150. *See Perez*, 402 U.S. at 157 (Stewart, J., dissenting).
151. *See id.* at 148-150.
152. *Id.* at 146 n.1.
153. *Id.* at 157.
154. *See id.* at 150.

full resources of the Federal Government."[155] Demonstrably, the Court considered the necessity of federal action as a factor in its decision even though, according to formal doctrine, it should not have.

Finally, *Hodel v. Virginia Surface Mining and Reclamation Ass'n*[156] also makes the necessity of a national solution the partial basis of its decision. The Court noted that the Congressional committees "explained that inadequacies in existing state laws and the need for uniform nationwide standards made federal regulations imperative."[157] The Court wrote that the Act:

> responds to a congressional finding that nationwide 'surface mining and reclamation standards are essential in order to insure that competition in interstate commerce among sellers of coal produced in different States will not be used to undermine the ability of the several States to improve and maintain adequate standards on coal mining within their borders.' The prevention of this sort of destructive interstate competition is a traditional role for congressional action under the Commerce Clause.[158]

The separate incompetence of the states to enact reclamation standards is evident from this passage.

Further, *Hodel* displays concern with the seriousness of the problem at hand. The Court quotes a Congressional finding that "surface coal mining activities have imposed large social costs on the public . . . in many areas of the country in the form of unreclaimed lands, water pollution, erosion, floods, slope failures, loss of fish and wildlife resources, and a decline in natural beauty."[159] It is therefore evident that the Court believed Congress' assessment of the situation as serious.

Tenth Amendment cases also betray the true nature of Commerce Clause decisionmaking.[160] *National League of Cities v. Usery*[161] is the first modern case to strike down a Congressional exercise of the Commerce Clause. Although it did so on the basis of the Tenth Amendment, its rationale is instructive for purposes of this paper's inquiry. The decision rested in part on distinguishing *Fry v. United States*[162] as a case in which "[t]he enactment at issue . . . was occasioned by an extremely serious problem which endangered the well-being of all the component parts of our federal system and which only collective action by the National Government might forestall."[163] The play between *Fry* and *Usery* indicates that in deciding the extent of Congress' commerce power, the necessity of federal action (as opposed to state action) plays a significant role, as does the seriousness of the problem with which Congress is faced.

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155. *Id.*
156. 452 U.S. 264 (1981).
157. *Id.* at 280 (citing S. REP. NO. 95-128, at 49 (1977); H.R. REP. No.95-128, at 58 (1977)).
158. *Id.* at 281-82 (citing 30 U.S.C. § 1201(G) (1976 ed., Supp. III)).
159. *Id.* at 279.
160. Although Tenth Amendment cases seem only to apply where the federal government seeks to use the commerce power to touch a state apparatus, the doctrines and concerns overlap to other exercises of the commerce power. That the *Lopez* decision quotes *Gregory v. Ashcroft*, 501 U.S. 452 (1971) is significant in this regard. *See supra* note 12 and accompanying text.
161. 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).
162. 421 U.S. 542 (1975)
163. *National League of Cities*, 426 U.S. at 853.

National League of Cities also supports a gloss of purposiveness in evaluating Commerce Clause regulation. The Court considered "how closely the challenged action implicates the central concerns of the Commerce Clause, viz., the promotion of a national economy and free trade among the states."[164] The Court, again, had a sense that Congress' regulation was consistent with the purpose for which the Commerce Clause had been adopted.

C. Lopez

The most recent Commerce Clause case, *Lopez*, confirms the interplay between the four-prong test and the rules the Court has espoused. In *Lopez*, there is another unprecedented permutation of doctrine—the origination of a commercial/non-commercial distinction. However, the connection to commerce does not seem to be so weak as to make the Gun-Free School Zones Act of 1990[165] unjustifiable under previous case law. Justice Breyer is correct when he says that application of the Gun-Free School Zones Act to Lopez could be justified under the substantial effects test.

What then is the difference between Lopez and the cases that came before? First, the seriousness of the national problem to be addressed was not clear to the Court. The Court made no statements indicating that guns-in-school-zones was a serious problem. Further, the Act lacked any findings to the effect that guns in school zones even affected commerce. Although the government argued that the presence of guns in schools undermines the learning environment, which in turn creates a less-educated, less productive citizenry,[166] the Court concluded that such an argument would require it to "pile inference on inference" in a manner it was unwilling to do.[167]

Second, the guns-in-schools problem did not need to be addressed by a national government. There was no indication that problems of competition prevented states from enacting beneficial legislation, as in *Darby*, *Jones & Laughlin Steel*, and *Hodel*. Nor was there an indication that states were unwilling to enact such legislation, as in *McClung* and *Heart of Atlanta Motel*. Finally, there was no sign that states could not deal with this problem on their own, as there was in *Perez* and *Hodel*. To the contrary, the majority opinion, endorsing consideration of the necessity of federal action, quotes a criticism of the Act by then President Bush, who said, "Most egregiously, [the Act] inappropriately overrides legitimate state firearms laws with a new and unnecessary Federal law. The policies reflected in these provisions could legitimately be adopted by the States, but they should not be imposed upon the States by Congress."[168]

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164. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 563 n.5 (1985) (Powell, J., dissenting, joined by Rehnquist, J., and O'Connor, J.). Although *National League of Cities* was overruled in *Garcia*, the dissenting opinion claims that the *Garcia* majority fundamentally misunderstood the nature of the *National League of Cities* test. That test was one of balancing rather than one that looked to traditional areas of state control. *See id.* at 561-62.

165. 18 U.S.C. § 922(q)(1)(A) (1988 ed. & Supp. V.).

166. *See* United States v. Lopez, 514 U.S. 549, 564 (1995).

167. *See id.* at 567.

168. Harry Litman & Mark D. Greenberg, *Federal Power and Federalism, A Theory of Commerce Clause Based Regulation of Traditionally State Crimes*, 47 CASE W. RES. L. REV. 921, 936 & n.39 (1997) (citing *Lopez*,

Third, the regulation in question implicated the federal/state balance. It was evident that the Justices were concerned about the expansion of the commerce power and the effect it would have on this system of federalism. This had not been so in earlier modern cases. However, in *Lopez* it seemed to animate the Court's opinion.[169] "When Congress criminalizes conduct already denounced as criminal by the States," notes the Court, "it effects a 'change in the sensitive relation between federal and state criminal jurisdiction.'"[170] Chief Justice Rehnquist's majority opinion states, "Just as the separation and independence of the coordinate branches of the Federal Government serves to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."[171]

Moreover, the Court was careful not to approve a law which would leave the door open to "convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States."[172] The majority finished its opinion stating that it was "unwilling" to obliterate the distinction between what is "truly national and what is truly local."[173] Even the dissenting Justices were careful to reserve some sphere of state control, although they were unable to say how their test might protect it.[174]

Hence, *Lopez* is best distinguished from other modern commerce power cases on the basis of the four-prong test. The Court's formal doctrine provides no real distinction. Rather, the difference lies in the absence of a serious and demonstrated problem which demanded a national solution, and in the presence of a concern for the federal/state balance.

III. FORMULATION OF A NEW TEST

The remainder of this article proposes that the four-prong test identified above be formally adopted. The point of this section is to explain the exact form this test might take and to defend it against certain objections. This article offers the four-prong test as a replacement to the current commerce clause rules.

A. Nexus to Commerce Power

The first prong of the four-prong test would incorporate the Court's current jurisprudence; if there is not a sufficient nexus to the interstate commerce power, then the regulation fails to pass the test and must be struck down. That is, Congress must regulate a channel or instrumentality of interstate commerce, or the activity regulated must have a substantial effect on interstate commerce. Hence, the mere presence of a serious exigency requiring a national solution would not justify

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514 U.S. at 561 n.3 and its reference to the *Statement of President Bush on Signing the Crime Control Act of 1990*, 26 WEEKLY COMP. PRES. DOC. 1944, 1945 (Nov. 29, 1990)).

169. *See Lopez*, 514 U.S. at 563-68.

170. *Id.* at 561 n.3 (quoting United States v. Enmons, 410 U.S. 396, 411-12 (1973) (quoting United States v. Bass, 404 U.S. 336, 349 (1971))).

171. *Id.* at 552 (quoting Gregory v. Ashcroft, 501 U.S. 452, 458 (1991)).

172. *Id.* at 567.

173. *Id.* at 567-68.

174. *See id.* at 622-25 (Breyer, J., dissenting).

federal intervention unless there is also some connection to interstate commerce. Of course, where Congress is regulating interstate commerce itself then no question is raised and the nexus test does not arise.

The Court's decision under this prong would not be dispositive and therefore it would not be tempted to expand doctrine in ways that may lead to seemingly limitless government power. Nor would it be tempted to contract doctrine in ways that seem arbitrary. Instead, the connection to commerce would be recognized as a matter of degree and strict categorizations would be unnecessary. Therefore, the first prong of the four-prong test could incorporate the Court's distinction between regulation of commercial and non-commercial activity.[175] However, it would evaluate the degree to which an activity is commercial, and not make absolute determinations about the matter.

In addition, the Court should also consider whether the Congressional enactment in question comports with the purpose behind granting the commerce power in the first place. If the purpose of the Commerce Clause is served by the regulation, then a stronger nexus exists. If not, the nexus is weaker. Hence, in cases in which the commerce power is being used to effect some other purpose than the regulation of commerce, such as a police power purpose found in *Champion* and *McClung*, the Court would be free to acknowledge that such regulations are at the outer edges of the commerce power. Similarly, the Court could recognize that the prohibition of lottery tickets, for instance, has a weaker nexus to the commerce power than, say, regulation of differential railroad rates, which preserves the movement of goods across state lines.

This helps provide a check on the "substantial effects" test. The effect of an activity on commerce would carry more weight when the regulation was enacted to make interstate commerce flow more smoothly, as in *Shreveport Rate Cases*. However, the effect of an activity would carry less weight when Congress was attempting to use its commerce power for purposes unrelated or only thinly related to interstate commerce, as in *Champion* or *McClung*.

B. Seriousness of the Exigency with which Congress is Faced

A serious exigency has been present in all the cases affirming federal power, and has been absent (at least as to findings) in the one modern case denying federal power. This factor would also be fairly deferential and its intent would be to make sure that Congressional action is really necessary. Failure to pass this prong probably would not result in many invalidations because politicians generally only pass laws in response to relatively serious problems. However, this factor would prevent Congressional grandstanding by giving the Court a means by which to invalidate laws that were passed for primarily political reasons.[176]

Hence, the absence of a serious problem should be cause to invalidate a federal law enacted under the Commerce Clause. Of course, the seriousness of the exigency

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175. *See Lopez*, 514 U.S. at 551.

176. The Gun-Free School Zones Act may be characterized as one such law. Justices Kennedy and O'Connor seem to imply this in their *Lopez* concurrence when they state that "momentary political convenience" often tempts legislators not to consider their role in the federal/state balance. *See id.* at 577.

should not alone be enough to expand federal power—in some cases, such as *Schechter* and *Hammer*, federal power was denied despite the presence of a national "crisis." Further, the mere claim of an emergency by the national government should not be enough to confer commerce power; any findings would have to be subject to independent judicial inquiry and scrutiny under *Lopez*.

C. *Necessity that Solution be National*

1. Form the Prong Would Take

The third prong of the test is the part most likely to provide a check on federal power under the Commerce Clause. Under this prong, the Court would ask whether a national solution, as opposed to a state or local solution, is necessary to address the problem at hand. In addition, per *Lopez*, the Court would ask whether the exercise of this power was "an appropriate means to the attainment of a legitimate end."[177]

For reasons stated below, this factor would be fairly deferential to Congress, invalidating Congressional acts only when the justification offered is "egregiously mistaken." The level of scrutiny should be that employed in *Lopez*. The Court should conduct an independent analysis and engage in a harsher probing than the "rational basis" test might allow. Hence, Congressional findings would not be dispositive. Conversely, the absence of findings would not necessarily condemn a regulation, although it would place the regulation in a more precarious spot. The end result would be that where there is a questionable regulation, Congress would have an incentive to make a study determining the need for federal intervention.

2. Objection as to the Competence of the Court

A valid objection to the four-prong test is that in evaluating the necessity of federal action, the Court would be doing something it is fundamentally ill-equipped to do: make policy decisions. This same objection was addressed by George A. Bermann in connection with the issue of subsidiarity in the European Union. The Maastricht Treaty on European Union requires that institutions of the Community act in areas of concurrent competence "only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States."[178] This test bears close resemblance to the "necessity of national action" standard (the third prong) of the four-prong test.

Bermann contends that courts are not "especially well-equipped to make the substantive judgment" whether national action is or is not necessary.[179] Judicial scrutiny of this type of decision can be problematic and Bermann suggests that Courts make the subsidiarity requirement one primarily of procedure rather than substance.[180] Hence, the Court would require that

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177. *Id.* at 555.

178. George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Union and the United States*, 94 COLUM. L. REV. 331, 334 (1994) (citing Treaty on European Union, Article G(5)).

179. *Id.* at 336.

180. *See id.*

> before adopting a measure . . . institutions inquire meaningfully into the capacity of the Member States to attain the objectives that the measure is intended to achieve and explain why they conclude that action at the Community level is necessary. In ensuring that the institutions ask and answer the right questions before acting, the Court in effect enforces a procedural mandate, something it is well-equipped to do.[181]

The "necessity of federal action" prong should reflect Bermann's idea. It is indeed the case that courts do not have the same capacity, compared to legislatures, to make substantive choices about the necessity of federal action. At most, courts can determine whether a legislative finding as to the necessity of government action is "egregiously mistaken."[182] Hence, the Court's requirement under this factor should be primarily procedural and fairly deferential. However, per *Lopez*, the Court need not accept the findings without scrutiny.

Such a test would not be too weak to have any meaningful effect. As Bermann points out, one of the most important functions of asking whether Community (or federal) action is necessary is that it forces legislative institutions to take the idea of subsidiarity seriously.[183] The same is true for federalism in the United States. The mere willingness of courts to consider the necessity of a national response may check unnecessary expansions of federal power.[184]

As a final note, despite the questionable competency of courts to determine the necessity of federal action, I have made clear that the Supreme Court already seems to be doing so. Hence, objecting to the four-prong test on those grounds is somewhat inapt. The real issue is whether this consideration should be formalized. As I have pointed out, making this issue formal would force Congress to take the necessity of its action seriously. It would also bring the current decisionmaking process into the light, where it belongs.

3. Authority for Employing this Prong

In a symposium on *Lopez*,[185] Donald H. Regan also suggested that the necessity of federal action be factored into the Court's Commerce Clause jurisprudence.[186] Regan points out that this idea was embodied in the sixth Virginia Resolution, which was approved by the Constitutional Convention in July 1787.[187] The language is as follows:

> That the National Legislature ought to possess the Legislative Rights vested in Congress by the Confederation; and moreover, to legislate in all cases for the general interests of the union, and also in those to which the States are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation.[188]

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181. *Id.*
182. *See id.*
183. *See id.*
184. *See id.*
185. *See* Regan, *supra* note 39.
186. *See id.* at 555.
187. *See id.*
188. *Id.* (citing NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 REPORTED BY JAMES MADISON

Unfortunately, Regan provides little authority for employing this test. He is careful to note that this language is not found in the Constitution and instead relies on the structure of the Constitution itself to provide its authority.[189] In enumerating powers, notes Regan, the Framers were capturing the spirit of the Virginia Resolutions if not the actual words.[190] However, as Regan himself makes evident, reliance on the structure of the Constitution to provide authority for employing this test has limited currency. Although the principle underlying the enumeration of powers found in the Constitution seems to imply some presumption against use of federal power—a presumption that, if put into words, would look similar to the sixth Virginia Resolution[191]—this alone is not enough support for changing Commerce Clause jurisprudence.

Regan seems to believe that the best support for employing his test is that it puts the Commerce Clause jurisprudence "on a reasonable footing."[192] In illustrating his test, Regan applies it to nearly all of the important Commerce Clause decisions and shows how the result can be arrived at through his more reasonable test rather than through the sometimes "transparently inadequate" justifications offered by the Court.[193] His analyses are convincing.

What is still missing from Regan's approach is adequate support in case law for employing a test that asks whether a national solution is required for a particular problem. However, as I have shown, Commerce Clause cases have employed a test similar to Regan's approach from the start. Regan emphasizes "how different [his] approach is . . . from the currently established mode of arguing for the existence of federal power."[194] But while his approach is very different from modes of *arguing* the extent of federal power, it is not so different from modes of *deciding* the extent of federal power. Regan's formulations are best offered not merely as wishful thinking, but as an empirical explanation of what the Court has in fact been doing with Commerce Clause doctrine. In this sense, Regan's proposals are based not only a reading of the structure of the Constitution, but in the jurisprudence as it already stands.

D. Concern for "Federal/State Balance"

1. Form this Prong Would Take

The "federal/state balance" factor would overlap with the "necessity of federal action" requirement, which provides some protection in itself for maintenance of the system of federalism. However, the "federal/state balance" factor would provide this protection explicitly. For reasons stated below, this prong would only come to work when Congress has "tipped the scales too far."[195]

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380 (W.W. Norton & Co. ed., 1966)).

189. *See id.* at 556.

190. *See id.* at 555.

191. *See id.* at 555-56.

192. *Id.* at 556.

193. *See id.* at 557.

194. *Id.* at 609.

195. United States v. Lopez, 514 U.S. 549, 578 (1995); *see also infra* notes 209 and 213.

The Court might consider whether the federal action would impinge on areas of traditional state concern, such as criminal law, family law, or private activities. This was the case in *Lopez*. The Court might also consider whether the action would create governance more distant from the "people" than state government, which was also a concern in *Lopez*. Another consideration would be whether the enactment in question is best characterized as a police power regulation or as protection of interstate commerce. If the latter, the case for maintaining state sovereignty over the issue is less forceful since states relinquished power to the federal government when they granted the federal government enumerated powers. Yet another consideration might be whether the enactment in question was meant to coordinate state policies, giving effect to already existing laws, or whether it was meant to override state laws.[196] If the act is meant to coordinate state policies, and if by non-redundancy it passed the "necessity of national action" prong, then the federal/state balance would be of less concern because the federal law would merely empower laws originated at the state level. This was the case in *Champion*. However, if the federal law contradicted many states' laws the enactment should be more suspect.

2. Objection as to the Competence of the Courts

As with the "necessity of federal action" prong, there is a valid objection as to the courts' competence to consider the overall balance of federal and state power. A further objection is that judicial concern over the federal/state balance is especially indeterminate, can change with the times, and is likely to change even with the personalities of the Justices. These objections, however, are subject to the counterargument raised above—that the Court is already considering this factor, and that formalizing it would force Congress to take federalism seriously. Further, limiting the application of this prong to extreme cases would help diminish the uncertainty that may result from use of this prong.

There are other aspects to the problem that must be addressed. While the federal/state balance prong of the test invites judges to exercise sometimes indeterminate and discretionary political judgments, it is a necessary component of any test that is meant to serve as a structural safeguard to the governmental system. This balance is a source of continuing scholarly debate.

Herbert Wechsler has argued that ensuring the proper balance between federal and state government should be left to the political process without the intervention of the courts. As Bermann notes, Wechsler "claims that restraints on intervention by the federal government flow chiefly from 'the sheer existence of the states and [from] their political power to influence the action of the national authority.'"[197] Indeed, the Supreme Court supported this position in *Garcia*.[198] Bermann points out, however, that confidence in the adequacy of such political safeguards has waned in the United States.[199] "Recent years . . . have witnessed growing concern over the

196. *See* Regan, *supra* note 39, at 575-578.

197. Bermann, *supra* note 178, at 404 (quoting Herbert Wechsler, *The Political Safeguards of Federalism: the Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 544 (1954)).

198. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 551 (1985).

199. *See* Bermann, *supra* note 178, at 395.

impact of federal legislation and regulation on the fabric of United States federalism."[200]

The reason is that Wechsler is incorrect. "Implicit in [Wechsler's] analysis is the assumption that Congress actually determines, during the process of deliberating over proposed legislation, whether federal action is in fact needed for achieving its purposes," writes Bermann.[201] However:

> The truth of this proposition has never . . . been demonstrated. Congress' criteria for assessing the necessity for federal intervention do not in fact seem to be especially well-defined, and it is certainly far from clear that these criteria entail a prior assessment of the state's own ability, acting alone or in concert, to achieve the objectives that Congress has.[202]

In fact, members of Congress have political incentives to *dis*regard the balance between federal and state government. The first incentive is obvious: legislators want credit for having solved problems.[203] Hence, members of Congress "may vigorously sponsor initiatives . . . that could just as easily be undertaken at the state level . . . ."[204] This may explain why the Gun-Free School Zones Act passed without an evaluation of state competence to meet this problem. Further, the groups to which Congress members are most responsive—interest groups and constituents—are not concerned with preserving federalism, but with getting their problems solved.[205] There is no institutional mechanism forcing Congress to deal with issues of federalism.

Perhaps in recognition of this problem, the Supreme Court in recent years has concluded that it must play some role in maintaining the federal/state balance. Chief Justice Rehnquist's majority opinion in *Lopez* focuses on this issue. Justices Kennedy and O'Connor write even more forcefully in their concurrence to Rehnquist's opinion. They state that although the

> powers conferred upon the Federal Government by the Constitution were phrased in language broad enough to allow for the expansion of the Federal Government's role" . . . It does not follow . . . that in every instance the Court lacks the authority and responsibility to review congressional attempts to alter the federal balance. This case requires us to consider our place in the design of the Government and to appreciate the significance of federalism in the whole structure of the Constitution.[206]

Kennedy and O'Connor specifically renounce Wechslerian trust in the political process to preserve the values of federalism. Although they concede that Congress

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200. *Id.* at 405.

201. *Id.* at 408.

202. *Id.* at 409 (citing Congress' discussion over the Surface Mining Control & Reclamation Act of 1977, 30 U.S.C. § 1201 (1988) and the Public Utility Regulatory Act of 1978, 16 U.S.C. § 2601 (1988)).

203. *See id.*

204. *Id.*

205. *See id.* (citing Zoe Baird, *State Empowerment After Garcia*, 18 URB. LAW. 491, 505-06 (1986); Carol F. Lee, *The Political Safeguards of Federalism? Congressional Responses to Supreme Court Decisions on State and Local Liability*, 20 URB. LAW 301, 338-39 (1988)).

206. United States v. Lopez, 514 U.S. 549, 575 (1995) (quoting New York v. United States, 505 U.S. 144, 157 (1992)).

has "substantial discretion and control over the federal balance,"[207] Kennedy and O'Connor state that "the absence of structural mechanisms to require those officials to undertake this principle task [of considering the federal/state balance in decisionmaking], and the momentary political convenience often attendant upon their failure to do so, argue against a complete renunciation of the judicial role."[208] They conclude that "the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far."[209]

Although courts may have a duty to preserve the balance of federalism, their competence to do so is another issue. Kennedy and O'Connor, however, note that in other areas of jurisprudence involving structural elements of the Constitution, such as separation of powers and checks and balances, the Court has "derived from the Constitution workable standards to assist in preserving"[210] the Constitutional structure. In these other areas the "Court has participated in maintaining the federal balance through judicial exposition of doctrines . . . ."[211] Indeed, Kennedy and O'Connor point out that of the various structural elements in the Constitution—checks and balances, federalism, judicial review and separation of powers—only with regard to federalism has the judiciary's role in maintaining the design of the Framers been in question.[212]

Nevertheless, requiring courts to consider the federal/state balance may challenge the courts' competence too much unless that consideration were fairly deferential. Hence, such a factor should only identify extreme cases in which the expansion of federal power may "tip the scales too far."[213] But as is the case with the "necessity of federal action" factor, the mere willingness of the courts to entertain the issue of federalism helps make the test efficacious. In that way, courts may force Congress to take federalism seriously. Thus, despite the fact that "resolution of specific cases [involving Constitutional structure] has proved difficult"[214] the Court should nevertheless endeavor to decide them.

IV. REASONS TO ADOPT THE FOUR-PRONG TEST

A. *Rules vs. Standards*

As a first issue in evaluating whether to adopt this four-prong test as the standard for Commerce Clause cases, it is imperative to consider generally the relative merits of rules and standards as methods of adjudication. The current doctrine can be termed a "rule" because it seeks to categorize activities, defining bright-line

207. *Id.* at 577.
208. *Id.* at 578.
209. *Id.*
210. *Id.* at 575 (string cite omitted).
211. *Id.* at 578.
212. *See id.* at 575.
213. *Id.* at 578.
214. *Id.* at 575.

boundaries and classifying fact situations as falling on one side or the other.[215] Kathleen M. Sullivan defines rules as follows: "A legal directive is "rule"-like when it binds a decisionmaker to respond in a determinate way to the presence of delimited triggering facts. Rules aim to confine the decisionmaker to facts, leaving irreducible arbitrary and subjective value choices to be worked out elsewhere."[216]

On the other hand, the four-prong test has more the character of a "standard," in Sullivan's language,[217] because it explicitly considers all relevant factors with an eye to the underlying purposes or background principles or policies at stake.[218] A standard "tends to collapse decisionmaking back into the direct application of the background principle or policy to a fact situation. Standards allow for the decrease of errors of under- and over-inclusiveness by giving the decision-maker more discretion than do rules."[219] Moreover, they "allow the decisionmaker to take into account all relevant factors or the totality of the circumstances."[220]

1. Reasons Rules are Thought Superior to Standards, and Why Such Reasons Do Not Hold When It Comes to Commerce Clause Jurisprudence

According to Sullivan, the first argument favoring application of rules is that they provide more fairness than standards because they force decisionmakers to act consistently, treating like cases alike.[221] Hence, well-formulated rules are supposed to reduce the danger of official arbitrariness or bias. This argument does not hold water when applied to Commerce Clause cases because Commerce Clause jurisprudence is driven not by adherence to the particular rule of the Commerce Clause, but by imperatives that do not find their way into doctrine. Indeed, the rules governing the commerce power actually change according to these unarticulated imperatives. Thus, although a rule is supposed to "capture the background principle or policy in a form that from then on operates independently,"[222] it is clear that in Commerce Clause jurisprudence, the rule has never acted independently of the background policy. Such malleable rules do not force decisionmakers to act consistently; hence, the danger of official arbitrariness is not diminished.

Further, a rule "necessarily captures the background principle or policy incompletely and so produces errors of over- or under-inclusiveness."[223] This problem is especially evident with regard to Commerce Clause cases. As has been shown, the failure of the substantial effects test is that it is too inclusive and would permit regulation of just about anything. On the other hand, tests like those formulated in *Lopez* and *Carter* are too under-inclusive, not permitting the national government to address important commerce-related problems it is uniquely able to address. Hence, the rules of Commerce Clause doctrine do not treat "like cases

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215. *See* Kathleen M. Sullivan, *The Supreme Court, 1991 Term-Forward: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 60 (1992).
216. *Id.* at 58.
217. Of course, the "distinctions between rules and standards ... mark a continuum, not a divide." *Id.* at 61.
218. *See id.* at 60.
219. *Id.* at 58-59.
220. *Id.* at 59.
221. *See id.* at 62.
222. *Id.* at 58.
223. *Id.* at 60.

alike" because they fail to incorporate important factors of the policy underlying the rule. The result is inconsistency rather than consistency.

A third argument favoring rules is that they produce greater certainty and predictability than standards.[224] However, the amount of certainty the rules of Commerce Clause cases provide is questionable. The New Deal era cases are a good example of a situation in which the Commerce Clause rule failed to provide certainty to those who may have relied on it. That rule fluctuated in those years largely because it was the principle and not the rule that was important to the Court's decisions. *Lopez* also shows how the Commerce Clause rules provide little certainty. That case came as a great surprise to most people and was taken as a signal that Court would invalidate federal legislation in the future. Since the rule by which the Court decided the case provides little substantive limitation on the federal government's power, *Lopez* leaves us with a vague feeling that there are limits on the commerce power, yet gives us no guidance as to where those limits lie.

A fourth argument favoring rules is that they are essential to liberty[225] because standards invite official arbitrariness if not totalitarianism.[226] It seems to me the counterarguments to this argument are embodied above, in the observation that evolutions in current doctrine seem arbitrary unless one grounds them in the four-prong test. I would only add that the federalism interest explicitly protected by the four-prong test is also considered protective of individual liberty.[227]

Finally, rules are thought to encourage judicial restraint.[228] As the *Lopez* decision shows, and as the above arguments illustrate, the current doctrine provides little restraint on the judiciary because the rule is so responsive to the principles underlying it. Judges have not had to fully account for some of the most important factors in their decisions because the Commerce Clause cases are based on principles that are not formally acknowledged.

2. Reasons Standards are Thought Superior to Rules, And Why Such Reasons Hold When it Comes to Commerce Clause Jurisprudence

Sullivan also illustrates the arguments favoring application of standards. First among these are that standards are also thought to produce fairness. "Rule-based decisionmaking suppresses relevant similarities and differences; standards allow decisionmakers to treat like cases that are substantively alike."[229] The suppression of relevant differences that results from poorly formulated rules can be seen in connection with *Lopez*, in which there was an absence of a crisis needing national attention, and the presence of federalism concerns. None of these differences made their way into the formal doctrine, yet they were important factors distinguishing *Lopez* from previous case law. The four-prong test would acknowledge these factors, allowing judges to take into consideration relevant similarities and differences among cases.

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224. *See id.* at 62.
225. *See id.* at 63.
226. *See id.* at 64.
227. *See, e.g.*, United States v. Lopez, 514 U.S. 549, 552 (1995).
228. *See* Sullivan, *supra* note 215, at 65.
229. *Id.* at 66.

There is also a utility argument favoring standards. Rules "tend toward obsolescence" whereas standards are "flexible and allow decisionmakers to adapt them to changing circumstances over time."[230] Clearly, the four-prong test has this advantage since Commerce Clause jurisprudence is a graveyard of obsolete rules. In the context of the ever-dynamic circumstances surrounding exercises of the commerce power, an adaptable test is preferable to a rigid one that may become outmoded.

Of course, it could be argued that current commerce power doctrine has allowed the Court to be adaptable as well; indeed it has. The modern doctrine, for the most part, has permitted adaptability in only one direction—that of expanding federal power to meet various exigencies. Once the circumstances called for a retraction or a denial of federal power, as in *Lopez*, the Court seems to have found itself hampered by the Commerce Clause rule and its subsequent adaptation has been tortured. Further, this flexibility of modern doctrine has come at the cost of providing an insufficient check on federal power. A new test would permit the Court this flexibility while maintaining a plausible and principled leash on the commerce power.

A third relevant advantage of standards is that of deliberation: "Rules favor judicial abdication of responsibility, while standards make the judges face up to their choices . . . Open balancing compels a judge to take full responsibility for his decisions, and promises a particularized, rational account of how he arrives at them."[231] As long as there are considerations in Commerce Clause doctrine that remain formally unincorporated, the Court is unaccountable for its decisions. As the mechanics behind the Court's decisionmaking process remain obscured from the legal community, politicians, and the public, the Court's reasoning is not fully subjected to proper scrutiny because the rules of decision do not require judges to fully account for every relevant consideration.

This not only results in unaccountability, but must result in poorly thought-out decisions. Since judges do not fully consider the factors important to their decisions, their deliberation is incomplete and necessarily of inferior quality. The four-prong test, on the other hand, would force the Court to tackle relevant issues head-on. It would also subject the courts to scrutiny not only among themselves, but by the legal community. This would increase the quality of decisionmaking.

B. General Reasons Why the Four-Prong Test is Appropriate for Commerce Clause Jurisprudence

1. The Four-Prong Test Would Place a Substantive Limit on Federal Power

Perhaps the best reason to adopt the four-prong test is that it would provide a true check on the commerce power by having an explicit requirement that national action be necessary to solve the problem at hand and that it not infringe on the system of federalism. This checking effect would come not only from the Court's formal test, but from the Court's mere willingness to entertain such issues as the

230. *Id.*
231. *Id.* at 67-68.

necessity of federal action and the federal/state balance. This would provide a deterrent to unnecessary expansions of power under the Commerce Clause.[232] Hence, by creating a procedural safeguard against expansion of federal power,[233] the four-prong test would provide the "structural mechanism" by which Congress would have to consider its role in the federal/state system—the mechanism whose absence Justices Kennedy and O'Connor lament in the concurrence to *Lopez*.[234]

2. The Four-Prong Test Would Hold States Accountable for Solving Important Problems Without Unnecessarily Treading on Sovereign Interests

Another reason to adopt this test is that it enables Congress to put pressure on states to solve important commerce-related problems without treading too much on state sovereignty. The inflexibility of current doctrine requires the Court to decide whether Congress can regulate a particular activity without regard to whether the states can adequately deal with it. The Court is forced into a difficult choice because it cannot consider the ability of states to handle a given problem: if it decides that a problem is within the sphere of state control, it requires that the problem will persist even if states prove unwilling or unable to deal with it. On the other hand, if the Court decides that the problem is within the province of the federal government to handle, then federal power may expand even though there is no necessity for it.

A Court considering the VAWA faces the same dilemma. The problem of violence against women has not been adequately handled by the states; however, it remains an issue whether states are ultimately incompetent or unwilling to correct this problem. Given the current doctrine, if the Court strikes down VAWA it will have declared that area of legislation off-limits to the federal government for good. This leaves states free to neglect the problem without fear of a federal usurpation of their powers. On the other hand, if the Court upholds the Act, it will have expanded federal power in an instance in which necessity was questionable.

Adopting the four-prong test evades this trap. It does not permit federal intrusion in cases where need has not been demonstrated because it asks whether states are competent to handle a particular problem. However, a decision to disallow federal intervention does not necessarily foreclose the possibility that the federal government may regulate a sphere of activity. This puts pressure on states to react to the problem of, for instance, violence against women, by threatening to usurp their role if they fail to respond adequately to the problem. If the states fail, the federal government may intervene to solve the problem because the necessity of intervention will have been made clear.

This is not to say that the four-prong test would allow the federal government to completely usurp the function of the states; the fourth prong of the test would protect against that. Indeed, certain areas may be permanently off-limits to the national government. In marginal areas in which jurisdiction is unclear, however, the four-prong test gives states an incentive to tackle serious problems.

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232. *See* Bermann, *supra* note 178, at 336-37 (1994).
233. *See infra* note 286-88; Bermann, *supra* note 178, at 336.
234. *See* United States v. Lopez, 514 U.S. 549, 578 (1995).

One objection to the four-prong test may be that because the test is time-dependent it allows the Commerce Clause to mean different things at different times, depending on either the relative balance of the federal and state governments, or on the particular competencies of the governments. This is true, and may be the price of flexibility. It seems impossible to define the parameters of the Commerce Clause once and for all without regard to the social circumstance in which it is considered.

3. The Four-Prong Test Would put Commerce Clause Jurisprudence on a Reasonable Footing Without Upsetting the Substantial Reliance Placed on Decisions to Date

The four-prong test is descriptive of Commerce Clause decisions and thus would not alter the results of the case law. Instead, it would merely put these cases on a more reasonable footing, making their outcome clearer and easier to understand. Hence, adopting the four-prong test would honor the fact that "the Court as an institution and the legal system as a whole have an immense stake in the stability of . . . Commerce Clause jurisprudence as it has evolved to this point."[235]

Adopting the four-prong test would not upset the reliance on Commerce Clause jurisprudence so far and therefore the *stare decisis* reasons for adhering to precedential rules of decision are substantially lessened.[236] The four-prong test really just reflects factors that have always been important to Commerce Clause cases and adopting it would honor, more than breach, the *stare decisis* rule.

In addition, adoption of the four-prong test would not force a reversion to "an understanding of commerce that would serve only an 18th-century economy."[237] If anything, the test would bring Commerce Clause jurisprudence into the modern era once and for all. It would help the Court abandon the formalistic definitions of the extent of commerce power by whole-heartedly embracing the practical conception of Commerce Clause thinking that the Court has endorsed since *Jones & Laughlin Steel*.[238]

V. APPLYING THE FOUR-PRONG TEST TO THE VIOLENCE AGAINST WOMEN ACT

VAWA was part of a comprehensive crime package[239] passed in 1994. It was written as a response to evidence that "violence motivated by gender"[240] was on the rise despite states' efforts to address the issue.[241] Among other provisions, VAWA

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235. *Id.* at 574 (Kennedy, J., and O'Connor, J., concurring).

236. Stare decisis exists as a "policy, grounded on the theory that security and certainty require that accepted and established legal principle . . . be recognized and followed . . . ." BLACK'S LAW DICTIONARY 1406 (6th ed. 1990).

237. *Lopez*, 514 U.S. at 574 (Kennedy, J., and O'Connor, J., concurring).

238. 301 U.S. 1 (1937). *See also Lopez*, 514 U.S. at 574 (Kennedy, J., and O'Connor, J., concurring).

239. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified in various sections of 16 U.S.C., 18 U.S.C., 28 U.S.C. and 42 U.S.C.).

240. VAWA 42 U.S.C. § 13981 (1994).

241. *See* Lisa A. Carroll, *Women's Powerless Tool: How Congress Overreached the Constitution with the Civil Rights Remedy of the Violence Against Women Act*, 30 J. MARSHALL L. REV. 803 (1997) (citing S. REP. NO. 101-545, at 38 (1990)).

creates a civil rights cause of action against anyone who "commits a crime of violence motivated by gender."[242]

In *Brzonkala v. Virginia Polytechnic Institute and State University*,[243] the Fourth Circuit invalidated VAWA's civil rights provision largely on the grounds that *Lopez* does not permit the exercise of the commerce power to regulate non-commercial acts.[244] However, in reading the opinion, it becomes immediately apparent that concerns of federalism (the fourth prong) are what primarily animated the Fourth Circuit in striking down VAWA. Hence, the Fourth Circuit's opinion is consistent with other Commerce Clause cases which purport to rely on untenable rules but actually decide the case according to the four-prong test.

The object of this section is to analyze VAWA under the proposed test to show that the test is not only workable, but is better than the current doctrine at addressing the concerns underlying Commerce Clause jurisprudence.

A. Nexus to Commerce Power

In determining the strength of VAWA's nexus to the commerce power, the Court should apply not only the formal test that has been formulated thus far in Commerce Clause decisions, but it should also ask how closely Congress' law comports with the purpose underlying the original grant of the commerce power. The civil rights remedy of VAWA has no jurisdictional tie-in to the channels or instrumentalities of interstate commerce, nor does it apply only to persons or things in interstate commerce.[245] VAWA requires no proof of interstate activity because "Congress intended VAWA to sweep much more broadly."[246] Hence, if there is a nexus to interstate commerce it must come through the "substantial effects" test.[247]

In terms of the first prong of the test, the Court should find that Congress had a justifiable basis for finding that violence against women exerts a substantial effect on interstate commerce. Unlike in *Lopez*, Congress made findings before passing VAWA, and the government did not rely on post-hoc findings of effects on commerce to justify the enactment in question.[248] However, the activity regulated can fairly be characterized as non-commercial, even non-economic, in nature, so under *Lopez* the connection to interstate commerce is significantly weakened.

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242. VAWA § 13891(c).

243. 169 F.3d 820 (4th Cir. 1999), *cert. granted sub nom.* U.S. v. Morrison, ___ S. Ct. ___, No. 99-5, 1999 WL 459152 (Sept. 1999).

244. *See id.* at 830-36.

245. *See Brzonkala v. Virginia Polytechnic and State University*, 935 F. Supp. 772, 776 (W.D. Va. 1996); *rev'd by* 132 F.3d 949 (4th Cir. 1997), *reh'g en banc granted, opinion vacated* (1998).

246. Carroll, *supra* note 241, at 805 (citing *Domestic Violence, Not Just a Family Matter: Hearing Before the House Judiciary Comm. on Crime and Criminal Justice*, 103d Congress 1 (1994) (statement of Charles Schumer, Representative, 10th Cong. Dist., N.Y., declaring that the purpose of the hearing was to help all of the four million women each year who are victimized by domestic violence), *available in* 1994 WL 313572 [F.D.C.H.].

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

248. It is indicative of current Commerce Clause jurisprudence that the Fourth Circuit awkwardly characterizes the issue of findings not a "mere factual or empirical inquiry" but as a "legal test," and the phrase "substantially affects interstate commerce" as one of "legal art." *See Brzonkala*, 169 F.3d at 831. By creating an opening in which to explicitly incorporate federalism concerns into the formal rules by which commerce power cases are decided, this unprecedented statement may represent an effort to establish something resembling the four-prong test, which incorporates principles that underlie those formal rules.

The second part of this prong includes an evaluation of whether VAWA's civil rights remedy comports with the purpose behind the original grant of the commerce power to Congress. Although one reason the commerce power was created was to ensure the health of interstate commerce—and VAWA does that—it is clear that the commerce power was not intended to permit Congress to enact police power regulations.[249] Since VAWA has essential characteristics of a police power regulation, its nexus to the commerce power must be considered weaker than if Congress had enacted a law whose sole purpose was to protect or facilitate interstate commerce, as in *Shreveport Rate Cases*. This would not be fatal to VAWA, of course, because many other Commerce Clause cases have validated enactments whose primary purpose or effect can be characterized as police-like. However, it makes it necessary that the other factors in the four-prong test show themselves more strongly than otherwise would be the case.

B. Seriousness of the Exigency

All that needs to be shown in this factor is that a serious exigency exists which Congress plans to meet. The presence of a serious problem alone would not be enough to justify exercise of the commerce power; however, absence of such a problem may invalidate such an exercise. Unlike in *Lopez*, Congress has made detailed studies, which are discussed below, showing that in fact there is a serious problem in the administration of justice in sex-based violent crimes. On this score, the four-prong test should not impede VAWA.

C. Need for a National Solution

Under this factor, the question is whether or not national, as opposed to state or local, action is necessary in facing the problem with which Congress is attempting to deal. Additionally, part of this prong includes the question whether the means Congress has chosen to address the problem are reasonably adapted to the end. As to this prong of the test, analysis of VAWA is not necessarily demonstrative of how such an analysis may take place were a four-prong test actually implemented. Since no such test exists, Congress has not made findings with an eye toward justifying an exercise of its commerce power. Hence, any evidence found in congressional records is not as complete as it could be. For this reason, this article will draw from other available evidence to determine whether VAWA should pass this prong of the test.

Part of the basis for Congress' passage of VAWA was the failure of the states to adequately address the problem of sex-based crimes. House hearings show that police often fail to thoroughly investigate domestic violence and fail to collect corroborating evidence.[250] Another House report documented a bias among Maryland prosecutors by which they often refuse to prosecute domestic violence

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249. *But see* Crosskey, *supra* note 62 and accompanying text.

250. *See Violence Against Women: Hearings Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary*, 102d Cong. 75 (1992), *not available in* WL.

cases.[251] Further, a California study found that "victims of domestic violence are often denied access to the protection of the justice system."[252]

Kerrie E. Maloney has demonstrated the inadequacy of many state legal systems regarding violence against women. State laws themselves often form the most formidable barrier to women seeking redress for violence committed against them since most domestic violence incidents are classified only as misdemeanors[253] and rape of a spouse is not a crime in some jurisdictions.[254]

Female victims of violent crime are also subject to under-enforcement of laws. Even when domestic violence cases are reported, police do not make arrests in the majority of cases.[255] And even when arrests are made, prosecution of domestic violence incidents is inadequate because the cases are often viewed as "one-on-one" cases for which there is no corroborating evidence.[256] Also, "some jurisdictions place procedural barriers in the victim's path, such as waiting periods before a domestic violence complaint may be filed."[257] Charges that are filed are sometimes dropped when, in another context, they would not be dropped.[258] Finally, very few battering cases result in jail sentences.[259]

Enforcement is also a problem when rape is the crime. The victim may be made to feel she is "on trial" by common defense practices such as exposing her prior sexual history or her reputation for unchasteness.[260] Sometimes prosecutors try to convince rape victims to drop charges because they find it difficult to convict.[261] Further, "stereotypical attitudes about women and violent crime often cause juries and judges to disbelieve victims and acquit defendants."[262] Judges and juries can trivialize domestic violence and put the blame for rape on the victim.[263]

Although these problems show that the administration of justice in sex-based violence cases is woefully inadequate, they do not demonstrate that a civil rights remedy to sex-based violence cases will improve matters. Nor do they show that states are unwilling or unable to handle the problem; in fact, VAWA places great reliance on the states to do just that. Further, there has been no showing of special competence of the federal government to handle the problem, even if states are unable. In short, these observations do not show the necessity for national action under the four-prong test.

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251. *See* H.R. REP. NO. 103-395, at 27 (1993).

252. REPORT OF THE JUDICIAL COUNCIL ADVISORY COMMITTEE ON GENDER BIAS IN THE COURTS OF CALIFORNIA 2 (1991).

253. *See* Kerrie E. Maloney, *Gender-Motivated Violence and the Commerce Clause: The Civil Rights Provision of the Violence Against Women Act After* Lopez, 96 COLUM. L. REV. 1876 (1996) (citing EVE S. BUZAWA & CARL G. BUZAWA, DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE 24, 82-83 (1990)).

254. *See id.* at 1887 (citing WILLIAM M GREEN, RAPE: THE EVIDENTIAL EXAMINATION AND MANAGEMENT OF THE ADULT FEMALE VICTIM 24 (1988)).

255. *See id.* at 1889 n.50.

256. *See id.* at 1890 n.54.

257. *Id.*

258. *Id.* at 1890 n.56; Carroll, *supra* note 241, at 803 n.74.

259. *See* Maloney, *supra* note 256, at 1890 n.57; Carroll, *supra* note 241, at 803 n.75.

260. *See* Maloney, *supra* note 256, at 1890 n.61.

261. *See id.* at 1891 n.62.

262. *Id.* at 1891.

263. *See id.* at 1891 nn.66-71; Carroll, *supra* note 241, at 814 nn.82-83.

Further, it is not clear that justice administered by federal courts would encounter less difficulty. Judges, prosecutors and juries in federal courts may be just as likely to have detrimental attitudes as their counterparts in state systems. They would also likely still rely on evidence and investigations conducted by local police.[264]

In only one regard does the need for a national solution seem to have been addressed by Congress. VAWA "is an important step . . . in the direction of developing what we need the most—a national consensus that this society will not tolerate this kind of violence."[265] However, a civil rights remedy is not necessary to establishing this consensus. Indeed, the Act's numerous other provisions, establishing grants, studies and educational programs,[266] will go far in creating this consensus.

The incompetence of the states to correct this problem is also far from proven. Every state outlaws domestic violence and rape. Although enforcement of these laws has been inadequate, the awareness of the severity of these problems is relatively recent. Examining the various provisions of VAWA shows that the problem of violence against women has only recently made a showing on the national radar screen. Section 13961 establishes a research agenda convening a "panel of nationally recognized experts" to examine issues involved with violence against women.[267] Congress also established a study on campus sexual assault,[268] a report on battered women's syndrome,[269] a report on confidentiality of addresses for victims of domestic violence,[270] and a report on record keeping relating to domestic violence.[271] Finally, the Attorney General must issue an annual report providing information to Congress on the incidence of stalking and domestic violence, and evaluating the effectiveness of states at meeting these crimes.[272]

Since the abundance of the studies and reports ordered by Congress show that national awareness of the severity of the problem of violence against women is a relatively new phenomenon, it can hardly be expected that states would have reacted to this problem when fairly little is known about it. Indeed, even the federal government has not been interested in the problem very long. In 1989, it appropriated only $8.5 million to solving this problem whereas under the 1990 version of VAWA, that amount would have been $125 million.[273]

Further, states have been willing to address the problem of sex-based crimes. Forty-six states have followed the federal government in enacting rape shield laws that restrict admissibility of a victim's past sexual history in sex-related crimes

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264. However, the Senate asserted that because federal courts had less prejudice than state courts and were not shackled by "antiquated" procedural rules, they were a more appropriate forum for remedying sex-based crimes. *See* S. REP. NO. 102-197, at 48 (1991).

265. S. REP. NO. 103-138, at 42 (1993).

266. *See infra* notes 270-75.

267. VAWA 42 U.S.C. § 13961 (1994). However, the report does not identify which rules it considered antiquated. *See* Carroll, *supra* note 241, at 814 n.87.

268. *See* VAWA § 14012.

269. *See id.* § 14013.

270. *See id.* § 14014.

271. *See id.* § 14015.

272. *See id.* § 14039.

273. *See* S. REP. NO. 101-545, at 39 (1990).

trials.[274] Moreover, Maryland, Georgia, California and Connecticut studied the problem as early as 1991.[275] Lastly, Illinois and several other states have passed revised sex crime statutes that resulted in increased conviction rates for violent crimes against women.[276]

Furthermore, VAWA actually demonstrates a confidence in the states to solve this problem. Besides its civil rights provision, VAWA directs the Attorney General to report to the states on how they may "collect centralized databases on the incidence of sexual and domestic violence offenses within a State."[277] The Attorney General is also directed to provide grants to states, tribes and local governments establishing projects to "investigate and prosecute incidents of domestic violence . . . ."[278] Further, Congress authorized the award of grants to States "for the purpose of developing, testing, presenting, and disseminating model programs to be used by States in training judges and court personnel in the laws of the States . . . on rape, sexual assault, domestic violence, and other crimes of violence motivated by the victim's gender."[279] Congress also established a grant program for States to "improve processes for entering data regarding stalking and domestic violence into local, State and national crime information databases."[280] Another training program was authorized to train state judges issuing orders in stalking and domestic violence cases.[281]

In sum, while it is clear there is a national problem regarding violence against women, there has been no showing that the national government is more capable than the states to address this issue. In other words, just because "states have largely failed to stem the tide of violence"[282] does not mean that the national government is more competent to do so. Nor is there a showing that the civil rights remedy of VAWA will address the problems Congress cites in its reports. Moreover, it has not been shown that the states are separately incompetent or unwilling to take on this task. Finally, the relative newness of the problem means that states, and the federal government for that matter, have had little time to react to this problem, about which relatively little is known. All these factors counsel against permitting an exercise of the commerce power in this case.

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274. *See* Paul S. Grobman, Note, *The Constitutionality of Statutorily Restricting Public Access to Judicial Proceedings: The Case of the Rape Shield Mandatory Closure Provision*, 66 B.U. L. REV. 271, 271 (1986).

275. *See* CONNECTICUT JUDICIAL TASK FORCE ON GENDER BIAS, GENDER, JUSTICE AND THE COURTS 17 (1991); ADMINISTRATIVE OFFICES OF THE COURTS OF CALIFORNIA, ACHIEVING EQUAL JUSTICE FOR WOMEN & MEN IN THE COURTS: REPORT OF THE JUDICIAL COUNCIL ADVISORY COMMITTEE ON GENDER BIAS IN THE COURTS 2 (1991); SUPREME COURT OF GEORGIA, GENDER AND JUSTICE IN THE COURTS: A REPORT TO THE SUPREME COURT OF GEORGIA BY THE COMMISSION ON GENDER BIAS IN THE JUDICIAL SYSTEM 34 (1991); MARYLAND SPECIAL JOINT COMMITTEE, GENDER BIAS IN THE COURTS 18 (1991).

276. *See Violence Against Women: Victims of the System: Hearing on S.15 Before the Senate Comm. on the Judiciary*, 102d Cong. 67 (1991) (testimony of Roland Burris), *not available in* WL.

277. VAWA § 13962(a).

278. *Id.* § 13971(a)(1).

279. *Id.* § 13991.

280. *Id.* § 14031(a).

281. *See id.* § 14036.

282. Maloney, *supra* note 256, at 1894.

D. *Federal/State Balance*

VAWA poses serious concerns for the state of federalism. The issue of violent crime in general has always been one of state concern,[283] and to usurp this role in this instance could lead to future erosion of states' governance. This would be of special concern here, where the other justifications for exercising federal control are weak.

It may be argued that because Section 13891 is a civil rights remedy for discriminatory violence against women, it actually falls within a sphere traditionally regulated by the federal government.[284] VAWA, however, for the first time seeks to use the commerce power in regulating purely private behavior, a sphere of regulation that has been left entirely to the states.[285] To permit the VAWA civil rights remedy to pass as an exercise of the commerce power may lead to imbalance of federal and state power since there would seemingly be no stopping point to the amount of intrusion the federal government could make into spheres of governance occupied by the states. The lack of a stopping point was a serious concern in *Lopez*,[286] and should be here as well.

This is not to say that the federal government should be forever barred from regulating in this area. If states prove incompetent or unwilling to correct the problems VAWA attempts to address, and if the national government shows special competence in this area, then this exercise of the commerce power may be justified. In the absence of such a showing, a stopping point for this kind of regulation seems impossible to find.

E. *Conclusion on the Application of the Four-Prong Test to VAWA*

All in all, VAWA has a weak nexus to the commerce power and threatens to introduce federal legislation into an area in which the states have not only traditionally been responsible, but in which there has been no showing that states cannot continue these responsibilities efficaciously. While the seriousness of the problem is clear, the need to mend it through this kind of federal legislation is not. VAWA should not pass under the four-prong test. However, the four-prong test is flexible enough to provide an incentive to states to tackle the serious problem at hand. By not permanently cordoning off the area of violence against women from the purview of the federal government, the four-prong test would essentially threaten states with loss of power unless they handle the problem adequately.

CONCLUSION

In over two centuries of Commerce Clause jurisprudence, the Supreme Court has failed to articulate a consistent set of rules. Rather, Commerce Clause jurisprudence has evolved haphazardly as the Court has tried to allow Congress the ability to deal

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283. *See* United States v. Lopez, 514 U.S. 549, 564 (1995).

284. *See* Maloney, *supra* note 256, at 1894.

285. This was a dire concern for the Fourth Circuit, which opened its opinion in *Brzonkala* by stating that the Constitution envisioned that "our federal government would be one of enumerated powers, and that all power unenumerated would be reserved to the several states . . . ." *See Brzonkala*, 169 F.3d at 826.

286. *See Lopez*, 514 U.S. at 564-65.

with commerce-related exigencies that arise, but has simultaneously tried to draw a line past which Congress cannot venture. Now, it seems the Court is faced with another important exigency—the need to coherently articulate the parameters of federal power. Instead of once again convoluting doctrine in order to meet this challenge, the Court ought to formally adopt the test it has always employed. This would put its jurisprudence on a reasonable footing, allow Congress to solve important commerce-related problems and provide a substantial limitation on the power of the federal government.