"FEDERALISM WHETHER THEY WANT IT OR NOT": THE NEW COMMERCE CLAUSE DOCTRINE AND THE FUTURE OF FEDERAL CIVIL RIGHTS LEGISLATION AFTER *UNITED STATES V. MORRISON*

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INTRODUCTION

The Supreme Court's recent decision in *United States v. Morrison*[1] further limited the reach of the federal commerce power by proceeding according to an interpretive rationale that was partially obscured in the Court's previous ruling in *United States v. Lopez*.[2] While the decision in *Lopez* appeared to point toward increasing restrictions on Congress's legislative authority, *Morrison* erased nearly all doubts that the Court intends to reduce federal commerce power to a fraction of what it had become in the previous sixty years. More specifically, the interpretive preferences of the *Morrison* Court squarely threaten future congressional attempts to address civil rights violations, as they have proven unable to provide principled and intelligible judicial standards for Congress to follow in drafting such legislation. Although *Morrison* provides perhaps the clearest view yet of the majority's conservative activism in deciding questions of federal power, the interpretive regime it has chosen already shows signs of its unworkability in the context of our modern national society.

The *Morrison* majority's inventive revision and re-characterization of Commerce Clause precedent prompts the need for a fresh historical review. In Part I, we provide a concise "interpretive history" of Commerce Clause precedent. Cases are grouped according to the three dominant interpretive themes the Court has embraced throughout its history in determining the scope of the Commerce Clause. In Part II, we demonstrate how the *Lopez* and *Morrison* decisions revive and distort these interpretive themes. The Court's progression from *Lopez* to *Morrison* indicates that the conservative major-

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[1] 120 S. Ct. 1740 (2000).

[2] 514 U.S. 549 (1995).

ity is steadily honing a new categorical test as a means to fashion and preserve a traditional view of state power. In Part III, we briefly discuss the potential implications of this re-emerging, formalist Commerce Clause jurisprudence for civil rights legislation through an analysis of recent constitutional challenges to existing environmental laws.

I. DOMINANT INTERPRETIVE RATIONALES OF COMMERCE CLAUSE JURISPRUDENCE

Supreme Court precedent involving interpretation of the Commerce Clause is notable for its blending of competing rationales. While many Commerce Clause cases owe their resolution in great part to the surrounding socioeconomic circumstances of the period in which they were decided,[3] it is possible to distill interpretive patterns and contests from this body of precedent. Specifically, our review of Commerce Clause precedent reveals that three recurring interpretive tensions dominate the field. The following is a concise history of Commerce Clause precedent arranged thematically to highlight these well-worn tracks of contested interpretation. This interpretive arrangement of precedent provides a clear view of the conservative activism of the *Morrison* majority from a doctrinal perspective.[4]

A. Gibbons *and* Cooley

Any history of Commerce Clause jurisprudence would be fatally flawed without including an analysis of the most important case to address the subject. At any given point in history, much of the debate surrounding the interpretation of the Commerce Clause can be traced to the case of *Gibbons v. Ogden*, decided in 1824.[5] That single decision, authored by Chief Justice Marshall, contains many of the seeds of interpretive tension that have flowered into the competing rationales that reverberate in today's cases. For those who wish to

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[3] Bruce Ackerman's discussion of the "constitutional crisis of 1937" is an excellent example of this kind of argument. *See generally* 1 BRUCE ACKERMAN, WE THE PEOPLE 40-57 (1991).

[4] Before embarking on this thematic historical review, one point deserves emphasis. The following discussion is not an attempt to highlight and organize every doctrinal tool or term of art employed by the Court to resolve Commerce Clause questions. Any student who has studied the Commerce Clause is aware that the Court over the years has applied certain conclusive labels that do no more than justify the result to be reached in a given case. Perhaps the most obvious of these is the oft-remarked distinction between "direct" and "indirect" effects. *See, e.g.*, A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 546 (1935) (concluding that intrastate acts that directly affect interstate commerce are subject to federal regulation, whereas those that only indirectly affect interstate commerce are not). These kinds of discussions are usually accompanied by one or more of the interpretive rationales discussed below. *See* text *infra* Part I.

[5] 22 U.S. (9 Wheat.) 1 (1824).

loosen the reins and allow Congress "plenary" authority in exerting its commerce power, *Gibbons* provides the rhetorical cover to do so. For those who would restrict Congress to certain subject matter categories and permit the states to share in regulating activities with commercial effects, *Gibbons* can also be useful.

The facts of *Gibbons* are well known and can be recapitulated briefly.[6] The New York legislature had granted Robert Livingston and Robert Fulton an exclusive license to navigate steamboats on New York waters. These licenses were later assigned to John Livingston, and then again to Aaron Ogden. Ogden's license gave him the exclusive privilege to navigate the waters between Elizabethtown, New Jersey and New York City. Thomas Gibbons operated two steamboats in violation of Ogden's grant. When Ogden sued Gibbons in the New York Court of Chancery to enjoin his operation, Gibbons defended by arguing that his ships were licensed by an Act of Congress passed in 1793. This federal statute, Gibbons claimed, allowed him to operate his ships notwithstanding the New York legislative grant. The Court of Chancery disagreed and granted the injunction. New York's "Court of Errors" (the court of last resort in the state at that time) affirmed. On appeal, with Chief Justice Marshall writing for the Court, the Supreme Court reversed, holding that Ogden's grant must yield to Gibbons's congressionally authorized license.[7]

Today, *Gibbons* is a case for all seasons. Those like Justice Souter point to *Gibbons* as the emblem of a "plenary" conception of commerce power.[8] Chief Justice Marshall provided sweeping phrases for his description of the scope of the commerce power. The power to regulate interstate commerce, he wrote, is the power "to prescribe the rule by which commerce is to be governed. This power, like all others vested in congress, *is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations,* other than are prescribed in the constitution."[9] After Marshall declared the plenary nature of congressional power over interstate commerce, he reinforced this notion by explaining that the constitutional system imposed only a singular governor upon its exercise:

> The wisdom and the discretion of congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments.[10]

When breathing meaning into the word "commerce," Marshall

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[6] *See id.* at 1-3.

[7] *See id.* at 24 ("[T]he concurrent power of the states, concurrent though it be, is yet subordinate to the legislation of congress.").

[8] *See Morrison*, 120 S. Ct. at 1766 (Souter, J., dissenting).

[9] *Gibbons*, 22 U.S. at 196 (emphasis added).

[10] *Id.* at 197.

provided an expansive term, specifically ignoring a limiting, categorical construction:

> The counsel for the appellee would limit [the term "commerce"] to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. *Commerce, undoubtedly, is traffic, but it is something more—it is intercourse.* It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. The mind can scarcely conceive a system for regulating commerce between nations, which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of the one nation into the ports of the other, and be confined to prescribing rules for the conduct of individuals, in the actual employment of buying and selling, or of barter.[11]

Marshall's treatment of the constitutional term "among" is similarly broad: "The word 'among' means intermingled with. A thing which is among others, is intermingled with them. Commerce among the states, cannot stop at the external boundary line of each state, but may be introduced into the interior."[12]

Earlier in the opinion, Marshall provided additional support for a "plenary" view of federal commerce power when he explicitly eschewed a "strict construction" of Article I powers.[13] Finally, and perhaps most importantly for congressional supporters, Marshall explained that the very history that generated the Constitution transformed the nature of the constituent states:

> [W]hen these allied sovereigns converted their league into a government, when they converted their congress of ambassadors, deputed to deliberate on their common concerns, and to recommend measures of general utility, into a legislature, empowered to enact laws on the most interesting subjects, *the whole character in which the states appear, underwent a change, the extent of which must be determined by a fair consideration of the instrument by which that change was effected.*[14]

Given language such as that found in the preceding passages, it is hardly surprising that the expansive decisions of the New Deal era looked to Marshall's *Gibbons* opinion as having construed the Commerce Clause with "a breadth never yet exceeded."[15] Even those with conflicting interpretations generally conceded the theoretical direction of his opinion.[16]

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[11] *Id.* at 189-90 (emphasis added).

[12] *Id.* at 194.

[13] *Id.* at 188.

[14] *Id.* at 187 (emphasis added).

[15] Wickard v. Filburn, 317 U.S. 111, 120 (1942).

[16] *See, e.g.*, County of Mobile v. Kimball, 102 U.S. 691, 699-700 (1880) (Field, J.) ("In the opinion of the court in *Gibbons v. Ogden*, the first and leading case upon the construction of the commercial clause of the Constitution, and which opinion is recognized as one of the ablest of the great Chief Justice then presiding, there are several expressions which would indicate, and

Gibbons, however, has also been read in a far more restrictive manner. For the definition of "commerce," Marshall provides a succinct alternative to "intercourse": "The word used in the constitution, then, comprehends, and has been always understood to comprehend, *navigation* within its meaning; and a power to regulate *navigation*, is as expressly granted, as if that term had been added to the word 'commerce.'"[17] Full stop.[18] Marshall's definition of "among" is also two-headed. "It is not intended to say," Marshall says of regulating commerce *among* the several States,

> 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 other states.... Comprehensive as the word "among" is, it may very properly be restricted to that commerce which concerns more states than one.[19]

For those who seek to restrict federal power, however, the true importance of *Gibbons* lies in its cogent statement of a traditional theoretical understanding of a written constitution. It is this traditional understanding, and its use by subsequent generations of jurists, to which we now turn.

The Court has decided many Commerce Clause questions along one basic interpretive fault line. One side of this interpretive divide proceeds from the basic fact that the Constitution is a written document.[20] Because the Constitution specifically enumerates certain powers of Congress in Article I, that enumeration implies the exclusion of subjects not mentioned.[21] On this view, Article I's grant of power "[t]o regulate Commerce . . . among the several States" implies a congressional inability to regulate subjects not included within that textual grant. Marshall put it this way in *Gibbons*: "The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the ex-

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his general reasoning would tend to the same conclusion, that in his judgment the grant of the commercial power was of itself sufficient to exclude all action of the States; and it is upon them that the advocates of the exclusive theory chiefly rely....").

[17] *Gibbons*, 22 U.S. at 193 (emphasis added).

[18] Marshall also explains that the historical practice of the national government, as well as the language of a companion clause of Article I, section 9, supports the "commerce means navigation" argument. *See id.* at 190-93; *see also* U.S. CONST. art I, § 9 ("No preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of Another....").

[19] *Gibbons*, 22 U.S. at 194 (emphasis added).

[20] The other side of this interpretive divide is discussed below. *See infra* Part I.D.

[21] This first proposition has a distinguished pedigree; its roots stretch back to James Madison's Federalist No. 45 and even further as a basic common law canon of statutory interpretation: *inclusio unius est exclusio alterius*. *See* THE FEDERALIST NO. 45, at 313 (James Madison) (J. Cooke ed., 1961) ("The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite.").

clusively internal commerce of a state."[22] From this perspective then, perhaps the most important task for the Court in interpreting the Commerce Clause is to police the perimeter and establish subject-matter categories that are excluded from the textual grant and therefore beyond the reach of Congress. In fact, the categorization of those characteristics that inhere in the presumptively excluded subject-matter of Commerce Clause regulation describes much of the history of the Court's interpretation of the clause. *Gibbons*, the case to describe the commerce power with a "breadth never yet exceeded," was also the first case to explicitly suggest this restrictive interpretive method. In short, just what is interstate commerce is demonstrated best by showing what is *not* interstate commerce, by being something that is inherently "non-commerce."[23]

In cases that followed *Gibbons*, the Court used this argument to limit the broader reading of Marshall's opinion. Justice Field in *County of Mobile v. Kimball*,[24] for example, dismissed the plenary theory of federal commerce power embedded in Marshall's *Gibbons* opinion as dicta and declared that Marshall himself was aware of this fact. Notwithstanding the language of plenary authority by Marshall, Field noted that Marshall

> takes care to observe that the question [of state authority] was not involved in the decision required by that case. "In discussing the question whether this [commerce] power is still in the States," he observes that, "in the case under consideration, we may dismiss from it the inquiry, whether it is surrendered by the mere grant to Congress, or is retained until Congress shall exercise the power."[25]

For Field, *Gibbons* answered *only* whether a state could regulate foreign and interstate commerce when Congress had addressed the subject at issue.[26] Field then pointed to cases that followed *Gibbons* (including one that was penned by Marshall himself) to reinforce the point that the existence or absence of federal legislation was the critical inquiry for resolving these kinds of controversies.[27]

What this limitation of *Gibbons* effectively meant for those like Field was that the first case to decide what subject matter and regula-

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[22] *Gibbons*, 22 U.S. at 194-95.

[23] Of course, since the constitutional grant includes two meaningful terms, this kind of interpretation by opposition can also be achieved by showing an activity to be intrinsically "local," or otherwise not inherently "among the several States." The history of this kind of interpretive maneuver is discussed below. *See infra* Part I.C.

[24] 102 U.S. 691 (1880) (Field, J.).

[25] *Id.* at 700 (quoting *Gibbons*, 22 U.S. (9 Wheat.) at 200).

[26] *See id.* (stating that all Marshall had determined in *Gibbons* was "that the grant of power by the Constitution, accompanied by legislation under it, operated as an inhibition upon the States from interfering with the subject of that legislation").

[27] *See id.* at 700-01 (quoting Willson v. Blackbird Creek Marsh Co., 27 U.S. (2 Pet.) 245, 252 (1829) (Marshall, J.) ("If Congress had passed any act which bore upon the case . . . we should not feel much difficulty in saying that a State law coming in conflict with such act would be void.")); *see also* License Cases, 46 U.S. (5 How.) 504 (1847).

tions Congress might address and employ under its commerce power was really *Cooley v. Board of Wardens*,[28] not *Gibbons*. *Cooley*, decided in 1852, involved a Pennsylvania statute that required any vessel entering or leaving the port of Philadelphia that did not employ a local pilot to pay a fee.[29] This state regulation was challenged as interfering with Congress's authority.

In resolving this question, Justice Curtis's *Cooley* opinion suggested for the first time that the scope of the federal commerce power should be determined by the *nature of the subject being regulated* rather than by any semantic interpretation of the constitutional textual grant itself.[30] The regulation concerning pilotage, Curtis explained, dealt with a subject that was of national concern: "Conflicts between the laws of neighboring states . . . might be created by state laws regulating pilotage, *deeply affecting that equality of commercial rights*, and that freedom from state interference, which those who formed the Constitution were so anxious to secure . . . ."[31]

Perhaps more important still, the *Cooley* Court upheld the Pennsylvania law, even while conceding that it dealt with a subject—navigation—admittedly within the scope of federal commerce power.[32] In doing so, the Court addressed the contention that the states were divested of the power to legislate on the subject by the very existence of the federal power.[33] "The grant of commercial power to Congress," Curtis explained, "*does not contain any terms which expressly exclude the states* from exercising an authority over this subject-matter."[34] Given

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[28] 53 U.S. (12 How.) 299 (1851). There were, of course, cases after *Gibbons* and yet before *Cooley* that restricted the federal commerce power. *See* Mayor of New York v. Miln, 36 U.S. (11 Pet.) 102, 107 (1837) ("Because congress has the power to regulate commerce, it is not as a consequence, that it is an exclusive power."); Passenger Cases, 48 U.S. (7 How.) 283, 572 (1849) ("[T]his power in the state is not taken away by the power ceded to Congress."). Important as these cases may be, however, their reasoning was skewed by issues of slavery that lay beneath their surface.

[29] *Cooley*, 53 U.S. (12 How.) at 311-13.

[30] In reading Curtis's opinion, one is reminded of the contemporary debate between Justice Antonin Scalia and Ronald Dworkin on the general subject of interpretation. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION 116-18, 144-49 (1997) (discussing the differences between "semantic intention" and "expectation intention").

[31] *Cooley*, 53 U.S. (12 How.) at 317 (emphasis added).

[32] *See id.* at 315, 321 ("That the power to regulate commerce includes the regulation of navigation, we consider settled.... [However w]e are of opinion [sic] that this state law was enacted by virtue of a power, residing in the state to legislate....").

[33] *See id.* at 318 ("[W]e are brought directly and unavoidably to the consideration of the question, whether the grant of the commercial power to Congress, did *per se* deprive the states of all power to regulate pilots."). Interestingly, the *Cooley* Court treated the question, notwithstanding *Gibbons*, as one of first impression. *See id.* ("This question has never been decided by this court....").

[34] *Id.* (emphasis added). Curtis also relied on Federalist No. 32 as authoritative support in favor of a non-exclusive conception of federal commerce power. *See id.* at 318-19; *see also* THE FEDERALIST NO. 32, at 200 (Alexander Hamilton) (J. Cooke ed., 1961) ("But as the plan of the Convention aims only at a partial Union or consolidation, the State Governments would clearly retain all the rights of sovereignty which they had before had and which were not by that act *exclusively* delegated to the United States.").

this textual silence, Curtis provided a test to determine whether the states were permitted to regulate an area within the scope of the federal commerce power. Once again, the subject matter of the regulation was the touchstone for resolving the issue. Curtis reasoned:

> [W]hen it is said that the nature of the [commerce] power requires that it should be exercised exclusively by Congress, it must be intended to refer to the subjects of that power, and to say they are of such a nature as to require exclusive legislation by Congress. Now the power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; *some imperatively demanding a single uniform rule*, operating equally on the commerce of the United States in every port; *and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities of navigation. . . . Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress. That this cannot be affirmed of laws for the regulation of pilots and pilotage is plain.*[35]

Curtis based his ultimate conclusion that the Pennsylvania pilotage law was not a subject "demanding a single uniform rule," and therefore did not fall within Congress's exclusive domain, on an interpretation of a 1789 federal statute declaring "[t]hat all pilots in the bays, inlets, rivers, harbors, and ports of the United States shall continue to be regulated in conformity with the existing laws of the states . . . until further legislative provision shall be made by Congress."[36] This statute, "plainly" for Curtis, was "a clear and authoritative declaration by the first Congress" that the subject at issue was inherently "local" and thus "should be left to the legislation of the states," notwithstanding the existence of a subsequent federal statute that authorized precisely the conduct prohibited by the Pennsylvania law.[37]

Cooley created a rival legacy to *Gibbons* in Commerce Clause interpretation that still resonates today. First, *Cooley* confirmed that the nature of the subject being regulated determines the *scope* of the federal commerce power (whether Congress could properly legislate upon a given subject at all). Second, the *exclusivity* of congressional authority in a given subject area depended upon whether that subject demanded a "uniform rule" or required "diversity" to meet "local necessities."[38] Both components of the Curtis opinion gained sharper

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[35] *Cooley*, 53 U.S. (12 How.) at 319 (emphasis added).

[36] *Id.* at 317 (quoting Act of 1789, 1 Stat. 54).

[37] *Id.* at 317, 319.

[38] *Id.* Subsequent cases reiterated this reasoning. *See, e.g.*, Henderson v. Mayor of New York, 92 U.S. 259, 272 (1875) (holding that a state statute "invade[d] the domain of legislation which belong[ed] exclusively to the Congress"); Welton v. Missouri, 91 U.S. 275, 282 (1875) (stating that "commercial power continues until the commodity has ceased to be the subject of discriminating legislation"); Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1867) (striking down a state tax levied when individuals entered the state); Gilman v. Philadelphia, 70 U.S. (3 Wall.) 713, 743 (1865) ("Congress has regulated the navigation of this river, and . . . the State law . . . is in

contours in the years to come.

B. Categorization

1. "Non-Commerce"

Cooley's focus on subject matter as a potential touchstone for Commerce Clause interpretation was a harbinger of things to come. Cases after *Cooley* focused on subject matter to determine their outcome. One of the earliest examples of this distilled method of interpretation is *Paul v. Virginia*.[39] *Paul* was a test case financed by the National Board of Fire Underwriters to challenge the protectionist taxes and license fees states imposed against nonresident fire and life insurance companies in the nineteenth century. Seeking to preempt the states from regulating any aspect of interstate insurance sales, lawyers for the insurance industry argued that such sales were transactions in interstate commerce.[40]

Unanimously, the Supreme Court ruled against the insurance industry and sustained the state regulatory scheme. The case is not as important for its result as it is for its reasoning,[41] because in rejecting the industry's argument, the Court erected a clear category of "non-commerce":

> The defect of the [insurance industry's] argument lies in *the character of their business. Issuing a policy of insurance is not a transaction of commerce.* The policies are simple contracts of indemnity against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. *These contracts are not articles of commerce in any proper meaning of the word.*[42]

While Justice Field's decision also emphasized the inherently "local" nature of these transactions,[43] there can be no doubt that the decision depended heavily upon the categorical exclusion of insurance policies as something other than "commerce."

About two decades after *Paul*, the Court decided *Kidd v. Pearson*,[44] a case involving a Commerce Clause challenge to an Iowa statute that prohibited the manufacture of liquor for shipment outside the state. As in *Paul*, the Court unanimously sustained the state law, and the

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conflict with those regulations, and therefore is void.").

[39] 75 U.S. (8 Wall.) 168 (1868).

[40] *Id.* at 171-74. The industry's attorneys also argued that corporations were "citizens" covered by the Privileges and Immunities Clause of Article IV.

[41] *See* United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944) (overruling *Paul* and holding that fire insurance companies that conducted substantial parts of their business across state lines were engaged in interstate commerce).

[42] *Paul*, 75 U.S. at 183 (emphasis added). On the general tension between "semantic intention" and "expectation intention" in legal interpretation, see SCALIA, *supra* note 30, at 116-18, 144-49.

[43] *Paul*, 75 U.S. at 183; *see also infra* Part I.C.

[44] 128 U.S. 1 (1888).

significance of Justice Lamar's opinion of the Court for the future of Commerce Clause interpretation cannot be overstated. Justice Lamar's conclusion that the Iowa statute did not trespass upon the federal commerce power is almost completely based upon a succinct categorical exclusion:

> No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between *manufactures* and *commerce*. Manufacture is transformation—the fashioning of raw materials into a change of form for use. *The functions of commerce are different. The buying and selling and the transportation incidental thereto constitute commerce*; and the regulation of commerce in the constitutional sense embraces the regulation at least of such transportation.[45]

For Justice Lamar then, "commerce" did not begin until "manufacture" was at an end. In making this interpretive move, Lamar relied in part on Justice Field's definition of "commerce among the several States" in *Kimball*,[46] decided eight years earlier. Compare Field's formulation: "Commerce with foreign countries and among the States, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities."[47] Even viewing Field's definition as comprehensive of the subject, Lamar's *Kidd* opinion represents a further extension of the interpretive technique of subject matter categorization in Commerce Clause cases.

Perhaps the case most often cited as an illustration of the interpretive technique of categorical exclusion is *E.C. Knight, Co. v. United States*.[48] In 1892, the American Sugar Refining Company controlled nearly all sugar refining in the United States. The federal government filed suit to challenge the combination under the new Sherman Antitrust Act.[49] The issue was whether the Sherman Act was a lawful exercise of the commerce power and could reach and suppress the sugar refining monopoly. Chief Justice Fuller, speaking for seven other members of the Court (only Justice John Marshall Harlan dissented), declared that "[c]ommerce succeeds to manufacture, and is not a part of it," and held that the Sherman Act could not be lawfully applied to suppress a monopoly of the manufacture of refined sugar.[50] Fuller relied heavily on the *Kidd* decision for support.[51]

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[45] *Id.* at 20 (emphasis added).

[46] 102 U.S. 691, 697 (1880).

[47] *Id.* at 702.

[48] 156 U.S. 1 (1895).

[49] 15 U.S.C. § 1 (2000).

[50] *E.C. Knight, Co.*, 156 U.S. at 12.

[51] *Id.* at 14-16. It is also worth noting here that the interpretive regime of formal categories did not always translate into a defeat for federal authority. Two years after *Kidd*, another Iowa statute banning the importation (as opposed to manufacture) of liquor was struck down. *See* Leisy v. Hardin, 135 U.S. 100, 119 (1890) ("[T]he grant of the power to regulate commerce among the States . . . is exclusive, the States cannot exercise that power without the assent of

Three years after *E.C. Knight* was decided, Congress passed the Erdman Act to prevent disruption of interstate commerce by labor strife. The Erdman Act protected union membership by prohibiting "yellow dog" contracts and making it a criminal offense to discharge or blacklist employees for union activity.[52] William Adair fired an employee because of his union membership and challenged the Act's constitutionality.[53] Justice Harlan's majority opinion in *Adair v. United States*[54] struck down the Act as both an invasion of the Fifth Amendment's Due Process Clause and beyond the scope of congressional commerce power.[55] In his discussion of the scope of the commerce power, Harlan's opinion represents legal formalism in ascendancy:

> But what possible legal or logical connection is there between an employé's [sic] membership in a labor organization and the carrying on of interstate commerce? *Such relation to a labor organization cannot have, in itself and in the eye of the law, any bearing upon the commerce with which the employé [sic] is connected by his labor and services.* Labor associations, we assume, are organized for the general purpose of improving or bettering the conditions and conserving the interests of its members as wage-earners—an object entirely legitimate and to be commended rather than condemned. *But surely those associations as labor organizations have nothing to do with interstate commerce as such.*[56]

Of course, in an era where judicial activism runs so rampant that the Erdman Act is held to violate the Due Process Clause of the Fifth Amendment, it is hardly surprising that the Court would hold that legislation concerning union membership was excluded from the federal commerce power.

The same brand of formalism reared its head again in 1935 when the Court struck down the Railroad Retirement Act of 1934 in *Railroad Retirement Board v. Alton R.R. Co.*[57] Justice Roberts's opinion is remarkable for its explicit rejection of the assumptions and connections that the *Adair* Court dealt with only implicitly—namely, that legislation aiming to regulate the morale and well-being of the employees of an interstate transportation industry was not "commerce." The Railroad Retirement Act "established a compulsory retirement and pension system for all carriers subject to the Interstate Commerce Act."[58] While superficially suggesting that the Court was not questioning the "means" by which Congress sought to regulate interstate commerce, Justice Roberts reasoned that the Act was "really and essentially related solely to the social welfare of the worker" and there-

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Congress.").

[52] 30 Stat. 424 (1898).

[53] *See* Adair v. United States, 208 U.S. 161 (1908).

[54] *Id.*

[55] *Id.*

[56] *Id.* at 178 (emphasis added).

[57] 295 U.S. 330 (1935).

[58] *Id.* at 344.

fore not "in any just sense a regulation on interstate transportation."[59] This interpretive maneuver would prevail until the watershed of 1937.[60]

2. *"Currents," "Channels," and "Instrumentalities"*

Not all of the Court's attempts at categorization resulted in restricting the scope of federal commerce regulation. In fact, much of the Court's Commerce Clause precedent stands squarely for the proposition that some types of conduct are, by their very nature, *inter*state activity.

Perhaps *Swift & Co. v. United States* provides the best illustration of an enlarged but still theoretically limited brand of categorization.[61] *Swift* involved an injunctive antitrust action against meat dealers from several states. Together, the *Swift* defendants controlled roughly 60% of the national meat market. They argued that the targeted activities were entirely intrastate. Justice Holmes wrote the Court's opinion in *Swift*, upholding the injunction on behalf of a unanimous Court. Holmes's Commerce Clause discussion begins with rather sweeping statements, distinguishing *E.C. Knight* and its excluded commerce category of "manufacture": "Here the subject matter is sales and the very point of the combination is to restrain and monopolize commerce among the States in respect of such sales."[62]

But Holmes did not simply rely on the categorical comparison of "manufacture" and "sales" to authorize the government's suit against conduct that was conceded to be taking place within only a single state. Rather, Holmes erected an entirely new category to encompass and define the practical elements of *interstate* business. "[C]ommerce among the States," he wrote,

> is not a technical legal conception, but a practical one, drawn from the course of business. When cattle are sent for sale from a place in one State, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stock yards, and when this is a typical, constantly recurring course, *the current thus existing is a current of commerce among the States*, and the purchase of the cattle is a part and incident of such commerce.[63]

Although this language, in one sense, rivals the notion that rigid formal categories can be utilized to determine the limits of permissible interstate commerce regulation, it really stands as a pragmatic variant of the same interpretive technique. The true theoretical rivals

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[59] *Id.* at 368.

[60] *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238, 303 (1936) (excluding "mining" and "production" from the constitutional meaning of "commerce").

[61] 196 U.S. 375 (1905).

[62] *Id.* at 397.

[63] *Id.* at 398-99 (emphasis added).

to the categorization of inherently and exclusively "interstate" activity as such are cases like *United States v. Wrightwood Dairy, Co.*[64] These cases usually invoke the Necessary and Proper Clause and authorize intrastate exertions of the federal commerce power as an "appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce."[65] The *Wrightwood Dairy* concept, taken to its extreme, does not deem any conduct or activity as "not interstate" in character beforehand. Every transaction, no matter how "internal" or "local," is potentially subject to regulation that is an "appropriate means to the attainment of a legitimate" interstate commercial end.

Swift, instead, shares theoretical footing with *Kidd*, not *Wrightwood Dairy*. Like *Kidd* and its employment of the "manufacturing" label, Holmes's "current of commerce" theory in *Swift* is an attempt to formally categorize intrinsically *interstate* activity as such. Though admittedly deviating from the purely formalist course that characterized much of the jurisprudence of the day, and despite providing greater latitude for federal regulation than previous formulations, Holmes's "current of commerce" theory attempts to characterize inherently interstate conduct. *Swift* and its progeny effectively rejected the notion that the single-state operation of certain transactions would remove an entire series of transactions with national scope and impact from federal reach.[66] In doing so it went far to categorize the elements of such an inherently "interstate" transactional series.

Entire lines of Commerce Clause precedent represent an implicit categorization of certain subject matter as "interstate commerce" by its very nature. Cases in the early twentieth century involving the railroads, manifesting the need for uniform national regulation, are perhaps the most obvious example.[67] Recently, in *United States v. Lopez*, the Court referred to these railroad cases as involving the "channels" or "instrumentalities" of interstate commerce.[68] Many early cases, however, employed precisely the kind of formal categorization so far discussed.

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[64] 315 U.S. 110 (1942) (involving the regulation of milk prices where the milk was transported interstate to the market).

[65] *Id.* at 119.

[66] *See, e.g.*, Stafford v. Wallace, 258 U.S. 495, 516 (1922) (upholding the Packers and Stockyards Act of 1921, which "treat[ed] the various stockyards of the country as great national public utilities to promote the flow of [interstate] commerce").

[67] *See* Railroad Comm'n v. Chicago B. & Q.R. Co., 257 U.S. 563 (1922) (affirming an interlocutory injunction enjoining the Railroad Commission of Wisconsin from meddling with the intrastate passenger fares set by the Interstate Commerce Commission); Texas & Pacific Ry. v. Rigsby, 241 U.S. 33 (1916) ("Congress may, in the exercise of the plenary power to regulate commerce between the States, require installation of safety appliances on cars used on highways of interstate commerce . . . ."); Southern Ry. Co. v. United States, 222 U.S. 20 (1911) (upholding Congress's safety regulation of vehicles on highways that carried interstate commerce).

[68] United States v. Lopez, 514 U.S. 549, 558 (1995) (striking down the Gun Free School Zone Act in part because the Court found no nexus between guns and interstate commerce).

Shortly after the Civil War, for example, the Court applied the categorization technique in *Coe v. Town of Errol*,[69] an early "instrumentality" case (to borrow the modern term). In that case, Edward Coe (and other residents of Maine and Massachusetts) owned logs that were cut and stored in New Hampshire to be transported out of state and sold. Coe challenged New Hampshire statutes assessing state taxes on the cargo, arguing that the statutes must yield to the federal commerce power since the logs were intended for export among the states.

Justice Bradley's opinion for the Court sustaining the state taxes represents a classic example of the technique of categorical exclusion. Bradley first explained that goods "in course of transportation through a State" should be deemed "already in the course of commercial transportation," and that they are "clearly under the protection of the constitution."[70] Further, such goods would also be outside of state regulatory control "when actually started in the course of transportation to another State, or delivered to a carrier for such transportation."[71] But, for Bradley and his brethren, Coe's logs did not fall into either of these categories. Bradley was searching for the temporal line where such cargo "cease[s] to be governed exclusively by the domestic law and begin[s] to be governed and protected by the national law of commercial regulation."[72] For the *Coe* Court, goods crossed into the national realm only when "they commence[d] their final movement for transportation from the State of their origin to that of their destination."[73] The "process of exportation" did not begin until the goods were "committed to the common carrier for transportation out of the State to the State of their destination, or have started on their ultimate passage to that State."[74] Before goods reached that point, Bradley wrote, "it is reasonable to regard them as not only within the State of their origin, but as a part of the general mass of property of that State, subject to its jurisdiction, and liable to taxation there."[75] Unfortunately for Edward Coe, his logs had not yet begun the "process of exportation" and were therefore subject to the New Hampshire taxes.[76]

Bradley's resort to such formalism in *Coe* is all the more remarkable given that he needed to steer clear of the Constitution's express prohibition of taxes on exports.[77] Bradley himself was of the view that

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[69] 116 U.S. 517, 517 (1886) (upholding the application of state taxes on goods "intended for exportation to another State").

[70] *Id.* at 525.

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] *Id.* at 528.

[77] *See* U.S. CONST. art. I, § 9, cl. 5 (prohibiting any tax or duty to be laid on articles exported

any kinds of duties imposed on exports from one state to another "would be a regulation of commerce among the States, and therefore, void as an invasion of *the exclusive power of Congress.*"[78] Bradley negotiated this hurdle by explaining that, while the New Hampshire taxes could not stand if they were imposed *because* these goods were intended for export, there was no evidence that Coe's logs were taxed with this purpose in mind. Bradley's search for a clear rule was motivated in part by the fear of including the intent of the producer as a factor in Commerce Clause analysis and thereby depleting chief sources of revenue.[79] "It seems to us untenable," Bradley wrote, "to hold that a crop or herd is exempt from taxation merely because it is, by its owner, intended for exportation. If such were the rule in many states there would be nothing but the lands and real estate to bear the taxes."[80]

The commencement of "the process of exportation" as a touchstone of federal reach represents another attempt to formally categorize activity that inherently resists such treatment.[81] Seen in this way, cases like *Coe* are a precursor for those early twentieth century cases involving federal legislation prohibiting the interstate shipment of various "social evils." Legislation such as the Lottery Act, the Pure Food and Drugs Act, and the Mann Act were each upheld by the Court as permissible regulations of interstate travel by relying on precisely the same notion of categorization that motivated the *Coe* Court.[82]

Of course, the categorization of "movement" was no match for the judicial activism of the early twentieth century. In *Hammer v. Dagenhart*, for example, Justice Day quickly disabused the country of the

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from any state).

[78] *Coe*, 116 U.S. at 526 (emphasis added).

[79] It is also noteworthy that Bradley, in making this claim, relied on the precedent of *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827), and its "original package" doctrine to determine the point where state jurisdiction over commodities begins and ends. *See Coe*, 116 U.S. at 526-27. The "original package" doctrine held that the taxing power of a state does not extend to imports from abroad so long as they remain in their original packaging. This doctrine was limited in later cases such as *Woodruff v. Parham*, 75 U.S. 123 (1869), and *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976), and was rejected by the Court entirely as a limit on the commerce power in *United States v. Sullivan*, 332 U.S. 689 (1948).

[80] *Coe*, 116 U.S. at 527-28.

[81] Another early case highlighted both the "instrumentality" and "channel" of commerce categories, with the Court sustaining the application of a federal safety inspection to a ship which operated solely on a Michigan river and engaged only in intrastate business. *See* The Daniel Ball, 77 U.S. 557, 564-65 (1870).

[82] *See* Caminetti v. United States, 242 U.S. 470 (1916) (upholding the White Slave Traffic Act of June 25, 1910); Hoke v. United States, 227 U.S. 308 (1913) (upholding the White Slave Act); Hipolite Egg Co., 220 U.S. 45 (1911) (affirming a decree to confiscate adulterated eggs pursuant to the Food and Drugs Act); Champion v. Ames, 188 U.S. 321 (1903) (upholding the Lottery Act). This "embargo theory" of congressional power over interstate transportation was viewed by some members of the Court at the time as so complete that even the Tenth Amendment did not pose an obstacle. *See* Hammer v. Dagenhart, 247 U.S. 251, 277-81 (1918) (Holmes, J., dissenting).

notion that the commerce power "incidentally includes the authority to prohibit the movement of ordinary commodities."[83] Instead, Day re-characterized the "movement" cases and created another category to suit his purposes. He re-interpreted earlier "movement" cases to stand for the proposition that certain exertions of the commerce power, to be lawful, must have an "evil" as their target.[84]

> In each of these instances the use of interstate transportation was *necessary to the accomplishment of harmful results.* In other words, although the power over interstate transportation was to regulate, *that could only be accomplished by prohibiting the use of the facilities of interstate commerce to effect the evil intended.*[85]

For Day and his brethren in the majority, of course, child labor was not the sort of "evil" comparable to lottery tickets, prostitution, or impure food or drugs, so the statute was struck down.[86] Without question, *Hammer* symbolizes an active inquiry into legislative purpose; it also stands as an emblem of willful categorization.[87]

C. "Traditional State Functions"

Along with erecting categories of "non-commerce" or inherently "non-interstate" subject matter, early Commerce Clause precedents also reinforced the notion that certain regulatory areas were inherently "local" in nature and therefore were left for exclusive state regulation regardless of their "commercial" character. In 1837, in the case of *Mayor of New York v. Miln*,[88] the Court applied a potent "inherently local" rationale to permit state regulation of vessels admittedly operating on interstate waterways.[89] *Miln* involved a local ordinance requiring ship masters to post security for indigent passengers, remove undesirable aliens from the ship, and provide passenger manifests. In upholding the ordinance, the Court invoked traditional state "police powers" as a sufficient ground for states to regulate the contents of vessels travelling on interstate waters.[90] The denomination of the ordinance as a "police" regulation grew from its perceived purpose—the control of population and immigration flows. The Court held that these subjects, unlike commerce, were "complete,

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[83] *Hammer*, 247 U.S. at 270.

[84] *Id.* at 270-71 (citing with approval Clark Distilling Co. v. Western Maryland Ry. Co., 242 U.S. 311 (1917), Caminetti v. United States, 242 U.S. 470 (1917), Hoke v. United States, 227 U.S. 308 (1913), Hipolite Egg Co. v. United States, 220 U.S. 45 (1911), Champion v. Ames, 188 U.S. 321 (1903)).

[85] *Id.* at 271 (emphasis added).

[86] *Id.* at 277.

[87] Justice Holmes's dissent in *Hammer* issued this precise concern: "The notion that prohibition [of movement between states] is any less prohibition when applied to things now thought evil I do not understand." *Id.* at 280 (Holmes, J., dissenting).

[88] 36 U.S. (11 Pet.) 102 (1837).

[89] *Id.* at 132.

[90] *Id.*

unqualified, and exclusive" areas for the states to regulate.[91]

Thirty-two years later, in *United States v. Dewitt*,[92] the Court relied heavily upon *Miln* and its "inherently local" rationale and struck down a federal commercial statute as beyond the commerce power for the first time.[93] *Dewitt* involved the Internal Revenue Act of 1867, which made it a misdemeanor to sell "illuminating oils" made from petroleum. Deeming the statute a "regulation of police," the Court followed the logic of cases like *Cooley* and *Miln* with a vengeance: "As a police regulation, relating exclusively to the internal trade of the States, it can only have effect where the legislative authority of Congress excludes, territorially, all State legislation. . . . Within State limits, it can have no constitutional operation."[94]

This rationale of "inherently local" subject matter is similar to the other methods of categorization already discussed but is a potentially more potent variant. While classifying certain subjects as "non-commerce" may limit federal regulation in one way, the "inherently local" view has the potential to thwart federal regulation that concerns "interstate commerce" on its face. In short, the "inherently local" or "reserved rights of the States" rationale bars federal regulation not because Congress lacks affirmative power to enact it but because it trespasses upon traditional notions of state sovereignty.[95] This rationale ultimately rests upon a theory of federalism and a specific interpretation of the Tenth Amendment.[96]

Carter v. Carter Coal Company,[97] decided in 1936, demonstrates the full implications of the "inherently local" method of reasoning. *Carter Coal* involved the Bituminous Coal Conservation Act of 1935, which established a collective bargaining mechanism for miners to negotiate acceptable hours and wages. Writing for the majority, Justice Sutherland struck down the Act, explaining that while labor strife in the coal industry might have a large impact upon interstate commerce,

> the conclusive answer is that the evils [targeted by the Act] are all *local*

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[91] *Id.* at 139.

[92] 76 U.S. 41 (1869).

[93] *Id.* at 45.

[94] *Id.*

[95] *See* National League of Cities v. Usery, 426 U.S. 833, 840-46 (1976) (acknowledging the limits on Congressional power when state sovereignty is at stake); United States v. Butler, 297 U.S. 1, 68 (1935) (finding that the Agricultural Adjustment Act "invades the reserved rights of the states"). *But see* New York v. United States, 505 U.S. 144, 159 (1992) ("In the end, just as a cup may be half empty or half full, it makes no difference whether one views the question at issue in these cases as one of ascertaining the limits of the power delegated to the Federal Government under the affirmative provisions of the Constitution or one of discerning the core of sovereignty retained by the States under the Tenth Amendment.").

[96] *See* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

[97] 298 U.S. 238 (1936).

> *evils* over which the federal government has no legislative control. *The relation of employer and employee is a local relation.* At common law, it is one of the domestic relations. . . . And *the controversies and evils, which it is the object of the act to regulate and minimize, are local controversies and evils affecting local work undertaken to accomplish that local result.* Such effect as they may have upon commerce, however extensive it may be, is secondary and indirect. An increase in the greatness of the effect adds to its importance. It does not alter its *character.*[98]

While Sutherland also noted the well-worn distinction between "production" and "commerce,"[99] his opinion is more important for its view that the Tenth Amendment governs the commerce power.[100]

The year after the *Carter Coal* decision, the Court's activism waned and it began to defer to Congress in deciding Commerce Clause questions. It was not until 1976 that the rationale of *Cooley* and *Miln* again emerged, when the Court struck down the wage and hours provisions of the Fair Labor Standards Act ("FLSA") as applied to state and municipal employees in *National League of Cities v. Usery*.[101] The *National League of Cities* decision marked a dramatic resurgence of a Tenth Amendment barrier to federal power. The *National League of Cities* majority, in an opinion written by (then) Justice Rehnquist, did not question the constitutional basis of the FLSA under the Commerce Clause.[102] Rather, Rehnquist's opinion was a paean to traditional notions of state sovereignty while conceding the "plenary" conception of the federal commerce power.[103] Although Rehnquist did not disturb a single Commerce Clause precedent, the FLSA was

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[98] *Id.* at 308-09 (emphasis added).

[99] *Id.* at 299-301.

[100] *Id.* at 295. Justice Sutherland wrote:

> 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. And adherence to that determination is incumbent equally upon the federal government and the states. State powers can neither be appropriated on the one hand nor abdicated on the other.

Id. Cf. United States v. Morrison, 529 U.S. 598, 699 (2000) (Souter, J., dissenting) (commenting that the states, as a result of the present case and *Carter Coal*, will be "forced to enjoy the new federalism whether they want it or not").

Decided the year before the "constitutional revolution of 1937," *Carter Coal* was handed down less than two months after *United States v. Butler*, 297 U.S. 1 (1936). Though not directly addressing the commerce power, Justice Roberts's *Butler* opinion remains perhaps the most controversial exemplar of Tenth Amendment strictures on federal regulation. *See Butler*, 297 U.S. at 68.

[101] 426 U.S. 833 (1976).

[102] The FLSA was unanimously upheld as a valid exercise of the commerce power in *United States v. Darby*, 312 U.S. 100 (1941).

[103] *See National League of Cities*, 426 U.S. at 836 ("Whatever their motive and purpose, regulations of commerce which do not infringe some constitutional prohibition are *within the plenary power conferred on Congress by the Commerce Clause.*" (quoting United States v. Darby, 312 U.S. 100, 115 (1941) (emphasis added))); *id.* at 840 ("It is established beyond peradventure that the Commerce Clause of Art. I of the Constitution is a grant of plenary authority to Congress." (citing Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824))).

struck down on the ground that it "impermissibly interfer[ed] with the integral governmental functions" of the states.[104] In doing so, the *National League of Cities* Court overruled the Tenth Amendment theory of *Maryland v. Wirtz*,[105] decided only eight years earlier.[106] Rehnquist explained that "the States as States stand on a quite different footing from an individual or corporation when challenging the exercise of Congress's power to regulate commerce."[107] Because the FLSA sought to regulate "traditional aspects of state sovereignty," the Tenth Amendment stood as an independent constitutional barrier.

Justice Brennan's dissent in *National League of Cities*[108] opened by citing *Gibbons*, *Wickard v. Filburn*,[109] and Federalist No. 31 for the proposition that "[a]t the beginning Chief Justice Marshall . . . made emphatic the embracing and penetrating nature of [Congress's commerce] power by warning that effective restraints on its exercise must proceed from political rather than from judicial processes."[110] Brennan argued that the *Gibbons* conception of the commerce power was limited only by restraints "prescribed in the constitution" and that "there is no restraint based on state sovereignty requiring or permitting judicial enforcement anywhere expressed in the Constitution."[111] Brennan was careful to point out that "regulations that this Court can say are not regulations of 'commerce' cannot stand" but that no argument of that kind was being made regarding the FLSA.[112] Borrowing language from *Wirtz* and *United States v. California*[113] to make his point, Brennan continued in terms that would reverberate decades later:

> [W]hile the commerce power has limits, valid general regulations of commerce do not cease to be regulations of commerce because a State is involved. If a State is engaging in *economic activities that are validly regulated by the Federal Government when engaged in by private persons*, the State too may be forced to conform its activities to federal regulation.[114]

The Tenth Amendment regime inspired by *National League of Cit-*

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[104] *Id.* at 851.

[105] 392 U.S. 183 (1968).

[106] *Wirtz* upheld the application of minimum-wage and overtime-pay requirements of the FLSA to state and municipal employees. *Wirtz* exemplified the largely unquestioned prevailing view (for almost four decades after 1937) that the rights of the states provided no judicially-enforceable limits on congressional power.

[107] *National League of Cities*, 426 U.S. at 854.

[108] *Id.* at 856-80 (Brennan, J., dissenting).

[109] 317 U.S. 111 (1942).

[110] *Id.* at 857-58 & n.1.

[111] *Id.* at 858; *see also id.* at 859 ("The sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution. . . . [T]he power of the state is subordinate to the constitutional exercise of the granted federal power." (quoting United States v. California, 297 U.S. 175, 184 (1936))).

[112] *Id.* at 859.

[113] United States v. California, 297 U.S. 175 (1936).

[114] *National League of Cities*, 426 U.S. at 861 (Brennan, J., dissenting) (citations omitted) (emphasis added).

ies did not last. After roughly a decade of attempting to distinguish "traditional" and "essential" governmental functions from those of a lesser order, the Court overruled *National League of Cities* in *Garcia v. San Antonio Metropolitan Transit Authority*.[115] Echoing Brennan, Justice Blackmun explained that "the attempt to draw the boundaries of state regulatory immunity in terms of 'traditional governmental function' is not only unworkable but is also inconsistent with established principles of federalism . . . ."[116]

D. "Substantial Effects" and Legislative Deference

To this point, we have been discussing only one side of the basic interpretive divide concerning the Commerce Clause. Arguments reflecting an alternative interpretive approach achieved nearly hegemonic status during the period from 1937 until 1995. This dominant interpretive regime opposed the formalist, subject-matter conception that characterized nineteenth and early twentieth century Commerce Clause decisions. Born out of the "constitutional crisis" of 1937, a spate of decisions emerged deferring to congressional judgment and easing prior restrictions on the scope of the commerce power.[117] Argued one week after President Roosevelt submitted his court-packing plan, the Court's decision in *NLRB v. Jones & Laughlin Steel Corp.*[118] signaled a sea-change in judicial attitude towards federal legislation. The case involved the constitutionality of the National Labor Relations Act ("NLRA"), which guaranteed the right of workers to organize unions. The NLRA applied both to businesses *operating* in interstate commerce and to those whose activities *affected* interstate commerce; it also prohibited employers from discriminating against their employees because of their union activities.

Leading with cases like *Kidd* and *Carter Coal*, Jones & Laughlin argued that applying NLRA provisions to employees engaged in "pro-

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[115] 469 U.S. 528 (1985) (finding that the Commerce Clause allowed congressional enforcement of the FLSA in this case, because it did not impinge upon state sovereign immunity or any constitutional provision).

[116] *Id.* at 531.

[117] We do not attempt to add to the scholarship that has been devoted to the "revolution of 1937." Professor Bruce Ackerman has explained that this period is of such fundamental structural importance to American constitutional democracy that it rises to the level of a constitutional amendment, notwithstanding the formal requirements of Article V. *See generally* 1 ACKERMAN, *supra* note 3.

[118] 301 U.S. 1 (1937). While *Jones & Laughlin* is rightly regarded as the crucial break from prior Commerce Clause precedent, Solicitor General Seth Waxman recently explained that the seeds for the decision were sown earlier that year. *See* Seth Waxman, *The Physics of Persuasion: Arguing the New Deal*, 88 GEO. L.J. 2399 (2000). *See also, e.g.*, Kentucky Whip & Collar Co. v. Illinois Cent. R. Co., 299 U.S. 334 (1937) (upholding Ashurst Sumners Act making it unlawful to transport in interstate commerce goods made by convict labor); Virginian R. Co. v. System Federation No. 40, 300 U.S. 515 (1937) (upholding collective bargaining provisions of the Railway Labor Act as applied to "back shop" employees).

duction" was beyond the scope of the commerce power.[119] The government countered that the corporation's steel products were part of a "stream of commerce," with the manufacturing plant as a single focal point within that stream.[120] In upholding the NLRA, the Court went far beyond the government's "stream of commerce" argument, and the core of Chief Justice Hughes's opinion for the Court formed the basis for much of the regulation of the modern industrial welfare state. "The congressional authority to protect interstate commerce from burdens and obstructions," Hughes wrote,

> is not limited to transactions which can be deemed to be an essential part of a flow of interstate or foreign commerce. Burdens and obstructions may be due to injurious action springing from other sources. The fundamental principle is that the power to regulate commerce is the power to enact "all appropriate legislation" for "its protection and advancement;" to adopt measures "to promote its growth and insure its safety;" "to foster, protect, control and restrain." That power is plenary and may be exerted to protect interstate commerce "no matter what the source of the dangers which threaten it." *Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control.*[121]

With that rhetorical flourish, the "substantial effects" test was born. Yet like Marshall before him, Hughes did provide a refuge of sorts for those who would restrict the federal commerce power by immediately following this expansive passage with a few lines of limitation. "Undoubtedly the scope of this power," he explained,

> 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.[122]

This rather nebulous limitation would prove useful to a future activist majority.[123]

After the Court handed down cases like *Jones & Laughlin* in 1937, the New Deal recovery program received a green light. Subsequent applications of the "substantial effects" principle to other forms of recovery legislation proved just how much the Court was willing to defer to Congress. In its 1941 decision in *United States v. Darby*,[124] the Court upheld the FLSA, affirming and solidifying the theory behind *Jones & Laughlin*. The minimum wage and maximum hours provi-

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[119] *See Jones & Laughlin*, 301 U.S. at 34.
[120] *See id.* at 35 (citing Stafford v. Wallace, 258 U.S. 495 (1922)).
[121] *Id.* at 36-37 (citations omitted) (emphasis added).
[122] *Id.* at 37.
[123] *See infra* Part II.B; United States v. Morrison, 120 S. Ct. 1740 (2000).
[124] 312 U.S. 100 (1941) (upholding restrictions on the production of goods under FLSA).

sions of the FLSA applied to all employees "engaged in commerce or in the production of goods for commerce." The FLSA embodied the same principle that had doomed the Child Labor Act in *Hammer*—Congress's attempt to close the channels of interstate commerce for purposes of social welfare. This time, however, the Court sustained the legislation unanimously and explicitly overruled *Hammer*.[125]

The importance of *Darby* to later interpretations of the Commerce Clause cannot be overstated; Justice Stone's opinion confirmed four major propositions regarding the scope of the commerce power that still resonate today. First, Stone reaffirmed the plenary conception of the commerce power and stated that its ambit "can neither be enlarged nor diminished by the exercise or non-exercise of state power."[126] Next, he declared that the motive and purpose of federal commerce legislation "are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control."[127] Third, Stone turned to the application of FLSA provisions to the workers themselves and severely limited *Carter Coal* by permitting regulation of wholly *intra*state activity in order to affect an entire *inter*state industry.[128] Fourth, Stone held that the Tenth Amendment posed no obstacle and rejected the notion that it rendered certain subjects beyond federal reach:

> The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers.[129]

Uncertainty surrounding the precise coverage of the FLSA would, as noted above, provoke controversy in *National League of Cities* and *Garcia* decades later. In the 1940's, however, *Darby*'s broad strokes provided ample support for much federal legislation. The following year, in *Wickard v. Filburn*,[130] the Court demonstrated the full extent of its deferential convictions. This time the vehicle was the Agricultural Adjustment Act of 1942 and the application of its quota schedule, under which the government imposed a 49-cent penalty for every bushel yielded by unauthorized planting. Filburn challenged the assessment, arguing that the provisions could not extend to his personal wheat production and consumption.

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[125] *Id.* at 116-17.
[126] *Id.* at 114.
[127] *Id.*
[128] *Id.* at 122-23.
[129] *Id.* at 124.
[130] 317 U.S. 111 (1942) (upholding Congressional quotas on farming products as within the scope of its commerce power).

Justice Jackson wrote for a unanimous (and almost entirely Roosevelt-appointed) Court in upholding the assessment. The *Wickard* Court concluded both that "questions of the power of Congress are not to be decided by reference to any formula which would give controlling force to nomenclature . . . and foreclose consideration of the actual effects of the activity in question upon interstate commerce"[131] and that the Court's "recognition of the relevance of the economic effects in the application of the Commerce Clause . . . has made the mechanical application of legal formulas no longer feasible."[132] It went on to demonstrate the breadth of Congress's commerce power by explaining that it "is not confined in its exercise to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce . . . as to make regulation of them appropriate means to the attainment of a legitimate end."[133] Finally, the *Wickard* Court removed all doubts as to its broad interpretation of the commerce power and its disinterest in the nature of the regulated activity when it explained that such activity "may still, *whatever its nature*, be reached by Congress if it exerts a substantial economic effect on interstate commerce."[134]

Jones & Laughlin, *Darby*, and *Wickard* formed the foundation upon which Commerce Clause decisions would rest for the next six decades. When the public accommodations provisions of the Civil Rights Act of 1964 were challenged in *Heart of Atlanta Motel, Inc. v. United States*[135] and *Katzenbach v. McClung*,[136] the Court relied upon the "substantial effects" and "rational basis" tests of earlier cases to uphold the legislation.[137] From *Jones & Laughlin* until *United States v. Lopez*,[138] Congress could regulate under its commerce power in two distinct ways. First, it could set regulations or conditions concerning interstate travel as long as it did not violate a specific constitutional guarantee. Second, it could regulate *any* activity that had a "close and substantial relationship" to, or effect upon, interstate commerce.

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[131] *Id.* at 120.

[132] *Id.* at 123-24.

[133] *Id.* at 124.

[134] *Id.* at 125 (emphasis added).

[135] 379 U.S. 241 (1964) (upholding Title II on the ground that Congress's power to regulate interstate commerce extended to prohibiting racial discrimination by motels toward travelers).

[136] 379 U.S. 294 (1964) (upholding Title II based on Congress's rational basis for finding that restaurants' refusal to serve blacks obstructed interstate commerce).

[137] Because much of our argument focuses upon the potential impact of current Commerce Clause interpretation on federal civil rights legislation, we provide a more detailed discussion of *Heart of Atlanta* and *McClung* in Parts II and III below.

[138] 514 U.S. 549 (1995) (holding that the Gun Free School Zone Act was beyond Congress's commerce power because the subject of the Act did not arise out of or have a connection to commercial transactions that substantially affected interstate commerce).

II. *UNITED STATES V. LOPEZ* AND *UNITED STATES V. MORRISON*

This deferential approach to Commerce Clause legislation came to an abrupt halt in 1995, when the Court in *United States v. Lopez*[139] altered its philosophy and struck down the Gun Free School Zones Act[140] ("GFSZA"), making it the first statute in nearly sixty years to be overturned for being outside the bounds of congressional commerce power. Despite a clearly established trend of evaluating statutes in terms of whether Congress acted rationally in finding that the regulated activity substantially affects interstate commerce,[141] the *Lopez* Court instead focused on whether the regulated activity was economic in nature or belonged to an area of the law that was traditionally reserved to the states.[142] This shift toward old doctrinal trends was

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[139] *Id.*

[140] 18 U.S.C. § 922(q)(1)(A) (1990).

[141] *See infra* Part II.A.1.

[142] *See* United States v. Lopez, 514 U.S. 549, 560, 561 n.3 (1995). Two other criteria were also cited as relevant to the Court's determination in *Lopez*: (1) the absence of express congressional findings regarding the relationship between gun possession in schools and interstate commerce, and (2) the lack of an express jurisdictional element in the statute, i.e. a clause limiting the GFSZA's regulated activity to the possession of guns that had already traveled in interstate commerce. *See id.* at 561-63.

Although *Lopez* seemed to imply that congressional findings accompanying future legislation would alter the Court's Commerce Clause analysis, *see id.* at 563 ("[T]o the extent that congressional findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce . . . they are lacking here."), that analytical tool was virtually destroyed in *Morrison*. The *Morrison* Court invalidated the VAWA despite the presence of substantial congressional findings. *See* United States v. Morrison, 120 S. Ct. 1740, 1752 (2000) "("[Section] 13981 is supported by numerous findings regarding the serious impact that gender-motivated violence has on victims and their families."); *id.* at 1763 ("Indeed, the legislative record here is far more voluminous than the record compiled by Congress and found sufficient in two prior cases upholding Title II of the Civil Rights Act of 1964 against Commerce Clause challenges.") (Souter, J., dissenting). The Court instead concentrated on the non-economic nature of the regulated activity. *See Morrison*, 120 S. Ct. at 1752 ("[T]he existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation."). As a result, congressional findings seem to no longer represent a viable means of justifying federal legislation under the commerce power, at least when regulating "non-economic" activity. This signifies the end of any sort of "rational basis" standard for congressional commerce authority. Nevertheless, as the *Morrison* Court circumscribed (if not eviscerated) the presence of findings as a criterion for upholding Commerce Clause legislation, a discussion of that criterion is beyond the scope of our present analysis. *But see id.* at 1778 (Breyer, J., dissenting) ("[T]he legislative process leading up to enactment of [the VAWA] . . . far surpasses that which led to the enactment of the statute we considered in *Lopez* . . . [a]nd that distinction provides a possible basis for upholding the law here.").

The role of a jurisdictional element in federal Commerce Clause legislation is likewise not discussed here because its part in establishing a statute's constitutionality is somewhat unclear and is relevant to too narrow a class of statutes. It appears from both *Lopez* and *Morrison* that the presence of a jurisdictional element is a strong indication to the Court that a statute is within Congress's commerce power. *See Lopez*, 514 U.S. at 561-62 (referring to a jurisdictional element as something that would ensure that possession of a firearm "affects interstate commerce"); *Morrison*, 120 S. Ct. at 1752 n.5 (mentioning that the VAWA's criminal provision, 18 U.S.C. § 2261(a)(1), contains a jurisdictional element that has been uniformly upheld). This conclusion is somewhat muddled, however, by the facts of the two cases. Although the GFSZA did not contain an express jurisdictional element, the vast majority of guns in circulation have

magnified by the Court's subsequent decision in *United States v. Morrison*,[143] which further limited the scope of congressional power by relying heavily on the non-economic nature of the regulated activity to overturn the civil rights provision of the Violence Against Women Act ("VAWA").[144] This reliance may forecast doom for a wide array of future federal legislation, as it represents both the Supreme Court's recent development of stricter standards of review for Commerce Clause statutes and the Court's desire to promote state autonomy generally, even at the expense of nationally beneficial federal legislation.

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traveled in interstate commerce. *See* Bradley A. Harsch, Brzonkala, Lopez, *and the Commerce Clause Canard: A Synthesis of Commerce Clause Jurisprudence*, 29 N.M. L. REV. 321, 327 (1999) ("In any event, most guns move in interstate commerce so the effect of the [GFSZA] would be much the same despite a jurisdictional nexus."). Similarly, nearly all victims of gender-motivated violence are, at some point, interstate travelers. *See* H.R. CONF. REP. NO. 103-711, at 385 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1839, 1853 (finding that gender-motivated violence "deter[s] potential victims from travelling interstate"); S. REP. NO. 103-138, at 54 (1993) (concluding that gender-based crimes restrict movement). These facts ostensibly eliminate the need for an express jurisdictional element; the requirement that guns or victims of gender-motivated crime travel interstate is satisfied by virtue of the realities of the firearms market and modern transportation. The *Lopez* and *Morrison* Courts nevertheless considered the lack of express language in overturning the respective statutes, ignoring the fact that an express jurisdictional element was practically unnecessary and clouding the role such a provision should play in determining a statute's constitutionality under the Commerce Clause. *See Lopez*, 514 U.S. at 561-62 (focusing on the fact that no express jurisdictional element is present); *Morrison*, 120 S. Ct. at 1751-52 ("Like the Gun-Free School Zones Act at issue in *Lopez*, § 13981 contains no jurisdictional element establishing that the federal cause of action is in pursuance of Congress's power to regulate interstate commerce.").

Statutes containing express jurisdictional elements are also by definition limited in their scope—by their own terms they regulate purely interstate activities. The Supreme Court in *United States v. Darby*, 312 U.S. 100 (1941), however, made it clear that Congress's commerce power was not limited to purely interstate activities: "The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate . . . ." *Id.* at 118. Since the Court has not suggested that *Darby* be overruled, it has apparently recognized that requiring a jurisdictional element in all commerce statutes would improperly eliminate Congress's power over intrastate activities. *But see Morrison*, 120 S. Ct. at 1759 (Thomas, J., concurring) (advocating the elimination of the substantial effects test). The presence of a jurisdictional element has instead been considered sufficient, but not necessary, to establish constitutionality under the Commerce Clause. *See Morrison*, 120 S. Ct. at 1751-52 (explaining that a jurisdictional element would "lend support" to the constitutionality of the VAWA, but refraining from making such a provision a prerequisite); *Lopez*, 514 U.S. at 561 (finding that a jurisdictional element "would ensure" the GFSZA's constitutionality, but failing to condition such a finding on the presence of a jurisdictional requirement). Since our inquiry focuses on the future of civil rights statutes generally, a detailed discussion of jurisdictional elements does not encompass a sufficiently broad range of potential federal legislation so as to be crucial to our analysis.

[143] 120 S. Ct. 1740 (2000).

[144] *See* 42 U.S.C. § 13981 (1994); *Morrison*, 120 S. Ct. at 1751 ("[T]he proper resolution of the present cases is clear. Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity.").

A. Lopez *and the Attempt to Limit Congressional Commerce Power: Old and New Doctrinal Trends*

1. *"Economic Activity"*

The commerce doctrine prior to *Lopez* was based strictly on the notion that a statute was valid under the Commerce Clause if Congress had a rational basis to determine that the regulated activity substantially affects interstate commerce.[145] Despite claiming to adhere to this deferential standard of review,[146] the *Lopez* Court effectively disregarded it in favor of focusing on the commercial nature of the GFSZA's regulated activity. The Court concluded that, since all of the controlling cases involved regulation of activity that it considered economic in nature, the rational basis test must implicitly subject only economic activity to congressional authority.[147] As a result, it reformulated its standard to require that Congress regulate "*economic activity* [that] substantially affects interstate commerce."[148] It then relied on this reformulation to strike the GFSZA on the grounds that the statute did not govern such activity.[149] The *Lopez* Court's reasoning, however, was unsupported by controlling precedent; none of the cases it cited as examples of Congress governing economic activity actually relied on the nature of the regulated activity in making their decision.[150] The Court simply resurrected an old practice of employ-

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[145] *See, e.g.*, Katzenbach v. McClung, 379 U.S. 294, 302 (1964) (requiring that Congress regulate an activity having a "substantial economic effect on interstate commerce"); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 250 (1964) (recognizing that Congress may regulate activities "having a direct and substantial relation to [interstate] commerce"); Wickard v. Filburn, 317 U.S. 111, 125 (1942) (holding that an activity may be regulated by Congress if it "exerts a substantial economic effect on interstate commerce"); United States v. Darby, 312 U.S. 100, 118 (1941) (finding that an activity may be regulated under the commerce power if it "affect[s] interstate commerce"); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937) (holding that intrastate activities with a close and substantial relation to interstate commerce are within Congress's commerce power).

[146] United States v. Lopez, 514 U.S. 549, 557 (1995) (acknowledging that since 1942 the Court has "undertaken to decide whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce").

[147] The *Lopez* majority cited, among others, *Wickard v. Filburn*, *Heart of Atlanta Motel, Inc. v. United States*, and *Katzenbach v. McClung* as examples of cases challenging statutes that passed Commerce Clause scrutiny due to their focus on economic activity. *See Lopez*, 514 U.S. at 559-60.

[148] *Id.* at 560 (emphasis added).

[149] *See id.* at 561 ("Section 922(g) . . . by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms."); *id.* at 567 ("The possession of a gun in a local school zone is in no sense an economic activity. . . .").

[150] *See, e.g.*, Katzenbach v. McClung, 379 U.S. 294, 302 (1964) (requiring that Congress regulate an activity having a "substantial economic effect on interstate commerce"); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 250 (1964) (recognizing that Congress may regulate activities "having a direct and substantial relation to [interstate] commerce"); Wickard v. Filburn, 317 U.S. 111, 125 (1942) (holding that an activity may be regulated by Congress if it "exerts a substantial economic effect on interstate commerce").

ing inevitably vague and artificial distinctions[151] to restrict Congress's commerce power and, in turn, promote principles of state autonomy and federal non-intervention.

For example, the *Lopez* majority cited the Agricultural Adjustment Act in *Wickard v. Filburn*[152] as legislation that survived the rational basis test by virtue of its regulating economic activity.[153] It claimed that the Act in *Wickard* was appropriately upheld and that the GFSZA should correspondingly be struck, because the growing of wheat is an "economic activity in a way that the possession of a gun in a school zone is not."[154] While this distinction between growing wheat and possessing guns may be accurate, the *Lopez* Court's decision nevertheless misrepresented the analysis actually employed by the Court in *Wickard.* As we have already discussed, the *Wickard* Court explicitly eschewed reliance upon "any formula which would give controlling force to nomenclature" in its deferential application of the substantial effects test, and it explained that an activity "may still, *whatever its nature,* be reached by Congress if it exerts a substantial economic effect on interstate commerce."[155] Notwithstanding the *Lopez* Court's contrary view, whether the production of wheat for personal use is an "economic" activity was simply immaterial to the *Wickard* Court's decision to uphold the Act.[156]

Two later cases further reveal the lack of precedential support for the "nature-of-the-regulated-activity" categorization employed in *Lopez.* In *Heart of Atlanta Motel, Inc. v. United States*[157] and *Katzenbach v. McClung,*[158] the Court upheld Title II of the Civil Rights Act of 1964 as it applied, respectively, to places of lodging and to restaurants. The *Lopez* majority insisted that in both cases the Court upheld Title II based on the economic nature of the regulated industries.[159] In fact, the *Heart of Atlanta* Court found that Title II regulated racial discrimination generally, not simply the hospitality industry, and spoke repeatedly about motives and rationales for upholding the statute that did not depend on the "economic" nature of such discrimination.[160] The Court relied on the fact that "Title II is carefully limited

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[151] For an explanation of the history and types of distinctions mentioned, see *supra* Part I.B.

[152] 317 U.S. 111 (1942).

[153] *See Lopez,* 514 U.S. at 560 (claiming that "[e]ven *Wickard* . . . involved economic activity").

[154] *Lopez,* 514 U.S. at 560.

[155] *Wickard,* 317 U.S. at 120, 125 (emphasis added).

[156] *See* United States v. Morrison, 120 S. Ct. 1740, 1768 (2000) (Souter, J., dissenting) ("*Wickard* applied the substantial effects test to domestic agricultural production for domestic agricultural consumption, an activity that cannot fairly be described as commercial . . . .").

[157] 379 U.S. 241 (1964).

[158] 379 U.S. 294 (1964).

[159] *See Lopez,* 514 U.S. at 559 (referring to the regulated activity in Title II as "inns and hotels catering to interstate guests" and "restaurants utilizing substantial interstate supplies").

[160] *See Heart of Atlanta,* 379 U.S. at 250 ("[T]he fundamental object of Title II was to vindicate 'the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.'").

to enterprises having a direct and substantial relation to the interstate flow of goods and people."[161] It considered the "burdens that discrimination by race or color places upon interstate commerce"[162] and the "disruptive effect[s] [of] *racial discrimination*."[163] The Court's ultimate decision to uphold Title II rested on a determination of "whether Congress had a *rational basis* for finding that *racial discrimination* . . . affected commerce."[164] None of these reasons for sustaining Title II are contingent upon the statute's regulated activity being "economic" in nature.

Similarly, the Court in *McClung* upheld Title II because Congress acted rationally in determining that racial discrimination substantially affects interstate commerce.[165] Instead of analyzing the economic nature of the statute's regulated activity, the *McClung* Court referred to the "burdens placed on interstate commerce by racial discrimination in restaurants."[166] The Court recited four main consequences of racial discrimination that it found to substantially affect interstate commerce: (1) that "established restaurants in such areas [where discrimination occurred] sold less interstate goods because of the discrimination, [2] that interstate travel was obstructed directly by it, [3] that business in general suffered and [4] that many new businesses refrained from establishing [in these areas] as a result of [racial discrimination]."[167] Like those in *Heart of Atlanta*, none of the reasons offered by the Court in *McClung* mentioned in any way the economic nature of racial discrimination; they instead focused on the *commercial results* of such discrimination and concluded that those results constituted a sufficient basis for upholding Title II.[168]

The *Lopez* majority misapplied controlling Commerce Clause precedent in order to narrow the category of activity reachable by federal commerce legislation. Neither *Wickard*, nor *Heart of Atlanta*, nor *McClung* considered the nature of the regulated activity (eco-

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[161] *Id.* at 250.

[162] *Id.* at 252.

[163] *Id.* at 257 (emphasis added). The *Heart of Atlanta* Court considered both the "qualitative as well as quantitative effect [of racial discrimination] on interstate travel by Negroes." *Id.* at 253. It found the former to be the "obvious impairment of the Negro traveler's pleasure and convenience," and the latter the "effect of discouraging travel." *Id.*

[164] *Id.* at 258 (emphasis added).

[165] *See McClung*, 379 U.S. at 304 (relying on the fact that Congress "had a rational basis for finding that racial discrimination in restaurants had a direct and adverse effect on the free flow of interstate commerce").

[166] *Id.* at 299. Among these burdens, the Court found that racial discrimination was an "artificial restriction on the market," *id.* at 299, and had a "direct and highly restrictive effect upon interstate travel by Negroes," *id.* at 300.

[167] *Id.*

[168] *See Lopez*, 514 U.S. at 628 (Breyer, J., dissenting) ("Although the majority today attempts to categorize . . . *McClung* and *Wickard* as involving intrastate 'economic activity,' the Courts that decided each of those cases did not focus upon the economic nature of the activity regulated. Rather, they focused upon whether that activity affected interstate or foreign commerce.").

nomic or otherwise) relevant to its Commerce Clause analysis.[169] The majority's argument in *Lopez* that an activity must be "economic" in nature to satisfy the rational basis test is therefore merely an attempt to justify the curtailment of congressional power in spite of existing precedent.[170]

2. *Traditional Area of State Concern*

The *Lopez* majority did not, however, strike down the GFSZA exclusively because of the non-economic nature of its regulated activity. The Court criticized the statute for regulating non-economic activity[171] *and* for interfering with existing criminal laws, an area it considered traditionally reserved for state control.[172] *Lopez* justified the invalidation of the GFSZA in part because it "foreclose[d] the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise."[173] Because it legislated conduct "already denounced as criminal by the States," the Court was concerned that upholding the GFSZA would "effect[] a 'change in the sensitive relation between federal and state criminal

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[169] *See* Julie Goldscheid, United States v. Morrison *and the Civil Rights Remedy of the Violence Against Women Act: A Civil Rights Law Struck Down in the Name of Federalism*, 86 CORNELL L. REV. 109, 134 (2000) ("[T]he *Heart of Atlanta* and *McClung* decisions reveal that the Court was concerned with the impact of private discrimination on the economy, not on whether the conduct itself was economic or non-economic.").

[170] *See Lopez*, 514 U.S. at 608 (Souter, J., dissenting) (highlighting the "inconsistency of this [economic/non-economic activity] categorization with our rational basis precedents from the last 50 years"). Justice Souter went on in his dissent to criticize the majority decision for relying on prior discarded logic in creating

> a backward glance at both the old pitfalls, treat[ing] deference under the rationality rule as subject to gradation according to the commercial or noncommercial nature of the immediate subject of the challenged regulation. The distinction between what is patently commercial and what is not looks much like the old distinction between what directly affects commerce and what touches it only indirectly.

Id.

[171] *See id.* at 561 (striking down GFSZA, in part, because the possession of guns in school zones has "nothing to do with 'commerce' or any sort of economic enterprise").

[172] *See id.* at 561 n.3 (citing Brecht v. Abramson, 507 U.S. 619, 635 (1993) ("States possess primary authority for defining and enforcing the criminal law.")). *But see* Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264 (1981) (upholding a federal law regulating strip mining against a state law autonomy challenge); Maryland v. Wirtz, 392 U.S. 183, 195 (1968) ("There is no general doctrine implied in the Federal Constitution that the two governments, national and state, are each to exercise its powers so as not to interfere with the free and full exercise of the powers of the other."); United States v. Darby, 312 U.S. 100 (1941) (upholding federal wage and hour law for workers involved in manufacture of goods).

[173] *Id.* at 583 (Kennedy, J., concurring). Interestingly, in *Wickard* the Court engaged in a comparative analysis to determine whether the Agricultural Adjustment Act dealt with a subject properly within the federal government's ken. The Court noted that Great Britain, Argentina, Australia, and the United States (all nations with federated systems of government), had implemented national price schedules. In all of them, the regulation came from the national government. *See Wickard*, 317 U.S. at 125-26 & n.27. While this kind of reasoning suggests one method of deciding whether a regulatory scheme is properly nationalized, the *Wickard* Court did not suggest that the absence of any comparative analog would have doomed the legislation.

jurisdiction.'"[174] The Court was similarly persuaded that the GFSZA must be invalidated because it would "convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States," thereby eliminating any distinction between "what is truly national and what is truly local."[175] Despite being employed to strike down the GFSZA, this two-pronged attack on congressional legislative power ironically left open the possibility that a statute regulating purely non-economic activity could pass Commerce Clause scrutiny. The GFSZA presented a relatively easy case; it was a regulation of non-economic activity that clearly duplicated existing state criminal laws.[176] If, however, Congress was careful to regulate only non-economic activities that were not within traditional areas of state control, that statute would be clearly distinguishable from the GFSZA and, potentially, an acceptable exercise of congressional power under *Lopez*.[177]

Lopez represented a change in the active principles behind the Supreme Court's Commerce Clause doctrine. Whereas the Court once favored deferring to congressional rationality, after *Lopez* it appeared to prefer some combination of categorizing "economic" and "non-economic" activity and protecting states from federal intrusion into areas of law traditionally within their control. It nevertheless remained to be seen after *Lopez* whether the Court's reference to traditional areas of state law was intended as an alternative Commerce Clause analysis or merely an additional ground to strike an individual statute. Although *Lopez* ostensibly left Congress a loophole through which it could continue to pass federal legislation of non-economic activity, the *Lopez* Court ultimately left its successor to determine whether congressional power would be limited solely by the nature of the regulated activity, or whether, by avoiding traditional areas of state control, Congress could still legislate under the deferential Commerce Clause doctrine of the previous sixty years.

The Court answered this question, at least temporarily, in *United States v. Morrison*,[178] where it further limited congressional commerce power by effectively relying solely on the nature of the regulated activity in striking down the civil rights remedy provision of the VAWA.[179] The *Morrison* Court demonstrated a skepticism about Congress's power to enact national "non-economic" legislation—in par-

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[174] *Lopez*, 514 U.S. at 561 n.3.

[175] *Id.* at 567-68.

[176] *See id.* at 561 n.3 (claiming that the GFSZA "inappropriately overr[ode] legitimate State firearms laws with a new and unnecessary Federal law").

[177] Justice Souter entertained this idea in his dissent in *Lopez*, recognizing that the majority "gestures toward . . . other considerations that it might sometime entertain in applying rational basis scrutiny,'" including: "'does the congressional statute deal with subjects of traditional state regulation . . . ?'" *Id.* at 608-09.

[178] 120 S. Ct. 1740 (2000).

[179] *See id.* at 1751, 1754.

ticular civil rights statutes like the VAWA—that bodes poorly for federal civil rights laws generally.

B. Morrison: *Closing the* Lopez *Loophole*

In *Morrison* the Court advocated local rather than federal regulatory power on the grounds that the VAWA, in allowing victims of gender-motivated violence a federal civil remedy against their attackers,[180] failed to regulate economic activity.[181]

The *Morrison* decision represented a potentially significant trend toward excluding Congress from important national issues. Although *Lopez* departed from the traditional substantial effects test, it still seemed to leave Congress sufficient latitude to enact civil rights statutes such as the VAWA, provided measures were taken to insulate state control over areas such as criminal and family law from federal interference.[182] The *Morrison* Court, however, disregarded the fact that the VAWA did not interfere with traditional state authority and invalidated the Act despite its complimentary relationship to admittedly inadequate state laws.[183] After *Morrison*, it appears that Congress only possesses legislative authority over economic activities that substantially affect interstate commerce, leaving it with its smallest measure of commerce authority in the last sixty years.

1. *Nature of Regulated Activity*

The *Morrison* Court began its analysis of the VAWA by relying on the nature-of-the-regulated-activity category developed in *Lopez*. The Court referred to prior Supreme Court decisions that it claimed "upheld a wide variety of congressional Acts regulating intrastate *economic* activity where [the Court] concluded that the activity substantially affected interstate commerce,"[184] and "sustained federal regulation of intrastate activity . . . [where] the activity in question ha[d] been some sort of *economic endeavor*."[185] The Court then criticized and ultimately invalidated the VAWA on the grounds that "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity . . . [and] thus far in our Nation's history our cases

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[180] *See* 42 U.S.C. § 13981(b)(1994) ("All persons within the United States shall have the right to be free from crimes of violence motivated by gender.")

[181] *See Morrison*, 120 S. Ct. at 1751 (relying on the nature of the regulated activity as the clearest grounds for overturning the VAWA); Goldscheid, *supra* note 169, at 123.

[182] *See supra* Part II.A.2.

[183] *See* Senator Joseph R. Biden, Jr., *The Civil Rights Remedy of the Violence Against Women Act: A Defense*, 37 HARV. J. ON LEGIS. 1, 25 (2000) (describing the VAWA as "narrowly drafted with the goals of minimizing any such intrusion [into state prerogatives] and maximizing cooperation between the federal and state governments").

[184] *Morrison*, 120 S. Ct. at 1750 (citation omitted) (emphasis added).

[185] *Id.* (emphasis added).

have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature."[186]

In arriving at this conclusion, the Court rejected two lines of reasoning that were instrumental in controlling Commerce Clause cases. It first dismissed the idea that "Congress may regulate noneconomic . . . conduct based solely on that conduct's aggregate effect on interstate commerce."[187] This "aggregate effect" doctrine was developed in *Wickard v. Filburn*,[188] a case that is considered the Court's broadest interpretation of the substantial effect test[189] and one that *Morrison* claimed to follow.[190] Instead of remaining loyal to the *Wickard* Court's finding that, "even if [regulated] activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce,"[191] the *Morrison* majority effectively abandoned the substantial effects test and limited the commerce power to activities that it deemed economic in nature.

The *Morrison* Court also rejected Congress's formal findings that gender-motivated violence is a valid subject for federal Commerce Clause regulation because it substantially affects interstate commerce by deterring victims from "travelling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved with interstate commerce."[192] In doing so, the *Morrison* majority seemingly overlooked the fact that Congress's conclusion was nearly identical to that relied on by the Court in *McClung* to uphold Title II.[193] Instead, it again found that the economic nature of the regulated activity, rather than that activity's effect on interstate commerce, was the determining factor in deciding a statute's constitutionality under the Commerce Clause. In short, *Morrison* breathed new life into the *Lopez* Court's nature-of-the-regulated-activity catego-

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[186] *Id.* at 1751.

[187] *Id.* at 1754.

[188] 317 U.S. 111 (1942).

[189] *See* United States v. Lopez, 514 U.S. 549, 560 (1995) (describing *Wickard* as "perhaps the most far reaching example of Commerce Clause authority over intrastate activity"); Jil L. Martin, Note, United States v. Morrison: *Federalism Against the Will of the States*, 32 LOY. U. CHI. L.J. 243, 267-68 (2000) (referring to *Wickard* as "possibly the most extreme example" of the substantial effect doctrine).

[190] *See Morrison*, 120 S. Ct. at 1750 & n.4 (citing *Wickard*); *id.* at 1759 (Souter, J., dissenting) (criticizing the majority's reliance on *Wickard*).

[191] *Wickard*, 317 U.S. at 125.

[192] *Morrison*, 120 S. Ct. at 1752 (quoting H.R. CONF. REP. NO. 103-711, at 385 (1994)).

[193] Katzenbach v. McClung, 379 U.S. 294, 300 (1964) (finding that Title II substantially affected interstate commerce on the grounds that "established restaurants . . . sold less interstate goods because of [racial] discrimination, that interstate travel was obstructed directly by it, that business in general suffered and that many new businesses refrained from establishing there as a result"); *see also Morrison*, 120 S. Ct. at 1763 (Souter, J., dissenting) ("[G]ender-based violence in the 1990's was shown to operate in a manner similar to racial discrimination in the 1960's in reducing the mobility of employees and their production and consumption of goods shipped in interstate commerce."). *Compare Morrison*, 120 S. Ct. at 1752, *with McClung*, 379 U.S. at 300.

rization by overtly disregarding the substantial effect test[191] in favor of striking down the VAWA due to the non-economic nature of gender-motivated violence.[195] More broadly, the Court attempted to abandon the existing doctrinal trend toward judicial deference to legislative decisions in favor of imposing substantive categories designed to restrain congressional commerce power.[196]

2. *Traditional Area of State Concern*

The *Morrison* decision further restricted Congress's commerce authority by casually ignoring the *Lopez* Court's discussion of whether a statute interferes in an area of traditional state concern. As mentioned above, perhaps the saving grace of the *Lopez* opinion was that a statute could seemingly still pass constitutional muster, despite regulating purely non-economic activity,[197] if it avoided infringing on the states' power to legislate in certain areas. Although it claimed to apply the same reasoning as *Lopez*, the *Morrison* majority expanded its definition of "areas of traditional state concern" to include gender-motivated violence. Such an expansion effectively precludes federal Commerce Clause legislation with respect to any non-economic activity and justifies doing so by misconstruing the subject of statutes like the VAWA and essentially disregarding the role of national civil rights legislation in our federal system.

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[194] As mentioned in the discussion, *supra* Part II.A.1, the *Morrison* Court, like the *Lopez* majority before it, justified invalidating the VAWA by relying on an essentially irrelevant historical fact. Regardless of how tirelessly the *Lopez* and *Morrison* majorities attempted to give historical context to the nature-of-the-regulated-activity categorization, the fact remains that their predecessors did not share in their quest. *See, e.g., McClung*, 379 U.S. at 302 (requiring that Congress regulate an activity having a "substantial economic effect on interstate commerce"); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 250 (1964) (recognizing that Congress may regulate activities "having a direct and substantial relation to [interstate commerce]"); Wickard v. Filburn, 317 U.S. 111, 125 (1942) (holding that an activity may be regulated by Congress if it "exerts a substantial economic effect on interstate commerce"). The economic nature of the regulated activity in both the Agricultural Adjustment Act in *Wickard* and Title II of the Civil Rights Act of 1964 in *Heart of Atlanta Motel* was immaterial to the Court's decision to uphold those statutes. The *Wickard*, *Heart of Atlanta*, and *McClung* Courts simply applied the substantial effects test; they neither thought the regulated activity was economic in nature nor cared if it was so long as the subject of the legislation substantially affected interstate commerce.

[195] *See* United States v. Morrison, 120 S. Ct. 1740, 1750 n.4 (2000) ("[I]n every case where we have sustained federal regulation under *Wickard*[] . . . the regulated activity was of an apparent commercial character."). *But see id.* at 1764-65 (Souter, J., dissenting) ("[T]he Court's nominal adherence to the substantial effects test is merely that . . . . This new characterization of substantial effects has no support in our cases (the self-fulfilling prophecies of *Lopez* aside), least of all those the majority cites.").

[196] For a discussion of the history of such distinctions in the Court's Commerce Clause jurisprudence, see *supra* Part I.B.

[197] We recognize the difficulties in classifying particular activities as inherently economic or non-economic. Because we take the position that the distinction is inappropriate, however, further treatment of the vagueness of these definitions is beyond the scope of this discussion.

a. *Misconstruing the VAWA's Subject*

The Court in *Morrison* mistakenly equated the gender-motivated violence governed by the VAWA with other types of violence that are traditionally the subject of state criminal law.[198] It referred to the criminal nature of gender-related violence[199] and pointed out that such violence often occurs domestically, thereby implicating state family laws as well.[200] It recycled quotations from *Lopez* discussing the disappearance of "any limitation on federal power, even in areas such as criminal law enforcement . . . where States historically have been sovereign"[201] and the potential obliteration of "the Constitution's distinction between national and local authority."[202] Finally, it worried aloud that upholding the VAWA would represent a license to Congress to regulate any violent crime, including murder, because "gender-motivated violence, as a subset of all other violent offenses, is certain to have lesser economic impacts than the larger class of which it is a part."[203]

Contrary to the assertions made by the *Morrison* majority, however, the VAWA in no way interfered with state criminal or family law.[204] First, the VAWA was not a criminal statute—it provided only a private civil remedy for victims of gender-related violence.[205] More importantly, the provision of such a remedy required a showing that the victim was attacked as *the result of gender-motivated animus.*[206] This standard is a very difficult one to meet[207] and involves inquiring into the

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[198] *See Morrison*, 120 S. Ct. at 1752-53 (equating gender-motivated violence to other violent crimes, such as murder, which are traditionally addressed by state law).

[199] *Id.* at 1753 (referring to gender-motivated violence as merely a "subset of all violent crime").

[200] *Id.* at 1752-54.

[201] *Id.* at 1751 (quoting United States v. Lopez, 514 U.S. 549, 564 (1995)).

[202] *Id.* at 1752.

[203] *Id.* at 1753.

[204] *See* Goldscheid, *supra* note 169, at 130 ("The statutory requirement that plaintiffs assert proof of discriminatory conduct in each case ensures that the law covers a limited category of conduct that is different in nature from all violent crime or all family law."); Catharine A. MacKinnon, *Disputing Male Sovereignty: On* United States v. Morrison, 114 HARV. L. REV. 135, 149 (2000) (describing the VAWA as "a federal law that duplicated no state law in theory, design, or remedy").

[205] *See* 42 U.S.C. § 13981(a) (1994) (establishing a "[f]ederal civil rights cause of action for victims of crimes of violence motivated by gender"); Goldscheid, *supra* note 169, at 111-12 ("From a civil rights perspective, it is apparent that the [VAWA] covers a limited universe—discriminatory conduct . . . . Had the Court analyzed the statute as civil rights legislation, it should have upheld the VAWA civil rights remedy as within the realm of traditional federal power.").

[206] *See* 42 U.S.C. § 13981(c) (1994) (providing a civil remedy for victims of *gender-motivated* crimes (emphasis added)); *Morrison*, 120 S. Ct. at 1773 (Souter, J., dissenting) ("The [VAWA] accordingly offers a federal civil rights remedy aimed exactly at violence against women, as an alternative to the generic state tort causes of action found to be poor tools of action by the state task forces.").

[207] *See* John S. Baker, Jr., United States v. Morrison *and Other Arguments Against Federal "Hate Crime" Legislation*, 80 B.U. L. REV. 1191, 1210 (2000) ("Adding bias motivation as an element of a crime does what adding any kind of motivation element does: it makes convicting defendants

attacker's state of mind in a way foreign to most criminal statutes.[208] While criminal statutes normally focus on questions of intent, the VAWA's standard of liability required a showing of motive,[209] thereby distinguishing it from other criminal provisions.[210]

Its gender-motivated animus requirement also ensured that the VAWA could not be used as a substitute for common domestic violence crimes.[211] Domestic violence statutes do not usually require such a difficult showing of the alleged attacker's state of mind.[212] If a common domestic violence statute were drafted to mimic the VAWA, the offense would be so difficult to prove that the statute would not adequately protect potential victims[213]—many instances of domestic abuse that are deserving of state law remedies occur without evidence of gender-related animus on the part of the attacker.[214] By contrast,

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more difficult.").

[208] *See id.* at 1197-98 ("Making motivation the determinant of the criminal harm redirects the analysis of criminal law away from the traditional normative focus on the act, the intent, and the criminal consequences.").

[209] For purposes of our discussion, we mean to differentiate *intent* from *motive* in the following way. Intent reflects the actor's desired end; for example, an intent to kill reflects a desire that someone be dead. By contrast, motive, for our purposes, represents the driving force behind the actor's willingness to act in the first place. An actor's motive to attack, for example, may be hatred or profit. His intent, however, would not be to hate, but rather to inflict a certain degree of harm upon his victim. While criminal laws traditionally evaluate an alleged perpetrator's conduct and the intent of his actions, the VAWA focused on the actor's reasons for attacking, his motive, in addition to his intended outcome. This distinction is important because it demonstrates a critical difference between criminal provisions, which are typically enacted and enforced by the states, and civil rights provisions, which are sometimes passed pursuant to Congress's commerce power. *See* Baker, *supra* note 207, at 1210 ("Intention goes to the mental element to perform the criminal act... traditionally considered as general intent and/or to achieve a certain end... traditionally considered specific intent. Motive, on the other hand, involves the reasons for the criminal act. Generally speaking, motive does not and should not matter [in criminal statutes].").

[210] This standard is not, however, unusual among civil rights statutes. Requiring gender-based animus for a grant of relief is analogous to requiring that an employer act on the basis of race or religion in hiring or firing an employee under Title VII. *See* Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(k) (2000). The familiarity of this standard is evidence that the VAWA is not a particularly unusual brand of federal statute. In *Morrison*, however, it became the victim of a contracting Commerce Clause doctrine.

[211] *See* Biden, *supra* note 183, at 27 ("[B]y enacting a civil rights statute that requires invidious discriminatory motivation, Congress also avoided creating a 'general federal tort law.'" (citation omitted)).

[212] *See, e.g.*, ALA. CODE § 13A-6-20 (2000) (defining domestic violence in terms of traditional intent crimes); ALASKA STAT. § 18.66.990 (Michie 2000); ARIZ. REV. STAT. ANN. § 13-3601 (West 2000); FLA. STAT. ANN. § 741.28 (West 2000); 750 ILL. COMP. STAT. ANN. 60/103 (West 2000); KY. REV. STAT. ANN. § 403.720 (Banks-Baldwin 2000); MICH. COMP. LAWS ANN. § 400.1501 (West 2000); OHIO REV. CODE ANN. § 2919.25 (West 2000); WASH. REV. CODE ANN. § 26.50.010 (West 2000).

[213] *See* Frederick M. Lawrence, *The Case for a Federal Bias Crime Law*, 16 NAT'L BLACK L.J. 144, 159 (1999) ("Motive can be difficult to prove in a gender-related crime.").

[214] *See Morrison*, 120 S. Ct. at 1753 (referring to gender-motivated violence as a "subset of all violent crime"); Brzonkala v. Virginia Polytechnic Inst., 169 F.3d 820, 851 (4th Cir. 1999) (finding only that "some portion of this violence [against women], and the toll that it exacts, is attributable to gender animus"), *aff'd sub nom*, Brzonkala v. Morrison, 529 U.S. 598 (2000); *id.* at 853 n.17 (recognizing that "gender-motivated crime constitutes a relatively small subset of all

the VAWA addressed a different offense. It was designed to remedy violations of a victim's right to be free of discrimination due to his or her gender, an offense that requires an intricate finding of discriminatory motive.[215] It did not even attempt to regulate typical instances of domestic violence. Finally, the VAWA explicitly forfeited its jurisdiction over traditional family law issues,[216] thereby further demonstrating its noninterference with state lawmaking authority.

While the GFSZA was a criminal provision that duplicated and confused the application of clearly established state law,[217] the VAWA represented a federal solution to a clearly national problem that was admittedly beyond the capacity of state legislatures and judiciaries to solve.[218] The majority in *Lopez* struck down the GFSZA because it did not consider gun possession to be a national problem addressable solely by federal intervention.[219] The VAWA, however, was supported by Congress and the Attorneys General from thirty-eight states as a necessary federal solution to a pressing national issue.[220] Instead of upholding the VAWA on the basis that it remedied a nationwide problem beyond the capabilities of the individual states to address, the *Morrison* Court improperly applied *Lopez* and further restricted congressional commerce power by finding that the VAWA contravened the interests of federalism through its involvement in areas of

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violent crime against women").

[215] *See* 42 U.S.C. § 13981(c) (1994) (limiting the scope of the remedy to "crime[s] of violence motivated by gender and thus depriv[ing] another of the right [to be free from such violence]"); *Morrison*, 120 S. Ct. at 1761 n.2 (Souter, J., dissenting) ("[T]he civil rights remedy [of the VAWA] limits its scope to 'crimes of violence motivated by gender'—presumably a somewhat narrower subset of acts." (citation omitted)).

[216] *See* 42 U.S.C. § 13981(e)(4) (2000) (specifically excluding federal "jurisdiction over any State law claim seeking the establishment of a divorce, alimony, equitable distribution of marital property, or child custody decree"); Biden, *supra* note 183, at 11 ("[T]he civil rights remedy was carefully crafted in the very best spirit of cooperative federalism. Congress did not preempt, invalidate, or duplicate state laws; create an intrusive remedy directly against offending states; or legislate in areas traditionally reserved to states such as divorce, child custody, or alimony. Instead, Congress provided a *supplemental* remedy for victims that minimally interferes with state prerogatives."); *id.* at 26 ("[Section] 13981 responds to the states' self-described needs without preempting or interfering with state prosecutions in any way.").

[217] *See Lopez*, 514 U.S. at 561 n.3 (noting the federal government's finding that the GFSZA "displace[s] state policy choices," and "overrides legitimate State firearms laws" (citation omitted)).

[218] *See Morrison*, 120 S. Ct. at 1772-73 (Souter, J., dissenting) (observing that "Attorneys General from 38 States urged Congress to enact the Civil Rights Remedy"); Martin, *supra* note 189, at 321 ("The uniformity of enforcement that can be achieved through federal legislation is necessary to make civil rights laws effective.").

[219] *See Lopez*, 514 U.S. at 561 n.3 (criticizing the GFSZA in part because it was an "unnecessary federal law" in conflict with the States' role as "primary authority for defining and enforcing the criminal law").

[220] *See Crimes of Violence Motivated by Gender: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 103d Cong. 34-36 (1993); *see also Violence Against Women: Victims of the System: Hearing Before the S. Comm. on the Judiciary*, 102d Cong. 37-38 (1991) (recording a unanimous vote by the National Association of Attorneys General in support of the VAWA); S. REP. NO. 103-138, at 38 (1993) ("The Violence Against Women Act is intended to respond to . . . the resulting failure of our criminal justice system to address such violence.").

law traditionally reserved to the states.[221]

b. *The VAWA's Special Role as a Civil Rights Statute*

The *Morrison* Court likewise failed to recognize the VAWA's special status as a civil rights statute.[222] The Court struck down the VAWA in part for interfering with particular areas of state law that the Court considered sacred. It did not, however, consider the tremendous social importance of civil rights legislation in the federal calculus.[223] Civil rights statutes are often designed to coerce social activity away from an established but disfavored norm, such as the exclusion of racial minorities from local restaurants and hotels,[224] and have been used to mandate new rules of social interaction in spite of contrary local preferences.[225] In short, civil rights laws are readily at odds with principles of state autonomy. This does not mean, however, as the *Morrison* Court seemed to believe, that we should eliminate Congress's power to promote social equity in the name of state autonomy.[226]

On the contrary, Attorneys General from thirty-eight states, the District of Columbia, and two federal territories expressly requested federal legislative assistance in combating gender-motivated vio-

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[221] *See Morrison*, 120 S. Ct. at 1753 (criticizing the VAWA for interfering in "areas of traditional state regulation"); *id.* at 1754 (stating that "[t]he regulation and punishment of intrastate violence . . . has always been the province of the States").

[222] *See* Wisconsin v. Mitchell, 508 U.S. 476, 487-88 (1993) (finding that discriminatory conduct "is thought to inflict greater individual and societal harm" than nonbiased crimes); Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 348 (1993) (O'Connor, J., dissenting) (noting federal efforts to expand "federal protection to diverse classes nationwide"); Biden, *supra* note 183, at 10-11 ("Section 13981 continues, and is in keeping with, a venerable tradition of federal civil rights law."); Goldscheid, *supra* note 169, at 111 ("[I]n enacting the VAWA civil rights remedy, Congress created a new civil rights law."); *id.* at 129 ("The [*Morrison*] Court ignored arguments, fully supported by the legislative record, that Congress sought to regulate a matter of civil rights, an area in which the federal government has a strong historic and enduring interest."); *id.* at 131-32 ("[T]he *Morrison* Court ignored the traditional national interest in the uniform enforcement of civil rights."); MacKinnon, *supra* note 204, at 177 (explaining that the VAWA addressed the fundamental question of female social equality).

[223] *See* Goldscheid, *supra* note 169, at 112 ("Had the [*Morrison*] Court analyzed the statute as civil rights legislation, it should have upheld the VAWA civil rights remedy as within the realm of traditional federal power.").

[224] *See* 42 U.S.C. § 2000a (2000) (Title II of the Civil Rights Act of 1964).

[225] See, e.g., id.; 42 U.S.C. § 2000e-2 (2000) (prohibiting discrimination by employers on the basis of "race, color, religion, sex, or national origin"); 42 U.S.C. § 1973b (2000) (prohibiting state and local literacy tests for voters). See also MacKinnon, supra note 204, at 149-50 (arguing that when civil rights legislation is enacted to remedy the "historic exclusion of a subordinated group from the legal system," "it is inadequate to respond that the laws on the subject have been this way for some time").

[226] The Commerce Clause is not, of course, the sole vehicle for passage of civil rights legislation. However, with the Court's recent rulings in *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000), and *Morrison*, 120 S. Ct. 1740 (2000), it appears that Section 5 of the Fourteenth Amendment is limited to regulating state action. As a result, the Commerce Clause remains a primary source of federal regulation of private conduct.

lence,[227] and "nearly three-quarters of the states joined a brief urging the [*Morrison*] Court to uphold the [VAWA]."[228] The Supreme Court has similarly acknowledged the importance of civil rights legislation. In both *Heart of Atlanta* and *McClung*, the Court upheld civil rights statutes without apparent concern for their potential duplication of, or interference with, state law.[229] The *Heart of Atlanta* Court recognized, with respect to Title II's prohibition of racial discrimination, that "[t]here is nothing novel about such legislation," citing numerous similar state and municipal laws outlawing discrimination in places of public accommodation.[230] Rather than give the Court pause, however, such duplication acted as justification for the statute's validity as an effective means of protecting minority rights; state autonomy took a back seat, in the Court's eyes, to the need to combat discrimination that substantially affected interstate commerce.[231] A similar set of circumstances existed in *McClung*, in which the Court recognized that some activities were necessarily within federal control because of their national effects. It argued that Congress's commerce power extends to matters, including civil rights legislation, that interfere with state law "for the purpose of executing some of the general

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[227] *See supra* notes 218, 220. This is due in part to pervasive gender discrimination in state prosecutorial and judicial systems that makes it exceedingly difficult to enforce nonfederal remedies. *See Crimes of Violence Motivated by Gender: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 103d Cong. 9 (1993) ("Women bringing tort actions for sexual assault are routinely subjected to intrusive questions about consensual sexual activity unrelated to the attack."); *Violence Against Women: Victims of the System: Hearing on S. 15 Before the S. Comm. on the Judiciary*, 102d Cong. 147 (1991) (testimony of Gill S. Freeman, Chair, Florida Supreme Court Gender Bias Commission) (revealing that in Florida state attorneys often refuse to file charges in cases of gender-motivated violence due to bias inherent in the criminal justice system); *Women and Violence: Hearing Before the S. Comm. on the Judiciary, Part I*, 101st Cong. 65 (1990) (statement of NOW Legal Defense and Education Fund) (reporting that state task forces on gender bias determined that state court judges often disbelieve female victims "unless there is visible evidence of severe physical injury"); S. REP. NO. 103-138, at 49 (1993) ("Women often face barriers of law, of practice, and of prejudice not suffered by other victims of discrimination . . . Traditional State law sources of protection have proved to be difficult avenues of redress for some of the most serious crimes against women."); S. REP. NO. 102-197, at 47 n.63 (1991) ("[A]lmost one quarter of the [state judges] believed that rape victims 'sometimes' or 'frequently' precipitate their sexual assaults because of what they wear and/or actions preceding the incidents."); *id.* at 43 ("Study after study commissioned by the highest courts of the States—from Florida to New York, California to New Jersey, Nevada to Minnesota—has concluded that crimes disproportionately affecting women are often treated less seriously than comparable crimes against men."); *id.* at 39 ("Despite States' most fervent efforts at legislative reform, these stereotypes [of women] persist and continue to distort the criminal justice system's response to violence against women.").

[228] *See* Goldscheid, *supra* note 169, at 120 (citing Brief of Amici Curiae State of Arizona, et al. in Support of Petitioners, United States v. Morrison, 120 S. Ct. 1740 (2000)).

[229] *See* Goldscheid, *supra* note 169, at 134 ("Viewing the [VAWA's] civil rights remedy in the context of other federal civil rights legislation [in *Heart of Atlanta* and *McClung*], the Court's conclusion that upholding the law would eliminate the distinction between national and local authority seems particularly misplaced.").

[230] Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 259 (1964).

[231] *See id.* at 260 (justifying Title II in light of the existence of numerous similarly valid state anti-discrimination laws).

powers of government."[232] In sum, both the specific circumstances surrounding the VAWA's enactment and Supreme Court precedent regarding civil rights statutes indicate that the VAWA did not inappropriately interfere with state lawmaking authority, but instead provided desperately needed federal relief from widespread civil rights violations.[233] Nevertheless, the Court in *Morrison* overlooked the VAWA's social significance as a civil rights statute and struck it down primarily for its failure to regulate "economic" activity.[234]

If the Court refuses to recognize the difference between a federal civil rights statute designed to combat proven prejudices and a criminal provision outlawing the possession of a firearm near a school, it will likely end up eradicating federal power to participate in either area. This will not only protect existing principles of state autonomy in certain areas of the law, but also will fashion new standards of state governance that will effectively preclude future federal protection of disadvantaged minorities. The majority in *Morrison* struck down the VAWA for allegedly violating elusive principles of noninterference in state lawmaking and thereby eliminated an important source of federal authority—only the *Lopez* Court's nature-of-the-regulated-activity categorization survives as a legitimate and potentially effective source of federal commerce legislation.

A number of alternative constructions of the VAWA's civil rights remedy may still survive constitutional scrutiny after *Morrison*, but they are likely to include vastly limited protections for victims of gender-motivated violence. A jurisdictional element, limiting application of the statute to acts involving interstate travel by either the parties or other instrumentalities of the crime, may satisfy the Court's concerns about preserving the federal-state balance.[235] Similarly, limiting the VAWA's application to places of public accommodation may satisfy the Court's economic activity requirement.[236] Finally, indirect approaches such as combating the economic barriers encountered by

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[232] Katzenbach v. McClung, 379 U.S. 294, 302 (1964) (upholding Title II of the Civil Rights Act of 1964 as a permissible and important exercise of congressional authority).

[233] *See, e.g.*, H.R. CONF. REP. NO. 103-711, at 385 (1994) (finding that gender-motivated violence is a widespread problem that greatly affects women's abilities to function normally in modern society, and therefore "substantially affects interstate commerce"); S. REP. NO. 103-138, at 54 (1993) ("Gender-based crimes and the fear of gender-based crimes restricts movement, reduces employment opportunities, increases health expenditures, and reduces consumer spending, all of which affect interstate commerce and the national economy."); Goldscheid, *supra* note 169, at 130 ("The Court's concerns about the implications of upholding the VAWA civil rights remedy are simply inapplicable when the statute is viewed as a civil rights law.").

[234] *See* United States v. Morrison, 120 S. Ct. 1740, 1751 (2000) (striking down the VAWA because "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity"); Goldscheid, *supra* note 169, at 123 ("Although it declined to adopt a categorical rule against aggregating the effects of noneconomic activity . . . the [*Morrison*] Court effectively created the categorical rule it expressly disclaimed.").

[235] *See* Goldscheid, *supra* note 169, at 137-38 (discussing alternate constructions of the VAWA civil rights remedy that have been proposed in light of *Morrison*).

[236] *See Morrison*, 120 S. Ct. at 1775-76 (Breyer, J., dissenting).

victims of gender-motivated violence may survive Commerce Clause review.[237] Regardless of the potential success of any of these approaches, however, it appears that *Morrison* stands for the proposition that civil rights laws offering the broadest protections, those aimed at non-economic, intrastate acts of discrimination, are for the time being outside the bounds of congressional commerce authority.[238] This limiting of congressional power may doom a variety of current and future federal regulation,[239] while simultaneously ushering in a new era of imposed autonomy for the states: "federalism whether they want it or not."[240]

III. THE FUTURE OF CIVIL RIGHTS LEGISLATION AFTER *MORRISON*

This restrictive interpretation of the new Commerce Clause doctrine—that statutes regulating intrastate, non-economic activity will not survive constitutional scrutiny—appeared again this term in the environmental context in *Solid Waste Agency v. United States Army Corps of Engineers*.[241] The Court refrained, however, from deciding the constitutional issue.[242] This leaves open the question of whether other non-civil-rights regulations of intrastate, non-economic activity will face the same restrictive constitutional scrutiny used to strike down the VAWA in *Morrison*.[243] If the Supreme Court upholds such regulations, it will represent a sharp break from *Morrison*, which overturned the VAWA because it found gender-motivated violence to be local and noncommercial in nature.[244] Such a break from precedent may threaten federal civil rights laws even more seriously than *Morrison*. If, however, the Court extends *Morrison* to statutes outside the civil rights realm, we believe it will create a situation so untenable in modern American society that it will likely inspire a wholesale doctrinal reevaluation. This type of reevaluation may be the only plausible way

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[237] *See* Goldscheid, *supra* note 169, at 138.

[238] *See, e.g.*, Baker, *supra* note 207, at 1193 (stating that *Morrison* "casts constitutional doubt on much of federal criminal law, and especially on federal crimes tied to motivation, of which 'hate crimes' are a species").

[239] *See, e.g.*, 50 C.F.R. § 17.84(c) (2001) (challenged in Gibbs v. Babbitt, 214 F.3d 483 (4th Cir. 1999)); Hate Crimes Prevention Act of 1999, S. 622, 106th Cong. (1999).

[240] *Morrison*, 120 S. Ct. at 1773 (Souter, J., dissenting); *see id.* at 1768 (Souter, J., dissenting) (arguing that the Court's decision to strike the VAWA was adopted because of its value "in serving a conception of federalism .... The legitimacy of the Court's current emphasis on the noncommercial nature of regulated activity, then, does not turn on any logic serving the text of the Commerce Clause .... The essential issue is rather the strength of the majority's claim to have a constitutional warrant for its current conception of a federal relationship enforceable by this Court through limits on otherwise plenary commerce power.").

[241] 121 S. Ct. 675 (2001).

[242] *Id.* at 678 (answering the question of whether § 404(a) extends to waters covered by the migratory bird rule "in the negative," thereby permitting the court to "not reach the second" question regarding the rule's constitutionality under the Commerce Clause).

[243] 120 S. Ct. 1740 (2000).

[244] *See supra* Part II.B.

to salvage federal anti-discrimination law after *Morrison.*

A. Recent Developments

Two recent decisions, *Solid Waste Agency*[245] and *Gibbs v. Babbitt,*[246] provide insight into the arguments likely to be presented to the Supreme Court in future cases involving the constitutionality of federal environmental legislation. *Solid Waste Agency* presented two separate issues involving the applicability of the Clean Water Act ("CWA")[247] to intrastate ponds under the so-called "migratory bird rule":[248] whether the migratory bird rule gave the Army Corps of Engineers ("Corps") jurisdiction over non-navigational, isolated, intrastate ponds, and, alternatively, whether Congress possessed the authority under the Commerce Clause to grant the Corps such jurisdiction.[249] The Court decided the case on the merits of the first issue, the jurisdictional scope of the regulation, and avoided the constitutional question.[250] Recognizing its doctrine of deference to administrative policymaking,[251] the Court nevertheless found the relevant section of the CWA to be "clear . . . [such that] we would not extend *Chevron* deference here."[252] The Court went on to explain that it retains a "prudent[] desire not to needlessly reach constitutional issues,"[253] and concluded that "[w]e thus read the statute as written to avoid the significant constitutional and federalism questions raised by respondents' interpretation, and therefore reject the request for administrative deference. We hold that . . . the 'Migratory Bird Rule' exceeds the authority granted to respondents under § 404(a) of the CWA."[254]

Although it did not base its ruling on the Commerce Clause challenge to § 404(a),[255] the Court did indicate that the statute was also infirm in that regard after *Morrison.* It referred to the Commerce

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[245] 121 S. Ct. 675 (2001).

[246] 214 F.3d 483 (4th Cir. 2000), *cert. denied,* 121 S. Ct. 1081 (2001).

[247] Clean Water Act § 404(a), 33 U.S.C. § 1344(a).

[248] The "migratory bird rule" interprets the Clean Water Act as extending to intrastate waters: "a. Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or b. Which are or would be used as habitat by other migratory birds which cross state lines." *Solid Waste Agency,* 121 S. Ct. at 678 (citing 51 Fed. Reg. 41217).

[249] *See id.* at 677-78.

[250] *See id.* at 678 ("We answer the first question in the negative and therefore do not reach the second.").

[251] *See, e.g.,* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 866 (1984) ("When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do.").

[252] *Solid Waste Agency,* 121 S. Ct. at 683.

[253] *Id.*

[254] *Id.* at 684 (citations omitted).

[255] *See id.*

Clause questions raised by § 404(a) as "serious constitutional problems," reiterating that its last two constructions of the Commerce Clause emphasized the fact that Congress's authority, "though broad, is not unlimited."[256] The Court went on to address the government's argument, based on the Supreme Court's prior holding in *Missouri v. Holland*,[257] that the protection of migratory birds is a "national interest of very nearly the first magnitude,"[258] as well as its contentions that the presence of migratory birds substantially affects interstate commerce[259] and that the activity associated with creating landfills is economic in nature.[260]

The Court appeared to rely on its reasoning in *Morrison* in dismissing each of the government's proffered arguments. Reluctant to specifically discredit its prior holding in *Holland*, the *Solid Waste Agency* Court nevertheless expressed its concern that permitting federal regulation under the migratory bird rule would interfere with the states' traditional dominion over land and water use.[261] The Court also expressed reservations about the government's conclusions that the protection of migratory birds has, in the aggregate, a substantial effect on interstate commerce, and that landfills represent economic activity. In order to evaluate the validity of these contentions, the Court explained it would have to evaluate the "precise object or activity that, in the aggregate, substantially affects interstate commerce,"[262] and it implied that it would not be inclined to consider the subject matter of § 404(a) economic in nature.[263] In short, despite its technical avoidance of the constitutional issue, the Court in *Solid Waste Agency* signaled that it would preserve *Morrison*'s restrictive reading of the Commerce Clause outside the civil rights arena by striking regulations of intrastate, non-economic activity.

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[256] *Id.* at 683 (citing United States v. Morrison, 120 S. Ct. 1740 (2000); United States v. Lopez, 514 U.S. 549 (1995)).

[257] 252 U.S. 416 (1920).

[258] *Solid Waste Agency*, 121 S. Ct. at 683 (citing *Holland*, 252 U.S. at 435).

[259] *See* Brief for Respondents at 47-48, Solid Waste Agency v. United States Army Corps of Engineers, (No. 99-1178) (U.S. Jan. 9, 2000) ("Migratory birds are the object of hunting activities that generate billions of dollars of commerce each year. In 1996, 3.1 million people hunted migratory birds and spent $1.3 billion doing so .... Like bird hunting, bird watching annually generates several billion dollars of commerce. In 1996 some 62.9 million Americans spent $29 billion on wildlife-watching activities, including bird watching." (citations omitted)).

[260] *See id.* at 43 ("The proposed activity for which petitioner sought a federal permit ... is plainly of a commercial nature.").

[261] *See Solid Waste Agency*, 121 S. Ct. at 684 ("Permitting respondents to claim federal jurisdiction over ponds and mudflats falling within the 'Migratory Bird Rule' would result in a significant impingement of the States' traditional and primary power over land and water use."); *see also* Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 44 (1994) ("[R]egulation of land use [is] a function traditionally performed by local governments.").

[262] *Solid Waste Agency*, 121 S. Ct. at 683.

[263] *See id.* ("[R]espondents now, *post litem motam*, focus upon the fact that the regulated activity is petitioner's municipal landfill, which is 'plainly of a commercial nature.' But this is a far cry, indeed, from the 'navigable waters' and 'waters of the United States' to which the statute by its terms extends." (citations omitted)).

Solid Waste Agency remains somewhat (albeit slightly) inconclusive, however, as a forecast of exactly what lies in store for interstate commerce regulation, because it did not rely for its ultimate disposition on the constitutionality of § 404(a). This uncertainty also pervades the Fourth Circuit's recent decision in *Gibbs v. Babbitt*,[264] which upheld a regulation associated with the Endangered Species Act ("ESA"), 50 C.F.R. § 17.84(c), against a Commerce Clause challenge. *Gibbs* offers a detailed analysis of Congress's commerce power in the wake of *Morrison*. Although the Court in *Solid Waste Agency* indicated that it would follow *Morrison* in future commerce cases, many of the justifications relied on by the Fourth Circuit in upholding § 17.84(c) are directly at odds with the *Morrison* Court's rationale for striking down the VAWA. Thus, despite recently being denied certiorari, *Gibbs* represents an alternative approach to non-civil rights commerce legislation that could create a kind of doctrinal double-standard for analyzing the constitutionality of federal civil rights laws and that, in turn, could endanger such laws' future survival.

Gibbs upheld a regulation associated with the ESA that prohibited the "taking" of a red wolf on private property except in limited circumstances.[265] The regulation was directly at odds with a North Carolina statute and was challenged for being outside the bounds of the commerce power.[266] The *Gibbs* court relied on a number of rationales in upholding the regulation, from declaring preservation of the red wolf an economic activity[267] and recognizing the "close connection" between preservation and commerce,[268] to claiming that principles of federalism required congressional intervention in an area of federal expertise and of such grave national importance as conservation,[269] to finding that the ESA is part of a complex federal regulatory scheme that, as a whole, satisfies commerce scrutiny.[270] The inconsistencies

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[264] 214 F.3d 483 (4th Cir. 2000), *cert. denied*, 121 S. Ct. 1081 (2001).

[265] *See* 50 C.F.R. § 17.84(c)(4)(i)-(iv).

> Section 17.84(c) allows a person to take red wolves on private land '[p]rovided that such taking is not intentional or willful, or is in defense of that person's own life or the lives of others.' Private landowners may also take red wolves on their property 'when the wolves are in the act of killing livestock or pets, [p]rovided that freshly wounded or killed livestock or pets are evident . . . .' A landowner may also 'harass red wolves found on his or her property . . . [p]rovided that all such harassment is by methods that are not lethal or physically injurious to the red wolf . . . .'

Gibbs, 214 F.3d at 488-89.

[266] *See Gibbs*, 214 F.3d at 489 ("[Appellants] seek a declaration that the anti-taking regulation, 50 C.F.R. § 17.84(c) . . . exceeds Congress's power under the interstate Commerce Clause." (citations omitted)).

[267] *See id.* at 492.

[268] *See id.* at 493.

[269] *See id.* at 500-01 (stating that conservation is "an appropriate and well-recognized area of federal regulation," as well as a "'matter of the sharpest exigency for national well being'" (quoting Justice Holmes in Missouri v. Holland, 252 U.S. 416, 432-33 (1920))).

[270] *See id.* at 497 ("This regulation [§ 17.84 (c)] is also sustainable as 'an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.'" (quoting United States v. Lopez, 514 U.S. 549, 561

between the reasoning employed in *Gibbs* and the Supreme Court's ruling in *Morrison* are stark.

The Fourth Circuit first found support for upholding the ESA regulation in the fact that "economic activity [in the context of Commerce Clause analysis] must be understood in broad terms."[271] It went on to explain that it was reasonable for Congress to conclude that § 17.84(c) regulates economic activity, finding that the "protection of commercial and economic assets is a primary reason for taking the wolves" and that the "relationship between red wolf takings and interstate commerce is quite direct."[272] The court relied on the *Wickard* aggregation principle to account for its finding that such a small number of red wolves could substantially affect interstate commerce.[273] By contrast, the *Morrison* Court specifically rejected *Wickard*'s aggregation doctrine.[274] It relied instead on a finding that, despite both voluminous congressional findings to the contrary[275] and prior determinations that farming and the provision of public accommodations are commercial in nature,[276] "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity."[277] Indeed, the Court's holding in *Morrison* seems more akin to a statement of the dissenting opinion in *Gibbs*:

> [t]he killing of even all 41 of the estimated red wolves that live on private property in North Carolina would not constitute an economic activity of the kind held by the Court in *Lopez* and in *Morrison* to be of central concern to the Commerce Clause, if it could be said to constitute an economic activity at all.[278]

The *Gibbs* court next concluded that, even if the taking of red wolves does not amount to an economic activity, the practice is "closely connected to a variety of interstate economic activities" and for that reason satisfies constitutional scrutiny under *Lopez* and *Morrison*.[279] It found that tourism connected to public appreciation of the

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(1995))).

[271] *Id.* at 491.

[272] *Id.* at 492. *Cf.* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 548 (1935) (distinguishing between "direct" and "indirect" effects on commerce); Hammer v. Dagenhart, 247 U.S. 251, 276 (1918) (same).

[273] *See id.* at 493 ("Because the taking of red wolves can be seen as economic activity . . . the individual takings may be aggregated for the purpose of Commerce Clause analysis.").

[274] *See Morrison*, 120 S. Ct. at 1754 ("We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce.").

[275] *See, e.g., Crimes of Violence Motivated by Gender: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 103d Cong. 5 (1993); H.R. CONF. REP. NO. 103-711, at 385-86 (1994); S. REP. NO. 101-545, at 43 (1990).

[276] *See Morrison*, 120 S. Ct. at 1750 (citing *Wickard v. Filburn*, *Katzenbach v. McClung*, and *Heart of Atlanta Hotel, Inc. v. United States* as cases involving the regulation of economic activity under the Commerce Clause).

[277] *Morrison*, 120 S. Ct. at 1751.

[278] *Gibbs*, 214 F.3d at 507 (Luttig, J., dissenting).

[279] *Id.* at 493.

red wolf would be hampered if takings were not regulated,[280] and determined that scientific research involving red wolves and the "possibility of a renewed trade in fur pelts" would be disadvantaged if the animals' welfare was not federally protected.[281] Finally, the court concluded that Congress may "balance economic effects—namely whether the negative effects on interstate commerce from red wolf predation are outweighed by the benefits to commerce from a restoration of this species."[282] By sharp contrast, the Court in *Morrison* struck down the VAWA on the basis of nearly identical arguments regarding the effects of gender-motivated violence on interstate commerce. The VAWA's supporters argued that, consistent with formal congressional findings, violence motivated by a victim's gender frustrates interstate tourism and travel as well as business transactions and employment.[283] The Court, however, rejected these arguments, finding that such a tenuous relationship with interstate commerce was insufficient to survive constitutional scrutiny under the Commerce Clause.[284]

The Fourth Circuit's third rationale for upholding § 17.84(c) focused, at least in part, on the comprehensiveness of the ESA's regulatory scheme. The court cited *Hodel v. Indiana*[285] for the proposition that not every aspect of a complex federal regulatory program need satisfy the commerce doctrine for the legislation to pass constitutional muster.[286] If regulations are considered an integral part of a larger legislative scheme, they may be upheld in the interest of maintaining that scheme's viability and effectiveness. This includes regu-

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[280] *See id.* ("The first nexus between the challenged regulation and interstate commerce is tourism.").

[281] *See id.* at 494-95 ("The regulation of red wolf takings is also closely connected to . . . scientific research . . . . [Section 17.84(c)] is also connected to . . . the possibility of a renewed trade in fur pelts.").

[282] *Id.* at 495.

[283] *See Crimes of Violence Motivated by Gender: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 103d Cong. 5 (1993) ("Fear of gender-based violence deters women's free movement interstate, and limits every economic choice, including education, employment, and travel."); H.R. CONF. REP. NO. 103-711, at 385-86 (1994) ("Crimes of violence motivated by gender have a substantial adverse effect on interstate commerce, by deterring potential victims from travelling interstate, from engaging in employment in interstate business, and from transacting with business . . . in interstate commerce."); S. REP. NO. 101-545, at 43 (1990) ("Gender-based crimes and the fear of gender-based crimes restricts movement, reduces employment opportunities, increases health expenditures, and reduces consumer spending, all of which affect interstate commerce and the national economy.").

[284] *See Morrison*, 120 S. Ct. at 1751 ("We rejected th[is] . . . 'national productivity' argument[] because . . . under this but-for reasoning: 'Congress could regulate any activity that it found was related to the economic productivity of individual citizens . . . [and therefore] it is difficult to perceive any limitation on federal power . . . .'").

[285] 452 U.S. 314 (1981).

[286] *See id.* at 329 n.17 ("A complex regulatory program . . . can survive a Commerce Clause challenge without a showing that every single facet of the program is independently and directly related to a valid congressional goal. It is enough that the challenged provisions are an integral part of the regulatory program and that the regulatory scheme when considered as a whole satisfies this test.").

lations of intrastate activity.[287] The *Gibbs* court argued that the ESA was just such a broad regulatory scheme. Because it was designed to "conserve the health of our national environment," the court found that Congress must have authority to protect endangered species, suggesting that the "specific needs of individual species . . . present a classic case for legislative balancing."[288] The Court in *Morrison*, however, rejected this line of reasoning with respect to the VAWA, finding that there was no complex federal regulatory scheme addressing gender-related violence, but rather that the VAWA was a single legislative attempt to regulate a private, intrastate, non-economic activity that is traditionally within the purview of the states.[289] On this score then, a comparison of *Gibbs* and *Morrison* intimates that, because much civil rights legislation develops in a "piecemeal" fashion, specific civil rights provisions will rarely benefit as a part of a complex regulatory scheme. These provisions therefore appear all the more vulnerable to the emerging Commerce Clause doctrine.[290]

The court in *Gibbs* next explained that § 17.84(c) was valid because it was consistent with principles of federal noninterference in areas of traditional state concern. Although it recognized the states' traditional power over land use, the court made clear that "State control over wildlife . . . is circumscribed by federal regulatory power,"[291]

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[287] *See id.*

[288] *Gibbs*, 214 F.3d at 497-98 ("The FWS issued this regulation pursuant to the provisions of the Endangered Species Act, a comprehensive and far-reaching piece of legislation that aims to conserve the health of our national environment. Congress undoubtedly has the constitutional authority to pass legislation for the conservation of endangered species.").

[289] *See Morrison*, 120 S. Ct. at 1752 n.5 (recognizing that the civil rights remedy of the VAWA is part of a larger statute addressing gender-related violence, but failing to categorize the entire statute as a comprehensive regulatory scheme designed to combat such violence); *id.* at 1754 ("We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce. . . . The regulation and punishment of intrastate violence . . . has always been the province of the States.").

[290] This point can be seen by noting the many distinct provisions and remedies incorporated into the VAWA. The VAWA was specifically designed to be an entirely self-sufficient, comprehensive approach to remedying gender discrimination. In addition to the civil rights remedy provision, § 13981, the statute provided for capital improvements to public transportation systems. *See* 42 U.S.C. § 13931(a) (2000) ("There is authorized to be appropriated not to exceed $10,000,000, for the Secretary of Transportation . . . to make capital grants for the prevention of crime and to increase security in existing and future public transportation systems."). Title II, the Safe Homes for Women Act, required full faith and credit for protective orders issued by other states. *See* 18 U.S.C. § 2265 (2000). The statute also included the Equal Justice for Women in the Courts Act, which provides for studies "on the nature and extent of gender bias in the federal courts, as well as for training of state and federal judges on the issues of sexual assault and domestic violence." Martin, *supra* note 189, at 255 (citing 42 U.S.C. §§ 13992, 14001 (1994)). Finally, the VAWA includes a criminal provision that presents a federal remedy for crimes of abuse committed in interstate travel or by virtue of travel across state lines. *See* 18 U.S.C. § 2261(a)(1)-(2) (2000). The breadth of the VAWA's reach makes it difficult to imagine what sort of regulatory scheme Congress would have to devise in order to draft a civil rights statute that the Court would find satisfies the standard articulated in *Hodel v. Indiana*.

[291] *Gibbs*, 214 F.3d at 499.

and that "endangered wildlife regulation has not been an exclusive or primary state function."[292] It also relied on what it deemed the historical federal interest in conservation.[293] The Court then distinguished § 17.84(c) from the provisions at issue in *Lopez* and *Morrison* by contrasting gun possession and gender-motivated violence with the conservation of natural resources, a practice the court considered "an appropriate and well-recognized area of federal regulation."[294] *Gibbs* concluded by finding that § 17.84(c) was not an impermissible intrusion into an area of traditional state concern because of the overwhelming need for national environmental standards and due to the importance of encouraging congressional efforts to devise more effective solutions to significant national problems.[295] The Supreme Court, however, rejected these same justifications in *Morrison.* The *Morrison* Court disregarded the fact that civil rights legislation is an area of traditional federal involvement.[296] It instead concluded that gender-motivated violence, although clearly defined and intended by Congress to represent a widespread discriminatory phenomenon,[297] was not a problem of national scope deserving national attention.[298] The Court came to this conclusion despite the specific request of Attorneys General from thirty-eight states for federal help in protecting women from such violence,[299] three-quarters of the states joining in

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[292] *Id.* at 500.

[293] *Id.* at 501 ("The Supreme Court has recognized that protection of natural resources may require action from Congress.... States may decide to forego or limit conservation efforts in order to lower... [implementation] costs, and other states may be forced to follow suit in order to compete."); *see also* Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 281-82 (1981) (deferring to congressional finding that nationwide criteria were "essential" to insuring environmental standards).

[294] *Gibbs*, 214 F.3d at 500.

[295] *See id.* at 502 ("[U]ltimate responsibility for the red wolf lies with the federal government.").

[296] *See* Goldscheid, *supra* note 169, at 129 ("The [*Morrison*] Court ignored arguments, fully supported by the legislative record, that Congress sought to regulate a matter of civil rights, an area in which the federal government has a strong historic and enduring interest."); *see also* Wisconsin v. Mitchell, 508 U.S. 476, 487-88 (1993) (finding that discriminatory conduct "is thought to inflict greater individual and societal harm" than other crimes); Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 348 (1993) (O'Connor, J., dissenting) (noting the federal interests in remedying class-based discriminatory conduct).

[297] *See, e.g.*, H.R. CONF. REP. NO. 103-711, at 385 (1994) ("[C]rimes of violence motivated by gender have a substantial effect on interstate commerce."); H.R. REP. NO. 103-395, at 25 (1993) ("Three out of four American women will be victims of violent crimes sometime during their life."); S. REP. NO. 101-545, at 33 (1990) ("Partial estimates show that violent crime against women costs this country at least 3 billion—not million, but billion—dollars a year.").

[298] *See Morrison*, 120 S. Ct. at 1752-53 (stating that "the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation," and that passage of the VAWA is inappropriate because "if Congress may regulate gender-motivated violence, it would be able to regulate murder or any other type of violence since gender-motivated violence, as a subset of all violent crime, is certain to have lesser economic impacts than the larger class of which it is a part").

[299] *See Morrison*, 120 S. Ct. at 1772-73 (Souter, J., dissenting) (observing that "Attorneys General from 38 States urged Congress to enact the Civil Rights Remedy").

an amici curiae brief in support of the VAWA,[500] and voluminous congressional findings outlining the scope of the problem and the inability of states to deal with it themselves.[501]

The *Gibbs* court finally justified upholding the red wolf regulation by explaining that, unlike the GFSZA or VAWA, the regulation did not interfere with existing state law.[502] The court cited examples to demonstrate that the regulation was not supplanting existing state law, but was part of a scheme of "cooperative federalism" designed to encourage federal and state teamwork and collective problem solving.[503] It likewise found that restricting the regulation to only "endangered" or "threatened" species served to limit any potential federal intrusions into established state law.[504] The court finally argued in the negative, citing as support for the regulation the fact that limiting federal regulatory power to federal lands would "place in peril the entire federal regulatory scheme for wildlife and natural resource conservation."[505] This rationale is inconsistent with the Supreme Court's holding in *Morrison*. While § 17.84(c) was upheld for respecting state authority within the context of its federal regulatory scheme, the VAWA was struck down despite incorporating similar "cooperative federalism" ideals.[506] The VAWA adopted state law definitions of crimes of violence as part of its identification of "crimes of violence motivated by gender"[507] and explicitly reserved crimes of family and domestic violence for state control.[508] Moreover, it provided a federal civil remedy for victims of gender-motivated violence, thereby supplementing existing state criminal laws by offering a form of relief previously unavailable in state courts.[509]

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[500] *See* Goldscheid, *supra* note 169, at 120 n.62 (citing Brief of Amici Curiae State of Arizona, et al. in Support of Petitioners, United States v. Morrison, 120 S. Ct. 1740 (2000) (Nos. 99-5, 99-29)).

[501] *See* Goldscheid, *supra* note 169, at 117-20.

[502] *See Gibbs*, 214 F.3d at 503 ("Unlike the GFSZA and the VAWA, § 17.84(c) does not duplicate or supplement state and local regulation.").

[503] "Congress, however, did not simply sweep away the role of the states by enacting a national solution to the problem of red wolf conservation. The ESA and § 17.84(c) embody principles of cooperative federalism and seek to involve the states in the conservation effort. . . . First, a species is listed as endangered or threatened only after reviewing 'those efforts, if any, being made by any State . . . to protect such species. Second, once the species has recovered and is 'delisted,' management responsibility will return to the states." *Id.* (citing Endangered Species Act, 16 U.S.C. §§ 1533(b)(1)(A), 1532(3)) (internal citations omitted).

[504] *See id.*

[505] *Id.* at 504.

[506] *See* Biden, *supra* note 183, at 11 ("[T]he civil rights remedy was carefully crafted in the very best spirit of cooperative federalism.").

[507] *See* 42 U.S.C. § 13981(d)(2)(A) (1994) (defining "crimes of violence" as, among other things, those that "come within the meaning of State . . . offenses").

[508] *See* 42 U.S.C. § 13981(e)(4) (1994) (excepting from coverage claims "seeking the establishment of a divorce, alimony, equitable distribution of marital property, or child custody decree").

[509] *See* S. REP. NO. 103-138, at 48 n.47 (1993) (reporting that prior to the VAWA's enactment, only ten states had hate crime laws that included crimes motivated by gender); Biden, *supra*

B. Potential Consequences

Nearly all of *Gibbs*'s justifications for sustaining § 17.84(c) conflict with the Supreme Court's most recent application of Commerce Clause doctrine in *Morrison*. The Court, however, recently denied certiorari in *Gibbs* and has postponed consideration of this conflict for another day. If the Court eventually adopts the Fourth Circuit's reasoning and sustains regulations like § 17.84(c), *Morrison* will then appear to stand for the disturbing proposition that civil rights laws are to be scrutinized more strictly than other federal, particularly environmental, regulations.[310] This result will cripple any future federal efforts to pass badly needed civil rights laws[311] by "pigeon-holing" such

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note 183, at 26 ("[Section] 13981 responds to the states' self-described needs without preempting or interfering with state prosecutions in any way.").

[310] This temptation to distinguish the VAWA and civil rights statutes generally from other Commerce Clause legislation is apparent in the Government's brief in *Solid Waste Agency*. Counsel for the Government took great pains to portray *Morrison* as a decision tailored to civil rights legislation, and the VAWA as an imposition on state sovereignty different from that posed by statutes in other areas of the law. *See* Brief for the Federal Respondents at 38, Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers (7th Cir. 2000) (No. 99-1178) (arguing that the "federal law[] struck down in [*Morrison*] w[as] intended to further governmental interests . . . the 'suppression of violent crime'—that have as an historical matter been principally entrusted to the States."); *id.* at 41 ("[T]he destruction of migratory bird habitat presents no danger that 'Congress might use the Commerce Clause to completely obliterate the Constitution's distinction between national and local authority.'" (quoting *Morrison*, 120 S. Ct. at 1752)).

[311] An example of such pending federal civil rights legislation is the Hate Crimes Prevention Act ("HCPA"), which is broader in scope but nonetheless similar to the VAWA, as it creates a federal (albeit criminal) penalty for

> Whoever, whether or not acting under color of law, willfully causes bodily injury to any person . . . because of the actual or perceived race, color, religion, or national origin of any person . . . [or] religion, gender, sexual orientation, or disability of any person . . . [if] the offense is in or *affects interstate or foreign commerce*.

See Hate Crimes Prevention Act of 1999, S. 622, 106th Cong. § 4(c) (1999) (emphasis added). Like it did in enacting the VAWA, Congress made formal findings in support of its exercise of the commerce power to enact the HCPA, concluding that

> (1) the incidence of violence motivated by . . . gender . . . poses a serious national problem;
> (2) such violence disrupts the tranquility and safety of communities . . . ;
> (3) existing Federal law is inadequate to address this problem;
> (4) such violence affects interstate commerce in many ways, including . . . impeding the movement of members . . . across State lines . . . and . . . preventing members of targeted groups from purchasing goods and services, obtaining or sustaining employment or participating in other commercial activity;
> (5) perpetrators cross State lines to commit such violence;
> (6) instrumentalities of interstate commerce are used to facilitate . . . such violence;
> (7) such violence is committed using articles that have traveled in interstate commerce;
> (8) violence motivated by bias . . . can constitute badges and incidents of slavery;
> (9) . . . Federal jurisdiction over certain violent crimes motivated by bias is necessary to supplement State and local jurisdiction . . . ;
> (10) Federal jurisdiction over certain crimes motivated by bias enables Federal, State, and local authorities to work together . . . ;
> (11) the problem of hate crime is sufficiently serious, widespread, and interstate in nature as to warrant Federal assistance to States and local jurisdictions.

legislation as outside congressional commerce authority.

By contrast, if the Court remains consistent and overturns non-civil rights legislation like § 17.84(c) because it regulates non-economic activity, the trend developed in *Morrison* will remain universal. Although this results, in our opinion, in an unfortunate outcome for the immediate future of federal commerce legislation, it creates a more optimistic long-term view for the protection of civil rights. If the Supreme Court applies a less arduous standard to non-civil rights legislation than it did to the federal civil rights law in *Morrison*, *Morrison* would have to be specifically overturned before Congress could legislate in the civil rights arena. If, however, all commerce legislation is treated with the same restrictive scrutiny applied in *Morrison*, the resulting situation would resemble that immediately preceding *NLRB v. Jones & Laughlin Steel Corp.*,[312] and likely cause the Court to reevaluate its recent Commerce Clause decisions. Limiting Congress's power so severely as to preclude it from enacting, at a minimum, civil rights and environmental legislation would create a situation so contrary to the needs and expectations of our modern, national society that the Court will quickly be forced to reevaluate its approach for the clear benefit of the country.[313]

Id. at § 2. Both Congress's purpose and cited justifications for enacting the HCPA are nearly identical to those relied on unsuccessfully in *Morrison* to uphold the VAWA, and will therefore likely be considered insufficient to uphold the HCPA against a similar Commerce Clause challenge. *See* Baker, *supra* note 207, at 1220 ("After the 'one-two punch' of *Morrison*, it would seem a federal 'hate crime' is constitutionally doomed."). Although this serves as only one example of the potential impact of *Morrison* on future civil rights legislation, it is a rather clear depiction of *Morrison*'s severe limitation of federal legislative authority.

[312] 301 U.S. 1 (1937).

[313] At least one commentator believes that the future of civil rights legislation is more clearly represented by *United States v. Nelson*, No. 98-1437, a case argued before the Second Circuit on January 9, 2001. *See* Jeffrey Ghannam, *Serving Up Civil Rights*, 87 A.B.A. J. 44 (Feb. 2001). *Nelson* involves a Commerce Clause challenge to 18 U.S.C. § 245, a criminal statute making it "unlawful to use force willfully to injure a person because of race or religion and because that person is enjoying a facility provided or administered by a subdivision of the state, as in a public sidewalk." *See id.* at 48. Martin Karlinsky, chair of the Anti-Defamation League's national legal affairs committee, stated that the issue in *Nelson* "very directly threatens the heart of civil rights protections in America. If Section 245 were held to be an unconstitutional exercise of congressional power in light of this new reading of the commerce clause, then the federal government will have lost one of its principal remedies to protect civil rights of all Americans." *Id.*

Both Ghannam and Karlinsky's focus on the potential impact of *Nelson* is somewhat misplaced, because the Supreme Court already made it virtually impossible for Congress to pass civil rights legislation when it struck down the VAWA in *Morrison* for regulating a non-economic activity. Furthermore, § 245 does not accurately represent the vast majority of federal civil rights legislation. By virtue of the fact that § 245 is a criminal provision and is limited in its coverage to areas "provided or administered by a subdivision of the state," it unavoidably interferes in areas of traditional state control in a way most other civil rights statutes do not. *See supra* Part II.A.2. In short, § 245 represents an easy case for the Court's activist conservative majority to strike down federal commerce legislation. As a result, even if the Supreme Court were to grant certiorari and invalidate the statute, such a gesture would not automatically spell doom for broader civil rights regulations. More importantly, it is our contention that the future of civil rights legislation is not to be determined by another case involving similar legislation, but rather by the Supreme Court's application of its *Morrison* rationale to other areas of federal law.

IV. CONCLUSION

The jurisprudential history of the Commerce Clause includes a variety of doctrinal trends that have moved in and out of prominence under varying administrations and social conditions. The Supreme Court recently revived some old trends in *United States v. Morrison*, when it struck down § 13981 of the Violence Against Women Act and ostensibly eliminated congressional commerce authority over any intrastate, non-economic activity. The Court reviewed a similar statute this term in *Solid Waste Agency v. United States Army Corps of Engineers*, but avoided applying *Morrison* by resolving the case on non-constitutional grounds. It similarly avoided interpreting *Morrison* by denying certiorari in *Gibbs*. The Court remains faced, therefore, with an important question regarding the future of federal civil rights legislation: do federal civil rights statutes interfere in areas of law traditionally reserved for the state in ways other federal regulations of non-economic activity do not? Answering this question in the affirmative will single out civil rights laws as being uniquely beyond the scope of Congress's commerce power, thereby making it virtually impossible to enact such legislation without explicitly overturning *Morrison*. Alternatively, if the Court finds that all federal regulations of non-economic activity are equally precluded by the Constitution's limitations on congressional power, then such a decision would so violate social expectations and needs that it would likely require the Court to turn to a different approach in order to define the commerce power in a way consistent with the four corners of the Constitution and the pressing needs of a growing national and international society.

It would seem much less remarkable for the Court to apply the *Morrison* rationale to what is arguably an easier case involving another civil rights statute than for the Court to be forced to decide whether it is willing to apply such a restrictive commerce doctrine to all federal laws enacted under the commerce power.