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The Clothes Have No Emperor, or, Cabining the Commerce Clause

JOHN T. VALAURI*

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I. INTRODUCTION

Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.¹

According to the noted child psychologist Bruno Bettelheim, the fairy tales we read as children greatly affect the adults we later become.² If Bettelheim is correct in his surmise, then it strikes me that the children who grow up to be legal academics must be inordinately taken with Andersen's tale, *The Emperor's New Clothes*,³ because so many of their later legal writings take the form of assertions that the emperor (namely, the Supreme Court) has no clothes (namely, no coherent, consistent, nonfatally flawed doctrine). I have not myself escaped the influence of this tale, but as a lifelong contrarian, it has affected me in the opposite way. So instead of doggedly deconstructing legal texts, I seek out their continuities and harmonies, which are hidden in plain sight.

Here I apply my approach to an area of law that received opinion would find quite unpromising—the proper scope of the federal commerce power under our Constitution (hence, the subtitle of this Article). Most critics find this part of constitutional law a better target for scorn than praise. One prominent commentator, Donald Regan, expresses a common complaint when he says that “we still do not have an adequate theory of the commerce power.” He then goes on to find current doctrine to be “a mess.”⁴ Even sitting members of the Court find great fault with its position here.⁵ And what they find fault with in the current state of affairs, they also criticize in doctrinal history. Both left and right unite in recounting with irritation a roller coaster history of Commerce Clause precedent⁶ that begins with John Marshall's broad,

1. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

2. He says, for example, “Fairy tales, unlike any other form of literature, direct the child to discover his identity and calling, and they also suggest what experiences are needed to develop his character further.” BRUNO BETTELHEIM, *THE USES OF ENCHANTMENT: THE MEANING AND IMPORTANCE OF FAIRY TALES* 24 (1976).

3. HANS CHRISTIAN ANDERSEN, *The Emperor's New Clothes*, in *THE COMPLETE FAIRY TALES AND STORIES* 77 (Erik Christian Haugaard trans., 1974).

4. Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite United States v. Lopez*, 94 MICH. L. REV. 554, 554 (1995).

5. See, e.g., *United States v. Morrison*, 529 U.S. 598, 640–47 (2000) (Souter, J., dissenting).

6. See, e.g., Robert H. Bork & Daniel E. Troy, *Locating the Boundaries: The Scope of Congress's Power to Regulate Commerce*, 25 HARV. J.L. & PUB. POL'Y 849, 873–83 (2002) (representing the conservative, profederalism approach); Erwin Chemerinsky, *The Federalism Revolution*, 31 N.M. L. REV. 7, 7–12 (2001) (presenting, more briefly,

classic opinions in *McCulloch* and *Gibbons v. Ogden*,⁷ careens from one side with the narrow holdings of the late nineteenth and early twentieth centuries⁸ to the other with the deferential, anything goes holdings of the 1937–1995 period,⁹ before once again veering back to more restrictive holdings in *United States v. Lopez*¹⁰ and *United States v. Morrison*.¹¹ This seems a poor place to search for continuity and doctrinal consistency.

Despite all this, I will argue that, in fact, there is and has been a consistent, traditional doctrine of the scope of the federal commerce power, a doctrine that was shared by the Framers and forcefully stated by John Marshall in his seminal Commerce Clause opinions,¹² one that runs a middle course between later decisions of opposite extremes. This doctrine also harmonizes the *Lopez* and *Morrison* opinions both with earlier New Deal era decisions and with the Marshall Court opinions. I would go so far as to claim that this doctrine expresses the plain meaning of the Constitution, but for the sad fact that this meaning is plain to almost no one else today (hence, the title of this Article, one nicked from Paul Slansky).¹³

This cure for the Court's current commerce power difficulties demands neither the wholesale rejection of present doctrine or precedent nor the creation of new law or doctrine from whole cloth. No, it requires little more than the recollection and restoration of the traditional constitutional notion of incidental powers,¹⁴ which has been temporarily

that history from an advocate of federal power). These writers and others, of course, then proceed to put quite different spins on this history.

7. 22 U.S. (9 Wheat.) 1 (1824).

8. See, e.g., *Hammer v. Dagenhart*, 247 U.S. 251, 276–77 (1918) (holding, notoriously, that the regulation of “the hours of labor of children in factories and mines” was not within the federal commerce power for Congress to enact and was “a purely state authority”).

9. See, e.g., *Wickard v. Filburn*, 317 U.S. 111, 128–29 (1942) (holding, again notoriously, that even the wheat a farmer grows to feed his own livestock may be regulated under the Agricultural Adjustment Act of 1938, enacted pursuant to the federal commerce power).

10. 514 U.S. 549 (1995) (holding that the Gun-Free School Zones Act of 1990 exceeded the federal commerce power).

11. *United States v. Morrison*, 529 U.S. 598, 617 (2000) (holding that the Violence Against Women Act of 1994 was likewise beyond Congress's commerce power).

12. This was perhaps most succinctly stated in the headnote to this Article. *Supra* text accompanying note 1.

13. See PAUL SLANSKY, *THE CLOTHES HAVE NO EMPEROR: A CHRONICLE OF THE AMERICAN '80S* (1989).

14. For a textbook exposition of the Marshallian doctrine of incidental or implied powers as aids in carrying out Congress's enumerated powers, see JOSEPH STORY, 3

obscured by the result-driven modern commerce power debate on the Court and in the academy. In presenting this doctrine, I will start from the three basic prongs of the Court's current Commerce Clause test, which the majorities and dissenters in *Lopez* and *Morrison* have distilled from earlier cases and over which they have essentially agreed to disagree. These three elements are Congress's power to regulate the use of the channels of interstate commerce, the instrumentalities of interstate commerce, and activity having a substantial effect on interstate commerce.¹⁵

The *Lopez* and *Morrison* Courts' adherence to this three-part commerce standard at first seems to be counterproductive, little more than a half measure, at once too weak and too strong for its stated purposes. It is too weak because, standing alone, it offers no basis for voiding the two acts in question in those cases. Quite the contrary, the *Lopez* and *Morrison* dissenters make much of the ability of the questioned statutes' ability to meet the third part of the test—the substantial effects prong.¹⁶ In fact, in order to strike down the statutes, the Court must introduce an additional requirement that the regulated activity be economic in nature.¹⁷ But the Court does not cogently explain the provenance and justification for this new criterion. Worse yet, this move also makes the Court's test too strong, for it throws into question some concededly constitutional federal laws that do not regulate economic activity.¹⁸

These shortcomings of the three-part Commerce Clause test, in turn, place the Court in an uncomfortable trilemma. It cannot clearly explain, let alone justify, its current stance, but neither does it have a palatable alternative. The way back to pre-1937 notions of “dual federalism” would involve the rejection of far more doctrine and precedent than the Court would dare to overthrow.¹⁹ The way forward to accepting the position of the *Lopez* and *Morrison* dissenters is likewise dismissed because it “would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.”²⁰ By all appearances, the Court has no good place left to stand.

The way out of the Court's prison of its own devise lies in the

COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 109–26 (Fred B. Rothman & Co. 1991) (1833).

15. See *Morrison*, 529 U.S. at 608–09; *Lopez*, 514 U.S. at 558–59.

16. Justice Breyer, for example, goes to “Brandeis brief” lengths to make such a showing in *Lopez*, 514 U.S. at 615–44 (Breyer, J., dissenting).

17. See *Lopez*, 514 U.S. at 560–61.

18. Embarrassingly, the Violence Against Women Act of 1994 itself contains just such a provision, the constitutionality of which the Court does not question. See *Morrison*, 529 U.S. at 613 n.5; see also 42 U.S.C. § 13981 (2000).

19. Only Justice Thomas is willing to dismantle the test by replacing the “substantial effects” prong. See *Morrison*, 529 U.S. at 627 (Thomas, J., concurring).

20. *Lopez*, 514 U.S. at 567.

traditional doctrine of incidental powers, especially in that doctrine's textual declaration in the Necessary and Proper Clause.²¹ We must recognize that the three parts of the Court's commerce test are not created equal. Only the first two actually deal directly with interstate commerce, the third only deals with activity that substantially affects interstate commerce; but that is not itself interstate commerce. How, then, does this "substantially affects" prong also fall within Congress's commerce power at all (a question that has not occurred to Court or commentators, in the main)? This can only happen by way of the doctrine of incidental powers, which finds its textual exposition in the Necessary and Proper Clause, and which endows Congress with the choice of appropriate means by which to pursue constitutionally enumerated ends.

But unlike Congress's power over the channels and instrumentalities of interstate commerce, this incidental power is not plenary. Instead, by its very text and nature, it has a means-ends limitation, lest it convert the limited commerce power into a general police power. It is, in a word, *telic*.²² To sum this assertion up in a sentence, the commerce power extends to activity that is commercial in at least its nature or purpose.²³ And the activities regulated in both *Lopez* and *Morrison* are neither. They are, therefore, beyond Congress's commerce power. Is there any basis in precedent for my assertion? You need look no further than the headnote of this Article from Marshall's opinion for a unanimous Court in *McCulloch*.²⁴

This is not, no one will be surprised to read, the only way to parse the Necessary and Proper Clause, but it is the best. Neither am I the only one to have taken it in this way. Absolutely no originality is claimed for this idea. On the contrary, I am standing on far more august shoulders

21. U.S. CONST. art. I, § 8, cl. 18.

22. This useful term was introduced to commerce power discussion by David Engdahl. See DAVID E. ENGDahl, CONSTITUTIONAL FEDERALISM IN A NUTSHELL § 3.01, at 20 (2d ed. 1987).

23. Chief Justice Rehnquist begins his opinion for the Court in *Lopez* by saying something close to this, but then strays from it later in the opinion. He says, "The Act neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce." *Lopez*, 514 U.S. at 551.

24. Especially note the words, "which are plainly adapted to that end." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

here, notably those of Hamilton,²⁵ Madison,²⁶ Marshall,²⁷ Story,²⁸ and Justice Stone.²⁹

If the doctrine I present has distinguished a lineage, why is it remarkable by its absence in the current commerce power discussion? Primarily because it does not serve the purposes of the hot, result-driven rhetoric of that debate in which the tail of the desired holding so often wags the dog of doctrine. But a result-driven approach cannot succeed because it preaches only to the choir and lacks the resources to appeal to the nonbeliever and establish the basis for a broader consensus. Most judges and commentators on both sides of the current argument see the commerce power issue through the prism of federalism,³⁰ which is the area of greatest difference between the contending parties. Unfortunately, they see it more as a club with which to beat the other side than as a clue in the puzzle of constitutional interpretation.

This is not to deny that federalism is an area of significant importance. It is only to say that, as it is with happiness, agreement here is best reached indirectly, as the supervening by-product of other factors including, most importantly, those shared by both sides (for they will form the basis for whatever persuasion and agreement that will occur).

II. THE COURT'S CURRENT QUANDARY

A. *The Lopez-Morrison Trilemma*

The Court's commerce power mess, and the way out of it, can be neither understood nor explained apart from a description of how and why the Court has gotten itself in this position. As with other uncomfortable positions, this has been the result of trying to do several different, seemingly inconsistent things at the same time. These goals may all be laudable, but they jockey uncomfortably for position in the *Lopez* and *Morrison* opinions. Those opinions give evidence of some

25. See, e.g., ALEXANDER HAMILTON, *Opinion on the Constitutionality of an Act to Establish a Bank*, in 8 THE PAPERS OF ALEXANDER HAMILTON 63, 101–07 (Harold C. Syrett ed., 1965) (setting out first the doctrine of incidental congressional powers later adopted and defended by Chief Justice Marshall and Justice Story).

26. See, e.g., JAMES MADISON, *Speeches in the First Congress—Third Session, 1791. February 2—Bank of the United States*, in 6 THE WRITINGS OF JAMES MADISON 19, 27–34 (Gaillard Hunt ed., 1906) (defending the notion of implied powers).

27. Especially in *McCulloch*, 17 U.S. at 421.

28. See, e.g., STORY, *supra* note 14, at 109–15.

29. Writing for a unanimous Court in *United States v. Darby*, 312 U.S. 100, 124 (1941).

30. In this they only follow the lead of the Court itself, which seeks to preserve an area of state police power beyond the reach of Congress's commerce power. See, for example, Justice Thomas's *Lopez* concurrence. *United States v. Lopez*, 514 U.S. 549, 584–85 (1995) (Thomas, J., concurring).

four main aims the Court seeks to achieve in the commerce power area:

- (1) to remain true to received, established commerce power doctrine,³¹
- (2) to maintain a constitutional commitment to the related principles of enumerated powers and limited government,³²
- (3) to achieve and maintain a balance between state and federal power,³³ and
- (4) to avoid repudiating its post-New Deal (namely, 1937–1995) commerce decisions.³⁴

Any plan this complicated and conflicted surely must have a high degree of difficulty. And good intentions alone will not suffice when at least two simpler and easier alternative paths lie open to the Court. One is to drop the first and fourth of the above aims, embrace the second and third aims, and roll back the revolution of 1937³⁵ in order to return to the more restrictive view of the commerce power that prevailed in the late nineteenth and early twentieth centuries. Of the Justices in the *Lopez* and *Morrison* majorities, only Justice Thomas displays any inclination to thus turn back the clock³⁶ (despite protestations from the dissenters that this is precisely what the Court is, in fact, doing).³⁷ The rest lack both the stomachs and the minds for such a move.

31. The *Lopez* and *Morrison* Courts find the kernel of that doctrine in the notion that congressional power reaches the channels and instrumentalities of interstate commerce and activity that substantially affects interstate commerce. See *United States v. Morrison*, 529 U.S. 598, 609 (2000); *Lopez*, 514 U.S. at 559.

32. Early in the *Lopez* opinion, the Court says, “We start with first principles. The Constitution creates a Federal Government of enumerated powers.” *Lopez*, 514 U.S. at 552.

33. A “healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.” *Id.* (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)).

34. Even Justice Thomas would stop short of “totally rejecting our more recent Commerce Clause jurisprudence.” *Id.* at 585 (Thomas, J., concurring).

35. Justice Souter accuses the *Morrison* majority of doing something approaching that, saying, “Cases standing for the sufficiency of substantial effects are not overruled; cases overruled since 1937 are not quite revived.” *Morrison*, 529 U.S. at 654 (Souter, J., dissenting).

36. See *Morrison*, 529 U.S. at 627 (Thomas, J., concurring) (“[T]he very notion of a ‘substantial effects’ test under the Commerce Clause is inconsistent with the original understanding of Congress’ powers and with this Court’s early Commerce Clause cases.”); *Lopez*, 514 U.S. at 585 (Thomas, J., concurring).

37. Justice Souter analogizes the Court’s efforts in *Lopez* to the long-rejected doctrines of economic substantive due process. See *Lopez*, 514 U.S. at 605–09.

The second, opposite path is to instead drop the second and the third of the above aims, and many traditional notions of constitutional law along with them,³⁸ and follow the dissenters toward a broader, more politically demarcated commerce power, one that verges upon, if it does not achieve, a general federal police power.³⁹ In doing this, the Court might avoid the futility it experienced in its attempt to impose federalism-based limits on the creeping federal regulation pursuant to the commerce power of the activities of the states themselves.⁴⁰

The Court has declined to follow either of these two easier paths for commendable reasons. The aims it seeks to pursue are all proper aims, although the justifications it gives for what it does are unconvincing even to those who agree with the results⁴¹ (let alone to those who do not).⁴² My first task in this Article will be to explain what the Court has done in *Lopez* and *Morrison*; the second will be to offer suggestions as to how the result can be maintained while the justification is improved. For if that cannot be done, the Court will have placed itself in an uncomfortable trilemma where it will not go back (to pre-1937 doctrine), cannot go forward (and join the dissenters), and cannot satisfactorily justify the stand it has taken.

B. Not Back to the Future

When *Lopez* was decided in 1995, the reaction in both lay and legal circles was strong and largely negative. One prominent journalist, Linda Greenhouse, wrote, “[I]t is only a slight exaggeration to say that . . . the

38. In his *Lopez* concurrence, Justice Kennedy lists “separation of powers, checks and balances, judicial review, and federalism.” *Id.* at 575 (Kennedy, J., concurring).

39. This is a repeated concern of the *Lopez* and *Morrison* Courts. See *Morrison*, 529 U.S. at 608 n.3 (assailing Justice Souter’s dissent for the “remarkable theory that the commerce power is without judicially enforceable boundaries”); *Lopez*, 514 U.S. at 567 (accepting that the government’s arguments would “convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States”).

40. In *National League of Cities v. Usery*, 426 U.S. 833, 852 (1976), the Court voided an extension of the Fair Labor Standards Act, which had been broadened in coverage several times since its enactment in 1938, to cover most state and local employees. Although the Court had earlier, in *United States v. Darby*, 312 U.S. 100, 125–26 (1941), upheld the original 1938 Act as a valid exercise of Congress’s commerce power, the *Usery* Court felt that this extension impermissibly intruded upon traditional state functions and violated federalism norms recognized in the Tenth Amendment. *Usery*, 426 U.S. at 841–52. Nine years later, *Usery* was itself reversed in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 556–57 (1985), as the Court rejected the concerns of *Usery* or, at least, returned them to the political arena for resolution.

41. In an article written in reaction to *Lopez*, Donald Regan writes, “I am inclined to think the result in *Lopez* is correct, though it is not my main object to establish that. Even if the result is right, the opinion of the Court is unsatisfactory.” Regan, *supra* note 4, at 555.

42. See, e.g., *Morrison*, 529 U.S. at 646–47 (Souter, J., dissenting).

Court [is] a single vote shy of reinstalling the Articles of Confederation”⁴³ And legal academic Mark Tushnet asked if we were entering a constitutional moment (namely, a time of constitutional transformation, de jure or de facto, such as Reconstruction or the New Deal).⁴⁴ Many saw the case as a portent of major constitutional change, for good or for ill.

Given the sharp public reaction, the close 5–4 division on the Court, and the heated rhetoric of the *Lopez* and *Morrison* opinions themselves, it is surprising to discover upon actually reading the decisions on just how much the majority and the dissenters do, in fact, agree. They all adhere, most importantly, to the same basic three-part test of commerce power constitutionality,⁴⁵ and they accept the post-New Deal commerce power cases from which it derives. This flows, in turn, from their common recognition of our modern integrated national economy and the functional approach to commerce regulation that goes along with it. What they differ in is the larger context against which they see this test and, therefore, the limitations and qualifications they place upon it. But this disagreement should not be exaggerated into a desire by the majority to turn the clock back to the doctrines of those formalistic pre-1937 commerce decisions.⁴⁶

The *Lopez* and *Morrison* dissenters themselves do not, in fact, go this far in their critique of the majority. This is not to say that they raise no objections. Two important criticisms that the dissenters do make of the Court’s opinions in these cases are that they are overly formalistic in their reasoning and that they are inconsistent with the Court’s 1937–1995 run of commerce opinions, none of which struck down congressional legislation as beyond the scope of the commerce power.

Drawing upon *Swift & Co. v. United States*,⁴⁷ Justice Breyer describes how the cases look, “[a]s long as one views the commerce connection, not as a ‘technical legal conception,’ but as ‘a practical one.’”⁴⁸ And later, he says the majority’s approach in these cases “fails to heed this

43. Linda Greenhouse, *Focus on Federal Power*, N.Y. TIMES, May 24, 1995, at A1 (discussing *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995)).

44. See Mark Tushnet, *Living in a Constitutional Moment?: Lopez and Constitutional Theory*, 46 CASE W. RES. L. REV. 845, 845–46 (1995).

45. See *Morrison*, 529 U.S. at 608–09; *United States v. Lopez*, 514 U.S. 549, 558–59 (1995); *supra* text accompanying note 15.

46. Linda Greenhouse notwithstanding. See *supra* note 43 and accompanying text.

47. 196 U.S. 375, 398 (1905) (upholding a federal antitrust statute against a Commerce Clause challenge).

48. *Lopez*, 514 U.S. at 618–19 (Breyer, J., dissenting) (citing *Swift*, 196 U.S. at 398).

Court's earlier warning not to turn 'questions of the power of Congress' upon 'formula[s]' that would give 'controlling force to nomenclature . . . and foreclose consideration of the actual effects of the activity in question upon interstate commerce.'"⁴⁹ In a similar vein, Justice Souter in *Morrison* speaks, almost wistfully, of the "understanding [of the commerce power], free of categorical qualifications, that prevailed in the period after 1937 through *Lopez*."⁵⁰

Both Justices also often assert or imply that the Court's holdings and opinions in *Lopez* and *Morrison* are not consistent with the 1937–1995 commerce power cases. In *Lopez*, for example, Justice Breyer complains that "the majority's holding runs contrary to modern Supreme Court cases that have upheld congressional actions despite connections to interstate or foreign commerce that are less significant than the effect of school violence."⁵¹ And, in *Morrison*, Justice Souter asserts that "[t]he Act would have passed muster at any time between *Wickard* in 1942 and *Lopez* in 1995, a period in which the law enjoyed a stable understanding."⁵²

It will take the rest of this Article to fully answer these objections, but we can at least begin here. Of the two charges just discussed, the charge of formalism against the *Lopez* and *Morrison* Courts is the more readily dispelled. Let us start by looking at what the Court actually says in its opinions. In his survey of the history of Commerce Clause precedent in *Lopez*, Chief Justice Rehnquist marks the beginning of federal commerce power doctrine (as opposed to limits on state law due to the Commerce Clause) with the cases involving the early federal legislation based upon the commerce power, namely the Interstate Commerce Act⁵³ in 1887 and the Sherman Antitrust Act⁵⁴ in 1890.⁵⁵ He notes that some, but not all, of those ensuing cases placed formalistic limits on the federal power⁵⁶ and that the 1937–1995 cases largely eliminated those distinctions.⁵⁷ Now, if he were drawn to the formalisms of the 1887–1937 cases, the Chief Justice surely would have praised those cases and linked true commerce power doctrine to them. But he does quite the opposite. He

49. *Id.* at 627–28 (quoting *Wickard v. Filburn*, 317 U.S. 111, 120 (1942)) (first alteration in original).

50. *Morrison*, 529 U.S. at 641 (Souter, J., dissenting).

51. *Lopez*, 514 U.S. at 625 (Breyer, J., dissenting).

52. *Morrison*, 529 U.S. at 637 (Souter, J., dissenting).

53. Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887) (codified as amended at 15 U.S.C. §§ 1–7 (2000)).

54. Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1890) (codified as amended in scattered sections of 49 U.S.C.).

55. *Lopez*, 514 U.S. at 554.

56. *Id.* at 554–55.

57. *Id.* at 555–57.

speaks approvingly of the New Deal cases that recognize broader federal commerce power, saying that “the doctrinal change also reflected a view that earlier Commerce Clause cases artificially had constrained the authority of Congress to regulate interstate commerce.”⁵⁸

Recognition of modern economic realities and their constitutional consequences can also be found in Justice Kennedy’s concurrence in *Lopez*. He, too, surveys the history of commerce power precedent. Looking at the 1887–1937 period, he contrasts those cases that “draw content-based or subject-matter distinctions, thus defining by semantic or formalistic categories those activities that were commerce and those that were not”⁵⁹ with other decisions from the same era that utilized “a more sustainable and practical approach.”⁶⁰

Reviewing this history, Justice Kennedy draws “two lessons of relevance.”⁶¹ The first is “the imprecision of content-based boundaries used without more to define the limits of the Commerce Clause.”⁶² And the other is that “the Court as an institution and the legal system as a whole have an immense stake in the stability of our Commerce Clause jurisprudence as it has evolved to this point.”⁶³ These are hardly the words of formalists and reactionaries eager to upend modern commerce power doctrine and turn the clock back to the pre-New Deal era or even more to the Articles of Confederation.

C. A Government of Limited and Enumerated Powers

But if the Court in *Lopez* and *Morrison* is uninterested in reverting to the era of formalistic commerce power jurisprudence, so, too, is it unwilling to move forward to a brave new world of a general federal police power pursuant to the Commerce Clause. The reason why is simple and quite basic. Such a move would be contrary to the Framers’ fundamental constitutional design. This is made quite clear at the outset in *Lopez*, where, after tracing the procedural history of the case, the Court says, “We start with first principles. The Constitution creates a Federal Government of enumerated powers.”⁶⁴ In this, it does little more

58. *Id.* at 556.

59. *Id.* at 569 (Kennedy, J., concurring).

60. *Id.* at 571.

61. *Id.* at 574.

62. *Id.*

63. *Id.*

64. *Id.* at 552 (citing U.S. CONST. art. I, § 8).

than echo Marshall's basic assumption in *McCulloch* that "[t]his government is acknowledged by all, to be one of enumerated powers," to which he adds, "[T]he government of the Union, though limited in its powers, is supreme within its sphere of action."⁶⁵

The reason this point is crucial here is that the *Lopez* and *Morrison* dissents provide no real, legal limitation on the commerce power. And, as Madison asserted in a 1791 speech in the First Congress debating the nation's first major commerce power issue, the establishment of a national bank, "An interpretation that destroys the very characteristic of the Government cannot be just."⁶⁶

In *Lopez*, the Court says, "The Government's essential contention, *in fine*, is that we may determine here that § 922(q) is valid because possession of a firearm in a local school zone does indeed substantially affect interstate commerce."⁶⁷ It then goes on to worry, "Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity . . . that Congress is without power to regulate."⁶⁸ The Court's misgivings arise, then, not from doubts that the activity in question falls within the general parameters of the three-part commerce power test distilled from earlier cases, but rather whether that test ought to be carried to its logical extremes in its application.

The Court looks at what precedent, including *McCulloch*, teaches about enumerated powers⁶⁹ and answers that question in the negative, concluding that "[t]o uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. . . . This we are unwilling to do."⁷⁰

In replying to this line of argument, Justice Breyer denies that the government's (and the dissent's) view of the commerce power would erase the distinction between the local and the national, that it would allow federal regulation of marriage, divorce, or child custody, or that it would expand the commerce power.⁷¹ But, as the majority notes, he "is unable to identify any activity that the States may regulate but Congress may not."⁷²

By the time the Court next wrestles with this problem five years later in *Morrison*, the dissenters have a better reply to the majority's

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

66. JAMES MADISON, *supra* note 26, at 27.

67. *Lopez*, 514 U.S. at 563 (citation omitted).

68. *Id.* at 564.

69. *Id.* at 566–67.

70. *Id.* at 567–68.

71. *See id.* at 624 (Breyer, J., dissenting).

72. *Id.* at 564.

enumerated powers argument, one of confession and avoidance. Justice Souter there says, “In short, to suppose that enumerated powers must have limits is sensible; to maintain that there exist judicially identifiable areas of state regulation immune to the plenary congressional commerce power even though falling within the limits defined by the substantial effects test is to deny our constitutional history.”⁷³ He then goes on to object to the Court’s “reviving traditional state spheres of action as a consideration in commerce analysis.”⁷⁴

But if turnabout is fair play, he has no good objection to this move. For he himself is only recycling a move successfully used in *Garcia* to snuff out an earlier attempt by a Rehnquist-led Court to limit the use of the federal commerce power to regulate the states themselves. That gambit does not deny the existence of limitations on the commerce power, but insists instead that these limits are political, rather than legal or constitutional, in nature (and, so, more matters for Congress than for the courts).⁷⁵ And it is to these concerns raised by the *Garcia* gambit that we now turn.

D. *Garcia’s Ghost*

Sometimes the Court just muddles through, not having a clear doctrine in an area of constitutional law, but possessing the negative justification of avoiding the clear error that lies at both extremes. All other things being equal, that may be sufficient cause for the Court seeking the mean, doctrinally speaking. But all things are not equal here. Even though the Court will not go back to pre-1937 formalism and cannot go forward to recognize a general federal police, it also has good reason to fear standing still.

That good reason is *Garcia’s* ghost. For this is not the Court’s first retreat from formalism or its first battle over federalism. It is not even the first “death of federalism.”⁷⁶ Some of the participants in the current struggle are veterans, as the dissenters hint, of the Court’s most recent battle in this area, which occurred between *Usery*⁷⁷ in 1976, in which the Court attempts to set judicially enforceable federalism limits on congressional exercise of the commerce power on the states themselves, and *Garcia*

73. *United States v. Morrison*, 529 U.S. 598, 646 n.14 (2000) (Souter, J., dissenting).

74. *Id.* at 647.

75. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 547–55 (1985).

76. *See infra* Part V.A.

77. *Nat’l League of Cities v. Usery*, 426 U.S. 833 (1976).

nine years later, in which the Court terminates these efforts and leaves Congress to police itself.

These cases make much, positively and negatively, of the notion of traditional state functions as a line demarcating federalism-protected state exclusivity. The *Usery* Court, for example, holds “[t]hat insofar as the challenged amendments operate to directly displace the States’ freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Art. I, § 8, cl. 3.”⁷⁸

Garcia, in turn, mocks the very idea of judicially enforceable traditional state function guidelines and, after attacking their cogency from both historical and conceptual perspectives, concludes, “We therefore now reject, as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is ‘integral’ or ‘traditional.’”⁷⁹ Then, after summarizing the defects of this approach (“inconsistent results . . . because it is divorced from those principles [of democratic self-governance]”), it continues, “If there are to be limits on the Federal Government’s power to interfere with state functions—as undoubtedly there are—we must look elsewhere to find them.”⁸⁰ And after looking elsewhere, the Court concludes, “State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.”⁸¹

The *Garcia* Court’s line of argument is echoed by the *Morrison* dissenters as an implied threat should they gain one more vote and become a majority. For as we have already noted,⁸² Justice Souter does not reject the traditional notions of enumerated powers and limited government. He insists only that they lack judicially enforceable formal, not to say formalistic, standards. So failing this, he finds them subject only to political, procedural limitations. The ball is thus put back in the court of the *Lopez* and *Morrison* majorities, and the burden is on them to come up with what they have not adequately done in those opinions—identify some clear, justified, judicially enforceable restraints on congressional exercise of the commerce power and thus exorcise *Garcia*’s ghost. In the absence of such limits, Justice Souter and the other dissenters feel entitled to argue that, although political and procedural restraints on the commerce power may not be perfect, they are nevertheless the best

78. *Id.* at 852.

79. *Garcia*, 469 U.S. at 546–47.

80. *Id.* at 547.

81. *Id.* at 552.

82. *See supra* notes 73–74 and accompanying text.

option available for problem at hand (a “second best” solution).

An argument of this type is also offered in the academic discussion of this issue by Lawrence Lessig, who suggests that American judicial review is regulated by what he calls “the Frankfurter constraint,” which asserts “[t]hat a rule is an inferior rule if, in its application, it appears to be political, in the sense of appearing to allow extra-legal factors to control its application.”⁸³

Applying this notion in the commerce power context, Lessig believes that “[t]he question is simply who should draw the limits: Congress or the Court. . . . The Court would be best if it could construct tools that would limit Congress’s power without running afoul of the Frankfurter constraint.”⁸⁴ Unfortunately, he concludes that, “[i]n [his] view, the tools that Chief Justice Rehnquist has provided in *Lopez* will run afoul of the Frankfurter constraint.”⁸⁵

So it is a common concern with judicial policy-making that moves Souter, Lessig, and Frankfurter to rein in judicial review of the Commerce Clause. This concern may, as well, be seen as nothing more than an application in the context of the commerce power of standard justiciability political question limitations, which exclude from the federal courts a case in which there is “a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion.”⁸⁶

The objections raised by Souter, Lessig, and Frankfurter score strongly against the doctrine advanced by the Court in *Lopez* and *Morrison* (and, for that matter, in *Usery*), but they would fail against clear, discernable, enforceable, nonpolitical standards for the limitation of the commerce power. I have been promising just such a doctrine, with an historical pedigree running back to Hamilton and Marshall, no less, since the beginning of this Article.⁸⁷ The stage has been set to introduce the doctrine

83. Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 SUP. CT. REV. 125, 174. As Lessig there notes, Justice Frankfurter discusses this notion in the context of the Commerce Clause. See FELIX FRANKFURTER, *THE COMMERCE CLAUSE: UNDER MARSHALL, TANEY AND WAITE* 54 (1937) (discussing the need for restraints on “judicial policy-making” in constitutional interpretation by the Court in commerce cases).

84. Lessig, *supra* note 83, at 196.

85. *Id.*

86. *Powell v. McCormack*, 395 U.S. 486, 518 (1969) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

87. See *supra* text accompanying notes 12–13.

of incidental powers. I will now do so, first in a functional context and then in an historical and doctrinal context. Let the reader judge it according to the standards of *Garcia*'s ghost and the Frankfurter constraint.

Judge it also according to traditional standards of constitutional evaluation, such as those in Philip Bobbitt's typology of constitutional argument—history, text, structure, prudence, and doctrine.⁸⁸ Bobbitt defines these traditional forms of constitutional argument in familiar ways. Historical argument, he says, “marshals the intent of the draftsmen of the Constitution and the people who adopted the Constitution.”⁸⁹ In contrast, textual argument “is drawn from a consideration of the present sense of the words of the provision.”⁹⁰ Next, he says, “Structural arguments are claims that a particular principle or practical result is implicit in the structures of government and the relationships that are created by the Constitution among citizens and governments.”⁹¹ Prudential argument looks not to the merits of a case, but “instead advanc[es] particular doctrines according to the practical wisdom of using the courts in a particular way.”⁹² And lastly, doctrinal argument “asserts principles derived from precedent or from judicial or academic commentary on precedent.”⁹³ I choose these typologies precisely because they are not novel or controversial (the reader is free to choose her own, if she wishes).

What purpose do these typologies serve? They act as a sort of constitutional lingua franca that unites, at least in speech forms, those constitutional practitioners otherwise divided over case results. They do this by roughly indicating the conventional standards to be met by any position claiming constitutional validity. As a result, these typologies provide both the clubs that critics use to attack opposing positions as well as the shields that defenders employ to protect favored doctrines and results. Yes, problems can and do arise when different typologies point toward different case results,⁹⁴ but fortunately, this difficulty does not arise with the doctrine of incidental powers propounded and defended here because it is the favored doctrine under all five typologies.

88. See PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 7 (1982) (setting out his five types of constitutional argument).

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. Bobbitt has written a book addressing this problem, too. See generally PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* (1991).

III. THE CLOTHES

A. *One Size Does Not Fit All*

Perhaps the simplest and most direct way of introducing the doctrine of incidental powers here is by asking the functional question of what case results a solution to the *Lopez-Morrison* trilemma would generate and then showing how incidental powers fits the bill. As noted previously,⁹⁵ such a solution must satisfy four important aims—consistency with established commerce power doctrine, fidelity to the principles of enumerated powers and limited government, maintenance of federalism, and adherence to post-New Deal commerce power precedent. In terms of commerce precedent, these aims require affirmation of the foundational Marshall Court decisions, such as *McCulloch* and *Gibbons*, as well as post-1937 cases including *Lopez* and *Morrison*, but they do not mandate defense of formalist decisions of the 1887–1937 period. In fact, these aims impliedly reject those decisions as well as the views contained in the *Lopez* and *Morrison* dissents.

Trying to generate these results using the three-part commerce power test nominally accepted by everyone on the Court, however, is precisely what got the Court into this trilemma in the first place. For there is one persistent problem encountered by doctrinal tinkers on (and off) the Court: tweaking the test in one place just causes difficulties in another place.

Let me illustrate this unfortunate fact using what Justice Souter in *Morrison* calls “two conceptions of the commerce power, plenary and categorically limited, [which] are in fact old rivals.”⁹⁶ Souter, along with the other *Lopez-Morrison* dissenters, defends the plenary approach to the three-part commerce power test,⁹⁷ one that he identifies with post-New Deal cases like *United States v. Darby*.⁹⁸ He contrasts this conception with the purpose-based version of the test employed by the Court from which he dissents. To leave no doubt in the mind of the reader as to which he favors, Justice Souter charges the Court’s approach

95. See *supra* notes 31–34 and accompanying text.

96. *United States v. Morrison*, 529 U.S. 598, 640 (2000).

97. In other words, one placing no formal limits on the scope of any of the three parts of the test.

98. See *Morrison*, 529 U.S. at 640 (citing *United States v. Darby*, 312 U.S. 100 (1941) (upholding the constitutionality of the Fair Labor Standards Act of 1938)).

with guilt by association with *Hammer v. Dagenhart*,⁹⁹ saying, “[T]he enquiry into commercial purpose, first intimated by the *Lopez* concurrence, is cousin to the intent-based analysis employed in *Hammer*, but rejected for Commerce Clause purposes in *Heart of Atlanta* and *Darby*.”¹⁰⁰

In a few short words, Justice Souter appears to have inflicted several grievous wounds on the doctrine of the *Lopez-Morrison* Courts. For not only has he placed those cases in a league with one of the least appealing of the old formalistic commerce decisions, he has joined himself with important post-New Deal precedent both sides wish to vindicate. And worse yet for the majority, he has done this on the basis of the old distinction between plenary and categorically limited conceptions of the commerce power.

In picking *Hammer* as the one old, formalistic holding with which to brand the *Lopez-Morrison* Courts, Souter has chosen shrewdly. For, among those cases, *Hammer* is the most notorious, the one with the best claim to the unsought title of “the *Lochner*”¹⁰¹ of commerce power cases.” *Lochner*, of course, has been called “one of the most condemned cases in United States history . . . used to symbolize judicial dereliction and abuse.”¹⁰² For this reason, it has been relegated to the lowest level of critical constitutional esteem, along with cases like *Dred Scott v. Sandford*¹⁰³ and *Plessy v. Ferguson*.¹⁰⁴

Lest you think such a comparison hyperbolic, consider some striking similarities between *Lochner* and *Hammer*:

- (1) Both cases void labor statutes enacted to protect exploited workers (adult bakers in *Lochner* and children in *Hammer*) from the superior power of employers.
- (2) Both are classic examples of formalism in the service of conservative judicial activism.

99. 247 U.S. 251 (1918) (holding a federal child labor act to be beyond Congress’s commerce power).

100. *Morrison*, 529 U.S. at 643 (citations omitted).

101. *Lochner v. New York*, 198 U.S. 45, 64 (1905) (holding New York’s statutory limit on maximum hours worked by bakers unconstitutional on substantive due process grounds).

102. BERNARD H. SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* 23 (1980).

103. 60 U.S. (19 How.) 393, 454 (1857) (denying citizenship rights to African-Americans on substantive due process grounds). For the pairing of *Lochner* and *Dred Scott*, see PAUL KENS, *JUDICIAL POWER AND REFORM POLITICS: THE ANATOMY OF LOCHNER V. NEW YORK 2* (1990).

104. 163 U.S. 537, 552 (1896) (upholding state-ordered racial segregation in railway travel against an equal protection challenge). The pairing of *Lochner* and *Plessy* occurs in the joint opinion by Justices O’Connor, Kennedy, and Souter in *Planned Parenthood v. Casey*, 505 U.S. 833, 862–63 (1992).

- (3) Both cases feature strong dissents from Justice Holmes in favor of the right of legislative majorities to enact their will, free of undue judicial scrutiny.¹⁰⁵
- (4) Both holdings were overruled in the wake of the Court's "revolution of 1937."¹⁰⁶

Justice Souter's example seems well chosen to drive home his argument and skewer the reasoning of the *Lopez-Morrison* Courts.

But Justice Souter's argument is not as ironclad as it first appears. Neither is his choice of illustrative cases as helpful to his side as he thinks. There is, unseen by both sides here, a functional doctrinal alternative that avoids both his criticisms of the *Lopez-Morrison* approach and the reply objection that the plenary approach to the three-part commerce power test "would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States."¹⁰⁷

The functional shortcomings of the approaches of both sides in the commerce power debate arise from a trait they share—they both take a categorical approach to the three-part test, albeit in different ways (for the plenary conception of the test is a categorical view, too). Neither notices that the doctrinal difficulties encountered in applying the test do not arise with all the possible permutations of limits and parts. No, they have occurred only with purpose-based or other limitations of the channels or instrumentalities prongs of the test (as in *Hammer*) and with a plenary approach to the substantial effects prong (as with the *Lopez-Morrison* dissenters).

In contrast, desired case results occur with a plenary view of the channels and instrumentalities parts of the test (as in *Darby* and *Heart of Atlanta*) and with a purpose limitation on the substantial effects prong of the test (as in *Lopez* and *Morrison*). Functional considerations, then, suggest a version of the three-part commerce power test in which the channels and instrumentalities prongs are plenary in scope, but the substantial effects prong is purpose-limited.

105. See *Hammer v. Dagenhart*, 247 U.S. 251, 277 (1918); *Lochner*, 198 U.S. at 74.

106. See *United States v. Darby*, 312 U.S. 100, 116–17 (1941) (overruling *Hammer*); *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 398–99 (1937) (overruling *Lochner*).

107. *United States v. Lopez*, 514 U.S. 549, 567 (1995).

B. Incidental Powers (A Telic Relation)

A functional analysis of commerce power case results cannot be the last word, though. For whatever functional advantages the noncategorical approach to the commerce power test offers might be outweighed when other factors are considered, sending my argument from the frying pan to the fire by trading the conflicts of the *Lopez-Morrison* trilemma for a theory that apparently violates the basic legal and constitutional demands of neutral principles and integrity that underlie *Garcia*'s ghost and the Frankfurter constraint. An approach that applies different interpretive limits to different parts of the same constitutional test looks to be the very antithesis of generality, neutrality, and consistency.

At least since Herbert Wechsler's famous contribution to the constitutional controversy raised by the Court's decision in *Brown v. Board of Education*,¹⁰⁸ the Court's critics have judged its decisions and doctrine according to the "special duty of the courts to judge by neutral principles."¹⁰⁹ Wechsler explains this duty, saying, "[T]he main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved."¹¹⁰ To this, Robert Bork would add additional requirements. He states, "We have been talking about neutrality in the *application* of principles. If judges are to avoid imposing their own values upon the rest of us, however, they must be neutral as well in the *definition* and the *derivation* of principles."¹¹¹

More recently, Ronald Dworkin has argued against this type of ad hoc approach to legislations and constitutions, asserting that "we say that a state that adopts these internal compromises is acting in an unprincipled way."¹¹² He calls these provisions "checkerboard laws"¹¹³ and contends that they violate legal integrity in the way some discriminatory statutes violate the Equal Protection Clause of the Fourteenth Amendment.¹¹⁴

These strictures raise questions concerning the functionally crafted version of the three-part commerce power test that I have just introduced, for it is *prima facie* nonneutral and admittedly compromises

108. 347 U.S. 483, 495 (1954) (holding public school racial segregation violative of the Equal Protection Clause of the Fourteenth Amendment).

109. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 16 (1959).

110. *Id.* at 15.

111. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 7 (1971).

112. RONALD DWORKIN, *LAW'S EMPIRE* 183 (1986).

113. *Id.* at 179.

114. *Id.* at 184–85.

conflicting considerations (plenary power and purpose limitation) for purely practical reasons. If I am to do more than offer the Emersonian defense that “[a] foolish consistency is the hobgoblin of little minds,”¹¹⁵ and in order to show that it is nevertheless an improvement on the doctrine offered by the Court in *Lopez* and *Morrison*, I need a substantial nonfunctional justification (such as might satisfy Bobbitt’s five typologies of constitutional argument,¹¹⁶ for example). Fortunately, just such justification is provided by the constitutional doctrine of incidental powers, the Necessary and Proper Clause,¹¹⁷ and traditional precedent and doctrine interpreting them.

The doctrine of incidental powers is the complement to the doctrine of enumerated powers embodied in the Federal Constitution.¹¹⁸ For if the federal government is strictly limited to those express powers (as it was, in theory, under the Articles of Confederation),¹¹⁹ as the nation found out under the Articles, the national government will be without effective power. The doctrine of incidental powers remedies this defect by also giving the general government the related auxiliary powers needed to carry out its enumerated powers.

At one time, the doctrine of incidental powers was hornbook law, and I will explain it from one of the great hornbooks of American constitutional law.¹²⁰ But over the years it has been largely forgotten, and now it is unknown even to those who have great need for it. One might not expect adherents of the plenary power view of the commerce power to bring up a doctrine that treats at least some federal power here as less than complete, but it is ignored as well by the *Lopez-Morrison* Courts, who could use it to better justify their holdings and doctrine and by some conservatives writing in the area.¹²¹

In his constitutional commentaries, Justice Story introduces the

115. RALPH WALDO EMERSON, *Self-Reliance*, in 2 THE COLLECTED WORKS OF RALPH WALDO EMERSON 25, 33 (1979).

116. See *supra* notes 88–94 and accompanying text.

117. U.S. CONST. art. I, § 8, cl. 18.

118. See *United States v. Lopez*, 514 U.S. 549, 552 (1995) (“We start with first principles. The Constitution creates a Federal Government of enumerated powers.”).

119. “Each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.” ARTICLES OF CONFEDERATION art. II.

120. See STORY, *supra* note 14, at 109–26.

121. See, e.g., JOHN T. NOONAN, JR., NARROWING THE NATION’S POWER: THE SUPREME COURT SIDES WITH THE STATES 120–37 (2002) (attacking the Court’s *Lopez-Morrison* decisions specifically and its federalism doctrine generally).

doctrine of incidental powers in order to illuminate the meaning of the Necessary and Proper Clause.¹²² He says that the clause “is only declaratory of a truth, which would have resulted by necessary and unavoidable implication from the very act of establishing the national government, and investing it with certain powers.”¹²³ He asks rhetorically of the enumerated powers, “What is a power, but the ability or faculty of doing a thing? What is the ability to do a thing, but the power of employing the *means* necessary to its execution?”¹²⁴ The clause is declaratory because the power is one inherent in the nature of government.¹²⁵

Just as the definition of commerce is often central to cases involving the channels and instrumentalities prongs of the three-part commerce power test, the definition and degree of necessity is often the central issue in incidental powers and Necessary and Proper Clause cases. Following Hamilton and Marshall again, Story rejects the view “that the constitution allows only the means, which are *necessary*; not those, which are merely *convenient* for effecting the enumerated powers.”¹²⁶ Instead, he believes, “‘necessary’ often means no more than *needful, requisite, incidental, useful, or conducive to*.”¹²⁷ The upshot of this doctrine, according to Story, is that “congress shall have all the incidental and instrumental powers, necessary and proper to carry into execution all the express powers.”¹²⁸

The application of the doctrine of incidental powers to the three-part commerce power test thus provides a principled explanation for different treatment of the substantial effects prong from the channels and instrumentalities prongs. The channels and instrumentalities parts of the three-part commerce power test concern interstate commerce itself and, so, fall within the plenary, enumerated Commerce Clause. Substantial effects, in contrast, by definition are not interstate commerce themselves, but rather activities that only affect interstate commerce (they even need not be commercial in character). They can fall within the commerce power by virtue of the doctrine of incidental powers if their regulation is

122. Congress’s power is “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” U.S. CONST. art. I, § 8, cl. 18.

123. STORY, *supra* note 14, at 109.

124. *Id.*

125. “In truth, the constitutional operation of the government would be precisely the same, if the clause were obliterated, as if it were repeated in every article.” *Id.* at 110. As we shall see below, in these arguments Story’s points paraphrase, where they do not actually quote, arguments made by Hamilton and Madison in *The Federalist* as well as Marshall’s opinion in *McCulloch*.

126. *Id.* at 114.

127. *Id.* at 118.

128. *Id.* at 113.

needful (i.e., convenient) to the enforcement of the Commerce Clause proper. The different, purpose-limited scope of the substantial effects prong, then, is not merely permissible, but is, in fact, required by the telic nature of its enabling power.

Application of the doctrine of incidental powers to the cases discussed above by Justice Souter serves not merely to illustrate the doctrine in a contemporary context; it also acts to undermine his attack on the *Lopez-Morrison* cases. In fact, it provides those case results with a sounder justification than they originally received from the Court. Recall that Souter seeks to identify *United States v. Darby* with the plenary approach to the commerce power he propounds and also to link the purpose-limited reasoning in the disfavored *Hammer* decision with the *Lopez-Morrison* cases from which he dissents.¹²⁹

But as David Engdahl has noted, *Darby* is not a plenary commerce power case. It is, instead, a twentieth century paradigm of the classic doctrine of incidental powers just described.¹³⁰ Yes, *Darby* does overrule *Hammer* and vindicate federal power to regulate labor standards pursuant to the federal commerce power. But the case is not a simple replacement of the purpose-limited view with the plenary version of that power. As Engdahl points out, there are two quite different parts of the opinion because there are two different issues raised in the case.¹³¹ Justice Stone, writing for an unanimous Court, sets out the issues in this way:

first, whether Congress has constitutional power to prohibit the shipment in interstate commerce of lumber manufactured by employees whose wages are less than a prescribed minimum or whose weekly hours of labor at that wage are greater than a prescribed maximum, and, *second*, whether it has the power to prohibit the employment of workmen in the production of goods “for interstate commerce” at other than prescribed wages and hours.¹³²

On the first question, the Court invokes the plenary congressional power over interstate commerce,¹³³ denying a purpose-limitation, saying, “The

129. See *supra* notes 96–106 and accompanying text.

130. See David E. Engdahl, *The Necessary and Proper Clause as an Intrinsic Restraint on Federal Lawmaking Power*, 22 HARV. J.L. & PUB. POL’Y 107, 110–11 (1998) (applying Marshall’s doctrine of implied powers to *Darby*).

131. See *id.* at 110 (noting that in addition to upholding the part of the Fair Labor Standards Act dealing with shipping prohibitions on plenary interstate commerce power grounds, “[t]he Court also upheld, on quite different grounds and in a separate part of the opinion, the wage and hour terms of the Act”).

132. *United States v. Darby*, 312 U.S. 100, 108 (1941).

133. “The power of Congress over interstate commerce ‘is complete in itself, may

motive and purpose of a regulation of interstate commerce 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.”¹³⁴

But this is only the first question, that involving regulation of interstate commerce itself (a subject matter within Congress’s enumerated powers). When it comes to the second question, the one dealing with activity that is not in interstate commerce, but which only affects interstate commerce, the Court takes a different approach. Here “the question [is] whether the employment . . . is so related to the commerce and so affects it as to be within the reach of the power of Congress to regulate it.”¹³⁵ Citing our *McCulloch* headnote as authority, the Court states the following:

The power of Congress over interstate commerce . . . 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 means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce.¹³⁶

Thus, pace Justice Souter, *Darby* stands not for the rejection of the purpose-limited approach to the federal commerce power and the victory of its plenary competitor. No, instead it stands for the more nuanced approach of the traditional doctrine of incidental powers, which, applied to the three-part commerce power test here, gives a plenary reading of the channels and instrumentalities prongs of the test while purpose-limiting only the substantial effects part. *Hammer* is criticized and overruled, not because it uses a purpose limitation, but because it incorrectly employs it in the wrong context (*Hammer* is taken up pursuant to the first question in *Darby*).¹³⁷

The reversal of his *Darby* analysis also undercuts Justice Souter’s critique of, and worse yet from his perspective, offers a better rationale for, the *Lopez-Morrison* holdings,¹³⁸ one that justifies a purpose-limited overruling of the substantial effects-based statutes in question in *Lopez* and *Morrison*, while leaving the earlier post-New Deal commerce power decisions untouched. To examine the relation (namely, the degree of necessity) called for by the doctrine of incidental powers, we next turn to

be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution.” *Id.* at 114 (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824)).

134. *Id.* at 115.

135. *Id.* at 117.

136. *Id.* at 118–19 (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819)).

137. *See id.* at 115–17.

138. For neither of these utilizes an incidental powers argument to reach its holding, although they should. *See Engdahl, supra* note 130, at 115–17 (critiquing *Lopez* along these lines).

a discussion of some relevant history and precedent pertaining to the Necessary and Proper Clause.¹³⁹

IV. THE NECESSARY AND PROPER CLAUSE

A. *Hamilton and the Bank*

If the doctrine of incidental powers has a father, he is Alexander Hamilton, who gives an incidental powers defense of the Necessary and Proper Clause in *The Federalist*¹⁴⁰ and also presents the doctrine full-blown in his *Opinion on the Constitutionality of an Act to Establish a Bank*¹⁴¹ to President Washington. In the constitutional ratification period in the late 1780s, the Necessary and Proper Clause, because of its seemingly vague terms and broad sweep, was a lightning rod for Antifederalist criticism. Consider some representative attacks from the pseudonymous debate of the fall of 1787. An Old Whig complains of the “*undefined, unbounded and immense power* which is comprised in the . . . clause.”¹⁴² Centinel worries that, combined with the Supremacy Clause, it would be used to “*controul and abrogate any and every of the laws of the state governments, on the allegation that they interfere with the execution of any of their powers.*”¹⁴³ And Brutus is concerned that Congress might use the power deriving from this clause “*as entirely to annihilate all the state governments, and reduce the country to one single government.*”¹⁴⁴

It is in part to allay these fears and refute this parade of horrors that Hamilton and other Federalists take up pen. Recognizing that the Necessary and Proper Clause and the Supremacy Clause “*have been the sources of much virulent invective and petulant declamation against the*

139. This will not be a general history or analytic discussion of the meaning of the Necessary and Proper Clause. Others have already done that. See, e.g., Randy E. Barnett, *Necessary and Proper*, 44 UCLA L. REV. 745, 786–93 (1997) (examining the role of the Necessary and Proper Clause in limiting Congress to carrying out its enumerated powers); J. Randy Beck, *The New Jurisprudence of the Necessary and Proper Clause*, 2002 U. ILL. L. REV. 581 (analyzing the Court’s recent federalism decisions from the perspective of the Necessary and Proper Clause).

140. THE FEDERALIST NO. 33 (Alexander Hamilton).

141. HAMILTON, *supra* note 25.

142. *An Old Whig, No. 2*, in 3 THE FOUNDERS’ CONSTITUTION 239, 239 (Philip B. Kurland & Ralph Lerner eds., 1987).

143. *Centinel, No. 5*, in 3 THE FOUNDERS’ CONSTITUTION, *supra* note 142, at 239, 239.

144. *Brutus, No. 1*, in 3 THE FOUNDERS’ CONSTITUTION, *supra* note 142, at 240, 240.

proposed constitution,”¹⁴⁵ Hamilton seeks to reassure ratifiers by refuting these dramatic charges. He counters that these two clauses “are only declaratory of a truth, which would have resulted by necessary and unavoidable implication from the very act of constituting a Federal Government, and vesting it with certain specified powers.”¹⁴⁶ He then asks rhetorically, “What is a power, but the ability or faculty of doing a thing? What is the ability to do a thing but the power of employing the *means* necessary to its execution?”¹⁴⁷ He would feign wonder that the Antifederalists are discomfited in the first place.

Although he would modify his view later, Madison at the time joins Hamilton in defense of the Necessary and Proper Clause, asserting that “[w]ithout the *substance* of this power, the whole Constitution would be a dead letter.”¹⁴⁸ He proceeds next to defend the form of the power by showing its superiority to other methods—the express power wording of the Articles of Confederation, positive enumeration of all powers, negative enumeration of prohibited powers, and silence on the subject.¹⁴⁹ These assurances by Hamilton and Madison may have been sufficient for ratification purposes, but they do not clearly specify the sweep of the clause.

This problem and its solution come into clearer focus during the debate over the establishment of a national bank in 1791. In this debate, Madison joins Jefferson in what a few years earlier would have been called an Antifederalist view of the issue. As was his wont, President Washington solicits the opinions of his cabinet on the matter and Hamilton responds with his *Opinion on the Constitutionality of an Act to Establish a Bank*.¹⁵⁰

Hamilton must here respond to Jefferson’s argument that “[t]he second general phrase is ‘to make all laws *necessary* and proper for carrying into execution the enumerated powers.’ But they can all be carried into execution without a bank. A bank therefore is not *necessary*, and consequently not authorized by this phrase.”¹⁵¹ He must also find an answer to Jefferson’s assertion that “the constitution allows only the means which are ‘necessary’ not those which are merely ‘convenient’ for effecting the enumerated powers.”¹⁵² In the same month, Madison, then in Congress, argues against the bill, saying, “The essential

145. THE FEDERALIST NO. 33, at 204 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

146. *Id.*

147. *Id.* (emphasis in original).

148. THE FEDERALIST NO. 44, at 303 (James Madison) (Jacob E. Cooke ed., 1961) (emphasis in original).

149. *Id.* at 303–05.

150. HAMILTON, *supra* note 25, at 63–134.

151. Thomas Jefferson, *Opinion on the Constitutionality of the Bill for Establishing a National Bank*, in 3 THE FOUNDERS’ CONSTITUTION, *supra* note 142, at 245, 246.

152. *Id.*

characteristic of the Government, as composed of limited and enumerated powers, would be destroyed, if, instead of direct and incidental means, any means could be used, which . . . might be conducive to the successful conducting of finances.”¹⁵³

In his *Opinion*, Hamilton sets the doctrine of incidental powers and the nature and scope of the Necessary and Proper Clause so clearly, authoritatively, and one might even say, canonically that later notable discussions (for example, by Marshall in *McCulloch* and Story in his *Commentaries*) are but restatements and glosses thereon. He starts with basic premises by declaring:

[T]his *general principle* is *inherent* in the very *definition* of *Government* . . . that every power vested in a Government is in its nature *sovereign*, and includes by *force* of the *term*, a right to employ all the *means* requisite, and fairly *applicable* to the attainment of the *ends* of such power.”¹⁵⁴

One upshot of this principle is that “there are implied, as well as express powers, and that the former are as effectually delegated as the latter.”¹⁵⁵

Hamilton counters Jefferson’s definition of “necessary” in the Necessary and Proper Clause by pointing out that “*necessary* often means no more than *needful, requisite, incidental, useful, or conducive to*.”¹⁵⁶ To define the word narrowly, as Jefferson does, “would be to give it the same force as if the word *absolutely* or *indispensibly* had been prefixed to it.”¹⁵⁷ This does not mean that the power is without limit. “For no government has a right to do *merely what it pleases*.”¹⁵⁸ If that is so, what are the limits of this doctrine and clause and how are they determined? Hamilton answers, “It leaves therefore a criterion of what is constitutional, and of what is not so. This criterion is the *end* to which the measure relates as a *mean*.”¹⁵⁹

B. *The McCulloch Model (Three, Not Two)*

There will be no general discussion of *McCulloch* here because, in truth, it does little new but enter the doctrine of Hamilton’s *Opinion* into constitutional case law. Instead, I seek only to make two points, two

153. JAMES MADISON, *supra* note 26, at 30.

154. ALEXANDER HAMILTON, *supra* note 25, at 98.

155. *Id.* at 100.

156. *Id.* at 102.

157. *Id.* at 103.

158. *Id.*

159. *Id.* at 107.

crucial points, about the role of *McCulloch* in commerce power doctrine and history. The first is that it is often left out of this doctrine and history altogether, with distorting effects resulting. The second is that, when it is considered, it is usually misinterpreted in a crucial way.

All too often, writers on the commerce power, on and off the bench, begin their histories five years too late, with *Gibbons* from 1824, rather than with *McCulloch* from 1819. The problem with this, beyond mere obsessiveness, is that *Gibbons* is, in modern analytical terms, a channels and instrumentalities case. Because it is a channels and instrumentalities case, it is concerned with the meaning of commerce in general and whether navigation is commerce, the Court concluding that “‘commerce,’ as the word is used in the constitution, comprehends navigation.”¹⁶⁰ With *Gibbons* as a starting point, there is a natural tendency to overlook and forget the doctrine of incidental powers and the traditional meaning of the Necessary and Proper Clause.

This is what Chief Justice Rehnquist unfortunately does in his discussion of commerce power doctrine and history in *Lopez*.¹⁶¹ From this he is led to a categorical approach to the commerce power. This leaves him with a Hobson’s choice—either adopt the plenary view of the dissenters and virtually cede Congress a general police power or else adopt a purpose-based limitation of the commerce power and risk the fate of *Hammer*, the *Lochner* of commerce power cases. He is lucky that *Lopez* and, for that matter, *Morrison* are substantial effects cases, so that his mistake affects only the rationales, but not the results, of those cases.

So, when the Chief Justice introduces the economic activity limitation¹⁶² to the three-part commerce power test, he fails to restrict its application to the substantial effects prong only, perhaps because, having overlooked the notion of incidental powers, he lacks a clear rationale for doing so. This has at least two bad consequences. One is that, as a result, he cannot say why Congress does have the power to regulate noneconomic

160. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 190 (1824).

161. He starts his discussion by saying, “The Court, through Chief Justice Marshall, first defined the nature of Congress’ commerce power in *Gibbons v. Ogden*.” *United States v. Lopez*, 514 U.S. 549, 553 (1995) (citations omitted). This is not quite true. What Marshall does in the quotation from *Gibbons* that follows this statement is to define commerce itself (after all, the issue in *Gibbons*), not the broader commerce power, which also includes Congress’s incidental power as auxiliary to its enumerated power under the Commerce Clause proper.

The Chief Justice is by no means alone in this misstep. Notable commentators also make the same move. Donald Regan, for example says, “[O]ur Commerce Clause jurisprudence began with *Gibbons v. Ogden*, and *Gibbons* is commonly read as a prescient anticipation of the essentially unlimited commerce power we now recognize.” Regan, *supra* note 4, at 573 (footnote omitted).

162. “Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.” *Lopez*, 514 U.S. at 560.

activity involving the channels and instrumentalities of interstate commerce. He cannot say why because Congress, in fact, does, contrary to the implication of his limitation, indeed have the power to regulate noneconomic activity in the channels and instrumentalities of interstate commerce, as the Court in *Morrison* seems to concede.

The Violence Against Women Act of 1994, under scrutiny in that case, itself contains such a provision. The Court there remarks that “[s]ection 40221(a) of the Act creates a federal criminal remedy to punish ‘interstate crimes of abuse including crimes committed against spouses or intimate partners . . . who cross State lines to continue the abuse.’”¹⁶³ It goes on to note with apparent approval that “[t]he Courts of Appeals have uniformly upheld this criminal sanction as an appropriate exercise of Congress’ Commerce Clause authority, reasoning that ‘[t]he provision properly falls within the first of *Lopez*’s categories as it regulates the use of channels of interstate commerce.’”¹⁶⁴

But how can the place of occurrence affect or determine the economic or noneconomic nature of the underlying act itself, the factor made pivotal by the Court in *Lopez*? Plainly, it cannot. But how then can whether or not the abuse occurs in the channels and instrumentalities of interstate commerce determine the constitutional power of Congress to criminalize it? Yet I agree with both views of the Court here: the constitutionality of section 40221(a) of the Act and the unconstitutionality of the civil remedy, 42 U.S.C. § 13981.

The Chief Justice does not have a good rationale for these discordant intuitions because the *Gibbons* family of cases cannot provide him with one.¹⁶⁵ But *McCulloch* and its progeny, in contrast, through the doctrine of incidental powers and the Necessary and Proper clause, can explain why these differing results are called for.

The initial question before the Court in *McCulloch* is, “[H]as Congress power to incorporate a bank?”¹⁶⁶ Because there clearly is no such

163. *United States v. Morrison*, 529 U.S. 598, 613 n.5 (2000) (quoting S. REP. NO. 103-138, at 43 (1993)).

164. *Id.* at 614 n.5 (quoting *United States v. Lankford*, 196 F.3d 563, 571–72 (5th Cir. 1999)) (alterations in original).

165. This is why no one wins the debate in *Lopez* between Justices Thomas and Breyer over the meaning and significance of *Gibbons*—that case is largely irrelevant to the central issues in *Lopez*. See *Lopez*, 514 U.S. at 593 (Thomas, J., concurring); *id.* at 630 (Breyer, J., dissenting).

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

express congressional power,¹⁶⁷ the question is, then, whether this power falls within its implied or incidental powers, for “a government, entrusted with such ample powers . . . must also be entrusted with ample means for their execution.”¹⁶⁸ Reviving Jefferson’s earlier argument, Maryland argues that Congress is limited to means “such as are indispensable, and without which the power would be nugatory.”¹⁶⁹ And echoing Hamilton’s reply to Jefferson, Marshall asserts that the word “necessary” “frequently imports no more than that one thing is convenient, or useful, or essential to another.”¹⁷⁰ Ultimately, Marshall delivers the statement that is our headnote,¹⁷¹ summarizing the means-ends requirement of incidental powers.

Now, that may be enough to resolve the issue before the Court, but it is not enough to clearly resolve the question of how close a means-ends relation is required. And that brings me to my second *McCulloch*-related point. Judges and commentators too often assume a false dichotomy relating to necessity and *McCulloch*—if the absolutely necessary definition proffered by Maryland is to be rejected, then almost anything goes,¹⁷² as might pass a rational basis test. So, for example, in *Lopez*, after rehearsing relevant commerce power doctrine, Justice Breyer says, “Applying these principles to the case at hand, we must ask whether Congress could have had a *rational basis* for finding a significant (or substantial) connection between gun-related school violence and interstate commerce.”¹⁷³ So too, in *Morrison*, after quoting *Darby* on the Necessary and Proper Clause,¹⁷⁴ Justice Souter says, “Accordingly, for significant periods of our history, the Court has defined the commerce power as plenary, unsusceptible to categorical exclusions, and this was the view expressed throughout the latter part of the 20th century in the substantial effects test.”¹⁷⁵

167. See *id.* at 406 (“Among the enumerated powers, we do not find that of establishing a bank or creating a corporation.”).

168. *Id.* at 408.

169. *Id.* at 413.

170. *Id.*

171. *Id.* at 421.

172. And so to mock this view of the Commerce Clause, Judge Kozinski referred to it as the “Hey, you-can-do-whatever-you-feel-like Clause.” Alex Kozinski, *Introduction to Volume Nineteen*, 19 HARV J.L. & PUB. POL’Y 1, 5 (1995).

173. *United States v. Lopez*, 514 U.S. 549, 618 (1995) (Breyer, J., dissenting).

174. See *United States v. Morrison*, 529 U.S. 598, 640 (2000) (Souter, J., dissenting).

The power of Congress . . . 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 means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce.

Id. (quoting *United States v. Darby*, 312 U.S. 100, 118 (1941)).

175. *Id.*

When I presented an earlier version of this Article to law professors, one strong reaction of theirs was that Marshall shared this view too, that he never met an assertion or expansion of federal power he did not like. But that position is not consistent with Marshall's words in *McCulloch*. Textually, the best indication of this is the pretext language in *McCulloch* itself:

[S]hould Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land.¹⁷⁶

Those who believe that Marshall in *McCulloch* takes a rational basis view of the Necessary and Proper Clause do not know quite what to make of this statement because it does not fit in with their theory of the case and the clause.¹⁷⁷ What they should take from it is that the doctrine of incidental powers and the Necessary and Proper Clause must have some teeth.

And if one textual bit is not enough for them, the controversy arising out of the *McCulloch* decision provides yet more evidence. Not surprisingly, Marshall's decision provoked criticism from states' rights adherents who opposed a broad reading of federal power. The most articulate and influential critics resided in his home state of Virginia. In the spring and summer of 1819, Amphictyon and Hampden (this was another pseudonymous debate) assailed Marshall and *McCulloch* in the *Richmond Enquirer*.¹⁷⁸ The main points of their attack are straightforward and familiar. On March 30, Amphictyon says, "Although every one admits that the government of the United States is one of limited powers . . . , yet so wide is the latitude given to the . . . word 'necessary' . . . that it will . . . really become a government of almost unlimited powers."¹⁷⁹ He goes on to worry that the Antifederalist prophesy of unlimited federal power under a supposedly limited Constitution is coming true.¹⁸⁰

Marshall replies to Amphictyon in the Philadelphia *Union* under the pseudonym, "A Friend of the Union." In his April 24, 1819 piece,

176. *McCulloch*, 17 U.S. (4 Wheat.) at 423.

177. One commentator tries to minimize the statement by saying that Marshall only "teasingly" suggests it. See Evan H. Caminker, "Appropriate" Means-Ends Constraints on Section 5 Powers, 53 STAN. L. REV. 1127, 1136 (2001).

178. JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* 52, 106 (Gerald Gunther ed., 1969).

179. *Id.* at 64, 65.

180. *Id.* at 74.

Marshall opines that there are three possible senses that might be given to the phrase “necessary and proper”—a restricted sense (namely, the one favored by Amphictyon and Marshall’s other critics at the time), a liberal sense (the anything goes view they accused him of), and the fair sense (the intermediate view he, in fact, took in *McCulloch*).¹⁸¹ Marshall spends all his effort arguing for the fair sense, the view of incidental powers running back to Hamilton.

C. *The Fourteenth Amendment Analogy*

The doctrine of incidental powers I have been presenting is a general doctrine of federal power, not one peculiar to the commerce area (although for historical and practical reasons, that may be its most fertile area of application). One would expect, then, to see it and the issues we have seen here recur with respect to other constitutional provisions and federal powers. And so it does. The debates and disagreements we have traversed here are largely replayed in the history of the other major fount of federal legislative power—Section Five of the Fourteenth Amendment. This is no coincidence, but is due to the same causes that produced disagreement here—differences over theories of constitutional interpretation, the scope of federal power, and case results.

I will not here present *The McCulloch Theory of the Fourteenth Amendment*. That has already been done¹⁸²—and I disagree with it. A brief survey of some ways in which Section Five framing history, early interpretation, and current doctrine support my account of incidental powers and, in turn, are supported by it will suffice.

From the beginning, Section Five tracks Necessary and Proper Clause language and doctrine. The original proposed draft from Representative John Bingham of Ohio provides that “[t]he Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several states.”¹⁸³ The adopted text uses the word “appropriate” as the bearer of the “necessary and proper” notion. The first Supreme Court case interpreting Section Five says, “Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions

181. *Id.* at 91, 91–105.

182. See, e.g., Steven A. Engel, Note, *The McCulloch Theory of the Fourteenth Amendment: City of Boerne v. Flores and the Original Understanding of Section 5*, 109 YALE L.J. 115, 134–40 (1999) (arguing that Marshall held a loose, rational relationship view of the Necessary and Proper Clause and of Congress’s incidental powers in *McCulloch*).

183. CONG. GLOBE, 39th Cong., 1st Sess. 1034 (1866).

they contain, . . . if not prohibited, is brought within the domain of congressional power.”¹⁸⁴ And recent cases, too, pay their respects, saying for example, “[T]he *McCulloch v. Maryland* standard is the measure of what constitutes ‘appropriate legislation’ under § 5 of the Fourteenth Amendment.”¹⁸⁵

That is the good news. The bad news is that there are two different understandings of the meaning of “appropriate” here, both claiming roots in *McCulloch* and the Necessary and Proper Clause—one corresponding to Marshall’s liberal sense of “necessary and proper” and the second corresponding to his fair sense.¹⁸⁶ It should come as no surprise that adherents of the liberal sense react with anger and surprise when the Court, in reviewing the Religious Freedom Restoration Act, applies scrutiny with some teeth to hold it unconstitutional.¹⁸⁷ The Court requires that “[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”¹⁸⁸ It is unfortunate that the Court does not employ this sort of incidental powers language in *Lopez* and *Morrison* as well.

One common major criticism of the Court’s decision in *Boerne* is that it improperly narrows the *McCulloch* standard. Evan Caminker, for example, says, “Rather than being assessed under the conventional ‘rational relationship’ test established by *McCulloch v. Maryland* in the context of Article I powers, now Section 5 regulations . . . must survive the stricter standard of ‘congruence and proportionality’ between means and legitimate ends.”¹⁸⁹ But the import of all I have argued before is that, if *McCulloch* is to be the standard (and I have noted significant historical support for that assumption), then means-ends congruence and proportion is precisely what is demanded.

V. A FEDERAL SYSTEM

A. *The Third Death of Federalism?*

Most other accounts of *Lopez* and *Morrison* have seen the cases through the prism of federalism. I have not, preferring instead the

184. *Ex parte Virginia*, 100 U.S. 339, 345–46 (1879).

185. *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966).

186. *See supra* note 181 and accompanying text.

187. *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).

188. *Id.* at 520.

189. Caminker, *supra* note 177, at 1131–32 (footnotes omitted).

perspective of limited and enumerated powers. But the two topics are not unrelated, and I do have two federalism-related arguments to make in support of my general position. The first is an argument against *Garcia*'s ghost, and the second is an observation about the notion of constitutional interpretation in a federal system.

When the "revolution of 1937" greatly expanded commerce power interpretation, Edward Corwin marked *The Passing of Dual Federalism*.¹⁹⁰ And when the Court overruled *National League of Cities* in the *Garcia* case in 1985, William Van Alstyne noted *The Second Death of Federalism*.¹⁹¹ Is it crying wolf now to worry that in the 5–4 splits in *Lopez* and *Morrison*, we are but one vote switch from a third death of federalism? The very number should give me pause, but the threat of what Justice Souter's *Garcia*-based critique of the *Lopez-Morrison* position poses spurs me to voice my concern.

The argument by Justice Souter that I have called *Garcia*'s ghost¹⁹² is presented as a fallback solution to compensate for the perceived faults of the Court's commerce power doctrine. My aim in the main heretofore has been to work to strengthen the justification for that doctrine, but in this section my aim is negative—to undercut the plausibility of and support for *Garcia*'s ghost itself. For that plausibility is illusory. *Garcia*'s ghost says that if, as it argues, substantive protections for federalism are unworkable, then procedural protections can serve instead. These protections lie in "the structure of the federal system,"¹⁹³ namely, in protection by Congress.

But protection of state interests by Congress is no protection at all. The fox running the henhouse nature of this argument can be made clearer by analogy. The implication of Souter's argument is that the states will find protection in Congress because they are represented in Congress. If we substitute "individual rights" for "state interests" in this argument, would anyone accept that the assertions that individual rights cannot be clearly specified or that, even if they can, the rights of individuals will be adequately protected by Congress simply because individuals are represented in Congress? Certainly not.¹⁹⁴

Another argument against *Garcia*'s ghost is that it only purports to limit

190. Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950).

191. William W. Van Alstyne, *The Second Death of Federalism*, 83 MICH. L. REV. 1709 (1985).

192. See *supra* notes 79–82 and accompanying text.

193. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 552 (1985).

194. Although the *Garcia* majority was unimpressed with this argument when Justice Powell made it there in dissent: "One can hardly imagine this Court saying that because Congress is composed of individuals, individual rights guaranteed by the Bill of Rights are amply protected by the political process. Yet, the position adopted today is indistinguishable in principle." *Id.* at 565 n.8 (Powell, J., dissenting).

federal power, but it in fact leaves federal power over the states unlimited. Let us look at definitions. Around the time that the Framers in Philadelphia were trying to craft a constitution of limited government, the noted English legal philosopher Jeremy Bentham was giving advice to the French concerning their constitution. Among other things, he wanted to convince them of the necessity of an omnipotent legislature, saying the following:

If there were a proposition in government more self-evident than any other, one should think it would be that at every period there should be some one authority competent to do every thing that may require to be done by government, and that that authority should extend to every case whatsoever.¹⁹⁵

Does Bentham’s “self-evident” proposition not describe Congress under *Garcia*’s ghost? What are the legal limits on its power? It is the very definition of sovereignty in that it is “incapable of *legal* limitation.”¹⁹⁶ Under this scheme Congress may do whatever it chooses to do to the states without violating states’ rights or giving the states any formal recourse. If this is protection, then protect me from such protection.

B. Federalism and Constitutional Interpretation

The other federalism argument I advance is one that, as far as I can tell, is original. It is simply this: If all parties agree that our Constitution establishes a federal system, does that fact have any structural implications for constitutional interpretation generally and for the commerce power debate in particular? I think that it has at least one—that the nature of the federal system argues for Marshall’s “fair sense” of necessary and proper over the two other alternatives.

How? Ask what level of incidental power is appropriate in each sort of system—confederation, federal government, and unitary government. The Articles of Confederation properly limit federal power strictly to expressly granted powers, the better to preserve the sovereignty of the individual states. Unitary governments need no distinction between express and incidental powers because the unitary government has general legislative power. So, England with parliamentary supremacy has traditionally lacked a written constitution. But the intermediate

195. Jeremy Bentham, *Necessity of an Omnipotent Legislature*, in RIGHTS, REPRESENTATION, AND REFORM: NONSENSE UPON STILTS AND OTHER WRITINGS ON THE FRENCH REVOLUTION 263, 265 (Philip Schofield et al. eds., 2002).

196. JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 212 (Wilfrid E. Rumble ed., Cambridge Univ. Press 1995) (1832).

category, federal government, needs some balance, some rough division of powers to maintain checks and balances between the state and federal governments. That balance is provided, in part, by the doctrine of incidental powers, as declared by the Necessary and Proper Clause.

VI. CONCLUSION: JUST AN OLD FEDERALIST

After reading this Article, given its arguments and especially given its heroes (Hamilton, Marshall, and Story), some wag might remark that I am just an old Federalist. That wag would be right. But an old Federalist is not a bad thing to be in this contest. If the Frankfurter constraint disfavors influence by political, nonlegal factors,¹⁹⁷ it is a definite advantage to be an adherent of a doctrine associated with a long-defunct political party. But there are stronger reasons, too. The Federalist position satisfies so many of Bobbitt's typologies of constitutional argument¹⁹⁸ for the obvious reason that Federalists wrote the Constitution and imbued it with their principles and worldview.

And speaking of worldviews, let me close with an irony. The Federalist view I expound insists that the Necessary and Proper Clause is merely declaratory of principles already in the Constitution and, as Story asserts, "the constitutional operation of the government would be precisely the same, if the clause were obliterated, as if it were repeated in every article."¹⁹⁹ Why do the old Federalists argue that the doctrine is obvious even without explicit statement, when today we cannot even agree on the meaning of the written clause? Why do the *Lopez-Morrison* dissenters seek to implement the Antifederalists' parade of horrors, which the Framers explicitly rejected?

Robert Cover answers these questions when he says the following:

We inhabit a *nomos*—a normative universe. . . . The rules and principles of justice, the formal institutions of the law . . . are, however, but a small part of the normative universe that ought to claim our attention. . . . Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live.²⁰⁰

We lack understanding because we no longer inhabit the Founders' constitutional *nomos* and so, no longer fully comprehend it. In a larger sense, then, this Article preaches a homecoming. And in regaining and reemploying the doctrine of incidental powers, we are not "dissing Congress,"²⁰¹ but rather becoming reacquainted with our constitutional *nomos*.

197. See *supra* notes 83–85 and accompanying text.

198. See *supra* notes 88–94 and accompanying text.

199. STORY, *supra* note 14, at 110.

200. Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 4–5 (1983).

201. Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80 (2001).