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I. INTRODUCTION

That in *United States v. Lopez*[1] the Supreme Court of the United States modified the law of the Interstate Commerce Clause is obvious.[2] Exactly to what extent the Court modified it is not. But interpretive questions about *Lopez* aside, others are more fundamental. Should the law of the Interstate Commerce Clause as it existed prior to *Lopez* have been changed at all? If so, how?

This article attempts two things. First, it distinguishes alternative interpretations of *Lopez* and discusses its implications for the future. Second, it argues that the law of the Interstate Commerce Clause as it existed before *Lopez* cannot be justified and that, however *Lopez* itself is best interpreted, it does not take us far enough in the right direction—that of becoming a federalist republic once again.

II. THE LAW OF THE INTERSTATE COMMERCE CLAUSE AND THE NECESSARY AND PROPER CLAUSE BEFORE *LOPEZ*

An understanding of the possible implications of *Lopez* requires an understanding of the prior state of the law. The Interstate Commerce Clause provides that Congress "shall have Power . . . To regulate Commerce . . . among the several States . . . ."[3] Thus, any plausible interpretation of the clause must include interpretations of "regulate," "commerce" and "among the several states," or, "interstate," as the last phrase is usually paraphrased.

A. *"Commerce"*

According to the Court, "commerce" includes at least the following: buying and selling,[4] navigation,[5] the electrical transmission of telegraphic messages,[6] transporting of goods by

1. 115 S. Ct. 1624 (1995).
2. The Court had not invalidated a federal statute regulating private sector commercial activity under the Interstate Commerce Clause since 1936. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 4.9, at 162 & n.27 (5th ed. 1995).
3. U.S. CONST. art. I, § 8, cl. 1, 3.
4. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 189-90 (1824).
5. *Id.* at 190-93.
6. Telegraph Co. v. Texas, 105 U.S. 460, 464 (1882).

railroad,[7] transporting persons and goods by ferry for consideration,[8] persons walking across bridges, whether or not consideration is involved,[9] the travel of prostitutes,[10] the travel of one's mistress,[11] livestock walking from range to market,[12] cattle walking back and forth in pastures,[13] carrying liquor for personal use in one's own vehicle,[14] petroleum moving through pipelines,[15] radio communication,[16] electrical power transmission,[17] the movement of pollutants in the air[18] and the movement of water.[19] This list could be indefinitely extended.

The sample suggests a generalization. "Commerce" includes any activity, process, event or state of affairs—human or nonhuman, commercial or noncommercial.

B. "Interstate"

Whatever else the scope of "interstate" may include,[20] it surely includes the event of something crossing a state line.[21] Thus, putting the meaning of "interstate" together with that of "commerce" yields the generalization that interstate commerce includes any activity, process, event or state of affairs—human or nonhuman, commercial or noncommercial—at the instant it

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7. *Id.*
8. Gloucester Ferry Co. v. Pennsylvania, 114 U.S. 196, 203 (1885).
9. Covington & Cincinnati Bridge Co. v. Kentucky, 154 U.S. 204, 218-19 (1894).
10. Hoke v. United States, 227 U.S. 308, 315 (1913).
11. Caminetti v. United States, 242 U.S. 470, 472 (1917).
12. Kelley v. Rhoads, 188 U.S. 1, 8 (1903).
13. Thornton v. United States, 271 U.S. 414, 425 (1926).
14. United States v. Simpson, 252 U.S. 465, 466 (1920).
15. The Pipe Line Cases, 234 U.S. 548, 560-61 (1914).
16. Federal Radio Comm'n v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266, 276 (1933).
17. Federal Power Comm'n. v. Florida Power & Light Co., 404 U.S. 453, 464 (1972).
18. United States v. Bishop Processing Co., 287 F. Supp. 624 (D. Md. 1968).
19. Illinois v. Milwaukee, 406 U.S. 91, 105 (1972). The foregoing citations are collected in DAVID E. ENGDAHL, CONSTITUTIONAL FEDERALISM IN A NUTSHELL 93-102 (2nd ed. 1987).
20. *See* ENGDAHL, *supra* note 19, at 102-08.
21. United States v. Hill, 248 U.S. 420, 423-24 (1919). The Court reasoned that "[i]mportation into one State from another is the indispensable element, the test, of interstate commerce." *Id.* (quoting International Textbook Co. v. Pigg, 217 U.S. 91, 107 (1910)). The Court ultimately held that the transportation of liquor for personal use from one state to another is an activity within the "well established meaning of the words 'interstate commerce'." *Id.* (quoting United States v. Chavez, 228 U.S. 525, 532 (1913)).

crosses a state line.

C. *"Regulate"*

"Regulation" includes any rule, including an absolute prohibition.[22] Thus, putting the meaning of "regulate" together with those of "interstate" and "commerce" yields the generalization that under the Interstate Commerce Clause, Congress has the power to prescribe any rule, including an absolute prohibition, regulating any activity, process, event or state of affairs—human or nonhuman, commercial or noncommercial—at the instant it crosses a state line.

D. *Things "In" Interstate Commerce and "Direct Exercises" of the Interstate Commerce Power*

I shall say that an activity, process, event or state of affairs is "in" interstate commerce at the instant it crosses a state line. I shall also say that Congress makes a "direct exercise" of the interstate commerce power when it regulates an entity, process, event or state of affairs that is in interstate commerce in this sense. The Court does not require that direct exercises of the interstate commerce power have, as a primary or ultimate objective, any interstate commerce concern or any other enumerated federal concern, for that matter.[23] For example, Congress may prohibit the interstate transportation of goods manufactured by workers whose wage and hour conditions fail to satisfy federal standards, even though Congress' primary objective is coercing the workers' employers to conform to those standards—a nonfederal concern.[24]

E. *The Necessary and Proper Clause*

Congress has power to regulate concerns that are not themselves enumerated federal concerns if regulating them is a "necessary and proper" means of accomplishing objectives that

22. United States v. Darby, 312 U.S. 100, 113 (1941) (holding that Congress' power to create rules that regulate interstate commerce "extends not only to those regulations which aid, foster and protect the commerce, but embraces those which prohibit it").

23. *Id.* at 115 ("The 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.").

24. *Id.* at 125.

themselves directly pertain to enumerated federal concerns.[25] Such exercises of power are based upon the Necessary and Proper Clause, which gives Congress the power "To 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."[26]

Such means do not have to be necessary conditions in the literal sense of being indispensable for the accomplishment of their ends. It is sufficient that they be useful or appropriate.[27]

Congressional uses of the Necessary and Proper Clause power, as linked to the Interstate Commerce Clause power, need satisfy only rational basis judicial review.[28] That is, courts may invalidate such exercises of Necessary and Proper Clause power only if they justifiably conclude that no rational basis exists for Congress' belief that the regulation in question will causally affect interstate commerce.[29]

Any particular use of the Necessary and Proper Clause is constitutional if a rational basis exists for believing that among the causal consequences of the statute in question would be at least one side effect upon something that is itself in interstate commerce. It does not matter if Congress' primary or ultimate objective pertains to a nonfederal concern.[30] For example, a statute prohibiting racial segregation in privately-owned motels is constitutional because it is rational for Congress to believe that one of the causal side effects of the statute would be an increase in the rate at which members of racial minority classes cross state lines. It does not matter that Congress' primary purpose in enacting the statute was to racially integrate part of the private sector—a nonfederal concern.[31]

Statutes based upon the Necessary and Proper Clause, as linked to the Interstate Commerce Clause power, need satisfy

25. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 418 (1819).

26. U.S. CONST. art. I, § 8, cl. 18.

27. *McCulloch*, 17 U.S. (4 Wheat.) at 420-21, 424-25 (recognizing the power of Congress to pass a law that created a federal Bank of the United States for the purpose of executing and implementing the "great powers assigned" to the bank by Congress).

28. *See* Hodel v. Indiana, 452 U.S. 314, 323-24 (1995).

29. *See id.*

30. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 250 (1964).

31. *Id.*

only the "class basis principle."[32] That is, they are constitutional so long as it is rational for Congress to believe that the statute's regulation of a class of things or activities would have a causal side effect upon interstate commerce.[33] Congress need not establish that it would be rational to believe that the regulation of any particular member of the class would have any effect upon interstate commerce at all.[34]

F. The Darby *Method of Legislation*

The method of legislation upheld in *United States v. Darby*[35] relies upon both the Interstate Commerce Clause and the Necessary and Proper Clause in a way that affords Congress an especially powerful tool. *Darby* involved a challenge to two sections of the Fair Labor Standards Act of 1938.[36] Section 15(a)(1) prohibited the interstate shipment of goods produced in factories employing workers under conditions violating the substantive wage and hour requirements of the Act.[37] Section 15(a)(2) reached directly into the factories themselves by requiring the employers to conform to the wage and hour requirements of the Act.[38] The Court upheld section 15(a)(1) on the basis of the argument that Congress may regulate anything that is itself in interstate commerce in any way Congress wishes.[39] Congress may prohibit the interstate movement of anything for any reason whatever. It does not matter that Congress may not have any ultimate interstate commerce objective, or any objective pertaining to any other enumerated federal concern, for that matter.[40] The Court went on to

32. *See* Katzenbach v. McClung, 379 U.S. 294, 298, 303-04 (1964) (affirming the constitutionality of Title II of the Civil Rights Act of 1964 as applied to a private restaurant that was deemed to be within the scope of the Act and was within a class defined by the Court as a restaurant that "serves or offers to serve interstate travelers or a substantial portion of the food which it serves . . . has moved in commerce").

33. *Id.* at 304-05 ("The absence of direct evidence connecting discriminatory restaurant service with the flow of interstate food . . . is not, given the evidence as to the effect of such practices on other aspects of commerce, a crucial matter.").

34. *Id.*

35. 312 U.S. 100 (1941).

36. *Id.* at 108.

37. *Id.* at 110.

38. *Id.*

39. *Id.* at 112-17. Of course, exercises of federal legislative power are always subject to the liberty guarantees of the Constitution.

40. *Id.*

uphold section 15(a)(2) under the Necessary and Proper Clause, as linked to the Interstate Commerce Power.[41] One of the Court's arguments was that section 15(a)(2) was a reasonable means of promoting the legislative agenda of section 15(a)-(1).[42] That is, if there were no goods made by workers whose wages and hours fail to conform to federal standards, then no such goods will cross state lines.

The generalization is obvious. Suppose that Congress wants to regulate some particular activity that is not itself within the scope of any enumerated federal concern. Under *Darby*, Congress need only enact a statute prohibiting some interstate aspect or causal side effect of the given activity and enact another statute prohibiting the activity itself. I shall refer to such exercises of legislative power as exercises of the "*Darby* method of legislation."

For example, suppose that Congress wishes to prohibit the manufacture, sale and consumption of cigarettes in the United States. Using the "*Darby* method of legislation," Congress could enact a statute prohibiting the interstate transportation of cigarettes. That provision would be constitutional on the basis of the principle that Congress may do anything it wants in directly regulating things in interstate commerce. Then Congress could enact another statute simply prohibiting the manufacture, sale and consumption of cigarettes in the United States. The second statute would presumably be upheld on the basis of the argument that if there were no cigarettes manufactured, sold or consumed in the United States, then no cigarettes would cross any state lines.

G. Summary

An example may serve to illustrate at least some of the implications of all this. Suppose that Congress decides that potato chips are bad for people. Before *Lopez*, Congress would have had at least three constitutional alternatives. First, it could enact a statute prohibiting the interstate transportation of potato chips. That statute would be constitutionally grounded upon the principle that Congress can directly regulate interstate commerce in any way it wishes for any reason it wishes. Second, Congress

41. *Id.* at 117-24.
42. *Id.* at 117-22.

could enact a statute prohibiting the manufacture, sale, or distribution of potato chips. That statute would be based upon the Necessary and Proper Clause, as tied to the Interstate Commerce Clause Power. For it would be rational for Congress to believe that prohibiting the manufacture, sale or distribution of potato chips would have at least one causal side effect upon something in interstate commerce. If nothing else, there would probably be a reduction in the rate at which bags of potatoes and boxes of salt were carried across state lines. Third, by invoking the *Darby* method of legislation, Congress could enact both of the statutes at once.

III. THE CONFLICT BETWEEN THE PRE-*LOPEZ* STATE OF THE LAW AND THE CONSTITUTION

The question whether there is a conflict between the pre-*Lopez* state of the law and the Constitution necessarily involves the question whether there is a conflict between the pre-*Lopez* state of the law and federalism, for whatever else the Constitution sets out to do, it obviously sets out to establish a federalist system.

How should "federalism" be understood in this context? One might plausibly begin by stipulating that a nation has a "federalist legal system" if and only if (1) the nation has a national legislature representing the geographical whole and regional legislatures representing geographical subparts of the whole, (2) the regional legislatures are independent sources of law in the sense that they have power to enact legislation without the consent of the national legislature, and (3) the validly enacted laws of the national legislature pre-empt those of the regional legislatures in the event of a conflict.

Condition (1) serves to rule out legal systems with just one legislature. Condition (2) rules out systems with regional legislatures that are not independent of the legislature representing the whole. For example, the relationship between a state legislature and component municipal legislatures is not a federalist relationship in this sense, at least when the municipal legislatures do not have a constitutionally based home-rule status. Condition (3) rules out confederations and leagues in which no single legislature has pre-emptive power over the other legislatures in the system.

Two varieties of federalist systems can be distinguished. I

shall say that a federalist system is a "concurrent-powers federalist system" if and only if its national legislature has the power to enact legislation concerning every subject matter over which the regional legislatures have legislative power. In contrast, a federalist system is a "reserved-powers federalist system" if and only if there exists at least one subject matter over which the regional legislatures have legislative power, but the national legislature does not.

In addition, I shall say that a legislature has "general- welfare powers" if and only if it has the power to enact any legislation it believes would promote the common good of the persons subject to its jurisdiction.[43]

Assuming these stipulations, one may plausibly conclude that a concurrent-powers federalist system could accommodate a national legislature possessing general-welfare powers, but that a reserved-powers federalist system could not. For unlike their concurrent-powers counterparts, reserved-powers systems set aside a particular set of subject matters and place them beyond the legislative powers of the national legislature. But no legislature lacking power over at least one subject matter could have general welfare powers. For having general-welfare powers entails having power to enact any legislation which the rule-makers believe would promote the common good.

Now, although there is a sense in which a concurrent-powers federalist system is logically compatible with a national legislature possessing general welfare powers, it seems that any such combination would, at least over time, tend to lose its federalist nature. This prediction can be supported by the following considerations. Imagine a concurrent-powers federalist system with a national legislature that has general-welfare powers. Now consider an arbitrarily-selected subject matter, M, which is within the scope of the legislative powers of the regional legislatures. There are two general cases to consider.

In the first general case, the national legislature has not yet regulated M. Suppose that one of the regional legislatures decides to regulate M. As a regional legislature in a federalist system, it has the power, at least initially, to regulate M without the national legislature's consent. Suppose that the regional

43. Subject, of course, to whatever liberty guarantees the relevant constitution provides.

legislature does so by enacting a statute. If the national legislature does not like the regional legislature's statute, it can override it by enacting a statute of its own. For, as a general-welfare legislature whose laws have pre-emptive force, it has the power to override any laws enacted by the regional legislatures. Suppose that the national legislature does choose to override the regional legislation by enacting its own statute. Now that the national legislature's statute is the law of the land, the regional legislatures are no longer free to regulate M as they please. Their federalist legislative independence has been limited, at least with respect to M.

In the second general case, the national legislature has already regulated M by means of a statute. As a legislature with general-welfare powers and pre-emptive powers, it can regulate M in any way it wishes. In this situation the regional legislatures would not have power to regulate M in ways that are inconsistent with the national legislature's statute. Thus, the federalist legislative independence of the regional legislatures would again have been limited, at least with respect to M.

Putting these two general cases together, one can say that, at least with respect to the subject matter, M, there is a sense in which the regional legislatures would have no power to regulate M without the consent of the national legislature. For if the regional legislatures regulate M before the national legislature does, then the latter can later pre-empt the regional regulation of M. Thus, in such a case there is a sense in which the regional legislatures would be able to continue to regulate M only with what is, in effect, the "later" consent of the national legislature. On the other hand, if the national legislature regulates M before the regional legislatures do, then the latter would be able to regulate M only in ways consistent with the national legislation, that is, only with the "prior" consent of the national legislature.

Now imagine this pattern multiplied by indefinitely many subject matters. It is then easy to recognize the truth of the prediction that concurrent-powers federalist systems are inherently unstable. And if that prediction is correct, then the only inherently stable federalist systems are reserved-powers systems.

Does our Constitution purport to establish a concurrent-powers federalist system or a reserved-powers system? Clearly, it purports to establish the latter. There are several ways of showing this. First, the Constitution's specific enumeration of

Congressional powers presupposes a set of powers not enumerated, and thus impliedly retained by the states.[44] Second, if there could be any doubt about this implied reservation of powers, the Tenth Amendment makes the presupposition explicit: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[45] Third, the Framers intended the Constitution to be so interpreted. As James Madison puts it in Federalist Number 45:

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.[46]

Hence, the pre-*Lopez* state of the law is inconsistent with the Constitution, as originally intended. The pre-*Lopez* interpretation of the Interstate Commerce Clause and the Necessary and Proper Clause gives Congress general-welfare powers. Indeed, given the Court's broad interpretation of those two clauses, there would have been no need for any of the other power-conferring clauses.[47] But the Constitution, as originally intended, does not give Congress general-welfare powers. Of course, what ought to be done, if anything, about the contradiction is another matter. But the fact of a contradiction seems beyond doubt.

IV. WHAT SHOULD BE DONE ABOUT THE CONTRADICTION?

Thus, the pre-*Lopez* state of the law conflicts with the

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44. U.S. CONST. art. I.

45. U.S. CONST. amend. X.

46. THE FEDERALIST NO. 45, at 292-93 (James Madison) (Clinton Rossiter ed., 1961).

47. In his concurring opinion in *Lopez*, Justice Thomas notes, "Put simply, much if not all of Art. I, § 8 (including portions of the Commerce Clause itself) would be surplusage if Congress had been given authority over matters that substantially affect interstate commerce." United States v. Lopez, 115 S. Ct. 1624, 1644 (1995) (Thomas, J., concurring).

Constitution as originally intended. So what? What should be done about it? There are at least two mutually exclusive alternatives, with variations of each. One can follow the Constitution, as originally intended, or one can follow the pre-*Lopez* state of the law.

Consider the first alternative. How might one try to justify following the Constitution as originally intended? There are at least two kinds of justifications one might offer. On the one hand, one might argue from historical premises and from the intrinsic nature of a written constitution. On the other hand, one might argue from premises that do not give any justificatory weight to history, as such, or to the intrinsic nature of a written constitution, but rather assert that a reserved-powers federalist system is desirable in terms of acceptable contemporary principles of political philosophy. I shall consider each mode of justification in turn.

A. An Historical Justification

How might a version of the historical argument go? Consider this one:

(1) If we know how the Constitution was originally intended then we should follow that intention.

(2) We know that the Constitution was originally intended to create a reserved-powers federalist system.

(3) Hence, we should follow the Constitution's intention to create a reserved-powers federalist system.

I have already argued in support of Premise (2). It is difficult to imagine how (2) could more obviously be true. Again, if anything is clear about the Constitution, this much is—it was intended to establish a reserved-powers federalist system. Thus, in light of the obviousness of the historical intent, we do not have to concern ourselves here with the special difficulties raised by legal issues concerning which there is no clearly discernible historical intent.[48]

How might Premise (1) be supported? It is a notable fact

48. For a discussion of some of the problems arising in such cases, see Russell Pannier, *An Analysis of the Theory of Original Intent*, 18 WM. MITCHELL L. REV. 695 (1992) (evaluating the theory of original intent as a principle of judicial interpretation of legislative and constitutional rules).

about the current state of constitutional debate that there is even a serious question here. After all, a layperson might well ask, "Just what do you mean by asking for justifications for following the Constitution, as originally intended? Of course, one should follow the Constitution. Who could possibly doubt it?"

In response to this last question, one might begin by observing that many lawyers not only doubt it, but reject it. Why? One major cause is the widely-shared belief among lawyers that a legal system based upon a constitution is simply an institutional arrangement in which a set of unelected governmental officials (e.g., members of the U.S. Supreme Court) have the legal power to invalidate legislation on the basis of nothing more than their own personal theories of good government. According to this conception, the relevant constitutional document's language and the original intentions motivating that language are legally irrelevant. Of course, for reasons of public appearances, if nothing else, one will probably do one's best to use the words of the constitutional document. Thus, a proponent of this view presumably would not hesitate to use the word "commerce" to mean "any activity, process, event or state of affairs." After all, "commerce" is just a word. Do not words mean anything we choose? And if, in the end, one cannot find words in the document with which to tie one's own preferred meanings, then one can always assert that the constitution somehow just "requires" an "interpretation" that happily happens to coincide with one's own philosophically preferred principles.

Of course, this is a large and difficult issue, and I will not give it the attention it deserves. But I will say this much: there are at least two very different conceptions of a constitution. According to the one just mentioned, a constitution is not primarily a set of legal principles expressed in an historical document, but is rather primarily a set of persons with the legal power to invalidate laws they do not like on the basis of their own political philosophies. I shall refer to this as the conception of "a constitution as a set of persons." For proponents of this conception, there will generally be little or no point in formal amendments of the constitutional document since whatever words the relevant document happens to use, the final interpretation of those words is completely in the philosophical hands of judges who are the "real" constitution.

According to the alternative conception, a constitution is

primarily a set of principles expressed in an historical document by persons who chose those principles to achieve particular objectives and intended the linguistic formulations of the principles to be interpreted in the light of those objectives. The principles expressed in the document can be amended, but only by compliance with the provisions for formal amendment set forth in the document itself. I shall refer to this as the conception of "a constitution as a set of principles."

Of course, I have oversimplified the contrast. A proponent of the conception of a constitution as primarily a set of historically-formulated principles would presumably be willing to concede the inevitable role played by present interpreters of those principles. Likewise, a proponent of the conception of a constitution as a set of persons would likely concede the inevitable role played by historically formulated principles. But despite such complexities, the two conceptions differ in fundamental ways. A judge who thinks of a constitution as primarily a set of persons will naturally tend to think of historically-formulated principles as, at best, raw materials for fashioning legal results of his own making on the basis of his own principles of political morality. The primary factor for him will be what he takes to be his own direct cognitive access to what he regards as true principles of political morality. Given that direct cognitive access, the language of the relevant constitutional document will play only a derivative and instrumental role. Such a judge would presumably regard herself as justified in bending, twisting, and in some cases, even ignoring, the words in the historical text if such bending, twisting and ignoring is necessary or useful for accomplishing substantive legal results that are desirable in terms of her own philosophical principles.

On the other hand, a judge who thinks of a constitution as primarily a set of historically-formulated principles will have a very different understanding of his own activities. He will naturally tend to think of the historically-formulated principles as antedating, transcending and limiting his own judicial discretion. He will regard his primary judicial responsibility as that of being faithful to the words of the relevant constitutional document and to the historical intentions grounding that document. Of course, he will sometimes be compelled to invoke some of his own principles of political morality. But such occasions will be few and, when they arise, limited. For example,

there will be the occasional necessity of choosing between competing, but equally plausible, interpretations of the document. But even then he will do his best to take care that any personal principles he invokes are fully compatible with all of the historically-formulated principles.

Any support for Premise (1) will have to be provided by the conception of a constitution as a set of principles. It is only when a constitution is understood as a historically-enacted set of principles expressed in words with certain specific intended meanings and directed to the attainment of certain specific objectives that one would have any reason at all for even paying attention to how the constitutional document was originally intended. If, in contrast, a constitution is understood primarily as a set of persons with the legal power to set aside laws based upon their own conceptions of political morality, then neither the historical intentions of those responsible for the words of the document nor the specific meanings of the words they chose are legally relevant.

So, the question becomes, "How can one justify invoking the conception of a constitution as a set of principles?" The primary justification is that a legal system that understands a constitution as a set of principles is more likely to protect the natural moral rights of its citizens than is a system which understands a constitution as primarily a set of persons. The risk of arbitrary governmental action is diminished. In such a system, the government's action must be justifiable in terms of basic constitutional principles whose meaning and force are beyond the immediate political control of any agents of the government, including the courts. If the government wishes to change those basic principles, it must follow the relevant constitutional provisions for formally amending the document. Any formal amendment, at least in the case of the U.S. Constitution, will require an appeal to the people.

In contrast, in a legal system based upon the conception of a constitution as a set of persons, the government's actions need be justifiable only in terms of the present political principles of the reigning "constitutional body." Modifying the constitution in such a system does not require any formal amending process or appeal to the people. It merely requires changing the set of political principles motivating the members of the highest constitutional court—either by changing the minds of the

present members of that court, or by replacing them by others with "better" political principles.

There is a sense in which in a system based upon the conception of a constitution as a set of principles the latter are ultimately within the control of the people. The original linguistic formulation of the principles was adopted by the people at some particular date, and any subsequent modifications of those principles must also be formally accepted by the people. Thus, it is plausible to say of such a system that the people "make their own rules"—one of the defining characteristics of a genuine democracy.

In contrast, in a system based upon the conception of a constitution as a set of persons, the constitutional principles are ultimately in control of the government—not the people. Yes, the original linguistic formulation of the constitutional rules may have been adopted by the people, as it was in the United States. But interpretations of those formulations, or any subsequent formal amendments, are ultimately in the hands of a small set of governmental agents—judges.

A closely-related consideration is the difference between the ways in which each system regards language itself. In a system based upon the conception of a constitution as a set of historically-formulated principles, there is a natural tendency to take language seriously. Words and sentences in natural languages are regarded as having certain specific meanings as opposed to others. Speakers and writers choose certain words rather than others for specific reasons. Their choices should be respected and taken for what they purport to be. In particular, linguistic formulations of legal rules, whether expressed in constitutions or in ordinary statutes, should be respected and taken seriously. If, in the formulation of a legal principle, the term "X" (e.g., "commerce") rather than the term "Y" (e.g., "activity, process, event or state of affairs") is used then that choice should be respected. Interpreters of the rule should not construe "X" by means of the meaning semantically tied to "Y," unless, of course, the rule itself has been formally amended to substitute "Y" for "X."

In contrast, the attitude toward language in a system based upon the conception of a constitution as a set of persons is likely to be quite different. Here the basic idea is that it really does not matter much *what* the original rule-makers said or meant.

What *does* matter is what the present interpreters of the rule believe ought to be done about the current political situation. There is a sense in which words, as such, do not matter. Surely, the people can adopt linguistic formulations of legal principles. But in doing so they are merely tossing their words out onto the historical river of legal interpretation. Once upon the water, the words are transformed into mere syntactical shells, stripped of their intended and customary semantical ties, and are now freely available for any newly-conceived semantical ties those blessed with the legal power of final interpretation happen to prefer. "Yes, they *did* use the word 'commerce.' But so what? They are not on this court; I am. So, it is my preferences that count, not theirs. I prefer a constitution which gives Congress general welfare powers. If promoting that preference requires interpreting 'commerce' to mean 'any activity, process, event or state of affairs,' then that's what I will do."

Genuine democracy is more likely to survive in a legal system of the former type than in one of the latter. Law itself, in the form of rules and principles with relatively fixed and stable meanings, whose boundaries are not subject to the direct political control of the government, is more likely in systems of the former kind. Law, in this sense, is a necessary condition for genuine democracy. In the absence of stable rules with fixed meanings binding both citizens and government, there can, in the long run, be no Rule of Law and therefore little or no chance for individual freedom from arbitrary governmental coercion.[49]

Coming to the point, these considerations suggest the following argument:

(1) Given any two legal systems, A and B, if a genuine democracy is more likely to exist and survive in A than in B, then A is preferable to B.

(2) A genuine democracy is more likely to exist and survive in a legal system based upon the conception of a constitution as a set of principles than in a system based upon the conception of a constitution as a set of persons.

(3) Hence, a legal system based upon the conception of

49. For a discussion of the connection between the Rule of Law and democracy, see F.A. HAYEK, THE CONSTITUTION OF LIBERTY (1960).

a constitution as a set of principles is preferable to a system based upon the conception of a constitution as a set of persons.

I have already argued in support of Premise (2). Premise (1) is supported by all of the justifications that can be offered in support of genuine democracy. The question whether genuine democracy is preferable to alternative forms of government is a difficult and serious one. But I shall not pursue it here.

What should we conclude about the question of an historical justification for following the Constitution, as originally intended? We should accept the historical justification. We should reject the pre-*Lopez* state of the law. If the nation wants to give Congress general-welfare powers, it should have to formally amend the Constitution to say so. But until and unless that is done, the Constitution should be interpreted in accordance with its obvious meaning and intent. That is how things ought to be done in a nation conforming to the Rule of Law.

B. Non-Historical Justifications

Earlier I mentioned the possibility of offering non-historical justifications for following the Constitution's purpose of establishing a reserved-powers federalist system. Such justifications do not give any weight to history, as such, or to the intrinsic nature of a written constitution, but rather assert that a reserved-powers federalist system is desirable in terms of the best principles of political philosophy. I shall briefly outline two such justifications-one negative in nature, the other affirmative.

The negative justification for federalism can be expressed as a teleological argument:

(1) It is desirable to reduce the risk of arbitrary and morally unjustifiable political coercion.

(2) A reserved-powers federalist legal system is a necessary, or at least useful, means of reducing that risk.

(3) Hence, a reserved-powers federalist system ought to be maintained.

The affirmative justification can also be formulated as a teleological argument:

(1) It is desirable to maintain a legal system in which there exists the conditions for the greatest possible common realization of the essential human powers.

(2) Maintaining a reserved-powers federalist system is a

necessary, or at least useful, means of achieving that objective.

(3) Hence, a reserved-powers federalist system ought to be maintained.

I have offered considerations in support of both arguments elsewhere[50] and so shall not go into the matter here. Suffice it to say that there are good reasons for believing that federalism was a good idea in 1787, and still is. In part IV.A., I argued that if the nation wants a Congress with general-welfare powers, it should have to formally amend the Constitution. I can now make the point that, in doing so, the nation would be making a serious mistake.

V. *LOPEZ*

I have argued that the pre-*Lopez* state of the law should be rejected because it conflicts with the Constitution, as originally intended. I shall now turn to *Lopez* to determine to what extent the Court agrees with that conclusion.

In *Lopez* the Court struck down the Gun-Free School Zones Act of 1990,[51] which makes it a federal offense "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone."[52] The term "school zone" is defined as "in, or on the grounds of, a public, parochial or private school"[53] or "within a distance of 1,000 feet from the grounds of a public, parochial or private school."[54] Chief Justice Rehnquist wrote the majority opinion, which was joined by Justices O'Connor, Scalia, Kennedy and Thomas. Justice Kennedy wrote a concurring opinion, in which Justice O'Connor joined. Justice Thomas also filed a concurring opinion. Justices Stevens and Souter each filed dissenting opinions. Justice Breyer filed a dissenting opinion, in which Justices Stevens, Souter and Ginsberg joined.

It would have been an easy matter to uphold the statute by invoking the pre-*Lopez* state of the law. The subject matter directly regulated is possession of a firearm within a school zone.

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50. Russell Pannier, *Justifying Federalism*, 16 WM. MITCHELL L. REV. 613 (1990).
51. 18 U.S.C. § 922(q)(1)(A) (1988).
52. *Id.*
53. 18 U.S.C. § 921(a)(25)(A) (1988).
54. 18 U.S.C. § 921(a)(25)(B) (1988).

Because that subject matter is not an enumerated federal subject matter, one must use the Necessary and Proper Clause. As always, a convenient enumerated power with which to tie this particular use of the Necessary and Proper Clause is the Interstate Commerce Power. There are several ways of doing this. One way is arguing that it would be rational for Congress to believe that a causal side effect of the statute would be a reduction in the rate at which guns that, at some point in their lives have been carried into a school zone, are later carried across at least one state line. Another way is arguing as follows: (1) Anything that tends to increase the Gross National Product is likely to increase the volume of interstate commerce. (2) Any law that tends to improve American education is likely to increase the Gross National Product. (3) The statute would tend to improve American education. (4) Hence, it would be rational for Congress to believe that the statute would have at least one causal side effect upon interstate commerce. This second argument is essentially one of the primary arguments made by Justice Breyer in dissent.

These, together with many other essentially similar arguments, are tediously obvious. Prior to *Lopez*, a Constitutional Powers teacher would expect any competent law student to be able to recite them effortlessly upon demand. Thus, in rejecting such arguments, the Court signalled its decision to change the law of the Interstate Commerce Clause in *some* respect.

The Court clearly rejected any interpretation of the Interstate Commerce Clause which effectively gives Congress general-welfare powers. It observed in this regard, "We start with first principles. The Constitution creates a Federal Government of enumerated powers."[55] And again, "But even these modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits."[56] The Court specifically rejected Justice Breyer's argument outlined above, with the observation that its "rationale lacks any real limits."[57] A fatal defect of his analysis is its failure "to identify any activity that the States may regulate but

55. *Lopez*, 115 S. Ct. at 1626.

56. *Id.* at 1628.

57. *Id.* at 1633 (asserting that "Justice Breyer's rationale lacks any real limits because, depending on the level of generality, any activity can be looked upon as commercial").

Congress may not."[58]

The Court reaffirmed the rational basis standard of review under the Necessary and Proper Clause, as tied to the Interstate Commerce Clause: "Since that time, the Court has heeded that warning and undertaken to decide whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce."[59] However, it also said that the regulated activity in question must "substantially" affect interstate commerce.[60] In this regard, after observing that its prior cases had not been completely clear as to whether the required relationship to interstate commerce is one of merely "affecting" or "substantially affecting," the Court said, "We conclude, consistent with the great weight of our case law, that the proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce."[61]

The Court specified three categories of activities that Congress may regulate under the Interstate Commerce Clause.

> First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce . . . .[62]

The Court went on to say that the challenged statute could not be justified in terms of either of the first two categories.[63] Hence, if it is justifiable at all, it must be justified in terms of the third category, as a regulation of an activity that substantially affects interstate commerce.[64]

In regard to the third category, the Court stated, "[W]e have upheld a wide variety of congressional Acts regulating intrastate economic activity where we have concluded that the activity substantially affected interstate commerce."[65] It mentioned, as

58. *Id.* at 1632.
59. *Id.* at 1629.
60. *Id.* at 1629-30 (citing Maryland v. Wirtz, 392 U.S. 183, 196 n.27 (1988)).
61. *Id.* at 1630.
62. *Id.* at 1629-30 (citations omitted).
63. *Id.* at 1630.
64. *Id.*
65. *Id.*

examples, intrastate coal mining,[66] intrastate credit transactions,[67] intrastate restaurants,[68] intrastate hotels,[69] and production and consumption of home-grown wheat.[70]

But the Court rejected the claim that the Gun-Free School Zones Act fits within the boundaries of the third category.

> Section 922(q) is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms. Section 922(q) is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.[71]

In a footnote keyed to the end of the first sentence in the foregoing quotation the Court said,

> Under our federal system, the "States possess primary authority for defining and enforcing the criminal law." "Our national government is one of delegated powers alone. Under our federal system the administration of criminal justice rests with the States except as Congress, acting within the scope of those delegated powers, has created offenses against the United States." When Congress criminalizes conduct already denounced as criminal by the States, it effects a "change in the sensitive relation between federal and state criminal jurisdiction."[72]

The Court pointed to the absence of any jurisdictional element in the statute that would guarantee, "through case-by-case inquiry, that the firearm possession in question affects interstate commerce."[73] The statute "has no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection

66. *Id.* (citing Hodel v. Virginia Surface Mining & Reclamation Ass'n., 452 U.S. 264, 276-80 (1981)).
67. *Id.* (citing Perez v. United States, 402 U.S. 146 (1971)).
68. *Id.* (citing Katzenbach v. McClung, 379 U.S. 294 (1964)).
69. *Id.* (citing Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964)).
70. *Id.* (citing Wickard v. Filburn, 317 U.S. 111 (1942)).
71. *Id.* at 1630-31.
72. *Id.* at 1631 n.3 (citations omitted).
73. *Id.* at 1631.

with or effect on interstate commerce."[74]

The Court also noted the absence of congressional findings concerning effects on interstate commerce.[75] It conceded that "Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce."[76] But on the other hand, "to the extent that congressional findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye, they are lacking here."[77]

The Court specifically addressed the Government's arguments for the proposition that possession of a gun in a school zone substantially affects interstate commerce.[78] One of the Government's arguments was that such possession may result in violent crime and that crime affects the national economy in two ways.[79] First, the substantial costs of crime are spread through the mechanism of insurance.[80] Second, crime impairs incentives to travel to unsafe areas of the country.[81]

In addition, the Government argued that the possession of guns in school zones threatens the learning environment, that anything that threatens the learning environment causes a less productive citizenry, and that a less productive citizenry causes a reduction of the nation's economic well-being.[82]

The Court rejected both arguments:[83]

> The Government admits, under its "costs of crime" reasoning, that Congress could regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce. Similarly, under the Government's "national productivity" reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for exam-

74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.* at 1632.
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*

> ple. Under the theories that the Government presents . . . it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard-pressed to posit any activity by an individual that Congress is without power to regulate.[84]

In summation, the Court said that having a gun within a school zone is not an economic activity that could, "through repetition elsewhere, substantially affect any sort of interstate commerce. Respondent was a local student at a local school; there is no indication that he had recently moved in interstate commerce, and there is no requirement that his possession of the firearm have any concrete tie to interstate commerce."[85] Upholding this statute would effectively give Congress a general police power under the Commerce Clause of the kind retained by the states.[86] That would be impermissible:

> Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action. . . The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further. To do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated . . . and that there never will be a distinction between what is truly national and what is truly local . . . . This we are unwilling to do.[87]

VI. POSSIBLE IMPLICATIONS OF *LOPEZ*

What are the implications of *Lopez* for the future? Answering that question requires an examination of at least some of the alternative ways of interpreting the case. I shall specify some of these alternative interpretations and offer brief comments on each.

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84. *Id.* (citations omitted).
85. *Id.* at 1634.
86. *Id.*
87. *Id.*

A. Interpretation (1): Congress can guarantee the constitutionality of any such statute simply by inserting a jurisdictional element requiring a connection to interstate commerce as a condition of the statute's applicability.

This interpretation finds apparent support in the Court's observation that the statute in question lacked any jurisdictional element that would require "through case-by-case inquiry, that the firearm possession in question affects interstate commerce."[88] This suggests that the statute would have been upheld if it had included a provision requiring that any such gun, or perhaps even any of its component parts, had previously been, or subsequently was, carried across a state line.

But if that is all that *Lopez* means, it is not a significant result. Congress could always easily avoid its impact by inserting a jurisdictional element in every such statute. Admittedly, such jurisdictional requirements would increase, to some extent, the prosecutorial burden upon the United States, but that does not seem nearly sufficient to significantly limit the general-welfare powers Congress had under the pre-*Lopez* cases.

B. Interpretation (2): Congress can guarantee the constitutionality of any such statute by simply making explicit findings concerning the statute's relation to interstate commerce.

This interpretation finds support in the Court's observation that the statute in question was not accompanied by congressional findings regarding the effects upon interstate commerce of gun possession in school zones.[89] But, again, if this is all that *Lopez* means, it is not significant, when evaluated against the goal of bringing the nation back to a reserved-powers federalism. Congress could always find *something* to say about *any* statute's relationship to interstate commerce. If law students can do it, Congress can.

C. Interpretation (3): The meaning of the word "commerce" in the Interstate Commerce Clause is restricted to commercial activities in the ordinary sense.

Perhaps some support for this interpretation is afforded by

88. *Id.* at 1631.
89. *Id.*

the Court's repeated observation that the mere possession of a gun in a school zone is not commercial activity in the ordinary sense of "commercial."[90]

If the Court intended to limit the scope of the term "commerce" in the Interstate Commerce Clause, then *Lopez* would be a very significant result. As I have argued, a crucial step in the process of giving Congress general-welfare powers was the Court's interpretation of "commerce" as "any activity, process, event or state of affairs—human or nonhuman, commercial or noncommercial."[91] It gives Congress the power to directly regulate interstate "commerce" in any way it wishes, for any reason it chooses. Further, given this limitless semantical scope of the word "commerce," Congress has equally limitless power under the Necessary and Proper Clause to indirectly regulate interstate "commerce" in any way it wishes, for any reason it chooses. Cutting down the semantical scope of "commerce" would be a large step in the direction of a reserved-powers federalist system.

But there are at least two reasons why this interpretation of *Lopez* cannot stand. First, the Court did not explicitly say so. One would naturally expect it to announce such a dramatic change in the law if it had thought of itself as making it. Second, it did explicitly reaffirm the principle that Congress can directly regulate interstate commerce in any way it wishes,[92] for any reason it chooses.[93] Obviously, that principle is incompatible with any semantical restriction of the word "commerce" to commercial activities in the ordinary sense.

Thus, it seems that, however the Court's comments about "commerce" should best be construed, they should not be understood to mean that Congress' power of direct regulation over interstate commerce is now limited to commercial activities

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90. *Id.* at 1630-31 (asserting that the criminal statute regulating possession of handguns near a school zone is a "statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms"); *see also id.* at 1634 ("The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce.").

91. *See supra* part II.A. (defining "commerce").

92. *Lopez*, 115 S. Ct. at 1629.

93. *Id.* (stating that Congress may even regulate commerce to keep it free of "immoral and injurious uses") (quoting Caminetti v. United States, 242 U.S. 470, 491 (1917)).

in the ordinary sense.

D. *Interpretation (4): The* Darby *method of legislation is unconstitutional.*

In part II.F. I described the *Darby* method of legislation as consisting of two Congressional actions. First, Congress enacts a statute prohibiting some interstate aspect, or causal side effect, of some given activity. Second, Congress enacts a statute prohibiting the activity itself. As I argued, the *Darby* method of legislation affords Congress an especially powerful general-welfare tool.

The Court's comments about gun possession in school zones not being "commercial" activity in the ordinary sense might suggest that *Lopez* intends to impose some limitation upon the *Darby* method.[94] For crucial to the *Darby* method is the principle that Congress can directly regulate interstate "commerce" in any way it wishes, for any reason it chooses.

However, for the reasons I mentioned in part VI.C., I do not believe that *Lopez* should be interpreted as reaching such a radical result. Further, it should be noted that the Court specifically cited *Darby* in an apparently approving way.[95] Finally, Justices Kennedy and O'Connor, in a concurring opinion, said with respect to *Darby*, along with other modern cases, "These and like authorities are within the fair ambit of the Court's practical conception of commercial regulation and are not called in question by our decision today."[96]

Thus, it seems that the Court did not intend to overrule or limit *Darby*. If that is so, then Congress could easily avoid the limitations of *Lopez* by amending the Gun-Free School Zones Act to conform to the *Darby* principles. One section of an amended statute could prohibit the interstate transportation of any gun, or any of its component parts, that, at any time during its previous existence, was possessed by a person who was at that very time within 1,000 feet of a school. This first section would presumably be upheld on the basis of the principle that Congress can directly regulate interstate "commerce" in any way it

94. *Lopez*, 115 S. Ct. at 1630-31.

95. *Id.* at 1629 (stating that "Congress may regulate intrastate activity that has a 'substantial effect' on interstate commerce") (quoting *Darby*, 312 U.S. at 119-20).

96. *Id.* at 1637 (Kennedy, J., concurring).

wishes, for any reason it chooses. A second section of the amended statute would prohibit the possession of any gun within 1,000 feet of any school. The section would presumably be upheld because it is a reasonable means of reducing the rate at which members of the class of guns regulated by the first section cross state lines.

E. Interpretation (5): There are special limitations upon the use of the Necessary and Proper Clause, as linked to the Interstate Commerce Clause, when the subject-matter directly regulated is not itself "commercial," in the ordinary sense.

The Court's remarks, already commented on for other purposes in parts VI.C. and VI.D., that the mere possession of a gun in a school zone is not itself "commercial" activity in the ordinary sense[97] suggests *some* limitation upon uses of the Necessary and Proper Clause in such contexts. But what precisely those limitations are is uncertain. There are alternative ways of interpreting the Court's remarks.

One might interpret them as stating that Congress cannot regulate noncommercial subject-matters under the Necessary and Proper Clause at all. That would be a drastic limitation upon Congress' pre-*Lopez* general-welfare powers. But it is doubtful that the Court intended to suggest this. Its comments about the lack of a jurisdictional element and congressional findings, discussed in parts VI.A and VI.B., suggest that Congress could have constitutionally regulated gun possession in school zones if it had remedied those deficiencies, as it could easily have done.

A less radical interpretation would take these remarks about "commerce" as stating that regulations of noncommercial matters under the Necessary and Proper Clause raise some kind of rebuttable presumption of unconstitutionality. That is, such regulations trigger a heightened degree of judicial scrutiny. This interpretation seems consistent with Justice Souter's dissent, which said about the majority opinion: "There is today, however, a backward glance at both the old pitfalls, as the Court treats deference under the rationality rule as subject to gradation according to the commercial or noncommercial nature of the

97. *Id.* at 1630-31.

immediate subject of the challenged regulation."[98]

This less radical interpretation is probably the preferable one. But, again, if this is the result the Court intended, it is not a significant limitation upon Congress' general-welfare powers, especially if Congress can satisfy the heightened scrutiny simply by inserting jurisdictional elements or congressional findings in their enactments.

F. Interpretation (6): There are special limitations upon the use of the Necessary and Proper Clause, as linked to the Interstate Commerce Clause, when the subject-matter directly regulated has been traditionally regulated by the states.

This interpretation is supported by those passages in which the Court observed that the Gun-Free School Zones Act invades subject matter areas traditionally regulated by the states. For example, the Court noted that, "Under our federal system, the 'States possess primary authority for defining and enforcing the criminal law.'"[99] Similarly, the Court said,

> [U]nder the Government's "national productivity" reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under the theories that the Government presents . . . it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign.[100]

As for Interpretation (5), there are different ways of construing these remarks. On the one hand, they might be interpreted as stating that Congress cannot regulate such subject matters at all with the Necessary and Proper Clause. Of course, that would be a dramatic limitation upon Congress' powers. But, again, it seems doubtful that the Court intended to say anything like this.

A more plausible, and less dramatic, interpretation would construe the Court's statements as merely indicating that

98. *Id.* at 1653-54 (Souter, J., dissenting) (explaining that the Court's commercial/noncommercial distinction is similar to the direct/indirect distinction because of its line drawing and its attempt to calibrate the amount of deference given to Congress according to how commercial the regulated activity is).

99. *Id.* at 1631 n.3 (citations omitted).

100. *Id.* at 1632 (citation omitted).

regulations of subject matters traditionally regulated by the states trigger some kind of heightened judicial scrutiny. If this is the result intended by the Court, then no significant limitation upon Congressional power has been effected.

VII. *LOPEZ* IS NOT ENOUGH.

I have argued that the meaning of *Lopez* is uncertain to some degree. But, however *Lopez* itself should best be interpreted, it seems doubtful that it stands for any principle that would seriously inhibit Congress' regulatory powers. Anyone desiring a return to something close to a reserved-powers federalism would naturally want something more than *Lopez* apparently affords.

What might that something more be? I shall briefly offer a few suggestions.

A. "Commerce"

Any serious step in the direction of a reserved-powers federalism must include an interpretation of the word "commerce" that brings it back to its customary and intended meaning. I have argued that in the modern era the Court has, in effect, interpreted it as meaning "any activity, process, event or state of affairs—human or nonhuman, commercial or noncommercial."[101] That is not only an unreasonable interpretation, but one guaranteed to give Congress vastly greater powers than the Framers intended.

A much more reasonable interpretation would limit "commerce" to the activities of buying, selling or exchange, and to the activity of transportation for the purpose of engaging in those activities.[102] Justice Thomas argued convincingly in his concurring opinion that this is the sense in which "commerce" was used and intended by the Framers.[103] As he observed, commercial activities in this sense must be distinguished from the activities of manufacturing and agriculture.[104]

If the nation wishes to give Congress the power to directly regulate the interstate aspects of "any activity, process, event or

101. *See supra* part II.A.
102. *Id.* at 1643 (Thomas, J., concurring).
103. *Id.*
104. *Id.*

state of affairs" then it should have to amend the Constitution to say precisely that.[105]

B. *"Interstate"*

It seems that the meaning of "interstate" could safely be left where it is under the Court's modern cases.[106] "Interstate" should be construed as meaning "crossing a state line." Thus, putting the meaning of "interstate" together with that of "commerce," yields the proposition that interstate commerce includes any transaction of buying, selling or exchange that crosses a state line.

C. *"Regulate"*

In contrast to the situation with "interstate," any reasonably adequate interpretation of "regulate" requires a significant departure from the Court's current usage. As I observed in part II.C., the Court construes "regulation" to include any rule, including an absolute prohibition. This is far too inclusive, given the Framers' primary purpose for the Interstate Commerce Clause.

That the Court's current interpretation is too inclusive can be seen by thinking about some of its logical consequences. If "regulation" includes *any* rule, including an absolute prohibition, then Congress could, for example, enact legislation prohibiting *all* commerce between the states. If that example strikes you as politically unlikely, and it probably is, consider one that is more likely. Under the Court's current interpretation of "regulate," Congress could constitutionally enact legislation prohibiting the importation of, say, tires, into a particular state for the protectionist purpose of giving special help to that state's local tire industry at the expense of tire interests in other states. It is easy to imagine this sort of legislation tacked on to a bill as a pork-barrel rider.

The reason such examples are relevant is that they illustrate how far the Court has departed from the original purpose of the

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105. "The Constitution not only uses the word 'commerce' in a narrower sense than our case law might suggest, it also does not support the proposition that Congress has authority over all activities that 'substantially affect' interstate commerce." *Id.* at 1644 (Thomas, J., concurring).

106. *See supra* part II.B.

Interstate Commerce Clause. Putting the matter in contemporary terms, that purpose was to give Congress the power to create the conditions for an efficient national common market—a market in which goods, services, capital and labor can flow freely to their highest valued uses, as measured by the willingness to pay, unhindered by the arbitrary and economically-inefficient barriers of state boundaries. The examples show that Congress could constitutionally enact legislation that directly conflicts with that basic purpose.

That purpose must be understood against the historical background of the nation's experience under the Articles of Confederation—a period in which the states often sought to protect their own domestic economic interests at the expense of economic interests in other states. In arguing for the desirability of giving to Congress the power to regulate trade between the states, Alexander Hamilton said the following:

> The interfering and unneighborly regulations of some States, contrary to the true spirit of the Union, have, in different instances, given just cause of umbrage and complaint to others, and it is to be feared that examples of this nature, if not restrained by a national control, would be multiplied and extended till they became not less serious sources of animosity and discord than injurious impediments to the intercourse between the different parts of the Confederacy. "The commerce of the German empire is in continual trammels from the multiplicity of the duties which the several princes and states exact upon the merchandises passing through their territories, by means of which the fine streams and navigable rivers with which Germany is so happily watered are rendered almost useless." Though the genius of the people of this country might never permit this description to be strictly applicable to us, yet we may reasonably expect from the gradual conflicts of State regulations that the citizens of each would at length come to be considered and treated by the others in no better light than that of foreigners and aliens.[107]

Thus, the fundamental problem is that the Court's current interpretation of "regulate" gives Congress the power to directly regulate interstate activities for purposes that have no serious

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107. THE FEDERALIST NO. 22, at 144-45 (Alexander Hamilton) (Clinton Rossiter ed., 1961). For a similar observation, see THE FEDERALIST NO. 42, at 267-68 (James Madison) (Clinton Rossiter ed., 1961).

relationship to the purpose of creating the economic conditions for an efficient national common market. The remedy is construing "regulate" in a way that precludes such congressional departures from the Constitution's intent.

Here is one possibility: Given a congressional statute that governs interstate commerce, as defined in parts VII.A. and VII.B., the statute is a *regulation* of interstate commerce if and only if (1) Congress' primary purpose in enacting the statute is that of helping create the conditions for an efficient national common market by reducing the extent to which state boundaries operate as inefficient barriers to the free flow of goods, services, capital and labor throughout the nation, and (2) the statute is likely to promote that objective.

Given this interpretation of "regulate," Congress could, for example, constitutionally enact legislation ensuring the freedom of interstate truckers from discriminatory state regulations. But Congress could not, for example, constitutionally enact legislation prohibiting the interstate transportation of heroin or kidnapped persons.

Putting this interpretation of "regulate" together with the recommended interpretations of "commerce" and "interstate," we have the following proposition: Legislation under the Interstate Commerce Clause is constitutional if and only if (1) the legislation directly governs the activities of buying, selling or exchange, or the activity of transportation for the purpose of engaging in those activities, (2) the legislation directly governs only the interstate aspects of those activities, (3) the primary purpose of the legislation is that of helping create the conditions for an efficient national common market by reducing the extent to which state boundaries operate as inefficient barriers to the free flow of goods, services, capital or labor throughout the nation, and (4) the legislation is likely to promote that purpose.

D. "Necessary and Proper"

As Justice Thomas noted, no amount of semantical reshaping of the terms "commerce," "interstate," and "regulate" will, by itself, serve to significantly limit Congress' powers unless the semantical boundaries of the words "necessary and proper" are

also reshaped.[108]

Under the Court's current interpretation of the Necessary and Proper Clause, Congress has the power to regulate any nonfederal subject matter by means of a statute so long as it would be rational for Congress to believe that among the causal effects of the statute would be at least one effect upon the rate at which some activity, process, event or state of affairs crosses a state line. This foreseeable impact upon something in interstate commerce does not have to be any part of Congress' primary purpose in enacting the statute. It is sufficient that the foreseeable effect be merely a "side effect." But this interpretation of "necessary and proper" effectively gives Congress power to regulate nonfederal matters in any way it wishes, for any reason it chooses. For, *any* regulation will have *some* causal effect upon the rate at which *something or other* crosses state lines.

Defining the words "commerce" and "interstate" more narrowly would not remedy this problem. Even if the meaning of the term "interstate commerce" were limited to the interstate aspects of the activities of buying, selling or exchange and the activity of transportation for the purpose of engaging in those activities, it would presumably still be the case that *any* federal regulation would have *some* foreseeable causal side effect upon interstate commerce, even in that narrowed sense.

An analogy might help. Suppose, as seems plausible, that anything a person does, while remaining on the planet Earth anyway, has *some* foreseeable effect upon the planet's environment, if nothing else, a discharge of carbon dioxide into the atmosphere. Now suppose that the Government decrees that any person can do anything she or he wishes so long as that action has at least one causal side effect upon the earth's environment. Obviously, this decree would not limit the citizens' activities in any way. There is a sense in which the condition would be pointless; it would not operate as a limitation of *any* kind.

So, the Court's current interpretation of "necessary and proper" will not do. Here is another suggestion that might serve to significantly limit Congress' power: A congressional enactment of a statute governing a nonfederal matter is a constitution-

108. *Lopez*, 115 S. Ct. at 1644 (1995) (Thomas, J., concurring) (stating that an interpretation of clause three that makes the rest of section eight superfluous simply cannot be correct).

al use of the Necessary and Proper Clause, as linked to the Interstate Commerce Power, if and only if (1) the primary purpose of the statute is the promotion of the regulation of interstate commerce, in the senses recommended in parts VII.A., VII.B. and VII.C, and (2) the statute is likely to promote that purpose.

VIII. FEDERALISM AND STATE IMMUNITY

The modest movement of the Court toward a genuine reserved-powers federalism under the Interstate Commerce Clause in *Lopez* does not stand alone. The Court had already taken a step in the direction of federalism with respect to the issue of state immunity from federal regulation.

As a general matter, any reserved-powers federalist system must incorporate at least some measure of state immunity from federal regulatory power. For consider any purported reserved-powers system lacking such an immunity. Then consider any subject-matter, S, within the scope of the states' alleged reserved powers. If the states have no immunity from federal regulation then the national legislature could enact legislation requiring the states to regulate S in some particular manner. But then the states would not be free to regulate S in ways that conflict with the federal mandate. Because this pattern could be repeated for any subject matter, the system would not be a genuine reserved-powers system at all.

Thus, constitutional theory requires that reserved-powers systems afford their constituent states some degree of regulatory immunity. Has the Court seen it that way? At times, it has; at others, it has not.

Before 1976 the Court regularly rejected challenges to federal regulation of state activities. For example, in *Case v. Bowles*,[109] the Court rejected a challenge to the application of a maximum price under the Emergency Price Control Act to a state timber sale.[110] In *California v. Taylor*,[111] the Court upheld an application of the Railway Labor Act to a railroad owned by a state.[112] In *Parden v. Terminal Railway*,[113] the Court re-

109. 327 U.S. 92 (1946).
110. *Id.* at 101-02.
111. 353 U.S. 553 (1957).
112. *Id.* at 564-65.

jected a claim that a state-owned railroad was immune from liability under the Federal Employers' Liability Act.[114] In *Maryland v. Wirtz*,[115] the Court upheld an application of the wage and hour provisions of the Fair Labor Standards Act to employees of public schools and hospitals.[116] In *Fry v. United States*,[117] the Court upheld an application of the Economic Stabilization Act limiting wage increases for governmental employees.[118]

But despite such rulings, there were hints of possible change. Dissenting in *Wirtz*, Justices Douglas and Stewart contended that the interstate commerce power could not be used in ways which unreasonably interfere with the states' sovereign powers.[119] Dissenting in *Fry*, Justice Rehnquist recommended that *Wirtz* be overruled.[120] In a footnote to the majority's opinion in *Fry*, Justice Marshall stated the following:

> While the Tenth Amendment has been characterized as "a truism," stating merely that "all is retained which has not been surrendered," . . . it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system.[121]

In a five-to-four decision in *National League of Cities v. Usery*,[122] the Court made good on these hints. Congress had extended the maximum hour and minimum wage provisions of the Fair Labor Standards Act to state employees.[123] The Court invalidated the Act, as applied to state employees performing traditional governmental functions.[124] Quoting from the above-mentioned footnote in *Fry*, the Court said that Congress cannot impair the states' integrity or their capacity to operate

113. 377 U.S. 184 (1964).
114. *Id.* at 190-91.
115. 392 U.S. 183 (1968).
116. *Id.* at 201.
117. 421 U.S. 542 (1975).
118. *Id.* at 548.
119. *Wirtz*, 392 U.S. at 201 (Douglas, J., dissenting).
120. *Fry*, 421 U.S. at 549 (Rehnquist, J., dissenting).
121. *Id.* at 547 n.7 (quoting United States v. Darby, 312 U.S. 100, 124 (1941)).
122. 426 U.S. 833 (1976).
123. *Id.* at 836.
124. *Id.* at 852.

effectively in a federal system.[125] Application of the Act would impose significant costs upon the states and limit their flexibility. The Court said in conclusion, "insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional government functions, they are not within the authority granted Congress by" the Interstate Commerce Clause.[126] Concurring, Justice Blackmun said that, although he was troubled by some of the possible implications of the majority's opinion, he was persuaded to join it because he construed it as adopting "a balancing approach" allowing for federal regulation "where the federal interest is demonstrably greater and where state . . . compliance with imposed federal standards would be essential."[127] Dissenting, Justice Brennan, joined by Justices White and Marshall, argued that because the political branches of the federal government are designed to give the states the power to protect their own interests, there is no need for judicial restraints upon applications of the interstate commerce power to state activities.[128] Justice Stevens also dissented.[129]

One of the technical weaknesses of the Court's opinion was its apparent invocation of the Tenth Amendment as an independent source of state immunity. The difficulty can be brought out by considering this syllogism:

(1) No powers delegated to the federal government by the Constitution are powers limited by the Tenth Amendment.

(2) The interstate commerce power is a power delegated to the federal government by the Constitution.

(3) Hence, the interstate commerce power is not limited by the Tenth Amendment.

The premises are true and the syllogism is deductively valid. This reasoning suggests that the doctrine of state immunity from federal regulation under the Interstate Commerce Clause should be understood as a limitation upon federal power implicit in that Clause itself, rather than as a limitation arising directly from the Tenth Amendment.

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125. *Id.* (quoting *Fry*, 421 U.S. at 547 n.7).
126. *Usery*, 426 U.S. at 852.
127. *Id.* at 856 (Blackmun, J., concurring).
128. *Id.* at 877 (Brennan, J., dissenting).
129. *Id.* at 880-81 (Stevens, J., dissenting).

In *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*,[130] the Court tried to clarify the principle it had articulated in *Usery*.[131] It summarized three conditions state-immunity challenges to federal regulation must satisfy.

> First, there must be a showing that the challenged statute regulates the "states as states." . . . Second, the federal regulation must address matters that are indisputably "attribute[s] of state sovereignty." . . . And, third, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional governmental functions."[132]

In addition, the Court acknowledged the possibility of upholding some federal laws, despite the satisfaction of all three of these conditions, under the balancing test mentioned in Justice Blackmun's concurring opinion in *Usery*.[133]

In *United Transportation Union v. Long Island Railroad Co.*,[134] the Court, in a unanimous opinion, found no immunity for a state-owned railroad from the Railway Labor Act because the operation of a railroad is not a traditional governmental function.[135] In *Equal Employment Opportunity Commission v. Wyoming*,[136] the Court upheld an application of the Age Discrimination in Employment Act to state employees. The Court divided five-to-four, with Justice Blackmun joining the four *Usery* dissenters.[137] The majority argued that the burdens imposed upon the states were less than those imposed by the minimum wage and maximum hour provisions at issue in *Usery*.[138]

Then in *Garcia v. San Antonio Metropolitan Transit Authority*,[139] the Court abruptly changed its mind, with Justice Black-

130. 452 U.S. 264 (1981).
131. *Id.* at 287-88.
132. *Id.* (quoting Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 262 (1964)). The *Heart of Atlanta Motel* Court had ruled that the means chosen by Congress to regulate private activity must be reasonably adapted to the end permitted by the Constitution. *Heart of Atlanta Motel*, 379 U.S. at 262.
133. *Hodel*, 452 U.S. at 288 n.29 (quoting National League of Cities v. Usery, 426 U.S. 833, 852-53 (1976)).
134. 455 U.S. 678 (1982).
135. *Id.* at 686.
136. 460 U.S. 226 (1983).
137. *Id.* at 228.
138. *Id.* at 240-41.
139. 469 U.S. 528 (1985).

mun joining the four *Usery* dissenters to make a five-to-four decision.[140] At issue was an application of the federal minimum wage and maximum hour provisions of the Fair Labor Standards Act to the employees of a municipally-owned mass transit system. The Court overruled *Usery*, holding that the states no longer have any substantive immunity from Interstate Commerce Clause regulation.[141] Whatever immunity the states have is purely "procedural":

> [T]he fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the "States as States" is one of process rather than one of result. Any substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process rather than to dictate a "sacred province of state autonomy."[142]

Justices Powell, Burger, Rehnquist and O'Connor dissented.[143]

The principle of procedural immunity articulated in *Garcia*[144] was clarified in *South Carolina v. Baker*.[145] Rejecting a state immunity claim, the Court said,

> Although *Garcia* left open the possibility that some extraordinary defects in the national political process might render congressional regulation of state activities invalid under the Tenth Amendment, the Court in *Garcia* had no occasion to identify or define the defects that might lead to such invalidation. . . . Nor do we attempt any definitive articulation here. It suffices to observe that South Carolina has not even alleged that it was deprived of any right to participate in the national political process or that it was singled out in a way that left it politically isolated and powerless. . . . Where, as here the national political process did not operate in a defective manner, the Tenth Amendment is not implicated.[146]

Thus, it appears that a state would have immunity from federal regulation under *Garcia* only if it could prove the existence of some serious procedural defect in the federal

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140. *Id.*
141. *Id.* at 557.
142. *Id.* at 554 (quoting EEOC v. Wyoming, 460 U.S. 226, 236 (1983)).
143. *Id.* at 557-89.
144. 469 U.S. 528 (1985).
145. 485 U.S. 505 (1988).
146. *Id.* at 512-13 (citations omitted).

legislative process resulting in the challenged legislation. For example, it might be sufficient for a state to prove that, just prior to a crucial vote in the House on a bill imposing special burdens on that particular state's operations, its representatives were abducted out of the House Chamber at gunpoint and held in confinement while the vote was taken. Such an immunity is unlikely to reassure the states very much. It seems obvious that *Garcia* effectively eliminates any meaningful state immunity.

But the state-immunity story is not yet complete. In spite of what it had said in *Garcia*, the Court ruled in favor of a state-immunity challenge in *New York v. United States*.[147] At issue in *New York* was the Low-Level Radioactive Waste Policy Amendments Act of 1985.[148] The Act provided as follows: "Each State shall be responsible for providing, either by itself or in cooperation with other States, for the disposal of . . . low-level radioactive waste generated within the State."[149] It authorized states to "enter into such [interstate] compacts as may be necessary to provide for the establishment and operation of regional disposal facilities for low-level radioactive waste."[150] The Act provided for incentives of three kinds to encourage states to dispose of waste generated within their own borders.

The first measure provided for "monetary incentives." One-fourth of the surcharges collected by sited states (i.e., states with disposal sites) were to be transferred to an escrow account held by the Secretary of Energy, who would then make payments from this account to any state which had complied with a series of deadlines.[151] By July 1, 1986, every state was to have enacted laws either providing for joining a regional compact or stating an intent to develop a waste-disposal facility within its own borders.[152] By January 1, 1988, every state was supposed to have identified the state in which its disposal facility was to be located, and every compact or "stand-alone" state was supposed to have developed a siting plan.[153] By January 1, 1990, every state or compact was supposed to have filed an application for a license

147. 505 U.S. 144 (1992).
148. *Id.* at 149.
149. 42 U.S.C. § 2021c(a)(1)(A) (1988).
150. 42 U.S.C. § 2021d(a)(2) (1988).
151. 42 U.S.C. § 2021e(d)(2)(A) (1988).
152. 42 U.S.C. §§ 2021e(e)(1)(A), 2021e(d)(2)(B)(i) (1988).
153. 42 U.S.C. §§ 2021e(e)(1)(B), 2021e(d)(2)(B)(i) (1988).

to operate a facility, or in the alternative, the governor of any state that had not yet filed such an application must have certified that the state would be able to dispose of all waste generated within its borders after 1992.[154] The remainder of the escrow account was to be paid to every state or compact capable of disposing of all low-level radioactive waste generated within its own borders by January 1, 1993.[155] Any state that had not met the 1993 deadline would either have to take title to the waste generated within its borders, or in the alternative, forfeit to the waste generators the incentive payments it had received.[156]

The second measure provided for "access incentives." Any state failing to meet the July 1986 deadline could be charged twice the ordinary surcharge for the rest of 1986, and could be denied access altogether to disposal facilities after 1986.[157] Any state failing to meet the 1988 deadline could be charged double surcharges for the first half of 1988, quadruple surcharges for the second half of 1988, and denied complete access after 1988.[158] Any state failing to meet the 1990 deadline could be denied access.[159] Any state failing to file an application by January 1, 1992, for a license to operate a facility, or any state belonging to a compact which had not filed such an application, could be charged triple surcharges.[160]

The third measure was a "take title provision." The Act provided as follows:

> If a State (or, where applicable, a compact region) in which low-level radioactive waste is generated is unable to provide for the disposal of all such waste generated within such State or compact region by January 1, 1996, each State in which such waste is generated, upon the request of the generator or owner of the waste, shall take title to the waste, be obligated to take possession of the waste, and shall be liable for all damages directly or indirectly incurred by such generator or owner as a consequence of the failure of the State to take possession of the waste as soon after January 1, 1996, as the

154. 42 U.S.C. §§ 2021e(e)(1)(C), 2021e(d)(2)(B)(iii) (1988).
155. 42 U.S.C. § 2021e(d)(2)(B)(iv) (1988).
156. 42 U.S.C. § 2021e(d)(2)(C) (1988).
157. 42 U.S.C. § 2021e(e)(2)(A) (1988).
158. 42 U.S.C. § 2021e(e)(2)(B) (1988).
159. 42 U.S.C. § 2021e(e)(2)(C) (1988).
160. 42 U.S.C. §§ 2021e(e)(1)(D), 2021e(e)(2)(D) (1988).

> generator or owner notifies the State that the waste is available for shipment.[161]

The Court upheld the monetary and access incentives and struck down the take title provision.[162] It apparently addressed the above-mentioned technical difficulty inherent in any state-immunity ruling that invokes the Tenth Amendment as an independent source of immunity:

> Congress exercises its conferred powers subject to the limitations contained in the Constitution. Thus, for example, under the Commerce Clause Congress may regulate publishers engaged in interstate commerce, but Congress is constrained in the exercise of that power by the First Amendment. The Tenth Amendment likewise restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which, as we have discussed, is essentially a tautology. Instead, the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States. The Tenth Amendment thus directs us to determine, as in this case, whether an incident of state sovereignty is protected by a limitation on an Article I power.[163]

Thus, the Court has apparently decided to ground the state-immunity doctrine upon the implied limitations of the Interstate Commerce Clause itself, as opposed to the Tenth Amendment, now understood as simply an explicit recognition of the fact that the affirmative grants of legislative power to Congress have their own intrinsic limitations.[164]

The Court distinguished the *New York* type of state-immunity question from the kind of state-immunity issue raised in cases such as *Usery* and *Garcia*. Cases of the latter type concern "the authority of Congress to subject state governments to generally applicable laws. . . . This case presents no occasion to apply or revisit the holdings of any of these cases, as this is not a case in which Congress has subjected a State to the same legislation applicable to private parties."[165] In contrast, the situation at hand "concerns the circumstances under which Congress may

161. 42 U.S.C. § 2021e(d)(2)(C) (1988).
162. *New York*, 505 U.S. at 186-87 (1992).
163. *Id.* at 156-57.
164. *Id.*
165. *New York*, 505 U.S. at 201 (White, J., concurring in part, dissenting in part) (citations omitted).

use the States as implements of regulation; that is, whether Congress may direct or otherwise motivate the States to regulate in a particular field or a particular way."[166] Thus, apparently the principle of *Garcia* still applies to situations in which Congress imposes legislative burdens upon both state non-regulatory activities and comparable private-sector activities. In such contexts the states apparently have only the insignificant "procedural" immunity already discussed.[167]

The Court then set forth "a few principles that guide our resolution of this issue."[168] First, "Congress may not simply 'commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'"[169] "While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions."[170] In general, the Constitution gives Congress the power to regulate persons, not states:

> We have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts. The allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce.[171]

On the other hand, this does not mean that Congress lacks power to encourage the states to regulate in certain ways. There are at least two methods, short of outright coercion, by which Congress may constitutionally urge the states to regulate in certain ways. "First, under Congress' spending power, 'Congress

166. *Id.* at 161.

167. *See supra* notes 139-42 and accompanying text.

168. *New York*, 505 U.S. at 161.

169. *Id.* (quoting Hodel v. Virginia Surface Mining Co., 452 U.S. 264, 288) (alteration in original). The *Hodel* Court upheld the Surface Mining Control and Reclamation Act of 1977 because it did not force the states to regulate mining. *Hodel*, 452 U.S. at 288-89.

170. *New York*, 505 U.S. at 162.

171. *Id.* at 165 (citations omitted).

may attach conditions on the receipt of federal funds.'"[172] "Second, where Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress' power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation."[173]

Turning to the merits, the Court ruled that the monetary incentives were constitutional.[174] These incentives proceed in three phases, each of which is permissible. In the first phase Congress authorizes states with disposal sites to impose a surcharge on radioactive waste coming from other states.[175] That measure is constitutional because it is an exercise of Congress' power to authorize the States to burden interstate commerce in ways otherwise prohibited by the Dormant Commerce Clause.[176] In the second phase the Secretary of Energy collects part of the surcharges and puts the money in an escrow account.[177] That measure is constitutional because it is a federal tax on interstate commerce, which can be based either upon the interstate commerce power or the taxing power.[178] The third step provides that states that satisfy a series of conditions are eligible to receive portions of the escrow fund.[179] That phase is constitutional because it is a conditional exercise of the spending power.[180] Congress has the power to attach conditions to federal funds, so long as the spending is for the general welfare, and the conditions tied to the funds are clear, reasonably related to the purpose of the spending, and do not violate any independent constitutional prohibitions.[181] All of these requirements are satisfied in the case at hand.[182]

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172. *Id.* (quoting South Dakota v. Dole, 483 U.S. 203, 206 (1987)).
173. *Id.* at 167.
174. *Id.* at 165.
175. *Id.* at 171.
176. *Id.* at 167-68.
177. *Id.* at 171.
178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.*
182. *Lopez*, 115 S. Ct. 1624. Even though Justice O'Connor cited South Dakota v. Dole, 483 U.S. 203 (1987) in New York v. United States, 505 U.S. 144, 167, 171 (1992) as authority for these constitutional limitations on conditions on federal funds, she did not mention one of the requirements mentioned in *Dole*, namely, that the conditions not be coercive. *Dole*, 483 U.S. at 211. Whether this omission means that non-

In summary, the set of monetary incentives "is thus well within the authority of Congress under the Commerce and Spending Clauses."[183] Hence, it does not violate any immunity the states have from federal regulation.

The access incentives authorize states and regional compacts with disposal sites to gradually increase the cost of access, and eventually deny access completely, to wastes generated within states failing to comply with the federal guidelines.[184] This measure is constitutional because it is based upon Congress' power to offer states the choice between regulating an activity according to federal standards and having its own law pre-empted by federal regulation: "States may either regulate the disposal of radioactive waste according to federal standards by attaining local or regional self-sufficiency, or their residents who produce radioactive waste will be subject to federal regulation authorizing sited States and regions to deny access to their disposal sites."[185] The affected states are not compelled to regulate because any burdens caused by their refusals to regulate would fall on those who produce the waste and can find no outlet for disposal, rather than upon the state as a sovereign entity.

> A State whose citizens do not wish it to attain the Act's milestones may devote its attention and its resources to issues its citizens deem more worthy; the choice remains at all times with the residents of the State, not with Congress. The State need not expend any funds, or participate in any federal program, if local residents do not view such expenditures or participation as worthwhile. Nor must the State abandon the field if it does not accede to federal direction; the State may continue to regulate the generation and disposal of radioactive waste in any manner its citizens see fit.[186]

The take title provision is unconstitutional. It offers states the choice between regulating pursuant to federal direction, on the one hand, and taking title to, and possession of, the waste generated within their borders and becoming liable for all

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coerciveness is no longer a constitutional requirement is not clear.

183. *New York*, 505 U.S. at 173.

184. *Id.*

185. *Id.* at 174.

186. *Id.* (citations omitted).

damages waste generators suffer, on the other.[187] Here Congress has "crossed the line distinguishing encouragement from coercion."[188]

Neither of these alternatives would be constitutional considered alone. On the one hand, Congress could not simply transfer radioactive wastes from waste producers to state governments. That would be essentially equivalent to a federally compelled subsidy from state governments to waste producers. The same can be said of the provision requiring the states to become liable for their waste producers' damages. That would be essentially equivalent to a federal statute requiring the states to assume the liabilities of certain of their own residents. Federal statutes of either kind would unconstitutionally "commandeer" state governments into assisting federal regulatory purposes. On the other hand, the second choice held out to the states—regulating according to Congress' direction—would, considered alone, be an unconstitutional order to state governments to implement federal legislation.

Hence,

> [b]ecause an instruction to state governments to take title to waste, standing alone, would be beyond the authority of Congress, and because a direct order to regulate, standing alone, would also be beyond the authority of Congress, it follows that Congress lacks the power to offer the States a choice between the two. Unlike the first two sets of incentives, the take title incentive does not represent the conditional exercise of any congressional power enumerated in the Constitution. In this provision, Congress has not held out the threat of exercising its spending power or its commerce power; it has instead held out the threat, should the States not regulate according to one federal instruction, of simply forcing the States to submit to another federal instruction. A choice between two unconstitutionally coercive regulatory techniques is no choice at all. Either way, "the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program," an outcome that has never been understood to lie within the authority conferred upon Congress by the Constitution.[189]

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187. *Id.*
188. *Id.* at 175.
189. *Id.* (citation omitted).

In summation, a state is not merely a political subdivision of the United States. Governments at the state level are "neither regional offices nor administrative agencies of the Federal Government. The positions occupied by state officials appear nowhere on the Federal Government's most detailed organizational chart. The Constitution instead 'leaves to the several States a residuary and inviolable sovereignty,' . . . reserved explicitly to the States by the Tenth Amendment."[190] Whatever the limits of that retained State sovereignty may be, this much is evident: "The Federal Government may not compel the States to enact or administer a federal regulatory program."[191]

Thus, the Court has taken a significant step in the direction of a meaningful state immunity from federal regulation. Congress cannot simply take over the legislative or administrative apparatus of the states. On the other hand, it seems that at least two additional steps should be taken to ensure the continuing existence of a healthy reserved-powers federal system. First, *Garcia* should be overruled. The distinction the Court draws in *New York* between federal regulations bearing both upon the states and the private sector, on the one hand, and federal regulations bearing exclusively upon the states alone, on the other hand, is both inherently unstable and unwise.

It is unstable because the distinction lacks constitutional plausibility. Why should it matter whether Congress chooses to burden just the states alone, on the one hand, or chooses to burden both the states and the private sector, on the other? Should not the states have the same sort of constitutional immunity in either case?

It is unwise because refusing to give the states meaningful substantive immunity in situations of the latter kind will subject the states to the risk of drastic invasions of their sovereignty, thereby threatening the foundations of our reserved-powers federalist system.

Finally, the Court should impose stronger limitations upon Congress' power to tie strings to federal funds allocated to the States. So long as Congress has virtually unlimited power to indirectly coerce the states through conditioned federal spend-

190. *Id.* at 188 (quoting THE FEDERALIST NO. 39, at 245 (James Madison) (Clinton Rossiter ed., 1961)).

191. *Id.*

ing, whatever substantive immunity from direct federal regulation the states may have or acquire under the Court's cases is sharply diminished in practical importance by the immense power of the federal purse.

IX. CONCLUSION

For a period of some sixty years prior to *Lopez*, the Court interpreted the Constitution to effectively give Congress general-welfare powers. That interpretation conflicts with the obvious original intent of the Constitution–creating a reserved-powers federalist legal system. Thus, we are forced to choose between the Constitution and the Court's interpretation. For both historical and nonhistorical reasons, we ought to follow the Constitution. *Lopez* itself imposes some limitations upon Congress' powers, but the extent of those limitations is uncertain. In any event, however best interpreted, they fail to advance us far enough along the path of re-establishing a federalist nation.