Finding a Sound Commerce Clause Doctrine: Time to Evaluate the Structural Necessity of Federal Legislation

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INTRODUCTION

Within the last decade the Supreme Court has rendered a number of decisions aimed at curbing the power of the federal government and enforcing the values of federalism. Two decisions in particular have been in the vanguard of this effort—*United States v. Lopez*[1] and *United States v. Morrison*.[2] Both decisions sought to implement the Court's federalism values by creating rules that purport to limit Congress's power to enact legislation under the Commerce Clause, which permits Congress to regulate interstate commerce. But in fact the rules arising out of *Lopez* and *Morrison* would allow regulation that plainly offends federalism principles. At the same time, these cases call into question the federal government's ability to pass needed commerce-related legislation that addresses important social issues. There is a significant disjunction between the rules the Court articulated in *Lopez* and *Morrison* and the federalism goals it attempted to realize.

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[1] 514 U.S. 549 (1995).
[2] 529 U.S. 598 (2000).

This article argues that the disjunction could be corrected if the Court adopts an inquiry into the "structural necessity" of the legislation it considers under the Commerce Clause. A proper understanding of Commerce Clause jurisprudence and federalism would permit Congress to pass legislation addressing problems the federal government is uniquely situated to solve, so long as the legislation has a relation to interstate commerce. By the same token, the Court should disallow legislation that does not require a national solution, or legislation that is not related to interstate commerce. In short, in evaluating the constitutionality of legislation passed under the Commerce Clause, the Court ought to ask whether a solution at the federal level is necessary, because the states and the federal government are politically structured in such a way as to preclude the states from dealing with the problem at hand. Such a test would provide a meaningful check on federal power and would not prevent the federal government from addressing social issues only it can ameliorate.

The need for an inquiry into structural necessity arises because the Court to this day has never articulated a sound rule of decision for its Commerce Clause jurisprudence. In this respect, *Lopez* and *Morrison* are typical of the Court's Commerce Clause cases. The definitions of the commerce power that preceded uniformly failed because they did not reflect the concerns that truly seem to motivate the Court's decision-making: History shows that regardless of the particular rule supposedly governing the commerce power at any given time, the Court accommodates legislation addressing an important social problem, the solution of which requires governance at the national level, so long as the legislation has a connection to interstate commerce.

Conversely, the Court's invalidation of the laws at issue in *Lopez* and *Morrison* is best explained not by the rules it articulated but by the fact that both laws represented needless federal legislation that therefore offended principles of federalism. The Gun Free School Zones Act ("GFSZA") at issue in *Lopez* was redundant of state regulation and by most accounts a product of political grandstanding. The civil rights remedy of the Violence Against Women Act ("VAWA") at issue in *Morrison* also represented superfluous federal regulation, though commentators and even the majority in *Morrison* did not recognize it as such. The federal government was no better positioned to address the problem of violence against women than were the states, and there were no findings that a federal civil rights remedy was necessary to accomplish the goals Congress purported to pursue. More importantly, VAWA's civil rights remedy represented a

worrisome precedent for federalism because the states ceded legislative prerogative in an area in which they were equally competent as the federal government.

The "structural necessity" approach has significant precedent in scholarly opinion, particularly in Donald H. Regan's idea that the Court ought to consider whether the problem addressed by federal legislation is such that the states are "separately incompetent" to deal with it. However, the approach advocated in this article differs in two key respects. First, whereas Regan is weakly committed to his "separate incompetence" theory, this article argues that structural necessity (or "separate incompetence" of the states) ought to be the principal criterion by which federal legislation is judged under the Commerce Clause. Second, because of important federalism values, federal legislation should be considered invalid if it addresses an issue that states are merely unwilling, as opposed to unable, to solve (*Morrison* being the case in point).

In addition to Regan's explicit focus on a "necessity" inquiry, there also is a significant body of scholarly work that implicitly supports such an inquiry because it recognizes the practical benefits of such a focus. However, in general the current literature fails to recognize the extent to which "necessity" arguments already are supported in the Court's jurisprudence as well as general principles of federalism. A test that gauges whether there is a structural necessity for federal legislation would best embody the principles underlying the whole of the Court's Commerce Clause jurisprudence, as well as the expectations we have come to attach to laws passed under the Commerce Clause. Such a scheme also would be consistent with the vision of federal-state relations that was established in the original constitutional grants of enumerated powers. In addition, such a test would meaningfully distinguish the Court's recent decisions striking down federal legislation from those that validated such legislation.

Further, an inquiry into structural necessity is defensible to criticisms. One may object that the political system provides an inherent protection against unnecessary federal legislation, but VAWA's § 13981 and GFSZA are counterexamples that have yet to be adequately explained by proponents of such theories. One also might object to a "structural necessity" inquiry on the ground that it strays too far from the text of the Commerce Clause. However, the Court already has abandoned a literal interpretation of the Commerce Clause; the goal now must be to find rational principles that reflect the circumstances under which such extensions of the commerce power should be permissible. The alternative is to continue to devise definitions of the commerce power that do not reflect the realities of the Court's decision-making.

I. THE SHORTCOMINGS OF THE CURRENT COMMERCE CLAUSE FRAMEWORK

A. After Sixty Years of the "Substantial Effects" Test, the Court Takes a New Approach: Lopez & Morrison

Few were surprised when the Supreme Court struck down the federal civil remedy for victims of gender-motivated violence in *United States v. Morrison*. Based on substantial findings showing the prevalence of domestic violence and rape, and the devastating effect of those crimes on women, § 13981 of the Violence Against Women Act of 1994 created civil liability for anyone who violated the "right to be free from crimes of violence motivated by gender."[3] The Court invalidated the law on the ground that Congress had over-stepped its power "to regulate Commerce . . . among the several States"[4] as provided in the Commerce Clause.[5]

Morrison followed on the heels of the 1995 case of *United States v. Lopez*, in which, for the first time in sixty years, the Court invalidated a federal law as being beyond Congress's commerce power. In the decades before *Lopez*, the Court had approved a plethora of far-reaching laws on the premise that Congress could regulate any activity having a "substantial effect" on interstate commerce, including racial discrimination in public accommodations,[6] loan sharking,[7] and various environmental problems.[8] Before *Lopez* and *Morrison*, Congress's power to address these issues was never in doubt as the Court validated seemingly the most dubious exercises of the commerce power.[9]

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[3] 42 U.S.C. § 13981(b) (1994).

[4] U.S. CONST. art. I, § 8, cl. 3.

[5] The Court also found that the law was not a valid exercise of Congress's power under Section 5 of the 14th Amendment. *Morrison*, 529 U.S. at 619-27. That ruling is not the subject of this article.

[6] Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964).

[7] Perez v. United States, 402 U.S. 146 (1971).

[8] *See, e.g.*, Hodel v. Virginia Surface Mining and Reclamation Ass'n, 452 U.S. 264 (1981).

[9] Professor Althouse's characterization of these cases is noteworthy both for its accuracy and its prose:

> [I]n the last few decades, we have . . . witnessed a Court calcified into a practice of such supine inaction that it routinely rubber-stamped congressional work product without regard to how little these statutes had to do with the regulation of interstate commerce, how little positive value they purchased at the cost of state autonomy, and how little need there was to burden the federal courts with these cases.

Ann Althouse, *Enforcing Federalism After* United States v. Lopez, 38 ARIZ. L. REV. 793, 793 (1996).

In *Lopez*, however, the Court struck down GFSZA, which made it a federal crime for a person to "knowingly . . . possess a firearm at a place that [he or she] knows . . . is a school zone."[10] The *Lopez* Court invalidated GFSZA partially on the ground that the Act lacked findings that guns in school zones actually affected commerce.[11] But the Court also invalidated the Act by creating a distinction between commercial and non-commercial activity and suggesting that Congress had no power to regulate the latter.[12] The Court also expressed concern that Congress not be allowed to assume the general police power retained by the states and that the distinction between what is "truly national and what is truly local" be preserved.[13]

In *Lopez*, the emphasis on the commercial/non-commercial distinction was prominent but relatively minor; in *Morrison*, it takes center stage.[14] The Court made clear that it was invalidating VAWA's civil rights remedy because "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity."[15] The Court interpreted the commercial/non-commercial distinction in *Lopez* as being "central to our decision in that case."[16] Further, the Court re-interpreted the whole of Commerce Clause jurisprudence to support its distinction even though no case but *Lopez* had explicitly relied on it.[17]

As for the substantial effects test, it appears that the Court truncated that decades-old doctrine. The *Morrison* Court dismissed Congress's findings in regard to the impact of gender-motivated violence on interstate commerce as relying on a "but-for" analysis of the commerce power that, if accepted, "would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption."[18] The Court pointed out that if such reasoning were taken to justify an exercise of the commerce power, it could be "applied equally as well to . . . other areas of traditional state regulation"[19] and effectively would open the door to Congress's usurpation of the states' general police power.

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[10] *Lopez*, 514 U.S. at 551 (citing 18 U.S.C. § 922(q)(1)(A) (1994)).

[11] *Id.* at 563.

[12] *Id.* at 551, 561-62.

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

[14] In fact, *Morrison* adopts an "economic/non-economic" distinction rather than the "commercial/non-commercial" distinction in *Lopez*. The *Morrison* court may have done this in order to make its decision consistent with *Wickard v. Filburn*, 317 U.S. 111 (1942), in which the regulated activity was economic but not commercial. *See infra* note 29.

[15] *Morrison*, 529 U.S. at 613.

[16] *Id.* at 610.

[17] *Id.* at 610-11.

[18] *Id.* at 615.

[19] *Id.*

As the next section illustrates, neither the majority opinion nor the dissenting opinion in *Morrison* assumes a tenable position with regard to Congress's Commerce Clause power. The majority's economic/non-economic distinction fails to account for regulations that seemingly ought to fit under Congress's commerce power. At the same time, it would permit regulation that, according to the Court's own vision of federalism, Congress should not have the power to enact. Meanwhile, the dissenting opinion adheres to the substantial effects test but offers a weak and disproved limitation on the commerce power. Each opinion ignores or discounts serious infirmities in its positions. Hence, both the majority and the dissenting opinions in *Morrison* fail to articulate a sound rationale for decision.

B. The Failure to Articulate a Coherent Doctrine: The Morrison *Majority Opinion*

The *Morrison* decision is a microcosm of the problems that have plagued the Supreme Court's Commerce Clause jurisprudence almost since its inception. It serves as an example of "over-" and "under-inclusive" rule-making. In addition, it illustrates the Court's tendency to excessive formalism in this field. However, before discussing these aspects of the *Morrison* approach to Commerce Clause legislation, it is important to appreciate just how much of a departure *Morrison* is from the Court's prior case law. For this departure helps demonstrate that the Court has yet to find consistent grounds for deciding its Commerce Clause cases.

1. The Departure of *Morrison* from Prior Case Law

Perhaps the most glaring contradiction with respect to the Court's prior case law is in respect to the putative source of the new distinction *Morrison* articulates: *Lopez*. Although the *Morrison* Court fairly draws support from *Lopez* for its distinction between economic and non-economic activity, it completely discounts the more prominent holding in *Lopez* that GFSZA failed because of a lack of findings on the part of Congress. It was in reliance on this holding that Congress, in enacting § 13981, was so careful to make specific findings that violence against women substantially affects interstate commerce.[20] Nonetheless, the *Morrison* majority concluded that "the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation."[21] For this holding, Justice Souter's dissent criticizes the majority for ignoring

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[20] Joseph R. Biden, Jr., *The Civil Rights Remedy of the Violence Against Women Act: A Defense*, 37 HARV. J. ON LEGIS. 1, 11, 15-25 (2000).

[21] *Morrison*, 529 U.S. at 614.

an "obvious difference" from *Lopez*—the "mountain of data assembled by Congress . . . showing the effects of violence against women on interstate commerce."[22] Justice Souter also notes that the legislative record for VAWA is "far more voluminous" than that which was deemed to support the Civil Rights Act of 1964.[23]

Also in the *Morrison* dissent, Justice Breyer observes that "[t]he Constitution itself refers only to Congress' power to 'regulate Commerce . . . among the several States,' and to make laws 'necessary and proper' to implement that power. The language says nothing about either the local nature, or the economic nature, of an interstate commerce-affecting cause."[24] To illustrate his point, Justice Breyer discusses the so-called "civil rights cases" of *Heart of Atlanta Hotel, Inc. v. United States*,[25] wherein the Court upheld civil rights laws forbidding discrimination at local motels, and *Katzenbach v. McClung*,[26] which upheld the same for restaurants.[27] In both of these cases—cases many would argue were critical to the success of the Civil Rights Movement—the Court validated laws that regulated *non-economic* behavior in economic establishments.

Moreover, the Court traditionally has allowed Congress to count the aggregate effects of certain activities without regard to whether the specific activity itself affects commerce and without regard to the nature of that activity. In *Wickard v. Filburn*,[28] the Court found that the aggregate effect on interstate commerce of wheat grown for a farmer's home consumption could justify regulation of that activity.[29] Further, in a very expansive view of this concept, *Perez v. United States*[30] upheld the conviction of a small-time loan shark under the federal Consumer Credit Protection Act on the ground that Congress may outlaw behavior that is within a class of activities having an effect on interstate commerce even if the specific activity in question did not have such an effect.[31]

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[22] *Id.* at 628-29 (Souter, J., dissenting).

[23] *Id.* at 635 (Souter, J., dissenting).

[24] *Id.* at 657 (Breyer, J., dissenting) (quoting U.S. CONST. art. I, § 8, cls. 3, 18).

[25] 379 U.S. 241 (1964).

[26] 379 U.S. 294 (1964).

[27] *Morrison*, 529 U.S. at 657.

[28] 317 U.S. 111 (1942).

[29] With respect to *Wickard* it is interesting to note that the activity of growing wheat for home consumption could be characterized as "economic" but not as "commercial" since the wheat is for the grower's consumption and not for sale to others. This is pertinent because *Morrison* articulated an economic/non-economic distinction, 529 U.S. at 617, but *Lopez* discussed a commercial/non-commercial distinction, 514 U.S. at 566.

[30] 402 U.S. 146 (1971).

[31] *Id.* at 150-57.

Although the *Morrison* Court attempted to reconcile these and other cases with its novel holding by interpreting each of the regulated activities as being economic in nature,[32] the point is that the *nature* of the activity in question never before had taken precedence over the *effect* of that activity on commerce.[33] And no case but *Lopez* has ever expressly relied on a distinction between what is economic behavior and what is non-economic behavior. Thus, *Morrison* was a significant departure from precedent because it relied on factors that never before had been significant.

2. The Concept of "Over-" and "Under-" Inclusive Rules in the Court's Commerce Clause Jurisprudence, and the Example of *Morrison*

As is shown later in this article, the Court has a long history of devising Commerce Clause rules that are "over-" or "under-inclusive." The consequence of an under-inclusive rule is that the Court is later confronted with legislation that it *should validate* but that the under-inclusive rule does not accommodate. The consequence of over-inclusive rules is the opposite—the Court is presented with legislation it *should invalidate*, but the rule does not give it the tools do so. The result in both cases is that the Court must allow inappropriate legislation to stand, allow appropriate legislation to fail, or constantly alter a supposed "rule." The result, naturally, is a lack of predictability and guidance in the field these rules govern. Unfortunately, the rules articulated by both the majority and the dissent in *Morrison* are examples of the under- and over-inclusiveness that has marked most of the Court's commerce power decisions. Therefore, no matter which view prevails in the short-term, the long-term consequence will be that the Court either validates bad legislation, strikes down good legislation, or invents a new test.

Even before the *Morrison* Court announced its new economic/non-economic distinction, the commercial/non-commercial distinction as articulated in *Lopez* had been criticized by Professor Donald H. Regan as being under-inclusive if logically applied. Professor Regan called the distinction a "highly tendentious" and "unacceptable" gloss on existing case law because "it is easy to think up cases in which Congress's power to

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[32] The *Morrison* Court's treatment of these cases in response to the dissent was dismissive. While paying lip service to *Wickard*, *Katzenbach*, *Heart of Atlanta*, and the others, the majority grounded its argument almost solely on the analysis of *Lopez*—itself a departure from prior law. *Morrison*, 529 U.S. at 610-11.

[33] *See Morrison*, 529 U.S. at 657-58 (Breyer, J., dissenting) ("Nothing in the Constitution's language, or that of earlier cases prior to *Lopez*, explains why the Court should ignore one highly relevant characteristic of an interstate-commerce-affecting cause (how "local" it is), while placing critical constitutional weight upon a different, less obviously relevant, feature (how "economic" it is).").

regulate noncommercial, local behavior . . . should be obvious."[34] To illustrate the under-inclusiveness of this distinction, Professor Regan points to the examples of private sport-hunting of migratory birds, drunk driving on interstate highways, or backyard incinerators that emit airborne toxins that accumulate hundreds of miles away—all examples of activity that most would agree should be subject to federal regulation.[35] Another example of such activity might include non-point sources of water pollution, such as the dumping of oil into waterways or lawn fertilization that creates run-off affecting downstream, out-of-state users.

Justice Breyer's dissenting opinion in *Morrison*, the relevant part of which was joined by the other three dissenters,[36] also argues that the Court's new economic/non-economic rules, "even if broadly interpreted, are under-inclusive."[37] To demonstrate, Justice Breyer asked: "If chemical emanations through indirect environmental change cause identical, severe commercial harm outside a state, why should it matter whether local factories or home fireplaces release them?"[38] Like Professor Regan, Justice Breyer was pointing to examples of localized non-commercial behavior that Congress seemingly should be able to regulate.

Perhaps of more concern is the fact that the *Morrison* economic/non-economic distinction is not just under-inclusive with respect to potential legislation, but also with respect to legislation that is already on the books. As one commentator observed, "[t]here are an awful lot of statutes out there dealing with the environment, drug and weapons possession, and prohibitions against gambling and the like that have no interstate predicate and are potentially vulnerable because of [*Morrison*]."[39] Even commentators who applauded the *Morrison* decision have pointed out that "[t]aken too far, the court's logic could call into question all sorts of important areas of federal law—civil rights protections, environmental statutes and drug laws, to name a few."[40]

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[34] Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite* United States v. Lopez, 94 MICH. L. REV. 554, 564 (1995).

[35] *Id.*

[36] *Morrison*, 529 U.S. at 656-61 (Breyer, J., dissenting).

[37] *Id.* at 658 (Breyer, J., dissenting).

[38] *Id.* at 657 (Breyer, J., dissenting).

[39] Marcia Coyle, *What's Left After Morrison*, NAT'L L.J., May 29, 2000, at A1 (quoting Professor Douglas Kmiec).

[40] Editorial, *States' Business*, WASH. POST, May 16, 2000, at A20 [hereinafter Editorial, *States' Business*]; *see also* E.J. Dionne, Jr., Editorial, *Concern Now is Court Activism of the Conservative Kind*, AKRON BEACON J., July 16, 2000, *available at* http://www.ohio.com/bj/editorial/com/2000/July/16/docs/001103.htm (last visited Aug. 9, 2001) (noting the "fear that the Court may be on the road to invalidating many years of regulatory legislation").

In addition to being a doctrine that could radically reduce the reach of the commerce power, the *Morrison* framework also appears to apply to a range of activity that Congress ought not be allowed to regulate. The economic/non-economic distinction is thus over-inclusive because there are a host of activities that could be deemed "economic" that seemingly should *not* fall under Congress's commerce power. For example, local laws addressing such things as the location of billboards, the use of neon or illuminated signs, and even the permissible location of certain businesses all conceivably could be subject to federal regulation because they regulate economic behavior that has a substantial effect on interstate commerce. Yet such a development clearly would not accord with the current Court's vision of the federal-state balance of power.[41]

Another example of this overly broad sweep is the potential regulation of criminal activity. Traditionally, the prevention, investigation, and prosecution of most criminal activity has been left to the states.[42] However, were the economic/non-economic distinction of *Morrison* applied as articulated, it would seem to allow for an unprecedented federalization of local crime. For example, prostitution is unarguably an economic or commercial activity in that it is an exchange of money for sex. There are also a number of other crimes that are essentially local in nature but also can be characterized as "economic." Drug dealing is one of them; another, as Justice Breyer points out, is pick-pocketing.[43] Any of these crimes could easily be considered "economic." In fact, GFSZA arguably should have *survived* the majority's commercial/non-commercial distinction analysis, at least as applied to the facts of that case: because the person who was arrested in the school zone with a gun was being *paid* to act as a courier, he was engaged in "commercial activity."[44] But permitting Congress to outlaw such essentially localized behavior would not accord with the Court's goal of limiting federal power.

Justice Breyer appears to recognize the over-inclusiveness of the majority's distinction when he observes that the "line becomes yet harder

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[41] The position of the Rehnquist Court on issues of federalism and states' rights is familiar. *See, e.g.*, Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000); Alden v. Maine, 527 U.S. 706 (1999); Florida v. Seminole Tribe of Florida, 517 U.S. 44 (1996). However, Professor Geoffrey Moulton, Jr. makes the interesting argument that the Court is in fact less interested in protecting state sovereignty than in checking the expansion of national power. A. Geoffrey Moulton, Jr., *The Quixotic Search for a Judicially Enforceable Federalism*, 4 MINN. L. REV. 849, 892 (1999). This assertion has some support in the fact that the Rehnquist Court has been rather free in striking down state legislation as well as federal legislation.

[42] *See* Cohens v. Virginia, 19 U.S. (6 Wheat) 264, 426 (1821).

[43] *Morrison*, 529 U.S. at 658 (Breyer, J., dissenting).

[44] Regan, *supra* note 34, at 564 n.46 (citing Brief for the United States at 7, *United States v. Lopez*, 514 U.S. 549 (1995) (No. 93-1260)).

to draw given the need for exceptions."[45] Stating that the economic/non-economic distinction is "not easy to apply," Justice Breyer asked, "[d]oes the local street corner mugger engage in 'economic' activity or 'non economic' activity when he mugs for money?" Continuing, the Justice wondered "[w]ould evidence that desire for economic domination underlies many brutal crimes against women save the present statute?"[46] This question raises the issue of whether, under the majority rationale, a federal civil remedy could be applied when pimps use violence against prostitutes in order to enforce their economic authority over them. The majority would wish to answer this question "no," but it is doubtful that its rule would allow it to do so.

The problem of over-inclusiveness may be mitigated somewhat by the majority's insistence that Congress respect the boundary between what is "truly local" and what is "truly national." But this distinction, as discussed below, has problems of its own. In addition, such a troublesome distinction is not necessary to achieve the respect for federalism principles that the majority so adamantly defends. A structural necessity inquiry can achieve the same ends.[47]

The over-inclusiveness of the majority opinion means that the Court will not have the doctrinal tools to strike down legislation that poses a threat to the very federalism values that motivated it to adopt the new test in the first place. On the other hand, the under-inclusiveness of the majority rationale virtually guarantees that in the future the Court will be presented with legislation that it ought to validate but that its rule seems to require it to invalidate. Inevitably, the Court will have to revise its newly articulated rule or be faced with unacceptable and perhaps unsupportable outcomes.

3. The Recurring Problem of Formalism

Another respect in which the majority opinion in *Morrison* is flawed is in its formalistic attempt to define the proper subject of the commerce power in terms of "economic" versus "non-economic" activity. Formalistic doctrines by definition do not expressly incorporate the substantive principles that underlie them. Rather, they attempt to express substantive principles in a set of rules that hopefully capture the result dictated by those underlying principles. Commerce Clause jurisprudence, however, has been unkind to formalistic definitions of activity subject to regulation. The poor

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[45] *Morrison*, 529 U.S. at 656 (Breyer, J., dissenting).

[46] *Id.* (citing Perez v. United States, 402 U.S. 146 (1971)).

[47] *Id.* at 620; *see also* Section II.D.

track record of such formalistic rules in Commerce Clause doctrine suggests that the *Morrison* rule will not survive.

In *United States v. E.C. Knight Co.*,[48] for instance, the Court held that Congress could not regulate a potential monopoly of sugar refineries because there existed a distinction between manufacture and commerce that was "vital" to maintaining state autonomy.[49] This manufacture/commerce distinction re-appeared in *Carter v. Carter Coal Co.*,[50] but was not even mentioned in *National Labor Relations Board v. Jones & Laughlin Steel Corp.*,[51] despite a set of facts that seemed ideal for its application. Consequently, the Court has not relied on a manufacture/commerce distinction since *Carter* and *E.C. Knight*.

The Court attempted another ill-fated formalism in *Hammer v. Dagenhart*,[52] ruling that Congress could not regulate goods made by child labor that crossed state lines because such goods were themselves "harmless."[53] *Hammer* was expressly overruled in *United States v.*

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

[49] *E. C. Knight*, 156 U.S. at 11-13 (1895). The Court articulated this distinction thus:

> It is vital that the independence of the commercial power and of the police power, and the delimitation between them, however sometimes perplexing, should always be recognized and observed, for, while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the states as required by our dual form of government; and acknowledged evils, however grave and urgent they may appear to be, had better be borne, than the risk be run, in the effort to suppress them, of more serious consequences by resort to expedients of even doubtful constitutionality.
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> The regulation of commerce applies to the subjects of commerce, and not to matters of internal police. Contracts to buy, sell, or exchange goods to be transported among the several states, the transportation and its instrumentalities, and articles bought, sold, or exchanged for the purposes of such transit among the states, or put in the way of transit, may be regulated; but this is because they form part of interstate trade or commerce. The fact that an article is manufactured for export to another state does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the state and belongs to commerce.

Id. at 13 (citation omitted).

[50] 298 U.S. 238 (1936).

[51] 301 U.S. 1 (1937).

[52] 247 U.S. 251 (1918).

[53] *Id.* at 271-72, 276-77. The *Hammer* Court's distinction is as follows:

> The thing intended to be accomplished by this statute is the denial of the facilities of interstate commerce to those manufacturers in the states who employ children within the prohibited ages. The act in its effect does not regulate transportation among the states, but aims to standardize the ages at which children may be employed in mining and manufacturing within the

Darby,[54] in which the Court rejected the "harmlessness" inquiry and instead applied the substantial effects test in upholding the Fair Labor Standards Act of 1938.[55]

Another formal distinction that met a swift demise can be found in *A. L. A. Schechter Poultry Corp. v. United States*,[56] where the Court disallowed prosecution under a federal law that set wage and hours restrictions for the live poultry industry. The Court rested on a "direct/indirect" effects test and struck down the legislation because the business was conducted almost entirely within the state of New York.[57] This direct/indirect effects test has not been used since.

Because the *Morrison* majority's distinction threatens so much legislation that seems within the proper province of the federal government, it will likely suffer the same fate as other efforts to limit federal power

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states. The goods shipped are of themselves harmless. The act permits them to be freely shipped after thirty days from the time of their removal from the factory. When offered for shipment, and before transportation begins, the labor of their production is over, and the mere fact that they were intended for interstate commerce transportation does not make their production subject to federal control under the commerce power.

Commerce "consists of intercourse and traffic . . . and includes the transportation of persons and property, as well as the purchase, sale and exchange of commodities." The making of goods and the mining of coal are not commerce, nor does the fact that these things are to be afterwards shipped, or used in interstate commerce, make their production a part thereof.

Id. at 271-72 (citations omitted).

[54] 312 U.S. 100 (1941).

[55] *Id.* at 117.

[56] 295 U.S. 495 (1935).

[57] *Id.* at 550-51. The *Schechter Poultry* Court's rule is that:

In determining how far the federal government may go in controlling intrastate transactions upon the ground that they 'affect' interstate commerce, there is a necessary and well-established distinction between direct and indirect effects. The precise line can be drawn only as individual cases arise, but the distinction is clear in principle. Direct effects are illustrated by the railroad cases we have cited, as, e.g., the effect of failure to use prescribed safety appliances on railroads which are the highways of both interstate and intrastate commerce, injury to an employee engaged in interstate transportation by the negligence of an employee engaged in an intrastate movement, the fixing of rates for intrastate transportation which unjustly discriminate against interstate commerce. But where the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of state power. If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people, and the authority of the state over its domestic concerns would exist only by sufferance of the federal government. Indeed, on such a theory, even the development of the state's commercial facilities would be subject to federal control.

Id. at 546 (citations omitted).

based on a formalistic conception of the activity to be regulated. As one commentator observed: "Constitutional history . . . is strewn with the wreckage of efforts to draw such sharp categorical lines based on the inherent 'nature' of the activity."[58] The *Morrison* dissent shares the prediction that the economic/non-economic distinction will go the same way as the Court's other doomed efforts to impose a "formalistically contrived confine[ ]"[59] on the commerce power.

Besides being formalistic in its ambition to define the inherent nature of economic versus non-economic activity, the *Morrison* majority's opinion also is formalistic in its attempt to define those governmental functions that belong essentially to the states and those that belong essentially to the federal government. The *Morrison* decision affirmed as "well-founded" the concern expressed in *Lopez* that "Congress might use the Commerce Clause to completely obliterate the Constitution's distinction between national and local authority."[60] This standard has no content and thus would lead to an *ad hoc* determination of what is "truly" local or national. As two commentators quipped: "Unfortunately, no one [at the Constitutional Convention] ever marked the precise boundary between 'national' concerns within federal power and 'local' subjects committed to the states."[61]

Further, as the *Morrison* dissent discussed, the distinction between what is "truly local" and what is "truly national" is essentially an attempt to revive the theory of "traditional state concern." This theory, however, was rejected as a grounding principle, and "more than once."[62] In *Garcia v. San Antonio Metropolitan Transit Authority*, noted the dissent, the Court "held that the concept of 'traditional governmental function' . . . was incoherent, there being no explanation that would make sense of the multifarious decisions placing some functions on one side of the line, some on the other."[63] The *Garcia* Court arrived at this conclusion after "nine years of

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[58] Herman Schwartz, *Supreme Court Assault on Federalism Swipes at Women*, L.A. TIMES, May 21, 2000, at M1.

[59] *Morrison*, 529 U.S. at 642 (Souter, J., dissenting). This dissent also criticizes the majority's distinction as contradicting *Wickard*, in which the Court approved Congress's regulation of wheat grown for home consumption. *Morrison*, 529 U.S. at 636 (Souter, J., dissenting). But the dissent's criticism is questionable. Although the dissent may be right to characterize the growing of wheat for home-consumption as "non-commercial" activity, it is at least economic activity. Hence, it is closer to the commerce power than domestic violence and rape.

[60] *Id.* at 615.

[61] Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues*, 85 IOWA L. REV. 1, 29 (1999).

[62] *Morrison*, 529 U.S. at 645 (Souter, J., dissenting).

[63] *Id.* at 646 (Souter, J., dissenting) (citing Garcia v. San Antonio Metro. Transit Auth.,

confusion and wasteful litigation"[64] in which "the lower federal courts split chaotically in their efforts to identify areas that were within the traditional control of the states."[65]

Moreover, the majority's insistence on maintaining "traditional state functions" provides no guidelines for determining whether the states or the federal government should regulate novel activities—such as organized crime, environmental degradation, guns in school zones, or the Internet—for which no "tradition" exists. As such novel activities are the most likely subjects of regulation, it is clear that the majority's distinction needs more content in order to be workable.

Another formalistic weakness in the majority's opinion is its insistence that Congress cannot assume a general police power. Although the Court's determination to deny Congress a general police power may serve to check an expansion of the commerce power with regard to at least some legislation, it cannot be applied as a limit on all existing or potential federal legislation because the federal government has already assumed many aspects of a general police power.[66] Unless the Court is willing to eliminate a number of well-entrenched federal laws, it seems too late to draw the line here. This is not to suggest that a general congressional police power would be acceptable, or that this is a thoroughly meaningless distinction. Rather, the fact that Congress has already taken on some attributes of a police power suggests that there must be a more nuanced or accurate definition of the sphere of congressional power.

The Court's quixotic adventures with formalistic definitions of the commerce power suggest that the *Morrison* majority's "economic activity" test will meet the same fate as the Court's other formalistic rules. Unfortunately, the dissent offers no better alternative.

C. *The Inadequacy of the "Substantial Effects" Test: The* Morrison *Dissent*

The dissenting justices in *Morrison* would have validated VAWA's civil rights remedy on the ground that Congress had made findings showing that the problem of violence against women has a substantial effect on interstate commerce. The dissent further argued that although the

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469 U.S. 528 (1985)).

[64] Schwartz, *supra* note 58.

[65] John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1325-26 (1997).

[66] Nelson & Pushaw, *supra* note 61 at 33-34. *See also* Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. §§ 841(a), 846 (1994) (allowing prosecution for possession of relatively small quantities of drugs); 18 U.S.C. § 1955 (1994) (prohibiting illegal gambling businesses).

substantial effects test may in principle be over-inclusive, the political process itself ensures a limited federal government and thereby protects the system of federalism.[67] Both arguments are flawed.

While pointing out legitimate infirmities in the majority opinion, the dissent fails to shore up the weaknesses in the substantial effects test it advocates. The substantial effects test always has suffered the same problem: *Everything* seems to affect commerce and therefore everything potentially could be regulated under the substantial effects test. In this sense it is the epitome of over-inclusiveness. The Court first criticized the over-inclusiveness of the substantial effects test in *Lopez*, where it stated that "if we were to accept the Government's arguments, we would be hard pressed to posit any activity by an individual that Congress is without power to regulate."[68] The *Lopez* majority pointed out that if Congress could regulate guns in school zones on the theory that guns affected the quality of education which in turn affected commerce, then there would be no logical reason why Congress could not regulate education itself. The door then would be open for Congress to mandate a national curriculum for local elementary schools or national salary levels for teachers on the ground that an inadequate education (however defined) adversely affects commerce.[69] However far-fetched one might think this scenario, its logic cannot be disputed.

The logical problems of the substantial effects test were no less present in *Morrison* than in any of the previous cases: "If Congress could federalize rape and assault, it's hard to think of anything it couldn't."[70] As in *Lopez*, the potential for infinite expansion of the substantial effects test is the reason the majority in *Morrison* rejected it—"if Congress may regulate gender-motivated violence, it would be able to regulate murder or any other type of violence . . . ."[71] Moreover, the substantial effects test could be "applied equally as well to family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant."[72]

The problem does not extend just to education, violent crime, and family law; many other things substantially affect commerce but do not seem the proper target of federal legislation. Local traffic lights, parking policies, and public transport might be construed as affecting interstate commerce since any one of them might have a substantial impact on

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[67] *See generally Morrison*, 529 U.S. at 528-55 (Souter, J., dissenting).
[68] *Lopez*, 514 U.S. at 564.
[69] *Id.* at 565.
[70] Editorial, *States' Business*, *supra* note 40.
[71] *Morrison*, 529 U.S. at 615.
[72] *Id.* at 615-16.

commuter traffic and the ease with which visitors to a city can avail themselves of the local economy. Local or state administration itself could be deemed to substantially affect commerce because the national economy is certainly influenced by the efficiency of state and local government. More ominous is the fact that so many local crimes—from panhandling and loitering to assault and murder—could be considered to have a direct and substantial effect on interstate commerce because businesses have difficulty operating in neighborhoods where crime is rampant. Could Congress then use the Commerce Clause to station federal marshals at every street corner?

Perhaps because of the logical problems with the substantial effects test, courts endorsing that test have at least paid lip service to the notion that the test has limits. Even in *Lopez*, Justice Breyer argued that application of the substantial effects test to GFSZA would not authorize a general federal police power and suggested that there are areas of law outside the scope of Congress's commerce power, giving the examples of domestic relations or certain aspects of education.[73] Hence, the dissenters in *Lopez* claimed that the substantial effects test had some logical limitation even if they failed to articulate what that limitation might be.[74]

In *Morrison*, however, such talk of limitation is notably absent. The dissent in *Morrison* abandons any effort to find a substantive limit to the substantial effects test and instead relies on the hypothesis that *national politics* protects states' interests and therefore should be "the moderator of the congressional employment of the commerce power."[75] By relying on the political process to protect the dual system of federalism, the dissent's approach in principle places no concrete limit upon Congress's commerce power. More importantly, as later discussion will make clear, the political process does not necessarily safeguard the system of federalism. Indeed, we will see that the very laws at issue in *Lopez* and *Morrison* seem to refute the dissent's argument.

D. The Consequences of Incoherence

The Court's failure to find a sound doctrine for its Commerce Clause decisions has injected much confusion into the process of lawmaking and litigating.[76] VAWA itself is a prime example. In applying *Lopez* to § 13981, lower courts "produced widely varying results."[77] Also, in view of

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[73] *Lopez*, 514 U.S. at 624 (Breyer, J., dissenting).

[74] *See id.*

[75] *Morrison*, 529 U.S. at 649 (Souter, J., dissenting).

[76] *See* Nelson & Pushaw, *supra* note 61 at 4; Regan, *supra* note 34 at 559.

[77] Sara A. Kropf, *The Failure of* United States v. Lopez*: Analyzing the Violence Against Women Act*, 8 S. CAL. REV. L. & WOMEN'S STUD. 373, 395 (1999).

Lopez, Congress took great care to make findings in order to assure that the civil rights provision in VAWA would pass the Court's scrutiny.[78] Yet, in the end, the Court abandoned, or at least truncated, the "findings" rationale of *Lopez* and chose instead an "economic/non-economic" distinction, which we have seen is inadequate in its own right. This continued incoherence will surely lead to more uncertainty for legislation passed under the Commerce Clause.

The Court's inability to find a consistent rationale for its Commerce Clause cases also undermines its prestige and authority by making its decisions appear arbitrary or politically motivated.[79] As both the conservative and liberal justices maintain untenable positions, it becomes easy to paint the Court's Commerce Clause decisions as being matters of momentary ideological advantage. Hence, in criticizing the majority opinion in *Morrison*, Professor Schwartz is able to say of the conservatives that "consistency has never been a strong point . . . particularly when deeply felt attitudes are concerned."[80] This also is why numerous commentators stressed the importance of the 2000 presidential election after the *Morrison* decision. The next president was expected to make crucial appointments to the Supreme Court, and those justices' ideological persuasions would doubtlessly determine whether *Lopez* and *Morrison* prove to be lasting restrictions on federal power.[81] This emphasis on the political demeanor of the Supreme Court justices injures the authority of their decisions and tarnishes the reputation of the Court.

II. A PROPOSAL FOR A NEW FRAMEWORK FOR THE COMMERCE POWER: EXAMINING THE STRUCTURAL NECESSITY OF LEGISLATION

A. The Structural Necessity Framework Explained

Put simply, it is the position of this article that in determining the validity of legislation passed under the Commerce Clause, the Court ought to inquire as to whether the political arrangement or structure of our system of government precludes the states from dealing with the problem that the federal legislation addresses.[82] The idea is relatively straightforward—if

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[78] *See generally* Biden, *supra* note 20 (noting Congress's efforts to conform VAWA to the case law that existed at the time).

[79] *See, e.g.*, Dionne, *supra* note 40 (characterizing the Court's recent federalism decisions as nothing more than a battle between liberals and conservatives).

[80] Schwartz, *supra* note 58.

[81] *See id.*; Dionne, *supra* note 40. The results of the 2000 presidential election litigation and the Supreme Court's role in the outcome of that election are obviously beyond the scope of this article.

[82] This test differs from the four-pronged test proposed in an earlier article, Bradley A. Harsch, *Brzonkala, Lopez and the Commerce Clause Canard: A Synthesis of Commerce*

the states can deal with the problem on their own, they should. On the other hand, where our political structure makes it infeasible for the states to address a given issue, federal legislation is appropriate.

The precise dimensions of this idea will become clearer in the following discussion of scholarly support and in the argument that a structural necessity inquiry already exists to some degree in Commerce Clause jurisprudence. Nonetheless, some elaboration is warranted at this point. To best illustrate the principle, consider these examples of legislation that would likely meet with the Court's approval under an analysis of structural necessity and those that would not.

First, consider an act aimed at preventing a "race to the bottom scenario," which often arises in the context of environmental issues. Once one state lowers its standards for environmental protection, its neighbors must follow suit or be left industrially destitute as manufactures flock to the less stringently regulated state. Although each individual entity may be better off if one strict law governed all, the difficulty of collective action in the face of economic politics can prevent such laws from being put in place absent some centralized authority. Thus, the political structure of the federal system suggests that this is an area ripe for federal regulation.[83]

Similarly, an act that addresses an overwhelming inter-jurisdictional problem also should pass the test. For example, organized crime might be a proper target of federal legislation because its spanning of local jurisdictions makes it difficult—if not impossible—for local or state police

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Clause Jurisprudence, 29 U. N.M. L. REV. 321 (1999), which had three major flaws that are now apparent. First, it did not adhere strictly enough to the question whether federal action was necessary by virtue of some *structural* impediment to state action. Hence, the test posited that state power should be usurped if states proved unwilling to handle a given problem. The flaw is that under this test states may find it easy to abdicate their duties and permit the federal government to regulate in areas where states could practicably address the problem themselves.

Secondly, the four-pronged test asked whether legislation threatened the proper balance between the federal and state governments. *Id.* at 347-50. Third, it also asked whether the legislation was "important." *Id.* at 344-45. Both inquiries would allow the courts to usurp the role of the legislature and would impart too much discretion. Under the proposed structural necessity test, however, such inquiries would be unnecessary to maintain a proper limitation on federal power.

[83] The "race to the bottom" problem was first put forward as a justification for national intervention in Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196 (1977). As Professor Moulton points out, this hypothesis "has been challenged on the ground that the benefits of a decentralized approach to environmental regulation may outweigh the benefits of national uniformity." Moulton, *supra* note 41, at 917. The "race to the bottom" phenomenon also was cited extensively by Judge Patricia Wald in her opinion upholding the Endangered Species Act against a challenge under the Commerce Clause. *See* Nat'l Ass'n of Homebuilders v. Babbitt, 130 F.3d 1041, 1049 (D.C. Cir. 1997).

to address the problem. Only by coordination at the national level can nationally-organized crime be adequately and effectively addressed.

In contrast, federal acts that are redundant of state regulation, or that the states effectively could pass on their own, should fail the structural necessity test because such acts are not dictated by the structure of our government and indeed violate principles of federalism. As will be demonstrated, both GFSZA and VAWA's § 13981 provide examples of legislation that properly lies within this latter class of acts and attempts to regulate areas that should be left to the states.

A test that focuses on structural necessity would provide a number of important advantages. First, it would not prevent Congress from addressing important social issues. At the same time, however, it would provide a meaningful limitation on federal power. Further, such a test would accord with precedent because it reflects the concerns that underlie the Court's Commerce Clause doctrine. Also, a structural necessity test would accord with the general principles that govern the Constitution and the grant of the commerce power itself. Finally, it would improve the Court's legal analysis by offering a functional rather than formal approach to the Commerce Clause doctrine.

B. Scholarship Supporting Structural Necessity

The idea that the Court's Commerce Clause doctrine should embrace an inquiry into the structural impediments to national action has been put forward, whether explicitly or implicitly, by several commentators. The only one to expressly emphasize structure is Professor Regan, who not only suggested that the Court evaluate the necessity of national action, but that any consideration of the necessity of national action ought to focus on whether "the regulatory problem has a structure that makes the states separately incompetent to deal with it."[84] Professor Regan pointed out that this idea was embodied in the sixth Virginia Resolution, which was approved by the Constitutional Convention in July 1787. The language of the Resolution is as follows:

> That the National Legislature ought to possess the Legislative Rights vested in Congress by the Confederation; and moreover, to legislate in all cases for the general interests of the union, and also in those to

[84] Regan, *supra* note 34, at 585. Sara E. Kropf applies Regan's proposed test to VAWA and finds that the states' record of failure creates a necessity for federal action. Kropf, *supra* note 77, at 408-11. But her account is flawed in that she omits to evaluate whether the *structure* of the problem makes states separately incompetent.

> which the States are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation.[85]

Under Professor Regan's theory, a court trying to decide whether a federal law is justified under the Commerce Clause should ask, "'[i]s there some reason the federal government must be able to do this, some reason why we cannot leave the matter to the states?'"[86] Specifically, he proposes that Congress should be able to regulate any activity in two scenarios: (1) where it is in the "general interests of the union"[87] and vindicates an interest that belongs to the nation "as a whole;"[88] or (2) where individual states are "separately incompetent" and thus cannot effectively address a problem having multi-state effects.[89] As is discussed later, Regan's "separately incompetent" theory is flawed because it would validate federal legislation merely because states are unmotivated to address the given issue. Nevertheless, Regan's explicit emphasis on the necessity of federal legislation provides significant scholarly support for a "structural necessity" test.

Another aspect of Professor Regan's proposition that lends support (albeit backhandedly) to the idea of structural necessity is that his concept of "general interests of the union" fails to provide a real limiting principle without reliance on structural necessity. In claiming that this idea would not "subvert all limits to federal power," Regan emphasizes that "general interests" means only those interests belonging to the nation "as a whole" or "as such." But the problem here is that "general interests" is a concept much like the substantial effects test in that practically anything can be said to be in the "general interests" of the Union. Congress may find it in the nation's "general interests" to federalize education, community policing, marriage, or indeed anything that substantially affects interstate commerce.

Thus, it would be difficult to impose a limiting concept to the "general interests" criterion without falling back on the idea of "separate incompetence," "to which [Regan] is relatively weakly committed as compared to other parts of [his] theory."[90] For instance, Regan's definition of "general interests" includes national security, international trade, the interest in transportation and communication networks, and economic

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[85] Regan, *supra* note 34, at 555 (quoting NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 REPORTED BY JAMES MADISON 380 (1966)).

[86] Regan, *supra* note 34, at 555.

[87] *Id.*

[88] *Id.* at 571.

[89] *See id.* at 583-610. A similar approach was also suggested in Robert L. Stern, *That Commerce Which Concerns More States Than One*, 47 HARV. L. REV. 1335 (1934).

[90] Regan, *supra* note 34, at 581.

productivity.[91] Yet the concept of "general interests" does not really add much to these examples because in each the states could not effectively act separately. Hence, Regan's justifications for federal regulation of the environment, transportation, and economic productivity really seem to depend more on structural necessity than on any notion of what is in the "general interests of the union."[92]

Professor Althouse is another scholar whose work seems to embrace an inquiry into structural necessity, though it does so only implicitly. Professor Althouse advocates "a pragmatic assessment of the positive value of state and local government, the best uses of federal power, and the ideal allocation of cases between the state and federal courts."[93] Without attempting to endorse a comprehensive test, she discusses "two general sorts of cases in which national legislation is important": (1) where "there is a national market or other system or organization that causes harm at a national level," and (2) when "moving from state to state is used as a way of inflicting harm."[94]

Both of Professor Ann Althouse's scenarios illustrate situations in which there is a structural impediment to national action. For example, as an illustration of the first category of cases, Professor Althouse cites *Wickard v. Filburn*, which permitted the regulation of wheat grown for personal consumption, on the theory that the cumulative effect of such production of wheat had a substantial effect on interstate commerce by taking growers out of the national market and thereby increasing the glut of wheat on the market.[95] Althouse observes that this small scale, individual behavior contributed to an interstate phenomenon that states could not address on an individual basis because it was "unlikely even to be perceived as [a] problem[ ] at the local level."[96] Because the problem only existed in the aggregate, it was a "national problem susceptible only to a national solution."[97] Thus, the structure of our federal system of government prevented the states from addressing the problem, yet all states would benefit by uniform legislation.

As an example the second category of cases—those in which harm is caused by means of crossing state lines—Althouse considers the Child Support Recovery Act (CSRA) of 1992.[98] This Act was passed after

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91 *Id.* at 571-81.
92 *Id.*
93 Althouse, *supra* note 9, at 794.
94 *Id.* at 817.
95 *Id.* at 797.
96 *Id.* at 818.
97 *Id.*
98 *Id.* at 820 (citing 18 U.S.C. § 228 (1994)).

Congress heard testimony about parents who moved from state to state as a method of avoiding enforcement proceedings of individual states.[99] Althouse observed that the individual states "lack[ed] the capacity to deal with the problem," creating "a need for a governmental power capable of responding" to this behavior.[100] The inter-jurisdictional aspects of the problem rendered states incapable of ameliorating the situation. Again, here is an example of the structure of our federal system—the sovereignty of the several states—preventing the solution of a problem that in the aggregate affects the nation as a whole.

It is clear from the foregoing that Professor Althouse's comments lend support, even if in an indirect manner, to an inquiry into the structural necessity of federal action when examining Commerce Clause legislation. Both of the above examples illustrate a circumstance in which there was some structural necessity for national action.

In addition to the work of Professors Regan and Althouse, Professor Steven Calabresi's scholarship also accords with a Commerce Clause doctrine that would incorporate an inquiry into the structural necessity of federal action. Professor Calabresi has observed that there is a "powerful normative case to be made for national governmental power in situations in which there are economies of scale or in which state laws produce seriously disruptive externalities . . . ."[101] He suggests that federal legislation is justified under the Commerce Clause only in three instances: (1) when the national government can supply certain public goods more cheaply because of economies of scale;[102] (2) when the uniformity of a national regime will reduce costs;[103] or (3) when state government actions create significant externalities.[104]

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[99] Althouse, *supra* note 9 at 802 n.153 (citing H.R. REP. NO. 771, 102d Cong., at 5 (1992); 138 CONG. REC. H11, 071 (daily ed. Oct. 3, 1992); 138 CONG. REC. S14,095 (daily ed. Sept. 18, 1992)).

[100] *Id.* Althouse thinks that CSRA may not survive the commercial/non-commercial distinction in *Lopez* since the transfer of money between family members is not a business activity. *Id.* at 820-21. She notes, however, that CSRA may regulate "economic" behavior. *Id.* at 821. Hence, it seems CSRA could survive *Morrison*. However, the fact that CSRA would live or die depending on whether child-support is considered "economic" is another illustration of how the majority rationale in *Morrison* diverges from the principles that should underlie the Commerce Clause power.

[101] Steven G. Calabresi, *A Government of Limited and Enumerated Powers: In Defense of* United States v. Lopez, 94 MICH. L. REV. 752, 807 (1995).

[102] *Id.* at 780.

[103] *Id.*

[104] *See id.* at 780, 829-29. Professor Calabresi provides several examples of this phenomena:

> State A will produce too much air pollution if the costs of that pollution are borne significantly by the residents of State B while all the benefits of the polluting activity accrue to its own residents. A national government

Calabresi's examples of these three categories support the notion that national legislation should be justified under the Commerce Clause only when a structural necessity exists for it. For instance, an "economy of scale" is achieved where the national government provides for national defense, negotiates trade deals or treaties with foreign governments, creates or regulates large-scale transportation networks, undertakes space exploration, or funds medical and scientific research.[105] "Uniformity" reduces costs where, for example, we employ a single national currency, or have unified banking and securities laws, or impose singular standards for industrial measurement.[106] Finally, as Professor Calabresi explains:

> Externalities exist . . . whenever a state governmental policy, law, or activity imposes costs or confers benefits on residents of other states. Imposition of costs is a negative externality; conferral of benefits is a positive externality. Absent a national government, the states will overindulge in activities that produce negative externalities and underindulge in activities that produce positive externalities.[107]

It is clear that in each of the situations Calabresi describes above, there exists some structural impediment that prevents the states from accomplishing what national legislation might achieve. None of these endeavors could be efficiently accomplished by the states acting

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> perceiving this dilemma might intervene and bring State A's costs more nearly in line with the total social costs of the activity. Absent a national government, however, State A either will continue to produce excessive amounts of pollution or it will extract an unjustified rent from State B for ending the pollution or the situation will escalate to a conflict of a potentially violent sort if the residents of State B are aggrieved sufficiently to make that worth their while.
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> As to positive externalities, consider the following case. State A invests heavily in education, a public good, only to find that the beneficiaries of that education routinely move out of state in disproportionate numbers to escape its high tax rates which taxes pay for the education. State B, a low-tax state, benefits from this jurisdictional flight as well-educated residents of A relocate to B. Reluctantly, State A concludes that it must cut back on its investment in public education because, due to federalism, it is unable to reap the full benefits of its investment, many of which are accruing to the freeloading residents of State B. State A thus ends up underinvesting [*sic*] in education, a public good, because federalism prevents it from recouping on its investment.

Id. at 782.

[105] *Id.* at 780.

[106] *Id.*

[107] Calabresi, *supra* note 101, at 782. Another well-known negative externality is, for example, the creation of acid rain in the Midwest states that destroys forests and trees in the Northeast. *See, e.g.*, Associated Press, *Conn. Joins N.Y. in Pollution Suit States Sue Power Plants in Midwest Over Acid Rain*, CHARLESTON DAILY MAIL (S.C.), Nov. 30, 1999, *available at* 1999 WL 6758991; *Acid Rain: Northeast States Ask for Tougher Federal Regs*, DAILY ENERGY BRIEFING, Oct. 28, 1999, *available at* 1999 WL 32356942.

independently. Indeed, Professor Calabresi's comment on the necessity of GFSZA reveals that one underlying focus of his thesis is structural necessity: "Carrying guns near a school is undoubtedly a national problem . . . [b]ut, it is not a federal problem."[108]

While the work of other scholars supports the concept of structural necessity,[109] the three examples discussed above illustrate how such an inquiry underlies seemingly divergent theories of Commerce Clause jurisprudence. To this author at least, this serves to highlight the centrality of the notion of structural necessity to any discussion of the commerce power.

C. Structural Necessity and the Constitution of the United States

The emphasis on structure in regard to the validity of legislation is consistent with the Constitution itself because there are a number of constitutional grants of power that are obviously predicated on the notion that states acting independently of one another cannot adequately accomplish certain tasks that are critical to the nation's survival. Indeed, as Professor Regan points out, in enumerating the federal powers the Framers attempted to capture the spirit of the Virginia Resolutions (which would permit federal legislation where the states are "separately incompetent")

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[108] Calabresi, *supra* note 101, at 802.

[109] Some other commentators whose work supports a structural necessity inquiry are William N. Eskridge, Jr. & John Ferejohn, *The Elastic Commerce Clause: A Political Theory of American Federalism*, 47 VAND. L. REV. 1355, 1364 (1994) (arguing that federal authority should be exercised where there is a need for national and uniform response, or where interstate competition yields a "race to the bottom"), Moulton, *supra* note 41, and Andrzej Rapaczynksi, *From Sovereignty to Process: The Jurisprudence of Federalism After* Garcia, 1985 SUP. CT. REV. 341 (arguing that federalism demands a practical analysis of functions that can best be performed by federal and state governments, but that courts should focus on preventing the federal government from acting tyrannically or threatening states' roles in enhancing citizen participation). Professor Moulton's work only partially supports the idea that the Commerce Clause doctrine should embrace an inquiry into structural necessity. He believes that federalism is not so much a theory of limited government as it is "a theory of allocating government responsibility," *Moulton*, supra note 41, at 922, and that the critical question is not how we protect the states but "how do we allocate particular responsibilities to the level of government best equipped to handle those responsibilities." *Id.* Moulton's "critical question" accords with the idea of an inquiry into structural necessity in that it is a functional approach. However, it is less concerned with striking a balance of power or preventing unnecessary centralization than it is with increasing administrative efficiency. *See id.* at 852. Moulton's lack of concern for federalism stems from his assumption that "states are, and seem destined to remain, a salient feature of American political life." *Id.* at 924. However, I think this is a wrong and dangerous assumption because, as a later section will clarify, GFSZA and VAWA both represent a precedent that threatens to erode the States' role in American government. Moreover, Moulton does not believe courts should inquire into the competence of the state versus the federal government to solve given problems. *See* text accompanying *infra* notes 237-39.

even if they did not adopt its actual wording.[110] Professor Regan also notes that "it was the practical incompetence of the states to deal separately with certain problems" that was relevant to the Founders' allocation of power between the state and federal governments.[111] Professor Moulton has further noted the "pragmatic" origins of American federalism, describing it as "a compromise designed to leave the states with primary responsibility for governing while granting the national government sufficient power to handle those aspects of government beyond the states' institutional competence."[112]

This idea also can be seen in the origin of the Commerce Clause itself. Under the Articles of Confederation, regulation of interstate commerce was left to the individual states.[113] But the result was chaotic. Disputes arose among the states over use and regulation of navigable waterways, and perceived discriminatory regulations would be met in kind, leading to a sort of war of regulation.[114] In addition, certain states enacted debtor relief laws enabling borrowers to escape their contractual obligations in other states.[115] But these debtor relief laws led to the passage of retaliatory laws by states that had a large number of creditors.[116] Add to this each state's protectionist trade laws, excise taxes, and port fees,[117] and it was clear why these structural problems of collective action led the states to call for a constitutional convention "to consider how far a uniform system in their commercial relations may be *necessary* to their common interest and their permanent harmony."[118] It is clear, then, that the Commerce Clause (and nearly every other enumerated power)[119] owes its very existence to

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[110] Regan, *supra* note 34, at 556.

[111] *Id.* at 583.

[112] Moulton, *supra* note 41, at 900.

[113] Articles of Confederation art. IX.

[114] LIBRARY OF CONGRESS, CONGRESSIONAL RESEARCH SERVICE, THE CONSTITUTION OF THE UNITED STATES: ANALYSIS AND INTERPRETATION, HISTORICAL NOTE ON THE FORMATION OF THE CONSTITUTION, UNITED STATES SENATE XVI (Johnny H. Killian & George A. Costello, eds. 1992), *available at* http://www.access.gpo.gov/congress/senate/constitution/con044e.pdf (last visited Aug. 9, 2001) (emphasis added) [hereinafter LIBRARY OF CONGRESS, HISTORICAL NOTE].

[115] Nelson & Pushaw, *supra* note 61, at 23 & n.91.

[116] *Id.* at 23 & n.93.

[117] *Id.* at 23 & n.94.

[118] LIBRARY OF CONGRESS, HISTORICAL NOTE , *supra* note 114, at XVII.

[119] Analogous support for a structural inquiry may be found in the structure of the federal government's authority over national defense and foreign affairs. The Articles of Confederation granted Congress authority to make treaties but gave it no authority to secure obedience by the states to the obligations incurred by the nation under those treaties. *Id.* at XVI. This imperfection "proved embarrassing" as "foreign nations doubted the value of a treaty with the new Republic." *Id.* at XVI. Hence, the 1789 Constitution provided more centralized power over treaty-making and national defense because of the states' separate

structural necessity, for the historical record is fairly clear that had the states not needed a central government, they would have preferred to do without one.

D. Structural Necessity and the Values of Federalism

A structural necessity inquiry also draws support because it would be faithful to the values of federalism. Among other things, the system of federalism serves to: protect individual liberty and democratic autonomy; maintain the closest possible connection between those who govern and those who are governed; ensure that government remains as responsive as possible to local interests; and preserve the ability of the states to offer diverse solutions to social problems. By ensuring that federal legislation is preferred to that of the states only when there is a need for it, a focus on structural necessity would avoid the unnecessary concentrations of centralized power that are anathema to these important functions.

A structural necessity test would accomplish these goals by causing legislators to consider the necessity of federal action—vis-à-vis the power to the states—before passing an act, and by allowing courts to strike down legislation where the legislation intrudes into areas the states are capable of regulating. A structural necessity test also would protect the values of federalism by not allowing states to diminish the sphere of state governance merely because it is convenient to do so.

1. Individual Liberty and Democratic Autonomy

The system of federalism, like the express guarantees contained in the Bill of Rights, is meant as a guarantor of personal freedom. The constitutionally mandated division of power between the states and the federal government was not meant merely to protect the sovereignty interests of the states; it "was adopted by the Framers to ensure protection of our 'fundamental liberties.'"[120] Hence, the states are supposed to act as "primary defenders of individual rights."[121] The idea of federalism is similar to the idea behind the separation of powers among the coordinate branches of government. Just as separation of powers is meant to prevent the accumulation of excessive power in any one branch of government, "a

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incompetence to deal with this area. *See* U.S. CONST. art. 1, § 10. The same can be said of the federal government's authority over the coining of money, *see* U.S. CONST. art. 1, § 8, cl. 5, naturalization, *see* U.S. CONST. art. 1, § 8, cl. 4, the post office, *see* U.S. CONST. art. 1, § 8, cl. 7, and intellectual property, *see* U.S. CONST. art. 1, § 8, cl. 8.

[120] Gregory v. Ashcroft, 501 U.S. 452, 458 (1991).

[121] Yoo, *supra* note 65, at 1313.

healthy balance of power between the states and the Federal Government will reduce the risk of tyranny and abuse from either front."[122]

When federal legislation assumes a role that could have been assumed by the states, the effect is to diminish the states' role in the system of federalism by increasing the power of the national government at the expense of state governments. The accretion of power at the national rather than state level is a concern for individual liberty because it is supposed that the states will "protect the rights of their citizens not only by creating and enforcing new rights, but also by simply checking the power of the federal government."[123] Hence, any erosion of this "checking power" should be met with scrutiny because, as Professor Calabresi argues, "federalism is much more important to the liberty and well-being of the American people than any other structural feature of our constitutional system."[124]

Closely linked to the protection of individual liberty is the fact that the system of federalism serves to keep government as close as possible to the citizenry. One of the consequences of enacting legislation at the federal level is that political control ebbs away from the individual citizen because the federal political process is less accessible than the state process. This is exemplified by the disparity in the ratio of representatives to citizen at the state and federal levels. For instance, Ohio has 99 state representatives, or 1 per every 110,000 citizens.[125] But Ohio has only 19 federal representatives, or one per every 573,157 citizens.[126] The ratio with regard to senators is more dramatic. There are 33 state senators in Ohio, or one per every 330,000 citizens;[127] the ratio of Ohio's federal senators to citizens is 1 to 5.4 million.[128]

By preserving a separate system of decentralized, local government alongside the national government, the system of federalism creates a body of local political agents who are more immediately accountable and accessible to the citizenry than their distant federal cousins. This goes to the heart of federalism, for this feature of the federal system preserves the individual autonomy that is vital to democratic citizenship. The notion of self-governance cannot be anything but a fiction if citizens are so remote

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[122] *Gregory*, 501 U.S. at 458.

[123] Yoo, *supra* note 65, at 1313.

[124] Calabresi, *supra* note 101, at 754; *see also* Moulton, *supra* note 41, at 900-07.

[125] *See* http://www.house.state.oh.us.reps (last visited Dec. 1, 2001).

[126] *See* http://clerkweb.house.gov (last visited Dec. 1, 2001) (showing that Ohio has nineteen federal representatives). The ratio to citizens is derived by extrapolation from the numbers presented on the Ohio House website. *See id.*

[127] *See* http://www.senate.state.oh.us/senators (last visited Dec. 1, 2001).

[128] The ratio of federal senators to citizens is derived by extrapolation from the numbers presented on the Ohio Senate website. *See id.*

from decision-makers that their ability to affect legislation becomes marginal. Thus, when the government exercises power over an individual, the democratic citizen should have some reasonable means of affecting the process by which that power is wielded. The more distant the political machinery, the more the average citizen is deprived of the autonomy that is central to democratic ideals.

The enactment of structurally unnecessary federal legislation therefore has an important ramification—the arbitrary distancing of government from the governed.[129] If a citizen group had wished to seek a modification or revision of VAWA's civil rights provision, that group would have faced a radically more difficult path than if it were seeking to modify a civil rights provision passed at the state level. Not only would the group's relative access to decision-makers have been greater at the state level, but they would not have had to account for the interests of forty-nine other states, all of which would have had a stake in the proposed changes and all of which may have had differing priorities or estimations of the problem.

If the tenets of federalism are correct, then legislation ought to be enacted by the governmental body that is closest and most accessible to the persons who are affected by the legislation. Only where there is a clear need should legislation be enacted by bodies that are less well-suited to take input from citizens. Because VAWA's § 13981 inevitably distanced government from the citizenry, it should not have been validated unless the states were unable to address the problem.

2. Responsiveness to Local Interests and Social Utility

The maintenance of proper federal-state relations also enhances the ability of government to respond to localized interests. According to Professor Calabresi, one of federalism's most beneficial features is that it serves as a response to the democratic problem of majority tyranny in a socially heterogeneous polity.[130] That is, federalism allows for a diversity of legislation within the national body politic that can be tailored to the priorities and preferences of local groups who otherwise would be ignored in the scope of national legislation. This particularized responsiveness has the overall effect of increasing social utility.[131]

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[129] In the context of § 13981, this has important consequences for personal liberty because VAWA's civil rights remedy allowed government to intrude on individual liberties to a far greater extent than its provisions that merely authorized spending. The civil rights remedy permits the government, at the behest of a private litigant, to divest an individual of his or her wealth and to occupy that person's time in the laborious process of litigation. VAWA's spending provisions affect citizens generally through the mechanism of taxation; but the civil rights remedy permitted the government to target its power at individuals.

[130] Calabresi, *supra* note 101 at 761-62.

[131] *See* Moulton, *supra* note 41 at 901-05 (acknowledging that the diversity of policies

Moreover, local responsiveness fosters a healthy jurisdictional competition to provide public goods. So the more the provision of services is decentralized—as is the case when individual states regulate in a given area—the more entities there are to compete in providing them. This competition further increases social utility, improves the quality of administrative decision-making, and leads to experimentation and improvement.[132]

In addition, a system of federalism helps foster social stability and prevent breakdown because it provides enclaves in which political minorities can enjoy some degree of hegemony.[133] Hence, a system of federalism can "sometimes . . . make minority groups feel secure while de-emphasizing the lines of political and social cleavage."[134]

An inquiry into structural necessity would preserve the value of local responsiveness because it would require a clear justification for federal legislation. The passage of a law at the federal level inevitably involves a sacrifice in local responsiveness because the national government, with its "uniform lawmaking power, is largely unable" to account for local tastes and customs.[135] If federal legislation must be justified by structural necessity, however, localized interests will be sacrificed only when some larger interest is at stake.

Finally, the federal system also provides an opportunity for states to act as laboratories for the cure of social ills. When states address a social issue, there is the possibility of fifty different solutions. But when the federal government passes a law without any "considered analysis about whether a national solution is needed," the effect is to "undercut superior solutions arrived at by the states and . . . squelch the kind of further state interest in the problem that might lead to creative and desirable solutions in the future."[136] By ensuring that Congress uses its commerce power only when a national solution is necessary, a structural necessity test would preserve the ability of American government to learn from the fifty states' experiments.

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produced at the state level permits a far greater level of citizen satisfaction than can a single, central government).

[132] Calabresi, *supra* note 101 at 775-79.

[133] *Id.*

[134] *Id.* at 763-64.

[135] *Id.* at 775.

[136] Althouse, *supra* note 9, at 818.

E. The Underlying Structural Inquiry in Past Commerce Clause Cases

Substantial support for a structural necessity inquiry also may be drawn from Commerce Clause cases themselves, because a close examination shows that, to some degree, the idea of structural necessity has been present throughout the Court's jurisprudence in this area. Indeed, an analysis of the Court's Commerce Clause jurisprudence reveals that its changing tests and rules have been merely a superficial manifestation of deeper imperatives that are rooted in structural necessity. As discussed earlier, the rules the Supreme Court has generated throughout the history of its Commerce Clause jurisprudence have been consistently either under- or over-inclusive.[137] The rules the Court has employed to strike down federal legislation (such as the "manufacture/commerce" and the "indirect/direct effects" distinctions) proved to be under-inclusive as the Court eventually accommodated New Deal legislation. On the other hand, the substantial effects test has proven to be drastically over-inclusive because it would allow Congress to regulate virtually anything. The *Morrison* Court's "economic/non-economic" distinction, too, is likely to meet the same fate as the Court's other rules because it is both under- and over- inclusive.

The changing and untenable rules typical of the Court's Commerce Clause doctrine suggest that the Court does not actually apply the rules it says it applies. Rather, the Commerce Clause cases must be decided by factors the Court fails to fully articulate. As this section shows, Commerce Clause cases are most probably decided with reference to the structural necessity of federal legislation rather than according to the rules proffered by the Court.[138] Hence, while the rules governing the commerce power have shifted wildly in the Court's history, the factors dictating the outcome

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[137] *See supra* Part I.B.2.

[138] This hypothesis is explored more fully in Harsch, *supra* note 82 That article analyzed the language in each of the major cases and tried to correlate the superficial changes in doctrine with the facts underlying each case. It identified the factors governing the Commerce Clause doctrine as being part of a four-pronged test whose main feature was an inquiry into the necessity of national action: where a statute does not fall squarely within Congress's power to regulate the channels and instrumentalities of interstate commerce, then (1) the regulation must have a nexus to interstate commerce; (2) the regulation must address a serious exigency; (3) a national solution must be necessary; and (4) the regulation must not upset the balance between the federal and state governments. *See id.* at 322.

As discussed earlier, *supra* note 82, the four-pronged test does not capture the Court's doctrine as well as a test that centers solely on structural necessity. Nonetheless, the detailed analysis of the earlier article still illustrates that the permutations in the Court's articulated doctrine are best explained by an unarticulated doctrine that focuses on the necessity of national legislation.

of the cases have been quite consistent. These factors are rooted in the notion of structural necessity.

Lopez and, to a greater degree, *Morrison*, may seem like exceptions; but they are not. Although the majority in *Morrison* apparently conceded the point that a national civil remedy was needed to address the problem of violence against women, the truly distinctive feature of both GFSZA and VAWA was that there was no structural necessity for either act. That is, neither act addressed a problem that the states were not situated to correct. In contrast, most laws validated under the substantial effects test had been justified by structural necessity. That is, in each case the law addressed a problem that required federal legislation because the states could not have solved it on their own.

Hence, the notion of structural necessity best explains the Court's case law and this lends further support for the idea of adopting such a test.

1. Legislation Preceding GFSZA & VAWA

The distinctive feature of the legislation the Court approved of before *Lopez* and *Morrison* was that it was justified by structural necessity. Further, language in those cases frequently refers to notions of structural necessity, showing that structural necessity is already a consideration in the Court's analysis. Yet it has not been incorporated into the Court's formal rules of decision.

For example, in *Hodel v. Virginia Surface Mining & Reclamation Association*,[139] the Court approved federal environmental standards for coal-mining operations.[140] In doing so, it quoted a congressional committee finding that federal regulation was "essential in order to insure that competition in interstate commerce among sellers of coal produced in different states will not be used to undermine the ability of the several states to improve and maintain adequate standards on coal mining operations within their borders."[141] This case is an example of the aforementioned "race to the bottom" problem, which requires many environmental laws to be national because each state individually has an incentive to provide comparatively lax environmental protections in order to attract and retain industry.

Another example of the "race to the bottom" scenario creating "structural necessity" is *United States v. Darby*,[142] in which the Court adopted the substantial effects test. In *Darby*, the Court permitted federal

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[139] 452 U.S. 264 (1981).
[140] *See id.* at 275-305.
[141] *Id.* at 281-82.
[142] 312 U.S. 100 (1941).

legislation that was intended to ameliorate poor labor conditions in factories throughout the United States. The substandard labor conditions in *Darby* were caused in part by the states' incentives to maintain lower labor standards than their neighbors in order to attract industry,[143] which illustrates that the legislation at issue in *Darby* was structurally necessary.

National Labor Relations Board v. Jones & Laughlin Steel,[144] in which the Court approved federal regulation of labor strikes, provides a further example of "structural necessity" for federal legislation because it involved an inter-jurisdictional problem. In that case, the problem addressed by regulation was nationally organized labor strikes. The Court acknowledged that the strikes had overwhelmed the capacity of each separate state jurisdiction to deal with the problem and noted that the industries were also organized "on a national scale."[145] This shows that the Court believed that the legislation at issue in *Jones & Laughlin Steel* was justified in part because labor strikes were a national problem that the states were unable to address on their own—a rationale firmly based in the concept of structural necessity.

Similarly, in *Perez v. United States*,[146] the Court sanctioned the Racketeer Influenced and Corrupt Organizations Act (RICO), which addressed the problem of organized crime.[147] Prior to RICO, states had found themselves unable to cope with the problem of organized crime because organized crime crosses state lines. Thus, the Court quoted Senator William Proxmire, who said the problem of organized crime "simply cannot be solved by the states alone. We must bring into play the full resources of the Federal Government."[148]

The notion of structural necessity also was present in a number of other major Commerce Clause cases pre-dating the modern substantial effects test.[149] For example, in two early Commerce Clause cases, *Gibbons v. Ogden*[150] and the *Shreveport Rate Cases*,[151] protectionist state legislation illustrates the problem of cooperative action discussed above and its basis as a rationale for national action. In *Gibbons*, the Court affirmed that a federal license to use navigable waters within the state of New York trumped a state law granting monopoly rights in that water to Robert

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143 *Id.* at 110 n.1.
144 301 U.S. 1 (1937).
145 *Id.* at 41.
146 402 U.S. 146 (1971).
147 *See id.* at 149-57.
148 *Id.* at 150.
149 *See generally* Harsch, *supra* note 82, at 328-42.
150 22 U.S. (1 Wheat.) 1, 2 (1824).
151 Houston, E. & W. Tex. Ry. Co. v. United States, 234 U.S. 342 (1914).

Fulton.[152] In the *Shreveport Rate Cases*, the Court affirmed an order of the Interstate Commerce Commission that prevented the state of Texas from enacting rail prices that discriminated against out of state carriers.[153] Both cases are early examples of this covert balancing of the needs of the Republic against the capabilities and needs of the individual states.

In each of the cases discussed in this section, the reasoning offered by the Court was inadequate to the result—and indeed has proven itself so. But the facts of these cases, as well as much of their language, suggest that the reason the Court was willing to sanction the exercise of federal power in those cases was because there was structural necessity for the acts at issue.[154] As the next section demonstrates, it seems that the best explanation for the denial of federal power in *Lopez* and *Morrison* was the converse of the situation in *Jones*, *Darby* and many of the other earlier cases—*lack* of structural necessity for the acts at issue.

2. GFSZA: Congress Tests the Substantial Effects Test

The Gun-Free School Zones Act lacked structural necessity because it was either redundant of state legislation or represented legislation that could have been undertaken at the state level. Over forty states already had passed laws banning the carrying of guns near a school zone by the time Congress passed GFSZA.[155] This fact evidently was on the *Lopez* Court's mind: the majority approvingly quoted then-President Bush as stating that GFSZA "inappropriately overrides legitimate state firearms laws with a new and unnecessary Federal law. The policies reflected in these provisions could legitimately be adopted by the states, but they should not be imposed upon the states by the Congress."[156] In addition, Justices Kennedy and O'Connor alluded to the lack of necessity for GFSZA when they argued that the lack of structural mechanisms to require federal legislators to consider the federal/state balance, as well as the "momentary political convenience often attendant upon their failure to do so," required that the Court play an active role in maintaining the balance between the federal and state governments.[157] Professor Althouse states it more bluntly when she describes the Act as "the work of a Congress making a politically

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[152] *Gibbons*, 22 U.S. (1 Wheat.) at 221.

[153] *Houston*, 234 U.S. at 360.

[154] This is true for the other major substantial effects test cases as well. For instance, in *Wickard*, the Court recognized that regulation of wheat prices was something appropriately undertaken by a national government. *See Wickard*, 317 U.S. at 125.

[155] Calabresi, *supra* note 101, at 802.

[156] *Lopez*, 514 U.S. at 561 n.3 (quoting Statement of President Bush on Signing the Crime Control Act of 1990, 26 WEEKLY COMP. PRES. DOC. 1944, 1945 (Nov. 29, 1990) (internal quotes omitted)).

[157] *Lopez*, 514 U.S. at 578 (Kennedy, J., concurring).

popular gesture at crime without regard for the traditional and possibly superior work of the states in this area."[158]

It seems fairly obvious that GFSZA represented needless and ill-advised federal legislation because it addressed a problem that states were not only perfectly equipped to handle, but were actually already handling.[159] Hence, the Court could have struck down GFSZA without concluding that it regulated non-commercial behavior, or that Congress had failed to make findings. For it is the lack of structural necessity for GFSZA that truly distinguished it from previous acts of which the Court had approved.

3. VAWA's § 13981

The Violence Against Women Act's civil remedy was supposed to have been different from GFSZA, but it too lacked structural necessity. Section 13981 addressed a problem that is truly substantial both in human terms and in economic terms. Moreover, it seemed to be predicated on state incompetence and so it appeared that intervention by the national government was necessary. In fact, however, the evidence indicates just the opposite—the states were at least as well situated as the federal government to provide a civil remedy for gender-motivated violence and may even have been better suited to address the issue.

Congress enacted VAWA because it believed the problem of violence against women was one "that state legal systems had proven unable and unwilling to remedy."[160] In particular, Congress determined that:

> [B]ecause of widespread gender bias, state legal systems institutionalized the historic prejudices against victims of rape or domestic violence by erecting "barriers of law, of practice and of prejudice not suffered by other victims of discrimination." Congress determined that this systemic bias in state systems deprived victims of gender-based violence "of equal protection of the laws and the redress to which they are entitled," subjecting them to "double victimization"—first at the hands of the offender and then of the legal system. Congress reached that conclusion after hearing from state officials, evaluating state laws, and reviewing reports issued by state task forces which themselves concluded that their state justice systems

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158 Althouse, *supra* note 9, at 812.

159 For example, in *Lopez*, the defendant was arrested and charged under a state law that prohibited the possession of a firearm on school property. *See* TEX. PENAL CODE ANN. § 46.03(a)(1) (2001), *quoted in Lopez*, 514 U.S. at 551.

160 Biden, *supra* note 20, at 2.

> were rife with gender bias in addressing domestic violence, rape, and sexual assault. In fact, state officials invited Congress to pass the Violence Against Women Act.[161]

Based on this "record of failure at the state level," Congress enacted § 13981 in order to "provide the choice of a federal forum in place of the state court systems found inadequate to stop gender-biased violence."[162] It was also this "record of failure" that convinced the dissent that violence against women is a problem "only collective action by the National Government might forestall."[163] Commentators have echoed the sentiment that the federal government is the appropriate governmental body to provide a civil rights remedy for victims of gender-motivated violence: "The effect of [*Morrison*] is to undermine Congress's traditional power to identify problems that states cannot or will not adequately deal with and to fashion national remedies."[164]

All the members of the *Morrison* Court seemed to agree that the problem of violence against women required a federal solution. But that assumption is not supported by Congress's findings. Although Congress had an extensive record indicating a deficiency in the states' administration of justice with respect to violence against women, few of Congress's findings were germane to the specific issue of whether a federal civil rights remedy would be effective to correct the problem. Rather, the findings pertained more to issues of whether the federal government needed to address the problem of violence against women in general or whether federal spending legislation ought to be pursued.[165]

For instance, much of the evidence of bias in the state court systems dealt with criminal matters and showed problems with state prosecutors, defenders, and judges in enforcing laws against crimes of domestic violence, rape, and sexual assault.[166] But the effect of any such bias would be diminished in the context of civil litigation to enforce a civil rights remedy because such a case is run by private litigants.

In addition, it was never shown that the federal court system was any more capable than those of the states to provide an effective civil remedy to victims of gender-motivated violence. Indeed, a number of the federal circuits also conducted gender-bias studies and found the same problems in

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[161] *Id.* at 5.

[162] *Morrison*, 529 U.S. at 653 (Souter, J., dissenting) (quoting Nat'l League of Cities v. Usery, 426 U.S. 833, 853 (1976)).

[163] *Id.* (quoting *Nat'l League of Cities*, 426 U.S. at 853).

[164] Editorial, *Violence Against the Constitution*, N.Y. TIMES, May 16, 2000, at A22.

[165] Biden, *supra* note 20, at 2-5.

[166] *Id.* at 5.

the federal courts as were present in the state courts.[167] Moreover, even if federal judges or court administrators were less biased than their state counterparts, it is the juries that make the substantive decision. Because juries in both the state and federal systems are drawn from the same general population, a federal court jury in a given state is no more likely to be unbiased than is a state court jury in that state.[168]

Further, although Congress identified a number of features of the state court systems that were in dire need of improvement, it also found it necessary to correct the federal government's neglect in these areas. For instance, Congress penalized interstate domestic violence and interstate violation of protective orders;[169] mandated that protective orders in one state be given full faith and credit in other states;[170] and amended the Federal Rules of Evidence to adopt a federal rape shield provision excluding evidence of a victim's prior sexual conduct.[171]

Moreover, even if the states have a "record of failure" in a given area, it does not necessarily mean that they are incapable of improving upon that record. Congress made no findings that the states had tried to correct the problem of bias in their court systems and found themselves unable to do so. In fact, government had been aware of the magnitude of the problem for only a relatively short period of time before the enactment of VAWA, which has a number of provisions that reflect this early ignorance. For instance, VAWA commissioned studies on campus sexual assault, battered women's syndrome, confidentiality of addresses of domestic violence victims, and record keeping.[172] It also established a national panel of experts to examine issues relating to violence against women in general.[173] The results of these studies indicate that the severity of the problem had not been known for very long by the time VAWA passed. Hence, the "record of failure at the state level" of which the dissent speaks does not necessarily result from the states' incompetence but from lack of previous political attention to the problem and the consequent failure of *any* governmental entity to meaningfully address the issue.

Indeed, in practical terms it cannot be doubted that the states would have been able to deal with the problem given the will to do so, for no

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[167] *See Arguing the Violence Against Women Act: Two Views*, *at* http://cyber.law.harvard.edu/events/vaw/eventtranscript.html (May 1, 2000) [hereinafter Berkman Center Discussion].

[168] *Id.*

[169] 18 U.S.C. §§ 2261-62 (1994).

[170] 18 U.S.C. § 2265 (1994).

[171] FED. R. EVID. 412.

[172] 42 U.S.C. §§ 14012-15, 14039 (1994).

[173] *Id.* at §§ 14012, 13961.

structural barriers lay in their way. Nothing would have prevented the states from enacting civil rights remedies of their own or from providing the same measure of relief to abused women as did the federal remedy. Moreover, in terms of states ridding their court systems of the bias that apparently stood in the way of making a civil rights remedy efficacious, nothing would have prevented states from changing atavistic or harmful laws, or from re-training their court personnel in sensitivity to crimes involving gender-based violence. Indeed, as we will see shortly, many of VAWA's provisions were created to do just that. In fact, Justice Souter himself believed that the problem was more one of will than of ability: "[t]he point here is not that I take the position that the states are incapable of dealing adequately with domestic violence if their political leaders have the will to do so . . . ."[174]

In fact, VAWA as a whole is premised on the notion that states are not incapable of handling the problem. VAWA set up numerous grants and programs to correct gender bias in state legal systems, all of which depend on the states for their execution. Perhaps the largest element of VAWA was its system of federal grant programs "enlisting federal, state, and local governments; domestic violence agencies; law enforcement; and courts as partners in the fight against gender-motivated crimes."[175] Over the course of six years, these grants would devote $1.6 billion and would include "assistance to local law enforcement; grants encouraging the adoption of mandatory arrest policies; rape prevention and education programs; victim services programs; battered women's shelters; a national domestic violence hotline; improved security; and training for judges and court personnel."[176]

These provisions show that the states were sufficiently equipped as a structural matter to address the problem of violence against women. Indeed, for the purposes of federalism, one of the most interesting and

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[174] *Morrison*, 529 U.S. at 653 n.20 (Souter, J., dissenting). The states' willingness to solve a problem (as opposed to their structural ability to do so) should be irrelevant to a structural necessity inquiry. Nonetheless, it is interesting to note that the states demonstrated great willingness to address the issue, albeit by way of a federal remedy. The dissent in *Morrison* noted the vast state support for VAWA and the "collective opinion of state officials that the Act was needed." *Id.* at 654 (Souter, J., dissenting). Thirty eight attorneys general urged and invited Congress to pass VAWA. *Id.* at 653 (Souter, J., dissenting). Numerous states formed task forces on the topic and issued reports to Congress. *Id.* at 629 & n.7 (Souter, J., dissenting); *see also* Biden, *supra* note 20, at 5. In addition, thirty-six states filed *amicus* briefs favoring § 13981 and only one took the other side. *Morrison*, 529 U.S. at 654 (Souter, J., dissenting).

[175] Biden, *supra* note 20, at 6.

[176] *Id.* at 6 n.36 (citing 42 U.S.C. §§ 300w-10, 3796gg, 10409(a), 13981 (1994)). The spending provisions of VAWA do not pose a constitutional problem because Congress is specifically granted the power to tax and spend for the "general welfare." U.S. CONST. art. I, § 8, cl. 1.

distressing features of § 13981 is that the political impetus for the statute did not begin at the federal level but at the state level. Maryland, Georgia, California, and Connecticut, for instance, established task forces on the subject as early as 1991.[177] Moreover, the numerous states that undertook task force studies did not do so in order to provide a record for VAWA but in order to improve *their own* court systems.[178] Further, forty-six states enacted rape shield laws long before the federal government did so itself.[179] It appears, then, that somewhere along the line the political support for ameliorating the problem of violence against women changed focus from the state governments to the federal government.

The legislative circumstance of VAWA shows that the states favored legislation that addressed problems they could have addressed on their own. It may be argued that the states were not willing to solve the problem themselves, but in fact were only willing to address the problem if the federal government paid for it. But what cannot be denied is that given the will to do so, the states *could* have accomplished the same aims that VAWA's civil rights remedy sought to accomplish.

It is in this point—the lack of a structural impediment to a state solution—that VAWA's civil remedy differs substantially from legislation that preceded it and of which the Court has approved. For example, with § 13981 no state gained an advantage over another state by neglecting to correct the problem. The civil remedy also did not involve an inter-jurisdictional problem that overwhelmed the capacity of each separate jurisdiction to deal with it. Thus, the lack of structural necessity for § 13981 is the feature that best distinguishes it from previous cases that had passed muster under the Court's Commerce Clause analysis.

4. VAWA, GFSZA, and Federalism: Why the Emphasis Must be on Structure as Opposed to the Will of the States

Because there was no structural necessity for § 13981, VAWA's civil rights remedy represented a superfluous, albeit temporary, accretion of centralized power. Some commentators have overlooked this feature at § 13981, however, and argued that the states' willingness or unwillingness to address the issue of violence against women should have been a definitive factor in deciding whether VAWA's civil rights remedy was valid. These commentators neglect to consider that the values of federalism require scrutiny of any needless accumulation of federal power, whether or not the states acquiesce in it.

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177 Harsch, *supra* note 82, at 360.

178 Berkman Center Discussion, *supra* note 167.

179 Harsch, *supra* note 82, at 360.

Both the *Morrison* dissent and Senator Biden cited the states' vast support for § 13981 as a reason to allay fears that the civil rights remedy might upset the proper balance between federal and state governments.[180] In the same vein, Professor MacKinnon suggested that because § 13981 "supplements rather than supplants" state remedies, it does not carry with it the federalism concerns that GFSZA did.[181] Like the *Morrison* dissent and Senator Biden, MacKinnon also argued that federalism is not an issue with § 13981 because the states support the remedy, say they are "not hurt" by it, and "feel that it's federalism friendly."[182]

At the same time, proponents of VAWA's civil rights remedy also argued that the states' "record of failure" showed that states had been unwilling to address the issue (at least at the state level) and that a federal solution was therefore mandated. Such a rationale would serve to validate federal legislation under Professor Regan's separate incompetence theory. Regan states that *Lopez* reached the correct result because "there is nothing in the background of the statute to suggest that states are less capable of dealing with the problem of guns in schools than the federal government; nor is there anything to suggest the states are inadequately motivated to do so."[183] Regan also suggests more generally that Congress is entitled to pursue the "general interests of the union" if the states are incapable of pursuing them effectively *or* if the states are "indifferent or opposed to [those interests]."[184] He also writes that in pursuing the general interests, "Congress may act if the states fail to, for whatever reason."[185] Hence, Regan would allow legislation even where there is no structural impediment if the states are politically unmotivated to address the given problem.

Both arguments that federalism concerns fall by the wayside when states favor federal legislation misperceive the value of federalism. The issue of whether states are willing to support a federal solution should not be relevant because federalism is not merely about preserving "states' rights" or state sovereignty. Federalism also is about protecting individual liberty, avoiding unnecessary centralization of power, keeping government as close as possible to the citizenry, and maintaining a political system that is responsive to localized interests. Hence, while the choices of states may

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[180] United States v. Morrison, 529 U.S. 598, 654 (2000) (Souter, J., dissenting); Biden, *supra* note 20, at 27.

[181] Berkman Center Discussion, *supra* note 167 (comments of Professor Catharine A. MacKinnon).

[182] *Id.*

[183] Regan, *supra* note 34, at 569.

[184] *Id.* at 610.

[185] *Id.* at 611.

deserve some deference, courts should be wary when states appear to exercise their sovereignty at the expense of the individual liberty and democratic autonomy that the system of federalism is meant to enhance.

Similarly, states' unwillingness to address an issue at the state level also should be irrelevant unless the democratic process effectively has broken down with respect to a certain segment of the citizenry (as in the Civil Rights Cases, which are discussed *infra*). Because federalism preserves core democratic values, the Court should not pursue a doctrine that makes it too easy for states to abdicate responsibility merely because the federal government makes it convenient to do so. The goal, on the contrary, should be to provide incentives that are likely to preserve the system of federalism by discouraging needless centralization of power.

Indeed, VAWA's § 13981 represented an affront to federalism in that the states supported the legislation even when they could have passed it on their own. This is an unsettling precedent because the states attempted to abrogate their role in a system which is supposed to bring important advantages "solely by diffusing power."[186] The system of federalism is premised on the assumption that states will guard their sovereignty jealously and will be reluctant to allow the federal government to enter domains in which the states are capable of legislating. But federalism cannot work unless the states operate "[a]s separate political units" that can "oppose the exercise of power by the national government . . . ."[187] VAWA's civil remedy turned all those presumptions on their head because states seemed to willingly cede territory to the national government when there was no clear need to do so.

This kind of threat to federalism was unprecedented and represents a disquieting new development in federal/state relations. GFSZA was easily identified as contrary to federalism interests because threats to federalism are normally perceived in terms "protecting the states against invasions by national institutions."[188] But the courts had never before been confronted with having to prevent states from *voluntarily* relinquishing power to the federal government. Hence, in some ways, § 13981 justifies more concern for federalism than did GFSZA because the circumstances of its passage run contrary to the basic presumptions that federalism depends upon to survive. It is on this basis, rather than upon some formalistic definition of regulable activity, that VAWA's civil rights remedy should have been struck down.

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[186] Yoo, *supra* note 65, at 1403.

[187] *Id.*

[188] Eskridge, Jr. & Ferejohn, *supra* note 109, at 1358; *see also* Moulton, *supra* note 41, at 891 (conceptualizing the problem as one of the national government encroaching on the states).

F. VAWA's § 13981 & GFSZA as a Refutation of the "Political Safeguards" Argument

Adopting a structural necessity inquiry also would mean that the Court does not have to rely on a dubious "political safeguards of federalism" approach in order to preserve a meaningful division between federal and state government. Put simply, the "political safeguards" doctrine holds that the system of national politics inherently provides a safeguard for federalism and, therefore, no judicial intervention is warranted on this issue. This "political safeguards" approach was most famously proposed by Professor Herbert Wechsler in the 1950s, but was reinvigorated in 1980 by Professor Jesse Choper.[189] Relying on Professor Choper's work, the Court adopted the "political safeguards" approach in *Garcia v. San Antonio Metropolitan Transit Authority*;[190] but the Court had since backed away from this approach[191] until it re-appeared in the *Morrison* dissents.

In the scholarly literature, the most recent argument put forth in favor of the "political safeguards" approach is that of Professor Kramer.[192] Professor Moulton is in the same camp as Kramer, believing that the Court should not exercise judicial review on questions of allocating state and federal responsibility.[193] Though all of these scholars have different ideas about why the political system supposedly safeguards federalism,[194] they all would rely on the political branches to enforce the Constitution's limitation on federal power and protect the interests of the states.

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[189] *See generally* Yoo, *supra* note 65, at 1315-21 (discussing JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL PROCESS (1980) and Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954)).

[190] 469 U.S. 528, 551 n.11 (1984).

[191] *See* Yoo, *supra* note 65, at 1321, 1321-57 (arguing that the Court has overruled *Garcia sub silencio*).

[192] *See generally* Larry D. Kramer, *Putting the Politics Back Into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 292 (2000).

[193] Moulton, *supra* note 41, at 923-25. Moulton estimates that the political process generally has created an appropriate allocation of responsibility between state and federal government, even if "the picture is not entirely rosy." *Id.* at 923.

[194] According to Professor Kramer, Wechsler has agreed with the Founders that any overbearing attempts by Congress on state sovereignty would be thwarted by state officials mounting popular political appeals. *See* Kramer, *supra* note 192, at 215. But Kramer argues that, in fact, Wechsler's vision of the "political safeguards of federalism" does not account for the "continued success of federalism for more than two centuries of practice." *Id.* Whereas Wechsler and the Founders believed that populism would prevent federal infringement on state sovereignty, in fact, argues Kramer, it is the party system that plays that role because it "preserved the states' voice in national politics . . . by linking the political fortunes of state and federal officials." *Id.*

The problem with the "political safeguards" approach is that it takes it as a given that the system of federalism has been working and will continue to work given present trends. Kramer, for instance, regards it as an "incontrovertible fact that the states have been and continue to be powerful and important components of American governance" because "states do most of the actual governing in this country, and the important objects of daily life are still chiefly matters of state and local, not federal, cognizance."[195] With that notion taken as granted, he finds that the central and continuing role of the states is a "fact that needs to be explained."[196] Therefore, Kramer deduces that it must be the political party system that protects federalism because nothing else could account for the "continued success of American federalism for more than two centuries of practice."[197]

Neither Kramer nor Moulton consider whether GFSZA or VAWA's civil remedy mar the "continued success" of federalism or constitute a breakdown in the very political process they believe safeguards federalism.[198] Hopefully, the above analysis of § 13981, as well as the previous discussion of GFSZA, should make clear that these two bills represent a failure of politics to safeguard federalism.

In fact, these Acts prove that members of Congress are inclined to pursue their own political survival at the expense of fine doctrines like federalism: "[a]nti-crime bills make good press [and] those who pass them . . . need not consider whether they are useful or effective."[199] As Justices Kennedy and O'Connor seemed to recognize, GFSZA represented the phenomenon of federal politicians who have political incentives to ignore issues of federalism in favor of popular legislation and interest-group pressure.[200] Members of Congress, notes George A. Bermann, disregard the balance between federal and state government because interest groups and constituents primarily are concerned with getting their problems solved and legislators want credit for having solved those problems.[201] Hence,

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[195] *Id.* at 227. Professor Kramer shares this assumption with Professor Moulton, who believes that "[t]he states aren't going anywhere." Moulton, *supra* note 41, at 891-92; *see also*, JESSE H. CHOPER, *supra* note 189, at 176-93.

[196] Kramer, *supra* note 192, at 227.

[197] *Id.* at 215.

[198] Professor Moulton off-handedly states that the statutes at issue in the Court's federalism cases presented "no real reason to fear that Congress will destroy the states . . . ." Moulton, *supra* note 41, at 891. Professor Moulton does not consider whether these statutes set a worrisome precedent or represent a nascent trend. It would be a shame if the Court were to wait until federal legislation poses a major threat to federalism before it began establishing principles to limit federal expansion of power into state domains.

[199] Althouse, *supra* note 9, at 818.

[200] Harsch, *supra* note 82, at 342, 350.

[201] George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331, 409 (1994).

says Bermann, members of Congress "may vigorously sponsor initiatives . . . that could just as easily have been undertaken at the state level . . . ."[202]

Professor Moulton agrees that federal legislators have a tendency "to make allocation decisions based on maximizing their chance for re-election rather than on public-interest-concerns like the promotion of federalism values."[203] And Professors Nelson and Pushaw add that "the political process does not restrain Congress, as evidenced by its massive recent federalization of purely local crimes."[204] With politicians' lack of concern for the federal system, bills such as GFSZA and § 13981 may pass "even when they will undercut superior solutions arrived at by the states and will squelch the kind of further state interest in the problem that might lead to creative and desirable solutions in the future."[205]

In fact, Kramer and Moulton's assumption that all is well with federalism is not based on anything more than a cursory examination. Professor Calabresi, on the other hand, notes that "many, although not all, Americans seem stunned by the range of issues the national government now routinely chooses to legislate upon."[206] As examples, Calabresi cites the fact that Congress sets speed limits on state and local roads; that Congress sets a national drinking age; that Senate Republicans have proposed to make every crime committed with a gun a national offense and to federalize all of state tort law; and that the Democrats have proposed to use midnight basketball games to deter teenage crime.[207] All of these examples illustrate the lack of consideration Congress may give to issues of federalism when contemplating legislation.[208]

More disturbingly, VAWA's § 13981 proved that even state officials will ignore issues of federalism in supporting federal legislation. Hence, to the extent the "political safeguards" approach depends on state officials' supposed reluctance to relinquish state sovereignty to the federal government, the "political safeguards" theory needs to be re-though in light of § 13981.

In short, GFSZA and VAWA are counterexamples that those in the "political safeguards" camp have yet to confront.

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202 *Id.*

203 Moulton, *supra* note 41, at 913.

204 Nelson & Pushaw, *supra* note 61, at 104.

205 *Id.*

206 Calabresi, *supra* note 101, at 793.

207 *Id.*

208 For additional criticism of the "political safeguards" approach, see MARTIN H. REDISH THE CONSTITUTION AS POLITICAL STRUCTURE 23-62 (1995); Lewis B. Kaden, *Politics, Money and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847 (1979); William W. Van Alstyne, *The Second Death of Federalism*, 83 MICH. L. REV. 1709 (1985); Yoo, *supra* note 65.

III. ADVANTAGES OF THE STRUCTURAL NECESSITY APPROACH

A. A Practical Approach

One important improvement that adopting the structural necessity test would allow is that it would render a meaningful and reasonable definition of Congress's commerce power. It would do so because it closely tracks the goals and priorities most people want out of federal legislation and it would account explicitly for the factors that have led the Court to provide wildly varying and transparently inadequate rationales for its previous decisions.

The reason for the Court's incoherence in the area of the Commerce Clause is a practical one and hardly needs much explanation. The Founders envisioned a system whereby any powers not expressly granted to the federal government would inhere in the states.[209] But instead of expounding a general principle by which to determine those powers that are assigned to the federal government, the Founders specifically enumerated each and every power. They did this in 1789. But, of course, things have changed since then and the nation has been confronted with problems the Founders never predicted—civil rights and race discrimination, environmental degradation, drug dealing, organized crime, and home-grown wheat.

Before *Lopez,* the Court's accommodation of laws dealing with such problems was "a pragmatic response to valuable and necessary legislation that brought a national solution to problems that needed a uniform response."[210] Though the Court always had maintained that the Commerce Clause "is not an unlimited grant of legislative power,"[211] the Court never had been able to arrive at a doctrine that aptly described where the limits might lie. Now that Congress's assertions of power have become "increasingly dubious"[212] and the Court has started to curtail Congress's commerce power, the Court once again has failed to arrive at a convincing rationale.

A test focusing on structural necessity would be practical and reasonable because it would reflect the underlying reasons why the Court expanded the commerce power during and after the New Deal and has contracted it in recent years. As was previously discussed, the presence or

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

[210] Althouse, *supra* note 9, at 812.

[211] Editorial, *States' Business*, *supra* note 40.

[212] Nelson & Pushaw, *supra* note 61, at 8.

absence of structural necessity provides the best explanation for the Court's erratic decisions in the area of Commerce Clause doctrine.

The structural necessity test also would improve the Court's legal analysis. For instance, by focusing on whether a national solution is necessary, the Court would not need to rely on the under- and over-inclusive economic/non-economic distinction, because the structural necessity test would provide meaningful and substantive distinctions among the important cases. The structural necessity test would correct the disjunction between rationale and result by embodying the framework by which the Court's rationales are considered over- or under-inclusive in the first place. Hence, almost by definition, the structural necessity test would not be over- or under-inclusive and the Court could dispense with superfluous rules that imperfectly reflect the values underlying its decisions.

So, for example, loan-sharking would be the subject of federal regulation not because it is a commercial activity and not merely because it has a substantial effect on interstate commerce, but also because the states are unable to cope with the problem of organized crime of which loan-sharking is an integral part.[213] So, too, home fireplaces that produce pollution outside a state could be the subject of federal regulation just the same as local factories because both present cross-jurisdictional difficulties that render independent state regulation infeasible.[214] In addition, Congress's ability to protect endangered species would not be threatened because individual states encounter collective action problems that make it difficult to separately address that exigency.[215]

B. Structural Necessity is Rooted in Normative Values

In addition, the structural necessity inquiry would accord with present-day normative values about federalism.[216] Various court decisions and commentaries have shown an expectation that the Court's decisions should not tie Congress's hands when federal legislation is truly needed to solve important social problems. At the same time, there is also an expectation that the federal government should expand its power under the Commerce Clause only when necessary to do so.

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[213] *See Morrison*, 529 U.S. at 656 (Breyer, J., dissenting) (citing *Perez*, 402 U.S. at 146 and discussing loan-sharking in terms of majority's rule)).

[214] *See id.* at 657 (Breyer, J., dissenting) (arguing that such home fireplaces can be the proper subject of federal regulation).

[215] *See, e.g.*, Erwin Chemerinsky, *And Federal Law Got Narrower, Narrower: The Supreme Court Continues to Limit the Federal Government's Ability to Deal With Important Issues*, L.A. TIMES, May 18, 2000, at B11.

[216] *See* Althouse, *supra* note 9, at 822.

For instance, even if the Court never has explicitly adopted a structural necessity test, it has referred numerous times— in cases such as *Lopez, Hodel, Perez,* and *Jones & Laughlin Steel*—to considerations that point to such a test. In addition, the mere fact that the *Morrison* dissent and Congress attempted to justify § 13981 on the ground of state incompetence also shows that the notion of necessity is a powerful normative force framing people's thinking on the Commerce Clause. These references strongly suggest that structural necessity is a normative principle affecting how the Court approaches federal legislation passed under the Commerce Clause.

The principle of structural necessity also is expressed in the comments of scholars. For instance, Professor Moulton states that "[t]he Supreme Court has not yet found adequate doctrinal tools to promote federalism values without simultaneously obstructing needed national legislation."[217] He also writes that the greatest potential harm of federalism-based judicial intervention "is the prospect of denying the nation the power needed to address problems beyond the institutional competence of the states."[218]

Professor Althouse's comments also exhibit the normative force of an inquiry into the structural necessity of federal legislation. She contends that judicial intervention is justified when "the states have the capacity to tailor regulation to local conditions or preferences, and when Congress, with little or no consideration for the role of the states, displaces their work with a uniform law where uniformity is in no way an improvement over the states' diverse solutions."[219] Further, Nelson and Pushaw also emphasize that a Commerce Clause doctrine should not leave the national government "impotent to tackle important societal problems."[220]

Thus, an inquiry into structural necessity would capture many of the imperatives already underlying Commerce Clause doctrine. In contrast, a definition of the commerce power that is too restrictive would leave us trapped in an old-world vision of federal-state politics that prevents the federal government from addressing emerging national issues, and would thereby contradict the normative values that surround our expectations of federal legislation. On the other hand, unnecessary expansions of federal, centralized power are anathema to the system of dual government and the individual liberty that the system protects. By seeing that Congress only stretches the definition of its enumerated powers when necessary, a structural necessity inquiry would help to safeguard the principles

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[217] Moulton, *supra* note 41, at 895.

[218] *Id.* at 920.

[219] Althouse, *supra* note 9, at 812.

[220] Nelson & Pushaw, *supra* note 61, at 161.

underlying our structure of government while at the same time permitting Congress to continue to address problems the Founders never foresaw.

C. *An End to Formalism*

Adopting the structural necessity test also would help the Court avoid some of the formalism that characterizes the *Morrison* framework and would lead to greater coherence and predictability in its opinions. Under a structural necessity test, local policing and child-rearing would not be subject to federal regulation merely because domestic tranquility and parental education have a profound impact on the national economy.[221] Moreover, while the test might look to the strength of a law's nexus to interstate commerce, it would not seek to *categorize* certain activities as definitively falling within or without an abstract definition of the commerce power.

Further, a focus on the necessity of a national solution would obviate the need to permanently assign the subject of the regulation to either the federal or state government. Currently, the Court's emphasis on "traditional" state functions would imply that any new problems that arise are the proper subject of federal regulation, regardless of whether the states are best positioned to address the problem. This, too, may lead to unnecessary expansions of federal power. But an emphasis on structure would account for future problems and provide a sound rationale for deciding which problems belong to state government and which to federal government. Even where federal legislation seems to infringe on the states' general police power (as much of it already does), the structural necessity test would provide a meaningful method of distinguishing between legitimate and illegitimate federal criminal regulation. For example, the federal government's drug legislation might be justified because it involves international and interstate problems that transcend the states' jurisdictional competence. But regulation of petty theft or car-jacking would not be accepted because those crimes lack the features that make federal legislation essential. In this way, the Court's jurisprudence is taken from the abstract level to a more practical one.

IV. A REPLY TO POTENTIAL CRITICISMS OF THE STRUCTURAL NECESSITY TEST

It is obvious that the structural necessity inquiry is not a panacea, and there are numerous legitimate objections that can be raised against it. The following sections attempt to address what seem to be the most salient weaknesses in the scheme this article advocates. Of course, this list is by

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[221] *Morrison*, 529 U.S. at 615-16.

no means exhaustive and certainly there are other shortcomings yet to be considered. However, this exercise is intended to demonstrate that the chief concerns—the text of the Commerce Clause, the problem of judicial discretion, the competence of the courts to determine when a law is "necessary," and the ever-present problem of *stare decisis*—are all satisfied or at least addressed.

A. Structural Necessity and the Text of the Constitution

Perhaps the most objectionable aspect of the structural necessity test is that it strays too far from the text of the Constitution and its grant of a "commerce" power. Though a structural necessity test has ample support in the historical circumstances that gave rise to the Commerce Clause itself, many people perhaps would prefer a test that is more firmly rooted in the idea of regulating interstate commerce. Such is the position of Professors Nelson and Pushaw, who argue that structural approaches, like the one advocated in this article, "put the cart before the horse"[222] because they advocate theories of federalism and principles "not drawn from the Commerce Clause."[223] They make a very good point, which is that such free-ranging theories may fail to "preserve the rule of law by insisting that Congress recognize that it is bounded by the Constitution."[224]

A structural necessity test could alleviate some of these concerns by requiring a nexus to interstate commerce that links it to the text of the Commerce Clause.[225] Such a nexus could be provided by examining the

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[222] Nelson & Pushaw, *supra* note 61, at 97.

[223] *Id.* at 100.

[224] *Id.* at 99. As Nelson and Pushaw point out, the Constitutional Convention rejected the Virginia Resolution (which used Professor Regan's "separate incompetence" language) and instead limited Congress to specific grants of power. *Id.* at 96. Regan acknowledges this, but notes that there is no reason to think that the Convention was "rejecting the spirit of the Resolution when they replaced it with an enumeration." Regan, *supra* note 34, at 556. Nonetheless, this does not change the fact that the Founders chose not to adopt the Virginia Resolution.

This article has de-emphasized the debate over original intent because it seeks some kind of coherent rationale or explanation for what has been going on in Commerce Clause doctrine, and it seems obvious that the Court has already "expanded the Commerce Clause far beyond any plausible view of its 'literal meaning.'" *Id.* at 611. It is too late to turn back; and, indeed, it would be inadvisable to turn back, even if we could, because worthwhile legislation may be lost if Congress was precluded from enacting legislation that does not deal specifically with "interstate commerce." The goal of this article, then, is to find a reasonable way to account for the liberties the Court has taken with the Commerce Clause without creating a test that would otherwise permit all kinds of federal action.

[225] The main proposition of this article is that the Court should inquire into structural necessity in deciding its Commerce Clause cases. The question of how precisely to integrate such an inquiry into a larger test is left somewhat unanswered here. It is at least clear that while the focus of the Court's framework should be on the structural necessity of legislation, it must remain rooted in the Commerce Clause. A "nexus" requirement is but

effect of the activity in question on interstate commerce as well as its "economic" nature. The analysis could combine aspects of the substantial effects test and the new "economic/non-economic" distinction articulated in *Morrison* and could examine both factors in a kind of balancing test: The more "economic" an activity, the less impact on interstate commerce would be required to satisfy the commerce nexus. Conversely, if the effect of the activity on commerce is great, the economic nature (or non-economic nature) should matter less. Hence, legislation without a nexus to interstate commerce would be simply forbidden.

Nonetheless, this would be unlikely to satisfy Professors Nelson and Pushaw, who have suggested a different alternative to the Court's current analytical approach. Theirs is a "back to basics" version that concentrates on the fact that Congress is permitted to regulate only commerce among the several states. Their approach, in brief, has two distinct requirements: (1) Congress must be regulating "commerce" which (2) implicates commerce in more than one state.[226] As with the structural necessity test, Nelson and Pushaw claim that their two-pronged test leads to the same results found in most of the Court's cases "but through radically simplified *reasoning*."[227]

Nelson and Pushaw's test is attractive in that, to use their own words, it "provides clear, constitutionally based rules that are fairly easy to apply and that yield consistent results."[228] But one problem with their idea is that it does not account for the fact that Congress's commerce power often has been the method by which Congress deals with important social legislation that is related only tangentially to commerce.[229] In the past, as this article has shown, the Court's definition of the commerce power has expanded when it appeared that there was some pressing social exigency that required national legislation. Although such expansions of federal power may seem dubious given the enumeration of specific powers, it is a practical fact that the Court has sought to accommodate such laws and probably will continue to do so into the future.

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one possibility.

[226] Nelson & Pushaw, *supra* note 61, at 8-9.

[227] *Id.* at 9 (emphasis added).

[228] *Id.* at 11. Nelson and Pushaw reject the Court's current division of the commerce power into channels, instrumentalities, and those activities that substantially affect commerce because each of those activities is "infinitely elastic." *Id.* They also dispense with the inquiry into what is "truly" national and what is "truly" local. *Id.* Their suggestion that the "channels and instrumentalities" rationale be abandoned seems especially wise, as this too can lead to unnecessary federal legislation.

[229] *See* Stephen R. McAllister, Essay, *Is There a Judicially Enforceable Limit to Congressional Power Under the Commerce Clause?*, 44 U. KAN. L. REV. 217, 224-25 (1996).

The structural necessity test recognizes this fact and uses it to limit what would otherwise seem like an infinitely expansive definition of the commerce power. But because Nelson and Pushaw's test does not recognize the circumstances under which the Court sanctions expansions of federal power, a court employing their test likely would need to expand the definition of "commerce among the several states" in order to accommodate laws that necessitate a national solution but which have only a slight relation to interstate commerce. That is, if Nelson and Pushaw's test does not account for the fact that the necessity of national action is a factor in the Court's decision-making, then their test may become all-encompassing as did the substantial effects test. Indeed, in order to accommodate the past cases, Nelson and Pushaw were obliged to provide a fairy expansive definition of "interstate commerce."[230] Under such a test, we might again see needless federal legislation being passed under an artificially inflated idea of what constitutes "interstate commerce."

The tension between the rule of law as expressed in the text of the Constitution and the "bending" of that text in favor of necessary national legislation also is reflected in the comments of Professor Charles Fried, who co-authored the brief against VAWA.[231] Professor Fried states that what was at stake in *Morrison* was "the proposition that the Constitution . . . cannot be simply stretched and pulled and pushed to mean anything at all when there is an urgent enough and popular enough reason . . . ."[232] But Fried was wary of "prov[ing] too much" and so tried to "avoid an argument that would . . . disenable Congress from dealing with vital, national problems . . . ."[233] The two imperatives—the literal text versus the need to address pressing national problems—are incompatible to some degree (absent constitutional amendment).[234] But given that the Court has

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[230] Nelson and Pushaw's test defines commerce as "the voluntary sale or exchange of property or services and all accompanying market-based activities, enterprises, relationships, and interests." Nelson & Pushaw, *supra* note 61, at 9. This expansive definition of "commerce" encompasses the buying and selling of goods; the incidents of that production, such as environmental and safety effects; the compensated provision of services; and the means by which commerce is transacted, i.e., contracts, negotiable instruments, etc. Their definition of "among the several states" requires that the commerce must have commercial effects in more than one state. *Id.* at 11-12.

[231] Brs. for Resp't, United States v. Morrison, 529 U.S. 598 (2000) (Nos. 99-5, 99-29), *available at* 1999 WL 1276924, 1269316, 1146897, 1146894.

[232] Berkman Center Discussion, *supra* note 167 (comments of Professor Charles Fried).

[233] *Id.*

[234] The ideal solution to the dilemma would be to pass a constitutional amendment setting out basic principles under which Congress might regulate. Another solution would be to pass amendments that added to Congress's enumerated powers—for instance, there might be an amendment that specifically permitted Congress to regulate in the area of the environment. This would make it unnecessary for the Court to fudge on Congress's commerce power. However, as such amendments seem extremely unlikely to occur, we are

historically upheld vital, national legislation that tends to stretch the constitutional text, it seems the most accurate and efficacious test would be one that accounts for the conditions under which such stretching occurs. Otherwise, one is left with the appearance of a slippery slope argument that might prove too much.

In short, the attempt to limit Congress's commerce power strictly to "interstate commerce" is not likely to be successful given the history of the Court's Commerce Clause jurisprudence. Rather, it may be better to acknowledge that the Court "winks its eye" at certain kinds of legislation and then limit the occasions in which it does so according to rational and practical principles. In this manner, the framework proposed in this article arguably is more protective of the rule of law than any test anchored solely in a definition of interstate commerce.

B. The Question of Judicial Discretion

Like the question of the constitutional text, another "rule of law" objection is that the structural necessity test may give judges too much latitude in deciding which laws pass muster and which do not. In contrast, it might be argued, the "rule-based" decisions of earlier courts have the advantage of minimizing the discretion afforded to judges. The argument runs as follows: if a judge merely has to decide whether an activity "substantially affects" interstate commerce, or is "economic," then that judge has comparatively little room for infusing mere personal preference into the results; on the other hand, a judge may have considerably more discretion if she gets to decide whether a nexus to commerce exists and whether national action is structurally necessary. That is, if "[a]ll we have are a set of broadly-defined powers and a set of very general principles," then "in any given context at any given time . . . reasonable people [can] reach very different conclusions about the proper limits of federal authority."[235]

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left with the perhaps impossible task of trying to establish a judicial doctrine that permits necessary regulation while not stretching the commerce power beyond credulity.

[235] Kramer, *supra* note 192, at 292. Professor Kramer is arguing here that it is pointless to have any standards at all for federalism and that the issue of federalism should be thrown entirely to the political process. As I have stated earlier, Professor Kramer's argument rests on a tenuous "given"—that the political system has successfully protected the system of federalism up this point. *See* text accompanying *supra* notes 192-97. The passage of the GFSA and § 13981 refute this blithe assumption. *See also* Moulton, *supra* note 41, at 916 (noting that "[t]o grant judges the responsibility for undoing congressional allocation decisions based on federalism values . . . is to invite bald substitution of judicial preferences for the judgments of elected officials").

The response to this objection is based on the earlier observation that the Court has never really applied the rules it says it has applied.[236] A rule-based jurisprudence is fine if the rules provide a coherent framework for decision. But when the rules themselves change according to some unarticulated underlying doctrine, then the danger of arbitrariness is not eliminated by adopting the rule instead of the underlying standard. It is better, then, to be explicit about the factors that truly govern the Commerce Clause jurisprudence than to continue fabricating rules that obscure the inner workings of the courts' decision-making.

C. The Competence of the Courts to Assess Structural Necessity

Another objection might be that the courts are not competent to make political and structural calls, such as whether a problem necessitates national action. Professor Moulton, for instance, argues that such judgments are empirical determinations "better made by legislators with access to a wide range of relevant data than by courts limited to the presentations offered by contestants in lawsuits."[237] Moulton has raised the example of environmental regulation, in which "the policy debate has now advanced to the point that sophisticated commentators understand that each environmental issue presents its own unique set of concerns, some of which may be best addressed locally, some nationally, and some internationally."[238] This illustrates the "complexity of the allocation decision and suggests the perils of a significant judicial role."[239]

In *Lopez*, Justices Kennedy and O'Connor made comments that are germane to this issue. They point out that of the various structural elements in the Constitution—checks and balances, judicial review, and separation of powers—only with regard to federalism has the judiciary's role in maintaining the design of the Framers been in question.[240] Justices

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[236] *See supra* II.E.

[237] Moulton, *supra* note 41, at 915-16.

[238] *Id.* at 917. This criticism is inapposite in one respect because judicial review does not prevent the decentralization of power from the federal to state governments if it is later learned that decentralization is the best way to handle a problem. Rather, it only questions whether centralization of power is necessary.

[239] *Id.* at 916. One problem with Moulton's approach is that he is less concerned with preventing centralization of power than with achieving administrative efficiency by allocating responsibility to the entities that can best handle the given problem. Judicial review may not be justified if the only concern is one of institutional competence. But our system has other goals in mind, like the protection of individual liberty through a healthy system of dual sovereignty. Hence, the merits of judicial review are not simply a matter of competence.

[240] *See Lopez*, 514 U.S. at 575 (citations omitted). *See also* Yoo, *supra* note 65, at 1313 (noting that the Court assiduously reviews laws concerning separation of powers and individual rights and argues that federalism should not be an "exception" subject to

Kennedy and O'Connor maintain that in these other "structural" areas of jurisprudence, the Court has "derived from the Constitution workable standards to assist in preserving" the governmental structure,[241] and has successfully "participated in maintaining the federal balance through judicial exposition of doctrines."[242]

Professor Calabresi also has pointed out that the Court "routinely protects many federalism interests" in contexts other than the Commerce Clause.[243] For example, the Court has ruled that the state courts are the final arbiters of state law; the *Erie* doctrine governs the choice of law in diversity cases; and the abstention doctrine occasions federal court deference to important state areas of law. In addition, the Court has been more willing to limit *habeas corpus* review;[244] has broadly constructed the Eleventh Amendment to protect the states from federal judicial scrutiny;[245] and has hesitated to find that Congress has pre-empted state law.[246] Calabresi acknowledges that many of these examples are controversial. However, he asserts that one thing is clear: "It is simply not true that the national courts generally are perceived as lacking institutional competence to take federalism into account and to help preserve the national-state balance of power."[247]

Moreover, the Court would not have to micro-manage the system of dual federalism in order to get positive results. While the issue of structural necessity involves "empirical questions about which the Court should give Congress considerable leeway,"[248] the mere fact that courts are willing to entertain the issue would help make the test efficacious because it would signal Congress to consider the factor before passing legislation. For when a court strikes down a law, it "sends a pulse into the lawmaking process that can have pervasive effects on a wide range of legislation, and it creates a rhetorical tool that can be used to great effect by ideologically motivated politicians and legislators."[249] A good example of this is

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"second-class status"). *But see* Kramer, *supra* note 192, at 241, 287, 291 (arguing that the Founders never envisioned judicial review for issues of federalism and that the Court's experiments in this area have been ill-advised and irresponsible).

241 *Lopez*, 514 U.S. at 575.

242 *Id.* at 578.

243 Calabresi, *supra* note 101, at 801.

244 *Id.* at 801.

245 *Id.*

246 *Id.*

247 *Id.*

248 Regan, *supra* note 34, at 559.

249 Kramer, *supra* note 192, at 290. I do not want to misrepresent Professor Kramer's argument. For Professor Kramer, the consequences of this "pulse" are destructive because, in his estimation, the Court's federalism decisions amount to a "treacherous game of blind man's bluff with the Constitution and American government." *Id.* at 291.

Congress's effort, based no doubt on *Lopez*, to make "findings" to support VAWA's § 13981.

In fact, this is the theory that Professor George Bermann argues should govern legislation by the European Union. The Maastricht Treaty requires that institutions of the European Community act in areas of concurrent competence "only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States."[250] Bermann contends that this requirement, even if applied in the courts as a procedural, rather than substantive requirement, ensures that "institutions inquire meaningfully into the capacity of the Member States to attain the objectives that [a] measure is intended to achieve and explain why they conclude that action at the Community level is necessary."[251]

Hence, although courts are not "especially well equipped to make the substantive judgment" whether national action is necessary, the willingness of the courts to look at the question would require legislators to "ask and answer the right questions."[252] This will correct the fact that "[m]any matters that absorb Congress today do not represent any sort of considered analysis about whether a national solution is needed."[253]

In fact, although a principle-based Commerce Clause doctrine may be inherently ambiguous and difficult to administer, these uncertainties "may put useful pressure on Congress."[254] This uncertainty would give Congress an incentive "to enforce federalism even more than the courts are willing to do, in order to steer clear of constitutional problems."[255] This way, even if the standards of adjudication are a little murky, the threat of judicial review may mean that courts will not often have to perform the difficult analyses.[256]

D. The Ever-Present Problem of Stare Decisis

Still another objection that could be raised is that the structural necessity test would represent a radical shift from precedent. But this

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[250] Bermann, *supra* note 201, at 334 (citing Treaty on European Union, Feb. 7, 1992, O.J. (C 224), Art. G(5)).

[251] *Id.* at 336.

[252] *Id.*

[253] Althouse, *supra* note 9, at 818. The reader will note that my analysis of § 13981 of the VAWA is hardly deferential and is not the kind of analysis that is ideally suited to the judiciary. However, such an analysis is necessary given the fact that the Court does not currently inquire into the structural necessity of national action. Were the Court to develop such a test, it is hoped that the end result would be that Congress would perform the in-depth analyses and the courts would merely review them under a deferential standard.

[254] *Id.* at 803.

[255] *Id.*

[256] *Id.*

objection does not hold water. For one, the test is true to precedent because courts have been employing it to some degree since the very beginning of the Commerce Clause jurisprudence, as has been shown. Indeed, it synthesizes all or most of the cases in a way that makes sense. Admittedly, the structural necessity test would represent a departure from the factors that the Court has always *articulated* as being important to its decisions. However, these rules have themselves undergone periodical revisions and the articulated factors do not appear to be the controlling concepts.

In addition, the structural necessity inquiry is consistent with the outcome of the Court's cases up to this point. Hence, a court employing the test would not have to ignore Congress's "powerful reliance" on the Supreme Court's broader precedents interpreting the commerce power.[257] The structural necessity inquiry plots a course for the future, but would not require the overturning of past laws; indeed, the structural necessity inquiry seems to have been the underlying rationale behind the Court's disposition with regard to those laws.[258]

E. Federalism and the Protection of Individual Liberties

One might find it ironic to defend federalism on the ground that it protects individual rights when in the name of federalism the *Morrison* court struck down legislation that was intended to protect an individual right to be free of gender-motivated violence. But the setting of a precedent that would allow unnecessary concentration of federal power could have long-term consequences for individual liberty that cannot necessarily be foreseen. Thus, if the states are capable of providing the same protections for individual liberty that the federal government is seeking to ensure, it is preferable that they do so. In this way, citizens can ensure legal protections for specific rights while at the same time preserving the rights that federalism is intended to protect.

One may also argue that based on the "Civil Rights Cases", in which the Court upheld Congress's prohibition of racial discrimination in places of public accommodation, the Court should be willing to compromise on issues of federalism when individual rights are at stake. Indeed, it also might be argued that the "Civil Rights Cases" present a situation for which no structural necessity existed for the legislation at issue—it may well be that they are classic examples of hard cases making bad law. In fact,

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[257] Calabresi, *supra* note 101, at 827.

[258] Another objection may be that the Framers never envisioned judicial review for issues of federalism. This issue has been much debated in the academic literature and is beyond the scope of this article. For the argument that no judicial review was envisioned, see Kramer, *supra* note 192, at 233-52. For the opposite stance, see Yoo, *supra* note 65, at 1361-1405.

Professor Regan states that although he approves of the result of the Civil Rights Cases as both "morally and politically necessary," certain of the arguments supporting those cases "represent the final corruption of Commerce Clause doctrine."[259]

Nonetheless, there is a principled distinction that rests on the idea that the system of federalism does not exist for its own sake or for the sake of state sovereignty, but also for the protection of individual liberty. In the "Civil Rights Cases," an entire segment of the population was effectively shut out of the political process in certain states.[260] It could be argued that the political structure in those states effectively had broken down as to the protection of individual civil rights and that to strike down civil rights legislation in such a circumstance would be to misconceive the reasons why the system of federalism exists in the first place. In contrast, with § 13981 the political system had not broken down with respect to the particular right at issue and its supporters showed no sign of having been excluded from the political process.[261] Indeed, the history of VAWA shows that the states seemed receptive to their cause.

In fact, there is some indication that the *Morrison* decision may have had the effect of re-focusing political efforts to pass a civil remedy for violence against women on state legislatures. For instance, one public-interest lawyer wrote just after *Morrison* that "[a]ction must be taken immediately to help states prepare to provide the level of redress that was available at the federal level" and "[w]e must now turn around and assess what changes can be made to make state police, courts and policy makers more responsive to victims' needs."[262] In the long run, such focus on reforming state systems is better than enacting federal legislation whenever state systems appear to be deficient—at least if one believes that the values of federalism are worth preserving.

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[259] Regan, *supra* note 34, at 59.

[260] Unfortunately, the notion of federalism acquired a bad name during the Civil Rights era as states used it to defend racial discrimination. This defense, however, was based on a notion of federalism that reduces it to mere protection of state sovereignty. As this article attempts to make clear, federalism principles go far beyond ideas of state sovereignty and it is therefore important to consider the issue of federalism without allowing it to be tainted by past usage.

[261] Kropf, *supra* note 77, at 411 (arguing that the states are "unmotivated" to solve the problem of violence against women, but only because "they do not even realize there is a problem").

[262] Dawn Marron, Editorial, *Violence Against Women: States Must Respond*, PITTSBURGH POST-GAZETTE, May 21, 2000, at E12.

CONCLUSION

By putting the legal analysis of the commerce power on a practical and sensible footing, the structural necessity test would frame the Court's debate in a way that would compel the Court to openly discuss the factors that seem most important to the outcome of its cases. As it stands, however, both the majority and the dissent in *Morrison* point out severe weakness in the opposition opinion but fail to fill the holes in their own logic. The Court is now talking at cross-purposes. The structural necessity test has the potential to rectify this situation by providing a reasonable framework within which to discuss the parameters of Congress's commerce power.[263] Regardless of the test's exact dimensions, it still seems that formally adopting a structural necessity inquiry would make the Court's Commerce Clause jurisprudence more transparent and reasonable.

[263] As much as commentators like to criticize the Court's doctrine as being incoherent and then offer ostensibly coherent rationales of their own, there may be some wisdom in the Court's *ad hoc* approach. For one, the lack of a coherent, expressed rationale keeps the Court from painting itself into a corner while at the same time signaling to litigants and to Congress at least some of the factors that play into the Court's decision-making. As it is probably unrealistic to expect that the Court will abandon this *ad hoc* approach and adopt any one "test" proposed in the scholarly literature, I hope this article at least shows that one factor the Court ought to consider is whether there is a structural necessity for the national legislation before it.