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The Constitutional Exercise of the Federal Police Power: A Functional Approach to Federalism

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NOTES

The Constitutional Exercise of the Federal Police Power: A Functional Approach to Federalism

I. INTRODUCTION

The Employee Polygraph Protection Act of 1988[1] (Polygraph Act) prohibits the use of polygraph examinations by private employers actively participating in commerce or producing goods for interstate commerce.[2] Prior to this federal action, forty-one states had addressed the issue of employer use of polygraph examinations. Twelve states and the District of Columbia prohibit employer use of polygraph tests altogether. Of the remaining states, some require licensing of examiners and others regulate the circumstances under which an employer may require polygraph examination of an employee.[3] According to the legislative history, federal legislation is necessary because state regulations are ineffective: existing state statutes are not enforced and employers circumvent state laws by pressuring employees into volunteering for the tests or by administering the tests in states without regulations.[4] Congress concluded that a uniform national policy was needed to eliminate the use of polygraph examinations in the workplace.[5]

The Polygraph Act is justified as an exercise of the power granted to Congress by the interstate commerce clause of the United States Constitution.[6] Modern commerce clause doctrine has become known as the "rational basis" test because it permits federal regulation of any activity that Congress reasonably concludes has a substantial effect on interstate commerce.[7] Since 1937, when the United States Supreme Court began using the rational basis test, only one legislative effort has been held to be beyond the scope of the federal commerce power, and that holding was recently overruled.[8] In both theory and practice the interstate commerce clause has evolved into the primary source of federal power over individual conduct.

The rational basis test supports legislation that regulates purely lo-

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1. Pub. L. No. 100-347, 102 Stat. 646 (to be codified at 29 U.S.C. §§ 2001-2009).

2. *Id.* § 3(2), 102 Stat. 646.

3. HOUSE COMM. ON EDUCATION AND LABOR, REPORT ON EMPLOYEE POLYGRAPH PROTECTION ACT, H.R. REP. No. 208, 100th Cong., 1st Sess. 8-9 (1987).

4. *Id.* at 9.

5. The Act "would uniformly ban the use of these tests by most private employers. This legislation would protect workers who are wrongfully denied employment and whose careers are devastated because of lie detector test inaccuracies and employer abuses." *Id.* at 4.

6. That clause provides that "Congress shall have Power. . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8.

7. *See infra* notes 117-21 and accompanying text.

8. In 1976 the United States Supreme Court invalidated certain amendments to the Fair Labor Standards Act that would have brought state and local governments within the provisions of that Act. National League of Cities v. Usery, 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985). For a discussion of these two cases, see *infra* notes 122-48 and accompanying text. Prior to *National League of Cities*, the most recent invalidation of commerce legislation occurred in Carter v. Carter Coal Co., 298 U.S. 238 (1936).

cal behavior for the purpose of promoting or protecting the public health, welfare, or morality.[9] The Polygraph Act is merely a single example of such regulation. During the past century Congress has used its power under the commerce clause to regulate a wide range of activities—from prostitution[10] to loan sharking,[11] from the number of toilets in factories[12] to the location of restroom facilities on farms employing eleven or more farm hands,[13] from the minimum age of child laborers[14] to the minimum age of forced-retirees.[15] Not only has the commerce clause become the source of federal police power,[16] it has become an unlimited source.

The growth of the federal police power based on the commerce clause disrupts the delicately balanced federal system. As federal power expands, state governments are displaced from their traditional role as the primary authority over individuals. Individuals increasingly are governed by a large federal bureaucracy that is not as accountable, democratic, or responsive as state and local governments and which cannot provide for local diversity. The demise of federalism ultimately will threaten individual rights because centralization eventually leads to regulation without adequate representation. This Note offers an interpretation of the commerce clause that would restrain the exercise of federal police power in order to preserve the benefits of state regulation while allowing congressional legislation when necessary.

Part II reviews the evolution of the commerce power from its origins at the Constitutional Convention through the major cases of this century out of which the modern interpretation has developed. Part III addresses the actual threat posed by federal usurpation of state authority by examining the continued value of state governments in an age when technological advances blur state lines and homogenize the population. Part IV proposes to confine the exercise of federal police power to situations in which the commerce clause forbids or compromises state regulation. Part V concludes by suggesting that the Supreme Court must resume its traditional role as protector of individual rights

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9. *See* Cirillo & Eisenhofer, *Reflections on the Congressional Commerce Power*, 60 TEMP. L.Q. 901, 912 (1987).

10. *See* White Slave Traffic Act, 18 U.S.C. §§ 2421-2424 (1982 & Supp. 1988).

11. *See* Extortionate Credit Transactions Act, 18 U.S.C. §§ 891-896 (1982).

12. *See* 29 C.F.R. § 1910.141(c) (1987).

13. *See id.* § 1928.110.

14. *See* 29 U.S.C. § 212 (1982).

15. *See* Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1982 & Supp. 1988).

16. The term "police power" refers to the power "to place restraints on the personal freedom and property rights of persons for the protection of the public safety, health, and morals or the promotion of the public convenience and general prosperity." BLACK'S LAW DICTIONARY 1041 (5th ed. 1979).

by defining meaningful limits on federal power.

II. Development of the Federal Police Power

In his concurring opinion to *Hodel v. Virginia Surface Mining & Reclamation Association*,[17] then-Associate Justice Rehnquist wrote that modern commerce clause interpretation leaves one with the impression that federalism exists only at the sufferance of Congress.[18] If this statement accurately reflects the situation in 1981, prior to the demise of the Court's only recent attempt to restrict congressional power,[19] then federalism must be greatly threatened now. This has not always been the case, however. In fact, the expansion of federal power under the commerce clause only began with the administration of President Franklin Roosevelt. During the first century under the Constitution, Congress rarely attempted to exercise its power over interstate commerce.[20] When statutes justified as commerce regulations were challenged as unconstitutional, the Supreme Court often was inconsistent in its holdings. The evolution of the modern commerce power has been authoritatively traced in detail by other commentators.[21] This section briefly discusses some of the highlights of the development in order to provide the background necessary to understand modern commerce clause doctrine.

A. *The Origin of the Commerce Clause*

Any endeavor to interpret the text of the Constitution naturally begins with the original intent of the Framers and the understanding of the ratifiers of that document. Anyone attempting to discover the original intent behind the commerce clause is struck by the paucity of discussion the clause generated in Philadelphia, at the ratifying conventions, and in contemporary writings. At the Philadelphia Convention, the interstate commerce clause was agreed to without dissent and there was a similar lack of opposition at the state ratifying conventions.[22] *The Federalist* contains very little discussion of the commerce clause, with only a small percentage of that consideration devoted to

17. 452 U.S. 264 (1981).

18. *Id.* at 308 (Rehnquist, J., concurring).

19. For a discussion of Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985) (overruling National League of Cities v. Usery, 426 U.S. 833 (1976)), see *infra* notes 122-48 and accompanying text.

20. *See* G. Gunther, Constitutional Law 103 (11th ed. 1985).

21. *See generally* P. Benson, The Supreme Court and the Commerce Clause, 1937-1970 (1970); Stern, *The Commerce Clause and the National Economy, 1933-1946* (pts. 1 & 2), 59 Harv. L. Rev. 645, 883 (1946).

22. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 Minn. L. Rev. 432, 443-44 (1941).

the interstate commerce power.[23] In short, the interstate commerce clause was conspicuously uncontroversial to the original Framers and ratifiers.[24]

Most of the discussion regarding the commerce clause focused on the federal power over foreign commerce.[25] In fact, the Framers apparently considered the commerce power synonymous with power over foreign commerce.[26] After some debate at the Convention, the Framers eventually agreed that Congress would exercise its commerce power through fiscal regulation of imports and exports, passage of a navigation act, and regulation of those engaged in the import-export business—all matters relating to foreign commerce.[27] James Madison's writings in *The Federalist* indicate that the power over interstate commerce was substantially an adjunct to the power over external commerce.[28] By removing state-imposed barriers to foreign trade, the interstate commerce clause made American markets more attractive to foreigners.[29]

During the ratification debates the Anti-Federalists continuously urged that the new Constitution gave too much power to the federal government,[30] but they never raised objections to the interstate commerce power. If the power over commerce among the states was intended by the Framers to be an independent grant of affirmative power over domestic affairs, then there certainly would have been more conflict over it. For example, the southern states would have perceived the interstate commerce power as a potential threat to the institution of slavery.[31] As further illustration, there is the fact that the proposed secretary of commerce and finance, who was to oversee the commercial in-

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23. *Id.* at 458; *see also* THE FEDERALIST No. 10 (J. Madison).

24. The only serious conflict over the commerce power was raised by the southern states because they feared that a navigation act would be detrimental to them. The conflict was resolved when the southern delegates agreed to the commerce clause as written in exchange for the infamous guarantee that no regulation on the importation of slaves would occur until 1808. Abel, *supra* note 22, at 453.

25. *Id.* at 465; *see also* Cirillo & Eisenhofer, *supra* note 9, at 905.

26. Abel, *supra* note 22, at 455.

27. *Id.* at 465.

28. *Id.* at 480-81.

29. *See* THE FEDERALIST No. 42, at 262 (J. Madison) (H. Lodge ed. 1908) (asserting that without the "supplemental" power to regulate interstate commerce, the power to regulate foreign commerce would be "incomplete" and "ineffectual"); *see also* THE FEDERALIST No. 11 (A. Hamilton).

30. *See generally* H. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR (1981).

31. The southern delegates were extremely wary of delegating power to the federal government that could be used to abolish slavery. The only express protection, however, appears in article V of the Constitution which prevents a constitutional amendment regarding slavery until 1808. Logic dictates that the federal government, under the original Constitution, could not have been granted power to regulate an activity like slavery. The article V prohibition against amendment was apparently the only protection the southerners deemed necessary.

terests of the nation, was distinguished from the proposed secretary of domestic affairs, who was to oversee the internal interests.[32] Clearly, commerce was distinct from domestic affairs and the commerce clause was not perceived to be a broad grant of domestic power.

Interpreting the Constitution in light of the problems it was intended to solve, as James Madison urged,[33] additionally supports the conclusion that the interstate commerce power was meant to be only a slight grant of domestic power. One of these problems was the economic Balkanization of the states: the states taxed imports from sister states in order to assist local businesses or to retaliate for levies placed on their exports.[34] Based on the available evidence, and lack thereof, the commerce clause apparently was a remedial measure that removed power from the states and empowered Congress to prevent obstructive, competitive state legislation.[35] The interstate commerce power, then, merely was incidental to the foreign commerce power.

For the first century of the country's existence, Congress rarely justified federal legislation as an exercise of the commerce clause;[36] it was invoked more frequently by the Supreme Court to strike down state statutes deemed discriminatory.[37] Just before the turn of the century, however, the federal government began an aggressive use of the commerce power to support far-reaching legislation. Since that early period the interstate commerce power has shed its anonymity and become a source of tremendous federal power.[38]

B. Congressional Regulation for the Public Welfare

The leading case during the early era of Supreme Court interpretation of federal legislation enacted under the commerce power was *Champion v. Ames*.[39] The appellant in *Champion* had been indicted for

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32. Abel, *supra* note 22, at 467.

33. Letter from James Madison to Professor Davis (1832), *reprinted in* 3 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION 520-21 (1911).

34. Abel, *supra* note 22, at 471; Cushman, *The National Police Power Under the Commerce Clause of the Constitution* (pt. 3), 3 MINN. L. REV. 452, 459 (1919); James Madison: Preface to Debates in the Convention of 1787, *reprinted in* 3 M. FARRAND, *supra* note 33, at 547-48.

35. E. PRENTICE & J. EGAN, THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION 2 (1898); Abel, *supra* note 22, at 471; Cirillo & Eisenhofer, *supra* note 9, at 905; Letter from James Madison to J.C. Cabell (Feb. 13, 1829), *reprinted in* 3 M. FARRAND, *supra* note 33, at 478.

36. In 1898, however, according to at least two observers, the commerce clause had already become "perhaps the most important and conspicuous power possessed by the Federal government." E. PRENTICE & J. EGAN, *supra* note 35, at 1.

37. This seems to lend credibility to the conclusion that the commerce power was negative and not affirmative.

38. For extended citation of statutes passed under the commerce power, see Friendly, *Federalism: A Foreword*, 86 YALE L.J. 1018, 1021-27 (1977).

39. (The Lottery Case), 188 U.S. 321 (1903).

the interstate transportation of lottery tickets in violation of the Lottery Act.[40] The Court offered two rationales for the Lottery Act's constitutionality. First, regardless of its motives for doing so, Congress may regulate any article being transported interstate.[41] The commerce clause delegates complete control to the federal government over the facilities of interstate commerce. This federal control directly parallels the individual states' control over internal commerce. Therefore, whatever states may do regarding conduct within their territory, Congress may do with regard to interstate commerce. Because a state may regulate the internal sale and transportation of lottery tickets, Congress may regulate the interstate counterpart to those activities.[42]

The second rationale for the *Champion* decision was broader than the first. The Court reasoned that Congress must have the power to protect public morals and health in situations in which the states cannot. The Lottery Act merely was a congressional attempt to supplement and strengthen the states' policy against lotteries.[43] Moreover, Congress was the only power competent to do so.[44] Recognizing the broad implications of its ruling, the Court carefully limited its holding to the facts of the case[45] and invoked the political process as an independent check on Congress.[46]

In *Champion* Justice Harlan, writing for the majority, declared that Congress has broad discretion in the exercise of its commerce power and vowed not to impose the Court's opinion as to the effectiveness of the means adopted.[47] Nevertheless, the depth of Justice Harlan's disapproval of lotteries is amply illustrated by the dramatic

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40. The Act prohibited the interstate transportation, via United States mail or other means, of lottery tickets or the equivalent. *Id.* at 322. The appellant was arrested for transporting tickets, by private carrier, from Dallas, Texas to Fresno, California. He was jailed upon his refusal to post bond. He thereupon petitioned the District Court for the Northern District of Texas for a writ of habeas corpus. *Id.* at 323-25.

41. *Id.* at 354. According to the Court, "regulation" included complete prohibition. *Id.* at 362.

42. *Id.* at 357 (stating that "[a]s a state may, for the purpose of guarding the morals of its own people, forbid all sales of lottery tickets within its limits, so Congress, for the purpose of guarding the people of the United States against the 'widespread pestilence of lotteries' . . ., may prohibit the carrying of lottery tickets from one State to another").

43. *Id.*

44. *Id.* at 358 (reasoning that interstate transportation of lottery tickets can be "met and crushed by the only power [Congress] competent to that end").

45. *Id.* at 363 (holding that "[t]he whole subject is too important . . . to justify any attempt to lay down a rule for determining in advance the validity of every statute that may be enacted under the commerce clause").

46. Justice Harlan explained that, if Congress exceeded the scope of the powers granted to it, the courts had the duty to invalidate the statute. However, if Congress acted within its power but the action was "unwise or injurious," the political process would take over. *Id.* (citing Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824)).

47. *Id.* at 353.

language he used in his opinion.[48] One cannot help but think that the *Champion* Court was judging lotteries and not the Lottery Act.

Writing for the four dissenters, Chief Justice Fuller similarly admitted distaste for lotteries. Yet, notwithstanding his own feelings, Chief Justice Fuller found the statute beyond the scope of the commerce power because it was based on Congress' determination that gambling on lotteries was detrimental to the public morals.[49] The protection of public health and morality, Chief Justice Fuller argued, is properly reserved to the states.[50] Congressional intent to aid the states in their endeavor to suppress lotteries was irrelevant because the scope of the commerce clause does not depend on current views of public interest.[51]

The Court's tolerance of early congressional commerce regulation is illustrated further by *Hipolite Egg Co. v. United States*.[52] The Pure Food and Drug Act (PFDA), under which the Egg Company's property had been confiscated, prohibited the interstate transportation of articles failing to meet federal standards of safety or purity.[53] After *Champion*, the success of the Egg Company's challenge to the PFDA depended on the rebuttal of the Court's interpretation that Congress may regulate any article being transported interstate. Thus, the Company was forced to argue that federal jurisdiction did not extend to goods shipped interstate after the goods had reached their destination and had been mingled with local property.[54] That is, Congress could act only on articles in transit, and the Egg Company's property had come to rest prior to seizure.[55] The Court did not agree to such a limitation. Instead it held that articles illicitly transported interstate may be confiscated wherever they are found.[56]

As in *Champion*, the *Hipolite* Court based its decision on the the-

48. For example, Justice Harlan stated that lotteries were an "evil of . . . appalling character," and "offensive to the entire people of the Nation." *Id.* at 357-58.

49. *Id.* at 364 (Fuller, C.J., dissenting) (noting that the express purpose of the statute was the suppression of lotteries and its validity must be tested against that purpose).

50. *Id.* at 364-65.

51. *Id.* at 372.

52. 220 U.S. 45 (1911).

53. Pure Food and Drug Act of June 30, 1906, Pub. L. No. 59-394, ch. 3915, 34 Stat. 768 (1907); *Hipolite Egg Co.*, 220 U.S. at 50-51. The Egg Company conceded that the eggs it had shipped interstate were adulterated within the meaning of the Act. *Id.* at 51-52.

54. The Egg Company actually raised three challenges: (1) the Act did not apply to products shipped for use as raw materials in the manufacture of other products; (2) the district court did not have in personam jurisdiction; and (3) the district court had no in rem jurisdiction over the eggs since Congress did not have power to enact a statute granting such jurisdiction. *Id.* at 52. The first two arguments are not considered here since they raised questions of statutory construction. Only the third argument implicated the commerce power.

55. *Id.* at 55.

56. *Id.* at 58.

ory that Congress may regulate anything transported interstate.[57] In addition, after examining Congress' reasons for enacting the PFDA,[58] the Court offered a second justification. The *Hipolite* Court recognized that while Congress was hoping to eliminate commerce in adulterated articles, the statute also was an attempt to assure American consumers that articles manufactured in this country, regardless of the state from which they originated, would be pure and safe.[59] The congressional purpose was to protect public health and facilitate interstate trade in food and prescription drugs.

Hoke v. United States[60] is another case exemplifying Congress' early success at enacting legislation to protect the public. In that case the White Slave Act was challenged by the defendants who had been convicted of transporting women and girls from Louisiana to Texas for the purpose of prostitution.[61] The Court again relied on the theory that anything, including people, transported interstate is per se within the reach of the commerce power.[62] The Court held that Congress had the power to take the facility of interstate commerce away from any activity.[63]

In *Hoke* the Court further recognized a congressional power to regulate for the general welfare of the people. According to the Court, both the states and Congress are empowered to act, whether independently or concurrently, to promote the material and moral welfare of the nation.[64] In conjunction with federal power to regulate for the general welfare, the Court declared limits on its own power. The Court adopted a policy of judicial abstention from the examination of Congress' purpose for enacting legislation. Using the PFDA as an example, the Court demonstrated the new policy. While Congress could not prohibit either the manufacture of adulterated products or the sale of such products within a state, Congress could accomplish the same end by prohibiting

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57. *See supra* notes 39-42 and accompanying text.

58. The purpose of the Act was not merely to prevent interstate movement of adulterated articles, but to prevent the use of them. *Hipolite Egg Co.*, 220 U.S. at 55.

59. *Id.* (reasoning that "[i]t is certainly to the interest of a . . . consumer that tbe article which he receives, no matter whence it come, shall be pure, and the law seeks to secure that interest").

60. 227 U.S. 308 (1913).

61. *Id.* at 317.

62. *Id.* at 323 (stating that "Congress has power over transportation 'among the several States' [and] the power is complete in itself").

63. *Id.* at 322.

64. *Id.* The defendants asserted that the Act was an interference with state sovereignty. The states have power to prohibit prostitution; therefore, Congress must not have the same power. The Court responded that Congress alone has power over prostitution beyond the jurisdiction of the states—that is, interstate prostitution. *Id.* at 321-22.

interstate commerce in adulterated products.[65]

C. Regulation of the National Economy

Despite the fact that the Court had permitted Congress to use the commerce power to regulate for the protection of public health and morality, the Court strongly resisted economic regulation during the same period. Then, after nullifying several New Deal efforts,[66] and perhaps in fear of President Franklin Roosevelt's "court-packing" plan,[67] the Court reversed its course and began sustaining congressional use of the commerce power to regulate the national economy. In the course of five years, the Court completely reinterpreted the commerce clause to allow broad economic regulation.

The first case to reinterpret the commerce clause to allow economic regulation was *NLRB v. Jones & Laughlin Steel Corp.*,[68] in which the Court sustained the National Labor Relations Act (NLRA). The Jones & Laughlin Steel Corporation (Jones & Laughlin) was a fully integrated enterprise owning assets and operating facilities throughout the country. In fact, Jones & Laughlin was the fourth largest manufacturer of steel and iron in the United States.[69] The Court placed great weight on the unique aspects of the case, noting that Jones & Laughlin had purposely organized itself to take advantage of interstate commerce.[70] After expressly reserving the right to test the constitutionality of the statute in future cases,[71] the Court concluded that the NLRA was constitu-

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65. *Id.* at 322. The Court, by this example, illustrated that Congress' motive or objection was irrelevant.

66. *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238 (1936) (nullifying the Bituminous Coal Conservation Act of 1935 (Guffey Coal Act) on the grounds that the connection to interstate commerce was too indirect); Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (striking down the National Industrial Recovery Act's wage and hour standards on similar grounds); Railroad Retirement Bd. v. Alton R.R. Co., 295 U.S. 330 (1935) (nullifying the Railroad Retirement Act of 1934 because the mandatory retirement and pension plan was not a regulation of commerce). *See generally* Stern, *supra* note 21.

67. President Roosevelt's plan would have permitted an incumbent president to appoint a new Supreme Court justice for every current justice over the age of 70.

68. 301 U.S. 1 (1937).

69. *Id.* at 26. For a detailed discussion of the corporation's activities throughout the country, see *id.* at 25-28.

70. *Id.* at 41. The Court rhetorically asked:

> When industries organize themselves on a national scale, making their relation to interstate commerce the dominant factor in their activities, how can it be maintained that their industrial labor relations constitute a forbidden field into which Congress may not enter when it is necessary to protect interstate commerce from the paralyzing consequences of industrial war?

Id.

71. *Id.* at 32. The Court devised a saving interpretation for the NLRA by which it could be constitutionally applied only when the regulated industry has a close and intimate effect on interstate commerce. *Id.*

tional as applied to Jones & Laughlin.[72] Thus, the National Labor Relation Board's orders regarding management practices at the Jones & Laughlin's Aliquippa, Pennsylvania plant were enforceable.[73]

In reaching its conclusion, the Court declared tbat the commerce clause gave Congress the power to protect interstate commerce from burdens and obstructions whenever they might arise.[74] The commerce power, therefore, can support congressional control over intrastate activities if the purpose is to protect and facilitate interstate commerce.[75] In this case federal intervention was proper because the stoppage of Jones & Laughlin's activities due to labor unrest would have had an immediate and perhaps catastrophic effect on interstate commerce.[76] However, the Court was careful to warn that some intrastate activity would be so remote from interstate commerce that congressional regulation would obliterate the distinction between national and local concerns and would result in a completely centralized government.[77]

Soon after *Jones & Laughlin* the Court sustained the Fair Labor Standards Act of 1938 (FLSA).[78] The FLSA prohibited the manufacture and interstate transportation of goods produced under substandard working conditions. In *United States v. Darby*[79] the owners of a lumber factory in Georgia had been charged with failure to comply with the wage, hour, and record-keeping requirements of the FLSA.[80] After overruling a prior case, which struck down a nearly identical statute,[81] the Supreme Court held all aspects of the FLSA to be properly within

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72. *Id.* at 43.

73. The Board ordered Jones & Laughlin to cease and desist discrimination against union employees, to offer reinstatement and back-pay to employees discharged because of their union activities, and to post notices that it would comply with the NLRA standards. *Id.* at 22.

74. *Id.* at 36. The Court rejected the restrictive interpretations that had been fatal to previous commerce regulations: the indirect-direct distinction, *see Carter Coal Co.*, 298 U.S. 238; the stream of commerce requirement, *see* Stafford v. Wallace, 258 U.S. 495 (1922); and the theory that manufacturing and production were not commerce, *see* Hammer v. Dagenhart, 247 U.S. 251 (1918).

75. In *Jones & Laughlin* the Court declared:

> [C]ongressional . . . power is plenary and may be exerted to protect interstate commerce "no matter what the source of the dangers which threaten it". . . . Although activities may he intrastate . . ., if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control.

301 U.S. at 36-37 (citations omitted).

76. *Id.* at 41.

77. *Id.* at 37.

78. Puh. L. No. 75-718, 52 Stat. 1060 (codified as amended at 29 U.S.C. § 201 (1982)).

79. 312 U.S. 100 (1941).

80. *Id.* at 111. Georgia and other states to which appellee's goods were shipped had chosen not to set labor standards. *Id.* at 112-14.

81. The Court overruled *Hammer*, 247 U.S. 251, which held that Congress could not establish child labor laws. *Darby*, 312 U.S. at 117.

the scope of the commerce power.[82]

In *Darby* the Court offered two independent justifications for sustaining the FLSA. First, the Court reiterated the familiar doctrine that Congress may regulate any article which is transported interstate and may exercise that power by choosing any means reasonably adapted to achieving that end.[83] Complete prohibition of production under substandard working conditions was a means reasonably adapted to keeping articles produced under substandard conditions out of interstate commerce.[84] The Court apparently held that Congress could prohibit a purely local activity on the grounds that it would be inconvenient to devise a less intrusive statute. The Court did state as a means of definition that Congress had the discretionary power to regulate interstate commerce for the protection of public health and morality even where a state had not seen fit to acknowledge a threat.[85] Despite this expansive language, the breadth of *Darby*'s first holding has been cited as perhaps unintended.[86]

The second justification for *Darby* was that the manufacture of goods under nonconforming conditions was detrimental to the interstate commerce of goods manufactured under better conditions.[87] Nonconforming goods are less expensive to produce and may be sold well below the price of similar products. The government argued that no state could establish humane working conditions without jeopardizing local industry.[88] Relying on *Jones & Laughlin*, the Court concluded that the FLSA regulated activities that had a substantial effect on interstate commerce and, therefore, was constitutional.[89]

In *Wickard v. Filburn*[90] the Court sustained the Agriculture Adjustment Act of 1938 (AAA)[91] in an opinion that gave a broad interpretation to the commerce clause. At issue was Filburn's refusal to pay a

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82. *Darby*, 312 U.S. at 115.

83. *Id.* at 121.

84. *Id.* at 118. The Court noted that "it would be practically impossible . . . to restrict the prohibited kind of production to the particular [articles] which later move in interstate rather than intrastate commerce." *Id.*

85. *Id.* at 114.

86. G. GUNTHER, *supra* note 20, at 143-44.

87. *Darby*, 312 U.S. at 122 (reasoning that "[t]he Act is thus directed at the suppression of a method or kind of competition in interstate commerce which it has in effect condemned as 'unfair' ").

88. *See infra* notes 201-06 and accompanying text.

89. *Darby*, 312 U.S. at 119.

90. 317 U.S. 111 (1942).

91. Pub. L. No. 75-430, ch. 30, 52 Stat. 31 (codified as amended at 7 U.S.C. § 1281 (1982)). The AAA authorized the Secretary of Agriculture to allot each wheat farmer a quota limiting the acreage he could sow. The quota did not distinguish between acres intended to yield home-consumed wheat and those yielding wheat for sale. *Wickard*, 317 U.S. at 114.

penalty for harvesting and using wheat in excess of his federal quota under the AAA.[92] Filburn asserted that the AAA was beyond the scope of the commerce clause because, as applied to him, it regulated a purely local activity with only a remote and indirect effect on interstate commerce.[93] The Court disposed of Filburn's argument by reaffirming the holdings of *Darby* and *Jones & Laughlin*: Congress may regulate any activity having a substantial effect on interstate commerce.[94] In this case there was sufficient evidence for Congress to conclude that home-consumed wheat substantially influenced price and market conditions by competing with wheat in commerce.[95]

Thus, after 1945, the Court had provided Congress with two broad commerce clause interpretations. First, based on the holdings of *Champion*, *Hipolite*, and *Hoke*, Congress could regulate any article being transported interstate. Second, based on *Jones & Laughlin*, *Darby*, and *Wickard*, Congress could regulate any activity that had a substantial effect on interstate commerce or the national economy. The only limitation was that the means employed must be reasonably related to the congressional objective.

D. Regulation for Local Welfare

Nearly a century after the first Civil Rights Act was struck down as unconstitutional,[96] the federal government responded to the still pervasive existence of racial discrimination by enacting the Civil Rights Act of 1964. The 1964 Act was an attempt to eliminate both state-sponsored and private discrimination against minorities.[97] Rather than rely on the

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92. Filburn sowed excess acreage and harvested 239 bushels of wheat from that acreage. The AAA required him to pay a penalty or store the excess wheat. *Id.* at 114-15. Rather than abide by the AAA, Filburn filed suit to enjoin enforcement of the penalty and for a declaratory judgment that the AAA was unconstitutional as applied to him. *Id.* at 113. Filburn relied on precedent which indicated that Congress did not have the power to regulate activities with only an indirect connection to interstate commerce. *See supra* note 74. Similar language was employed in *Jones & Laughlin* to limit the holding of that case. *See supra* note 75. In *Wickard* the distinction between direct and indirect economic effects was discarded in favor of the "substantial effect on interstate commerce" standard. *Wickard*, 317 U.S. at 125.

93. *Wickard*, 317 U.S. at 119. The Court admitted that Filburn's wheat was trivial by itself but the aggregate effect of home-consumed wheat was "far from trivial." *Id.* at 127-28.

94. *Id.* at 125.

95. *Id.* at 128-29.

96. In The Civil Rights Cases, 109 U.S. 3 (1883), the Court struck down the Civil Rights Act of 1875. That Act sought to secure to all people in the United States equal access to facilities open to the public. The Court held that neither the thirteenth nor the fourteenth amendment empowered Congress to reach anything but state action. *Id.* at 23.

97. The stated purpose of the Act was "to promote the general welfare by eliminating discrimination based on race, color, religion, or national origin in . . . public accommodations through the exercise by Congress of the powers conferred upon it . . . to regulate commerce among the several States . . . ." Heart of Atlanta Motel v. United States, 379 U.S. 241, 245 (1964) (quoting

as-yet undeveloped power of the thirteenth and fourteenth amendments to the Constitution,[98] Congress, at the urging of Attorney General Robert Kennedy, linked the legislation to the commerce clause.[99]

In *Heart of Atlanta Motel v. United States*,[100] *Katzenbach v. McClung*,[101] and *Daniel v. Paul*,[102] the Court held that every aspect of the Civil Rights Act was within congressional commerce power. In *Heart of Atlanta Motel* the appellant operated a large motel serving interstate travelers on major highways intersecting in Atlanta.[103] Given the clientele of the motel, it was easy for the government to show that interstate commerce was affected by the motel's discriminatory policies.[104] In the other two cases, however, the establishments guilty of discrimination had no direct connection with interstate travelers.[105] Nevertheless, the Court agreed with the government's contention that discrimination created artificial barriers to interstate commerce. A specific showing that a restaurant or recreational park catered to interstate customers or otherwise utilized interstate commerce was not necessary. The aggregate activity substantially affected interstate commerce and, therefore, was

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the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (approved July 2, 1964)).

98. *See infra* notes 215-25 and accompanying text.

99. *See A Bill to Eliminate Discrimination in Public Accommodations Affecting Interstate Commerce: Hearings on S. 1732 Before the Senate Comm. on Commerce*, 88th Cong., 1st Sess. 163 (1964) (statement of the Hon. Robert F. Kennedy, Attorney General of the United States).

100. 379 U.S. 241 (1964).

101. 379 U.S. 294 (1964).

102. 395 U.S. 298 (1969).

103. The appellant actively solicited patronage from out-of-state residents through the use of national advertising media. The motel refused to rent rooms to blacks, and instituted suit against the United States seeking a declaration that the discrimination could continue. The appellant also sought an injunction against enforcement of the Civil Rights Act. *Heart of Atlanta Motel*, 379 U.S. at 243-44.

104. *Id.* at 253 (stating: "We shall not burden this opinion with further details since the voluminous testimony [before Congress] presents overwhelming evidence that discrimination by hotels and motels impedes interstate travel"); *see also id.* at 270-71 (Black, J., concurring) (stating that "[i]t requires no novel or strained interpretation of the Commerce Clause to sustain [the Civil Rights Act] as applied in either of these cases").

105. In Katzenbach v. McClung, 379 U.S. 294 (1964), the appellees instituted a suit similar to the one in *Heart of Atlanta Motel*. *See supra* note 103. McClung owned a restaurant in Birmingham, Alabama which catered to a local clientele. The policy of Ollie's Barbecue was to serve blacks only through take-out service. The evidence presented indicated that the restaurant used a substantial quantity of meat procured by a local supplier from out-of-state sources. *Katzenbach*, 379 U.S. at 296. The Court held that Congress reasonably could have concluded that local discrimination created an artificial barrier to interstate commerce by restricting interstate travel by blacks and generally depressing the business climate. *Id.* at 300.

In Daniel v. Paul, 395 U.S. 298 (1969), blacks refused admission to a recreation facility near Little Rock, Arkansas brought a class action to enjoin the owners from excluding them. *Id.* at 300-01. The Court held that, by virtue of the fact that the facility sold food that had heen shipped interstate, leased paddleboats from an Oklahoma company, and owned a jukehox manufactured out-of-state, the operations of the facility affected interstate commerce. *Id.* at 308.

within Congress' power to regulate.[106]

In addition to its attempt to eliminate local discrimination, Congress also has used its commerce power to bring certain local crimes within the jurisdiction of federal law enforcement agencies. The statutes involved often criminalize activity already proscribed at the state level.[107] The leading case in the federal criminal area is *Perez v. United States*.[108] Perez was convicted under Title II of the Consumer Credit Protection Act for engaging in loan shark activity. His petition challenged congressional authority to classify his purely intrastate activity as a federal offense.[109] After examining the evidence gleaned from the legislative history, the Court concluded that there was a rational basis for the congressional finding that loan sharking had a substantial effect on interstate commerce.[110] As to Perez' purely intrastate loan sharking, the Court held that in regulating a class of activities, Congress should consider the aggregate effect on interstate commerce.[111] Even when an individual instance cannot be shown to have an interstate effect, the Court will not consider that activity beyond the reach of Congress if, when taken in the aggregate, that activity may be viewed as affecting interstate commerce. The Consumer Credit Protection Act, therefore, was constitutional as applied to anyone engaged in the prohibited activity.[112]

In dissent to *Perez*, Justice Stewart pointed out that all criminal activity, when aggregated, affects interstate commerce. Nothing about loan sharking distinguished it from other local crimes.[113] On the grounds that the Framers did not intend the commerce clause to empower the national government to enact federal criminal laws over purely local matters,[114] Justice Stewart concluded that the ninth and tenth amendments reserved the definition and prosecution of local

106. *Katzenbach*, 379 U.S. at 300-01 (quoting *Wickard*, 317 U.S. at 127-28 (1942)).

107. *See, e.g.*, 18 U.S.C. § 1201 (1982 & Supp. 1988) (criminalizing kidnapping when the victim is transported interstate); 18 U.S.C. § 1962 (1982) (making certain state crimes federal offenses when interstate commerce is affected); 18 U.S.C. § 2113 (1982 & Supp. 1988) (criminalizing bank robbery); 21 U.S.C. §§ 841-852 (1982 & Supp. 1988) (criminalizing the manufacture, distribution or possession of certain drugs). *See generally* Stern, *The Commerce Clause Revisited—The Federalization of Intrastate Crime*, 15 ARIZ. L. REV. 271 (1973).

108. 402 U.S. 146 (1971).

109. *Id.* at 146-49, 156-57.

110. The legislative history tended to show that Congress based the Consumer Credit Protection Act on evidence that loan sharking was a major source of income for national organized crime and was used to gain control of legitimate businesses. *Id.* at 156-57.

111. *Id.* at 154.

112. *Id.*

113. *Id.* at 157 (Stewart, J., dissenting).

114. *Id.*

crime to the states.[115] According to Justice Stewart, the statute at issue was unconstitutional as applied to Perez because there was no showing that he was ever involved in interstate activity or that his conduct affected interstate commerce.[116]

Recent cases have formalized a two-part test for determining the constitutionality of federal regulation enacted as an exercise of the commerce power. The test is grounded in the interpretation that the commerce clause is a grant of plenary authority to Congress extending to activities affecting interstate commerce.[117] When Congress determines that an activity affects interstate commerce, the only limitation on its regulatory power is that there be a rational basis for that finding.[118] The court then inquires whether the means are reasonably adapted to the permitted end.[119] Civil rights and criminal cases show that Congress may regulate acts with no independent effect on interstate commerce, but which are part of a class that, as a whole, could be said to have such an effect.[120] As a practical matter, the rational basis test, in combination with the aggregate effect principle, brings all activities within the scope of the commerce power.[121]

E. The National League of Cities *Experiment*

In 1976 the Supreme Court added another restriction to the two-part rational basis test. In *National League of Cities v. Usery*[122] the Court adopted the position that the tenth amendment operated as an independent bar to congressional regulation of states and their political subdivisions.[123] At issue in *National League of Cities* was a 1974 amendment to the FLSA[124] which required state governments to com-

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115. *Id.* at 158.

116. *Id.* at 157.

117. Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 276-77 (1981).

118. *Id.* at 276.

119. *Id.*

120. *See* Fry v. United States, 421 U.S. 542, 547 (1975); Stern, *supra* note 107, at 274; *cf.* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 310 (1978).

121. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 584 (1985) (O'Connor, J., dissenting) (pointing out that "virtually every activity of a private individual, arguably 'affects' interstate commerce"); Light, *The Federal Commerce Power*, 49 VA. L. REV. 717, 728 (1963) (stating that "[i]n the light of *Wickard v. Filburn* it is difficult to discern a meaningful limit to the [commerce] power, which now, as the Court asserted in 1946, 'is as broad as the economic needs of the nation' "); *see also* M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS 41 (1982) (stating that the delegated powers are "quite indeterminate in scope").

122. 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

123. *National League of Cities*, 426 U.S. at 845.

124. The Supreme Court found the FLSA within the commerce power in United States v. Darby, 312 U.S. 100 (1941). For a discussion of *Darby*, see *supra* notes 79-89 and accompanying text.

ply with the labor standards of that Act. After examining the potential effect on the states,[125] the Court concluded that application of the FLSA to state employees would unjustifiably interfere with the "integral governmental functions" of the states.[126] The Court held that the amendment, insofar as it regulated the states as states and displaced the states' freedom to structure traditional governmental operations,[127] was beyond the scope of Congress' commerce power.[128]

After nearly ten years of struggling to define "traditional governmental functions," however, the Court abandoned the effort as "unworkable" in *Garcia v. San Antonio Metropolitan Transit Authority*.[129] The *Garcia* Court held that the principles of *National League of Cities* were inconsistent with federalism and had no constitutional basis.[130] As an illustration, the Court noted that the Constitution and the Bill of

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125. For a discussion of the increased cost to the states, both monetary and indirect, see *National League of Cities*, 426 U.S. at 846-51.

126. *Id.* at 851. In *Hodel* the Court formalized the test as follows:

> [I]n order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of *National League of Cities* must satisfy *each* of three requirements. First, there must be a showing that the challenged statute regulates the "States as States." Second, the federal regulation must address matters that are indisputably "attribute[s] of state sovereignty." And third, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional governmental functions."

Hodel, 452 U.S. at 287-88 (citations omitted) (emphasis in original). Additionally, the *Hodel* Court stated that "[d]emonstrating that these three requirements are met does not . . . guarantee [success]. There are situations in which the nature of the federal interest advanced may be such that it justifies state submission." *Id.* at 288 n.29.

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

128. *National League of Cities* received extended consideration by commentators. *See, e.g.*, Bogen, Usery *Limits on National Interest*, 22 ARIZ. L. REV. 753 (1980); Choper, *The Scope of National Power Vis-à-Vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552 (1977); Matsumoto, National League of Cities—*From Footnote to Holding: State Immunity from Commerce Clause Regulation*, 1977 ARIZ. ST. L.J. 35; Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty" in* National League of Cities v. Usery, 86 YALE L.J. 1165 (1977); Tribe, *Unraveling* National League of Cities: *The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065 (1977).

129. 469 U.S. 528 (1985) (overruling *National League of Cities*, 426 U.S. 833). *Garcia* received much attention from commentators. *See, e.g.*, Baird, *State Empowerment After* Garcia, 18 URB. LAW. 491 (1986); Field, Garcia v. San Antonio Metropolitan Transit Authority: *The Demise of a Misguided Doctrine*, 99 HARV. L. REV. 84 (1985); Howard, Garcia *and the Values of Federalism: On the Need for a Recurrence to Fundamental Principles*, 19 GA. L. REV. 789 (1985); La Pierre, *Political Accountability in the National Political Process—The Alternative to Judicial Review of Federalism Issues*, 80 NW. U.L. REV. 577 (1985); Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After* Garcia, 1985 SUP. CT. REV. 341; Tushnet, *Federalism and the Traditions of American Political Theory*, 19 GA. L. REV. 981 (1985); Van Alstyne, *The Second Death of Federalism*, 83 MICH. L. REV. 1709 (1985).

130. *Garcia*, 469 U.S. at 531. The Court also warned that state immunity from federal regulation based on a judicial determination of traditional or integral functions would stifle state legislative experimentation and evolution of policy because innovation might compromise intergovernmental immunity. *Id.* at 546-47.

Rights are replete with limitations of, and infringements on, state sovereignty.[131] Moreover, the Court continued, the structure of the federal government, inasmuch as each state is represented in Congress, assures that state interests will be protected.[132] Thus, the principal and basic limitations on the federal commerce power, according to the *Garcia* Court, are the built-in restraints that safeguard federalism in the political process itself.[133]

Garcia departed from traditional constitutional interpretation when it declared the political system a primary restraint on federal power.[134] The structure of the Constitution indicates that the Framers believed that the political branches were incapable of restraining themselves.[135] Section eight of article one expressly lists the powers delegated to the national legislature; section nine expressly lists powers that may not be exercised.[136] If the Framers thought Congress competent to monitor itself, then express boundaries would not have been necessary.[137] By opting to enumerate specifically the powers of the federal legislature, the Framers provided absolute limits on congressional power—limits that could not be changed by the political process except through amendment.[138]

In *Garcia* Justice Blackmun argued that the political process was a built-in restraint on Congress,[139] but nowhere in the Constitution was the power of the people invoked to restrict the exercise of congressional

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131. *Id.* at 548-49 (citing article I, §§ 8 & 10 and the incorporation of the Bill of Rights into the fourteenth amendment).

132. *Id.* at 551.

133. *Id.* at 556.

134. Since the time of Marbury v. Madison, 5 U.S. (1 Cranch.) 137 (1803), it has been the role of the Supreme Court to interpret the Constitution. By relinquishing that role, even in the "narrow" case of commerce clause jurisprudence, the Court compromises the integrity of the counter-majoritarian principles of judicial review. *See* Redish & Drizin, *Constitutional Federalism and Judicial Review: The Role of Textual Analysis*, 62 N.Y.U. L. REV. 1, 16-17 (1987).

135. This is not to say that the Framers did not believe in majority rule:

> [T]he framers believed in democratic principles, they feared any unchecked power—even power lodged in the majority. Consequently, in order to limit the majority's power, the framers established a *constitutional* form of democracy. Through a written Constitution, subject to stringent amendment procedures, they limited certain governmental action, thereby protecting important values, principles, and rights from majority control.

Redish & Drizin, *supra* note 134, at 15 (footnotes omitted) (emphasis in original).

136. *See* U.S. CONST. art. I, §§ 8 & 9.

137. Redish & Drizin, *supra* note 134, at 13. The Redish and Drizin article noted:

> Article I, section 8 contains eigbteen clauses, each bestowing a discrete power on the national government. . . . This checklist structure necessarily implies a limitation on congressional authority. Had the drafters not intended that the powers of the federal government be limited, enumerating specific powers would have been a pointless exercise.

Id. (footnotes omitted).

138. *See* U.S. CONST. art. V.

139. *Garcia*, 469 U.S. at 556.

power. Instead, the built-in restraint is the constitutional separation of powers.[140] Since the time of *Marbury v. Madison*,[141] the role of the Supreme Court has been to measure congressional action against the yardstick of the Constitution. *Garcia* goes against nearly two hundred years of constitutional jurisprudence by adopting a policy that allows federal officials to be the sole judges of the limitations of their own power.[142] Thus, while the political process may serve to defeat federal legislation that is unwise, the Supreme Court is obliged to invalidate legislation that exceeds the boundaries defined in the Constitution.[143]

In the three dissenting opinions to *Garcia*,[144] each dissenter expressed the hope that the traditional state function doctrine would be revived in the near future.[145] *National League of Cities*, however, only protected states by interpreting the tenth amendment to be an independent restraint on congressional regulation of state governments.[146] Because *National League of Cities* did not adjust the rational basis test as applied to commerce regulation generally, it did not address the

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140. *See* O'Donoghue v. United States, 289 U.S. 516, 530 (1933) (reasoning that "[t]he Constitution, in distributing the powers of government, creates three distinct and separate departments . . . [and] [i]ts object is basic and vital, . . . namely, to preclude a commingling of these essentially different powers of government in the same hands" (citation omitted)); Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting) (pointing out that "[t]he purpose [of separation of powers] was, not to avoid friction, but, by means of the inevitable friction incident to the distributions of the governmental powers among three departments, to save the people from autocracy"); Rapaczynski, *supra* note 128, at 374 (noting that "to guarantee that . . . 'tyranny' would not ensue . . ., supraindividual (institutional) bodies were created to watch over each other to forestall the rise of an oppressive government"); *see also* THE FEDERALIST No. 47 (J. Madison).

141. 5 U.S. (1 Cranch.) 137 (1803).

142. *Garcia*, 469 U.S. at 567 (Powell, J., dissenting).

143. *See* Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 17 (1988) (positing that "[*Garcia*] errs because it assumes that mere political consensus may override constitutional provisions designed to check the concentration of governmental power").

144. Justice Powell wrote a dissent in which Chief Justice Burger, Justice Rehnquist, and Justice O'Connor joined. Justice Rehnquist dissented in a separate opinion. Justice O'Connor also dissented separately in an opinion joined by Justices Powell and Rehnquist.

145. *See Garcia*, 469 U.S. at 580 (Rehnquist, J., dissenting) (stating "I am confident [that the principles of *National League of Cities* will] in time again command the support of a majority of this Court"); *see also id.* at 589 (O'Connor, J., dissenting) (predicting that "this Court will in time again assume its constitutional responsibility").

146. Even in this narrow field, *National League of Cities* was the only instance that the "traditional state functions" test was invoked to invalidate federal legislation. In the nine years between *National League of Cities* and *Garcia*, the Court faced four cases requiring interpretation of that test and never found the criteria met. EEOC v. Wyoming, 460 U.S. 226 (1983) (finding no state government immunity from the Age Discrimination Act); Federal Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742 (1982) (holding no immunity for state public utilities from federal energy regulations); United Transp. Union v. Long Island R.R., 455 U.S. 678 (1982) (holding no immunity for state commuter railroads from the Railway Labor Act); Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981) (holding that federal surface mining regulations did not infringe state sovereignty).

broader issue of the displacement of state regulation of individual conduct by federal legislation.[147]

Garcia, in contrast to the narrow holding of *National League of Cities*, may be read as the Supreme Court's admission that it was unable to define any limits on congressional commerce power whether exercised to regulate states or individuals.[148] Perhaps the fundamental issue after *Garcia*, then, is whether it is desirable for the judiciary to restrict federal power. In other words, should the political process be the only restriction on Congress because the country has changed so much over the past two hundred years that constitutional limitations are no longer relevant? In order to answer this question, Part III considers the role of the states in the federal system and the advantages of state regulation of the individual.

III. THE VIRTUES OF STATE REGULATION

Some commentators have suggested that as long as one government (state, local, or federal) has the power to regulate an activity, it is immaterial which government actually regulates. In fact, some commentators have said that allowing the federal government to impose the same kinds of regulation which the states have been able to impose will have no effect on individual freedom.[149] Therefore, only the states—not individuals or the Supreme Court—need be concerned about federal encroachment. Individual rights, however, are affected when the federal government usurps traditional state authority over private conduct. The Framers of the Constitution intended to create an indivisible Union, composed of indestructible states,[150] by balancing the strengths

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147. Rapaczynski, *supra* note 129, at 362 (stating that "the [*National League of Cities*] decision did not protect the states as governmental institutions in the sense . . . of assuring their ability to impose the ultimate rules of conduct in any given area of extragovernmental activities"). One commentator stated that:

> [N]o doctrine that protects the states only from direct regulation by the federal government . . . could go far in redressing the basic shift in power [from states to federal government]. . . . As long as the federal government is free to regulate the states' citizens and corporations whenever it operates within its broad delegated powers, the very goals [of *National League of Cities*] cannot be achieved.

Field, *supra* note 129, at 103 (footnotes omitted).

148. *See* Redish & Drizin, *supra* note 134, at 9 (observing that "[a]s a practical matter . . . it appears clear after *Garcia* that the Court will abstain from enforcing limits on the commerce power inherent in the structure of article I").

149. *See* Alfange, *Congressional Power and Constitutional Limitations*, 18 J. PUB. L. 103, 121 (1969); *see also* J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 196 (1980) (noting that "[i]f the states concededly may do to the individual what it is claimed that the federal government may not do, the issue of concern is primarily one for the states and . . . may be entrusted to the states' representatives in the national political branches to decide").

150. Texas v. White, 74 U.S. (7 Wall.) 700, 725 (1869). *See* Lane County v. Oregon, 74 U.S. (7 Wall.) 71 (1869). The Court in *Lane County* wrote: "[I]n many articles of the Constitution the

of state governance with the need for federal regulation of some activities.[151] When Congress displaces local authority, individuals lose the benefits of being governed by the states. This section discusses some of those benefits.

A. *Ability to Provide for Local Diversity*

A diversity of attitudes, values, and resources exists in the United States despite the integration of the national economy and the technological advances that blur state boundaries.[152] Yet, when Congress regulates, because it must legislate for the nation as a whole, no allowance can be made for these variations.[153] As the Anti-Federalists recognized, in a large nation many important regional differences must be ignored for the sake of uniform administration.[154] When the federal government does not act, state and local governments can adjust for local diversity.[155]

The Supreme Court, in negative commerce clause cases,[156] has recognized the value of state regulation as a reflection of varying conditions. For example, in *South Carolina State Highway Department v. Barnwell Bros., Inc.*,[157] the respondent sued to enjoin the state from enforcing a statute restricting the size and weight of trucks permitted on state highways. The suit alleged that the statute was discriminatory

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necessary existence of the States, and, within their proper spheres, the independent authority of the States, is distinctly recognized." *Id.* at 76.

151. *See* Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847, 855 (1979) (maintaining that "[t]he ultimate justification for federalism . . . must be found in its potential to merge the advantages of localism for enhancing liberty with the necessity of a national government to cope with threats to security and prosperity"); Stewart, *Federalism and Rights*, 19 GA. L. REV. 917 (1985) (stating that "[f]ederalism seeks to maintain political decentralization and social diversity while simultaneously promoting national measures to meet national needs and prevent localized oppression").

152. *See* Stern, *supra* note 107, at 284-85 (noting that "[t]he ease with which the public and the judiciary now swallow the federal regulation of what were once deemed exclusively local matters undoubtedly reflects the general integration of the nation, in disregard of state lines"); *see also* Kaden, *supra* note 151, at 854.

153. *See* 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, 547 (1954); *see also* Kilpatrick, *The Case for "States' Rights"*, in A NATION OF STATES: ESSAYS ON THE AMERICAN FEDERAL SYSTEM 100 (R. Goldwin ed. 1961) [hereinafter A NATION OF STATES] (essay quoting Roth v. United States, 354 U.S. 476, 503-06 (1957) (Harlan, J., dissenting)).

154. *See* H. STORING, *supra* note 30, at 15.

155. Kaden, *supra* note 151, at 854. The author states that "[d]espite the homogenizing effects of media and mobility on twentieth-century American life, the existence of separate state and local governmental units still provides avenues for expressions of the variations in style in different parts of the country." *Id.*; *see also* H. STORING, *supra* note 30, at 11.

156. Even when Congress has not chosen to regulate an activity, the commerce clause restricts state action by implication. The "negative commerce clause" prevents states from discriminating against interstate commerce in favor of local businesses or industries.

157. 303 U.S. 177 (1938).

and burdened interstate commerce in a manner inconsistent with the commerce clause. The Court held that use of state highways was a peculiarly local concern[158] and, because there was no overt discrimination against out-of-state interests, the state had the power to determine how its highways would be used.[159] The *Barnwell Bros.* Court recognized that some issues are best left to state determination.[160]

The Supreme Court has also acknowledged the importance of local variation by deferring to local values for the definition of obscenity. The test, which requires an examination of "contemporary community standards," was first adopted in *Roth v. United States*.[161] Justice Harlan, in his dissent to that case,[162] elaborated on the importance of permitting state diversity. The Constitution, he argued, secured to the states the prerogative to have varying concepts of morality[163] by differentiating between the areas of conduct subject to state regulation and the areas subject to federal control.[164] By imposing a uniform definition of obscenity, the federal obscenity statute infringed on the state role and should have been found unconstitutional.

Although a large federal government may be desirable because it cannot be dominated by the concerns of a local majority,[165] it is precisely this detachment of Congress that renders it inadequate for local regulation.[166] Due to modern technology, local problems often are perceived as national crises.[167] The fact remains, however, that solving

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158. *Id.* at 187.

159. *Id.* at 189.

160. In Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1980), the Court struck down an Iowa statute that regulated the length of trucks admitted onto that state's highways. Although the statute was similar to the one in *Barnwell Bros.*, the Court held that the Iowa law substantially burdened interstate commerce without significantly increasing safety. *Id.* at 671. In fact, Justice Brennan, who concurred in the judgment, argued that the statute was not motivated by safety concerns at all; rather, Iowa's actual purpose was protectionist and per se unconstitutional. *Id.* at 685 (Brennan, J., concurring). The holding in *Kassel* does not undermine the principles of *Barnwell Bros.* because the Court repeatedly emphasized the state's prerogative to legislate for peculiar concerns of its own citizens. The problem for Iowa was that the burden on commerce was not outweighed by the significance of the countervailing state interest. *Id.* at 678.

161. 354 U.S. 476, 489 (1957).

162. Justice Harlan did not dissent from the adoption of the "community standards" test for determination of obscenity. His objection was based on the belief that the federal statute under which the defendant was convicted was beyond the scope of congressional power. *Id.* at 503-08 (Harlan, J., concurring in part, dissenting in part).

163. *Id.* at 506.

164. *Id.* at 503.

165. THE FEDERALIST No. 10, at 58 (J. Madison) (H. Lodge ed. 1908); *see also* Rapaczynski, *supra* note 129, at 382.

166. Wechsler, *supra* note 153, at 545. The author asserts that national action is likely to impose control in areas where the politically dominant local judgment finds control unnecessary, or it attenuates control in areas where it is really needed. When the need is not uniform throughout the country, hostile interests in Congress attack the legislation and dilute it. *Id.*

167. *Garcia*, 469 U.S. at 581 (O'Connor, J., dissenting) (pointing out that in the eighteenth

"problems" is not the only function of local regulation. The shift of control to the national legislature has handicapped the states' ability to develop policies that reflect the values and attitudes of the local population before issues of apparent national proportion are addressed in Congress.

B. *Advantages of Small Size*

As the country grows and the federal government expands, a large bureaucracy is evolving to administer national regulation. Because people are baffled by the complexity of the bureaucracy, they become discouraged and do not participate.[168] Furthermore, people do not develop loyalty to a monolithic government[169] and do not respect the law when they see no local connection.[170] In its report entitled *Citizen Participation in the American Federal System*, the Advisory Commission on Intergovernmental Relations recognized that the ideal of citizen participation is likely to be more frequent and diversified at the local level rather than at state and federal levels.[171] Decisionmaking in smaller units maximizes the opportunity for individual involvement in government.[172]

State and local governments are also more accountable to their constituencies.[173] State and local representatives are accessible because they are more likely to be friends and neighbors of the average citizen.[174] Furthermore, because states are smaller, information regarding the performance of representatives is more readily available[175] and the citizenry knows whom to hold responsible.[176] Moreover, restraints, in-

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century "technology had not yet converted every local problem into a national one"); *see also* Stern, *supra* note 107, at 284-85.

168. Diamond, *What the Framers Meant by Federalism*, in A NATION OF STATES, *supra* note 153, at 35; *see also* H. LASKI, THE AMERICAN DEMOCRACY 167 (1948). Laski observes: "[Citizens] tend to feel that what is done by a government institution is bound to be less well done than if it were undertaken by individuals, whether alone or in the form of private corporations." *Id.*

169. *See* THE FEDERALIST No. 17, at 98 (A. Hamilton) (H. Lodge ed. 1908) (arguing that, because state governments are closer to the people and more visible, citizens will be more loyal to the states).

170. H. STORING, *supra* note 30, at 16-17. How often, for example, have we heard a tax-evader justify his actions on the grounds that he is only cheating the IRS?

171. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, CITIZEN PARTICIPATION IN THE AMERICAN FEDERAL SYSTEM 95 (1980); *see also* Federal Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 789 (1982) (O'Connor, J., concurring in part, dissenting in part).

172. Kaden, *supra* note 151, at 853.

173. *Id.* at 854.

174. THE FEDERALIST No. 46, at 292-93 (J. Madison) (H. Lodge ed. 1908).

175. Kaden, *supra* note 151, at 854.

176. *Id.* at 857. Professor Kaden recognized that regulation through the use of conditional federal grants creates a special problem because "the people are necessarily unsure which of their representatives may be called to account: the federal officials who issued the directive, or the state

cluding recall and referenda, can be applied more easily at the local level.[177]

Massachusetts' recent experience with a seatbelt law poignantly illustrates the easier application of referenda at the local level. In 1985 the Massachusetts legislature passed a statute requiring the use of seatbelts for all occupants of motor vehicles.[178] Opponents of the law organized and successfully petitioned for a binding referendum on the regulation. In a state-wide vote the statute was struck down. Despite the response of Massachusetts' citizens, other states have retained or enacted seatbelt legislation. If the regnlation had been established by Congress, however, it is unlikely that the citizenry of a single state could have effected the repeal of the legislation. Only at the state level can a local majority the size of Massachusetts consistently influence public policy.

Because there are more representatives of a given population in state government than in Congress, state and local governments are more democratic.[179] It may be more than just numbers, however. Justice Powell, in his *Garcia* dissent, explained that the unelected members of the federal bureaucracy know less about the services traditionally rendered by the states and, therefore, are less responsive to the recipients than are state institutions.[180] Moreover, because federal government officials often move back and forth between the federal and state bureaucracies, their commitment may be to the expansion and the maintenance of the public services that they supervise. Thus, in the process of federal policy making, a local population's views could be represented by public officials with a direct connection to national programs rather than local values and attitudes.[181] As a result, Congress has become less representative of local interests and more accessible to various national constituencies.[182] Preserving the role of the states

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officials who responded to it." *Id.* at 890; *see also Federal Energy Regulatory Comm'n*, 456 U.S. at 787. Justice O'Connor in *Federal Energy Regulatory Commission* wrote: "Congressional compulsion of state agencies . . . blurs the lines of political accountability and leaves citizens feeling that their representatives are no longer responsive to local needs." *Id.*

177. Kilpatrick, *supra* note 153, at 101; *see also* Rapaczynski, *supra* note 129, at 403.

178. MASS. GEN. LAWS ANN. ch. 90, § 7BB (West Supp. 1988) (repealed Nov. 4, 1986). The Massachusetts statute apparently arose as a response to federal regulation of the automobile industry. *See* 49 C.F.R. § 571.208 (1987) (providing for relaxation of automobile safety standards upon passage of mandatory seathelt laws applying to at least two-thirds of the country's population).

179. The Anti-Federalists argued that the national legislature was too small to adequately represent the interests, feelings, and opinions of the population. State legislatures, on the other hand, were large enough to be more democratic. H. STORING, *supra* note 30, at 17.

180. *Garcia*, 469 U.S. at 577 (Powell, J., dissenting).

181. Kaden, *supra* note 151, at 867.

182. *Garcia*, 469 U.S. at 565 n.9 (Powell, J., dissenting); *see also* Rapaczynski, *supra* note

could be the best way to ensure democratic regulation.

C. States as Social Laboratories

Another advantage of state regulation is that states can function as laboratories for social experimentation.[183] The large and complex federal bureaucracy cannot deal quickly and effectively with highly complex social and political problems that may merit radically new approaches.[184] Insiders claim that among federal regulatory agencies there is a strong resistance to considering alternative and innovative approaches to problems.[185] Even with less complex problems, state governments have the luxury of experimentation without the fear that the entire nation will be jeopardized by their errors in judgment.[186] Thus, even when states and the federal government have the same goals, each state has the flexibility to take a different approach using its own judgment in response to the idiosyncrasies of its population, economy, and geography.[187]

D. The Political Process Theory Revisited

Despite the conflict between the political process theory of *Garcia* and the text of the Constitution,[188] several commentators have suggested that judicial intervention is unnecessary when congressional commerce legislation infringes on state authority. Professor Herbert Wechsler has argued that the Court need not protect the states from

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129, at 392-93 (arguing that federal representatives increasingly depend on national and local private interests and less on local majorities and consequently the less well-organized can only succeed on the state level).

183. Kaden, *supra* note 151, at 854.

184. H. SEIDMAN & R. GILMORE, POLITICS, POSITION, AND POWER: FROM THE POSITIVE TO THE REGULATORY STATE 330 (4th ed. 1986).

185. Lilley & Miller, *The New "Social Regulation"*, 47 PUB. INTEREST 49, 57 (1977).

186. States were responsible for innovations such as zero-based budgeting, equal housing, and no-fault insurance. States also took the lead in gun control, pregnancy benefits for working women, limited-access highways, education for handicapped children, auto pollution standards, and energy assistance for the poor. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, STATE AND LOCAL ROLES IN THE FEDERAL SYSTEM 62-63 (1982). As Justice Brandeis noted in his dissent to New State Ice Co. v. Liebmann, 285 U.S. 262 (1932), "[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *Id.* at 311 (Brandeis, J., dissenting).

187. *But see* Rapaczynski, *supra* note 129, at 408-14. Professor Rapaczynski lists six reasons why the social laboratory theory may be overrated: (a) state boundaries may be inefficient divisions of territory; (b) state regulation often does affect sister states; (c) local solutions are hindered by an unwillinguess to disadvantage local industries; (d) local innovation may be too expensive for local government to bear; (e) federal bureaucrats can innovate without fear of political reprisal; and, (f) uniformity can be an advantage. *Id.*

188. *See supra* notes 129-48 and accompanying text.

federal action because the states' representatives control the legislative process. Theoretically, therefore, the states themselves have sanctioned the challenged act of Congress.[189] Professor Jesse Choper, expanding on Wechsler's theory, has recommended that the Court, rather than expending judicial authority by invalidating commerce regulation, should use its limited power to protect individual rights.[190] The political process ultimately will establish the proper balance between state, local, and federal roles.

For the political process to function as Professors Wechsler and Choper assume it will, several criteria must be met. First, the citizenry must be sufficiently informed about the actions of their congressional representatives. Second, the representatives must be responsive to the protestations and suggestions of their constituencies. Third, local majorities, through their congressional representatives, must have the power to influence national policies. In other words, the political safeguards of federalism require a national government that is accountable, responsive, and democratic. The paradoxical result of the political process theory is that the weakest attributes of the federal government must be relied upon to protect individuals from federal action which is objectionable because the government lacks those attributes. If the federal government were accountable, responsive, and democratic, then state regulations would not be preferable. For the same reasons that state regulation is preferred over federal regulation, the national political process is inadequate to protect federalism.

In 1971 Justice Black declared that federalism does not require Congress to blindly defer to "states' rights" any more than it requires every important issue to be controlled by our national government.[191] For the past two hundred years the Supreme Court has attempted to reach a balance between these two extremes by devising a commerce clause doctrine broad enough to support needed federal legislation while simultaneously incorporating some restrictions on federal displacement of state authority over local activities. The ability of the modern commerce power to justify legislation such as the Polygraph Act[192] indicates that the rational basis test, especially after *Garcia*, insufficiently protects individuals from unnecessary federal regulation. The time has come for a new approach to the interstate commerce clause, and Part IV of this Note proposes one.

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189. Wechsler, *supra* note 153, at 559.

190. J. CHOPER, *supra* note 149, at 171-258.

191. Younger v. Harris, 401 U.S. 37, 44 (1971). Justice Black wrote that "the Framers rejected both these courses." *Id.*

192. *See supra* notes 1-9 and accompanying text.

IV. THE CONSTITUTIONAL EXERCISE OF FEDERAL POLICE POWER

For the past century, but more frequently since 1937, Congress has exercised its power over interstate commerce to promote and to protect the public health, welfare, and morality. The Supreme Court has held that as long as such regulations of commerce do not infringe upon any constitutional prohibitions, they are within Congress' commerce power, regardless of their motive or purpose.[193] As a consequence, the interstate commerce clause has evolved from a remedial measure, preventing economic Balkanization and facilitating commerce, into the source of unrestrained federal police power. Nowhere in the Constitution is Congress expressly granted the power to enact police legislation. The question, then, is whether any federal police power is implied in the Constitution[194] and if so, what are the limitations of that power?

Developing a commerce clause doctrine requires a determination of which government—state, local, or federal—ought to govern a certain activity. For example, when the Supreme Court is called upon to determine the scope of the federal executive or legislative power in the separation of powers context, the Court engages in an analysis focusing on the functional characteristics of the branch under scrutiny.[195] Many commentators have suggested that this functional analysis is the proper approach to all separation of powers issues.[196] In other words, when a

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193. United States v. Darby, 312 U.S. 100, 115 (1941). The Supreme Court was not always so willing to ignore congressional objectives. In M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), the Court wrote that the federal powers were not unlimited but "[l]et the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *Id.* at 421. Under modern doctrine, however, objectives are immaterial and the fact that "Congress [is] legislating against moral wrongs . . . render[s] its enactments no less valid." Heart of Atlanta Motel v. United States, 379 U.S. 241, 257 (1964).

194. The notion of implied federal powers originated in *M'Culloch*, 17 U.S. (4 Wheat.) 316. In *M'Culloch* the Court began its inquiry into the constitutionality of a federal bank by noting that the power to incorporate such a bank was not expressly enumerated in the Constitution. *Id.* at 409. However, the Court went on to find that incorporating a federal bank was a legitimate means of exercising delegated powers and there was, therefore, an implied power. *Id.* at 411.

195. *See, e.g.*, Nixon v. Fitzgerald, 457 U.S. 731, 749 (1982) (holding that immunity from damages liability is a "functionally mandated incident" of the presidency). The functional analysis approach to separation of powers issues has its roots in Justice Jackson's concurrence to Youngstown Sheet & Tube Co. v. Sawyer (The Steel Seizure Case), 343 U.S. 579 (1952). Justice Jackson outlined three situations in which the Supreme Court might be called upon to officiate between the two political branches and concluded that when there was a direct conflict "any actual test of power is likely to depend on the imperatives of events and contemporary imponderables . . . ." *Id.* at 637 (Jackson, J., concurring) (citation omitted); *see also* Banks, *Efficiency in Government: Separation of Powers Reconsidered*, 35 SYRACUSE L. REV. 715, 728-30 (1984) (discussing the Court's use of functional analysis in the separation of powers context); Bruff, *On the Constitutional Status of the Administrative Agencies*, 36 AM. U.L. REV. 491, 502-06 (1987).

196. *See, e.g.*, Chemerinsky, *A Paradox Without a Principle: A Comment on the Burger Court's Jurisprudence in Separation of Powers Cases*, 60 S. CAL. L. REV. 1083, 1109-11 (1987)

power is not expressly delegated to one branch, the Court should inquire which branch is best able to exercise the power and infer from the constitutional text that the power is assigned to that branch.

A functional inquiry ought to be as valuable in the federalism context as in the separation of powers context.[197] This approach to federalism has the added advantage of an historical basis in the framing of the Constitution. Section eight of article one was developed from an outline offered by the Virginia delegation to the Philadelphia Convention.[198] The Virginia Plan proposed a federal legislature empowered to legislate in all cases in which the several states were incompetent or in which the harmony of the relationship between the states would be threatened by independent state action.[199] The Virginia Plan can be viewed as the Framers' appraisal of the necessary functions of a federal government. The enumeration of section eight is a list of all the occasions in which federal action is required; that is, when the federal government is best suited to govern. Presumably, if a situation arises that fits into the Virginia Plan, then Congress should have been granted, either expressly or implicitly, the power to legislate in that case. The exercise of federal police power, therefore, ought to be constitutional when it is consistent with the Virginia Plan.

The Framers uniformly considered it imperative to remove from the states the power to obstruct interstate and foreign commerce. As a practical matter, the thirteen states could not operate as a single nation if the states retained power over commerce. The remedial effect of the commerce clause, therefore, ensures an integrated national economy when interstate and international transactions are unobstructed by individual state legislation.[200] By removing this legislative power from the states, however, the commerce clause creates situations in which state regulations are an unconstitutional or inadequate response to legitimate

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(describing a three-part functional analysis for separation of powers cases); Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984) (advocating a functional analysis approach to decide the constitutionality of administrative agencies).

197. *Cf.* Rapaczynski, *supra* note 129, at 345 (noting that the Court has not chosen to focus on a "functional analysis of the role of the states in the federal system").

198. *See* M. FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 68 (1913).

199. *Id.* at 226. The Virginia Plan states: "Resolved that . . . the National Legislature ought to be impowered . . . to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may he interrupted by the exercise of individual Legislation. . . ." *Id.*

200. *See, e.g.*, Philadelphia v. New Jersey, 437 U.S. 617 (1978) (striking down a New Jersey statute restricting the importation of waste generated outside the state); Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333 (1977) (striking down a North Carolina statute regulating the labeling of imported apples); Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951) (striking down a city ordinance regulating milk that had been processed by foreigu companies).

local or national problems. When problems are unsolvable because of the commerce clause, then, out of necessity, that clause should empower Congress to enact federal police legislation. In other words, the federal government may exercise police power constitutionally when, as a practical matter, it is the best or only government able to exercise that power. The remainder of this Note discusses some of the situations in which federal police power ought to be constitutional.

A. Avoidance of Interstate Competition Compromises

In an ideal world a state government would legislate for the welfare of its citizens after considering local values, conditions, and public opinion. The legislation would represent accurately the unique values of that state's population and be tailored to satisfy the majority. In most cases, the state political process functions according to this model. In some cases, however, the legislative process is distorted by the realities of interstate commerce because a state must consider the effect that police regulation will have on local businesses. In those cases, the state political process does not work and the result is a compromise that is not representative of public opinion. Because the commerce clause creates the problem, the federal commerce power must be invoked to solve it.

The labor standards established by the FLSA and sustained in *Darby*[201] illustrate the kind of situation in which federal legislation protects the general welfare better than state legislation. Absent the commerce clause, states would be able to choose, based on local values and conditions, a minimum wage and maximum hour work week. In Georgia, for example, the legislature might establish a low minimum wage and longer work week given the low cost of living and agrarian tradition in that state. On the other hand, the New York legislature might mandate higher wages and shorter hours. As a result, Georgia products, because they are manufactured by cheaper labor, could be sold for less than New York products. New York might make its products more competitive within the state by imposing tariffs on goods imported from other states, and it might subsidize exports to make New York products less expensive in other states. Eventually, other states would retaliate and the result would be a trade war of the type that existed under the Articles of Confederation.

Fortunately, the commerce clause prevents interstate trade wars. By the same token, however, it prevents states from protecting local industry from the consequences of federal legislation for the public

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201. 312 U.S. 100 (1941). For a discussion of *Darby*, see *supra* notes 79-89 and accompanying text.

health and welfare.[202] In short, by insisting that states consider the effects of social regulation on local competitiveness, the commerce clause ensures that states cannot regulate purely on the basis of local values and conditions. Once one state establishes a standard, no state can afford to exceed it. Thus, to paraphrase Justice Brandeis, a single courageous state may not try novel social and economic experiments without crippling its local businesses.[203]

In situations in which local competitiveness is jeopardized by individual state police regulation, a national regulatory minimum is established by default. The states are unable to utilize their own judgment and must instead capitulate to the lowest common denominator. In those cases, congressional regulation does not infringe on state prerogatives because Congress' judgment is not being substituted for that of the states. In fact, federal legislation is the only reflection of legislative judgment untainted by outside considerations.[204] When the state legislative process is distorted by considerations of the consequences that regulations will have on local business and industry, the commerce power is exercised constitutionally to override state authority.

According to this analysis, *National League of Cities* was correctly decided but for the wrong reasons.[205] The problem with extending the FLSA to cover state employees is not that it offends notions of federalism for Congress to regulate states,[206] but that federal police legislation is unnecessary. State legislatures are competent to determine state employee wages, hours, and working conditions, because state employees, unlike private employees, do not produce any goods to compete in the interstate market. Local judgment, therefore, is not tainted by considerations of competitiveness. The decision to pay state employees less than every other state in the Union has completely local repercussions and, therefore, creates no need for federal intervention.

B. Facilitation Through Uniformity

The previous section suggested that federal police power should be constitutional in situations in which the commerce clause impairs the ability of states to consider the welfare, safety, or morality of the public. Federal legislation also would be constitutional when, in addition to protecting the public, it promotes the goals of the commerce clause—

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202. *See* Stern, *supra* note 21, at 883.

203. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

204. Congress can use its power over foreign commerce to protect American products manufactured under better working conditions from competition with products from foreign countries.

205. *See supra* notes 122-28 and accompanying text.

206. If this were true then every federal conditional grant to the states would be unconstitutional as an infringement on state sovereignty prohibited by the tenth amendment.

namely, the integration of the national economy and the free flow of goods across state lines. When national uniformity facilitates interstate transactions in a way that individual state regulation cannot, then federal police legislation is consistent with the Virginia Plan and ought to be permissible.

The Pure Food and Drug Act, sustained in *Hipolite Egg Co. v. United States*,[207] is an example of legislation that facilitates interstate transactions through national uniformity. Federal food and drug laws are police regulations in that they set national standards for purity and safety. In *Hipolite* the Court found that the statute, in addition to promoting safety, was designed to facilitate interstate commerce in food and prescription drugs by assuring consumers that products throughout the country conformed to the same standards.[208] The facilitation aspect of the law should save this legislation from nullification as an invalid exercise of federal police power.

A result contrary to the one reached by the *Hipolite* Court would be unacceptable. Imagine the burden on interstate transactions if each state had its own standards for food and drugs. A safety-conscious resident of Tennessee, for example, would have to know the standards of every state in order to protect himself from impure food. Each state would be forced to institute an elaborate inspection system so that consumers would know which products conform to local standards. Moreover, the negative commerce clause, which forbids state discrimination against goods from other states, might even prevent states from taking certain kinds of action against imported products that do not meet the state's safety standards.[209]

Federal food and drug legislation facilitates interstate commerce and seems crucial to an integrated national economy. Although both the states and Congress would have the same objectives in food and drug legislation, state regulation would defeat the goal of the commerce clause and hinder both interstate and foreign commerce. The Court should not invalidate a federal statute that facilitates commerce by establishing national uniformity even though the objective of the legislation is the protection of individuals.

Congress, however, could conceivably tie every piece of legislation

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207. 220 U.S. 45 (1911). For a discussion of *Hipolite Egg*, see *supra* notes 52-59 and accompanying text. The case was decided prior to the development of the modern commerce clause doctrine. Under the rational basis test, food and drug regulation is constitutional because Congress could reasonably conclude that the activity of producing and selling adulterated products would have a substantial effect on interstate commerce.

208. *Hipolite Egg Co.*, 220 U.S. at 55.

209. *See* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 471 (1981) (stating that even "[w]hen legislating in areas of legitimate local concern, such as environmental protection and resource conservation, States are nonetheless limited by the Commerce Clause").

to a desire for national uniformity. The Supreme Court, therefore, ought to be wary of such conduct and be willing to scrutinize congressional motivations. For example, Congress has determined that a national policy on employer use of polygraph examinations is desirable.[210] In fact, the House Committee on Education and Labor found that the lack of uniformity enabled employers to circumvent state regulations.[211] The Polygraph Act, however, is not a reasonable means of facilitating interstate and foreign commerce because there is no rational connection between the examination of an employee and the marketability of goods he manufactures. While a single state's attempt to ensure that food and drugs are safe obstructs interstate commerce,[212] a state's decision to regulate polygraph tests has no effect on commerce at all. In facilitation cases, therefore, the Court should look at the consequences of state action not inaction.

This scrutinization of legislative intent leads to the conclusion that the Civil Rights Act of 1964 cannot be justified as a constitutional exercise of federal police power under the commerce clause. According to the Court's reasoning and the legislative history, federal civil rights legislation was necessary because the failure of states to eliminate racial discrimination set up artificial barriers to interstate commerce.[213] While it was true in 1964 that state tolerance of private discrimination through inaction discouraged travel and investment in that state, the only harm, other than the serious injury to individual rights, was to that state. Moreover, states were free to eliminate local discrimination without burdening interstate commerce.

Although the Civil Rights Act would not survive scrutiny under this Note's proposed interpretation of the commerce clause, the Act probably is justifiable as an exercise of congressional power granted in the Civil War Amendments.[214] While detailed consideration of this proposition is beyond the scope of this Note, several cases have interpreted the enabling clauses of the thirteenth and fourteenth amendments to permit congressional regulation of private discrimination. For example, in *Jones v. Alfred H. Mayer Co.*,[215] the Supreme Court held that sec-

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210. HOUSE COMM. ON EDUCATION AND LABOR, REPORT ON EMPLOYEE POLYGRAPH PROTECTION ACT, H.R. REP. No. 208, 100th Cong., 1st Sess. 8-9 (1987).

211. *Id.* at 9.

212. *See supra* note 209 and accompanying text.

213. For a discussion of the commerce clause rationale for the Civil Rights Act of 1964, see *supra* notes 96-106 and accompanying text.

214. The thirteenth, fourteenth, and fifteenth amendments to the Constitution are collectively referred to as the Civil War Amendments.

215. 392 U.S. 409 (1968) (sustaining 42 U.S.C. § 1982 which prohibits discrimination based on race in the sale or rental of property).

tion two of the thirteenth amendment[216] empowered Congress to determine the badges and incidents of slavery and legislate to eliminate them.[217] In *Katzenbach v. Morgan*[218] the Court gave a similar interpretation to section five of the fourteenth amendment.[219] The Court held that section five authorized Congress to enact legislation to secure the guarantees of the fourteenth amendment.[220] Some commentators also have interpreted *Morgan* as conceding to Congress the power to interpret the substantive rights in section one and provide a remedy for those violations.[221] Although *Morgan* and *Jones* raise serious separation of powers questions,[222] congressional power to eliminate private discrimination apparently is consistent with the original intent of the framers and ratifiers of the Civil War Amendments.[223]

In 1964 the jurisprudence of the Civil War Amendments had not

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216. The thirteenth amendment provides in part:

Section 1. Neither slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

U.S. CONST. amend. XIII, §§ 1, 2.

217. *Jones*, 392 U.S. at 440. *See* Baldwin, *The Thirteenth Amendment as an Effective Source of Constitutional Authority for Affirmative Action Legislation*, 18 COLUM. J.L. & SOC. PROBS. 77, 103-04 (1983); Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603, 616 (1975); Howe, *Federalism and Civil Rights*, in CIVIL RIGHTS, THE CONSTITUTION, AND THE COURTS 54 (1967).

218. 384 U.S. 641 (1966) (upholding the Voting Rights Act of 1965 which prohibited English literacy as a prerequisite to the right to vote).

219. The fourteenth amendment provides in part:

Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

. . .

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

U.S. CONST. amend. XIV, §§ 1, 5.

220. *Morgan*, 384 U.S. at 651.

221. Baldwin, *supra* note 217, at 107; *see also* Cohen, *supra* note 217, at 605.

222. The Supreme Court has carefully guarded its role as final interpreter of the Constitution. By permitting Congress to interpret the substantive rights created by the thirteenth and fourteenth amendments, the Court radically changes the scope of congressional power. Commentators have asserted that, in the case of the Civil War Amendments, the Court's role should be adjusted. For example, Professor Cohen argues that section five is a federalism clause granting Congress the power to determine whether governmental action should be taken. Relying on Professor Wechsler's theory of judicial abstention, see *supra* note 189 and accompanying text, Cohen promotes judicial deference to the political branches on fourteenth amendment issues. Cohen, *supra* note 217, at 614; *see also* Baldwin, *supra* note 217, at 108-13 (arguing that the enabling clauses of the Civil War Amendments merit special treatment by the Court including deference to congressional fact-finding). *See generally* G. STONE, L. SEIDMAN, C. SUNSTEIN & M. TUSHNET, CONSTITUTIONAL LAW 238-45 (1986).

223. *See generally* C. ANTIEAU, THE ORIGINAL UNDERSTANDING OF THE FOURTEENTH AMENDMENT (1981).

developed past the construction that had defeated the Civil Rights Act of 1875.[224] Since 1964 the Supreme Court has taken a more expansive view of congressional power under the Civil War Amendments and this modern interpretation likely is capable of supporting civil rights legislation currently justified under the commerce clause. There is no way to determine, however, whether this more expansive view can support civil rights legislation because most modern civil rights legislation is based on the commerce power. Permitting the expansion of the commerce clause beyond reasonable boundaries not only has "perverted"[225] the constitutional text, but also has frozen the jurisprudence of the Civil War Amendments.

C. Protection of National Resources

As the discussion in the last section intimated, state legislation that inhibits interstate commerce is unacceptable. Similarly, when state legislation, or the lack thereof, threatens national interests, the country cannot afford to permit a state to function as a legislative laboratory because the risk cannot be confined to that state. In these rare cases congressional interference is warranted.

One of the situations that merits federal action occurs when national resources, whether natural or otherwise, cannot be protected adequately by the independent legislation of individual states. The state resources must be protected, even if this protection is detrimental to the local population, and this protection can only be afforded through national action.

In *Wickard v. Filburn*[226] the statute at issue regulated the national

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224. *See supra* note 96 and accompanying text. Commentators recognized in 1964 that the use of the commerce clause was a calculated effort to avoid that early precedent. For example, Professor Gunther reacted as follows:

> The proposed end run by way of the commerce clause seems to me [ill-advised].
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> . . . .
>
> It would, I think, pervert the meaning and purpose of the commerce clause to invoke it as the basis for this legislation. . . . The Fourteenth Amendment, after all, [specifically] focuses on the problem of racial discrimination; and the fifth section of the Amendment as well as the Necessary and Proper Clause speak to congressional power to enforce it. [I] would much prefer to see the Government channel its resources of ingenuity and advocacy into the development of a viable interpretation of the Fourteenth Amendment . . . . [I]t would carry the incidental benefit of giving the Department the opportunity to aid the Supreme Court in the fashioning of a more adequate rationale for the modern scope of the Fourteenth Amendment than is now apparent . . . .

Letter from Gerald Gunther to Department of Justice (June 5, 1963) [hereinafter Gunther Letter], *reprinted in* G. GUNTHER, *supra* note 20, at 163.

225. *See* Gunther Letter, *supra* note 224.

226. 317 U.S. 111 (1942). For a discussion of *Wickard*, see *supra* notes 90-95 and accompanying text.

wheat market at a time of economic depression.[227] The congressional objective was to protect farmers from dramatic price fluctuations that led to farm failures and jeopardized the entire food supply.[228] No state acting independently could have achieved that objective; thus, congressional action was necessary to coordinate the market. Even though the AAA regulated a purely intrastate activity as to Filburn, Congress could constitutionally reach that local activity because the separate states were incompetent to protect the wheat supply.

The National Labor Relations Act sustained in *Jones & Laughlin* presents a similar situation.[229] In *Jones & Laughlin* the NLRA was enforced against the fourth largest steel and iron producer in the country. Had labor unrest stopped production at the Aliquippa plant, a general strike might have crippled the nation. Moreover, *Jones & Laughlin* was not a case in which the social laboratory concept was applicable. A legislative experiment by Pennsylvania might have had substantial repercussions for the entire nation. The NLRA, as applied to Jones & Laughlin and similar corporations, was constitutional as an exercise of power necessary to protect the nation by establishing a national policy.

D. Interstate Transportation of Hazardous Articles

Just as federal regulation is justified when national resources are threatened by the legislative experimentation of a single state, federal regulation may be justified when the action or inaction of a single state jeopardizes the local resources of another state. According to the Virginia Plan, the Constitution was to permit national legislation when individual state regulation would threaten the harmony of relations between states. Although there are few situations in modern America in which interstate relations are at issue, Congress should maintain the power to remedy situations giving rise to such friction.

One situation with the potential to create interstate arguments occurs when the transportation of articles from one state might result in damage in another state. For example, Congress has prohibited the interstate transportation of plant pests without the authorization of the Secretary of Agriculture.[230] The Animal and Plant Health Inspection

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227. *Wickard*, 317 U.S. at 125-26 (recounting the problems caused by surplus wheat including volatile prices, railroad car tie-ups, and overhurdened grain elevators).

228. *Id.* at 128. The Court stated: "One of the primary purposes of the Act . . . was to increase the market price of wheat, and to that end to limit the volume thereof that could affect the market." *Id.*

229. *See supra* notes 68-77 and accompanying text.

230. 7 U.S.C. § 150hb (1982). Section 150gg provides for civil and criminal penalties for violation of § 150hb. 7 U.S.C. § 150gg (Supp. 1988). The Secretary is empowered to develop rules and regulations to implement this prohibition. 7 U.S.C. § 150ee (1982).

Service of the Department of Agriculture promulgated regulations prohibiting the transportation of citrus fruits bearing the citrus canker virus from quarantined areas to citrus-producing areas of the United States.[231] The entire state of Florida was under quarantine[232] until February 9, 1988, when the Service ruled that the export of Florida citrus fruits to other citrus-producing states posed no danger to the fruit crops of those areas.[233]

The problem of infected fruits seems particularly suited to federal legislation. Assuming that individual states constitutionally could restrict the importation of Florida citrus, the potential friction that would arise from this action would be unacceptable. Florida's citrus growers no doubt would resent any state legislation directed at the Florida citrus crop even if there were legitimate reasons for such action. Retaliation might be an appealing response for Florida. Moreover, citrus-producing states would have a tempting constitutional means of increasing the local competitiveness of their own fruit though no actual danger was posed by exposure to infected fruit.[234] Regulations enacted by Congress or an administrative agency, which Florida has the same opportunity to influence as any other state, eliminate this potential friction.

E. Local Hazards which Cross State Lines

Under the Virginia Plan, Congress was to have power to regulate in all cases in which the states, acting separately, could not achieve the desired national goal. For example, congressional regulation would be necessary when a local hazard cannot be contained by a single state and the hazard threatens surrounding states. In this case, the problem does not necessarily arise from the integrated national economy but rather from the contiguous geography of the United States. Once again, Congress should have the constitutional power to solve the problem.

The case of nuclear energy offers a good example of the need for congressional regulation. When a state determines that nuclear energy is a safe alternative to more conventional methods of energy production, the consequences of an error in judgment do not abide by state boundaries. A radioactive cloud created by an accident in Oregon may have deadly consequences for the entire nation. The only opportunity for Ohio, for example, to influence the actions of Oregon regarding nuclear power is through Congress. Congress, therefore, should make deci-

231. 7 C.F.R. § 301.75 (1988).
232. *Id.* § 301.75-3.
233. 53 Fed. Reg. 3999 (1988) (to be codified at 7 C.F.R. §§ 301.75 to 301.75-16).
234. *See id.* (concluding the risk posed is minimal).

sions involving the welfare of all of the states. By setting a national minimum, the federal legislature can ensure that all states are not jeopardized by the policy decisions of a single state.

This congressional action, however, should set only a minimum. Nothing should prevent a state from choosing more stringent requirements when the local majority prefers them. The purpose of permitting federal regulation is to protect one state from the errors in judgment of another state. Once that purpose is accomplished, the federal role is fulfilled. Congress may determine that certain safety regulations protect California from mistakes in Nevada, but California still may desire to better protect both Nevada and itself from Californian accidents. More stringent safety regulations do not conflict with the national policy and should remain the prerogative of California.[235]

V. CONCLUSION

The Supreme Court must take an active role in defining the limits of congressional power to regulate individual conduct. Practically speaking, the present construct used by the Court places no restrictions on Congress, and *Garcia* seems to indicate that the Court has resigned itself to this situation. Limits on congressional power to regulate under the commerce clause should be developed. This Note proposes an approach to develop a more useful construct that focuses on the underlying federalist framework of the Constitution. The list of categories of constitutional police power legislation in Part IV is not exhaustive and other situations might warrant its expansion. It is the obligation of the Supreme Court, however, as the final interpreter of the Constitution, to ensure that the list does not become infinite.

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235. *Cf.* Hillsborough County v. Automated Medical Labs., Inc., 471 U.S. 707 (1985). In *Hillsborough* the Court held that county ordinances regulating the collection of blood plasma were not preempted by the extensive federal regulation of the industry. In a footnote to the unanimous opinion, the Court pointed out that "[t]he federal interest at stake here is to ensure minimum standards, not uniform standards." *Id.* at 722 n.5. *But cf.* Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190 (1983). In *Pacific Gas* the Court was presented with a California statute requiring potential builders of atomic energy plants to show that provisions had been made for the storage and disposal of the spent fuel. *Id.* at 194. The appellant alleged that the state law had been preempted by the extensive federal regulatory scheme. *Id.* at 204. The Court rejected the preemption argument on the grounds that the federal regulations preempted only those state statutes motivated by safety concerns. *Id.* at 213. Since California's laws were designed to avoid uneconomical investment in nuclear power, the federal laws did not preempt the state law. *Id.* at 216. Had the state statutes been for the protection of the public health, however, they would have been superseded.

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