RESCUING FEDERALISM AFTER *RAICH*: THE CASE FOR CLEAR STATEMENT RULES

by
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The Rehnquist Court's federalism jurisprudence began with a focus on clear statement rules, but then turned to prohibitory limits on the scope of federal power. This Article specifies the differences between clear statement rules and prohibitory limitations, and outlines some of the factors courts should consider in determining which strategy to pursue in any given context. The Article argues that the scope of the Commerce Clause is an issue that should be resolved using clear statement rules. The Court's decision in United States v. Lopez *to follow a prohibitory approach was both strategically mistaken and poorly executed. Although the principles the Court established in* Lopez *have been largely eviscerated by* Gonzales v. Raich*, the Court now has the opportunity to consider whether to turn to a strategy of clear statement rules. Such an approach would put Commerce Clause jurisprudence on a sounder footing, and could be achieved without upsetting the results in any of the major decisions in the post-*Lopez *era.*

I. INTRODUCTION

The basic dilemma of constitutionalism, at least as applied to questions of federal-state relations, is how to strike the right balance between stability and change. On the one hand, we do not want the assignment of responsibilities among the different levels of government to shift around in an unpredictable fashion. Governing requires long-term investments in laws, institutions, and human capital. It is important that governments—and the people they govern—

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know where these investments are to be made. On the other hand, it is inevitable that the assignment of responsibilities will change over time. New technologies, changes in the scope of markets and the scale of enterprises, and the emergence of new issues like environmental protection and international terrorism require adjustments in the respective functions of the central and regional governments. Within a framework of stability in the assignment of functions, there must be some mechanism for change.[1]

Probably the best approach to reconciling stability and change in the context of a federal system is to precisely set forth the functions of the central government in the basic law or constitution and to allow additions and subtractions through amendments. This is the way the problem is handled in other constitutional federations, such as Germany and Switzerland.[2] The American Constitution adopts half of this strategy. It sets forth a fairly precise list of the powers that, in 1787, seemed most appropriate for the federal government to discharge, leaving all residual governmental powers with the States. Unfortunately, it coupled this precise list of federal powers with an amendment process that makes it extremely difficult to add to or subtract from the list of powers given to the federal government. Thus, the American Constitution, in what is arguably its most significant flaw, contains no adequate mechanism for making needed changes in the assignment of powers between the levels of government.

In default of a satisfactory formal mechanism for change, the solution to adjusting the respective roles of the federal government and the States has been judicial amendments of the Constitution—reinterpretations by the Supreme Court of specific grants of power to the federal government. The net effect of these judicial amendments has been to sanction the transfer of many functions of government from the States to the federal government. The high water mark in this process of judicial sanctioning of federal expansion was reached in 1985, when the Court in *Garcia v. San Antonio Metropolitan Transit Authority*[3] seemed to say that questions about the proper allocation of powers should be determined unilaterally by Congress, without any judicial input at all.

One year after the *Garcia* decision, in 1986, William Hubbs Rehnquist became Chief Justice. Rehnquist dissented in *Garcia*, which overruled one of his most important opinions written as an Associate Justice, *National League of Cities v. Usery*.[4] Rehnquist predicted that *Garcia* itself would some day be overruled, and *National League of Cities* restored.[5] This did not happen. But the Rehnquist Court can be seen as a nineteen-year campaign by the late Chief Justice and his allies to repudiate the underlying thesis of *Garcia*—that the respective spheres of authority between the federal government and the states

[1] *See generally* Lawrence Lessig, *Translating Federalism*: United States v. Lopez, 1995 SUP. CT. REV. 125, 137–44.

[2] *See, e.g.*, WILLIAM H. RIKER, FEDERALISM: ORIGIN, OPERATION, SIGNIFICANCE (1964).

[3] 469 U.S. 528 (1985).

[4] 426 U.S. 833 (1976).

[5] *Garcia*, 469 U.S. at 580 (Rehnquist, J. dissenting).

should be determined solely by the political process.[6] A central theme of the Rehnquist Court—perhaps *the* central theme—was that the federal courts do have a vital role to play in determining the allocation of powers in the federal system.

Constitutional commentators, overwhelmingly focused on questions of individual rights, tend to be puzzled by the Rehnquist's Court absorption with federalism. They often assume, cynically, that the Court's motivation for enlarging the role of courts in federalism controversies was to mount a flank attack on the individual rights decisions of the Warren and Burger Courts.[7] But a more charitable explanation is that the late Chief Justice and his allies regarded *Garcia* and all it stands for as putting too much emphasis on the need to accommodate change in the assignment of governmental roles and not enough on the importance of stability. The central effort of the Rehnquist Court, from this perspective, was to re-strike the balance between change and stability in federalism in a way that more fully acknowledges the importance of both values.

Looking back, we can see that the Rehnquist Court's campaign to define a new role for courts in federalism controversies falls into roughly two periods. The first period, which predated the beginning of the Rehnquist Court by a few years and ran into the mid-1990's, was characterized by an effort to prescribe clear statement rules in federalism controversies. Thus, in cases involving the States' immunity from lawsuits under the Eleventh Amendment, the Court held that such suits were permitted only if authorized by Congress in "clear and unmistakable" language in the statute.[8] The Court similarly held that conditions attached to grants of federal monies could be enforced against the States only if set forth "unambiguously" in the grant.[9] And in *Gregory v. Ashcroft,*[10] the Court said it would interpret a federal regulatory statute to apply to traditional state functions, such as the appointment of state judges, only if there was a "plain statement" from Congress requiring this result.[11]

The second period, which ran from the mid-1990s to the waning days of the Rehnquist Court, saw a shift from the articulation of clear statement rules to the imposition of prohibitory limitations on the powers of Congress. The most

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[6] *Garcia*, 469 U.S. at 549–555.

[7] *See, e.g.*, William N. Eskridge, Jr. and Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 636–40 (1992) (worrying that the Court's new clear statement rules might be a form of "backdoor" judicial activism).

[8] *See, e.g.*, Hoffman v. Conn. Dep't of Income Maint., 492 U.S. 96, 101 (1989); Dellmuth v. Muth, 491 U.S. 223, 228 (1989). This particular clear statement rule originated in *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985), decided the year before Rehnquist became Chief Justice.

[9] South Dakota v. Dole, 483 U.S. 203, 207−08 (1987); Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981).

[10] 501 U.S. 452, 461 (1991).

[11] Preemption is another very important category of cases where the Court has occasionally asserted clear statement rules. *See, e.g.*, Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992). But the Court's inconsistency in following such rules leads me to omit preemption as an unequivocal example of such a strategy.

decisive shift came in the Eleventh Amendment context, where the Court announced in *Seminole Tribe v. Florida*[12] that Congress has no power to abrogate state sovereign immunity under the Commerce Clause—a result in some tension with its decisions in the immediately preceding years requiring a clear statement to abrogate. But the Court also announced new prohibitory limitations under the Commerce Clause[13] and Section 5 of the Fourteenth Amendment,[14] and a new prohibition against federal laws commandeering state governmental officers.[15]

Whatever the Court's motives for moving from clear statement rules to prohibitory limitations, the shift was ill-advised. The decision that reveals the mistake most clearly is *Gonzales v. Raich*.[16] Under the prohibitory approach to the scope of the Commerce Clause inaugurated in *United States v. Lopez*,[17] Congress can regulate intrastate activity that has a substantial effect on interstate commerce only if that activity is "economic" in nature. It is difficult to see how growing and consuming marijuana at home for medicinal purposes is "economic" activity. The activity singled out in *Raich* was therefore presumptively beyond the power of Congress to regulate under *Lopez*. But a majority of the Court was unwilling to invalidate the Controlled Substances Act (CSA), as applied to homegrown medical marijuana. To reach this result, *Lopez*'s prohibitory rule was watered down to the point where it may have little continuing significance.

In order to rescue federalism after *Raich*, the Court should return to the clear statement strategy for determining the scope of congressional power it began to articulate in the 1980s and early 1990s.[18] The clear statement strategy prescribes a much more constructive and workable role for the courts in determining the balance between stability and change in the assignment of powers between the federal government and the States. Moreover, under a clear statement approach, *Raich* would have been an easy case for upholding federal power. Congress, in the Controlled Substances Act, made explicit findings in

[12] 517 U.S. 44 (1996).

[13] United States v. Morrison, 529 U.S. 598 (2000); United States v. Lopez, 514 U.S. 549 (1995).

[14] City of Boerne v. Flores, 521 U.S. 507 (1997).

[15] Printz v. United States, 521 U.S. 898 (1997); New York v. United States, 505 U.S. 144 (1992).

[16] 125 S. Ct. 2195 (2005).

[17] 514 U.S. 549 (1995).

[18] I am not the first to advocate something like clear statement rules in this context. *See* Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795, 799 (1996) (advocating a shift in approach from identification of boundaries to "policing Congress's deliberative processes and its reasons for regulating"), Vicki C. Jackson, *Federalism and the Uses and Limits of Law:* Printz *and Principle?*, 111 HARV. L. REV. 2180, 2237 (1998) (suggesting that courts consider the record before Congress and any formal findings in determining whether legislation is "necessary and proper" to carrying out enumerated powers); Gill Seinfeld, *The Possibility of Pretext Analysis in Commerce Clause Adjudication*, 78 NOTRE DAME L. REV. 1251, 1324-27 (2003) (proposing a legislative findings requirement in order to assure that Congress is regulating for a commercial purpose).

the text of the Act clearly explaining how it derived its authority to regulate the intrastate possession of controlled substances from the Commerce Clause and the Necessary and Proper Clause. The statutes invalidated in *Lopez* and *United States v. Morrison*, by contrast, would have been easy cases for invalidation. In those statutes, Congress did *not* spell out in the text any connection between the regulation it imposed and its power to regulate interstate commerce. Thus, requiring a clear statement by Congress would be consistent with the outcomes of the Court's major Commerce Clause decisions of the *Lopez* era. Recasting those decisions as resting on clear statement principles would require some revisionism, but would be largely consistent with the values associated with stare decisis.

II. CLEAR STATEMENT VERSUS PROHIBITORY STRATEGIES

In theory, courts can enforce any limitation on legislative power through either a clear statement or a prohibitory strategy. In order to consider which strategy is more appropriate in striking the balance between stability and change in the federalism context, we must first pinpoint the differences between the two strategies, and then consider some relevant variables that should guide judges in choosing between them.

A. The Distinguishing Features of Clear Statement Rules

The key difference between clear statement rules and prohibitory limitations is that clear statement rules are collaborative—they draw upon both the courts and the political branches in determining the constitutionality of the exercise of legislative power. The prohibitory approach, in contrast, is unilateral—the question whether the legislature has transgressed the bounds of the Constitution is determined by the courts alone.

The prohibitory strategy proceeds in two steps. First, the legislature enacts a statute that arguably exceeds the limits of its constitutional authority. The court then reviews this legislation against whatever limitations on legislative power it determines to be appropriate based on its reading of the Constitution. These limitations can be framed in terms of general principles, bright line rules, standards of review, multi-factoral or balancing tests, or some combination thereof, giving whatever deference to legislative explanations or findings the courts deem appropriate. This is obviously the most familiar mode of judicial review of legislation.

The clear statement strategy proceeds in three steps. First, the court identifies a zone of sensitivity, i.e., an area close to the boundary of legislative power, and specifies that the legislature must signal with some degree of clarity that it is aware it is entering this zone. The court may also require that the legislature identify the theory that would sustain its exercise of power within this zone, including any particular findings necessary under that theory. Second, the legislature decides to enter the zone and attempts to signal it is doing so, together with any required specification of theory and findings. Third, the court reviews the legislative signal and, if appropriate, its explanation and

findings in order to determine whether they meet the requirements of the clear statement standard.

Notice that courts play an active interpretational role under the clear statement strategy, just as under the prohibitory strategy. Courts identify the zones of sensitivity, they specify the required signal, they decide whether some sort of explanation or finding is required, and they review the legislative response to determine compliance with these requirements. But the ultimate judgment of constitutionality under this approach is a joint product of the courts and the political branches, not the unilateral judgment of the court. Both the courts and the legislative branches must concur before the government will be permitted to intrude into a previously-identified zone of constitutional sensitivity.

B. Three Differentiating Variables

When is the clear statement strategy appropriate as opposed to the prohibitory approach? Three variables seem to point toward the use of one strategy as opposed to the other. They are: (1) the extent to which the interpretational question entails the need to accommodate stability and change, as opposed to merely promoting stability; (2) the extent to which the meaning of the provision is a matter of doubt or is regarded as well settled; and (3) the extent to which interpretation entails the determination of legislative facts rather than adjudicative facts. I will briefly elaborate on each of these variables.

First, insofar as the process of constitutional interpretation is designed to facilitate change in the scope of legislative powers, i.e., to effect a de facto constitutional amendment, the collaborative form of interpretation associated with the clear statement strategy has distinct advantages. The clear statement approach requires the concurrence of multiple branches of government—all three, actually, when we consider that the President participates in the legislative process through the exercise of the veto. The participation of the political branches injects a dynamic element into the process of interpretation likely to be absent when the courts act alone.[19] The judiciary is oriented toward "principled" interpretation, which requires that judgments be justified in terms of constitutional text, original understanding, and established precedent. This style of interpretation, because it is backward-looking, is heavily weighted against change in the status quo. Clear statement rules establish a division of labor between the political branches and the courts. The political branches, which are relatively unconstrained by the requirements of principled interpretation, can play the role of change agent, adopting a more aggressive reading of the Constitution than courts would be comfortable making. The courts can concentrate on promoting stability, by requiring that the political branches take a second look before committing to such an aggressive interpretation, and that they engage in appropriate deliberation before fundamental change occurs.

[19] *Cf.* WILLIAM ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION (1994) (contrasting traditional and dynamic statutory interpretation).

Requiring the concurrence of multiple branches has additional advantages in facilitating constitutional change. Such concurrence enhances the likelihood that the need for change will be correctly determined. Each branch has different sources of information and different constituencies to which it is accountable, and consensus about the need for change will reinforce the judicial willingness to act. And it seems plausible that securing the assent of the political branches means that a de facto amendment is more likely to be regarded by the public as legitimate. Certainly, criticism of the judiciary for fostering constitutional change will be muted if the political branches have also concurred in the change.

In contrast, insofar as the function of constitutional interpretation is not to accommodate change but solely to promote stability, the prohibitory strategy seems more suitable. Just as clear statement rules promote dynamic interpretation, prohibitory rules tend to reinforce the status quo. This follows from the convention requiring that courts justify their decisions in terms of preexisting sources of law. In addition, preserving the status quo requires no calibration of the need for change. Lastly, when courts enforce the status quo, their legitimacy is not likely to be called into question to the same degree as when they seek to facilitate change. Thus, insofar as we view a particular limitation as one that should be preserved in the face of transient agitation for change—the protection for free speech, perhaps—the prohibitory strategy is likely to dominate the clear statement approach.

Second, insofar as there is doubt about the correct meaning of a constitutional limitation, the clear statement strategy can give the provision content that eludes the judiciary.[20] The courts must still identify zones of sensitivity. But they need not determine the precise line within the zone where the scope of permissible legislative power has been passed. Many times the language of the Constitution is so vague, and the evidence of original understanding so sparse, that particularizing the meaning of a constitutional limitation is beyond the capabilities of the judicial method. In these circumstances, legislative line drawing based on pragmatic judgment or overlapping consensus may be a superior way to determine limits.

A possible illustration is provided by the "public use" limitation on the exercise of the power of eminent domain found in the Fifth Amendment.[21] Courts have never been able to develop a coherent particularized account of what "public use" means, and have settled on the vacuous notion that public use means public purpose. This has led to widespread agitation for a more precise prohibitory meaning. But rather than ask courts to develop artificial restrictions on eminent domain, a better approach might be to require legislative or administrative bodies to make a clear statement that a particular exercise of the power is for a "public use," perhaps giving a brief explanation in support of this determination. Such a clear statement requirement would

[20] *See* Lessig, *supra* note 1, at 187 (noting that clear statement rules permit courts to maintain fidelity to constitutional principles "without requiring of the Court some impossible interpretative task").

[21] *See* Kelo v. City of New London, 125 S. Ct. 2655 (2005).

force democratically accountable decision makers to consider and give content to the constitutional limitation. The process of requiring such an articulation (subject to further judicial review for compliance with the clear statement requirement) would arguably provide more protection for property owners than the theoretical possibility of de novo judicial review under a vacuous formulation.

In contrast, insofar as we are highly confident about the meaning of a particular constitutional provision and the ability of the courts to elaborate on that meaning over time, the prohibitory strategy is likely to be preferred to the clear statement approach. Again, certain individual rights provisions of the Constitution—the guarantee of free speech, or of racial equality, for example—may fit this description. Obviously, if we think the courts have "got it right" with respect to a particular type of limitation, there is less reason to dilute judicial oversight with a collaborative model of interpretation that injects the less predictable political branches into the interpretational process.

Third, the clear statement approach and the prohibitory approach correlate with a predominance of different kinds of factual determinations. Administrative lawyers often distinguish between legislative facts and adjudicative facts.[22] Legislative facts involve generalizations, usually predictive, about human behavior. Adjudicative facts involve determinations, always historical, about the behavior of specific individuals or institutions. There is a strong tradition in American public law that politically accountable bodies should be the primary determiners of legislative facts, and politically insulated courts should be the primary determiners of adjudicative facts. This is based in part on assumptions about the comparative competencies of legislatures and courts, and in part on considerations of legitimacy.

Many constitutional provisions cry out for determinations of legislative fact. For example, under the Necessary and Proper Clause,[23] questions about whether particular enactments are "necessary" entail making predictive generalizations about future behavior. The Court has always deferred to Congress in making such predictions.[24] The clear statement strategy comfortably accommodates such deference by asking whether Congress made the appropriate legislative findings. The prohibitory strategy does not, since it is unclear what standard of review courts should apply to legislative findings under this approach, and there is always the temptation to substitute judicial for legislative fact finding.[25]

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[22] 2 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE §§ 10.5−10.6 (Aspen Law & Business 4th ed. 2002).

[23] U.S. CONST., art. I, § 8, cl. 18.

[24] *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 417 (1819); Hanna v. Plumer, 380 U.S. 460, 472 (1965); Sabri v. United States, 541 U.S. 600, 608 (2004).

[25] An interesting and somewhat parallel claim for the superiority of legislative fact-finding is offered by Michael Paulsen, to the effect that the factors considered by the Supreme Court in determining whether to overrule one of its precedents (thereby facilitating constitutional change) involve factual determinations more appropriately made by legislatures than courts. Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of* Roe *and* Casey*?*, 109 YALE L.J. 1535, 1551-67

Conversely, insofar as the interpretation and enforcement of a limitation entails adjudicative facts, this tends to point toward a stronger role for courts in the process of enforcing the limitation. The prohibition of legislative Bills of Attainder is an illustration.[26] Determining whether a particular statute operates as an attainder entails inquiry into particular historical facts about particular individuals. Article III courts are institutionally designed to make these sorts of determinations with accuracy and impartiality. Legislatures are not.

C. Other Factors Relevant to Choice of Strategy

In addition to the foregoing three variables, which seem helpful in differentiating between the circumstances appropriate for clear statement rules and prohibitory limitations, other policy arguments for or against the use of clear statement rules have also been advanced. These arguments are not without force, although they tend to cancel each other out to a considerable degree, and thus are ultimately less helpful.

One fundamental objection to clear statement rules is that courts have no authority to adopt such rules in interpreting the Constitution. Such rules, it is claimed, are judicial creations, not requirements of the Constitution itself, and under *Marbury v. Madison*[27] the only authority of the courts is to review legislation on the ground that it transgresses the Constitution, not some judicially-identified "zone of sensitivity" surrounding a constitutional provision.[28] If the question before the court is one of statutory interpretation, perhaps the court can adopt a clear statement rule as a canon of interpretation; in this application, clear statement rules are merely a species of the more general canon of avoiding difficult constitutional questions.[29] But when the question concerns the meaning of the Constitution itself, a clear statement rule functions like a judge-made "penumbra" that expands judicial authority in an illegitimate fashion.[30]

The answer to this objection, however, is that constitutional interpretation has always been a collaborative endeavor, certainly where the exact limits of constitutional authority are unclear. This is why courts often review legislative enactments for unconstitutionality under a deferential standard of review—a practice that predates even *Marbury*[31]—and why some constitutional provisions are not enforced by courts at all. When courts "underenforce" constitutional

(2000).

[26] U.S. CONST. art. I, §§ 9, 10.

[27] 5 U.S. (1 Cranch) 137 (1803).

[28] I am indebted to Robert Pushaw for drawing this criticism to my attention.

[29] *See* Philip P. Frickey, *The Fool on the Hill: Congressional Findings, Constitutional Adjudication, and* United States v. Lopez, 46 CASE W. RES. L. REV. 695, 720 (1996).

[30] *Cf.* RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 285 (1985).

[31] *See* Calder v. Bull, 3 U.S. (3 Dall.) 386, 395 (1798) (opinion of Chase, J.) (disclaiming power to declare legislation unconstitutional except in "a very clear case"); *id.* at 399 (opinion of Iredell, J.) (stating that such power should be exercised only in a "clear and urgent case"). *See generally* James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

provisions in these ways, they are acknowledging that the political branches of government play an important role in giving content to provisions whose meaning is problematic.[32] Clear statement rules represent yet another interpretative technique that allows courts to share interpretative authority with the political branches.

Another argument sometimes launched against clear statement rules is that they are an affront to Congress, because they appear to dictate to Congress about the manner in which a coequal branch conducts its business and exercises its constitutionally assigned duties.[33] There is something to this concern, especially if the Court continually changes the ground rules about how clear is clear, whether supporting explanations or findings are required, and whether the clear statements, explanations, and findings must be found in the text or merely in the legislative history of an enactment. The heyday of clear statement rules in federalism—the 1980s and early 1990s—was characterized by a fair bit of shifting about with respect to these ground rules, and this cast a certain taint on the whole enterprise.[34] There can be no quarrel with the proposition that respect for Congress requires that the Court avoid gamesmanship in its description of clear statement requirements.

In the end, however, whether clear statement rules are an affront to Congress depends largely on the baseline against which they are assessed. If the baseline is the anything-goes regime of *Garcia*, then clear statement rules seem like an affront, because they impose certain conditions on judicial willingness to enforce legislation in zones of sensitivity that did not exist before. If the baseline is the prohibitory regime of *Lopez*, then clear statement rules seem like a gesture of respect. Clear statement rules represent an offer to collaborate with Congress in the determination of the scope of legislative powers, rather than a threat to dictate such limits unilaterally. From the vantage of a post-*Lopez* world, therefore, it is hard to get too exercised about the dignitary implications of clear statement rules, provided they are applied by courts in a consistent and good faith manner.[35]

A third argument against clear statement rules is that they do not foreclose the possibility that Congress could usurp every function traditionally performed by state governments, thereby erasing the understanding that the federal government is one of limited powers.[36] This of course is the argument that lies at the heart of *Lopez*—there must be some stopping point to the scope of

[32] *See* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

[33] *See, e.g.*, Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80 (2001).

[34] *See generally* Philip P. Frickey and Steven S. Smith, *Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 YALE L.J. 1707 (2002).

[35] *See* Lessig, *supra* note 1, at 207 ("If the Court can say that certain areas cannot be regulated by Congress, I don't understand why it can't say that those areas can be regulated, but only if Congress shows it has considered just why.").

[36] Again, I thank Robert Pushaw for focusing my attention on this argument.

congressional power, lest we no longer have a genuine system of federalism.[37] Clear statement rules, the argument goes, fail to meet this concern. They may slow down the juggernaut of federal expansion, but they do not stop it.

Like most slippery slope arguments, this is an effective debater's point. But it is doubtful whether debater's points should determine the structure of constitutional law.[38] *Lopez*'s concern that there be some stopping point is satisfied as long as the Court preserves a peppercorn of exclusive state authority. But why should we care about peppercorns of state authority? What really matters is preserving a sensible division of authority between the federal government and the States, in which each level of government regulates subjects appropriate to its respective sphere of competence.[39]

Proponents of clear statement rules sometimes draw upon the so-called political safeguards of federalism as a reason for requiring clear statements by Congress. The Court endorsed the argument in *Gregory v Ashcroft*.[40] Requiring Congress plainly to state its intention to regulate traditional state functions puts States on notice that they are targeted for regulation. This allows the States and their allies to mobilize in opposition to such regulation, perhaps defeating or modifying the proposal without any need for recourse to judicial enforcement of prohibitory limits.

The efficacy of political safeguards has been much debated.[41] *Garcia* almost certainly exaggerated the extent to which traditional state prerogatives are protected by the representation of state interests through Congress. Politics has changed in a number of ways since the founding that have had the collective effect of reducing the clout of the States in Congress.[42] Others have been more skeptical about the efficacy of clear statement rules in influencing the behavior of Congress. The extreme version of the skeptical position is captured in the sneering line that compliance with such rules is assured as long as Congress is not burdened with a "stupid staff."[43] In other words, compliance with clear statement rules is just a formality to be discharged after the basic political decision to regulate has been made on other grounds.

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[37] United States v. Lopez, 514 U.S. 549, 564, 568 (1995).

[38] *See* Kelo v. City of New London, 125 S. Ct. 2655, 2667 n.19 (2005) (rejecting the argument that the scope of government power should be fixed based on a "parade of horribles[,]" because all power is subject to abuse).

[39] *See* Steven G. Calabresi, *"A Government of Limited and Enumerated Powers": In Defense of* United States v. Lopez, 94 MICH. L. REV. 752, 774-84 (1995); Jacques LeBoeuf, *The Economics of Federalism and the Proper Scope of the Federal Commerce Power*, 31 SAN DIEGO L. REV. 555 (1994).

[40] 501 U.S. 452 (1991).

[41] *See, e.g.*, Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000); Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459 (2001).

[42] William Marshall, *American Political Culture and the Failures of Process Federalism*, 22 HARV. J.L. & PUB. POL'Y 139 (1998); Calabresi, *supra* note 39, at 790-99.

[43] *Cf.* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1025 n.12 (1992) (offering this characterization in response to the suggestion that the Court should defer to a state legislative recitation of a harm-preventing justification for a regulation challenged as a taking).

In the end, whether the States are protected through the political process and whether Congress is influenced by deliberation are empirical questions, which I cannot answer with any confidence. As Ernest Young has rightly emphasized, even if the political process does not work perfectly, this does not mean that the political process imposes no restraint at all on the expansion of federal power.[44] To which I would add, even if deliberation requirements impose only weak constraints, it does not follow that they have no effect at all. Thus, to the extent we think that state and local governments have at least some influence with Congress, and to the extent we wish to harness these political safeguards as part of a larger strategy of accommodating stability and change in intergovernmental relations, there is logic in imposing clear statement rules as part of this general strategy of accommodation.

A final argument, which has played relatively little role in the debate but perhaps deserves more consideration, concerns the implications of clear statement rules in constraining executive branch officials—federal regulators and prosecutors—from unilaterally changing the scope of federal authority. If Congress must make a clear statement before amending the scope of federal authority, then executive officials obviously cannot exercise federal power on their own initiative until such a clear statement is forthcoming. In particular, executive actors cannot leverage ambiguous grants of power into regulations that expand federal authority in new ways. The clear statement strategy in effect incorporates a kind of express delegation doctrine, which serves not only to protect federalism values but separation of powers values as well.[45]

Against this claim it can be said that a prohibitory limitation will also constrain executive officers, because if an area of regulation is beyond the power of Congress it is presumably also beyond the power of the executive. But it is plausible that the Court will be more willing to enforce clear statement rules, over larger zones of sensitivity, than it will be to enforce prohibitory limitations. If this is true, then the enforcement of clear statement rules provides a separation of powers "bonus" in terms of constraining executive actors, relative to the degree of constraint one would get with prohibitory limitations. I would not make too much of this point in the larger balance of considerations, but it weighs modestly in further support of the clear statement approach.

D. How to Choose?

A complete assessment of clear statement rules versus prohibitory limitations obviously entails considerable complexity. For present purposes, I confine the inquiry to three questions that seem unambiguously relevant to the exercise of choice. As particularized to the present context, which concerns the proper strategy for interpreting the Commerce Clause, those questions are: (1)

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[44] *See* Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349 (2001).

[45] *See* Thomas W. Merrill, *Rethinking Article I, Section I: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097 (2004).

Does the history of interpretation of the Commerce Clause reflect a desire to accommodate stability and change, or has the primary focus been preserving stability? (2) Is the correct meaning of the Commerce Clause a matter of doubt, or is this something as to which we have a high degree of confidence? (3) Does interpretation of the Commerce Clause entail the need to determine legislative facts, or do adjudicative facts predominate?

Fortunately, we need not look far to discover the answers to these questions. They are found in the Court's own decisions, starting with *Lopez*.

III. *LOPEZ* AND THE CHOICE OF INTERPRETATIVE STRATEGY

In 1995, the Supreme Court inaugurated a new Commerce Clause doctrine. The animating theme of *United States v. Lopez* was the need to impose some limit on the scope of the commerce power, lest the concept of limited federal government be lost forever. As the Court put it, to uphold the Gun-Free School Zones Act of 1990 "we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States."[46] *Lopez* did not address whether the limiting principle should be determined in collaboration with the political branches. The unstated assumption was that the Court alone had to impose some prohibitory rule. When we reconsider Chief Justice Rehnquist's opinion for the Court, however, we find that it expressly addresses each of the three variables discussed in Part II that critically determine the choice between clear statement rules and prohibitory limitations. On each score, *Lopez* suggests, clear statement rules would be preferable in determining the outer limits of the Commerce Clause.

First, the *Lopez* opinion readily acknowledges that "our interpretation of the Commerce Clause has changed as our Nation has developed."[47] The opinion includes a capsule history of interpretation of the Commerce Clause.[48] According to that history, the commerce power was not used by Congress as a basis for legislating during most of the nation's first hundred years, generating little judicial doctrine about the limits of congressional power. In the early twentieth century, the Court offered up somewhat inconsistent principles limiting the power of Congress; invoking these principles, the Court invalidated some early New Deal legislation as going beyond the scope of the power. A few years later, the Court was forced to "depart[]" from these precedents.[49] As the Court candidly explained, the post-1937 decisions

> ushered in an era of Commerce Clause jurisprudence that greatly expanded the previously defined authority of Congress under that Clause. In part, this was a recognition of the great changes that had occurred in the way business was carried on in this country. Enterprises that had once

[46] United States v. Lopez, 514 U.S. 549, 567 (1995).

[47] United States v. Morrison, 529 U.S. 598, 607 (2000) (characterizing discussion in *Lopez*).

[48] *Lopez*, 514 U.S. at 552–58.

[49] *Id*. at 555.

> been local or at most regional in nature had become national in scope. But the doctrinal change also reflected a view that earlier Commerce Clause cases artificially had constrained the authority of Congress to regulate interstate commerce.[50]

It would be difficult to imagine a more explicit acknowledgement that the Court's decisions in this area have functioned as de facto constitutional amendments, adjusting the power of the federal government relative to the States in response to changed circumstances.

Second, the *Lopez* opinion also acknowledged that there was considerable doubt about the correct interpretation of the Commerce Clause. In response to Justice Breyer's critique of the Court's newly-minted economic versus non-economic distinction, the Chief Justice acknowledged that the distinction "may in some cases result in legal uncertainty."[51] But the Chief Justice sought to deflect criticism of this uncertainty by attributing it to the enterprise of interpreting the scope of the Commerce Clause. As he put it:

> The Constitution mandates this uncertainty by withholding from Congress a plenary police power that would authorize enactment of every type of legislation. Congress has operated within this framework of legal uncertainty ever since this Court determined that it was the Judiciary's duty "to say what the law is."[52]

He further noted that previous decisions of the Court had characterized the question of congressional power under the Commerce Clause as "necessarily one of degree,"[53] which also resulted in something less than a "precise formulation[]."[54] But he repeated once again that this lack of precision was inevitable, given the very nature of the inquiry. Whatever one thinks of the Chief Justice's analysis of the causes of uncertainty about the meaning of the Commerce Clause, there can be no question that he recognized that the correct meaning of the Clause was a matter of considerable doubt.

Third and finally, the *Lopez* opinion acknowledged that "legislative findings" play an important role in Commerce Clause review.[55] The Fifth Circuit, in the decision under review, had invalidated the Gun-Free School Zones Act on the ground that Congress had made no findings, either in the text of the statute or legislative history, explaining the connection between possession of guns near schools and interstate commerce.[56] The Supreme Court declined to follow the Fifth Circuit in invalidating the Act on what was in effect a clear statement rationale. Nevertheless, the Court cited the lack of findings as one factor underscoring its conviction that Congress had transgressed a prohibitory limitation. As the Chief Justice ambiguously put it: "[T]o the extent that congressional findings would enable us to evaluate the legislative judgment

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[50] *Id*. at 556.
[51] *Id*. at 566.
[52] *Id*. (citations omitted).
[53] *Id*.
[54] *Id*. at 567.
[55] *Id*. at 562.
[56] Lopez v. United States, 2 F.3d 1342, 1367–68 (5th Cir. 1993).

that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye, they are lacking here."[57] Thus, although the Court perceived that legislative facts were relevant and important in Commerce Clause controversies, it declined to make this of decisional significance.

In short, *Lopez* expressly acknowledged that each of the principal variables discussed in Part II points toward the superiority of clear statement rules rather than prohibitory limitations in implementing the Commerce Clause. It is not clear why the Court ignored these signals and plunged ahead in an effort to articulate a new prohibitory limitation. The best I can offer are some conjectures.

The first is peculiar to *Lopez* itself. After the Fifth Circuit's decision, but before the case reached the Supreme Court, Congress re-enacted the Gun-Free School Zones Act, incorporating specific legislative findings about the effects of firearm possession near schools on interstate commerce.[58] This was not the version of the statute before the Court, but the Court was aware of the existence of the amended version of the Act.[59] Consequently, it may have seemed to Chief Justice Rehnquist and his allies that it would be an empty ritual to invalidate the 1990 version of the Act for want of a clear statement, when it was a foregone conclusion that Congress would re-adopt the statute with such a statement—indeed, it had already done so. In other words, in the peculiar circumstances of *Lopez*, imposing a clear statement requirement would have seemed like an especially lame expression by the Court of the need for greater stability.

Other developments in federalism jurisprudence about the same time also may have convinced the Chief Justice and his allies that clear statement rules do not offer enough protection for federalism values. As previously noted, in the Eleventh Amendment context the Court had refused to allow suits against States under a number of statutory schemes on the ground that Congress had not authorized such suits explicitly in the text of the statute. Toward the end of the 1980s and into the 1990s, the Court began to review cases in which Congress, in response to these rulings, arguably had made just such an explicit statement.[60] One could see this as evidence that clear statement rules work. Or, one could see it as evidence that clear statement requirements are mere formalities that do little to slow down the intrusion of federal power into areas of traditional state autonomy. Those Justices who thought Congress was too profligate in subjecting States to new forms of liability may have concluded that the latter was the more likely explanation. Perhaps this perception spilled over to the Commerce Clause context, convincing the majority that only a

[57] *Lopez*, 514 U.S. at 563.

[58] *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, § 320904, 108 Stat. 1796, 2125−26 (1994).

[59] *Lopez*, 514 U.S. at 563 n.4 (discussing amended statute).

[60] *See, e.g.*, Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989); Dellmuth v. Muth, 491 U.S. 223 (1989).

prohibitory limitation would secure a stopping point to the relentless expansion of federal regulation.[61]

A final possibility is that the Court felt boxed in by its own Commerce Clause precedent. In the other areas where the Court had adopted the clear statement approach—Eleventh Amendment immunity, conditional spending, and extension of general federal regulation to traditional state functions—it was writing on a relatively blank slate. In the context of the Commerce Clause, however, a number of previous decisions had considered, at least in passing, how far Congress must spell out its reasoning in support of an exercise of authority under the Clause. These decisions sometimes gave significant weight to congressional findings.[62] But on other occasions the Court had said that no findings were required.[63]

In the face of this precedent, imposition of a new prohibitory limitation, which purported to be grounded in a restatement of prior case law, may have seemed less vulnerable to criticism than articulation of a clear statement rule that would have required the Court explicitly to disapprove some statements in its prior cases. The reality is that the clear statement approach would have been more collaborative, and hence ultimately more restrained. But the short-term exigencies of holding together a bare majority of five may have impelled Chief Justice Rehnquist toward the prohibitory strategy, since such an opinion could be written without questioning any prior decision.

IV. *LOPEZ*'S FLAWED PROHIBITORY RULE

Lopez's apparent mistake in its choice of interpretative strategy might be forgivable, if the Court came up with a prohibitory rule that was securely grounded in constitutional traditions and provided a workable formula for resolving future disputes. Unfortunately, the opposite is more true. The prohibitory limitation devised by *Lopez* was not based on any inquiry into the original understanding, or even on a general theory of the proper division of functions between the federal government and the States. Instead, it was cobbled together from the Court's prior decisional law. *Lopez*'s basic game plan was to glean certain generalizations from the Court's post-New Deal case law—generalizations that could be said to reflect the constitutional status quo—and turn those generalizations into a prohibitory limitation on the exercise of congressional power. The idea, in effect, was to ratify or

[61] Support for this conjecture is found in *Morrison*, where the majority responded to the extensive findings in the legislative history seeking to establish a connection between gender related violence and interstate commerce as follows: "Given these findings and petitioners' arguments, the concern that we expressed in *Lopez* that Congress might use the Commerce Clause to completely obliterate the Constitution's distinction between national and local authority seems well founded." United States v. Morrison, 529 U.S. 598, 615 (2000).

[62] *See, e.g.*, Hodel v. Va. Surface Mining & Reclamation, 452 U.S. 264, 277 (1981).

[63] *See, e.g.*, Perez v. United States, 402 U.S. 146, 156 (1971). In fact, Congress had made formal findings in the anti-loan sharking statute upheld in *Perez*. For the Court's inconsistent responses over time to congressional findings, see Frickey, *supra* note 29, at 708-20.

grandfather innovations of the past that the public had come to take for granted, while allowing the Court to review with skepticism further innovations in federal power falling outside the pattern reflected in prior adjudications. The Court in effect drew a line in the sand and said: thus far and no further.

The prohibitory rule inaugurated by *Lopez* has two prominent elements: a tripartite classification of permissible Commerce Clause regulations, and a limitation on the most frequently invoked branch of this classification to phenomena that can be regarded as "economic." Both of these features were derived by generalizing post-New Deal precedents.

Consider first the tripartite classification of commerce clause regulations: regulations of the channels of commerce, regulations of instrumentalities of commerce or things in commerce, and regulations of activities that substantially affect interstate commerce. This classification made its first appearance in *Perez v. United States*[64] where it was presented as a rough summary of prior decisional law. It was then repeated in *Hodel v. Virginia Surface Mining & Reclamation*,[65] again as a generalization about prior holdings. In *Lopez*, Chief Justice Rehnquist cleverly transformed this description of prior precedent into a fixed menu of the permissible options available to Congress, the implication being that Congress must fit its legislation into one of the three categories or risk invalidation.

This doctrinal sleight of hand would be regarded as quite silly if it did not have the imprimatur of the Supreme Court behind it. First, it is not clear that the three-part classification, cavalierly tossed off by Justice Douglas in his opinion for the Court in *Perez*, is descriptively accurate. Where do the cases that permit Congress to regulate based on the presence of some interstate commerce jurisdictional hook—such as the mail or wire fraud statutes—fit in? *Lopez* quoted a passage from *Heart of Atlanta Motel* implying that such cases involve protecting the channels of interstate commerce from "immoral and injurious uses."[66] But it seems utterly implausible to say that Congress is protecting the postal system or the telephone system from immorality by criminalizing frauds that use the mails or interstate telephone lines. Later in the opinion, the Court noted that one of the defects in the Gun-Free School Zones Act was that it contained "no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce."[67] Thus, the Court acknowledged the validity of the jurisdictional hook decisions. Why not then include them directly as a fourth category in the typology of permissible Commerce Clause regulations?

Similarly, it is unclear where the *Shreveport Rate Cases*[68] fit in. The question in *Shreveport* was whether the Interstate Commerce Commission

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[64] 402 U.S. 146, 150 (1971).

[65] 452 U.S. 264, 276–77 (1981).

[66] United States v. Lopez, 514 U.S. 549, 558 (1995), quoting Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 256 (1964), quoting Caminetti v. United States, 242 U.S. 470, 491 (1917).

[67] *Lopez*, 514 U.S. at 561.

[68] 234 U.S. 342 (1914).

could override state regulation of intrastate railroad rates. Economically speaking, railroads operate as a single integrated enterprise, deriving revenue from both intrastate and interstate movements. If rates are held too low on intrastate movements, this puts pressure on carriers to charge higher rates on interstate movements. Recognizing this reality, the Court in *Shreveport* permitted federal regulation of intrastate railroad rates in order to avoid frustration of a federal scheme regulating interstate railroad rates. *Lopez* cited *Shreveport* as an example of a regulation of intrastate commerce designed to "protect the instrumentalities of interstate commerce."[69] But this is accurate only if one understands "protecting instrumentalities" to include "assuring the economic viability of integrated corporations that engage in part in interstate commerce." Elsewhere in the opinion, the Court provided a more accurate recapitulation of *Shreveport*,[70] and it went on to observe that the Gun-Free School Zones Act could not be justified under the *Shreveport* doctrine because it was "not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated."[71] But again, why not include the *Shreveport* doctrine directly as another category of permissible regulation under the Commerce Clause?

Even if the three-part classification were accurate, from whence does it derive its normative force? The Court made no attempt, either in *Lopez* or subsequent decisions, to connect its classification of permissible regulations to the language of the Constitution, the purposes of the Framers, or some normative theory of the proper role of the federal government in a federated system. Since the classification scheme started as a description of Supreme Court decisional law, its normative force is no greater than the normative force of the decisions it purports to restate. Those cases are at best a mixed bag in terms of connecting up with some larger vision of constitutional federalism.

The only apparent virtue of the tripartite classification was its grounding in relatively contemporary, post-New Deal decisional law. The Chief Justice apparently thought this feature would grandfather past innovations, on the assumption that they would fall within the scheme. Yet by wrapping up all prior innovations in a tidy, three-part scheme, the doctrine also promised to give the Court authority to strike down new innovations it did not like, on the ground that they went beyond what was permissible under the scheme.

The second prominent element of the new doctrine was the suggestion that the Commerce Clause permits Congress to regulate intrastate activity only if that activity is "economic" in nature. This element has the same provenance as the three-part classification scheme, namely, a synthesis of the Court's past decisions, transformed by sleight of hand in *Lopez* into a normative limitation.

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[69] *Lopez*, 514 U.S. at 558.

[70] *Id*. at 554 (noting that the Court had held regulation permissible "where the interstate and intrastate aspects of commerce were so mingled together that full regulation of interstate commerce required incidental regulation of intrastate commerce," citing *Shreveport*).

[71] *Id*. at 561.

The sleight of hand here can be traced through the late Chief Justice's successive characterizations of *Wickard v. Filburn*,[72] the Court's seminal opinion on the power of Congress to regulate activity that has a substantial affect on interstate commerce. In his first pass at *Wickard*, the Chief Justice provided a relatively full quotation: "[E]ven if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce . . . ."[73] A page later, this was shortened to "Congress may regulate activity that 'exerts a substantial economic effect on interstate commerce.'"[74] Notice that "economic" in these passages refers primarily to the *effect* of the regulation, not the activity regulated.

Some pages later, *Wickard* and other substantial effects cases were then said to reflect a pattern that was clear: "Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained."[75] Then, several pages after that, the substantial effects test was restated again: "We do not doubt that Congress has authority under the Commerce Clause to regulate numerous commercial activities that substantially affect interstate commerce and also affect the educational process."[76] Notice that, in these passages, "economic" or "commercial" has migrated over from the effect of the regulation, to a description of the *activity regulated*.

Then comes the clincher: "The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce."[77] This seems to say unequivocally that the *activity regulated* must be economic in nature, not just the effect of the regulation. But there is no support for this proposition in *Wickard*, or any other precedent of the Court before *Lopez*.[78]

In *Morrison*, five years later, this spurious generalization from prior cases was elevated to the status of fixed limitation on congressional power. Relying almost exclusively on *Lopez*, the Court observed that "where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor."[79] Although the Court drew up short of announcing "a

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[72] 317 U.S. 111 (1942).

[73] *Lopez*, 514 U.S. at 556 (quoting *Wickard*, 317 U.S. at 128–29).

[74] *Id*. at 557 (quoting *Wickard*, 317 U.S. at 125).

[75] *Id*. at 560.

[76] *Id*. at 565–66.

[77] *Id*. at 567.

[78] Indeed, as Robert Schapiro and William Buzbee have pointed out, there are at least two Supreme Court cases from early decades of the twentieth century that say the exact opposite: it is the effect on interstate commerce, not the economic or commercial nature of the activity regulated, that marks the limits of congressional power. *See* Robert A. Schapiro & William W. Buzbee, *Unidimensional Federalism: Power and Perspective in Commerce Clause Adjudication*, 88 CORNELL L. REV. 1199, 1213–14, 1217–18 (2003), citing Second Employers' Liab. Cases, 223 U.S. 1, 115–17 (1912); United States v. Ferger, 250 U.S. 199, 203 (1919).

[79] United States v. Morrison, 529 U.S. 598, 611 (2000).

categorical rule against aggregating the effects of any noneconomic activity," it pointedly observed that "thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature."[80]

The economic activity limitation, unlike the three-part classification, arguably has some connection to the language of the Constitution. The Constitution refers to commerce, and commerce—the contractual exchange of goods and services—covers much but not all economic activity. But why talk about economic activity, when the Constitution says commerce? Should not a Commerce Clause doctrine require a linkage to commerce, i.e., buying and selling? Moreover, as in the case of the tripartite scheme, the Court made no effort to link the economic activity limitation to the purposes of the Framers or a theory of federalism. The virtue of the limitation, again, appeared to be that it promised to validate what has gone before, while permitting the Court to strike down newer innovations, on the ground that they target "non-economic" activity for regulation.

Whatever its analytical weaknesses, the Court's new prohibitory doctrine would at least be entitled to some respect if the Court were prepared to stick to it. But warning signs quickly emerged that the Court would have difficulty consistently enforcing the tripartite scheme or the limitation to economic activities. The *Lopez* strategy, it turned out, did not successfully grandfather all federal regulatory programs that were well-entrenched and enjoyed widespread popular and political support. Modern federal environmental legislation, for example, enjoys widespread popular and political support, and is largely based on the commerce power.[81] But many environmental laws are not drafted in such a way that the *activity being regulated*—degradation of air, water, or other natural resources—is described in "economic" terms. Rather, they are drafted on the supposition that degradation of air, water, and other resources can be prohibited because of *the effect* this would have on interstate commerce.

The potential difficulties *Lopez* posed for environmental legislation were soon revealed in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* (*SWANCC*),[82] where the Court confronted a challenge to the constitutionality of the Clean Water Act as applied to isolated intrastate waters. The relevant agencies had promulgated a regulatory guideline indicating that federal controls would be applied to intrastate waters if they serve as habitat for migratory birds. Under the Court's new prohibitory doctrine, this "migratory bird rule" should have been an easy case for invalidation. Isolated intrastate waters are not channels of commerce; migratory birds are not instrumentalities of commerce or items in interstate commerce;

[80] *Id*. at 613.

[81] *See generally* Jonathan H. Adler, *Judicial Federalism and the Future of Federal Environmental Regulation*, 90 IOWA L. REV. 377, 404–06 (2005). Adler also shows that lower federal courts have been very resistant to using *Lopez* and *Morrison* to invalidate federal environmental laws, *id.* at 406–21, creating what amounts to an ad hoc "environmental" exception to the Court's prohibitory doctrine.

[82] 531 U.S. 159 (2001).

and the coming and going of migratory birds is not a form of economic activity, and hence should not be eligible for aggregation under the substantial effects test. But the Court ducked the constitutional question, and ruled on statutory grounds. Why? Quite likely because the briefing in the case made clear that invalidation would jeopardize the federal wetlands preservation program and the Endangered Species Act, both of which enjoy widespread political support.

We come now to *Gonzales v. Raich*,[83] and the question of whether Congress has authority under the Commerce Clause to prohibit possession of locally grown marijuana to be used in the home for medical purposes. The Ninth Circuit, in a plausible application of the Court's new Commerce Clause doctrine, said no.[84] Marijuana grown locally and consumed at home is neither a channel nor an instrumentality of interstate commerce. Congress can regulate it only on the ground that possession of marijuana has a substantial effect on interstate commerce. But, said the Ninth Circuit, possession of a substance for purposes of self-medication is not an economic activity. So the Controlled Substances Act, as applied to the two plaintiffs in *Raich*, was unconstitutional.

The problem with this relatively straightforward analysis, as in *SWANCC*, is that this application of the Court's new prohibitory doctrine threatened another federal program—the War on Drugs—that is also well entrenched and enjoys widespread political support. Not universal support: According to the government's brief, approximately one in ten Americans smokes marijuana. And the good citizens of California had adopted the Compassionate Use Act, permitting medical use of marijuana, by popular referendum. But the War on Drugs enjoys massive support overall, and a ruling that Congress could not regulate marijuana grown and consumed at home would presumably also mean that Congress could not regulate methamphetamines, LSD, or ecstasy produced and consumed at home. The grandfathering strategy of *Lopez* was not intended to cast the Court in the role of revolutionary, undermining popular shibboleths like the War on Drugs.

Thus it was that in *Raich* a very different majority, composed largely of the dissenters in the previous cases, watered down the prohibitory theory inaugurated in *Lopez*. The principal opinion, authored by Justice Stevens, gave a perfunctory bow to the tripartite analysis of Commerce Clause regulations emphasized by *Lopez*.[85] But Justice Stevens stressed that the CSA fell into another category mentioned by *Lopez*, of intrastate activity that is "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated."[86] This language, as we have seen, was designed to encapsulate the rationale of the *Shreveport Rate Cases*, which otherwise fit poorly within the tripartite scheme. One can therefore read *Raich* as elevating regulation of something that is an "essential part of a larger scheme of economic regulation" to the status of a fourth category of permitted Commerce Clause regulation.

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[83] 125 S. Ct. 2195 (2005).

[84] Raich v. Ashcroft, 352 F.3d 1222 (9th Cir. 2003).

[85] *Raich*, 125 S. Ct. at 2205.

[86] *Id*. at 2209 (quoting United States v. Lopez, 514 U.S. 549, 561 (1995)).

With respect to the innovation limiting the substantial effects test to economic activity, the new majority did not deny that such a restriction had been imposed by *Lopez* and *Morrison*. But it largely drained the innovation of any significance, by defining "economic" in sweepingly broad terms:

> Unlike those at issue in *Lopez* and *Morrison*, the activities regulated by the CSA are quintessentially economic. "Economics" refers to "the production, distribution, and consumption of commodities." Webster's Third New International Dictionary 720 (1966). The CSA is a statute that regulates the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market. . . . Because the CSA is a statute that directly regulates economic, commercial activity, our opinion in *Morrison* casts no doubt on its constitutionality.[87]

As Justice O'Connor observed in her dissent, this definition of economic—essentially any activity that *could be* the subject of market exchange, without regard to whether it was—is so broad it threatens "to sweep all of productive human activity into federal regulatory reach."[88]

One can of course read *Raich*'s revisionist characterizations of *Lopez* and *Morrison* narrowly, as adding an additional category of permissible regulation and broadening the concept of economic. But a more accurate reading of the new majority's intentions is signaled by its admonition to lower courts that they should not read *Lopez* and *Morrison* "myopic[ally]" or through a "narrow prism," but rather should interpret them against "the larger context of modern-era Commerce Clause jurisprudence preserved by those cases."[89] In other words, *Lopez* and *Morrison* have been largely confined to their facts.

What can we learn from the rapid rise and apparently equally rapid fall of *Lopez*'s prohibitory strategy? First, *Lopez* based its prohibitions on generalizations drawn from a very limited database—basically post-New Deal Commerce Clause controversies that had been adjudicated by the Court itself. This database was too small to capture the full range of regulations Congress has adopted under the Commerce Clause. In effect, the Court made the classic mistake of equating its own case law with the larger universe of regulation. As it turned out, the Court's generalizations were quite threatening to a significant number of established regulations, including environmental statutes like the Clean Water Act and the Controlled Substances Act. Since a majority of the Court was unwilling to invalidate these popular enactments, the prohibitory strategy had to give way.

Second, even within the universe of its narrow database, the generalizations *Lopez* elevated to prohibitory limitations were in critical respects of doubtful accuracy as a synthesis of prior decisional law. The fact that these generalizations overlooked or distorted elements in a more complex doctrinal picture easily rendered the prohibitory strategy vulnerable to revisionism. When the narrow majority supporting *Lopez* and *Morrison* gave

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[87] *Id*. at 2211.

[88] *Id*. at 2224 (O'Connor, J., dissenting).

[89] *Id*. at 2209.

way as the Court encountered statutes that enjoy broader and more entrenched support, other doctrines downplayed in *Lopez*, like the *Shreveport* doctrine, could be called upon to perform a rite of validation.

Third, the Court's strategy ignored the central lesson of history it had itself recognized in *Lopez*—the need to accommodate stability and change. The Court sought to draw a line in the sand, acquiescing in previous changes while warning against future innovations. But since change is inevitable, it was an exercise in hubris doomed from the start.

V. THE CLEAR STATEMENT ALTERNATIVE

Instead of synthesizing judicially-defined and enforceable prohibitory rules, the Court should have extended the clear statement strategy it developed in other types of federalism cases in the 1980s and early 1990s to Commerce Clause controversies. I will not attempt to spell out the details of such a doctrine here. It is enough for now to state a few general principles governing the major questions that would be encountered in developing such a jurisprudence, and suggest how those principles would apply to the recent decisions.

One obvious question is how the courts would identify the zones of sensitivity that require articulation of a clear statement by the political branches. Here I think no set formula is possible. The zones should be identified based on historical experience in implementing the Commerce Clause, leavened with some common sense. For example, the Court's tripartite analysis of permissible forms of Commerce Clause regulation, which I have criticized as a prohibitory limitation, could be used as a partial guide to the circumstances requiring a clear statement. The Court has recognized on several occasions that regulations of the channels of interstate commerce or of instrumentalities of interstate commerce are generally unproblematic under the tripartite division, and this suggests that such regulations would also steer clear of any zone of sensitivity. In contrast, regulations that rest on the substantial effects test are more controversial, and hence more likely to intrude into a zone of sensitivity.

Similarly, the Court's economic/non-economic distinction, which I have also criticized, might be of relevance in determining whether a regulation intrudes into a zone of sensitivity. It is intuitively plausible that a regulation resting on the aggregation of clearly commercial intrastate transactions, such as initiating commercial loans, is less likely to intrude into a zone of sensitivity than a regulation resting on the aggregation of non-economic intrastate activity, such as endangering insects or frogs.

Another issue concerns the form the clear statement must take, such as whether it must be in the text of the statute or the legislative history, and whether it must advance a theory of constitutional authority or merely cite findings. These sorts of questions bedeviled the Court's development of a clear statement strategy in the early years of the Rehnquist Court. The Court's inconsistent answers, and the criticism this provoked, may have contributed to the shift to the prohibitory strategy.

With the benefit of hindsight, I think that whatever clear statement is required, it must be in the text of the statute itself. Only the text represents the official action of the political branches, so only the text can be attributed unambiguously to the political branches.[90] Looking elsewhere for clear statements will give rise to endless debates about what kinds of unofficial materials can be fairly attributed to Congress or the President. Because of these uncertainties, such an investigation is also likely give rise to charges of gamesmanship and impermissible intrusion by courts into the internal affairs of Congress. More fundamentally, giving dispositive legal significance to legislative history materials is problematic as a matter of first principles, since such material by definition does not satisfy the Constitution's bicameral and presentment requirements for the exercise of legislative power. Thus, limiting the operation of clear statement rules to clear statements rendered in the text of duly enactment statutes both simplifies the clear statement strategy, and makes it more legitimate.[91]

At the same time, respect for Congress as a coequal branch of government—at least in the context of the Commerce Clause—requires that Congress must do more than set forth its "legislative findings." It also requires that Congress specify its understanding of why a particular regulation is permissibly grounded in a constitutional grant of legislative power. The enumerated powers of Article I, Section 8 are given to Congress, not to the courts. Thus, it should not be for the courts to specify which theories about the scope of the Commerce Clause are permissible, and which are forbidden. The courts should invalidate legislation enacted under this authority only when Congress has failed to explain what power it is exercising and why its law can be derived from that grant. In most cases, it will be clear from the mechanics of the enactment what theory Congress is invoking. But when it is not clear, and the regulation is one the courts conclude intrudes into a zone of sensitivity, courts should require Congress to spell out its theory of constitutionality.

Some theories of constitutionality, such as the theory that a particular activity must be regulated because it will have a substantial effect on interstate commerce, necessarily presuppose certain findings of legislative facts. When Congress invokes such a theory, it should also set forth in the text of the statute the findings that it believes support the exercise of power under its theory. The absence of such findings should also be a basis for invalidating the legislation for lack of the required clear statement.

A final issue concerns the standard of review courts should apply in determining whether congressional explanations of constitutionality, and any required legislative findings of fact, satisfy the clear statement standard. Here I believe the traditional rationality standard is appropriate. This is the settled standard of review in considering challenges to the exercise of the commerce

[90] *See, e.g.*, John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1 (2001).

[91] *See* William W. Buzbee & Robert A. Schapiro, *Legislative Record Review*, 54 STAN. L. REV. 87 (2001) (arguing that legislative findings set forth in the statutory text are entitled to weight even if those in the legislative history are problematic).

power, and none of the Court's recent decisions has challenged this understanding.[92] Thus, once a court has determined that Congress has made the required clear statements—both as to theory of legislative power and as to any required findings of legislative fact—the courts should confine their further review of these clear statements to the question whether a rational legislature could believe them to be true and accurate. The ultimate test, therefore, is one that entails great deference to the political branches of government.

The forgoing general principles would make the clear statement strategy at once more constraining and less constraining than the current prohibitory doctrine announced in *Lopez*. It would be more constraining because federal legislation could no longer be sustained on the basis of ex-post arguments by government lawyers about what power Congress might have been exercising, or what facts Congress might have imagined to exist in support of such an exercise of power. Nor could legislation be sustained based on findings allegedly contained in legislative history. The courts would look to what Congress has formally announced its source of authority to be, or what legislative power is implicit in the terms of the legislation itself. If no apparent source of authority appears, as in the original version of the Gun-Free School Zone Act struck down in *Lopez*, this would be the death-knell of the legislation. In this way, the clear statement rule would assure that Congress is held accountable for squaring its assertions of power with the powers conferred upon it by the text of the Constitution.

Such a clear statement rule would be less constraining, however, because the Court would not take it upon itself to prescribe fixed limits on the exercise of legislative power under any clause of the Constitution. For example, if Congress passed a law requiring all persons to protect endangered species wherever they are found, and justified this on the ground that protecting genetic diversity is important to fostering interstate and foreign commerce in biomedical and bio-engineered products, the court would assess such a statute on its own terms, and would ask whether a legislature could rationally believe this to be an appropriate exercise of the power to regulate interstate and foreign commerce. It would not demand proof that the law fits within a particular classification of previously recognized forms of commerce regulation, nor would it insist that protecting endangered species be capable of characterization as a type of "economic activity." In this sense, the clear statement approach would confer greater flexibility on Congress than *Lopez* and *Morrison* appeared to contemplate.

I will close by considering how such a clear statement regime would apply to the Court's recent Commerce Clause decisions. *Lopez* is easy. The 1990 version of the Gun-Free School Zones Act contained no hint of what theory of constitutionality might sustain the Act, nor did it contain any statutory findings of legislative fact. The Court would have been amply justified in invalidating the Act under a clear statement approach.

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[92] *See* Gonzales v. Raich, 125 S. Ct. at 2208–09 (collecting authorities).

United States v. Morrison is also easy. At first blush it might seem that *Morrison* is a more difficult case under a clear statement approach because, as the Court acknowledged, the Violence Against Women Act was "supported by numerous findings regarding the serious impact that gender-motivated violence has on victims and their families."[93] But it turns out that all the "legislative findings" referred to by the Court were contained in the legislative history, not in the text of the Act itself. The text of the Act includes only a bare assertion of power to legislate; there is no explication in the text of the constitutional theory that would support legislation under the Commerce Clause, nor any enumeration of findings in the text.[94] Under the clear statement strategy I have outlined, the Court therefore would also have been warranted in striking down the Violence Against Women Act.

Two other decisions rendered after *Morrison*, but before *Raich*, are consistent with the clear statement approach. In *Jones v. United States*,[95] the Court construed a statute making it a federal crime to commit arson on any property "used in interstate or foreign commerce" to exclude arson of an owner-occupied residence. One reason the Court cited in support of this narrowing construction was the canon of interpretation that statutes should be construed to avoid serious constitutional questions—in this case, whether Congress would have power under the Commerce Clause to regulate arson of any occupied dwelling in the United States. But it also gave a clear statement rationale, noting that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance in the prosecution of crimes."[96] *Jones* thus provides direct support for the proposition that the clear statement approach continues to apply, notwithstanding the emergence of the prohibitory strategy associated with *Lopez*.

Equally instructive is *SWANCC*. The Clean Water Act, in section 404(a), extends federal regulatory control over all "navigable waters" of the United States.[97] Navigable waters are in turn defined to be "waters of the United States."[98] The government argued in *SWANCC* that this definition signaled Congress's intention to assert control over all bodies of water to the fullest extent permitted by the Commerce Clause. Thus, the government argued, the

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[93] United States v. Morrison, 529 U.S. 598, 614 (2000).

[94] The relevant statutory provision reads:

> Pursuant to the affirmative power of Congress to enact this part under Section 5 of the Fourteenth Amendment to the Constitution, as well as under Section 8 of Article I of the Constitution, it is the purpose of this part to protect the civil rights of victims of gender motivated violence and to promote public safety, health, and activities affecting interstate commerce by establishing a Federal civil rights cause of action for victims of violence motivated by gender.

Violence Against Women Act of 2000, 42 U.S.C. § 13981(a) (2000). The statute, in other words, at most asserts that the cause of action it creates for gender motivated violence will "affect" interstate commerce; it does not explain why or offer any supporting findings.

[95] 529 U.S. 848 (2000).

[96] *Id*. at 858, quoting United States v. Bass, 404 U.S. 336, 349 (1971) (internal quotes removed).

[97] 33 U.S.C. § 1344(a) (2000).

[98] *Id*. § 1362(7).

migratory bird rule was constitutional, at least as applied to isolated sand and gravel pit in the case before the Court, because the site was to be filled with solid waste, which is a byproduct of interstate commerce. But the Court demurred, again finding that Congress had not spoken clearly enough to sustain such an interpretation. The Court supported its narrow construction of the act, as in *Jones*, by stressing that this would avoid a serious constitutional question—presumably, the question whether intrastate activity described in non-economic terms (filling an isolated site used by migratory birds) could be aggregated to find a substantial effect on interstate commerce.

The same outcome would be reached in *SWANCC* under the clear statement analysis proposed here. As the Court explained, by conferring authority over "navigable waters," Congress seemed to be invoking its power to regulate the channels of interstate commerce—in this case, navigable rivers and lakes.[99] By defining navigable waters to be the "waters of the United States," Congress apparently intended to go beyond the traditional understanding of navigability. But it was unclear, certainly on the face of the statute, whether Congress was invoking its power to regulate activity that has a substantial effect on interstate commerce. There was, as the Court noted, "nothing approaching a clear statement from Congress that it intended § 404(a) to reach an abandoned sand and gravel pit such as we have here."[100] The Court was therefore correct to invalidate the migratory bird rule and any other construction of the statute grounded in a substantial effects analysis, since Congress never articulated an intention to permit regulation on that theory.

We come at last to *Gonzalez v. Raich*. How would the Controlled Substances Act and the regulation of marijuana possessed for purposes of medical treatment fare under the clear statement approach? Not all that badly, as it turns out. In contrast to the enactments struck down in *Lopez* and *Morrison*, and the statutes narrowly construed in *Jones* and *SWANCC*, Congress in the Controlled Substances Act made specific statutory findings that seem to track a *Shreveport*-like rationale, or perhaps a *Shreveport* plus *Wickard*-like rationale. Specifically, Congress found:

> A major portion of the traffic in controlled substances flows through interstate and foreign commerce. Incidents of the traffic which are not an integral part of the interstate or foreign flow, such as manufacture, local distribution, and possession, nonetheless have a substantial and direct effect upon interstate commerce because—
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> (A) after manufacture, many controlled substances are transported in interstate commerce,
>
> (B) controlled substances distributed locally usually have been transported in interstate commerce immediately before their distribution, and

[99] Solid Waste Agency of N. Cook County v. United States Army Corps of Eng., 531 U.S. 159, 168 n.3 (2001).

[100] *Id*. at 174.

> (C) controlled substances possessed commonly flow through interstate commerce immediately prior to such possession.[101]

What is more, Congress specifically found, again in the text of the law, that "local distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances;" that "controlled substances manufactured and distributed intrastate cannot be differentiated from controlled substances manufactured and distributed interstate;" and therefore that "it is not feasible to distinguish" between such substances "in terms of controls." In short, Congress found, "federal control of the intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic."[102]

These statutory findings reflect a conscious awareness that the source of congressional authority to regulate the possession of controlled substances is the Commerce Clause. Furthermore, they set forth a reasoned explanation of why it is "essential" to regulate intrastate possession in order to have an effective regime of controls over interstate commercial transactions in such substances. Of course, it is possible to find fault with this explanation. There is no specific finding about medical uses of marijuana or use of controlled substances in ways permitted by state law. But Congress cannot be expected to be clairvoyant. It would be quite unusual, not to say unworkable, to make the constitutionality of federal legislation fluctuate based on subsequently enacted state law, unless of course Congress has built this feature into its legislation.

So I would conclude that, under the clear statement version of federalism I have sketched, the outcome reached by the Court in *Raich* was also correct. Congress clearly stated in the text of the CSA that it was regulating intrastate possession in order to effectuate its control of interstate commerce in controlled substances. The nexus Congress identified between the power asserted and the objects regulated is clearly a rational one, without regard to any particular classification of powers or menu of permissible options. Such a judgment both honors the Constitution and yet gives Congress significant flexibility to adopt that document to changing circumstances in keeping with the basic principle of federalism the Framers sought to establish.

Raich presented a perfect opportunity for the Court to recast its new Commerce Clause doctrine in terms of clear statement rules. There are hints of a clear statement approach in Justice Stevens's opinion: naturally, he took full advantage of the impressive delineation of constitutional theory and supporting findings contained in the text of the CSA.[103] But the Court drew up well short of repudiating the prohibitory doctrine of *Lopez*, and turning unambiguously to clear statement rules. Fortunately, if the Court were to take this step in the future, it could point to *Raich* as a prime example of how Congress can function as a collaborative partner in determining the limits of constitutional power under a regime of clear statement rules. And it could say with

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[101] 21 U.S.C. § 801(3) (2000).

[102] 21 U.S.C. § 801(4), (5), (6).

[103] *See* Gonzales v. Raich, 125 S. Ct. 2195, 2203 n.20, 2207, 2208, 2208 n.32, 2212, 2215 (2005).

confidence that the outcomes of its post-*Lopez* decisions, if not the reasoning of those decisions, are fully consistent with the clear statement strategy. Thus, turning to a clear statement strategy could be substantially reconciled with the policies underlying stare decisis.

VI. CONCLUSION

The *Lopez* doctrine, like other elements of the federalism revolution, was a product of conflicting impulses. One was a sense that the Constitution is out of balance, the federal government has grown too powerful, and the forces of constitutional change have outraced the need to preserve a sense of continuity and stability. Another was fear of doing anything that would deny the public the benefits of big government it has come to expect and rely upon. Unfortunately, the strategy the Court selected for reconciling these conflicting impulses—devising a prohibitory doctrine based on an inaccurate synthesis of the Court's own post-New Deal cases—was the wrong strategy to achieve a rebalancing of fundamental values. A far better approach would have been to continue to build a regime of clear statement rules, slowing down the intrusion of federal power into areas of sensitivity, and seeking to limit further federal growth to problem areas that all three branches agree require such a solution. It is not too late to turn from prohibitory limitations to clear statements rules. Given the collapse of the *Lopez* doctrine in *Raich*, doing so may be the last remaining option for rescuing federalism.