

# A CASE FOR RECOGNIZING UNENUMERATED POWERS OF CONGRESS

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## I.

### INTRODUCTION

Nocturnal, multi-colored, and only about three inches long, the arroyo toad lives only in sandy streambeds of coastal southern California.<sup>1</sup> Threatened by pollution and development, the toad is protected by a federal statute, the Endangered Species Act.<sup>2</sup> Is such protection by Congress properly characterized as the “regulation of interstate commerce”?<sup>3</sup> Meanwhile, a federal civil rights act prohibits a coffee shop from discriminating on the basis of gender, race, or religion in its hiring practices.<sup>4</sup> Federal statutes both provide a mandatory prison sentence for possessing with intent to distribute a small amount of crack cocaine<sup>5</sup> and override states from legalizing marijuana for medi-

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1. For information about the biology of the arroyo toad, whose Latin name is *bufo californicus*, see Center for Biological Diversity, Arroyo Toad, <http://www.biologicaldiversity.org/swcbd/species/arroyotoad/> (last visited Apr. 18, 2006); San Diego Natural History Museum, *Bufo californicus*, <http://www.sdnhm.org/fieldguide/herps/bufo-cal.html> (last visited Apr. 18, 2006).

2. 16 U.S.C. §§ 1531–1544 (2004); 50 C.F.R. § 17 (1994).

3. The new Chief Justice of the United States, John Roberts, wrote that the D.C. Circuit should rehear *en banc* the Commerce Clause case involving what he called the “hapless toad,” suggesting that protection of the arroyo toad was an impermissible exercise of the commerce power. *Rancho Viejo, LLC v. Norton*, 334 F.3d 1158, 1160 (D.C. Cir. 2003), *reh’g en banc denied*, (Roberts, J., dissenting).

4. See Civil Rights Act of 1964, 42 U.S.C. § 2000a (2000) (prohibiting discrimination in places of public accommodation). See also *Katzenbach v. McClung*, 379 U.S. 294, 304-05 (1964) (upholding application of Civil Rights Act on commerce power grounds against constitutional challenge by owner of small barbeque restaurant in Alabama).

5. Controlled Substances Act, 21 U.S.C. § 841(b)(1)(A) (2000) (mandatory 20-year sentence for felony possession of only 50 grams of crack cocaine).

cal use.<sup>6</sup> Are these laws truly the regulation of “commerce” that is “interstate”?

It is, of course, the constitutional power to regulate interstate commerce<sup>7</sup> that serves as the sole source of authority, often uneasily, for most congressional legislation. Without too much effort, of course, one can conjure up how such legislation might *affect* interstate commerce in some way.<sup>8</sup> A housing development in California that threatens the arroyo toad uses construction material that comes from out of state.<sup>9</sup> Outlawing medical marijuana might make it marginally more difficult to buy illegal drugs in places across the nation.<sup>10</sup> And the coffee shop probably bought coffee that arrived through interstate trade—a rationale that the U.S. Supreme Court has used to justify such federal laws.<sup>11</sup>

For those who see little reason to restrict congressional power under the Constitution, it may cause no loss of sleep to stretch this far to find links to interstate commerce. Appreciation of the value of national legislation was certainly behind the U.S. Supreme Court’s 2005 opinion in *Gonzales v. Raich*,<sup>12</sup> which upheld national legislation that pre-empted states’ ability to legalize marijuana for medical use.<sup>13</sup> But

6. Controlled Substances Act § 812(b)-(c) (classifying marijuana as schedule I controlled drug with no “accepted medical use in treatment”). The Supreme Court has held that state attempts at legalizing marijuana for medicinal purposes were still controlled by the Controlled Substances Act. *Gonzalez v. Raich*, 125 S.Ct. 2195, 2201 (2005).

7. U.S. CONST. art. I, § 8, cl. 3 (granting Congress power to regulate “commerce . . . among the several States”).

8. Under the currently muddled Commerce Clause doctrine, legislation of an activity is justified in most, but not all, instances if it “substantially affects” interstate commerce. *See, e.g., Raich*, 125 S. Ct. 2205 (2005). *But cf.* *United States v. Morrison*, 529 U.S. 598, 612–13, 617–19 (2000) (holding link between gender-motivated crime and effect on interstate commerce too attenuated to be valid under Commerce Clause); *United States v. Lopez*, 514 U.S. 549, 551, 559, 561 (1995) (overturning, under Commerce Clause, federal criminal law on guns near schools as unrelated to economic activity).

9. *See Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1064, 1069 (concluding that application of federal Endangered Species Act to stop housing development was permissible regulation of interstate commerce because, in part, the development presumably would use construction materials from out of state and would attract persons to travel from out of state).

10. *See Raich*, 125 S. Ct. at 2207 (concluding that Congress’s anti-marijuana law may trump medical-marijuana state legalization laws because “Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would . . . affect price and market conditions.”).

11. *See Katzenbach v. McClung*, 379 U.S. 294, 304–05 (1964) (concluding that Congress may use Civil Rights Act of 1964 to regulate restaurant that uses ingredients shipped across state lines).

12. 125 S. Ct. 2195 (2005).

13. *Id.* at 2207.

the gnawing problem with the anything-can-be-justified approach to the Commerce Clause, however, is that it flies in the face of the 200-year-old principle, never seriously challenged rhetorically but consistently flouted in practice, that Congress holds only limited powers under the U.S. Constitution, and that the remaining powers are reserved to the prerogative of the states.<sup>14</sup> But if the courts defer to any and all congressional assertions of links to interstate commerce, the principle of limited powers is destroyed, making it a constitutional nullity. Dissatisfaction with the twentieth century disregard of federalism led to the handful of Rehnquist Court decisions that struck down a few congressional statutes for having putative “effects” on interstate commerce that were too attenuated.<sup>15</sup> But even the Rehnquist court failed to articulate a workable limitation to congressional power.<sup>16</sup>

The heart of the problem is a fact that social progressives have been avoiding for nearly 70 years, when the Supreme Court originally began its long stretch of deferring to almost all congressional assertions of links to interstate commerce.<sup>17</sup> The fact is that much social

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14. See *United States v. Lopez*, 514 U.S. 549, 552, (1995) quoting THE FEDERALIST No. 45, at 292–93 [sic] (James Madison) (Clinton Rossiter ed., 1961) (“The powers delegated by the proposed Constitution to the federal government are few and defined.”). As stated by the great early avatar of national authority, Chief Justice John Marshall, nearly 200 years ago: “This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted.” *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819).

15. See cases cited *supra* note 8. See also *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng’rs (SWANCC)*, 531 U.S. 159, 173 (2001) (“Twice in the past six years [in *Lopez* and *Morrison*] we have reaffirmed the proposition that the grant of authority to Congress under the Commerce Clause, though broad, is not unlimited.”).

16. In concluding that a handful of laws went too far, the Rehnquist Court relied on a supposed “tradition” of exclusive state control of certain fields, as well as a complaint about the anything-can-be-justified standard. See *SWANCC*, 531 U.S. at 174 (relying on supposed tradition of state and local powers of land use regulation); *Morrison*, 529 U.S. at 628 (relying on putative tradition of state regulation of violent crime); *Lopez*, 514 U.S. at 564 (relying on supposed tradition of state control of criminal law enforcement and reasoning that almost any law could be justified through argument of potential indirect affect on interstate commerce). In *Raich*, however, the Court did precisely what it had previously said it would not allow: it accepted tenuous assertions of a link between medical marijuana use and the national market for the drug and downplayed the tradition of state control of criminal law. See *Raich*, 125 S. Ct. at 2206–07. Chief Justice Rehnquist and Justices O’Connor and Thomas dissented in *Raich*, see *id.* at 2220–39, but not Justices Scalia or Kennedy. See *id.* at 2198.

17. The federal courts “defer to a congressional finding that a regulated activity affects interstate commerce, if there is any rational basis for such a finding.” *Hodel v.*

legislation is not properly characterized as the regulation of interstate commerce, if this term means anything. Rather, these statutes are enacted in order to further *social values*—protecting species from extinction, discouraging socially corrosive drug abuse, and furthering racial equality, for example. Many of these social values have only tenuous or incidental links to commerce and perhaps little or no relation to interstate activity. Such social legislation represents some of the greatest achievements of American law; the on-going dilemma, however, is that such laws fit poorly within the interstate commerce power.

This essay makes the case that it would be more intellectually honest for the federal courts to recognize formally that Congress has the power to regulate matters outside of interstate commerce or other specified powers.<sup>18</sup> Because it would be more honest, a doctrine of *unenumerated* powers might form a more stable basis for social legislation in an era of growing skepticism of a limitless commerce power. Contortions and fictions would not be necessary to justify the regulation of, for example, injuries to the arroyo toad.

A doctrine of unenumerated powers would give the courts the opportunity to reason and explain why certain areas of legislation—such as protection of the environment, the outlawing of personal discrimination, and the furthering of American culture in a fractured world climate—are permissible areas for congressional legislation, and why others should remain solely within the prerogative of the states alone. In this sense, a doctrine of unenumerated powers of Congress would resemble the law of unenumerated individual constitutional rights, such as the right to privacy. Unenumerated powers would also hold the benefit of being democratic, in that they reflect the wishes of the people expressed through their representative government. By creating a doctrine of unenumerated powers, the federal courts could recognize what everyone except the most virulent states-rights advocates accept in some sense—that Congress should and does

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Virginia Surface Mining & Reclamation Assn., 452 U.S. 264, 276 (1981). Indeed, “Congress need [not] make particularized findings in order to legislate.” *Perez v. United States*, 402 U.S. 146, 156 (1971); see also *Raich*, 125 S. Ct. at 2207 (concluding that Congress could have enacted its sweeping anti-marijuana law because of concern over effect that legal marijuana use might have on interstate market for illegal use).

18. The other powers include the authority to tax, raise and regulate an armed forces and declare war, regulate immigration, coin money and regulate bankruptcy, grant patents, create courts, establish post offices and roads, create a national capital region, and, most controversially, make laws “necessary and proper” to these enumerated powers. U.S. CONST. art. I, § 8.

hold the power to legislate beyond interstate commerce in the twenty-first century to further compelling social goals.

## II.

### TWO HUNDRED YEARS OF PRECEDENT?

Every student of the law learns that Congress holds only limited powers—those enumerated in the United States Constitution.<sup>19</sup> After all, the Tenth Amendment, adopted in 1791, states plainly: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”<sup>20</sup> From the days of Chief Justice John Marshall, the Supreme Court has consistently reiterated that Congress holds only those powers specifically granted to it by Article I, Section 8.<sup>21</sup> Along with the authorities to tax, coin money, declare war, and create a postal system, among others, Section 8 grants to Congress the power “to regulate Commerce with foreign nations, and among the several States . . . .”<sup>22</sup> It is this authority to regulate interstate commerce—often called the “Commerce Clause”—that forms the constitutional basis for nearly all modern social legislation, from the civil rights laws, to employment statutes, to environmental legislation.<sup>23</sup>

The Constitutional Convention of 1787, which created Article I, was motivated in large part by concerns over the progress of interstate commerce.<sup>24</sup> Under the relatively weak Articles of Confederation, which had governed relations among the states since independence,

19. See *supra* note 14 and accompanying text.

20. U.S. CONST. amend. X.

21. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819) (“This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent, to have required to be enforced by all those arguments, which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted.”).

22. U.S. CONST. art. I, § 8.

23. See, e.g., *Gonzales v. Raich*, 125 S. Ct. 2195, 2209 (2005) (finding federal anti-marijuana law that pre-empts contradictory state laws to be within the commerce power); *Hodel v. Virginia Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 281–82 (1981) (upholding federal regulation to regulate competition among coal sellers under Commerce Clause); *Katzenbach v. McClung*, 379 U.S. 294, 302–05 (1964) (determining that Commerce Clause justifies federal legislation banning racial discrimination in private accommodations and restaurants); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 43 (1937) (upholding national regulation of labor-management law based on commerce power); *Hoke v. United States*, 227 U.S. 308, 322–23 (1913) (upholding law regulating interstate prostitution as within commerce power).

24. See, e.g., CHRISTOPHER COLLIER & JAMES LINCOLN COLLIER, *DECISION IN PHILADELPHIA: THE CONSTITUTIONAL CONVENTION OF 1787* 3–24, 30–31 (1985) (discussing impetuses to Constitutional Convention).

there was no authority for the national government to facilitate commerce. A dispute between Maryland and Virginia over trade on the Potomac River, along with other disputes, spurred leaders of those states to call for a convention that snowballed into the radical overhaul of 1787.<sup>25</sup> According to one traditional telling of the story, the drafters understood that, without a guiding national hand, each state would have an incentive to adopt commercial laws to protect residents of their state, with the result that they would stifle beneficial trade throughout the federation.<sup>26</sup> By granting to the new Congress the power to control interstate commerce, the Constitution avoided local protectionism<sup>27</sup> and paved the way for the United States' advance, in the nineteenth and twentieth centuries, to its position as the leading economic power in the world.<sup>28</sup>

The flaw in this story is that the system gave Congress an incentive to legislate in fields beyond pure interstate commerce. In the twentieth century, Congress enacted a sweeping range of social legislation—from labor laws to anti-discrimination statutes to the protection of endangered species—that did not constitute direct regulation of interstate commerce.<sup>29</sup> Such federal laws have been motivated by the

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25. See *id.* at 30-31; *Virginia v. Maryland*, 540 U.S. 56, 60-63 (2003) (providing history of centuries-long disputes over Potomac River); JOEL ACHENBACH, *THE GRAND IDEA* 152-53 (2004) (discussing jurisdictional dispute between Maryland and Virginia over Potomac River).

26. Today's economists would call this destructive incentive a variant of the hypothetical "prisoner's dilemma," in which each actor in a scenario holds the incentive to try to give himself or herself a small advantage, with the result that all suffer in the long run. By organizing and policing themselves, however, the actors can restrain their short-term desires and achieve a better result for all. For discussions of the "prisoner's dilemma" in law, see, e.g., James A. Brander, *Economic Policy Formation in a Federal State: A Game Theoretic Approach*, in 63 *INTERGOVERNMENTAL RELATIONS* 33, 47-48 (1985); Jenna Bednar & William N. Eskridge, *Steadying the Court's "Unsteady Path": A Theory of Judicial Enforcement of Federalism*, 68 *S. CAL. L. REV.* 1447, 1469-75 (1995).

27. The role of the Commerce Clause in sublimating the desires for state protectionism is not a relic of the past. In 2005, the Supreme Court struck down a variety of state laws prohibiting or burdening the delivery of alcohol through the mail. See, e.g., *Granholt v. Heald*, 544 U.S. 460, 484-87 (2005) (rejecting states' argument that 21st Amendment, which reserved to states the power to limit sale of alcohol, allowed them to discriminate against out-of-state sales by mail).

28. See, e.g., *Wardair Canada, Inc. v. Florida Dep't of Revenue*, 477 U.S. 1, 12 (1986) (noting that dormant Commerce Clause doctrine, which prevents states from hindering interstate commerce, is essential component of American nationhood); cf. Norman R. Williams, *The Dormant Commerce Clause: Why Gibbons v. Ogden Should Be Restored to the Canon*, 49 *ST. LOUIS U. L.J.* 817 (2005) (discussing interpretation of *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), as statement of economic freedom against anti-protectionist state regulation and author's additional federalist interpretations).

29. See *supra* notes 2-17 and accompanying text.

fact that the national majority view on social affairs varies from those in some of the states. Congress can push these states into line through national legislation. For example, early twentieth century progressive politics spurred state laws regulating employment; because other states still believed in a policy of *laissez-faire*, however, the majoritarian Congress responded with national legislation such as the statute against child labor in 1916<sup>30</sup> (which was later struck down by a conservative, anti-majoritarian Supreme Court<sup>31</sup>). When a majority of the nation was persuaded in the 1960s by the need to bar racial discrimination—a policy to which the South still clung—Congress intervened with the Civil Rights Act of 1964.<sup>32</sup> Moreover, the history is not merely one of a socially liberal national Congress compelling conservative states to toe the line of progress. In the twenty-first century, a conservative majority of Congress successfully pre-empted a California law that sought to legalize medical use of marijuana; the pre-emption was upheld by the Supreme Court.<sup>33</sup>

The constitutional dilemma with having Congress legislate social policy—that is, legislation for the general welfare of the nation—is that such legislation is not explicitly authorized in the Constitution.<sup>34</sup> According to a history proffered by some federalist advocates of original intent, the commerce power was intended only to limit squabbling and protectionism among the states over interstate trade; it was not intended as a blank check for Congress to regulate all the social inter-

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30. National Child Labor Act of 1916, Ch. 432, 39 Stat. 675 (1916).

31. *Hammer v. Dagenhart*, 247 U.S. 251 (1918), *overruled by* *United States v. Darby*, 312 U.S. 100, 115-17 (1941).

32. Pub. L. 88-352, 78 Stat. 241 (1964) (codified as amended at 42 U.S.C. §§ 2000a-2000h-6 (2000)).

33. *See Gonzales v. Raich*, 125 S. Ct. 2195 (2005) (holding that federal anti-marijuana law pre-empted state law that sought to legalize marijuana for medical purposes).

34. Although Article I, Section 8 of the Constitution does use the term “general welfare,” it has consistently been held to refer only to the power to tax, not a blanket power to legislate in any area. *See, e.g., Kansas Gas & Electric Co. v. City of Independence*, 79 F.2d 638, 638-39 (10th Cir. 1935).

Another potential source of sweeping power for Congress is the Necessary and Proper Clause at the end of Section 8. While this clause was a contentious issue in early constitutional law and was employed by Chief Justice Marshall in upholding the power of the national bank to operate without hindrance by the states in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), most observers now agree that the clause is not by itself an independent grant of authority that would make the specifically enumerated powers irrelevant. *See, e.g.,* Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. PA. J. CONST. L. 183, 184-87 (2003) (arguing that Framers did not intend Necessary and Proper Clause to expand the scope of Congress’ enumerated powers).

actions of American citizens.<sup>35</sup> To the extent that social legislation was enacted in the eighteenth century—schools were established, slavery was regulated, and construction laws were passed to prevent fires—it was done at the state level.<sup>36</sup> In a nation where people rarely strayed far from their homes or towns, there was little practical need for national uniformity in social legislation.

As it turned out, early critics of the Constitution who feared that the national legislature was receiving a great amount of power turned out to be prescient.<sup>37</sup> Although it has sometimes acted slowly, Congress has nearly always responded, for better or worse, to the great moral questions of the day. The greatest social issue in American history has been race, highlighted by de Tocqueville in the early nineteenth century<sup>38</sup> and continuing through the tragedy of hurricane Katrina in New Orleans in 2005.<sup>39</sup> Before 1861, Southern fear that a

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35. Professor Randy Barnett has been a leader in arguing, with considerable force, that the Framers of the Constitution intended the commerce power to be limited to the regulation of trade among the states. See Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 130–34 (2001); see also Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 ARK. L. REV. 847 (2003). For another libertarian assessment of the limited extent of the original intent, see Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1388–99 (1987).

36. It is often stated that the federal government did not insert itself into the regulation of economic or social affairs until the late 19th century, and that the Sherman Antitrust Act was a turning point in a new age of regulation for a more fast-paced and industrialized society. See, e.g., *Raich*, 125 S. Ct. at 2205 (2005); *Wickard v. Filburn*, 317 U.S. 111, 121 (1942).

37. George Mason and Patrick Henry, two of the leading thinkers of 18th century politics, objected to the 1787 Constitution, largely because of the lack of a bill of rights. See, e.g., George Mason and Patrick Henry, *Virginia Ratifying Convention (June 14, 1788)*, in 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION IN PHILADELPHIA IN 1787 444–49 (Jonathan Elliot ed., 2d ed. 1891); Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 250 (2000) (discussing Henry's fears and assurances he was given by John Marshall that Constitution did not give national government unfettered powers).

38. See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 331–73 (Alfred A. Knopf, Inc. 1994) (1835) (recording observations on great dilemma of race in American culture).

39. In the immediate aftermath of the Katrina disaster, many commentators noted that those left behind in New Orleans were mostly poor African Americans, and some attributed this to the racially neglectful policies of the Bush administration. See, e.g., Associated Press Online, *AP Political NewsBrief*, available on Westlaw at 9/8/05 APWIRES 00:06:44 (reporting that Democratic National Committee chairman Howard Dean stated that “race was a factor in the death toll from Hurricane Katrina”); see also Bob Herbert, Op-Ed., *No Stranger to the Blues*, N.Y. TIMES, Sept. 8, 2005, at A29 (noting history of neglect of poor in New Orleans, especially in schools where 96% of children are black).

Northern-heavy Congress would continue to chip away at slavery led to a series of national crises and eventually to the Civil War.<sup>40</sup> A hundred years later, a majority of the nation finally agreed that racial segregation was unjust, leading to the congressional civil rights enactments of the 1960s over Southern opposition.<sup>41</sup> Earlier in the twentieth century, no reform seemed more crucial to progressive reformers than giving power to the working class, and Congress responded by limiting working hours, restricting child labor, and fostering labor unions.<sup>42</sup> In the early 1970s, a socially conscious Congress responded to the costs of industrialization by adopting far-reaching environmental protection laws.<sup>43</sup> National uniformity once again was preferable, at least for environmentalists, because of a perception that the states were reluctant to enact laws that might push business to competing states.<sup>44</sup>

The dramatic history of judicial reaction to Congress's social legislation is well known. In the early twentieth century, a conservative Supreme Court, appointed mostly by business-friendly Republican presidents, struck down statute after statute of progressive legislation,

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40. Before the Civil War, Southern states tried to balance the number of free states with slave states in order to restrain the U.S. Senate, in which each state is represented equally. For example, the entrance of the free state of Maine in 1820 was accompanied by the slave state of Missouri. See W. Sherman Rogers, *The Black Quest for Economic Liberty: Legal, Historical, and Related Considerations*, 48 HOW. L.J. 1, 31–34 (2004).

41. See generally ADAM FAIRCLOUGH, *BETTER DAY COMING: BLACKS AND EQUALITY, 1890–2000* 203–93 (2001) (presenting history of civil rights struggle).

42. See generally WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* 147–66 (1991) (explaining the history of the 20th-century legal developments and attitude of law towards the labor movement).

43. See generally RICHARD J. LAZARUS, *MAKING ENVIRONMENTAL LAW* 67–125 (2004) (providing history of creation of modern environmental law, key results of which have included the Clean Water Act, 33 U.S.C. §§ 1251–1387 (2000), the Clean Air Act, 42 U.S.C. §§ 7401–7671q (2000), and the Solid Waste Disposal Act, 42 U.S.C. §§ 6901–6992k (2000)).

44. See, Kirsten H. Engel, *State Environmental Standard-Setting: Is There a "Race" and Is It "To the Bottom"?*, 48 HASTINGS L.J. 271, 283–97 (1997) (using game theory to explain how each state has incentives to relax its environmental standards to attract industry); see also E. Donald Elliott, Bruce A. Ackerman & John C. Millian, *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L. ECON. & ORG. 313, 326–31 (1985) (explaining some varied impetuses to federalization of some environmental law, including desire of some large corporations to avoid inconsistent and more stringent state environmental laws). But see Peter P. Swire, *The Race to Laxity and the Race to Undesirability: Explaining Failures in Competition Among Jurisdictions in Environmental Law*, YALE L. & POL'Y REV., SYMPOSIUM ISSUE 1996 at 71 (asserting that states err on side of promoting industry and polluting environment due to measurement and public choice problems, not because of traditional prisoner's dilemma of game theory).

especially labor and employment laws.<sup>45</sup> The Court's rationale was, in part, that such laws were motivated largely by *social value* judgments, which were meant to be exclusively reserved to the states, and were not truly spurred by a desire to facilitate or control interstate commerce.<sup>46</sup> Starting in 1937, however, the Court abandoned its close scrutiny and deferred to congressional findings that a statute affected interstate commerce in some way, no matter how tenuous the connection.<sup>47</sup> The change in the Court's approach may have had many causes, but two were particularly prominent: first, the fact that statutes such as labor laws had wider interstate ramifications in an industrialized age than they had in earlier times; and second, the growing national consensus during the Depression era in favor of national solutions to social problems.<sup>48</sup> Congress soon found that almost any

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45. See *Carter v. Carter Coal Co.*, 298 U.S. 238, 303 (1936) (refusing to allow Congress to regulate working conditions in the coal mining industry, in part because "the relation of employer and employee . . . is purely local in character" and thus not subject to national regulation); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 550 (1935) (holding unconstitutional national system of wage and price controls of local trade that had only "indirect" effect on interstate commerce); *Hammer v. Dagenhart*, 247 U.S. 251, 276 (1918) (holding national child labor law unconstitutional because employment is local matter beyond federal control), *overruled by United States v. Darby*, 312 U.S. 100, 115–17 (1941). The earliest expression of the idea that the courts should overturn national legislation *motivated* by social policy concerns, not commerce, was made by dissenting Chief Justice Fuller in a case upholding a national law regulating trade in lottery tickets. *Champion v. Ames*, 188 U.S. 321, 364–65 (1903) ("That the purpose of Congress in this enactment was the suppression of lotteries cannot reasonably be denied.").

46. See, e.g., *Dagenhart*, 247 U.S. at 275–77 (maintaining that protection of working children must come from state and local policy judgments, not national ones). This view did not always prevail, however. In *Champion*, 188 U.S. at 363–64, a divided Court had upheld a national law prohibiting the interstate transportation of lottery tickets.

47. With *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30–31 (1937) (upholding National Labor Relations Act as "affecting commerce"), the Court began its nearly 70-year era of extreme deference to congressional legislation under the commerce power. One theory of the origin of the Supreme Court's deference focuses on President Franklin D. Roosevelt's 1937 plan to expand the membership of the Supreme Court with jurists who presumably would overturn decisions like *Schechter*. As the story goes, the Court then adopted a more approving view of national legislation—the so-called "switch in time that saved nine." See PHILIP BOBBITT, *CONSTITUTIONAL FATE* 39, 27–28 (1982). The Court expansion plan never came to fruition. See William E. Leuchtenburg, *The Origins of Franklin D. Roosevelt's "Court-Packing" Plan*, 1966 SUP. CT. REV. 347, 397–400 (outlining events leading to defeat of Roosevelt's plan to expand Court).

48. Another way of looking at the changes in the 1930s commerce power law is that the Court finally began to realize, in the wake of President Roosevelt's 1936 landslide election, that the economic crisis of the 1930s justified a greater national role in economic activity, even at the local level, which in turn led to a more pragmatic view of the commerce power. The classic case is *Wickard v. Filburn*, 317 U.S. 111, 127–29 (1942), in which the court upheld a national law that regulated the household con-

activity could have a potential link to interstate commerce in some way: use of ingredients made out of state by a restaurant in Alabama was accepted as a adequate basis for applying the Civil Rights Act of 1964.<sup>49</sup> Criminal laws and civil rights were especially attractive fields for congressional legislation, in part because of a belief that federal prosecutors and federal courts could more efficiently handle such claims.<sup>50</sup> Although tradition and politics discouraged Congress from taking over the regulation of fields such as education and family law, by 1990 most observers concluded that any limitations exerted by the Commerce Clause were, in effect, a nullity.<sup>51</sup> Congress was unfettered in its ability to legislate; the courts were no longer in the business of telling Congress that its laws exceeded its constitutional authority.

Federalists kept the flickering flame alive, however, and a more conservative Supreme Court under the late Chief Justice Rehnquist revived the Commerce Clause restrictions in a handful of cases. First, a divided Court struck down a minor federal gun law<sup>52</sup> in *United States v. Lopez*,<sup>53</sup> and then upended a portion of a statute federalizing

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consumption of home-grown wheat, because of the effect that such consumption could have on the national market, which Congress was trying to stabilize. Although the growing and eating of wheat on a small farm seems removed from interstate commerce, there is no doubt that such practices have an effect on the national price of the commodity.

49. *Katzenbach v. McClung*, 379 U.S. 294, 304–05 (1964).

50. The Voting Rights Act of 1965, which focused primarily on assuring the voting rights of African-Americans, was impelled by a concern that states were not acting vigorously enough in enforcing rights, including the prosecution of crimes against blacks. See Sheryll D. Cashin, *Shall We Overcome? Transcending Race, Class, and Ideology Through Interest Convergence*, 79 ST. JOHN'S L. REV. 253, 264 n.37 (2005), citing JOHN LEWIS & MICHAEL D'ORSO, *WALKING WITH THE WIND: A MEMOIR OF THE MOVEMENT* 344, 353, 360–61 (1998). Similarly, the federal government argued in *United States v. Morrison* that a reason for a national law criminalizing violence against women was the insufficient focus of local prosecutors on such crimes. See 529 U.S. 598, 619–20 (2000).

51. Writing in 1987, before the Rehnquist Court revived the Commerce Clause restrictions in *United States v. Lopez*, 514 U.S. 549 (1995), Professor Richard Epstein lamented that

The labor statutes, the civil rights statutes, the farm and agricultural statutes, and countless others rest on the commerce power, or more accurately on a construction of the Commerce Clause that grants the federal government jurisdiction so long as it can show (as it always can) that the regulated activity burdens, obstructs, or affects interstate commerce, however indirectly.

Epstein, *supra* note 35, at 1387.

52. Gun-Free School Zones Act of 1990, Pub. L. 101-647, § 1702, 104 Stat. 4844, (codified as amended at 18 U.S.C. § 922(q)(1) (1994)), *invalidated* by *United States v. Lopez*, 514 U.S. 549 (1995).

53. 514 U.S. 549, 567–68 (1995).

violent crimes against women<sup>54</sup> in *United States v. Morrison*.<sup>55</sup> The Rehnquist Court resuscitated the logic of the early twentieth century jurisprudence that, for federalism to have any significance, some fields of legislation must be exclusively reserved to the states.<sup>56</sup> Although the government argued in both cases that there was a plausible link between the regulated violence and the national economy, the Court rejected such “attenuated” reasoning.<sup>57</sup> If the mere assertion of an effect were all that was required, the Court reasoned, all legislation could be justified by some argument of a link to interstate commerce.<sup>58</sup> Congress would have no limits, even in areas of traditionally state and local control, such as education and family law.<sup>59</sup> More difficult for the Rehnquist Court, however, was the broader question of drawing coherent boundaries for the commerce power. In *Lopez*, *Morrison*, and a subsequent decision narrowing the federal Clean Water Act, the Court relied primarily on a supposed “tradition” of state primacy in criminal and water law to limit the congressional

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54. Violence Against Women Act of 1994, Pub. L. No. 103-322 § 40302, 108 Stat. 1941–42 (providing civil remedy for gender-motivated violent acts), *invalidated by United States v. Morrison*, 529 U.S. 598 (2000).

55. 529 U.S. 598, 627 (2000).

56. See *Morrison*, 529 U.S. at 615 (expressing fear that, if Court deferred to all congressional assertions of link to interstate commerce, “Congress might use the Commerce Clause to completely obliterate the Constitution’s distinction between national and local authority . . .”); *Lopez*, 514 U.S. at 566 (concluding that Commerce Clause must be limited to ensure that Congress does not hold “plenary police power that would authorize enactment of every type of legislation”). In *Gonzales v. Raich*, Justice Thomas argued forcefully in his dissent that allowing the national government to control the use of marijuana grown and used in California violated the principle of “dual sovereignty” that supported the concept of limited powers of the national government. 125 S. Ct. 2195, 2233–34 (2005) (Thomas, J., dissenting).

57. See *Morrison*, 529 U.S. at 612–13 (noting that attenuation is reason for holding law unconstitutional, particularly when intrastate activity is not economic in nature). The Court failed to explain, however, what analysis should be used in determining whether a link is too “attenuated.” Indeed, the asserted link between the legal use of marijuana for medical purposes and the effect on the national market for illegal marijuana would seem to be rather attenuated. See *Raich*, 125 S. Ct. at 2206–08 (concluding that congressional assertion of such link is sufficient to justify blanket national law against marijuana).

58. See *Morrison*, 529 U.S. at 615 (“[I]f Congress may regulate gender-motivated violence, it would be able to regulate murder . . .”); *Lopez*, 514 U.S. at 564 (arguing that if congressional assertions of link between gun crime and economy were allowed to stand, “it is difficult to perceive any limitation on federal power”).

59. See *Morrison*, 529 U.S. at 615–16 (stating that government’s arguments of link to interstate commerce “may, as we suggested in *Lopez*, be applied equally as well to family law and other areas of traditional state regulation”); *Lopez*, 514 U.S. at 564 (explaining that extreme deference would lead to national regulation “even in areas such as criminal law enforcement and education, where States historically have been sovereign”).

commerce power.<sup>60</sup> None of these decisions, however, set forth a coherent standard.<sup>61</sup>

Lest anyone think that the commerce power issue divides cleanly between liberal nationalists and conservative federalists, the administration of President George W. Bush has shown no great appreciation for constitutional federalism. Two of his leading domestic initiatives have been in fields that the Supreme Court has referred to as the core of state prerogative—education and family. First, President Bush pushed for the enactment of the educational policy of “No Child Left Behind,” which insinuated national standards into educational policy as never before.<sup>62</sup> Second, he led an effort to forbid states from permitting same-sex marriages (concededly, by a proposed constitutional amendment).<sup>63</sup> And in the marijuana case *Gonzales v. Raich*, the Bush administration successfully argued for a commerce power that encompasses legislation with a tenuous link to nationwide commerce but an obvious social policy motivation.<sup>64</sup>

Even under the deferential standard, not all legislation is automatically justified under the commerce power. If Congress makes no findings whatsoever as to an effect on interstate commerce and the

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60. *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs (SWANCC)*, 531 U.S. 159, 174 (2001); *Morrison*, 529 U.S. at 615–18; *Lopez*, 514 U.S. at 564–66. The clever *SWANCC* decision narrowed the government's previously wide definition of water bodies covered by the Clean Water Act on the ground that the government's wide definition got too close to the limits of the commerce power. *See* 531 U.S. at 169, 172–74. Thus, the Court was able to use the commerce power to limit a major federal statute without technically making a constitutional holding. *See also* *Rapanos v. United States*, 126 S. Ct. 2208, 2224 (2006) (once again using specter of commerce power to limit statutory reach of Clean Water Act).

In *Gonzales v. Oregon*, 126 S. Ct. 904 (2006), the Roberts Court held, largely on administrative law grounds, that a federal anti-drug law did not permit the Attorney General to prohibit the use of regulated drugs for physician-assisted suicides. *Id.* at 914–15. While the liberal majority avoided reliance on a commerce power restriction, Justice Scalia, in dissent, asserted that the Attorney General's prohibition was permissible, in part because the federal overriding of state law “[did] not push the outer limits of Congress's power,” as it had in *SWANCC*. *Id.* at 935 (Scalia, J., dissenting). The avatar of states rights did not explain why the regulation of isolated water bodies pushed the limits of the commerce power while the regulation of drug prescriptions did not.

61. *See supra* note 16 and accompanying text.

62. No Child Left Behind Act of 2001, 20 U.S.C. §§ 6301–7941 (Supp. 2004). For an explanation of the Act's sweep of federal insinuation into educational policy, see U.S. Dep't of Educ., Preliminary Overview of Programs and Changes Included in the No Child Left Behind Act of 2001, [http://www.ed.gov/nclb/overview/intro/progsum/sum\\_pg3.html#readingfirst](http://www.ed.gov/nclb/overview/intro/progsum/sum_pg3.html#readingfirst) (last visited Jan. 23, 2006).

63. *See* Mike Allen & Alan Cooperman, *Bush Proposes Constitutional Ban on Gay Marriage*, WASH. POST, Feb. 29, 2004, at A3.

64. *See* 125 S. Ct. 2195, 2222–24 (2005) (O'Connor, J., dissenting).

government proffers no plausible link in litigation, a federal law might not survive.<sup>65</sup> But this restriction is merely *procedural*, not *substantive*. Congress is not limited from regulating any particular substantive area; it must merely make some effort at explaining—or perhaps conjuring up—a link to interstate commerce.

Uncritical judicial deference may not bother advocates of national authority, at least as a matter of policy. But on a constitutional level, the anything-can-be-justified standard—which has been the law of the land since 1937, with the handful of Rehnquist Court exceptions—is intellectually unsatisfying. The restriction of the Commerce Clause and the 200-year-old principle of the limited powers of Congress should mean *something*. Even if one rejects the federalist notion that the original intent of the drafters of 1787 was in effect a contract of power-sharing between the national and state governments,<sup>66</sup> the words of Article I should impose some substantive limitation on Congress's authority to legislate. Moreover, it is troublesome for courts to defer blindly to the purported ties to interstate commerce, especially when such legislation is plainly motivated, perhaps exclusively, by social policy concerns.<sup>67</sup> It is dishonest to deny that social legislation—from the civil rights laws to the environmental statutes to the anti-drug legislation—is indeed primarily social legislation, not commercial legislation. Such dishonesty should not form the constitutional justification for many of our most cherished laws.

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65. In *United States v. Lopez*, the Court explained that congressional findings are not necessary to establish a link to interstate commerce but suggested that they are helpful in doing so. See 514 U.S. 549, 562–63 (1995); see also *Perez v. United States*, 402 U.S. 146, 156 (1971) (“We do [not] infer that Congress need make particularized findings in order to legislate.”).

66. A federalist explanation of the Commerce Clause suggests that it was drafted as a narrow national power. See Barnett, *The Original Meaning of the Commerce Clause*, *supra* note 35, at 104, 114–16; *Gonzales v. Raich*, 125 S. Ct. 2195, 2229–30 (2005) (Thomas, J., dissenting) (describing the limited meaning of “commerce” at time of nation’s founding).

67. Courts do not always defer to the express assertions of legislators. In cases asserting violation of the race discrimination laws, for example, the courts look behind the facial assertions and inquire whether a law was motivated by a discriminatory purpose. See, e.g., *City of Mobile v. Bolden*, 446 U.S. 55, 62 (1980) (asserting that facially neutral laws violate the Fifteenth Amendment if motivated by racially discriminatory purpose); *Washington v. Davis*, 426 U.S. 229, 242 (1976) (noting that, while disparate impact alone is not sufficient to show Fourteenth Amendment violation, “invidious discriminatory purpose” can be inferred from totality of circumstances).

## III.

## A THEORY OF UNENUMERATED CONGRESSIONAL POWERS

I propose that the federal courts recognize that Congress may legislate outside the enumerated powers of Article I, Section 8, of the Constitution—that Congress holds certain unenumerated powers. Such a doctrine would, of course, make it simpler to justify much of our nation's social legislation. It also would appear, of course, to contradict the established principle of the limited powers of Congress. In this part, I endeavor to justify a doctrine of unwritten powers of Congress by addressing some of the potential obstacles and drawbacks of the proposal. I suggest that a new set of congressional powers would not upset the constitutional balance of powers between the federal and state governments. Indeed, the doctrine—the potential parameters of which I describe later in this part—might, ironically, give federalism a firmer basis in the twenty-first century.

*What about the principle of the limited powers?*

The fundamental dilemma for a doctrine of unenumerated powers is the two centuries of precedent that Congress holds the power to legislate only in those areas specified by the Constitution. But the hurdle is not insurmountable. I discuss briefly two reasons why a break with this principle would not be a tremendous shock to our constitutional system.

First, the limited powers principle has been honored more as rhetoric than as reality. Since the nineteenth century, both Congress and the federal courts have carved out exceptions to this rule. The most notable exception is the power over foreign affairs.<sup>68</sup> Article I of the Constitution sets forth powers to declare war, run an army and navy and grant letters of marque and reprisal,<sup>69</sup> but it contains no general authority to regulate external relations of the nation. There is no authorization to regulate fields such as the colonial territories or the conduct of Americans overseas. The courts have avoided the enumerated-powers-only doctrine by relying on a dubious rationale that authority over foreign affairs is inherent in sovereignty and thus exists outside of the constitutional text.<sup>70</sup> The impetus for such constitutional gym-

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68. See generally Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power Over Foreign Affairs*, 81 TEX. L. REV. 1 (2002), for a detailed discussion and critical analysis of the foreign affairs power.

69. U.S. CONST. art. I, § 8.

70. *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 318 (1936) (upholding Congress's delegation of authority to criminalize foreign arms sales to President).

nastics is clear. Faced with an apparent gap in congressional authority, the courts have simply filled it in by recognizing an unenumerated power that almost everyone agrees Congress must hold. This idea—that Congress should hold the powers that it needs to make government and the nation run efficiently—helps form a basis for a larger doctrine of unenumerated powers.<sup>71</sup>

Second, the federal courts have already developed a widely accepted body of constitutional law outside the text of the document, despite the long-standing principle that the federal courts are courts of limited jurisdiction that must confine themselves to the words of Constitution.<sup>72</sup> This extra-textual doctrine is the constitutional law of unwritten individual rights. In the late nineteenth century, the Supreme Court conjured up the notion of “substantive due process,” a principle of natural rights that courts then used to impede legislation that they found distasteful to their ideas of economic liberty.<sup>73</sup> Until the 1930s, this unenumerated constitutional right was employed to strike down much national and state legislation that impinged upon conservative courts’ belief in laissez-faire and unfettered business. Statutory limits on working hours, minimum wage laws, and other progressive social legislation was held unconstitutional, not because the constitution specifically forbade them, but because of an unwritten “right to contract” and its variants.<sup>74</sup>

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71. A variant of this rationale, concerning not congressional power but the power of the federal executive, was asserted by the Bush administration in 2006. In justifying his once-secret program of scrutinizing the phone calls of American citizens without warrants, President Bush and his Attorney General asserted that the President holds, in effect, an inherent right to do things to protect national security, even if such powers are not directly granted by the text of the Constitution. See U.S. DEP’T OF JUSTICE, LEGAL AUTHORITIES SUPPORTING THE ACTIVITIES OF THE NATIONAL SECURITY AGENCY DESCRIBED BY THE PRESIDENT 6–10 (2006), <http://files.findlaw.com/news.findlaw.com/hdocs/docs/nsa/dojnsa11906wp.pdf>; Eric Lichtblau & James Risen, *Top Aide Defends Domestic Spying*, N.Y. TIMES, Feb. 7, 2006, at A1. One way of viewing this argument is that if circumstances demand that the executive should have a power, the courts should grant it.

72. For an argument in support of textualism, see ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 17, 23 (Amy Gutmann ed., 1997). For an argument scrutinizing that approach, see Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930).

73. See generally Edward S. Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366 (1911). The notion that “due process” of law could encompass substantive rights got one of its first significant boosts in the now infamous case of *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 450 (1856).

74. Beginning with *Lochner v. New York*, 198 U.S. 45, 53 (1905), business-oriented judges used the notion of a substantive due process right to strike down employment and economic regulations. For a history of the rise and fall of substantive due process, see GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 741–68 (5th ed. 2005);

Although such pro-business rights were discredited in the mid-twentieth century, the idea of unenumerated individual rights has lived on.<sup>75</sup> The umbrella of substantive due process—never more than an awkwardly worded catch-all for limiting government’s power to regulate the conduct of private citizens—has shifted to protect a “right to privacy.”<sup>76</sup> Such a right is not enumerated in the U.S. Constitution, of course. Privacy was first given expression as a right through the much-maligned argument of a “penumbra” of enumerated rights in *Griswold v. Connecticut*,<sup>77</sup> which invalidated a state law criminalizing the use of reproductive contraceptives. Once established (and penumbra discarded), however, the unenumerated right to privacy has been used to strike down laws regulating fetal abortions and hindering family unity.<sup>78</sup> Other unwritten individual rights have been posited, with varying success in the courts, including the right to access information, the right to construct a household, and the right to die.<sup>79</sup>

Those who oppose judicial activism view with dismay the creation of such unenumerated individual rights, seemingly out of thin air.<sup>80</sup> The doctrine creates, in essence, a super-legislature of judges.<sup>81</sup>

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see also FRANK R. STRONG, *SUBSTANTIVE DUE PROCESS OF LAW: A DICHOTOMY OF SENSE AND NONSENSE* (1986).

75. Although advocates of original intent of the Framers often scoff at the creation of unenumerated rights, one historian has pointed out that the Constitution was written against the background of a strong history of both English and American colonial courts imposing natural rights in favor of citizens against their government. See RUTLAND, *THE BIRTH OF THE BILL OF RIGHTS, 1776–1791* (Ne. Univ. Press 1983).

76. See *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965) (holding that the “right to privacy” includes a right to use contraceptives). For an analysis of the *Griswold* decision, see Paul G. Kauper, *Penumbras, Emanations, Things Fundamental and Things Forgotten: The Griswold Case*, 64 MICH. L. REV. 235 (1965) (analyzing each Justice’s opinion in detail, relationship between fundamental rights and Bill of Rights, and impact of case on general constitutional theory).

77. 381 U.S. at 480, 484–85.

78. See, e.g., *Roe v. Wade*, 410 U.S. 113, 153–54 (1973) (concluding that right of personal privacy includes right to have abortion); *Moore v. City of E. Cleveland*, 431 U.S. 494, 502–06 (1977) (using substantive due process to invalidate a local law that prevented a family, including cousins, from living in the same house).

79. See, e.g., *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575–81 (1980) (establishing right of access to criminal trials, in conjunction with First Amendment); *Moore*, 431 U.S. at 498–99 (asserting right to live as extended family, despite local land use laws); but see *Washington v. Glucksberg*, 521 U.S. 702, 719–24 (1997) (refusing to articulate “right to die” when rejecting challenge to law banning assisted suicide).

80. Some analysts of new Chief Justice John Roberts maintain that his judicial philosophy has been dominated by a belief in judicial restraint and a dislike of judicial activism and that President Bush has sought nominees with such a philosophy. See Charles Lane, *Like Rehnquist, the Nominee is a Skeptic on Judicial Intervention*, WASH. POST, Sept. 6, 2005, at A1; Elisabeth Bumiller, *Bush Vows to Seek Conservative Judges*, N.Y. TIMES, Mar. 29, 2002, at A24.

Nonetheless, even conservative judges sometimes succumb to the allure of unwritten rights. Former Chief Justice Rehnquist and Justice Scalia assiduously developed the doctrine of “regulatory takings,” under which a government regulation of property may trigger compensation, despite the lack of such an explicit right in the Constitution.<sup>82</sup> The property-rights orientation of these justices impelled them to create their own variant of a penumbra.

The history of unenumerated rights, therefore, provides a precedent for concluding that the text of the Constitution does not completely answer all of the “constitutional” questions for modern America. Just as we might not expect the words of the Bill of Rights, which were written by James Madison and other late eighteenth century men with no notion of gender equality or modern medicine, to resolve whether a twenty-first century woman holds a right to abortion, we might not expect Article I to address whether the national government holds the power to address, for example, the problem of toxic wastes—a topic of which the Framers knew little.

It is true, of course, that unwritten rights hold a stronger tie to the words of the Constitution than would unenumerated congressional powers. The Ninth Amendment refers to rights “retained by the people,”<sup>83</sup> whereas the Tenth Amendment states that powers not granted to the federal government “are reserved to the states respectively, or to the people.”<sup>84</sup> This is undeniably a textual barrier to recognizing unwritten powers. But unenumerated powers, as a principle of constitutional law, would hold a critical advantage that unwritten rights do not—unenumerated powers would not be anti-democratic. One of the most potent criticisms of unwritten rights rests on the principle of separation of powers—that the courts have used private lawsuits to over-

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81. For criticism of the courts acting as super-legislatures, *see, e.g.*, JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980) (criticizing view of judges as arbiters who make decisions based on their own values); *see also* *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 487–88 (1955) (holding that courts can not second-guess legislative decisions simply because they seem “unwise, improvident, or out of harmony with a particular school of thought”).

82. While the precise motive for the Takings Clause is unclear, it does not seem to have been a response to concerns about the existence of government regulation of land use. *See* FRED P. BOSSELMAN, ET AL., *THE TAKING ISSUE* 99–104 (1973) (discussing history and limits of governmental regulations of private land). A draft of the Fifth Amendment referred to the requirement of “just compensation” in instances when a person was to “relinquish his property, where it may be necessary for public use.” *Id.*, citing 1 *ANNALS OF CONG.* 451–52 (Joseph Gales ed., 1834).

83. U.S. CONST. amend. IX.

84. U.S. CONST. amend. X.

ride decisions of representative government.<sup>85</sup> Courts can decide, by a simple majority of unelected judges or justices and without the opportunity for public input or response, to overturn a statute of the duly elected representatives of the people, by asserting whatever individual “right” appeals to the body of judges at hand—be it laissez-faire economics in 1905, social progressivism in 1973, or property rights in 1994.<sup>86</sup>

By contrast, a doctrine of unenumerated powers of Congress would not have courts act as super-legislatures. Courts would not be denying the power to legislate to the people’s elected representatives; to the contrary, courts would be upholding democracy, at least on a national level. A doctrine of unenumerated powers would have the courts work in conjunction with the wishes of the nation’s people through their elected national representatives.

*Shouldn’t constitutional federalism restrict federal power?*

The chief drawback of unenumerated powers is not one of separation of powers among branches of government, but rather of *federalism*—the separation of authority between the federal and state governments. Allowing Congress to legislate in areas beyond the Constitution’s Article I might appear to impose a devastating blow to state prerogative. But the reality does not support the fear.

If this were 1935, when the courts were vigorously—if somewhat inconsistently—enforcing federalism to strike down social legislation, then a doctrine of unenumerated powers would radically change the constitutional system. But there has been no real federalism in the law of the commerce power for most of the past seventy years. Before 1937, the courts had developed a somewhat internally coherent interpretation of the commerce power, which barred the federal government from enacting social legislation if it held only a tangential link to interstate commerce.<sup>87</sup> But the modern practice, in effect, has been

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85. See, e.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 16 (2d ed. 1986) (discussing the counter-majoritarian nature of much of constitutional law); RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 337–57 (2d ed. 1997) (criticizing the wide scope of judicial review).

86. See *United States v. Lochner*, 198 U.S. 45, 64–65 (1905) (holding unconstitutional state law limiting working hours of bakers because it violated freedom to contract); *Roe v. Wade*, 410 U.S. 113, 153 (1973) (establishing right to terminate pregnancy under “right to privacy”); *Dolan v. City of Tigard*, 512 U.S. 374, 377, 396 (1994) (restricting government’s ability to impose exaction upon landowner seeking government permit).

87. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 549–50 (1935) (holding unconstitutional national system of wage and price controls of local

simply not to enforce federalism through the Commerce Clause—a deference that was applied in fits and starts during the later years of the Rehnquist Court.<sup>88</sup> One of the first ways in which the courts loosened the restriction of the Commerce Clause was to allow Congress to regulate local conduct if it nonetheless had a small interstate commerce “hook.”<sup>89</sup> To the chagrin of many criminals, a burglary of the local convenience store can be made into a “federal case” if, for example, the perpetrator ordered a tool for the job by a long-distance phone call.<sup>90</sup>

Indeed, it would not be difficult to come up with links to justify almost *any* conceivable federal law, under the deferential standard of “affecting” interstate commerce. A federal law establishing a uniform age for marriage could be justified as facilitating interstate migration of young people,<sup>91</sup> which in turn stimulates economic productivity. A national statute prescribing whether the Darwinian theory of natural selection in biology is taught in public schools could be justified as helping educate a generation of skeptical and well-educated future scientists who will enable the United States to compete in international markets. While such links might seem attenuated, they are no more extreme than some of the Commerce Clause justifications for civil rights, narcotics, or natural resource laws. Social legislation is always an awkward fit with the interstate commerce power.

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trade that had only “indirect” effect on interstate commerce); *Carter v. Carter Coal Co.*, 298 U.S. 238, 303 (1936) (refusing to allow Congress to regulate working conditions in coal mining industry, in part because “relation of employer and employee . . . is purely local in character” and thus not subject to national regulation).

88. While the Rehnquist Court refused to allow commerce-based congressional legislation in *United States v. Lopez*, 514 U.S. 549 (1995), *United States v. Morrison*, 529 U.S. 598 (2000), and *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, (2001), the final Rehnquist Court commerce power decision was *Gonzales v. Raich* 125 S. Ct. 2195, 2205, 2215 (2005), in which the Court reverted to a very deferential standard and upheld a congressional statute that appeared to be grounded more in social policy than in regulating interstate commerce. A cynical observer might attribute the outcomes to the political viewpoints of the justices.

89. *See, e.g.*, *Hoke v. United States*, 227 U.S. 308, 323 (1913) (upholding federal law that barred transportation of females across state lines for immoral purposes); *Champion v. Ames*, 188 U.S. 321, 363–64 (1903) (upholding federal law banning transportation of certain lottery tickets across state lines).

90. Under 18 U.S.C. § 844(e) (2000), for example, using a telephone or other “instrument of commerce” to make a bomb threat is a federal offense. *See United States v. Gilbert*, 181 F.3d 152, 157–58 (1st Cir. 1999) (rejecting defendant’s claim that, based on *Lopez*, use of telephone had no effect on interstate commerce).

91. Facilitating interstate movement of women was one of the putative connections to interstate commerce asserted by the federal government in *Morrison*. *See* 529 U.S. at 614–15, *citing* H.R. REP. NO. 103-711, at 385 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 1839, 1853.

Moreover, by allowing regulation of activity because of an indirect “effect” on interstate commerce, the courts permitted Congress to govern conduct that was neither interstate nor commerce.<sup>92</sup> By adding a procedural rule of extreme deference to congressional findings,<sup>93</sup> the courts gave Congress a blank check to enact nearly whatever it wanted, without risk of federalist hurdles. A law that regulated a farmer’s personal consumption of home-grown wheat?<sup>94</sup> Permissible because it was part of a plan to regulate the national price of the commodity.<sup>95</sup> A statute that required mining companies to landscape closed strip mines according to precise federal standards?<sup>96</sup> Acceptable, in part because of the aggregate effect that such mining might have on interstate pollution.<sup>97</sup> Legislation that protected groundwater species that live only in Texas? Upheld because the aggregate effect of harming endangered species might be to upset the web of biodiversity, including its economically valuable components.<sup>98</sup>

The Rehnquist Court did not overrule either the precedent of deference or the “affecting” commerce standard. Although it created much commotion when it struck down a few laws, essentially on ad

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92. In *Preseault v. Interstate Commerce Comm’n*, 494 U.S. 1, 17 (1990), the Court utilized only rational basis review to evaluate congressional use of the Commerce Clause based on a finding that the regulated activity “affects” interstate commerce. In *United States v. Lopez*, the Court narrowed the requirement to “substantially affect[ing]” interstate commerce. 514 U.S. 549, 559 (1995). *Lopez* was the first Supreme Court decision since 1936 to invalidate a federal statute under the Commerce Clause. See Charles B. Schweitzer, Comment, *Street Crime, Interstate Commerce, and the Federal Docket: The Impact of United States v. Lopez*, 34 DuQ. L. Rev. 71, 71 (1995).

93. See *supra* note 17 and accompanying text.

94. See Agricultural Adjustment Act of 1938, 7 U.S.C. § 1340 (1940).

95. *Wickard v. Filburn*, 317 U.S. 111, 127–29 (1942). The Supreme Court in *Lopez* called *Wickard* “perhaps the most far reaching example of Commerce Clause authority over intrastate activity.” 514 U.S. at 560. Professor Richard Epstein has taken particular aim at *Wickard* as an unjustified use of the commerce power. See Epstein, *supra* note 35, at 1451–53. However, in my view, the law in *Wickard* was one of the most justifiable of all the controversial commerce power cases because of the *purpose* of the law. There is no reason to believe that Congress was attempting to regulate morality under the guise of commerce; Congress clearly was concerned only about the national wheat market. If one adheres to a strict idea of dual sovereignty, the law in *Wickard* might easily fit within the realm of Congress because the law was completely and exclusively about regulating the national price of wheat and nothing else.

96. See Surface Mining Control and Reclamation Act of 1977 § 515(d)–(e), 30 U.S.C. § 1265(d)–(e) (2000).

97. *Hodel v. Virginia Surface Mining & Reclamation Ass’n.*, 452 U.S. 264, 277 (1981).

98. *GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622, 640–41 (5th Cir. 2003) (upholding application of Endangered Species Act under interstate commerce power), *cert. denied*, 125 S. Ct. 2898 (2005).

hoc grounds, the Court's federalist bark was worse than its bite. While the decisions contained dicta suggesting, as old federalists used to, that some fields—family law and schools, for example<sup>99</sup>—are truly local in nature and may not be regulated by Congress, the Court failed to develop any coherent doctrine for reviving federalism under the Commerce Clause. The medical marijuana case in 2005, *Gonzales v. Raich*, revealed that the Court still accepts some attenuated links to commerce in order to support social legislation.<sup>100</sup>

In sum, it cannot be said that there *is* a living principle of federalism in the law of the commerce power, even ten years after the Rehnquist Court's *Lopez* decision. With federalism in such a sorry state, it would hardly do any more damage to recognize unenumerated powers of Congress. Indeed, a doctrine that is more intellectually honest about the constitutional support for social legislation could allow courts once again to carve out a coherent niche for state prerogative.

*Which unenumerated powers should the courts recognize?*

If the federal courts were to recognize a doctrine of unenumerated powers, they would have to define the scope of such powers and how constitutional law would retain some semblance of federalism. Perhaps surprisingly, this task might not be as difficult as it may first appear.

The best starting point for crafting a doctrine of unenumerated powers would be to include those fields in which there is a “good reason” for Congress, and not the states, to regulate. Professor Donald H. Regan has, in essence, developed this rationale to justify a wide interpretation of the Commerce Clause.<sup>101</sup> Courts could police the

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99. See *United States v. Morrison*, 529 U.S. 598, 615–16 (2000) (referring to family law as traditional area of state prerogative); *United States v. Lopez*, 514 U.S. 549, 564 (1995) (referring to education as an area where “[s]tates historically have been sovereign”).

100. 125 S. Ct. 2195, 2206–08, 2211 (2005) (indicating simple rational basis review of congressional findings of economic effects on interstate commerce). Justice Thomas was the only justice who dissented from the deferential application of the Commerce Clause. *Id.* at 2229 (Thomas, J., dissenting).

101. Professor Regan argued that the constitutional commerce power should be interpreted to allow Congress to regulate when it is in the “general interests of the union” and when the states are “separately incompetent” to do so. Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite United States v. Lopez*, 94 MICH. L. REV. 554, 570–71 (1995). Professor Ulen has noted that social and economic changes call for a change in the division of authority between the national and state governments. See Thomas S. Ulen, *Economic and Public-Choice Forces in Federalism*, 6 GEO. MASON L. REV. 921, 924 (1998). Ulen notes that problems such as air and water pollution, which were once viewed largely as only local matters, have become national issues as the nation has developed large new

doctrine by requiring that Congress both explain and give support for its assertion of a need to regulate; Congress could rely on observations from economics, political science, or foreign affairs to show a “good reason” for a nationwide law in a particular arena. These factual observations would be policy-neutral—meaning that they would be separate from the content of the congressional policy decision—and they could justify social legislation that is either socially liberal or conservative.<sup>102</sup> When Congress accompanies social legislation with a cogent reason for a national law, the courts would uphold the legislation as constitutional, as far as it is justified by the rationale. If the legislation is not justified by a cogent rationale and also is not within a written power, then the legislation would be struck down as an unconstitutional infringement on state prerogative.

It is not the purpose of this essay to detail or exhaust all possible grounds of economics, politics, or international relations that might form good reasons for national regulation. Nonetheless, it is worth discussing a few such reasons, some of which have already been explicated by courts in Commerce Clause litigation, where social legislation has been shoehorned into the commerce power.

### *The Discouragement Effect.*

Perhaps the most prominent of the “good reasons” for national legislation is that states are discouraged, by virtue of competition with other states for business, from enacting certain types of social legislation. An unwanted competition among states can be avoided by having Congress enact a nationwide floor of regulation. The *discouragement effect* is referred to by a variety of terms. Environmentalists often use the term “race to the bottom,” even though the

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industries and technology. *Id.* at 943. One response to this observation is that legal changes should be reflected not in a narrow revision of the commerce power *per se*. Instead, the changes call for amending the Constitution to authorize the national government to respond to the new problems of interstate pollution. Absent this step, unenumerated powers might be a second-best solution. For another argument for construing congressional powers broadly through “holistic” interpretation of national powers, see Vicki C. Jackson, *Holistic Interpretation: Fitzpatrick v. Bitzer and Our Bifurcated Constitution*, 53 STAN. L. REV. 1259 (2001).

102. This is not to say that nationalism is apolitical. As explained below, making policy decisions at a national, rather than a state, level may result in more regulation of business, by virtue of the fact that states compete with their neighbors for business by offering a pro-business regulatory climate; thus they may be discouraged in certain instances from adopting business regulations. Moreover, many national statutory regimes allow state governments to regulate citizens *beyond*, but not less than, the level of the national regulation. See, e.g., Federal Water Pollution Control Act (Clean Water Act) 33 U.S.C. § 1370 (2000); Clean Air Act, 42 U.S.C. § 7416 (2000). Thus, a legal system that allows for less national legislation is likely to be more libertarian.

effect may be more one of dissuading worthwhile legislation than of spurring roll-backs in existing laws.<sup>103</sup> Economists refer to a “prisoner’s dilemma” in which a number of actors—here, states—seek to gain an advantage over others in the same predicament because they fear that if they don’t seek the advantage, others will, leaving them behind. This leads to a less-than-optimal result for all.<sup>104</sup> The actors can attain the optimal result, however, through coordinated and enforced conduct by all—such as the creation of a national government that imposes a uniform standard on all the states.

Consider the example of minimum wage laws. In the early twentieth century, the Supreme Court struck down national labor legislation on the ground that the employer-employee relationship was not in itself interstate commerce, so its regulation was reserved to the states by the Constitution.<sup>105</sup> As helping American workers became a key component of progressive social policy, however, the Court retreated. Eventually, a more deferential Court permitted somewhat attenuated links to interstate commerce to justify federal employment statutes.<sup>106</sup>

An alternative justification for national wage regulations, however, would be to ground them on the observation that states hold a disincentive to enact labor laws. While it is true that higher wages attract workers, there is an economic argument (not uncontroversial, of course, but few things are in social science) that businesses are more mobile than workers.<sup>107</sup> Because state legislators understand that more regulation would send production elsewhere, they are discouraged from imposing regulations, even if they would prefer a

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103. See, e.g., Engel, *supra* note 44, at 375 (concluding that states competing for industry often engage in race-to-the-bottom toward more lax environmental standards). But not all agree that there is a “race” at all. See, e.g., Jonathan H. Adler, *The Ducks Stop Here? The Environmental Challenge to Federalism*, 9 SUP. CT. ECON. REV. 205, 207–08 (2001) (arguing that “[t]here is little reason to believe that interstate competition amongst states will produce a ‘race-to-the-bottom’ in environmental regulation today”); Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the “Race-to-the-Bottom” Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1211–12, 1244 (1992).

104. For discussions of the “prisoner’s dilemma” in law, see, e.g., Brander, *supra* note 26, at 41–42, 47–51; Bednar & Eskridge, *supra* note 26, at 1471–75 (1995).

105. See cases cited *supra* note 45.

106. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30–32 (1937) (upholding national regulation of labor-management law).

107. See, e.g., Engel, *supra* note 44, at 294 (“Congress believed that states could not be trusted to achieve minimum levels of environmental quality because of the intense pressures they received from mobile industries to relax their environmental standards.”); Robert Wai, *Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization*, 40 COLUM. J. TRANSNAT’L L. 209, 265 (2002) (arguing that even though businesses must “put down roots,” they are far more mobile than labor).

higher minimum wage as a matter of public policy.<sup>108</sup> State legislators may welcome a national minimum wage, which would suppress the discouragement effect on individual lawmakers.<sup>109</sup>

Although some commentators question the strength of the discouragement effect,<sup>110</sup> and others assert that state competition leads to efficiency,<sup>111</sup> there is little doubt that the phenomenon occurs in some instances.<sup>112</sup> The discouragement effect can be avoided, in part, through Congress's adoption of a national minimum wage, which cools wage competition among the states.<sup>113</sup> Regardless of whether one believes that suppressing state wage competition is good or bad, the choice of economic policy should be left to the legislatures, not the courts.<sup>114</sup>

There are practical drawbacks, of course, to granting Congress the power to battle the discouragement effect. One problem is that many types of national legislation *could* be justified by a desire to avoid undesirable competition among states. Congress could assert authority in even supposedly core state realms such as family law and education law.<sup>115</sup> Thus the problems of an unfettered commerce

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108. For example, automakers prefer that there be a uniform national law on auto emissions and that states not be permitted to complicate the law with their own requirements. See E. Donald Elliott et al., *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L. ECON. & ORG. 313, 330–31 (1985).

109. As an analogy, with some exceptions, the Clean Air Act prohibits states from enacting separate auto emissions standards. 42 U.S.C. § 7543 (2000).

110. See *supra* note 103.

111. Professor Epstein has argued that variations in state laws serve as competitive markets in which citizens (residents as well as businesses) can choose the values that matter to them. Epstein, *supra* note 35, at 1431–32. See also Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 416–18 (1956) (arguing that allowing local governments to craft their own laws will create market of governments competing for consumer-voters).

112. See, e.g., Nat'l Fed'n of Indep. Bus., *Small Businesses View Virginia's Business Climate Favorably* (Mar. 1, 2005), <http://www.nfib.com/object/sbcva0305.htm> (advertising that state offers legal climate favorable to business and more attractive than those of competing states); Mary Jordan, *Mexican Workers Pay for Success: With Labor Costs Rising, Factories Depart for Asia*, WASH. POST, June 20, 2002, at A1 (demonstrating that businesses pay attention to competing markets as evidenced by the fact that rising wages in Mexico are leading some companies to relocate jobs to lower-wage countries in Asia).

113. National law would not, of course, do much to keep low-wage jobs from moving to countries with lower wages.

114. The most famous statement that the courts should not impose their business attitudes is that of Justice Holmes in *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (arguing that “[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer’s Social Statics,” referring to variant of libertarian theory of Social Darwinism that discouraged governmental efforts to help the poor).

115. See *supra* note 99 and accompanying text. A local government might be discouraged from adopting a vigorous educational policy, for example, out of concern

power might merely be transferred to an unlimited unenumerated power.

But it might be easier, I suggest, for the courts to scrutinize unenumerated powers than to scrutinize the commerce power as it has for the past two hundred years. A law of unenumerated powers could require that Congress accompany legislation with evidence to support, for example, the assertion of the discouragement effect. The burden of proof could be switched away from citizen challengers and instead reside with Congress.<sup>116</sup> Courts could ferret out unjustifiable assertions when Congress failed to provide such evidence, which might include failed legislative efforts in state legislatures or proof that businesses have sought out concessions from state and local governments.<sup>117</sup> The judicial inquiry would not be foolproof, of course, but it might be better than the toothlessly deferential standard of scrutiny applied to the modern commerce power, under which Congress need not even set forth any real evidence of an effect on interstate commerce.<sup>118</sup>

#### *Foreign Affairs.*

Another “good reason” for an unenumerated power for Congress would be a desire for uniformity in foreign relations. As briefly noted above, the federal courts have held that Congress holds an extra-constitutional power to legislate foreign policy.<sup>119</sup> Because of the potential collision between state forays into foreign affairs and the national policy, the federal courts have consistently struck down state med-

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that parents from neighboring jurisdictions will try to find ways to get their children into the new program, thus swamping it with students. See Laura Mansnerus, *Great Haven for Families, but Don't Bring Children*, N.Y. TIMES, Aug. 13, 2003, at A1 (discussing town's law that discourages families with children from moving there in order to avoid overcrowding schools); see also *United States v. Town of Cicero*, No. 93-C-1805, 1997 WL 337379, at \*1, 4–5 (N.D. Ill. June 16, 1997) (challenging town's 1991 adoption of more restrictive residential occupancy standard in apparent effort to stem Latino immigration; town claimed it was attempting to contain effect of growing population on schools).

116. Reversing the usual burden of proof so that government must justify its action has been proposed as a partial solution to the perceived abuse of government's use of the power of eminent domain. See, e.g., Stephen J. Jones, Note, *Trumping Eminent Domain Law: An Argument for Strict Scrutiny Analysis Under the Public Use Requirement of the Fifth Amendment*, 50 SYRACUSE L. REV. 285, 311–14 (2000) (arguing for reversal of presumption in favor of constitutionality when taken land is intended for private ownership).

117. See PAUL KANTOR, *THE DEPENDENT CITY* 170–72 (1988) (arguing that impoverished city governments compete with each other for business development opportunities in order to attract revenue).

118. See *supra* note 17 and accompanying text.

119. See *supra* notes 68–70 and accompanying text.

dling.<sup>120</sup> Making foreign affairs part of a coherent constitutional doctrine of unenumerated powers could form a more satisfying fit than the questionable notion of an extra-constitutional authority.

Indeed, the national prerogative in international relations might extend to legislation not typically thought of as relating to foreign affairs. Part of foreign policy in today's information-rich world involves trying to maintain a positive international image. Congress might, for example, establish a federal bureau of Islamic-American affairs. Such a step might not fit easily in any specified power in Article I,<sup>121</sup> but it could be justified as useful in making a statement to the world that the United States is tolerant of the Islamic religion.<sup>122</sup> It has been suggested that the civil rights laws of the 1960s could have been better justified as serving the important national purpose of furthering the reputation of the United States as a land of opportunity and equality.<sup>123</sup> This was, after all, an era in which the United States appeared to be losing to the Communist bloc in the battle for the hearts and minds of world citizens, considering the harm that the war in Vietnam and racial unrest were causing to the United States' reputation.<sup>124</sup>

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120. See, e.g., *Zschernig v. Miller*, 389 U.S. 429, 432 (1968) (holding unconstitutional state law on inheritances by foreigners that involved state assessment of foreign governments); *In re World War II Era Japanese Forced Labor Litig.*, 164 F. Supp. 2d 1160, 1168, 1178 (N.D. Cal. 2001) (holding unconstitutional state law that sought to give compensation to persons forced to labor for imperial Japan in World War II). See also Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1847–48 (1998) (discussing *Zschernig* case).

121. One could, of course, develop an argument for linking almost any law to interstate commerce in some way. An Islamic-American community that feels closer to the American cultural mainstream is more likely to act productively in the American economy, for example. *But see* *United States v. Morrison*, 529 U.S. 598, 614 (2000) (criticizing argument that congressional assertion is sufficient to establish link to interstate commerce). The challenge for federalists remains, however, to distinguish between tolerable assertions of tenuous links, such as the assertion of the effect of medical marijuana use on the national market for illegal marijuana, which was accepted by the Court in *Gonzales v. Raich*, 125 S. Ct. 2195 (2005), and unacceptable assertions, such as those made in *Morrison*, *United States v. Lopez*, 514 U.S. 549 (1995), and *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001).

122. Relations between western and Islamic nations were so strained in 2006 that riots erupted in the Muslim world over Danish political cartoons depicting the Prophet Mohammed. See Alan Cowell, *West Coming to Grasp Wide Islamic Protests as Sign of Deep Gulf*, N.Y. TIMES, Feb. 8, 2006, at A10.

123. See Regan, *supra* note 101, at 602 (suggesting that Civil Rights Act of 1964 may have been justified by motivation of improving international relations in light of moral questions generated by racial discrimination in the South).

124. See Kevin Toolis, *Sending the Army into Ulster or B52s into Vietnam Did Not Win Hearts and Minds*, TIMES (London), Apr. 7, 2003, at 16 (“‘Hearts and minds’ comes from a speech given by President Lyndon Johnson at a dinner in Texas in May

The foreign affairs rationale leads to another “good reason” of broader notions of national purpose and leadership, even for domestic legislation. Consider, for example, a federal law banning the use of humiliating treatment of inmates in state and local prisons. Such a congressional act might be difficult, although not impossible, to shoe-horn into the interstate commerce power.<sup>125</sup> It would fit more comfortably, however, if justified as part of a national statement to convince the world of the United States’ moral leadership, particularly in the wake of the Abu Ghraib and Guantánamo Bay scandals and our self-proclaimed role as a vanguard of democracy.<sup>126</sup>

### *National Symbols and Future Ideals.*

In the realm of environmental law, an early federal wildlife statute, the Bald Eagle Protection Act of 1940,<sup>127</sup> made unlawful even the possession of bald eagle parts because the national symbol was on the verge of extinction.<sup>128</sup> The Act was upheld in a Commerce Clause challenge because of possible links that bald eagles might have to valuable commerce,<sup>129</sup> even though the commercial value of eagles obviously was not the primary rationale for the law. A more straightforward constitutional justification would be that Congress holds an unenumerated power to protect national symbols.<sup>130</sup>

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1965 as he sought to justify his disastrous decision to escalate US troop numbers in Vietnam.”).

125. Although the Eighth Amendment of the U.S. Constitution bans cruel and unusual punishment, *see* U.S. CONST. amend. VIII, it does not authorize the federal government to regulate state prisons.

126. *See, e.g.,* James Glanz, *Torture Is Often a Temptation and Almost Never Works*, N.Y. TIMES, May 9, 2004, at 4.5 (noting international criticism of Abu Ghraib and Guantánamo).

127. 16 U.S.C. § 668 (2000) (original version at Ch. 278, § 1, 54 Stat. 250 (1940)).

128. *See* S. REP. NO. 92-1159, at 1–3 (1972) (discussing amendment that would enhance penalties for violations of Act), *as reprinted in* 1972 U.S.C.C.A.N. 4285; DALE D. GOBLE & ERIC T. FREYFOGLE, WILDLIFE LAW 875–76 (2002).

129. *United States v. Bramble*, 103 F.3d 1475, 1477, 1481 (9th Cir. 1996) (“Extinction of the eagle would substantially affect interstate commerce by foreclosing any possibility of several types of commercial activity: future commerce in eagles or their parts; future interstate travel for the purpose of observing or studying eagles; or future commerce in beneficial products derived either from eagles or from analysis of their genetic material.”).

130. Compare this to the argument of former Chief Justice Rehnquist that the American flag deserves protection from burning, for reasons outside the Constitution: “For more than 200 years, the American flag has occupied a unique position as the symbol of our Nation, a uniqueness that justifies a governmental prohibition against flag burning . . . .” *Texas v. Johnson*, 491 U.S. 397, 422, (1989) (Rehnquist, J., dissenting). *See also id.* at 429–31, 435.

Another example of a national statement through wildlife law might be on the grounds of “biodiversity.” Some courts have used this rationale to justify 1973’s sweeping Endangered Species Act, which imposes restrictions on both public and private conduct in order to protect imperiled animals and plants,<sup>131</sup> even those which live in only one state, such as the arroyo toad.<sup>132</sup> While biodiversity might help future interstate commerce through use of genetic material—*some* species might be useful in creating medical and industrial products—a broader reason for biodiversity relates to “deep ecology,” the idea that species preservation is a worthwhile end in and of itself.<sup>133</sup> The eighteenth-century Framers could not have included biodiversity as a power of Congress because they did not understand the science of ecology; in fact, they probably did not even understand that human behavior could cause extinction.<sup>134</sup> Our modern knowledge of the relationship between human actions and the survival of other species would be another good reason to justify protection of wildlife through an unenumerated power of Congress.

#### IV.

##### APPLYING AN UNENUMERATED POWERS DOCTRINE

Recognizing that Congress holds unenumerated powers would not be a panacea to the tough questions of constitutional federalism. Such a doctrine would not dissolve the thorny problems of ferreting out the true or dominant motivations behind national legislation. Moreover, Congress would still hold an incentive to try to justify any statute it desired through the doctrine of unenumerated powers, as it has with the interstate commerce power. Nonetheless, I suggest that recognizing unenumerated powers would not enable Congress to enact a much wider range of statutes than it already has. The *political* values of federalism and state prerogative—Americans often prefer pol-

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131. 16 U.S.C. §§ 1531–1544 (2000).

132. *See, e.g.,* *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1064–67, 1077 n.20 (D.C. Cir. 2003) (discussing arroyo toad and noting biodiversity rationale without relying on it); *Nat’l Ass’n of Home Builders v. Babbitt*, 130 F.3d 1041, 1043, 1052–54 (D.C. Cir. 1997) (upholding application of ESA to Delhi Sands Flower-Loving Fly, which lives only in California, with biodiversity as one rationale).

133. For discussions of deep ecology, *see, e.g.,* PHILIP SHABECOFF, *A FIERCE GREEN FIRE: THE AMERICAN ENVIRONMENTAL MOVEMENT* 124 (1993); Keith Hirokawa, *Some Pragmatic Observations About Radical Critique in Environmental Law*, 21 *STAN. ENVTL. L.J.* 225, 239 (2002).

134. *See* EDWARD J. LARSON, *EVOLUTION: THE REMARKABLE HISTORY OF A SCIENTIFIC THEORY* 22–23 (2004) (noting that concept of extinction was emerging in 1800); SIMON WINCHESTER, *THE MAP THAT CHANGED THE WORLD* 39 (2000) (discussing dawning awareness of extinction in eighteenth and nineteenth centuries).

icy decisions to be made at the state or local level—would continue to serve as a restraint on Congress.<sup>135</sup>

Moreover, a doctrine of unenumerated powers holds a great advantage that, perhaps ironically, may serve the cause of federalism and state prerogative. This advantage is that a doctrine of unenumerated powers could have a reasoned *boundary*, as explained below, whereas the interstate Commerce Clause, as interpreted over the past 70 years, does not. If constitutional law were to replace its loosely circumscribed commerce power doctrine with a bounded law of unenumerated powers and a tightened Commerce Clause, the law might be able to develop a more stable basis for reserving certain types of legislation to the states.

A benefit of the doctrine it is that it could help strengthen the principle of federalism. If the constitutional pedestal for much of social legislation were shifted to the more stable support of unenumerated powers, the interstate commerce power could then be narrowed to its old breadth—that is, to justify only legislation whose *purpose* and application is to regulate or foster trade and travel across the states.<sup>136</sup> An example is the federal law that regulates automobile emissions.<sup>137</sup> Both automobiles and their pollution move across state lines with regularity; without a uniform national law, states would be encouraged to favor local industries with protectionist requirements.<sup>138</sup> Thus, the automotive emissions law fits within even a narrowed commerce power. By contrast, social legislation that bears only an attenuated relation to interstate commerce,<sup>139</sup> such as a law federalizing violent crimes,

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135. For a prominent example of a once-national legal regime that was significantly defederalized because of politics, consider the welfare reforms of 1996, in which states were given a far greater say in how to spend money in the Temporary Assistance for Needy Families program. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 U.S.C. §§ 601–617 (2000) (codifying and amending Pub. L. No. 104-193, §§ 101–116, 110 Stat. 2105 (1996)).

136. A narrowed commerce power could resemble the pre-New Deal commerce power. See cases cited *supra* note 45.

137. 42 U.S.C. § 7521 (2000) (Clean Air Act's national standards for motor vehicle emissions).

138. With limited exceptions, the Clean Air Act prohibits states from adopting their own emissions standards, which both facilitates production of automobiles that may be sold nationwide and avoids state protectionism. See 42 U.S.C. § 7543 (2000).

139. It is beyond the scope of this essay to determine precisely all the contours of a narrowed commerce power. The discredited cases of the early twentieth century, however, could provide some guidance. One means of limiting the commerce power would be to determine *purpose*: Was Congress motivated, in whole or in large part, by a desire to regulate or foster interstate commerce, or was the true motivation a desire to impose social judgments on local events? Another way would be to ask whether interstate commerce is a direct effect of the statute, which would be permissible, or merely an indirect one, which would not be permissible. See *Gonzales v. Raich*, 125

would have no justification under a narrowed commerce power; it would then be tested under the doctrine of unenumerated powers. If the law were not supported by a “good reason” for national regulation or some other justification for an unenumerated power, the law would be deemed an unconstitutional infringement on state prerogative. For a federal judiciary that appears to be increasingly skeptical of unfettered national power, the doctrine might form an intellectually more solid basis for the revival of constitutional federalism.

Nationalists in the twentieth century faced the dilemma that the Constitution did not explicitly authorize Congress to enact the sweep of legislation that they saw as necessary for the modern nation. If the courts had continued to enforce their early-twentieth-century Commerce Clause doctrine, most of modern social legislation—from employment law to civil rights statutes to environmental legislation—would have been snuffed out in infancy. But nationalism eventually prevailed. An original rationale for the interstate commerce power, the idea that only the federal government could effectively police trade among the economically distrustful states, had little or nothing to do with the modern impulses for national social legislation. The nationalist solution to the dilemma was to give lip service to the limitations of the Commerce Clause through the supposed restriction that law must “affect” interstate trade, while effectively deferring to nearly every congressional assertion of authority.<sup>140</sup> As a result, the Commerce Clause became nearly meaningless as a restriction on national power.

The doctrine of unenumerated powers, by contrast, would be a far better fit for the modern impulses toward nationalist legislation. Instead of being forced to conjure up links to interstate commerce, Congress could be more honest. If the legislature decided, for exam-

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S. Ct. 2195, 2231–34 (2005) (Thomas, J., dissenting) (discussing requirement of “directness” between permissible end and means and other ways of limiting commerce power to preserve state prerogative in fields such as health and safety). I believe that a reliance on “tradition” is a dead end. See Paul Boudreaux, *Federalism and the Contrivances of Public Law*, 77 ST. JOHN’S L. REV. 523, 543–47 (2003) (discussing *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 174 (2001), and its reliance on tradition to narrow scope of Clean Water Act). I also believe that *Wickard v. Filburn*, 317 U.S. 111, 128–29 (1942), in which the sole purpose of Congress was to control the national price of wheat—unlike the obvious moral and social issues behind the anti-marijuana law in *Gonzales*—was a justifiable regulation under the commerce power.

140. Congress may regulate activities that “substantially affect” interstate commerce. *United States v. Morrison*, 529 U.S. 598, 609 (2000). The Court has never clarified what makes an effect “substantial.” Moreover, courts are required to defer to a congressional finding of such an effect. See *supra* note 17 and accompanying text.

ple, that regulating a particular activity is preferable at the federal level because of a belief that states are discouraged from regulating, then this “good reason” would form the honest basis for an unenumerated power of Congress. With a doctrine of unenumerated powers, there would be a convergence between the social justification of the legislation and the constitutional foundation. Such honesty could help cement both judicial and popular support for national legislation in the twenty-first century.

Here are two examples of how a revised law of congressional powers could work. First, reconsider the constitutional scrutiny of the Clean Water Act,<sup>141</sup> which the Supreme Court in 2001 narrowed in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*.<sup>142</sup> There, the federal government argued that application of the water law to a single-state pond was justified because it assisted migratory birds, which rely on such ponds while moving across state lines.<sup>143</sup> The Court held, however, that the law cannot regulate conduct at “isolated” water bodies because such regulation would come too close to the constitutional limits of the Commerce Clause, considering the “tradition” of state and local control of land and water use.<sup>144</sup> But reliance on tradition is an inherently weak and unstable boundary for the commerce power, as shown a few years later in *Gonzales v. Raich*.<sup>145</sup> Thus, the reasoning in *SWANCC* serves as a poor guide for future cases.

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141. 33 U.S.C. §§ 1251–1387 (2000).

142. 531 U.S. 159 (2001). The issue in *SWANCC* was whether Congress could constitutionally regulate, through the Clean Water Act, the filling in of wetlands and other small water bodies, such as the Illinois pond at issue in the case, that are isolated from interstate watercourses. *See id.* at 162–63. A federal regulatory agency, the Army Corps of Engineers, decided whether a particular water body was covered or not covered by the Act. *See id.* at 166–71 (discussing the development of Army Corps’ policies toward Clean Water Act’s coverage of “navigable waters,” 33 U.S.C. § 1362(7) (2000), including Army Corps’ rather vague regulatory definition, 33 C.F.R. § 328.3 (2005), and its more precise but less formal “migratory bird rule,” 51 Fed. Reg. 41,217 (Nov. 13, 1986)). A plurality of the Supreme Court further narrowed the statutory interpretation of “navigable waters” in *Rapanos v. United States*, 126 S. Ct. 2208, 2226–27 (2006).

143. *See SWANCC*, 531 U.S. at 164–65 (citing evidence that pond was used by migratory birds).

144. *See id.* at 174 (relying on supposed history of state control of land and water use to narrow scope of Clean Water Act to avoid commerce power issue).

145. 125 S. Ct. 2195, 2215 (2005) (upholding federal outlawing of marijuana and preemption of state laws). The tradition of state control over health issues, crop regulation, drug regulation, and issues of social morality played no role in the Supreme Court’s conclusion that the federal government could pre-empt a state’s decision to legalize marijuana for medical use. *See id.* I have argued that tradition cannot succeed as a dividing line between national and state authority. *See Boudreaux, supra* note 139, at 543–48.

With a revised constitutional law, the Commerce Clause scrutiny would have been more focused. The government would have been required to show that the law was enacted for the *purpose* of regulating commerce across state borders and that the application did regulate interstate commerce as Congress anticipated. Perhaps the protection of migratory birds would fit under this narrowed test. Even if it did not, however, the government could nonetheless prevail by relying on an unenumerated power of Congress. Because migratory birds move from state to state, it is unlikely that one state's efforts to protect them would be wholly successful; there is a "good reason" to protect the birds at a national level.<sup>146</sup>

For another example of a recent constitutional controversy, reconsider 2005's marijuana litigation, *Gonzales v. Raich*.<sup>147</sup> The Supreme Court in *Raich* concluded that the federal anti-marijuana statute, which overrode California's partial legalization for medical purposes, was constitutional because it *might* have the effect of dampening the national market for illegal marijuana.<sup>148</sup> Under a tighter Commerce Clause inquiry, however, the Court would scrutinize whether the *purpose* of Congress's law was primarily the social or moral implications of marijuana use, which of course would be invalid bases under the Commerce Clause or, conversely, the economic ef-

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146. An economist might say that states are discouraged from protecting migratory birds because the benefits of the regulation are not necessarily "internalized" to the state enacting the protection; each state knows that its actions might end up benefiting *another* state when the birds migrate.

In other environmental cases, the analysis might not favor the federal government so readily. Consider the federal hazardous waste cleanup law, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601–9675 (2000), which regulates the cleanup of even small spills that have no apparent interstate connection. See 42 U.S.C. § 9604(a)(1) (the federal government may order cleanup action whenever there is "substantial danger to the public health or welfare," regardless of interstate concerns). So far, the appellate courts have upheld the Act against Commerce Clause challenges. See *Freier v. Westinghouse Elec. Corp.*, 303 F.3d 176, 203 (2d Cir. 2002) ("Clearly, CERCLA itself was . . . within Congress's powers under the Commerce Clause."); *United States v. Olin Corp.*, 107 F.3d 1506, 1511 (11th Cir. 1997) ("[A]s applied in this case, CERCLA constitutes a permissible exercise of Congress's authority under the Commerce Clause."). Under a revised constitutional analysis, however, if there were no "good reason" to justify national regulation, such as a discouragement effect upon state governments (which in reality might indeed exist, of course), then the statute might be revealed as simply a social welfare law, at least as applied to intrastate spills. If there were no justification under a narrowed commerce power or under an enumerated power (and again, I believe there might be a justification), then the federal law could not be applied to such intrastate spills.

147. 125 S. Ct. 2195 (2005).

148. See *id.* at 2206–07.

fects on the illegal drug trade.<sup>149</sup> As courts before 1937 might have reasoned, Congress's desire to regulate marijuana for social policy reasons is not a sufficient ground for federal intervention. If these commerce power supports failed, then the national law could be justified only through a probably fruitless search for an unenumerated power. No states are discouraged from adopting tough anti-marijuana laws out of fear of pushing business elsewhere, and it seems difficult to argue that a law overriding local regulation of medical marijuana serves any great national statement. There may be no "good reason" for a federal law on marijuana use, except for the desire of Congress to impose its social or moral values on the entire nation. This would be an infringement on the prerogative of the states. Unlike the hit-and-miss federalism of "tradition" proffered by the Rehnquist Court, a revised constitutional law with unenumerated powers could form a more principled way of reserving some purely social policy judgments to the states.

## V.

### CONCLUSION

At a minimum, the proposal for a doctrine of unenumerated powers offers a third option for determining the powers of Congress. The first two options proved to be intellectual dead ends in the twentieth century. The first option, the pre-1937 law of a highly restrictive commerce power, simply does not match the modern nation's desire for social legislation, especially in fields in which we do not trust the states to do an adequate job. The second option, the anything-can-be-justified commerce power, also is unsatisfactory, in large part because it is disingenuous, and disingenuousness cannot permanently support constitutional law, especially in an era in which the courts have become more questioning of a broad commerce power. A law of unenumerated powers, by contrast, would have its share of doctrinal problems, but it nevertheless holds the promise of a more stable, more honest, and more responsive law of congressional powers than either of the other two options.

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149. Perhaps the earliest Supreme Court statement of the impermissibility of national legislation *motivated* by a desire to regulate matters other than interstate commerce was made by dissenting Chief Justice Fuller in the Lottery Case. *Champion v. Ames*, 188 U.S. 321 (1903); *see also supra* note 45. Subsequent decisions before 1937 tiptoed around the thorny issue of discerning motivation, but the Court seemed to make a finding as to motivation in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 550 (1935) ("the attempt . . . to fix the hours and wages of employees of defendants in their intrastate business was not a valid exercise of federal power").

A doctrine of unenumerated powers is, of course, unlikely to be welcomed with open arms by either end of the spectrum in the nationalist-federalist debate. On the nationalist side, advocates of congressional power might see little need for a doctrine that would restrict the cherished commerce power, which after *Gonzales v. Raich* seems once again to provide Congress with nearly unfettered authority to regulate in nearly every corner of American society. On the state prerogative side, federalists might instinctively recoil at the prospect of a new doctrine to give the national government new powers. But without a reformulation of congressional power to enact social legislation, the current state of the constitutional law is unlikely to remain secure in front of a more skeptical judiciary. The extraordinary breadth of Congress's social policy-making cannot remain forever balanced on the flimsy support of the interstate commerce power. For federalists, a doctrine of unenumerated powers might offer some boundary, however small, against the national usurpation of state prerogative. For nationalists, shifting much of social legislation from the commerce power to unenumerated congressional powers might provide more rational justifications for such legislation and, just as significantly, would allow for more honesty in constitutional law.

