Federalism and the Contrivances of Public Law

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INTRODUCTION

The specter of federalism is stalking public law. Through its recent resuscitation of constitutional limitations on Congress's power to legislate under the Commerce Clause, the United States Supreme Court appears amenable, for the first time in generations, to striking down a range of public welfare laws. Most recently, the Rehnquist Court wielded the blunt side of its federalist ax in **Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers (SWANCC)** to strike down on statutory grounds a major component of the Federal Clean Water Act. Although SWANCC has been underestimated in the shadow of the more straightforward Commerce Clause holdings in **United States v. Lopez**, which overturned a minor federal gun law, and **United States v. Morrison**, which struck down a limited federal civil statute on violence against women, SWANCC is arguably more significant in that it marked the first time that a major federal statutory regime felt the sting of the Rehnquist Court's restrictive new federalism.

Some advocates of broad national power comfort themselves with the thought that the Rehnquist Court is finished with its
new federalism, in part because the Court in SWANCC technically stopped just short of reaching the constitutional issue.\(^8\) By contrast, I maintain that the Rehnquist Court has positioned itself to take aim at a range of public welfare statutes, from environmental legislation to laws outlawing race and sex discrimination.

To understand fully the bases and implications of the Rehnquist Court's new federalism, it is necessary to acknowledge and understand what I call the contrivances at issue in many public welfare laws and their judicial review. The first two of the four contrivances concern the federal government's creation of statutory regimes. The contrivance of motivation arises when the government concocts arguments that its public welfare laws, such as the water pollution law in SWANCC\(^9\) or statutes against racial discrimination,\(^10\) somehow fall within the regulation of interstate commerce, as opposed to being simply vindications of modern conceptions of a fair and just society. Relatedly, the contrivance of construction arises when zealous drafters or agency administrators expand unnaturally the scope of a statutory regime. These contrivances raise the ire of federalist jurists, as shown by the Rehnquist Court's disapproval in SWANCC.

The third and fourth contrivances arise from the Supreme Court's federalist jurisprudence. The Rehnquist Court's new federalism threatens—or promises, if you prefer—to return constitutional law to the so-called dual federalism of the early twentieth century,\(^11\) in which certain realms of human activity were held to be off-limits to national legislation, regardless of potential links between the law and interstate commerce.\(^12\) A

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8 Professor Calvin Massey, for example, has described Lopez and Morrison as "abberational and anomalous." CALVIN MASSEY, AMERICAN CONSTITUTIONAL LAW 183 (2001).


11 See, e.g., Hammer v. Dagenhart, 247 U.S. 251, 276 (1918) (concluding that Congress cannot regulate child labor because employment is "purely local in its character").

12 Before 1937, the Supreme Court struck down much, but not all, of the
full-scale revival of this doctrine would imperil not only much of federal environmental law but also anti-discrimination law, labor standards, and much of what progressives think of as the essentials of social legislation. The fundamental flaw in the Rehnquist Court's new jurisprudence is that so far it is only a contrivance of dual federalism, in which the line between national and state realms is drawn merely by the Court's perception of tradition, which makes little sense as a matter of logic, precedent, or history.

Finally, the contrivance of libertarianism arises from the federalist assumption that constraining the national government will result in more freedom. Although the role of libertarianism in the new federalism might seem obvious, it has failed to achieve the prominence that it deserves in either the jurisprudence or in the commentary—in large part because advocacy of libertarianism is difficult to justify as a principle of constitutional interpretation.

Explicit recognition of the contrivances surrounding federalism may lead to better statutory construction and better constitutional jurisprudence. In this Article, I focus on two fields of social legislation—environmental laws and antidiscrimination statutes—because they are among the broadest of today's public welfare regimes. Acknowledging the vulnerabilities of statutory creation would assist Congress and agencies in drafting and administering more stable and ultimately more effective public laws. The conclusion of this Article proposes some potential solutions to the current federalist quagmire. The solutions range from relatively modest ideas, such as reworking agency interpretations to better explain the links to interstate commerce, to bolder proposals, such as explicitly grounding congressional power in unenumerated powers or a constitutional amendment. These new paths for nationalism would help build a more satisfying and sustainable constitutional foundation for the nation's public welfare laws.


I. BOTH A UNION AND A NATION:
FEDERALISM VERSUS NATIONALISM

The Supreme Court has held for nearly two centuries that Congress holds only those powers specifically granted to it under the Constitution; the constitutional structure of the United States creates both a single nation and a union of sovereign states. During the twentieth century, however, the Court honored the limitations on central government more in theory than in practice. From laws regulating sexual liaisons to occupational safety legislation to the landscaping of closed strip-mines, Congress has enacted social legislation that has little to do with dictionary or commonsense notions of "commerce," or that which is interstate. It was once, and is now again, the challenge of the central government to fit the range of congressional legislation within the supposed confines of this constitutional power. Advocates of both states-oriented federalism and what I call nationalism—to which my own inclinations tend—have marshaled arguments of political theory that are worth reassessing before moving to today's jurisprudence.


15 Because the constitutional structure of the United States creates both a single nation and a union of sovereign states, the appropriate division of power between the national government and the states has been the main policy debate in American history. The most shattering manifestation of this debate, the American Civil War, resulted in the most significant advance for the national cause. As many have stated, perhaps more symbolically than accurately, this war changed the United States from an "are" to an "is." See, e.g., Susan A. Ehrlich, The Increasing Federalization of Crime, 32 ARIZ. ST. L. J. 825, 831 & n.40 (2000).

16 See Hoke v. United States, 227 U.S. 308 (1913) (upholding law that regulated interstate prostitution).


19 In everyday speech it is common to refer to the government based in Washington as the "federal" government; however, because the advocates of limited national power are today called "federalists," in this Article, I use the less confusing term "national government" and "nationalists" to refer to advocates of resting authority in Congress and the President.
A. Federalism

There should be no doubt that the eighteenth-century framers of the United States Constitution believed in a division of powers between the national government and those of the states. This system, which today we call federalism, remains the building block of how we think about government in the United States. Nonetheless, the drafters probably would be astounded by the twentieth century's explosion in the reach of the central government. From pollution laws that tell manufacturers how to build factories to anti-discrimination statutes that prescribe the grounds on which an employer can hire and fire, today's national laws cover a wide territory, especially in the spheres of commercial and business activity. This is not to say that state and local governments have been eclipsed. For many of life's most common personal activities—going to school, buying a house, marrying, and raising a family—one still encounters state law more often than national. Indeed, a typical citizen's most frequent day-to-day encounter with the law—the highway speed limits—has moved in the last decade from being largely a federal command to being almost exclusively a state and local one. In fact, the past twenty years

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20 See, e.g., The Federalist No. 45, at 292–93 (James Madison) (Clinton Rossiter ed., 1961). The "Federalist Papers" were written in large part to convince skeptics that the Constitution drafted by the 1787 Convention would not grant the national government extreme power at the expense of the states. See generally George W. Carey & James McClellan, Introduction to The Federalist, at xliii–liv (George W. Carey and James McClellan eds., 2001) (explaining the history behind the "Federalist Papers").

21 It is ironic that today's supporters of states' rights are called "federalists." In the early days of the nation, the political party of John Adams, Alexander Hamilton, and John Marshall, which advocated stronger powers for the national government, was dubbed the "Federalist" Party. The party of Thomas Jefferson and James Madison, who distrusted central power, was called the "Anti-Federalist," "Republican" or "Republican-Democratic" Party. See Charles A. Beard & Mary R. Beard, A Basic History of the United States 163–70 (1944). Professor James Simon has recently published an entertaining book explaining how John Marshall and the Federalists/nationalists won most of the key battles. See generally James F. Simon, What Kind of Nation (2002).

22 See, e.g., Clean Air Act, 42 U.S.C. §§ 7411, 7503 (2000) (detailing new source technology standards for new factories under the Clean Air Act, which include the requirement that government authorities must approve construction plans before the factory is built).


24 See Editorial, Public Pulse, Omaha World-Herald, May 11, 2002, at 10B
have witnessed a revival in the idea of state authority, at least in political rhetoric.\textsuperscript{25}

To judge from the recent judicial rhetoric, it would seem apocalyptic that the national government could usurp responsibility for fields such as education or family law.\textsuperscript{26} Yet for all the hand-wringing over excessive nationalism, little in political science compels a reservation of powers to the states. Some affluent nations give their national government nearly absolute authority,\textsuperscript{27} even if this national government in turn voluntarily delegates administration to the provinces, just as United States agencies such as the National Park Service delegate most site-specific decisions to local managers.\textsuperscript{28} and American states typically hand over authority to counties and cities for matters such as land use and policing.\textsuperscript{29} There is no inherent reason why historically local matters, such as education or family law, could not be handled well by the national government. Indeed, for educational matters such as standardized testing and for family matters such as abortion rights, state prerogatives have yielded to national control, largely because many citizens believe that such matters are too important to be left to the diverse views of the states.\textsuperscript{30}


\textsuperscript{26} See United States v. Morrison, 529 U.S. 598, 615–16 (2000) (raising the specter that without limits, the Commerce Clause could allow the federal government to regulate family law and other areas of traditional state regulation); United States v. Lopez, 514 U.S. 549, 564 (1995) (same).


\textsuperscript{28} See generally DAN SHOLLY, GUARDIANS OF YELLOWSTONE (1991) (discussing the local discretionary authority of National Park superintendents).

\textsuperscript{29} See, e.g., DAVID L. CALLIES ET AL., LAND USE 3, 23–24, 36–40 (3d ed. 1999) (discussing the authorization by states or localities to adopt their own zoning laws pursuant to local police power).

Let us consider some of the leading arguments in favor of a federalist system. First, states may serve as laboratories for governmental experimentation. Lessons learned from one state's experience can be compared with those of other states. Through a trial-and-error process of thesis and antithesis, a happy synthesis can be achieved. Although states do use the trial-and-error method, it is less clear whether states compare their approaches with those of other states in any systematic manner. A recent example of successful state programs that garnered nationwide attention was the so-called welfare-to-work public assistance programs that appeared to be extraordinarily successful in the 1990s. The kicker to the story, however, is that the most notable student of this state experiment was the national government itself, which radically overhauled the national welfare financial assistance program in 1996.

A second argument for a federal system is that state authority is more likely to foster democratic participation. Citizens are more likely able to speak out at a civic meeting, shake the hand of a legislator, or visit an administrative hearing in their state capital than in Washington. Skeptics might point out, of course, that closeness to constituency also leaves state

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31 The most destructive and traumatic experience in American history, the Civil War, was fought, at least in southern political rhetoric, for the Confederate States of America to pursue their "states' rights" without interference from the national government. As was clear to many northerners, of course, the lone "state right" over which the southern states' citizens would risk their lives was that of slavery of African Americans. In a recent study, Professor William C. Davis has explained that the Confederacy in practice gave few rights to its states during its sorry four-year existence. See, e.g., WILLIAM C. DAVIS, LOOK AWAY! 323-40 (2002).


33 See Lopez, 514 U.S. at 581–83 (Kennedy, J., concurring).


36 See, e.g., DANIEL FARBER ET AL., CONSTITUTIONAL LAW 764-65 (1998). Farber, Frickey, and Eskridge refer to this idea as a republican benefit, but I believe that democracy is a more apt term.
governments closer to business interests, on which they may rely more heavily than Congress for financial and political support, especially in places with a nondiversified economy—the so called company town syndrome.\(^{37}\) For all the opportunity for corruption in Congress, city mayors have had an even more unsavory record,\(^{38}\) but this may be a criticism more of American republicanism in general than of federalism per se.

The third and fourth supposed benefits of federalism together form, in my opinion, the chief impetus to the Rehnquist Court's revived federalism. Federalism enables variations in local opinion to be reflected in the varied state laws.\(^{39}\) If a majority of citizens of Kansas hold views that differ from the views of a majority in Nebraska concerning, for example, protections of ecologically valuable grasslands or a right against discrimination based on sexual orientation, federalism allows for expression of these local variations, instead of having all issues subject to the views of a majority of the nation as a whole. In theory, therefore, federalism allows law to reflect the views of states that hold the minority position on a particular issue, whether involving California's unusually tough land-use restrictions\(^{40}\) or Virginia's retention of the old doctrine of strict contributory negligence in tort law.\(^{41}\) A nationalist retort is that variations among the states cause citizens in a minority of states to receive fewer rights than they might under a nationalist system. Criminal defendants who are unlucky enough to find themselves in the Texas court system are without some procedural protections that they would enjoy in the federal system,\(^{42}\) while beachfront landowners in Oregon find that they


\(^{39}\) See, e.g., *FARBER ET AL.*, supra note 36, at 764-65.


\(^{41}\) See, e.g., *Sawyer v. Comerci*, 563 S.E.2d 748, 752 (Va. 2002) (citing Virginia's adherence to contributory negligence).

\(^{42}\) See, e.g., Bob Herbert, *Defending the Status Quo*, N.Y. TIMES, June 17, 1999, at A31 (summarizing the variety of difficulties facing criminal defendants in the Texas criminal justice system).
must allow the public to walk along the beach, even above the high-tide line, unlike beachfront owners in most other states.\textsuperscript{43} Depending on one's views about the relative merits of protecting either national minority variations or local minority rights, it seems unwise to judge either federalism or nationalism as being more protective of minority viewpoints.\textsuperscript{44}

From the examples above, it should be plain that in some instances, a federalist system allows for more regulation than nationalism would and sometimes less. Nonetheless, commentators from Constitutional framers such as James Madison to today's free-market advocates\textsuperscript{45} have linked federalism with freedom or, in today's political terminology, libertarianism. Because libertarianism forms such an important foundation for today's thinking about federalism, I devote Part IV of this Article to discussing what I call the contrivance of libertarianism in modern federalist jurisprudence.

B. Nationalism

Having surveyed briefly some of the strongest arguments for federalism,\textsuperscript{46} I turn to nationalism. Some advocates of broad national power contend that the supposed benefits of federalism no longer apply to today's political and economic system.\textsuperscript{47} Because of the nationwide scope of today's commercial markets and social activity, nationalists argue that a tremendous range of laws may properly be characterized as regulation of interstate commerce.\textsuperscript{48} Professor Mark Tushnet, for one, once argued


\textsuperscript{44} See, e.g., THE FEDERALIST NO. 10 (James Madison) (recognizing the unavoidable existence of minority opinions and discussing the pitfalls associated with a republican form of government).

\textsuperscript{45} See, e.g., THE FEDERALIST NO. 51 (James Madison); see also Richard Epstein, The Proper Scope of the Commerce Power, 73 VA. L. REV. 1387, 1452–54 (1987).

\textsuperscript{46} The lists here are not meant to be exclusive; no doubt there are other arguments. One of the most annoying habits of legal argumentation is to confine an opponent’s arguments to a single or limited position and then seek to defeat it without acknowledging other points. This is a variant of the “straw man” error.

\textsuperscript{47} See, e.g., Rubin & Feeley, supra note 25, at 951–52 (concluding that states should serve the purpose of merely being administrative units of the national government).

\textsuperscript{48} See id.
provocatively that “everything is interstate commerce.” For some nationalists, the limitation of the commerce power may be likened to an annoying little dog that nips at the heels of Congress—the national government cannot upset bystanders by kicking the dog in the mouth, of course, but it must regularly brush the mutt aside if Congress is to be able to march toward its important work of regulating national justice.

A related nationalist argument observes that it is often more effective for the national government to regulate an area of concern. Put succinctly, “national problems require[] national responses.” In a widely cited article published after Lopez, Professor Donald H. Regan argued that the constitutional commerce power should be interpreted to allow Congress to regulate whenever it is in the “general interests of the union” to do so—a conception that in some instances would extend the Commerce Clause beyond the Supreme Court’s pre-Lopez holdings. Regan borrowed his term from a Virginia Resolution that was initially adopted by the United States Constitutional Convention of 1787 before the Convention finally settled on the enumerated powers listed in Article I, including the Commerce Clause. By the term “general interests of the union,” however, Regan did not mean that Congress should be free to legislate whenever it feels that the interests of the nation would be served. Rather, he meant to refer to situations when there is “some reason why we cannot leave the matter to the states.” Because states are “separately incompetent” to conduct foreign affairs, for example, Congress should be permitted to act

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49 Mark Tushnet, Rethinking the Dormant Commerce Clause, 1979 Wis. L. Rev. 125, 148.
50 See, e.g., Epstein, supra note 45, at 1443 (characterizing New Deal attitudes); see also A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 528 (1935) (stating the nationalist argument that “[e]xtraordinary conditions may call for extraordinary remedies”).
52 Id. Professor Regan pointed out that his proposal does not call for an unlimited concentration of national power and that in some instances, where the practical arguments for national power are lacking, his proposal would reserve governmental power with the states. See id. at 567, 571.
53 Id. at 555, 556 n.4 (citing Notes of Debates in the Federal Convention of 1787 Reported by James Madison 380 (W.W. Norton & Co. 1966)).
54 Id. at 555.
whenever a matter seriously implicates foreign relations. Regan even suggested that the Civil Rights Act of 1964 was justified by its role in improving relations with foreign nations that were assessing the relative moral stances of the United States and the Soviet Union during the Cold War—an argument that I think holds at least as much power as the strained interstate commerce argument that the Supreme Court accepted in *Katzenbach v. McClung*, which upheld key aspects of the statute.

A fundamental problem with practical proposals for nationalism, such as Regan's, is that they are difficult to reconcile with the legal text of the Constitution. It might have been a fine idea to advise James Madison and the conventioneers of 1787 to give Congress the power to regulate for the "general interests of the union," but the fact is that the drafters did not choose the language of the Virginia Resolution; they chose instead to authorize regulation of "[c]ommerce ... among the several States" and other enumerated powers. For those who rely on the text to start constitutional interpretation, the practical approach seems at odds with the words of the document. To the extent, however, that a pragmatic approach might garner widespread support, Regan's suggestion might form the basis for a constitutional change, an idea to which I return at the end of this Article.

Moreover, many nationalist proposals do not address adequately a criticism that oozes from the Rehnquist Court's opinions—a skepticism of the national government's assertions of links between its laws and interstate commerce. For example, when presented in *Morrison* with explicit congressional findings that violence against women hindered interstate commerce, the Court rejected deference to the legislature: "If accepted, [the government's] reasoning would allow Congress to regulate any

55 Id. at 555–56, 583–86 (identifying the regulation of wheat prices and the establishment of a worker minimum wage as other matters in which the states are "separately incompetent").
57 See Regan, supra note 51, at 602.
59 See id. at 304–05.
60 U.S. CONST. art. I, § 8.
crime" and "might... obliterate the Constitution's distinction between national and local authority."61

Speaking of distrust, perhaps the most commonly expressed nationalist argument is that states cannot be entrusted to enact worthy social legislation because of the pressures of unhealthy competition with other states. Environmentalists often call it a "race to the bottom," in which states compete with each other for lax regulation of business, knowing that businesses are likely to be more mobile than labor.62 An economic variant is called the prisoner's dilemma, in which multiple criminal defendants—analogs to the states—would like to cooperate to achieve a mutually beneficial result but are prevented from doing so and end up working against their own interests out of fear that one is going to sell out the others.63 The result is that worthy state social legislation is defeated. Tied to the railroad tracks by dastardly competition, the states can be rescued only by the federal government, arriving on a white horse named the Commerce Clause.64

There is considerable skepticism among economists, particularly those of the libertarian bent, however, as to the reality and extent of the supposedly destructive race-to-the-bottom.65 Because environmental protection or consumer safety

61 United States v. Morrison, 529 U.S. 598, 615 (2000). Similarly, the Court in SWANCC dismissed almost offhandedly the government's argument for deference to administrative interpretations under the Chevron doctrine. 531 U.S. at 172 (citing Chevron U.S.A. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984)). "Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result," the Court in SWANCC sniffed. Id.

62 See Kirsten H. Engel, State Environmental Standard-Setting: Is There a "Race" and is it "To the Bottom"?, 48 HASTINGS L.J. 271, 375 (1997) (concluding that many state legislators are fearful of discouraging business); see also PAUL KANTOR, THE DEPENDENT CITY 172-73 (1988) (arguing that impoverished city governments must incessantly seek to please both business and its state government in order to attract dollars).

63 See Regan, supra note 51, at 583-86; see also PAUL A. SAMUELSON, ECONOMICS 506-07 (10th ed. 1976). A variant in land use is the "tragedy of the commons." See Garrett Hardin, The Tragedy of the Commons, 162 SCIENCE 1243, 1243-44 (1968).

64 See Regan, supra note 51, at 583-86 (arguing that only the federal government can allow states to achieve their regulatory goals when faced with a prisoner's dilemma).

65 See 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
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laws are popular with voters, the skeptics maintain, fear of competition is little reason for states to refrain from enacting worthy social legislation.\(^66\) There should be no doubt, of course, that companies often seek out limited regulation and low wages as part of their choice of where to locate.\(^67\) Regardless of the proof of the theory, however, it has made its way to the front of the legal arguments for nationalism. In SWANCC, for example, the four-justice dissent written by Justice Stevens asserted that broad federal regulation of the nation’s waters was necessary to avoid “destructive interstate competition.”\(^68\) This term was borrowed from a Burger Court opinion upholding national regulation of strip-mining practices,\(^69\) and it has been repeated in appellate opinions rejecting federalist challenges to application of the Endangered Species Act\(^70\) to species that are found in only one state.\(^71\)

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'race-to-the-bottom' in environmental regulation today’); see also Engel, supra note 62, at 353–54 (concluding that as a general matter businessmen do not follow deregulation, but many legislators think that they do).

\(^66\) See Adler, supra note 65, at 207–08.

\(^67\) See, e.g., Mary Jordan, Mexican Workers Pay for Success; With Labor Costs Rising, Factories Depart for Asia, WASH. POST, June 20, 2002, at A1 (reporting that rising wages in Mexico are leading some companies to relocate jobs to lower-wage countries in Asia).

\(^68\) SWANCC, 531 U.S. 159, 196 (2001) (Stevens, J., dissenting) (quoting Hodel v. Va. Surface Mining & Reclamation Ass’n, 452 U.S. 264, 282 (1981)). Professor Adler has rather easily dismantled Stevens’ citation and logic in many areas, which I take as evidence that Justices and their clerks should do their homework before delving into economic analysis. See Adler, supra note 65, at 222–25.


\(^71\) In Nat’l Ass’n of Home Builders v. Babbitt, 130 F.3d 1041 (D.C. Cir. 1997), the plaintiff argued that national protection of the endangered delhi sands flower-loving fly, an insect that metamorphoses from larva to pupa to fly only in certain sands of southern California and which is used for no current commercial purpose, could not be considered regulation of interstate commerce. The D.C. Court rejected the contention, holding in part that “destructive interstate competition,” which is “likely to produce destructive results, such as elimination of endangered species’ habitat, environmental degradation, or exploitation of labor, can be regulated by Congress.” Id. at 1052 & n.10.

More recently, in a case involving a more charismatic megafauna, the red wolf, which has been reintroduced by the national government as an endangered species in North Carolina, the Court of Appeals for the Fourth Circuit upheld application of the ESA because “Congress may take cognizance of this [competitive] dynamic and arrest the ‘race to the bottom’ in order to prevent interstate competition whose overall effect would damage the quality of the national environment.” Gibbs v. Babbitt, 214 F.3d 483, 501 (4th Cir. 2000).
Nationalism also ensures that extremist state positions, especially on matters such as individual rights, are less likely to hold sway. The victories of nationalism over southern states in the 1860s and 1960s freed African Americans first from slavery and then from second-class citizenship under state laws that were inconsistent with the moral views of the majority.\textsuperscript{72} Finally, for those who question government more because of its gaps in competence than for its power,\textsuperscript{73} national government may be preferable because it can draw on the ideas and analyses of interested persons throughout the entire nation, not just one state.\textsuperscript{74} While neither James Madison nor current federalist rhetoric acknowledges them, efficiency and simplicity are often fostered when citizens have only one level of government with which to deal.\textsuperscript{75}

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The Endangered Species Act is an especially rich topic in which to develop Commerce Clause and federalist arguments. Perhaps the most intriguing argument is the nationalist assertion that protection of each endangered species fosters interstate commerce because of the interest in protecting biodiversity. Because each species contains unique genetic or biological material, it is possible that each species may be used for practical purposes at some time in the future by science or industry. Gibbs, 214 F.3d at 496; Nat'l Ass'n of Home Builders, 130 F.3d at 1052–53. There have been a number of instances in which material from rare species has been put to dramatic practical use, such as the Madagascar's rosy periwinkle's use in medicine. See, e.g., EDWARD O. WILSON, THE DIVERSITY OF LIFE 283–85 (1992). Once a species goes extinct, its unique biology can never be recaptured. See DAVID QUAMMEN, THE SONG OF THE DODO 605–25 (1996). Other commentators have questioned the scientific validity of the astonishingly simple and elegant biodiversity argument. See CHARLES C. MANN & MARTIN L. PLUMMER, NOAH'S CHOICE 125–38 (1995).

\textsuperscript{72} See generally TAYLOR BRANCH, PARTING THE WATERS (1988) (giving a history of the civil rights movement of the 1950s and 1960s).

\textsuperscript{73} See, e.g., DeShaney v. Winnebago County Soc. Servs. Dep't, 489 U.S. 189, 213 (1989) (Blackmun, J., dissenting) (exclaiming "Poor Joshua!" to the Court's holding that the government's failure to take action in a perceived child abuse case was not a violation of due process rights); William A. Owens & Stanley A. Weiss, An Indefensible Military Budget, N.Y. TIMES, Feb. 7, 2002, at A29 (referring to the scandal of $700 military toilet seats).

\textsuperscript{74} Although bureaucracies in the national government may prove frustrating, they are often more efficient than those at the state or local level, as I think every year when I compare my Internal Revenue Service form 1040—which I find to be a model of clarity, considering the complexity of the tax code—with the more mystifying state income tax forms.

\textsuperscript{75} See, e.g., Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 523–25 (1959) (showing the difficulties in having varying state laws for things such as mud flaps on trucks).
II. THE CONTRIVANCE OF DUAL FEDERALISM

The Rehnquist Court's restrictions on the commerce power have flummoxed many observers. Professor Calvin Massey has called Lopez and Morrison "aberrational and anomalous," and he has predicted that Congress can avoid future federalist difficulties with the Court simply by better draftsmanship. Some commentators have criticized the Court's decisions for being as ad hoc and as unworkable as the we-know-it-when-we-see-it obscenity doctrine of the 1960s and 1970s. Others assure us that nationalism need not worry about extreme changes as a result of the new federalism—at least as long as moderate Justices O'Connor and Kennedy remain on the Court.

In contrast to this sanguine attitude, I maintain that the Rehnquist Court's opinions reveal a deep mistrust of common features of modern national public law. Focusing on this mistrust, I argue in this section of the Article that the Rehnquist Court has revived, even if the Court has not admitted it, the doctrine of dual federalism that was discredited in the New Deal and that the foundation of the Rehnquist Court's new federalism is not even as solid as its predecessor's. In Part III, I suggest that much of the Court's impatience stems from faults in the creation and implementation of certain national law regimes—what I call the contrivances of motivation and construction. Finally, in Part IV, I suggest that federalists are guilty of the contrivance of libertarianism. In Part V, I propose new paths for nationalism.

A. SWANCC and Statutory Disregard

Although the Supreme Court in SWANCC did not formally reach the Commerce Clause issue, one should not assume that this most recent federalist opinion is less significant than Lopez or Morrison. Indeed, because it involved the interpretation of a

76 See MASSEY, supra note 8, at 183.
80 Since SWANCC, the Court has not decided a major Commerce Clause case. The most significant has been Pierce County, Wash. v. Guillen, 123 S. Ct. 720
major federal public statutory regime, the Clean Water Act,81 SWANCC provides lessons that go beyond the holdings concerning the comparatively obscure and isolated federal laws struck down in Lopez and Morrison.82

The facts of SWANCC were an exemplar of the ways in which national law has insinuated itself into the regulation of even relatively minor natural resources. Because the plans for a new landfill in the suburbs of Chicago involved filling in some small ponds that had been created by an abandoned mining operation, the Solid Waste Agency of Northern Cook County (SWANCC) sought permission from both state authorities and the U.S. Army's Corps of Engineers.83 Congress has entrusted the Army Corps84 with authority to grant or deny permits for the "discharge of dredged or fill material into the navigable waters" through section 404 of the Clean Water Act.85 "Navigable waters" is defined to include "the waters of the United States."86 While there was no question that SWANCC's plan would involve "discharge of . . . fill," the state agency balked at the Corps' conclusion that the small ponds in northern Illinois were "navigable waters."87

The Corps defined "waters of the United States" through regulation to include all waters that "could affect interstate or

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81 33 U.S.C. §§ 1251–1387 (2000). In its current codification, the Clean Water Act is a mixture of various acts, the most significant of which was the Federal Water Pollution Control Act, also called the Clean Water Act, of 1972, Pub. L. 92-240, 86 Stat. 47.


84 The Army Corps has often been criticized by environmentalists for a lack of adequate attention to the environmental consequences of its permitting program. See, e.g., Michael Grunwald, Working to Please Hill Commanders; In Miss. and Elsewhere, Lawmakers Call Shots, WASH. POST, Sept. 11, 2000, at A1 (criticizing the Corps' permit programs).

85 33 U.S.C. § 1344(a) (2000). The authority of the Secretary of the Army is carried out through the Chief of Engineers. Id. § 1344(d).


87 See SWANCC, 531 U.S. at 163–66.
foreign commerce" and further clarified its definition through a less formal administrative rule in 1986. This rule defined "waters of the United States" as waters that are (a) habitat for birds protected by migratory bird treaties with foreign nations, (b) habitat for birds that cross state lines, (c) endangered species habitat, and (d) water bodies used to irrigate crops sold in interstate commerce. Because the migratory bird "hook" of this administrative definition covered the largest number of water bodies, the administrative rule was referred to as the "Migratory Bird Rule."

Upon finding dozens of bird species at the site, the Army Corps concluded that the Cook County ponds were "waters of the United States" under the Clean Water Act's section 404. The Corps then denied SWANCC's permit application, concluding, among other things, that the plan to fill the ponds was not the "least environmentally damaging" alternative for the landfill. The state agency challenged the Corps' determination in federal court, arguing that isolated, single-state water bodies such as the Illinois ponds it wanted to fill were not "navigable waters" and, moreover, that the regulation of such water bodies is beyond Congress's authority under the Commerce Clause.

The Supreme Court found for the state agency on the statutory argument. Writing for a five-justice majority, Chief Justice Rehnquist concluded that the Clean Water Act's "navigable waters" does not, as a matter of statutory

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89 The treaties with the United Kingdom (for Canada) (Aug. 16, 1916, 39 Stat. 1702), with Mexico (Feb. 7, 1936), and with the former Soviet Union (Nov. 19, 1976) are referred to in the Migratory Bird Treaty Act, 16 U.S.C. §§ 703–715 (2000), which implements these treaties by making it illegal to "take" nearly any migratory bird without a permit. Id. § 703.
91 See SWANCC, 531 U.S. at 164. Although the Supreme Court noted that this rule was not adopted pursuant to the notice and comment procedures of the Administrative Procedure Act, 5 U.S.C. § 553(c) (2000), the Court did not indicate what significance this fact held, other than to taint it. See SWANCC, 531 U.S. at 164 n.1.
92 See SWANCC, 531 U.S. at 164–65 (citing Army Corps' determinations).
93 See id. at 165 (citing Corps' determination).
94 See id. at 165–66.
95 See id. at 174. The Court of Appeals for the Seventh Circuit had decided for the Corps. 191 F.3d 845, 853 (7th Cir. 1999), affg 998 F. Supp. 946 (N.D. Ill. 1998).
interpretation, reach isolated, single-state ponds. Although the Court did not delineate all the boundaries of the term "navigable waters," it acknowledged that it covers water bodies that are actually navigable by boats in interstate commerce and water bodies that are adjacent to and affect truly navigable waters.

While the Court focused repeatedly on the import of the adjective "navigable," it mentioned only briefly a source that one might have expected to be the starting point for any question of statutory interpretation: Congress's statutory definition of the term in question. Congress specifically defined "navigable waters" in the Act to mean "the waters of the United States, including the territorial seas." This broad definition, albeit somewhat vague, arguably covers all water bodies, regardless of whether boats can navigate them. Statutory definitions usually are dispositive in matters of interpretation, even if they do not agree with a commonsense meaning of the term. Congress is the dictator of its own statutes; it could define navigable waters to mean only those waters that are used in interstate commercial navigation, only those waters in which the Exxon Valdez could turn around, or all waters that look green at twilight. Congress chose the definition "waters of the United States." Yet the Supreme Court seemed to disallow to Congress the power to define navigable waters as it wished: "We cannot agree [with the Army Corps] that Congress' separate definitional use of the phrase 'waters of the United States' constitutes a basis for reading the term 'navigable waters' out of the statute." The Court cited no authority for its usurpation of Congress's authority to define a statutory term.

Moreover, with its exclusive focus on section 404, the Court failed to acknowledge that, in effect, it was defining "navigable waters" for the entire Clean Water Act, of which the section 404 permit program is only a small part. A larger component of the

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96 SWANCC, 531 U.S. at 171–72, 174.
97 Id. at 167, 171–72 (citing United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985)).
98 See id. at 163 (citing 33 U.S.C. § 1362(7) (2000)).
100 See, e.g., Cavanaugh v. W. Md. Ry. Co., 729 F.2d 289, 292 n.8 (4th Cir. 1984) ("If the statute itself provides any definition of the meaning of the term involved, that definition is controlling." (citing Conoco, Inc. v. FERC, 622 F.2d 796, 800 (5th Cir. 1980))).
101 SWANCC, 531 U.S. at 172.
Act is the program for regulating "effluents"—that is, regulating industrial water pollution. Through what has been called the most successful pollution control program in American history, the Act prohibits polluting any navigable water without a permit. Permits are granted by either the United States Environmental Protection Agency (EPA) or through a federally authorized state permit program, in most instances with a requirement that the polluter use control technology to curtail its pollution. The permit program applies to any pollution from a point source, such as a factory pipe, into navigable waters. Because SWANCC is now the leading Court opinion as to the term "navigable waters," it holds tremendous significance for the pollution control program. Had the Court dived even shallowly into the history of the Act, it would have had to acknowledge that the primary purpose of the Clean Water Act, which in its present form is mostly the product of the 1972 Federal Water Pollution Control Act, was pollution control, not navigation. As Congress stated at the beginning of the 1972 Act: "The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."

The Court also diverged from traditional means of statutory interpretation by refusing to defer to the administrative agency. Citing the usually reliable Chevron doctrine, the Army Corps

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102 See 33 U.S.C. §§ 1311-12, 1314, 1317.
105 Id. §§ 1342, 1311(b).
106 Id. § 1362(12), (16).
107 Pollution-control advocates and perhaps an environmentally minded EPA will no doubt argue that "navigable waters" for subchapter III, 33 U.S.C. §§ 1311-1330, is not controlled by the interpretation in SWANCC.
had argued that the Court should defer to its interpretation of the ambiguous definition of "navigable waters." The Court declined, both stating, "We find § 404(a) to be clear," without specifying precisely the content of the supposed clarity, and strongly implying that the Army Corps' interpretation was not entitled to the usual level of respect. As explained by the Court, the Corps in 1974 had originally interpreted "navigable waters" in effect to be waters that were truly navigable. It was not until 1977 that the Army Corps adopted its more expansive interpretation, leading to the so-called Migratory Bird Rule. Implying that the 1974 reading was superior, the Court concluded that the federal agency "put forward no persuasive evidence that the Corps mistook Congress' intent in 1974" even though agencies typically are entitled to Chevron deference even when they change interpretations of statutory phrases. Crucially, moreover, the Court failed to explain that the Army Corps' 1974 interpretative regulation was not the first administrative reading of "navigable waters." Congress granted most of the responsibilities under the Clean Water Act to the EPA, which in 1973 had defined the term to include in effect all waters, including single-state water bodies that are utilized in some fashion by interstate commerce activities. In a lawsuit brought in 1975 by environmentalists who were dissatisfied with the narrower Army interpretation, a federal court ruled against the Corps, holding that the key term "[was] not limited to the traditional tests of navigability," and enjoining application of the

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112 Id.
113 The Court wrote, "Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result." Id. This doctrine arises from "our prudential desire not to needlessly reach constitutional issues," among other factors. Id. Because the legislative history was unclear, the Court disregarded the Corps' interpretation that "invoked" the outer limits of the commerce power. See id. at 172–73.
114 See id. at 168 (citing 33 C.F.R. §§ 209.120(d)(1), 209.260(e)(1) (1974)).
115 See id. at 168.
116 Id.
117 See Rust v. Sullivan, 500 U.S. 173, 186 (1991) (noting deference still applies even if an agency changes its interpretation). But see Seldovia Native Ass'n, Inc. v. Lujan, 904 F.2d 1335, 1345 (9th Cir. 1990) (remarking that when an agency changes its interpretation of a statute without explanation it should be accorded less deference).
118 See 38 Fed. Reg. 13529 (May 22, 1973) (defining the term "navigable waters").
Corps' 1974 regulation. This ruling led the Corps into a long rule making process that ended with its 1977 regulation. The SWANCC opinion's chiding of the Army Corps for changing its interpretation failed to acknowledge that the Corps was in effect ordered to abandon the 1974 regulation because the EPA—the agency with primary responsibility for the Clean Water Act—and a federal court had forced it to do so.

The Court's rejection in SWANCC of traditional tools for statutory construction and deference left it with little by which to decide the case. After it had concluded that the statutory definition was not dispositive, decided that the legislative history was ambiguous and useless, ruled that Corps was not entitled to deference, and ignored the role of the EPA in interpreting the Clean Water Act, the Court grasped at one remaining interpretative tool.

B. The Hand of "Tradition"

The Court in SWANCC retreated to a most rudimentary argument—the tradition of state control over land and water use. Citing the Clean Water Act's declaratory statement that one of the purposes of the Act was to "recognize, preserve, and protect the primary responsibilities and rights of the States . . . to plan the development and use . . . of land and water resources," among other things, the Court concluded that it

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119 See Natural Res. Def. Council, Inc. v. Callaway, 392 F. Supp. 685, 686 (D.D.C. 1975) (concluding that Congress meant the term "navigable waters" to be as broad as possible under the Constitution and that the Army Corps' 1974 interpretation was thus unlawful).


121 See SWANCC, 531 U.S. at 170 (discounting the definition of "waters of the United States").

122 See id. at 170–72 (rejecting arguments from passage of the 1972 Act and an "acquiescence" argument surrounding the 1977 amendments).

123 See id. at 172 (declining to apply Chevron deference).

124 See id. at 174 (finding that permitting respondent's claim would result in impinging a state's right to exercise control over its land and water use).

125 Id. (quoting 33 U.S.C. § 1251(b) (2000)) (alteration in original). Nearly all environmental laws include such reassuring federalist boilerplate, even though the Clean Water Act provides little for the states to do with regard to substantive regulation of water pollution.
must interpret the law so as not to interfere with “the States’
traditional and primary power over land and water use.”
Thus isolated ponds cannot be navigable waters.

Did the Court really mean this? Is the tradition of state
government control over land and water use an adequate
support for the Court’s narrow interpretation of the keystone
term of the Clean Water Act? I suggest that reliance on
“tradition” is unsupportable as an interpretive principle.

First, while it is true that state governments traditionally
have exercised the lion’s share of land and water regulation—
actually, local governments traditionally have controlled most of
land use law, whereas states have had primary responsibility
over water allocation—this share has been so eroded over the
years that the Court’s implication of exclusivity is terribly
mistaken. Federal environmental law, of which the Clean Water
Act is a leading example, has implicated the federal government
in land and water law for decades. The most prominent
requirement of the Clean Water Act of 1972 prohibits pollution
from a point source, such as an industrial pipe, without a
permit. Although most states operate the permit system for
polluting sources within their boundaries, they do so through the
permission and supervision of the EPA. Moreover, national
law sets forth the substantive requirements for a permit. For
the discharge of both toxic pollutants and less dangerous
conventional pollutants, a polluter must comply with EPA-
mandated technology appropriate for the particular industry to
which the applicant belongs, regardless of its location. Thus
the Clean Water Act has been a major feature of water law for
thirty years. Even with the SWANCC Court’s narrow
interpretation of navigable waters, the Act would still impose

\[
\text{126 Id. at 174.}
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\text{127 See id. at 168–74.}
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\text{128 See CALLIES ET AL., supra note 29, at 3, 23–24, 36–40 (explaining the}
\text{development of state-authorized local land use controls).}
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\text{129 See JOSEPH L. SAX ET AL., LEGAL CONTROL OF WATER}
\text{RESOURCES 9–10 (3d ed. 2000) (explaining that water resources are largely}
\text{controlled by a variety of state laws).}
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\text{130 See 33 U.S.C. § 1311(a) (2000) (stating that the “discharge of any pollutant}
\text{by any person shall be unlawful”).}
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\text{131 See id. § 1412(b) (indicating the procedure for states to run the national}
\text{pollution control system).}
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\text{132 See id. §§ 1412, 1311(b)–(c).}
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\text{133 See id.}
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national control over pollution into any truly navigable river in
the nation, as well as any stream that flows into it or any
wetland that is adjacent to such truly navigable water bodies.\textsuperscript{134} In sum, while Congress set forth in the Clean Water Act the
rhetoric of preserving state authority over land and water,\textsuperscript{135} in
substance it gave extraordinary authority to the national
government. If Congress were unable to regulate land or water
use as a category, the Clean Water Act would be a nullity.

Other environmental laws similarly impose national
standards on land and water use. The Clear Air Act, while
giving states broader discretion than the Water Act to make site-
specific decisions concerning pollution control, still invokes the
firm hand of national regulation. The guiding principle of the
Clean Air Act is the attainment of “national ambient air quality
standards” created by the EPA for an EPA-generated list of
pollutants.\textsuperscript{136} To give an example of the detail of national control
under the Clean Air Act, a business cannot—among other
restrictions—construct a polluting facility in a region where an
air quality standard has not been met unless the business has
arranged for an “offset” of pollution by some other polluting
source in the same region.\textsuperscript{137}

Likewise, the Superfund statute, which governs spills of
hazardous waste,\textsuperscript{138} is essentially a national land use regulatory
law. Through the Superfund law, the EPA holds the authority to
order private landowners to engage in costly and time-
consuming cleanups of hazardous spills.\textsuperscript{139} Cleanup standards

\textsuperscript{134} See United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 138
(1985) (stating that “navigable waters” includes those waters that are navigable by
boats and those waters “abutting” a truly navigable waterway); see also SWANCC,

\textsuperscript{135} See 33 U.S.C. § 1251(b) (recognizing states’ rights to prevent, reduce, and
eliminate pollution and to develop plans for effective use of land and water
resources).

\textsuperscript{136} See 42 U.S.C. § 7409 (2000) (stating requirements for setting the National
Ambient Air Quality Standards).

\textsuperscript{137} See id. § 7503(c)(1) (indicating offset requirement in non-attainment
regions). The offset may be obtained from a reduction in another region if the other
region has air quality that is as bad or worse than that of the new source. Id.

\textsuperscript{138} See generally Comprehensive Environmental Response, Compensation, and
Liability Act, 42 U.S.C. §§ 9601–9675 (governing “hazardous substances releases,
liability, [and] compensation”).

\textsuperscript{139} See id. § 9606(a) (stating that the Attorney General may “secure such relief
as may be necessary” when dealing with the “release of a hazardous substance from
a facility”).
must follow an EPA-developed system. Similarly, the national Endangered Species Act (ESA), which makes it unlawful to "take" any species on a nationally created list, regulates land and water use activities when they harm a protected species. Thus, draining water from a river for private use may trigger the ESA if the decreased water flow harms a protected fish. The ESA followed the venerable Migratory Bird Treaty Act, which makes it illegal to kill, even unintentionally, any of a list of protected migratory birds. Accordingly, SWANCC's blanket assertion that by tradition the states, not the national government, control land and water law is not valid today, and it has not been so for decades. When eroded, tradition becomes merely history.

The Court's reliance on tradition was not isolated to SWANCC. Indeed, it has been the guiding principle of the Rehnquist Court's federalist jurisprudence. In Lopez, the Court rebuffed the government's argument that a national gun possession law was a permissible exercise of the commerce power because of the potentially adverse effect that gun violence near schools might have on the national economy. Under such logic, the Court reasoned, Congress could generate similar arguments, "even in areas such as criminal law enforcement or education where States historically have been sovereign." Accepting the government's argument, the Court concluded,

140 See id. § 9605 (creation of the National Contingency Plan to guide cleanups).
144 See id. § 703 (stating that the killing of migratory birds is unlawful).
145 See United States v. Lopez, 514 U.S. 549, 563-64 ("Under the theories that the Government presents . . . it is difficult to perceive any limitation on federal power . . . ").
146 Id. at 564.
“would require us to conclude that the Constitution’s enumeration of powers does not presuppose something not enumerated, and that there never will be a distinction between what is truly national and what is truly local.”

In *Morrison*, the Court again grounded its federalist ruling on tradition. The Violence Against Women Act, unlike the *Lopez* gun law, contained explicit congressional findings and assertions that the national law would foster interstate commerce. But such statements were of no avail, the Court wrote, because similar arguments “may, as we suggested in *Lopez*, be applied equally as well to family law and other areas of traditional state regulation.”

Returning to history, the Court made the following conclusion:

The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States. Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.

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147 *Id.* at 567–68 (citations omitted).

148 See United States v. *Morrison*, 529 U.S. 598, 614–15 (2000) (citing congressional findings on the effect that gender-motivated violence has on its victims and their families and the deterrence that this violence has on interstate travel and commerce).

149 *Id.* at 615.

150 *Id.* at 618 (citations omitted). In the first half of this quotation, the Court added a significant requirement that it did not discuss elsewhere. Having noted that, along with regulating channels and instrumentalities of interstate commerce, the regulation of activities “substantially affect[ing] interstate commerce” is a means in which Congress may exercise its commerce power, *id.* at 608–09, the Court then wrote that the “punishment of intrastate violence . . . has always been the province of the States,” with the exception of “instrumentalities, channels, or goods involved in interstate commerce,” *id.* at 618. The Court did not explain why it separated the “affecting interstate commerce” justification; its only citation was to *Cohens v. Virginia*, in which Chief Justice Marshall wrote that “Congress has . . . no general right to punish murder committed within any of the States.” 19 U.S. (6 Wheat.) 264, 426 (1821). The Rehnquist Court needed to segregate channels and instrumentalities, of course, because of the venerable precedent for Congress’s power to regulate them. See, e.g., *Hoke v. United States*, 227 U.S. 308, 323 (1913) (concluding that Congress may regulate interstate sexual transit); *Champion v. Ames*, 188 U.S. 321, 363 (1903) (holding that Congress may regulate interstate commerce in the sale of lottery tickets); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 239–40 (1824) (finding that the Commerce Clause reaches interstate boat service). What the Rehnquist Court did not do was explain why the “affecting interstate commerce” justification is a lesser justification than the others.
C. Dual Federalism, Revived

Thus, the Rehnquist Court's stance is revealed. The Court's federalists assert that there are certain realms that are exclusive to the states, onto which Congress may not trespass, regardless of a national law's relation to interstate commerce. This view, which has the benefit of seeming simplicity, is a reprise, I argue, of the doctrine that the Supreme Court followed in the late nineteenth and early twentieth centuries and that modern commentators have called dual federalism.

Professor David Engdahl, a federalist who nonetheless has agreed with the expansion of national power in the New Deal cases, explained that:

[D]ual federalism conceives of governmental power itself as sliced into separate segments and parceled between nation and states. . . . [B]y virtue of the distribution of governing power under the Constitution, any given matter must be subject to governance only by either the states or the United States, and not by both: Each slice of the pie must be on one plate or the other. . . . A natural corollary of this pie-slice [notion] is that national and state governments each are forbidden to nibble at the other's plate.151

A classic example of early dual federalism was Hammer v. Dagenhart,152 the child labor case of 1918. Influenced by nationalist Progressive thought in the first two decades of the twentieth century, Congress had enacted the National Child Labor Act of 1916.153 The Act made it unlawful to ship any good in interstate commerce if it had been produced by the labor of children under the age of sixteen.154 The Supreme Court struck down the law, reasoning that Congress plainly was concerned not with commerce in the goods produced but with the perceived evil of child labor.155 The Act failed, therefore, because it "exert[ed] a power as to a purely local matter to which the federal authority does not extend."156 Hammer served to limit national social legislation for twenty years.157

151 DAVID E. ENGDAHL, CONSTITUTIONAL FEDERALISM IN A NUTSHELL 11, 104 (2d ed. 1987).
154 See id. § 1.
156 Id. at 276. One might summarize the lesson of Hammer as "you can't touch
The history of Commerce Clause jurisprudence before 1940—and often after—was one of the most muddled, encrusted, and occasionally contradictory bodies of precedent in constitutional law. This was not surprising, considering the inevitable clash between the federalist view of limited congressional power and the progressive desires of socially minded twentieth century legislators. Beyond the problems of distinguishing between commerce and non-commerce and between interstate and non-interstate activity, the early twentieth century Court also distinguished between what it viewed as separate and traditional realms of national and local authority. Thus, in 1935, in *A.L.A. Schechter Poultry Corp. v. United States,* the Court overturned aspects of a national law regulating working conditions at businesses, such as the butcher Schechter's, which sold poultry that had been shipped interstate. The Court reasoned that because the trigger for the National Industrial Recovery Act was the local sale of poultry to consumers, nearly all of whom were New Yorkers, the law had only an “indirect” effect on interstate commerce, and thus the statute was unconstitutional. Local transactions “remain[ed] within the domain of state power.” Similarly, in the last major reversal of New Deal legislation, *Carter v. Carter Coal Co.*, the Court in 1936 refused 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. These pre-1937 decisions, which relied on a perception of traditional and exclusive dual realms of authority to delineate the commerce power, are the true precursors to the Rehnquist

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158 Federalists might respond by arguing that the difficulties of pre-1937 Commerce Clause jurisprudence were nonetheless superior to the post-1937 law, which consisted entirely of judicial contortions to make nearly any law fit within the Commerce Clause.

159 295 U.S. 495 (1935).

160 See id. at 541–42.

161 See id. at 545–47.

162 Id. at 546.

163 298 U.S. 238 (1936).

164 Id. at 303.
Court’s reasoning, even though the Rehnquist Court fails to cite them.

Dual federalism is seductive as a solution for limiting national power. Its appeal rises from the observation that, as *Hammer* put it, nationalist arguments seem to have no stopping point, and thus “the power of the States over local matters may be eliminated.” As the Court would repeat nearly a century later in *Morrison*, “Congress might use the Commerce Clause to completely obliterate the Constitution’s distinction between national and local authority.” A dilemma in reinstituting dual federalism, however, is that the doctrine of separate authorities was thoroughly repudiated in the mid-twentieth century cases. The familiar story of its decline has its roots in cases such as *Champion v. Ames*, in which the Court in 1903 allowed Congress to intrude on the traditionally local matter of lottery regulation, but the fall was given its real push in 1937 with *National Labor Relations Board v. Jones & Laughlin Steel Corp.* The New Deal Congress had enacted compulsory requirements for labor negotiations—a topic that the Court just a year earlier in *Carter Coal* had dubbed “purely local in character.” In *Jones & Laughlin*, however, the Court shifted the constitutional analysis away from the tradition-oriented approach towards a pragmatic approach of asking whether the regulation had the effect of fostering or protecting interstate commerce. Because smooth labor relations promote interstate commerce, the national law was a permissible exercise of the commerce power. Following *Jones & Laughlin*, the dual

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167 *188 U.S. 321 (1903)* (upholding congressional regulation of interstate commerce in lottery tickets).
168 *301 U.S. 1 (1937)*. One theory of the Supreme Court’s post-1936 liberality with regard to congressional power arises from President Franklin Roosevelt’s 1937 plan to expand the membership of the Court with additional like-minded jurists, who presumably would overturn decisions such as *Schechter*. As the story goes, the Court, or at least swing vote Justice Roberts, adopted a more approving view of national legislation—the so-called “switch in time that saved nine.” *PHILIP BOBBITT, CONSTITUTIONAL FATE* 39 (1982). The Court expansion plan was defeated in the Senate. *See generally William E. Leuchtenburg, The Origins of Franklin Roosevelt’s Court-Packing Plan*, 1966 SUP. CT. REV. 347.
169 *Carter Coal*, 298 U.S. at 303.
170 *See Jones & Laughlin*, 301 U.S. at 32–42.
171 *See id.*
federalist doctrine quickly crumbled. In *United States v. Darby*, the Court in 1941 upheld national regulation of working conditions for a business that shipped goods in interstate commerce, despite the business's argument that the obvious purpose of the law was to regulate wages and hours—the argument that had carried the day in *Hammer*. The Court followed a permissive effects test and explicitly overruled *Hammer*.

In addition to allowing Congress to legislate public morality through the hook of interstate commercial crossings, as in *Darby*, the Court also adopted a realist approach to laws regulating activities that, though seemingly local in character, have an indirect effect on nationwide commerce. The classic case was *Wickard v. Filburn*, which concerned a congressional quota system for national wheat production put in place to prop up wheat prices. A wheat farmer who was penalized for growing more than his personal quota sued, arguing that because his excess wheat was consumed domestically—for food, livestock, and seed—it never entered into interstate commerce and thus was free from national regulation. The Court rejected the argument that certain realms, such as local food consumption, were off-limits to congressional authority. Because unregulated home consumption could have a substantial influence on the national market for wheat—with the consumption of home-grown grain, the quantity of wheat demanded in the national market would fall, thus leading to a decline in the national market price—Congress must be permitted to enact legislation that assists in achieving its legitimate goal of regulation of wheat prices, regardless of the local nature of home consumption. In the wake of permissive cases such as *Darby* and *Wickard*, the Supreme Court rejected Commerce Clause challenges for the next half-century, firmly rejecting separation of authority arguments and accepting all assertions of links to interstate commerce until *Lopez*.

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172 312 U.S. 100 (1941).
173 See id. at 115–17.
174 See id. at 116–17.
175 317 U.S. 111 (1942).
176 See id. at 113–14 & n.2.
177 See id. at 118–19.
178 See id. at 121–31.
179 See, e.g., *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S.
The challenge for federalist-minded jurists on the current Court is to make sense of limitations on the commerce power in light of the precedent since 1937. So far, the Rehnquist Court has failed to do so. The Court could have attempted to dismantle the perceived lenity of the post-1937 jurisprudence logically or to revive Schechter's requirement of a "direct" relation to interstate commerce. However, the Court has avoided the difficulties of overruling precedent—as the Court did in Darby—and has instead decided cases with its own ad hoc assessment of tradition.

Tradition is, I maintain, an unstable support for delineating the commerce power. Assumptions about history are often overly broad and poorly justified, especially in the world of law. The SWANCC opinion, as I have noted, assumed a historical exclusiveness of state authority over land and water use, yet failed to take account of the extensive national regulations of land and water use for environmental protection purposes, many of which are firmly grounded in the direct regulation of interstate channels and instrumentalities, which even federalists presumably would accept. To say that the national government cannot regulate land and water use means that the national government cannot regulate the environment. Even before environmental law reached maturity in the 1970s, one could not generalize about land and water regulation. Congress first regulated dumping into water bodies in 1899 with the Rivers and Harbors Act, also called the Refuse Act, a precursor of the Clean Water Act's section 404. While federalists might hasten to add that the purpose of the Rivers and Harbors Act


was to protect interstate navigation from encumbrances, not to protect the environment per se, the point is that the law imposed national regulation on land and water use for more than 100 years before SWANCC. The first national Water Pollution Control Act was enacted in 1948. The Rehnquist Court has relied on English traditions to help delineate property rights, yet English history reveals a tradition of national regulation of land use stretching back to the Elizabethan era.

Assumptions about tradition in other areas of law can be just as shaky. Recall that a key holding of Carter Coal and other cases disapproving of national regulation of employment conditions was that this field was “purely local in character.” This was the view of tradition-minded jurists in 1936. A year later, however, the Court opened up the gates to congressional regulation of employment in Jones & Laughlin, and the nation’s employers have seen national regulation expand from the area of collective bargaining, the issue in Jones & Laughlin, to national regulation of occupational health and safety and national control of discrimination in hiring and firing. While it may have seemed historically accurate to view employment as a purely local matter in 1937, it plainly is not accurate to do so anymore.

With the expansion of national law into so many spheres of human activity, it has become more difficult to locate realms that remain free of congressional intrusion. The Rehnquist Court in Lopez and Morrison cited family law and education

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184 Ch. 758, 62 Stat. 1155 (1948).
185 See Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1029–30 (1992) (relying in large part on the traditional Anglo-American common law of “nuisance” to establish the boundaries of the Fifth Amendment’s right against uncompensated takings of private property).
186 See CALLIES ET AL., supra note 29, at 2–3.
188 301 U.S. 1 (1937).
law—spheres that have the benefit of seeming "domestic" and thus perhaps the most inappropriate for meddling from Washington. Yet there is nothing inherent in family law or education law that makes them appropriate for state control alone. Through the establishment of nationally created rights to abort pregnancies\(^\text{193}\) and use contraceptives,\(^\text{194}\) national law—albeit from the courts, not Congress—restricts state regulation of personal reproductive decisions. If it seems difficult to imagine a national law regulating marriage, childbirth, or parenting,\(^\text{195}\) I suggest that this is because we perceive such spheres to be outside the limits of governmental authority,\(^\text{196}\) rather than because such spheres are inherently appropriate for exclusive state regulation. In education, as well, the assumed exclusivity of state law is in reality a mixed issue. It is true that state and local governments hold the primary responsibility for educating young people.\(^\text{197}\) Nonetheless, the national government has insinuated national ideas into the educational world through financial support of school construction and instructional assistance, albeit mostly voluntary, by the Department of Education.\(^\text{198}\)

Indeed, as the Rehnquist Court has rightly concluded, it would require no leap of logic to move fromjustifying the national laws at issue in *Lopez* and *Morrison* to justifying national regulation of education. As reasoned in *Lopez*, the national government's argument relating gun-related violence to

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\(^{193}\) See Roe v. Wade, 410 U.S. 113 (1973) (creating right to abortion).

\(^{194}\) See Griswold v. Connecticut, 381 U.S. 479 (1965) (finding right to use contraceptives).

\(^{195}\) It was difficult to imagine, that is, before suggested by the Senate Republican leader in 2003, a constitutional amendment prohibiting states from allowing gay marriages. See Alan Cooperman, *Sodomy Ruling Fuels Battle Over Gay Marriage*, WASH. POST, July 31, 2003, at A1.

\(^{196}\) See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967) (deciding that states may not prohibit interracial marriages, in large part because of a right to marry). The exceptions are for relatively minor state administrative rules, such as a minimum age for marriage and blood-test requirements.

\(^{197}\) See, e.g., *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) ("Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. ... By and large, public education in our Nation is committed to the control of state and local authorities.").

\(^{198}\) For a link to summaries of the various national programs that support local education, see the U.S. Department of Education's web site, http://www.ed.gov/offices/OESE/program.html.
the interstate economy "would be equally applicable, if not more so, to subjects such as family law and direct regulation of education." As reiterated in Morrison, the argument that Congress may foster interstate commerce by protecting women from violence could apply equally well to questions of parenting because "the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant." To envisage an example less sensationalistic than a regulation of how many children a woman may bear—something that states could not do either, of course—imagine a future pressing foreign policy and national security need for American citizens who understand the Arabic language. Congress might respond with legislation requiring that all local school systems of a certain size offer courses in Arabic in high school. While such a law would intrude on the supposed tradition of exclusive state and local control of education, it seems to me that such a law would be no more abhorrent on Commerce Clause grounds than the regulation of home-grown wheat or small-town restaurants.

The appropriate response to the Rehnquist Court's slippery slope argument is not to deny it but to question the dividing line that the Court has drawn. Tradition does not justify a stopping point. Indeed, it would be more stable intellectually, I suggest, to return to first principles by construing "commerce ... among the several states" to encompass only direct regulation of interstate commerce, as in Schechter, even if such a doctrine would be more incendiary as a matter of politics. In any event, the Rehnquist Court's reliance on tradition to delineate the

202 Professor Weinberg has suggested that, while Congress has the presumptive power to enact the national school curricula, see Louise Weinberg, Fear and Federalism, 23 OHIO N.U. L. REV. 1295, 1333 (1997), there is a real fear that national control could lead to mass education, with totalitarian vulnerabilities, see id. at 1335.
203 See generally Katzenbach v. McClung, 379 U.S. 294 (1964) (regulating discrimination in restaurants that serve food that has moved in interstate commerce); Wickard v. Filburn, 317 U.S. 111 (1942) (regulating a farmer's production of wheat purely for his own consumption).
204 U.S. CONST. art. I, § 8, cl. 3.
commerce power is a contrivance that should and will be regretted.

III. THE CONTRIVANCES OF MOTIVATION AND CONSTRUCTION

Behind the Rehnquist Court's new federalism lies a deep skepticism of the course of certain national public laws. This skepticism stems, I believe, from perceived contrivances in the drafting and administration of the statutory regimes. These contrivances, which I discuss in this part, may help push the Court in a federalist direction for years to come.

A. The Contrivance of Motivation

The first federalist criticism of national law is the contrivance of motivation. According to this criticism, many national laws that are purported to be regulations of interstate commerce are more properly characterized as laws motivated by morality, fairness, or social justice. The Child Labor Act of 1916 and the Violence Against Women Act of 1994 are prime examples. To characterize such social legislation as an exercise of Congress's power to regulate "commerce . . . among the several states" strikes many as contrived and false. The Rehnquist Court, however, unlike the Court before 1937, has not been willing to reject laws explicitly on the ground of improper motivation, perhaps because of the thorns involved in trying to construe the purpose and motivation for congressional legislation. Nonetheless, a close reading of the Rehnquist

205 Ch. 432, 39 Stat. 675 (1917).
207 It is not unusual for the Supreme Court to suppress important elements of its thinking, even in the most significant cases, to avoid difficulties of politics and application. In perhaps the most famous opinion of the 20th century, Brown v. Board of Education, 347 U.S. 483 (1954), the Court avoided the most straightforward objection to the separate-but-equal myth of racial segregation—the fact that opportunities and services available to African Americans were rarely, if ever, truly equal in practice—in favor of reliance on a sociological conclusion that educational segregation "generates a feeling of inferiority" among African American students. Id. at 494. By relying on studies such as the doll-choosing tests of sociologist Kenneth Clark, id., the Court was able to outlaw, at least in theory, racial segregation throughout the nation as a matter of law, as opposed to having to resort to findings of fact, which would have been easier for supporters of segregation to battle in the lower courts and through piecemeal improvements in opportunities for African Americans. Today, of course, the notion that studying in an all-black environment "generates a feeling of inferiority" is an argument to which few African American leaders would subscribe. See, e.g., Michael Fletcher, NAACP Facing New
Court's decisions reveals dissatisfaction with the contrivance of motivation, which in turn serves as a major impetus to its revived federalism.

The first of the three recent major federalist decisions, *Lopez*, was the most difficult for the government to justify because Congress failed to explain in its legislation how criminalizing gun possession near schools might affect interstate commerce. Rejecting government counsel's argument that gun possession might depress national productivity, the Court stated that "[t]o uphold the government's contentions here, we would have to pile inference upon inference." To its credit, the Court then noted that cases after 1937 had in effect been so deferential to the government that they allowed the piling of inference upon inference to reach a finding of constitutionality. But no more contrivances, the Court seemed to say—we now need explicit and well-supported congressional evidence that the national laws are indeed designed to substantially affect interstate commerce.

*Morrison* made out a stronger case for congressional authority because Congress, perhaps mindful of growing federalist skepticism, incorporated in the Violence Against Women Act explicit findings that the law would foster interstate commerce by, among other things, encouraging potential female victims of violence to travel from state to state. Nevertheless, the Supreme Court refused to swallow the evidence. First, it characterized the findings as "a method of reasoning that we have already rejected [in *Lopez*] as unworkable if we are to maintain the Constitution's enumeration of powers." The "method" that the Court referred to, however, was not a method at all, but rather the Court's perceived dilemma that if it allowed the law in *Morrison* to stand, there could be no stopping Congress from "obliterat[ing] the Constitution's distinction between national and local authority." In effect, the complaint was that the Court could see no limit for national law if it let the violence against women law pass muster.

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209 Id. at 567.
210 See id.
212 Id.
213 Id.
So where is the dividing line between permissible congressional invocations of an effect on interstate commerce and those that the Court will reject? As I have argued above, the Court’s reliance on “tradition” is a dead end. In *Lopez* and *Morrison*, another, somewhat hidden, factor was at work—a factor expressed through the Court’s observation of what it called the “attenuated” link of the law to interstate commerce.\(^{214}\)

This criticism of attenuation can be explained by either of two related concepts. First, the Court could have been seeking to inject a requirement of *proximate causation*—that notorious bugbear of the common law of torts.\(^{215}\) Using the law of causation would not be unprecedented in commerce power jurisprudence. In 1935, *Schechter* set forth a distinction based on whether the law was a permissible “direct” regulation of interstate commerce or an impermissible “indirect” regulation.\(^{216}\) If so, however, the Rehnquist Court has created for itself a distinction that is even more vague than *Schechter’s* soon-abandoned direct/indirect test. Would the proximate causation issue be decided under the tight standard of *In re Polemis*,\(^{217}\) the Restatement of Torts’s much looser “substantial factor” test,\(^{218}\) or with some other application? And considering that interstate commerce is not a discrete event, such as an accidental tort, but a process of economic activity across the nation, how could a court ever reasonably determine whether a law is too “attenuated” to be a proximate cause of changes in commerce? Such questions would have to be resolved before proximate causation could serve as a working limitation on the commerce power.

A more sensible interpretation, I suggest, is that the Court did not mean to refer to proximate causation at all. Rather, it

\(^{214}\) See id. at 612 (referring to the government’s argument in *Lopez* as “attenuated”) (emphasis added); see also id. at 615 (describing the government’s justification in *Morrison* as suffering from the same defects).

\(^{215}\) See PROSSER & KEETON ON TORTS 273 (W. Page Keeton et al. eds., 5th ed. 1984) (referring to the confusion surrounding the doctrine).

\(^{216}\) See A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 546 (1935) (“[W]here the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of state power.”).

\(^{217}\) See *In re Polemis*, 3 K.B. 560, 572 (1921) (holding that the actor is liable for all direct consequences of his negligent acts).

\(^{218}\) See RESTATEMENT (SECOND) OF TORTS § 431 (1965) (“The actor’s negligent conduct is a legal cause of harm to another if . . . his conduct is a substantial factor in bringing about the harm.”).
meant to address the question of motivation. If legislation is motivated (exclusively? primarily?) by a desire to foster interstate commerce, it probably passes constitutional muster. If aimed primarily at some other goal, it may not. Thus, in *Morrison*, it is likely that the Court viewed the Violence Against Women Act as being motivated primarily by considerations of social justice—a desire to provide in federal court a civil law remedy for women who have suffered gender-motivated violence. Indeed, the legislative history shows that the chief concern of Congress was that some state and local law enforcement officials have not paid adequate attention to prosecuting gender-motivated violence. The same rationale, of course, provided the impetus for enacting national civil rights remedies to combat racial discrimination. Likewise, making gender-motivated crimes a federal violation provided a “symbol” of a national commitment to overcoming generations of neglect of domestic and other forms of violence against women.

Judicial scrutiny of the true motivations of Congress would be nothing new in commerce power jurisprudence. In the era before 1937, the Supreme Court often struck down legislation that appeared to be motivated primarily by social welfare concerns, not by a desire to foster interstate commerce. As early as *Champion v. Ames*, in which the Court upheld the national criminalization of interstate traffic in lottery tickets, Chief Justice Fuller joined three other dissenters in arguing that the Court should puncture Congress's veneer of interstate commerce regulation and expose its true motivation. He wrote "[t]hat

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219 See *Morrison*, 529 U.S. at 624–25 (discussing the purpose of the law as, in part, making up for lax prosecution).
222 188 U.S. 321 (1903).
223 See *id.* at 354 (holding that lottery tickets can be subject to trafficking and are therefore part of interstate commerce).
224 See *id.* at 364–75.
the purpose of Congress in this enactment was the suppression of lotteries cannot reasonably be denied."\textsuperscript{225} Such a purpose is unconstitutional, he concluded, because the "promotion of the public health, good order and prosperity is a power originally and always belonging to the States, not surrendered by them to the General Government nor directly restrained by the Constitution."\textsuperscript{226} By the 1930s, the Court was bolder in its rejection of the contrivance of using the commerce power as a means of legislating social welfare. In the first major setback for New Deal legislation, \textit{Railroad Retirement Board v. Alton Railroad},\textsuperscript{227} the Supreme Court struck down a law regulating the railroad business, usually a safe arena for congressional regulation, because the statute imposed employment retirement and pension requirements on the railroads.\textsuperscript{228} Holding that such employment matters were too "remote" from interstate commerce concerns, the Court reasoned that the statute was "really and essentially related solely to the social welfare of the worker" and was thus beyond the power of Congress.\textsuperscript{229} Similarly, the Court in \textit{Schechter} pierced the argument that Congress was regulating interstate commerce in the poultry business and determined that "the attempt... to fix the hours and wages of employees of defendants in their intrastate business was not a valid exercise of federal power."\textsuperscript{230}

The era of motivation piercing soon dissipated, of course, and by \textit{United States v. Darby}\textsuperscript{231} the Court permitted wage and working-hour controls on businesses that shipped goods across state lines.\textsuperscript{232} As long as the law was triggered only by interstate transactions then Congress was within its powers. "The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are

\textsuperscript{225} \textit{Id.} at 364.
\textsuperscript{226} \textit{Id.} at 364–65.
\textsuperscript{227} 295 U.S. 330 (1935).
\textsuperscript{228} \textit{See id.} at 374 (holding that a railroad pension plan is not connected to the regulation of interstate commerce).
\textsuperscript{229} \textit{Id.} at 368.
\textsuperscript{231} 312 U.S. 100 (1941).
\textsuperscript{232} \textit{See id.} at 125–26 (holding that employers whose goods are shipped interstate are subject to the provisions of the Fair Labor Standards Act).
given no control," the Court held in dismissing the business's arguments of improper congressional purpose.\textsuperscript{233}

The issue of congressional motivation held little weight in commerce power jurisprudence for the next half-century, as the Court repeatedly upheld laws that appeared to be driven by perceptions of social welfare because of their "effect," however slight or incidental, upon interstate commerce. The most striking examples were the Civil Rights Act cases of 1964, \textit{Katzenbach v. McClung}\textsuperscript{234} and \textit{Heart of Atlanta Motel, Inc. v. United States}.\textsuperscript{235} Although the preamble to the original bill for the Civil Rights Act\textsuperscript{236} stated that its purpose was "to promote the general welfare by eliminating discrimination based on race, color, or national origin,"\textsuperscript{237} the Court in \textit{Katzenbach} found the issue of congressional motivation irrelevant. Instead, the constitutional issue whether Ollie's Barbecue of Birmingham, Alabama, could be regulated by Congress depended only on "whether the particular restaurant either serves or offers to serve interstate travelers or serves food a substantial portion of which has moved in interstate commerce."\textsuperscript{238} The Court applied

\begin{footnotesize}
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\item \textsuperscript{233} \textit{Id.} at 115. The \textit{Darby} opinion hedged its bets on the issue of motivation, however, by characterizing Congress's purpose not simply as the desire to regulate employment conditions through the hook of interstate commerce but through the following fine example of saying something impressive without saying much of anything:

The motive and purpose of the present regulation are plainly to make effective the Congressional conception of public policy that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions, which competition is injurious to the commerce and to the states from and to which the commerce flows.

\textit{Id.}

\item \textsuperscript{234} 379 U.S. 294, 298–305 (1964) (holding that racial discrimination in restaurants may be regulated because it encourages interstate travel to restaurants and because the restaurant served food that crossed state lines).

\item \textsuperscript{235} 379 U.S. 241, 252–53 (1964) (concluding that Title II of the Civil Rights Act of 1964, currently codified at 42 U.S.C. § 2000a (2000), which outlawed racial discrimination in accommodations, was constitutional in large part because of the effect of fostering interstate travel among African Americans).


\item \textsuperscript{237} See \textit{Heart of Atlanta Motel, Inc.}, 379 U.S. at 245 (quoting H.R. Doc. No. 124, at 14 (1963)). An assertion that a law is justified because it serves the "general welfare" would of course imperil the law under a restrictive view of the commerce power.

\item \textsuperscript{238} 379 U.S. at 304.
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the ultra-deferential "rational basis" test and upheld the national law on this ground.\footnote{See id. (holding that Congress has a "rational basis" for linking racial discrimination in a restaurant with interstate commerce).}

By contrast, the Rehnquist Court's jurisprudence, with its rejection of "attenuated" assertions of an effect on interstate commerce,\footnote{See United States v. Morrison, 529 U.S. 598, 612 (2000) (referring to the attenuated link between gun possession and interstate commerce).} has opened the door for a revolution in constitutional law. The Court's revived skepticism of the motivations of Congress is potentially a far more significant development than other details of commerce power doctrine, such as the issue of when the effects of economic activity may be "aggregated"\footnote{See United States v. Lopez, 514 U.S. 549, 559-60, 567 (1995) (differentiating instances where the Court found that Congress did not overreach its Commerce Clause authority and possessing a gun in a school zone).}—a detail that has attracted far more commentary than the motivation issue.\footnote{See, e.g., Dral & Phillips, supra note 77, at 606-08, 618-20.} The revival of skepticism also raises problems. The challenge of ascertaining legislative motivation, which has been developed largely in the context of racially-motivated laws, is notoriously complicated.\footnote{See, e.g., Pamela S. Karlan & Daryl J. Levinson, Why Voting Is Different, 84 CAL. L. REV. 1201, 1214-15 (1996) (discussing the complexities of discerning racial motivation in legislative decisions).} Suffice to say here that the Rehnquist Court has not yet explained how it might grapple with the issue of mixed motivations. Consider the Violence Against Women Act at issue in \textit{Morrison}. While one may assume that the primary motivation of members of Congress was social justice, which may be outside the commerce power, it is also possible that the supposed positive economic effect of the law was a secondary motivation. Or consider an environmental law such as the Clean Water Act. One motivation for the government's regulation of single-state water bodies may have been a belief in "deep ecology," the notion that environmental integrity is good for its own sake.\footnote{See, e.g., Keith Hirokawa, Some Pragmatic Observations About Radical Critique in Environmental Law, 21 STAN. ENVTL. L.J. 225, 239 (2002) (discussing deep ecology).} Another motivation may have been to protect the interstate commerce of migratory bird hunting. So far, the Rehnquist Court has failed to address whether such mixed-
motivation laws might or might not be permissible under the commerce power.\textsuperscript{245}

The Rehnquist Court has avoided many difficult issues by falling back, of course, on “tradition.” In \textit{SWANCC}, \textit{Morrison}, and \textit{Lopez}, the Court each time evaded the sticky issue of motivation by moving on to the conclusion that Congress had trespassed into a sphere—land and water use or violent crime—onto which it cannot tread, presumably even if the exclusive motivation was to foster interstate commerce.\textsuperscript{246} Because this dual federalist idea is unsustainable, I maintain, the Court must address the complex and subtle questions of motivation if it hopes to make its commerce power jurisprudence whole. Whether it can do so successfully remains to be seen.

To flesh out the implications of a revived federalism that draws a line between permissible and contrived motivations, return to the Civil Rights Act of 1964,\textsuperscript{247} which among other things outlawed race and gender discrimination in accommodations such as motels and restaurants,\textsuperscript{248} in government-operated schools,\textsuperscript{249} in federally-assisted programs,\textsuperscript{250} and in employment.\textsuperscript{251} Constitutional challenges to this famous law brought on behalf of a Georgia motel and an Alabama barbecue restaurant led to the Supreme Court’s most deferential opinions in its Commerce Clause jurisprudence.\textsuperscript{252} But segregationists and diehard federalists were not the only ones bothered by the Supreme Court’s holding that the Civil Rights Act was a justified exercise of the commerce power.

\textsuperscript{245} See, e.g., Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (noting the standards for assessing mixed motivation in statutory discrimination cases). Returning to first principles, advocates of nationalism might argue that because Congress holds the power to regulate any and all interstate commerce, the fact that laws serve other purposes should not invalidate them—to do so would limit Congress’s plain authority.


\textsuperscript{248} 42 U.S.C. § 2000a.

\textsuperscript{249} Id. § 2000b.

\textsuperscript{250} Id. § 2000d.

\textsuperscript{251} Id. §§ 2000e, 2000e-2.

\textsuperscript{252} See Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 278 (1964) (upholding application of nondiscrimination requirements to a motel); Katzenbach v. McClung, 379 U.S. 294, 304 (1964) (upholding application of the nondiscrimination requirements to a restaurant).
Professor Gerald Gunther suggested that the Court should have sought out alternative constitutional foundations. More recently, in developing a response to the Rehnquist Court's new federalism, Professor Donald Regan called Katzenbach's reasoning a "disaster as Commerce Clause precedent" and suggested that the Court should have relied instead on the Reconstruction Amendments, especially the Fourteenth Amendment's authorization to Congress to pass legislation to enforce the equal protection guarantee.

Whatever their flaws at the time, the 1964 Commerce Clause opinions now hold nearly forty years of precedential value. But this is only half as long as the period in which the Supreme Court adhered to the precedent of 1883's Civil Rights Cases that Congress could not regulate discrimination at privately-owned accommodations. Although it may seem unthinkable that the Court could revisit the constitutionality of the discrimination statutes, it is instructive to consider how an emboldened federalist Court might scrutinize such laws today.

It is not hard to figure out how the pre-1937 Court would have dealt with national laws that sought to regulate whom restaurants could serve, hotels could accept, or employers could hire. As reasoned in Hammer, the courts must penetrate a contrived veneer of legislation and ascertain its true motivation. The Child Labor Act of 1916 "aim[ed] to standardize the ages at which children may be employed." Social welfare, or even the argument that the law prevented "unfair competition," were not valid goals of national legislation under the Constitution, the Court concluded. Likewise, in rejecting the national collective bargaining requirements at issue in Carter Coal, the Court reaffirmed its statement that "beneficent aims, however great or well directed, can never serve in lieu of constitutional power... Thus, it may be said that to a constitutional end many ways are open; but to an end not within the terms of the Constitution, all ways are closed." The anti-discrimination legislation of the 1960s, even couched in terms of restricting only

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254 See Regan, supra note 51, at 595–96.
255 109 U.S. 3 (1883).
257 Id. at 272.
businesses that are somehow linked to interstate commerce, would have been struck down as pursuing an aim—the social justice of equality and non-discrimination—that was beyond the authority of Congress under the Constitution.

Today’s commerce power doctrine has been refined to encompass three categories of permissible congressional regulation:259 (1) the regulation of channels of interstate commerce, such as interstate roads and rivers;260 (2) the regulation of instrumentalities in interstate commerce, such as lottery tickets that cross state lines;261 and (3) the regulation of activities that “substantially affect interstate commerce.”262 Nearly all of the controversies that reach the Supreme Court implicate the third category, in which the regulated activity is not itself interstate commerce but may nonetheless be regulated because it substantially affects interstate commerce.263 The most striking example remains Wickard v. Filburn,264 in which the Court upheld the regulation of homegrown wheat because of its potential effect on the national wheat market.265

To assess how the discrimination laws might fare under the Rehnquist Court’s logic and rhetoric, consider the most frequently litigated title266 of the 1964 Civil Rights Act—Title VII, which makes it unlawful for an employer to discriminate in hiring, firing, or other employment practices “because of [an] individual’s race, color, religion, sex, or national origin.”267 Although lower courts have held, in accordance with the 1964

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259 See, e.g., United States v. Morrison, 529 U.S. 598, 609 (2000) (summarizing the three means by which Congress may lawfully exercise its commerce power).
260 E.g., Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 22 (1824) (stating that only the national government can regulate channels of interstate commerce).
261 E.g., Champion v. Ames, 188 U.S. 321 (1903); see also Houston, E. & W. Tex. Ry. v. United States, 234 U.S. 342, 351–52 (1914) (allowing the national regulation of a railroad business, even for those lines that did not cross state borders).
262 E.g., NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 41–42 (1937) (stating that Congress may regulate collective bargaining in industries that promote interstate commerce).
263 See, e.g., Morrison, 529 U.S. at 609 (noting that the government argued only that the violence-against-women law was justifiable under the “affects interstate commerce” prong); United States v. Lopez, 514 U.S. 549, 563–64 (1995) (arguing the same for the guns law).
265 See id. at 124–25.
266 In 2001, of the approximately 41,000 civil rights cases filed in the U.S. Courts, slightly more than half were employment cases. See Federal Judicial Caseload Statistics, March 31, 2002, Table C-2, available at www.uscourts.gov.
opinions, that Title VII is a valid exercise of the commerce power, the Supreme Court, while assuming constitutionality, has never directly ruled on the question.

Under the Rehnquist Court's doctrine, the constitutional scrutiny of Title VII might go something like this. First, the fact that nearly every employer is engaged in "economic activity" permits a particular employer's effect on interstate commerce to be aggregated with those of other employers in the same business. Although being "economic" differentiates employment from gun-carrying or violence against women, this factor is only the first step in the "affecting interstate commerce" analysis. The second step is determining whether Congress provided any jurisdictional element to limit the reach of the law. Congress ostensibly limited Title VII to those employers in an "industry" that "affects interstate commerce." But this restriction is nothing more than a truism—Congress merely restated the law of the greatest potential reach of the commerce power.

Indeed, the practical reach of Title VII bears a resemblance to the reach of the Clean Water Act that the Rehnquist Court interpreted so severely in SWANCC. Title VII defines "commerce" to mean "trade, traffic, commerce, transportation,

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268 E.g., Novotny v. Great Am. Fed. Sav. & Loan Ass'n, 584 F.2d 1235, 1255 & n.102 (3d Cir. 1978).


271 Indeed, in Lopez the fact that the defendant was planning to sell the gun he was prosecuted for possessing was not mentioned by the Supreme Court and obviously did not affect the Court's skepticism. See United States v. Lopez, 2 F.3d 1342, 1345 (5th Cir. 1993) (explaining that Lopez was planning to sell the gun), aff'd, 514 U.S. 549 (1995).

272 See 42 U.S.C. §§ 2000e(b), (g), (h) (2000).

273 See, e.g., Polish Nat'l Alliance v. NLRB, 322 U.S. 643, 647 (1944) (stating that when Congress "wants to bring aspects of commerce within the full sweep of its constitutional authority, it manifests its purpose by regulating not only 'commerce' but also matters which 'affect,' 'interrupt' or 'promote' interstate commerce"). Unlike the public accommodations provision in Title II, Title VII does not explicitly make the use of goods in interstate commerce a ground for regulating the business. Compare Title VII, 42 U.S.C. § 2000e(h) (defining "industry affecting commerce" in general terms) with Title II, id. § 2000a(c) (defining a restaurant as "affect[ing] commerce" if "a substantial portion of the food which it serves . . . has moved in commerce").
transmission, or communication among the several States."\textsuperscript{274} In practice, however, it has proven nearly impossible for an employer to avoid Title VII coverage because the federal courts have allowed the employers' use of any goods from interstate commerce to serve as a sufficient hook.\textsuperscript{275} As stated by one appellate opinion, "[i]t is difficult to imagine any activity, business or industry employing 15 or more employees that would not in some degree affect commerce among the states."\textsuperscript{276} Just as the Court in \textit{SWANCC} reasoned that the government's expansive interpretation of "navigable waters" was an unacceptable contrivance,\textsuperscript{277} it would not be surprising for the Rehnquist Court to conclude that the expansive application of Title VII is a similarly unacceptable contrivance. Following the logic of \textit{SWANCC} that the Clean Water Act cannot reach every local pond, the Court could similarly restrict the Title VII practice of covering every small business under the statute simply because it uses an out-of-state chair or pencil. After all, statutes must be read even to avoid the constitutional problems raised by regulating local activities, the Rehnquist Court concluded in \textit{SWANCC}.\textsuperscript{278}

The next step in the Rehnquist Court's commerce power analysis concerns whether the legislature made express findings as to the effect of the regulated activity on interstate commerce.\textsuperscript{279} As cited in the 1964 opinions, Congress found that racial discrimination hampered interstate travel and job opportunities for African Americans.\textsuperscript{280} There should be no doubt that employment discrimination serves as a barrier to full participation in the national economy. But congressional findings of a link between violence against women and interstate

\begin{footnotes}
\textsuperscript{274} 42 U.S.C. § 2000e(g).
\textsuperscript{275} \textit{See}, e.g., \textit{EEOC v. Ratliff}, 906 F.2d 1314, 1316–17 (9th Cir. 1990) (concluding that use of business equipment made in a different state would be sufficient to justify regulation under the Commerce Clause).
\textsuperscript{276} \textit{Id.} (quoting A. \textsc{Larson} & L.K. \textsc{Larson}, \textsc{Employment Discrimination} § 5.31, at 2–40 (1987)).
\textsuperscript{280} \textit{See Heart of Atlanta Motel, Inc. v. United States}, 379 U.S. 241, 252–53 (1964) (citing congressional findings concerning the difficulties for African Americans in finding accommodations).
\end{footnotes}
commerce failed to save the statute in *Morrison*. While the connection between employment discrimination and commerce might seem closer than the association between violence and commerce, the Civil Rights Act's justifications might be more vulnerable on a number of grounds. First, they are nearly forty years old. Second, while they relate almost exclusively to discrimination against African Americans, *Title VII* was amended during drafting to outlaw discrimination based on sex, religion, and national origin as well.

The Rehnquist Court has in effect relied on two paths of thought in declining to defer to congressional findings of a putative link between regulation and interstate commerce—first, a slippery slope concern, and second, a finding of unlawful "attenuation." As for the slippery slope, the Court in *Morrison* rejected the supposed links between the law and interstate commerce because, if it accepted Congress's reasoning, Congress would be able to regulate anything. To arrest the slip, the Court turned to tradition. How might *Title VII* fare under such scrutiny? In the days of *Carter Coal*, the Court viewed employment matters as firmly within the traditionally and exclusively "local" sphere. Such a generalization regarding employment matters would be harder to swallow today, considering the decades of national regulation of working hours, employment safety, and, since 1964, race and sex discrimination.

By contrast, the "attenuation" ground might form a more coherent way of limiting congressional power over employment matters. Although *SWANCC* seemed to relate the problem of

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281 See *Morrison*, 529 U.S. at 614–15.
283 See *Morrison*, 529 U.S. at 612–17.
284 See *id.* at 612.
285 *Id.* at 615–16.
286 See *id.* at 615–16.
287 See Carter v. Carter Coal Co., 298 U.S. 238, 303 (1936) (explaining that the "relation of employer and employee . . . is purely local in character").
attenuation to the traditional spheres of authority,\textsuperscript{291} there is nothing inherently attenuated about national regulation of traditionally local matters. Regulation of state water use, for example, has potentially important interstate concerns, as a history of federal intervention in state-to-state water disputes shows.\textsuperscript{292} Rather, I argue, the Court's assertion that legislative findings are "attenuated" is the way that the Court has expressed skepticism over the true motivation for the law. Such skepticism is what the Court had in mind, I suggest, when it stated that it would not allow Congress to pile "inference upon inference" to find a link to interstate commerce.\textsuperscript{293} Following an inference with another inference is problematic only when one distrusts the inferences to begin with. In sum, the Rehnquist Court ruled against the government in \textit{SWANCC} and \textit{Morrison} in large part because it rejected as contrived the government's assertions of congressional motivation.

Although it is often problematic, ascertaining motivation is not an impossible task. Indeed, in 1991 Congress amended the employment discrimination law to clarify that an employer is liable whenever an impermissible factor, such as race or sex, was a "motivating factor" in the employment decision to hire or fire.\textsuperscript{294} Of course this test might not be workable as a constitutional standard for scrutinizing legislation. Even before 1937, when the Court routinely rejected legislation because of an impermissible motivation,\textsuperscript{295} the Court never resolved the problem of mixed motivations. Relying on the Constitution's Supremacy Clause,\textsuperscript{296} one might argue that if Congress is motivated even slightly by a desire to foster interstate commerce, the law should be allowed to stand, in order to fulfill this legitimate purpose.\textsuperscript{297} On the other hand, if the Court truly

\textsuperscript{291} See \textit{SWANCC}, 591 U.S. at 172–74.
\textsuperscript{292} See, e.g., \textit{Texas v. New Mexico}, 462 U.S. 554, 575–76 (1983) (holding that the national government may resolve an interstate water dispute through a Special Master).
\textsuperscript{296} \textit{U.S. Const.} art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . .").
\textsuperscript{297} See \textit{generally} \textit{Gibbons v. Ogden}, 22 U.S. (9 Wheat.) 1 (1824) (setting forth
were to revert to a pre-1937 view and find that certain subject matters are completely off limits to Congress, then mixed motivation laws might be unsalvageable. Second-guessing the motivations of a legislature is bound to be a tricky matter. The Rehnquist Court so far has not even acknowledged that this is what it has done; in *Lopez* and *Morrison*, it trotted out its assessment that the laws were too “attenuated” and left it at that, leaving the difficult details of doctrine to be filled in either by lower courts or future cases. However, the development of a doctrine on motivation is needed in order to create a coherent jurisprudence for a limited commerce power.

It may seem inconceivable that the Supreme Court could rule that Title VII of the Civil Rights Act of 1964 is unconstitutional because it was motivated by a desire for social justice and not by a motivation to foster interstate commerce. Such a ruling would be a body-blow to the great national commitment, which slowly came to fruition in the 1950s, ’60s, and ’70s, that discrimination on the basis of race, sex, and other personal characteristics such as disabilities is impermissible in American society. Accordingly, one should not expect the Supreme Court to overturn Title VII anytime soon; such a step would be, of course, politically explosive. But it would be a logical result of the Rehnquist Court’s new federalism.

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298 See, e.g., *Loving v. Virginia*, 388 U.S. 1, 9 (1967) (striking down Virginia’s law banning marriages between two persons of different races, despite arguments of the state’s mixed motivations in passing the prohibition); see also Ugo Colella, *Trust the Tale, Not the Author*, 69 Temp. L. Rev. 1081, 1129–30 (1996) (arguing for closer judicial scrutiny into the motive of a legislature when a law is alleged to have been racially motivated); Kenneth Karst, *The Costs of Motive-Centered Inquiry*, 15 San Diego L. Rev. 1163, 1165 (1978) (displaying skepticism of inquiring into motivation).


301 The outer limits of this commitment are being tested, of course, by assertions that sexual orientation is a similarly immutable characteristic and should receive similar protection. See, e.g., *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000) (“Sexual orientation and sexual identity are immutable . . .”). The inner limits of this commitment stop at the personal level, where otherwise unlawful discrimination is still allowed in one’s personal domestic affairs, such as friendship and marriage.
B. The Contrivance of Construction

In addition to its distrust of the contrivance of motivation, the Rehnquist Court also revealed in SWANCC a skepticism of the contorted means by which Congress sometimes drafts and agencies sometimes interpret national laws. I call this contortion the contrivance of construction.

The Court in SWANCC barely restrained its exasperation with the Army Corps' expansive interpretation of the Clean Water Act, even though the Court had no interpretative basis for concluding that the agency's construction plainly was inconsistent with the statute. Rather, with a neat balancing act, the Court managed both to avoid deferring to the government and to avoid resolving the constitutional question. By demanding a "clear indication" of congressional intent before allowing an agency interpretation that "invokes the outer limits" of the commerce power, the Court was able to reverse the usual burden of proof in Commerce Clause challenges. Finding no "clear indication" from Congress, the Court was then free to impose its own narrow statutory interpretation of "navigable waters" that avoided addressing the constitutional issue.

Missing from the Court's reasoning, however, was a thorough analysis of the critical question whether the government's interpretation was indeed at the "outer limits" of national power, as the Court assumed. The Corps' expansive Migratory Bird Rule covered water bodies under section 404 if they were habitat for migratory birds. The agency argued that its interpretation was permissible under the commerce power because of the fact that millions of people spend over a billion dollars annually on recreational pursuits relating to migratory birds. Because protecting migratory birds fosters this

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302 See SWANCC, 531 U.S. 159, 168-69 (2001) (noting that the Army Corps' original interpretation was narrower and further commenting that the government "put forward no persuasive evidence" that this original interpretation was wrong).


304 See SWANCC, 531 U.S. at 172.

305 See id. at 172-73.


307 SWANCC, 531 U.S. at 173.
commerce, the proposition went, the Migratory Bird Rule had a significant effect on interstate commerce.\textsuperscript{308} In my view, protecting commerce related to migratory birds seems to be no more at the “outer limits” of the Constitution than the regulation of the landscaping of a closed strip mine\textsuperscript{309} or the regulation of a small company’s practices regarding wages and labor conditions,\textsuperscript{310} just to name two of the laws that the Court decades ago held to be within the commerce power. But the Rehnquist Court refused to assess the government’s arguments on their merits. Instead it returned to its requirement that the Corps prove that Congress intended such a result,\textsuperscript{311} invoked the supposed “tradition” of state control over land and water use, and ended its analysis.\textsuperscript{312}

The Rehnquist Court’s logical and argumentative short-cuts can be explained by recognizing the Court’s annoyance with the government’s boot-strapping on the venerable term “navigable waters” to construct a large-scale regime for environmental protection. Indeed, the Court in \textit{SWANCC} concluded its only paragraph devoted to the supposed effect of the law on interstate commerce with the dismissive, “[b]ut this a far cry, indeed, from the ‘navigable waters’ and ‘waters of the United States’ to which the statute by its term extends.”\textsuperscript{313} The crux of the annoyance is this: How could “navigable waters” end up meaning waters that plainly are not navigable? The answer lies in the history of the contrived creation and administration of the Clean Water Act.

\textsuperscript{308} \textit{Id.} Not asserted as vigorously were arguments that migratory birds themselves are “instrumentalities” of interstate commerce and that the Supreme Court had already upheld congressional protection of migratory birds in \textit{Missouri v. Holland}, 252 U.S. 416, 434–35 (1920) (upholding the authority of Congress to enact the Migratory Bird Treaty Act of 1918 in large part because the Act enforced provisions of treaties with foreign nations).

\textsuperscript{309} See \textit{Hodel v. Va. Surface Mining & Reclamation Ass’n}, 452 U.S. 264, 277–80 (1981) (explaining that regulating surface coal mining was within Congress’s commerce power because Congress rationally determined that the activity affected commerce and that determination was entitled to deference).

\textsuperscript{310} See \textit{United States v. Darby}, 312 U.S. 100, 121 (1941) (finding that regulating small business’s practices regarding wages and labor conditions was within the commerce power because it was a reasonable means to a legitimate end).

\textsuperscript{311} \textit{SWANCC}, 531 U.S. at 172.

\textsuperscript{312} \textit{Id.} at 174.

\textsuperscript{313} \textit{Id.} at 173. Although it might have been a far cry from “navigable waters,” it was not a far cry from the much broader “waters of the United States.” See 33 U.S.C. § 1362(7) (2000).
Congressional regulation of the nation's navigable waters began with the Rivers and Harbors Act of 1899, which made it a crime to dump "refuse" into a "navigable water" or a tributary of such water, unless permitted by the Army Corps upon a finding that the dumping would not injure "anchorage and navigation." According to at least one scholar of water law, the statute was nearly forgotten by the 1960s, when the first generation of national environmental advocates encouraged prosecutions under the Act. This "discovery" of a national pollution control statute, even if its effectiveness had been limited in practice, was a major impetus to Congress's passage of the Federal Water Pollution Control Act of 1972, which largely supplanted the Rivers and Harbors Act and the provisions of an older national water pollution act that similarly had addressed "navigable waters."

During congressional consideration of draft legislation for the new water law in 1971 and 1972, various bills used the then-familiar term "navigable waters" to define the statute's reach. In an enlightening history of the act, Professor William Funk explained that the leading sponsors of the Act intended that "navigable waters' be given the broadest possible constitutional interpretation." Congress intended to cover all waters related to interstate commerce, even if the water bodies were not navigable, Funk maintained, which Congress expressed with the definition of navigable waters as "the waters of the United States." As to why Congress employed the seemingly outmoded term "navigable waters," Funk suggested that "the answer must be that Congress believed its power to regulate..."
water did not extend beyond navigable waters broadly defined.\textsuperscript{321} Less clear is how Congress could sensibly "broadly define" a narrow term such as navigable waters. The suggestion does not clarify why congressional drafters continued to use "navigable waters" if they intended it to include waters that were plainly \textit{not} navigable in the commonsense or dictionary meaning of the term. I suggest alternative explanations. The drafters either did not understand how to invoke the full extent of the modern commerce power—which would include regulation of all water pollution that "significantly affect[s] interstate commerce"\textsuperscript{322}—or they simply borrowed the most familiar term in national water regulation, "navigable waters," tacked on a contradictory definition, "waters of the United States," and left it to the administrative agencies and the courts to sort out the contrivance.

Faced with this contrived statutory command and prodded by the EPA and environmental litigants, the Army Corps developed its Migratory Bird Rule.\textsuperscript{323} The Corps created a distinction based on whether or not the body of water was bird habitat—a rough but reasonable decision, in light of existing Commerce Clause precedent\textsuperscript{324}—but nonetheless a distinction that had no basis whatsoever in the text of the Clean Water Act itself. The Army Corps could and should have supported its interpretation with an explanation of why the Migratory Bird Rule was justified by existing judicial interpretations of the scope of the commerce power.\textsuperscript{325} The Army Corps also should have explained in its rule making documents that protecting migratory bird habitat fosters the significant interstate

\textsuperscript{321} Id.


\textsuperscript{323} See SWANCC, 531 U.S. 159, 164 (2001); see also Funk, supra note 120, at 10748–49.

\textsuperscript{324} The Migratory Bird Rule also covered waters that were used to irrigate crops sold in interstate commerce and that were a habitat for endangered species. See SWANCC, 531 U.S. at 164 (quoting Final Rule for Regulatory programs of the Corps of Engineers, 51 Fed. Reg. 41216, 41217 (Nov. 13, 1986)). From cases such as \textit{Katzenbach} and \textit{Hodel}, the Supreme Court had by the 1980s permitted national regulation of activity that "affected commerce" or provided some sort of interstate hook. See Katzenbach, 379 U.S. at 301–02; Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 277 (1981).

\textsuperscript{325} See \textit{Katzenbach}, 379 U.S. at 299–301 (determining that national regulation is permitted if it affects interstate commerce).
commerce associated with recreation and the hunting of birds. Instead, however, the Army Corps promulgated its rule with little regulatory explanation and without the notice and comment procedures outlined in the Administrative Procedure Act—omissions that seem to have exacerbated the Supreme Court’s perception that the Army Corps’ construction was unacceptably contrived. As a result, the vulnerabilities laid by Congress’s contradictory drafting in 1972 were resolved, thirty years later in SWANCC, with disastrous results for nationalism and environmentalism.

In light of the Rehnquist Court’s skeptical new federalism, it is worthwhile to explore whether other public-spirited laws are likely to engender displeasure over the contrivance of construction, as revealed in SWANCC. Unfortunately for social welfare legislation, the Court may not have far to go to uncover similar contrivances in a range of national statutes. In this section, I briefly note some potentially vulnerable provisions in the arena of environmental law.

In light of the contrivances implicated by section 404 of the Clean Water Act, it is not surprising that this provision became the first section of a major federal statute to incur the wrath of the Rehnquist Court’s revived federalism. Industrial polluters are already attempting to use SWANCC to limit the reach of the Clean Water Act’s regulation of industrial point source discharges. If the federal courts apply SWANCC broadly,
industrial polluters would no longer be restricted by national law from dumping into isolated wetlands or intrastate lakes, perhaps including one as large as Utah's Great Salt Lake. Such a result would be consistent with the Court's view that regulation of land and water must return to the exclusive realm of state law. It would also transform the law of pollution control.

Similarly vulnerable would be key provisions of the ESA. In recent years, environmental advocates have made increasingly bold use of the statute's prohibition against "take" of endangered species, even by private parties on private land. As interpreted by the U.S. Fish and Wildlife Service, the "take" provision potentially limits a variety of land or water-disturbing activities, such as the logging of a forest that is home to an endangered migratory bird, a town's permitting bright lights to shine on a beach where turtles hatch, and sheep-grazing on plants that are the food for a rare island bird.


If a large but single-state lake such as the Great Salt Lake or Florida's Lake Okeechobee is not part of interstate navigation, it would seem that national regulation of the lake would not be constitutionally permitted under SWANCC's logic, even though the lakes are navigable-in-fact, unless the government were able to show that a particular activity on the lake significantly affected interstate commerce. But see Colvin v. United States, 181 F. Supp. 2d 1050, 1055 (C.D. Cal. 2001) (finding that California's large Salton Sea is a "navigable water" covered by the Clean Water Act). The constitutional justification should be made in regard to the activity that is regulated, not simply by general reference to the body of water. Neither Congress in the Clean Water Act nor the Court in SWANCC was willing to make such an analysis, however.

See SWANCC, 531 U.S. at 173.

See Funk, supra note 120, at 10741, 10770–72 (noting that SWANCC could portend a major change in water pollution control).


See 50 C.F.R. § 17.3 (2002).

See Marbled Murrelet v. Babbitt, 83 F.3d 1060, 1066 (9th Cir. 1996) (finding that logging may cause an unlawful "take" of a bird that relies on the forest).

See Loggerhead Turtle v. County Council, 148 F.3d 1231, 1258 (11th Cir. 1998) (approving preliminary injunction). Lights that shine on the beaches of sea turtles can disorient hatchlings, which crawl toward low-lying nighttime light, which in their natural settings exist only in the moon's reflection off the sea. Id. at 1235.

See Palila v. Hawaii Dep't of Land and Natural Res., 852 F.2d 1106, 1109–10 (9th Cir. 1988) (affirming decision prohibiting sheep grazing where the Palila
Because of its potential to restrict private land and water use, the ESA has been a target of federalist challenges. So far, most efforts have failed. In 1998, a construction-business group challenged the government's decision to list as endangered the obscure delhi sands flower-loving fly.\(^{339}\) Because the inch-long fly lives only in California and has no known connection to commerce, the group argued that protection was beyond Congress's commerce power.\(^ {340}\) The D.C. Circuit upheld the listing, finding among other things that preservation of any endangered species protects unique and potentially commercially valuable genetic material.\(^ {341}\) The Fourth Circuit echoed the D.C. Circuit in a challenge to regulations concerning the reintroduction of the endangered red wolf to North Carolina. The court held that the interstate tourist travel to "howling events" was, among other factors, sufficient to support national protection of the wolf pursuant to the commerce power.\(^ {342}\)

Application of the ESA's older cousin, the Migratory Bird Treaty Act (MBTA),\(^ {343}\) enacted in 1918, has also expanded with the years to address private commercial activity. Once primarily directed at hunting, the MBTA has recently been applied to regulate such non-malicious acts as the maintenance of uninsulated power lines that are known to kill migratory birds, which led to a successful criminal prosecution against a rural electric cooperative.\(^ {344}\)

Although the federal courts have so far upheld the broad applications of the national wildlife statutes, the new federalism might soon bring them within its sights. In *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*,\(^ {345}\) handed down just weeks after *Lopez*, a divided Supreme Court rejected an argument that the expansive administrative regulations for the ESA's "take" prohibition contradicted congressional intent.\(^ {346}\)


\(^{340}\) See Nat'l Ass'n of Homebuilders, 130 F.3d at 1050–54.

\(^{341}\) See id. at 1052–53.

\(^{342}\) See Gibbs v. Babbitt, 214 F.3d 483, 494 (4th Cir. 2000).


\(^{346}\) See id. at 708.
With a somewhat reluctant Justice O'Connor joining the majority, the Court approved of applying the ESA to private land use that unintentionally harms an endangered species. However, a spirited dissent by Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, argued that the ESA's "take" proscription should be limited to hunting. Although the Commerce Clause question was not briefed or addressed in *Sweet Home*, the ESA and the MBTA seem likely candidates for critical scrutiny by the Rehnquist Court's federalists. Following its criticism in *SWANCC* of the expansion of the Clean Water Act from its "navigable waters" roots, the Rehnquist Court might well conclude that the ESA and MBTA have been contrived to serve broad environmentalist purposes without sufficient statutory or commerce power supports. It is not difficult to see parallels between the administrative expansion of water regulation struck down in *SWANCC* and, as the *Sweet Home* dissenters argued, the extension of the wildlife laws to restrict land and water activities.

Indeed, some of the hardest fought epics of American civil litigation, as well as some of the biggest victories of environmentalism, have come through assertive application of the ESA as a regulator of land that serves as habitat. For example, in the Pacific Northwest during the 1990s, the northern spotted owl's need to nest in old trees led to, as environmentalists saw it, unprecedented legal attention to protecting old-growth forests, or, as loggers viewed it, a devastating twist of a federal statute to depress an essential part of the local economy. A veteran advocate of endangered species protection has suggested that the potential clout of the ESA was hidden by verbal "camouflage" during the drafting of the Act, critical requirements of which are unclear even after repeated readings. Congress employed a similar burrowing technique with the keystone requirement of an environmental impact statement in section 102(2)(C) of the National

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347 See id. at 708–09 (O'Connor, J., concurring).
348 See id. at 714 (Scalia, J., dissenting).
349 See id. at 715.
350 For a discussion of the northern spotted owl controversy and its tangled litigation, from a pro-environmentalist perspective, see PLATER ET AL., supra note 183, at 674–84.
351 See id. at 657, 666.
Environmental Policy Act, enacted in 1970.\textsuperscript{352} Both the ESA and NEPA are popular with environmental advocates because of their potential to stop planned construction projects in their tracks for failure to follow appropriate procedures. Indeed, when other efforts fail, some environmentalists admit to turning to the bureaucratic hurdles of these statutes as a last resort to try to secure at least a delay in ground-disturbing activities.\textsuperscript{353}

Although all diligent attorneys pursue a variety of arguments to further their client’s interests, the aggressive application of the environmental statutes may encourage the Rehnquist Court’s federalists to use the Commerce Clause to batten down what they perceive as contrivances of the laws, as they did in \textit{SWANCC}. Advocates of private property rights have already tried, as I have noted, to challenge aspects of the ESA in the federal appellate courts. So far, the Supreme Court has not decided a Commerce Clause challenge to the ESA, MBTA, or NEPA. If and when it does, however, it is quite conceivable that the Court could limit the reach of the statute to sustain the “tradition” of state authority over land and water use, as it did in \textit{SWANCC}.

Even if the Court does not go so far as to declare unconstitutional an entire statute, it is likely to look for ways to nibble at the edges of the law when it detects the contrivances of motivation or construction, just as it gnawed at the Clean Water Act in \textit{SWANCC}.\textsuperscript{354} Particularly vulnerable are regimes that combine both the contrivances of motivation and construction—that is, where a statute primarily serves the purpose of


\textsuperscript{353} See, e.g., PLATER ET AL., supra note 183, at 659–62, 667–68. Plater explained how opponents of the planned Tellico Dam in the 1970s first used NEPA and then the ESA, with the famous snail darter case that went to the Supreme Court, \textit{TVA v. Hill}, 437 U.S. 153 (1978), to delay completion of the dam, which was eventually completed. See \textit{PLATER ET AL. supra} note 183, at 659–71. Similarly, opponents of the Navy’s bombing on the island of Vieques, Puerto Rico, sought out and found provisions of environmental law that gave them victories on the merits, but did not secure them injunctive relief. See \textit{id.} at 667–68 (citing \textit{Weinberger v. Romero-Barcelo}, 456 U.S. 305 (1982)).

\textsuperscript{354} I agree with Professor William Funk that \textit{SWANCC} is a fairly substantial bite. Funk has suggested that \textit{SWANCC} “may be the most devastating judicial opinion affecting the environment ever,” as it restricts coverage of the Clean Water Act’s section 404 program away from perhaps as much as 80 percent of the nation’s “wetlands”—areas that are sometimes wet and sometimes dry, such as marshes and swamps—and perhaps even away from single-state lakes such as Utah’s Great Salt Lake. See Funk, \textit{supra} note 120, at 10741, 10745.
furthering social welfare, not interstate commerce, and where a crafty drafter or an exuberant administrative agency has inflated its coverage. Section 404 of the Clean Water Act may have fulfilled both contrivances. So might have, before Congress finally codified it in 1991, the judicially created doctrine of unlawful race discrimination by “disparate impact” under Title VII of the Civil Rights Act of 1964, which exposed even seemingly dispassionate requirements such as employment tests and job qualifications to the exacting scrutiny of the federal courts. In the environmental realm, we should expect more challenges to the ESA, MBTA, and NEPA. Similarly vulnerable in the Superfund statute might be the practice of the EPA of ordering private parties to clean up hazardous waste spills in situations in which there is only a remote risk of contamination to humans, and a remote link to interstate commerce. Exposure of such vulnerabilities is the logical next step of the Rehnquist Court’s new federalism.

IV. THE CONTRIVANCE OF LIBERTARIANISM

The idea that federalism fosters freedom is as old as the nation. In The Federalist, James Madison argued that by restricting the powers of the national government, the Constitution would advance liberty because citizens would face only one level of government. Adherents of political libertarianism continue to echo Madison’s linkage of federalism to freedom, although today’s contentious political debates tend to focus on the benefits of laissez-faire in the marketplace and the putative rights of personal and business property. Indeed, the


358 See id. § 9606(a) (giving authority to issue orders for remedial action when there is an imminent threat of endangerment).

359 See THE FEDERALIST NO. 51, 321–24 (James Madison). The notion that Congress might largely supplant state legislatures was not within Madison’s thinking and has never entered the mainstream of American political or jurisprudential thought.

360 See, e.g., Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1031–32
libertarian-oriented law school organization calls itself The Federalist Society. Perhaps the leading libertarian commentator in American law, Professor Richard Epstein, argued years before *Lopez* that "the great peril of national regulation is that it may be taken too far, to impose national uniformity which frustrates, rather than facilities markets." Variations among state laws, Epstein wrote, constitute "competitive market[s]," thus serving as "powerful instruments for human happiness and well-being."

Even a more moderate commentator, Professor Louise Weinberg, has written that the chief benefit of limiting national power is to avoid an "abuse of national prerogatives." The reason to fear nationalism, Weinberg contended, is the risk that unfettered national power might lead to mass "propoganda," such as through a nationally run school system or a national

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(1992) (stating that the government may not regulate to deprive a landowner of the complete value of the property unless the regulation reflects traditional nuisance law or the government provides just compensation); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261–62 (1964) (holding that the national government may regulate public accommodations).


362 Epstein, *supra* note 45, at 1454.

363 *Id.* at 1453. Not all libertarians, however, are federalists. Professor Charles Fried, Solicitor General under President Reagan, has written skeptically of the notion that reliance on state as opposed to national government is likely to lead to more liberty. *See* CHARLES FRIED, ORDER AND LAW 186–87 (1990). The "village tyrant," Fried wrote, can be as arbitrary in abuse of his power as the national government. *Id.*

From a more humorous stance, journalist P.J. O'Rourke, a former 1960s student-radical who turned conservative, has argued that hallowed institutions of local democracy, such as the New Hampshire "Blatherboro" town meetings in which he participates, are as venal and threatening to liberty as big government. *See* P.J. O'Rourke, *Parliament of Whores* 223–33 (1991). In particular, local government is the authority that most often infringes on private real property rights. Writing of his town's voting to block a private property owner from building a golf course on his own land—with O'Rourke voting with the majority—he concluded:

The whole idea of government is this: If enough people get together and act in concert, they can take something and not pay for it . . . . What we were trying to do with our legislation in the Blatherboro Town Meeting was wanton, cheap, and greedy—a sluttish thing. This should come as no surprise. Authority has always attracted the lowest elements in the human race. . . . Every government is a parliament of whores . . . . The trouble is, in a democracy the whores are us.

*Id.* at 232–33.

police force.\textsuperscript{365} Weinberg's apprehension is a centrist variant of the beliefs of right-of-center anti-nationalists who fear national gun control as a first step toward totalitarianism and who distrust the United Nations, which is the ultimate high-level government.\textsuperscript{366} Indeed, historians note that a key move in the Nazis' takeover of Germany in 1933 was their abolition of the traditionally strong German state governments, including those of Bavaria, which had a history of Catholic-oriented moderation, and of Prussia, in which left-wing socialism was strong.\textsuperscript{367}

There should be no doubt that the Rehnquist Court's majorities in \textit{Lopez}, \textit{Morrison}, and \textit{SWANCC} took seriously the purported "liberty" benefits of federalism. In \textit{Lopez}, the Court wrote that the restriction on federal power "was adopted by the Framers to ensure protection of our fundamental liberties."\textsuperscript{368} While neither \textit{Morrison} nor \textit{SWANCC} relied on liberty per se—the defendant in \textit{Morrison}, after all, was trying to avoid a civil claim arising from an alleged rape\textsuperscript{369} and the plaintiff in \textit{SWANCC} was a local governmental body\textsuperscript{370}—the federalist-friendly justices on the Rehnquist Court have made known their skepticism of excessive governmental authority over private citizens in the economic sphere. Chief Justice Rehnquist, author of \textit{SWANCC}, \textit{Morrison}, and \textit{Lopez}, penned a famous dissent in \textit{Penn Central Transportation Co. v. New York} \textsuperscript{371} that in 1978 helped rekindle the jurisprudence of the Fifth Amendment's right against uncompensated "taking,"\textsuperscript{372} which is the Constitution's chief limitation on government regulation of

\textsuperscript{365} \textit{Id.} at 1332–36.


\textsuperscript{367} See, e.g., \textit{William L. Shirer, The Rise and Fall of the Third Reich} 200 (Simon & Schuster 1990) (1959). With the statement, "[t]he state governments from now on are merely administrative bodies of the Reich," the Nazis were able to eliminate other political parties and consolidate their totalitarian power. See \textit{id.} at 200.


private property. Since joining the Court in 1986, Justice Scalia has written many of the Court's most scathing opinions of perceived government overreaching on private property, such as his equation of government land use regulation with "extortion" in *Nollan v. California Coastal Commission.*373 Chief Justice Rehnquist and Justices Scalia, O'Connor, Kennedy, and Thomas have formed the foundation of the court's advocacy both of private property rights and of federalism.374

The role of libertarianism is the under appreciated impetus to the Rehnquist Court's new federalism. Scholars and litigants who are puzzled by the Court's logical gyrations375 in *Lopez, Morrison,* and SWANCC have often failed to acknowledge the impetus of this political philosophy. While scholars of the commerce power often speak of the debate over federalism as concerning a choice between national law and state law,376 this characterization fails to capture the gist of many of the leading controversies. Many of the most important and contentious federalist debates actually concern whether to govern at all—that is, whether to regulate the citizens through national law or whether to leave them to their own devices, as state law would permit.

The nationalists' "race to the bottom" argument, for instance, is predicated on the assumption that states wish to enact social legislation but are discouraged from doing so by fear of competition for business from other states—a prisoner's dilemma that can only be relieved by national intervention.377 Although this dilemma may exist for some issues, it is not the scenario that has played out in many controversies of public policy and law. From health and safety regulation378 to

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374 See, for example, *Palazzolo v. Rhode Island,* 533 U.S. 606 (2001), for the Court's latest major statement on the Fifth Amendment's right against uncompensated takings, in which Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas formed the majority.
375 See, e.g., *MASSEY,* supra note 8, at 183 (calling *Lopez* and *Morrison* "anomalous").
376 See, e.g., *Weinberg,* supra note 202, at 1319 (referring to the issue of federalism as being national "encroachment on state governance").
377 See, e.g., *Engel,* supra note 62, at 304-05 (concluding that many state legislators are fearful of losing business to other states as a result of interstate competition arising from lack of uniform national environmental standards).
378 See, e.g., *Lochner v. New York,* 198 U.S. 45, 57-58 (1905) (evaluating the
employment conditions to race and gender discrimination to environmental protections, many of the greatest debates of law over the past century have concerned whether government should interfere at all with the freedoms of society and the marketplace. The battles between regulation and libertarianism are not merely skirmishes over whether to choose a national or a state dialect, but rather constitute a war between completely different languages of social construction.

A high-water mark of the nationalist approach to the Commerce Clause, 1964's *Katzenbach v. McClung* revealed the contrasting approaches to government. It is unlikely that the Alabama legislature in the early 1960s was constrained by fear of interstate competition from enacting a law requiring Ollie's Barbeque to serve African-Americans; rather, the prevailing political view in Alabama at the time—at least as reflected in its white-dominated politics—was that Ollie's Barbeque and places like it should be allowed to discriminate. Likewise, in the more recent dispute resolved in *SWANCC*, it seems likely that Illinois allowed pond-filling not because it feared competition but because it preferred the economic benefits of filling ponds to ecological protection. Libertarianism is followed voluntarily, not reluctantly.

This is not to concede, however, that federalism is inherently friendlier to freedom than is nationalism. The American system of cooperative federalism among the national and state governments often results in more regulation than would exist with exclusively national law. Most prominent national statutes set only a floor for regulation. In the environmental realm, for

constitutionality of New York's regulation of working hours for bakers).


383 See id. at 298 (stating that there was no contention that the government forced the restaurant to discriminate).

example, both the Clean Water Act and the Clean Air Act permit states to adopt pollution controls that go beyond the national laws, if they so desire.\textsuperscript{385} Similarly, the Superfund law specifies that the national statute does not affect state tort law,\textsuperscript{386} meaning that a party that has contributed to a spill of hazardous waste may be liable through state tort standards even if the national law provides no remedy. Likewise, in the realm of discrimination law, many states have enacted rights and remedies for alleged victims of discrimination that go beyond those provided in the national Civil Rights Act of 1964.\textsuperscript{387} Even for national statutes that do not explicitly permit states to go further, the jurisprudence of the Commerce Clause usually allows states to supplement national law with tighter state requirements. Courts restrain supplemental state laws only in the occasional case in which (1) Congress has explicitly preempted state law, such as in the case of motor vehicle emissions—with limited exceptions;\textsuperscript{388} (2) there is a real conflict between national law and state law that makes it impossible for a party to comply with both;\textsuperscript{389} or (3) a “dormant” Commerce Clause prevents state regulation in the absence of national law, which usually occurs when states discriminate against out-of-state commerce or unnecessarily hinder interstate traffic.\textsuperscript{390}

\textsuperscript{386} 42 U.S.C. § 9672.
\textsuperscript{388} See 42 U.S.C. § 7543(a) (indicating that states may not adopt “any standard relating to the control of emissions from new motor vehicles”). This preemption ensures that manufacturers will not have to make multiple variations of autos to comply with varying state standards. Exceptions include a waiver process for more stringent state standards adopted before 1966, \textit{id.} § 7543(b), and the limited “clean fuel vehicle” program that applies to California and a few other states that choose to adopt it, \textit{id.} at §§ 7581–7590.
\textsuperscript{389} See, e.g., \textit{California Coastal Comm’n v. Granite Rock Co.}, 480 U.S. 572, 582 (1987) (allowing a state land-use regulation to co-exist with an arguably conflicting federal environmental regulation).
\textsuperscript{390} See, e.g., \textit{Kassel v. Consolidated Freightways}, 450 U.S. 662, 671 (1981) (striking down an Iowa regulation of double-trailer trucks because of its hindrance on interstate commerce); \textit{Philadelphia v. New Jersey}, 437 U.S. 617, 624 (1978) (announcing a “virtually per se rule of invalidity” against a state’s protectionism of its own commerce against out-of-state competition). Many of the facially neutral statutes that have been struck down involve situations, such as in \textit{Kassel}, in which
result is that American federalism typically provides for two levels of regulation on business—more than if the law were strictly national or strictly state.\textsuperscript{391} Thus, it is a gross oversimplification to equate federalism with liberty, despite a long history of doing so.\textsuperscript{392}

The salient libertarian result of restricting national power would be to permit a minority of states that disagree with the majority view—which presumably sways the national government—to follow their own course of limited regulation. If the Supreme Court were to declare the bulk of the national environmental laws and anti-discrimination laws unconstitutional—the stuff of dreams, no doubt, for some libertarians\textsuperscript{393}—many if not most states would then enter the breach. Some states might stop short of the old national laws, perhaps out of fear of dissuading business. However, if the safety promises of environmentalism are as important to citizens as is often suggested,\textsuperscript{394} we might expect many states to appease voters by vigorously instituting new state environmental

the state law might have been a ruse for discrimination under the guise of public safety. Beyond this, the doctrine of the dormant Commerce Clause for facially neutral state laws is far from clear. See \textit{Engdahl}, \textit{supra} note 151, at 248–57 (exploring the ambiguity of the scope of the Commerce Clause and the power it gives the states).

\textsuperscript{391} This is not to say that either national or state law would remain unchanged if the United States were to follow a strictly national or strictly state regulatory system. If a solely national system was in place, advocates of regulation, especially from those states that are amenable to tougher regulation, would try harder to adopt more stringent national laws. Under a state system, advocates of regulation would certainly fight for stricter state laws because of the absence of a national floor for legislation.

\textsuperscript{392} For another example, consider the typical progressive view of the role of the federal judiciary. Because progressive federal court judges have led the way on matters such as the rights of minority groups, the rights of the accused, and the freedom of speech from the 1940s to the 1970s, many left-of-center advocates continue to view the federal courts as their first choice for vindicating their policy aims, despite the fact that the federal judiciary as a whole today may be no more liberal than Congress or many state legislatures. See, e.g., Patrick Todd Mullins, \textit{The Militia Clauses, The National Guard, and Federalism: A Constitutional Tug of War}, 57 GEO. WASH. L. REV. 328, 348–49 (1988) ("[T]he federal courts, not the state governments, are viewed as the vanguard protectors of individual rights.").

\textsuperscript{393} See Epstein, \textit{supra} note 45, at 1443–54 (criticizing the New Deal expansion of the commerce power to social justice laws, such as labor statutes, in large part on libertarian grounds).

\textsuperscript{394} See, e.g., ROBERT V. PERCIVAL ET AL., \textit{ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY} 8 (3d ed. 2000) (noting the consistency of polls showing public support for environmental protection).
standards. Likewise, if the Court were to set aside the national antidiscrimination laws, they would be replaced in effect by the extant state anti-discrimination laws that have been adopted in varying forms in nearly all states.\(^{395}\) Libertarianism would prevail only in a minority of states.

Perhaps because of their orientation toward economics, many federalists perceive the “race to the bottom” assertion to be among the most formidable of the arguments for nationalism.\(^{396}\) Federalist responses, however, appear to be a mixed bag: Some federalists sometimes deny that policy-forcing competition between states exists at all, while others say that it is a good thing that the competition exists. Professor Jonathan Adler, an economically oriented federalist, has commented in the wake of SWANCC that “[t]here is little reason to believe that interstate competition among states will produce a ‘race-to-the-bottom’ in environmental regulation today, if it ever did.”\(^{397}\) Because many citizens cherish environmental protections, state legislators attract votes by adopting such laws.\(^{398}\) He noted that some states with the highest concentration of wetlands, the water bodies for which SWANCC largely left the states to regulate, hold the strongest laws to protect these wetlands.\(^{399}\) Adler concluded that state control is usually preferable because decisions of policy are best made by those closest to the matter, especially for site-specific issues such as environmental choices.\(^{400}\)

By contrast, Professor Richard Epstein has been plain in his assessment that federalism is better because it does engender competition among the states.\(^{401}\) Such competition, he asserted, discourages regulation and encourages market solutions.\(^{402}\) Indeed, one of the most provocative conservative political ideas of the twentieth century was the local government choice theory

\(^{395}\) See, e.g., Schwemm, supra note 387, at 275 n.402 (listing fair housing laws).

\(^{396}\) See, e.g., Adler, supra note 65, at 207–08; Epstein, supra note 45, at 1443–44.

\(^{397}\) Adler, supra note 65, at 207–08.

\(^{398}\) See id. at 207–08, 224–25.

\(^{399}\) See id. at 229 (citing Jon A. Kusler, State Wetland Regulation: Status of Programs and Emerging Trends 3 (1994)).

\(^{400}\) Adler, supra note 65, at 230 (citing F. A. Hayek, The Use of Knowledge in Society, 35 AM. ECON. REV. 519, 521–22 (1945)).

\(^{401}\) See Epstein, supra note 45, at 1443–44.

\(^{402}\) See id. at 1451–55.
of Charles Tiebout, who argued that competition among
jurisdictions allows citizens to choose the sort of government
they prefer—poor persons who desire subsidized government
services may choose to live in a service-friendly city; whereas
more tax-conscious citizens who need little from government
may choose a low-tax and low-service suburb.\textsuperscript{403} Although
advocates for the poor see this effect as potentially crippling to
social obligations to the disadvantaged,\textsuperscript{404} Tiebout characterized
the process as a means of providing for a voluntary and efficient
“market” for government services.\textsuperscript{405}

It is revealing that the nationalist Commerce Clause opinion
that Professor Epstein has reviled most vociferously was
\textit{Wickard v. Filburn},\textsuperscript{406} the case upholding national control of
homegrown wheat.\textsuperscript{407} \textit{Wickard} seems to me to be among the
most rational of the expansive commerce power decisions in that
it focused on the \textit{practical} question of whether the law served to
control an aspect of interstate commerce. Congress in the 1940s
desired to prop up prices in the national wheat market, which
even skeptics should admit is “interstate commerce.” As a
result, Congress had to be able to regulate activities that would
affect the national market, such as the consumption of home-
grown wheat. This economic argument, however, was not
persuasive to Epstein because of the Court’s tacit approval of the
“disaster” of an idea that markets are suspect and that
government “cartels” are preferable.\textsuperscript{408} While Epstein did not go
so far as to use the word “socialism,” this is in effect what he was
complaining about.\textsuperscript{409}

The flaw of criticizing price controls through constitutional
law is, of course, that neither the commerce power nor anything
else in the Constitution prohibits price-fixing, regardless of how
objectionable it may appear to libertarians. To reprise the

\begin{itemize}
  \item \textsuperscript{403} See Charles M. Tiebout, \textit{A Pure Theory of Local Expenditures}, 64 J. OF POL.
  Econ. 416, 416–24 (1956).
  \item \textsuperscript{404} See, e.g., Paul Boudreaux, \textit{E Pluribus Unum Urbs: An Exploration of the
  Potential Benefits of Metropolitan Government on Efforts to Assist Poor Persons}, 5
  Va. J. Soc. Pol'y & L. 471, 503–04 (1998) (discussing the adverse effects of
  competition on poverty assistance).
  \item \textsuperscript{405} See Tiebout, supra note 403, at 416–24.
  \item \textsuperscript{406} 317 U.S. 111 (1942).
  \item \textsuperscript{407} See id. at 127–28.
  \item \textsuperscript{408} See Epstein, supra note 45, at 1451–53.
  \item \textsuperscript{409} See id.
\end{itemize}
famous dissent of Justice Holmes nearly a century ago in *Lochner v. New York*, the Constitution "does not enact Mr. Herbert Spencer's Social Statics,"\(^{410}\) referring to an influential nineteenth century variant of Adam Smith's free market theories.\(^{411}\) Libertarianism is not enshrined in the Constitution. The commonly asserted federalist syllogism that the Court should interpret the Commerce Clause narrowly because James Madison believed in a limited national government\(^{412}\) seems to me no more satisfying as an interpretative principle than a nationalist reliance on the fact that other conventioneers in 1787 wanted to give Congress sufficient power to address all "general interests of the union."\(^{413}\) The purported benefits of libertarianism should be touted and tested in the arena of politics, not through constitutional claims in the federal courts. To wield the commerce power as a libertarian tool for dismantling much of national public welfare legislation, as some nationalists fear the Rehnquist majority has in mind,\(^{414}\) is as counter-textual and contrived as the nationalists' arguments at their most extreme.

V. NEW PATHS FOR NATIONALISM

With its slowly developing jurisprudence of the commerce power, the Rehnquist Court has placed nationalism on the defensive. Congressional assertions of a link between regulation and interstate commerce are no longer protected by deference

\(^{410}\) 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (citing HERBERT SPENCER, SOCIAL STATICS (New York, D. Appleton & Company 1896)).


\(^{412}\) See, e.g., Lawrence Lessig, *Translating Federalism*: United States v. Lopez, 1995 SUP. CT. REV. 125, 192–93 (1995) (arguing "[t]hat to be faithful to the constitutional structure, the Court must be willing to be unfaithful to the constitutional text"); see also Clark, supra note 13, at 1162–66 (criticizing Professor Lessig and arguing for a more moderate federalist approach).

\(^{413}\) See Regan, supra note 51, at 555–56 (quoting NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 REPORTED BY JAMES MADISON 380 (W.W. Norton & Co. ed., 1966)).

and rational review, at least in certain cases. Instead, the Court has staked out an aggressive new stance in scrutinizing national legislation. As I have argued, the most salient feature of this new assertiveness has been the Court's contrivance of "tradition" as a means for invalidating legislation, regardless of its otherwise valid relation to interstate commerce. Less overt but no less a contrivance is the current of libertarianism in the new federalism. At the same time, however, the Rehnquist Court's commerce power jurisprudence plainly is not a juggernaut. The recent SWANCC decision was the first instance in which a component of a major federal statute fell to the Court's new federalism. Statutory provisions that may suffer the same fate as section 404 of the Clean Water Act include those that are vulnerable because their own contrivances of motivation or construction, as in SWANCC. Some national statutes may be vulnerable on one or both grounds.

How could nationalism regain the offensive when, as is inevitable, the federalists train their sights on other provisions of national law? I suggest that nationalists can do more than simply hope to turn the clock back to pre-Lopez deference. I briefly propose here four ideas that are worth pursuing, either in arguing commerce power cases in court or, perhaps more importantly, in drafting and administering statutes so that they are less vulnerable to begin with.

A. Alternative Constitutional Powers

First, the national government may attempt to justify legislation through powers other than the interstate Commerce Clause. As noted above, some scholars have argued that antidiscrimination legislation is logically supported by the Reconstruction amendments to the Constitution, which were designed to limit racial discrimination. For those jurists who are uneasy about using the commerce power to justify social

415 In Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 276 (1981), the Court followed a rational basis test for review of congressional findings as to the link with interstate commerce. After United States v. Lopez, 514 U.S. 549, 563–64 (1995), the Court has all but abandoned the notion of deference, even if it has not stated so.

416 See U.S. CONST. amends. XIII–XV.

417 See, e.g., Regan, supra note 51, at 595–96.
welfare legislation, the Reconstruction amendments might provide such laws with a more suitable justification.

Indeed, the government argued in *Morrison* that the Violence Against Women Act was supportable as an exercise of the Fourteenth Amendment, which requires that a state not deny any citizen the "equal protection of the laws." In particular the government relied on the amendment's section 5, which states that "Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." This section is a positive grant of legislative power to Congress. One of the reasons for the national law at issue in *Morrison*, the government reasoned, was Congress's observation of discriminatory stereotypes and a lack of vigorous prosecution by state authorities of violence against women. The law thus was a method of enforcing the equal protection guarantee, the government concluded. The Court rejected this argument, however, because of a lack of "congruence" between the perceived harm and the remedy that Congress employed. Although the Fourteenth Amendment restricts only state governments, not private citizens, the Violence Against Women Act worked in the opposite fashion—it provided for a civil remedy against private persons who commit violence but not against lax state or local governmental officials.

Although the Rehnquist Court's Fourteenth Amendment analysis may seem as hostile as its commerce power precedent, *Morrison* does reveal a glimmer of hope for national laws. Had the Violence Against Women Act provided a remedy against police or prosecutors, the rhetoric of *Morrison* would seem to justify it. It is true, of course, that Congress could not constitutionally require a state to pursue specific criminal prosecutions, by virtue of the well-established precedent that

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418 U.S. CONST. amend. XIV.
419 Id. § 1.
420 Id. § 5.
422 See *Morrison*, 529 U.S. at 619–21.
423 See id. at 665.
424 See id. at 621–23 (citing The Civil Rights Cases, 109 U.S. 3, 11 (1883)).
425 See id. at 626 (discussing the effect of the Violence Against Women Act, 42 U.S.C. § 13981 (2000)).
prosecution is discretionary.\textsuperscript{426} There might be more hope, however, for a law that required state or local governments to establish special procedures or safeguards for handling claims of violence against women, especially in localities where there has been a history of lax prosecution.\textsuperscript{427}

One should not expect that there are alternative constitutional authorities for all, or even most, congressional statutes that serve social justice. The enumeration of powers in the Constitution's Article I does not include the power to craft a more just society.\textsuperscript{428} Novel arguments—such as that the Civil Rights Act of 1964 was a valid exercise of Congress's powers over war and foreign affairs because it garnered international support for the United States during the Cold War against Communism\textsuperscript{429}—might seem as unacceptably "attenuated" to skeptical judges as supposed links to interstate commerce. In particular, it seems difficult to find an enumerated power that fits the environmental laws any better than the commerce power. Notably, the government did not attempt an alternative constitutional argument in \textit{SWANCC}. But \textit{Morrison} showed that the power to regulate commerce among the states might not be the only means of supporting social justice legislation, as long as it is drafted with close attention to the alternative power.

\textbf{B. Unenumerated Powers}

Second, congressional authority might be supported by unenumerated powers. At first blush, such an idea may seem preposterous. After all, since Chief Justice Marshall wrote in \textit{Marbury v. Madison}\textsuperscript{430} that "the powers of the legislature are defined and limited,"\textsuperscript{431} the Supreme Court has steadfastly maintained that every law enacted by Congress must be based

\begin{itemize}
\item \textsuperscript{426} See, e.g., Heckler v. Chaney, 470 U.S. 821, 846–47 (1985) (denying relief for a plaintiff that alleged a failure to enforce food and drug laws).
\item \textsuperscript{427} See, e.g., South Carolina v. Katzenbach, 383 U.S. 301, 336–37 (1966) (upholding voting requirements imposed on South Carolina in response to a finding that the state had discriminated against African Americans); \textit{Ex Parte Virginia}, 100 U.S. 339, 346–48 (1879) (upholding criminal punishment of state officials who intentionally discriminated in jury selection).
\item \textsuperscript{428} For a discussion of the debate in the early days of the republic over the "necessary and proper" clause of the Constitution, U.S. CONST. art. 1, § 8, see SIMON, supra note 21, at 30–31.
\item \textsuperscript{429} See Regan, supra note 51, at 602.
\item \textsuperscript{430} 5 U.S. (1 Cranch) 137 (1803).
\item \textsuperscript{431} \textit{Id.} at 176.
\end{itemize}
on one or more of the authorities listed in Article I of the Constitution. It is difficult, if not impossible, to imagine that jurists who rejected the government’s Commerce Clause arguments in *Morrison* and *SWANCC* would have any patience with an assertion that Congress may act in ways that are not enumerated in the Constitution.

But the Supreme Court is not always dismissive of unenumerated constitutional rights. In the early twentieth century, at the same time that it limited the scope of national legislation, the Court similarly restricted state legislation that diverged too far from its conception of liberty, through the oxymoronically named doctrine of “substantive due process.” The most notorious of these cases was *Lochner v. New York*, which struck down a state regulation that limited working hours, through an unenumerated constitutional “liberty of... contract.” The New Deal Court eventually discarded substantive due process as a restraint on legislation at the same time that it adopted its more liberal commerce power jurisprudence—both changes being consistent with a move away from libertarianism in favor of allowing government regulation. The notion of unenumerated or “implied” rights was soon revived, however, for socially progressive ideas such as the right to bear children, the right to vote, and, most controversial today, the right to privacy, including the right to an abortion. Each of these rights holds only a tenuous tie to

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433 The doctrine began with *Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857), the *Dred Scott* decision, in which the Court referred to laws that deprive a person of liberty or property as outside the “due process of law.” *Id.* at 450.
434 198 U.S. 45 (1905).
435 See id. at 53–54, 58.
436 *Compare* West Coast Hotel Co. v. Parrish, 300 U.S. 379, 391–92 (1937) (diverging from precedent and rejecting a substantive due process argument of freedom of contract in a challenge to a minimum wage for women), with NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937) (allowing the Commerce Clause to encompass a national collective bargaining law).
437 See Epstein, supra note 45, at 1451–54 (discussing the New Deal-era belief in the value of a strong government).
enumerated constitutional rights, the most famous (or infamous) explanation being the “penumbra” metaphor in the establishment, in Griswold v. Connecticut, of a right to procreative privacy.\textsuperscript{441}

The Court has not, of course, created a similar doctrine of implied powers for Congress. Perhaps the closest it has come to granting extraordinary powers to the national government was in Youngstown Sheet & Tube Co. v. Sawyer,\textsuperscript{442} in which a divided Court denied to the President the right to seize most of the nation’s steel mills in the midst of a labor strike during the Korean War.\textsuperscript{443} The reason for the distinction between human rights and congressional powers is, I suggest, the simple matter that neither the Court nor the nation has ever faced a truly compelling need to abandon the enumerated powers limitation. For example, when the Supreme Court in Griswold considered whether to solidify a right to privacy for contraceptive use,\textsuperscript{444} the advantages of such a human right overshadowed what the Court probably perceived to be only minor disadvantages at the time—short-lived opposition from the few states that actively outlawed contraceptives.\textsuperscript{445} By contrast, establishing an implied power for the national government, as in Youngstown Sheet & Tube, held out the prospect of creating a monster of unchecked power in return for only a short-term gain.\textsuperscript{446} If, however, the balance of costs and benefits were to shift at some time in the future, the Court might be more willing to imply an unenumerated national power.

\textsuperscript{441} Griswold, 381 U.S. at 483, 484, 499.
\textsuperscript{442} 343 U.S. 579 (1952).
\textsuperscript{443} Id. at 588–89. Had the case been resolved the other way, in the midst of both the Korean War and the Cold War, it is distinctly possible that the President, and perhaps Congress, may have been emboldened to take even greater “emergency” steps to fight Communism, with a potentially extraordinary effect on American society.
\textsuperscript{444} Griswold, 381 U.S. at 485–86.
\textsuperscript{445} To the extent that advocates of the right to privacy expected that the right would be limited and fairly uncontroversial, the later inclusion within this right of the right to an abortion has made it, ironically, among the most contentious constitutional issues of American history. See, e.g., Roe, 410 U.S. 113.
\textsuperscript{446} See, e.g., Paul G. Knauper, The Steel Seizure Case: Congress, the President, and the Supreme Court, 51 Mich. L. Rev. 141, 150 (1952). In fact, the 1952 steel strike ended within two months after the Supreme Court’s decision and, by accounts, did not result in significant national steel shortages. See Mathew N. Kaplan, Who Will Guard the Guardians? Independent Counsel, State Secrets, & Judicial Review, 18 Nova L. Rev. 1787, 1842 (1994).
Consider as an example the following possible scenario: the Supreme Court might apply its new federalism to strike down much of the Superfund law. Such a ruling is not unthinkable, considering that the statute’s cleanup requirements on private landowners do not depend on any link to interstate commerce and that the law insinuates national control over land and water use, which SWANCC held to be within the “tradition” of state and local control. If the frequently criticized Superfund law fell, control of pollution on land would be returned largely to the states. If a “race to the bottom” or other factors discouraged many states from enacting their own vigorous cleanup laws and if public opinion were galvanized by a revival of toxic “scares” like those of Times Beach, Missouri, and Love Canal, New York, in the 1970s and 1980s, the balance of national political opinion might shift. A later Court might look favorably upon a means of constitutionally permitting reinstitution of national environmental regulation, regardless of tradition. Political pressure, after all, may have played a large role in moving the Supreme Court’s jurisprudence on the commerce power in the late 1930s. If it were problematic to overturn recent Supreme Court precedent under the Commerce Clause, it is conceivable that a later Court could turn to an implied or unenumerated authority in order to allow Congress to respond to a pressing national dilemma. Acknowledgement of an unenumerated power would also have the benefit of frankness and candor, which have often been lacking in the government’s commerce power arguments over the past century. Establishment of an implied congressional power to protect human environmental safety,  

448 See id. § 9606 (a) (granting to the President the authority to order a private party to perform a cleanup).
450 See, e.g., GREGG EASTERBROOK, A MOMENT ON THE EARTH 228–35 (1995) (discussing Times Beach and Love Canal). The fact that commentators such as Easterbrook have said that public reaction was overblown does not change the galvanizing public response to such scares.
452 See, e.g., SWANCC, 531 U.S. 166–73 (criticizing the administrative transformation of the term “navigable waters” to the protection of migratory birds); Regan, supra note 51, at 595–602 (criticizing the strained interstate commerce arguments made in Katzenbach v. McClung, 379 U.S. 294 (1964)).
perhaps located in a penumbra of Article I’s reference to the “general Welfare,” might seem as wise as, and perhaps less contrived than, what the Court did between 1937 and 1995—shoehorn social welfare legislation into the Constitution through the Commerce Clause.

C. Constitutional Amendment

If public opinion were indeed emboldened by a perceived crisis that could be resolved only by national legislation outside of the commerce power, the most straightforward solution would be to amend the Constitution. Because the Constitution forms the foundation for all of American law, changes to this framework should be made only reluctantly, deliberately, and when other solutions are found wanting. Indeed, through the requirements of a two-thirds majority to convene a constitutional convention and a three-quarters majority of states to ratify a proposed amendment, the drafters ensured that the United States Constitution could not be changed at whim. No amendment has been both proposed and ratified since 1971, when the national voting age was lowered to eighteen years; even the broadly accepted principle of gender equality has not been enshrined through the still-pending proposed “equal rights amendment.”

Short-lived efforts to adopt amendments on dubious topics such as flag-burning and changing rules for congressional succession after the events of September 11, 2001, show plainly the potential dangers of using the amendment process to solidify ephemeral desires.

Yet a constitutional amendment remains the most forthright means of transforming a strong nationwide desire for

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454 See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (“[A] written constitution . . . is . . . one of the fundamental principles of our society.”).
455 See id. (stating that a constitution is “unchangeable by ordinary means”).
456 See U.S. CONST. art. V.
457 See STONE ET AL., supra note 451, at 742 (discussing the proposed gender equality amendment, which was approved by Congress in 1972).
fundamental change into law, particularly in the realm of such inherently constitutional matters as the relations between national and state governments. To the extent that public welfare laws are imperiled by today's federalism, they stand precariously because of a weakness in the Constitution itself. For all their wisdom in establishing a stable form of government based on checks, balances, and a mixture of democratic and republican virtues, the eighteenth century drafters simply did not anticipate the modern desire for a range of national powers greater than those spooned out in Article I. If there is indeed a near-nationwide consensus for strong national laws governing, for example, pollution control or outlawing race and sex discrimination, it is a failing of our national Constitution that it does not clearly provide for such powers.

How could the Constitution be amended to remedy this failing? The Rehnquist Court has warned against the perils of reading the Constitution so as to provide for a national "plenary police power." Under most state law interpretations, the police power is a sanction to enact nearly any law, as long as it is couched in terms of supporting the general public welfare and does not violate an individual right. A constitutional revision would not have to be so broad. Reconsider the scenario in which the Court has struck down the Superfund law, with the eventual result of nationwide dissatisfaction. Under pressure to provide for an effective means for handling pollution, politicians at both the national and state level might realize the benefits of amending the Constitution to provide for national authority, which would hold the additional benefit of providing a "level playing field" for businesses in all the states. Two-thirds of Congress and three-quarters of the state legislatures might warm to an amendment that gave Congress the power to "protect

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460 See, e.g., STONE ET AL., supra note 451, at 1–20 (discussing the drafters' intentions and balances).
461 Federalists might argue, of course, that there is no such consensus and that, even if there was, the drafters specifically crafted the Constitution to restrict the ability of short-lived consensuses from imposing restraints on liberty. See Lessig, supra note 412, at 192–94 (arguing for a vigorous federalist jurisprudence in order to fulfill the federalist conception of the framers).
463 See id.; see also CALLIES ET AL., supra note 29, at 1–4 (noting the great breadth of the police power to regulate private property).
the human environment" and to enforce this power by appropriate legislation.464

The constitutions of many foreign nations expressly provide for protection of the environment as a responsibility of government.465 Although this authority often may be merely hortatory, it sometimes has legal clout. A fascinating example arose in India, where pollution was threatening the integrity of the famous Taj Mahal, a shrine constructed by a Mughal leader in the eighteenth century.466 Employing constitutional authority, Indian courts imposed stringent orders to force polluting cars and factories away from the shrine.467 Although the United States typically has not drawn on other nation's experiences since the age of Jefferson, our nation has also been proud of being the world's leader in the establishment of protective environmental laws.468 A crisis of federalism in environmental protection might push the United States to seek a constitutional solution.

D. Avoiding Statutory Contrivances

Finally, the least radical, but perhaps most far-reaching, new path for nationalism would be to craft public statutes so that they avoid the vulnerabilities of statutory contrivances that I have identified. In the half-century of extreme judicial deference, Congress and the agencies did not need to pay close attention to solid construction or to fitting statutes within the boundaries of the Commerce Clause; they must now do so.

Reconsider the government's situation in SWANCC. Under the Clean Water Act, Congress granted the Army Corps of Engineers the authority to regulate the dumping of fill and dredged material, typically associated with construction

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464 Note that the 26th amendment, lowering the voting age to eighteen years nationwide, was ratified less than four months after approval by Congress. See THE WORLD ALMANAC AND BOOK OF FACTS 537 (2002).
projects,\textsuperscript{469} and to the EPA the power to regulate pollution from point sources, typically from industrial operations.\textsuperscript{470} These authorities were granted over “navigable waters,”\textsuperscript{471} which in turn was defined seemingly contradictorily as “the waters of the United States,”\textsuperscript{472} apparently because the drafters wanted to give the agencies the power to regulate as broadly as possible under the Commerce Clause.\textsuperscript{473} Had Congress crafted a more forthright statute, however, it could have jettisoned the term “navigable waters” and its contradictory definition in favor of covering all actions that “affect interstate commerce,” to use language from Katzenbach v. McClung.\textsuperscript{474} Such a delineation would not have had the statutory familiarity of the venerable term “navigable waters” and would have required the administrative agencies to interpret “affect interstate commerce” in a reasoned and workable fashion, but it would have avoided the complications that finally backfired in SWANCC.\textsuperscript{475}

Similarly, in administering the Clean Water Act, the Army Corps and EPA could have taken steps to avoid vulnerability. Pushed to regulate as widely as possible, the Corps’ revised section 404 regulations included within their ambit any intrastate water body that “could” affect interstate commerce.\textsuperscript{476} More specifically, the Corps further noted in its Migratory Bird Rule that any water that “could” be migratory bird habitat was included within the Corps’ section 404 regulation.\textsuperscript{477} While the Supreme Court in SWANCC did not need to focus on the precise wording of these provisions, use of the word “could” in effect relieved the agency of much responsibility to show, by any

\textsuperscript{469} See 33 U.S.C. § 1344(a) (2000).
\textsuperscript{470} See id. § 1342(a).
\textsuperscript{471} Id. §§ 1342(a)(1), 1344(a).
\textsuperscript{472} Id. § 1362(7).
\textsuperscript{473} See Funk, supra note 120, at 10746–50 (explaining the legislative history of Democratic sponsors’ desire to give the agencies broad Commerce Clause authority).
\textsuperscript{475} See id. at 304 (upholding congressional regulation in large part because the business used food that traveled in interstate commerce). If Congress had wanted to push the extremist logic of Katzenbach to its limits, it could also have extended coverage to all pollution by any commercial operation that used any good or service from interstate commerce.
\textsuperscript{476} 33 C.F.R. § 328.3(a)(3) (2002).
standard of proof, that the intrastate water did indeed affect interstate commerce.

A better regulation, by contrast, would require the government to prove a link between the regulation and interstate commerce. This link could be established for single-state waters through hydrologic connections to interstate waters, through interstate recreation at water bodies such as Utah's Great Salt Lake, or through the water body's support of interstate commerce that depends on migratory birds. The Army Corps and the EPA could develop evidence that migratory birds generate commerce among the states through tourism and permitted hunting. The regulatory documentation could rely on the venerable Supreme Court precedent of congressional authority to protect migratory birds in order to fulfill our treaties with foreign nations. For each instance of application of the regulation to a specific water body, the agency would document that migratory birds use the implicated water body or are reasonably expected to use it in the near future. For commercial activities, such as the dumping associated with industrial or real estate construction, regulation would be justified by the aggregate effect of this activity on migratory birds, without a need to analyze the effect of the specific construction project under scrutiny. For those limited number of water-disturbing activities that are non-commercial, such as an American Indian subsistence farmer's filling of a pond, the

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480 See Funk, supra note 120, at 10745 (discussing the Great Salt Lake).

481 See Missouri v. Holland, 252 U.S. 416, 435 (1920) (upholding the MBTA on treaty-making constitutional grounds).

482 Cf. Babbitt v. Sweet Home Chapter of Cmtys. for a Great Oregon, 515 U.S. 687, 691, 708 (1995) (upholding the agency interpretation of the Endangered Species Act that includes as "take" land-disturbing conduct that "actually kills or injures" the species by impairing its ability to breed, feed, and shelter, 50 C.F.R. § 17.3 (2002)).

483 See, e.g., SWANCC, 531 U.S. 159, 173 (2001) (discussing when it is permissible to employ the aggregation concept).
agency’s burden would be greater. In such cases, a federal permit would be required only if the site-specific activity substantially affects interstate bird commerce, such as might be the case if the pond was an important stop along a migratory bird route. Closer attention to drafting by Congress and better administration by the agencies would undoubtedly entail more work, but such work is necessary to make statutory regimes less vulnerable in an era of judicial skepticism toward the commerce power and toward governmental power in general.

CONCLUSION

The Supreme Court’s active new federalism is not an anomaly that will soon dissipate along with little-known statutes such as the guns-near-schools law or the Violence Against Women Act. As a close reading of the recent SWANCC decision shows, the Rehnquist Court’s more exacting view of the Commerce Clause holds ominous potential for a host of national public welfare statutes that Congress has adopted over the past half-century with little attention to a supportable link to interstate commerce. We cannot know which statutory provision will next wither under the Court’s scrutiny, but laws ranging from the wildlife laws to health and safety legislation to race and gender protections hold potential constitutional vulnerabilities that federalists may be eager to exploit.

So far, the Rehnquist Court has failed to develop a coherent jurisprudence for restricting the commerce power. The Court has drifted toward a dual federalism that relies far too heavily on tradition to separate state and national authorities. This contrivance, especially when it is coupled with a contrived libertarian ardor, forms a dividing line that is as weak as the strained nationalist arguments of which the Rehnquist Court has been so critical.

For nationalists, however, the task ahead should be plain. It will be unsatisfying and potentially disastrous simply to hope that inertia and a reluctance to upset expectations will moderate the Court’s zeal in vindicating its new conception of federalism. Laws that suffer from contrivances in congressional drafting and

\[484\] See United States v. Morrison, 529 U.S. 598, 609–13 (2000) (indicating that the Court is more reluctant to aggregate or allow for congressional regulation of non-economic activity).
agency construction should be reconsidered, and the links between regulation and interstate commerce strengthened and modified where appropriate, as I have explored with the Clean Water Act. Only through recognition and attention to these vulnerabilities can advocates of national authority be more certain that national problems will be resolved successfully by national solutions.