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School of Law

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MEMORANDUM

TO: Texas Workhop Readers

DATE: November 27, 2012

RE: Lakier and Friedman Paper

Greetings, and thanks for having us. You are the first people to see this paper. It has been a tough project, and we are very much looking forward to input.

The paper is a bit long, so we thought we'd give you a reading guide. The argument in the paper is that Congress lacks the power to ban commerce in products (like, say, marijuana, or raw milk). This certainly is contrary to conventional wisdom, and might strike you as crazy, but bear with us!

If you were in a serious time pinch, this being the end of the semester, you'd get the idea from the introduction, which is only 9 or 10 pages.

Part I describes how the supposed power of Congress to regulate things moving across state lines is premised ultimately on the decision in Champion v. Ames, and makes an argument that Champion should not be read this broadly. If you are interested in doctrine, this is a section for you.

Part II is an argument that the Framers did not intend for Congress to have the power to ban articles in commerce, and that in fact over the next hundred or so years people (mostly) didn't think Congress had this power, and Congress (mostly) didn't exercise it.

Part III explains why things shifted around the time of Champion, two of the primary motivations being industrialization of the economy, and moral panic about changes wrought by that industrialization. Part III also explains that the latter problem ultimately is solved by Congress's power to regulate things having a "substantial effect" on commerce, leaving the broad conception of the Champion power as vestigial -- except to adopt a lot of laws we believe are of dubious constitutionality.

Part IV tests our historical arguments against present-day conceptions of the purposes of American federalism. We employ (or plan to employ) two tests of whether our theory is cockamamie. First, we show that solving most collective action problems in the federalism area do not require this broad Champion power, and that the one that might – interstate externalities or spillovers – doesn't really. Second, we discuss what laws currently on the books might be jeopardized by our theory. Here, we ran out of time, but will be able to discuss this with all of you (and particularly welcome your thoughts and concerns).

TO "REGULATE" NOT ANNIHILATE: LIMITING CONGRESS'S OTHER COMMERCE POWER

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TABLE OF CONTENTS

INTRODUCTION*

The history of the commerce power is a search for limits. Despite universal acknowledgment that Congress's power to regulate "Commerce . . . among the several States" does not constitute an unbounded police power, the struggle has been to find the line that divides "what is truly national and what is truly local."[1] This theme is a constant in Commerce Clause decisions.[2] Thus it was that in *National Federation of Independent Businesses v. Sebelius*, the Chief Justice explained: "'the power to regulate commerce, though broad indeed, has limits,'" and the joint dissenters – joining with the Chief Justice to find the individual mandate invalid under the Commerce Clause – wrote that to uphold the individual mandate of the Affordable Care Act would be "to extend federal power to virtually all human activity."[3]

In the last half-century or more, this judicial search for limits has focused almost entirely on Congress's power to regulate activity having a "substantial effect" on interstate commerce – and with notably poor results.[4] Only two limits have been found, and neither is likely to affect congressional power much in the end. Commencing with

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[1] U.S. CONST. art. I, § 8, cl. 3; *Lopez*, 514 U.S. at 567–68. *See, e.g.*, *NFIB*, 132 S. Ct. at 2578 (Roberts, C. J., opining) (explaining that the Commerce Clause "must be read carefully to avoid creating a general federal authority akin to the police power").

[2] *See, e.g.*, *Raich*, 545 U.S. at 42 (O'Connor, J., dissenting) ("We enforce the 'outer limits' of Congress' Commerce Clause authority . . . to protect . . . state sovereignty"), *Lopez*, 514 U.S. at 565 ("Justice Breyer's rationale lacks any real limits"), *Heart of Atlanta*, 379 U.S. at 276–77 ("In view of the Commerce Clause it is not possible to deny that the aim of protecting interstate commerce from undue burdens is a legitimate end. . . . The means adopted to achieve these ends are also appropriate, plainly adopted to achieve them and not prohibited by the Constitution but consistent with both its letter and spirit.").

[3] *NFIB*, 132 S. Ct. at 2589 (Roberts, C. J., opining) (quoting *Wirtz*, 392 U.S. at 196); *NFIB*, 132 S. Ct. at 2643 (Scalia, Kennedy, Thomas, Alito, JJ., dissenting).

[4] *See Lopez*, 514 U.S. at 557 (explaining that "the Court . . . decide[s] whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce"). **SUBSTANTIAL EFFECTS SCHOLARLY LIT HERE**

United States v. Lopez, the Supreme Court drew a line that rests on the distinction between "economic" and "non-economic" activity.[5] That line quickly withered – and some believe died a death of sorts – in the case of *Gonzalez v. Raich* (about which, much more presently).[6] Then, of course, there was the decision in *NFIB v. Sebelius*, distinguishing between economic "activity" Congress could regulate, and "inactivity," which it could not.[7] Whatever one thinks of the ACA decision on its merits, the fact is this is not a line Congress has needed to cross for over two hundred years, and some commentators doubt it will have much germinal significance.[8]

Yet, there is another aspect of the commerce power – indeed, some would say it is the *real* commerce power – in which line-drawing might be more meaningful, but the attempt to draw lines has been all but abandoned.[9] That is Congress's power over "the channels of interstate commerce" and "persons or things in interstate commerce."[10] Think here of the seminal case of *Champion v. Ames,* in which the Supreme Court held that Congress could ban the transportation of lottery tickets in interstate commerce.[11]

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[5] *Lopez*, 514 U.S. at 567.

[6] Raich, 545 U.S. at 25. Jonathan H. Adler, Is Morrison Dead: Assessing a Supreme Drug (Law) Overdose, 9 LEWIS & CLARK L. REV. 751 (2005). *See also* Thomas W. Merrill. *Rescuing Federalism after* Raich*: The Case for Clear Statement Rules*, 9 LEWIS & CLARK L. REV. 823, 826 (2005) ("*Lopez*'s prohibitory rule was watered down to the point where it may have little continuing significance.").

[7] *NFIB*, 132 S. Ct. at 2589.

[8] *E.g.*, Jonathan Cohn, *Did Roberts Gut the Commerce Clause?*, The New Republic (June 28, 2012, 3:26 PM), http://www.tnr.com/blog/plank/104455/did-roberts-gut-the-commerce-clause; Kevin Drum, *Obamacare Ruling Doesn't Limit Congress Much*, Mother Jones (June 28, 2012, 8:12 AM), http://www.motherjones.com/kevin-drum/2012/06/obamacare-ruling-doesnt-limit-congress-much. But others believe it will prove more consequential. *E.g.*, Tom Scocca, *Obama Wins the Battle, Roberts Wins the War*, Slate (June 28, 2012, 11:59 AM), http://www.slate.com/articles/news_and_politics/scocca/2012/06/roberts_health_care_opinion_commerce_clause_the_real_reason_the_chief_justice_upheld_obamacare_.html.

[9] The real commerce power as distinguished from the power to regulate things with a "substantial effect" on interstate commerce but which are not commerce themselves. In *Gonzalez v. Raich*, Justice Scalia argued with some persuasive force that what was at issue in that case was not the commerce power at all, but an exercise of Congress's "necessary and proper" power over activity that while not commerce itself nonetheless has a "substantial effect" on commerce. *Raich*, 545 U.S. at 34–35.

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

[11] *Champion*, 188 U.S. at 363–64.

No one takes very seriously the idea of limiting Congress's power over things moving in commerce. This was evident in the aftermath of *United States v. Lopez*. *Lopez* invalidated a congressional law that prohibited the possession of a gun within one thousand feet of a school.[12] The *Lopez* majority said that to uphold the law "we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States."[13] Shortly thereafter, however, Congress re-enacted the same law, but with a "jurisdictional element" requiring nothing more than that the gun in question have "moved . . . in commerce."[14] In transmitting the new bill to Congress, the President pointed out that the change would make almost no difference because the "vast majority" of guns had traveled across state lines.[15] If all it takes for Congress to regulate an activity is that some component have once moved or be likely to move in interstate commerce, then the line between what is "truly national" and "truly local" is ephemeral.[16]

Unlike the limits the Court has attempted to impose on Congress's power to regulate "substantial effects," limiting Congress's power over things simply because they move in interstate commerce would mean something. Take *Gonzalez v. Raich*. There the Court held Congress could ban the possession of marijuana grown and consumed within the state because the legal possession of marijuana within California could have a "substantial effect" on Congress's ability to ban the interstate marijuana market

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[12] *Lopez*, 514 U.S. at 551.
[13] *Lopez*, 514 U.S. at 643.
[14] Gun-Free School Zones Amendments Act of 1995, Pub. L. No. 104-208, 110 Stat. 369–71 (codified at [18] U.S.C. § 922(q) (2006)).
[15] Message from President William J. Clinton to the Congress Transmitting Proposed Legislation To Amend the Gun-Free School Zones Act of 1990 (May 10, 1995), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=51344.
[16] *Lopez*, 514 U.S. at 567–68.

altogether.[17] But no one seemed to stop and ask: why could marijuana be banned from interstate commerce in the first place? Instead, the justices in the majority swept the question aside on the basis of established precedent: "It has long been settled that Congress' power to regulate commerce includes the power to prohibit commerce in a particular commodity."[18] Some have disagreed with the quick conclusion that the "*Champion*" power gives carte blanche to Congress to regulate things just because they have moved or might move in commerce, but they are few, either because congressional power here seems obvious, or perhaps because it is difficult to identify a workable limit on this power.[19] This is a mistake.

Recent events have moved this question to the fore. Two states just legalized the possession and use of marijuana, posing the question whether the United States can ban a product that the states would like to legalize. Although the recent initiatives in Colorado and Washington pose the starkest challenge to federal power, the same was true of the many states that have legalized marijuana for medicinal purposes. And similar questions can arise with regard to other "vices," (such as prostitution or gambling), as well as national prohibitions on foods like raw milk cheeses.[20]

There *is* an identifiable limit on Congress's power to regulate goods crossing state lines. It is a limit grounded in the text of the Constitution, founding-era understandings and intentions, and well over one hundred years of subsequent history – until the 1903

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[17] *Raich*, 545 U.S. at 19, 32–33.

[18] *Raich*, 545 U.S. at 19 n.29. *See also Raich*, 545 U.S. at 39 (Scalia, J., concurring) (explaining that the Commerce Cause "unquestionably" allows prohibition).

[19] *See* Diane McGimsey, *Closing the Jurisdictional Loophole*, 90 CALIF. L. REV. 1675, 1728–30 (2002) (explaining that restricting regulation of movement in commerce to economic activity only is unworkable); Craig M. Bradley, *Racketeering and the Federalization of Crime*, 22 Am. Crim. L. Rev. 213, 222–25 (1984) (giving early examples of Congress appending jurisdictional elements). **ALL LINES-CROSSING LIT HERE**

[20] See infra Part I for a description of these various controversies

decision in *Champion v. Ames* in fact. It is a limit that is workable from a doctrinal perspective. And, it is a limit that furthers the policies underlying "Our Federalism" by distinguishing in a sensible way between what is truly national and what is local.

The limit is this: Congress can regulate goods or services moving in interstate commerce, but it cannot shut down a viable market in those goods or services. Like drugs. The power to "*regulate* Commerce . . . among the several States" does not include the power to destroy it. Although this idea may seem surprising in our time, this was the general understanding of the commerce power until *Champion* was decided, and many remained dubious about the broad *Champion* power for long thereafter.[21]

Lest the breadth of this limitation be misunderstood, two caveats are in order at the outset.

First, Congress surely can prohibit the transportation of specific goods across state lines, so long as that prohibition is "in service "of fostering a national commercial market – it simply cannot shut down that market. So, Congress can ban diseased cattle from interstate commerce.[22] And it can prohibit the transportation of misbranded food products.[23] These regulations are permissible, because they are necessary to foster a healthy market in beef, or food products, one in which consumers can have confidence, and readily will participate. These specific prohibitions are the means to an acceptable end, not an end unto itself.

Second, Congress can help states that have chosen through their own democratic

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[21] U.S. CONST. amend. XVIII, § 1. *See* Nigro v. United States, 276 U.S. 322, 341 (1928) (noting that " a mere act for the purpose of regulating and restraining the purchase of the opiate and other drugs . . . is beyond the power of Congress").

[22] *See* 21 U.S.C. §§ 331(a), 342(a)(2)(C)(v) (2006) (prohibiting "[t]he introduction or delivery for introduction into interstate commerce of any food . . . that is adulterated" and defining the products of diseased animals as adulterated).

[23] *See* 21 U.S.C. § 331(a) (2006) (prohibiting "[t]he introduction or delivery for introduction into interstate commerce of any food . . . that is . . . misbranded.").

processes to ban certain goods. In fact, that was the case with *Champion*; at the time it was decided every state banned "the pestilence of lotteries," so all the congressional law did was assist their unified efforts to stop the trafficking in lottery tickets.[24] It was also true of the Webb-Kenyon Act, which disallowed the transportation of alcohol into states that had banned it.[25] "Helper" statutes like these leave it to each state to determine what goods to ban or allow, and simply assist those state choices. Enabling state choices is precisely what a federal system is all about. What Congress cannot do is pass laws that hinder or ban the transportation of goods into a state that would welcome them.

This line is a notable step toward taking seriously the difference between what is truly national and what is truly local. Banning goods deemed harmful or injurious is at the very heart of the states' police power. But so too is the flip side, deciding that certain goods should not be banned. Although the *Champion* court may have gotten it right in upholding the Lottery Act given that all states had banned lotteries,[26] the Court's rationale was potentially much broader, leaving Congress with the virtually unlimited power it has today. The "broad *Champion* power" is the sweeping power of Congress to ban anything moving in commerce, or worse yet to regulate something simply because it once has moved, or might in the future move, in commerce. The step proposed here is not to eliminate the broad *Champion* power – although some believe that would be a good idea – but simply to hold that it does not extend to shutting down markets.

This article proceeds in four parts.

Part I elaborates upon the theoretical basis for the claim here, that Congress

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[24] *Champion*, 188 U.S. at 356 (quoting Phalen v. Virginia, 163 U.S. 168 (1850)). CHARLES T. CLOTFELTER & PHILIP J. COOK, SELLING HOPE: STATE LOTTERIES IN AMERICA 38 (1991).
[25] An Act: Divesting Intoxicating Liquors of Their Interstate Character in Certain Cases, Pub. L. 62-398, 37 Stat. 699 (1913) (codified as amended at 27 U.S.C. § 122 (2006)).
[26] SELLING HOPE, at 38.

cannot ban interstate markets. Part I shows how in cases like *Gonzales v. Raich* the power to do so has been taken for granted, traces that power back to *Champion*, and demonstrates that the *Champion* court's broad rationale was ungrounded.[27] To say that Congress can ban things moving in commerce is a formal rule with not much in the way of purpose to commend it. As Part I makes clear, despite broad dicta in *Champion*, there is in fact a sound basis for reading it far more narrowly, and in fact in a way that is perfectly consistent with the thesis of this article.

Part II turns to history, explaining that the broad *Champion* power did not emerge until the early twentieth century. This Part makes the textualist and originalist argument that Congress's power to "regulate" "Commerce . . . among the several States" was meant to foster the free flow of domestic commerce, and did not include the power to ban commerce.[28] This was not true of the foreign commerce power; the two are different, and prohibitions on foreign commerce were familiar and accepted from the start.[29] This Part shows that for some 140 years the country adhered to the original limitation on Congress's commerce power, with few people arguing that Congress's power to regulate domestic commerce included the power to ban it.[30] If one is a strict originalist, this Part alone might settle the question.

Part III then historicizes the shift from the narrow understanding of Congress's power to limit things moving in commerce, to the broad view held by the Supreme Court and Congress today. This Part explains why the shift occurred to permit Congress the

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[27] *See Raich*, 545 U.S. at 39 (Scalia, J., dissenting) (explaining that the Commerce Cause "unquestionably" allows prohibition); *Champion*, 188 U.S. at 363–64. *See infra* text accompanying note

[28] U.S. CONST. art. I, § 8, cl. 3. *See infra* text accompanying note

[29] U.S. CONST. art. I, § 8, cl. 3. *See infra* text accompanying note

[30] *See infra* text accompanying note . But there were abolitionists who argued that the interstate slave trade could be banned under the Commerce Clause. *See* DAVID L. LIGHTNER, SLAVERY AND THE COMMERCE POWER: HOW THE STRUGGLE AGAINST THE INTERSTATE SLAVE TRADE LED TO THE CIVIL WAR (2006).

broad *Champion* power, and how as events unfolded that rationale lost its significance, leaving the broad *Champion* power with little in the way of a rationale. Acceptance of a broad *Champion* power occurred in the age of "steam and electricity," as the industrial revolution accelerated, and state boundaries seemed obstacles to essential national regulation, leaving constitutional law uncertain how to deal with the problem. At the same time, America's rapidly changing landscape – the influx of ethnic minorities, the flow of people from farm and village to city – terrified some, provoking a moralizing sentiment that included national bans on perceived vices such as alcohol, drugs and lotteries.[31] The broad *Champion* power had its roots in an effort to *enable* the burgeoning interstate market, but took a wrong turn when the Supreme Court unthinkingly applied those concepts to allow Congress to *ban* goods from that market.

Part Three explains that the broad *Champion* power became vestigial and ought to have disappeared once the country came to understand the nature of an integrated market, and constitutional law embraced the "substantial effects" test to deal with the necessity of national regulation brought about by industrialization. The "substantial effects" test, which came into being in *Jones & Laughlin Steel* and flourished in *Wickard v. Filburn,* was designed to deal precisely with the sorts of problems raised by industrialization.[32] Once the substantial-effects test was widely accepted, the *Champion* power became largely unnecessary. Today people debate the wisdom of *Wickard v. Filburn*, and ignore *Champion* altogether, but this is exactly backward.[33] *Wickard* is but the recognition that the United States constitutes an integrated economic market that requires certain control from the center. Yet such control is inappropriate and unfortunate when it interferes with

[31] *See infra* text accompanying note
[32] *Wickard*, 317 U.S. at 128–29; *Jones & Laughlin*, 301 U.S. at 37.
[33] *See infra* text accompanying note

choices the citizens of states can and should make under their police power.

Part IV justifies the rule barring Congress from prohibiting commerce from a policy perspective. This Part rests on a set of "Federalism Basics," the sorts of functional policy arguments most advance today to explain what tasks the national or state governments should undertake in our the federal system. Under this analysis, state choice is preferred in order to maximize overall utility, while national power is invoked to deal with collective action problems. This Part explains that federalism raises two very different categories of collective action problems, one category involving things like races to the bottom, holdouts, and first mover problems, and the other involving spillovers or externalities. The first sorts of collective action problems are dealt with in the main by the Supreme Court's "substantial effects" test, and are not implicated by the rule proposed here. On the other hand, a ban on congressional power to shut down markets can raise concerns about spillovers or externalites. But, as this Part explains, spillovers are inevitable whether Congress bans a market or allows it. Thus, those concerns are not sufficient to allow Congress to shut down a market in products that some states would legalize. The ultimate choice is a democratic one properly within the police power of the states. That does not mean Congress is without any role in these situations. Rather, federal power can be invoked in service of state choices, by adopting "helper" statutes that minimize spillovers while allowing each of the states to make its own choices.

I. READING CHAMPION: THE ROOTS OF CONGRESS'S POWER OVER THINGS MOVING IN COMMERCE

Congress's power over interstate commerce has two distinct aspects: the power to regulate things moving in commerce, and the power to regulate those that have a

"substantial effect" on commerce. The justices of the Supreme Court are given to dividing the former into two categories – the regulation of the "instrumentalities" of commerce and the "channels" of commerce – but there is overlap between the "instrumentalities" and "channels" categories, and confusion in the case law as to what falls under each.[34] (In addition, there is some support for the notion that the substantial effects test is not, strictly speaking, an aspect of the commerce power, but rather is implements Congress's "necessary and proper" power over things that are not interstate commerce themselves – while "[t]he first two categories are self-evident, since they are the ingredients of interstate commerce itself."[35])

The primary reason to divide the power over interstate commerce into two categories (rather than the Court's oblique three) is to note that all the struggle in recent times is over the "substantial effects" test, while Congress's absolute control over things moving in commerce is taken largely as a given. Think of the battleground cases since, say, 1936: *Jones & Laughlin Steel*, *Wickard v. Filburn* (if this unanimous decision can even be said to be a battleground), *Heart of Atlanta Motel*, *Katzenbach v. McClung*, *Perez v. United States*, *Lopez*, *Morrison*, *Gonzales v. Raich* and *NFIB v. Sebelius*.[36]

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[34] *See Lopez*, 514 U.S. at 558–59 (dividing prior cases into these categories). One guess is that "channels" is the broad *Champion* power and "instrumentalities" refers only to the vehicles of commerce such as ships and airplanes. But then the addition of "persons and things moving in commerce" to the "instrumentalities" category makes no sense. *Cf. id.* Or perhaps all three categories are not the actual commerce — that's the persons and things — but are so tied to commerce that they may be controlled under the commerce power.

[35] *Raich*, 545 U.S. at 34–35 (Scalia, J., concurring); see O'Connor in Garcia making this argument at 584-85; see also commentators adopting this formulation.

[36] Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012) (Affordable Care Act's individual mandate for health insurance unsustainable under the Commerce Clause); Gonzales v. Raich, 545 U.S. 1 (2005) (Congress may prohibit marijuana growth for personal use because of its substantial effects on commerce); United States v. Morrison, 529 U.S. 598 (2000) (parts of the Violence Against Women Act unsustainable because the effects of violence were too remote from commerce); Lopez v. United States, 514 U.S. 549 (1995) (effects of guns near schools too insubstantial for Congress to regulate under Commerce power); Perez v. United States, 402 U.S. 146 (1971) (local loansharking substantially affects commerce); Katzenbach v. McLung, 379 U.S. 294 (1964) (racial discrimination in restaurants substantially affects commerce); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (racial discrimination in

These were all substantial effects case: the question in each was whether the activity Congress was regulating had enough of a connection to a national market to qualify as "Commerce . . . among the several States." One has to go back to *United States v. Darby* in 1941 to find any real discussion or debate over the extent of Congress's power to regulate things moving in commerce. And as Part III explains, this debate was largely unnecessary even by the time of *Darby* because in that case the Court decided Congress had the power under the "substantial effects" test to regulate the conditions of employment under the Fair Labor Standards Act.[37]

To see the significance of Congress's power over things moving in interstate commerce, focus on *Gonzalez v. Raich*.[38] *Raich* involved a challenge to the federal Controlled Substances Act (CSA) insofar as it banned the possession and noncommercial cultivation of marijuana for personal use.[39] The petitioners were California residents, and California had adopted a statute – the "Compassionate Use Act" – legalizing the activities in which they wished to engage.[40] In *Raich* the Supreme Court upheld federal authority to criminalize the production and use of marijuana for medicinal purposes, in the face of a contrary judgment by California.

Raich presents a classic federalism struggle, one that has only grown more acute since the time of the Supreme Court's decision in that case. In *Raich*, the Supreme Court informed us, "at least nine States" authorized the use of marijuana for medical purposes,

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lodging); Wickard v. Filburn, 317 U.S. 111 (1942) (wheat growth for personal consumption); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (anti-union practices).

[37] *See* United States v. Darby, 312 U.S. 100 (1941) (banning from interstate commerce goods produced in violation of the Fair Labor Standards Act). *See infra* text accompanying note xxx

[38] Gonzales v. Raich, 545 U.S. 1 (2005).

[39] *Raich*, at 7.

[40] *Raich*, at 5–6.

particularly to ease the pain or discomfort of those who are gravely ill.[41] Today, at least eighteen states and the District of Columbia have passed laws authorizing the use of medical marijuana, under a variety of regulations.[42] These laws have been passed by statute and referendum both, often by wide margins.[43] In addition, many states have decriminalized marijuana possession or use to some extent.[44] Most dramatically, Colorado and Washington just legalized the possession of marijuana, and Colorado has legalized its sale.[45] Suffice to say, there is real disagreement throughout the country about the value of using marijuana in certain circumstances, and the wisdom of barring its possession, cultivation and use.

Marijuana is not unique in this regard; the same might be said, for example, of raw milk. It is against federal law to transport unpasteurized milk products in interstate commerce.[46] Many states disagree with this judgment, and many people believe raw milk has healthful qualities.[47] (Some people just like the taste, as in raw milk cheeses.) Indeed, here the numbers flip, with – at present – twenty states banning raw milk and thirty states allowing it, again under a variety of regulations.[48]

Raich is important because its holding that Congress could criminalize the growing and use of marijuana for medicinal purposes rested at bottom on Congress's

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[41] *Raich*, at 5.
[42] *18 Legal Medical Marijuana States and DC* Laws, Fees, and Possession Limits, PROCON.ORG, http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881 (last visited Nov. 18, 2012).
[43] *18 Legal Medical Marijuana States and DC Laws, Fees, and Possession Limits*, PROCON.ORG, http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881 (last visited Nov. 18, 2012).
[44] *States That Have Decriminalized*, NORML, http://norml.org/marijuana/personal/item/states-that-have-decriminalized (last visited Nov. 18, 2012).
[45] http://abcnews.go.com/Politics/OTUS/colorado-washington-states-legalize-recreational-marijuana/story?id=17652774#.ULJYWoU1dT4
[46] 21 C.F.R. §1240.61 (2012) .
[47] Damian C. Adams et. al., *Déjà Moo: Is the Return to Public Sale of Raw Milk Udder Nonsense?*, 13 DRAKE J. AGRIC. L. 305, 310–12, 316 (2008).
[48] *Raw Milk*, NCSL, http://www.ncsl.org/issues-research/agri/raw-milk-2012.aspx (last visited Nov. 18, 2012).

power to ban things moving in interstate commerce. Superficially this does not seem to be the case; Raich was fought and resolved as a substantial effects case.[49] Yet, close attention to *Raich* shows how the Congress's power to regulate things moving in commerce was unavoidably lurking in the background. It also underscores the significance of the 1903 decision in *Champion v. Ames* to the Court's perspective on Congress's power over things moving in commerce.[50]

When the Supreme Court in *Raich* concluded that the CSA as applied to the local production and use of medical marijuana was well within Congress's power over activity having a "substantial effect" on interstate commerce, *Wickard v. Filburn* was the lodestar.[51] The facts of *Wickard* are familiar, and important. Filburn grew wheat for consumption on the family farm, and in doing so exceeded his congressionally authorized allotment. The question was whether Congress's power over interstate commerce extended to regulating the growth and consumption of wheat all on one farm, and assuredly *intra*state. The Supreme Court famously held yes: "Even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce."[52]

Wickard is controversial among some today who worry over the extent of congressional power, but if the substantial effects test makes sense as a matter of simple

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[49] *Raich*, at 17.
[50] Champion v. Ames, 188 U.S. 321 (1903).
[51] *See Raich*, at 18 ("The similarities between this case and Wickard are striking."). Wickard v. Filburn, 317 U.S. 111 (1942).
[52] *Wickard*, at 125.

economics so does *Wickard*.[53] Under the law at issue in *Wickard*, Congress had sought to stabilize wheat prices. Although what farmer Filburn was doing was not commerce, and was a miniscule part of the national market, the critical point was that if everyone did what he did, demand for wheat on the open market would drop and so would prices. By the time of *Wickard*, in 1942, there was widespread consensus that Congress's power over "Commerce . . . among the several States" included the ability to protect market prices in essential commodities.[54] *Wickard* thus gave birth to the notion that in evaluating substantial effects, any given activity must be considered in the aggregate.[55] One might disagree with the law at issue in *Wickard* on policy terms, but if Congress was going to have regulatory control over the national economy, then the conduct in *Wickard* was within that power.

It was as true in *Raich*, as it was in *Wickard*, that the local activity could undercut Congress's national regulatory scheme. This was the basis for the Supreme Court's decision in *Raich*. The concern was that if people were allowed to grow and use marijuana on the family farm, that marijuana would bleed into commerce. Thus, to the extent Congress sought to "control the supply and demand of controlled substances in both lawful and unlawful drug markets," local growing of marijuana had the potential to upset that ban.[56]

The problem with *Raich* was this: where did the power to ban the possession of marijuana come from in the first place? If Congress lacked the power to shut down the

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[53] *E.g.*, ROBERT LEVY& WILLIAM MELLOR, THE DIRTY DOZEN: HOW TWELVE SUPREME COURT CASES RADICALLY EXPANDED GOVERNMENT AND ERODED FREEDOM 37 (2008) (criticizing *Wickard* as one of the worst Supreme Court decisions of all time);

[54] U.S. CONST. art. I, § 8, cl. 3. *See* Wickard, at 128 ("It is well established by decisions of this Court that the power to regulate commerce includes the power to regulate the prices at which commodities in that commerce are dealt in and practices affecting such prices.").

[55] *Wickard*, at 127–28.

[56] *Raich*, at 19.

market in marijuana, then it would not matter if the CSA had a substantial effect on that commerce. The very fact that so many states have adopted laws mandating the opposite of what Congress has decreed in the CSA makes the point that congressional power in this area is challenged.[57] And that compels some analysis of whether that underlying power exists in Congress.

Unfortunately, the issue of whether Congress has the power to ban the exchange of marijuana, let alone its possession or use, was simply taken for granted in *Raich*.[58] Seeking to minimize the import of the relief they were seeking, the respondents did not challenge Congress's power to pass the CSA under the commerce power. They argued only that "the categorical prohibition of the manufacture and possession of marijuana for medical purposes pursuant to California law exceeds Congress' authority under the Commerce Clause."[59] Their argument was that local use could be confined intrastate—surely a difficult argument to make, Justice O'Connor's dissent notwithstanding.[60]

The justices' ability to take for granted Congress's power to ban marijuana from commerce rested squarely on *Champion v. Ames*:

> To be sure, the wheat market is a lawful market that Congress sought to protect and stabilize, whereas the marijuana market is an unlawful market that Congress sought to eradicate. This difference, however, is of no constitutional import. *It has long been settled that Congress' power to regulate commerce includes the power to prohibit commerce in a particular commodity. Lopez,* 514 U. S., at 571 (KENNEDY, J., concurring) ("In the *Lottery Case,* 188 U. S. 321 (1903), the Court rejected the argument that Congress lacked [the] power to prohibit the interstate movement of lottery tickets because it had power only to regulate, not to prohibit")[61]

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[57] *18 Legal Medical Marijuana States and DC Laws, Fees, and Possession Limits*, PROCON.ORG, http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881 (last visited Nov. 18, 2012).
[58] *Raich*, at 19.
[59] *Raich*, at 15.
[60] Pet'r's Br. 17–18, *Raich. Raich*, at 42–74 (O'Connor, J., dissenting).
[61] *Raich*, at 19 (emphasis added).

In his concurrence, Justice Scalia was even more direct:

> In the CSA, Congress has undertaken to extinguish the interstate market in Schedule I controlled substances, including marijuana. The Commerce Clause unquestionably permits this. *The power to regulate interstate commerce "extends not only to those regulations which aid, foster and protect the commerce, but embraces those which prohibit it." Darby*, 312 U.S. at 113. See also *Hipolite Egg Co.* v. *United States,* 220 U. S. 45, 58 (1911); *Lottery Case,* 188 U. S. 321, 354 (1903).[62]

On *Champion*'s shoulders, therefore, rests Congress's power to ban items from interstate commerce – and in that way to keep many states from pursuing a policy they otherwise would choose.

The question is whether *Champion* supports broad congressional power to regulate things moving in commerce, and specifically whether that power to regulate includes the power to prohibit. *Champion* is frequently read as conveying such power. *Champion* at the least is understood to allow Congress to ban anything moving in commerce.[63] And it is, as we have seen, also read at times to allow Congress to regulate anything that once has moved or might move in commerce.[64] Call these the "broad *Champion* powers." But there is a basis for reading *Champion* in a considerably narrower way.

The issue in *Champion* was the constitutionality of the 1895 law, "An Act for the suppression of lottery traffic through national and interstate commerce . . . ."[65] The act made it a crime to "carr[y] from one State to another in the United States" a lottery

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[62] *Raich*, at 39–40 (Scalia, J., concurring) (emphasis added).
[63] cite
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[65] An Act for the suppression of lottery traffic through national and interstate commerce and the postal service subject to the jurisdiction and laws of the United States, 28 Stat. 963 (1895).

ticket.[66] After marching through many of its Commerce Clause precedents, which in truth had remarkably little say about the law there at issue, the Court at long last came to the crux of the issue: "It is said that the statute in question does not regulate the carrying of lottery tickets from State to State, but . . . in effect prohibits such carrying" and that "the authority given Congress was not to prohibit, but only to regulate."[67] In other words, does the power to regulate necessarily encompass the power to prohibit?

The *Champion* Court said yes, but for reasons that turn out to be thin indeed and that rest ultimately on the highly remarkable conclusion that Congress should possess the same police power as the states. Given *Champion's* centrality, a close reading is warranted. That reading is revealing. There's no argument to most of the *Champion* decision, simply rhetorical questions:

> We have said that the carrying from State to State of lottery tickets constitutes interstate commerce, and that the regulation of such commerce is within the power of Congress under the Constitution. Are we prepared to say that a provision which is, in effect, a *prohibition* of the carriage of such articles from State to State is not a fit or appropriate mode for the *regulation* of that particular kind of commerce? If lottery traffic, *carried on through interstate commerce,* is a matter of which Congress may take cognizance and over which its power may be exerted, can it be possible that it must tolerate the traffic, and simply regulate the manner in which it may be carried on? Or may not Congress, for the protection of the people of all the States, and under the power to regulate interstate commerce, devise such means, within the scope of the Constitution, and not prohibited by it, as will drive that traffic out of commerce among the States?[68]

The whopper of the rhetorical questions at the heart of *Champion* is the final one, because it essentially equates congressional powers with the police powers of the state: "If a State, when considering legislation for the suppression of lotteries within its own

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[66] An Act for the suppression of lottery traffic through national and interstate commerce and the postal service subject to the jurisdiction and laws of the United States, 28 Stat. 963 (1895).
[67] *Champion*, at 354.
[68] *Champion*, at 355.

limits, may properly take into view the evils that inhere in the raising of money, in that mode, why may not Congress, invested with the Power to regulate commerce among the several States, provide that such commerce shall not be polluted by the carrying of lottery tickets from one State to another?"[69] The Court had in the past noted the "widespread pestilence of lotteries" and that was determinative here: if the states could stamp them out why not the federal government?[70] (Perhaps it was the capital P in "Power" that clinched the case for the majority, as little else in the way of logic seems to have.)

The answer to the *Champion* Court's final rhetorical question goes to the very heart of American federalism. The reason why a state may properly "take into view the evils" of lotteries is because the state has the police power to regulate anything it wishes based on its view of the evils (and subject, always, of course, to constitutional limitations).[71] But Congress does not have this power. As was germane in *Champion*, Congress has only the enumerated power over interstate commerce -- and so the question becomes, how to define "Commerce . . . among the several States."[72]

In defining what constitutes "interstate commerce," the *Champion* Court left us with what is at best a deeply formal test. Justice Harlan concluded (even before considering the arguments *contra*): "We are of opinion that lottery tickets are subjects of traffic and therefore are subjects of commerce, and the regulation of the carriage of such tickets from State to State, at least by independent carriers, is a regulation of commerce among the several states.[73] The Court seems to say little more than: "lottery tickets cross state lines, so this is interstate commerce, so Congress can regulate it, including

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[69] *Champion*, at 356.
[70] *Champion*, at 357.
[71] *Champion*, at 356. U.S. Const. amend X.
[72] U.S. CONST. art. I, § 8, cl. 3
[73] *Champion*, at 352–353.

prohibiting it." But if that were really the case, then the difference between what is "truly national and truly local" becomes fairly meaningless.[74] As President Clinton noted in submitting to Congress after *Lopez* a revised federal law banning guns near schools, most guns have moved in commerce at some point.[75] Thus, if Congress can regulate based on the fact that an item has moved or might move in commerce, Congress could regulate anything involving guns. Or people, for that matter, for it turns out the vast majority of Americans also have crossed or will cross state lines at some point. If Congress possesses the broad *Champion* power, it becomes true to say there is virtually nothing Congress could not regulate. To the extent such formalism is to own the day, ours runs the risk of becoming a bankrupt federalism.

Upon close reading, however, *Champion* read properly may not actually support the broad *Champion* powers. Two important points are to be made. Both are supportive of the argument advanced here concerning the scope of Congress's power to ban commerce in particular goods or services.

First, the chief precedential support in *Champion* was for laws that allow the banning of particular goods or practices commerce moving in commerce, but *in service* of the healthy functioning of the broader interstate market. The *Champion* Court cites the "case of diseased cattle," which Congress banned transporting from one state to

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[74] *Lopez*, 567–68.

[75] Message from President William J. Clinton to the Congress Transmitting Proposed Legislation To Amend the Gun-Free School Zones Act of 1990 (May 10, 1995), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=51344. For example, of the 2,258,450 American pistols manufactured in 2010, about two-thirds comes from five states: 471,920 were made by Sturm, Ruger in Arizona; 232,276 by Kel Tec and Taurus in Florida; 290,209 by Smith & Wesson in Massachusetts; 133,397 by Beretta in Maryland; and 360,157 by Sig Sauer and Burbak in New Hampshire. About three-fourths of revolvers come from just Smith & Wesson and Sturm, Ruger. BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES, ANNUAL FIREARMS MANUFACTURING AND EXPORT REPORT YEAR 2010 1–12 (2012), *available at* http://www.atf.gov/statistics/download/afmer/2010-final-firearms-manufacturing-export-report.pdf.

another.[76] But the ban on diseased cattle plainly is in service of a national integrated food market. The Court also cites the "Sherman Anti-Trust Act."[77] But as the *Champion Court* noted with regard to the Sherman Act, "the object of that act was to protect trade and commerce against unlawful restraints and monopolies."[78] Not shut trade down, but foster it.

Second, *Champion* was a case in which all the states had banned lotteries themselves, making the federal law a "helper" statute.[79] A "helper" statute is one in which the federal government assists states in regulatory decisions that are properly theirs to make. *Champion* involved a habeas petition on behalf of someone who had no interest in respecting state or federal criminal laws, so it is not altogether surprising that under these circumstances, the Court sharply turned away the challenge to the Lottery Act.

In the Court's opinion in *Champion*, the "helper" rationale loomed large. The *Champion* Court relied on *In re Rahrer,* a case dealing with the federal Wilson Act.[80] That act banned the transportation of alcohol into states that had already banned it. This federal law and the *Rahrer* Court's upholding of it were a big deal at the time. The country was struggling with the question of prohibition of alcohol, and previously the Court had taken a hard line that transportation of alcohol was interstate commerce beyond state control.[81] Reversing itself in *Rahrer*, the Supreme Court held states could make the decision about whether to allow alcohol, and federal law then acted in service

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[76] *Champion*, at 358–59.
[77] *Champion*, at 359. An act to protect trade and commerce against unlawful restraints and monopolies (The Sherman Anti-Trust Act), 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1–7).
[78] *Champion*, at 359.
[79] SELLING HOPE: STATE LOTTERIES IN AMERICA 38 (1991) (explaining that by 1894 every state had outlawed lotteries).
[80] *Champion*, at 360 (citing *In re* Rahrer, 140 U.S. 545 (1891)).
[81] Leisy v. Hardin, 135 U.S. 100 (1890) (striking down Iowa's prohibition of alcohol as applied to an importer who had imported but not sold alcohol).

of that state decision.[82] Tellingly, the Assistant Attorney General in *Champion* justified the Lottery Act on this same sort of reasoning:

> In this connection it is well to remember the lottery act was not passed to conflict with or trespass upon the police powers of the State. Just as the Wilson Act which was sustained in *In re Rahrer* was designed to make effective the police statutes of the State where prohibitory liquor laws were in force, this act of Congress was obviously intended to remove an obstruction which the channels of interstate trade presented to the various States in their attempt to suppress the lottery traffic.[83]

And in upholding the Lottery Act, Justice Harlan made perfectly clear that congressional power was being used in that case to aid the states, not to trench on their police powers. He said "we have in the *Rahrer* case a recognition of the principle that the power of Congress to regulate interstate commerce may *sometimes* be exerted with the effect of excluding particular articles from such commerce."[84] Sometimes. As when (as in *Rahrer*) that prohibition does nothing other than serve state choices. Justice Harlan was quite explicit on this point:

> In legislating upon the subject of the traffic in lottery tickets, as carried on through interstate commerce, Congress only supplemented the action of those states-perhaps all of them-which, for the protection of the public morals, prohibit the drawing of lotteries, as well as the sale or circulation of lottery tickets, within their respective limits. It said, in effect, that it would not permit the declared policy of the states, which sought to protect their people against the mischiefs of the lottery business, to be overthrown or disregarded by the agency of interstate commerce.

Stated simply, the Lottery Act was a helper statute, and the Court sustained it on that basis. As one commentator explained not long after the decision was rendered, "The power was exercised, it was said, not in hostility to the State, but supplementing the actions of those States which had for the protection of public morals prohibited the

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[82] *Rahrer*, at 564.
[83] Revised Resp't's Br. on 3d. oral argument, *Champion* (citation omitted).
[84] *Champion*, at 359, 362 (emphasis added).

drawing of lotteries or the circulation of lottery tickets within their respective limits."

Finally, Justice Harlan, despite some seemingly sweeping language in the opinion, made clear that the holding in *Champion* was limited to precisely what was before the Court. Even in its context as a helper statute, upholding the Lottery Act was controversial and sharply fractured the Court. The dissent invoked horrors about what allowing Congress to regulate things just because they moved across state lines would entail: "An invitation to dine, or to taka a drive, or a note of introduction, all become articles of commerce under the ruling in this case, by being deposited with an express company for transportation."[85] Responding to complaints about the possible reach of the opinion, Justice Harlan made clear he was deciding what needed to be decided, and no more:

> *It is said*, however, that if, in order to suppress lotteries carried on through interstate commerce, Congress may exclude lottery tickets from such commerce, *that principle leads necessarily to the conclusion that Congress may arbitrarily exclude from commerce among the states any article, commodity, or thing, of whatever kind or nature, or however useful or valuable*, which it may choose, no matter with what motive, to declare shall not be carried from one state to another. *It will be time enough to consider the constitutionality of such legislation when we must do so. The present case does not require the court to declare the full extent of the power that Congress may exercise in the regulation of commerce among the states.*

Thus, it is not clear that *Champion* need be or should be read any more broadly than this: Congress, as an adjunct of its power to regulate interstate commerce, may prohibit items or activities in commerce, but only so long as the prohibition is either (a) in service of a broader fostering of the interstate market; or a (b) "helper" statute assisting a state in enforcing its own choices made pursuant to the police power. Plainly, Justice Harlan and the other members of the majority – consistent with the dominant opinion of

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the time – thought little of lotteries.[86] But whether the Court would have sustained the Lottery Act in the face of disagreement among the states as to the relevant policy, we cannot know. Indeed, that is a question the Court has not addressed in any significant way since *Champion*, with the possible exception of United States v. Darby.[87]

To modern eyes, the notion that Congress's commerce power does not extend to the banning of goods crossing state lines is a novel one. But that is only because modern eyes do not see the past. In truth, this formulation of the *Champion* power is likely the one the Framers intended, was certainly the dominant one for well over one hundred years thereafter and collapsed around the time of *Champion* for reasons that had nothing to do with what the broad *Champion* powers would now allow. It is to these contentions that Part II now turns.

II. EARLY CONCEPTIONS OF THE OTHER COMMERCE POWER: FOUNDING ERA AND 19TH CENTURY DEBATES

For roughly the first one hundred and fifteen years of constitutional history, the dominant view of the Commerce Clause was that it did not vest Congress with the power to ban goods merely because they crossed state lines. This is not to say that there was no disagreement on the question. There was, particularly as it related to the domestic slave trade. But the opposing view was sufficiently marginal that, as late as 1886, a report prepared by the House Judiciary Committee could assert that a proposed bill that made it illegal to ban the interstate sale of oleomargarine was "plainly unconstitutional" and declare itself entirely ignorant of any arguments to the contrary. As the report explained:

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[86] *See Champion*, at 357 (describing lotteries as a "pestilence"); CHARLES T. CLOTFELTER & PHILIP J. COOK, SELLING HOPE: STATE LOTTERIES IN AMERICA 38 (1991) (explaining that by 1894 every state had outlawed lotteries).

[87] *See* United States v. Darby, 312 U.S. 100, 114 (1941) (banning from interstate commerce goods produced in violation of the Fair Labor Standards Act even though some states did not have similar regulations).

> Your committee are not aware that it has ever been asserted for the power to regulate commerce that it involved a power to prohibit the free transportation of the products of each State through and into every other; and it could hardly have been within the minds of the framers of the Constitution to give to Congress the power to do so, when history shows that the purposes of giving the power to Congress and taking it from the States was to prevent the very result which this construction of the clause would involve and bring about... It may be within the meaning of this clause such needful regulations as to articles transported from State to State as will conserve the safety and well-being of the transportation, but the right to say what articles shall and what shall not be the subject of commerce is not included in the regulation of the commerce in such articles. [88]

Congress agreed, ultimately choosing to regulate oleomargarine under its taxing rather than its commerce powers.[89]

This Part explores why it was that, for over one hundred years, most members of Congress rejected the idea that they possessed the power to determine "what articles shall and shall not be the subject of commerce" among the several states. It argues that the Judiciary Committee report is correct in its reading of Founding-era history—that what evidence of the Founders' intent exists suggests that those who participated in the drafting and ratifying debates did not intend Congress to possess the power to limit what goods could travel in interstate commerce even if they did intend Congress to possess the power to limit what goods could travel in foreign commerce. Today it is commonly argued that, because the Framers vested Congress with the power to "regulate" both foreign and interstate commerce, they must have intended the scope of these powers to be equivalent. Yet, almost all of the historical evidence from the Founding supports the contrary position, and it was this view of the Commerce Clause that prevailed for more than a century post-ratification—only changing shortly after the Oleomargarine Act was enacted in 1886, for reasons that we explore below.

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[88] H.R. Rep. No. 1880, 49th Cong., 1st Sess. (1886).
[89] Oleomargarine Act of 1886, 24 Stat. at L. 209.

Founding Assumptions

As an originalist matter, it seems likely the founding generation did not expect Congress to be using its power over interstate commerce to ban that commerce. Given the paucity of discussion about the commerce clause that took place during the drafting and ratification debates it is impossible to know with certainty what the Framers intended or expected when they granted Congress the power to "regulate Commerce . . . among the several States."[90] The Framers viewed Congress's authority to regulate interstate commerce as both less important and less of a threat to the state power than Congress's foreign commerce power, and so it received far less attention.[91] Still, what evidence does exist strongly suggests that the Framers neither imagined nor intended Congress to possess the power to determine, via prohibition, what kinds of goods moved in interstate markets.

First, the primary reason for granting Congress the domestic commerce power was facilitating interstate trade and protecting it against the protectionist state trade policies that flourished under the Articles of Confederation government. Such laws proliferated in the weak economic climate of the post-Revolutionary period, as states attempted to protect local manufacturers by discriminatorily taxing and regulating

[90] Grant Nelson and Robert Pushaw note that "the Philadelphia delegates approved the Commerce Clause drafted by the Committee of Detail unanimously and without discussion" and that "[d]uring the Convention and Ratification debates, many participants declared, without challenge, that everyone agreed that the Commerce Clause would be especially beneficial" without elaborating further what it meant. Nelson & Pushaw, *Rethinking the Commerce Clause, 85* Iowa L. Rev. 1, 35-36 (1999). See also Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment,* 25 MINN. L. REV. 432, 443, 446 (1941) ("[T]he nearly universal agreement that the federal government should be given the power of regulating commerce...militated against the conscious articulation of that meaning, there being no need to elaborate what all understood and none opposed.")

[91] Abel, at 470 ("The first thing that strikes one's attention in seeking references directed to interstate commerce is their paucity."); *infra notes* __.

domestic imports, and by restricting the access of other states' vessels to local ports.[92] The profusion of protectionist laws of this kind in the years after the Revolution—and of laws retaliating against them—generated increasing concern about their effect on the national economy, and on political unity. As Alexander Hamilton argued in Federalist #22:

> The interfering and unneighborly regulations of some states, contrary to the true spirit of the Union, have, in different instances, given just cause of umbrage and complaint to others, and it is to be feared that examples of this nature, if not restrained by national control, would be multiplied and extended, till they become not less serious sources of animosity and discord than injurious impediments to the intercourse between the different parts of the confederacy.[93]

By vesting Congress with the power to regulate interstate trade, those who gathered in Philadelphia sought to take from the states the power to pass "interfering and unneighborly regulations" of this kind. They also sought to empower Congress to make uniform rules for trade, so that what James Madison described as "the perverseness" of the states would not hamper "concert in matters where common interest requires it."[94] In both cases, the ultimate aim was to promote what Hamilton described as the "unrestrained intercourse between the States" that he, and other Federalists, believed would promote both economic prosperity and political unity.[95]

Second, no one suggested at any point during the Philadelphia convention that in

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[92] Cathy D. Matson & Peter S. Onuf, A Union of Interests 70-74 (1990).

[93] THE FEDERALIST NO. 22 (Alexander Hamilton)

[94] James Madison, *Vices of the Political System of the United States*, *reprinted in* JAMES MADISON: WRITINGS 71 (Jack Rakove ed., 1999).

[95] THE FEDERALIST NO. 11 (Alexander Hamilton). Hamilton argued that "[a]n unrestrained intercourse between the States themselves" would advantage all the states, and disadvantage none, by promoting "the trade of each by an interchange of their respective productions, not only for the supply of reciprocal wants at home, but for exportation to foreign markets. The veins of commerce in every part will be replenished, and will acquire additional motion and vigor from a free circulation of the commodities of every part. . . . The speculative trader will at once perceive the force of these observations, and will acknowledge that the aggregate balance of the commerce of the United States would bid fair to be much more favorable than that of the thirteen States without union or with partial unions."

addition to facilitating an unrestrained intercourse between the states, Congress would also be empowered to *restrain* such intercourse, by restricting what goods could cross state lines or could be sold in interstate markets. Instead, when delegates referred to Congress's interstate commerce powers, they referred to them exclusively as a solution to the problem of burdensome or discriminatory state legislation.[96] The same was true of the ratification debates. On those few occasions on which participants discussed Congress's, domestic commerce powers, they depicted them along the lines Hamilton and Madison suggested in the Federalist papers: as a mechanism for "preserv[ing] . . . a beneficial intercourse among [the states]."[97]

Although obviously an absence of debate does not provide irrefutable evidence of constitutional meaning, it does suggest that the possibility that Congress would use its interstate commerce powers to ban markets was something the Framers did not intend or for that matter, even imagine. This is particularly so when the total silence in Philadelphia and afterwards about the possibility of federal bans on interstate trade is compared to the relatively extensive discussion that took place about the possibility of federal bans on foreign trade.

In sharp contrast to the debate over the domestic commerce power, participants in the drafting and ratifying debates were quite explicit about that under its foreign commerce powers, Congress would possess the power not only to regulate—that is, to set the rules for—trade with foreign nations, but also to limit it. There was wide agreement

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[96] Abel, infra at 470 ("In the convention, control over commerce between the states seems to have been mentioned only nine times. In three of these instances, reference was made to the potentialities of the clause affording a means of protection against injury inflicted by hostile or harmful restrictions or regulations of sister states, without intimating what particular type of state commercial regulation was thus to be stricken down. The other six all refer in like manner to anticipated operation of the grant in preventing discriminatory commercial regulations by states, but mention particular subjects legislation as being affected.").

[97] Roger Sherman, *Observations on the New Federal Constitution,* New Haven Gazette, 25 Dec. 1788

that Congress would have the authority to pass what were colloquially referred to as "navigation acts," restricting what kinds of ships could legally bring goods into and out of the United States, and what kinds of goods they could carry.[98] Empowering Congress to limit foreign trade in this manner was believed necessary to defend U.S. interests against the exclusionary trade policies that Great Britain imposed in the wake of the Revolution.[99] These laws barred U.S. ships and most kinds of U.S. goods from access to British ports and caused significant damage to U.S. industries, which depended heavily on trade with Britain and Britain's colonies. Yet the states proved incapable of a coordinated response and Congress was not able to get the supermajority approval necessary under the Articles of Confederation to respond in kind.[100]

Federalists therefore actively promoted the view that as a major benefit of union under the new constitution, Congress would be able to enact "prohibitory regulations . . . capable of excluding Great Britain . . . entirely from our shores".[101] Southern delegates, in contrast, expressed considerable concern that Congress would unduly limit foreign

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[98] The term was borrowed from Great Britain, which beginning in 1651 passed a number of Navigation Acts, in order to protect British ships and manufacturers from foreign (often Dutch) competition and ensure that Great Britain reaped all the benefits of its colonial possessions. The Acts banned foreign ships from importing goods into British ports and required British goods, including those produced in British colonies, be exported in British ships. CITE. In many cases, they also restricted foreign goods themselves. See Roger Delahunty, *Federalism at Water's Edge,* 37 STAN. J. INT'L L. 1, 18 (2001).

[99] Id. at 17 ("Courts and legal scholars have long recognized the desire for an effective national authority to regulate foreign commerce—more specifically, an authority that would enable the states to take concerted action to resist and retaliate against exclusionary British trade practices—was one of the primary causes of the agitation for the Constitution of 1787"); Nelson and Pushaw, *supra* note _, at 22, 25 ("Several related problems had plunged the economy into an abyss. Most obviously, the break from England ruptured America's umbilical commercial connection to the mother country, with special harm flowing from the loss of colonial subsidies and preferences. . . . Furthermore, Great Britain and other nations pursued hostile commercial policies and refused to execute treaties that would open up foreign markets to the United States. America's weak national government under the Articles of Confederation could not pass retaliatory measures or raise revenues to meet the mounting debt. . . . The Constitutional Convention met in June 1787 to resolve these problems.")

[100] See Delahunty (discussing the federal response); Jacques LeBouef, *The Economics of Federalism and the Proper Scope of the Federal Commerce Power*, 31 San Diego L. Rev. 555, 595-98 (1994) (discussing the state response)

[101] THE FEDERALIST NO. 11 (Alexander Hamilton).

trade in order to protect northern industries, and northern ships, to the detriment of the much more import-dependent southern states.[102] They also expressed anxiety about the possibility that Congress would use its foreign commerce power to ban the importation of slaves. Representatives of Georgia and South Carolina in fact threatened to walk out of the convention if their concerns on this score were not addressed—which they were, eventually, by the agreement to include in the constitution the Migration and Importation Clause, barring any restriction on the importation of slaves until 1808.[103]

On the other hand, Southern delegates expressed no concern about the possibility that Congress would use its domestic commerce powers to restrict or prohibit the interstate sale or transport of commodities, including the most controversial of commodities, slaves.[104] Nor, for that matter, did anyone else suggest that Congress's domestic commerce powers were equivalent to its foreign commerce powers in this respect. As the historian David Lightner notes, "[a]lthough the Antifederalists racked their brains to conjure up every possible objection to the Constitution, not one of them ever suggested that it opened the way for Congress to restrict the interstate movement of slaves."[105]

It is very difficult to believe that the Southern delegates who otherwise expressed

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[102] Abel, supra note at 454 ("This objection, that the power to regulate commerce, by a mere majority, would facilitate adoption of a navigation act beneficial to the shipping states and prejudicial to the South, was a favorite subject of complaint with the Southern opponents of the constitution, alike in the occasional literature and in the debates over ratification."). *See also* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 449-456 (Max Farrand ed., rev. ed. 1937) [FARRAND, RECORDS] (discussing the possibility that a northern-dominated Congress would use its foreign commerce powers to pass "oppressive regulations" harmful to the Southern states).

[103] See David Lightner, *The Founders and the Interstate Slave Trade*, 22 J. EARLY REP. 25, 27-28 (2002) (discussing the deal).

[104] Abel, at 476 (noting that, in Philadelphia, "the possibility of federal restraints on the movements of slaves in interstate commerce was not once mentioned"); Walter Berns, at 205 ("[I]t is surprising how little was said in the South concerning [the interstate commerce clause], surprising because the clause obviously affected commerce in slaves in *some* manner and because, just as obviously, Congress was being given authority to regulate domestic as well foreign commerce.").

[105] Lightner, supra at 46.

such anxiety about the possible misuse of federal commerce power would express no concern about the possibility of a domestic ban on the interstate slave trade if they believed that Congress possessed the power to enact such a ban. Indeed, a number of historians have interpreted the significant silence of the Southern states on the issue of the domestic slave trade as decisive proof that Congress's interstate commerce powers were not intended by the Framers to empower Congress to prohibit the interstate sale or transport of slaves—or for that matter, anything else.[106]

One could, of course, argue that the relative unimportance of the interstate slave trade during this period makes the Southern silence less significant than these scholars suggest. In theory it is certainly possible that delegates simply overlooked or ignored the threat that the commerce clause posed to the interstate slave trade, when faced with the perhaps more pressing threat it posed to the foreign slave trade. But although it is true that the domestic slave trade was not, in 1789, nearly as important as the foreign slave

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[106] In 1941, for example, Albert Abel invoked the "deep" and "significant silence" of the southern states as "striking proof of the relatively limited scope of the power over interstate, as compared with foreign, commerce" at the time of the Founding:

> Such deep silence cannot safely be dismissed as accidental. Some Southerners were ready enough to take alarm at the constitution, and the commerce clause was sectionally unpopular anyway, so that the argument would hardly have been neglected had it come to mind. The pertinacity of Southern leaders in safeguarding the foreign slave trade and their utter absence of precautions with respect to interstate slave traffic are not easily explainable on any hypothesis other than that of universal concurrence at the time in the view that the power over interstate commerce was of a merely preventive – and perhaps somewhat ancillary–character.

Abel, infra, at 476. See also Lightner at 51 ("The preponderance of evidence is against the . . . thesis that the founding fathers intended to give Congress the power to destroy slavery by abolishing the interstate slave trade. Both at Philadelphia and in the ratifying conventions, the vast majority of white southerners would never have accepted the Constitution if they had thought that it granted such power, and the vast majority of white northerners were too respectful of property rights to have embraced such a purpose."); PAUL FINKELMAN, SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON (1996), 175n (arguing that the claim that the commerce clause vested Congress with power over the domestic slave trade "defies all understanding of the Convention"); Alan Greenspan *The Constitutional Exercise of the Federal Police Power: A Functional Approach to Federalism*, 41 VAND. L. REV. 1019, 1023 (1988) ("[I]f the power over commerce among the states was intended by the Framers to be an independent grant of affirmative power over domestic affairs, then there certainly would have been more conflict over it. For example, the southern states would have perceived the interstate commerce power as a potential threat to the institution of slavery."); DAVID BRION DAVIS, THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION 128-29n (1975) (concluding that there is "no reason to believe that the framers intended or could have agreed upon" giving Congress the power to interdict the interstate slave trade).

trade, it was clearly important enough to warrant discussion in the ratifying debates. On a number of occasions, Southern representatives made statements suggesting that not only did they consider the interstate slave trade economically and political important, but that they also considered it to provide an important defense against any attempts by Congress to threaten the institution of slavery by prohibiting the foreign importation of slaves.[107]

The Southern delegates and Antifederalists also failed to raise any concern about the possibility that Congress might limit what goods travelled in interstate markets in order to advance certain commercial interests over others. This is not to say that there was no concern about the possible misuse of Congress's domestic commerce powers. Delegates worried, for example, that the commerce clause empowered Congress to establish "mercantile monopolies"— that is, to dictate that only certain persons or entities could provide certain kinds of goods and services to the interstate market.[108] That was as far as it went, however. No one suggested that under its commerce clause authority Congress might act not only to limit who could provide goods and services to the interstate market but also to limit what kinds of interstate markets could exist.

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[107] David Ramsay of South Carolina argued, for example, during that state's ratifying convention that the temporary nature of the Migration and Importation Clause should not prevent the slave-owning states from ratifying the constitution because "[t]hough Congress may forbid the importation of negroes after 21 years, ... we have other sources of supply—the importation of the ensuing 20 years, added to the natural increase of those we already have, and the *influx from our northern neighbours* who are desirous of getting rid of their slaves." General Pinckney of North Carolina, arguing against a proposal to vest the federal government with the power to prohibit the importation of slaves on the grounds that such a prohibition would harm South Carolina and Georgia, who would be forced to "confederate on unequal terms" with Virginia, who had "more [slaves] than she wants" and therefore would "gain by stopping the importations" because "[h]er slaves will rise in value" presumably because of the demand for them from South Carolinian and Georgian plantations." Although these statements are somewhat opposed in their political objectives, both assume that, although Congress might act to forbid entirely the importation of slaves, it would not, perhaps because it could not, act to forbid their interstate sale.

[108] One of the reasons that Elbredge Gerry of Massachusetts provided for refusing to sign the constitution draft was that "Under the power over commerce, monopolies may be established." 2 FARRAND RECORDS, supra, at 633. Abel, supra, at 459-60 (discussing more generally the objections).

Both positive and negative evidence thus suggests that the Framers did not intend or for that matter even imagine that Congress would be able to "restrain" interstate intercourse by limiting what goods, and what ships, could transport goods across state (as opposed to national) lines. Critics of this view today rely primarily on the similarity in the language with which Congress is vested the power to regulate both foreign and interstate commerce and argue that this means the two powers must be read *in pari materia*, so that if Congress possessed the power to ban the import of foreign goods—as everyone at the convention agreed it did—they also must have intended Congress to possess the power to ban the interstate transport and sale of goods. But there is in fact almost no evidence from the Founding to support this position, other than the language of the clause itself. As a result, arguments in favor of a uniform interpretation of Congress's commerce powers, both in the nineteenth century and today, have tended to focus on the text of the clause in isolation.[109] However, the text, and particularly the crucial verb, "to regulate," is not conclusive. As we have seen, when the object of "to regulate" was foreign commerce, what this meant was that Congress could prohibit, not merely make rules for, the transport and sale of foreign goods into the United States. In other parts of the constitution, however, when the Founders used the verb "to regulate," it is difficult to believe that they also meant "to prohibit." For example, Article I, Section 8 gives Congress the power "to coin money, [and] *regulate* the Value thereof." Given the context, it makes no sense to read the clause as granting Congress the power to "coin

[109] *See, e.g.*, Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 28 (2010); Grant & Nelson, supra at 46 n.185. *See also* Saikrishna Prakash, Our Three Commerce Clauses and the Presumption of Intrasentence Uniformity, 55 Ark. L. Rev. 1149, 1163-64 (2003) (noting the historical evidence that the Framers intended the Interstate, Foreign and Indian Commerce Clauses to achieve different ends but finding this insufficient to defeat the textualist "presumption of intrasentence uniformity."

money [and] to prohibit its value."[110]

In 1819, when debates about the introduction of slavery into the Missouri territories broke out, James Madison expressly denied that Congress had the authority to ban the interstate sale of slaves, notwithstanding its clear authority to ban their foreign import and export.[111] In a letter he wrote to Virginia state senator Joseph Cabell in 1829, Madison made even more explicit his view that the domestic and foreign commerce clauses were neither intended, nor should be construed, as vesting Congress with equivalent power. "I always foresaw that difficulties might be started in relation to [the domestic commerce power]," Madison wrote.

> Being in the same terms with the power over foreign commerce, the same extent, if taken literally, would belong to it. Yet it is very certain that it grew out of the abuse of the power by the importing states in taxing the non-importing, and was intended as a negative and preventive provision against injustice among the States themselves, rather than as a power to be used for the positive purposes of the General Government, in which alone, however, the remedial power could be lodged. And it will be safer to leave the power with this key to it, than to extend it all the qualities and incidental means belonging to the power over foreign commerce....[112]

Even as he recognized the appeal of the textualist argument, given the wording of the commerce clause, Madison adamantly rejected it as unfaithful to the intent of the Framers, and the different purposes that Congress's foreign and domestic commerce powers were intended to serve.[113]

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[110] Randy Barnett makes this point, even while remaining committed to a textualist interpretation of the clause as a whole. Randy Barnett, *The Original Meaning of the Commerce Clause,* 68 U. Chi. L. Rev. 101, 140 (2001).

[111] James Madison to Robert Walsh (Nov. 27, 1819), reprinted in 3 FARRAND, RECORDS 437.

[112] James Madison to Joseph C. Cabell (13 Feb 1829), reprinted in 3 FARRAND, RECORDS 478.

[113] Critics have since challenged Madison's interpretation of the Framers intent. Grant Nelson and Robert Pushaw, for example, argue that Madison must have been either mistaken or duplicitous in claiming that the Framers conceived Congress's domestic commerce powers as purely "negative and preventive" in character, given evidence that delegates in Philadelphia—including Madison himself—believed that Congress would possess the positive power to, among other things, set uniform rules for the regulation of interstate trade and (albeit more controversially) grant mercantile monopolies. Nelson & Pushaw, supra, at

Many commentators since Madison have recognized the sense of interpreting the foreign and domestic commerce powers differently, given they were aimed at distinct problems. [Discuss Regan, Currie? Others]

Subsequent Interpretations

All of the available historical evidence thus suggests that the Framers did not intend Congress to possess the power to destroy markets or shut them down, even if they did intend Congress to be able to do just that in the foreign context, but instead vested Congress with authority over interstate commerce so that it could facilitate and protect it. This interpretation of the Founders' intentions is reinforced by the first century of post-ratification practice, which largely hewed to the disjunctive interpretation of the Commerce Clause that Madison laid out in his 1829 letter.

In the wake of ratification, Congress passed a number of what Hamilton called "prohibitory regulations" of foreign trade. In 1794, for example, it passed a law banning the export from the United States of "any cannons, muskets, pistols, bayonets, swords,

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46 n. 185. It is not at all clear, however, that Madison was in fact arguing that Congress possessed no power to enact positive regulations of trade. Instead, the passage occurs in a discussion about the constitutional debate then raging about whether Congress possessed the constitutional authority to impose protective tariffs on imports. Madison argued strenuously that it did, and that Congress possessed the power to tax imports up until the point of prohibition. He was much less sanguine, however—as the slave debates make clear—about domestic prohibitions.

Read in this context, the passage can be understood not as an attempt to outline the proper scope of Congress's domestic commerce powers but instead as an attempt to explain why it was that Congress might possess the power to tax, even entirely prohibit, foreign imports yet not possess the same power vis a vis interstate trade. The answer Madison provides is that the purposes behind the grant to Congress of foreign and domestic commerce power are different: if in the one case, Congress is vested with commerce power in order to advance the "general interests of government," in the other case, Congress is vested with commerce power only in order to "prevent injustice among the states." Hence, while in the former context, it may advance its own economic and political agenda—including, when necessary, the imposition of prohibitory tariffs—in the latter context, it may only protect "injustice among the States." Conceived in this light, the passage provides a powerful explanation of why it was that the Framers recognized, almost, without question, that Congress could prohibit foreign trade but did not assume that Congress would possess the same power to prohibit interstate trade.

cutlasses, musket balls, lead, bombs, grenados, gunpowder, sulphur or saltpeter."[114] In 1806, it banned the importation of any silk, leather, hemp, tin or brass goods from Great Britain or Ireland or of British or Irish manufacture.[115] In 1807, it banned the importation of slaves, effective January 1, 1808.[116] Most dramatically, three days before Christmas, 1807, it passed an Embargo Act, prohibiting all ships in the United States from travelling to foreign ports, save with the express permission of the President.[117] The Act, and supplementary Embargo Acts passed the following year, made "virtually everything that moved in commerce in the United States potentially subject to seizure."[118]

In contrast, it passed no bills limiting what kinds of goods could travel in interstate commerce. This is not to say that it was not active in the domestic arena. To the contrary: the First Congress almost immediately set about establishing rules for the licensing of ships that participated in coastal (i.e. interstate) trade.[119] It funded the building of lighthouses, beacons, buoys, and public piers.[120] In later years, Congress remained heavily involved in regulating and improving the waterways and other channels of interstate commerce, and the ships that travelled along them.[121] It also passed, very early on, a number of helper laws, designed to lend federal muscle to the enforcement of state trade regulations and restrictions. In 1799, for example, Congress enacted An Act Respecting Quarantine and Health Laws. The Act "authorized and required [officers of

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[114] 1 Stat. 369 (May 22, 1794).
[115] 2 Stat. 379 (Apr. 18, 1806).
[116] 2 Stat. 426 (March 2, 1807).
[117] An Act Laying an Embargo on All Ships and Vessels in the Ports and Harbors of the United States (Embargo Act), 2 Stat. 451 (Dec 22, 1807).
[118] Jerry Mashaw, *Reluctant Nationalists,* 116 Yale L. J. 1636, 1655 (2007).
[119] See, e.g., An Act for Registering and Clearing Vessels, Regulating the Coasting Trade, and for other purposes, Sept 2., 1789.
[120] An Act for the establishment and support of Lighthouses, Beacons, Buoys, and Public Piers, Aug 7, 1789.
[121] Hence, for example, in 1838 and 1852 Congress passed a series of ambitious statutes, setting rules for the construction and maintenance of steamboat boilers. Rabin, *Federal Regulation in Historical Perspective,* supra note _ at 1196.

the Unites States] forcefully to aid in the execution of [state] quarantines and health laws, according to their respective powers and precincts, and as they shall be directed, from time to time, by the Secretary of the Treasury of the United States."[122]

At no point, however, did Congress establish its own restrictions on what goods could travel across state lines. Nor was its failure to do so purely passive. Where prohibitions targeted at foreign trade appeared likely to impact the domestic market, Congress carved out express exemptions for those engaged in interstate trade. Hence, a proviso to the Embargo Acts exempted from its prohibitions any ships that engaged in purely domestic trade, so long as "the owner, master, consignee, or factor of the vessel gave a bond equal to double the value of the vessel and its cargo, guaranteeing that the ship's cargo would be re-landed in some port of the United States, 'dangers of the sea excepted."[123]

Congress thus did not act as if it possessed equivalent power over foreign and interstate trade. Nor, at least for the first two decades after ratification, did anyone suggest that it did. It was only in 1807, in the midst of debates about the implementation of a ban on the importation of foreign slaves, that anyone raised the possibility that Congress might use its commerce powers to prohibit not only slave imports but also their interstate transport or sale.[124] It was even later—during the 1818-1819 debates about whether slavery would be permitted in the new state of Missouri—that abolitionist groups

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[122] See also: "An Act to prevent the exportation of goods not duly inspected according to the laws of the several States." April 2, 1790.

[123] Mashaw, *Reluctant Nationalists*, at 1651 (citing Embargo Act § 1).

[124] DAVID L. LIGHTNER, SLAVERY AND THE COMMERCE POWER 37 (2006) (noting that prior to 1807/1808 "most people, even those for whom slavery was a central concern, remained oblivious to [the possibility that the interstate commerce clause empowered Congress to interfere with the interstate slave trade]" and that it was "[n]ot until 1807, when Congress moved towards exercising its acknowledged power to ban the importation of slaves from abroad beginning in 1808 [that] it dawn[ed] upon some southern representatives in Congress that there was a danger of federal interference in the domestic slave trade.").

first argued that Congress had the constitutional authority to ban the interstate sale as well as the importation of slaves.[125] The fact that it took thirty years for abolitionist groups to recognize that the Commerce Clause could be interpreted to vest Congress with the same power to prohibit the interstate as the foreign slave trade suggests how strongly the assumptions of the Founding era generation dictated the opposite conclusion. It is in this respect perhaps not coincidental that the new interpretation of the commerce powers emerged into public view roughly a generation after ratification—at a point when most of those who participated in the drafting and ratifying debates were no longer active in government and it was therefore possible to unsettle the taken-for-granted assumptions that guided the Founding generation and read the text anew.[126]

Even then, notwithstanding the persistent efforts by abolitionist groups to persuade Congress of the necessity, as well as the constitutionality, of a federal ban on the interstate slave trade, Congress refrained, for over sixty years, from imposing any restraints on what goods circulated in interstate markets. Outside of the immediate context of the slavery debate, no one suggested that it could or should. Hence the House Judiciary Committee Report could easily assert, in its report on the constitutionality of the proposed ban on oleomargarine, that it was "not aware that it has ever been asserted for the power to regulate commerce that it involved a power to prohibit the free

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[125] *Id.* at 49-64.

[126] Lightner suggests as much when he argues that although "the preponderance of evidence is against the .... thesis that the founding fathers intended to give Congress the power to destroy slavery by abolishing the interstate slave trade... the fact remains that no matter what was in the minds of the delegates to the Constitutional Convention when they drew up the commerce clause and the 1808 clause, and in the minds of the men who ratified the Constitution at the several state conventions, those clauses were worded that they could be read as giving Congress the power to prohibit the interstate slave trade. The founding fathers had, however inadvertently, created a constitutional loophole with huge potential as an antislavery weapon." LIGHTNER, SLAVERY AND THE COMMERCE POWER, at 51.

transportation of the products of each State through and into every other." [127]

In 1867, Congress did pass a law banning the sale, and the possession with intent to sell, of a particular kind of what was generally referred to as "illuminating oil."[128] However, those who passed the law apparently believed that they were exercising their taxing, rather than their commerce clause authority—or at least hoped to make it appear that way. Hence, the ban was included in the Internal Revenue Act of March 2, 1867 and applied generally, rather than to just the sale or possession the intent to sell across state lines.[129] The Supreme Court was not convinced. It found the connection to federal taxation too remote to sustain the law under the Taxing Clause. It thereby struck it down the statute as an unconstitutional attempt to use the Commerce Clause to enact a "police regulation, relating exclusively to the internal trade of the States."[130]

Suitably chastened, Congress did not repeat the mistake. Although in the 1860s and 1870s, it got increasingly involved in the moral policing of domestic markets—for reasons we explore below—it relied on its Postal Clause, rather than its Commerce Clause powers to do so. Hence, in 1868, Congress passed a law banning the distribution of lottery tickets in the mail.[131] In 1873, it passed the Comstock Act, which made it illegal to send obscene material (including material about contraception) through the mail. And when it finally passed the Oleomargarine Act in 1886, it imposed a tax rather

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[127] H.R. Rep. No. 1880, 49th Cong., 1st Sess. (1886).
[128] Section 29 of the Internal Revenue Act of March 2, 1867.
[129] *See* Stern, *That Commerce Which Concerns More States Than One,* 47 Harv. L. Rev. 1335, 1357-58 (1934). *See also* United States v. Dewitt, 76 U.S. 41, 43 (1870) (noting the claim that, in passing the statute, Congress intended to exercise its power under the taxing clause).
[130] States v. Dewitt, 76 U.S. 41, 43-44 (1870).
[131] 15 Stat. 194 (1868) ("That it shall not be lawful to deposit in a post-office, to be sent by mail, any letters or circulars concerning lotteries, so-called gift concerts, or other similar enterprises offering prizes of any kind on any pretext whatever.").

than a ban, to avoid any constitutional difficulties.[132]

In the 1880s and 1890s, Congress did begin to intervene more aggressively in the policing of domestic markets. In 1884, for example, it passed the Animal Industry Act.[133] The Act authorized the establishment of a Bureau of Animal Industry; and gave the Commissioner of that Bureau rather sweeping powers to take action to investigate and prevent the spread of communicable disease in cattle. The Act also made it a misdemeanor to transport cattle infected with contagious or communicable diseases across state, territorial or district lines. Although today largely a footnote to history, at the time the Act

The Animal Industry Act ultimately passed, but it generated tremendous resistance from states' rights advocates precisely because it was seen as a novel exercise of the federal commerce powers to limit the interstate transport of domestic goods.[134] Constitutional understandings were shifting during this period in response to the changing economic and material conditions brought about by, and symbolized in, the railroad. As many scholars have noted, the increasingly translocal nature of economic and production in the late nineteenth century United States enabled by the establishment of a national railroad network, and by other nationalizing technologies like the telegraph, undermined the effectiveness of the local and state systems of regulation that had traditionally policed domestic markets by rendering an increasing amount of economic life beyond their control.[135]

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[132] CITE.

[133] 48 Cong. Ch. 60, 23 Stat. 31.

[134] See, e.g., 15 Cong Rec 876 (Feb 6, 1884); more.

[135] See, e.g., see LAWRENCE M. FRIEDMAN, HISTORY OF AMERICAN LAW 330-331 (3d Ed.) ("In an age of national railroad nets, an age of telegraph and telephone—that is, communication and coordination across great distances—town and county authorities were particularly futile and ineffective. The cure was, at first, statewide control. But the states too could not deal with *national* businesses, legally or factually. The only

Supporters of the Animal Industry Act were quite explicit about the connection between the newly mobile economy that the railroads made possible, and the necessity for federal action. Specifically, they argued that federal intervention was necessary to prevent the "great transcontinental lines of railways, and their network of branches . . . rapidly penetrating to all the valleys and grazing ranges of the West" from threatening the health of the domestic cattle industry, by carrying disease to all the states through which they passed.[136] The risk of "spreading . . . dire contagion all over the United States and Territories, by the indiscriminate use of cattle-cars that may have been used in the transportation of diseased cattle" was too great, they argued, to allow the individual states to choose to regulate, or not, as they desired.[137] Federal intervention was therefore necessary to erect a "Chinese wall" around those states in which regulations were lax, or disease concentrated.[138]

Still, the 1884 Act did not represent a fundamental departure from the conception of the interstate commerce power promoted in Founding-era debates. As supporters of the law made clear, the ban was not an effort by Congress to "say what articles shall and shall not be the subject of commerce" among the several states. Instead, it was an attempt to protect the U.S. cattle industry by preventing disease from spreading along the new transcontinental railroad network. As such, it can be assimilated into a conception of federal commerce power in the states retained primary authority to dictate what goods circulate in their markets, and the federal government's responsibility was to prevent

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remedy then was *federal* control. The process was repeated in many areas of law. In welfare, for example, first came local poor laws, run by local overseers of the poor. Then came statewide systems. When the states could no longer handle the job (much later, to be sure), the federal government stepped in.").

[136] 15 Cong Rec 890 (House Feb 6, 1884) (Joint Memorial from the Territory of Montana)

[137] Id.

[138] *Id.* at 893 (Hatch of Missouri).

burdens and other obstructions to interstate trade.

Indeed, at no point in any of the nineteenth-century debates did anyone suggest that because Congress possessed the power to ban the circulation of diseased commodities, it possessed the power to ban the circulation of an entire class of goods. The only exception to this rule is of course the Anti-Lottery Act upheld in the Champion decision, but even here, the lack of any serious constitutional debate about the law suggests that members of Congress did not believe that they were doing something constitutionally significant when they passed the law —perhaps because they perceived it, as we suggested earlier, as nothing more than a helper statute, and therefore part of a long-established tradition of state-facilitating laws.[139]

Outside of the peculiar example of the Anti-Lottery Act itself, Congress continued to express considerable solicitude during this period to the importance of state regulatory autonomy, as was in the debates concerning the Wilson Act of 1890, which prohibited the interstate sale of alcohol in states that prohibited its domestic sale.[140] The Act was proposed, and ultimately passed, in direct response to the Supreme Court's decision in *Leisy v. Hardin*, earlier that year. In *Leisy*, the Court ruled that states could not constitutionally ban the sale of alcohol imports—at least, so long as they remained in their original packaging—because to do so was to intrude upon Congress's exclusive power under the Commerce Clause to regulate interstate commerce.[141] The *Leisy* Court thus concluded that Iowa's state prohibition law could not be constitutionally applied to

[139] Herbert Margulies has suggested, as an alternative, that members of Congress may have believed they were acting under their foreign commerce powers, because the lottery that the Act was designed to [given the fact that the target of the Act was in fact a foreign lottery company. Herbert F. Margulies, *Pioneering the Federal Police Power*: Champion v. Ames *and the Anti-Lottery Act of 1895* 4 J. S. Legal Hist. 45, 55 (1996).

[140] 26 Stat. 313 (1890).

[141] Leisy v. Hardin, 135 U.S. 100 (1890).

ban the sale of liquor imports in their original packages. *Leisy* did suggest that states like Iowa could ban the sale of such goods if and when Congress gave them permission to do so.[142] The Wilson Act was Congress's attempt to do just that.

Although the Wilson Act was cited by Justice Harlan as support for the proposition that Congress's power to regulate commerce included the power to prohibit it, the legislative history of the Act makes clear its supporters intended to exercise the commerce power only to assist the states in enforcing their own policy decisions. Senator Wilson argued, for example, that the bill was intended only "to grant to the states what may be called a local option, to allow them to do as they please in regard to the liquor question."[143] Senator George, a states-right Democrat from Mississippi, confessed that he was "constrained to support the bill since only through such legislation can the states, under the decision by the Supreme Court, exercise their rightful and necessary jurisdiction" over the sale of liquor.[144] David Culberson, a Democrat from Texas, meanwhile opposed the law because, by taking up the power the Supreme Court in *Leisy* gave it, he perceived Congress to be complicit in the undermining of the federalist system. He warned that what Congress could give, it could also take away, and that the Wilson Act threatened [therefore] to make "the great state" he represented "a mendicant at the footstool of federal power."[145]

The Wilson Act thus provides perhaps a strong indication of how committed many in Congress remained, albeit for both strategic and ideological reasons, to a

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[142] *Id.* at 123–124 ("[T]he responsibility is upon Congress, so far as the regulation of interstate commerce is concerned, to remove the restriction upon the State in dealing with imported articles of trade within its limits, which have not been mingled with the common mass of property therein, if in its judgment the end to be secured justifies and requires such action.").
[143] 50th Cong. 1888.
[144] 51st Cong. Rec. 5325.
[145] 51st Cong Rec 7521.

conception of federal power that preserved for the states the "rightful and necessary" authority to decide what kinds of goods circulated in their markets. It was this conception of the balance between state and federal power whose demise the expansive language of Harlan's opinion in Champion signaled and helped bring about. In the next Part, we examine why it was that both the Court and an initially reluctant Congress embraced, in the early twentieth century, an expansive view of Congress's prohibitory, Champion powers. Excavating the reasons that led the Court to expand the principle so that Congress possessed the power not only to ban whole markets but to regulate essentially any good or thing that at any point in its life or life cycle moved across states lines helps clarify why it is that the formal rule articulated in *Champion* survived the New Deal revolution, when so many of the other formal rules developed by the Court during this period did not. It also suggests, as we explore in more detail in Part IV, why we may no longer need the unbounded Champion power today.

III. THE VESTIGIAL COMMERCE POWER

At the time *Champion* was decided, there remained an important difference between what powers Congress could constitutionally exert over domestic markets, and what powers were reserved to the states. Under their reserved police powers, states retained "legislative control, exclusive of Congress, . . . of all persons, things, and transactions of strictly internal concern."[146] They could therefore "adopt[]... precautionary measures against social evils," including measures that prohibited the manufacture and sale of immoral or other dangerous goods.[147] States could not, however, transgress on what the Court made clear were the exclusive commerce powers of the

[146] Bowman v. Chi. & N. Ry., 125 U.S. 465, 492 (1888)
[147] Railroad Co. v. Husen, 95 U.S. 465, 471 (1878).

federal government. They could not, in most cases, prohibit the importation of even immoral goods into their territory or their initial sale, at least not unless and until Congress gave them permission to do so.[148]

Congress, in turn, possessed the power to grant or withdraw permission for the states to ban importation.[149] It also possessed the authority to regulate goods moving across state lines and to prohibit such circulation when necessary to protect the channels or instrumentalities of commerce, and thereby to protect interstate commerce itself (or at least supporters of the Animal Industry Act argued).[150] There remained real doubt, however, about whether Congress possessed the power to do any more than that. Leaving aside the arguable exception of the Anti-Lottery Act, at no point in the nineteenth century did Congress act as if it possessed the authority to prohibit the interstate circulation or sale of an entire class of goods. Nor did the Court suggest that it did. Congress's domestic commerce power remained therefore, in important respects, what Madison described as "remedial." That is, it facilitated state action, and it protected the market against danger and obstruction. It did not however promote a social agenda other than the protection and promotion of commerce itself.

The sweeping language in the *Champion* opinion both signaled and helped justify the demise of this conception of Congress's domestic commerce powers. Indeed, over the next century, *Champion*, and cases directly following from it, would be used to uphold a tremendous array of federal prohibitions. Some of these laws clearly were intended to facilitate an "unrestrained intercourse" among the states by encouraging

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[148] Leisy v. Hardin, 135 U.S. 100 (1890).
[149] *Id.* at 123--124.
[150] Although Harlan cited the Animal Industry Act approvingly in his majority opinion in Champion, the Act was not in fact affirmed as constitutional until 1926. Thornton v. United States, 271 U.S. 414, 418-419 (1926).

consumer faith in the quality of (for example) out-of-state food and medicines.[151] Others, however, were not. This is true, for example of the Mann Act of 1910, which prohibited the interstate transportation of women "for the purpose of prostitution or debauchery, or for any other immoral purpose."[152] Proponents of the law argued that it was necessary to protect women from the dangerous prostitution rings that were believed to forcibly conscript women into prostitution by plying them with liquor and carting them across state lines.[153] As opponents of the law pointed out, however, no evidence suggested that state laws were unable to prohibit the forcible conscription or the resulting prostitution, and no argument was made as to how the law protected or promoted interstate commerce.[154]

The only available argument that state laws were inadequate to protect against prostitution, and that therefore Congress must, (as Representative Kiefer of Ohio noted, to applause) was that the transport of the women themselves polluted the channels of commerce, just like the lottery tickets in *Champion* were said to pollute them, on the model of diseased animals. This was not an argument that proponents (for obvious reasons) pressed too hard.[155] Nevertheless, the Act passed with a sizeable majority and in *Hoke v. United States*, the Court, citing *Champion*, upheld it, without dissent, as a

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[151] Cite Regier on the Pure Food and Drug Act of 1906, upheld in X; intended to protect against fraud; increase consumer confidence.

[152] White Slave Traffic Act of June 25, 1910, 36 Stat. 825.

[153] DAVID LANGUM, CROSSING OVER THE LINE: LEGISLATING MORALITY AND THE MANN ACT 4 (2007) ("It was widely thought and feared that large-scale rings of "white slavers" were preying upon young women in the nation's cities.... This fear had a special poignancy for middle-class Progressives. There was a sharp tension between the prevailing image of women as precious, domesticated, virtuous beings and the historically unprecedented fact of middle-class women moving into the crowded urban areas and living alone, without the male protection of a father, brother, or husband...")

[154] See, e.g., 45 Cong Rec 1033 (January 10, 1910) ("[I]f it is morally wrong to buy that ticket, a State, in the exercise of its police power, can pass and en-force a law. If it be not wrong, no jurisdiction can prohibit it. In the third place, it is strange that this country has gotten along for a century and a quarter and the balance of the world for six thousand years without the necessity or on the part of moral people that that had to be done, and only the American Congress could do it...") (Adamson).

[155] 45 Cong Rec 1033 (January 10, 1910) (Kiefer)

constitutional exercise of Congress's domestic commerce powers.[156] Four years later, in *Caminetti v. United States*, the Court found the Act constitutional even as applied to defendants who travelled across states lines to engage in purely non-commercial sex and who lacked therefore even that tenuous connection to the interstate market present in *Hoke*.[157]

In 1918 the Court did attempt to limit the reach of the *Champion* doctrine when it held, in *Hammer v. Dagenheart*, that Congress could not use its domestic commerce powers to prohibit the interstate transportation of goods made from child labor because the transportation of those goods across state lines was not "necessary to the harmful results" that the law sought to prevent—as it presumably was in *Champion*.[158] By suggesting that Congress could only prohibit interstate movement to prevent harms that occurred either during or after the journey across state lines, *Hammer* appeared to impose a significant constraint on the application of the *Champion* principle. The decision proved, however, largely unworkable; or, at least, the Court failed to demonstrate a commitment to maintaining it. By the 1930s, *Hammer* was being routinely ignored, even in cases dealing with laws that similarly targeted pre-transportation harms.[159] In *United*

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[156] Hoke v. United States, 227 U.S. 308, 322 (1913) ("The principle established by the cases is the simple one, when rid of confusing and distracting considerations, that Congress has power over transportation "among the several States"; that the power is complete in itself, and that Congress, as an incident to it, may adopt not only means nec-essary but convenient to its exercise, and the means may have the quality of police regulations. . . We have no hesitation, therefore, in pronouncing the act of June 25, 1910, a legal exercise of the power of Congress.")

[157] Caminetti v. United States, 242 U.S. 470 (1917). The Court cited Champion as support for the proposition that "the authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question." *Id.* at 491.

[158] .Hammer v. Dagenhart, 247 U.S. 251 (1918).

[159] See, e.g., Electric Bond & Share Co. v. SEC, 303 U.S. 419 (1938) (upholding, under Champion, constitutionality of §§ 4(a) and 5 of the Public Holding Company Act of 1935 (49 Stat. 803, 812-13), which prohibited the use of the mails and the instrumentalities of interstate commerce to holding companies which failed to register with the newly-formed Securities and Exchange Commission); NLRB v. Fainblatt, 306 U.S. 601 (1939) (invokes Champion to support the constitutionality of the National Labor Relations Act)

States v. Darby, in 1941, it was finally overruled.[160]

The Court would not attempt to –impose any further limits on the *Champion* doctrine. It instead extended *Champion* to justify the use of federal power to regulate not only interstate movement but also the activities in which goods or persons that at one point in their lives or life cycles travelled across state lines engaged, even years after their interstate journey was completed.[161] The simple fact that the targets of federal regulation crossed state lines was deemed sufficient to justify federal regulation under the principle, as articulated in *Hoke*, that because Congressional power over transportation among the states was "complete in itself...Congress [could] adopt not only means necessary but convenient to its exercise" including and up to laws that "have the quality of police regulations."[162]

Of course, as we saw in the previous Part, the fact that Congress's power over interstate commerce had been considered since *Gibbons v. Ogden*, "complete in itself", had not prevented either the Court or Congress from reading purpose-based limitations into what Congress could do.[163] As Justice Fuller asserted, in *Leisy*, "it is not for Congress to determine what measures a State may properly adopt as appropriate or needful for the protection of the public morals, the public health or the public safety" even if it *was* Congress's responsibility "to remove the restriction upon the State in dealing with imported articles of trade within its limits, which have not been mingled with the common mass of property therein, if in its judgment the end to be secured

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[160] United States v. Darby, 312 U.S. 100, 116-117 (1941) ("*Hammer v. Dagenheart* has not been followed . . .[and] should be and now is overruled."

[161] See, e.g., Scarborough; Bass. McGimsey.

[162] Hoke v. United States, 227 U.S. 308, 323 (1913)

[163] Gibbons v. Ogden, 22 U.S. 1, 196-197 (1824) ("This [commerce] power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.")

justifies and requires such action."[164] In other words, Congress did not, at least under this nineteenth-century view of its commerce powers, possess the authority to promote its own conception of public morals or, for that matter, public health, even if it did possesses the authority to judge whether the moral and health ends states claimed to be promoting merely cloaked protectionism.

It was this limitation on federal power that *Champion* appeared to do away with, by removing questions of purpose from the Commerce Clause analysis, at least when it came to federal power over things crossing state lines. Decades before the New Deal revolution reshaped the conventional understanding of federal power, *Champion* thus can be understood to have enacted its own, somewhat more subtle, revolution in constitutional understandings when it decisively rejected the disjunctive view of federal commerce power dominant since the Founding, and in so doing, inaugurated a line of constitutional precedent that today gives Congress authority over a tremendous range of activities that have in many cases only the most tenuous connection to the interstate market.

The question, of course, is why understandings regarding the reach of the commerce power were occurring around the time of Champion.

One answer must be that the nineteenth-century rule was simply too restrictive to adequately empower Congress to regulate the industrializing economy. The idea that, as the House Judiciary Report asserted, Congress could *only* prohibit the circulation of goods across state lines when necessary to protect the instrumentalities and channels of commerce themselves from obstruction and dangers such as disease sharply restricted Congress' ability to respond to the demand for federal regulation of interstate goods such

[164] Leisy v. Hardin, 135 U.S. 100, 123-124 (1890).

as food and medicine. This pressure in turn reflected the increasing burden imposed on manufacturers by clashing state regulations in an increasingly nationalized marketplace. Diverse state regulations of food quality and labeling threatened to subject manufacturers to a welter of potentially conflicting rules.[165] This led industry groups to increasingly lobby Congress in the 1880s and 1890s to act.[166] Meanwhile, the increasing interconnectedness and sophistication of the food and drug markets imposed a serious strain on the regulatory capacity of local and state governments.[167]

That the integration of the national market caused an expansion in Congress's exercise of the commerce power is, of course, a familiar story. Similar factors led Congress to pass the Interstate Commerce Act in 1887 regulating the interstate railroads, which were by the late 19th century, similarly burdened by conflicting regulations and cutthroat competitors.[168] But whereas, under the 19th century conception, Congress could

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[165] Charles Wesley Dunn, *The Original Food and Drug Act of 1906: Its Legislative History,* 1 Food Drug Cosm. L.Q. 297, 305 (1946) ("[W]hen the 1906 act was enacted the state food and drug laws were in an irreconcilable condition of divergent and conflicting provisions, e.g., with respect to food standards"); Grenier, at 5 ("By 1906, practically all states had pure food laws.....[However] [i]t was soon apparent that only a national law would be adequate. The states, acting separately, could not protect themselves against interstate commerce [!], and by establishing different standards, they made it very difficult for the manufacturer to meet them all. The more reputable manufacturers of food products were not slow to appreciate that a federal law would be to their interest....").

[166] As Regier notes, in his history of the Pure Food and Drug Act of 1906, the "organizations of the food and drug industries and trades . . . supported the enactment of th[e] law from the beginning to the end of its legislative career." C.G. Regier, *The Struggle for Federal Food and Drugs Legislation,* 1 Law & Contemp. Probs. 3, 5 (1934). Associations that Regier reports supported a 1990 version of the law include: the American Chemical Association, American Medical Society, American Bee-Keepers Association, American Pomological Society, American Pharmaceutical Society, Association of American Colleges and Experiment Stations, Association of Dairy and Food Comnissioners, Association of Agricultural Chemists, National Confectioners, National Board of Trade, National Grange, National Alliance and Industrial Union, National Retail Grocers' Association, National Millers' Executive Committee, National Pure Food Association, National Preservers and Syrup Refiners Association, National Retail Liquor Dealers' Association, Proprietary Association of America, Society of Vital Friends, United States Brewers Association, Universal Peace Union, Women's Christian Temperance Union, and the Wholesale Druggists Association. *Id.*

[167] Peter Barton Hutt & Peter Barton Hutt II, *A History of Government Regulation of Adulteration and Misbranding of Food,* 39 FOOD DRUG COSM. L.J. 2, 39 (1984).

[168] See, e.g., Robert L. Rabin, *Federal Regulation in Historical Perspective,* 38 STAN. L. REV. 1189, 1206 (1986) (describing the system of state railroad regulation prior to passage of the ICA as a "crazy- quilt

regulate the railroads, it could not similarly regulate the goods they carried—or at least, they could not prohibit from that carriage harmful or inferior specimens of the good. At least this was the argument made by opponents of the more than ten pure food and drug bills proposed (unsuccessfully) in either the House or Senate in the 1880s and 1890s.[169]

Justice Harlan's rejection in *Champion* of the claim that the federal government could not act, if it so chose, to further the same goals as those traditionally associated with state police power—and his suggestion that, instead, Congress could act whenever goods crossed state lines—undermined the constitutional arguments against Congress's ability to regulate food and drugs, and other commodities. It is thus not coincidental that three years after *Champion* was decided, Congress finally passed a pure food and drug law. Indeed, *Champion* was cited directly in Congressional debates as support for the constitutionality of the Pure Food and Drug Act of 1906.[170] In 1911, when a unanimous Court subsequently upheld the constitutionality of the law, it (unsurprisingly enough) also invoked the *Champion* powers.[171]

The case of the Food and Drug Act suggests the important role that the declaration of federal police powers played in justifying and enabling the gradual emergence, over the course of the first half of the twentieth century, of the modern regulatory state. Indeed, it was not only regulations of commodities that *Champion* enabled. It also provided a justification for federal regulation of economic production and other purely intrastate activities that under the rule laid down in the 1895 decision,

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system" burdened by cutthroat competition among railroad companies that led "[m]erchants, farmers, regionalist loyalists, and railroad enterpreneurs [to believe] that federal regulation was essential."

[169] Dunn at 307 (noting the intensity and prevalence of the constitutional argumetns against a "Federal law against adulteration or misbranding of food and drugs" on the grounds that it "was virtually a regulation of their manufacture within a state, and therefore an invalid police measure. ")

[170] See, e.g., 40 Cong. Rec. 2762 (Feb. 21, 1906) (Knox) (quoting heavily from the opinion).

[171] Hipolite Egg Co. v. United States, 220 U.S. 45, 57-58 (1911).

United States v. E.C. Knight Co., remained in principle firmly beyond the scope of Congress's domestic commerce powers.[172] Hence, in 1938, in *Electric Bond & Share Company v. SEC*, the Court cited *Champion* to support the constitutionality of provisions of the Public Holding Company Act that punished holding companies that did not register with the Securities and Exchange Commission by barring them from the use of the instrumentalities and channels of commerce.[173] Similarly, in *NLRB v. Fainblatt*, *Champion* was invoked to uphold the application of the National Labor Relations Act as applied to employers who were not themselves engaged in interstate commerce but who received and shipped goods in interstate commerce.[174]

Both cases suggest how Congress was used in the late 1930s to justify federal regulation of manufacturing and economic production that in practice failed to obey the distinction between manufacturing and commerce established by the formalist Commerce Clause jurisprudence of the *Lochner* Era. The virtue of the decision was, of course, that it allowed Congress to regulate, albeit indirectly, activities that occurred purely intrastate, without requiring the Court to formally reject *E.C. Knight*. As such, we can understand the *Champion* rule as [among other things] a stopgap measure between the older, what we might call spatialized, conception of federal commerce power that governed in the nineteenth century and the new consequentialist model of effects that would emerge in the New Deal cases.

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[172] United States v. E. C. Knight Co., 156 U.S. 1, 11-12 (1895) ("It cannot be denied that the power of a State to protect the lives, health, and property of its citizens, and to preserve good order and the public morals, "the power to govern men and things within the limits of its dominion," is a power originally and always belonging to the States, not surrendered by them to the general government, nor directly restrained by the Constitution of the United States, and essentially exclusive...Commerce succeeds to manufacture, and is not a part of it....The fact that an article is manufactured for export to another State does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the State and belongs to commerce.")

[173] Electric Bond & Share Co. v. SEC, 303 U.S. 419 (1938).

[174] NLRB v. Fainblatt, 306 U.S. 601, 602-609 (1939).

What characterized this older model—a model that continued to have force well into the 20th century in precedents such as EC Knight—was that it defined the boundary between federal commerce power and state police power by reference to the location of the regulated goods. Under the rule first articulated by Marshall in *Brown v. Maryland*, federal power attached to goods that travelled in interstate markets once they began on their journey out of the state, and it continued to attach so long as they remained in transit [the stream of commerce], as demonstrated by the persistence of the original packaging.[175] Federal commerce power was not, in other words, limited merely to authority over the interstitial spaces between the states; but it was limited to objects that were either intended for, or had just arrived at their destination after a journey across state lines.

The decision in *E.C. Knight* makes clear how strongly this spatialized model continued to dominate constitutional jurisprudence at the turn of the century. The distinction between manufacturing and commerce that the Court drew in that decision lay ultimately, after all, on a distinction between activities that either occurred during, or directly facilitated, voyages between states, and those that did not. As Chief Justice Fuller asserted in the opinion:

> Contracts to buy, sell, or exchange goods to be transported among the several States, the transportation and its instrumentalities, and articles bought, sold, or exchanged for the purposes of such transit among the States, or put in the way of transit, may be regulated, but this is because they form part of interstate trade or commerce. The fact that an article is manufactured for export to another State does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from

[175] Brown v. Maryland, 25 U.S. 419 (U.S. 1827) ("When an importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution.")

the control of the State and belongs to commerce.

By targeting, and identifying federal power with, commodities that crossed or at one point in their life cycle had crossed state lines, the rule developed in the *Champion* line of cases maintained this spatialized conception of the distinction between federal commerce power and state police power. Nevertheless, by reducing it to its bare essential—by making the mere fact of movement across state lines sufficient to justify federal action—the conception of federal power developed in the *Champion* line of cases in fact allowed Congress to extend its authority in new ways over activities that under Knight did not properly rest under its jurisdiction, such as, for example, the food and drug manufacturers regulated by the Pure Food and Drug Act of 1906—or the public holding companies who, under the terms of the Public Holding Company Act of 1935 were denied access to the instrumentalities of interstate commerce if they chose not to register with the newly-established SEC.

Champion's usefulness in enabling federal regulation helps explain why it continued to be cited approvingly by the Supreme Court long after it was required to do so. Beginning in *Jones & Laughlin Steel,* the justices began to move away from the spatial tests of federal commerce power that guided the 19th century doctrine, and towards a new consequentialist logic of "effects." The "effects" test did not rely upon the location of the targeted regulation to determine whether or not federal power was constitutional, but instead distinguished those activities subject to federal control from those that were not on the basis of their connection to, and effect on, the integrated, interstate economy.

The pivot point was *United States v. Darby,* the opinion which gave the

substantial effects line of cases its name, but also relied heavily upon the Champion rationale to sustain the legislation there at issue.[176] *Darby* involved a challenge to provisions of the Fair Labor Standards Act, which set minimum wages and maximum hours for employees who engaged in the production of goods for interstate commerce, and prohibited the shipment in interstate commerce of any goods produced in violation of the Act. In his opinion for the (unanimous) Court, Justice Stone invoked *Champion* and its progeny twice: first to affirm the constitutionality of the prohibition on the interstate shipment of goods made in violation of the Act; and also to affirm the constitutionality of the wage and hour provisions. The prohibition on interstate shipment he argued was constitutional because:

> Congress, following its own conception of public policy concerning the restrictions which may appropriately be imposed on interstate commerce, is free to exclude from the commerce articles whose use in the states for which they are destined it may conceive to be injurious to the public health, morals or welfare, even though the state has not sought to regulate their use [and even though...the assertion of the power to regulate interstate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the states."

The hour and wage regulations were similarly constitutional, he argued, because:

> Congress, having by the present Act adopted the policy of excluding from interstate commerce all goods produced for the commerce which do not conform to the specified labor standards, it may choose the means reasonably adapted to the attainment of the permitted end, even though they involve control of intrastate activities. . . .

It was, in other words, Congress's power to prohibit the transport across state lines of goods made in violation of the Act's wage and hour provisions was used to justify those provisions themselves. Note how obedience to the *Champion* logic required the Court to effectively turn the statute on its head, by construing the regulations that were its primary purpose as merely Necessary and Proper Means of effectuating the

[176] United States v. Darby, 312 U.S. 100 (1941)

border-crossing prohibition. Here we see how invocation of the *Champion* rule both required and allowed the Court to obscure what Congress was in fact doing: which was, of course, not really regulating transportation at all. Nevertheless, it was sufficient to sustain the law.

Of course, *Darby* is a landmark case not because of the border-crossing argument Justice Stone first made to dispose of the constitutional objections to the Act, but because of the entirely separate argument Justice Stone made to justify the constitutionality of the FLSA wage and hour provisions under a logic of substantial effects. Specifically, Justice Stone argued that the FLSA's wage and hour regulations were constitutional because they were a necessary and proper means not to effectuate the ban on interstate circulation but instead to protect the market against "unfair competition." As he explained:

> As we have said the evils aimed at by the Act are the spread of substandard labor conditions through the use of the facilities of interstate commerce for competition by the goods so produced with those produced under the prescribed or better labor conditions; and the consequent dislocation of the commerce itself caused by the impairment or destruction of local businesses by competition made effective through interstate commerce. The Act is thus directed at the suppression of a method or kind of competition in interstate commerce which it has in effect condemned as "unfair," as the Clayton Act has condemned other "unfair methods of competition" made effective through interstate commerce....The means adopted by § 15 (a) (2) for the protection of interstate commerce by the suppression of the production of the condemned goods for interstate commerce is so related to the commerce and so affects it as to be within the reach of the commerce power.[177]

In other words, even though the activities which the wage and hour provisions of the FLSA regulated were not themselves part of commerce—as defined in the statute at least to include "trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof"—they had, Stone argued, a significantly substantial effect on (in this case) the interstate labor market to fall within

[177] Id. at 122.

Congress's Necessary and Proper, if not its Commerce Clause powers per se.[178]

Darby thus demonstrates not only the important role that the *Champion* test played in the New Deal case law but also its increasing superfluousness as a justification of federal power—or at least, as a justification of the kind of federal power with which Darby was concerned. As the opinion itself demonstrates, once courts had available to them the vocabulary of substantial effects they no longer needed to rely upon *Champion* in order to justify regulations of production like the FLSA, or even non-commercial transactions like those upheld in *Wickard*. These could, and would, be equally well-justified under the new logic of substantial effects.[179] Indeed, it was within this substantial effects rubric that the Court justified most of the major Commerce Clause regulations Congress passed in the post-New Deal period, such as the Civil Rights Act of 1964 and the loansharking measure at issue in *Perez v. United States*.[180] With regard to federal regulation of the interstate market—even federal regulations aimed, like the Civil Rights Act of 1964, at moral ends—*Champion* became, therefore, in the post-New Deal period largely vestigial: a holdover from a period before it was possible to justify federal power using the logic of substantial effects.

Of course, this is not to say that *Champion* became entirely vestigial. It remained necessary to sustain laws like the Mann Act and the Controlled Substances Act upheld by the Court in *Raich* under the substantial effects test but which, as we argued in Part I, was ultimately grounded in the *Champion* power. These laws—which cannot easily be

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[178] Darby, 312 U.S. at 110.

[179] Don Regan makes a very similar argument. See Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite* United States v. Lopez, 94 Mich. L. Rev. 554, 589 (1995).

[180] See, e.g., Perez v. United States, 402 U.S. 146, 146-147 (U.S. 1971) (upholding Title II of the Consumer Credit Protection Act under a logic of "substantial effects"); Maryland v. Wirtz; Atlanta Motel; Katzenbach v. McClung…

See also Sebelius, Lopez, Morrison (striking down federal statutes b/c no substantial effects; no discussion of the Champion power).

justified under the logic of substantial effects, insofar as what they seek to do is shut down markets, not protect them, point to the other primary motivation behind the Court and Congress's embrace in the early twentieth century of the expansive *Champion* power: namely, the intense political mobilization taking place at the time around the problem of vice.

Even while *Champion* was becoming irrelevant to regulation and promotion of the national market, then, it retained relevance in situations such as vice regulation, where the goal was to shut down a market. As an enormous literature attests, during the last few decades of the nineteenth century and the first few decades of the twentieth century social progressives joined forces with Christian reformers to spearhead often national campaigns against vices such as alcohol, gambling and prostitution, which they saw as posing a serious problem to social progress in the industrial age.[181] Although drunkenness, gambling, and prostitution were by no means new problems in early twentieth century America, reformers believed they were exacerbated by the new freedoms and stresses of life in an industrializing economy. As William Howard Moore, summarizing a generation of scholarship on the morals policing side of progressivism, noted:

[T]he campaigns against prostitution, the saloon, and gambling constituted

[181] Relatively oft-cited works exploring the anti-vice movement in 19th/early 20th century America (and the legislative response to it) include NICOLA BEISEL, IMPERILED INNOCENTS: ANTHONY COMSTOCK AND FAMILY REPRODUCTION IN VICTORIAN AMERICA (1997); PAUL BOYER, URBAN MASSES AND MORAL ORDER IN AMERICA, 1820-1920 (1978); GAINES M. FOSTER, MORAL RECONSTRUCTION: CHRISTIAN LOBBYISTS AND THE FEDERAL LEGISLATION OF MORALITY, 1865–1920 (2002); DAVID LANGUM, CROSSING OVER THE LINE: LEGISLATING MORALITY AND THE MANN ACT (2007); DAVID J. PIVAR, PURITY CRUSADE, SEXUAL MORALITY, AND SOCIAL CONTROL: 1858-1900 (1973); JASON H. TIMBERLAKE, PROHIBITION AND THE PROGRESSIVE MOVEMENT, 1900-1920 (1963); Herbert Hovenkampf, *Law and Morals in Classical Legal Thought*, 82 Iowa L. Rev. 1427 (1997). [And this is just a small selection!] General histories that also explore the issue include MICHAEL E. MCGERR, A FIERCE DISCONTENT: THE RISE AND FALL OF THE PROGRESSIVE MOVEMENT IN AMERICA, 1870-1920 (2003); MORTON KELLER, AFFAIRS OF STATE: PUBLIC LIFE IN LATE NINETEENTH CENTURY AMERICA (1977); and the go-to book, Richard Hofstadter's *The Age of Reform*.

> important elements of national progressivism. Reformers saw these institutions as part of the social disorder resulting from rapid expansion and industrialization. Not only would Progressives seek to tame the forces of growth itself but they would also seek to ameliorate its immediate impact on the community. The brothel, saloon, and gambling parlor seemed to many Progressives distinct threats to home, the work ethic, and even to the political process."[182]

By prohibiting, or at the least significantly limiting, an individual's access to "the brothel, the saloon, the gaming parlor," Progressives and social movements like the Women's Christian Temperance Union, which in the teens and twenties spearheaded the movement for prohibition, attempted to ensure that Americans would not succumb to the new freedoms available to them in the more anonymous and much more diverse cities of late nineteenth-century America. They also sought to defend the traditional social order against the threats that urbanization and the massive wave of immigration that accompanied industrialization in the United States appeared to pose to it. As Jerry Mashaw notes, "[i]mmigrants challenged the economic position of skilled workers, the political control of the Republican Party, and the moral authority of dominant protestant groups."[183] Industrialization and urbanization threatened the traditional gender order by providing women new economic opportunities outside the home, and greater freedom generally.

By empowering Congress to pass regulations that looked, to all extent and purpose, like "police regulations," the *Champion* life of cases gave to Congress the authority to guard society against the moral ills that many at the time associated with industrialization. In many of the early cases—including *Champion* itself—the Court justified doing so by analogizing the moral harms associated with, for example, the

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[182] William Howard Moore, Progressivism and the Social Gospel in Wyoming: The Antigambling Act of 1901 as a Test Case, 15 THE WESTERN HISTORICAL QUARTERLY 299, 301 (1984).
[183] Jerry Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 Yale L. J. 1362, 1370–71 (2010).

lottery ticket with the economic harms associated with, for example, the transport across state lines of diseased cattle. Hence Harlan's repeated references in his *Champion* opinion to the "polluting" and "infectious" nature of the lottery ticket.

But of course, although at the time the moral harms associated with industrialization may have been closely associated—at least rhetorically—with the economic and political difficulties created by an increasingly national market, the regulation of vice does not pose the same challenge to the regulatory authority of the states as do the other problems that Congress sought to solve, under first its *Champion* and later its substantial effects powers. Banning a market is, after all, a much simpler proposition than regulating one. It does not require regulators and consumers to do anything; merely that they not do something. Differences among the states in what items they choose to ban, what kind of behavior they choose to disallow, may therefore pose less of a burden—ironically—to markets or consumers than differences among the states in regulation. Diversity among the states in what they choose to ban certainly poses less of a burden on the interstate market as a whole than other differences in state regulation—as we argue below.

The next Part, therefore, explores the continued vitality of *Champion* as a means of shutting down interstate commerce markets. Recognizing that the *Champion* power is, in an age of substantial effects, unnecessary to ensuring free flowing national markets, the question is whether it should be retained to shut them down instead. That is an inquiry formed not so much by history, as by the basic workings of our federalist structure.

IV. IN DEFENSE OF A BAN ON CONGRESSIONAL BANS

Thus far, the argument has been largely originalist and historical. Part II made clear that the Founding generation most likely did not intend for Congress to use the commerce power to shut down commerce, and that for at least one hundred years there was no widespread belief to the contrary, until the dam broke open after *Champion v. Ames*. Part III explained that the dam broke open for reasons that we now understand were unnecessary: once the Nation came to understand the integrated nature of the interstate market, and congressional power to regulate this integrated market was captured doctrinally by the substantial effects test, the broad reach of *Champion* became vestigial.

The question becomes, what to make of this history? An originalist might say matter settled, the broad *Champion* powers are inconsistent with original understandings and longstanding practice. Precedentialists, on the other hand, might place a heavy burden on those who would limit Congresses power in the way proposed here. But neither perspective seems quite right. Certainly the fact that for half of the nation's history Congress was without the power to shut down markets suggests the power to do so should not be lightly implied. But just because Congress has exercised the power – particularly given the insight from Part III that the breach proved unnecessary – does not mean Congress should exercise the power now. It would seem appropriate to test the original insight against modern circumstances, to determine whether something else has changed in the nature of the American republic to necessitate Congress exercising this power.

This Part takes up the burden of establishing that the claim advanced here – that Congress

lacks the power under the Commerce Clause to shut down markets – is workable in the modern world. As will be clear, adopting this limitation on congressional power has its consequences, but those consequences are far fewer than one might expect, they may be unavoidable in any event, and the gains to be achieved are substantial. Section A specifies the claim here, which is consistent with a narrow reading of Champion. Section B responds to potential objections, common with regard to Commerce Clause jurisprudence, that the proposed test is too formal or unworkable as a doctrinal matter. Section C then relies on two analytic techniques to establish that although the matter is not entirely clear-cut, there is, all things considered, much to be gained and little lost if Congress is deprived of the power to shut down markets. The first analytic technique is to recur to the basic principles widely believed to animate American federalism, showing how those principles argue in favor of curtailing congressional power to ban markets. The second technique is to ask precisely what, if any, branches of existing statutory law would need to be pruned if congressional power were so limited.

A. Specifying the Claim

Today, *Champion* is given a wide reach. At the least, *Champion* is read to allow Congress to ban anything traveling in commerce. But it also is the precedent used to justify Congress regulating not only anything traveling in commerce, but anything that has so traveled, or might travel in the future. Thus, in addition to the sort of "morals" legislation that was prominent at the turn of the twentieth century, *Champion* has provided a basis for much additional federal legislation, most notably an explosion in federal criminal laws. These include racketeering laws, loansharking laws, arson laws, child support laws, the wire fraud provisions, and obscenity laws, to name but a few.

Many are critical of the broad reach of national power *Champion* has engendered. As Donald Regan, states, aptly, "The idea that Congress can regulate whatever has moved across a state line has become a popular 'hook' for federal legislation . . . But it is none the better argument for that." Some propose limitations on the use of the sort of extended "nexus" test that justified the reenactment of federal legislation banning guns near schools.[184] Others decry the expansion of federal criminal law premised on a broad reading of Champion, and urge cutting back on that authority.[185]

While these complaints about the broad *Champion* powers suggest considering whether *Champion* should be overruled altogether, the claim here is substantially narrower, and perfectly consistent with the reading of *Champion* urged in Part I. The argument is that Congress lacks the power to shut down commerce; congressional power can be exercised only in the service of promoting, regulating, and harmonizing commerce. Congress certainly can bar from commerce articles that threaten the instrumentalities of commerce themselves, such as bombs on airplanes. And Congress equally can bar transportation of products that threaten the viability of interstate markets, such as adulterated food or drugs. But as an exercise of the domestic commerce power, Congress cannot simply decide that it wants to shut down an entire market, be it in prostitution, drugs, raw milk, fireworks, or whatever. Those are decisions for the states to make.

It is important to stress, however, that Congress can pass legislation assisting states that, in the exercise of their police power, want to curtail these markets. If all the states agree, then Congress's power is vast, as in *Champion* itself. The interesting questions arise when all the states do not agree what are proper articles of commerce. That is the nub of the question, and we come to it shortly.

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[184] McGimsey; others
[185] Bradley, others.

B. Against Formal Rules, and In Favor of the Ban on Bans

Before examining the likely effects of the proposed test, it is appropriate to anticipate some arguments that may be raised against it. Anticipating these arguments requires little foresight; they are the sorts of objections to Commerce Clause doctrine that have been raised repeatedly any time the Supreme Court has attempted to place limitations on congressional power. First, critics may challenge the proposed rule as overly formal; second, they may question whether it is workable as a principle for distinguishing when Congress may Act, and when it may not.

Challenges to the formal (as opposed to functional) nature of Commerce Clause doctrine hark back to prior attempts by the Supreme Court to define separate spheres for state and national regulation. For example, the Court sought to draw lines between local activity like "manufacturing" and the regulation of "commerce" itself. But similar complaints have met the Court's more recent Commerce Clause jurisprudence, particularly the attempt to draw a line between what is "economic" or "commercial," and thus within the commerce power, and what is "noneconomic" or "noncommercial" and thus out.

Critics today maintain that, if anything, Congress's doctrinal tests for telling what is commerce and what is not have grown ever more formal, and thus less clearly tied to what reasons we might have for granting Congress power over interstate commerce. As Don Regan explains, "The essence of formalism in legal interpretation is paying no attention to the purpose embodied in the text one is interpreting."[186] Those who adopted the commerce power had their reasons, and doctrinal tests should bear some relationship to such reasons. But, says Regan, joining the complaints of many, none of the Court's doctrinal tests "reflects any explicit concern

[186] Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite* United States v. Lopez, 94 MICH. L. REV 554, 562 (1995).

with what might be the *point* of giving the federal government the power to 'regulate commerce among the several states.' "[187]

A related complaint about modern attempts to limit Congress's commerce power is that the tests are simply unworkable; even if they bore some relationship to the purposes of the commerce power, under pressure the tests will crack and provide no dividing line at all.[188] Justice Kennedy called this "the imprecision of content-based boundaries used without more to define the limits of the Commerce Clause."[189]

Neither of these complaints, however, is problematic for the test proposed here. To say that Congress cannot shut down markets is not to apply a formal test at all. It is one that captures precisely what the animating purpose of the Commerce Clause was. Congress was granted the domestic commerce power to lubricate markets, not to destroy them; to take down barriers to the free flow of commerce, not to impose them.[190] It is possible that as a policy matter the test proposed here is too harsh, curtailing congressional power where it might be desired. That is a different issue, one taken up below. But the rule that Congress cannot ban articles from commerce unless in service of a broader market, or as a helper statute, is a purpose-driven

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[187] Id. *See also* Roderick M. Hills, *Our Federalism, Our Formalism* 4–5 (quoting Regan and further criticizing formalistic interpretations of the enumerated powers)

[188] *See* Susan R. Klein, *Independent-Norm Federalism in Criminal Law*, 90 CALIF. L. REV. 1541, 1573–74 (2002) (reviewing criticism of the commerce–non-commerce distinction).

[189] *Lopez*, at 569–74 (Kennedy, J., concurring) (reviewing the breakdown of formalism in Commerce Clause cases: The manufacturing–commerce distinction was enforced in United States v. E.C. Knight Co., 156 U.S. 1 (1895) and disavowed in Standard Oil Co. of N.J. v. United States, 221 U.S. 1 (1911). Outright bans were allowed in Champion v. Ames, 188 U.S. 321 (1903) and struck down in Hammer v. Dagenheart, 247 U.S. 251 (1918). The direct–indirect test on effects was enforced in Carter v. Carter Coal Co., 298 U.S. 238 (1936), but not NLRB v. Jones & Laughlin Steel Co., 301 U.S. 1 (1937). Wickard v. Filburn, 317 U.S. 111 (1942), finished burying this formalism.). In fairness, it is not clear that at the time tests like the "manufacturing" "commerce" distinction were adopted, they were fairly understood as formal. Congress's commerce power was understood to control movement among the states – that was thought to be its purpose – and activities like "manufacturing" or "agriculture" seemed beyond the very purpose of granting Congress the power to regulate commerce. This simple reasoning exploded in the face of the integrated market that followed in the wake of the industrial revolution, which is precisely why the substantial-effects test came to dominance. (There are critics of that test as well, arguing it insufficiently captures what properly is left to the federal or state governments under a functional approach.)

[190] Cooter and Siegel use lubricate at 149; friedman and deacon on taking down barriers; also part II

doctrinal test.[191] There is nothing formal about it.

Somewhat more apt, but still not fatal, is a concern that the distinction between Congress not being permitted to shut down markets, and Congress being allowed to ban products to foster the health of markets, may not hold up easily. When Congress bans, say, unlabeled dietary supplements, is it aiming its regulatory power at the unlabeled dietary supplements, or seeking to keep safe and open for trade a market in such supplements? The point is a fair one but also easily overstated. At a minimum, if Congress decides to ban something from the interstate market, it must be able to articulate in the service of what broader market this is being done. When Congress forbids the transportation of women in commerce, what market precisely is it furthering? Similarly, when Congress makes it a crime to possess marijuana, or to transport marijuana across state lines, what market is Congress trying to foster? There may well be hard cases, but that is the nature of judicial decisionmaking – and more important, many cases will be easy ones.

C. *Are Congress's Hands being Tied in Difficult Ways?*

From a functional perspective the real worry is that the proposed limit on market bans will tie the national government's hands in ways that prove deleterious in times of necessity. Perhaps changes in the nature of the interstate market have made this limitation problematic. Perhaps the sorts of factors that brought the substantial effects test to the fore mandate retaining the broad *Champion* powers.

This section addresses the question in two separate ways. First, it looks to some "Federalism Basics," to show that although it is in some facets a difficult question, the limit on market bans fosters a vibrant federalism rather than detracts from it. This rule leaves the national government free to do what it must, while otherwise respecting state choices. Second, it looks at

[191] Cite Hills MS at around 14??

some enactments that might prove threatened by the limit on market bans, showing that when central authority truly is necessary it is almost always available. There may be hard cases, and the rule imposes some limitations we are reluctant to accept, but they seem appropriate trades for eliminating the damage done by ill-considered market bans.

1. Fostering Federalism

It should by now be apparent that a formal rule that something has once moved or sometime will move, or even is moving, in commerce is counterproductive. Yes, a gun will move in commerce at some point. But if regulating guns near schools is not apt under a functional analysis for national control, then reliance on the formal broad *Champion* power is a mistake. That was the point of Justice Kennedy's concurrence in *Lopez*, in which he argued that national control of guns near schools was likely to preempt state experimentation and alternative solutions.[192] Yet, it was apparent that the national government was not really going to manage this problem nor was it well-suited to do so.[193]

Although they approach the problem differently, most theorists understandably prefer to think of federalism in functional rather than purely formal terms.[194] They ask whether transferring power to the national government makes sense, or if there are important reasons to retain power in the states. People understandably have differing views, even at this level, of what is a sensible allocation of power between nation and states. Still, there is a set of what might be called "Federalism Basics" that gain widespread acceptance with regard to the workings of American federalism. These basics may not easily translate into doctrinal tests, but one ought to be clear on the principles before trying to write the doctrine. Doctrine, which after all is nothing

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[192] *Lopez*, at 581–83 (Kennedy, J., concurring).

[193] *See Lopez*, at 581–83 (Kennedy, J., concurring) (explaining that there are 100,000 public schools and federal supervision is impracticable).

[194] xxx

but judicial implementation of constitutional understandings, would be valueless if it fell far afield from the problems it was trying to solve.[195] And with regard to Congress's jurisdiction over things moving in commerce, this is precisely the case.

Federalism, at bottom, is a means of increasing overall utility.[196] An honest look at American federalism might begin by acknowledging that we have our system of divided sovereignty in part because this was simply the price paid at the Constitutional Convention for Union.[197] There were those who preferred eliminating the states as separate entities, but this was a complete non-starter.[198]

Back then, and since, people have understood that the primary grounding principle for federalism is maximizing utility. When states are allowed to go their own way on a variety of issues, the preferences of more people will be satisfied. To see this, imagine a country with two states, each with 100 citizens. The citizens of State A prefer Policy X by a 70-30 margin. The citizens of State B oppose it by the same margin. If a single answer must be selected, then the utility payoff is 100 happy and 100 unhappy citizens. If, however, the each state can choose its own policy, 140 people will be satisfied and 60 will be unhappy.

Of course, the rub is figuring out when a state-by-state solution is plausible, and when it is not. If there were no downside to letting each state go its own way, the above example would mandate that we do so. But the Constitution was adopted precisely because state autonomy under all circumstances was undesirable or unworkable. Thus, the question is: Can we tolerate a checkerboard, or must all our squares be red (or black)?

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[195] **Michell Berman article. Also Kim Roosevelt. And Dick Fallon's implementation stuff here also.**

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[197] *See* Michael P. Zuckert, *Federalism and the Founding: Toward a Reinterpretation of the Constitutional Convention*, 48 REV. OF POL. 166,207 (1986) (explaining the complexities of the "Great Compromise").

[198] Michael P. Zuckert, *Federalism and the Founding: Toward a Reinterpretation of the Constitutional Convention*, 48 REV. OF POL. 166, 198 (1986).

There are various ways of putting the question of when national power is necessary. The familiar list of congressional powers in Article I, Section 8 of the Constitution came out of the Convention's instructions to the Committee on Detail to provide for national power "in all cases for the general interest of the Union, and also in those to which the States are separately incompetent, . . . or in which the harmony of the U. States may be interrupted by the exercise of individual Legislation."[199] There are those who see this as a formula that in many cases should resolve questions of federal power.[200] Others suggest that is mistaken; all the Convention adopted and the country ratified was the specific language of Article I, Section 8.[201] A sensible middle ground would be to acknowledge that the enumeration itself governs, but our understanding of how to interpret it surely is illuminated by the framework it was to further. It seems hard to quibble with the notion that Congress should act when the "general interest" does not require it, when states are competent to act on their own, and when their doing so does not affect the "harmony" of the United States.

The language of law and economics is frequently used to today to capture the notion of when the center should act or refrain from acting. In general, it is thought, states should be left to make decisions for themselves unless there are collective action problems associated with state choice.[202] Collective action problems are those in which individuals would be better off if, acting as a group, they adopted a specific solution or approach, but for one reason or another the individuals are unlikely to adopt that solution or approach acting on their own. Barriers to taking collective action vary, from the transaction costs of doing so, to formal rules that require unanimity. The classic example is overgrazing of a commons.

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[199] Lash, 87 Notre Dame at 2138.
[200] See, e.g., Balkin; Cooter and Siegel
[201] Lash
[202] Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115, 144–150 (2010).

In the law and economics literature on federalism, two sorts of collective actions problems are commonly identified. People sometimes speak of them in one breath. Analytically, however, it is important to keep them distinct.[203] One of them is implicated in the rule barring Congress from shutting down markets; the other is not.

The first federalism collective action problem travels by many names, but points to a situation in which paralysis or partial paralysis might well take hold if the central government could not act despite the contrary preferences of some states. *Wickard* is a classic example: any state could develop its own allocation system for growing wheat, but if wheat is available on the open market from other states, those price supports will not work.[204] Sometimes states that decide to move first might well suffer a competitive loss. *Darby* is an example of this. If some states adopt higher labor standards, their products will be more expensive on the market and they will lose out to states with lower standards. This can lead to races to the bottom, or holdouts. As Justice Cardozo explained in upholding the Social Security pension tax in Steward Machine:

> "inaction [on the part of the States]was not owing, for the most part, to the lack of sympathetic interest Many held back through alarm, lest in laying such a toll upon their industries, they would place themselves in a position of economic disadvantage as compared with neighbors or competitors."

As an example, Justice Cardozo pointed to a Massachusetts pension law that said it would not go into effect until the federal government passed a law on the subject, or 11 of 22 designated states did so.

These problems are so severe that some advocate empowering the national government to solve them if even only a single state has the same preference as the national government. Whether this is the case or not might depend on how unlikely it is that states will move in the absence of collective action. For example, minimum wage, maximum hour and child labor laws

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[203] See Revesz, Response to Critics, Stewart, Pyramids of Sacrifice, Regan.
[204] Wickard v. Filburn, 317 U.S. 111 (1942).

might be thought to have this structure, but historically many states did adopt these reforms in the absence of collective action.

Importantly, this sort of federalism collective action problem is *not* implicated by a rule barring Congress from shutting down a market in a given good. It is hard to imagine that a state would decide to allow trafficking in a good or service, or disallow it, because other states have chosen differently. Historically this has not been the case; rather, from alcohol, to marijuana, to prostitution, to gambling, to raw milk, a checkerboard has at times prevailed.

However, the bar on Congress banning markets most definitely raises the second prominent form of collective action problem, that of negative externalities, or spillovers. Externalities are costs (or benefits) that are not captured within any given state, and so spill over to other states. The classic example here is environmental pollution. If State A benefits in taxation or otherwise from a factory whose harmful pollutants are swept away on the wind to State B, State A maximizes its benefits and minimizes its costs by doing nothing about the pollution. The solution is national legislation that forces states to internalize the costs of their policies or prevents spillovers altogether.[205] Here, national power is believed appropriate, even at the expense of state choices.[206]

Spillovers are common in market bans, and undoubtedly provide the strongest rationale for national decision-making in the face of state disagreement. Mere disagreement among the states without more should not justify national action; to hold otherwise would be to give up on

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[205] Of course – and this problem will surface again by the end – in a theoretical sense spillover costs cannot ever be prevented among contiguous states or states bound to Union, and so even the seductive precision of economics will not solve all our federalism problems. Any time State A develops a policy, people in that state may have preferences that cause them to move to or impose costs in State B. Spillovers are in some sense ubiquitous, and so ultimately the costs and benefits of state choice may need to be weighted.

[206] Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115, 138 (2010). Again, this fashionable law and economics terminology finds frequent mention in the literature and case law of federalism throughout the ages, even if not put in present day terms. *See* Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115, 159–180 (2010) (giving historical examples of federalism thought of as collective action).

the benefits of federalism altogether. As Richard Revesz says, "Given the existence of the states as plausible regulatory units, the tradeoffs reflecting the preferences of citizens of different regions should not be wholly disregarded in the regulatory process, absent strong reasons for doing so."[207] But as the Raich Court pointed out, a good allowed in State A but banned in State B will not be easily contained within its bounds. Some of the good prohibited in State B will flow in across the border between the states; some citizens of State B will come to State A to get what is disallowed back home.

The problem with using spillovers as a ready justification for national action is that spillovers are ubiquitous. Any time two states adopt differing regulatory or policy regimes, there will be some incentive to arbitrage them. Those inclined to burglary in State A, with high penalties, will commit their crimes in State B, where sentences if caught are lower. Given this ubiquity, even scholars attuned to collective action concerns justifying national action are inclined to raise the bar on displacing state choices when spillovers are the issue.[208]

In the face of ubiquitous spillovers, the tricky question becomes what the tipping point should be for choosing one policy over another. If 10 states want to legalize marijuana, and 40 do not, may the national government then impose a ban? If 40 states prefer raw milk and 10 would bar it, is that enough to justify national action?

The very difficult of enforcing bans in the face of state disagreement has led to temporizing by the federal government. Take raw milk and marijuana. In theory the national government has taken hardline absolutist stances as to each.[209] In practice, however, national regulators recognize the difficulty with this position and in each area have tempered the national

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[207] Revesz, response to critics at 536.

[208] *See* Stewart, Pyramids at 1229 ("Recognizing the legitimacy of state autonomy values, the spillovers required to justify federal coercions of the states should be substantial – more substantial than those required to support the exertion of the federal commerce power against private firms or individuals.");

[209] *See* 21 C.F.R. § 1308.11 (classifying marijuana as a Schedule I drug); 21 C.F.R. §1240.61 (banning raw milk).

hard line with a more pragmatic enforcement policy. For example, the federal Food and Drug Administration recently stressed that it did not intend to ban individuals from drinking raw milk, or indeed from transporting it across state lines for personal consumption.[210] Similarly, the Department of Justice has announced it will not interfere with individuals who consume marijuana for medicinal reasons in states that allow it.[211]

The difficulty with the seemingly pragmatic approach of national regulators is that it undercuts the argument for the necessity of national regulation in the first place. Consider raw milk. The FDA regulates it under federal statutes that allow it to ban products that might cause communicable diseases.[212] The FDA not only still believes raw milk unwholesome but stresses that consuming E. coli, which may be present in it, can cause the disease to be transmitted.[213] So, why allow raw milk transportation and consumption if this is the case? Similarly, the DOJ policy seems to concede that at least it is open to questioning whether marijuana should be classified as Schedule I, the highest category of regulation, reserved for items having absolutely no therapeutic value.[214] In truth, medical evidence as to each product is mixed, and often it is politics that determines which policy prevails.[215] The result is unsatisfactory, as the enforcement

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[210] Press Release, FDA, Food Safety and Raw Milk (Nov. 1, 2011), *available at* http://www.fda.gov/Food/FoodSafety/Product-SpecificInformation/MilkSafety/ucm277854.htm.

[211] *See* Memorandum from Deputy Attorney Gen. David W. Ogden (October 19, 2009), *available at* http://www.justice.gov/opa/documents/medical-marijuana.pdf (explaining to U.S. Attorneys that drug enforcement "should not focus federal resources in your States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana").

[212] 21 U.S.C. §§ 331(a), 342(a)(1).

[213] *The Dangers of Raw Milk: Unpasteurized Milk Can Pose a Serious Health Risk*, FDA.GOV, http://www.fda.gov/Food/ResourcesForYou/consumers/ucm079516.htm (last visited Nov. 18, 2012).

[214] 21 U.S.C. § 812 (2006) (defining the five drug schedules). It is possible of course that the DOJ policy is simply one of enforcement priorities, but that is a little hard to comprehend. If marijuana is properly a Schedule 1 drug, then its widespread use ought to be a problem.

[215] *Should marijuana be a medical option?*, PROCON.ORG, http://medicalmarijuana.procon.org (last visited Nov. 24, 2012). *Compare The Dangers of Raw Milk: Unpasteurized Milk Can Pose a Serious Health Risk*, FDA.GOV, http://www.fda.gov/Food/ResourcesForYou/consumers/ucm079516.htm (last visited Nov. 18, 2012 *with* ???

policy of each regulator is sufficiently discretionary and incoherent that it has sown confusion.[216]

When it comes to bans, however, the determinative factor favoring state autonomy is that there are spillovers no matter which way the federal government would act. This is a serious problem. One's instinct is to think of the spillovers from states that would legalize to those that would not. Thus, at some tipping point – difficult to pinpoint though it may be – the federal government should go ahead and adopt a total ban. But total bans have externalities of their own, the most serious of which is a black market with all its attendant crime. As Craig Bradley points out, the United States created organized crime when it adopted a policy of Prohibition. When it comes to marijuana, the negative externalities of the national ban are breathtaking in terms of lives lost, and people incarcerated.

None of this is to say the issue of imposing a ban as a matter within a state's police power is an easy one. Tradeoffs abound, which is precisely why states disagree. Some states may worry that if they legalize certain drugs, addiction will rise, or use of the drug by youths will skyrocket. Others may decide they will bear these risks to stop the carnage of a black market, or its costs in law enforcement.

The salient point, however, is that tradeoffs like these cannot be eliminated by a national ban; the national government cannot solve the collective action problem, and may in fact exacerbate it. Prohibition was adopted not because of spillovers but because some people wanted to impose their moral will on others, and doing so at the state level was too costly or impossible. Yet, the policy imposed from the top down proved disastrous.

Some respond that the right move in the face of tradeoffs is cost-benefit analysis, but it is

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[216] *The Confused State of Pot Law Enforcement*, CNBC.COM (12:02 AM, April 20, 2010), http://www.cnbc.com/id/36179498/The_Confused_State_of_Pot_Law_Enforcement. *See* Press Release, FDA, Food Safety and Raw Milk (Nov. 1, 2011), *available at* http://www.fda.gov/Food/FoodSafety/Product-SpecificInformation/MilkSafety/ucm277854.htm (responding to "concerns that have been raised about potential FDA actions").

unclear that cost benefit analysis will – when externalities are at issue – settle the question. The values at stake may simply defy monetization or prove incommensurable. How does one put a price on the preference for raw milk, or a belief that marijuana eases the discomfort of medical conditions in a way nothing else will.[217] It is possible that the only reason states (or the citizens of states) disagree is that they've not done the math. But one suspects not. Some things are simply unknown, or valued differently.

Besides, a national decision to impose a ban has lock-in effects and prevents the sort of experimentation that federalism is lauded for fostering.[218] In the absence of a national ban, states can choose themselves to limit certain markets. But once a ban is in place, it becomes difficult or impossible to violate, prohibiting states from trying various regulatory frameworks to see if they deal better with negative externalities than a complete ban. This was precisely Justice Kennedy's point in Lopez. States might have believed that guns best would be kept out of schools by encouraging people to turn their guns in voluntarily, or implementing an amnesty, or encouraging tattle-telling by having less harsh policies in place for violators. A federal uniform ban prevented all this from occurring. These are the very sorts of perplexing questions that will move to the fore in the face of the recent Colorado and Washington initiatives on marijuana.

Finally, and perhaps most important, it bears recalling: to say that the national government cannot ban markets is not to say the federal government cannot legislate in ways that assist state choices. To the extent states are having trouble patrolling their boundaries, the federal government is entitled to pass federal laws – like the Wilson Act regarding alcohol – imposing harsh penalties for violating a state ban. The federal government can devote whatever resources it wishes to assisting states in enforcing their own bans. The federal government even

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[217] FN on why willingness to pay won't work.

[218] But see Feeley and Rubin. Are they really going to set up dry and wet states?

can pass laws regulating markets it would ban, to impose uniformity and assure that legalization of a good or service is as safe as possible. All these "helper" laws and laws "in service" of a market are permissible.

Thus understood, the answer to the *Champion* Court's rhetorical question is that the national government does not and should not have the same regulatory leeway as the states. If states conclude by weighing costs and benefits that lotteries are a good idea or a bad one, they can allow or ban them. (It is worth noting this assessment has seesawed in dramatic ways throughout the nation's history.)[219] But that choice is not the choice of the national government. The national government should act only when state choices must be trumped. In the case of bans, the case for trumping state choice is far less than compelling.

2. The Costs of Disabling Federal Authority

In this section we intend to take one additional pass at the question whether limiting Champion as we suggest, i.e. forbidding Congress from shutting down interstate markets, may limit congressional power unduly. Our technique here is to discuss laws on the books today that might be threatened by the proposed limitation on congressional power. So far our investigation has led us to examine the regulation of things like machine guns, anthrax, plutonium and endangered species.

First, we'll note that the proposed limitation does not affect environmental legislation generally. There are aspects of environmental legislation that are difficult to regulate under the rubric of "commerce," such as any law aimed at non-commercially related pollution control. Whether the treatment of such sources of pollution is properly within the commerce power is

[219] *Compare* CHARLES T. CLOTFELTER & PHILIP J. COOK, SELLING HOPE: STATE LOTTERIES IN AMERICA 38 (1991) (all lotteries were banned by 1894) *with* Ronald J. Rychlack, *Lotteries, Revenues and Social Costs: A Historical Examination of State-Sponsored Gambling,* 34 B.C. L. REV. 11, 56–58 (1992) (discussing the rise of state lotteries in the 1960s and 1970s).

complicated – they may involve externalities and spillovers and yet prove hard to squeeze into the notion of "commerce." Yet, they are not implicated by the test proposed here at all, because the laws are not bans on a market of any sort.

Second, we'll suggest how the proposed test might bear upon markets in dangerous goods such as anthrax or plutonium, which Congress most definitely wants to shut down. Despite worries, however, these laws too may not be implicated by the limitation on congressional power proposed here. Congress has in the main adopted regulatory structures that look like helper statutes or serve to protect the interstate market itself.

Third, the most difficult challenge we've faced is the Endangered Species Act, some provisions of which protect endangered species by shutting down an interstate market in same. And just such a law might be required to protect endangered species, in the sense that states lack the incentive to do what is necessary, and the only meaningful means of regulation may be a market ban. It is these provisions of the Endangered Species Act that are most endangered by the test proposed here.

We end, though, on an ironic and cautionary note, for it turns out some courts have been sustaining provisions of the ESA relying not on a Champion rationale, but a substantial effects test. We are a bit skeptical that such arguments work. If they do, though, they ultimately threaten the merit of the limitation on congressional power proposed here, for the substantial effects test may itself prove so pliable that it can be used to sustain laws – like the federal regulation of marijuana – that we do not believe ought to persist under the limitation we propose.