The Third Translation of the Commerce Clause: Congressional Power to Regulate Social Problems

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In a series of provocative articles, Professor Lawrence Lessig has developed a theory of constitutional translation and applied that theory to the Commerce Clause.[1] His writings have illuminated two important issues under the Commerce Clause: the clause's adaptability to technological change and economic integration, and the impact of that adaptability on state sovereignty. Lessig's translation theory, however, would also shed light on a third, more central issue of Commerce Clause interpretation: does that clause support expansive federal regulation of social problems only tangentially related to the economy?

This Essay briefly reviews the two questions Lessig has analyzed under the Commerce Clause. The Essay then turns to the third, too often overlooked problem of Commerce Clause interpretation and explores how Lessig's theory might address that question. The Essay suggests that courts could translate the list of congressional powers in Article I, Section 8 of the Constitution to allow Congress to regulate any subject that the states cannot govern effectively on their own. This translation builds upon the history of Article I and adds coherence to current Supreme Court doctrine.

I.

The first question of interpretation that arises under the Commerce Clause is whether the clause allows Congress to regulate business practices that *now* affect "Commerce . . . among the several States,"[2] even though the same activities would not have affected interstate commerce in the eighteenth century. In one recent paper, Lessig illustrates this interpretive question with the example of meat packing.[3] In 1787, butchering meat was a purely local activity. Slaughter methods in Boston could not affect the price

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1 *See, e.g.*, Lawrence Lessig, *Fidelity and Constraint*, 65 FORDHAM L. REV. 1365 (1997) [hereinafter Lessig, *Fidelity and Constraint*]; Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993) [hereinafter Lessig, *Fidelity in Translation*]; Lawrence Lessig, *Translating Federalism: United States v Lopez*, 1995 SUP. CT. REV. 125 [hereinafter Lessig, *Translating Federalism*]; Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395 (1995).

2 U.S. CONST. art. I, § 8, cl. 3.

3 Lessig, *Fidelity and Constraint, supra* note 1, at 1369; *see also* Lessig, *Translating Federalism*, *supra* note 1, at 137-38 (using milk as a similar example).

of meat in Charleston because there was no way to transport fresh meat over long distances. Today, with the advent of refrigeration, the activities of a Boston meat packer do affect the price of meat in Charleston. Should Congress be able to regulate meat packing today?

Almost everyone now agrees that this is an easy question and that the answer is "yes." The easy question, however, makes an important point about textualism, translation, and original intent. Much of our Constitution is written with abstract, timeless words. The phrase "Commerce among the several States" is not the same as "Commerce among the several States that was technologically feasible in 1787." In one way, the Framers understood the clause in the latter sense because they could not picture refrigerated trucks in 1787. In a more important way, however, the Framers understood the words in the former, broader sense, foreseeing that the things known as commerce would change but that Congress's power to regulate those things would not. The authors of the Commerce Clause used ageless language to convey their meaning, and there is no reason to read a temporal or technological limitation into the clause.

This answer to the first easy question brings Lessig to the second interpretive question, one he has discussed in several articles.[4] As the economy has become more integrated, federal power has grown. Does this growth, faithful though it is to one part of the Constitution, upset another part of the constitutional design? Because economic integration was low in the eighteenth century, the Framers believed that the states would retain substantial power to govern large areas of law without any federal intervention. Should the Supreme Court translate that commitment to state sovereignty to the twentieth century by seeking ways to modulate Congress's expansive authority and leave some breathing room for the states?

This translation question is important, and I agree with Lessig's central points, although I would sketch many of the details differently. In particular, I would stress the deep constitutional roots of the Supreme Court's anticommandeering concept. That principle, which limits congressional power to issue direct commands to the states,[5] has a pedigree of its own; the principle is not a newly crafted response to a bloated Commerce Clause.[6] I would also

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4 *See* Lessig, *Fidelity and Constraint*, *supra* note 1, at 1379-80; Lessig, *Fidelity in Translation*, *supra* note 1, at 1224-28; Lessig, *Translating Federalism*, *supra* note 1.

5 *See* Printz v. United States, 117 S. Ct. 2365 (1997); New York v. United States, 505 U.S. 144 (1992).

6 I have suggested that the anticommandeering concept is rooted in Article IV, Section 4 of the Constitution, which guarantees each state a republican form of government. *See* Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1 (1988); Deborah Jones Merritt, *Republican Governments and Autonomous States: A New Role for the Guarantee Clause*, 65 U. COLO. L. REV. 815 (1994); Deborah Jones Merritt, *Three Faces of Federalism: Finding a Formula for the Future*, 47 VAND. L. REV. 1563 (1994) [hereinafter Merritt, *Three Faces of Federalism*]. The Supreme Court has not founded its anticommandeering concept on the Guarantee Clause, but has suggested that the concept flows directly from the Constitution's structure, especially the Framers' decision to empower Congress to regulate individuals rather than states. *See Printz*, 117 S. Ct. at 2376-79; New York v. United States, 505 U.S. at 161-66; FERC v. Mississippi, 456 U.S. 742, 791-96 (1982) (O'Connor, J., concurring in the judgment in part and dissenting in part). The Court also has noted the historical absence of congressional attempts to commandeer state legislative or executive power, sug-

be more optimistic about the states' strength on the eve of the twenty-first century. Political rhetoric aside, state and local governments seem to be thriving. As other scholars have noted, the last sixty years have witnessed dramatic growth in all levels of government, not just Congress.[7] The states have lost exclusive control over most regulatory fields, a fact that surely would have surprised the Framers, but this loss does not mean that the states have lost their importance or their ability to govern.[8]

More important than these quibbles, however, is the third interpretive issue Lessig omits. Before we can judge the need to redress any imbalance between state and federal power, we must determine why the imbalance has grown so large. Technological change and economic integration explain why Congress can regulate meat packing, as well as why it can set nationwide minimum wages and rules to govern collective bargaining. These congressional powers, however, still fall within the field of economic regulation. Where does Congress get its power to regulate intrastate crimes, race discrimination, air pollution, violence against women, and other social evils? It is those regulations, not just laws governing an increasingly integrated economy, that have helped to swell the United States Code. Until we understand the source of Congress's power to regulate these social problems, it is hard to talk sensibly about the Commerce Clause.

Courts have recognized Congress's power to pass laws on all of these subjects under the Commerce Clause. Yet, if we consider Article I, Section 8 of the Constitution as a coherent text, it is hard to discern Congress's powers to regulate noneconomic matters.[9] Section 8 enumerates more than two dozen specific subjects that Congress may govern. The specificity of each subject, together with the length of the list, suggests that each power is reasonably finite. It is hard to believe that the Framers buried in the middle of

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gesting a deeply rooted understanding that such commandeering is improper. *See Printz*, 117 S. Ct. at 2370-76, 2379-83; *see also* Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite* United States v. Lopez, 94 MICH. L. REV. 554, 593 (1995) (proposing that the Necessary and Proper Clause embodies the anticommandeering principle).

7 *See, e.g.*, Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. CHI. L. REV. 483 (1997). Professor Lessig recognizes this point to some extent. *See* Lessig, *Translating Federalism*, *supra* note 1, at 169-70.

8 As I have argued elsewhere, exclusive control over particular legislative domains is not essential to preserving federalism's vitality. Contemporary American society is highly integrated; there are few opportunities for isolated state regulation. It is more common today for Congress and the states to regulate cooperatively, in parallel, or (in some political climates) in alternation. Under these circumstances, it is more important to preserve state governments as vigorous, independent actors in a larger universe of regulation than to shield certain subjects from national power. Protecting the autonomy of state governments thus has become more important as a constitutional principle; this principle also is consistent with twentieth-century needs for national regulation in a broad array of substantive arenas. *See* Merritt, *Three Faces of Federalism*, *supra* note 6, at 1573-75; *see also* Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499, 538-39 (1995); Deborah J. Merritt, *Federalism as Empowerment*, 47 FLA. L. REV. 541, 546-48 (1995).

9 Other portions of the Constitution delegate power to Congress, but Section 8 is the primary source of congressional power to enact the type of social legislation discussed here. Section 5 of the Fourteenth Amendment might also support much of that legislation, but the Court has avoided resting congressional power on that clause. I touch briefly on this problem below. *See infra* notes 32-33.

this inventory—in the second phrase of the third clause, no less—a cloaked dynamo that one day would generate congressional power over virtually any social problem. Yet that is exactly how the Supreme Court has interpreted the Commerce Clause.

The Court, moreover, has interpreted the Commerce Clause expansively with only sporadic mention of the problem.[10] Scholars and lawyers have tended to downplay the matter of social regulation as well.[11] Compared to the constitutional firestorm over Congress's authority to regulate the national economy, a power the Framers clearly intended to confer, barely a candle has flickered over Congress's power to regulate a variety of social issues.[12] Yet it is in the latter cases that the Court has wandered farthest from the apparent meaning of the Commerce Clause and has engaged in the most extreme forms of one type of textualism. The Court has taken the phrase "Commerce . . . among the several States" out of its documentary, historical, and cultural context and has used that phrase to uphold regulation of any activity that has some link to interstate commerce—even if the nexus is purely incidental to the law's purpose.

This complaint does not mean that the Court should strike down all federal statutes regulating the environment, race and sex discrimination, or intrastate crimes. The Court should continue to uphold those statutes but might rethink the narrow textualism it has used to achieve those ends. Part II considers how a constitutional theorist committed to fidelity and armed with Lessig's concept of translation might approach Congress's power to regulate a broad range of social issues.

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10 Individual Justices occasionally have questioned the scope of Congress's power to regulate social problems. *See, e.g.*, United States v. Salerno, 481 U.S. 739, 759 n.4 (1987) (Marshall, J., dissenting) ("The Constitution does not contain an explicit delegation to the Federal Government of the power to define and administer the general criminal law."); Perez v. United States, 402 U.S. 146, 157 (1971) (Stewart, J., dissenting) ("I think the Framers of the Constitution never intended that the National Government might define as a crime and prosecute such wholly local activity through the enactment of federal criminal laws."); Roth v. United States, 354 U.S. 476, 504 (1957) (Harlan, J., concurring in the result in part and dissenting in part) ("Congress has no substantive power over sexual morality.").

The Court's most famous discussion of congressional power to regulate noneconomic matters occurred in its recent decision in *United States v. Lopez*, 514 U.S. 549 (1995). Even there, however, a majority of the Justices did not question precedents allowing Congress to regulate a broad array of social problems. They focused instead on whether the economic nexus in *Lopez* was sufficiently strong. *See id.* at 558-68.

11 A few thoughtful works, however, do exist on this topic. *See, e.g.*, Regan, *supra* note 6; William Van Alstyne, *Federalism, Congress, the States and the Tenth Amendment: Adrift in the Cellophane Sea*, 1987 DUKE L.J. 769.

12 *See, e.g.*, Robert L. Stern, *The Commerce Clause Revisited—The Federalization of Intrastate Crime*, 15 ARIZ. L. REV. 271, 284 (1973) (noting that the Supreme Court's decision in *Perez v. United States*, 402 U.S. 146 (1971), upholding congressional regulation of intrastate loan sharking, "is practically an unknown case . . . . It has attracted little publicity or attention in the literature."). Stern, who helped defend Congress's New Deal legislation before the Supreme Court, professed his own surprise at the Court's willingness to countenance congressional power over intrastate crimes, "and at how readily [that] expansion [was] accepted." *Id.*

II.

The powers enumerated in Article I, Section 8 have a unifying theme: they all concern subjects that the states cannot regulate effectively by themselves. More than this, the powers appear to form a complete list of the ways in which the eighteenth-century Framers found individual state regulation inadequate. By 1787, the states already had shown that they could not effectively regulate commerce with other nations or among themselves; nor could they coin money without creating fiscal chaos.[13] The Framers addressed these specific problems in Section 8. Can we abstract from the Framers' list a more general principle, that Congress should have the power to regulate whenever the states cannot do the job effectively, and then translate that principle to the twentieth century? This translation is a more audacious task than the ones Lessig has discussed, but is this translation a plausible interpretation of Section 8?[14]

The history of Section 8 is relevant to this inquiry. Curiously, the Framers originally expressed Congress's powers with just the abstract, unifying principle I have described. When the Constitutional Convention met in Philadelphia, the Virginia delegation proposed giving Congress power "to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation."[15] The full Convention approved this language twice,[16] and even expanded upon the principle by adding a power to "legislate in all cases for the general interests of the Union."[17] Members of the Convention debated briefly, but did not resolve, whether these principles could be reduced

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13 *See, e.g.*, WILLIAM B. LOCKHART ET AL., CONSTITUTIONAL LAW: CASES, COMMENTS, QUESTIONS 76-77 (7th ed. 1991) (summarizing the difficulties created by states under the Articles of Confederation); 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 316-19 (Max Farrand ed., rev. ed. 1937) [hereinafter THE RECORDS] (June 19) (notes of James Madison) (speech by Madison detailing the difficulties created by states under the Articles of Confederation).

14 Donald Regan proposes a similar interpretation of congressional power in his insightful essay on the Commerce Clause, although he does not rely upon the concept of translation. *See* Regan, *supra* note 6, at 594. Barry Friedman also has suggested that interpretation of congressional power might center on whether Congress has demonstrated a need for national legislation. *See* Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 405-12 (1997).

A variation on the question I raise about translating Section 8 would be to ask whether the Necessary and Proper Clause, which concludes that section, empowers Congress to enact any other law "necessary and proper" for carrying out national objectives. That clause, however, gives Congress authority "[t]o make all Laws which shall be necessary and proper for carrying into Execution the *foregoing Powers*, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. CONST. art. I, § 8, cl. 18 (emphasis added). The reference back to the enumerated "foregoing powers" suggests some limit on Congress's power under this clause. I prefer, therefore, to suggest a more general translation of Section 8.

15 1 THE RECORDS, *supra* note 13, at 21 (May 29) (notes of James Madison).

16 *Id.* at 53-54 (May 31) (notes of James Madison); 2 *id.* at 27 (July 17) (notes of James Madison). On the first vote, Connecticut divided while the other nine states endorsed the resolution. On the second vote, Connecticut assented while two other states (Georgia and South Carolina) dissented.

17 2 *id.* at 26-27 (July 17) (notes of James Madison).

to an enumerated list of powers.[18] The full Convention also rejected a more narrow proposal from the New Jersey delegation that would have given Congress power to govern just a short list of subjects including "trade [and] commerce."[19] The delegates rejected the short list as too narrow, instead preferring the more abstract principle proposed by the Virginia delegation.[20]

Where, then, did the enumerated powers of Section 8 come from? The delegates referred their broad language, giving Congress the power to "legislate in all cases to which the separate States are incompetent," to the committee of detail.[21] Ten days later, the committee reported the enumerated powers of Section 8.[22] The full Convention tinkered with some of the specifics, but the delegates did not resume discussion, at least not in any form recorded for history, of the relative merits of enumeration versus a general principle.

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18 When the delegates first considered the broad Virginia resolution, Charles Pinckney and John Rutledge objected that "they could not well decide how to vote until they should see an exact enumeration of the powers comprehended by this definition." 1 *id.* at 53 (May 31) (notes of James Madison). James Wilson responded "that it would be impossible to enumerate the powers which the federal Legislature ought to have." *Id.* at 60 (May 31) (notes of William Pierce). Similarly, Madison explained to the Convention that "he had brought with him into the Convention a strong bias in favor of an enemeration [sic] and definition of the powers necessary to be exercised by the national Legislature; but had also brought doubts concerning its practicability. His wishes remained unaltered; but his doubts had become stronger." *Id.* at 53 (May 31) (notes of James Madison).; *see also id.* at 60 (May 31) (notes of William Pierce) ("Mr. Maddison [sic] said he had brought with him a strong prepossession for the defining of the limits and powers of the federal Legislature, but he brought with him some doubts about the practicability of doing it:—at present he was convinced it could not be done."); *id.* at 59-60 (May 31) (notes of William Pierce) ("Mr. Sherman was of opinion that [the scope of congressional power] would be too indifinitely [sic] expressed,—and yet it would be hard to define all the powers by detail.").

Six weeks later, the Convention briefly returned to the desirability of further specifying congressional powers. Pierce Butler objected that the language previously approved by the delegates, "particularly . . . the word *incompetent*," was too vague. 2 *id.* at 17 (July 16) (notes of James Madison). Nathaniel Gorham attempted to reassure Butler that "[t]he vagueness of the terms constitutes the propriety of them. We are now establishing general principles, to be extended hereafter into details which will be precise [and] explicit." *Id.* (July 16) (notes of James Madison). John Rutledge, on the other hand, supported Butler and moved "that the clause should be committed to the end that a specification of the powers comprised in the general terms, might be reported." *Id.* (July 16) (notes of James Madison). The delegates, however, refused to approve Rutledge's motion, which would have required greater specification of Congress's powers, on an evenly divided vote. *Id.* (July 16) (notes of James Madison).

These brief debates suggest at least three different attitudes among the delegates: some of the delegates seemed to favor enumeration from the beginning, some seemed to believe a more general delegation of congressional power would be necessary, and some seemed to assume that the general principle they endorsed was merely a guide to the drafting committee that ultimately would produce a more detailed enumeration of powers, whatever the merits of that enumeration would be. The conflicting attitudes, combined with the brief reports of the Convention debates, makes it difficult to unwrap the history of Section 8 more than two hundred years later.

19 1 *id.* at 243 (June 15) (notes of James Madison). James Wilson summarized the difference between the two plans by noting that under the Virginia plan, "the Nat[ional] Legislature is to make laws in all cases to which the separate States are incompetent," while under the New Jersey plan, "in place of this [Congress is] to have additional power in a few cases only." *Id.* at 252 (June 16) (notes of James Madison).

20 *Id.* at 313 (June 19) (official journal).

21 2 *id.* at 117-18 (July 26) (official journal).

22 *Id.* at 181-82 (August 6) (notes of James Madison).

What is the significance of this shift? Does the change prove conclusively that the Framers wanted to narrow Congress's powers to the specific problems of state regulation that the Framers had identified in the late eighteenth century? Did the Framers consciously, although silently, reject the broader statement of principle as too dangerous or too broad a delegation of power? If so, translating Section 8 by reading it to empower Congress to regulate in any area in which the states have become ineffective would undercut the Framers' intent.

This inference, however, is not the only plausible interpretation of Section 8's history. The Framers might have worried that an abstract statement of principle would be too weak in the eighteenth century, and that the new government needed a full enumeration of its powers so that states would not challenge congressional power by asserting their own competence to govern interstate commerce and other matters of national concern. Alternatively, the Framers might have viewed the enumeration as fully equivalent to the general principle, seeing the two as completely interchangeable because, bound by their own circumstances, they could not perceive the emergence of other areas of state incompetence. If the Framers adopted enumeration for either of these reasons, translating their list to include new areas in which the states cannot regulate effectively on their own would be compatible with the Framers' design.

The original Constitution does not solve this interpretation problem. Nor does the Tenth Amendment. That amendment expresses a clear desire to limit congressional power and retain nondelegated powers to the states.[23] The translation of Section 8 I have proposed, however, still limits congressional power and leaves other powers to the states. The limitation simply occurs at a different level of abstraction.

So should courts translate the enumerated powers in Section 8 to establish the general principle outlined above? Would this translation be faithful to the constitutional text and the Framers' intent? I confess that I do not know the answer to this question, at least not without further inquiry.[24] The

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23 "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

24 In particular, my comments on the drafting history of Section 8 are necessarily preliminary. I am struck, however, by how little attention courts and scholars have paid to this history. An electronic search of all federal court opinions for "'separate states are incompetent' or 'harmony of the United States'" identified only three Supreme Court opinions (two of them dissents) and two lower court decisions quoting this language. Search of LEXIS, Genfed Library, US File (July 24, 1998). Federal courts, therefore, have rarely quoted the original language of the Virginia resolution that generated Congress's Section 8 powers.

A similar search of law review articles reveals only twenty-five articles quoting that language, and most treat the language summarily. Search of LEXIS, Lawrev Library, Allrev File (July 24, 1998). Older articles not included in LEXIS may discuss this language more extensively. For a selection of old and new articles considering the evolution of Section 8, including the original Virginia resolution, see Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432 (1941); David E. Engdahl, *The Basis of the Spending Power*, 18 SEATTLE U. L. REV. 215 (1995); David E. Engdahl, *The Spending Power*, 44 DUKE L.J. 1 (1994); Jacques LeBoeuf, *The Economics of Federalism and the Proper Scope of the Federal Commerce Power*, 31 SAN DIEGO L. REV. 555 (1994); Regan, *supra* note 6, at 555-57; Robert L. Stern, *That Commerce Which Concerns More States than One*, 47

remarkable fact, however, is that the Supreme Court implicitly has answered this question "yes" without ever explicitly posing the question. The Court silently has abstracted a general principle from the list in Section 8, translated the eighteenth-century inventory to the present, and given Congress the power to regulate any subject that the states cannot regulate effectively. At the same time, the Court has maintained vociferously that it is doing no such thing but is simply adhering to the original list. Rather than admit the interpretive problem this Essay discusses and grapples with that problem, the Court has insisted that almost everything Congress does is a regulation of "Commerce . . . among the several States."

It is easy to see why the Supreme Court has chosen this somewhat surreptitious route. The political constraints Lessig has described would make it difficult for the Court to confront directly the question this Essay poses.[25] If the Court announced that the register of congressional powers in Section 8 is outdated, that it was going to translate those powers to the twentieth (or twenty-first) century, and that it would uphold congressional legislation whenever Congress reasonably concluded that the states could not reach the same result effectively, then the Court's actions would look too political. A test of congressional-competence-whenever-the-states-would-be-incompetent, moreover, might leave too much discretion for lower courts. Inconsistent judgments would proliferate and the Court's own docket would be swamped. The prospects are sufficiently frightening that, even if the Framers had stuck with their original expression of congressional power, the Court might have found some way to sidestep that test.

The Court instead has given Congress the power it needs by elaborate constructions of the Commerce Clause. This is textualism—even twisted textualism—but it is also pragmatic. It is, moreover, long-settled doctrine that I do not expect to unravel in one short essay.

It is worth reflecting, however, on the costs of the Court's somewhat disingenuous approach to congressional power. First, courts ask silly questions rather than meaningful ones when they consider the constitutionality of congressional statutes. Commerce Clause cases involve tedious and somewhat arcane attempts to show how various social problems affect the economy. Courts end up tracing these supposed effects rather than asking the meaningful question: has Congress acted in an area in which the states could not regulate effectively on their own?[26]

HARV. L. REV. 1335 (1934); John C. Hueston, Note, *Altering the Course of the Constitutional Convention: The Role of the Committee of Detail in Establishing the Balance of State and Federal Powers*, 100 YALE L.J. 765 (1990).

25 *See* Lessig, *Translating Federalism*, *supra* note 1, at 170-76.

26 For example, in *Palila v. Hawaii Department of Land & Natural Resources*, 471 F. Supp. 985, 995 (D. Haw. 1979), *aff'd*, 639 F.2d 495 (9th Cir. 1981), the court upheld federal protection of an endangered bird species found only in Hawaii on the grounds that preservation of the species would allow the "interstate movement of persons, such as amateur students of nature or professional scientists who come to a state to observe and study these species." Also, in *Building Industry Ass'n v. Babbitt*, 979 F. Supp. 893, 907 n.17 (D.D.C. 1997), the federal government defended its power to regulate endangered species of fairy shrimp in part by introducing "declarations of at least one out-of-state expert who has bought or sold fairy shrimp specimens (before they were listed) and who has traveled to California to study them." Congress possesses much

Second, the Court has lost the ability to reject cases of congressional action in which there really is no need for national regulation. There is widespread agreement that, although many types of criminal activity demand national attention, other portions of the federal criminal code are congressional posturing. Members of Congress like to look tough on crime, especially around election time, so Congress passes a flurry of criminal laws every two years without much consideration of whether states are handling the subject adequately.[27] These criminal statutes, however, enjoy the same tenuous connection to interstate commerce that more justifiable laws possess. The Court is unable to separate the many kernels of legislative wheat from this small but annoying amount of chaff. When the Court tries, as in the recent *United States v. Lopez* decision,[28] it stumbles over its own preoccupation with "commerce."[29]

Third, and much more important, I see a loss in our failure to articulate national values other than commerce. Courts are writing now that Congress created a federal cause of action for victims of domestic violence because women are workers, battered women miss days at work, and battering thus hurts the national economy.[30] But that wasn't really the point, was it? And I

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more substantial reasons than these to regulate endangered species—even when those species are confined to a single state. The loss of even a single species diminishes the genetic diversity on our planet and can damage the ecosystem in unforeseen ways. *See* Tennessee Valley Auth. v. Hill, 437 U.S. 153, 172-93 (1978) (recounting legislative history of the Endangered Species Act); National Ass'n of Home Builders v. Babbitt, 130 F.3d 1041, 1050-54 (D.C. Cir. 1997), *cert. denied*, 66 U.S.L.W. 3604 (U.S. June 22, 1998) (No. 97-1451); *Building Indus. Ass'n*, 979 F. Supp. at 907. Without national regulation, moreover, individual states might eliminate species protection to lure land developers from other states. This destructive interstate competition would irreparably harm those species. *See National Ass'n of Home Builders*, 130 F.3d at 1054-57. Courts sometimes mention these rationales, but the Supreme Court's approach to the Commerce Clause forces lower courts to extol the more tenuous links to interstate commerce described above.

27 *See, e.g.*, Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1145 & nn.70-71, 1159-62, 1165-67 (1995); Thomas M. Mengler, *The Sad Refrain of Tough on Crime: Some Thoughts on Saving the Federal Judiciary from the Federalization of State Crime*, 43 U. KAN. L. REV. 503, 504 (1995); Geraldine Szott Moohr, *The Federal Interest in Criminal Law*, 47 SYRACUSE L. REV. 1127, 1130 (1997); Sanford H. Kadish, Comment, *The Folly of Overfederalization*, 46 HASTINGS L.J. 1247, 1248-51 (1995); *see also* Henry J. Friendly, *Federalism: A Foreword*, 86 YALE L.J. 1019, 1026-27 (1977) ("Considerably more troubling to me . . . has been what seems a knee-jerk tendency of Congress to seek to remedy any serious abuse by invoking the commerce power as a basis for the expansion of the federal criminal law into areas of scant federal concern.").

28 514 U.S. 549 (1995).

29 *See, e.g.*, Friedman, *supra* note 14, at 336-38, 410-12; Regan, *supra* note 6, at 563-70.

30 *See, e.g.*, Anisimov v. Lake, 982 F. Supp. 531, 538 (N.D. Ill. 1997) (asserting that the Violence Against Women Act rests on congressional concern over "the nationwide impact on commerce of women withdrawing from the workplace, being deterred from traveling interstate and reducing their consumer expending as a result of gender-motivated violence"); Doe v. Doe, 929 F. Supp. 608, 614-15 (D. Conn. 1996) (finding that Congress rationally concluded that "gender-based violence has a substantial effect on interstate commerce" because of "the repetitive nationwide impact of women withholding, withdrawing or limiting their participation in the workplace or marketplace in response to . . . gender-based violence or the threat thereof"); *id.* at 613 ("[S]tudies report that almost 50 percent of rape victims lose their jobs or are forced to quit in the aftermath of the crime.") (quoting S. REP. NO. 103-138, at 54 (1993)).

Congress and courts also have noted that domestic violence increases health care costs,

hope we did not prohibit race discrimination at Ollie's Barbecue just because we were worried about the amount of catsup Ollie ordered from other states.[31] It would be ennobling—even affirming to those who have suffered from discrimination—if the Supreme Court admitted that we now have a national commitment to equality that does not countenance discrimination in any corner of the nation. That commitment, not tangential effects on the economy, explains congressional action to reduce bias.[32]

The Court's failure to articulate a commitment to equality is especially perplexing because the guarantee has independent roots in the Fourteenth Amendment.[33] But there are other areas in which the twentieth-century states have had difficulty regulating by themselves. The seamlessness of the ecosystem, for example, combined with market incentives for individual states to eschew environmental regulation, suggests that Congress must help

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creates homelessness, and deters women from traveling interstate. *See, e.g.*, *Anisimov*, 982 F. Supp. at 537-38; *Doe*, 929 F. Supp. at 613. Although these costs are indisputably high, it minimizes the pain of women who suffer from gender-related violence to suggest that Congress provided a private right of action for this conduct because of its concern for the national economy.

31 In *Katzenbach v. McClung*, 379 U.S. 294 (1964), the Supreme Court upheld Title II of the Civil Rights Act as applied to a restaurant in which a "substantial portion of the food which it serves . . . has moved in commerce." *Id.* at 298 (quoting section 201 of the Act). The Court noted that the restaurant at issue, Ollie's Barbecue, "annually receiv[ed] about $70,000 worth of food which has moved in commerce," and that Congress "determined . . . that refusals of service to Negroes have imposed burdens both upon the interstate flow of food and upon the movement of products generally." *Id.* at 298, 303.

32 Some supporters of the Civil Rights Act regretted the Act's Commerce Clause foundation because they believed that the Fourteenth Amendment more correctly embodied Congress's moral commitment to racial equality. During deliberations on the Act, Rhode Island Senator Pastore declared:

> [I] believe in this bill, because I believe in the dignity of man, not because it impedes our [commerce]. [I] like to feel that what we are talking about is a moral issue. [And] that morality, it seems to me, comes under the Fourteenth Amendment [about] equal protection of the law. [I] am saying we are being a little too careful, cagey, and cautious.

GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 202 (13th ed. 1997). Justice Douglas made a similar point in an opinion concurring in the Court's decisions upholding the Act. *See* Heart of Atlanta Motel v. United States, 379 U.S. 241, 279 (1964) (Douglas, J., concurring) ("[T]he right of people to be free of state action that discriminates against them because of race . . . 'occupies a more protected position in our constitutional system than does the movement of cattle, fruit, steel and coal across state lines.'") (quoting Edwards v. California, 314 U.S. 160, 177 (1941) (Douglas, J., concurring)); *see also id.* at 291 (Goldberg, J., concurring) ("The primary purpose of the Civil Rights Act of 1964 . . . is the vindication of human dignity and not mere economics.").

Similarly, Congress enacted the Violence Against Women Act, not only because it found that violence causes substantial economic effects, but also because the statute was needed "to redress an area of civil rights violations that were not being adequately protected by the States." *Anisimov*, 982 F. Supp. at 540. Recognizing that fact, together with our national commitment to insuring equality for women, would dignify the interests of battered women in a way that discussions of their sick days cannot.

33 Congress invoked both the Commerce Clause and Section 5 of the Fourteenth Amendment when it enacted the Civil Rights Act and, more recently, the Violence Against Women Act. Courts, however, have preferred to rest congressional power solely on the Commerce Clause. In part, this avoids further discussion of whether Congress can reach private action under the Fourteenth Amendment.

the states regulate the environment.[34] Perhaps courts should acknowledge the states' difficulties, and Congress's power to respond to those difficulties with national legislation, rather than pretending that all of our federal laws are about commerce.

Finally, the Court's textual manipulation of the word "commerce" has cost us the ability to explain the Constitution's delegation of national power to the ordinary citizen. Lessig begins one of his essays on translation by mourning the loss of Alexis de Tocqueville's America, in which ordinary citizens could readily "distinguish[ ] the matters falling within the general prerogatives of the Union from those suitable to the local legislature."[35] We have not lost that ability just because the Constitution's text has aged and we no longer comprehend eighteenth-century culture; we have lost that power, in part, because twentieth-century courts have engaged in interpretive fictions that do not make sense. I could explain to my ten-year-old son that the Constitution permits Congress to prohibit racial discrimination because racism anywhere in the country undermines the dignity of all citizens. But my son would think I was joking if I suggested that the Constitution allows Congress to prohibit race discrimination because those acts occur in settings in which people purchase goods from other states. Yet the latter explanation is exactly what the Supreme Court would have him believe.

These are important costs, so we should consider whether the political constraints Lessig describes are as daunting as we suppose. Lessig, along with other scholars, argues that the public will not accept constitutional decisions that they perceive as too political.[36] Is this popular constraint real, or have judges and scholars been too timid in predicting what the public will tolerate?

It is true that the public does not like some constitutional decisions, but does their disapproval stem from the nature of the Court's reasoning or from the consequences of the bottom line? The public, after all, did not like the Supreme Court's holding in the flag burning cases[37] any more than the Court's abortion decision,[38] even though the flag burning cases rested rather tightly on the text of the First Amendment while the abortion decision invoked more general principles of privacy. Perhaps we have been too quick to attribute public disapproval to the political appearance of a court's reasoning rather than the inevitable effect of the court's decision.

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34 *See, e.g.*, John P. Dwyer, *The Practice of Federalism Under the Clean Air Act*, 54 MD. L. REV. 1183, 1191-95 & n.60 (1995); Peter P. Swire, *The Race to Laxity and the Race to Undesirability: Explaining Failures in Competition Among Jurisdictions in Environmental Law*, YALE L. & POL'Y REV./YALE J. ON REG. 67, 68, 98-105 (1996). Even with a clear need for central guidance, the states retain their own important role in environmental regulation; government in this field, as in many others, remains multifaceted. *See* Dwyer, *supra*.

35 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 165 (Anchor 1966), *quoted in* Lessig, *Translating Federalism*, *supra* note 1, at 125.

36 *See, e.g.*, Lessig, *Translating Federalism*, *supra* note 1, at 174-76.

37 *See* United States v. Eichman, 496 U.S. 310, 318-19 (1990) (holding that flag burning is protected speech under the First Amendment); Texas v. Johnson, 491 U.S. 397, 406 (1989) (same).

38 *See* Roe v. Wade, 410 U.S. 113, 154 (1973) (holding that right of privacy protects woman's right to choose abortion under some circumstances).

Our courts operate in a legal culture that discourages constitutional standards that appear too political, but how much of that culture is of our own making? Would the public really complain if courts said that the Framers intended Congress to legislate on matters in which there was a need for national legislation and that courts would help implement that design? The proposition is a tantalizing thought for constitutional theorists. Building upon Lessig's translation theory, we could refocus our courts' understanding of congressional power. A "third translation" of the Commerce Clause and Section 8 would lead to a search for areas in which the national government has special competence to govern, not just those areas in which it can feign some association with interstate commerce.