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The Right Results for All the Wrong Reasons: An Historical and Functional Analysis of the Commerce Clause

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NOTES

The Right Results for All the Wrong Reasons: An Historical and Functional Analysis of the Commerce Clause

I.	INTRODUCTION	272
II.	DEVELOPMENT OF THE COMMERCE CLAUSE	274
	A. <i>The Framers' Foundation</i>	274
	B. <i>Judicial Interpretations of the Commerce Clause</i>	277
	1. Pre-Civil Rights Act Interpretation	277
	2. The Civil Rights Act of 1964 and Beyond	282
III.	RECOGNIZING THE PROBLEMS WITH THE CURRENT APPROACH	286
	A. <i>The Court</i>	286
	B. <i>The States</i>	288
	C. <i>The Solution</i>	289
IV.	A TALE OF TWO CASES	292
	A. <i>The Story–Take One</i>	293
	B. <i>The Story–Take Two</i>	295
	C. <i>The Tie That Binds</i>	298
	1. The Constitutionality of the Violence Against Women Act.....	299
	a. <i>VAWA Under Lopez</i>	300
	b. <i>VAWA Under Functional Analysis</i>	302
	2. The Constitutionality of the “Isolated Wetlands” Regulation of the Clean Water Act.....	304
	a. <i>The “Isolated Wetlands” Regulation of the Clean Water Act Under Lopez....</i>	304
	b. <i>The “Isolated Wetlands” Regulation of the Clean Water Act Under Functional Analysis</i>	306
V.	CONCLUSION	309

I. INTRODUCTION

The powers delegated . . . to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce The powers reserved to the States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

—James Madison¹

Two football players rape an eighteen-year-old college student.² A high-school senior carries a concealed handgun into a school building.³ An arsonist burns down a trailer occupied by an interracial couple.⁴ An armed robber, after burglarizing the home of a couple and their handicapped child, speeds off in the family's Suburban.⁵

All of these crimes are local in nature. It seems obvious that each perpetrator would be hauled down to the local courthouse and indicted under applicable criminal law. One naturally assumes that the law would be a state statute. Yet, these perpetrators will not only face state criminal prosecution but also trial and punishment under a federal criminal statute. In response to public outrage at crime and the need to control persons who commit these crimes, Congress enacted an array of national criminal statutes to punish such criminals. Without a national police power, Congress purportedly passed such laws under the power granted to it by the Commerce Clause.⁶ Good causes for legislation—but is it constitutional?

The Supreme Court attempted to provide an answer, or at least part of one, in the 1995 case *United States v. Lopez*.⁷ The Court announced the first limitation on the Commerce Clause power since that power reached its zenith when the Court upheld the 1964 Civil Rights Act as a valid exercise of Congress's power under the Commerce Clause.⁸ However, *Lopez* did not clearly explain the standard that

1. THE FEDERALIST NO. 45, at 292-93 (James Madison) (Clinton Rossiter ed., 1961).

2. See *Brzonkala v. Virginia Polytechnic Inst.*, 132 F.3d 949, 953 (4th Cir. 1997), *vacated on reh'g en banc*, 169 F.3d 820 (4th Cir. 1999), *cert. granted sub nom.*, *United States v. Morrison*, 68 U.S.L.W. 3177 (U.S. Sept. 28, 1999) (No. 99-5).

3. See *United States v. Lopez*, 514 U.S. 549, 551 (1995).

4. See *United States v. Ramey*, 24 F.3d 602, 604 (4th Cir. 1994).

5. See *United States v. Romero*, 122 F.3d 1334, 1336-37 (10th Cir. 1997), *cert. denied*, 118 S. Ct. 1310 (1998).

6. U. S. CONST. art. I, § 8, cl. 3 (granting Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes").

7. 514 U.S. 549.

8. See *Katzenbach v. McClung (Ollie's Barbeque)*, 379 U.S. 294, 301-05 (1964) (construing Congress's power under the Commerce Clause as broad enough to include enactment of the Civil Rights Act of 1964).

lower courts should apply when faced with a lack-of-commerce-clause-power challenge. The absence of a clear standard leaves courts with three choices: (1) construe the Commerce Clause as if *Lopez* never existed; (2) apply *Lopez* stringently to invalidate statutes; or (3) apply *Lopez* in a manner that generally finds statutes constitutional. Lower courts have chosen either option one or three, with only a few exceptions.⁹ Courts' hesitancy to find statutes unconstitutional implies no real limit on Congress's Commerce Clause power.

Lopez surprised many scholars, prompting a rampage of commentary on the decision and the constitutionality of particular federal statutes.¹⁰ This Note concentrates on two federal statutes that have recently faced Commerce Clause challenges: the Violence Against Women Act¹¹ ("VAWA"), now on certiorari to the United States Supreme Court, and the Clean Water Act.¹² It attempts to find a common thread among federal criminal statutes in order to create a principled standard for interpretation of the Commerce Clause. This Note recommends the use of functional analysis to interpret the Constitution's grant of power to Congress under the Commerce Clause. Without a clear, functional standard, Congress will continue to enact federal criminal statutes that invade the police power of the states and generate more backlog in the federal courts under the guise of a sweeping Commerce Clause.¹³ The Commerce Clause vests power in the national government to regulate only when necessary to maintain or respond to an integrated national economy.¹⁴ The public appeal of legislation on "good causes" should not override the constitutional limitations of the Commerce Clause.

To ascertain an accurate understanding of the meaning of the Commerce Clause, Part II of this Note traces the development of the

9. See *infra* notes 98-104 and accompanying text.

10. See, e.g., Susan M. Bauerle, *Congress' Commerce Clause Authority: Is the Pendulum Finally Swinging Back?*, 1997 DET. C.L. REV. 49, 93-121; John P. Frantz, *The Reemergence of the Commerce Clause as a Limit on Federal Power: United States v. Lopez*, 19 HARV. J.L. & PUB. POL'Y 161, 161-74 (1995); Barry Friedman, *Legislative Findings and Judicial Signals: A Positive Political Reading of United States v. Lopez*, 46 CASE W. RES. L. REV. 757, 761-800 (1996); Stephen M. McJohn, *The Impact of United States v. Lopez: The New Hybrid Commerce Clause*, 34 DUQ. L. REV. 1, 23-39 (1995); Sheila A. Mikhail, *Reversing the Tide Under the Commerce Clause*, 86 J. CRIM. L. & CRIMINOLOGY 1493, 1513-38 (1996); Mark Tushnet, *Living in a Constitutional Moment?: Lopez and Constitutional Theory*, 46 CASE W. RES. L. REV. 845, 850-51 (1996).

11. Violence Against Women Act of 1994, Pub. L. No. 103-322, tit. IV, 108 Stat. 1902 (codified in scattered sections of 42 U.S.C.). The VAWA provides that "[a]ll persons within the United States shall have the right to be free from crimes of violence motivated by gender." 42 U.S.C. § 13981(b) (1994).

12. Federal Water Pollution Control (Clean Water) Act, ch. 758, 62 Stat. 1155 (1948) (codified in scattered sections of 33 U.S.C.).

13. See *infra* notes 94-111 and accompanying text.

14. See *infra* notes 118-25 and accompanying text.

clause. It follows the expansion of Congress's power under the Commerce Clause during the 1960s, when the Court allowed Congress enough power to enact the Civil Rights Act. It also details the most important Commerce Clause case in the last few years, *United States v. Lopez*, which created a potential limit on the reach of the Commerce Clause and suggested a trend toward a more limited understanding of the clause.

Part III describes Congress's expansive use of the Commerce Clause to nationalize crimes, including car jacking, violence against women, environmental crimes, and drug possession. It describes the effect of the nationalization of crime on the court system and the states' police power. After describing the disadvantages of the current interpretation of the Commerce Clause, this Note recommends a solution. Functional analysis provides a better definition of the Commerce Clause than the amorphous construction presently in use—a definition that trial and appellate courts can use. It recommends an interpretation that allows the national government to regulate only those things germane to the integrated national economy. This interpretation restricts the current understanding of the power of Congress in the criminal arena and allows the states to regulate using their police power.

Part IV compares and contrasts two different federal statutes: the VAWA and certain criminal aspects of the Clean Water Act. In recent years, defendants have challenged both statutes as transcending the Commerce Clause power.¹⁵ Courts overturned convictions under both statutes because of unjustified congressional reliance on national power under the Commerce Clause. While producing the right result under functional analysis, the courts' reasoning illustrates a need for a standard that lower courts can effectively apply. Finally, this Note analyzes both laws under the *Lopez* standard and Part III's functional analysis. By juxtaposing these paradigms, the advantages of functional analysis and the disadvantages of *Lopez* come into view.

II. DEVELOPMENT OF THE COMMERCE CLAUSE

A. *The Framers' Foundation*

The intent of the Framers of the Constitution serves as a natural starting point for reaching an understanding of the Commerce

15. See *infra* Part IV.A-B.

Clause. Unfortunately, the Constitutional Convention in Philadelphia included little discussion of the Commerce Clause's purpose.¹⁶ However, historians have gathered a few salient facts. Evidently, attendees at the Convention sought to provide Congress with a power sufficiently general enough to allow import and export of foreign goods without burdensome or conflicting state legislation.¹⁷ To accomplish this end, the Convention anticipated three types of legislation: (1) navigation acts, (2) tariffs, and (3) acts preventing states from imposing duties upon articles imported from or through other states.¹⁸ The Framers hoped that these types of legislation would help America form a strong economy and make it an attractive destination for foreign commerce.¹⁹ While the wording shows that the Convention anticipated other regulations on commerce, nothing in the record hints at what the Framers thought those regulations might be.²⁰

Despite the dearth of detailed discussion on the Commerce Clause itself, the Framers did discuss the overall delegation of powers in Article I, Section 8, at length.²¹ The powers granted to Congress included those to lay and collect taxes, regulate commerce, coin money, and declare war.²² The full Convention twice approved language 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."²³ Of course, this language did not appear in the final Constitution. The Convention referred the proposal to the Committee on Detail for discussion.²⁴ Ten days later, the committee reported back to the full Convention with the enumerated powers now found in Section 8 of Article I.²⁵ The Convention did not discuss the Commerce Clause again, despite minor changes in wording.

16. See E. PARMALEE PRENTICE & JOHN G. EGAN, *THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION* 2-9 (1898).

17. See *id.*

18. See *id.*

19. See *id.* at 3.

20. See *id.* at 8. James Monroe commented that a grant of power under the Commerce Clause to Congress involved "a radical change in the whole system of our government." *Id.* at 9.

21. See Notes of James Madison (May 29, 1787), in 1 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 21 (Max Farrand ed., rev. ed. 1937) [hereinafter *THE RECORDS*]; see Deborah Jones Merritt, *The Third Translation of the Commerce Clause: Congressional Power to Regulate Social Problems*, 66 *GEO. WASH. L. REV.* 1206, 1210 (1998).

22. See U.S. CONST. art. I, § 8.

23. Notes of James Madison (May 29, 1787), in 1 *THE RECORDS*, *supra* note 21, at 21; see Merritt, *supra* note 21, at 1210.

24. See Official Journal (July 26, 1787), in 2 *THE RECORDS*, *supra* note 21, at 117-18; Merritt, *supra* note 21, at 1211.

25. See Notes of James Madison (Aug. 6, 1787), in 2 *THE RECORDS* 181-82. See Merritt, *supra* note 21, at 1211.

The Framers repeatedly stated that the Constitution reserved power over internal functions to the states.²⁶ They rejected unlimited national power and emphasized that the delegated powers of the national government were specifically enumerated in the Constitution.²⁷ These statements indicate the Framers' condemnation of sweeping congressional powers, including the commerce power.²⁸

Without any direct discussion by the Framers of the meaning of the Commerce Clause, one can turn to four sources for interpreting that provision: (1) the text of the Constitution; (2) the legislation the Framers thought Congress would pass under that power; (3) the referral to committee of Article I, Section 8; and (4) the Framers' understanding of federalism. These sources suggest a power focused on foreign, rather than interstate, commerce.²⁹ The grant of interstate commerce power was designed to enable regulation in furtherance of the purpose of the Commerce Clause—the promotion of foreign commerce.³⁰ Fostering foreign commerce demanded preventing the states from regulating the economy in ways that disabled other states from engaging in trade with foreign entities.³¹ Accordingly, the interstate commerce power permitted the national government to prohibit states from discriminating against other states in ways that would fragment the American economy along state borders.³² As a related safeguard, vesting the interstate commerce power in the national government enables Congress to regulate commerce when the integrated national economy created to further foreign commerce disables states from independently instituting sound regulatory policies.³³ The sequence of events surrounding the passage of Article I, Section 8 indicates that

26. See RAOUL BERGER, *FEDERALISM: THE FOUNDERS' DESIGN* 131 (1987).

27. See *id.*

28. See *id.*

The Founders' anxiety to safeguard the States' police powers—protection of the health, safety, and morals of their citizens—from federal 'intermeddling' is well documented. It should require more than the colorless 'commerce among the several states' to demonstrate their intention *sub silentio* to act in derogation of assurances to allay such fears.

Id. at 140-41.

29. The Commerce Clause points toward regulation of foreign commerce because all three types of hypothetical legislation proposed by the Framers were designed to eliminate strains on foreign commerce. The Framers' federalist views indicate that they would not have passed a broad interstate commerce power that invaded the police power of the states. Combined, both of these portend a broad foreign commerce power and an interstate commerce power for use only to aid foreign commerce. See Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432, 451-59 (1941) (stating that the Commerce Clause was intended to cover navigation and maritime affairs).

30. See *id.*

31. See *id.*

32. See *id.*

33. See *id.*

the Framers wanted to grant the national government power under the Commerce Clause over activities the states could not effectively regulate on their own.³⁴

B. Judicial Interpretations of the Commerce Clause

The reasoning contained in most judicial construction of congressional power under the Commerce Clause falls into two broad categories. The first variety relates to the interstate transportation of items, or the transportation of "fill in the blank" across state lines. The second interpretation is less objective and tangible. It requires proof of a substantial effect on interstate commerce. The jurisprudence that created these two interpretations began its development with the first Commerce Clause power challenge in 1824. The discussion became heated at the turn of the century and continued to evolve until the mid-twentieth century.

1. Pre-Civil Rights Act Interpretation

Gibbons v. Ogden,³⁵ the first Commerce Clause challenge, did not spark as much controversy as the cases that bombarded the Court in the early 1900s. The Supreme Court worked from a "clean slate" in deciding this case because of the lack of discussion during the Constitutional Convention.³⁶ The Court, per Chief Justice Marshall, gave the word *commerce* a broad and comprehensive meaning, allowing Congress enough power to deal with economic problems in the young country.³⁷ *Gibbons* provided the first hint that judicial interpretation of the Commerce Clause would run counter to assurances made by the Framers that they had preserved the states' control over internal affairs.³⁸

The first major controversy erupted in 1903 with *Champion v. Ames*, in which the Court addressed the constitutionality of a federal statute prohibiting the transportation of lottery tickets across state lines.³⁹ The Court ruled that the carrying of an item of value from one

34. See Merritt, *supra* note 21, at 1210. Merritt argues that this is the only "plausible interpretation" of the history of Article I, Section 8. See *id.*

35. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

36. See PAUL R. BENSON, JR., *THE SUPREME COURT AND THE COMMERCE CLAUSE, 1937-1970*, at 21 (1970).

37. *Id.*; see *Gibbons*, 22 U.S. (9 Wheat.) at 76 ("[T]he power of Congress is 'to regulate commerce.' The correct definition of *commerce* is, the transportation and sale of commodities.").

38. See *Gibbons*, 22 U.S. (9 Wheat.) at 20-25; see also BERGER, *supra* note 26, at 133-41.

39. *Champion v. Ames*, 188 U.S. 321, 321-25 (1903).

state to another constituted interstate commerce.⁴⁰ Personal liberty did not include the freedom to introduce into commerce an element injurious to the public morals.⁴¹ From this notion, the Court created the black letter principle that the transportation of any item across state lines constituted interstate commerce and was thus subject to regulation by the national government.⁴² This formalistic decision represented the first major encroachment on state powers via the Commerce Clause.

This black letter principle allowed the national government to assert control over moral decisions, instead of letting each state determine the morality or immorality of various activities. It approved the creation of a national standard of morality.⁴³ If lotteries truly "offen[ded] the entire nation," as the Court declared,⁴⁴ then each state could have just as easily passed a law banning them. The Court did not discuss the necessity of having a national rule on this issue to ensure the steady and productive flow of commerce. Instead, it created a definition of interstate commerce that allowed Congress to dictate a national morality as long as the offensive behavior involved some form of movement across state lines.⁴⁵

The Court continued to apply this standard in subsequent cases. In *Caminetti v. United States*, the Supreme Court upheld the Mann Act, which prohibited the transportation of women across state lines for immoral purposes.⁴⁶ Because it involved the transportation of an item (a woman) across state lines, the proscribed activity fit within the definition of interstate commerce.⁴⁷ The Court again did not ex-

40. *See id.* at 345.

41. *See id.* at 357.

42. *See id.* at 345.

43. *See id.* at 358. The Court wrote:

If the carrying of lottery tickets from one state to another be interstate commerce, and if Congress is of opinion that an effective regulation for the suppression of lotteries, carried on through such commerce, is to make it a criminal offence to cause lottery tickets to be carried from one state to another, we know of no authority in the courts to hold that the means thus devised are not appropriate and necessary to protect the country at large against a species of interstate commerce which, although in general use and somewhat favored in both national and state legislation in the early history of the country, has grown into disrepute and has become offensive to the entire people of the Nation. It is a kind of traffic which no one can be entitled to pursue as of right.

Insert cite

Id.

44. *Id.*

45. *See infra* notes 112-17 and accompanying text (discussing the benefits of state regulatory action, including fostering experimentation by various states in dealing with problems of national significance).

46. *See White-Slave Traffic (Mann) Act*, 18 U.S.C. §§ 2421-2424 (1994)); *Caminetti v. United States*, 242 U.S. 470, 482-96 (1917).

47. *See Caminetti*, 242 U.S. at 485-86, 491.

plore the need for a national rule on the transportation of women or why the states could not pass their own laws regulating, presumably, the use of women for immoral purposes. The rule for the Supreme Court was simple: if it passed over state lines, it fell within the range of congressional power. Functional analysis was absent. The Court ignored the question of whether effective regulation of the targeted evil demanded action by the national government instead of the several states.⁴⁸

The black letter rule was easy to apply. If something moved across state lines, Congress had the power to legislate under the Commerce Clause. If there were no transportation across state lines, it could not. Yet unusual fact patterns soon revealed the inadequacy of the rule. *Hammer v. Dagenhart* held a law barring the transportation in interstate commerce of goods produced in factories employing children unconstitutional.⁴⁹ The Court found that the law did not regulate transportation across state lines but instead aimed to standardize the legal age of employment.⁵⁰

While this result follows the black letter principle developed in *Champion* and *Caminetti*, the Court did not recognize that a national rule on minimum age of employment was needed to sustain any such regulation in an integrated national economy.⁵¹ By focusing only on

48. The federal government's power over interstate commerce is complete. The Constitution contains no exceptions that reserve for the states any power over interstate commerce. Justice Marshall defined the commerce power in *Gibbons v. Ogden*: "It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power . . . is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824). Thus, the definition of "commerce" becomes the only limitation on the power as long as an item crosses state lines. If the definition ignores the question of whether a law needs to come from the national government or could come from the states, the courts applying the Commerce Clause will ignore it, too.

49. *Hammer v. Dagenhart*, 247 U.S. 251, 268-77 (1918).

50. See *id.* at 271-72. The Court wrote:

In [*Caminetti* and *Champion*] the use of interstate transportation was necessary to the accomplishment of harmful results. . . . This element is wanting in the present case. The thing intended to be accomplished by this statute is the denial of the facilities of interstate commerce to those manufacturers in the States who employ children within the prohibited ages. The act in its effect does not regulate transportation among the States, but aims to standardize the ages at which children may be employed in mining and manufacturing within the States.

Id. 51. *Hammer* was overruled in *United States v. Darby*, 312 U.S. 100, 115-17 (1941). The Court held that

the thesis of the [*Hammer*] opinion that the motive of the prohibition or its effect to control in some measure the use or production within the states of the article thus excluded from the commerce can operate to deprive the regulation of its constitutional authority has long since ceased to have force.

Id. at 116.

"interstate," rather than "interstate commerce," the "transportation" principle established by those early cases did not heed the underlying concern of the clause. States could not by themselves regulate the employment of children while participating in a national economy. A race to the bottom would occur as each state set its own laws on the age limit for working children to attract manufacturers willing to locate in the state with the lowest limit.⁵² To prevent such harmful competition among the states for manufacturers from frustrating the ability of any state to pursue such a policy objective, the national government needed to craft a national standard.⁵³ The states simply could not address such a problem individually. The black letter "transportation" principle required the Court to look for transportation across state lines. It did not allow for analysis of whether the states could manage the issue on their own or whether the realities of the integrated economy demanded national intervention.

The limited applicability of the "transportation" principle and the desire to accommodate New Deal legislation led the Court to develop another interpretation of the Commerce Clause.⁵⁴ The new rule allowed Congress to regulate *intrastate* activities as long as they bore a "close and substantial relationship" to interstate commerce.⁵⁵ The expansion of the Commerce Clause to intrastate activities dealt a "blow" to dual sovereignty.⁵⁶ Congress could now reach manufacturing activities previously considered local and subject only to state police power.⁵⁷ The Court warned that the scope of the power must be con-

52. The race to the bottom—or top, depending on one's perspective—has occurred in other areas. For example, in corporations law, Delaware maintains favorable laws to attract corporations to incorporate in Delaware.

53. The *Hammer* Court briefly addressed this concept by stating: "There is no power vested in congress to require the States to exercise their police power so as to prevent possible unfair competition." *Hammer*, 247 U.S. at 273.

54. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 40 (1937). The Court upheld a law protecting employees from termination in retribution for union activity, even though these activities were confined to a single state. See *id.* at 22.

55. See *id.* at 40. This test originated in *Gibbons v. Ogden*. *Jones & Laughlin* held that the federal government could regulate commerce that extends to or affects other states. See *id.* While *Gibbons* did not go so far as to extend the Commerce Clause to intrastate activities, *Jones & Laughlin* directly confronted and approved regulation of intrastate activity with a tangential effect on interstate commerce.

56. See *BENSON*, *supra* note 36, at 82. The dissent in *Jones & Laughlin* stated: "Whatever effect any cause of discontent [among employees] may ultimately have upon commerce is far too indirect to justify Congressional regulation. Almost anything—marriage, birth, death—may in some fashion affect commerce." *Jones & Laughlin*, 301 U.S. at 99.

57. See *BENSON*, *supra* note 36, at 82. The court in *Jones & Laughlin* changed the focus of the inquiry. "It is the effect upon commerce, not the source of the injury, which is the criterion." *Jones & Laughlin*, 301 U.S. at 32. This test allows the federal government to regulate intrastate activities. No longer would the Court look at which entity, the state or the federal government,

sidered in light of dual sovereignty to prevent destruction of the distinction between local and national powers.⁵⁸ Yet nothing in the black letter rule announced in *Jones & Laughlin* tempered its reach in order to address the danger to federalism, making it easy to discard the warning and use the sweeping standard by itself.

The Court demarcated the two distinct interpretations of the Commerce Clause in *United States v. Darby*.⁵⁹ Using the transportation version of the Commerce Clause in the first half of its decision, the Court upheld Congress's assertion of regulatory power over the hours and wages of employees in local manufacturing activities.⁶⁰ Congress had banned the interstate transportation of goods manufactured under labor conditions in which wages and hours failed to conform to standards set by Congress.⁶¹ Because this fit the transportation of "fill-in-the-blank" principle, it was constitutional.⁶² However, the Court also applied the "substantial effects" principle in the second half of the opinion to support the constitutionality of Congress's exercise of the Commerce Clause power.⁶³ The inclusion of the two interpretations of the Commerce Clause in the *Darby* opinion demonstrated that the Court recognized both analytical models. Under *Darby*, the national government may invoke the transportation principle not only to regulate transportation of goods across state lines but also to reach and set an underlying policy. After *Darby*, the national government

has control over the activity. As long as the activity had an effect on commerce, the federal government could regulate it.

58. See *Jones & Laughlin*, 301 U.S. at 37. The Court warned:

Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control. Undoubtedly the scope of [Congress's power under the Commerce Clause] must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.

Id.

59. *United States v. Darby*, 312 U.S. 100, 113-17 (1941).

60. See *id.* at 117-18.

61. See *id.* at 110.

62. See *id.* at 117 ("The obvious purpose of the Act was not only to prevent the interstate transportation of the proscribed product, but to stop the initial step toward transportation, production with the purpose of transporting it.").

63. See *id.* at 119-20 ("[T]his Court had many times held that the power of Congress to regulate interstate commerce extends to the regulation through legislative action of activities intrastate which have a substantial effect on the commerce or the exercise of the Congressional power over it.").

could either jump over the "transportation" hurdle or resort to the substantial effects rationale.⁶⁴

Just one year later, the Court swept aside the "transportation" understanding of "interstate" to permit Congress to regulate all activities that have a substantial effect, taken in the aggregate, on interstate commerce.⁶⁵ This broad rule allowed Congress to regulate the consumption of homegrown wheat by a farmer.⁶⁶ The Court reasoned that, while the consumption by one farmer of his own wheat was trivial, all farmers' consumption of their own wheat had a substantial effect on interstate commerce.⁶⁷ Congress could now reach any individual activity, no matter how insignificant by itself, if the activity, when aggregated nationally, created a substantial economic effect on interstate commerce.⁶⁸ This test of "interstate" concentrates on the effect of an activity on commerce, not which sovereign is best equipped to govern such behavior. Thus, if an activity has a substantial effect on commerce, the national government may legislate, despite the fact that such regulation usurps the traditional police power of the state. In a fair and real sense, the Court's approval of national control over purely local behavior eliminated the "interstate" aspects of the "interstate commerce" clause.

2. The Civil Rights Act of 1964 and Beyond

Passage of the Civil Rights Act of 1964⁶⁹ prompted both a challenge to and an expansion of the Commerce Clause power. A long-heralded and noble piece of legislation, it spawned intense pressure on

64. Two federal statutes on automobiles illustrate Congress's ability to use the transportation principle to regulate local matters. See Kathleen F. Brickey, *The Commerce Clause and Federalized Crime: A Tale of Two Thieves*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 27, 29-30 (1996). In the early part of the twentieth century, car thieves would leave the state of the crime to avoid state prosecution. See *id.* The federal government stepped in with a federal law that criminalized such border-crossing behavior, a criminal statute predicated on the "transportation across state lines" version of the Commerce Clause. See *id.* In the last part of the twentieth century, a car thief confronted a different federal statute. See *id.* This one criminalized the stealing of a car even if the thief never left the state. See *id.* It relied on the notion that, because the thief stole something that *had* been in transported in interstate commerce, the thief's act—still criminal under state law—was subject to national regulation. See *id.* Congress thus used the transportation version of the Commerce Clause to legislate local concerns.

65. See *Wickard v. Filburn*, 317 U.S. 111, 125 (1942).

66. See *id.*

67. See *id.* at 127-28 ("That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated is far from trivial.").

68. See BENSON, *supra* note 36, at 100.

69. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified in scattered sections of 42 U.S.C.).

the Court⁷⁰ to find the law constitutional.⁷¹ *Katzenbach v. McClung* (*Ollie's Barbecue*) held a federal law regulating the seating policy of a local restaurant a constitutional exercise of Congress's Commerce Clause power.⁷² The Court found the discriminatory activity affected interstate commerce in three ways: (1) it could impede interstate travel by minorities; (2) it could create reluctance among new businesses to locate in the area; and (3) it could reduce the amount of goods moving between states because it limits the market for out-of-state products to white customers.⁷³ The Court reasoned that the act of serving food that had traveled in interstate commerce subjected the restaurant to federal regulation of its seating policy.⁷⁴ This decision opened the door for Congress to regulate any aspect of local activity that had a remote—even hypothetical—connection to interstate commerce.⁷⁵

For the next thirty-one years, Congress enjoyed the Supreme Court's broad proclamation of Commerce Clause power. Congress used its power to enact thousands of laws. One area Congress found especially attractive was crime. Two centuries ago, only seventeen acts were subject to national criminal sanctions. Today, there are more than 3000 federal crimes.⁷⁶ No limitation on the Commerce

70. See BENSON, *supra* note 36, at 221. Benson notes that "the Court could not possibly have invalidated the statute without at the same time repudiating everything it had done over the last quarter of a century." *Id.*

71. See Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1141 (1995). "However noble [Congress's] purpose, then, the civil rights acts indelibly altered the role of federal criminal jurisdiction and signaled the coming presence of a national police power." *Id.* But see BENSON, *supra* note 36, at 224 (noting that "[t]he powers of the states are in no way reduced or impaired").

72. *Katzenbach v. McClung* (*Ollie's Barbeque*), 379 U.S. 294, 304 (1964). *Heart of Atlanta Motel v. United States* first tested the constitutionality of the power to enact the Civil Rights Act of 1964. *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 258 (1964). Unlike *Ollie's Barbeque*, an argument can be made, however strained, that the proscribed activity in *Heart of Atlanta* had an effect on interstate commerce. The *Heart of Atlanta Motel* served travelers on a nearby interstate highway. See *id.* Racial discrimination could have affected the flow of people and commerce into and through that area. See *id.* The connection between interstate commerce and the proscribed activity in *Ollie's Barbeque* was more tenuous. The restaurant bought food from a local provider who bought it from out of state suppliers. *Ollie's Barbeque*, 379 U.S. at 300-01.

73. See *Ollie's Barbeque*, 379 U.S. at 299-302; see also BENSON, *supra* note 36, at 218.

74. See *Ollie's Barbeque*, 379 U.S. at 303-04. The Court did not require any evidence connecting discriminatory restaurant service with the flow of food in interstate commerce.

75. The Court held that "[t]he power of Congress in this field is broad and sweeping; where it keeps within its sphere and violates no express constitutional limitation it has been the rules of this Court, going back almost to the founding days of the Republic, not to interfere." *Ollie's Barbeque*, 379 U.S. at 305; see also BENSON, *supra* note 36, at 224 (placing responsibility on Congress to prevent a runaway commerce power).

76. See Brickey, *supra* note 64, at 28.

Clause power appeared in the case law to prevent the expansive nationalization of criminal law.

In 1995, the Supreme Court decided *United States v. Lopez*, and for the first time since the tense civil rights era, appeared to limit Congress's power under the Commerce Clause.⁷⁷ The Court identified three broad categories of constitutional use of Commerce Clause power: (1) Congress may regulate the use of the channels of interstate commerce; (2) Congress may regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities; and (3) Congress's commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce.⁷⁸

The three-part *Lopez* test actually combined prior versions of Commerce Clause analysis. The first two constitutional exercises of the Commerce Clause named in *Lopez* relate back to the "transportation" principle. The last corresponds directly to the "substantial effects" version. The law challenged in *Lopez*, the Gun-Free School Zones Act,⁷⁹ relied on the third category, the substantial effects version.⁸⁰ Startling many legal scholars,⁸¹ the Court held the law invalid under that test.⁸² It signaled to Congress that not every activity would automatically be deemed to affect commerce.⁸³ The Court quoted the warning issued in *Jones & Laughlin* about the substantial effects test and admitted that it had failed to heed that warning.⁸⁴ At the end of the decision, the majority indicated that the Court had taken great steps in recent years towards eliminating the distinction between local and national power.⁸⁵ With a "buck stops here" attitude, the Court declared that it would go no further.⁸⁶

77. See *United States v. Lopez*, 514 U.S. 549, 558-59 (1995).

78. See *id.*

79. Gun-Free School Zones Act, 18 U.S.C. § 922(q) (Supp. 1999).

80. See *Lopez*, 514 U.S. at 559.

81. See Kathleen F. Brickey, *Crime Control and the Commerce Clause: Life After Lopez*, 46 CASE W. RES. L. REV. 801, 839-40 (1996), who wrote:

[T]he real significance of *Lopez* may be its symbolic value. The Gun-Free School Zones Act federalized a local crime. It was part of a burgeoning body of federal criminal law, much of which overlaps with or merely duplicates state crimes. Notably, the unrestrained expansion of this body of law has occurred without regard for its effect on the federal courts.

82. See *Lopez*, 514 U.S. at 567-68.

83. See *id.* at 558. The "proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce" (instead of "merely affects"). *Id.* at 559.

84. See *id.* at 557. In heeding that warning, *Lopez*'s substantial relationship requirement, as opposed to mere relationship, attempts to give substance to the meaning of "interstate."

85. See *id.* at 567-68. The Court observed:

Justice Thomas concurred in the result, but looked to the “text, structure, and history of the commerce clause” for support.⁸⁷ He urged that the substantial effects test runs contrary to the text of the Constitution.⁸⁸ If Congress can regulate everything that substantially affects commerce, then “much if not all of Art. I, § 8 . . . would be surplusage.”⁸⁹ After discussing the original understanding of early case law on the Commerce Clause, Justice Thomas recommended that the Court adopt a new test.⁹⁰ The repercussion of not adopting a test more in line with the Constitution, he warned, is to grant the national government a police power.

Ultimately, the *Lopez* decision did not explicitly overrule any Commerce Clause precedent.⁹¹ This left the legal community and the courts wondering how to apply the decision to future cases.⁹² It left scholars wondering whether the three-part standard set out in the opinion successfully commits the Court to the distinction between what is “truly national and what is truly local.”⁹³ To answer this question, this Note turns to the problems with the current approach.

To uphold the Government's contentions here, 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. Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action. The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further. To do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated, and that there never will be a distinction between what is truly national and what is truly local. This we are unwilling to do.

Id. (citations omitted).

86. *See id.* at 567-68.

87. *Id.* at 585.

88. *See id.* at 587-89.

89. *Id.* at 589 (citing the authority to coin money and regulate its value, to pass uniform bankruptcy laws, to provide for the punishment of counterfeiters, to establish a postal service, and to confer patents and copyrights).

90. *See id.* at 602. Justice Thomas reviewed the original meaning and jurisprudence of the Commerce Clause. He concluded that eventually “we must modify our Commerce Clause jurisprudence . . . [but in this case] it is easy enough to say that the Clause certainly does not empower Congress to ban gun possession within 1,000 feet of a school.” *Id.*

91. *See Brickey, supra* note 64, at 37. The concurrence of Justice Kennedy emphasized that in no way did *Lopez* question the validity of key Commerce Clause precedent, such as *Heart of Atlanta Motel* and *Ollie's Barbeque*. *See Lopez*, 514 U.S. at 567-68; *Brickey, supra* note 81, at 839-40.

92. *See Brickey, supra* note 64, at 37.

93. *Lopez*, 514 U.S. at 567.

III. RECOGNIZING THE PROBLEMS WITH THE CURRENT APPROACH

The dangers of an expansive interpretation of the Commerce Clause, which include an overburdened federal court system and the destruction of dual sovereignty, can be avoided by shifting the understanding of the Commerce Clause towards a functional interpretation.

A. *The Court*

The federal court system is at or beyond its capacity in the wake of the nationalization of criminal law. In several of his year end reports to the judiciary, Chief Justice Rehnquist cautioned that the federal courts are not an unlimited resource and a crisis will result if nothing checks the growth of federal crimes.⁹⁴ Thirty criminal justice organizations criticized the nationalization of state crimes.⁹⁵ The National Association of Attorneys General and the National Conference of State Legislatures pleaded with Congress to recognize that the states, not the national government, bear responsibility for criminal law enforcement.⁹⁶

The proliferation of national criminal cases has clogged federal court dockets.⁹⁷ While caseloads increase, the Speedy Trial Act⁹⁸ re-

94. See Brickey, *supra* note 81, at 840. Chief Justice Rehnquist warned that "we can no longer afford the luxury of state and federal courts that work at cross-purposes or irrationally duplicate one another." Brickey, *supra* note 71, at 1168.

95. See Brickey, *supra* note 81, at 842.

96. See Brickey, *supra* note 64, at 38.

97. See Sara Sun Beale, *Federalizing Crime: Assessing the Impact on the Federal Courts*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 39, 45-46 (1996). The number of federal criminal cases grew by 70 percent from 1980 to 1992. *See id.* Criminal cases today consume a disproportionate and unprecedented share of federal judicial resources. *See id.* While criminal cases occupy 17 percent of the federal docket, 38 of the 92 federal court districts devote more than 50 percent of their trial dockets to criminal cases. *See id.*; *see also* Andrew Weis, *Commerce Clause in the Cross-Hairs: The Use of Lopez-Based Motions to Challenge the Constitutionality of Federal Criminal Statutes*, 48 STAN. L. REV. 1431, 1439 (1996). But see Harry Litman and Mark D. Greenberg, *Federal Power and Federalism: A Theory of Commerce-Clause Based Regulation of Traditionally State Crimes*, 47 CASE W. RES. L. REV. 921, 963 (1997), who wrote:

[T]he act and other recent legislation in traditionally state areas do not supplant state criminal legislation and bring vast numbers of local crimes into federal court. Rather, the legislation merely creates concurrent federal jurisdiction, making federal prosecutions possible in select cases where the need for a federal response is difficult to deny. Both by design and in practice, federal prosecutions occur in only a tiny fraction of the cases covered by the federal criminal legislation.

Litman and Greenberg's analysis notably does not include drug cases, which constitute a large portion of federal criminal adjudications. *See* Brickey, *supra* note 71, at 1168-69.

98. 18 U.S.C. § 3161 (1994 & Supp. 1999). The Speedy Trial Act provides that "the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days" of indictment or first appearance. *Id.* § 3161(c)(1).

quires federal courts to adjudicate criminal cases before civil actions.⁹⁹ The strain on the federal prisons serves as an indicator of the rapid nationalization of criminal law. The federal prison population more than doubled between 1980 and 1990.¹⁰⁰ Between 1990 and 1995, it almost doubled again.¹⁰¹ In addition to the federal courts and prisons, federal prosecutors and federal police agencies feel the overwhelming burden of the nationalization of criminal law.¹⁰²

Even if one does not think that the overwhelming burden of nationalized crime justifies, on policy grounds, a restricted Commerce Clause interpretation, institutional integrity supports a change in the status quo. The *Lopez* standard provides inadequate guidance to lower courts in their application of the Commerce Clause. To ensure a cohesive and reliable interpretation of the Commerce Clause, the Supreme Court should clarify what precedent and principles remain valid tools of Commerce Clause jurisprudence.

Since the Court handed down *Lopez* in 1995, the federal appellate courts have been hesitant to strike down a federal statute for overstepping Commerce Clause power.¹⁰³ Meanwhile, courts approved several federal statutes. For example, appellate courts upheld statutes relating to car jacking,¹⁰⁴ blocking entrances to abortion clinics,¹⁰⁵ committing violence against women,¹⁰⁶ possession of firearms by felons,¹⁰⁷ and manufacturing marijuana.¹⁰⁸ In the words of one court, "courts have resisted urgings to extend *Lopez* beyond [the Gun-Free School Zones Act of 1990]."¹⁰⁹ Few courts have cited *Lopez* to reverse a

99. See Weis, *supra* note 97, at 1439.

100. See Brickey, *supra* note 71, at 1157-58.

101. See *id.*

102. See Beale, *supra* note 97, at 45-46. The budget of federal prosecutors (The Criminal Division in the Department of Justice and The United States Attorney's Office) has increased dramatically since the 1970s. See *id.* The number of federal prosecutors has swelled from approximately 3,000 in the mid-1970s to more than 8,000 in the 1990s. See *id.* More than fifty major federal agencies play a role in enforcing federal criminal laws. See *id.*

103. See Lisanne Newell Leasure, *Commerce Clause Challenges Spawned by United States v. Lopez are Doing Violence to the Violence Against Women Act (VAWA): A Survey of Cases and the Ongoing Debate over how the VAWA will Fare in the Wake of Lopez*, 50 ME. L. REV. 410, 442 (1998).

104. See, e.g., *United States v. McHenry*, 97 F.3d 125, 129 (6th Cir. 1996); *United States v. Hutchinson*, 75 F.3d 626, 627 (11th Cir. 1996) (per curiam); *United States v. Bishop*, 66 F.3d 569, 590 (3d Cir. 1995).

105. See, e.g., *Hoffman v. Hunt*, 126 F.3d 575, 588 (4th Cir. 1997); *Cheffer v. Reno*, 55 F.3d 1517, 1520-21 (11th Cir. 1995).

106. See, e.g., *Brzonkala v. Virginia Polytechnic Inst.*, 132 F.3d 949, 974 (4th Cir. 1997), *vacated on reh'g en banc*, 169 F.3d 820 (4th Cir. 1999), *cert. granted sub nom.*, *United States v. Morrison*, 68 U.S.L.W. 3177 (U.S. Sept 28, 1999) (No. 99-5).

107. See, e.g., *United States v. Chesney*, 86 F.3d 564, 569 (6th Cir. 1996).

108. See, e.g., *United States v. Leshuk*, 65 F.3d 1105, 1112 (4th Cir. 1995).

109. *United States v. Wall*, 92 F.3d 1444, 1448 (6th Cir. 1996).

conviction.¹¹⁰ In March of 1999, the Fourth Circuit, sitting en banc, reversed a panel decision and became the first appellate court to follow *Lopez* and heed the *Jones & Laughlin* warning by striking down the Violence Against Women Act.¹¹¹ Nevertheless, the persistent reluctance of federal courts to use *Lopez* to overturn Congressional acts indicates the need for clarification by the Supreme Court.

B. *The States*

Lopez announced that the “[s]tates possess primary authority for defining and enforcing the criminal law . . . [and] [w]hen Congress criminalizes conduct already denounced as criminal by the States, it effects a ‘change in the sensitive relation between federal and state criminal jurisdiction.’”¹¹² The change destroys the positive aspects of federalism. The Constitution no longer checks the potentially sweeping power of the national government.¹¹³ Under dual sovereignty, state governments may experiment with solutions to problems, making them laboratories of democracy.¹¹⁴ When a particular state, through trial and error, devises the optimal solution to a problem of national import, other states may copy it. Allowing the national government to implement a single solution typically means that no experimentation to determine the best solution occurs. Instead of having fifty experiments, the nation must hope that the one solution chosen by the national government succeeds.¹¹⁵

The argument that local action is better than national action is far from new. When he visited America, Alexis de Tocqueville proclaimed that local action was better than centralized action because it created “an all-pervading and restless activity, a superabundant force, and an energy which is inseparable from it, and which may, however unfavorable circumstances may be, produce wonders. These are the true advantages of democracy.”¹¹⁶ This energy force de Tocqueville refers to comes from the “awareness of one’s neighbor . . . rather than

110. See, e.g., *United States v. Pappadopoulos*, 64 F.3d 522, 527-28 (9th Cir. 1995) (stating that federal jurisdiction under the federal arson act could not be conferred based on the use of out of state natural gas); *United States v. Mussari*, 894 F. Supp. 1360, 1363-65 (D. Ariz. 1995) (holding a federal statute that punished the failure to pay child support unconstitutional).

111. *Brzonkala v. Virginia Polytechnic Inst.*, 169 F.3d 820 (4th Cir. 1999), cert. granted sub nom., *United States v. Morrison*, 68 U.S.L.W. 3177 (U.S. Sept 28, 1999) (No. 99-5).

112. *United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995) (citations omitted); see also *Hoffman v. Hunt*, 923 F. Supp. 791, 807 (W.D.N.C. 1996).

113. See Weis, *supra* note 97, at 1439.

114. See *id.* at 1440.

115. See Bauerle, *supra* note 10, at 112-13.

116. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 110 (Richard D. Heffner ed., 1984).

some theoretical knowledge of the needs of other people which guides action."¹¹⁷ The physical proximity that state governments have to the people make them more likely to know the needs and wants of their citizens. The central government in Washington, D.C., must regulate for everyone in the country, while state governments can concentrate on the particular needs of their own citizens. The national government runs the risk of satisfying no one by trying to please everyone. A single state avoids such inefficiency by confining its focus within state boundaries.

C. *The Solution*

Functional analysis provides a solution to the problems outlined above that reaps the benefits of local action without denying the occasional utility of national action. Functional analysis focuses on the Commerce Clause's purpose in the federal system by asking the question: "Which body of government within our Constitutional structure should regulate?" Congress should only exercise its power under the Commerce Clause when necessary to maintain or respond to the integrated national economy. This will occur only when the states cannot effectively regulate by themselves.¹¹⁸

What is functional analysis? Functional analysis is a practical approach to law. It takes a step back from the problem itself and asks what roles the state and national governments should play in the constitutional system. The Constitution created two governments, striking a careful and certain balance between the enumerated powers of the national government and the reserved powers of the states. The current Commerce Clause jurisprudence creates a system in which the functions of the state and national governments effectively merge, almost to the point where they are performing the same tasks. The Framers created a system in which the states regulate almost everything, and restricted the scope of national authority to the specific areas enumerated in Article I, Section 8. Yet, through the twentieth-century expansion of the interstate commerce power, the national government now regulates almost anything it wants. Functional analysis

117. F.A. HAYEK, *THE ROAD TO SERFDOM* 258 (1994).

118. Several authors have argued that the court should use functional analysis to determine the meaning of the Commerce Clause. See Merritt, *supra* note 21, at 1211; Donald H. Regan, *How to Think about the Federal Commerce Power and Incidentally Rewrite United States v. Lopez*, 94 MICH. L. REV. 554, 594 (1995). Merritt argues that the commerce power should extend to things that the state cannot do itself. See Merritt, *supra* note 21, at 1213. She does not add that we should adopt this policy because of an integrated national economy. The theory this Note introduces asks both who should regulate and why they should regulate. Neither of these articles advocates both principles.

crafts a workable doctrine that will prevent this usurpation of state power.

Functional analysis asks whether the states can handle the problem by themselves, or whether the national government needs to step in to serve the needs or counteract the influence of an integrated national economy. Current Commerce Clause jurisprudence incorrectly ignores this functional inquiry. Functional analysis helps sort out issues that actually need national attention from ones used to make Congress look responsive to public sentiments.¹¹⁹ Politics will always play a role in legislation, but by asking whether Congress is the proper regulatory body, functional analysis minimizes the negative effects of politics on the dual sovereignty system.

Asking whether the states can legislate on their own changes the direction of the courts' analysis of Commerce Clause challenges. Instead of asking how much out-of-state beef Olie's Barbecue buys each month or whether violence against women affects the national economy, it directs a court to ask which body can best solve the underlying problem and best serve the legislative objective. The questions are more probative than thoughtlessly connecting the dots from the targeted activity to its effects on interstate commerce. Functional analysis reaches and serves the heart of federalism, a central concern of the Framers, the Constitution, and its early critics.

While it calls for an ad hoc, fact-intensive judgment in each case, the guidance functional analysis provides is key to creating a cohesive, principled Commerce Clause jurisprudence. In a sense, functional analysis turns the current question around and searches for cases in which interstate commerce has a substantial effect on the regulation. It preserves federalism by recognizing that when individual states satisfying the needs of their own citizens frustrate the ability of other states to act, national legislation is appropriate.

In interpreting "interstate commerce," functional analysis considers the objective of fostering an integrated national economy and seeks meaning in both terms. *Lopez* suggested that Congress's commerce power did not include power over non-economic activity, or, if it implicated non-economic activity, the Congressional act deserved heightened review.¹²⁰ The *Lopez* Court's statement on non-economic

119. For example, by enacting the Gun-Free School Zones Act, Congress could appear tough on crime to constituents. The law arguably had no other value because states already had similar laws. See Merritt, *supra* note 21, at 1214. Similarly, the VAWA creates a national law punishing violence against women, seemingly already served by state rape, assault, and domestic violence statutes.

120. See *Lopez v. United States*, 514 U.S. 549, 561 (1995).

activity hints that the proper interpretation of the Commerce Clause might not cover non-economic activity at all. The inclusion of *only* economic activity—notably, broader in scope than commercial activity—in the definition of interstate commerce focuses the Court's Commerce Clause interpretation on the national economic aspects of a congressional act. By giving content to the notion of "commerce," it supplies a limiting factor to the definition of the Commerce Clause. Without these text- and purpose-based restrictions, the words "interstate commerce" have no boundaries, and Congress can regulate almost anything. It can govern purely local wheat consumption, as in *Wickard*; non-commercial labor relations, as in *Jones & Laughlin* and *Darby*; or it can expand on both fronts and capture non-commercial discrimination by purely local barbecue bigots in *Ollie's Barbecue*.

Apparently conceding the substantive value of "interstate," some scholars assert that the Court should not define commerce as requiring an economic component, and instead use the Commerce Clause to allow Congress to legislate any issue of national concern.¹²¹ One commentator argues:

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.¹²²

This argument appears to assume the desirability of creating national regulations on race discrimination under the Commerce Clause authority.¹²³ Yet good causes are not always within the scope of con-

121. See Merritt, *supra* note 21, at 1216.

122. See *id.*

123. The Commerce Clause may not provide the power to regulate racial discrimination. Fortunately, national regulation may be supported by other parts of the Constitution, such as the Thirteenth Amendment. The Thirteenth Amendment states:

Neither slavery nor involuntary servitude except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Congress shall have the power to enforce this article by appropriate legislation.

U.S. CONST. amend XIII. An argument can be made that racial discrimination results from and remains one of the badges and incidents of slavery. Thus, Congress has the power to prevent such racial discrimination. See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). See generally Douglas L. Colbert, *Liberating the Thirteenth Amendment*, 30 HARV. C.R.-C.L. L. REV. 1 (1995) (urging a resurrection of the Thirteenth Amendment to enable Congress to legislate against inequality); Charles H. Jones, Jr., *An Argument for Federal Protection Against Racially Motivated Crimes: 18 U.S.C. § 241 and the Thirteenth Amendment*, 21 HARV. C.R.-C.L. L. REV. 689 (1986). While this argument may work for black-white racial discrimination, other types of discrimination (e.g., gender) could not be regulated under the Thirteenth Amendment, as it applies only to slavery. But see Marcellene Elizabeth Hearn, *A Thirteenth Amendment Defense of the*

gressional authority. The economic nature of the Commerce Clause is clear from the ordinary meaning of "commerce,"¹²⁴ the Framers' intent, and judicial interpretation up until the Civil Rights Act of 1964.¹²⁵

The appeal of legislating good causes, such as racial discrimination and certain forms of crime, has occasionally forced the Court and Congress to find some power in the Constitution, usually the Commerce Clause, to sanction national legislation. An economic limitation on the Commerce Clause hinders such legislation. The requirement that regulated behavior threaten or otherwise bear a substantial relation to interstate commerce similarly circumscribes the breadth of national legislation.

Unfortunately, in the past, courts have minimized these factors' importance, often jumping clear over the "interstate" and "commerce" hurdles. Race discrimination, guns in schools, and violence against women are all bad things, but national legislation addressing these issues manipulates the Constitution, casting aside the Framers' intent and the dual-sovereign structure to accomplish unnecessary national uniformity on politically fashionable subjects. The allure of legislation on good causes should not justify manipulation of the Constitution. The states can legislate on these good causes just as well as or better than the national government. The Court's interpretation of an invigorated Commerce Clause might give them that chance.

IV. A TALE OF TWO CASES

In the last year, two cases signaled the possible legacy of *Lopez*, *Brzonkala v. Virginia Polytechnic Institute*¹²⁶ and *United States v. Wil-*

Violence Against Women Act, 146 U. PA. L. REV. 1097, 1144-45 (arguing that violence against women constitutes involuntary servitude, thus Congress had the power to enact the VAWA).

124. Black's Law Dictionary defines commerce as "[t]he exchange of goods, productions, or property of any kind; the buying, selling, and exchanging of articles [or t]he transportation of persons and property by land, water, and, air." BLACK'S LAW DICTIONARY 269 (6th ed. 1990).

125. See *supra* Part II. In the cases up until *Ollie's Barbeque*, an argument could be made that state regulation of racial discrimination would interfere with the integrated national economy. On the other hand, it was impossible to make the argument that national regulation of racial discrimination was *needed* in order to maintain an integrated national economy or that the national economy prevented such regulation. The national government regulated racial discrimination for moral reasons that some states refused to recognize. While moral reasons are good reasons, they cannot be a constitutional basis for otherwise unconstitutional national legislation.

126. *Brzonkala v. Virginia Polytechnic Inst.*, 132 F.3d 949, 953 (4th Cir. 1997), *opinion vacated on reh'g en banc*, 169 F.3d 820 (4th Cir. 1999), *cert. granted sub nom. United States v. Morrison*, 68 U.S.L.W. 3177 (U.S. Sept. 28, 1999) (No. 99-5).

son.¹²⁷ The cases addressed the constitutionality of the Violence Against Women Act¹²⁸ and the Clean Water Act, respectively.¹²⁹ The cases share a common thread: a challenge to Congress's power under the Commerce Clause. The timeliness of the cases provides an opportunity to test not only the applicability of *Lopez* but also the possible use of functional analysis in Commerce Clause jurisprudence.

A. *The Story—Take One*

Christy Brzonkala entered Virginia Polytechnic Institute as a first year student in the fall of 1994.¹³⁰ On the evening of September 21, 1994, she and another female student met two men, later identified as Antonio Morrison and James Crawford, whom Christy only knew by their first names and their status as football players.¹³¹ The four students gathered in the dormitory where Christy lived. They chatted for fifteen minutes, and then Christy's friend and Crawford left the room.¹³² Morrison immediately turned to Christy and asked if she would have sexual intercourse with him.¹³³ She twice told Morrison, "No."¹³⁴ The verbal refusals did not deter Morrison. Christy got up to leave the room, and Morrison grabbed her and threw her on the bed.¹³⁵ He pushed her down by the shoulders and tore off her clothes.¹³⁶ He turned off the lights and then used his arms and legs to hold her down. She struggled to get away, without success.¹³⁷ Morrison forcibly raped her without using a condom.¹³⁸ Before Christy could get away, Crawford returned to the room and raped Christy by holding her down with his arms and knees.¹³⁹ After Crawford was finished, Morrison raped Christy for a second time.¹⁴⁰

127. *Unites States v. Wilson*, 133 F.3d 251 (4th Cir. 1997).

128. Violence Against Women Act of 1994, Pub. L. No. 103-322, tit. IV, 108 Stat.1902 (codified in scattered sections of 42 U.S.C.).

129. Federal Water Pollution Control (Clean Water) Act, 62 Stat. 1155 (1948) codified in scattered sections of 33 U.S.C.).

130. *See Brzonkala*, 132 F.3d at 953.

131. *See id.*

132. *See id.*

133. *See id.*

134. *See id.*

135. *See id.*

136. *See id.*

137. *See id.*

138. *See id.*

139. *See id.*

140. *See id.*

After he was done, Morrison warned Christy that she "better not have any fucking diseases."¹⁴¹ In the months following the rape, Christy became depressed and avoided contact with her friends and classmates. She cut off her long hair, stopped attending classes, and eventually attempted suicide.¹⁴² She later withdrew from the university. Morrison publicly announced in the dormitory cafeteria that he "like[d] to get girls drunk and fuck the shit out of them."¹⁴³

Christy filed a complaint with the university in April, 1995.¹⁴⁴ After imposing a two-semester suspension against Morrison, the university judiciary committee allowed Morrison to return, reversing its original decision.¹⁴⁵ Christy filed suit against the university in federal court, alleging a violation of Title III of the VAWA and raising some state law claims against Morrison and Crawford.¹⁴⁶ The district court held Title III unconstitutional as overstepping the bounds of the Commerce Clause power and the Fourteenth Amendment.¹⁴⁷ Brzonkala appealed and a three-judge panel of the Fourth Circuit overturned the decision.¹⁴⁸ On rehearing en banc, the Fourth Circuit vacated the panel decision and reinstated the trial court's ruling.¹⁴⁹ The Supreme Court granted certiorari on this case to determine the constitutionality of Title III of the VAWA.¹⁵⁰

The Fourth Circuit relied on *Lopez* to hold the VAWA an unconstitutional exercise of Congress's power under the Commerce

141. *See id.*

142. *See id.*

143. *See id.*

144. *See Brzonkala v. Virginia Polytechnic Inst.*, 935 F. Supp. 779, 782 (W.D. Va. 1996), *cert. granted sub nom. United States v. Morrison*, 68 U.S.L.W. 3177 (U.S. Sept 28, 1999) (No. 99-5).

145. *See id.* On appeal, the committee found insufficient evidence to convict Crawford. *See id.* After several appeals, the university provost deferred Morrison's two year suspension until Morrison's graduation from the university, and required him to attend a one-year educational session regarding the university's policies on acceptable standards of student conduct. *See Brzonkala*, 132 F.3d at 955.

146. *See Brzonkala*, 132 F.3d at 956. Title III of the VAWA is a civil rights provision creating "a positive statutory right for all individuals to be free from gender motivated violence." Leaseure, *supra* note 103, at 410-411.

147. *See Brzonkala*, 935 F. Supp. at 793.

148. *See Brzonkala*, 132 F.3d at 953.

149. *See Brzonkala v. Virginia Polytechnic Inst.*, 169 F.3d 820, 821 (4th Cir. 1999), *cert. granted sub nom.*, *United States v. Morrison*, 68 U.S.L.W. 3177 (U.S. Sept 28, 1999) (No. 99-5). This Note only addresses whether Congress constitutionally exercised its power under the Commerce Clause in passing Title III of the VAWA. The court also considered whether Title III was a constitutional exercise of Congress's power under Section 5 of the Fourteenth Amendment. *See id.* at 862. On this issue, the Court ruled that "Congress may not regulate purely private conduct pursuant to its Fourteenth Amendment enforcement power." *Id.*

150. *United States v. Morrison*, 68 U.S.L.W. 3177 (U.S. Sept 28, 1999) (No. 99-5).

Clause.¹⁵¹ The court noted that the substantial effects prong of the three-part *Lopez* standard cannot uphold regulation of a non-economic activity.¹⁵² The court stated that, even if the requirement of economic activity or a jurisdictional element served only as the “presumptive outer limits,” and not the absolute extreme of what the Supreme Court would approve, the statute would still not survive a constitutional challenge.¹⁵³ The court hypothesized that the absolute limit of Commerce Clause power would be a holding that Congress could regulate non-economic activities if they bore a direct and distinct relationship to interstate commerce.¹⁵⁴ Assuming that marks the outer limit, the court found an “attenuated and indirect relationship with interstate commerce” in the VAWA and remarked that holding the Act within Congress’s power under the Commerce Clause would “do what the Supreme Court has never done.”¹⁵⁵

B. *The Story—Take Two*

James J. Wilson, a land developer with over thirty years experience, served as the chief executive officer and chairman of the board of directors for Interstate General, a publicly traded land development company.¹⁵⁶ Interstate General was a general partner in St. Charles Associates, which owned land under development in the planned community of St. Charles. Its prized piece of real estate lay between the Potomac River and the Chesapeake Bay in Charles County, Maryland.¹⁵⁷ In 1997, St. Charles consisted of 4,000 developed acres and 10,000 housing units with 33,000 residents. When finished, it was to be a 9,100 acre planned community of some 80,000 residents.¹⁵⁸ The community was formed under the New Communities Act of 1968

151. See *Brzonkala*, 169 F.3d at 833. (“[I]t cannot be sustained on the authority of *Lopez*, nor any of the Court’s previous Commerce Clause holdings, as a constitutional exercise of Congress’ power to regulate interstate commerce.”).

152. See *id.* at 831. The court decided that the distinction between economic and non-economic regulations is of “critical importance” to the *Lopez* analysis. *Id.* at 832 n.5. However, it stated that a jurisdictional element could save the statute. See *id.* at 831. The VAWA does not have a jurisdictional element. See *id.* at 836. A jurisdictional element requires the Court to adjudicate whether the act regulated by Congress affects interstate commerce in each case. The result cannot be presumed from precedent. See *id.*

153. See *id.* at 837.

154. See *id.*

155. *Id.* at 844. Applying the *Lopez* analysis to the facts before it, the court remarked that it would “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.” See *id.* (quoting *United States v. Lopez*, 514 U.S. 549, 567-68 (1995)).

156. See *United States v. Wilson*, 133 F.3d 251, 254 (4th Cir. 1997).

157. See *id.*

158. See *id.*

and initially developed as a joint project of Interstate General and the United States Department of Housing and Urban Development.¹⁵⁹

At issue in the trial were four parcels of land located more than ten miles from the Chesapeake Bay, more than six miles from the Potomac River and hundreds of yards away from the nearest stream.¹⁶⁰ With the parcels not ready for construction, Wilson attempted to use a type of excavation known as "sidecasting" to drain water from these parcels and dump fill material on the land.¹⁶¹ Section 404 of the Clean Water Act required developers to obtain a permit from the Army Corps of Engineers for such activity.¹⁶²

The Clean Water Act prohibits discharges of pollutants into "navigable waters,"¹⁶³ which it defines as "waters of the United States."¹⁶⁴ The Army Corps of Engineers, in turn, defines "waters of the United States" as: (1) interstate wetlands;¹⁶⁵ (2) wetlands adjacent to other waters of the United States (adjacent wetlands);¹⁶⁶ and (3) intrastate, non-adjacent waters (isolated wetlands).¹⁶⁷ The areas filled at James Wilson's direction were inland, isolated areas that fell within the Corps' regulation defining waters of the United States to include those waters whose "degradation . . . could affect" interstate com-

159. *See id.*

160. *See id.* at 257.

161. *See id.* at 254-55.

162. *See* 33 U.S.C. § 1344 (1994). The § 404 program requires permits in connection with the discharge of "dredged" or "fill" material into "navigable waters." § 1344(a). Congress delegated to the Army Corps of Engineers ("Corps") authority to administer the program. *See* 33 C.F.R. § 323 (1998). The Corps' regulations define "dredged material" as "material that is excavated or dredged from waters of the United States." § 323.2(c). "Fill material" is defined as "any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of an [sic] waterbody." § 323.2(e). The Clean Water Act holds a person liable if he or she engages in these activities without a § 404 permit. *See* 33 U.S.C. § 1311(a). The permit program is one of the most important and controversial portions of the Clean Water Act. *See* Oliver A. Houck, *Clean Water Act and Related Programs*, in ENVIRONMENTAL LAW 241 (A.L.I.-A.B.A. 1997). Houck states that "Section 404 has been the most controversial provision in the Act and, the case could be made of all environmental law. It pits the nation's most productive and threatened ecosystems against its most cherished notions of private property development . . . several thousands times per year." *Id.* at 244. *See also* Matthew L. Pirnot, *United States v. Wilson: Did Interstate General Substantially Affect Interstate Commerce?*, 77 N.C. L. REV. 361, 371 (1998).

163. 33 U.S.C. §§ 1311(a), 1362(12).

164. *Id.* § 1362(7).

165. *See* 40 C.F.R. § 230.3(s)(2) (1998); 33 C.F.R. § 328.3(a)(2).

166. *See* 40 C.F.R. § 230.3(s)(7); 33 C.F.R. § 328.3(a)(7).

167. *See* 40 C.F.R. § 230.3(s)(3); 33 C.F.R. § 328.3(a)(3).

merce.¹⁶⁸ The United States charged James Wilson and Interstate General with criminal violations of the Clean Water Act.¹⁶⁹

At trial, the government introduced evidence that all four of the parcels contained wetlands¹⁷⁰ and that the defendants failed to obtain permits from the Corps to drain the land and fill it with dirt.¹⁷¹ To prove that the parcels fell within the authority of the Corps to regulate, the government introduced substantial evidence about the physical characteristics that identified them as wetlands.¹⁷² The government showed that the water from these parcels flowed in a drainage pattern ultimately joining the Potomac River, which drains into the Chesapeake Bay.¹⁷³ This proof was necessary to meet the Corps' definition of waters whose degradation could affect interstate commerce.¹⁷⁴

The defendants introduced evidence contradicting the Corps' assertion that the parcels constituted wetlands.¹⁷⁵ They showed that the Corps' enforcement was inconsistent in that it took action on only one parcel despite awareness of ongoing development on all four parcels.¹⁷⁶ An internal Corps memorandum that stated that, while the areas in the St. Charles development have the "necessary parameters . . . to be considered wetlands when using the Corps Wetland Manual, . . . it is not clear . . . that these areas can be interpreted as 'waters of the United States' within the meaning or purview of Section 404."¹⁷⁷ Despite this defense, the jury convicted all defendants on four felony counts.¹⁷⁸ The court sentenced Wilson to twenty-one months imprisonment and one year supervised release and fined him \$1 million.¹⁷⁹ Interstate General and St. Charles Associates were fined \$3 million and placed on five years probation.¹⁸⁰ The court also ordered

168. See *United States v. Wilson*, 133 F.3d 251, 255 (4th Cir. 1997); see also 33 C.F.R. § 328.3(a)(3).

169. See *Wilson*, 133 F.3d at 253.

170. The National Research Council defines "wetland" as "an ecosystem that depends on constant or recurrent, shallow inundation or saturation at or near the surface of the substrate. The minimum essential characteristics of a wetland are recurrent, sustained inundation or saturation. Common diagnostic features of wetlands are hydric soils and hydrophytic vegetation." NATIONAL ACADEMY OF SCIENCES, *WETLANDS: CHARACTERISTICS AND BOUNDARIES* 3 (1995).

171. See *Wilson*, 133 F.3d at 254.

172. See *id.* at 254-55. The evidence included "testimonial and photographic evidence of significant standing water, reports of vegetation typical to hydrologic soils, and infrared aerial photographs showing a pattern of stream courses visible under the vegetation." *Id.* at 254.

173. See *id.* at 254-55.

174. See *id.* at 255-56; see also 33 C.F.R. § 328.3 (a)(3) (1998).

175. See *Wilson*, 133 F.3d at 255.

176. See *id.*

177. *Id.*

178. See *id.*

179. See *id.* at 254.

180. See *id.*

the defendants to implement a wetlands restoration and mitigation plan proposed by the government.¹⁸¹

The defendants appealed, and the Fourth Circuit held that the Corps exceeded its congressional authorization in promulgating regulations under the Clean Water Act because its regulations extended the jurisdiction of the Act beyond the scope of the commerce power.¹⁸² The Court did not declare the statute unconstitutional but stated in dicta:

Were this regulation a statute, duly enacted by Congress, it would present serious constitutional difficulties, because, at least at first blush, it would appear to exceed congressional authority under the Commerce Clause. Absent a clear indication to the contrary, we should not lightly presume that merely by defining "navigable waters" as "the waters of the United States," Congress authorized the Army Corps of Engineers to assert its jurisdiction in such a sweeping and constitutionally troubling manner.¹⁸³

This excessive use of the commerce power led the Fourth Circuit to reverse the lower court decision and remand for a new trial.¹⁸⁴

C. *The Tie That Binds*

The Fourth Circuit invalidated both Title III of the Violence Against Women Act and an agency's interpretation of the Clean Water Act because those laws exceeded the scope of Congress's power under the Commerce Clause. The right results, no doubt, but the decisions do not clarify or suitably explain the application of *United States v. Lopez*, and likely could not. As courts rely on this unstable law, they must operate without a logical framework to decide whether a statute builds on one inference too many or ties together too many strained readings of "interstate" and "commerce."

181. *See id.*

182. *See id.* at 257. The unauthorized regulation was 33 C.F.R. § 328.3(a)(3), which defines "waters of the United States" to include: "All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mud flats, sand flats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce."

183. *See Wilson*, 133 F.3d at 257 (citation omitted).

184. *See id.* at 266. Including the Fourth Circuit decision in *Wilson*, three circuit courts have examined the constitutionality of the Clean Water Act's regulation of "isolated wetlands." *See Leslie Salt Co. v. United States*, 55 F.3d 1388 (9th Cir. 1995); *Hoffman Homes, Inc. v. Administrator, United States Env'tl. Protection Agency*, 961 F.2d 1310 (7th Cir. 1992). The Seventh and Ninth Circuits upheld the regulation, while the Fourth Circuit in *Wilson* invalidated it as an unreasonable interpretation of the Clean Water Act. *Wilson*, 133 F.3d at 257. Thus, a circuit split has developed on the issue, which may prompt review by the Supreme Court. *See David A. Linehan, Endangered Regulation: Why the Commerce Clause May no Longer be Suitable Habitat for Endangered Species and Wetlands Regulation*, 2 TEX. REV. L. & POL. 365, 386 (1998). The Seventh and Ninth Circuit opinions were decided before *Lopez* and, while decided on Commerce Clause grounds, do not address the *Lopez* approach.

Before discussing the law, some non-legal observations must be made. Christy Brzonkala's story is tragic. One cannot help but feel that she needs and deserves as much legal protection as the nation can muster. The story pulls at the heartstrings, and one wants to find the VAWA constitutional because it serves an important purpose that has extensive public support. The maxim that hard cases make bad law does not even apply here because this could very well be an easy case making bad law. On the other hand, the story of James Wilson is much less dramatic. While he may have harmed the environment by developing houses on wetlands, those facts do not have the same emotional appeal as the story of Christy Brzonkala. One does not feel the urge to punish him as one feels the urge to protect rape victims. The lack of an emotional tug makes it easier to find this regulation unconstitutional under the Commerce Clause without feeling tremendous regret. Because the case lacked emotional appeal, *Wilson* was "largely overlooked by the media."¹⁸⁵ One cannot ignore the emotional appeal that a decision on violence against women invokes and the effect such emotion may have on the outcome in the court system.

The emotional tugs of these cases should not control the legal analysis. While VAWA is a noble cause, the Court should not follow its decision in *Ollie's Barbeque*¹⁸⁶ and allow a good cause to make bad constitutional law. The standard established in *United States v. Lopez* needs clarification from the Supreme Court.¹⁸⁷ Hopefully, the grant of certiorari in *Brzonkala v. Virginia Polytechnic Institute* signals the Court's desire to dispel that confusion and develop a basis for unemotional, principled Commerce Clause decisionmaking.

1. The Constitutionality of the Violence Against Women Act

The passage of the VAWA in 1994 prompted a flurry of scholarship on its constitutionality under the Commerce Clause power, most supporting the statute.¹⁸⁸ The media joined the coverage when the

185. Brigid McMnamin, *Drawing a Line in the Sand*, FORBES, Mar. 9, 1998, at 100.

186. *Katzenbach v. McClung (Ollie's Barbeque)*, 379 U.S. 294 (1964).

187. The confusion is demonstrated by the Fourth Circuit's analysis of the VAWA. A three judge panel upheld Title III as a constitutional exercise of Congress's power under the Commerce Clause, but the en banc majority and the district court found it an unconstitutional step beyond Congress's power, all applying *Lopez*. The opposite results of the reviewing courts indicate that the standard in *Lopez* needs clarification from the Supreme Court. See also *infra* notes 188-203 and accompanying text.

188. See generally Peter J. Liuzzo, *Brzonkala v. Virginia Polytechnic and State University: The Constitutionality of the Violence Against Women Act—Recognizing that Violence Targeted Against Women Affects Interstate Commerce*, 63 BROOK. L. REV. 367 (1997); Kerrie E. Maloney, *Gender-Motivated Violence and the Commerce Clause: The Civil Rights Provision of the Violence*

Fourth Circuit en banc struck down the law and when the Supreme Court granted certiorari in the fall of 1999.¹⁸⁹ The malleable *Lopez* standard asks whether the VAWA constitutes one of the three permissible uses of the Commerce Clause power.¹⁹⁰ Functional analysis asks whether Congress should regulate violence against women. Juxtaposing the answers to these questions, in turn, shows that functional analysis makes better sense of the Commerce Clause and illuminates the disadvantages of *Lopez*.

a. VAWA Under Lopez

The *Lopez* standard¹⁹¹ examines the VAWA under the "substantial effects" test, as the Act does not involve channels or instrumentalities of interstate commerce. The compelling interstate effects of violence against women persuasively support the argument for the constitutionality of the VAWA. Unlike the statute at issue in *Lopez*, Congress extensively studied violence against women, relying on experts in the field.¹⁹² This information allowed Congress to conclude

Against Women Act after Lopez, 96 COLUM. L. REV. 1876 (1996); Charis Mincavage, *Title III of the Violence Against Women Act: Can it Survive a Commerce Clause Challenge in the Wake of United States v. Lopez*, 102 DICK. L. REV. 441 (1998); Karen Tichenor, *The Violence Against Women Act: Continued Confusion over the Scope of the Commerce Clause*, 18 WOMEN'S RTS. L. REP. 329 (1997); Megan Weinstein, *The Violence Against Women Act after United States v. Lopez: Defending the Act from Constitutional Challenge*, 12 BERKELEY WOMEN'S L.J. 119 (1997); Carolyn Peri Weiss, *Title III of the Violence Against Women Act: Constitutionally Safe and Sound*, 75 WASH. U. L.Q. 723 (1997)

189. See Joan Biskupic, *Dispute May Test Power of Congress: Court to Review Law on Gender*, WASH. POST, Sept. 29, 1999, at A3; Steve Chapman, Editorial, *A Distorted View of Violence Against Women*, CHI. TRIB., Mar. 28, 1999, at C21; Tony Mauro, *Court Will Review Laws of Protection, Validity of Safeguards for Women, Clinics Challenged*, USA TODAY, Sept. 29, 1999, at 4A; Jean McNair, *Gender-Based Violence Law is Overturned*, CHI. TRIB., Mar. 24, 1999, at CN9; Patt Morrison, *The Law Grapples with Men Who Hate Women*, L.A. TIMES, Oct. 15, 1999, at B1.

190. (1) Congress may regulate the use of the channels of interstate commerce; (2) Congress may regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities; and (3) Congress's commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce. See *United States v. Lopez*, 514 U.S. 549, 558-59 (1995).

191. See *supra* notes 77-93 and accompanying text.

192. These experts revealed disturbing statistics. For example, violence is the leading cause of injury to women ages 15-44, more common than automobile accidents, muggings, and cancer deaths combined. See S. REP. NO. 103-138, at 38 (1993) (citing Surgeon General Antonia Novello, *From the Surgeon General, U.S. Public Health Services*, 267 JAMA 3132, 3132 (1992)). Every week during 1991, more than 2,000 women were raped and more than 90 women were murdered. See *id.* Studies have reported that 50 percent of rape victims lose their jobs or are forced to quit because of the crime's severity. See S. REP. NO. 103-138, at 37 (1993); see also *Brzonkala v. Virginia Polytechnic Inst.*, 132 F.3d 949, 966 (4th Cir. 1997), *vacated on reh'g en banc*, 169 F.3d 820 (4th Cir. 1999), *cert. granted sub nom.*, *United States v. Morrison*, 68 U.S.L.W. 3177 (U.S. Sept. 28, 1999) (No. 99-5) ("Thus based upon exhaustive and meticulous

that violence against women affects interstate commerce.¹⁹³ Thus, if the court uses a rational basis test to review the statute, the heightened fact-finding performed by Congress will permit the Court to regard the statute as a constitutional exercise of Commerce Clause power.¹⁹⁴ The Supreme Court has long permitted Congress to promote civil rights using its Commerce Clause power, as long as it had a rational basis for regarding the legislation as within its power.¹⁹⁵ This history of constitutional exercises of the Commerce Clause power to attack discrimination creates an impressive array of precedent to rely upon in defending the Act.

Yet the same *Lopez* standard also offers persuasive arguments for invalidating the VAWA. First, *Lopez* created a distinction between economic and non-economic activity, limiting Congress to the former.¹⁹⁶ The VAWA regulates non-economic activity¹⁹⁷ in that it nationalizes the law of violent crimes motivated by gender.¹⁹⁸ Congress's fact-findings show that violence against women impedes their performance in the workplace, which in turn affects and harms interstate commerce.¹⁹⁹ Such evidence, however, seems "to pile inference upon infer-

investigation of the problem, Congress found that 'crimes of violence motivated by gender have a substantial and adverse effect on interstate commerce.' " (quoting H.R. CONF. REP. NO. 103-711, at 385 (1994), reprinted in 1994 U.S.C.C.A.N. 1839, 1853)).

193. See Lori L. Schick, Comment, *Breaking the "Rule of Thumb" and Opening the Curtains—Can the Violence Against Women Act Survive Constitutional Scrutiny?*, 28 U. TOL. L. REV. 887, 915 (1997).

194. See Mincavage, *supra* note 188, at 463.

195. See *Katzonbach v. McClung* (Ollie's Barbeque), 379 U.S. 294, 304 (1964); Liuzzo, *supra* note 188, at 390; see also *Brzonkala*, 132 F.3d at 966 ("[A] 'court must defer' to congressional findings when there is a 'rational basis for such a finding.' " (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 311 (1981))).

196. The limit is established by inference from both the majority opinion and Justice Kennedy's concurrence, which stressed that the Gun-Free School Zones Act was neither interstate economic activity nor part of a "larger regulation of economic activity." *Lopez*, 514 U.S. at 561; *id.* at 580 (Kennedy, J., concurring); see also *Brzonkala v. Virginia Polytechnic Inst.*, 169 F.3d 820, 833 (4th Cir. 1999), *cert. granted sub nom.*, *United States v. Morrison*, 68 U.S.L.W. 3177 (U.S. Sept 28, 1999) (No. 99-5) ("[The VAWA] neither regulates an economic activity nor contains a jurisdictional element. Accordingly, it cannot be sustained on the authority of *Lopez*, nor any of the Court's previous Commerce Clause holdings, as a constitutional exercise of Congress's power to regulate interstate commerce."). *But see* Liuzzo, *supra* note 188, at 387-88 (arguing that the court did not set down a rule to be used in distinguishing economic from non-economic activities).

197. See Melinda M. Renshaw, *Choosing Between Principles of Federal Power: The Civil Rights Remedy of the Violence Against Women Act*, 47 EMORY L.J. 819, 841-42 (1998). *But see* Weinstein, *supra* note 188, at 124 (arguing that the statute does regulate economic activity because of the "significant economic toll that violence against women exacts on women and their employers").

198. See Mincavage, *supra* note 188, at 468.

199. See, e.g., S. REP. NO. 103-138, at 39, 41-42 (1993) (estimating that the social costs of domestic violence are 5 to 10 billion dollars per year and finding that "violence is the leading cause of injury to women ages 15-44," and family violence is the largest threat of injury to adult

ence [in order] to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States."²⁰⁰ Relying on the argument that the cost of crime on the national economy meets the substantial effects test would render the *Lopez* multiple inference proscription meaningless²⁰¹ because it allows Congress to regulate almost any activity as long as it has some small, tenuous link to interstate commerce.²⁰² To avoid this result, the *Lopez* majority specifically rejected "cost of crime" as a basis for finding substantial effects on interstate commerce.²⁰³

Whether the VAWA satisfies the *Lopez* standard remains unanswered. Without guidance from the Court on the meaning of the post-*Lopez* Commerce Clause, lower courts—and Congress—can manipulate the substantial effects test to produce desired results. *Lopez*'s failure to identify invalid precedent in its reinvigorated Commerce Clause analysis leaves rhetoric supporting both sides of the debate. The inconsistency of the "controlling" case law gives each side substantial support for its position and leaves courts navigating without a map.

b. VAWA Under Functional Analysis

Functional analysis provides the courts a more detailed analytical map by asking who should regulate—the states or the national government. While Congress may have deemed violence against women a "national tragedy,"²⁰⁴ functional analysis shows that it need not craft national legislation.

Both concurrences in the Fourth Circuit en banc ruling hint at the use of functional analysis in their decisions. Chief Judge Wilkinson urged that the question under the Commerce Clause "is not what

women in the United States); H.R. CONF. REP. NO. 103-711, at 385 (1994) reprinted in 1994 U.S.C.C.A.N. 1839, 1853 (stating that violence against women deters women from "traveling interstate, from engaging in employment in interstate business, and from transacting with businesses, and in places involved in interstate commerce.").

200. *Lopez*, 514 U.S. at 567; see Mincavage, *supra* note 188, at 468; see also *Brzonkala*, 169 F.3d at 846 ("*Lopez*, however, cannot reasonably be understood to have turned on a mere lack of documentation of the effects of the regulated conduct on interstate commerce."); *id.* at 851 ("[A]lthough appellants repeatedly assert that the relationship described by these findings is direct, it quite simply is not." (citations omitted)).

201. See Renshaw, *supra* note 197, at 842.

202. See *Lopez*, 514 U.S. at 567; Renshaw, *supra* note 197, at 842; see also *Brzonkala*, 169 F.3d at 859 ("[T]here is no reason that Congress must, under the logic of [the national government], limit its reach to violent crime motivated by gender animus, rather than assume control over the entire field of violent crimes, or, for that matter, all crime within all of the States.")

203. See *Lopez*, 514 U.S. at 563-64.

204. S. REP. NO. 103-138, at 38 (1993).

the proper allocation of economic regulatory power ought to be, but whether the states will have any subjects of social welfare to call their own."²⁰⁵ Wilkinson described the "present jurisprudence of federalism [as] purely allocative, standing for the simple proposition that the Constitution does not cast states as mere marionettes of the central government."²⁰⁶ Judge Niemeyer followed Wilkinson by noting that "[i]f a federal regulation ostensibly justified by the Commerce Clause unduly infringes on the general police power, a power that was never conferred on the national government, it follows that such regulation exceeds the limited federal power."²⁰⁷

While the concurrences to the en banc *Brzonkala* decision take the first step towards functional analysis, further development of the model must take place before courts will be able to apply it. In general, the national government has a comparative advantage over the states in regulating only a few fields. Circumstances call for national regulations when the states have incentives *not* to regulate a behavior in order to gain an advantage in the integrated national economy. For example, states might race to the bottom by lowering standards in a particular field to attract business and employees. In that case, the national government could justifiably act because the competition for business in the integrated national economy limits the freedom of various states to craft different regulations and, sometimes, any regulations at all. However, with respect to violence against women, nothing in the nature of the integrated national economy prevents the states from regulating—in possibly the exact same manner as the national government—and achieving similar (or better) results. States can regulate the local behavior and the national legislation merely duplicates their effort.

States retain the police power over people within their jurisdiction. Because each state has an independent police power, differences in criminal legislation are expected and encouraged.²⁰⁸ Differing state legislation on violence against women does not impair—or even noticeably affect—the integrated national economy. Though Congress made the argument that abused women miss work, which adversely affects the national economy,²⁰⁹ this argument lacks the force necessary to warrant national legislation. The absence of employees from

205. *Brzonkala v. Virginia Polytechnic Inst.*, 169 F.3d 820, 894 (4th Cir. 1999) (Wilkinson, C.J., concurring), *cert. granted sub nom.*, *United States v. Morrison*, 68 U.S.L.W. 3177 (U.S. Sept. 28, 1999) (No. 99-5).

206. *Id.* at 895 (Wilkinson, C.J., concurring).

207. *Id.* at 903 (Niemeyer, J., concurring).

208. See *supra* notes 112-17 and accompanying text.

209. See *supra* note 192.

work may hurt business, but solving the problem does not require national legislation. State legislatures can independently address and solve the problem. For Congress to invoke the commerce power, it must do so only when achieving the desired policy outcome within the integrated national economy requires national legislation.

Here, functional analysis sounds similar to the substantial effects test of *Lopez*: if a problem causes substantial national economic harms, Congress can legislate. However, there is a distinct difference. *Lopez* seeks a cause and effect relationship between local activities and national effects. Functional analysis connects a desire to regulate local activities with the need for national legislation to effectively address the problem. It confines Congress to assertions of power on issues that demand national legislation and prevents Congress from usurping state power when public outrage on popular issues has turned to Washington, D.C., rather than state capitals, for responsive action. Violence against women remains a disturbing problem of national import, with broad support for legislation to prevent or punish abuse, but the campaign for legislation can and should occur at the state level instead of the national level.

2. The Constitutionality of the "Isolated Wetlands" Regulation of the Clean Water Act

In the isolated wetlands context, the *Lopez* case rears its confusing head yet again. The "isolated wetlands" regulation may meet the standard set forth in *Lopez*. But, as shown above with respect to the VAWA, functional analysis provides a more useful analytical tool. As the following analysis shows, functional analysis will remedy the confusing nature of the current Commerce Clause jurisprudence.

a. The "Isolated Wetlands" Regulation of the Clean Water Act Under Lopez

As with the VAWA, the Clean Water Act's "isolated wetlands" regulation likely falls into the third category of *Lopez*'s permissible legislation—substantial effects on commerce.²¹⁰ *Wilson* involved homebuilding, which, if not itself interstate commerce, closely resembles interstate commerce. But the isolated wetlands regulation did

210. See *United States v. Lopez*, 514 U.S. 549, 558 (1995). One could argue that isolated wetlands are channels of interstate commerce. While this argument might work for the regulation of navigable waters, it does not work for isolated wetlands. Because they are isolated, they are exempt from the category—channels of interstate commerce.

not regulate construction; it regulated draining the wetlands, regardless of the planned post-drainage use. With the government forced to focus on the maintenance of the wetlands, the migratory bird rule attempted to meet the substantial effects test:

The presence of migratory birds attracts scientists and amateur bird watchers, which causes these people to spend money on gear to engage in study and observation of birds. This expenditure is substantial and would be substantially reduced if landowners were allowed to fill in potholes on their property that are only sporadically wet. Of course, to substantially preclude or diminish this "commerce," in substantial numbers, the birds would have to be so put off by the filling of their pothole landing pads that they will die and fail to make it to other more hospitable wetlands for observation there.²¹¹

Use of the migratory bird rule to validate the exercise of Commerce Clause power has recently come under attack.²¹² The migratory bird rule is widely regarded as an ex post context-of-litigation justification to slide the statute under Congress's Commerce Clause power.

A less fanciful argument for how this regulation meets the substantial effects test developed in response. Builders stand to make a considerable amount of money by draining wetlands.²¹³ A race to the bottom could prevent regulation by the several states. In order to attract business and boost their economies, states would compete to adopt the most environmentally unfriendly policies. Contrasting the facts of *Lopez*, which recognized that the economic implications of gun possession near schools are limited, the regulation here has a direct effect on economic incentives,²¹⁴ meeting the substantial effects test of interstate commerce.

There are also persuasive arguments demonstrating why neither of these justifications meets the *Lopez* standard. First, economic analysis does not show that isolated wetlands affect interstate commerce to an extent sufficient to justify national regulation. The migratory bird rule carries no weight because neither Congress nor the Corps has regulated all of the other activities that presumably constitute the "commerce" of migratory birds.²¹⁵ The lack of other regulations makes the justification appear superficial, as if it were used to support the regulation in court rather than provide the rationale that

211. Linehan, *supra* note 184, at 418-19.

212. See *Cargill v. United States*, 516 U.S. 955, 957-58 (1995) (Thomas, J., dissenting) (dissenting from the denial of certiorari to *Leslie Salt Co. v. United States* because of the questionable constitutionality of the migratory bird rule); *Leslie Salt Co. v. United States*, 55 F.3d 1388, 1395 (9th Cir. 1995) (conceding that the migratory bird rule tests the limits of Congress's powers).

213. See Pirnot, *supra* note 162, at 398-99.

214. See J. Sloane Stricker, Noto, *Federal Wetland Jurisdiction Gets Swamped in the Fourth Circuit: An Analysis of United States v. Wilson*, 5 ENVTL. LAW. 225, 250-51 (1998).

215. See Linehan, *supra* note 184, at 417-18.

animates its use in practice. While a "race to the bottom" justification sounds persuasive at first blush, no evidence exists that this would occur, and, if it did, that the market would not fix the problem on its own. Without such proof, it is unclear whether the subject of the regulation has any effect on interstate commerce at all. The lack of such evidence shows that Congress has grounded its regulation on a possible, instead of a true, effect on interstate commerce. If it cannot find any effects on interstate commerce, the Court does not have to ask the *Lopez* question of whether the effect is substantial.

Moreover, the above justifications for finding the statute a constitutional exercise of Congress's Commerce Clause power pile up too many inferences to reach the substantial effect on interstate commerce.²¹⁶ The migratory bird rule requires numerous steps to reach its ultimate, and only possible, effect on interstate commerce.²¹⁷ The "race to the bottom" approach assumes that: (1) environmental regulations contribute significantly to interstate business relocation; (2) states would sacrifice their natural resources to attract business; (3) vast numbers of developers would move to that state to develop the limited number of isolated wetlands; and (4) such regulations would interfere with interstate commerce by creating unfair competition. Reaching the ultimate conclusion that the regulation substantially affects interstate commerce thus requires several tenuous logical steps. *Lopez* warns that the Court will not "pile inference upon inference" to constitutionalize the exercise of congressional power under the Commerce Clause.²¹⁸

The analysis of whether the "isolated wetlands" provision is constitutional could go either way. Yet again, the *Lopez* standard lacks adequate direction to guide courts to a reasoned answer. The substantial effects test's black letter principle can be manipulated by courts such that it becomes a meaningless magic word. It lacks the identification of an objective standard to guide the courts in their decisions.

b. The "Isolated Wetlands" Regulation of the Clean Water Act Under Functional Analysis

Functional analysis steps back from the issue and asks which governmental body should regulate, the states or the national government. The nature of environmental problems makes functional

216. See *Lopez*, 514 U.S. at 567.

217. See *supra* notes 211-12 and accompanying text.

218. *Lopez*, 514 U.S. at 567.

analysis difficult. Environmental problems rarely confine themselves to one state; they drift without regard to boundaries.²¹⁹ The amorphous nature of many environmental problems complicates the analysis of which entity should regulate.²²⁰ The environment, like race discrimination, is a thorn in the side of the Commerce Clause jurisprudence. Both test the outer limits of the Commerce Clause, making them candidates for poor precedent. Environmental problems often transcend state borders, but they do not always call for national legislation. Whether the states are *able* to legislate effectively and whether the states will, when able, act in the way that interested citizens across the country want them to act present difficult issues.

When confronted with an environmental problem, the ease of expanding the Commerce Clause might tempt the court to vest power over such difficult problems in Congress under the Commerce Clause's umbrella. A similar temptation prompted the Court to stretch the Commerce Clause to accommodate the Civil Rights Act of 1964.²²¹ The problem with making hard-issue exceptions to the otherwise reasoned and intelligible jurisprudence is the precedent it creates. Congress and future courts could read such a strained ruling as permission for Congress to legislate on anything. The difficulty of the analysis and the salience of environmental problems strains functional analysis no less than traditional jurisprudence. Isolated pockets of wetlands that are not even wet the entire year appear relegated to a specific area, which arguably makes it easy for the states to regulate isolated wetlands without national help. However, some scientists urge that all waterways are connected, and only by regulating each individual waterway can one efficiently protect waterways of seemingly greater significance.²²² If the environment is an integrated mass, it makes sense that only a national policy can protect it—a national approach could account for the effect one area has on another.

Yet a national policy may not be the success story that it at first appears. When the national government takes action, local and state environmental actors typically stop, relying on the assumption

219. See Norma Myers, *The Question of Linkages in Environment and Development*, 43 BIOSCIENCE 302, 302 (1993).

220. See ROD HAGUE ET AL., POLITICAL SCIENCE: A COMPARATIVE INTRODUCTION 111 (1992) (stating that environmental problems are regarded as "everyone's problem—and therefore as no one's [problem]").

221. See *supra* notes 69-75 and accompanying text.

222. See Lisa Wilson, Comment, *Substantial Effect under Lopez: Using a Cumulative Impact Analysis for Environmental Regulations*, 11 TUL. ENVTL. L.J. 479, 502 (1998). The Act itself seeks to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(c) (1994).

that the national policy will solve the problem.²²³ As noted above, stunting local policy experimentation can leave in place a dysfunctional national policy, with states unwilling—or unable, thanks to preemption—to solve the problem. Additionally, macro-management of the environment by the national government may not account for the particular ecological needs and characteristics of the countless local ecosystems that canvas the country. The characteristics of wetlands change from location to location. “What is considered wet in one area of the nation, such as the arid southwest United States, may be relatively dry for another area, such as Louisiana.”²²⁴ Worthwhile micro-management from Washington, D.C., may prove extremely costly. Nevertheless, the wisdom of particular policies and the efficiency of national regulation should not determine the extent of Congress’s power under the Commerce Clause. Judicial subjectivity in reviewing policies creates a danger of each new issue changing the bounds of Congress’s power. Confusion and instability will inevitably result if the meaning of the Commerce Clause turns on a scientific or efficiency rationale.

Functional analysis provides stability by only allowing the national government to regulate when the integrated national economy—not the utility of particular policies—so demands. National legislation under the Commerce Clause power cannot pass constitutional muster under functional analysis without a connection between the regulation and the integrated national economy. National legislation should only occur when realities of the national economy make state action effectively impossible, leaving national action as the only method of achieving the desired policy results. The notion that the national government can do a better job simply does not suffice.

Differing state regulations of isolated wetlands will not impair the smooth functioning of the integrated national economy. Moreover, the national economy does not prevent states from adopting the regulations they deem appropriate. Each state will engage in its own balancing of economic and environmental interests. Critically, each can do so without regard to other states’ decisions, as the market could demand a race to the bottom (no regulation in return for homebuilding opportunities) or a race to the top (plenty of regulations boosting neighboring property values and encouraging tourism).

223. See HAGUE, *supra* note 220, at 111; see also Steven Teles, *Think Local, Act Local: Civil Environmentalism*, NEW STATESMAN, Aug. 22, 1997, at 28.

224. Jon Kusler, *Wetlands Delineation, An Issue of Science or Politics?*, ENVT., Mar. 1992, at 10.

For most environmental regulations, protection of national natural resources provides the appropriate connection to the integrated national economy, justifying national legislation. "[W]hen state legislation, or the lack thereof, threatens national interests, the country cannot afford to permit a state to function as a legislative laboratory because the risk cannot be confined to that state. In these rare cases congressional interference is warranted."²²⁵ As a general proposition, cases in which local regulations threaten a particular national economic interest are rare, and often turn on the extent to which intrastate action affects interests outside the state. However, particular environmental resources—including certain waterways and airways—routinely express the need for congressional legislation because the risk to the integrated national economy posed by loss or destruction of those resources cannot be confined to individual states.

Yet an *isolated* wetland stands as an exception to environmental resources' routine need for congressional action because isolated wetlands, in and of themselves, do not form part of the web of natural resources that falls within the *national* interest. This difficult and admittedly unusual result springs from the fact that the wetland is, by its nature, isolated, a considerable distance from any navigable waterway.

This result achieves the best of both worlds. First, it allocates to the states some power over the environment, so that they have a reason to act and experiment rather than leaving the entire process to the national government. Second, the risks posed by experimenting with regulation of isolated wetlands and other resources that do not constitute national interests do not extend beyond the state itself. However, once you move beyond isolated wetlands to wetlands more closely connected to the national interest, the risks no longer remain confined to a single state. Thus, national legislation becomes imperative, as the states cannot be expected to adequately protect waterways and related wetlands that form the nation's web of water resources.

V. CONCLUSION

The use of functional analysis in the dissection of the Violence Against Women Act and the isolated wetlands provision of the Clean Water Act offers several important insights. The *Lopez* decision provides inadequate guidance to lower courts on how to analyze Com-

225. Alan R. Greenspan, Note, *The Constitutional Exercise of the Federal Police Power: A Functional Approach to Federalism*, 41 VAND. L. REV. 1019, 1052 (1988).

merce Clause challenges. It provides a standard that can be manipulated to produce both unconstitutional and constitutional interpretations. Functional analysis takes a practical approach by stepping back from the law and asking which governmental body should regulate under the dual-sovereign constitutional system. It prevents meaningless inquiries into the effect on commerce that, for example, migrating birds might have, by asking the important question of whether the several states can effectively regulate or the realities of the integrated national economy create a functional need for national action. Functional analysis does not leave the courts an easy task; it calls for ad hoc, case-by-case judgments. However, it provides necessary guidance that will prevent complete usurpation of the states' power by the national government.

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