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Barry Friedman
NYU School of Law, barry.friedman@nyu.edu

Genevieve Lakier
glakier@gmail.com

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BARRY FRIEDMAN AND
GENEVIEVE LAKIER

“TO REGULATE,” NOT “TO PROHIBIT”:
LIMITING THE COMMERCE POWER

Despite universal acknowledgment that Congress’s power to regulate interstate commerce does not constitute an unbounded police power, the difficulty has been in distinguishing “what is truly national and what is truly local.”¹ Since the New Deal, the effort to

Barry Friedman is the Jacob D. Fuchsberg Professor of Law at New York University School of Law. Genevieve Lakier is a 2011 graduate of the New York University School of Law, and a law clerk to the Honorable Martha Craig Daughtrey, United States Court of Appeals for the Sixth Circuit.

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¹ *Lopez v United States*, 514 US 549, 567–68 (1995). For cases insisting such limits must exist see, for example, *United States v Morrison*, 529 US 598, 608 (2000) (“[E]ven under our modern, expansive interpretation of the Commerce Clause, Congress’ regulatory authority is not without effective bounds.”); *NLRB v Jones & Laughlin Steel Corp.*, 301 US 1, 37 (1937) (“Undoubtedly the scope of [the commerce] power . . . 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.”); *Gibbons v Ogden*, 22 US 1, 194–95 (1824) (“The enumeration [in the Commerce Clause] of the particular classes of commerce, to which the power was to be extended, would not have been made, had the intention been to extend the power to every description. The enumeration presupposes something not enumerated.”).

do so has been notably unsuccessful. The Supreme Court has identified only two limiting principles, and neither has or is likely to affect congressional power much in the end. Commencing with *United States v Lopez*, the Supreme Court drew a line resting on the distinction between “economic” and “non-economic” activity.² That line quickly withered.³ Then, there was the decision in *National Federation of Independent Business v Sebelius*, distinguishing between economic “activity,” which Congress can regulate, and “inactivity,” which it cannot.⁴ Whatever one thinks of the decision on its merits, this is not a line Congress has needed to cross for over two hundred years, which is reason enough to doubt it will have much significance.⁵

Yet, there is one aspect of the commerce power—the question of what it means “to regulate” commerce—in which line-drawing might better foster federalism, but any attempt to do so has been abandoned. The Supreme Court is taken to have held, in its 1903 decision in *Champion v Ames* sustaining a congressional law banning the interstate transportation of lottery tickets, that Congress’s power “to regulate” commerce includes the power to prohibit it altogether.⁶ Based on that assumption, Congress has exercised free rein to shut down interstate markets, even if the states would have it otherwise. For over one hundred years, few commentators, and even fewer court decisions, have questioned Congress’s power to enact market bans as a “regulation” of interstate commerce.⁷

² *Lopez*, 514 US at 567.

³ See Jonathan H. Adler, *Is Morrison Dead: Assessing a Supreme Drug (Law) Overdose*, 9 Lewis & Clark L Rev 751, 765 (2005) (arguing that the distinction between economic and noneconomic activity no longer represents “a meaningful limit on federal power”); Thomas W. Merrill, *Rescuing Federalism after Raich: The Case for Clear Statement Rules*, 9 Lewis & Clark L Rev 823, 826 (2005) (arguing that “*Lopez*’s prohibitory rule [has been] watered down to the point where it may have little continuing significance”).

⁴ 132 S Ct 2566, 2589 (2012) (Roberts, CJ); *id.* at 2648 (Scalia, Kennedy, Thomas, and Alito, JJ, dissenting).

⁵ Immediate responses to the decision certainly suggested as much. See, for example, Jonathan Cohn, *Did Roberts Gut the Commerce Clause?*, New Republic (June 28, 2012), online at <http://www.tnr.com/blog/plank/104455/did-roberts-gut-the-commerce-clause>; Kevin Drum, *Obamacare Ruling Doesn’t Limit Congress Much*, Mother Jones (June 28, 2012), online at <http://www.motherjones.com/kevin-drum/2012/06/obamacare-ruling-doesnt-limit-congress-much>.

⁶ 188 US 321, 357–58 (1903).

⁷ There are, however, notable exceptions to this general rule. See Richard A. Epstein, *A Most Improbable 1787 Constitution: A (Mostly) Originalist Critique of the Constitutionality of the ACA*, in Nathaniel Persily, Gillian E. Metzger, and Trevor W. Morrison, eds, *The Health Care Case: The Supreme Court’s Decision and Its Implications* 28 (Oxford, 2013) (ar-

Gonzales v Raich is endemic of the problem.⁸ The plaintiffs in *Raich* were California residents who wished to cultivate and use marijuana for medicinal purposes, which was legal under California's Compassionate Use Act, but illegal under the federal Controlled Substances Act (CSA).⁹ Relying on *Lopez* and its progeny, *United States v Morrison*, the plaintiffs argued that the CSA was unconstitutional as applied to the purely intrastate, noncommercial use of marijuana.¹⁰ The *Raich* majority disagreed. Holding that Congress may regulate even purely intrastate noncommercial activity that, in the aggregate, might "undercut [its] regulation of the interstate market in that commodity," it found the application of the CSA to the plaintiffs' conduct entirely constitutional, given the risk that medical marijuana would seep into the interstate marijuana market and thereby impede Congress's efforts to shut that market down.¹¹ But what no one asked in *Raich* was where Congress got the power to shut down the interstate market in marijuana in the first place.¹² Instead, relying on *Champion*, the majority simply asserted that "[i]t has long been settled that Congress' power to regulate commerce includes the power to prohibit commerce in a particular commodity."¹³

The impact on federalism of blithely assuming that Congress has the power to shut down interstate markets is readily apparent. Roughly eighteen states have legalized the use of marijuana for medicinal purposes, and in 2012 two states—Colorado and Washington—legalized the recreational use of marijuana as well.¹⁴ This

guing that Congress cannot prohibit interstate commerce "at least absent some strong justification in some particular case"); Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U Chi L Rev 101, 139 (2001) (arguing that "[t]he power to regulate does not generally include the power to prohibit"); Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite United States v. Lopez*, 94 Mich L Rev 554, 576–77 (1995) (arguing that Congress should not usually have the power to ban goods that the states would allow). See also *Hammer v Dagenhart*, 247 US 251 (1918).

⁸ 545 US 1 (2005).

⁹ *Id.* at 6–7.

¹⁰ Brief for Respondents, *Gonzales v Raich*, No 03-1454, *12 (US filed Oct 13, 2004) (available on Westlaw at 2004 WL 2308766), citing *United States v Morrison*, 529 US 598 (2000).

¹¹ *Raich*, 545 US at 18.

¹² Seeking to minimize the import of the relief they were seeking, the plaintiffs in *Raich* did not challenge Congress's power to pass the Controlled Substances Act under the commerce power. *Id.* at 15.

¹³ *Id.* at 19 n 29.

¹⁴ Jack Healy, *Voters Ease Marijuana Laws in 2 States, but Legal Questions Remain*, NY Times P15 (Nov 7, 2012); 18 *Legal Medical Marijuana States and DC: Laws, Fees, and*

sort of state-by-state choice is often thought emblematic of the real virtues of a federal system. It encourages experimentation, localized democracy, and maximization of individual choice.¹⁵ Yet, under the Supremacy Clause, if Congress has the power to adopt the CSA, congressional will prevails.¹⁶ End of story.

The problem transcends marijuana of course—although, given the seemingly unending, expensive, yet equally unsuccessful war on drugs, one might think the cost of granting Congress the power to enact total bans of this sort to be particularly evident in this context.¹⁷ Nevertheless, Congress's ability to shut down interstate markets impedes the values of federalism whenever there is a good that some states wish to allow their citizens but the federal government prohibits. At times this has been an issue with regard to alcohol, gambling, and prostitution. Today there is a similar conflict between state and federal power with respect to products made of raw milk.¹⁸ And recent calls for federal bans on assault weapons and high-volume ammunition magazines may raise related concerns.

This article calls for a reexamination of the long-standing, yet inadequately examined, assumption that Congress's power to regulate interstate commerce necessarily includes the power not only

Possession Limits (ProCon.org, updated Feb 22, 2013), online at <http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881>.

¹⁵ See Barry Friedman, *Valuing Federalism*, 82 Minn L Rev 317, 389–400 (1997).

¹⁶ Robert Mikos argues that states retain authority to allow marijuana even in the face of the federal ban, but most other scholars disagree. Compare Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 Vand L Rev 1421, 1423 (2009) (arguing that “states retain both de jure and de facto power to exempt medical marijuana from criminal sanctions, in spite of Congress’s uncompromising—and clearly constitutional—ban on the drug”), with Robert J. Pushaw Jr., *The Medical Marijuana Case: A Commerce Clause Counter-Revolution?*, 9 Lewis & Clark L Rev 879, 912 (2005) (arguing that in the face of the federal ban, “no state may help its citizens who are enduring constant pain that can be relieved only through the controlled use of marijuana”); Susan R. Klein, *Independent-Norm Federalism in Criminal Law*, 90 Cal L Rev 1541, 1563 (2002) (suggesting state efforts to legalize marijuana will “never succeed” in the face of the federal ban); Caleb Nelson, *Preemption*, 86 Va L Rev 225, 261 (2000) (“If state law purports to authorize something that federal law forbids . . . then courts [] have to choose between applying the federal rule and applying the state rule, and the Supremacy Clause requires them to apply the federal rule.”).

¹⁷ See generally Steven B. Duke and Albert C. Gross, *America’s Longest War: Rethinking Our Tragic Crusade Against Drugs* (Putnam, 1993); Doug Bandow, *War on Drugs or War on America?*, 3 Stan L & Pol Rev 242, 245 (1991) (arguing that “drug prohibition is, at best, an imperfect, and at worst, a counterproductive vehicle for” protecting the public).

¹⁸ Although federal law bans the interstate transport of unpasteurized milk products, thirty states allow raw milk, under a variety of regulations. See 21 CFR § 1240.61 (banning raw milk); National Conference of State Legislatures, *Raw Milk*, NCSL.org (Oct 2012), online at <http://www.ncsl.org/issues-research/agri/raw-milk-2012.aspx> (detailing the various state regulatory schemes).

to (as the *Raich* Court put it) “protect” interstate markets but also to “eradicate” them.¹⁹ Nothing in the analysis advanced here is easy or definitive. Nevertheless, it suggests that there are very good reasons to resist an unthinking adherence to the assumption that under its power to regulate commerce, Congress also can shut it down.

The case for limiting congressional power is grounded in history, albeit history that unfortunately has been lost to us over the years. At the Founding and for more than one hundred years thereafter, Congress’s power to regulate commerce was *not* thought to include the power to prohibit it. Nor, in fact, did *Champion v Ames* hold otherwise. Rather, *Champion* simply countenanced a federal regulatory ban on the interstate shipment of lottery tickets in a situation in which all states already had banned the lottery.²⁰ The federal statute at issue in *Champion* was a “helper” law facilitating state choices, not barring them. It was only after the decision in *Champion* that the dam of federal power burst open. And even then, the extension of federal power to issues such as gambling and narcotics was left unjustified by anything other than a (misplaced) citation to *Champion* and a highly formal test that deemed anything crossing state lines a “regulation” of commerce.

But the case here rests as well on constitutional structure and the theory of American federalism. If this article accomplishes nothing else, it seeks to force a debate, and require a justification—beyond a simple citation to *Champion*—when Congress seeks to shut down a market some states would allow. Constitutional limits govern not only the courts but members of Congress as well. Under the interpretation of the Commerce Clause offered here, Congress must justify its decision to privilege the preferences of some states over others when in fact both sets of preferences could be respected. Once the question is analyzed, rather than the answer simply assumed, the case for congressional power to prohibit markets becomes notably weaker and the argument for state autonomy concomitantly greater.

This article ultimately concludes that restricting Congress’s ability to shut down markets would not render either the states or the

¹⁹ *Raich*, 545 US at 19 n 29 (2005) (asserting that the difference between regulations that seek “to protect and stabilize” interstate markets and those that seek “to eradicate” them is “of no constitutional import”).

²⁰ See notes 85–93, and accompanying text.

federal government unable to act in the face of moral, physical, or environmental threats to the public welfare. First, Congress retains the power “to regulate” commerce, even if it cannot prohibit it altogether. Second, Congress can enact “helper” statutes like the one at issue in *Champion*, to assist states in enforcing their own choices. Third, Congress can ban individual products from the market when doing so would be “in service” of the broader market. (A classic example is the federal ban on the interstate transportation of diseased cattle that Congress passed in 1884 not out of antipathy to the possession of diseased cattle but in order to protect and foster a vibrant national livestock market.²¹) What Congress may not do, however, is determine that it will shut down trade that some of the states would allow.

In Part I, we advance the argument in terms both originalist and grounded in one hundred years of subsequent historical practice. The evidence from the Constitutional Convention and the ratification debates makes clear that Congress’s power “to regulate Commerce . . . among the several States” was meant to foster the free flow of interstate commerce, not curtail it. For over one hundred years after the Founding, the country adhered to this view of Congress’s interstate commerce power. Few even argued otherwise, and at no point did Congress act as if it possessed the power to ban markets in goods that the states would allow. This history calls into question any easy assumption that the power “to regulate” commerce necessarily includes the power to eradicate it.

In Part II, we explore why this long-standing interpretation of Congress’s interstate commerce powers changed around the turn of the twentieth century. We explain that, following *Champion*, Congress increasingly came to rely upon its power to prohibit the movement of things in commerce for two reasons. First, prohibiting the circulation of goods in commerce provided Congress a means by which to regulate an increasingly integrated national economy without appearing to regulate the purely intrastate activities that the Court, in 1895, declared to be beyond the reach of federal power.²² But once the Court adopted the now-familiar “substantial effects” test of commerce power, this first use of the power to prohibit commerce became entirely vestigial—it is altogether unnecessary

²¹ Animal Industry Act, 23 Stat 31 (1884).

²² *United States v E. C. Knight Co.*, 156 US 1, 21 (1895).

today.²³ Second, Congress used its power to ban interstate markets to restrict consumers' access to the vice goods that many believed posed a serious threat to social progress and stability in an industrializing age. Yet, the cases sustaining such use of congressional power were remarkably candid in stating that, in going after vice, Congress effectively was exercising a police power of the sort historically reserved to the states. If prohibiting commerce—rather than fostering it and regulating it—is nothing but an exercise of the power of police, then the existence of that power in Congress requires squaring up with long-standing notions of federalism.

In Part III, we argue that there are structural reasons, grounded in principles of American federalism, why the states should have primary responsibility for determining what kinds of goods can legally circulate in domestic markets. Filling out Framing-era understandings of the proper division between the national and state governments with modern economic analysis of the values of federalism, we explain in Part III.A that the only conceivable justification for allowing Congress to ban markets—other than simply granting Congress a generalized police power—is to control the spillover costs of state diversity. We conclude that although the matter is not entirely free from doubt, the spillover rationale standing alone is insufficient justification to allow Congress to prohibit commerce, in large part because it either cannot work, or proves too much.

In Part III.B, we specify what it would mean to deny Congress the power to “prohibit” commerce. We make clear that, although Congress would not under this interpretation of the Commerce Clause have the power to ban interstate markets, it would still be able to ban goods when doing so serves, rather than restricts, the interstate market. “In-service” laws of this kind have a long genealogy that significantly predates the *Champion* rule. Because they do not work to shut interstate commerce down, but instead typically help enforce the rules by which interstate commerce operates, they do not represent prohibitions of commerce in the sense used here or in the nineteenth-century debates. Congress would also have the power to adopt “helper” statutes. Helper statutes do what the name

²³ *United States v Darby*, 312 US 100, 122 (1941) (upholding the Fair Labor Standards Act based on its effect on interstate commerce); *NLRB v Jones & Laughlin Steel Corp.*, 301 US 1, 37 (1937) (adopting the substantial effects test for exercises of the Commerce Clause).

suggests: they lend federal enforcement authority to states that have chosen through their own democratic processes to ban certain goods. Because statutes of this kind leave it to each state to determine what goods to ban or allow, they also do not constitute prohibitions of commerce, in the sense of the term used here.

Finally, in Part III.C we take up possible objections to our reading of the Commerce Clause. We argue that because Congress would still be able to enact in-service laws and helper statutes, restricting Congress's ability to prohibit markets would not undermine its ability to regulate the national economy, or to protect the environment or public health. It would simply keep Congress from prohibiting interstate trade that "states themselves" would allow. We also defend against the objection that drawing a line between regulation and prohibition would be, in practice, unworkable or too difficult to enforce. Although the distinction is not always an easy one to draw, we conclude that it is neither incoherent nor impossible to maintain—particularly if we recognize that it need not only be the courts that bear responsibility for enforcing the rule, but members of Congress themselves.

Many truths that seem universal at one time, turn out not to be at another. So it was with lottery tickets, and alcohol, and may ultimately prove the case with marijuana. State divergence on these issues necessarily calls into question the universality of such truths. When states diverge, it suggests uniform regulation may not only be unnecessary, but that it may be inappropriate or even counterproductive. The simple fact is that Congress's power to regulate commerce was not thought to encompass the power to prohibit it for the first half of the country's history. The claim here is not novel—it just has been lost to us. At the least, recovering it requires us to ask provocative but important questions about the scope of federal power, particularly when the states disagree among themselves.

I. THE FOUNDING AND THE NINETEENTH CENTURY

Although it is commonly assumed today that Congress's power "to regulate" commerce necessarily includes the power to prohibit it, this was not how the Commerce Clause was always understood. At the Founding, and for roughly 115 years thereafter, the dominant view was that Congress did not possess the authority to ban goods merely because they crossed state lines. This is not

to say that there was no disagreement on the question. There was, particularly as it related to the domestic slave trade.²⁴ But as late as 1886, a report prepared by the House Judiciary Committee could assert that a proposed bill to ban the interstate sale of oleomargarine was “plainly unconstitutional” and declare itself entirely ignorant of any arguments to the contrary. As the report explained (and it is worth reading this carefully):

Your committee are not aware that it has ever been asserted for the power to regulate commerce that it involved a power to prohibit the free transportation of the products of each State through and into every other; and it could hardly have been within the minds of the framers of the Constitution to give to Congress the power to do so, when history shows that the purpose of giving the power to Congress and taking it from the States was to prevent the very result which this construction of the clause would involve and bring about. . . .

It may be within the meaning of this clause such needful regulations as to articles transported from State to State as will conserve the safety and well-being of the transportation, but the right to say what articles shall and what shall not be the subject of commerce is not included in the regulation of the commerce in such articles.²⁵

Congress agreed, ultimately choosing to regulate oleomargarine under its taxing rather than its commerce powers.²⁶

In this part, we show that the Judiciary Committee report was correct in its reading of constitutional history from the Founding to the end of the nineteenth century. This history calls into question any easy assumption that Congress’s power to regulate commerce inevitably or necessarily includes its prohibition.

A. FOUNDING ASSUMPTIONS

While there was a paucity of discussion at the Constitutional Convention about the domestic commerce power, extant evidence suggests the Framers neither imagined nor intended Congress to possess the power to determine, via prohibition, what kinds of goods could move in interstate markets. Congress’s power over foreign commerce received far more attention, and here it was clear that the power “to regulate” foreign commerce included the power to ban it. No doubt, the relative lack of conversation about

²⁴ See note 60 and accompanying text.

²⁵ *Adulteration of Food*, HR Rep No 49-1880, 49th Cong, 1st Sess 2 (1886).

²⁶ Oleomargarine Act of 1886, 24 Stat 209.

the domestic power makes drawing certain conclusions more difficult.²⁷ Still, the Framers clearly intended the domestic commerce power to serve very different purposes than the foreign commerce power. The authority to ban commerce made much more sense in the context of the foreign commerce power, and silence about a like authority in the context of domestic commerce is telling.

The primary reason for granting Congress the domestic commerce power was *to facilitate* interstate trade and protect it against the sort of protectionist state trade policies that occurred all too frequently under the Articles of Confederation. Such laws proliferated in the weak economic climate of the post-Revolutionary period, as states attempted to protect local manufacturers by discriminatorily taxing and regulating domestic imports, and by restricting the access of other states' vessels to local ports.²⁸ These measures generated increasing concern about their effect on the national economy, and political unity. As Alexander Hamilton argued in Federalist No. 22:

The interfering and unneighbourly regulations of some States, contrary to the true spirit of the Union, have, in different instances, given just cause of umbrage and complaint to others, and it is to be feared that examples of this nature, if not restrained by national controul, would be multiplied and extended, till they become not less serious sources of animosity and discord than injurious impediments to the intercourse between the different parts of the confederacy.²⁹

The Framers plainly sought to take from the states the power to pass “interfering and unneighbourly regulations” of this kind. They also sought to empower Congress to make uniform rules for trade, so that what James Madison described as “the perverse-

²⁷ See Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 Minn L Rev 432, 443, 446, 470 (1941) (“The first thing that strikes one’s attention in seeking references directed to interstate commerce is their paucity.”). See also Grant S. Nelson and Robert J. Pushaw Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control over Social Issues*, 85 Iowa L Rev 1, 35 n 138 (1999) (noting that “during the Convention and Ratification debates, many participants declared, without challenge, that everyone agreed that the Commerce Clause would be especially beneficial” without elaborating further what it meant).

²⁸ Cathy D. Matson and Peter S. Onuf, *A Union of Interests: Political and Economic Thought in Revolutionary America* 70–74 (Kansas, 1990); Barry Friedman and Daniel T. Deacon, *A Course Unbroken: The Constitutional Legitimacy of the Dormant Commerce Clause*, 97 Va L Rev 1877, 1884–85 (2011).

²⁹ Federalist 22 (Hamilton), in Jacob E. Cooke, ed, *The Federalist* 135, 137 (Wesleyan, 1961).

ness” of the states would not hamper “concert in matters where common interest requires it.”³⁰ In both cases, the ultimate aim was to facilitate what Hamilton described in Federalist No. 11 as the “unrestrained intercourse between the States” that he, and other Federalists, believed would promote both economic prosperity and political unity.³¹

No one suggested, during the framing or ratification of the Constitution, that in addition to facilitating an unrestrained intercourse between the states, Congress also would be empowered to *restrain* such intercourse, by restricting what goods could cross state lines or be sold in interstate markets. When delegates referred to Congress’s interstate commerce powers, they referred to them exclusively as a solution to the problem of burdensome or discriminatory state legislation.³² On the few occasions in which participants discussed Congress’s domestic commerce powers, they depicted them along the lines Hamilton and Madison suggested in the Federalist papers: as a mechanism for “preserv[ing] . . . a beneficial intercourse among [the states].”³³

An absence of debate alone hardly provides irrefutable evidence of constitutional meaning, but this particular silence speaks loudly given the quite explicit acknowledgment that under its *foreign* commerce power, Congress would possess the power not only to regulate—that is, to set rules for—trade with foreign nations, but also to limit it. Indeed, there was wide agreement among the delegates in Philadelphia that Congress would have the authority to pass what were colloquially referred to as “navigation acts,” restricting what kinds of ships could legally bring goods into and out of the United States, and what kinds of goods they could carry.³⁴

³⁰ James Madison, *Vices of the Political System of the United States*, in Jack N. Rakove, ed., *James Madison: Writings* 69, 71 (Library of America, 1999).

³¹ Federalist 11 (Hamilton), in Jacob E. Cooke, ed., *The Federalist* 65, 71 (Wesleyan, 1961). Hamilton argued that “[a]n unrestrained intercourse between the States themselves” would advantage all the states, and disadvantage none, by promoting “the trade of each, by an interchange of their respective productions, not only for the supply of reciprocal wants at home, but for exportation to foreign markets.” *Id.*

³² See Abel, 25 Minn L Rev at 470 (cited in note 27) (describing each mention of the domestic commerce power during the Constitutional Convention).

³³ Roger Sherman, *Observations on the New Federal Constitution*, New-Haven Gazette 1 (Dec 25, 1788).

³⁴ The term was borrowed from Great Britain, which beginning in 1651 passed a number of Navigation Acts to protect British ships and manufacturers from foreign competition. In many cases the acts also restricted foreign goods themselves. See Roger J. Delahunty,

Empowering Congress to limit foreign trade in this manner was believed necessary to defend U.S. interests against the exclusionary trade policies that Great Britain imposed in the wake of the Revolution.³⁵ These laws barred U.S. ships and most kinds of U.S. goods from access to British ports and caused significant damage to U.S. industries, which depended heavily on trade with Britain and Britain's colonies. Yet the states proved incapable of a coordinated response and Congress was not able to get the supermajority approval necessary under the Articles of Confederation to respond in kind.³⁶

Congress's power to ban goods in foreign commerce was the subject of quite explicit debate; the power was not granted unknowingly or without challenge. Federalists promoted the view that, as a major benefit of union under the new constitution, Congress would be able to enact "prohibitory regulations . . . capable of excluding Great Britain . . . from all our ports."³⁷ Southern delegates, in contrast, expressed considerable concern that Congress would unduly limit foreign trade in order to protect northern industries, and northern ships, to the detriment of the much more import-dependent southern states.³⁸ They also expressed anxiety about the possibility that Congress would use its foreign commerce power to ban the importation of slaves. Representatives of Georgia and South Carolina even threatened to walk out of the convention if their concerns on this score were not addressed—which they were, eventually, by the agreement to include in the Constitution

Federalism Beyond the Water's Edge: State Procurement Sanctions and Foreign Affairs, 37 *Stan J Intl L* 1, 18 (2001).

³⁵ See *id.* at 17 ("Courts and legal scholars have long recognized the desire for an effective national authority to regulate foreign commerce—more specifically, an authority that would enable the states to take concerted action to resist and retaliate against exclusionary British trade practices—was one of the primary causes of the agitation for the Constitution of 1787."). See also Nelson and Pushaw, 85 *Iowa L Rev* at 22, 25 (cited in note 27).

³⁶ See Delahunty, 37 *Stan J Intl L* at 17–19 (cited in note 34) (discussing the federal response); Jacques LeBoeuf, *The Economics of Federalism and the Proper Scope of the Federal Commerce Power*, 31 *San Diego L Rev* 555, 595–98 (1994) (discussing the state response).

³⁷ *Federalist* 11 (Hamilton) at 66–67 (cited in note 31).

³⁸ Abel, 25 *Minn L Rev* at 454 (cited in note 27) ("This objection, that the power to regulate commerce, by a mere majority, would facilitate adoption of a navigation act beneficial to the shipping states and prejudicial to the South, was a favorite subject of complaint with the Southern opponents of the constitution."). See also Max Farrand, ed, 2 *The Records of the Federal Convention of 1787* 449–53 (rev ed 1937) (discussing the possibility that a northern-dominated Congress would use its foreign commerce powers to pass "oppressive regulations" harmful to the southern states).

the Migration or Importation Clause, barring any restriction on the importation of slaves until 1808.³⁹

In contrast to their expressed worries about Congress foreclosing the foreign slave trade, southern delegates were noticeably silent about the possibility that Congress would use its power over interstate commerce to restrict or prohibit the interstate sale or transport of commodities, including the most controversial of commodities, slaves.⁴⁰ Nor did anyone else suggest that Congress's interstate commerce powers were equivalent to its foreign commerce powers in this respect. As the historian David Lightner notes, "[a]lthough the Antifederalists racked their brains to conjure up every possible objection to the Constitution, not one of them ever suggested that it opened the way for Congress to restrict the interstate movement of slaves."⁴¹ Any number of historians have interpreted the silence of the southern states on this issue as decisive proof that Congress's interstate commerce powers were not intended by the Framers to empower Congress to prohibit the interstate sale or transport of slaves, or anything else.⁴²

Southern delegates and Antifederalists also failed to raise any concern about the possibility that Congress might limit what goods traveled in interstate markets in order to advance certain

³⁹ US Const, Art I, § 9, cl 1. See David L. Lightner, *Slavery and the Commerce Power: How the Struggle Against the Interstate Slave Trade Led to the Civil War* 17–19 (Yale, 2006) (discussing the deal).

⁴⁰ Walter Berns, *The Constitution and the Migration of Slaves*, 78 Yale L J 198, 205–06 (1968) (“[I]t is surprising how little was said in the South concerning [the Interstate Commerce Clause], surprising because the clause obviously affected commerce in slaves in some manner and because, just as obviously, Congress was being given authority to regulate domestic as well foreign commerce.”); Abel, 25 Minn L Rev at 476 (cited in note 27) (noting that, in Philadelphia, “the possibility of federal restraints on the movements of slaves in interstate commerce was not once mentioned”).

⁴¹ Lightner, *Slavery and the Commerce Power* at 32 (cited in note 39).

⁴² See David Brion Davis, *The Problem of Slavery in the Age of Revolution, 1770–1832* 128–29 n 33 (Cornell, 1975) (concluding that there is “no reason to believe that the framers intended or could have agreed upon” giving Congress the power to interdict the interstate slave trade); Abel, 25 Minn L Rev at 475–76 (cited in note 27) (invoking the “deep” and “significant silence” of the southern states as “striking proof of the relatively limited scope of the power over interstate, as compared with foreign, commerce”); Alan N. Greenspan, Note, *The Constitutional Exercise of the Federal Police Power: A Functional Approach to Federalism*, 41 Vand L Rev 1019, 1023 (1988) (“If the power over commerce among the states was intended by the Framers to be an independent grant of affirmative power over domestic affairs . . . the southern states would have perceived the interstate commerce power as a potential threat to the institution of slavery.”); Lightner, *Slavery and the Commerce Power* at 36 (cited in note 39) (“[T]he vast majority of white southerners would never have accepted the Constitution if they had thought that it granted such power.”).

commercial interests over others. Delegates did worry that the Commerce Clause empowered Congress to establish “mercantile monopolies”—that is, to dictate that only certain persons or entities could provide certain kinds of goods and services to the interstate market.⁴³ That was as far as it went, however. It seems to have occurred to no one that Congress might act not only to limit who could provide goods and services to the interstate market but also to limit what kinds of interstate markets could exist.

In short, both positive and negative evidence suggests that the Framers did not intend—and probably did not even imagine—that the Interstate Commerce Clause would be read in such a way as to give Congress the power to “restrain” interstate intercourse, as well as to promote it.

Critics of this view make primarily a textual argument. Because Congress’s power “to regulate” interstate commerce appears in the same clause granting that power over foreign commerce, critics argue that the two powers must be read *in pari materia*. In other words, if Congress’s power “to regulate” foreign commerce includes the power to ban the import of foreign goods—as everyone at the convention agreed it did—then the same must be true of domestic goods as well.⁴⁴ But there is no evidence from the Found-

⁴³ One of the reasons that Elbridge Gerry of Massachusetts provided for refusing to sign the Constitution draft was that “[u]nder the power over commerce, monopolies may be established.” Farrand, ed, 2 *Records of the Convention* at 633 (cited in note 38). See also Abel, 25 *Minn L Rev* at 459–60 (cited in note 27).

⁴⁴ See, for example, Jack M. Balkin, *Commerce*, 109 *Mich L Rev* 1, 28 (2010); Nelson and Pushaw, 85 *Iowa L Rev* at 46 n 185 (cited in note 27). Proponents of this view also sometimes point to the Migration or Importation Clause as textual evidence of the Framers’ intent. They argue that the fact that the clause refers to both the migration and the importation of “such Persons as any of the States now existing shall think proper to admit” suggests that it was meant to apply to both the foreign slave trade—which involved the “importation” of slaves into the United States—and the interstate slave trade—which involved their “migration” across state lines. See, for example, Berns, 78 *Yale L J* at 214 (cited in note 40); see also Robert J. Pushaw Jr. and Grant S. Nelson, *A Critique of the Narrow Interpretation of the Commerce Clause*, 96 *Nw U L Rev* 695, 702 (2002). The historical evidence does not appear to support this interpretation of the clause, however. Instead, as David Lightner has argued, evidence from the drafting debates suggests that “migration” was either intended to refer to the immigration of free whites or was included in the clause to avoid the ire of antislavery delegates who might object to referring to slaves as property subject to “importation.” Lightner, *Slavery and the Commerce Power* at 27, 36 (cited in note 39) (noting that the “preponderance of evidence is against the Berns thesis”). See also Paul Finkelman, *Slavery and the Founders: Race and Liberty in the Age of Jefferson* 204 n 87 (Sharpe, 2d ed 2001) (arguing that Berns’s thesis “defies all understanding of the Convention” and that “Berns . . . provides no evidence that anyone at the Constitutional Convention or in any of the state ratifying conventions believed this. . . . At no time before 1861 did any president, leader of Congress, or majority in either house of Congress accept this analysis.”).

ing to support this position, other than the language of the clause itself, and there is no reason the verb “to regulate” must mean the same thing in different contexts.

First, when the Constitution invoked the power “to regulate,” it did not always encompass the power to prohibit. For example, Article I, Section 8 gives Congress the power “to coin money, [and] *regulate* the Value thereof.” One might respond that, given the context, it simply makes no sense to read the clause as granting Congress the power to “coin money [and] to prohibit its value.”⁴⁵ But that’s the very point—to the Framing generation it also seems not to have made sense to read the power “to regulate” interstate commerce to include the power to prohibit it. It is difficult to believe that if it had occurred to them, it would not have engendered discussion similar to what occurred regarding the foreign commerce power.

Second, and perhaps more important, the foreign and interstate commerce powers were understood as aimed at distinct evils, suggesting that the power “to regulate” each must be read to address distinct problems. James Madison certainly argued as much. In 1819, when debates about the introduction of slavery into the Missouri territories broke out, Madison expressly denied that Congress had the authority to ban the interstate sale of slaves, notwithstanding its clear authority to ban their foreign import and export.⁴⁶ In a letter he wrote to Virginia state senator Joseph Cabell in 1829, Madison made even more explicit his view that the interstate and foreign commerce clauses were neither intended, nor should be construed, as vesting Congress with equivalent power. “I always foresaw that difficulties might be started in relation to [the interstate commerce power],” Madison stated.

Being in the same terms with the power over foreign commerce, the same extent, if taken literally, would belong to it. Yet it is very certain that it grew out of the abuse of the power by the importing states in taxing the non-importing, and was intended as a negative and preventive provision against injustice among the States themselves, rather than as a power to be used for the positive purposes of the General Government, in which alone, however, the remedial power could be lodged.

⁴⁵ Randy Barnett makes this point, even while remaining committed to a textualist interpretation of the clause as a whole. Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U Chi L Rev 101, 140 (2001).

⁴⁶ Letter from James Madison to Robert Walsh (Nov 27, 1819), in Max Farrand, ed, 3 *The Records of the Federal Convention of 1787* 437 (rev ed 1937).

And it will be safer to leave the power with this key to it, than to extend it all the qualities and incidental means belonging to the power over foreign commerce.⁴⁷

Madison hardly stands alone on this point; a number of commentators since have made precisely the same point: that despite the similarity of constitutional language, the two powers should be interpreted differently, in light of the very different problems to which they were addressed.⁴⁸

B. SUBSEQUENT INTERPRETATIONS

This interpretation of the Founders' intentions is reinforced by the first century of postratification practice. Although Congress regularly passed laws prohibiting foreign trade, it did not pass any laws to prohibit interstate trade for well over one hundred years. On a few occasions it passed laws that restricted what goods could travel across state lines, but only when doing so was necessary to safeguard a domestic market or helped enforce the diverse domestic policies of the states. Still, Congress did not pass a ban on commerce that was neither an in-service law nor a helper law for the country's first century.

1. *No breach during the first century.* Following ratification, in the area of *foreign* commerce, Congress passed a number of what Hamilton referred to as "prohibitory regulations." In 1794, for example, it passed a law banning the export from the United States of "any cannon, muskets, pistols, bayonets, swords, cutlasses, musket balls, lead, bombs, grenados, gunpowder, sulphur or saltpetre."⁴⁹ In 1806, it banned the importation of any silk, leather, hemp, tin, or brass goods from Great Britain or Ireland.⁵⁰ In 1807, it banned the importation of slaves, effective January 1, 1808.⁵¹

⁴⁷ Letter from James Madison to Joseph C. Cabell (Feb 13, 1829), in Farrand, ed, 3 *Records of the Convention* at 478 (cited in note 46).

⁴⁸ See Regan, 94 Mich L Rev at 577-78 n 95 (cited in note 7) (arguing that the verb "regulate" "has a different most natural meaning as applied to foreign and to interstate commerce, given that the situations of the union and the individual states are quite different in these two arenas"); Abel, 25 Minn L Rev at 475 (cited in note 27) ("Despite the formal parallelism of the grants, there is no tenable reason for believing that anywhere nearly so large a range of action was given over commerce 'among the several states' as over that 'with foreign nations.'").

⁴⁹ Act of May 22, 1794, 1 Stat 369.

⁵⁰ Act of Apr 18, 1806, 2 Stat 379.

⁵¹ Act of Mar 2, 1807, 2 Stat 426.

Most dramatically, three days before Christmas 1807, it passed an Embargo Act, prohibiting all ships in the United States from traveling to foreign ports, save with the express permission of the President.⁵² The Act, and supplementary Embargo Acts passed the following year, made “virtually everything that moved in commerce in the United States potentially subject to seizure.”⁵³

In contrast, although Congress passed many regulations of domestic commerce, it enacted no prohibitions of what kinds of goods could travel in interstate commerce. The First Congress almost immediately set about establishing rules for the licensing of ships that participated in coastal (that is, interstate) trade.⁵⁴ It funded the building of lighthouses, beacons, buoys, and public piers.⁵⁵ In later years, Congress remained heavily involved in regulating and improving the waterways and other channels of interstate commerce, and the ships that traveled along them.⁵⁶ It also passed, very early on, a number of helper laws, designed to lend federal muscle to the enforcement of state trade regulations and restrictions. In 1799, for example, Congress enacted “An Act respecting Quarantines and Health Laws.”⁵⁷ The Act “authorized and required [officers of the United States] faithfully to aid in the execution of [state] quarantines and health laws, according to their respective powers and precincts, and as they shall be directed, from time to time, by the Secretary of the Treasury of the United States.”⁵⁸ At no point, however, did Congress establish its own restrictions on what goods could travel across state lines.

Indeed, where prohibitions targeted at foreign trade appeared likely to affect the domestic market, Congress expressly carved out exemptions for those engaged in interstate trade. Hence, a proviso to the Embargo Acts exempted from its prohibitions any ships that engaged in purely domestic trade. The only caveat was

⁵² Embargo Act of 1807, 2 Stat 451.

⁵³ Jerry L. Mashaw, *Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era, 1801–1829*, 116 Yale L J 1636, 1654 (2007).

⁵⁴ See, for example, Act of Sept 1, 1789, 1 Stat 55.

⁵⁵ Act of Aug 7, 1789, 1 Stat 53.

⁵⁶ Hence, for example, in 1838 and 1852 Congress passed a series of ambitious statutes, setting rules for the construction and maintenance of steamboat boilers. Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 Stan L Rev 1189, 1196 (1986).

⁵⁷ Act of Feb 25, 1799, 1 Stat 619.

⁵⁸ *Id.* See also Act of Apr 2, 1790, 1 Stat 106 (directing federal customs officers to “pay due regard to the inspection laws of the states in which they may respectively act”).

that “the owner, master, consignee, or factor of the vessel” had to give bond to guarantee that “the ship’s cargo would be re-landed in some port of the United States, ‘dangers of the sea excepted.’”⁵⁹

It was not until the 1818–19 debates about whether slavery would be permitted in the new state of Missouri that slavery abolitionists came up with the argument that Congress had the constitutional authority to ban the interstate sale as well as the importation of slaves.⁶⁰ The fact that it took thirty years for abolitionist groups to recognize that the Commerce Clause could be interpreted to vest Congress with the same power to prohibit the interstate as the foreign slave trade suggests how strongly the assumptions of the Founding generation dictated the opposite conclusion.

Outside of the immediate context of the slavery debate, no one suggested that Congress could or should impose any restraints on what goods circulated in interstate markets. Instead, it appears to have been widely accepted that, as the House Judiciary Committee report put it, Congress did not have the power “to prohibit the free transportation of the products of each State through and into every other.”⁶¹ This helps explain why, in 1849, a report examining the efficacy of a federal law that banned the importation, but not the domestic sale or interstate transport, of adulterated medicines could note without elaboration that the bill would be far more effective if it also banned domestic manufacture or sale of drugs, but that under the constitutional system, only the states had the power to enact such a ban.⁶²

To the extent Congress wanted to ban articles of commerce in the first hundred years, it relied on other Article I powers. In 1867, Congress passed a law banning the sale, and the possession with intent to sell, of a particular kind of “illuminating oil.”⁶³ But

⁵⁹ Mashaw, 116 Yale L J at 1651 (cited in note 53) (citing Embargo Act § 1).

⁶⁰ Lightner, *Slavery and the Commerce Power* at 37–38, 48–52 (cited in note 39). The first suggestion Congress might have such power was made by worried southerners in 1807 in the context of Congress exercising its power to ban the importation of slavery in 1808. *Id.* at 37.

⁶¹ HR Rep No 49-1880 at 2 (cited in note 25).

⁶² *Report of the Secretary of the Treasury*, S Exec Doc No 30-16, 30th Cong, 2d Sess 8 (concluding that “[t]he general government has done all in its power, and it is incumbent on the several States, by special statute, to render penal the conduct that endangers the lives and health of the citizens”).

⁶³ Revenue Act of 1867 § 29, 14 Stat 471, 484.

those who passed the law apparently believed that they were exercising their taxing, rather than their Commerce Clause authority—or at least hoped to make it appear that way. Hence, the ban was included in the Internal Revenue Act of March 2, 1867, and applied generally, rather than to just the sale or possession with intent to sell across state lines.⁶⁴ The Supreme Court nevertheless struck the statute down as an unconstitutional attempt to use the Commerce Clause to enact a “police regulation, relating exclusively to the internal trade of the States.”⁶⁵ Suitably chastened, Congress did not repeat the mistake. When, in the 1860s and 1870s, it got increasingly involved in the moral policing of domestic markets—for reasons we explore below—it relied on the Postal Clause, rather than its Commerce Clause powers, to do so. In 1868, Congress passed a law banning the distribution of lottery tickets in the mail.⁶⁶ In 1873, it passed the Comstock Act, which made it illegal to send obscene material (including material about contraception) through the mail.⁶⁷ And when it finally passed the Oleomargarine Act in 1886, it imposed a tax rather than a ban, to avoid any constitutional difficulties.⁶⁸

2. *No breach despite industrialization.* By the late nineteenth century, industrialization and the nationalization of the market were putting increasing pressure on Congress to enact commercial regulations. As many scholars have noted, industrialization contributed to economic growth but also posed a serious challenge to local and state systems of regulation by rendering an increasing amount of economic life beyond their jurisdiction and control.⁶⁹ In addition, in an increasingly nationalized marketplace, clashing state regulations of matters such as food quality and labeling troubled manufacturers seeking to do business on a national scale,

⁶⁴ Robert L. Stern, *That Commerce Which Concerns More States Than One*, 47 Harv L Rev 1335, 1357–58 (1934). See also *United States v Dewitt*, 76 US (9 Wall) 41, 43 (1869) (noting the claim that, in passing the statute, Congress intended to exercise its power under the Taxing Clause).

⁶⁵ *Dewitt*, 76 US at 43–44.

⁶⁶ Act of July 27, 1868 § 13, 15 Stat 194, 196.

⁶⁷ 17 Stat 598.

⁶⁸ 24 Stat 209.

⁶⁹ See, for example, Rabin, 38 Stan L Rev at 1194 (cited in note 56) (explaining how the interconnectedness of railroads obligated Congress to regulate them).

leading industry groups to lobby Congress in the 1880s and 1890s to act.⁷⁰

Yet, when Congress responded to the pressures of industrialization with legislation, it largely adhered to the original understanding of the interstate commerce power as more limited in scope than the foreign commerce power. Hence, although in the late nineteenth century, Congress passed a number of bills prohibiting the import and export of adulterated or otherwise inferior food and drugs, it refused to similarly regulate the domestic food and drug markets.⁷¹ Congress's reluctance was due largely to concerted opposition by states' rights advocates who argued that such legislation would amount to "virtually a regulation of [] manufacture within the state" and therefore exceeded Congress's power under the Commerce Clause.⁷²

On several occasions, Congress did in fact pass legislation that prohibited the transport of goods across state lines, but these laws were plainly "in service" of the well-being of the national economy, rather than an attempt to dictate to the states what goods were proper subjects of commerce. In 1884, for example, Congress passed the Animal Industry Act, which banned the transport of diseased cattle across state lines.⁷³ The purpose of the Act was to ensure that the "great transcontinental lines of railways, and their network of branches . . . [that were then] rapidly penetrating to all the valleys and grazing ranges of the West" did not threaten the health of the domestic cattle industry by carrying disease to all the states through which they passed.⁷⁴ Similar justifications

⁷⁰ Charles Wesley Dunn, *Original Food and Drugs Act of 1906: Its Legislative History*, 1 Food Drug Cosm L J 297, 306, 303 (1946) ("[W]hen the 1906 act was enacted the state food and drug laws were in an irreconcilable condition of divergent and conflicting provisions, e.g., with respect to food standards" and that as a result "organizations of the food and drug industries and trades . . . supported the enactment of th[e federal] law from the beginning to the end of its legislative career.").

⁷¹ Examples of import laws regulating food and drugs that Congress passed during this period include the Tea Importation Act, 29 Stat 604 (1897), the Meat Inspection Act, 26 Stat 1089 (1891), and the Import Drugs Act, 9 Stat 237 (1848). For discussion of Congress's failure to pass similar regulations of the domestic market, see Thomas A. Bailey, *Congressional Opposition to Pure Food Legislation, 1879-1906*, 36 Am J Soc 52, 52 (1930) (noting that during this period "it was comparatively easy to pass a measure governing the importation of foreign goods, less easy to regulate exported goods, less easy to improve food conditions in the District of Columbia, and exceedingly difficult to prohibit adulterated foods in interstate commerce").

⁷² Dunn, 1 Food Drug Cosm L J at 307 (cited in note 70).

⁷³ Animal Industry Act, 23 Stat 31 (1884).

⁷⁴ *Bureau of Animal Industry*, HR Rep 48-119, 48th Cong, 1st Sess 4 (1884).

were invoked in support of the 1893 National Quarantine Act, which authorized the Secretary of the Treasury to make rules and regulations to prevent the introduction of disease into any state or territory whose own regulations were deemed to be insufficient to do so.⁷⁵

In-service laws of this kind had an established lineage. The Steamboat Boiler Act of 1838, for example, prohibited the transportation of any goods “upon the bays, lakes, rivers or other navigable waters of the United States” on any steamboats that had not satisfied the inspection requirements set up by the Act.⁷⁶ It did so to ensure the safety of what was at the time one of the most important instruments of interstate trade and transportation in the United States. It thus provides a very early example of an in-service law that included a prohibition.

Despite the existence of precedents like the Steamboat Boiler Act, however, it is notable that both the Animal Industry Act and the National Quarantine Act generated considerable constitutional debate. Opponents challenged the constitutionality of what appeared at the time to be the unprecedented use of federal power to limit what goods could travel across state lines.⁷⁷ (Earlier statutes, like the Steamboat Boiler Act, targeted only the vehicles that carried goods across state lines, not the goods themselves.) The fact that even what appears today to be federal regulation of the most obvious and necessary kind engendered stiff opposition when it involved a ban on commerce emphasizes the original understanding that it was the states, and the states alone, that determined

⁷⁵ National Quarantine Act, 27 Stat 449 (1893); Edwin Maxey, *Federal Quarantine Laws*, 23 Pol Sci Q 617, 622 (1908) (“recurring epidemics of yellow fever in the sixties, seventies and eighties created a popular sentiment which forced Congress to do something more than ‘second the motion.’”). Maxey notes, however, that “[e]ven under pressure, Congress moved very cautiously.” Id.

⁷⁶ Steamboat Boiler Act of 1838 § 2, 5 Stat 304.

⁷⁷ See, for example, 15 Cong Rec 938–39 (Feb 6, 1884) (statement of Rep Gibson) (calling the Animal Industry Act a “fraud” and objecting to the fact that the bill gives to a federal agent the power to “adopt rules and methods and say in what kind of cars you shall carry your cattle, . . . and that no man shall transport cattle otherwise than according to the rules adopted by [the agent]”; arguing also that, by vesting a federal agent with the power to “build a wall of fire around” any state that it found to possess diseased cattle, the bill “invade[s] constitutional rights . . . [and] invade[s] every idea and every principle of good government”); Carleton B. Chapman and John M. Talmadge, *Historical and Political Background of Federal Health Care Legislation*, 35 L & Contemp Probs 334, 339 (1970) (noting that the Quarantine Act passed but only “after lively debate” and significant opposition from states’ rights advocates, who argued that Congress had “no jurisdiction to enact quarantine or health laws overruling the laws of the states”).

what goods were fit subjects of commerce in their markets.

Legislative debates over the Wilson Act of 1890 also demonstrate the strength of Congress's commitment in the late nineteenth century to the view that it belonged to the states to determine what goods circulated in their markets—though Congress could pass “helper laws” to assist with enforcement. The Wilson Act provided that all liquor transported into a state or territory “shall upon arrival . . . be subject to the operation and effect of the laws of such State or Territory . . . to the same extent and in the same manner as” domestically produced liquor.⁷⁸ The Act was a direct response to the Supreme Court's holding in *Leisy v Hardin*, handed down earlier that year, that states could not constitutionally ban the sale of alcohol imports—at least so long as they remained in their original packaging.⁷⁹ The opinion did suggest, however, that states like Iowa could ban the sale of such goods if and when Congress gave them permission to do so.⁸⁰ The Wilson Act was Congress's attempt to do just that.

In adopting the Wilson Act, members of Congress went out of their way to make clear that it was a helper law, and as such did not trench on the states' police powers. Senator James Wilson argued, for example, that the bill was intended only “to grant to the states what may be called a local option, to allow them to do as they please in regard to the liquor question.”⁸¹ Senator James George, a states-right Democrat from Mississippi, confessed that he was “constrained to support the bill, since only through such legislation can the States, under the decision of the Supreme Court, exercise their rightful and necessary jurisdiction over” the liquor question.⁸² Indeed, like the 1799 “Act respecting Quarantines and Health Laws”⁸³—and many other helper statutes Congress passed subsequently—the Wilson Act supported, rather than supplanted, state policymaking by providing federal muscle and federal legitimacy to help enforce state regulations. Thus it is that

⁷⁸ Wilson Act, 26 Stat 313 (1890).

⁷⁹ 135 US 100, 125 (1890).

⁸⁰ *Id.* at 123–24.

⁸¹ Richard F. Hamm, *Shaping the Eighteenth Amendment: Temperance Reform, Legal Culture, and the Polity, 1880–1920* 80 (North Carolina, 1995).

⁸² 21 Cong Rec 4957–58 (May 20, 1890); see also *id.* at 5325–30 (May 27, 1890) (statement of Sen George) (elaborating on this point).

⁸³ Act of Feb 25, 1799, 1 Stat 619.

throughout the nineteenth century, Congress adhered to the view that its power over interstate commerce did not include the power to prohibit that commerce, at least when doing so was not an in-service law necessary to conserve the safety and well-being of the channels of interstate commerce, or a helper law necessary to help ensure the effectiveness of state policymaking. Views on this limitation were about to change, however, in the aftermath of the Supreme Court's decision in *Champion v Ames*.

II. OF VESTIGIAL VIRTUE AND VICE: THE CHAMPION POWER

The 1903 decision in *Champion v Ames* was taken by some to signal a decisive shift away from the view—dominant through the end of the nineteenth century—that Congress lacked the power under the Commerce Clause to prohibit interstate commerce that the states would allow.⁸⁴ But, as we make clear below, a far narrower reading of *Champion* was available, one that was perfectly consistent with earlier understandings of the scope of Congress's commerce power. In this part, we explain why views of Congress's commerce power changed in the wake of *Champion*, and show how the decision came to be interpreted to allow Congress to exercise a police power akin to that of the states.

A. CHAMPION, ON ITS OWN TERMS

At issue in *Champion* was the constitutionality of an 1895 law, “An Act for the suppression of lottery traffic through national and interstate commerce,” conventionally known as the Lottery Act.⁸⁵ The Act made it a crime to bring lottery tickets into the United States or to carry them “from one State to another in the United States.”⁸⁶ The defendant, Charles F. Champion, was arrested after he used the Wells Fargo Express Company to ship Paraguayan

⁸⁴ *Champion v Ames*, 188 US 321 (1903). In 1911, for example, Frederick H. Cooke interpreted *Champion* to mean that “under the power to regulate commerce, Congress may likewise interfere by way of prohibition or otherwise with transportation between points in different states.” Frederick H. Cooke, *The Source of Authority to Engage in Interstate Commerce*, 24 Harv L Rev 635, 638–39 (1911). See also Alfred Russell, *Three Constitutional Questions Decided by the Federal Supreme Court During the Last Four Months*, 37 Am L Rev 503, 505–07 (1903) (“So the court decided [in *Champion*] . . . that the power to regulate does involve the power to prohibit interstate commerce altogether”).

⁸⁵ Lottery Act, 28 Stat 963 (1895).

⁸⁶ *Id.*

lottery tickets from San Antonio, Texas, to Fresno, California.⁸⁷ Champion argued that his arrest was illegal because Congress lacked the constitutional authority to prohibit the interstate circulation of lottery tickets.⁸⁸ After hearing argument in the case twice, the Court, in a 5–4 decision, sustained Congress’s power to enact the Lottery Act under the Commerce Clause.

Although *Champion* was later read to grant Congress broad power to prohibit the interstate transport of goods, Justice Harlan’s opinion made perfectly clear that he viewed the Lottery Act as a helper statute, an attempt by Congress to shore up state police power, not to trench upon it. He was quite explicit on this point:

In legislating upon the subject of the traffic in lottery tickets, as carried on through interstate commerce, *Congress only supplemented the action of those States*—perhaps all of them—which, for the protection of the public morals, prohibit the drawing of lotteries, as well as the sale or circulation of lottery tickets, within their respective limits. *It said, in effect, that it would not permit the declared policy of the States, which sought to protect their people against the mischiefs of the lottery business, to be overthrown or disregarded by the agency of interstate commerce.*⁸⁹

Congressional power was necessary to aid the states, Justice Harlan explained, because “Congress alone has the power to occupy, by legislation, the whole field of interstate commerce.”⁹⁰ As one commentator explained, “The power was exercised it was said, not in hostility to the State, but supplementing the actions of those States which had for the protection of public morals prohibited the drawing of lotteries or the circulation of lottery tickets within their respective limits.”⁹¹

This reading of the decision is supported by the fact that, when Congress passed the Lottery Act in 1895, all forty-four states already banned lotteries.⁹² The statute thus merely reflected the widely shared view that lotteries were a “pestilence” that had to be exterminated. Unlike the Wilson and Animal Industry Acts, the Lottery Act was passed with almost no constitutional debate

⁸⁷ Herbert F. Margulies, *Pioneering the Federal Police Power: Champion v. Ames and the Anti-Lottery Act of 1895*, 4 J Southern Legal Hist 45, 46 (1996).

⁸⁸ *Id.*

⁸⁹ *Champion*, 188 US at 357 (emphasis added).

⁹⁰ *Id.*

⁹¹ Paul Fuller, *Is There a Federal Police Power?*, 4 Colum L Rev 563, 584 (1904).

⁹² G. Robert Blakey and Harold A. Kurland, *The Development of the Federal Law of Gambling*, 63 Cornell L Rev 923, 941 (1978).

whatsoever, suggesting that members of Congress did not believe they were doing anything novel.⁹³ Undoubtedly many members of Congress viewed the statute as nothing more than a helper statute that lent federal muscle to help enforce the state prohibitions on the sale of lottery tickets.

In this context, the *Champion* majority's conclusion that the Lottery Act was a legitimate exercise of Congress's commerce power may stand for something much less than a blanket authority to ban. Indeed, Justice Harlan was careful to narrow the scope of the holding. He did state that "regulation may sometimes appropriately assume the form of prohibition," but this assertion was made in the specific context of a discussion of Court decisions upholding in-service and helper statutes.⁹⁴ Furthermore, responding to the dissenters' complaints about the possible reach of the opinion, Justice Harlan made clear that he was deciding what needed to be decided, and no more:

*It is said, however, that if, in order to suppress lotteries carried on through interstate commerce, Congress may exclude lottery tickets from such commerce, that principle leads necessarily to the conclusion that Congress may arbitrarily exclude from commerce among the states any article, commodity, or thing, of whatever kind or nature, or however useful or valuable, which it may choose, no matter with what motive, to declare shall not be carried from one state to another. It will be time enough to consider the constitutionality of such legislation when we must do so. The present case does not require the court to declare the full extent of the power that Congress may exercise in the regulation of commerce among the states.*⁹⁵

Thus *Champion* need not be, and perhaps should not be, read—despite some loose language in Justice Harlan's opinion—to hold

⁹³ Margulies, 4 J Southern Legal Hist at 50–51 (cited in note 87).

⁹⁴ *Champion*, 188 US at 358. As support for this claim, Justice Harlan pointed specifically to *In re Rabrer*, 140 US 545 (1891), which affirmed the constitutionality of the Wilson Act, the helper statute discussed in Part II, and *Reid v Colorado*, 187 US 137 (1902), which recognized federal power to enact the Animal Industry Act, the in-service law discussed also in Part II. See 188 US at 359–60. Justice Harlan also invoked the Sherman Antitrust Act, 26 Stat 209 (1890), as "an illustration of the proposition that regulation may take the form of prohibition." *Champion*, 188 US at 360. As Justice Harlan himself noted, the object of the Sherman Act was "to protect trade and commerce against unlawful restraints and monopolies." *Id.* The Sherman Act was therefore, like the Animal Industry Act but unlike the Lottery Act, an in-service law that aimed to protect interstate markets from the problems associated with monopolization, rather than to limit what markets could exist.

⁹⁵ *Id.* at 362 (emphasis added).

that Congress's power to regulate commerce necessarily includes the power to prohibit it.

B. WHY THE BREACH AFTER CHAMPION?

Despite Justice Harlan's careful qualifications, Congress was quick to read *Champion* as granting it broad authority to prohibit the transport of articles of commerce across state lines, and in subsequent cases the Court upheld Congress's authority to do so.⁹⁶ Only once thereafter, in *Hammer v Dagenhart*, did the Court impose any limits on Congress's authority to prohibit the interstate movement of goods—and even then, the Court quickly abandoned its own limitation.⁹⁷

Two factors appear to have motivated Congress, as well as the Court, to affirm a broad federal power to ban interstate commerce. First, industrialization, and the increasingly integrated nature of the national economy, led industry groups and others to place increasing pressure on Congress to regulate the national marketplace. Because the Commerce Clause jurisprudence of the late nineteenth century made it impossible for Congress to regulate economic production directly, it embraced a broad interpretation of *Champion* to justify its regulation of products (as well as persons) crossing state lines. This use of *Champion* quickly became vestigial, however, once the Court—in cases such as *NLRB v Jones & Laughlin Steel Corp.* and *United States v Darby*—recognized Congress's authority to regulate activities that, even if not commerce themselves, have a “substantial effect” on interstate commerce.⁹⁸ Sec-

⁹⁶ See, for example, *Hoke v United States*, 227 US 308 (1913) (affirming Congress's power to prohibit the interstate transportation of women for purposes of prostitution); *United States v Sullivan*, 332 US 689 (1948) (affirming Congress's power to prohibit the sale of unlabeled goods that had at one point in their life cycle crossed state lines); *Gonzales v Raich*, 545 US 1 (2005) (affirming Congress's power to prohibit the intrastate possession and sale of drugs). See generally Diane McGimsey, *The Commerce Clause and Federalism after Lopez and Morrison: The Case for Closing the Jurisdictional-Element Loophole*, 90 Cal L Rev 1675, 1685–1701 (2002) (chronicling the evolution of the *Champion* line of cases).

⁹⁷ 247 US 251 (1918). The *Hammer* Court held that, although Congress could prohibit goods when the fact of transportation itself was necessary to the harm that the federal prohibition aimed to prevent—when, in other words, the harm came about either during or after the transportation of the good—it could not constitutionally prohibit goods in order to prevent harms that occurred prior to transportation. *Id.* at 271. Whether or not this distinction was a plausible one, the Court quickly lost its commitment to enforcing it. See *United States v Darby*, 312 US 100, 116 (1941) (noting that “*Hammer v. Dagenhart* has not been followed” and citing cases).

⁹⁸ *NLRB v Jones & Laughlin Steel Corp.*, 301 US 1, 37 (1937); *United States v Darby*, 312 US 100, 119–20 (1941).

ond, the social changes taking place in early twentieth-century America led to the growth of popular movements aimed at the prohibition of vices such as alcohol and gambling. These movements increasingly focused their demands on the federal, rather than the state, governments. *Champion's* potentially expansive view of federal power over goods moving across state lines allowed Congress to respond to both sets of demands.

1. *Regulating the national economy—until the rise of “substantial effects.”* Although *Champion* was itself ambiguous on whether, and to what extent, Congress could prohibit the interstate transportation of goods when those goods did not themselves pose a direct threat to the instrumentalities of commerce, it was quickly seized on to justify federal regulation of the interstate food and drug markets. *Champion* was cited in the congressional debates over the Pure Food and Drug Act of 1906, for example, and when a unanimous Court upheld the law, it expressly invoked *Champion* as authority.⁹⁹

Champion was soon put to even broader purposes yet; it was relied upon as justification for the federal regulation of economic production and other purely intrastate economic activities that previously had been understood to be beyond the scope of Congress's power. In *United States v E. C. Knight*, the Supreme Court had held that Congress was powerless under the Sherman Antitrust Act to criminalize the establishment of a monopoly power in sugar production.¹⁰⁰ The Court famously drew a line between the regulation of “manufacturing”—a purely intrastate activity beyond Congress's authority—and the regulation of interstate commerce itself:

The fact that an article is manufactured for export to another state does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the state and belongs to commerce.¹⁰¹

Champion allowed Congress to work around the restrictions that

⁹⁹ See, for example, 40 Cong Rec 2762 (Feb 21, 1906) (statement of Sen Knox) (quoting heavily from *Champion*); *Hipolite Egg Co. v United States*, 220 US 45, 57–58 (1911) (citing *Champion* as support for Congress's power not only to prohibit the transportation of adulterated food and drugs across state lines, but also to seize food and drugs shipped in contravention of the law “wherever [they are] found”).

¹⁰⁰ 156 US 1, 16–18 (1895).

¹⁰¹ *Id* at 13.

the decision in *E. C. Knight* imposed on its ability to regulate production and manufacturing. Although Congress could not, under *E. C. Knight*, regulate intrastate commercial activity directly, it could achieve the same result by banning the products of that activity from interstate commerce. In 1938, for example, in *Electric Bond & Share Company v SEC*, the Court cited *Champion* to support the constitutionality of provisions of the Public Utility Holding Company Act that punished holding companies that failed to register with the Securities and Exchange Commission by barring them from the use of the instrumentalities of commerce.¹⁰² Similarly, in *NLRB v Fainblatt*, in 1939, the Court invoked *Champion* to uphold the application of the National Labor Relations Act to employers who were not themselves engaged in interstate commerce but who received and shipped goods in interstate commerce.¹⁰³

This first novel use of the *Champion* rule served as a stopgap measure between the “spatialized” conception of federal commerce power of the nineteenth-century cases, and the “consequentialist” model of congressional power that would emerge from the New Deal cases. Under the earlier model, the boundary between federal commerce power and state police power was drawn with reference to the location of the regulated goods and their position in a stream of commerce. Under the rule first articulated by Chief Justice Marshall in *Brown v Maryland*, federal power attached to goods that traveled in interstate markets only while they remained in transit.¹⁰⁴ The decision in *E. C. Knight* made clear how strongly this spatialized model continued to dominate constitutional jurisprudence at the turn of the century. Indeed, the central justification that the *E. C. Knight* Court provided for why federal power did not reach manufacturing was a temporal one: namely, that “[c]ommerce succeeds to manufacture, and is not a part of it.”¹⁰⁵

By continuing to identify federal commerce power with the movement of goods across state lines, *Champion*, and the cases that followed after it, managed to adhere to this essentially spatialized conception while at the same time expanding federal power to regulate the national economy. Decisions such as *Electric Bond &*

¹⁰² 303 US 419, 442 (1938).

¹⁰³ 306 US 601, 608–09 (1939).

¹⁰⁴ 25 US 419, 441–42 (1827).

¹⁰⁵ *E. C. Knight*, 156 US at 12.

Share Company and *Fainblatt* demonstrate how the *Champion* rule allowed Congress to evade at least some of the restrictions imposed on its authority by the commerce-manufacturing distinction. But under this approach the test of federal power became increasingly formal, requiring only that some kind of interstate movement take place, at some point in the life of the regulated object or entity.¹⁰⁶

Beginning with the decision in *Jones & Laughlin*, however, the Court moved away from its spatialized approach and toward a new consequentialist logic of “effects.”¹⁰⁷ The “effects” test focused not on the location of the regulated activities but instead on their connection to, and effect upon, the integrated interstate economy. This approach took the integrated nature of the national economy as a given, and asked whether the regulated activity had an impact on it.

Wickard v Filburn is emblematic of the new consequentialist approach.¹⁰⁸ The facts of *Wickard* are familiar. Filburn, who grew wheat for consumption on his family farm, exceeded his congressionally authorized allotment. The question was whether Congress had the power to regulate Filburn’s purely intrastate, noncommercial cultivation of wheat.¹⁰⁹ The Supreme Court answered in the affirmative: “Even if appellee’s activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce.”¹¹⁰

Wickard is controversial among those who today fret over the extent of congressional power, but if the substantial effects test makes sense, then so does *Wickard*.¹¹¹ The law at issue in *Wickard*—

¹⁰⁶ In later cases, the Court explicitly held as much. See *Scarborough v United States*, 431 US 563 (1977) (finding the fact that a gun had at some point in its life cycle traveled across state lines sufficient to vest Congress with the authority to regulate it under the Commerce Clause); *United States v Bass*, 404 US 336, 350 (1971) (suggesting same); McGimsey, 90 Cal L Rev at 1700 (cited in note 96) (“In sum, after *Bass* and *Scarborough*, . . . Congress could regulate any person or good that had ever crossed state lines, even if that line crossing was entirely unconnected with the regulated activity, as long as Congress included a jurisdictional element in the statute.”).

¹⁰⁷ *Jones & Laughlin*, 301 US at 37.

¹⁰⁸ 317 US 111 (1942).

¹⁰⁹ *Id* at 113–14.

¹¹⁰ *Id* at 125.

¹¹¹ See, for example, Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 Va L Rev 1387, 1450–51 (1987) (criticizing *Wickard* as “stand[ing] a clause of the Constitution upon its head”).

the Agricultural Adjustment Act of 1938—was intended to stabilize wheat prices by limiting the domestic production of the crop.¹¹² Although Filburn intended to use his above-quota wheat on his own farm rather than selling it on the open market—and even if he had, what he produced was, in terms of the national market, only a miniscule amount of wheat—what the *Wickard* Court recognized was that if everyone did what Filburn did, demand for wheat on the open market would drop and so would prices, thereby undermining the congressional scheme.¹¹³ *Wickard* thus gave birth to the notion that in evaluating substantial effects, any given activity must be considered in the aggregate.¹¹⁴ One might disagree with the law at issue in *Wickard* on policy terms, but if Congress was going to have regulatory control over the national economy, then Filburn's conduct was logically within that power.

Once cases like *Wickard* made clear that Congress no longer needed to rely upon interstate movement to justify its regulation of the national economy, but could regulate activities that were themselves not interstate commerce so long as they had a substantial effect on interstate commerce, the first novel use of *Champion* became entirely vestigial. The pivot point was *United States v Darby*, the decision that (a) gave the substantial-effects line of cases its name, but (b) also still relied heavily upon the now unnecessary *Champion* rationale to sustain the legislation there at issue.¹¹⁵ *Darby* involved a challenge to provisions of the Fair Labor Standards Act, which set minimum wages and maximum hours for employees who engaged in the production of goods for interstate commerce.¹¹⁶ In his opinion for a unanimous Court, Justice Stone invoked *Champion* both to affirm the constitutionality of the pro-

¹¹² 317 US at 115, citing Agricultural Adjustment Act of 1938, § 331, 52 Stat 52 (codified at 7 USC § 1331).

¹¹³ See *Wickard*, 317 US at 128–29 (“It is well established by decisions of this Court that the power to regulate commerce includes the power to regulate the prices at which commodities in that commerce are dealt in and practices affecting such prices. . . . It can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions. . . . This record leaves us in no doubt that Congress may properly have considered that wheat consumed on the farm where grown, if wholly outside the scheme of regulation, would have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices.”).

¹¹⁴ *Id.* at 127–28.

¹¹⁵ *Darby*, 312 US at 119–20.

¹¹⁶ *Id.* at 108–09.

hibition on the interstate shipment of goods made in violation of the Act and to affirm the constitutionality of the wage and hour provisions.¹¹⁷

The Court's first basis for upholding the FLSA relied on the logic of *Champion*, applied in what can only be characterized as an "inside-out" way. The prohibition on interstate shipment was constitutional, Justice Stone argued, because "Congress . . . is free to exclude from the commerce articles whose use in the states for which they are destined it may conceive to be injurious to the public health, morals or welfare, even though the state has not sought to regulate their use."¹¹⁸ Note the oddness of the reasoning here. Congress's power to regulate what ultimately crosses state lines was used to reach backward to allow it to control what eventually will cross state lines. Obedience to *Champion* required the Court effectively to turn the FLSA on its head, construing the regulations that were its primary purpose—the wage and hour provisions—as merely necessary and proper means of effectuating the border-crossing prohibition.

Darby is a landmark case, however, because of the entirely separate argument Justice Stone made to justify the constitutionality of the FLSA wage and hour provisions: the logic of substantial effects. Specifically, Justice Stone held that the FLSA's wage and hour regulations were constitutional because they were a necessary and proper means, not to effectuate the ban on interstate circulation, but to protect the market against "unfair competition." As he explained:

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

¹¹⁷ Id at 113–16, 124.

¹¹⁸ Id at 114.

terstate commerce is so related to the commerce and so affects it as to be within the reach of the commerce power.¹¹⁹

In other words, Congress could directly regulate wages and hours, not because those goods would someday cross state lines, but because their manufacture affected commerce, and the regulation of interstate commerce now was understood in an integrated national economy to include commercial activity in one state that might indirectly affect commercial activity in the others.

As *Darby* demonstrated, once courts had available to them the consequentialist vocabulary of substantial effects, they no longer needed to rely upon the formal logic of the *Champion* cases to uphold Congressional regulations of production. It was within this substantial effects rubric that the Court justified most of the major Commerce Clause regulations Congress passed in the post-New Deal period, such as the loansharking measure at issue in *Perez v United States*.¹²⁰ With regard to federal regulation of the interstate market—even federal regulations aimed, like the Civil Rights Act of 1964, at moral ends—*Champion* became, therefore, entirely unnecessary: a remnant of an era before it was possible to justify federal power using the logic of substantial effects.¹²¹

2. *Regulating vice—Congress’s power of police.* This is not to say that *Champion* became entirely vestigial. In the early twentieth century, Congress began to shut down markets simply because it disapproved of particular goods or services—also relying upon *Champion* to do so. These laws included the Mann Act, barring the interstate transportation of women for immoral purposes, the Wire Act of 1961, an antigambling statute banning the interstate transmission of wagers and bets in interstate commerce, and—of course—the CSA, which although technically upheld by the Court in *Raich* under the substantial effects test, was in fact premised on *Champion*.¹²² These laws could not be justified by the logic of “substantial effects.” Rather, they point to the other primary mo-

¹¹⁹ *Id.* at 122–23.

¹²⁰ 402 US 146, 146–47, 151–54 (1971) (upholding Title II of the Consumer Credit Protection Act under a logic of “substantial effects”).

¹²¹ Civil Rights Act of 1964, Pub L No 88-352, 78 Stat 241, codified as amended at 42 USC §§ 1981–2000h6.

¹²² White Slave Traffic (Mann) Act, 36 Stat 825 (1910), codified as amended at 18 USC §§ 2421–24; Wire Act, Pub L No 87-216, 75 Stat 491, codified as amended at 18 USC § 1084; Controlled Substances Act, Pub L No 91-513, 84 Stat 1242 (1970), codified as amended at 21 USC § 801 et seq.

tivation behind the Court and Congress's embrace in the early twentieth century of the expansive *Champion* power: namely, the intense political mobilization taking place at the time around the problem of vice.

During the last few decades of the nineteenth century and the first few decades of the twentieth century, social progressives joined forces with Christian reformers to spearhead national campaigns to suppress vices such as alcohol, gambling, and prostitution, which they saw as posing a serious problem to social progress in the industrial age.¹²³ These laws were aimed in part at the waves of immigrants who were then entering the country.¹²⁴ As William Howard Moore, summarizing a generation of scholarship on the morals policing side of progressivism, noted:

[T]he campaigns against prostitution, the saloon, and gambling constituted important elements of national progressivism. Reformers saw these institutions as part of the social disorder resulting from rapid expansion and industrialization. Not only would Progressives seek to tame the forces of growth itself but they would also seek to ameliorate its immediate impact on the community. The brothel, saloon, and gambling parlor seemed to many Progressives distinct threats to home, the work ethic, and even to the political process.¹²⁵

Champion was read, by Congress and the Court alike, as justifying these new anti-vice laws; the simple fact that something crossed a state line was deemed sufficient to allow a federal ban. The Mann Act of 1910, for example, prohibited the interstate transportation of women “for the purpose of prostitution or debauchery, or for any other immoral purpose.”¹²⁶ Proponents of the law argued that it was necessary to protect women from the

¹²³ See generally David Langum, *Crossing over the Line: Legislating Morality and the Mann Act* (Chicago, 2007); Gaines M. Foster, *Moral Reconstruction: Christian Lobbyists and the Federal Legislation of Morality, 1865–1920* (North Carolina, 2002); Nicola Kay Beisel, *Imperiled Innocents: Anthony Comstock and Family Reproduction in Victorian America* (Princeton, 1997); Paul Boyer, *Urban Masses and Moral Order in America, 1820–1920* (Harvard, 1978); David J. Pivar, *Purity Crusade, Sexual Morality, and Social Control: 1858–1900* (Greenwood, 1973); Jason H. Timberlake, *Prohibition and the Progressive Movement, 1900–1920* (Harvard, 1963).

¹²⁴ See, for example, Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 *Yale L J* 1362, 1370–71 (2010) (“Immigrants challenged the economic position of skilled workers, the political control of the Republican Party, and the moral authority of dominant protestant religious groups.”).

¹²⁵ William Howard Moore, *Progressivism and the Social Gospel in Wyoming: The Anti-gambling Act of 1901 as a Test Case*, 15 *Western Hist Q* 299, 301 (1984).

¹²⁶ White Slave Traffic Act, 36 Stat 825 (1910), codified as amended at 18 USC §§ 2421–24.

dangerous prostitution rings that were believed to forcibly conscript women into prostitution by plying them with liquor and carting them across state lines.¹²⁷ Opponents of the law pointed out, however, the lack of evidence that state laws were inadequate to prohibit either the forcible conscription or the resulting prostitution of women, and argued that the proposed federal law neither protected nor promoted interstate commerce.¹²⁸ Thus the only justification for federal intervention, as Representative William C. Adamson of Georgia noted to applause, was that the interstate transportation of women for immoral purposes polluted the channels of commerce, like the diseased animals prohibited by the Animal Industry Act or the lottery tickets in *Champion*.¹²⁹ This was not an argument that proponents (for obvious reasons) pressed too hard. Nevertheless, the Act passed with a sizable majority.

Despite the speciousness of the commerce argument regarding the Mann Act—that women crossing state lines for commercial sex were polluted in the same way as diseased cattle—the Court, in *Hoke v United States*, upheld the law without dissent, citing *Champion*.¹³⁰ Four years later, in *Caminetti v United States*, the Court held the Mann Act constitutional even as applied to defendants who traveled across states lines to engage in purely non-commercial sex and who therefore lacked any connection to interstate “commerce.”¹³¹

The difficulty was that, in truth, these statutes were really noth-

¹²⁷ See Langum, *Crossing over the Line* at 4 (cited in note 123) (describing these arguments).

¹²⁸ See, for example, 45 Cong Rec 1033 (Jan 26, 1910) (statement of Rep Adamson).

¹²⁹ Id (“Now, the present proposition is that a general ticket unlimited to the use of any person shall be tabooed and the man shall be imprisoned for buying it if it is to be used by a woman to go into another State for the purpose of prostitution. Now, in order to be parallel with either of the cases cited, in order for the proponents of this legislation to find in either of these cases a single leg to stand on, much less a case going on all fours, they must show either, as in the quarantine case, that the woman’s condition of vileness and immorality is contagious by contact, and that by using the ticket in paying for transportation on the train there is danger of contagion and contamination to the other persons and things being transported, or they must show, in order to parallel the case of the lottery ticket, the horrible falsehood that women are creatures per se vile and immoral, designed and intended in nature for no other than immoral purposes.”).

¹³⁰ 227 US 308, 321 (1913).

¹³¹ 242 US 470 (1917). The Court cited *Champion* as support for the proposition that “the authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question.” Id at 491–92.

ing other than police power regulations masquerading as regulations of interstate commerce, a fact acknowledged with remarkable candor in the Supreme Court opinions upholding them. In *Champion* itself, Justice Harlan observed: “If a State, when considering legislation for the suppression of lotteries within its own limits, may properly take into view the evils that inhere in the raising of money, in that mode, why may not Congress, invested with the Power to regulate commerce among the several States, provide that such commerce shall not be polluted by the carrying of lottery tickets from one State to another?”¹³²

When the Court upheld laws under this understanding of *Champion* it frequently resorted to describing congressional power as akin to the state police power. In *Hoke*, the Court explicitly acknowledged that “Congress [could] adopt not only means necessary but convenient to its exercise,” including laws that “have the quality of police regulations.”¹³³ Later opinions freely endorsed this view. In *Brooks v United States*, for example, the Court affirmed the constitutionality of the Stolen Motor Vehicles Act, which made it a federal crime to transport stolen vehicles across state lines, by noting that “Congress can certainly regulate interstate commerce to the extent of forbidding and punishing the use of such commerce as an agency to promote immorality, dishonesty or the spread of any evil or harm to the people of other States from the State of origin.”¹³⁴ In acting in such a manner, the Court noted, Congress “is merely exercising the police power, for the benefit of the public, within the field of interstate commerce.”¹³⁵

Of course, no one—then or now—really believed Congress possessed a general power of police. Rather, the logic of the cases was implicitly premised on the following reasoning: (a) Congress is banning something crossing state lines; (b) congressional power over commerce is “plenary”; therefore (c) Congress may use its power to regulate interstate commerce to enact what are in essence simple police regulations. As the Court said in *Caminetti*: “the authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sus-

¹³² *Champion*, 188 US at 356.

¹³³ *Hoke*, 227 US at 323.

¹³⁴ 267 US 432, 436 (1925).

¹³⁵ *Id.* at 436–37.

tained, and is no longer open to question.”¹³⁶ In *Raich*, the Court went even further. It did not even pretend to justify the state border-crossing part of the rationale. Instead it simply cited *United States v Lopez* citing *Champion*.¹³⁷

In short, the reasoning of these cases became strained and completely formalistic. The mere fact that a good or a person crossed a state line was deemed sufficient to give Congress the power to ban it. Indeed, at the same time it decided *Champion* and *Caminetti*, the Court—for what now must seem obvious reasons—took the position that Congress’s motive in adopting a law was simply irrelevant.¹³⁸ After all, looking too closely at motive would reveal that in these cases Congress was “regulating” commerce in only the most superficial sense. Line-crossing became but a hook to justify congressional intrusion into matters that heretofore would plainly have been deemed beyond congressional ken.

Moreover, it added absolutely nothing to the calculus to insist that congressional power was “plenary.” Although Congress’s power has long been deemed plenary, that conclusion still applies only to what properly is a regulation of commerce in the first place. “Plenary” is a description of Congress’s power within its proper realm; it does not expand that realm. This much was clear from *Gibbons v Ogden*, which itself established the plenary power doctrine. Even as Chief Justice Marshall said in *Gibbons* that federal power was “plenary” and “complete in itself” he acknowledged that it did not extend to “commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend or affect other States.”¹³⁹

The difficulty is that the formalism required by the use of *Champion* in these vice cases ran smack against the entire point of the nineteenth-century distinction between Congress’s power to reg-

¹³⁶ *Caminetti*, 242 US at 491.

¹³⁷ *Raich*, 545 US at 19 n 29, citing *United States v Lopez*, 514 US 549, 571 (1995) (Kennedy, J., concurring).

¹³⁸ See, for example, *McCray v United States*, 195 US 27, 55 (1904) (explaining that there is “no authority in the judiciary to restrain a lawful exercise of power by another department of the government, where a wrong motive or purpose has impelled to the exertion of the power”). In reaching this conclusion, the *McCray* Court relied in part on *Champion* itself, and specifically on dicta in Justice Harlan’s opinion that suggested that the only remedy for the “unwise or injurious” use of federal power was the democratic process, not judicial review. *Id.*, quoting *Champion*, 188 US at 363.

¹³⁹ *Id.* at 194.

ulate and its power to prohibit, which was intended to provide a means of drawing a line between what properly was a matter within the states' police power, and what Congress could properly tackle as a national matter. As counsel for the individuals accused of transporting lottery tickets explained in *Champion*:

If the present question had arisen in the days of Marshall, when the public opinion of the country was not as hostile to lotteries as it is today, and if the Federal government had sought to prevent the people of any State from dealing as they saw fit in the lottery issues of other States, it would have been held that Congress had gone outside of the powers which had been conferred on it by the terms of the Constitution, and that the legislation was unconstitutional and void because it was not a regulation of commerce, but an unwarranted interference with the police power reserved to the States.¹⁴⁰

Case after case after case from the nineteenth century relied on the police power to explain why decisions regarding the morality or even the dangerousness of goods or conduct remained with the states and outside congressional control. Because they involved questions regarding the health, safety, and welfare of citizens, they were thought to be matters exclusively for the states. In *Brown v Maryland*, in 1827, Chief Justice Marshall said, "The power to direct the removal of gunpowder is a branch of the police power, which unquestionably remains, and ought to remain, with the states. . . . The removal or destruction of infectious or unsound articles [from trade] is, undoubtedly, an exercise of that power."¹⁴¹ In *Patterson v Kentucky*, in 1878, the Court held that a state ban on certain illuminating oil trumped its use pursuant to a congressional patent.¹⁴² "By the settled doctrines of this court the police power extends, at least, to the protection of the lives, the health, and the property of the community against the injurious exercise by any citizen of his rights. . . . Hence the States may, by police regulations, protect their people against the introduction within their respective limits of infected merchandise."¹⁴³ In *Mugler v Kansas*,¹⁴⁴ in 1887, the Court asked the apt question: "But by whom, or by what authority, is it to be determined whether

¹⁴⁰ Brief for Appellant, *Champion*, 188 US 321.

¹⁴¹ *Brown*, 25 US at 443.

¹⁴² 97 US 501 (1878).

¹⁴³ *Id.* at 504–05.

¹⁴⁴ 123 US 623 (1887).

the manufacture of particular articles of drink, either for general use or for the personal use of the maker, will injuriously affect the public?”¹⁴⁵ The answer was that it was within “the police powers of the State . . . to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety.”¹⁴⁶ Indeed, it is instructive to note that on the two occasions in the nineteenth and early twentieth centuries when the federal government acted to ban trade that some states wanted to permit—that being slavery, and alcohol—a constitutional amendment was believed necessary, given the limits on federal power.¹⁴⁷

Of course, simply because the power to prohibit or ban commerce was considered part of state police power, and beyond federal commerce power, in the nineteenth century does not mean that conclusion must remain static. There is almost universal agreement that Congress’s commerce powers necessarily expanded in the twentieth century in response to industrialization and the integration of the national economy. In light of these changes, one must ask whether it also follows that Congress’s commerce power should be expanded to enable it to ban products or activities merely because they cross a line. Fidelity to principles of precedent and federalism require at a minimum that the necessity of expanded congressional power in this regard be justified by changed circumstances that demonstrate that it is unworkable today to leave such matters to the states.

This difficulty within our system of federalism of simply assuming Congress has the power to ban commerce is brought into focus when the states differ over the wisdom of banning the product or activity. In the early *Champion* police power cases, the states tended to hold similar views, which is why this facet of *Champion* went down rather easily at the time. Although constitutional purists like the *Champion* dissenters bemoaned what they saw as an extension of the commerce power in *Champion*, it was not seriously disruptive of federalism because these federal laws mirrored what the states already were doing on their own. But what if the states *do* disagree about the legality of the underlying product or activity?

¹⁴⁵ Id at 660.

¹⁴⁶ Id at 661.

¹⁴⁷ See US Const, Amend XIII; US Const, Amend XVIII.

To what extent may the national government resolve the issue for them under the guise of its authority to regulate interstate commerce? It is to this question that we now turn.

III. IN DEFENSE OF A BAN ON CONGRESSIONAL BANS

This part suggests that it is time to reconsider the broad, post-*Champion* view that Congress's power "to regulate" commerce includes the power to ban it entirely. Here, we explain that under legitimate principles of federalism, the only plausible justification for allowing congressional market bans is to mitigate the spillover costs of a checkerboard regulatory scheme, and it is doubtful that this rationale justifies giving Congress the power to arbitrate between disagreeing states. Although our approach would deny Congress the authority to adopt bans merely because it disapproves of the product or activity, most of the remainder of congressional power would remain untouched.

A. BEYOND FORMALISM: THE PROBLEM OF SPILLOVERS AS A JUSTIFICATION FOR FEDERAL POWER

Most authorities today accept that the transformation in Congress's power under the Commerce Clause reflected in the "substantial effects" test set out in *Jones & Laughlin* and *Darby* was a necessary response to the changing nature of the national economy. But can the same be said of Congress's power to shut down markets, as exercised in statutes such as the Mann Act and the Controlled Substances Act? This is not so vexing when the states coalesce on a set of policy choices that federal action then supports, as was the case with the Lottery Act. But what about when states do not agree? This is the central question, and it cannot be answered simply by noting that the articles or conduct Congress forbids might—at some point—cross a state line. Some rationale beyond formalism is required, and until now none has been offered.

There is, in federalism's birth logic, a starting place for evaluating the question of whether Congress ought to possess the power to ban markets. The enumerated congressional powers in Article I, Section 8 of the Constitution—including the Commerce Clause—arose out of Resolution VI of the Constitutional Convention. That resolution held that there should be national power

“in all Cases for the general Interests of the Union, and also in those Cases to which the States are separately incompetent, or in which the Harmony of the United States may be interrupted by the Exercise of individual Legislation.”¹⁴⁸

Scholars differ over the role Resolution VI should play in interpreting the Constitution, but there is a sensible middle position. Some today—typically those who would expand federal authority—believe Congress’s enumerated powers should be interpreted through the lens of Resolution VI.¹⁴⁹ Others (generally those who would limit federal authority) insist this is mistaken; they argue that, despite some agreement in the Convention on the general principles reflected in Resolution VI, what the Convention in fact adopted, and the country ratified, was the specific text of Article I, Section 8. It is therefore only the text, they argue, that should govern.¹⁵⁰ The middle ground here seems both apparent and sensible: quite obviously it is the enumeration itself that is determinative, but interpretation of that enumeration is illuminated by the problem it was understood to address. This is particularly the case when Resolution VI is used as a limiting principle. It would be difficult to maintain that Congress should act when the “general interest” does *not* require it, when states *are* competent to act on their own, and when their doing so *does not* affect the “harmony” of the United States.

Of course, the rub remains in figuring out when a state-by-state solution is plausible, and when the exercise of national power is

¹⁴⁸ Kurt T. Lash, “Resolution VI”: *The Virginia Plan and Authority to Resolve Collective Action Problems under Article I, Section 8*, 87 *Notre Dame L Rev* 2123, 2126 (2012).

¹⁴⁹ See, for example, Robert D. Cooter and Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 *Stan L Rev* 115, 123–24 (2010) (tracing the Framers’ concerns about collective action problems to Resolution VI and arguing more broadly for the resolution’s value in interpreting Section 8); Balkin, 109 *Mich L Rev* at 8–12 (cited in note 44) (arguing that “all of Congress’s powers were designed to realize the structural principle of Resolution VI”); Regan, 94 *Mich L Rev* at 570–71 (cited in note 7) (arguing for Resolution VI’s value in interpreting “the vaguer of the grants of power, like the Commerce Clause”).

¹⁵⁰ See Lash, 87 *Notre Dame L Rev* at 2145–52 (cited in note 148) (citing evidence that the Framers considered Resolution VI a mere placeholder and that it later played no role in the ratification debates); Robert J. Pushaw Jr., *Obamacare and the Original Meaning of the Commerce Clause: Identifying Historical Limits on Congress’s Powers*, 2012 *U Ill L Rev* 1703, 1721–25 (2012) (arguing that Resolution VI was not “implicitly enacted” because it was replaced by a set of more specific, enumerated powers). See also Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* 155 (Princeton, 2004) (characterizing the Committee on Details’ response to Resolution VI as a rejection of the resolution’s “open-ended grant of power to Congress”).

necessary. If there were no downside to letting each state go its own way, both history and the values of federalism would mandate doing so. But the Constitution was adopted precisely because allowing complete state autonomy was thought to be undesirable and unworkable. Thus, the question is: Can and should we tolerate a checkerboard, or must all our squares be red (or black)?

Although Resolution VI is ambiguous, economics can help shed light on the matter. An economic approach allows us to identify with some greater specificity when, with regard to market bans, “the States are separately incompetent” or the “harmony of the United States would be interrupted.” Economic terminology is neither determinative nor essential here—the argument largely is intuitive—yet it helps frame and analyze the relevant question with some precision.

1. *Of collective action problems, first movers, and spillovers.* In the language of economic analysis, individuals and firms should be left free to make decisions for themselves unless there are collective action problems associated with individual choices.¹⁵¹ Collective action problems are those in which actors would be better off if they adopted a common approach, but barriers of one sort or another prevent them from doing so. Overgrazing of the commons is the classic example.

When it comes to federalism—and, in particular, the regulatory choices made by the states—two sorts of collective action problems are commonly identified. Although often spoken of in one breath, it is useful to keep them distinct. One form of collective action problem is implicated by the rule barring Congress from shutting down markets; the other is not.

The first federalism collective action problem travels by many names, but generally describes a situation in which paralysis or partial paralysis might well take hold if the central government could not act despite the contrary preferences of some states. *Wickard* provides an example: any state could develop its own system of price supports to assure an adequate supply of wheat, but if wheat were available on the open market from other states, those price supports will collapse.¹⁵² Sometimes states that would be

¹⁵¹ See Cooter and Siegel, 63 *Stan L Rev* at 137–44 (cited in note 149) (arguing that power should be allocated to the smallest social unit internalizing its effects).

¹⁵² This was because, as the Court noted, wheat grown outside the system of price supports “tends to flow into the market and check price increases.” *Wickard v Filburn*,

first-movers decline to do so out of fear of suffering a competitive loss. *Darby* provides an example of this.¹⁵³ If some states adopt higher labor standards, their products will be more expensive on the market and they will lose out to states with lower standards. This can lead to races to the bottom, or holdouts. As Justice Cardozo explained when upholding the Social Security pension tax in *Steward Machine Co. v Davis*:

inaction [on the part of the States] was not owing, for the most part, to the lack of sympathetic interest. Many held back through alarm lest in laying such a toll upon their industries, they would place themselves in a position of economic disadvantage as compared with neighbors or competitors.¹⁵⁴

As an example, Justice Cardozo pointed to a Massachusetts pension law that would not go into effect unless and until either the federal government passed a law on the subject, or eleven of twenty-two designated states did so.¹⁵⁵ This type of collective action problem maps onto that aspect of *Champion* that was rendered vestigial by the logic of the “substantial effects” test. Although people may disagree about whether the collective action problems at issue in the post-*Champion* cases dealing with such issues as wage and hour regulations were sufficiently grave to warrant federal regulation, it was a concern with these problems that underscored Justice Cardozo’s opinion in *Steward Machine Co.*

However, this sort of federalism collective action problem is *not* implicated by a rule that would prohibit Congress from shutting down markets in particular goods or activities. Indeed, it is hard to imagine that a state would decide to allow trafficking in a good or service, or feel compelled to disallow it, simply to stay in line with other states. And, in fact, when given the opportunity for divergence, this sort of collective action problem has not kept states from going their own way. To the contrary, from alcohol, to marijuana, to prostitution, to gambling, a checkerboard has

317 US 111, 128 (1942). The Court also noted that of the four large exporting countries that had (at the time the decision was handed down) taken measures to prop up domestic wheat prices against the global downturn, all four had enacted such legislation at the national rather than the local or state level—presumably because of the difficulties of enforcing and rendering local legislation of this sort effective. *Id.* at 126 n 27.

¹⁵³ See *United States v Darby*, 312 US 100 (1941).

¹⁵⁴ *Steward Machine Co. v Davis*, 301 US 548, 588 (1937).

¹⁵⁵ *Id.* at 588 n 9.

often prevailed—particularly when the national government has not interfered.

On the other hand, the second form of collective action problem—that of negative externalities, or spillovers—is implicated by, and provides some justification for, congressional market bans. Externalities are costs (or benefits) that are not captured within any given state, and so spill over to other states. The classic example here is environmental pollution. If State A benefits in taxation or otherwise from a factory whose harmful pollutants are swept away on the wind to State B, State A maximizes its benefits and minimizes its costs by doing nothing about the pollution. One obvious solution is national legislation that either compels states to internalize the costs of their policies or prohibits spillovers altogether. Here, national power is generally thought to be appropriate, even at the expense of state autonomy.¹⁵⁶

Spillovers are common in the realm of market bans, and undoubtedly provide the strongest rationale for national decision making in the face of state disagreement. Indeed, they seem to provide the only *sound* rationale for federal market bans. Spillovers are undoubtedly real. As the *Raich* Court observed, if marijuana is grown and possessed legally in California, some of it inevitably will bleed into the interstate market.¹⁵⁷ Similarly, when police chiefs testified in 1994 in favor of a federal ban on assault weapons, they argued that a national ban was essential given the ease with which guns flowed across state lines.¹⁵⁸

2. *Are spillovers enough?* Although a concern with spillovers might provide a rational basis for action by the national government, it may not be sufficient justification to overcome the competing interest in federalism when the states do not agree on the merits of the policy. There are a number of problems with relying on spillovers as a basis for federal action.

The first problem is that spillovers are ubiquitous. If the existence of a spillover allows federal action, then state choice over most things could be eliminated. Any time two states adopt dif-

¹⁵⁶ Cooter and Siegel, 63 *Stan L Rev* at 138 (cited in note 149).

¹⁵⁷ *Gonzales v Raich*, 545 US 1, 19 (2005).

¹⁵⁸ Assault Weapons: A View from the Front Lines: Hearing on S 639 and S 653 before the Senate Committee on the Judiciary, 103d Cong, 1st Sess 49, 62 (1993) (statements of Fred Thomas, Chief, DC Police Department, and Johnny Mack Brown, President, National Sheriffs' Association).

fering regulatory or policy regimes, there will be some incentive to arbitrage them. Some persons inclined to commit burglaries in State A will shift their crime to neighboring State B if State A's penalties for burglary are more severe. Can the federal government then dictate uniform state penalties for burglary?¹⁵⁹ It is necessary, in other words, to determine which sorts of spillovers justify national action and which do not.

The second problem is that when the national government steps in to arbitrate between state choices, it does not necessarily eliminate spillovers; it simply replaces one spillover problem with another. The national ban on marijuana is a good example. Some states favor legalization, at least for medicinal purposes. Other states, and the national government, do not. The latter policy generally has prevailed, but the inevitable consequence of this has been the creation of a black market, with its own spillover costs. As Craig Bradley points out, the United States created organized crime when it adopted a policy of alcohol prohibition.¹⁶⁰ Marijuana policy fosters such organized crime. When it comes to marijuana, the negative externalities of the national ban are breathtaking in terms of lives lost, money spent, and people incarcerated.¹⁶¹

The problem with market bans is that when people disagree about them spillovers cannot be eliminated easily, if at all. There will always be a border across which the banned good can travel. The national ban on marijuana has only emphasized the complete inability of the national government to shut its international borders.¹⁶² Black markets, with their attendant costs, *are* inevitable.

Some suggest that the right move in the face of trade-offs in spillovers like these is cost-benefit analysis, but it is unclear that cost-benefit analysis would or should settle the question. Trade-

¹⁵⁹ See Doron Teichman, *The Market for Criminal Justice: Federalism, Crime Control, and Jurisdictional Competition*, 103 Mich L Rev 1831, 1842 (2005) (making this point).

¹⁶⁰ Craig M. Bradley, *Racketeering and the Federalization of Crime*, 22 Am Crim L Rev 213, 226 (1984).

¹⁶¹ See, for example, Jeffrey A. Miron, *The Budgetary Implications of Marijuana Prohibition* *1 (report, Taxpayers for Common Sense, 2005), online at <http://www.prohibitioncosts.org/wp-content/uploads/2012/04/MironReport.pdf> (estimating the cost of federal and state marijuana enforcement at \$7.7 billion annually); Duke and Gross, *Longest War* at xxi (cited in note 17) (estimating the total cost of the "drug problem" to be up to \$200 billion annually, when the costs of drug-related crime are factored in).

¹⁶² See Federal Research Division, Library of Congress, *Marijuana Availability in the United States and Its Associated Territories* *12, *23 (report, 2003), online at <http://www.loc.gov/rr/frd/pdf-files/MarAvail.pdf> (noting that 50 percent of marijuana in the United States is imported and that no more than 10 percent of imported marijuana is intercepted).

offs in this area abound, which is precisely why states disagree—as they have come to over the issue of marijuana. Some states may worry that if they legalize certain drugs, addiction will rise, or use of the drug by youths will skyrocket. Others may decide they will bear these risks in order to halt the black market, or better prioritize law enforcement resources.

Deciding among trade-offs like these is precisely what federalism leaves to the states. If spillovers could be eliminated, or seriously curtailed, federal action might be justified. But given the trade-offs in the real world and the nature of the competing values, it is hard to believe that cost-benefit analysis will yield either a persuasive or uniform answer that would justify overriding the legitimate interests of the states.¹⁶³

The third problem with allowing spillovers to justify congressional action is that the difficulty of enforcing national bans in the face of state disagreement typically leads to temporizing by the federal government, which in turn undercuts the spillover rationale that justified federal regulation in the first place. Consider raw milk and marijuana. In theory the national government has taken a hard-line absolutist stance with respect to both.¹⁶⁴ In practice, however, national regulators recognize the difficulty with this position, and in each area have tempered the national policy with a more pragmatic approach to enforcement. For example, the Food and Drug Administration (FDA) recently stressed that it would not prohibit individuals from drinking raw milk, or from transporting it across state lines for personal consumption.¹⁶⁵ Similarly, the Department of Justice has instructed federal drug enforcement agencies that they should “not focus federal resources . . . on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of

¹⁶³ As Richard Hamm notes, prohibitionists targeted the federal government only after their efforts to enact state-level prohibition laws failed, or achieved only temporary success. Hamm, *Shaping the Eighteenth Amendment* at 123–24 (cited in note 81) (noting that, after a decade of success, “[t]emperance progress, as measured by the adoption of state prohibition laws, halted abruptly” and that even among the prohibition states, enforcement “ranged from sporadic to nonexistent”).

¹⁶⁴ 21 CFR § 1240.61(a) (banning raw milk from interstate commerce); 21 CFR § 1308.11(d) (classifying marijuana as a Schedule I drug).

¹⁶⁵ FDA, *Food Safety and Raw Milk* (press release, Nov 1, 2011), online at <http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/Milk/ucm277854.htm>.

marijuana.”¹⁶⁶ But it is difficult to square these decisions with the rationale for the national bans in the first place. The FDA claims not only that raw milk is unwholesome, but that it may contain *E. coli*, and that consuming it may cause communicable disease.¹⁶⁷ If this is true, it is hard to see why the FDA allows anyone to possess raw milk that surely will bleed into the interstate market. So too with marijuana. The federal government has classified it as a Schedule I drug. This is the highest category of regulation, reserved for items having absolutely no therapeutic value.¹⁶⁸ But if marijuana has no therapeutic value, why tolerate consumption of marijuana for medicinal purposes, given the inevitable bleed that plainly is occurring from the medical marijuana market to other markets?¹⁶⁹

Fourth, allowing spillovers as a rationale for a national ban has lock-in effects that prevent the sort of experimentation that federalism is lauded for fostering.¹⁷⁰ In the absence of a national ban, states can choose themselves to limit or prohibit certain markets. But once a national ban is in place, it becomes very difficult for states to diverge from the federal policy, limiting states from trying various regulatory frameworks to see if they deal better with negative externalities than a complete ban. This was precisely the point of Justice Kennedy’s concurrence in *United States v Lopez*, which struck down the Gun Free School Zones Act. States might reasonably have believed that guns would most effectively be kept out of schools by encouraging people to turn their guns in voluntarily, or by implementing an amnesty, or by encouraging tattle-telling by reducing the penalties imposed on violators.¹⁷¹ The fed-

¹⁶⁶ See David W. Ogden, Deputy Attorney General, DOJ (memorandum to US attorneys, Oct 19, 2009), online at <http://www.justice.gov/opa/documents/medical-marijuana.pdf>.

¹⁶⁷ *The Dangers of Raw Milk: Unpasteurized Milk Can Pose a Serious Health Risk* (FDA Aug 2012), online at <http://www.fda.gov/downloads/Food/FoodborneIllnessContaminants/UCM239493.pdf>.

¹⁶⁸ 21 USC § 812 (defining the five drug schedules). It is possible, of course, that the DOJ policy is simply one of enforcement priorities, but that is a little hard to comprehend. If marijuana is properly a Schedule I drug, then its widespread use ought to be a problem.

¹⁶⁹ See Adam Nagourney, *Marijuana, Not Yet Legal for Californians, Might as Well Be*, NY Times A1 (Dec 21, 2012), online at <http://www.nytimes.com/2012/12/21/us/politics/stigma-fading-marijuana-common-in-california.html>.

¹⁷⁰ See Ilya Somin, *Gonzales v. Raich: Federalism as a Casualty of the War on Drugs*, 15 Cornell J L & Pub Pol 507, 540–42 (2006) (citing the marijuana ban as an example of national policy decision undercutting the benefits of federalism).

¹⁷¹ *United States v Lopez*, 514 US 549, 581–83 (1995) (Kennedy, J, concurring).

eral ban that the Court struck down in *Lopez* prevented all this from occurring.

In light of these difficulties with spillovers, the final—and especially perplexing—problem is how courts should decide when the federal government should be allowed to regulate spillover effects at the expense of state diversity. If ten states want to legalize marijuana, and forty do not, may the national government impose a ban? If twenty states prefer raw milk and thirty would bar it, is that enough to justify national action?

Note that when the first sort of collective action problem exists—the one discussed above that is not germane to market bans—it can be so severe that some advocate empowering the national government to act to solve it, even if only a single state has the same preference as the national government. But even scholars who support the exercise of federal power in response to the first sort of collective action problem even when there is widespread disagreement among the states reach the opposite conclusion when spillovers are the issue. Because of their ubiquity and lock-in effects, these scholars conclude that the federal government may act to prevent spillovers only in the face of widespread state agreement. Only then is it appropriate, they maintain, to curtail the activities of outliers.¹⁷² But how does one decide as a matter of constitutional law where to place the line that allows national action, short-circuiting state choice?

In answering the question of whether spillover costs justify market bans when state preferences diverge, it is worth recalling why our federal system exists in the first place. One answer, of course, is that it was but the price for Union—although there were some then and now who preferred erasing state lines altogether, this never was a remote possibility. But federalism is believed to exist for reasons other than historical path dependence. Federalism fosters local governance and permits experimentation. Most impor-

¹⁷² See Balkin, 109 Mich L Rev at 33 (cited in note 44) (requiring widespread agreement among the states before Congress acts to address claimed spillover effects); Cooter and Siegel, 63 Stan L Rev at 138, 140–42 (cited in note 149) (calling for federal intervention to address externality problems only where there are “significant” spillovers, and only where a majority of states are in favor); Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 Yale L J 1196, 1229 (1997) (“Recognizing the legitimacy of state autonomy values, the spillovers required to justify federal coercion of the states should be substantial—more substantial than those required to support the exertion of the federal commerce power against private firms or individuals.”).

tantly, the belief is that allowing states to go their own way except when national uniformity demands it maximizes utility.¹⁷³ If eighty citizens of State A prefer policy X and twenty oppose it, whereas twenty citizens of State B prefer policy X while eighty oppose it, more people will be satisfied with policy if a checkerboard prevails.

At the least, the democratic and utilitarian benefits that flow from allowing independent and divergent state choices should not be displaced casually. Congress should not act on the spillover justification except when a small number of outlier states impose significant spillovers on most others. But even here, caution is warranted, in light of the many difficulties with using national power to control spillovers by way of a market ban, and in view of the lock-in effect that then keeps states from changing their minds. This is particularly so given that, as we will show, the costs of limiting Congress's ability to prohibit interstate commerce are lower than they may seem initially.

B. SPECIFYING THE CLAIM

What would be the consequence of denying Congress the power to shut down viable markets? In exploring this question, it is both useful and necessary to specify with some precision what it means to say that Congress may not prohibit commerce, only regulate it. Specifying the claim allows us to see what is within it—that is, what Congress may not do—but also what is outside the claim, that is, the extent to which Congress's power would remain untouched.

Clarifying the claim is important because, as we have seen, Congress's power to adopt such bans rests ultimately on *Champion v Ames*, but in the years since *Champion*, that opinion has been given exceptionally broad scope. Today, *Champion* is used to justify the federal regulation—and prohibition—of not only anything traveling in commerce, but anything that has so traveled, at any point in its life or life cycle.¹⁷⁴ Thus, in addition to the sort of “morals”

¹⁷³ See John O. McGinnis and Ilya Somin, *Federalism vs. States' Rights: A Defense of Judicial Review in a Federal System*, 99 Nw U L Rev 89, 106–07 (2004); Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U Chi L Rev 1484, 1493–94 (1987) (“So long as preferences for government policies are unevenly distributed among the various localities, more people can be satisfied by decentralized decision making than by a single national authority.”).

¹⁷⁴ McGimsey, 90 Cal L Rev at 1698–99 (cited in note 96).

legislation that was prominent at the turn of the twentieth century, *Champion* has provided a basis for much additional federal legislation, most notably an explosion in federal criminal laws. These include racketeering laws, child support laws, gun laws, obscenity laws, and child pornography laws, to name but a few.¹⁷⁵

Many are critical of the broad reach of national power *Champion* has engendered. As Donald Regan states, “The idea that Congress can regulate whatever has moved across a state line has become a popular ‘hook’ for federal legislation. . . . But it is none the better argument for that.”¹⁷⁶ Some propose limitations on the use of the sort of extended “nexus” test that was used to justify the reenactment of federal legislation banning guns near schools.¹⁷⁷ Others decry the expansion of federal criminal law premised on a broad reading of *Champion*, and urge cutting back on that authority.¹⁷⁸

No matter what the general controversy over *Champion*, however, our focus is decidedly narrower. Limiting Congress’s power to prohibit commerce says nothing about the vast majority of federal laws enacted pursuant to *Champion* (or otherwise). It is aimed at a very specific kind of federal law, and leaves most others—whether enacted pursuant to *Champion* or not—wholly untouched.

1. *The claim.* Our claim is straightforward. Congress’s power “to regulate Commerce . . . among the several States” does not encompass the power to prohibit that commerce. Congress may regulate markets, but it may not eliminate them. The choice of what goods citizens may or may not consume is one for the citizens of each state to make.

Still, that straightforward claim requires definition. In particular, it is necessary to distinguish “regulation” from “prohibition,” and

¹⁷⁵ See, for example, 18 USC § 228 (imposing criminal penalties on anyone who travels in interstate commerce with the intent to evade the obligation to provide child support); 18 USC § 922(g) (prohibiting any person convicted of a felony from transporting, possessing, or receiving any firearm or ammunition that has been transported across state lines); 18 USC § 1462 (prohibiting the receipt of “any obscene, lewd, lascivious, or filthy” book, film, or recording or any “thing designed, adapted, or intended for producing abortion, or for any indecent or immoral use” that has traveled in interstate or foreign commerce); 18 USC § 2252A (prohibiting the interstate transport, receipt, or distribution of material constituting or containing child pornography).

¹⁷⁶ Regan, 94 Mich L Rev at 600 (cited in note 7).

¹⁷⁷ See McGimsey, 90 Cal L Rev at 1731–35 (cited in note 96).

¹⁷⁸ See Bradley, 22 Am Crim L Rev at 213–15 (cited in note 160).

to think about how to define a market. As acknowledged below, there may be hard questions at the margin; nonetheless, the broader principle properly frames the debate about where the margin should be located.

2. *Congress may enact regulations that are not bans.* To begin, regulations that do not involve prohibitions would not be implicated at all by reading Congress's power to regulate commerce as denying it the power to prohibit. A great deal of environmental regulation, for example, is justified on the basis of spillovers, but does not involve banning any article of commerce. This is true of laws that regulate smokestack emissions or set clean air or water standards.¹⁷⁹ These laws regulate the ill effects of commerce, but they do not ban commerce, so nothing here speaks to them.

3. *Congress can enact "helper" laws.* Congress also retains full authority to adopt bans (and related regulations) to the extent that they are "helper statutes" designed to assist states in the enforcement of their own domestic prohibitions. The Wilson Act of 1890, which mandated that domestically imported liquor be subject to state law, and the Webb-Kenyon Act of 1913, which made it a federal crime to transport liquor into a state with the intent or knowledge that it would be received, sold, or otherwise used in violation of state law, both imposed federal restrictions on commerce.¹⁸⁰ But rather than reflecting a *federal* judgment that commerce in the targeted good—for example, alcohol—should be prohibited, they merely assisted in enforcing choices the citizens of each state had made for themselves about what kinds of goods were proper subjects of commerce. Such statutes support rather than limit the autonomy of the individual states.¹⁸¹

4. *Congress may enact laws "in service" of the national market.* Congress can also prohibit the possession, transportation, or sale

¹⁷⁹ See, for example, Clean Air Act, 42 USC § 7401 et seq (regulating pollution sources and setting emission standards without regulating goods or movement per se); Clean Water Act, 33 USC § 1251 et seq (prohibiting the addition of pollutants to U.S. water without a permit).

¹⁸⁰ Webb-Kenyon Act, 37 Stat 699 (1913) (similar to 27 USC § 122); Wilson Act, 26 Stat 313 (1890).

¹⁸¹ Although helper statutes are permissible, they should be written clearly as support for state choices, rather than flat prohibitions. The Lottery Act at issue in *Champion* was in effect a helper statute, but it was framed as a flat prohibition. When states began to permit lotteries again in the middle of the twentieth century, Congress was forced to enact exceptions before states could do so lawfully. See 5 Stat 304. This is the sort of lock-in effect that should be avoided by the wording of helper statutes to allow states to move in and out of Congress's regulatory ambit.

of a particular article if it does so in service of the functioning of a national market (as opposed to shutting down the market altogether). As we showed in Part I, in-service laws have a well-established history that significantly predates *Champion*. Such laws operate to enforce the rules by which markets operate, not to shut those markets down. In-service laws may be aimed at two distinct problems. First, like the ban on the transport of diseased cattle in the Animal Industry Act of 1884, they can serve the market by keeping it safe and well functioning. Second, like the Steamboat Boiler Act of 1838, they can protect the instrumentalities of commerce themselves.¹⁸² In both situations, in-service laws operate on the assumption that well-regulated markets will encourage participation and minimize externalities.

Today there are many analogues to the Steamboat Boiler Act and the Animal Industry Act. As to the former, 18 USC § 842 prohibits the unlicensed carrying of explosives on interstate instrumentalities like airplanes.¹⁸³ As to the latter, many environmental and public health laws serve the market by making it safe and transparent, so that consumers are eager to participate. Examples include the Federal Food, Drug & Cosmetic Act (FFDCA) and the Toxic Substances Control Act, which prohibit—respectively—the transport and distribution of adulterated food and cosmetics, and unduly dangerous chemicals.¹⁸⁴ Laws that seek to counter the negative externalities of a well-functioning market also can be understood as in-service laws. For example, the federal ban on the sale of asbestos-containing products serves the market in those goods by ensuring that its operation does not entail unnecessary public health costs.¹⁸⁵

As these examples suggest, some in-service laws can be understood as a form of public good. When the EPA, under authority delegated from Congress, decides that certain pesticides, rather

¹⁸² 5 Stat 304.

¹⁸³ 18 USC § 842(a)(3)(A) (prohibiting anyone but licensees to “transport, ship, cause to be transported, or receive any explosive materials”).

¹⁸⁴ 21 USC § 331(a) (prohibiting adulterated and misbranded food and drugs); 15 USC § 2605 (prohibiting certain injurious substances).

¹⁸⁵ 16 CFR § 1304.4 (banning consumer patching compounds containing intentionally added asbestos because of the danger they pose to the public health); 16 CFR § 1305.4 (banning for the same reason artificial fireplace ash and embers containing asbestos); 40 CFR § 763.169 (banning the distribution in commerce of asbestos-containing flooring felt, commercial paper, corrugated paper, rollboard, and specialty paper).

than others, are too dangerous to be offered for sale in domestic markets, it performs a cost-benefit analysis.¹⁸⁶ States could perform the same cost-benefit analysis and make individual determinations about what goods to allow, but it would be costly—perhaps too costly—to have each state do so, and in any event the market requires some minimal regulatory uniformity. That said, states remain free to perform their own cost-benefit analyses if they wish, and in many cases are permitted to set regulatory standards that exceed the federal floor. Statutes of this kind do not as a result typically take from the states the authority to regulate the targeted markets, although they clearly constrain state power in certain respects. Moreover, they do not bring all commerce in the targeted market to a halt.

C. OBJECTIONS

Finally, we address possible objections to our approach.

1. *Difficulties of line-drawing.* Some may argue that the critical distinction we draw between in-service laws and market bans is unworkable. In both cases, federal power is being used to prohibit the movement, sale, or possession of goods or persons who have, are, or will travel across state lines. But there is a real distinction here, and although hard cases may arise, for the most part the distinction can and should be made.

Line-drawing efforts under the Commerce Clause have frequently come under attack, but the reason may not be so much that lines are inherently difficult to draw.¹⁸⁷ Rather, there are political stakes in drawing the lines and so they come under pressure. It is thus important to distinguish between principles about which it is inherently difficult to draw lines, and principles about which the difficulty derives instead from resistance to the principle itself.

In theory, there is a clear difference between bans on particular products that are adopted in service of a well-functioning com-

¹⁸⁶ See Federal Insecticide, Fungicide, and Rodenticide Act, USC § 136(bb) (defining the term “unreasonable adverse effects on the environment” to mean “any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide”).

¹⁸⁷ See, for example, Gil Seinfeld, *The Possibility of Pretext Analysis in Commerce Clause Adjudication*, 78 Notre Dame L Rev 1251, 1282–84 (2003) (criticizing the economic-noneconomic line-drawing in *Lopez*); Lawrence Lessig, *Translating Federalism: United States v Lopez*, 1995 Supreme Court Review 125, 161 (explaining that line-drawing under the Commerce Clause is difficult in our presently functionalist jurisprudence).

merce, and those bans that simply seek to shut down trade and transport entirely. The former are a means to a healthy market; the latter attempt to squelch all market activity. Justice Marshall noted in *Gibbons v Ogden* that “the power to regulate . . . is to prescribe the rule by which commerce is to be governed.”¹⁸⁸ The power to prohibit, in contrast, is the power to bring commerce to an end. The first presupposes the continuation of the regulated activity; the second presupposes its cessation. It is only when the federal government enacts prohibitions that work to bring all commerce in a given market to a halt that it bans commerce, in the sense used here, rather than “regulates” it.

Moreover, in-service laws further the purposes of the Commerce Clause and federalism, as described in Parts I and II, whereas market bans frustrate those purposes. Congress was given the power over interstate commerce to foster a vibrant commerce, not to shut it down. In-service laws attempt to protect commerce and to encourage participation in well-functioning markets. They do not trench on state choices about which commodities their citizens may (or may not) possess and use. Market bans do the opposite.

One way to think of operationalizing the distinction is to ask whether there would be an identifiable market in the product that is banned in the absence of the federal law. If so, the law is a ban; if not, it may be in service of the market. Compare, for example, the Mann Act’s ban on the interstate transportation of prostitutes with the prohibition in the FFDCA on the interstate transport and sale of adulterated drugs.¹⁸⁹ In the latter case, there is no independent market in adulterated drugs that the federal law prohibits. To the extent people know a product is adulterated, we may assume that they will not want to buy or use it. (And indeed, historically, supporters of the federal ban on adulterated drugs promoted it primarily as necessary to safeguard consumers against fraud and abuse.¹⁹⁰) In the former case, however, there is a viable

¹⁸⁸ 22 US 1, 196 (1824).

¹⁸⁹ White Slave Traffic Act, 36 Stat 825 (1910), codified as amended at 18 USC § 2421; 21 USC § 331 (prohibiting the transport or receipt in interstate commerce of adulterated or misbranded food, drugs, devices, or cosmetics).

¹⁹⁰ See C. C. Regier, *The Struggle for Federal Food and Drug Legislation*, 1 L & Contemp Probs 3, 5–10 (1933) (describing the popular agitation around the problem of consumer fraud in the food and drug markets); Richard Curtis Litman and Donald Saunders Litman, *Protection of the American Consumer: The Muckrakers and the Enactment of the First Federal Food and Drug Law in the United States*, 36 Food Drug Cosm L J 647, 647 (1981) (“The Pure Food and Drug Act of 1906 was passed in response to the demand of the public for

interstate market that the federal ban prohibits. It thus comes as little surprise that the legislative history of the Mann Act is brimming with evidence that moral antipathy toward a particular kind of product (namely, prostitution) was what drove the bill's enactment, rather than a desire to protect consumers against fraud and abuse.¹⁹¹

Congressional laws requiring labeling of food and other products are interesting in this regard. They often are written as market bans on unlabeled goods, posing the question whether such bans are permissible in-service laws or impermissible prohibitions. The answer is that they are the former. Congress's intention in requiring the (proper) labeling of goods is to inform people of what they are purchasing, thereby facilitating the operation of the market rather than shutting it down. The assumption is that if consumers know what they are buying they can make wise decisions when they consume, thus enhancing market efficiency.¹⁹² The labeling requirements provided by laws as diverse as the FFDCA, the Fair Packaging and Labeling Act, and the Federal Insecticide, Fungicide, and Rodenticide Act therefore all rather straightforwardly represent permissible in-service laws.¹⁹³

In some cases, however, determining whether a given statute is

protection from the deception practiced upon consumers by manufacturers of and dealers in foods and drugs.”).

¹⁹¹ Although proponents of the law justified it as necessary to protect women themselves from exploitation at the hands of the criminal cartels that allegedly sold them into what was called at the time “white slavery,” the legislative debates make clear that behind this concern with the welfare of the women targeted by the Act was a distaste for their “degraded” profession in which they were forced, or voluntarily participated. See White Slave Traffic, HR Rep No 61-47, 61st Cong, 2d Sess 10–11 (discussing the “degraded life” of the prostitute); Langum, *Crossing over the Line* at 17 (cited in note 123) (noting how, in the early twentieth century, the “‘problem’ of prostitution became a flash point for . . . social tensions [arising from] immigration, urbanization [and changing social mores relating to] the sexuality of women”). The extent of the moral antipathy placed states’ rights opponents of the law into a difficult position. Representative William Richardson of Alabama, who opposed the bill, noted, for example, that “a man puts himself in a position . . . to be criticized by standing up here on the floor of this House and undertaking to resist a bill of this kind.” 45 Cong Rec 810 (1910). Another southern representative, before criticizing the bill on states’ rights grounds, reassured his audience that he was not speaking “in defense of prostitution of women. We are all opposed to that.” 45 Cong Rec 823 (1910) (Rep Adamson).

¹⁹² Indeed, to the extent the health or safety aspects of a particular problem are contested, this is reason for Congress to adopt a labeling requirement rather than a ban.

¹⁹³ 7 USC § 136(a), (c)(9) (prohibiting the distribution of unlabeled pesticides); 21 USC § 331(a) (prohibiting the “misbranding of any food, drug, device, tobacco product, or cosmetic in interstate commerce”); 21 USC § 331(a) (prohibiting the “misbranding of any food, drug, device, tobacco product, or cosmetic in interstate commerce”).

a ban or an in-service regulation will raise more difficult questions. For example, if Congress were to enact a ban on assault weapons similar to the assault weapons ban that expired in 2004, would that legislation represent a permissible in-service regulation or an impermissible market ban?¹⁹⁴ The same questions can be asked about the federal ban on marijuana enacted in the CSA and upheld in *Raich*: does it regulate the broader market in drugs, or does it impermissibly shut down the market in marijuana? These statutes pose a more difficult question of line-drawing because, unlike the Mann Act, they prohibit goods that could conceivably participate in a larger, legal market (the market in remedial drugs, in the case of marijuana, or the market in guns, in the case of assault weapons) but, unlike other congressional statutes, nevertheless reflect an a priori judgment on the part of Congress that certain kinds of goods are simply unfit or inappropriate for use or consumption.

In the face of hard cases, it may prove instructive to ask—as is often asked in antitrust cases, where market definition is extremely important—whether the targeted goods are substitutable.¹⁹⁵ If consumers can easily find a nonbanned substitute for the prohibited good, then the prohibited good does not compose a distinct market, and therefore it is likely that Congress is not seeking to ban the good but is attempting to foster, or otherwise regulate, the broader market of which the banned good forms only one part.¹⁹⁶ It is only when Congress bans a good for which there are

¹⁹⁴ Violent Crime Control and Law Enforcement Act of 1994, Pub L. No. 103-322, § 110102, 108 Stat. 1796, 1996, codified at 18 USC § 922, expired Sept. 13, 2004. See David Jackson and Aamer Madhani, *Obama Calls for Assault-Weapons Ban, Background Checks*, USA Today.com (Jan. 16, 2013), online at <http://www.usatoday.com/story/news/politics/2013/01/16/obama-gun-violence-plan-assault-weapons-ban-background-checks/1837793/>.

¹⁹⁵ The leading case setting out the substitutability test of market definition in the antitrust context is *United States v. E. I. Du Pont de Nemours and Co.*, 351 US 377, 395 (1956) (“In considering what is the relevant market for determining the control of price and competition, no more definite rule can be declared than that commodities reasonably interchangeable by consumers for the same purposes make up that part of the trade or commerce, monopolization of which may be illegal.”) (internal punctuation omitted). See also *National Collegiate Athletic Association v. Board of Regents of University of Oklahoma*, 468 US 85, 111 (1984) (noting that the “correct test for determining whether” particular products “constitute a separate market” is “whether there are other products that are reasonably substitutable” for them).

¹⁹⁶ One might argue that under this logic Congress can ban marijuana, viewing alcohol as a safe substitute in a general market for intoxicants or mood-altering substances. Note, however, that this is not what Congress has done or purported to do. Marijuana only has been considered (and banned) for its supposedly therapeutic values. (Of course, not all would agree that alcohol and marijuana are in fact substitutes, or that alcohol is safe in some way marijuana is not when used recreationally.)

no legal substitutes that the federal prohibition amounts to a market ban. Indeed, it is only in the latter case that Congress attempts to dictate the purposes that may be served by market activity. In the former case, Congress merely regulates which specific kinds of goods may serve the ends consumers seek from them. For example, consumers use leaded and unleaded gasoline for precisely the same purposes—to fuel their cars—suggesting that they are substitutable products, even if some may differ on which kind of gasoline they find more effective. For this reason, the federal ban on the sale of leaded gasoline represents a permissible in-service regulation of the gasoline market, not a prohibited market ban.¹⁹⁷

Of course, the question of when a product is or is not substitutable becomes complex when there are multiple uses that a product does or can serve. Consider, for example, the proposed ban on assault weapons. In surveys, gun owners cite three primary reasons why they own guns: hunting, sport shooting, and self-defense.¹⁹⁸ Gun advocates also cite another purpose for owning guns that is less commonly mentioned in surveys: namely, protection against tyrannical government. (This is also a purpose that was historically associated with the Second Amendment right to bear arms.¹⁹⁹) And, of course, guns are used to commit crime.

With respect to some of these uses, an argument could be made that there are no reasonable substitutes for the banned goods. In defending against tyrannical government, a revolver will certainly not prove as effective as an assault weapon. One could argue, on that basis, that the two weapons are not reasonably substitutable and that a congressional ban on assault weapons would therefore be impermissible under our reading of the Commerce Clause. The problem with this argument, however, is that it proves too much. Semiautomatic pistols will certainly prove more effective than revolvers in defending against tyranny, but tanks will prove far more

¹⁹⁷ 42 USC 7545(n).

¹⁹⁸ See, for example, Philip J. Cook and Jens Ludwig, *Guns in America: National Survey on Private Ownership and Use of Firearms* *2–3 (report, National Institute of Justice, DOJ, May 1997), online at <https://www.ncjrs.gov/pdffiles/165476.pdf> *2–3 (reporting that, in a national survey of gun owners, the most common reason for owning a gun was self-protection (46 percent) and the second most common reason was recreation—not only hunting but sport shooting (35 percent or 50 percent). More recent polls report similar results. See, for example, *Guns*, Gallup.com, online at <http://www.gallup.com/poll/1645/guns.aspx>).

¹⁹⁹ Calvin Massey, *Guns, Extremists, and the Constitution*, 57 Wash & Lee L Rev 1095, 1100–25 (2000).

effective still, as will nuclear weapons, and yet neither the states nor the federal government permit civilian use of these kinds of weapons, and no one within their right mind thinks they should. Defense against tyranny may therefore play an important role in the rhetoric of the gun rights movement, but it is not a use that federal or state law appears to legitimate. For that reason, it is unclear how important a role it should play in defining the market.

On the other hand, if we consider the other uses for which consumers possess or purchase guns—namely, hunting, sport shooting, and self-defense—a reasonable argument can be made that other guns *are* substitutes for assault weapons, and that a federal ban on assault weapons would therefore not represent a ban of the market in assault weapons but instead would represent an in-service regulation of the larger market in guns. One could argue, in other words, that in banning assault weapons, Congress is not enacting a moral judgment about the use of those kinds of guns but merely seeking to minimize the negative externalities associated with the legal, and constitutionally protected, interstate gun market. Gun advocates themselves argue, in critiquing the proposed ban, that little distinguishes the weapons referred to as “assault weapons” in contemporary debates from other guns not designated as such, and that both assault and nonassault weapons are equally useful when it comes to hunting and self-defense.²⁰⁰ Evidence from the 1994 assault weapons ban suggests that, at least at that time, the banned guns were quickly replaced by other nonbanned weapons—and thereupon used, for both legitimate and illegitimate purposes.²⁰¹ If this characterization of the uses of assault weapons and the availability of substitutes is correct (though there may well be those who disagree), then just as Congress may ban particularly harmful pesticides as a means of regulating the

²⁰⁰ See Sarah Jones, *In 2004 the NRA Called the Assault Weapons Ban Nonsense, Here's Why They're Wrong*, Politicususa.com (Dec 17, 2012), online at <http://www.politicususa.com/wayne-lapierre-2004-its-question-harm-question-meaningless-ban-involved-cosmetics.html> (quoting NRA CEO Wayne LaPierre as saying “there’s no difference in the performance characteristics”).

²⁰¹ Christopher S. Koper, *An Updated Assessment of the Federal Assault Weapons Ban: Impacts on Gun Markets and Gun Violence, 1994–2003* *10–11 (report, National Institute of Justice, DOJ, June 2004), online at <https://www.ncjrs.gov/pdffiles1/nij/grants/204431.pdf> (noting that manufacturers produced legal substitutes for the banned weapons and that “[r]elatively cosmetic changes . . . [were] sufficient to transform a banned weapon into a legal substitute”). Of course, some of this substitutability reflects the shortcomings of the law itself and might be avoided in future legislation.

broader pesticide market, it may ban assault weapons as a means of regulating the broader gun market.

The legislative history and purposes of the bill can also help resolve the question of whether it constitutes a permissible in-service regulation or an impermissible market ban. Consider the example of the congressional ban on the possession or use of marijuana. Given the extensive evidence of the drug's therapeutic uses as a painkiller and antinausea medication, one could argue that the drug is both substitutable for, and substitutable by other, legal pain and antinausea medications and that its prohibition is merely an in-service regulation of the broader drug market.²⁰² Congress may have determined that, among a variety of products with similar uses, marijuana was less safe than the alternatives (and perhaps less effective). But there are two problems with this argument. First, there is also a recreational market for marijuana. As with the gun market, there are alternatives here too, such as alcohol, but also—as with assault weapons—disagreement about how substitutable these are. Second, perhaps more importantly, the federal government has actively discouraged research into marijuana's medical safety and therapeutic efficacy by imposing onerous procedural requirements that apply to no other drugs.²⁰³ There is thus good reason to doubt that the federal government has taken the question of substitutability very seriously, or that marijuana is banned because of its specific, scientifically demonstrated, risks.

The history of the drug laws certainly suggests that what lies behind the federal ban is a moral, rather than a technical or scientific, judgment about the uses that consumers make of the drug, and about the kinds of persons associated with its use.²⁰⁴ If so, the

²⁰² See, for example, Janet E. Joy, Stanley J. Watson Jr., and John A. Benson Jr., eds, *Marijuana and Medicine: Assessing the Science Base* *137–92 (report, Institute of Medicine, National Academy of Sciences, 1999), online at http://www.nap.edu/openbook.php?record_id=6376 (explaining the therapeutic uses of marijuana).

²⁰³ See *Federal Obstruction of Medical Marijuana Research* *1 (report, Marijuana Policy Project), online at <http://www.mpp.org/assets/pdfs/library/Federal-Obstruction-of-MMJ-Research-1.pdf> (noting that “[i]n addition to the standard FDA and DEA approvals needed for all research using Schedule I drugs, researchers conducting trials with marijuana must receive approval through a National Institute on Drug Abuse/Public Health Service (NIDA/PHS) protocol review process that exists for *no other drug*”).

²⁰⁴ See Erik Grant Luna, *Our Vietnam: The Prohibition Apocalypse*, 46 DePaul L Rev 483, 491–95 (1997) (noting the extent to which the early drug laws were motivated by, and justified in terms of, racist stereotypes of Chinese immigrants, African Americans, and Hispanics); Duke and Gross, *Longest War* at 82–83, 90–94 (cited in note 17).

ban cannot be justified as an in-service regulation. Of course, supporters of the ban could contest that conclusion; but in so doing, they would have to engage in a serious discussion about the purposes of the federal prohibition, and about the ways in which it serves those purposes. This would be a welcome discussion that the formalism of the *Champion* rule largely has foreclosed.

This last point—focusing on what the legislative history and past practice tell us about congressional purposes in adopting a ban—raises the question of what to do with congressional motives. In general, looking to congressional motives is disfavored under the Commerce Clause.²⁰⁵ Thus, perhaps the analysis here runs the risk of slipping into an impermissible examination of motive and pretext.

Note, however, that our thesis is directed as much to members of Congress as to the courts. Even if courts ought not take congressional motives into account—and recall that the ban on examining motives finds its root in *Champion*—it does not mean members of Congress should not examine their own motives. The judiciary may be unwilling to examine congressional motives for reasons of institutional competence or interbranch respect. Whether the disfavoring of these tests makes sense or not, something that is debatable, members of Congress ought themselves to take the Constitution into account and cast votes in good-faith compliance with the best conception of its requisites. Even if judicial line-drawing is complicated, members of Congress ought to know whether they are trying to shut down a market because of ideological disfavor, or whether they are instead attempting to foster a broader market.

2. *The “tying Congress’s hands” objection.* One might also object that limiting congressional power in the way we suggest here could tie Congress’s hands in undesirable ways. Consider for example the Endangered Species Act. The Act functions to shut down the interstate market in endangered animals not as a means of regulating a broader market, but—as the congressional statement of purposes indicates—as a means of protecting endangered and

²⁰⁵ See, for example, *United States v Orito*, 413 US 139, 144 (1973), citing *McCray v United States*, 195 US 27 (1904) (“The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control.”).

threatened species of animals and wildlife from extinction.²⁰⁶ In this respect, it constitutes, under the rule articulated above, an impermissible market ban that is beyond Congress's power to enact under its commerce power. And yet the Endangered Species Act addresses a problem that appears to be genuinely interstate. Animal habitats and ecosystems cross state lines, which means that leaving primary enforcement of the prohibition on the sale of endangered animals to the states may seriously undermine the purpose of enacting such a prohibition in the first place: that is, to protect particular species against commercial exploitation.

Or consider the federal prohibition on the production, transfer, and possession of biological weapons such as anthrax.²⁰⁷ Given the tremendous harm that weapons of this sort can impose on the general population, and the significant threat they may pose to national security, as well as to public health, one could argue that it is perfectly appropriate for the federal government to ban markets in them—particularly given the slim probability that there will be any significant divergence among the states about the propriety of such a ban. And yet an argument could be made that the federal biological weapons prohibition goes beyond what is necessary simply to protect the channels and instrumentalities of commerce from harm because it bans not only the use and transport of biological weapons across state lines but even their purely intrastate production, manufacture, and sale. As such, the ban may constitute an impermissible market ban.

Statutes like the Endangered Species Act and the federal biological weapons ban suggest that there may be real costs associated with limiting Congress's ability to prohibit commerce. Given the significant role that the federal government assumes not only over the regulation of the economy but also in protecting national security and advancing other ends, one might fear that such a limit—however well grounded in history and theory—constrains federal power too much.

There are, however, good reasons to believe that federal power will not be unduly constrained by a ban on congressional market bans. First, as explained in Part III.B, Congress remains free to

²⁰⁶ 16 USC § 1531(b) (“The purposes of this [Act] are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved.”).

²⁰⁷ 18 USC § 175.

regulate in ways that do not result in the prohibition of the market. In service of the uninterrupted functioning of the national market, Congress could (as it in fact already does) prohibit the transportation in interstate commerce of explosive or dangerous materials.²⁰⁸ Similarly, although Congress may lack the power to ban the market in endangered species, nothing in our reading of the Commerce Clause limits Congress's power to intervene to protect these species in a number of other ways—including by enacting prohibitions on the destruction of their habitats.²⁰⁹

Second, to the extent that these limitations on the commerce power are a problem, it sometimes will be the case that Congress can act in the face of genuinely interstate problems on the basis of another of its enumerated powers. The Treaty Power, Congress's power over foreign commerce, and Congress's war powers may empower Congress to act even when the Commerce Clause does not.²¹⁰ For example, when Congress banned the markets in

²⁰⁸ 18 USC § 842(a)(3)(A) (prohibiting anyone but licensees to “to transport, ship, cause to be transported, or receive any explosive materials”).

²⁰⁹ Courts have found that Congress can constitutionally prohibit the killing of endangered animals, as well as activities that result in the destruction of the habitats in which endangered species live, under its authority to regulate activities that have a “substantial effect” on interstate commerce. Activities that target endangered animals or their habitats have a substantial effect on interstate commerce, courts conclude, because they threaten the potentially significant economic resources that these species, and their biodiverse habitats, represent. See *GDF Realty Investments, Ltd. v Norton*, 326 F3d 622, 638–41 (5th Cir 2003); *Gibbs v Babbitt*, 214 F3d 483, 492 (4th Cir 2000); *National Association of Home Builders v Babbitt*, 130 F3d 1041, 1050–52 (DC Cir 1997). Because these cases do not rely on Congress's power to prohibit commerce, nothing in our reading of the Commerce Clause should prevent Congress from prohibiting activities of this sort. They also suggest that a federal ban on the sale of endangered species might be justifiable, as a necessary and proper means of enforcing the federal regulation of endangered species.

This raises, however, the interesting and perhaps difficult question of how the Necessary and Proper Clause fits into our analysis. There are two possibilities. The first is to say that congressional bans are not appropriate under the Necessary and Proper Clause for all the federalism reasons rehearsed above. The second position is that although interstate market bans are not acceptable under the Commerce Clause, they may be permissible under the Necessary and Proper Clause. Without resolving this question, it is useful to note that under the second position, market bans still must be necessary and proper to some *other* permissible goal of Congress's. So, for example, could a ban on the interstate (or intrastate) possession and use of marijuana be justified under the Necessary and Proper Clause? The only justification that conceivably would work is one maintaining that Congress—under the Commerce Clause—can prohibit the consumption of particular commodities to protect public health and thereby lower costs in the national health care market. It goes without saying, especially in light of the controversy over the Affordable Care Act, that such a position—which would seem to apply equally to issues such as alcohol consumption and obesity—would trigger quite a national debate. It is difficult to see such a position being adopted anytime soon.

²¹⁰ US Const, Art II, § 2, cl 2 (treaties); US Const, Art I, § 8, cl 3 (foreign commerce); US Const, Art I, § 8, cl 11 (war).

endangered species and biological weapons, it made clear that in each case, one of the goals of the legislation was to implement the United States's various treaty obligations.²¹¹ Courts have affirmed the constitutionality of the biological weapons ban under the Treaty Clause, and commentators have suggested that the Endangered Species Act is similarly sustainable under the treaty power.²¹²

In the absence of a treaty, Congress's war powers may also allow it to prohibit goods that pose a significant threat to national security, such as nuclear materials and other goods that may be used as weapons. Congress's war powers have been invoked to justify broad prohibitions of other kinds of activities that implicate national security. There is no obvious reason why any limits should be imposed on Congress's ability to enact other kinds of national security bans.²¹³ And of course Congress may always use its power to ban foreign commerce to limit what kinds of goods circulate in domestic markets. This means that, in many cases in which there is a pressing justification for a market ban, and even in some cases where there is not, Congress will be able to enact the ban,

²¹¹ Endangered Species Act, 16 USC § 1531 (noting that "the United States has pledged itself as a sovereign state in the international community to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction" and enumerating the many treaties and conventions which the Act is intended to implement); Biological Weapons Anti-Terrorism Act of 1989, Pub L No 101-298 § 2, 104 Stat 201 (1990) (noting that "the purpose of the [biological weapons act] is to implement the Biological Weapons Convention, an international agreement unanimously ratified by the United States Senate in 1974" as well as to "protect the United States against the threat of biological terrorism"). See also Migratory Bird Treaty Act, 16 USC §§ 703–12 (prohibiting the killing, as well as the sale, of migratory birds, their nests, eggs, and products, as an implementation of the Migratory Bird Treaty of 1916); Chemical Weapons Convention Implementation Act, 22 USC § 7601–71 (implementing the Chemical Weapons Convention in the United States by prohibiting the development, production, acquisition, transfer, receipt, possession, as well as use of chemical weapons).

²¹² *United States v Bachner*, 2011 WL 1743427, *2 (ND Ill) (recognizing the biological weapons prohibition enacted in 18 USC § 175 to be a "valid exercise of Congress' [treaty] power under the framework of [*Missouri v Holland*]"). See also *United States v Bond*, 681 F3d 149, 166 (3rd Cir 2012) (affirming the constitutionality of a similar ban on chemical weapons under Congress's treaty powers), cert granted, 133 S Ct 978 (2013). See also Gavin R. Villareal, Note, *One Leg to Stand On: The Treaty Power and Congressional Authority for the Endangered Species Act After United States v. Lopez*, 76 Tex L Rev 1125, 1153–62 (1998).

²¹³ See *Holder v Humanitarian Law Project*, 130 S Ct 2705, 2731 (2010) (rejecting challenges under the First and Fifth Amendments to a statute prohibiting material support to terrorist organizations). See also *In re Consolidated U.S. Atmospheric Testing Litigation*, 820 F2d 982, 990 (9th Cir 1987) (recognizing 42 USC § 2212, which limits contractor liability for harms arising from domestic nuclear testing, as a constitutional exercise of Congress's war and commerce powers); *Hammond v United States*, 786 F2d 8, 13 (1st Cir 1986) (same).

if not under its Commerce Clause authority, then under one of its other enumerated powers.

3. *The no-effect objection.* The fact that Congress will retain the power to enact market bans under its other powers—while of comfort to those who might worry about imposing undue constraints on the federal government—might prompt others to wonder whether, in practice, the interpretation of the Commerce Clause advocated here will have too little effect on the overall scope of federal power. A related objection might be that Congress, even if it is genuinely barred from banning the market in a particular good, and cannot use its other powers as a means of running around the limitations on the Commerce Clause, will be able to get around the limitation nonetheless by enacting regulations that function in effect like bans.

We have two responses to this objection. First, our approach is functionalist, not formalist. Our claim is that, when acting under its interstate commerce powers, Congress may not attempt, either in form or in effect, to shut a market down when it is not acting in service to the market as a whole. What is decisive, in other words, is not whether the law *looks* like a prohibition or a regulation but whether it *functions* like a prohibition or a regulation. Congress should not therefore be able to cloak prohibitions as regulations by imposing such onerous requirements that effectively make it impossible to buy or sell a particular good. Nor should it be able to tax those goods out of existence—as it has tried on multiple occasions in the past—although it can legitimately tax goods in order to influence market behavior.²¹⁴

Second, there are significant structural and subject-area con-

²¹⁴ As the Court noted only last term in *National Federation of Independent Business v Sebelius*, Congress's power under the Taxing Clause is limited to the regulation, rather than the prohibition, of behavior—just as is true, we argue, of Congress's power under the Commerce Clause. See 132 S Ct 2566, 2600 (2012), quoting *Oklahoma Tax Commission v Texas Co.*, 336 US 342, 364 (1949) (noting that “[t]he power to tax is not the power to destroy”). Congress cannot therefore rely upon its taxing power to evade the limitations imposed on its commerce powers, as it can rely, when appropriate, on its treaty or foreign commerce powers. Nevertheless, as the Court has long recognized, Congress can use its taxing power to influence the behavior of customers who participate in a market. See Robert D. Cooter and Neil S. Siegel, *Not the Power to Destroy: An Effects Theory of the Tax Power*, 98 Va L Rev 1195, 1209 (2012) (noting that both “constitutional text and political history suggest that Congress possesses ample power to alter individual behavior by using taxes much like it uses many regulations”). Therefore, Congress can certainly influence consumer behavior, either by means of its taxing or by means of its commerce powers. What it cannot do is pass taxes—or regulations—that function in effect to shut the market down.

straints on the exercise of Congress's other powers that limit the extent to which they can enable Congress to evade the limitations on its authority under the Commerce Clause. Consider, for example, Congress's power over foreign commerce: although Congress may enact bans on imported and exported goods, that provides no justification for federal bans of domestically produced goods; nor, under existing precedents, does it justify federal power to restrict imported goods that are no longer in their original packaging and have been assimilated into the mass of property properly under the control of the states.²¹⁵ Similarly, bans justified under Congress's war powers can and should relate only to products that are genuinely relevant to the national security because of their use or potential use as weapons of war. Because it takes two-thirds of the Senate to ratify a treaty, Congress also should not be able to use the Treaty Power to evade the limitations on its power under the Commerce Clause. The fact that, as Oona Hathaway has noted, it takes an "extraordinary level of consensus . . . to conclude an Article II treaty," makes it unlikely that Congress will be able to ban the market in a particular good or class of goods using its treaty powers unless there is widespread agreement among the states about the importance of the ban.²¹⁶

4. *Facilitating diversity: the change-over-time objection.* Our approach thus *will* limit federal power. But the constraint it will impose will matter only in cases where there is a difference of opinion among the states about whether any particular product or activity should be prohibited. This suggests that congressional power might ebb and flow over time with respect to specific commodities. While some may see this as a problem, we believe it is a virtue.

To see why this is so, consider the example of child pornography. Federal law has prohibited the transportation, receipt, and possession of child pornography since 1977, when it passed the Protection of Children Against Sexual Exploitation Act.²¹⁷ It seems clear that this law constitutes a market ban, given strong evidence

²¹⁵ See *Brown v Maryland*, 25 US 419, 441–42 (1827).

²¹⁶ See, for example, Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 Yale L J 1236, 1310, 1312 (2008) (noting that senators representing about 8 percent of the country's population can halt a treaty and that "an extraordinary level of consensus is required to conclude an Article II treaty").

²¹⁷ Protection of Children Against Sexual Exploitation Act of 1977, Pub L No 95-225, 92 Stat 7 (1978), codified as amended at 18 USC § 2251 et seq.

that child pornography is not reasonably substitutable by another, nonbanned good—for example, adult pornography—and that Congress’s intent when passing the law was to curb the nationwide demand for these materials, rather than to ensure the safety or transparency of a broader market.²¹⁸ There is therefore a good argument to be made that, under our analysis, Congress may not constitutionally enforce the prohibition.

Because there is widespread unanimity among the states about the importance of enacting a ban on child pornography, however, little would be lost by redrafting the federal prohibition as a helper statute.²¹⁹ In this situation, the helper statute would function in effect much like a total ban, insofar as it would effectively make the interstate transport or distribution of child pornography a federal crime. Of course, enforcement of the federal prohibition would depend in part on the vagaries of the various states’ statutory schemes. But presumably this is to the good, because it would allow variation and experimentation among the states, while still ensuring that federal muscle is available to help prevent spillovers. On the whole, then, the transport, sale, and possession of child pornography would still be banned nationally—albeit under a somewhat more complex and diverse regulatory scheme than is currently the case.

But what if this state consensus on child pornography were to break down, rendering the federal helper law ineffective or at least limited in its ability to combat something that many believe is a great evil? It is, of course, almost unimaginable that child pornography will ever be acceptable. But sometimes, as is obvious with regard to the cases of marijuana and alcohol, views *do* shift over time. And when they do, federal power will shift with them.

We view this as a good thing. Tolerating this sort of diversity is precisely what federalism is all about. What the regulation of alcohol has taught us—and perhaps the regulation of marijuana in time might—is that seemingly universal and timeless truths can prove neither. When this is the case, allowing the federal gov-

²¹⁸ See *United States v Robinson*, 137 F3d 652, 656 (1st Cir 1998) (discussing Congressional purposes). See also Amy Adler, *The Perverse Law of Child Pornography*, 101 Colum L Rev 209, 236–37 (2001) (discussing the history of child pornography laws).

²¹⁹ Eva J. Klain, Heather J. Davies, and Molly A. Hicks, *Child Pornography: The Criminal-Justice-System Response* *26–34 (report, ABA Center on Children and the Law, Mar 2001), online at http://www.popcenter.org/problems/child_pornography/PDFs/Klain_etal_2001.pdf (discussing the various state child pornography laws and their differences and similarities).

ernment to supplant state action cheats the sort of checkerboard regulation that enables the values of federalism to find full expression.

IV. CONCLUSION

Our argument is straightforward: Congress's power "to regulate" interstate commerce does not include the power to prohibit commerce in products or services that the states themselves, or some of them, do not want to prohibit. This interpretation of the Commerce Clause is supported by history, and by the structure and theory of the Constitution. Returning to this original understanding would do little to displace federal power in many areas in which central decision making is essential. But it would deprive Congress of a police power that an accident of history bestowed upon it.