The Revival of Federalism

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In late 1940, still reeling from the effects of the great depression on his small dairy farm in Montgomery County, Ohio, Roscoe Filburn sowed on his own land and later harvested 23 acres of winter wheat, some of which he used to feed his chickens and cows, some of which he used for making flour for home consumption, and some of which he saved as seed for the following season. For this, he was fined by the federal government because he had grown more wheat on his farm than federal law allowed. Regulations issued by Claude Wickard, the Secretary of Agriculture, pursuant to the Agricultural Adjustment Act of 1938, limited Filburn to 11.1 acres of wheat at a normal yield of 20.1 bushels of wheat per acre. Filburn harvested 462 bushels of wheat from the 23 acres, or 239 bushels more than his allotment, an illegal “farm marketing excess” under the Act and its implementing regulations.

Farmer Filburn may have thought the law could not possibly have applied to him. After all, the putative source of the federal government’s authority was the power of Congress “to regulate commerce among the states.” Filburn was not selling the wheat at issue, so he was not engaged in commerce of any kind, much less interstate commerce. His harvest could hardly be deemed a “marketing excess” when none of it was sent to market. Nevertheless, the Supreme Court in 1942 unanimously upheld the federal law

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and the fine imposed on Filburn. Had Filburn not chosen to use his own wheat, he would have purchased wheat from others; his decision not to enter the wheat market, therefore, when aggregated with the similar decisions of countless other farmers throughout the country trying, literally, to put bread on their own families’ tables, had a substantial enough effect on the interstate market in wheat to render the law constitutional.

Following on a handful of other New Deal-era decisions by the Supreme Court that expansively interpreted the Interstate Commerce Clause\(^2\) and repudiated a slew of decisions that had been rendered by the Court over the previous 50 years,\(^3\) Wickard v. Filburn\(^4\) stood for the proposition that Congress had virtually unlimited power to regulate the nation’s economic as well as non-economic activity. Congress could regulate the price of milk produced and sold within a single state because of the effect it would have on commerce. \textit{United States v. Wrightwood Dairy Co.}, 315 U.S. 110 (1942). It could regulate the wages earned and hours worked by employees of manufacturing facilities in a single state, if any of the goods were later shipped in (or even affected) interstate commerce. \textit{United States v. Darby}, 312 U.S. 100 (1941). And it could regulate, under its “commerce among the states” power, any wholly intrastate activity that was downstream from a transaction that had at one time involved interstate commerce. \textit{See, e.g., United States v. Sullivan}, 332 U.S. 689 (1948) (upholding conviction for “misbranding” of a Columbus, Georgia retail druggist who had purchased a 1000-table bottle of sulfathiazole from an Atlanta, Georgia wholesaler and later sold it in a 12-tablet tin without a warning.

\(^2\) \textit{N.L.R.B. v. Jones & Laughlin Steel Corp.}, 301 U.S. 1 (1937); \textit{United States v. Darby}, 312 U.S. 100 (1941)


\(^4\) 317 U.S. 111 (1942)
label, where the wholesaler had purchased his product from a Chicago, Illinois manufacturer).

Together, these New Deal cases sanctioned the view that, in addition to interstate commerce itself, Congress could regulate any activity that might one day result in commerce, as well as any activity that utilized goods that had previously moved in commerce. In other words, Congress could regulate virtually anything it chose to regulate, and it took the unlimited power to heart. Even the supposedly conservative President Richard Nixon joined it in even more expansive exertions of federal power such as the Clean Water Act of 1972 and the Endangered Species Act of 1973.

The regulatory agencies, too, became drunk on the commerce clause aphrodisiac. The U.S. Army Corps of Engineers, for example, acting pursuant to a statute designed to protect the flow of commerce through the navigable waterways of the United States, contended that it had the power to regulate a proposed local landfill because migratory birds sometimes stopped to bathe in the puddles that developed after a rain in the gravel pit that was to be the site of the landfill. In another case, the Corps successfully prosecuted the owner of a truck repair shop for removing some old tires from and adding fill dirt to his land so that he could expand his garage. The land became soggy during Pennsylvania’s rainy season, and therefore was a “wetland,” which according to the Corps qualified as a “navigable water” of the United States, necessitating a Clean Water Act permit before fill dirt—a “pollutant” under the Act—could be added.5

The Environmental Protection Agency, acting pursuant to the same Clean Water Act, imposed massive fines on a farmer for plowing his own fields in central California,

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based on the view that the farmer’s plowing prevented run-off of water that would, when aggregated with the run-off from other un-plowed farms, form a streamlet, then a stream, and ultimately make its way, God willing and the sun don’t shine (too warmly, that is), into a navigable waterway.6

After *Wickard*, there was virtually no judicial check on the exercise of the federal government’s commerce clause power. By 1978, Harvard Law Professor Lawrence Tribe, one of the nation’s leading constitutional law scholars, would write that “The Supreme Court has … largely abandoned any effort to articulate and enforce *internal* limits on congressional power—limits inherent in the grants of power themselves.”7 Professor Gerald Gunther would write in the Tenth edition of his Constitutional Law textbook shortly thereafter that “After nearly 200 years of government under the Constitution, there are very few judicially enforced checks on the congressional commerce power.” Indeed, *Wickard*’s view of the Commerce Clause was so pervasive that generations of law school students were not even taught that there might be another constitutional interpretation to consider.

According to the received wisdom, the correct view of the Commerce Clause had been articulated in the 1824 case of *Gibbons v. Ogden*, in which Chief Justice John Marshall had written that it gave the federal government power to regulate not just interstate commerce but all “commerce which concerns more states than one,” including wholly intrastate commerce that had an effect in other states (which meant, in the modern world, just about everything). The fifty-year period leading up to *Wickard* in which the

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6 *Borden Ranch Partnership v. U.S. Army Corps of Engineers*, 261 F.3d 810 (9th Cir. 2001), aff’d by equally divided Court, 537 U.S. 99 (2002).

Court strictly interpreted the clause to reach only “commerce” (in contrast to agriculture or manufacturing, on the one hand, or retail sales, on the other) that was truly “interstate” (in contrast to wholly intrastate), if taught at all, was taught as a naïve aberration from the founders’ vision (as articulated by Marshall) of a laissez-faire-motivated Court that was finally buried once and for all with Wickard. “The view of the commerce clause developed by the Court” between 1887 and 1937, wrote Tribe matter-of-factly, “contrasted sharply with the approach of Marshall in Gibbons v. Ogden.8

The Scholarly Effort

All of this demonstrates just how enormous is the task of restoring the original understanding of the Commerce Clause, of reviving any sense of limits on the awesome power of the federal government. This was one of the key tasks undertaken at the outset by the pro-freedom public interest law movement, but litigation strategies alone would not accomplish the mission. The founders’ original vision was all but lost to the academic world and, hence, to the jurisprudential world that drew heavily from it. A scholarly recovery effort would also have to be undertaken, laying the groundwork for the litigation efforts.

It is thus no accident that the same year the Pacific Legal Foundation opened its doors in 1973, the Heritage Foundation was formed as a research and educational think tank “whose mission is to formulate and promote conservative public policies based on the principles of free enterprise, limited government, individual freedom, traditional American values, and a strong national defense.” Within five years, the Claremont

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8 Id. at 307. See also Erwin Chemerinsky, Constitutional Law 105-06 (2001) (“Beginning in the 1890s, the Supreme Court took a very different approach to the Commerce Clause than that expressed in Gibbons v. Ogden”); Geoffrey R. Stone, et al., Constitutional Law 140 (2nd ed. 1991) (referring to the broad view of Gibbons as the “classical view”).
Institute for the Study of Statesmanship and Political Philosophy was formed with the explicit mission “to restore the principles of the American founding to their rightful, preeminent authority in our national life.” The Reason Foundation and the Cato Institute with their more libertarian bent were formed to support the rule of law, private property, and limited government. In 1982, the Federalist Society was formed, designed to revive or at least reopen the debate about the founders’ vision in the very belly of the beast, the nation’s law schools. Today, the Society’s student division numbers more than 5,000 law students at roughly 145 of the nation’s 168 ABA-accredited law schools; its lawyers division counts more than 20,000 legal professionals in its ranks; and its faculty division, formed in 1999, is testament to the growing influence on law school campuses of those who seek to restore the principles of the American founding to the law school corpus.

The archeology of the founders’ views undertaken by these scholarly think tanks was a critical component of the pro-freedom public interest law movement’s assault on the New Deal’s citadel of unlimited federal power. Below, with particular focus on the Commerce Clause itself, is what that archeology uncovered, which is now serving as the basis for further litigation efforts.

The Founders’ Vision Un-Earthed

When the framers of our Constitution met in Philadelphia in 1787, it was widely acknowledged that a stronger national government than existed under the Articles of Confederation was necessary if the new government of the United States was going to survive. The Continental Congress could not honor its commitments under the Treaty of Paris; it could not meet its financial obligations; and it could not insure that its citizens, especially those living on the western frontier, were secure in their lives and property.
Perhaps of greatest concern, though, was the inability of the central government to counteract the crippling trade barriers that were being enacted by the several states against each other, for the framers rightly perceived that the disputes over commerce threatened the national unity that was critically important to the survival of the new nation. Indeed, the first convention called to address problems with the Articles of Confederation, held at Annapolis in 1786, was specifically devoted to concerns about interstate commerce and navigation. There was thus general agreement about the need to give to the national government more power over interstate commerce.

But the framers were equally cognizant of the fact that the deficiencies of the Articles of Confederation existed by design, due to a genuine and almost universal fear of a strong, centralized government. Our forebears had not successfully prosecuted the war against the King’s tyranny merely to erect another form of tyranny in its place.

The central problem faced by the convention delegates, therefore, was to create a government strong enough to meet the threats to the safety and happiness of the people, yet not so strong as to itself become a threat to the people’s liberty. The framers drew on the best political theorists of human history to craft a government that was most conducive to that end. The idea of separation of powers, for example, evident in the very

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9 See, e.g., Letter from Tench Coxe to the Virginia Commissioners at Annapolis (Sept. 13, 1786), reprinted in 3 'THE FOUNDER'S CONSTITUTION' 473-74 (P. Kurland & R. Lerner eds., 1987) (noting that duties imposed by the states upon each other were “as great in many instances as those imposed on foreign Articles”); THE FEDERALIST NO. 22, at 144-45 (Hamilton) (C. Rossiter & C. Kesler eds., 1999) (referring to “[t]he interfering and unneighborly regulations in some States,” which were “serious sources of animosity and discord” between the States); New York, 505 U.S., at 158 (“The defect of power in the existing Confederacy to regulate the commerce between its several members [has] been clearly pointed out by experience”) (quoting The Federalist No. 42, p. 267 (C. Rossiter ed. 1961)).

10 See, e.g., Bartkus v. People of State of Illinois, 359 U.S. 121, 137 (1959) (“the men who wrote the Constitution as well as the citizens of the member States of the Confederation were fearful of the power of centralized government and sought to limit its power”); Garcia v. San Antonio Metropolitan Transportation Authority, 469 U.S. 528, 568-69 (1985) (Powell, J., dissenting, joined by Chief Justice Burger and Justices Rehnquist and O’Connor).

11 See THE FEDERALIST NO. 51, at 322 (Madison).
structure of the Constitution, was drawn from Montesquieu, out of recognition that the "accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny."12

But the framers added their own contribution to the science of politics, as well. In what can only be described as a radical break with past practice, the Founders rejected the idea that the government was sovereign and indivisible. Instead, the Founders contended that the people themselves were the ultimate sovereign,13 and could delegate all or part of their sovereign powers, to a single government or to multiple governments, as, in their view, was "most likely to effect their Safety and Happiness."14 As a result, it became and remains one of the most fundamental tenets of our constitutional system of government that the sovereign people delegated to the national government only certain, enumerated powers, leaving the residuum of power to be exercised by the state governments or by the people themselves.15

This division of sovereign powers between the two great levels of government was not simply a constitutional add-on, by way of the Tenth Amendment.16 Rather, it is inherent in the doctrine of enumerated powers embodied in the main body of the

12 THE FEDERALIST NO. 47, at 301 (Madison).
14 Declaration of Independence, ¶ 2.
15 See, e.g., THE FEDERALIST NO. 39, at 256 (Madison) (noting that the jurisdiction of the federal government "extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects"); THE FEDERALIST NO. 45, at 292-93 (Madison) ("The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite"); M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819) (Marshall, C.J.) ("We admit, as all must admit, that the powers of the government are limited and that its limits are not to be transcended"); Gregory, 501 U.S. at 457 ("The Constitution created a Federal Government of limited powers").
16 See U.S. CONST. Amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people").
Constitution itself. Article I of the Constitution provides, for example, that “All legislative Powers herein granted shall be vested in a Congress of the United States.”

And the specific enumeration of powers, found principally in Article I, section 8, was likewise limited.

Perhaps foremost among the powers granted to the national government was the power to regulate commerce among the states, but for the Founders, “commerce” was trade, or commercial intercourse between nations and states, not business activity generally.

Indeed, in *Gibbons v. Ogden*, the first major case arising under the clause to reach the Supreme Court, it was contested whether the Commerce Clause even extended so far as to include “navigation.” Chief Justice Marshall, for the Court, held that it did, but even under his definition, “commerce” was limited to “intercourse between nations, and parts of nations, in all its branches.”

This is a far cry from the expansive reading of Marshall’s opinion in *Gibbons* that prevailed after *Wickard* and the other New Deal-era commerce clause cases. Rather, the *Gibbons* Court specifically rejected the notion “that [commerce among the states] comprehend[s] that 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

17 U.S. CONST. ART. I, Sec. 1 (emphasis added); see also Art. I, Sec. 8 (enumerating powers so granted); *M’Culloch*, 17 U.S. (4 Wheat.), at 405 (“This government is acknowledged by all, to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, . . . is now universally admitted”); *United States v. Lopez*, 514 U.S. 549, 552 (1995) (“We start with first principles. The Constitution creates a Federal Government of enumerated powers”).

18 See, e.g., *Corfield v. Coryell*, 6 F. Cas. 546, 550 (C.C.E.D.Pa. 1823) (Washington, J., on circuit) (“Commerce with foreign nations, and among the several states, can mean nothing more than intercourse with those nations, and among those states, for purposes of trade, be the object of the trade what it may”); *Lopez*, 514 U.S., at 585 (Thomas, J., concurring) (“At the time the original Constitution was ratified, “commerce” consisted of selling, buying, and bartering, as well as transporting for these purposes”).

19 22 U.S. (9 Wheat.) 1, 190 (1824); see also *Corfield*, 6 F. CAS., at 550 (“Commerce . . . among the several states . . . must include all the means by which it can be carried on, [including] . . . passage over land through the states, where such passage becomes necessary to the commercial intercourse between the states”).
extend to or affect other States." In other words, for Chief Justice Marshall and his colleagues, the Commerce Clause did not even extend to trade carried on between different parts of a state. The notion that the power to regulate commerce among the states included the power to regulate all other kinds of business activity, therefore, was completely foreign to them.

This understanding—the original understanding—of the Commerce Clause continued for nearly a century and a half. Manufacturing was not included in the definition of commerce, held the Court in *United States v. E.C. Knight Co.*, because “Commerce succeeds to manufacture, and is not a part of it.” “The fact that an article is manufactured for export to another State does not of itself make it an article of interstate commerce . . . .” Neither were retail sales included in the definition of “commerce.”

For the Founders and for the Courts which decided these cases, regulation of such activities as retail sales, manufacturing, and agriculture was part of the police powers reserved to the States, not part of the power over commerce delegated to Congress. And, as the Court noted in *E.C. Knight*, it was essential to the preservation of the states and therefore to liberty that the line between the two powers be retained:

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20 *Gibbons*, 22 U.S., at 194 (quoted in *Morrison*, 120 S. Ct., at 1753).
21 156 U.S. 1, 12 (1895).
22 *Id.*, at 13; *see also Kidd v. Pearson*, 128 U.S. 1, 20 (1888) (upholding a state ban on the manufacture of liquor, even though much of the liquor so banned was destined for interstate commerce).
23 *See The License Cases*, 46 U.S. (5 How.) 504 (1847) (upholding state ban on retail sales of liquor, as not subject to Congress’s power to regulate interstate commerce); *see also A.L.A. Schecter Poultry Corp. v. United States*, 295 U.S. 495, 542, 547 (1935) (invalidating federal law regulating in-state retail sales of poultry that originated out-of-state and fixing the hours and wages of the intrastate employees because the activity related only indirectly to commerce).
24 *See, e.g.*, *E.C. Knight*, 156 U.S., at 12 (“That which belongs to commerce is within the jurisdiction of the United States, but that which does not belong to commerce is within the jurisdiction of the police power of the State”) (citing *Gibbons*, 22 U.S. (9 Wheat.), at 210; *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 448 (1827); *The License Cases*, 46 U.S. (5 How.), at 599; *Mobile Co. v. Kimball*, 102 U.S. 691 (1880); *Bowman v. Railway Co.*, 125 U.S. 465 (1888); *Leisy v. Hardin*, 135 U.S. 100 (1890); *In re Rahrer*, 140 U.S. 545, 555 (1891)).
It is vital that the independence of the commercial power and of the police power, and the delimitation between them, however sometimes perplexing, should always be recognized and observed, for, while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the States as required by our dual form of government....

**The Litigation Front**

The original view of the Commerce Clause described above, recovered by the think tanks and ultimately in the legal literature, would have to be recovered as a jurisprudential matter as well if there was to be any chance at restoring a federal government of only limited, enumerated powers.

Much more than constitutional purity was at stake. The founders believed that centralized government would tend to become tyrannical, but they also thought it would become unaccountable and inefficient. As with the notoriously erroneous five-year plans of Stalin’s Soviet Union, command-and-control bureaucracies are simply not very good at balancing costs and benefits, or getting right the incentives necessary for good policy-making. Indeed, in many instances, they may be legally incapable of even considering the economic costs of their regulatory policies.

25 156 U.S., at 13; see also Carter Coal, 298 U.S., at 301 (quoting E.C. Knight); Garcia, 469 U.S., at 572 (Powell, J., dissenting, joined by Chief Justice Burger and Justices Rehnquist and O’Connor) (“federal overreaching under the Commerce Clause undermines the constitutionally mandated balance of power between the States and the Federal Government, a balance designed to protect our fundamental liberties”).

Two news items of 2003 highlight the nature of the problem. Because of the absolutist nature of the Endangered Species Act, extraordinary efforts have been demanded by the U.S. Fish and Wildlife Service to protect the silvery minnow in Colorado, including the refusal to release water to downstream users from the reservoirs that serve as the minnow’s habitat. The Service’s demands exacerbated the drought conditions in northern New Mexico, leaving an insufficient supply of water for the region’s pinyon trees. Without enough water, the trees were unable to produce sap, their primary defense against insects. The result was a bark beetle infestation that, by latest estimates, will destroy between 80-85% of the region’s pinyon trees, and has already destroyed 96% of the trees in some higher elevation areas.27

Even more troubling were the October 2003 California wildfires. The Endangered Species Act was again the culprit. Required by law to protect species habitat to the exclusion of all else, the U.S. Fish and Wildlife Service prevented California officials from implementing prudent forestry management tools because of a putative threat to southwestern arroyo toad habitat, leaving southern California’s forests a tinderbox of excessive growth and dead brush. The tragic irony: in addition to the loss of human life and property, much of the sacrosanct species habitat was itself destroyed by the fires.28

Leading the litigation charge, as in other areas, was Ronald Zumbrun and the Pacific Legal Foundation. Founded in 1973, PLF’s commerce clause litigation efforts

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began as early as 1975 when, in the case of Kleppe v. New Mexico,\textsuperscript{29} Zumbrun and another PLF attorney, John Findley, filed an \textit{amicus curiae} brief contending that the Wild Free-roaming Horses and Burrows Act of 1971\textsuperscript{30} exceeded Congress’s commerce clause power. The federal government’s unconstitutional regulation protected wild horses and jackasses not just on federal lands, but on private lands as well, without any connection to interstate commerce.

PLF’s brief provided a good description of the consequences: “As a result of the legislation, the animals are completely unrestrained and are allowed to roam at will onto private property resulting in the destruction of crops, the depletion of food supplies provided for livestock, and the injury and harassment of livestock.” The federal law was ultimately upheld as a valid exercise of the federal government’s power under the lands clause—the jackasses won the first round—but PLF had begun the commerce clause recovery effort.\textsuperscript{31}

It took a hearty band of litigators at PLF and elsewhere, though, for the original commerce clause views espoused by PLF and its pro-liberty allies met with one defeat after another, much as Thurgood Marshall’s early efforts to recover the promise of equality contained in the Declaration of Independence but repudiated in the ignominious decision of \textit{Plessy v. Ferguson} were repeatedly rebuffed by the courts.

\textsuperscript{29} 426 U.S. 529 (1976).


\textsuperscript{31} PLF also argued that the federal law intruded upon state sovereignty. Parallel to the commerce clause cases discussed here has been a litigation effort by a number of the same pro-liberty public interest groups to recover the “state sovereignty” aspects of federalism. While the courts have frequently misconstrued the doctrine in cases interpreting the Tenth and Eleventh Amendments, Justice Scalia’s holding for the Court in \textit{Printz v. United States}, 521 U.S. 898 (1997), properly addressed the issue as a component of the “proper” requirement in the Article I, section 9 Necessary and Proper Clause. While related, these sovereign immunity cases are beyond the scope of this chapter.
In *Hodel v. Indiana*,\(^{32}\) for example, the Supreme Court upheld the prime farmland provisions of the Surface Mining Control and Reclamation Act of 1977,\(^{33}\) which required that surface mined prime farmland be returned to prime farmland condition once mining operations were completed—necessitating, among other things, that the land be returned to its original contours after the completing of mining operations, a process that rendered most surface mining projects economically unfeasible. John Cannon of the Mid-Atlantic Legal Foundation, founded in 1975, filed an *amicus* brief contending that the prime farmland provisions of the 1977 Act exceeded Congress’s authority under the Commerce Clause.\(^{34}\)

Cannon contended that the provisions went even further than the wheat marketing orders of the Agricultural Adjustment Act upheld in *Wickard v. Filburn*, because they regulated only local activity without any pretense of connection to a regulation of interstate commerce itself. Although the federal district court had agreed that the Act’s prime farmland provisions exceeded Congress’s commerce clause power, the Supreme Court unanimously rejected the claim, reiterating its broad view of the power conferred by the Commerce Clause: “A court may invalidate legislation enacted under the Commerce Clause only if it is clear that there is no rational basis for a congressional finding that the regulated activity affects interstate commerce, or that there is no reasonable connection between the regulatory means selected and the asserted ends.”\(^{35}\)


34 In parallel litigation involving related provisions of the 1977 Act, the Ronald Zumbrun, Raymond Momoise, and Eileen White of the Pacific Legal Foundation contended that the Act violated the Tenth Amendment and the Takings Clause of the Fifth Amendment. Those claims, too, were unanimously rejected by the Court, which continued to treat the Commerce Clause as a virtually unlimited grant of power to Congress. See *Hodel v. Virginia Surface Min. and Reclamation Ass’n, Inc.*, 452 U.S. 264 (1981).

Amicus curiae briefs raising a combination of Commerce Clause and Tenth Amendment challenges to the Public Utility Regulatory Policy Act of 1978 ("PURPA") were filed in the 1982 case of F.E.R.C. v. Mississippi, by the Southeastern Legal Foundation, founded in 1976, and the Mountain States Legal Foundation, founded in 1977. Southeastern’s legal crew of Ben Blackburn, Wayne Elliott, Allen Hirons, and Stephen Parker contended that “PURPA does not regulate directly energy or commerce in energy. Instead, PURPA regulates sovereign state governmental activities which, by their very nature, are not subject to the Commerce Power.” Mountain State’s legal team of Roger Marzulla, Gale Norton (later to become Secretary of the Interior), and Alison Noven pointed out that “PURPA does not regulate commerce itself but attempts to regulate the manner in which states exercise their legislative, judicial and executive power to regulate public utilities.” Indeed, noted Mountain States, “the procedural rules imposed by PURPA are so specific that they even tell the state commission what it may charge for transcripts.” Although the anti-commandeering position advanced in these briefs would subsequently prevail a decade later in New York v. United States, it was rejected 6-3 by the Court in F.E.R.C. as “somewhat novel.” Justice O’Connor (who would later author the majority opinion in New York v. United States), joined by Chief Justice Burger and Justice Rehnquist, dissented on the Court’s Tenth Amendment analysis but “agreed with the Court that the Court’s Commerce Clause supported” PURPA.

36 16 U.S.C. § 2601 et seq.
Pacific Legal Foundation’s Ron Zumbrun, Sam Kazman, and Kevin Heron also filed an *amicus* brief in *United States v. Riverside Bayview Homes, Inc.*, 38 contending that the extension of the federal Clean Water Act’s definition of “navigable waters” to cover backyard swamps exceeded the Commerce Clause power. PLF’s description of the case is particularly enlightening: “In 1981, Mr. Thomas extended his backyard an additional 8 feet to his property line by filling in a ‘swamp’ area with 50 cubic yards of dirt. He then planted grass seed and started a vegetable garden on the filled-in land. The [U.S. Army Corps of Engineers] asserted Section 404 jurisdiction over the property and ordered Mr. Thomas either to remove the dirt or apply for an "after-the-fact" Section 404 permit.

Mr. Thomas decided to submit a permit application, which contained as one of its 55 questions what the effect of the project would be on navigation.” The “swamp” Mr. Thomas filled had previously been a breeding ground for rodents and mosquitoes and was not connected to any other body of water, navigable or otherwise. Yet a unanimous Supreme Court nevertheless found the Corps’ assertion of jurisdiction over Mr. Thomas’ backyard swamp to be a valid exercise of Congress’s power to regulate commerce among the states.

PLF’s Ron Zumbrun, this time joined by fellow PLF attorneys Edward Connor, Jr., and John Groen, also participated in *Presault v. Interstate Commerce Commission*, 39 which involved the federal “Rails to Trails” program that essentially obliterated the reversionary interests of private property owners in abandoned railroad easements. The Court unanimously upheld the federal program against a Commerce Clause challenge by petitioners in the case, but so thoroughly had the Commerce Clause claims been

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repudiated by the Court in prior cases that PLF rested its argument on the Takings Clause rather than the Commerce Clause.

Similarly, in *Gregory v. Ashcroft*, the Washington Legal Foundation’s Daniel Popeo and John Scully declined even to advance a Commerce Clause challenge to the federal Age Discrimination in Employment Act, which was relied upon by Missouri State Court judges to challenge Missouri’s mandatory retirement age. Although the Supreme Court held that the ADEA could not be applied to state court judges, it did so on Tenth Amendment grounds without even a hint of Commerce Clause concern, thus leaving Congress free to regulate private sector retirement ages (and a whole host of other employment regulations that had been held unconstitutional prior to the New Deal judicial revolution).

The twenty-year effort to restore limits to the Commerce Clause finally bore fruit, however, with the Supreme Court’s decision in *United States v. Lopez* and its progeny, *United States v. Morrison*, and *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*. By then, PLF had a number of allies, including: the Texas Justice Foundation (which, like PLF, filed an amicus curiae brief in *Lopez*); the Center for Individual Rights, founded in 1989, which pursued the commerce clause challenge in *Morrison* all the way to argument in the Supreme Court; the Washington Legal Foundation; the Cato Institute; the Institute for Justice; Defenders of Property Rights; and the newest entry, the Center for Constitutional Jurisprudence, the public interest wing of the Claremont Institute founded in 1999, all of which filed amicus curiae briefs in one or

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more of these landmark cases, articulating the founders’ view of the Commerce Clause and urging the Court to restore the original limits to the Commerce Clause power.

In *Lopez* itself, Ron Zumbrun, Anthony “Tom” Caso, and John Schmidt, Jr. contended in the *amicus* brief filed by the Pacific Legal Foundation, and Professor Clayton Trotter contended in the *amicus* brief filed by the Texas Justice Foundation, that the federal Gun Free School Zone Act, which prohibited gun possession near a school, exceeded Congress’s power under the Commerce Clause. More than 20 years after PLF opened its doors and starting making such arguments, the Supreme Court finally struck down a federal law on Commerce Clause grounds.

The battle was hardly won, however. Scores of federal statutes and hundreds, perhaps thousands, of federal regulations were invalid under any faithful application of the *Lopez* holding, yet the lower courts continued uniformly to reject Commerce Clause challenges to federal regulatory power, in hundreds of cases decided in the immediate aftermath of *Lopez*, resting on the flimsiest of hooks. For five years the Supreme Court let the decisions stand, denying certiorari in almost every case raising the issue, many of them pursued by the pro-freedom public interest law movement. Indeed, the Supreme Court itself rejected a strong Commerce Clause challenge pressed by the Washington Legal Foundation’s Daniel Popeo and Shawn Gunnerson and the Pacific Legal Foundation’s Anne Hayes and Deborah La Fretia in *Reno v. Condon*, 41 in which the Court upheld the Driver’s Privacy Protection Act.

Finally, in a case defended by Michael Rosman and Hans Bader of the Center for Individual Rights, Judge J. Michael Luttig, writing for an *en banc* majority of the Court

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41 528 U.S. 141 (2000).
of Appeals for the Fourth Circuit, held that the Violence Against Women Act exceeded Congress’s Commerce Clause power, all but forcing the Supreme Court to grapple with the implications of its *Lopez* decision. Dozens of briefs were filed in the case, representing hundreds of organizations, most of which urged the Court to reverse the Fourth Circuit (even to overturn *Lopez*) and uphold the Violence Against Women Act. The Trial Lawyers, the Bar Association of the City of New York, Senator Joseph Biden, a coalition of self-proclaimed international law scholars and human rights experts, the American Association of University Women, the American Federation of State, County and Municipal Employees, AFL-CIO, a coalition of 100 law professors led by Yale Law School’s Bruce Ackerman, and 36 states and the Commonwealth of Puerto Rico were among the hundreds of individuals and organizations that filed briefs in the case in support of the VAWA (and of the United States government’s own defense of VAWA).

Arrayed against them was the State of Alabama (represented by its Attorney General William Pryor, later nominated to the Eleventh Circuit Court of Appeals, and Jeff Sutton, later confirmed to the Sixth Circuit Court of Appeals), a couple of policy groups, and a small handful of public interest law firms: Rosman and Bader for the Center for Individual Rights, representing the Respondent in the case; former Attorney General Edwin Meese III and John Eastman for The Claremont Institute Center for Constitutional Jurisprudence; William “Chip” Mellor and Clint Bolick of the Institute for Justice and Roger Pilon, Timothy Lynch, and Robert Levy of the Cato Institute, together with University of Chicago Professor Richard Epstein; and Anne Hayes and Reed Hopper for the Pacific Legal Foundation.
This was the showdown over the Commerce Clause that had been nearly thirty years in the making. This was the case that would demonstrate whether *Lopez* was merely an historical anomaly, or whether the Court truly intended to enforce the constitutional limits of the Commerce Clause. It was what is known in the legal profession as a “bad facts” case. Morrison was a Virginia Tech football player accused of raping college co-ed Christy Brzonkala after getting her drunk at a fraternity party. He was initially suspended by the University, but the suspension was subsequently overturned and he was allowed to return to school (and, perhaps as importantly, to the football team). The state law remedies available to Christy Brzonkala seemed to many to be wholly inadequate to the emotional trauma she was alleged to have suffered.

What is more, in the wake of *Lopez*, Congress had taken special care to include in the VAWA’s legislative history lots of testimony about how violence against women affects interstate commerce. The flaw with the Gun Free School Zone act in *Lopez*, it was believed, was that Congress had not articulated the effect on commerce that would have allowed the Court to sustain the act. On this view, *Lopez* would be rendered meaningless, merely requiring Congress to go through some additional legislative hearing hoops before getting back to the “we can regulate whatever we want” *Wickard* view of the Constitution.

The Supreme Court, again 5-4, rejected these attempts to marginalize *Lopez*. The Violence Against Women Act had nothing to do with commerce, and was therefore not a proper exercise of Congress’s Commerce Clause power. All of the effects on commerce identified in the legislative history were simply too attenuated, too indirect, to sustain an exertion of power that could essentially supplant the entire criminal law of the fifty states.
If Lopez was the Commerce Clause version Sweatt v. Painter, Morrison was its Brown v. Board of Education. Surely now the lower courts would get the message that the Court meant what it said in Lopez: There were constitutional limits to the Commerce Clause that the courts were required to enforce.

The opportunity would come quickly. Pending in the Fourth Circuit—the Circuit whose holding of VAWA unconstitutionality had promoted the Supreme Court’s decision in Morrison—was a case addressing whether the Endangered Species Act could, under the Commerce Clause, validly be extended to a species in which there had not been any known commerce for over a hundred years. Particularly at issue was whether the federal government could criminally prosecute a farmer for shooting a red wolf that was threatening livestock on his private property. The case, Gibbs v. Babbit, had already been briefed and argued, with active amici involvement from the public interest law movement, but decision was held pending the Supreme Court’s decision in Morrison. When that decision came down, invalidating the Violence Against Women Act, most court observers thought that the Fourth Circuit would follow suit in the red wolf case.

It was not to be. Over a strong dissent from Judge Luttig, Chief Judge Wilkinson held that the red wolf regulations were a valid regulation of interstate commerce because the farmers and ranchers challenging the regulations “take wolves mainly because they are concerned that the animals pose a risk to commercially valuable livestock and crops,” and because without red wolves, there would be “no red wolf related tourism, no

44 214 F.3d 483 (2000).
45 Reed Hopper and Anne Hayes for the Pacific Legal Foundation; Daniel Popeo and Paul Kamenar for the Washington Legal Foundation.
scientific research, and no commercial trade in pelts.” The Supreme Court’s decision in *Morrison* was inapposite, held Wilkinson, because it involved a federal intrusion on state criminal law, not environmental law. Apparently, the *Lopez* revolution did not apply in the environmental context.

So the public interest groups sprang into action again, this time to challenge the Army Corp of Engineers’ “migratory bird rule,” which extended the Clean Water Act’s definition of “navigable waters” to include any standing body of water in which migratory birds might take a drink or a bath, whether or not the water was in any way connected to a navigable stream. The Pacific Legal Foundation, the Washington Legal Foundation, the Center for Individual Rights, the Cato Institute and Institute for Justice, The Claremont Institute Center for Constitutional Jurisprudence, and Defenders of Property Rights (founded in 1991), all weighed in with Commerce Clause challenges to the Corps’ ridiculous assertion of power in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*.46

The groups arrayed against them puts the case in context: In addition to the core environmental groups that one would expect (the Environmental Defense Fund, the Natural Resources Defense Council, the National Wildlife Federation, the Chesapeake Bay Foundation, the World Wildlife Fund, and Defenders of Wildlife), an eclectic collection of groups—the Anti-Defamation League, People For The American Way Foundation, the National Gay And Lesbian Task Force, the NOW Legal Defense and Education Fund, the National Conference For Community and Justice, the Human Rights Campaign, the National Coalition Against Domestic Violence, the National Federation

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Of Filipino American Associations, the India Abroad Center For Political Awareness, the National Urban League, the National Council of Jewish Women, the National Women's Law Center, and the American Association of University Women—filed an *amicus curiae* brief, urging the Court to uphold the Corps’ migratory bird rule. Actually, the groups didn’t care one way or another about the migratory bird rule; but they cared mightily about the Commerce Clause, and in particular about the old *Wickard* holding that Congress could regulate any activity that, in the aggregate, had an effect on commerce.

In *SWANCC*, the Court struck down the “migratory bird rule” as a simple matter of statutory construction, but it left no doubt that its *Lopez* Commerce Clause constitutional analysis was as applicable in the environmental context as in the criminal law context. It also left ambiguous, though, just how its Commerce Clause analysis was to be applied.

So the federal government persists in defending, and the lower courts persist in refusing to give any teeth to their review of, federal regulatory policy having nothing to do with interstate commerce. The United States now claims confusion over the meaning of the words "*adjacent to navigable waters*" in the Clean Water Act, so in *United States v. Rapanos*, the Pacific Legal Foundation is defending John Rapanos, who could be sentenced to federal prison for sixteen months for modifying wetlands on his Michigan property even though his property is 20 miles away from any recognized navigable water. PLF’s petition for certiorari is, at this writing, pending before the Supreme Court. Pacific Legal Foundation is also supporting James and Rebecca Deaton of Maryland, whose 12
acre parcel is eight miles away from any navigable waters. A petition for certiorari in *Deaton v. United States* is also pending.

The recalcitrance continues in the Endangered Species Act context as well. In *GDF Realty v. Norton*, the Fifth Circuit upheld (over a Commerce Clause challenge pressed by the Pacific Legal Foundation, as part of its new Endangered Species Act Reform Project) the extension of the Endangered Species Act to a group of Texas cave bugs that have no connection to commerce (or to any other species, for that matter). A petition for rehearing has been pending in the case for nearly a year, though, so perhaps a change of course is in the works.

Similarly, in a case that brings us full circle back to the California wildfires discussed at the outset of this chapter, the D.C. Circuit rejected a Commerce Clause challenge brought by The Claremont Institute Center for Constitutional Jurisprudence to the extension of the ESA to the wholly intra-state, non-commercial southwestern arroyo toad. At this writing, the petition for a writ of certiorari in the case, *Rancho Viejo v. Norton*, is pending before the Supreme Court. It remains to be seen whether the Court is ready fully to apply *Lopez*, and the Founders’ original view of the Commerce Clause, in the environmental law context. Even if it is, though, we should not expect it to be the final chapter; the proponents of unlimited federal power seem to have an infinite number of epilogues to offer. One thing is certain: the pro-freedom public interest law movement will be ready to answer them.