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Guillen and Gullibility: Piercing the Surface of Commerce Clause Doctrine

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Guillen and Gullibility: Piercing the Surface of Commerce Clause Doctrine

Mitchell N. Berman*

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* Bernard J. Ward Centennial Professor in Law, The University of Texas School of Law. E-mail: mberman@mail.law.utexas.edu. I am grateful to my colleague Lynn Baker for first drawing my attention to the Washington Supreme Court's decision in *Pierce County v. Guillen*, 31 P.3d 628 (Wash. 2001), for inviting me to join her on projects related to that case, and for authoring many of the ideas that find expression in this Article. I also wish to thank Lino Graglia and Douglas Laycock for helpful comments on an earlier draft, and Lacy Cooper and Caitlin Kasmar for excellent research assistance.

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INTRODUCTION

*Pierce County v. Guillen*¹ is not likely to make many reviewers' Top Ten lists of the most important decisions handed down during the Supreme Court's 2002 Term. In most commentators' estimation the big federalism case of the term was *Nevada Department of Human Resources v. Hibbs*,² a decision upholding the Americans with Disabilities Act as a valid exercise of Congress's power under Section Five of the Fourteenth Amendment. *Eldred v. Ashcroft*,³ which rejected various challenges to the Copyright Term Extension Act of 1998, generally ranks second. The Court's unanimous decision in *Guillen*, which upheld on Commerce Clause grounds a federal law that protects information "compiled or collected" by states and localities in connection with various federal highway safety programs from being discovered or admitted into evidence in state or federal trials, has gone largely unnoticed.⁴

From one perspective, this is decidedly odd. Contemporary Commerce Clause doctrine starts, of course, with *United States v. Lopez*,⁵ the 1995 decision in which a 5–4 Court held for the first time in nearly sixty years that a federal statute exceeded Congress's commerce power. *Lopez* found the federal Gun-Free School Zone Act (GFSZA) objectionable on at least two bases: that it regulated non-commercial activity—gun possession—and interfered with traditional areas of state sovereignty—education.⁶ Subsequently, in *United States v. Morrison*,⁷ the same 5–4 majority struck down a section of the Violence Against Women Act (VAWA), also because it regulated non-commercial activity—gender-motivated violence—and interfered with traditional areas of state sovereignty—criminal law.⁸ The statute at issue in *Guillen*, 23 U.S.C. § 409, regulated apparently non-commercial activity—the discovery and introduction of evidence in civil litigation—and interfered with a traditional area of state sovereignty—state judicial processes.⁹ One might

1. 537 U.S.129 (2003).

2. 538 U.S. 721 (2003).

3. 537 U.S. 186 (2003).

4. For example, the decision earned just cursory mention in the New York Times when it was announced and failed to make the Term-end summary. See Linda Greenhouse, *Justices Reject a Double-Jeopardy Claim*, N.Y. TIMES, Jan. 15, 2003, at A14; Linda Greenhouse, *The Supreme Court: Overview; In a Momentous Term, Justices Remake the Law, and the Court*, N.Y. TIMES, July 1, 2003, at A1. *Guillen* has fared no better in the 2003 supplements to leading constitutional law casebooks. See, e.g., DANIEL A. FARBER ET AL., 2003 SUPPLEMENT TO CASES AND MATERIALS ON CONSTITUTIONAL LAW (3d ed. 2003); GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW: 2003 SUPPLEMENT 35 (4th ed. 2003); KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW: 2003 SUPPLEMENT (14th ed. 2003).

5. 514 U.S. 549 (1995).

6. See *infra* notes 46–58 and accompanying text.

7. 529 U.S. 598 (2000).

8. See *infra* notes 60–66 and accompanying text.

9. These two assertions are problematized *infra* Section II.B.

think, therefore, that § 409 would fall on the authority of *Lopez* and *Morrison*. That it did not might signal something of importance—perhaps some shift in the conservative Justices’ attitude toward the state-federal balance, or perhaps a significant step in the working out of the Rehnquist Court’s Commerce Clause jurisprudence. At the least, the outcome in *Guillen* should have been enough to raise eyebrows.

To date, however, it has not. Admittedly, it is not too hard to identify possible reasons why. The case involved a little-known and fairly complicated statute. It arrived, not from the lower federal courts, but from the state courts where the glare of publicity is reduced. And, although the case raised questions about the scope of congressional power, it was not an exercise to which the states themselves were opposed.¹⁰ Even more notable, however, were the composition and tenor of the Court’s opinion. Reversing the Supreme Court of Washington, the United States Supreme Court upheld § 409 as a valid exercise of Congress’s commerce power in a brief, unanimous decision designed to make *Guillen* look like a modest little case with much to be modest about. For these reasons, perhaps among others, the silence that has greeted *Guillen* can be explained.

It is nonetheless unfortunate, for *Guillen*, properly understood, opens a window on the Court’s evolving understanding of what the Commerce Clause means. If this is so, its importance cannot be substantially overstated. The central challenge confronting the Court’s Commerce Clause jurisprudence for most of the nation’s history has been to steer a doctrinal path between conferring upon Congress an effective police power and hamstringing

10. Actually, this is a more complex matter than the statement in text lets on. It is true, of course, that the federal statute was challenged by a private party, not by a state. Furthermore, thirteen states (along with the Commonwealth of the Northern Mariana Islands) filed an amicus brief in support of Pierce County defending § 409 on Spending Clause grounds. See Brief of Amici Curiae State of Washington et al., *available at* 2002 WL 1484393. So it surely looks on the face of things that the states were not opposed to this legislation. Then again, if the states really supported § 409, there would have been no need for it; the states could have enacted the same ban on discovery and admissibility on their own as a matter of state law. The very existence of the federal law is thus some evidence that the states did not want it. The solution to this puzzle might be to distinguish between two conceptions of “the states”: state *governments* and state *sovereigns*, i.e., the citizenry. Perhaps the former liked this partial protection against tort liability but would have been unable to enact it into state law because of popular opposition. Indeed, the common law long recognized an individual right to inspect public records. See, e.g., *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978) (“It is clear that the courts of this country recognize a general right to inspect and copy public records and documents.”); 66 AM. JUR. 2D *Records and Recording Laws* § 17 (2003) (“A citizen has a fundamental right to have access to public records, and his or her right to know is the rule, while secrecy is the exception.”). Several states, including Washington, have open records laws written into their constitutions or adopted by referendum. See, e.g., FLA. CONST. art. I, § 24; LA. CONST. art. XII, § 3 (2004); MONT. CONST. art. II, § 9; N.D. CONST. art. 11, § 6; CAL. GOV. CODE § 81008 (2003) (California statute adopted by referendum providing free access to all records relating to political reform); WASH. REV. CODE § 42.17.260 (2003) (Washington open records law adopted by referendum).

Congress from meeting the changing needs of a vibrant national economy. Experience has shown that this is no easy task. Too often, though, the Supreme Court and its commentators have jumped straight into the project of doctrine-making without pausing to consider what the constitutional meaning is that the in-court doctrine should be designed to implement. *Guillen*, I will suggest, sheds valuable light on just that analytically prior question: What does the Commerce Clause mean? And in doing so, it offers clues—perhaps clues that the Justices have not themselves picked up on—for the direction in which sound Commerce Clause doctrine might develop. In short, there are important lessons to be learned from the decision for those not so credulous as to judge it by its packaging.

This thesis is developed over four parts. Part I describes the *Guillen* litigation. Part II demonstrates that the Court's unanimous decision in *Guillen* stands in considerable tension with the majority and concurring opinions from *Lopez* and *Morrison*. This is not to conclude that the three decisions are irreconcilable. It is to claim that the basis on which any possible reconciliation might be effectuated is sufficiently unclear—at both first and second blush—as to warrant close attention from scholars, litigants, and the Court itself.

Part III proposes one solution to this puzzle. In brief, it argues that the outcomes in all three cases might be best explained by reference to the implicit principle (often proposed in the scholarly literature) that the Commerce Clause permits Congress to regulate intrastate activities for commercial purposes, but not otherwise. Part IV emphasizes that this underlying principle—which is not the burden of this Article to defend—would be a judicial view about what the Commerce Clause *means*, or provides of its own force; it would not be a judicial view about the Commerce Clause *doctrine* that courts should apply as a way to implement or administer Commerce Clause meaning. This Part then elaborates on the difference between constitutional meaning and constitutional doctrine and offers exploratory thoughts about how the project of making constitutional doctrine—in the Commerce Clause arena and elsewhere—might be advanced were the Court to attend more sensitively to the analytically prior step of ascertaining constitutional meaning.

I. THE CASE

A. *THE FACTS*¹¹

The dispute in *Guillen* arose when Washington State motorists involved in traffic accidents requested access to accident reports and other materials and data held by county agencies related to the traffic history of the sites of their accidents.¹² The motorists sought the information to pursue tort claims against the relevant city and county governments for negligence in their maintenance and operation of the intersections at which the accidents had occurred.¹³

Pierce County refused to provide the requested reports and data in reliance, in part, on a federal statute,¹⁴ 23 U.S.C. § 409, as amended in 1995, which states:

Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.¹⁵

Because the accident reports and other materials that the plaintiffs sought had been collected as part of an application to the State of Washington for federal hazard elimination funds under 23 U.S.C. § 152,¹⁶ the county argued that they were privileged under § 409. The plaintiffs, in turn, objected that the collecting of certain reports and other materials for this statutorily specified purpose did not render such reports and data privileged if

11. This Section and the next are drawn from an amicus brief that Lynn Baker and I filed in the U.S. Supreme Court in support of respondents in *Guillen*. See generally Brief of Amici Curiae Law Professors in Support of Respondents, *Pierce County v. Guillen*, 537 U.S. 129 (2003) (No. 01-1229), available at 2002 WL 1964091. To discount possible bias, readers should be aware that the thrust of that brief was to argue that § 409 was an invalid exercise of Congress's spending power under *South Dakota v. Dole*, 483 U.S. 203 (1987). We also argued, briefly, that *Lopez* and *Morrison* precluded successful reliance on the Commerce Clause. *Id.* at 22-24.

12. *Guillen v. Pierce County*, 31 P.3d 628, 632-37 (Wash. 2001).

13. *Id.*

14. *Id.* at 632, 634-35.

15. 23 U.S.C. § 409 (2000).

16. *Guillen*, 31 P.3d at 634.

they had initially been compiled for other purposes, such as routine law enforcement.¹⁷

An example illustrates the import of the dispute. A local police officer prepares (“compiles”) an accident report as the officer is required to do under long-standing state law. At a later point in time, that report is collected by a state authority pursuant to 23 U.S.C. § 152 in order for the state to determine the twenty intersections in the state where safety improvements are most needed.¹⁸ The state authority prepares a report discussing those twenty intersections, and uses the report and the data on which it was based to set its priorities for spending its annual allotment of federal highway safety funds. Plainly, the report prepared by the state pursuant to § 152 would be covered by the § 409 privilege. The central question, however, was whether the original accident reports—reports that (by hypothesis) would have been prepared even in the absence of the federal scheme, and which were not *prepared* pursuant to § 152—would *also* be covered by the privilege once they were *collected* pursuant to § 152 in order to generate the report of state-wide highway safety priorities.

B. THE WASHINGTON SUPREME COURT INVALIDATES THE ACT

The Washington Supreme Court held that they were.¹⁹ Emphasizing the statute’s plain language, the court explained that whether the materials or data had been originally compiled for distinct purposes appears irrelevant.²⁰ On the face of the statute, the only question is whether they have been “collected” for a statutorily specified purpose.²¹ Moreover, the court found that

17. *Id.* at 644–46.

18. Section 152 states in relevant part:

Each State shall conduct and systematically maintain an engineering survey of all public roads to identify hazardous locations, sections, and elements, including roadside obstacles and unmarked or poorly marked roads, which may constitute a danger to motorists, bicyclists, and pedestrians, assign priorities for the correction of such locations, sections, and elements, and establish and implement a schedule of projects for their improvement.

23 U.S.C. § 152(a)(1) (2000).

Notice that this provision is stated as an unconditional mandate; seemingly, a state’s obligation to conduct and maintain an engineering survey of the sort described exists independently of that state’s pursuit or receipt of federal funds. If this is the correct understanding of § 152, then the mandate arguably violates the anticommandeering rules of *New York v. United States*, 505 U.S. 144 (1992) and *Printz v. United States*, 521 U.S. 898 (1997), rendering the corresponding portion of § 409 invalid for the same reason. Put another way, insofar as the § 409 privilege *cum* discovery ban applies to engineering surveys mandated under § 152, that privilege is itself a mandate, rather than a condition on spending. In *Pierce County v. Guillen*, however, the Supreme Court read § 152 as an eligibility requirement not as an unconditional mandate. See *Pierce County v. Guillen*, 537 U.S. 29, 133 (2003).

19. *Guillen*, 31 P.3d at 646.

20. *Id.*

21. *Id.*

the history of the evolution of § 409 bolstered this interpretation. When initially enacted in 1987, § 409 did not contain the words “or collected.”²² As a result, “most state courts restricted the application of the federal privilege” to materials and data “that had been *specifically* created for the purpose of applying for federal safety improvement funding of implementing a funded project.”²³ Congress amended § 409 in 1995 by adding the words “or collected” after “compiled” specifically in response to these narrow decisions and to “clarify” the intended scope of the privilege.²⁴ In doing so, Congress explicitly described its intention

that raw data collected prior to being made part of any formal or bound report shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mention[ed] or addressed in such data.²⁵

For these reasons, the Washington Supreme Court agreed with Pierce County that any reports or data collected for the statutorily specified purposes became fully privileged.²⁶

But Pierce County’s victory on the question of the scope of the privilege afforded by § 409 quickly turned pyrrhic for the Washington Supreme Court proceeded to hold that the § 409 privilege, construed so broadly, was unconstitutional.

In the part of its analysis most important for present purposes, the court reasoned that § 409 was not a valid exercise of Congress’s commerce power because such an expansive privilege “cannot reasonably be characterized as an ‘integral part’ of the Federal-aid highway system’s regulation.”²⁷ It also concluded that the privilege failed the *South Dakota v. Dole*²⁸ requirement that any condition attached to the receipt of federal funds be related to the spending program and was therefore not sustainable as an exercise of the spending power.²⁹ Lastly, relying heavily on its construction of recent

22. Pub. L. No. 100-17, § 132(a), 101 Stat. 170 (1987), *reprinted in* 1987 U.S.C.C.A.N. (101 Stat.) 170.

23. *Guillen*, 31 P.3d at 641.

24. *Id.* at 644.

25. H.R. REP. NO. 104-246, at 59 (1995), R.13.4(a), *reprinted in* 1995 U.S.C.C.A.N. 551.

26. *Guillen*, 31 P.3d at 644.

27. *Id.* at 654 (quoting *Hodel v. Indiana*, 452 U.S. 314, 328 n.17 (1981)).

28. 483 U.S. 203 (1987).

29. The Washington Supreme Court stated:

We find that no valid federal interest in the operation of the federal safety enhancement program is reasonably served by barring the admissibility and discovery in state court of accident reports and other traffic and accident materials and “raw data” that were originally prepared for routine state and local purposes, simply because they are “collected,” . . . pursuant to a federal statute for federal purposes.

Guillen, 31 P.3d at 651.

Rehnquist Court federalism decisions as displaying a “fundamental respect for state sovereignty,”³⁰ the court reasoned that § 409 “cannot be characterized as a valid exercise of *any* power constitutionally delegated to the federal government.”³¹ Simply put, Congress lacks “power to intrude upon the exercise of state sovereignty in so fundamental an area of law as the determination by state and local courts of the discoverability and admissibility of state and local materials and data relating to traffic and accidents on state and local roads.”³²

Three justices of the Washington Supreme Court disagreed with the majority’s interpretation of § 409. As these justices read the privilege, an individual report originally compiled for an ordinary state or local law enforcement purpose was not covered by § 409 merely because it was later collected, along with other reports or data, for the purpose of applying for a share of the state’s federal safety-improvement funds.³³ In their view, all that the 1995 amendment clarified was that if these reports were subsequently “collected” pursuant to § 152 or another specified provision of federal law, the *collection* of reports would not itself be discoverable.³⁴

In other words, as the concurring justices read the legislative history, when amending § 409 in 1995, Congress was reacting against judicial decisions that permitted plaintiffs “to gain information that was ‘collected’ by an agency for purposes of preparing an application for federal funding from the agency that ‘collected’ the information.”³⁵ This, Congress worried, would deter states from participating in federally funded highway and railway improvement projects as vigorously as they otherwise might. By adding “or collected” to “compiled,” under this view, Congress simply wanted to ensure that a tort plaintiff could not piggyback on the state’s efforts in collecting reports and data instead of doing the hard work of identifying, securing, sorting through, and analyzing documents and data on its own. It would not follow, the concurrence concluded, that plaintiffs should be handicapped when “seeking information or reports from their original source, such as accident reports from a law enforcement agency.”³⁶

Having interpreted the evidentiary privilege and discovery ban more narrowly than had the majority, the concurrence would have upheld the statute as a valid exercise of the spending power under *Dole*.³⁷ The concur-

30. *Id.* at 653.

31. *Id.* at 655 (emphasis added).

32. *Id.*

33. *Id.* at 657 (Madsen, J., concurring).

34. *Guillen*, 31 P.3d at 658.

35. *Id.*

36. *Id.*

37. *Id.* at 659 (asserting that, on its interpretation of the statute, § 409 “is a clearly valid exercise of the Federal Spending Power”). Although these three justices split with the majority on the constitutionality of § 409, they did not dissent. Because the majority had remanded the

rence intimated no disagreement with the majority's Commerce Clause analysis.

C. *THE UNITED STATES SUPREME COURT REVERSES*

The United States Supreme Court granted certiorari to resolve whether § 409 "is a valid exercise of Congress's power under the Supremacy, Spending, Commerce, or Necessary and Proper Clauses of the United States Constitution."³⁸ A bare ten weeks after oral argument, the Court reversed the Washington Supreme Court and upheld § 409 in a brief and unanimous decision.³⁹

The Court's analysis, per Justice Thomas, proceeded in two critical steps.⁴⁰ First, the Court interpreted § 409 much as the concurring justices at the state court had, and just as the Solicitor General advocated. In its view, the Court explained:

Section 409 protects all reports, surveys, schedules, lists, or data actually compiled *or* collected for § 152 purposes, but does not protect information that was originally compiled or collected for purposes unrelated to § 152 and that is currently held by the agencies that compiled or collected it, even if the information was at some point "collected" by another agency for § 152 purposes.⁴¹

Then, having construed the statute in this relatively narrow fashion, the Court explained that the statute passed muster under the Commerce Clause with ease. Its full analysis occupied no more than one full page of the United States Reports. Here it is, nearly in its entirety:

It is well established that the Commerce Clause gives Congress authority to "regulate the use of the channels of interstate commerce." In addition, under the Commerce Clause, Congress "is empowered to regulate and protect the instrumentalities of inter-

case to the trial court for further discovery proceedings, they concurred in the majority's disposition.

38. See Petition for Certiorari for Pierce County, *available at* 2002 WL 32100984. The Court granted certiorari on a second question too: "Whether private plaintiffs have standing to assert 'states' rights' under the Tenth Amendment where their State's Legislative and Executive branches expressly approve and accept the benefits and terms of the federal statute in question." *Id.* But the Court did not reach this question in light of its dismissal of the Tenth Amendment question. See *infra* text accompanying note 45.

39. *Pierce County v. Guillen*, 537 U.S. 129 (2003). The opinion was issued on January 14. Oral argument had been held on November 4.

40. Because the issue arose as part of a discovery dispute, a threshold question before the Court was whether there existed a final judgment to review, as required by 28 U.S.C. § 1257(a). The Court answered this question in the affirmative before reaching the merits of § 409. *Guillen*, 537 U.S. at 140–43.

41. *Guillen*, 537 U.S. at 144.

state commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities.”

. . . Congress adopted § 152 to assist state and local governments in reducing hazardous conditions in the Nation’s channels of commerce. That effort was impeded, however, by the States’ reluctance to comply fully with the requirements of § 152, as such compliance would make state and local governments easier targets for negligence actions by providing would-be plaintiffs a centralized location from which they could obtain much of the evidence necessary for such actions. In view of these circumstances, Congress could reasonably believe that adopting a measure eliminating an unforeseen side effect of the information-gathering requirement of § 152 would result in more diligent efforts to collect the relevant information, more candid discussions of hazardous locations, better informed decisionmaking, and, ultimately, greater safety on our Nation’s roads. Consequently, both the original § 409 and the 1995 amendment can be viewed as legislation aimed at improving safety in the channels of commerce and increasing protection for the instrumentalities of interstate commerce. As such, they fall within Congress’ Commerce Clause power.⁴²

In light of this disposition, the Court noted in a footnote, it “need not decide whether [§ 409] could also be a proper exercise of Congress’ authority under the Spending Clause or the Necessary and Proper Clause.”⁴³ Nor, a final footnote added, did the Court need to address a contention raised “in passing” that the statute “violates the principles of dual sovereignty . . . because it prohibits a State from exercising its sovereign powers to establish discovery and admissibility rules to be used in state court for a state cause of action.”⁴⁴ This contention was properly ignored because “[t]he court below did not address this precise argument, reasoning instead that the 1995 amendment to § 409 was beyond Congress’ enumerated powers.”⁴⁵

II. THE PUZZLE

One who had not paid attention to the case before the Court got its hands on it could be excused for thinking *Guillen* a no-brainer. Certainly that’s the impression that Justice Thomas’s opinion appears designed to convey. Matters are not, however, quite so simple.

42. *Id.* at 146–47 (internal citations and cross reference omitted).

43. *Id.* at 147 n.9.

44. *Id.* at 148 n.10.

45. *Id.*

A. AT FIRST GLANCE

1. The Precedent

Current Commerce Clause doctrine starts with the identification, in *United States v. Lopez*,⁴⁶ of:

three broad categories of activity that Congress may regulate under its commerce power. First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce.⁴⁷

Lopez involved the constitutionality of the Gun-Free School Zone Act (GFSZA), which made it a federal criminal offense to knowingly possess a firearm within a school zone.⁴⁸ After noting that "[t]he first two categories of authority may be quickly disposed of," the Court concluded that if the GFSZA "is to be sustained, it must be under the third category as a regulation of an activity that substantially affects interstate commerce."⁴⁹

Now, Chief Justice Rehnquist's analysis under this third heading has been fairly criticized as something of a hodge-podge.⁵⁰ But for our purposes, two claimed defects of the statute stand out.⁵¹ First, Rehnquist read the

46. 514 U.S. 549 (1995).

47. *Id.* at 558–59 (internal citations and quotations omitted). The same classification appeared in nearly identical terms in *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276–77 (1981), and *Perez v. United States*, 402 U.S. 146, 150 (1971). But *Lopez* was the first to turn a mere list into a more fundamental organizing framework.

48. 18 U.S.C. § 922(q) (2000). The offense did require that the actor "knows, or has reasonable cause to believe," that his possession occurs in a school zone. *Id.*

49. *Lopez*, 514 U.S. at 559.

50. See, e.g., Glenn H. Reynolds & Brannon P. Denning, *Lower Court Readings of Lopez, or What If the Supreme Court Held a Constitutional Revolution and Nobody Came?*, 2000 WIS. L. REV. 369, 377 ("The most serious shortcoming of the *Lopez* opinion . . . is the lack of any explicit instructions or framework for the lower courts to apply to Category Three regulations."). For what strikes me as an implausibly glowing assessment of the majority opinion, in terms of craftsmanship as well as result, see Charles Fried, *The Supreme Court, 1994 Term—Foreword: Revolutions?*, 109 HARV. L. REV. 13, 34–45 (1995).

51. I am ignoring three other claimed defects: the lack of an "express jurisdictional element which might limit [the statute's] reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce," *Lopez*, 514 U.S. at 562; the absence of specific congressional findings regarding the statute's effect on interstate commerce, see *id.* at 562–63; and the overarching concern that to uphold the GFSZA would effectively "bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States," *id.* at 567.

Court's precedents to stand for the proposition that, "[w]here *economic* activity substantially affects interstate commerce, legislation regulating that activity will be sustained."⁵² Even *Wickard v. Filburn*,⁵³ the Court explained, "involved economic activity in a way that the possession of a gun in a school zone does not."⁵⁴ The GFSZA was infirm, then, because it "has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms."⁵⁵

Second, the Court objected to the statute's interference in areas of traditional state sovereignty—namely, criminal law enforcement and education.⁵⁶ Although this was a relatively minor note in the majority's opinion, it was the central focus of Justice Kennedy's concurrence, in which he was joined by Justice O'Connor. Where Congress regulates non-commercial activities, Kennedy explained, "then at the least we must inquire whether the exercise of national power seeks to intrude upon an area of traditional state concern."⁵⁷ And when subjected to such an inquiry, he concluded, the GFSZA did not fare well. In short, the statute's core defect, in the view of two members of the five-person *Lopez* majority, was that the GFSZA "forecloses the States from experimenting and exercising their own judgment in an area to which States lay claim by right and expertise, and it does so by regulating an activity beyond the realm of commerce in the ordinary and usual sense of that term."⁵⁸

Although *Lopez* grabbed headlines everywhere, distinguished commentators questioned whether it would have legs.⁵⁹ Doubts on that score were

I ignore the second consideration because *Morrison* revealed the absence-of-findings criticism to be close to a make-weight. See *United States v. Morrison*, 529 U.S. 598, 614–15. And I skip over the third because, as fundamental as was this argument to the *Lopez* decision, it counts not so much as a defect of the statute itself but as a criticism of the pre-*Lopez* substantial effects test that the dissent would have deployed to uphold the statute. Put another way, this basic concern serves to explain why the Court treated the other features of the statute as defects. The lack of a jurisdictional nexus also strikes me as something other than a defect. I am tempted to say, rather, that the *presence* of a jurisdictional nexus was offered as a possible cure for a statute that is otherwise defective. Of course, this claim needs considerable fleshing out that I am not disposed to provide here. So I will not object if anyone prefers to add the absence of a jurisdictional nexus to the two defects that I focus on.

52. *Lopez*, 514 U.S. at 560.

53. 317 U.S. 111 (1942) (upholding provisions of the Agricultural Adjustment Act that imposed limits on the harvesting of wheat even for home consumption).

54. *Lopez*, 514 U.S. at 560.

55. *Id.* at 561.

56. See, e.g., *id.* at 564 ("Under the theories that the Government presents in support of § 922(q), it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign.")

57. 514 U.S. at 580 (Kennedy, J., concurring).

58. *Id.* at 583 (Kennedy, J., concurring).

59. See, e.g., Sanford Levinson, *Raoul Berger Pleads for Judicial Activism: A Comment*, 74 TEX. L. REV. 773, 774 (1996); Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674, 692 (1995) ("*Lopez* is a narrow decision that will invalidate few congressional acts. The Court's decision rests

erased five years later in *United States v. Morrison*.⁶⁰ *Morrison* addressed the constitutionality of a provision of the Violence Against Women Act (VAWA) that provided federal civil remedies for victims of gender-related violence. The very same 5–4 majority that had decided *Lopez* held that Congress lacked authority to enact the provision in question, 42 U.S.C. § 13981, under either of the claimed sources of power—the Commerce Clause or Section Five of the Fourteenth Amendment.

Again writing for the Court, the Chief Justice viewed the Commerce Clause question as presenting largely a reprise of *Lopez*. As in *Lopez*, the inquiry centered on category three, the substantial-effects prong of Commerce Clause doctrine.⁶¹ Section 13981 of VAWA failed that inquiry for essentially the same two reasons as had the GFSZA.

First, the Court made clear that the nature of the activity being regulated as either economic or non-economic was of “central” importance, if not necessarily outcome-determinative.⁶² This requirement all but doomed § 13981, for

[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity. While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity to decide these cases, thus far in our Nation’s history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.⁶³

Second, drawing both upon his own majority opinion in *Lopez* and Justice Kennedy’s *Lopez* concurrence, Rehnquist charged that the reasoning which would support VAWA may “be applied equally as well to family law and other areas of traditional state regulation.”⁶⁴ Because the suppression of violent crime “has always been the prime object of the States’ police power,”⁶⁵ in creating remedies for non-economic violent crime, VAWA improperly intruded upon core areas of historical state concern.⁶⁶

on the confluence of almost a dozen factors making the case virtually unique.”); Louis H. Pollak, *Symposium: Reflections on United States v. Lopez—Foreword*, 94 MICH. L. REV. 533, 550–53 (1995).

60. 529 U.S. 598 (2000).

61. *Id.* at 609 (“Petitioners do not contend that these cases fall within either of the first two of [the three] categories of Commerce Clause regulation. They seek to sustain § 13981 as a regulation of activity that substantially affects interstate commerce. . . . [W]e agree that this is the proper inquiry.”).

62. *See id.* at 610 (“[A] fair reading of *Lopez* shows that the noneconomic, criminal nature of the conduct at issue was central to our decision in that case.”).

63. *Id.* at 613.

64. *Id.* at 615.

65. *Morrison*, 529 U.S. at 615.

66. *Id.* These twin considerations—concerning the economic/non-economic character of the regulated activity, and the intrusion of a federal regulatory scheme into traditional areas of state sovereignty—resurfaced in two post-*Morrison* decisions in which the Court narrowly con-

2. The Upshot

The relevance to *Guillen* of this brief survey of recent Rehnquist Court precedents should be obvious. A law that imposes a blanket ban on the discovery of certain safety-related information and also bars state courts from admitting such information into evidence in state tort proceedings is not, it would seem, a regulation of the channels or instrumentalities of interstate commerce. The fate of § 409 should depend, then, on whether it can stand on the “substantial effects” prong. But, on the authority of both *Lopez* and *Morrison*, it cannot. Concededly, even after *Morrison*, it is not clear precisely what test governs this third category.⁶⁷ Yet we do not need to know the precise formulation in order to assess § 409. The discovery and introduction of evidence are not economic activities *and* these are matters falling squarely within traditional areas of state sovereignty. Furthermore, even if these two factors—economic character and non-interference in traditional areas of state sovereignty—are best understood not as sine qua nons for the valid exercise of the commerce power but, instead, as something closer to weighty factors in an all-things-considered balance, nobody has identified extraordinary circumstances even plausibly sufficient to tip the balance in favor of congressional power. So the Commerce Clause does not supply authority for § 409. If it is to stand, it must be as an exercise of the spending power.⁶⁸

The Court, however, analyzed matters very differently. Its critical move was to analyze § 409 under the first and second prongs identified by *Lopez*, not under the third. Essentially, the Court advanced the following syllogism: First, the Commerce Clause authorizes Congress to “regulate the use of the channels of interstate commerce”⁶⁹ and “to regulate and protect the instru-

strued Commerce Clause legislation in order to avoid what it deemed serious constitutional questions. See *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001) (interpreting a federal statute not to confer authority upon the Corps of Engineers to define “navigable waters” to include intrastate bodies of water used as a habitat for migratory birds because a contrary reading, and its corresponding extension of federal regulatory authority, “would result in a significant impingement of the States’ traditional and primary power over land and water use”); *Jones v. United States*, 529 U.S. 848, 858 (2000) (interpreting the federal arson statute not to criminalize arson of an owner-occupied house in reliance on the stress that *Lopez* had placed on whether a regulated area “was one of traditional state concern and [whether] the legislation aimed at activity in which neither the actors nor their conduct has a commercial character”) (internal quotations and citations omitted).

67. It is not certain, for example, whether the intrusion upon core or traditional areas of state sovereignty is always a relevant consideration on the third prong or if it becomes relevant only if the activity being regulated is non-economic in nature. Nor is it clear whether the economic-character and core-state-sovereignty considerations, either singly or in tandem, set forth absolute bars to congressional authority or just presumptive bars and, if the latter, what the weight of the presumption is.

68. This is essentially how Lynn Baker and I analyzed the matter in our brief. See *supra* note 11.

69. *Pierce County v. Guillen*, 537 U.S. 129, 146 (2003) (quoting *United States v. Lopez*, 514 U.S. 549, 558 (1995)).

mentalities of interstate commerce”⁷⁰ Second, “both the original § 409 and the 1995 amendment can be viewed as legislation aimed at improving safety in the channels of commerce and increasing protection for the instrumentalities of interstate commerce.”⁷¹ Therefore, “they fall within Congress’ Commerce Clause power.”⁷²

This, then, is the *Guillen* Court’s response to the need to distinguish both *Lopez* and *Morrison*: Because the GFSZA and the VAWA were patently not regulations of instrumentalities or channels of interstate commerce, inquiry in those prior cases necessarily focused on the third *Lopez* category—regulations of “activities that substantially affect[ed] interstate commerce.” Section 409, in contrast, could stand on the first and second prongs.

The difficulty with this answer is that § 409 is *not* a regulation of either the channels of interstate commerce (e.g., interstate sale or transport) or the instrumentalities of interstate commerce (e.g., roads and railroads). It is a regulation of state court litigation. Put another way, it is a regulation *of* judicial procedure adopted (purportedly) *for the purpose* of protecting instrumentalities and channels.

Of course, the Court knew that. That is why what I have identified as the second premise in the *Guillen* syllogism does not say that § 409 regulates the channels or instrumentalities. Instead, it says only that § 409 is “aimed” at protecting the channels and instrumentalities. Notice that this can possibly be enough to permit the conclusion that the Court would reach only on a particular and non-obvious construal of the *first* premise. The *Guillen* Court must assume that the *Lopez* Court’s statement (which it quotes) that Congress “is empowered to regulate and protect the instrumentalities of interstate commerce”⁷³ is properly understood (by application of something akin to a principle of distribution) as two distinct empowerments: an empowerment to regulate instrumentalities of interstate commerce themselves and a distinct empowerment to protect them.⁷⁴

70. *Id.* at 147 (quoting *Lopez*, 514 U.S. at 558).

71. *Id.*

72. *Id.* (footnote omitted).

73. *Id.* (quoting *Lopez*, 514 U.S. at 558).

74. It is ironic that a rare commentator who recognizes that the *Guillen* decision is “significant,” see Erwin Chemerinsky, *The Court Marks the Limit of Federalism*, TRIAL, Sept. 2003, at 77, misses its real importance when describing it as having “emphatically affirmed Congress’s power under the Commerce Clause to regulate the channels of interstate commerce.” *Id.* Because the statute did not directly regulate channels of interstate commerce and did regulate intrastate activities, *Guillen* affirms a congressional power even more expansive than the power to regulate the channels themselves. Of course, one might speculate that the Commerce Clause by itself empowers Congress to regulate only the instrumentalities and channels of interstate commerce and that regulation of other subjects for the purpose of protecting those instrumentalities or channels is authorized as a necessary and proper means “for carrying into execution” the commerce power. U.S. CONST. art. I, § 8, cl. 18. But that is not a move open to the *Guillen* Court given its explicit disclaimer of reliance on the Necessary and Proper Clause. See *supra* note 43 and accompanying text.

Yet, even if this is the better reading of the first premise,⁷⁵ neither *Lopez* itself nor the precedents upon which it relies—*Southern Railway Company v. United States*,⁷⁶ the *Shreveport Rate Cases*,⁷⁷ and *Perez v. United States*⁷⁸—remotely establish that Congress is authorized under the Commerce Clause to regulate just *anything* for the purpose (or with the “aim”) of protecting the channels or instrumentalities of interstate commerce. In *Southern Railway*, the Court permitted Congress to require that all rail cars used on interstate rail lines employ specified safety devices even if the cars carried intrastate traffic. *The Shreveport Rate Cases* upheld Interstate Commerce Commission orders that prohibited certain rate discriminations in favor of intrastate Texas rail traffic against interstate traffic.⁷⁹ Dicta in *Perez* merely cited approvingly federal laws that criminalized the destruction of airplanes (instrumentalities of interstate commerce) and theft from interstate shipments.⁸⁰ Prior to *Guillen*, then, *Morrison*’s observation that “thus far in our Nation’s history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature”⁸¹ applied as much to regulations aimed

75. Notice, for whatever it may be worth, that this is not the way *Lopez* is often summarized. See, e.g., ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 263 (2d ed. 2002) (“Congress may regulate (a) the channels of interstate commerce, (b) the instrumentalities of interstate commerce . . . and (c) activities that have a substantial effect on interstate commerce.”); JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 177 (6th ed. 2000) (“Under the first standard, Congress can regulate the channels of interstate commerce. Under the second standard, Congress can regulate the instrumentalities of commerce or people or products that travel in interstate commerce.”); Fried, *supra* note 50, at 39–40; Allen Ides, *Economic Activity as a Proxy for Federalism: Intuition and Reason in United States v. Morrison*, 18 CONST. COMMENT. 563, 565 (2002) (observing that under the standard description of Commerce Clause doctrine described in *Morrison*, “Congress may regulate the channels or instrumentalities of interstate commerce, i.e., anything that either *is* interstate commerce or anything that is *in* interstate commerce, as well as certain matters that substantially affect interstate commerce”).

76. 222 U.S. 20 (1911).

77. *Houston, E. & W. Tex. Ry. Co. v. United States*, 234 U.S. 342 (1914).

78. 402 U.S. 146 (1971).

79. Indeed, it is not at all clear why the ICC orders upheld in *The Shreveport Rate Cases*—which directed carriers not to charge higher rates for the transportation of goods from Shreveport, Louisiana to certain points in Texas than they charged for the transportation of the same goods wholly within Texas, see 234 U.S. at 347 n.2—ought to be conceived of as regulation of intrastate activities for the purpose of protecting interstate rail traffic rather than as regulation of interstate instrumentalities that affect intrastate activities. To make things muddier still, my colleague Lino Graglia notes that the case is “often cited as the leading case on the ‘affects doctrine.’” Lino A. Graglia, *United States v. Lopez: Judicial Review Under the Commerce Clause*, 74 TEX. L. REV. 719, 733 (1996) (citing GERALD GUNTHER, CONSTITUTIONAL LAW 102 (12th ed. 1991)).

80. *Perez*, 402 U.S. at 150.

81. *United States v. Morrison*, 529 U.S. 598, 613 (2000), quoted *supra* text accompanying note 63; see also, e.g., *United States v. Lopez*, 514 U.S. 549, 595 (1995) (Thomas, J., concurring). Justice Thomas argues that language from *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 194 (1824), “at most, permits Congress to regulate only intrastate *commerce* that substantially affects interstate and foreign commerce. There is no reason to believe that Chief Justice Marshall was asserting that Congress could regulate *all* activities that affect interstate commerce.” *Id.*

at protecting instrumentalities or channels of interstate commerce as to regulations of intrastate activities that, in the aggregate, substantially affected interstate commerce. Certainly that is true so far as *Guillen* itself reveals.

So the puzzle is this. *Lopez* and *Morrison* establish that when Congress regulates intrastate activities with the aim or purpose of somehow affecting (as by increasing) interstate commerce, whether such activities are economic in character and whether the regulation intrudes upon traditional areas of state sovereignty are considerations of central, perhaps decisive, significance. But the apparent lesson of *Guillen* is that when Congress's regulation of intrastate activities is aimed at protecting the channels or instrumentalities of interstate commerce, those two factors are of no moment whatsoever. These are puzzling disparities, all the more so because the protection of the channels and instrumentalities of interstate commerce is itself only an intermediate goal, one presumably aimed at the yet more ultimate goal of somehow affecting (as by increasing) interstate commerce. What justifies them?

B. ON RE-EXAMINATION

This is not a rhetorical question. Perhaps *Guillen* extends *Lopez* and *Morrison* in an entirely sensible way. Perhaps the economic or non-economic character of regulated intrastate activity *should* be relevant when federal legislation is aimed at improving, protecting or increasing interstate commerce itself (as VAWA and GFSZA were alleged to be), but *not* when the legislation is aimed at protecting the instrumentalities or channels of interstate commerce (as was claimed of § 409). Perhaps whether a challenged regulation of intrastate activities interferes with core areas of traditional state sovereignty *should* be relevant when the legislation is aimed to protect or promote interstate commerce itself but *not* when it is aimed to protect the instrumentalities or channels. My point here is only that neither asymmetry in doctrine is so obviously sound as not to warrant some explanation.⁸²

If pressed, the Court, or its defenders, might be able to muster just such an explanation. But there is no hint in *Guillen* that the Court was aware of these disparities let alone that it had a theory adequate to defend them. So let us consider another gambit open to the *Lopez-Morrison-Guillen* Court. It could deny that *Guillen* did, in fact, create either sort of disparity. That is, instead of trying to answer the puzzle, it could argue that there is no puzzle in need of resolution.

82. The first of these asymmetries is noted in Vikram David Amar, *The New "New Federalism": The Supreme Court in Hibbs (and Guillen)*, 6 GREEN BAG 349, 356 (2003) (deeming *Guillen* "somewhat interesting when it is contrasted with the two other major Commerce Clause cases of recent years—*Lopez* and *Morrison*"). The qualifier *somewhat*, not to mention the titular parentheses, reveals how little respect *Guillen* has won—even from the few who have recognized it.

1. Economic Character

The first move in this gambit is obvious. The Court could agree that when Congress regulates intrastate activities with the aim of protecting any one of the three Commerce Clause categories—channels, instrumentalities, or interstate commerce itself—that activity must be economic in nature. The Court would then simply deny that § 409 runs afoul of this restriction. Litigation, the claim would run, *is* economic activity.

This is unpersuasive. As the *Lopez* majority acknowledged in response to Justice Breyer's dissent, "depending on the level of generality, any activity can be looked upon as commercial."⁸³ So the economic/non-economic⁸⁴ characterization must proceed at the appropriate level of generality. Seeking to reconcile *Guillen* with *Lopez* and *Morrison* on the ground that § 409 regulates economic or commercial activity would choose the wrong level.

Of course, there is a rich sense in which litigation is economic activity. Ordinarily, litigants hire lawyers. Often the plaintiff seeks money damages. The court system employs large numbers of people. There is no doubt that a law prescribing economic features of the commercial relationship between attorney and client would be a regulation of economic activity. But the introduction of evidence at trial does not itself look "economic" or "commercial" if those terms are to have real limits. So the question is whether we ought to analyze the regulated activity as litigation (economic) or as the discovery and introduction of evidence (non-economic).

Surely, however, *Lopez* itself answers that question. Education, after all, is economic or commercial in much the same way litigation is. Students or their families often pay tuition. Much education is narrowly designed to transmit and develop commercially valuable skills. Schools employ teachers and large staffs. By any measure, education is big business.⁸⁵ And yet the Court made clear that a federal regulation of school curriculum would not be deemed a regulation of economic activity for purposes of Commerce Clause analysis.⁸⁶ If the Commerce Clause "does not include the authority to

83. 514 U.S. at 565. Justice Breyer had objected that "[s]chools . . . serve *both* social and commercial purposes, and one cannot easily separate the one from the other." *Id.* at 629 (Breyer, J., dissenting); see also, e.g., *Ides*, *supra* note 75 at 570–719 (discussing the difficulty of defining commercial activity); Gil Seinfeld, *The Possibility of Pretext Analysis in Commerce Clause Adjudication*, 78 NOTRE DAME L. REV. 1251, 1278–79 ("Perhaps the only thing about which there is at least limited consensus among scholars . . . is that clarifying the line between economic and non-economic activity is sure to be a contentious and difficult undertaking.") (citations omitted).

84. The immediately preceding quotation speaks in terms of "commercial" character, not "economic." But as that quotation itself suggests, the Court has appeared to treat commercial/non-commercial and economic/non-economic as synonymous pairs of oppositions.

85. Public expenditures on K–12 alone top \$300 billion per year. See National Center for Education Statistics, *Projections of Education Statistics to 2011*, ch. 6: Expenditures of Public Elementary and Secondary Schools, at <http://nces.ed.gov/pubs2001/proj01/chapter6.asp>.

86. See *Lopez*, 514 U.S. at 565.

regulate each and every aspect of local schools,”⁸⁷ nor would it seem to include the authority to regulate each and every aspect of state court litigation.

Morrison reinforces this conclusion. The narrow result of that case was to deny Christy Brzonkala a federal cause of action against fellow students whom she claimed raped her. Nonetheless, the majority took pains to express empathy. “If the allegations here are true,” the Chief Justice wrote, “no civilized system of justice could fail to provide her a remedy for the conduct of respondent Morrison.”⁸⁸ The clear import, of course, was that VAWA is gratuitous; Ms. Brzonkala and similarly situated others could file civil actions under state law. Suppose that is true. Suppose also, though, that Congress decided that the successful prosecution of such suits was unfairly impeded by evidentiary rules that favored the defense. Consequently, it redrafts 42 U.S.C. § 1981 to provide that in suits seeking damages for gender-related acts of violence, no evidence of any prior conduct by the plaintiff shall be discoverable or admissible. Would this hypothetical VAWA II be a valid exercise of Congress’s commerce power? If the activity regulated by § 409 is economic then the answer would seem to be yes. But I would doubt that many readers of the *Morrison* opinion would reach that conclusion. If that is right, then the proposition that the discovery and introduction of evidence are economic activities within the meaning of *Lopez-Morrison* appears weak indeed.

2. Traditional State Sovereignty

As dubious as would be the contention that the intrastate activity regulated by § 409 is economic in character, the additional claim that the regulation does not intrude upon a core area of state sovereignty is even less tenable. As the Court has often observed, a state “is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness, unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.”⁸⁹ To be sure, statements of this sort generally appear in the course of the Court’s investigation into whether a challenged state procedure violates the Constitution. But the tenor of these declarations reflects what should in any event be obvious: the establishment of evidentiary and other procedural rules for its courts constitutes a fundamental exercise of state sovereignty.⁹⁰

87. *Id.* at 566.

88. *United States v. Morrison*, 529 U.S. 598, 627 (2000).

89. *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) (citations omitted), *overruled in part by* *Malloy v. Hogan*, 378 U.S. 1 (1964); *see also, e.g., Patterson v. New York*, 432 U.S. 197, 201–02 (1977) (citations omitted).

90. Because I am skeptical that the notion of core or fundamental aspects of state sovereignty is useful, *see Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546–57 (1985) (rejecting “a rule of state immunity from federal regulation” based on whether the “function is ‘integral or ‘traditional’”), I should say, rather, that *if* this is thought to be an important and

One should be surprised, therefore, were the *Guillen* Court to have concluded otherwise. And it did not, choosing instead not even to reach the question of whether, as plaintiffs contended, § 409 “violates the principles of dual sovereignty . . . because it prohibits a State from exercising its sovereign powers to establish discovery and admissibility rules to be used in state court for a state cause of action.” This question was properly left unresolved, the Court explained, for the state supreme court “did not address this precise argument, reasoning instead that the 1995 amendment to § 409 was beyond Congress’ enumerated powers.”⁹¹

But Thomas’s characterization of the Washington Supreme Court’s decision rings false. Indeed, it is not even clear what sense can be made of the Court’s contention that “instead” of addressing the “precise argument” that § 409 “violates the principles of dual sovereignty embodied in the Tenth Amendment,” the state court reasoned that the statute “was beyond Congress’ enumerated powers.”⁹² The Court had previously explained in *New York v. United States* that in a case

involving the division of authority between federal and state governments, the two inquiries are mirror images of each other. If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress.⁹³

This being so, one might suppose that the distinction the *Guillen* Court would rely upon in its footnote ten is conceptually incoherent. The state court’s conclusion that § 409 “was beyond Congress’ enumerated powers” necessarily entailed that it “violates the principles of dual sovereignty embodied in the Tenth Amendment.”⁹⁴

Of course, perhaps the *New York* dictum is wrong or too broad. Perhaps there is a universe of cases in which legislation exceeds Congress’s power under the Commerce Clause but not because it violates principles embodied in the Tenth Amendment. Yet if that is so, again one could reasonably expect *Guillen* to explain this point. The distinction drawn in footnote ten cannot fairly stand without clarification.

non-null set (as some members of the *Lopez-Morrison* majority apparently believe), then it should encompass the establishment of rules of in-court procedure.

91. *Pierce County v. Guillen*, 537 U.S. 129, 148 n.10 (2003).

92. *Id.*

93. *New York v. United States*, 505 U.S. 144, 156 (1992) (citations omitted); *see also* *United States v. Darby*, 312 U.S. 100, 124 (1941) (observing, famously, that the Tenth Amendment “states but a truism that all is retained which has not been surrendered”).

94. *Guillen*, 537 U.S. at 148 n.10.

Suppose, however, that sense can be made of the Court's distinction between the scope of an enumerated power and the force of principles of dual sovereignty. This still would not justify the Court's refusal to address the argument from state sovereignty. For its assertion that the state court found that § 409 exceeded Congress's commerce power for reasons *other* than that it "violates the principles of dual sovereignty . . . because it prohibits a State from exercising its sovereign powers to establish discovery and admissibility rules to be used in state court for a state cause of action"⁹⁵ is baseless.

To start, the Washington Supreme Court devoted an entire section of its opinion to what can most fairly be described as concerns about dual sovereignty. This section, which stands wholly separate from its Commerce Clause, Spending Clause, and Necessary and Proper Clause sections, is even captioned "Unconstitutional Violation of State Sovereignty."⁹⁶ In it, the court asserted that Congress

fundamentally lacks authority to intrude upon state sovereignty by barring state and local courts from admitting into evidence or allowing pretrial discovery of routinely created traffic and accident related materials and 'raw data' created and held by state and local governments and essential to the proper adjudication of claims brought under state and local law, simply because such collections *also* serve federal purposes.⁹⁷

Admittedly, one who read only this section of the court's opinion might deem this assertion a little conclusory. Therefore, one might be tempted to agree, in defense of the Supreme Court's footnote ten, that the Washington Supreme Court's treatment of the state sovereignty argument was not "sufficiently developed" to justify consideration of the matter by the Supreme Court.⁹⁸ But that would be mistaken, for the state court provided ample reasoning and precedential authority for its conclusion earlier in its opinion—notably, squarely in that part of the analysis section captioned "Commerce Clause."

After observing that "[t]he United States Supreme Court has repeatedly redefined the limits"⁹⁹ of Congress's commerce power, that section jumped directly into a long quotation from *National League of Cities*¹⁰⁰ leading up to that decision's holding that the Fair Labor Standards Act amendments challenged in that case "are not within the authority granted Congress" by the Commerce Clause "insofar as [they] operate to directly displace the States' freedom to structure integral operations in areas of traditional government-

95. *Id.*

96. *See* Guillen v. Pierce County, 31 P.3d 628, 655 (Wash. 2001).

97. *Id.*

98. *See* Roberts v. Galen of Va., Inc., 525 U.S. 249, 253–54 (1999).

99. *Guillen*, 31 P.3d at 651.

100. *National League of Cities v. Usery*, 426 U.S. 833 (1976).

tal functions.”¹⁰¹ And lest the point be lost, the state court dropped a footnote to that quotation deeming it “notabl[e]” that the year after *National League of Cities*, “the Court indicated that it thought that internal state court procedures such as the determination of evidentiary rules deserved deference under the federalist framework as an area traditionally regulated by states.”¹⁰² To be sure, the Supreme Court overruled *National League of Cities* in *Garcia*.¹⁰³ But that overruling did not undermine the critical lesson the state court sought to draw from the earlier case because, it concluded, the “precedential authority” of *Garcia* has itself “been fundamentally eroded by recent decisions such as *Lopez* and *Morrison*.”¹⁰⁴ Those decisions, the state court explained, issued from the same ground as *National League of Cities*—namely, from a “fundamental respect for state sovereignty.”¹⁰⁵ It is all this that supports the state court’s conclusion that the § 409 privilege “lacks the requisite nexus to § 409’s *raison d’être* and cannot reasonably be characterized as an ‘integral part’ of the Federal-aid highway system’s regulation” as *Hodel* requires.¹⁰⁶

The point, in short, is that the state court opinion plainly reasons that § 409 was not a valid exercise of the Commerce Clause *precisely because* of the way it intruded upon core areas of traditional state sovereignty.¹⁰⁷ No fair reading of the opinion can miss that. Therefore, the conclusion to its analysis section (Part III of the state court’s opinion) seemed entirely justified:

If this state court has misconstrued the United States Constitution’s limitations upon the federal government’s power to intrude upon *the exercise of state sovereignty in so fundamental an area of law as the determination by state and local courts of the discoverability and admissibility of state and local materials and data relating to traffic and accidents on state and local roads*, we are confident that the United States Supreme Court will so instruct . . .¹⁰⁸

101. *Guillen*, 31 P.3d at 652 (citing *National League of Cities*, 426 U.S. at 851–52).

102. *Id.* at 652 n.36 (discussing *Patterson v. New York*, 432 U.S. 197 (1977)).

103. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

104. *Guillen*, 31 P.3d at 653.

105. *Id.*

106. *Id.* at 654. It is worth noting in passing that § 409 cannot be upheld on the *Hodel* rationale as an integral part of a scheme of Commerce Clause regulation because the federal highway funding scheme to which § 409 is attached is Spending Clause regulation, not Commerce Clause regulation. And this is not picking nits. *South Dakota v. Dole* sets forth the test governing conditions that states must satisfy to receive federal spending. But any such “condition” could be recharacterized as a “regulation” attached to the spending program. To permit such a recharacterization to bring the condition/regulation within *Hodel* would moot *Dole*.

107. See generally *Guillen*, 31 P.3d at 651–54 (explaining that a state’s control over its court system is a fundamental power and that past cases have looked at the nature of the state’s power infringed upon by the federal regulation).

108. *Id.* at 655 (emphasis added).

In the event, this confidence proved misplaced. Through its footnote ten, the United States Supreme Court announced that it would say nothing at all about the statute's intrusion into purportedly fundamental areas of state sovereignty. But this fact says more about the United States Supreme Court than about its state counterpart. Indeed, the Court's treatment of the traditional state sovereignty problem is so unconvincing as to serve, like the proverbial thirteenth chime, to put into question all that came before. In particular, it reinforces doubts that the economic-character problem can be so easily rectified. It suggests that the Court upheld § 409 not because all the Justices believed doctrine compelled it, but for other reasons.

III. A PRE-DOCTRINAL SOLUTION

Do not misunderstand. I do not mean to press the strong claim that the Court's holding that § 409 was a permissible exercise of Congress's commerce power was necessarily incompatible with its pre-existing doctrine. I mean to claim only that such a holding was rife with difficulties—some profound—that the Court's opinion either failed to recognize or distorted. The validity of § 409 as an exercise of the commerce power was, at best, a deeply vexed question under existing doctrine, *not* the gimme that the Court's cavalier treatment suggested. The opinion itself is thoroughly unsatisfying, seeming not to recognize some of the difficult questions raised by the case and, it must be said, treating others with less than full candor.

Why was the Court's opinion so superficial, even sloppy? This is not much of a puzzle for the Court's four more liberal and nationalist members. Justices Stevens, Souter, Ginsburg and Breyer all voted to uphold the GFSZA and the civil remedy provision of VAWA. That they would likewise want to uphold § 409 is entirely consistent with these prior positions. And if the more conservative five were willing to go along, the liberals had little reason to quibble with Thomas's reasoning by pointing out apparent inconsistencies with the *Lopez-Morrison* doctrine that they themselves derided. The puzzling votes are those of Justices Thomas, Scalia, Kennedy, O'Connor, and Chief Justice Rehnquist.

Undoubtedly cynics could hypothesize a raft of answers. A simple legal realist story might see the conservatives' apparent shift as motivated by little more than some Justices' personal preferences for railroads and other likely tort defendants.¹⁰⁹ Or perhaps the Justices realized that reaching the spend-

109. Before the Court even granted certiorari, Michael Dorf speculated that a reversal of the Washington Supreme Court might bespeak an unprincipled antagonism to tort plaintiffs:

In summary, *Guillen* is a strange mixture: conservative in that it is pro-states' rights, but also liberal in that it is pro-plaintiff and pro-tort suits. Faced with this mix, how is the U.S. Supreme Court likely to rule if it decides to review *Guillen*? The answer to that question depends on whether the Justices put legal principle before ideology. . . . If it reaches the Court and is reversed, *Guillen* could turn out to be a *Bush v. Gore* in miniature—with conservative Justices abandoning states' rights when

ing question might have provoked splintered opinions on the continued viability of *Dole*,¹¹⁰ and thus they agreed to uphold the statute on Commerce Clause grounds to avoid a potentially messy and inconclusive unsettling of the spending doctrine.

Explanations of this sort all assume a high degree of disingenuousness on the part of the Court: for peculiar ends of their own, the Justices intentionally papered over—even misrepresented—the difficulties the case ran into with existing Court-crafted Commerce Clause doctrine. Such an account cannot be conclusively ruled out. But it should be a conclusion of last, not first, resort. It is useful, then, to start by assuming, at least *arguendo*, that the Justices were not quite so guileful. Working with this hypothesis, I would like to suggest that members of the *Guillen* Court failed to see the infirmities with the opinion's doctrinal analysis because they intuited conformity with the Commerce Clause *at a pre-doctrinal level*.

A. COMMERCE CLAUSE MEANING

To see where I am going, take a step back from the arcana of Supreme Court precedent. Put aside, for the moment, the complex Commerce Clause doctrine that emerges (or appears to be in the process of emerging) from *Lopez* and *Morrison*. Following Akhil Amar, I would like to invite you to turn your attention away from Court-created doctrine and back toward the Constitution itself.¹¹¹ Do so by asking yourself this question: What distinguishes § 409, on the one hand, from the GFSZA and VAWA, on the other, in a way that might be relevant in light of Congress's constitutional authority "to regulate Commerce . . . among the several states"?

One possible answer seems obvious:¹¹² Section 409 was actually adopted to serve ends that can be fairly labeled commercial, whereas the commercial considerations advanced in support of the GFSZA and the VAWA were pre-textual. That is to say: (1) GFSZA was adopted not to grow the economy, and not even to improve education, but to earn cheap political credit for Congress;¹¹³ (2) VAWA was a well-intentioned law designed to advance the safety and dignity of women, but its possible economic consequences were window

they assist "litigious" plaintiffs in tort suits against the government, and thus providing more fuel to the cynics.

Michael C. Dorf, *What an Auto Accident Decision Teaches about Federalism*, FINDLAW'S WRIT, Oct. 15, 2001, at <http://writ.findlaw.com/dorf/20011015.html>.

110. For my thoughts both on *Dole*'s infirmities and on the difficulty of predicting its future, see Lynn A. Baker & Mitchell N. Berman, *Getting Off the Dole: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It to Do So*, 78 IND. L.J. 459 (2003).

111. See generally Akhil Reed Amar, *The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26 (2000).

112. I do not mean to suggest that this is obviously the right answer, only that it is an obvious candidate.

113. This is the consensus view about the GFSZA. See, e.g., Levinson, *supra* note 59, at 774; Pollak, *supra* note 59, at 552; Seinfeld, *supra* note 83, at 1254. It is hard to find a dissenter.

dressings;¹¹⁴ and (3) § 409 was designed to induce states to work harder at identifying those intersections most in need of improvement, thereby promoting the safe and speedy transportation of people, goods, and services.

The superficial plausibility of all three of these descriptive (or interpretive) claims, along with the pattern of votes by the States' Rights Five, permits an inference regarding what they take the meaning or import of the Commerce Clause to be. The inference, in short, is that a majority of the Supreme Court believes (perhaps inchoately) that the Commerce Clause authorizes Congress to regulate intrastate¹¹⁵ behavior only in order to achieve what I will loosely call "commercial purposes"¹¹⁶—a family of ends including, most centrally, promoting economic growth and also (perhaps) ameliorating the negative externalities that economic growth produces.

B. THREE OBJECTIONS

To this thinly sketched suggestion, we can anticipate at least three sorts of objections: (1) factual, (2) doctrinal, and (3) conceptual.

1. Factual

The factual objection is that the hypothesis fails to distinguish GFSZA and VAWA on the one hand from § 409 on the other either because one or both of the former pair also was motivated by commercial purposes or because the latter was not. Therefore, the hypothesis must be false.

Keep in mind, though, that the question is not whether commercial purposes did in fact underlie either the GFSZA or the civil remedy provision of VAWA. Of course, they *may* have. Nor is the question whether § 409 was

114. See, e.g., Amar, *supra* note 111, at 103 ("Candid supporters of VAWA can concede that the issue of violence against women is not mainly an economic one, or chiefly an interstate one."); Christopher H. Schroeder, *Environmental Law, Congress, and the Court's New Federalism Doctrine*, 78 IND. L.J. 413, 449 (2003) ("We are providing a civil remedy for violence against women because such acts of violence have an effect on interstate commerce" is a claim that can reasonably be greeted with, 'c'mon, that's not your real reason.'). For the contrary view that economic considerations do qualify as a "real" purpose of the civil remedy provision, see, for example, Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619, 633–34 (2001); Deborah M. Weissman, *Gender-Based Violence as Judicial Anomaly: Between "The Truly National and the Truly Local"*, 42 B.C. L. REV. 1081 (2001).

115. One could argue that this purposive consideration limits not only the regulation of intrastate behavior but also the prohibition of interstate shipments themselves pursuant to what is sometimes called the "bar" power. On such a view, cases like *Champion v. Ames*, 188 U.S. 321 (1903) (upholding a federal ban on the interstate transporting of lottery tickets), and *Hoke v. United States*, 227 U.S. 308 (1913) (upholding a federal statute prohibiting the transportation of women in interstate commerce for immoral purposes), would be inconsistent with Commerce Clause meaning. For present purposes, it is enough to focus on the narrower hypothesis set forth in the text. That is, I am refraining from drawing any inferences from *Lopez*, *Morrison*, or *Guillen* regarding any Justice's views about the meaning of Congress's Commerce Clause authority to set rules regarding what may or may not be shipped in interstate commerce.

116. Cf. *United States v. Lopez*, 514 U.S. 549, 580 (1995) (Kennedy, J., concurring) (observing that "neither the purposes nor the design of the statute has an evident commercial nexus").

really motivated by commercial purposes. Perhaps Congress's purpose was to improve road safety for *only* what might be called humanitarian purposes (to reduce the human suffering that auto accidents produce), without regard for the effect that unsafe roads have on commerce. To be clear then, I do not insist that any one of the three characterizations of statutory purposes set forth in Section III.A is correct, let alone that all three are.

But that is not to the point. The instant task is to explain the results in *Lopez*, *Morrison*, and *Guillen*, not to justify them. And a satisfactory explanation depends upon what members of the Court believed,¹¹⁷ not what they should have believed. So my observation is not that no story could be told in which the statutes at issue in *Lopez* or *Morrison* issued from commercial motivations or in which § 409 did not. I claim only that although an economic story *can* be told about all three statutes, economic considerations seem significantly less likely to have exerted actual motivational force in the cases of GFSZA and VAWA than in that of § 409.

Put another way, I am making only the relatively weak point that the results in *Lopez*, *Morrison*, and *Guillen* are all consistent with, and make plausible, the hypothesis that a commercial-purpose-based understanding of the Commerce Clause holds some attraction to a majority of the present Court. I am not defending the absurdly strong claim that the results compel that hypothesis. The crucial lesson of *Guillen*, then, may yet concern the light it sheds on what the Rehnquist Court, or at least many of its members, understand the Commerce Clause to mean.¹¹⁸

2. Doctrinal

The notion that Commerce Clause authority might depend upon Congress's purposes is, to understate matters, nothing new. It is plausibly inferable, of course, from *McCulloch*'s famous pretext passage,¹¹⁹ and was in fact so inferred by a four-member minority of the Court a century ago.¹²⁰ Moreover, a majority seemed to endorse precisely this position when, in *Hammer v. Dagenhart*,¹²¹ it struck down a federal ban on the shipment in interstate commerce of goods produced by child labor. Although the majority carefully disclaimed either "authority [o]r disposition to question the motives of

117. Again, in speaking of the Justices' beliefs, I am not referring to beliefs that must have been consciously reflected upon.

118. I hope it obvious that to speak of Commerce Clause "meaning" does not commit one to any form of originalism. The meaning that matters could be "original meaning" or it could be something else—plain meaning, literal meaning, best meaning, etc.

119. "[S]hould [C]ongress, under the pretext of executing its powers, pass laws for the accomplishment of objects not [e]ntrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say, that such an act was not the law of the land." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819).

120. See *Champion v. Ames*, 188 U.S. 321, 364–66 (1903) (Fuller, C.J., dissenting).

121. 247 U.S. 251 (1918).

Congress in enacting this legislation,”¹²² most commentators believe that it was doing precisely that. But the Court overruled *Hammer* in *United States v. Darby*,¹²³ announcing plainly that “[t]he thesis of the opinion that the motive of [a prohibition on the shipment of goods in interstate commerce] . . . can operate to deprive the regulation of its constitutional authority has long since ceased to have force.”¹²⁴ So despite periodic—and increasing—efforts by scholars to revive purpose-based Commerce Clause review,¹²⁵ the doctrine might be thought clear: Congress’s purposes and motives¹²⁶ are legally immaterial when adjudicating challenges to putative exercises of the commerce power.

This objection does not bite for two reasons. First, the doctrine is not quite so clear as is often believed. *Darby* holds that purposes are irrelevant when Congress regulates interstate commerce directly, as by prohibiting the interstate shipment of various goods. It is not at all clear that *Darby*, or any other binding precedent,¹²⁷ dictates that Congress’s purposes are irrelevant

122. *Id.* at 276.

123. 312 U.S. 100 (1941).

124. *Id.* at 116.

125. Among the best known such argument appears in William Van Alstyne, *Federalism, Congress, the States and the Tenth Amendment: Adrift in the Cellophane Sea*, 1987 DUKE L.J. 769, 795–96 (arguing that “a regulation of commerce [is] not a regulation of ‘commerce’ . . . [w]hen, functionally speaking, it is plain that Congress is indifferent to commerce,” equating this “functional” test with “the ‘pretext’ rule,” and explaining that it amounts to an inquiry into “what interests evidently drove this law, i.e., whom it meant to affect, how and why”). See also, e.g., Diane McGimsey, Comment, *The Commerce Clause and Federalism After Lopez and Morrison: The Case for Closing the Jurisdictional-Element Loophole*, 90 CAL. L. REV. 1675, 1731–35 (2002) (advocating that the Court supplement its extraordinarily permissive jurisdictional element with a “purpose-nexus requirement” that would require, among other things, that “the primary purpose” of the challenged legislation be “connected to the purposes for giving Congress the Commerce Clause power in the first place”); Schroeder, *supra* note 114, at 445–47 (endorsing a “bona fide reason approach” that would ask, when Congress regulates intrastate activity on the substantial-effects rationale, whether “it is plain that Congress is indifferent to commerce and concerned, rather, with controlling activity in an area of traditional state concern”); Seinfeld, *supra* note 83, at 1303 (“[E]xercises of the commerce power—at least when predicated on the substantial effects rationale—ought to have a commercial purpose. That is, when Congress justifies regulation of an activity on the ground that it substantially affects interstate commerce, the purpose of the regulation must be to ‘get at’ that effect.”).

126. Despite reservations, I am here following the scholarly consensus in treating these as synonymous terms. See Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1, 23 n.87 (2001) (citing authorities).

127. Decisions validating Title II of the Civil Rights Act of 1964 are not obviously to the contrary. *Katzenbach v. McClung*, 379 U.S. 294 (1964), and *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964), which upheld enforcement against a small restaurant and a motel of the Act’s ban on racial discrimination in places of public accommodation, did rely (among many other theories) on the substantial effect test. See *McClung*, 379 U.S. at 304; *Heart of Atlanta*, 379 U.S. at 257–59. And, to be sure, the decisions are often cited as evidence that the Court has rejected the “purpose-based view” pursuant to which “the commerce power is the power to regulate for certain purposes” in favor of the view “that the Constitution gives Congress the power to regulate particular subjects or areas, regardless of its aims.” Harry Litman & Mark D. Green-

when Congress exerts its Commerce Clause authority to regulate *intrastate* activities.¹²⁸

Second and more importantly, even if existing Supreme Court doctrine does preclude judicial scrutiny of congressional purposes, that does not de-

berg, *Federal Power and Federalism: A Theory of Commerce-Clause Based Regulation of Traditionally State Crimes*, 47 CASE W. RES. L. REV. 921, 937–40 (1997). But this is an over-reading. Those cases establish only that regulation of intrastate activities on a substantial-effects rationale is not rendered unconstitutional by the presence of a non-commercial motivation; they do not establish that presence of a bona fide commercial motivation is unnecessary:

In framing Title II of this Act Congress was also dealing with what it considered a moral problem. But that fact does not detract from the overwhelming evidence of the disruptive effect that racial discrimination has had on commercial intercourse. It was this burden which empowered Congress to enact appropriate legislation, and, given this basis for the exercise of its power, Congress was not restricted by the fact that the particular obstruction to interstate commerce with which it was dealing was also deemed a moral and social wrong.

Heart of Atlanta, 379 U.S. at 357–58.

Even *Scarborough v. United States*, 431 U.S. 563 (1977), among the most notorious of the “nexus” cases, is not an unambiguous counter-example. *Scarborough* held that, for the purposes of a federal statute, 18 U.S.C. § 1202(a), making it a crime for a convicted felon to possess “in commerce or affecting commerce” any firearm, proof that the possessed firearm had traveled at some time in interstate commerce was sufficient to satisfy the statutorily required nexus. *Id.* at 563. In so holding, Justice Marshall for the Court acknowledged candidly that “Congress was not particularly concerned with the impact on commerce except as a means to insure the constitutionality” of the statute. *Id.* at 575 n.11. This passage is sometimes read to reflect the Court’s resolute commitment to a formalistic Commerce Clause doctrine in which Congress’s actual purposes are entirely irrelevant. But this is reading the passage for more than it may be worth.

For one thing, the supposed facts that Congress was unconcerned with whether any particular gun possession exhibited the requisite nexus with interstate commerce, and was adding such a requirement for largely (or wholly) opportunistic reasons, do not entail that Congress was unconcerned with the impact on commerce of the basic activity it “really” wanted to regulate: possession of firearms by convicted felons. In short, neither in footnote eleven nor anywhere else in its opinion does the Court opine that no commercial motivation lay behind the statute at issue. Second, *Scarborough* was not a constitutional decision. The issue was one of statutory interpretation. Although one might reasonably conclude that the Court assumed the constitutionality of the statute, as interpreted, the Court did not address that question and did not purport to answer it. Nor was that question squarely resolved in the precedent that set the stage for *Scarborough*. See *United States v. Bass*, 404 U.S. 336, 341 (1971) (interpreting the statutory phrase “in commerce or affecting commerce” to modify “possesses” and “receives” as well as “transports”).

128. Gil Seinfeld has recently argued at length that two considerations combine to make this a distinction with a difference. See Seinfeld, *supra* note 83, at 1288–1301. First, when Congress regulates interstate commerce directly, as by barring the shipment of some article, it is exercising the commerce power alone, whereas the substantial effects test is best understood as relying upon the Necessary and Proper Clause too. *Id.* Second, pretext analysis is appropriate—indeed, unavoidable—under the Necessary and Proper Clause, but not under the Commerce Clause itself. *Id.* For a similar argument that does not rely on a distinction between regulation supported by the Commerce Clause itself and regulation that requires assistance from the Necessary and Proper Clause, see Schroeder, *supra* note 114; cf. Fried, *supra* note 50, at 40 (observing that, *with respect to the first two Lopez categories*, “the search for motive . . . is properly discarded, not as too intrusive or difficult, but as irrelevant”).

feat the instant hypothesis so long as judge-created constitutional doctrine is not identical to judicial interpretation of constitutional meaning. And this seems almost certainly true. As Richard Fallon recently explained, “identifying the ‘meaning’ of the Constitution is not the Court’s only function. A crucial mission of the Court is to implement the Constitution successfully. In service of this mission, the Court often must craft doctrine that is driven by the Constitution, but does not reflect the Constitution’s meaning precisely.”¹²⁹

So even if purposes are not suited to judicial scrutiny as a matter of doctrine, it is a separate question whether they are relevant as a matter of constitutional meaning.¹³⁰ More to the point, it does not mean that they are not relevant even to what the Court understands constitutional meaning to be. The hypothesis on the table is, therefore, resolutely a-doctrinal. It is a claim that the Justices’ understanding of the meaning of Congress’s constitutional authority to regulate commerce among the states makes the purposes of such regulation critical even though such an understanding has not been concretized into the nominal doctrine.

3. Conceptual

A final objection to the suggestion that the present Court views Commerce Clause meaning in purposive terms derives from the doctrinal objection but is conceptual and thus more fundamental. There are, after all, reasons why the doctrine rejects inquiry into congressional purposes. And one such reason, the argument goes, is that the very notion of purposes held by multimember bodies like Congress is incoherent.¹³¹ This being so, a purposive test makes no sense as a matter of either constitutional doctrine *or* constitutional meaning.

In light of all the careful philosophical attention lavished on whether multimember bodies can have purposes,¹³² this would seem a “big” question.

129. RICHARD H. FALLON, IMPLEMENTING THE CONSTITUTION 57 (2001).

130. This is a commonly marked distinction: “The principles underlying judicial review of unconstitutional motives are no less applicable to legislative enactments than to other official decisions. If the motives underlying an administrative decision or a legislative enactment should be insulated from judicial review, *it must be for institutional rather than jurisprudential reasons*—courts cannot properly undertake the inquiry or act on its findings.” Paul Brest, *Reflections on Motive Review*, 15 SAN DIEGO L. REV. 1141, 1142 (1978) (emphasis added).

131. See, e.g., Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363, 1374 (2000) (“Notwithstanding the common scholarly habit . . . of referring to the ‘purposes’ or ‘intentions’ or ‘motivations’ of legal bodies, there is typically no such thing (at least for multimember bodies such as courts or legislatures).”); Michael Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 279, 351 (1985); Jeremy Waldron, *Legislators’ Intentions and Unintentional Legislation*, in LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY 353 (Andrei Marmor ed., 1995).

132. For some of the most provocative work endeavoring to establish the affirmative position, see generally MICHAEL E. BRATMAN, *FACES OF INTENTION: SELECTED ESSAYS ON INTENTION AND AGENCY* chs. 5–8 (1999); MARGARET GILBERT, *LIVING TOGETHER: RATIONALITY, SOCIALITY,*

At the risk of disappointing, I aim to dismiss it cavalierly: *Of course* the actions produced by multimember bodies consisting of human agents can be produced for purposes. Each of us has just too much experience imagining and describing the purposes of such bodies—corporations, social organizations, faculties, faculty committees, all in addition to legislatures—to take seriously the skeptical claim.¹³³ I am disposed to believe, with the philosopher Daniel Dennett, that we cannot make adequate sense of our world without adopting what Dennett calls “the intentional stance,”¹³⁴ a perspective that views even non-human objects (like computer programs and legislation) as capable of possessing beliefs, wants, and purposes. But we need not go that far to agree that the concept of multimember-body purposes is very likely ineliminable from our conceptual terrain. The objection that Congress cannot have purposes for acting cannot be credited.

Lest my drive-by response be taken as insultingly dismissive, let me suggest that what I have labeled the conceptual objection is not really intended as an objection at all. It is, rather, a caution—a caution that it is not yet clear what it is we are talking about when we are talking about the purposes behind a given piece of legislation. That is, we do not yet understand well what type of thing are the “purposes” held by multimember bodies and how such a thing relates to the type of thing that are an individual human being’s purposes.¹³⁵ Now *these* questions *are* big ones. Fortunately, they are not ones we need tackle here. Suffice it to say that if the meaning of the Commerce Clause does turn on Congress’s purposes, such meaning is not referring to things that “do not exist”; it is referring to things that plainly do exist *in some sense*, albeit in a sense that we likely do not grasp very adequately.¹³⁶ That our

AND OBLIGATION (1996); MARGARET GILBERT, *SOCIALITY AND RESPONSIBILITY: NEW ESSAYS IN PLURAL SUBJECT THEORY* (2000); J. David Velleman, *How To Share an Intention*, 57 *PHIL. & PHENOMENOLOGICAL RES.* 29 (1997). For our very limited purposes I think it not worth the effort to map the philosophical distinctions between, e.g., *purpose* and *intention*.

133. “The Texas Legislature adopted the 10% plan in order to [for the purpose of] increasing minority enrollment.” “The board authorized the bond issue in order to make the company a less attractive takeover target.” “For the purpose of retaining Mary, the faculty voted a tenured lateral offer to Mary’s sometime co-author Bob.”

134. The intentional stance is introduced in DANIEL DENNETT, *CONTENT AND CONSCIOUSNESS* ch. 2 (1969). For a short but illustrative discussion of some of its power, see DANIEL DENNETT, *DARWIN’S DANGEROUS IDEA* 228–38 (1995).

135. A central theme in the debate concerns the supposed distinction between “objective” purposes and “subjective” purposes. See, e.g., FALLON, *supra* note 129, at 93–95. On the (relatively few) occasions on which “motives” and “purposes” are not treated as synonyms, the former is sometimes used to refer to “subjective” purposes. See *supra* note 126. People can have subjective purposes. Whether multimember bodies can too is a matter of disagreement.

136. Compare with Ashutosh Bhagwat, who expresses a similar idea:

[W]hile of course legislative purpose is to some degree a fictional concept, the process of attributing purposes to the actions of lawmaking bodies is implicit in the legal method. In other words, the legal community has agreed upon a series of conventions and techniques through which we construct a narrative account of

collective grasp of the concept is inadequate is something to take seriously. However it is not a bar to the hypothesis on the table. If the Court views Commerce Clause meaning as providing that regulations of intrastate commerce must be for “commercial purposes,” then the notion of commercial purposes at work in this sentence bears whatever sense that notion can bear, neither more nor less.¹³⁷

IV. FROM MEANING TO DOCTRINE

I have just proposed that *Guillen*, when read against the background supplied by *Lopez* and *Morrison*, suggests that a large number of present Justices might harbor something like the following vision of what (in part) the Commerce Clause means: Congress is authorized to regulate intrastate activities to achieve commercial ends, but not otherwise. Should that henceforth be the constitutional doctrine? Should courts be called upon to determine, every time some party challenges a putative exercise of the commerce power, whether Congress acted out of a commercial motivation? No, not necessarily. Recall again the distinction between meaning and doctrine. That Commerce Clause meaning turns upon the existence of a commercial purpose, even if true, need not entail that it should be the in-court rule of constitutional law. Doctrine does not equal court-interpreted meaning. And there may be good reasons of administrability and the like why this would be bad doctrine.

But if doctrine need not be identical to meaning, and if there are good reasons why courts should not apply this particular meaning in any direct or straightforward way during constitutional litigation, why bother to ascertain the meaning at all? Doesn't the challenge remain to draw doctrine in a sensible, workable way?

'legislative intent' or purpose, and though naturally there are close cases, the process produces a reasonably consistent account in most cases.

Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CAL. L. REV. 299, 323 (1997).

137. In a partial recognition that we cannot do wholly without the concept of legislative purpose, some respond that what really has purposes is not legislatures but legislation. We cannot intelligibly speak of Congress's purpose(s) in passing statute *x*, but we *can* speak of the purpose(s) of statute *x*. See, e.g., ANTONIN SCALIA, A MATTER OF INTERPRETATION 16–18 (1997). This is most peculiar. Obviously, being an inanimate object, a statute cannot possess purposes in the conventional mind-dependent sense. So to speak of the legislation's purpose requires a social *attribution* of purpose to something that does not possess it prior to the attribution. But if we can attribute purposes to something not human at all, why can we not attribute them to collections of humans? Someone who allows that *legislation* can have purposes therefore has no basis for denying that *legislatures* can have purposes *in passing the legislation*; all such a person can credibly maintain is that the purposes that such legislatures have are not the same sort of thing that the individual *legislators* have. And that supports rather than denies my claim, which is only that legislatures can have purposes in some (useful, intelligible) sense, albeit a sense that still wants for elucidation.

Yes, it does. But what is a sensible doctrine should itself depend upon what the meaning is that the doctrine is designed to administer.¹³⁸ In this last Part, I will argue that if Part III is right about the vision of Commerce Clause meaning that implicitly undergirds *Guillen*, that knowledge gives us greater purchase on the construction of sound Commerce Clause doctrine. In short, the Court can do a better job of creating the doctrine once the meaning is made clearer. Thus, insofar as *Guillen* provides insight into what the Court believes Commerce Clause meaning to be, it provides an opening for the construction of a more sensible Commerce Clause doctrine.

A. OPERATIVE PROPOSITIONS AND DECISION RULES

It will be helpful, to start, to make the nature of the relationship between meaning and doctrine a little clearer. Think of constitutional doctrine as “the rules and principles of constitutional law . . . that are capable of statement and that generally guide the decisions of courts, the conduct of government officials, and the arguments and counsel of lawyers.”¹³⁹ Or as the “interpretations, reasons, principles, and frameworks” that courts set forth when enforcing the Constitution.¹⁴⁰ Because constitutional doctrine is a judicial work product, and because courts can get things wrong, it is necessarily the case that constitutional doctrine is not identical to constitutional meaning, if by the latter we mean the “true” or “best” constitutional meaning. More importantly, though, Supreme Court-created constitutional doctrine is not identical even to *the Supreme Court’s interpretation* of constitutional meaning. As Fallon has taught, courts create doctrine (like the familiar tiers of Equal Protection scrutiny) to implement their visions of constitutional meaning. It is for this reason that we can talk intelligibly about doctrine that under-enforces¹⁴¹ or over-enforces¹⁴² constitutional meaning. When people

138. To believe that this is ideally true does not commit one to deny the minimalist insight that sometimes, perhaps often, courts should embrace the very practical task of crafting doctrine without feeling compelled to reach agreement on the possibly more abstract or contestable subject of constitutional meaning. *See generally* CASS SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999). But “often” is the key word here. For if the Supreme Court ought often to skip the stage of meaning-articulation in its march to doctrine-creation, at least sometimes it should not. And the instability and uncertainty that has always bedeviled Commerce Clause doctrine suggests that at least in this area at this time there is little to be lost and potentially much to be gained by attending seriously to constitutional meaning.

139. Charles Fried, *Constitutional Doctrine*, 107 HARV. L. REV. 1140, 1140 (1994).

140. Amar, *supra* note 111, at 79.

141. *See generally* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

142. Many discussions of over-enforcement describe the phenomenon as the application of so-called prophylactic rules. *See, e.g.*, Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U. L. REV. 100, 123 (1985); Brian K. Landsberg, *Safeguarding Constitutional Rights: The Uses and Limits of Prophylactic Rules*, 66 TENN. L. REV. 925, 926 (1999). The converse, however, is not true. Some of the most well-known explorations of pro-

speak of under-enforced constitutional norms or of “prophylactic rules” that over-enforce constitutional meaning, the notion they (almost always) have in mind is not that the court-announced doctrine under- or over- enforces “true” constitutional meaning (which amounts to what the speaker herself *believes* is the proper constitutional meaning) but rather that the doctrine under- or over- enforces *what the speaker believes the doctrine-maker believes* is the proper constitutional meaning.¹⁴³

Merely to recognize the distinction between meaning and doctrine provokes a host of questions. One question—perhaps the most profound—concerns legitimacy. If meaning and doctrine can do the very same thing—that is, if either could be straightforwardly applied by a court of law when adjudicating a live case or controversy—it is not at all clear that courts enjoy legitimate authority to substitute the latter for the former.¹⁴⁴ Doubts on this score linger in part, I believe, because distinguishing judge-interpreted constitutional meaning from judge-crafted constitutional doctrine can mislead.

I think there is a better way to conceptualize the relevant terrain. As I have argued at length elsewhere,¹⁴⁵ meaning and doctrine are not, strictly speaking, alternatives. Instead, judge-crafted constitutional doctrine may contain a judicial judgment about constitutional meaning but is not reducible to it. Or, to put it another way, while courts could apply constitutional doctrine without identifying the constitutional meaning that such doctrine serves, they could not apply their understanding of constitutional meaning all by itself. They cannot apply meaning without doctrine because the very notion of unmediated application of constitutional meaning to the facts of a case is inapt. Because courts are necessarily confronted with epistemic uncertainty, they necessarily require an additional device that sets forth the decisional procedure they are to follow in order to reach a conclusion as to whether the Constitution’s meaning (as judicially determined) has been

phylactic rules, see especially David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 191 (1988), invest that concept with a broader meaning than the notion of over-enforcement can capture. For an extensive analysis of Strauss’s concept of prophylactic rules, see Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 30–50 (2004).

143. It is worth emphasizing this point because so many discussions of the relevant concepts do not make it clear. See, e.g., Joseph D. Grano, *Miranda’s Constitutional Difficulties: A Reply to Professor Schulhofer*, 55 U. CHI. L. REV. 174, 176–77 (1988) (defining a prophylactic rule as “a court-created rule that can be violated without violating the Constitution itself”).

144. This is the chief challenge confronting Henry Monaghan’s endorsement of what he termed “constitutional common law.” See Henry P. Monaghan, *The Supreme Court 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 2–3 (1975) (arguing “that a surprising amount of what passes as authoritative constitutional ‘interpretation’ is best understood as something of a quite different order—a substructure of substantive, procedural, and remedial rules drawing their inspiration and authority from, but not required by, various constitutional provisions”). See generally Thomas S. Schrock & Robert C. Welsh, *Reconsidering the Constitutional Common Law*, 91 HARV. L. REV. 1117 (1978) (criticizing constitutional common law as illegitimate).

145. See Berman, *supra* note 142.

complied with. In short, courts cannot adjudicate concrete disputes merely by “applying” constitutional meaning.

Consider an example: Suppose the Supreme Court interprets the Commerce Clause to mean that Congress may regulate any activity if but only if that activity, in the aggregate, has a substantial effect on interstate commerce. Alfonso Lopez then challenges his conviction under the GFSZA on the ground that it exceeds Congress’s commerce power because the possession of guns near schools does not, even in the aggregate, have the requisite substantial effect. What is a court to do? Measured against judge-interpreted constitutional meaning, the constitutionality of the GFSZA is obvious: It is constitutional if and only if the possession of guns near schools substantially affects interstate commerce. There is a factual question here (What effect does gun possession near schools have?) and also an evaluative one (Is that effect substantial?). The problem is that courts do not know the answer to the factual question. They can make only probabilistic estimates. Accordingly, doctrine needs to include a rule that tells courts what to do when uncertain. So if constitutional doctrine (or “constitutional law”) consists of what judges take constitutional meaning to be, it cannot consist of *only* that. It must also contain what we may call an application rule or a decision rule—something, for example, like this: “Conclude that the regulated activity substantially affects interstate commerce if and only if you are persuaded that it is more likely the case than not.” Such a directive is, of course, the preponderance of the evidence standard. It is *how* the courts “apply” the constitutional meaning.¹⁴⁶

You might be tempted to draw the following lesson from this example. Constitutional doctrine must consist, at the least, of two things: judge-interpreted constitutional meanings *and* the preponderance of the evidence standard of review. Were that the right lesson, my argument would be truly banal. But that conclusion is mistaken. What this example really demonstrates is that constitutional doctrine consists of judge-interpreted constitutional meanings and *some* rule that directs courts how to determine whether the meaning is satisfied. To coin some terms, judge-crafted constitutional doctrine must consist of “operative propositions” (what the courts take the Constitution to mean)¹⁴⁷ and “decision rules” (instructions courts should fol-

146. We generally think of the preponderance standard as an instruction given to fact finders. But “factual” questions of this sort—for example, whether a regulation will substantially affect interstate commerce, or even whether Congress could rationally have so concluded—are routinely resolved by judges as though they were matters of law.

147. I use the term “operative propositions” to refer to a court’s view (usually the Supreme Court’s view) of what constitutional meaning is. The term “constitutional meanings” is not apt because it is important to emphasize that we are speaking of judicially interpreted constitutional meanings, not the constitutional meaning in an ideal sense or from the perspective of some non-judicial preferred interpreter. And “judge-interpreted constitutional meanings,” is cumbersome. For the reasons for this somewhat clunky vocabulary, see Berman, *supra* note 142, at 58 n.92.

low in order to determine whether the operative propositions are satisfied). The preponderance of the evidence standard is *a* possible decision rule, but it is not the only one. And, in many cases, it will not be the best one. This is so for many reasons.¹⁴⁸

First, even if the only legitimate function of a decision rule is to minimize total adjudicatory errors, a more-likely-than-not standard will not always accomplish it. Imagine, for example, that either of the following two generalizations is true: federal judges are likely to be subconsciously biased in favor (or against) congressional power, or are somewhat more (or less) disposed to credit arguments advanced by government attorneys than by private counsel. If so,¹⁴⁹ then a decision rule that requires judges to conclude that the regulated activity does, in the aggregate, substantially affect interstate commerce only if their subjective confidence level regarding this proposition is something higher (or lower) than “more likely than not” would predictably yield fewer total errors in adjudication of our supposed constitutional operative proposition than would a preponderance-of-the-evidence decision rule.

Second, courts might reasonably believe that the social disutility of false positives and false negatives in the adjudication of any particular constitutional operative proposition are not identical. And if they are constitutionally authorized (if, say, it is part of the constitutionally granted “judicial Power”¹⁵⁰) to craft devices designed to minimize total *weighted* adjudicatory error, then, again, a preponderance-of-the-evidence decision rule might appear suboptimal. Many other considerations could enter the judicial mind. The Court might, for example, discern constitutional value in implementing constitutional meanings in a way that increases predictability of adjudications thereby providing firmer guidance for other governmental actors¹⁵¹ or that reduces inter-branch friction. In any particular context, a decision rule other than the preponderance standard could better serve these goals too. Or so the Court might conclude.

These are far from idle speculations. Considerations of this sort have already exerted powerful influence on the construction of constitutional doctrine. Indeed, I believe that vast stretches of constitutional doctrine can be

148. The following discussion is elaborated in *id.* at 88–100.

149. These are not entirely fanciful suppositions. One or both of these suggestions might help explain why lower federal courts have been so inhospitable to Commerce Clause challenges even after both *Lopez* and *Morrison*. See Brannon P. Denning & Glenn H. Reynolds, *Rulings and Resistance: The New Commerce Clause Jurisprudence Encounters the Lower Courts*, 55 ARK. L. REV. 1253, 1256 (2003) (“There is evidence from the lower courts’ opinions that they are still reluctant to take *Lopez* seriously, even after *Morrison*’s clarifying opinion.”); Reynolds & Denning, *supra* note 50.

150. U.S. CONST. art. III, § 1.

151. Cf. *United States v. Lopez*, 514 U.S. 594, 574 (1995) (Kennedy, J., concurring) (contending that “the Court as an institution and the legal system as a whole have an immense stake in the stability of our Commerce Clause jurisprudence as it has evolved to this point”).

more fruitfully conceived in terms of operative propositions that are administered via what we might dub “non-standard decision rules”—i.e., decision rules that are something other than the simple preponderance standard.¹⁵²

The rational basis test of Equal Protection doctrine, for instance, might be faithfully broken down into the operative proposition that all government classifications must be reasonably designed to further a legitimate state interest, administered by the decision rule that courts must conclude that the classification was so designed unless persuaded that no “conceivable state of facts . . . could provide a rational basis for the classification.”¹⁵³ Such a decision rule preserves institutional capital by reducing conflicts between courts and legislatures. The *Miranda* warnings are rescued from Justice Scalia’s charge¹⁵⁴ that they constitute an exceptional and illegitimate “prophylactic rule” when viewed as an operative proposition that the Fifth Amendment bars the introduction into evidence of out-of-court statements that had been compelled by the police, administered by a decision rule directing that a court conclusively presume a statement to have been compelled if it believes it more likely than not that the statement was elicited during custodial interrogation not preceded by the requisite warnings. The Court’s recently minted doctrine that “[i]f an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender”¹⁵⁵ does less violence to the Fourth Amendment’s straightforward command that people not be subjected to “unreasonable searches and seizures” if understood as another decision rule that employs a conclusive presumption. The list of plausible examples could be multiplied almost without number.

B. POSSIBLE COMMERCE CLAUSE DECISION RULES

If I am right about the light that *Guillen* (when read against *Lopez* and *Morrison*) sheds on the present Court’s view of constitutional meaning, and if I am also right about the conceptual structure of constitutional doctrine, the task remaining for the Court is to craft a constitutional decision rule to implement its commercial-purpose-based understanding of Commerce Clause meaning. How might that be done?

152. See Berman, *supra* note 142, at 61–78.

153. *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993). This way of breaking down the Equal Protection doctrine makes sense of the principal dissent in *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356 (2001), by suggesting that the congruence and proportionality test of *City of Boerne v. Flores*, 521 U.S. 507 (1997), should measure federal legislation adopted under Section Five of the Fourteenth Amendment against the constitutional operative proposition alone, not the operative proposition as administered by the constitutional decision rule.

154. See *Dickerson v. United States*, 530 U.S. 428, 444–65 (2000) (Scalia, J., dissenting).

155. *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001).

Most obviously, the Court could simply adopt the preponderance of the evidence standard. If so, the doctrine would be (roughly) the following: legislation that regulates intrastate activity is held to be within Congress's commerce power if and only if a court concludes that, more likely than not, it issues from a commercial purpose. Such a doctrine would probably provoke several interpretive problems, two of which stand out.

The first concerns what it means for legislation to *issue from* a commercial purpose. Assuming a commercial purpose was in play, what sort of causal force must it have exerted in order for the legislation to pass muster? One possible answer can be ruled out quickly: the sole-purpose test. Such a test would blink reality. "[L]aws tend to have purposes, not a purpose, and to reflect compromises."¹⁵⁶ Moreover, there appears no good reason why, even in some idealized theory, the commercial purpose behind a regulation must have been its sole purpose to satisfy the Commerce Clause. So long as whatever other purposes might have exerted force were not themselves bad (like disadvantaging racial minorities), their presence should not serve as a fatal taint.¹⁵⁷ For basically similar reasons, it seems inappropriate to require that the (supposed) commercial purpose was a necessary (or but-for) cause of the regulation. The relevant issue is more likely to be whether the commercial interest exerted sufficient motivating force to have produced the legislation in question even if (perhaps contrary to fact) no non-commercial purpose had also exerted motivating force. This is not a causally necessary purpose but rather a causally sufficient one. Presumably the doctrine would require something of this sort—a causally sufficient commercial purpose, or perhaps a substantially motivating one.

The next matter requiring elaboration, of course, is *commercial*. What types of purposes, supposing they were causally sufficient, count as *commercial*? Skeptics of the (near) requirement under *Lopez* and *Morrison* that the intrastate activity being regulated under the substantial effects prong must be "commercial" or "economic" are likely to suppose that distinguishing "commercial" from "noncommercial" purposes will be equally unpromising. This is not obviously so. Still, even if the two inquiries are not *equally* problematic,¹⁵⁸ there is no denying that distinguishing commercial from non-commercial purposes will be radically contestable at the margins. For the present, it is perhaps enough to observe that this is just the sort of question

156. Robert A. Schapiro & William W. Buzbee, *Unidimensional Federalism: Power and Perspective in Commerce Clause Adjudication*, 88 CORNELL L. REV. 1199, 1235 (2003).

157. Cf. *supra* note 127 (discussing *Heart of Atlanta*).

158. My own guess is that courts would find themselves presented with more regulated activities that demand characterization as commercial vel non than with candidate regulatory purposes that call for the same sort of characterization and, therefore, that common law decision-making could produce stability and predictability faster if the doctrine turns on the latter than on the former. But I offer this rumination less to insist upon its correctness than to support the claim that a "commercial purposes" doctrine need not raise just the same difficulties, in just the same degree, as does a "commercial activity" doctrine.

likely to be resolved not by a neat verbal formula but by the accretion of common law precedents operating by analogy.

The doctrine under consideration, to sum up, would require courts to determine whether a particular claimed purpose was *commercial* and, if so, whether its pursuit constituted a *causally sufficient* factor. Neither is likely to be a simple inquiry. Errors are to be expected, which prospect threatens the stability and predictability that many think so important in this area. So even if the Court believes that this hypothetical doctrine rests upon a fair approximation of Commerce Clause meaning, it might nonetheless conclude that implementing such an operative proposition by means of the simple preponderance decision rule is unwise. If this proves true, and if erroneous determinations that the challenged regulation lacked a causally sufficient commercial purpose are thought to be more socially harmful than are false positives (because the former risk frustrating a critical national interest in effective regulation of the economy by the federal government), the Court could choose to ratchet up the plaintiff's evidentiary burden. For example, the decision rule could direct courts to conclude that challenged legislation was adopted for a causally sufficient commercial purpose unless the challenger demonstrates by, say, a "substantial probability" or by "clear and convincing evidence" that no commercial purpose substantially motivated the legislation.

Suppose, though, that one or more of these two inquiries—into the commercial nature of a given purpose and its causal sufficiency—are thought too hard to undertake no matter what subjective confidence level is required of judges. The customary solution is to introduce into the decision rule factors that can serve as a reasonable proxy or surrogate for the matters that the operative proposition captures. This might be how the commercial character and traditional state function factors, as they operate in existing doctrine, are meant to work. That is, the Court could be working toward a decision rule that directs judges to conclude that a challenged regulation of intrastate activity was adopted for a causally sufficient commercial purpose (as the operative proposition requires) if and only if persuaded by a preponderance that: (1) the regulation is aimed at protecting the instrumentalities or channels of interstate commerce, or (2) it (a) regulates commercial activity and (b) does not interfere in a traditional area of state sovereignty.

Unfortunately, this solution does not seem to avoid the difficulties that (by hypothesis) recommended against the deployment of a simple preponderance decision rule. Courts still are required to undertake some sort of purposive inquiry (the "aimed at" feature of prong (1)) and must undertake other inquiries—whether the activity being regulated is "commercial" (or "economic") and whether an activity implicates "traditional areas of state sovereignty"—that are not obviously better suited to judicial investigation than is the "commercial purpose" question. So if the Court comes to think that

the purposive operative proposition is best administered in an oblique manner, it ought to consider other possible decision rules.

Consider, for example, this doctrinal solution: First, Congress is required to articulate a commercial purpose claimed to have motivated the legislation in question. Once it does so, the burden shifts to the challenger to articulate a non-commercial purpose served by the legislation. If the reviewing court concludes that there is a substantial probability that the challenger's proposed purpose was, say, a "substantial factor" behind the legislation,¹⁵⁹ then the burden shifts to the government to demonstrate by a preponderance of the evidence that the challenged legislation is likely to substantially advance the claimed commercial purpose. Notwithstanding its complex decision-tree structure, this is functionally still a decision rule. A passable reformulation would be: A court must conclude that challenged legislation was adopted for a causally sufficient commercial purpose if it concludes either (1) that there is not a substantial probability that any proposed non-commercial purpose was a substantially motivating cause of the legislation,¹⁶⁰ or (2) that it is more likely than not that the legislation will substantially advance a legitimate commercial purpose.

159. I am not at all wedded to the "substantial factor" component of this imagined decision rule. Nonetheless, a few words are warranted to explain what favors it over one obvious alternative. The notion of causal necessity (deployed via the familiar "but-for" formulation) would be inappropriate here because a judicial determination (by a substantial probability) that a non-commercial purpose was a but-for cause of the challenged legislation amounts to a determination (by that same probability) that a commercial purpose was not a sufficient cause. And the very assumption underlying this particular complex decision rule is that courts will have better success adjudicating *that* question—whether the commercial purpose was a sufficient cause—obliquely than directly.

160. This is not the place to offer a complete refutation of those who contend that courts are ill suited to engage in any inquiry into animating purposes. I'll offer just two reactions. First, as Donald Regan has argued:

Courts regularly inquire into legislative purpose in the course of interpreting statutes. There are many sorts of evidence that can be brought to bear on the question of purpose, over and above the often powerful evidence of effect and even in the absence of recorded legislative debates or explicit statements of bad purpose. . . . There is of course no mechanical procedure for uncovering and weighing the evidence relevant to legislative motive, and different people looking at the same record may come to different conclusions. Even so, the intractability of the issue has been overstated.

The fact is, this is just the kind of problem courts are best at. Courts must ascertain the purpose with which some agent (individual or corporate body) acted in many areas of law—criminal law, contracts, trusts and estates, income taxation, to say nothing of ordinary statutory interpretation. In deciding what was the agent's purpose, the court does not need to inquire into the effects of the act beyond asking in general terms what sort of effects the agent probably expected. Nor does the court need to value the effects beyond asking how the agent appears to have valued them. In short, the court does not need to consult either the future or its view of social morality. The court needs only to look at something that was done in the past and to interpret what was done in light of the surrounding events and judicial

A doctrine of this shape is likely to produce outcomes largely in accord with existing caselaw¹⁶¹ but to possess several advantages over its obvious competitors. Unlike current doctrine, for example, it would not rely on the commercial-character factor at all, let alone on the (almost unbearably goofy) jurisdictional nexus test.¹⁶² And it has more bite than pre-*Lopez* doctrine. Prong (2) of this decision rule is tougher on Congress than was pre-*Lopez* doctrine because it requires that the government establish that the legislation is in fact *likely* to substantially advance a legitimate commercial purpose, not just that Congress could *rationaly* have so concluded. But this more demanding test has a narrower scope than does the commercial-character test because it kicks in only once the challenger meets her burden of establishing a substantial probability that some specific non-commercial purpose was at work. Lastly, if the Court is attracted to the operative proposition I have inferred from recent decisions (that Congress may regulate intrastate activities only when pursuing a causally sufficient commercial purpose) this complex decision rule might administer it more effectively than would a simple preponderance-of-the-evidence decision rule because courts would not be required to directly address the very difficult question of causal sufficiency.

C. THE POINT MORE GENERALLY

Maybe one of these decision rules would satisfactorily administer the operative proposition that seems lurking behind *Guillen*, maybe not. It is not the aim of this Article to defend any one particular formulation of optimal Commerce Clause doctrine. Indeed, not only am I not committed to any

knowledge of the proclivities of the sort of agent involved. Such projects are the judge's daily fare.

Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1151–52 (1986); see also Richard H. Pildes, *Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law*, 45 HASTINGS L.J. 711, 729 n.45 (1994) (“Judicial review of legislative justifications and motives might well be the task judges are most well positioned to perform.”). Second, and notwithstanding the oft-expressed doubts about purpose inquiry, the Court has, in fact, injected purpose scrutiny into a large number of its existing constitutional doctrines. See FALLON, *supra* note 129, at 90–91.

161. For example, *Wickard* would have come out the same way because farmer Filburn would be unable to establish a substantial probability that the statute was adopted for a non-commercial purpose. *Lopez* also would have come out the same way on the assumptions that the challenger would have been able to meet his burden and that the government would have been unable to meet its. *Morrison* becomes a very close case: the defendant would have been able to meet his burden of identifying a motivating non-commercial purpose, but the government might be able to meet its burden too.

162. The jurisdictional element is perhaps the most egregious example of what Donald Regan has fairly derided as Commerce Clause doctrine's “fetishism of state-line crossings.” Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite United States v. Lopez*, 94 MICH. L. REV. 554, 562 (1995); see also *id.* at 600 (discussing the jurisdictional element more specifically). For a more extended critique, see McGimsey, *supra* note 125, at 1706–19. For a defense, see generally Litman & Greenberg, *supra* note 127.

particular decision rule as the best means of administering an operative proposition that turns upon commercial purposes, I am not even committed to a purpose-based operative proposition in the first place.¹⁶³ My ambition is more general.

1. The “Test of Fidelity”

If the Rehnquist Court’s developing Commerce Clause doctrine is driven by a single impulse, it is the insistence that the doctrine not amount to a blank check. Almost certainly, few if any Justices in the majority have a clear idea of what the appropriate limits on Congress’s commerce power are. Yet, all are committed to the proposition that some limits there must be. The single overarching desideratum for an acceptable Commerce Clause doctrine, accordingly, is that it not, in practical application, permit everything. It must, in Jefferson Powell’s felicitous phrase, meet “the test of consequences.”¹⁶⁴

But that can’t be the lone desideratum, lest any sort of arbitrary cut-off mechanism be acceptable. “Congress may regulate intrastate activity that, in the aggregate, substantially affects interstate commerce unless that activity (a) can be spelled from the letters in the phrase ‘commerce among the states’; or (b) is fairly inferable from Part I, Book 8, chapter 3 of Montesquieu’s *Spirit of the Laws*;¹⁶⁵ or (c) involves the use or consumption, in whole or part, of the common American ground squirrel.” How about *that* for a doctrine that would meet the test of consequences? Okay, this is a patently absurd example. But I would be more embarrassed to have offered it for sake of illustration had other foolish examples that came to mind not already been taken—such as the commercial-character requirement and the risible jurisdictional nexus test.

The point, of course, is that doctrine-making should be constrained by at least two considerations at once. The “test of consequences” is perfectly reasonable. But it must not be allowed to displace what we might call the “test of fidelity”—that the doctrine must sensibly implement the Court’s understanding of constitutional meaning.¹⁶⁶ The first lesson of this exploration,

163. I do agree with Donald Regan, however, that “[f]rom the point of view of the constitution-writer, who is attempting to define for herself, in abstraction from particular legislative problems, what the legislature ought and ought not to be able to do, it turns out that in some areas motive is precisely the crucial variable.” Regan, *supra* note 160, at 1144.

164. H. Jefferson Powell, *Enumerated Means and Unlimited Ends*, 94 MICH. L. REV. 651, 655–56 (1995); see also, e.g., Merritt, *supra* note 59, at 685–90 (stating that the Court in *Lopez* required some limit to Congress’s power under the Commerce Clause).

165. CHARLES DE SECONDAT, BARON DE MONTESQUIEU, DE L’ESPRIT DES LOIX [THE SPIRIT OF THE LAWS], Pt. I, bk. 8, ch. 3 (1748) (“On the spirit of extreme equality”).

166. I leave open the question of what a “sensible” implementation consists of. At a minimum, the Court should be able to articulate the reasons that militate in favor of any particular non-standard decision rule. Those reasons could then be assessed on the usual grounds of legitimacy, coherence, cogency, and the like.

then, is that it is high time for the Court and constitutional scholars to think hard about Commerce Clause meaning without being paralyzed by the felt need that such meaning be “workable.” The decision rule must meet that criterion, the operative proposition need not.

2. Doctrinal Flexibility

If the Court’s pursuit of sensible Commerce Clause doctrine would be advanced by its attending to the difference between Commerce Clause meaning and a decision rule crafted to administer that meaning, there are related but distinct reasons for it to make its views on Commerce Clause meaning explicit. Put another way, there are reasons for the Court actually to announce the constitutional operative proposition, not only to be aware of it. Doing so can help the Court more effectively respond if whatever doctrine it does create proves not to its satisfaction.

Whenever doctrine is deemed not to satisfactorily implement meaning (in the Commerce Clause context or elsewhere), the Court has three options open to it. It can, of course, just lump it by continuing to apply the doctrine even though it believes that the outcomes in adjudicated cases are not faithful to its view of constitutional meaning. Or it could change the doctrine. A third possibility is, in effect, to abandon doctrine opportunistically. The Court could strike down a statute, even though the statute seems to comply with preexisting doctrine, and even without nominally changing the rules.

The second option—changing the doctrine—is impeded, of course, by *stare decisis*. But the Court might find itself better able to experiment in the construction of Commerce Clause doctrine if it makes an effort to settle on the operative proposition and to limit its experimentation to the decision rule.¹⁶⁷ This is because the social interest in stability and predictability of constitutional doctrine is probably less threatened if the Court announces its operative propositions and its decision rules and then modifies only the latter than if, failing to distinguish between these two elements of doctrine, it proceeds to change its doctrine tout court.

The reason is simple. Insofar as doctrine is constrained only by the constitutional text and the rich menu of available interpretive methods, changes in doctrine can range across a wide reach of conceptual space. However, because a constitutional operative proposition is, by its nature, at least some-

167. I will not argue here for the merits of doctrinal experimentation, except to recommend that we not turn a blind eye to history. Past performance is not, we well know, a guarantee of future results. But when many iterations of the Supreme Court have struggled for many generations to craft doctrine in a given area, we have reason to anticipate that the doctrine du jour—whatever it may be—is unlikely to see old age. We might, therefore, look for devices or conventions that can more easily accommodate doctrinal change, if it comes. For an extended defense of doctrinal experimentation, see generally Michael C. Dorf, *The Supreme Court, 1997 Term—Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4 (1998).

what more determinate than is the constitutional provision¹⁶⁸ which it interprets, a decision rule designed to administer a constitutional operative provision has a more circumscribed orbit. That is, the operative proposition anchors the decision rule more firmly than the Constitution itself anchors the doctrine, full stop (i.e., the doctrine conceived as an undifferentiated whole). Therefore, by fixing upon an operative proposition, the Court reduces the territory over which the decision rule could plausibly range and enhances the ability of interested nonjudicial actors—like Congress—to predict the direction in which doctrinal changes might move. As a consequence, it might be thought permissible and desirable for stare decisis to weigh less heavily against changes in decision rules than operative propositions. And if that is so, then when the Court anticipates a significant probability that newly minted doctrine might not stick, it can enhance its ability to make that change if and when such a revision subsequently proves necessary by being clear in the first place what is operative proposition and what is decision rule.

How about the third option? What should the Court do if it (a) concludes that existing doctrine allows inappropriately wide latitude for Congress (if, that is, it believes that the decision rule *unduly* under-enforces the operative proposition), but (b) is unable to come up with a doctrine that would work better for the mine run of cases, and (c) is unwilling to lump it? My colleague Philip Bobbitt has provided one answer: By invalidating some challenged legislation that might conform nominally to existing doctrine, the Court could “cue” Congress even without really bringing constitutional doctrine in line with that holding of unconstitutionality.¹⁶⁹

Many commentators have accepted that some exercises of judicial review are best understood in terms of Bobbitt’s “cueing function.”¹⁷⁰ Some have described *Lopez* itself in just such terms.¹⁷¹ Whether *Lopez* illustrates the

168. “Provision” here is a term of art that serves linguistic convenience at the risk of imprecision. By using the term, I do not mean to endorse a narrow clause-bound interpretivism. I mean to refer to whatever is “in” the Constitution or “about” the Constitution (including structures and relationships) that can serve to generate judicial understandings about constitutional meaning.

169. PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 194 (1982) (proposing that *National League of Cities* “is not a major doctrinal turn but a cue to a fellow constitutional actor, an incitement to Congress to renew its traditional role as protector of the states”).

170. See, e.g., T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines after Shaw v. Reno*, 92 MICH. L. REV. 588, 603–04 (1993) (describing *Shaw* as a possible exercise of the cueing function); Frank B. Cross, *Essay, Realism About Federalism*, 74 N.Y.U. L. REV. 1304, 1324 & n.109 (1999) (discussing federalism doctrine in general in cueing terms); Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2226–27 (1998) (same).

171. See, e.g., Jenna Bednar & William N. Eskridge, Jr., *Steadying the Court’s “Unsteady Path”: A Theory of Judicial Enforcement of Federalism*, 68 S. CAL. L. REV. 1447, 1484 (1995) (*Lopez* “is best read as a remand for Congress to attend to federalism values more explicitly. It was a constitu-

principle or not (and the characterization was surely more plausible before *Morrison* than it is today) any exercise of the cueing function confronts at least two difficulties. First, because “readers outside Congress, including lawyers for state governments and lower court judges, will take the decisions to be ordinary exercises of judicial review, articulating doctrines that should be applied consistently,” the cueing decision has a tendency, over time, to concretize into doctrine.¹⁷²

Second and more fundamentally, even if Congress picks up that the Court is sending a message, it may find that message cryptic. An exercise of the Court’s cueing function is intended to instruct Congress not to exploit the full latitude that nominal Court-created doctrine permits. It does not, however, tell Congress how far it *may* go (without fearing judicial invalidation). In particular, Congress must wonder whether a majority of the Court harbors a fairly distinct (though unarticulated) notion of the acceptable scope of Congress’s powers or, instead, aims only to prod Congress to more seriously exercise its *own* judgment on that question.¹⁷³ If the answer is the former, then Congress, voicing complaints (only too familiar to law professors) about “hiding the ball,” might fairly ask the Court to be more forthcoming. And if the answer is the latter, then we all might fairly doubt that

tional wake-up call.”); Daniel J. Meltzer, *The Seminole Decision and State Sovereign Immunity*, 1996 SUP. CT. REV. 1, 63 (opining that the purpose of *Lopez* was “to remind Congress that there may be a price to pay when it cavalierly fails to ‘make out even a minimally plausible case for utilizing the commerce power to undergird a new regulatory scheme, especially one that deals with problems historically regarded as chiefly of state and local concern’”) (quoting Pollak, *supra* note 59, at 552; citing Bobbitt’s discussion of the cueing function); Ernest A. Young, *Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception*, 69 GEO. WASH. L. REV. 139, 165 (2001) (noting the Court’s efforts to demonstrate to Congress that its authority is limited).

172. I am quoting here from Mark Tushnet, although drawing a nearly opposite conclusion. Tushnet proceeds to reason that:

the Supreme Court, having presented the initial decision as ordinary judicial review, will be unable to say that these readers have misunderstood the point of the Court’s action. Instead, the Court will have to explain why these readers misinterpreted the precedent. . . . As these explanations accumulate, the notion that *New York v. United States* articulates a constitutional doctrine will dissipate. Eventually, the decision will become a relic.

Mark Tushnet, *Why the Supreme Court Overruled National League of Cities*, 47 VAND. L. REV. 1623, 1653 (1994). It seems to me that Tushnet and I do not share the same understanding of what a true cueing decision involves. A bona fide cueing decision, as I understand it, does not purport to articulate constitutional doctrine, which is why *New York* is an unlikely instance.

173. The latter interpretation is suggested by many discussions of the cueing function. See, e.g., *Leading Cases*, 109 HARV. L. REV. 111, 118 (1995) (observing that in exercising the cueing function, “the Court may strike down a law to signal Congress that it should engage in its own review of the constitutionality of its actions, and that it has been remiss in this duty”); Note, *Commerce Clause in the Cross-Hairs: The Use of Lopez-Based Motions to Challenge the Constitutionality of Federal Criminal Statutes*, 48 STAN. L. REV. 1431, 1443–44 (1996) (contending that, in *Lopez*, the Court “‘cued’ Congress that it needs to assess more seriously the constitutionality of its own enactments”).

the cueing decision would produce much change in congressional practice.¹⁷⁴

If these observations hit the mark, then separating doctrine into its operative proposition and decision rule components would allow the Court to cue Congress more effectively. Assume, for example, that the Court were to announce, as a matter of Commerce Clause doctrine, the operative proposition that I have already hypothesized: the Commerce Clause authorizes Congress to regulate intrastate activities only when such regulation rests on causally sufficient commercial purposes. Assume too that the Court formulates a non-standard decision rule that will predictably under-enforce this operative proposition. If Justices come later to believe that Congress is exploiting this predictable under-enforcement by regulating for non-commercial purposes while engineering the legislation to satisfy the decision rule, the Court can respond in a way that neither compels it to change the doctrine nor risks failure of uptake.

Very simply, the Court could on occasion apply the preponderance-of-the-evidence decision rule to the already announced operative proposition to strike down legislation that might have survived scrutiny had the more complex decision rule been applied. In such a case the meaning of the cue would be clear: "Try to abide by the applicable constitutional operative proposition that we have announced, not by the more generous decision rule. If you continue to take purposeful advantage of our under-enforcing decision rule, we will feel compelled to administer the operative proposition by a new decision rule, one that you will find less accommodating." By distinguishing Commerce Clause operative propositions from Commerce Clause decision rules, the Court thereby increases the effectiveness of the tools at its command. Were the Court thereafter to send a message to Con-

174. Perhaps a prosaic, if imperfect, analogy can make this point clearer. Suppose that the dean at the University of Texas School of Law has adopted the following rule governing the distribution of summer money: "Faculty are entitled to summer funds if they have published at least one article or essay over the preceding twelve months in a legal journal." Suppose, too, that the dean denies me any funding for the upcoming summer, even though I have satisfied the formal prerequisite by having published this Article. In denying me funds, then, it is plausible to infer that the dean is trying to cue me. But because he acknowledges that I have conformed to the rule, I am not entirely certain just what he is trying to cue me to do. Most generally, I do not know whether he has in mind some substantive standard, even if fuzzy, that he wants faculty to satisfy (e.g., publish more articles, or longer articles, or better articles, or articles on more important subjects) or, instead, whether he just wants us to live up to our *own* standards of scholarly excellence, whatever they be, and believes that I have not made a serious effort to comply with mine. If the former, I might protest that the dean should rewrite the rule to capture the standard he seems really to be employing—something like, e.g., "faculty will receive summer funding who, in the dean's judgment, have made meaningful contributions to legal scholarship over the preceding twelve months." And if the latter, you might reasonably wonder whether I would really work harder or better, or, instead, would just make my exertions more conspicuous in an effort to persuade the dean that I am taking my scholarly responsibilities seriously.

gress without effecting a true change in doctrine, it would be clearer to Congress not only that a message was being sent, but also what the content of that message was.

CONCLUSION

Guillen has all the earmarks of a case intended, and destined, to have as little effect on the development of the law as possible. A unanimous Court rejects a constitutional challenge to federal legislation in a brief opinion that treats the ultimate constitutional question as though fully determined by settled precedent. A case disposed of in this way would seem destined to serve out its life as filler for long string cites.

This Article urges that we readers of the Court's handiwork ought not to be fooled. Doctrine did not determine the result in *Guillen*. To the contrary, the result in *Guillen* is more in tension than conformity with preexisting Commerce Clause doctrine. Sub silentio, *Guillen* seems to declare that restrictions on exercises of the Commerce power that regulate intrastate activities in order to promote interstate commerce announced in *Lopez* and *Morrison* have no bearing when the regulation is designed to promote the instrumentalities or channels of interstate commerce. As a doctrinal matter, this is puzzling. It is not obviously bad doctrine. But it is obviously in need of a defense.

No defense appeared in *Guillen*. And yet, the result in *Guillen* seems reasonable. At the least, it cannot be fairly dismissed as patently wrong. Why not? One possible answer—the answer explored here—is that *Guillen* issued not from attention to the Court's own Commerce Clause *doctrine* but rather from sensitivity to the Court's understanding of Commerce Clause *meaning*. In particular, *Guillen* can be reconciled with *Lopez* and *Morrison* if the Court decided that case based on a majority's belief (perhaps conscious, perhaps not) that part of the operative significance of the Commerce Clause is to permit Congress to regulate intrastate activities for "commercial" purposes. That is an admittedly indistinct notion but includes, at the least, that Congress may act to promote economic growth.

To take this hypothesis seriously, however, does not recommend that the Court simply adopt this view of meaning as its doctrine. Constitutional doctrine necessarily contains, if implicitly, at least two discrete components: judicial understandings of constitutional meaning (what I term "operative propositions") and judicially announced decision rules. The decision rule is the test that courts are to apply in deciding whether to adjudge the operative propositions satisfied. Reflection on *Guillen* can help us, and the Court itself, focus clearly on what the Commerce Clause should be understood to mean. Once the Court announces its view of Commerce Clause meaning, one component of Commerce Clause doctrine—the operative proposition—becomes settled (only provisionally, of course). The Court can then set upon its task of crafting a sensible decision rule more thoughtfully. I am under no

illusion that crafting the optimal decision rule will be easy. But for the Court to keep trying to craft “doctrine” without bothering to think clearly about the meaning that the doctrine should be designed to implement is to wander in the dark.