INACTIVITY, DEREGULATION, AND THE COMMERCE CLAUSE: A THOUGHT EXPERIMENT

DAVID M. DRIESEN*

This Essay examines an unsuspected parallel between the regulation of inactivity and deregulation of activity under the Commerce Clause. The substantial effects test justifying most federal regulation of interstate commerce does not by its terms authorize either regulation of inactivity or deregulation of activity. For that test only authorizes regulation of activities.

The courts, however, have not treated regulation of inactivity and deregulation of activity alike. The Supreme Court has disapproved of regulation of inactivity as incompatible with its articulation of the substantial effects test. The courts, however, have upheld laws deregulating activity without noticing their incompatibility with the Supreme Court's articulation of the substantial effects test.

Juxtaposing these two types of formalist violations of the substantial effects test sets the stage for a more neutral evaluation of the limits of formalism under the Commerce Clause than one can obtain through analysis of regulation of inactivity alone. While deregulation and regulation formally flunk the substantial effects test, both may advance the Commerce Clause's most fundamental purpose—the promotion of interstate commerce. This Essay therefore suggests some less formalist approaches to addressing the potential for inappropriate invasion of states' rights through deregulation and of individual liberty through regulation of inactivity.

TABLE OF CONTENTS

* David M. Driesen, University Professor, Syracuse University College of Law. J.D., Yale Law School.

I. INTRODUCTION

In *United States v. Lopez*,[1] the Supreme Court affirmed that Congress may regulate activity that substantially affects interstate commerce under the Commerce Clause.[2] *Lopez*'s articulation of the substantial effects test suggests that two threshold elements must be present in order for a law to pass muster under this test: (1) an activity and (2) a regulation.[3] This two-part test in turn suggests that Congress may not regulate absent activity under this test.[4] It also suggests that laws that fail to regulate cannot pass muster under this test.[5] In other words, the verbal formula that the *Lopez* Court employed to describe the substantial effects test suggests that Congress has no constitutional power under that test to regulate inactivity or to deregulate activity. The concept of deregulation is the opposite of regulation, just as the concept of inactivity is the opposite of activity. An absence of either of the elements that the substantial effects test demands would seem to doom laws requiring justification under that test.

Yet, courts have not treated deregulation and regulation of inactivity alike. In *National Federation of Independent Business v. Sebelius* ("*NFIB*"),[6] five Justices indicated that the Commerce Clause does not authorize the Affordable Care Act's ("ACA")[7] so-called individual mandate—a requirement to purchase health insurance—

1. 514 U.S. 549 (1995).
2. *Id.* at 558–59.
3. *Id.*
4. Of course, this test does not suggest that the Commerce Clause authorizes all laws regulating activities. When the threshold elements of activity and regulation exist, the Court conducts a further inquiry into whether the regulated activities substantially affect interstate commerce. *See id.* at 563–64 (considering the argument that gun possession in school zones substantially affects interstate commerce).
5. *See id.* at 551, 553.
6. 567 U.S. 519 (2012).
7. *Id.* at 520.

because it regulates inactivity.[8] Two appellate courts, however, have upheld deregulation of rental car companies under the Graves Amendment.[9] And a third appellate court upheld the Protection of Lawful Commerce in Arms Act ("Arms Act"),[10] which protects gun manufacturers and dealers from court orders regulating them under state nuisance law, without noting that it deregulates companies providing guns.[11]

Deregulation and regulation of inactivity have differing political valiances. One might view regulation of inactivity, which commands a person not doing anything harmful to carry out an activity, as an especially intrusive form of regulation and therefore especially odious from a conservative point of view.[12] On the other hand, deregulation rarely plays well in liberal circles.[13] It might be thought of as capitulating to special interests and permitting misconduct that should be restrained or penalized in some way.[14]

But at first glance, neither deregulation nor regulation of inaction appears to pass muster under the substantial effects test articulated in *Lopez*. This Essay critically examines inaction and deregulation together in order to figure out how courts should address laws that regulate inactivity or deregulate ongoing activities and therefore appear to flunk the substantial effects test.

This topic matters for several reasons. First, in spite of *NFIB*, both issues remain open. The *NFIB* Court ultimately *upheld* the individual mandate as an appropriate use of congressional taxation authority.[15] Hence, *NFIB*'s statements declaring the individual mandate beyond the Commerce Clause's power constitute dicta and do not bind any court.[16] The appellate decisions upholding deregulation, while binding in the jurisdictions from which they come, do not preclude the Supreme Court or other jurisdictions from taking

---

8. *See id.* at 552–53, 555.

9. *See* Garcia v. Vanguard Car Rental USA, Inc., 540 F.3d 1242, 1252 (11th Cir. 2008); Rodriguez v. Testa, 993 A.2d 955, 968 (Conn. 2010).

10. Protection of Lawful Commerce in Arms Act, 15 U.S.C. §§ 7901–03 (2012).

11. City of New York v. Beretta U.S.A. Corp., 524 F.3d 384, 393–95 (2d Cir. 2008).

12. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 648 (2012) (Scalia, J., dissenting) (suggesting that acceptance of the ACA's individual mandate would be tantamount to accepting federal regulation of breathing).

13. *See* Juan Williams, *Reagan is the Real King of Special Interest Groups*, WASH. POST (Apr. 1, 1984), https://www.washingtonpost.com/archive/opinions/1984/04/01/reagan-is-the-real-king-of-special-interest-groups/5d0958ba-3df6-49a7-8988-3b7b0861f91d/?noredirect=on&utm_term=.d351b45bff2d (explaining public reaction to President Reagan's deregulatory agenda).

14. *Id.*

15. *See NFIB*, 567 U.S. at 570.

16. Lawrence B. Solum, *How* NFIB v. Sebelius *Affects the Constitutional Gestalt*, 91 WASH. L. REV. 1, 28 (2013).

a different view.[17] Second, prohibitions on regulating inactivity and deregulating activity pose a potentially broad threat to congressional authority under the Commerce Clause. Congress frequently either commands a party to do something it has not done before or relaxes regulatory mechanisms.[18] Third, either prohibition, if well established, could introduce an enormous amount of uncertainty into Commerce Clause jurisprudence. This Essay has introduced the concepts of deregulation and inactivity simply, implicitly treating them as well-defined readily detectable categories. But this Essay will demonstrate that the characterization of laws as either regulating inactivity or deregulating activity depends upon malleable decisions about how to describe the activities a law addresses and the law under review.[19]

Scholars have written critiques of the *NFIB* decision but have not generally considered the deregulation cases as posing a parallel problem.[20] The juxtaposition of deregulation and inaction generates a deeper understanding of the Commerce Clause and its relationship to these two matters than the existing *NFIB* critiques do on their own. The existing scholarship emphasizes the libertarian roots of the concern about regulating inaction and critiques this libertarianism as constitutional doctrine.[21] This Essay's approach tends to greater neutrality, since it juxtaposes liberal and conservative formalist

17. *See* Green v. Toyota Motor Creditcorp, 605 F. Supp. 2d 430, 436 (E.D.N.Y. 2009) (noting the lack of binding precedent addressing the constitutionality of the Graves Amendment).

18. *See, e.g.*, Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (codified as amended at 49 U.S.C. §41713 (2012)); Heart of Atlanta Motel v. United States, 379 U.S. 241, 258 (1964) (acknowledging Congress' power to prohibit racial discrimination by motels serving interstate travelers under the Civil Rights Act of 1964); NLRB v. Katz, 369 U.S. 736, 742–43 (1962) (noting the duty "to bargain collectively" created by the National Labor Relations Act).

19. Other scholars and judges have made similar points about inactivity but not about deregulation. *See, e.g.*, John Valauri, *Baffled by Inactivity: The Individual Mandate and the Commerce Power*, 10 GEO. J.L. & PUB. POL'Y 51, 65 (2012).

20. *See* ANDREW KOPPELMAN, THE TOUGH LUCK CONSTITUTION AND THE ASSAULT ON AMERICAN HEALTH CARE REFORM 107–36 (2013); David A. Strauss, *Commerce Clause Revisionism and the Affordable Care Act*, 2012 SUP. CT. REV. 1, 22 (arguing that the Court's prohibition on regulation of inaction presumes a constitutional right to be free of federal regulation); Note, NFIB v. Sebelius *and the Individualization of the State Action Doctrine*, 127 HARV. L. REV. 1174, 1195 (2014) (characterizing the action/inaction distinction as "analytically unstable").

21. *See, e.g.*, KOPPELMAN, *supra* note 20, at 109, 122 (identifying Justice Roberts' treatment of the unfunded mandate with "tough luck libertarianism"); Catherine A. Hardee, *Considering Consequences: Autonomy's Missing Half*, 43 PEPP. L. REV. 785, 797–99 (2016) (characterizing the *NFIB* opinion as recognizing a "liberty interest"); Gillian E. Metzger, *To Tax, to Spend, to Regulate*, 126 HARV. L. REV. 83, 85 (2011) (characterizing Justice Roberts' opinion as embodying "libertarian resistance to compulsory measures"); Strauss, *supra* note 20, at 22 (arguing that the Court's prohibition against regulating inaction presumes a constitutional right to be free of federal regulation).

Commerce Clause interpretations. It reveals that both interpretations, while formally attractive in some ways, undermine the Commerce Clause's commerce-promoting purpose. It provides doctrinal, theoretical, and structural reasons to eschew formally tenable interpretations of the substantial effects test, including several reasons that are missing from existing *NFIB* critiques.

Part II lays the groundwork, explaining the substantial effects test's role in Commerce Clause jurisprudence. It goes on to describe the holdings of *NFIB* and the courts of appeal, which have treated inactivity and deregulation inconsistently.

Part III analyzes these concepts of inactivity and deregulation more closely. This analysis shows that courts and lawyers can usually reconceptualize apparent deregulation and regulation of inactivity as regulation of activity by shifting the characterization of regulatory targets and the law under review.

Part IV addresses the question of whether the Commerce Clause prohibits regulation of inactivity and deregulation. It also considers the question of whether, in spite of the apparent symmetry between deregulation and inactivity, a good reason exists to treat deregulation differently from inaction. This analysis relies primarily on the Commerce Clause's text, its purpose, and the structural relationship between the substantial effects test and the Commerce Clause.

II. THE SUBSTANTIAL EFFECTS TEST

Article I, section 8 of the Constitution authorizes Congress to regulate commerce "among the several States."[22] In *Gibbons v. Ogden*,[23] the Supreme Court defined the Commerce Clause power as the "power to regulate; that is, to prescribe the rule by which commerce is to be governed."[24] The Court recognized that this provision gives Congress the power to regulate the "subject" of interstate commerce and began the task of describing this subject.[25]

The *Gibbons* Court defined commerce as including "commercial intercourse" between states and held that regulation of navigation is a proper subject of Commerce Clause regulation.[26] The Court also indicated that Congress could regulate interstate commerce within a state.[27] The *Gibbons* Court never mentioned the word "activity," but

22. U.S. CONST. art. I, § 8, cl. 3.
23. 22 U.S. (9 Wheat.) 1 (1824).
24. *Id.* at 196.
25. *Id.* at 189 (describing commerce as a "subject" to be regulated and going on to try and establish the "meaning of the word" commerce).
26. *See id.* at 189–90.
27. *See id.* at 196 (explaining that the Commerce Clause, by necessity, must apply within the states).

it focused on the regulation of ships travelling between states, which is essentially regulation of an interstate activity.[28]

In a subsequent case, *The Daniel Ball*,[29] the Court upheld the federal regulation of a vessel travelling within Michigan when some of its cargo had an interstate destination.[30] The Court justified upholding this regulation of *intrastate* activity by stating that the power to regulate interstate commerce authorizes "legislation for the . . . advancement of . . . interstate . . . commerce."[31] The Court, however, did not use the word "activity" but focused on the link between the statute and the purpose of promoting commerce.[32] Thus, the right to regulate intrastate activity under the Commerce Clause derives from the power to promote interstate commerce.[33]

The Supreme Court began to limit regulation of intrastate activities under the Commerce Clause in response to progressive legislation passed in the late nineteenth and early twentieth centuries.[34] It repeatedly held that Congress could not regulate the activities of manufacturing, production, and mining under the Commerce Clause.[35]

Yet, at the same time the Court continued to justify regulation of intrastate transportation as commerce promoting.[36] The Court declared several principles important to the modern jurisprudence in justifying commerce-promoting regulation of intrastate transport. In the *Shreveport Rate Cases*,[37] it announced that Congress may regulate "the common instrumentalities of interstate and intrastate commercial intercourse."[38] It expressly linked the authority to regulate "intrastate transactions" to congressional power to "foster and protect interstate commerce."[39] It held that Congress may regulate intrastate rates (railroad charges for carrying freight) that

---

28. *See id.* at 212–14 (discussing the challenged statute as a regulation of "vessels" engaged in the "coasting trade").

29. 77 U.S. (10 Wall.) 557 (1870).

30. *Id.* at 564–66.

31. *Id.* at 564.

32. *Id.*

33. *Id.*

34. Eric R. Claeys, *The Living Commerce Clause: Federalism in Progressive Political Theory and the Commerce Clause after* Lopez *and* Morrison, 11 WM. & MARY BILL RTS. J. 403, 416 (2002).

35. *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238, 304 (1936) (striking down a regulation on mining); United States v. E.C. Knight Co., 156 U.S. 1, 16–17 (1895) (striking down antitrust law as a regulation of manufacturing of sugar).

36. *See* Hous., E. & W. Tex. Ry. Co. v. United States, 234 U.S. 342, 351 (1914) (quoting The Daniel Ball, 77 U.S. (10 Wall.) 557, 564 (1870)) (stating that Congress may enact legislation for interstate commerce's "protection and advancement").

37. *Id.* at 342.

38. *Id.* at 353.

39. *Id.*

have a "close and substantial relation to interstate commerce."[40] The Court linked this early articulation of the substantial effects test to commerce promotion.[41]

While the Court approved Congressional regulation of intrastate transporters having a "direct" effect upon interstate Commerce, it held that the Commerce Clause did not authorize regulation of intrastate activities having only an "indirect" effect on interstate commerce, such as mining and manufacturing.[42] This formalist distinction between direct and indirect effects proved unworkable.[43]

At the same time that the Court grappled with the scope of Congressional authority to regulate intrastate activities affecting interstate commerce in order to promote it, the Court confronted several cases restricting interstate commerce in order to achieve moral and social purposes. The Court upheld restrictions aimed at the moral evils of prostitution,[44] gambling,[45] and kidnapping,[46] whilst invalidating a prohibition on interstate shipments of goods made by child labor.[47]

The Court repudiated the cases invalidating laws regulating manufacturing, production, and mining or otherwise regulating intrastate activities said to have an indirect effect on commerce in *Wickard v. Filburn*.[48] Relying, in part, on the *Shreveport Rate Cases*, the *Wickard* Court held that Congress may regulate intrastate activity that exerts a substantial effect on interstate commerce.[49] At about the same time, it overruled a child labor case and upheld a

40. *Id.* at 355.

41. *See id.* at 353–55 (linking commerce promotion through intrastate regulation to prevention of the "injury" inflicted by discriminatory transportation rates).

42. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 550–51 (1935) (striking down a wages and hours law as only indirectly affecting interstate commerce).

43. *See* United States v. Morrison, 529 U.S. 598, 642 (2000) (Souter, J., dissenting) (characterizing the direct/indirect effects test as a formalist contrivance that "provoked the judicial crisis of 1937").

44. *See* Hoke v. United States, 227 U.S. 308, 323–24 (1913) (upholding the White Slave Traffic Act's prohibition on taking women across state lines for immoral purposes).

45. *See* Champion v. Ames, 188 U.S. 321, 330 (1903) (upholding a restriction on interstate transport of lottery tickets).

46. *See* Gooch v. United States, 297 U.S. 124, 128–29 (1936) (upholding a federal kidnapping statute).

47. Hammer v. Dagenhart, 247 U.S. 251, 271–72 (1918), *overruled by* United States v. Darby, 312 U.S. 100, 116–17 (1941) (striking down a statute prohibiting interstate shipment of goods made by children).

48. 317 U.S. 111, 123–25 (1942).

49. *See id.* (noting the *Shreveport Rate Cases*' reliance on economic effects and authorizing the regulation of local activity exerting a substantial economic effect on interstate commerce regardless of the directness of the effect).

statute prohibiting interstate shipment of goods to enforce federal labor standards.[50]

In *United States v. Lopez*, the Supreme Court grouped its overlapping case law establishing broad Congressional authority to regulate under the Commerce Clause into three categories and suggested, for the first time, that Congress may only regulate pursuant to the Commerce Clause when a statute falls into one of the three categories.[51] Citing modern cases upholding laws restricting interstate commerce to address moral evils, the *Lopez* Court announced that Congress "may regulate the use of the channels of interstate commerce."[52] The *Lopez* Court also approved regulation and protection of "instrumentalities of interstate commerce, or persons or things in interstate commerce," citing the *Shreveport Rate Cases* and other cases addressing transportation.[53]

The Court concluded by approving regulation of "activities" that "substantially affect interstate commerce."[54] In doing so, the Court equated regulation of activity substantially affecting interstate commerce with regulation of activities "having a substantial relation to interstate commerce," thereby linking the modern substantial effects cases to the language employed in earlier cases, such as the *Shreveport Rate Cases*.[55]

The *Lopez* Court went on to invalidate the Gun-Free School Zones Act of 1990 ("GFSZA"),[56] which prohibited possession of guns in school zones.[57] It quickly concluded that the GFSZA did not regulate commerce channels or instrumentalities.[58] But it surprised many observers by also holding that the GFSZA did not regulate activities substantially affecting interstate commerce, employing reasoning that harkened back to the indirect effects test repudiated in *Wickard*.[59] The Court subsequently invalidated a provision of the

---

50. *See Darby*, 312 U.S. at 116–17.

51. United States v. Lopez, 514 U.S. 549, 558–59 (1995) (identifying three categories of "activity" that Congress may regulate and then stating that since the GFSZA does not fall into the first two categories, it must fall into the third to be valid).

52. *Id.* at 558.

53. *Id.*

54. *Id.* at 558–59.

55. *See id.* at 559; NLRB v. Jones & Laughlin Steel Co., 301 U.S. 1, 37 (1937); Hous., E. & W. Tex, Ry. Co. v. United States, 234 U.S. 342, 355 (1914) (authorizing federal regulation of utility rates that have a "close and substantial relation to interstate commerce").

56. *Lopez*, 514 U.S. at 551–52.

57. *Id.* (affirming a court of appeals ruling invalidating the GFSZA as beyond the Congress' Commerce Clause authority).

58. *Id.* at 559.

59. *See id.* at 564 (finding the relationship between gun violence in school and interstate commerce tenuous after describing an indirect causal chain); *id.* at 608 (Souter, J., dissenting) (likening a formalistic distinction employed in the

Violence Against Women Act[60] as not satisfying the substantial effects test in *United States v. Morrison*.[61] Both of these cases involved narrowly drawn statutes.[62] The Court characterized the GFSZA as regulating the activity of gun possession in school zones and the Violence Against Women Act as regulating "gender-motivated crimes."[63]

In *Gonzales v. Raich*,[64] however, the Court upheld a much broader statute, the Controlled Substances Act ("CSA"),[65] under the substantial effects test.[66] The parties challenging the CSA sought to narrowly characterize the activity it regulated for purposes of their litigation as cultivation and use of medical marijuana, seeking a ruling only invalidating the CSA's application to medical marijuana.[67] The Court, however, recognized that the CSA regulated the activities of producing, distributing, and consuming illicit drugs.[68] This broad characterization of the activities regulated led the Court to conclude that the CSA regulated activities substantially affecting interstate commerce.[69] Prior case law has not permitted as-applied challenges to statutes enacted pursuant to the Commerce Clause, instead applying a "class of activities test" which asks whether the entire class of activities regulated under a statute substantially affects interstate commerce.[70]

---

majority opinion to the old direct/indirect test repudiated in *Wickard*); *see also* United States v. Morrison, 529 U.S. 598, 615 (2000) (suggesting that *Lopez* prohibited following a "but-for causal chain from the initial occurrence of violent crime . . . to every attenuated effect" on interstate commerce).

60. *Morrison*, 529 U.S. at 598.

61. *Id.* at 601–02 (holding that the Commerce Clause does not authorize federal creation of a civil remedy for gender-based violence).

62. *See Morrison*, 529 U.S. at 613 (analyzing the question of whether gender-motivated crimes constitute commercial activity); *Lopez*, 514 U.S. at 559–60 (analyzing the question of whether gun possession constitutes economic activity).

63. *See Morrison*, 529 U.S. at 613; *Lopez*, 514 U.S. at 551.

64. 545 U.S. 1 (2005).

65. *Id.*

66. *See id.* at 21–24 (characterizing the CSA as "at the opposite end of the regulatory spectrum" from the "brief single-subject" statute at issue in *Lopez*).

67. *See id.* at 15 (explaining that the plaintiffs sought to limit their challenge to cultivation and use of medical marijuana authorized by California law).

68. *See id.* at 26 (characterizing the CSA as regulating the "production, distribution, and consumption of commodities").

69. *Id.* at 2.

70. *See id.* at 17 (stating that the Commerce Clause authorizes regulation of "purely local activities that are part of an economic class of activities that have a substantial effect on interstate commerce") (internal quotation marks omitted); Perez v. United States, 402 U.S. 146, 153–54 (1971) (applying the "class of activities" test to extortionate credit transactions to uphold a conviction of one loan shark); Wickard v. Filburn, 317 U.S. 111, 127–28 (1942) (finding the triviality of Wickard's contribution to demand for wheat immaterial when his contribution together with those of other regulated parties has an impact on interstate commerce).

Under modern case law, the substantial effects test serves the function of authorizing regulation of intrastate activities under the Commerce Clause but does not describe the totality of the Commerce Clause power.[71] For Congress also may regulate the "channels of interstate commerce" and instrumentalities of commerce.[72] These latter two categories, however, are fairly narrow, so that the substantial effects test applies to a statute much more frequently than these other two tests.[73]

In *NFIB*, the National Federation of Independent Business challenged the ACA's "individual mandate."[74] The ACA constitutes an extraordinarily broad piece of legislation enacted in order to secure adequate medical treatment for all Americans through affordable insurance coverage.[75] Its central provisions include a guaranteed issue provision, which requires that insurers offer medical insurance policies to all who seek coverage, even those with preexisting conditions.[76] In order to ensure adequate coverage, the ACA extensively regulates insurers.[77] It establishes an insurance market by authorizing federal and state governments to establish an Internet site showing available medical insurance policies.[78] It also expands Medicaid, which pays for medical treatment of the poor.[79] Thus, it extensively regulates insurance companies and providers of medical services.

The individual mandate itself requires individuals who can afford it to purchase health insurance.[80] Those who fail to purchase available health insurance face a tax penalty.[81]

---

71. *Raich*, 545 U.S. at 16–17.

72. *Id.*

73. *See* United States v. Lopez, 514 U.S. 549, 559 (1995).

74. *See* NFIB v. Sebelius, 567 U.S. 519, 539 (2012). The NFIB and its allies also challenged the ACA's expansion of Medicaid, but that is not relevant to this Essay's topic. *Id.*

75. *See id.* at 519 (Roberts, C.J.) (noting that the ACA seeks to "increase the number of Americans covered by health insurance and decrease the cost of health care").

76. *Id.* at 650–51 (Scalia, J., dissenting).

77. *See, e.g.*, *id.* (discussing community rating provisions limiting the factors insurers may take into account in establishing premiums).

78. *See* King v. Burwell, 135 S. Ct. 2480, 2497–99 (2015) (Scalia J., dissenting) (explaining that the ACA awards tax credits on both federal and state "exchanges"—websites serving as an insurance marketplace).

79. *See NFIB*, 567 U.S. at 539.

80. *Id.* (Roberts, C.J.) (describing the individual mandate as requiring the purchase of "minimum essential health insurance coverage") (internal quotation marks omitted).

81. *Id.* (Roberts, C.J.) (describing the "shared responsibility payment" owed by noncompliers as a "percentage of household income, subject to a floor . . . and a ceiling").

The Court divided on the individual mandate's constitutionality, upholding it by a 5-4 vote.[82] Chief Justice Roberts, relying on a provision providing a tax penalty for violation of the individual mandate, held that the individual mandate should be upheld as a constitutional tax.[83] The liberal wing of the Court joined him in this conclusion, thereby creating a majority for upholding the individual mandate.[84]

Although this holding made it unnecessary to discuss the Commerce Clause, Chief Justice Roberts opined that the Commerce Clause does not authorize the individual mandate, a conclusion endorsed by the Court's conservative wing.[85] Accordingly, a majority of the Justices concluded, albeit in dicta, that the Commerce Clause does not authorize the individual mandate.[86]

Chief Justice Roberts characterized the ACA as compelling "individuals not engaged in commerce to purchase an unwanted product."[87] He then stated that "[t]he power to *regulate* commerce presupposes the existence of . . . activity to be regulated."[88] He characterized prior cases as uniformly describing the Commerce Clause power as reaching "activity," citing the modern cases articulating the substantial effects test but ignoring the *Shreveport Rate Cases* and a host of older cases that do not use that word.[89] He expressed fear that upholding regulation of inactivity would vastly expand Congressional authority.[90] Continuing in a libertarian vein, he argued that upholding regulation of inactivity could open the door to mandatory vegetable purchases to cure health problems caused by poor diet.[91] Thus, the Roberts opinion combines concerns about general federal intrusion with a formalist treatment of the substantial effects test focusing on the activity requirement suggested by the *Lopez* articulation of the test.

---

82. *Id.* at 529.

83. *Id.* at 563 (Roberts, C.J.).

84. *See id.* at 589 (Ginsburg, J., concurring) (noting that the provision is "a proper exercise of Congress' taxing power").

85. *See id.* at 558 (Roberts, C.J.); *id.* at 649–50 (Scalia, J., dissenting).

86. *See id.* at 646 (indicating that Justices Kennedy, Thomas, and Alito joined Justice Scalia's dissenting opinion).

87. *Id.* at 549 (Roberts, C.J.).

88. *Id.* at 550 (emphasis in original).

89. *Compare id.* at 551 (Roberts, C.J.) (noting that all prior cases construing the scope of commerce power have uniformly described the power as reaching "activity"), *with* The Daniel Ball, 77 U.S. (10 Wall.) 557 (1870) (defining the scope of commerce power without using the word "activity"), *and* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) (explaining the scope of commerce power with no mention of "activity").

90. *See NFIB*, 567 U.S. at 520–21 (Roberts, C.J.) (characterizing regulating individuals doing nothing as opening "a new and potentially vast domain to congressional authority").

91. *See id.* at 554 (Roberts, C.J.).

Justice Scalia's opinion for the rest of the conservative wing does the same. He likewise framed the case narrowly as about whether Congress may regulate those who fail "to engage in economic activity."[92] He struck an even shriller libertarian note, stating that upholding regulation of inactivity would make "mere breathing" the basis for federal regulation of "virtually all human activity."[93] In addition, he insisted on a formalist application of the substantial effects test, stating that "*activity*" must be regulated under that test, "not merely the failure to engage in commerce."[94] Thus, the majority would have held that the Commerce Clause does not authorize regulation of inactivity (if the individual mandate had not been upheld as a valid tax).[95]

By contrast, courts adjudicating the validity of deregulatory statutes under the Commerce Clause have not noticed that the substantial effects test by its terms only authorizes regulation, not deregulation. Several of these cases address the constitutionality of the Graves Amendment, which shields rental car companies from liability for their customers' accidents.[96] The appellate courts adjudicating the validity of the Graves Amendment have treated it as *regulating* vehicle leasing,[97] even though it imposes no restrictions on that activity.[98] The US Court of Appeals for the Second Circuit likewise upheld the Arms Act,[99] which shields gun manufacturers and sellers from both court orders and liability under state common law,[100] without even considering that the Act might flunk the *Lopez* test by deregulating, rather than regulating, an activity.[101]

III. THE MALLEABILITY OF INACTION AND DEREGULATION

The *NFIB* Court's conclusion that the ACA regulates inactivity is debatable.[102] So too, are the conclusions of several appellate courts

92. *See id.* at 647 (Scalia, J., dissenting).
93. *Id.* at 648 (Scalia, J., dissenting).
94. *Id.* at 658 (Scalia, J., dissenting)..
95. *See id.* at 558, 648, 657–58.
96. 49 U.S.C. § 30106 (2012).
97. *See, e.g.*, Garcia v. Vanguard Car Rental USA, Inc., 540 F.3d 1242, 1252 (11th Cir. 2008) (upholding the Graves Amendment because it regulates the commercial activity of vehicle leasing); Graham v. Dunkley, 852 N.Y.S.2d 169, 174 (N.Y. App. Div. 2008) (upholding the same statute because it regulates the commercial activities of car rental and leasing).
98. *See Garcia*, 540 F.3d at 1246 (describing the Graves Amendment as having just "two operative provisions," a preemption clause and a savings clause).
99. 15 U.S.C. §§ 7901–03 (2012).
100. *Id.* § 7902.
101. *See* City of New York v. Beretta U.S.A. Corp., 524 F.3d 384, 394–95 (2d Cir. 2008).
102. *Cf.* Dan T. Coenen, *The Commerce Power and Congressional Mandates*, 82 GEO. WASH. L. REV. 1052, 1062–70 (2014) (reading *NFIB* as rejecting mandates

that the Graves Amendment and the Arms Act regulate various activities, which appear to contradict this Essay's suggestion that they deregulate activity.[103] Conclusions about deregulation and inactivity depend on problematic decisions about how to describe a law and its objects.[104] Plausible alternative descriptions of what the statutes regulate would call into question the idea that they regulate inactivity or deregulate activity. These problems will arise frequently in deregulatory or inactivity cases, so they are important to understand.

A. Activity Characterization and the Affordable Care Act

The *NFIB* Court's conclusion that the ACA regulates inactivity rested upon a choice about how to characterize what the ACA regulates.[105] The Court chose to treat it as a regulation of individuals not engaged in the activity of purchasing insurance.[106]

This characterization was hardly inevitable. Justice Ginsburg's opinion (joined by three other Justices) characterized the individuals regulated by the individual mandate as participating in the market for health services.[107] A court characterizing the individual mandate as regulating the activity of purchasing health services should accept it as regulating activity since almost everybody purchases health services at some point,[108] whilst characterizing it as regulating insurance purchases leads to the conclusion that it regulates inactivity.[109]

For a broad, many-faceted statute like the ACA, a related question arises about whether to look at the statute as a whole or just the challenged provision to decide what the ACA regulates.[110] The parties and the *NFIB* Court implicitly assumed that the Court should

---

and proposing a framework to evaluate which mandates lie beyond the Commerce Clause power).

103. *See Garcia*, 540 F.3d at 1252; *Beretta*, 524 F.3d at 394–95; Graham v. Dunkley, 852 N.Y.S.2d 169, 174 (N.Y. App. Div. 2008).

104. *See* Strauss, *supra* note 20, at 14–16 (showing that the Court's treatment of inactivity is inconsistent with its prior decisions upholding the Civil Rights Act's requirement that businesses serve racial minorities).

105. *See id.*

106. NFIB v. Sebelius, 567 U.S. 519, 552 (2012) (Roberts, C.J.) (characterizing the individual mandate as regulating individuals who are "doing nothing").

107. *See id.* at 605 (Ginsburg, J., concurring).

108. *See id.* at 590–91 (noting that virtually everyone will "sooner or later . . . visit a doctor").

109. *See id.* at 647 (Scalia, J., dissenting) (noting that the Court has never extended the Commerce Clause so far as to regulate the "failure to engage in economic activity," including the purchase of health insurance).

110. *Compare id.* at 589–99 (Ginsburg, J., concurring) (discussing the goals and impact of the ACA as a whole), *with id.* at 649 (Scalia, J., dissenting) (discussing specifically the individual mandate as opposed to the ACA as a whole).

focus on what a single challenged provision of the statute regulates.[111] This approach seems at odds with the Court's traditional focus on the statute as a whole as the locus of Commerce Clause inquiry.[112] This broader focus played a key role in *Gonzales v. Raich*, which upheld the CSA based on an analysis of the full range of activities that the CSA regulates.[113] If one asks what activities the ACA regulates rather than what activities the individual mandate regulates, one must conclude that it regulates the provision of medical services (including insurance) and that it primarily regulates insurance companies and medical providers.[114]

This broader activity characterization would lead to a very different treatment of the individual mandate than one finds in *NFIB*. In *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*,[115] the Court refused to focus its analysis on a challenged requirement that coal mining companies restore disturbed land.[116] Since the plaintiffs previously did not engage in land restoration, one might characterize the land restoration requirement as regulation of inactivity.[117] The *Hodel* Court, however, focused on the activity of mining, the activity motivating the entire statute.[118] The *Hodel* Court did not even analyze the question of whether land restoration affects commerce or constitutes an activity; instead, it upheld the land restoration requirement as a measure rationally related to the Congressional goal of remedying mining's environmental effects.[119] Had the *NFIB* Court focused on the ACA as a whole, it might have similarly concluded that the individual mandate should be upheld as a provision rationally related to the purpose justifying an obviously valid statute.[120] But the government did not explicitly argue for that

111. *See id.* at 2647 (Scalia, J., dissenting) (characterizing the government's argument as claiming the Individual Mandate, not the ACA as a whole, is "a regulation of activities having a substantial relation to interstate commerce") (internal quotation marks and citations omitted).

112. *See, e.g.*, Gonzales v. Raich, 545 U.S. 1, 23–24 (2005).

113. *Id.* at 23–26.

114. *See NFIB*, 567 U.S. at 590 (Ginsburg, J., concurring) (suggesting that the ACA regulates the "market for health-care products and services" and focusing on individual consumer participation in the health care market, thereby ignoring the regulation of medical and insurance services).

115. 452 U.S. 264 (1981).

116. *Id.* at 269 (discussing the land restoration requirement).

117. *See id.* at 279 (discussing the "unreclaimed lands" in many "areas of the country" that have resulted from surface coal mining activities).

118. *See id.* at 283 (focusing on the effects of "surface mining" on commerce).

119. *See id.* at 282–83.

120. NFIB v. Sebelius, 567 U.S. 519, 618 (2012) (Ginsburg, J., concurring) (arguing that "the minimum coverage provision is valid Commerce Clause legislation" and that when the provision is "viewed as a component of the entire ACA, [its] constitutionality becomes even plainer").

approach.[121] Thus, the question of whether a law regulates activity or inactivity depends, in part, on whether one asks the question for the law as a whole or for a single application.

B. Characterization of Regulation and Deregulation

This same problem of characterization would apply to a regulation/deregulation distinction. The Graves Amendment and Arms Act illustrate the point.

The appellate courts that have addressed the Graves Amendment's constitutionality under the Commerce Clause treat that statute as regulating rental car leasing when it shields rental car companies from tort suits.[122] This characterization is not convincing.[123] The Graves Amendment deregulates rental car companies.[124] Absent the Graves Amendment, liability would potentially attach to the rental car companies when their customers have accidents.[125] This liability performs a regulatory function, providing an incentive for the companies to screen the drivers they rent to for safe driving records.[126] As Guido Calabresi emphasized long ago, tort law serves as a deterrent and therefore a form of conduct regulation.[127] The Supreme Court has accordingly treated tort law as a form of regulation in deciding the scope of federal regulatory preemption.[128] Hence, viewed in terms of the statute's

---

121. *See* Brief for Petitioners (Minimum Coverage Provision) at 17, *NFIB*, 567 U.S. 519 (No. 11-398) (arguing, instead, that the Necessary and Proper Clause authorizes enactment of the minimum coverage provision).

122. Garcia v. Vanguard Car Rental USA, Inc., 540 F.3d 1242, 1252 (11th Cir. 2008); Graham v. Dunkley, 852 N.Y.S.2d 169, 174 (N.Y. App. Div. 2008) (upholding the same statute because it regulates the commercial activities of car rental and leasing). *But see* Stampolis v. Provident Auto Leasing Co., 586 F. Supp. 2d 88, 95 (E.D.N.Y. 2008) (upholding the same statute as regulating cars).

123. *See* Susan Lorde Martin, *Commerce Clause Jurisprudence and the Graves Amendment: Implications for the Vicarious Liability of Car Leasing Companies*, 18 U. FLA. J.L. & PUB. POL'Y 153, 177 (2007) (explaining that the Graves Amendment does not regulate "the use of motor vehicles").

124. 49 U.S.C. § 30106(a) (2012).

125. *See Garcia*, 540 F.3d at 1245 (explaining that Florida common law imposes "strict vicarious liability" on a car owner if the renter's negligence harms another).

126. *See* RESTATEMENT (SECOND) OF TORTS § 901 (AM. LAW INST. 1979) (stating that one of the purposes for tort liability and damages is "to punish wrongdoers and deter wrongful conduct").

127. *See generally* GUIDO CALABRESI, THE COST OF ACCIDENTS 68–129 (1970) (developing concepts of general and specific deterrence in accident law); *see also* Alexandra B. Klass, *Tort Experiments in the Laboratories of Democracy*, 50 WM. & MARY L. REV. 1501, 1508 (2009) (noting that many prominent scholars consider tort law a "branch of the public regulatory state" because of its regulatory effect).

128. *See* Riegel v. Medtronic, Inc., 552 U.S. 312, 324 (2008) (interpreting preemption of State "requirements" to include preemption of "common-law duties"); Geier v. Am. Honda Motor Co., 529 U.S. 861, 880–81 (2000) (treating a tort suit seeking damages for violating a duty to install an airbag as a regulation

relationship to rental car companies, the Graves Amendment's disabling of state tort law constitutes a form of deregulation.[129]

But some lower court decisions reveal another potential way of viewing the Graves Amendment, as a statute regulating tort suits.[130] Treating tort suits rather than car rentals as the activity addressed by the Graves Amendment leads to the conclusion that the Graves Amendment regulates, rather than deregulates, activity.[131]

Indeed, the one court to address the constitutionality of the Arms Act, the Second Circuit, treated the Arms Act as a law regulating civil litigation.[132] But the facts of the case make it very clear that it deregulates gun suppliers as well.[133] The case arose from a public nuisance action brought by New York City to seek an injunction regulating gun suppliers' activities to prevent evasion of New York's gun control laws.[134] The Arms Act, said the Second Circuit, stripped the courts of the authority to regulate gun suppliers in all of the ways sought by the complaint.[135]

In addition, the unit of analysis problem can influence the characterization of a law as regulatory or deregulatory apart from the activity characterization problem. *MCI Telecommunications Corp. v. American Telephone and Telegraph Company*[136] illustrates the difficulty in distinguishing the modification of regulation from deregulation. The *MCI* Court held that deregulation of telecommunications pricing in response to growing competition in the

---

of passive restraint systems); Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 521–22 (1992) (holding that a common law damage action constitutes a "requirement or prohibition" because it governs conduct); *cf.* San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 247 (1959) (holding that a damage award can regulate conduct).

129. *See Garcia*, 540 F.3d at 1252 ("Appellants protest that the Graves Amendment does not regulate the rental car market at all, but state tort law. . . . [O]n this theory, the Graves Amendment protects the rental car market by deregulating it . . . .").

130. *See* Vanguard Car Rental USA, Inc. v. Huchon, 532 F. Supp. 2d 1371, 1379 (S.D. Fla. 2007) (holding that the Graves Amendment "regulates tort liability"); Graham v. Dunkley, 827 N.Y.S.2d 513, 524–25 (N.Y. Sup. Ct. 2006) (finding that the statute unconstitutionally regulates the "pursuit of justice"), *rev'd*, 852 N.Y.S.2d 169 (N.Y. App. Div. 2008).

131. *See Huchon*, 532 F. Supp. 2d at 1379.

132. *See* City of New York v. Beretta U.S.A. Corp. 524 F.3d 384, 393–95 (2d Cir. 2008) (noting the City's argument that the Arms Act regulates civil litigation and then analyzing the relationship between civil litigation against gun providers and commerce).

133. *Id.* at 388–90.

134. *See id.* at 388–89 (describing the City's lawsuit as a criminal nuisance action seeking an injunction to address the failure of firearms manufacturers and sellers to prevent illegal gun sales).

135. *See id.* at 398–400 (finding that the Arms Act's prohibition of a "qualified civil liability actions" bars the city's nuisance claim).

136. 512 U.S. 218 (1994).

industry did not constitute mere modification of rate filing requirements.[137] Three Justices, however, dissented from that holding, arguing that abolition of the basis for price regulation of smaller carriers modified the statutory regime, which it characterized as seeking to make telecommunications services efficient and affordable.[138] Hence, viewed narrowly as a change in rate filing requirements, the law looked like deregulation whilst viewed more broadly in terms of the statute as a whole, it looked like a mere modification of the regulatory regime.[139] The characterization of a legal change as deregulatory or not depends in part on the characterization of the law it changes.[140]

Thus, the categories of inactivity and deregulation do not define themselves. Instead, these categories prove malleable, dependent on decisions about how to characterize the law and its objects.

IV. DOES THE COMMERCE CLAUSE PROHIBIT DEREGULATION OR REGULATION OF INACTIVITY?

A. *Inactivity*

The idea that Congress may not regulate inactivity has an apparently valid theoretical justification. After all, as the Supreme Court said in *Gibbons*, the Court's job in Commerce Clause cases is to delineate the *subject* of interstate commerce.[141] Article I describes that which Congress may regulate, including foreign and interstate commerce.[142] *Lopez*'s three-part framework seeks to define the subject of interstate commerce, because that is what Congress may regulate.[143] The exercise of this authority appears to require that this subject exist, i.e. that some foreign and interstate commerce must

137. *See id.* at 220, 229–31 (explaining that since filing of rates was fundamental to price regulation contemplated by the statute, abolition of rate filing could not be considered a modification of the filing requirements).

138. *See id.* at 237–39 (Stevens, J., dissenting).

139. The *MCI* case arose from a challenge to FCC deregulation as contrary to its governing statute. *See id.* at 222 (defining the question before the Court as whether 47 U.S.C. § 203(b) authorizes the FCC to "make tariff filing optional"). This same issue arises when Congress changes a statute and parties argue for its unconstitutionality based on its deregulatory character.

140. *See, e.g.*, *id.* at 229–32.

141. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 30 (1824) ("[Congress] legislates over *subjects*; and over those subjects which are within its power, its legislation is supreme, and necessarily overrules all inconsistent or repugnant State legislation.").

142. U.S. CONST. art. I, § 8.

143. *See* United States v. Lopez, 514 U.S. 549, 558–59 (1995) (describing the three areas of commerce that Congress may regulate as "the use of channels of interstate commerce," "the instrumentalities of interstate commerce, or persons or things in interstate commerce," and "those activities having a substantial relation to interstate commerce").

already be ongoing, otherwise there is no interstate commerce to regulate.[144] The substantial effects test constitutes part of the judicial effort to define the subject of interstate commerce.[145] It implies that when Congress regulates activities that substantially affect interstate commerce, Congress, in effect, regulates interstate commerce.[146] If no activity exists, then there can be no activity affecting interstate commerce, and therefore there is no subject to validly regulate.[147] Hence, the regulation of interstate commerce does not encompass regulation of inactivity.[148]

While this analysis seems right at first glance, it is completely at odds with the Commerce Clause's least controversial purpose. The Court has long held that Congress may use its Commerce Clause authority to promote commerce, not merely to limit it.[149] Historically, statutes limiting commerce, often enacted to serve moral or social purposes, have often been more controversial than commerce-promoting statutes.[150] Accordingly, if no commerce existed between the states, surely this inactivity would not defeat an exercise of the Commerce Clause authority.[151] A major goal of the Commerce Clause is to create activity where there is none or to supplement ongoing commercial activity with more commercial activity.[152] On a very fundamental conceptual level, the idea of prohibiting regulation of inaction seems at odds with the core theory of the Commerce Clause.

The idea that the Commerce Clause authorizes actions promoting interstate commerce lies at the base of the *dormant* Commerce Clause

144. NFIB v. Sebelius, 567 U.S. 519, 550 (2012) (Roberts, C.J.) ("The power to regulate commerce presupposes the existence of commercial activity to be regulated.").

145. *See Lopez*, 514 U.S. at 555–58 (discussing the extent of the Commerce Clause power and the efforts to define what constitutes commerce).

146. *See id.* at 558–61 (discussing the substantial effects test).

147. *See NFIB*, 567 U.S. at 555 (Roberts, C.J.) (stating that inactivity is not an appropriate subject for regulation under the Commerce Clause).

148. *See id.* (Roberts, C.J.).

149. *See, e.g.*, Hous., E. & W. Tex. Ry. Co. v. United States, 234 U.S. 342, 351 (1914) (explaining that the Commerce Clause power includes the power to promote the "advancement" and "growth" of commerce) (internal quotation marks omitted).

150. *See, e.g.*, Hammer v. Dagenhart, 247 U.S. 251, 271–72 (1918), *overruled by* United States v. Darby, 312 U.S. 100, 116–17 (1941) (holding that Congress may not restrict commerce to discourage use of child labor); Champion v. Ames, 188 U.S. 321, 363–64 (1903) (5–4 decision) (upholding a restriction on interstate transport of lottery tickets aimed at discouraging gambling).

151. *See generally Hous., E. & W. Tex. Ry. Co.*, 234 U.S. at 351–52 (explaining Congress' authority under the Commerce Clause to "promote" commerce through legislation).

152. *See* Barry Friedman & Genevieve Lakier, *"To Regulate," Not "To Prohibit": Limiting the Commerce Power*, 2012 SUP. CT. REV. 255, 264 (arguing that "[t]he primary reason for granting Congress the domestic commerce power was *to facilitate* interstate trade").

jurisprudence.[153] The Commerce Clause only explicitly authorizes Congress to regulate interstate and foreign commerce.[154] By its terms, it imposes no restrictions on state law.[155] The Supreme Court, however, has long held that the Commerce Clause authorizes the Court to abrogate some state laws that obstruct interstate commerce even when Congress has not acted to preempt state law (i.e. when the Commerce power lies dormant).[156] This idea draws its support from the idea that the framers enacted the Commerce Clause in part to promote interstate commerce.[157]

Furthermore, the dormant Commerce Clause jurisprudence teaches us that the Commerce Clause regulates things other than activity. The dormant Commerce Clause authorizes federal regulation of state laws.[158] A state law is not an activity.[159] Rather, it is a legal rule that usually regulates activities.[160] It seems incongruous to suggest that the Commerce Clause authorizes the Supreme Court to go beyond the regulation of activity, but not Congress.[161] Hence, the dormant Commerce Clause jurisprudence

153. *See* Daniel A. Farber & Robert E. Hudec, *Free Trade and the Regulatory State: A GATT's-Eye View of the Dormant Commerce Clause*, 47 VAND. L. REV. 1401 (1994) (demonstrating how free trade values animate the dormant Commerce Clause).

154. *See* U.S. CONST., art. I, § 8, cl. 3.

155. *See* Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 571 (1987) (noting the lack of a textual basis for dormant Commerce Clause jurisprudence).

156. *See* David M. Driesen, *Must the States Discriminate Against Their Own Producers Under the Dormant Commerce Clause?*, 54 HOUS. L. REV. 1, 15–16 (2016) (noting that the Supreme Court has limited state law under the dormant Commerce Clause).

157. *See* CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 87 (1987) (declaring statutes discriminating *against* interstate commerce to be the "principal objects of dormant Commerce Clause scrutiny"); Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986) (arguing that dormant Commerce Clause jurisprudence primarily seeks to root out state protectionism as inimical to free trade).

158. *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (characterizing the dormant Commerce Clause doctrine as the "criteria for determining the validity of state statutes affecting interstate commerce"); Redish & Nugent, *supra* note 155, at 570 (noting that the Supreme Court invalidates state regulation under the Commerce Clause when it acts pursuant to the dormant Commerce Clause doctrine).

159. *See* U.S. v. Morrison, 529 U.S. 598, 612–13 (2000) (discussing the limitations of what constitutes "activity" within reach of the Commerce Clause).

160. *See, e.g.*, City of Philadelphia v. New Jersey, 437 U.S. 617, 618–21 (1978) (discussing a law that prohibits importation of garbage from a neighboring state); *Pike*, 397 U.S. at 138 (discussing a law regulating the activity of fruit packing).

161. *See Morrison*, 529 U.S. 598, 612–13 (2000) (discussing the limitations of "activity" falling within the purview of the Commerce Clause); Driesen, *supra*

teaches us that the Commerce Clause authorizes regulation of matters other than activity.

Moreover, the substantial effects test historically grew up, in large part, to allow regulation of things that are not themselves interstate commerce, because they promote commerce.[162] The *Shreveport Rate Cases* authorize federal regulation to affect intrastate shipping rates, because of the relationship between those rates and interstate commerce.[163] *NLRB v. Jones & Laughlin Steel Corp.*[164] and *United States v. Darby*[165] authorize federal regulation of labor relations, not because labor relations are interstate commerce, but because Congress had determined that regulation of labor relations was necessary to promote interstate commerce.[166] In other words, the justification for the substantial effects test does not require that this test itself target laws regulating interstate commerce in the sense of interstate commercial transactions. Instead, it rests on the idea that a regulation's intrastate targets substantially affect commerce. The legitimacy of the substantial effects test stems, in part, from the idea that the power to regulate commerce includes the power to promote commerce by regulating things that by themselves *do not* constitute interstate commerce.[167] Hence, the existence of activity seems beside the point.

Because the substantial effects test focuses on intrastate activity, some commentators claim that laws enacted pursuant to that test properly constitute an exercise of the authority of Congress to take actions "necessary and proper" to the exercise of its enumerated powers.[168] Although this view commanded some support from Justice Scalia, the majority continues to describe the substantial effects test

---

note 156, at 15–16 (discussing limitations the Court has placed on state law under the dormant Commerce Clause).

162. *See* Valauri, *supra* note 19, at 81 (noting that the substantial effects test regulates activities that "are not themselves interstate commerce").

163. *See* Hous., E. & W. Tex. Ry. Co. v. United States, 234 U.S. 342, 353–54 (1914) ("Congress, in the exercise of its paramount power, may prevent the common instrumentalities of interstate and intrastate commercial intercourse from being used in their intrastate operations to the injury of interstate commerce.").

164. 301 U.S. 1 (1937).

165. 312 U.S. 100 (1941).

166. *Id.* at 117, 122–23 (upholding the Fair Labor Standards Act even though employees are not "engaged in interstate commerce" because it protects interstate commerce from unfair competition) (internal quotation marks omitted); *Jones & Laughlin Steel Corp.*, 301 U.S. at 37 (holding that regulation of labor practices has "such a close and substantial relationship to interstate commerce that [its] control is . . . appropriate to protect that commerce").

167. *See* Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795, 830–31 (1996).

168. *See, e.g., id.* at 808–11 (arguing that the power to regulate intrastate activities stems from the Necessary and Proper Clause).

as a Commerce Clause test.[169] In any case, it is not clear that locating the substantial effects test in the Necessary and Proper Clause would change the analysis of inactivity and deregulation.[170]

The framers granted Congress the power to regulate interstate commerce partly in order to facilitate its promotion.[171] Disallowing Congress from taking actions that promote interstate commerce conflicts with the purpose of this grant of plenary authority.

This rationale applies fully to *NFIB*'s facts. Congress passed the individual mandate to encourage interstate commerce in the form of robust markets in insurance and medical care.[172] The individual mandate requires more insurance transactions by requiring purchases of insurance contracts.[173] The purpose of requiring these contracts involves encouraging more purchases of needed medical care.[174] These purchases have a social purpose—to improve people's health and well-being.[175] But commerce exists to improve people's health and well-being.[176] Trade is never an end in and of itself; it is a means of improving our lives through the procurement of useful goods and services.[177] Thus, the unfunded mandate serves a commerce promoting purpose.

---

169. *Compare* United States v. Lopez, 514 U.S. 549, 558–59 (1995) (identifying activities "having a substantial relation to interstate commerce" as one of three "categories of activity" that "Congress may regulate under its *commerce power*") (emphasis added), *and* NFIB, 567 U.S. 519, 549–51 (2012) (Roberts, C.J.) (characterizing the substantial effects test as a test of Congress' Commerce Clause power), *with* Gonzales v. Raich, 545 U.S. 1, 34–35 (2005) (Scalia, J., concurring) (describing the substantial effects test under the Necessary and Proper Clause as about the regulation of "activities").

170. *See Raich*, 545 U.S. at 34–35 (Scalia, J., concurring) (discussing the two general circumstances under which Congress may protect interstate commerce under the Necessary and Proper Clause; neither circumstance involves inactivity or deregulation).

171. *See* H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 533 (1949) (discussing the Commerce Clause's objection of removing burdens and restrictions on the flow of commerce).

172. *See NFIB*, 567 U.S. at 594 (Ginsburg, J., concurring) (explaining that the ACA sought to address the inability of many people to afford insurance and their inability to purchase needed medical services before they became seriously ill).

173. *See id.* at 539 (Roberts, C.J.) (explaining that the individual mandate requires purchase of insurance from private companies).

174. *See id.* at 594 (Ginsburg, J., concurring) (explaining that those who lacked insurance often "lack access to preventative care").

175. *See* KOPPELMAN, *supra* note 20, at 1–2 (linking federally required insurance to the social norm of caring for sick people who cannot afford needed medical care).

176. *See* Ronald Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191, 195 (1980) (explaining that "[i]mprovements in social wealth are not valuable in themselves, but valuable because they may or will produce other improvements").

177. *See, e.g.*, *Benefits of Trade*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, https://ustr.gov/about-us/benefits-trade (last visited Aug. 4, 2018) (listing

The individual mandate, in addition to directly encouraging more transactions, has a more specific and broader purpose in promoting commerce by making the insurance market sustainable. Some states had experimented with requiring coverage of people with "pre-existing conditions" before Congress passed the ACA.[178] In many cases, this requirement had destroyed much of the commerce it sought to promote.[179] The added requirement increased insurers' cost.[180] In some cases, the insurers responded by raising prices, thereby increasing the number of people who could not afford coverage and reducing the number of insurance contracts and, by extension, the number of purchases of needed medical services.[181] In other cases, insurers had simply exited the state, again contracting the market.[182] In both cases, requirements to insure the sick had contracted the health care market.[183]

Massachusetts, however, had required individuals to purchase health insurance.[184] This approach gave insurance companies an additional source of revenue to offset the costs of insuring the sick, and therefore prevented the "death spiral" of rising costs and loss of coverage that other states had experienced.[185] The ACA reflects a decision to copy the Massachusetts model and to avoid the problems other states had encountered.[186] The federal individual mandate therefore sought to promote commerce by avoiding the contraction of commerce that mandatory insurance coverage of the sick would otherwise cause.[187]

---

benefits of trade and concluding that "[t]rade is critical to America's prosperity . . .").

178. *Id.* at 597–98 (noting that several states enacted "guaranteed-issue" laws in the 1990s, which required offering insurance to those with preexisting conditions).

179. *Id.*

180. *Id.* at 596–97 (explaining that insuring the sick costs much more than insuring the healthy).

181. *Id.* at 597–98 (noting that all seven states that required insurance companies to sell policies to those with preexisting conditions at the same price as others saw "skyrocketing insurance premium costs [and] reductions in individuals with coverage").

182. *Id.* (discussing how many insurers responded to the requirement by exiting state markets and reducing insurance coverage of individuals).

183. *See id.*

184. *Id.* at 598–99 (noting how Massachusetts required "most residents to obtain insurance").

185. *See id.* (contrasting Massachusetts' "success" with the "death spiral" in states that sought to require coverage of the sick without requiring healthy individuals to also purchase insurance).

186. *Id.* (discussing how Congress followed "Massachusetts' lead" in combining a requirement to purchase insurance with a requirement to insure the sick).

187. *See id.*

B. *Deregulation*

Deregulation has a logic similar to that of inaction. The idea that the Commerce Clause may not permit deregulation has an apparently persuasive theoretical basis. The Commerce Clause by its terms only authorizes *regulation* of interstate commerce, not deregulation of interstate commerce.[188]

This argument, like the argument about inactivity, conflicts with the Commerce Clause's commerce-promoting purpose.[189] Congress may validly regulate interstate commerce by restricting it in various ways, either for moral or commerce-promoting purposes.[190] But sometimes lifting regulatory restrictions may promote interstate commerce.[191]

The dormant Commerce Clause supports the legitimacy of deregulation, just as it supports regulation of inactivity.[192] The dormant Commerce Clause empowers the Supreme Court to deregulate by invalidating state legal restrictions on interstate commerce.[193] It would seem incongruous to hold that the Commerce Clause authorizes the Supreme Court to deregulate by superseding state law but does not allow Congress to deregulate through passage of a federal statute.[194]

The substantial effects test's purpose of authorizing regulation of things that are not themselves interstate commerce in order to promote commerce also supports allowing it to authorize deregulation.[195] Deregulation is not a regulation of interstate commerce. But the substantial effects test's legitimacy does not rest on a claim that it applies to laws regulating interstate commerce itself.[196] Instead, it relies on the idea that Congress must have the power to take actions that promote interstate commerce.[197] If we

---

188. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196–97 (1824).

189. *Cf.* Mark A. Hall, *Commerce Clause Challenges to Health Care Reform*, 159 U. PA. L. REV. 1825, 1833 (2011) (pointing out that the First Congress built lighthouses under its Commerce Clause power, even though building is not regulation).

190. *See* United States v. Darby, 312 U.S. 100, 114–15 (1941) (approving interstate commerce restrictions aiming to improve "public health, morals or welfare" and upholding the Fair Labor Standards Act as preventing competition that damages commerce and the states).

191. *See* Flagler v. Budget Rent A Car Sys., Inc., 538 F. Supp. 2d 557, 560 (E.D.N.Y. 2008) (upholding the Graves Amendment's preemption of vicarious liability against car rental companies because it aims "to protect interstate commerce").

192. *See* Susan Bartlett Foote, *Regulatory Vacuums: Federalism, Deregulation, and Judicial Review*, 19 U.C. DAVIS L. REV. 113, 115–16 (1985).

193. Redish & Nugent, *supra* note 155, at 581.

194. *See id.* at 570.

195. *See* Martin, *supra* note 123, at 173–74.

196. Gonzales v. Raich, 545 U.S. 1, 17 (2005).

197. *Id.* at 17–18.

apply the substantial effects test literally so as to permit regulation but forbid deregulation, we would defeat the substantial effects doctrine's purpose of permitting laws promoting commerce.

This rationale applies fully to the problem of shielding rental car companies and gun providers from state common law actions. The decision to create a liability shield reflects Congressional concerns about the burdens of suits on rental car companies.[198] By reducing these costs, Congress encouraged more commerce in the form of expansion and improvement of rental car services.[199] Similarly, shielding gun providers from state common law actions protects them from actions that may reduce legitimate interstate commerce in firearms.[200] Thus, shielding rental car companies and gun providers from common law actions promotes interstate commerce.[201]

C. Trying to Distinguish Deregulation from Inactivity

We have seen that formalist application of the substantial effects test would seem to condemn both deregulation and regulation of activity. On the other hand, the purpose of promoting Commerce would seem to suggest that the Constitution permits both deregulation and regulation of inactivity. Does any constitutional reason exist to treat the two differently?

1. Regulation of Inactivity and Liberty

One can say that the Constitution limits federal authority in order to promote liberty.[202] This might suggest that the Constitution frowns upon regulation of inactivity but smiles upon deregulation.[203]

Protection of individual rights has not been a dominant theme of Commerce Clause jurisprudence, as the Court tends to invoke state

198. *See* Martin, *supra* note 123, at 164 (discussing Representative Graves' claim that the purpose of the Graves Amendment was to protect consumers by reducing the number of costly lawsuits).

199. *See* Flagler v. Budget Rent A Car Sys., Inc., 538 F. Supp. 2d 557, 560 (E.D.N.Y. 2008) (upholding the Graves Amendment because it was designed "to protect interstate commerce").

200. *See* 15 U.S.C. §§ 7901–03 (2012).

201. The conclusion that these laws promote commerce is, of course, debatable. Perhaps these liability shields promote gun violence and car accidents, thereby interfering with commerce to a greater extent than they promote it. But for Commerce Clause purposes, it suffices that the regulated activities substantially affect commerce.

202. Tony Mowry, *The Protection of [Unlawful] Commerce in Arms Act–Does Congress Have the Power to Pass Special Legislation?*, 14 TEMP. POL. & CIV. RTS. L. REV. 225, 235–36 (2004).

203. *See* Peter J. Smith, *Federalism,* Lochner*, and the Individual Mandate*, 91 B.U. L. REV. 1723, 1742 (2011) (characterizing the attacks on the individual mandate as libertarian arguments about an "individual's right to choose to participate").

rights in justifying Commerce Clause restrictions.[204] To be sure, the Constitution limits the federal government to the various powers enumerated in Article I and contains a Bill of Rights to protect liberty. But these facts can hardly settle by themselves questions about the scope of one of the enumerated powers when they do not touch upon the liberties explicitly protected in the Bill of Rights.[205] The framers did decide to limit liberty to some extent by allowing for national regulation under the Commerce Clause, which surely involves some restraint on liberty.[206]

Other commentators have rebutted the case for finding a prohibition on regulation of inactivity in a theory of a libertarian Constitution.[207] The Court's concern that countenancing regulation of inactivity may authorize Congress to force people to buy broccoli suggests a substantive due process concern—that requiring action may abridge a liberty interest.[208] The modern Court, however, has been reluctant to recognize individual rights not explicitly provided for in the Constitution, because of concern about *Lochner*-ism—the tendency of late nineteenth and early twentieth century Justices to read their prejudices into law through substantive due process rulings.[209]

---

204. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 401 (1819) (arguing that the scope of Article I power does not implicate the "great principles of liberty" but instead the balance of powers between elected federal and state officials); Mark D. Rosen & Christopher W. Schmidt, *Why Broccoli? Limiting Principles and Popular Constitutionalism in the Health Care Case*, 61 UCLA L. REV. 66, 121 (2013) (explaining that the Court's federalism jurisprudence historically has not focused on individual liberty); Strauss, *supra* note 20, at 22 (arguing that the protection of federalism animates Commerce Clause jurisprudence).

205. *Cf.* Strauss, *supra* note 20, at 22 (identifying protection of individual liberty as the fundamental purpose of federalism but arguing that it is not the purpose of the enumeration of Congressional powers in Article I).

206. *See* Redish & Nugent, *supra* note 155, at 586.

207. *See, e.g.*, KOPPELMAN, *supra* note 20, at 111–22 (critiquing the Court's treatment of the unfunded mandate under the Commerce Clause); Strauss, *supra* note 20, at 12–26 (critiquing the Court's prohibition on regulating inaction).

208. *See* Rosen & Schmidt, *supra* note 204, at 69–72 (discussing the role of the "broccoli hypothetical" challenge to the ACA and its implication of liberty interests).

209. *See* Florida *ex rel.* McCollum v. U.S. Dep't of Health & Human Servs., 716 F. Supp. 2d 1120, 1161–62 (N.D. Fla. 2010) (rejecting the argument that the individual mandate violated substantive due process as inconsistent with Supreme Court precedent); Jamal Greene, *What the New Deal Settled*, 15 U. PA. J. CONST. L. 265, 285–88 (2012) (discussing how the rejection of *Lochner*-ism influenced the ACA challenge); Hall, *supra* note 189, at 1857–59 (identifying Tenth Amendment arguments against the unfunded mandate as providing a "federalized version of *Lochner*"); Rosen & Schmidt, *supra* note 204, at 114 (noting that the "logical home" for the "individual liberty-based claim" against the unfunded mandate was the Fifth Amendment Due Process Clause, but that due process claims against the ACA "went nowhere" in the federal courts); Smith, *supra* note 203, at 1743–45 (explaining why objections to the individual mandate

2. Deregulation and States' Rights

One can say that the Constitution limits federal authority in order to preserve state rights.[210] This might suggest that the Constitution prohibits at least some types of deregulation but allows regulation of inactivity.[211] States' rights concerns figured prominently in a state court case invalidating the Graves Amendment under the Commerce Clause.[212] The state court judge issuing this ruling characterized the Graves Amendment as an unconstitutional interference with traditional state tort law.[213]

The Supreme Court, however, after a brief and unsuccessful effort to delineate core state functions protected from federal intrusion by the Tenth Amendment, repudiated the idea that the Tenth Amendment immunizes core state functions from regulation under the Commerce Clause.[214] Instead, the Court has read a prohibition on issuing federal orders to states into the Constitution on the basis of states' rights.[215] The modern Court has on multiple occasions repudiated the notion that states' rights can broadly immunize areas of state law from federal abrogation pursuant to valid federal legislation regulating individuals under the Commerce Clause.[216]

Yet, *Morrison* and *Lopez* teach that concerns for states' rights still properly influence decisions about the scope of the Commerce

---

are the same objections which gave rise to *Lochner*, which the modern Court has forcefully repudiated).

210. Redish & Nugent, *supra* note 155, at 595.

211. *Cf.* Mowry, *supra* note 202, at 240 (discussing a draft provision of the Constitution, rejected during the constitutional debates, that would have provided Congress a check on the state legislatures).

212. *See* Graham v. Dunkley, 827 N.Y.S.2d 513, 524–25 (N.Y. Sup. Ct. 2006) (holding that the Commerce Clause does not authorize interference with traditional state tort law through preemption of vicarious liability), *rev'd*, 852 N.Y.S.2d 169 (N.Y. App. Div. 2008).

213. *See id.*

214. *Compare* Nat'l League of Cities v. Usery, 426 U.S. 833, 852 (1976) (holding that Congress may not regulate "traditional government functions" by imposing fair labor standards on state employees), *with* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 531 (1985) (overruling *National League of Cities* because walling off "traditional government functions" from federal regulation is unworkable and inconsistent with principles of federalism).

215. *See* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1478–79 (2018) (holding that Congress may not prohibit states from enacting new laws); Printz v. United States, 521 U.S. 898, 935 (1997) (holding that states may not "issue directives" to states or their officers); New York v. United States, 505 U.S. 144, 161 (1992) (prohibiting Congress from compelling states to enact a federal regulatory program).

216. *See Murphy*, 138 S. Ct. at 1476 (reviewing cases preempting state law in conflict with federal regulation of individuals); *cf.* Graham v. Dunkley, 852 N.Y.S.2d 169, 174–75 (N.Y. App. Div. 2008) (holding that the 10th Amendment does not prohibit the Graves Amendment's preemption of state tort law).

Clause power.[217] The Court invalidated federal laws in those cases in part because of concern about federal intrusion into areas of law traditionally dominated by states.[218]

The deregulatory statutes subject to recent Commerce Clause scrutiny interfere with state sovereignty much more than the statutes at issue in *Lopez* and *Morrison*.[219] While the Violence Against Women Act and the GFSZA addressed matters most often within the purview of state law, the Court did not suggest that they interfered with any extant state law or policy.[220] By contrast, both the Graves Amendment and the Arms Act eliminate traditional state common law in order to protect special interests.[221]

The Graves Amendment and the Arms Act may present a better case for tempering Commerce Clause authority based on states' rights than many federal statutes, even many federal statutes abrogating state common law.[222] Usually, federal statutes abrogate state common law in order to facilitate affirmative federal regulation under the Commerce Clause.[223] The Graves Amendment and the Arms Act,

---

217. *See* Hall, *supra* note 189, at 1865 (discussing the Court's decisions in *Lopez* and *Morrison* to reject federal invasion into purely local matters).

218. *See* United States v. Morrison, 529 U.S. 598, 615–16 (2000) (rejecting an argument for the Violence Against Women Act because it could justify a federal intrusion into "areas of traditional state regulation" such as family and criminal law); United States v. Lopez, 514 U.S. 549, 564 (1995) (rejecting the government's argument for the GFSZA in part because of concerns about encroachment into "areas such as criminal law enforcement or education where States historically have been sovereign"); Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619, 627–29 (2001) (arguing that a vision of exclusive categories of federal and state law animates *Morrison*).

219. *See* Klass, *supra* note 127 (suggesting that courts should consider the value of state experimentation and tort law before upholding statutes eliminating tort remedies without providing alternative remedies).

220. *See supra* note 218 and accompanying cases.

221. *See* Martin, *supra* note 123, at 164, 178 (noting that Representative Graves "received substantial political contributions from executives of Enterprise Rent-A-Car, Vanguard Car Rental, and other car and truck leasing companies" and explaining that Congress made no findings and referred to no data about vicarious liabilities' effects on interstate commerce); Mowry, *supra* note 202 (arguing that the Arms Act constitutes "special legislation" protecting "negligent" industry); Brent Steinberg, Note, *The Graves Amendment: Putting to Death Florida's Strict Vicarious Liability Law*, 62 FLA. L. REV. 795, 802 (2010) (noting that Enterprise Rent-a-Car was the largest contributor to Graves' 2006 congressional campaign and that opponents of his amendment considered it a "special interest sham").

222. *Cf.* Duke Power Co. v. Carolina Envtl. Study Grp., Inc., 438 U.S. 59, 87–88 (1978) (finding it unnecessary to decide whether the Due Process Clause requires a substitute remedy for abrogated state tort remedies, when the federal statute provides its own alternative remedies).

223. *See* Klass, *supra* note 127, at 1537–38 (finding a pattern of relieving specific industries of tort liability in conjunction with the creation of new federal remedies starting in the mid-20th century); *see, e.g.*, Riegel v. Medtronic, Inc., 552 U.S. 312, 330 (2008) (holding that the Medical Device Amendments of 1976

however, do not purport to eliminate obstacles to effective implementation of some valid federal regulatory scheme.[224] Thus, they constitute stand-alone deregulation.[225]

Yet, the dormant Commerce Clause jurisprudence does exactly the same thing; it abrogates state law in the absence of a federal regulatory scheme needing protection from state law.[226] It would seem incongruous to read the Constitution as permitting the Supreme Court to abrogate state law in the absence of an accompanying federal regulatory scheme but not allowing Congress to do the same.[227]

More fundamentally, the states' rights concerns do not apply to most deregulatory statutes.[228] If Congress deregulates by repealing existing *federal* law, instead of by displacing state common law, it may increase the scope of valid state legislation by restricting the scope of federal preemption.[229]

---

preempt state common law when the requirements under the Medical Device Amendments are different from those created under the common law for a specific medical device); Geier v. Am. Honda Motor Co., 529 U.S. 861, 865–66 (2000) (finding that the federal Motor Vehicle Safety Act preempts a tort suit seeking damages for violating a duty to install an airbag when that suit conflicts with federal regulation of passive restraints); Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 524 (1992) (preempting state common law duty-to-warn claims that conflict with federal requirements for a specific warning label on cigarettes).

224. *See* Garcia v. Vanguard Car Rental USA, Inc., 540 F.3d 1242, 1252 (finding the Graves Amendment novel because its purpose is solely to preempt tort liability, not to regulate the rental car market). The Arms Act's stated purpose is to "prohibit causes of action against manufacturers, distributors, dealers, and importers of firearms or ammunition." Protection of Lawful Commerce in Arms Act, 15 U.S.C. § 7901(b) (2012). The statute does contain requirements to use gun storage or lock devices when gun providers transfer a gun to somebody without a license. *See* 18 U.S.C. § 922(z) (2012). It also limits the sale of armor piercing bullets. *See id.* § 922(a)(7). But the removal of liability does not remove a hindrance to these federal regulations, and the primary purpose of the law is deregulatory, rather than regulatory. The Graves Amendment was tacked on to a "$286.4 billion, 834-page federal transportation bill" without any committee report and with only twenty minutes of debate on the House floor. Steinberg, *supra* note 221, at 800. Its sponsor did not suggest that it furthered any federal regulatory purpose. *See id.* at 802 (discussing Representative Graves' statements on behalf of the Amendment).

225. I use the term "stand-alone" deregulation to refer to a law that deregulates for some purpose other than advancing regulation. Under this definition, the Graves Amendment constitutes "stand-alone" legislation even though Graves tacked his amendment on to a highway bill, and it is codified in a title that also codifies prior law regulating highway safety. 49 U.S.C. § 30106 (2012); *see* Smith, *supra* note 203. Similarly, the Arms Act constitutes "stand-alone" legislation, even though the public law creating it also took some regulatory steps, since nobody claimed that the exemptions from liability avoided interference with the regulation. *See* Mowry, *supra* note 202.

226. Driesen, *supra* note 156, at 15.

227. *See* Redish & Nugent, *supra* note 155, at 570.

228. *See id.* at 570–71, 578.

229. *See id.*

Another distinction between the Constitution's treatment of inactivity and deregulation suggests itself with respect to statutes that deregulate by repealing federal law. Since Article I only authorizes but does not require exercise of federal authority to regulate interstate commerce, it seems bizarre to read the Commerce Clause as forbidding repeal of a federal law enacted under the Commerce Clause. Congress should remain free to repeal a law once it no longer serves the purpose that motivated its enactment. This rationale does not apply to the regulation of inactivity.

Yet, the basic form of analysis used to support this idea, that Congress should be free to deregulate, does apply to the regulation of inactivity. Since the Commerce Clause power is plenary, the Constitution authorizes Congress to choose its own purposes in acting under the Commerce Clause.[230] And the Commerce Clause does not categorically restrict the means that Congress may use based on the wording of a judicial test seeking to summarize prior jurisprudence.[231] Just as Congress should be able to deregulate once regulation no longer serves its purposes, it should be able to regulate inactivity when necessary to achieve its purposes. The Commerce Clause does not categorically restrict the means Congress may use to promote or restrict interstate commerce.

D. Using Narrower Reasoning to Address Legitimate Concerns about Deregulation and Regulation of Inaction

Yet, the concerns about individual liberty that the *NFIB* majority articulated and the concerns suggested here about the federalism implications of Congressional alteration of state common law requirements through stand-alone special interest legislation do seem to have constitutional dimensions. Even if categorical rules against regulation of inactivity regulation and deregulation conflict with the Commerce Clause's purpose and structure and the dormant Commerce Clause's teachings, perhaps narrower means exist to address these concerns.

The Court could guard against truly silly requirements to engage in activities through the remaining due process requirement that laws have a rational basis.[232] And it might be able to limit some other applications, as it did in *Lopez* and *Morrison*, through manipulation of conclusions about whether a law's targets substantially affect

230. Martin, *supra* note 123, at 172.

231. *See* United States v. Lopez, 514 U.S. 549, 552–59 (1995).

232. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938) (describing the rational basis standard of review as applied to the Commerce Clause).

interstate commerce.[233] Indeed, Justice Scalia's breathing hypothetical does not suggest a need for a categorical restriction on regulation of inactivity, because breathing does not affect interstate commerce. The breathing hypothetical suggests, instead, that the existing doctrine provides some limits to the regulation of inactivity.

A narrower argument for a Tenth Amendment restraint on Congressional deregulation through stand-alone abrogation of state common law might also be available.[234] That argument would confine Congressional abrogation of traditional state common law to cases that pose problems under the dormant Commerce Clause.[235] That argument would rest on the notion that respect for state sovereignty requires a strong showing that state common law interferes with interstate commerce in order to justify a stand-alone alteration of state common law rules. That argument is consistent with the dormant Commerce Clause jurisprudence, which generally only permits judicial abrogation of state law when it discriminates against interstate commerce or imposes a burden on interstate commerce grossly disproportionate to the putative local benefits.[236]

Such an argument draws some support from the *Erie* doctrine.[237] That doctrine suggests that the Constitution does not authorize federal creation of general common law in conflict with state common law, thereby implying special solicitude toward state common law.[238] The prohibition on Supreme Court creation of federal common law suggests that Congress may likewise not create federal common law through alteration of state common law, except in pursuit of valid regulation (as opposed to deregulation).[239] The foregoing establishes that a respectable case exists for implying some limitation on stand-alone deregulatory statutes that abrogate state common law.

---

233. Hall, *supra* note 189, at 1865 (noting that permitting regulation of inactivity leaves in place the limits *Morrison* and *Lopez* placed on Commerce Clause power).

234. *See supra* notes 218–20 and accompanying text.

235. *See* Redish & Nugent, *supra* note 155, at 570.

236. United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 338–39 (2007) (quoting Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978)) (holding that a "virtually *per se* rule of invalidity" applies to discriminatory protectionist measures); Pike v. Bruch Church, Inc., 397 U.S. 137, 142 (1970) (holding that the Court will uphold state law that applies evenly to both intrastate and interstate commerce unless such law generates "clearly excessive" burdens on interstate commerce relative to its "putative local benefits").

237. *See* Graham v. Dunkley, 827 N.Y.S.2d 513, 522–23, 525 (N.Y. Sup. Ct. 2006) (suggesting that the Arms Act declares a general common law rule in violation of the *Erie* doctrine), *rev'd*, 852 N.Y.S.2d 169 (N.Y. App. Div. 2008).

238. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) (stating that Congress has no power to create general or local common law rules for states).

239. *See id.*

The argument that the Constitution restrains federal deregulation through stand-alone abrogation of state law draws strong support from the Supreme Court's very recent decision in *Murphy v. National Collegiate Athletic Association*.[240] *Murphy* struck down a federal law that prohibited state legislatures from enacting laws authorizing gambling on sporting events.[241] It did so on the broad ground that federal law cannot tell states what not to do.[242] The *Murphy* Court recognized, however, that under the Supremacy Clause, the federal government can tell states not to enact laws that would interfere with affirmative federal regulation of private individuals.[243] This ruling suggests that the Constitution generally prohibits stand-alone federal commands that states *deregulate*, because such laws likewise tell a state what not to do.[244]

Defenders of federal destruction of state regulation might seek to distinguish interference with state common law from interference with state legislatures to try and save recent stand-alone federal deregulation.[245] But the Supreme Court's federalism jurisprudence treats federal interference with traditional state common law as more egregious than federal interference with legislation and both infringe state sovereignty.[246] Furthermore, if the Court decided to distinguish between federal commands to legislatures and commands to state

240. 138 S. Ct. 1461 (2018).

241. *Id.* at 1478 (holding that the federal prohibition on state authorization of gambling "violates the anticommandeering rule").

242. *See id.* (holding that Congress may not prohibit a State from enacting legislation).

243. *Id.* at 1479-81 (approving laws that restricts or gives rights to private actors and prohibits state legislation conflicting with the federal regulation).

244. *See id.* at 1478 (noting that "Congress cannot issue direct orders to state legislatures" applies regardless of whether the federal statute prohibits or mandates state law).

245. *Cf. id.* (holding that Congress may not issue orders to "state legislatures").

246. *See* United States v. Morrison, 529 U.S. 596, 615–18 (2000) (declining to construe the Commerce Clause so broadly as to endanger "areas of traditional state regulation"); Printz v. United States, 521 U.S. 898, 935 (1997) (holding that states may not "issue directives" to states or their officers); United States v. Lopez, 514 U.S. 549, 564 (1995) (not accepting the constitutionality of the GFSZA because doing so would empower the federal government to regulate "in areas . . . where States historically have been sovereign"); New York v. United States, 505 U.S. 144, 188 (1992) (holding that the federal government cannot compel *states* to enact a federal regulatory program) (emphasis added); Erie R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) (stating that Congress has no power to create general or local common law rules for states); *cf.* Testa v. Katt, 330 U.S. 386 (1947) (requiring state courts to apply federal law establishing price ceilings on goods, but not suggesting that federal law may displace state common law rules without establishing federal rules on the subject).

courts, legislatures could immunize state common law from federal abrogation by codifying it in a statute.[247]

Advocates of deregulation would point out that *Murphy* itself supports deregulation rather than restrains it. After all, *Murphy* authorized state repeal of a gambling prohibition banned by federal statute, thereby authorizing deregulation of sports betting.[248] But the Constitutional principle that *Murphy* announces does not depend on federal law's regulatory or deregulatory character, but on the problem of issuing a direct order to a state in the absence of federal regulation of private individuals implicating the Supremacy Clause.[249] Even after *Murphy*, however, the Court must allow congressional repeal of state laws that the Supreme Court would abrogate under the Dormant Commerce Clause.

V. CONCLUSION

Considering deregulation and inactivity together yields a deeper appreciation of why the Constitution generally allows deregulation and regulation of inactivity. A categorical rule forbidding either deregulation or regulation of inactivity would interfere with the core purpose of the Commerce Clause, allowing Congress to promote interstate commerce through legislation. Existing doctrine, however, does contain some tools that may permit the courts to appropriately address states' rights and individual liberty concerns that deregulation and inactivity raise.

247. *See, e.g.*, Estate of Charlotte v Bush Master Firearms, Inc., 628 F. Supp. 2d 174, 179–90 (D.D.C. 2009) (quoting an ordinance affirming strict liability in torts for manufacturers and dealers for death or injuries from assault weapons).

248. *See Murphy*, 136 S. Ct. at 1473-75, 1481 (explaining that the provision struck by the Court prohibits state repeal of legislation banning sports betting).

249. *See id.* at 1478 (describing "the basic principle" as a prohibition on Congress issuing direct orders to state legislatures).