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IMPLEMENTING ENUMERATION

ANDREW COAN*

ABSTRACT

The enumeration of legislative powers in Article I of the U.S. Constitution implies that those powers must have limits. This familiar “enumeration principle” has deep roots in American constitutional history and has played a central role in recent federalism decisions of the U.S. Supreme Court. Courts and commentators, however, have seldom rigorously considered what follows from embracing it. The answer is by no means straightforward. The enumeration principle tells us that federal power must be subject to some limit, but it does not tell us what that limit should be. Nor does it tell us how the Constitution’s commitment to limited federal power should be balanced against its equally clear commitment to effective national government. Finally, the enumeration principle sheds no light on the difficult questions of judicial competence and capacity raised by a principle that requires judges to craft limits on federal power out of whole cloth. These difficulties may or may not be surmountable, but

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no rigorous attempt to implement the enumeration principle can avoid grappling with them.

TABLE OF CONTENTS

INTRODUCTION	1988
I. THE IMPLICATIONS OF ENUMERATION	1992
II. AN EMBARRASSMENT OF LIMITS	1994
<i>A. Text</i>	1996
<i>B. Purpose</i>	1996
<i>C. Doctrine</i>	1998
<i>D. Summing Up</i>	1999
III. CONSTITUTIONAL TRADE-OFFS	2000
IV. JUDICIAL COMPETENCE AND CAPACITY	2005
<i>A. Judicial Competence</i>	2005
<i>B. Judicial Capacity</i>	2007
V. A CONSTITUTION AT WAR WITH ITSELF?	2009
CONCLUSION	2014

INTRODUCTION

The enumeration principle is familiar to all first-year constitutional law students. Conventionally understood, it holds that the enumeration of legislative powers in Article I of the U.S. Constitution implies that those powers must be limited.¹ Put in reverse, the powers of Congress cannot amount to the equivalent of the general legislative authority—or “police power”—enjoyed by the states. Otherwise, why would the Framers have bothered drafting such a careful and circumscribed list of legislative powers?

So formulated, the enumeration principle is a special case of the *expressio unius* canon: to express one thing (enumeration) is to exclude the other (a general federal police power).² It can also be understood as a special case of the closely related canon against surplusage. To construe federal legislative power as the equivalent of a general police power would render the careful enumeration of powers in Article I purely gratuitous—in the language of the cases, mere “surplusage.”³ Or so the argument goes.

There are good reasons that the enumeration principle is so familiar. It has deep roots in American constitutional history.⁴ More recently, it has played a central role in justifying the only limits the Supreme Court has enforced on the federal commerce power since the New Deal—the economic/non-economic distinction established in *United States v. Lopez*⁵ and the activity/inactivity distinction endorsed by five Justices in *NFIB v. Sebelius*.⁶ The enumeration principle was also at the heart of the challengers’ arguments in

1. Saikrishna Bangalore Prakash, *The Boundless Treaty Power Within a Bounded Constitution*, 90 NOTRE DAME L. REV. 1499, 1510-11 (2015).

2. See, e.g., WILLIAM N. ESKRIDGE JR. ET AL., *CASES AND MATERIALS ON LEGISLATION AND REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 708 (5th ed. 2014) (explaining the *expressio unius* canon and its limits).

3. See, e.g., *United States v. Lopez*, 514 U.S. 549, 589 (1995) (Thomas, J., concurring) (explaining the canon against surplusage and its limits).

4. See, e.g., Kurt T. Lash, *The Sum of All Delegated Power: A Response to Richard Primus*, *The Limits of Enumeration*, 124 YALE L.J. F. 180, 191-95 (2014), http://www.yalelawjournal.org/pdf/LashPDF_dkt69ak6.pdf [<https://perma.cc/RT6F-YLJY>] (canvassing historical sources).

5. See 514 U.S. 549, 558-59 (1995).

6. See 132 S. Ct. 2566, 2589 (2012).

Gonzales v. Raich, which convinced three Justices that the regulation of homegrown, state-sanctioned medical marijuana was beyond the commerce power of Congress.⁷ If *NFIB* marks the arrival of a new “constitutional gestalt,” as one leading commentator has suggested,⁸ the enumeration principle is unquestionably central to the vision of American federalism that gestalt embraces.

The most interesting recent challenge to this vision comes from Richard Primus.⁹ The enumeration of specific federal powers in the U.S. Constitution may “*presuppose* [] something not enumerated,” he argues, but it *requires* only that Congress be limited to those powers enumerated in Article I.¹⁰ Depending on the state of the external world, it is entirely possible that the sum of those powers will be indistinguishable from a general police power.¹¹ In particular, given the highly integrated character of the modern American economy, the Commerce and Necessary and Proper Clauses may, in 2016, be best read to encompass virtually all human activity.¹² If that is the case, Primus contends, nothing in the text, history, or structure of the Constitution justifies the imposition of artificial “internal limits” on Congress’s powers.¹³

Primus may be right, but he is a clear outlier. The Supreme Court’s post-1995 federalism decisions have many academic critics, but few take serious issue with the enumeration principle. None of the dissenting Justices in those cases has disputed its validity. Like

7. See 545 U.S. 1, 42-43, 47, 52 (2005) (O’Connor, J., dissenting); *id.* at 57-58 (Thomas, J., dissenting).

8. Lawrence B. Solum, *How NFIB v. Sebelius Affects the Constitutional Gestalt*, 91 WASH. U. L. REV. 1, 2-4 (2013).

9. See generally Richard Primus, *The Limits of Enumeration*, 124 YALE L.J. 576 (2014) [hereinafter Primus, *Limits*]; Richard Primus, *Why Enumeration Matters*, 114 MICH. L. REV. (forthcoming 2016) [hereinafter Primus, *Enumeration Matters*].

10. Primus, *Limits*, *supra* note 9, at 637 (emphasis added).

11. See *id.* at 580.

12. See *id.* at 620.

13. *Id.* at 580. *But see* Lash, *supra* note 4, at 180 (“If we are talking about enumeration in general, then Primus is right If we are talking about our actual Constitution, however, he is wrong.”). “Internal limits” flow from the outer boundaries of Congress’s enumerated powers, “external limits” from specific prohibitions on the exercise of those powers that apply even within their boundaries. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 297 (2d ed. 1988). The individual rights protections of the Bill of Rights are the classic example of external limits but not the only one. See *id.* Among others, the anticommandeering principle established in *New York v. United States*, 505 U.S. 144, 188 (1992), and the prohibitions of U.S. CONST. art. I, § 9 also fall into this category.

the correctness of *Brown v. Board of Education*,¹⁴ acceptance of the enumeration principle remains something close to a prerequisite for admission to the American constitutional mainstream. All of the sitting Justices of the U.S. Supreme Court appear to embrace it.¹⁵ Even Primus recognizes the conventional understanding of the enumeration principle as a “longstanding orthodoxy” with a venerable pedigree in American constitutional thought.¹⁶

Taking this orthodoxy as given, this Article asks what follows from accepting it. How, precisely, does the enumeration principle bear on the resolution of particular constitutional challenges to particular exercises of congressional power? How, in other words, should the Supreme Court go about implementing that principle? Surprisingly, courts and commentators have seldom rigorously considered this important question. The answer is by no means straightforward.

There are three essential difficulties. First, if the enumeration principle tells us that Congress’s power must be subject to some internal limit, it does not tell us what that limit should be. Put differently, the set of internal limits consistent with the enumeration principle is infinite—or nearly so. Some additional justification is therefore needed to defend any particular limit.

Second, the enumeration principle does not tell us how to balance the Constitution’s commitment to internal limits with its equally apparent commitment to effective national government. Put differently, the enumeration principle focuses exclusively on the risk of Type I errors (giving Congress too much power) while ignoring the risk of Type II errors (giving Congress too little power). This problem is made especially acute by the fact that the enumeration principle does no serious analytic work unless the sum of Congress’s enumerated powers is otherwise—that is, without reference to the enumeration principle—best interpreted as equivalent to a general police power.

14. 347 U.S. 483 (1954).

15. See Nat’l Fed’n of Indep. Bus. [NFIB] v. Sebelius, 132 S. Ct. 2566, 2577-78 (2012); *id.* at 2628 & n.11 (Ginsburg, J., concurring in part and dissenting in part); *id.* at 2646 (Scalia, J., dissenting).

16. Primus, *Limits*, *supra* note 9, at 580. See generally Lash, *supra* note 4 (defending the historical and doctrinal pedigree of the enumeration principle).

Third, the enumeration principle sheds no light on the questions of judicial competence and capacity raised by a principle that requires judges to craft internal limits from whole cloth, when the best reading of the constitutional text would otherwise render federal power free from such constraints. What do Supreme Court Justices know about the optimal balance of state and federal power in the twenty-first century? The categorical tests they have embraced thus far—distinguishing between economic and noneconomic activity and between activity and inactivity—are not encouraging. Neither of these distinctions is even a fair proxy for “what is truly national and what is truly local.”¹⁷

It is no accident, however, that the Supreme Court has embraced such crude categorical rules. A more sensitive standard, which might permit the Court to more reliably distinguish the national from the local, would generate substantial uncertainty, casting a pall of constitutional doubt over a broad swath of federal legislation. Because the Supreme Court reviews nearly every lower court decision invalidating a federal law, such an approach might well invite more litigation than the Court could handle.¹⁸

Any attempt to implement the enumeration principle therefore threatens to impale the Court on the horns of a dilemma. It can either settle for a crude categorical rule, which poorly serves the underlying purposes of American federalism, or embrace a more sensitive standard and risk overwhelming its own limited capacity, which it has historically been unwilling to do.¹⁹ Compared to these alternatives, abandoning the enumeration principle does not look so bad. This, at any rate, is the challenge that proponents of that principle must overcome.

I do not propose to resolve these difficulties in this brief Article. However, I do propose that they are worth grappling with. Indeed, for anyone who embraces the enumeration principle as conventionally understood, they are unavoidable. More generally, these difficulties highlight a surprisingly little-remarked challenge of interpreting a 225-year-old constitution. Not only can the passage

17. *United States v. Lopez*, 514 U.S. 549, 567-68 (1995).

18. See Andrew B. Coan, *Judicial Capacity and the Substance of Constitutional Law*, 122 *YALE L.J.* 422, 428-29 (2012); *infra* Part IV.B.

19. See *infra* Part IV.

of time change the practical meaning of such a constitution²⁰—or render it clumsy and outdated, as critics have long urged.²¹ The passage of time can also place such a constitution—and perhaps does place the U.S. Constitution—at war with itself. This possibility deserves more attention than it has received to date.

I. THE IMPLICATIONS OF ENUMERATION

What follows from the enumeration principle conventionally understood? At least since 1995, a majority of the U.S. Supreme Court has thought the answer to be straightforward.²² Any interpretation of Congress's enumerated powers that would render them without internal limit—that is, the effective equivalent of a general police power—must be rejected. Conversely, the proper interpretation of Congress's enumerated powers—individually and in the aggregate—must impose some internal limit on those powers.

This was the essential logic behind the economic/non-economic distinction announced in *Lopez* and reaffirmed in *United States v. Morrison*. In defending the Gun-Free School Zones Act and the Violence Against Women Act, respectively, the government relied on the “substantial effects test,” which, at the time, permitted Congress to regulate any activity it rationally believed, in the aggregate, to have a substantial effect on interstate commerce.²³ As a matter of existing doctrine, this argument was strong.²⁴ But as Chief Justice

20. See, e.g., Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1170 (1993) (“[W]e all know that sometimes fidelity to an original meaning requires doing something different, and that, in those cases, doing the same thing done before would be to change the meaning of what was done before.”); Primus, *Limits*, *supra* note 9, at 580 (“[W]hether the powers of Congress have as great a scope in practice as a general police power can only be answered by examining the powers and applying them sensibly to the social world” at any given time).

21. See, e.g., SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) 15-16 (2006); Michael J. Klarman, *Antifidelity*, 70 S. CAL. L. REV. 381, 383-87 (1997); see also LOUIS MICHAEL SEIDMAN, ON CONSTITUTIONAL DISOBEDIENCE 11-12 (2013) (ebook).

22. See, e.g., *Lopez*, 514 U.S. at 564-66.

23. See *United States v. Morrison*, 529 U.S. 598, 612-13 (2000); *Lopez*, 514 U.S. at 559, 563-64.

24. In nearly sixty years of applying the substantial effects test, the Court had not once held federal legislation unconstitutional. See *Lopez*, 514 U.S. at 625-27 (Breyer, J., dissenting).

Rehnquist explained for the *Lopez* majority, “[I]f we were to accept the Government’s arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.”²⁵ Unwilling to step onto this slippery slope, the Court effectively prohibited Congress from regulating noneconomic activities.

The enumeration principle was also the driving force behind Justice O’Connor’s and, especially, Justice Thomas’s dissents in *Gonzales v. Raich*, which would have held Congress powerless to regulate homegrown medical marijuana—at least in states that sanctioned and regulated its use.²⁶ Again the government relied on the substantial effects test to defend the Controlled Substances Act.²⁷ This time the Court agreed, holding that the cultivation and consumption of marijuana—even on a small, noncommercial scale—were economic activities, which Congress rationally could have believed to have a substantial effect on interstate commerce.²⁸

The dissenters were not convinced. Justice O’Connor protested that the majority’s broad definition of economic activity drew “no line at all.”²⁹ Justice Thomas echoed *Lopez*: “If Congress can regulate this under the Commerce Clause, then it can regulate virtually anything—and the Federal Government is no longer one of limited and enumerated powers.”³⁰ Unwilling to accept this result, both Justices would have required Congress to demonstrate that regulation of personal cultivation and consumption was genuinely—not merely rationally—necessary to the regulation of the interstate marijuana market.³¹

Finally, and most recently, the enumeration principle was central to the strategy of the Affordable Care Act challengers in *NFIB v. Sebelius*: If Congress could force otherwise inactive citizens to buy health insurance on the private market, they asked, what could it not do? Convinced that the answer was “nothing,” five Justices embraced a constitutional prohibition—an internal limit—on congres-

25. *Id.* at 564 (majority opinion).

26. *See* 545 U.S. 1, 42-43 (2005) (O’Connor, J., dissenting); *id.* at 57-58 (Thomas, J., dissenting).

27. *See id.* at 12 n.20 (majority opinion).

28. *See id.* at 22, 25-26.

29. *Id.* at 50 (O’Connor, J., dissenting).

30. *Id.* at 57-58 (Thomas, J., dissenting).

31. *See id.* at 51-52 (O’Connor, J., dissenting); *id.* at 60-61, 64 (Thomas, J., dissenting).

sional regulation of inactivity under the Commerce and Necessary and Proper Clauses.³² As the joint dissent put it, to say that the failure to purchase health insurance “nonetheless affects commerce and therefore can be federally regulated, is to make mere breathing in and out the basis for federal prescription and to extend federal power to virtually all human activity.”³³ On this basis, Chief Justice Roberts and the four joint dissenters dismissed the government’s very strong argument that an individual insurance purchase mandate was essential to the functioning of the Affordable Care Act’s other regulations of the national health insurance market.³⁴

II. AN EMBARRASSMENT OF LIMITS

There is a missing link in this logical chain. From the requirement that federal power as a whole be subject to *some* internal limit, *Lopez*, *Morrison*, and *NFIB* infer that the commerce power must be subject to quite particular limits—namely, a virtually absolute prohibition on the regulation of noneconomic activities and a categorical bar on the regulation of inactivity. But these are hardly the only limits that would satisfy the enumeration principle. Indeed, the universe of potential limits is practically infinite.

Consider the following list. To implement the enumeration principle, Congress might be prohibited from exercising its commerce power to regulate:

- (1) activities (or inactivities) whose most important effects are intrastate;³⁵
- (2) activities (or inactivities) occurring in (or affecting) only a small fraction of states;
- (3) activities (or inactivities) engaged in by (or affecting) only a small fraction of the national population;
- (4) activities (or inactivities) traditionally regulated exclusively by the States;
- (5) activities (or inactivities) beginning with the letter “G”;

32. See *NFIB v. Sebelius*, 132 S. Ct. 2566, 2591-93 (2012); *id.* at 2646 (Scalia, J., dissenting).

33. *Id.* at 2643 (Scalia, J., dissenting).

34. See *id.* at 2625-26 (Ginsburg, J., concurring in part and dissenting in part).

35. See, e.g., Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115, 162-63 (2010).

- (6) persons who share a first name with any core *Sesame Street* character;³⁶ or
- (7) the noncommercial cultivation, possession, and consumption of marijuana for medical purposes by women over the age of forty within a sixty-mile radius of San Francisco, California.³⁷

The list could go on, but the point should be clear. The universe of potential limits on federal power is constrained only by the imagination. Because the enumeration principle merely requires that federal power be subject to *some* limit, that principle can provide no help in choosing among the large universe of candidates.³⁸

This is not to say that all limits are equally plausible. We can probably dispense with numbers five and six above without much discussion. Neither the letter “G” nor the names of *Sesame Street* characters have any plausible basis in the constitutional text, the underlying purposes of American federalism, or Supreme Court case law. Presumably, number seven, standing alone, would not constitute the sort of “meaningful” limit proponents of the enumeration principle frequently insist upon.³⁹ But this just underscores the need for additional criteria beyond the enumeration principle to support the choice of limits on federal power.

36. At a minimum, this would preclude federal regulation of persons named Bert, Ernie, Big Bird, or Oscar. The boundaries of the *Sesame Street* core, however, are a bit fuzzy. Cf. Richard Primus & Eve Brensike Primus, *The Core of Sesame Street: An Empirical Assessment* 1 (Dec. 2009) (unpublished manuscript) (on file with author).

37. Cf. *Gonzales v. Raich*, 545 U.S. 1, 26-28 (2005) (rejecting as-applied challenge to federal regulation of noncommercial cultivation, possession, and consumption of marijuana, as prescribed by a doctor pursuant to state law).

38. If the commerce power alone threatens the enumeration principle, any viable limit would have to impose outer bounds on that power. At least in theory, however, the threat to limited federal power might arise from the commerce power *in combination with Congress's other legislative powers*. That is to say, even if the best reading of the commerce power is subject to internal limits, the other powers of Congress might permit it to regulate whatever lies outside the commerce power. In this case, the enumeration principle could be satisfied either by imposing additional internal limits on the commerce power or by imposing such limits on some other enumerated power—say, the copyright or the taxation power. Because most contemporary applications of the enumeration principle focus on the threat posed by the commerce power (and the Necessary and Proper Clause) standing alone, I bracket this possibility for the remainder of my analysis.

39. See, e.g., *United States v. Lopez*, 514 U.S. 549, 580 (1995) (Kennedy, J., concurring) (describing the Court's “duty to recognize *meaningful* limits on the commerce power of Congress”) (emphasis added).

A. Text

One obvious possibility is the constitutional text. The Commerce Clause authorizes Congress “[t]o regulate Commerce ... among the several States.”⁴⁰ At first blush, economic activity seems to be a fair, if somewhat broad, synonym for commerce. Conversely, it seems uncontroversial that noneconomic activity—like possession of firearms in school zones and gender-motivated crimes of violence—is *not* commerce.⁴¹ *Morrison* encourages this reading, frequently using the terms “noncommercial” and “noneconomic” interchangeably.⁴² Similarly, it seems plausible to say that “commerce” is a form of activity, and that whatever its precise bounds, it does not encompass economic inactivity. In *NFIB*, Chief Justice Roberts made this point explicitly.⁴³

The problem with this textual answer is that Congress’s regulatory power over guns, violent crime, and health insurance is not defined by the commerce power alone.⁴⁴ It also includes the Necessary and Proper Clause, and nothing in the text of the latter limits Congress’s power either to “commerce” or “activity.”⁴⁵ Justice Scalia made this point nicely in his *Raich* concurrence.⁴⁶ It may be true, as Chief Justice Roberts argued in *NFIB*, that the Necessary and Proper Clause implicitly incorporates the enumeration principle and therefore requires that Congress’s power be subject to internal limits.⁴⁷ But this just brings us back to where we started: How did the Court arrive at these particular limits? They certainly do not derive from the text of the Necessary and Proper Clause.

B. Purpose

What about the underlying purposes of American federalism? *Lopez*, *Morrison*, and *NFIB* cited two such purposes as justifications

40. U.S. CONST. art. I, § 8, cl. 3.

41. See *United States v. Morrison*, 529 U.S. 598, 617 (2000); *Lopez*, 514 U.S. at 567.

42. See, e.g., *Morrison*, 529 U.S. at 610-11.

43. *NFIB v. Sebelius*, 132 S. Ct. 2566, 2586 (2012) (“The power to regulate commerce presupposes the existence of commercial activity to be regulated.”) (emphasis omitted).

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

45. See *id.* cl. 18.

46. See *Gonzales v. Raich*, 545 U.S. 1, 34-35 (2005) (Scalia, J., concurring).

47. See *NFIB*, 132 S. Ct. at 2579.

for limiting federal power: (1) distinguishing “between what is truly national and what is truly local”⁴⁸ and (2) “protect[ing] the liberty of the individual from arbitrary power.”⁴⁹ Certainly, these are not the only purposes one might attribute to the American federal system. But even with respect to these explicitly stated justifications, the economic/noneconomic and activity/inactivity distinctions fare remarkably poorly.

As Robert Cooter and Neil Siegel have persuasively shown, not all economic activities require national regulation, and plenty of noneconomic activities do require such regulation.⁵⁰ The same is true of the activity/inactivity distinction, as Justice Ginsburg persuasively argued in her *NFIB* dissent.⁵¹ If individual states were to mandate the purchase of insurance as part of a scheme like the Affordable Care Act, they would face a real risk that their healthiest residents would flee to other states, while the sickest residents of other states would flock to their borders. This interstate collective action problem makes national regulation of the nonpurchase of health insurance far more pressing than national regulation of many economic activities. In the parlance of *Lopez* and *Morrison*, neither noneconomic activity nor economic inactivity is “truly local,” nor is economic activity “truly national.” The world is messier than that.

Alas, the economic/noneconomic and activity/inactivity distinctions are no more promising as safeguards of individual liberty. As *Raich* illustrates, federal regulation of economic activity can and does strike at such fundamental and intimate personal choices as the selection of doctor-prescribed treatments for debilitating disease.⁵² By contrast, the only liberty infringed by the Violence Against Women Act’s regulation of noneconomic, gender-motivated crimes of violence is that of the rapist or assailant.⁵³ If anything, the

48. *United States v. Morrison*, 529 U.S. 598, 617-18 (2000); *United States v. Lopez*, 514 U.S. 549, 567-68 (1995).

49. *NFIB*, 132 S. Ct. at 2578 (quoting *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011)).

50. See Cooter & Siegel, *supra* note 35, at 172-73, 184 (identifying pollution as noneconomic activity requiring national regulation).

51. See *NFIB*, 132 S. Ct. at 2618-20 (Ginsburg, J., concurring in part and dissenting in part).

52. See *Gonzales v. Raich*, 545 U.S. 1, 5-7, 15, 25-26 (2005).

53. See *Morrison*, 529 U.S. at 605-06.

Act seems to enhance liberty—at least of the sort entitled to moral respect—by extending additional protection to crime victims.⁵⁴

What about federal regulation of economic inactivity? Chief Justice Roberts's solo opinion in *NFIB* raises the specter of a federal broccoli purchase mandate,⁵⁵ which certainly sounds unpleasant. But is such a mandate any worse, from the standpoint of individual liberty, than a prohibition on the cultivation or consumption of broccoli, which the activity/inactivity distinction would plainly allow?⁵⁶ It is not easy to see why. In fact, a prohibition on the consumption of broccoli would completely preclude any individual from choosing to eat this delicious vegetable. A broccoli purchase mandate, by contrast, would permit those unable to appreciate its nutritious goodness to throw away or donate their purchases.

Notably, none of the Justices who joined the *Lopez*, *Morrison*, and *NFIB* majorities made any meaningful attempt to explain why the federal government is systematically better situated to regulate economic activity, or, conversely, why the states are systematically better situated to regulate noneconomic activity or economic inactivity. Nor has any Justice attempted to explain why federal regulations of noneconomic activity and economic inactivity pose a systematically greater threat to individual liberty than do regulations of economic activity. On reflection, this is not terribly surprising. Persuasive explanations along these lines are extremely difficult to imagine.

C. Doctrine

What about judicial precedent? Prior to *Lopez* and *Morrison*, the Supreme Court had never prohibited Congress from regulating noneconomic activity under the substantial effects test,⁵⁷ but neither had it clearly authorized such regulation.⁵⁸ The same goes for

54. *See id.*

55. *NFIB*, 132 S. Ct. at 2591 (Roberts, C.J.).

56. *Cf. Raich*, 545 U.S. at 9 (upholding a federal prohibition on the cultivation and consumption of another green plant).

57. *See Wickard v. Filburn*, 317 U.S. 111, 120 (1942) (emphasizing the irrelevance of “nomenclature such as ‘production’ and ‘indirect’” in comparison to “the actual effects of the activity in question upon interstate commerce”).

58. *See United States v. Lopez*, 514 U.S. 549, 560 (1995) (“[T]he pattern is clear. Where economic activity substantially affects interstate commerce, legislation regulating that activ-

federal regulation of economic inactivity prior to *NFIB*.⁵⁹ Both of these limits, therefore, were at least arguably consistent with the Court's previous commerce power decisions. The same, however, is true of nearly every alternative limit listed at the beginning of this Part, including the prohibitions on regulating activities beginning with the letter "G" and persons with the names of *Sesame Street* characters.⁶⁰ Thus, judicial precedent cannot explain the Court's embrace of the economic/noneconomic and activity/inactivity distinctions in preference to these limits—or to the practically infinite universe of other limits that were, likewise, arguably consistent with the Court's previous commerce power decisions.

D. Summing Up

This analysis leaves a final possibility. The internal limits embraced by the Court were pulled out of thin air. They lack any plausible constitutional rationale except the need for some limit.⁶¹ Under a conventional understanding of the enumeration principle, this does make the economic/noneconomic and activity/inactivity distinctions preferable to truly unlimited interpretations of the federal commerce power. But it cannot explain why these limits are preferable to the innumerable other limits that are equally consistent with constitutional text, purpose, and precedent, as well as the enumeration principle. This is not necessarily an insurmountable obstacle to judicial implementation of the enumeration principle. It is, however, a real difficulty, which that principle's judicial and academic defenders have as yet failed to confront.

ity will be sustained.") (emphasis added).

59. Compare *NFIB*, 132 S. Ct. at 2642 (Scalia, J., dissenting) (describing congressional power to regulate economic inactivity as a "question[] of first impression"), with *id.* at 2587 (Roberts, C.J.) (noting that the Court's commerce power decisions "uniformly describe the power as reaching 'activity'").

60. See *supra* text accompanying notes 35-37.

61. See Louise Weinberg, *Fear and Federalism*, 23 OHIO N.U. L. REV. 1295, 1323 (1997) ("The actual limiting principle, then, on which Chief Justice Rehnquist can be said to rely in *Lopez*, is the weirdly circular proposition that there must *be* a limiting principle."). I thank Richard Primus for this reference.

III. CONSTITUTIONAL TRADE-OFFS

By failing to acknowledge the necessity of choosing among limits, the Supreme Court and its academic defenders have overlooked a second and closely related difficulty. The enumeration principle does not tell us how to balance the Constitution's commitment to internal limits with its equally apparent commitment to effective national government. Any rigorous attempt to implement the enumeration principle must grapple with this difficulty, not blink it away.

By "effective national government" I simply mean the Constitution's commitment to creating a national government that can exercise its enumerated powers—those the founding generation judged to require national action—fully and effectively. This commitment cannot be dismissed as incidental or obviously subordinate. It was the principal motivation for convening the Philadelphia Convention of 1787 and a principal theme of the arguments made on behalf of ratification.⁶² It features prominently in Supreme Court decisions running from *McCulloch v. Maryland*⁶³ and *Gibbons v. Ogden*⁶⁴ through *United States v. Darby*⁶⁵ and *Wickard v. Filburn*⁶⁶ through

62. See, e.g., THE FEDERALIST NO. 34, at 158-59 (Alexander Hamilton) (Lawrence Goldman ed., 2008) (ebook) ("Nothing ... can be more fallacious than to infer the extent of any power proper to be lodged in the national government from ... its immediate necessities. There ought to be a CAPACITY to provide for future contingencies as they may happen; and as these are illimitable in their nature, so it is impossible safely to limit that capacity.").

63. See 17 U.S. (4 Wheat.) 316, 415 (1819) ("The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers, to insure, as far as human prudence could insure, their beneficial execution.").

64. See 22 U.S. (9 Wheat.) 1, 195 (1824) ("The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government.").

65. See 312 U.S. 100, 114 (1941) ("The power of Congress over interstate commerce 'is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution.'" (quoting *Gibbons*, 22 U.S. (9 Wheat.) at 196)).

66. See 317 U.S. 111, 120 (1942) (emphasizing "the embracing and penetrating nature" of the commerce power); *id.* (approving of *Gibbons*'s "warning that effective restraints on its exercise must proceed from political rather than from judicial processes" (citing *Gibbons*, 22 U.S. (9 Wheat.) at 197)).

Raich.⁶⁷ It is also arguably the most persuasive structural explanation for the list of enumerated powers vested in Congress by Article I.⁶⁸

To be sure, nearly all of these sources have assumed, implicitly or explicitly, that a commitment to effective national government and the enumeration principle could be fully reconciled.⁶⁹ Put differently, they have assumed that full and effective exercise of Congress's enumerated powers would naturally amount to something less than a general police power.⁷⁰ But if that were so, we would not need the enumeration principle to decide constitutional cases. The internal limits it requires would simply inhere in the best interpretation of Congress's enumerated powers. Only when the best interpretation of Congress's powers would otherwise result in the effective equivalent of a general police power does the enumeration principle do any serious analytic work.⁷¹ This does not mean that the enumeration principle must necessarily give way to the constitutional imperative of effective national government. It does mean that, in every case in which the enumeration principle really matters, these two constitutional commitments will be in real conflict.

67. See *Gonzales v. Raich*, 545 U.S. 1, 17 (2005) (“[E]ven if appellee’s activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce.” (quoting *Wickard*, 317 U.S. at 125)); *id.* at 22 (“We need not determine whether respondents’ activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a rational basis exists for so concluding.”).

68. See Cooter & Siegel, *supra* note 35, at 121-24; see also Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 8-10 (2010).

69. See, e.g., *Wickard*, 317 U.S. at 124 (“The power of Congress over interstate commerce is plenary and complete in itself ... and acknowledges no limitations other than are prescribed in the Constitution.... Hence the reach of that power extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power.” (quoting *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942))).

70. See *id.* at 124-25 (refraining from granting Congress a general police power over all the states by establishing a requirement that an activity “exert[] a substantial economic effect on interstate commerce” to be subject to regulation under the commerce power).

71. For present purposes, I take no position on the proper approach to constitutional interpretation. Whatever that approach might be, the enumeration principle does no significant analytic work unless, under that approach, federal power is otherwise best interpreted as the equivalent of a general police power. Cf. Primus, *Limits*, *supra* note 9, at 635 (“The canon is a rule for construing the powers of Congress (‘Under no circumstances may you read these powers such that they end up covering all possible subjects of legislation’), not a description of something that one would discover after construing the powers without the influence of that rule (‘Hey, I read all these grants of power and thought about what they add up to collectively, and it turns out that they don’t exhaust all possible subjects of legislation’).”).

Kurt Lash denies this. In his view, the best interpretation of Congress's powers will always be limited.⁷² The role of the enumeration principle is not to support or impose additional limits. It is simply to guard against abusive *misconstructions* that would improperly transform those powers into a general police power.⁷³ The problem with this view is that the enumeration principle does almost no analytic work. At most, it serves as a kind of reliability check for results reached, and independently justified, on other grounds. If the enumeration principle played only this modest role, it would be difficult to understand the passion of either its defenders or its critics.

As actually applied by the Supreme Court, however, the enumeration principle performs a far more robust function. It serves as the sole proffered justification for rejecting otherwise plausible interpretations of congressional power.⁷⁴ It also serves as the sole proffered justification for judicial enforcement of particular internal limits.⁷⁵ To perform either of these functions, the enumeration principle must be in conflict with the otherwise best interpretation of Congress's enumerated powers—and, thus, with the Constitution's commitment to effective national government.

How do *Lopez*, *Morrison*, and *NFIB* grapple with this conflict? Basically, by ignoring it. In each case, the Court considered only whether the Government's interpretation of the Commerce and Necessary and Proper Clauses would grant Congress the equivalent of a general police power.⁷⁶ In *Lopez* and *Morrison*, this meant asking whether there was any limit on the activities that Congress could rationally believe to have a substantial effect on interstate commerce when considered in the aggregate.⁷⁷ In *NFIB*, it meant asking whether the power to regulate economic inactivity rendered all

72. See Lash, *supra* note 4, at 180-81.

73. See *id.* at 181-83.

74. See, e.g., *United States v. Morrison*, 529 U.S. 598, 617 (2000) (rejecting the otherwise plausible argument that Congress could “regulate noneconomic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce”).

75. See, e.g., *id.* at 616 & n.7 (holding that “the limitation of congressional authority is not solely a matter of legislative grace” but that it is subject to judicial review as well).

76. See, e.g., *United States v. Lopez*, 514 U.S. 549, 567-68 (1995) (declining to grant Congress a general police power over the states through the Commerce Clause).

77. See *Morrison*, 529 U.S. at 612-13; *Lopez*, 514 U.S. at 564.

other limits on federal power effectively meaningless.⁷⁸ Answering each of these questions in the affirmative, the Court jumped directly to the conclusion that its preferred tests—the economic/noneconomic and activity/inactivity distinctions—were superior.⁷⁹

This should have been only one side of the analysis. Having concluded that the government’s proposed test would give Congress too much power, the Court should have asked whether its own proposed test would give Congress too little. More concretely, the Court should have asked whether its proposed test would deny Congress the power to address serious national problems that the federal government is better situated to regulate than the states acting on their own.

In all three cases, the clear answer was yes. In *Lopez* and *Morrison*, the Court denied Congress the power to deal with noneconomic activities—such as a refusal to be vaccinated or submit to quarantine for pandemic disease—that states cannot plausibly regulate on their own.⁸⁰ Similarly, in *NFIB*, the Court denied Congress the power—at least under the Commerce Clause—to deal with an economic inactivity—the nonpurchase of health insurance—that states cannot plausibly regulate on their own.⁸¹ Again, this does not mean the Court was necessarily wrong, but its analysis was indefensibly one-sided.

A more balanced approach would have considered both Type I and Type II errors—that is, false positives and false negatives. In this context, Type I errors are cases in which a proposed constitutional test would give Congress more power than it needs. More precisely, they are cases in which the states, on balance, are better situated than Congress to deal with a problem. Type II errors, by contrast, are cases in which a proposed constitutional test would give

78. See *NFIB v. Sebelius*, 132 S. Ct. 2566, 2586-88 (2012); *id.* at 2649 (Scalia, J., dissenting).

79. See *id.* at 2586-88 (majority opinion); *id.* at 2649 (Scalia, J., dissenting); *Lopez*, 514 U.S. at 564. In *NFIB v. Sebelius*, there was technically no opinion for the Court. But five Justices agreed that the power to regulate economic inactivity would render federal authority limitless and that this justified limiting the commerce power to economic activity.

80. See *Morrison*, 529 U.S. at 613 (declining to grant Congress the authority to regulate noneconomic, gender-based discriminatory actions based solely on their aggregate effect on interstate commerce); *Lopez*, 514 U.S. at 551 (declining to grant Congress the authority to regulate the noneconomic possession of firearms based solely on their aggregate effect on interstate commerce).

81. See *NFIB*, 132 S. Ct. at 2585, 2587, 2591, 2593.

Congress less power than it needs. More precisely, they are cases in which Congress is, on balance, better situated than the states to deal with a problem. Ideally, the Court would consider and attempt to minimize the sum total of both types of errors.

This is no easy task. Figuring out which problems Congress is best situated to regulate and which are best left to the states is a very complex inquiry, made all the more complicated by the need to translate the results into judicially administrable rules. In theory, this inquiry might result in a constitutional test that ignores one type of error in some or all circumstances. Although superficially obtuse, such a one-sided test could conceivably produce the lowest sum total of error costs in the aggregate, given the Court's limited competence and capacity.⁸² More concretely, a one-sided test might correct for a systematic bias in the Court's diagnosis of Type I and Type II errors—for example, one in favor of expanding federal power. This sort of “second-best” analysis is probably the best defense of *Lopez*, *Morrison*, and *NFIB*, though a lot of unpacking would be required to make it persuasive.⁸³ It is also the best defense of the dissenters in those cases, who would basically surrender the field to Congress—in effect ignoring Type I errors.⁸⁴

The Court may or may not be up to the job of cashing all this out. Indeed, the difficulty of these questions is a traditional justification for the Court to defer to congressional judgments.⁸⁵ But if the Court is to implement the enumeration principle at all, it cannot responsi-

82. See *infra* Part IV. If we factor in decision costs, as well as error costs, the chances of a one-sided rule winning out over a more balanced (and thus more complicated and costly) alternative would be even higher.

83. Cf. Adrian Vermeule, *The Supreme Court 2008 Term—Foreword: System Effects and the Constitution*, 123 HARV. L. REV. 4, 17-23 (2009).

84. See Coan, *supra* note 18, at 443-46 (elaborating such a defense); cf. Primus, *Limits*, *supra* note 9, at 582 (“[T]he federal structure of American government has long been maintained not by internal limits on Congress’s powers but by a combination of external limits, process limits, and the practical conditions that shape interactions between federal and state officials. There is no reason to think that a better brand of federalism would result if some consequential set of internal limits were added to the mix.”) (footnote omitted).

85. See, e.g., Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1503 (1994) (“[J]udges lack the resources, know-how, and flexibility to make dependable decisions about the level at which to govern in today’s complex and rapidly evolving world. Hence the non-role of the courts in federalism.”).

bly ignore the Constitution's competing commitment to effective national government.⁸⁶

IV. JUDICIAL COMPETENCE AND CAPACITY

As we have seen, the enumeration principle demands a great deal of those who would invoke it to impose internal limits on federal power.⁸⁷ From these demands flows yet another difficulty: the enumeration principle tells us nothing about the Supreme Court's competence to choose among the universe of potential internal limits or to balance the risk of Type I and Type II errors. Nor does it tell us anything about the Court's ability to undertake these tasks without overwhelming its limited capacity. Because the Court's limited capacity constrains the options at its disposal for implementing the enumeration principle, these questions are interdependent.

A. *Judicial Competence*

What do Supreme Court Justices know about the optimal balance of state and federal power in the twenty-first century? About the empirical incidence of collective action problems and interstate spillovers that preclude states from acting effectively on their own?⁸⁸ About the accountability costs associated with federal law making?⁸⁹ About the complex conflict-coordination game of the modern regulatory-cum-welfare state, with its deeply intertwined federal and state bureaucracies?⁹⁰ About the complex interactions between federalism

86. *Cf. id.* at 1502 ("There are, after all, two sides to federalism: not just preserving state authority where appropriate, but also enabling the federal government to act where national action is desirable.").

87. *See supra* Part III.

88. *See* Cooter & Siegel, *supra* note 35, at 131-33.

89. *See, e.g.,* V.F. Nourse, *Toward a New Constitutional Anatomy*, 56 STAN. L. REV. 835, 874 (2004) ("As a general rule, it is easier for a majority to be constructed in a town than a city, a state than in a nation (even if there may be exceptions to that rule."); Gordon Tullock, *Federalism: Problems of Scale*, 6 PUB. CHOICE 19, 21 (1969) ("[T]he smaller the governmental unit the more influence any one of its citizens may expect to exert, consequently, the smaller the unit, the closer it will come to fitting the preference patterns of its citizens.").

90. *See generally* David E. Adelman & Kirsten H. Engel, *Adaptive Federalism: The Case Against Reallocating Environmental Regulatory Authority*, 92 MINN. L. REV. 1796 (2008); Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009).

and America's increasingly cohesive and polarized party system?⁹¹ The answer is not nothing, to be sure. But whether the Justices know enough—or have good enough fact-finding and remedial tools at their disposal—to do more good than harm in implementing the enumeration principle is a serious question.⁹²

Lopez, *Morrison*, and *NFIB* have obscured this question by ignoring the difficulties discussed in Parts II and III. They did not compare the economic/noneconomic or activity/inactivity distinction to other plausible limits. Nor did they balance the risk of Type II errors associated with these limits against the risk of Type I errors associated with the government's position. Instead, they gave the impression that these limits sprang directly and straightforwardly from the enumeration principle itself.⁹³ If this were true, implementing the enumeration principle would be fairly standard lawyerly work.

Of course, it is not true. As Parts I and II have shown, the enumeration principle tells us that Congress's power must be subject to some internal limit, but it does not tell us what that limit should be. Nor does it tell us how to balance the Constitution's commitment to internal limits with its equally apparent commitment to effective national government. These questions cannot be answered without making complex judgments about the optimal division of power between the federal government and the states—judgments that must rest on criteria other than the enumeration principle, constitutional text, or judicial precedent. Rather than providing a route around this thicket, as *Lopez*, *Morrison*, and *NFIB* imply, the enumeration principle leads straight into it.

I do not suggest that this is a decisive objection to judicial implementation of the enumeration principle. Someone, or some institution, must make these difficult judgments.⁹⁴ The practical alternative to judicial implementation of the enumeration principle

91. See generally Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077 (2014).

92. See, e.g., Nourse, *supra* note 89, at 894-95 (raising this question and expressing doubts).

93. See *NFIB v. Sebelius*, 132 S. Ct. 2566, 2577 (2012); *United States v. Morrison*, 529 U.S. 598, 615 (2000); *United States v. Lopez*, 514 U.S. 549, 566 (1995).

94. See, e.g., NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* 4 (1994) (emphasizing the intrinsically comparative nature of institutional choice).

is to leave these questions to Congress, which has significant informational advantages over the Court, but at least in some contexts, may face problematic incentives to expand its power into spheres that would be better regulated by the states.⁹⁵ Perhaps judicial implementation of the enumeration principle makes things better on balance, perhaps not. The important point is that proponents of that principle cannot avoid this difficult question.

B. Judicial Capacity

The crude categorical character of the limits established in *Lopez*, *Morrison*, and *NFIB* is not especially encouraging. As Part II showed, these limits appear to have almost no connection to the underlying purposes of American federalism. They give Congress more power than it needs over economic activities and less than it needs over noneconomic activities and economic inactivity.⁹⁶ They also permit very serious interference with personal liberty while prohibiting much more moderate interference.

Yet it is no accident that the Supreme Court has embraced such crude categorical rules. A more sensitive standard, requiring that federal commerce power statutes respond to a sufficiently serious national problem, might permit the Court to distinguish the national from the local more reliably. But such a standard, if applied with any stringency, would cast a pall of constitutional doubt over an enormous quantity of federal legislation.⁹⁷ Indeed, what commerce

95. See, e.g., Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 74 (2004) (“[C]ompetition [between federal and state politicians] provides strong incentives for federal representatives to expand their own responsibilities at the expense of their state-level colleagues.”).

96. See Cooter & Siegel, *supra* note 35, at 131.

97. The best recent example of such an approach is Justice O'Connor's dissent in *Raich*, which genuinely grappled with the question of whether federal regulation of homegrown medical marijuana was necessary to solve an interstate problem. See *Gonzales v. Raich*, 545 U.S. 1, 47-48 (2005) (O'Connor, J., dissenting). For any given subset of regulated activity, she would have had the Court independently inquire into the necessity for federal regulation. See *id.* In rejecting this approach, the majority emphasized its concern about inviting litigants to propose ad hoc exemptions from federal regulatory schemes. See *id.* at 28 (majority opinion) (“[T]he dissenters' rationale logically extends to place *any* federal regulation (including quality, prescription, or quantity controls) of *any* locally cultivated and possessed controlled substance for *any* purpose beyond the “outer limits” of Congress' Commerce Clause authority.”).

power legislation would not be vulnerable to challenge under this formulation? Such a result would not only generate costly legal uncertainty. It would also bury the federal courts under an avalanche of new litigation, much of which the Supreme Court would feel compelled to review itself.⁹⁸

The Supreme Court's New Deal experience is illustrative. This was the only time in the modern era that the Court seriously attempted to rein in the constitutional power of Congress.⁹⁹ In so doing, the Court substantially increased the expected benefits of litigation challenging federal legislation, with spectacular results. In 1935 alone, "more than 100 district judges held acts of Congress unconstitutional, issuing more than 1,600 injunctions against" a vast array of New Deal legislation.¹⁰⁰ Because the Supreme Court feels compelled to review virtually every lower court decision invalidating federal legislation, it is impossible to imagine it keeping up such an approach for long.¹⁰¹

To be sure, the Supreme Court currently decides significantly fewer cases than it could handle.¹⁰² But it is not the ratio of the Court's current caseload (70-80 cases) to its maximum capacity (150-200 cases) that matters.¹⁰³ It is the ratio of the Court's maximum capacity to the potential volume of litigation the Court would invite if it ignored its limited capacity in deciding cases. In the commerce power context, that volume is hundreds or thousands of cases, far more than the Court could handle without abandoning its deeply rooted commitments to minimum professional standards and the uniformity of federal law.¹⁰⁴

To avoid overwhelming its capacity in this way, the Court has consistently employed a combination of strong deference to Congress and clear categorical rules that cleanly insulate most commerce power legislation from constitutional challenge.¹⁰⁵ Deference reduces

98. See Coan, *supra* note 18, at 439.

99. See Richard H. Pildes, *Is the Supreme Court a "Majoritarian" Institution?*, 2010 SUP. CT. REV. 103, 129-30.

100. *Id.* at 130.

101. See Coan, *supra* note 18, at 439.

102. *Id.* at 428 n.12.

103. See *id.* at 427-28; Kenneth W. Starr, *The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft*, 90 MINN. L. REV. 1363, 1369 tbl. (2006).

104. See Coan, *supra* note 18, at 443-46.

105. See *id.* at 446.

the expected value of bringing suit by increasing the odds that the government will prevail. This, in turn, reduces the volume of litigation.¹⁰⁶ Clear rules reduce uncertainty and thereby encourage greater voluntary compliance and settlement outside of court.¹⁰⁷ Clear rules also promote uniformity among lower court decisions, reducing the need for Supreme Court review to achieve this end.¹⁰⁸

This approach has enabled the Court to implement the enumeration principle without overwhelming its limited capacity, but the cost to its institutional competence has been severe. Simply put, it is exceedingly difficult to capture the complex dynamics of modern American federalism in a clear categorical rule. A Court constrained to employ such rules in deciding commerce power cases is laboring under a substantial handicap.¹⁰⁹

Any attempt to implement the enumeration principle therefore forces the Court to choose between two bad options. It can either settle for a crude categorical rule, which poorly serves the underlying purposes of American federalism, or risk overwhelming its own limited capacity, which it has historically been unwilling to do. Alternatively, the Court might simply abandon the field—not because the political safeguards of federalism adequately protect state interests, but because judicial implementation of the enumeration principle is likely to do more harm than good, given the Court's limited competence and capacity. None of these alternatives is especially attractive, but no proponent of the enumeration principle can avoid choosing among them.

V. A CONSTITUTION AT WAR WITH ITSELF?

The root of all these difficulties is a tension between internal limits and effective national government. This tension has probably always been there, as Alexander Hamilton and Thomas Jefferson's debate over the constitutionality of the first Bank of the United

106. *See id.* at 436; *see also* KOMESAR, *supra* note 94, at 147.

107. *See* Coan, *supra* note 18, at 436.

108. *See id.* at 440; *see also* RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 178 (1996); Lawrence M. Friedman, *Legal Rules and the Process of Social Change*, 19 STAN. L. REV. 786, 819-20 (1967).

109. *See* Coan, *supra* note 18, at 447.

States attests.¹¹⁰ But it has grown exponentially more acute with the industrial, transportation, and communication revolutions of the last two centuries. Indeed, at the dawn of the twenty-first century, the word “tension” no longer seems adequate. Against the background of today’s tightly integrated national economy, internal limits and effective national government are not merely in tension; they are in open conflict.¹¹¹ One might even say that the passage of time has placed the U.S. Constitution at war with itself.

The mechanism by which this conflict has arisen is straightforward. In 1789, both the Commerce Clause and the Necessary and Proper Clause could be construed generously in order to ensure their effective exercise without threatening the Constitution’s commitment to internal limits.¹¹² By sometime in the middle of the twentieth century, however, the volume of interstate commerce had grown so vast—as had the spectrum of activities affecting such commerce or affected by it—that the Commerce and Necessary and Proper Clauses threatened to engulf virtually all human activity. Reasonable observers continued to endorse both commitments simultaneously, but with less and less conviction.¹¹³ Under these

110. See *Hamilton’s Opinion as to the Constitutionality of the Bank of the United States: 1791*, YALE L. SCH.: AVALON PROJECT, http://avalon.law.yale.edu/18th_century/bank-ah.asp [<https://perma.cc/JXS6-YMDP>] (last visited Apr. 15, 2016); *Jefferson’s Opinion on the Constitutionality of a National Bank: 1791*, YALE L. SCH.: AVALON PROJECT, http://avalon.law.yale.edu/18th_century/bank-tj.asp [<https://perma.cc/8CWF-76P4>] (last visited Apr. 15, 2016); see also Walter Dellinger & H. Jefferson Powell, *The Constitutionality of the Bank Bill: The Attorney General’s First Constitutional Law Opinions*, 44 DUKE L.J. 110, 112 (1994).

111. See, e.g., Lawrence Lessig, *Translating Federalism: United States v Lopez*, 1995 SUP. CT. REV. 125, 130 (“As commerce today seems plainly to reach practically every activity of social life, it would seem to follow [from *Gibbons* and *McCulloch*] that Congress has the power to reach, through regulation, practically every activity of social life.”).

112. Compare *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 408 (1819) (“[I]t may with great reason be contended, that a government, entrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be entrusted with ample means for their execution.”), with *id.* at 405 (“This government is acknowledged by all to be one of enumerated powers.”).

113. Compare *Nat’l Labor Relations Bd. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937) (“Undoubtedly the scope of [the commerce] power ... may not be extended so as to ... effectually obliterate the distinction between what is national and what is local and create a completely centralized government.”), with John Q. Barrett, *Wickard v. Filburn* (1942), at 5 (June 26, 2012), <http://thejacksonlist.com/wp-content/uploads/2014/02/20120626-Jackson-List-Wickard.pdf> [<https://perma.cc/NG7X-V682>] (“If we were to be brutally frank, ... I suspect what we would say is that in any case where Congress thinks there is an effect on interstate commerce, the Court will accept that judgment.” (quoting Letter from Justice Robert H. Jackson to Judge Sherman Minton (Dec. 21, 1942))). See generally Primus, *Enumeration*

circumstances, it may well have become impossible—at least for the Supreme Court, with its limited capacity and competence—to honor both commitments simultaneously.

Contemporary interpreters have two essential options for handling such a conflict. On one hand, they might attempt to dissolve it—to demonstrate that it is illusory, rather than real, or that the Constitution itself anticipates and resolves it. On the other hand, they might openly acknowledge the existence of a conflict and roll up their sleeves for the difficult task of resolving it.

Despite their profound differences, Richard Primus, Kurt Lash, and the Supreme Court majorities of *Lopez*, *Morrison*, and *NFIB* all fall into the first of these camps. Primus dissolves the conflict in favor of effective national government, by treating internal limits as a contingent, rather than a necessary, feature of the American Constitution.¹¹⁴ Kurt Lash and recent Supreme Court majorities dissolve the conflict in favor of internal limits, by ignoring the need to choose among a practically infinite universe of potential limits and the need to balance Type I against Type II errors.¹¹⁵

One of these positions could be right, but it is worth considering the possibility that the conflict is real and intractable. The Constitution might be genuinely, deeply committed both to internal limits and to effective national government, and those commitments may, in modern economic circumstances, be fundamentally irreconcilable. Certainly, this is a conceptual possibility, and it should not be surprising to encounter such conflicts in a 225-year-old constitution.

A nonlegal analogy may be helpful. Suppose I promise, at T1, to attend both my daughter's cello recital and my son's ballet performance. Then suppose, at T2, both events end up being scheduled for the same evening. At T1, my two promises do not conflict, though they have the potential to do so. At T2, circumstances have changed to put them in direct conflict. I cannot be in two places at once. Thus, it is physically impossible for me to honor both promises.

Matters, *supra* note 9 (explaining contemporary role of the enumeration principle as ceremonial rather than substantive).

114. See Primus, *Limits*, *supra* note 9, at 583.

115. See *NFIB v. Sebelius*, 132 S. Ct. 2566, 2577 (2012); *United States v. Morrison*, 529 U.S. 598, 615 (2000); *United States v. Lopez*, 514 U.S. 549, 566 (1995); Lash, *supra* note 4, at 180-81.

Faced with such a conflict, I have two essential choices. On one hand, I might attempt to balance, or accommodate, the two commitments. For example, I might attend the first half of my daughter's recital and the second half of my son's performance, or vice versa. On the other hand, I might sacrifice one of my two commitments based on a normative criterion outside the commitments themselves. For example, I might breach the promise to my daughter on the ground that her brother needs my support more after getting cut the previous week from the school glee club. The one thing I cannot do is dissolve the conflict between my two promises. Nor can I resolve it by appeal to any sort of proviso, implicit in the original promises, for adjudicating conflicts. By hypothesis, no such proviso exists.

If changed circumstances have rendered it impossible to reconcile the Constitution's commitments to internal limits and effective national government, contemporary constitutional interpreters are in the same situation as our unfortunate overcommitted father. They have two essential choices. On one hand, they might attempt to balance, or accommodate, the two commitments. For example, they might attempt to develop categorical rules that minimize the sum of Type I and Type II errors across the run of cases, taking into account the limits of judicial competence and capacity.¹¹⁶

On the other hand, contemporary interpreters might elect to sacrifice one commitment to the other on the basis of contemporary needs and interests or some other normative criterion external to the commitments themselves. For example, an interpreter might give up on internal limits entirely based on the view that federalism has ceased to serve any useful function in modern American society.¹¹⁷ Or, conversely, an interpreter might give up on effective national government on the theory that decentralization better protects individual liberties. What contemporary interpreters cannot do is dissolve the conflict or resolve it by appeal to a second-order commitment establishing the relative priority of internal limits and effective national government. By hypothesis, no such commitment exists.

116. *See supra* Part IV.

117. *See, e.g.*, MALCOM M. FEELEY & EDWARD RUBIN, *FEDERALISM: POLITICAL IDENTITY AND TRAGIC COMPROMISE* 5 (2008).

Again, I do not contend that the Constitution's commitments to internal limits and effective national government are actually at war with one another in this way. I contend only that constitutional theorists should seriously consider this possibility, both in the context of the commerce power and across the spectrum of American constitutional law. This brief Article is not the place for an extended discussion of examples, so I will offer just one more speculative possibility.

New and old originalists sometimes argue over the best reading of the Equal Protection Clause, with many new originalists contending that the Clause is best read as embodying an abstract prohibition on unjust discrimination, whatever that objectively encompasses.¹¹⁸ Old originalists, by contrast, read the Clause more narrowly—as a prohibition on those (and only those) specific practices the drafters and ratifiers of the Fourteenth Amendment would have intended or expected it to prohibit.¹¹⁹ Some critics of originalism also adopt this view of the Fourteenth Amendment's original meaning.¹²⁰ On the former understanding, school segregation,

118. See, e.g., Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 496 (2007) (“[T]he text of the Equal Protection Clause prohibits class legislation, caste legislation, ‘special’ or ‘partial’ legislation, and arbitrary and unreasonable distinctions between persons or citizens.”); Steven G. Calabresi & Hannah Begley, *Originalism and Same Sex Marriage 2* (Nw. Univ. Sch. of Law, Pub. Law & Legal Theory Research Paper Series, Paper No. 14-51, 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2509443 [<https://perma.cc/L3EN-XKSL>] (interpreting “original public meaning” of the Equal Protection Clause as “ban[ning] systems of caste and class-based discrimination”); see also Akhil Reed Amar, *The Supreme Court 1999 Term—Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 63-64 (2000) (“The text calls for equal protection and equal citizenship, pure and simple.”).

119. See, e.g., RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 457 (2d ed. 1997) (arguing that the intention of the Framers of the Fourteenth Amendment is clear and “as good as written into the text”); Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U. L. REV. 703, 723 (2009) (endorsing an interpretation of the Fourteenth Amendment focused on “a far narrower category of protected conduct ... intended by the actual people whose agreement made the Constitution law”); cf. Amanda Terkel, *Scalia: Women Don’t Have Constitutional Protection Against Discrimination*, HUFFINGTON POST (May 25, 2011, 6:20 PM), http://www.huffingtonpost.com/2011/01/03/scalia-woman-discrimination-constitution_n_803813.html [<https://perma.cc/BRP7-SS55>] (quoting Justice Scalia as saying: “Certainly the Constitution does not require discrimination on the basis of sex. The only issue is whether it prohibits it. It doesn’t. Nobody ever thought that that’s what it meant.”).

120. See, e.g., Michael J. Klarman, Brown, *Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1884 (1995) (discussing historical evidence of the original intentions and expectations of the Fourteenth Amendment's drafters and

sex discrimination, and discrimination based on sexual orientation all violate the Constitution—or might plausibly be said to do so.¹²¹ On the latter understanding, none of these practices is constitutionally prohibited.

But what if the Framers and ratifiers were committed, in some legally relevant sense, to both understandings? That is to say, what if they affirmatively intended to permit the racial segregation of public schools but simultaneously intended to prohibit all objectively unjust government discrimination, or, in less anachronistic terms, caste legislation? In this case, the original understanding of the Fourteenth Amendment is today—if it was not always—at war with itself.

Under versions of originalism that treat only the semantic meaning of the text as authoritative, this conflict might be legally irrelevant.¹²² But under those that embrace original intent, understanding, and purpose, it would certainly not be. This conflict would also be relevant to the much larger community of constitutional interpreters who view original intent, understanding, etc. as important but not dispositive. The options available to them for handling this conflict would require significant care to unpack fully, but as with the conflicts described above, they would basically boil down to accommodation and sacrifice.

CONCLUSION

The enumeration principle has played a central role in recent academic debates and Supreme Court decisions. Those debates and decisions, however, have largely ignored the difficulties elaborated in this Article. Personally, I suspect that these difficulties are insur-

ratifiers).

121. See, e.g., Calabresi & Begley, *supra* note 118, at 1 (interpreting the original public meaning of the Equal Protection Clause to require marriage equality); Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1, 11, 15 (2011) (interpreting the original public meaning of the Equal Protection Clause to prohibit sex discrimination).

122. *But cf.* Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1118 (2003) (“To the extent that the secret drafting history displays how the text of the Constitution was originally understood and used by the hypothetical Ratifier, its use would not only be permissible, but indeed strongly encouraged and perhaps required under an original public meaning approach.”).

mountable, but I have not attempted to defend that conclusion here. The important point is that no rigorous attempt to implement the enumeration principle can avoid grappling with them. Given the centrality of that principle to contemporary discussions of federalism, this is a vitally important task for lawyers, judges, and scholars alike.

The difficulties of implementing the enumeration principle also have a broader theoretical significance. They highlight the intriguing and little-discussed possibility that the passage of time might place an entrenched constitution—and perhaps does place the U.S. Constitution—at war with itself. Again, I have not attempted to show that the Constitution's commitments to internal limits and effective national government actually conflict in this way, merely that the possibility cannot be dismissed out of hand. Both in the context of federalism and across the spectrum of American constitutional law, this possibility deserves more attention than it has received.

