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THE GOOD SOCIETY, COMMERCE, AND THE REHNQUIST COURT

*Michael C. Dorf**

INTRODUCTION

What is the relation between constitutional interpretation and the good society? Different approaches to constitutional interpretation give very different answers.

For textualists and originalists,¹ there is no necessary connection. For them, the goal of constitutional interpretation is to discover what the words of the Constitution mean or meant and enforce that meaning. The constitutional textualist or originalist may believe, like many lay Americans have believed for much of our history, that the “Miracle at Philadelphia,” as supplemented by the amendment process, has produced such a wondrous document that applying its meaning will typically lead to the best of all possible worlds.² The textualist or originalist, however, accepts that when the Constitution and his vision of the good society make competing demands, he owes his allegiance to the former.

Interpreters committed to a “moral reading” of the Constitution believe that at least some provisions of the Constitution—most notably the First Amendment, the Due Process Clauses, and the Equal Protection Clause—enact moral principles.³ For two reasons, those moral principles are not co-extensive with the ordering principles of the good society. First, the Constitution only provides a framework of government; it does not set forth a comprehensive moral view. Thus, a complete vision of the good society must supplement the Constitution’s moral principles with additional ones. Second, at least as espoused by its leading proponent, the moral

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1. *See, e.g.*, Antonin Scalia, *A Matter of Interpretation* 23-25, 138-40 (1997); Gary Lawson, *On Reading Recipes . . . And Constitutions*, 85 *Geo. L.J.* 1823, 1833-36 (1997).

2. For a discussion of popular attitudes toward the Constitution, see Michael Kammen, *A Machine That Would Go of Itself* (1986).

3. *See, e.g.*, Ronald Dworkin, *Freedom’s Law: The Moral Reading of the American Constitution* 7-15 (1996).

reading recognizes the constraint of precedent broadly construed.⁴ A moral reading must not only be morally attractive; it must also fit our constitutional tradition, and that tradition may depart in important respects from the ideal. Within these limits, however, a moral reading of the Constitution is likely to advance the reader's vision of the good society.

Process theorists of constitutional interpretation begin with the assumption that our system of government assigns to elected representatives the task of resolving most disputes about what the good society is and how to foster it. Process theorists interpret the Constitution as authorizing judges to unblock the democratic process, thereby directly facilitating democratic deliberation, but only indirectly fostering the good society.⁵

The list of constitutional theories and their relation to the good society could be expanded and refined, but, for my purposes, the foregoing sufficiently illustrates the diverse possibilities. By accepting the offer to present one of the principal papers for this panel, I appear to have taken upon myself the burden of setting out my own approach to constitutional interpretation, articulating its relation to and vision of the good society, and then urging that my theory, rather than one of its rivals, be adopted. I am unable to discharge that burden, however, because I do not believe that judges or other constitutional interpreters "choose a constitutional theory like a suit off the rack."⁶

My view of constitutional interpretation is pragmatic, but not in the same way as that term has been used in the recent debate between Richard Posner and Ronald Dworkin. I consider myself a

pragmatist in the sense that philosophers use that term—namely, the view that one understands institutions and practices by participating in them according to their own (corrigible) rules, rather than by pondering them from the outside. [Dworkin] offers an argument against a different sort of pragmatism—the view that [as Richard Fallon disparagingly characterizes it] "judges should simply decide cases in whatever way will produce the best future results." There is no necessary connection between this notion of legal pragmatism and philosophical pragmatism. The former is a form of instrumentalism, the latter a form of contextualism. One can find [the] arguments against pure adjudicatory instrumentalism persuasive, but still believe that the best way to make sense of constitutional practice is to participate in it, rather than theorize about it.⁷

4. *See id.* at 10-11 (discussing integrity).

5. *See, e.g.,* John Hart Ely, *Democracy and Distrust* 105-07 (1980).

6. Michael C. Dorf, *Create Your Own Constitutional Theory*, 87 Cal. L. Rev. 593, 595 (1999).

7. *Id.* at 595-96 (footnotes omitted) (quoting Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 Cal. L. Rev. 535, 564 (1999)).

Thus, to understand the relation between constitutional interpretation and the good society, I believe it is most useful to look at how cases are decided.

At the level of doctrine, much of constitutional interpretation concerns itself with questions of regulatory immunity. Various spheres of activity are protected against the political process to different degrees. Sorting permissible from impermissible interventions is not, at the level of official doctrine, specifically about visions of the good society. Indeed, Supreme Court Justices routinely disclaim any connection between their constitutional judgments and a vision of the good society.⁸ Nevertheless, it is to be expected that the boundaries of regulatory immunity will in substantial measure reflect the Justices' vision of the good society. Crudely, activities the Court values highly will, other things being equal, receive greater immunity than activities the Court values less.

This article explores the doctrinal relation between regulatory immunity and conceptions of the good society through two recent Supreme Court decisions. In *United States v. Morrison*,⁹ the Court held that the Commerce Clause did not authorize Congress to create a right of action against private actors for gender-motivated violence because such violence is not, in any obvious sense, "economic" activity.¹⁰ In *Boy Scouts of America v. Dale*,¹¹ the Court ruled that the application to the Boy Scouts of a state public accommodations law forbidding sexual orientation discrimination violated the organization's freedom of expressive association,¹² relying in part (I shall argue) on the fact that the Boy Scouts are a non-commercial association.

Although these two cases concern quite different doctrines, they both make regulability—whether by the federal government or at all—turn in part on participation in commercial or economic activity. (I shall use the terms commercial and economic interchangeably.) Non-commercial activities are more likely to enjoy immunity from federal regulation than are commercial activities, and non-commercial associations are more likely to enjoy immunity from federal, state and local public accommodations laws than their commercial counterparts.

8. See, e.g., *Boy Scouts of Am. v. Dale*, 120 S. Ct. 2446, 2479 (2000) (Souter, J., dissenting) ("The fact that we are cognizant of this laudable decline in stereotypical thinking on homosexuality should not, however, be taken to control the resolution of this case."); *Planned Parenthood v. Casey*, 505 U.S. 833, 850 (1992) ("Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision."); *Texas v. Johnson*, 491 U.S. 397, 420 (1989) (Kennedy, J., concurring) ("The hard fact is that sometimes we must make decisions we do not like.").

9. 120 S. Ct. 1740 (2000).

10. *Id.* at 1751.

11. 120 S. Ct. 2446 (2000).

12. *Id.* at 2457.

Ceteris paribus, there is greater freedom to engage in non-commercial than otherwise similar commercial activities. Yet that result seems at least a little bit ironic coming from a conservative Court that has reinvented property rights through the Takings Clause.¹³ What accounts for the fact that the Rehnquist Court seems to privilege non-commercial over commercial activity by partially immunizing the former from regulation?¹⁴

This article suggests that the Court's constitutional attitude toward commercial activity in these and some other cases rests on a seductive but mistaken interpretation of the overruling of *Lochner v. New York*.¹⁵ From Holmes' famous contention that "a constitution is not intended to embody a particular economic theory,"¹⁶ it follows that laws should not be invalidated simply because they depart from laissez-faire assumptions. Yet the Court has sometimes inferred more, as in *Boy Scouts* and *Morrison*, where it treats the purported absence of economic activity as an impediment to regulation, and in other cases discussed below, where it treats the presence of economic activity as a sufficient basis to overcome claims of regulatory immunity. Neither inference is warranted. The overruling of *Lochner* tells us that a claim of economic liberty is not a sufficient basis for regulatory immunity. It does not imply that the commercial or non-commercial nature of any activity in general ought to be the dispositive factor in constitutional interpretation.

How does the distinction between commercial and non-commercial activity affect the Court's vision of the good society? My hypothesis is that current doctrine partially reflects a distorting cognitive division of the fields of human endeavor into a domain of private, non-market activity and a domain of public, economic activity. The latter is seen as largely instrumental to the former: we work, earn, and buy to sustain ourselves for the activities that really matter—such as religious devotion, family, and friendship. Government regulation of public, economic activity is presumptively permissible both because that activity is public—connected to the well-being of others—and because it is economic, i.e., instrumental, and thus less constitutive of the self than private, non-economic activity.

Why has a conservative Court that values free enterprise sometimes fallen prey to this distorting cognitive map? Taking a legal realist perspective we might conclude that the Rehnquist Court uses the

13. See *Dolan v. City of Tigard*, 512 U.S. 374, 383-85 (1994); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029-31 (1992); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 831-32 (1987).

14. I do not rule out the possibility that nothing explains the pattern of decisions across divergent doctrines, but before reaching that conclusion, it is worth exploring other possibilities.

15. 198 U.S. 45 (1905).

16. *Id.* at 75 (Holmes, J., dissenting).

distinction purely instrumentally—i.e., simply as a handy tool to justify results it reaches on other, ideological, grounds. Nonetheless, the question remains why the Court finds this particular distinction to be an effective tool. By connecting the sometimes-invoked distinction between economic and non-economic activity to a larger constitutional and ultimately social vision, I hope to explain why the Court finds attractive a distinction that is problematic for the very Justices who espouse it.

Part I argues that the overall shape of constitutional rights doctrine in the modern era encourages the Court to attach exaggerated significance to the distinction between economic and non-economic activity. Since 1937, constitutional doctrine has quite properly accorded a strong presumption of constitutionality to “economic” legislation, but this has sometimes led the Justices and other constitutionalists to attribute to the presence or absence of economic factors greater weight than appropriate. Part I uses *Boy Scouts* and other rights cases as illustrations.

Part II argues that the same phenomenon may be at work in the recent cases narrowly construing the Commerce Clause. Although one might think that the Clause’s express invocation of “commerce” explains the recent decisions attaching cardinal significance to the commercial or non-commercial character of regulated activity, I show how more than fidelity to text is required to support these decisions.

Part III offers a longer-term perspective on the vision of the good society associated with the economic/non-economic distinction. This part asks whether anything other than a confused understanding of the meaning of the overruling of *Lochner* lies behind the Court’s vision. I tentatively propose a neo-Jeffersonian account—one that ties together the virtues of limited central government and a polity comprising yeoman farmers—as a possible justification for this vision. However, I ultimately reject this account as untrue to Jefferson and unworkable in modern times.

I conclude that the Court often employs the economic/non-economic distinction as a substitute for a public/private distinction. Yet the fit is quite poor. As de Tocqueville knew, “private” associations are very much enmeshed in, and supported by, commercial activity. Moreover, these same private associations serve fundamentally public functions. There may be constitutionally sound, indeed pressing, reasons to confer some form of regulatory immunity on various activities or associations because they are local or private. But in our inter-connected world those reasons will rarely be justified by the objective characteristics of the activities or associations. Seen this way, the attempt to separate the economic from the non-economic is a flight from the sorts of value judgments necessary to construct a viable domain of regulatory immunity.

I. THE POST-1937 LEGACY

A first principle of post-1937 judicial review holds that “economic and social legislation” is presumptively valid.¹⁷ However, even as the Justices continue to invoke this axiom,¹⁸ there is considerable confusion about precisely what is meant by economic and social legislation. Laws mandating segregated schools or forbidding contraceptive use quite obviously address *social* relations; yet, they would hardly be presumed valid. The formal doctrinal solution is straightforward: economic and social legislation is only presumed valid absent the employment of a suspect classification or the infringement of a fundamental right. But this formulation provides no help in identifying what constitutes a suspect classification or, even more problematically, a fundamental right.

The Court’s response to this difficulty takes a characteristic form. Because most laws calling for heightened scrutiny have been susceptible of characterization as social legislation, the Justices have tended to treat the residual unprotected category as simply economic legislation. The distinction dates at least as far back as the controversy over President Roosevelt’s Court-packing plan.¹⁹ Even as critics denounced judicial overreaching in economic matters, they sought to preserve the Court’s counter-majoritarian function with respect to (other) civil rights.²⁰ The Court itself followed suit. Justice Douglas’ dissent in *Poe v. Ullman*,²¹ perhaps the font of modern unenumerated rights doctrine, is typical. He wrote:

The error of the old Court, as I see it, was not in entertaining inquiries concerning the constitutionality of social legislation but in applying the standards that it did. Social legislation dealing with business and economic matters touches no particularized prohibition of the Constitution, unless it be the provision of the Fifth Amendment that private property should not be taken for public use without just compensation. If it is free of the latter guarantee, it has a wide scope for application.²²

It is easy to understand why, taking *Lochner* and its ilk as an anti-paradigm, Justice Douglas and others would treat the regulation of run-of-the-mill economic activity as falling within the presumption of constitutionality. Even if the legislative classifications in such classic

17. See, e.g., *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 316 (1993); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 442 (1985); *Village of Belle Terre v. Boraas*, 416 U.S. 1, 7-8 (1974).

18. See, e.g., *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 701 (1999) (Breyer, J., dissenting).

19. See Barry Friedman, *The History of the Counter-majoritarian Difficulty, Part Four: Law’s Politics*, 148 U. Pa. L. Rev. 971, 1040-44 (2000).

20. See *id.* at 1040-43.

21. 367 U.S. 497 (1961).

22. *Id.* at 517-18 (Douglas, J., dissenting) (citation omitted).

post-1937 cases as *Williamson v. Lee Optical Co.*²³—advantaging optometrists and ophthalmologists at the expense of opticians²⁴—or *Ferguson v. Skrupa*²⁵—advantaging lawyers against other debt adjusters²⁶—seem arbitrary or worse,²⁷ some arbitrariness is understood as an acceptable price to pay to avoid judicial overreaching of the *Lochner* sort. Yet, as I shall shortly illustrate, the Court has sometimes gone further, treating the economic or commercial character of regulated activity as a reason to strip that activity of protection it might otherwise enjoy.

These further steps hardly follow from the overruling of *Lochner*, however, because activities with a substantial commercial component may be deserving of constitutional protection nonetheless. To give just a few examples: marriage is in substantial measure an economic relationship; religious institutions engage in a wide variety of not-for-profit, but nonetheless clearly economic activities, such as building houses of worship, running schools, and raising money for such activities; doctors performing abortions are typically compensated for doing so; and news organizations peddle their wares not only in the marketplace of ideas but in the actual marketplace as well.

Although the mixed commercial character of the regulated activity in the foregoing examples has not blinded the Court to the appropriateness of constitutional protection, in other areas the Court has sometimes fallen prey to the tendency to think that commercialization entails lack of protection. A recent example of this phenomenon is *Minnesota v. Carter*.²⁸ In that case, the two respondents claimed that a police officer violated their Fourth Amendment rights when he peered through a closed blind of a third person's apartment and observed the three of them bagging cocaine.²⁹ The Court held that the respondents lacked the requisite "expectation of privacy" to raise a Fourth Amendment objection because they "were obviously not overnight guests, but were essentially present for a business transaction and were only in the home a matter of hours. . . . While the apartment was a dwelling place for [the lessee], it was for these respondents simply a place to do business."³⁰

It is not entirely clear that the *Carter* Court would have reached a different result had the respondents been doing something other than business; the terse opinion lists two additional factors that contribute

23. 348 U.S. 483 (1955).

24. *Id.* at 488-89.

25. 372 U.S. 726 (1963).

26. *Id.* at 732.

27. See Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 Colum. L. Rev. 1689, 1712-14 (1984).

28. 525 U.S. 83 (1998).

29. *Id.* at 85.

30. *Id.* at 90.

to its decision.³¹ However, the business purpose is the factor that receives the most emphasis. Is that sensible? If, instead of bagging cocaine, the respondents were snorting it, would they then have had a reasonable expectation of privacy? Why should any of this matter given that the police could not know, *ex ante*, the nature of the activity inside the apartment? The Court's Fourth Amendment doctrine sometimes sensibly accords noticeably commercial activity less protection than other forms of activity;³² equally sensibly, the doctrine does not invariably strip workplace activity of all Fourth Amendment protection by virtue of its commercial situs.³³ In *Carter*, however, the Court accords the commercial character of the activity in question unwarranted significance. Looking for a justification to deny what the Justices no doubt regarded as a constitutional windfall to drug traffickers, they appear to have mistakenly concluded that, notwithstanding the Fourth Amendment, this was a case of mere "business and economic matters touch[ing] no particularized prohibition of the Constitution."³⁴

The *Boy Scouts* case is a particularly interesting example of the connection the Court draws between commercial activity and regulability. In two pre-*Boy Scouts* cases, the Court rejected claims of associational rights to resist anti-discrimination statutes where the associations in question—the Rotary and the Jaycees, respectively—provided their members with opportunities to make business contacts.³⁵ In a third pre-*Boy Scouts* case, the Court rejected a facial challenge to an anti-discrimination ordinance that was justified on the same basis.³⁶ Giving expression to an acute form of the distinction we have been considering, Justice O'Connor wrote in a separate concurrence in one of those cases: "[a]n association must choose its market. Once it enters the marketplace of commerce in any substantial degree it loses the complete control over its membership that it would otherwise enjoy if it confined its affairs to the marketplace of ideas."³⁷

31. See *id.* at 91 ("The purely commercial nature of the transaction engaged in here, the relatively short period of time on the premises, and the lack of any previous connection between respondents and the householder, all lead us to conclude that respondents' situation is closer to that of one simply permitted on the premises [than to that of an overnight guest].").

32. See *New York v. Burger*, 482 U.S. 691, 700 (1987) ("An expectation of privacy in commercial premises . . . is different from, and indeed less than, a similar expectation in an individual's home.").

33. See *O'Connor v. Ortega*, 480 U.S. 709, 715-16 (1987) (recognizing workers' reasonable expectation of privacy in their personal belongings).

34. *Poe v. Ullman*, 367 U.S. 497, 517 (1961) (Douglas, J., dissenting).

35. See *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987); *Roberts v. United States Jaycees*, 468 U.S. 609, 626-27 (1984).

36. See *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 18 (1988).

37. *Roberts*, 468 U.S. at 636 (O'Connor, J., concurring in part and concurring in the judgment); see also *N.Y. State Club Ass'n*, 487 U.S. at 20 (O'Connor, J., concurring) ("Predominately commercial organizations are not entitled to claim a

The *Boy Scouts* Court might have placed dispositive importance on the fact that the Boy Scouts—like the parade organizers in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*,³⁸ but unlike the Jaycees or the Rotary—had avoided sullyng their hands with commerce.³⁹ To its credit, the *Boy Scouts* Court did not rely exclusively on the distinction between commercial and non-commercial activities. Nonetheless, the distinction played a distressingly substantial role in the decision. In setting forth the history of anti-discrimination laws, Chief Justice Rehnquist, in his opinion for the Court, noted that the conflict between anti-discrimination law and associational rights was occasioned by the expansion of the statutory “definitions of ‘public accommodation’ . . . from clearly commercial entities, such as restaurants, bars, and hotels, to membership organizations such as the Boy Scouts.”⁴⁰ Note the dichotomy: an entity is *either* commercial *or* a membership organization. In this regard, *Boy Scouts* is of a piece with Justice O’Connor’s earlier claim that an association ceases to be protected as such by engaging in commercial activity. Here, because the Boy Scouts had not engaged in commercial activity, they retained their associational rights.⁴¹

The *Boy Scouts* case also contains a classic statement of the post-1937 understanding of the primary role of economic activity in constitutional law. Quoting Justice Brandeis, Justice Stevens in his *Boy Scouts* dissent criticized the Court for interfering with New

First Amendment associational or expressive right to be free from the anti-discrimination provisions triggered by the law.”). Another expressive association case, *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986), also drew a sharp distinction between commercial and non-commercial entities. *See id.* at 256-63. There the Court argued that the compelling interest that justifies forbidding corporations from using general treasury funds for political activities—an interest in preventing a company’s fortunes in the market from exerting an excessive influence in the unrelated marketplace of ideas—does not justify applying the same fund segregation requirement to an association that raises all of its funds from private contributions by people who support its expressive aims. *See id.* That distinction, however, may be sensible; at least it is substantially different from a general inclination to afford less autonomy to organizations engaged in commercial activities.

38. 515 U.S. 557 (1995).

39. *See id.* at 579.

40. *Boy Scouts of Am. v. Dale*, 120 S. Ct. 2446, 2456 (2000).

41. Justice O’Connor appeared to take this position during the oral argument. She asked Dale’s lawyer:

Do you think there’s a difference at all in application of such a policy to commercial entities and groups, as opposed to private membership groups? Does that weigh in the balance at all? I mean, I can well understand how a public accommodation law should apply to commercial groups, or even to groups such as Jaycees, which essentially depend on a commercial nexus for its membership. Should it apply, do you think, or should the weight we give it in the context of a First Amendment claim be the same for a purely private organization?

Boy Scouts, No. 99-699, 2000 U.S. TRANS LEXIS 44, at *28-29 (Apr. 26, 2000).

Jersey's ability to experiment with "things social."⁴² In response, the majority upbraided Justice Stevens for using this archaic formulation. The *Boy Scouts* majority, true to the modern view, characterized Brandeis as "a champion of state experimentation in the economic realm."⁴³ "But," the Court continued, "Justice Brandeis was never a champion of state experimentation in the suppression of free speech."⁴⁴ In other words, "things social" includes too much constitutionally privileged activity to count as a fair description of the zone of legitimate regulatory experimentation.

To be sure, the Court does not always equate the non-commercial character of activity with non-regulability, nor, as I acknowledged in the Fourth Amendment discussion above, does it always withdraw constitutional protection because of the presence of commercial features.⁴⁵ Moreover, in some doctrinal areas, such as freedom of speech, the doctrine appears to be moving toward taking commercial features into account with some attention to nuance.⁴⁶ These are healthy trends, and viewed within this larger context, the fixation on commercial activity in recent cases like *Carter* and (to a lesser degree) *Boy Scouts* might be taken as aberrational, but I fear that they are not. An increasingly formalist Court is looking for bright lines, and the commercial/non-commercial distinction fits so well with the post-1937 era zeitgeist as to exert a powerful gravitational pull.

Indeed, the impulse to denigrate activities with a commercial character is so ingrained that it has become a common movè among constitutional litigators. Consider *Bowers v. Hardwick*.⁴⁷ Challenging the application of Georgia's sodomy prohibition to a gay couple, Hardwick's extremely accomplished lawyers—Laurence H. Tribe, Kathleen M. Sullivan, and Brian Koukoutchos—felt obliged to supply a limiting principle to distinguish forms of sexuality to which the

42. *Boy Scouts*, 120 S. Ct. at 2459 (Stevens, J., dissenting) (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)). The full quotation from Justice Brandeis, also cited by Justice Stevens, see *Boy Scouts*, 120 S. Ct. at 2459 (Stevens, J., dissenting), refers to "experimentation in things social and economic." *New State Ice Co.*, 285 U.S. at 311 (Brandeis, J., dissenting).

43. *Boy Scouts*, 120 S. Ct. at 2457.

44. *Id.*

45. See *supra* notes 28-34 and accompanying text.

46. See, e.g., *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 787-95 (1988) (invalidating a law regulating fundraising fees and requiring that paid fundraisers be licensed and that they disclose to potential donors the percentage of funds that go to pay fundraisers). One can take issue with the *Riley* Court's conclusion that the disclosure provision is not narrowly tailored to advance a compelling state interest. See *id.* at 798-801. I cite the case because the Court does not allow the presence of some commercial features to relegate the speech to a lesser status. See *id.* at 796 ("Our lodestars in deciding what level of scrutiny to apply to a compelled statement must be the nature of the speech taken as a whole and the effect of the compelled statement thereon.").

47. 478 U.S. 186 (1986).

Justices would be unwilling to afford constitutional protection.⁴⁸ Thus, they characterized prostitution as a mere “commercial exchange[.]”⁴⁹ Then, sensing that the Justices would also fear that a victory for *Hardwick* might entail a right to same-sex marriage, the brief authors sought to allay these fears by characterizing marriage in commercial terms: “Marriage,” they contended, “unlike other manifestations of intimate association, is a contract controlled by the state, and, like ‘any other institution,’ it is ‘subject to the control of the legislature.’”⁵⁰

This last move was an uncharacteristic blunder. Although modern substantive due process doctrine allows reasonable regulation of the incidents of marriage,⁵¹ restrictions or prohibitions on the core right to marry are subject to exacting judicial scrutiny.⁵² But my point is not to criticize *Hardwick*’s lawyers. Rather, I wish to illustrate the seductiveness of the economic/non-economic distinction in the post-1937 constitutional order. The next part argues that this same seduction may be at work in the recent Commerce Clause decisions.

II. ECONOMIC AND NON-ECONOMIC ACTIVITY IN COMMERCE CLAUSE DOCTRINE

I begin with a necessary concession: the principal significance of *United States v. Lopez*⁵³ and *United States v. Morrison*⁵⁴—respectively invalidating the Gun Free School Zones Act and portions of the Violence Against Women Act as beyond the scope of Congress’ power to regulate interstate commerce⁵⁵—concerns federalism. In most respects, these cases are part of the Rehnquist Court’s larger project of restricting federal power in favor of the States. To be sure, *Lopez* and *Morrison* restrict the ends Congress may pursue, while most of the other federalism doctrines place limits on the means by which Congress may act: Congress cannot “commandeer” state legislative or executive officials;⁵⁶ Congress cannot authorize suits

48. Brief for Respondent at text accompanying notes 34-38, *Bowers* (No. 85-140).

49. *Id.*

50. *Id.* at text accompanying note 44 (quoting *Maynard v. Hill*, 125 U.S. 190, 205 (1888)).

51. See *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978) (“[W]e do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny. To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed.”).

52. See *id.* at 384-87; *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (“The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”).

53. 514 U.S. 549 (1995).

54. 120 S. Ct. 1740 (2000).

55. See *Lopez*, 514 U.S. at 567; *Morrison*, 120 S. Ct. at 1751.

56. See *Printz v. United States*, 521 U.S. 898, 935 (1997); *New York v. United States*, 505 U.S. 144, 161-69 (1992).

against the States for retrospective relief;⁵⁷ and Congress cannot take a variety of measures absent an exceptionally clear statement.⁵⁸ Nonetheless, the overall philosophy of the cases is clearly the same: they reflect suspicion of federal power and a heroic view of the States that borders on Anti-Federalism.⁵⁹

Although *Lopez* and *Morrison* are undoubtedly federalism cases first, here I want to discuss a different feature of the cases: the significance they accord to the elusive distinction between commercial and non-commercial activity. I begin with *Lopez*. Although the case could be understood as turning on the adequacy of congressional findings, or on how substantial an activity's effects on interstate commerce must be to justify federal regulation, neither of these factors makes much sense of the decision. The *Lopez* Court expressly denied that such findings would be dispositive,⁶⁰ and made no attempt to dispute the obvious point documented at length by Justice Breyer in dissent—that the presence of guns near schools has a substantial impact on students' abilities to learn, which in turn has a substantial effect on their ability, upon entering the workforce, to contribute to the national economy.⁶¹

Despite all of the *Sturm und Drang*, the *Lopez* majority's point was a remarkably simple analytic and formal one: if the activity that

57. See *Alden v. Maine*, 527 U.S. 706, 754 (1999); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 672-75 (1999); *Seminole Tribe v. Florida*, 517 U.S. 44, 54-73 (1996). There is an exception for acts passed pursuant to Congress' power to enforce the Fourteenth Amendment, but the exception is narrow. See *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 80-86 (2000) (applying the "congruence and proportionality" test first announced in *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997)); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 639-47 (1999) (same).

58. For example, in *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989), the Court declined to read "person" as used in 42 U.S.C. § 1983 to include States. See *id.* at 64. Citing cases involving Eleventh Amendment immunity, federal preemption, conditional spending, and statutory construction, the Court announced a general-purpose plain statement rule: "if Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" *Id.* at 65 (citing *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) (Eleventh Amendment); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984) (Eleventh Amendment); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (preemption); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 15 (1981) (conditional spending); *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (conditional spending); *United States v. Bass*, 404 U.S. 336, 349 (1971) (statutory construction)).

59. See Michael C. Dorf, *No Federalists Here: Anti-Federalism and Nationalism on the Rehnquist Court*, 31 Rutgers L.J. 741, 741 (2000) (characterizing contemporary concerns for state sovereignty as "Anti-Federalism") [hereinafter Dorf, *No Federalists Here*]; Michael C. Dorf, *Instrumental and Non-Instrumental Federalism*, 28 Rutgers L.J. 825, 825-26 (1997) (same).

60. *Lopez*, 514 U.S. at 562-63.

61. *Id.* at 618-25 (Breyer, J., dissenting); see also Barry Friedman, *Legislative Findings and Judicial Signals: A Positive Political Reading of United States v. Lopez*, 46 Case W. Res. L. Rev. 757, 771-76 (1996).

Congress chooses to regulate is not itself commercial, it does not matter whether, in the aggregate, non-commercial activities of that sort have a substantial effect on interstate commerce.⁶² Absent a jurisdictional nexus in the statute,⁶³ non-commercial activity is beyond Congress' power to regulate under the Commerce Clause.⁶⁴ If there was any doubt about this point immediately after *Lopez*, Morrison resolved it.⁶⁵ "[A] fair reading of *Lopez*," Chief Justice Rehnquist wrote for the Court, "shows that the noneconomic, criminal nature of the conduct at issue was central to our decision in that case."⁶⁶ After quoting no fewer than eight passages from the *Lopez* majority and concurring opinions to that effect, the Morrison Court summarized prior case law stating that, "in those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor."⁶⁷ In case we missed the point, the Morrison Court repeated it six paragraphs later,⁶⁸ after observing, "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity."⁶⁹

Well, you ask, what's wrong with insisting on economic activity as a predicate to regulation? Isn't it perfectly natural that in deciding whether some activity falls within Congress' authority to regulate interstate commerce, the Court should require at a bare minimum that the regulated activity actually be commercial (or as the Court puts it, economic)?⁷⁰ If one were to criticize any of the recent federalism decisions, shouldn't one begin with the prohibition on commandeering and the expansion of state sovereign immunity? These doctrines have no discernible roots in the Constitution's text, and the latter actually seems to contradict the negative pregnant of the Eleventh Amendment. By contrast with these made-up federalism doctrines, the Court's effort to limit the Commerce Clause to commercial activity should satisfy even the most punctilious textualist, should it not?

62. See *Lopez*, 514 U.S. at 561.

63. See *infra* text accompanying notes 72-78.

64. In summarizing the holding at the very beginning of the opinion, Chief Justice Rehnquist wrote: "The Act neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce." *Lopez*, 514 U.S. at 551.

65. *United States v. Morrison*, 120 S. Ct. 1740, 1750 (2000).

66. *Id.* (citing *Lopez*, 514 U.S. at 551).

67. *Id.* (citing *Lopez*, 514 U.S. at 559-60).

68. See *id.* at 1751 ("[T]hus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.").

69. *Id.*

70. See *id.* at 1766 (Souter, J., dissenting) ("Obviously, it would not be inconsistent with the text of the Commerce Clause itself to declare 'noncommercial' primary activity beyond or presumptively beyond the scope of the commerce power.").

We can give affirmative answers to the foregoing rhetorical questions⁷¹ yet still puzzle over the Court's recent insistence that the regulated activity be "economic." For one thing, the Court does not in fact consistently require that regulated activity be economic. If a statute contains a "jurisdictional nexus"—a requirement that the government prove in each particular case that the object of regulation has "an explicit connection with or effect on interstate commerce"⁷²—the statute will almost certainly be upheld, regardless of whether the object of regulation is economic activity.⁷³ A dramatic example is the recent case of *United States v. Kammersell*,⁷⁴ in which the Court of Appeals for the Tenth Circuit upheld a conviction for making a threatening communication in interstate commerce in violation of 18 U.S.C. § 875(c). The defendant had sent a bomb threat to his girlfriend via an Internet instant message. Even though the sender and the recipient were both in Utah, the court deemed the jurisdictional nexus satisfied because the message was first routed to the America OnLine server in Virginia, and then back to Utah.⁷⁵ To be sure, one might think the Tenth Circuit was mistaken in this judgment, but note that even in completely conventional, uncontroversial cases, such as the making of a threat via an interstate telephone call,⁷⁶ or interstate stalking in violation of 18 U.S.C. § 2261A,⁷⁷ there is no requirement that the regulated conduct itself be economic activity. Indeed, one could as easily say of a great many federal criminal statutes containing a jurisdictional nexus what the Court says in *Lopez* of the Gun Free School Zones Act: it "is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms."⁷⁸ In other words, the *Lopez/Morrison* requirement that the regulated activity be economic only applies if there is no

71. Indeed, as I have argued elsewhere, other doctrines are less warranted in constitutional text and history than the Court's efforts to limit the scope of the Commerce Clause. See Dorf, *No Federalists Here*, *supra* note 59, at 745.

72. *Lopez*, 514 U.S. at 562.

73. The Court all but says as much in *Morrison*. *Morrison*, 120 S. Ct. at 1752 n.5 (approvingly noting that the courts of appeals have uniformly upheld a different provision of the Violence Against Women Act, section 40221(a), codified at 18 U.S.C. § 2261(a)(1), which does contain a jurisdictional nexus).

74. 196 F.3d 1137 (10th Cir. 1999), *cert. denied*, 120 S. Ct. 2664 (2000).

75. See *id.* at 1138.

76. See, e.g., *United States v. Cox*, 957 F.2d 264, 265 (6th Cir. 1992) (affirming a conviction of "knowingly transmitting in interstate commerce" a threatening communication); *United States v. Lampley*, 573 F.2d 783, 785 (3d Cir. 1978) (affirming a conviction for making "threatening interstate telephone call[s]").

77. See, e.g., *United States v. Young*, No. 98-4742, 1999 U.S. App. LEXIS 32721, at *4 (4th Cir. Dec. 16, 1999) (affirming a conviction for interstate stalking), *cert. denied*, 120 S. Ct. 1704 (2000); *United States v. Page*, 167 F.3d 325, 326 (6th Cir. 1999) (per curiam) (en banc) (affirming convictions for "interstate domestic violence and interstate violation of protection orders"), *cert. denied*, 528 U.S. 1003 (1999).

78. *United States v. Lopez*, 514 U.S. 549, 561 (1995).

jurisdictional nexus to interstate activity of any kind; there is no requirement that the particular interstate activity be economic. The decision to give determinative weight to the economic or commercial character of the regulated activity absent a jurisdictional nexus cannot, therefore, be understood as an inevitable consequence of constitutional text.

The real reason for the Court's requirement that the regulated activity be economic in cases like *Lopez* and *Morrison* has little to do with constitutional text as such. It is instead the Court's fear that without some such limiting principle, the Commerce Clause would grant Congress a general police power, thus entirely defeating the notion that the Constitution creates a government of enumerated powers.⁷⁹

That is an understandable worry, but it does not explain why the Court settles on this limiting principle. If one wants to take the text as a guide, why not a limiting principle that, as in the jurisdictional nexus cases, focuses on the interstate character of the regulated activity rather than its commercial character? In circumscribing the limits of national power, surely the interstate character of activity is a more apt criterion than its commercial character. It is, after all, precisely the point of a national government to address matters that affect multiple states. Whether the regulated activity at issue is commercial is less fundamental to the purposes of a federal union than whether it is interstate.

The problem, of course, is that the Court tried this approach during *Lochner's* heyday. While the Court was reading property and contract rights broadly, it was also reading the Commerce Clause narrowly. In particular, from the 1890s through the mid-1930s, "Commerce . . . among the several States" was understood by the Court to connote trade or movement as opposed to production.⁸⁰ The Court distinguished between direct and indirect connections to

79. See *id.* at 564 ("Although Justice Breyer argues that acceptance of the Government's rationales would not authorize a general federal police power, he is unable to identify any activity that the States may regulate but Congress may not."). Following Herbert Wechsler, Jesse Choper, and now Larry Kramer, one might think that abandoning the quest for a limiting principle would not defeat the enumerated powers strategy, but merely commit it to the political safeguards of federalism. See Jesse Choper, *Judicial Review and the National Political Process* 171-259 (1980); Larry Kramer, *Putting the Politics Back Into the Political Safeguards of Federalism*, 100 *Colum. L. Rev.* 215 (2000); Herbert Wechsler, *The Political Safeguards of Federalism*, in *Principles, Politics, and Fundamental Law* 49-82 (1961). However, the members of the *Lopez/Morrison* majority are unlikely to accept that argument. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 579-80 (1985) (Rehnquist, J., dissenting); *id.* at 580-89 (O'Connor, J., dissenting).

80. *Carter v. Carter Coal Co.*, 298 U.S. 238, 304 (1936) ("Mining brings the subject matter of commerce into existence. Commerce disposes of it."); *United States v. E.C. Knight Co.*, 156 U.S. 1, 12 (1895) ("Commerce succeeds to manufacture, and is not a part of it.").

interstate commerce, but the distinction proved unworkable given the realities of an integrated national economy.⁸¹

The same may prove true for the economic/non-economic distinction.⁸² As Justice Souter wrote in his *Lopez* dissent, “[t]he distinction between what is patently commercial and what is not looks much like the old distinction between what directly affects commerce and what touches it only indirectly.”⁸³ Literally any activity, if compensated, is economic, and even absent actual compensation, one can always impute it. Nor does it take much imagination to see the difficulties with the Court’s line. For example, at the end of the *Lopez* majority’s parade of horrors comes the specter of a national curriculum,⁸⁴ but in the age of the information economy, surely education is quite closely linked to commerce. If the Constitution prohibits Congress from prescribing a national curriculum, that must be because, in the Justices’ view, education is a matter of almost uniquely state and local concern,⁸⁵ notwithstanding its patently commercial character.

Looking for some limiting principle, the *Lopez/Morrison* Court understandably gravitated toward the textually plausible distinction between commercial and non-commercial activity. Justice Souter stated in his *Morrison* dissent that the majority deployed the distinction because it “is useful in serving a conception of federalism.”⁸⁶ The distinction is not merely useful, however; it seems natural. Because a generation of rights cases had accustomed the Court to thinking the commercial character of an activity was a legitimate basis for subjecting that activity to regulation of any kind, the *Lopez/Morrison* majority was comfortable using the economic/non-economic distinction to sort those activities that could be subject to federal regulation from those that were left to the states.

81. *Lopez*, 514 U.S. at 554-57.

82. See *United States v. Morrison*, 120 S. Ct. 1740, 1774-75 (2000) (Breyer, J., dissenting).

83. *Lopez*, 514 U.S. at 608 (Souter, J., dissenting).

84. See *id.* at 565.

85. See *Milliken v. Bradley*, 433 U.S. 267, 280-81 (1977) (“[T]he federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution. In *Brown II* the Court squarely held that “[s]chool authorities have the *primary* responsibility for elucidating, assessing, and solving these problems. . . .” (alteration in original) (citing *Brown v. Bd. of Educ.*, 349 U.S. 294, 299 (1955)); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42 (1973) (“[T]his case . . . involves the most persistent and difficult questions of educational policy, another area in which this Court’s lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels.”).

86. *Morrison*, 120 S. Ct. at 1768 (Souter, J., dissenting).

III. THE ROOTS OF THE COMMERCIAL/NON-COMMERCIAL DISTINCTION

Why would the Justices and other constitutionalists want to associate commercial activity with regulability and non-commercial activity with regulatory immunity? I have argued thus far that *Lochner* serves as an anti-paradigm.⁸⁷ Along with *Dred Scott v. Sandford*⁸⁸ and *Plessy v. Ferguson*,⁸⁹ *Lochner* is taken as the very antithesis of correct constitutional decision-making.⁹⁰ But why exactly was *Lochner* wrongly decided?

On one view, *Lochner* was wrong because it was activist. This is a controversial interpretation, however, because, in one category of cases or another, all of the Justices are activist, in the sense of willing to overrule democratically chosen outcomes even absent an exceptionally clear constitutional basis for doing so.⁹¹ Crudely, the liberals are activists (or at least unwilling to roll back decisions of Warren Court activists) in cases involving rights claims by individuals,⁹² whereas the conservatives are activists in cases involving limits on federal power for the benefit of the States.⁹³ No doubt each side believes that it can distinguish between good and bad judicial activism,⁹⁴ but this merely highlights the fact that no one takes the overruling of *Lochner* to stand for a repudiation of judicial activism in

87. See *supra* Part I.

88. 60 U.S. 393 (1856).

89. 163 U.S. 537 (1896).

90. *Bush v. Gore*, 121 S. Ct. 525 (2000), may soon be added to this infamous list.

91. There are numerous definitions of judicial activism. See, e.g., Bradley C. Canon, *A Framework for the Analysis of Judicial Activism*, in *Supreme Court Activism and Restraint* 385 (Steven C. Halpern & Charles M. Lamb eds., 1982). I am using the term here to mean any view of judicial review that leads to substantially more frequent counter-majoritarian decision-making than one would expect under an approach like the one described in James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 129 (1893).

92. See, e.g., *Stenberg v. Carhart*, 120 S. Ct. 2597, 2604-20 (2000); *Romer v. Evans*, 517 U.S. 620, 623-36 (1996). I emphasize that this is a crude categorization. Neither Justice O'Connor, who joins the majority in both of these cases, nor Justice Kennedy, the author of *Romer*, is a liberal, and the four relatively liberal Justices are all to the right of the late Justices Brennan and Marshall.

93. See, e.g., *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 66-67 (2000); *Alden v. Maine*, 527 U.S. 706, 712 (1999); *Seminole Tribe v. Florida*, 517 U.S. 44, 47 (1996). Note, especially, Justice Souter's howls of protest and invocation of *Lochner* in *Alden*, 527 U.S. at 814 (Souter, J., dissenting) ("The resemblance of today's state sovereign immunity to the *Lochner* era's industrial due process is striking. The Court began this century by imputing immutable constitutional status to a conception of economic self-reliance that was never true to industrial life and grew insistently fictional with the years, and the Court has chosen to close the century by conferring like status on a conception of state sovereign immunity that is true neither to history nor to the structure of the Constitution."), and *Seminole Tribe*, 517 U.S. at 166 (Souter, J., dissenting) ("The majority today, indeed, seems to be going *Lochner* one better.").

94. See *Brzonkala v. Va. Polytechnic Inst. & State Univ.*, 169 F.3d 820, 889-96 (4th Cir. 1999) (Wilkinson, C.J., concurring), *aff'd sub nom.*, *United States v. Morrison*, 120 S. Ct. 1740 (2000).

all forms. There is consensus, however, that, whatever other significance may be attributed to the overruling of *Lochner*, at a minimum it disestablishes laissez-faire as a constitutional principle. It is this association of *Lochner* with laissez-faire, I have argued thus far, that tempts the Justices to associate commercial activity with regulability and non-commercial activity with regulatory immunity.

There may also be older connections between these domains. To oversimplify enormously, American history can be understood as a grand struggle between Alexander Hamilton's and Thomas Jefferson's conceptions of the good society and the role of government in promoting it. Hamilton envisioned a commercial empire in which an activist federal government would foster economic activity while eliminating regional, state, and local barriers to commerce.⁹⁵ On one account, Jefferson disdained large-scale commerce and its effects on character; he envisioned a nation of self-sufficient yeoman farmers participating in public life to deliberate about the common good, but he was generally skeptical of all exercises of government power.⁹⁶

95. Statements to this effect abound in Hamilton's public papers. See, e.g., The Federalist No. 11 (Alexander Hamilton); The Federalist No. 36, at 223 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("I acknowledge my aversion to every project that is calculated to disarm the government of a single weapon, which in any possible contingency might be usefully employed for the general defense and security."); Alexander Hamilton, *The Continentalist*, No. 5. N.Y. Packet (Apr. 18, 1782), reprinted in Alexander Hamilton and the Founding of the Nation 358 (Richard B. Morris ed., 1957) [hereinafter *Founding*] ("Commerce, like other things, has its fixed principles, according to which it must be regulated. If these are understood and observed, it will be promoted by the attention of government; if unknown, or violated, it will be injured—but it is the same with every other part of administration."); Alexander Hamilton, *Original Report on the Subject of Manufactures* (Dec. 5, 1791), reprinted in *Founding, supra*, at 361 ("[Agriculture's] real interests . . . will be advanced, rather than injured, by the due encouragement of manufactures . . . [T]he expediency of such encouragement, in a general view, may be shown to be recommended by the most cogent and persuasive motives of national policy . . ."); see also Lance Banning, *The Sacred Fire of Liberty: James Madison and the Founding of the Federal Republic* 29-39, 208-14, 309-16 (1995) (discussing Hamilton's views during the Founding period); Herbert Croly, *The Promise of American Life* 38-51, 265-88 (Archon Books 1963) (1909) (recognizing the Hamiltonian school at the founding and tracing its developments throughout the "second republic"); James Landis, *The Administrative Process* (7th prtg. 1966) (providing the standard view of Hamilton's nationalism during the first half of the twentieth century); Richard B. Morris, *Alexander Hamilton After Two Centuries*, in *Founding, supra*, at ix ("Hamilton was the friend of business enterprise, but he believed that business should be regulated in the interest of the general welfare, that competition should be fostered and monopoly discouraged. He did not subscribe to the view that business was not the business of government."); J.G.A. Pocock, *The Machiavellian Moment* 529-30 (1975) ("Hamilton saw America as predestined to become a commercial and military empire . . . The whole argument is based on the ascendancy of commerce over frugality.") (citing Gerald Stourzh, *Alexander Hamilton and the Idea of Republican Government*, chs. IV & V (1970)).

96. See, e.g., Thomas Jefferson, *Notes on the State of Virginia: Query XIX: Manufactures* (1782), reprinted in *Thomas Jefferson: Selected Writings* 52 (Harvey C. Mansfield, Jr. ed., 1979) [hereinafter *Mansfield*] ("Those who labour in the earth are

Still oversimplifying, we might follow those historians who claim that Jacksonians inherited the Jeffersonian tradition and passed it on to Populists, who in turn were succeeded by Progressives, finally paving the way for the New Deal.⁹⁷ True, along the path from Jefferson to (both) Roosevelt(s) there were substantial ideological reversals—most significantly in attitudes towards activist government. Nonetheless, there is continuity also. Fear of concentrated economic power—and a concomitant preference for self-reliance over dependence on the market—are recurrent leitmotifs in this tradition.⁹⁸

Do the current Justices endorse the foregoing narrative? Maybe, maybe not, but by viewing the Court's attitudes towards commerce as neo-Jeffersonian we can closely connect those attitudes to the resurgent interest in state sovereignty. In important respects, the current debate over the scope of the Commerce Clause replays the Founding Era debate between Jefferson and Hamilton. To be sure, with the possible exception of Justice Thomas,⁹⁹ none of the current Justices takes as restrictive a view of commerce as Jefferson did,¹⁰⁰ but

the chosen people of God, if ever he had a chosen people, whose breasts he has made his peculiar deposit for substantial and genuine virtue."); Thomas Jefferson, First Inaugural Address (1801), *reprinted in* Mansfield, *supra*, at 65 ("[W]hat . . . is necessary to make us a happy and prosperous people? . . . [A] wise and frugal government, which shall restrain men from injuring one another, which shall leave them otherwise free to regulate their own pursuits of industry and improvement, and shall not take from the mouth of labor the bread it has earned. This is the sum of good government . . ."); *see also* Kenneth Dolbeare, *American Political Thought* 159 (4th ed. 1998) ("Jefferson . . . feared that an urban mass of impoverished and unstable workers would be created should Hamilton's goal of establishing manufacturing succeed. And he adamantly opposed the expansion of national powers at the cost of state and local responsibilities."); Richard Hofstadter, *The Age of Reform* 23 (1955) ("Writers like Thomas Jefferson . . . admired the yeoman farmer not for his capacity to exploit opportunities and make money but for his honest industry, his independence, his frank spirit of equality, his ability to produce and enjoy a simple abundance.").

97. *See* Merrill D. Peterson, *The Jefferson Image in the American Mind* 69-87 (1962) (Jacksonians); *id.* at 257-65 (Populists); *id.* at 328-34 (Progressives); *id.* at 355-76 (New Deal); *see also* Pocock, *supra* note 95, at 532-52 (tracing the agrarian "myth" through early American rhetoric). For a skeptical (practically mocking) account of these Jeffersonian traces, *see* Joyce Appleby, *Without Resolution: The Jeffersonian Tensions in American Nationalism* 2 (1992) (citing Clinton Rossiter, *Which Thomas Jefferson Do You Quote?*, Reporter 17 (1955)).

98. Consider a recent example of this way of viewing the world. Commenting on the goals of antitrust law, my colleague Harvey Goldschmid expressly associates Jeffersonianism and Progressivism with hostility to the concentration of economic power. *See* Stephen Labaton, *The Nation: 800 Pound Gorillas: Oligopoly*, N.Y. Times, June 11, 2000, § 4, at 1 ("We can't go back to a Jeffersonian world or a literal Brandeis concern about human-sized institutions . . .").

99. *See, e.g.*, *United States v. Morrison*, 120 S. Ct. 1740, 1759 (2000) (Thomas, J., concurring) (reiterating the need for an "original understanding" of the commerce power); *United States v. Lopez*, 514 U.S. 549, 584 (1995) (Thomas, J., concurring) (urging a highly restrictive interpretation of the Federal Government's power under the Commerce Clause).

100. *See, e.g.*, Thomas Jefferson, *Opinion on the Constitutionality of a National*

the conservative Justices do, in their efforts to protect state sovereignty, stake a (perhaps unwitting) claim to the Jeffersonian legacy.

In this view, states are seen as virtuous republics, whose relatively small size allows for truer participatory democracy than is possible in the extended Republic. Politics, in the civic republican tradition, is a domain of reasons, not interests, and thus protection even against the states themselves is afforded to those entities that are free of the taint of the market. Accordingly, even as it protects the states from the federal government, the 5-4 Anti-Federalist majority of the current Supreme Court (as I have dubbed them elsewhere),¹⁰¹ stands ready to protect from state regulation those most central participatory institutions—associations like the Boy Scouts and political parties.¹⁰²

Yet there are two sorts of reasons why neo-Jeffersonianism as I have just described it would provide a very weak justification for the Court's newfound reliance on the distinction between economic and non-economic activity: first, it is not true to Jefferson; second, and more important, it is not suited to modern conditions.

Begin with Jefferson, and let us put to one side the most glaring contradiction in the Jeffersonian vision itself, its entanglement with slavery,¹⁰³ which required a peculiar conception of self-sufficiency. As Joyce Appleby's work demonstrates so well, Jefferson and his fellow Republicans would have rejected the basic assumptions of post-1937 constitutionalism; they wanted to limit federal regulatory competence precisely because they were, to an even greater degree than Hamilton and the Federalists, economic libertarians.¹⁰⁴ The tendency to treat the Jeffersonian agrarian ideal as anti-market is largely a Populist/Progressive legacy.¹⁰⁵ Thus, it stands Jeffersonianism on its

Bank (Feb. 15, 1791), reprinted in Thomas Jefferson: Writings 416-21 (Merrill D. Peterson ed., 1984); Merrill D. Peterson, Thomas Jefferson and the New Nation 433-34 (1970).

101. See Dorf, *No Federalists Here*, *supra* note 59, at 741.

102. See *Cal. Democratic Party v. Jones*, 120 S. Ct. 2402, 2414 (2000) (invalidating California's blanket primary as a violation of political parties' right of expressive association). *Jones* was decided by the same 5-4 majority as *Boy Scouts* and the federalism cases. The Anti-Federalist majority fractured in one important case in the 1999-2000 Term, but that is hardly surprising given that the case involved a claim of constitutional right to use money for political gain. See *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377 (2000). More generally, whenever an organization employs market-based means to pursue public ends, a wedge is driven between the non-economic/economic distinction and the public/private distinction.

103. See John Chester Miller, *The Wolf by the Ears: Thomas Jefferson and Slavery* (1977); see also Garrett Ward Sheldon, *The Political Philosophy of Thomas Jefferson* 129-40 (1991).

104. See Joyce Appleby, *Capitalism and a New Social Order: The Republican Vision of the 1790s*, at 88 (1984) ("Alexander Hamilton labeled the idea that commerce might regulate itself a 'wild speculative paradox,' but Adam Smith's invisible hand was warmly clasped by Republicans.")

105. See *id.* at 45-46.

head to protect a sphere of state sovereignty over non-economic activity when, in Jeffersonian terms, the greatest threat to liberty comes from federal intervention in the economy.

Appleby's reading of Jefferson is, admittedly, controversial among historians.¹⁰⁶ Suppose, then, that following J.G.A. Pocock, we do understand Jefferson as a New World civic republican in the tradition of Bolingbroke, committed to an agrarian republic because self-reliance would breed the sort of virtue necessary for participation in public life.¹⁰⁷ But if that is the meaning of Jeffersonianism, it has almost no bearing on contemporary American society. In 1800, 74 percent of American laborers were farmers.¹⁰⁸ Today, agriculture accounts for only 2.8 percent of American economic activity,¹⁰⁹ employing a mere 2.6 percent of American workers.¹¹⁰ Of that 2.6 percent, only approximately one third own the land they work.¹¹¹ Meanwhile, the United States has become the center of the world economy. With 4.5 percent of the world's population,¹¹² the United

106. See Gordon S. Wood, *Early American Get-Up-and-Go*, N.Y. Rev. Books, June 29, 2000, at 50, 51 (describing Joyce Appleby's dispute with adherents of the "republican synthesis" in *Inheriting the Revolution: The First Generation of Americans* (2000)); Peter S. Onuf, *Reflections on the Founding: Constitutional Historiography in Bicentennial Perspective*, 46 *Wm. & Mary Q.* 341, 350-51 (1989); Lance Banning, *Jeffersonian Ideology Revisited: Liberal and Classical Ideas in the New American Republic*, 43 *Wm. & Mary Q.* 3, 14 (1986).

107. See Pocock, *supra* note 95, at 533 ("[Jefferson was] as committed as any classical republican to the ideal of virtue, but saw the preconditions of virtue as agrarian rather than natural."); *id.* at 538-39 ("Let us resume exegesis of the text cited from Jefferson's *Notes on Virginia* [see *supra* note 96]. Commerce—the progress of the arts—corrupts the virtue of agrarian man; but, Webster had added and Jefferson had agreed, an agrarian society can absorb commerce, and an expanding agrarian society can absorb an expanding commerce. America is the world's garden; there is an all but infinite reservoir of free land, and expansion to fill it is the all but infinite expansion of virtue.")

108. Out of a total labor force of 1.9 million men, 1.4 million were engaged in Agriculture. Bureau of the Census, U.S. Dep't of Commerce, 1 *Historical Statistics of the United States, Colonial Times to 1970*, at 139 (1975).

109. In 1997, Gross Farm Product for the United States was \$225,300,000,000. Bureau of the Census, U.S. Dep't of Commerce, *Statistical Abstract of the United States 679* (119th ed., 1999) [hereinafter *Statistical Abstract*, 119th ed.]. United States Gross Domestic Product ("GDP") was \$7,824,600,000,000. *Id.* at 842. This information is also available on the internet at <http://www.oecd.org/std/gdp.htm>.

110. In 1998, out of 131,463,000 employed Americans, 3,358,000 worked in agriculture. *Statistical Abstract*, 119th ed., *supra* note 109, at 424-26.

111. Out of 3,399,000 employed in agriculture in 1997, 1,147,000 were full owners of the land they worked. *Id.* at 675; Bureau of the Census, U.S. Dep't of Commerce, *Statistical Abstract of the United States 410* (118th ed., 1998).

112. As of this writing, the United States Census Bureau estimates the 2000 world population to be 6,085,247,300 and the United States population to be 275,321,055. *Statistical Abstract*, 119th ed., *supra* note 109, at 831, 834. These statistics are available on the internet at <http://www.census.gov/main/www/popclock.html> and <http://www.census.gov/ipc/worldpop.html>.

States accounts for 36.8 percent of its economic output¹¹³ and nearly 25 percent of its consumption.¹¹⁴

American culture more broadly also appears to have taken a decidedly commercial turn. Especially since the collapse of communism and the triumph of global capitalism, commercial conceptions of value have penetrated ever more deeply into our national ethos. Professions that once saw themselves as removed from, if not wholly immune to market forces—such as journalism,¹¹⁵ medicine,¹¹⁶ and law¹¹⁷—have become increasingly focused on the

113. The United States GDP in 1998 was \$7,824,000,000,000. Total GDP for all the world's countries was \$21,246,000,000,000. Statistical Abstract, 119th ed., *supra* note 109, at 842; *see also* <http://www.oecd.org/std/gdp.htm>.

114. For example, the United States' primary energy consumption in 1997 was 94.2 quadrillion Btu, compared to total world consumption of 379.5 quadrillion. *See* Statistical Abstract, 119th ed., *supra* note 109, at 853.

115. Compare Ben H. Bagdikian, *The Media Monopoly* 203 (1st ed., 1983) ("Newspapers no longer depend solely on their readers. They must satisfy advertisers, Wall Street investors, and parent corporations. . . . In the race for short-term profits, the American newspaper is no different from other large American corporations in the last half of the twentieth century."), with Herbert J. Gans, *Deciding What's News: A Study of CBS Evening News, NBC Nightly News, Newsweek, and Time* 214 (1979) ("Since national news is produced commercially, one might imagine that story selectors are under constant pressure to choose news which will attract the most profitable audience. In practice, however, they are not. . . . [E]ditorial and business departments operate independently of each other."). *See also* Max Frankel, *The Wall, Vindicated*, N.Y. Times, Jan. 9, 2000, § 6 (Magazine), at 24 (discussing need to separate business and editorial functions); Max Frankel, *What's Happened to the Media?*, N.Y. Times, Mar. 21, 1999, § 6 (Magazine), at 28 (same); Iver Peterson, *The Bottom-Line Publisher of the Los Angeles Times Faces the Hard-Line Skeptics*, N.Y. Times, Mar. 9, 1998, at D7 (same).

116. *See* Mark A. Hall & Robert A. Berenson, *Ethical Practice in Managed Care: A Dose of Realism*, 128 *Annals Internal Med.* 395, 395 (1998) ("Medical ethics and medical economics are increasingly in conflict."); *see also* Marc A. Rodwin, *Medicine, Money, and Morals: Physicians' Conflicts of Interest* 11-13 (1993); Jerome P. Kassirer, *Managed Care and the Morality of the Marketplace*, 333 *New Eng. J. Med.* 50, 50 (1995) ("Market-driven health care creates conflicts that threaten our professionalism. On the one hand, doctors are expected to provide a wide range of services, recommend the best treatments, and improve patients' quality of life. On the other, to keep expenses to a minimum they must limit the use of services, increase efficiency, shorten the time spent with each patient, and use specialists sparingly. Although many see this as an abstract dilemma, I believe that increasingly the struggle will be more concrete and stark: physicians will be forced to choose between the best interests of their patients and their own economic survival.").

117. Consider, for example, the developing interest in "Multi-Disciplinary Partnerships," in which lawyers and non-lawyers work together to provide full-service legal and extra-legal counseling to large clients (and, not accidentally, to greatly increase hourly rates). *See, e.g.*, John S. Dzienkowski & Robert J. Peroni, *Multidisciplinary Practice and the American Legal Profession: A Market Approach to Regulating the Delivery of Legal Services in the Twenty-first Century*, 69 *Fordham L. Rev.* 83 (2000); Richard E. Mikels & Mark I. Davies, *Multidisciplinary Practices: Ethical Concerns or Economic Concerns*, *Am. Bankr. Inst. J.* (July 1999), 1999 *ABJ JNL LEXIS* 103; Ronald A. Landen, Comment, *The Prospects of the Accountant-Lawyer Multidisciplinary Partnership in English-Speaking Countries*, 13 *Emory Int'l L. Rev.* 763 (1999); Gianluca Morello, Note, *Big Six Accounting Firms Shop Worldwide for Law Firms: Why Multi-Discipline Practices Should be Permitted in the*

bottom line; shopping, whether over the internet or at stores that never close, has become a national pastime;¹¹⁸ and many of the most ambitious public policy proposals now urge the transfer of functions from government to private actors.¹¹⁹

Perhaps, as historian Alan Brinkley argues, the policy consensus that emerged from the late New Deal assured the triumph of market values. In this consensus, the central role of the federal government was to promote prosperity, understood by the 1940s as consumer welfare.¹²⁰ If Brinkley is right, then the one piece of the New Deal program that may have fit within the Jeffersonian legacy—hostility to concentrated economic power—was the piece most clearly jettisoned. Whatever the precise chronology,¹²¹ there can be little doubt that the United States today is far removed from the land Jefferson may have envisioned.¹²² Thus, under current circumstances, Jeffersonianism cannot justify a jurisprudence that divides human endeavors into spheres of commercial and non-commercial activity.

Indeed, in Commerce Clause cases, the non-commercial sphere will not even include the few remaining yeoman farmers. Although the *Lopez* Court described *Wickard v. Filburn*¹²³ as “perhaps the most far

United States, 21 Fordham Int'l L.J. 190, 216-26 (1997).

118. According to the International Council of Shopping Centers, 190 million adults—or, 94% of the over-18 population—shop at shopping centers in a typical month. Int'l Council of Shopping Centers, *Scope USA* (2000), <http://icsc.org/srch/rsrch/scope/current/index.html>. Median total weekly hours of operation for American shopping malls topped 73 in 1999, an increase of almost 58% since the 1960s. See Int'l Council of Shopping Centers, *The Score: ICSC's Handbook on Shopping Center Operations, Revenues & Expenses* 29-30, 120 (1999); see also Howard Buerkle, *MIE Message*, VRN: The Outlet and Off-Price Journals 48 (1999). In general, the last decade has witnessed an explosion of 24-hour shopping meccas. See, e.g., Tom Moran, *More Places to Shop Round the Clock*, Christian Sci. Monitor, Oct. 17, 1997, at 4.

119. Consider, for example, calls for government-sponsored private school vouchers, investment of social security accounts in the stock market, and the privatization of prisons. See, e.g., E. S. Savas, *Privatization: The Key to Better Government* 143-44, 212-18 (1987); Ronald Brownstein, *The Role of Government Comes into Play in Debate over Social Security*, L.A. Times, June 26, 2000, at A5. See generally Charles H. Logan, *Private Prisons: Cons and Pros* (1990) (providing a critical examination of arguments against the privatization of prisons).

120. See Alan Brinkley, *The End of Reform* 170-74 (1995).

121. In the realm of antitrust law, for example, the reorientation away from trust-busting for its own sake and towards economic efficiency did not take hold until the Reagan administration. See generally, 10 *Business and Government in America Since 1870: Evolution of Antitrust Policy From Johnson to Bush* (Robert F. Himmelberg ed., 1994); Rudolph R. Peritz, *Competition Policy in America: 1888-1992: History, Rhetoric, Law* 265-82 (1996).

122. In a colossal miscalculation, Jefferson declared in his first inaugural address that the United States contained “room enough for our descendants to the hundredth and thousandth generation.” Jefferson, *First Inaugural Address*, *supra* note 96, at 64. Jefferson made this claim prior to the Louisiana Purchase, when the country was bounded in the West by the Mississippi River and in the south by the northern border of Florida.

123. 317 U.S. 111 (1942).

reaching example of Commerce Clause authority over intrastate activity,¹²⁴ the Court nonetheless reaffirmed *Wickard* on the ground that growing wheat, even for home consumption, is economic activity.¹²⁵ And were the Court to take the unlikely step of overruling *Wickard*, immunity from federal regulation would still result only for a tiny class of subsistence farmers. The vast majority of family farmers, to say nothing of the overwhelming remainder of citizens, would be subject to federal regulatory authority because they are engaged in clearly economic activity. Hence, even as the economic/non-economic distinction of *Lopez* and *Morrison* threatens federal regulatory competence in areas of clear national importance—such as environmental protection¹²⁶—it simultaneously permits extensive federal regulation of the very domain a neo-Jeffersonian would wish to protect the most.

Nor does the economic/non-economic distinction do a good job of capturing Jeffersonian ideals in rights cases. In cases like *Carter* and *Boy Scouts*, the economic/non-economic distinction appears to be a rough proxy for a public/private distinction. But it is a very poor proxy, as we saw in Part I.¹²⁷ That pattern is likely to hold when the next generation of rights claims arises. For example, modern computer databases create numerous opportunities for collection of personal data as a result of increasingly unavoidable, but unmistakably economic, activities such as credit card purchases or the use of highway and subway debit cards. These activities in turn create opportunities for the government to learn about and regulate matters that many of us would deem private. Categorizing the information obtained from such transactions as “public” because the transactions are commercial or economic begs the normative question of whether to recognize a privacy claim. Just as the economic/non-economic distinction in Commerce Clause cases leaves nearly everyone but the hermit subject to federal regulation, so in rights cases, only complete

124. *United States v. Lopez*, 514 U.S. 549, 560 (1995).

125. *See id.* (“*Wickard* . . . involved economic activity in a way that the possession of a gun in a school zone does not. Roscoe Filburn operated a small farm in Ohio, on which, in the year involved, he raised 23 acres of wheat. It was his practice to sow winter wheat in the fall, and after harvesting it in July to sell a portion of the crop, to feed part of it to poultry and livestock on the farm, to use some in making flour for home consumption, and to keep the remainder for seeding future crops.”).

126. In *Solid Waste Agency, Inc. v. United States Army Corps of Engineers*, 121 S. Ct. 675 (2001), the Court rejected an interpretation of section 404 of the Clean Water Act, 33 U.S.C. § 1344, that would have empowered the Army Corps of Engineers to block development on wetlands used by migratory birds. The Court narrowly construed the statute because it believed the respondent’s interpretation raised “significant constitutional questions.” *Id.* at 683.

127. I am claiming only that the economic/non-economic distinction does not closely track the values that lead the Court to draw a public/private distinction. I am not making the further claim that the public/private distinction is pernicious. For an application of that claim to the issue in *Morrison*, see Sally F. Goldfarb, *Violence Against Women and the Persistence of Privacy*, 61 *Ohio State L.J.* 1 (2000).

withdrawal from public life could preserve a rights claim if the distinction were consistently applied.

Furthermore, as the *Boy Scouts* case reveals, the non-commercial category is not only too narrow; it is also too broad. For, even if the *Boy Scouts* are in some sense a non-commercial organization, they are very much a public one, and it is this dimension of the organization that the Court's decision most clearly overlooks. De Tocqueville famously observed that civil society organizations—whether or not engaged in what might be called commercial affairs—play an essential role in nurturing democracy in America.¹²⁸ That observation applies doubly to the Boy Scouts, an organization devoted to creating good citizens. As I noted above, the *Boy Scouts* Court was right to resist (even if only partly) Justice O'Connor's inclination to make the case turn exclusively on the fact that the Boy Scouts were not engaged in commercial affairs in the way that the Jaycees and the Rotary were.¹²⁹ But in partially avoiding one formalism, the Court fell into another: an unwarranted reliance on the public/private distinction. Deciding whether to recognize a claim of regulatory immunity is an unavoidably normative question that sharp distinctions like commercial/non-commercial or even public/private often do not capture very well.

This last point applies to doctrinal categories more generally. Consider the *Boy Scouts* case one final time. During the oral argument, some of the Justices expressed concern that a victory for Dale would mean that states could require the Boy Scouts to admit girls as troop members and women as leaders.¹³⁰ That is hardly clear, however. Granting the Boy Scouts associational autonomy may be appropriate in the face of a claim by a girl because there exist alternative co-educational and all-girls organizations that provide roughly the same opportunities as the Boy Scouts. For children, at least, separate-but-equal on grounds of sex does not seem nearly as

128. See Alexis de Tocqueville, 2 *Democracy in America* 403-08 (Thomas Bender ed., Modern Library 1981) (1835) ("Nothing, in my opinion, is more deserving of our attention than the intellectual and moral associations of America. . . . In democratic countries the science of association is the mother of science; the progress of all the rest depends upon the progress it has made. . . . Americans of all ages, all conditions, and all dispositions constantly form associations. They have not only commercial and manufacturing companies, in which all take part, but associations of a thousand other kinds, religious, moral, serious, futile, general or restricted, enormous or diminutive. . . . Wherever at the head of some new undertaking you see the government in France or a man of rank in England, in the United States you will be sure to find an association."). The contemporary version credits associations with building social capital. See Robert D. Putnam, *Bowling Alone: The Collapse and Revival of American Community* 19-26 (2000).

129. See *supra* text accompanying notes 35-41.

130. See *Boy Scouts of Am. v. Dale*, No. 99-699, 2000 U.S. TRANS LEXIS 44, at *24-25 (Apr. 26, 2000).

invidious as separate-but-equal on grounds of race.¹³¹ Now a rigid doctrinalist might think that if the Boy Scouts' autonomy claim can override a prohibition on sex discrimination, a fortiori it can override a prohibition on sexual orientation discrimination: the former is, constitutionally speaking, more invidious. Yet this sort of decision by doctrinal categorization is unsatisfying in just the way that the deployment of the economic/non-economic distinction is. The social meaning of the Boy Scouts' exclusion of girls and women is separate but equal. The social meaning of their exclusion of gay troop leaders and members is the subordination of gays.

Perhaps a persuasive argument could nonetheless be made that the Boy Scouts ought to have the constitutional right to exclude gays. But if so, it would have to take account of the fact that the Boy Scouts are unlike the Amish in *Wisconsin v. Yoder*¹³² or the subsistence farmers I hypothesized in the discussion of *Wickard*.¹³³ The Boy Scouts are not some small quaint group whose right to exclude those whom the organization disapproves contributes only marginally to our public life.¹³⁴ Through their practices, the Boy Scouts, along with many other associations, *constitute* our public life. Any discussion of regulatory immunity should begin with that fact.

CONCLUSION

The themes I have identified here transcend ideology. The moderate/liberal Justices of the Rehnquist Court are less concerned about preserving property rights and more interested in distinguishing cases like *Roe v. Wade*¹³⁵ from *Lochner* than are the conservatives; hence the moderates/liberals are, if anything, more likely to find the commercial/non-commercial distinction useful than the conservatives are. Because the conservatives are currently in the majority, I have concentrated in this article on conservative decisions employing the commercial/non-commercial distinction to privilege the latter, but, as the discussion in Part II makes clear, that move is a standard one in constitutional law, available to conservatives and liberals alike.

So too, despite the large-scale changes in our economic and social life, is Jeffersonianism available to all ideological persuasions. This is a mixed blessing to be sure, for some of the contemporary Jeffersonian echoes are truly horrifying. For example, when he was

131. Cf. *United States v. Virginia*, 518 U.S. 515, 532-33 (1996).

132. 406 U.S. 205 (1972).

133. See *supra* notes 123-26 and accompanying text.

134. It is not even clear that the Amish are such a group. See generally Donald B. Kraybill, *The Riddle of Amish Culture* (1989); Donald B. Kraybill & Steven M. Nolt, *Amish Enterprise: From Plows to Profits* (1995); Jack Brubaker, *Each Weekend, Hundreds of Amish Sell Farm Goods Outside the County*, *Lancaster New Era*, Mar. 3, 2000, at A10.

135. 410 U.S. 113 (1973).

arrested, Timothy McVeigh wore a tee-shirt emblazoned with Jefferson's statement that "[t]he tree of liberty must be refreshed from time to time with the blood of patriots and tyrants."¹³⁶ However, the Jeffersonian legacy cannot simply be dismissed as part wistful symbol, part paranoia.¹³⁷ For its core ideals—such as respect for individual rights of conscience and distrust of government—remain very much mainstream American ideals, and constitutional ones at that. Any worthwhile constitutional vision must honor them. But however else the Court chooses to pay homage to Jefferson and our other constitutional heroes,¹³⁸ it should not rely on rigid categories that bear little relation to the circumstances of modern life.

136. Jo Thomas, *Trial Begins in the Oklahoma City Bombing Case*, N.Y. Times, Apr. 25, 1997, at A1.

137. See generally Garry Wills, *A Necessary Evil: A History of American Distrust of Government* (1999).

138. Constitutional law is full of what I have elsewhere described as "heroic originalism," the selective invocation of bits and pieces of Revolutionary Era thought to buttress one or another argument. See Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 Geo. L.J. 1765, 1803-05 (1997). There is a legitimate place for heroic originalism, for believing "that the Founders of the Republic had insight into the problems of government which their handiwork addressed." *Id.* at 1801. When performed clumsily, however, this enterprise is the worst form of law office history.

Notes & Observations