

**A Desperate Case under the Commerce Clause:
Federal Jurisdiction over All Radio Use**

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Abstract

Developments over the past seventy years in law governing radio use demonstrate the importance of judiciously articulating the Commerce Clause. In the absence of such articulation, an expedient and widely acclaimed solution to a regulatory crisis involving AM radio service in the mid-1920s led to apparent federal authority over all radio use. Statutory law governing jurisdiction in radio regulation changed significantly without significant legislative deliberation. Case law ignored the written text of statutory law and converted weak precedent into doctrine through repetition and *dicta*. To foster a better federal-state balance in radio regulation, courts should read existing Commerce Clause precedent with renewed appreciation for the eighteenth century meaning of "commerce" as "intercourse." Doing so provides a coherent, relevant, and practical basis for Commerce Clause law in the twenty-first century.

¹ The opinions and conclusions expressed in this paper are those of the author. They do not necessarily reflect the views of the Federal Communications Commission, its Commissioners, or any staff other than the author. I am grateful for numerous FCC colleagues who have helped me and encouraged me. The most current version of this paper, and related papers, are available at <http://www.galbithink.org>

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I. Introduction

From 1937 to 1994, the Supreme Court did not find any federal power asserted under the Commerce Clause of the U.S. Constitution to be outside the power lawfully granted in that clause.² Perhaps the Commerce Clause describes boundaries relevant only to a different era. When the Constitution was written, you could not fly across the country in a matter of hours, you could not talk with a person thousands of miles away, nor could everyone all across the U.S. watch an event occurring in Washington, or on the moon. Our economy seems much more unified now. Federalism itself smells of slavery, succession, and dead bodies. Discussing federalism as a matter of constitutional law seems like an anachronism, a pointless and dangerous diversion, or a betrayal of our national unity.³ Surely progress means defending the New Deal and upholding the supremacy of our national legislative process in areas classified as economic or social. Why should courts care about federalism? Why should courts care about the Commerce Clause, a most implausible aspect of federalism?

Federal radio regulation shows consequences of careless interpretation of the Commerce Clause. In the 1920s, most persons considered radio to be AM radio broadcasting. Many other uses of radio were known at the time, but they were much less popular. Fruitful development of radio broadcasting was widely thought to require a scheme of federal regulation. With remarkably little attention to statutory construction and judicial process, the courts allowed that consensus to create federal law covering all radio use. This complete federalization of radio law has endured, despite relevant technological, social, political, and economic changes, through to the present. Thus an expedient and widely acclaimed solution to the regulatory crisis of the day led to federal law covering all radio use.

This unprecedented legal development offers the opportunity to better understand the significance of the Commerce Clause. The natural sense of the word “commerce” was much different in the eighteenth century than it is today. Commerce then meant intercourse – ongoing, deeply enmeshing relationships among persons. While much has changed since the eighteenth century, general patterns of human behavior indicate that most persons still seek to realize themselves more fully through relationships with others. Such relationships are not necessarily alternatives to the relationships that define the

² Grant S. Nelson & Robert J. Pushaw, *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations But Preserve State Control Over Social Issues*, 85 Iowa L. Rev. 1, 79-86 (1999). Article I., § 8 of the U.S. Constitution enumerates powers of the federal government. These powers include the power “To regulate commerce with foreign nations, and among the several states, and with the Indian tribes”. This clause is commonly called the Commerce Clause.

³ Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. Rev. 903 (1994) describes federalism as a “national neurosis,” while Edward L. Rubin, *The Fundamentality and Irrelevance of Federalism*, 13 Ga. St. U.L. Rev. 1009 (1997) argues that federalism is enjoyable to discuss because it has long been and remains irrelevant to any real issues in the U.S. That is not the case in Australia and Canada. In those federations, constitutional clauses similar to the Commerce Clause of the U.S. Constitution have real, contemporary significance. See Greg Taylor, *The Commerce Clause – Commonwealth Comparisons*, 24 B.C. Int'l. & Comp. L. Rev. 235 (2001).

national polity.⁴ Human relationships concern, for the most part, mundane human activities. The Commerce Clause, understood in its eighteenth century meaning, provides constitutional protection against legal developments that might too easily suppress broad categories of relationships.⁵ The Commerce Clause should have provided constitutional protection against federal suppression of radio use supporting distinctive local relationships but no substantial interstate relation. Understanding the Commerce Clause in this way shows the continuing significance of important Commerce Clause cases. Understanding the Commerce Clause in this way also points to the importance of constitutional law in fostering a good federal-state balance in radio regulation.

II. Absence of Substantive Deliberation

Radio regulation provides a case study in important statutory changes in jurisdiction without substantial deliberation. About 1927, when the Federal Radio Commission was created, U.S. legal scholarship dismissed all geographic boundaries in radio regulation (but one, usually) with appeals to obvious scientific and practical concerns:

*In the present situation, unity of control is indispensable. Wave lengths must not conflict. ...National and uniform rules are necessary.*⁶

*Radio communication cannot be confined by artificial state boundaries. It is essentially interstate in scope and character, broadcasting stations being so constructed that purely intrastate service is not only impracticable but all but impossible.*⁷

*...the practical advantages not to say necessity of some centralized control is apparent. ... The very nature of the scientific phenomenon made use of in radio communications demands centralized regulation as a condition of its advantageous exploitation.*⁸

That the federal government must control the broadcasting situation is generally admitted. The tremendous present importance and future possibilities of radio, the limitations upon the number of persons who may broadcast simultaneously

⁴ Cf. Judge Stephen F. Williams, Radical Reform: Transitions to Liberal Democracy and the Rule of Law, Bradley Lecture at the American Enterprise Institute (Jan. 7, 2002) (text at <http://www.aei.org/bradley/bl020107.htm>). Judge Williams emphasized that rule of law does not mean “a society in which most or lots of issues are resolved by ‘law,’ i.e. rules created and enforced by the state, or by agencies using the power of the state.” He pointed out that forming voluntary organizations is important to liberal democracy because such actions provide practice in working out relationships. It is not necessary that the relationships themselves have intrinsic political significance, nor that they are alternatives to a particular type of political affiliation. But cf. Rubin, *supra*, which focus on human affiliations as a matter of political identity.

⁵ Cf. Alexis De Tocqueville, Democracy In America (1835), available at http://xroads.virginia.edu/~HYPER/DETOC/toc_indx.html. De Tocqueville argued that if persons in a democracy “did not acquire the practice of associating with each other in ordinary life, civilization itself would perish.” Without the counterbalancing effect of growth in civic associations across a range of desires and objects, Tocqueville felt that more democratic societies would tend more toward torpor in sentiments and ideas. *Id.* at vol. 2, § 2, chap. v.

⁶ Blewett Lee, *Power of Congress over Radio Communication*, 11 A.B.A.J. 19, 20 (1925).

⁷ Carl Zollman, *Radio Act of 1927*, 11 MARQ. L. REV. 121 (1927).

⁸ *The Radio and Interstate Commerce*, 26 MICH. L. REV. 919, 921 (1928).

*without causing a chaos of interference, and the fact that radio waves are not confined within the bounds of a single state or nation, make obvious the necessity of unified federal control.*⁹

*If the air is to be used successfully by radio, it must be on the basis of a world utility, regulated by a world public service commission through agreement of the governments. ...it is hard to image a station that will not be strong enough to send a message over the boundary of a particular state.*¹⁰

This legal scholarship largely ignored "amateur" radio, it lacked insight into the subsequent trajectory of radio technology and radio uses (think, for example, of microwave ovens and garage door openers), and it failed to appreciate adequately then developing European examples of governance.¹¹ It foreclosed debate about regulatory geography with vague appeals to necessary implications of specialized, extra-legal knowledge.

Contrast this view of the futility of drawing boundaries and the necessity of unified federal control with the FCC's program of area-based auctions of radio rights ("spectrum auctions"), which began in 1993. Under this approach to radio rights, an entity buys from the FCC license to regulate privately radio use within a defined geographic boundary and frequency range.¹² A principle repeatedly proclaimed, but less vigorously followed, has been to give the entity extensive flexibility to control radio use within the geographic area and frequency band. Thus the FCC has made geographically partitioning radio regulation a central component of current radio regulation. The key issue seems to be not technical feasibility but politics: only private regulation, and not public regulation, is allowed sub-nationally, regulatory boundaries are established so as not to correspond to any significant sub-national political boundaries, and all radio rights are subject to the absolute sovereignty of the FCC.¹³

Significant changes in statutory law, carried out with little deliberation, have played an important role in eliding the contrast between the consensus of the mid-1920s and the realities of radio use today. Early U.S. radio law formally limited the scope of federal regulation. The first sentence of the Radio Act of 1912 specified:

That a person, company, or corporation within the jurisdiction of the United States shall not use or operate any apparatus for radio communication as a means of commercial intercourse among the several States, or with foreign

⁹ *Federal Control of Radio Broadcasting*, 39 YALE L.J. 247, 247 (1929). The quoted sentences are the first two sentences of the article, which focused on determining which stations should be licensed.

¹⁰ Joseph P. Chamberlain, *Department of Current Legislation: The Radio Act of 1927*, 13 A.B.A.J. 343, 343 (1927).

¹¹ For a description and discussion of amateur radio, see Douglas A. Galbi, *Revolutionary Ideas for Radio Regulation*, Section IV.A.1 (2002), available at <http://www.galbithink.org> [hereinafter Galbi, *Revolutionary Ideas*]. In the U.S. on January 1, 1927, there were 14,768 amateur radio stations, 671 broadcast stations, and 583 other stations (transoceanic stations and domestic point-to-point stations). Stephen Davis, *The Law Of Radio Communication* 3 (1927). Little centralized frequency planning and assignment was done for amateur stations or point-to-point stations. On European radio regulation, see Galbi, *Revolutionary Ideas*, *supra*, Section III.B.

¹² For a discussion of area-based radio licensing in the U.S. and Australia, see Galbi, *Revolutionary Ideas*, *supra* Section III.D.

¹³ *Id.*

*nations, or upon any vessel of the United States engaged in interstate or foreign commerce, or for the transmission of radiograms or signals the effect of which extends beyond the jurisdiction of the State or Territory in which the same are made, or where interference would be caused thereby with the receipt of messages or signals from beyond the jurisdiction of the said State or Territory, except under and in accordance with a license, revocable for cause, in that behalf granted by the Secretary of Commerce and Labor upon application therefore; but nothing in this Act shall be construed to apply to the transmission and exchange of radiograms or signals between points situated in the same State: Provided, That the effect thereof shall not extend beyond the jurisdiction of the said State or interfere with the reception of radiograms or signals from beyond said jurisdiction;*¹⁴

The contrast between this sentence, and an obvious, much simpler one, indicates at least a perceived need to describe limits on the scope of the law.¹⁵ Even to a politically and rhetorically sophisticated person of that time, the natural sense of this sentence would have excluded weak radio emissions unrelated to commercial activity and not generally understood as communication, radiograms, or signals. Radio emissions that a home electrical generator might incidentally create are an example of such an exclusion. Many persons probably would have regarded the plain meaning of the sentence to imply additional exclusions as well.

The distinction between interstate radio communications and intrastate radio communications had little practical significance for early radio. Early radio uses – maritime communication, military communication, and “wireless telegraphy” – were closely associated with federal power. Private, non-commercial (amateur) radio users were interested in radio technology.¹⁶ Since the ability to communicate over long

¹⁴ Radio Act of 1912, Pub. L. No. 632 (Feb. 23, 1927), available at <http://showcase.netins.net/web/akline/1912act.htm>.

¹⁵ An example of a simpler sentence: “This Act prescribes that all apparatus and operators for radio communication within the jurisdiction of the United States (except Government stations and operators and those in the Philippines) shall be licensed by the Secretary of Commerce and Labor.” Annual Report of the Commissioner of Navigation to the Secretary of Commerce and Labor for the Fiscal Year Ended June 30, 1912 [hereinafter Annual Report of 1912], under heading “Regulation of Radio Communication,” (Submitted November 13, 1912 from Commissioner Eugene Tyler Chamberlain to Secretary Charles Nagel), available at <http://www.ipass.net/~whitetho/1912arcn.htm>

¹⁶ Private (amateur) radio grew rapidly on an unlicensed basis from 1900-1912. Around Boston alone 250 private stations were estimated to be in operation circa 1909. A significant number of those were asserted to be “equal or superior to those operated by the navy.” A leading Navy operator was reported to have said that Navy radio stations were three years behind the leading radio technology and that this technological backwardness made Navy communications more susceptible to interference. The author of a long article on amateur radio declared:

...legal action providing for the control by Government of wireless telegraph stations is at the present time immature and unnecessary. Wireless apparatus guaranteed to prevent interference has for some time been at the disposal of the Navy Department. Moreover, any attempt to eliminate amateur stations would simply ward off for a time a problem, the solution of which must finally be found by the scientist, not the lawyer.

Robert A. Morton, *Wireless Interference* 422-27 Electrician and Mechanic (April, 1909), available at <http://www.ipass.net/~whitetho/1909ama.htm>. Army, Navy, and other government agencies presented private radio as a nuisance – mere entertainment for “amateurs” who interfered with government organs

distances was central to the perceived technological wonder of radio, using radio only for intrastate communication was not an interesting possibility for amateurs. Moreover, influential figures in amateur radio strongly supported the Radio Act of 1912. The opportunity to get a federal license was hailed as a great victory for amateurs.¹⁷ By the mid 1920s, most persons associated radio with AM radio broadcasting. Most AM radio broadcasts in the 1920s covered multi-state areas. Few persons in the 1920s cared about intrastate radio communications.

The Radio Act of 1912 was implemented in accordance with this predominate balance of interests. In an Annual Report submitted on November 13, 1912 to the Secretary of Commerce and Labor, the Commissioner of Navigation began discussion of the new radio act by explaining forthrightly what it meant:

*In brief it [The Radio Act of 1912] prescribes that all apparatus and operators for radio communication within the jurisdiction of the United States (except Government stations and operators and those in the Philippines) shall be licensed by the Secretary of Commerce and Labor.*¹⁸

The implementing regulations themselves were more legally fastidious. These regulations observed that the Act of 1912 limited federal authority to require licenses.

The limit was recognized with a one-sentence regulatory provision:

*The owner or operator of any apparatus who may be in doubt whether his apparatus, under [the first paragraph of the Radio Act of 1912], is exempt from license may write the facts to the Commissioner of Navigation, Department of Commerce and Labor, Washington, D. C., before applying for a license.*¹⁹

Less than a year later this issue of statutory construction and federal authority had devolved to a lower level of government:

*The owner or operator of any apparatus who may be in doubt whether his apparatus, under this paragraph, is exempt from license may write the facts to the radio inspector for his district before applying for a license.*²⁰

performing important national functions. In an article published nine months later, Morton was more deferential to the Navy and more accepting of licensing amateurs. Perhaps high Navy officials, after reading his earlier article, had dressed him down. Robert A. Morton, *The Amateur Wireless Operator*, 131-35 *The Outlook* (Jan. 15, 1910), available at <http://www.ipass.net/~whitetho/1910ama.htm>.

¹⁷ See H. Gernsback, *Wireless and the Amateur: A Retrospective*, 1143-4 *Modern Electronics* (Feb. 1913), available at <http://www.ipass.net/~whitetho/1913retr.htm>.

¹⁸ Annual Report of 1912, under heading "Regulation of Radio Communication." But *cf.* Radio Act of 1912, ¶ 1.

¹⁹ Dep't of Commerce & Labor, Bureau of Navigation, Regulations Governing Radio Communication (Sept. 28, 1912), available at <http://www.ipass.net/~whitetho/1912reg.htm>. The clause "before applying for a license" seems to highlight that the need for a license, as a matter of administrative implementation, was already established.

²⁰ Dep't of Commerce, Bureau of Navigation, Regulations Governing Radio Communication, Regulations, Part 1.A (July 1, 1913), available at <http://www.ipass.net/~whitetho/1913breg.htm>. This transition was made in two steps. In regulations issued February 20, 1913, an owner or operator who might have doubts about whether he or she needed a license was instructed to contact a radio inspector or the Commissioner of Navigation. Dep't of Commerce & Labor, Bureau of Navigation, Regulations Governing Radio Communication (Feb. 20, 1913), available at <http://www.ipass.net/~whitetho/1913areg.htm>

According to a scholarly article published in 1928, the Secretary of Commerce required all stations to be licensed.²¹ The Radio Act of 1912 produced in implementation little deliberation about regulatory geography.

The Radio Act of 1927 did not significantly change the statutory description of regulatory geography. The geographic scope of regulation stated in the Radio Act of 1912 was more compactly stated in the introductory phrase of the Radio Act of 1927:

...this Act is intended to regulate all forms of interstate and foreign radio transmissions and communications within the United States, its Territories and possessions; to maintain the control of the United States over all the channels of interstate and foreign radio transmission;

The Radio Act of 1927 included a qualified enumeration of powers with a qualified statement about preventing interference:

Sec. 4. Except as otherwise provided in this Act, the commission, from time to time, as public convenience, interest, or necessity requires, shall— ...

(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and carry out the provisions of this Act...

(k)...

Most significantly, text in the first paragraph of the Radio Act of 1927 merely transformed the 1912 Act's stated limit on authority into an affirmative enumeration of authority:

*...[a federal license is needed to] use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any Territory or possession of the United States, or from the District of Columbia to another place in the same Territory, possession or District; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or Possession of the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; (e) upon any vessel of the United States; or (f) upon any aircraft or other mobile stations within the United States,*²²

To a sophisticated legal scholar, and probably also to some legislators, this statement implied in 1927 a broader scope for regulation than the same statement implied in 1912.²³

²¹ James Patrick Taugher, *The Law of Radio Communication with Particular Reference to a Property Right in Radio Wavelength*, 12 *Marq. L. Rev.* 179, 314 (1928).

²² Radio Act of 1927, Pub. L. No. 632 (Feb. 23, 1927), available at <http://showcase.netins.net/web/akline/1927act.htm>

²³ U.S. courts over that period were adopting a less restrictive interpretation of the Commerce Clause of the U.S. Constitution. See Barry Cushman, *Formalism and Realism in Commerce Clause Jurisprudence*, 67 *U. Chi. L. Rev.* 1089 (2000). This change in judicial interpretation changes the significance of the sentence.

But to the typical U.S. voter in 1912 and in 1927, the plain meaning of the words most probably would be the same.

In Congressional testimony and deliberation preceding the Communications Act of 1934, state representatives showed little interest in radio services then extant. State regulators cared most about the kind of regulation that was most familiar. State commissions focused on rate cases. Most persons in the early 1930s understood radio to be freely available AM broadcasts. As the General Solicitor for the National Association of Railroad and Utilities Commissioners (NARUC) explained in 1934 to the House Committee on Interstate and Foreign Commerce:

*The particular interest of the State commissions is in the wire companies. Radio may become important to them from the point of view of regulation as the uses of radio increase. State representatives do not wish to surrender the future as to that industry, although the present prospect is that efficient Federal regulation will obviate occasion for State regulation, unless State regulation of intrastate rates shall some time become necessary. At present Federal regulation meets the need in the radio field.*²⁴

Jurisdictional distinctions in radio regulation, distinctions with great significance for railroad and telephone regulation, thus attracted little deliberation.²⁵

The statutory limits on federal radio regulation enacted in the Communications Act of 1934 duplicate with further emphasis those in the Radio Act of 1927. The first section of the Communications Act of 1934 established the FCC to regulate “interstate and foreign commerce in communication by wire and radio.” Section 2(b) stated:

*Subject to the provisions of section 301, nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications service of any carrier...*²⁶

Section 301 contained the words of the enumeration of authority in the first paragraph of the Act of 1927, with only small changes concerning aircraft and mobile stations.

²⁴ Communications Bill, Hearings on H.R. 8301 Before House Comm. On Interstate and Foreign Commerce [hereinafter Hearings] 135 (May 9, 1934) (statement of John E. Benton, General Solicitor for the National Association of Railroad and Utilities Commissioners), reprinted in Max D. Paglin, A Legislative History of the Communications Act of 1934, 481 (1989).

²⁵ State commissioners expressed considerable concern that the Communications Act not “Shreveport” them out of regulating local telephone rates. See Hearings, *supra*, testimony of Kit F. Clardy, Chairman of the Legislative Committee of NARUC 70-74 (Apr. 11, 1934) *id.* at 416-20, esp. p. 419. Benton, the General Solicitor of NARUC, warned Congress against legislation encroaching on current state regulatory activities:

[the paramount concern of State commissions is] that any legislation which may be enacted by Congress be so drawn that State regulation of intrastate communications shall not be broken down or hampered by the Federal law or by the operation of the Federal agency thereunder.

Hearings, *supra* (May 9, 1934), *id.* at 481. See also Hearings, *supra*, testimony of Andrew R. McDonald, First Vice President and Chairman of the Executive Committee of NARUC, 131-4 (May 9, 1934), *id.* at 477-80.

²⁶ Communications Act of 1934, as enacted, Pub. L. No. 416, c. 652, 48 Stat. 1064 (June 19, 1934). Sec. 3 defined “interstate communication” or “interstate transmission” essentially using the terms and concepts in clauses (a), (b), and (c) of the first paragraph of the Radio Act of 1927.

Section 303 enumerated general powers, with the same qualifying heading as Sec. 4 of the Act of 1927, and § 303(f) included the exact text of Sec. 4(f) of the Act of 1927. General powers enumerated in § 303 included additional powers not included in Sec. 4 of the Act of 1927, but these additional § 303 powers do not relate to the geographic scope of radio regulation. Thus the Communications Act of 1934 provided no more textual clarity about the scope of federal radio regulation than did the Radio Act of 1927, or the Radio Act of 1912.

Further legislative activity after World War II seems to have been directed towards limiting the possibility of significant deliberation about the scope of federal radio regulation. In 1968, the Communications Act was amended to include a new § 302. Section 302(a) stated:

*The Commission may, consistent with the public interest, convenience, and necessity, make reasonable regulations governing the interference potential of devices which in their operation are capable of emitting radio frequency energy by radiation, conduction, or other means in sufficient degree to cause harmful interference to radio communications. Such regulations shall be applicable to the manufacture, import, sale, offer for sale, shipment, or use of such devices.*²⁷

The text of § 302(a) does not clearly indicate whether § 302(a) is subject to limits stated elsewhere in the Communications Act. However, § 2(b) of the Communications Act makes clear that § 302(a) is subject to the provisions of § 301 and should not be “construed to apply or to give the Commission jurisdiction with respect to” broad areas of intrastate radio communications.²⁸

Legislative history has created some confusion about the statutory scope of radio regulation. With respect to the 1968 Communications Act amendment establishing a new § 302, the Senate Report on the enacting bill stated:

*The Federal Communications Commission presently has authority under section 301 of the Communications Act to prohibit the use of equipment or apparatus which causes interference to radio communications and, under section 303(f), to prescribe regulations to prevent interference between stations. Pursuant to this authority the Commission has established technical standards applicable to the use of various radiation devices. At the outset it should be emphasized, therefore, that this legislation is not primarily designed to empower the Commission to promulgate stricter technical standards with respect to radiation devices but to enable it to make these standards applicable to the manufacturers of such devices.*²⁹

The legislative intent apparently was not to expand FCC concerns, but to give the FCC an additional regulatory tool for addressing concerns already within the scope of the Communications Act.

²⁷ Amendment to the Communications Act of 1934, Pub.L. No. 90-379, 82 Stat. 290 (July 5, 1968).

²⁸ Recently, the U.S. Supreme Court addressed a somewhat related question about FCC jurisdiction. See *AT&T Corporation v. Iowa Utilities Board*, 119 S.Ct. 721 (1999). The issue here is simpler because the last sentence of § 201(b) of the Communications Act does not apply to communication services not provided on a common carrier basis.

²⁹ 1968 U.S.C.C.A.N 2486, 2487. The Senate Report recommended passage, without amendment, of House bill H.R. 14910. The bill was thus passed and became Pub. L. No. 90-379, 82 Stat. 290.

One might further consider, not the scope of the Communications Act, but what legislators thought was the scope of the Communications Act.³⁰ The 1968 Senate Report on § 302 noted:

*An important example of interference to radio communications occurred in December 1965 at the time of the Gemini 7 space flight. The U.S. Government went into court and received a temporary restraining order against a manufacturing company in Corpus Christi, Tex., on the grounds that certain equipment at the plant, including the ignition system of a winch truck used for lifting steel, was interfering with the communications between a tracking station at Corpus Christi and the Gemini 7 spacecraft.*³¹

It seems implausible that legislators believed that the Communications Act gave the FCC authority to license the use and operation of winch trucks because they generate radio frequency energy. On the other hand, legislators seem to have believed that the FCC had authority to regulate many types of communication, including local public safety communications as well as extra-earthly communications.³²

The Communications Amendment Act of 1982 provided additional legislative history that has been very influential. The 1982 Act was a collection of unrelated provisions, one of which amended § 302(a) to include after the words “make reasonable regulations” an additional clause:

*(2) establishing minimum performance standards for home electronic equipment to reduce their susceptibility to interference from radio frequency energy.*³³

This amendment gives the FCC authority over a certain class of equipment that might operate poorly due to reception of radio frequency energy. Of great significance has been the Conference Report’s statement associated with that amendment:

*The conference substitute is further intended to clarify the reservation of exclusive jurisdiction to the Federal Communications Commission over matters involving RFI [radio frequency interference]. Such matters shall not be regulated by local or state law, nor shall radio transmitting apparatus be subject to local or state regulation as part of any effort to resolve an RFI complaint. The conferees believe that radio transmitter operators should not be subject to fines, forfeitures or other liability imposed by any local or state authority as a result of interference appearing in home electronic equipment or systems. Rather, the conferees intend that regulation of RFI phenomena shall be imposed only by the Commission.*³⁴

This statement has been cited repeatedly, and rather loosely, in FCC orders, FCC letters, court cases, on an influential web site, and in the most comprehensive recent article on

³⁰ As legislators are well aware, the public meaning of a law’s text is not necessarily the same as its meaning to legislators (or, of course, its meaning in effect). Which meaning should be privileged depends on constitutional aspects of communications.

³¹ 1968 U.S.C.C.A.N. 2486, 2489.

³² *Ib.* Sec. 1 of the Communications Act [47 U.S.C. 15] which present as a regulatory objective “a rapid, efficient, Nation-wide, and world-wide wire and radio communication service.”

³³ Communications Amendments Act of 1982, Pub. L. No. 97-259, 96 Stat 1087, § 108 (Sept. 13, 1982).

³⁴ H.R. Conf. Rep. 97-765, 33, 1982 U.S.C.C.A.N. 2261, 2277.

jurisdiction in radio regulation.³⁵ Note, however, that the statement goes far beyond clarifying the text of the statutory amendment associated with it. Moreover, the Conference met, wrote its report, and the report and the law were passed, all in one day. The law passed on a voice vote that dispensed with reading the Conference Report. While the Conference Report's statement is more closely related to § 302(a)(1), it seems not to provide a correct description of the legislative intent in establishing that provision. In any case, surely legislative history from 1982 is weak evidence for legislative intent in 1968.

In addition to providing influential legislative history, a few small edits buried in the middle of the Communications Amendment Act of 1982 made significant changes to statutory language concerning regulatory geography. First, the purpose of federal radio regulation in the introductory clause of § 301 was expanded. The phrase “to maintain the control of the United States over *all the channels of interstate and foreign radio transmission*” became “to maintain the control of the United States over *all the channels of radio transmission*” [emphasis added].³⁶ Second, the clause describing jurisdictionally distinctive places, § 301(a), was transformed into a clause describing every place. In particular, “from one place *in any Territory or possession* of the United States or in the District of Columbia to another place *in the same Territory, possession, or District*” became “from one place *in any State, Territory or possession* of the United States or in the District of Columbia to another place *in the same State, Territory, possession, or District*” [emphasis added].³⁷ These edits thus provided much stronger statutory support for federal regulation of intrastate radio communications.

Many members of Congress may have been unaware of the formal significance of these changes. The amendments were passed as a few lines of edits, not understandable on their own, placed in the middle of a law spanning thirteen pages and a wide variety of concerns.³⁸ Within the Communications Act as a whole, the edits make § 301(d)

³⁵ FCC, *In the Matter of 960 Radio*, Memorandum Opinion and Declaratory Ruling, FCC 85-578, ¶ 5 (rel. Nov. 4, 1985); FCC, *In the Matter of David Hildebrand*, Memorandum Opinion and Order, PR Docket No. 81-302, 2 FCC Rcd. 2708, ¶ 8 (rel. Apr. 29, 1987); FCC, Letter from Robert L. Pettit, General Counsel, FCC, to Christopher D. Imlay, ARRL (Feb. 14, 1990), available at <http://www.arrl.org/FandES/field/regulations/rfi-legal/pettit.html>; FCC (1994b), Letter from Ralph A. Haller, Chief, Private Radio Bureau, FCC, to Board of Zoning Appeals, Town of Hempstead, NY (25 Oct., 1994), available at <http://www.arrl.org/FandES/field/regulations/rfi-legal/haller.html>; *Broyde v. Gotham Tower*, 13 F.3d 994, 997 (1994); *Southwestern Bell Wireless v. Johnson County Board*, 199 F.3d 1185, 1191 (1999); *Freeman v. Burlington Broadcasters*, 204 F.3d 311, 320 (2000); Amateur Radio Relay League, Regulatory Affairs webpage, available at http://www.arrl.org/FandES/field/regulations/rfi-legal/#pl_97_259 (accessed May, 2002); Ralph H. Brock, *The Ghost in the Computer: Radio Frequency Interference and the Doctrine of Federal Preemption*, 1999 Computer L. Rev. & Tech. J. 1, 21 (1999), available at <http://www.sbot.org/docs/RFI.pdf>

³⁶ Change effected through Pub. L. No. 97-259, 96 Stat 1087, § 107 (1) (Sept. 13, 1982).

³⁷ Change effected through *id.* § 107, (2),(3), and (4).

³⁸ The law is a collection of sections related only by their relevance to the Communications Act. The full text of the section entitled “Jurisdiction of the Commission,” which comes in the middle of the law, is:

Sec. 107. Section 301 of the Communications Act of 1934 (47 U.S.C. 301) is amended –
(1) by striking out “interstate and foreign”;
(2) by inserting “State,” after “any” the third place it appears therein;
(3) by inserting a comma after “Territory” the first place it appears therein; and

redundant and heighten the contrast between the introductory clause of § 301 and phrases in § 1 and § 2(a).³⁹ The Conference Report described these changes as helping to avoid wasteful proceedings when the FCC prosecutes Citizens Band radio operators transmitting in violation of FCC rules. The Conference Report also stated that the amendments make § 301 “consistent with judicial decisions holding that all radio signals are interstate by their very nature.”⁴⁰

Congress itself had little time to ponder the significance of these amendments. The Communications Amendments Act of 1982 was introduced in the Senate on August 18, 1982 as a substitute for all but the title of a much different House bill. There was unanimous consent to dispense with reading the bill, and the Senate passed it straight away.⁴¹ On August 19, the House requested a conference, the conference met, agreed to minor changes in the Senate bill, reported to both chambers, and both chambers agreed to the conference report. In short, legislation significantly changing the statutory basis for regulatory geography was introduced and passed in two days, with no deliberation in the legislature.⁴²

Eventually federal legislation preempted even the radio issues that most interested state regulators. The federal statutory basis for authority over intrastate radio services was strengthened in 1982, as described above. In 1983, cellular telephony was offered to customers in Chicago. Over the next ten years, some states regulated some cellular phone rates. Then the Omnibus Budget Reconciliation Act of 1993 preempted, with little fanfare, state regulation of rates and entry for commercial mobile services.⁴³ Preempting

(4) by inserting “State,” after “same”.

³⁹ Section 301(d) gives the FCC authority over radio:

within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State;

As edited, § 301(a) includes the situations described in § 301(d).

Section 1 of the Communications Act describes the purpose of the Act. It begins: “For the purpose of regulating interstate and foreign commerce in communication by wire and radio....” Thus the purpose of the Act describes interstate radio.

Section 2 is titled “Application of Act”. Section 2(a) begins:

The provisions of this Act shall apply to all interstate and foreign communication by wire or radio and interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided;

Thus § 2(a) describes the application of the Act in terms of interstate radio and subsequently described rules for radio stations.

⁴⁰ H.R. Conf. Rep. No. 765, 97th Cong., 2nd Sess., printed in Cong. Record, vol. 128, part 16 at 22132 (Aug. 19, 1982). The judicial citation is “See, e.g., Fisher’s Blend Station Inc. v. Tax Commission of Washington State, 297 U.S. 650, 655 (1936).” For discussion of this case and relevant U.S. case history, see the following part of this paper.

⁴¹ See Cong. Record, vol. 128, part 16 at 21826 (Aug. 18, 1982).

⁴² The bill was presented to the President Ronald Reagan on September 2. He signed it on September 13, 1982. Reagan tends to be thought of as a president who sought to restrain the (federal) government.

⁴³ Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat 312 (Aug. 10, 1993).

state regulation of rates and entry for commercial mobile radio may have been a sound regulatory choice. The point is that it was relatively easy to do. State regulators in 1934 did not want to surrender their voice about governance of radio communications. But over time the natural functioning of the national political process seems to have foreclosed much needed deliberation about regulatory geography.

The tension between real needs and the deliberative status of federal radio regulation is evident in recent legislation. On November 22, 2000, a federal law authorized state and local governments to enact laws prohibiting violations of FCC rules governing interference from Citizens Band radio. The authorization was carefully limited to specific FCC regulations pertaining to Citizens Band radio. Services that the FCC licenses under § 301 were explicitly privileged against sub-national regulation. The FCC was authorized to hear appeals of sub-national government's actions. In addition, the law declared:

*Nothing in this subsection shall be construed to diminish or otherwise affect the jurisdiction of the Commission under this section over devices capable of interfering with radio communication.*⁴⁴

Overall, the legislation illustrates the practical importance of sub-national regulation. It also shows the national political concern that such regulation not have any legal significance for federal jurisdiction.

Concern over a possible reduction in federal jurisdiction largely shaped the legislative process. On Aug. 2, 1996, a bill was proposed in the Senate to give sub-national governments police powers to resolve interference relating to CB radio. The bill gave FCC concurrent jurisdiction over such issues and explicitly reserved the FCC's exclusive jurisdiction over radio interference falling outside the scope of the bill.⁴⁵ That bill was redrafted to retain and emphasize FCC authority over all radio interference. The "non diminish" clause quoted above was added. This new bill was proposed in the Senate on Apr. 17, 1997.⁴⁶ A bill introduced in the House on June 24, 1999, was similar to the Senate bill from 1997. The House bill included additional minor edits that emphasized FCC authority.⁴⁷ It also included a new sub-section requiring "probable cause" in state or local enforcement action against Citizens Band radio equipment aboard commercial

⁴⁴ State and Local Enforcement of Federal Communications Commission Regulations on Use of Citizens Band Radio Equipment, Pub. L. No. 106-521 (HR 2346), 114 Stat 2438 (Nov. 22, 2000). The quotation is § 1(6).

⁴⁵ The bill was S. 2025. See 142 Cong. Rec. S9555-02.

⁴⁶ The bill was S. 608. See 143 Cong. Rec. S3349-02.

⁴⁷ The bill was HR 2346. See 1999 Cong. U.S. H.R. 2346, 106th Congress, 1st Sess. Sec. 302(f)(2) was extended to require that a state or local government statute or ordinance identify that radio stations licensed by the FCC "pursuant to section 301 ((47 USCA 301)) in any radio service for the operation at issue" are exempt from the state or local law. The FCC licenses CB radios on a class basis, rather than for particular operations. In addition, in § 302(f)(5), the phrase "The enforcement of a regulation by a State or local government" was changed to "The enforcement of a statute or ordinance that prohibits a violation of a regulation by a State or local government". The latter awkward phrase does not seem intended to address state and local governments violating regulations. In light of the legislative history, the change is best interpreted to emphasize that the FCC writes the regulations, and state and local governments are only to pass laws to enforce those FCC regulations.

motor vehicles.⁴⁸ The bill that finally passed the Senate (Oct. 31, 2000) and the House (Nov. 13, 2000) included further minor edits that again emphasized FCC authority in regulating radio interference.⁴⁹ Thus the national political process produced more than four years of deliberation about a possible, small reduction in federal jurisdiction over a particular, relatively unimportant radio use.

U.S. experience highlights significant deliberative failure in the national political process. The weak policy, statutory, and constitutional basis for federal control over all radio use has not been considered in an open, substantive way. Regulatory geography for AM radio broadcasting in the late 1920s and early 1930s probably didn't matter much relative to the political, economic, and social problems of that time. But radio communications is much more important to life in the twenty-first century. Getting better regulation requires seeking truth and sincerely evaluating current beliefs.⁵⁰ With respect to regulatory geography, U.S. experience thus far shows little evidence of these crucial aspects of policy deliberation.

III. Case Law on the Federal-State Balance in Radio Regulation

U.S. courts did little to encourage deliberation about the geographic division of power in radio regulation. By 1929, several federal district court decisions had obliterated the distinction between interstate and intrastate radio. Moreover, these decisions ruled that federal regulation of all radio communications is constitutional under the Commerce Clause of the U.S. Constitution. Subsequent decisions of the D.C. Circuit and the U.S. Supreme Court followed the decisions of the district courts. Widely cited cases in these higher courts seemed to have relied essentially on *dicta* in earlier decisions, and the higher courts provided additional *dicta* on their own initiative. Qualifying language disappeared over time. By the end of World War II, courts seemed reluctant to examine carefully past precedent and the changing nature of radio communications. Moreover, developments in Commerce Clause law suggested that courts could not use that clause to provide judicial review of federal legislation concerning economic matters. Despite the great significance of communications to personal life, public life, and democratic deliberation, regulation of radio communication devices became an “economic” or “technical” matter subject to totalizing federal control.

⁴⁸ See *id.*, § 302(f)(7).

⁴⁹ The bill became law as Pub. L. No. 106-521, 114 Stat 2438 (Nov. 22, 2000). Relative to HR 2346 as introduced in the House on June 24, 1999, Pub. L. No. 106-521 has a few minor changes. The heading “Section 1. Enforcement of Regulations Regarding Citizens Band Radio Equipment” was changed to “Section 1. State and Local Enforcement of Federal Communications Commission Regulations on Use of Citizens Band Radio Equipment.” In reference to enforcement in § 302(f)(4)(A) and (D), “State or local government” was changed to “State or local government agency”. Other minor edits reduced FCC responsibilities to state and local governments. Reference to FCC technical guidance in defining “probable cause” was eliminated (§ 302(f)(7)). FCC responsibility to provide State and local governments with technical guidance concerning detecting and determining violations was qualified with the phrase “to the extent practicable” (§ 302(f)(3)).

⁵⁰ Seeking truth and sincerely evaluating current beliefs are not sufficient to produce good regulatory performance. Other activities, such as understanding different views, encouraging deliberation, and making persuasive arguments, also matter.

The first federal court decision considering jurisdiction in radio regulation was *Whitehurst v. Grimes* (decided Sept. 17, 1927). That case involved an amateur radio operator who brought suit in a district court in Kentucky. The amateur radio operator sought to void a municipal ordinance imposing a license tax on radio operation. In the third and concluding paragraph of its decision, the Court declared:

*Radio communications are all interstate. This is so, though they may be intended only for intrastate transmission; and interstate transmission of such communications may be seriously affected by communications intended only for intrastate transmission. Such communications admit of and require a uniform system of regulation and control throughout the United States, and Congress has covered the field by appropriate legislation. It follows that the ordinance is void, as a regulation of commerce.*⁵¹

The breadth of this decision, along with its economy of analysis and forthright statement of policy necessity, points to contemporary scholarly consensus regarding radio regulation.⁵² This decision, in turn, made this consensus more significant by giving it legal sanction.

In *White v. Federal Radio Commission* (decided Oct. 16, 1928), a district court in Illinois addressed even more concisely the federal-state balance in radio regulation. The plaintiffs sought to enjoin enforcement of a Federal Radio Commission (FRC) order. One of the motions for action was that the Radio Act of 1927 is unconstitutional. The court denied this motion with a single sentence:

*The regulation of radio communication is a valid exercise of the power of Congress under the commerce clause.*⁵³

Subsequent cases cited *White* as establishing that Congress can regulate all radio communications under the Commerce Clause.

The judge that decided *White* provided a more extensive opinion in *United States v. American Bond & Mortgage Co.* (decided Mar. 1, 1929). The U.S. Attorney General sought injunction against the defendant broadcasting without a federal license in Illinois, about twenty-five miles south of Chicago. The defendant attacked the constitutionality of the Radio Act of 1927 and questioned “the scope of the act as a proper regulation of interstate and foreign commerce.”

The Court’s judgment in *American Bond & Mortgage* takes different forms. Anticipating the Communications Amendments Act of 1982, the Court described the Radio Act of 1927 as asserting government control “over all channels of radio transmissions” rather than “over all channels of interstate and foreign radio transmissions.”⁵⁴ In addition, the decision provided data relating the power of a radio station to the radius of service, differentiated by service quality. The terrain, weather conditions, and quality of

⁵¹ *Whitehurst v. Grimes*, 21 F.2d 787 (1927).

⁵² See *infra*, Part II.

⁵³ *White v. Federal Radio Commission*, 29 F.2d 113, 114 (1929).

⁵⁴ *United States v. American Bond & Mortgage Co.*, 31 F.2d 448 at 451 (1929). But *cf.* Radio Act of 1927, ¶ 1.

receiving equipment were not specified, and the data source was not given. The Court presented this data as establishing necessary conditions:

It is also apparent that the nuisance area of a station using power of 50 watts (the lowest for which a station is licensed) will almost certainly pass beyond the borders of the state in which the broadcasting station is located. This may cause interference within the state with radio waves coming into the state from other states; with broadcasting stations within the state whose service area extends beyond the state; with broadcasting stations in other state which are broadcasting across other state lines. The engineering showing demonstrates that unified public control is essential to secure to the owners of broadcasting stations an assured channel, which they may use without interference, and to secure to the listening public satisfactory reception of the programs broadcast on those channels.⁵⁵

Given that the FRC refused to license broadcasting stations with less than 50 watts power, the significance of this power level to the validity of federal licensing of all radio communications is not clear. But analysis of the proper scope of federal regulation of radio communication wasn't, after all, really necessary for the Court:

It does not seem to be open to question that radio transmission and reception among the states are interstate commerce. ... A device in one state produces energy which reaches every part, however small, of the space affected by its power. ...It is intercourse, and that intercourse is commerce. ... The provisions of the act prescribed the only method by which order could be brought out of chaos and this form of interstate commerce saved from destruction.⁵⁶

This decision has been regularly cited as support for the proposition that the Commerce Clause does not limit federal jurisdiction over radio use. The Court noted that emphasis in analyzing radio regulation should be “on the receiving public, whose interest it is the duty of the Government, *parens patriae*, to protect.”⁵⁷

Beginning in 1929, the D.C. Circuit issued *dicta* that, although often inconsistent and indirect, played an important role in providing judicial support for federal regulation of all radio communications. Under the Radio Act of 1927, this Court handled all appeals of FRC decisions. Appeals typically concerned license denials. An appeal of a FRC license denial would not seem to present for judgment the constitutionality of federal licensing. Nonetheless, in addressing appeals of FRC decisions, the Court repeatedly made statements and references addressing the constitutionality of federal licensing.

General Electric Co. vs. Federal Radio Commission (decided Feb. 25, 1929):
This act [Radio Act of 1927], which is yet in force, forbids all radio broadcasting in this country, except under and in accordance with a license granted under the provisions of the act. ... under the commerce clause of the Constitution (article 1, Sec. 8, cl. 3), Congress has the power to provide for the reasonable regulation of the use and operation of radio stations in this country.... Without such national

⁵⁵ *Id.* at 453. The “radius of nuisance area” for a 50 watts station was listed as 300 miles.

⁵⁶ *Id.* at 454, 456 (first three sentences quoted are from the same paragraph).

⁵⁷ *Id.* at 455.

*regulation of radio, a condition of chaos in the air would follow...Davis, Law of Radio, p. 71; Zollman, Law of the Air, pp. 102, 103.*⁵⁸

Technical Radio Lab. v. Federal Radio Commission (decided Nov. 4, 1929):
...Congress has power to regulate interstate commerce, and radio communication in general falls within this classification. *Whitehurst v. Grimes* (D.C.) 21 F.(2d) 787; 35 Op. Attys. Gen. 126; *White v. Federal Radio Commission* (D.C.) 29 F.(2d) 113; *United States v. Am. Bond & Mtg. Co.* (D.C.) 31 F.(2d) 448; *Davis, Law of Radio Communication, p. 29.*⁵⁹

City of New York v. Federal Radio Commission (decided Nov. 4, 1929):
In our opinion the interstate broadcasting of radio communications is a species of interstate commerce, and as such is subject to federal regulations. *Whitehurst v. Grimes* (D.C.) 21 F.(2d) 787; *United States v. American Bond & Mortgage Co.* (D.C.) 31 F.(2d) 448; *General Electric Co. v. Federal Radio Commission*, 58 App.D.C. 386, 31 F.(2d) 630; *Davis, Law of Radio, 71; Zollman, Law of the Air, 102, 103.*⁶⁰

Chicago Fed. of Labor v. Federal Radio Commission (decided May 5, 1930):
This statement [FRC cannot arbitrarily withdraw licenses] does not imply any derogation of the controlling rule that all broadcasting privileges are held subject to the reasonable regulatory powers of the United States...⁶¹

KFKB Broadcasting Ass'n v. Federal Radio Commission (decided Feb. 2, 1931):
We have held that the business of broadcasting, being a species of interstate commerce, is subject to the reasonable regulation of Congress. *Technical Radio Lab. v. Fed. Radio Comm.*, 59 App.D.D. 125, 36 F. (2d) 111, 66 A.L.R. 1355; *City of New York v. Fed. Radio Comm.*, 59 App.D.C. 333, 41 F. (2d) 422.⁶²

Trinity Methodist Church v. Federal Radio Commission (decided Nov. 28, 1932):
We have already held that radio communication, in the sense contemplated by the act, constituted interstate commerce, *KFKB Broadcasting Ass'n v. Federal Radio Commission, supra; General Elec. Co. v. Federal Radio Commission*, 58 App. D.C. 386, 31 F.(2d) 630, and in this respect we are supported by many decisions of the Supreme Court, *Pensacola Telegraph Co. v. Western Union Tel Co.*, 96 U.S. 1, 9, 24 L.Ed. 708; *International Text-Book Co. v. Pigg*, 217 U.S. 91, 106, 107, 30 S. Ct. 481, 54 L Ed. 678, 27 L.R.A. (N.S.) 493, 18 Ann. Cas. 1103; *Western Union Teleg. Co. V. Pendleton*, 122 U.S. 347, 356, 7 S.Ct. 1126, 30 L.Ed. 1187.⁶³

⁵⁸ *General Electric Co. vs. Federal Radio Commission*, 58 App.D.C. 386, 31 F.2d 630 (1929).

⁵⁹ *Technical Radio Lab. v. Federal Radio Commission*. 59 App.D.C. 125, 36 F.2d 111 (1929).

⁶⁰ *City of New York v. Federal Radio Commission*, 59 App.D.C. 129, 36 F.2d 115 (1929).

⁶¹ *Chicago Fed. of Labor v. Federal Radio Commission*, 59 App.D.C. 333, 41 F.2d 422 (1930).

⁶² *KFKB Broadcasting Ass'n v. Federal Radio Commission*, 60 App.D.C. 79, 47 F.2d 670 (1931).

⁶³ *Trinity Methodist Church v. Federal Radio Commission*, 61 App.D.C. 311, 62 F.2d 850 (1932).

These statements supported federal regulation of all radio communications in a variety of formally interesting ways. They also present a largely unexplored constitutional “reasonableness” constraint on at least this area of federal legislation. But most importantly, these statements show that, from 1929 to 1932, the D.C. Circuit struggled to establish a solid legal foundation for federal regulation of all radio communications.

Supreme Court *dicta* aided this project. In *Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co.* (decided May 8, 1933), the Supreme Court considered whether the FRC could grant a licensing to a radio broadcaster in one state, and, to avoid interference, terminate licenses to two radio broadcasters in another state. The Court declared:

*No question is presented as to the power of the Congress, in its regulation of interstate commerce, to regulate radio communications. No state lines divide the radio waves, and national regulation is not only appropriate but essential to the efficient use of radio facilities.*⁶⁴

The first sentence above is literally true. The following sentence, however, points to the Court’s position: Federal regulation of all radio communications is unquestionably legal under the Commerce Clause. The Court cited three of the above D.C. Circuit decisions in support of this position. But the Court’s statement suggests that this position seemed not to have required legal justification then.

The most recent Supreme Court *dicta* that bear any formal resemblance to a ruling came in *Fisher’s Blend Station v. Tax Commission of State of Washington* (decided Mar. 30, 1936). In this case, the licensee of two stations, one broadcasting across eleven states, another broadcasting across the U.S., sought to enjoin the Tax Commission from collecting tax on its stations. The arguments concerned whether factors other than the range of broadcasting implied that the station operator was engaged in intrastate commerce. The court rejected the arguments and voided the tax as a tax on interstate commerce. The Court also declared:

*By its very nature broadcasting transcends state lines and is national in its scope and importance – characteristics which bring it within the purpose and protection, and subject it to the control, of the commerce clause. See Federal Radio Commission v. Nelson Bond & Mortgage Co., 289 U.S. 266, 279, 53 S.Ct. 627, 77 L.Ed. 1166.*⁶⁵

This statement clearly pertains to AM radio broadcasting. That it has more general legal significance for the federal-state balance of power in regulating radio use seems questionable.

Subsequent Supreme Court cases simply describe the radio and communications statutes as establishing federal control over all radio use. Compare the texts of those statutes, quoted and discussed previously, to the Supreme Court’s descriptions of them. In *Federal Communications Commission v. Pottsville Broadcasting Co.* (1940), the Court declared:

⁶⁴ *Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 279, 53 S.Ct. 627, 633-4 (1933).

⁶⁵ *Fisher’s Blend Station v. Tax Commission of State of Washington*, 297 U.S. 650, 655, 56 S.Ct. 608, 609 (1936).

*By this Act [Radio Act of 1927] Congress, in order to protect the national interest involved in the new and far-reaching science of broadcasting, formulated a unified and comprehensive regulatory system for the industry.*⁶⁶

National Broadcasting Co. v. United States (1943) pushed a similar description back to the Radio Act of 1912:

*The Statute [Radio Act of 1912] forbade the operation of radio apparatus without a license from the Secretary of Commerce and Labor;*⁶⁷

By 1963, *Head v. New Mexico Board of Examiners in Optometry*, the description became an abbreviated statutory reference placed in a footnote:

*It is to be noted that this case in no way involves the Commission's jurisdiction over technical matters such as a frequency allocation, over which federal control is clearly exclusive. 47 U.S.C. s 301.*⁶⁸

None of the three quotes above are literally correct. The jurisdictional qualifications written in the federal communications statutes have not merely been rendered without effect. They have been obliterated – the Court reads the text of the statutes and literally does not see them.

Judicial decisions through to the present do not recognize the problems with precedent in this area. The status of federal jurisdiction over all radio use is perceived to be authoritatively settled. In 1984, *Federal Communications Commission v. League of Women Voters of California*, Supreme Court merely declared:

*First, we have long recognized that Congress, acting pursuant to the Commerce Clause, has power to regulate the use of this scarce and valuable national resource [radio spectrum].*⁶⁹

The cited case history most directly relevant is *National Broadcasting Co. v. FCC* and *Federal Radio Comm'n v. Nelson Bros. Bond & Mortgage Co.* See the analysis of these cases above. Lower courts have generally followed the Supreme Court's lead. For example, a Circuit Court decision in 1994 declared:

*As the Supreme Court recognizes, the FCC's jurisdiction "over technical matters" associated with the transmission of radio signals "is clearly exclusive." Head v. New Mexico Board of Examiners in Optometry, 374 U.S. 424, 430 n. 6, 10 L.Ed.2d 983 (1963);*⁷⁰

Whether bad precedent can be converted into good precedent through time and repetition seems to be the relevant legal question here.

To see existing precedent in action, consider an FCC Order that addressed the constitutionality of an unlicensed low power radio station. The station was broadcasting

⁶⁶ *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137, 60 S.Ct. 437, 439 (1940). But *cf.* Radio Act of 1927, ¶ 1 (see *infra*, Part II).

⁶⁷ *National Broadcasting Co. v. United States*, 319 U.S. 190, 210, 63 S.Ct. 997, 1007 (1943). But *cf.* Radio Act of 1912, ¶ 1 (see *infra*, Part II).

⁶⁸ *Head v. New Mexico Board of Examiners in Optometry*, 374 U.S. 424, 430, 83 S.Ct. 1759, 1763, n. 6 (1963). But *cf.* 47 U.S.C. § 301, codifying Communications Act of 1934, as enacted in 1934 (see *infra*, Part II).

⁶⁹ *Federal Communications Commission v. League of Women Voters of California*, 468 U.S. 364, 376, 104 S.Ct. 3106, 3115 (1984).

⁷⁰ *Broyde v. Gotham Tower*, 13 F.3d 994, 997 (1994).

with a power of about 10 watts from an apartment in Berkeley, CA in 1993. According to a determination based on established FCC technical regulations, a 10 watt station with a 100 meter antenna has a service radius of 5.9 kilometers. The Order noted that the Communications Act of 1934 (as amended in 1982) requires a license for intrastate radio transmissions. To support the constitutionality of requiring a federal license, the Order cited *National Broadcasting Co.* and *League of Women Voters*. The Order noted:

*There is no support whatever in these or any other Supreme Court decisions for [the station operator's] view that the licensing requirement of Section 301 of the Communications Act cannot be enforced unless there is a specific showing that the unlicensed radio transmissions caused or may cause harmful interference.*⁷¹

The FCC saw no need to consider statutory and legal history or the evolution of radio technology and applications. What appeared to be a clear, general legal rule simply decided the case.

One can find, however, analysis that dared to show more sensitivity to particular, contemporary facts and that exercised more analytical discipline. In 1927, an important treatise on radio law noted:

*Perhaps the applicable rule can be expressed by saying that if the station is in fact an isolated unit, keeping its emanations within the state boundaries, separate and apart from the general mass of interstate communications, it remains free from Federal control.*⁷²

This statement was clearly meant to have no practical effect. It succeeded. Court rulings cited the treatise to support the position that all radio communication is necessarily interstate. While most courts saw no need to maintain space for deliberation about effects and jurisdiction, a district court in 1931 impressively reasoned:

*The plaintiff contends that all radio communication is necessarily interstate, and in the present state of the art, this appears to be correct. However, it is not inconceivable that radio communication may in the future be so perfected that it may be confined strictly intrastate; but we do not consider it necessary to make any ruling upon that point now.*⁷³

Other parts of the opinion contradict the above statement.⁷⁴ The court seemed unable to resist making statements supporting the prevailing view that all radio communications are categorically interstate commerce.

The most careful, fact-based analysis of jurisdiction is in *United States v. Gregg*. A district court in Texas decided *Gregg* on Jan. 10, 1934.⁷⁵ The case concerned a 2-4 watt

⁷¹ FCC, Application for Review of Stephen Paul Dunifer, Berkeley, California, Memorandum Opinion and Order, FCC 95-333, 11 FCC Rcd 718, 727 (rel. Aug. 2, 1995).

⁷² Davis, *supra* at 29.

⁷³ *Station WBT v. Poulnot*, 46 F.2d 671, 675 (1931).

⁷⁴ “All radio communication, anywhere in the United States, travels actually or potentially across state lines, and even if certain radio electric wave energy, through an accident or otherwise, should lose its force before crossing the state line, yet it potentially interferes with other radio communication passing interstate. Congress has assumed control of all communications by radio, acting through the Federal Radio Commission, which activity and continuously supervises all such communication.” *Id.* at 672. “There can be no doubt that communications by radio constitutes interstate commerce.” *Id.* at 675.

radio station in Houston, called “Voice of Labor, Inc.,” which had a service radius of approximately 30 miles. The Court found that the station did not ordinarily communicate with receivers in other states or on vessels at sea; it did not ordinarily have effects in other states; it did not ordinarily interfere with radio communications from Texas to other states; and it did not interfere with communications among states other than Texas. The Court noted, however, that other stations in Miami, Fla., and Shreveport, La. broadcast on the frequency that “The Voice of Labor” used. “The Voice of Labor” broadcasts interfered with reception in Houston of those interstate broadcasts. The Court thus found that “The Voice of Labor” was prohibited under the Radio Act of 1927 from operating without a license.

The Court then addressed the constitutionality of the portion of the Radio Act of 1927 that forbid “The Voice of Labor” from broadcasting without a license. The Court reviewed in detail a number of cases regarding regulation of interstate commerce. After three and half pages of such review, the Court curiously added the following paragraph:

See, also, cases involving various phases of radio broadcasting: American Bond & Mortgage Co. v United States (C.C.A.) 52 F.(2d)319; Station WBT v. Poulnot (D.C.) 46 F.(2d) 671; Whitehurst v. Grimes (D.C.) 21 F.(2d) 787; United States v. American Bond & Mfg. Co. (D.C.) 31 F.(2d) 448; General Electric Co. v. Federal Radio Commission, 58 App.D.C. 386, 31 F.(2d) 630, 631; White v. Federal Radio Com. (D.C.) 29 F.(2d) 113.⁷⁶

These cases may have gone unanalyzed because their value as precedent was not related to specific written rulings in them. The Court followed that paragraph immediately with its ruling:

In light of these cases and many others that may be cited, I have no difficulty in concluding that the Congress may lawfully, as has been done in this act, require the licensing and regulation of intrastate radio broadcasting stations where, as here, the operation thereof interferes with interstate commerce.⁷⁷

Note that this ruling is narrow: it relates to radio broadcasting of the type discussed in the case. The Court, deciding in equity, then quickly found the Radio Act of 1927 reasonable:

That it is reasonable will be seen by reflecting that a sufficient number of unlicensed and unregulated intrastate radio broadcasting stations, such as is defendants’, broadcasting on different frequencies in each community, could and would not only interfere with, but destroy, all interstate radio broadcasting.

This statement contrasts sharply with the style of reasoning and findings in the rest of the opinion. It reasons from an extreme hypothetical far removed from any actual findings.

Precedent for federal control of all radio use, though widely regarded as rock-solid, at best settles the matter legally just for AM radio broadcasting. *Stare decisis* is an

⁷⁵ *United States v. Gregg*, 5 F.Supp. 848 (1934). On March 4, 1934, the Supreme Court decided *Nebbia v New York*, 291 U.S. 502, 54 S.Ct. 505 (1934). This decision essentially eliminated the existing distinction between public and private businesses and effectively expanded the range of the Commerce Clause. See Cushman, *supra* at 1132-7.

⁷⁶ 5 F. Supp. 848, 857.

⁷⁷ *Id.*

important legal principle. But in considering “technical” matters related to “radio” frequencies, courts might apply *stare decisis* much more carefully and much more narrowly. Areas of human activity that once might have been considered technical radio matters are now central public concerns. Radio regulation, to promote the public interest, needs judicious legal review.

IV. Misunderstanding Commerce in the Real World

In legal deliberations in the 1920s, AM radio broadcasting was abstracted into radio communications, and radio waves were analogized to instruments of commerce such as railroads and the telegraph.⁷⁸ Thus a natural aspect of the physical world – electromagnetic spectrum – was implicitly conceptualized as an instrument. The sense that the physical world is not an instrument but part of creation, and very good, was lost. Dominion over the physical world, in the sense of good stewardship of a household, can easily be mistaken for merely ruling over. Keeping the physical world, in the sense of keeping a garden, can be easily mistaken for keeping a purchase. Both dominion and gardening evoke relationships. AM radio broadcasting, as historically incarnated, can be characterized in terms of relationships among persons. But all activities associated with a particular physical aspect of the world, e.g. activities using (radio) spectrum, cannot be articulated in this way. Because of an unappreciated transformation of its subject, radio regulation developed a totalizing approach radically different from regulation for other aspects of the physical world.

To see how easily this transformation occurred, consider an important, non-judicial opinion. Early in 1926, the Commerce Department apparently was pondering the legality of its implementation of the Radio Act of 1912. On June 4, 1926, the Secretary of Commerce requested an opinion from the Attorney General on this question:

*Does the 1912 Act require broadcasting stations to obtain licenses, and is the operation of such a station without a license an offense under the Act?*⁷⁹

On July 8, 1926, the Attorney General replied:

*There is no doubt whatever that radio communication is a proper subject for Federal regulation under the commerce clause of the Constitution. Pensacola Telegraph Company v. Western Union Telegraph Company, 96 U.S. 1, 9, 24 L. Ed. 708; 24 Op. Attys. Gen. 100. And it may be noticed in passing that even purely intrastate transmission of radio waves may fall within the scope of Federal power when it disturbs the air in such a manner as to interfere with interstate communication, a situation recognized and provided for in the Act.*⁸⁰

From the question to the answer there is a shift from (AM radio) broadcasting to radio communication. This shift in formal categories might have been of little real significance in 1926. At that time, for the vast majority of persons, radio communications practically

⁷⁸ See Davis, *supra* at 29-31; Zollmann, *supra* at 102-3; *Note and Comment: The Radio and Interstate Commerce*, 26 Mich. L. Rev. 919, 920 (1928); Taugher, *supra* at 313-4.

⁷⁹ 35 Op. Attys. Gen. 126 (1926), reprinted in Carl Zollmann, *Cases on Air Law* 292-8 (1st ed., 1930).

⁸⁰ *Id.* at 293.

meant such broadcasting. But the shift had deep, subsequent significance for radio regulation.

Federal radio regulation became law with a different constitutional status than federal regulation of other aspects of the physical world. Consider land use. State and local governments are involved in regulating land use through mechanisms such as property law, zoning statutes, nuisance laws, and the use of land in providing public services (garbage collection, schools, etc.). Moreover, land use directly relates to state and local taxation. Economic studies of the sort discussed in *United States v. Lopez*⁸¹ and *United States v. Morrison*⁸² could easily be produced to document that land use affects interstate commerce. However, in *Jones v. United States*, a unanimous Supreme Court found that the statutory language “property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce” does not cover an owner-occupied residence not used for any commercial purpose.⁸³ The Court made careful and well-justified formal distinctions between “used in any activity affecting commerce” and “affecting commerce,” and between statutory and constitutional questions. Does a realistic appraisal of the meaning of *Jones* imply limits on federal regulation of land use under the Commerce Clause? Are there constitutional constraints on federal regulation of land use other than the constitutional rules of the national political process? Such questions would be vigorously deliberated if anyone really thought that the answers were not obvious.

Consider also federal regulation of water use. *Gibbons v. Ogden* ruled that the Commerce Clause comprehended the power to regulate navigation. Navigation, a particular water use feasible in some bodies of water, was considered in *Gibbons* as an aspect of trade.⁸⁴ Most other water uses have been primarily of local concern. Physiographic, climatic, economic, and historical factors create significant differences in water use across the U.S.⁸⁵ States and persons hold title to most water on the land and tidal areas of the U.S.⁸⁶ Water use law has primarily developed within states and localities. As a Supreme Court decision that reviewed the federal-state balance in water law noted:

*The history of the relationship between the Federal Government and the States in the reclamation of the arid lands of the Western States is both long and involved, but through it runs the consistent thread of purposeful and continued deference to state water law by Congress.*⁸⁷

⁸¹ *United States v. Lopez*, 514 U.S. 549, 563-5, 619-25, 631-44, 115 S.Ct. 1624, 1632-3, 1659-61, 1665-71 (1995).

⁸² *United States v. Morrison*, 529 U.S. 598, 628-37, 120 S.Ct. 1740, 1760-4 (2000).

⁸³ *Jones v. United States*, 529 U.S. 848, 120 S.Ct. 1904 (2000).

⁸⁴ See *Gibbons v. Ogden*, 22 U.S. 1, 190-4 (1824).

⁸⁵ *California v. United States*, 438 U.S. 645, 648, 98 S.Ct. 2985, 2987 (1978).

⁸⁶ Title to coastal tidelands and the beds of navigable rivers belong to states as part of the constituting legal framework for states. The beds of non-navigable rivers and other bodies of water are owned under the same general legal framework as for land ownership. Others may have rights to the use of such water under legal doctrines such as the prior appropriation doctrine. Acts such as the Desert Land Act of 1877 (43 USC § 321) made water on federal lands subject to state laws of water appropriation.

⁸⁷ *California v. United States*, 438 U.S. 645, 653, 98 S.Ct. 2985, 2990 (1978).

Whether Congress could regulate all water use under the Commerce Clause is a question that has been unnecessary to discuss. Even to contemplate it seems impolite.

With respect to specific activities, a federal statute might rationally be interpreted to have regulated water use to the fullest extent possible under the Commerce Clause. Section 404(a) of the Clean Water Act regulates discharging dredged or fill material into “navigable waters.” “Navigable waters” are defined under the Act as “the waters of the United States, including the territorial seas.”⁸⁸ In *Solid Waste Agency of Northern Cook County v. United States Corps of Engineers*, the petitioner sought to use an abandoned sand and gravel mining site to dispose baled, non-hazardous solid waste. The site included “a scattering of permanent and seasonal ponds of varying size (from under one-tenth of an acre to several acres) and depth (from several inches to several feet).”⁸⁹ The Supreme Court found that Congress had not made a clear statement indicating that the Act covers such sites.⁹⁰ The Court noted “the States’ traditional and primary power over land and water use,” cited precedent indicating a preference for avoiding constitutional questions, and read the Act as not applying to the site.

A vigorous dissent argued that the Act clearly addresses its regulations to all “waters over which federal authority may properly be asserted.”⁹¹ The dissent analyzed this federal authority under the Commerce Clause and concluded that Congress has the power to prohibit “filling any part of the 31 acres of ponds” on the site.⁹² Even dissenting Supreme Court justices, by virtue of their position in the U.S. judiciary, deserve to have their formal statements categorized as rational.⁹³ While the correct legal interpretation may still be debated among scholars, the Clean Water Act surely can be rationally interpreted to regulate a particular water use to the fullest extent possible under the Commerce Clause.

The point is that the Clean Water Act identifies a particular water use. As the dissent pointed out:

The activity being regulated in this case (and by the Corps § 404 regulations in general) is the discharge of fill material into water. The Corps did not assert jurisdiction over petitioner’s land simply because the waters were “used as habitat by migratory birds.” It asserted jurisdiction because petitioner planned

⁸⁸ See 33 U.S.C. § 1344(a) and § 1362(7).

⁸⁹ *Solid Waste Agency of Northern Cook County v. United States Corps of Engineers*, 531 U.S. 159, 163, 121 S.Ct. 675, 678 (2001) [hereinafter *Solid Waste Agency Case*]. Acting under the Clean Water Act, the United States Army Corps of Engineers blocked this use of the site.

⁹⁰ In fact the majority stated, “We find § 404(a) [regulations interpreting the scope of waters covered by the Clean Water Act] to be clear, but even were we to agree with respondents, we would not extend Chevron deference here.” *Id.* at 172. That statement means that the subsequent statements concerning the Constitutional questions in this case are *dicta*.

⁹¹ *Id.* at 182.

⁹² *Id.* at 192.

⁹³ Whether members of Congress merit in U.S. law this same type of respect is still an open question in some areas of law. Categorizing statements as rational by virtue of their relation to particular institutions, times, and manners should not be done indiscriminately. Certainly the writings of academics and government bureaucrats deserve no such respect.

to discharge fill [*emphasis in original*] into waters “used as habitat by migratory birds.”⁹⁴

More generally, the dissent noted that the Clean Water Act proclaimed the goal of ending water pollution by 1985.⁹⁵ Legislative history of the Act includes a statement that the “main purpose” of the Act is “to establish a comprehensive long-range policy for the elimination of water pollution.”⁹⁶ Water pollution is a much narrower class of activities than water use. Moreover, many types of water pollution effect relationships of harm substantially between persons within a state and persons outside the state.⁹⁷ Such relationships clearly come under the meaning of interstate commerce.

The development of aviation regulation also shows the importance of understanding the Commerce Clause in relation to specific activities. Law of the air in the 1920s meant law concerning aviation and law concerning radio.⁹⁸ With the development of aviation and radio broadcasting, the physical characteristics of air gained new significance. Just as persons struggled to communicate the meaning of radio spectrum (“the ether”), a judge in 1934 similarly struggled to define airspace:

*What is the sky? Who can tell where it begins or define its meaning in terms of the law? When can it be said that a plane is above the sky or below it?*⁹⁹

Many subsequent cases struggled with such issues, and law in this area remains unclear to this day.¹⁰⁰ Federal law of the air has, however, remained focused on aviation.

The Empire State Building illustrates the extent of state and local regulation of air use. Technical analysis of the flight patterns of airplanes, such as a biplane with a motor rated at 90 horsepower and a monoplane with motor rated at 220 horsepower, established 500 feet of altitude as the lower boundary of airspace under federal aviation regulation in the late 1920s.¹⁰¹ Courts, beginning in 1930 through to the present, have given this early technical judgment enduring importance in aviation law.¹⁰² That legal boundary did not, however, affect early skyscraper construction. A former governor of New York led construction of the Empire State Building in 1930 in a race between New York and Chicago to claim the world’s tallest building.¹⁰³ When completed in 1931, the Empire

⁹⁴ *Id.* at 193.

⁹⁵ *Id.* at 175. 33 USC § 1251(a)(7) states: “it is the national goal that the discharge of pollutants into navigable waters be eliminated by 1985.”

⁹⁶ *Solid Waste Agency Case, supra* at 179, quoting Senate Report No. 92-414, p. 95.

⁹⁷ Not all such uses do so. Consider a farmer who lets pigs drink from a pond on his land. Some Jewish and Muslim scholars might argue that the pond is polluted by this activity. Yet if no other persons have the right or the need to use the water from the pond, surely that pollution does not effect a relationship between the farmer and anyone else.

⁹⁸ See Zollmann, *Cases on Air Law, supra*.

⁹⁹ *Thrasher v. City of Atlanta*, 173 S.E. 817, 825 (1934).

¹⁰⁰ See Colin Cahoon, *Low Altitude Airspace: A Property Rights No-Man's Land*, 56 J. Air L. & Com. 157 (1990).

¹⁰¹ See *Smith v. New England Aircraft*, 270 Mass. 511 515-20, 170 N.E. 385, 387-9 (1930); *Swetland v. Curtiss Airports Corp*, 41 F.2d 929, 938-42 (1930). Over congested parts of cities, towns, or settlements, the minimum height of flight was declared to be 1000 feet.

¹⁰² See Cahoon, *supra*, esp. § IX, X.

¹⁰³ Other buildings in New York at the time reached 808, 792, 700, 625, and 612 feet into the sky. *Smith v. New England Aircraft Co.*, 270 Mass. 511, 522, 170 N.E. 385, 389 (1930).

State Building reached 1250 feet into the Manhattan skyline. The building included a final 200 feet section intended as a dirigible mooring mast. The significance of this building to aviation was tragically emphasized in 1945, when a B-25 bomber in dense fog crashed into the seventy-ninth floor.¹⁰⁴ Such an accident surely provided reason and opportunity to establish comprehensive, unified federal regulation of the airways.

Despite the significance of tall objects and airports to aviation, federal air regulations carefully assert only an advisory role in regulating real estate development. Federal Aviation Administration (FAA) rules require that it be given notification of plans for a construction extending more than 200 feet above ground level.¹⁰⁵ The FAA analyzes the implications of the construction for air navigation and categorizes the construction as a hazard or not a hazard. The FAA does not assert authority to prohibit constructions that it deems hazardous to air navigation.¹⁰⁶ The FAA also requires notification for construction of an airport.¹⁰⁷ Upon such notification, the FAA does an aeronautical study of the proposal, and then states objections, if any, and in some cases conditions for ameliorating objections. The FAA does not claim authority to prohibit construction in any case.¹⁰⁸ Thus FAA regulations show considerable respect for state and local governance of activities significantly affecting the use of the airways, i.e. the use of air for aviation.

A federal law regulating all uses of the air would raise serious constitutional issues under the Commerce Clause. The Air Commerce Act of 1926, like the Radio Act of 1927, distinguished between interstate and intrastate activities.¹⁰⁹ In the 1930s, states passed statutes regulating intrastate aviation.¹¹⁰ Over time, however, federal law came to cover both interstate and intrastate aviation. This development of federal law seems to have sound legal and practical bases. But despite many public concerns relating to aviation, airspace law was not totally federalized. A complex and vitally important law governing air rights relating to real estate developed at the state and local level.¹¹¹ State and local law regarding airport zoning and associated nuisances also developed.¹¹² These developments indicate awareness that the Commerce Clause places limits on federal regulation of air use.

¹⁰⁴ This accident killed 14 persons and injured about 25 others. John Tauranac, *The Empire State Building: the Making of a Landmark* 317-31 (1995).

¹⁰⁵ FAA Notice of Construction or Alteration of Objects Affecting Navigable Airspace, 14 C.F.R. § 77.13

¹⁰⁶ Scott J. Hamilton, *Allocation of Airspace as a Scarce National Resource*, 22 *Transp. L.J.* 251, 266 (1994).

¹⁰⁷ FAA Notice of Construction, Alteration, Activation, and Deactivation of Airports, 14 C.F.R. § 157.3.

¹⁰⁸ Hamilton, *supra* at 270.

¹⁰⁹ The distinction between interstate and intrastate aviation was a major issue in deliberations about the Air Commerce Act of 1926. See Charles F. Downs II, *Calvin Coolidge, Dwight Morrow, and the Air Commerce Act of 1926* (2001) (unpublished manuscript), available at <http://www.calvin-coolidge.org/pages/history/research/ccmf/downs.htm>

¹¹⁰ See *Swetland and Smith*, *supra*.

¹¹¹ For a review, see, e.g., Norman Marcus, *Air Rights in New York City: TDR Zoning Lot Merger and Well-Considered Plan*, 50 *Brook. L. Rev.* 867 (1984).

¹¹² For a review of these developments, see Hamilton, *supra*.

Electromagnetic spectrum is similar to land, water, and air. Electromagnetic spectrum, like land, water, and air, is a general aspect of the physical world. Electromagnetic spectrum, like land, water, and air, is not itself an instrumentality of commerce. New technological developments are rapidly expanding the range and variety of human activities that use radio. That one federal law would assert authority under the Commerce Clause to govern interstate highways and backyard sandboxes (land use), or water pollution and swimming (water use), or aviation and speech (air use), seems so remote and gratuitously provocative as to be not worth deliberating. But current federal law that governs “disturbing” radio spectrum is that type of law.¹¹³

V. Re-Articulating Commerce

To identify and maintain boundaries for radio regulation under the Commerce Clause, one must recover the natural sense of the word “commerce” in eighteenth century thought. “Commerce” meant intercourse.¹¹⁴ The word “commerce” has been used in English only since the sixteenth century, when it came into use to supplement “merchandise,” meaning the buying, selling or bartering of moveable goods, or the moveable goods themselves.¹¹⁵ With the rapid growth of the English economy in the second half of the sixteenth century and the development of a Dutch empire in world trade, the activity of merchandizing became a systematic network of ongoing relationships.¹¹⁶ Ongoing, deeply enmeshing relationships is what “commerce” added to the terms “merchandise,” “traffic,” and “trade.”¹¹⁷

Key works in the English language illustrate this meaning. Consider Christian scripture. In the King James Version of the Bible, a translation finished in England in 1611, the words “merchandise,” “trade,” and “traffick” occur repeatedly, but “commerce” never occurs.¹¹⁸ Words used in a sense most closely approaching the eighteenth century

¹¹³ The phrase “disturbs the air [radio spectrum]” was used in 35 Op. Attys. Gen. 126 (1926). Quoted *infra*.

¹¹⁴ Other scholars have briefly noted and dismissed this meaning of commerce with respect to the Commerce Clause. See Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101, 128-9 (2001); Nelson and Pushaw, *supra* at 19, 41; Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 Sup. Ct. Rev. 125, 141 n. 37 (1995) [hereinafter, Lessig, *Translating*].

¹¹⁵ Oxford English Dictionary (2nd ed., 1989), heading note for “commerce”.

¹¹⁶ In seventeenth century Dutch society, Dutch Calvinist moralists fostered hospitality to the values found in Roman commercial law and thus helped to create moral space for commercial activities. See James Q. Whitman, *The Moral Menace of Roman Law and the Making of Commerce: Some Dutch Evidence*, 105 Yale L. Rev. 1841. In England, where Roman law and Protestant theology had much less significance, the way “commerce” was understood helped to distinguish it from “unbrotherly” or “uncommunal” activities.

¹¹⁷ The period 1550-1580 in England was a period of rapidly increasing internal trade and consumption -- the most intensely concentrated period of economic growth before the late eighteenth century. Trade then was deeply connected to an intricate system of personal relations. Credit meant not just money but social standing and character. See Craig Muldrew, *The economy of obligation: the culture of credit and social relations in early modern England* (1998). Given that the word “commerce” came into the English language about this time, these developments shed light on the meaning of that word.

¹¹⁸ The King James Version, as well as a number of other translations, can be searched at The Bible Gateway, available at <http://www.biblegateway.org>. “Commerce” was derived from the Latin “commercium”. This term, and related forms, does not occur in the Vulgate. The ARTFL Project offers an

meaning of commerce are in Matthew 22:5 (“But they made light of it, and went their ways, one to his farm, another to his merchandise”) and in John 2:16 (“make not my Father’s house a house of merchandise”) In the Vulgate, St. Jerome’s Latin translation of Christian scripture in 400 CE, these phrases are rendered with forms of “negotiation,” meaning wholesale or banking business, or more generally, business or traffic.¹¹⁹ Twentieth-century translations use “business” for “merchandise” in Matthew 22:5, and “into a market,” “place of business,” or “house of trade” for “house of merchandise” in John 2:16.¹²⁰ These meanings were too narrow to invoke the use of the word “commerce” in early seventeenth century English.

Shakespeare shows that the natural sense of commerce then covered the full sense of human relationships. The word “commerce” occurs four times in Shakespeare’s oeuvre.¹²¹ Malvolio, a courtier deluded that has become a great political and romantic favorite of the Countess Olivia, is described by Olivia’s maid at the end of a playful dialogue as being engaged “in some commerce with my lady.”¹²² That is an insinuation of intercourse in many human dimensions. Regarding Achilles’ intimate relationship with a prominent woman in the enemy city of Troy, Ulysses says to him: “All the commerce that you have had with Troy / As perfectly is ours as yours, my lord.”¹²³ The significance to the state of this relationship – this commerce – means that it could not be kept hidden. To Agamemnon, the leader of the Greek camp, Ulysses urges the importance of respecting order in relationships, and he contrasts “peaceful commerce from dividable shores” with bounded waters flooding the globe, sons striking fathers, and power, will, and appetite perverting justice.¹²⁴ Finally, in a scene underscoring disordered relationships, Ophelia, returning love letters to a Hamlet deeply troubled by the events in his family and in the royal court, asks Hamlet: “Could beauty, my lord, have better commerce than with honesty?”¹²⁵ Hamlet responds by speculating on the transforming power of relationships between virtues and of relationships between persons. Thus commerce means intercourse so intimate and comprehensive as to be transformative.

online search of the Vulgate, available at
<http://www.lib.uchicago.edu/efts/ARTFL/public/bibles/vulgate.search.html>

¹¹⁹ See Vulgate text, *id.* For an online Latin dictionary, see the Perseus Digital Library, available at <http://www.perseus.tufts.edu/cgi-bin/resolveform?lang=Latin>. The early Greek texts use, in Matthew 22:5 and John 2:16 respectively, “emporía” and “emporion”. These terms mean trade or a place of trade. See interlinear Greek, Strong’s Concordance, and Vine’s Expository Dictionary linked to verses online at Blue Letter Bible, <http://www.blueletterbible.org/index.html>. A translation in Rheims in 1582 used “merchandise” and “traffick” in the same respective passages. See Douay-Rheims translation at The Unbound Bible, available at <http://unbound.biola.edu/>.

¹²⁰ See various Bible translations at links mentioned in footnotes above.

¹²¹ For online searches of Shakespeare’s oeuvre, see the Rhyme Zone, <http://www.rhymezone.com/shakespeare/> and Matty Farrow’s search, <http://www.it.usyd.edu.au/~matty/Shakespeare/test.html>

¹²² William Shakespeare, *Twelfth Night*, act 3, sc. 4.

¹²³ William Shakespeare, *Troilus and Cressida*, act 3, sc. 3.

¹²⁴ *Id.*, act 1, sc.3.

¹²⁵ William Shakespeare, *Hamlet, Prince of Denmark*, act 3, sc. 1.

For eighteenth century intellectuals and public figures, the natural and obvious meaning of commerce comprised a broad sense of relationship. The 1776 Declaration of Independence declared the “United Colonies” to have “...full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do.” Consider the four distinguished acts and things: “War,” “Peace,” “Alliances,” and “Commerce.” The selection and order of these terms indicates that commerce, balanced against “alliances,” is a serious, informal, general, peaceful relationship not merely limited to trade.¹²⁶

Montesquieu discussed *doux commerce* – sweetness and gentleness that commerce engendered in relations among persons. This state of relations he set in contrast to hostility and violence.¹²⁷ A Scottish historian in 1769 declared:

*Commerce tends to wear off those prejudices which maintain distinction and animosity between nations. It softens and polishes the manners of men.*¹²⁸

Concern about commerce meant concern about relationships among persons. Thus James Madison argued that the purpose of the Commerce Clause is to avoid practices that would “nourish unceasing animosities” and that might “terminate in serious interruptions of public tranquillity.”¹²⁹

Alexander Hamilton recognized contemporary views on the transformative power of commerce and of republican government:

*The genius of republics (say they) is pacific; the spirit of commerce has a tendency to soften the manners of men, and to extinguish those inflammable humors which have so often kindled into wars. Commercial republics, like ours, will never be disposed to waste themselves in ruinous contentions with each other. They will be governed by mutual interest, and will cultivate a spirit of mutual amity and concord.*¹³⁰

But he ridiculed such a view as abstract speculation contrary to real experience:

*Are not popular assemblies frequently subject to the impulses of rage, resentment, jealousy, avarice, and of other irregular and violent propensities? Is it not well known that their determinations are often governed by a few individuals in whom they place confidence, and are, of course, liable to be tainted by the passions and views of those individuals? Has commerce hitherto done anything more than change the objects of war? Is not the love of wealth as domineering and enterprising a passion as that of power or glory? Have there not been as many wars founded on commercial motives since that has become the prevailing system of nations, as were before occasioned by the cupidity of territory or dominion? Has not the spirit of commerce, in many instances, administered new incentives to the appetite, both for the one and for the other? Let experience, the least fallible guide of human opinions, be appealed to for an answer to these inquiries.*¹³¹

¹²⁶ Note as well that the expressed causes for the Declaration contain only one reference to trade.

¹²⁷ Albert O. Hirschman, *The Passions and the Interests*, 60 (1977).

¹²⁸ *Id.* at 61, quoting William Robertson, *View of the Progress of Society in Europe* (1769).

¹²⁹ Federalist No. 42, available at http://memory.loc.gov/const/fed/fed_42.html

¹³⁰ Federalist No. 6, available at http://memory.loc.gov/const/fed/fed_06.html

¹³¹ *Id.*

Hamilton argued that the structure of commercial governance affected the nature of relationships among citizens of the United States:

*The interfering and unneighborly regulations of some States, contrary to the true spirit of Union, have, in different instances, given just cause of umbrage and complaint to others, and it is to be feared that examples of this nature, if not restrained by a national control, would be multiplied and extended till they became not less serious sources of animosity and discord than injurious impediments to the intercourse between the different parts of the Confederacy. ... we may reasonably expect, from the gradual conflicts of State regulations, that the citizens of each would at length come to be considered and treated by the others in no better light than that of foreigners and aliens.*¹³²

Thus, to Hamilton, commerce itself does not constitute harmonious human relationships. Under different structures of governance, the qualities of commerce can be very different.

Gibbons v. Ogden, a Supreme Court case decided in 1824, inadvertently helped to create space for a much different legal perspective on commerce. The primary ruling of the Court declared:

*Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse....*¹³³

The opinion clearly identifies “commerce” as “intercourse,” meaning more than “traffic” or “trade.” Yet the opinion also uses the phrases “no sort of trade,” “commercial intercourse,” and “trading intercourse.” These phrases may have contributed to misunderstanding the eighteenth century meaning of commerce as being only a particular dimension of intercourse, and thus less than intercourse.¹³⁴ The concurring opinion shows meaning moving in that direction:

*Commerce, in its simplest signification, means an exchange of goods; but in the advancement of society, labour, transportation, intelligence, care, and various mediums of exchange, become commodities, and enter into commerce...*¹³⁵

This is an early glimpse of what Marx saw in the British Industrial Revolution. Commerce, and economics more generally, was evolving to focus on concepts and commodities abstracted from persons.

¹³² Federalist No. 22. available at http://memory.loc.gov/const/fed/fed_22.html

¹³³ *Gibbons v. Ogden*, 22 U.S. 1, 189-90 (1824).

¹³⁴ Marshall seems to have attached the adjectives “commercial” and “trading” to “intercourse” only for emphasis in the context of a specific description. “It has, we believe, been universally admitted, that these words [‘with foreign nations, and among the several States, and with the Indian tribes.’] comprehend every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and any other, to which this power does not extend.” *Id.* at 193-4. “What is commerce ‘among’ them [states]; and how is it to be conducted? Can a trading expedition between two adjoining States, commence and terminate outside each? And if the trading intercourse be between two States remote from each other, must it not commence in one, terminate in the other, and probably pass through a third? Commerce among the States must, of necessity, be commerce with the States.” *Id.* at 196.

¹³⁵ *Id.* at 229-30.

Cases addressing the telegraph contributed to this change in the meaning of commerce. In *Pensacola Telegraph v. Western Union* (decided in 1877), the Supreme Court declared:

*Since the case of Gibbons v. Ogden (9 Wheat. 1), it has never been doubted that commercial intercourse is an element of commerce which comes within the power of Congress. ... it is not only the right, but the duty, of Congress to see to it that intercourse among the States and the transmission of intelligence are not obstructed or unnecessarily encumbered by State legislation.*¹³⁶

One might consider the transmission of intelligence to be intrinsically related to human intercourse. But *Pensacola*'s reference point was not the primary ruling in *Gibbons* but the concurrence. *Pensacola* presented intelligence as a commodity – something “transmitted” like a commercial good.

Four years later, *Telegraph v. Texas* showed this understanding in analogy:

*A telegraph company occupies the same relation to commerce as a carrier of messages, that a railroad company does as a carrier of goods. Both companies are instruments of commerce, and their business is commerce itself.*¹³⁷

The wonder of the telegraph was that it separated communication from physical relation and movement of objects:

*But the telegraph transports nothing visible and tangible; it carries only ideas, wishes, orders, and intelligence.*¹³⁸

In these decisions and others, the Court found telegraphic communication across state lines to be interstate commerce. Rather than understanding communication as inter-subjectivity extended in space, courts, following *Pensacola* and reasoning consistent with the intellectual and practical circumstances of their times, presented communications as the transmission of intelligence analogized to a commodity.

Yet by the late nineteenth century, the telegraph had substantial and well-recognized affects on relationships spanning the nation. Telegraph lines expanded with the railroads, enabling considerable capital savings and thus enabling more persons to be brought more quickly within the scope of this national transportation network.¹³⁹ Logistical control through telegraphic communication prompted a new national division of labor in the slaughtering and meat packing industries, a national trade in fresh fruits and vegetables, and the growth of mail order houses and mass merchandising.¹⁴⁰ The telegraph also transformed commodities and securities trading. By 1874, Western Union Telegraph transmitted near-real-time transaction data from the New York Stock Exchange to 116

¹³⁶ *Pensacola Telegraph v. Western Union*, 96 U.S. 1, 9 (1877).

¹³⁷ *Telegraph v. Texas*, 105 U.S. 460 (1881).

¹³⁸ *Western Union Tel. Co. v. Pendleton*, 122 U.S. 347, 356, 7 S.Ct. 1126, 1127 (1887).

¹³⁹ The telegraph provided control that allowed rail lines to be single-tracked. In 1890, the U.S. rail system was 73% single-tracked. The additional cost of double-tracking the system would have been about one billion dollars in 1890. For comparison, the total book value for construction of all railroads and for the equipment on them was about \$8 billion at that time. Alexander J. Field, *The Magnetic Telegraph, Price and Quantity Data, and the New Management of Capital*, 52 J. Econ. Hist. 401, 406-9 (1992).

¹⁴⁰ Huge stockyards and slaughtering operations developed in Chicago and other major mid-Western cities. *Id.* at 410-2.

other cities.¹⁴¹ By that time Western Union was the first national monopoly, pointing toward a new, important national political issue. Working with the U.S. Navy, Western Union also transmitted nationally time synchronization pulses that standardized time across the nation.¹⁴² Moreover, arising directly from the opportunities that the telegraph presented and closely tied to Western Union, the Associated Press had become “one of the most powerful centripetal forces shaping American society.”¹⁴³ By the late 1880s, Associated Press wire dispatches made up 80-100% of news copy in mid-western small town dailies.¹⁴⁴

These realities should be recognized when reading the *Pensacola* decision of 1877. That decision merely briefly noted that the telegraph had “changed the habits of business” and had fostered communications among government officials spread across the country and the world.¹⁴⁵ Certainly the telegraph had done much, much more than that. The telegraph greatly transformed relationships among persons across the nation. Yet the heart of the *Pensacola* decision was to judge intelligence to be a commodity. Judging the scope of commerce came to be about identifying commodities and estimating effects on commodity streams.¹⁴⁶ The loss of the eighteenth century understanding of commerce in

¹⁴¹ Alexander J. Field, *The Telegraphic Transmission of Financial Asset Prices and Orders to Trade: Implications for Economic Growth, Trading Volume, and Securities Market Regulation*, in 18 *Research in Economic History* 145, 167 (1998). In addition,

Physical proximity to the exchange was no longer a prerequisite for a trader whose strategies depended on knowing what was happening on the floor, reacting to it, transmitting trading instructions, and having them executed and confirmed within very short time spans.

Id. These were important changes in relationships of trade. More generally, see *id.* at 163-9.

¹⁴² Annteresa Lubrano, *The telegraph: how technology innovation caused social change*, 118-20 (1997).

¹⁴³ Menahem Blondheim, *News over the wires: the telegraph and the flow of public information in America, 1844-1897*, 7 (1994).

¹⁴⁴ Blondheim’s impressively detailed history of news wire services noted:

The Associated Press replaced the great party organs and popular metropolitan newspapers as the primary source of national news. Unlike predecessors such as the Washington National Intelligencer or the New York Weekly Tribune, the wire service was not a local institution. Wire service reports were a compilation of dispatches, by hundreds of anonymous local agents, printed verbatim in all the country’s major newspapers simultaneously. And thus they were not perceived as representing any local institution or interest.

Id. at 195.

¹⁴⁵ Compare the Court’s description to this newspaper description more than 30 years earlier:

Washington is as near to us now as our up-town wards. We can almost hear through the Telegraph, members of Congress as they speak. The country now will be excited from its different capitals. Man will immediately respond to man. An excitement will thus be general, and cease to be local. Whether good or ill is to come from all this, we cannot foresee, but that the Telegraph is to exert an important bearing over our political and social interest, no man can doubt.

Id. at 191, quoting the *New York Express* from 1846. Developments from the time that account was written to the time the Court issued its opinion confirmed what the journalist regarded as indubitable.

¹⁴⁶ To get a sense for the extent to which analysis of commerce got unmoored from the eighteenth century understanding of commerce, consider this analysis in a 1928 law review article examining the law of radio communication:

Pensacola now seems natural and unremarkable. Commerce as an economic reality is now firmly entrenched in a grand, deterministic narrative of the rise of a single national market.¹⁴⁷ A better reading of *Pensacola* looks backwards and finds a different story. In the silences of *Pensacola* – the obvious, unnoted reality that railroads and telegraphs dramatically changed human relations across the country – one can recognize the resources for much more vigorous and fruitful deliberations about the Commerce Clause.

VI. Spurring Fruitful Deliberation

Considering commerce in its eighteenth century meaning can help to revitalize deliberations about the Commerce Clause. One might well consider many past Commerce Clause cases to be correctly decided, or at least to be prudently preserved. But decisions are written to be discussed. And discussions, like barn-raising, require good tools, in addition to what might be called rational calculations. The eighteenth century meaning of commerce, etched in still-accessible artifacts, is one such tool.

With this tool, one can better understand influential precedent. For example, the *Shreveport* decision:

...does not ground federal power to regulate rates for intrastate carriage solely in their effect on commerce. [That decision] repeatedly emphasizes that it is the intrastate operations of “agencies” or “instruments” of interstate commerce that

[quoting Pensacola] “...The powers thus granted to Congress are not confined to the instrumentalities of commerce known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances.” It would seem, therefore, that the analogy between the radio wave as an instrumentality of interstate commerce and the telegraph is a much closer one than that between the telegraph and the railroad, as the electro-magnetic energy which is the basis of communication in the case of both radio and telegraphy by wire has already received judicial cognizance as a means of commercial intercourse.

Taugher, *supra* at 314. The telegraph’s use of electromagnetic energy to transmit messages has little to do with the intercourse related to the telegraph. Locomotives’ use of iron railroad tracks likewise has little to do with the intercourse associated with railroads.

¹⁴⁷ A more critical approach to this narrative is needed. What does it mean to say that the U.S. (or the European Union) is a “single market”? The contextual significance of such references are usually promotion of a particular set of contemporary economic policies. In attempting to give this use of “market” additional historical significance, Lessig, *Translating*, *supra* at 138 suggests:

There is no simply way to describe this difference in the extent of integration, and no handy way to quantify it. But I don’t believe that we need data to make the point that I want to make here: That integration in the sense I suggest has increased; that more operates in a national rather than local market; and that this change in the extent of the market properly has consequences for the scope of federal and state power.

Consider one long-run economic trend that Lessig neglects: the growth of (monetized) services in the economy. Transactions for services tend to be more individualized, more localized, and involve more relationship-specific investments than transactions for goods. That the “market” for health care now is much more national than the “market” for corn was in the mid-nineteenth century is not at all clear. The same seems to be the case for the economy as a whole. On trends in shared symbolic experience and cultural homogeneity, see Douglas A. Galbi, *A New Account of Personalization and Effective Communication* (2001), available at <http://www.galbithink.org> [hereinafter, Galbi, *Personalization*].

*are being regulated. That is, [it] focuses not just on the activity regulated, but also on the interstate nature of the entity regulated.*¹⁴⁸

An entity in the sense used above can be understood as a network of human relations. The scope of these relations – commerce in the eighteenth century meaning of the word – matters in determining what falls within the boundaries of the Commerce Clause.

The eighteenth century meaning of commerce can also spur needed discussion of the many Commerce Clause cases categorized as non-economic. Consider *Heart of Atlanta Motel v. United States* (1964), *Katzenbach v. McClung* (1964), *Daniel v. Paul* (1969), and *United States v. Morrison* (2000).¹⁴⁹ The first three found that the Commerce Clause provides authority to enjoin racial discrimination in certain motels, restaurants, and snack bars in the 1960s. The latter found that the Commerce Clause does not provide authority to enact civil remedies against gender-motivated violence in the 1990s. These decisions imply a judgment directly related to the eighteenth century notion of commerce. Through them the Court judged that racial discrimination in the 1960s was a national problem in commerce – intercourse – to an extent that gender-motivated violence in the 1990s was not.

That judgment might seem controversial or questionable, but it has a rational basis. In an ideal speech situation, which characterizes a type of rationality, most persons might agree with the Court's judgment. Alternatively, based on lived experience, actual discussions with real persons, and moral intuition, most persons might agree with the Court's judgment. A mass of statistics and citations might also, on a purely formal level, be impressive enough to convince some. Others might seek a clear, disciplined, and coherent analysis of statistics, preferably calculated using data from sources collecting data for broad purposes, in a methodical way, and with full documentation of definitions and measurement techniques. Today there is no general agreement about what a rational basis for a view formally entails. If there ever were such agreement, it certainly broke down more than a century ago. A dominant thrust of philosophical and literary thought over the past decades has been to show the tenuous and historically contingent character of the basis or foundation for reasoning and knowledge.¹⁵⁰ Nonetheless, the Supreme Court is the head of a judicial process that deserves considerable respect. Its decisions, in a serious sense, define an important type of rationality. Therefore, that racial discrimination in the 1960s was a national problem in commerce to an extent that gender-motivated violence in the 1990s was not is a statement with a rational basis.

The Supreme Court's rationality has significance not just because it has legal force, but also because the Court provides written decisions that can stimulate fruitful discussions.

¹⁴⁸ Cushman, *supra* at 1130.

¹⁴⁹ *Heart of Atlanta Motel v. United States* 379 U.S. 241, 85 S.Ct. 348 (1964), *Katzenbach v. McClung* 379 U.S. 294, 85 S.Ct. 377 (1964), *Daniel v. Paul* 395 U.S. 298, 89 S.Ct. 1697 (1969), and *United States v. Morrison*, 529 U.S. 598, 120 S.Ct. 1740 (2000).

¹⁵⁰ See, e.g. Paul Feyerabend, *Against method: outline of an anarchistic theory of knowledge* (1975); Richard Rorty, *Philosophy and the mirror of nature* (1979); Jean-François Lyotard, *The postmodern condition: a report on knowledge (Condition postmoderne)* (1984); Jacques Derrida, *Limited Inc* (1988); Alasdair MacIntyre, *Whose justice? Which rationality?* (1988); Stanley Fish, *The trouble with principle* (1999).

Such discussions do not naturally emerge via the workings of some invisible hand or tongue. Good discussion, like every other aspect of human existence, requires resources and confronts constraints. To see how the eighteenth century meaning of commerce can support more disciplined reading of statutes, prompt recognition of previously unrecognized but relevant facts, eliminate some utterability constraints, and stimulate imaginative discussion, consider in more detail *Morrison*.¹⁵¹

Morrison concerns gender and the Violence Against Women Act.¹⁵² What does “gender” mean in the Violence Against Women Act? Gender there, as in much of the gender literature, seems to mean concern only about women. However, interpreting “gender” to mean “women” probably would be an inappropriately cramped reading of the Violence Against Women Act. “Gender” might better be read in the Act as a simple substitute for “sex” (among those who consider “sex” to be impolite, undesirable, or unfashionable), or as a word emphasizing the social and political construction of sexual categories, particular from a post-modern perspective that does not take the intrinsic differences between males and females to be significant.¹⁵³ A hypothetical (reasonable) Member of Congress in the year 1994 probably would have had the courage to use “sex” in a statute and probably would not have felt compelled by decorum to choose the more ambiguous substitute “gender.” Moreover, a (hypothetical) reasonable Member of Congress in the year 1994 or in the year 2000 probably would have wanted the statute to apply to a man, hostile to the idea of women voting, who assaulted, for that reason, a man voting dressed as a woman. Thus, in judicial interpretation of the Violence Against Women Act, gender should be understood to refer to the social and political construction of sexual categories.

Now consider the Violence Against Women Act relative to the Commerce Clause. The Act addresses “a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim’s gender.”¹⁵⁴ Criminal violence, without further qualification, has long been recognized as a matter of intrastate commerce. One might analyze whether that is still appropriate under current circumstances by considering whether the relationships associated with criminal violence have a substantial interstate component.¹⁵⁵ But criminal violence does not describe well

¹⁵¹ *United States v. Morrison*, 529 U.S. 598, 120 S.Ct. 1740 (2000). For an analysis of utterability constraints, see Lawrence Lessig, *Understanding Federalism's Text*, 66 *George Washington Law Review* 1218 (1998). For an additional attempt to address utterability constraints in a scholarly context, see Galbi, *Personalization*, *supra* § III.

¹⁵² Violence Against Women Act, Pub. L. No. 103-322, 108 Stat 1796, § 40001 (September 13, 1994).

¹⁵³ Forms that instruct the respondent to identify “gender” as male or female are a fine example of the first meaning of “gender.”

¹⁵⁴ 42 U.S.C. § 13981(d)(1).

¹⁵⁵ As part of such inquiry, one might ask whether the significance of violence in intercourse considered from a national perspective differs significantly from the significance considered in states as separate entities. Considering Commerce Clause cases from a “commerce is intercourse” approach provides better connection to existing precedent, more focus on case-specific facts, and a more tightly defined framework for analysis than the “structural necessity” approach proposed in Bradley A. Harsch, *Finding a Sound Commerce Clause Doctrine: Time to Evaluate the Structural Necessity of Federal Legislation*, 31 *Seton Hall L. Rev.* 983. The “commerce is intercourse” approach has similar advantages relative to interpreting the Commerce Clause to mean “Congress should have the power to regulate whenever the states cannot do

the relationship that the Act governs. The relationship that the Act governs is better described as gender hostility to such an extent that it is expressed in criminal violence.

Attention to appropriately characterizing the relationships of concern matters for analysis. A lower court made specific findings that the alleged crime in *Morrison* expressed gender animus. But such evidence does not go to the constitutionality of the Act under the Commerce Clause. Cited statistics from the “mountain of data” put forward to support Commerce Clause authority consisted only of evidence that criminal violence significantly affects women.¹⁵⁶ Such violence is repugnant and an insult to human dignity. Thus data describing it are an affective showing. These data do not, however, provide useful material for discussing Commerce Clause authority.

Other aspects of the formal use of data in *Morrison* have similar weaknesses. The principal dissent cites statistics concerning the effects of violence against women on “the supply and demand for goods in interstate commerce,” as well as on “reductions in the [size of] the work force.”¹⁵⁷ These data seem to reflect “silly questions rather than meaningful ones” and “tedious and somewhat arcane attempts to show how various social problems affect the economy.”¹⁵⁸ The statistical material in *Morrison* does not enrich deliberation about the Court’s judgment that racial discrimination in the 1960s was a national problem in commerce to a greater extent than gender-motivated violence in the 1990s.

With a better understanding of commerce, the Court could have easily found statistics and pushed forward analysis that would have stimulated meaningful deliberation. Consider, for example, that in 1999, 12,785 males and 4,104 females died from assault (homicide).¹⁵⁹ Gender unquestionably has something to do with the fact that more than three times as many males were killed. One would explore whether gender animus, in particular, notions of male disposability and social norms suggesting that killing a male is

the job effectively.” The latter interpretation is presented in Deborah Jones Merritt, *The Third Translation of the Commerce Clause: Congressional Power to Regulate Social Problems*, 66 Geo. Wash. L. Rev. 1206.

¹⁵⁶ 529 U.S. 598, 628-36, 120 S.Ct. 1740, 1760-4, esp. fn. 2.

¹⁵⁷ *Id.* at 636.

¹⁵⁸ Merritt, *supra* at 1213. These descriptions were made in the context of discussion of Commerce Clause cases in general. They appear to me to be directly relevant to some aspects of judicial reasoning in the principal dissents in *Morrison* and in *Lopez*.

¹⁵⁹ See National Center for Health Statistics (NCHS), “Deaths: Final Data for 1999” available online at <http://www.cdc.gov/nchs/about/major/dvs/mortdata.htm> NCHS is a broad source of statistics with considerable relevant expertise. Its website provides comprehensive descriptions of the data and documentation of statistical methods used. Compare these statistics and its citation to a statement in the principal dissent in *Morrison*: “Supply and demand for goods in interstate commerce will also be affected by the deaths of 2,000 to 4,000 women annually at the hands of domestic abusers, see S.Rep. No. 101-1545, at 36...” *Morrison*, *supra*, 120 S.Ct. 1740, 1764. One should wonder at the plausibility and meaning of the implication that roughly 50-100% of females that die from assault are women who die “at the hands of domestic abusers.” FBI homicides reports for 1999 indicate that 1,218 females were killed, inside or outside the home, by intimate partners, defined as “current or former spouses, boyfriends or girlfriends.” Rennison, Callie Marie Rennison, U.S. Bureau of Justice Statistics Special Report, Intimate Partner Violence, 1993-1990, NCJ 187635 at 2(Oct. 2001), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ipva99.pdf>. One should interrogate the symbolic domination that creates the statistics cited in *Morrison*, and effaces those cited *infra*.

less horrible than killing a female, are part of the explanation for this disparity. With respect for the Commerce Clause, one would also consider whether these norms reflect a systematic national pattern of human relationships that is not encompassed by relationships in the states taken separately.¹⁶⁰ Such facts and such analysis do not appear to have been seriously considered in the intellectually and rhetorically mechanistic deliberations about the Violence Against Women Act, or in the Court's analysis of its constitutionality under the Commerce Clause. Doing justice in a case is not a matter of displaying a mass of statistics, or even analyzing a couple. But facts can be useful in identifying truth. The eighteenth century meaning of commerce can help to inform the selection and analysis of relevant facts.

This understanding of commerce also provides better intuition about boundaries. A focus on economic effects exacerbates the un-Donne challenge:

No man is an island, entire of itself; every man is a piece of the continent, a part of the main. If a clod be washed away by the sea, Europe is the less, as well as if a promontory were, as well as if a manor of thy friend's or thine own were: any

¹⁶⁰ Being sent far from home for long periods to risk death in wars is a culturally salient form of disposition historically associated with maleness in the US. While the US now has a sex-integrated military, the Military Selective Service Act currently requires only males to register. The Supreme Court has upheld such discrimination (see *Rostker v. Goldberg*, 435 U.S. 57, 101 S.Ct. 2646 (1981); both the majority opinion and the two sharp dissents lack any serious consideration of men as male, or of the social construction of maleness). That a large share of military jobs currently require physical characteristics highly disproportionately found among males seems doubtful. Women currently serve in military positions very closely related to combat. The Military Selective Service Act might be understood as current national law supporting norms of male disposability. Disposal of persons in the criminal justice system also fosters stereotypes of male disposability. In 1997, 1.23% of males ages 20 and over were in federal and state prisons under a sentence longer than 1 year. The comparable figure for women is 0.07%. See Bureau of Justice Statistics, *Correctional Populations in the United States, 1997*, Table 1.8, p. 4 (online at <http://www.ojp.usdoj.gov/bjs/abstract/cpus97.htm>) and US Census Bureau, *Current Population Reports P25-1130*, Table 2, p. 46 (online at <http://www.census.gov/prod/1/pop/p25-1130/>). This sex disparity, which concerns some of the most disadvantaged persons in the US and has attracted little political concern, is typically legitimated via an essentialist stereotype of males that re-enforces their disposability. Violence directed at males by virtue of their sex is recorded in some of the earliest written human records (see Exodus 1:16, 22) and across a variety of cultures (see Adam Jones, *Gendercide and Genocide*, 2 J.Genocide Res.185 (2000), available at http://www.gendercide.org/gendercide_and_genocide.html; *id.* at 186 notes that “gendercide, at least when it targets males, has attracted virtually no attention at the level of scholarship or public policy.”). Domestic violence against males has received virtually no public policy attention, perhaps because of archaic and overbroad stereotypes that presume women not capable of the full range of human emotions and not capable of devising tools to attack men who on average are physically larger and stronger. A highly credible recent study found that among heterosexual partners women were slightly more likely than men to “use one or more acts of physical aggression and to use such acts more frequently,” and that 38% of those physically injured by a partner were men. See John Archer, *Sex Differences in aggression between heterosexual partners: A meta-analytic review*, 126 Psychological Bulletin 651, 651 (2000). The narrow focus of the literature on gender and the Violence Against Women Act might indicate that violence toward males continues at a relatively high level because of gender animus that has become a truly national problem. Cf. Jennifer Hagen, *Can We Lose The Battle And Still Win The War?: The Fight Against Domestic Violence After The Death Of Title III Of The Violence Against Women Act*, 50 DePaul L. Rev. 919 (2001); Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 Yale L.J. 619 (2001); J. Rebekka S. Bonner, *Reconceptualizing VAWA's 'Animus' For Rape In States Emerging Post-VAWA Civil Rights Legislation*, 111 Yale L.J. 1417 (2002).

*man's death diminishes me, because I am involved in mankind, and therefore never send to know for whom the bell tolls; it tolls for thee.*¹⁶¹

These words are easily recognized as poetry, which most persons in the U.S. today would regard as ignorable. But viewed through the discourse of twentieth century economics, they present a formidable challenge:

*"I really know of no place," [Supreme Court Justice] Jackson confessed, "where we can bound the doctrine of competition as expounded in the Shreveport, the Wrightwood, and the Wickard cases. I suppose that soy beans compete with wheat, and buckwheat competes with soy beans, and a man who spends his money for corn liquor affects the interstate commerce in corn because he withdraws that much purchasing power from that market." As so the jig was up. "If we were to be brutally frank," he wrote, "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. All of the efforts to set up formulae to confine the commerce power have failed. When we admit it is an economic matter, we pretty nearly admit that it is not a matter which courts may judge."*¹⁶²

With more emphasis on intercourse, the situation may be more appealing. While everyone may in some sense be related to everyone else, one intuitively recognizes that the relationship between spouses is of different quality than the relationship between foreigners.¹⁶³ No arcane and tedious calculations of economic effects are necessary. More generally, compared to such calculations, evidence and judgments about the boundaries of ongoing, systematic relationships are likely to produce a more coherent, stable, understandable, and satisfying body of law.¹⁶⁴

Current case law tends to interpret the "substantially affects" test to describe an absolute measure of a single, all-encompassing quantity – dollars. In *Lopez*, the Supreme Court "identified three broad categories of activity that Congress may regulate under its commerce power."¹⁶⁵ The final broad category was described as follows: "Congress' commerce authority includes the power to regulate those activities that have a substantial relation to interstate commerce i.e. those activities that substantially affect interstate

¹⁶¹ John Donne, "For whom the Bell Tolls" (1623), available at <http://www.incompetech.com/authors/donne/bell.html>

¹⁶² Cushman, *supra* at 1145-6, quoting letter from Justice Jackson to his friend Sherman Minton.

¹⁶³ Strong relationships of similar type are not necessarily conflicting. A person may give herself in love fully to another person. Yet doing so might complement, rather than conflict with, that person loving God with all her heart, and with all her soul, and with all her might. See Ruth 1:16. *U.S. Term Limits v. Thornton*, 514 U.S. 779, 115 S.Ct. 1842 (1995), presents a challenging case concerning the nature of political relationships. See, in particular, the intellectually impressive dissenting opinion.

¹⁶⁴ Merritt, *supra* at 1210, suggests that, under the Commerce Clause, "Congress should have the power to regulate whenever the states cannot do the job effectively...." Harsch, *supra* at 985, similarly argues that courts "ought to ask whether a solution at the federal level is necessary, because the states and the federal government are politically structured in such a way as to preclude the states from dealing with the problem at hand." While these approaches make sense for policy inquiry, practical legal needs seem rather different. These approaches move far from the text of the Commerce Clause and provide little general structure for positive inquiry into facts. What type of analysis would these approaches imply for considering federal regulation of all radio use? What value would precedent offer under that kind of analysis?

¹⁶⁵ *United States v. Lopez*, 514 U.S. 549, 557, 115 S.Ct. 1624, 1629 (1995).

commerce...”¹⁶⁶ Such language does not prescribe a particular method of analysis. The requirement for “substantial relation” is entirely consistent with an eighteenth-century understanding of “commerce.” Nonetheless, toting up the “effects” of an activity in dollar terms predominates in asserting the constitutionality of a federal statute under the Commerce Clause. This may be related to the intellectual aura of cost-benefit analysis. But even under this spell, law in this area struggles to establish legal discipline.¹⁶⁷

Extent of relationship provides a better metric for disciplined analysis of relevant facts. Common discourse, as well as scholarship outside the discipline of economics, often identifies as values sex and power, in addition to money. But all three of these values appear to be, at least in academic discourse, reducible to any one. Real relationships, in contrast, are case-specific and not reducible.¹⁶⁸ The definition of the relationships of concern itself often provides a natural, direct measure for judging whether there is a substantial interstate component. Thus water pollution, understood in terms of ecological relationships, has a substantial interstate component. The allocation of water among persons living along a stream within a state does not. Growing wheat for home consumption in the U.S. in the year 2002 might concern only relationships within households, while in a time and place where agriculture was key to national economic stability, the relevant set of relationships might be much different.¹⁶⁹

A relational understanding of commerce has additional advantages with respect to jurisdictional elements. Suppose Congress passes a law making it a federal crime to kill a child where the child wears any article of clothing home-sewn or otherwise affecting interstate commerce. Would such a law pass constitutional muster? The significance of murdering clothed children to intercourse would seem to be about how threats to children, and parental fears of such threats, affect children’s opportunities to participate in social interaction. Thus the clothes that a child wears would not matter in judging whether such a law comes under the scope of the Commerce Clause. In contrast, a jurisdictional element such as participation in activities sponsored by national organizations, and a finding that threats to children participating in such activities are in

¹⁶⁶ Internal citations omitted.

¹⁶⁷ Among other problems, there is little basis for defining a relevant threshold value for cost-benefit analysis. See Lessig, *Translating*, supra at 208.

¹⁶⁸ Consider fatherhood. Legally, fatherhood in the U.S. today is defined in terms of a DNA test for paternity, i.e. particular effects of a particular sex act. Moreover, the consequences of this sex act can be effectively nothing more than a legal obligation to pay money, i.e. child support. Despite this legal regime, many persons still believe that fatherhood cannot be reduced to sex and money.

¹⁶⁹ The literature known as new institutional economics provides considerable insight into relationships. See, e.g. Oliver Williamson, *The economic institutions of capitalism: firms, markets, relational contracting* (1985). Commerce, understood as intercourse – ongoing, systematic relationships – is associated with relationship-specific investment (getting to know persons). Thus the mere functioning of a national commodity market does not imply anything about such relationships. Certain understandings of markets place markets in direct opposition to human relationships; see e.g. Karl Polanyi, *The Great Transformation* (1944). On the other hand, a common mistake is to consider markets too abstractly. Understanding the relationships relevant to a particular law requires a case-specific enquiry into real circumstances.

fact greater, would be relevant to Commerce Clause analysis. Analysis would thus recognize real circumstances and make meaningful distinctions.¹⁷⁰

VII. Doing Justice in Communications

If, in 1934, the *Gregg* case had been judged in terms of the relational understanding of commerce natural in the eighteenth century, the ruling may well have been different.

“The Voice of Labor” described itself as follows:

That the purpose of the station is to furnish a medium, free of charge, whereby the laboring people of Houston, Texas, may be kept in daily touch with all matters of public interest affecting the interests of working people.

That each day there is broadcast over the station addresses and talks by men prominent in labor circles. That these talks counsel and advise laboring people to wholeheartedly support the President of the United States in his effort to restore normalcy.

...That the station’s facilities are daily used, free of charge, for conducting religious services. Any denomination is welcome, absolutely without cost, to conduct religious services, etc. over said station.

An interdenominational ‘Go to Church’ hour is conducted, free of charge, over this station.

...The facilities of the station are offered, free of charge, for any emergency use, and for all civic and charitable uses.¹⁷¹

“The Voice of Labor” seems predominately oriented toward developing local community relationships. Moreover, “The Voice of Labor” asserted:

...that said station is furnishing a valuable public service to this community, free of charge, which is far more beneficial, convenient and helpful to this community than would be an occasional fragmentary broadcast which might under extraordinary conditions occasionally be heard in this locality from a ‘local’ licensed station in Shreveport, Louisiana or other out-of-state station broadcasting on the same frequency as is ‘The Voice of Labor.’¹⁷²

...that ‘The Voice of Labor’ station does not impair, does not destroy and does not interfere with any interstate or foreign radio communication or transmission and that even though ‘The Voice of Labor’ station was not on the air that the people of Houston and of Harris County, Texas, would not be served with any satisfactory, reasonable or consistent radio entertainment by any licensed station broadcasting on a frequency of 1310 kilocycles during the hours of the day when ‘The Voice of Labor’ broadcasts on such frequency.

¹⁷⁰ George D. Brown, *Constitutionalizing the Federal Criminal Law Debate: Morrison, Jones, and the ABA*, 2001 Univ. Ill. L. Rev. 983 (2001), reviews the debate about federal criminal law and emphasizes the importance of analysis of jurisdictional elements.

¹⁷¹ 5 F. Supp. 848, 853 (1934) fn. 1.

¹⁷² *Id.*

...That during the hours when 'The Voice of Labor' station is broadcasting the Federal Radio Commission and the Plaintiff are making no use of said 1310 kilocycle channel within the area served by 'The Voice of Labor.'

*...In the event at a future date the Federal Radio Commission licenses some other station at Houston, Texas, to broadcast interstate or foreign radio communications and the broadcast of 'The Voice of Labor' illegally interferes with such licensed station these Defendants will, upon notice of such illegal interference by 'The Voice of Labor' station, immediately discontinue such interference.*¹⁷³

U.S. communications regulation views localism and universal service as key public policy objectives. The ruling in *Gregg* fostered neither of these objectives. From a legal perspective, in considering whether federal suppression of “The Voice of Labor” is constitutional under the Commerce Clause, the ruling did not consider whether stations like “The Voice of Labor” were actually engaged in interstate commerce. The facts of the case indicate that “The Voice of Labor” employees, listeners, and programmers did not have a substantial interstate relation relevant to the case. On that basis and with appreciation for the natural sense of commerce as understood at the time the Constitution was written, the Court might have let “The Voice of Labor” continue broadcasting to the community about Houston, Texas.

One can imagine today equally compelling cases that would not be brought because the prospects for justice now appear so dim. Suppose an inner city school in Atlanta wants to use a device utilizing short-range radio emissions to screen students for guns. The device has been successfully deployed in another country. While it uses radio spectrum categorically forbidden for such devices in the U.S., there is no evidence that it causes harmful interference to any other radio use. Suppose the Georgia Public Service Commission, unwilling to accept the FCC’s refusal to license the device, authorized the school to use the device. Why should courts be unable to deliberate about an FCC enforcement action against this federally unauthorized radio use?

Here’s another possibility. Suppose that a poor, retired cowboy in Idaho lives twenty-five miles, by deeply rutted dirt roads, from the nearest oncological specialist. He needs a weekly visual examination to confirm the shrinkage of a tumor. The most cost-effective wireless video conferencing system under the geographic and meteorological conditions in Idaho uses radio spectrum allocated in the U.S. to broadcast television services. The Idaho Department of Health and Welfare and the Idaho Public Utilities Commission, in light of pressing rural healthcare needs, jointly declare that such systems can be used in Idaho so long as they do not cause harmful and irremediable interference to any other radio users. Why should courts be unable to deliberate about an FCC enforcement action against this federally unauthorized radio use?

For a more mundane but very contentious concern, consider mobile phone suppression technology. Maintaining a certain aural atmosphere is an important concern in opera theatres, movie houses, courtrooms, and other places. In such places, ringing mobile

¹⁷³ Above three sentences are from *id.* at 858, fn. 2.

phones ringing are a disturbing and interfering sound. Radio technology now available allows the organization that operates a space to suppress electronically mobile phone communications. Mobile phone suppression technology is illegal in most developed countries, but permitted in Israel and Japan. As of mid-2001, Hong Kong and Canada were considering legalizing mobile phone suppression.¹⁷⁴ There is some evidence of low-level debate about this issue in the U.S.¹⁷⁵ One might imagine state or local politics engaging with the issue and experimenting with different policies. Why should the only forum for considering this issue in the U.S. be the Federal Communications Commission?¹⁷⁶

The significance to radio communications of inarticulate Commerce Clause jurisprudence is growing. Wireless technology is developing rapidly, with costs plummeting and the range of applications expanding dramatically. Such technology is being adopted quickly in many countries around the world. Moreover, many countries are likely to permit short-to-medium-range radio services in spectrum bands where such services are not permitted in the U.S. Geographic, demographic, and economic conditions vary significantly across U.S. states. Federal radio regulation will not be able to respond completely, with no contested decisions, to the wide range of radio communications needs and opportunities that will be presented to U.S. state governments. Yet a simplistic, widely held, and scarcely deliberated view of the Commerce Clause's meaning for U.S. radio regulation might prevent courts from ever seriously considering desperate pleas for justice.¹⁷⁷

VIII. Conclusion

Federal jurisdiction over all radio use merits more judicial scrutiny. Authority in this area consists essentially of three federal district court decisions from the 1920s, *dicta*, and the unquestioned belief that comprehensive and uniform federal control over all radio use exists and is necessary.¹⁷⁸ The absence of judicial scrutiny has allowed significant statutory changes to proceed as if written law never mattered. By failing to highlight courts' relevant experience in addressing a wide range of interference issues, case law has

¹⁷⁴ See "Canadians debate use of cell-phone 'jammers'", *USA Today*, April, 23, 2001; available at <http://www.usatoday.com/life/cyber/tech/review/2001-04-23-cell-phone-jam.htm>

¹⁷⁵ See the online "Talkback" section at the end of the article, "Silencing Cell Phones," *techtv*, Aug. 16, 2001; online at <http://www.techtv.com/news/culture/story/0,24195,3342655,00.htm>

¹⁷⁶ Thus far public discussion of this issue at the FCC seems to consist only of posting a web page indicating that the Communications Act of 1934, as amended, does not permit the use of transmitters to prevent or jam the operation of wireless devices. See <http://wireless.fcc.gov/services/cellular/operations/blockingjamming.html>

¹⁷⁷ Mercy and truth can meet over radio regulation. The Superior Court of Pennsylvania recently stated: *Empathy for others woes and travails may evoke sympathy, but not jurisdiction. Rather, the decision of whether a court is seized with the ability to exercise subject matter jurisdiction must be predicated upon a careful statutory and constitutional foundation.*

See *Feterman v. Green*, 455 Pa.Super.639,646,689 JA.2d 228, 293 (1997). If courts follow that statement, this paper should help offer hope for easing some woes and travails.

¹⁷⁸ Galbi, *Revolutionary Ideas*, *supra* at 59-62, explains that federal control over all radio use actually does not describe current radio regulation and is literally inconceivable.

fostered the view that interference in radio use raises wholly distinctive questions that cannot be addressed in the courtroom. Courts have thus allowed law governing radio use to take a much different form than law governing land use, water use, and air use. This exceptional form of radio law is now widely considered to be hindering the development of communications capabilities.¹⁷⁹

Existing Commerce Clause precedent, invigorated with renewed appreciation for the eighteenth century meaning of "commerce" as "intercourse," could help push radio law back into the main stream of U.S. law. The line of cases from *Gibbons* to *Shreveport* to *Lopez* is consistent with the Commerce Clause providing constitutional protection against federal suppression of radio use that entails no substantial interstate relation. Rather than pursuing some generic reduction of all relations to dollars, characterizing the human relationships at issue in a case, and their actual scope, should be at the center of statutory analysis and fact-finding. Such an approach would provide coherence to Commerce Clause precedent and a sound basis for the important judicial role of judging whether federal law transgresses the Commerce Clause.

¹⁷⁹ In June, 2002, the FCC formed a Spectrum Policy Task Force "to assist the Commission in identifying and evaluating changes and improvements in spectrum policy." FCC News Release, Aug. 9, 2002, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-225310A1.doc. In remarks concerning the formation of the Task Force, FCC Chairman Michael K. Powell said, "the Commission cannot rely on outmoded procedures and policies. We must establish new ways to support innovation and the efficient, flexible use of spectrum." See quotation at the top of the FCC Spectrum Policy Task Force website, available at <http://www.fcc.gov/sptf> [accessed Aug. 29, 2002].