CONSTRUCTIVE UPHEAVAL: *RAILWAY LABOR EXECUTIVES' ASS'N V. GIBBONS* AND THE "CHOICE OF CLAUSE" CHALLENGE TO TRADITIONS OF STATUTORY CONSTRUCTION

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I. INTRODUCTION

> "The beginnings and endings of all human undertakings are untidy . . . ." – John Galsworthy, *Over the River*[1]

Some beginnings are tidier than others. Throughout American history, courts have relied consistently on certain basic principles of statutory construction when beginning to analyze legislation under the Federal Constitution. When interpreting a particular congressional enactment, courts have repeatedly taken a flexible approach to construction, rooted in a presumption of constitutionality and a preference for constitutional readings.[2] In practice, challenged legislation has been invalidated only when no available authority can reasonably justify it.[3] Although the flexible approach admits certain limits,[4] the "cardinal principle" remains that "as between two possible interpretations of a statute . . . [a court's] plain duty is to adopt that which will save the act" from being rendered unconstitutional.[5]

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[1] JOHN GALSWORTHY, OVER THE RIVER 4 (1933).

[2] *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB*), 132 S. Ct. 2566, 2594 (2012) (opinion of Roberts, C.J.) ("[E]very reasonable construction must be resorted to, in order to save a statute from unconstitutionality." (quoting Hooper v. California, 155 U.S. 648, 657 (1895)) (internal quotation marks omitted)); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937) (identifying preference for interpretations that render legislation constitutional as representing the "cardinal principle of statutory construction"); Miller v. United States, 78 U.S. 268, 309 (1870) ("[W]hen a statute will bear two constructions, one of which would be within the constitutional power of Congress . . . and the other a transgression of the power, that must be adopted which is consistent with the Constitution."); Parsons v. Bedford, 28 U.S. 433, 448–49 (1830) ("No court ought, unless the terms of an act rendered it unavoidable, to give a construction to it which should involve a violation, however unintentional, of the [C]onstitution.").

[3] *See NFIB*, 132 S. Ct. at 2594 ("[E]very reasonable construction must be resorted to, in order to save a statute from unconstitutionality." (quoting *Hooper*, 155 U.S. at 657) (internal quotation marks omitted)).

[4] *See, e.g.*, Aptheker v. Sec'y of State, 378 U.S. 500, 515 (1964) ("[A]lthough this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute . . . or judicially rewriting it." (quoting Scales v. United States, 367 U.S. 203, 211 (1961)) (internal quotation marks omitted)).

[5] *Jones & Laughlin Steel*, 301 U.S. at 30. The Court has also expressed an interest in avoiding the constitutional question altogether if possible. *See* Brockett v. Spokane Arcades,

Given the regular adherence to that cardinal principle, one might expect a court's analysis of a challenged statute to be a relatively tidy affair; a court need only consider the merits of each reasonable construction of the statute until finding an appropriate source of authority or running out of options.[6] A string of recent cases examining the validity of certain provisions of the Uruguay Round Agreements Act (URAA) that prohibit the "bootlegging" of live musical performances[7] has revealed how flawed that assumption is. Three challengers have argued that the URAA's anti-bootlegging provisions exceed the limits of Congress's authority under the Copyright Clause[8] of the Constitution.[9] Advocates for the legislation responded that Congress had enacted the anti-bootlegging provisions under its broad power to regulate interstate commerce.[10] Rather than fighting over the merits of this argument, the challengers relied on one particular Supreme Court decision to limit the courts' constructions of the URAA as an

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Inc., 472 U.S. 491, 501 (1985) (stating that federal courts should "never . . . anticipate a question of constitutional law in advance of the necessity of deciding it"). This Note is only concerned with cases where the constitutional question cannot be avoided. In that case, courts may either apply the "cardinal principle" or the "choice of clause analysis."

[6] *E.g.*, *NFIB*, 132 S. Ct. at 2594.

[7] *See* 17 U.S.C. § 1101 (2006) (creating civil liability for bootlegging); 18 U.S.C. § 2319A (2006) (creating criminal liability for bootlegging). Under both provisions of the URAA, "bootlegging" refers to the "[u]nauthorized fixation of and trafficking in sound recordings and music videos of live musical performances." 18 U.S.C. § 2319A; 17 U.S.C. § 1101.

[8] The Copyright Clause refers to Article I's grant of congressional power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. I, § 8, cl. 8. The possible limits on Congress's Copyright Clause authority are discussed in detail by Dotan Oliar, *Resolving Conflicts Among Congress's Powers Regarding Statutes' Constitutionality: The Case of Anti-Bootlegging Statutes*, 30 COLUM. J.L. & ARTS 467, 489–95 (2007).

[9] *See* KISS Catalog v. Passport Int'l Prods. (*KISS I*), 350 F. Supp. 2d 823, 829–30 (C.D. Cal. 2004) (addressing a constitutional challenge to the URAA's civil provision), *vacated in part*, 405 F. Supp. 2d 1169 (C.D. Cal. 2005); United States v. Martignon (*Martignon I*), 346 F. Supp. 2d 413, 416–17 (S.D.N.Y. 2004) (making a similar constitutional challenge to the URAA's criminal provision), *vacated*, 492 F.3d 140 (2d Cir. 2007); United States v. Moghadam, 175 F.3d 1269, 1271 (11th Cir. 1999) (addressing a constitutional challenge to the URAA's criminal provision).

[10] *E.g.*, *Moghadam*, 175 F.3d at 1274–75.

exercise of the commerce power: *Railway Labor Executives' Ass'n v. Gibbons*.[11]

Although most often remembered for discussing the Bankruptcy Clause,[12] the challengers cited *Gibbons* for its unique approach to statutory construction. Rather than testing each reasonable interpretation of the statute at issue until the presumption of constitutionality had been rebutted, *Gibbons* began by asking "whether the [challenged legislation was] an exercise of Congress's power under the Bankruptcy Clause . . . or under the Commerce Clause."[13] Although the Court acknowledged that there might be multiple interpretations of the statute,[14] it avoided any mention of the cardinal principle of construction. Instead, *Gibbons* attempted to determine which authority had been exercised in the particular case by "[d]istinguishing a congressional exercise of power under [one clause] from an exercise under [another]."[15] After overviewing the circumstances of the law's enactment, *Gibbons* decided to categorize the statute as a particular kind of law, a bankruptcy law,[16] and thereafter analyzed the legislation exclusively under Congress's limited Bankruptcy Clause authority.[17] The Court's categorization allowed it to dodge discussion of the Commerce Clause as potential authority, instead striking down the legislation due to its inconsistency with the Bankruptcy Clause.[18] With the constitutionality of Congress's efforts in jeopardy, the choice to leave out a possible interpretation creates dissonance with the cardinal principle, which would

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[11] 455 U.S. 457 (1982); *see, e.g.*, *Moghadam*, 175 F.3d at 1279 (addressing *Gibbons* as a deviation from the general rule).

[12] *See Gibbons*, 455 U.S. at 469–73 (holding, for the first time, that a statute violated the "uniformity" constraint on Congress's Bankruptcy Clause authority).

[13] *Id*. at 465.

[14] *See id*. at 465–66 (noting the difficulty of determining whether a law is an exercise of Congress's bankruptcy or commerce power).

[15] *Id*. at 465.

[16] *See id*. at 468–69 (discussing Congress's power to enact bankruptcy laws).

[17] *See id*. at 469–73 (discussing whether challenged legislation was "uniform throughout the country" as required by the Bankruptcy Clause).

[18] *See id*. (evaluating Congress's constitutional authority without discussing the possible authority vested under the Commerce Clause).

emphasize flexible interpretation and judicial deference in precisely such a setting.

This "choice of clause" aspect of *Gibbon*'s analysis maintained a relatively low profile after the decision's announcement; as of 1999, it had yet to be cited in a single court opinion.[19] When it made its courtroom debut in the first anti-bootlegging case, it did not disappoint; the choice of clause analysis had an immediate and dramatic impact on the trajectory of that case and those that followed.[20] The treatment of *Gibbons* in subsequent cases raised a fundamental challenge to existing principles of interpretation: to paraphrase Chief Justice John Marshall, if judges are asked to analyze the Constitution in light of a challenged statute, "what part of it are they forbidden to read, or to obey?"[21] Instead of resolving this question, the anti-bootlegging cases amplified it: their struggles to reconcile *Gibbons* with the cardinal principle of interpretation foreshadowed a state of confusion as courts attempt to understand the choice of clause language and its significance.[22]

Anticipating these conflicts, this Note examines the choice of clause approach to statutory interpretation, using the anti-bootlegging decisions as a starting point and guidepost for analysis. After analyzing *Gibbons*'s approach in the context of tradition and basic policies, this Note presents *Gibbons* as a significant departure from an otherwise stable, workable canon of construction. To avoid inevitable inconsistencies that it creates and tidy the beginning of the constitutional analysis, this Note argues that *Gibbons*'s role should be diminished either by limiting or eliminating its application in future cases.

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[19] *See, e.g.*, United States v. Ptasynski, 462 U.S. 74, 85 n.14 (1983) (distinguishing *Gibbons* without discussing the choice of clause analysis); St. Angelo v. Victoria Farms, Inc., 38 F.3d 1525, 1530 (9th Cir. 1994) (citing *Gibbons* without discussing the choice of clause analysis).

[20] *See, e.g.*, United States v. Moghadam, 175 F.3d 1269, 1279–80 (11th Cir. 1999) (recognizing and attempting to reconcile tension among *Gibbons* and other Supreme Court precedents).

[21] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 179 (1803) ("In some cases then, the [C]onstitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read, or to obey?").

[22] *See infra* Part III.B.

Part II provides background to frame the conflict between traditional principles and the *Gibbons* rationale. First, Part II.A establishes the pedigree of the cardinal principle of construction through the decisions of the United States Supreme Court. These cases set the stage to consider the Court's unique reasoning in *Gibbons*; further, they establish an actual rather than theoretical baseline from which to measure *Gibbons*'s inconsistency with the cardinal principle.[23] Part II.B walks through the *Gibbons* decision with a focus on its choice of clause language and discusses the limited impact of its reasoning prior to the anti-bootlegging cases. Part II.C then examines the anti-bootlegging decisions and chronicles five attempts by the judiciary to resolve the "tension" between the cardinal principle and the choice of clause approach.[24] The inconsistent efforts suggest the basic question addressed in this Note: how could *Gibbons*'s constraints on statutory construction impact future constitutional analyses?

Part III.A begins to answer that question by comparing *Gibbons* with the cardinal principle. This section focuses on *Gibbons*'s deviation from a controlling chain of precedent in terms of its analysis and driving policies, culminating in a thought experiment that injects the choice of clause reasoning into a well-known Supreme Court case to highlight the contrast between *Gibbons* and the cardinal principle.

Rather than discussing *Gibbons* in a vacuum, Part III.B predicts the mess that *Gibbons* could make if treated as a principle of construction on par with the cardinal principle. The anti-bootlegging cases provide the best reference point for these predictions—real-world examples of the two approaches to interpretation in conflict. Ultimately, this section argues that the addition of *Gibbons* as a competing principle would have a destabilizing effect on constitutional challenges, affecting both the parties asserting and the judges deciding them.

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[23] For an overview of theoretical treatments of inter-clause conflicts, see Oliar, *supra* note 8, at 496–507.

[24] *See Moghadam*, 175 F.3d at 1279 (noting "tension" between previous cases' treatment of the cardinal principle and the approach in *Gibbons*).

To avoid a jurisprudential crisis, Part IV concludes that courts should limit *Gibbons*'s application or ignore its choice of clause language entirely rather than subject themselves to its constraints. To avoid repeating the messy anti-bootlegging decisions and to promote stability and reliability, the choice of clause analysis cannot be treated as a legitimate alternative to the traditional, cardinal principle of statutory construction.

II. BACKGROUND

Gibbons's "conflict with clear Supreme Court precedent"[25] is impossible to appreciate without comparison to the broader context of Supreme Court jurisprudence. Only then does the tension created by its choice of clause analysis become most clear. This Part establishes the appropriate context to analyze *Gibbons* and its consequences in three steps. First, it examines Supreme Court precedent—excluding *Gibbons*—to derive and characterize the cardinal principle of statutory construction. Second, it analyzes *Gibbons* itself, discussing its reasoning, holding, and its role as precedent prior to the anti-bootlegging litigation. Finally, this Part discusses the anti-bootlegging cases and observes the chaos that ensued after *Gibbons* was added to the mix of applicable precedent. This discussion, and the narrative preceding it, frames the subsequent analysis of how the choice of clause reasoning should be treated by future courts.

A. BUILDING FOUNDATIONS: ESTABLISHING THE TRADITIONAL APPROACH TO STATUTORY INTERPRETATION DURING CONSTITUTIONAL ANALYSES

As Chief Justice Marshall predicted, "question[s] respecting the extent of the powers actually granted" by the Constitution have "continue[d] to arise" before the Supreme Court for resolution.[26]

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[25] United States v. Martignon (*Martignon II*), 492 F.3d 140,149 (2d Cir. 2007).

[26] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819); *accord* United States v. Lopez, 514 U.S. 549, 553–59 (1995) (providing a historical overview of numerous cases questioning the extent of the commerce power).

Each test of Congress's authority rests on a basic question: what empowered Congress to enact this particular legislation?[27]

Where a single power can be agreed on as the basis for challenged legislation,[28] judicial decisionmaking is naturally confined to analysis of the particular reading suggested.[29] However, courts and commentators have disagreed over how to treat the assertion of multiple sources of constitutional authority.[30] In spite of that disagreement, the Court itself has maintained a fairly consistent position on the matter, employing a "presumption that Congress will pass no act not within its constitutional power" that can be rebutted only when "the lack of constitutional authority to pass an act . . . is clearly demonstrated."[31] To further that deferential policy, the Court has stated that it will resort to "every reasonable construction" of a given enactment "in order to save a statute from unconstitutionality."[32] In practice, these policies permit the Court to use statutory construction as a tool to protect challenged legislation.[33]

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[27] *See* United States v. Morrison, 529 U.S. 598, 607 (2000) ("Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution.").

[28] Courts have looked to a variety of indicators for congressional authority. *See NFIB*, 132 S. Ct. 2566, 2593 (2012) (opinion of Roberts, C.J.) (following the parties' arguments for suggestions of possible authority); Leocal v. Ashcroft, 543 U.S. 1, 8 (2004) (stating that statutory interpretation "begins with the language of the statute"); *Lopez*, 514 U.S. at 562–63 (discussing the usefulness of legislative or committee findings for constitutional analysis).

[29] *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 251–52 (1964) (discussing *The Civil Rights Cases*, 109 U.S. 3 (1883), which consciously limited its analysis to Fourteenth Amendment concerns without examining a possible source of authority not argued).

[30] *Compare* United States v. Moghadam, 175 F.3d 1269, 1277 (11th Cir. 1999) ("In general, the various grants of legislative authority contained in the Constitution stand alone and must be independently analyzed."), *with* Altin Sila, Comment, *Mixing Up the Medicine: A Remedy for Constitutional Inter-Clause Conflicts and the Case of the Anti-Bootlegging Statutes*, 159 U. PA. L. REV. 1141, 1160 (2011) (arguing that the "[c]ase law does not support" treating enumerated powers as "strictly alternative").

[31] United States v. Harris, 106 U.S. 629, 635 (1883); *see also* Miller v. United States, 78 U.S. 268, 309 (1870) ("It is always a presumption that the legislature acts within the scope of its [constitutional] authority."), *cited with approval in NFIB*, 132 S. Ct. at 2579 (majority opinion) (explaining the Court's "permissive reading" of Congress's enumerated powers).

[32] Hooper v. California, 155 U.S. 648, 657 (1895).

[33] *See generally* 16A AM. JUR. 2D *Constitutional Law* § 172 (2009) (overviewing general practices applied when a statute is susceptible to more than one interpretation).

This cardinal principle represents more than rhetoric—it is reflected in the Court's actual practice. In its decisions, the Court has examined reasonable interpretations of challenged legislation until finding one that can sustain its constitutionality, even if other constructions are left unexamined[34] or have proven insufficient.[35] Circuit courts have read the Court's practice as a general rule that the "various grants of legislative authority contained in the Constitution . . . must be independently analyzed" with "each of the powers" acting as an "alternative to all of the other powers."[36] As a result, "the fact that legislation reaches beyond the limits of one grant of legislative power has no bearing on whether it can be sustained under another."[37]

The cardinal principle is not without limits, however. Countervailing principles set outer boundaries on flexible interpretation. Such principles include the requirement that courts focus on "the statute that Congress did enact" rather than some hypothetical statute that it "might have enacted"[38] and an adherence to the fair interpretation of a statute's plain language or clear purpose.[39] Skepticism toward legislative intentions[40] and occasional policy preferences also constrain courts' interpretive powers.[41] Such policies control construction without abandoning the cardinal principle outright. However, recent cases have

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[34] *See, e.g.*, *Heart of Atlanta Motel*, 379 U.S. at 249–50 (declining to consider "other grounds relied upon" as a basis for Congress's constitutional authority after being satisfied that "Congress possessed ample power" under one enumerated power).

[35] *See NFIB*, 132 S. Ct. at 2608 (plurality opinion) (upholding legislation under Congress's power to tax even though it "[could not] be upheld as an exercise of Congress's power under the Commerce Clause").

[36] United States v. Moghadam, 175 F.3d 1269, 1277 (11th Cir. 1999). *But see* Sila, *supra* note 30, at 1167 (criticizing *Moghadam*'s interpretation of precedent).

[37] *Moghadam*, 175 F.3d at 1277 (citing *Heart of Atlanta Motel*, 379 U.S. at 250).

[38] Aptheker v. Sec'y of State, 378 U.S. 500, 515 (1964).

[39] *See* 16A AM. JUR. 2D *Constitutional Law* §§ 170–171 (2009) (collecting general restrictions on construction).

[40] *See, e.g.*, Child Labor Tax Case, 259 U.S. 20, 37–38 (1922) (rejecting the "presumption of validity" for a "so-called tax" found to be a commerce regulation in "effect and purpose").

[41] *See Heart of Atlanta Motel*, 379 U.S. at 279–80 (Douglas, J., concurring) (stating a preference for upholding legislation on Fourteenth Amendment grounds in order to acknowledge the importance of equal protection concerns).

tackled an overlooked perspective that threatens to displace the cardinal principle altogether.

B. FORGOTTEN OUTLIER: THE SUPREME COURT'S NOVEL ANALYSIS IN *RAILWAY LABOR EXECUTIVES' ASS'N V. GIBBONS*

In *Railway Labor Executives Ass'n v. Gibbons*,[42] the Supreme Court considered the constitutionality of two sections of the Rock Island Railroad Transition and Employee Assistance Act (RITA).[43] At the outset, the Supreme Court announced that RITA was "repugnant to . . . the Bankruptcy Clause" and therefore unconstitutional.[44] Before explaining its conclusion, however, the Court posed a prerequisite question: did RITA represent an "exercise of Congress' power under the Bankruptcy Clause, as contended by appellees, or under the Commerce Clause, as contended by appellant and the United States"?[45]

To answer this question, the Court sought to determine "whether RITA was *really* a bankruptcy or commercial regulation"[46] by distinguishing "a congressional exercise of power under the Commerce Clause from an exercise under the Bankruptcy Clause."[47] After acknowledging the difficulty that might inhere in distinguishing the "closely related" clauses,[48] the Court focused on the definition of bankruptcy, the obligations created in RITA, and the context of its enactment to determine that "RITA [was] an exercise of Congress' power under the Bankruptcy Clause."[49]

The Court's desire to categorize RITA was motivated by a key difference between the enumerated powers: the Bankruptcy Clause contained "an affirmative limitation or restriction upon Congress' power," a uniformity requirement, that did not bind

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[42] 455 U.S. 457 (1982).
[43] *See id.* at 463 (describing constitutional challenge to RITA).
[44] *Id.* at 465.
[45] *Id.*
[46] *Martignon II*, 492 F.3d 140, 149 (2d Cir. 2007) (emphasis added) (discussing *Gibbons*).
[47] *Gibbons*, 455 U.S. at 465.
[48] *Id.*
[49] *Id.* at 466–67.

enactments under the Commerce Clause.[50] In the Court's view, "to hold that Congress had the power to enact nonuniform bankruptcy laws pursuant to the Commerce Clause . . . would eradicate from the Constitution a limitation on the power of Congress to enact bankruptcy laws."[51]

The Court did not explicitly connect the danger of eradication with its earlier decision to categorize RITA as a certain kind of statute, but later courts and commentators interpreted the anti-eradication principle as the main motivation for its choice of clause analysis.[52] Instead, the Court proceeded to analyze RITA as enacted under the Bankruptcy Clause,[53] ultimately holding that the Clause's uniformity requirement prevented Congress from enacting RITA, which "applie[d] only to one regional debtor."[54] The Court stated that "[t]o hold otherwise would allow Congress to repeal the uniformity requirement from [the Bankruptcy Clause] of the Constitution."[55] Accordingly, it unanimously held that RITA was unconstitutional.[56]

After *Gibbons*'s announcement, its choice of clause analysis received limited attention in briefs and secondary sources.[57]

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[50] *Id*. at 468.

[51] *Id*. at 469. Although Justice Rehnquist did not cite authority for his anti-eradication stance, the concern has been reflected in the language of other Court decisions. *See, e.g.*, United Bldg. & Constr. Trades Council v. Mayor of Camden, 465 U.S. 208, 217 n.9 (1984) (criticizing the dissent's position as a "formalistic construction [that] would effectively write the [Privileges and Immunities] Clause out of the Constitution"); Child Labor Tax Case, 259 U.S. 20, 38 (1922) (rejecting an interpretation that would effectively "break down all constitutional limitation of the powers of Congress").

[52] *See, e.g.*, *Martignon I*, 346 F. Supp. 2d 413, 426 (S.D.N.Y. 2004) (supplying *Gibbons*'s anti-eradication policy as the reason to categorize legislation), *vacated*, 492 F.3d 140 (2d Cir. 2007).

[53] *See Gibbons*, 455 U.S. at 469–73 (evaluating Congress's authority under the Bankruptcy Clause of the Constitution).

[54] *Id*. at 473.

[55] *Id*.

[56] *Id.* at 465. Two justices proposed a "more stringent test" for analysis under the Bankruptcy Clause, but the concurrence did not question the choice of clause analysis. *See id*. at 474–77 (Marshall, J., concurring).

[57] *See, e.g.*, Brief of Rita Gluzman as Amica Curiae in Support of Respondents at 2, United States v. Morrison, 529 U.S. 598 (2000) (Nos. 99-5, 99-29) (supporting limits on Congress's Commerce Clause authority); William Patry, *The Enumerated Powers Doctrine and Intellectual Property: An Imminent Constitutional Collision*, 67 GEO. WASH. L. REV. 359, 375–76 (1999) (discussing Congress's power to legislate under the Commerce Clause in

However, neither the Supreme Court nor any circuit court actually implemented the choice of clause analysis before the first anti-bootlegging case in 1999.[58] As a result, the anti-bootlegging litigation initiated a new chapter in *Gibbons*'s story: its emergence as a source of substantial tension with the existing analysis of constitutional authority.

C. TENSION RISING: THE REVIVAL OF *GIBBONS*'S "CHOICE OF CLAUSE" ANALYSIS IN THE ANTI-BOOTLEGGING DECISIONS

Gibbons's value as precedent increased dramatically in May 1999 when the Eleventh Circuit resolved the first challenge to Congress's anti-bootlegging legislation.[59] The choice of clause analysis figured prominently in that and subsequent cases,[60] and its impact provided a startling glimpse at the upheaval that *Gibbons* could cause in the process of statutory construction.[61]

The first anti-bootlegging case, *United States v. Moghadam*, involved an attack on the criminal provision of the anti-bootlegging legislation.[62] Moghadam challenged his indictment on grounds that the legislation exceeded Congress's authority under the Copyright Clause of the Constitution.[63] The Government

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areas related to intellectual property). Patry's article foreshadows the problems confronted in the anti-bootlegging context, discussed *infra* Part II.C.

[58] Most telling is the absence of a choice of clause analysis in any subsequent Supreme Court decision. *United States v. Ptasynski*, 462 U.S. 74, 85 (1983), and *Central Virginia Community College v. Katz*, 546 U.S. 356, 365, 369, 375–77, 385 (2006), the two Court cases that have cited *Gibbons*, rely on its Bankruptcy Clause analysis without mentioning the choice of clause categorization. The Court's frequent confrontation of constitutional questions since deciding *Gibbons* makes this absence interesting. *See, e.g.*, Patry, *supra* note 57, at 359–60 (describing the "regularity" with which the Court had been "striking down legislation on constitutional grounds" and a growing "concern about Congress's efforts to exceed its enumerated powers").

[59] *See generally* United States v. Moghadam, 175 F.3d 1269 (11th Cir. 1999) (evaluating the "constitutionality of the anti-bootlegging statute" as "a question of first impression in the nation").

[60] *See, e.g.*, *id.* at 1279 (introducing *Gibbons* as a source of "significant limitations" on the reach of Congress's enumerated powers).

[61] *See infra* Part III.B.

[62] *See* 175 F.3d at 1271 (providing procedural history and context for the decision).

[63] *Id.*

countered that Congress was authorized to pass the provision "under either the Copyright Clause or the Commerce Clause."[64]

On appeal, the Eleventh Circuit addressed Moghadam's challenge by side-stepping the specifics of his argument.[65] The court "decline[d] to decide" whether the provision could be construed as a valid exercise of the Copyright Clause because it could be upheld "on the basis of an alternative source of [c]ongressional power."[66] The court assumed for the sake of argument that the Copyright Clause could not support the statute and turned to the other proposed source of authority, the Commerce Clause.[67] However, before continuing, the court had to tackle the "more difficult question" of whether Congress could use one enumerated power "to avoid the limitations that might prevent it from passing the same legislation under" another source of authority.[68]

The court responded with the general principle that "various grants of legislative authority contained in the Constitution stand alone and must be independently analyzed," and that "each . . . power of Congress is alternative to all of the other powers, and what cannot be done under one of them may very well be doable under another."[69] The court cited *Heart of Atlanta Motel, Inc. v. United States*[70] as the "most prominent example" of

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[64] *Id*.

[65] *See id*. at 1273–74 (addressing questions of Copyright Clause authority). Moghadam's argument, like those of other challengers, alleged that Congress had overstepped a particular limitation in the Copyright Clause. *See id*. at 1273 (focusing analysis on the concept of "fixation," which means that works cannot be copyrighted unless they appear in a tangible form); *see also Martignon II*, 492 F.3d 140, 143 (2d Cir. 2007) (discussing arguments regarding the "Writings" and "limited Times" limitations); Kiss Catalog, Ltd. v. Passport Int'l Prods., Inc. (*KISS II*), 405 F. Supp. 2d 1169, 1170 (C.D. Cal. 2005) (identifying a challenge to the "limited Times" limitation). See Oliar, *supra* note 8, at 489–95, for an overview of limitations that might be derived from the Copyright Clause in relation to the anti-bootlegging legislation.

[66] *Moghadam*, 175 F.3d at 1274.

[67] *See id*. at 1274–75 (assuming without deciding that Moghadam's arguments would succeed).

[68] *Id*. at 1277.

[69] *Id*.

[70] 379 U.S. 241 (1964). See *supra* Part II.A for a discussion of *Heart of Atlanta Motel*'s treatment of alternate sources of constitutional authority. The Eleventh Circuit interpreted *Heart of Atlanta Motel*'s reasoning as evidence that "the fact that legislation reaches beyond

the stated principle but also found guidance[71] in the Supreme Court's treatment of authority in the *Trade-Mark Cases*.[72]

Having discussed the cardinal principle, the Eleventh Circuit noted for the first time "some tension between the former line of cases . . . and the [*Gibbons*] case."[73] The court interpreted *Gibbons* as indicating that "in some circumstances the Commerce Clause cannot be used to eradicate a limitation placed upon [c]ongressional power in another grant of power."[74] In an effort to rectify that principle with cases like *Heart of Atlanta Motel*, the court accepted the notion that *Gibbons* constrained Congress's authority in some circumstances but held that the anti-bootlegging legislation did not present one of those circumstances because it was "not fundamentally inconsistent" with the proposed limitations in the Copyright Clause.[75] The court distinguished *Gibbons*, where the "statute at issue . . . was irreconcilably inconsistent with the uniformity requirement of the Bankruptcy Clause."[76] Based on that distinction, it saw no need to discuss the possible consequences had the cases been more analogous.[77] Having dispensed with the "tension" created by *Gibbons*, the Eleventh Circuit analyzed the anti-bootlegging legislation as an

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the limits of one grant of legislative power has no bearing on whether it can be sustained under another." *Id*. at 1277. Some commentators have criticized that interpretation of the case. *See* Sila, *supra* note 30, at 1160 (criticizing an interpretation of case law that suggests the enumerated powers be treated as "strictly alternative").

[71] *Moghadam*, 175 F.3d at 1277.

[72] *See* 100 U.S. 82, 93–95 (1879) (analyzing constitutionality first under the Copyright Clause and subsequently under the Commerce Clause).

[73] *Moghadam*, 175 F.3d at 1279.

[74] *Id*. at 1279–80.

[75] *Id*. at 1280. Commentators have discussed the "fundamental inconsistency" approach with varying degrees of approval. *Compare* Sila, *supra* note 30, at 1164 (describing the approach as "appealing on its face" but ultimately "unacceptably flawed"), *and* Oliar, *supra* note 8, at 498 (indicating satisfaction with the approach while criticizing its application in *Moghadam*), *with* William McGinty, *Not a Copyright Law?* United States v. Martignon *and Why the Anti-Bootlegging Provisions Are Unconstitutional*, 23 BERKELEY TECH. L.J. 323, 324 (2008) (supporting "fundamental inconsistency" as the proper approach for analyzing the anti-bootlegging legislation).

[76] *Moghadam*, 175 F.3d at 1281.

[77] *See id*. at 1282 n.16 ("Because we find no such inconsistency, we need not decide the consequences if there were inconsistency.").

exercise of the Commerce Clause[78] and ultimately upheld the provisions on those grounds.[79]

The Eleventh Circuit's attempt to reconcile *Gibbons* only marked the beginning of its role in the anti-bootlegging litigation. The next decision in the saga, *United States v. Martignon* (*Martignon I*),[80] faced another challenge to the criminal provision but reached the opposite conclusion as the Eleventh Circuit.[81] More importantly for this Note, *Martignon I*'s reasoning followed a very different arc, guided in large part by *Gibbons*'s choice of clause analysis.[82]

The district court distinguished *Moghadam*[83] before launching into an analysis that diverged completely from the Eleventh Circuit's.[84] As its initial inquiry, the court considered it "necessary to determine whether the statute is a copyright law or a commercial regulation,"[85] citing *Gibbons* as the basis for its distinction.[86] *Martignon I* proceeded to classify the anti-bootlegging provision as *Gibbons* had, examining the multiple aspects of the statute and its passage.[87] After rejecting a classification implied in *Moghadam*'s reasoning,[88] the court held

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[78] *See id.* at 1274–75 (discussing the government's assertion of Commerce Clause authority).

[79] *See id.* at 1282 (rejecting Moghadam's constitutional attack).

[80] 346 F. Supp. 2d 413 (S.D.N.Y. 2004), *vacated*, 492 F.3d 140 (2d Cir. 2007).

[81] *See id.* at 429 (finding the criminal provision unconstitutional).

[82] *See id.* at 419–20 (treating a choice of clause decision as "essential" to its analysis).

[83] *See id.* at 419 (distinguishing *Moghadam* because Martignon had challenged the legislation on an additional ground explicitly left undecided in *Moghadam*).

[84] *See id.* at 420 (commencing the analysis with an attempt to classify Congress's exercise of authority in passing the anti-bootlegging statute).

[85] *Id.* at 419.

[86] *See id.* at 420 (citing Ry. Labor Execs.' Ass'n v. Gibbons, 455 U.S. 457, 467 (1982) (noting it is essential to classify a statute in order to ensure that it does not run afoul of any express limitation imposed on Congress)).

[87] *See id.* at 420–21 (citing *Gibbons*, 455 U.S. at 467) (discussing the same factors *Gibbons* considered when classifying a statute).

[88] *See id.* at 422 (rejecting the classification of the anti-bootlegging legislation as a commercial regulation). The court's criticism may have been misplaced because *Moghadam* did not intend to classify the anti-bootlegging statute to the exclusion of other sources of authority but rather conducted a far more permissive analysis. *See supra* notes 62–79 and accompanying text.

that the criminal provision was "clearly a copyright-like regulation."[89]

Martignon I then elaborated on the consequences of its preliminary categorization.[90] It held that "Congress may not, if the Copyright Clause does not allow for such legislation, enact the law under a separate grant of power, even when the separate grant provides proper authority."[91] Accordingly, the court found that "Congress' power to act in the copyright field" with copyright-like legislation was "limited by the confines of the Copyright Clause."[92] As support, *Martignon I* repeatedly referred to *Gibbons*'s "instructive" choice of clause analysis,[93] even treating it as a primary source of guidance on principles of statutory construction.[94] Following this classification and exclusion of alternative readings, the court held that the criminal provision violated both argued limitations in the Copyright Clause and was therefore unconstitutional.[95]

The government appealed the district court's holding, and in *United States v. Martignon* (*Martignon II*)[96] the Second Circuit reversed, upholding the constitutionality of the criminal provision under the Commerce Clause.[97] *Martignon II* focused prominently on how the availability of multiple constructions should affect the scope of constitutional authority, and the court frequently grappled with *Gibbons*'s impact on the issue.[98]

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[89] *Martignon I*, 346 F. Supp. 2d at 422.

[90] *See id.* at 424–25 (justifying giving effect to the Copyright Clause's express limitations).

[91] *Id.* at 425.

[92] *Id.*

[93] *See id.* at 425–26 (describing the *Gibbons* approach in detail and referencing it as a source of "obvious" similarities).

[94] *See id.* at 425–28 (using *Gibbons*'s rationale as an analytical guide); *accord* McGinty, *supra* note 75, at 340 (describing the court's decision as "follow[ing] *Gibbons*"); Oliar, *supra* note 8, at 473 (summarizing *Martignon I*'s analysis and acknowledging *Gibbons*'s importance in that case).

[95] *See Martignon I*, 346 F. Supp. 2d at 422–24 (applying Copyright Clause authority and finding the provision outside of the Clause's scope).

[96] 492 F.3d 140 (2d Cir. 2007).

[97] *Id.* at 142.

[98] *See id.* at 141, 144–50 (comparing the holding in *Gibbons* with other precedents to determine how conflicting constructions should be treated).

Early in its discussion, the Second Circuit conceded that the holding in *Gibbons* could affect the principles of construction "in limited instances."[99] Its ensuing analysis attempted to reconcile two particular cases, the *Trade-Mark Cases* and *Heart of Atlanta Motel*, with *Gibbons*.[100] After fusing the reasoning in *Heart of Atlanta Motel* and *Gibbons*, the court held that "the Supreme Court's cases allow the regulation of matters that could not be regulated under the Copyright Clause in a manner arguably inconsistent with that clause unless the statute at issue is a copyright law."[101] *Martignon II* treated *Gibbons* as a narrow exception that applied only because the Court there had "found that RITA was actually a bankruptcy law, not that it was very close to a bankruptcy law or that it was bankruptcy-like."[102] To evaluate whether that exception applied, the court considered whether the anti-bootlegging statute had particular features that could qualify it as "a copyright law in the sense that RITA was a bankruptcy law" in *Gibbons*.[103] Based on the text of the Copyright Clause and the circumstances surrounding its enactment, the court decided that "copyright laws" "create and bestow property rights upon authors or inventors, or allocate those rights among claimants to them" in ways that the criminal provision did not.[104] As a result, the court could not definitively label the provision a "copyright law" in the way necessary to implicate its *Gibbons* exception.[105] That failed categorization allowed the Second Circuit to distinguish *Gibbons*, and after a brief analysis of Congress's broad Commerce Clause authority, it upheld the anti-bootlegging legislation under that power.[106]

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[99] *Id*. at 144.

[100] *See id*. at 146–49 (comparing the holdings of the three cases).

[101] *Id*. at 149. See *infra* Part III.B for further discussion.

[102] *Martignon II*, 492 F.3d at 149. The Second Circuit's limited emphasis on *Gibbons* relative to other precedent can be partially attributed to the fact that "*Gibbons* [was] the only case called to [its] attention . . . in which the Supreme Court struck down a statute that violated the limitation of one constitutional provision despite its clear nexus to another provision." *Id*.

[103] *Id*.

[104] *Id*. at 150–51.

[105] *Id*. at 151.

[106] *See id*. at 152–53 (upholding the criminal provision under the Commerce Clause).

Litigation in the Central District of California provided the last chapter in the anti-bootlegging saga. The defendants in *KISS Catalog v. Passport International Productions* (*KISS I*)[107] challenged claims made against them by attacking the civil provision's constitutionality.[108] *KISS I*'s analysis largely mirrored *Martignon I*, which had been cited by defendants as the basis for their constitutional challenge.[109] Agreeing with the rationale in that case[110] and citing two particularities of the civil provision,[111] the court found it easy to categorize the civil provision as "copyright-related."[112]

KISS I then addressed whether an alternative interpretation of the civil provision could allow Congress to "use the alternative means of the Commerce Clause to achieve the same end" as a copyright-related regulation.[113] After touching on *Martignon I* and *Moghadam* and restating much of the case law cited in those decisions,[114] the court essentially followed *Martignon I*, holding that *Gibbons*'s choice of clause reasoning prevented it from construing the civil provision as an exercise of the Commerce Clause.[115]

However, the district court reconsidered its decision at the request of the United States, which had successfully intervened,[116] and under the watch of a different judge[117] came to the opposite

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[107] 350 F. Supp. 2d 823 (C.D. Cal. 2004), *vacated in part*, 405 F. Supp. 2d 1169 (C.D. Cal. 2005).

[108] *See id*. at 829–30 (describing defendant's constitutional argument).

[109] *See id*. at 830 ("Defendants move to dismiss . . . on the basis of *Martignon* [*I*] . . . ."). It is noteworthy that both iterations of *KISS Catalog* were argued and decided before *Martignon II*.

[110] *See id*. at 836 (agreeing with *Martignon*'s treatment of the conflicting constructions).

[111] *See id*. at 830 (highlighting both the provision's placement with other statutory copyright provisions and the copyright-like protection granted).

[112] *See id*. ("This Court does not believe there can be much debate that [the civil provision of the anti-bootlegging legislation] is a copyright-related statute.").

[113] *Id*. at 834.

[114] *Id*. at 834–36.

[115] *Id*. at 836–37.

[116] *See KISS II*, 405 F. Supp. 2d 1169, 1170 (C.D. Cal. 2005) (discussing procedural posture).

[117] The judge presiding in *KISS I* had passed away just after granting the United States' request to intervene, so *KISS II* was decided by a different judge. *Id*. While this may

conclusion.[118] Citing a recent statement of the cardinal principle by the Supreme Court,[119] *KISS II* held that it had an "obligation to look elsewhere for a source of congressional power to enact the [s]tatute" to avoid invalidating it.[120] The court agreed with *Moghadam* that the anti-bootlegging legislation was "well within Congress' Commerce Clause powers as broadly defined by" Supreme Court precedent.[121]

KISS II then criticized the "copyright-like" categorizations made in *KISS I* and *Martignon I*, restating that "nothing prohibits Congress from protecting similar things in different ways—so long as some provision of the United States Constitution allows it to do so."[122] Like *Martignon II* would later,[123] the court distinguished *Gibbons* by observing that RITA had been categorized as "a bankruptcy statute—not a 'bankruptcy-like' statute."[124] Accordingly, the provisions' similarities to copyright protection did not preclude Commerce Clause authority from applying,[125] and on that interpretation, the court upheld the civil provision.[126]

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account for the difference in interpretations, the difference itself is the focus of this Note. *See infra* Part III.B.

[118] *See KISS II*, 405 F. Supp. 2d at 1171 (finding the anti-bootlegging legislation constitutional).

[119] *See id.* at 1172 ("[R]espect for the decisions of [Congress] demands that [courts] invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds." (quoting United States v. Morrison, 529 U.S. 598, 607 (2000)) (internal quotation mark omitted)).

[120] *Id.* at 1172.

[121] *Id.* at 1173.

[122] *Id.* at 1174.

[123] *See supra* note 102 and accompanying text.

[124] *KISS II*, 405 F. Supp. 2d at 1174. *KISS II*'s representation of *Gibbons* may be somewhat distorted—namely, its assertion that "[n]either the appellant nor the United States argued that Congress could have enacted the law pursuant to the Commerce Clause" clashes with the test of *Gibbons*. *Id.* (citing Ry. Labor Execs.' Ass'n v. Gibbons, 455 U.S. 457, 468 (1982)). In the portion of *Gibbons* cited, the Supreme Court only discussed its understanding that neither party had argued that Congress could enact *bankruptcy laws* under its commerce power. 455 U.S. at 468. In fact, *Gibbons* noted earlier in the opinion that the appellant and the United States had both argued for a Commerce Clause construction. *See id.* at 465 (considering whether RITA had been enacted "under the Commerce Clause, as contended by appellant and the United States").

[125] *See KISS II*, 405 F. Supp. 2d at 1175 ("That the Statute might provide 'copyright-like' or 'copyright-related' protection . . . is not important.").

[126] *See id.* at 1176 (finding the civil provision constitutional).

III. ANALYSIS

By reversing the last remaining adverse ruling, *Martignon II* brought the anti-bootlegging challenges to a close.[127] Although all three case cycles reached the same conclusion, their consistent outcomes did not result from consistent reasoning; the judgments belie discordant analyses that indicate *Gibbons*'s tension with the cardinal principle of statutory interpretation at the root of every constitutional decision. This Part digs deeper into the conflicts implied by the anti-bootlegging decisions to identify the challenges *Gibbons* could pose for future courts and litigants.

A. UNCOVERING CONFLICT BETWEEN *GIBBONS*'S CHOICE OF CLAUSE ANALYSIS AND THE CARDINAL PRINCIPLE OF STATUTORY CONSTRUCTION

A comparison of *Gibbons*'s choice of clause language to other Supreme Court decisions reveals its basic inconsistency with the cardinal principle followed in most cases. After highlighting the differences between the traditional and *Gibbons* approaches, this subpart will inject a choice of clause analysis into a well-known constitutional decision to illustrate its potential to disrupt the analyses and outcomes of cases.

1. Distinguishing Gibbons*'s Approach from the Cardinal Principle of Statutory Construction.* As previously discussed, the Court decided *Gibbons* in a world where a basic approach to statutory interpretation already existed.[128] Rather than operating within the expected framework,[129] the Court examined RITA

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[127] *See generally Martignon II*, 492 F.3d 140 (2d Cir. 2007) (overruling *Martignon I*, which was the only decision on the books at the time that invalidated the anti-bootlegging legislation).

[128] *See supra* Part II.A.

[129] Although none of the briefs discussed the prevailing principles of construction in constitutional cases, each tailored their arguments to reflect an assumption that the Court would consider multiple sources of power in construing RITA. *See* Brief for the Rock Island Appellees at 50 n.23, *Gibbons*, 455 U.S. 457 (Nos. 80-415, 80-1239) (arguing that the commerce power is limited by more specific constitutional provisions like the Bankruptcy Clause); Reply Brief for Appellant at 16, *Gibbons*, 455 U.S. 457 (Nos. 80-415, 80-1239) ("Appellees' [Bankruptcy Clause arguments] fail to recognize that Congress, in the exercise of its Commerce Clause powers, can enact laws which affect railroads in reorganization.");

through a significantly narrowed lens: its choice of clause analysis.[130] The Court's reasoning, and the policies cited in support, signified a dramatic shift in perspective on statutory construction for purposes of constitutional analysis.

Unlike cases before and after,[131] *Gibbons* did not investigate "every reasonable construction" of the statute; instead, it sought to categorize the statute and limit its possible interpretations accordingly.[132] The Court did not cite any authority as the precursor to its inquiry.[133] Following the decision to categorize, the Court abandoned its traditional presumption of constitutionality and practice of flexible interpretation, instead decisively concluding that RITA had been enacted pursuant to Congress's Bankruptcy Clause powers; thus, it could only be interpreted in that light.[134] This conclusion prevented the

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Reply Brief for the Federal Appellees at 5–6, *Gibbons*, 455 U.S. 457 (Nos. 80-415, 80-1239) (asserting that Congress acted validly under its Commerce Clause authority in passing RITA).

[130] *See Gibbons*, 455 U.S. at 465 (proposing that RITA be categorized within the scope of one power rather than another).

[131] *See supra* Part II.A.

[132] *Compare supra* notes 34–37 and accompanying text, *with Gibbons*, 455 U.S. at 465 (describing a need to distinguish the alternate powers to effectively categorize RITA), *and Martignon I*, 346 F. Supp. 2d 413, 420 (S.D.N.Y. 2004) (citing *Gibbons*'s decision to "classify" the statute before analyzing its constitutionality), *vacated*, 492 F.3d 140 (2d Cir. 2007).

[133] *See Gibbons*, 455 U.S. at 465 (performing the choice of clause analysis without citation to any precedent for its procedure). *Contra* United States v. Lopez, 514 U.S. 549, 559 (1995) (listing examples from past cases that support a Commerce Clause test analyzing whether "the regulated activity 'substantially affects' interstate commerce").

The briefs contain seeds of the arguments that the Court relied on to support its categorization. *See* Reply Brief for the Federal Appellees, *supra* note 129, at 6 (asserting that RITA was "not a law on the subject of bankruptcies"); Brief for the Rock Island Appellees, *supra* note 129, at 53 (arguing that the Court must invalidate RITA "[i]f the uniformity provision of the Bankruptcy Clause is to retain any meaning"); *id.* at 50 n.23 (arguing that the Bankruptcy Clause's uniformity requirements act as an external limit on Congress's commerce power in the same way the "First, Fourth, Fifth, Sixth, Seventh, and Eighth Amendments" and the express prohibitions on "bills of attainder and *ex post facto* laws, and laws imposing export duties" do).

[134] *See Gibbons*, 455 U.S. at 466 ("An examination of the [disputed] provisions of RITA, we think, demonstrates that RITA is an exercise of Congress' power under the Bankruptcy Clause.").

government from asserting a Commerce Clause reading of any kind.[135]

Although the Court treated its categorization as a small step in the overall analysis, the choice of clause reasoning significantly altered the course of the decision, in large part due to its distance from the principles adopted in other constitutional cases. The choice of clause analysis flatly rejects the norm that "every reasonable interpretation must be resorted to" before invalidating a statute as unconstitutional.[136] Although the Court was well aware of an asserted Commerce Clause argument,[137] the choice of clause analysis allowed it to avoid asking whether RITA could have been interpreted as a regulation of commerce. This move seems unusual in light of the Court's acknowledgement of a close relationship between bankruptcies and commerce; after noting a likely overlap in situations like the one in *Gibbons*, it is surprising that the Court declined to address the commerce interpretation more directly.[138] Moreover, the Court's fear that Congress would enact bankruptcy laws without abiding by the uniformity limitation would have lacked any real force had a commercial interpretation of the law been unreasonable—it is the likely fit of the alternate interpretation that gives the Court's concern its teeth.[139]

The omission of a Commerce Clause discussion would be meaningless had the Court upheld RITA under some other source

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[135] *See id.* at 469–73 (discussing the constitutionality of RITA exclusively under the Bankruptcy Clause).

[136] *NFIB*, 132 S. Ct. 2566, 2594 (2012) (opinion of Roberts, C.J.) (quoting Hooper v. California, 155 U.S. 648, 657 (1895)) (internal quotation mark omitted).

[137] *See Gibbons*, 455 U.S. at 465 (recognizing the argument that RITA had been enacted "under the Commerce Clause, as contended by appellant and the United States"); *see also* Reply Brief for Appellant, *supra* note 129, at 16 ("Appellees' [Bankruptcy Clause arguments] fail to recognize that Congress, in the exercise of its Commerce Clause powers, can enact laws which affect railroads in reorganization."); Reply Brief for the Federal Appellees, *supra* note 129, at 5–6 (asserting that Congress acted under its Commerce Clause authority).

[138] *See Gibbons*, 455 U.S. at 465–66 (noting the close connection between bankruptcies and the regulation of commerce).

[139] *See id.* at 468–69 (expressing concern that holding Congress could enact nonuniform bankruptcy laws under the commerce power "would eradicate from the Constitution a limitation on the power of Congress to enact bankruptcy laws").

of constitutional authority. After all, decisions only implicate the cardinal principle of construction when legislation is threatened with invalidation.[140] However, because the Court considered RITA a violation of the Bankruptcy Clause,[141] the cardinal principle would have compelled it to look for alternate constructions of the statute that could provide the necessary support. Precisely because of the close relationship between bankruptcies and commerce noted by the Court,[142] it would seem reasonable for the Court to consider whether RITA could "bear [another] construction . . . which would be within the constitutional power of Congress."[143]

But *Gibbons* did no such thing. Instead, the choice of clause analysis allowed the Court to decide, once and for all, which construction of RITA was appropriate. And the Court did decide, based on its interpretation of the statute and the surrounding circumstances, that RITA was a bankruptcy law and declined to consider any other construction that could have saved the statute.[144] In application, if not in purpose, the Court's choice of clause reasoning rejected the cardinal principle when it almost certainly should have applied.

The Court supported its unique approach with several policy reasons,[145] but these do little to offset its departure from the cardinal principle. Its understanding that neither party would have argued against RITA's bankruptcy categorization[146] conflicts with the Court's own statement of the appellant's argument.[147]

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[140] *See supra* note 2 and accompanying text; Part II.A.

[141] *Gibbons*, 455 U.S. at 465.

[142] *See id.* at 465–66 (discussing the close relationship).

[143] Miller v. United States, 78 U.S. 268, 309 (1870) ("[W]hen a statute will bear two constructions, one of which would be within the constitutional power of Congress . . . and the other a transgression of the power, that must be adopted which is consistent with the Constitution.").

[144] *See Gibbons*, 455 U.S. at 468–71 (construing RITA as a bankruptcy law which Congress could not enact pursuant to the Commerce Clause).

[145] *See supra* Part II.B (discussing the Court's policy justifications).

[146] *See Gibbons*, 455 U.S. at 468 (noting that neither party was arguing that Congress could enact bankruptcy laws pursuant to its commerce power).

[147] *See id.* at 465 (describing "appellant and the United States" as having argued that Congress acted "under the Commerce Clause").

More importantly, the parties' thoughts on how RITA might have been categorized do nothing to explain why the Court would depart from the cardinal principle in the first place.

Gibbons's desire to safeguard affirmative limits on the enumerated powers provides a more substantial defense of its analysis.[148] Policies preventing the eradication of constitutional provisions are not new to Supreme Court opinions.[149] Setting aside a normative evaluation of this perspective,[150] *Gibbons*'s anti-eradication policy is difficult to reconcile with the cardinal principle. Concerns about permitting Congress to effectively repeal the uniformity requirement from the Bankruptcy Clause reflect skepticism about Congress's willingness to play within the constitutional rules.[151] That attitude clashes with the traditional "presumption that Congress will pass no act [outside] its constitutional power."[152]

At a minimum, *Gibbons*'s reliance on an anti-eradication policy further distances its reasoning from traditional approaches to construction. The Court has indicated that, at least in some instances, the choice of clause analysis will serve as a relevant, even necessary part of the constitutional analysis.[153] This observation raises an important question: when the *Gibbons* approach applies, what results can be expected? Where might a choice of clause analysis take us in other constitutional cases?

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[148] *See id.* at 469 (expressing concern that permitting Congress "to enact nonuniform bankruptcy laws pursuant to the Commerce Clause . . . would eradicate from the Constitution a limitation on the power of Congress to enact bankruptcy laws").

[149] *See supra* note 51 and accompanying text; *see also* Thomas B. Nachbar, *Intellectual Property and Constitutional Norms*, 104 COLUM. L. REV. 272, 315–16 (2004) (aligning *Gibbons*'s reasoning with "the Court's approach to regulatory taxation in the 1920s and 30s," which imposed certain limits on the taxing power).

[150] *Compare* Nachbar, *supra* note 149, at 317 (describing *Gibbons*'s perspective as a "plausible interpretation[ ] of the Constitution's structure"), *with* Oliar, *supra* note 8, at 495–507 (listing multiple guiding policies for resolving inter-clause conflicts).

[151] *See Gibbons*, 455 U.S. at 473 (noting the negative effects of upholding RITA under the Commerce Clause).

[152] United States v. Harris, 106 U.S. 629, 635 (1883).

[153] Look no further than the anti-bootlegging decisions for examples of when both parties and judges considered the *Gibbons* analysis relevant, even controlling. *See supra* Part II.C; *see also infra* Part III.B.*1*.

2. Injecting a Gibbons*-like Analysis Results in Dramatically Different Outcomes.* To illustrate the possible consequences of following *Gibbons* in the future, this subpart turns to a timely example of the cardinal principle in action: the Supreme Court's decision in *NFIB*.[154] Therein, the Court adopted a flexible approach to interpreting challenged legislation, frequently emphasizing the cardinal principle as its guide.[155] Because it dealt with multiple statutory interpretations and overlapping enumerated powers, *NFIB* provides a perfect guinea pig for testing the choice of clause analysis. After describing the Court's actual reasoning, this subpart injects a choice of clause analysis into the beginning of *NFIB*'s analysis and predicts the dramatic consequences of its categorization requirement. This exercise clarifies the basic differences between the cardinal principle and the choice of clause analysis and introduces the upheaval threatened by *Gibbons*'s analytical framework.

NFIB presents a textbook application of the cardinal principle. The Court considered two asserted sources of authority in examining the "individual mandate" provision in the Affordable Care Act: Congress's power "under the Commerce Clause" and its "power to tax."[156] As *Gibbons* had long before, *NFIB* suggested that the asserted powers could be used by Congress to affect different activities in different ways, creating the familiar possibility of Congress using one power to circumvent the limited reach of another.[157]

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[154] Due to the scarcity of cases applying the choice of clause analysis, some speculation is required to project the ways that *Gibbons*'s methodology could impact constitutional analyses. Fortunately, constitutional history provides a plethora of decisions that set the cardinal principle of construction at the foundation for their analyses. *See supra* Part II.A. Such cases do not follow the choice of clause analysis, but they do offer a point of contrast from which we can observe the characteristics of a choice of clause framework and predict its relative impact on legal decisionmaking.

[155] *See, e.g.*, *NFIB*, 132 S. Ct. 2566, 2579 (2012) (explaining the Court's deferential approach when examining policy issues).

[156] *Id*. at 2584.

[157] *See id*. at 2600 ("[A]lthough the breadth of Congress's power to tax is greater than its power to regulate commerce, the taxing power does not give Congress the same degree of control over individual behavior.").

However, the fact that Congress might use a tax to influence activities "that it cannot authorize, forbid, or otherwise control" with commercial regulation did not constrain the Court's reasoning as it did in *Gibbons*.[158] Where *Gibbons* treated the applicability of two powers as a threat to the structure of the Constitution and insisted on categorization to avoid that threat,[159] *NFIB* treated each power as a potential route to a constitutional statutory enactment and analyzed each of the asserted authorities in succession, searching for an interpretation that would bring the mandate within Congress's enumerated powers.[160] The Court first attempted to read the mandate as a regulation of commerce, and after discussing the reach of Commerce Clause authority in detail, ultimately concluded that the Affordable Care Act fell outside that power.[161] However, the absence of authority under that power did not prevent the Court from considering the mandate as an exercise of Congress's power to tax; on the contrary, the Court found it "necessary to ask whether the Government's alternative reading of the statute" could provide the requisite authority.[162] Although the mandate did not resemble a tax under the "most straightforward reading,"[163] the Court was willing to interpret it as a tax so long as doing so was "reasonable" and could "save [the] statute from unconstitutionality."[164] Guided by the "full measure of deference owed to federal statutes"[165] and its "duty to construe a statute to save it, if fairly possible," the Court did interpret the mandate as a tax measure and ultimately upheld it pursuant to that reading.[166]

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[158] *Id*. at 2579.

[159] *See supra* notes 148–52 and accompanying text.

[160] *See NFIB*, 132 S. Ct. at 2585 (opinion of Roberts, C.J.) (transitioning immediately to a discussion of the Government's Commerce Clause argument).

[161] *See id*. at 2585–93 (analyzing the Affordable Care Act under the commerce power).

[162] *Id*. at 2593.

[163] *Id*.

[164] *Id*. at 2594 (quoting Hooper v. California, 155 U.S. 648, 657 (1895)) (internal quotation mark omitted).

[165] *Id.*

[166] *Id*. at 2600 (majority opinion). In *NFIB* the dissenting justices criticized the majority's reading of the mandate as an attempt to judicially "rewrite" the legislation. *See id.* at 2651 (joint opinion of Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (distinguishing the-statutory-interpretation principles against judicial rewriting and emphasizing that the statute referred to the mandate as a "penalty" rather than a "tax"). This perspective

The radical differences between *NFIB*'s and *Gibbons*'s methods of statutory construction are illuminated if one imagines that the Court had injected a choice of clause analysis into *NFIB*'s reasoning before discussing the scope of the asserted powers.[167] *NFIB* would have been a reasonable case to apply the choice of clause analysis: like *Gibbons* and the anti-bootlegging cases, it involved a risk that Congress could regulate decisions or activities under one power that it would have been unable to reach under another.[168] To avoid eradicating any of the limitations that have been placed on the enumerated powers, *NFIB* could have predicated its entire analysis, as *Gibbons* did, on whether the individual mandate was an exercise of *either* Congress's power under the Commerce Clause *or* its power to tax. Doing so would have forced the Court to categorize the mandate as one kind of law or other *before* asking whether it fell within either source of authority. And as in *Gibbons*, the Court would have then been bound by its categorization—if a regulation of commerce, the mandate would be considered exclusively under authority granted by the Commerce Clause, and if a tax, by its taxing authority.

Applying *Gibbons*'s binding-categorization approach would have significantly impacted the analysis and outcome in *NFIB*.[169] The Court acknowledged both the straightforward reading of the mandate as a regulation of commerce and the less natural but reasonable interpretation of the mandate as a tax.[170] The cardinal

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emphasizes outer limits on flexible construction, such as the desire to avoid "doing violence to the fair meaning of the words used" by Congress. *Id.* (quoting Granada Cnty. Supervisors v. Brogden, 112 U.S. 261, 269 (1884)) (internal quotation mark omitted). However, the justices did not appear to reject the cardinal principle themselves; they merely criticized the principles' implementation on the facts of *NFIB*. Their approach seems distinguishable from *Gibbons*, which departed from the cardinal principle altogether in favor of exclusive categorization of legislation as a particular kind of law. *See supra* Part III.A.*1*.

[167] *See* Ry. Labor Execs.' Ass'n v. Gibbons, 455 U.S. 457, 465 (1982).

[168] *See NFIB*, 132 S. Ct. at 2600 (majority opinion) (discussing the different scopes of Congress's asserted powers); *see also supra* Part II.B–C (describing inter-clause conflicts in both *Gibbons* and the anti-bootlegging cases).

[169] Five Justices found that the Affordable Care Act's individual mandate exceeded Congress's Commerce Clause authority. *See id.* at 2585–93 (opinion by Roberts, C.J.); *id.* at 2642–43 (joint opinion of Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

[170] *See supra* notes 161–64 and accompanying text.

principle allowed *NFIB* to consider the possibility that the less natural interpretation could control its analysis. By contrast, the choice of clause analysis would have prevented it from considering the less natural interpretation at all, regardless of any link it might have to the law itself. *Gibbons* noted an intimate connection between bankruptcy and interstate commerce that makes distinguishing between these types of laws unusually difficult, as the matters they cover often "closely related."[171] Nevertheless, it felt comfortable distinguishing between the two related types of legislation and evaluated whether RITA fell within one category or the other.[172] The *NFIB* Court found one reading of the individual mandate more natural than another, indicating that certain characteristics made the mandate read like a regulation of interstate commerce rather than a tax measure.[173] Whatever those features might be, the Court's capacity to distinguish between the different types of law would have allowed it to perform the categorization required by *Gibbons*'s choice of clause analysis and choose one reading of the individual mandate to the exclusion of any other.

In that event, *NFIB*'s analysis of Congress's authority would have likely begun and ended with its discussion of the Commerce Clause; any discussion of the power to tax, the less natural alternate reading, would have been left out entirely.[174] Given that five Justices concluded that the mandate exceeded Congress's Commerce Clause authority,[175] the discussion would have been over, and in all likelihood, the mandate would have been invalidated. Because *Gibbons* categorization excludes alternative readings of the legislation, the Court's policy of presuming that

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[171] *Gibbons*, 455 U.S. at 465–66.

[172] *See id*. at 469–73.

[173] *See NFIB*, 132 S. Ct. at 2593–94 (opinion of Roberts, C.J.) (describing the Commerce Clause reading as "most straightforward" compared to other readings).

[174] *Accord Gibbons*, 455 U.S. at 466–73 (omitting any discussion of Commerce Clause authority after having categorized RITA as a bankruptcy statute).

[175] United States v. Harris, 106 U.S. 629, 635 (1883); *see also* Miller v. United States, 78 U.S. 268, 309 (1870) ("It is always a presumption that the legislature acts within the scope of its [constitutional] authority."), *cited with approval in NFIB*, 132 S. Ct. at 2579 (majority opinion) (explaining the Court's "permissive reading" of Congress's enumerated powers).

Congress intends to enact constitutional statutes[176] would be severely limited because its analysis would be bound by the clause it had chosen. In *NFIB*, the choice of clause analysis would have had more than a procedural effect on the Court's analysis; it would have prevented the Court from considering the taxing-power argument that ultimately saved the individual mandate from being declared unconstitutional. Through its potential to substantially alter the process and substance of *NFIB*, a case that closely adhered to the cardinal principle, we glimpse the potential for the choice of clause analysis to profoundly impact constitutional cases by constraining the process statutory construction. That observation invites an obvious question: would that change be for the better or for the worse?

B. BREAKING POINTS: THE LIKELY IMPACT OF EMBRACING *GIBBONS* AS A COMPETING PRINCIPLE OF CONSTITUTIONAL STATUTORY CONSTRUCTION

As the dystopian version of *NFIB* suggests, employing a choice of clause approach could have a disruptive impact on constitutional statutory-interpretation cases. Not only does *Gibbons* create an opportunity to vary the substantive outcome of these cases, but applying its approach would also severely destabilize the process by which courts consider constitutional challenges. The anti-bootlegging cases revealed the difficulty of aligning the choice of clause reasoning with the cardinal principle.[177] This subpart draws on those decisions to foreshadow two additional complications of following *Gibbons*'s reasoning: greater judicial influence on framing and analyzing constitutional challenges and downstream uncertainty for the authors of laws and those who would challenge them.

1. The Anti-Bootlegging Decisions Highlight and Amplify the Uncertainty Created by Gibbons. Judicial uncertainty in applying the choice of clause framework serves as the most observable effect of applying *Gibbons* outside the bankruptcy context. Since the

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[176] *Gibbons*, 455 U.S. at 465.

[177] *See supra* Part II.C.

initiation of the anti-bootlegging challenges, *Gibbons* has been obscured by inconsistent rationales containing multiple readings and levels of emphasis on its reasoning.[178]

These dissonant perspectives provide a smorgasbord of examples of how the choice of clause analysis could impact future decisions. In the first instance, *Moghadam* decided that *Gibbons* bound it to a "circumscribed analysis" of whether a proposed reading of legislation would allow Congress to act in a way "fundamentally inconsistent" with the limits on another power.[179] Although it ultimately gave some lip service to *Moghadam*'s approach,[180] *Martignon I* primarily followed a very different route, treating *Gibbons* as an obvious requirement that it "classify [the] statute" to preserve "any express limitations imposed on Congress when regulating in the respective arena."[181] *Martignon I* then closely followed the choice of clause analysis, eventually deciding that the anti-bootlegging legislation could only be interpreted as an exercise of one of Congress's powers.[182] *Martignon II* conducted an analysis very similar to the lower court's but reached the opposite result[183] based on a narrower reading of the types of laws that should be exclusively categorized, refining the application of *Gibbons* that *Martignon I* had conducted.[184] In contrast, *KISS II*

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[178] See Part II.C for background on the anti-bootlegging decisions.

[179] *See* United States v. Moghadam, 175 F.3d 1269, 1279–81 (11th Cir. 1999) (crafting and applying the "fundamentally inconsistent" test).

[180] *See Martignon I*, 346 F. Supp. 2d 413, 428–29 (S.D.N.Y. 2004) (mimicking the "fundamentally inconsistent" test as an alternative analysis to justify its conclusion), *vacated*, 492 F.3d 140 (2d Cir. 2007).

[181] *Id*. at 420.

[182] *See id*. at 420–23 (citing Ry. Labor Execs.' Ass'n v. Gibbons, 455 U.S. 457, 467 (1982)) (classifying legislation based on "events surrounding the statute's passage as well as the legislative history").

[183] *See Martignon II*, 492 F.3d 140, 152 (2d Cir. 2007) (concluding that the anti-bootlegging legislation "was not enacted under the Copyright Clause" because it "does not create, bestow, or allocate property rights in expression, it does not share the defining characteristics of other laws that are concededly 'copyright laws,' and it differs significantly from the Copyright Act that was passed pursuant to the Copyright Clause (and that is valid under it)"). By characterizing the statute as a "copyright law" and evaluating whether particular enumerated powers could support it, the court engaged in the sort of categorization required by the choice of clause framework. *See supra* Part III.A.*1*.

[184] *See Martignon II*, 492 F.3d at 149–50 (distinguishing a "copyright law" categorization from a "copyright-like" categorization).

ardently criticized the *Martignon I–KISS I* approach and rejected it in favor of yet a third perspective: a faithful application of the cardinal principle.[185] *KISS II* treated *Gibbons* with less deference than the other cases, reasoning that *Gibbons* did not contradict the principle that "nothing prohibits Congress from protecting similar things in different ways—so long as some provision of the United States Constitution allows it to do so."[186]

This jumbled set of rulings illustrates the uncertainty that *Gibbons* heaps on judges. Even after extensive efforts to grapple with *Gibbons*'s place among the canons of construction, the anti-bootlegging decisions fundamentally disagreed about how its choice of clause reasoning should be reconciled with the cardinal principle, ultimately leaving future parties with three distinct takes on the matter. This lack of consensus allows *Gibbons* to linger in the background without any clear guidelines as to how it should be applied. The uncertain state of statutory construction could have troubling consequences for future judges, legislators, and litigants.

2. The Threatened Increases to the Judicial Role and Responsibilities in Constitutional Cases. The demands of *Gibbons*'s choice of clause analysis threaten to magnify judicial responsibility in several ways. Some relate to the mere existence of an alternate approach to the cardinal principle, while others grow out of the requirements of the choice of clause analysis. Each of these changes could have a profound impact on the resolution of constitutional statutory-interpretation cases.

First, judges will exert influence on each case's outcome early in the analysis by deciding which principle of construction to invoke. Asking judges to choose between the cardinal principle and the choice of clause approach demands that they consider the scope of

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[185] *See KISS II*, 405 F. Supp. 2d 1169, 1175 (C.D. Cal. 2005) ("Neither the court in *Martignon* [*I*] nor [*KISS I*] gave sufficient deference to the fundamental premise that legislation is presumed to be constitutional.").

[186] *Id*. at 1174. Note that portions of the court's justification for distinguishing *Gibbons* simply invites other questions raised by the choice of clause analysis, such as how a judge would determine whether a clause "negate[s] any of the purposes of, protections afforded by, or limitations established by" another. *See id*. (concluding that an exercise of Commerce Clause power has no such effect on the Copyright Clause).

congressional powers and weigh in on any threat of eradicating constitutional limits. As demonstrated in the *NFIB* hypothetical,[187] those considerations alone can have a substantial impact on a case's outcome. And unlike the cardinal principle, which favors judicial flexibility to protect Congress's decisions, the choice of clause analysis grants judges a discretionary check on legislative action. This about-face from the traditional deference to Congress's legislative enactments could result in unwanted upheaval and unpredictability as judges take on greater authority.[188]

The second important change relates to the kind of judicial activity that *Gibbons* demands. As a prerequisite to classifying a given statute, the choice of clause analysis requires judges to determine whether Congress has acted in a particular arena of the law by enacting that statute. The Court in *Gibbons* treated this like a fairly simple determination; the decisions in *Martignon I* and *Martignon II* suggest otherwise.

Gibbons suggested that a simple examination of the challenged legislation would demonstrate whether it was an exercise of one power or another.[189] The *Martignon* cases complicate that belief in two ways: they show that different courts can take very different approaches to defining the relevant arena,[190] and that they can use different benchmarks for measuring whether the challenged legislation falls within the boundaries identified.[191] Although the

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[187] *See supra* Part III.A.*2*.

[188] *Accord* Mistretta v. United States, 488 U.S. 361, 382 (1989) ("It is this concern of encroachment and aggrandizement that has animated our separation-of-powers jurisprudence and aroused our vigilance against the hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power." (quoting INS v. Chadha, 462 U.S. 919, 951 (1983)) (internal quotation marks omitted)).

[189] *See* Ry. Labor Execs.' Ass'n v. Gibbons, 455 U.S. 457, 466 (1982) (stating that examining RITA's employee-protection provisions point toward classifying it under the Bankruptcy Clause).

[190] *Compare Martignon I*, 346 F. Supp. 2d 413, 420 (S.D.N.Y. 2004) (classifying the statute based on the context of the statute's passage and legislative history), *vacated*, 492 F.3d 140 (2d Cir. 2007), *with Martignon II*, 492 F.3d at 152 (defining acts passed pursuant to the Copyright Clause as those that "create, bestow, or allocate property rights in expression" and share traits with prototypical copyright legislation).

[191] *Compare Martignon I*, 346 F. Supp. 2d at 420–22 (focusing on the court's interpretation of statutory language, purpose, and placement), *with Martignon II*, 492 F.3d at 149–52 (determining first the kind of power granted to Congress under an enumerated power and

courts are often expected to resolve questions like these, defining a power's prevailing arena asks for substantial investigation into the congressional record, historical circumstances, and even other legislation considered to be properly enacted under a particular enumerated power.[192] This additional responsibility, while not necessary negative, undoubtedly places a greater burden on the courts and increases the influence of their findings on the ultimate constitutionality of Congress's acts.

Third, adding *Gibbons* to the canons of construction could cause partial displacement of a longstanding, often-followed judicial doctrine. Although the importance of tradition and precedent can be disputed,[193] one can argue that certain benefits of adhering to the enduring cardinal principle would be abrogated by the introduction of a largely untested alternative like the choice of clause approach.[194] Given the increases in judicial responsibility discussed above, special emphasis should be given to concerns about judicial credibility and legitimacy, which are arguably threatened by departing from traditional approaches without substantial justifications.[195] If a "page of history is worth a volume of logic,"[196] there is reason to believe that the cardinal principle will continue to play a beneficial role in constitutional statutory-interpretation; were courts to ignore the weight of tradition and

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then asking whether the challenged statute was an instance where that power had been clearly exercised).

[192] Such factors were considered in the anti-bootlegging decisions, as discussed in Part II.C and III.B.*1*. Note that the categorization of unchallenged legislation for the purposes of comparison may raise jurisprudential issues. *See, e.g.*, Rescue Army v. Mun. Court of L.A., 331 U.S. 549, 568 (1947) (explaining the Court's traditional "refusal to render advisory opinions").

[193] *See, e.g.*, Daniel A. Farber, *The Rule of Law and the Law of Precedents*, 90 MINN. L. REV. 1173, 1173–74 (2006) (contrasting alternate views on the importance of precedent in judicial decisionmaking).

[194] *Cf.* Payne v. Tennessee, 501 U.S. 808, 827 (1991) (describing consistency and predictability as benefits provided by adherence to precedent); *id.* at 834–35 (Scalia, J., concurring) (discussing role the of precedent in protecting "settled practices and expectations").

[195] *Accord* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 866 (1992) (relating adherence to precedent to the Court's legitimacy).

[196] N.Y. Trust Co. v. Eisner, 256 U.S. 345, 349 (1921).

adopt the choice of clause approach, they would risk losing the value of many pages of history supporting the cardinal principle.[197]

3. The Threatened Impact on Congress and Future Litigants of Changing the Interpretive Framework. Any changes to the principles of statutory construction and the role of the judiciary caused by introducing *Gibbons* into other constitutional cases would also be felt by lawmakers and litigators. Although *Gibbons* may have questioned Congress's sensitivity to the boundaries of constitutional authority,[198] Congress could respond to the increase in judicial scrutiny demanded by the choice of clause's categorization. As with past cases where the Court closely examined legislative findings and statutory language,[199] Congress could experience increased pressure to clearly articulate the power exercised and the arena of law affected when enacting a particular statute. However, courts are not bound by such statements of purpose,[200] and given the uncertainty about which factors a court will consider in categorizing statutes, it is questionable whether a congressional response would be effective or whether judicial categorization would simply increase tension between these coequal branches.

Broad adoption of the choice of clause approach would apply similar pressures to future litigants. In preparing for constitutional statutory-interpretation cases, parties would have to construct arguments based on their predictions of whether the judge will follow the cardinal principle or the choice of clause framework. Because the outcome of a choice of clause analysis

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[197] *See supra* Part II.A.

[198] *See* Ry. Labor Execs.' Ass'n v. Gibbons, 455 U.S. 457, 473 (1982) (suggesting that permitting Congress to enact RITA under the Commerce Clause would essentially enable Congress to repeal the Bankruptcy Clauses' uniformity requirement).

[199] *See*, *e.g.*, United States v. Morrison, 529 U.S. 598, 614 (2000) ("In contrast with the lack of congressional findings that we faced in *Lopez*, [which overturned a gun control law as beyond Congress's commerce power, the challenged statute] *is* supported by numerous findings . . . .").

[200] *See, e.g.*, *id.* at 614 (noting that the presence of congressional findings or specific language does not control the Court's analysis). *But see* DAN T. COENEN, CONSTITUTIONAL LAW: THE COMMERCE CLAUSE 115–16 (2004) (explaining that lower courts have credited some congressional findings in upholding the exercise of the commerce power).

depends greatly on the judge's reading of the challenged statute,[201] that choice between principles of construction adds important variables for constitutional challengers to consider and emphasize. This is particularly true when the range of arguable topics can be tightly controlled by a judge's categorization of a statute. In a case like *Gibbons*, many arguments are left on shaky ground when a court can use statutory construction to exclude entire issues from its analysis.[202] Litigants would have to respond to this risk by emphasizing the outer boundaries of arenas of law and related enumerated powers and arguing over whether particular readings might allow Congress to eradicate constitutional limits. Lawyers are frequently asked to tackle similar issues, and as a result, these changes appear less dramatic than those affecting judges. Nevertheless, they might lead to additional cost and complexity that should push further against treating *Gibbons* as an alternative to the cardinal principle of construction.

IV. CONCLUSION

These consequences, combined with the confusion that has already arisen from the introduction of *Gibbons* into constitutional analyses, point to that case's power to upend a traditional canon of statutory construction. Were it not for the Eleventh Circuit's decision to wrestle with its language, future courts and litigants might have continued to overlook *Gibbons*'s departure from the cardinal principle. Maybe doing so would have been for the best. However, through the anti-bootlegging decisions, the choice of clause analysis has been transformed from a piece of legal arcane into a tool that could threaten some of the earliest, most fundamental steps in statutory analyses.

Although commentators have discussed *Gibbons* and the anti-bootlegging decisions, the importance of the choice of clause analysis has gone underappreciated. The anti-bootlegging decisions and the *NFIB* hypothetical demonstrate the core

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[201] *See supra* Part III.B.*2*.

[202] *See* 455 U.S. at 465–68 (refusing to discuss the merits of appellant's Commerce Clause arguments after classifying RITA as a bankruptcy law).

challenges raised by this alternate stance on statutory construction: its fundamental departure from a tradition of flexible interpretation, and its refusal to be easily reconciled with that tradition; its potential to influence the outer reaches of Congress's enumerated powers; its magnification of the judge's role in controlling constitutional cases; and its downstream burdens on legislators and litigators. Each grows out of the application of the *Gibbons* approach outside of the narrow context of that decision. Adherence to the cardinal principle has provided powerful consistency throughout American constitutional history. As *Martignon II* pointed out, *Gibbons* is an outlier, a wrinkle in that chain of precedent.[203] In spite of its relative obscurity, its choice of clause analysis contains the potential to upend the prevailing canon of construction.

However, *Gibbons* does not present an insurmountable threat. Rather than waiting for this Note's predictions to unfold, courts and commentators should refuse to treat the choice of clause analysis as a serious alternative to the cardinal principle. Statutory interpretation may never be perfectly simple or clean. That said, courts should shelter their analyses from the incredible mess that *Gibbons* made in the anti-bootlegging decisions. Their beginnings were untidier than any judicial undertaking should be and show that the choice of clause analysis is better suited for the dustbin than the courtroom floor.

Jordan Christopher Seal

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[203] *See Martignon II*, 492 F.3d 140, 149 (2d Cir. 2007) ("*Gibbons* is the only case called to our attention . . . in which the Supreme Court struck down a statute that violated the limitation of one constitutional provision despite its clear nexus to another provision . . . .").