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COLLECTIVE ACTION FEDERALISM: A GENERAL THEORY OF ARTICLE I, SECTION 8

Robert D. Cooter* & Neil S. Siegel**

The Framers of the United States Constitution wrote Article I, Section 8 in order to address some daunting collective action problems facing the young nation. They especially wanted to protect the states from military warfare by foreigners and from commercial warfare against one another. The states acted individually when they needed to act collectively, and Congress lacked power under the Articles of Confederation to address these problems. Section 8 thus authorized Congress to promote the "general Welfare" of the United States by tackling many collective action problems that the states could not solve on their own.

Subsequent interpretations of Section 8, both outside and inside the courts, often have focused on the presence or absence of collective action problems involving multiple states—but not always. For example, the Supreme Court of the United States, in trying to distinguish the "truly national" from the "truly local" in the context of the Commerce Clause, United States v. Morrison*, 529 U.S. 598,*

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** Professor of Law and Political Science, Duke University School of Law. I dedicate this Article to the loving memory of my mother, Sharon Ruth Siegel, for giving me life—and a whole lot more.

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617-18 (2000), has differentiated "economic" activity, which Congress may regulate, from "noneconomic" activity, which Congress may not regulate.

A federal constitution ideally gives the central and state governments the power to do what each does best. But economic activity does not generally cause collective action problems among the states, and noneconomic activity is not generally free from collective action problems. Consequently, Congress is not generally better at regulating economic activity, and the states are not generally better at regulating noneconomic activity. The distinction between economic and noneconomic activity seems mostly irrelevant to the problems of federalism.

We propose a better foundation for American federalism in Section 8. Our theory distinguishes activities that pose collective action problems from those that do not. This approach flows directly from the relative advantages of the federal government and the states. We show that Section 8 mostly concerns collective action problems created by interstate externalities and national markets. We conclude that Section 8 authorizes Congress to tax, spend, and regulate to solve these collective action problems.

Collective action federalism finds that the limits and expanse of congressional power in Section 8 turn on the difference between individual and collective action by the states. The theory uses this distinction to differentiate interstate commerce from intrastate commerce, not the economic/noneconomic distinction. Our distinction best explains why Congress may not ordinarily use its commerce power to regulate such crimes as assault or gun possession in schools. Collective action federalism also identifies a constitutional "hook" for Congress to regulate multi-state problems of collective action that may not involve commerce: Clause 1 of Section 8 authorizes some forms of regulation of noneconomic harms that spill over state boundaries, such as contagious diseases and certain kinds of environmental pollution.

INTRODUCTION 117
I. PAST INTERPRETATIONS OF ARTICLE I, SECTION 8 120
A. *Section 8 Outside the Courts* 121
1. *Preratification* 121
2. *Postratification* 125
B. *Section 8 Inside the Courts* 126
1. *The General Welfare Clause* 126
2. *The Commerce Clause* 128
II. THEORY OF THE GENERAL WELFARE 135
A. *Externalities* 135
B. *Internalization Principle* 137
C. *Federal Coase Theorem* 139
D. *Political Logic of U.S. Federalism* 144
III. ANALYTICAL CATEGORIES OF ARTICLE I, SECTION 8 144
A. *Analysis of Section 8* 145
B. *Collective Action Federalism and Other Parts of the Constitution* 151
C. *Collective Action Federalism and Constitutional Disagreement* 152
D. *Collective Action Federalism and Theories of Interpretation* 155
IV. EXPLAINING (OR IMPROVING) CONTEMPORARY UNDERSTANDINGS 159
A. *The Commerce Clause* 159
B. *Dormant Commerce Clause* 166

C. *The General Welfare Clause* 168
1. *The purposes for which Congress may tax and spend*.....168
2. *Regulation under Clause 1?* 170
3. *When to avoid avoidance* 175
V. EVALUATING CONGRESSIONAL JUDGMENTS ABOUT COLLECTIVE ACTION PROBLEMS 180
CONCLUSION.....183

INTRODUCTION

> The Federal system was created with the intention of combining the different advantages which result from the magnitude and the littleness of nations . . . .[1]

Under the Articles of Confederation, Congress lacked the power to protect the states from military warfare waged by foreigners and from commercial warfare waged by one another. The states proved unable to solve these difficulties on their own. They acted individually when they needed to act collectively, and the Framers of the United States Constitution concluded that the states cannot reliably achieve an end when doing so requires two or more of them to cooperate. The solution lay with the establishment of a more comprehensive unit of government—a national government with the authority to tax, raise and support a military, regulate interstate and international commerce, and act directly on individuals. The Constitutional Convention thus instructed the midsummer Committee of Detail that Congress would possess the power "to legislate in all Cases for the general Interests of the Union, and also in those Cases to which the States are separately incompetent, or in which the Harmony of the United States may be interrupted by the Exercise of individual Legislation."[2] The Committee subsequently produced Article I, Section 8.

The Framers lacked the tools and language of modern social science, but they knew a collective action problem when they saw it. When activities spilled over from one state to another, the Framers recognized that the actions of individually rational states produced irrational results for the nation as a whole—the definition of a collective action problem. The federal government is the smallest unit that internalizes these spillovers. By internalizing the effects, the federal government is more likely than the states to solve the problem of interstate spillovers. So Article I, Section 8 of the new Constitution gave Congress additional powers to address collective action problems.

Interpretations of Article I, Section 8 since the Founding have not always focused on collective action problems involving multiple states. Regardless of collective action problems, many presidents and members of Congress

1. 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 206 (Francis Bowen ed., Henry Reeve trans., Cambridge, Sever & Francis 1862).

2. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 131-32 (Max Farrand ed., rev. ed. 1966).

throughout the nineteenth century doubted the constitutionality of internal improvements and disaster relief by the federal government.[3] Moreover, the Supreme Court of the United States, in trying to distinguish the "truly national" from the "truly local" in the context of the Commerce Clause,[4] historically has gone back and forth between imposing essentially no limits on the scope of the commerce power and imposing a series of dubious formal distinctions. The crisis of the Great Depression ultimately exploded the *Lochner* Court's categorical differentiations between "manufacturing" and "commerce," "direct" and "indirect" effects on commerce, goods in the "flow" of commerce and goods not in the flow, and "harmful" and "harmless" goods in commerce.[5] More recently, the Court has distinguished "economic" or "commercial" activity, which Congress may regulate using its commerce power, from "noneconomic" or "noncommercial" activity, which Congress may not regulate.

A federal constitution ideally gives the central and state governments the power to do what each does best. Economic activity, however, does not generally cause collective action problems among the states, and noneconomic activity is not generally free from collective action problems. Consequently, Congress is not generally better at regulating economic activity, and the states are not generally better at regulating noneconomic activity. Whatever its usefulness in defining the word "Commerce,"[6] the distinction between economic and noneconomic activity is mostly irrelevant to the problems of federalism.

We propose a more promising constitutional foundation for American federalism in Article I, Section 8. Our theory of collective action federalism flows directly from the relative advantages of the federal government and the states: much of what the federal government does best is to solve collective action problems that the states cannot solve on their own.[7] We will argue that the

3. *See infra* Part I.A.2.

4. United States v. Morrison, 529 U.S. 598, 617-18 (2000). The Commerce Clause is Clause 3 of Article I, Section 8. The Court has, at times, also imposed federalism-based limits on the General Welfare Clause, which is Clause 1 of Article I, Section 8.

5. *See, e.g.*, PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 447-49 (5th ed. 2006).

6. For a discussion of competing views of the meaning of the word "Commerce" in Clause 3, see *infra* notes 177, 242, and accompanying text, contrasting the modern Court's "economic" conception with the broader, social conception of Akhil Amar and Jack Balkin.

7. As Donald Regan has written about the Commerce Clause in particular, "when we are trying to decide whether some federal law or program can be justified under the commerce power, we should ask ourselves the question, 'Is there some reason the federal government must be able to do this, some reason why we cannot leave the matter to the states?'" Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite* United States v. Lopez, 94 MICH. L. REV. 554, 555 (1995). Regan's approach to the commerce power shares some important similarities with ours, although he does not purport to offer an integrated theoretical account of Article I, Section 8 as a whole. *See also* Ann Althouse, *Enforcing Federalism After* United States v. Lopez, 38 ARIZ. L. REV. 793, 817 (1996) ("We should begin a reconstruction of Commerce Clause jurisprudence that looks deeply into why it is good for some matters to be governed by a uniform federal standard,

eighteen clauses of Section 8 are a coherent set, not a heterogeneous aggregation of unrelated powers. Coherence comes from the connection the specific powers have to collective action problems affecting the general welfare.

Section 8 begins in Clause 1 by granting Congress the power to "lay and collect Taxes . . . to pay the Debts and provide for the . . . general Welfare of the United States." Welfare is "general" (or "among the several States," in the language of Clause 3) when the federal government can obtain it and the separate states cannot—that is, when spillovers pose a collective action problem for the states. The theory of collective action federalism interprets the clauses of Section 8 as authorizing Congress to tax, spend, and regulate when two or more states face collective action problems. Conversely, governmental activities that do not pose collective action problems for the states are "internal to a state" or "local."

Some concepts from economics help to develop the theory of collective action federalism. We will show that the eighteen clauses of Article I, Section 8 mostly address two kinds of spillovers: interstate externalities and national markets.

Conscientious members of Congress and presidents should use the theory of collective action federalism in assessing the scope of their own legislative or veto powers. Courts also should use the theory to the extent that they engage in judicial review of federalism questions. The theory of collective action federalism addresses the constitutional meaning of Section 8, not the extent to which courts should declare its meaning in constitutional adjudication.

Part I, on history, surveys past interpretations of Article I, Section 8, both outside and inside the courts. Part II, on theory, shows how interstate externalities and markets cause collective action problems that affect the general welfare. Part III, on taxonomy, sorts the powers in Article I, Section 8 into analytical categories from economics, notably interstate externalities and national markets. Taken together, Parts I through III demonstrate that the specific powers form a coherent group, one that defines a substantive constitutional conception of the "general Welfare."

Part IV identifies substantial support for the theory of collective action federalism in the U.S. Supreme Court's interpretation of Article I, Section 8 during the tenure of Chief Justice John Marshall and since 1937. We also identify two ways in which existing constitutional understandings of Congress and the Court would improve by taking greater account of the existence or nonexistence of collective problems involving multiple states. First, collective action federalism differentiates interstate commerce from intrastate commerce by us-

why it is good for some things to remain under the control of the various states, and what effect these choices will have on the federal courts."). *See generally* Steven G. Calabresi, *"A Government of Limited and Enumerated Powers": In Defense of* United States v. Lopez, 94 MICH. L. REV. 752, 781-84 (1995) (stressing the importance of federalism, including the problem of positive and negative externalities in the absence of a national government).

ing the distinction between individual and collective action by the states, not the Supreme Court's distinction between "economic" and "noneconomic" activity. The distinction between individual and collective action by the states best explains why Congress may not ordinarily use the Commerce Clause to regulate such crimes as assault or gun possession in schools. Indeed, our distinction explains what the Court has actually done in recent Commerce Clause cases better than the Court's own proffered distinction.[8]

Second, collective action federalism suggests that Congress possesses some power under Clause 1 to *regulate* noncommercial harms that spill over state boundaries, such as certain environmental problems and contagious diseases. We thus favor reconsideration of the Court's conclusion in *United States v. Butler* that the General Welfare Clause does not confer any regulatory authority.[9] Not only can the text of Clause 1 bear such an interpretation, but we also avoid longstanding concerns about a general federal police power and about rendering the rest of Section 8 superfluous. We avoid these concerns by defining the "general Welfare" substantively based on the nature of the problems addressed by the balance of Section 8.

Part V identifies one way of evaluating congressional judgments about the existence and seriousness of collective action problems, and about the adequacy of Congress's response. The Conclusion summarizes the argument.

I. PAST INTERPRETATIONS OF ARTICLE I, SECTION 8

We begin with previous interpretations of Article I, Section 8, both extrajudicial and judicial, over the course of American history. Although we will not rest our interpretation of Section 8 primarily on history, much of this history supports our structural and consequentialist approach.[10] Moreover, the parts of the history that do not support our approach illustrate the problems that result when constitutional interpretation of Section 8 disregards collective action problems and attempts instead to resolve federalism questions by using one or another variety of formal distinctions.

8. This Article's approach to the Commerce Clause remarkably resembles an important paper by Jack Balkin that we recently discovered. *See* Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1 (2010). Whereas Balkin is especially concerned with the original public meaning of the Commerce Clause, we are especially concerned with the analysis of collective action problems in Article I, Section 8 as a whole and their connection to the general welfare. Notwithstanding those differences in emphasis, Balkin and we entirely agree that collective action problems are the key to understanding the scope of the commerce power, and that this insight is evident in the structure of the Constitution, in the historical discussions that led to its drafting and ratification, in much judicial precedent, and in a sound consequentialist analysis of the optimal division of authority in a federal system.

9. 297 U.S. 1, 64-66 (1936). For a discussion of *Butler*, see *infra* Part I.B.1.

10. For a discussion of the standard approaches to constitutional interpretation, see *infra* Part III.D.

A. *Section 8 Outside the Courts*

1. *Preratification*

The structure of governance established by the Articles of Confederation often prevented the states from acting collectively to pursue their common interests.[11] Solving these problems of collective action was a central reason for calling the Constitutional Convention.[12] These facts bear on the proper interpretation of the constitution that emerged from the Convention, as we will show by beginning with the general welfare.

Like the constitution that would replace it, the Articles of Confederation used the phrase "general welfare" to describe problems that a central government can solve better than the states. A particular understanding of this problem resulted in the Articles' assignment of taxing and spending powers: Congress was permitted to apportion taxes, but levying and collection was left to state governments.[13] The Articles thus required the national government to finance itself by requisitioning the states. State governments, however, failed to honor the requisition orders, which deprived the federal government of the resources it needed to protect the states both from external attack and from internal restraints on trade. The young nation subsequently experienced the failures of the Articles of Confederation, which changed many people's understanding of the problem of the general welfare and convinced them that the central government needed additional powers. As a result, the Framers retained the same phrase—the "general Welfare"—in the Constitution, but they enumerated many specific powers of Congress denied in the Articles. For example, to solve the problem of financing the national government, the General Welfare Clause in the Constitution empowers Congress to levy taxes.[14]

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11. *See, e.g.*, JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 24-28, 47-48, 102-08, 167-68, 188-89 (1996) (discussing various failures of the Articles of Confederation). Almost all of the first thirty-six essays in *The Federalist* are devoted to the various inadequacies of the Articles.

12. For a nice summary, see Larry D. Kramer, *Madison's Audience*, 112 HARV. L. REV. 611, 616-23 (1999).

13. The relevant language in the Articles read as follows:

> All charges of war, and all other expenses that shall be incurred for the common defense or general welfare, and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several States in proportion to the value of all land within each State, granted or surveyed for any person, as such land and the buildings and improvements thereon shall be estimated according to such mode as the United States in Congress assembled, shall from time to time direct and appoint.
>
> The taxes for paying that proportion shall be laid and levied by the authority and direction of the legislatures of the several States within the time agreed upon by the United States in Congress assembled.

ARTICLES OF CONFEDERATION OF 1781, art. VIII.

14. Akhil Amar explains:

> Along with other federal organs, the navy could be directly financed by new federal imposts, duties, and other taxes imposed on individuals from every region—individuals who would be

Illuminating in this regard is James Madison's *Vices of the Political System of the United States*,[15] a memorandum he wrote while preparing for the Constitutional Convention.[16] Madison recorded various problems with the Articles of Confederation, including the failure of states to comply with congressional requisitions, encroachments by states on federal power, state violations of the law of nations and treaties, state violations of the rights of other states, lack of concert despite common interests, lack of federal protection of the states against internal violence, and lack of coercive power.[17] Particularly revealing is Madison's concern about "want of concert in matters where common interest requires it," a "defect . . . strongly illustrated in the state of our commercial affairs. How much has the national dignity, interest, and revenue suffered from this cause?"[18] Madison further decried "the want of uniformity in the laws concerning naturalization & literary property; of provision for national seminaries, for grants of incorporation for national purposes, for canals and other works of general utility, [which] may at present be defeated by the perverseness of particular States whose concurrence is necessary."[19] The problems of collective action confronting America in 1787 "necessitated a government with many more powers than were possessed by Congress under the Articles—including

> directly represented in the Congress that would set general tax rates and approve the overall defense budget. This new and readily enforceable revenue system would cure the collective-action problems that had doomed the Articles' requisition regime, which lacked strong mechanisms to sanction shirking states. (State self-interest alone had failed to guarantee adequate financial support; continental defense was a classic shared good whose benefits radiated beyond the contributing states.)

AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 46 (2005).

15. JAMES MADISON, *Vices of the Political System of the United States*, *in* JAMES MADISON: WRITINGS 69, 78-79 (Jack N. Rakove ed., 1999).

16. *See* RAKOVE, *supra* note 11, at 46.

17. MADISON, *supra* note 15, at 69-73. Madison also listed the failure of the people to ratify the Articles of Confederation. *Id.* at 73-74. He further urged that "[i]n developing the evils which viciate the political system of the U.S. it is proper to include those which are found within the States individually, as well as those which directly affect the States collectively, since the former class have an indirect influence on the general malady and must not be overlooked in forming a compleat remedy." *Id.* at 74. Focusing on the "multiplicity," "mutability," and "injustice" of state laws, *id.* at 74-75, Madison then articulated a version of what would later become known as his theory of the extended republic, *id.* at 76-80. Historical scholarship has shown that the Framers were most concerned about the various collective action problems confronting the states, not about the problems internal to the states that preoccupied Madison. *See* AMAR, *supra* note 14, at 44 ("The central argument for a dramatically different and more perfect union was not that it would protect Virginians from the Virginia legislature [as Madison insisted], but rather that it would protect Virginia from foreign nations and sister states, and in turn protect these sisters from Virginia."). *See generally* Kramer, *supra* note 12, at 637-71 (developing this point in the context of arguing that the other Framers did not understand Madison's theory of the extended republic).

18. MADISON, *supra* note 15, at 71.

19. *Id.*; *see also* Kramer, *supra* note 12, at 619 ("Federal authority to act independently of the states was also called for in other areas deemed properly subject to federal supervision by virtue of their interstate aspects, such as bankruptcy, intellectual property, and immigration and naturalization.").

the great powers to tax, to raise and support armies, and to regulate commerce."[20] Facing these problems also "necessitated conferring authority to exercise these powers by acting directly on individual citizens."[21]

The proceedings of the Philadelphia Convention confirm that, in thinking through the scope of congressional power that would eventually become Article I, Section 8, the delegates focused on collective action problems involving multiple states.[22] Specifically, the Convention instructed the midsummer Committee of Detail that Congress would be authorized "to legislate in all Cases for the general Interests of the Union, and also in those Cases to which the States are separately incompetent, or in which the Harmony of the United States may be interrupted by the Exercise of individual Legislation."[23] This language registers the need to overcome a series of collective action problems facing the states. It was offered by Gunning Bedford of Delaware on July 17, 1787, in order to clarify the sixth resolution of the Virginia Plan,[24] so named because it was drafted by the Virginia delegation before the Convention was ready to proceed.[25] Notably, when the Committee of Detail made its report ten days later, "[i]t had changed the indefinite language of Resolution VI into an enumeration of the powers of Congress closely resembling Article I, Section 8 of the Constitution as it was finally adopted."[26]

This "radical change" wrought by the Committee of Detail was uncontroversial among the delegates; the Convention "accepted *without discussion* the enumeration of powers made by a committee which had been directed . . . that the Federal Government was 'to legislate in all cases for the general interests of the Union . . . and in those to which the states are separately incompetent.'"[27] The delegates apparently perceived the connection between the general propo-

20. Kramer, *supra* note 12, at 619.

21. *Id.* at 619-20.

22. As Akhil Amar explains, "Federal power over genuinely interstate and international affairs lay at the heart of the plan approved by the Philadelphia delegates." AMAR, *supra* note 14, at 108 n.*.

23. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 2, at 131-32.

24. It is not clear how each part of the quoted language fits with the other parts. We perceive redundancy, as did Bedford. Regan explains that "[t]he Framers themselves were unclear about the precise reach and interrelations of the various clauses." Regan, *supra* note 7, at 570 n.70.

25. *See* RAKOVE, *supra* note 11, at 59. The Virginia Plan incorporated most of James Madison's pre-Convention assessment of what ailed America. It formed the basis of the Convention's first two weeks of debate. *Id.*

26. Robert L. Stern, *That Commerce Which Concerns More States than One*, 47 HARV. L. REV. 1335, 1340 (1934).

27. *Id.* Rakove concludes from the fact that the Committee of Detail went unchallenged on this matter that it "was only complying with the general expectations of the Convention." RAKOVE, *supra* note 11, at 178. According to Rakove, the Committee was attempting "to identify particular areas of governance where there were 'general Interests of the Union,' where the states were 'separately incompetent,' or where state legislation could disrupt the national 'Harmony.'" *Id.*

sitions in Resolution VI and the specific powers conferred in Article I, Section 8. "If the Convention had thought that the committee's enumeration was a departure from the general standard for the division of powers to which it had thrice agreed, there can be little doubt that the subject would have been thoroughly debated on the Convention floor."[28] This history suggests that Section 8 is appropriately read as a coherent response to a series of collective action problems. It suggests that Section 8 should be read as a unified whole, not as a list of unrelated powers.[29]

During the ratification battle, James Wilson of Pennsylvania, an influential Framer and future Supreme Court Justice, seemed to understand Section 8 in a similar manner. In defending the proposed Constitution, the nationalist Wilson insisted that

> [w]hatever object of government is confined, in its operation and effects, within the bounds of a particular state, should be considered as belonging to the government of that state; whatever object of government extends, in its operation or effects, beyond the bounds of a particular state, should be considered as belonging to the United States.[30]

Rather than considering Section 8 piecemeal, he generalized in much the same way that the Convention generalized in instructing the Committee of Detail on how to write Section 8. Wilson seemed to read Section 8 as a unified whole aimed at collective action problems involving more than one state.[31]

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28. Stern, *supra* note 26, at 1340; *see also* Regan, *supra* note 7, at 556 ("[T]here is no reason to think the Committee of Detail was rejecting the spirit of the Resolution when they replaced it with an enumeration.").

29. Stern analogized a dysfunctional economy to an ailing human body in order to underscore the magnitude of the collective action problem facing the states during the Great Depression:

> In the human organism the unity of the system which makes it impossible to treat any part of the body as entirely separate from the rest also makes it possible to treat and cure the body as a whole. Does the commerce clause, which is the integrating factor in the union of states, likewise permit the economic treatment of the union as a whole—or, by merely devitalizing the separate units without substituting any positive central authority, has it become the agency which will bring about their ruin?

Stern, *supra* note 26, at 1336-37. Needless to say, Stern was asking a rhetorical question: "The Court can avoid the possibility of placing the nation in a defenseless position . . . by allowing federal control of those business transactions which occur in and concern more states than one and which the individual states are separately incompetent to control." *Id.* at 1366. He even noted the inclusion of the "general welfare" language in the Preamble and Clause 1 of Article I, Section 8, arguing that this placement demonstrated the view of the Convention "that the Constitution would serve and should be construed 'to promote the general welfare' and not to perpetuate a union of states powerless when power is needed most." *Id.* at 1342. Stern intuitively grasped some of the key economic concepts that we use throughout this Article.

30. BREST ET AL., *supra* note 5, at 556. Note, however, that there is an important difference between effects and external effects. Wilson's language arguably was not as precise as it should have been.

31. Chief Justice John Marshall would later reason similarly to Wilson. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 195 (1824) ("The genius and character of the whole govern-

2. *Postratification*

If key Framers were acutely mindful of collective action problems facing the states, the need for collective action often seemed lost on constitutional interpreters during the Constitution's first full century. After the Constitution was ratified, national politicians continued to debate the scope of federal power in Section 8, particularly the meaning of the reference in Clause 1 to the "general Welfare." Because Congress seldom used its commerce power before the latter decades of the nineteenth century,[32] and because presidential vetoes often prevented the constitutionality of spending bills from being litigated in court,[33] the main participants in these debates tended to be presidents and members of Congress. Unfortunately for the young nation, many of these participants did not seem particularly interested in inquiring whether Congress or the states were better situated to address the problem at hand.

A major antebellum constitutional controversy concerned the extent to which the General Welfare Clause authorized Congress to spend money on "internal improvements." Members of the Federalist Party, who were heavily influenced by Alexander Hamilton, defended robust congressional power under Clause 1 to spend for the "general Welfare" regardless of whether the expenditure could plausibly be viewed as carrying out another enumerated power in Section 8.[34] Federalists were opposed by Democratic Republicans such as James Madison, who argued that Congress possessed no independent power to tax and spend in pursuit of the general welfare. Rather, Madison insisted that the constitutional meaning of the phrase "general Welfare" is defined and limited by the specific grants of authority in Clauses 2 through 17 of Section 8.[35]

It was on this constitutional ground that President Madison, in 1817, rested his veto of then-Representative John C. Calhoun's Bonus Bill, which would have funded internal improvements, including roads and canals. Calhoun believed that it would advance the "general welfare" of the nation as a whole "to perfect the communication from Maine to Louisiana," "to connect all the great commercial points on the Atlantic . . . with the Western States," and "to perfect

ment seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally . . . .").

32. BREST ET AL., *supra* note 5, at 176.

33. *Id.* at 450.

34. *See* ALEXANDER HAMILTON, REPORT ON THE SUBJECT OF MANUFACTURES (1791), *reprinted in* 10 THE PAPERS OF ALEXANDER HAMILTON 230, 302-04 (Harold C. Syrett ed., 1966) (arguing that the General Welfare Clause confers independent authority to tax and spend).

35. *See, e.g.*, United States v. Butler, 297 U.S. 1, 65-66 (1936) (discussing Madison's restrictive view of the General Welfare Clause and Hamilton's expansive view); THE FEDERALIST NO. 41 (James Madison) (arguing that the General Welfare Clause confers authority to tax and spend only for purposes indicated by the enumerated powers listed in Article I, Section 8).

the intercourse between the West and New Orleans."[36] Madison conceded the policy virtues of the proposal but vetoed it because he was "constrained by the insuperable difficulty I feel in reconciling the bill with the Constitution of the United States."[37] Likewise, Madison's successor, President James Monroe, vetoed a similar internal improvements bill on constitutional grounds in 1822,[38] and President Jackson voiced constitutional objections in vetoing the Maysville Road Bill in 1830.[39] Subsequent Democratic Presidents—specifically, Tyler, Polk, Pierce, and Buchanan—articulated increasingly narrow conceptions of congressional authority over internal improvements. "And thus on the eve of the Civil War," David Currie writes, "Congress found itself unable even to remove obstructions to naturally navigable waters, which Andrew Jackson himself had conceded it not only could but ought to do."[40]

In the decades after the Civil War, the same constitutional qualms about federal spending extended to disaster relief. There was substantial political precedent for federal spending to help the victims of disasters.[41] But people disagreed about whether such spending was for the "general Welfare" as required by the Constitution, rather than for the particular welfare of those who benefited from the expenditures. For example, some congressional supporters of federal funding to aid the victims of an Ohio River flood in 1884 argued in effect that necessity trumped the Constitution.[42] Likewise, President Grover Cleveland signed certain disaster relief bills during his presidency, but in 1887 he vetoed on constitutional grounds a bill that would have provided relief to drought victims in Texas.[43]

B. *Section 8 Inside the Courts*

1. *The General Welfare Clause*

The Supreme Court did not weigh in on this longstanding political debate over the scope of the federal taxing and spending powers until 1936.[44] In *Unit-*

36. BREST ET AL., *supra* note 5, at 82.

37. *Id.* at 83. Madison continued: "[I]t does not appear that the power proposed to be exercised by the bill is among the enumerated powers, or that it falls by any just interpretation within the power to make laws necessary and proper for carrying into execution those or other powers vested by the Constitution in the Government of the United States." *Id.*

38. *Id.* at 84.

39. *See* DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: DEMOCRATS AND WHIGS 1829-1861, at 10-12 (2005).

40. *Id.* at 25.

41. BREST ET AL., *supra* note 5, at 451 (discussing Michelle Dauber Landis, *The Sympathetic State*, 23 LAW & HIST. REV. 387, 403-06 (2005)).

42. *Id.*

43. *Id.* at 452-53.

44. The Court upheld federal land and franchise grants for interstate railroads in 1888, but relied on the Commerce Clause in doing so. *See* California v. Cent. Pac. R.R. Co., 127

ed States v. Butler, the Court explicitly approved Hamilton's robust view of the scope of the taxing and spending powers as "the correct one."[45] Accordingly, the Court held that Congress possesses broad authority to tax and spend for the general welfare, so long as Congress does not violate another constitutional provision. The Court reaffirmed this holding in subsequent cases. In *Steward Machine Co. v. Davis*, the Court rejected a constitutional challenge to the federal unemployment compensation system created by the Social Security Act (SSA).[46] And in *Helvering v. Davis*, the Court sustained the constitutionality of the SSA's old age pension program, which had been funded exclusively by federal taxes.[47]

While the *Butler* Court approved broad congressional power to tax and spend according to its assessment of what the general welfare requires, the same Court rejected the possibility that the General Welfare Clause allows federal regulation in addition to taxation and spending. "The true construction [of the clause]," the Court wrote, "undoubtedly is that the only thing granted is the power to tax for the purpose of providing funds for payment of the nation's debts and making provision for the general welfare."[48] The *Butler* Court reasoned that a contrary conclusion would allow a general federal police power and render the rest of Section 8 superfluous:

> The view that the clause grants power to provide for the general welfare, independently of the taxing power, has never been authoritatively accepted. Mr. Justice Story points out that if it were adopted "it is obvious that under color of the generality of the words, to 'provide for the common defence and general welfare,' the government of the United States is, in reality, a government of general and unlimited powers, notwithstanding the subsequent enumeration of specific powers."[49]

Madison reasoned in much the same fashion in vetoing Calhoun's "internal improvements" bill.[50] Neither seemed to consider the possibility that their con-

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U.S. 1, 39-41 (1888).

45. 297 U.S. 1, 66 (1936).

46. 301 U.S. 548 (1937).

47. 301 U.S. 619 (1937).

48. *Butler*, 297 U.S. at 64.

49. *Id.* (quoting 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 907 (Melville M. Bigelow ed., Little, Brown & Co. 5th ed. 1905) (1833)).

50. Madison wrote:

> To refer the power in question to the clause "to provide for the common defense and general welfare" would be contrary to the established and consistent rules of interpretation, as rendering the special and careful enumeration of powers which follow the clause nugatory and improper. Such a view of the Constitution would have the effect of giving to congress a general power of legislation instead of the defined and limited one hitherto understood to belong to them, the terms "common defense and general welfare" embracing every object and act within the purview of a legislative trust. It would have the effect of subjecting both the Constitution and laws of the several States in all cases not specifically exempted to be superseded by laws of Congress.

BREST ET AL., *supra* note 5, at 83 (quoting James Madison, Veto Message (Mar. 3, 1817), *in* 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, at 584-85

cerns about a general federal police power were overstated—that the phrase "general Welfare" in the General Welfare Clause might possess substantive content that is illuminated by considering the nature of the problems addressed in the balance of Section 8.

Instead, the *Butler* Court held unconstitutional the Agricultural Adjustment Act of 1933 (AAA), which sought to stabilize agricultural production and raise prices by offering farmers subsidies to limit their crops. The Court explained that the AAA "invades the reserved rights of the states" because its "purpose is the control of agricultural production, a purely local activity."[51] "It hardly seems necessary to reiterate," Justice Owen Roberts wrote for the Court, "that ours is a dual form of government."[52] The Court was unmoved by "the fact that," as one astute commentator noted contemporaneously, "no state ha[d] ever undertaken any serious exercise of such power, and . . . could not possibly make any such regulation effective."[53]

2. *The Commerce Clause*

In contrast to judicial interpretation of the General Welfare Clause, the Court began construing the scope of Congress's power "[t]o regulate Commerce . . . among the several States"[54] early in the nineteenth century. During that time period, the Court rarely but broadly interpreted the Commerce Clause. After generously construing the scope of congressional power in Section 8 as a whole in *McCulloch v. Maryland*,[55] the Court expansively read the scope of the commerce power in *Gibbons v. Ogden*.[56]

The *Gibbons* Court held that the Commerce Clause authorizes Congress to

(James Richardson ed., 1897)).

51. *Butler*, 297 U.S. at 63-64, 68. This part of the *Butler* Court's holding is no longer good law. *See* United States v. Darby, 312 U.S. 100, 108-10, 113-24 (1941) (upholding the Fair Labor Standards Act of 1938, which prohibited the shipment in interstate commerce of goods produced by employees paid less than the mandated minimum wage).

52. *Butler*, 297 U.S. at 63.

53. BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 203 (2009) (quoting Isidor Loeb, *Constitutional Interpretation in a Transitional Period*, 21 ST. LOUIS L. REV. 95, 105 (1936)).

54. U.S. CONST. art. I, § 8, cl. 3.

55. 17 U.S. (4 Wheat.) 316, 424, 436 (1819) (holding that Congress had Section 8 authority to create the Second Bank of the United States and that the states were prohibited by the Constitution from taxing the Bank). Although Section 8 neither mentions a bank nor empowers Congress to charter corporations, Chief Justice Marshall reasoned for the Court that the Bank was an "appropriate" means for Congress to employ in carrying out several of its enumerated powers: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *Id.* at 421.

56. 22 U.S. (9 Wheat.) 1, 193-97 (1824).

regulate navigation. In reaching that conclusion, Chief Justice Marshall's definition of the phrase "among the several States" in the Commerce Clause was expansive but not limitless. "The word 'among,'" Marshall wrote, "means intermingled with. A thing which is among others, is intermingled with them. Commerce among the States, cannot stop at the external boundary line of each State, but may be introduced into the interior."[57] Yet Marshall took care to note that "[c]omprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one. . . . The completely internal commerce of a State, then, may be considered as reserved for the State itself."[58] Although Marshall's language left a good many line-drawing problems unresolved, he did point the way toward a functional middle ground between very limited federal power on the one hand, and effectively limitless federal power on the other.

Congress did not begin using its commerce power in earnest until the decades after the Civil War, in response to the rapid industrialization of the country. From the late 1800s until 1937, the *Lochner* Court, which was committed to a largely unregulated national economy, adopted a narrow view of the Commerce Clause, and invalidated many federal statutes as beyond the scope of the commerce power. Sometimes the Court struck down acts that regulated "manufacturing" and not "commerce."[59] Other times the Court concluded that the commerce at issue was not "among the several States" because the effect on interstate commerce was "indirect," as opposed to "direct,"[60] or because the goods at issue were not in the "flow" of commerce,[61] or because the goods that Congress was attempting to regulate were "harmless," as opposed to "harmful."[62] In one of these decisions, the Court went out of its way to dismiss the

57. *Id.* at 194.

58. *Id.* at 194-95.

59. *E.g.*, United States v. E.C. Knight Co., 156 U.S. 1, 12-13 (1895) (holding that the Sherman Antitrust Act could not be used to thwart a monopoly in the sugar-refining industry because the commerce power did not authorize Congress to regulate manufacturing, which was antecedent to commerce); *see also, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238, 303-04 (1936) (invalidating the Bituminous Coal Conservation Act of 1935 because federal regulation of wages and hours concerned production, not commerce).

60. *E.g.*, A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 523-25, 527-28, 542-51 (1935) (invalidating the Federal Live Poultry Code for the New York City metropolitan area, which regulated the sale of diseased chickens and which included wage, hour, and child labor provisions, based on an "indirect" relationship to interstate commerce).

61. *Carter Coal*, 298 U.S. at 305. *Compare* Swift & Co. v. United States, 196 U.S. 375, 398-99 (1905) (upholding application of the Sherman Act to price fixing by stockyard owners), *with Schechter Poultry*, 295 U.S. at 543 ("So far as the poultry here in question is concerned, the flow in interstate commerce had ceased. The poultry had come to a permanent rest within the state.").

62. *E.g.*, Hammer v. Dagenhart, 247 U.S. 251, 268-72, 276-77 (1918) (invalidating a federal ban on the shipment in interstate commerce of goods produced by child labor, and distinguishing cases in which the Court upheld federal regulation on the ground that in those cases "the use of interstate transportation was necessary to the accomplishment of harmful results," whereas in the case at bar "[t]he goods shipped [were] of themselves harmless").

"proposition, often advanced and as often discredited, that the power of the federal government inherently extends to purposes affecting the nation as a whole with which the states severally cannot deal or cannot adequately deal . . . ."[63]

These formal distinctions proved difficult to apply consistently, nonarbitrarily, and (eventually) in a manner that was compatible with the widely perceived necessity for action by the federal government during the Great Depression. All of these distinctions abruptly exited constitutional law beginning in 1937, when Justice Roberts altered his view of the scope of the commerce power and became the fifth vote to uphold laws of the kind previously invalidated by the Court.[64] Perhaps he responded to a very popular President who was pushing a "court packing" plan to overcome judicial invalidations of key components of his New Deal economic recovery programs.[65] (Roosevelt registered quickly that "[i]f forty states go along with adequate legislation and eight do not . . . we get nowhere.")[66] Perhaps Roberts experienced a genuine change of heart.[67] In any case, his "switch in time that saved nine" came to characterize this deferential era of Commerce Clause jurisprudence.[68] From 1937 until 1995, the Court did not invalidate one federal law as beyond the scope of the commerce power.

For example, in *Wickard v. Filburn*, the Court allowed Congress to use its commerce power to attempt to raise the price of wheat on the interstate market.[69] Specifically, the Court upheld the Agricultural Adjustment Act's wheat-production quota as applied to a farmer who exceeded his quota but used the excess wheat exclusively for home consumption and livestock feeding. The Court reasoned that such home consumption constituted a substantial and varying percentage of national demand, and so had a significant effect on the price.[70] The Court also reasoned that Congress might rationally fear that excess

63. *Carter Coal*, 298 U.S. at 291.

64. *E.g.*, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 22-24, 34-43 (1937) (upholding federal regulation of labor relations in the steel industry).

65. *See generally* FRIEDMAN, *supra* note 53, at 3-8, 202, 214, 217-36 (describing the political fight over President Roosevelt's plan); JEFF SHESOL, SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT (2010) (detailing the controversy surrounding President Roosevelt's plan).

66. FRIEDMAN, *supra* note 53, at 208 (quoting Letter from President Franklin D. Roosevelt to David Grey (June 17, 1935)).

67. For impressive use of a formal, statistical model to prove this point, see Daniel E. Ho & Kevin M. Quinn, *Did a Switch in Time Save Nine?*, 2 J. LEGAL ANALYSIS 69 (2010).

68. *See, e.g.*, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 247-49, 253-58, 261 (1964) (upholding Title II of the Civil Rights Act of 1964, which prohibited racial discrimination by places of public accommodation); Katzenbach v. McClung, 379 U.S. 294, 296-99, 301-05 (1964) (upholding Title II's application to a midsized, family-owned restaurant); United States v. Darby, 312 U.S. 100, 108-10, 113-24 (1941).

69. 317 U.S. 111, 114-16, 118-29 (1942).

70. *Id.* at 127-28 ("The effect of consumption of home-grown wheat on interstate commerce is due to the fact that it constitutes the most variable factor in the disappearance of

wheat would end up being sold on the interstate market.[71] *Wickard* has long been considered controversial; many commentators have viewed it as an instance in which Congress pushed the outer limits of its commerce power.

Until the 1990s, conventional wisdom held that Congress could regulate essentially any activity under the Commerce Clause. In 1995, however, the Supreme Court started imposing some limits on the regulatory power of Congress. The Court's holdings created a new jurisprudence of the Commerce Clause. As discussed below, the Court has ostensibly placed decisive emphasis on its determination of whether the activity regulated by Congress is "economic" or "noneconomic" in nature, which also appears to determine whether that activity exists "among the several States" or instead is internal to one state.

The new epoch began with a constitutional challenge to a component of the Federal Gun-Free School Zones Act of 1990 (GFSZA), which criminalized possession of a firearm within one thousand feet of a school zone.[72] In *United States v. Lopez*, the Justices considered whether Congress had exceeded its commerce power in enacting this law.[73] Writing for Justices O'Connor, Scalia, Kennedy, Thomas, and himself, Chief Justice Rehnquist concluded that the law was unconstitutional on the ground that the presence of a firearm near a school did not substantially affect interstate commerce. In supporting this conclusion, the Chief Justice stressed that the GFSZA "is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms."[74] He did not actually refute the gov-

the wheat crop. Consumption on the farm where grown appears to vary in an amount greater than 20 per cent of average production.").

71. *Id.* at 128 ("[B]eing in marketable condition such wheat overhangs the market and, if induced by rising prices, tends to flow into the market and check price increases."). The Court further reasoned that homegrown wheat, even if never marketed, "supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. Home-grown wheat in this sense competes with wheat in commerce." *Id.*

72. 18 U.S.C. § 921(a)(25) (2006) (defining a "school zone" as: "(A) in, or on the grounds of, a public, parochial, or private school; or (B) within a distance of 1,000 feet from the grounds of a public, parochial, or private school"); *id.* § 922(q)(2)(a) (making it a crime "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone"), *invalidated by* United States v. Lopez, 514 U.S. 549 (1995).

73. 514 U.S. 549, 552 (1995). Chief Justice Rehnquist identified three types of activity that Congress may regulate using its commerce power:

> First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce.

Id. at 558-59 (citations omitted).

74. *Id.* at 561. Rehnquist further observed that the law "contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce." *Id.* He also noted the absence of legislative findings on how firearm possession in school zones affects interstate commerce. *Id.* at 562-63.

ernment's empirical assertion that guns near schools substantially affect interstate commerce in the aggregate.[75] Instead, he changed the subject, "paus[ing] to consider the implications of the Government's arguments,"[76] which were essentially that if Congress may regulate gun possession in schools, then Congress may regulate anything. Specifically, Rehnquist rejected the government's rationales because he could not "perceive [in them] any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign."[77] The Court did not—because it could not—provide a functional test for distinguishing substantial from insubstantial effects on interstate commerce. In *Lopez*, the Court's characterization of the regulated activity as noncommercial appeared decisive.

Likewise, Justice Kennedy, whose views are likely controlling for the time being, wrote in a concurring opinion that "here neither the actors nor their conduct has a commercial character, and neither the purposes nor the design of the statute has an evident commercial nexus."[78] While noting that "[i]n a sense any conduct in this interdependent world of ours has an ultimate commercial origin or consequence," he stressed that "we have not yet said the commerce power may reach so far."[79]

Five years later, the Court demonstrated that *Lopez* was not merely symbolic. The Federal Violence Against Women Act (VAWA) authorized victims of gender-motivated violence to sue their assailants for money damages in federal court.[80] *United States v. Morrison* concerned the constitutionality of this civil damages provision; the question presented was whether the damages remedy fell within the scope of congressional authority under either the Commerce Clause or Section 5 of the Fourteenth Amendment.[81] Splitting 5-4 the same way as in *Lopez*, the Court invalidated the damages remedy as beyond federal power under both provisions. In analyzing the commerce power, Chief

75. More precisely, the Court considered whether Congress could have rationally concluded that the presence of firearms near schools substantially affects interstate commerce:

> The Government argues that possession of a firearm in a school zone may result in violent crime and that violent crime can be expected to affect the functioning of the national economy in two ways. First, the costs of violent crime are substantial, and, through the mechanism of insurance, those costs are spread throughout the population. Second, violent crime reduces the willingness of individuals to travel to areas within the country that are perceived to be unsafe. The Government also argues that the presence of guns in schools poses a substantial threat to the educational process by threatening the learning environment. A handicapped educational process, in turn, will result in a less productive citizenry. That, in turn, would have an adverse effect on the Nation's economic well-being.

Id. at 563-64 (citations omitted).

76. *Id.* at 564-65.

77. *Id.* at 564.

78. *Id.* at 580 (Kennedy, J., concurring).

79. *Id.*

80. 42 U.S.C. § 13981 (2006), *invalidated by* United States v. Morrison, 529 U.S. 598 (2000).

81. 529 U.S. 598 (2000).

Justice Rehnquist again emphasized for the Court that Congress was regulating noneconomic activity traditionally regulated by the states: "Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity."[82] Rehnquist declined to impose "a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases," but he nonetheless insisted that "thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature."[83]

The Court rejected the government's submission that violence against women substantially affects interstate commerce, despite a voluminous legislative history documenting Congress's judgment to that effect.[84] According to the Chief Justice, "Congress' findings are substantially weakened by the fact that they rely so heavily on a method of reasoning that we have already rejected as unworkable if we are to maintain the Constitution's enumeration of powers."[85] Specifically, such reasoning "seeks to follow the but-for causal chain from the initial occurrence of violent crime (the suppression of which has always been the prime object of the States' police power) to every attenuated effect upon interstate commerce."[86]

The Chief Justice warned that the government's reasoning, if accepted, "would allow Congress to regulate any [violent] crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption."[87] This rationale could "be applied equally as well to family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant."[88] Again, the Court did not actually refute the government's empirical assertions. Instead, it denied "that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce."[89]

In *Gonzales v. Raich*,[90] the Court clarified that the economic/noneconomic characterization attaches to the general *class* of activity at issue. The general class of activity must be economic in order to fall under the regulatory power

82. *Id.* at 613.

83. *Id*. The Chief Justice further wrote that, like the GFSZA in *Lopez*, VAWA "contains no jurisdictional element establishing that the federal cause of action is in pursuance of Congress' power to regulate interstate commerce." *Id.*

84. *Id.* at 614 ("In contrast with the lack of congressional findings that we faced in *Lopez*, § 13981 *is* supported by numerous findings regarding the serious impact that gender-motivated violence has on victims and their families.").

85. *Id.* at 615.

86. *Id.*

87. *Id.*

88. *Id.* at 615-16.

89. *Id.* at 617.

90. 545 U.S. 1 (2005).

granted to Congress by Clause 3, but some particular instances within the class may be noneconomic. In other words, regulation may encompass activity that the Court deems noneconomic if Congress rationally concludes that it is an essential part of a general class of activity that the Court deems economic. For example, production of marijuana or wheat generally is an economic activity and thus is regulable by Congress under its commerce power. But according to the Court, congressional regulation of this general activity also can cover marijuana or wheat grown and consumed at home, which may be noneconomic.[91]

Raich arose when California created a medical exception to its marijuana laws and the administration of President George W. Bush sought to prohibit the practice, arguing that it was preempted by the Federal Controlled Substances Act (CSA).[92] Faced with an as-applied constitutional challenge to the CSA as beyond the scope of the commerce power, the Court held 6-3 that the Commerce Clause allows Congress to prohibit the local cultivation and use of marijuana in compliance with state law authorizing such use.[93] Writing for the Court, Justice Stevens relied upon *Wickard v. Filburn*,[94] which he read as "establish[ing] that Congress can regulate purely intrastate activity that is not itself 'commercial,' in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity."[95] Justice Stevens saw "striking" similarities between *Raich* and *Wickard*: Congress could have rationally concluded that leaving home-consumed wheat or marijuana outside the federal regulatory scheme would affect interstate price and market conditions.[96]

In these cases, the Court has sought to impose limits on the power of Congress in order to preserve the separation of federal and state powers established by Clause 3's grant of authority to "regulate Commerce . . . among the several States." The Court has purported to find this limit by restricting regulatory power under the Commerce Clause to "economic" or "commercial" activity, no doubt in part because of the reference to "Commerce" in Clause 3. To clarify what it regards as "economic activity," the Court in *Raich* cited a dictionary definition of "economics" as "the production, distribution, and consumption of commodities."[97] Under the Court's jurisprudence, then, the economic/ noneconomic determination appears dispositive because only economic activities may be aggregated for purposes of deciding whether the activity has substantial effects on interstate commerce, and essentially every activity Congress might want to regulate has substantial effects on interstate commerce in the aggregate.

91. *Id.* at 17-19.

92. 21 U.S.C. § 801 (2006).

93. *Raich*, 545 U.S. at 3-4, 6, 8-9.

94. 317 U.S. 111 (1942).

95. *Raich*, 545 U.S. at 18.

96. *Id*. at 18-19.

97. *Id.* at 25-26 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 720 (1966)).

Justice Souter understandably charged the *Morrison* Court with resuscitating the formalism of the *Carter Coal* Court in the service of different ends.[98]

There is a basic problem with using formal distinctions to divide federal and state powers in Article I, Section 8: the main reason for separating powers is the relative advantages of the federal and state governments. Formal distinctions that are unrelated to relative advantages will fail to advance the general welfare when applied to federalism problems. To clarify the mismatch, we turn now to the economic theory of the general welfare. Later, we will show that a substantive conception of the general welfare has informed many of the Court's decisions construing the Commerce Clause or the General Welfare Clause, both during the tenure of Chief Justice Marshall and since 1937—sometimes despite what the Court has said in cases such as *Lopez*, *Morrison*, and *Raich*. We also will identify ways in which contemporary constitutional understandings would be improved by taking greater account of the distinction between individual and collective action by states.

II. THEORY OF THE GENERAL WELFARE

We will use modern economics to analyze problems in the Articles of Confederation and their amelioration by Article I, Section 8. We begin with concepts that are familiar to economists and positive political theorists, but that constitutional lawyers and judges may comprehend imperfectly.

A. *Externalities*

Economists use the term "public goods" to refer to goods supplied by the state whose technical characteristics require financing by taxes instead of prices. Two characteristics of public goods necessitate financing by taxes. First, pure public goods are *nonrivalrous*, meaning that one person's enjoyment does not detract from another's. Thus, the security from foreign invasion enjoyed by one citizen does not detract from the security enjoyed by another citizen. Similarly, when pollution abatement improves air quality, one person who breathes better air does not detract from another person's breathing it. In contrast, private goods are *rivalrous*. The bite that I take out of a sandwich leaves one less bite for someone else, and the land where I build my house becomes unavailable for building by others.

Besides being nonrivalrous, pure public goods are *nonexcludable*, which means that excluding individuals from enjoying the benefits generated by the goods is infeasible or uneconomical. For example, all residents of the United States during the Cold War enjoyed the benefits of deterring a Soviet missile

98. United States v. Morrison, 529 U.S. 598, 644 (2000) (Souter, J., dissenting) ("Just as the old formalism had value in the service of an economic conception [i.e., laissez faire], the new one is useful in serving a conception of federalism.").

attack, and no one could be excluded from enjoying these benefits. Likewise, when abatement improves local air quality, everyone in the locality enjoys breathing the improved air. Similarly, everyone enjoys free access to local streets because establishing tollbooths on them is impractical. In contrast, private goods are excludable with help from the law. Thus, the owner and possessor of a sandwich can prevent others from eating it, and the owner of land can prevent others from entering it.[99]

When exclusion is infeasible or uneconomical, individuals have an incentive to free ride by not paying for the benefits that they receive. When beneficiaries do not pay, suppliers cannot earn a profit, and so the market undersupplies the good.[100] A free market will undersupply national defense, clean air, local streets, and other public goods. The state can prevent free riding by collecting taxes to finance public goods. Because taxes are compulsory, people who try to free ride break the law.

We have been discussing public goods, which convey benefits to people regardless of whether they pay for them. In general, "externalities" refer to unpriced benefits and costs. Public goods are positive externalities that the state produces intentionally. Similarly, a person who gets vaccinated benefits others by reducing their risk of exposure to contagious diseases, and an apiarist who keeps bees for honey also pollinates other peoples' orchards. These are positive externalities that individuals incidentally convey to others without their paying for them. Similarly, pollution is a negative externality that individuals and firms incidentally convey to others without having to pay for it. Dirty air is the byproduct of burning fuel; congested streets are the byproduct of commuting by car; and depleted stocks of fish are the byproduct of overfishing. Households and firms pursue private goods and dump pollution in the public domain.

Some negative externalities affect only contiguous landowners, such as the tree that blocks the neighbor's light or the smell from a neighbor's barn. In law, many of these externalities are "private nuisances." Other negative externalities affect many people, such as pollution in the Los Angeles basin. Externalities that affect many people are called "public externalities" because they have the

99. Using these two defining characteristics of public goods, Paul Samuelson provided a remarkably simple and powerful mathematical formulation of efficiency in demand and supply. Paul A. Samuelson, *Diagrammatic Exposition of a Theory of Public Expenditure*, 37 REV. ECON. & STAT. 350 (1955); Paul A. Samuelson, *The Pure Theory of Public Expenditure*, 36 REV. ECON. & STAT. 387 (1954). Note that the two characteristics of public goods are distinct. An uncongested bridge is nonrivalrous, but a tollbooth could be used to exclude people. A congested road with many entrances is rivalrous, but it is difficult to exclude people from using it.

100. Technical characteristics of goods can cause markets to fail. The classic mathematical treatment is KENNETH J. ARROW & F.H. HAHN, GENERAL COMPETITIVE ANALYSIS (1971). Market failure provides the conventional economic justification for state supply and regulation of goods. Early examples of books that use the categories of market failure to organize and evaluate regulations are STEPHEN BREYER, REGULATION AND ITS REFORM (1982), and CHARLES L. SCHULTZE, THE PUBLIC USE OF PRIVATE INTEREST (1977).

two characteristics of public goods: nonrivalry and nonexclusion.[101]

Three propositions are analytically equivalent: (i) a free market will undersupply public goods; (ii) a free market will undersupply positive externalities; and (iii) a free market will oversupply negative externalities.

B. *Internalization Principle*

By definition, a *national public good* or *bad* is nonrivalrous and nonexcludable at the national level. Military defense is the standard example. Instead of being national, however, many externalities are mostly local. A local public good or bad is nonrivalrous and nonexcludable at the local level. Thus, Central Park in Manhattan mostly benefits the people who live or work nearby, and congestion on the streets of San Francisco mostly harms local people who drive or walk on them. An air quality basin, a city park, and a congested local street are standard examples of local public goods and bads.

All public goods and bads present a challenge for public policy. Economists have a simple prescription to meet this challenge. Compared to unaffected people, the people affected by a policy have more reason to inform themselves about it and to influence it. Thus the affected people are more likely to cast informed votes, monitor politicians, impose taxes on themselves, and perform the acts of citizenship that make democracy work. Considerations of information and motivation imply a prescription for allocating political power in a federal system that we call the *internalization principle*: *assign power to the smallest unit of government that internalizes the effects of its exercise*.[102]

To illustrate, the internalization principle suggests why the largest and finest parks in the United States are almost entirely the work of the federal government. Assume that establishing a large park in the mountains would attract visitors from all over the nation. The national government, not state or local governments, represents *all* of the beneficiaries. If most financing must come from taxes and not entrance fees, financing the national park from a national tax puts the burden on the beneficiaries. Federal officials have better incentives than state or local officials to build a large park that would attract visitors nationally. Responsibility for such parks should fall upon officials who have a national perspective, which is mostly what we observe in fact.

Thus the internalization principle has this national application: when a public good is purely national, or nearly so, the central government should provide it. In other words, the central government should raise revenues and use them

101. The distinction between private and public externalities is fundamental to the economic analysis of property law. *See* ROBERT COOTER & THOMAS ULEN, LAW & ECONOMICS 147-50 (5th ed. 2008).

102. For an early formulation of this general approach that influenced economists, see WALLACE E. OATES, FISCAL FEDERALISM (1972). For a later summary of this approach, see Wallace E. Oates, *Federalism and Government Finance*, *in* MODERN PUBLIC FINANCE 126 (John M. Quigley & Eugene Smolensky eds., 1994).

to supply national public goods, either directly by government production or indirectly by purchasing the good from a nongovernment producer. Equivalently, when a negative externality is purely national, or nearly so, the central government should control it. In other words, the federal government should abate the harm directly through government activity or indirectly by regulating the activities that cause the harm.

Conversely, assume that a city neighborhood needs a small park for local residents. In situating and scaling the park, local residents possess better information than nonresidents. Local residents also have stronger incentives than nonresidents to monitor the officials responsible for creating and maintaining the park. Thus, local officials have better incentives than central officials for supplying local public goods. Moreover, a local public good can be financed by a local tax, which primarily hits the beneficiaries and misses nonbeneficiaries. These facts favor assigning power over city parks to local governments. Thus the internalization principle has this local application: when a public good or bad is purely local, or nearly so, local government should provide or control it.[103]

The internalization principle applies simply and immediately when the extent of the public good or bad corresponds to a government's jurisdiction. Many types of externalities, however, disrespect jurisdictional boundaries. Water and air circulate in regions formed by natural contours such as rivers and mountains, not political boundaries. Consequently, pollution spills over from one government jurisdiction to another. Spillovers create an incentive for each government to free ride on pollution abatement by others. To avoid free riding by localities, the government with primary responsibility for abatement should encompass the natural region affected by the pollution.

Sometimes special governments can be created to fit the boundaries of a natural region. The jurisdiction of a special government ideally extends as far as the effects of the public goods that it supplies or the externalities that it abates. A special district might provide clean water to several counties, or it might impose liability on local governments that pollute an air basin. Some jurisdictions rely more heavily on special districts than others. For example, the legal framework in California makes forming special districts relatively easy, and the state contains more than five thousand special governments such as water districts, school districts, park districts, and transportation districts.[104]

We use the phrase "interstate externality" to refer to a good or bad that is nonrivalrous and nonexcludable at the interstate level. Interstate externalities exist when significant benefits or costs from activities in one state spill over to another state without being priced. In practice, the federal government may be the only authority able to solve the problem. To understand why, the next Subpart explains the political foundation of the internalization principle.

103. *See* OATES, *supra* note 102.

104. ROBERT D. COOTER, THE STRATEGIC CONSTITUTION 107 (2000).

C. *Federal Coase Theorem*

The internalization principle is grounded in the politics of federalism, which we will analyze abstractly. With interstate externalities, two or more states can gain by cooperating with one another. Economists have studied various obstacles that either increase the time and effort needed for cooperation or block it completely. The obstacles include unclear rights, incomplete contracts, lack of credible commitments, asymmetrical information, distrust, holdouts, and high communication costs.

The strategies that people use to respond to such obstacles are often complicated, and models of them in game theory often have indeterminate results.[105] A remarkable simplification often gives determinacy: sweep all of the obstacles to cooperation into the encompassing term "transaction costs."[106] A famous proposition in law and economics, which helped Ronald Coase win the Nobel Prize in Economic Sciences, asserts that individuals bargain successfully unless transaction costs impede them.[107] Applied to intergovernmental relations, this proposition implies that when transaction costs are low, bargaining among governments will correct any undersupply of public goods or oversupply of public bads.[108] For example, when state governments can bargain easily with one another, they will cooperate in supplying the optimal amount of national defense and pollution abatement. These considerations lead to a proposition that we call the *Federal Coase Theorem*: *assuming zero transaction costs, the supply of public goods and the control of externalities are efficient regardless of the allocation of powers to different levels of government.*

The Federal Coase Theorem describes a condition—zero transaction costs—under which the allocation of powers to different levels of government makes no difference to the efficient supply of public goods. In reality, the allocation of powers to different levels of government makes a big difference. The point of the Federal Coase Theorem is to isolate the cause of this difference, not to deny its existence. Following this lead, we compare the transaction costs of cooperation in centralized and decentralized states. We will explain why un-

105. For an overview of game theory, see DREW FUDENBERG & JEAN TIROLE, GAME THEORY (1991).

106. For a critique of transaction costs and the Coase Theorem in light of game theory, see Robert Cooter, *The Cost of Coase*, 11 J. LEGAL STUD. 1 (1982).

107. *See, e.g.*, NICHOLAS L. GEORGAKOPOULOS, PRINCIPLES AND METHODS OF LAW AND ECONOMICS 97 (2005) ("[T]he costs of transacting impede the parties' bargain."); Cooter, *supra* note 106, at 14 ("The basic idea of [Coase's] theorem is that the structure of the law which assigns property rights and liability does not matter so long as transaction costs are nil; bargaining will result in an efficient outcome no matter who bears the burden of liability.").

108. Here is the equivalent proposition for the private sector: *with zero transaction costs of bargaining, the supply of private goods is efficient regardless of the number of markets.* The choice between markets and hierarchies matters to efficiency only because of transaction costs.

animity rule paralyzes organizations with many members and majority rule animates them.

In a decentralized system, states can cooperate with each other by forming compacts. In principle, compacts among states can supply interstate public goods and suppress interstate externalities without intervention by the federal government. When states compact, each one is free to join or not to join. Forming a state compact thus requires unanimity among the participating governments.[109] In contrast, Congress does not require unanimity among the states to pass a federal law. Instead of unanimity, Congress follows a majoritarian process—enacting legislation requires a majority of votes in both houses of Congress and the President's signature.[110] Economies of scale and scope generally create positive externalities that impose collective action problems. Interstate infrastructure provides an example. Just think of what would happen if the states were responsible for the interstate highway system. North Carolina might plan a north-south highway in a different place from where South Carolina was planning a north-south highway. Coordinating their plans so that the roads meet in the same place involves a collective action problem. The federal government solved this problem and created a coherent interstate highway system that far surpassed prior accomplishments by the individual states.

The same logic that applies to interstate externalities also applies to the legal foundations for interstate markets. Thus, assume that an interstate market requires a highway (an "internal improvement") to pass through five states arranged in a line: A⇔B⇔C⇔D⇔E. Building the road through compacts requires all five states to agree. The road will benefit people in each of the five states, but each state may prefer to shift most of the construction costs onto the other states. The value of cooperation jumps from zero to a large number when the number of cooperators increases from four to five. Each state gains bargaining power by holding out and being the last state to join the compact.

To reiterate, the holdout problem makes the probability of cooperation fall with the number of actors who must cooperate. We can illustrate these facts by using hypothetical numbers for a federal system. Imagine that the probability of cooperation is roughly 90% when interstate externalities affect two states.[111]

109. In the United States, compacts may require congressional approval. U.S. CONST. art. I, § 10, cl. 3 ("No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State . . . ."). In *Virginia v. Tennessee*, 148 U.S. 503, 519 (1893), the Court held that congressional approval is required only for compacts "tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States." The Court declined to revisit this holding in *United States Steel Corp. v. Multistate Tax Commission*, 434 U.S. 452, 460 (1978).

110. *See* U.S. CONST. art. I, § 7. For several reasons, it may be more accurate to describe Congress, especially the Senate, as operating under a supermajority rule than under a majority rule, but this fact does not change the analysis in the text. There is less of a difference between unanimity rule and supermajority rule than there is between unanimity rule and majority rule, but there is still a difference, and typically a significant one.

111. We choose 90% as our illustrative number because legal claims settle out of court

The probability of cooperation approaches zero as the number of states that must unanimously agree exceeds, say, ten. So the probability is very small that all fifty states would join a compact for common defense, create a unified post office, protect intellectual property, abolish internal tariffs, or allow the free mobility of capital and labor. Because unanimity rule paralyzes groups with more than a few members,[112] state compacts seem unpromising as means to solve interstate externalities and build interstate markets.

Having explained why unanimity rule paralyzes organizations with many members, now we will explain why majority rule animates them. Majority rule creates competition to become the decisive member in a majority coalition. Consider an assembly of one hundred one members. A coalition of fifty-one constitutes a majority. To form a majority coalition, a minority coalition of fifty members must attract one additional member. Any one of fifty-one persons could join the coalition and make a majority. Belonging to the majority coalition conveys power and advantages unavailable to the minority. Conversely, holding out risks exclusion from power and other advantages. Instead of holding out and risking exclusion, the fifty outsiders may stampede to join the majority coalition and share in the advantages of power.[113]

Applying this logic to the example of a polluted lake, assume that five local governments form a council with the power to impose a pollution-abatement program on its members by majority vote. A coalition of three local governments can impose an abatement plan that makes the other two bear a disproportionate share of abatement costs. A minority coalition with two members must attract an additional member to create a majority coalition. All three players outside this coalition may rush to join in order to avoid bearing a disproportionate share of abatement costs. In general, competition to become the decisive

at least 90% of the time for most types of disputes. *See, e.g.*, Leandra Lederman, *Precedent Lost: Why Encourage Settlement, and Why Permit Non-Party Involvement in Settlements?*, 75 NOTRE DAME L. REV. 221, 221 (1999) ("Even considering only cases actually docketed, approximately ninety percent settle . . . ."). The problem of settlement may be harder for states than for individuals because the state is a collective actor with competing interest groups.

112. Unsurprisingly, the Framers provided that ratification by nine of the thirteen states would suffice to establish the Constitution, U.S. CONST. art. VII, even though unanimity was required to amend the Articles of Confederation, ARTICLES OF CONFEDERATION of 1781, art. XIII.

113. This logic explains why theorists predicted that majority coalitions will incorporate as many members as effective control requires, and no more. William Riker developed this argument through the concept of the minimum winning coalition. *See* WILLIAM H. RIKER, THE THEORY OF POLITICAL COALITIONS 255-56 (1962). This prediction, however, is not borne out by many real-world legislatures, including the U.S. Congress. *See, e.g.*, KEITH KREHBIEL, PIVOTAL POLITICS: A THEORY OF U.S. LAWMAKING 4, 6 (1998) (observing that one of the "basic facts of lawmaking" in modern America is that winning coalitions are almost always much greater than bare-majority sized). The instability of governing coalitions under majority rule, discussed in the following note, may help to explain the predictive failure of Riker's theory.

member of the majority coalition often prevents holdouts in large organizations.[114]

As an organization grows, it may switch from unanimity to majority rule in order to avoid paralysis. Thus, as more countries join the European Union, the Council of Ministers increasingly follows qualified majority rule rather than unanimity rule.[115] Equivalently, a shift from unanimity rule to majority rule increases the optimal number of governments in a federal system. A federal system with majority rule can work effectively with more members than can a federal system with unanimity rule. Thus, as the European Union resolves more problems by majority rule and fewer problems by unanimity rule, it can accommodate more members.

Switching from unanimity rule to majority rule ameliorates the problem of holdouts, but it creates a new problem: minority exploitation. Under unanimity rule, anyone who stands to lose from collective action can veto it. The switch to majority rule removes this protection from the minority. If collective action creates more costs than benefits for the minority, then the minority suffers a net loss from federal action.[116] For this reason, governments that fear being in the minority (rightly or wrongly) may resist the centralization of power, as do the smaller countries in the European Union,[117] as did delegates from the smaller

114. Note, however, that the same reason many people wish to join the majority coalition explains why it may be unstable: anyone excluded from the majority coalition can offer to benefit all but one member of it by replacing one of its members on terms more favorable to the others. The technical name for this problem is the "empty core." *See* Tracey E. George & Robert J. Pushaw, Jr., *How Is Constitutional Law Made?*, 100 MICH. L. REV. 1265, 1270 n.21 (2002) ("A bargaining situation requiring a majority agreement contains an empty core when a participant may be persuaded to defect from an agreement by the offer of a bigger share and such defection changes the majority agreement."); *see also* COOTER, *supra* note 104, at 58-59 (discussing majority-rule division of a fixed sum of money).

115. *See, e.g.*, PAUL CRAIG & GRÁINNE DE BÚRCA, EU LAW: TEXT, CASES AND MATERIALS 124 (4th ed. 2008) ("Member States acknowledged that there had to be an extension of qualified-majority voting in an expanded Union. Unanimity would often be synonymous with inaction, since one State out of twenty-seven would almost certainly object."); HANS SLOMP, EUROPEAN POLITICS INTO THE TWENTY-FIRST CENTURY: INTEGRATION AND DIVISION 134 (2000) ("Since the late 1980s, . . . the rule of unanimity has been given up, except for very important matters. In the Council of Ministers, a qualified majority now suffices for most decisions.").

116. This is one reason why Buchanan and Tullock stressed the advantages of unanimity rule in their classic book that revived contractarianism. JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY 88-96 (1962); *see also* Mathias Dewatripont & Gerard Roland, *Economic Reform and Dynamic Political Constraints*, *in* 2 MONETARY AND FISCAL POLICY 415, 421 (Torsten Persson & Guido Tabellini eds., 1994) ("Unanimity might seem less relevant than majority for understanding the effects of political constraints. However, not only is unanimity required in many institutional contexts, but one might also view it as a way to model consensual decision-making, whereas majority rule can be seen as a way to examine more conflictual contexts.").

117. *See, e.g.*, ERIK BERGLÖF ET AL., BUILT TO LAST: A POLITICAL ARCHITECTURE FOR EUROPE 35 (2003) ("Small countries [in the EU] are concerned about the influence of large

states at the Constitutional Convention in 1787.[118] They prefer risking paralysis under unanimity rule to exploitation under majority rule.

As more parties must cooperate, the transaction costs of cooperation increase, and so does the probability of failure. Consequently, the probability that federal power is required to solve an interstate externality increases as the number of affected states increases. When all states are affected, as with military defense and free trade, the advantages of federal power are overwhelming. Conversely, when two states are involved, the advantages of federal power are smaller.[119] When the number of parties shrinks to two, there is no majority or minority, so the difference between unanimity rule and majority rule disappears. Without majority rule, there is no holdout problem. Two-state externalities pose a problem of bargaining, but not a problem of holdouts. Successful cooperation is much more likely when it involves a bargaining problem between two states than when it involves a holdout problem among many states. Even so, the nation's experience under the Articles of Confederation included important examples where two states failed to cooperate.[120]

In interpreting the Constitution, a rule is required to bound federal power. The Commerce Clause grants federal regulatory power over commerce "among the several States," which always has been understood to include two or more

countries . . . ."); JANUSZ BUGAJSKI & ILONA TELEKI, ATLANTIC BRIDGES: AMERICA'S NEW EUROPEAN ALLIES 30 (2007) ("The smaller states, including the newcomers, seek access to the higher reaches of the EU leadership and fear being marginalized by the bigger powers."); CRAIG & DE BÚRCA, *supra* note 115, at 57 ("The [Constitutional Treaty] had important institutional implications for the European Council. Some Member States felt that the Presidency should no longer rotate between States on a six-monthly basis, since they believed that this would not work within an enlarged Union, which required greater continuity of policy. This view was advocated by a number of the larger States, but was opposed by some of the smaller States, which felt that the Presidency of the European Council would be dominated by the larger Member States.").

118. Madison thought his fellow delegates were concerned about the wrong sort of division. In response to delegates who stressed conflicts between large and small states, Madison stated that "the great division of interests in the U. States. . . . did not lie between the large & small States: it lay between the Northern & Southern." 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 2, at 486.

119. Even in the two-state scenario, the advantages of federal power are often significant, which helps to explain why the Constitution extends federal judicial power "to Controversies between two or more States." U.S. CONST. art. III, § 2, cl. 1.

120. *See, e.g.*, THE FEDERALIST NO. 7 (Alexander Hamilton) (detailing land disputes between Connecticut and Pennsylvania and between New York and Vermont, and describing Connecticut's "disposition to retaliation" in response to Rhode Island's passage of laws violating private contracts). Hamilton expressed this concern:

> America, if not connected at all, or only by the feeble tie of a simple league offensive and defensive, would by the operation of such opposite and jarring alliances [between different states and foreign nations] be gradually entangled in all the pernicious labyrinths of European politics and wars; and by the destructive contentions of the parts, into which she was divided would be likely to become a prey to the artifices and machinations of powers equally the enemies of them all.

Id.

states.[121] Given experience under the Articles of Confederation, "more States than one" was a natural boundary to draw as the lower limit for the power of Congress to regulate interstate commerce. As we show in Part III, the Framers wrote Section 8 to give Congress power over interstate externalities and interstate markets, regardless of whether they affect two states or many states. The fact that Congress possesses this power, however, does not mean that it should always exercise it. Rather, Congress should exercise its regulatory power only when two or more states fail to promote the general welfare because they cannot cooperate with one another.[122]

D. *Political Logic of U.S. Federalism*

To review, benefits and costs that spill across state lines create an incentive for each state to free ride on the efforts of other states. The incentive to free ride exists if spillovers affect two states or many states. If the problem is not addressed, citizens will suffer from too few interstate public goods, too many harmful interstate externalities, and not enough interstate commerce. To overcome this problem, states may compact with one another. Compacts that require unanimity impose high transactions costs on collective action. Transaction costs increase sharply with the number of states that must cooperate together. If the compact encompasses many states, holdouts will paralyze it. The central government operating through majority rule can find solutions that elude states cooperating through unanimity rule. Empowering Congress animates collective action, but risks exploiting states in the minority. Thus, majority rule ideally extends far enough to solve the problem of public goods, harmful externalities, and interstate markets, but no further in order to reduce the danger of exploitation. Balancing these considerations leads to the internalization principle: *assign power to the smallest unit of government that internalizes the effects of its exercise*.

III. ANALYTICAL CATEGORIES OF ARTICLE I, SECTION 8

We have explained the political logic at the foundation of the internalization principle. The internalization principle grounds our analysis of the enumerated powers in Article I, Section 8, to which we now turn. In the system created by the U.S. Constitution, the federal government is the smallest unit of government that always internalizes the effects of interstate public goods, externalities, and markets. The internalization principle thus implies that Congress should have constitutional authority to solve these collective action prob-

121. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 194 (1824) ("Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one.").

122. *See* discussion *infra* Part III.A.

lems. This explanation, although incomplete,[123] is fundamental for understanding the allocation of powers in Article I, Section 8.

A. *Analysis of Section 8*

Figure 1 assigns numbers to the eighteen clauses of Section 8. The General Welfare Clause, which comes first, authorizes Congress to "lay and collect Taxes . . . to pay the Debts and provide for the . . . general Welfare of the United States."[124] A list of sixteen specific powers follows. The final clause authorizes Congress to use the means "necessary and proper" to achieve the previously authorized ends—the Necessary and Proper Clause.[125]

123. A complete discussion would consider the separation and interrelation of powers at the national level, including such topics as the bicameralism and presentment requirements of Article I, Section 7; instability under majority rule, including the empty core of a game of redistribution by majority rule, *see supra* note 114; and the agency problem of representation of citizens by officials, including lobbying. For a discussion of these topics, see COOTER, *supra* note 104, at 171-239. These are matters of political logic. A complete theory would have to go beyond logic in explaining politics.

124. U.S. CONST. art. I, § 8, cl. 1.

125. *Id.* art. I, § 8, cl. 18.

FIGURE 1
The Eighteen Clauses in Article I, Section 8

The Congress shall have Power
1. To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;
2. To borrow Money on the credit of the United States;
3. To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;
4. To establish a uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;
5. To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;
6. To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;
7. To establish Post Offices and post Roads;
8. To 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;
9. To constitute Tribunals inferior to the supreme Court;
10. To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations;
11. To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;
12. To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;
13. To provide and maintain a Navy;
14. To make Rules for the Government and Regulation of the land and naval Forces;
15. To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections, and repel Invasions;
16. To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;
17. To exercise exclusive Legislation in all cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And
18. To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States or in any Department or officer thereof.

Figure 2 sorts the specific powers into three analytical categories that we will explain.

FIGURE 2
Economic Analysis of Enumerated Powers

A. Interstate Externalities
National defense 1. Common defense 10. Suppress piracy 11. Declare war 12. Raise armies 13. Maintain navy 14. Make military law 15. Call militia 16. Govern militia 7. Establish post offices 8. Make intellectual property law
B. Interstate Markets
3. Regulate interstate and foreign commerce 4. Naturalization law 4. Bankruptcy law 5. Issue money 5. Fix weights and measures 6. Punish counterfeiting
C. Federal Administration
1. Taxes and duties 2. Issue bonds 9. Create lower federal courts 17. Govern D.C. & federal buildings in states 18. Make laws necessary & proper to execute these and other powers

We begin with interstate externalities. Clause 1 authorizes Congress to "lay and collect Taxes . . . to . . . provide for the common Defence,"[126] and Clauses 10 through 16 confer specific powers of national defense. In economics textbooks, military defense is the standard example of a good with positive externalities that affect an entire nation. Without a federal army, each state would have to provide for its own defense. The benefits of defense in one state would spill over to people in another state. The provider would have no practical way to collect fees from out-of-state beneficiaries to pay for the costs of defense. So each state would have an incentive to free ride on the security provided by oth-

126. *Id.* art. I, § 8, cl. 1.

er states, leaving each of the states insecure.

As explained in Part II.A, a positive interstate externality exists when an activity in one state benefits people in another state who do not pay for it. Given the technical characteristics of the activity, the provider in one state has no practical way to collect fees from the beneficiaries in another state. Congress, which does not suffer this disadvantage, can provide for the common defense much more effectively than the states.

After the common defense, Clause 7 refers to the next power embodying positive externalities: the federal post office. The post office is a network that becomes more valuable for each user as it acquires more pick-up and delivery points. If the postal industry consisted of several private firms that cooperated, each firm's activity would expand the network and thus benefit the other firms. In this respect, the post office in the eighteenth century resembles the railroad in the nineteenth century and the Internet in the twentieth century. Modern legal scholars who observed positive externalities on the Internet called them "network effects."[127]

Given network effects, the initial problem is to grow the industry enough so that costs fall to the point of economic viability. In this respect, the federal government's interest in promoting the post office in the eighteenth century resembles its concern with promoting the railroad in the nineteenth century and the Internet in the twentieth century.

Once such an industry is viable, competition often propels the market towards a single provider or a small number of very large providers, as with the railroads in the nineteenth century and Google in the late twentieth century. A large firm can internalize positive externalities and lower the transaction costs of coordination. Economists call this situation a "natural monopoly." With a natural monopoly at the national level, the federal government appropriately stands ready to constrain the dominant firm through antitrust laws and regulations, or to provide the service itself.[128]

Proceeding down the rows of Figure 2, we turn to Clause 8, which empowers Congress to make intellectual property law. An inventor without a patent cannot prevent someone else from copying her invention, and an author without a copyright cannot prevent someone else from reprinting her book. Effective

127. *See, e.g.*, Brett M. Frischmann & Barbara van Schewick, *Network Neutrality and the Economics of an Information Superhighway: A Reply to Professor Yoo*, 47 JURIMETRICS J. 383, 402 n.62 (2007) ("A network effect exists if consumers' valuation of the good increases with the number of users of the good; this leads to an externality because a user who considers joining the network does not consider the positive impact of his adoption decision on other users." (citing Michael L. Katz & Carl Shapiro, *Network Externalities, Competition, and Compatibility*, 75 AM. ECON. REV. 424 (1985) (defining network effects))).

128. Note, however, that rapid technological change undermines the case for government intervention in natural monopolies by making them vulnerable to innovation. Thus, telephone systems exhibit natural monopoly, but the case for regulating long-distance carriers was greater before cell phones and the Internet created dynamic competition.

intellectual property law enables creators to collect fees from users of their creations, which provides an incentive for creativity.[129] Because the problem of unauthorized use extends across state lines, the problem is national and Congress is better placed than the states to solve it. Federal intellectual property laws enable creators to collect fees from users across the nation, which creates a unified national market for creative works.

Military defense, the postal service, and intellectual property affect the "general" welfare because of positive interstate externalities. Now our analysis turns from interstate externalities to national markets. The publication of Adam Smith's *The Wealth of Nations* in 1776 systematically explained the advantages of free markets and free trade for a nation. In the same year, America declared its independence. Subsequently, the young nation's unhappy experience under the Articles of Confederation confirmed Smith's ideas about the disadvantages of fettered markets and trade barriers.[130]

In the eighteenth century, America faced the problem of creating a unified market for goods, capital, and labor. Legal obstacles to the movement of resources inhibit national markets. In contrast, a uniform regulatory framework lubricates national markets for some goods. Recognizing the federal government's decisive advantage over state governments, the drafters of the Constitution in 1787 gave Congress the power to create unified national markets in Clauses 3 through 6.

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129. Scholars are now engaged in a lively debate about where intellectual property rights should expand and where they should contract. *See, e.g.*, JAMES BOYLE, THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND (2008); William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U. CHI. L. REV. 471, 471-75 (2003) ("rais[ing] questions concerning the widely accepted proposition that economic efficiency requires that copyright protection should be limited in its duration"); Lawrence Lessig, Commentary, *The Creative Commons*, 65 MONT. L. REV. 1, 11 (2004) ("The idea here is that we need to build a layer of reasonable copyright law, by showing the world a layer of reasonable copyright law resting on top of the extremes. Take this world that is increasingly a world by default regulating all and change it into a world where once again we can see the mix between all, none, and some, using the technology of the Creative Commons.").

130. *See, e.g.*, Granholm v. Heald, 544 U.S. 460, 472 (2005) (emphasizing the "tendencies toward economic Balkanization that had plagued relations among . . . the States under the Articles of Confederation" (quoting Hughes v. Oklahoma, 441 U.S. 322, 325-26 (1979))). Justice Jackson once recounted this history on behalf of the Court:

> When victory relieved the Colonies from the pressure for solidarity that war had exerted, a drift toward anarchy and commercial warfare between states began. ". . . [E]ach State would legislate according to its estimate of its own interests, the importance of its own products, and the local advantages or disadvantages of its position in a political or commercial view." This came "to threaten at once the peace and safety of the Union." The sole purpose for which Virginia initiated the movement which ultimately produced the Constitution was "to take into consideration the trade of the United States; to examine the relative situations and trade of the said States; to consider how far a uniform system in their commercial regulations may be necessary to their common interest and their permanent harmony" and for that purpose the General Assembly of Virginia in January of 1786 named commissioners and proposed their meeting with those from other states.

H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 533 (1949) (omission in original) (citations omitted).

Congress used this power. Labor mobility increased as a result of uniform federal laws enacted pursuant to Clause 3, such as social security and civil rights, and as a consequence of naturalization laws passed pursuant to Clause 4. Stability and trust in capital markets increased following federal statutes enacted pursuant to Clause 3, such as federal deposit insurance, compulsory disclosure by issuers of stocks, registration of brokers, and uniform bankruptcy law passed pursuant to Clause 4. Federal statutes enacted pursuant to Clause 3 also provide the legal foundation for specific industries such as radio and television, in which the Federal Communications Commission prevents broadcasters from interfering with one another. The dormant Commerce Clause, which the Supreme Court has inferred from the grant of power to Congress in Clause 3, usually prohibits states from discriminating against interstate commerce or placing an undue burden on the interstate movement of goods and services.[131] The transaction costs of interstate trade fell because Congress created a common currency as authorized in Clauses 5 and 6, and established national standards for weights and measures as authorized in Clause 5. Taken together, these actions made the United States into the world's largest zone of unrestricted mobility of goods, capital, and labor for more than 150 years,[132] which goes far towards explaining the country's remarkable economic performance.[133]

Implementing the preceding powers requires federal administration. Clauses 1, 2, 9, 17, and 18 authorize robust means to achieve the ends specified in the other clauses.

In sum, the theory of collective action federalism reads Section 8 as a unified whole, like a well-written paragraph. Clause 1 is the topic sentence that expresses the unifying principle of a federal government empowered to promote the general welfare. Clauses 2 though 17 provide illuminating instances of the principle that were most important at the time the Framers wrote the paragraph. And Clause 18, the Necessary and Proper Clause, concludes by underscoring the broad availability of means to realize both the general principle and specific instances of it.[134]

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131. For a cogent discussion of contemporary doctrine, see *Granholm*, 544 U.S. at 472-73. There are two exceptions to the dormant commerce principle: congressional approval and market participation by states. We do not discuss them here.

132. The European Union has eclipsed the United States as the world's largest zone of unrestricted mobility. Like the United States, moreover, Europe has experienced unprecedented, sustained economic growth.

133. *See, e.g.*, *H.P. Hood & Sons*, 336 U.S. at 538 ("The material success that has come to inhabitants of the states which make up this federal free trade unit has been the most impressive in the history of commerce, but the established interdependence of the states only emphasizes the necessity of protecting interstate movement of goods against local burdens and repressions.").

134. *See supra* note 55 (quoting Chief Justice Marshall's language in *McCulloch*). Notably, in our account, the Necessary and Proper Clause is primarily a reminder. Similarly, Chief Justice Marshall already had decided *McCulloch* in favor of the federal government before he turned to the Necessary and Proper Clause. *See* 17 U.S. (4 Wheat.) at 411 ("But

B. *Collective Action Federalism and Other Parts of the Constitution*

Our analysis of Article I, Section 8 does not address the proper interpretation of other parts of the Constitution. We believe, although we do not establish here, that the logic of collective action persuasively explains most of the prohibitions on state conduct in Article I, Section 10.[135] These include the various restrictions on states conducting their own foreign policies in the realms of interstate or international politics and economics.[136]

By contrast, a collective action approach almost certainly does *not* explain the proper scope of federal powers authorized by the enforcement clauses of the Civil War Amendments.[137] These amendments dramatically changed the balance of power between the federal government and the states by authorizing congressional regulation of certain subject matters—including, but not limited to, racial inequality. These amendments especially aimed to grant basic constitutional rights previously denied to minority groups. Minorities had been excluded because collective action had succeeded for the majority, not because it failed. We see no reason why the logic of collective action should guide interpretation of these provisions.[138]

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the constitution of the United States has not left the right of Congress to employ the necessary means, for the execution of the powers conferred on the government, to general reasoning. To its enumeration of powers is added [the Necessary and Proper Clause].").

135. U.S. CONST. art. I, § 10, cl. 1 ("No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in payment of Debts; pass any Bill of Attainder, *ex post facto* Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility."); *id.* art. I, § 10, cl. 2 ("No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress."); *id.* art. I, § 10, cl. 3 ("No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.").

136. We express no view on whether the distinction between individual and collective action by (nation) states should guide interpretation of the Treaty Clause, *id.* art. II, § 2, cl. 2. Writing for the Court in *Missouri v. Holland*, 252 U.S. 416 (1920), Justice Holmes registered the existence of a multination problem of collective action. *See infra* note 227. Another set of questions concerns the constitutional implications of the fact that many collective action problems today are global in scope. So, for example, one might argue that Congress may not pass a law addressing the problem of global warming on the ground that one nation acting alone cannot meaningfully ameliorate a global collective action problem. A defender of such legislation might respond that the law would be sufficiently related to advancing the general welfare, such as by showing global leadership or by taking action in anticipation of eventual treaty negotiations. *See infra* Part V (discussing how courts might evaluate congressional judgments about collective action problems).

137. *See* U.S. CONST. amend. XIII, § 2; *id.* amend. XIV, § 5; *id.* amend. XV, § 2.

138. One might argue that the profoundly transformative nature of the Civil War, Reconstruction, and the post-Civil War Amendments should inform the scope of congressional

C. *Collective Action Federalism and Constitutional Disagreement*

When collective action problems harm all of the states, the justification of congressional power does not turn on the precise definition of externalities. Overlapping views about the nature of externalities suffice to justify congressional authority under Article I, Section 8. In other cases, however, the interests of the states diverge, so one can anticipate vigorous disagreements about the nature and extent of externalities.[139] Our analytical framework for interpreting Section 8 encompasses robust disagreements about the appropriate scope of federal power. If the theory of collective action federalism gained general support, then hard cases involving the enumerated powers might resemble many environmental disputes. In such disputes, cost-benefit analysis is a basic method for focusing debates. Putting numbers on divergent values identifies the important areas where differences in values yield different policy decisions. Focus improves debate so much that the law often mandates cost-benefit analysis in environmental impact statements. Environmental impact statements thus illustrate our claim that externalities provide a useful framework within which parties can dispute legal questions, including the enumerated powers.

Disagreements about interstate externalities will follow predictable political lines. People who seek to reduce federal power will argue that, beyond national defense, interstate public goods are few in number. They will also articulate a narrow understanding of interstate externalities, and they will contend that national markets are self-regulating. Conversely, those who aim to expand federal power will argue that interstate public goods are numerous, including education, research, poverty relief, the arts, and the environment. They will also maintain that national markets often fail without federal regulation.[140] And in addition to material externalities, they will point to psychological externalities,[141] such as the concerns of people in one state for the health, education, en-

power under Article I, Section 8—that Section 8 should not be read in isolation of them. Such an historical argument, if persuasively developed, obviously would require modification of our own account.

139. In technical terms, collective action problems that harm all of the states are Pareto inefficiencies, whereas collective action problems that harm some states a lot and benefit other states a little are cost-benefit inefficiencies.

140. It would be a mistake to code those who seek to limit federal power as "conservative" and those who seek to promote it as "liberal." There are different kinds of conservatives and liberals on federalism questions. There are also different kinds of federalism questions. For example, many social conservatives would vigorously defend a federal law banning abortion. *Cf.* Gonzales v. Carhart, 550 U.S. 124 (2007). And many liberals often oppose broad federal preemption of state law. *See, e.g.*, Wyeth v. Levine, 129 S. Ct. 1187 (2009); Altria Grp., Inc. v. Good, 129 S. Ct. 538 (2008).

141. *See, e.g.*, Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570, 638-48 (1996) (discussing different kinds of externalities, including psychological externalities). Amartya Sen refers to this sort of externality as an instance of "sympathy." Amartya K. Sen, *Rational Fools: A Critique of the Behavioral Foundations of Economic Theory*, 6 PHIL. & PUB. AFF. 317, 326-29 (1977).

vironment, and physical or financial security of people in another state. Psychological externalities can be particularly large in the wake of a natural disaster,[142] such as Hurricane Katrina or the recent earthquake in Haiti.[143]

If weak feelings that people in one state have for people in another count as interstate externalities, then collective action is a ubiquitous problem and our framework would impose no limits on federal action. In principle, unbounded expansion of the meaning of "externalities" would destroy the usefulness of the concept and vindicate the general complaint that collective action federalism is too indeterminate for use in constitutional interpretation.[144]

In fact, economists faced this problem long ago and they bounded the concept of externalities sufficiently for cost-benefit analysis to become a basic tool for debating public policy. In the economics tradition, feelings count as costs and benefits only if people are willing to pay to vindicate them. Cheap talk does not suffice. Under this approach, the concerns of people in one state for what happens in another state count as interstate externalities to the extent that they are willing to pay to vindicate them.

Could the standard of "willingness to pay" achieve the same success in constitutional law by limiting the feelings that count as interstate externalities?[145] We can only mention a few of the difficult questions that require an-

142. This is not to suggest that one must invoke the idea of psychological externalities in order to justify federal disaster relief. A large disaster has humanitarian consequences that the federal government can relieve far better than the states. For example, the federal government can maintain a field hospital to deploy to any state facing a medical disaster. One federal field hospital is cheaper and more effective than each state maintaining its own field hospital, or one state maintaining such a hospital and charging other states for its use. Similarly, much disaster relief rebuilds infrastructure such as roads and bridges. The localities and states that build roads and bridges cannot insure them privately against disasters. So federal relief for disastrous destruction of infrastructure fills a hole in insurance markets for states.

143. An interstate externality refers to interdependence in the utility functions of individuals in at least two states. Mathematics can handle interdependence regardless of whether it is material or psychological. But the measurement of some kinds of externalities is easier than others, notably the traditional, material externalities. The history of cost-benefit analysis, however, is in part a history of learning to measure what was previously unmeasurable.

144. *Cf., e.g.*, Esty, *supra* note 141, at 595 n.73 ("Indeed, without a 'willingness to pay' mechanism to check the reality and depth of [psychological] harms, there exists a moral hazard problem of potentially significant proportions because those claiming injury have little reason to report accurately on their welfare losses and much reason to exaggerate."). For relevant economic writing, see Amartya Sen, *The Impossibility of a Paretian Liberal*, 78 J. POL. ECON. 152 (1970) (explaining why meddlesome preferences erode the usefulness of Pareto efficiency); *cf.* JOHN STUART MILL, ON LIBERTY (Currin V. Shields ed., Bobbs-Merrill Co. 1956) (1859) (proposing the "harm" principle to cabin the circumstances in which others may interfere with the liberty of the individual).

145. Constitutional law has struggled with the problem of psychological harm in the context of standing doctrine. *See* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167 (2000); Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992); Sierra Club v. Morton, 405 U.S. 727, 760 (1972) (Blackmun, J., dissenting) ("In this environmental context I personally prefer the older and particularly pertinent observation and warning of John

swers. One normative question that must be confronted is whether certain second-order preferences should be ruled out-of-bounds on moral grounds no matter how much individuals are willing to pay to vindicate them. Another question is whether willingness to pay is an appropriate measure of welfare effects when individuals care intensely but lack the ability to pay. "Ability to pay" refers to a person's income and wealth. The most common approach to cost-benefit analysis gives the same weight to how much people are willing to pay even though they differ in their ability to pay. A less common but familiar approach in economics gives more weight to the willingness of poor people to pay.[146]

We further note that the theory of collective action federalism addresses the substantive meaning of Article I, Section 8, not the institutional roles of Congress and the Court in constitutional interpretation and implementation.[147] Those who endorse vigorous judicial review of federalism questions will interpret our framework primarily in terms of how courts should restrain Congress. Those who favor judicial deference to Congress will interpret our framework primarily in terms of congressional self-restraint and the political safeguards of federalism.[148]

There is much to be gained from an analytical framework that encompasses disagreements. Theory directs research towards missing information that often advances policy debates and occasionally ends them. Collective action federalism directs political disagreements into debates about the scope of public goods, externalities, and markets. Applying our framework requires extensive factfinding, which interacts with contestable normative judgments.[149] Finding

Donne." (referencing Devotions XVII)).

146. For an illuminating discussion, see generally Cass R. Sunstein, *Willingness to Pay vs. Welfare*, 1 HARV. L. & POL'Y REV. 303 (2007). Willingness to pay is also not an appropriate criterion in certain situations regardless of whether it accurately measures welfare, such as in matters of basic human rights.

147. Similarly, Jack Balkin distinguishes questions of fidelity to the Constitution from questions of institutional responsibility. *See* Jack M. Balkin, *Fidelity to Text and Principle*, *in* THE CONSTITUTION IN 2020, at 11, 20 (Jack M. Balkin & Reva B. Siegel eds., 2009) ("Many theories of constitutional interpretation conflate two different questions. The first is the question of what the Constitution means and how to be faithful to it. The second asks how a person in a particular institutional setting—like an unelected judge with life tenure—should interpret the Constitution and implement it through doctrinal constructions and applications.").

148. There is a robust and longstanding debate over the political safeguards of federalism in constitutional law and theory. *See, e.g.*, JESSE CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 171-259 (1980); Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485 (1994); Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After* Garcia, 1985 SUP. CT. REV. 341; Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

149. An example of a contestable normative concept is national identity. *Cf., e.g.*, Esty, *supra* note 141, at 640 ("Interest in distant environmental harms may derive from a sense of community identity that exceeds narrow jurisdictional bounds."); *id.* at 641 n.267 ("A num-

the scope of interstate externalities and market failures requires mathematical theory, econometrics, cost-benefit analysis, psychological surveys, behavioral experiments, etc. Social scientists from across the political spectrum generally embrace these techniques, although they often reach different conclusions when using them. In cases where our framework does not end disagreement, it directs argument towards questions that matter to the general welfare, not towards formal distinctions that do not matter.

D. *Collective Action Federalism and Theories of Interpretation*

Philip Bobbitt, in his 1982 book *Constitutional Fate*,[150] catalogued six kinds of constitutional arguments that lawyers, judges, and legal academics use. *Historical* arguments appeal either to preratification history or to postratification history. *Prudential* or *consequentialist* arguments identify the good or bad social consequences of an interpretation. *Textual* arguments rely on the text of the Constitution and the rules for interpreting texts. *Structural* arguments draw inferences from the theory and structure of government created by the Constitution. *Precedential* arguments offer the existence of previous decisions, either past political practice or past judicial rulings, as justifying a certain outcome in a later case. Finally, *ethos* arguments tell a story about national identity; they tend to take a narrative or historical form and inquire whether a given interpretation is faithful to the meaning or destiny of the country, its deepest cultural commitments, or its national character.

Interpretations of the Constitution often invoke multiple forms of constitutional authority to support the same conclusions, as we have done for collective action federalism. Part I looked to preratification history for inspiration and support, but not for decisive guidance; we honored the general intentions of the Framers in drafting Article I, Section 8 without expounding the original meaning of "the general Welfare" or any other language in Section 8.[151] Besides pre-

ber of existing federal environmental programs seem to reflect . . . a national ecological and political identity that spans the fifty states. One could argue, for example, that the Clean Water Act's construction grants program, providing federal funds to build wastewater treatment facilities, represents a commitment that no American should live in a community where untreated sewage flows into nearby rivers.").

150. PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1982).

151. Originalists and their critics make distinctions that we do not address, such as the difference between the intent of the Framers and the intent of the Ratifiers, and the differences between original intent and original meaning. *See, e.g.*, RAKOVE, *supra* note 11, at 7-11 (discussing these distinctions). An originalist theory must cope with the fact that Hamilton and Madison vigorously debated the meaning of the General Welfare Clause during the Constitution's first fifteen years, which suggests the existence of original *meanings*, not a single, definitive understanding. *See supra* notes 34-37 and accompanying text; *see also, e.g.*, United States v. Butler, 297 U.S. 1, 65-66 (1936) (discussing Madison's restrictive view of the General Welfare Clause and Hamilton's expansive view). As one prominent historian has written:

Both the framing of the Constitution in 1787 and its ratification by the states involved

ratification history, Part I also relied on postratification history, where we made both traditionalist and antitraditionalist claims. We drew support both from how later generations of Americans understood Section 8 and from some of the mistakes that they made. Part II developed a theory to predict the consequences of alternative interpretations of Section 8. Part III proceeded from explicating the text of Section 8 into an analysis of its language and organization. Looking ahead, Part IV will examine judicial precedent in detail. We have not developed an ethos argument in favor of collective action federalism, but a promising narrative might portray Americans past and present as eminently practical people who have valued federalism primarily as a tool for solving social problems and governing effectively, not for reasons of identity or ideology.

As revealed by Parts II and III, our primary interpretive approaches are structural and consequentialist. We have sought to interpret Article I, Section 8 by drawing "inference[s] from the structures and relationships created by the constitution,"[152] most especially the maintenance of a federal system that presupposes the continued existence of the states and that endows the federal government with authority to solve problems that the states cannot solve on their own. Using modern economic theory, we have pursued a consequentialist inquiry to identify the logic of such problems and to explain how federalism can ameliorate them. We use modern analytical tools unknown to the Framers to help us assign meaning to the language of Article I, Section 8. Without these tools, our account might not crystallize in one's mind.

Because the theory of collective action federalism is not an originalist theory, it can accommodate substantial historical changes, including changes in constitutional meaning.[153] The most important for our purposes concerns the

> processes of collective decision-making whose outcomes necessarily reflected a bewildering array of intentions and expectations, hopes and fears, genuine compromises and agreements to disagree. The discussions of both stages of this process consisted largely of highly problematic predictions of the consequences of particular decisions. In this context, it is not immediately apparent how the historian goes about divining the true intentions or understandings of the roughly two thousand actors who served in the various conventions that framed and ratified the Constitution, much less the larger electorate that they claimed to represent . . . . [T]he notion that the Constitution had some fixed and well-known meaning at the moment of its adoption dissolves into a mirage.

RAKOVE, *supra* note 11, at 6.

152. CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 7 (1969).

153. At the opposite end of the interpretive spectrum from originalism lies the view that evolving social values inform the meaning of the Constitution. *See generally, e.g.*, ROBERT C. POST, *Theories of Constitutional Interpretation*, *in* CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 23 (1995); Neil S. Siegel, *The Virtue of Judicial Statesmanship*, 86 TEX. L. REV. 959 (2008). As social values change, according to this view, so may the legally authoritative understanding of the Constitution. *Compare, e.g.*, Roper v. Simmons, 543 U.S. 551, 587 (2005) (Stevens, J., concurring) ("[T]hat our understanding of the Constitution does change from time to time has been settled since John Marshall breathed life into its text."), *with id.* at 608 (Scalia, J., dissenting) ("The Court reaches this implausible result by purporting to advert, not to the original meaning of the Eighth Amendment, but to 'the evolving standards of decency' of our national society." (citation

changes in understanding of the sorts of problems that implicate the general welfare. Just as the Founders improved their understanding of the "general Welfare" from their experiences under the Articles of Confederation, so we can improve our understanding of this phrase from subsequent historical experience, the emergence of a modern economy and integrated society, contemporary social science, and the kinds of problems facing the United States today.[154]

The specific powers in Article I, Section 8 address the collective action problems of the eighteenth century. Two hundred years of social, economic, and technological change have added to the list. In Part IV.C, we will discuss one such addition: environmental protection. We cannot discuss others given limited space, but we can suggest what they might be. For this purpose, Figure 3 compares eighteenth century problems addressed by the specific powers in Article I, Section 8 to twenty-first century equivalents. The Figure also identifies the relevant collective action problems among the states. Justice Cardozo may have had in mind some of the changes reflected in Figure 3 when he wrote

omitted)). Over time, most Americans have broadened their appreciation of interstate externalities that warrant federal intervention. Daniel Esty makes related points in focusing on the "choice of public" issue that arises in the context of psychological externalities. *See* Esty, *supra* note 141, at 594-97, 638-47; *id.* at 597 ("It is clear . . . that in environmental policymaking, the sphere of affected interests may expand or contract depending on an evolving definition of community."); *id.* at 646-47 ("[T]o the extent that we have a national political identity as Americans, there will be [a] . . . set of environmental rules that represents the moral behavioral minimum that each citizen owes to his fellow citizens.").

154. While we propose a flexible framework for understanding the general welfare, some modern scholars who have investigated the original meaning of the "general Welfare" have reached strong conclusions. One has argued that the original meaning precludes federal spending "for the special welfare of particular regions or states." John C. Eastman, *Restoring the "General" to the General Welfare Clause*, 4 CHAP. L. REV. 63, 65 (2001) ("Congress, I contend, has only the power to spend for the 'general' welfare and not for the special welfare of particular regions or states, even if the spending was undertaken in all regions or all states and therefore might be said to enhance 'general' welfare in the aggregate."). Others have maintained that the General Welfare Clause does not authorize any federal spending. *See* David E. Engdahl, *The Basis of the Spending Power*, 18 SEATTLE U. L. REV. 215, 216 (1995) ("Congress' power to spend does not derive from that so-called 'General Welfare' Clause, but instead derives from two overlapping but independent provisions found elsewhere in the Constitution. . . . Th[e] 'Property Clause' is ample to authorize all federal spending, whether or not it is also authorized by the Necessary and Proper Clause." (footnote omitted)); Jeffrey T. Renz, *What Spending Clause? (Or the President's Paramour): An Examination of the Views of Hamilton, Madison, and Story on Article I, Section 8, Clause 1 of the United States Constitution*, 33 J. MARSHALL L. REV. 81, 142, 144 (1999) ("The [General Welfare C]lause is not . . . a grant of power to spend. . . . The General Welfare Clause is an intentionally redundant limit on the tax power."). Still another commentator has discerned in the original meaning of the clause not just a failure to authorize federal spending, but also a significant restriction on federal authority—namely, "a standard of impartiality borrowed from the law of trusts." Robert G. Natelson, *The General Welfare Clause and the Public Trust: An Essay in Original Understanding*, 52 U. KAN. L. REV. 1, 4 (2003) ("Examination of history . . . shows that the General Welfare Clause is more than a mere 'non-grant' of spending power. It was intended to be a sweeping *denial* of power—specifically, it was intended to impose on Congress a standard of impartiality borrowed from the law of trusts, thereby limiting the legislature's capacity to 'play favorites' with federal tax money.").

for the Court in 1937 that the concept of the general welfare is not "static" and "[n]eeds that were narrow or parochial a century ago may be *interwoven* in our day with the well-being of the Nation."[155]

FIGURE 3:
Modern Analogies to Specific Powers in Article I, Section 8

18th Century Problem	*21st Century Problem*	*General Problem*
7. Post office	Internet Interstate highways Communication satellites Electromagnetic spectrum	Infrastructure with network effects
5. Money	Credit cards Internet payments Fedwire	Medium of exchange
8. Intellectual property	Newly created species Computer programs	Nonappropriable creations
10. Piracy	Interstate theft Software piracy Computer viruses	Property protection
4. Naturalization	Illegal immigration Immigration policy Labor law	Spillover across states Race-to-bottom
4. Bankruptcy	Distressed firms Tort creditors	Race-to-bottom
5. Weights and measures	Credit card regulation Computer protocols Truth in labeling	Set standards Asymmetrical information Adverse selection against quality
6. Counterfeiting	High-tech fakes	Asymmetrical information Adverse selection against quality
2. Bonds	New forms of government debt	Finance government activity
3. Interstate commerce	Interstate services	Sustain national markets
11. Declare war 12. Raise armies 13. Maintain navy 14. Make military law 15. Call militia 16. Govern militia	Unconventional wars (terrorism, counter-insurgency, failed states)	Positive externalities

155. Helvering v. Davis, 301 U.S. 619, 641 (1937) (emphasis added); *see also* New York v. United States, 505 U.S. 144, 157 (1992) ("The Federal Government undertakes activities today that would have been unimaginable to the Framers . . . . Yet the powers conferred upon the Federal Government by the Constitution were phrased in language broad enough to allow for the expansion of the Federal Government's role.").

IV. EXPLAINING (OR IMPROVING) CONTEMPORARY UNDERSTANDINGS

The preceding Part showed that collective action federalism provides a sound structural and consequentialist understanding of the division of powers between the federal government and the states in Article I, Section 8. Collective action federalism clarifies how members of Congress should interpret their constitutional powers—that is, when they should vigorously use the authority granted by Article I, Section 8 and when they should leave problems for the states to address. Sometimes state cooperation is likely to succeed, as when the need for cooperation involves only two states and they are disposed to cooperate. In such circumstances, Congress should *not* exercise its power.[156] Rather, it should allow the affected states to solve the problem on their own. Other times, state cooperation is unlikely to succeed, as when the need for cooperation involves numerous states, or when states face historical or political obstacles to cooperation. In such situations, Congress should exercise its constitutional power.

Turning from Congress to the courts, we reiterate that we say nothing about whether courts should engage in judicial review of federalism questions. We argue, rather, that if courts do engage in such review, they should use the theory of collective action federalism to understand the clauses of Section 8.

We now consider judicial interpretation of Article I, Section 8 by Justices past and present. We will identify substantial support for the theory of collective action federalism in the U.S. Supreme Court's interpretation of Article I, Section 8, both during the Chief Justiceship of John Marshall and since 1937. We further identify ways to improve existing constitutional understandings, including judicial doctrine, by taking more explicit account of the existence or nonexistence of collective problems involving more than one state.

This Part will focus on the two most important and controversial clauses of Section 8. First, our discussion of the Commerce Clause will identify the bases in case law for replacing the distinction between economic and noneconomic activity with the distinction between collective and individual choice by states. This discussion also encompasses the dormant Commerce Clause, whose justification we locate in the collective action problems motivating each state to impede business competition from other states. Second, our discussion of the General Welfare Clause explains why it could bear some of the justificatory burden of federal regulation that courts currently assign to the Commerce Clause.

A. *The Commerce Clause*

Recall that Chief Justice Marshall upheld congressional power to regulate

156. We do not provide here a public choice analysis of the circumstances in which Congress would be willing to exercise self-restraint.

navigation between states in *Gibbons v. Ogden*. To reach this result, he read the word "among" in the phrase, "To regulate commerce . . . among the several States," to mean "intermingled with," and he stated that navigation intermingled commerce in one state with commerce from another state.[157] Collective action federalism supports this interpretation of the Commerce Clause. When commerce from different states intermingles, large economic advantages come from uniformity, access, and coordination in the channels and instrumentalities of commerce. Thus a road across one state is far more valuable if it connects to a road across another state; a flood control program upstream is more effective if it coordinates with a flood control program downstream; standardized electric plugs are more useful than heterogeneous plugs; and the Internet is more valuable than unconnected intranets. Instead of uniformity, access, and coordination, firms often seek diversity, closure, and noncooperation by state governments to protect against competition. In *Gibbons* itself, the beneficiary of a state-granted navigation monopoly claimed interference by a federal licensee. Like exclusionary tariffs, such policies create modest individual advantages and massive collective costs. Marshall's decision gives Congress the power to solve this collective action problem for the channels and instrumentalities of interstate commerce.

The theory of collective action federalism is also consistent with many of the Court's post-1937 Commerce Clause decisions. For example, *Wickard v. Filburn*[158] is controversial because of skepticism that federal power to regulate interstate commerce could possibly extend to home production of wheat. The case looks different in light of collective action federalism. Congress perceived a national problem of overproduction of wheat. A state could have ordered limits on production within its own jurisdiction, which would have disadvantaged its producers relative to unrestricted producers in other states. The states thus faced insuperable difficulties cooperating together to limit wheat production (the "holdout problem"). In contrast, national regulation could effectively reduce production of wheat. The main question posed by this case for collective action federalism is whether home production undermines regulation of market production for wheat. This is a question of fact.

During this post-1937 period of deference to Congress, the Court often decided cases involving allegedly unfair economic competition among states. A central argument in these cases concerned whether an unfair practice in one jurisdiction conveyed a competitive advantage over another jurisdiction with a fair practice.[159] In national markets, competition favors the lowest-cost produc-

157. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 193-97 (1824).

158. 317 U.S. 111 (1942).

159. Some scholars conceive of competitiveness effects that spill across jurisdictions as "economic externalities." *See, e.g.*, Esty, *supra* note 141, at 593; Richard B. Stewart, *International Trade and Environment: Lessons from the Federal Experience*, 49 WASH. & LEE L. REV. 1329, 1340-41 (1992) (discussing "several different types of . . . externalities," including "[p]ollution spillovers," "[r]esource externalities," "[p]reservation externalities," and

ers. Absent federal intervention, economic pressure will cause producers to adopt practices that lower costs, even when legislators and the public judges them to be unfair, such as paying low wages, permitting various forms of discrimination in the workplace,[160] or destroying the environment.[161]

The Court used this argument in the 1941 case of *United States v. Darby* when it sustained federal minimum-wage and maximum-hour regulations on manufacturers of goods shipped in interstate commerce.[162] The Court stated:

> [T]he evils aimed at by the Act are the spread of substandard labor conditions through the use of the facilities of interstate commerce for competition by the goods so produced with those produced under the prescribed or better labor conditions; and the consequent dislocation of the commerce itself caused by the impairment or destruction of local businesses by competition made effective through interstate commerce. The Act is thus directed at the suppression of a method or kind of competition in interstate commerce which it has in effect condemned as "unfair" . . . .[163]

"[c]ompetitiveness externalities"); Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1211-12, 1215-19 (1977).

160. Antidiscrimination provisions that cover the workplace may increase the costs of doing business. Accordingly, states may be disinclined to impose such costs on employers that operate within their jurisdictions unless a certain number of other states do the same. Thus the need for collective action can impede a state seeking to end workplace discrimination. Moreover, local discrimination against potential providers or consumers of goods and services may impede the development or functioning of national markets in various ways. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), and *Katzenbach v. McClung*, 379 U.S. 294 (1964), both of which upheld a federal prohibition on racial discrimination in places of public accommodation, can be justified on this ground. When discrimination discourages the interstate movement of labor and capital, a collective action problem exists.

161. Note that this is a statement about national markets, not externalities. Competitive pressures favoring the lowest-cost practices operate through markets, not externally to them. The confusion in language stems partly from Tibor Scitovsky's description of market competition as a "pecuniary" externality, which contradicts the idea that an externality is unpriced. *See* Tibor Scitovsky, *Two Concepts of External Economies*, 62 J. POL. ECON. 143, 146 (1954).

162. 312 U.S. 100 (1941); *see also* Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-219 (2006). *Darby* overruled *Hammer v. Dagenhart*, 247 U.S. 251 (1918), and embraced the dissent of Justice Holmes. The post-1937 Court repudiated the pre-1937 Court's insistence that "[t]here is no power vested in Congress to require the States to exercise their police power so as to prevent possible unfair competition." *Id.* at 273. The pre-1937 Court described well the logic of collective action that it deemed unpersuasive:

> It is further contended that the authority of Congress may be exerted to control interstate commerce in the shipment of child-made goods because of the effect of the circulation of such goods in other States where the evil of this class of labor has been recognized by local legislation, and the right to thus employ child labor has been more rigorously restrained than in the State of production. In other words, that the unfair competition, thus engendered, may be controlled by closing the channels of interstate commerce to manufacturers in those States where the local laws do not meet what Congress deems to be the more just standard of other States.

Id.

163. *Darby*, 312 U.S. at 122; *see also id.* at 115 ("The motive and purpose of the

The *Darby* Court thus viewed Congress as concerned about the "race to the bottom" that might ensue among the states in the absence of federal intervention.[164]

The Court later used a similar argument from collective action to justify federal regulation of environmentally destructive practices.[165] In *Hodel v. Virginia Surface Mining & Reclamation Ass'n*,[166] the Court deemed significant a congressional finding that national "surface mining and reclamation standards are essential in order to insure that competition in interstate commerce among sellers of coal produced in different States will not be used to undermine the ability of the several States to improve and maintain adequate standards on coal mining operations within their borders."[167] The Court emphasized that "[t]he prevention of this sort of destructive interstate competition is a traditional role for congressional action under the Commerce Clause."[168]

Rather than focusing on races to the bottom, the Rehnquist Court emphasized the distinction between economic and noneconomic activity. As we saw in Part I.B.2, the modern Court has sought to impose limits on the power of Congress in order to preserve the separation of federal and state powers established by Clause 3's grant of authority to "regulate Commerce . . . among the several States." The Court has purported to find this limit by restricting regulatory power under the Commerce Clause to "economic" or "commercial" activity.

Although current doctrine formally emphasizes the economic or noneconomic nature of the regulated activity, a more functional logic may in fact have animated the Court in *Lopez*, *Morrison*, and *Raich*. Just as the Court offered

present regulation are plainly to make effective the Congressional conception of public policy that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions, which competition is injurious to the commerce and to the states from and to which the commerce flows.").

164. For the use of similar reasoning to defend the result in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), see Regan, *supra* note 7, at 603-04. For ongoing debates on races to the bottom (or top), see, for example: Kirsten H. Engel, *State Environmental Standard-Setting: Is There a "Race" and Is It "To the Bottom"?*, 48 HASTINGS L.J. 271 (1997); Esty, *supra* note 141; Richard L. Revesz, *The Race to the Bottom and Environmental Regulation: A Response to Critics*, 82 MINN. L. REV. 535 (1997); Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992); Joshua D. Sarnoff, *The Continuing Imperative (but Only from a National Perspective) for Federal Environmental Protection*, 7 DUKE ENVTL. L. & POL'Y F. 225, 278-85 (1997); and Peter P. Swire, *The Race to Laxity and the Race to Undesirability: Explaining Failures in Competition Among Jurisdictions in Environmental Law*, 14 YALE L. & POL'Y REV. 67 (1996).

165. The Court also used collective action reasoning in upholding the 1961 amendments to the FLSA. *See* Maryland v. Wirtz, 392 U.S. 183, 190-93 (1968), *overruled by* Nat'l League of Cities v. Usery, 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

166. 452 U.S. 264 (1981).

167. *Id.* at 281-82 (quoting 30 U.S.C. § 1201(g) (1976 & Supp. III 1979)).

168. *Id.* at 282.

collective action problems as a reason to sustain congressional regulation in many of the Commerce Clause cases decided from 1937 until the early 1990s, so too the Rehnquist Court implicitly has offered the absence (or presence) of a collective action problem as a reason to prohibit (or sustain) congressional regulation. Almost appearing to anticipate *Raich*, and with *Wickard* surely in mind, Chief Justice Rehnquist wrote in *Lopez* that the Gun-Free School Zones Act "is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated."[169] This statement, particularly if one replaces the word "economic" with "interstate,"[170] suggests that the absence of regulation of guns near schools in one state would not undercut the effectiveness of regulations prohibiting them in other states. Justice Kennedy may have been getting at the same point when he stated in his concurring opinion that

> [i]f a State or municipality determines that harsh criminal sanctions are necessary and wise to deter students from carrying guns on school premises, the reserved powers of the States are *sufficient* to enact those measures. Indeed, over 40 States already have criminal laws outlawing the possession of firearms on or near school grounds.[171]

With independence rather than interdependence, the states do not face a collective action problem.[172]

The key constitutional question posed by these and related criminal cases is how much coordination among law enforcement personnel in different states is required to police the proscribed conduct at issue. The question is whether there is a spillover of welfare and whether the spillover causes a collective action problem. The issue is not whether a crime is "economic" in nature. The general welfare is affected by the presence or absence of spillovers, not the formal category of the activity.[173]

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

170. *See* BREST ET AL., *supra* note 5, at 626.

171. *Lopez*, 514 U.S. at 581 (Kennedy, J., concurring) (emphasis added); *see* Regan, *supra* note 7, at 566 (arguing that this is one way to read the portion of Kennedy's opinion quoted in the text).

172. On this view, a critic of *Lopez* would want to argue that Congress rationally could have viewed the Gun-Free School Zones Act as an important part of a larger, interstate regulation of firearm sale, possession, and use that would have been undermined unless Congress were permitted to regulate gun possession in school zones. A critic of the Commerce Clause holding in *Morrison* would want to compile evidence of impediments to the interstate movement of women caused by state failures to protect them from gender-motivated violence.

173. Anything can be included or excluded from a class by selecting its level of generality. Thus, horses belong to the class of mammals but not to the class of primates. Similarly, wheat grown and consumed at home belongs to the class of "wheat" and to the class of "goods grown and consumed at home." The former is a class of market goods and the latter is a class of non-market goods. There is no logical or natural way of choosing the class to which wheat grown and consumed at home belongs. It belongs to either of them depending on the purpose of the categorization. The correct level of generalization should be the con-

For example, enforcing a prohibition on guns within school zones seems the opposite of a problem requiring coordination among law enforcement officers in different states. It seems local: local officials presumably have better information concerning who might carry firearms near schools, and better incentives to do something about the problem. As we explained in Part II, these considerations are central to the internalization principle. By contrast, suppressing a market for guns is a national problem in light of the ease with which firearms can move across state lines. The failure to suppress such a market affects the ability of state law enforcement personnel to keep guns away from schools. The federal government in *Lopez* did not argue that the Gun-Free School Zones Act addressed this national problem or was otherwise an integral part of a larger regulatory scheme.[174]

Raich, by contrast, did involve a potential spillover problem. Given the inability to distinguish marijuana used for medicinal purposes from marijuana used for other purposes, and given that the market for marijuana disrespects state borders, California's authorization of marijuana use for medicinal purposes might make it more difficult for other states to ban marijuana use. If there is no spillover problem for state policing, then states and localities should be permitted to go their own way as far as constitutional federalism is concerned. But if there is a spillover—for example, medical marijuana use in California makes it more difficult to police drug traffickers at the Arizona border—then there is a rationale for federal intervention. The distinction between individual and collective action, which collective action federalism uses to draw the limits and expanse of congressional power, best explains why Congress may not ordinarily use its commerce power to regulate such crimes as assault or gun possession in schools, but may regulate a multistate market for guns or drugs.

Collective action federalism explains why the distinction between economic and noneconomic activity should not demarcate the boundary between federal and state power in Clause 3. The main reason for separating powers is the relative advantages of the federal and state governments. The economic/ noneconomic distinction, however, does not systematically relate to the advantages of the federal and state governments. The federal government is not especially able in economic matters and the state governments are not especially able in noneconomic matters. This is because economic activities do not generally cause collective action problems, and noneconomic activities are not generally free from collective action problems.

By contrast, the distinction between individual and collective action by states relates to the advantages of the federal and state governments. It gives independent, sensible meaning to the phrase "among the several States" in Clause 3. On our account, the phrase "among the several States" references a

clusion of the Court's decision, not its basis.

174. *See supra* note 75 (quoting the *Lopez* Court's description of why the government believed that prohibiting guns in schools is within the scope of the commerce power).

problem of collective action involving at least two states.[175] That is the key inquiry in determining whether "Commerce" is interstate and thus regulable under Clause 3 or intrastate and thus beyond the scope of the commerce power.[176]

The power of Congress to "regulate Commerce . . . among the several States" given in Clause 3 is best understood in light of the collective action problems that the nation faced under the Articles of Confederation, when Congress lacked this power. Interpreting this phrase requires a theoretical account of federalism. With such an account in mind, the economic/noneconomic categorization may suffice in a rough-and-ready way for defining "Commerce" in Clause 3; we have nothing to say about that subject. But without such an account, a dictionary definition of "economics" cannot yield the proper interpretation of Clause 3. Moreover, reading the enumerated powers to exclude the regulation of "noneconomic" problems will frustrate the animating purpose of Section 8, which is to give Congress the authority to solve collective action problems. If interpretation of Clause 3 turns on the economic/noneconomic distinction, then pressure must mount to find authorization for regulatory powers elsewhere in the Constitution.[177]

To further illustrate the difference between an analysis of collective action problems and an analysis based on the economic/noneconomic distinction, consider the traditional exclusion of Congress from regulating marriage. Congress could be excluded on the ground that marriage is a noneconomic activity. Marriage, however, significantly affects the ownership of property, the taxation of goods and income, the division of labor, and the wealth of most couples. Consequently, income and wealth are important motives for some people to marry. There is also a robust interstate market in goods and services pertaining to weddings.

175. Or, to reiterate Chief Justice Marshall's language in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 194 (1824), an analysis of collective action should determine whether Congress is dealing with "that commerce which concerns more States than one." *See also id.* at 195 ("The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally . . . ."). In this sentence, Marshall used the word "generally" as a synonym for the phrase "among the several States." The theory of collective action federalism also ascribes the same meaning to them.

176. For a related approach to the Commerce Clause, see generally Regan, *supra* note 7.

177. If Clause 1 continues to be read to prohibit any federal regulation, then we share Akhil Amar's concern that "[w]ithout a broad reading of 'Commerce' in [Clause 3], it is not entirely clear whence the federal government would derive its needed power to deal with noneconomic international incidents—or for that matter to address the entire range of vexing nonmercantile interactions and altercations that might arise among states." AMAR, *supra* note 14, at 107-08; *see also* Balkin, *supra* note 8, at 1 ("In the eighteenth century . . . , 'commerce' did not have such narrowly economic connotations. Instead, 'commerce' meant 'intercourse' and it had a strongly social connotation. 'Commerce' was interaction and exchange between persons or peoples."). For further discussion of the relation between Clause 1 and Clause 3, see *infra* note 242 and accompanying text.

Even if marriage were nonetheless a noneconomic institution or activity, the question remains why states are commonly thought to be better situated than the federal government to regulate it. The best reason for believing that the state governments are more able than the federal government to regulate marriage does not concern its allegedly noneconomic character. Rather, the best reason is that regulating marriage does not seem to pose a collective action problem for the states. On this view, one state does not appear to free ride on another's law. Nor does one state hold out against harmonizing marriage laws in order to obtain better terms from other states. Nor do state marriage laws impede or have aggregative effects on the interstate market for wedding gowns. In the absence of interstate externalities or impediments to interstate markets, decentralized decision-making does not pose a collective action problem.

To sensibly limit federal power, a line of reasoning based on the paucity of collective action problems seems more promising than a line of reasoning based on the economic/noneconomic distinction. We cannot, however, fully explore the arguments here. In particular, we cannot discuss the extent to which nationalizing marriage law would remove impediments to interstate labor mobility, nor can we examine harmonization in marriage laws[178] or whether all marriages recognized by one state must be recognized by other states.[179] We also do not address the analytically distinct question of whether state marriage laws violate the federal constitutional rights of individuals.[180]

B. *Dormant Commerce Clause*

In contrast to the post-1937 Court, which often (explicitly or implicitly) recognized the existence of collective action problems among the states in upholding congressional regulation, the Rehnquist Court twice perceived the

178. We have in mind the fact that differences in state laws complicate custody disputes, wills, and trusts. A federal system requires balancing harmonization through centralization and diversity through decentralization.

179. We have in mind the full-faith-and-credit questions potentially implicated by the issue of gay marriage.

180. Discrimination historically occurred against racial intermarriage. *See, e.g.*, Naim v. Naim, 350 U.S. 985 (1956) (dismissing a challenge to Virginia's antimiscegenation statute despite the statute's incompatibility with the equal protection principles first articulated in *Brown v. Board of Education*, 347 U.S. 483 (1954)). When the legitimacy of *Brown* was more secure, the Court unanimously invalidated the Virginia law as a violation of equal protection and due process. Loving v. Virginia, 388 U.S. 1 (1967). Today, discrimination occurs against same-sex marriages. In *Lawrence v. Texas*, the Court overruled *Bowers v. Hardwick*, 478 U.S. 186 (1986), announcing a right of sexual privacy in the home that extends to homosexuals. 539 U.S. 558, 578 (2003). The Court explicitly put aside the issue of gay marriage without explaining why or how it was distinguishable. *See id.* If the Court followed to its logical conclusion its defense of the dignity of intimate homosexual relationships and the state's lack of authority to demean homosexuals, *see id.* at 560, 567, 575, 578, prohibitions of gay marriage would almost certainly violate equal protection. For a discussion, see Siegel, *supra* note 153.

absence of a collective action problem among the states as impugning congressional regulation. A third type of case—implicating the so-called dormant Commerce Clause[181]—occurs when a collective action problem allows a state to pass a law that harms businesses or individuals in other states. In these cases, a state regulation typically conveys a competitive advantage to in-state producers or users. The Court invalidates state laws that advantage in-state producers or users by impeding interstate commerce. The dormant Commerce Clause almost always prohibits states from discriminating against interstate commerce or placing an undue burden on the interstate movement of goods and services. In international trade, economists regard tariffs as favoring domestic producers at the expense of foreign producers and domestic consumers. This analysis of international trade applies to the behavior of states in most dormant Commerce Clause cases.

The Court has inferred the existence of the dormant Commerce Clause from the role that state protectionism played in inspiring the Constitutional Convention,[182] as well as from the grant of legislative power to Congress in Clause 3. Although the idea that state and local governments are capable of violating the Commerce Clause is difficult to defend textually, such a constitutional principle is sound from a structural and consequentialist perspective. A collective action problem is at the core of any regulation by a state that benefits its inhabitants less than it harms inhabitants of other states.[183]

There are many examples in the *U.S. Reports* of these kinds of collective action problems.[184] We will not attempt a comprehensive or historical treatment of the doctrine; rather, we will offer an illustration. In *H.P. Hood & Sons, Inc. v. Du Mond*, Justice Jackson wrote for the Court that "the established *interdependence* of the states only emphasizes the necessity of protecting interstate movement of goods against local burdens and repressions."[185] In that case, a New York law prevented a company from building an additional depot for receiving milk. The effect of the law was to retain more milk for consumption in New York at the expense of consumers in Massachusetts. The Court in-

181. Chief Justice Marshall came up with the term in his opinion in *Willson v. Black-Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245, 252 (1829).

182. *See, e.g.*, *supra* note 130; *infra* note 187.

183. A basic exercise in microeconomics involves proving that the benefits from restricting trade in various ways are less than the costs.

184. *See, e.g.*, Granholm v. Heald, 544 U.S. 460 (2005) (prohibiting New York and Michigan from discriminating against certain out-of-state wineries).

185. 336 U.S. 525, 538 (1949) (emphasis added). Justice Jackson continued:

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

Id. at 539.

validated the law for lacking a permissible nonprotectionist purpose. In general, collective action problems justify the Court's distinction there and elsewhere between state protectionism, which is almost always unconstitutional,[186] and health and safety regulations, which are often permissible exercises of a state's police powers.[187] States may not advantage their industries by protectionist regulations, but states may disadvantage their industries in interstate competition by imposing higher health and safety standards.[188]

C. *The General Welfare Clause*

1. *The purposes for which Congress may tax and spend*

In *Steward Machine Co. v. Davis*, the Court upheld the federal unemployment compensation system created by the SSA.[189] In *Helvering v. Davis*, the Court upheld the SSA's old age pension program.[190] In both cases, the Court based its decision in part on a collective action problem involving more than one state—specifically, the problem of destructive interstate competition discussed above. Justice Cardozo wrote for the Court in *Steward Machine*:

> But if states had been holding back before the passage of the federal law, inaction was not owing, for the most part, to the lack of sympathetic interest. Many held back through alarm lest, in laying such a toll upon their industries, they would place themselves in a position of economic disadvantage as compared with neighbors or competitors. Two consequences ensued. One was that the freedom of a state to contribute its fair share to the solution of a national problem was paralyzed by fear. The other was that in so far as there was failure by the states to contribute relief according to the measure of their capacity, a disproportionate burden, and a mountainous one, was laid upon the resources of the Government of the nation.[191]

186. For a seminal interpretation of the case law, see generally Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986).

187. *H.P. Hood & Sons*, 336 U.S. at 533 ("This distinction between the power of the State to shelter its people from menaces to their health or safety and from fraud, even when those dangers emanate from interstate commerce, and its lack of power to retard, burden or constrict the flow of such commerce for their economic advantage, is one deeply rooted in both our history and our law."); *id.* at 535 ("This Court consistently has rebuffed attempts of states to advance their own commercial interests by curtailing the movement of articles of commerce, either into or out of the state, while generally supporting their right to impose even burdensome regulations in the interest of local health and safety.").

188. In *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935), the Court rejected the submission that economic protectionism is justified when it is done for the sake of the health of the beneficiaries. Justice Cardozo wrote for a unanimous Court that such an exception would "eat up the rule," and that the Constitution "was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Id.* at 523.

189. 301 U.S. 548 (1937).

190. 301 U.S. 619 (1937).

191. *Steward Machine*, 301 U.S. at 588 (citations and footnote omitted).

As evidence for a collective action problem, Justice Cardozo noted a Massachusetts bill that would remain inoperative unless the federal bill became law or eleven states from a list of twenty-one states "impose[d] on their employers burdens substantially equivalent."[192]

Justice Cardozo also wrote for the Court in *Helvering*, and again he pointed to a collective action problem among the states:

> Apart from the failure of resources, states and local governments are at times reluctant to increase so heavily the burden of taxation to be borne by their residents for fear of placing themselves in a position of economic disadvantage as compared with neighbors or competitors. We have seen this in our study of the problem of unemployment compensation. *Steward Machine Co. v. Davis*. A system of old age pensions has special dangers of its own, if put in force in one state and rejected in another. The existence of such a system is a bait to the needy and dependent elsewhere, encouraging them to migrate and seek a haven of repose. Only a power that is national can serve the interests of all.[193]

Note that federal unemployment compensation and old age pensions promote labor mobility among the states by creating rights that a worker takes with her when she moves. In contrast to the United States, local provisions for unemployment and old age pensions in Europe create impediments to labor mobility, so the European Union has not reached its goal of a single labor market.[194]

Cardozo gave notice that the Court would defer to Congress' determination that taxing and spending advances the general welfare "unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment."[195] Perhaps implicitly suggesting how the Court might make that determination, he returned to collective action problems by insisting that "the concept of the general welfare" is not "static." On the contrary, "[n]eeds that were narrow or parochial a century ago may be interwoven in our day with the well-being of the Nation."[196] Cardozo's use of "interwoven" echoes Jackson's use of "interde-

192. *Id.* at 588 n.9.

193. *Helvering*, 301 U.S. at 644 (citation omitted).

194. One author observes:

> In social policies the European Union has much less of a record. One of its main concerns has been the removal of barriers to labor mobility, the free flow of people to jobs in other countries. In practice, labor mobility remains severely curtailed by language diversity and great variations in national social security systems. It is still very difficult for people who move to other member states to transfer the collective old-age pension rights they have earned in their country of origin. This "nontransferability" of social security rights, in particular of old-age pension rights, is called the "pension gap." In contrast to practice in most member states, the European Union's social policies have not included any active employment policies.

SLOMP, *supra* note 115, at 127.

195. *Helvering*, 301 U.S. at 640. The Court has taken this approach ever since. *See, e.g.*, South Dakota v. Dole, 483 U.S. 203, 207 (1987) ("In considering whether a particular expenditure is intended to serve general public purposes, courts should defer substantially to the judgment of Congress.").

196. *Helvering*, 301 U.S. at 641.

pendence,"[197] which echoes Marshall's use of "intermingled."[198]

2. *Regulation under Clause 1?*

The theory of collective action federalism conceives the "general Welfare" as substantively defined by collective action problems involving more than one state. This interpretation suggests that it is time to revisit the *Butler* Court's rejection of the possibility that the General Welfare Clause allows some federal regulation in addition to taxation and spending.[199] To begin with, the text of Clause 1 should not end the conversation; notwithstanding what generations of lawyers have been taught in law school, the Clause does not clearly include taxation and spending while excluding regulation. The relevant language grants Congress the power to "lay and collect Taxes . . . to pay the Debts and provide for the common Defence and general Welfare of the United States."[200] The Clause thus ends the requisition practice that existed under the Articles of Confederation,[201] and authorizes Congress to use federal tax revenue to pay national debts and "provide for the common Defence and general Welfare of the United States." One way to "provide for the common Defence and general Welfare of the United States" is to spend federal money on public goods. Another way to achieve this objective is by spending federal money to enact, administer, and enforce federal regulations. Neither expenditures on public goods nor expenditures on regulations are explicitly mentioned in the text of Clause 1. It is not clear or obvious from the text that Clause 1 authorizes supplying public goods or prohibits imposing regulations.[202]

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197. *See supra* note 185 and accompanying text.

198. *See supra* notes 57, 157, and accompanying text.

199. Lest our suggestion be dismissed as implausible, we note that what counts as a plausible constitutional argument can change dramatically over time. Recently, for example, the Court radically changed the longstanding judicial understanding of the Second Amendment. *Compare* District of Columbia v. Heller, 128 S. Ct. 2783 (2008) (holding for the first time in American history that the Second Amendment protects an individual right to possess a firearm—including a handgun—unconnected with service in a militia, and to use that firearm for traditionally lawful purposes, such as self-defense within the home), *with* Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in* Heller, 122 HARV. L. REV. 191, 224 (2008) (reproducing Chief Justice Warren Burger's 1991 statement that the individual rights view of the Second Amendment is "the subject of one of the greatest pieces of fraud, I repeat the word 'fraud,' on the American public by special interest groups that I have ever seen in my lifetime," and Judge Robert Bork's 1989 statement that the Amendment "guarantee[s] the right of states to form militia, not for individuals to bear arms" and that state gun control legislation is "probably constitutional" (citations omitted)). The Roberts Court has further held that the right declared in *Heller* binds state and local governments. McDonald v. City of Chicago, 130 S. Ct. 3020 (2010).

200. U.S. CONST. art. I, § 8, cl. 1.

201. *See supra* Part I.

202. Notably, Madison did not reject the idea of regulatory power under Clause 1 as textually impossible based on a plain reading of Clause 1. *See supra* note 37. If anything, Madison discounted the importance of the distinction between regulation and expenditure.

Further, the theory of collective action federalism ameliorates the longstanding concern about a general federal police power by imbuing the phrase "general Welfare" with substantive meaning. We offer a rationale for federal power to address problems of collective action among the states when the other clauses of Section 8 are unavailable. We do not provide a justification for Congress to regulate whatever it wants under Clause 1.

Moreover, under our approach, allowing some forms of regulation under Clause 1 does not render the rest of Section 8 superfluous. On the contrary, when Article I, Section 8 is interpreted according to the theory of collective action federalism, the enumerated powers constitute a coherent response to a series of collective action problems, not a diverse collection of unrelated powers. Coherence comes from the conceptual link between the specific powers and collective action problems affecting the general welfare. It is the enumeration of the specific powers in the balance of Section 8 that imbues the inherently vague phrase "general Welfare" with definite meaning. That is the primary purpose of the enumeration; the purpose is not to exclude everything not enumerated.[203]

Even if the foregoing arguments are deemed insufficient to displace the conventional understanding of the constitutional text, it does not necessarily follow that Clause 1 does not authorize regulation. Also relevant to the proper construction of the clause is the fact that many economists advocate externality taxes as the most effective way to accomplish regulatory objectives, such as taxes on air and water pollution. A federal price on pollution can be construed as a tax or a regulation. The two may be materially equivalent.[204] The tenuous

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See BREST ET AL., *supra* note 5, at 83 ("A restriction of the power 'to provide for the common defense and general welfare' to cases which are to be provided for by the expenditure of money would still leave within legislative power of Congress all the great and most important measures of Government, money being the ordinary and necessary means of carrying them into execution." (quoting Madison, *supra* note 50, at 585)).

203. *Cf.* CALVIN H. JOHNSON, RIGHTEOUS ANGER AT THE WICKED STATES: THE MEANING OF THE FOUNDERS' CONSTITUTION 119 (2005) ("There is much to be said for the position that the listed powers [in Article I, Section 8] were not intended to be exclusive . . . ."). Calvin Johnson writes:

> [T]he best legal maxim of interpretation for the list of powers in Article I, Section 8 of the Constitution is not *expressio unius est exclusio alterius* (expression of one excludes all others), but rather *ejusdem generic*, meaning that unstated items covered by a general standard must be of the same class as the enumerated items, but the enumerated items are not exclusive. The list of powers is illustrative. Indeed they may be campaign promises of what the Framers really wanted to do quickly. But they are not exhaustive of what the Congress could do within the appropriately national sphere.

Id. at 122 (footnote omitted). According to Johnson, "[t]he broadest statement of the principle of federal jurisdiction is the power 'to provide for the common Defense and general Welfare' in clause 1 of the Constitution's description of the powers of Congress." *Id.*

204. The Court at one point distinguished impermissible "regulatory" taxes from permissible "revenue raising" taxes. *See, e.g.*, Bailey v. Drexel Furniture Co. (Child Labor Tax Case), 259 U.S. 20 (1922). But the Court has long since abandoned that doctrine as resting on a false distinction and as not grounded in the Constitution. *See, e.g.*, United States v. Kahriger, 345 U.S. 22, 31 (1953) ("Unless there are provisions extraneous to any tax need,

economic distinction between many taxes and regulations, which we will analyze in future work, suggests that allowing one and not the other under Clause 1 makes little sense. Exploring the forms of regulation permitted under Clause 1 is a task that we leave for a subsequent article.[205]

More concretely, when Congress wants to address a problem of collective action involving multiple states, the specific clause of Section 8 that it may use under our approach depends on the nature of the problem. If no clause in Section 8 authorizes Congress to address a collective action problem involving more than one state, then the General Welfare Clause remains available to Congress. Collective action federalism reads Section 8 as authorizing Congress to address problems of collective action that the states are unable to solve.[206]

To illustrate, consider situations in which Congress seeks to regulate arguably noneconomic activities that spill environmental harms across state borders. When the regulated activity crosses state boundaries, the federal courts are lax about its being "economic." Thus, environmental pollution and endangered species that cross state lines are apparently understood to fall within the commerce power, even though they are not commerce and may have very attenuated effects on commerce.[207] Congress may regulate the interstate movement of, say, naturally occurring arsenic in water that crosses state lines through an underground aquifer or nonnavigable stream.[208] And Congress may regulate

courts are without authority to limit the exercise of the taxing power."); Sonzinsky v. United States, 300 U.S. 506, 513-14 (1937) ("Every tax is in some measure regulatory. . . . But [it] is not any the less a tax because it has a regulatory effect . . . . Inquiry into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it is beyond the competency of courts.").

205. *See* Robert D. Cooter & Neil S. Siegel, Taxes, Regulations, and Health Care: Part II of Collective Action Federalism (Sept. 20, 2010) (unpublished manuscript) (on file with authors). A relevant question we do not explore here is whether federal regulatory power under Clause 1 should be unavailable when Congress is barred from taxing the states by the doctrine of intergovernmental tax immunity.

206. To the extent that Clause 1 authorizes federal regulation, it follows that Congress need not invoke the Necessary and Proper Clause to justify federal regulation of noneconomic activity on the ground that it affects economic activity. Rather, the Necessary and Proper Clause would serve as a reminder of the breadth of federal power in Section 8 to address collective action problems, economic or otherwise. *See supra* note 134 and accompanying text.

207. *See, e.g.*, Bradford C. Mank, *Protecting Intrastate Threatened Species: Does the Endangered Species Act Encroach on Traditional State Authority and Exceed the Outer Limits of the Commerce Clause?*, 36 GA. L. REV. 723, 724 (2002) ("While the Court's Commerce Clause jurisprudence is ultimately more concerned with the impacts of activities upon interstate commerce than the activities' location, most judges and commentators have assumed that whether a species is located in only one state or crosses state boundaries is an important factor." (footnotes omitted)). *But see* John Copeland Nagle, *The Commerce Clause Meets the Delhi Sands Flower-Loving Fly*, 97 MICH. L. REV. 174, 185 n.49 (1998) ("Why the fact that a bird or animal crosses state lines of its own volition and without being itself an object of interstate commerce is sufficient for Commerce Clause purposes remains unexplained.").

208. The airshed is easier to defend as a channel of interstate commerce because air is undifferentiated and airplanes fly through it at nearly all altitudes.

activities just because they threaten the existence of a species that moves across state boundaries.[209] These examples are unequivocally interstate in the sense that material harms are spilling across state borders, but the nexus to commerce is attenuated or nonexistent. Decisional law endorses the principle that Congress may regulate interstate pollution and interstate endangered species as if they were commerce, and we know of none that casts doubt on it.[210]

We have explained that when the regulated activity is interstate in the sense that it spills across state borders, courts are undemanding about its being economic. Conversely, as we showed in Part I.B.2, when the regulated activity is deemed economic, courts are undemanding about its being interstate. The Court simply presumes that economic activity has substantial effects on interstate commerce and that noneconomic activity does not. In short, the federal judiciary has construed the Interstate Commerce Clause in Article I, Section 8 as if it were the Interstate *or* Commerce Clause.

This could change, however, if the Roberts Court continues to build Commerce Clause jurisprudence on the economic/noneconomic distinction. What is presently uncontroversial may not always remain so.[211] In time, the Court may find that Congress lacks the power to regulate interstate pollution and interstate endangered species unless they have a causal nexus with commerce. Environmental harms may spill across state borders, but their causes and effects may or may not be economic or commercial as the Supreme Court has conceived these terms.

Unlike the Commerce Clause, the General Welfare Clause does not require a distinction between economic and noneconomic welfare. Regardless of whether it is economic in its cause or effect, air pollution, water pollution, and endangered species that move between states constitute an interstate externality. Under the theory of collective action federalism, Congress may target them when they pose a collective action problem.

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209. *See* William Funk, *The Court, the Clean Water Act, and the Constitution:* SWANCC *and Beyond*, 31 ENVTL. L. REP. 10741, 10766-67 (2001) ("[W]hen one seeks the authority for plenary congressional authority over interstate waters per se or to regulate interstate pollution simply by reason of its being interstate, one seeks in vain. . . . Congress' power to legislate must be grounded in its enumerated powers and does not extend to . . . interstate waters . . . except as any such legislation is otherwise based on the enumerated powers.").

210. *See id.* at 10761-62, 10765 (compiling case citations and quotations). This problem has been around for a long time. "Curiously enough," Robert Stern wrote in the *Harvard Law Review* in 1934, "the cases most out of harmony with the historical approach to the commerce clause are not those holding federal legislation invalid, but those upholding federal statutes regulating movements across state lines where no true 'commerce' was present at all. The fact that automobile thieves or persons bent on private immorality cross state lines does not render their activity commercial." Stern, *supra* note 26, at 1355.

211. *Cf.* Funk, *supra* note 209, at 10771 ("The larger question raised by a stricter scrutiny of the Commerce Clause basis for environmental legislation . . . is the extent to which the Court will reconsider, or consider for the first time, assumptions that have underlain environmental legislation and its judicial review for one-quarter century.").

For example, the touchstone of federal authority for five Justices in *Rapanos v. United States* was interstate navigable waters.[212] But lots of water that flows across state boundaries is *nonnavigable*, and some of this water presumably lacks a significant nexus to interstate navigable waters. If federal authority were triggered by an interstate externality—as it would be under our interpretation of the General Welfare Clause—the movement across a state line could justify federal action. The crucial fact would be a spillover of welfare and a collective action problem, not a significant nexus to interstate navigable waters.[213]

To consider another example, the extinction of an endangered species harms the future well-being of people in all states where the species might otherwise live. Thus an activity in state *A* may extinguish a species in states *A*, *B*, and *C*. Moreover, whether the harmful activity is the construction of a housing development or the recreational use of land by local residents makes no difference for purposes of the general welfare. The same can be said of interstate drinking water that has been contaminated by naturally occurring arsenic instead of an industrial polluter. In either case, federal action can internalize the externality. The federal government, therefore, potentially enjoys a decisive

212. *Rapanos v. United States*, 547 U.S. 715 (2006), concerned a fight over wetlands endangered by economic development. The question presented was whether wetlands adjacent to nonnavigable tributaries of traditional navigable waters were part of "the waters of the United States" within the meaning of the Federal Clean Water Act (CWA), *see infra* note 221. The plurality concluded that the term "navigable waters" in the CWA includes "only relatively permanent, standing or flowing bodies of water," not "intermittent or ephemeral flow[s]." *Id.* at 732-34. It further concluded that "*only* those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the Act." *Id.* at 742. The plurality invoked federalism concerns and constitutional avoidance. *Id.* at 737-38.

By contrast, Justice Kennedy concluded that the U.S. Army Corps of Engineers had both statutory and constitutional authority to regulate wetlands that are adjacent to nonnavigable tributaries of traditional navigable waters so long as the wetlands "possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." *Id.* at 759 (Kennedy, J., concurring in judgment) (quoting Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 167, 172 (2001)). In his controlling opinion, Kennedy did not specify what the "significant nexus" test requires, but he did emphasize that the Corps must establish substantial ecological connections between the wetlands and traditionally navigable waters, regardless of the existence of hydrologic connections. *Id.* at 778-87. In practice, this requirement should allow robust federal protection of wetlands. Kennedy wrote that his interpretation of the CWA "does not raise federalism or Commerce Clause concerns sufficient to support a presumption against its adoption." *Id.* at 782. While conceding that his "significant-nexus requirement may not align perfectly with the traditional extent of federal authority," he wrote that "in most cases regulation of wetlands that are adjacent to tributaries and possess a significant nexus with navigable waters will raise no serious constitutional or federalism difficulty." *Id.*

213. While it is important to distinguish between questions of statutory interpretation—for example, the meaning of "navigable waters" in the CWA—and issues of constitutional authority, it is also true that the former often takes place in the shadow of the latter. For example, the previous note makes clear that the Justices in *Rapanos* were partially motivated by constitutional concerns.

advantage over the states in addressing the problem of preserving species or combating pollutants that move interstate. Justifying federal pursuit of the general welfare would extend at least some forms of federal regulation to instances of environmental degradation without notably economic characteristics that involve collective action problems.

3. *When to avoid avoidance*

An advantage of collective active federalism is that it will discourage courts from construing federal statutes narrowly in ways that exacerbate collective action problems. *Lopez* and *Morrison* are the only cases in which the Rehnquist Court invalidated federal laws on Commerce Clause grounds. In other cases, however, the Court limited congressional power in a different way: it construed federal statutes narrowly. A narrow construction limits how much Congress can do under the statute, thereby easing "constitutional doubts" regarding whether Congress has exceeded the commerce power. Construing a statute narrowly to avoid constitutional doubts is a well-established practice in certain areas of constitutional law. The Rehnquist Court extended this practice to Commerce Clause challenges—including, unfortunately, to cases implicating collective action problems.

The first avoidance decision came in *Jones v. United States*.[214] Federal law criminalized arson or attempted arson of "any building . . . used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce."[215] *Jones* presented the question of whether arson of a private residence violated this statute and, if so, whether the statute was therefore unconstitutional. The federal government argued that the dwelling was "used" in activities affecting interstate commerce because the homeowner secured a mortgage from an Oklahoma lender, bought casualty insurance from a Wisconsin insurer, and used natural gas from outside Indiana.[216]

The Court unanimously construed the statute not to apply to arson of a private residence. Justice Ginsburg wrote for the Court that the statute's "used in" requirement "is most sensibly read to mean active employment for commercial purposes, and not merely a passive, passing, or past connection to commerce."[217] Having construed the statue narrowly, the Court did not have to decide its constitutionality. Justice Ginsburg stated that the Court's reading "is in harmony with the guiding principle that where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the

214. 529 U.S. 848 (2000).
215. 18 U.S.C. § 844(i) (2006).
216. *Jones*, 529 U.S. at 855.
217. *Id.*

latter."[218] Specifically, she wrote that in light of *Lopez*, "it is appropriate to avoid the constitutional question that would arise were we to read [the law] to render the traditionally local criminal conduct in which petitioner Jones engaged a matter for federal enforcement."[219]

We would add that state control over arson laws—whether they are applied to arson of a commercial enterprise or of a private residence—does not seem to cause a collective action problem. Different rates of arson in different states may have some effect on the price residents pay for mortgages, insurance, or gas. These effects, however, do not allow one state to externalize its costs to another. In controlling arson, one state does not have an incentive to free ride on the laws of a neighboring state. Nor does one state try to extract concessions from another state by threatening to reduce sanctions against arsonists. The federal law apparently did not address a collective action problem, so construing it narrowly (or invalidating it) limits federal power, as the theory of collective action federalism commends.

By contrast, federal laws protecting the environment often address interstate externalities, so construing these statutes narrowly can aggravate a collective action problem. *Solid Waste Agency of Northern Cook County (SWANCC) v. United States Army Corps of Engineers* was such a case.[220] A consortium of Chicago suburbs sought to purchase a gravel pit filled with water and used by migratory birds. The buyers wished to drain and convert it for disposal of solid wastes. Section 404(a) of the Federal Clean Water Act (CWA)[221] regulates the discharge of dredged or fill material into "navigable waters," which the Act defines as "the waters of the United States, including the territorial seas."[222] The Army Corps of Engineers (Corps) had promulgated rules regarding the applicability of the CWA. One of them, the Migratory Bird Rule,[223] required compliance with the CWA for waters used by migratory birds. The case arose when the Corps applied the Migratory Bird Rule to the gravel pit. The United States defended the constitutionality of the Migratory Bird Rule on the ground that

218. *Id.* at 857 (internal quotation marks omitted).

219. *Id.* at 858 (internal quotation marks omitted).

220. 531 U.S. 159 (2001).

221. Federal Water Pollution Control Act Amendments of 1972 (Clean Water Act) § 404(a), 33 U.S.C. § 1344 (2006).

222. 33 U.S.C. § 1362(7) (2006).

223. Migratory Bird Rule, 51 Fed. Reg. 41,217 (Nov. 13, 1986) (stating that section 404(a) extends to intrastate waters: "a. Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or b. Which are or would be used as habitat by other migratory birds which cross state lines; or c. Which are or would be used as habitat for endangered species; or d. Used to irrigate crops sold in interstate commerce"); *see also SWANCC*, 531 U.S. at 164 (quoting the Migratory Bird Rule). The Migratory Bird Rule clarified a federal regulation issued by the Corps to define a key statutory term in the CWA. *See* 33 C.F.R. § 328.3(a)(3) (2010) (defining "waters of the United States" to include "waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce").

"protection of migratory birds is a national interest of very nearly the first magnitude," and that "millions of people spend over a billion dollars annually on recreational pursuits relating to migratory birds."[224]

The Court fractured in the same way that it did in *Lopez* and *Morrison*, holding 5-4 that the CWA did not apply to intrastate waters used as habitat by migratory birds. Having decided that the statute did not apply to the case at bar, the Court did not have to decide its constitutionality. Writing for the Court, Chief Justice Rehnquist underscored the "significant constitutional questions" avoided by the Court, for "[p]ermitting respondents to claim federal jurisdiction over ponds and mudflats falling within the 'Migratory Bird Rule' would result in a significant impingement of the States' traditional and primary power over land and water use."[225] To the extent that there is no political will in Congress to amend the statute to include what the Court held was excluded, the Court's decision proves as decisive as a holding of unconstitutionality.[226]

In stark contrast to Chief Justice Rehnquist, Justice Stevens wrote a dissent that follows the theory of collective action federalism:

> The destruction of aquatic migratory bird habitat, like so many other environmental problems, is an action in which the benefits (*e.g.*, a new landfill) are disproportionately local, while many of the costs (*e.g.*, fewer migratory birds) are widely dispersed and often borne by citizens living in other States. In such situations, described by economists as involving "externalities," federal regulation is both appropriate and necessary.[227]

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224. *SWANCC*, 531 U.S. at 173 (citations omitted) (internal quotation marks omitted).

225. *Id.* at 174.

226. As one of our colleagues has noted:

> Environmental legislation has become politically divisive. At a time when political institutions are themselves closely divided, the prospects are not bright for enacting contentious legislation sure to produce well-organized losers, which such wetlands legislation certainly would be. . . . As a practical political matter, *SWANCC* removes the federal government from this area as surely as a holding of unconstitutionality would . . . . [T]he shadow that *SWANCC*'s clear statement interpretive rule casts is much more ominous than the shadow *Lopez* and *Morrison* together have cast over the theoretical reach of federal authority under the Commerce Clause.

Christopher H. Schroeder, *Environmental Law, Congress, and the Court's New Federalism Doctrine*, 78 IND. L.J. 413, 455, 457 (2003). The political situation in Washington, D.C., obviously has changed significantly since 2003, but this does not mean Congress will now provide the clear statement that the *SWANCC* Court held was required—particularly in light of the Senate's rules and the present composition of the Court.

227. *SWANCC*, 531 U.S. at 195 (Stevens, J., dissenting). Justice Stevens invoked the reasoning of Justice Holmes in *Missouri v. Holland*, 252 U.S. 416 (1920), where the state sued to stop a federal game warden from enforcing the Migratory Bird Treaty Act of 1918 and associated regulations, arguing that the law violated the Tenth Amendment, *id.* at 430-31. Writing for the Court, Holmes rejected the appeal to state sovereignty:

> Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power. The subject-matter is only transitorily within the State and has no permanent habitat therein. *But for the treaty and the statute there soon might be no birds for any powers to deal with*. We see nothing in the Constitution that compels the Government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed. It is not sufficient to rely upon the States. The re-

Birds have nonmarket value that spills across jurisdictions as they migrate. Protecting birds thus combines an externality problem and a problem of collective action. Many localities destroy animal habitat for profit and hope that other localities will preserve it. When federal law addresses a collective action problem involving multiple states, construing the law narrowly could aggravate the problem. Moving the constitutional justification for the law from Clause 3 to Clause 1 renders a narrowing construction unnecessary. If *Lopez*, *Morrison*, and *Raich* were rightly decided, then *SWANCC* was wrongly decided.

The theory of collective action federalism focuses the interpretive community on the issue that really matters to lawmakers and citizens: the environmental impact of the harmful activity upon the general welfare, not the effect on interstate economic activity. In the environmental context, debate over whether a regulated activity is economic distracts attention from the central constitutional question of whether welfare is general or particular. So do arguments about whether Congress "really" wanted to regulate economic activity or whether its commerce justification is pretextual.[228] For example, the relationship between water pollution and economic activity distracts attention from the question of how clean water promotes the general welfare of the United States. A debate on that point should result in a more straightforward defense of federal authority, aligning better with common-sense reasoning.

The same could be said of the justification for federal regulation in other settings. Consider, for example, the control of contagious diseases. The federal government might want to impose regulations to prevent the spread of a contagious disease across state lines—say, by authorizing federal officials to quarantine infected individuals or to close local schools in defined and temporally limited circumstances. This would not qualify as a regulation of economic activity in any obvious or straightforward sense (even though here, as elsewhere, one could invoke substantial effects on interstate commerce in the aggregate).[229] Yet in light of potentially large spillover effects impinging the general welfare, Congress ought to possess this power without having to condition related federal funds on compliance. The rationale for allowing federal regula-

> liance is vain, and were it otherwise, the question is whether the United States is forbidden to act.

Id. at 435 (emphasis added).

228. Our concern is with the distracting quality of the "pretext" debate in many settings. Our point is not that allegations of pretext have force, so that Congress may regulate interstate commerce only for certain purposes and not others. *Compare, e.g.*, William Van Alstyne, *Federalism, Congress, the States and the Tenth Amendment: Adrift in the Cellophane Sea*, 1987 DUKE L.J. 769, 797-99 (arguing for the invigoration of pretext doctrine in Commerce Clause cases), *with* Schroeder, *supra* note 226, at 443-45 (critically analyzing Van Alstyne's view).

229. One could also attempt to justify federal regulation in this hypothetical by invoking the current doctrine's broad approval of congressional regulation of persons in interstate commerce. *See supra* text accompanying note 73. It is not clear, however, why individuals subject to a federal quarantine would necessarily qualify as persons in interstate commerce.

tion of this powerful noneconomic externality under the General Welfare Clause is straightforward and compelling.

The Court implicitly adopted the logic of collective action in its recent decision in *United States v. Comstock*.[230] The question presented was whether Congress has the power under Article I, Section 8 to authorize the United States Department of Justice to civilly commit a mentally ill, sexually dangerous federal prisoner after the completion of his federal sentence if no state will accept custody of the prisoner. In holding 7-2 that Congress possesses such authority, the Court, in a majority opinion authored by Justice Breyer, relied in part on the fact that the case implicated a collective action problem involving more than one state. After the sentence of a sexually dangerous prisoner has expired, the federal government might release him in any number of states—for example, the state where he had been tried, or the state where he is presently domiciled. A state that agrees to assume custody of the individual internalizes significant financial costs associated with indefinite civil commitment and externalizes the social benefits of committing the individual, who might otherwise travel interstate upon release. The Court showcased unsurprising evidence that states often refuse to assume custody, presumably hoping that another state will blink first.[231] To be sure, the Court relied on the Necessary and Proper Clause to justify this assertion of federal power, not the General Welfare Clause, as would be our inclination. The key analytical point, however, is that the Court and the Justices concurring in the judgment implicitly stressed the relationship between the federal statute at bar and the general welfare, understood in terms of collective action problems that the federal government is better situated to address than the states.[232]

In his biography of the Constitution, Akhil Amar criticizes the Supreme

230. 130 S. Ct. 1949, 1961-62 (2010).

231. *Id.* at 1959 (quoting a 1945 report of the Judicial Conference of the United States finding that "States would not accept an 'appreciable number' of 'mental[ly] incompetent' individuals 'nearing expiration' of their prison terms, because of their 'lack of legal residence in any State,' even though those individuals 'ought not . . . be at large because they constitute a menace to public safety'"); *id.* at 1961 ("Congress could . . . have reasonably concluded (as detailed in the Judicial Conference's report) that a reasonable number of such individuals would likely *not* be detained by the States if released from federal custody, in part because the Federal Government itself severed their claim to legal residence in any State by incarcerating them in remote federal prisons." (internal quotation marks omitted)).

232. *See id.*; *id.* at 1968 (Kennedy, J., concurring in judgment) ("Federal prisoners often lack a single home State to take charge of them due to their lengthy prison stays, so it is incumbent on the National Government to act."); *id.* at 1969 (Alito, J., concurring in judgment) ("The statute recognizes that, in many cases, no State will assume the heavy financial burden of civilly committing a dangerous federal prisoner who, as a result of lengthy federal incarceration, no longer has any substantial ties to any State."); *id.* at 1970 ("These federal prisoners, having been held for years in a federal prison, often had few ties to any State; it was a matter of speculation where they would choose to go upon release; and accordingly no State was enthusiastic about volunteering to shoulder the burden of civil commitment."). In dissent, Justice Thomas, joined by Justice Scalia, dismissed this rationale as "implausible" and, in any event, as constitutionally irrelevant. *Id.* at 1980-81 (Thomas, J., dissenting).

Court's "move[ment] toward reading the [Commerce Clause] paragraph as applicable only to economic interactions," arguing that "[w]ithout a broad reading of 'Commerce' in this clause, it is not entirely clear whence the federal government would derive its needed power to deal with noneconomic international incidents—or for that matter to address the entire range of vexing nonmercantile interactions and altercations that might arise among states."[233] There may be an independent way: under our interpretation of Article I, Section 8, Congress possesses some authority under Clause 1 to regulate noneconomic collective action problems involving multiple states.[234]

V. EVALUATING CONGRESSIONAL JUDGMENTS ABOUT COLLECTIVE ACTION PROBLEMS

Because people disagree about the appropriate scope of federal power, they will disagree about how constitutional interpreters, particularly courts, should evaluate congressional judgments about the existence and seriousness of collective action problems, and about the adequacy of Congress's response. Because Congress can always seek to justify legislation by asserting that a collective action problem exists, that its effects are significant, and that the law it has enacted addresses the problem effectively, the evaluative question becomes what degree of proof courts should require of Congress before they will defer to its judgment. We do not seek to resolve disagreements over this question in this Article, but we can illustrate one form that judicial review could take.

Many people believe that Congress possesses broad but not limitless authority to legislate under Section 8. This belief is reflected in the interpretive principle of loose construction first articulated by Chief Justice Marshall for the

233. AMAR, *supra* note 14, at 107-08; *see also* Regan, *supra* note 7, at 564-65 ("[E]ven if we are faithful to the spirit of the sixth Virginia Resolution and believe in genuine limits on federal power, we are forced to construe some clause in Article I, Section 8 in a not fully literal way to fill up the gap between the enumeration of specific powers and the current needs of the national system. An expansive reading of the Commerce Clause is what we have mainly relied on to fill this gap.").

234. We also flag another potential basis for addressing interstate problems that are deemed both to be beyond the scope of the Commerce Clause and to require federal *regulation*. The Necessary and Proper Clause grants Congress the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution" not only "the foregoing Powers," but also "all other Powers vested by this Constitution in the Government of the United States." U.S. CONST. art. I, § 8, cl. 18. These other powers include the "judicial Power of the United States," U.S. CONST. art. III, § 1, and the "judicial Power" extends to "Controversies between two or more States," U.S. CONST. art. III, § 2. Accordingly, it might suffice to justify federal regulation of an interstate problem on the ground that a rational, means-ends relationship exists between such regulation and the federal judiciary's execution of its responsibility to resolve controversies between at least two states. Such a rational relationship might exist if federal regulation obviated the need for judicial intervention. We note, but do not develop, this possible constitutional "hook" for federal regulation of noneconomic problems of collective action involving more than one state.

Court in *McCulloch v. Maryland*[235] and recently reaffirmed by a majority of Justices in *United States v. Comstock*.[236] One possible standard of review is whether Congress had a reasonable basis to believe that it was ameliorating a significant problem of collective action involving two or more states. If reasonable people could disagree (1) about the existence of a collective action problem, (2) about the seriousness of the problem, and (3) about the efficacy of the congressional response, then courts should uphold the law. Congress would have to offer a basis for its judgments that there is a serious multistate problem of collective action and that the law addresses the problem to some extent. Courts would defer to plausible findings by Congress. Such an approach to judicial review would "cue" the political branches to take seriously those federalism questions that are worth taking seriously,[237] but it would not license federal courts to engage in *Lochner*-style invalidations of many federal laws and overrulings of precedent. A deferential approach to judicial review would also substantially address the objection that the theory of collective action federalism tasks judges with making determinations ill-suited for them.[238] Resolution

235. 17 U.S. (4 Wheat.) 316, 405-07, 421 (1819). For a discussion, see *supra* note 55 and accompanying text.

236. 130 S. Ct. 1949, 1956-58 (2010). In *Comstock*, the Justices debated the standard of review courts should apply to federal legislation that is defended as resting on the Necessary and Proper Clause. The majority consisting of Chief Justice Roberts and Justices Stevens, Ginsburg, Breyer, and Sotomayor stated that "in determining whether the Necessary and Proper Clause grants Congress the legislative authority to enact a particular federal statute, we look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power." *Id.* at 1956 (citation omitted). By contrast, Justice Kennedy would insist on "a demonstrated link in fact, based on empirical demonstration." *Id.* at 1967 (Kennedy, J., concurring in judgment). Justice Alito seemed to endorse Justice Kennedy's more demanding standard. *Id.* at 1970 (Alito, J., concurring in judgment).

237. *See, e.g.*, Jenna Bednar & William N. Eskridge, Jr., *Steadying the Court's "Unsteady Path": A Theory of Judicial Enforcement of Federalism*, 68 S. CAL. L. REV. 1447, 1484 (1995) (stressing this function of judicial review in federalism cases); Daniel J. Meltzer, *The* Seminole *Decision and State Sovereign Immunity*, 1996 SUP. CT. REV. 1, 63 (similar); Ernest A. Young, *State Sovereign Immunity and the Future of Federalism*, 1999 SUP. CT. REV. 1, 51 (similar).

238. In vetoing an internal improvements bill on constitutional grounds, Madison worried about "excluding the judicial authority of the United States from its participation in guarding the boundary between legislative powers of the General and State Governments, inasmuch as questions relating to the general welfare, being questions of policy and expediency, are unsusceptible of judicial cognizance and decision." BREST ET AL., *supra* note 5, at 83 (citation omitted); *see also, e.g.*, Ernest A. Young, *Protecting Member State Autonomy in the European Union: Some Cautionary Tales from American Federalism*, 77 N.Y.U. L. REV. 1612, 1647-48, 1677-82 (2002) (critiquing a collective action approach to federalism as contrary to the judicial role). The theory of collective action federalism, whether or not it is used in judicial review, is similar in important respects to the European principle of "subsidiarity." *See, e.g.*, Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795, 831-38 (1996); Mattias Kumm, *Democratic Constitutionalism Encounters International Law: Terms of Engagement*, *in* THE MIGRATION OF CONSTITUTIONAL IDEAS 256, 264-68 (Sujit Choudhry ed., 2006).

of the issue of judicial capacity should follow resolution of the issue of constitutional meaning, not the other way around.

The above illustration leaves several critical questions unanswered or answered incompletely. In order to establish the existence of a collective action problem among the states, does Congress need a plausible rationale, some evidence, or substantial evidence? Would it make sense to use a balancing test, such that greater intrusions on the regulatory autonomy of states would require greater evidentiary showings from Congress? What is the minimum threshold of harm to the general welfare that a collective action problem must cross before Congress has the constitutional authority to act? When addressing a collective action problem, does Congress need to adopt the least intrusive means of federal intervention?

To illustrate concretely, if the severity of punishment for the same crime differs between two states, then rational criminals have an incentive to commit their crimes in the state with milder punishment. Perceiving this fact, states might enact severe punishments to deflect crime away from themselves and onto others. This interstate externality could cause the states to race towards severity, even though all states would benefit from lowering average punishments and reducing the burden on their prisons. Could Congress rely on this rationale to federalize all of criminal law? Or would it have to proceed crime by crime? Would it have to provide evidence that a race to severity exists and causes a large fall in the general welfare? Would it have to show that federalizing some or all criminal law is the least intrusive federal solution?

We can raise these questions but we cannot answer them in this Article. Answers must await future developments and applications of the theory of collective action federalism in different areas of law. We resist, however, the objection that the concept of a collective action problem involving two or more states is indeterminate—that Congress can, with equal plausibility, justify regulating whatever it wishes on the ground that it is adequately addressing a serious problem of collective action. Some federal laws are substantially easier to justify on such grounds than others. Moreover, we are aware of no better alternative to understanding the division of power between the federal government and the states in Article I, Section 8. For example, the Court's distinction between economic and noneconomic activity is neither determinate nor sensible for all of the reasons we have identified.

Most importantly, the indeterminacy objection may presuppose that the Constitution is substantially more determinate than it in fact is—that the Constitution authoritatively resolves disagreements, as opposed to organizing and orienting them.[239] We offer the theory of collective action federalism as the

239. It is a mistake to view the Constitution or constitutional law as fully determinate. *See* H. JEFFERSON POWELL, A COMMUNITY BUILT ON WORDS: THE CONSTITUTION IN HISTORY AND POLITICS 6 (2002) ("However counterintuitive it may seem, the integrity and coherence of constitutional law are to be found in, not apart from, controversy."); Robert C. Post &

best, all-things-considered interpretation of what Article I, Section 8 means. Whether that meaning is fully determinate is a separate question. In our view, it is not fully determinate, but neither is it wholly indeterminate.

CONCLUSION

A federal constitution ideally gives the central and state governments the power to do what each does best. Thinking along these lines about the United States Constitution, Alexis de Tocqueville remarked that the "[f]ederal system was created with the intention of combining the different advantages which result from the magnitude and the littleness of nations."[240] To secure these advantages, according to the internalization principle, a constitution should assign power to the smallest unit of government that internalizes the effects of its exercise.

By definition, the costs and benefits of interstate public goods, externalities, and markets spill over from one state to another, which creates collective action problems for the states. According to the Federal Coase Theorem, states could ideally solve the problem of spillovers by bargaining and compacting without the intervention of the federal government. Under the Articles of Confederation, Americans found that voluntary cooperation among several states worked poorly to address these problems. Transaction costs, especially holdouts, obstruct cooperation. Solving the problem of interstate externalities and markets usually requires majority (or supermajority) rule in the nation, which the Constitution embodies in the federal government. The federal government is usually the smallest unit that effectively internalizes the benefits and costs of interstate public goods, externalities, and markets. Accordingly, the internalization principle assigns power over interstate externalities and markets to the federal government.

The theory of collective action federalism interprets Article I, Section 8 in light of this principle; it views the enumerated powers as a coherent response to collective action problems, not a heterogeneous collection of unrelated powers. Coherence comes from the connection of the specific powers to collective action problems affecting the general welfare. The enumeration of the specific powers in the Constitution imbues the inherently vague phrase "general Welfare" in Clause 1 with definite meaning. Welfare is "general" when the federal government can obtain it and the states cannot. The states cannot reliably achieve an end when doing so requires many (or even as few as two) states to cooperate. According to the theory of collective action federalism, Article I,

Neil S. Siegel, *Theorizing the Law/Politics Distinction: Neutral Principles, Affirmative Action, and the Enduring Legacy of Paul Mishkin*, 95 CALIF. L. REV. 1473, 1501 (2007) ("[I]t is simply fantasy to imagine that law can be fully determinate or fully autonomous from popular beliefs.").

240. TOCQUEVILLE, *supra* note 1, at 206.

Section 8 empowers Congress to solve collective action problems that predictably frustrate the states. In the language of Clause 3, interstate public goods, externalities, and markets are "among the several States." In the language of Clause 1, they are "general."[241] Governmental activities that do not pose collective action problems for the states are "internal to a state" or "local."

The "general Welfare," interpreted as part of the enumerated powers, is a substantive conception of interstate effects that centers on collective action problems. Members of Congress, Presidents, their supporters, and their critics should use this framework to understand and debate the constitutional scope of Congress's power to tax, spend, and regulate.

In 1995, the Court abandoned its longstanding willingness to allow the federal government to regulate almost any activity by invoking the Commerce Clause. The Court has limited the power of Congress by declaring federal statutes unconstitutional or by construing them narrowly. The Court has purported to build a jurisprudence of federalism under Clause 3 on the distinction between economic activity, which Congress may regulate, and noneconomic activity, which Congress may not regulate. Unfortunately, Congress is not generally better at regulating economic activity, and the states are not generally better at regulating noneconomic activity. However adequate it may (or may not) be for purposes of defining "Commerce" in Clause 3, the distinction between economic and noneconomic activity seems mostly irrelevant to the problems of federalism; it does not explain when an activity exists "among the several States" and when it exists within a state.

A more promising foundation for the American federal system established by Article I, Section 8 distinguishes between activities that pose collective action problems for the states and those that do not pose such problems. The theory of collective action federalism is superior because it flows directly from the relative advantages of the federal government and the states. We hope that Section 8 will eventually be understood as authorizing congressional power over activities that pose collective action problems for the states, and as forbidding congressional power over activities that do not pose collective action problems for the states. We also hope that Clause 1 will eventually be understood to authorize some forms of federal regulation of noneconomic activities when states face collective action problems. When Clause 1 assumes some of the burden of justifying federal regulation, there is less need to define the word "Commerce" in Clause 3 to encompass almost every collective action problem warranting congressional action. By thickening "Welfare," constitutional interpretation can (although need not) thin "Commerce."[242] With these changes,

241. A more complete analysis of constitutional powers would buttress this conclusion. *See, e.g.*, COOTER, *supra* note 104, at 171-239.

242. Specifically, our thick conception of the "general Welfare" can combine with either a thick or a thin understanding of "Commerce." In the former case, our thick conception of the general welfare *complements* Jack Balkin's and Akhil Amar's thick conception of commerce, *see supra* note 177 and accompanying text, because each conception reinforces

federal law could then be seen to rest on what often motivates its enactment: its promotion of the general welfare, not the economic character of the activity that it regulates.[243]

the other in providing constitutional authorization for regulating commerce. In the latter case, our thick conception of the general welfare *substitutes* for a thin, economic conception of commerce by providing an independent basis for regulating noneconomic problems of collective action. While we do not choose between a thick and a thin understanding of "Commerce," we do advocate understanding the Commerce Clause and the General Welfare Clause in terms of the collective action problems that motivate this part of the Constitution.

243. The recently enacted health care legislation, Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), has provoked renewed interest in constitutional limits on the federal powers to tax and regulate. One question presently being debated in public discourse and constitutional litigation is whether the provisions in the statute concerning compulsory heath insurance fall within the scope of the commerce power. Collective action federalism provides a useful framework of analysis: the key federalism question is whether individual action by states suffices to address this issue, or whether addressing it effectively requires collective action—for example, because of the likely movement of insurance companies, sick Americans, and healthy Americans to different state regimes.

Another question currently in dispute is whether the "individual mandate" in the law qualifies as a tax or a regulation for constitutional purposes. Economic theories of federalism have a lot to say about taxes and regulations, including similarities and differences between them. A future article will extend our theory of collective action federalism to this timely issue. *See* Cooter & Siegel, *supra* note 205.