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# General Welfare, Interstate Commerce, and Economic Analysis

Neil S. Siegel, *Duke University*
Robert D. Cooter

# *GENERAL* WELFARE, *INTERSTATE* COMMERCE, AND ECONOMIC ANALYSIS

Robert D. Cooter & Neil S. Siegel

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rcooter@law.berkeley.edu
siegel@law.duke.edu

ABSTRACT

The Supreme Court of the United States has not articulated a general account of the division of authority between the federal government and the states in Article I, Section 8 of the United States Constitution. Instead, the Court has tried to distinguish the "truly national" from the "truly local" in the specific context of the Commerce Clause, *United States v. Morrison*, 529 U.S. 598, 617–18 (2000). The Court has distinguished "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. Congress is not generally more competent at regulating economic activity, and the states are not generally more competent at regulating noneconomic activity. The distinction between economic and noneconomic activity seems mostly irrelevant to the problems of federalism.

We propose a more promising foundation for American federalism in Article I, Section 8. Our account distinguishes between activities that pose collective action problems for the states and those that do not. This approach is superior because it flows directly from the relative competences of the federal government and the states. We show that Section 8 mostly concerns collective action problems. According to our interpretation, the clauses of Section 8 authorize Congress to tax, spend, and regulate to solve these problems. We use modern economics to analyze interstate collection action problems.

Our account distinguishes interstate commerce from intrastate commerce. It also provides a new constitutional "hook" for Congress to regulate interstate problems of collective action that do not involve commerce. Specifically, our framework extends federal regulatory power under Clause 1 to some problems, including environmental harms, that are not essentially commercial.

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# *GENERAL* WELFARE, *INTERSTATE* COMMERCE, AND ECONOMIC ANALYSIS

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

## 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]

The Supreme Court of the United States has not articulated a general account of the division of authority between the federal government and the states in Article I, Section 8 of the United States Constitution. Instead, the Court has tried to distinguish the "truly national" from the "truly local" in the specific context of the Commerce Clause.[2] The Court has differentiated "economic" or "commercial" activity, which Congress may regulate, 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. Unfortunately, Congress is not generally more competent at regulating economic activity, and the states are not generally more competent at regulating noneconomic activity. The distinction between economic and noneconomic activity seems mostly irrelevant to the problems of federalism.

We propose a more promising constitutional foundation for American federalism in Article I, Section 8, one that flows directly from the relative competences of the federal

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[*] Herman Selvin Professor of Law, University of California at Berkeley.
[**] Professor of Law and Political Science, Duke University School of Law.
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[1] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 141 (2003).
[2] United States v. Morrison, 529 U.S. 598, 617–18 (2000). The Commerce Clause is Clause 3 of Article I, Section 8.

government and the states.[3] Under the Articles of Confederation, Americans learned that voluntary cooperation among states works poorly to address problems that spill over from one state to another. The states cannot reliably achieve an end when doing so requires many, or even several, of them to cooperate. Spillovers create a collective action problem for the states. The solution lies with the more comprehensive unit of government. The federal government is the smallest unit that effectively internalizes many spillovers.

To overcome collective action problems among the states under the Articles of Confederation, the Constitution gave Congress additional powers, notably in Article 1, Section 8. We will argue that these eighteen clauses are a coherent set, not a heterogeneous aggregation of unrelated powers. Coherence comes from the connection of the specific powers to 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. According to our interpretation, the clauses of Section 8 authorize Congress to tax, spend, and regulate when the 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."

Interpreted in light of the enumerated powers, the "general Welfare" is a substantive conception. Congress should use this conception in assessing the scope of its own powers.

[3] 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 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.

Some concepts from economic theory help to develop this interpretation. We will show that the eighteen clauses of Article I, Section 8 mostly address two kinds of spillovers: interstate externalities and interstate markets.

Part I, on taxonomy, sorts the powers in Article I, Section 8 into analytical categories from economics, notably interstate externalities and markets. Part II, on theory, shows how interstate externalities and markets cause collective action problems that affect the general welfare. Taken together, Parts I and II demonstrate that the specific powers form a coherent group, one that defines a substantive constitutional conception of the general welfare.

Parts III and IV address the Court's current approach to the problem of federalism in Article I, Section 8. Part III explains how our framework reduces the relevance of the distinction between economic and noneconomic activity in contemporary Commerce Clause jurisprudence. Part IV explains how our framework extends federal regulatory power under Clause 1 to some problems, including environmental harms, that are not essentially commercial. We thus favor reconsidering the Court's conclusion in *United States v. Butler* that the General Welfare Clause does not confer regulatory authority.[4] The causes and effects of environmental spillovers between the states are not necessarily commercial in character, but this fact should pose no impediment to federal action aimed at promoting the general welfare.

## I. ANALYTICAL CATEGORIES OF ARTICLE I, SECTION 8

Figure 1 assigns numbers to the eighteen clauses of Article I, Section 8. The General Welfare Clause, which comes first, authorizes Congress to "lay and collect Taxes . . . to pay the

[4] *United States v. Butler*, 297 U.S. 1, 318–19 (1936). For a discussion of *Butler*, see *infra* notes 138-140 and accompanying text.

Debts and provide for the . . . general Welfare of the United States."[5] 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.[6]

[5] U.S. CONST. art. I, § 8, cl. 1.
[6] U.S. CONST. 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 defense 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, dockyards, 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.

Using this enumeration, Figure 2 sorts the specific powers into three analytical categories that we will explain.

Figure 2: Economic Analysis of Enumerated Powers

| 1. provide for common defense and general welfare | |
|---|---|
| Interstate Externalities | |
| | 1. common defense<br>10. suppress piracy<br>11. declare war<br>12. raise armies<br>13. maintain navy<br>14. make military law<br>15. call militia<br>16. govern militia |
| | 7. establish post office |
| | 8. make intellectual property law |
| 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 |
| 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 powers |

We begin with interstate externalities. Clause 1 authorizes Congress to "lay and collect Taxes . . . to . . . provide for the common Defence,"[7] 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 other states, leaving each of the states insecure.

[7] U.S. CONST. art. I, § 8, cl. 1.

In general, 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. Later we develop the underlying theory of externalities in more detail.

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 18th century resembles the railroad in the 19th century and the Internet in the 20th century. Modern legal scholars who observed positive externalities on the Internet called them "network effects."[8]

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 18th century resembles its concern with promoting the railroad in the 19th century and the Internet in the 20th 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 19th century and Google in the late 20th century. A large firm can internalize positive externalities and lower the

[8] *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, 424 (1985) (defining network externalities)).

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 anti-trust laws and regulations, or to provide the service itself.[9]

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 has difficulty preventing someone else from copying her invention, and an author without a copyright has difficulty preventing someone else from reprinting her book. Effective intellectual property law enables creators to collect fees from users of their creations, which provides an incentive for creativity.[10] 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 interstate markets. The publication of Adam Smith's *Wealth of Nations* in 1776 systematically

[9] 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.

[10] 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, *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."). Many scholars believe that Congress has created a problem by using intellectual property statutes to over-regulate some types of creativity. *See, e.g.*, Landes & Posner, *supra*, at 507–13 (describing the decrease in copyright registrations and renewals following passage of congressional statutes).

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.[11]

In the 18th 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.

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

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[11] *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"). 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. '* * * each 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.' Story, The Constitution, ss 259, 260. . . . 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 regulation 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).

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 other. The dormant Commerce Clause, which the Supreme Court has inferred from the grant of power to Congress in Clause 3, almost always prohibits states from discriminating against interstate commerce or placing an undue burden on the interstate movement of goods and services.[12] 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,[13] which goes far towards explaining the country's remarkable economic performance.[14]

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

In sum, we read Section 8 as a unified whole, like a well-written paragraph. Clause 1 is the topic sentence that expresses the main idea of a federal government empowered to promote the general welfare. Clauses 2 though 17 provide illuminating instances of the idea that were most important at the time the Framers wrote the paragraph. And Clause 18 concludes by underscoring the broad availability of means to realize both the main idea and specific instances of it.

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[12] For a cogent discussion of contemporary doctrine, see *Granholm*, 544 U.S. at 472–73.

[13] 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.

[14] *See, e.g.*, H. P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 538 (1949) ("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 interdependencies of the states only emphasizes the necessity of protecting interstate movement of goods against local burdens and repressions.").

## II. THEORY OF THE GENERAL WELFARE

Figure 2 fits the enumerated powers into the analytical categories of interstate externalities and markets. Now we go beyond "fit" to the underlying analysis of collective action. The structure of governance established by the Articles of Confederation often prevented the states from cooperating together to pursue their common interests.[15] Solving these problems was a central reason for calling the Constitutional Convention.[16]

Consider, for example, James Madison's *Vices of the Political System of the United States*,[17] a memorandum he wrote while preparing for the Constitutional Convention.[18] 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.[19] Particularly revealing is Madison's concern about "want of concert in matters where common interest requires it":

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[15] *See, e.g.*, JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 24–28, 47–48, 167–68, 188–89, 102–08 (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.

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

[17] James Madison, *Vices of the Political System of the United States, in* MADISON: WRITINGS 69, 79 (Jack N. Rakove ed., 1999) [hereinafter *Vices Memo*].

[18] *See* RAKOVE, *supra* note 15, at 46.

[19] *Vices Memo*, *supra* note 17, 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 the theory of the extended republic for which he is best known. For an interpretation and critique of the theory, see Neil S. Siegel, Madison's Reasoning (August 2009) (unpublished manuscript on file with authors). 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 generally* Kramer, *supra* note 16; *see also* AMAR, *supra* note 23, 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.").

> This defect is strongly illustrated in the state of our commercial affairs. How much has the national dignity, interest, and revenue suffered from this cause? Instances of inferior moment are 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, wch. may at present be defeated by the perverseness of particular States whose concurrence is necessary.[20]

As Larry Kramer has written, 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 the great powers to tax, to raise and support armies, and to regulate commerce."[21] Facing these problems also "necessitated conferring authority to exercise these powers by acting directly on individual citizens."[22]

The proceedings of the Philadelphia Convention confirm that the delegates focused on collective action problems for the states in thinking through the scope of congressional power that would eventually become Article I, Section 8:

> Federal power over genuinely interstate and international affairs lay at the heart of the plan approved by the Philadelphia delegates. According to the Convention's general instructions to the midsummer Committee of Detail, which [translated] these instructions into the specific enumerations of Article I, Congress was to enjoy authority 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]

The quoted language registers the need to overcome a series of collective action problems facing the states. This language was offered by Gunning Bedford of Delaware on July 17, 1787 in

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[20] *Id*. at 71. *See* Kramer, *supra* note 16, 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.").

[21] Kramer, *supra* note 16, at 619.

[22] *Id*. at 619–20.

[23] AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 108 (2005) (quoting 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 131–32 (Max Farrand ed. 1966)).

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] What is more, this change wrought by the committee was uncontroversial among the delegates:

> [T]he Convention did not at any time challenge the radical change made by the committee in the form of the provision for the division of powers between state and nation. It accepted *without discussion* the enumeration of powers made by a committee which had been directed to prepare a constitution based upon the general propositions 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 propositions 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 supports our view that

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[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 "the Framers themselves were unclear about the precise reach and interrelations of the various clauses." Regan, *supra* note 3, at 570 n.70.

[25] *See* RAKOVE, *supra* note 15, at 60, 177–78. 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*. at 59.

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

[27] *Id*. Rakove concluded from the fact that the Committee of Detail went unchallenged on this matter that it "was only complying with the expectations of the convention." Rakove, *supra* note 15, at 178. According to Rakove, the committee was "attempt[ing] 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*.

[28] Stern, *supra* note 26, at 1340. *See* Regan, *supra* note 3, at 556 ("[T]here is no reason to think the Committee of Detail was rejecting the spirit of the Resolution when they repealed it with an enumeration.").

Section 8 is a coherent response to a series of collective action problems. It should be read as a unified whole, not as a list of unrelated powers.[29]

We will use modern economics to explain the incompetence and disharmony that many Framers and Founders perceived in the workings of the Article of Confederation. Economics also helps to explain how the powers granted in Article I, Section 8 ameliorated these problems.

### *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. Similary, when pollution abatement improves air quality, one person who breathes air does not detract from another person's breathing it. In contrast, private goods are rivalrous. The bite that

[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?

*Id*. 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.

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 attack, and no one could be excluded from enjoying these benefits. Americans enjoyed these benefits regardless of whether they paid their taxes. Likewise, when abatement improves local air quality, everyone in the locality enjoys breathing the improved air. Similarly, establishing booths and collecting tolls on local streets, while feasible, is uneconomical. 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.[30]

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.[31] A free market will undersupply national defense, clean air, local streets, and other public goods. The state can prevent free

[30] Using these two defining characteristics of public goods, Paul Samuelson provided a remarkably simple and powerful mathematical formulation of efficiency in demand and supply. *See* Paul A. Samuelson, *The Pure Theory of Public Expenditure*, 36 REV. ECON. & STAT. 387, 387–89 (1954); Paul A. Samuelson, *Diagrammatic Exposition of a Theory of Public Expenditure*, 37 REV. ECON. & STAT. 350, 350–56 (1955). Note that the two characteristics of public goods are distinct. An uncongested bridge is nonrivalrous, but a toll booth could be used to exclude people. A congested road with many entrances is rivalrous, but it is difficult to exclude people from using it.

[31] Technical characteristics of goods can cause markets to fail. K.J. ARROW & F.H. HAHN, GENERAL COMPETITIVE ANALYSIS (1971). Market failure provides the conventional economic justification for state supply and regulation of goods. STEPHEN BREYER, REGULATION AND ITS REFORM 7–8 (1982) ("[T]he justifications for regulation . . . are traditional instances of market failure."). Economic theory has analyzed the forms of market failure and proposed remedies for them. *See* CHARLES L. SCHULTZE, THE PUBLIC USE OF PRIVATE INTEREST 54 (1977) ("[A]n incentive-oriented approach [to market failure] has a very large potential role, and its absence is very costly.").

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, including public goods supplied by the states. Unlike public goods, many externalities are byproducts. Whereas people make goods intentionally, they make byproducts incidentally, and many incidental byproducts are harmful. 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 over-fishing. Households and firms enjoy the good and dump the bad in the public domain. When people do not have to pay for making harmful byproducts, they are negative externalities. The proposition that a free market will oversupply negative externalities is analytically equivalent to the proposition that a free market will undersupply positive externalities.

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 affecting many people have the two characteristics of public goods: nonrivalry and nonexclusion. Negative externalities with these two characteristics are called "public negative externalities" or "public bads."[32]

### *B. Internalization Principle*

Some externalities affect more people than others. By definition, a national public good or bad is nonrivalrous and nonexcludable at the national level. Military defense is the standard

[32] 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).

example. Other examples include the post office and intellectual property protection. Instead of being national, however, many externalities are mostly local. Thus, Central Park in Manhattan mostly benefits the people who live or work nearby. Congestion on the streets of San Francisco mostly harms local people who drive or walk on them. A local public good or bad is nonrivalrous and nonexcludable at the local level. 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. The people affected by a policy have more reason to inform themselves and act than people who are unaffected by it. The affected people are more likely than unaffected people 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*.[33]

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 people from all over a nation could benefit from establishing a large park in the mountains. 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 the park at a national scale. Responsibility for such parks should fall upon officials who have a national perspective, which is mostly what we observe in fact.

[33] *See, e.g.*, WILLIAM J. BAUMOL & WALLACE E. OATES, THE THEORY OF ENVIRONMENTAL POLICY (2d ed. 1988).

Generalizing, the internalization principle has this form: 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 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. The internalization principle yields this result: When a public good or bad is purely local, or nearly so, local government should provide or control it.

The internationalization 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 5,000 special governments such as water districts, school districts, park districts, and transportation districts.[34]

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 to solve the problem. To understand why, the next section explains the political foundation of the internalization principle.

### *C. Federal Coase Theorem*

The internalization principle is grounded in the politics of federalism, which we will analyze abstractly. Interstate externalities create an incentive for different governments to cooperate with one other. "Transaction costs" refer to the time and effort required to bargain to an agreement. A famous proposition in law and economics, which helped Ronald Coase win the Nobel Prize in economics, asserts that individuals bargain successfully unless transaction costs

[34] *See, e.g.*, ROBERT D. COOTER, THE STRATEGIC CONSTITUTION 107 (2000).

impede them.[35] 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.[36] For example, when state governments can bargain easily with one other, 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 of bargaining, the supply of public goods and the control of externalities is efficient regardless of the allocation of powers to different levels of government.*

The Federal Coase Theorem describes conditions 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 significant 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 political bargaining in centralized and decentralized states.

The Federal Coase Theorem implies that the federal government enjoys an advantage over the states when obstacles to bargaining among them obstruct the supply of interstate public goods and the control of harmful interstate externalities. To understand the federal government's advantage, we need to understand the obstacles to bargaining among the states. When states

[35] *See, e.g.*, NICHOLAS L. GEORGAKOPOULOS, PRINCIPLES AND METHODS OF LAW AND ECONOMICS 97 (2005) ("[T]he costs of transacting impede the parties' bargain."); Robert Cooter, *The Cost of Coase*, 11 J. LEGAL STUD. 1, 14 (1982) ("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.").

[36] 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.

bargain to form a compact,[37] each one is free to join or not to join. Forming a state compact thus requires unanimity among the participating governments. 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.[38]

We want to contrast these two poles of intergovernmental relations—unanimity and majority rule—without a complicated discussion of the division of powers. Unanimity rule quickly becomes unmanageable as the number of participants increases. To illustrate, assume that five local governments have jurisdiction over segments of a lake's shore. They want to use the lake for recreational swimming, which requires all of them to stop polluting. An agreement among any four governments is worthless without participation by the fifth government. The governments negotiate to distribute the abatement costs. If any four governments reach a tentative agreement, the fifth government can hold out. A holdout government may refuse to cooperate unless the others pay most of the abatement costs. Any of the five governments could be the holdout that shifts abatement costs to the others. In the worst case, all five governments hold out, so that abatement efforts never begin.[39]

In this example of lake swimming, cooperation among four jurisdictions has no value without cooperation by the fifth. The value of cooperation jumps from zero to a large number

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[37] Compacts also 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 . . . .").

[38] *See* U.S. CONST. art. I, § 7. It may be more accurate to describe Congress 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 very significant one.

[39] As a coalition grows, each member who joins demands a fraction of the resulting increase in the surplus from cooperation. With increasing returns to the scale of cooperation, the last member to join increases the coalition's value more than each previous member. The last member can thus demand better terms than each previous member for joining the coalition. Recognizing this fact, everyone has an incentive to hold out and join the coalition last. If everyone holds out, however, the coalition never forms.

when the size of the coalition increases from four to five. This is an extreme case of increasing returns to the scale of cooperation. In general, a coalition has increasing returns to scale when the payoff per member increases with the number of members. Under unanimity rule, increasing returns to scale often causes a holdout problem. Sometimes people can overcome holdout problems by nongovernmental means, such as social norms,[40] but often they cannot. Because of the holdout problem, the probability of cooperation under unanimity rule usually falls with the number of actors who must cooperate.[41]

The same logic applies to the legal foundations for interstate markets. To illustrate, assume that the nation needs a highway 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. As with the lake, the value of cooperation jumps from zero to a large number when the size of the compact increases from four to five. Each state gains bargaining power by holding out and being the last state to join the compact.

As explained, the holdout problem makes the probability of cooperation fall with the number of actors who must cooperate. We can depict these facts by using hypothetical numbers for a federal system. Imagine that the probability of cooperation is roughly .9 when interstate externalities affect two states.[42] 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

[40] *See, e.g.*, ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 123 (1991) ("[T]he theory offered is designed to illuminate in what social contexts and with what content informal norms emerge to help people achieve order without law.").

[41] Equivalently, the transaction costs of bargaining under unanimity rule increase rapidly with the number of bargainers.

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

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, state compacts are unpromising means to solve interstate externalities and build interstate markets.[43]

Having explained why unanimity rule paralyzes large organizations, 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 101 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.[44]

To illustrate by the example of the 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

[43] Unsurprisingly, the Framers provided that ratification by nine of the thirteen states would suffice to establish the Constitution, *see* U.S. CONST. art. VII, even though unanimity was required to amend the Articles of Confederation, *see* Article XIII.

[44] 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.

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 member of the majority coalition often prevents holdouts in large organizations.[45]

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.[46] Equivalently, a shift from unanimity rule to majority rule increases the optimal number of governments in a federal system. Thus, as the European Union resolves more problems by majority rule and fewer problems by unanimity rule, the number of its members increases. A federal system with majority rule can work effectively with more members than can a federal system with unanimity rule.

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

[45] 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 34, at 58–60 (discussing majority-rule division of a fixed sum of money). For a rational reconstruction of Madison's theory of the extended republic in *Federalist 10* and elsewhere that draws from the economic theory of the core, see generally Siegel, *supra* note 19.

[46] *See, e.g.*, PAUL CRAIG & GRAINNE DE BURCA, 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.").

minority suffers a net loss from federal action.[47] 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,[48] as did delegates from the smaller states at the Constitutional Convention in 1787.[49] They prefer risking paralysis under unanimity rule to exploitation under majority rule.

### *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. 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 other. Compacts that require unanimity impose high transactions costs on collective action. If the compact encompasses many states, holdouts will paralyze it. The central government operating through

[47] 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 85–96 (1962); *see also* Mathias Dewatripont & Gerard Roland, *Economic Reform and Dynamic Political Constraints*, *in* 2 MONETARY AND FISCAL POLICY: POLITICS 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.").

[48] *See, e.g.*, CRAIG & DE BURCA, *supra* note 46, 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."); 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."); ERIK BERGLOF ET AL., BUILT TO LAST: A POLITICAL ARCHITECTURE FOR EUROPE 35 (2003) ("In the context of the EU, as a union of states and peoples, . . . . [s]mall countries are concerned about the influence of large countries.").

[49] 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." James Madison, *Speech of June 30, 1787*, *in* 1 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 486 (rev. ed. 1966).

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*.

We have explained the political logic at the foundation of the internalization principle. The internalization principle grounds our explanation of the enumerated powers in Article I, Section 8. 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 problems.

This explanation, although incomplete,[50] is fundamental for understanding the allocation of powers in Article I, Section 8. Our analysis clarifies how Congress should interpret its constitutional powers—that is, when it should vigorously use the authority granted by Article I, Section 8 and when it should leave problems for the states to address. Sometimes state cooperation is likely to succeed, as when the need for cooperation involves only two or three states and they are disposed to cooperate. In such circumstances, Congress should *no*t exercise its power.[51] 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 more

[50] 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 44; and the agency problem of representation of citizens by officials, including lobbying. For a discussion of these topics, see Part III of COOTER, *supra* note 34. These are matters of political logic. A complete theory would have to go beyond logic in explaining politics.

[51] We do not provide here a public choice analysis of the circumstances under which Congress would be willing to exercise self-restraint.

than two or three states, or when states have historical or political obstacles to cooperation. In such situations, Congress should exercise its constitutional power.

We underscore that our analysis of Article I, Section 8 does not address the bounds of federal power authorized by other parts of the Constitution, particularly the enforcement clauses of the Civil War Amendments.[52] We perceive no reason to think that the logic of collective action should guide interpretation of those provisions. The Civil War Amendments dramatically changed the balance of power between the federal government and the states in part by authorizing robust congressional regulation of certain subject matters—including, but not limited to, racial inequality—regardless of the existence of collective action problems involving multiple states.[53]

### *E. Disagreement and Change*

Our analytical framework for interpreting Article I, Section 8 encompasses robust disagreements about the appropriate scope of federal power. 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.[54] And in

[52] *See* U.S. CONST. amend. XIII, § 2; amend. XIV, § 5; amend XV, § 2.

[53] 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 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, which primarily employs tools of economic analysis.

[54] 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 very different kinds of conservatives and liberals on federalism questions.

addition to material externalities, they will point to psychological externalities,[55] such as the concerns of people in one state for the health, education, environment, and physical or financial security of people in another state.[56]

We further note that our framework addresses the substantive meaning of Article 1, Section 8, not the respective institutional roles of Congress and the Court in constitutional interpretation and implementation.[57] Those who endorse vigorous judicial review of federalism

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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, 127 S. Ct. 1610 (2007). And many liberals often oppose broad federal preemption of state law. *See, e.g.*, Wyeth v. Levine, 129 S. Ct. 1187 (2009); Altria Group, Inc. v. Good, 129 S.Ct. 538 (2008).

[55] *See, e.g.*, Daniel 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 Sen, *Rational Fools: A Critique of the Behavioral Foundations of Economic Theory*, 6 PHIL. & PUB. AFF. 317 (1977). We note that if weak feelings people in one state have for people in another count as an interstate externality, then our framework would impose no limits on federal action; the Constitution's distinction between national and local power would collapse. The intellectual tradition of cost-benefit analysis, however, limits the extent to which feelings count as costs and benefits. Under this approach, in order to count, people must be willing to pay to vindicate their feelings. Cheap talk does not suffice. The standard of "willingness to pay" limits the scope of psychological externalities. *See, e.g.*, Esty, *supra*, 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 (1859) (proposing the "harm" principle to cabin the circumstances in which others may interfere with the liberty of the individual). Of course, willingness to pay is a problematic measure of welfare effects in some circumstances, including when individuals care intensely but lack the ability to pay because they are poor. 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 on matters of fundamental human rights.

Constitutional law has struggled with the problem of psychological harm in the context of standing doctrine. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992); Friends of Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167 (2000); 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 Donne." (referencing Devotions XVII)).

[56] 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 are 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.

[57] 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 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.").

questions will interpret our framework primarily in terms of how the Court should restrain Congress, whereas those who favor judicial deference to Congress will interpret our framework primarily in terms of congressional self-restraint and the political safeguards of federalism.[58]

While our framework does not directly address the level of deference that the Court should show to Congress, it does suggest one form that judicial review might take: an inquiry into collection action problems. To illustrate, many people believe that the Court should allow Congress very broad but not limitless authority to legislate under Section 8. One possible standard of review is whether Congress had a rational basis to believe that the tax, expenditure, or regulation at issue addresses a problem of collective action involving more than one state. Congress would have to offer an empirical basis for its judgment that the law is directed at a multi-state problem of collective action, and courts would defer to plausible findings by Congress.

What is gained from an analytical framework that encompasses disagreements? Theory directs research towards missing information that often advances policy debates and occasionally ends them. Our framework for interpreting Article I, Section 8 directs political disagreements into debates about the scope of public goods, externalities, and markets. Applying our framework requires extensive fact finding, which interacts with contestable normative judgments.[59] Finding the scope of interstate externalities and market failures requires

[58] There is a robust and longstanding debate over the political safeguards of federalism in constitutional law and theory. *See, e.g.*, 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); JESSE CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980); Andrej Rapczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After* Garcia, 1985 SUP. CT. REV. 341; Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485 (1994).

[59] An example of a contestable normative concept is national identity. *Cf., e.g.*, Esty, *supra* note 55, 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 number of existing federal environmental programs seems 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

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.

Besides accommodating differences of opinion over the scope of federal power, our interpretation of the general welfare also accommodates historical change, including changes in constitutional meaning.[60] The most important for our purposes concerns the changes in understanding of the sorts of problems that implicate the general welfare. Even before the Constitution was drafted, 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.[61] The young nation subsequently experienced the failures of the Articles of

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a commitment that no American should live in a community where untreated sewage flows into nearby rivers. *See* Clean Water Act §§ 201–219, 33 U.S.C. §§ 1281–1299 (1994).").

[60] 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.*, Neil S. Siegel, *The Virtue of Judicial Statesmanship*, 86 TEX. L. REV. 959 (2008); Robert C. Post, *Theories of Constitutional Interpretation*, *in* CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 23–50 (1995). 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.*, 543 U.S. 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." (internal citations omitted)). Certainly most Americans have broadened their appreciation of interstate externalities that warrant federal intervention. Professor Esty makes related points in focusing on the "choice of public" issue that arises in the context of psychological externalities. *See* Esty, *supra* note 55, 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 ("[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.").

[61] The relevant language allowed Congress to apportion taxes, but left tax levying and collection to the states:

> 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.

Confederation,[62] which changed peoples' 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. As noted earlier, several acute problems of collective action led to the Constitutional Convention.[63]

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 would not crystallize in one's mind. By design, our approach reflects problems that led to the original framing of Article I, Section 8. We honor the general intentions of the Framers without expounding the original

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> 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 art. VIII.

[62] *See supra* notes 15–22 and accompanying text (discussing the shortcomings of the Articles). As the previous note indicates, one such problem was financing the national government. The Articles required the national government to finance itself by requisitioning the state governments. It could not levy taxes against individuals in the states. State governments, however, failed to honor the requisition orders, which deprived the federal government of the resources it needed to act. To solve this problem, the General Welfare Clause in the Constitution empowers Congress to finance itself by taxes:

> 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 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.)

AMAR, *supra* note 23, at 46.

[63] The debate continued after the Constitution was ratified. A major antebellum constitutional controversy concerned the extent to which Congress could spend money on "internal improvements." David Currie provides an illuminating account of various controversial efforts to distinguish "national" from "local" improvements during the first half of the nineteenth century, including President Madison's veto of Senator Calhoun's Bonus Bill in 1817 and President Jackson's veto of the Maysville Road bill in 1830. *See* DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: DEMOCRATS AND WHIGS 1829-1861, 9-25 (2005). 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," 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." *Id*. at 25. We thank Rick Hills for alerting us to this historical period.

meaning of "the general Welfare."[64] Just as the Founders improved their understanding of the phrase from their experiences under the Articles of Confederation, so we can improve our understanding of it from contemporary social science, subsequent historical experience, and the kinds of problems facing the United States today.[65]

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[64] 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 15, 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. *Compare* ALEXANDER HAMILTON, 1791 REPORT ON THE SUBJECT OF MANUFACTURES (1791), *reprinted in* 10 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), *with* THE FEDERALIST NO. 41 (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). *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). As one prominent historian has written:

> Both the framing of the Constitution in 1787 and its ratification by the states involved 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 at 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 15, at 6.

[65] 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." *See* John 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."). This view of the modern scope of federal power apparently would have disabled the federal government from directing federal dollars to the states affected by Hurricane Katrina. Others have maintained that the General Welfare Clause does not authorize any federal spending. *See* 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 (1995) ("The [General Welfare Clause] is not . . . a grant of power to spend. . . . The General Welfare Clause is an intentionally redundant limit on the tax power."); David E. Engdahl, *The Basis of the Spending Power*, 18 SEATTLE U. L. R. 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." (footnotes omitted)). 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." *See* Robert G. Natelson, *The General Welfare Clause and the Public Trust: An Essay in Original Understanding*, 52 KAN. L. REV. 1, 4 (2003) ("Examination of history . . . shows that the General Welfare Clause is more than a mere 'non-grant' of

The specific powers in Article 1, Section 8 address the collective action problems of the 18th century. Two hundred years of social, economic, and technological change have added to the list. In Part IV, we will discuss one such addition at length: environmental protection. We cannot discuss others, but we can suggest what they might be. Figure 3 compares 18th century problems addressed by the specific powers in Article 1, Section 8 to 21st century equivalents. The table also identifies the relevant collective action problems among the states.

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.").

Figure 3: Modern Analogies to Specific Powers in Article 1, Section 8

| **18th Century Problem** | **21st Century Problem** | **General Problem** |
|---|---|---|
| 7. post office | Internet<br>interstate highways<br>communication satellites<br>electromagnetic spectrum | infrastructure with network effects |
| 5. money | credit cards<br>Internet payments<br>Fedwire | medium of exchange |
| 8. intellectual property | newly created species<br>computer programs | Nonappropriable creations |
| 10. piracy | interstate theft<br>software piracy<br>computer viruses | property protection |
| 4. naturalization | immigration law<br>labor law | race-to-bottom |
| 4. bankruptcy | distressed firms<br>tort creditors | race-to-bottom |
| 5. weights and measures | credit card regulation<br>computer protocols | set standards |
| 6. counterfeiting | Truth-in-labeling | protect quality |
| 2. bonds | New forms of state debt | finance state activity |
| 3. interstate commerce | interstate services | sustain national markets |
| 11. declare war<br>12. raise armies<br>13. maintain navy<br>14. make military law<br>15. call militia<br>16. govern militia | Air Force<br>Marines<br>multi-national forces<br>military alliances | positive externalities |

Justice Cardozo may have had in mind some of the changes reflected in Figure 3 when he wrote for the Court in 1937 that the concept of 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."[66]

[66] Helvering v. Davis, 301 U.S. 619, 641 (1937).

## III. DISTINGUISHING INTERSTATE AND INTRASTATE COMMERCE

In the next two Parts, we consider the U.S. Supreme Court's approach to the problem of federalism in Article I, Section 8. We identify lines established by the Court that we mean to reconceive by arguing that interstate public goods, externalities, and markets are "truly national," not "truly local."[67] This Part addresses contemporary Commerce Clause jurisprudence. To distinguish commerce "among the several States" from commerce within a state, our conceptual framework substitutes collective action problems for the Supreme Court's distinction between "economic" and "noneconomic" activity, which is mostly irrelevant to the problems of federalism. In Part IV, we revisit the Court's longstanding interpretation of the General Welfare Clause.

To be clear, this Part and the next do not presuppose that the Court ought to engage in judicial review of federalism questions. Nor do these Parts address how active or deferential the Court should be in the event it does engage in judicial review of federalism questions. Rather, our main point is that an analysis of collective action problems provides a substantive understanding of the division of powers between the federal government and the states in Article I, Section 8 that is superior to the understanding reflected in the Court's jurisprudence interpreting the Commerce Clause and the General Welfare Clause.

### *A. Collective Action Problems, Not Commercial Activity*

Before 1995, conventional wisdom held that Congress could regulate essentially any activity under the Commerce Clause.[68] In 1995, the Supreme Court started imposing some limits

[67] United States v. Morrison, 529 U.S. 598, 617–18 (2000).

[68] Throughout U.S. history, the Supreme Court has vacillated regarding the scope of Congress's "power . . . [t]o regulate Commerce . . . among the several States." U.S. CONST. art. 1, § 8, cl. 3. Initially, the Court broadly construed the Commerce Clause. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 193–97 (1824). From the late 1800s

on the regulatory power of Congress. The Court's holdings created a new jurisprudence of the Commerce Clause. We will show that, under this jurisprudence, the Court's determination of whether the activity regulated by Congress is "economic" or "noneconomic" also determines whether that activity exists "among the several States" or instead is internal to a state. We will then show that our analysis of collective action provides a better constitutional understanding of the scope of federal power authorized in Clause 3.

The new epoch began with a constitutional challenge to the federal Gun-Free School Zones Act of 1990 ("GFSZA"),[69] which criminalized possession of a firearm within 1000 feet of a school.[70] In *United States v. Lopez*, the Justices considered whether Congress had exceeded its commerce power in enacting this law.[71] Writing for Justices O'Connor, Scalia, Kennedy,

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until 1937, however, the Court adopted a narrower view and invalidated many statutes as beyond the scope of the commerce power. Sometimes the Court struck down acts that regulated "manufacturing" and not "commerce." *See, 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); 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). Other times, the Court concluded that the effect on interstate commerce was insufficiently "direct." *See, e.g.*, A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495, 546 (1935) (invalidating the Live Poultry Code for New York City, which regulated the sale of sick chickens and which included wages, hours, and child-labor provisions, based on an "indirect" relationship to interstate commerce).

In 1937, however, the Court reversed course. Justice Owen Roberts changed 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. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (upholding federal regulation of labor relations in the steel industry). His "switch in time that saved nine" came to characterize this era of Commerce Clause jurisprudence. *See* United States v. Darby, 312 U.S. 100 (1941) (upholding the Fair Labor Standards Act of 1938, which prohibited the shipment in interstate commerce of goods made by employees paid less than the mandated minimum wage); Wickard v. Filburn, 317 U.S. 111 (1942) (upholding 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); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (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 (1964) (upholding Title II's application to a small, family-owned restaurant). From 1937 until 1995, the Court did not invalidate one federal law as beyond the commerce power.

[69] 18 U.S.C. § 922(q)(2)(a) (2000); 18 U.S.C. § 921(a)(25) (2000).

[70] 18 U.S.C. § 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"); § 921(a)(25) (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").

[71] Chief Justice Rehnquist identified three types of activity that Congress may regulate using its commerce power:

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 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."[72] He did not actually refute the government's empirical assertion that guns near schools substantially affect interstate commerce in the aggregate.[73] Instead, he changed the subject, "paus[ing] to consider the implications of the Government's arguments,"[74] which were essentially that if Congress may regulate gun possession in schools, then Congress may regulate anything. Specifically, Rehnquist rejected the

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> 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.

514 U.S. at 558–59 (citations omitted). We focus on substantial-effects cases because it has proven most difficult to distinguish interstate from intrastate commerce in those cases. We note, however, that our approach would allow robust congressional regulation of the channels and instrumentalities of interstate commerce. There are large economic advantages in requiring uniformity and access in the channels and instrumentalities of interstate commerce, and collective action problems often impede the achievement of uniformity and access. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 193–97 (1824), and Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964), can be justified on this ground.

[72] *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.

[73] 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).

[74] *Id*. at 564–65.

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."[75] 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 proved 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."[76] 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."[77]

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.[78] *United States v. Morrison*[79] 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 Five of the Fourteenth Amendment. 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 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,

[75] *Id*. at 564.
[76] *Id*. at 580 (Kennedy, J., concurring).
[77] *Id*.
[78] 42 U.S.C. § 13981.
[79] 529 U.S. 598 (2000).

economic activity." 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.[80]

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.[81] 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."[82] 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."[83]

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."[84] 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."[85] Again, the Court did not actually refute the government's empirical assertions. Instead, it denied "that Congress may regulate noneconomic,

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[80] 529 U.S. at 613. The Chief Justice further wrote that, like 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*.

[81] *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.").

[82] *Id*. at 615.

[83] *Id*.

[84] *Id*.

[85] *Id*. at 615–16.

violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce."[86]

In *Gonzales v. Raich*,[87] 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 granted to Congress by Clause 3, but some particular instances within the class may be noneconomic. In other words, regulation may encompass noneconomic activity if Congress rationally concludes that it is part of a general class of economic activity. 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.[88]

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 found 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

[86] *Id*. at 617–18.

[87] 545 U.S. 1 (2005).

[88] *Raich* arose when California created a medical exception to its marijuana laws. No such exception exists in the federal Controlled Substances Act (CSA), 21 U.S.C. § 801 *et seq*. 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. Writing for the Court, Justice Stevens relied upon *Wickard v. Filburn*, *see supra* note 68, 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." *Raich*, 545 U.S. at 18. 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. *Id*. at 18–19.

production, distribution, and consumption of commodities."[89] Under the Court's jurisprudence, then, the economic/noneconomic determination is dispositive because only economic activities may be aggregated for purposes of deciding whether the activity has substantial effects on interstate commerce, and every activity Congress might want to regulate has substantial effects on interstate commerce in the aggregate.

Can the distinction between economic and noneconomic activity demarcate the boundary between federal and state power in Clause 3? This distinction may suffice in a rough-and-ready way for purposes of defining "Commerce" in that clause; we have nothing to say about that subject. But in our view, a dictionary definition of economics is the wrong place to look for the distinction between commerce "among the several States" and commerce within a state. The idea of "Commerce . . . among the several States" entails independent requirements: "commerce" and "among the several States." Reducing the two requirements to one leaves out the main reason for making the distinction. The main reason for separating powers is the relative competences of the federal and state governments. The economic/noneconomic distinction, however, does not systematically relate to the competences of the federal and state governments. The federal government is not especially competent in economic matters and the state governments are not especially competent in noneconomic matters.

The logic of collective action, by contrast, relates to the competences 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 problem of collective action involving multiple states.[90] That is the key inquiry in determining whether a

[89] *Id*. at 25 (quoting Webster's Third New International Dictionary 720 (1966)).

[90] Or, to use Chief Justice Marshall's language in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), an analysis of collective action should determine whether Congress is dealing with "that commerce which concerns more States than one." *Id*. at 194. *See id*. at 195 ("The genius and character of the whole government seem to be,

commercial activity is interstate and thus regulable under Clause 3 or intrastate and thus beyond the scope of the commerce power. As we now show, the Court has, at times, recognized this point.[91]

### *B. The Court on Collective Action Problems*

During the 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 a collective action problem—whether an unfair practice in one jurisdiction conveyed a competitive advantage over another jurisdiction with a fair practice.[92] In national markets, competition favors the lowest-cost producers. 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 or destroying the environment.[93]

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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.").

[91] For a related approach to the Commerce Clause, see generally Regan, *supra* note 3. For concern that using such an approach in constitutional adjudication would require courts to make political judgments that they should not make, see 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). Our approach to the problem of federalism, whether or not it is used in judicial review, is similar in important respects to the European principle of "subsidiarity." *See, e.g.*, Mattias Kumm, *Democratic Constitutionalism Encounters International Law: Terms of Engagement*, *in* THE MIGRATION OF CONSTITUTIONAL IDEAS 256, 264-68 (Sujit Choudhry ed., 2007); Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795, 831-38 (1996).

[92] Some scholars conceive of competitiveness effects that spill across jurisdictions as "economic externalities." *See, e.g.*, Esty, *supra* note 55, at 593; Richard B. Stewart, *International Trade and the Environment: Lessons from the Federal Experience*, 49 WASH. & LEE L. REV. 1329, 1340–41 (1992); Richard B. Stewart, *Pyramids of Sacrifice?: Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1211–19 (1977).

[93] 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).

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:[94]

> [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," as the Clayton Act . . . has condemned other "unfair methods of competition" made effective through interstate commerce.[95]

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.[96]

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[94] Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 (2000). *Darby* overruled *Hammer v. Dagenhart,* 247 U.S. 251 (1918) (the Child Labor Case), 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." 247 U.S. at 532. The *Lochner* 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 childmade 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*. at 531-32.

[95] 312 U.S. 100, 122 (1941); *see also id*. at 115 ("The motive and purpose of the 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.").

[96] 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 3, at 603-04. For ongoing debates in law and economics on races to the bottom (or top), see, for example, 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); 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 55; Joshua D. Sarnoff, *The Continuing Imperative (But Only from a National Perspective) for Federal Environmental Protection*, 7 DUKE ENVTL. L. & POL'Y F. 225 (1997); Peter P. Swire, *The Race to Laxity and the Race to Undesirability: Explaining Failures in Competition Among Jurisdictions in Environmental Law*, 14 YALE J. ON REG. 67 (1996); Richard L. Revesz, *The Race to the Bottom and Environmental Regulation: A Response to Critics*, 82 MINN. L. REV. 535 (1997).

The Court later used a similar argument from collective action to justify federal regulation of environmentally destructive practices.[97] In *Hodel v. Virginia Surface Mining and Reclamation Association*,[98] 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.[99]

The Court emphasized that "the prevention of this sort of destructive interstate competition is a traditional role for congressional action under the Commerce Clause."[100]

The Court also recognized the problem of destructive competition when explicitly considering the relationship of congressional action to the general welfare. In *Steward Machine Co. v. Davis*,[101] the Court rejected a constitutional challenge to the federal unemployment compensation system created by the Social Security Act ("SSA"). Writing for the Court, Justice Cardozo stressed a collective action problem among the states:

> 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.[102]

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[97] The Court also used collective action reasoning in upholding the 1961 amendments to the FLSA. *See* Maryland v. Wirtz, 392 U.S. 183, 190 (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).

[98] 452 U.S. 264, 281 (1981).

[99] *Id*. at 281–82 (quoting 30 U.S.C. § 1201(g) (1976 ed., Supp. III)).

[100] *Id*. at 282.

[101] 301 U.S. 548 (1937).

[102] *Id*. 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."[103]

On the same day that *Steward Machine Company* came down, the Court in *Helvering v. Davis*[104] sustained the constitutionality of the SSA's old-age pension program, which had been funded exclusively by federal taxes. Writing for the Court, Justice Cardozo again 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, supra. 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.[105]

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.[106]

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[103] *Id*. at 588 n.9.
[104] 301 U.S. 619 (1937).
[105] *Id*. at 644 (footnote omitted).
[106] 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.

In the preceding cases, the Court offered collective action problems as a reason to sustain congressional regulation. Conversely, the Court implicitly has offered the absence of a collective action problem as a reason to prohibit congressional regulation. Almost appearing to anticipate *Raich*, 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."[107] This statement 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."[108] With independence rather than interdependence, the states do not face a collective action problem. On the other hand, one way to criticize *Lopez* is 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 possession and use that would have been undermined unless Congress were permitted to regulate intrastate gun possession in school zones. However this debate turns out, the right place to look for the contours of Congress's regulatory power is collective action problems involving multiple states, not a distinction between economic and noneconomic activity.[109]

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SLOMP, *supra* note 46, at 127.

[107] *Lopez*, 514 U.S. at 561.

[108] *Id.* at 581 (Kennedy, J., concurring) (emphasis added). *See* Regan, *supra* note 3, at 566 (arguing that this is one way to read the portion of Kennedy's opinion quoted in the text).

[109] For this reason, our approach supports the result in *Wickard v. Filburn*, 317 U.S. 111 (1942), which, as noted *supra* note 68, 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. Collective

We have discussed cases in which a collective action problem among the states helps to justify congressional regulation, and a case in which no collective action problem among the states serves to impugn congressional regulation. A third type of case—implicating the dormant Commerce Clause—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.[110] 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.[111]

There are many examples in the *U.S. Reports* of these kinds of collective action problems.[112] For instance, 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."[113] 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

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action problems render it impossible for states to address the problem of agricultural overproduction (and low prices) on their own. A state can order limits on production within its own jurisdiction, but the effect on market price will be limited or nonexistent if the crop is grown in a number of other states.

[110] *See supra* notes 11–12 and accompanying text (discussing dormant Commerce Clause doctrine).

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

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

[113] 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 export, 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.

consumers in Massachusetts. The Court invalidated the law for lacking a permissible nonprotectionist purpose. In general, collection action problems justify the Court's distinction there and elsewhere between state protectionism, which is almost always unconstitutional,[114] and health and safety regulations, which are often permissible exercises of a state's police powers.[115] 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.[116]

### *C. Illustration: The Regulation of Marriage*

We have surveyed cases in which the Court cited a problem of collective action among the states as one reason for its decision. In many cases involving the Commerce Clause, however, this reason was unimportant or absent. The Court often upheld federal statutes without inquiring into collective action problems.[117] Prospectively, we counsel greater reliance on collective action problems and less reliance on the economic/noneconomic distinction as grounds for constitutional interpreters to decide whether Clause 3 authorizes federal regulation.

To see the difference between these two grounds, consider the traditional exclusion of Congress from regulating marriage. Congress could be excluded on the ground that marriage is a

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

[115] *H. P. Hood & Sons, Inc. v. Du Mond*, 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.").

[116] In *Baldwin v. G. A. F. Seeling, 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.

[117] *See, e.g.*, *supra* note 68 (citing illustrative cases).

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.

Even if marriage were nonetheless a noneconomic institution or activity, the question remains why states have greater competence than the federal government in regulating it. The reason for believing that the state governments are more competent than the federal government to regulate marriage does not concern its allegedly noneconomic character. Rather, the reason is that regulating marriage does not seem to pose a collective action problem for the states. 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.

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 harmonization in marriage laws,[118] or the question whether all marriages recognized by one state must be

[118] 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.

recognized by other states.[119] We also do not address the analytically distinct question of whether state marriage laws violate the federal constitutional rights of individuals.[120]

## IV. REGULATION UNDER CLAUSE 1: POLLUTION AND ENDANGERED SPECIES

We turn now from Clause 3 to Clause 1 and identify a key implication of our interpretation of Section 8. In our view, Clause 1 sometimes encompasses authority to regulate, not only to tax and spend. We particularly focus on environmental interdependencies that cause activities in one state to spill over to another. First we consider potentially problematic uses of congressional power that are presently of theoretical interest only—specifically, where Congress seeks to regulate *interstate* activities that are arguably not commercial in nature. Next we analyze potential constitutional problems that are of immediate practical concern—specifically, where Congress seeks to regulate *intrastate* activities that are arguably not commercial in nature.

### *A. Interstate Activities That May Not Be Commercial In Nature*

#### 1. The Problem

As we have seen, Clause 3 gives Congress the power to regulate commerce "among the several States."[121] When the regulated activity crosses state boundaries, the federal courts are lax

[119] We have in mind the full-faith-and-credit questions implicated by the issue of gay marriage. Under our framework (and putting aside the equal-protection issue), advocates of gay marriage might argue that mobility requires marriages performed in one state to be recognized in all other states, even if these other states might not themselves recognize gay marriages originating in their states.

[120] 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 suggested that the issue of gay marriage was distinguishable without explaining why or how. *See id.* at 578. 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, *id.* at 560, 567, 575, 578, prohibitions of gay marriage would almost certainly violate equal protection. Yet the Court explicitly avoided that conclusion. *Id.* at 578. For a discussion, see Siegel, *supra* note 60.

about its being "commercial." Thus, environmental pollution and endangered species that cross state lines apparently fall within the commerce power, even though they are not commerce and may have very attenuated effects on commerce.[122] Congress may regulate the interstate movement of, say, naturally occurring arsenic in water that crosses state lines through an underground aquifer or nonnavigable stream.[123] And Congress may regulate activities just because they threaten the existence of a species that moves across state boundaries.[124] These examples are unequivocally interstate, 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.[125]

We have explained that when the regulated activity is clearly interstate, the Court is undemanding about its being commercial. Conversely, as we showed in Part III, when the regulated activity is deemed commercial, the Court is undemanding about its being interstate.

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[121] U.S. CONST. art. I, § 8, cl. 3.

[122] *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.").

[123] 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.

[124] *Accord* William Funk, *The Court the Clean Water Act, and the Constitution:* SWANCC *and Beyond*, 31 ENVTL. L. REP. 10766 (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.").

[125] *See* Funk, *supra* note 124, 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 (citing Brooks v. United States, 267 U.S. 432 (1925), and Caminetti v. United States, 242 U.S. 470 (1917)).

The Court simply presumes that commercial activity has substantial effects on interstate commerce and that noncommercial 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.[126] 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.

2. The Solution

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

For example, the touchstone of federal authority for five Justices in *Rapanos v. United States* was interstate navigable waters.[127] But lots of water that flows across state boundaries is

[126] *Cf.* Funk, *supra* note 124, 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.").

[127] *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) (cited *infra* note 148). 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" flows.

*nonnavigable*, and some of this water presumably lacks a significant nexus to interstate navigable waters. Were federal authority triggered by an interstate externality, however, 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.[128]

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.[129] The same can be said of interstate drinking water that has been contaminated by naturally occurring arsenic instead of an industrial polluter.[130] In either case, federal action can internalize the externality. The federal government, therefore, potentially enjoys a decisive advantage over the states in addressing the problem of preserving species or combating pollutants that move interstate.

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*Id*. at 730–35. 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 *SWANCC*, 531 U.S. at 167, 172). 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*.

[128] 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.

[129] *See infra* Part IV.C.2 (discussing these examples and citing relevant case law).

[130] *See id*.

So far, we have argued that Article 1, Section 8 authorizes Congress to promote the general welfare in the presence of interstate environmental externalities without a nexus to commerce or economics. Accordingly, the economic or noneconomic nature of an environmental problem is irrelevant to the constitutionality of federal taxation,[131] spending,[132] or conditional spending[133] aimed at addressing it. This assertion is uncontroversial so long as Congress limits its means to taxation or expenditure and avoids regulation. Many economists, however, advocate externality taxes as the most effective way to accomplish regulatory

[131] Congress has seldom used its tax power to advance environmental protection. The most prominent example is Superfund, under which the federal government can fund a cleanup of hazardous substances through a tax on petrochemical companies, utilities, and crude oil importers, as well as reimbursement from responsible parties. *See generally* 26 U.S.C. § 9611 (2000).

[132] Congress appropriates billions of dollars in grants under various Clean Water Act programs. *See, e.g.*, Denis Binder, *The Spending Clause as a Positive Source of Environmental Protection: A Primer*, 4 CHAP. L. REV. 147, 161 (2001) (providing examples from fiscal year 2000, including a Drinking Water State Revolving Fund and a Clean Water State Revolving Fund, each providing roughly $1.2 billion). The federal government could make widespread use of federal funds to finance state environmental protection efforts directed at interstate externalities.

[133] Under *South Dakota v. Dole*, 483 U.S. 203 (1987), Congress may condition federal dollars on state compliance with requirements that the federal government has no power to impose directly. In *Dole*, the Court assumed that the Twenty-First Amendment would prohibit Congress from imposing a national minimum drinking age directly and held 7–2 that the General Welfare Clause nonetheless allowed Congress to condition five percent of federal highway funds on the adoption by recipient states of a minimum drinking age of twenty-one. *Id.* at 217–18. Chief Justice Rehnquist wrote for the Court that the condition imposed by Congress was "clearly stated" and "directly related to one of the main purposes for which highway funds are expended—safe interstate travel." *Id.* at 208. *Dole* thus allows Congress to accomplish indirectly through financial incentives much of what it cannot impose directly through regulations. *See, e.g.*, New York v. United States, 505 U.S. 144, 166–67 (1992). For an analysis of how much leverage *Dole* likely gives Congress in light of the current composition of the Court, see generally Neil S. Siegel, Dole*'s Future: A Strategic Analysis*, 16 SUP. CT. ECON. REV. 165 (2008).

The most prominent environmental example of conditional federal spending is the 1990 amendments to the Clean Air Act, which withdraw federal highway funds from states that have not achieved the National Ambient Air Quality Standards ("NAAQS"). *See* 42 U.S.C. § 7509(b)(1)(A) (2000); 42 U.S.C. § 7410(m) (2000). The NAAQS specify the level of air quality required to protect the public health and welfare. We do not analyze whether this use of the conditional spending power raises concerns under *Dole*'s relatedness and coercion requirements. We instead use our analysis of collective action to elucidate the coercion requirement.

In *Dole*, Rehnquist suggested there could come a point at which incentives become coercive. Without offering much guidance, he found that the incentive at issue was not "so coercive as to pass the point at which pressure turns into compulsion." 483 U.S. at 211. Our account of collective action clarifies this tipping point. As we explained in Part II, unanimity rule among the states allows each state to veto collective action, so unanimity rule assures that collective action does not make a state worse off than inaction. Similarly, a voluntary program of federal funding allows each state to opt out of the program, so opting in should not make a state worse off than opting out. Federal coercion of states is less likely under conditional funding than under regulation. We also explained in Part II that unanimity rule paralyzes collective action. Most states, however, will accept conditional funding under reasonable conditions, thus avoiding paralysis. Thus, conditional funding by Congress ideally achieves collective action without coercion.

objectives. For example, a federal price on pollution could be construed as a permitted tax or a forbidden regulation under Clause 1 of Article 1, Section 8.

In our view, the courts should allow Congress to use such instruments to promote the general welfare without the need to establish a nexus to interstate commerce. Indeed, the tenuous economic distinction between taxes and regulations suggests that it does not make sense to allow one under Clause 1 but not the other.[134] Regulations often impose fines for their violation. Distinguishing a fine on forbidden behavior from a tax on permitted behavior can be difficult.[135] Confusion is especially likely insofar as policy makers heed the urging of economists to control behavior by relying more on taxes and less on regulations.[136] Justifying federal pursuit of the general welfare would extend federal regulation to instances of environmental degradation without notably economic character that involve collective action problems.[137]

Some will no doubt argue that it is too late in the day to consider allowing any federal regulation under Clause 1, which the Court held in 1936 does not grant Congress independent authority to regulate in order to promote the general welfare. "The true construction [of the first clause]," the Court wrote in *United States v. Butler*, "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

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[134] The Court at one point distinguished impermissible "regulatory" taxes from permissible "revenue raising" taxes. *See, e.g.*, Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922) (Child Labor Tax Case). 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.*, Sonzinsky v. United States, 300 U.S. 506, 513 (1937) ("Every tax is in some measure regulatory. . . . But [it] is not any 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 the courts."); United States v. Kahriger, 345 U.S. 22, 31 (1953) ("Unless there are provisions extraneous to any tax need, courts are without authority to limit the exercise of the taxing power.").

[135] For a behavioral distinction, see Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523 (1984).

[136] Economists have notably urged governments to scrap regulations and replace them with taxes for pollution, congestion, overfishing, accident risks, and energy consumption.

[137] We note, but do not analyze here, the complication that intergovernmental tax immunity prohibits the federal government from taxing the states.

provision for the general welfare."[138] The issue, however, warrants revisiting. To begin with, the text of Clause 1 can be parsed in several ways. Most relevant here, the words "provide for the common Defence and general Welfare of the United States" can be read as standing alone, not as modifying the previously mentioned power to tax (or spend, which is not explicitly mentioned in the text).[139] Further, our interpretation of Article I, Section 8 ameliorates the longstanding concern about a general federal police power[140] because it imbues the phrase "general Welfare" with substantive meaning. We offer a rationale for federal power to address noneconomic 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 regulation under Clause 1 does not render the rest of Section 8 superfluous. On the contrary, when Article I, Section 8 is interpreted in the way we suggest, 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 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.

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[138] *United States v. Butler*, 297 U.S. 1, 318–19 (1936).

[139] We also note that *Lopez* and *Morrison* changed the interpretation of the commerce power that had prevailed since 1937, and the Court just radically changed the longstanding judicial understanding of the Second Amendment. *See* 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).

[140] *Butler*, 297 U.S. at 318 ("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.'").

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. For example, if the regulated activity is "commercial" or "economic" as the Court has conceived those terms, then the Commerce Clause provides the appropriate warrant. If, however, no other clause in Section 8 authorizes Congress to address a problem of collective action involving more than one state, then the General Welfare Clause remains available to Congress. On our account, Section 8 authorizes Congress to address non-economic problems of collective action that the states are unable to solve.

3. A Virtue of the Solution: Avoiding Avoidance

Now we turn to another advantage of allowing Congress to regulate under Clause 1. *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, in cases implicating collective action problems.

The first avoidance decision came in *United States v. Jones*.[141] Federal law criminalized arson or attempted arson of "any building" that is "used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce."[142] *Jones* presented the question whether

[141] 529 U.S. § 848 (2000).
[142] 18 U.S.C. § 844(i) (2000).

arson of a private residence violates 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.[143]

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."[144] 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 latter."[145] 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."[146]

We would add that state control over arson laws does not seem to cause a collective action problem. Different rates of arson in different states may have some effect on the price its residents pay for mortgages, insurance, or gas. These effects, however, do not allow one state to externalize its costs on 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

[143] *Jones*, 529 U.S. at 855.
[144] *Id*.
[145] *Id*. at 857 (internal quotation marks omitted).
[146] *Id*. at 858 (internal quotation marks omitted).

another state by threatening to reduce sanctions against arsonists. The federal law apparently did not address a collective action problem, so construing it narrowly limits federal power, as our framework commends.

Conversely, 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* is such a case.[147] 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")[148] 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."[149] The Army Corps of Engineers ("Corps") had promulgated rules regarding the applicability of the CWA. One of them, the "Migratory Bird Rule,"[150] 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 "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."[151]

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[147] 531 U.S. 159 (2001).

[148] Federal Water Pollution Control Act Amendments of 1972 (Clean Water Act or CWA), Pub. L. No. 92–500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251–1387 (2000)).

[149] 33 U.S.C. § 1362(7) (2000).

[150] Migratory Bird Rule, 51 Fed. Reg. 41,217 (Nov. 13, 1986) (stating that section 404(a) extends to intrastate waters "[w]hich are or would be used as habitat by birds protected by Migratory Bird Treaties," "[w]hich are or would be used as habitat by other migratory birds which cross state lines," "[w]hich are or would be used as habitat for endangered species, or which are or would be "[u]sed to irrigate crops sold in interstate commerce"). *See also* 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) (1999) (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 . . . .").

[151] *SWANCC*, 531 U.S. at 173 (internal quotation marks omitted).

The Justices divided along the same lines as in *Lopez* and *Morrison*, deciding 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:

> [W]e would have to evaluate the precise object or activity that, in the aggregate, substantially affects interstate commerce. This is not clear, for although the Corps has claimed jurisdiction over petitioner's land because it contains water areas used as habitat by migratory birds, respondents now . . . focus upon the fact that the regulated activity is petitioner's municipal landfill, which is "plainly of a commercial nature." But this is a far cry, indeed, from the "navigable waters" and "waters of the United States" to which the statute by its terms extends.
>
> These are significant constitutional questions . . . , and yet we find nothing approaching a clear statement from Congress that it intended § 404(a) to reach an abandoned sand and gravel pit such as we have here. Permitting 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. . . . We thus read the statute as written to avoid the significant constitutional and federalism questions raised by respondents' interpretation . . . .[152]

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.[153]

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[152] 531 U.S. at 173–74 (citations omitted).

[153] 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 fact does not indicate that Congress will now provide the clear statement that the *SWANCC* Court held was required—particularly in light of the present composition of the Court.

In stark contrast to Chief Justice Rehnquist, Justice Stevens wrote a dissent that follows our interpretation of Article I, Section 8:

> [T]he migratory bird rule does not blur the "distinction between what is truly national and what is truly local." Justice Holmes cogently observed in Missouri v. Holland that the protection of migratory birds is a textbook example of a national problem. . . . 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.[154]

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.

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[154] 531 U.S. at 195 (Stevens, J., dissenting) (some citations omitted). Stevens referred to *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. 252 U.S. at 430–431. Writing for the Court, Justice 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 reliance is vain, and were it otherwise, the question is whether the United States is forbidden to act.

*Id*. at 435 (emphasis added).

### *B. Intrastate Activities That May Not Be Commercial In Nature*

1. The Problem

A large literature identifies applications of federal environmental law that may be constitutionally vulnerable after *Lopez*, *Morrison*, *SWANCC*, and now *Rapanos*.[155] Prominent concerns include (1) the Clean Water Act's protection of isolated, intrastate wetlands[156] and other wetlands that lack "a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made";[157] (2) the Endangered Species Act's protection of isolated, intrastate habitats for species that lack commercial value;[158] (3) the Clean Air Act's regulation of wholly intrastate ambient air quality standards;[159] (4) the Safe Drinking Water Act's purity

[155] *See, e.g.*, Schroeder, *supra* note 153, at 422–23 (discussing problematic applications and citing the literature). *But see* Mollie Lee, *Environmental Economics: A Market Failure Approach to the Commerce Clause*, 116 YALE L.J. 456, 460 (2006) (arguing that "environmental regulation is economic in nature because it changes commercial actors' economic calculations by requiring them to internalize the environmental externalities of their decisions"); *id*. at 476 ("The market failure approach suggests that when Congress enacts statutes correcting market failures, that legislation should be understood as economic in nature."); *id*. at 489–91 (arguing that the Endangered Species Act is within the scope of the commerce power so conceived).

[156] *See supra* note 148 (citing the Clean Water Act ("CWA")).

[157] *Rapanos*, 547 U.S. at 759 (Kennedy, J., concurring in judgment) (quoting *SWANCC*, 531 U.S. at 167, 172).

[158] Endangered Species Act of 1973 (ESA), Pub. L. No. 93–205, 87 Stat. 884 (codified as amended at 16 U. S. C. §§ 1531–1544 (2000)). For a lucid description of the operative provisions of the ESA, see Lee, *supra* note 155, at 462. For decisions entertaining Commerce Clause challenges to various applications of the ESA, see GDF Realty Invs., Ltd. v. Norton, 326 F.3d 622 (5th Cir. 2003) (commercial development of private property that could harm six species of subterranean invertebrates found only within two Texas counties), *reh'g and reh'g en banc denied*, 362 F.3d 286 (5th Cir. 2004); Rancho Viejo, LLC v. Norton, 323 F.3d 1062 (D.C. Cir. 2003) (housing development construction that could jeopardize the continued existence of the arroyo southwestern toad, which is located only in California), *reh'g and reh'g en banc denied*, 334 F.3d 1158 (D.C. Cir. 2003); Gibbs v. Babbitt, 214 F.3d 483 (4th Cir. 2000) (taking of red wolves on private land); Nat'l Ass'n of Homebuilders v. Babbitt, 130 F.3d 1041 (D.C. Cir. 1997) (public hospital and power plant construction that could harm the Delhi Sands Flower-Loving Fly, which is located only in California). The Supreme Court denied certiorari in all four cases. We expect a grant of certiorari in an ESA case in the near future.

[159] 42 U.S.C. §§ 7401–7671q (2000).

requirements for the arsenic content of local drinking water supply systems;[160] and (5) the Superfund statute's regulation of on-site disposal of hazardous waste.[161]

Defenders of these regulations often invoke Congress's authority to regulate intrastate activity that affects interstate commerce. The problem under current law, however, is that localized private conduct—such as the modification of critical habitat by a single landowner on a small piece of property—has little discernible impact on any national market and is not readily described as "economic" activity. For example, the Endangered Species Act regulates both the commercial developer (economic) and the recreational user (noneconomic) whose use of private land harms an endangered species.[162] Likewise, the Safe Drinking Water Act regulates the contamination of water from both industrial pollution (economic) and natural sources such as arsenic (noneconomic). Regulatory schemes established by the Clean Water Act and the Clean Air Act apply to anyone who generates certain kinds of pollution, not just commercial enterprises.[163]

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[160] Safe Drinking Water Act, Pub. L. No. 93–523, 88 Stat. 1660 (1974) (codified as amended at 42 U.S.C. § 300f (2000)). *See* Nebraska v. E.P.A., 331 F. 3d 995 (D.C. Cir. 2003) (rejecting a facial Commerce Clause challenge to the Safe Drinking Water Act regulation setting the maximum contaminant level for arsenic in drinking water).

[161] Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980, Pub. L. No. 96–510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601–9675 (2000)). *See* United States v. Olin Corp., 107 F.3d 1506 (11th Cir. 1997) (rejecting a Commerce Clause challenge to federal regulation of the on-site disposal of hazardous waste under CERCLA).

[162] *See, e.g.*, Rancho Viejo, LLC v. Norton, 323 F.3d 1062, 1080 (D.C. Cir. 2003) (Ginsburg, C.J., concurring) ("Our rationale is that, with respect to a species that is not an article in interstate commerce and does not affect interstate commerce, a take can be regulated if—but only if—the take itself substantially affects interstate commerce. The large-scale residential development that is the take in this case clearly does affect interstate commerce. Just as important, however, the lone hiker in the woods, or the homeowner who moves dirt in order to landscape his property, though he takes the toad, does not affect interstate commerce.").

[163] The comprehensive-scheme approach of *Raich*, *see supra* notes 87–89 and accompanying text, may relieve some of the stress on certain applications of environmental statutes. *See, e.g.*, Michael C. Blumm & George A. Kimbrell, Gonzales v. Raich, *the "Comprehensive Scheme" Principle, and the Constitutionality of the Medical Marijuana Case: A Commerce Clause Counter-Revolution?*, 35 ENVTL. L. 491, 497 (2005). Courts, however, will still need to decide whether the comprehensive scheme itself regulates economic activity. *See* Lee, *supra* note 155, at 468.

2. The Solution

Our account of Article I, Section 8, depending on how it is interpretated, might ease some of the constitutional pressure in situations where an intrastate activity is noneconomic in nature. Under our conception of Clause 1, federal regulation can be premised on interstate externalities; it need not be premised on economic activity or interstate movement. As we explained in our discussion of psychological externalities,[164] if people in one state care enough to pay to protect the local environment in another, then this fact counts in a broad measure of externalities.[165] The existence of such externalities could justify federal regulation under Clause 1 to protect isolated, intrastate wetlands or species habitats; to regulate intrastate ambient air quality standards; to limit the arsenic content of local drinking water supply systems; and to regulate on-site disposal of hazardous waste. Professor Esty may have had a robust conception of interstate externalities in mind when he observed that "[i]nterest in distant environmental harms may derive from a sense of community identity that exceeds narrow jurisdictional bounds," and that a "number of existing federal environmental programs seems to reflect . . . a national ecological and political identity that spans the fifty states."[166]

3. A Virtue of the Solution: Focusing on What Matters

Our approach focuses the interpretive community on the issue that really matters to lawmakers and citizens: the environmental impact of the harmful activity on the general welfare, not the effect on interstate commerce. In the environmental context, debate over the nexus between a regulated activity and commerce distracts attention from the central constitutional

[164] *See supra* notes 55–56 and accompanying text (discussing psychological externalities).

[165] *See* Esty, *supra* note 55, at 638–48 (discussing different kinds of externalities, including psychological externalities).

[166] Esty, *supra* note 55, at 640, 641 n.267.

question of whether welfare is general or particular. So do arguments about whether Congress "really" wanted to regulate interstate commerce or whether its commerce justification is pretextual.[167] For example, the relationship between water pollution and commerce 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. Surely this would not qualify as a regulation of commerce or commercial activity in any obvious or straightforward sense (even though here, as elsewhere, one could invoke substantial effects on interstate commerce in the aggregate). Yet just as surely Congress ought to possess this power (without having to condition related federal funds on compliance). The rationale for allowing federal regulation of this powerful noneconomic externality under the General Welfare Clause is straightforward and compelling.

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

[167] Our point is not that Congress may regulate interstate commerce only for certain purposes and not others, so that allegations of pretext have force. *Compare, e.g.*, William Van Alstyne, *Federalism, Congress, the States and the Tenth Amendment: Adrift in the Cellophane Sea*, 1987 DUKE L.J. 769 (arguing for the invigoration of pretext doctrine in Commerce Clause cases), *with, e.g.*, Schroeder, *supra* note 153, at 443–45 (critically analyzing Van Alstyne's view). Rather, our concern is with the distracting quality of the debate itself in many settings.

nonmercantile interactions and altercations that might arise among states."[168] We submit that there is an independent way: under our interpretation of Article I, Section 8, Congress possesses authority under Clause 1 to regulate noneconomic collective action problems involving multiple states.[169]

## 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, 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."[170] 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.[171]

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[168] AMAR, *supra* note 23, at 107–08. *See* Regan, *supra* note 3, 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.").

[169] 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 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 relation might exist if federal regulation obviated the need for judicial intervention. We leave for another occasion the development of this possible constitutional "hook" for federal regulation of noncommercial interstate problems.

[170] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 141 (2003).

[171] An alternative view is that the federal-state distinction should be understood not functionally but formally or symbolically based on some other conception such as respect for state sovereign dignity, which may be indifferent to questions of relative governmental competence or welfare consequences. *See, e.g.*, Jonathan H. Adler, *Judicial Federalism and the Future of Federal Environmental Regulation*, 90 IOWA L. REV. 377, 397 (2005) ("[T]he Court has invalidated federal actions that impede upon, or affront the 'dignity' of, states *qua* states."); Elizabeth Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PENN. L. REV. 1503, 1559 (2000) (suggesting that the Rehnquist Court's anticommandeering decisions may be animated by concern that commandeering expresses disrespect for states). This perspective is at odds with an understanding of constitutional law informed by social science.

By definition, the costs and benefits of interstate public goods, externalities, and markets spill over from one state to another, which creates a collective action problem 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 works 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.

When we interpret Article I, Section 8 in light of this principle, we see 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 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 several) of them to cooperate. Article I, 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."[172] 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. Congress, its supporters, and its critics should use this framework to understand and debate the constitutional scope of the Congress's powers 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 tried 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 more competent at regulating economic activity, and the states are not generally more competent at regulating noneconomic activity. 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. This approach is superior because it flows directly from the relative competences of the federal government and the states. We hope that Clause 1, not Clause 3, will eventually be understood to authorize federal regulation of noncommercial activities when states face collective action problems. Federal law would then be seen to rest on

[172] A more complete analysis of constitutional powers would buttress this conclusion. *See, e.g.*, COOTER, *supra* note 34, at 171–240.

what really motivates its enactment: its promotion of the general welfare, not the economic character of the activity that it regulates.