

DISTINGUISHING THE “TRULY NATIONAL” FROM THE “TRULY LOCAL”:

CUSTOMARY ALLOCATION, COMMERCIAL ACTIVITY, AND COLLECTIVE ACTION

Neil S. Siegel*

Draft of 14 August 2012

We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local. In recognizing this fact we preserve one of the few principles that has been consistent since the Clause was adopted. The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States.¹

Congress possesses the power to regulate “Commerce . . . among the several States”² primarily so that it can solve collective action problems like the ones that the states faced under the Articles of Confederation, when Congress lacked the power to regulate interstate commerce.³ Most of the eighteen clauses in Article I, Section 8, of the United States Constitution likewise give Congress the power to solve multi-state collective action problems.⁴ The commerce power in particular, however, possesses perhaps the greatest potential to collapse the “distinction between what is truly national and what is truly local.”⁵ There are three main judicial strategies for maintaining such a distinction in Commerce Clause cases.⁶

One historic strategy, which has few adherents today, is to invoke what is asserted to be the customary allocation of regulatory authority between the federal government and the states. Most often, this approach is formulated in a way that is akin to “dual federalism,” which died in 1937 because it proved unable to define unique and exclusive spheres of federal and state

* Professor of Law and Political Science, Duke Law School. For useful conversations, I thank Joseph Blocher, Curtis Bradley, Katie Ertmer, Mitu Gulati, Roderick Hills, Jedediah Purdy, Arti Rai, Ernest Young, and, especially, Margaret Lemos. I commend Curt and Mitu for organizing this symposium on law and custom, and I am grateful to the staff of the Duke Law Journal for an exquisite edit.

¹ U.S. v. Morrison, 529 U.S. 598, 617–18 (2000) (internal citations omitted).

² U.S. CONST. Art. I, § 8, cl. 3.

³ See generally Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115 (2010).

⁴ See *id.* at 144-50.

⁵ *Id.*

⁶ One could identify various political safeguards of federalism as limiting the scope of the commerce power. 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). This inquiry, however, focuses on judicially enforceable limits.

legislative jurisdiction.⁷ The method of customary allocation identifies so-called traditional subjects of state regulation. It regards subject matters that “ha[ve] always been the province of the States”⁸ as beyond the reach of federal commerce power.

The unworkability of this approach has led to a toned-down version of it, which does show up in the Court’s present jurisprudence. The Rehnquist Court identified traditional subjects of state regulation as a factor or consideration in its Commerce Clause analysis, but not as exhausting the constitutional inquiry. According to the Court, those regulatory areas include criminal law, education, and family law.⁹

Second, the modern Court distinguishes between “commercial” or “economic” activity on the one hand, and “noncommercial” or “noneconomic” activity on the other. The Court allows Congress to use its commerce power to regulate only commercial subject matter in cases involving allegedly substantial effects on interstate commerce.¹⁰ Although the Rehnquist Court sometimes referenced the idea of traditional subjects of state regulation as supporting its invalidation of a federal law on federalism grounds,¹¹ the Court’s formal distinction between commercial and noncommercial activity did more of the work in its Commerce Clause rulings.¹²

A third possible approach is to interpret the commerce power in light of its underlying justification, which is to empower Congress to solve multi-state collective action problems. Scholars who advocate this approach distinguish problems whose solution requires collective action by states, which they view as within the scope of federal commerce power, from problems whose solution requires individual action by states, which they regard as beyond the reach of the commerce power.¹³ This approach accounts for the results reached by the Rehnquist Court in its commerce power rulings better than the Court’s own proffered distinction between commercial and noncommercial activity.¹⁴ Justice Ginsburg emphasized multi-state collective action

⁷ For an illuminating discussion of the rise and fall of dual federalism, see generally Ernest A. Young, *Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception*, 69 GEORGE WASH. L. REV. 139, 139–50 (2001).

⁸ *Morrison*, 529 U.S. at 618.

⁹ For a discussion, see *infra* Part I.

¹⁰ See *Gonzales v. Raich*, 545 U.S. 1 (2005) (stressing the economic/noneconomic distinction); *United States v. Morrison*, 529 U.S. 598 (2000) (same); *United States v. Lopez*, 514 U.S. 549 (1995) (same). The Court’s pre-*Lopez* doctrine, which asked whether the regulated subject matter substantially affected interstate commerce in the aggregate, is not an approach to limiting the scope of the commerce power. It reflects a regime in which there are no judicially enforceable limits on the commerce power.

¹¹ See, e.g., *supra* text accompanying note 1 (quoting the dual federalism rhetoric in *Morrison*).

¹² For a discussion, see *infra* Part III.

¹³ See generally Neil S. Siegel, *Free Riding on Benevolence: Collective Action Federalism and the Minimum Coverage Provision*, 75 LAW & CONTEMP. PROBS., no. 3, 29 (2012) [hereinafter “*Free Riding on Benevolence*”]; Neil S. Siegel, *Four Constitutional Limits that the Minimum Coverage Provision Respects*, 27 CONST. COMMENT. 591 (2011) [hereinafter “*Four Constitutional Limits*”]; Cooter & Siegel, *supra* note 3; Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1 (2010); Andrew Koppelman, *Bad News for Mail Robbers: The Obvious Constitutionality of Health Care Reform*, 121 YALE L.J. ONLINE 1, 9 (2011), <http://yalelawjournal.org/2011/04/26/koppelman.html> (last visited Oct. 5, 2011); Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite United States v. Lopez*, 94 MICH. L. REV. 554 (1995); Robert L. Stern, *That Commerce Which Concerns More States Than One*, 47 HARV. L. REV. 1335, 1340 (1934).

¹⁴ See Cooter & Siegel, *supra* note 3, at 162–64.

problems in her opinion for four Justices in *National Federation of Independent Business v. Sebelius*.¹⁵

This Essay makes two claims about these three methods of defining the expanse and limits of the Commerce Clause. First, approaches that privilege traditional subjects of state regulation are unworkable and undesirable. These approaches are unworkable in light of the frequency with which the states and the federal government regulate the same subject matter in our modern world of largely overlapping state and federal legislative jurisdiction. Either a regulated area is never of exclusive state concern, or else the answer will turn on arbitrary (and increasingly narrow) definitions of the breadth of the area at issue. Moreover, if “traditional” is redefined to mean a subject of predominant, though not exclusive, state concern, then the inquiry will often prove indeterminate.

In addition to being unworkable, approaches that privilege traditional subjects of state regulation are undesirable. They are undesirable because the question of customary allocation is unrelated to a principal reason why Congress possesses the power to regulate interstate commerce: solving collective action problems involving multiple states.

These problems are evident in the way that some federal judges—although none of the Justices—invoked regulatory custom in litigation over the constitutionality of the minimum coverage provision (or “individual mandate,” as its opponents prefer) in the Patient Protection and Affordable Care Act.¹⁶ The areas of “health insurance” and “health care” are not of exclusive state concern, and it is impossible to lose—or to win—a competition requiring skillful lawyers or judges to describe them as more state than federal, or more federal than state. This facet of the litigation brings to mind Tic-Tac-Toe, a boring game for sophisticated players because it is impossible to win or lose.

More promising are approaches that view congressional authority as turning on either commercial activity or collective action problems facing the states. My second claim is that the commercial activity and collective action approaches have advantages and disadvantages, and that the choice between them exemplifies the more general tension between applying rules and applying their background justifications. In previous work with Robert Cooter, I have articulated a collective-action approach to Article I, Section 8.¹⁷ My primary purpose here is to clarify the jurisprudential stakes in adopting one method or the other, and to identify the problems that advocates of each approach must address.

I begin with constitutional theory. Part I discusses the primary historical and contemporary justification for the Commerce Clause. I then move to the three methods of operationalizing the Commerce Clause through legal doctrine. Part II examines approaches that

¹⁵ 132 S. Ct. __ (2012) (Ginsburg, J., joined by Breyer, Sotomayor, and Kagan, JJ., concurring in part, concurring in the judgment in part, and dissenting in part), slip op. at 12–14.

¹⁶ Pub. L. No. 111-148, 124 Stat. 119 (2010), amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (to be codified primarily in scattered sections of 42 U.S.C.). The law requires, among many other things, that most lawful permanent residents of the United States either maintain a minimum level of health insurance coverage (the minimum coverage provision) or else pay a certain amount of money each year (the shared responsibility payment).

¹⁷ See generally Cooter & Siegel, *supra* note 3.

turn on the customary allocation of different subject matters to different sovereigns. Part III analyzes the virtues and vulnerabilities of the strategies that favor commercial activity or collective action. The Conclusion suggests a different possibility—that the commercial activity and collective action approaches could form part of one overarching implementation of the Commerce Clause. It then explains why federalism formalists and functionalists are unlikely to converge on the same solution—and, yet, why both the commercial activity and collective action approaches may continue to influence the Court’s decision making.

I. THEORY: A PRIMARY JUSTIFICATION FOR THE COMMERCE CLAUSE

As I have discussed elsewhere,¹⁸ the Framers wrote Article I, Section 8, primarily to empower Congress to ameliorate serious problems of collective action facing the states during the Critical Period of the 1780s.¹⁹ In the wake of the American Revolution, the states acted individually when they needed to act collectively, discriminating against commerce coming from sister states and free riding on the contributions of other states to the federal treasury and military. Under the Articles of Confederation, Congress lacked the power to solve these problems.²⁰

James Madison decried the discord among the states in his *Vices of the Political System of the United States*,²¹ which he wrote while preparing for the Constitutional Convention.²² Recording various problems with the Articles,²³ Madison stressed “want of concert in matters where common interest requires it,” a “defect . . . strongly illustrated in the state of our commercial affairs. How much has the national dignity, interest, and revenue suffered from this cause?”²⁴ When conduct such as tariff barriers spilled over from one state to another, Madison and other nationalist Framers recognized that the actions of individually rational states produced irrational results for the nation. The solution ultimately sought for these and other collective action problems was the establishment of a more comprehensive unit of government with the authority to tax, borrow money on credit, raise and support a military, and regulate interstate commerce, thereby creating a national free trade zone.²⁵

The delegates at the Philadelphia Convention focused on multi-state collective action problems in describing the scope of federal power that would become Section 8. The Convention instructed the midsummer Committee of Detail that Congress would be entrusted with 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

¹⁸ This part draws from *id.* at 121–24.

¹⁹ For a discussion, see Larry D. Kramer, *Madison’s Audience*, 112 HARV. L. REV. 611, 616–23 (1999).

²⁰ See, e.g., JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 24–28, 47–48, 102–08, 167–68, 188–89 (1996) (discussing various failures of the Articles of Confederation).

²¹ JAMES MADISON, *Vices of the Political System of the United States*, in JAMES MADISON: WRITINGS 69, 78–79 (Jack N. Rakove ed., 1999).

²² See RAKOVE, *supra* note 20, at 46.

²³ MADISON, *supra* note 21, at 69–73.

²⁴ *Id.* at 71.

²⁵ See, e.g., *Baldwin v. G. A. F. Seeling, Inc.*, 294 U.S. 511, 523 (1935) (stating 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.”).

States may be interrupted by the Exercise of individual Legislation.”²⁶ This language registers the importance of ameliorating various collective action problems facing the states. When the Committee of Detail made its report ten days later, “[i]t had changed the indefinite language . . . into an enumeration of the powers of Congress closely resembling Article I, Section 8 of the Constitution as it was finally adopted.”²⁷

The Convention “accepted *without discussion* the enumeration of powers made by [the] committee.”²⁸ The delegates must have perceived the connection between the general principles conveyed to the Committee of Detail and the specific powers listed in Section 8, including the Commerce Clause. The Committee was embodying these general principles, not rejecting them, when it provided an enumeration.²⁹

Enabling Congress to solve multi-state problems of collective action was, and remains, the primary justification for giving Congress the power to regulate “Commerce . . . among the several States.”³⁰ It may not be the only justification; constitutional provisions are often written in vague, value-laden language, which enables the ascription of multiple, contested justifications to them. But in light of the historical background out of which the Commerce Clause arose, and in light of its present role in American life in addressing races to the bottom and interstate externalities, solving interstate collective action problems qualifies as the primary background justification for the clause.³¹

II. DOCTRINE: CUSTOM AND THE COMMERCE CLAUSE

With an understanding of the core justification of the commerce power in hand, I turn in this Part and the next to three methods of operationalizing the Commerce Clause through legal doctrine. Because many laws can plausibly be described as regulations of interstate commerce, or as necessary and proper to the regulation of interstate commerce,³² the commerce power has the potential to unravel the principle of limited federal power. This potential has led to three approaches to restrict the scope of the clause.

A. *The Unworkability of Custom*

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

²⁷ Stern, *supra* note 13, at 1340.

²⁸ *Id.*

²⁹ See, e.g., *id.* (“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.”); Regan, *supra* note 13, at 556 (“[T]here is no reason to think the Committee of Detail was rejecting the spirit of the Resolution when they replaced it with an enumeration.”).

³⁰ U.S. CONST. art. I, § 8, cl. 3.

³¹ Many federal laws regulating such areas as securities, the environment, civil rights, public health, and criminality fit this description. For discussions, see generally, for example, Siegel, *Free Riding on Benevolence*, *supra* note 13, at 46–47; Richard Revesz, *Federalism and Interstate Environmental Externalities*, 144 U. PENN. L. REV. 2341 (1996).

³² See U.S. CONST. art. I, § 8, cl. 18.

One strategy, which has noteworthy historical roots in American constitutional law, is to invoke the idea of the customary allocation of subject matter authority between the federal government and the states. For example, in *United States v. Lopez*³³ and *United States v. Morrison*,³⁴ the Court invalidated two federal laws as beyond the scope of the commerce power for the first time since the 1930s: the Gun-Free School Zones Act of 1990,³⁵ and the provision of the Violence Against Women Act of 1994 giving victims of gender-motivated violence a private civil damages remedy.³⁶ Chief Justice Rehnquist appeared to support these rulings by identifying criminal law, as well as family law and education, as traditional subjects of state regulation.³⁷ Similarly, Justice Kennedy’s concurring opinion, which in all likelihood embodies the Court’s present position,³⁸ inquired “whether the exercise of national power seeks to intrude upon an area of traditional state concern”³⁹—that is, “an area to which States lay claim by right of history and expertise.”⁴⁰ He concluded that “[a]n interference of these dimensions occurs here, for it is well established that education is a traditional concern of the States.”⁴¹

Following the Supreme Court’s lead, some federal courts invoked another allegedly traditional subject of state concern in litigation over the constitutionality of the Patient Protection and Affordable Care Act (ACA).⁴² For example, the United States Court of Appeals for the Eleventh Circuit invalidated the law’s minimum coverage provision and shared responsibility payment.⁴³ These provisions require that most lawful residents of the United States either obtain a minimum level of health insurance coverage or pay a certain amount of money each year.⁴⁴ In supporting its holding that the provisions were beyond the scope of the commerce power, the Eleventh Circuit invoked the “Supreme Court’s Commerce Clause jurisprudence” for the proposition that, “in assessing the constitutionality of Congress’s exercise of its commerce authority, a relevant factor is whether a particular federal regulation trenches on an area of traditional state concern.”⁴⁵ The court of appeals then concluded that “insurance qualifies as an

³³ 514 U.S. 549 (1995).

³⁴ 529 U.S. 598 (2000).

³⁵ 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”).

³⁶ 42 U.S.C. § 13981 (authorizing victims of gender-motivated violence to sue their assailants for money damages in federal court).

³⁷ See, e.g., *Morrison*, 529 U.S. at 618 (“The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States.”); *id.* at 615–16 (“Petitioners’ reasoning, moreover, will not limit Congress to regulating violence but may, as we suggested in *Lopez*, be applied equally 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.”).

³⁸ Justice Kennedy appears to be the median Justice on the Court in Commerce Clause (and Necessary and Proper Clause) cases.

³⁹ *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring).

⁴⁰ *Id.* at 583.

⁴¹ *Id.* at 583 (citing *Milliken v. Bradley*, 418 U.S. 717, 741–42 (1974)).

⁴² Pub. L. No. 111-148, 124 Stat. 119 (2010), amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (to be codified primarily in scattered sections of 42 U.S.C.).

⁴³ *Florida ex rel. Att’y Gen. v. U.S. Dep’t Health & Human Servs.*, --- F.3d ---, 2011 WL 3519178 (11th Cir. Aug. 12, 2011).

⁴⁴ 26 U.S.C. § 5000A(b)(1).

⁴⁵ *Florida ex rel. Att’y Gen. v. U.S. Dep’t Health & Human Servs.*, --- F.3d ---, 2011 WL 3519178 at *149.

area of traditional state regulation”; that “[t]he health care industry . . . falls within the sphere of traditional state concern”; and that “the narrower category of ‘health care’ is an area of traditional state concern.”⁴⁶ The court added “this federalism factor” to “numerous indicia of constitutional infirmity” and concluded that the provisions under review were beyond the scope of the commerce power.⁴⁷

The Eleventh Circuit’s invocation of legislative custom, like the Supreme Court’s in *Lopez* and *Morrison*, illustrates two problems with identifying traditional subjects of state regulation in Commerce Clause litigation. First, the approach is generally unworkable. Second, the approach is undesirable because it is insensitive to whether the states face collective action problems.

As for the first problem, the Eleventh Circuit’s assertions about regulatory tradition are erroneous if the court was suggesting that the states exclusively or uniquely have regulated “insurance,” “the health care industry,” or “health care.” The federal government, too, has long regulated extensively in the fields of health insurance and health care. (The federal government has also regulated extensively in the areas of criminal law,⁴⁸ family law,⁴⁹ and education,⁵⁰ other traditional subjects of state regulation identified by the Court in *Lopez* and *Morrison*.⁵¹)

Judge Marcus recognized his colleagues’ error, writing in dissent in the Eleventh Circuit case that “Congress has extensively exercised its commerce power to regulate the health insurance market for many years, long before the [ACA] was passed.”⁵² He further noted that Congress has often regulated the content of private health insurance policies.⁵³ He also observed that Congress has long regulated health care providers.⁵⁴ And he pointed out that Congress “has extensively regulated under its commerce power the commodities used in the health care services

⁴⁶ *Id.* at *152–53, 155.

⁴⁷ *Id.* at *157.

⁴⁸ Title 18 of the United States Code is not short.

⁴⁹ *See, e.g.*, Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 U.C.L.A. L. Rev. 1297 (1998) (noting the significant involvement of the federal government in regulating the family since Reconstruction).

⁵⁰ *See, e.g.*, No Child Left Behind Act, Pub. L. No. 107-110, 115 Stat. 1425 (codified in 20 U.S.C. §§ 6301, et seq. (2006)); Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified in 42 U.S.C. § 2000d (2006)); Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (codified as amended at 20 U.S.C. §§ 6301-6578 (2006)).

⁵¹ *Accord* JACK M. BALKIN, *LIVING ORIGINALISM* 172 (2011) (“[T]he federal government has regulated family law since at least Reconstruction, and it has regulated education heavily in the last fifty years. And, of course, the federal government has attacked crime since the beginning of the Republic and with increasing frequency in the twentieth century.” (footnote omitted)).

⁵² *Florida ex rel. Att’y Gen. v. U.S. Dep’t Health & Human Servs.*, --- F.3d ---, 2011 WL 3519178 at *219–21 (Marcus, J., dissenting) (discussing the Employee Retirement Income Security Act of 1974 (“ERISA”), the Consolidated Omnibus Budget Reconciliation Act of 1985 (“COBRA”), and the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”)).

⁵³ *Id.* at *221–*22 (discussing the Mental Health Parity Act of 1996, the Newborns’ and Mothers’ Health Protection Act of 1996, the Women’s Health and Cancer Rights Act of 1998, and the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008).

⁵⁴ *Id.* at *222–*23 (discussing the Hospital Survey and Construction Act, the Emergency Medical Treatment and Active Labor Act (“EMTALA”), and HIPAA).

market, most notably drugs and medical devices.”⁵⁵ Finally, he underscored concededly constitutional federal regulations of the prices to be paid for consuming health care services.⁵⁶

The D.C. Circuit agreed with Judge Marcus. “Appellants have not argued that health care and health insurance are uniquely state concerns,” the court wrote, “and decades of established federal legislation in these areas suggest the contrary.”⁵⁷ “Nor do we think states’ powers over health and general welfare make the health care *industry* a traditional state concern.”⁵⁸

Medicare insures virtually every American who is 65 years of age or older, as well as several million others with certain disabilities. In 2009, the federal government spent around \$500 billion on Medicare, which amounted to 22% of total spending on health care consumption in the United States. Moreover, the federal and state governments together finance health care access for low-income people through Medicaid and the Children’s Health Insurance Program (CHIP). In 2009, spending on these programs amounted to roughly \$390 billion, or 17% of total spending on health care consumption in the country. Medicaid and CHIP financed the health care of 37.6 million non-elderly people, or 14.2% of the non-elderly population.⁵⁹

Since the Eisenhower Administration,⁶⁰ the federal government has secured employer-sponsored health insurance through use of Congress’s tax power for regulatory purposes.⁶¹ Pursuant to a tax subsidy for employment-based health insurance that amounted to \$242 billion in 2009,⁶² employees generally do not include as income and pay taxes on the payments of their health insurance premiums by their employers.⁶³ This favorable tax treatment contrasts with most other forms of employee compensation. Moreover, employers may deduct their premium payments as business expenses.⁶⁴

Finally, the plaintiffs themselves in the ACA litigation concede that the Commerce Clause supports the fundamental changes that the ACA Congress made in the ways insurance companies do business and control costs. Specifically, the plaintiffs do not challenge the ACA provisions prohibiting insurance companies from denying coverage based on preexisting conditions, canceling insurance absent fraud, charging higher premiums based on medical

⁵⁵ *Id.* at *224 (discussing the Food, Drug, and Cosmetics Act).

⁵⁶ *Id.* (discussing Medicare and the Omnibus Budget Reconciliation Act of 1989).

⁵⁷ *Seven-Sky v. Holder*, No. 11-5047, --- F.3d --- (D.C. Cir. Nov. 8, 2011), at *33–34 (citing *United States v. South Eastern Underwriters Ass’n*, 322 U.S. 533, 539 (1944)).

⁵⁸ *Id.* at *34.

⁵⁹ The data in this paragraph come from Brief for Petitioners, *Dep’t of Health & Human Services v. State of Florida*, No. 11-398 (Jan. 2012), at 3–4.

⁶⁰ For an account of the history, see *Dwight D. Eisenhower: Compassionate Conservative*, in DAVID BLUMENTHAL & JAMES A. MORONE, *THE HEART OF POWER: HEALTH AND POLITICS IN THE OVAL OFFICE* 99–130 (2010).

⁶¹ For an argument that Congress may use its tax power for some regulatory purposes in addition to revenue-raising purposes, see generally Robert D. Cooter & Neil S. Siegel, *Not the Power to Destroy: An Effects Theory of the Tax Power*, 99 VA. L. REV. (forthcoming 2012).

⁶² See Brief for Petitioners, *supra* note 59, at 4.

⁶³ 26 U.S.C. § 106 (2006).

⁶⁴ 26 U.S.C. § 162 (2006 & Supp. III 2009).

history, and imposing lifetime limits on benefits.⁶⁵ The Supreme Court has long held that Congress may use the Commerce Clause to regulate insurance markets.⁶⁶

When the ACA litigation reached the U.S. Supreme Court, no Justice responded by characterizing the ACA as operating in an area of traditional state concern. On the contrary, Justice Ginsburg, joined by Justices Breyer, Sotomayor, and Kagan, stressed that “the Federal Government plays a lead role in the health-care sector, both as a direct payer and as a regulator.”⁶⁷ Moreover, Chief Justice Roberts made no mention of traditional subjects of state regulation in his decisive opinion, even as he concluded that the ACA’s minimum coverage provision was beyond the scope of the Commerce Clause.⁶⁸ And the joint dissenters—Justices Scalia, Kennedy, Thomas, and Alito—invoked traditional areas of state concern only in making general points about the need for limits on the Spending Clause, in the part of their opinion that considered the ACA’s expansion of Medicaid.⁶⁹ They declared the minimum coverage provision beyond the scope of the Commerce Clause, the Necessary and Proper Clause, and the Taxing Clause without invoking traditional subjects of state concern.

It is false to call fields such as “insurance,” “health insurance,” “health care,” or the “health care industry” exclusive or unique subjects of state regulation when the same areas are also subjects of substantial and longstanding federal concern. If the test of tradition sounds in exclusivity, federal power is virtually limitless. To avoid this conclusion, one would have to keep redefining the regulated “area” more and more narrowly, so as to find a level of abstraction at which it is possible to describe the federal government as not previously having regulated. That recourse, however, seems arbitrary. Dual federalism died and has been little mourned because of the difficulty of defining and policing the boundaries of the assertedly separate spheres of state and federal authority.⁷⁰

Alternatively, one could (re)define traditional subjects of state concern as areas where historically there has been “more” state regulation than federal regulation—that is, where state regulation has predominated. Such a reconceptualization of regulatory custom is more defensible in theory, and may work in practice with respect to certain subject matters. For example, in his opinion invalidating part of the federal Defense of Marriage Act, Judge Boudin may have been right that “domestic relations and the definition and incidents of lawful marriage” is “a realm that has from the start of the nation been primarily confided to state regulation.” This may be so even if the area of “domestic relations” seems considerably broader than “the definition and incidents of lawful marriage” and it is not obvious which level of abstraction to

⁶⁵ 42 U.S.C.A. §§ 300gg, 300gg-1(a), 300gg-3(a), 300gg-11, 300gg-12 (West 2010).

⁶⁶ *United States v. South-Eastern Underwriters Ass’n*, 322 U.S. 533 (1944); 42 U.S.C. § 18091(a)(3) (citing *South-Eastern Underwriters Ass’n* as authority for the proposition that “insurance is interstate commerce subject to Federal regulation”).

⁶⁷ *National Federation of Independent Business v. Sebelius*, 132 S. Ct. __ (2012) (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part), slip op. at 35–36 (pointing to Medicare, Medicaid, ERISA, and HIPAA).

⁶⁸ *NFIB*, 132 S. Ct. at __ (opinion of Roberts, J.). Roberts instead upheld the minimum coverage provision under Congress’s tax power. For a theory of the tax power that is entirely consistent with the Chief Justice’s analysis, see generally Cooter & Siegel, *supra* note 61.

⁶⁹ *NFIB*, 132 S. Ct. at __ (dissenting opinion of Scalia, Kennedy, Thomas, and Alito, JJ.), slip op. at 3, 32, 37–38.

⁷⁰ See, e.g., Young, *supra* note 7, at 139.

choose.⁷¹ In many instances, however, the approach will prove indeterminate and thus unworkable. It does not seem difficult to describe many subject matter categories as either extensively state or as extensively federal. That is one moral of the above discussion of how different courts have characterized the regulation of health insurance and health care. Moreover, some cases may plausibly be described as involving multiple subject matters, some predominantly federal and others predominantly state.⁷² This does not seem a promising way of deciding Commerce Clause cases in a reasonably predictable, transparent way.

There is nothing new about this problem. Twice before—first in the context of intergovernmental tax immunity and then in the context of federal regulation of the “states qua states”—the Supreme Court invoked the idea of traditional state governmental functions in order to police the boundary between federal and state power, only to abandon the notion when it proved unsusceptible to consistent application.⁷³ Lawrence Lessig thus wrote of the *Lopez* Court’s invocation of traditional subjects of state concern that “it is too late in this game to forgive the Court for this move.”⁷⁴ “[O]ver and over,” Lessig observed, “in a wide range of federalism contexts, just this line has proved itself Maginot.”⁷⁵

The unworkability of the first approach, at least as a general matter, may explain why courts today tone down their invocation of traditional subjects of state concern in Commerce Clause cases: they call it only an additional consideration or “relevant factor,”⁷⁶ not a freestanding approach. For example, the Eleventh Circuit invoked custom towards the end of its constitutional analysis, only after it had decided the case on other grounds much earlier in the opinion. One hundred pages before (in the slip opinion), the court reasoned decisively that “the

⁷¹ *Mass. v. HHS*, No. 10-2204, (1st Cir. May 31, 2012), slip op. at 20. The court held that Section 3 of the federal Defense of Marriage Act (DOMA) violates equal protection principles. Section 3 defines “marriage” for purposes of federal law and excludes same-sex marriage from this definition. The court raised its level of scrutiny based on its federalism concern that “DOMA intrudes extensively into an area that from the start of the nation has been primarily confided to state regulation.” The court did not persuasively explain the propriety of its novel use of federalism concerns to change the level of scrutiny under equal protection. The decision does, however, nicely illustrate that invocations of regulatory custom can cut both ways ideologically. There is no reason to think it is less problematic when used in the service of certain ideological ends than it is when used in the service of others.

⁷² Is *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011), an immigration case (federal) or a case involving the licensing of in-state businesses (state)? Is *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), a case involving arbitration (federal) or consumer protection (state)? See Ernest A. Young, “*The Ordinary Diet of the Law*”: *The Presumption Against Preemption in the Roberts Court*, 2011 SUP. CT. REV. 253, 336 (2012). For a more recent illustration, see *Arizona v. United States*, 132 S. Ct. ___ (2012) (Alito, J., concurring in part and dissenting in part) (characterizing “employment regulation, even of aliens unlawfully present in the country, [a]n area of traditional state concern”).

⁷³ See *New York v. United States*, 326 U.S. 572 (1946) (rejecting existing tax immunity doctrine as resting on an unworkable line between traditional/essential and nontraditional/nonessential state functions); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (overruling *National League of Cities v. Usery*, 426 U.S. 833 (1976), which prohibited regulation of “states qua states” in areas of traditional governmental functions).

⁷⁴ Lawrence Lessig, *Translating Federalism*: *United States v. Lopez*, 1995 SUP. CT. REV. 125, 206 (1995).

⁷⁵ *Id.* One doctrinal area where the analysis of regulatory custom remains relevant is in preemption cases, see, e.g., *supra* note 72, where the prevailing—albeit not always consistent—view of the Court seems to be that the application of the presumption against preemption turns on whether the federal government is intervening in a traditional field of state regulation. See Young, *supra* note 72, at 332. Professor Young criticizes “the indeterminacy of any approach that tries to divide up the world into spheres of state and federal primacy.” *Id.* at 335.

⁷⁶ *Florida ex rel. Att’y Gen. v. U.S. Dep’t Health & Human Servs.*, --- F.3d ---, 2011 WL 3519178 at *149.

regulated conduct is defined by the *absence* of both commerce or even the ‘the production, distribution, and consumption of commodities’—the broad definition of economics in *Raich*.”⁷⁷

But describing custom as just a “factor” does not secure for it a less problematic role in commerce power cases. To be a factor in any constitutional analysis, whether of federal power or of individual rights, is to be potentially decisive in close cases.⁷⁸ Otherwise, the alleged factor is not a factor; it is window dressing. Thus, whether legislative custom is defined in terms of state exclusivity or predominance, reducing it to a factor does not avoid the above problems.

B. *The Undesirability of Custom*

The Eleventh Circuit’s invocation of custom in the health care litigation illustrates a second problem with approaches that turn on traditional subjects of state regulation. The court’s depiction of health insurance and health care as such subjects may have little to do with the principal purpose of the commerce power discussed in Part I: enabling Congress to address collective action problems involving multiple states. Looking to what states have traditionally regulated may be unhelpful if one is interested in identifying and solving multi-state problems of collective action. By definition, the states themselves have inadequate incentives to solve multi-state collective action problems by regulating on their own. Their rationally self-interested incentives, rather, are to externalize costs onto other states. Accordingly, there may be a lot of state regulation in an area of traditional state concern, but such regulation may be creating or exacerbating multi-state collective action problems, not solving them.

Moreover, federal regulation may have long been absent for reasons having little to do with the existence or scope of a collective action problem. Alternative possibilities include competing political priorities (such as wars and depressions); changing social values (on such matters as environmental protection and civil rights); improperly imposed constitutional constraints on Congress (such as during the *Lochner* Era); or effective political resistance by powerful minority interests in Congress (such as the Southern opposition that doomed federal civil rights legislation in the mid-twentieth century).⁷⁹

In addition, the scope of collective action problems may change over time. For instance, whatever may have been the scope of such problems in health insurance and health care markets in the past, changes in society, the economy, and technology may mean that the scope of those problems is interstate in the present.⁸⁰ Races to the bottom among states, interstate externalities,

⁷⁷ *Id.* at *49 (quoting *Raich*, 545 U.S. at 25).

⁷⁸ For example, to use race “as a factor” in student admissions or assignment decisions is necessarily to use race decisively in close cases, potential appearances notwithstanding. For discussions, see generally Robert C. Post & Neil S. Siegel, *Theorizing the Law/Politics Distinction: Neutral Principles, Affirmative Action, and the Enduring Legacy of Paul Mishkin*, 95 CAL. L. REV. 1473 (2007); Neil S. Siegel, *Race-Conscious Student Assignment Plans: Balkanization, Integration, and Individualized Consideration*, 56 DUKE L.J. 781 (2006).

⁷⁹ For a collective action analysis of some of these examples, see Siegel, *Free Riding on Benevolence*, *supra* note 13, at 46-47. For the legislative story of the Civil Rights Act of 1964, see WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY, & ELIZABETH GARRETT, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 2–23 (4th ed. 1995).

⁸⁰ *Accord* BALKIN, *supra* note 51, at 172 (“If an area of concern has significant spillover effects on other states, or begins to do so, it shouldn’t matter that it was the traditional concern of state regulation.”).

and other kinds of collective action problems emerge over time.⁸¹ The customary allocation of regulatory authority between the federal government and the states is unlikely to track the existence of significant problems of collective action facing the states—however preferable reliance on custom may be to cost-benefit calculations in other settings.⁸²

Consider, for example, annual spending on health care in the United States. In this regard, America is a fundamentally different place than it was 50 years ago, let alone 150 years ago. While national health care spending was only 5.4% of gross domestic product (or \$200 billion) in 1960, such spending amounted to 16.2% of GDP (or \$2.3 trillion) by 2007 and is projected to be 20.3% of GDP (or \$4.4 trillion) by 2018.⁸³ Of course, these facts do not themselves establish a collective action problem among the states that did not previously exist. But they do help to illustrate how such a problem could emerge (or fade) in a society with vastly different social and economic practices over time.⁸⁴

For the foregoing reasons, courts are wrong to presume that the unprecedented nature of an exercise of federal power renders the exercise unconstitutional.⁸⁵ Chief Justice Roberts avoided imposing such a presumption in his recent opinion in *National Federation of Independent Business v. Sebelius*,⁸⁶ even as he sent mixed signals about the pertinence of past congressional inaction.⁸⁷ The customary allocation of regulatory authority between the federal

⁸¹ For a discussion of these problems in the context of health care and health insurance markets, see generally Siegel, *Free Riding on Benevolence*, *supra* note 13.

⁸² See generally Richard A. Epstein, *The Path to “T. J. Hooper”*: *The Theory and History of Custom in the Law of Tort*, 21 J. LEGAL STUD. 1, 4 (1992) (arguing that, “given the imperfections of the legal system, the conventional wisdom that places cost-benefit analysis first and custom second [in the law of negligence] is incorrect”).

⁸³ THE STAFF OF THE WASHINGTON POST, LANDMARK: THE INSIDE STORY OF AMERICA’S NEW HEALTH-CARE LAW AND WHAT IT MEANS FOR US ALL 64 (2010). See CHARLES E. PHELPS, HEALTH ECONOMICS 530 (4th ed. 2010) (“In constant dollars per capita, total spending is estimated to have increased more than 8-fold between 1960 and 2010, and the comparable spending increase for drugs is almost 10-fold for that period.”).

⁸⁴ Another good example of changed conditions is the importance of education to economic productivity in an information economy with easy interstate mobility due to improved transportation networks. For a discussion of potential spillover effects on other states in such circumstances, see BALKIN, *supra* note 51, at 172–73.

⁸⁵ See, e.g., *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3159 (2010); *Printz v. United States*, 521 U.S. 898, 905 (1997). Compare *Florida ex rel. Att’y Gen. v. U.S. Dep’t Health & Human Servs.*, 648 F.3d 1235, 1289 (11th Cir. 2011) (“The fact that Congress has never before exercised this supposed authority is telling. As the Supreme Court has noted, ‘the utter lack of statutes imposing obligations on the States’ executive (notwithstanding the attractiveness of that course to Congress), suggests an assumed *absence* of such power.’” (citation omitted)), with Siegel, *Four Constitutional Limits*, *supra* note 13, at 601–602 (arguing that “the widespread political unpopularity of individual mandates in the United States, . . . rather than the Eleventh Circuit’s suggestion about Congress’s past confessions of unconstitutionality, likely explains why Congress has not made a habit of imposing purchase mandates throughout American history” (footnote omitted)).

⁸⁶ 132 S. Ct. ___ (2012) (Ginsburg, J., joined by Breyer, Sotomayor, and Kagan, JJ., concurring in part, concurring in the judgment in part, and dissenting in part), slip op. at 12–14.

⁸⁷ Chief Justice Roberts wrote:

But Congress has never attempted to rely on that power to compel individuals not engaged in commerce to purchase an unwanted product. Legislative novelty is not necessarily fatal; there is a first time for everything. But sometimes “the most telling indication of [a] severe constitutional problem . . . is the lack of historical precedent” for Congress’s action. At the very least, we should “pause to consider the implications of the Government’s arguments” when confronted with such new conceptions of federal power.

government and the states does not appear viable as a factor in commerce power cases, let alone as a stand-alone approach to the Commerce Clause. It is not helpful in distinguishing the “truly national” from the “truly local”⁸⁸ in the context of the commerce power.

I underscore the narrowness of my normative claim. I am not addressing the role of custom in law, or the role of custom in constitutional law, or the role of custom in questions of constitutional structure,⁸⁹ or even the role of custom in all problems of constitutional federalism.⁹⁰ Instead, I am arguing that a particular conception of constitutional custom—traditional subjects of state regulation—should not play any role in questions about the scope of Congress’s commerce power.

It may be unsatisfying, particularly in a symposium on law and custom, to conclude that a particular invocation of custom in a particular legal setting is not doctrinally useful or intellectually illuminating, at least as a general matter. What *is* interesting, however, is why courts nonetheless persist in invoking traditional subjects of state regulation in Commerce Clause cases. Lower federal courts may feel obliged because the Supreme Court has directed them to do so.⁹¹ But what about the Justices? Why, for example, does Justice Kennedy purport to care “whether the exercise of national power seeks to intrude upon an area of traditional state concern”?⁹² What is it in the judicial temper that an appeal to constitutional custom in this setting addresses?

These are big questions, and I cannot do them justice here. Part of the answer may be that the Court recognizes the need for some limits on both the commerce power and judicial discretion, and also recognizes the problems with past formalisms in sensibly policing those

National Federation of Independent Business v. Sebelius, 132 S. Ct. ___ (2012) (slip op. at 18) (opinion of Roberts, C.J.) (quoting, respectively, *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 130 S. Ct. 3138, 3159 (2010) (internal quotation marks omitted), and *Lopez*, 514 U.S. at 564). Roberts acknowledged that “there is a first time for everything,” and his use of the word “sometimes” to qualify that acknowledgement is doing a lot of unexplained work. Moreover, the Court should always consider the implications of any litigant’s arguments for the expanse and limits of federal power, not just “when confronted with . . . new conceptions” of that power. So it is unclear on balance what Roberts’ view is on the constitutional pertinence of the unprecedented nature of a federal law. In this passage, he may want to have it both ways.

⁸⁸ *Morrison*, 529 U.S. at 618.

⁸⁹ Separation-of-powers questions are different from problems of constitutional federalism in important ways. For example, courts are more reluctant to intervene in separation-of-powers controversies, so that custom may be among the few legal materials available for consultation in debating issues of executive or congressional power. In addition, the idea of “acquiescence” is not in play in Commerce Clause cases, but it is a major theme in separation-of-powers arguments that invoke custom. See generally Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. (forthcoming 2012).

⁹⁰ For example, perhaps past practice should inform whether a federal statute is best read as preempting state law. If states have been regulating a certain subject matter in a certain way for a long time, that fact (in a close case) might inform whether Congress is now saying that the states may no longer regulate that subject matter in that way. *But cf.* note 75 (identifying problems with reliance on regulatory custom in preemption cases).

⁹¹ See, e.g., *Seven-Sky v. Holder*, No. 11-5047, --- F.3d --- (D.C. Cir. Nov. 8, 2011), at *33 (“Appellants’s related argument is that upholding the mandate would turn the Commerce Clause into a federal police power, at the expense of state sovereignty. But the distinctions that separate national and local spheres have been understood as those between intrastate and interstate commerce, and between traditional, non-economic areas of state concern and those involving commerce. *Morrison*, 529 U.S. at 617-19.”).

⁹² *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring).

limits.⁹³ Hence the perceived need for an alternative. But the Court may be erroneously imagining that an appeal to traditional subjects of state regulation—notwithstanding multiple past failures to deploy the same basic idea—can serve as a sensible substitute. The Court seems to have an intuition about what is “normal” for each level of government to do, but “[s]ometimes an intuition is just an intuition.”⁹⁴ While the Court’s reaching for some bounds is admirable, it should look elsewhere for the expanse and limits of the commerce power—and of judicial power.

III. DOCTRINE: COMMERCIAL ACTIVITY AND COLLECTIVE ACTION

The Court already does look elsewhere. Notwithstanding some of its rhetoric, the Court’s stated test for defining the limits of the commerce power does not focus on whether an activity is a traditional subject of state regulation. This Part analyzes the Court’s stated approach and contrasts it with one that focuses directly on the animating purpose of the Commerce Clause identified in Part I. The Part also examines whether regulatory custom, properly reconceived, should inform a collective action approach to the commerce power.

A. *Commercial Activity v. Collective Action*

In cases turning on whether the regulated conduct has substantial effects on interstate commerce,⁹⁵ the Court asks whether the object of congressional regulation is properly categorized as “commercial” or “economic” in nature. If it is, the Court asks whether the regulated conduct, considered in the aggregate, substantially affects interstate commerce and invariably concludes that the Commerce Clause justifies federal regulation.⁹⁶ If, however, the Court determines that the regulated conduct is “noncommercial” or “noneconomic,” then it disallows aggregation and holds that the commerce power does not support the law.⁹⁷

Compared with customary allocation, the Court’s new formalism has at least two advantages. First, it is judicially more administrable and therefore better at cabining federal

⁹³ See, e.g., *id.* at 569–60 (observing that the Court used to “draw content-based or subject-matter distinctions, thus defining by semantic or formalistic categories those activities that were commerce and those that were not,” and that this approach “was not at all propitious when applied to the . . . question of what subjects were within the reach of the national power when Congress chose to exercise it”).

⁹⁴ *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 565 (6th Cir. 2011) (Sutton, J., concurring in part and delivering the opinion of the court in part).

⁹⁵ In *Lopez*, Chief Justice Rehnquist wrote for the Court that Congress may use the commerce power (1) to “regulate the use of the channels of interstate commerce”; (2) “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”; and (3) “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).

⁹⁶ In addition, five Justices recently concluded that Congress may not use the Commerce Clause to require individuals to purchase a product. See *supra* text accompanying notes 68–69. In view of the unpopularity and extraordinary rarity of purchase mandates, this new limit on federal commerce power seems unlikely to play a significant role in shaping future legislation or litigation.

⁹⁷ See, e.g., *Lopez*, 514 U.S. at 561 (stressing that the Gun-Free School Zones Act of 1990 “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”); *id.* at 580 (Kennedy, J., concurring) (emphasizing 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”).

power and judicial discretion.⁹⁸ Second, it relates in some way to a background justification for the Commerce Clause. This is because problems that are reasonably regarded as “commercial” may implicate collective action problems involving multiple states.

A primary problem with privileging commercial activity, however, is that it is underinclusive and overinclusive with respect to this primary justification for the Commerce Clause and Section 8 more generally. It is underinclusive because numerous noncommercial activities implicate significant collective action problems involving two or more states. It is overinclusive because numerous commercial activities do not implicate collective action problems involving two or more states.⁹⁹

The Court’s defenders may point to the text of the Commerce Clause, which references “Commerce.” They may insist that an emphasis on commercial activity is required by that textual reference to “Commerce.” They are right to point out that any plausible interpretation of the constitutional text must provide an account of the word “Commerce” in the Commerce Clause. For example, Jack Balkin, who, like me, endorses a collective action approach to the commerce power, has disputed the Court’s “commercial” interpretation of the term “Commerce.” “In the eighteenth century,” he argues, “‘commerce’ did not have such narrowly economic connotations. Instead, ‘commerce’ meant ‘intercourse’ and it had a strongly social connotation. ‘Commerce’ was interaction and exchange between persons or peoples.”¹⁰⁰

Regardless of whether Balkin is right about the original semantic meaning of “Commerce,” however, the textual argument for formalism neglects the balance of the clause, which references commerce “among the several States.” The text itself does not support the Court’s doctrinal position that if an activity is “Commerce,” then it is “among the several States,” and that if an activity is not “Commerce,” then it is not “among the several States.” The principal advantage of focusing on the commercial status of the regulated activity seems to lie more in judicial administrability than in fidelity to the text. It allows the Court to avoid such questions as whether commercial activities are interstate or intrastate in scope, but it does not make them go away.

By contrast, focusing directly on collective action problems “among the several States” avoids these problems of underinclusiveness and overinclusiveness with respect to a key background justification for the Commerce Clause. A collective action approach proceeds from the idea that the states often cannot achieve an end when doing so requires multiple states to

⁹⁸ For scholarship that stresses the virtues of formalism in Commerce Clause jurisprudence, see generally, for example, Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate is Unconstitutional*, 5 N.Y.U. J.L. & LIBERTY 581 (2010); Robert G. Natelson, *The Legal Meaning of “Commerce” in the Commerce Clause*, 80 ST. JOHN’S L. REV. 789 (2006); Young, *supra* note 7; Stephen G. Calabresi, “A Government of Limited and Enumerated Powers”: *In Defense of United States v. Lopez*, 94 MICH. L. REV. 752 (1995); Lessig, *supra* note 74; Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387 (1987).

⁹⁹ For example, the federal arson law, 18 U.S.C. § 844(i) (2006), appears problematic as commerce power legislation even as applied to commercial enterprises. A federal ban on arson of buildings actively employed for commercial purposes does not appear to address any collective action problem or spillover effect involving multiple states. *See* Cooter & Siegel, *supra* note 3, at 175–76 (analyzing the Court’s use of constitutional avoidance in *Jones v. United States*, 529 U.S. 848 (2000)).

¹⁰⁰ Balkin, *supra* note 13, at 1. *See also* JACK M. BALKIN, *LIVING ORIGINALISM* (2011) (chapter 9).

cooperate. On this view, the clauses of Section 8 empower Congress to solve collective action problems that frustrate the states. Such problems are “truly national.”¹⁰¹ Conversely, problems whose solution does not require collective action by the states are internal to a state or “truly local.”¹⁰² In this way, the allocation of regulatory authority in the American federal system flows from the relative advantages of the federal government and the states.

Unlike the distinction between noncommercial and commercial activity, the distinction between individual and collective action by states assigns specific meaning to the phrase “among the several States” in the Commerce Clause. This phrase references a problem of collective action involving two or more states. This is the key inquiry in determining whether “Commerce” is interstate and thus regulable under Clause 3, or is intrastate and thus beyond the scope of the commerce power.

The main advantage of a collective action rationale lies in avoiding errors of inclusion and exclusion by moving constitutional doctrine closer to a background justification for the Commerce Clause. Likewise, the primary disadvantage follows from moving the doctrine closer to this purpose of the commerce power: underdeterminacy, a potential lack of judicial administrability, and thus excessive judicial discretion. Reasonable minds often will differ about (1) whether there is a problem of collective action involving two or more states; (2) whether the problem is significant; and (3) whether Congress’s response will ameliorate the problem. In practice, the outcome of constitutional cases often will turn in significant part on the level of deference that courts accord congressional judgments about the existence and scope of collective action problems, and about the adequacy of Congress’s response.¹⁰³

Accordingly, the choice between commercial activity and collective action implicates the more general jurisprudential tension between applying rules and applying their background justifications.¹⁰⁴ A good rule tends to provide clearer guidance than its background justification and may generally do a better job of cabining judicial discretion, but a rule is also underinclusive and overinclusive with respect to its background justification.¹⁰⁵ Those problems may cause judges to refuse to be bound by the rule in cases in which the background justification strongly suggests a different outcome.¹⁰⁶ Applying the background justification avoids substantial

¹⁰¹ *Morrison*, 529 U.S. at 618.

¹⁰² *Id.*

¹⁰³ For a discussion, see Cooter & Siegel, *supra* note 3, at 180–83; *infra* notes 120–121 & accompanying text.

¹⁰⁴ For an illuminating exploration of the tension between doctrinal rules and background justifications in the context of First Amendment theory and doctrine, see generally Frederick Schauer, *The Second-Best First Amendment*, 31 WM. & MARY L. REV. 1 (1989).

¹⁰⁵ *Cf. id.* at 7 (“[F]reedom of speech’ is necessarily both underinclusive and overinclusive with respect to its background justification, whatever that background justification might be.”).

¹⁰⁶ *Cf.* Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 63 (1991) (“[D]ecisionmakers [may] spend time inventing end-runs around [rules] because they just cannot stand their over- or under-inclusiveness.”); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1701 (1976) (arguing that rules become standards when “judges [are] simply unwilling to bite the bullet, shoot the hostages, break the eggs to make the omelette and leave the passengers on the platform”); *cf.* MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 49–51 (1987) (distinguishing the “real operative rule” from the “nominal rule” based on the exceptionality of total rule enforcement).

problems of fit between the rule and the values it is charged with vindicating, but raises problems of under determinacy, excessive discretion, and error.¹⁰⁷

Each side in this jurisprudential debate over the scope of the commerce power has its work cut out for it. Formalists who privilege the commercial nature of the regulated activity must demonstrate that their approach is correct about the meaning of the term “Commerce.” They must also show that their approach is relatively determinate, administrable, and unsusceptible to judicial manipulation. Finally, they must establish that these benefits outweigh the costs of the approach, which are incurred when judges conclude that conduct within the scope of the commerce power is beyond its scope, and that conduct beyond the scope of the commerce power is within its scope.

In practice, judges applying the commercial activity test appear to exercise discretion of a functionalist character when the test is under determinate. It is not self-evident how to identify what the regulated subject matter is, nor is it self-evident how to determine whether that subject matter is commercial in nature. For example, it is not obvious why the personal possession or use of marijuana for medicinal purposes pursuant to state law is commercial activity.¹⁰⁸ Nor is it clear why growing wheat on one’s own land for one’s family and livestock qualifies as commercial activity.¹⁰⁹ Yet the Court upheld federal regulation of both under the Commerce Clause on the asserted ground that they are part of a larger class of commercial activity.

Writing for the Court in *Gonzales v. Raich* (the medical marijuana case), Justice Stevens relied upon *Wickard v. Filburn* (the wheat quota case), 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.”¹¹⁰ The Court seemed to have been moved less by the inherently commercial character of the general class of conduct subject to federal regulation than by its *interstate* character—that is, by the collective action problems that would impede state regulation of the wheat and marijuana markets.¹¹¹ In other words, the Court’s formal conclusion may have resulted from a functional inquiry into the interstate scope of the problem. If true, the “commercial activity” test, which purports to privilege formalist inquiry into the commercial status of the object of federal regulation, raises important questions of transparency about the fact of judicial discretion and the grounds of judicial decision.¹¹²

¹⁰⁷ See Schauer, *supra* note 104, at 16–17 (discussing the problem of error).

¹⁰⁸ See *Gonzales v. Raich*, 545 U.S. 1 (2005).

¹⁰⁹ See *Wickard v. Filburn*, 317 U.S. 111 (1942).

¹¹⁰ *Raich*, 545 U.S. at 18.

¹¹¹ See, e.g., *Raich*, 545 U.S. at 19 (“[O]ne concern prompting inclusion of wheat grown for home consumption in [*Wickard*] was that rising market prices could draw such wheat into the interstate market, resulting in lower market prices. The parallel concern making it appropriate to include marijuana grown for home consumption in the CSA is the likelihood that the high demand in the interstate market will draw such marijuana into that market.” (citation omitted)).

¹¹² Formalism is often charged with occluding the actual reasons for a decision. See, e.g., *District of Columbia v. Heller*, 554 U.S. 570, 719 (2008) (Breyer, J., dissenting) (“The majority’s methodology is, in my view, substantially less transparent than mine.”); *id.* at 722 (stressing the need for “judicial judgment exercised within a framework for constitutional analysis that guides that judgment and which makes its exercise transparent”).

Even when the commercial activity test is relatively determinate, judges applying it seek to avoid problems of underinclusiveness and overinclusiveness. For example, federal courts presume that interstate movements of persons, animals, or things are regulable under the Commerce Clause in simple virtue of their interstate movements. They so conclude without inquiring into the “commercial” status of those movements. Examples include the movement of pollution or species across state lines.¹¹³ In essence, judges who apply the conception of “Commerce” as “commercial activity” feel moved to regard the Interstate Commerce Clause as the Interstate *Or* Commerce Clause.¹¹⁴

Similarly, there is little doubt that the Supreme Court would uphold federal power to quarantine¹¹⁵—or to individually mandate vaccination—in response to a flu pandemic that disrespected state borders. Moreover, there is little doubt that the Court would do so under the Commerce Clause, notwithstanding that an individual was subject to federal regulation based merely on her presence in an affected area.¹¹⁶ One could attempt to tell various “commercial activity” (or “channels” or “instrumentalities”) stories to justify federal commerce power in this situation, but they likely would not decide the case. The interstate character and gravity of the problem would decide the case.¹¹⁷ As health law authority Mark Hall cautions, federal power “to mandate behavior, unconditioned on citizens engaging in some economic activity. . . . might someday be absolutely essential to saving a million or more lives, based on solid public health science, in the event of a catastrophic public health emergency.”¹¹⁸

Functionalists, too, have their work cut out for them. For one thing, they require their own definition of “Commerce,” not just their own definition of “among the several States.” For another thing, they must demonstrate that a focus on a primary background justification of the Commerce Clause is cost-justified because the underdeterminacy it entails matters less than the errors it avoids. In addition to limiting the kinds of interstate externalities that count as collective action problems,¹¹⁹ collective action theorists need to identify the level of judicial deference or nondeference to congressional judgments about the existence and scope of collective action problems. I have elsewhere argued that there must be a reasonable basis to believe that the federal law under review will ameliorate a significant problem of collective

¹¹³ 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)).

¹¹⁴ Alternatively, these judges conceive of “Commerce” in terms that transcend “commercial activity”—indeed, in terms that transcend even forms of human interaction outside of markets.

¹¹⁵ Cf. 42 U.S.C. § 264(a) (authorizing the Secretary of Health and Human Services to make and enforce regulations necessary “to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession”). For a discussion of this federal quarantine statute and related measures, see generally KATHLEEN S. SWENDIMAN & JENNIFER K. ELSEA, FEDERAL AND STATE QUARANTINE AND ISOLATION AUTHORITY, CRS REPORT FOR CONGRESS (Jan. 23, 2007), available at www.fas.org/sgp/crs/misc/RL33201.pdf.

¹¹⁶ Cf. *id.* at 4 (“Federal quarantine authority derives from the Commerce Clause . . .”).

¹¹⁷ See Tr. of Oral Arg., *United States v. Comstock*, No. 08-1224, Jan. 12, 2010, at 21–22, 30.

¹¹⁸ Mark A. Hall, *Constitutional Mortality: Precedential Effects of Striking Down the Individual Mandate*, 75 LAW & CONTEMP. PROBS., no. 3, at 107 (2012).

¹¹⁹ For a discussion, see Cooter & Siegel, *supra* note 3, at 152–54.

action involving two or more states.¹²⁰ But that reasonableness standard leaves important questions unanswered.¹²¹

B. *A Return to Custom?*

In the face of empirical uncertainties about the existence and scope of multi-state collective action problems, it may be tempting to revisit, and attempt to reinvent, constitutional custom—to rely on some variant of past practice as part of the judicial inquiry that collective action theorists commend.¹²² To illustrate with extreme (and unrealistic) examples, imagine a movement in Congress to federalize all of criminal law based on fears about races to severity in punishment among the states. Or imagine a movement in Congress to federalize all of education law based on fears about races to poor quality in public education among the states. Such movements would naturally raise the question of “why now?” in light of all the regulatory water under the bridge.

Rather than focusing on whether the subject matter at issue has been exclusively or predominantly regulated by the states or by the federal government—approaches rejected in Part II—an inquiry into past practice might examine the present extents of concurrent state and federal regulation, which would define the status quo from which the federal law under review potentially sought to deviate. Greater deviations from the status quo might require Congress to provide a stronger basis in evidence for its conclusion that there exists a multi-state collective action problem of real significance. A key issue is whether conceptualizing and operationalizing the idea of past regulatory practice in this way avoids the problems with invoking the idea of traditional subjects of state regulation.

On the one hand, a “status quo” approach would account for the present reality of overlapping state and federal regulation. On the other hand, it is not clear that the approach would avoid the problem of indeterminacy. More fundamentally, it is not clear that the approach would be asking the right question. One would have to believe that Congress is generally responsive to collective action problems facing the states for past failures to act to be meaningful. Is it in the nature of a multi-state collective action problem that it is likely to elicit a congressional response? I do not have an answer to that question, but I at least know why I do not have an answer: having an answer requires not just a theory of congressional *power*, but also a theory of congressional *process*.¹²³ One requires an account of whether collective action problems facing the states are likely to get on Congress’s agenda and, if they do, whether solutions to them will be able to overcome the various “veto gates” that impede the passage of

¹²⁰ See, e.g., Siegel, *Free Riding on Benevolence*, *supra* note 13, at 32 & n.25; Siegel, *Four Constitutional Limits*, *supra* note 13, at 605 & n.51.

¹²¹ The reasonableness test is derived from contemporary Commerce Clause doctrine, which is generally—but not wholly—deferential. See, e.g., *Thomas More Law Ctr. v. Obama*, No. 10-2388, at 49 (6th Cir. June 29, 2011) (Sutton, J., concurring in part and delivering the opinion of the court in part) (“The courts do not apply strict scrutiny to commerce clause [sic] legislation and require only an ‘appropriate’ or ‘reasonable’ ‘fit’ between means and ends.” (quoting *United States v. Comstock*, 130 S. Ct. 1949, 1956–57 (2010))).

¹²² Cf. Epstein, *supra* note 82, at 2 (noting that the standards of custom and cost-benefit analysis in the law of negligence would converge “[i]f courts and juries could effortlessly apply the cost-benefit formulas” and “if customs always incorporated all the relevant information about the costs and benefits of certain practices”).

¹²³ I thank my Duke colleague Margaret Lemos for bringing this point to my attention.

federal legislation.¹²⁴ I lack a persuasive theory of how Congress functions as an institution. More importantly, so do the judges who decide Commerce Clause cases.

My present inclination is to be skeptical that one should infer much from past congressional inaction, even in cases of substantial deviations from the regulatory status quo.¹²⁵ To be sure, Congress has, over the course of American history, often used its powers in Article I, Section 8 to solve numerous collective action problems facing the states.¹²⁶ But in light of the powerful influence of committee chairs and interest groups in Congress,¹²⁷ the regulatory status quo at any particular time may not reflect collective wisdom in the form of solutions to multi-state collective action problems.¹²⁸ The status quo may be as likely to reflect any number of things,¹²⁹ including the cost-externalizing incentives of organized interests that benefit from races to the bottom at the state level.¹³⁰

CONCLUSION

Of the three approaches to defining the scope of the Commerce Clause explored here, the one centered on traditional subjects of state regulation seems most difficult to defend. To the extent that traditional areas of state regulation are defined as exclusive areas of state regulation, the first variant is dual federalism by another name. It has long been understood that dual federalism does not work in modern America, where the federal government and the states have concurrent legislative jurisdiction over many areas of life subject to government regulation.¹³¹ Redefining traditional subjects of state regulation as areas where the states historically have predominated is more defensible in theory, but it may prove indeterminate in practice most of the time. In any event, it asks the wrong question about the constitutional structure.

¹²⁴ See ESKRIDGE, FRICKEY, & GARRETT, *supra* note 79, at 5 (“Over 90% of bills introduced in Congress die in the legislative labyrinth.”).

¹²⁵ *Cf.*, e.g., *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616, 672 (1987) (Scalia, J., dissenting) (“The ‘complicated check on legislation’ erected by our Constitution creates an inertia that makes it impossible to assert with any degree of assurance that congressional failure to act represents (1) approval of the status quo, as opposed to (2) inability to agree upon how to alter the status quo, (3) unawareness of the status quo, (4) indifference to the status quo, or even (5) political cowardice.” (quoting THE FEDERALIST No. 62, at 378 (Clinton Rossiter ed. 1961))). Of course, one does not have to be a new textualist in the area of statutory interpretation to reject “vindication by congressional inaction,” *id.* at 672, in the different context of congressional inattention to collective action problems facing the states.

¹²⁶ Part of the reason Congress has been able to do so is that each House operates according to a majority or supermajority rule, not the unanimity rule that impedes voluntary cooperation among states. See Cooter & Siegel, *supra* note 3, at 139–45.

¹²⁷ See ESKRIDGE, FRICKEY, & GARRETT, *supra* note 79, at 5–6 (discussing the power of committee chairs).

¹²⁸ For Burkean arguments that past practice may embody collective wisdom, see generally, for example, Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353 (2006); Ernest A. Young, *Rediscovering Conservatism: Burkean Political Theory & Constitutional Interpretation*, 72 N.C. L. REV. 619 (1994). *Cf.*, e.g., *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring) (referencing “an area to which States lay claim by right of history and expertise” (emphasis added)).

¹²⁹ For some possibilities, see *supra* notes 79–84 and accompanying text.

¹³⁰ See, e.g., JAMES SALZMAN & BARTON H. THOMPSON, JR., ENVIRONMENTAL LAW AND POLICY 22 (3rd ed. 2010) (“Air pollution, water pollution, and wildlife certainly pay no heed to state . . . borders, with the result that often the generator of the pollution is politically distinct from those harmed.”).

¹³¹ See *supra* note 7 and accompanying text (discussing dual federalism).

A variant of customary allocation reduces traditional subjects of state regulation to a supporting role. To whatever extent it influences outcomes in Commerce Clause litigation, it suffers from the same problems as the stand-alone approach to regulatory custom.

More promising are the formal and functional approaches to the Commerce Clause discussed above. For the most part, I have portrayed them as mutually exclusive. They need not be. In “substantial effects” cases, commercial activity could be the doctrinal test for whether Congress is regulating “Commerce,” and collective action could be the doctrinal test for whether Congress is regulating commerce that is “among the several States.”

For Commerce Clause functionalists, the most serious objection to such an approach may be a lack of constitutional warrant for Congress to regulate certain serious, noncommercial problems of collection action involving multiple states.¹³² The problem could be overcome if constitutional authorization for federal power in such situations could be found elsewhere in Article I, Section 8.¹³³ That solution, however, would probably be regarded as unacceptable clause shifting by Commerce Clause formalists. Accordingly, the commercial activity and collective action approaches may continue to be viewed as competitors, not as complements, in debates over the expanse and limits of the commerce power.

I note a final possibility, which may best describe the Supreme Court’s current practice. The Court’s distinction between commercial and noncommercial subject matter will remain the blackletter test because it appears more determinate and administrable than a focus on collective action problems facing the states. But because the distinction is not in fact determinate, and because it produces non-trivial problems of overinclusiveness and underinclusiveness, collective action reasoning will continue to inform the Court’s judgment regarding whether the object of congressional regulation is commercial in nature—and thus interstate in scope.

¹³² See, e.g., AMAR, *supra* note **Error! Bookmark not defined.**, at 107–08 (“Without a broad reading of ‘Commerce’ in [Clause 3], it is not entirely clear whence the federal government would derive its needed power to deal with noneconomic international incidents—or for that matter to address the entire range of vexing nonmercantile interactions and altercations that might arise among states.”).

¹³³ For an unconventional suggestion that the General Welfare Clause might do some of the work, see Cooter & Siegel, *supra* note 3, at 170–75; see generally Cooter & Siegel, *supra* note 61.