Collective Action Federalism and Its Discontents

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An increasing number of scholars argue that the Commerce Clause is best read in light of the collective action problems that the nation faced under the Articles of Confederation. The work of these "collective action theorists" is reflected in Justice Ginsburg's opinion in National Federation of Independent Business v. Sebelius*. Writing for four Justices, she stressed the "collective-action impasse" at the state level to which the Affordable Care Act responds.*

In its purest form, a collective action approach maintains that the existence of a significant problem of collective action facing two or more states is both necessary and sufficient for Congress to address the problem by relying on the Commerce Clause. Unlike nationalist defenders of unlimited federal commerce power, a collective action approach does not ask whether the regulated conduct substantially affects interstate commerce in the aggregate. Unlike federalist defenders of limited federal commerce power, a collective action approach does not focus on the distinction between economic and noneconomic conduct, or between regulating and requiring commerce.

Accordingly, nationalists may agree that a collective action problem is sufficient for Congress to invoke the Commerce Clause, but they will disagree that it is necessary. By contrast, federalists may agree that a collective action problem is necessary for Congress to invoke the Commerce Clause, but they will disagree that it is sufficient.

This Essay anticipates such criticism. Regarding the nationalist critique of a collective action approach, I argue that the nationalist "substantial effects" test imposes no judicially enforceable limits on the scope of the Commerce Clause. I also argue that nationalists may define multistate collective action problems too narrowly. In addition to races to the bottom, collective action problems include interstate externalities that do not cause races to the bottom.

Broadening the definition of multistate collective action problems to include interstate externalities gives rise to the federalist objection that every subject Congress might want to address can plausibly be described as a collective action problem. Federalists may further object that the Commerce Clause is limited to "Commerce." In response, I argue that "Commerce" is best understood broadly to encompass many social interactions outside markets, as

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Professors Jack Balkin and Akhil Amar have urged. I also argue that a collective action approach need not validate unlimited federal commerce power. Specifically, I identify three ways of limiting the kinds of interstate externalities that justify use of the Commerce Clause.

Introduction

In the 1780s, the young nation faced serious problems, and the Articles of Confederation prevented it from addressing them effectively. Most significantly, the states made a habit of discriminating against commerce from other states and refusing to contribute their fair share of money and troops to the national treasury and military.[1] The nation could not solve these problems for three primary reasons: they transcended the boundaries of any one state; the states faced substantial impediments to collective action; and the federal government lacked constitutional authority to act effectively when the states were unable to act collectively.[2]

The Constitutional Convention of 1787 responded to these failures of governance. Echoing Resolution VI of the Virginia Plan, the Convention instructed the midsummer Committee of Detail that Congress would be empowered to legislate in, among other things, "those Cases to which the States are separately incompetent."[3] The Committee of Detail "changed the indefinite language of Resolution VI into an enumeration . . . closely resembling Article I, Section 8" as adopted,[4] including its authorizations of federal power to regulate interstate commerce, tax, and raise and support a military.[5]

An increasing number of legal scholars have drawn from this history in offering structural accounts of the scope of the Commerce Clause. Specifically, "collective action theorists," as I shall call these scholars, have argued that the commerce power is best read in light of the collective action problems that the nation faced under the Articles of Confederation, when Congress lacked the power to regulate interstate commerce. Included in their

1. *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) (cataloguing the problems with the Articles of Confederation); AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 44–46, 106–08 (2005) (same); Larry D. Kramer, *Madison's Audience*, 112 HARV. L. REV. 611, 616–23 (1999) (same).

2. *See* Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115, 121–24 (2010) (using the logic of collective action to explain the failures of the Articles of Confederation).

3. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 131–32 (Max Farrand ed., rev. ed. 1966).

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

5. U.S. CONST. art. I, § 8, cls. 1, 3, 11–16.

ranks are Akhil Amar, Jack Balkin, Robert Cooter, Andy Koppelman, Donald Regan, and myself.[6]

The work of these collective action theorists appears to be reflected in Justice Ginsburg's opinion in *National Federation of Independent Business v. Sebelius* (*NFIB*).[7] In one of the most important opinions of her tenure, Ginsburg stressed the "collective-action impasse"[8] at the state level to which the Patient Protection and Affordable Care Act (ACA)[9] responds. Ginsburg insisted that "States cannot resolve the problem of the uninsured on their own,"[10] and Justices Breyer, Sotomayor, and Kagan joined this part of her opinion.[11]

This is a significant, if underappreciated, development. Ginsburg did not argue merely that Congress could have rationally concluded that the conduct of the uninsured, as a general class, substantially affects interstate commerce. In addition, she argued that the scope and nature of the problem rendered the federal government better situated than the states to solve it.[12] To be sure, Ginsburg did not reject the substantial effects test in favor of an alternative that would make the existence or nonexistence of a multistate collective problem dispositive of the Commerce Clause inquiry.[13] But she did place special emphasis on the collective action problems that the ACA's

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6. *See* AMAR, *supra* note 1, at 107–08; Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 1 (2010); Cooter & Siegel, *supra* note 2, at 115–16; Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite* United States v. Lopez, 94 MICH. L. REV. 554, 554–57 (1995); Neil S. Siegel, *Free Riding on Benevolence: Collective Action Federalism and the Minimum Coverage Provision*, 75 LAW & CONTEMP. PROBS. 29, 30 (2012); *see also* ANDREW KOPPELMAN, THE TOUGH LUCK CONSTITUTION AND THE ASSAULT ON HEALTH CARE REFORM 42–43, 71, 155 n.7 (2013) (drawing from works by collective action theorists in arguing that the ACA's minimum coverage provision is valid Commerce Clause legislation).

7. 132 S. Ct. 2566 (2012).

8. *Id.* at 2612 (Ginsburg, J., dissenting in part) ("Congress'[s] intervention was needed to overcome this collective-action impasse.").

9. Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 21, 25, 26, 29, and 42 U.S.C.).

10. *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2612 (Ginsburg, J., dissenting in part).

11. *Id.* at 2609.

12. *See id.* Justice Ginsburg explained why states expose themselves to economic risk by passing health care reforms on their own:

> States that undertake health-care reforms on their own thus risk "placing themselves in a position of economic disadvantage as compared with neighbors or competitors." [Helvering v. Davis, 301 U.S. 619, 644 (1937).] See also Brief for Health Care for All, Inc., et al. as [Amici Curiae in Support of Petitioners Urging Reversal on the Minimum Coverage Provision Issue at 4, Dep't of Health & Human Servs. v. Florida, 132 S. Ct. 2566 (2012) (No. 11-398)] ("[O]ut-of-state residents continue to seek and receive millions of dollars in uncompensated care in Massachusetts hospitals, limiting the State's efforts to improve its health care system through the elimination of uncompensated care."). Facing that risk, individual States are unlikely to take the initiative in addressing the problem of the uninsured.

Id. at 2612.

13. *See id.* at 2616.

minimum coverage provision can reasonably be understood to ameliorate[14]—both alone and in combination with the ACA provisions that prohibit insurance companies from denying people coverage based on preexisting conditions, canceling coverage absent fraud, charging higher premiums based on medical history, and imposing lifetime limits on benefits.[15]

Ginsburg's opinion suggests that four Justices deem the logic of collective action constitutionally pertinent to the scope of Congress's commerce power. Depending on changes in the Court's composition in the years ahead, this plurality may become a majority. Accordingly, it is especially important at this time to understand and critically evaluate the work of collective action theorists.

In its purest form, a collective action approach to the Commerce Clause maintains that the existence of a significant problem of collective action facing two or more states is both necessary and sufficient for Congress to address the problem by relying on the commerce power. In the context of judicial review, a collective action approach asks whether Congress had a rational, or a reasonable, or some other more demanding basis to conclude that such a collective action problem exists.[16] A collective action approach focuses on the distinction between problems whose solutions require individual (that is, separate) action by states, and problems whose solutions require collective action by states.

Unlike nationalist defenders of robust federal commerce power (nationalists), a collective action approach does not ask whether the regulated subject matter substantially affects interstate commerce in the aggregate.[17] Unlike federalist defenders of limited federal commerce power (federalists), a collective action approach does not focus on the formal distinction between economic and noneconomic conduct, or on the formal distinction between regulating and requiring commerce.[18] Accordingly, nationalists may be willing to agree that a collective action problem is sufficient for Congress to invoke the Commerce Clause, but they will disagree that it is necessary. By

14. *Id.* at 2613–14. The ACA 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). Patient Protection and Affordable Care Act ch. 48, 124 Stat. at 244–50.

15. 42 U.S.C. §§ 300gg, 300gg-1(a), 300gg-5, 300gg-11, 300gg-12 (Supp. V 2012).

16. The question of what the Commerce Clause means is separate from the question of how deferential courts should be in deciding whether Congress has acted consistently with its meaning. *See, e.g.*, Jack M. Balkin, *Fidelity to Text and Principle*, *in* THE CONSTITUTION IN 2020 11, 20 (Jack M. Balkin & Reva B. Siegel eds., 2009) (distinguishing "the question of what the Constitution means and how to be faithful to it" from the question of "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").

17. *See, e.g.*, Neil S. Siegel, *Four Constitutional Limits that the Minimum Coverage Provision Respects*, 27 CONST. COMMENT. 591, 601 (2011) (describing the nationalist position).

18. *See, e.g.*, Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate is Unconstitutional*, 5 N.Y.U. J.L. & LIBERTY 581, 604–05 (2010) (endorsing both formal distinctions identified in the text).

contrast, federalists may be willing to agree that a collective action problem is necessary for Congress to invoke the Commerce Clause, but they will disagree that it is sufficient.[19]

I anticipate such criticism by nationalists and federalists alike in this Essay, which is part of a larger effort to provide a structural theory of the expanse and limits of congressional power and state power in Article I, Section 8 and certain other parts of the Constitution.[20] Regarding the nationalist critique of a collective action approach, I argue that the primary nationalist alternative—the substantial effects test as applied for decades before the Court's 1995 decision in *United States v. Lopez*[21]—imposes no judicially enforceable limits on the scope of the Commerce Clause. No member of the late Rehnquist or early Roberts Courts has been prepared to embrace this implication, and contemporary American constitutional culture appears to reject it. I also argue that nationalists may define a multistate collective action problem too narrowly, which may cause them to conclude that a collective action approach would excessively limit the scope of the commerce power.

By a "collective action problem," collective action theorists typically mean a situation in which individually rational action by states leads to collectively irrational results.[22] This could arise with a race to the bottom (or top) among the states. In such a situation, states share the same basic objective but have incentives to act in ways that make it difficult to achieve the objective.[23] Collective action problems, however, are not limited to races among the states. A collective action problem may also arise in cases of interstate spillovers that do not involve races among the states.[24] When states impose external costs on sister states, a solution to the problem will require collective action by the affected states, which they often will not be able to accomplish on their own.[25]

Broadening the definition of a multistate collective action problem to include interstate externalities invites the federalist objection that every subject Congress might want to address can plausibly be described as requiring collective action by the states. (This is not the only federalist

19. It is, of course, oversimplified to divide the universe of constitutional interpreters into "nationalists," "federalists," and "collective action theorists." Many constitutional interpreters do not fall cleanly into one category or another. Nonetheless, these stylized categories reflect reality at least roughly, and they render the analysis that follows analytically more tractable.

20. I call this theory "the Collective Action Constitution." For relevant writing, see generally Cooter & Siegel, *supra* note 2; Siegel, *supra* note 6; and Siegel, *supra* note 17. For additional work I have done on this subject, see my articles cited *infra* notes 75, 124, 133, and 155.

21. 514 U.S. 549 (1995).

22. Cooter & Siegel, *supra* note 2, at 117.

23. Siegel, *supra* note 6, at 46.

24. *See id.* at 46–47 (discussing spillovers such as pollution across state lines and the cross-state economic effects of racial discrimination).

25. *See id.* (arguing that collective action may be required in cases of pollution and racial discrimination).

objection; another, which I will address, is that the Commerce Clause contains the word "Commerce.") If every problem Congress might want to address can reasonably be portrayed as a collective action problem, then a collective action approach—like the pre-1995 substantial effects test—imposes no judicially enforceable limits on the Commerce Clause.

A collective action approach, however, need not justify unlimited federal commerce power. In the context of judicial review, resources are available to limit the kinds of interstate externalities that justify use of the Commerce Clause. As I argue below, courts should deem psychological externalities inadmissible in commerce power cases. When Congress uses the Commerce Clause—unlike when it uses the spending power—it need not be willing to pay to vindicate the psychological concerns of people in one state about the well-being of people in other states. Moreover, judicial review should turn not just on the existence of an interstate externality, but also on its significance and on the extent to which the federal law at issue meaningfully addresses it. Finally, courts should impose a reasonableness inquiry in the context of judicial review, in contrast to genuine rational basis review.

So implemented, a collective action approach offers a multigenerational synthesis of the U.S. Supreme Court's Commerce Clause jurisprudence from 1937 through the end of the Rehnquist Court, justifying federal commerce power that is very broad but not limitless. For example, the approach reconciles the validations of Commerce Clause authority in *Wickard v. Filburn*[26] and *Gonzales v. Raich*[27] with the invalidations of Commerce Clause authority in *Lopez* and *United States v. Morrison*.[28] Moreover, the rejection of Commerce Clause authority for the minimum coverage provision by five Justices in *NFIB*, while warranting criticism from a collective action perspective, is ultimately reconcilable with the post-New Deal synthesis.

Part I addresses the nationalist critique of a collective action approach to the Commerce Clause—namely, that it excessively limits federal power. Part II addresses two primary objections of federalists—namely, that any approach to the Commerce Clause must attribute meaning to the word "Commerce," and that a collective action approach justifies unlimited federal commerce power. A brief Conclusion summarizes the argument.

I. The Nationalist Critique

Nationalists are likely to view a collective action approach as working much better as a principle of inclusion than as a principle of exclusion. As Professor Michael Dorf has conveyed, "It's hard to conceive of a genuine collective action problem for the States that wouldn't give rise to regulatory

26. 317 U.S. 111 (1942).
27. 545 U.S. 1 (2005).
28. 529 U.S. 598 (2000).

authority for Congress under the Commerce Clause."[29] At the same time, Professor Dorf has resisted my past characterizations[30] of *Heart of Atlanta Motel, Inc. v. United States*[31] and *Katzenbach v. McClung*[32] as collective action cases:

> The Southern states were not trying to mandate civil rights but couldn't because of a race to the bottom or spillover effects; quite the contrary. The 1964 Civil Rights Act was a matter of the dominant national opinion on civil rights simply displacing dissenting regional and state opinion on the matter. It's possible to spin the cases as addressing collective action problems (as you do), but to my mind doing so robs the notion of a collective action problem among the States of its explanatory force.[33]

For Professor Dorf it is preferable "simply to say, as the Court more or less said in these cases, that the Commerce Clause reaches instances of activity (or inactivity) having substantial effects on interstate markets, whether or not national regulation of such activities (or inactivities) is needed to solve a collective action problem."[34]

Dean Erwin Chemerinsky has voiced similar concerns. He has distinguished between the argument that a collective action problem is sufficient to rely on the Commerce Clause and the argument that such a problem is necessary. He deems the former claim an "insight [that] is tremendously valuable."[35] He is "very skeptical" about the latter claim.[36] He prefers the substantial effects test and deems a collective action analysis unnecessary when the substantial effects test is satisfied.[37] Judging from exchanges with other defenders of robust federal power, the reactions of Professor Dorf and Dean Chemerinsky are typical.

Two responses to the nationalist critique seem appropriate. First, the preferred alternative among nationalists—the substantial effects test[38] as applied before *Lopez*—imposes no judicially enforceable limits on the Commerce Clause. The pre-*Lopez* version of the substantial effects test

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29. E-mail from Michael C. Dorf, Robert S. Stevens Professor of Law, Cornell Univ. Law Sch., to author (May 21, 2011, 9:23 AM) (on file with author).

30. Siegel, *supra* note 6, at 46–47.

31. 379 U.S. 241 (1964).

32. 379 U.S. 294 (1964).

33. Dorf, *supra* note 29 (emphasis omitted).

34. *Id.*

35. E-mail from Erwin Chemerinsky, Dean and Distinguished Professor of Law, Univ. of Cal., Irvine Sch. of Law, to author (Aug. 2, 2011, 10:49 PM) (on file with author).

36. *Id.*

37. *See id.* (arguing that the substantial effects test is satisfied by the ACA's minimum coverage provision and questioning the necessity or utility of further justifying the provision using a collective action analysis).

38. The court often dropped the "substantiality" requirement. *See, e.g.*, Perez v. United States, 402 U.S. 146, 150 (1971) ("The Commerce Clause reaches . . . . those activities affecting commerce.").

asked whether Congress rationally could have concluded that the regulated conduct—whether economic or noneconomic in nature—affects interstate commerce in the aggregate.[39] No possible or actual federal law would fail this test, even if one includes a "substantiality" requirement.

In *Lopez*, for example, Justice Breyer was most persuasive in showing how Congress reasonably could have concluded that the possession of guns in school zones, in the aggregate, substantially affects interstate commerce.[40] If one extends the time horizon, there is a demonstrable relationship between school violence and student academic performance, and between student academic performance and national economic performance.[41] Justice Breyer was so persuasive that Chief Justice Rehnquist, in his majority opinion, did not try to rebut these effects. Instead, he changed the subject, pausing to consider the implication of Justice Breyer's argument, which was that the Commerce Clause was unlimited.[42]

By contrast, Justice Breyer was least persuasive in explaining how his analysis was compatible with judicially enforceable limits on the commerce power.[43] Like Solicitor General Drew Days at oral argument,[44] Justice Breyer was unable or unwilling to name a single potential federal law that would be beyond the scope of the Commerce Clause if the Gun Free School Zones Act were upheld.[45] It is hard to think of conduct that, taken cumulatively, does not substantially affect interstate commerce.

Nationalists may view this aspect of the substantial effects test as a virtue, not a vulnerability. Instead of advocating judicially enforceable limits on the Commerce Clause, they tend to stress the political safeguards of federalism.[46] Nationalists are right to stress them. Political constraints, not

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39. *See, e.g.*, Hodel v. Indiana, 452 U.S. 314, 323–24 (1981) ("A court may invalidate legislation enacted under the Commerce Clause only if it is clear that there is no rational basis for a congressional finding that the regulated activity affects interstate commerce, or that there is no reasonable connection between the regulatory means selected and the asserted ends.").

40. *See* United States v. Lopez, 514 U.S. 549, 618–24 (1995) (Breyer, J., dissenting) (analyzing the effect of guns in and around schools on education and commerce).

41. *Id.*

42. *See id.* at 564–65 (majority opinion) (stating that under the Government's position, "we are hard pressed to posit any activity by an individual that Congress is without power to regulate").

43. *See id.* at 624 (Breyer, J., dissenting) (arguing that the "special way in which guns and education are incompatible" and the impact of education on economic well-being made *Lopez* the "rare case" where noncommercial conduct has "so significant an impact upon commerce" that it is regulable under the Commerce Clause).

44. For a discussion of the Solicitor General's performance at oral argument in *Lopez*, see Siegel, *supra* note 17, at 591, 593–94.

45. Justice Breyer's performance is the more revealing of the two. Unlike the Solicitor General, a Justice has no institutional responsibility to defend the constitutionality of almost all federal laws.

46. The seminal article is Herbert Wechsler, *The Political Safeguards of Federalism: The Rôle of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954), in which Professor Wechsler suggests that "the national political process in the United States . . . is intrinsically well adapted to retarding or restraining new intrusions by the center on the domain of the states." *Id.* at 558; *see also, e.g.*, JESSE H. CHOPER, JUDICIAL REVIEW AND THE

judicially enforceable limits, explain why no Justice worries about much of what the Court's longstanding doctrine allows, including a minimum wage of $1,000 an hour and a prohibition on buying unhealthy foods. To be sure, one might draw a different lesson from such examples—namely, that the political process tends to protect against congressional actions that will be unpopular with large segments of the American public, not that the political process protects federalism. But by protecting against such federal laws, the political process does help to protect federalism, at least to some extent—even if this protection is not attributable to the role of the states in the national political process, and even if Congress is not otherwise motivated to protect federalism.

Regardless, no Justice appointed over the past three decades has accepted that the political safeguards of federalism are the only safeguards available. To reiterate, Justice Breyer devoted great energy to denying this implication of his position in *Lopez*.[47] Every present Justice appears to believe in a national government of limited, enumerated powers, and none insists that the federal judiciary has no role in preserving these limits.[48]

I do not know why every current Justice seems to reject the nonjusticiability approach of *Garcia v. San Antonio Metropolitan Transit Authority*.[49] I have an intuition, however, after observing and participating in the fight over health care reform over the past few years. No one involved in the debate thought it persuasive to argue that the ACA's minimum coverage provision is within the scope of the Commerce Clause just because any possible federal law is within the scope of the commerce power as far as judicial review is concerned. No one thought it unimportant to have an answer to the "*Lopez* question." Perhaps this is just a function of having a Court with a federalist majority, but I am not so sure. Given the extent to which hypotheticals involving congressional mandates to buy broccoli or American cars resonated in the public imagination,[50] it may not be tenable in

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NATIONAL POLITICAL PROCESS 2 (1980) (arguing that "state interests are forcefully represented in the national political process"); Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 219 (2000) (arguing that American federalism has been protected not by "the formal constitutional structures highlighted in Wechsler's original analysis," but "by a complex system of informal political institutions (of which political parties have historically been the most important)—institutions that were not part of the original design, but have nevertheless served to fulfill its objectives"); Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After* Garcia, 1985 SUP. CT. REV. 341, 360 (noting that the judicial focus in vindicating federalism is now "on the nature of the political process responsible for making the federalism-related decisions").

47. *See Lopez*, 514 U.S. at 624–25 (Breyer, J., dissenting) (arguing that his position would not "expand the scope" of the Commerce Clause).

48. *See, e.g.*, Bond v. United States, 131 S. Ct. 2355, 2366 (2011) (unanimous opinion) (stating that "action that exceeds the National Government's enumerated powers undermines the sovereign interests of States" and that such "unconstitutional action can cause concomitant injury").

49. 469 U.S. 528 (1985).

50. *See, e.g.*, James B. Stewart, *How Broccoli Landed on Supreme Court Menu*, N.Y. TIMES, June 13, 2012, http://www.nytimes.com/2012/06/14/business/how-broccoli-became-a-symbol-in-

contemporary American constitutional culture to advocate abandoning all judicially enforceable limits on the Commerce Clause. A collective action approach identifies a functional limit on federal commerce power, one that seeks to authorize and limit the federal government to regulate what it regulates best.[51]

A second response to the nationalist critique is warranted. Nationalists may entertain too restricted an understanding of what qualifies as a collective action problem involving multiple states. No doubt such problems include races to the bottom (or top) among the states, such as the historic problems of "unfair competition" caused by the absence of laws in certain states banning child labor or requiring minimum wages and maximum hours.[52] In a race to the bottom, all (or most) of the states share the same objective (such as national defense or a national free market), but they must overcome a collective action problem in order to achieve the objective.[53] A collective action approach plainly justifies use of the Commerce Clause to target such problems.

But a collective action rationale is not limited to races among the states. Collective action problems also include situations in which states pursue different objectives in ways that cause significant spillover effects in other states. *Heart of Atlanta* and *McClung* were such cases. Of course the Southern states were interested in promoting racial discrimination, not discouraging it. But the collective action problem caused by racial discrimination was not the fact that Southern states wanted to abandon discrimination but were unable to do so individually. Rather, the collective action problem lay in the fact that Southern states, by practicing racial discrimination, created a significant burden on commerce with those states that did not practice racial discrimination.[54] In other words, Professor Dorf focuses on the wrong states in the quotation above.[55] Southern states were not impeded from combating racial discrimination because of the conduct of non-Southern states. On the contrary, racial discrimination by Southern states imposed negative externalities on non-Southern states.

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the-health-care-debate.html (discussing the use of hypotheticals involving broccoli and American cars in public discourse over health care reform).

51. *See generally* Cooter & Siegel, *supra* note 2 (developing the theory of collective action federalism).

52. *See, e.g.*, *id.* at 160–62 (discussing *United States v. Darby*, 312 U.S. 100 (1941)).

53. If unanimity were required, then there would typically be insuperable impediments to collective action by the states. For example, a distinct minority of states (or just Rhode Island) would have defeated any effort to abandon the Articles of Confederation in favor of a more powerful central government. *See* U.S. CONST. art. VII (providing that ratification of the Constitution by nine out of thirteen states would suffice).

54. *See, e.g.*, Balkin, *supra* note 6, at 37 ("Businesses in states that do not permit discrimination may alter their employment and production policies in order to cater to consumers and clients in jurisdictions that permit (or even expect) discrimination.").

55. *See supra* text accompanying note 29.

In promoting an apartheid social order, Southern states made it substantially more difficult for African-Americans and other racial minorities to travel interstate for purposes of business, education, and tourism. The State of California so argued in its amicus brief in *Heart of Atlanta*:

> California industry is a prime recipient of government contracts, which can necessitate travel to the nation's capital or defense installations in other states. Californians serve in the armed forces of our nation, which frequently requires them to travel through and reside in sister states during their period of service. Citizens of California, in the course of their business and employment, must utilize places of public accommodation throughout the United States.
>
> Of no less significance to our national well-being is interstate travel for educational and recreational purposes, including visitation of our great national shrines located in other states.[56]

The *Green Book*, which helped African-Americans to find accommodations while on the road in the Jim Crow South, has come to symbolize the impediments to interstate travel that Southern states imposed.[57]

Moreover, Jim Crow practices in the South led to the Great Migration of African-Americans to Northern cities, with all of the social problems associated with an influx of cheap labor.[58] "Immigration from discriminating states will put pressure on housing, wages, and working conditions in more egalitarian states, especially if the new immigrants are used to working at lower wages and under inferior working conditions."[59] These external effects of Southern racism were demonstrable, not merely plausible or hypothetical. Internalization of these interstate externalities required collective action by the states, which only Congress could provide.

Accordingly, a collective action approach to the Commerce Clause justifies federal commerce power over discrimination affecting interstate commerce. And the problem of discrimination affecting commerce illustrates a more general point. Properly understood, a collective action approach authorizes substantially broader federal commerce power than nationalists may presuppose.

To be sure, a collective action defense of the Civil Rights Act of 1964 does not adequately reflect our moral and constitutional intuitions about why the federal government may dismantle a regime of public and private racial discrimination. Of course our primary objection to racial discrimination, like our main objection to sex discrimination, sounds not in interference with commerce, but in human equality and liberty. But underscoring the equality

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56. Brief of the State of California as Amicus Curiae at 5–6, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (No. 515), 1964 WL 81384, at *5–6 (footnotes omitted).

57. *See, e.g.*, Celia McGee, *The Open Road Wasn't Quite Open to All*, N.Y. TIMES, Aug. 22, 2010, http://www.nytimes.com/2010/08/23/books/23green.html.

58. Balkin, *supra* note 6, at 37.

59. *Id.*

and liberty values compromised by various forms of discrimination is just a way of suggesting (without demonstrating) that the Court has erred in disabling Congress from ever regulating private conduct under Section Five of the Fourteenth Amendment.[60] It is just a way of suggesting, for example, that *United States v. Morrison* should have been an easy win for the federal government under Section Five.[61] The structural logic of the enforcement clauses of the Civil War Amendments[62] does not commend inquiry into the existence or nonexistence of multistate collective action problems.[63] On the contrary, the enforcement clauses of the Civil War Amendments give Congress authority to regulate the internal policy choices of state governments concerning certain subject matters regardless of collective action problems facing the states.[64] From a structural perspective, such federal power is central to the meaning of the Civil War and the purposes of Reconstruction.

Of course, stressing how discrimination diminishes equality and liberty is not an argument in favor of the pre-*Lopez* substantial effects test in Commerce Clause litigation. The substantial effects test is equally oblivious to the profound interest people have in being free from various forms of discrimination, public and private.

II. The Federalist Critique

Reassuring nationalists that a collective action approach would not severely limit the commerce power may encourage federalists to scream "gotcha!" for at least two reasons. First, federalists may observe that

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60. *See* United States v. Morrison, 529 U.S. 598, 619–27 (2000) (prohibiting Congress from using its Section Five power to regulate private action); The Civil Rights Cases, 109 U.S. 3, 46 (1883) (Harlan, J., dissenting) ("The assumption that [the Fourteenth Amendment] consists wholly of prohibitions upon State laws and State proceedings in hostility to its provisions[] is unauthorized by its language. The first clause . . . is of a distinctly affirmative character."). Justice Harlan wrote that "[t]he citizenship thus acquired" by African-Americans, "in virtue of an affirmative grant from the nation, may be protected, not alone by the judicial branch of the government, but by congressional legislation of a primary direct character." *Id.* This was "because the power of Congress is not restricted to the enforcement of prohibitions upon State laws or State action. It is, in terms distinct and positive, to enforce . . . *all* of the provisions—affirmative and prohibitive, of the [A]mendment." *Id.*

61. *Morrison*, 529 U.S. at 619–27 (holding that § 13981 of the Violence Against Women Act of 1994, which provided a private civil damages remedy for victims of gender-motivated violence, was beyond the scope of Congress's enforcement power under Section 5 of the Fourteenth Amendment).

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

63. This observation, however, hardly suffices to refute the "state action" requirement imposed on Section Five legislation by the *Civil Rights Cases* and *Morrison*. One way to demonstrate the impropriety of this requirement is to follow Justice Harlan's lead, *see supra* note 60, by focusing on the affirmative character of the Citizenship Clause of Section One.

64. *See* U.S. CONST. amend. XIII, § 2 (authorizing Congress to enforce the constitutional prohibition on slavery and involuntary servitude within the United States); *id.* amend. XIV, § 5 (authorizing Congress to enforce Section One's Citizenship Clause and guarantees of due process and equal protection); *id.* amend. XV, § 2 (authorizing Congress to enforce the constitutional prohibition on racial discrimination in voting by states or the federal government).

interstate externalities are pervasive, so that any problem can be characterized as requiring collective action by two or more states—and therefore as justifying use of the Commerce Clause. But if that is right, federalists may urge, then federal commerce power is limitless under a collective action approach, just as it is under the version of the substantial effects test that nationalists embrace.

Turning to judicial review in particular, federalists may underscore certain considerations that may seem to render this conclusion inescapable. One is the tradition of judicial deference to acts of Congress.[65] Another is the empirical uncertainty surrounding the significance of many interstate externalities and the adequacy of Congress's response to them.[66] If courts ask merely whether Congress had a rational basis to believe that federal regulation would ameliorate a multistate collective action problem, federalists might think, then deferential courts will always uphold federal legislation.

Federalists may be inclined to scream "gotcha!" for a second reason. In their view, the Commerce Clause does not justify federal power to solve any and all collective action problems. Rather, this provision includes the word "Commerce," which limits the kinds of problems "among the several States"[67] that Congress may use the commerce power to address—namely, those problems that are "commercial" or "economic" in nature. Moreover, some (though not all) federalists may insist that the Commerce Clause includes the word "regulate,"[68] which further limits the kinds of problems that Congress may use the Clause to address—namely, those problems that involve preexisting "activity."[69] The joint dissent in *NFIB* appeared to voice these objections to a collective action approach.[70] In response to Justice Ginsburg's portrayal of the ACA as meaningfully addressing problems that

65. *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2579 (2012) (Roberts, C.J.) ("Our permissive reading of these [enumerated] powers is explained in part by a general reticence to invalidate the acts of the Nation's elected leaders."); Salazar v. Buono, 130 S. Ct. 1803, 1820 (2010) ("Respect for a coordinate branch of Government forbids striking down an Act of Congress except upon a clear showing of unconstitutionality."); *see also* Steven G. Calabresi, *"A Government of Limited and Enumerated Powers": In Defense of* United States v. Lopez, 94 MICH. L. REV. 752, 808 (1995) ("[T]he Supreme Court's past record is one of . . . general deference to national [laws].").

66. *Cf.* Cooter & Siegel, *supra* note 2, at 182 ("In order to establish the existence of a collective action problem among the states, does Congress need a plausible rationale, some evidence, or substantial evidence?").

67. U.S. CONST. art. I, § 8, cl. 3.

68. *Id.*

69. *See, e.g.*, *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2586 (Roberts, C.J.) ("The power to *regulate* commerce presupposes the existence of commercial activity to be regulated.").

70. *Id.* at 2648 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) ("[T]he decision to forgo participation in an interstate market is not itself commercial activity . . . . [I]f every person comes within the Commerce Clause power . . . by the simple reason that he will one day engage in commerce, the idea of a limited Government power is at an end.").

the states cannot solve on their own, the dissent wrote that "Article I contains no whatever-it-takes-to-solve-a-national-problem power."[71]

To my mind, the first criticism poses the most significant challenge to collective action approaches to the Commerce Clause. Although one can define collective action problems broadly or narrowly,[72] there is an entrenched presumption of constitutionality in enumerated powers litigation, one that goes back at least as far as *McCulloch v. Maryland*.[73] This presumption has particular force on empirical questions in light of Congress's superior fact-finding ability and democratic legitimacy to resolve empirical uncertainties.[74] As long as the Court continues to respect the presumption of constitutionality,[75] there will likely be greater cause for concern that collective action theory will remove judicially enforceable limits on the commerce power than that it will unduly limit the Commerce Clause. This may help to explain why a collective action approach has been embraced more by those who defend broad federal commerce power than by those who oppose it, and why it has been criticized more by those who oppose broad federal commerce power than by those who defend it. I will consider each criticism in turn, although I will do so in reverse order for purposes of analytical clarity. That is, I will first address the meaning of the word "Commerce" in the Commerce Clause, and I will then address the meaning of the phrase "among the several States."[76]

A. First Objection: The Commerce Clause Says "Commerce"

The first federalist criticism of a collective action approach to the Commerce Clause is that just because a problem is "among the several

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71. *Id.* at 2650. My friend Randy Barnett has voiced a similar objection:

> Unless they voluntarily choose to engage in activity that is within Congress's power to regulate or prohibit, the American people retain their sovereign power to refrain from entering into contracts with private parties, even when commandeering them to do so may be convenient to the regulation of commerce among the several states.

Barnett, *supra* note 18, at 634.

72. For a discussion, see Cooter & Siegel, *supra* note 2, at 152–55, in which the authors suggest that the choice between broad and narrow definitions of interstate externalities may follow "predictable political lines."

73. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819). For a good discussion of the presumption, see generally Gillian E. Metzger & Trevor W. Morrison, *The Presumption of Constitutionality and the Individual Mandate*, 81 FORDHAM L. REV. 1715, 1729–31 (2013).

74. *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 704 (2008) (Breyer, J., dissenting) ("[L]egislators, not judges, have primary responsibility for drawing policy conclusions from empirical fact.").

75. A majority of the Court respected the presumption to a significant extent in *NFIB*. For a discussion, see Neil S. Siegel, *More Law than Politics: The Chief, the "Mandate," Legality, and Statesmanship*, *in* THE HEALTH CARE CASE: THE SUPREME COURT'S DECISION AND ITS IMPLICATIONS 192–214 (Nathaniel Persily et al. eds., 2013).

76. U.S. CONST. art. I, § 8, cl. 3.

States" does not make it "Commerce."[77] The objection, in other words, is that the commerce power does not authorize Congress to address all multistate collective action problems. Rather, it empowers Congress to ameliorate just those problems that involve "Commerce," a term that the *Lopez* and *Morrison* Courts properly viewed as limited to "commercial" or "economic" interactions.[78]

Federalists are right to point out that any plausible interpretation of the constitutional text must offer an account of the word "Commerce" in the Commerce Clause.[79] A collective action approach is primarily a structural approach. Structural approaches do not contradict the constitutional text. Rather, they give meaning to the text by explaining how various parts of the Constitution work, or should work, in practice.[80]

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77. *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2650 (2012) (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) ("[The Constitution] enumerates not federally soluble *problems*, but federally available *powers*. . . . Article I contains no whatever-it-takes-to-solve-a-national-problem power.").

78. United States v. Lopez, 514 U.S. 549, 561 (1995) ("Section 922(q) 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. . . . It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of . . . a commercial transaction . . . ." (footnote omitted)); United States v. Morrison, 529 U.S. 598, 611 (2000) ("*Lopez*'s review of Commerce Clause case law demonstrates that in those cases where we have sustained federal regulation of intrastate activity . . . , the activity in question has been some sort of economic endeavor." (citing *Lopez*, 514 U.S. at 559–60)).

79. *See, e.g.*, Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 116 (2001) ("In none of the sixty-three appearances of the term 'commerce' in *The Federalist Papers* is it ever used to unambiguously refer to any activity beyond trade or exchange.").

80. Consider, for example, the theory of collective action federalism that I have articulated with Professor Cooter. Cooter & Siegel, *supra* note 2. Although the theory is consistent with the constitutional text, the theory is, first and foremost, neither textualist nor originalist nor consequentialist. It is, rather, primarily an account of an important part of the American constitutional structure. The theory seeks to interpret most of the clauses of Article I, Section 8 by drawing inferences from the relevant structures and relationships that the Constitution establishes—namely, a federal system that presupposes the continued existence of the states and that endows the federal government with authority to solve problems that the states cannot address effectively on their own. Using modern economics, collective action federalism pursues a consequentialist inquiry to identify the logic of such problems and to explain how federalism can ameliorate them.

Resolution VI of the Virginia Plan, *see supra* note 3 and accompanying text, and the recorded statements of influential Framers matter to the theory because such materials provide important evidence of the federalist structure that was planned; they offer illuminating evidence of how an important component of the constitutional machine was supposed to function in practice. *The Federalist Papers*, for example, are relevant to our structural account even though they had little impact on the ratification debate.

It might have turned out that this original plan for the proper interpretation of Section 8 ceased to make sense over time. But that is not what happened regarding the distinction between individual and collective action by states; it continues to make good sense of this part of the American constitutional structure today, as modern economics helps to confirm. Consequences matter to collective action federalism not because its structural account is instrumentalist all the way down, but because structural accounts are always in part consequentialist, regardless of how they are presented.

Federalists err, however, if they believe that collective action approaches read the word "Commerce" out of the Commerce Clause. Collective action theorists offer persuasive evidence that the Court's "commercial" or "economic" interpretation of the word "Commerce" is not the best available interpretation. For example, Professor Jack Balkin, who endorses a collective action approach to the commerce power, has disputed the Court's "commercial" interpretation of the term "Commerce."[81] "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."[82]

Similarly, Professor Akhil Amar writes that the term "commerce" originally applied to more than economic interactions: it "also had in 1787, and retains even now, a broader meaning referring to all forms of intercourse in the affairs of life, whether or not narrowly economic or mediated by explicit markets."[83] Amar further argues that this broader reading of "Commerce" is structurally most sound:

> [It] would seem to make better sense of the [F]ramers' general goals by enabling Congress to regulate *all* interactions (and altercations) with foreign nations and Indian tribes—interactions that, if improperly handled by a single state acting on its own, might lead to needless wars or otherwise compromise the interests of sister states.[84]

In accord with the views of Balkin and Amar, the Marshall Court in *Gibbons v. Ogden*[85] defined "Commerce" broadly as "intercourse," and thus as including navigation.[86]

My work with Professor Cooter has been agnostic about whether the Court and supportive commentators[87] or Professors Balkin and Amar have

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81. *See, e.g.*, Balkin, *supra* note 6, at 15–18.

82. *Id.* at 1; *see also* JACK M. BALKIN, LIVING ORIGINALISM 138–82 (2011) (defining "commerce" as "intercourse").

83. AMAR, *supra* note 1, at 107.

84. *Id.*

85. 22 U.S. (9 Wheat.) 1 (1824).

86. *Id.* at 189–90. Marshall reasoned:

> Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. The mind can scarcely conceive a system for regulating commerce between nations, which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of the one nation into the ports of the other, and be confined to prescribing rules for the conduct of individuals, in the actual employment of buying and selling, or of barter.

Id.

87. *See, e.g.*, Randy E. Barnett, *Jack Balkin's Interaction Theory of "Commerce,"* 2012 U. ILL. L. REV. 623, 649 (concluding that "[c]ommerce can mean a good deal more than trade—and the fact that it includes navigation is important evidence that it did—while meaning a good deal less than interaction").

the better of this argument.[88] In solo work, I have applied both the Court's economic interpretation as a requirement of governing law, and a collective action approach as an interpretation and justification of pre-*NFIB* law.[89] I have done so in order to establish that the ACA's minimum coverage provision is within the scope of the Commerce Clause even if one accepts the Court's "economic" definition of "Commerce."[90] I am persuaded, however, that the Balkin–Amar interpretation of "Commerce," while very broad, is also likely correct.

For example, a quick Google search of "commerce definition" produces this initial set of definitions of the word "commerce":

> Noun
>
> 1. The activity of buying and selling, esp. on a large scale.
> 2. Social dealings between people.[91]

The first hit below these two definitions produces three definitions from the Merriam-Webster Online Dictionary:

> Definition of COMMERCE
>
> 1: social intercourse : interchange of ideas, opinions, or sentiments
>
> 2: the exchange or buying and selling of commodities on a large scale involving transportation from place to place
>
> 3: sexual intercourse[92]

Such definitions, and definitions like them in the Oxford English Dictionary, [93] suggest that conceiving of "commerce" broadly—as encompassing social intercourse—is no great leap beyond the constitutional text. And, of course, the sexual connotation of "intercourse" endures, which may explain why my less seasoned students giggle when I teach *Gibbons*.

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88. *See generally* Cooter & Siegel, *supra* note 2 (focusing on the distinction between individual and collective action by states, not on the distinction between economic and noneconomic conduct).

89. *See, e.g.*, Siegel, *supra* note 17, at 594 (discussing four constitutional limits on the scope of the Commerce Clause, including a discussion of collective action limits and limits preventing congressional regulation of noneconomic conduct).

90. *See id.* (concluding that the ACA's minimum coverage provision respects several actual or potential constitutional limits on the scope of the Commerce Clause); Siegel, *supra* note 6, at 34 (concluding that the minimum coverage provision is constitutional because it addresses economic problems of collective action facing the states).

91. Commerce Definition, GOOGLE SEARCH, http://www.google.com (search for "commerce definition").

92. *Commerce*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/commerce.

93. *See* 3 THE OXFORD ENGLISH DICTIONARY 552 (2d ed. 1989) (defining "commerce" as, *inter alia*, (1) "Exchange between men of the products of nature or art; buying and selling together; trading; exchange of merchandise"; (2) "Intercourse in the affairs of life; dealings"; (3) "Intercourse of the sexes"; (4) "Interchange (esp. of letters, ideas, etc.)"; and (5) "Communication, means of free intercourse").

True, the primary conception of "commerce" today focuses on market interactions. Consider, for example, the regulatory jurisdiction of the Department of Commerce.[94] Even so, a change in principal meaning over time is no reason for courts to invalidate acts of Congress that meet the broader definition of "Commerce" but not the narrower one. The primary meanings today of other terms of art in the Constitution—such as "Militia,"[95] "Magazines,"[96] "Misdemeanors,"[97] "Republican,"[98] "domestic Violence,"[99] and "Reside"[100]—are also different from what they were at the time of the founding. Their original meanings, however, continue to control interpretation of the Constitution.[101]

Federalists on and off the Court will reject the Balkin–Amar interpretation of "Commerce." In addition to disputing the historical evidence, they may fear that the commerce power is limitless absent a narrow definition of "Commerce." But such fears are overstated. The effect of the Balkin–Amar conception of commerce is not to remove all limits on the commerce power. The effect, rather, is to move constitutional analysis away from the formal question of whether Congress is regulating a *commercial* problem to the functional question of whether Congress is regulating an *interstate* problem—that is, to whether commerce is "among the several States." This analytical move requires an analysis of collective action, which is a structurally more sensible place to look for limits on the Commerce Clause.

Even as federalists reject the Balkin–Amar interpretation of "Commerce," collective action reasoning may be informing their

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94. *See* 15 U.S.C. § 1512 (2006) ("It shall be the province and duty of [the Department of Commerce] to foster, promote, and develop the foreign and domestic commerce, the mining, manufacturing, and fishery industries of the United States . . . .").

95. U.S. CONST. art. I, § 8, cl. 15 ("The Congress shall have Power . . . To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions . . . .").

96. *Id.* cl. 17 ("The Congress shall have Power . . . To exercise . . . Authority . . . for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings . . . ."). This provision obviously does not refer to reading material.

97. *Id.* art. II, § 4 ("The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."). *See* AMAR, *supra* note 1, at 222 (observing that "'Misdemeanor' in Article II was best read to mean misbehavior in a general sense as opposed to a certain kind of technical criminality").

98. U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government . . . ."). This provision obviously does not refer to one of the two major political parties in the United States in modern times.

99. *Id.* ("The United States . . . shall protect each of [the States] . . . against domestic Violence."). This provision obviously does not refer to spousal abuse.

100. *Id.* amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."). Today, "reside" is often used in distinction from "domicile."

101. *See* BALKIN, *supra* note 82, at 37 (discussing the examples of "domestic Violence" and "Republican").

determinations of whether the conduct that Congress seeks to regulate is economic in nature. In other words, federalist Justices appear to answer the question of whether the conduct targeted by Congress is "economic" in nature by bundling in collective action logic. It is not always obvious how to identify what the regulated conduct is, nor is it always obvious how to decide whether that conduct is economic. Why, for instance, is personal use of marijuana for medicinal purposes pursuant to state law "economic activity"?[102] Why is growing wheat on one's own land to feed one's family and livestock "economic activity"?[103] The Court upheld federal regulation of both under the Commerce Clause, ostensibly on the ground that they were part of a larger class of economic activity.

Writing for a Court that included Justice Kennedy, in *Gonzales v. Raich* (the case about federal power to regulate medical marijuana use), Justice Stevens relied upon *Wickard v. Filburn* (the case about federal power to impose a wheat quota). Stevens read *Wickard* 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."[104] The Court's reasoning seemed to turn not on the inherently economic character of the general class of conduct subject to federal regulation, but on its *interstate* character. Specifically, the Court seemed concerned about the collective action problems that would impede separate state regulation of the interstate wheat and marijuana markets.[105] The Court's ostensibly formal conclusion about the nature of the regulated conduct may have resulted from an implicit collective action inquiry into the interstate scope of the problem. If this interpretation is correct, then a collective action approach may be informing the reasoning of those who think they reject it. A straightforward analysis of collective action problems would seem to be more transparent.

Of course, even if federalists were right that a collective action approach was incapable of sufficiently limiting federal power or making sense of the word "Commerce" in the text, they would still need to defend their own

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102. *See* Gonzales v. Raich, 545 U.S. 1 (2005) (holding that the Commerce Clause allows Congress to regulate the personal possession and use of marijuana for medicinal purposes pursuant to state law authorizing such possession and use).

103. *See* Wickard v. Filburn, 317 U.S. 111 (1942) (holding that the Commerce Clause allows Congress to regulate wheat grown for personal consumption or use).

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

105. *See, e.g.*, *id.* at 19. The Court alluded to a collective action problem:

> [O]ne concern prompting inclusion of wheat grown for home consumption in [the regulation reviewed 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.

Id. (citation omitted).

preferred constitutional limits against charges of arbitrariness. As I have written elsewhere, whether or not the distinction between economic and noneconomic conduct explains when Congress is regulating "Commerce," it does not explain when that commerce is "among the several States."[106] Federalists in essence assume that the regulated conduct is interstate in scope if it is commerce and intrastate in scope if it is not commerce. That seems hard to defend formally or functionally. Formally, the text suggests an *Interstate* Commerce Clause, not an *Any* Commerce Clause. Functionally, the federal government is not necessarily better than the states at regulating economic problems, and the states are not necessarily better than the federal government at regulating noneconomic problems. This is because economic matters may not implicate collective action problems for the states, and noneconomic matters may implicate collective action problems for the states.[107]

What about the Court's most recent Commerce Clause case, *NFIB v. Sebelius*? The distinction five Justices drew between regulating and requiring commerce is even more difficult to defend as an independent limit on Congress.[108] I have elsewhere examined the problems with this distinction from the standpoints of constitutional text, structure, history, precedent, and consequences.[109] Here I will observe only that the distinction between prohibiting (or allowing) a purchase on the one hand, and requiring a purchase on the other—between regulating commerce and compelling commerce—has nothing to do with whether the regulated conduct is interstate or intrastate in scope. If states may mandate private action when a commercial problem is *intrastate* in scope, then the federal government should be able to mandate private action when a commercial problem is *interstate* in scope. Collective action theorists will therefore be inclined to reject the conclusion of five Justices in *NFIB* that the minimum coverage provision is beyond the scope of the Commerce Clause.[110]

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106. Cooter & Siegel, *supra* note 2, at 184 ("However adequate it may (or may not) be for purposes of defining 'Commerce' in Clause 3, the distinction between economic and noneconomic activity seems mostly irrelevant to the problems of federalism; it does not explain when an activity exists 'among the several States' and when it exists within a state."); Siegel, *supra* note 6, at 48 ("Even if the economic–noneconomic categorization can suffice as a rough definition of 'Commerce,' it cannot define when such commerce is 'among the several States' and when it is internal to one state.").

107. This point is stressed in Cooter & Siegel, *supra* note 2, at 164.

108. I offer no view here of whether this conclusion of five Justices is "holding" or "dicta." The answer, it seems to me, turns on whether Chief Justice Roberts was entitled to apply the "classical" canon of constitutional avoidance instead of the "modern" canon. For a discussion, see Siegel, *supra* note 75, at 198–200.

109. *See* Siegel, *supra* note 6, at 41–54.

110. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2589 (2012) (Roberts, C.J.) ("The Framers gave Congress the power to *regulate* commerce, not to *compel* it, and for over 200 years both our decisions and Congress's actions have reflected this understanding. There is no reason to depart from that understanding now."); *id.* at 2649 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) ("[I]t must be *activity* affecting commerce that is regulated, and not merely the failure to

That being said, the conclusion of these five Justices can be reconciled with a collective action approach. A constitutional ban on using the commerce power to impose a purchase mandate rests on a narrow interpretation of the term "regulate" in the Commerce Clause. Such a ban does not rest on an interpretation of the phrase "among the several States," which is the language that collective action theory is best equipped to construe. Accordingly, more than collective action logic is needed to persuasively reject the view that a purchase mandate is beyond the scope of the commerce power, just as more than collective action logic is needed to define the word "Commerce" in the Commerce Clause.[111] To reject the conclusion of five Justices in *NFIB*, what is most needed is the straightforward observation that the term "regulation" has long been understood broadly in American constitutional law. It has been understood to encompass prohibitions, permissions, *and requirements*.[112]

B. Second Objection: The Commerce Clause Has Limits

The upshot of the analysis so far is that the words "Commerce" and "regulate" in the Commerce Clause should be interpreted broadly. There is, however, a potential problem with having the expanse and limits of the commerce power turn on an analysis of collective action problems "among the several states." In economics, an externality is an interdependence in the utility or production functions of different actors.[113] Thus, an "interstate externality" is an interdependence in the utility or production functions of

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engage in commerce. . . . Our test's premise . . . rests upon the Constitution's requirement that it be commerce which is regulated. If all inactivity affecting commerce is commerce, commerce is everything.").

111. Similarly, more than collective action logic is needed to persuasively reject the Court's anticommandeering principle, another independent limit on the commerce power that the Court has imposed even when the federal law at issue was obviously directed at solving serious, multistate collective action problems. *See* New York v. United States, 505 U.S. 144, 175–76 (1992) (invalidating provisions of a 1985 federal law that required states either to take title to low-level radioactive waste produced within their borders or else to pass certain regulations governing disposal of the waste, on the ground that both options involved unconstitutional commandeering of the states' legislative and administrative apparatuses). *New York* and *Printz v. United States*, 521 U.S. 898 (1997), which also enforced the anticommandeering principle, are nonetheless reconcilable with collective action approaches to the Commerce Clause because such approaches do not reject all other independent limits on congressional power.

112. *See, e.g.*, Seven-Sky v. Holder, 661 F.3d 1, 16 (D.C. Cir. 2011). Judge Silberman wrote:

> At the time the Constitution was fashioned, to "regulate" meant, as it does now, "[t]o adjust by rule or method," as well as "[t]o *direct*." To "direct," in turn, included "[t]o prescribe certain measure[s]; to mark out a certain course," and "[t]o order; to command." In other words, to "regulate" can mean to require action, and nothing in the definition appears to limit that power only to those already active in relation to an interstate market. Nor was the term "commerce" limited to only *existing* commerce.

Id. (footnotes omitted).

113. *See, e.g.*, Cooter & Siegel, *supra* note 2, at 153 n.143 ("An interstate externality refers to interdependence in the utility functions of individuals in at least two states.").

actors in different states.[114] This interdependence may take one of two basic forms. First, it may involve the imposition of material costs or benefits without paying for them (material externalities).[115] An example is pollution in State A that migrates and harms the physical health of residents of State B. Second, this interdependence may involve the imposition of psychological costs or benefits without paying for them (psychological externalities).[116] An example is pollution in State A that stays put but causes residents of State B to object on moral grounds that private industry in State A is harming the health of residents of State A.

Interstate externalities in this technical sense are pervasive, particularly if one broadens the time horizon. In *Lopez*, to reiterate, Justice Breyer was right that guns in schools impact violence in schools, and that violence in schools eventually impacts national economic performance, so that the ways in which states regulate (or do not regulate) guns in schools (eventually) have external effects in other states.[117] Accordingly, an approach to the Commerce Clause that turns exclusively on the existence of any sort of interstate externality risks blowing up the idea of a national government of limited, enumerated powers.[118]

To avoid this consequence, a collective action approach has two primary options. First, it can enforce collective action limits *indirectly* through legal doctrine that employs a conceptually imperfect but relatively determinate proxy for multistate collective action problems.[119] I will call this the "indirect approach." Alternatively, a collective action approach can enforce collective action limits *directly* by limiting the kinds of interstate externalities that justify Commerce Clause legislation. I will call this the "direct approach."

1. The Indirect Approach.—One could commend a proxy approach to the Commerce Clause. Indeed, one could attempt to justify the contemporary Court's distinction between "economic" and "noneconomic" conduct in just this way.[120] The Court's economic–noneconomic distinction may be de-

114. *Id.*

115. *Id.* at 152, 153 n.143, 172–73.

116. *Id.* at 152–53.

117. *See supra* note 41 and accompanying text.

118. I also referenced Justice Breyer's *Lopez* dissent in critiquing the substantial effects test, but this does not imply that the substantial effects test is the same as a test that turns on interstate externalities. While substantial effects on interstate commerce are potential evidence of interstate spillover effects, the two kinds of effects are conceptually distinct. Externalities are limited to effects that are external to the market. They are external to the market because they are unpriced. The Court's current doctrine is thus overinclusive.

119. *See generally* Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1 (2004) (distinguishing questions of constitutional meaning from the formulation of implementing doctrines).

120. *Cf.* Ernest A. Young, *Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception*, 69 GEO. WASH. L. REV. 139, 159 (2001) ("[T]he Court's attention to where the causal

fended as roughly correlated with the existence or nonexistence of collective action problems involving multiple states, even if some (or much) economic conduct does not cause collective action problems involving multiple states, and even if some (or much) noneconomic conduct does cause such problems.[121]

I am skeptical of such an approach for two reasons. First, as noted in the previous section, the question of whether something is "Commerce" may not have much to do with whether it is "among the several States." This is because economic conduct does not characteristically cause collective action problems for the states, and noneconomic conduct is not characteristically free of collective action problems. Accordingly, Congress is not generally better than the states at regulating "economic" problems, and the states are not generally better than Congress at regulating "noneconomic" problems.

Second, the costs of a relatively poor proxy may be particularly high in this setting because the Commerce Clause licenses federal coercion of individuals. To the extent that constitutional federalism distributes regulatory power vertically in part to prevent unjustified federal interference with individual liberty (a point of emphasis among opponents of the ACA),[122] it follows that the costs of commerce power regulations that do not solve multistate collective action problems may be particularly high. To illustrate the potential coerciveness of commerce power regulations, the Commerce Clause may usefully be contrasted with the Taxing Clause.[123]

Professor Cooter and I have developed an effects theory of the tax power, according to which there is a substantive, anticoercion limit on the scope of the Taxing Clause.[124] Whereas taxes characteristically dampen the conduct subject to the exaction, penalties characteristically prevent the conduct.[125] It is just because taxes dampen conduct without preventing it that taxes raise revenue. If the exaction is relatively modest in amount and thus is a tax, many individuals subject to it reasonably can opt out of federal regulation by paying the tax. By contrast, if the exaction is very high in amount and thus is a penalty, almost everyone subject to it has no reasonable choice but to engage in the congressionally favored conduct. The exaction may be as coercive as congressional use of the Commerce Clause.[126] The

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chain *starts*—i.e., with whether the regulated activity is itself 'commercial' or 'non-commercial'—seems to stem from the Court's reluctance to attempt to draw lines at any later point in the chain of economic interactions.").

121. Cooter & Siegel, *supra* note 2, at 164.

122. *See, e.g.*, Bond v. United States, 131 S. Ct. 2355, 2364 (2011) ("Federalism . . . protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions.").

123. U.S. CONST. art. I, § 8, cl. 1.

124. *See generally* Robert D. Cooter & Neil S. Siegel, *Not the Power to Destroy: An Effects Theory of the Tax Power*, 98 VA. L. REV. 1195 (2012).

125. *Id.* at 1229–30.

126. For greater specification of what it means for a federal exaction to be relatively modest or very high in amount, see generally *id.* The key distinction is between dampening conduct and

Court's tax power analysis in *NFIB* tracks the effects theory almost exactly.[127]

Professor Cooter and I have written elsewhere that the tax–penalty distinction helps to preserve limits on the Commerce Clause.[128] The distinction stops Congress from taking a regulation backed by a penalty that is beyond the scope of the commerce power, relabeling the penalty a tax, and imposing it under the Taxing Clause. I have just shown something else—that the tax–penalty distinction helps to preserve limits on the Taxing Clause itself. Congress must always respect the particular constitutional constraints on use of a given enumerated power, not all of which concern the existence or absence of a collective action problem.[129] The tax–penalty distinction ensures that Congress uses the tax power only in ways that are consistent with revenue raising. Congress need not intend to raise revenue as a primary objective in order to rely on the tax power—from the very beginning, Congress has used the tax power for both revenue-raising and regulatory purposes.[130] But congressional exercise of this power must result in revenue raising.[131] The tax–penalty distinction guarantees that it will.[132]

In contrast to the Taxing Clause, there is no substantive anticoercion limit on the scope of the commerce power.[133] Not only may Congress require people to pay very large sums of money for violating valid Commerce Clause regulations, but it may also prosecute violators criminally.[134] Accordingly, the harm to the constitutional structure is likely to be greater when the judiciary allows Congress to regulate intrastate commerce than when it allows Congress to tax for intrastate regulatory purposes. Instead of using a relatively unreliable proxy for problems that are

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preventing conduct. To make this determination, we counsel looking primarily to the material characteristics of the exaction: whether it is high relative to the benefit of almost everyone from engaging in the assessed conduct, and whether the amount one must pay increases with intentionality and repetition. Secondarily, we advise looking to the expressive form of the exaction. *See generally id.*

127. *See* Neal Kumar Katyal, *Foreword: Academic Influence on the Court*, 98 VA. L. REV. 1189, 1190–91 (2012).

128. *See generally* Cooter & Siegel, *supra* note 124.

129. In other words, Section 8 as a whole gives Congress the tools it requires to solve all multistate collective action problems. But each enumerated power in Section 8 does not give Congress the power to address every conceivable collective action problem facing the states.

130. *See* Cooter & Siegel, *supra* note 124, at 1204–10 (providing examples from different eras of American history).

131. *See id.* at 1224.

132. *See supra* text accompanying notes 124–27.

133. There is also an anticoercion limit on the scope of the spending power, which I explore elsewhere. *See generally* Robert D. Cooter & Neil S. Siegel, Not the Power to Destroy or Dragoon: Unity in Taxing and Spending Under the General Welfare Clause (May 2013) (unpublished manuscript) (on file with author).

134. *See, e.g.*, Gonzales v. Raich, 545 U.S. 1, 9 (2005) (upholding a criminal provision of the Controlled Substances Act under the Commerce Clause).

interstate in scope, a collective action approach should find ways to limit the kinds of interstate externalities that justify Commerce Clause legislation.

2. The Direct Approach.—There is no neutral or objective way to limit the kinds of interstate externalities that are admissible in a collective action analysis of the Commerce Clause. For example, people disagree in ideologically predictable ways about whether interstate public goods are few or many in number.[135] They also disagree about whether interstate markets are largely self-regulating.[136] Even so, resources are available that have the potential to attract broad support. I will note three of them.

First, courts should rule out psychological externalities as justifying use of the commerce power.[137] To be sure, psychological externalities can be real and pervasive in a country in which most citizens self-identify as Americans, particularly after a natural disaster, terrorist attack, or other cataclysmic event.[138] Americans care about whether other Americans live or die, have clean air and water, have access to food and shelter, etc. On the more meddlesome side, Americans may also care about what other Americans read, watch, and do in their free time. Professor Amartya Sen used as an example the preferences of two people, one a "prude" and one not, regarding whether the other should read a book that the prude deems obscene and the non-prude deems good literature.[139] It is apt to describe such psychological externalities as busybody preferences.

Regardless of whether particular psychological externalities are normatively attractive, allowing them to justify federal power risks vindicating the federalist objection that a collective action approach confers unlimited congressional authority. Professor Sen's point was that negative psychological externalities pose a threat to individualism in economic theory by making Pareto improvements impossible.[140] In the face of such externalities, every deviation from the status quo that would make one party better off would necessarily make some other party worse off.[141] Similarly,

135. Cooter & Siegel, *supra* note 2, at 152.

136. For a discussion, see *id.* at 152–53.

137. Balkin, *supra* note 6, at 44; *see also* Cooter & Siegel, *supra* note 2, at 153–54 (reserving judgment on this question).

138. *See, e.g.*, Michele Landis Dauber, *The Sympathetic State*, 23 LAW & HIST. REV. 387, 404–06 (2005) (recounting instances in American history where public support for humanitarian relief initiatives was used in arguments countering constitutional objections to the proposed measures).

139. Amartya Sen, *The Impossibility of a Paretian Liberal*, 78 J. POL. ECON. 152, 155 (1970). The book that Professor Sen used in his example is *Lady Chatterly's Lover* by D.H. Lawrence. *Id.*

140. Specifically, Professor Sen demonstrated that preferences about other people's preferences (second-order preferences) undermine the utility of Pareto efficiency as a normative criterion. *See id.* at 157 n.6 ("The difficulties of *achieving* Pareto optimality in the presence of externalities are well known. What is at issue here is the *acceptability* of Pareto optimality as an objective in the context of liberal values, given certain types of externalities.").

141. *See* Cooter & Siegel, *supra* note 2, at 153 & n.144.

psychological externalities pose a threat to state regulatory autonomy in constitutional theory by potentially justifying unlimited federal power.

The tradition of cost–benefit analysis in economics neither categorically excludes nor categorically includes psychological externalities. Rather, economists have tended to handle the issue of psychological externalities by crediting such externalities only if there is a demonstrated willingness to pay to vindicate one's moral concerns. Cheap talk does not suffice.[142] This intellectual tradition can be deployed to help justify the contemporary Court's deference to Congress regarding whether particular federal expenditures promote the general welfare,[143] but it does not justify admitting psychological externalities into a collective action analysis of the Commerce Clause.

In conditional spending cases, Congress conditions federal funds to the states or private entities on the agreement by recipients to act in ways that Congress cannot simply require. In *South Dakota v. Dole*,[144] for example, the Court upheld a federal law that conditioned five percent of federal highway funds on the agreement by recipient states to impose a 21-year-old drinking age.[145] By using the conditional spending power in this and other ways, Congress may be able to achieve regulatory objectives that it may not otherwise be able to achieve.[146] The *Dole* Court, for instance, assumed for purposes of analysis that the Twenty-First Amendment would prohibit Congress from imposing a national drinking age directly.[147]

Significantly, however, Congress's efforts to achieve regulatory objectives through use of the conditional spending power are not cost free. On the contrary, Congress is paying to vindicate whatever regulatory concerns it has.[148] Accordingly, psychological externalities may be available to justify much conditional spending. If psychological externalities are admissible, then the highway deaths on intrastate roads caused when young adults drink and drive may impact the general welfare. If only material

142. For a discussion, see *id.* at 153.

143. *See, e.g.*, South Dakota v. Dole, 483 U.S. 203, 207 n.2 (1987) ("The level of deference to the congressional decision is such that the Court has more recently questioned whether 'general welfare' is a judicially enforceable restriction at all." (citing Buckley v. Valeo, 424 U.S. 1, 90–91 (1976) (per curiam))).

144. 483 U.S. 203 (1987).

145. *Id.* at 211–12. The *Dole* Court identified four constitutional limits on conditional federal spending: (1) the spending must be for the general welfare; (2) the condition must be clearly stated; (3) the condition must be related to the purpose(s) of the federal spending program; and (4) the condition must not violate an independent constitutional limit. *Id.* at 207–08.

146. *Id.* at 207 ("Thus, objectives not thought to be within Article I's 'enumerated legislative fields[]' may nevertheless be attained through the use of the spending power and the conditional grant of federal funds." (citation omitted)).

147. *Id.* at 206.

148. *See* Brian Galle, *Federal Grants, State Decisions*, 88 B.U. L. REV. 875, 883 n.34 (2008) (arguing that while the Spending Clause "might allow Congress to enact legislation that would go beyond the limits of its other main sources of authority," still "Congress must literally pay a price, both in treasury dollars and political capital, for such expansions").

externalities are admissible, then the problem of highway deaths on intrastate roads is more likely to be local in nature.

The propriety of taking psychological externalities into account when Congress is willing to pay is one way to understand the longstanding judicial practice of deferring completely to congressional determinations of whether particular federal expenditures promote the "general Welfare."[149] In principle, welfare is "general" (in the language of the General Welfare Clause) when and only when commerce is "among the several States" (in the language of the Commerce Clause).[150] Specifically, welfare is "general" or "among the several States" when the federal government can obtain it and the separate states cannot—that is, when spillovers pose a collective action problem for the states. Both bits of constitutional language reference a problem of collective action involving at least two states.

In practice, however, Congress's need to pay to advance the general welfare only in conditional spending power cases may justify a less demanding judicial inquiry into the interstate scope of the regulatory problem. The need for Congress to pay helps to ensure that it is not engaging in cheap talk and thus sensibly limits its use of the Spending Clause.[151] Allowing Congress to spend based on psychological externalities, whose existence and scope may change over time, also helps to make sense of Justice Cardozo's statement for the Court that the concept of the general welfare is not "static."[152] "Needs that were narrow or parochial a century ago," he wrote, "may be interwoven in our day with the well-being of the Nation."[153]

To be sure, when Congress demonstrates its willingness to pay, it is not the same as when an individual demonstrates such willingness. Not only is Congress spending other people's money, but it can also raise taxes to support more spending, and it can deficit spend. Even so, Congress's ability to keep spending is limited; it is not cost free for Congress to work its will through the spending power. Indeed, anticommandeering doctrine perceives a constitutionally significant difference between simply requiring states to regulate on Congress's behalf and offering states money if they agree to

149. U.S. CONST. art. I, § 8, cl. 1.

150. For a discussion, see Cooter & Siegel, *supra* note 2, at 119.

151. The *Dole* Court, at the end of its opinion, mentioned that a "financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" *Dole*, 483 U.S. at 211 (quoting Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937)). But the Court upheld the drinking-age condition on the ground that Congress was offering only "relatively mild encouragement to the States." *Id.* Twenty-five years later, in *NFIB*, the Court held for the first time that a condition attached to a federal funding program was unconstitutionally coercive, with the Justices fracturing three ways on whether or why the condition was coercive. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2608, 2641–42, 2662–66 (2012). For a theory of coercion in conditional spending cases that seeks to bring some clarity to this newly important constitutional question, see generally Cooter & Siegel, *supra* note 133.

152. Helvering v. Davis, 301 U.S. 619, 641 (1937).

153. *Id.*

regulate on Congress's behalf.[154] Only the latter alternative requires Congress to internalize at least some of the costs of its regulatory objectives.[155] This cost-internalization rationale for the anticommandeering principle is stronger than the Court's strained analysis of political accountability.[156]

The Commerce Clause is different from the conditional spending power on the key question of whether Congress has demonstrated a willingness to pay. When resting on the Commerce Clause, Congress need not demonstrate any willingness to pay to vindicate the psychological concerns of people in one state for the welfare of people in other states.[157] Congress need simply impose the requirement. Limiting a collective action analysis to material externalities avoids the unboundedness of an inquiry into nonmaterial externalities—into preferences about other people's preferences—when there is no requirement to pay.

In addition to ruling out psychological externalities as justifying use of the commerce power, there is a second way to limit the kinds of interstate externalities that count in a collective action analysis of the Commerce Clause. Judicial review should turn not just on the *existence* of an interstate externality, but also on its *significance* and on the extent to which the federal law at issue *meaningfully addresses* it. Consider, for example, the regulated conduct in *Lopez*—firearm possession in a school zone.[158] The way that one state regulates this problem does not appear to undermine how other states regulate this problem, and the external effect of guns in schools on national productivity is attenuated and long-term. The externality seems relatively

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154. *See, e.g.*, New York v. United States, 505 U.S. 144, 166 (1992) ("Our cases have identified a variety of methods, short of outright coercion, by which Congress may urge a State to adopt a legislative program consistent with federal interests.").

155. *See* Neil S. Siegel, *Commandeering and Its Alternatives: A Federalism Perspective*, 59 VAND. L. REV. 1629, 1644 (2006). In this article, I identify a cost-internalization rationale for the anticommandeering principle:

> Anticommandeering doctrine vindicates federalism values . . . to the extent that it forces the federal government to internalize more of the financial and accountability costs associated with regulating. As law and economics posits, actors that do not internalize the full costs of their behavior tend to engage in too much of the behavior.

Id. (footnote omitted).

156. *See id.* at 1632. I question the Court's accountability rationale for anticommandeering doctrine:

> Even after factoring in search costs and rational ignorance, it seems likely that citizens who pay attention to public affairs and who care to inquire will be able to discern which level of government is responsible for a government regulation, and citizens who do not care to inquire may be largely beyond judicial or political help on the accountability front.

Id.

157. *Cf.* Cooter & Siegel, *supra* note 2, at 153–54 (asking whether "the standard of 'willingness to pay' [could] achieve the same success in constitutional law [as in cost–benefit analysis] by limiting the feelings that count as interstate externalities").

158. United States v. Lopez, 514 U.S. 549, 551 (1995).

insignificant. Moreover, in light of the forty-plus state criminal laws already on the books, the Gun-Free School Zones Act (GFSZA)[159] did not appear to meaningfully address the problem.[160] Justice Kennedy was almost certainly right that the regulatory power of the states was "sufficient" to address it.[161] For the most part, the GFSZA seemed to be symbolic grandstanding by the federal government.

Third, courts should impose a reasonableness inquiry in the context of judicial review, in contrast to genuine rational basis review. Questions of significance and meaningfulness are matters of judgment. Reasonable people will often disagree about them. When reasonable people could differ about the significance of a multistate collective action problem and about the adequacy of Congress's response, courts should uphold federal legislation in light of the aforementioned presumption of constitutionality and the tradition of judicial deference to Congress in federalism cases.[162]

A reasonableness inquiry, however, is not the same thing as genuine rational basis review. Under a rational basis test, even *Lopez* may be justifiable on collective action grounds. By contrast, a reasonableness inquiry should require both a plausible theoretical rationale that a significant, multistate collective action problem exists, and some empirical evidence to support that rationale.[163] The stronger the theoretical rationale, the less evidence should be required. And the less plausible the theoretical rationale, the more evidence should be required.

For example, contrast the GFSZA with the ban on racial discrimination in public accommodations imposed by the Civil Rights Act of 1964.[164] As explained in Part I, it was at least reasonable to view the Civil Rights Act of 1964 as meaningfully addressing significant collective action problems involving multiple states in light of the various ways in which Jim Crow laws and policies in the South impeded the interstate travel of African-Americans to Southern states on a temporary basis; distorted the allocation of labor and capital from other parts of the nation; and encouraged the Great Migration of African-Americans in the South to cities in the North.[165] By maintaining racial segregation, Southern states were imposing significant, material costs on the rest of the nation.

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159. Gun-Free School Zones Act of 1990, Pub. L. No. 101-647, § 1702, 104 Stat. 4789, 4844 (codified as amended at 18 U.S.C. § 922(q) (2006)).

160. *See, e.g.*, *Lopez*, 514 U.S. at 581 (Kennedy, J., concurring) ("Indeed, over 40 States already have criminal laws outlawing the possession of firearms on or near school grounds.").

161. *Id.*

162. *See supra* notes 73–75 and accompanying text.

163. In constitutional litigation, the federal government should be permitted to supplement the record compiled by Congress, particularly for statutes enacted before judicial imposition of evidentiary demands.

164. In *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), and *Katzenbach v. McClung*, 379 U.S. 294 (1964), the Court held that the Commerce Clause justified provisions of the Civil Rights Act of 1964 that prohibited racial discrimination by hotels and restaurants.

165. *See supra* notes 54–59 and accompanying text.

Key provisions of the Affordable Care Act are also reasonably viewed as meaningfully contributing to the solution of significant collective action problems in light of the mobility or immobility of various participants in health care and health insurance markets, including insurers, hospitals, employers, healthy individuals, and unhealthy individuals.[166] For example, the minimum coverage provision is reasonably viewed as combating cost shifting from the uninsured to other participants in health care markets.[167] This cost shifting is likely interstate in scope because of the presence of "insurance companies in multiple states and the phenomenon of cross-state hospital use."[168] Consider as well the ACA provisions that prohibit insurance companies from denying people coverage based on preexisting conditions and discriminating against them based on their medical histories.[169] These provisions very likely solve collective action problems for the states by facilitating labor mobility, discouraging the flight of insurance companies from states that guarantee access to states that do not, and discouraging states from free riding on the more generous health care systems of other states.[170]

In sum, the foregoing federalist objection to a collective action account of the Commerce Clause warrants serious consideration. The objection appropriately instructs collective action theorists either to defend a good proxy to a collective action analysis, or to limit the universe of interstate externalities that count as multistate collective action problems justifying federal commerce power. Fortunately, resources are available to accomplish the latter task in the context of judicial review. The decisive question in Commerce Clause cases should be whether Congress had a reasonable basis to believe that it was meaningfully addressing a significant, material interstate externality. To support an affirmative answer, a reviewing court could require Congress to proffer both a theoretical rationale and empirical evidence.

To be sure, these resources are not fully determinate; they require contestable judgment calls. But the same is true of any approach to the commerce power that places at least some limits on federal power. Chief Justice Rehnquist thus conceded in *Lopez* that "a determination whether an intrastate activity is commercial or noncommercial may in some cases result in legal uncertainty."[171] Echoing Chief Justice Marshall, however, he added that "so long as Congress'[s] authority is limited to those powers enumerated in the Constitution, and so long as those enumerated powers are interpreted

166. For a more detailed collective action analysis of the ACA, see generally Siegel, *supra* note 6.

167. *Id.* at 38–39.

168. *Id.* at 33.

169. *See supra* note 15.

170. *See generally* Siegel, *supra* note 6.

171. United States v. Lopez, 514 U.S. 549, 566 (1995).

as having judicially enforceable outer limits, congressional legislation under the Commerce Clause always will engender legal uncertainty."[172]

Conclusion

Nationalists and federalists alike may be inclined to reject collective action approaches to the Commerce Clause. Collective action theory seeks a path between a regime of no judicially enforceable limits on the commerce power and a regime of structurally arbitrary limits on the commerce power. If one does not believe in judicial review of federalism questions, then one should reject collective action approaches, or else should understand them as directed at conscientious legislators, presidents, and citizens. If one does believe in judicial review of federalism questions, and if one believes that only relatively clear rules can meaningfully limit federal power, then one should also reject collective action theory.

I have argued, however, that nationalists and federalists have more reason to accept collective action theory than they may think. A collective action approach justifies substantially more federal power than nationalists may fear, particularly in light of material interstate externalities and the presumption of constitutionality in the context of judicial review. A collective action approach would also impose some structurally sensible limits on the Commerce Clause, thereby speaking to the constitutional commitments of federalists. Collective action approaches largely legitimate—and integrate different decades of—the constitutional regime in which Americans have been living since 1937. Both nationalists and federalists have played major roles in the construction of this regime.

172. *Id.* (internal quotation marks omitted). Rehnquist then quoted *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819), and *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824).