DISTINGUISHING THE "TRULY NATIONAL" FROM THE "TRULY LOCAL": CUSTOMARY ALLOCATION, COMMERCIAL ACTIVITY, AND COLLECTIVE ACTION

NEIL S. SIEGEL†

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

ABSTRACT

This Essay makes two claims about different methods of defining the expanse and limits of the Commerce Clause.

My first claim is that approaches that privilege traditional subjects of state regulation are unworkable and undesirable. These approaches are unworkable in light of the frequency with which the federal government and the states regulate the same subject matter in our world of largely overlapping federal and state legislative jurisdiction. The approaches are undesirable because the question of customary allocation is unrelated to the principal reason why Congress possesses the power to regulate interstate commerce: solving collective action

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

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

problems involving multiple states. These problems are evident in the way that some federal judges invoked regulatory custom in litigation over the constitutionality of the minimum coverage provision in the Patient Protection and Affordable Care Act. The areas of "health insurance" and "health care" are not of exclusive state concern, and it is impossible to lose—or to win—a competition requiring skillful lawyers or judges to describe them as more state than federal, or more federal than state. Nor is it most important what the answer is.

More promising are the approaches that view congressional authority as turning on either commercial activity or collective action problems facing the states. My second claim is that these two approaches have advantages and disadvantages, and that the choice between them exemplifies the more general tension between applying rules and applying their background justifications. I have previously defended a collective action approach to Article I, Section 8. My primary purpose in this Essay is to clarify the jurisprudential stakes in adopting one method or the other and to identify the problems that advocates of each approach must address.

TABLE OF CONTENTS

INTRODUCTION

Congress possesses the authority "[t]o regulate Commerce . . . among the several States"[2] primarily so that it can solve collective action problems like the ones that the states faced under the Articles of Confederation, when Congress lacked the

2. U.S. CONST. art. I, § 8, cl. 3.

power to regulate interstate commerce.[3] Most of the eighteen clauses in Article I, Section 8 of the United States Constitution likewise give Congress the authority to solve multistate collective action problems.[4] The commerce power in particular, however, possesses perhaps the greatest potential to collapse the "distinction between what is truly national and what is truly local."[5] There are three main judicial strategies for maintaining such a distinction in Commerce Clause cases.[6]

One historic strategy, which has few adherents today, is to invoke what is asserted to be the customary allocation of regulatory authority between the federal government and the states. Most often, this approach is formulated in a way that is akin to "dual federalism," which died in 1937 because it proved unable to define unique and exclusive spheres of federal and state legislative jurisdiction.[7] The method of customary allocation identifies so-called traditional subjects of state regulation. It regards subject matters that "ha[ve] always been the province of the States"[8] as beyond the reach of federal commerce power.

The unworkability of this approach has led to a toned-down version of it, which continues to show up in the Court's jurisprudence.

---

3. *See generally* Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115, 117 (2010) ("Article I, Section 8 of the new Constitution gave Congress additional powers to address collective action problems.").

4. *See id*. at 144–50 (explaining how various clauses of Article I, Section 8 solve particular collective action problems).

5. *Morrison*, 529 U.S. at 617–18; *see also* Cooter & Siegel, *supra* note 3, at 118 (discussing how the Supreme Court "historically has gone back and forth between imposing essentially no limits on the scope of the commerce power and imposing a series of dubious formal distinctions").

6. One could identify various political safeguards of federalism as limiting the scope of the commerce power. *See, e.g.*, JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 2 (1980) (arguing that "state interests are forcefully represented in the national political process"); 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"); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 558 (1954) (suggesting 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"). The inquiry in this Essay, however, focuses on judicially enforceable limits.

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

8. *Morrison*, 529 U.S. at 618.

The Rehnquist Court identified traditional subjects of state regulation as a factor or consideration in its Commerce Clause analysis, but not as exhausting the constitutional inquiry. According to the Court, those regulatory areas include criminal law, education, and family law.[9]

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

A third possible approach is to interpret the commerce power in light of its primary underlying justification, which is to empower Congress to solve multistate collective action problems. Scholars who advocate this approach distinguish problems whose solution requires collective action by states, which they view as within the scope of federal commerce power, from problems whose solution requires individual action by states, which they regard as beyond the reach of the commerce power.[13] This approach accounts for the results reached

---

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

10. *See* Gonzales v. Raich, 545 U.S. 1, 35 (2005) ("Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained." (quoting *Morrison*, 529 U.S. at 610) (internal quotation marks omitted)); United States v. Lopez, 514 U.S. 549, 560 (1995) (same). The Court's pre-*Lopez* doctrine, which asked whether Congress could rationally have concluded that the regulated subject matter substantially affects interstate commerce in the aggregate, is probably not an approach to limiting the scope of the commerce power. It seems to reflect a regime in which there are no judicially enforceable limits on the commerce power.

11. *See, e.g.*, *Morrison*, 529 U.S. at 617–18 (distinguishing between subjects that are "truly national" and those that are "truly local").

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

13. *See generally* Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 23–31 (2010) (articulating the collective action component of his theory of the commerce power); Cooter & Siegel, *supra* note 3 (articulating a theory of Article I, Section 8 that focuses on collective action problems involving multiple states); Andrew Koppelman, *Bad News for Mail Robbers: The Obvious Constitutionality of Health Care Reform*, 121 YALE L.J. ONLINE 1, 14–18 (2011), http://yalelawjournal.org/images/pdfs/981.pdf (explaining why individual action by states cannot solve the problems addressed by the Patient Protection and Affordable Care Act (ACA), Pub. L. No. 111-148, 124 Stat. 119 (2010), *amended by* Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029); Donald H. Regan, *How To Think About the*

by the Rehnquist Court in its commerce-power rulings better than the Court's own proffered distinction between commercial and noncommercial activity.[14] The approach also tracks Justice Ginsburg's emphasis on multistate collective action problems in her opinion for four Justices in *National Federation of Independent Business v. Sebelius* (*NFIB*).[15]

This Essay makes two claims about these three methods of defining the expanse and limits of the Commerce Clause. First, approaches that privilege traditional subjects of state regulation are unworkable and undesirable. These approaches are unworkable in light of the frequency with which the federal government and the states regulate the same subject matter in our modern world of

---

Federal Commerce Power and Incidentally Rewrite United States v. Lopez, 94 MICH. L. REV. 554 (1995) (arguing that the Commerce Clause should be understood to authorize Congress to address problems requiring action by multiple states); Neil S. Siegel, *Four Constitutional Limits That the Minimum Coverage Provision Respects*, 27 CONST. COMMENT. 591, 603–09 (2011) [hereinafter Siegel, *Four Constitutional Limits*] (identifying the distinction between individual and collective action by states as a principled, judicially enforceable limit on the commerce power); Neil S. Siegel, *Free Riding on Benevolence: Collective Action Federalism and the Minimum Coverage Provision*, 75 LAW & CONTEMP. PROBS. 29 [hereinafter Siegel, *Free Riding on Benevolence*] (identifying how the ACA addresses multistate collective action problems); Robert L. Stern, *That Commerce Which Concerns More States Than One*, 47 HARV. L. REV. 1335 (1934) (examining the proceedings of the Philadelphia Convention and concluding that the drafting history of Article I, Section 8 helps to justify federal commerce power in instances of separate state incompetence).

14. *See* Cooter & Siegel, *supra* note 3, at 162–64 ("Although current doctrine formally emphasizes the economic or noneconomic nature of the regulated activity, a more functional logic may in fact have animated the Court in *Lopez*, *Morrison*, and *Raich*. Just as the Court offered collective action problems as a reason to sustain congressional regulation in many of the Commerce Clause cases decided from 1937 until the early 1990s, so too the Rehnquist Court implicitly has offered the absence (or presence) of a collective action problem as a reason to prohibit (or sustain) congressional regulation.").

15. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB*), 132 S. Ct. 2566, 2615–16 (2012) (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part). Justices Breyer, Sotomayor, and Kagan joined this part of Ginsburg's opinion. The other five Justices articulated a new distinction between regulating and requiring commerce. *See id.* at 2589 (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."); *see 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 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."). This distinction cannot constitute a freestanding approach to defining the expanse and limits of the Commerce Clause because only one federal law in American history has even arguably implicated the distinction: the minimum coverage provision in the ACA. To my knowledge, no defender of this distinction argues that it should replace, as opposed to supplement, the Court's distinction between economic and noneconomic subject matter.

largely overlapping federal and state legislative jurisdiction. Either a regulated area is never of exclusive state concern, or else the answer will turn on arbitrary—and increasingly narrow—definitions of the breadth of the area at issue. Moreover, if "traditional" is redefined to mean a subject of predominant, though not exclusive, state concern, then the inquiry will often prove indeterminate.

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

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

More promising are approaches that view congressional authority as turning on either commercial activity or collective action problems facing the states. This Essay's second claim is that the commercial activity and collective action approaches have advantages and disadvantages, and that the choice between them exemplifies the more general tension between applying rules and applying their background justifications. In previous work with Professor Robert Cooter, I have articulated a collective action approach to Article I, Section 8.[17] My primary purpose here is to clarify the jurisprudential stakes in adopting one method or the other, and to identify the problems that advocates of each approach must address.

---

16. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), *amended by* Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029). The law requires, among many other things, that most lawful permanent residents of the United States either maintain a minimum level of health insurance coverage (the minimum coverage provision), 26 U.S.C. § 5000A(a) (Supp. IV 2011), or else pay a certain amount of money each year (the shared responsibility payment), *id.* § 5000A(b)(1).

17. Cooter & Siegel, *supra* note 3, at 118–19.

I begin with constitutional theory. Part I discusses the primary historical and contemporary justification for the Commerce Clause. I then move to three methods of operationalizing the Commerce Clause through legal doctrine. Part II examines approaches that turn on the customary allocation of different subject matters to different sovereigns. Part III analyzes the virtues and vulnerabilities of the strategies that favor commercial activity or collective action. The Conclusion suggests a different possibility—that the commercial activity and collective action approaches could form part of one overarching implementation of the Commerce Clause. It then explains why federalism formalists and functionalists are unlikely to converge on the same solution—and, yet, why both approaches may continue to influence the Court's decision making.

I. THEORY: THE PRIMARY JUSTIFICATION FOR THE COMMERCE CLAUSE

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

James Madison decried the discord among the states in his *Vices of the Political System of the United States*,[21] which he wrote while preparing for the Constitutional Convention.[22] Recording various

18. *Id.* at 121–24.

19. *See, e.g.*, Larry D. Kramer, *Madison's Audience*, 112 HARV. L. REV. 611, 616–23 (1999) (arguing that, under the Articles of Confederation, "many of the Union's difficulties could not have been met without more ambitious changes in the structure of the government" and that the Commerce Clause was one such change).

20. *See, e.g.*, JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 24–28, 47–48, 102–08, 167–68, 188–89 (1996) (identifying national finances, foreign relations, and westward expansion as instances in which the Articles of Confederation failed to give Congress adequate power to address important national issues).

21. *See* JAMES MADISON, *Vices of the Political System of the United States*, *in* JAMES MADISON: WRITINGS 69, 69–70 (Jack N. Rakove ed., 1999) (lamenting the failure of states to comply with requisitions under the Articles of Confederation, their encroachments on federal authority and on the rights of other states, and their violations of treaties).

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

problems with the Articles of Confederation, Madison stressed the "want of concert in matters where common interest requires it," a "defect . . . strongly illustrated in the state of our commercial affairs. How much has the national dignity, interest, and revenue suffered from this cause?"[23] When conduct such as tariff barriers spilled over from one state to another, Madison and other nationalist Framers recognized that the actions of individually rational states produced irrational results for the nation. The solution ultimately sought for these and other collective action problems was the establishment of a more comprehensive unit of government with the authority to tax, borrow money on credit, raise and support a military, and regulate interstate commerce, thereby creating a national free-trade zone.[24]

The delegates at the Philadelphia Convention focused on multistate collective action problems in describing the scope of federal power that would become Section 8. The Convention instructed the midsummer Committee of Detail that Congress would be entrusted with authority "to legislate in all Cases for the general Interests of the Union, and also in those Cases to which the States are separately incompetent, or in which the Harmony of the United States may be interrupted by the Exercise of individual Legislation."[25] This language registers the importance of ameliorating various collective action problems facing the states. When the Committee of Detail made its report ten days later, "[i]t had changed the indefinite language . . . into an enumeration of the powers of Congress closely resembling Article I, Section 8 of the Constitution as it was finally adopted."[26]

The Convention "accepted *without discussion* the enumeration of powers made by [the] committee."[27] The delegates must have perceived the connection between the general principles conveyed to the Committee of Detail and the specific powers listed in Section 8, including the Commerce Clause. The Committee was embodying

23. MADISON, *supra* note 21, at 71.

24. *See, e.g.*, Baldwin v. G.A.F. Seeling, Inc., 294 U.S. 511, 523 (1935) ("[The Constitution] was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.").

25. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 131–32 (Max Farrand ed., rev. ed. 1966).

26. Stern, *supra* note 13, at 1340.

27. *Id.*

these general principles, not rejecting them, when it provided an enumeration.[28]

Enabling Congress to solve multistate problems of collective action was, and remains, the primary justification for giving Congress the power "[t]o regulate Commerce . . . among the several States."[29] It may not be the only justification; constitutional provisions are often written in vague, value-laden language, which enables the ascription of multiple, contested justifications to them. But in light of the historical background out of which the Commerce Clause arose, and in light of its present role in American life in addressing races to the bottom and interstate externalities,[30] solving multistate collective action problems qualifies as the primary background justification for the Clause.

II. DOCTRINE: CUSTOM AND THE COMMERCE CLAUSE

With an understanding of the core justification of the commerce power in hand, I turn in this Part and the next to three methods of operationalizing the Commerce Clause through legal doctrine. Because many laws can plausibly be described as regulations of interstate commerce, or as necessary and proper to the regulation of interstate commerce,[31] the commerce power has the potential to unravel the principle of limited federal power. This potential has led to three approaches to restrict the scope of the clause.

---

28. *See, e.g.*, Regan, *supra* note 13, at 556 ("[T]here is no reason to think the Committee of Detail was rejecting the spirit of the Resolution when they replaced it with an enumeration."); Stern, *supra* note 13, at 1340 ("If the Convention had thought that the committee's enumeration was a departure from the general standard for the division of powers to which it had thrice agreed, there can be little doubt that the subject would have been thoroughly debated on the Convention floor.").

29. U.S. CONST. art. I, § 8, cl. 3.

30. Many federal laws, including statutes regulating securities, the environment, civil rights, public health, and criminality, fit this description. *See, e.g.*, Siegel, *Free Riding on Benevolence*, *supra* note 13, at 46–47 (defining collective action problems for the states and discussing examples in the areas of environmental law and civil rights); *see also* Richard L. Revesz, *Federalism and Interstate Environmental Externalities*, 144 U. PA. L. REV. 2341, 2342 (1996) ("The two justifications most prominently offered . . . for environmental regulation at the federal level focus on the existence of a 'race to the bottom' and of interstate externalities.").

31. *See* U.S. CONST. art. I, § 8, cl. 18 (authorizing Congress to pass laws that are "necessary and proper for carrying into Execution" Congress's other enumerated powers).

A. The Unworkability of Custom

One strategy, which has noteworthy historical roots in American constitutional law, is to invoke the idea of the customary allocation of subject-matter authority between the federal government and the states. For example, in *United States v. Lopez*[32] and *United States v. Morrison*,[33] the Court invalidated two federal laws as beyond the scope of the commerce power for the first time since the 1930s: the Gun-Free School Zones Act of 1990[34] and the provision of the Violence Against Women Act of 1994[35] giving victims of gender-motivated violence a private civil-damages remedy.[36] In *Lopez* and *Morrison*, Chief Justice Rehnquist appeared to support these rulings by identifying criminal law, education, and family law as traditional subjects of state regulation.[37] Similarly, Justice Kennedy's concurring opinion in *Lopez* inquired "whether the exercise of national power seeks to intrude upon an area of traditional state concern"[38]—that is, "an area to which States lay claim by right of history and expertise."[39] He concluded that "[a]n interference of these dimensions occurs here, for it is well established that education is a traditional concern of the States."[40]

Following the Supreme Court's lead, some federal courts invoked another allegedly traditional subject of state concern in litigation over the constitutionality of the ACA. For example, the United States Court of Appeals for the Eleventh Circuit invalidated

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

33. United States v. Morrison, 529 U.S. 598 (2000).

34. Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q) (Supp. V 1994) (making it a crime "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone"), *invalidated by Lopez*, 514 U.S. 549.

35. Violence Against Women Act of 1994, Pub. L. No. 103-322, tit. IV, §§ 40001–40703, 108 Stat. 1902 (codified as amended in scattered sections of 18 & 42 U.S.C.) *invalidated in part by Morrison*, 529 U.S. 598.

36. 42 U.S.C. § 13981(c) (1994) (authorizing victims of gender-motivated violence to sue their assailants for money damages in federal court), *invalidated by Morrison*, 529 U.S. 598.

37. *See, e.g.*, *Morrison*, 529 U.S. at 618 ("The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States."); *id.* at 615–16 ("Petitioners' reasoning, moreover, will not limit Congress to regulating violence but may, as we suggested in *Lopez*, be applied equally as well to family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant.").

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

39. *Id.* at 583.

40. *Id.* at 580.

the law's minimum coverage provision and shared responsibility payment.[41] These provisions require that most lawful residents of the United States either obtain a minimum level of health insurance coverage or pay a certain amount of money each year.[42] In supporting its holding that the provisions were beyond the scope of the commerce power, the Eleventh Circuit invoked the "Supreme Court's Commerce Clause jurisprudence" for the proposition that, "in assessing the constitutionality of Congress's exercise of its commerce authority, a relevant factor is whether a particular federal regulation trenches on an area of traditional state concern."[43] The court of appeals then concluded that "insurance qualifies as an area of traditional state regulation," that "[t]he health care industry . . . falls within the sphere of traditional state regulation," and that "the narrower category of 'health care' is an area of traditional state concern."[44] The court added "this federalism factor" to "numerous indicia of constitutional infirmity" and concluded that the provisions under review were beyond the scope of the commerce power.[45]

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

As to the first problem, the Eleventh Circuit's assertions about regulatory tradition are erroneous if the court was suggesting that the states exclusively or uniquely have regulated "insurance," "the health care industry," or "health care." The federal government, too, has long regulated extensively in the fields of health insurance and health care. Indeed, the federal government has also regulated extensively in the areas of criminal law,[46] education,[47] family law,[48] and other

41. Florida *ex rel.* Att'y Gen. v. U.S. Dep't of Health & Human Servs., 648 F.3d 1235, 1328 (11th Cir. 2011), *aff'd in relevant part*, *rev'd in part sub nom. NFIB*, 132 S. Ct. 2566 (2012).

42. 26 U.S.C. § 5000A(b)(1) (Supp. IV 2011).

43. *Florida*, 648 F.3d at 1303.

44. *Id*. at 1305–06.

45. *Id*. at 1307.

46. 18 U.S.C. (2006).

47. *See, e.g.*, No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended in scattered sections of 20 U.S.C.); Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (codified as amended in scattered sections of 20 U.S.C.); Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 28 & 42 U.S.C.).

traditional subjects of state regulation identified by the Court in *Lopez* and *Morrison*.[49]

Judge Marcus recognized his colleagues' error, writing in dissent in the Eleventh Circuit case that "Congress has extensively exercised its commerce power to regulate the health insurance market for many years, long before the [ACA] was passed."[50] He further noted that Congress has often regulated the content of private health insurance policies.[51] He also observed that Congress has long regulated health care providers.[52] And he pointed out that Congress "has extensively regulated under its commerce power the commodities used in the health care services market, most notably drugs and medical devices."[53] Finally, he underscored concededly constitutional federal regulations of the prices to be paid for consuming health care services.[54]

---

48. *See generally* Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. REV. 1297 (1998) (noting the significant involvement of the federal government in regulating the family since Reconstruction).

49. United States v. Lopez, 514 U.S. 549, 564 (1995); United States v. Morrison, 529 U.S. 598, 615–16 (2000); *see also* JACK M. BALKIN, LIVING ORIGINALISM 172 (2011) ("[T]he federal government has regulated family law since at least Reconstruction, and it has regulated education heavily in the last fifty years. And, of course, the federal government has attacked crime since the beginning of the Republic and with increasing frequency in the twentieth century." (footnote omitted)).

50. *Florida*, 648 F.3d at 1333–34 (Marcus, J., concurring in part and dissenting in part) (discussing the Employee Retirement Income Security Act of 1974 (ERISA), Pub. L. No. 93-406, 88 Stat. 829 (codified as amended in scattered sections of 26 & 29 U.S.C.); Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, 100 Stat. 82 (1986) (codified as amended in scattered sections of the U.S. Code); and Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. No. 104-191, 110 Stat. 1936 (codified as amended in scattered sections of 18, 26, 29, & 42 U.S.C.)).

51. *Id.* at 1334 (pointing to the Mental Health Parity Act of 1996, Pub. L. No. 104-204, tit. VII, 110 Stat. 2944 (codified as amended at 29 U.S.C. § 1185a, 42 U.S.C. § 300gg-26); Newborns' and Mothers' Health Protection Act of 1996, Pub. L. No. 104-204, tit. VI, 110 Stat. 2935 (codified as amended at 29 U.S.C. § 1185, 42 U.S.C. §§ 300gg-25, 300gg-51); Women's Health and Cancer Rights Act of 1998, Pub. L. No. 105-277, tit. IX, 112 Stat. 2681-436 (codified as amended at 29 U.S.C. § 1185b, 42 U.S.C. §§ 300gg-27, 300gg-52); and Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008, Pub. L. No. 110-343, tit. V, subtit. B, 122 Stat. 3881 (codified as amended at 26 U.S.C. § 9812, 29 U.S.C. § 1185a, 42 U.S.C. § 300gg-26)).

52. *Id.* at 1335 (discussing the Hospital Survey and Construction Act, ch. 958, 60 Stat. 1040 (1946); Emergency Medical Treatment and Active Labor Act, Pub. L. No. 99-272, tit. IX, subtit. A, pt. 1, subpt. B, § 9121(b), 100 Stat. 164 (1986) (codified as amended at 42 U.S.C. § 1395dd (2006)); and HIPAA).

53. *Id.* (referring to portions of the Federal Food, Drug, and Cosmetic Act, ch. 675, 52 Stat. 1040 (1938) (codified as amended in scattered sections of 21 U.S.C.)).

54. *Id.* at 1336 (referring to the Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, 103 Stat. 2106 (codified as amended in scattered sections of the U.S. Code)).

The D.C. Circuit agreed with Judge Marcus. "Appellants have not argued that health care and health insurance are uniquely state concerns," the court wrote, "and decades of established federal legislation in these areas suggest the contrary."[55] Moreover, the court rejected the idea that "states' powers over health and general welfare make the health care *industry* a traditional state concern."[56]

The D.C. Circuit correctly recognized the federal government's heavy involvement in the provision and regulation of health insurance and health care in the United States. As the government stated in its brief to the Eleventh Circuit:

> Medicare . . . insures virtually all Americans aged 65 or older, as well as several million others with certain disabilities. In 2009, the federal government spent approximately $500 billion on Medicare—22% of total spending on health care consumption in the country.
>
> The federal and state governments jointly finance access to health care for low-income persons through Medicaid and the Children's Health Insurance Program (CHIP). In 2009, combined spending on these programs was approximately $390 billion—17% of total spending on health care consumption in the United States. Medicaid and CHIP paid for the health care of 37.6 million nonelderly individuals, 14.2% of the nonelderly population.[57]

Since the Eisenhower administration,[58] the federal government has secured employer-sponsored health insurance through use of Congress's tax power for regulatory purposes.[59] Pursuant to a tax subsidy for employment-based health insurance that amounted to $242 billion in 2009,[60] employees generally do not include as income or pay taxes on the payments of their health insurance premiums by their employers.[61] This favorable tax treatment contrasts with most

---

55. Seven-Sky v. Holder, 661 F.3d 1, 19 (D.C. Cir. 2011).

56. *Id.*

57. Brief for Petitioners at 3–4, U.S. Dep't of Health & Human Servs. v. Florida, 132 S. Ct. 2566 (No. 11-398) (2012).

58. For an account of the history, see generally DAVID BLUMENTHAL & JAMES A. MORONE, THE HEART OF POWER: HEALTH AND POLITICS IN THE OVAL OFFICE 99–130 (2009).

59. For an argument that Congress may use its tax power for some regulatory purposes in addition to revenue-raising purposes, see generally Robert D. Cooter & Neil S. Siegel, *Not the Power To Destroy: An Effects Theory of the Tax Power*, 98 VA. L. REV. 1195 (2012).

60. Brief for Petitioners, *supra* note 57, at 4.

61. 26 U.S.C. § 106 (2006 & Supp. IV 2011).

other forms of employee compensation. Moreover, employers may deduct their premium payments as business expenses.[62]

Finally, the plaintiffs themselves in the ACA litigation conceded that the Commerce Clause supports the fundamental changes that the ACA makes in the ways insurance companies do business and control costs. Specifically, the plaintiffs did not challenge the ACA provisions prohibiting insurance companies from denying coverage based on pre-existing conditions, canceling insurance absent fraud, charging higher premiums based on medical history, and imposing lifetime limits on benefits.[63] The Supreme Court has long held that Congress may use the Commerce Clause to regulate insurance markets.[64]

When the ACA litigation reached the Supreme Court, no Justice responded by characterizing the ACA as operating in an area of traditional state concern. On the contrary, Justice Ginsburg, joined by Justices Breyer, Sotomayor, and Kagan, stressed that "the Federal Government plays a lead role in the health-care sector, both as a direct payer and as a regulator."[65] Moreover, Chief Justice Roberts made no mention of traditional subjects of state regulation in his decisive opinion, even as he concluded that the ACA's minimum coverage provision was beyond the scope of the Commerce Clause.[66] And the joint dissenters—Justices Scalia, Kennedy, Thomas, and Alito—invoked traditional areas of state concern only in making general points about the need for limits on the Spending Clause, in the part of their opinion that considered the ACA's expansion of Medicaid.[67] They declared the minimum coverage provision beyond the scope of the Commerce Clause, the Necessary and Proper Clause,

62. *Id.* § 162.

63. *See* 42 U.S.C. §§ 300gg, 300gg-1, 300gg-3(a), 300gg-11, 300gg-12 (Supp. IV 2011).

64. *See* United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 553 (1944) ("No commercial enterprise of any kind which conducts its activities across state lines has been held to be wholly beyond the regulatory power of Congress under the Commerce Clause. We cannot make an exception of the business of insurance."); *see also* 42 U.S.C. § 18091(3) (Supp. IV 2011) (citing *South-Eastern Underwriters Ass'n* as authority for the proposition that "insurance is interstate commerce subject to Federal regulation").

65. *NFIB*, 132 S. Ct. 2566, 2628 (2012) (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (pointing to Medicare, Medicaid, ERISA, and HIPAA).

66. *Id.* at 2591 (Roberts, C.J.). Roberts instead upheld the minimum coverage provision under Congress's tax power. *Id.* at 2600. For a theory of the tax power that is consistent with almost all of the Chief Justice's analysis, see generally Cooter & Siegel, *supra* note 59.

67. *NFIB*, 132 S. Ct. at 2643, 2659, 2661–62 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).

and the Taxing Clause without invoking traditional subjects of state concern.

It is false to call fields such as "insurance," "health insurance," "health care," or the "health care industry" exclusive or unique subjects of state regulation when the same areas are also subjects of substantial and longstanding federal concern. If the test of tradition sounds in exclusivity, federal power is virtually limitless. To avoid this conclusion, one would have to keep redefining the regulated "area" more and more narrowly, so as to find a level of abstraction at which it is possible to describe the federal government as not previously having regulated that area. That recourse, however, seems arbitrary. Dual federalism died and has been little mourned because of the difficulty of defining and policing the boundaries of the assertedly separate spheres of federal and state authority.[68]

Alternatively, one could (re)define traditional subjects of state concern as areas where historically there has been "more" state regulation than federal regulation—that is, where state regulation has predominated. Such a reconceptualization of regulatory custom is more defensible in theory, and may work in practice with respect to certain subject matters. For example, in his opinion invalidating part of the federal Defense of Marriage Act (DOMA),[69] Judge Boudin may have been right that "domestic relations and the definition and incidents of lawful marriage" is "a realm that has from the start of the nation been primarily confided to state regulation."[70] This may be so even if the area of "domestic relations" seems considerably broader than "the definition and incidents of lawful marriage" and it is not obvious which level of abstraction to choose.[71] In many instances, however, the approach will prove indeterminate and thus

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

69. Defense of Marriage Act (DOMA), 1 U.S.C. § 7, 28 U.S.C. § 1738C (2006).

70. Massachusetts v. U.S. Dep't of Health & Human Servs., 682 F.3d 1, 12 (1st Cir. 2012). The court in *Massachusetts* held that section 3(a) of the federal DOMA, 1 U.S.C. § 7, violates equal protection principles, *Massachusetts*, 682 F.3d at 15. Section 3 defines "marriage" for purposes of federal law and excludes same-sex marriage from this definition. DOMA § 3, 1 U.S.C. § 7.

71. The court in *Massachusetts* raised its level of scrutiny based on its federalism concern that "DOMA intrudes extensively into a realm that has from the start of the nation been primarily confided to state regulation." *Massachusetts*, 682 F.3d at 12. The court did not persuasively explain the propriety of its novel use of federalism concerns to change the level of scrutiny under equal protection. The decision does, however, nicely illustrate that invocations of regulatory custom can cut both ways ideologically. There is no reason to think it is less problematic when used in the service of certain ends than it is when used in the service of others.

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

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

The unworkability of the first approach, at least as a general matter, may explain why courts today tone down their invocation of traditional subjects of state concern in Commerce Clause cases: they

---

72. Is *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011), an immigration case (federal) or a case involving the licensing of in-state businesses (state)? Is *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), a case involving arbitration (federal) or consumer protection (state)? For a discussion of the federal and state aspects of these cases, see Ernest A. Young, *"The Ordinary Diet of the Law": The Presumption Against Preemption in the Roberts Court*, 2011 SUP. CT. REV. 253, 336. For a more recent illustration, see *Arizona v. United States*, 132 S. Ct. 2492, 2525 (2012) (Alito, J., concurring in part and dissenting in part), which characterizes "employment regulation, even of aliens unlawfully present in the country, [a]s an area of traditional state concern."

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

74. Lawrence Lessig, *Translating Federalism:* United States v. Lopez, 1995 SUP. CT. REV. 125, 206. One doctrinal area in which the analysis of regulatory custom remains relevant is in preemption cases, *see supra* note 72, in which the prevailing—albeit not always consistent—view of the Court seems to be that the application of the presumption against preemption turns on whether the federal government is intervening in a traditional field of state regulation. Young, *supra* note 72, at 332. Professor Young criticizes "the indeterminacy of any approach that tries to divide up the world into spheres of state and federal primacy." *Id.* at 335.

call it only an additional consideration or a "relevant factor,"[75] not a freestanding approach. For example, the Eleventh Circuit invoked custom towards the end of its constitutional analysis, only after it had decided the case on other grounds. Nearly twenty pages earlier in the opinion, the court reasoned decisively that "the regulated conduct is defined by the *absence* of both commerce or even 'the production, distribution, and consumption of commodities'—the broad definition of economics in *Raich*."[76]

But describing custom as just a "factor" does not secure for it a less problematic role in commerce power cases. To be a factor in any constitutional analysis, whether of federal power or of individual rights, is to be potentially decisive in close cases.[77] Otherwise, the alleged factor is not a factor; it is window dressing. Thus, whether legislative custom is defined in terms of state exclusivity or predominance, reducing it to a factor does not avoid the above problems.

B. The Undesirability of Custom

The Eleventh Circuit's invocation of custom in the health care litigation illustrates a second problem with approaches that turn on traditional subjects of state regulation. The court's depiction of health insurance and health care as such subjects may have little to do with the principal purpose of the commerce power discussed in Part I: enabling Congress to address collective action problems involving multiple states. Looking to what states have traditionally regulated may be unhelpful if one is interested in identifying and solving problems of collective action facing the states. By definition, the states themselves have inadequate incentives to solve multistate collective action problems by regulating on their own. Their rationally self-interested incentives, rather, are to externalize costs onto other states. Accordingly, there may be a lot of state regulation in an area

75. Florida *ex rel.* Att'y Gen. v. U.S. Dep't of Health & Human Servs., 648 F.3d 1235, 1303 (11th Cir. 2011), *aff'd in part, rev'd in part sub nom. NFIB*, 132 S. Ct. 2566 (2012).

76. *Id.* at 1286 (quoting Gonzales v. Raich, 545 U.S. 1, 25 (2005)).

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

of traditional state concern, but such regulation may be creating or exacerbating multistate collective action problems, not solving them.

Moreover, federal regulation may have long been absent for reasons having little to do with the existence or scope of a collective action problem. Alternative possibilities include competing political priorities (such as wars and depressions), changing social values (on such matters as environmental protection and civil rights), improperly imposed constitutional constraints on Congress (such as during the *Lochner* Era), and effective political resistance by powerful minority interests in Congress (such as the Southern opposition that doomed federal civil rights legislation in the twentieth century until 1964).[78]

In addition, the scope of collective action problems may change over time. For instance, whatever may have been the scope of such problems in health insurance and health care markets in the past, changes in society, the economy, and technology may mean that the scope of those problems is interstate in the present.[79] Races to the bottom among states, interstate externalities, and other kinds of collective action problems emerge over time.[80] The customary allocation of regulatory authority between the federal government and the states is unlikely to track the existence of significant problems of collective action facing the states—however preferable reliance on custom may be to cost-benefit calculations in other settings.[81]

Consider, for example, annual spending on health care in the United States. In this regard, America is a fundamentally different place than it was fifty years ago, let alone 150 years ago. While national health care spending was only 5.4 percent of gross domestic product (or $200 billion) in 1960, such spending amounted to 16.2 percent of GDP (or $2.3 trillion) by 2007 and is projected to be 20.3

78. For a collective action analysis of some of these examples, see Siegel, *Free Riding on Benevolence*, *supra* note 13, at 46–47. For the legislative story of the Civil Rights Act of 1964, see WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 2–23 (4th ed. 2007).

79. *See* BALKIN, *supra* note 49, at 172 ("If an area of concern has significant spillover effects on other states, or begins to do so, it shouldn't matter that it was the traditional concern of state regulation.").

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

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

percent of GDP (or $4.4 trillion) by 2018.[82] Of course, these facts do not themselves establish a multistate collective action problem that did not previously exist. But they do help to illustrate how such a problem could emerge—or, for that matter, fade—in a society with vastly different social and economic practices over time.[83]

For the foregoing reasons, courts are wrong to presume that the unprecedented nature of an exercise of federal power renders the exercise unconstitutional.[84] Chief Justice Roberts avoided imposing such a presumption in his recent opinion in *NFIB*, even as he sent mixed signals about the pertinence of past congressional inaction.[85]

---

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

83. Another good example of changed conditions is the importance of education to economic productivity in an information economy with easy interstate mobility due to improved transportation networks. For a discussion of potential spillover effects on other states in such circumstances, see BALKIN, *supra* note 49, at 172–73.

84. *See, e.g.*, Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3159 (2010) ("Perhaps the most telling indication of the severe constitutional problem with the PCAOB [Public Company Accounting Oversight Board] is the lack of historical precedent for this entity." (quoting Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 537 F.3d 667, 699 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) (internal quotation marks omitted), *aff'd in part, rev'd in part*, 130 S. Ct. 3138)); Printz v. United States, 521 U.S. 898, 905 (1997) ("[I]f . . . earlier Congresses avoided use of this highly attractive power, we would have reason to believe that the power was thought not to exist."). *Compare* Florida *ex rel.* Atty' Gen. v. U.S. Dep't of Health & Human Servs., 648 F.3d 1235, 1289 (11th Cir. 2011), ("The fact that Congress has never before exercised this supposed authority is telling. As the Supreme Court has noted, 'the utter lack of statutes imposing obligations on the States' executive (notwithstanding the attractiveness of that course to Congress), suggests an assumed *absence* of such power.'" (quoting *Printz*, 521 U.S. at 907–08)) *aff'd in part, rev'd in part sub nom. NFIB*, 132 S. Ct. 2566 (2012), *with* Siegel, *Four Constitutional Limits*, *supra* note 13, at 601–02 ("In light of the widespread political unpopularity of individual mandates in the United States, nationalists can plausibly insist that the political safeguards of federalism will operate to discipline Congress. This observation about public perceptions of federal regulation, rather than the Eleventh Circuit's suggestion about Congress's past confessions of unconstitutionality, likely explains why Congress has not made a habit of imposing purchase mandates throughout American history." (footnotes omitted)).

85. Chief Justice Roberts wrote:

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

NFIB, 132 S. Ct. at 2586 (Roberts, C.J.) (alterations in original) (footnote omitted) (citation omitted) (quoting, respectively, *Free Enter. Fund*, 130 S. Ct. at 3159, and United States v. Lopez, 514 U.S. 549, 564 (1995) (internal quotation marks omitted)). Roberts acknowledged that "there

The customary allocation of regulatory authority between the federal government and the states does not appear viable as a factor in commerce power cases, let alone as a stand-alone approach to the Commerce Clause. It is not helpful in distinguishing the "truly national" from the "truly local"[86] in the context of the commerce power.

I underscore the narrowness of my normative claim. I am not addressing the role of custom in law, or the role of custom in constitutional law, or the role of custom in questions of constitutional structure,[87] or even the role of custom in all problems of constitutional federalism.[88] Instead, I am arguing that a particular conception of constitutional custom—traditional subjects of state regulation—should not play any role in questions about the scope of Congress's commerce power.

It may be unsatisfying, particularly in a symposium on law and custom, to conclude that a particular invocation of custom in a particular legal setting is not doctrinally useful or intellectually illuminating, at least as a general matter. What *is* interesting, however, is why courts nonetheless persist in invoking traditional subjects of state regulation in Commerce Clause cases. Lower federal courts may feel obliged because the Supreme Court has directed them to do so.[89] But what about the Justices? Why, for example, does

---

is a first time for everything," and his use of the word "sometimes" to qualify that acknowledgement is doing a lot of unexplained work. *Id.* Moreover, the Court should always consider the implications of any litigant's arguments for the expanse and limits of federal power, not just "when confronted with . . . new conceptions" of that power. *Id.* So it is unclear on balance what Roberts's view is on the constitutional pertinence of the unprecedented nature of a federal law. In this passage, he may want to have it both ways.

86. United States v. Morrison, 529 U.S. 598, 618 (2000).

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

88. For example, perhaps past practice should inform whether a federal statute is best read as preempting state law. If states have been regulating a certain subject in a certain way for a long time, that fact, in a close case, might inform whether Congress is now saying that the states may no longer regulate that subject in that way. *But cf. supra* note 74 (identifying problems with reliance on regulatory custom in preemption cases).

89. *See, e.g.*, Seven-Sky v. Holder, 661 F.3d 1, 18–19 (D.C. Cir. 2011) ("Appellants'[] related argument is that upholding the mandate would turn the Commerce Clause into a federal

Justice Kennedy purport to care "whether the exercise of national power seeks to intrude upon an area of traditional state concern"?[90] What is it in the judicial temper that an appeal to constitutional custom in this setting addresses?

These are big questions, and I cannot do them justice here. Part of the answer may be that the Court recognizes the need for some limits on both the commerce power and judicial discretion, and also recognizes the problems with past formalisms in sensibly policing those limits.[91] But the Court may be erroneously imagining that an appeal to traditional subjects of state regulation—notwithstanding multiple past failures to deploy the same basic idea—can serve as a sensible substitute. The Court seems to have an intuition about what is "normal" for each level of government to do, but "[s]ometimes an intuition is just an intuition."[92] Although the Court's reaching for some bounds is admirable, it should look elsewhere for the expanse and limits of the commerce power—and of judicial power.

A. Commercial Activity Versus Collective Action

In cases turning on whether the regulated conduct has substantial effects on interstate commerce, the Court asks whether the object of congressional regulation is properly categorized as "commercial" or "economic" in nature.[93] If it is, the Court asks whether the regulated conduct, considered in the aggregate, substantially affects interstate commerce and invariably concludes that the Commerce Clause justifies federal regulation.[94] If, however, the Court determines that the regulated conduct is "noncommercial" or "noneconomic," then it disallows aggregation and holds that the commerce power does not support the law.[95]

Compared with customary allocation, the Court's new formalism has at least two advantages. First, it is judicially more administrable and therefore better at cabining federal power and judicial discretion.[96] Second, it relates in some way to the main background justification for the Commerce Clause. This is because problems that are reasonably regarded as "commercial" may implicate collective action problems involving multiple states.

---

93. In *Lopez*, Chief Justice Rehnquist wrote for the Court that Congress may use the commerce power (1) to "regulate the use of the channels of interstate commerce"; (2) "to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities"; and (3) "to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce." *Lopez*, 514 U.S. at 558–59 (citations omitted).

94. *See id.* at 560 ("Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained."). In addition, five Justices recently concluded that Congress may not use the Commerce Clause to require individuals to purchase a product. *See supra* notes 66–67 and accompanying text. In view of the unpopularity and extraordinary rarity of purchase mandates, this new limit on federal commerce power seems unlikely to play a significant role in shaping future legislation or litigation.

95. *See, e.g.*, *Lopez*, 514 U.S. at 561 (stressing that the Gun-Free School Zones Act of 1990 "is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms"); *id.* at 580 (Kennedy, J., concurring) (emphasizing that "here neither the actors nor their conduct has a commercial character, and neither the purposes nor the design of the statute has an evident commercial nexus").

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

A primary problem with privileging commercial activity, however, is that it is underinclusive and overinclusive with respect to the primary justification for the Commerce Clause and Section 8 more generally. It is underinclusive because numerous noncommercial activities implicate significant collective action problems involving two or more states. It is overinclusive because numerous commercial activities do not implicate collective action problems involving two or more states.[97]

The Court's defenders may point to the text of the Commerce Clause, which does, after all, use the word "Commerce." They may insist that an emphasis on commercial activity is required by that textual inclusion of "Commerce." They are right to point out that any plausible interpretation of the constitutional text must provide an account of the word "Commerce" in the Commerce Clause. For example, Professor Jack Balkin, who also endorses a collective action approach to the commerce power, has disputed the Court's "commercial" interpretation of the term "Commerce." "In the eighteenth century," he argues, "'commerce' did not have such narrowly economic connotations. Instead, 'commerce' meant 'intercourse' and it had a strongly social connotation. 'Commerce' was interaction and exchange between persons or peoples."[98]

Whether Professor Balkin is right or wrong about the original semantic meaning of "Commerce," the textual argument for formalism neglects the balance of the clause, which references commerce "among the several States."[99] The text itself does not support the Court's doctrinal position that if conduct is "Commerce," then it is "among the several States," and that if conduct is not "Commerce," then it is not "among the several States." The principal advantage of focusing on the commercial status of the regulated

97. For example, the federal arson law, 18 U.S.C. § 844(i) (2006), appears problematic as commerce power legislation even as applied to commercial enterprises. A federal ban on arson of buildings actively employed for commercial purposes does not appear to address any collective action problem or spillover effect involving multiple states. *See* Cooter & Siegel, *supra* note 3, at 176 ("In controlling arson, one state does not have an incentive to free ride on the laws of a neighboring state. Nor does one state try to exact concessions from another state by threatening to reduce sanctions against arsonists.").

98. Balkin, *supra* note 13, at 1; *see also* BALKIN, *supra* note 49, at 149–59 (noting that, in the eighteenth century, "commerce" was understood broadly in terms of "'intercourse'—that is, interactions, exchanges, interrelated activities, and movements back and forth, including, for example, travel, social connection, or conversation"—rather than "only business and the exchange of commodities").

99. U.S. CONST. art. I, § 8, cl. 3.

activity seems to lie more in judicial administrability than in fidelity to the text. It allows the Court to avoid such questions as whether commercial activities are interstate or intrastate in scope, but it does not make them go away.

By contrast, focusing directly on collective action problems "among the several States" avoids these problems of underinclusiveness and overinclusiveness with respect to the key background justification for the Commerce Clause. A collective action approach proceeds from the idea that the states often cannot achieve an end when doing so requires multiple states to cooperate. On this view, the clauses of Section 8 empower Congress to solve collective action problems that frustrate the states. Such problems are "truly national."[100] Conversely, problems with solutions that do not require collective action by the states are internal to a state or "truly local."[101] In this way, the allocation of regulatory authority in the American federal system flows from the relative advantages of the federal and state governments.

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

The main advantage of a collective action rationale lies in avoiding errors of inclusion and exclusion by moving constitutional doctrine closer to the principal background justification for the Commerce Clause. Likewise, the primary disadvantages follow from moving the doctrine closer to this purpose of the commerce power: underdeterminacy, a potential lack of judicial administrablity, and thus excessive judicial discretion. Reasonable minds often will differ about (1) whether there is a problem of collective action involving two or more states, (2) whether the problem is significant, and (3) whether Congress's response will ameliorate the problem.[102] In practice, the outcome of constitutional cases often will turn in significant part on the level of deference that courts accord

100. United States v. Morrison, 529 U.S. 598, 618 (2000).

101. *Id.*

102. Cooter & Siegel, *supra* note 3, at 181.

congressional judgments about the existence and scope of collective action problems, and about the adequacy of Congress's response.[103]

Accordingly, the choice between commercial activity and collective action implicates the more general jurisprudential tension between applying rules and applying their background justifications.[104] A good rule tends to provide clearer guidance than its background justification and may generally do a better job of cabining judicial discretion, but a rule is also underinclusive and overinclusive with respect to its background justification.[105] Those problems may cause judges to refuse to be bound by the rule in cases in which the background justification strongly suggests a different outcome.[106] Applying the background justification avoids substantial problems of fit between the rule and the values it is charged with vindicating, but such an approach raises problems of underdeterminacy, excessive discretion, and error.[107]

Each side in this jurisprudential debate over the scope of the commerce power has its work cut out for it. Formalists who privilege the commercial nature of the regulated conduct must demonstrate that their approach is correct about the meaning of the term "Commerce." They must also show that their approach is relatively determinate, administrable, and unsusceptible to judicial manipulation. Finally, they must establish that these benefits

---

103. For a discussion of a potential standard of review for legislation purportedly addressing multistate collective action problems, see *id.* at 180–83 and *infra* notes 123–124 and accompanying text.

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

105. *See, e.g.*, *id.* at 7 ("'[F]reedom of speech' is necessarily both underinclusive and overinclusive with respect to its background justification, whatever that background justification might be.").

106. *Cf.* MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 49–51 (1987) (distinguishing the "real operative rule" from the "nominal rule" based on the exceptionality of total rule enforcement); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1701 (1976) (arguing that rules become standards when "judges [are] simply unwilling to bite the bullet, shoot the hostages, break the eggs to make the omelette and leave the passengers on the platform"); Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 63 (1992) ("[D]ecisionmakers [may] spend time inventing end-runs around [rules] because they just cannot stand their over- or under-inclusiveness.").

107. *See* Schauer, *supra* note 104, at 16 ("Still, the choice in the instruction for the instantiation rather than the justification is based on the empirical supposition that these errors are likely to be less in frequency and smaller in magnitude than the errors that might be expected were the background justification alone used . . . .").

outweigh the costs of the approach, which are incurred when judges conclude that conduct within the scope of the commerce power is beyond its scope, and that conduct beyond the scope of the commerce power is within its scope.

In practice, judges applying the commercial activity test appear to exercise discretion of a functionalist character when the test is underdeterminate. It is not self-evident how to identify what the regulated subject matter is, nor is it self-evident how to determine whether that subject matter is commercial in nature. For example, it is not obvious why the personal possession or use of marijuana for medicinal purposes pursuant to state law is commercial activity.[108] Nor is it clear why growing wheat on one's own land for one's family and livestock qualifies as commercial activity.[109] Yet the Court upheld federal regulation of both under the Commerce Clause on the asserted ground that they are part of a larger class of commercial activity.[110]

Writing for the Court in *Gonzales v. Raich*[111] (the medical marijuana case), Justice Stevens relied upon *Wickard v. Filburn*[112] (the wheat quota case), which he read as "establish[ing] that Congress can regulate purely intrastate activity that is not itself 'commercial,' in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity."[113] The Court seemed to have been moved less by the inherently commercial character of the general class of conduct subject to federal regulation than by its *interstate* character—that is, by the collective action problems that would impede state regulation of the wheat and marijuana markets.[114] In other words, the

108. *See* Gonzales v. Raich, 545 U.S. 1, 45 (2005) (O'Connor, J., dissenting) ("What is the relevant conduct subject to Commerce Clause analysis in this case?").

109. *See, e.g.*, United States v. Morrison, 529 U.S. 598, 643 (2000) (Souter, J., dissenting) ("It was obvious in *Wickard* that growing wheat for consumption right on the farm was not 'commerce' in the common vocabulary, but that did not matter constitutionally . . . ." (footnote omitted)).

110. *Raich*, 545 U.S. at 22 (majority opinion); Wickard v. Filburn, 317 U.S. 111, 128–29 (1942).

111. Gonzales v. Raich, 545 U.S. 1 (2005).

112. Wickard v. Filburn, 317 U.S. 111 (1942).

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

114. *See, e.g.*, *id.* at 19 ("[O]ne concern prompting inclusion of wheat grown for home consumption [in the 1938 Act at issue 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

Court's formal conclusion may have resulted from a functional inquiry into the interstate scope of the problem. If true, the "commercial activity" test, which purports to privilege formalist inquiry into the commercial status of the object of federal regulation, raises important questions of transparency about the fact of judicial discretion and the grounds of judicial decisionmaking.[115]

Even when the commercial activity test is relatively determinate, judges applying it seek to avoid problems of underinclusiveness and overinclusiveness. For example, federal courts presume that interstate movements of persons, animals, or things are regulable under the Commerce Clause by simple virtue of their interstate movements. They so conclude without inquiring into the "commercial" status of those movements. Examples include the movement of pollution or species across state lines.[116] In essence, judges who apply the conception of "Commerce" as "commercial activity" feel moved to regard the Interstate Commerce Clause as the Interstate "or" Commerce Clause.[117]

Similarly, there is little doubt that the Supreme Court would uphold federal power to quarantine[118]—or to individually mandate vaccination—in response to a flu pandemic that disrespected state borders. Moreover, there is little doubt that the Court would do so

---

that the high demand in the interstate market will draw such marijuana into that market." (citation omitted)).

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

116. *See, e.g.*, Bradford C. Mank, *Protecting Intrastate Threatened Species: Does the Endangered Species Act Encroach on Traditional State Authority and Exceed the Outer Limits of the Commerce Clause?*, 36 GA. L. REV. 723, 724 (2002) ("While the Court's Commerce Clause jurisprudence is ultimately more concerned with the impacts of activities upon interstate commerce than the activities' location, most judges and commentators have assumed that whether a species is located in only one state or crosses state boundaries is an important factor." (footnotes omitted)).

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

118. *Cf.* 42 U.S.C. § 264(a) (2006) (authorizing the Surgeon General to make and enforce regulations "necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession"). For a discussion of this federal quarantine statute and related measures, see generally KATHLEEN S. SWENDIMAN & JENNIFER K. ELSEA, CONG. RESEARCH SERV., RL33201, FEDERAL AND STATE QUARANTINE AND ISOLATION AUTHORITY (2007), *available at* www.fas.org/sgp/crs/misc/RL33201.pdf.

under the Commerce Clause, notwithstanding that an individual would be subject to federal regulation based merely on her presence in an affected area.[119] One could attempt to tell various "commercial activity" (or "channels" or "instrumentalities") stories to justify federal commerce power in this situation, but those stories likely would not decide the case. The interstate character and gravity of the problem would decide the case.[120] As health law authority Professor Mark Hall cautions, federal power "to mandate behavior, unconditioned on citizens engaging in some economic activity," "might someday be absolutely essential to saving a million or more lives, based on solid public health science, in the event of a catastrophic public health emergency."[121]

Functionalists, too, have their work cut out for them. For one thing, they require their own definition of "Commerce," not just their own definition of "among the several States." For another thing, they must demonstrate that a focus on the primary background justification of the Commerce Clause is cost-justified because the underdeterminacy it entails matters less than the errors it avoids. In addition to limiting the kinds of interstate externalities that count as collective action problems,[122] collective action theorists need to identify the level of judicial deference to accord congressional judgments about the existence and scope of collective action problems. I have elsewhere argued that there must be a reasonable basis to believe that the federal law under review will ameliorate a significant problem of collective action involving two or more states.[123] But that reasonableness standard leaves important questions unanswered.[124]

---

119. *Cf.* SWENDIMAN & ELSEA, *supra* note 118, at 4 ("Federal quarantine authority derives from the Commerce Clause . . . .").

120. *See* Transcript of Oral Argument at 21–22, 29–30, United States v. Comstock, 130 S. Ct. 1949 (2010) (No. 08-1224) (suggesting, in Justice Scalia's and Justice Kennedy's responses to the Solicitor General's hypothetical, that if a communicable disease among prisoners threatened the larger population, the federal government could intervene under the commerce power to detain infected prisoners beyond the terms of their sentences if the states were unable to address the problem adequately).

121. Mark A. Hall, *Constitutional Mortality: Precedential Effects of Striking the Individual Mandate*, 75 LAW & CONTEMP. PROBS. 107, 107 (2012).

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

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

124. The reasonableness test is derived from contemporary Commerce Clause doctrine, which is generally—but not wholly—deferential. *See, e.g.*, Thomas More Law Ctr. v. Obama, 651 F.3d 529, 564 (6th Cir. 2011) (Sutton, J., concurring in part and delivering the opinion of the

B. A Return to Custom?

In the face of empirical uncertainties about the existence and scope of multistate collective action problems, it may be tempting to revisit, and attempt to reconstruct, constitutional custom—to rely on some variant of past practice as part of the judicial inquiry that collective action theorists commend.[125] To illustrate with extreme—and unrealistic—examples, imagine a movement in Congress to federalize all of criminal law based on fears about races to severity in punishment among the states. Or imagine a movement in Congress to federalize all of education law based on fears about races to poor quality in public education among the states. Such movements would naturally raise the question of "why now?" in light of all the regulatory water under the bridge.

Rather than focusing on whether the subject matter at issue has been exclusively or predominantly regulated by the states or by the federal government—approaches rejected in Part II—an inquiry into past practice might examine the present extents of concurrent state and federal regulation, which would define the status quo from which the federal law under review sought to deviate. Greater deviations from the status quo might require Congress to provide a stronger basis in evidence for its conclusion that there exists a multistate collective action problem of real significance.

A key issue is whether conceptualizing and operationalizing the idea of past regulatory practice in this way avoids the problems with invoking the idea of traditional subjects of state regulation. On the one hand, a "status quo" approach would account for the present reality of overlapping federal and state regulation. On the other hand, it is not clear that the approach would avoid the problem of indeterminacy. More fundamentally, it is not clear that the approach would be asking the right question. For past congressional inaction to be meaningful, one would have to believe that Congress is generally responsive to collective action problems facing the states. Is it in the nature of a multistate collective action problem that it is likely to

---

court in part) ("The courts do not apply strict scrutiny to commerce clause legislation and require only an 'appropriate' or 'reasonable' 'fit' between means and ends." (quoting *Comstock*, 130 S. Ct. at 1956–57)).

125. *Cf.* Epstein, *supra* note 81, at 2 (noting that the standards of custom and cost-benefit analysis in the law of negligence would converge "[i]f courts and juries could effortlessly apply the cost-benefit formulas" and "if customs always incorporated all the relevant information about the costs and benefits of certain practices").

elicit a congressional response? I do not have an answer to that question, but I at least know why I do not have an answer: having an answer requires not just a theory of congressional *power*, but also a theory of congressional *process*.[126] One requires an account of whether collective action problems facing the states are likely to get on Congress's agenda and, if they do, whether solutions to them will be able to overcome the various "vetogates" that impede the passage of federal legislation.[127] I lack a persuasive theory of how Congress functions as an institution. More importantly, so do the judges who decide Commerce Clause cases.

My present inclination is to be skeptical that one should infer much from past congressional inaction, even in cases of substantial deviations from the regulatory status quo.[128] To be sure, Congress has, over the course of American history, often used its powers in Article I, Section 8 to solve numerous collective action problems facing the states.[129] But in light of the powerful influence of committee chairs and interest groups in Congress,[130] the regulatory status quo at any particular time may not reflect collective wisdom in the form of solutions to multistate collective action problems.[131] The status quo may be as likely to reflect any number of things,[132] including the cost-

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

127. *See* ESKRIDGE ET AL., *supra* note 78, at 5 ("Over 90% of all bills introduced in Congress die in the legislative labyrinth.").

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

129. Part of the reason Congress has been able to do so is that each house operates according to a majority or supermajority rule, not the unanimity rule that impedes voluntary cooperation among states. *See* Cooter & Siegel, *supra* note 3, at 139–44.

130. *See* ESKRIDGE ET AL., *supra* note 78, at 5–6 (discussing the power of committee chairs).

131. For Burkean arguments that past practice may embody collective wisdom, see generally, for example, Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353 (2006); Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619 (1994). *Cf.* United States v. Lopez, 514 U.S. 549, 583 (1995) (Kennedy, J., concurring) (referencing "an area to which States lay claim by right of history *and expertise*" (emphasis added)).

132. For some possibilities, see *supra* notes 78–83 and accompanying text.

externalizing incentives of organized interests that benefit from races to the bottom at the state level.[133]

CONCLUSION

Of the three approaches to defining the scope of the Commerce Clause explored in this Essay, the one centered on traditional subjects of state regulation seems most difficult to defend. To the extent that traditional areas of state regulation are defined as exclusive areas of state regulation, the first variant is dual federalism by another name. It has long been understood that dual federalism does not work in modern America, where the federal government and the states have concurrent legislative jurisdiction over many areas of life subject to government regulation.[134] Redefining traditional subjects of state regulation as areas in which the states historically have predominated is more defensible in theory, but it may prove indeterminate in practice most of the time. In any event, it asks the wrong question about the constitutional structure.

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

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

For Commerce Clause functionalists, the most serious objection to such an approach may be a lack of constitutional warrant for Congress to regulate certain serious, noncommercial problems of collective action involving multiple states.[135] The problem could be

---

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

134. *See supra* note 7 and accompanying text.

135. *See, e.g.*, AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 107–08 (2005) ("Without a broad reading of 'Commerce' in [Clause 3], it is not entirely clear whence the federal government would derive its needed power to deal with noneconomic international

overcome if constitutional authorization for federal power in such situations could be found elsewhere in Article I, Section 8.[136] That solution, however, would probably be regarded as unacceptable clause shifting by Commerce Clause formalists. Accordingly, the commercial activity and collective action approaches may continue to be viewed as competitors, not as complements, in debates over the expanse and limits of the commerce power.

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

incidents—or for that matter to address the entire range of vexing nonmercantile interactions and altercations that might arise among states.").

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