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The New Commerce Clause Doctrine in Game Theoretical Perspective

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The panel's approach in this case leads to the result that regulating the taking of a hapless toad that, for reasons of its own, lives its entire life in California constitutes regulating "Commerce . . . among the several States."[1]

Was United States v. Lopez *a constitutional freak? Or did it signify that the Commerce Clause still imposes some meaningful limits on congressional power?*[2]

INTRODUCTION

The Roberts Court emerges at a critical juncture in the development of Commerce Clause doctrine. While the Commerce Clause doctrine implicates federalism and separation of powers, concerns rooted in the earliest part of our constitutional history, the arrival of a new Court presents an ideal opportunity to critically assess existing doctrines and to develop new analytical paradigms. An

1. Rancho Viejo, LLC v. Norton, 334 F.3d 1158, 1160 (D.C. Cir. 2003) (Roberts, J., dissenting from denial of petition for rehearing en banc) (quoting U.S. CONST. art. I, § 8, cl. 3).

2. United States v. Rybar, 103 F.3d 273, 286 (3d Cir. 1996) (Alito, J., dissenting) (citation omitted).

analysis of Commerce Clause doctrine reveals that while the Rehnquist Court successfully imposed substantive limits on the scope of this important source of congressional power for the first time in sixty years,[3] that Court was far less successful in developing a coherent normative theory that reconciled its new doctrinal limitations with the traditional broad scope of the post-New Deal Commerce Clause cases.[4] This Article's new game theoretical approach achieves these objectives by offering a compelling normative account of Commerce Clause doctrine and a framework for applying the new methodology to actual cases.

In the confirmation hearings for both John Roberts and Samuel Alito, Chairman of the Senate Judiciary Committee Arlen Specter expressed concern that the Supreme Court's new Commerce Clause doctrine, first articulated in *United States v. Lopez*[5] and later applied in *United States v. Morrison*,[6] demonstrated disrespect for Congress and for its factfinding processes.[7] In *Lopez*, Chief Justice Rehnquist, writing for a majority, struck down the Gun-Free School Zones Act, which had made it a federal crime to use or possess a gun within 1000 feet of a public school.[8] The *Lopez* Court changed the longstanding test governing the scope of Congress's Commerce Clause powers,

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3. *See* United States v. Lopez, 514 U.S. 549, 567-68 (1995) (striking down the Gun-Free School Zones Act of 1995 as exceeding the scope of Congress's Commerce Clause power); *see also* United States v. Morrison, 529 U.S. 598, 617-19 (2000) (striking civil remedies provisions of the Violence Against Women Act as exceeding the scope of Congress's Commerce Clause power).

4. *See* Gonzales v. Raich, 545 U.S. 1, 5-9 (2005) (sustaining the application of the Controlled Substances Act against the California Compassionate Use Act, thus disallowing physician prescribed medical marijuana as permitted under state law). For a critical analysis of the four approaches offered in separate opinions to the Commerce Clause in *Raich*, see *infra* Part I.

5. 514 U.S. at 567-68.

6. 529 U.S. at 617-19.

7. *See Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 3 (2005) [hereinafter *Roberts Hearings*] (statement of Sen. Arlen Specter, Chairman, S. Comm. on the Judiciary) ("When the Supreme Court of the United States struck down a portion of the legislation to protect women against violence, the Court did so because of our 'method of reasoning.' And the dissent noted that that had carried the implication of judicial competence, and the inverse of that is congressional incompetence."); *Confirmation Hearing on the Nomination of Samuel Alito to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 4 (2006) [hereinafter *Alito Hearings*] (statement of Sen. Arlen Specter, Chairman, S. Comm. on the Judiciary) ("In declaring unconstitutional legislation designed to protect women against violence, the Supreme Court did so notwithstanding a voluminous record in support of that legislation, but because of Congress' 'method of reasoning,' rather insulting to suggest that there is some superior method of reasoning in the court.").

8. 514 U.S. at 552.

attributable to the infamous case *Wickard v. Filburn*.[9] While prior cases had used "economic" to qualify the effects that the underlying regulated activity had on commerce,[10] the new Commerce Clause doctrine used "economic" to qualify the activity itself.[11]

The Commerce Clause has long been a source of contention between liberal and conservative jurists in large part because the commerce power is broader in reach than virtually any other delegated congressional power.[12] The Tenth Amendment notwithstanding,[13] congressional regulation under the Commerce Clause has highlighted the tension between a model of limited and delegated federal powers on the one hand and presumed or plenary police state powers on the other. Using the newly devised non-economic activities test, Rehnquist was able to cabin longstanding and expansive Commerce Clause cases into a neatly defined, and seemingly limited, category,[14] thus restoring at least the appearance of limited congressional regulatory powers.

By devising a new Commerce Clause doctrine in the important "substantial effects" category, the *Lopez* Court was able, for the first time in over sixty years, to strike down an exercise of congressional Commerce Clause power based upon the subject matter of the underlying regulation. Most importantly, it did so while claiming to reconcile *Wickard*, widely regarded as the Supreme Court's most far reaching Commerce Clause case.[15] Five years later, in *United States v. Morrison*,[16] the Court struck down the civil remedies provision for

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9. 317 U.S. 111 (1942).

10. *See id.* at 125 ("But even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce . . . .").

11. *See Lopez*, 514 U.S. at 560 ("Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.").

12. For a debate on the proper scope of Congress's Commerce Clause power, compare *id.* at 584 (Thomas, J., concurring) (arguing that taking the logic of the substantial effects cases to its logical extreme would result in conferring police powers, rather than limited delegated powers, upon Congress), with *id.* at 615, 631 (Breyer, J., dissenting) (rejecting majority's restrictive understanding of Congress's Commerce Clause powers and producing an Appendix that lists a broad range of federal statutes potentially affected by the newly articulated non-economic activities test).

13. *See* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

14. *See Lopez*, 514 U.S. at 559-60 (claiming that the articulated test includes even the most expansive Supreme Court precedents sustaining Congress's Commerce Clause power).

15. *See id.* at 560 ("Even *Wickard*, which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that the possession of a gun in a school zone does not.").

16. 529 U.S. 598 (2000).

violent gender-related crimes in the Violence Against Women Act ("VAWA"),[17] as exceeding the permissible scope of Congress's Commerce Clause powers.[18] While many viewed *Lopez* as symbolic—the opinion itself suggested that including a jurisdictional provision linking the relevant gun to commerce might satisfy the new test[19]—*Morrison* demonstrated that more was at stake. No simple jurisdictional fix could remedy the claimed difficulty that VAWA's civil remedies provisions appeared to render a traditional matter of state criminal law the basis for a new federal civil damages action.[20]

The Supreme Court's most recent Commerce Clause case, *Gonzales v. Raich*,[21] which sustained a seemingly far reaching exercise of congressional Commerce Clause power in the substantial effects category,[22] further demonstrated that the *Lopez* Court's seemingly

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17. 42 U.S.C. § 13981 (1994).

18. *Morrison*, 529 U.S. at 627. For a description of the *Morrison* facts, see *infra* note 304.

19. *See Lopez*, 514 U.S. at 561 ("Second, § 922(q) contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce.").

20. For a more detailed discussion of *Morrison*, see *infra* Part III.B.3.

21. 545 U.S. 1 (2005). Since *Raich*, the Supreme Court decided *Rapanos v. United States*, a case in which it reversed and remanded a decision by the United States Court of Appeals for the Sixth Circuit broadly construing the term "navigable waters" and "waters of the United States" under the Clean Water Act ("CWA"). 126 S. Ct. 2208, 2235 (2006). The Sixth Circuit had sustained a decision by the Army Corps of Engineers construing those terms to prevent the filling of wetlands located a substantial distance from and with apparently tenuous connections to traditional waters of the United States. *Id.* at 2219. While *Rapanos* implicated the Commerce Clause, the case was ultimately resolved on statutory grounds, thus providing limited insight into the Roberts Court's approach to the new Commerce Clause doctrine. *Id.* at 2235. The *Rapanos* case generated a set of fractured panel opinions in which Justice Kennedy's concurrence in the judgment, which no one else joined, stated the holding under the narrowest grounds doctrine. *See id.* at 2236 (Kennedy, J., concurring); *see also id.* at 2235 (Roberts, C.J., concurring) (discussing application of *Marks* doctrine to *Rapanos* (citing Marks v. United States, 430 U.S. 188 (1977))). Justice Scalia produced a broader plurality opinion, which the new Chief Justice and Associate Justices Alito and Thomas joined, in which he offered a narrow construction of the relevant provisions of the CWA, claiming that under the doctrine of constitutional avoidance, his reading was necessary to avoid a conflict with the limits on congressional powers under the Commerce Clause. *See id.* at 2224. Scalia maintained that for the Corps to exercise jurisdiction over wetlands under the CWA, two conditions must be met: "First, . . . the adjacent channel [must] contain[] a 'water of the United States,' (*i.e.* a relatively permanent body of water connected to traditional interstate navigable waters); and second, . . . the wetland [must have] a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins." *Id.* at 2227. A majority of the *Rapanos* Court, including Justice Kennedy, *id.* at 2246, and four dissenters, *id.* at 2261 (Stevens, J., dissenting), rejected the plurality test, claiming that it was inconsistent with the statute's wording and with governing precedent, and that the alternative broader readings of the statute that they offered posed no Commerce Clause difficulty. For a more detailed discussion, see *infra* notes 223-38 and accompanying text.

22. Chief Justice Rehnquist demonstrated, for example, that he did not intend his newly articulated non-economic activities test to condone a congressional ban on state-approved,

modest change in doctrinal formulation may have produced an important, if unintended, consequence. In *Raich*, the Supreme Court sustained an application of the federal Controlled Substances Act of 1970 ("CSA") to ban the cultivation, acquisition, and use of medical marijuana, with a physician's prescription, as permitted under the California Compassionate Use Act.[23] For the *Raich* majority, the justification grew out of a straightforward application of the newly minted substantial effects test. "Economics," now used to modify the activities Congress can regulate, rather than the relationship between the regulated activity and commerce, includes the study of production, and the CSA ban regulated, among other activities, the production of marijuana.[24]

While Rehnquist had employed the non-economic activities test to impose new limits on the scope of Congress's Commerce Clause power, Justice Stevens, writing for the *Raich* majority, applied the test in a manner that was more obviously intended to restore the doctrine's earlier breadth.[25] The *Raich* Court set out to restore *Wickard v. Filburn*,[26] the centerpiece of the post-New Deal Court's expansive Commerce Clause jurisprudence, notwithstanding that at least nominally, under *Lopez* and *Morrison*, *Wickard* remained good law.[27]

The *Wickard* Court sustained the Agricultural Adjustment Act of 1938, which allowed the Secretary of Agriculture to set production quotas on wheat during an international wheat glut in an effort to bolster prices, as applied to Filburn, a small farmer who exceeded his modest wheat allotment.[28] In an excessively quoted portion of his opinion for the unanimous *Wickard* Court, Justice Robert Jackson

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physician-prescribed medical marijuana, by joining the principal dissent in *Raich*, 545 U.S. at 42 (O'Connor, J., dissenting).

23. *See id.* at 9 (majority opinion) ("The CSA is a valid exercise of federal power, even as applied to the troubling facts of this case.").

24. *See id.* at 25-26 (noting that "'[e]conomics' refers to 'the production, distribution, and consumption of commodities,' " and sustaining application of CSA to Respondents' activities on the ground that "[t]he CSA . . . regulates the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market").

25. Justice Stevens was joined hy the liberal Justices Souter, Ginsburg, and Breyer, and by the centrist conservative Justice Kennedy. *Id.* at 5. Justice Scalia wrote a separate concurrence in the judgment. *Id.* at 33 (Scalia, J., concurring in the judgment).

26. 317 U.S. 111 (1942).

27. While *Lopez* did not overturn *Wickard*, as stated above, it did alter the wording of the *Wickard* substantial effects test. *See supra* notes 10, 11, and 15, and accompanying text.

28. *See Wickard*, 317 U.S. at 118. For a discussion of how Filburn used the excess wheat, see *infra* note 101, and accompanying text.

explained, in essence, that while Filburn's activity was entirely local, if everybody engaged in it, the activity would then become national.[29]

While jurists and scholars have ridiculed *Wickard*, claiming that it has no stopping point,[30] read in context, Justice Jackson's argument was substantially more measured.[31] Fairly read, Jackson's opinion demonstrates that federal regulatory intervention was necessary to solve a peculiar coordination problem associated with wheat production: Rational farmers, and states, could be expected to undermine any agreed upon beneficial pricing scheme intended to extricate growers from the difficulties associated with the international wheat glut.

The *Raich* Court did not offer any satisfactory theory that reconciled the post-New Deal Commerce Clause expansion with the more recent doctrinal retrenchments represented by *Lopez* and *Morrison*. Rather than inquiring whether a coordination difficulty similar to that in *Wickard* or other post-New Deal cases appeared on the facts of *Raich* that would justify imposing a federal regulatory ban on state-sanctioned medical marijuana, Justice Stevens instead applied the literal definition of "economics" to find that the growth and distribution of marijuana qualifies as a regulable market activity.[32] Ironically, under this reading of *Lopez*, the act of production, which in an earlier and more formalistic generation of Commerce Clause cases represented the principal limitation on the scope of Congress's Commerce power,[33] suddenly provides an independent basis for congressional regulatory authority.

The discussions about the Commerce Clause in the two most recent Senate Judiciary Committee hearings were no more successful in suggesting a coherent framework for applying the new Commerce Clause doctrine. John Roberts assured Senator Specter that the federal judiciary was obligated to respect Congress and its factfinding processes.[34] At the same time, however, Roberts defended his dissent

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29. *See id.* at 127-28 (asserting "[t]hat appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial").

30. *See, e.g.*, United States v. Lopez, 514 U.S. 549, 600 (1995) (Thomas, J., concurring) (claiming that "[t]he aggregation principle is clever, but has no stopping point," and that the principle could be used to justify regulation of "every aspect of human existence").

31. For a more detailed discussion of *Wickard*, see *infra* Part II.A.

32. Gonzales v. Raich, 545 U.S. 1, 25-26 (2005).

33. For a more detailed discussion, with citations, see *infra* note 98 and accompanying text.

34. *Roberts Hearings*, *supra* note 7, at 300 (statement of Judge Roberts responding to Senator Specter) ("[W]ith respect to review of congressional findings . . . my view of the appropriate role of a judge is a limited role and that you do not make the law . . . .").

from the denial of rehearing en banc in *Rancho Viejo, LLC v. Norton*[35]—a case in which a panel rejected a constitutional challenge to applying the Endangered Species Act to prevent a planned development that threatened the arroyo toad, a listed endangered species endemic to California[36]—as a modest judicial attempt to search for an alternative, less problematic ground with which to sustain the federal regulation.[37] Similarly, while Samuel Alito flatly rejected the suggestion that federal jurists exhibit superior reasoning to members of Congress,[38] he defended his dissent in *United States v. Rybar*,[39] a case that sustained a conviction for possession and distribution of machine guns, on the ground that the statute failed to include a simple jurisdictional provision linking the gun to interstate commerce.[40]

Current Supreme Court case law and the recent Senate Judiciary Committee hearings clearly demonstrate the need for critical new thinking on the Commerce Clause.[41] Using basic insights

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35. 323 F.3d 1062 (D.C. Cir. 2003).

36. *See id.* at 1065, 1080.

37. Roberts also explained in both his dissent and in the hearings that the case was problematic in that the panel had at least implicitly sustained the regulation on the ground that the overall regulatory scheme, rather than the regulated activity itself, substantially affected commerce. *See Roberts Hearings*, *supra* note 7, at 226 (statement of Judge John Roberts in response to question by Sen. Feinstein). Then-Judge Roberts said:

> Well, the opinion I wrote there noted that the panel decision that I thought should be reheard en banc looked at one ground . . . under the Commerce Clause and the concluding paragraph in my opinion said that we ought to rehear the case to look at other grounds that were also under the Commerce Clause, but they were not the particular prong of the Commerce Clause analysis that the panel opinion had relied on . . . .

Id.; *see also* Rancho Viejo, LLC v. Norton, 334 F.3d 1158, 1160 (D.C. Cir. 2003) (Roberts, J., dissenting from denial of rehearing en banc) (arguing that the "panel's opinion in effect asks whether the challenged *regulation* substantially affects interstate commerce, rather than whether the *activity* being regulated does so," possibly creating conflict among Circuits and with the Supreme Court (emphasis in original)). For an analysis that compares this to Justice Scalia's analysis in *Raich*, see *infra* note 123 and accompanying text, and for a more detailed analysis of *Rancho Viejo*, see *infra* notes 196-98 and accompanying text.

38. *Alito Hearings*, *supra* note 7, at 476 (statement of Judge Samuel Alito responding to questioning by Sen. Spector) ("I would never suggest that judges have superior reasoning power than does Congress.").

39. 103 F.3d 273, 286 (3d Cir. 1996) (Alito, J., dissenting).

40. *Cf. id.* at 285 (majority opinion) (finding that the inclusion of a jurisdictional element is not a necessary condition for validity under the Commerce Clause). Of course including such a provision would move both *Rybar* and *Lopez* from the difficult "substantial effects" category of Congress's commerce power to the far less controversial category involving the regulation of persons or things traveling in interstate commerce. *See infra* Part III.A (discussing case category).

41. Notably, one paper symposium was dedicated to the Supreme Court's most recent decision, *Gonzales v. Raich*, 545 U.S. 1 (2005). *See* Symposium, *Federalism After* Gonzales v. Raich, 9 LEWIS & CLARK L. REV. 743, 743-934 (2005) (paper symposium with contributions by

from game theory, this Article fills this void by offering a new analytical framework that reconciles two sets of insights that remain in tension. First, the post-New Deal Commerce Clause doctrine reveals the inherent difficulties in limiting the scope of federal Commerce Clause powers based upon simple tests that demarcate the proper allocation of authority between the states and the federal government. Second, the new Commerce Clause doctrine reflects the concern that, taken to its logical extreme, *Wickard*'s multiplier analysis risks transforming the Commerce Clause from a specific, if broad, delegation of power to Congress, into the equivalent of plenary police powers operating on a national scale. While this Article offers a means of reconciling the expansive post-New Deal Commerce Clause cases with *Lopez* and *Morrison*, its goals are appreciably more ambitious. This Article articulates a compelling normative account of Commerce Clause doctrine—one that grounds the doctrine in the need for federal regulation to resolve coordination problems that prevent states from furthering desired regulatory objectives on their own—and offers a framework for implementing that normative policy in actual cases.

To present the Commerce Clause doctrine, this Article begins with *Raich*, not only because it is the most recent Supreme Court decision,[42] but also because it provides four separate opinions, each offering an alternative method of framing Commerce Clause doctrine in the critical substantial effects category. The *Raich* opinions also provide a ready means through which to present the most important Supreme Court cases, including most notably *Wickard*, *Lopez*, and *Morrison*. The discussion will demonstrate that while the Court lacks a coherent normative theory governing the scope of Congress's

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Randy Barnett, Jonathan H. Adler, Ann Althouse, Eric R. Claeys, Thomas W. Merrill, John T. Parry, Robert J. Pushaw, Jr., Glenn H. Reynolds, and Brannon P. Denning). While the contrihutors offer important insights into Commerce Clause doctrine, including critical assessments of *Raich*, none offers a comprehensive scheme drawing upon tools of game theory to reconcile the ambitious post-New Deal Commerce Clause cases with the more recent retrenchments represented in *Lopez* and *Morrison*.

42. While the Court might have used *Gonzales v. Oregon*, 126 S. Ct. 904 (2006), to offer further guidance on the permissible scope of congressional regulation under the Commerce Clause, the Court instead limited its holding, that the Controlled Substances Act did not authorize Attorney General John Ashcroft to interpret the Act to ban physician-assisted suicide in contravention of an Oregon law permitting it, to an application of the agency deference rules established in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and *United States v. Mead Corp.*, 533 U.S. 218 (2001). *See Gonzales*, 126 S. Ct. at 915-17 (applying *Chevron* and *Mead* to hold that under the CSA, the Attorney General "is not authorized to make a rule declaring illegitimate a medical standard for care and treatment of patients that is specifically authorized under state law"); *accord* Ilya Somin, *A False Dawn for Federalism: Clear Statements Rules After* Gonzales v. Raich, 2005-2006 CATO SUP. CT. REV. 113, 124 ("*Oregon* does not in any way undercut *Raich*'s constitutional holding.").

Commerce Clause powers, a majority of the Rehnquist Court that appears likely to have carried over to the Roberts Court is committed to continuing the *Lopez* project while also maintaining the major post-New Deal Commerce Clause cases. To reconcile these intuitions, this Article will rely upon two simple coordination games: the prisoners' dilemma and the multiple Nash equilibrium bargaining game.

The prisoners' dilemma analysis will show the circumstances in which, absent federal regulatory intervention, individual firms or states are motivated to thwart the objectives of three identified federal policies: first, centrally coordinated pricing schemes; second, centrally regulated working conditions; and third, centrally coordinated environmental regulations.[43] The multiple Nash equilibrium game will establish a fourth category, which arises when individual states are rationally motivated to undermine a desired policy that promotes geographical coordination among states.

These two game theoretical models, and the four doctrinal categories that they create, are sufficiently broad to encompass most of the major post-New Deal Commerce Clause cases, not limited to the substantial effects cases.[44] The models also reconcile current doctrine by demonstrating the absence of any needed federal regulatory coordination in the *Lopez* and *Morrison* cases. While this Article thus reconciles the pre-*Raich* Commerce Clause cases, it offers a critical assessment of *Raich* itself. The analysis demonstrates the absence of any coordination difficulty justifying the application of the CSA to ban California from facilitating physician prescribed medical marijuana. Even if readers disagree with this Article's ultimate conclusion that *Raich* represents an improper application of congressional Commerce Clause power, however, that is secondary to this Article's larger mission, namely to offer a compelling normative theory of the Commerce Clause and to set out a comprehensive framework for applying that theory to actual cases.

The Article proceeds in three parts. Part I presents the four opinions in *Gonzales v. Raich* and places them in their proper doctrinal context. Part II presents two simple game theoretical models that together develop four doctrinal categories. Identifying these

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43. I do not suggest that additional coordination games beyond those listed, which are suggested in the case law, might not arise. This Article is not intended to provide an exhaustive list, but rather a flexible, yet comprehensive framework for analysis that allows for the inclusion of additional coordination games identified in future Commerce Clause cases.

44. As explained *infra* Part III.B.4.a, while the analysis makes *Wickard* an easy case justifying the use of congressional Commerce Clause power, it raises the question whether the Supreme Court correctly sustained Congress's exercise of Commerce Clause power in *Perez v. United States*, 402 U.S. 146, 146-57 (1971).

categories proves essential to assessing the proper scope of Congress's Commerce Clause power. While Part II presents specific cases that help to develop the models, Part III applies the framework developed in Part II to several additional cases including *Raich*. The Article closes with some comments on the future scope of Commerce Clause power.

I. THE *RAICH* OPINIONS IN CONTEXT

In *Gonzales v. Raich*,[45] the federal Controlled Substances Act,[46] which prohibited all marijuana use except as part of a research project approved by the Food and Drug Administration ("FDA"),[47] conflicted with the California Compassionate Use Act ("CCUA").[48] Under specified conditions, the CCUA protected patients who suffered specified ailments, others for whom marijuana provides relief,[49] and their prescribing physicians, from prosecution for the cultivation, possession, and use of medical marijuana.[50]

Respondents Angel Raich and Diane Monson were California residents who suffered serious illnesses and who, as a result of the failure of traditional medicines and the success of medical marijuana in treating their symptoms, qualified for eligibility under the CCUA. Both Raich and Monson had used marijuana under medical supervision "to function on a daily basis."[51] Raich's physician had submitted an affidavit attesting that he "believe[d] that forgoing cannabis treatments would . . . cause Raich excruciating pain and could very well prove fatal."[52]

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45. 545 U.S. 1 (2005).

46. 21 U.S.C. §§ 801-904 (2000). The CSA, Pub. L. No. 91-513, § 100, 84 Stat. 1242, is contained in Title II of The Comprehensive Drug Abuse Prevention and Control Act of 1970. *See Raich*, 545 U.S. at 12 & n.19.

47. *See Raich*, 545 U.S. at 14 ("By classifying marijuana as a Schedule I drug, as opposed to listing it on a lesser schedule, the manufacture, distribution, or possession of marijuana became a criminal offense, with the sole exception being use of the drug as part of a Food and Drug Administration pre-approved research study.").

48. This Act was originally passed by California voters as Proposition 215 in 1996. *See* CAL. HEALTH & SAFETY § 11362.5 (West 2005); *Raich*, 545 U.S. at 5.

49. Among the listed ailments for which medical marijuana is deemed appropriate are "cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief." *Raich*, 545 U.S. at 5 n.4 (quoting the Compassionate Use Act, now codified as CAL. HEALTH & SAFETY § 11362.5).

50. Justice Stevens explained, "The proposition was designed to ensure that 'seriously ill' residents of the State have access to marijuana for medical purposes, and to encourage Federal and State Governments to take steps towards ensuring the safe and affordable distribution of the drug to patients in need." *Id.* at 5-6.

51. *Id.* at 7.

52. *Id.*

While "Monson cultivate[d] her own marijuana," Raich instead "relie[d] on two caregivers, litigating as 'John Does,' [who] provided her with locally grown marijuana at no charge."[53] In August 2002, county sheriffs and agents from the Drug Enforcement Administration ("DEA") found marijuana in Monson's home.[54] Although California law authorized her use of the marijuana, the federal agents nonetheless seized and destroyed her six cannabis plants.[55]

A. Lower Court Proceedings

Respondents brought suit against the Attorney General of the United States and the head of the DEA, seeking injunctive and declaratory relief prohibiting enforcement of the CSA inasmuch as it prevented them "from possessing, obtaining, or manufacturing cannabis for their personal medical use."[56] While respondents raised a number of constitutional claims,[57] based upon the disposition in the United States Court of Appeals for the Ninth Circuit, the *Raich* Court focused exclusively on whether, as applied to respondents' activities, the absolute federal ban on marijuana was a proper constitutional exercise of Congress's Commerce Clause powers.

The district court, which denied respondents' motion for preliminary injunction, determined that although the federal interest in a complete ban on medical marijuana "waned" in comparison with the harm to respondents if their access were discontinued, respondents nonetheless could not "demonstrate a likelihood of success on the merits."[58] The Ninth Circuit, which reversed and ordered the district court to issue a preliminary injunction, split on whether the controlling line of Supreme Court precedent was the recent retrenchment in Commerce Clause powers set out in *United States v. Lopez*[59] and *United States v. Morrison*,[60] or instead, the expansive body of post-New Deal Commerce Clause cases, including

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. Respondents presented claims under the Commerce Clause, the Fifth Amendment Due Process Clause, the Ninth and Tenth Amendments, and the doctrine of medical necessity. *Id.* at 8.

58. *Id.*

59. *See* 514 U.S. 549, 551 (1995) (holding that the Gun-Free School Zones Act exceeds Congress's Commerce Clause powers).

60. *See* 529 U.S. 598, 601-02 (2000) (holding that the civil remedies provisions of the Violence Against Women Act exceed Congress's Commerce Clause powers).

most notably *Wickard v. Filburn*.[61] The majority determined that recent Ninth Circuit precedent construing *Lopez* and *Morrison* had placed medical marijuana as a "separate class of purely local activity beyond the reach of federal power."[62] In contrast, the dissent determined that it was "simply impossible to distinguish the relevant conduct surrounding the cultivation and use of the marijuana crop at issue in this case from the cultivation and use of the wheat crop that affected interstate commerce in *Wickard v. Filburn*."[63] The Supreme Court granted certiorari.[64]

B. Justice Stevens' Majority Opinion

Justice Stevens defined the central issue in *Raich* as whether "Congress's power to regulate interstate markets for medicinal substances encompasses the portions of those markets that are supplied with drugs produced and consumed locally."[65] While expressing sympathy for the respondents and acknowledging the troubling facts, Stevens ultimately concluded that, as applied to respondents' activities, "[w]ell-settled law" demonstrates that "[t]he CSA is a valid exercise of federal power."[66]

Stevens explained that the CSA was enacted as part of President Nixon's first campaign in the "war on drugs."[67] Through the Comprehensive Drug Abuse Prevention and Control Act of 1970 ("Comprehensive Drug Act"),[68] Congress consolidated various drug laws into a single statute and reorganized federal drug law administration.[69] The Comprehensive Drug Act also accomplished two further objectives. First, it limited diversion of drugs to illegal

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61. *See* 317 U.S. 111, 128-29 (1942) (holding that the Agricultural Adjustment Act of 1938 as applied to a local farmer producing wheat above allotted quota does not exceed Congress's Commerce Clause powers).

62. *Raich*, 545 U.S. at 9.

63. *Id.* (quoting Raich v. Ashcroft, 352 F.3d 1222, 1235 (9th Cir. 2003) (Beam, J., dissenting)).

64. This case was not only important to California, but also to at least eight other states, which had enacted similar compassionate use laws governing medical marijuana. *See id.* at 5.

65. *Id.* at 9.

66. *Id.*

67. *Id.* at 10.

68. Pub. L. No. 91-513, 84 Stat. 1236 (1970). Stevens also described prior congressional efforts to regulate the national market for illicit drugs prior to the 1970 reforms. *See Raich*, 545 U.S. at 10 (describing the Pure Food and Drug Act of 1906 and the Harrison Narcotics Act of 1914).

69. *See Raich*, 545 U.S. at 10-11 (describing the Comprehensive Drug Abuse Prevention and Control Act of 1970 as a response to the perceived need to consolidate the various drug laws and enhance federal enforcement powers).

channels by regulating their legitimate sources. Second, it strengthened law enforcement against illegal drug trafficking.[70]

The CSA, which contains the marijuana prohibition at issue in *Raich*, forms Title II of the Act. Title II establishes a comprehensive regime to fight domestic and international drug trafficking by controlling both the legitimate and illegitimate market in controlled substances.[71] Justice Stevens explained that one of the principal objectives of Title II was preventing the diversion of drugs from legal to illegal channels.[72]

To accomplish this objective, Congress developed a closed regulatory system making it illegal to "manufacture, distribute, dispense, or possess any controlled substances," other than as authorized by the CSA.[73] The CSA established five schedules for drugs based upon "their accepted medical uses, the potential for abuse, and their psychological and physical effects on the body."[74] Each schedule contains a distinct set of regulatory controls governing the manufacture, distribution, and uses of the drugs. Marijuana is included in Schedule I, which contains the most stringent regulations, including making "the manufacture, distribution, or possession of marijuana . . . a criminal offense, with the sole exception being use of the drug as part of a Food and Drug Administration pre-approved research study."[75]

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70. For Justice Stevens' discussion of earlier federal marijuana regulation, see *id.* at 11 (describing the Marihuana Tax Act).

71. *Id.* at 12.

72. Justice Stevens noted that Congress had made the following findings to support the CSA:

> (5) Controlled substances manufactured and distributed intrastate cannot be differentiated from controlled substances manufactured and distributed interstate. Thus, it is not feasible to distinguish, in terms of controls, between controlled substances manufactured and distributed interstate and controlled substances manufactured and distributed intrastate.
>
> (6) Federal Control of the intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic.

Id. at 13 n.20 (quoting 21 U.S.C. §§ 801(1)-(6) (2006)).

73. *Id.* at 13.

74. *Id.*

75. *Id.* at 14. Stevens explained that while the CSA delegates authority to the Attorney General, after consulting with the Secretary of Health and Human Services ("HHS"), to move drugs between the five schedules, the considerable efforts by the National Organization for the Reform of Marijuana Laws ("NORML") to change marijuana from Schedule I have generally failed. *Id.* at 14-15 & n.23. Stevens identified a single exception, which involved a 1988 decision of an Administrative Law Judge concluding that it would be "unreasonable, arbitrary, and capricious" to continue denying marijuana to seriously ill patients. *Id.* at 15 n.23. The DEA declined to endorse this opinion, and all prior and subsequent efforts at reclassification,

Justice Stevens observed that respondents did not challenge the passage of the CSA as part of the larger overhaul of drug laws set out in the Act, and that they did not contend that any provision or section of the CSA exceeded Congress's Commerce Clause powers.[76] Instead, Stevens explained, respondents presented the following, narrower claim: "[T]he CSA's categorical prohibition of the manufacture and possession of marijuana as applied to the intrastate manufacture and possession of marijuana for medical purposes pursuant to California law exceeds Congress's authority under the Commerce Clause."[77]

1. Justice Stevens' Doctrinal Analysis

While Justice Stevens stressed the importance of reading the Commerce Clause cases in their proper context, his historical analysis of the Commerce Clause doctrine was notably thin.[78] Stevens explained that the Commerce Clause was enacted in response to the Framers' perception that the absence of federal commerce power had proved problematic under the Articles of Confederation.[79] He added that for the first century, the Commerce Clause was primarily employed judicially against state laws that discriminated in commerce.[80] Stevens then observed that Congress began relying upon the Commerce Clause at the end of the Nineteenth Century, during the era of industrialization, in an effort to regulate the "increasingly interdependent national economy."[81]

Whereas constitutional scholars generally recognize several changing historical periods in the Supreme Court's Commerce Clause jurisprudence,[82] Justice Stevens instead presented the resulting doctrine as comprising a single " 'new era,' which now spans more than a century."[83] Stevens thus treated different doctrinal periods as

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including five petitions for reclassification over thirty years in the Court of Appeals for the District of Columbia Circuit, have failed. *Id.*

76. *Id.* at 15.

77. *Id.*

78. In fact, Stevens's historical summary consisted of three paragraphs. *See id.* at 15-16 (describing the evolution of the Commerce Clause from 1937 to 2006).

79. *Id.* at 16.

80. *Id.*

81. *Id.*

82. *See, e.g.*, KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 124-215 (15th ed. 2004) (dividing Commerce Clause jurisprudence into (1) The Interpretation of the Commerce Power from 1824 to 1936; (2) The Decline of Limits on the Commerce Power from 1937 to 1995; (3) New Limits on Commerce Power Since 1995; and (4) External Limits on the Commerce Power: State Autonomy, Federalism and the Tenth and Eleventh Amendments).

83. *Raich*, 545 U.S. at 16.

continuous, and in so doing ascribed the *Lopez* Court's revised doctrinal formulation of the substantial effects category to cases from an earlier period.[84] This is important because the revised *Lopez* formulation, rather than the formulation that it replaced, proved essential to Stevens' ultimate determination that wheat, per *Wickard*, and medical marijuana, per *Raich*, warranted like treatment under the Commerce Clause.

2. Lopez, Morrison, and the Doctrinal Transformation from "Economic Effects" to "Economic Activities"

Justice Stevens listed the permissible Commerce Clause categories recognized in *Lopez*[85] and reiterated in *Morrison*.[86] In addition to the power to regulate the channels of interstate commerce, the instrumentalities of interstate commerce, and persons or things traveling in interstate commerce, categories not implicated in *Wickard* or *Raich*, Justice Stevens observed that longstanding case law afforded Congress the power to regulate "activities that substantially affect interstate commerce."[87]

While Stevens initially presented the test articulated in such cases as *NLRB v. Jones & Laughlin Steel Corp.*[88] and *Perez v. United States*,[89] he proceeded to reformulate this test, consistently with *Lopez*, without identifying the source of modification or even mentioning the doctrinal change. Justice Stevens stated: "Our case law firmly establishes Congress's power to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce."[90] Because this doctrinal

84. Specifically, Stevens ascribed the "economic 'class of activities' " test from the substantial effects category to *Perez v. United States*, 402 U.S. 146, 151 (1970), and to *Wickard v. Filburn*, 317 U.S. 111, 128-29 (1942), when neither case employed that test. *See Raich*, 545 U.S. at 11 n.17. Instead, *Perez* quoted the famous *Wickard* formulation. 402 U.S. at 151-52 (quoting *Wickard*, 317 U.S. at 125); *see also supra* note 10 (citing *Wickard*).

85. 514 U.S. 549, 558-59 (1995).

86. 529 U.S. 589, 609 (2000); *see also Raich*, 545 U.S. at 16-17 (explaining there are three categories of authorized regulation: (1) channels of interstate commerce; (2) instrumentalities of interstate commerce; and (3) activities that substantially affect interstate commerce).

87. *Raich*, 545 U.S. at 17.

88. 301 U.S. 1, 37 (1937) ("activities that substantially affect interstate commerce").

89. 402 U.S. at 150 ("activities affecting commerce").

90. *Raich*, 545 U.S. at 17. Curiously, Justice Stevens went on to quote the *Wickard* formulation: "[E]ven if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce." *Id.* And yet, while claiming to apply *Wickard*, Stevens instead rested his analysis on the critical reformulation in *Lopez*. *Id.* at 24.

transformation is critical to the analysis that follows, it is important to briefly consider its origins.

Other commentators have commented on, and criticized, Rehnquist's doctrinal transformation in *Lopez* from inquiring into whether the regulated activity has a substantial economic effect on commerce to whether the activity itself is economic.[91] In one line of pre-*Lopez* Commerce Clause cases, the Supreme Court had based the scope of Congress's regulatory power on whether the underlying activity was characterized as "economic."[92] These cases provide little support for the use of a non-economic activities test in *Lopez*, however, because they involved the question of whether Congress can regulate states acting as employers or as service providers in the same manner that Congress regulates private actors.[93] In the statutes at issue in *Wickard* and *Raich*, in contrast, Congress was not regulating states or other units of government. Rather, Congress was regulating private individuals. Instead of relying upon this line of cases for the new non-economic activities test, Rehnquist cited *Heart of Atlanta Hotel v.*

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91. Justice Breyer, dissenting in *Lopez*, observed:

> Moreover, the majority's test is not consistent with what the Court saw as the point of the cases that the majority now characterizes. Although the majority today attempts to categorize *Perez*, *McClung*, and *Wickard* as involving intrastate "economic activity," the Courts that decided each of those cases did not focus upon the economic nature of the activity regulated. Rather, they focused upon whether that activity affected interstate or foreign commerce. In fact, the *Wickard* Court expressly held that Filburn's consumption of homegrown wheat, "*though it may not be regarded as commerce*," could nevertheless be regulated—"*whatever its nature*"—so long as "it exerts a substantial economic effect on interstate commerce."

United States v. Lopez, 514 U.S. 549, 628 (1995) (Breyer, J., dissenting) (alteration in original) (internal citation omitted). For academic commentaries on this doctrinal formulation, see, e.g., Robert A. Schapiro & William W. Buzbee, *Unidimensional Federalism: Power and Perspective in Commerce Clause Adjudication*, 88 CORNELL L. REV. 1199, 1222 (2003); Adrienne J. Vaughan, *The Civil Rights Remedy of the Violence Against Women Act as Litigated in* United States v. Morrison*: The Supreme Court's Sacrificial Lamb to Reinforce* United States v. Lopez, 24 HAMLINE L. REV. 163, 166 (2000).

92. Prior critics of *Lopez* have not focused on the use of economic activities in this group of Commerce Clause cases.

93. In *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), the Supreme Court upheld the application of the Fair Labor Standards Act of 1938 (FLSA), Pub. L. No. 75-718, § 13, 52 Stat. 1060, 1067, to the San Antonio Metropolitan Transit Authority ("SAMTA"), stating that even though SAMTA's activities "might well be characterized as local . . . it has long been settled that Congress' authority under the Commerce Clause extends to intrastate economic activities that affect interstate commerce." *Garcia*, 469 U.S. at 537. In formulating the economic activities test, the *Garcia* Court relied upon *Maryland v. Wirtz*, 392 U.S. 183 (1968), which sustained the application of FLSA to state schools and hospitals, stating: "If a State is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the State too may be forced to conform its activities to federal regulation." *Id.* at 197.

United States,[94] *Katzenbach v. McClung*,[95] and *Wickard*,[96] cases in which Congress regulated private actors and in which the Supreme Court had applied the traditional substantial effects test without inquiring into the nature of the regulated activity.[97]

3. The *Wickard* Connection

While Stevens suggested that the *Wickard* Court sustained Congress's regulation of wheat production as a quintessential economic activity, a careful reading of the case demonstrates otherwise. Indeed, *Wickard* rejected the very formalist analysis that in an earlier period invalidated the regulation of production, including minimum wages and maximum hours in manufacturing, on the ground that it was an activity that preceded commerce, and thus fell within the protected sphere of reserved state powers.[98] Instead, *Wickard* sustained Congress's regulation of wheat production because of the effect that allowing such production without regulation would have had on the regulated interstate wheat market.

Justice Stevens explained that the *Wickard* Court considered the Adjustment Act of 1938's impact upon Filburn. The Adjustment Act was intended to bolster the price of wheat amid a glut by limiting the volume of wheat produced.[99] Filburn had been allotted 11.1 acres for his 1941 wheat crop, but sowed twenty-three acres instead.[100] Filburn maintained that he used the excess entirely on his own farm.[101]

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94. 379 U.S. 241, 269 (1964).

95. 379 U.S. 294, 302 (1964).

96. 317 U.S. 111, 125 (1942).

97. *See* United States v. Lopez, 514 U.S. 549, 559-60 (1995). While Rehnquist reformulated the substantial activities test to limit Congress's lawmaking power in the expansive substantial effects category, as explained in the next part, see *infra* Part III, the doctrinal transformation was not necessary to the holdings in *Lopez* or *Morrison*.

98. *See, e.g.*, United States v. E.C. Knight Co., 156 U.S. 1, 12 (1895) ("Commerce succeeds to manufacture, and is not a part of it."); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 72 (1824) ("[I]nspection laws . . . act upon the subject before it becomes an article of foreign commerce, or of commerce among the States, and prepare it for that purpose.").

99. *See* Gonzales v. Raich, 545 U.S. 1, 17 (1995) (citing *Wickard*, 317 U.S. at 118).

100. *Id.*

101. *Id.* Although Justice Stevens makes this assertion in *Raich* when characterizing *Wickard*, in the majority opinion for *Wickard*, Justice Jackson states: "The intended disposition of the crop bere involved has not been expressly stated." 317 U.S. at 114. Nevertheless, numerous academic commentators have characterized *Wickard* as Justice Stevens did in *Raich*. *See, e.g.*, Erwin Chemerinsky, Keynote Address at the Willamette Law Review Symposium: Laboratories of Democracy: Federalism and State Law Independency (Mar. 11, 2005), *in* 41 WILLAMETTE L. REV. 827, 830 (2005) ("A farmer [in *Wickard*] challenged the law and said that what he grew for his family to eat didn't bave any effect on interstate commerce."); Barry Cushman, *Formalism and Realism in Commerce Clause Jurisprudence*, 67 U. CHI. L. REV. 1089,

Justice Stevens quoted the following excerpt from Justice Jackson's famous decision rejecting Filburn's argument that the penalty for violating his wheat quota exceeded Congress's Commerce Clause powers:

> The effect of the statute before us is to restrict the amount which may be produced for market and tbe extent as well to wbich one may forestall resort to the market by producing to meet his own needs. That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.[102]

After noting several factual similarities between *Raich* and *Wickard*,[103] Justice Stevens explained:

> In *Wickard*, we had no difficulty concluding that Congress had a rational basis for believing that, when viewed in the aggregate, leaving home-consumed wheat outside the regulatory scheme would have a substantial influence on price and market conditions. Here too, Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would similarly affect price and market conditions.[104]

Justice Stevens explained that, as in *Wickard*, where the Court recognized Congress's concern that enforcing production quotas was necessary to protect rising market prices given that wheat intended for home consumption competed with wheat in commerce, in *Raich*, Congress had expressed a parallel concern that the high demand for illicit marijuana would draw into the market home-grown marijuana intended for medical use.[105] One difficulty with Stevens's analysis, however, is that the issue in *Raich* was not whether Congress could limit the market in marijuana as an illegal drug. Instead, it was whether, given the local nature of respondents' activities and the use of state police powers to regulate it, Congress had a rational basis for

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1138 (2000) ("Filburn had marketed the harvest from his allotted acreage, but rather than storing the excess as prescribed, he bad reserved all of his surplus wheat for use and consumption on his own farm."). A possible source of this confusion is a sentence in the *Wickard* opinion that says: "It can hardly be denied that a factor of such volume and variability as *home-consumed wheat* would have a substantial influence on price and market conditions." 317 U.S. at 128 (emphasis added).

102. *Raich*, 545 U.S. at 18 (quoting *Wickard*, 317 U.S. at 127-28).

103. Justice Stevens explained:

> Like the farmer in *Wickard*, respondents are cultivating, for home consumption, a fungible commodity for which there is an established, albeit illegal, interstate market. Just as the Agricultural Adjustment Act was designed "to control the volume [of wheat] moving in interstate and foreign commerce in order to avoid surpluses . . ." and consequently control the market price, . . . a primary purpose of the CSA is to control the supply and demand of controlled substances in both lawful and unlawful drug markets.

Id. at 18-19 (alteration in original) (internal citations omitted).

104. *Id.* at 19. To support this argument, Stevens noted that respondents had themselves participated in the illegal marijuana market. *See id.* at 18 n.28.

105. *Id.* at 19.

believing that the federal scheme would be undermined if it did not also ban the more narrowly targeted class of state-sanctioned medical marijuana. In analogizing wheat and marijuana, Justice Stevens assumed Congress's power to impose a complete ban, when that was the issue presented in the case.[106]

Justice Stevens explained that in applying the substantial effects test, the Court inquires only whether Congress had a rational basis for having found a substantial effect. Given the difficulty in assessing the origin of marijuana and in preventing diversion from legal to illicit channels, as applied to the CSA's complete ban, Stevens concluded that the scheme's justification was not merely rational, but was "visible to the naked eye."[107]

Like Justice Scalia, who concurred in the judgment,[108] Justice Stevens maintained that the Necessary and Proper Clause demonstrates that Congress had a rational basis in linking even local use of marijuana to interstate commerce. Stevens stated:

> [As] in *Wickard*, when it enacted comprehensive legislation to regulate the interstate market in a fungible commodity, Congress was acting well within its authority to make all Laws which shall be necessary and proper to regulate Commerce . . . among the several States. . . . That the regulation ensnares some purely intrastate activity is of no moment. As we have done many times before, we refuse to excise individual components of that larger scheme.[109]

Justice Stevens rejected the Ninth Circuit's reliance upon *Lopez* and *Morrison* in striking down the absolute marijuana ban. Stevens explained that while those cases involved challenges to isolated federal regulatory schemes, the *Raich* respondents were

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106. Thus, Stevens stated:

> While the diversion of homegrown wheat tended to frustrate the federal interest in stabilizing prices by regulating the volume of commercial transactions in the interstate market, the diversion of homegrown marijuana tends to frustrate the federal interest in eliminating commercial transactions in the interstate market in their entirety.

Id. As Justice Thomas observed in dissent, this part of Stevens's argument is circular. The federal interest justifying the ban on medical marijuana is defined to include all transactions, including those limited to physician-approved uses. If the federal interest had instead been defined to prohibit illicit uses, permitting Congress to extend the ban to approved medical uses would not necessarily further that federal interest. *See id.* at 68 n.6 (Thomas, J., dissenting).

107. *Id.* at 28-29. Stevens further argued that limiting the activity to marijuana possession and cultivation "in accordance with state law" cannot prevent congressional regulation because the Supremacy Clause "unambiguously provides that if there is any conflict between federal and state law, federal law must prevail." *Id.* at 29. This argument is also circular, see *supra* note 106, since federal law only prevails under the Supremacy Clause when in pursuance of the Constitution and laws of the United States. If the Court had determined instead that as applied to respondents' activities, which were permitted under state law, the CSA was unconstitutional, the Supremacy Clause would not apply.

108. *See infra* Part I.C.

109. *Raich*, 545 U.S. at 22 (internal quotations omitted).

seeking to have the Court "excise individual applications of a concededly valid statutory scheme."[110] Instead, Stevens relied upon the revised *Lopez/Morrison* framework to pose the central question in *Raich* as whether cultivating (or otherwise acquiring) and using marijuana, even on the advice of a physician as permitted under state law for a medical ailment, was "economic" activity and therefore within Congress's power to proscribe under the Commerce Clause. To answer this question, Stevens referred to the definition of "Economics" set out in *Webster's Third New International Dictionary*, which includes "the production, distribution, and consumption of commodities."[111] Stevens concluded that respondents' activities, like those of Mr. Filburn in *Wickard*, qualified as economic and were thus within Congress's power to proscribe.

While conceding that respondents' narrow claim, seeking to protect physician-prescribed medical marijuana from federal regulation as a "distinct class of activity," might justify different legislative or administrative treatment, Stevens concluded that it did not undermine Congress's constitutional exercise of lawmaking power.[112] Instead, Stevens determined that the "personal medical purposes on the advice of a physician" cannot distinguish respondents' activities from other cultivation of marijuana banned by Schedule I of the CSA because Congress found that marijuana has no legitimate use.[113]

C. Justice Scalia's Concurrence in the Judgment

In his separate opinion, Justice Scalia noted that while the Court, since *Perez v. United States*,[114] has "mechanically recited" three

110. *Id.* Thus, Stevens explained that the Court has repeatedly asserted that "where the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class." *Id.* at 23 (quoting Perez v. United States, 402 U.S. 146, 154 (1971)).

111. *Id.* at 25-26 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 720 (1966)). As Justice Thomas noted in dissent, it is curious that Stevens relied upon a forty-year-old dictionary to define economics. *See id.* at 69 n.7 (Thomas, J., dissenting).

112. *See id.* at 26 (majority opinion) (noting the "differences between the members of a class so defined and the principal traffickers in Schedule I substances might be sufficient to justify a policy decision exempting the narrower class from the coverage of the CSA").

113. *Id.* Stevens conceded that the absolute ban on marijuana, through its continued Schedule I listing, might run counter to current scientific evidence supporting a valid medical use, but maintained that such arguments should be advanced to Congress, not to the Supreme Court. *See id.* at 28 n.37 (citing studies and explaining they would, if accepted, "cast serious doubt on the accuracy of the findings that require marijuana to be listed in Schedule I").

114. 402 U.S. 146.

permissible Commerce Clause categories, the listing is misleading.[115] Because "activities that substantially affect interstate commerce are not themselves part of interstate commerce," Scalia explained, Congress's power to regulate them "cannot come from the Commerce Clause alone."[116] And yet, Congress sometimes finds it necessary and proper to regulate interstate commerce by "eliminating potential obstructions" or by "eliminating potential stimulants."[117] The resulting power to regulate intra-state activities that are not themselves in commerce is expansive, Scalia explained, but "not without limitation."[118] Instead, the power to regulate in the substantial effects cases is limited because the underlying activity must be "economic," and because the connection from the regulated activity to commerce cannot result from "pil[ing] inference upon inference."[119]

Scalia maintained that, at least implicitly, *Lopez* recognized Congress's power to enact laws necessary and proper to furthering its commerce power even if the regulation was not "directed against economic activities that have a substantial effect on interstate commerce."[120] Instead, in regulating interstate commerce, Congress "possesses every power needed to make that regulation effective."[121] While these two powers overlap, they are distinct. Scalia claimed that in *Raich*, the distinction proved critical.[122]

While Stevens, writing for the majority, distinguished *Lopez* and *Morrison* on the ground that in those cases, Congress had regulated non-economic activities, Scalia instead maintained that the distinction was more subtle. Whether or not *Lopez* and *Morrison* involved economic activity or activity with a substantial effect on commerce, in contrast with the schemes at issue in *Wickard* and *Raich*, neither case involved the regulation of local activity in a

115. *Raich*, 545 U.S. at 33 (Scalia, J., concurring in the judgment).

116. *Id.* at 34.

117. *Id.* at 35.

118. *Id.*

119. *Id.* at 36.

120. *Id.*

121. *Id.* (quoting United States v. Wrightwood Dairy Co., 315 U.S. 110, 118-19 (1942)).

122. This analysis helped Scalia to offer the following alternative reading of *Wickard*:

> Because the unregulated production of wheat for personal consumption diminished demand in the regulated wheat market, the Court said, it carried with it the potential to disrupt Congress's price regulation by driving down prices in the market. This potential disruption of Congress's interstate regulation, and not only the effect that personal consumption of wheat had on interstate commerce, justified Congress's regulation of that conduct.

Id. at 37 n.2 (citation omitted).

manner that was necessary and proper in the furtherance of a comprehensive federal regulatory scheme.[123]

As applied to the CSA, Scalia claimed, the resulting analysis was "straightforward."[124] As part of its comprehensive regulatory scheme, the CSA sought to eliminate altogether traffic in marijuana. Even though the cultivation of marijuana itself might not qualify as an economic activity that substantially affects interstate commerce, because marijuana is a fungible commodity it was necessary and proper for Congress to ban it entirely in order to effectuate Congress's larger regulatory scheme.[125]

D. Justice O'Connor's Principal Dissent

In the principal dissent, which the Chief Justice and Justice Thomas joined, Justice O'Connor claimed that properly viewed, the *Raich* facts exemplified the benefits of a scheme of horizontally divided powers in which the states operated as experimental laboratories.[126] O'Connor chided the majority for thwarting this role and for producing "perverse incentive[s]" by allowing Congress to regulate local non-economic activity provided it somehow linked the regulation to a broader regulatory scheme.[127] O'Connor claimed that the same arguments for rejecting the application of the Commerce

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123. *See id.* at 39 (positing that "*Lopez* expressly disclaimed that it was such a case, and *Morrison* did not even discuss the possibility that it was [such a case]" (citations omitted)). Scalia's reasoning is at least potentially in tension with that of Justice Roberts, as expressed both in Roberts's confirmation hearing, *see supra* note 37 and cites therein, and in Roberts's dissent from the denial of the petition of rehearing en banc in *Rancho Viejo*, in which he maintained that the difficulty in applying the Endangered Species Act was that the overall regulatory scheme, but not the regulated activity itself, substantially affected interstate commerce, *see* Rancho Viejo, LLC v. Norton, 334 F.3d 1158, 1160 (D.C. Cir. 2003) (Roberts, J., dissenting).

124. *Raich*, 545 U.S. at 39 (Scalia, J., concurring in the judgment).

125. Scalia rejected the principal dissent's criticism that the majority analysis turns *Lopez* into a drafting guide by letting Congress regulate local activity when linked to a comprehensive federal regulatory scheme. Scalia argued instead that Congress's power to regulate local non-economic activities remains limited because as a precondition, Congress must have in place a comprehensive scheme regulating activity affecting interstate commerce, a requirement that he claimed was absent in *Lopez* and *Morrison*. *Id.* at 38-39.

126. *See id.* at 42 (O'Connor, J., dissenting).

127. *See id.* at 43. Justice O'Connor further wrote:

> I did not understand our discussion of tbe role of courts in enforcing outer limits of the Commerce Clause for the sake of maintaining the federalist balance our Constitution requires . . . as a signal to Congress to enact legislation that is more extensive and more intrusive into the domain of state power.

Id. at 47.

Clause in *Lopez* also applied in *Raich*,[128] and that under the Court's analysis, Congress could have justified the regulation in *Lopez* as part of a larger scheme regulating commerce in guns.[129] *Lopez* did not invite such evasion, O'Connor argued, but instead required the Court to identify "objective markers" that properly limit congressional powers in Commerce Clause cases.[130] O'Connor explained: "The task is to identify a mode of analysis that allows Congress to regulate more than nothing (by declining to reduce each case to its litigants) and less than everything (by declining to let Congress set the terms of analysis)."[131]

O'Connor identified several such markers in *Raich*. First, both the CSA and state law recognized that medical and non-medical use of drugs "are realistically distinct and can be segregated" for regulatory purposes.[132] Second, respondents limited their claim to state-permitted, physician-prescribed, medical marijuana.[133] Third, *Raich* arose in a regime of overlapping federal and state regulation in an area of criminal law in which "[s]tates lay claim by right of history and expertise."[134] Finally, California had drawn upon its reserved powers to distinguish medicinal and recreational use of marijuana.[135]

O'Connor also identified three factors that distinguished *Raich* from *Wickard*. First, after rejecting the majority's "dictionary definition" of economics as "breathtaking,"[136] O'Connor maintained that unlike wheat, "[t]he home grown cultivation and personal use of marijuana for medicinal purposes has no apparent commercial character."[137] Second, in contrast with the broad reach of the CSA, the Agricultural Act of 1938 exempted "small-scale, noncommercial wheat farming."[138] Finally, O'Connor maintained that while the *Wickard*

128. First, *Lopez* involved criminal activity that was not economic. *See id.* at 44. Second, the Gun-Free School Zones Act contained no express jurisdictional element linking the regulated activity to commerce. *Id.* Third, Congress had made no legislative findings that linked the regulated activity to commerce. *Id.* And finally, the Court's analysis revealed the linkage between the regulated activity and commerce to be attenuated. *Id.* at 44-45.

129. *Id.* at 46.

130. *Id.* at 47.

131. *Id.* at 47-48.

132. *Id.* at 48.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.* at 49.

137. *Id.* at 50. In addition, O'Connor noted that marijuana is "highly unusual" in that it can be manufactured entirely with local materials that have not traveled interstate. *Id.*

138. *See id.* at 51 ("When Filburn planted the wheat at issue in *Wickard*, the statute exempted plantings less than 200 bushels (about six tons), and when he harvested his wheat it exempted plantings less than six acres.").

Court relied upon stipulations concerning the effects of domestically produced wheat on the overall market,[139] in *Raich*, Congress's findings amounted to no more than a bold claim concerning the need for an absolute ban.[140] O'Connor concluded that in contrast with *Raich*, "*Wickard* . . . did not extend Commerce Clause authority to something as modest as the home cook's herb garden."[141]

E. Justice Thomas' Dissent

In an independent dissent, Justice Thomas reiterated his call for fundamental Commerce Clause reform, as set out in his *Lopez* concurrence, claiming that the original meaning of commerce was limited to the buying and selling of goods and services.[142] Under this more radical approach to Commerce Clause reform, Thomas would reject altogether the category of cases allowing Congress to regulate local activities on the ground that they have a substantial effect on interstate commerce without regard to whether the activities themselves, or their effect on commerce, can be described as economic.

In his *Lopez* opinion, Thomas steadfastly rejected the *Wickard* multiplier analysis as a clever but limitless argument.[143] In *Raich*, however, Thomas maintained that even the substantial effects test did not provide a basis for allowing Congress to apply the CSA to respondents' activities. Because *Raich* presented an as-applied, rather than a facial, challenge, Thomas argued, it was not sufficient for the claimed exercise of congressional commerce power to maintain that unregulated marijuana growers could "swell" the market for marijuana.[144] Instead, the issue was whether, given the statutory limits upon permissible use in California, it was necessary and proper to the CSA to limit even locally grown marijuana specifically intended for medical use.[145] Thomas concluded that the answer was no.

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139. *See id.* at 53 ("Critically, the Court was able to consider 'actual effects' because the parties had 'stipulated a summary of the economics of the wheat industry.'" (quoting Wickard v. Filburn, 317 U.S. 111, 125 (1942))).

140. *See id.* (claiming that the congressional findings "amount to nothing more than a legislative insistence that the regulation of controlled substances must be absolute," and that "[t]hese bare declarations cannot be compared to the record before the Court in *Wickard*").

141. *Id.* at 51.

142. *See id.* at 58-59 (Thomas, J., dissenting).

143. United States v. Lopez, 514 U.S. 549, 600 (1995) (Thomas, J., concurring) ("The aggregation principle is clever, but has no stopping point.").

144. *Raich*, 545 U.S. at 61 (Thomas, J., dissenting).

145. *See id.* at 63-64. Thus, Thomas stated:

> But even assuming that States' controls allow some seepage of medical marijuana into the illicit drug market, there is a multibillion-dollar interstate market for marijuana. It is difficult to see how this vast market could be

II. DEVISING A GAME THEORETICAL MODEL OF PERMISSIBLE COMMERCE CLAUSE POWERS

What emerges most prominently from the prior discussion is that none of the four *Raich* opinions offers a framework with which to develop a comprehensive normative theory of the Commerce Clause that is capable of reconciling the expansive post-New Deal cases with the Supreme Court's more recent project of imposing meaningful limits on the permissible scope of Congress's Commerce Clause powers. Justice Stevens treated all Commerce Clause cases, beginning in the late nineteenth century, as a uniform whole, and inquired, based upon the *Lopez* non-economic activities test, whether respondents' activities were "economic." But in answering this question, Stevens relied upon a dictionary definition that, ironically, prevented a meaningful economic analysis of the permissible scope of Congress's Commerce Clause powers. While Stevens placed *Raich* and *Wickard* in the same doctrinal category, he did so by resorting to a version of the very formalism that *Wickard* rejected, now including what had once been a pre-commerce activity within Congress's core regulatory powers under the Commerce Clause.

Justice Scalia, who instead rested his analysis primarily on the Necessary and Proper Clause, maintained that Congress's powers included the power to regulate non-economic activity and activity that did not have a substantial effect on commerce, provided that Congress regulated such activity within the context of a more comprehensive legislative scheme. This analysis also placed *Wickard* and *Raich* in the same doctrinal category, but again failed to offer a means of imposing meaningful limits on the scope of Congress's Commerce Clause powers, other than counterintuitively insisting upon broader

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> affected by diverted medical cannabis, let alone in a way that makes regulating intrastate medical marijuana obviously essential to controlling the interstate drug market.

Id. at 64 (citing OFFICE OF NAT'L DRUG CONTROL POLICY, EXECUTIVE OFFICE OF THE PRESIDENT, NCJ NO. 198099, ONDCP DRUG POLICY INFORMATION CLEARINGHOUSE FACT SHEET: MARIJUANA 5 (2004)). Legalizing marijuana can have both a supply side and a demand side effect. While Thomas focused on the demand side, namely how marijuana can seep from the legal to the illegal market, it is also possible that the increased demand from medical marijuana can affect the supply of the illegal drug. The supply side effect is also unlikely to rise to a sufficient magnitude to substantially affect interstate commerce, however, because as Justice Stevens noted for the majority, part of the supply will be home grown, and thus limited to the intended user, see *id.* at 7 (majority opinion) (noting that "Monson cultivates her own marijuana"), and because there is no evidence to support the claim that additional supplies for approved medical users from illegal producers will have a substantial spillover effect with respect to illicit users given the vast scope of the illicit marijuana market, see *id.* at 64 (Thomas, J., dissenting) (discussing magnitude of the illicit marijuana market).

regulatory schemes to sustain the narrowest applications. Moreover, Scalia did not demand an economic justification for either the broader regulatory scheme itself or the narrower class of activity attached to it.

In her principal dissent, Justice O'Connor distinguished *Wickard* and *Raich*, but employed an alternative formalistic analysis in doing so. Applying O'Connor's analysis, Congress could evade any judicially imposed limits on the scope of its Commerce Clause powers provided it jumped through certain hoops, including, most importantly, exempting some even narrower class of activity or articulating "findings" that linked the regulated activity to commerce.

Finally, in his separate and broader dissent, Justice Thomas appeared to agree that *Wickard* and *Raich* fall into the same category, but rejected the category on normative grounds. Abolishing the substantial effects category, and limiting the permissible understanding of commerce to exchange, would produce a radical retrenchment of Commerce Clause doctrine and call into question the continuing validity of many Commerce Clause cases decided in the post-New Deal era.

Finding a viable theory that can reconcile the broad post-New Deal expansion of Commerce Clause powers with the more recent efforts at retrenchment requires a careful understanding of the relationship between "economics" and the Commerce Clause. A proper economic analysis of the Commerce Clause demonstrates that, holding *Raich* aside, almost all of the post-New Deal cases—including most notably *Wickard*, *Lopez*, and *Morrison*—fit within a coherent and functional conception of the permissible scope of Congress's Commerce Clause powers.

The theory of the Commerce Clause set out below is simple. When Congress can rationally infer that individual states have an incentive to obstruct rather than advance a selected regulatory scheme, then only a central coordinating authority, namely Congress itself, can create a vehicle for implementing and enforcing that scheme. Among the principal benefits of this normative theory is that it aligns the economic analysis of the doctrines governing the permissible scope of Congress's Commerce Clause powers with the doctrines governing the use of the Commerce Clause, operating in its dormant capacity, as a source of limitation on the permissible scope of state regulatory powers.[146]

146. For my comprehensive assessment of the dormant Commerce Clause doctrine, see Maxwell L. Stearns, *A Beautiful Mend: A Game Theoretical Analysis of the Dormant Commerce Clause Doctrine*, 45 WM. & MARY L. REV. 1 (2003). In that article, I demonstrated that almost all dormant Commerce Clause cases could be explained by introducing a second game theoretical

Coordination difficulties, as shown below, arise primarily in two contexts. First, they arise when individual firms or states could evade a scheme affecting pricing, working conditions, or environmental regulations. Second, they arise when individual states could pursue policies that impose geographical obstructions or inhibitions to commerce. Using two simple games, the prisoners' dilemma and the multiple Nash equilibrium game,[147] this Part identifies the conditions under which defection from beneficial coordination is likely to arise, and thus, when central regulation involving congressional Commerce Clause powers is justified.

In this Part, I will further draw upon actual Commerce Clause cases to the extent that they are helpful in developing the formal models. Other applications are presented in Part III. The analysis begins with an alternative account of *Wickard*, based upon the prisoners' dilemma, which explains how Congress has used its Commerce Clause power to develop solutions to coordination problems that are beyond the competence of states, acting on their own, to enact unilaterally. I then apply the model in two other contexts that present similar coordination problems.

A. Coordination on the Supply Side: Wickard v. Filburn *and Cartel Enforcement*

Let us now reconsider *Wickard v. Filburn*.[148] *Wickard* emerged in the aftermath of the Great Depression, during a period in which a major wheat glut resulted in a dramatic decline in wheat prices. Congress enacted the Agricultural Adjustment Act of 1938, which authorized the Secretary of Agriculture to propose a referendum, subject to a two-thirds majority vote among wheat farmers, which would result in the imposition of a "compulsory national marketing quota."[149] Filburn, who was penalized for violating his quota, raised,

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dimension beyond the traditional justification of the dormant Commerce Clause doctrine as solving a prisoners' dilemma among potentially defecting states. *See id.* at 69-117. By also considering the possibility that states can upset a benign multiple Nash equilibrium game that facilitates the flow of commerce, the analysis reconciles not only the dormant Commerce Clause cases, see *id.* at 123-54, but also such related doctrines as the market participant cases, Article IV privileges and immunities doctrine, and the export taxation doctrine, see *id.* at 118-23.

147. The analysis also draws upon insights from the empty core bargaining game to demonstrate the circumstances under which moves from decentralized to centralized decision making, or the reverse, among three or more players, can produce superadditive gains. *See infra* notes 162-64 and accompanying text.

148. 317 U.S. 111 (1942).

149. *Id.* at 115.

among other arguments, a claim that, as applied to him, the 1938 statute exceeded Congress's Commerce Clause power.

The *Wickard* opinion is almost invariably cited for its multiplier analysis.[150] Focusing on other, less well known aspects of the case helps to lay a foundation for the first game justifying congressional Commerce Clause authority. With respect to the four wheat net exporter nations, Jackson explained: "It is interesting to note that all of these have federated systems of government, not of course without important differences. In all of them, wheat regulation is by the national government."[151] This raises the question why none of the four net export nations employed a decentralized solution to the problem of depressed wheat pricing.[152]

Justice Jackson also explained the incentives that the coordinated scheme created for individual producers like Filburn: "It is agreed that as the result of the wheat programs he is able to market his wheat at a price 'far above any world price based on the natural reaction of supply and demand.' "[153] Jackson recognized that while small scale producers, like Filburn, were given a choice to cooperate and receive the higher price, or not to cooperate and be penalized,[154] the quota produced an incentive to reap the benefit of the heightened price while avoiding the imposed restrictions that created it.[155]

These two observations help to explain *Wickard* as more than a clever argument premised upon the very multiplier analysis that the Court had then recently rejected in *Carter v. Carter Coal Co.*[156]

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150. *See supra* text accompanying note 102 (quoting passage from *Wickard*, 317 U.S. at 127-28).

151. *Wickard*, 317 U.S. at 126 n.27. Jackson also explained:

> The four large exporting countries of Argentina, Australia, Canada, and the United States have all undertaken various programs for the relief of growers. Such measures have been designed, in part at least, to protect the domestic price received by producers. Such plans have generally evolved towards control by the central government.

Id. at 125-26.

152. Indeed, Justice Jackson suggested an evolutionary process in which experimentation with more local regulation among the net exporter nations failed to produce the desired effect, prompting central regulatory controls. *See id.*

153. *Id.* at 130-31.

154. *Id.* at 130.

155. *See id.* at 133.

156. 298 U.S. 238, 308 (1936). In *Carter*, the Court held:

> If the production by one man of a single ton of coal intended for interstate sale and shipment, and actually so sold and shipped, affects interstate commerce indirectly, the effect does not become direct by multiplying the tonnage, or increasing the number of men employed, or adding to the expense or complexities of the business, or by all combined.

Id.

Instead, *Wickard* rested upon an intuition, albeit one not fully developed into a theory, that certain structural conditions required policies to operate strictly at the national level, and that once those policies were implemented, enforcement was most effective if coupled with a signal operating at the lowest level of agreed upon restraint.[157]

To generalize the problem, imagine that in a given year there is an anticipated wheat glut that will force down prices below an acceptable level. A price increase can be affected either by enhancing demand or by restricting supply.[158] The question then is how to accomplish this, a problem that is well understood in the literature on the theory of cartels.[159] If several producers that collectively possess market power over their products seek to raise their prices, they can achieve this objective most easily by agreeing to collective restrictions on their aggregate outputs. The ideal restriction is one that would replicate the outputs of a single firm controlling production for the entire market. A firm with complete market power faces a downward sloping demand curve and a corresponding marginal revenue curve, as shown in Figure 1.

157. This is not to suggest that the scheme would not have produced any monopolistic rent if only the larger producers' outputs were cartelized, and in fact, this observation helps to explain why large producers were motivated to coerce smaller ones to comply through the two-thirds voting requirement. *See Wickard*, 317 U.S. at 115-16.

158. *See id.* at 127 ("The maintenance by government regulation of a price for wheat undoubtedly can be accomplished as effectively by sustaining or increasing the demand as by limiting the supply.").

159. For general discussions of cartel theory, see GEORGE STIGLER, THE THEORY OF PRICE 228-32 (4th ed. 1987); *see also* Alexis Jacquemin & Margaret E. Slade, *Cartels, Collusion, and Horizontal Merger*, *in* 1 HANDBOOK OF INDUSTRIAL ORGANIZATION 415, 417-24 (Richard Schmalensee & Robert D. Willig eds., 1989) (discussing cartels and factors relating to collusion and cheating).

Figure 1

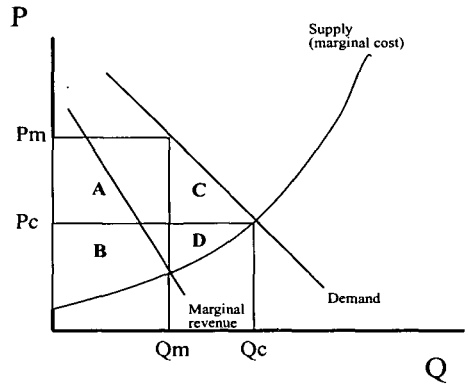

Figure 1 depicts a downward sloping demand curve, which confronts a monopolistic firm operating within a noncompetitive market, or which confronts the aggregation of firms operating within a competitive market.[160] For the market as a whole, the price is set where the supply and demand curves for all producers and consumers meet. In Figure 1, this results in Qc and Pc. For any individual firm within a competitive market, the demand curve is effectively flat and is set at the equilibrium price for the market as a whole. In contrast, if the market is controlled by a single monopolistic firm, the demand curve for that firm is not flat, but rather is the downward sloping curve for the entire market. While the monopolistic firm must consider the downward sloping demand curve, it must also consider the marginal revenue curve, which is also downward sloping and which lies below the demand curve. That is because if we assume an inability to segment the market and thus to engage in price discrimination, then for each additional unit sold, the price drops for all units sold of the same good up to that point based upon the reduction in price for the marginal increase in output along the demand curve. In setting an

160. For a more detailed discussion that includes an analysis of various forms of rent and of rent seeking, see Stearns, *supra* note 146, at 97-102; MAXWELL L. STEARNS, PUBLIC CHOICE AND PUBLIC LAW: READINGS AND COMMENTARY 111-17 (1997); MAXWELL L. STEARNS & TODD ZYWICKI, PUBLIC CHOICE CONCEPTS AND APPLICATIONS IN LAW ch. 1 (forthcoming West Publishing Co. 2008) (providing price theory appendix). For a firm that has no market power, and thus no control over prices, in contrast, the relevant demand curve is effectively flat.

optimal price, therefore, the monopolistic firm considers the marginal revenue curve, which reflects the consequences of incremental price reductions for all units sold as the monopolist sells at various levels of output. The monopolist's ideal strategy is to set price where marginal cost, or supply, equals marginal revenue, and then to set price for that level of output along the corresponding demand curve. In Figure 1, this means that the optimal strategy for a monopolistic firm is to set quantity at Qm and price at Pm. This scheme not only allows the monopolistic firm to set price at a monopolistic level, but also, and more importantly, to secure monopolistic rents. Monopolistic rents refer to the different level of "profit" associated with pricing schemes that predominate in competitive versus monopolistic markets. [161]

The difficulty that confronts members of a cartel—in contrast with a single monopolistic firm—is one of coordination. Unlike the monopolistic firm, cartel members do not have individual control of the entire market output. Assuming no legal barriers to horizontal price fixing, the would-be cartelists are motivated to agree upon outputs that correspond to the level that a monopolistic firm would achieve, and then to use the reduction in outputs to command a monopolistic price, and thus to secure monopoly rents. The problem, however, involves setting and enforcing the necessary allocations.

While farmers might agree on the desire to secure monopoly rents, they are less likely to agree on how the necessary production cuts should be allocated to produce that result. The difficulties that firms confront in determining such allocations can be assessed based upon a game theoretical insight that involves core theory. Core theory demonstrates that for any potential coalition of manufacturers proposing a scheme of output reductions, an alternative, superior coalition exists that will benefit from an alternative scheme that

161. In Figure 1, *supra* p.131, the rent comprises the reduction in the competitive rents, boxes B and D, associated with a market in which demand is downward sloping for the industry as a whole, but is flat for individual firms. Even though no individual firm is large enough relative to the overall market to affect prices by reducing its outputs, substantial differences remain among individual firms. As a result of differences in soil conditions, climates, or other factors, some firms obtain, at the price controlled by the market, relatively higher competitive rents than others. The aggregation of these rents is depicted in areas B and C, which lie above the marginal cost curve. By moving from a competitive to a monopolistic price, the affected firms instead obtain the monopolistic profit, as depicted in areas A and B, which lie above the marginal cost curve but to the left of the level of output set at Qm. Because the firms gain rents equal to (A+B), but lose the competitive rents (B+D), the monopolistic rent (A-D), represents the improved payoff to the industry as a whole of moving from a competitive to a monopolistic price. For a more detailed discussion, see Stearns, *supra* note 146, and cite therein.

improves the position of a newly constituted group of manufacturers.[162]

Empty cores are endemic to policymaking because they arise whenever there is a gain, or superadditivity, that results from replacing atomistic decision making with coordinated behavior.[163] The empty core reflects the absence of a unique or even dominant equilibrium solution in allocating the superadditive gains.[164] One solution to the problem of bargaining in the absence of a core is government coercion, and this no doubt characterizes *Wickard*.[165]

Assume for now that the parties have agreed to an allocation formula, for example uniform percentage cuts based upon the prior year's production, or based upon an average over the prior five years' production. Even assuming such agreement, the parties confront an equally daunting task of monitoring and punishing defection. Once production quotas are set and the resulting price is raised from the competitive to the oligopolistic equilibrium levels,[166] the cartel

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162. *See generally* John S. Wiley, Jr., *Antitrust and Core Theory*, 54 U. CHI. L. REV. 556, 558 (1987) (describing empty core game).

163. Empty core bargaining games can also arise in reverse, namely in replacing centralized coordination with decentralized decision making. As shown in Figure 1, *supra* p.131, moving from competitive to noncompetitive pricing produces a societal welfare loss, representing the part of the consumer surplus that is not transferred to the producer. (The part of the consumer surplus transferred to the producer is a wealth transfer rather than a welfare loss.) While the cartel game involves the allocation of gains resulting from centrally coordinating outputs, the game focuses solely on the benefit to the producers, without accounting for the resulting societal welfare loss. Congress can also facilitate superadditive gains by encouraging a competitive or decentralized decision making regime. As shown in the discussion of environmental regulation, the possibility of such gains sometimes proves essential in encouraging states to effectuate various policies associated with waste storage. *See infra* Part II.C.

164. For my more detailed introduction to the problem of the empty core, see Maxwell L. Stearns, *The Misguided Renaissance of Social Choice*, 103 YALE L.J. 1219, 1233-47 (1994) (exploring various implications of empty core bargaining for institutional design).

165. Thus, while the Agricultural Adjustment Act of 1938 allowed one-third plus one producers to veto a proffered scheme of allocations, Wickard v. Filburn, 317 U.S. 111, 116 (1942), a lower percentage in opposition, perhaps reflecting the local growers whose home grown wheat, like that of Filburn, competed with wheat in commerce, was effectively coerced by the supermajority's agreed upon allocation scheme. Notice that the referendum of wheat growers held on May 31, 1941, was approved by eighty-one percent to nineteen percent. *Id.*

166. Oligopoly refers to a group of producers that collectively possess market power, and thus a downward sloping demand curve, as opposed to a monopolist, who has exclusive market power. The demand curve confronting an individual firm in an oligopoly takes a somewhat different form from that facing a monopolist as depicted in Figure 1, *supra* p.131. For the individual firm in an oligopoly, the demand curve appears "kinked." Demand is highly inelastic (meaning a change in price results in a dramatic reduction in quantity purchased) when the oligopolist raises price above the point of equilibrium for the oligopoly as a whole, and is highly elastic (meaning that a lowering of the price results in a dramatic increase in the quantity purchased) for prices below the set equilibrium point for the oligopoly as a whole. *See* William Drennan, *Changing Invention Economics by Encouraging Corporate Inventors to Sell Patents*, 58 MIAMI L.Q. 1045, 1112 (2004) ("[T]he producers in an oligopoly are faced with a downward

members suddenly have a strong incentive to cheat by producing above quota.[167] Assuming that a mechanism for punishment exists, or that detection of cheating threatens to unravel the cartel, rational cartelists will try to cheat, albeit in sufficiently modest amounts to escape detection. If a sufficient number cheat, however, the aggregate effect is to move the now cartelized price back in the direction of the competitive market price.[168]

In effect, the cartel members confront a classic prisoners' dilemma. Each member obtains a higher payout by cooperating, meaning that he or she accepts the assigned or agreed upon quota, thus producing a lower level of output sold at a higher price. Once the higher price is achieved as a result of the overall quota scheme, however, it is then rational for each cartel member to cheat in an effort to capture more of the gains associated with the above-competitive pricing strategy. The prisoners' dilemma characterizes this game because each producer has the same incentive to cheat without regard to what the remaining producers do. If all other members cooperate, thus abiding the assigned quota, then for any given firm, there is an incentive to cheat and to sell more at the higher price. Conversely, if the other firms cheat, it remains rational to cheat and thus to capture as much of the higher price as possible until the overall pricing scheme erodes. Because these payoffs are reciprocal, the dominant outcome is mutual defection.

Table 1 depicts the resulting game, using two firms, A and B.

Table 1: The Prisoners' Dilemma

Payoffs for (A,B)	A Cooperates	A Cheats
B Cooperates	(10, 10)	(12, 5)
B Cheats	(5, 12)	(7,7)

sloping demand curve, and can charge prices in excess of marginal cost, and generally each producer is reluctant to charge a price that is significantly different from the other producers in the market."). For a general discussion of oligopolistic pricing, see ROBERT L. HEILBRONER & LESTER C. THUROW, UNDERSTANDING MICROECONOMICS 180 (1975) (providing illustration of kinked demand curve).

167. *See* STEVEN D. LEVITT & STEPHEN J. DUBNER, FREAKONOMICS: A ROGUE ECONOMIST EXPLORES THE HIDDEN SIDE OF EVERYTHING 25 (2005) (describing cheating as "a primordial economic act").

168. Again, cheating would not necessarily eliminate all potential monopolistic rents. *See supra* note 157.

For expositional purposes, Table 1 considers a prisoners' dilemma game involving two firms that together have market power.[169] If firms A and B cooperate, each receives a payoff of 10, which results from optimally reduced production and resulting higher prices. If instead one party cheats, then as a result of the additional production, the price will erode somewhat for both parties, albeit not as much as if both parties cheated. The cheating party receives a benefit because she sells more than her allotted share at a non-competitive price, even if the price is slightly lower than that resulting from strict cartel enforcement in a regime of mutual cooperation. Conversely, because the price has eroded as a result of one party's cheating, the party who cooperated, and thus limited production to the assigned allocation at the now slightly reduced price, receives a reduced payoff relative to mutual cooperation. The resulting payoffs are 12 for the cheating party and 5 for the cooperating party. Finally, if both parties cheat, the price erodes entirely to the competitive levels. While each party produces as much as is cost effective, the resulting payoff of 7 is lower than the potential payoff of 10 associated with mutual cooperation.

As is generally true in prisoners' dilemmas, the relationships between and among the numbers are important, rather than the actual numbers. Given the payoff relationships in this game, regardless of what the other player does, it is rational for each player to cheat. This is true even though if the cartel were enforced, each player would receive a higher payoff than in the resulting regime of mutual defection.

Because it is rational for the cartel members to cheat, the question arises how to prevent mutual defection. An obvious, and powerful, solution is to seek governmental enforcement. Government enforcement offers three significant benefits. First, by having the government, rather than the parties, impose and enforce the quotas, the parties avoid any legal repercussions associated with privately agreed-upon horizontal price fixing.[170] Second, allowing the government to set quotas ameliorates some of the difficulties associated with agreeing on allocations by creating a coercive

169. While this game depicts two firms, the essential intuition can be generalized to any size cartel.

170. *See* ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 263 (1978) (discussing benefits of ban on horizontal price fixing in promoting consumer welfare); *see also* Timothy J. Muris, *Looking Forward: The Federal Trade Commission and the Future Development of U.S. Competition Policy*, 2003 COLUM. BUS. L. REV. 359, 392-93 (2003) (explaining FTC policy of pursuing enforcement actions against "naked horizontal agreements such as pure price fixing, naked output restraints or market divisions, and bans on advertising," and other means by which firms make peace with each other but to the detriment of consumers).

mechanism against those who would hold out for a superior allocation.[171] Third, and most importantly, government enforcement provides the necessary mechanism to monitor and punish cheating.[172]

These insights help to explain Justice Jackson's observation in *Wickard* that in each wheat net exporting nation, which by coincidence had a federalist form of government,[173] the wheat production scheme operated at the national level. While the prior analysis explained the need for governmental intervention, we now need to explain why in a nation characterized by federalism, such a scheme must be implemented nationally rather than among separate states.

Thankfully, the analysis is simple in that it tracks the presentation of the prisoners' dilemma confronting two firms. Imagine a federalist system with two states, A and B, which both produce wheat during a glut. Ideally, each state, A and B, would recognize the need for a quota, and both would impose output restrictions that result in the equivalent of monopolistic pricing. The difficulty, however, is that each state realizes that the ideal regime is one in which the other state strictly sets and enforces its quotas, thus raising the price to the monopolistic level, while allowing its own farmers to cheat by producing above quota to capture more sales at the now higher price. If instead the other state cheats, it still remains rational to cheat. While each state would receive a higher payoff in a regime of mutual cooperation, thus adhering to the agreed-upon quotas, because both states are motivated to cheat regardless of what the other state does, the dominant outcome is mutual defection. The payoffs in Table 1, this time with states rather than firms as the players, capture the basic game and explain why a decentralized solution to imposing a quota-and-monitoring regime will not suffice to create an optimal output-and-pricing scheme within a federalist system.[174]

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171. For an analysis applying this to the two-thirds rule in *Wickard*, see *supra* note 165. Cooperative advertising programs, an example of which the Supreme Court recently struck down as a First Amendment violation, raise similar concerns about coercing small firms to join schemes that benefit larger producers. *See* United States v. United Foods, Inc., 533 U.S. 405 (2001) (striking mushroom check-off program on grounds that it forced contributions for the purpose of advertising, rather than some other associational benefit).

172. Kenneth Davidson, *1982 Merger Guidelines: The Competitive Significance of Segmented Markets*, 71 CAL. L. REV. 445, 451 (1983) ("The temptation to cheat appears to have been too great to maintain price agreements purely through voluntary undertakings. To be sure, price fixing can be sustained if enforced or supported by government action, as is the case with many agricultural products.").

173. Hopefully most would agree that net wheat exporter status is an unlikely cause of federalism.

174. In theory, the same prisoners' dilemma among firms and states that requires a federal solution to cartelizing wheat outputs could recur among wheat exporter nations, thus

The analysis thus far highlights an important point about Commerce Clause regulation. In facilitating a scheme of output reductions and raised prices, Congress is providing a benefit to wheat producers that economists would classify as a form of rent. Public choice economists are critical of rent-seeking behavior. In part this is the result of the societal welfare loss that rent seeking produces (consider the lost consumer's surplus resulting from the move from competitive to noncompetitive pricing),[175] and in part it is because of the deadweight losses resulting from rent seeking activity itself.[176] And yet, the *Wickard* Court sustained the application of the penalty used to preserve the new pricing scheme as applied to Filburn. This implies that the Commerce Clause doctrine as articulated in *Wickard*, inquiring whether the regulated activity has a substantial economic effect on commerce, does not demand that Congress only exercise Commerce Clause power to produce efficient results. Even rent-seeking activity is condoned under the Commerce Clause provided there is a structural economic justification for implementing the selected scheme centrally, rather than on a state-by-state basis.

While the preceding structural analysis might make *Wickard* appear an easy case justifying congressional intervention,[177] one important step remains. Once we employ a central authority to set quotas, what is to prevent individual producers from cheating, or the states from failing to enforce the resulting agreement?

To ensure compliance with the established wheat cartel, it is also critical to signal that defection, or at least defection above a certain point, will not be tolerated. The issue is how to send the appropriate signal. One might imagine sending a signal to the largest producers who cheat, thus ensuring that other large-scale producers

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undermining the pricing scheme. This is less likely, however, because unlike states, which are forbidden to discriminate in commerce by the dormant Commerce Clause doctrine, the United States can effect an import quota or tariff to protect domestically raised prices and thus can prevent other nations from dissipating the gains to affected farmers. For a helpful discussion, see David R. Purnell, *A Critical Examination of the Targeted Export Assistance Program, Its Transformation into the Market Promotion Program and Its Future,* 18 N.C. J. INT'L L. & COM. REG. 551, 580 n.141 (1993) (describing statutory changes to Agricultural Adjustment Act of 1938 affecting power to impose quotas and tariffs).

175. More precisely, under a competitive pricing structure, the consumer surplus is (A+C), but because monopolistic pricing allocates A to the producers, the deadweight societal loss is represented in area C. For a more detailed discussion, see Stearns, *supra* note 146, at 97-102 (discussing various forms of rent).

176. For seminal works on rent seeking, see Anne O. Krueger, *The Political Economy of the Rent-Seeking Society*, 6 AM. ECON. REV. 291, 302 (1974); Gordon Tullock, *The Welfare Costs of Tariffs, Monopolies, and Theft*, 5 W. ECON. J. 224 (1967).

177. This argument is based solely upon the Commerce Clause doctrine. *See infra* note 186, and cites therein (arguing that challenges to the merits of these policies should rest on other constitutional bases).

cooperate. The problem is that signals work in more than one direction. Signaling enforcement against top producers also signals to those who are not top producers that cheating will be tolerated. The government can, of course, start at the top and gradually work its way down, thus determining the point at which it is no longer cost effective to monitor and punish cheaters. The difficulty, however, is that such an approach sends a clear signal to producers below a certain size that although their defection is not legal, as against them, the law will not be enforced.[178]

Now consider an alternative approach. What about sending a signal by enforcing the cartel against the smallest producer who falls within the quota policy approved by Congress and set by the Secretary of Agriculture with the requisite approval of two-thirds of the wheat producers? By enforcing the law against a recalcitrant small scale producer like Filburn, the Secretary of Agriculture sends a highly effective, low-cost signal that the cartel will be enforced as envisioned in the law that created it. Certainly if the government is willing to invest resources prosecuting Filburn, all other producers—from those slightly larger than Filburn to the largest wheat producers—will be on notice that their cheating will not be tolerated.

Let us once again consider the much-criticized passage from Justice Jackson's *Wickard* opinion: "That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial."[179] Commentators have read this passage to mean that Congress has the power to regulate any activity, regardless of its scope, because by multiplying that activity by a sufficiently large number, the effect is to produce the same activity on a national scale.[180] A more cautious reading, however, suggests that without authority to signal enforcement of the wheat production

178. When the signal is noisy and enforcement costs are high, as for example is frequently the case in fighting street crime, a triage approach makes considerable sense. When signaling is less noisy and enforcement costs are lower, in contrast, it makes sense to send a clear signal at a lower level.

179. Wickard v. Filburn, 317 U.S. 111, 127-28 (1942).

180. *See, e.g.*, Robert J. Pushaw, Jr., *Methods of Interpreting the Commerce Clause: A Comparative Analysis*, 55 ARK. L. REV. 1185, 1204 n.92 (2003). Pushaw wrote:

> In particular, the *Wickard* Court allowed Congress to regulate anything it pleased by (1) upholding legislation that concerned noncommercial activities (such as growing wheat for personal consumption rather than sale) merely because they had a "substantial effect" on interstate commerce, and (2) finding that this effect could be measured by aggregating activities that were trivial in themselves.

Id.

allocations at the level set by Congress, the Secretary of Agriculture would not have been able to prevent the mass of producers who were similarly situated to Filburn and whose activities were a major source of competition with wheat in commerce, from cheating from their production quotas.[181] Absent that ability to control collective outputs,

181. Recall that consumption of home grown wheat varied in an amount of over 20% of average production. *Wickard*, 317 U.S. at 127. For a thoughtful and largely complementary analysis, see Ann Althouse, *Enforcing Federalism After* United States v. Lopez, 38 ARIZ. L. REV. 793, 818 (1996). Although Professor Althouse does not rest her analysis on game theory, she recognizes a coordination difficulty preventing wheat producers themselves from controlling outputs to bolster prices. *See id.* The particular problem in *Wickard*, however, is not merely explaining the need for regulatory intervention, but also explaining (1) why intervention had to be implemented at the federal, rather than state or local, level, and (2) why, once implemented, it was appropriate to enforce the scheme against a small scale producer like Filburn. Althouse posits:

> Though local and small-scale, the individual behavior regulated really did contribute to an interstate phenomenon, which states could not address on an individual basis. Indeed, high levels of production by local businesses were unlikely even to be perceived as problems at the local level. The problem existed only in the aggregate, thus demonstrating the national character of the problem.

Id. Of course depressed wheat prices were perceived as a problem in all affected areas, and although small scale violators contributed to the glut, this explanation ultimately follows the logic of the multiplier analysis. In contrast, the game theoretical analysis presented in the text explains not only the need for regulatory intervention at the federal level, but also the benefits of a strong signal against a small scale producer like Filburn.

For an article and book chapter that offer an alternative economic defense of *Wickard*, see Jim Chen, *Filburn's Legacy*, 52 EMORY L.J. 1719 (2003); Jim Chen, *The Story of* Wickard v. Filburn: *Agriculture, Aggregation, and Congressional Power over Commerce*, *in* CONSTITUTIONAL LAW STORIES 69-118 (Michael Dorf ed., 2004). Of particular note is Professor Chen's thoughtful analysis, which transforms Ronald Coase's Theory of the Firm into a provocative theory of the farm. Chen observes:

> Justice Jackson admitted that wheat which "is never marketed . . . supplies a need of the man who grew it, which would otherwise be reflected by purchases in the open market." There is no better statement in *United States Reports* of Ronald Coase's Nobel Prize-winning observation that vertical integration and open-market purchases are flip sides of the same economic phenomenon.

Chen, *Filburn's Legacy*, *supra*, at 1763. Chen suggests that *Wickard* was a pyrrhic victory in which the government, by successfully regulating outputs on small farms, prevented the necessary creative deployment of resources (and resulting creative accounting to circumvent such regulations) that permitted small farms to thrive. *See id.* at 1763-66. As Professor Chen recognizes, the theory of the farm ultimately rests upon the *Wickard* multiplier analysis, and specifically a finding that the aggregate effect of wheat farming on individual scale affects commerce. *See id.* Thus, he notes that "each wheat farmer's seemingly discrete act, multiplied across a large population, profoundly affected prices and supplies in the larger market," *id.* at 1761, and that "[an] agriculturally literate understanding of *Filburn* makes it impossible to argue that any realm of profitable enterprise is strictly local, let alone private." *Id.* at 1756. While I agree with Professor Chen that "Congress unquestionably had the power to regulate this market," *id.* at 1761, in this Article I have supported that result with an alternative game theoretical account of *Wickard* that focuses on the specific structural concerns that motivate

the result would have been to allow a gradual erosion of the federal policy implementing production quotas to boost wheat prices.

While the decision is often ridiculed, *Wickard* is actually an easy Commerce Clause case. But it is not easy under any of the four normative theories of Commerce Clause doctrine expressed in the opinions in *Raich*. Once the wheat producers settled on the policy to boost prices by coordinating outputs, two essential steps remained. First, the quotas themselves had to be determined and imposed by a central coordinating authority. Second, that authority had to signal that above the point determined in the agreed upon scheme, which included exemptions based upon the small scale of production,[182] the quota scheme would be strictly enforced. Filburn, although operating on a small scale, operated above the cutoff point for the implementation of the selected federal policy.

Read in context, Justice Jackson's famous passage does not rest on the intuition that a small activity is subject to federal regulation because it can be multiplied to achieve a larger level of the same activity. Instead, Justice Jackson asserted that the selected production quotas will not achieve the goal of raising the price of wheat unless they are enforced, and they will not be enforced absent a proper signal. Justice O'Connor is correct that the *Wickard* Court relied upon detailed stipulations concerning the effect of home-grown wheat on the wheat market.[183] However, those stipulations did not merely demonstrate a link between something local and something national. Instead, they demonstrated that home-produced wheat proved among the most significant variable factors as a source of competition for wheat in commerce. Failing to signal enforcement against this group—local wheat producers whose production was above the identified cutoff point for required enforcement—threatened to move wheat pricing back in the direction of the previously depressed competitive levels.[184]

The cartel game is one of four games that justify central coordinated intervention under the Commerce Clause. We will now

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federal, as opposed to state level, regulatory intervention, and that uses this structural understanding to go beyond *Wickard*'s much criticized multiplier analysis.

182. *See Wickard*, 317 U.S. at 130.

183. *See* Gonzales v. Raich, 545 U.S. 1, 53 (2005) (O'Connor, J., dissenting).

184. While anxious readers undoubtedly appreciate the ease with which the *Raich* Court could have distinguished *Wickard*, such an analysis remains premature. The goal is to provide a comprehensive treatment of Commerce Clause doctrine, not simply an assessment of *Raich*. Moreover, the coordination game involving cartel enforcement is but one of four games that justify coordinated central regulation under the Commerce Clause. We must now consider the remaining games justifying coordinated intervention and also a paradigm case in which none of the games are implicated, and thus in which coordinated intervention is not justified.

consider the remaining three games, and a paradigm case that implicates none of the identified games.

B. Coordination on the Demand Side: Regulating Working Conditions

Consider a policy to regulate certain conditions of employment. Such regulations might include a prohibition against particular sources of labor, for example, disallowing children below a certain age from working at all or from working other than under specified protective conditions, or general limitations on working conditions for persons eligible to work, for example, minimum wages or maximum hours. While economists and legal scholars have criticized laws regulating working conditions on various normative grounds,[185] the purpose here is not to assess the normative merit of labor regulations.[186] Instead, it is to address a more limited question: Assuming agreement on the underlying policies expressed in these laws, is a central coordinating authority required to implement them? Based upon the preceding analysis, the answer is yes.

Assume a policy to prevent wages below a set minimum or to limit maximum working hours per day or per week. If those selecting the policy choose decentralized implementation, they would soon realize that individual states, trying to adopt the scheme, once again,

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185. These include (1) the libertarian principle that employers and workers should be allowed to contract on mutually agreeable terms, *see, e.g.*, RICHARD EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 135-40 (1992) (arguing against Supreme Court decisions sustaining minimum wage laws based upon libertarian premises); (2) the policy argument that such laws disadvantage their claimed beneficiaries who have fewer marketable skills and thus cannot secure work under the required contract terms, *see, e.g.*, George J. Stigler, *The Economics of Minimum Wage Legislation*, 36 AM. ECON. REV. 358 (1946); Finis Welch, *Minimum Wage Legislation in the United States*, 12 ECON. INQUIRY 285 (1974); and (3) the public choice observation that such laws were often motivated by the desire of present workers to limit competition, for example, from women, *see* Michael J. Phillips, *The Progressiveness of the* Lochner *Court*, 75 DENV. U. L. REV. 453, 497 (1998) ("[M]inimum wage laws for women may have reflected the interests of male-dominated unions interested in reducing competition for their members' services."). For a debate on the empirical question wbether minimum wage laws adversely affect unskilled workers, compare DAVID CARD & ALAN B. KRUEGER, MYTH AND MEASUREMENT: THE NEW ECONOMICS OF THE MINIMUM WAGE (1995) (questioning neo-classical analysis on empirical grounds), with Richard V. Burkhauser, Kenneth A. Couch & David C. Wittenburg, *"Who Gets What" from Minimum Wage Hikes: A Re-Estimation of Card and Krueger's Distributional Analysis*, *in* Myth and Measurement: The New Economics of Minimum Wage, 49 INDUS. & LAB. REL. REV. 547, 547-52 (1996) (criticizing Card and Krueger study on methodological grounds).

186. Whatever the merits of such arguments, and once again, the above competitive pricing is a form of rent, they should be directed at arguments based upon due process, rather than based upon the Commerce Clause. *See* Stearns, *supra* note 146, at 76 (arguing that the dormant Commerce Clause doctrine is not targeted against inefficient or rent-seeking laws, but at laws that undermine the concept of political union among states).

confront a prisoners' dilemma.[187] Absent such regulation, firms contract for labor on terms set by the market. Relative to a regime imposing restrictions on labor contracting, market-based wages allow firms to operate at lower cost. If not, firms would implement policies reflecting societal consensus concerning proper working conditions even absent regulatory intervention. Of course firms generally do not elect to impose labor restrictions on themselves that raise the cost of doing business as compared with competitors, and so the question then arises how best to facilitate the desired regulatory regime.

First consider implementation at the state level in light of the prisoners' dilemma in Table 1.[188] Assuming minimum wage laws will be implemented, all states would receive a relatively higher payoff if the policy were implemented and enforced in a uniform fashion. Whatever disadvantages minimum wage laws impose upon them, the burden is diminished when all firms bear the burdens in like fashion.[189] This regime is depicted in the upper left box with payoffs of (10, 10). From the perspective of any given state, however, the preferred regime is one in which other states police their firms' working conditions, while that state cheats by declining to police the working conditions of its firms. This regime of unilateral defection is depicted in the upper right and lower left boxes, with payoffs of (12, 5) or (5, 12). The firms in the defecting state are able to compete with lax regulatory enforcement against firms in states with strict regulatory enforcement that are thus disadvantaged by the resulting higher labor costs. And of course if other states also decline to adopt the preferred labor policies, it remains rational for any individual state to defect, producing the outcome of mutual defection, with the lowest mutual payoffs (7, 7). As in the prior game, given the reciprocal payoffs, the dominant outcome is mutual defection, even though each firm would be better off in a regime of mutual cooperation.

This final point requires some clarification. Some might argue that in this game the regime of mutual defection yields higher payoffs

187. We could, of course, replicate the problem by moving the analysis down one more level. *See supra* Part II.A (considering prisoners' dilemma among firms in reducing outputs to raise prices). If individual firms were called upon to implement the minimum wage or maximum hour policy, they too would find themselves in a prisoners' dilemma, and thus require some form of regulatory intervention. The question then, addressed in the text, is whether successful regulation requires intervention at the state or federal level.

188. *See supra* Table 1 at p.134.

189. This is somewhat oversimplified. Certainly firms with a large cohort of unskilled workers will be affected more than firms with mostly professional staffs whose salaries are already well above the minimum wage. But assuming all states have a proportionate share of both types of firms, the burdens resulting from uniform implementation will generally be equal among the states.

than mutual cooperation. Otherwise, there must be some market failure that has prevented firms, absent regulation, from implementing the preferred policy governing working conditions. Stated differently, if in fact the firms would prefer not to abide the minimum wage law, then mutual defection produces the optimal result.

The difficulty with this argument is that the payoffs are based on the assumption that the labor regulations will be implemented in some fashion, and thus the relative payoffs result from potential inconsistent enforcement. Defection can take any number of forms, including articulating laws in an ambiguous manner or announcing clear rules but declining to enforce them. If the choice is to have inconsistent application of laws governing working conditions or laws implemented uniformly against all firms, the payoffs in the latter regime (represented in the upper left box depicting mutual cooperation) are superior to those in the former regime (represented in the lower right box depicting mutual defection). Again, however, from the perspective of each individual firm, the ideal strategy is one in which there is predicted and uniform enforcement in other states against competitor firms, with non-enforcement or lax enforcement against themselves.

The need for central coordination here represents the obverse of the cartel game. While the cartel game works toward solving a coordination problem on the supply side, in *Wickard* the supply of wheat, this game resolves a coordination problem on the demand side, here the demand for laborers. As in the cartel game, mutual cooperation can only be achieved with central coordination. And in fact, within the United States, such policies are implemented at the federal level.[190]

With these two games in mind, let us now reconsider the original formulation of the substantial effects test: "[E]ven if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce."[191] Laws regulating production allocations and labor conditions both qualify. In the absence of centrally imposed regulation, individual states would decline to adopt a uniform system, and the effect would be that individual states would have an incentive to depart from the selected regulatory regime. The ultimate result of preventing congressional regulation would be to allow individual states to thwart the desired

190. *See infra* Part III.B.1.

191. Wickard v. Filburn, 317 U.S. 111, 125 (1942).

policy as a means of improving the competitive position of their firms with respect to those in other states.[192] If we assume that in the context of the Supreme Court's Commerce Clause doctrine, "economic" means having to do with the national economy, then the coordination problem that individual states confront in implementing these regulatory schemes explains why failing to allow Congress to regulate even local incidents of such activity would have a substantial economic effect on interstate commerce.

C. Coordination in Preservation: Environmental Regulation

The final prisoners' dilemma game involves environmental regulation.[193] This is an especially controversial area of Commerce Clause regulation because the various federal statutes, including most notably the Endangered Species Act,[194] have been used to prevent economic development based upon the goal of preserving the habitats of listed endangered species.[195] Commentators have lamented that to preserve endangered birds, rodents, or fish, people have been prevented from engaging in gainful economic activity.[196] Once again, the question here is not the merits of the environmental policy. Instead, it is whether coordinated congressional regulation is needed to effectuate the selected policy.

Imagine that a particular species of bird, say the spotted owl, is on the endangered species list. Also imagine that the owl is present in more than one state or that it migrates across state lines. Assume that society wishes to preserve the owl, along with other endangered

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192. Of course differences in competitive position are fine, but not when they result from the inconsistent application of a chosen regulatory policy.

193. For a discussion of the recent *Rapanos v. United States* decision, 126 S. Ct. 2208 (2006), which involves environmental regulation and which implicates both the multiple Nash equilibrium bargaining game and the prisoners' dilemma, see *infra* notes 223-38 and accompanying text.

194. Endangered Species Act, 16 U.S.C. §§ 1531-44 (2000).

195. *See* Laymont C. Hempel, *EPA in the Year 2000: Perspectives and Priorities*, 21 ENVTL. L. 1493, 1504 (1991) ("Policy makers, caught in the middle, can be expected to retreat from environmental commitments that appear to offer increased protection of nonhuman nature at the expense of human comfort or economic development. Efforts to weaken the Endangered Species Act, for example, may provide a crucial test of how far ecological goals can be separated from instrumental values.").

196. *See, e.g.*, Rufus C. Young, Jr., *How the Endangered Species Act Affects Land Use*, 16 A.L.I.–A.B.A. COURSE MATERIALS J. 65, 65-78 (1992) (assessing implications on land use of designated endangered species in Western states); Michael A. Yuffee, *Prior Appropriations Water Rights: Does* Lucas *Provide a Takings Action Against Federal Regulation Under the Endangered Species Act?*, 71 WASH. U. L.Q. 1217, 1218 (1993) ("Politicians are forced to make difficult value judgments when faced with the choice of supporting economic development or protecting a bird or fish from extinction.").

species, and seeks to implement the scheme in a decentralized fashion. What is the likely result?

Once again, refer to the prisoners' dilemma in Table 1.[197] Assuming that the regulatory scheme will be implemented, states receive the higher payoffs depicted in the upper left box (10, 10) if they cooperate, thus implementing the policy uniformly. This not only increases the probability of preserving the endangered species, but also imposes roughly equal burdens on in-state developers who are disadvantaged by the resulting restrictions. From the perspective of each individual state, however, the actions of other states might be necessary or sufficient to achieving the goal of species preservation. It is possible that the species is sufficiently scarce that unless preserved in all states, it will become extinct, but it is also possible that the species could survive if only the other states preserved its habitat. As a result, from the perspective of each individual state, the ideal strategy is unilateral defection (with payoffs, represented in the upper right and lower left boxes, of 12, 5 or 5, 12). In this case, unilateral defection means declining to adopt or to enforce strict policies concerning endangered species, while hoping that the other state adheres to such policies. And finally, because it is rational for each state to defect without regard to what the other state does, the dominant outcome is mutual defection, as seen in the lower right box (with payoffs of 7, 7).

Rancho Viejo, LLC v. Norton,[198] discussed at the John Roberts' confirmation hearing,[199] might appear more difficult. In that case, a developer was prevented from undertaking a project that threatened the arroyo toad, a species endemic to California that was listed under the Endangered Species Act.[200] Then-Judge Roberts had lamented that "[t]he panel's approach . . . leads to the result that regulating the taking of a hapless toad that, for reasons of its own, lives its entire life in California constitutes regulating 'Commerce . . . among the several states.' "[201] The preceding analysis, however, helps to explain the result. Assume that several states possess endemic endangered species. If the desired policy is to protect endangered species generally within the United States, then applying the preceding assumptions, each individual state is motivated to relax internal enforcement, while

197. *See supra* Table 1 at p.134.

198. 323 F.3d 1062 (D.C. Cir. 2003).

199. *See supra* notes 35-37 and accompanying text.

200. *See Rancho Viejo*, 323 F.3d at 1065 (explaining that the Secretary of the Interior listed the arroyo toad in 1994).

201. *Id.* at 1160 (Roberts, J., dissenting from order denying petition for rehearing en banc) (citing U.S. CONST. art. I, § 8, cl. 3).

hoping that the remaining states enforce the endangered species preserving law more zealously. Once again, mutual defection emerges as the dominant strategy in the absence of federal enforcement.

To be clear, it is certainly possible to imagine that the benefits of preserving the spotted owl or the arroyo toad are sufficiently small that the costs imposed upon potentially thwarted developers who threaten their habitats produce a net societal loss. There are two responses to this claim. First, whether or not this is true, and it is certainly difficult to place meaningful values on competing claims of environment preservation versus economic development,[202] the issue once again is not whether the particular policy for which Congress seeks to exercise its Commerce Clause power is welfare enhancing. Instead, assuming that the policy will be implemented, the question is which level of enforcement is required. The game theoretical model, once again, explains the need for federal enforcement.

In the context of the dormant Commerce Clause, one can argue that state policies that threaten to balkanize markets or to otherwise disrupt the flow of commerce[203] justify federal judicial intervention on the ground that such intervention is welfare enhancing.[204] In this context, however, we are not calling upon the federal judiciary to effectuate policies associated with the Commerce Clause against seemingly problematic state laws. Instead, recognizing that the Commerce Clause is first and foremost a delegation of authority to Congress, the question is what types of regulatory policies require centralized coordination for their implementation and enforcement. To engage in such an analysis, we begin by assuming the objectives of the selected policy, or perhaps more precisely, leaving challenges to the substantive merits of the policy to other, more appropriate, constitutional bases.[205] Only then can we evaluate whether the policy can be implemented in a decentralized fashion or whether, instead, it requires centralized implementation.

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202. For a general analysis of the problem of incommensurability, see Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779 (1994).

203. *See* Stearns, *supra* note 146, at 69-117 (identifying coordination games that justify application of dormant Commerce Clause doctrine to strike state laws that undermine political union among states).

204. For an exception in which a seeming disruption to commerce involving a state reciprocity law enhances welfare by raising the cost of another state's defection, see Sporhase v. Nebraska *ex rel.* Douglas, 458 U.S. 941 (1982). *See also* ROBERT AXELROD, THE EVOLUTION OF COOPERATION 27-54 (1984) (demonstrating that in repeated games, tit-for-tat strategy generally yields highest payoffs); Stearns, *supra* note 146, at 39-40 and 146-47.

205. *See supra* note 186, and cite therein (distinguishing due process claims targeting inefficient or rent-seeking laws from dormant Commerce Clause claims targeting state laws affecting commerce).

Some scholars might dispute the wisdom of each of the sets of policies described thus far—price fixing, labor regulations, and various environmental controls—or at least the selected level of enforcement with respect to these policies. But the question as to the wisdom of these policies, or the appropriate enforcement level, is separate from the question whether structural impediments reflected in the prisoners' dilemma prevent the affected firms or states from implementing the policies absent central coordinated intervention. The analysis in this Part demonstrates that with respect to these three sets of policies, the states are in a prisoners' dilemma justifying federal regulation because the underlying activity has a substantial economic effect on commerce respecting each policy's implementation.

D. Geographical Barriers to Interstate Coordination

The final coordination problem implicating Congress's Commerce Clause power involves a different analytical game. Successful business ventures often depend upon coordination among separate political or geographical entities, which operate at the same hierarchical level, but which answer to different constituencies.[206] Interstate railroads require cooperation among states to lay tracks and to transport cars and materials, and trucks engaged in interstate shipping require agreements on licensing and regulatory controls.[207] If each state were permitted to depart from generally accepted requirements governing emissions, permissible truck weight or length, structural safety features, or even the shape of mud flaps, the resulting regime would threaten to raise the costs of commerce sufficiently to turn states into balkanized trade zones.

Notably, such barriers can arise not only in the context of federal legislation, but also when a single state thwarts a regime adopted by other states.[208] This helps to explain some of the more anomalous dormant Commerce Clause cases associated with state

206. For a complementary analysis, see RICHARD A. EPSTEIN, BARGAINING WITH THE STATE 127-44 (1993) (explaining various state practices, especially taxation, that can disrupt flow of interstate business); Dan L. Burk, *Federalism in Cyberspace*, 28 CONN. L. REV. 1095, 1123-26 (1996) (extending Epstein's analysis to context of cyberspace).

207. *See generally* EPSTEIN, *supra* note 206, at 161-76 (discussing public roads and highways).

208. *See, e.g.*, Kassel v. Consol. Freightways Corp., 450 U.S. 662, 677-79 (1981) (striking state law preventing 65-foot twin trailers, which departed from laws of surrounding states); Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 529-30 (1959) (striking state law demanding curved mudflaps, when most states permitted and one state required straight mudflaps); S. Pac. Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761, 783-84 (1945) (striking state law imposing more severe constraint on train length than the laws of other states).

highway safety regulations that, although falling within the traditional sphere of state police powers, nonetheless thwart a benign coordinated scheme operating among surrounding states.[209] One unique feature of the dormant Commerce Clause doctrine is that unlike most other constitutional rules, Congress can overturn the Supreme Court's decisions with ordinary legislation.[210] The problem of interstate coordination provides a simple account of this doctrinal feature and helps to explain this final category of congressional Commerce Clause powers.[211]

In the context of the dormant Commerce Clause, states sometimes find themselves in a multiple Nash equilibrium bargaining game.[212] This game, as illustrated in Table 2, is notably different from the prisoners' dilemma. The paradigmatic illustration of multiple Nash equilibria involves driving. As indicated by the difference between the British and United States driving regimes, a functional driving infrastructure can operate when vehicles drive either on the left or on the right side of the road. Neither regime is superior to the other, but either is superior to the absence of a clear and agreed upon regime that dictates left or right driving.

Imagine two drivers who have acquired vehicles at the inception of automobiles, and thus before the imposition of any regulatory regime governing right or left driving. As shown in Table 2, the drivers receive a maximum payoff (10, 10) if they agree to a common driving regime, whether (left, left) or (right, right). In contrast, if the drivers are unwilling or unable to settle upon a coordinated driving regime and instead select opposite regimes (left,

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209. *See* Stearns, *supra* note 146, at 130-33 (explaining cases based upon multiple Nash equilibrium game).

210. *See id.* at 133-36 (explaining default nature of dormant Commerce Clause doctrine).

211. While one professor has recently argued that Congress should not have the power to overturn the Supreme Court's dormant Commerce Clause cases, see Norman R. Williams, *Why Congress May Not 'Overrule' the Dormant Commerce Clause*, 53 CAL. L. REV. 153 (2005), the argument in the text instead provides a compelling positive account for the default nature of dormant Commerce Clause doctrine. For a more detailed analysis, explaining the necessary default status of dormant Commerce Clause doctrine, see Stearns, *supra* note 146, at 133-36, and see also *infra* note 264 and accompanying text.

212. A Nash equilibrium is a solution to a game that results from each player's assessment, in the absence of any coordination with the other players, of the probable strategy that the other players will select. *See* Stearns, *supra* note 146, at 90 n.266 and accompanying text (discussing the potential outcomes of situations with multiple Nash equilibria); *see also* DOUGLAS G. BAIRD ET AL., GAME THEORY AND THE LAW 22 (1994). In the prisoners' dilemma, as shown in Table 1 at p.134, there is a single dominant equilibrium outcome, mutual defection, which results from each player's strategy without regard to the other player's selected strategy. In the game presented in Table 2 at p.149, in contrast, there is more than a single preferred outcome and, under specified conditions, there is also the possibility of a suboptimal, mixed strategy equilibrium outcome.

right or right, left), the result is a "mixed strategy equilibrium," which yields dramatically lower payoffs (0, 0).

Table 2: Multiple Nash Equilibrium Bargaining Game

Payoffs for (A, B)	A Drives Right	A Drives Left
B Drives Right	(10, 10)	(0, 0)
B Drives Left	(0, 0)	(10, 10)

Whereas the prisoners' dilemma game conduces to a unique equilibrium outcome of mutual defection, this Nash equilibrium game instead suggests two preferred equilibrium strategies represented in the upper left and lower right boxes. If Driver A drives right, then Driver B can increase her potential payoff from 0 to 10 by also driving right, and if Driver A drives left, then Driver B can increase her potential payoff from 0 to 10 by also driving left. The payoffs are reciprocal and so Driver A has the same incentive to align his strategy with the strategy selected by Driver B.

This is not to suggest that the preferred arrangement invariably obtains in a multiple Nash equilibrium bargaining game.[213] If, for example, either driver tried in good faith to anticipate the other's preferred driving regime but got it wrong, the result would be a mixed strategy equilibrium with mutually low payoffs and potentially deadly consequences.

In the context of interstate commerce, most states are also in a game in which they benefit from common driving regimes. As each state adopts a particular regime, say driving on the right, the marginal returns increase as other states follow the same course.[214] In addition, unlike two drivers simultaneously guessing at each other's preferences, the probability of absolutely simultaneous decision making among states is unlikely, and thus the prospect of mixed strategy equilibrium outcomes is diminished.[215] And yet, states sometimes enact regulatory policies that thwart commonly accepted regimes that facilitate the flow of commerce.

213. For a general discussion, see BAIRD ET AL., *supra* note 212, at 22 (finding that the actors "might adopt a strategy that is part of a different Nash equilibrium, and the combination of strategies might not be Nash").

214. For a more detailed discussion, see Stearns, *supra* note 146, at 112-15.

215. This follows from the assumption that the game is strictly one of coordinated strategies. If instead, states seek to disrupt the pro-commerce coordinated strategy, non-simultaneity will not ensure a preferred equilibrium outcome.

In the driving game, this could arise if one state chose left after the surrounding states had chosen right.[216] More typically, the problem arises when, for example, a group of states permits a certain rig formation to travel in commerce, but one state in the middle elects instead to ban it, or when a group of states employs a common mudflap and one state in the middle instead insists upon an alternative mudflap. In two such cases, *Kassel v. Consolidated Freightways Corp.*,[217] and *Bibb v. Illinois*,[218] the Supreme Court's decisions to strike state laws that were out of keeping with the dominant laws of the surrounding states suggest that the defecting states perceived a benefit from attempting to thwart what would otherwise have been a simple multiple Nash equilibrium game.[219] In each case, the Court struck down the challenged contrary state law, evincing a concern that the state enacting or maintaining it was not motivated by the law's superiority as a safety measure as compared with those of the surrounding states, but rather was attempting to secure the benefits of the surrounding states' pro-commerce coordinated activity, without incurring its fair share of the cost.[220]

When an individual state thwarts the dominant regime of the surrounding states, those burdened by the outlier regime will sometimes, as in *Kassel* and *Bibb*, challenge the minority rule based upon the dormant Commerce Clause doctrine. The federal courts have blunt tools to deal with such cases, allowing them to strike or sustain the challenged law.[221] In contrast, Congress has more subtle tools at its disposal. Congress can, for example, implement a new scheme on

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216. *See* Stearns, *supra* note 146, at 109-12 (presenting path dependent driving game).

217. 450 U.S. 662, 677-79 (1981).

218. 359 U.S. 520, 529-30 (1959).

219. *See* Stearns, *supra* note 146, at 130-33 (explaining cases based upon multiple Nash equilibrium game).

220. In *Kassel*, most notably, the exceptions to the ban on 65-foot twin trailers strongly suggested that Iowa benefited from the flow of commerce to Iowa, but elected not to be a thruway for commerce from point to point outside Iowa. 450 U.S. at 676. This intuition is strengthened by the Governor's statement in support of his vetoing a bill that would have relaxed restrictions on the intra-state shipment of mobile homes. *Id.* at 666 n.6. As Justice Powell, writing for the plurality explained:

> Governor Ray commented, in his veto message: "This bill . . . would make Iowa a bridge state as these oversized units are moved into Iowa after being manufactured in another state and sold in a third. None of this activity would be of particular economic benefit to Iowa."

Id. at 666 n.7 (quoting Governor Ray, Veto Message (Mar. 16, 1972)).

221. *See* Stearns, *supra* note 146, at 133-36 (explaining judicial limitations in dormant Commerce Clause cases).

its own or make the minority rule dominant should it find that rule superior.[222]

Congress not only has greater flexibility than does the Supreme Court in selecting remedies to solve problems of interstate coordination, but also it has broader flexibility in selecting among normative objectives associated with the implementation of its Commerce Clause authority. Thus, for example, the Supreme Court has allowed Congress, using its Commerce Clause powers, to further objectives associated with race, and specifically with access to places of public accommodation.[223] The difficulties in implementing such policies are similar to those associated with a state thwarting the benign outcome of a multiple Nash equilibrium game.

Imagine a group of states that permits places of public accommodation to segregate or to decline service altogether based upon race. Now imagine that society has decided to implement a regime change that would prevent this continued set of discriminatory practices, not only because such discrimination is morally repugnant, but also to ensure that racial minorities are not inhibited from engaging in interstate travel by the inconvenience associated with scarce or shoddy hotel and restaurant accommodations.[224] As in the prior coordination games, the question arises whether the states, operating in a decentralized manner, could implement the regime change, or whether instead, they require Congress, using its central regulatory enforcement power, to act on their behalf.

Assume that all or almost all of the relevant states agree to the liberalized public accommodations policy that promotes the ability of African Americans to travel freely throughout the United States, and that they have declared illegal any practice that denied access to places of public accommodation based upon race or ethnicity. The difficulty is that these state practices are not alone sufficient to ensure the desired result. Even a single recalcitrant state in the middle of a group of surrounding states could thwart the scheme by declining to adopt the liberalized rule, once again explaining the benefits of central coordination in implementing the desired public accommodations regime.

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222. *See id.*

223. *See, e.g.*, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 261-62 (1964) (sustaining public accommodations provisions of the Civil Rights Act of 1964 against Commerce Clause challenge as applied to a motel); Katzenbach v. McClung, 379 U.S. 294, 304-05 (1964) (sustaining same provisions against Commerce Clause challenge as applied to a restaurant).

224. For a discussion of congressional findings describing these difficulties, see *Heart of Atlanta Motel, Inc.*, 379 U.S. at 252-53.

The preceding analysis provides insight into the Supreme Court's recent consolidated decision, *Rapanos v. United States*,[225] a case that although implicating the Commerce Clause, was ultimately decided based upon a construction of the Clean Water Act ("CWA").[226] *Rapanos* involved the jurisdiction of the Army Corps of Engineers (the "Corps") to prevent the filling of wetlands as part of its authority with respect to "navigable waters," defined in the CWA to mean "waters of the United States." In the *Rapanos* action, the Corps had construed "navigable waters" and "waters of the United States," to allow jurisdiction to deny permits to fill wetlands when "[t]he nearest body of navigable water was 11 to 20 miles away," and the wetlands were connected to those waters by a combination of manmade drains, a creek and a river.[227] In the companion *Carabells* action, the Corps had construed the same terms to allow jurisdiction to deny permits to fill wetlands located about one mile from a lake where the wetlands were separated from the lake by a man-made berm, but occasionally overflowed into a ditch or drain, which fed into a creek and then into the lake.[228]

Justice Scalia, writing for a plurality of four, claimed that to avoid a potentially unconstitutional expansion of Commerce Clause powers, it was necessary to rely upon the clear statement rule.[229] Applying that rule, Scalia determined that the CWA only conferred jurisdiction over wetlands when two conditions were met: "First, that the adjacent channel contains a 'water of the United States,' (*i.e.*, a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous

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225. 126 S. Ct. 2208 (2006).

226. *See supra* note 21 (discussing application of doctrine of constitutional avoidance to *Rapanos*).

227. 126 S. Ct. at 2214-15 (plurality opinion). As Justice Scalia explained:

> The wetlands at the Salzburg site are connected to a man-made drain, which drains into the Hoppler Creek, which flows into the Kawkawlin River, which empties into Saginaw Bay and Lake Huron . . . . The Wetlands at the Hines Road site are connected to something called the "Rose Drain," which has a surface connection to the Tittabawassee River . . . . And the Wetlands at the Pine River site have a surface connection to the Pine River, which flows into Lake Huron.

Id. at 2219.

228. *Id.* at 2214-15, 2219.

229. The clear statement rule requires a "'clear and manifest' statement from Congress to authorize an unprecedented intrusion into traditional state authority." *Id.* at 2224. For an article claiming that the Supreme Court's recent Commerce Clause decisions, including *Gonzales v. Raich*, 545 U.S. 1 (2005), *Gonzales v. Oregon*, 126 S. Ct. 904 (2006), and *Rapanos*, 126 S. Ct. 2208, and its spending decision, *Arlington Central School District v. Murphy*, 126 S. Ct. 2455, 2463-64 (2006), have not succeeded in revitalizing the clear statement rule, see generally Somin, *supra* note 42.

surface connection with that water, making it difficult to determine where the 'water' ends an the 'wetland' begins."[230] Justice Kennedy, concurring in the judgment on narrower grounds,[231] instead offered a broader construction of the CWA. Kennedy would allow the Corps to exercise jurisdiction over wetlands when there is a "significant nexus between the wetlands in question and navigable waters in the traditional sense,"[232] an issue to be determined on a case-by-case basis. Writing the principal dissent, Justice Stevens rejected the constructions offered by both Justice Scalia and Justice Kennedy, claiming that neither afforded appropriate agency deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[233] and that governing precedents were sufficiently broad to sustain the jurisdiction in both cases.[234] While *Rapanos* raises issues of statutory construction and agency deference that extend beyond the scope of this Article, assuming that a fair construction of the CSA authorizes the exercise of jurisdiction over the relevant wetlands, this Article's analysis suggests a normative basis for sustaining that result against a Commerce Clause challenge.

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230. *Rapanos*, 126 S. Ct. at 2227 (plurality opinion).

231. *See id.* at 2236 (Roberts, C.J., concurring) (lamenting need to apply narrowest ground doctrine due to tbe lack of a majority opinion); *see also* Marks v. United States, 430 U.S. 188, 193-94 (1977) (setting out narrowest grounds doctrine); Maxwell L. Stearns, *The Case for Including* Marks v. United States *in the Canon of Constitutional Law*, 17 CONST. COMMENT. 321, 322 (2000) (explaining importance of narrowest grounds rule in reading and in appreciating the dynamics that give rise to fractured Supreme Court decisions).

232. *See Rapanos*, 126 S. Ct. at 2248 (Kennedy, J., concurring in the judgment). Kennedy added:

> [W]etlands possess the requisite nexus and thus come within the statutory phrase "navigable waters," if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical and biological integrity of other covered waters more readily understood as "navigable." When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term "navigable waters."

Id.

233. 467 U.S. 837, 842-44 (1984).

234. *Rapanos*, 126 S. Ct. at 2252 (Stevens, J., dissenting). The major precedents were *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), and *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers ("SWANCC")*, 531 U.S. 159 (2001). In *Riverside Bayview Homes, Inc.*, the Court construed the same provisions of the CSA to permit the Corps to prevent discharge of fill into wetlands adjacent to a navigable creek. 474 U.S. at 131, 139; *see also Rapanos*, 126 S. Ct. at 2255 (Stevens, J., dissenting). In *SWANCC*, the Court rejected the application of the Corps' Migratory Bird Rule as the basis for jurisdiction respecting abandoned sand and gravel pit mining operations that "evolved into a scattering of permanent and seasonal ponds," 531 U.S. at 163, which migratory birds used as habitats, because the ponds were "not part of a tributary system to interstate waters or to navigable waters of the United States, the degradation or destruction of which could affect interstate commerce." *Id.* at 168-69 (quoting 33 C.F.R. § 323.2(a)(5) (1978)).

As Justice Kennedy observed in his separate opinion, even without resorting to the *Wickard* multiplier analysis,[235] the states themselves identified a significant structural impediment to safeguarding wetlands that ultimately feed into navigable waters within their borders. Thirty-three states plus the District of Columbia submitted an amici brief on behalf of the government, maintaining that the Corps' broad reading of the term "navigable waters" in the CSA "protects downstream States from out-of-state pollution that they cannot themselves regulate."[236] If we accept the policy of preserving wetlands to provide, among other benefits, protection of waters of the United States against pollutants,[237] the preceding analysis demonstrates the need for imposed multi-state cooperation to enforce the scheme. Because navigable waters, like railroads and interstate highways, flow through multiple states, and because, as the two *Rapanos* actions well illustrate, wetlands preservation imposes considerable costs upon potential land developers,[238] rational states are prone to obstructing coordinated strategies to protect wetlands affecting waters of the United States.[239] While Justice Scalia suggested that state support for the Corps' actions in *Rapanos* was motivated by the desire to pass political responsibility onto the federal government for costly regulatory actions,[240] this Article's game theoretical analysis suggests a more generous account. The states supported the Corps' regulatory restrictions because if left to state level enforcement, the states themselves would have confronted a potentially insurmountable structural impediment to implementing the wetlands preservation regime.

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235. *See Rapanos*, 126 S. Ct. at 2246 (Kennedy, J., concurring in the judgment).

236. *Id.*

237. Among the benefits identified by the government's expert witness at the *Rapanos* trial were "habitat, sediment trapping, nutrient recycling, and flood peak diminution." *Id.* at 2253-54 (Stevens, J., dissenting) (quoting testimony of Dr. Daniel Willard).

238. For a discussion of the thwarted development projects at issue in the *Rapanos* cases, see *id.* at 2214 (plurality opinion); *id.* at 2253 (Stevens, J., dissenting) (discussing the Rapanos' defiance of orders safeguarding wetlands on their properties and resulting prosecutions).

239. Alternatively, one might view this as a multilateral prisoners' dilemma respecting wetlands preservation. Individual states seeking the benefits of a program of wetlands preservation will prefer to limit the obligations they impose on their in-state developers, while hoping that adjoining states enforce wetlands regulations more zealously. *See generally supra* Part II.C (describing prisoners' dilemma respecting environmental regulation).

240. *See Rapanos*, 126 S. Ct. at 2224 n.8 (plurality opinion) ("Legislative and executive officers of the States may be content to leave 'responsibilit[y]' with the Corps because it is attractive to shift to another entity controversial decisions disputed between politically powerful, rival interests." (alteration in original)).

E. Policies Not Requiring Central Coordinated Intervention

We have now applied two coordination games to four paradigmatic cases that require federal intervention to implement a desired policy affecting interstate commerce. Completing the model, however, requires a final step. We need to identify a paradigm case that implicates neither model and that fits none of the four paradigms requiring coordinated central intervention to facilitate the desired policy.

Let us reconsider *United States v. Lopez*.[241] In *Lopez*, the Supreme Court struck down the Gun-Free School Zones Act.[242] The statute prohibited persons from carrying or using weapons within a 1000 foot radius of a school.[243] Certainly the policy is normatively appealing. Few would argue against banning the carrying and use of guns near schools.[244] As before, however, the question is not the wisdom of the selected policy; rather, it is whether implementing the policy requires central coordination. And here the answer is no.

To understand why, imagine that State A elects to enact a similar law that prohibits the possession and use of guns within a specified radius of its schools. The question is whether the decision of neighboring State B not to enact the same law undermines the selected policy in state A. If instead, State B targets the offensive conduct without classifying gun-related crimes committed on school property as a separate offense, but rather by enhancing penalties for any crime with or without a gun committed on school premises, this would have no effect on the particular method of targeting the same conduct in State A. Indeed, if State B treated gun-related crimes on school grounds no differently than other gun-related crimes committed elsewhere, that would have no effect on the policy selected in State A.

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241. 514 U.S. 549 (1995).

242. *Id.* at 551.

243. *Id.* at n.1.

244. Few but not none. *See* John R. Lott, Jr., Editorial, *The Real Lesson of the School Shootings*, WALL ST. J., Mar. 27, 1998, at A14 (arguing that allowing law-abiding adults to carry guns in public schools potentially protects students from on-campus violence). More recently, Lott has been joined by at least one conservative online commentator who, in the aftermath of the recent and tragic school shooting in the Amish community, has posited a linkage between such zones and recent school shootings. *See, e.g.*, Alan Gottlieb & Dave Workman, *Gun-Free Schools Imperil Students*, PRESS REPUBLICAN, Oct. 8, 2006, http://www.pressrepublican.com/apps/pbcs.dll/article?AID=/20061008/OPINION/610070310; *See also* Amy Worden & Mario F. Cattabiani, *Shootings overshadow crime session*, Phila. Inquirer, Oct. 4, 2006, at A15 (quoting Pennsylvania Governor Edward Rendell as stating: "I believe with all my heart that we need more gun control, . . . [and that] "You can make all the changes you want, but you can never stop a random act of violence by someone intent on taking his own life.").

There is no prisoners' dilemma game that would result in States A and B defecting from a regime in which, through whatever means they happen to prefer, the states punish various crimes on school grounds. And the decision of State B to select a different means of targeting that conduct, or even to decline to target the conduct separately, in no sense blocks any geographically coordinated pro-commerce strategy among states. In short, *Lopez* implicates neither model justifying the use of central authority to ensure that the selected policy is not undermined by the decisions of states as a whole to defect or by the decisions of a single state to undermine the selected coordinated strategy.

We have now completed the analytical model with respect to the Supreme Court's major Commerce Clause cases, including the most recent precedent, *Gonzales v. Raich*. The discussion demonstrates the power of game theoretical analysis to reconcile the major post-New Deal expansion of Commerce Clause power with the retrenchments represented in *Lopez* and *Morrison*. I do not wish to suggest that there are no hard cases arising under the Commerce Clause.[245] But addressing even the most difficult Commerce Clause cases is easier if the Court's analysis is informed by a better set of analytical tools.[246]

III. A CLOSER LOOK AT THE COMMERCE CLAUSE CASES

In this Part, we will briefly consider several prominent Commerce Clause cases that help test the coordination theory of Congress's Commerce Clause power described in Part II. While the review is not comprehensive, together with the cases used to develop the model in Part II, the discussion provides the basis for assessing the game theoretical model of the Commerce Clause, including completing the analysis of *Gonzales v. Raich*.[247]

245. As demonstrated *infra* Parts III.B.3 and III.B.4.a, *United States v. Morrison*, 529 U.S. 598 (2000), and *Perez v. United States*, 402 U.S. 146 (1971), are potentially difficult cases under the analysis presented in this Article.

246. Readers familiar with Commerce Clause doctrine should have little difficulty fitting other cases into the model.

247. 545 U.S. 1 (2005).

A. A Comment on the Least Controversial Commerce Clause Categories: Channels of Interstate Commerce, and Instrumentalities, and Persons and Things Traveling in Interstate Commerce

While this Article has focused primarily on the substantial effects category of Congress's Commerce Clause power, which encompasses *Wickard*, *Lopez*, *Morrison*, and most recently *Raich*, the game theoretical model developed in Part II helps to assess the scope of Congress's Commerce Clause power more broadly. As a result, it is important to consider, in light of that model, the remaining, and less controversial, doctrinal categories.

To assess Congress's power to regulate the channels of interstate commerce, the instrumentalities of interstate commerce, and persons and things traveling in interstate commerce, it is helpful to relate those doctrinal categories to the dormant side of the Supreme Court's Commerce Clause jurisprudence. Although not without exception,[248] the dormant Commerce Clause cases generally involve state laws that infringe on commerce by closing access to interstate commerce directly,[249] for example by granting an exclusive license to use a channel of interstate commerce to the exclusion of potential interstate competitors,[250] or indirectly, by imposing restrictions on permissible instrumentalities of commerce that are out of keeping with the general requirements accepted in other states.[251]

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248. Consider, for example, *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 119-21 (1978), which sustained a state law that prohibited producers or refiners of gasoline from owning service stations in Maryland, and which did not involve a regulation of channels, instrumentalities, or persons or things in interstate commerce.

249. While *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), which involved Congress's power to grant a license over navigable waters that conflicted with an exclusive license granted by the State of New York, was decided on the Commerce Clause rather than the dormant Commerce Clause, *see id.* at 221-22, as demonstrated below, the case nonetheless provides the paradigm for dormant Commerce Clause analysis. It is important to recognize that not all state laws that regulate channels of interstate commerce violate the Commerce Clause operating in its dormant capacity. *See, e.g.*, Willson v. Black Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245, 250-52 (1829) (holding that a dam authorized under state law on a creek flowing into the Delaware River that was injured by a federally licensed sloop did not violate the Commerce Clause and thus the Commerce Clause did not provide a defense to the owner of the sloop).

250. *See* Gibbons, 22 U.S. (9 Wheat.) at 212-13.

251. *See, e.g.*, Kassel v. Consol. Freightways Corp., 450 U.S. 662, 677-79 (1981) (striking down Iowa ban on 65-foot twin trailers, when such trailers were permitted in surrounding states); Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 529-30 (1959) (striking down Illinois requirement of curved mudflaps when forty-five other states permitted straight mudflaps and one other state banned curved mudflaps); *see also* Brannon P. Denning, The Dormant Commerce Clause Doctrine and Constitutional Structure 20 (Feb. 19, 2001) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=260830 (observing that "most . . . [dormant Commerce Clause] cases involve conduct that, were it regulated by Congress, would be considered regulation of either the *channels* of interstate commerce (and things or persons

The doctrinal connection between the two sides of the Supreme Court's Commerce Clause jurisprudence, which affords Congress the power to regulate in areas where states have traditionally interfered with commerce, should not be surprising. Among the principal objectives animating the Commerce Clause, and indeed animating the replacement of the Articles of Confederation with the Constitution itself, was preventing state laws that undermine the concept of political union among states.[252] Whether the vehicle for implementing this objective is a judicial decision that invalidates a challenged state law alleged to infringe on commerce or a congressional statute that ensures a uniform policy with respect to that subject area, the effect is to ensure that the difficulties associated with decentralized decision making among individual states do not thwart the framers' desired objective of unifying the United States into a single entity with respect to commerce by instead allowing them to fracture into balkanized trade zones.[253]

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moving therein) or of *instrumentalities* of interstate commerce—the least controversial of *Lopez*'s taxonomy of congressional commerce clause power").

252. Some scholars have maintained that the Commerce Clause was designed to promote political union and thus to inhibit discriminatory state laws that might generate a retaliatory response. *See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 417 (2d ed. 1988) ("[T]he negative implications of the commerce clause derive principally from a *political* theory of union, not from an *economic* theory of free trade. The function of the clause is to ensure national solidarity, not economic efficiency."). Others have instead focused on the role of the Commerce Clause in promoting economic union characterized by specialization and exchange. *See, e.g.*, Brannon P. Denning & Glenn Harlan Reynolds, *Comfortably Penumbral*, 77 B.U. L. REV. 1089, 1109 (1997) ("[T]he Court has linked much of its dormant Commerce Clause jurisprudence to its assertion that one of the animating principles of the Constitution is economic union, which would be frustrated if states could enact discriminatory or protectionist legislation aimed at out-of-state commerce."). My own position is that because the Commerce Clause condones a variety of welfare-reducing, rent-seeking laws, while targeting laws that undermine coordinated pro-commerce strategies, the clause is best understood as promoting political, rather than economic, union. *See* Stearns, *supra* note 146, at 8-9 n.13.

253. While the framing generation could not have couched their arguments in game theoretical terms, some members were well aware of coordination difficulties associated with continuing to rest regulatory power over matters of trade and commerce with the States. For an informative illustration, consider James Madison's August 7, 1785 letter, in which he forcefully expresses such concerns to James Monroe. *See* Letter from James Madison to James Monroe (Aug. 7, 1785), *in* 8 THE PAPERS OF JAMES MADISON, MAR. 10, 1784-MAR. 28, 1786, at 333-36 (Robert A. Rutland et al. eds., 1973). Madison observed:

> If it be necessary to regulate trade at all, it surely is necessary to lodge the power, where trade can be regulated with effect, and experience has confirmed what reason foresaw, that it can never be so regulated by the States acting in their separate capacities. They can no more exercise this power separately, than they could separately carry on war, or separately form treaties of alliance or Commerce.

Id. at 333. He goes on to explain that "harmony" can only be achieved in a regime demanding "an acquiescence of all the States in the opinion of a reasonable majority." *Id.* at 334. He then describes the conceptual difficulty in allowing "seven or eight of the States [to] be hindered by

It should not be surprising, therefore, that the facts underlying *Gibbons v. Ogden*,[254] the landmark Supreme Court case concerning the scope of Congress's Commerce Clause power, implicate both the channels and instrumentalities of interstate commerce. New York had granted an exclusive license to Fulton and Livingston, who granted it to Ogden, to operate a steamboat ferry between New York City and Elizabethtown, New Jersey.[255] Gibbons operated a competing ferry pursuant to a federal law authorizing him to operate a vessel in the "coasting trade."[256] While Gibbons's ferry, an instrumentality of commerce, operated pursuant to a federal statute, the exclusive New York license under which Ogden operated effectively blocked a channel of interstate commerce.

In sustaining the federal law, and thus the scope of Congress's regulatory power under the Commerce Clause, the Supreme Court recognized, at least implicitly, the risks associated with decentralized regulation of the channels of interstate commerce.[257] If Congress were not permitted to regulate the channels of interstate commerce, and thus to remove geographical obstructions to the flow of interstate commerce, then open channels of commerce would depend entirely upon the fortuity of coordinated state laws, which as *Gibbons* itself illustrated, was not always forthcoming.

Cases involving the regulation of channels and instrumentalities of commerce are easily explained based upon the intuition that underlies the multiple Nash equilibrium game. Allowing states to enact laws that undermine geographical coordination among states would obviously prevent the flow of commerce among states. In such dormant Commerce Clause cases as *Kassel* and *Bibb*, individual state defection from a coordinated pro-commerce regime arises simply by the decision of a single state to enact or maintain a law contrary to

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the others from obtaining relief by federal means" respecting, for example, trade restrictions imposed by Great Britain. *Id.* at 334-35.

254. *Gibbons*, 22 U.S. (9 Wheat.) at 35-36 (statement of Appellant Gibbons).

255. *Id. at* 8-9.

256. *Id.* at 211-12 (majority opinion).

257. Justice Johnson, who concurred separately, made the connection more explicit:

> If there was any one object riding over every other in the adoption of the constitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints. And I cannot overcome the conviction, that if the [federal] licensing act was repealed tomorrow, [Gibbons's right] to a reversal . . . would be as strong as it is under this license. One half the doubts in life arise from the defects of language, and if this instrument [meaning Ogden's New York license] had been called an exemption instead of a license, it would have given a better idea of its character.

Id. at 231-32 (Johnson, J., concurring).

that in surrounding states, even if that law is not the product of a superior policy. While *Kassel* and *Bibb* arose on the dormant side of the Supreme Court's Commerce Clause jurisprudence, the clause itself is a delegation of regulatory power to Congress.

Congress's power with respect to the Commerce Clause surpasses that of the federal judiciary in several significant respects. Congress need not await a case presenting a challenge to a non-conforming law.[258] It can instead anticipate a potential conflict by electing to regulate channels or instrumentalities of commerce directly. And when the Supreme Court, for example, strikes a state law down under the dormant Commerce Clause doctrine, Congress can supersede that ruling through ordinary legislation that either facilitates a mixed strategy equilibrium, thus permitting states to embrace different regimes,[259] or by making the rejected minority position mandatory among states.[260]

The multiple Nash equilibrium bargaining model also explains why, unlike with constitutional rulings generally, Congress can override dormant Commerce Clause decisions through ordinary legislation.[261] Most state laws that result in coordinated pro-commerce strategies are not enacted simultaneously. States enact laws aware of how they will relate to those of surrounding states. The consequence of sequential decision making, however, is to render state laws dependent upon the order or path of state decision making.[262] The resulting path dependence implies that the laws selected in the earliest moving states have an advantage relative to contrary laws enacted later in other states.[263]

Because state laws affecting commerce are potentially prone to path dependence, there is a risk that the regime that emerges as dominant, even if once viewed as a pure matter of interstate coordination, produced a policy that over time proved inferior to an

258. For a discussion of how standing doctrine affects the timing of judicial versus legislative decision making, see Maxwell L. Stearns, *Standing Back from the Forest: Justiciability and Social Choice*, 83 CAL. L. REV. 1309, 1319 (1995).

259. For a discussion of an example in which Congress modified a Supreme Court dormant Commerce Clause ruling, thus facilitating potential mixed strategy equilibria, see Stearns, *supra* note 146, at 135 n.362.

260. *See id.* at 133-36 (discussing the power of Congress to adopt the rejected minority position).

261. *See id.*

262. *See id.* at 112-15 (explaining that as more states enact similar pro-commerce strategies, marginal returns are increasing due to path dependence).

263. *See id.*

available alternative regime.[264] If the Supreme Court's dormant Commerce Clause rulings were like ordinary constitutional rulings, requiring a constitutional amendment or overruling to replace, then the result would be to entrench regulatory regimes that are the product of fortuitous timing among individual states rather than an assessment of their merit as compared with other potential regimes.

We have now demonstrated how the coordination analysis in Part II explains the easiest categories of Commerce Clause cases. We now turn to the final and most controversial category in which Congress regulates local activity that exhibits a substantial effect on interstate commerce.

B. Substantial Effects Cases

This final category has been most recently transformed as part of the Supreme Court's new Commerce Clause doctrine and is critical to assessing the major cases under review, *Wickard*, *Lopez*, and *Raich*. Most recently, the *Raich* Court relied upon the revised doctrine to sustain the application of the CSA to respondents' activities in producing, acquiring, and using medical marijuana. Because the *Raich* Court determined that *Wickard*, a case implicating the cartel game, was strikingly similar, and ultimately controlling, we will leave that paradigm until the end. We will now employ the game theoretical analysis of the Commerce Clause developed in the prior part to consider several major cases and doctrinal categories that justify coordinated federal intervention.

1. Wage and Hour Regulations

The landmark New Deal legislation did not regulate channels or instrumentalities of commerce, but rather regulated conditions of employment directly or things traveling in commerce as an indirect means of regulating conditions of employment. As a result, to sustain such regulation, the Supreme Court needed a new paradigm for evaluating the permissible scope of Congress's Commerce Clause powers. Such regulations took various forms. The National Labor Relations Act "(NLRA"),[265] sustained in *NLRB v. Jones & Laughlin Steel Corp.*,[266] created a comprehensive regime governing labor-management relations, including the right of employees to organize

264. For a more detailed discussion, see *id.* at 134-36 (linking the power of Congress to overturn dormant Commerce Clause rulings to path dependence).

265. 29 U.S.C. §§ 151-69 (1935).

266. 301 U.S. 1, 46-49 (1937).

and bargain collectively. The Fair Labor Standards Act,[267] sustained in *United States v. Darby*,[268] prohibited the interstate shipment of goods that were manufactured by employees who earned below the specified minimum wage or who worked beyond the specified maximum number of hours.[269]

As before, the issue considered here is not the normative merit of collective bargaining agreements or of minimum wage or maximum hour laws. Instead, the question is whether the Supreme Court decisions sustaining these labor laws are consistent with the insight that the scope of Congress's Commerce Clause power is linked to the need for a central coordinating authority to implement selected regulatory schemes. In these two cases, the answer is yes.

Darby follows simply from the model presented in Part II.B. Firms and states confront a prisoners' dilemma in seeking to implement minimum wage or maximum hours schemes, thus requiring a centrally imposed federal solution. The more difficult case is *Jones & Laughlin Steel Corp.* Collective bargaining allows employees to cartelize their wages, thus setting a rate that exceeds what they would obtain under ordinary market conditions.[270] While the results of individual collective bargaining contracts will not be uniform among firms subject to the NLRA, states remain in a prisoners' dilemma in seeking to implement a policy that facilitates collective bargaining. From the perspective of individual firms, operating in a collective bargaining environment imposes higher labor costs relative to firms not subject to such requirements. It is therefore rational for each firm or state to prefer imposing the burden of collective bargaining on other firms or states while declining to impose the obligation on themselves. It is not surprising therefore that the regime facilitating collective bargaining arises at the federal, rather than state, level.[271]

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267. 29 U.S.C. §§ 201-19 (1938).

268. 312 U.S. 100, 125-26 (1941). *Darby* overruled *Hammer v. Dagenhart*, 247 U.S. 251, 280-81 (1918), which held that a federal statute setting working conditions for children was beyond the permissible scope of Congress's Commerce Clause power on the ground that manufacturing precedes commerce. As previously explained, rather than establishing that production is commerce, these cases rejected the very temporal formalism embraced in this earlier era.

269. *See Darby*, 312 U.S. at 121. As stated in the text, the statute regulated things traveling in interstate commerce as a backdoor mechanism for regulating working conditions. *See id.* at 121-26. The argument in the text provides a more direct foundation for Congress's power to address the underlying regulatory objective under the Commerce Clause. *See id.*

270. *See* Thomas J. Campbell, *Labor Law and Economics*, 38 STAN. L. REV. 991, 1005-06 (1986) (describing unions as monopolists); Richard Posner, *Some Economics of Labor Law*, 51 U. CHI. L. REV. 988, 990 (1984) (describing unions as labor cartels).

271. In addition, each state has both management and labor interests and the political results of their lobbying efforts might not produce consistent outcomes in protecting the rights of

2. Environmental Coordination

The model in Part II explained the need for central coordination in environmental conservation policies. In this Part, we focus on a discrete aspect of environmental coordination, namely waste disposal. This area of law is important not only because it is ubiquitous,[272] but also because it shows that superadditive gains can arise with moves either in the direction of central or decentralized decision making. Unfortunately, the Supreme Court has not facilitated an optimal set of doctrines to encourage the creation of much needed waste disposal facilities because it has treated waste in much the same manner as other categories of commerce without considering which regime produces the largest superadditive gains. To understand the coordination problem that arises in the context of waste disposal, it is helpful to contrast two cases, one arising on each side of the Supreme Court's Commerce Clause jurisprudence.

In *City of Philadelphia v. New Jersey*,[273] the Supreme Court struck down a New Jersey statute that banned the import of solid or liquid waste originating from out of state.[274] After determining that, its negative value notwithstanding, waste was an article in commerce,[275] the Court determined that states could not discriminate against waste originating from other states in an effort to prolong the life of their landfills.[276] The Court determined that states could further their environmental interests, or even their residents' financial interests implicated by the threat of closing their waste disposal facilities,[277] but only through commerce-neutral means.[278]

As then-Associate Justice Rehnquist observed in a dissenting opinion, the difficulty with the *City of Philadelphia* ruling is that it imposes a Hobson's choice upon states, which must either regulate waste commerce neutrally or not at all.[279] One might respond that imposing such a choice is the very point of the dormant Commerce Clause doctrine. But consider whether in this context an insistently

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labor to bargain collectively. This further underscores the need for a federal regulatory solution to impose the policy in a uniform manner.

272. *See* SSC Corp. v. Town of Smithtown, 66 F.3d 502, 505 (2d Cir. 1995) (lamenting that the federal judicial docket is "clogged with . . . garbage").

273. 437 U.S. 617 (1978).

274 *Id.* at 618, 629.

275. *Id.* at 622.

276. *Id.* at 625-27.

277. *Id.* at 626.

278. *See id.* ("New Jersey may pursue . . . [its] ends by slowing the flow of *all* waste into the State's remaining landfills, even though interstate commerce may incidentally be affected.").

279. *See id.* at 631 (Rehnquist, J., dissenting).

commerce-neutral regime is necessarily welfare-enhancing. By preventing states from capturing the benefit of their own waste disposal, states lose the incentive to grant the necessary permits to facilitate the creation of waste disposal facilities.[280] In a perfect world, Philadelphia, because it is across the river from New Jersey, would be permitted to dispose of its waste at an appropriate site in southern New Jersey if doing so was less costly than disposing of its waste at a more distant site in Pennsylvania. But for this first-best solution to work, New Jersey must be motivated to facilitate the creation of the needed waste outlet. If the choice is a shortage of facilities, but treating waste from Philadelphia the same as waste from Camden, versus encouraging the creation of facilities, but forcing waste from Philadelphia to travel a greater distance within Pennsylvania, the latter option might well be superior. While this, of course, is a second-best theory, comparative institutional analysis depends upon avoiding the critical error of making the perfect the enemy of the good.[281]

Another option, of course, would be to have Congress direct states to create needed waste disposal facilities. This implicates the scope of Congress's Commerce Clause powers and, once again, the Supreme Court has failed adequately to consider the relative merit of two admittedly imperfect alternative regimes. In the context of low-level radioactive waste, the Supreme Court has relied upon the anti-commandeering doctrine to prevent Congress from insisting that states create the needed disposal facilities. In *New York v. United States*,[282] the Supreme Court struck down the take-title provisions of the Low-Level Waste Policy Amendments of 1985.[283] The complicated statutory scheme contained a series of incentives designed to motivate states to develop a coordinated solution to the looming crisis concerning disposal of low-level radioactive waste.[284] While the United States once had three disposal facilities, at the time that the amendments were enacted, there was only a single facility, and the Governor of South Carolina, where the site was located, had threatened to reduce intake by fifty percent.[285]

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280. *See* Stearns, *supra* note 146, at 88.

281. For a general discussion of the nirvana fallacy in economics, see Stearns, *supra* note 164, at 1230 n.33, and cites therein.

282. 505 U.S. 144 (1992).

283 *Id.* at 187-88.

284. For a more detailed discussion of *New York v. United States*, see MAXWELL L. STEARNS, CONSTITUTIONAL PROCESS: A SOCIAL CHOICE ANALYSIS OF SUPREME COURT DECISION MAKING 58-63 (paperback ed. 2002).

285. *See New York*, 505 U.S. at 150.

The federal scheme, which required that each state become self sufficient in low-level waste management by either creating its own disposal facility or by joining a regional pact with other states, contained three sets of incentives.[286] Only the third, the take-title provision, created a Commerce Clause problem.[287]

The take-title provision demanded non-complying states to either take title to their producers' waste or reimburse producers for their failure to do so.[288] The Court struck this down on the ground that Congress lacks the power to commandeer state legislatures by forcing the legislatures to pass laws that implement Congress's chosen regulatory policy, as opposed to Congress directly regulating private entities.[289] The purpose here is not to evaluate the merits of the Court's historical argument that the Constitution prevents Congress from commandeering state legislatures.[290] Rather, it is to demonstrate that the Court has thwarted two possible second-best regimes, either of which would suffice to facilitate the development of a pro-commerce strategy respecting waste disposal. First, the Court could allow states to balkanize, thus encouraging states to become self sufficient by letting them capture the benefit of their approved facilities. Or second, if the Court insists as part of its dormant Commerce Clause analysis upon commerce-neutral state waste regulation, it can afford Congress the flexibility denied under the anti-commandeering doctrine to coerce states as needed to force the creation of waste disposal facilities when allowing discrimination in commerce is not alone sufficient.[291]

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286. *Id.* at 151-53.

287. The first incentive allowed states that had developed such facilities, or that joined pacts with other states containing such facilities, to discriminate in the intake of waste against those that did not by imposing surcharges and sending the proceeds to the Secretary of the Treasury, who would then send rebates to complying states. *Id.* at 152-53. The Court upbeld this combined incentive on the grounds that Congress can authorize the states to burden commerce, the federal government can tax commerce, and Congress can use its spending power to reward complying states. *Id.* at 171-72. The second incentive allowed complying states to limit access to their disposal facilities by noncomplying, nonmember states. *Id.* at 153. The Court sustained this incentive on the ground that Congress had authorized states and regional compacts to discriminate in commerce. *Id.* at 173.

288. *Id.* at 153-54.

289. *See id.* at 175-77.

290. For an argument that Justice O'Connor's historical account goes to the propriety, rather than to the constitutionality of commandeering, see Erik M. Jensen & Jonathan L. Entin, *Commandeering, the Tenth Amendment, and the Federal Requisition Power:* New York v. United States *Revisited*, 15 CONST. COMMENT. 355 (1998).

291. Tbe *New York* case demonstrated the insufficiency because New York, the only remaining state not to create an in-state outlet or to join a regional pact, was not motivated to become self-sufficient even in a regime allowing self-sufficient states or states in a regional pact to discriminate against waste in commerce. *See* 505 U.S. at 154-55 (describing New York's decision to comply with the Low-Level Waste Policy Act by enacting legislation that provided for the creation of a site).

The point of this discussion is to emphasize that coordination difficulties implicate both sides of the Commerce Clause doctrine. This Article has focused on games affecting the affirmative side of Commerce Clause doctrine. If the Roberts Court is going to reevaluate longstanding premises affecting its interpretation of the Commerce Clause, however, it is also important to consider the judicially crafted anti-commandeering doctrine, which might fail properly to account for the structural relationship between the affirmative and dormant sides of the Supreme Court's overall Commerce Clause jurisprudence.

3. Geographic coordination

The most recent major case testing Congress's power under the Commerce Clause to further the goal of geographic coordination is *United States v. Morrison*,[292] the second case after *Lopez* to strike a federal statute under the non-economic activities test. Because this case bears some similarities to two prominent civil rights cases, *Heart of Atlanta Motel, Inc. v. United States*,[293] and *Katzenbach v. McClung*,[294] it is important to compare these cases.

In *Heart of Atlanta Motel*, the Supreme Court upheld the application of the public accommodations provisions of the Civil Rights Act of 1964[295] to a motel located in Atlanta, Georgia that was readily accessible to two interstate and two state highways that advertised on billboards along those highways, and that did seventy-five percent of its business with out-of-state guests.[296] In the companion case, *Katzenbach v. McClung*, the Court denied a request to enjoin the application of the same statute to Ollie's Barbeque, a family owned restaurant located in Birmingham, Alabama,[297] that received in one year about $150,000 in food from a vendor who purchased a substantial portion in interstate commerce, and that was located eleven blocks from an interstate highway.[298]

To avoid the state action requirement under the Fourteenth Amendment, the Supreme Court rested its rulings sustaining both laws on the Commerce Clause.[299] Thus, the issue in these cases was

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292. 529 U.S. 598, 617-19 (2000).

293. 379 U.S. 241 (1964).

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

295. The public accommodations provisions were set out in Title II, 42 U.S.C. § 2000a to § 2000a-6 (2000).

296. *Heart of Atlanta Hotel, Inc.*, 379 U.S. at 243.

297. *Id.* at 296.

298. *See id.*

299. Section 1 of the Fourteenth Amendment prevents states from denying due process or equal protection and § 5 provides Congress with the power to enforce the substantive provisions

whether Congress could rely upon its Commerce Clause power to prohibit private persons who owned or operated places of public accommodation from engaging in various forms of racial discrimination. In both cases, Justice Clark, writing for a majority, noted the serious difficulties that African Americans traveling in the South had confronted as a result of discriminatory practices.[300] And yet, in both cases, Justice Clark justified Congress's exercise of Commerce Clause power on the proximity to channels of interstate commerce or on the likely linkage to persons or goods traveling in commerce. Thus, in *Heart of Atlanta Motel*, Clark focused on the proximity of the motel to interstate highways,[301] and in *Katzenbach*, Clark focused on the wholesale vendor's purchase of interstate supplies.[302]

The coordination game presented in Part II provides a more intuitive linkage from the regulated activity and the objectives of interstate commerce than the fortuity that the particular place of public accommodation was located near a highway or purchased supplies beyond some minimal threshold level that traveled in interstate commerce. To implement Congress's desired federal scheme effectuating the ability of persons to travel in commerce without regard to race, it was essential to do so centrally. In *Heart of Atlanta Motel*, Justice Clark noted that thirty-two states had public accommodations laws similar to that at issue in the case.[303] While the states that failed to afford such protections were generally geographically contained, Congress could intuit that the ability to liberalize this policy and thus to ensure free travel by African Americans throughout the United States depended on the willingness of individual states to regulate resistant places of public accommodation. The inability to rely upon states to ensure this result (eighteen states did not go along), certainly justifies the need for central coordinated intervention.

Once we recognize the policy of ensuring free travel, including access to places of public accommodation without regard to race, we

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in § 1. U.S. CONST. amend. XIV, §§ 1, 5. The public accommodations provisions of the Civil Rights Act of 1964, in contrast, regulated private firms, thus making reliance upon Congress's § 5 enforcement power prohlematic. *Accord* William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033, 1116 n.317 (1983).

300. *See Heart of Atlanta Motel, Inc.*, 379 U.S. at 252-53 (describing congressional findings concerning difficulties African Americans have confronted due to discrimination during interstate travel); *Katzenbach*, 379 U.S. at 299-300 (same).

301. *See Heart of Atlanta Motel, Inc.*, 379 U.S. at 255-58.

302. *See Katzenbach*, 379 U.S. at 297-304.

303. 379 U.S. at 260.

can see that even a single recalcitrant state, or a group of such states, could inhibit the implementation of that policy by other states. The analytical problem justifying central coordination is in effect the same as when a single state blocks commerce in a multiple Nash equilibrium game by enacting a law that thwarts the dominant regime in surrounding states.

In *United States v. Morrison*,[304] the most recent case striking down an exercise of Congress's Commerce Clause power, the Supreme Court invalidated the civil remedies provision for violent gender-related crimes in the Violence Against Women Act ("VAWA")[305] as a Commerce Clause violation.[306] The *Morrison* Court applied the *Lopez* non-economic activities test to hold that violence against women was not an economic activity, and thus did not qualify under the substantial effects test for congressional Commerce Clause powers.[307]

As in *Heart of Atlanta Hotel* and *Katzenbach*, *Morrison* did not involve the regulation of persons traveling in interstate commerce directly. Certainly no state banned women, or women from other states, from traveling within their borders. The question instead was whether Congress could effect a supplemental federal civil remedy for what was already a state law crime in virtually every jurisdiction when that criminal activity was gender motivated. Chief Justice Rehnquist rejected a line of reasoning, based upon congressional findings that linked the burdens of gender-motivated violence to a

304. 529 U.S. 598, 617-19 (2000).

305. 42 U.S.C. § 13981 (1994).

306. In *Morrison*, Petitioner Christy Brzonkala, a student at Virginia Polytechnic Institute ("VPI") claimed to have been raped by two VPI students, Antonio Morrison and James Crawford. 529 U.S. at 602. After an investigation, the school determined that the evidence against Crawford was insufficient, but found Morrison guilty of sexual assault and suspended him for two semesters. *Id.* at 603. Morrison challenged this result under VPI's Sexual Assault Policy, but the second hearing produced the same result. *Id.* Brzonkala then sued VPI, Morrison, and Crawford in federal court under VAWA, claiming that the school's handling of her complaint violated Title IX of the Education Amendments of 1972, and that Morrison's attack provided a basis for relief under § 13981. *Id.* at 604. The district court dismissed the suit against VPI, finding it failed to state a claim upon which relief could be granted, and found that while the suit against Morrison and Crawford stated a claim, VAWA exceeded Congress's Commerce Clause powers. *Id.* After a divided panel of tbe United States Court of Appeals for the Fourth Circuit reversed and reinstated both claims, *id.*, the Fourth Circuit, acting as an en banc court, affirmed the district court's determination that Brzonkala had stated a claim under § 13981, but also affirmed the district court determination that the statute exceeded Congress's Commerce Clause powers. *Id.* at 604-05.

307. *See id.* at 617-18. The Court did not disturb the part of VAWA creating a federal criminal remedy against gender-motivated crime, which fell within the first of the tbree *Lopez* categories because it regulated the use of channels of interstate commerce while seeking to engage in specified criminal activity. *See id.* at 613 n.5 (explaining that the Courts of Appeals have uniformly upheld the criminal counterpart to the civil remedy struck down in *Morrison*, set out in 42 U.S.C. § 40221(a)).

diminution in travel, to a reduction in business, and to an effect on interstate commercial activity.[308] Rehnquist determined that taking this but-for causal reasoning to its logical extreme would allow Congress to regulate in such traditional state areas as family law, marriage, divorce, and childrearing.[309]

At one level, *Morrison* appears to implicate the structural issues associated with geographical coordination raised in *Heart of Atlanta Hotel* and *Katzenbach*. If states had not uniformly criminalized and enforced laws against gender motivated crime, the result could be balkanized travel in which women based their decisions on the criminal statutes of individual states. Even if all states agreed to the policy of ensuring free travel without regard to gender, in theory, effectuating the policy might require uniform implementation because of the threat that one state could reverse course. But in this case, it appears that the Supreme Court found this insufficiently plausible to justify the challenged provisions in VAWA. The Court apparently intuited instead that the historical context of state laws that resulted in impediments to interstate travel by African Americans did not have a strong analogue with respect to gender. This is an admittedly hard case because the game theoretical intuitions affecting African Americans and women are similar, even if the Court intuited that the historical records concerning the specific question of burdens on interstate travel justified different results.

4. Noncoordination cases

Before proceeding to *Raich*, we will consider one final, and also difficult, case. In *Perez v. United States*,[310] the Supreme Court sustained the exercise of Commerce Clause power,[311] but in a context in which the coordination analysis makes this determination at least potentially problematic. After *Perez*, we will revisit *Raich*, in light of the preceding analysis, which demonstrates why preventing the state-approved use of medical marijuana was not justified to effectuate a coordinated federal regulatory scheme.

a. Perez

In *Perez*, the Supreme Court sustained the application of Title II of the Consumer Credit Protection Act, which prohibited, among

308. *See id.* at 615.

309. *See id.* at 615-16.

310. 402 U.S. 146 (1971).

311 *Id.* at 146-47.

other activities, "extortionate credit transactions,"[312] against a man convicted of loan sharking in connection with organized crime.[313] The *Perez* Court sustained the Act as applied to petitioner on the ground that even if the particular incident of activity was local, the larger class of organized crime affected interstate commerce.[314]

The apparent difficulty, as Justice Stewart noted in dissent, is that the nature of organized crime is no different from crimes that are the subject of state criminal laws in general.[315] As a result, Stewart claimed, sustaining the law as applied to petitioner's activities threatened to confer the equivalent of state police powers upon Congress.[316] In one sense, this critique of *Perez* finds support in the recent holdings in *Lopez* and *Morrison*, both of which curtailed Congress's Commerce Clause power in areas that overlapped with state criminal laws. These recent precedents, therefore, might be read to cut back at the edges of *Perez*.

There is, however, a plausible theory under which the statute at issue in *Perez* is justified under a coordination analysis in a manner that these more recent cases are not. Extortionate credit practices in many parts of the United States are connected with organized criminal activity that crosses state lines. Organized crime in New York extends to, or is at least connected with, organized crime in Connecticut and New Jersey. The coordination problem involves state and local prosecutors who might resist information sharing and other forms of cooperation that could result in successful convictions in high profile cases against criminals whose harmful activity was experienced locally.

Referring once again to the prisoners' dilemma presented in Table 1,[317] from the perspective of the fight against organized crime, each individual state would receive a relatively high payoff by cooperating with the other state. And yet, from the perspective of each individual state, which wants credit for high profile convictions, the ideal solution is to enjoy the benefits of the other state's cooperation

312. *Id.* at 147 (citing 18 U.S.C. § 891 (1964 ed., Supp. V)).

313. *Id.*

314. *See id.* at 154 ("Where the class of activities is regulated and that class is within the reach of federal power, the courts have no power to excise, as trivial, individual instances of the class." (internal quotations and citations omitted)).

315. *See id.* at 157 (Stewart, J., dissenting) ("In order to sustain this law we would, in my view, have to be able to say that Congress could rationally have concluded that loan sharking is an activity with interstate attributes that distinguish it in some substantial respect from other local crime.").

316. *See id.* at 158 ("The definition and prosecution of local, intrastate crime are reserved to the States under the Ninth and Tenth Amendments.").

317. *See supra* Table 1 at p.134.

while jealously guarding information gathered in the course of the underlying criminal investigation. Because it is rational for each state to defect from a cooperative strategy without regard to what the other state does, the result is mutual defection, depicted in the lower right box, even though each state would receive higher payoffs with mutual cooperation.

By raising the criminal enforcement action to the federal level, the Consumer Credit Protection Act effectively forces the states to share information. As a result, this act generates the equivalent of mutual cooperation, even though the ultimate enforcement authority will be federal, rather than state, prosecutors. This game simply has no counterpart on the facts of either *Lopez* or *Morrison*. Isolated street crimes that take place at or near schools, or random acts of violence against women, do not create the sort of coordinated law enforcement problem associated with information sharing that is at least potentially relevant in the context of organized crime. As stated previously, given the overlap with traditional state police powers, *Perez* remains a difficult case. At a minimum, there is a plausible coordination rationale for distinguishing *Perez* from the recent cases retrenching on Congress's Commerce Clause powers. We are now ready to return to *Gonzales v. Raich*.

b. Raich *Revisited*

The preceding analysis developed four paradigmatic cases from two game theoretical models, which demonstrate the circumstances under which central coordinated authority is needed to implement a selected policy. Congressional regulatory intervention does not require proof that structural coordination problems of the sort described in Part II would actually emerge if the states were left to regulate the matter on their own. Such an exacting standard would be impossible to maintain. When the structural markers for a coordination difficulty are identified, the burden should fall upon those seeking to limit congressional power, not the other way around. Recall that the test to assess the proper exercise of Congress's Commerce Clause power is rational basis.[318] Provided there is a rational basis for presuming the particular problem to require a central coordinated solution, the burden falls upon those who would challenge the selected federal regime.

318. *See* Gonzales v. Raich, 545 U.S. 1, 19 (2005) ("Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would similarly affect price and market conditions.").

It is easy to see that none of the coordination games previously identified apply to *Raich*.[319] Because none of the coordination games provides a compelling justification for the *Raich* result, selecting any particular game to focus on is to some extent arbitrary. Still the game at issue in *Wickard*, involving supply side coordination as a means of raising prices, is important if for no other reason than that the *Raich* majority found the two cases strikingly similar.[320] To demonstrate that they are actually quite dissimilar, let us consider what Congress set out to achieve in the schedule I marijuana classification in the CSA. The classification was intended to further two objectives, first to ban illicit marijuana use, and second, to ensure that marijuana, which like wheat is fungible, is not moved from legitimate to illicit channels.[321]

Defining these legislative goals precisely is important. If the goal instead were defined as ensuring that no one uses marijuana, even if permitted under state law and on advice of a physician to relieve intense pain or other symptoms for which traditional medications fail to provide relief, then an absolute ban would be essential to furthering the scheme. But this is entirely circular.[322] Notice, for example, that in *Wickard*, the Court did not justify its application of the ban to Filburn on the circular logic that the scheme was intended to prevent violations of quotas even by particular local farmers like Filburn.[323] Rather, Justice Jackson suggested that

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319. The analysis that follows in the text considers the *Wickard* coordination game. We can quickly rule out the remaining categories. The regulatory objective is not to improve working conditions. *See supra* Part II.B. In addition, while we will consider the question of raising marijuana prices, the goal is not to ensure a competitive marijuana market by breaking marijuana trusts. *See supra* Part II.B. If anything, the decrease in supply from the marijuana ban raises prices and thus encourages the illicit market. As explained in the text, however, the goal is also not to cartelize marijuana pricing. Rather, it is to ban acquisition and use in the illicit marijuana market. The preservation game is not relevant because the goal is to ban, rather than to preserve, marijuana as an illicit substance other than for FDA approved research, and no one to my knowledge has ever suggested that cannabis is in danger of extinction thus threatening that limited use. *See supra* Part II.C. And there is no geographical coordination problem since the purpose is actually to block the flow of marijuana in commerce altogether as an illicit drug. *See supra* Part II.D.

320. *See Raich*, 545 U.S. at 19-20.

321. *See id.* at 12-13 ("The main objectives of the CSA were to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances. Congress was particularly concerned with the need to prevent the diversion of drugs from legitimate to illicit channels.").

322. This would raise two further problems. First, it is doubtful that this goal would require centralized coordinated intervention. State B's decision to allow limited use of medical marijuana would not interfere with State A's contrary decision to ban such use even with the advice of a physician. Second, even if the goal were as defined in the text, it is doubtful that there is a rational basis to support that objective.

323. For a case in which then-Associate Justice Rehnquist employed comparable circular logic to a provision of the Railroad Retirement Act of 1974, which denied continued windfall

imposing the burden on Filburn was somehow linked to furthering the larger legislative scheme.

As shown in Part II, individual states would confront a structural impediment to implementing coordinated output reduction as a means of securing non-competitive prices. While a centrally coordinated scheme is therefore justified in implementing this selected policy, it is not sufficient. Adopting the scheme but failing to signal the level at which it will be enforced will result in an erosion of the scheme. Since home grown wheat accounted for twenty percent of the variance in the market, Justice Jackson evaluated the impact of declining to honor the government's selected penalty on others similarly situated.

The policy of preventing illicit use and illicit diversion of marijuana does not possess the sort of structural impediments to decentralized implementation at issue in *Wickard*.[324] Some states might be skeptical concerning the benefits of marijuana as a treatment for pain and nausea, while other states might take a more liberal view. But one state's decision to implement a more liberal scheme on this narrow policy in no sense prevents another state from declining to do so.

There is undoubtedly a risk of some seepage from the protected medical marijuana market to the illicit drug market.[325] But this only underscores the analysis. Recall that the original *Wickard* formulation demanded a "substantial economic effect" on commerce.[326] An effect that is not both "substantial" and "economic" will not do.[327] The

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benefits to one class of workers, while allowing them to other workers, see *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 176-77 (1980) ("[T]he plain language of § 231b(h) marks the beginning and end of our inquiry. There Congress determined that some of those who in the past received full windfall benefits would not continue to do so.").

324. This is true unless we engage in the unrealistic assumption that the states were somehow in the pocket of the illegal drug industry and thus motivated to thwart the ban by transferring medical marijuana to illicit channels. Of course since states do not tax illegal drugs, it is hard to see this as plausible.

325. Of course it is almost certain that there will be more seepage in the reverse direction, namely marijuana reallocated from the recreational drug market to the market for persons who want it, but cannot obtain it, for medical use. *See Raich*, 545 U.S. at 19 n.28 ("Raich has personally participated in that [illegal marijuana] market, and Monson expresses a willingness to do so in the future.").

326. *See* Wickard v. Filhurn, 317 U.S. 111, 125 (1942).

327. *See Raich*, 545 U.S. at 64 (Thomas, J., dissenting). Justice Thomas wrote:

> But even assuming that States' controls allow some seepage of medical marijuana into the illicit drug market, there is a multibillion-dollar interstate market for marijuana . . . . It is difficult to see how this vast market could be affected by diverted medical cannabis, let alone in a way that makes regulating intrastate medical marijuana obviously essential to controlling the interstate drug market.

structural problem justifying central coordinated intervention in cartel enforcement arises because the failure to implement that policy at the federal level will have a substantial effect in thwarting the policy and because the effect will result in a change in the resulting economic conditions in a manner that affects interstate commerce. Absent central implementation and enforcement, the cartel would threaten to break down. In *Raich*, however, a contrary ruling allowing those who are permitted under state law, with their physician's prescription, to use medical marijuana would have no such effect. Instead, the Court's ruling simply denied relief—at least by lawful means—to two women seeking relief for their pain and suffering.

CONCLUSION

While this Article has criticized particular doctrinal formulations and applications under the Commerce Clause, and in particular the *Lopez* formulation of the non-economic activities test and the application of that test in *Raich*, its larger purpose goes beyond any particular case. The central goal has been to construct a new methodology for assessing the Commerce Clause—one grounded in the need for a central coordinating authority to implement the selected policy that has a substantial affect on interstate commerce—that can be practically applied in actual cases.

The Commerce Clause is important because as shown in such cases as *Katzenbach v. McClung*, and *Heart of Atlanta Motel v. United States*, absent a more specific delegation, Congress will naturally gravitate toward the most open ended source of power to effectuate normative objectives it deems important. At the same time, however, our federal Constitution, unlike its state counterparts, does not rest on a model of plenary or presumed powers. The normative framework developed in this Article satisfies the admonition most compellingly expressed by now retired Justice Sandra Day O'Connor that the Commerce Clause doctrine must ensure that Congress has the power to "regulate more than nothing . . . and less than everything."[328] A methodology that meets these objectives should appeal not only to those who study constitutional law, but also, and more importantly, to the sitting members of the Roberts Court.

Id. (internal citation omitted).

328. *Raich*, 545 U.S. at 47 (O'Connor, J., dissenting).