GEORGE MASON UNIVERSITY SCHOOL of LAW

CROPS, GUNS & COMMERCE: A GAME THEORETICAL CRITIQUE OF *GONZALES V. RAICH*

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Crops, Guns & Commerce: A Game Theoretical Critique of *Gonzales v. Raich*

Maxwell L. Stearns[*]

Abstract

In Gonzales v. Raich*, the Supreme Court sustained an application of the Controlled Substances Act ("CSA"), banning all private use of marijuana, as applied to two women who had cultivated or otherwise acquired marijuana for the treatment of severe pain pursuant to the California Compassionate Use Act. Writing for the majority, Justice Stevens placed* Raich *at the intersection of two landmark Commerce Clause precedents:* Wickard v. Filburn*, the notorious 1942 decision, which upheld a penalty under the Agriculture Adjustment Act of 1938 applied to a local farmer who violated his wheat quota but who had used the modest excess portion entirely on his own farm, and* Lopez v. United States*, the controversial 1995 decision, which stuck down the Gun-Free School Zones Act and for the first time in over sixty years imposed limits on the scope of Congress's Commerce Clause power based upon the underlying subject matter of the regulated activity.*

Writing for the Lopez *majority, Chief Justice Rehnquist had claimed not to disturb the expansive post-New Deal Commerce Clause precedents, but rather to fit all of the cases neatly into three circumscribed categories: the use of channels of interstate commerce; instrumentalities or persons or things traveling in interstate commerce; and economic activities that have a substantial effect on interstate commerce. Significantly, the* Lopez *Court redefined the third and most important category from its original formulation set out in* Wickard*. While* Wickard *had allowed Congressional regulation of local activity, "whatever its nature . . . if it exerts a substantial economic effect on interstate commerce," Rehnquist instead used "economic" to qualify the activity itself.*

Following the revised Lopez *formulation, the* Raich *Court inquired whether cultivating, acquiring, and using medical marijuana qualified as a regulable economic activity. Relying upon a dictionary for the proposition that economics refers to "the production, distribution, and consumption of commodities," Stevens determined that just as the* Wickard *Court had sustained Congress's regulation of wheat production, so too, the* Raich *Court was compelled to sustain Congress's prohibition of marijuana acquisition, production, and use even if for medical purposes and on the advice of a physician as permitted under state law.*

This Article traces the Lopez *Court's doctrinal modification, explores its implications, and offers an alternative economic analysis that considers the need for a central coordinating authority to effectuate the Congressional policy enacted pursuant to the Commerce Clause. The analysis reveals the shortcomings of Justice Stevens's analysis in employing a dictionary definition of economics and of focusing strictly on the nature of the underlying activity to equate* Wickard *and* Raich*. Using an analysis that draws instead upon the prisoners' dilemma and the multiple Nash equilibrium bargaining game, this Article demonstrates that the Court could have reconciled the expansive post-New Deal Commerce Clause cases with the more recent efforts, embodied in* Lopez *and in* Morrison v. United States*, to impose meaningful substantive restraints*

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on the scope of Congress's Commerce Clause powers. And it could have done so while applying Lopez *to invalidate the CSA as applied to Respondents' activities.*

Most notably, the analysis reveals that Wickard *does not represent an extreme example of Congressional Commerce Clause powers. Instead,* Wickard *relies upon the need for a central authority to curb national wheat outputs as a means of controlling price, and the need for a meaningful signal concerning the level at which the governmentally imposed quota regime will be enforced to avoid the consequence of cheating in undermining the overall pricing scheme. Neither of these concerns, nor any of the other identified concerns that justify the broad post-New Deal exercise of Congressional Commerce Clause powers, properly bear on the facts of* Raich*.*

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A panda walks into a café. He orders a sandwich, eats it, then draws a gun and fires two shots in the air.

"Why?" asks the confused waiter, as the panda makes toward the exit. The panda produces a badly punctuated wildlife manual and tosses it over his shoulder.

"I'm a panda," he says, at the door. "Look it up."

The waiter turns to the relevant entry and, sure enough, finds an explanation.

"Panda. Large black-and-white bear-like mammal, native to China. Eats, shoots and leaves."

Lynn Truss, EATS, SHOOTS & LEAVES: THE ZERO TOLERANCE APPROACH TO PUNCTUATION! (2004).

Introduction

Language matters. To lawyers especially that aught not to come as a surprise. Most often minor glitches in the written or spoken word, whether based upon errors in punctuation, diction, or syntax, or simply the product of awkwardness of style, do not prevent the writer from conveying his or her essential message. But there are notable exceptions. A small change from the intended to the conveyed sometimes results in unforeseen, and perhaps unforeseeable, consequences. This is particularly true in matters of legal doctrine.[1]

In *Lopez v. United States*,[2] Chief Justice Rehnquist, writing for a majority, made a seemingly modest change to a longstanding legal test that had governed the limits of Congressional Commerce Clause powers. The Chief Justice relocated an adjective. While prior cases had used "economic" to qualify the effects that the underlying regulated activity had on commerce,[3] Rehnquist instead moved the adjective to qualify the activity itself.[4]

Certainly this was not inadvertent on Rehnquist's part. The newly devised non-economic activities test allowed Rehnquist to cabin longstanding and expansive Commerce Clause cases into a neatly defined, and seemingly limited, category.[5] Still this minor wording change produced for Rehnquist an unintended, and according to some, life-threatening,[6] consequence.[7]

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[1] For a recent case in which Justice O'Connor made a similar observation, see Lingle v. Chevron U.S.A. Inc., 125 S. Ct. 2074, 2077 (2005) (noting that "On occasion, a would-be doctrinal rule or test finds its way into our case law through simple repetition of a phrase—however fortuitously coined," and rejecting application of often repeated "substantially advances" formulation in a regulatory takings case challenging state-imposed limit on rent that oil companies can charge dealers leasing service stations).

[2] 514 U.S. 549 (1995).

[3] See Wickard v. Filburn, 317 U.S. 111, 125 (1942) ("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 . . . .")

[4] See Lopez v. United States, 514 U.S. at 560 ("Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.").

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

[6] See Gonzales v. Raich, 125 S. Ct. 2195, 2199 (2005) (stating "Indeed Raich's physician believes that forgoing cannabis treatments would certainly cause Raich excruciating pain and could very well prove fatal").

[7] The Chief Justice demonstrated that he did not intend his newly articulated non-economic activities test to condone a Congressional ban on state-approved, physician-prescribed medical marijuana, by joining the principal dissent in *Raich*, 125 S. Ct. at 2220 (O'Connor, J., dissenting).

In *Gonzales v. Raich*,[8] the Supreme Court sustained an application of the federal Controlled Substances Act of 1970 to ban the cultivation, acquisition, and use of medical marijuana, with a physician's prescription, as permitted under the California Compassionate Use Act.[9] For the *Raich* majority, the justification was as simple, if as misguided, as was shooting the gun for the panda: "Look it up!"[10] "Economics" includes the study of production, and growing marijuana is an act of production.[11]

Just as Rehnquist suggested that his revisionism in *Lopez* would limit Commerce Clause doctrine, Justice Stevens, writing for the *Raich* majority, and joined by the liberal Justices Souter, Ginsburg, and Breyer, and by the centrist conservative Justice Kennedy,[12] suggested that applying the *Lopez* test literally would restore the doctrine's earlier scope. Among the landmark Commerce Clause precedents that *Lopez* itself sought to limit, while claiming no need to overrule,[13] and the principal one that the *Raich* Court set out to restore, was the infamous decision, *Wickard v. Filburn*.[14]

The *Wickard* Court had sustained an application of 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, to Filburn, a small farmer, even though the government stipulated that he had used the above-quota portion entirely on his own farm.[15] In an excessively quoted portion of his opinion for the unanimous *Wickard* Court, Justice Robert Jackson explained, in essence, that while Filburn's activity was entirely local, if everybody engaged in it, the activity would then become national. [16]

Another problem with language arises when readers take text out of context. While jurists and scholars have ridiculed this part of the *Wickard* opinion, claiming for example that it has no stopping point,[17] read in context, Jackson's argument was substantially more measured.[18] Fairly read, Jackson's opinion suggests that because of a peculiar coordination problem associated with wheat pricing, federal intervention was needed to prevent many local growers from thwarting their quotas with the aggregate effect of undermining the pricing scheme.

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[8] 125 S. Ct. 2195.
[9] *See id.* at 2201 ("The CSA is a valid exercise of federal power, even as applied to the troubling facts of this case.")
[10] Lynn Truss, EATS, SHOOTS & LEAVES: THE ZERO TOLERANCE APPROACH TO PUNCTUATION! (2004) (presenting anecdote on back cover) (punctuation modified). For a critical assessment claiming that Lynn Truss is a stickler wannabe, see Bryan A. Garner, *Don't Know Much About Punctuation: Notes on a Stickler Wannabe: Eats, Shoots & Leaves: The Zero[-]Tolerance Approach to Punctuation*, 83 TEX. L. REV. 1443 (2005) (noting among other deficiencies the ironic missing hyphen in Lynn Truss's subtitle).
[11] 125 S. Ct. at 2211 (noting that "'Economics' refers to 'the production, distribution, and consumption of commodities,'" and sustaining application of CSA to Respondents' activities on the ground that "The CSA . . . regulates the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market.").
[12] Justice Scalia wrote a separate opinion, concurring in the judgment. *See* Raich v. Gonzales, 125 S. Ct. at 2215 (Scalia, J., concurring in the judgment).
[13] See *Lopez*, 514 U.S. at 560 (asserting "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.").
[14] 317 U.S. 111 (1942).
[15] *See id.*
[16] *See id.* at 127-28 (asserting "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.").
[17] *See, e.g., Lopez*, 514 U.S. at 601 (Thomas, J., concurring).
[18] For a more detailed discussion of *Wickard*, see infra part II.A.

Rather than distinguishing the exercise of federal regulatory power in *Wickard* as a means of striking the marijuana regulation in *Raich*, Justice Stevens instead used *Raich* to revive *Wickard* by reading quite literally the *Lopez* Court's relocated adjective. Stevens noted that "Economics refers to 'the production, distribution, and consumption of commodities.'"[19] Thus, under *Lopez*, the CSA is a valid exercise of federal regulatory power because it regulates the "production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market."[20] This exercise in analysis by definition eliminated the argument that the states, by virtue of their reserved and plenary powers, were free to liberalize access to medical marijuana.

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.[21] The tenth amendment notwithstanding,[22] Congressional regulation under the Commerce Clause has highlighted the tension between a model of delegated federal powers on the one hand and preserved or plenary state police powers on the other. In addition, because the Commerce Clause is a delegation of power to Congress, judicially enforced limits on the scope of Congress's Commerce Clause power, as for example occurred in *Lopez* and in *Morrison v. United States*,[23] raise separation of powers concerns.[24] The Supreme Court's teeter totter from *Wickard* to *Lopez* to *Raich* illustrates these tensions.

The narrow conservative majority, first in *Lopez*,[25] and then in *Morrison*,[26] to retrench Commerce Clause precedent, has now given way to only a slightly less narrow, mostly liberal, majority in *Raich*,[27] which has taken the *Lopez* bait and defined "economic activity" so broadly that Chief Justice Rehnquist, the *Lopez* author, has found himself in dissent. While the decision of the remaining liberals to join Stevens might suggest a doctrinal victory, the victory somehow rests on prioritizing the federal power to control wheat pricing in the 1940s above the power of states to

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[19] 125 S. Ct. at 2210.
[20] *Id.*
[21] For a debate on the proper scope of Congress's Commerce Clause power, *compare Lopez*, 514 U.S. 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 (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.).
[22] See U.S. CONST. AM. 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.").
[23] 529 U.S. 598 (applying *Lopez* non-economic activities test to strike civil remedies provision of the Violence Against Women Act.).
[24] Consider, for example, Chairman of the Senate Judiciary Committee Arlen Specter's recent letter to Supreme Court nominee John Roberts. Specter maintained that members of Congress were "irate about the Court's 'disrespectful comments about Congress's competence,' and by its interference with Congressional power," in such cases as *Lopez* and *Morrison*. *See* Jesse J. Holland, *In a Letter, Specter Tells Roberts Court 'disrespectful' of Congress,* www.boston.com/news/nation/washington/articles/2005/08/09/in_letter_specter_tells_roberts_court_disprespectful_of_congress/ (last visited August 14, 2005). Whether or not one accepts Senator Specter's characterization, one thing is certain. As this Article shows, the Supreme Court lacks a coherent and normatively compelling framework for assessing the proper scope of Congress's Commerce Clause power.
[25] 514 U.S. 549.
[26] 529 U.S. 598.
[27] 125 S. Ct. 2195. The majority comprised Justices Stevens, Kennedy, Souter, Ginsburg, and Breyer. Justice Scalia concurred in the judgment. *See id.* at 2215.

liberalize access to medical marijuana access today. Moreover, for the conservatives, who split over the resulting four opinions,[28] it was less clear that *Raich* marked defeat.

A review of the four *Raich* opinions,[29] will demonstrate that the Supreme Court lacks a coherent normative theory governing the permissible scope of Congressional Commerce Clause powers. While the Court is unwilling to embrace Justice Thomas's call, reiterating his famous *Lopez* concurrence,[30] for a complete retrenchment of post-New Deal Commerce Clause jurisprudence,[31] the Court remains committed to imposing meaningful limits on the scope of Congress's Commerce Clause powers. A growing alliance now including both liberal and conservative members of the Court appears committed to continuing the *Lopez* project without abandoning the essential post-New Deal Commerce Clause cases.

To accomplish this task, the Court needs an appropriate analytical framework. Such a framework must be capable of distinguishing those regulatory schemes affecting commerce that require central coordinated regulatory authority from those regulatory schemes that can be implemented in a decentralized manner. None of the four *Raich* opinions succeeded in offering such an approach and thus none proved satisfying in furthering the *Lopez* project. The difficulty in *Raich* is not merely the outcome, although it is wrong. Rather it is the lack of coherent framework capable of assessing the factual predicates of such cases as *Wickard*, *Lopez*, and *Raich*, and of placing them within the larger context of post-New Deal Commerce Clause cases. While *Raich* provides the immediate impetus for our inquiry, this Article transcends that case and goes to the larger, and increasingly timely,[32] question concerning how to define the proper scope of Congress's Commerce Clause power.

To be clear, the Article will criticize the *Lopez* reformulation of doctrine, not simply because it changed prior wording, but because, ironically, it thwarts rather than promotes a careful economic analysis of how the failure to regulate certain activity centrally can substantially affect interstate commerce. Whether economics qualifies the activity or the effects, however, the ultimate question is how the term economics itself is used. The original *Wickard* formulation focused on whether the regulated activity, whatever its nature, had a substantial economic effect on interstate commerce. While Justice Thomas has maintained that this test is akin to a Congressional blank check,[33] in fact, however, if economic effect is used to evaluate the need for central regulatory coordination, the resulting categories, while broad, are identifiable and limited. The expansive post-New Deal Commerce Clause cases and the two principal cases marking a substantive Commerce Clause retreat—*Lopez* and *Morrison*—can be reconciled based upon two simple coordination games, which together establish four analytical categories.

[28] In addition to Justice Stevens's majority opinion and Justice Scalia's concurrence in the judgment, Justice O'Connor wrote the principal dissent, which the Chief Justice and Justice Thomas joined, 125 S. Ct. at 2220 (O'Connor, J., dissenting), and Justice Thomas wrote a separate dissent, 125 S. Ct. at 2229 (Thomas, J., dissenting).
[29] *See infra* part II.
[30] *See Lopez*, 514 U.S. at 653 (Thomas, J., concurring)
[31] *See* Raich, 125 S. Ct. at 2229 (Thomas, J., dissenting) ("As I explained at length in *United States v. Lopez*, . . . , the Commerce Clause empowers Congress to regulate the buying and selling of goods and services trafficked across state lines.") *see also id.* at 2233 (noting that "[i]n *Lopez*, I argued that allowing Congress to regulate intrastate, noncommercial activity under the Commerce Clause would confer on Congress a general 'police power' over the Nation.").
[32] *See supra* note 24.
[33] *See, e.g., Lopez*, 518 U.S. at 665 (Thomas, J., concurring) ("Such a formulation of federal power is not a test at all: it is a blank check.").

The first coordination game, which grows out of the prisoners' dilemma, shows when, in the absence of federal regulatory intervention, individual firms, or individual states, are motivated to thwart three categories of coordinated federal policy, first centrally coordinated pricing schemes; second, centrally regulated working conditions; and third, centrally coordinated environmental regulations. The second coordination game, which grows out of a multiple Nash equilibrium model, establishes the fourth and final category, namely the need for federal regulatory intervention to prevent individual states from undermining a desired policy that promotes geographical coordination among states. These two economic models, and the four doctrinal categories that they produce, are sufficiently broad as to embrace almost all of the major post-New Deal Commerce Clause cases.[34] The models also help to explain why the Supreme Court implicitly recognized the absence of any need for coordinated federal intervention in the *Lopez* and *Morrison* cases. While this Article reconciles the pre-*Raich* Commerce Clause cases, its purpose in doing so is to provide a proper normative framework for assessing the proper scope of Congress's Commerce Clause powers. Such a framework must both facilitate proper Congressional choice in selecting regulatory policy under the Commerce Clause and impose meaningful limits on the scope of Congress's Commerce Clause powers that are consistent with a model of delegated, rather than plenary or police, legislative powers.

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 categories proves essential to assessing the proper scope of Congress's Commerce Clause power. While part II will present specific cases that help to develop the models, part III applies the framework developed in part II to several additional cases. The analysis demonstrates that while both *Wickard* and *Lopez* were rightly decided, neither provided a normative justification for the outcome in *Raich.*

I. The *Raich* Opinions in Context

As frequently occurs in Commerce Clause cases, *Gonzales v. Raich*[35] resulted from a conflict between a federal statute, which prohibited an activity, and a state law, which permitted it.[36] In *Raich*, the federal Controlled Substances Act (the "CSA"),[37] which prohibited all marijuana use except as part of a research project approved by the Food and Drug Administration ("FDA"),[38] conflicted with the California Compassionate Use Act ("CCUA").[39] Under specified conditions,

[34] As explained *infra* part III, 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 (1971).

[35] 125 S. Ct. 2195.

[36] While this paradigm is familiar, *see, e.g.*, Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) (holding that state license granting exclusive use of channel of interstate commerce must yield to contrary federal law), it is not exclusive. Commerce Clause cases also arise when Congress has regulated in the absence of any contrary state law. See, e.g., *Wickard,* 317 U.S. at 111 (sustaining application of the Agricultural Adjustment Act of 1938 to a local farmer who exceeded his wheat allotment); *Lopez,* 514 U.S. at 549 (striking Gun-Free School Zones Act).

[37] The Controlled Substances Act, 84 Stat. 1242, is contained in Title II of The Comprehensive Drug Abuse Prevention and Control Act of 1970. See *Raich*, 125 S. Ct. at 2203 n.19, and accompanying text.

[38] *See id.* at 2204 (explaining that "By classifying marijuana as a Schedule I drug, as opposed to putting 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.").

[39] This Act was originally passed by California voters as Proposition 215 in 1996. *See* Cal. Health & Safety Code Ann. § 11362l5 (West Supp. 2005); *Raich*, 126 S. Ct. at 2199.

the CCUA protected patients who suffered specified ailments, and others for whom marijuana provides relief,[40] and their prescribing physicians, from prosecution for the cultivation, possession, and use of medical marijuana.[41]

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 as eligible patients under the CCUA. Both Raich and Monson had used marijuana under medical supervision "to function on a daily basis."[42] 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."[43]

While Monson cultivated her own marijuana, which she ingested by smoking or with a vaporizer, Raich instead relied upon two caregivers, litigating as John Does, who provided her locally grown marijuana free of charge.[44] In August 2002, county sheriffs and agents from the Drug Enforcement Administration (DEA) found marijuana in Monson's home. Although California law authorized her use of the marijuana, the federal agents nonetheless seized and destroyed her six cannabis plants.[45]

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."[46] While respondents raised a number of constitutional claims,[47] based upon the disposition in the United States Court of Appeals for the Ninth Circuit, the *Raich* Court focused exclusively on the question whether the absolute federal ban on marijuana as applied to respondents' activities 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."[48] 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

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[40] 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*, 125 S. Ct. at 2199 n.4 (quoting the Compassionate Use Act, now codified as Cal. Health & Safety Code Ann. § 11462.5 (West Supp. 2005).

[41] Justice Stevens explained that "The proposition was designed to ensure that 'seriously ill' residents 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." *Raich*, 125 S. Ct. at 2199.

[42] *Id.* at 2200.

[43] *Id.*

[44] *See id.*

[45] *See id.*

[46] *Id.*

[47] Respondents presented claims under the Commerce Clause, the Fifth Amendment Due Process Clause, the Ninth and Tenth amendments, and the doctrine of medical necessity. *See id.*

[48] *Id.*

United States v. Lopez,[49] and *United States v. Morrison*,[50] or instead, the expansive body of post-New Deal Commerce Clause cases, including most notably *Wickard v. Filburn.*[51] 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."[52] 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*."[53] The Supreme Court granted certiorari to resolve this important issue.[54]

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."[55] While expressing sympathy for the respondents and acknowledging the troubling facts, Stevens ultimately concluded that even as applied to respondents' activities, "[w]ell-settled law" demonstrates that "[t]he CSA is a valid exercise of federal power."[56]

Stevens explained that the CSA was enacted as part of President Nixon's first campaign in the "war on drugs."[57] Through the Comprehensive Drug Abuse Prevention and Control Act of 1970 (the "Comprehensive Drug Act"),[58] Congress consolidated various drug laws into a single statute and reorganized federal drug law administration.[59] The Comprehensive Drug Act also accomplished two further objectives. First, it limited diversion of drugs to illegal channels by regulating their legitimate sources, and second, it strengthened law enforcement against illegal drug trafficking.[60]

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.[61] Justice Stevens explained that among the principal objectives of Title II, which proved significant in *Raich*, was preventing the diversion of drugs from legal to illegal channels.[62]

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[49] 514 U.S. 549 (1995) (holding that the Gun-Free School Zones Act as exceeds Congress's Commerce Clause powers).
[50] 529 U.S. 598 (2000) (holding that the civil remedies provision of the Violence Against Women Act exceeds Congress's Commerce Clause powers.)
[51] 317 U.S. 111 (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).
[52] *Raich*, 125 S. Ct. at 2201.
[53] *Id.* (quoting ninth circuit dissent).
[54] 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 2198.
[55] *Id.* at 2201.
[56] *Id.*
[57] *Id.*
[58] 84 Stat. 1236. Stevens also described prior Congressional efforts to regulate the national market for illicit drugs prior to the 1970 reforms. *See id.* at 2202 (describing the Pure Food and Drug Act of 1906 and the Harrison Narcotics Act of 1914).
[59] *See Raich*, 125 S. Ct. at 2202-3.
[60] For Justice Stevens's discussion of earlier federal marijuana regulation, see *Raich*, 125 S. Ct. at 2202.
[61] *See id.* at 2203.
[62] Justice Stevens noted that Congress had made the following findings to support the CSA:

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.[63] 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.”[64] 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.”[65] Stevens further 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 to Reform Marijuana Laws (“NORML”) to change the marijuana from schedule I have generally failed.[66]

Justice Stevens observed that Respondents did not challenge the passage of 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.[67] 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.”[68]

1. Justice Stevens’s 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.[69] 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.[70] He added that for the first century, the Commerce Clause was primarily employed judicially against state laws that discriminated in commerce.[71] Stevens then observed

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> (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.

21 U.S.C. §§ 801 (1)-(6). *Raich*, 125 S. Ct. at 2203.
[63] *Raich*, 125 S. Ct. at 2203.
[64] *Id.* at 2203-4.
[65] *Id.* at 2204.
[66] *See id.* at 2204 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. The DEA declined to endorse this opinion, and all prior and subsequent efforts at reclassification, including five petitions for reclassification over thirty years in the Court of Appeals for the District of Columbia Circuit, have failed. *See id.*
[67] *See id.* at 2204.
[68] *Id.* at 2204-5.
[69] In fact, Stevens’s historical summary consisted of three paragraphs *See id.*
[70] *See id.* at 2205.
[71] *See id.*

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."[72]

While constitutional scholars generally recognize several changing historical periods in the Supreme Court's Commerce Clause jurisprudence,[73] Justice Stevens instead presented the resulting doctrine as comprising a single "'new era,' which now spans more than a century."[74] Stevens not only treated different doctrinal periods as continuous, but in doing so he ascribed the revised doctrinal formulation of the substantial effects category established in *Lopez* and reiterated in *Morrison*, to cases from an earlier era.[75] And yet, the revised *Lopez* formulation, rather than formulation that it replaced, proved essential to Stevens's 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*,[76] and reiterated in *Morrison.*[77] In addition to the power to regulate the channels of interstate commerce, and the instrumentalities, and persons or things traveling in interstate commerce, neither of which were implicated in *Wickard* or *Raich*, Justice Stevens observed that long standing case law afforded Congress the power to regulate "activities that substantially affect interstate commerce."[78]

While Stevens initially presented the test articulated in such cases as *NLRB v. Jones & Laughlin Steel Corp.*,[79] and *Perez v. United States*,[80] he then reformulated it, consistently with *Lopez*, without identifying the source of modification or even mentioning the doctrinal change. Justice Stevens stated: "Our case law firmly establishes Congress' power to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce."[81]

Other commentators have noted Rehnquist's doctrinal transformation in *Lopez* from inquiring into whether the regulated activity had a substantial economic effect on commerce to whether the

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[72] *See id.*
[73] *See, e.g.*, KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 124-216 (dividing Commerce Clause jurisprudence into (1) The Interpretation from 1824-1936; (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 Commerce Power).
[74] *Id.* at 2205.
[75] 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*, 317 U.S. 111, 128-29, when neither case employed that test. Instead, *Perez* quoted the famous *Wickard* formulation, contained at 317 U.S. at 125, and quoted *supra* note 3 (using economic to qualify effects, not activities). *See Raich*, 125 S. Ct. at 2205 n.5.
[76] 514 U.S. 558-59.
[77] 529 U.S. at 609. *See Raich*, 125 S. Ct. at 2205.
[78] *Raich*, 125 S. Ct. at 2205.
[79] 301 U.S. 1, 37 (1937) ("activities that substantially affect interstate commerce").
[80] 402 U.S. 146, 150 (1971) (same).
[81] 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." *Raich*, 125 S. Ct. at 2205-6. And yet, while claiming to apply *Wickard*, Stevens instead rested his analysis on the critical reformulation in *Lopez*. *Id.* at 2211.

activity itself is economic.[82] It is important, however, to identify one line of pre-*Lopez* Commerce Clause cases in which the Supreme Court had in fact based the scope of Congress's regulatory power on whether the underlying activity was characterized as "economic."[83] These cases provide little support for the use of a non-economic activities test in *Lopez*, however, because they involve the question whether Congress can regulate states acting as employers or as providers of services in the same manner that Congress regulates private actors.[84] In both *Wickard* and *Raich*, in contrast, the Court was not regulating states or other units of government, but rather, 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. United States*,[85] *Katzenbach v. McClung*,[86] and *Wickard*,[87] cases in which Congress regulated private actors and in which the Supreme Court applied the traditional substantial effects test without inquiring into the nature of the regulated activity.[88]

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[82] 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). 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).

[83] Prior critics of *Lopez* have not focused on the use of economic activities in this group of Commerce Clause cases. This doctrinal connection is helpful because identifying the limited circumstances in which the Court has considered economic activity, as distinguished from the economic effect of local activity on commerce, supports the earlier doctrine by focusing on whether states should be treated as private actors for purposes of implementing a chosen regulatory policy. See infra part II.

[84] 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 ("FLSA"), 52 Stat. 1060, 1067 (1938), 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 the earlier decision *Maryland v. Wirtz*, 392 U.S. 183 (1968), which sustained the application of FLSA to state schools and hospitals. The *Wirtz* Court justified its holding as follows: "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 the federal regulation." *Id.* at 197.

[85] 379 U.S. 241, 269 (1964).

[86] 379 U.S. 294, 302 (1964).

[87] 317 U.S. 111, 125.

[88] *See Lopez*, 514 U.S. 559-60. 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*. That is not to suggest that the *Lopez* Court's stated test, requiring economic activity as a precondition to the exercise of Congressional Commerce Clause power in the substantial effects cases, is dicta. See Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953 (2005). Even assuming that the revised doctrinal formulation was unnecessary to the disposition in *Lopez* and *Morrison*, courts generally have authority to formulate tests in crafting their holdings, and the Supreme

3. The *Wickard* Connection

Contrary to Stevens's analysis in *Raich*, the *Wickard* Court did not sustain Congress's regulation of wheat production because growing wheat is a quintessential economic activity. 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 within the protected sphere of reserved state powers.[89] 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. Relying on the *Lopez*, however, Stevens presented the central issue in *Raich* as whether Congress's prohibition of all cultivation, acquisition, and use of marijuana, even with a physician's prescription as permitted under state law, was a permissible regulation of economic activity.

Justice Stevens explained that the *Wickard* Court considered the application to Filburn of the Agricultural Adjustment Act of 1938, which was intended to bolster the price of wheat amid a glut by limiting the volume of wheat produced.[90] Filburn had been allotted 11.1 acres for his 1941 wheat crop, but sowed 23 acres instead.[91] Filburn maintained, and the government stipulated, that he used the excess entirely on his own farm.[92]

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 the extent to which 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.[93]

After noting several factual similarities between *Raich* and *Wickard*,[94] Justice Stevens explained:

Court in particular has comparatively broad authority to determine the scope of its own holdings. Abramowicz & Stearns, *supra* at 1067.

[89] *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.")

[90] *See Raich*, 125 S. Ct. at 2206 (citing *Wickard*, 317 U.S. at 118).

[91] *See id*.

[92] *See id.*

[93] *Id.* at 2206 (quoting *Wickard*, 317 U.S. 111, 127-28).

[94] 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.

Raich, 125 S. Ct. at 2206-7.

> 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. [95]

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 will draw in home-grown marijuana intended for medical use.[96] Despite the claimed parallel to wheat, however, 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 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.[97]

Justice Stevens explained that in applying the substantial effects test, the Court inquires only whether Congress had a rational basis for having determined that there was a substantial effect. Given the difficulty in assessing the origin of marijuana and of 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."[98]

Like Justice Scalia, who concurred in the judgment,[99] 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:

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[95] *Raich*, 125 S. Ct. at 2207. To support this argument, Stevens noted that respondents had themselves participated in the illegal marijuana market. *See id.* n.28.

[96] *See id.* at 2207. It is important to distinguish two effects that could result from legalized medical marijuana, first, the demand side effect, which involves potential seepage from the legal to illegal market, and second, the supply side effect, which involves increased production to satisfy the legal market. For an explanation of why neither effect provides a basis for the complete ban on medical marijuana, see *infra* at 136.

[97] 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 2235 n.6 (Thomas, J., dissenting).

[98] *Id.* at 2212. 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.* This argument is also circular, see supra note 97, since federal law only prevails under the supremacy clause provided it is 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.

[99] See *infra* part I.C.

> [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.[100]

Justice Stevens rejected the Ninth Circuit's reliance upon *Lopez* and in *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 seeking to have the Court "excise individual applications of a concededly valid statutory scheme."[101] 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 relied upon the definition of "Economics" set out in Webster's Third New World International Dictionary,[102] which refers to "the production, distribution, and consumption of commodities."[103] Stevens concluded that Respondent's activities, like that of Mr. Filburn in *Wickard*, qualified as economic and was 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.[104] 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.[105]

C. Justice Scalia's Concurrence in the Judgment

In his separate opinion, Justice Scalia noted that while the Court, since *Perez v. United States*,[106] has "mechanically recited" three permissible Commerce Clause categories, the listing is misleading.[107] 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 Commerce Clause alone."[108] And yet, Congress sometimes finds it necessary and proper to

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[100] *Raich*, 125 S. Ct. at 2208 (internal quotations omitted).
[101] *Id.* at 2209. 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.* (quoting Perez v. United States, 402 U.S. at 154).
[102] *See id.* at 2211.
[103] *Id.* (quoting WEBSTERS THIRD NEW INTERNATIONAL DICTIONARY 720 (1966)). As Justice Thomas noted in dissent, it is curious why Stevens relied upon a forty year old dictionary to define economics. *See Raich*, 125 S. Ct. at 2236 (Thomas, J., dissenting).
[104] *See id.* at 2211.
[105] *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 2211 n.37 (citing studies).
[106] 402 U.S. 146 (1971).
[107] *Raich*, 125 S. Ct. at 2215 (Scalia, J., concurring in the judgment).
[108] *Id.* at 2215-16.

regulate interstate commerce by "eliminating potential obstructions" or by "eliminating potential stimulants."[109] The resulting power to regulate intra-state activities that are not themselves in commerce is expansive, Scalia explained, but "not without limitation."[110] 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."[111]

Scalia maintained that, at least implicitly, *Lopez* recognized Congress's power to enact laws necessary and proper to its commerce power even if the regulation was not "directed against economic activities that have a substantial effect on interstate commerce."[112] Instead, in regulating interstate commerce, Congress "possesses every power needed to make that regulation effective."[113] While these two powers overlap, they are distinct. Scalia claimed that in *Raich*, the distinction proved critical.[114]

While Stevens, writing for the majority, had 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 manner that was necessary and proper in the furtherance of a comprehensive federal regulatory scheme.[115]

As applied to the CSA, Scalia claimed, the resulting analysis was "straightforward."[116] As part of its comprehensive regulatory scheme, the CSA sought to eliminate altogether traffic in marijuana. Because marijuana is a fungible commodity, even though the cultivation of marijuana itself might not qualify as an economic activity that substantially affects interstate commerce, it was necessary and proper for Congress to ban it entirely in order to effectuate Congress's larger regulatory scheme.[117]

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[109] *Id.* at 2216.
[110] *Id.*
[111] *Id.* at 2217.
[112] *Id.*
[113] *Id.*
[114] 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 2217 n.2.
[115] *See id.* at 2218 (positing that "*Lopez* expressly disclaimed that it was such a case, . . . and [that] *Morrison* did not even discuss the possibility that it was [such a case].")
[116] *Id.* at 2219.
[117] Scalia rejected the principal dissent's criticism that the majority analysis turns *Lopez* into a drafting guide by letting Congress regulate local activity provided it linked that activity 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, *see id.* at 2218, a requirement that he claimed was absent in *Lopez* and *Morrison*. *See Raich*, 125 S. Ct. at 2218 (Scalia, J., concurring in the judgment).

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.[118] 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.[119] O'Connor claimed that the same arguments for rejecting the application of the Commerce Clause in *Lopez* also applied in *Raich*,[120] and that under the Court's analysis, Congress could justify the same regulation as part of a larger scheme regulating commerce in guns.[121] O'Connor claimed that *Lopez* did not invite such evasion, but instead it required the Court to identify "objective markers" that properly limit Congressional powers in Commerce Clause cases.[122] 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)."[123]

O'Connor identified several such markers in *Raich*. First, both the CSA and state law recognize that medical and non-medical use of drugs "are realistically distinct and can be segregated" for regulatory purposes.[124] Second, respondents limited their claim to state-permitted, physician-prescribed, medical marijuana. Third, *Raich* arises in a regime of overlapping federal and state regulation in an area of criminal law in which "States lay claim by right of history and expertise."[125] Finally, California had drawn upon its reserved powers to distinguish medicinal and recreational use of marijuana.[126]

O'Connor also identified three factors that distinguished *Raich* from *Wickard*. First, after rejecting the majority's "dictionary definition" of economics as "breathtaking,"[127] O'Connor maintained that unlike wheat, "The home grown cultivation and personal use of marijuana for medicinal purposes has no apparent commercial character."[128] Second, in contrast with the broad reach of the CSA, the Agricultural Act of 1938 exempted "small-scale, noncommercial wheat farming."[129] Finally, O'Connor maintained that while the *Wickard* relied upon stipulations

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[118] *See Raich*, 125 S. Ct. at 2220 (O'Connor, J., dissenting).
[119] *See id.* at 2223 (O'Connor, J., dissenting) ("I do not understand our discussion of the 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.").
[120] First, Lopez involved criminal activity that was not economic. *See id.* at 2221-22. Second, the Gun Free School Zones Act contained no express jurisdictional element linking the regulated activity to commerce. *See id.* Third, Congress had made no legislative findings that linked the regulated activity to commerce. *See id.* And finally, the Court's analysis revealed the linkage between the regulated activity and commerce to be attenuated. *See id.*
[121] *Id.* at 2223.
[122] *See id.* at 2223.
[123] *See id.*
[124] *See id.* at 2224.
[125] *Id.*
[126] *See id.*
[127] *Id.*
[128] *Id.* at 2225. 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. *See id.*
[129] *See id.* ("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.").

concerning the effects of domestically produced wheat on the overall market,[130] in *Raich*, Congress's findings amounted to no more than a bold claim concerning the need for an absolute ban.[131] 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."[132]

E. Justice Thomas's 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.[133] 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.[134] In *Raich*, however, Thomas maintained that even the substantial effects test does 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.[135] Instead, the issue was whether, given the statutory limits upon permissible use in California, it is necessary and proper to the CSA to limit even locally grown marijuana specifically intended for medical use.[136] Thomas concluded that the answer was no.

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[130] *See id.* at 2227.
[131] *See id.* at 2227 (claiming that the Congressional findings "amount to no 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.*").
[132] *Id.*
[133] *See id.* at 2229-30 (Thomas, J., dissenting).
[134] Lopez, 514 U.S. at 600 (Thomas, J., concurring) ("The aggregation principal is clever, but has no stopping point.").
[135] *Raich*, 125 S. Ct. at 2231 (Thomas, J., dissenting).
[136] *See id.* at 2233-34. 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 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 2233. (citing Executive Office of the President, Office of Nat. Drug Control Policy, Marijuana Fact Sheet 5 (Feb. 2004) http://www.whitehousedrugpolicy.gov/publications/factsht/marijuana/index.html.) As previously noted, *see supra* note 96, 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* Raich, 125 S. Ct. at 2200 (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* Raich, 125 S. Ct. at 2233 (Thomas, J., dissenting) (discussing magnitude of the illicit marijuana market).

II. Devising an Economic 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 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 19th 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's placed *Raich* and *Wickard* in the same doctrinal category, he did so by resorting to a version of the very formalism—now including what had once been a pre-commerce activity within Congress's core regulatory powers under the Commerce Clause—that *Wickard* rejected.

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 that 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, counter intuitively, insisting upon broader 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 link the regulated activity to commerce.

And 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, calling 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 very 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.[137]

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,[138] this part identifies the conditions under which defection from beneficial coordination is likely to arise, and thus when central regulation, taking the form of an exercise of Congressional Commerce Clause powers, is justified.

In this part, I will 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. The model is then applied in two other contexts presenting similar coordination problems.

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

Let us now reconsider *Wickard v. Filburn*.[139] *Wickard* emerged in the aftermath of the Great Depression, and during a period in which there was a well known wheat glut that 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 that would result in the imposition of a "compulsory national marketing quota."[140] Filburn, who was penalized for violating his quota, raised, among other arguments, a claim that as applied to him, the 1938 statute exceeded Congress's Commerce Clause power.

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[137] 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*, 145 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 dimension beyond the traditional justification of the Dormant Commerce Clause doctrine as solving a prisoners' dilemma among potentially defecting states. *See id.* at 69-118. 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.

[138] 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 152 through 154, and accompanying text.

[139] 317 U.S. 111 (1942).

[140] *Id.* at 115.

The *Wickard* opinion is almost invariably cited for its multiplier analysis.[141] Focusing on other, less well known aspects of the case helps to establish 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."[142] This observation invites the question why none of the four net export nations employed a decentralized solution to the problem of depressed wheat pricing.[143]

Justice Jackson also explained the incentives that the coordinated scheme created for individual producers like Filburn. Jackson stated: "It is agreed that as a 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.'"[144] 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,[145] the effect of the quota produced an incentive to reap the benefit of the heightened price while avoiding the imposed restrictions that created them.

These two observations help to provide a foundation for understanding *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*.[146] Instead, *Wickard* rested upon an understanding, 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.[147]

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.[148] The question then is how to accomplish this, a problem that is well understood in the literature on the theory of cartels.[149] If a group of producers that collectively has market power over their products seeks 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

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[141] *See supra* note 15 (quoting passage from *Wickard*, 317 U.S. at 127-28).
[142] *Id.* 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.
[143] 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.*
[144] *Id.* at 130-31.
[145] *See id.* at 132.
[146] 298 U.S. 238, 308 (1936) ("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.")
[147] This is not to suggest that the scheme would not have produced any monopoly 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 n.2.
[148] *See id.* at 137 ("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.")
[149] For general discussions of cartel theory, see GEORGE STIGLER, THE THEORY OF PRICE 230-31 (3d ed. 1966); *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).

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.

Figure 1

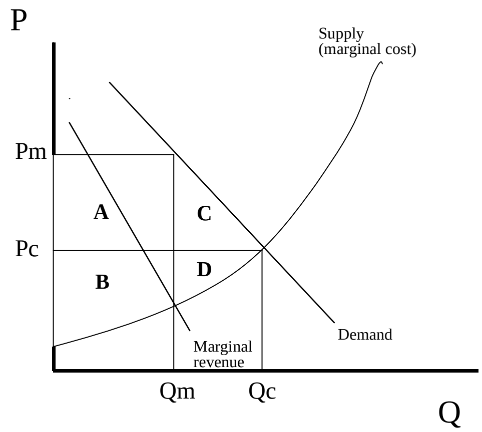

Figure 1 depicts a downward sloping demand curve, which confronts a monopolistic firm.[150] For a firm that has no market power, and thus no control over prices, in contrast, the relevant demand curve is effectively flat. The price is set where the supply and demand curves for the suppliers and the consumers as a whole meet. In Figure 1, this results in Qc and Pc. In contrast, if the firm is a monopolist, the market demand curve is downward sloping because for each additional unit sold, the price drops for all units sold of the same good. In setting an optimal price, the monopolistic firm considers not only the downward sloping demand curve, but also the marginal revenue curve that lies below the demand curve. The ideal strategy for the monopolist is to set price where marginal cost, which equals supply, equals marginal revenue, and then to set the price for that level of output along the corresponding demand curve. In Figure 1, this means that the optimal strategy is to set quantity at Qm and price at Pm.

The difficulty that confronts members of a cartel, in contrast with a single monopolistic firm, is one of coordinated decision making. Unlike the monopolistic firm, the members of the cartel 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 single firm would achieve, and then to use the reduction in outputs to command a monopolistic price. The difficulty, however, involves allocations and enforcement.

[150] For a more detailed discussion that includes an analysis of various forms of rent and of rent seeking, see Stearns, *supra* note 137, at 97-102; MAXWELL L. STEARNS, PUBLIC CHOICE AND PUBLIC LAW: READINGS AND COMMENTARY 111-17 (1997).

While farmers might agree on the desire to secure monopolistic rents,[151] 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 improves the position of a newly constituted group of manufacturers.[152]

Empty cores are endemic to policymaking because they arise whenever there is a gain, known as a superadditivity, that results from replacing atomistic decision making with coordinated behavior.[153] The empty core reflects the absence of a unique or even dominant equilibrium solution in allocating the superadditive gains.[154] One solution to the problem of bargaining in the absence of a core is government coercion, and this no doubt played a role in *Wickard.*[155]

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[151] In Figure 1, 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 137, and cite therein.

[152] John Shepard Wiley Jr. has provided the following description of the problem of the empty core:

> A core of a game is the set of solutions that leaves no coalition in a position to improve the payoffs to all of the coalition's members. A solution . . . in the core offers no possible subset of players an option to defect to a different coalition and do better on their own. If some group can improve its collective lot by playing in a different way, then that subset will reconstitute itself as a new coalition that will play the game in a different way, and, hence, distribute the game's proceeds differently. Because the new coalition will block the first round's result from emerging as the stable or permanent resolution of the game, the first round solution is said to be outside the core. If some new coalition of players can block all possible solutions of a game, no solution is within the core. Synonymously, any such game has an empty core.

John S. Wiley, Jr., *Antitrust and the Empty* Core, 54 U. CHI. L. REV. 556, 558 (1987).

[153] Empty core bargaining games can also arise in reverse, namely in replacing centralized coordination with decentralized decision making. As shown in Figure 1, 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.

[154] 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). In his article, Wiley *supra* note 152, John Shepard Wiley responds to an argument developed in George Bittlingmayer, *Decreasing Average Cost and Competition: A New Look at the Addyston Pipe* Case, 25 L.J. & ECON. 201 (1982), which relies upon core theory to explain horizontal price fixing as a potentially benign solution to enhancing collective outputs when producers confront an empty core. *See* Wiley, *supra* note 152.

Assume for now that through whatever means 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 this level of agreement, parties confront an equally daunting problem of monitoring and punishing defection. Once production quotas are set and the resulting price is raised from the competitive to the oligopolistic equilibrium level,[156] the cartel members suddenly have a strong incentive to cheat by producing above quota.[157] Assuming a mechanism for punishment or that detected cheating threatens to unravel the cartel, rational cartelists will try to cheat in a sufficiently modest amount 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.[158]

In effect, the cartel members confront a classic prisoners' dilemma. Each member requires a higher payout by cooperating, meaning that he or she accepts the assigned or agreed upon quota, thus producing a lower level of output, but selling the output at a higher price. Once the higher price is achieved as a result of the overall quota scheme, however, it becomes 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

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Wiley instead maintains that courts should ignore core theory given the lack of empirical evidence supporting Bittlingmayer's claimed implications.

More recently, Reza Dibadj argued for a "more refined interpretation" in which, rather than treating the implications of core theory as the basis for attacking antitrust, we recognize horizontal price fixing, like the theory of the firm, as one of several potential solutions to a "variety of market failure that requires a partial suppression of independence and the competitive mechanism." Reza Dibadj, *Saving Antitrust*, 75 U. COLO. L. REV. 745, 774 (2004) (maintaining that her approach is "remarkably consistent with the intuition of prominent scholars who have made similar suggestions, but have approached the problem without the benefit of core theory.") Whether or not empty core bargaining provides a positive explanation of horizontal price fixing, or a normative justification for relaxing relevant antitrust restrictions, it helps to explain *Wickard* as an acquired regulation designed to avoid the inevitable difficulties that a large and dispersed group of producers would confront in trying to use output restrictions as a means to raise prices on their own as a result of their inability to allocate the resulting superadditive gains.

[155] Thus, while the Agricultural Adjustment Act of 1938 allowed 1/3 plus one producers to veto a proffered scheme of allocations, see *Wickard*, 317 U.S. at 116 ("if more than one-third of the farmers voting in the referendum do oppose, the Secretary must, prior to the effective date of the quota, by proclamation suspend its operation"), 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 81 % to 19 %. *See Wickard*, 317 U.S. at 116.

[156] 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. 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 among 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 generally* ROBERT L. HEILBRONER & LESTER C. THOROW, UNDERSTANDING MICRO-ECONOMICS 180 (1975). *See also* William Drennan, *Changing Invention Economics by Encouraging Corporate Inventors to Sell Patents*, 58 MIAMI L. REV. 1045, 1112 (2004) ("[The] producers in an oligopoly are faced with a downward sloping demand curve and charge prices in excess of marginal cost, and generally each producer is reluctant to charge a price that is significantly different from other producers in the market.").

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

[158] Again, cheating would not necessarily eliminate all potential monopolistic rents. *See supra* note 147.

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 is rational to also 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)

For expositional purpose, Table 1 considers a prisoners' dilemma game involving two firms that together have market power.[159] 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 is important rather than the actual numbers themselves. 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 two 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.[160] Second, allowing the government to set quotas

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[159] While this game depicts two firms, the essential intuition can be generalized to any size cartel.
[160] *See* ROBERT H. BORK, THE ANTITRUST PARADOX 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 (explaining FTC policy of pursuing enforcement actions against "naked horizontal agreements such as pure price fixing, naked output

ameliorates some of the difficulties associated with agreeing on allocations by creating a coercive mechanism against those who would hold out for a superior allocation.[161] Third, and most importantly, government enforcement provides the necessary mechanism to monitor and punish cheating.[162]

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,[163] 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 scheme 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 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 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.[164]

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

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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.)

[161] For an analysis applying this to the 2/3 rule in *Wickard*, see supra note 155. Cooperative advertising programs, 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, 533 U.S. 405 (2001) (striking mushroom checkoff program on grounds that it forced contributions for the purpose of advertising, rather than some other associational benefit).

[162] 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 through purely 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.")

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

[164] 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 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 affect 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 & COM. REG. 551, 558 n.141 (1993) (describing statutory changes to Agricultural Adjustment Act of 1938 affecting power to impose quotas and tariffs).

to noncompetitive pricing),[165] and in part it is due to the deadweight losses resulting from rent seeking activity itself.[166] 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 that there is an 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,[167] one important step remains. Once we employ a central authority, Congress, or the Secretary of Agriculture acting on Congress's behalf, 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 below 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 cooperate. The problem is that signals work in more than one direction. Signaling enforcement against top producers also signals that for those who are not top producers, 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.[168]

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 2/3 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."[169] Commentators have read this

[165] 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 137, at 97-102 (discussing various forms of rent).

[166] For seminal works on rent seeking, see Gordon Tullock, *The Welfare Costs of Tariffs, Monopolies, and Theft*, 5 W. ECON. J. 224 (1967); Anne O. Krueger, *The Political Economy of the Rent-Seeking Society*, 64 AM. ECON. REV. 291, 302 (1974).

[167] This argument is based solely upon the Commerce Clause doctrine. *See infra* note 176, and cites therein (arguing that challenges to the merits of these policies should rest on other constitutional bases).

[168] 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.

[169] *Wickard*, 317 U.S. at 127-28.

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.[170] A more careful reading, however, suggests that without authority to signal enforcement of the wheat production 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.[171] Absent that ability to control collective outputs, 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 for the reasons articulated in any of the four *Raich* opinions. 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, and second, that authority had to signal that below the point determined in the agreed upon scheme, which included exemptions based upon the small scale of production,[172] the quota scheme would

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[170] *See, e.g.*, Robert J. Pushaw, Jr., *Methods of Interpreting the Commerce Clause: A Comparative Analysis*, 55 ARK. L. REV. 1185, 1211 n.92 (2003) ("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.") This reading runs directly contrary to the admonition against using a multiplier to find a commerce connection in *Carter Coal Co*., 298 U.S. 238, *see supra* note 146 (quoting relevant passage). While the holding in *Carter Coal*, striking the wage and hour provisions of the Bituminous Coal Conservation Act of 1935, was discredited, nothing in *Wickard* necessarily discredits the *Carter Coal* Court's rejection of the pure multiplier analysis as a means of linking local activity to commerce. Instead, the better reading of *Wickard* demonstrates that if a regulatory scheme can be implemented only on a national scale with signaling to a local producer, then the small incidence of that producer's activity will not exempt application of Congressional regulation under the Commerce Clause. While this analysis appears similar to that of Justice Scalia, which would condone targeted applications of large scale Commerce Clause regulation, a critical difference remains. Rather than justifying the targeted application because of the large scale regulation, the proposed rule instead demands a structural justification for both the national regulation and for the application to local activity.

[171] Recall that consumption of home grown wheat varied in an amount of 20% of average production. *See 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. 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 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.

See 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. *See supra* note 129, and cites therein.

[172] *See Wickard*, 117 U.S. at 130.

be strictly enforced. Filburn, although operating on a small scale, operated above the cut off point for 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,[173] but 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 cut off point for required enforcement—threatened to move the wheat pricing back in the direction of the previously depressed competitive levels.[174]

The cartel game is one of four games that justify central coordinated intervention under the Commerce Clause. We will now 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 the conditions of employment. Such regulations might include a prohibition against certain 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 it might include 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,[175] the purpose here is not to assess

[173] *See Raich*, 125 S. Ct. at 2227 (O'Connor, J., dissenting).
[174] While anxious readers undoubtedly appreciate the ease with which the *Raich* Court could have distinguished *Wickard*, such an analysis remains premature. 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.
[175] Some have argued that such laws violate the libertarian principle of allowing employers and workers to contract on mutually agreeable terms. *See, e.g.,* RICHARD EPSTEIN, FORBIDDEN GROUNDS 135-40 (1992) (arguing against Supreme Court decisions sustaining minimum wage laws based upon libertarian premises). Others maintain that the claimed beneficiaries of such laws, persons at the lower end of the pay scale who possess fewer marketable skills, are generally disadvantaged by laws that prohibit them from contracting their services at a wage that their marginal product can support. *See, e.g.,* George J. Stigler, *The Economics of Minimum Wage Legislation*, 26 AM. ECON. REV. 358; Finis Welch, *Minimum Wage Legislation in the United States*, 12 ECON. INQUIRY 285 (1974). For a prominent study presenting empirical evidence that questions this neo-classical model of minimum wage laws, see David Card & Alan B. Krueger, *Myth and Measurement: The New Economics of the Minimum Wage* (1995). Not surprisingly, economists have questioned the methodology and results in the Card and Krueger study. *See, e.g., Review Symposium, Myth and Measurement: The New Economics of the Minimum Wage*, 48 INDUS. & LAB. REL. REV. 497 (1994). And finally, some scholars, drawing upon public choice theory, have combined these insights to argue that many such laws were enacted not to protect an identified class of workers, women for example, *see, e.g.*, West Coast Hotel v. Parrish, 300 U.S. 379 (1937) (sustaining minimum wage law for women and overruling Adkins v. Children's Hospital, 261 U.S. 525 (1923)), but to remove them from competition in the labor force. *See* Michael J. Phillips, *The*

the normative merit of labor regulations.[176] 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 an agreed upon policy to prevent wages below a set minimum or to prevent work per day or per week beyond a specified number of hours. If those selecting the policy chose a regime of decentralized implementation, they would soon realize that the individual states, trying to adopt the scheme, once again, confront a prisoners' dilemma.[177] In the absence of regulation governing working conditions, 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 do generally not elect to impose labor restrictions on themselves that raise the cost of doing business as compared with other firms, and so the question then arises how best to facilitate the desired regulatory regime.

First consider implementation at the state level based upon the prisoners' dilemma in Table 1.[178] 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.[179] 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 labor regulation enforcement against firms in states that enforce labor regulations strictly and who are 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 the firms 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 than mutual cooperation. Otherwise, there must be some market failure that has prevented firms, absent regulation, from implementing the preferred policy

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Progressiveness of the Lochner *Court*, 75 DENV. 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.").

176 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 also* Stearns, supra note 137, at 76 (arguing that the Commerce Clause is not targeted against inefficient or rent-seeking laws, but at laws that undermine the concept of political union among states).

177 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.

178 *See supra* at 25.

179 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.

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 their competitor firms, with non-enforcement or lax enforcement against themselves, as seen in the upper right and lower left boxes depicting unilateral defection.

The need for central coordination should not be surprising. It is simply the obverse of the cartel game. While the cartel game worked toward solving a coordination problem on the supply side, in *Wickard* the supply of wheat, this game resolved a coordination problem on the demand side, here the demand for laborers. As with the cartel game, mutual cooperation can only be achieved with central coordination. And in fact, within the United States, such policies are in fact implemented at the federal level.[180]

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."[181] 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 policy as a means of improving the competitive position of their firms with respect to those in other states.[182] 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. This is an especially controversial area of Commerce Clause regulation because the various federal statutes, including most notably the Endangered Species Act,[183] have been used to prevent economic development based upon the goal of preserving the habitats of listed endangered species.[184] Commentators have

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180 *See infra* part III.B.1.
181 *Wickard*, 317 U.S. at 125.
182 Of course differences in competitive position is fine, but not when it results from the inconsistent application of a chosen regulatory policy.
183 16 U.S.C. § 1531 et seq.
184 *See* Laymont C. Hempel, *EPA in the Year 2000: Perspectives and Priorities*, 21 ENVTL. L. 1493, 1504 (1991) (observing that "Policy makers, caught in the middle, can be expected to retreat from environmental commitments that

lamented that in the name of preserving endangered birds, rodents, or fish, people have been prevented from engaging in gainful economic activity.[185] Once again, the question here is not the merits of the environmental policy. Instead, it is whether coordinated Congressional regulation is needed to effectuate that 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 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.[186] 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 as compared with mutual defection. 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 both 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), which in this case 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).

One might suspect that the payoffs in this story have somehow been rigged. It is certainly possible to imagine that the benefits of preserving the spotted owl are sufficiently small that the costs imposed upon those who would endanger their habitats as a result of their potentially thwarted economic development produce a net societal benefit in doing so. There are two responses to this claim. First, whether or not this is true, and it is impossible here to place meaningful values on the competing claims of environment preservation versus economic development,[187] 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 in some fashion, the question is which level of enforcement is required. The game theoretical model, once again, explains the need for federal enforcement.

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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.").

[185] *See, e.g.*, Rufus C. Young, Jr., *The Endangered Species Act: Impacts and Land Use*, 629 A.L.I.-A.B.A. 631 (1001) (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.")

[186] *See supra* at 25.

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

Second, in one important sense, the prisoners' dilemma numbers are rigged. But it is important to appreciate what that means. 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,[188] justify federal judicial intervention on the ground that such intervention is welfare enhancing.[189] Here, however, we are not calling upon the federal judiciary to effectuate policies associated with the Commerce Clause against contrary 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.[190] Only then can we evaluate whether the policy can be implemented in a decentralized fashion or whether, instead, it requires centralized implementation.

Many scholars would dispute the wisdom of each of the sets of policies described thus far: price fixing, labor regulations, and environmental controls. But the question as to the wisdom of these policies is separate from the question whether structural impediments reflected in the prisoners' dilemma prevent the affected firms or states from implementing them absent central coordinated intervention. The analysis in this part demonstrated that with respect to these three sets of policies, the states are in a prisoners' dilemma that justifies federal regulation on the ground that the underlying activity has a substantial economic effect on commerce respecting that policy's implementation.

D. Geographical Barriers to Interstate Coordination

The final coordination problem involving 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.[191] Interstate railroads require cooperation among states to lay tracks and to transport cars and materials, and trucks engaged in interstate shipping require agreement licensing and regulatory controls.[192] 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 as to turn states into balkanized trade zones.

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[188] *See* Stearns, *supra* note 137, at 69-118 (identifying coordination games that justify application of Dormant Commerce Clause Doctrine to strike state laws that undermine political union among states).
[189] For an exception in which a seeming disruption to commerce involving a state reciprocity law that 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 137, at 39-40 and 146-47.
[190] *See supra* note 176, and cite therein (distinguishing due process claims targeting inefficient or rent seeking laws from Dormant Commerce Clause claims targeting state laws affecting commerce).
[191] For a complementary analysis, see RICHARD A. EPSTEIN, BARGAINING WITH THE STATE 127-45 (1993) (explaining various state practices that can disrupt flow of interstate business); Dan Burk, *Federalism in Cyberspace*, 28 CONN. L. REV. 1095, 1123-26 (1996) (extending Epstein analysis to context of cyberspace).
[192] *See generally* Epstein, *supra* note 191.

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.[193] This helps to explain some of the more anomalous dormant Commerce Clause cases associated with state highway safety regulations that although falling within the traditional sphere of state police powers, nonetheless thwart a benign coordinated scheme operating among surrounding states.[194] 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.[195] 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.

In the context of the Dormant Commerce Clause, states sometimes find themselves in a multiple Nash equilibrium bargaining game.[196] This game, as illustrated in Table 2, is noticeably 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 both are markedly 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, 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)

[193] *See, e.g.,* Kassel v. Consol. Freightways Corp., 450 U.S. 662 (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 (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 (1945) (striking state law imposing more severe constraint on train length than the laws of other states).
[194] *See* Stearns, *supra* note 137, at 130-33 (explaining cases based upon multiple Nash equilibrium game).
[195] *See id.* at 133-36 (explaining default nature of Dormant Commerce Clause Doctrine).
[196] 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 137, at 90 n.266 and accompanying text. *See also* DOUGLAS G. BAIRD, ET AL., GAME THEORY AND THE LAW 22 (1994). In the prisoners' dilemma, as shown in Table 1, *see supra* at 25, 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 below, 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. *See id.*

While the prisoners' dilemma game conduces to a unique equilibrium outcome of mutual defection, this Nash equilibrium game instead produces 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.[197] If for example the two drivers tried in good faith to anticipate the other's preferred driving regime but got it wrong, then 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.[198] 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 equilibria is diminished.[199] And yet, states sometimes enact regulatory policies that thwart commonly accepted regimes that facilitate the flow of commerce.

In the driving game, this could arise if the one state chose left after the surrounding states had chosen right.[200] 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 such cases *Kassel v. Consolidated Freightways Corp.*,[201] and *Bibb v. Illinois*,[202] 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.[203] In each case, the Court struck down the challenged contrary state laws, 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

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[197] As Professors Douglas Baird, Robert Gertner, and Randal Picker have explained:

> One can point to games in which the unique Nash equilibrium may not be the combination of strategies that the players would in fact adopt. Moreover, the Nash solution concept often does not identify a unique solution to a game. When there are multiple Nash equilibria, we may not be able to identify one of these as that which the players are likely to choose. Indeed, when there are multiple Nash equilibria, there is no guarantee that the outcome of the game is going to be a Nash equilibrium. Each player, for example, might adopt a strategy that is part of a different Nash equilibrium, and the combination of strategies might not be Nash.

BAIRD, *supra* note 196, at 22.

[198] For a more detailed discussion, see Stearns, *supra* note 137, at 112-15.

[199] 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.

[200] *See* Stearns, supra note 137, at 109-112 (presenting path dependent driving game).

[201] 450 U.S. 662 (1981).

[202] 359 U.S. 520 (1959).

[203] *See* Stearns, *supra* note 137, at 130-33 (explaining cases based upon multiple Nash equilibrium game).

secure the benefits of the surrounding states' pro-commerce coordinated activity, without incurring its fair share of the cost.[204]

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. The federal courts have blunt tools in dealing with such cases, allowing them to strike or sustain the challenged law.[205] In contrast, Congress has more subtle tools at its disposal. Congress can, for example, implement a new scheme on its own or make the minority rule dominant should it find that rule superior.[206]

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.[207] 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.[208] 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,

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[204] 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. 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. 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."

Kassel, 450 U.S. at 666 n.7 (quoting Governor's Veto Message of March 16, 1972).

[205] *See* Stearns, *supra* note 137, at 133-36 (explaining judicial limitations in Dormant Commerce Clause cases).

[206] *See id.*

[207] *See, e.g.,* Heart of Atlanta Motel v. United States, 379 U.S. 241 (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 (1964) (sustaining same provisions against a Commerce Clause challenge as applied to a restaurant).

[208] For a discussion of Congressional findings describing these difficulties, see *Heart of Atlanta Motel*, 379 U.S. at 252-53.

once again explaining the benefits of central coordination in implementing the desired public accommodations regime.

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 *Lopez v. United States*.[209] In *Lopez*, the Supreme Court struck down the Gun-Free School Zones Act.[210] The statute prohibited persons from carrying or using weapons within a 1000 foot radius of a school. Certainly the policy is normatively appealing. Few would argue against banning the carrying and use of guns near schools.[211] 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 elected to target the offensive conduct without classifying gun-related crimes committed on school property as a separate offense, but rather by imposing an enhanced penalty for any crime with or without a gun committed on school premises, this would have no affect on the particular method of targeting the same conduct in State A. Indeed, if State B were simply lax and 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.

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 which to assess not only *Gonzales v. Raich*,[212] but also other commerce cases. While the review that follows is not comprehensive, the selected cases illustrate the benefits of applying the preceding game theoretical framework, and its power in explaining the Commerce Clause cases generally. The analysis also reconciles the post-New Deal expansion with the retrenchments represented in *Lopez* and *Morrison*. To be clear, I do

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[209] 514 U.S. 549 (1995).
[210] *See id.*
[211] Few but not none. See John R. Lott, Jr., *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).
[212] 126 S. Ct. 2195.

not wish to suggest that there are no hard cases arising under the Commerce Clause.[213] 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.[214]

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 and for completing the critical analysis of *Gonzales v. Raich*.[215]

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 *Raich* arises in the substantial effects category of Congress's Commerce Clause power, the game theoretical model developed in part II is designed to assess the scope of Congress's Commerce Clause power generally. As a result, it is important to consider the remaining, and less controversial, doctrinal categories based upon that model.

To assess Congress's power to regulate the channels of interstate commerce, and instrumentalities, 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,[216] the Dormant Commerce Clause cases generally involve state laws that infringe on commerce by closing access to interstate commerce directly,[217] for example by granting an exclusive license to use a channel of interstate commerce to the exclusion of potential interstate competitors,[218] or indirectly, by imposing restrictions on permissible instrumentalities of commerce that are out of keeping with the general requirements accepted in other states.[219]

[213] As demonstrated *infra* part III.B.3 and III.B.4(a), Morrison v. United States, 529 U.S. 598, and Perez v. United States, 402 U.S. 146 (1971), are potentially difficult cases under the coordination model presented in this Article.
[214] Readers familiar with Commerce Clause doctrine should have little difficulty fitting other cases into the model.
[215] 126 S. Ct. 2195.
[216] Consider, for example, Exxon Corp. v. Maryland, 437 U.S. 117 (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.
[217] 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.*, 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.*, Wilson v. Black Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245 (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).
[218] *See id.*
[219] *See, e.g.*, Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (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

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.[220] 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.

It should not be surprising, therefore, that the facts underlying *Gibbons v. Ogden*,[221] 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. Gibbons operated a competing ferry pursuant to a federal law authorizing him to operate a vessel in the "coasting trade."[222] While Gibbons's ferry, an instrumentality of commerce, operated pursuant to a federal statute, the exclusive New York license under which Ogden was operating, 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.[223] If Congress were not permitted

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(1959) (striking down Illinois requirement of curved mudflaps when 45 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 (Mar. 20, 2001) (unpublished manuscript on file with author) (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 moving therein) or of *instrumentalities* of interstate commerce—the least controversial of *Lopez*'s taxonomy of congressional Commerce Clause power.")

[220] 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) (stating "the 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 & Glen Harlan Reynolds, *Comfortably Penumbral*, 77 B.U. L. REV. 1089, 1101 (1997) (stating "the 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 137, at 8-9 n.13.

[221] *Gibbons*, 22 U.S. at 35-36.

[222] *Id.* at 211-12.

[223] Justice Johnson, who concurred separately, made the connection was 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

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 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 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 under the 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.[224] It can instead anticipate a potential conflict by electing to regulate channels or instrumentalities of commerce directly. And when the Supreme Court, for example, does strike a state law down under the Dormant Commerce Clause, Congress can supercede that ruling through ordinary legislation that either facilitates a mixed strategy equilibrium, thus permitting states to embrace different regimes,[225] or by making the rejected minority position mandatory among states.[226]

The multiple Nash equilibrium bargaining model also explains why, unlike with constitutional rulings generally, Congress can override Dormant Commerce Clause decisions through ordinary legislation.[227] 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.[228] 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.[229]

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 available alternative regime.[230] If the Supreme Court's Dormant Commerce Clause rulings were like ordinary constitutional rulings, requiring a constitutional amendment or overruling to replace, then the

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> [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.

Gibbons, 22 U.S. at 231-32 (Johnson, J., concurring).

[224] 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 (1995).

[225] For a discussion of an example in which Congress modified a Supreme Court Dormant Commerce Clause ruling, thus facilitating a potential mixed strategy equilibrium, see Stearns, *supra* note 137, at 135 n.362.

[226] *See id.* at 133-36 (discussing power of Congress to prefer rejected minority position).

[227] *See id.*

[228] *See* Stearns, *supra* note 137, at 112-15 (explaining that as more states enact similar pro-commerce strategies, marginal returns are increasing due to path dependence).

[229] *See id.*

[230] For a more detailed discussion, see id. at 133-36 (linking power of Congress to overturn Dormant Commerce Clause rulings to path dependence).

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, those in which Congress regulates local activity that exhibits a substantial effect on interstate commerce.

B. Substantial Effects Cases

This final category is most relevant to the two major precedents, *Lopez* and *Wickard*, that the *Raich* Court relied upon in sustaining 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 consider cases within the remaining paradigms justifying coordinated federal intervention.

1. Wage and Hour Regulations

The landmark New Deal legislation did not regulate channels or instrumentalities of commerce, but rather primarily 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,[231] sustained in *NLRB v. Jones & Laughlin Steel Corp.*,[232] created a comprehensive regime governing labor-management relations, including the right of employees to organize and bargain collectively. The Fair Labor Standards Act,[233] sustained in *United States v. Darby*,[234] 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.[235]

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 and Laughlin Steel*

[231] 29 U.S.C. 151 (1935).
[232] 301 U.S. 1 (1937).
[233] 29 U. S. C. § 201, et seq (1938).
[234] 312 U.S. 100 (1941). *Darby* overruled Hammer v. Dagenhart, 247 U.S. 251 (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 manufacture precedes commerce. As previously explained, rather than establishing that production is commerce, these cases reject the very temporal formalism embraced in this earlier era.
[235] *See Darby*, 312 U.S. 100. As stated in the text, the statute regulated things traveling in interstate commerce as a backdoor mechanism for regulating working conditions. As a result, the argument in the text defends Congress's power to address the underlying regulatory objective directly under the Commerce Clause.

Corp. Collective bargaining allows employees to cartelize their wages, thus setting a rate that exceeds what they would obtain under ordinary market conditions.[236] While the results of individual collective bargaining contracts will not be uniform among firms subject to the NLRA, states nonetheless 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.[237]

2. Environmental Coordination

The model in part II explained the need for central coordination in environmental conservation policies. In this part, we focus a discrete aspect of environmental coordination, namely waste disposal. This area of law is important not only because it is ubiquitous,[238] 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,*[239] the Supreme Court stuck down a New Jersey statute that banned the import of solid or liquid waste originating from out of state.[240] After determining that its negative value notwithstanding, waste was an article in commerce,[241] the Court determined that states could not discriminate against waste originating from other states in an effort to prolong the life of their landfills.[242] 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,[243] but only through commerce-neutral means.[244]

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. One might respond that imposing such a choice is

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[236] *See* Richard Posner, *Some Economics of Labor Law*, 51 U. CHI. L. REV. 988, 990 (1984) (describing unions as labor cartels); Thomas J. Campbell, *Labor Law and Economics*, 38 STAN. L. REV. 991, 1006-7 (1986) (describing unions as monopolists).
[237] 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 labor to bargain collectively. This further underscores the need for a federal regulatory solution to impose the policy in a uniform manner.
[238] *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").
[239] 437 U.S. 617 (1978).
[240] *See id.*
[241] *See id.* at 622.
[242] *See id.* at 625.
[243] *See id.* at 626.
[244] (stating "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.").

the very point of the Dormant Commerce Clause doctrine. But consider whether in this context an insistently 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.[245] 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.[246]

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*,[247] the Supreme Court struck down the take-title provisions of the Low-Level Waste Policy Amendments of 1985.[248] The complicated statutory scheme contained a series of incentives designed to motivate states to develop a coordinated solution to the looming crisis that concerned disposal of low-level radio active waste.[249] While 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 50%.[250]

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.[251] Only the third, the take-title provision, created a Commerce Clause problem.[252]

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[245] *See* Stearns, *supra* note 138, at 88.
[246] For a general discussion of the nirvana fallacy in economics, see Stearns, *supra* note 154, at 1230 n.33, and cites therein.
[247] 505 U.S. 144 (1992).
[248] *See id.* at 157.
[249] For a more detailed discussion of New York v. United States, 505 U.S. 144, see MAXWELL L. STEARNS, CONSTITUTIONAL PROCESS: A SOCIAL CHOICE ANALYSIS OF SUPREME COURT DECISION MAKING 58-63 (paperback edition 2002).
[250] *See id.* at 150.
[251] *See id.* at 151-52.
[252] The first incentive allowed states that had developed such facilities, or that joined pacts with other states containing such facilities, to discriminate against those that did not in the intake of waste by imposing surcharges and sending the proceeds to the Secretary of the Treasury, who would then send rebates to complying states. *See id.* at 152-53. The Court upheld this combined incentive on the ground 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. *See id.* at 171-72. The second incentive allowed complying states to limit access to their disposal facilities by noncomplying, nonmember states. *See id.* at 153. The Court sustained this incentive on the ground that Congress had authorized states and regional compacts to discriminate in commerce. *See id.* at 173.

Congress demanded non-complying states to either take title to their producers' waste or reimburse producers for their failure to do so.[253] The Court struck this down on the ground that Congress lacks the power to commandeer states, meaning to force states to implement Congress's chosen regulatory policy, as opposed to regulating private entities directly.[254] The purpose here is not to evaluate the merits of the Court's historical argument that the Constitution prevents Congress from commandeering state legislatures.[255] 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.[256]

3. Geographic coordination

The most recent case testing Congress's power under the Commerce Clause to further the goal of geographic coordination is *Morrison v. United States*,[257] 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 v. United States*,[258] and *Katzenbach v. McClung*,[259] comparing these cases will help to evaluate this important recent holding.

In *Heart of Atlanta Motel*,[260] the Supreme Court upheld the application of the public accommodations provisions of the Civil Rights Act of 1964[261] 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 75% of its business with out-of-state guests.[262] In the companion case, *Katzenbach v. McClung*,[263] 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,[264] 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 11 blocks from an interstate highway.[265]

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[253] *See id.* at 153-54.
[254] *See id.* at 175-77.
[255] For an argument that 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*, 25 CONST. COMM. 355 (1998).
[256] The *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 or pacted states to discriminate against waste in commerce. *See New York*, 505 U.S. at 154-55.
[257] 529 U.S. 598 (2000).
[258] 379 U.S. 241 (1964).
[259] 379 U.S. 294 (1964).
[260] 379 U.S. 241.
[261] The public accommodations provisions were set out in Title II, 78 Stat. 241, 243.
[262] *Id.* at 243.
[263] 379 U.S. 294.
[264] *Id.* at 296.
[265] *See id.*

To avoid the state action requirement under the 14th amendment, the Supreme Court rested its rulings sustaining both laws on the Commerce Clause.[266] Thus, the issue in these cases was 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 had faced as a result of discriminatory practices operating throughout the South in traveling that region of the United States.[267] 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,[268] and in *Katzenbach,* Clark focused on the wholesale vendor's purchase of interstate supplies.[269]

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 32 states had public accommodations laws similar to that at issue in the case.[270] 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 (18 states did not go along), certainly justifies central coordinated intervention.

Once we recognize the policy of ensuring free travel, including access to places of public accommodation during travel without regard to race, we 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 as a single state blocks commerce in a multiple Nash equilibrium game by enacting a law that thwarts the dominant regime in surrounding states.

In *Morrison v. United States*,[271] 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,[272] as a Commerce Clause violation.[273]

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[266] Section 1 of the 14th Amendment prevents states from denying due process or equal protection and § 5 provides Congress with the power to enforce the substantive provisions in § 1. 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 problematic. 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, 1131 (1983) ("Because of its doubts about the reach of the fourteenth amendment, Congress decided to rely substantially on the commerce clause, even though the underlying issues were essentially fourteenth amendment concerns.").

[267] *See Heart of Atlanta Motel*, 379 U.S. at 253 (describing Congressional findings concerning difficulties African Americans have confronted due to discrimination during interstate travel); *Katzenbach*, 397 U.S. at 299-300 (same).

[268] *See Heart of Atlanta Motel*, 379 U.S. at 260-61.

[269] *See Katzenbach*, 379 U.S. at 296-97.

[270] 379 U.S. at 260.

[271] 529 U.S. 598 (2000).

[272] 42 U.S.C. § 13981 (1994).

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.[274]

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 from traveling within their borders. The question instead was whether Congress could affect 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 diminution in travel and thus a reduction in business, and thus an affect on interstate commercial activity.[275] 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.[276]

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 justify 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.[277] 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.

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[273] 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 603-4. 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. *See id.* Morrison challenged this result under VPI's Sexual Assault Policy, but the second hearing produced the same result. *See id.* Brzonkala then sued both VAWA and Morrison in federal court under VAWA, claiming that the school policy violated Title IX of the Education Amendments of 1972, *see id.*, and that Morrison's attack provided a basis for relief under § 13981. 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. *See id.* After a divided panel of the United States Court of Appeals for the Fourth Circuit reversed and reinstated both claims, *see 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. *See id.* at 604-5.

[274] *See Morrison*, 529 U.S. at 619. The Court did not disturb the part of VAWA creating a federal criminal remedy against gender-motivated crime, which fell within the second of the three *Lopez* categories because it regulated persons traveling in commerce seeking to engage in specified criminal activity. *See Morrison*, 529 U.S. at 614 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)).

[275] *See Morrison*, 529 U.S. at 615.

[276] *See id.*

[277] As an informal, and certainly nonscientific, experiment, I have asked my students over the years whether they or anyone they know was affected in their decision to travel anywhere in the United States as a consequence of the decision in *Morrison* to strike the civil remedies provisions in VAWA. Without exception, the answer has been no.

4. Noncoordination cases

Before proceeding to *Raich*, we will consider one final, and also difficult case. In *Perez v. United States*,[278] the Supreme Court sustained the exercise of Commerce Clause power, 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*,[279] the Supreme Court sustained the application of Title II of the Consumer Credit Protection Act,[280] which prohibited, among other activities, "extortionate credit transactions,"[281] against a man convicted of loan sharking in connection with organized crime. The *Perez* Court sustained the application 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.[282]

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.[283] 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.[284] 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,[285] 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, the ideal

[278] 402 U.S. 146 (1971).
[279] 402 U.S. 146.
[280] 18 U.S.C.S. § 891 et seq. (1964 ed., Supp. V).
[281] *See id.*; *Raich*, 402 U.S. at 148 n.2.
[282] *See Raich*, 402 U.S. at 154 n.4 ("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).
[283] *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.").
[284] *See id.* at 158 ("The definition and prosecution of local, intrastate crime are reserved to the States under the Ninth and Tenth Amendments.").
[285] *See supra* at 25.

solution is to enjoy the benefits of the other state's cooperation 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 states are effectively forced to share information, thus generating the equivalent of mutual cooperation, even though the ultimate enforcement authority will be the federal, rather than the 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.[286] 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.

This, of course, is a statement against interest because it requires that I demonstrate the absence of such structural markers, as opposed to the inadequacy of a structural marker that has been identified, in *Raich.* Even so, is easy to rule out all four games,[287] and selecting any single game to focus on, here the game involving supply side coordination as a means of raising prices, is arbitrary in a certain sense. Still the game at issue in *Wickard* is important if for no other reason than that the *Raich* majority found the two cases strikingly similar.[288] To demonstrate that once we put down the dictionary they are 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

[286] Recall that the test to assess the proper exercise of Congress's Commerce Clause power is rational basis. *See Raich*, 125 S. Ct. 2208. 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.
[287] We can quickly rule out the remaining categories. The regulatory objective is not to improve working conditions. *See infra* 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 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 infra* part II.D.
[288] *See Raich*, 125 S. Ct. at 2207.

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.[289]

Defining these legislative goals clearly 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.[290] 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.[291] Rather, Justice Jackson suggested that 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, however, 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 wheat accounted for 20 % 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 sorts of structural impediments to decentralized implementation at issue in *Wickard*.[292] 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 the decision of one state to implement a more liberal scheme on this narrow policy in no sense prevents another state from declining to do so.

To be clear, there is undoubtedly a risk of some seepage from the protected medical marijuana market to the illicit drug market.[293] Recognizing this is important, but for a reason that might not be obvious. Recall that the original *Wickard* formulation demanded a "substantial economic effect" on commerce.[294] An effect that is not both substantial and economic will not do.[295] The

[289] *See id.* at 2203 ("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.).

[290] 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 it did, it is doubtful that there is a rational basis to support that objective.

[291] For a case in which then-Associate Justice Rehnquist employed comparable circular logic to a provision of the Railroad Retirement Act of 1974 that denied continued windfall benefits to one class of workers, while allowing them to others, see U.S. 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.").

[292] 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.

[293] 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, 125 S. Ct. at 2202 n.28 (noting that "Raich has personally participated in that market, and Monson expresses a willingness to do so in the future.").

[294] *See Wickard*, 317 U.S. at 125.

[295] See *Raich*, 125 S. Ct. at 2232 (Thomas, J., dissenting) ("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.

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, it simply denied relief—at least by lawful means—to two women seeking relief for their pain and suffering.

Conclusion

In *McCulloch v. Maryland*,[296] Chief Justice John Marshall based his decision upholding the Second Bank of the United States on the meaning of the world "necessary," in the necessary and proper clause. Marshall determined that the term did not require proof that absent Congress's selected policy, its delegated power would be nugatory. Instead, he maintained that the word embraced several less stringent meanings, including convenient, essential, or essential.[297] Of course the latter terms were not then, and are not now, synonymous, and Marshall's lengthy discourse intended to demonstrate otherwise,[298] merely underscores that point.

It is often said that dictionaries record, rather than dictate, meaning. As *McCulloch* demonstrates, Article III establishes a Supreme Court, not Supreme Dictionary. And yet, while Justice Stevens selected a conventional definition of "economics," the common usage of that term suggests a far richer and more nuanced understanding.

Of course economists do study the production, distribution, and consumption of commodities within the broader study of markets. But they also study such varied subjects as political processes and actors, charitable institutions, and even morality and ethics. And this list is far from exhaustive. While these varied economic inquiries do not focus on a common subject matter, they do share an important common intuition. Economists believe that by constructing models, or testable hypotheses, from a deliberately simplified understanding of human behavior, they can generate valuable insights—and often counter intuitions—concerning how institutional structures affect society's desire to fulfill its broad and varied objectives.

Commerce Clause doctrine is about the choice of institutional structures. When the Court holds that Congress has acted within its power under the Commerce Clause, it forecloses another set of institutions, the states, from harnessing their efforts to regulate the activity that Congress has chosen to address. Conversely, when the Supreme Court holds that Congress has exceeded its Commerce Clause power, it frees the states to tackle the policy on their own. There is no generally correct answer to which institution best suits our needs. The post-New Deal cases and the recent retrenchments reveal that this is a work in progress. In the end, the problem with *Raich* is not that it took the term "economic" too seriously; rather it is that it failed to take the deeper meaning of that term seriously enough.

. . . 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.").

[296] 17 U.S. (4 Wheat.) 316 (1819).

[297] See id. at 413 ("If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another.").

[298] *See id.*