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## Toward a Unitary Commerce Clause: What the Negative Commerce Clause Reveals About the Commerce Power

Donald L. R. Goodson

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# TOWARD A UNITARY COMMERCE CLAUSE: WHAT THE NEGATIVE COMMERCE CLAUSE REVEALS ABOUT THE COMMERCE POWER

DONALD L. R. GOODSON\*

## ABSTRACT

The Supreme Court's recent Commerce Clause cases have acknowledged that in order to give full effect to the values of federalism embedded in the Constitution and the related notion that the national government is one of limited powers, some limitation on the commerce power is needed. But without an understanding of why we have the Commerce Clause in the first place, it is difficult to articulate a limitation of the power, much less one that furthers the values of federalism. Unfortunately, the Court's own precedent in the affirmative Commerce Clause context does not provide doctrinal support for a functionalist approach given that the Court has instead relied on formalistic divides, such as the commercial/non-commercial and activity/inactivity dichotomies. In contrast, the dormant Commerce Clause, or more accurately the negative Commerce Clause, provides a clear statement of the Clause's purpose, as well as the starting point of a coherent limitation of the commerce power. The doctrine is able to provide this understanding because it has been insulated from the Court's affirmative Commerce Clause jurisprudence and remains anchored to the Commerce Clause's purpose. Stated succinctly, the Court has enforced the negative Commerce Clause to achieve the dual interests of interstate commercial harmony and economic union, both of which give doctrinal support to collective action views of federalism. At a minimum, the negative Commerce Clause shows that the Court should and can avoid formalistic categories and instead employ a functionalist inquiry that only permits Congress to regulate commerce among the several states when it furthers the ends of the Commerce Clause.

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“Perhaps even more than by interpretation of its written word, this Court has advanced the solidarity and prosperity of this Nation by the meaning it has given to these great silences of the Constitution.”—Justice Jackson<sup>1</sup>

#### I. INTRODUCTION

The Supreme Court’s modern Commerce Clause decisions, beginning with *United States v. Lopez*<sup>2</sup> and most recently *National Federation of Independent Business v. Sebelius*<sup>3</sup>, represent failed attempts to address the central conundrum facing modern Commerce Clause jurisprudence. On the one hand, the Court aspires to give meaning to the structural principles of federalism embodied in the Constitution. On the other hand, the Court lacks a coherent foothold to limit Congress’s commerce power in light of its own jurisprudence, which accorded virtually unlimited legislative power to Congress from 1937 to 1995.<sup>4</sup> While clearly attempting to resolve this difficulty, the result reached in *Lopez*, using a commercial/non-commercial dichotomy to limit Congress’s power under the Commerce Clause, is unsatisfying. It neither advances the values of federalism nor places a principled limitation of the commerce power. And although Chief Justice Rehnquist famously opened *Lopez* by noting the Court would “start with first

<sup>1</sup> *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 535 (1949).

<sup>2</sup> *United States v. Lopez*, 514 U.S. 549 (1995).

<sup>3</sup> *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

<sup>4</sup> H. Jefferson Powell, *Reflections on United States v. Lopez: Enumerated Means and Unlimited Ends*, 94 MICH. L. REV. 651, 651 (1995).

principles,”<sup>5</sup> he limited his discussion to structural principles of federalism embedded in the Constitution without tying these ideas to the purpose of the Commerce Clause. An analysis of first principles would have similarly addressed what ends the Commerce Clause serves in order to develop a principled limitation on the commerce power. Nor did Chief Justice Roberts make any attempt to tie his activity/inactivity distinction in *National Federation* to the underlying reason for having the Commerce Clause.<sup>6</sup> Justice Ginsburg attempted to draw on the Commerce Clause’s purpose to support her partial dissent in that case, but she had no doctrinal sources to support her position—at least not in affirmative Commerce Clause case law.<sup>7</sup> The premise of this Paper is that the dormant Commerce Clause, or more accurately, the negative Commerce Clause, provides a source of that very purpose as well as the starting point of a coherent limitation of the commerce power. The doctrine is able to provide this understanding because it has been insulated from the Court’s affirmative Commerce Clause jurisprudence and remains anchored to the Commerce Clause’s purpose. This insulation provides an analysis otherwise impossible under the affirmative Commerce Clause, and the Court would do well to look to the Clause’s negative inference in articulating a principled limitation of the commerce power.

The problem, of course, is not of the current Court’s making, but rather stems in part from the distortions the Commerce Clause has endured since it began doing the work of the Reconstruction Amendments. As Professor Kenji Yoshino notes, any time Congress “doubted whether it could enact legislation under section 5 [of the Fourteenth Amendment], it turned to the commerce power, as it did when enacting the Civil Rights Act of 1964.”<sup>8</sup> There was serious debate regarding the propriety of using the Commerce Clause instead of the Fourteenth Amendment at the time Congress decided to pursue Civil Rights under its commerce power.<sup>9</sup> For example, Professor Gerald Gunther cautioned the Department of Justice that in pursuing this route “the substantive content of the commerce clause would have to be drained beyond any point yet reached,” and relying on the argument that national regulation was warranted “merely because some formal crossing of an interstate boundary once took place . . . would, I think, pervert the meaning and purpose of the commerce clause.”<sup>10</sup> Rather than persuade the Court to reverse the 1883 *Civil Rights Cases*,<sup>11</sup> which held that Congress’s Section 5 enforcement powers under the Fourteenth Amendment did not reach private actors, Congress ultimately “decided to ground Title II of the Act (which prohibited discrimination in public accommodations) primarily on its power to regulate interstate commerce.”<sup>12</sup> The strategy paid off and

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<sup>5</sup> *Lopez*, 514 U.S. at 552.

<sup>6</sup> *Sebelius*, 132 S. Ct. 2566.

<sup>7</sup> *Id.* at 2609-43.

<sup>8</sup> Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 770 (2011).

<sup>9</sup> PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING 558-560 (5th ed. 2006).

<sup>10</sup> *Id.* at 559 (quoting GERALD GUNTHER, CONSTITUTIONAL LAW 203 (10th ed. 1980)).

<sup>11</sup> *United States v. Stanley*, 109 U.S. 3 (1883).

<sup>12</sup> Yoshino, *supra* note 8, at 770.

the Court upheld the Civil Rights Act of 1964 in *Katzenbach v. McClung*<sup>13</sup> and *Heart of Atlanta Motel, Inc. v. United States*<sup>14</sup> at the expense of the distortion that Professor Gunther predicted. After *Katzenbach* and *Heart of Atlanta* revealed that the Court would not question legislation passed under the Commerce Clause so long as one could rationally perceive the regulated activity as “substantially affecting” interstate commerce, Congress transformed the Clause into a means of achieving limitless federal power.<sup>15</sup> Prior to *Lopez*, both the Court and observers put faith in the political system to serve as a restraint on the commerce power.<sup>16</sup> However, by the time *Lopez* arrived it had become painfully clear that political restraint was not able to serve as a meaningful check on the Commerce Clause.

The negative Commerce Clause, in contrast, has been insulated from the distortions the affirmative Commerce Clause has endured, and it is this insulation that provides an analysis that is otherwise impossible. To be sure, the negative Commerce Clause remains controversial and there are members of the Court who routinely object when it is applied because the doctrine lacks textual support in the Constitution<sup>17</sup> or is seen to be entirely outside the judicial competence<sup>18</sup>. This Article will not take a position on the relative merits of the negative Commerce Clause or

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<sup>13</sup> *Katzenbach v. McClung*, 379 U.S. 294 (1964).

<sup>14</sup> *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964).

<sup>15</sup> See Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425, 432 (1982) (“Save for one notable exception [(*Nat’l League of Cities v. Usery*, 426 U.S. 833 (1976), *overruled by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985))], the Court has placed no obstacles in Congress’ path. To the contrary, the Court’s expansive interpretations of the power to regulate commerce among the states have prompted congressional enactments in such diverse areas as crime, civil rights, job safety, drug manufacturing, and endangered animals.” (footnotes omitted)).

<sup>16</sup> See Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954) (advancing a view that the role of the states in selecting the composition of the central government serves as a natural check on the central government’s intrusion on state power). But see Steven G. Calabresi, “*A Government of Limited and Enumerated Powers*”: In Defense of *United States v. Lopez*, 94 MICH. L. REV. 752, 811-26 (1995) (criticizing the view that because federalism values will be enforced politically based on the structure of the House and Senate, courts should preserve their institutional capital to protect individual rights).

<sup>17</sup> See, e.g., *Dep’t of Revenue of Ky. v. Davis*, 553 U.S. 328, 361 (2008) (Thomas, J., concurring) (“rather than apply a body of doctrine that ‘has no basis in the Constitution and has proved unworkable in practice,’ I would entirely ‘discard the Court’s negative Commerce Clause jurisprudence’” (quoting *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 349 (2007) (Thomas J., concurring))).

<sup>18</sup> See, e.g., *Camps Newfound/Owatonna, Inc. v. Town of Harrison* 520 U.S. 564, 619 (1997) (Thomas, J., dissenting) (“Any test that requires us to assess (1) whether a particular statute serves a ‘legitimate’ local public interest; (2) whether the effects of the statute on interstate commerce are merely ‘incidental’ or ‘clearly excessive in relation to the putative benefits’; (3) the ‘nature’ of the local interest; and (4) whether there are alternative means of furthering the local interest that have a ‘lesser impact’ on interstate commerce, and even then makes the question ‘one of degree,’ surely invites us, if not compels us, to function more as legislators than as judges.” (citing *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897-98 (1988) (Scalia, J., concurring))).

address critics of the doctrine's application.<sup>19</sup> Perhaps ironically, it is the doctrine's controversial nature that makes it such a fruitful source of analysis. Indeed, one of the reasons why the negative Commerce Clause has escaped distortion is also a primary criticism: as Professor Barry Friedman notes disapprovingly, the Court has "mov[ed] on its own" in this arena, "with little guidance from Congress."<sup>20</sup> But it is the Court's awareness that it is moving on its own and standing on shaky textual foundations that has forced it to enunciate "first principles" of the Commerce Clause to justify its actions under the negative inference. The controversial nature of the doctrine itself, then, provides the additional benefit of the Court ruminating extensively on what it is doing in this realm and why. Included in nearly every negative Commerce Clause case is an exposition of the purpose of the Clause, which the Court routinely ties directly to its decision to strike down or uphold a challenged state action. Such analysis of the Commerce Clause and the connection between means and ends are almost entirely absent from the affirmative Commerce Clause context.

In broad terms, the Court enforces the negative Commerce Clause to achieve the dual interests it attributes to the Commerce Clause of interstate commercial harmony and economic union.<sup>21</sup> The Court takes a strict line with respect to interstate commercial harmony by imposing a virtually per se rule of invalidity on discriminatory actions, but recognizes states retain the ability to regulate commerce under their police power and engages in balancing when a non-discriminatory state action nonetheless burdens interstate commerce and so undermines the benefits of economic union.<sup>22</sup> This reveals that to further the goal of interstate commercial harmony, Congress should regulate to address collective action problems, such as

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<sup>19</sup> For articles critical of the negative Commerce Clause, see Eule, *supra* note 15 (advancing a process-based view of the interests the negative Commerce Clause serves and concluding that these interests are better served under the Privileges and Immunities Clause of Article IV); Mark Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 WIS. L. REV. 125 (1979) (advancing a process-based theory of the negative Commerce Clause that is critical of the Court's contemporary doctrine). For articles in favor of the negative Commerce Clause, see Richard B. Collins, *Economic Union as a Constitutional Value*, 63 N.Y.U. L. REV. 43 (1988) (arguing that the federalist structure of government is in need of the Court's negative Commerce Clause tests, which advance the purpose of the Commerce Clause in interstate commercial harmony and economic union); Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986) [hereinafter Regan, *The Supreme Court*] (noting that although "balancing" is not needed under the negative Commerce Clause, the Court's general condemnation of protectionist measures serves a valid interest in safeguarding the union).

<sup>20</sup> Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 359 (1997).

<sup>21</sup> This precise phraseology comes from Professor Richard Collins whose work is perhaps the most comprehensive treatment of the negative Commerce Clause and is in agreement with the central argument of this paper. See Collins, *supra* note 19 (noting that while the Court frequently uses the term free trade, historical intent and the Court's own doctrine demonstrate the Court actually ascribes the dual purpose of economic union and interstate commercial harmony to the Clause); see also *Dennis v. Higgins*, 498 U.S. 439, 453 (1991) (Scalia, J., dissenting) ("The Framers intended the Commerce Clause as a way to preserve economic union and to suppress interstate rivalry.").

<sup>22</sup> Collins, *supra* note 19, at 75.

those caused by spillover effects<sup>23</sup> or races to the bottom,<sup>24</sup> that the states are singularly incompetent to address. To further economic union, Congress should address collective action problems in which a rule of uniformity is needed to avoid conflicting state requirements. At a minimum, the negative Commerce Clause teaches us that the Court can and should avoid formalistic categories such as direct/indirect or activity/inactivity. Just as the Court cannot strike down a state regulation simply because it addresses commerce, Congress should not be able to regulate an activity simply because it is commercial—or commercial *activity*—as the Court’s current doctrine allows. Rather, to give full effect to the ideals of federalism and a government of limited powers, Congress should only regulate commerce among the several states when it furthers the ends of the Commerce Clause.

Before proceeding, it is worth pointing out that this relationship between the Commerce Clause and its negative inference did not entirely escape the Court in *Lopez*. Justice Kennedy’s concurring opinion flirted with drawing on the negative Commerce Clause for doctrinal support in that he noted the Court’s “position in enforcing the dormant Commerce Clause is instructive.”<sup>25</sup> Justice Kennedy referenced the negative Commerce Clause to respond to “the prevailing skepticism that surrounds [the Court’s] ability to give meaning to the explicit text of the Commerce Clause.”<sup>26</sup> Such skepticism was unwarranted, he argued, given what he saw as “widespread acceptance of [the Court’s] authority to enforce the dormant Commerce Clause, which [it has] but inferred from the constitutional structure as a limitation on the power of the States.”<sup>27</sup> Justice Kennedy did not use the negative Commerce Clause doctrine as an anchor of the affirmative Clause’s purpose, but rather as a counter to the argument that the Court lacked institutional competence to provide a check on the power of Congress.<sup>28</sup> Nonetheless, he is correct that the “dormant Commerce Clause is instructive.”<sup>29</sup>

This Article also seeks to provide doctrinal expression for a position taken by a cogent line of scholarship that contends the purpose of the Commerce Clause lies in addressing collective action problems.<sup>30</sup> Of note, Professors Robert Cooter and Neil

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<sup>23</sup> A “spillover effect” is “when one state or group of states imposes external costs on other states, such as by generating pollution that crosses state lines.” Neil S. Siegel, *Free Riding on Benevolence: Collective Action Federalism and the Minimum Coverage Provision*, 75 LAW & CONTEMP. PROBS. 29, 46 (2012).

<sup>24</sup> A “race to the bottom” involves a situation in which “states generally share the same objective but individually have insufficient incentives to take steps to achieve it.” *Id.*

<sup>25</sup> *United States v. Lopez*, 514 U.S. 549, 579 (1995).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 579-80.

<sup>29</sup> *Id.* at 579.

<sup>30</sup> See, e.g., Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 2 (2010) (arguing the commerce power “authorizes Congress to regulate problems or activities that produce spillover effects between states or generate collective action problems that concern more than one state”); Calabresi, *supra* note 16 (arguing the federal government should be limited to addressing problems posed by positive and negative externalities of individual states); Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115, 137 (2010) (arguing Article I, Section 8 provides a general

Siegel recently put forth a holistic theory of “collective action federalism” grounded largely in structural and consequentialist arguments.<sup>31</sup> For historical support they point to the sixth of the Virginia Resolutions, which was the precursor to Article I, Section 8. The resolution articulated a general principle that gave Congress the power to legislate “in all cases for the general interests of the union” and in “which the States are separately incompetent, or in which the Harmony of the United States may be interrupted by the exercise of individual legislation.”<sup>32</sup> Textually, Professors Cooter and Siegel contend that when viewed holistically rather than as individual clauses, Article I, Section 8 provides a comprehensive theory of Congress’s enumerated powers as one of “collective action federalism.”<sup>33</sup> They correctly point to the negative Commerce Clause as supporting their view of collective action federalism, but do not use it as an independent source of analysis, as this Article aims to do. Professor Donald Regan similarly draws on the sixth of the Virginia Resolutions to advance historical and normative arguments in favor of amending the *Lopez* framework.<sup>34</sup> He argues Congress should be able to pursue the general interests of the union if the states are incapable of doing so effectively.<sup>35</sup> Despite his prolific writing in the negative Commerce Clause context, which advances related notions, Professor Regan does not reverse the analysis to provide guidance in the affirmative context.

This Article will proceed in four parts. The first Part discusses the purpose of, or ends served by, the Commerce Clause as articulated in the Court’s negative Commerce Clause cases. The second Part discusses how the Court’s negative Commerce Clause principles or tests advance the purpose it ascribes to the Commerce Clause. The third Part asks whether there is a connection between what the states cannot do under the negative Commerce Clause and what Congress can do under the affirmative Commerce Clause. This Part contends there is a direct relationship and one that the Court can draw on as doctrinal support for a limitation on the commerce power in the affirmative context. The final Part discusses whether a new standard of review may be possible in light of the foregoing analysis.

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theory of federalism that “assign[s] power to the smallest unit of government that internalizes the effects of its exercise,” meaning Congress should be limited to addressing spillover effects that cause collective action problems); Jacques LeBoeuf, *The Economics of Federalism and the Proper Scope of the Federal Commerce Power*, 31 SAN DIEGO L. REV. 555 (1994) (suggesting the economics of federalism indicate the federal government ought to be able to regulate only those areas of commerce where state regulation would be inefficient due to externalities); Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite United States v. Lopez*, 94 MICH. L. REV. 554 (1995) [hereinafter Regan, *Federal Commerce Power*] (relying on an early draft of Article I, Section 8 to argue Congress should be limited to pursuing the general interests of the union if the states are incapable of doing so or inadequately incentivized to do so effectively, and if the rationale is state incompetence, Congress should be limited to playing the role of facilitator of state choices).

<sup>31</sup> Cooter & Siegel, *supra* note 30.

<sup>32</sup> *Id.* at 123.

<sup>33</sup> *Id.* at 144-59.

<sup>34</sup> Regan, *Federal Commerce Power*, *supra* note 30.

<sup>35</sup> *Id.* at 610.

## II. PURPOSE, OR THE ENDS SERVED BY THE COMMERCE CLAUSE

In order to place a limit on a given enumerated power under the Constitution, it would seem natural to begin with some notion of the purpose served by that power. Stated differently, in order to define the permissible means that are available to accomplish an end, it is usually necessary to know what end the means are attempting to accomplish. As obvious as this may seem, the Court's affirmative Commerce Clause jurisprudence is almost entirely devoid of such discussion. In the prominent contemporary affirmative Commerce Clause cases of *United States v. Lopez*,<sup>36</sup> *United States v. Morrison*,<sup>37</sup> *Gonzales v. Raich*,<sup>38</sup> and *National Federation of Independent Business v. Sebelius*,<sup>39</sup> various majority, concurring, and dissenting opinions vigorously debate the reach of the Commerce Clause but none of these opinions, with minor exception, instills its analysis with a discussion of why we have the Commerce Clause in the first place. The most notable exception comes from Justice Ginsburg's partial dissent in *National Federation*, in which she notes, "[t]he Commerce Clause, it is widely acknowledged, 'was the Framers' response to the central problem that gave rise to the Constitution itself.'"<sup>40</sup> The central problem was that the Articles of Confederation left the regulation of commerce entirely to the states, which, "understandably focused on their own economic interests, often failed to take actions critical to the success of the Nation as a whole."<sup>41</sup> But throughout her opinion, Justice Ginsburg only cites one case to support her contention, and even that was a short concurring opinion by Justice Stevens that had no doctrinal support itself.<sup>42</sup> The other exception comes from the concurring opinion of Justice Kennedy in *Lopez*, in which he notes Congress may "regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy."<sup>43</sup> This quote is later repeated in the *Morrison* majority opinion,<sup>44</sup> but is merely dropped in as part of a string cite and is not used as an anchor of the Commerce Clause's reach. Similarly, the three critical cases from the 1930s and 1940s that ushered in Congress's virtually plenary commerce power—*NLRB v. Jones & Laughlin Steel*,<sup>45</sup> *United States v. Darby*,<sup>46</sup> and *Wickard v. Filburn*<sup>47</sup>—lack any discussion of the ends the Commerce Clause serves. And when the Court upheld

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<sup>36</sup> *United States v. Lopez*, 514 U.S. 549 (1995).

<sup>37</sup> *United States v. Morrison*, 529 U.S. 598 (2000).

<sup>38</sup> *Gonzalez v. Raich*, 545 U.S. 1 (2005).

<sup>39</sup> *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

<sup>40</sup> *Id.* at 2615 (Stevens, J., concurring) (citing U.S. Equal Emp't Opportunity Comm'n v. Wyoming, 460 U.S. 226, 244-45 n.1 (1983) (Stevens, J., concurring)).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *United States v. Lopez*, 514 U.S. 549, 574 (1995).

<sup>44</sup> *United States v. Morrison*, 529 U.S. 598, 611 (2000).

<sup>45</sup> *Nat'l Labor Relations Bd. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

<sup>46</sup> *United States v. Darby*, 312 U.S. 100 (1941).

<sup>47</sup> *Wickard v. Filburn*, 317 U.S. 111 (1942).

the Civil Rights Act of 1964, it focused entirely on whether the regulated activity was commercial rather than on whether it furthered the ends of the Commerce Clause.<sup>48</sup> Therefore, at the critical junctures of twentieth-century Commerce Clause jurisprudence, majorities of the Court failed to make any reference to the purpose of the Clause in order to delineate the reach of Congress's authority to regulate under it.<sup>49</sup> It should come as no surprise that Congress wields its commerce power indiscriminately given that the Court does not require it to act in furtherance of the Clause's purpose.

In contrast to the paucity of discussion in the affirmative context, the negative Commerce Clause doctrine is replete with analysis of the ends served by the Commerce Clause. In fact, nearly every negative Commerce Clause opinion opens with an exposition of purpose.<sup>50</sup> Moreover, this rumination is consistent throughout the twentieth century, appearing before the 1937 "switch in time,"<sup>51</sup> during the

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<sup>48</sup> See *Katzenbach v. McClung*, 379 U.S. 294 (1964) (containing no discussion of the Commerce Clause's purpose); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (same).

<sup>49</sup> Similarly, a brief review of prominent pre-1937 affirmative Commerce Clause cases reveals that they also failed to develop a theoretical understanding of the purpose of the Commerce Clause. Instead, these cases relied almost exclusively on textual arguments regarding the meaning of "commerce" or "among the several states" and in turn used formal binary distinctions, such as direct/indirect or manufacturing/commerce, to delineate the boundaries between permissible and impermissible congressional regulation of commerce. See, e.g., *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (containing no discussion of the purpose or ends served by the Commerce Clause); *Champion v. Ames (The Lottery Case)*, 188 U.S. 321 (1903) (same); *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895) (same). Of note, however, is Justice Harlan's dissent in *E.C. Knight*. Although he does not explicitly point to the purpose of the Commerce Clause, Justice Harlan implicitly recognizes the Commerce Clause should enable the federal government to address collective action problems that the states are singularly incompetent to address, such as interstate combinations in restraint of trade: "The common government of all the people is the only one that can adequately deal with a matter which directly and injuriously affects the entire commerce of the country, which concerns equally all the people of the Union, and which, it must be confessed, cannot be adequately controlled by any one state." *E.C. Knight*, 156 U.S. at 45 (Harlan, J., dissenting). Although Justice Harlan's view arguably found expression in *The Lottery Case*, this view of the federal commerce power was explicitly rejected by subsequent *Lochner*-era majority opinions. See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238, 291 (1936) ("The proposition . . . that the power of the federal government inherently extends to purposes affecting the nation as a whole with which the states severally cannot deal or cannot adequately deal . . . ha[s] never been accepted but always definitely rejected by this court."); *Hammer*, 247 U.S. at 273 ("There is no power vested in Congress to require the states to exercise their police power so as to prevent possible unfair competition.").

<sup>50</sup> See *Wyoming v. Oklahoma*, 502 U.S. 437, 470 (1992) (Scalia, J., dissenting) (noting "[v]irtually every one of our cases in this area thus begins its analysis with some form of the incantation that the very purpose of the Commerce Clause was to create an area of free trade among the several States" (citation omitted)).

<sup>51</sup> See, e.g., *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 522 (1935) ("[A] chief occasion of the commerce clause was 'the mutual jealousies and aggressions of the States, taking form in customs barriers and other economic retaliation.'" (citation omitted)); *West v. Kan. Natural Gas Co.*, 221 U.S. 229, 255 (1911) ("If one state has it, all states have it; . . . [the welfare] of each state is made the greater by a division of its resources, natural and created, with every

period of unlimited congressional authority from 1937 to 1995,<sup>52</sup> and even after *Lopez*.<sup>53</sup> While the Court never explicitly acknowledges the reason for this stark difference, one can assume that the Court feels the need to justify its actions with greater specificity under the negative Commerce Clause given the doctrine's lack of a textual foundation and its controversial application. Regardless of the reasons, when the Court invokes its power to strike down a state tax or regulation under the negative Commerce Clause, the Court does so on the grounds that it has "the responsibility . . . to determine whether action taken by state or local authorities unduly threatens the values the Commerce Clause was intended to serve."<sup>54</sup> Thus, the Court only acts when it furthers the purpose of the Commerce Clause.

As Justice Kennedy's concurring opinion in *Lopez* implies, the Court often states a narrow view of the Commerce Clause's purpose to be the creation of "an area of trade free from interference by the States."<sup>55</sup> Whether the Court misunderstands the term or is simply using a pithy phrase in an undisciplined manner, "free trade" is not the purpose of the Commerce Clause. Instead, the Court's own voluminous statements under, and actual application of, the negative Commerce Clause reveal a much more nuanced view of the Commerce Clause than simply free trade, defined as cross-border "trade left to follow its natural course."<sup>56</sup> More accurately, the purpose of the Commerce Clause is stated as a dual interest in interstate commercial harmony and economic union.<sup>57</sup>

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other state, and those of every other state with it. This was the purpose, as it is the result, of the interstate commerce clause."

<sup>52</sup> See, e.g., *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979) ("The few simple words of the Commerce Clause . . . reflected a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." (citing *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 533-34 (1949))).

<sup>53</sup> See, e.g., *Granholt v. Heald*, 544 U.S. 460 (2005) (noting the Commerce Clause "reflects a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation" (citation omitted)).

<sup>54</sup> *Wardair Can., Inc. v. Fla. Dep't of Revenue*, 477 U.S. 1, 7 (1986) (citing *S. Pac. Co. v. Arizona*, 325 U.S. 761 (1945)).

<sup>55</sup> *Bos. Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 328 (1977) (quoting *Freeman v. Hewit*, 329 U.S. 249, 252 (1946)); see also *Reeves, Inc. v. Stake*, 447 U.S. 429, 437 (1980) (noting the negative Commerce Clause prevents "state taxes and regulatory measures impeding free private trade in the national marketplace"); *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 350 (1977) (referring to "the Commerce Clause's overriding requirement of a national 'common market'"); *McLeod v. J. E. Dilworth Co.*, 322 U.S. 327, 330 (1944) (stating "[t]he very purpose of the Commerce Clause was to create an area of free trade among the several States").

<sup>56</sup> OXFORD ENGLISH DICTIONARY 168 (2d ed. 1989).

<sup>57</sup> See Collins, *supra* note 19.

*A. Articulations of Purpose Under the Negative Commerce Clause*

Beginning with the Court's own articulation of purpose, negative Commerce Clause dicta has often looked to the Founding Fathers for historical intent and developed from this a rich tradition elaborating the ends served by the Commerce Clause. In *H. P. Hood & Sons, Inc. v. Du Mond*, perhaps the most frequently cited negative Commerce Clause case, Justice Jackson's majority opinion begins its historical discussion by noting:

[t]he sole purpose for which Virginia initiated the movement which ultimately produced the Constitution was to take into consideration the trade of the United States; to examine the relative situations and trade of the said States; [and] to consider how far a uniform system in their commercial regulations may be necessary to their common interest and their permanent harmony.<sup>58</sup>

Consequently, Justice Jackson believed "[t]he [Commerce] Clause was designed in part to prevent trade barriers that had undermined efforts of the fledgling States to form a cohesive whole following their victory in the Revolution."<sup>59</sup> From this foundational observation, the Court has discerned that Congress was granted authority to regulate commerce among the several states in "the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation."<sup>60</sup> This historical analysis leads to the conclusion that the purpose of the Commerce Clause lies in "securing the maintenance of harmony and proper intercourse among the States."<sup>61</sup> Statements of this kind, connecting the purpose of the Clause to the Court's jurisprudence, appear regularly throughout twentieth-century negative Commerce Clause cases, including up to the present day. For example, the Court recently struck down a state regulation because it "risk[ed] generating the trade rivalries and animosities, the alliances and exclusivity, that the Constitution and, in particular, the Commerce Clause, were designed to avoid."<sup>62</sup>

Despite the clarity of this analysis, the Court often confuses itself and outside observers by routinely using the term "free trade" loosely when it really means something more complex.<sup>63</sup> A perfect example is *Commonwealth Edison Co. v. Montana*,<sup>64</sup> in which the Court upheld Montana's severance tax on coal mined within its borders. In a bizarre twist of words, the Court begins by saying, "[t]he premise of

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<sup>58</sup> *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 533 (1949) (internal quotation marks omitted).

<sup>59</sup> *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 807 (1976).

<sup>60</sup> *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979) (citing *H. P. Hood & Sons, Inc.*, 336 U.S. at 533-34); see also *Alexandria Scrap Corp.*, 426 U.S. at 807 n.16.

<sup>61</sup> *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 551 (1944) (internal quotation marks omitted).

<sup>62</sup> *Granholt v. Heald*, 544 U.S. 460, 473 (2005).

<sup>63</sup> For a more detailed discussion see Collins, *supra* note 19.

<sup>64</sup> *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981).

our discrimination cases is that ‘the very purpose of the Commerce Clause was to create an area of free trade among the several States. Under such a regime the borders between the States are essentially irrelevant.’”<sup>65</sup> Just a few short sentences later, though, the Court rejects Commonwealth Edison’s argument that “the Commerce Clause gives residents of one State a right of access at ‘reasonable’ prices to resources located in another State that is richly endowed with such resources, without regard to whether and on what terms residents of the resource-rich State have access to the resources.”<sup>66</sup> The Court concludes by stating it is “not convinced that the Commerce Clause, of its own force, gives the residents of one State the right to control in this fashion the terms of resource development and depletion in a sister State.”<sup>67</sup> This is true; the Commerce Clause does not convey such a right. But this last sentence is at odds with the assertion that “borders between the states are essentially irrelevant.”<sup>68</sup> If that were the case, Montana could not enact this tax for its own citizens’ benefit on a resource located within its borders. The Court went on to uphold Montana’s severance tax, but not because it was consistent with a free trade area.<sup>69</sup> Rather, the Court upheld the tax because it was evenhanded in that it applied equally to in-state and out-of-state purchasers of coal.<sup>70</sup> In this respect, it did not threaten interstate commercial harmony.

Despite the confusing wording that is often used, sorting through the Court’s statements regarding the purpose of the Commerce Clause is not difficult if it is understood that the Court is merely using shorthand for a more complicated idea. If the Court only believed the Clause intended commerce to be able to move freely across state borders without hindrance, it should not be concerned with “economic Balkanization,”<sup>71</sup> interstate “rivalries,”<sup>72</sup> “harmony and proper intercourse among the States,”<sup>73</sup> affairs that the individual states “with their limited territorial jurisdictions, are not fully capable of governing,”<sup>74</sup> and the idea that no state may retreat into “economic isolation”<sup>75</sup> because we all “sink or swim together.”<sup>76</sup> Yet these ideas appear frequently in negative Commerce Clause opinions. While addressing these concerns can contribute to the creation of a free trade area by making it easier for

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<sup>65</sup> *Id.* at 618.

<sup>66</sup> *Id.* at 619.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 618.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 610.

<sup>71</sup> *Hughes v. Oklahoma*, 441 U.S. 322, 326 (1979) (citing *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 533-34 (1949)).

<sup>72</sup> *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 522 (1935).

<sup>73</sup> *United States v. South-Eastern Underwriters Ass’n*, 322 U.S. 533, 551 (1944).

<sup>74</sup> *Id.*

<sup>75</sup> *Dep’t of Revenue of Ky. v. Davis*, 553 U.S. 328, 338 (2008) (quoting *Fulton Corp. v. Faulkner*, 516 U.S. 325, 330 (1996)).

<sup>76</sup> *Am. Trucking Ass’n v. Mich. Pub. Serv. Comm’n*, 545 U.S. 429, 433 (2005) (quoting *Baldwin*, 294 U.S. at 523).

trade to move freely across state borders, they represent a broader concern for interstate commercial harmony and economic union. The Court is able to get away with using the shorthand “free trade” because, very often, the overlap between the principles of free trade and interstate commercial harmony are such that exact terminology is not needed in order to reach the proper result. Yet even the Court has been forced to recognize explicitly that “[t]he Commerce Clause significantly limits the ability of States and localities to regulate or otherwise burden the flow of interstate commerce, but it does not elevate free trade above all other values.”<sup>77</sup>

In addition to the Court’s loose use of the phrase “free trade” when it really means something else, Professor Richard Collins notes that part of the confusion comes from the fact that merchants tend to be the ones who bring challenges to state actions and the Court often uses words borrowed from its individual rights jurisprudence, such as “discrimination” and “strict scrutiny,” in its negative Commerce Clause cases.<sup>78</sup> This leads to unfortunate cross-pollination with the Court’s personal rights jurisprudence. Distracted by this similar terminology, numerous scholars argue that the Commerce Clause protects individual rights and should be understood using process-based theories, as articulated in *United States v. Carolene Products Co.*<sup>79</sup> and refined by Professor John Hart Ely.<sup>80</sup> The *Carolene Products*, or process-based, theory explains the negative Commerce Clause as subjecting state legislation “that imposes costs on those not represented in the political process” to strict scrutiny.<sup>81</sup> Not only is this theory incapable of explaining the entirety of negative Commerce Clause case law as shown below, but it also “assumes that out-of-state interests really ought to be represented—the theory assumes it is a defect in our system that the system denies foreigners representation, as it is a defect if racial minorities or women are unrepresented or represented ineffectively.”<sup>82</sup> Professor Regan persuasively counters that “[n]onrepresentation of foreign interests follows from the simple fact that there are separate states.”<sup>83</sup> Thus, the underlying assumption of the process-based theory of the negative Commerce Clause is directly counter to our federal system. Professor Collins warned in the mid-1980s that the Court should be clearer in its terminology lest the argument be made for “retroactive judicial remedies, remedies that can be highly disruptive of state and local government.”<sup>84</sup> Unfortunately, he was proved prescient when the confusion reached its logical conclusion in *Dennis v. Higgins*, in which the Court acknowledged the ability of individuals to bring 42 U.S.C. § 1983 civil rights actions

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<sup>77</sup> *Maine v. Taylor*, 477 U.S. 131, 151 (1986).

<sup>78</sup> Collins, *supra* note 19, at 78 (“A few aberrant jurists and academics have replaced discrimination against interstate or foreign commerce with personal discrimination against nonresident merchants, a concept that if fairly applied would probably cause the Court to invalidate more state laws.”).

<sup>79</sup> *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938).

<sup>80</sup> See Eule, *supra* note 15; LeBeouf, *supra* note 30; Tushnet, *supra* note 19.

<sup>81</sup> LeBeouf, *supra* note 30, at 609-10.

<sup>82</sup> Regan, *The Supreme Court*, *supra* note 19, at 1164.

<sup>83</sup> *Id.* at 1164-65.

<sup>84</sup> Collins, *supra* note 19, at 114.

against states that violate the negative Commerce Clause.<sup>85</sup> Despite *Dennis*, individual rights and process-based theories in the Commerce Clause context are misplaced given that the Clause has long been recognized to address commercial conflicts between states.<sup>86</sup> To the extent individuals are harmed by these commercial conflicts, they are merely proxies for their aggrieved states.

*B. Applications of the Negative Commerce Clause Revealing the Clause's Purpose*

Aside from pronouncements that indicate free trade is not the end served by the Commerce Clause, the Court's application of the negative Commerce Clause itself reveals a more nuanced purpose. The application of the negative Commerce Clause also reveals that the doctrine does not concern individual rights because the principles the Court uses to govern relations among the several states would run directly counter to an effort to protect such rights. Without delving into detail regarding the actual tests the Court applies, which is reserved for Part II, a few brief examples from the Court's negative Commerce Clause jurisprudence prove that interstate commercial harmony and economic union are more accurate descriptions of the Clause's purpose than free trade. These examples are not exhaustive, but are merely instances in which, if free trade were the purpose of the Commerce Clause, the Court's application of the Commerce Clause would contravene that very purpose.

The most striking example is the principle articulated in *Prudential Insurance Co. v. Benjamin*<sup>87</sup> that Congress is permitted, by clear statement, to allow the states to regulate commerce in a way that would otherwise be impermissible under the negative Commerce Clause.<sup>88</sup> The *Benjamin* principle first appeared in the mid-1800s in the *Pennsylvania v. Wheeling & Belmont Bridge Co.*<sup>89</sup> decision, upholding Congress's ability to sanction a state action previously struck down under the negative Commerce Clause.<sup>90</sup> In the earlier *Wheeling Bridge* case, the Court held that the low-lying bridge constructed over the Ohio River was an obstruction of interstate commerce and therefore unconstitutional under the negative Commerce Clause.<sup>91</sup> Congress subsequently passed a statute specifically authorizing the construction of that bridge at that height.<sup>92</sup> When the issue was relitigated and

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<sup>85</sup> *Dennis v. Higgins*, 498 U.S. 439 (1991).

<sup>86</sup> *Collins*, *supra* note 19, at 46; *Regan*, *The Supreme Court*, *supra* note 19, at 1161-67.

<sup>87</sup> *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408 (1946).

<sup>88</sup> The logical consistency of the *Benjamin* principle is discussed in Part III, *infra* in greater detail.

<sup>89</sup> *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. 421 (1855).

<sup>90</sup> See Norman R. Williams, *Why Congress May Not "Overrule" the Dormant Commerce Clause*, 53 UCLA L. REV. 153, 155 (2005) [hereinafter Williams, *Congress May Not*] (noting "Congress has authorized states to regulate and even ban the importation of alcoholic beverages manufactured in other states or nations; to regulate insurance companies in ways that favor in-state insurers; and to limit out-of-state bank holding companies from acquiring in-state banks" (footnotes omitted)).

<sup>91</sup> *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. 518, 521 (1851).

<sup>92</sup> Act of Aug. 31, 1852, ch. 112, sec. 6, 10 Stat. 110, 112 ("And be it further enacted, That the bridges across the Ohio River at Wheeling, in the State of Virginia, and at Bridgeport, in

returned to the Court, it noted the bridge was now constitutional given Congress's power to regulate interstate commerce.<sup>93</sup> Some commentators struggle with the apparent paradox of how something could be at once constitutional and unconstitutional under the Commerce Clause.<sup>94</sup> If free trade were the purpose of the Commerce Clause, it would be unconstitutional to allow Congress, even under its affirmative Commerce Clause authority, to sanction anti-free trade policies of the states. But because the negative Commerce Clause addresses interstate commercial harmony and economic union, the *Benjamin* principle is perfectly constitutional. This is because interstate commercial harmony is advanced when Congress, in which all states are represented, collectively decides to permit state regulation of commerce that would otherwise be impermissible.

A second illustration comes from the Court's recognition of state standing to sue another state for lost tax revenue, which also runs directly counter to a free trade rationale. The first, and so far only, negative Commerce Clause case in which the Court recognized such standing<sup>95</sup> is *Wyoming v. Oklahoma*.<sup>96</sup> In that case, Wyoming brought suit after Oklahoma passed a statute requiring all "coal-fired electric utilities in the state to burn a mixture containing at least ten percent Oklahoma-mined coal," which led several utilities to reduce the amount of coal they purchased from Wyoming, a major coal exporter.<sup>97</sup> To meet the standing requirement, Wyoming claimed its injury came in the form of lost extraction tax revenue given the reduced amount of coal extracted from within its borders, and the majority ultimately struck down the Oklahoma regulation as contravening the Commerce Clause.<sup>98</sup> Justice Scalia's dissent in that opinion provides an apt explanation of why this case, and the negative Commerce Clause doctrine as a whole, does not stand for free trade principles: "Wyoming's right to collect taxes presents an entirely different category of interest, only marginally related to the national market/free trade foundation of

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the State of Ohio, abutting on Zane's Island, in said river, are hereby declared to be lawful structures in their present position and elevation, and shall be so held and taken to be, any thing in any law or laws of the United States to the contrary notwithstanding.").

<sup>93</sup> *Wheeling & Belmont Bridge Co.*, 59 U.S. at 458.

<sup>94</sup> The *Benjamin* principle is particularly difficult for academics that believe free trade is the purpose of the Clause or who advocate the equally flawed individual rights and process-oriented theories of the negative Commerce Clause. For example, because Professor Norman Williams contends that the "[d]ormant Commerce Clause is a constitutional limitation on state power that protects the ability of individuals to engage in commerce free of unduly burdensome or protectionist state regulation," he is led to the conclusion that the *Benjamin* principle is unconstitutional—"Congress may not authorize the states to violate the Constitution." Williams, *Congress May Not*, *supra* note 90, at 153, 156. If the negative Commerce Clause were anything like the Equal Protection or Due Process Clauses he would be correct, but it is not.

<sup>95</sup> There are other instances of states suing each other under the Commerce Clause, but where the injury asserted was simply discrimination. *See, e.g.*, *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923) (striking down West Virginia statute attempting to restrict use of West Virginia natural gas for in-state residents).

<sup>96</sup> *Wyoming v. Oklahoma*, 502 U.S. 437 (1992).

<sup>97</sup> *Id.* at 437.

<sup>98</sup> *Id.*

our jurisprudence . . . it is in a sense positively antagonistic to that objective, since all state taxes . . . burden interstate commerce by reducing profit.”<sup>99</sup> Justice Scalia is correct that the majority’s holding contravened free trade principles, but the majority was also right in striking down the Oklahoma regulation. If the Clause were about free trade, the Court should not have recognized any injury to bring suit given that lost tax revenue does not promote free trade, as Justice Scalia notes. The injury, though, was the threat of Oklahoma’s regulation to interstate commercial harmony. If Oklahoma’s regulation were to stand, nothing would stop Wyoming from retaliating by requiring in-state merchants to purchase ten percent of their natural gas from within the state and thereby reduce one of Oklahoma’s major exports.

A final counter-example is seen in the fact that the Court routinely permits states to tax interstate commerce. Taxing interstate commerce is one of the greatest inhibitors of free trade as such commerce would undoubtedly cross borders more readily when left to its natural course without any such burdens. Yet the Court permits such taxation under two related tests. The first is the complementary or compensatory tax test.<sup>100</sup> These taxes are facially discriminatory as they only apply to out-of-state goods that have not been subject to similar taxes applied to goods purchased or used within the state.<sup>101</sup> It is not surprising that states use complementary taxes to level the playing field with similar goods purchased in state and subject to taxes applicable to such in-state purchases. Without the complementary tax, the in-state goods would be more expensive than comparable out-of-state goods. If the states could not level the playing field in this respect, it would likely cause tensions as they would also not be able to block importation of such goods under the negative Commerce Clause. By allowing compensatory taxes, then, the Court both advances state autonomy by allowing states to tax goods of their choosing and also protects interstate commercial harmony by making sure out-of-state goods are not treated in a discriminatory manner. The second tax doctrine is the more complicated *Complete Auto Transit* four-part test in which the Court allows taxation of interstate commerce but does so in a way that avoids duplicative taxation of that commerce and “ensure[s] that each State taxes only its fair share of an interstate transaction.”<sup>102</sup> If the Court were only concerned with free trade, it would be easier to enforce a bright-line rule that states may not tax interstate commerce, permitting it to cross state boundaries without hindrance.

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<sup>99</sup> *Id.* at 470.

<sup>100</sup> *Fulton Corp. v. Faulkner*, 516 U.S. 325 (1996); *see also* *Associated Indus. of Mo. v. Lohman*, 511 U.S. 641, 647-48 (1994) (“The end result under the theory of the compensatory tax is that, [w]hen the account is made up, the stranger from afar is subject to no greater burdens . . . than the dweller within the gates. The one pays upon one activity or incident, and the other upon another, but the sum is the same when the reckoning is closed.” (quoting *Henneford v. Silas Mason Co.*, 300 U.S. 577, 584 (1937))).

<sup>101</sup> *See, e.g., Fulton Corp.*, 516 U.S. at 331 n.2 (noting “a tax on interstate commerce ‘complements’ a tax on intrastate commerce to the extent that it ‘compensates’ for the burdens imposed on intrastate commerce by imposing a similar burden on interstate commerce”).

<sup>102</sup> *Goldberg v. Sweet*, 488 U.S. 252, 261 (1989).

### C. Summary

Negative Commerce Clause discussions of purpose, as well as applications of the doctrine, reveal that the Court has a very clear understanding of the Clause's purpose as furthering a dual interest in interstate commercial harmony and economic union. While it is true that the Court often uses the term free trade to describe the Commerce Clause's purpose, its voluminous dicta throughout negative Commerce Clause cases reveal a more nuanced concern. Moreover, there are several examples of the negative Commerce Clause being applied in ways that would directly contravene a free trade purpose. And although the Court recognizes the right of individuals to sue under the Clause, it should be acknowledged that these individuals are merely proxies for their aggrieved states and are not vindicating individual rights.

## III. PRINCIPLES, OR THE MEANS BY WHICH THE COURT FURTHERS THE ENDS OF THE COMMERCE CLAUSE

### A. Laws Discriminating Against Interstate Commerce

In order to further the purpose of the Commerce Clause in interstate commercial harmony and economic union, the Court strikes down state regulations in its negative Commerce Clause jurisprudence under two broad categories: (1) laws discriminating against interstate commerce and (2) laws unreasonably burdening interstate commerce.<sup>103</sup> The first directly addresses interstate commercial harmony and the second more closely addresses economic union. The Court frequently notes that addressing the commercial rivalries that riddled the states under the Articles of Confederation was a primary motivation for calling the Constitutional Convention, and the Commerce Clause is seen as addressing this problem, hence the concern for discriminatory measures.<sup>104</sup> In order to prevent the sort of "economic Balkanization" that discriminatory policies cause, the Court applies a virtually *per se* rule of invalidity to such measures, upholding them in the rare case that the state action furthers a legitimate goal that cannot be accomplished by nondiscriminatory alternatives.<sup>105</sup> Some commentators classify this first category as concerned solely with "protectionist" measures, but it is not.<sup>106</sup> This is because protectionism is properly defined as "the theory or system of fostering or developing home industries

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<sup>103</sup> See *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 338-39 (2008) ("Under the resulting protocol for dormant Commerce Clause analysis, we ask whether a challenged law discriminates against interstate commerce. A discriminatory law is 'virtually *per se* invalid,' and will survive only if it 'advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.' Absent discrimination for the forbidden purpose, however, the law 'will be upheld unless the burden imposed on interstate commerce is clearly excessive in relation to the putative local benefits.'" (citations omitted)).

<sup>104</sup> See, e.g., *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994) ("The central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent." (citing *THE FEDERALIST* No. 22, at 143-45 (Alexander Hamilton) (Clinton Rossiter ed., 1961); 2 JAMES MADISON, *Vices of the Political System of the United States*, in *THE WRITINGS OF JAMES MADISON* 362-63 (Gaillard Hunt ed., 1901))).

<sup>105</sup> See, e.g., *Maine v. Taylor*, 477 U.S. 131 (1986).

<sup>106</sup> See Regan, *The Supreme Court*, *supra* note 19.

by protecting them from the competition of foreign productions, the importation of these being checked or discouraged by the imposition of duties or otherwise.”<sup>107</sup> It undoubtedly includes state regulations limiting the importation of goods from out-of-state that will compete with in-state interests, which the negative Commerce Clause condemns. But the Court frequently extends this “anti-discrimination” rule to instances in which a state has sought to conserve a resource for use by in-state residents, such as water<sup>108</sup> or natural gas,<sup>109</sup> or when a state has sought to isolate itself from a problem common to all, such as landfill overflow.<sup>110</sup> Anti-protectionist principles are not generally concerned with whether a nation attempts to conserve its own resources for its own citizens or attempts to isolate itself from a common problem like global warming. This is why the Court’s own use of “discrimination” is a more befitting definition of the rule, rather than protectionism. Such discrimination causes rivalries, which were the very impetus for the Constitution.<sup>111</sup>

Discriminatory action produces, and may also be symptomatic of, spillover effects caused by externalities of state behavior. In economic terms, “[e]xternalities exist whenever the private costs or benefits of an activity do not correspond to the social costs or benefits.”<sup>112</sup> Professors Cooter and Siegel “use the phrase ‘interstate externality’ to refer to a good or bad that is nonrivalrous and nonexcludable at the interstate level. Interstate externalities exist when significant benefits or costs from activities in one state spill over to another state without being priced.”<sup>113</sup> Nonrivalrous means that “one person’s enjoyment does not detract from another’s” and nonexcludable means it is infeasible or uneconomical to exclude others “from enjoying the benefits generated by the goods.”<sup>114</sup> For example, purely protectionist measures shift the costs of discriminatory regulations onto external actors in order to capture benefits for internal actors. If the state instead applied the regulation in an even-handed manner, the costs would be internalized locally and would be less likely to produce spillover effects. The natural response of states who are the victims of such discriminatory regulations is to respond with like measures, thus exacerbating

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<sup>107</sup> THE OXFORD ENGLISH DICTIONARY 679 (2d ed. 1989).

<sup>108</sup> See *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982).

<sup>109</sup> See *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923); *West v. Kan. Natural Gas Co.*, 221 U.S. 229, 255 (1911).

<sup>110</sup> See *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994); *Or. Waste Sys., Inc. v. Dep’t of Env’tl. Quality*, 511 U.S. 93 (1994); *Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep’t of Natural Res.*, 504 U.S. 353 (1992); *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978).

<sup>111</sup> See, e.g., *C & A Carbone, Inc.*, 511 U.S. at 390 (“The central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent.” (citing THE FEDERALIST No. 22, at 143-45 (Alexander Hamilton) (Clinton Rossiter ed., 1961); 2 JAMES MADISON, *Vices of the Political System of the United States*, in THE WRITINGS OF JAMES MADISON 362-63 (Gaillard Hunt ed., 1901))).

<sup>112</sup> LeBoeuf, *supra* note 30, at 567 (citing JOHN G. HEAD, PUBLIC GOODS AND PUBLIC WELFARE 190 (1974)).

<sup>113</sup> Cooter & Siegel, *supra* note 30, at 138.

<sup>114</sup> *Id.* at 135.

the harm of the spillover effects. If the states could cooperate effectively, they would likely recognize that they are all better off in the long run working out a compromise solution. Transaction costs and collective action problems, though, make it very difficult to achieve such cooperation and states will instead pursue their own self-interests leading to the least optimal outcome—a trade war. This extremely simplified discussion is treated in greater detail by far more capable scholars,<sup>115</sup> but suffices for present purposes to illustrate that the non-discrimination rule is attempting to address the most basic collective action problem—the Prisoner’s Dilemma.<sup>116</sup> By imposing a virtually per se rule of invalidity to measures that discriminate against interstate commerce, then, the Court responds to a Prisoner’s Dilemma among the states by foreclosing the option of “defection” (State acting alone) in order to leave “cooperation” as the only remaining option. The States can accomplish this cooperation by simply treating out-of-state commerce the same as in-state commerce or, if the activity is producing undesirable spillover effects or races to the bottom that require some form of collective management, the states can broker congressionally sanctioned compacts or Congress can achieve cooperation by imposing a uniform rule.

The Court’s recent decision in *Granholm v. Heald*<sup>117</sup> is a textbook illustration of the non-discrimination rule and is one that perfectly aligns with protectionism concerns as traditionally understood. *Granholm* addressed similar statutes in Michigan and New York that allowed in-state wineries to make direct sales to in-state consumers, such as over the Internet, but prohibited or made it economically unfeasible for out-of-state wineries to make similar direct sales to in-state consumers. The existence of these statutes in a handful of states led to their enactment in other states and, subsequently, to the “enactment of statutes under which some States condition the right of out-of-state wineries to make direct wine sales to in-state consumers on a reciprocal right in the shipping State.”<sup>118</sup> Justice Kennedy observed that:

California, for example, passed a reciprocity law in 1986, retreating from the State’s previous regime that allowed unfettered direct shipments from out-of-state wineries. Prior to 1986, all but three States prohibited direct shipments of wine. . . . The obvious aim of the California statute was to open the interstate direct-shipping market for the State’s wineries.<sup>119</sup>

Justice Kennedy was troubled because of the then-current state of affairs:

States banning direct shipments altogether, others doing so only for out-of-state wines, and still others requiring reciprocity—is essentially the product of an ongoing, low-level trade war. Allowing States to discriminate against out-of-state wine “invites a multiplication of

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<sup>115</sup> See *id.*; see also William N. Eskridge, Jr. & John Ferejohn, *The Elastic Commerce Clause: A Political Theory of American Federalism*, 47 VAND. L. REV. 1355 (1994); LeBoeuf, *supra* note 30.

<sup>116</sup> See also LeBoeuf, *supra* note 30, at 574-79.

<sup>117</sup> *Granholm v. Heald*, 544 U.S. 460 (2005).

<sup>118</sup> *Id.* at 473.

<sup>119</sup> *Id.* (citation omitted).

preferential trade areas destructive of the very purpose of the Commerce Clause.”<sup>120</sup>

Although the Court split five-four because of the unique issue posed by the Twenty-First Amendment, two of the dissenters acknowledged “[t]he New York and Michigan laws . . . would be patently invalid under well-settled dormant Commerce Clause principles if they regulated sales of an ordinary article of commerce rather than wine.”<sup>121</sup> Thus, had this been anything other than liquor, a seven-member majority of the Court would have struck down these discriminatory measures because they threaten interstate commercial harmony.

An example of the non-discrimination rule that does not perfectly align with protectionism as traditionally understood is seen in the numerous cases in which states have sought to conserve resources exclusively for use by in-state residents. Again, these are not classically protectionist because they do not involve states attempting to protect in-state commercial interests from out-of-state competition. Rather, they seek to hoard a resource in one state exclusively for use by in-state residents, rather than conserve such resources using even-handed measures. Although not classically protectionist, under our federalist structure these discriminatory measures produce the same threat to interstate commercial harmony. The early twentieth-century case of *West v. Kansas Natural Gas Co.*<sup>122</sup> is routinely cited for the harmful consequences that flow from these discriminatory measures.<sup>123</sup> *West* involved an Oklahoma statute that sought to prohibit interstate transportation of natural gas mined from within the state and thereby conserve the resource solely for use by Oklahoma residents. In a frequently quoted passage, the Court observed that

[i]f the states have such power, a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining states their minerals. . . . To what consequence does such power tend? If one state has it, all states have it; embargo may be retaliated by embargo, and commerce will be halted at state lines. . . . In such commerce, instead of the states, a new power appears and a new welfare, a welfare which transcends that of any state. But rather let us say it is constituted of the welfare of all of the states, and that of each state is made the greater by a division of its resources, natural and created, with every other state, and those of every other state with it. This was the purpose, as it is the result, of the interstate commerce clause of the Constitution of the United States.<sup>124</sup>

If conservation of a natural resource were the intent of the statute, the state could have legislated indiscriminately and simply capped the amount of natural gas that anyone could produce regardless of the purpose to which the gas would be put. In other words, the Court acknowledges that the states retain police power to regulate the health, safety, and general welfare of their own citizens, they just cannot do so in

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<sup>120</sup> *Id.* (quoting *Dean Milk Co. v. Madison*, 340 U.S. 349, 356 (1951)).

<sup>121</sup> *Id.* at 494 (Stevens, J., dissenting).

<sup>122</sup> *West v. Kan. Natural Gas Co.*, 221 U.S. 229 (1911).

<sup>123</sup> *See, e.g.*, *Hughes v. Oklahoma*, 441 U.S. 322, 330 (1979).

<sup>124</sup> *West*, 221 U.S. at 255.

a way that would lead to animosities with other states. As shown in Part I, if the concern were merely about free flow of commerce, the Court would not recognize the ability of states to pursue such conservation using nondiscriminatory alternatives. By forbidding discrimination, the Court prevents rivalries and hostility that will inevitably lead to retaliation while leaving room for states to pursue their own policies in an even-handed manner.

This concern for non-protectionist, but otherwise discriminatory regulations is also seen in the several landfill cases that have reached the Court in recent decades. As *Philadelphia v. New Jersey*<sup>125</sup> illustrates, the Court consistently strikes down state regulations that attempt to block the importation of waste, which can also be seen as an attempt to conserve landfill space for domestic use. The justification for doing so protects all states equally:

Today, cities in Pennsylvania and New York find it expedient or necessary to send their waste into New Jersey for disposal, and New Jersey claims the right to close its borders to such traffic. Tomorrow, cities in New Jersey may find it expedient or necessary to send their waste into Pennsylvania or New York for disposal, and those States might then claim the right to close their borders. The Commerce Clause will protect New Jersey in the future, just as it protects her neighbors now, from efforts by one State to isolate itself in the stream of interstate commerce from a problem shared by all.<sup>126</sup>

Again, if the state merely aimed to conserve the resource, perhaps in an effort to effectuate a policy preference for less landfill, it could have done so by implementing a blanket limitation on landfill use that applied evenhandedly to in-state residents as well as out-of-state residents. As noted above, this form of discrimination is perhaps more symptomatic of spillover effects. If New York and Pennsylvania were not perceived to be overwhelming New Jersey with garbage, the state would likely not have felt the pressure to pass discriminatory measures. That the states feel the need to pass such measures indicates Congress can and should step in to address this collective action problem.<sup>127</sup>

Although the Court applies strict scrutiny to discriminatory state regulations of interstate commerce, there are at least three recognized exceptions that would excuse an otherwise impermissible state regulation. The first is the general rule that a discriminatory law “will survive only if it ‘advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.’”<sup>128</sup> The

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<sup>125</sup> *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978).

<sup>126</sup> *Id.* at 629.

<sup>127</sup> Professor Williams notes Congress has considered a bill that would authorize such discriminatory measures under the *Benjamin* principle. Williams, *Congress May Not*, *supra* note 90, at 156. Although the bill has failed to pass, if Congress were to pass such a bill it could indicate that the states collectively believe the proper solution is to encourage states that produce excess waste, such as New York, to find ways to internalize their waste, which might lead to innovative recycling improvements or otherwise reduced waste production.

<sup>128</sup> *Dep’t of Revenue of Ky. v. Davis*, 553 U.S. 328, 338 (2008) (citations omitted).

reason the current doctrine uses the somewhat contradictory phrase<sup>129</sup> “virtually *per se* invalid” to describe the Court’s approach to discriminatory measures is that *Maine v. Taylor*<sup>130</sup> is the only instance in which such a discriminatory measure survived judicial challenge. *Taylor* upheld a ban on the importation of baitfish into the State of Maine on the grounds that such a ban was needed to protect native species from foreign parasites and non-native species.<sup>131</sup> The Court pointed to factual evidence that “the small size of baitfish and the large quantities in which they are shipped made inspection for commingled species ‘a physical impossibility.’ Parasite inspection posed a separate set of difficulties because the examination procedure required destruction of the fish.”<sup>132</sup> For this reason, the legitimate local purpose in ecological conservation could not be adequately served by reasonable nondiscriminatory alternatives.

The second exception applies to one of the two primary tests the Court uses to address state taxation of interstate commerce. This is the compensatory or complementary tax, which I place in the first category of cases because these laws facially discriminate against out-of-state commerce. As the Court notes, “a tax on interstate commerce ‘complements’ a tax on intrastate commerce to the extent that it ‘compensates’ for the burdens imposed on intrastate commerce by imposing a similar burden on interstate commerce.”<sup>133</sup> Such taxes are generally disfavored, unless they meet three conditions “distilled” from the *Henneford v. Silas Mason Co.*<sup>134</sup> line of cases:

First, a State must, as a threshold matter, identify the intrastate tax burden for which the State is attempting to compensate. Second, the tax on interstate commerce must be shown roughly to approximate—but not exceed—the amount of the tax on intrastate commerce. Finally, the events on which the interstate and intrastate taxes are imposed must be substantially equivalent; that is, they must be sufficiently similar in substance to serve as mutually exclusive proxies for each other.<sup>135</sup>

This test is a way of justifying a facially discriminatory tax as achieving a legitimate local purpose that cannot be achieved through non-discriminatory means.<sup>136</sup> As noted in Part I, these taxes address interstate commercial harmony in

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<sup>129</sup> Or, as Professor Regan refers to it, “mildly oxymoronic.” Regan, *The Supreme Court*, *supra* note 19, at 1134.

<sup>130</sup> *Maine v. Taylor*, 477 U.S. 131 (1986).

<sup>131</sup> *Id.* at 131.

<sup>132</sup> *Id.* at 141 (citation omitted).

<sup>133</sup> *Fulton Corp. v. Faulkner*, 516 U.S. 325, 331 n.2 (1996).

<sup>134</sup> *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937).

<sup>135</sup> *Fulton Corp.*, 300 U.S. at 332-33 (citations omitted) (internal quotation marks omitted).

<sup>136</sup> *See Or. Waste Sys., Inc. v. Dep’t of Env’tl. Quality*, 511 U.S. 93, 102 (1994) (“Though our cases sometimes discuss the concept of the compensatory tax as if it were a doctrine unto itself, it is merely a specific way of justifying a facially discriminatory tax as achieving a legitimate local purpose that cannot be achieved through nondiscriminatory means.” (citing *Chem. Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 346 n.9 (1992))).

that they merely attempt to level the playing field between in-state and out-of-state commerce. If states could not offset such taxes on in-state goods, they would be unable to block importation of such goods under the negative Commerce Clause and would instead have to forego taxing similar in-state purchases or face unfair competition with out-of-state goods. This latter option infringes upon state autonomy to choose what goods to tax and at what rate, hence why the Court does not force states to make this choice so long as the state taxes in an even-handed manner.

The third and final exception to discriminatory measures is the market participant exception, which is admittedly the hardest to explain. The key reason a state is unlikely to threaten interstate commercial harmony when it acts as a market participant is that it is spending money.<sup>137</sup> As Professor Regan explains, “[p]artly because they are less coercive, and partly because it just seems obvious that when states distribute benefits they can prefer their own citizens, discriminatory spending programs seem less hostile to other states and less inconsistent with the concept of union than discriminatory regulation or taxation.”<sup>138</sup> Moreover, Professor Regan notes that many of these spending programs benefit the nation as a whole, and if we did not allow States to exclude non-residents from receiving the benefits, they are likely to underinvest in these public goods.<sup>139</sup> In addition, the expense of spending programs makes them less likely to proliferate, and because they are less hostile to other states, they are less likely to produce the resentment and retaliation that threaten interstate commercial harmony.<sup>140</sup> However, the Court’s own inability to adequately explain its reasoning with respect to the market participant exception<sup>141</sup> and the fact that it does pose a potential threat to interstate commercial harmony indicate that a more consistent approach would be for the Court to apply *Taylor* strict scrutiny: A state may only act as a market participant and favor its own citizen when it is pursuing a legitimate objective that cannot be achieved using non-discriminatory alternatives.

#### *B. Laws Unreasonably Burdening Interstate Commerce*

With respect to the second category of cases, the Court advances the opaque principle that states may not “burden” interstate commerce. This is the more controversial application of the two, in part because the Court engages in “balancing” under this prong, which is seen as squarely outside the judicial competence. It is for this reason that Justice Scalia endorses the first half of the negative Commerce Clause, invalidating laws that discriminate against interstate commerce, but will only strike down on *stare decisis* grounds laws unreasonably burdening interstate commerce in areas the Court has previously addressed.<sup>142</sup>

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<sup>137</sup> Regan, *The Supreme Court*, *supra* note 19, at 1193-94.

<sup>138</sup> *Id.* at 1194.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 1194-95.

<sup>141</sup> See Collins, *supra* note 19, 98-105 (analyzing the incomplete and somewhat contradictory justification the Court has offered for the exception).

<sup>142</sup> See, e.g., *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring) (“I would . . . abandon the ‘balancing’ approach to these negative Commerce Clause cases . . . and leave essentially legislative judgments to the Congress. Issues already decided I would leave untouched, but would adopt for the future an

Balancing is also controversial because it is not always clear what the Court is doing. Professor Regan contends that, at least in movement-of-goods cases, the Court should not, and actually is not, balancing but rather is employing only the anti-protectionism principle.<sup>143</sup> In taxation and transportation cases, though, he concedes the Court may be pursuing a national interest other than anti-protectionism, such as economic union.<sup>144</sup> In these cases the Court may consider, to a degree, whether the benefits of the state's rule outweigh the benefits of a uniform rule. Professor Collins contends that what the Court is doing here is simply "limit[ing] multiple and conflict burdens on commerce in transit and external transactions [by] allocat[ing] jurisdiction to the states with the strongest interest."<sup>145</sup> Regardless of how one characterizes what the Court is doing in these "balancing" cases, it seems clear that it is attempting to advance an interest in economic union, either by making sure that interstate commerce is not taxed more heavily than intrastate commerce, or by ensuring that state interests do not inhibit interstate commerce by imposing unreasonable and conflicting burdens.

Although the second category of cases is often put under the heading of *Pike* balancing in reference to the Court's decision in *Pike v. Bruce Church, Inc.*,<sup>146</sup> *Pike* balancing is one of two forms of balancing the Court performs in this arena. *Pike* balancing applies to regulations of interstate commerce,<sup>147</sup> while taxation of interstate commerce is addressed under the *Complete Auto Transit* test.<sup>148</sup> The principles the Court advances under both approaches do not directly address harmony, although it may be a happy byproduct, because there is rarely a concern that one state will retaliate against another in light of such regulation or taxation measures. Instead, the second category addresses multiple or conflict burdens that stymie the benefits of economic union. If economic union were all we cared about the Court would simply strike down every state regulation of commerce. Instead, "[t]he law has had to respect a cross-purpose as well, for the Framers' distrust of economic Balkanization was limited by their federalism favoring a degree of local autonomy."<sup>149</sup> In this respect, there is an inherent tension in the second category of cases that is not as evident in the first category of discrimination cases. With few exceptions, it is easy to say states may not engage in discriminatory measures because they are rarely ever legitimate; yet, state regulations that burden interstate commerce often address legitimate state objectives and the Court has long recognized that state regulation of commerce and congressional regulation of

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analysis more appropriate to our role and our abilities. This does no damage to the interests protected by the doctrine of *stare decisis*.").

<sup>143</sup> Regan, *The Supreme Court*, *supra* note 19.

<sup>144</sup> *Id.* at 1182.

<sup>145</sup> Collins, *supra* note 19, at 86.

<sup>146</sup> *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

<sup>147</sup> *Id.* at 142.

<sup>148</sup> *Goldberg v. Sweet*, 488 U.S. 252 (1989).

<sup>149</sup> *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 338 (2008) (comparing THE FEDERALIST Nos. 7, 11 (Alexander Hamilton), No. 42 (James Madison), with THE FEDERALIST No. 51 (James Madison)).

commerce are not mutually exclusive. When the Court “allocates jurisdiction” to the state with the greatest interest, to use Professor Collins’s terminology,<sup>150</sup> it simultaneously furthers state autonomy by allowing reasonable regulation of interstate commerce, but also promotes economic union by avoiding duplicative or conflicting burdens on interstate commerce. Congress furthers the purpose of economic union in this context when it regulates in an area in need of a uniform rule or standard; i.e., in an area in which interstate commerce is facing conflicting regulations imposed by different states. Arguably, this situation also represents a Prisoner’s Dilemma, with the Court foreclosing the option of states acting alone where such action produces less utility than a uniform rule or standard. Where the utility of such a uniform rule or standard is less than individual state regulation, the Court will not strike it down. The problem, of course, is that weighing interests in this way is an inherent policy decision and one less amenable to bright line rules such as no discriminating against trade coming from sister states.

The clearest example of the Court striking down a conflicting regulation comes from *Southern Pacific Co. v. Arizona*.<sup>151</sup> In that case, an Arizona statute made it unlawful to operate a railroad train of more than fourteen passenger or seventy freight cars within the state.<sup>152</sup> The Court pointed to

findings show[ing] that the operation of long trains, that is trains of more than fourteen passenger and more than seventy freight cars, is standard practice over the main lines of the railroads of the United States, and that, if the length of trains is to be regulated at all, national uniformity in the regulation adopted, such as only Congress can prescribe, is practically indispensable to the operation of an efficient and economical national railway system.<sup>153</sup>

In its defense, Arizona advanced a local interest in safety, arguing that shorter train car lengths lead to fewer accidents.<sup>154</sup> The Court was skeptical of any safety benefit and held that even if it were shown that shorter car lengths are safer, the increased safety accruing to residents of Arizona was not enough to offset the incredible cost caused by conflicting train length requirements.<sup>155</sup> Because neighboring states had different requirements than Arizona, trains had to stop well before they reached the border and re-arrange their train cars to meet the requirements, which was deemed too great a burden.<sup>156</sup> In contrast, the Court has upheld different and conflicting requirements for train operating crews, even though they impose a burden on interstate commerce.<sup>157</sup> In doing so, the Court

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<sup>150</sup> Collins, *supra* note 19, at 86.

<sup>151</sup> *S. Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761 (1945).

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 771.

<sup>154</sup> *See id.* at 782.

<sup>155</sup> *Id.* at 779.

<sup>156</sup> *Id.* at 775-76.

<sup>157</sup> *See Bhd. of Locomotive Firemen & Enginemen v. Chi., Rock Island & Pac. R.R. Co.*, 393 U.S. 129 (1968) (upholding state law regulating composition of train crew).

acknowledged a legitimate safety rationale and noted that the requirement, while imposing a financial burden on the railroads, was not an unreasonable burden on interstate commerce.<sup>158</sup>

With respect to taxation, the Court applies the *Complete Auto Transit* test to state taxation of interstate commerce. Stated succinctly, the Court will uphold state taxation of interstate commerce “when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State.”<sup>159</sup> The Court later elaborated in *Goldberg v. Sweet* that “the central purpose behind the apportionment requirement is to ensure that each State taxes only its fair share of an interstate transaction,” and to “determine whether a tax is fairly apportioned [the Court] examin[es] whether it is internally and externally consistent.”<sup>160</sup> The internal and external consistency tests are just another way of stating the *Complete Auto Transit* requirements, but they reveal more clearly the reasoning behind this allocation. “To be internally consistent, a tax must be structured so that if every State were to impose an identical tax, no multiple taxation would result.”<sup>161</sup> To be externally consistent, the state can only tax “that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed.”<sup>162</sup> In other words, the test ensures that states are able to collect reasonable taxes on interstate commerce that makes use of benefits provided by the state; i.e., interstate commerce is made to “pay its way.”<sup>163</sup> But the test does so in a way that does not overly burden interstate commerce and put it at a disadvantage to purely intrastate commerce. In this respect, the Court simultaneously furthers state autonomy while also advancing economic union.

### C. Extraterritorial Regulation

In yet an additional arena of “burden” cases, which is sometimes classified as protectionism, the Court prevents states from regulating outside their territorial boundaries. For example, in *Brown-Forman Distillers Corp. v. New York State Liquor Authority*,<sup>164</sup> the Court struck down New York’s “affirmation law,” which required distillers to affirm that they would not sell liquor in any other state at a lower price than the price at which they had sold to New York wholesalers in the prior month. The Court unconvincingly attempted to analyze the law under negative Commerce Clause tests by contorting it into protectionism: “Economic protectionism is not limited to attempts to convey advantages on local merchants; it may include attempts to give local consumers an advantage over consumers in other States.”<sup>165</sup> But requiring New York consumers to receive the same price as

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<sup>158</sup> *Id.* at 139-40.

<sup>159</sup> *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

<sup>160</sup> *Goldberg v. Sweet*, 488 U.S. 252, 260-61 (1989).

<sup>161</sup> *Id.* at 261.

<sup>162</sup> *Id.* at 262.

<sup>163</sup> *Or. Waste Sys., Inc. v. Dep’t of Env’tl. Quality*, 511 U.S. 93, 102 (1994) (quoting *Complete Auto Transit*, 430 U.S. at 281).

<sup>164</sup> *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573 (1986).

<sup>165</sup> *Id.* at 580 (citing *New Eng. Power Co. v. New Hampshire*, 455 U.S. 331, 338 (1982)).

consumers in other states does not accord them an advantage, so it is not clear how this is protectionist. The Court then went on to revive, in a way, the long-abandoned distinction between direct versus indirect regulations of commerce by noting that “[f]orcing a merchant to seek regulatory approval in one State before undertaking a transaction in another directly regulates interstate commerce.”<sup>166</sup> This is perplexing as the Court routinely permits “direct” regulation of interstate commerce in nearly every negative Commerce Clause case in which the court upholds the contested state regulation, so long as it is not discriminatory and does not place an undue burden on interstate commerce. I contend that these few cases, although they seem to raise negative Commerce Clause concerns, do not actually run afoul of the Commerce Clause itself. Rather, what the Court means by “direct” is that a state is legislating on a nationwide scale, which only Congress can do. Professor Regan also observes that the Court’s attempt to squeeze these cases into the negative Commerce Clause does not make sense because “the extraterritoriality principle is not to be localized in any single clause” but is instead derived from structural principles in the Constitution as a whole.<sup>167</sup> Therefore, these few cases<sup>168</sup> will not be discussed at length in this paper as they have very little to do with the negative Commerce Clause despite the fact that the Court is addressing forbidden extraterritorial legislation under this doctrine.<sup>169</sup>

#### D. Summary

The above analysis of negative Commerce Clause tests and rules is admittedly superficial and does not do justice to the complexity of the doctrine. Nor does it address the various outliers or controversial hard cases in which the Court may have produced dubious results. Instead, this discussion aims to outline the broad contours of the Court’s negative Commerce Clause rules to show how they advance the purpose of the Commerce Clause in interstate commercial harmony and economic union. To the extent that the Court has reached more questionable results, a more disciplined adherence to the Clause’s dual interest in interstate commercial harmony and economic union would help clarify the negative Commerce Clause as well, such as requiring the market participant exception to adhere to *Taylor* strict scrutiny analysis. Few disagree with the first broad category of cases addressing discriminatory state regulations, which clearly advance interstate commercial harmony. The second category of cases involving burden balancing is inevitably more controversial because of the inherent tension the Court is trying to address

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<sup>166</sup> *Id.* at 582.

<sup>167</sup> Donald H. Regan, *Siamese Essays: (I) CTS Corp. v. Dynamics Corp. of America and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 MICH. L. REV. 1865, 1887 (1987).

<sup>168</sup> See also *Healy v. Beer Inst., Inc.*, 491 U.S. 324 (1989) (invalidating state statute requiring out-of-state shippers of beer to affirm their posted prices for products sold to Connecticut wholesalers are no higher than the prices at which those products are sold in bordering states); *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69 (1987) (upholding Indiana statute determining the voting rights of shares of Indiana corporations); *Edgar v. MITE Corp.*, 457 U.S. 624 (1982) (invalidating Illinois statute regulating the terms of interstate tender offers).

<sup>169</sup> Professor Collins analyzes these cases under his allocational principle, but given that no state can legislate beyond its borders, the Court itself cannot allocate the right to do so. See Collins, *supra* note 19, at 94-98.

between state autonomy and economic union, which bright line rules cannot easily resolve. Nonetheless, the Court is clearly trying to further the purpose of the Commerce Clause in economic union under this branch of the doctrine. Moreover, unlike the “substantially affects” test under the affirmative Commerce Clause, these two broad categories of principles are directly tied to an understanding of the Commerce Clause’s purpose.

#### IV. THE RELATIONSHIP BETWEEN WHAT THE STATES *CANNOT* DO AND WHAT CONGRESS *CAN* DO

By this point in the paper, readers may conclude that it is all well and good that the Court furthers economic union and interstate commercial harmony under the negative Commerce Clause, but there is no direct relationship between what the states cannot do and what Congress can do. Indeed, it appears to be an accepted fact in the scholarly literature that the two doctrines are and should be completely divorced from one another.<sup>170</sup> Congress, after all, is given an affirmative grant of power in the Constitution that says nothing about what the states cannot do. This would be true if our negative Commerce Clause jurisprudence were itself based on a separate textual foundation in the Constitution, but it is not. Rather, the negative inference itself implies that there is and should be a relationship between the two doctrines. Admittedly, under existing jurisprudence, it is not clear how the Court’s pronouncements in the negative Commerce clause context relate to its affirmative Commerce Clause jurisprudence. I argue that the general principles of the negative Commerce Clause reveal a great deal about the limitations that should be placed on the affirmative commerce power. Specifically, the negative Commerce Clause instructs us that a key problem with modern affirmative Commerce Clause doctrine is that it has become overly formalistic and obsessed with a single word, “commerce,” at the expense of a more functionalist understanding driven by the purpose of the Commerce Clause.

##### A. The Cooley Principle

One point on which both critics and opponents of the negative Commerce Clause can agree is that the affirmative grant of power to Congress to regulate commerce among the several states did not completely divest the states from also regulating commerce, even commerce that is interstate. This point is central to the negative Commerce Clause, but it also reveals a critical flaw in the Court’s affirmative Commerce Clause doctrine. To elaborate, Chief Justice Marshall first suggested there was “great force” to the idea that Article I, Section 8, Clause 3 excluded state regulation of interstate commerce in *Gibbons v. Ogden*,<sup>171</sup> but it was not until *Cooley*

<sup>170</sup> See Barry Cushman, *Formalism and Realism in Commerce Clause Jurisprudence*, 67 U. CHI. L. REV. 1089 (2000) (arguing the Court’s affirmative Commerce Clause jurisprudence during the Gilded Age was the flip side of the Court’s negative Commerce Clause but was decoupled in the 1930s); Norman R. Williams, *The Commerce Clause and the Myth of Dual Federalism*, 54 UCLA L. REV. 1847 (2007) [hereinafter Williams, *Dual Federalism*] (arguing the two doctrines are, and should be, completely divorced from one another because of divergent theoretical concerns underlying them).

<sup>171</sup> *Gibbons v. Ogden*, 22 U.S. 1, 209 (1824); see also Norman R. Williams, *Gibbons*, 79 N.Y.U. L. REV. 1398, 1398 (2004) (“*Cooley* refined a pre-existing understanding of the Commerce Clause that Chief Justice John Marshall first articulated over twenty-five years earlier in the seminal case *Gibbons v. Ogden*.”).

*v. Board of Wardens*<sup>172</sup> that the Court directly addressed “whether the grant of the commercial power to Congress, did *per se* deprive the states of all power to regulate [commerce].”<sup>173</sup> *Cooley* answered in the negative, and since then the case has stood for the proposition that the realms of what Congress can regulate and what the states can regulate are not mutually exclusive.<sup>174</sup> This proposition lies at the heart of the negative Commerce Clause, since it explains why the Court does not strike down all state regulations of interstate commerce. While *Cooley* is routinely cited merely for the limited idea that states remain free to regulate Commerce in the absence of congressional legislation, the Court’s approach to this question also illuminates the limitation on Congress’s affirmative power to regulate commerce. To illustrate this point it is necessary to quote the Court at length:

If [the States] are excluded it must be because the *nature of the power*, thus granted to Congress, requires that a similar authority should not exist in the states. . . . But when the nature of a power like this is spoken of, when it is said that the nature of the power requires that it should be exercised exclusively by Congress, it must be intended to refer to the subjects of that power, and to say they are of such a nature as to require exclusive legislation by Congress. Now the power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities of navigation.

*Either absolutely to affirm, or deny that the nature of this power requires exclusive legislation by Congress, is to lose sight of the nature of the subjects of this power, and to assert concerning all of them, what is really applicable but to a part.* Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress.<sup>175</sup>

The import of these words is clear—the nature of the power granted to Congress to regulate commerce among the several states is not co-extensive with the subjects of that power, i.e., commerce. Instead, states remain free to regulate commerce, even interstate commerce, when regulating does not conflict with the purpose of the Commerce Clause, which the *Cooley* Court narrowly defined as areas that “admit only of one uniform system, or plan of regulation.”<sup>176</sup> A fundamental flaw in the Court’s current Commerce Clause jurisprudence is that it looks exclusively to the meaning of commerce to delineate the bounds of permissible congressional

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<sup>172</sup> *Cooley v. Bd. of Wardens*, 53 U.S. 299 (1851).

<sup>173</sup> *Id.* at 318.

<sup>174</sup> *See id.* at 320.

<sup>175</sup> *Id.* at 318-19 (emphasis added).

<sup>176</sup> *Id.* at 319.

legislation, a distinction the negative Commerce Clause doctrine long ago recognized as “los[ing] sight of the nature of the subjects of this power, and to assert concerning all of them, what is really applicable but to a part.”<sup>177</sup> Herein lies a key problem for the Court. For if it is beyond debate that the states retain power to regulate commerce so long as they do not contravene the purpose of the Commerce Clause, then it is untenable to say, as the Court’s current doctrine does, that Congress may regulate any activity that is commercial in nature and thereby preempt the states from so regulating. The flaw is the Court’s focus on the subjects of the power, rather than the nature of the power. In contrast, the negative Commerce Clause focuses on the nature of the power, or the purpose the Clause serves in furthering interstate commercial harmony and economic union.

### B. *The Benjamin Principle*

A second observation addresses the relative distribution of power and, more specifically, whether there is a one-to-one inverse relationship between the power of the states and Congress. This is brought to light in one of the few areas in which the doctrines directly overlap, or what I refer to as the *Benjamin* principle. The Court is usually able to escape the contradictions posed by its parallel doctrines because it is not forced to explain the two bodies of law in the same breath when it addresses state regulations and congressional regulations separately. This avoidance is not possible in cases arising under the *Benjamin* principle, which requires the Court to confront the relationship between the Commerce Clause and its negative inference. As discussed in Part I, the principle dates from *Pennsylvania v. Wheeling & Belmont Bridge Co.*,<sup>178</sup> but is now identified with *Prudential Insurance Co. v. Benjamin*.<sup>179</sup> *Benjamin* stands for the proposition that Congress may, by clear statement, bless state action under its affirmative commerce power that would otherwise be impermissible under the negative Commerce Clause.<sup>180</sup> This principle works in tandem with the more straightforward rule that Congress may also affirmatively ban what the states have blessed. The *Benjamin* principle often perplexes both the Court and observers, particularly those who advocate highly formalistic views of the affirmative Commerce Clause and those who advocate individual rights views of the negative Commerce Clause. For, “if the commerce clause ‘by its own force’ forbids discriminatory state taxation, or other measures, how is it that Congress by expressly consenting can give that action validity?”<sup>181</sup> The Court’s answer to this question in *Benjamin* itself confuses more than it clarifies, in part because it makes the same mistake as in *Lopez* by focusing on *what* may be regulated rather than on *why* it may be regulated. The Court states that the limitation on Congress

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<sup>177</sup> *Id.*

<sup>178</sup> *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. 421 (1855).

<sup>179</sup> *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408 (1946).

<sup>180</sup> Or, as the Court puts it, these are the cases “involving situations where the silence of Congress or the dormancy of its power has been taken judicially, on one view or another of its constitutional effects, as forbidding state action, only to have congress later disclaim the prohibition or undertake to nullify it.” *Id.* at 423-24 (footnotes omitted).

<sup>181</sup> *Id.* at 426.

is entirely distinct from the implied prohibition of the commerce clause. . . . The one limitation bounds the power of Congress. The other confines only the power of the states. And the two areas are not co-extensive. . . . [T]o blur them, and thereby equate the implied prohibition with the affirmative endowment is altogether fallacious. There is no such equivalence.<sup>182</sup>

Furthermore, “[i]ts plenary scope enables Congress not only to promote but also to prohibit interstate commerce, as it has done frequently and for a great variety of reasons.”<sup>183</sup> This is an additional point that confuses some, for if the Commerce Clause restricts the states from *prohibiting* or, more accurately *inhibiting*, interstate commerce, how is it that Congress can be allowed to promote or prohibit interstate commerce at its leisure? The problem with the Court’s answer is that it implies, as Prudential rightly noted in *Benjamin*, that Congress can sanction this otherwise impermissible behavior because it is “the power of Congress to make conclusive its own mandate concerning what is commerce.”<sup>184</sup> This answer also casts greater doubt on the legitimacy of striking down state actions under the negative Commerce Clause. If the justification for doing so lies in the purpose of the Commerce Clause, surely Congress must also be constrained by the purpose of the Commerce Clause. Otherwise, state autonomy is squeezed from both the Court’s rulings and Congress’s legislation.<sup>185</sup> In the end, the Court’s answer to the logical paradox in *Benjamin* is really no answer as it hangs its hat on the mere assertion that there is no equivalence between the two doctrines.

The Court was unable to fully answer the question in *Benjamin* because the affirmative jurisprudence concerns itself only with formalistic categories and the negative jurisprudence concerns itself with functionalist inquiries. Without aligning the two doctrines under functionalist inquiries, the Court cannot adequately explain why *Benjamin* is permissible. If one thinks in functionalist terms, the *Benjamin* principle makes perfect sense and supports, rather than undermines, the Court’s negative Commerce Clause cases. Instead of responding that Congress may regulate commerce and that is the end of the matter, the Court could have been more explicit in explaining *why* it would be the case that Congress would sanction state regulation of insurance when it was within its power to regulate insurance itself. It may be that Congress believes it is preferable for the states to regulate an activity because of path dependency. State regulation of insurance, the activity in question in *Benjamin*, provides a possible example.<sup>186</sup> By the time Congress began to consider the issue of regulating insurance the states had already built up a regulatory structure to govern

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<sup>182</sup> *Id.* at 423.

<sup>183</sup> *Id.* at 434.

<sup>184</sup> *Id.* at 425.

<sup>185</sup> This ratcheting effect against state autonomy may be the reason why advocates of states’ rights are so hostile to the negative Commerce Clause.

<sup>186</sup> The relevant statute is commonly referred to as the McCarran-Ferguson Act, 15 U.S.C.A. § 1011 (West 2013) (“Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.”).

the area.<sup>187</sup> This was partly due to the Court itself because of an earlier ruling that had found regulation of insurance not to involve commerce.<sup>188</sup> Arguably, it would be less costly to continue on that path than completely obliterate all that the states had built and start from scratch, even if it would be more efficient to have a uniform national rule.<sup>189</sup> This is a plausible explanation of why Congress may wish to permit individual state regulation rather than legislate nationally, but it still does not explain why it is constitutionally permissible for Congress to do so. Some scholars contend that the rationale put forward by the Court is that coordinated action of the states and Congress is what makes this permissible.<sup>190</sup> But it is not permissible to violate the Constitution so long as the states and Congress do it together, which is exactly why Professor Norman Williams believes the principle is unconstitutional.<sup>191</sup> If this were the actual justification, then scholars would be right to criticize the *Benjamin* principle. This is not the justification, however.

For a more complete and internally consistent answer, one must turn to a crucial component of the *Benjamin* principle: The requirement of a clear statement from Congress to bless otherwise impermissible state regulation.<sup>192</sup> As the Court explained in *South-Central Timber Development, Inc. v. Wunnicke*, requiring a clear statement ensures that “when Congress acts, all segments of the country are represented, and there is significantly less danger that one State will be in a position to exploit others. Furthermore, if a State is in such a position, the decision to allow it is a collective one.”<sup>193</sup> In other words, a clear statement assures the Court that Congress is furthering the purpose of the Commerce Clause in interstate commercial harmony and economic union. The Court explicitly recognizes that

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<sup>187</sup> See, e.g., Alan M. Anderson, *Insurance and Anti-Trust Law: The McCarran-Ferguson Act and Beyond*, 25 WM. & MARY L. REV. 81, 83 (1983) (discussing the history of the insurance industry in the United States and noting “[e]ach state regulated the insurance industry to some degree” by the time Congress first began considering federal regulation in the 1940s).

<sup>188</sup> See *Paul v. Virginia*, 75 U.S. 168 (1868) (holding an insurance policy is not an article of commerce), *overruled by* *United States v. South-Eastern Underwriters Ass’n*, 322 U.S. 533 (1944); see also Williams, *Dual Federalism*, *supra* note 170, at 1867 (“the Court held that the issuance of insurance contracts did not constitute commerce because there was no exchange of goods or commodities”).

<sup>189</sup> For a discussion of the history of the McCarran-Ferguson Act, see Anderson, *supra* note 187.

<sup>190</sup> See Williams, *Congress May Not*, *supra* note 90.

<sup>191</sup> *Id.*

<sup>192</sup> See *Hillside Dairy Inc. v. Lyons*, 539 U.S. 59, 66 (2003) (“Congress certainly has the power to authorize state regulations that burden or discriminate against interstate commerce, but we will not assume that it has done so unless such an intent is clearly expressed.” (citation omitted)); *Maine v. Taylor*, 477 U.S. 131, 139 (1986) (“[T]his Court has exempted state statutes from the implied limitations of the Clause only when the congressional direction to do so has been ‘unmistakably clear.’” (citation omitted)); *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 91 (1984) (“[O]ne way of meeting the requirement that for a state regulation to be removed from the reach of the dormant Commerce Clause, congressional intent must be unmistakably clear.”).

<sup>193</sup> *Wunnicke*, 467 U.S. at 92.

[t]he requirement that Congress affirmatively contemplate otherwise invalid state legislation is mandated by the policies underlying dormant Commerce Clause doctrine. It is not . . . merely a wooden formalism. The Commerce Clause was designed “to avoid the tendencies toward economic Balkanization that had plagued relations among the colonies and later among the States under the Articles of Confederation.”<sup>194</sup>

Whether Congress chooses to legislate a uniform rule or allow the states to regulate individually is a policy decision that it is free to make, but it is nonetheless a collective decision. The requirement of a clear statement squares the circle and explains fully the paradox of the *Benjamin* principle. It is not explained by the fact, as the *Benjamin* Court argued, that the limitation on Congress “is entirely distinct from the implied prohibition of the commerce clause.”<sup>195</sup> Instead, when the Court strikes down a state regulation that burdens or discriminates against interstate commerce it advances interstate commercial harmony and economic union. And when it allows Congress to sanction such burdens or discrimination but only by clear statement, ensuring a collective decision was made, it similarly furthers interstate commercial harmony and economic union.<sup>196</sup> Thus, the *Benjamin* paradox can be explained by aligning functionalist inquiries rather than by relying on the formalistic categories of the affirmative Commerce Clause.<sup>197</sup>

### C. The Meaning of “Commerce”

As the above analysis illustrates, the seeming paradoxes created by the negative Commerce Clause as well as the unlimited power of Congress can be traced in large part to the reliance on formalism in the affirmative context. This then leads to the question of whether a “unitary” Commerce Clause doctrine is possible. On this point it is first worth noting that the Court routinely ties itself in knots by asserting that “commerce” means the same thing in both contexts. The Court’s reasoning in *Benjamin* certainly implied that what it means by “commerce” in the affirmative and negative contexts is not the same, and the Court’s grant of unlimited authority to Congress often leads outside observers to conclude the affirmative context is

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<sup>194</sup> *Id.* at 91-92 (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979)).

<sup>195</sup> *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 423 (1946).

<sup>196</sup> See also LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 6-2, at 1041 (3d ed. 2000) (“It is important to understand that . . . Congress does not transmute the constitutional valence of the state law at issue from negative to positive, in apparent violation of *Marbury v. Madison*. No such constitutional alchemy need be posited. Rather, the congressional enactment into which the state law fits should be understood to *transform the state law itself*—changing not what its words say, of course, but what it *means* and how it *operates* once it has been transplanted from a context in which its very existence threatens to provoke retaliation by other states and to fragment the Union, to a context in which its threatening sting has been removed by the congressionally established grid into which it fits. In essence, the entry of Congress onto the legal landscape serves to tame, in a sense to domesticate, a state law that, before Congress entered the picture, represented a paradigmatic instance of what the Commerce Clause was designed to prevent.”).

<sup>197</sup> This is also further proof that the negative Commerce Clause does not concern individual rights, which the Court is applying through process-based theories. If it were, the *Benjamin* principle would be blatantly unconstitutional.

considerably more expansive.<sup>198</sup> Yet, the Court went out of its way in *City of Philadelphia v. New Jersey*<sup>199</sup> to correct this apparent misconception. *Philadelphia* concerned a case on appeal from the New Jersey Supreme Court, which interpreted the Court's negative and affirmative Commerce Clause jurisprudence as providing two definitions of commerce: "When relied on 'to support some exertion of federal control or regulation,' the Commerce Clause permits a very sweeping concept of commerce. But when relied on 'to strike down or restrict state legislation,' that Clause and the term 'commerce' have a 'much more confined reach.'"<sup>200</sup> The Court rejected this "two-tiered definition of commerce" as a misreading of prior case law.<sup>201</sup> Rather, "[j]ust as Congress has power to regulate the interstate movement of these wastes, States are not free from constitutional scrutiny when they restrict that movement."<sup>202</sup> Thus, the Court advanced the belief that the terms are trans-substantive between the two doctrines, indicating it is not comfortable with the view that the two doctrines are completely divorced from one another. The only way to bring them into alignment is by relying on functionalism in both contexts. The contrary option, relying on formalism, will abolish state autonomy and confer unlimited power on Congress or return us to the unstable binaries of the late nineteenth century.

On at least one occasion, a majority of the Court has provided a glimpse of what a unified functionalist approach to the Commerce Clause could look like. In *Sporhase v. Nebraska*,<sup>203</sup> the Court confronted a Nebraska statute that required any person who withdrew ground water from any well in the state with intent to transport it for use in adjoining states to first obtain a permit from the Nebraska Department of Water Resources. The permit issued only if the Department found such withdrawal was reasonable, not contrary to conservation of ground water or otherwise detrimental to public welfare, and, critically, only if the state in which the water was to be used also granted reciprocal rights to withdraw water and transport it for use in Nebraska.<sup>204</sup> The majority struck down the statute on the grounds that the reciprocity requirement imposed an unconstitutional discrimination against interstate commerce.<sup>205</sup> The case is noteworthy for its unique approach to the analysis. A quirk in prior case law cast doubt on whether water was in fact an article of commerce, requiring the Court to address an issue that is normally taken for granted.<sup>206</sup> In this

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<sup>198</sup> *Benjamin*, 328 U.S. 408.

<sup>199</sup> *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978).

<sup>200</sup> *Id.* at 621 (citations omitted).

<sup>201</sup> *Id.* at 622.

<sup>202</sup> *Id.* at 622-23. This rejection of a two-tiered definition of commerce was reiterated post-*Lopez*. See *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 574 (1997) ("The definition of 'commerce' is the same when relied on to strike down or restrict state legislation as when relied on to support some exertion of federal control or regulation." (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 326 (1979))).

<sup>203</sup> *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982).

<sup>204</sup> *Id.* at 944.

<sup>205</sup> *Id.* at 960.

<sup>206</sup> *Id.* at 953.

respect, the case provides a rare instance in which the Court had to decide simultaneously and *de novo* whether Congress could legislate under its affirmative power and whether the states were forbidden from regulating under the Clause's negative inference.<sup>207</sup> The Court first addressed the obstacle of precedent, which had relied heavily on differences in property law among the states, some of which allowed an owner of land to freely sell "all of the percolating water he could capture from the wells on his land," whereas in others, like Nebraska, "the surface owner has no comparable interest in ground water."<sup>208</sup> The Court ultimately found that "[i]t would be anomalous if federal power to regulate economic transactions in natural resources depended on the characterization of" the ownership interest that can vary state-to-state.<sup>209</sup>

Second, and more interesting for present purposes, was the Court's assertion of why water was an article of commerce and thus susceptible of Congressional regulation. Nebraska's claim was that it was beyond the reach of the Commerce Clause because "water, unlike other natural resources, is essential for human survival"<sup>210</sup> and therefore exclusively within its police powers. The Court conceded that Nebraska and

the *amici curiae* that are vitally interested in conserving and preserving scarce water resources in the arid Western States have convincingly demonstrated the desirability of state and local management of ground water. But the States' interests clearly have an interstate dimension. Although water is indeed essential for human survival, studies indicate that over 80% of our water supplies is used for agricultural purposes. The agricultural markets supplied by irrigated farms are worldwide. They provide the archtypical [sic] example of commerce among the several States for which the Framers of our Constitution intended to authorize federal regulation. The multistate character of the Ogallala aquifer—underlying appellants' tracts of land in Colorado and Nebraska, as well as parts of Texas, New Mexico, Oklahoma, and Kansas—confirms the view that there is a significant federal interest in conservation as well as in fair allocation of this diminishing resource.

The Western States' interests, and their asserted superior competence, in conserving and preserving scarce water resources are not irrelevant in the Commerce Clause inquiry. . . . [T]hese factors inform the determination whether the burdens on commerce imposed by state ground water regulation are reasonable or unreasonable. But appellee's claim that Nebraska ground water is not an article of commerce goes too far: it would not only exempt Nebraska ground water regulation from burden-on-commerce analysis, it would also curtail the affirmative power of Congress to implement its own policies concerning such regulation. If

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<sup>207</sup> The third issue in the case, "whether Congress has granted the States permission to engage in ground water regulation that otherwise would be impermissible," directly implicates the *Benjamin* principle. *Id.* at 943.

<sup>208</sup> *Id.* at 949-50.

<sup>209</sup> *Id.* at 952.

<sup>210</sup> *Id.*

Congress chooses to legislate in this area under its commerce power, its regulation need not be more limited in Nebraska than in Texas and States with similar property laws. Ground water overdraft is a national problem and Congress has the power to deal with it on that scale.<sup>211</sup>

In other words, the Ogallala aquifer is not located only in Nebraska, nor is water shortage limited to that state's borders. Ground water overdraft of this shared aquifer creates spillover effects that states are responding to with discriminatory regulations. It is a collective problem, susceptible and desirous of collective solutions. Thus, ground water use falls within the power of Congress to regulate commerce among the several states. For these same reasons, state action that seeks to isolate the state from a common problem could lead to interstate rivalries and is therefore subject to being struck down under the negative Commerce Clause. In this respect, *Sporhase* illustrates a direct relationship between the two doctrines and its affirmative Commerce Clause analysis is precisely the type of analysis the Court should be doing post-*Lopez*.

Aside from the reciprocity requirement, Nebraska's regulation of the water resource was perfectly permissible because "a State that imposes severe withdrawal and use restrictions on its own citizens is not discriminating against interstate commerce when it seeks to prevent the uncontrolled transfer of water out of the State."<sup>212</sup> The problem arose with the reciprocity requirement, which was not "narrowly tailored to the conservation and preservation rationale."<sup>213</sup> Nebraska made a final attempt to argue that Congress exhibited deference to state water law as evidenced by thirty-seven statutes and interstate compacts,<sup>214</sup> and so the regulation should be upheld under the *Benjamin* principle. The Court rejected this argument, as there was insufficient evidence that "Congress' intent and policy to sustain state legislation from attack under the Commerce Clause was expressly stated."<sup>215</sup>

In a somewhat ironic dissent, Justice Rehnquist joined by Justice O'Connor vehemently criticized the *Sporhase* majority for "gratuitously" reaching the application of both the negative and affirmative Commerce Clauses.<sup>216</sup> To Justice Rehnquist, "[t]hat these two questions are quite distinct leaves no room for doubt."<sup>217</sup> Rather,

the authority of Congress under the power to regulate interstate commerce may reach a good deal further than the mere negative impact of the Commerce Clause in the absence of any action by Congress. Upon a showing that ground-water overdraft has a substantial economic effect on interstate commerce, for example, Congress arguably could regulate ground-water overdraft, even if ground water is not an 'article of

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<sup>211</sup> *Id.* at 952-54 (footnotes and citations omitted).

<sup>212</sup> *Id.* at 955-56.

<sup>213</sup> *Id.* at 957-58.

<sup>214</sup> *Id.* at 958.

<sup>215</sup> *Id.* at 960 (internal quotation marks and citations omitted).

<sup>216</sup> *Id.* at 961 (Rehnquist, J., dissenting).

<sup>217</sup> *Id.*

commerce' itself. It is therefore wholly unnecessary to decide whether Congress could regulate ground-water overdraft in order to decide this case.<sup>218</sup>

Justice Rehnquist went on to argue that the Nebraska statute should be upheld because water was not an "article of commerce" under state water law and was therefore beyond the reach of the negative Commerce Clause.<sup>219</sup> Although Justice Rehnquist was clearly attempting to advance his states' rights values, his dissent is ironic because his view of the affirmative commerce power is broad enough to displace the state regulation he was attempting to protect should Congress choose to do so. The majority would permit regulation of ground water overdraft because of collective action problems, thereby furthering the purpose of the Commerce Clause. The dissent would permit it if it substantially affected interstate commerce, which is not tied to any purpose related to the Commerce clause and is ultimately more damaging to state autonomy.

#### *D. A Unitary Commerce Clause?*

The *Sporhase* dissent is characteristic of a general view among some members of the Court and outside observers that is critical of a unitary Commerce Clause. Part of the hostility towards advocating a "unitary" Commerce Clause comes from a misunderstanding of what that might mean. Critics believe that advocating a unitary Commerce Clause means the same thing as advocating the now debunked dual federalism notion, which views state and congressional regulation of commerce as mutually exclusive and seeks to establish clear lines between what is intrastate or interstate commerce.<sup>220</sup> This view of dual federalism is undesirable because it relies solely on delineating formalistic categories. But this does not mean that the negative and affirmative Commerce Clauses cannot be unified under a functionalist inquiry driven by the Commerce Clause's purpose. As Professors Cooter and Siegel note, "the main reason for separating powers is the relative advantages of the federal and state governments. Formal distinctions that are unrelated to relative advantages will fail to advance the general welfare when applied to federalism problems."<sup>221</sup> Thus, the Court can be true to its word when it says commerce means the same thing in both contexts, but it can only be internally consistent if it applies a functionalist approach. Certainly Congress's power will still be far more expansive, but that is because it has the power to regulate on a nationwide scale and Article I, Section 8's Necessary and Proper Clause will permit greater latitude to Congress in fulfilling the purpose of the Commerce Clause. That being the case, there is still no fundamental reason why the negative and affirmative Commerce Clauses both cannot be animated by functionalist inquiries that seek to further the ends of the Commerce Clause.

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<sup>218</sup> *Id.* at 961-962 (citation omitted).

<sup>219</sup> *Id.* at 963.

<sup>220</sup> See Williams, *Dual Federalism*, *supra* note 170, at 1850.

<sup>221</sup> Cooter & Siegel, *supra* note 30, 135; see also Balkin, *supra* note 30, at 22 (noting that while the contemporary Commerce Clause doctrine is often praised as being pragmatic and realistic, it is actually formalistic); Cushman, *supra* note 170, at 1149 (noting "the relentless pursuit of the logic of realism ha[s], in dialectical fashion, pointed the Court toward a new kind of formalism" in the affirmative Commerce Clause).

## V. A NEW STANDARD OF REVIEW?

In light of the foregoing analysis, the question then becomes how to translate the principles derived from the Court's negative Commerce Clause doctrine into its affirmative Commerce Clause jurisprudence. As a threshold matter, in order for the Court to fulfill the promise of a government of limited powers, the Court must abandon formalistic categories in favor of functionalist inquiries. This argument is hardly novel as other scholars have advanced functionalist approaches for a number of years,<sup>222</sup> but the negative Commerce Clause analysis here simply provides greater theoretical support and a doctrinal foundation for these views. This functionalist approach contends the Court's affirmative Commerce Clause jurisprudence, like its negative Commerce Clause jurisprudence, should be driven by consideration of whether Congressional action in this realm advances the purpose of the Commerce Clause. The purpose of the Commerce Clause, as the Court makes clear in the negative Commerce Clause context, is interstate commercial harmony and economic union.

The greatest threats to interstate commercial harmony are externalities or spillover effects of state behavior, and the greatest impediments to economic union are instances in which a uniform rule is needed or desired but is difficult to achieve because of coordination problems, which may be caused by races to the bottom or conflicting state regulations of national commerce. Congress, then, should only regulate to address externalities of activities within states or solve collective action problems that the states are singularly incompetent to address. Where the states face no such spillover effects or collective action problems, the Commerce Clause does not grant Congress any authority to act.

This view of what Congress should regulate directly maps onto views of collective action federalism. For example, Professors Cooter and Siegel argue that power should be assigned "to the smallest unit of government that internalizes the effects of its exercise."<sup>223</sup> The relevant question for congressional legislation, then, is "whether there is a spillover of welfare and whether the spillover causes a collective action problem. The issue is not whether a crime [or other regulated activity] is 'economic' in nature."<sup>224</sup> Professor Jack Balkin similarly argues that "federal problems are those that single states cannot unilaterally solve by themselves, because activity in one state has spillover effects in other states, or because a problem that affects multiple states creates collective action problems, so that some states may be

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<sup>222</sup> See Ann Althouse, *Enforcing Federalism After United States v. Lopez*, 38 ARIZ. L. REV. 793, 817-22 (1996) (advocating Congressional regulation of harms at the national level and harms achieved by means of crossing state lines); Balkin, *supra* note 30 (arguing the structural purpose of Congress's enumerated powers authorizes it to regulate problems or activities that produce spillover effects between states or generate collective action problems that concern more than one state); Calabresi, *supra* note 16 (arguing the Court should look to whether an "intrastate activity generates appreciable externalities"); Regan, *The Supreme Court*, *supra* note 19, at 555 (arguing the Court's affirmative Commerce Clause framework should be animated by the question, "[i]s there some reason the federal government must be able to do this, some reason why we cannot leave the matter to the states?").

<sup>223</sup> Cooter & Siegel, *supra* note 30, at 137.

<sup>224</sup> *Id.* at 163.

unable or unwilling to act effectively in ways that promote the general welfare unless other states do so as well.”<sup>225</sup>

Moreover, the benefits of this framework for the Commerce Clause are clear. By restricting congressional power to address collective action problems, we start with a presumption that the states can regulate all commercial activity and Congress may displace the states and regulate such activity only when it furthers the ends of the Commerce Clause. This approach responds to those, such as Professor Friedman, who lament the fact that constitutional law currently “lacks a coherent vision of when national authority or state authority should be exercised.”<sup>226</sup> In fact, the functional theory advocated here encapsulates the four instances in which Professor Friedman argues it is appropriate to exercise national power: providing public goods, addressing externalities, preventing races to the bottom, and creating uniformity.<sup>227</sup> Because this doctrine begins with a default presumption in favor of the states and only allows Congress to displace the states when it furthers the ends of the Commerce Clause, it does more to protect state autonomy than the current framework. This will allow the states to experiment and enunciate local values, while similarly capturing the benefits provided by a centralized government.

*A. Application of Negative Commerce Clause Principles to Existing Case Law*

Applying the insights from the negative Commerce Clause to the prominent modern Commerce Clause cases of *Lopez*, *Morrison*, and *Raich* results in the same outcome as that reached by the Court, indicating that a functionalist inquiry is unlikely to greatly upset settled expectations. Beginning with *Lopez*, regulating possession of guns on school campuses does not produce externalities that the states are incompetent or poorly incentivized to address on their own. This is because “the absence of regulation of guns near schools in one state would not undercut the effectiveness of regulations prohibiting them in other states.”<sup>228</sup> In fact, the states internalize directly the costs of guns in schools,<sup>229</sup> and are also in a better position to formulate effective solutions that take into account local values and circumstances. In the terminology of Professors Cooter and Siegel, they are the smallest unit of government that internalizes the effects of its exercise.<sup>230</sup> This explanation does not require an attempt to distinguish the truly local from the truly national as the *Lopez* majority attempted to do. Nor does it rely on an attempt to delineate activity that “substantially affects interstate commerce,” which is vulnerable to the attack that anything substantially affects interstate commerce if extrapolated at a high enough level. Instead, congressional regulation of guns in schools is not needed to secure the maintenance of harmony and proper intercourse among the states because one state’s decision in this realm will have very little effect on another.

Similarly, the problem posed by gender-based violence in *Morrison* does not create spillover effects that are likely to undermine the policies of neighboring states,

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<sup>225</sup> Balkin, *supra* note 30, at 13.

<sup>226</sup> Friedman, *supra* note 20, at 324.

<sup>227</sup> *Id.* at 319.

<sup>228</sup> Siegel, *supra* note 23, at 49.

<sup>229</sup> Cooter & Siegel, *supra* note 30, at 163-64.

<sup>230</sup> *Id.* at 137.

nor does the issue lend itself to a “race to the bottom” in which the states would like to but are unable to address the issue because of cross-cutting pressures favoring no intervention. If one state decides to establish a private right of action for victims of gender-based violence, another state that has chosen not to establish such a private right will not have its policy undermined by its neighbor. Nor will it be the case that a state would want to establish such a right, but “race to the bottom” forces would prevent it from effectuating this policy preference. Like guns in schools, gender-based violence produces costs that are internalized within the state. Moreover, a similar analysis would be called for regardless of whether the activity were traditionally a matter of family law, which was an additional justification offered in *Morrison* as to why this was beyond the reach of the Commerce Clause.<sup>231</sup> Whether the regulation in question is traditionally a matter of family law or some other traditional state domain is irrelevant to the determination of whether it poses collective action problems requiring congressional solutions.

In contrast, the regulation of marijuana at issue in *Raich* does create spillover effects that undermine the policy preferences of neighboring states, largely because marijuana is a fungible commodity. A state that prohibits marijuana use within its borders will find that policy undermined by a neighboring state’s decision to legalize marijuana; efforts to eradicate the drug within the state’s borders will be less effective when the drug can easily flow back in from a neighboring state. The scenario in *Raich*, though, reveals that the nature of a collective action problem is in the eye of the beholder. The state that has chosen to legalize marijuana will be thwarted simply because its sister states have taken the opposite view and are going to be able to impose their policy preferences on the legalizing state. This is a natural consequence of our federal system, and one that is addressed by the fact that all the states are represented in Congress. Similar to the reasoning in *Wunnicke* behind the clear statement rule under the *Benjamin* principle, the fact that the states collectively chose to address one collective action problem as opposed to another is a policy determination left to the Congress in which all states are represented. As long as Congress is addressing a collective action problem in some form, the fact that not all states will be able to effectuate their own policy preferences is part of the price of membership in the union. Thus, a collective action problem need not have consensus support. Other scholars have analyzed how collective action views of federalism would apply to environmental<sup>232</sup> and labor regulation,<sup>233</sup> as well as civil rights,<sup>234</sup> and have similarly noted that a collective action approach is unlikely to upset settled expectations in these other areas.

One final example directly anticipates the argument that we need a plenary commerce power to address the complexity of modern society. The discussion of *Benjamin* noted that there may be reasons, such as path dependency, why Congress may prefer to allow states to regulate an activity such as the market for interstate insurance. This example also reveals how an activity could evolve over time from

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<sup>231</sup> United States v. Morrison, 529 U.S. 598, 615-16 (2000).

<sup>232</sup> See Balkin, *supra* note 30, at 35-36; Regan, *Federal Commerce Power supra* note 30, at 581-82.

<sup>233</sup> See Balkin, *supra* note 30, at 32-34; Regan, *Federal Commerce Power supra* note 30, at 579-81.

<sup>234</sup> See Balkin, *supra* note 30, at 36-39; Calabresi, *supra* note 16, at 815-17.

being beyond the reach of Congress to requiring congressional legislation. Two hundred years ago, state regulation of insurance companies likely imposed tolerable externalities on neighboring states given the size of insurance companies and the limited interconnectedness of insurance and financial markets.<sup>235</sup> It may have been inappropriate for Congress to regulate insurance companies at that time.<sup>236</sup> However, the financial collapse of 2008 revealed that states were no longer capable of adequately regulating interstate insurance companies. This lax oversight of global insurance companies was brought into stark relief with the collapse of AIG. Although Congress previously authorized this state of affairs, the enormous spillover effects caused by state regulation of the insurance industry makes it a prime candidate for collective action and thus congressional legislation. Individual states lack the resources and, potentially, the incentive to police global insurance companies and the subsequent lack of regulation imposes externalities on all states in the country when these insurance companies engage in risky financial transactions that expose the whole country to economic turmoil. Perhaps recognizing this, Congress has already moved in the direction of greater oversight to address this collective action problem with the creation of the Federal Insurance Office as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act.<sup>237</sup>

#### B. Articulating a Standard of Review

Admittedly, putting the collective action insights from the negative Commerce Clause into a concise standard of review is easier said than done. As *Sporhase* and Justice Ginsburg's partial dissent in *National Federation* indicate, the Court is clearly competent to analyze and recognize collective action problems in need of Congressional solution, but whether it can do so without incurring the same criticism it encountered under its *Lochner*-era decisions is unclear. For example, such assessment of facts and weighing of interests is likely to incur criticism that the Court is acting outside its judicial competence and directly undermining our democratic institutions by acting as a super legislature. Yet the Court is already doing something similar to this under *Lopez* by asking whether the regulated activity "substantially affects" interstate commerce, which in turn requires asking whether the activity is economic in nature or has a sufficiently close link to interstate commerce. If the Court is going to engage in such policy review it should at least apply a more principled justification for what it is doing. One solution may be to require a clear statement from Congress, similar to that required by the *Benjamin* principle, indicating that it considered the issue and decided to displace the states because of a collective action problem. Professors Cooter and Siegel advance a standard of "reasonable basis review" that would ask "whether Congress had a reasonable basis to believe that it was ameliorating a significant problem of collection action involving two or more states."<sup>238</sup> The Court would then uphold the

<sup>235</sup> Though note that Anderson, *supra* note 187, at 83-89, offers a more cynical view as to the reasoning behind the decision to invoke the *Benjamin* principle on the part of Congress.

<sup>236</sup> Admittedly, this was not the rationale put forward by the Court in *Paul v. Virginia*, 75 U.S. 168 (1868), *overruled by* *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944) (denying Congress the power to regulate interstate sales of insurance contracts).

<sup>237</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of 12 U.S.C.).

<sup>238</sup> Cooter & Siegel, *supra* note 30, at 181.

law if “reasonable people could disagree (1) about the existence of a collective action problem, (2) about the seriousness of the problem, and (3) about the efficacy of the congressional response.”<sup>239</sup> Additionally, they would require Congress to provide a basis for its judgment to which courts would defer if plausible. Professors Cooter and Siegel believe this approach, while not perfect, may strike the appropriate balance by “cu[ing]’ the political branches to take seriously those federalism questions that are worth taking seriously, but it would not license federal courts to engage in *Lochner*-style invalidations of many federal laws and overrulings of precedent.”<sup>240</sup> As far as suggested standards of review go, I am not sure we can do much better than this.

### C. Application to the Affordable Care Act

Justice Ginsburg arguably applied just this standard of review to the Patient Protection and Affordable Care Act (ACA)<sup>241</sup> in her partial dissent in *National Federation*. Early in her opinion, Justice Ginsburg declares, “States cannot resolve the problems of the uninsured on their own.”<sup>242</sup> Although she did not cite it for this point, the very opinion that overruled *Paul v. Virginia*’s holding that “the business of insurance is not commerce” provides support for the proposition that the regulation of insurance as a general matter poses collective action problems for the states: “The power granted Congress . . . is the power to legislate concerning transactions which, reaching across state boundaries, affect the people of more states than one; to govern affairs which the individual states, with their limited territorial jurisdictions, are not fully capable of governing.”<sup>243</sup> That case, *South-Eastern Underwriters Association*, concerned the application of the Sherman Act’s prohibition on restraints of trade.<sup>244</sup> Given the interstate character and size of the insurance companies at issue, individual states were not fully capable of addressing the noncompetitive practices alleged, such as the fixing of noncompetitive premium rates for certain kinds of insurance.<sup>245</sup> Although no one is necessarily alleging anti-trust violations in the present provision of healthcare in America, the market forces underlying the interstate medical insurance system—involving patients, doctors, hospitals, insurance providers, and pharmaceutical companies—are similar in that the individual states are singularly incompetent to extend maximum coverage to their respective populations at rates that will not be prohibitively expensive.<sup>246</sup>

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<sup>239</sup> *Id.*

<sup>240</sup> *Id.* (footnote omitted).

<sup>241</sup> Patient Protection and Affordable Care Act (ACA), Pub. L. No. 111-148, 124 Stat. 119 (2010), amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (codified as amended primarily in scattered sections of 42 U.S.C.).

<sup>242</sup> *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2612 (2012) (Ginsburg, J., dissenting).

<sup>243</sup> *United States v. South-Eastern Underwriters Ass’n*, 322 U.S. 533, 552 (1944).

<sup>244</sup> *Id.* at 536.

<sup>245</sup> *Id.* at 553-55.

<sup>246</sup> Siegel, *supra* note 23, at 62-67.

These market forces also explain the underlying two-part structure of the ACA. The first component involves prohibitions on certain underwriting practices of insurance companies, such as “denying coverage based on preexisting conditions, canceling insurance, discriminating based on medical history, and imposing lifetime benefit limits.”<sup>247</sup> As Justice Ginsburg noted, no one state could impose these requirements alone without either losing insurance companies willing to insure its own citizens or imposing astronomical insurance rates on its own citizens.<sup>248</sup> This is because an insurance company unable to limit its risk exposure with these underwriting practices will be forced to raise its rates on those remaining in its coverage pool, largely because existing state and federal law limits the ability of healthcare providers to deny treatment to those lacking insurance.<sup>249</sup> Hospitals forced to treat these uninsured individuals pass these costs on to the insured and their insurance companies. In this respect, healthcare has been described as mandated access to a private good,<sup>250</sup> similar to a public good that is non-excludable with its concomitant free rider problems. It is this feature of healthcare that led to the second part of the two-part structure at the heart of the ACA, or the so-called “individual mandate” or “minimum coverage provision.”<sup>251</sup> In order to address the “free rider” problem and spread risk more evenly throughout the entire population, the ACA mandates that all individuals who lack health insurance, either because they do not qualify for government-based programs or receive private health insurance from their employers, purchase health insurance in the private market.<sup>252</sup> Without the individual mandate, the changes to underwriting practices are unfeasible.<sup>253</sup> But it is this second part that raised the most consternation, with critics latching on to the idea that the government is forcing individuals to purchase a product that they would not buy otherwise.

There is little doubt that this two-part structure addresses a collective action problem. The only relevant question under a standard of review driven by the purpose of the Commerce Clause is whether this is a collective action problem among the states.<sup>254</sup> Justice Ginsburg argued that “States that undertake health-care reforms on their own . . . risk placing themselves in a position of economic disadvantage as compared with neighbors or competitors. . . . Facing that risk, individual States are unlikely to take the initiative in addressing the problem of the uninsured, even though solving that problem is in all States’ best interests.”<sup>255</sup> Professor Siegel comprehensively analyzed the dynamics leading to this outcome, and notes there are two types of collective action problems posed by the current state

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<sup>247</sup> *Id.* at 61.

<sup>248</sup> *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2612 (2012).

<sup>249</sup> Siegel, *supra* note 23, at 57.

<sup>250</sup> *Id.* at 61.

<sup>251</sup> *Id.* at 29.

<sup>252</sup> 26 U.S.C.A. § 5000A(a) (West 2013).

<sup>253</sup> 42 U.S.C.A. § 18091 (West 2013).

<sup>254</sup> Siegel, *supra* note 23, at 33.

<sup>255</sup> *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2612 (2012) (Ginsburg, J., dissenting) (internal quotation marks and citations omitted).

of healthcare in the country that might be addressed by the Act: a “race to the bottom” or interstate spillover effects.<sup>256</sup> With respect to spillover effects, the argument is that

an uninsured individual in State A may go to State B for medical care, either temporarily or permanently, because the publicly financed care options in State A are less available or less generous. In this situation, the uninsured individual in State A is free riding on insured individuals in State B, and State A is free riding on State B by not providing public benefits sufficient to prevent an exodus of its own residents to State B.<sup>257</sup>

However, State B can solve this problem by denying the benefit to non-state residents and thus deprive them of what is essentially a positive externality. To the extent a state is successful in doing so it would solve any potential collective action problem, but the Court’s holding in *Memorial Hospital v. Maricopa County*<sup>258</sup> arguably limits the ability of states to require meaningful residency requirements.<sup>259</sup> As Justice Ginsburg noted, “[a]n influx of unhealthy individuals into a State with universal health care would result in increased spending on medical services. To cover the increased costs, a State would have to raise taxes, and private health-insurance companies would have to increase premiums. Higher taxes and increased insurance costs would, in turn, encourage businesses and healthy individuals to leave the State.”<sup>260</sup> And there is anecdotal evidence of this type of spillover effect already occurring in that Washington, D.C., which provides more generous healthcare coverage for its own residents, has been confronting the problem of Maryland and Virginia residents crossing into the District to obtain treatment.<sup>261</sup> Similar problems have arisen in Massachusetts.<sup>262</sup>

Yet, even Professor Siegel acknowledges that “the apparent success of Massachusetts in achieving near universal coverage without causing insurers to leave [may] demonstrate that the interstate spillover effects are modest at best, such that states can ‘go it alone’ without incurring prohibitive costs.”<sup>263</sup> In the six years since Massachusetts implemented its own two-part structure, coverage has increased, insurance companies have not left the state, and the overall cost to the state has been

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<sup>256</sup> Siegel, *supra* note 23, at 46.

<sup>257</sup> *Id.* at 58 (emphasis added).

<sup>258</sup> *Mem’l Hosp. v. Maricopa Cnty.*, 415 U.S. 250 (1974) (holding one-year residency requirement for access to non-emergency medical care at county’s expense to be a violation of the Equal Protection Clause).

<sup>259</sup> See Siegel, *supra* note 23, at 60-61.

<sup>260</sup> *Sebelius*, 132 S. Ct. at 2612.

<sup>261</sup> Siegel, *supra* note 23, at 60 (citing Sara Rosenbaum, *Can States Pick Up the Health Reform Torch?*, *NEW ENG. J. MED.*, Mar. 11, 2010, available at <http://www.nejm.org/doi/full/10.1056/NEJMp1001439>).

<sup>262</sup> See *Sebelius*, 132 S. Ct. at 2612 (citing Brief for Commonwealth of Massachusetts as Amicus Curiae, at 15 (No. 11-398)).

<sup>263</sup> Siegel, *supra* note 23, at 66.

reasonable.<sup>264</sup> At the same time, healthcare costs in Massachusetts are continuing to rise and unless the state is able to bring those costs down, its model program may be unsustainable.<sup>265</sup> Ironically, then, while Massachusetts is the model for the nationwide approach embodied in the ACA, its independent success could provide evidence that there is no “race to the bottom” or interstate spillover effect requiring Congress’s attention. It should be stressed that the evidence is not clear one way or the other. And the fact that only Massachusetts, a relatively prosperous state with a low percentage of uninsureds to begin with, has tried such an ambitious approach may be the clearest sign that the states are in fact trapped in a race to the bottom, requiring “Congress’ intervention . . . to overcome this collective-action impasse,” as Justice Ginsburg contends.<sup>266</sup> This mixed bag of evidence indicates that ultimately, even under a collective action theory, the Court will not be able to escape the criticism that it is engaging in policy review. For this reason, the Cooter-Siegel deferential standard of review provides a compromise that gives effect to the purpose of the Commerce Clause while maintaining the separation of competencies between our democratic legislatures and appointed courts. Applying their standard of review on these facts would uphold the law because “reasonable people could disagree (1) about the existence of a collective action problem, (2) about the seriousness of the problem, and (3) about the efficacy of the congressional response.”<sup>267</sup>

#### VI. CONCLUSION

*United States v. Lopez* rightly acknowledged that in order to give full effect to the values of federalism embedded in the Constitution and the related notion that the national government is one of limited powers, some limitation on the commerce power is needed.<sup>268</sup> But without an understanding of why we have the Commerce Clause in the first place, it is difficult to articulate a limitation of the power, much less one that furthers the values of federalism. Justice Ginsburg deserves credit for attempting to rectify this problem of under-theorization by bringing a discussion of the Commerce Clause’s purpose back into the Court’s affirmative jurisprudence. Unfortunately, the Court’s own precedent in the affirmative context did not provide her much source material to buttress her argument regarding the Clause’s purpose. The Court’s negative Commerce Clause doctrine, though, provides an understanding of the purpose she advocated and one that derives itself from almost two centuries of doctrine. It provides a sound basis of doctrinal support to advocate collective action views of federalism. In sum, the Court has enforced the negative Commerce Clause to achieve the dual interests it attributes to the Commerce Clause of interstate commercial harmony and economic union. It takes a strict line with respect to interstate commercial harmony by imposing a virtually per se rule of invalidity to discriminatory actions, but recognizes states retain the ability to regulate commerce

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<sup>264</sup> See DIV. OF HEALTH CARE FIN. & POLICY, EXEC. OFFICE OF HEALTH & HUMAN SERVS., MASSACHUSETTS HEALTH CARE COST TRENDS 2010 FINAL REPORT (April 2010), available at <http://www.mass.gov/chia/docs/cost-trend-docs/final-report-docs/health-care-cost-trends-2010-final-report.pdf>.

<sup>265</sup> *Id.*

<sup>266</sup> See Siegel, *supra* note 23, at 66-67.

<sup>267</sup> Cooter & Siegel, *supra* note 30, at 181.

<sup>268</sup> *United States v. Lopez*, 514 U.S. 549 (1995).

under their police power and engages in balancing when a non-discriminatory state action nonetheless burdens interstate commerce and threatens economic union. This reveals that to further the goal of interstate commercial harmony, Congress should regulate to address externalities of state behavior. To further economic union, Congress may regulate to solve collective action problems where a rule of uniformity is needed due to the interstate nature of a given economic activity. At a minimum, the negative Commerce Clause reveals that the Court should and can avoid formalistic categories such as the commercial/non-commercial framework of *Lopez*, or the activity/inactivity divide in *National Federation*. Rather, to give full effect to the values of federalism and a government of limited powers, the Court should employ a functionalist inquiry that only permits Congress to regulate commerce among the several states when it furthers the ends of the Commerce Clause.

The fractured opinions in *National Federation* leave interpretation of the Commerce Clause's reach open to continued debate. Chief Justice Roberts did not engage Justice Ginsburg's arguments relating to the purpose underlying the Commerce Clause; in fact, he too lacked much doctrinal support for his holding. And even if a future majority of the Court were convinced of the wisdom of maintaining a threshold activity requirement to the exercise of Congress's commerce power, there is still no reason why the Court cannot use Justice Ginsburg's opinion as an opening to re-anchor the Commerce Clause to an understanding of its purpose. The negative Commerce Clause provides a clear indication of that purpose, and drawing on the negative inference in the affirmative context will provide the additional benefit of bringing these two bodies of law back into alignment.