

7-1-1997

Federalism: The Argument from Article V

Lynn A. Baker

Follow this and additional works at: <https://readingroom.law.gsu.edu/gsulr>

 Part of the [Law Commons](#)

Recommended Citation

Lynn A. Baker, *Federalism: The Argument from Article V*, 13 GA. ST. U. L. REV. (1997).

Available at: <https://readingroom.law.gsu.edu/gsulr/vol13/iss4/6>

This Article is brought to you for free and open access by the Publications at Reading Room. It has been accepted for inclusion in Georgia State University Law Review by an authorized editor of Reading Room. For more information, please contact mbutler@gsu.edu.

GEORGIA STATE UNIVERSITY LAW REVIEW

VOLUME 13

NUMBER 4

JULY 1997

FEDERALISM: THE ARGUMENT FROM ARTICLE V

Lynn A. Baker[†]

INTRODUCTION

Should the federal courts play a role in regulating the balance of power between the states and the federal government? Until quite recently, the Supreme Court appeared to have “sworn off federalism for good.”¹ And many, perhaps most, commentators applauded the Court’s persistent unwillingness to impose any effective limits on the exercise of federal power under the Commerce Clause, the Spending Clause, or the Tenth Amendment.

To justify a level of judicial self-restraint in federalism cases that might also plausibly be construed as an abnegation of constitutional duty, the Court and its commentators have repeatedly offered three general arguments: the nature of the federal political process, changed conditions, and unworkability. The political process argument contends that there is no need for the federal courts to invalidate federal legislation that arguably

[†] Thomas Watt Gregory Professor, University of Texas School of Law [lbaker@mail.law.utexas.edu]; J.D., Yale University, 1985; B.A., Oxford University, 1982; B.A., Yale University, 1978. This Article was prepared for the Henry J. Miller Distinguished Lecture Series/Symposium on “New Frontiers of Federalism,” held at the Georgia State University College of Law on February 27, 1997. The Author is grateful to Dean Janice Griffith, Professor Stephen Wermiel, Symposium Editor Kim Dammers, and the members of the *Georgia State University Law Review* for their most gracious hospitality and for having made possible an enormously rewarding intellectual exchange. Erwin Chemerinsky, Robert Nagel, and Edward Rubin offered valuable commentary during the Symposium. As always, conversations with Samuel Dinkin made this Article better, and made writing it more fun.

1. Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 903 (1994).

encroaches on the autonomy of the states because of the role that the states themselves play in the enactment of federal legislation.² That is, the states are arguably fully capable of protecting themselves against federal oppression through the federal political process.

The argument from changed conditions, when invoked in the context of the Commerce Clause, contends that the scope of the power the Framers granted Congress "to regulate commerce . . . among the several states" necessarily expands as the extent of "commerce . . . among the several states" expands.³ Thus, at the present time when everything, including families on vacation and medical supplies used for performing abortions, can be expected to cross state lines for commercial purposes, there is arguably no limit to Congress's regulatory power for the federal courts to enforce. Professor Mark Tushnet has made an analogous argument in the Tenth Amendment context. Observing that "the population of the entire state of New York in 1790" was only slightly larger than the population represented by "the so-called community school boards in New York City" in 1967, Tushnet argues that "the 'states' that were protected by *National League of Cities* are not the same as the entities the framers had in mind."⁴

The argument from unworkability was the centerpiece of the Court's 1985 decision in *Garcia v. San Antonio Metropolitan Transit Authority*.⁵ In holding the Tenth Amendment to be a mere truism, the *Garcia* Court declared "unworkable" the substantive test it had proposed some eight years earlier, which had required the federal courts "to draw the boundaries of state regulatory immunity in terms of 'traditional governmental function.'"⁶

Recently, Professors Ed Rubin and Malcolm Feeley have offered two additional, and more extreme, arguments for why the

2. See, e.g., 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); JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* (1980).

3. See, e.g., Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 SUP. CT. REV. 125, 131-35; Lawrence Lessig, *Fidelity and Constraint*, 65 FORDHAM L. REV. 1365 (1997).

4. MARK V. TUSHNET, *RED, WHITE AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* 42 n.64 (1988).

5. 469 U.S. 528 (1985).

6. *Id.* at 531; see *National League of Cities v. Usery*, 426 U.S. 833, 852 (1976).

Court “should never invoke federalism as a reason for invalidating a federal statute.”⁷ First, they contend, “federalism in America achieves none of the beneficial goals that the Court claims for it” in “occasional oddities” such as *Gregory v. Ashcroft*,⁸ *New York v. United States*,⁹ *National League of Cities v. Usery*,¹⁰ and, presumably, *United States v. Lopez*¹¹ and *Printz v. United States*.¹² Federalism, they argue, “does not secure citizen participation, does not make government more responsive or efficient by creating competition, and does not encourage experimentation.”¹³

Having rejected “these essentially instrumentalist arguments for federalism,” Rubin and Feeley turn to what they consider to be “the major normative arguments” and, again, they find federalism wanting.¹⁴ Federalism, they contend, not only “does not diffuse power in our system, but may actually act as an impediment to its diffusion.”¹⁵ In addition, “federalism does not secure community because our real community is a national one.”¹⁶ Simply and boldly, Rubin and Feeley conclude that “there is no normative principle involved [in federalism] that is worthy of protection.”¹⁷

In this Article, I will undertake to respond to all of these arguments, not by rebutting each in turn, but rather by discussing a long-overlooked implication of the case against “states’ rights,” of which each of these arguments is an important part. My starting point is an utterly simple observation: The basic structure of representation in Congress today is that set out by the Framers more than two hundred years ago. No matter how much today’s states may differ from those the Framers experienced or envisioned, and no matter how much the nature and extent of “commerce . . . among the states” may have changed since 1790, the basic structure of representation in Congress has not changed. Even if “our real community” today “is

7. Rubin & Feeley, *supra* note 1, at 909.

8. 501 U.S. 452 (1991).

9. 505 U.S. 144 (1992).

10. 426 U.S. 833 (1976).

11. 514 U.S. 549 (1995).

12. 65 U.S.L.W. 4731 (U.S. June 27, 1997).

13. Rubin & Feeley, *supra* note 1, at 909.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

a national one," as Rubin and Feeley assert, *our federal lawmaking process is not national*. And this simple fact has important implications for any discussion of the proper role of the federal courts in regulating the balance of power between the states and the federal government.

Part I describes the structure of representation in Congress and uses modern game theory to show that the disproportionately great power, relative to their shares of the nation's population, that the Senate affords small population states is only very slightly mitigated by the proportional representation that the House provides. Building on this finding, Part II explains why we should expect Congress to generate laws that, in the long run, systematically benefit small-population states at the expense of large ones. Some empirical evidence that supports this theoretical claim is then presented. Part III describes the various constraints on the enactment of special legislation that the Framers included in the Constitution to combat this problem. These include "federalism" provisions such as the Spending Clause, the Commerce Clause, and the Tenth Amendment. It argues that those who applaud the Court's frequent unwillingness to enforce these provisions have the burden of justifying the increased federal redistribution in favor of small-population states that is highly likely to result. Part IV discusses the relevance of Article V to the arguments in favor of judicial enforcement of the Constitution's federalism provisions that are presented in Parts I through III.

I. THE STRUCTURE OF REPRESENTATION IN CONGRESS

Article I of the Constitution provides that each state shall be represented in the House substantially in proportion to its population, with each state to have at least one Representative,¹⁸ while the Senate "shall be composed of two Senators from each State."¹⁹ By providing the states equal representation without regard to population, the Senate affords small-population states (small states) disproportionately great representation, and large-population states (large states) disproportionately little representation, relative to their shares of the nation's population. This, in turn, means that the small

18. U.S. CONST. art. I, § 2, cl. 3.

19. *Id.* § 3, cl. 1.

states have disproportionately great coalition-building power in the Senate, relative to their shares of the population.

One measure of a state's theoretical "coalition-building power" is the likelihood that it will be the "swing" vote on any proposed legislation.²⁰ In the Senate, each state has the same 2-in-100 theoretical chance to be the "swing" vote on a given piece of proposed legislation.²¹ In the language of modern game theory, the Shapley-Shubik power index of every state is equal in the Senate.²² But this means that smaller states have a

20. The notion of the swing voter or "pivot" for the winning coalition is central to both the Shapley-Shubik power index and the Banzhaf power index. See MARTIN SHUBIK, *GAME THEORY IN THE SOCIAL SCIENCES: CONCEPTS AND SOLUTIONS* 200-04 (1982). I assume throughout that each state's representatives vote as a block. Relaxing this assumption simplifies the calculations I discuss in this Part, but does not change the results.

21. Each senator has the same 1-in-100 theoretical chance to be the swing vote on any proposed legislation. And each of the fifty states is represented by two senators, each with one vote. See U.S. CONST. art. I, § 3, cl. 1.

22. The Shapley-Shubik index considers all possible orders in which a vote can take place. For any ordering of n players (voters) there will be a unique player who is in a position to provide the winning coalition with just enough strength to win. That player is the pivot for the coalition. If all $n!$ orderings are assumed equiprobable, then the Shapley-Shubik index is a measure of the probability that any player is pivotal. There are 100 players (senators) in the Senate. Thus, there are 100! possible orderings in which a vote can take place. Because each player has the same number of votes—one—on a given piece of proposed legislation, each player has the same likelihood of being the swing vote. And, since each state is represented by the same number of players (senators)—two—each state has the same likelihood of being the swing vote. Calculated precisely, each state has a 2-in-100 chance to be the swing vote on any given piece of proposed legislation, and each state's Shapley-Shubik index is therefore .02.

Although in this instance each state's (and each player's) Shapley-Shubik index is the same as its voting strength, that will not always be the case. Indeed, a major contribution of the Shapley-Shubik index is to demonstrate the erroneousness of the common intuition that the *a priori* power distribution inherent in a given apportionment of voting strength is always a trivial function of the nominal voting strengths. In particular, the Shapley-Shubik index shows that large weighted majority games (such as the electoral college) give a disproportionate power advantage to the big players, and that some voters may be incapable of affecting the outcome of any proposed legislation even though they have a vote. The former finding is presented in Irwin Mann & L. S. Shapley, *The a Priori Voting Strength of the Electoral College*, in *GAME THEORY AND RELATED APPROACHES TO SOCIAL BEHAVIOR* 151-163 (M. Shubik ed., 1964) (demonstrating that states with 16 or more votes in the electoral college have a Shapley-Shubik index slightly greater than their number of votes, while states with 14 or fewer votes have a Shapley-Shubik index that is slightly smaller than their number of votes). The latter finding is demonstrated by the following example.

Consider a game with four players (or coalitions)—A, B, C, 1—with votes of 2, 2, 2, and 1, respectively. A simple majority of four votes is needed to carry a motion. In each of the 24 (4!) possible orderings of the four players, the pivot is underlined.

disproportionately great likelihood, relative to their share of the nation's population, of being the swing vote on any proposed legislation. In the House, in contrast, where each state's representation is substantially proportional to its population,²³ the theoretical likelihood that a small state is the swing vote on any proposed legislation is small, roughly equal to its share of the population.²⁴ This means that smaller states are less likely than larger states to cast the deciding vote in the House. In sum, the Shapley-Shubik power index of a small state is larger in the Senate than in the House.²⁵

Of course, neither the House nor the Senate alone may enact legislation; the approval of at least a simple majority present in each body is required.²⁶ Thus, it is necessary to determine each

<u>ABC1</u>	<u>BAC1</u>	<u>BCA1</u>	<u>BC1A</u>	<u>AB1C</u>
<u>BA1C</u>	<u>B1AC</u>	<u>B1CA</u>	<u>A1BC</u>	<u>CAB1</u>
<u>CBA1</u>	<u>CB1A</u>	<u>A1CB</u>	<u>CA1B</u>	<u>ClAB</u>
<u>C1BA</u>	<u>ACB1</u>	<u>1ABC</u>	<u>1CAB</u>	<u>1BCA</u>
<u>AC1B</u>	<u>1ACB</u>	<u>1BAC</u>	<u>1CBA</u>	

The Shapley-Shubik indices for A, B, C, and 1 are, respectively 8/24 (.33), 8/24 (.33), 8/24 (.33), and 0/24 (0). Thus, although the player denoted 1 has 1/7 of the total *voting strength* in this hypothetical body, it can be shown to have no *power*. That is, it can be shown mathematically to be incapable of affecting the outcome of any motion, no matter how it votes. See Lynn A. Baker, *Direct Democracy and Discrimination: A Public Choice Perspective*, 67 CHI-KENT L. REV. 707, 730 n.83 (1991); SHUBIK, *supra* note 20, at 203-04. Similarly, in a game with three players with votes of 2, 2, and 1, respectively, each of the players has a Shapley-Shubik index of .33 if a simple majority of three votes is required for passage. Thus, even though one player has a *voting strength* only one-half as large as the others', his *power* to affect the outcome of any vote is identical to theirs.

23. Because the Constitution provides that "each State shall have at Least one Representative" no matter how small its population, the smallest states may be slightly overrepresented in the House even though representation in that body is "apportioned among the several States . . . according to their respective Numbers." U.S. CONST. art. I, § 2, cl. 3. Thus, although California, for example, currently has nearly 66 times the population of Wyoming (29,760,021 versus 453,588), it has only 52 times as many representatives in the House (52 versus 1). See THE COUNCIL OF STATE GOVERNMENTS, 30 THE BOOK OF THE STATES, 1994-95, at 635-36 (tab. 10.3) (1994) [hereinafter THE BOOK OF THE STATES].

24. For two reasons, a small state's Shapley-Shubik index will only approximate, rather than be identical to, its share of the nation's population. First, as explained in note 23, *supra*, the smallest states' voting strength in the House slightly exceeds their actual share of the population. Second, as explained in note 22, *supra*, large weighted majority games such as the House give a disproportionate power advantage to the big players. For a complete listing of the various states' current Shapley-Shubik power indices for the House, Senate, and Congress, and their number of House Representatives, see *infra* Table 1, p. 929.

25. See *infra* Table I, p. 929. Similarly, the *voting strength* of a small state is greater in the Senate than in the House. See *supra* note 22.

26. See U.S. CONST. art. I, § 7, cl. 2. Sometimes, of course, more than a simple

state's theoretical coalition-building power in the Congress as a whole. It is important to appreciate that one cannot simply add a state's power indices in the House and in the Senate, then divide by two. This naive approach would simply add the likelihood that a particular state is the swing voter in the House once legislation has already passed the Senate and the likelihood that it is the swing voter in the Senate once legislation has already passed the House, giving equal weight to these two likelihoods. One seeks instead to measure the frequency with which a particular state will be the pivot or swing voter *in Congress*. A state is the swing voter in Congress whenever its votes *in Congress as a whole* enable legislation to pass that would not have passed without its votes.

TABLE 1

State	Reps	S-Shubik Index for House	S-Shubik Index for Senate	S-Shubix Index for Congress
CA	52	.130	.02	.081
NY	31	.073	.02	.049
TX	30	.070	.02	.047
FL	23	.053	.02	.038
PA	21	.048	.02	.035
IL	20	.046	.02	.034
OH	19	.044	.02	.033
MI	16	.036	.02	.029
NJ	13	.029	.02	.025
NC	12	.027	.02	.024
GA; VA	11	.025	.02	.023
MA; IN	10	.022	.02	.021
MO; WI; TN; WA	9	.020	.02	.020
MD; MN	8	.018	.02	.019
LA; AL	7	.016	.02	.018
KY; AZ; SC; CO; CT; OK	6	.013	.02	.016
OR; IA; MS	5	.011	.02	.015
KS; AR	4	.009	.02	.014
WV; UT; NE; NM	3	.007	.02	.013
ME; NV; NH; HI; ID; RI	2	.004	.02	.011
MT; SD; DE; ND; VT; AK; WY	1	.002	.02	.010

majority of one or both chambers is required, as in the case of Senate filibusters, see *infra* note 37, in order to override a President's veto, see U.S. CONST. art. I, § 7, cl. 3, or where supermajorities are required by the Constitution, see, e.g., U.S. CONST. art. I, § 3, cl. 6; *id.* § 5, cl. 2; *id.* art. II, § 2, cl. 2; *id.* art. V.

Table 1 presents original computer calculations of each state's Shapley-Shubik power index for Congress.²⁷ Comparing any large and small state, one can see that the disproportionately great power, relative to their shares of the nation's population, that the Senate affords small states is only very slightly mitigated by the proportional representation that the House provides. Consider, for example, the following relationships between California and Rhode Island:²⁸

population ²⁹	29.7 to 1
power in House ³⁰	32.5 to 1
power in Senate ³¹	1 to 1
power in Congress ³²	7.4 to 1

Counter-intuitively, the ratio of California's and Rhode Island's power in Congress (7.4 to 1) turns out *not* to be the midpoint between the ratio of their power in the House and in the Senate (16.25 to 1), but much more nearly approximates the ratio of their power in the Senate (1 to 1) than the ratio of their power in the House (32.5 to 1).

Of course, theoretical measures of coalition-building power such as the Shapley-Shubik power index capture only part of the complex reality. The committee system, seniority, savvy, and charisma—to name just a few variables—will all affect a particular legislator's, and therefore a particular state's, *actual* coalition-building power in Congress. Happily, however, we need not attempt to quantify these myriad, often intangible variables. For the apportionment of representation in the Senate and the House also determines the likelihood that an especially powerful Senator or Representative—*by any chosen measure of influence*—represents a particular state.

27. A formal mathematical statement of how these Shapley-Shubik values were calculated appears in Lynn A. Baker & Samuel H. Dinkin, *The Senate: An Institution Whose Time Has Gone?*, 13 J.L. & POL. Appendix 1 (forthcoming 1997).

28. Rhode Island was chosen because it receives two representatives in the House. See THE BOOK OF THE STATES, *supra* note 23, at 635-36 (tab. 10.3). States, such as Wyoming, that receive only one representative may be overrepresented in the House because of the Constitution's dictate that "each State shall have at Least one Representative" no matter how small its share of the Nation's population. U.S. CONST. art. I, § 2, cl. 3.

29. THE BOOK OF THE STATES, *supra* note 23, at 635-36 (tab. 10.3).

30. See *supra* Table 1, p. 929.

31. See *id.*

32. See *id.*

Thus, West Virginia, for example, has a 2-in-100 chance of having one of its representatives chair all of the important Senate committees and otherwise wield the influence that a Senator Byrd currently does.³³ To be sure, this is the same 2-in-100 chance that California or Texas has, but it is much larger than the 3-in-435 chance than West Virginia would have if representation in the Senate were apportioned as it is in the House.³⁴ That is, relative to its share of the population, West Virginia has a disproportionately great chance of having an especially powerful representative in the Senate, while it has only a substantially proportional chance of having an especially powerful representative in the House.

In addition to providing small states disproportionately great coalition-building power relative to their shares of the population, the structure of representation in the Senate injects a significant super-majoritarianism into the lawmaking process. Legislation that reaches a vote in the full House can be blocked only by legislators formally representing at least a simple majority of the population.³⁵ In the Senate, however, it is possible for legislators

33. In the 104th Congress, for example, Senator Byrd's committee memberships included Appropriations, Armed Services, and Rules and Administration. See 1995-1996 OFFICIAL CONGRESSIONAL DIRECTORY 439 (1995) (S. Pub. 104-14). Many observers have attributed Senator Byrd's extraordinary success in steering federal dollars to his home state to his Chairmanship of the Senate Appropriations Committee. See, e.g., Richard Munson, *Deforming Congress: Why Those Capitol Hill Budget Reforms Could Cost You Plenty*, WASH. POST, Sept. 5, 1993, at C3; Brian Kelly, *Pigging Out at the White House: Never Mind Last Week's Spending Bonanza; George Bush Has Long Been A Closet Pork Barreler*, WASH. POST, Sept. 6, 1992, at C1; see also BRIAN KELLY, *ADVENTURES IN PORKLAND* (1992) (highlighting Senator Byrd's ability to obtain a relatively large share of federal benefits for his small home state and terming him "the Pontiff of Pork"); Drummond Ayres, Jr., *Senator Who Brings Home the Bacon*, N.Y. TIMES, Sept. 6, 1991, at A16 (detailing Senator Byrd's steering of over \$750 million worth of federal projects and over 3000 jobs into West Virginia over a three-year period); Helen Dewar & Eric Pianin, *For Byrd, Getting His Way is Part of Senate Tradition: Master of Procedure Wields Power With Gusto*, WASH. POST, June 24, 1993, at A1; Cal Thomas, *Disaster Relief Isn't the Only Partisan Bill*, WASH. POST, June 12, 1997, at A1.

34. See THE BOOK OF THE STATES, *supra* note 23, at 636.

35. As an *a priori* matter, 218 of 435 representatives are necessary to block legislation in the House, assuming that all 435 members are present for the vote. Under the Constitution, however, as few as 218 representatives constitutes a quorum. See U.S. CONST. art. I, § 5, cl. 1 ("[A] majority of each [chamber] shall constitute a Quorum to do Business."). Thus, as few as 110 representatives will be able to block legislation in the House if only the minimum necessary quorum is present. And these 110 representatives, of course, will formally represent far less than a simple majority of the Nation's population—25.3% (110/435). It is important to note, however, that the

representing only 18% of the population to block the enactment of any proposed legislation.³⁶ Moreover, the Senate's cloture rule makes it possible for legislators representing only 11% of the population to prevent legislation from coming to a vote even when all 100 senators are present.³⁷

Constitution specifies the same quorum for the Senate. *See id.*

The distinction between formal and actual representation is also important. In order to be elected, a representative needs the support of only a simple majority of her constituents (even more precisely, a simple majority of her constituents who choose to vote in the relevant election). On any given issue, therefore, she may actually represent the views of only a simple majority of all the individuals she formally represents. Thus, the formal representatives of a simple majority of the nation's population may actually represent only 26% (.51 x .51) of the population on any given issue. *See Baker, supra* note 22, at 716; *see also* JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* 220-22 (1962); Harold H. Bruff, *Legislative Formality, Administrative Rationality*, 63 *TEX. L. REV.* 207, 219 (1984); Saul Levmore, *Bicameralism: When Are Two Decisions Better Than One?*, 12 *INT'L REV. L. & ECON.* 145, 151-52 (1992). This is also true for the Senate, however, and should therefore make no systematic difference when comparing the two chambers.

36. This represents the total population of the 26 smallest states. *See THE BOOK OF THE STATES, supra* note 23, at 635-36 (tab. 10.3). Of course, as explained *supra* note 35, the number of persons *actually*, rather than *formally*, represented by these states' senators on a given issue may be a vastly smaller 9.2% (.51 x .18). And when the minimum constitutionally required quorum is present, *see* U.S. CONST. art. I, § 5, cl. 1, legislation can in theory be blocked by senators who may actually represent only the 4.4% of the nation's population that resides in the thirteen smallest states. *See THE BOOK OF THE STATES, supra* note 23, at 635-36 (tab. 10.3).

37. This represents the total population of the 21 smallest states. *See THE BOOK OF THE STATES, supra* note 23, at 635-36. Under Senate Rule XXII, a three-fifths vote of the full membership—60 votes—is required to end debate regardless of the number of senators present. *See* S. DOC. NO. 100-1, at 21-23 (1988) (Rule 22.2). Thus, 41 senators representing as few as 21 states can prevent any piece of legislation from coming to a vote. The House has no analogous cloture rule. H.R. DOC. NO. 102-405, at 665-66 (1993) (Rule 23(5)(a)); H.R. DOC. NO. 103-342, at 604 (1995) (Rule 17). The use of the filibuster has expanded greatly during the past 200 years. *See* Hendrik Hertzberg, *Comment: Catch-XXII*, *THE NEW YORKER*, Aug. 22 & 29, 1994, at 9-10 (summarizing June 1992 study of the Congressional Research Service of the Library of Congress: "during the eighteenth century, no filibusters; during the nineteenth, sixteen; during the first half of this one, sixty-six; during the nineteen-sixties, twenty; during the seventies, fifty-two; and during the eighties, ninety. During the nineties, if the pace set so far is maintained, the Senate will rack up some two hundred"). Recently, for example, a filibuster was used to block the confirmation of Dr. Fester as Surgeon General. Laurie McGinley & Rick Wartzman, *Foster's Bid to be Surgeon General Ends in Defeat Amid Divisions Over Abortion*, *WALL STREET J.*, June 23, 1995, at A5.

Lloyd Cutler, White House counsel in two Administrations, has recently argued that Senate Rule XXII is unconstitutional. *See Hertzberg, supra*, at 10.

II. SYSTEMATIC REDISTRIBUTION FROM LARGE STATES TO SMALL STATES

The disproportionately great coalition-building power that Congress affords small states and the super-majoritarianism that the Senate injects into the federal lawmaking process suggest that Congress is likely to enact laws that, in the long run, will systematically benefit small-population states at the expense of large ones. This prediction is consistent with a public choice analysis and is borne out by the available empirical evidence.

A. *Special Legislation*

Insofar as legislators are concerned with re-election, and therefore also with the welfare of their constituents, they will each seek to enact legislation whose expected benefits to their own constituents exceed its expected costs. Moreover, because legislators themselves are scarce resources and their choice of agenda necessarily entails opportunity costs,³⁸ their first priority is likely to be legislation whose expected benefits to their constituents *most greatly* exceeds its expected costs. Thus, we would expect each legislator to be especially eager to enact "special legislation" whose benefits accrue uniquely to her own constituents, but whose costs are spread among the constituents of all legislators. Certainly, each legislator should be relatively more interested in enacting such special legislation than in seeking legislation whose costs and benefits are both generally distributed or are both concentrated on their own constituents.³⁹

38. Professors Paul Samuelson and William Nordhaus explain "opportunity costs" as follows:

The immediate dollar cost of going to a movie instead of studying is the price of a ticket, but the opportunity cost also includes the possibility of getting a lower grade on the exam. The opportunity costs of a decision include all its consequences, whether they reflect monetary transactions or not.

Decisions have opportunity costs because choosing one thing in a world of scarcity means giving up something else. The opportunity cost is the value of the good or service foregone.

PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, *ECONOMICS* 119 (15th ed. 1995) (emphasis omitted).

39. Although any legislator's first preference might logically be to enact special legislation that uniquely benefits her own constituents and whose costs are borne *exclusively* by other legislators' constituents, such legislation is likely to face greater opposition than similar legislation whose costs are distributed more generally. This is particularly likely to be the case if the costs of the legislation are concentrated on

Unfortunately, special legislation is more likely to be expropriative—to have aggregate costs that exceed its aggregate benefits—than legislation whose costs and benefits are both generally distributed or both concentrated on the same constituency. Each of the latter two types of legislation is likely to be enacted only if its aggregate benefits exceed its aggregate costs, since no constituency is likely to seek the passage of legislation whose costs to itself exceed its benefits. Special legislation, however, may be enacted even if its aggregate costs exceed its aggregate benefits. Since vote trading is possible, Legislator A will often agree to support legislation that yields \$10 million in benefits for Legislator's B's constituents, even if it imposes aggregate costs of \$11 million on the rest of the nation (including, but not concentrated on, Legislator A's constituents), in exchange for Legislator B's vote on legislation that similarly benefits Legislator A's constituents at the expense of the rest of the nation (including Legislator B's constituents).

Notwithstanding the aggregate welfare loss, this type of vote trading may be attractive to representatives for at least two reasons. First, the terms of each representative's trades, taken alone, might well provide *her own constituents* aggregate benefits that exceed its aggregate costs to them. That is, in order to obtain support sufficient to enact legislation that provides her constituents \$10 million in special benefits, a representative may need to support legislation that provides other representatives' constituents special benefits at an aggregate cost to her own constituents of only \$8 million. This is possible because the approval of only a simple majority of legislators is necessary for enactment. Thus, the constituents of representatives who were not a party to these particular bargains, and who may have even opposed the legislation, will nonetheless bear a portion of its total cost, a portion that the beneficiaries of the special legislation need not internalize.⁴⁰

another group. See Maxwell L. Stearns, *The Public Choice Case Against the Line Item Veto*, 49 WASH. & LEE L. REV. 385, 400-22 (1992).

40. In making such bargains, therefore, a representative might logically be expected to seek the support of the minimum number of representatives necessary to secure passage of her legislation. See, e.g., WILLIAM H. RIKER, *THE THEORY OF POLITICAL COALITIONS* 32-101 (1962) (arguing that in American politics, parties seek to increase votes only until they achieve the minimum necessary to form a winning coalition). By doing so, a representative simultaneously minimizes the amount of strategic bargaining in which the representative must engage (*i.e.*, the representative's

Second, even if the terms of a particular set of trades do not provide a representative's constituents aggregate benefits that exceed its aggregate costs to them, the representative will be able to claim complete credit for the special legislation that benefits her constituents, but will share only diffuse blame for helping to enact special legislation that benefits others at the partial expense of her own constituents. And because this blame is diffuse, it will be less salient to her constituents and may also be less well-publicized than the passage of the special legislation. Thus, the benefits *to each representative* of this sort of vote trading are likely to exceed the costs.

This is the tragedy of the legislative commons.⁴¹ Although each representative's individually rational decisions will thus necessarily contribute to a decline in social welfare, a representative can only hurt his own constituents (and therefore his own chances for re-election) if he does not seek special legislation.⁴² For, as we have seen, in a majoritarian system in which vote trading is possible, a representative's constituents

opportunity costs), and maximizes the competition among legislators to join her coalition, thereby driving down the price of obtaining any legislator's support. This, in turn, minimizes the total amount the representative must "pay" to ensure passage of her legislation.

In practice, however, proponents of legislation will strive to secure a supermajority of votes, largely because of the uncertainty under which pre-vote lobbying and logrolling takes place: the outcome of the final vote cannot be known in advance. In this context, the political scientist R. Douglas Arnold has observed:

All else equal, [legislative] leaders prefer large coalitions because they provide the best insurance for the future. Each proposal must survive a long series of majoritarian tests—in committees and subcommittees, in House and Senate, and in authorization, appropriations, and budget bills. Large majorities help to insure that a bill clears these hurdles with ease.

R. DOUGLAS ARNOLD, *THE LOGIC OF CONGRESSIONAL ACTION* 117-18 (1990); *see also* R. DOUGLAS ARNOLD, *CONGRESS AND THE BUREAUCRACY: A THEORY OF INFLUENCE* 43 (1979) (legislators seek supermajorities "because a whole series of majorities are required, one at each stage of the congressional process . . . [and] they want to minimize risks of miscalculation or last-minute changes"); DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* 112 (1974) (frequency distribution data indicate that House and Senate roll-call votes "are bimodal, with a mode in the marginal range (50%-59.9%) and a mode in the unanimity or near-unanimity range (90%-100%)").

41. Cf. Garrett Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243 (1968); *see also* Clayton P. Gillette, *Expropriation and Institutional Design in State and Local Government Law*, 80 *VA. L. REV.* 625, 645-46 (1994); BUCHANAN & TULLOCK, *supra* note 35, at 139-40.

42. BUCHANAN & TULLOCK, *supra* note 35, at 139-40; Gillette, *supra* note 41, at 636-38, 645-46.

nonetheless will bear part of the costs of other successful bargains, including bargains to which the representative was not a party and which he even may have opposed, resulting in special legislation for other representative's constituents. Thus, only by joining the race to forge successful bargains that simultaneously benefit his constituents and exploit those who are not members of the winning coalition—a true “race to the bottom”—can an individual legislator maximize his constituents', and therefore also his own, welfare.⁴³

Of course, legislation must also receive the approval of the President before it becomes law, and such expropriative legislation seems a likely target for an executive veto. Because his constituency is the entire nation, a President might be expected to be guided by the preferences of a majority of the entire electorate.⁴⁴ And, notwithstanding its passage by a majoritarian body, special legislation, as we have seen, is unlikely to have the sincere support of a majority of voters.⁴⁵ Nonetheless, special legislation is unlikely to be vetoed for the same sorts of reasons that legislators seek its enactment. Should

43. The “race to the bottom” and the “tragedy of the commons,” whether legislative or otherwise, are both variants on the Prisoner's Dilemma. See Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the “Race-to-the-Bottom” Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1217-19 (1992) (explaining race to the bottom in terms of the prisoner's dilemma); Gillette, *supra* note 41, at 638 n.36 (explaining tragedy of the commons in terms of the prisoner's dilemma).

44. BUCHANAN & TULLOCK, *supra* note 35, at 248 (“The President should, insofar as he uses his veto power as a simple legislative tool, follow the preferences of the majority of the voters.”); Levmore, *supra* note 35, at 155 (“One-quarter of the voters may elect one-half of the legislature, but the President must still be responsive to a coalition of one-half.”).

This expectation must be modified slightly, however, in light of the fact that the President is not elected directly by the People, but rather by the electoral college which gives different weights to the votes of residents of different states. See U.S. CONST. art. II, § 1, cl. 2-3. By affording each state “a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress,” *id.* at cl. 2, the Constitution gives the small states a disproportionately great power to choose the President, relative to their shares of the nation's population. Thus, although California, for example, currently has nearly 66 times the population of Wyoming (29,760,021 versus 453,588), it has only 18 times as many presidential Electors ((52 Reps. + 2 Sens. = 54) versus (1 Rep. + 2 Sens. = 3)). See THE BOOK OF THE STATES, *supra* note 23, at 635-36 (tab. 10.3). This in turn means that the President, who needs 268 electoral votes in order to be re-elected, may formally represent only the 45.4% of the nation's population that resides in the 40 smallest states. See *id.*

45. That is, in a world without vote trading, this legislation would not garner the support of a majority. Cf. Gillette, *supra* note 41, at 636-47.

he veto such legislation, the President will arouse the intense, well-publicized, and not-soon-forgotten ire of the concentrated minority that would have benefitted from the legislation, while simultaneously providing a diffuse and scarcely salient benefit to a substantial majority.⁴⁶ Clearly, the benefits *to a President* of vetoing such legislation (particularly during his first term) will seldom exceed the costs.⁴⁷

B. *The Relevance of Representation*

Two questions now require answers. How does the apportionment of representation in the Congress affect the *size* of the pork barrel? And how does it affect the *distribution* of the pork? As we have seen, the small states receive disproportionately great representation, and therefore also disproportionately great coalition-building power, in Congress relative to their shares of the population. There is no *a priori* reason, however, to expect this allocation of coalition-building power to affect the total dollar amount of special legislation that is enacted. A legislator's incentive to seek special legislation for his constituents is not affected by whether the representation he

46. See Glen O. Robinson, *Public Choice Speculations on the Item Veto*, 74 VA. L. REV. 403, 411-12 (1988) (suggesting this as the reason why one "may doubt that item veto authority would effect a major change in political practice"). These same incentives nearly led President Clinton in 1995 to *veto* the recommendations of an independent commission on military base closings—a body originally established to avoid the problem of special legislation—because their recommendation would result in a loss of nearly 20,000 jobs in California, a state crucial to his re-election. See Tim Weiner, *Decrying Base-Closing Plan as an "Outrage," the President Gives a Grudging Go-Ahead*, N.Y. TIMES, July 14, 1995, at A16. Indeed, Clinton ultimately approved the commission's recommendations only after the commission assured him that the Pentagon would be permitted to turn over most of the jobs at risk to local private contractors. Eric Schmitt, *After Assurances on California Jobs, Clinton is Expected to Approve Base-Closing List*, N.Y. TIMES, July 10, 1995, at B9.

47. Buchanan and Tullock do not appear to see this. BUCHANAN & TULLOCK, *supra* note 35, at 248 (contending that "[t]he President should, insofar as he uses his veto power as a simple legislative tool, follow the preferences of the majority of the voters. Therefore, he would accept only bargains which meet the approval of the majority of the populace"). This lack of presidential incentive is why Professor Robinson predicts that "the item veto would be only marginally useful in curtailing private goods [or "special"] legislation." Robinson, *supra* note 46, at 419-20. In addition, the President may himself have "special political debts to particular groups or geographic regions, and can be expected to favor special benefits for them" or at least not to veto such benefits. *Id.* at 412 n.32. Former President Reagan, for example, was not willing to extend "his general campaign against wasteful spending to subsidized grazing rights and electric power in the West, his strongest political base." *Id.* (citing Norman Ornstein, *Veto the Line Item Veto*, FORTUNE, Jan. 7, 1985, at 109-11).

affords them is disproportionately great, disproportionately small, or directly proportional to their numbers. In each case, he has the same, maximum incentive to seek legislation whose aggregate benefits to his constituents exceed its aggregate costs to them. Thus, there is no *a priori* reason to expect *any* allocation of representation in a legislative body to prevent the tragedy of the legislative commons, or to affect the size of the pork barrel.⁴⁸

The allocation of coalition-building power within the legislature, however, will importantly affect the *distribution* of the pork that is enacted. In the Senate, as we have seen, each state has the same likelihood over time of providing the swing vote on a given piece of proposed legislation,⁴⁹ and each state's Senators therefore have the same power to secure special legislation for their constituents. Thus, if the Senate alone could enact legislation, and if all senators were rationally self-interested,⁵⁰ one would expect the total dollar amount of special legislation that each state receives over time to be equal. This means, however, that the *per capita* benefits of the special legislation received will be substantially greater in small population states than in large ones. When California and Wyoming each secure the equivalent of one billion dollars in special legislation from the federal government, for example, this amounts to \$34 for each of California's 29.76 million residents, but \$2207—65 times as much—for each of Wyoming's 453,000 residents.⁵¹

In the House, in contrast, representation is allocated on the basis of population, and, as we have seen, each state's coalition-building power within that body is substantially proportional to

48. The best ways to reduce the total size of the federal pork barrel, in order of decreasing effectiveness, are: to reduce the size of the federal fisc; to increase the proportion of legislators' votes necessary for the enactment of pork or special legislation; to prohibit the enactment of pork or special legislation; and to prohibit legislative logrolling. For a discussion of why constitutional prohibitions on special legislation may not be desirable, see Gillette, *supra* note 41, at 640-57. For a discussion of why there is little direct regulation of logrolling, see *id.* at 639-40.

49. See *supra* note 22.

50. This is a central assumption of the interest group theory component of public choice theory. See DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 12-37 (1991); BUCHANAN & TULLOCK, *supra* note 35, at 11-39.

51. The 1990 census determined the population of California to be 29,760,021 and the population of Wyoming to be 453,588. See *THE BOOK OF THE STATES*, *supra* note 23, at 635-36 (tab. 10.3).

its share of the Nation's population.⁵² Thus, if the House alone could enact legislation, one would expect the total dollar amount of each state's benefits from all the special legislation enacted over time to be approximately proportional to its population.⁵³ And the *per capita* benefits to each state would therefore be nearly the same.

But, of course, neither the House nor the Senate acting alone can pass legislation. The approval of at least a simple majority

52. See *supra* notes 22-24.

53. See *supra* notes 22-24. It is a common misconception that if the House alone could enact legislation, a permanent majority coalition of large states would form, depriving the smaller states of any benefits of Union membership while imposing on them all of its costs. This outcome, however, would require the congressional logrolling "game" to have a permanent "core," which it lacks.

Robert Sugden explains that a Condorcet choice provide the only "core solution" to the logrolling game:

An outcome is said to be in the core of a game if it cannot be *blocked* by any coalition of players. Given the assumption that all preferences take the form of strict orderings, a coalition of players blocks one outcome, *x*, if there is some other alternative, *y*, such that (i) every member of the coalition prefers *y* to *x*, and (ii) by the rules of the game, concerted action by the members of the coalition can ensure that *y* is the outcome of the game, irrespective of what non-members do. . . . [A]n alternative, *x*, is in the core of the majority rule game if and only if, for every other feasible alternative, *y*, a majority of voters prefer *x* to *y*. This of course is Condorcet's criterion. The core of the game is identical with the Condorcet choice.

ROBERT SUGDEN, *THE POLITICAL ECONOMY OF PUBLIC CHOICE: AN INTRODUCTION TO WELFARE ECONOMICS* 148 (1981).

In the following example, alternative 1 is the Condorcet winner even though only A prefers it to all other alternatives, because both A and B prefer 1 to 3, and both A and C prefer 1 to 2:

<u>A</u>	<u>B</u>	<u>C</u>
1	2	3
2	1	1
3	3	2

See *id.* at 140, 147; DENNIS C. MUELLER, *PUBLIC CHOICE II*, at 2-3, 112-14 (1989); Saul Levmore, *Parliamentary Law, Majority Decisionmaking, and the Voting Paradox*, 75 VA. L. REV. 971, 989 n.55, 994-96 (1989).

Whenever a Condorcet choice does not exist—that is, whenever there is no single alternative that defeats all competitors in head-to-head competition even though it is not the first choice of a majority—the legislative outcome will be a function of such "procedural" variables as the order in which various alternatives are formally considered. This is the "voting paradox," frequently referred to as the Arrow "impossibility theorem." See KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (1951). The theoretical significance of this paradox had been discussed by Black in the 1940s. See DUNCAN BLACK, *THE THEORY OF COMMITTEES AND ELECTIONS* (1958); see also Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121 (1990); SUGDEN, *supra*, at 140; Levmore, *supra*, at 984-90.

present in each body is required.⁵⁴ And we would therefore expect the total dollar amount of each state's benefits from all the special legislation enacted over time to be neither directly proportional to its share of the Nation's population (House) nor equal (Senate), but somewhere in between. More specifically, we might expect the percentage share of special legislation that each state will receive over time to approximate its Shapley-Shubik power index in Congress as set forth in Table 1.⁵⁵ Thus, it is now clear how the allocation of coalition-building power in Congress is likely to affect the distribution of the "gains" from the special legislation that is enacted. It is likely to ensure small states a disproportionately large slice—and large states a disproportionately small slice—of the federal "pie," relative to their shares of the Nation's population. The prediction, in short, is that the structure of representation in Congress ensures systematic wealth redistribution from the larger states to the smaller states over time.⁵⁶

C. *Empirical Evidence*

Empirical evidence supports this theoretical claim. A September 1996 statistical study conducted by researchers at Harvard's Kennedy School of Government calculates the "balance of payments" that each state had with the federal government in fiscal year 1995.⁵⁷ Each state's contribution to the federal fisc

54. See U.S. CONST. art. I, § 7, cl. 2. Sometimes, of course, more than a simple majority of one or both chambers is required, as in the case of Senate filibusters, see *supra* note 37, in order to override a President's veto, see U.S. CONST. art. I, § 7, cl. 2, or where supermajorities are required by the Constitution, see *supra* note 26.

55. See *supra* p. 929.

56. This prediction rests in part on the assumption that large and small states' contributions to the federal fisc are not systematically disproportional to their shares of the nation's population.

57. MONICA E. FRIAR ET AL., *THE FEDERAL BUDGET AND THE STATES: FISCAL YEAR 1995* (20th ed. 1996) [hereinafter *FY 1995 STUDY*]. It is revealing that the federal government, usually a font of statistics, does not appear to compile and publish such state-by-state, balance of payments data. The federal government does, however, publish one of the two sets of data on which Friar et al. base their calculations: the annual report of the Bureau of the Census titled *Federal Expenditures by State*. See MONICA E. FRIAR & LEONARD, *THE FEDERAL BUDGET AND THE STATES: FISCAL YEAR 1994 3-4* (14th ed. 1995) [hereinafter *FY 1994 STUDY*]; FRIAR ET AL., *FY 1995 STUDY*, *supra*, at 93. The tax collection data published by the I.R.S., however, "show which states collect the taxes rather than those states that bear the burden of Federal taxes." FRIAR & LEONARD, *FY 1994 STUDY*, *supra*, at 4; FRIAR ET AL., *FY 1995 STUDY*, *supra*, at 93. Thus, Friar et al. use the "state by state tax estimates

(for example, individual and corporate income taxes, social security taxes, and Medicare taxes)⁵⁸ is measured against the federal outlays it received (for example, payments to individuals, grants to state and local governments, procurement, salaries and wages).⁵⁹ The results are striking and consistent with the prediction. As Tables 2 and 3 show, the Fiscal Year 1995 balance of payments with the federal government was negative in six of the ten largest states, but positive in eight of the ten smallest states. The result is an average per capita income transfer of -\$446 for residents of the ten largest states, compared to a average per capita transfer of +\$356 for residents of the ten smallest states.⁶⁰ A regression analysis of the Fiscal Year 1995 date for all fifty states indicates that the Per Capita Shapley-Shubik Index is in fact a statistically significant predictor of a given state's Per Capita Balance of Payments with the federal government.⁶¹

published by the nonprofit and nonpartisan Tax Foundation." FRIAR & LEONARD, FY 1994 STUDY, *supra*, at 4; FRIAR ET AL., FY 1995 STUDY, *supra*, at 93.

58. FRIAR ET AL., FY 1995 STUDY, *supra* note 57, at 30-31; *see also id.* at 93-96.

59. *Id.* at 32-35; *see also id.* at 93 (stating methodology).

60. Because of the difficulties in aggregating data reflecting different states' cost of living indices, my comparisons rely solely on data that do not include any cost of living adjustment. This typically requires that I divide Friar and Leonard's data by the cost of living indices that they used. *See id.* at 96-100; *see also id.* at 93-94.

61. The *p* value of the relevant co-efficient is 0.01. For the complete regression model, *see Baker & Dinkin, supra* note 27, at Appendix 3.

TABLE 2

**BALANCE OF PAYMENTS WITH THE FEDERAL GOVERNMENT
FISCAL YEAR 1995
Ten Largest States**

State	Per Capita Income Transfer	Population (millions)	Poverty Rate (%)
California	-\$132	32	21.5
New York	-\$1024	18	20.4
Texas	+\$118	19	18.8
Florida	+\$406	14	15.5
Pennsylvania	+\$81	13	15.3
Illinois	-\$1517	12	13.7
Ohio	-\$447	11	14.7
Michigan	-\$1221	10	14.9
New Jersey	-\$2055	8	12.7
North Carolina	+\$123	7	13.6
		144	

Average per capita income transfer = **-\$446**

Average poverty rate among these states = **17.4%**

Mean poverty rate nationwide = **15.8%**

TABLE 3

**BALANCE OF PAYMENTS WITH THE FEDERAL GOVERNMENT
FISCAL YEAR 1995
Ten Smallest States**

State	Per Capita Income Transfer	Population (millions)	Poverty Rate (%)
Wyoming	+\$364	0.5	10.6
Alaska	+\$1224	0.6	13.4
Vermont	+\$49	0.6	10.9
North Dakota	+\$1608	0.6	10.8
Delaware	-\$1378	0.7	9.5
South Dakota	+\$1071	0.7	14.3
Montana	+\$1563	0.9	12.3
Rhode Island	+\$506	1.0	14.3
Idaho	+\$606	1.2	13.4
New Hampshire	-\$1313	1.1	9.8
		7.9	

Average per capita income transfer = **+\$356**

Average poverty rate among these states = **12.0%**

Mean poverty rate nationwide = **15.8%**

III. THE ROLE OF THE COURTS

It seems clear that the Framers anticipated this potentially redistributive effect of their chosen structure of congressional representation because they included in their Constitution many different restrictions on Congress' ability to enact special legislation:⁶² for example, the religion clauses of the First Amendment;⁶³ the protection Article I, Section 9 affords against the congressional imposition of "any Regulation of Commerce or Revenue" that gives a preference "to the Ports of one State over those of another";⁶⁴ and the requirement of Article I, Section 8 that "all Duties, Imposts and Excises shall be uniform throughout the United States."⁶⁵

The broadest and most promising constitutional constraints on special legislation that the Framers' included, however, were surely the three federalism provisions mentioned at the outset of this Article: the Spending Clause of Article I, Section 8, which authorizes Congress to "pay the Debts and provide" only "for the common Defence and *general Welfare* of the United States";⁶⁶ the Commerce Clause of Article I, Section 8, which limits

62. The Constitution also contains restrictions on the ability of individual states to secure a benefit for themselves by (discriminatorily) imposing a cost solely on others. *See, e.g.*, U.S. CONST. art. I, § 8, cl. 3 (Commerce Clause); *id.* art. I, § 9, cl. 5 ("No Tax or Duty shall be laid on Articles exported from any State."). These sorts of restrictions, however, are not relevant to the current discussion.

63. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . ."). Richard Epstein has suggested that the religion clauses, particularly the Establishment Clause, should be invoked more frequently to prevent government-mandated redistribution. RICHARD A. EPSTEIN, *BARGAINING WITH THE STATE* 260-61 (1993) (observing that "[o]nce general takings and public trust arguments are no longer sufficient to forestall all forms of redistribution, whether covert or overt, between A and B, then additional pressure is placed upon the religion clauses to forbid redistribution both from or to any religious group," and implicitly suggesting that the notion of a "religious group" be read broadly). *But see* Lynn A. Baker, *Bargaining for Public Assistance*, 72 *DENV. U. L. REV.* 949 (1995) (contribution to Symposium on "The Unconstitutional Conditions Doctrine") (providing a critique of Epstein's argument).

64. U.S. CONST. art. I, § 9, cl. 6. It is not facially clear whether the last portion of this provision—"nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another"—is intended to restrict Congress, the state legislatures, or both. If state legislatures are the target, this provision is not relevant to the current discussion. And if Congress is the target, this provision is arguably redundant with Article I, Section 8, Clause 1: "all Duties, Imposts and Excises shall be uniform throughout the United States."

65. U.S. CONST. art. I, § 8, cl. 1.

66. *Id.* (emphasis added).

Congress's regulatory authority to matters of "Commerce with foreign Nations, and among the several States, and with the Indian Tribes";⁶⁷ and the Tenth Amendment, which "reserved to the States respectively, or to the people" the "powers not delegated to the United States by the Constitution, nor prohibited by it to the States."

But the Court has not always been willing to enforce these provisions. It has long held the general welfare restriction on Congressional spending to be essentially nonjusticiable.⁶⁸ Similarly, for many decades prior to *United States v. Lopez* the Court had interpreted Congress' power under the Commerce Clause so expansively as to render this constraint, too, virtually nonjusticiable.⁶⁹ And this, in turn, led the Court in the years between *Garcia*⁷⁰ and *New York*⁷¹ (and now *Printz*⁷²) to find

67. *Id.* cl. 3.

68. *See, e.g.,* *Massachusetts v. Mellon*, 262 U.S. 447 (1923) (holding that a challenge to a conditional offer of funds to the states under the federal Maternity Act posed a non-justiciable political question). In *South Dakota v. Dole*, the Court observed that the "general welfare" restriction on Congress's spending power is subject to the caveat that "courts should defer substantially to the judgment of Congress" when applying this standard. 483 U.S. 203, 207 (1987). The Court went on to acknowledge that the required level of deference is so great that it has "questioned whether 'general welfare' is a judicially enforceable restriction at all." *Id.* at 207 & n.2 (citing *Buckley v. Valeo*, 424 U.S. 1, 90-91 (1976) (per curiam)).

For discussion of the evolution of the Court's spending power jurisprudence, see Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911, 1924-32 (1995); David E. Engdahl, *The Spending Power*, 44 DUKE L.J. 1 (1994); Thomas R. McCoy & Barry Friedman, *Conditional Spending: Federalism's Trojan Horse*, 1988 SUP. CT. REV. 85, 102-17, 123-34.

69. In *United States v. Lopez*, 514 U.S. 549 (1995), the Supreme Court held for the first time in nearly sixty years that a federal law exceeded Congress's power under the Commerce Clause. *See* LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 316 (2d ed. 1988) (observing before *Lopez* that "[c]ontemporary commerce clause doctrine grants Congress such broad power that judicial review of the affirmative authorization for congressional action is largely a formality"); JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 154 (4th ed. 1991) (observing before *Lopez* that "[t]he Supreme Court today interprets the commerce clause as a complete grant of power") (emphasis added); *cf.* JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 155 (5th ed. 1995) (observing after *Lopez* that "[t]he Supreme Court today interprets the commerce clause as a broad grant of power") (emphasis added).

70. 469 U.S. 528 (1985).

71. 505 U.S. 144, 188 (1992) (holding that "the Federal Government may not compel the states to enact or administer a federal regulatory program").

72. 65 U.S.L.W. 4731, 4737 (U.S. June 27, 1997) (observing that "[r]esidual state sovereignty was . . . implicit, of course, in the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones, Art. 1, § 8, which implication was rendered express by the Tenth Amendment"); *see also id.* at

not only that the Tenth Amendment is a truism, but that the powers it “reserved to the States” constitute a null set.⁷³

Those who applaud the Court’s frequent unwillingness to give bite to the restrictions on Congressional action contained in the Spending Clause, the Commerce Clause, and the Tenth Amendment, are celebrating more than the Court’s refusal to enforce states’ rights, however. As the analysis presented in Parts I and II above reveals, they are also implicitly celebrating systematic redistribution from large population states to small ones. Opponents of federalism therefore have the burden of justifying this form of redistribution. And no principled justification appears to exist.

One possible justification is that this federal redistribution is actually from richer states to poorer ones, with state wealth bearing a direct and positive relationship to state population. In fact, however, calculations based on the Census Bureau’s poverty statistics indicate that the rate of poverty in the ten largest states is substantially higher on average than in the ten smallest states (see Tables 2 and 3),⁷⁴ yet the direction of the federal

4740 (“It is an essential attribute of the States’ retained sovereignty that they remain independent and autonomous within their proper sphere of authority.”); *id.* at 4742 (“The Brady Act violates the Tenth Amendment to the extent it forces States and local law enforcement officers to perform background checks on prospective handgun owners and to accept Brady Forms from firearms dealers.”) (O’Connor, J., concurring).

73. The Tenth Amendment states that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. amend. X. In *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), the Court explicitly overruled *National League of Cities v. Usery*, 426 U.S. 833 (1976), which had interpreted the Tenth Amendment to put matters “essential to [the] separate and independent existence” of the states beyond the reach of Congress’s power under the Commerce Clause. *National League of Cities*, 426 U.S. at 845. The *Garcia* Court made clear that the Tenth Amendment provided no independent check on Congress’s ability to regulate “the States as States,” in holding that “State sovereign interests . . . more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.” 469 U.S. at 551; *cf.* *New York v. United States*, 505 U.S. 144, 156-57 (1992) (Tenth Amendment “restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which, . . . is essentially a tautology”); Martha Field, *Garcia v. San Antonio Metropolitan Transit Authority: The Demise of a Misguided Doctrine*, 99 HARV. L. REV. 84 (1985); Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 SUP. CT. REV. 341; William W. Van Alstyne, *Federalism, Congress, the States, and the Tenth Amendment: Adrift in the Cellophane Sea*, 1987 DUKE L.J. 769.

74. FRIAR ET AL., FY 1995 STUDY, *supra* note 57, at 94, 100. The rankings used are not adjusted for the cost of living in different states. See *supra* note 60.

income transfer is from the larger (and poorer) to the smaller (and richer) states.

That a state has a small population does not make it—or its residents—obviously more virtuous, needy, beneficial to the larger society, or otherwise deserving of a disproportionately large share of federal benefits relative to large-population states and their residents. And such redistribution therefore offends our notions of equality⁷⁵ and distributional justice,⁷⁶ among both individuals and sovereigns. This forced redistribution also conflicts with our notions of property⁷⁷ and cannot be justified by a compensating increase in aggregate social welfare since none is likely to result. In short, both moral and economic theory provide arguments against, but can offer no justification for, the type of redistribution ensured by the Court's refusal to enforce the Constitution's "federalism" constraints on the enactment of special legislation.

IV. THE RELEVANCE OF ARTICLE V

At this point, the clever and persistent opponent of states' rights might argue that I have persuaded him only that the apportionment of representation in Congress—in particular, in the Senate—should be changed, and not that the Court should be more aggressive in its protection of state autonomy. And, indeed, I have argued elsewhere that a scheme of proportional

75. For discussion of various conceptions of "equality," see, e.g., AMY GUTMANN, *LIBERAL EQUALITY* (1980); IMMANUEL KANT, *FOUNDATION OF THE METAPHYSICS OF MORALS* 47 (L. Beck Trans., 1959) (1st ed. Riga 1785) ("Act so that you treat humanity, whether in your own person or in that of another as an end and never as a means only."); *NOMOS IV: EQUALITY* (J. Roland Pennock & John W. Chapman eds., 1967); *THE IDEA OF EQUALITY: AN ANTHOLOGY* (George L. Abernethy ed., 1959).

76. The classic discussion of distributional justice is JOHN RAWLS, *A THEORY OF JUSTICE* (1971). See also JOHN LOCKE, *OF CIVIL GOVERNMENT* (J.M. Dent ed., 1943); JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* (Peter Laslett ed., 1960); JOHN RAWLS, *POLITICAL LIBERALISM* (1993).

77. A cornerstone of American political, legal, and economic institutions is the idea that private property is a natural adjunct of individual dignity and an essential foundation for democracy and free enterprise. See JOHN LOCKE, *TWO TREATISES OF GOVERNMENT*, Bk. II, ch. V ("Of Property") (Peter Laslett ed., 1960) (asserting that private property originates in the law of nature and individual ownership rights stem from mixing one's labor with the property); RICHARD SCHLATTER, *PRIVATE PROPERTY: THE HISTORY OF AN IDEA* (1951). Thus, our Constitution provides that "[n]o person shall . . . be deprived of life, liberty, or *property*, without due process of law; nor shall *private property* be taken for public use, without just compensation"). U.S. CONST. amend. V (emphasis added).

representation of the states and a super-majority decision rule has many important advantages relative to the existing allocation of representation in Congress.⁷⁸ Unfortunately, however, the Constitution contains one significant barrier, and affords no especially plausible route, to adopting such a scheme.

The most obvious barrier to any reapportionment of the Senate is Article V of the Constitution, which mandates that “no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.”⁷⁹ As we have seen, each of the small states, for which “equal” representation in the Senate means disproportionately great representation relative to its share of the population, reaps financial and political benefits from this arrangement.⁸⁰ And none of these states is therefore likely to consent to a (disadvantageous) reapportionment of the Senate on the basis of population.

Nonetheless, Article V need not preclude such a reapportionment—at least as a theoretical matter. First, this clause of Article V is itself arguably subject to repeal or change under the *general* procedures outlined within the Article.⁸¹ Second, even if this clause were determined to be unamendable,⁸² or to be amendable only pursuant to its own

78. See Baker & Dinkin, *supra* note 27.

79. U.S. CONST. art. V, cl. 4.

80. See *supra* Part II.C.

81. That is, the text of Article V arguably could be amended simply to delete the clause stating that “no State, without its Consent, shall be deprived of its equal Suffrage in the Senate,” if the change were proposed by two-thirds of both houses of Congress and ratified by the legislatures of three-fourths of the states, for example. See U.S. CONST. art. V; Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 461 (1994). Some might plausibly argue, however, that such a change to the text of Article V does deprive some states of their equal suffrage in the Senate and therefore also requires the consent of the affected states, pursuant to the special amendment provision of Article V. See, e.g., Thomas A. Baker, *Exercising the Amendment Power to Disapprove of Supreme Court Decisions: A Proposal for a “Republican Veto”*, 22 HASTINGS CONST. L.Q. 325, 340 n.47 (1995) (calling such a proposal to amend the entrenchment clause “disingenuous”); Douglas Linder, *What in the Constitution Cannot be Amended?*, 23 ARIZ. L. REV. 717, 726-27 (1981) (contending that any amendment that “represents an effort to dilute the influence in the Senate of the smaller states” should be invalid, but that “an amendment abolishing the Senate” could be upheld “on a holistic theory of constitutional interpretation”).

82. The Senate Clause of Article V, however, seems obviously different from—more amendable than—the companion clause specifying that “no Amendment which may be made prior to [1808] shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article.” U.S. CONST. art. V (emphasis added); see also Sanford Levinson, *The Political Implications of Amending Clauses*, 13 CONST.

dictates,⁸³ it could simply be rendered moot by alterations to other, unambiguously amendable provisions of the Constitution.⁸⁴ Notably, Article I, Section 1, which currently vests

[a]ll legislative Powers . . . in a Congress of the United States, which shall consist of a Senate and House of Representatives[,]

could be amended to vest

[a]ll legislative Powers . . . in a Congress of the United States, which shall consist of a single Chamber that affords each state representation in proportion to its population and which requires a two-thirds supermajority for the passage of any law.⁸⁵

COMMENT. 107, 122 & n.32 (1996) (noting that the other "entrenchment" provision of Article V seems to have precluded "any amendment concerning congressional abolition of the slave trade prior to 1808," and contending that "the Senate clause is not 'unamendable' as a matter of theory") (emphasis in original).

83. Professor Sandy Levinson has argued that amending the Senate clause of Article V pursuant to its own dictates would essentially require unanimous consent:

Contrary to what is sometimes asserted, the Senate clause is *not* "unamendable" as a matter of theory, though, as a practical matter, that is almost certainly the case, given the extreme unlikelihood of, say, Wyoming agreeing to give up its excess of power in the Senate. This assumes, incidentally, that *only* Wyoming *must* consent to its reduced representation. But, of course, *all* states would be deprived of "equal Suffrage in the Senate," even if one assumes, reasonably enough, that the states that benefit would be delighted to accept the inequality. But, as a theoretical matter, this raises the possibility that Vermont's failure to consent to Wyoming's reduced representation in the Senate would doom the proposal, since otherwise one would be foisting an "unequal Suffrage" on Vermont, relative to Wyoming's, without its consent.

Levinson, *supra* note 82, at 122 n.32 (emphasis in original).

84. Much less plausibly, "equal Suffrage" in the Senate clause of Article V could be interpreted to mean "equal Suffrage *in proportion to its share of the population.*" The preceding phrase, "deprived of," however, also suggests that no change from the practice-to-be-established was intended. And our current practice, as well as the implicit interpretation of this clause for the past 200 years, suggest that the equality intended was that of two Senators per state, see U.S. CONST. art. I, § 3, cl. 1, and not that based on each state's share of the nation's population. *Id.* art. I, § 2, cl. 3 (states' apportionment in the House of Representatives to be determined "according to their respective Numbers").

85. U.S. CONST. art. I, § 1. Similarly, Section 3, Clause 6 of the Constitution could be amended to grant this newly constituted Chamber "the sole power to try all impeachments," and Section 7, Clause 2 could be modified to state that, "Every bill which shall have passed *the Chamber* shall, before it becomes a Law, be presented to the President of the United States . . ." Indeed, "Chamber" could be substituted for

All of these amendment possibilities are likely to remain no more than that, however. Again, any state that currently receives disproportionately great representation in the Senate relative to its share of the population benefits from the existing allocation of representation and should therefore have little interest in changing it. As Table 4 shows, the number of such overrepresented states has *always* substantially exceeded the one-third-plus-one necessary to block the mere proposal of any constitutional amendment by Congress or the calling of “a Convention for proposing Amendments” on the application of state legislatures.⁸⁶ (And, of course, the number of such overrepresented states has always greatly exceeded the *one* necessary to block any reapportionment of the Senate under the special amendment procedures set out in Article V, Clause 3.) It logically follows that none of these overrepresented states should be interested in amending Article V to permit a smaller proportion of the two congressional houses (or of the state legislatures) to propose constitutional amendments, or to permit a smaller proportion of the states to ratify any amendments that are proposed.

“Senate” and “House” throughout the Constitution—with the arguable exception of Article V, of course.

86. *See* U.S. CONST. amend. V. Indeed, the closest we have ever been was at the Framing, when the number of states needed to block the proposal of a constitutional amendment in Congress (5) exactly equalled the number of states overrepresented in the Senate, relative to their shares of the nation’s population (also 5). *See infra* Table 4, p. 950.

TABLE 4

THE AMENDMENT PROCESS AND
OVER-REPRESENTATION IN THE U.S. SENATE

Year	# States	# House Reps.	Sen. Rep = X House Reps.	# States Over-rep. in Senate	# States needed to block proposal to amend Const.
1787	13	65	5.00	5	5
1790	16	106	6.22	9	6
1800	17	142	8.35	11	6
1810	23	186	8.09	15	8
1820	24	213	8.87	14	9
1830	26	242	9.31	18	11
1840	31	232	7.48	21	12
1850	33	237	7.18	22	13
1860	36	243	6.75	24	13
1870	38	293	7.71	22	15
1880	44	332	7.54	27	16
1890	45	357	7.93	26	16
1900	46	391	8.49	27	16
1910	48	435	9.06	28	16
1920		- no reapportionment -			
1930	48	435	9.06	34	16
1940	48	435	9.06	33	16
1950	*50	*437	8.74	32	17
1960	50	435	8.70	33	17
1970	50	435	8.70	34	17
1980	50	435	8.70	33	17
1990	50	435	8.70	32	17

$(1/\text{total \# states}) \times (\text{total \# House reps.}) = \text{point of perfect proportionality}$
between House and Senate reps.

*Membership was temporarily increased to 437 after Hawaii and Alaska were granted statehood in 1959.

At this point another thought occurs to the clever and persistent opponent of states' rights. If the Court's reluctance to enforce the Constitution's federalism provisions in fact ensures that federal legislation will, in the long run, systematically and unjustifiably benefit small-population states at the expense of large ones, why haven't the large-state Representatives engaged in a "work stoppage"? Taken alone, the Representatives of the nine largest of the existing eighteen large states constitute more than half of the total membership of the House.⁸⁷ If these representatives simply refused to appear on the floor of the

87. See *supra* Table 1, p. 929.

House, there would be no quorum and no legislation could be passed.⁸⁸ (This possibility takes on substantial plausibility at a time when Congress has repeatedly demonstrated its capacity to shut down the federal government.⁸⁹) Through such a work stoppage, the representatives of the large states could conceivably coerce unanimous consent to a formal amendment of Article I, Section 3, Clause 1, reapportioning representation in the Senate on the basis of population.⁹⁰

Why, then, have the large states' Representatives not yet taken this route? The idea may not have occurred to any one.⁹¹ Or those to whom it may have occurred may also have been uncertain as to the ramifications for their own political careers.

88. Article I, Section 5 specifies that "a Majority of each [house] shall constitute a Quorum to do Business." The 18 largest states have a total of 315 of 435 Representatives, *id.*; THE BOOK OF THE STATES, *supra* note 23, at 635-36, leaving the remaining 32 states 98 Representatives short of the 218 House members necessary for a quorum.

It is further noteworthy that the remaining 32 states cannot formally amend this quorum requirement today, since, taken alone, they will fall short of the two-thirds of each chamber needed to propose the amendment, as well as of the three-fourths of the states necessary to ratify. It should be noted, however, that a smaller number of Representatives "may be authorized to compel the Attendance of absent Members, in such Manner, and under such penalties, as each House may provide." U.S. CONST. art. I, § 5. Under House Rules 5 and 15(4), in the absence of a quorum, a majority of 15 present members may have absent members arrested, "by officers appointed by the Sergeant-at-Arms for that purpose," brought before the House by the Sergeant-at-Arms and noted as present. At that point, whether or not the Representatives vote on the pending matter, the member will be counted toward the majority necessary to constitute a quorum. See H.R. DOC. NO. 102-405, at 538, 542 (Rule 15(2)(a) & Rule 15(4)). Because these rules only provide for arrest "by officers appointed by the Sergeant-at-Arms, however, they appear only to contemplate the arrest and forced attendance of members already in the Capitol building, or at least nearby. Members would thus seem to be able to avoid becoming part of a quorum in this way simply by staying in their home districts.

89. See, e.g., Ann Devroy & Eric Pianin, *Shutdown Widens as Impasse Persists: D.C. Government Services Spared Disruption*, WASH. POST, Dec. 18, 1995, at A1; Eric Pianin, *Workers Go Home; Talks Go Nowhere; Clinton, GOP at Impasse on Budget*, WASH. POST, Nov. 15, 1995, at A1; Dana Priest, *Columbus Day Cushions Shutdown's Initial Blow: "Anything that Can Be Closed . . . Will Be"*, WASH. POST, Oct. 6, 1990, at A1.

90. It seems likely, but is not certain, that unanimity would be necessary. See *supra* note 83.

91. Cf. John J. Donohue, III, *Opting for the British Rule, Or If Posner and Shavell Can't Remember the Coase Theorem, Who Will?*, 104 HARV. L. REV. 1093, 1118 (1991) ("[E]xceptional intelligence and thorough familiarity with the Coase Theorem cannot guarantee that Coasean bargains will be perceived and struck."); Daniel A. Farber, Commentary, *The Case Against Brilliance*, 70 MINN. L. REV. 917, 919 (1986) ("[T]he Coase Theorem is just too contrary to common sense to keep in mind.").

Even the large state residents, who clearly have the most to gain from a reapportionment of the Senate, may not be eager to bear certain short-term costs of such a shut down of Congress and, eventually, of the federal government.⁹² In this regard, the aggregate expected costs of such a large state work stoppage, which necessarily include the (likely small) risk of Union dissolution, may rationally be thought to exceed the likely benefits. That is, the existence of the Union, even without any constitutional protection afforded states' rights, may rationally be understood to provide even the large states (and their residents) a host of benefits, which exceed the aggregate costs imposed by the existing apportionment of congressional representation: for example, better national defense at lower per capita cost, a federal floor on the rights that individuals have against their state government,⁹³ the availability of higher quality goods at lower prices ensured by the prohibition against discriminatory tariffs imposed by other states,⁹⁴ protection against oppression by other states' governments when one travels,⁹⁵ and a common currency.⁹⁶

92. See, e.g., Raymond Hernandez, *Federal Budget Impasse Hits Home With the Threat of Layoffs in School Districts*, N.Y. TIMES, Mar. 18, 1996, at B1 (explaining how the 1996 federal budget impasse adversely affected local school districts in New York State).

93. Under the Due Process Clause of the 14th Amendment, virtually all of the rights guaranteed by the first eight Amendments have been selectively absorbed into the 14th Amendment and, therefore, applied to the states. The U.S. Supreme Court has justified this incorporation by holding the rights involved to be "implicit in the concept of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), and "fundamental to the American scheme of justice," *Duncan v. Louisiana*, 391 U.S. 145, 148-49, *reh'g denied*, 392 U.S. 947 (1968). See generally LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 772-73 (2d ed. 1988); Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193 (1992).

94. See U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have power . . . To regulate Commerce . . . among the several States, . . ."); *id.* § 10, cl. 2 ("No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws; and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.").

95. See *id.* art. IV, § 2 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."); *id.* amend. XIV ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

96. See *id.* art. I, § 8, cl. 5 ("The Congress shall have Power . . . to coin Money,

CONCLUSION

My goal in this Article has been to add a new, and generally applicable, argument to the case for judicial enforcement of states' rights under the Commerce Clause, the Spending Clause, and the Tenth Amendment. I have demonstrated that the allocation of representation in Congress is highly likely to yield enactments that, in the long run, systematically and unjustifiably benefit small-population states at the expense of large ones. Thus, one important, and previously unremarked-upon, effect of judicial enforcement of the federalism provisions of the Constitution should be to mitigate—however slightly—this small-state bias inherent in the existing federal lawmaking process. The role of the courts here is made all the more critical by the fact that Article V precludes the possibility of remedying this bias by altering the structure of representation in Congress.

Today we are held captive by an element of the Framers' design in a way that they likely neither anticipated nor intended. Union formation logically demanded a structure of representation that would ensure both large and small states protection against systematic oppression by the other.⁹⁷ It is not surprising that the large states considered Article I's apportionment of representation to be a reasonable mid-point between equal

regulate the Value thereof, and of foreign Coin. . . ."); *id.* § 10, cl. 1 ("No State shall . . . coin Money; . . . [or] make any Thing but gold and silver Coin a Tender in Payment of Debts.").

97. See, e.g., THORNTON ANDERSON, *CREATING THE CONSTITUTION: THE CONVENTION OF 1787 AND THE FIRST CONGRESS* 44-68 (1993); M.E. BRADFORD, *ORIGINAL INTENTIONS ON THE MAKING AND RATIFICATION OF THE UNITED STATES CONSTITUTION* 9 (1933); MAX FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* 54-60, 104-06 (1913); JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 57-93 (1996); Edmund Randolph, *Virginia Resolutions* (May 29, 1787), in 1 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 20-21 (Max Farrand ed., 1911); Roger Sherman, *Remarks in Debate* (June 11, 1787), in *id.* at 193, 201. Implicit in this concern, of course, is the desirability of some degree of continued sovereignty for the states. See generally ANDERSON, *supra*, at 54-58; RAKOVE, *supra*, at 70 ("With the Convention verging toward a deadlock, the supporters of the equal-state vote grew impervious to appeals for justice, however eloquent. Either states were corporate units deserving an equal voice in national government or they were not. On this issue there is little left to say."); *Letter from Alexander to James Dane* (Sept. 3, 1780), in 2 *THE PAPERS OF ALEXANDER HAMILTON* 401, 407-08 (Harold C. Syrett ed., 1961) ("The confederation in my opinion should give Congress complete sovereignty; except as to that part of internal police, which relates to the rights of property and life among individuals and to raising money by internal taxes. It is necessary, that every thing, belonging to this, should be regulated by the state legislatures.").

representation of the states and representation solely in proportion to population.⁹⁸ After all, the large states had earlier in the Articles of Confederation agreed to equal representation of the states, which is obviously even more disadvantageous than the scheme set out in Article I.⁹⁹ Nonetheless, the Constitution's apportionment of representation—taken alone—disadvantages the large states.

As we have seen, however, the large states originally had little reason to mind any advantage that Article I's apportionment of representation formally gave the small states, or to contest the inclusion of Article V's requirement that "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate,"¹⁰⁰ because the Constitution also included a multitude of constraints on the enactment of special or expropriative legislation. In a world in which the Spending Clause is intended and expected to authorize the expenditure of federal money only for the "general Welfare of the United States,"¹⁰¹ and the

98. Much of the historical record suggests, however, that the large states agreed to this apportionment of representation quite grudgingly and out of a fear that the Union could not otherwise be preserved. See, e.g., RAKOVE, *supra* note 97, at 58 ("Had delegates from the large states not grudgingly accepted [the equal representation of the states in the Senate], the Convention might have broken apart—and once disbanded, the last best hope for preserving the Union might have evaporated as well."); *id.* at 69 ("[D]eadlock itself offered a sufficient rationale for compromise [on the apportionment of representation in Congress], regardless of the weight of argument."); Randolph, *supra* note 97, at 96-97 (explaining that the small states would have withdrawn from the Constitutional Convention if states had not be provided an equal vote in the Senate). *But see id.* at 100-01 (stating that the small states were weary of the Connecticut Compromise because it conceded too much, but that a "spirit of compromise" strengthened during the Convention).

99. See U.S. ARTICLES OF CONFEDERATION art. V ("In determining questions in the United States in Congress assembled, each State shall have one vote."); see also CHARLES PINCKNEY, SPEECH BEFORE THE NEW JERSEY ASSEMBLY (Mar. 13, 1786), reprinted in 8 LETTERS OF MEMBERS OF THE CONSTITUTIONAL CONGRESS 321, 327 (Edmund C. Burnett ed., 1936) (stating that the large states agreed to equal representation of the states in the Articles of Confederation because an immediate agreement was necessary in order to fight the Revolution).

100. At least one recent commentator, however, has argued that this was in fact the Framers' crucial mistake. See DANIEL LAZARE, THE FROZEN REPUBLIC: HOW THE CONSTITUTION IS PARALYZING DEMOCRACY 48-49, 285-310 (1996); Daniel Lazare, *The Lords of Misrule*, N.Y. TIMES, Dec. 27, 1995, at A11. As I have shown, however, the ratio of large and small states has *always* since the Framing been such that one would not expect the original structure of congressional representation to be changed even under the general amendment procedures of Article V. See *supra* Table 4, at p. 950. And one surely would not have expected or have wanted the Framers to make the structure of congressional representation *easier* to amend than other provisions of the Constitution.

101. U.S. CONST. art. I, § 8, cl. 1; see also David E. Engdahl, *The Spending Power*,

Commerce Clause is expected and intended to authorize Congress to regulate a small and quite clear category of inter-state activities,¹⁰² the enactment of legislation that systematically

44 DUKE L.J. 1, 26-35 (1994). The Supreme Court did not interpret the “general Welfare” clause until 1936 when it decided *United States v. Butler*, 297 U.S. 1 (1936). See *TRIBE*, *supra* note 93, at 321. Well into the 19th century, however, this clause was understood to constrain severely Congress’s ability to spend. Three examples bear particular mention.

Thomas Jefferson contended in his annual address to Congress on December 2, 1806, that a constitutional amendment would be necessary if a federal revenue surplus were used to fund internal improvements and education “because the objects now recommended[—public education, roads, rivers, canals, and other objects of public improvement—]are not among those enumerated in the Constitution, and to which it permits the public moneys to be applied.” 16 *Annals of Cong.* 11, 15 (1806). Although Congress passed, and Jefferson ultimately signed, a bill appropriating funds to pay for construction of the “Cumberland Road,” it should be noted that this improvement was not internal to a single state but was projected to extend from Cumberland, Maryland, across West Virginia to the Ohio River. See Act of Mar. 29, 1806, ch. 19, § 1, 2 Stat. 357, 358.

Two decades later, President Jackson vetoed the Maysville Road Bill of 1830 on the ground that the proposed road ran wholly within the state of Kentucky and therefore would be of merely local benefit rather than for the “general Welfare” as he believed the Spending Clause required. See *ANDREW JACKSON, VETO OF THE MAYSVILLE ROAD BILL (1830)*, reprinted in 2 *A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS* 483-92 (James D. Richardson ed., 1896).

In December of the previous year, Jackson observed publicly that the federal fisc would soon show a surplus:

On account of the doubtful constitutionality of national improvements, [Jackson] considered that “the most safe, just, and federal disposition which could be made of the surplus revenue would be its apportionment among the several States, according to the ratio of their representation; and that should the measure not be found warranted by the Constitution, it would be expedient to propose to the States an amendment authorizing it.”

EDWARD G. BOURNE, *THE HISTORY OF THE SURPLUS REVENUE OF 1837* (1885) (emphasis added). In 1836, Congress passed and Jackson signed a bill that purported to “deposit” the surplus revenue with the states, subject to repayment upon demand by the federal government. It was commonly understood that the bill provided for the “temporary deposit” rather than for the “distribution” of the surplus in order to avoid a veto by Jackson who believed the latter to exceed Congress’s powers under the Constitution. *Id.* at 20, 22 & n.2; see also Harold Faber, *Once Upon a Time a Budget Surplus*, N.Y. TIMES, Dec. 31, 1995, at E3. One powerful example of how the constraint afforded by the Spending Clause today differs from that evident in the early 1800s is the seemingly constitutional expenditure of federal funds to build and maintain “interstate” Highway 1 on the island of Oahu, Hawaii.

102. See, e.g., *United States v. DeWitt*, 76 U.S. (9 Wall.) 41, 44 (1870) (invalidating federal legislation prohibiting the sale of naphtha and certain illuminating oils on the ground that the “express grant of power to regulate commerce among the States has always been understood . . . as a virtual denial of any power to interfere with the internal trade and business of the separate States”); *Trade-Mark Cases*, 100 US. 82 (1879) (invalidating federal legislation establishing a trademark registration scheme on

benefits the small states at the expense of the large states will be of scant concern. This was arguably the original understanding, the Framers' world.

Would the large states in 1937, say, have supported a formal amendment to Article I, Section 8, Clause 3 of the Constitution authorizing Congress to regulate any activity with a "substantial economic effect" on interstate commerce?¹⁰³ Would the large states in that same year have supported a formal amendment to Article I, Section 8, Clause 1 authorizing Congress to spend federal funds except when its "choice [of objective] is clearly wrong, a display of arbitrary power [rather than] an exercise of judgment"?¹⁰⁴ It is hard to know. What is the right answer if a state wants to permit Congress to impose minimum wage and maximum hour requirements on private industry,¹⁰⁵ but wants simultaneously to prohibit Congress from imposing many other types of homogenizing legislation on the states? What is the right answer if a state wants to permit Congress to spend federal funds on behalf of the unemployed or aged,¹⁰⁶ but wants simultaneously to minimize the amount of pork-barrel legislation that Congress can enact? Faced in 1937 with the choice between a federal government of *too limited* power and a federal government of *too plenary* power, it might well have been rational for the large states to take the bitter with the sweet and choose the latter. We would need to quantify the unquantifiable

the ground that if a statute "is designed to govern the commerce wholly between citizens of the same state, it is obviously the exercise of a power not confided to Congress"; see also G. REYNOLDS, *THE DISTRIBUTION OF POWER TO REGULATE INTERSTATE CARRIERS BETWEEN THE NATION AND THE STATES* 59-76 (1928); F. RIBBLE, *STATE AND NATIONAL POWER OVER COMMERCE* 61-65 (1937); TRIBE, *supra* note 93, at 306-10 (citing specific examples of the Court's early unwillingness to restrict congressional power under the Commerce Clause, culminating in *NLRB v. Jones and Laughlin Steel Corp.*, 301 U.S. 1 (1937)).

103. Cf. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 41 (1937) (holding that Congress could regulate labor relations at any manufacturing plant operated by an integrated manufacturing and interstate sales concern because a work stoppage at any such plant "would have a most serious effect upon interstate commerce"); see also Robert L. Stern, *The Commerce Clause and the National Economy*, 59 HARV. L. REV. 645-93, 883-947 (1946) (tracing development of "substantial economic effect" test); TRIBE, *supra* note 93, at 309-10 (same).

104. Cf. *Helvering v. Davis*, 301 U.S. 619, 640 (1937).

105. Cf. *United States v. Darby*, 312 U.S. 100 (1941) (upholding federal wage and hour legislation as a valid exercise of the commerce power).

106. See *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937) (unemployment compensation); *Helvering v. Davis*, 301 U.S. 619 (1937) (old age benefits).

in order to test this hypothesis empirically, so we likely shall never know the answer.

It is significant, however, that if the precise amendments to the Constitution set out above had been proposed in 1937, and if the fourteen then-existing large states *had* sought to block their adoption, they had sufficient numbers to do so.¹⁰⁷ But, of course, these “amendments” to Article I, Section 8 were adopted by the Supreme Court, outside of the procedures specified in Article V.¹⁰⁸ Indeed, the history of how the New Deal Supreme Court came to reinterpret the Spending and Commerce Clauses might suggest that the critical defects in the Framers’ design were a failure in Article III, Section 1, to specify precisely the number of Justices to sit on the United States Supreme Court, and a failure in Article II, Section 2, Clause 2, to give the House any say in the approval of appointments to the Court.¹⁰⁹ Although the large states were sufficiently great in number in 1937 to *block* the adoption of any proposed amendment to Article 1, Section 8 or to any other provision of the Constitution, taken alone they have *never* had sufficient numbers even to propose, let alone adopt, any formal amendment.¹¹⁰

Ultimately, the critical flaw in the Framers’ scheme appears to derive from their failure to appreciate fully the extent to which judicial review could and would enable constitutional provisions such as the Commerce and Spending Clauses to evolve as societal conditions and norms changed.¹¹¹ Meanwhile, the vastly more determinate provisions specifying the structure of congressional representation would be frozen in time. The Framers could not

107. These 14 large states constituted 29% of the then-existing 48 states, one more than the 13 necessary to prevent ratification pursuant to Article V. See U.S. CONST. art. V (requiring ratification by 3/4 of the states); see also *supra* Table 4, p. 950.

108. See BRUCE ACKERMAN, 1 WE THE PEOPLE: FOUNDATIONS (1991) (justifying and explaining the operation of a legitimate process of constitutional change outside of Article V); cf. Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984) (same).

109. See, e.g., Michael Ariens, *A Thrice-Told Tale, or Felix the Cat*, 107 HARV. L. REV. 620 (1994); William E. Leuchtenburg, *FDR’s Court-Packing Plan: A Second Life, A Second Death*, 1985 DUKE L.J. 673; William E. Leuchtenburg, *The Origins of Franklin D. Roosevelt’s “Court-Packing” Plan*, 1966 SUP. CT. REV. 347; Alpheus T. Mason, *Harlan Fiske Stone and FDR’s Court Plan*, 61 YALE L.J. 791 (1952).

110. See *supra* Table 4, p. 950.

111. See, e.g., TRIBE, *supra* note 93, at 305-17 (detailing evolution of the Court’s interpretation of the Commerce Clause); Baker, *supra* note 68, at 1924-32 (detailing evolution of the Court’s interpretation of the Spending Clause); Engdahl, *supra* note 68, at 26-49 (same).

anticipate that the structure of congressional representation, which, together with the Spending and Commerce Clauses, so neatly resolved the central difficulty of union formation, would many years later create rather than solve some important problems of governance. The problem we face today, in sum, is one that only the Court—its creator—can solve.