

**THE (NOT SO DIRE) FUTURE OF THE NECESSARY AND  
PROPER POWER AFTER *NATIONAL FEDERATION OF  
INDEPENDENT BUSINESS V. SEBELIUS***

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INTRODUCTION

The Supreme Court's decision in *National Federation of Independent Business v. Sebelius*<sup>1</sup> (*NFIB*) received immediate, widespread, and sustained scholarly attention. Observers debated everything from the decision's doctrinal substance<sup>2</sup> to its

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<sup>1</sup> 132 S. Ct. 2566 (2012).

<sup>2</sup> See, e.g., Charles Fried, *The June Surprises: Balls, Strikes, and the Fog of War*, in *THE HEALTH CARE CASE: THE SUPREME COURT'S DECISION AND ITS IMPLICATIONS* 51, 53–61 (Nathaniel Persily, Gillian E. Metzger & Trevor W. Morrison eds., 2013) [hereinafter Fried, *The June Surprises*] (criticizing the commerce, necessary and proper, tax, and spending holdings); Andrew Koppelman, “Necessary,” “Proper,” and *Health Care Reform*, in *THE HEALTH CARE CASE: THE SUPREME COURT'S DECISION AND ITS IMPLICATIONS* 105, 105–16 (Nathaniel Persily, Gillian E. Metzger & Trevor W. Morrison eds., 2013) [hereinafter Koppelman, *Necessary, Proper*] (criticizing the necessary and proper analysis contained in the opinions of the Chief Justice and the joint dissent); Neal Devins, *Party Polarization and Judicial Review: Lessons from the Affordable Care Act*, 106 *NW. U. L. REV.* 1821, 1821 (2012) (arguing in favor of judicial enforcement of federalism limits but not “endors[ing] the action-inaction distinction advanced by five Justices in the ACA decision”); Maureen Mullen Dove, *The Obamacare Decision: Does Anyone Know What It Means?*, 46 *MD. B.J.* 28 (2013) (discussing how to interpret *NFIB* and the precedential effect of commerce and necessary and proper rulings); Jamal Greene, *What the New Deal Settled*, 15 *U. PA. J. CONST. L.* 265, 266 (2012) (examining why “[i]tigation over the individual mandate focused on the limits of congressional power embodied within Article I,” rather than on the limits imposed by substantive due process); Craig L. Jackson, *The Limiting Principle Strategy and Challenges to the New Deal Commerce Clause*, 15 *U. PA. J. CONST. L.* 11, 12 (2012) (discussing how the *NFIB* decision impacts Commerce Clause doctrine); Jerry L. Mashaw, *Legal, Imagined, and Real Worlds: Reflections on National Federation of Independent Business v. Sebelius*, 38 *J. HEALTH POL. POL'Y & L.* 255 (2013) (evaluating the Chief Justice's opinion); Robert J. Pushaw, Jr. & Grant S. Nelson, *The Likely Impact of National Federation on Commerce Clause Jurisprudence*, 40 *PEPP. L. REV.* 975, 979 (2013) (evaluating the impact of Commerce Clause decision and concluding that “[o]n balance . . . history and pragmatism suggest that this case will have a marginal jurisprudential impact”); Glenn H. Reynolds & Brannon P. Denning, *National Federation of Independent Business v. Sebelius: Five Takes*, 40 *HASTINGS CONST. L.Q.* 807, 807 (2013) (discussing five different “meanings and implications of the Supreme Court's decision”); Ilya Shapiro, *Like*

precedential impact<sup>3</sup> and the reasons behind Chief Justice Roberts's vote to uphold the so-called "individual mandate"<sup>4</sup> under the taxing power,<sup>5</sup> despite his simultaneous conclusion that the mandate exceeded Congress's commerce power.<sup>6</sup> Although the

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*Eastwood Talking to a Chair: The Good, the Bad, and the Ugly of the Obamacare Ruling*, 17 TEX. REV. L. & POL. 1 (2012) (praising the commerce, necessary and proper, and spending holdings, and criticizing the tax holding); Andrew Koppelman, *Terrible Arguments Prevail!*, SALON (June 28, 2012, 4:26 PM), [http://www.salon.com/2012/06/28/terrible\\_arguments\\_prevail/](http://www.salon.com/2012/06/28/terrible_arguments_prevail/) [<http://perma.cc/B2X4-L2WP>] [hereinafter Koppelman, *Terrible Arguments*] (evaluating the Chief Justice's opinion).

Courts are also grappling with how to interpret *NFIB*. See *United States v. Roszkowski*, 700 F.3d 50, 57–58 (1st Cir. 2012) (declining an invitation to read *NFIB* as cutting back on commerce power in general); *United States v. Lott*, 912 F. Supp. 2d 146, 152–53 (D. Vt. 2012) (holding the Chief Justice's opinion represents the narrowest views of those supporting the judgment, discussing varying interpretations of *NFIB*'s commerce and necessary and proper analyses, and noting that it might well confine the holding in *Gonzales v. Raich*, 545 U.S. 1, 39 (2005)); *United States v. Spann*, No. 3:12-CR-126-L, 2012 WL 4341799, at \*3 (N.D. Tex. Sept. 24, 2012) (addressing whether to combine the Chief Justice's opinion with that of the four dissenters and declining to do so).

<sup>3</sup> See, e.g., Randy E. Barnett, *No Small Feat: Who Won the Health Care Case (And Why Did So Many Law Professors Miss the Boat)?*, 65 FLA. L. REV. 1331, 1336 (2013) [hereinafter Barnett, *No Small Feat*] (explaining why the Chief Justice's commerce and necessary and proper discussions represent "the holding[s] of the Court"); Dove, *supra* note 2, at 31 (discussing how to interpret *NFIB* and precedential effect of commerce and necessary and proper analyses); Mashaw, *supra* note 2, at 264 (arguing that the commerce and necessary and proper discussions are "pure dictum"); Ilya Somin, *The Individual Mandate and the Proper Meaning of "Proper,"* in *THE HEALTH CARE CASE: THE SUPREME COURT'S DECISION AND ITS IMPLICATIONS* 146, 160 (Nathaniel Persily, Gillian E. Metzger & Trevor W. Morrison eds., 2013) [hereinafter Somin, *The Individual Mandate*] (discussing whether the commerce and necessary and proper discussions are dicta); Joel Alicea, *The Two Versions of the Avoidance Canon*, SCOTUSREPORT (July 5, 2012, 9:52 AM), <https://web.archive.org/web/2013043092707/http://www.scotusreport.com/2012/07/05/the-two-versions-of-the-avoidance-canon/> (discussing whether the Chief Justice's commerce and necessary and proper holdings are dicta).

<sup>4</sup> The individual mandate "requires individuals to purchase a health insurance policy providing a minimum level of coverage." *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2577. Individuals who failed to obtain health insurance had to "make an additional payment to the IRS" at tax time. *Id.* at 2593–94.

<sup>5</sup> *But see* Barnett, *No Small Feat*, *supra* note 3, at 1337 (arguing that the Chief Justice did not uphold the individual mandate under the taxing power, but rather "rewr[ote] the law[.] . . . so that it was no longer a *mandate* but merely an *option*: get insurance or pay a mild 'tax' penalty").

<sup>6</sup> See, e.g., Jonathan H. Adler, *Judicial Minimalism, the Mandate, and Mr. Roberts*, in *THE HEALTH CARE CASE: THE SUPREME COURT'S DECISION AND ITS IMPLICATIONS* 171 (Nathaniel Persily, Gillian E. Metzger & Trevor W. Morrison eds., 2013) (rejecting the suggestion that Chief Justice Roberts was driven by "political motives, or worse," and arguing that "[t]he key elements of his opinion are of a piece with his prior opinions as a justice and circuit court judge and his accounts of the proper judicial role"); Fried, *The June Surprises*, *supra* note 2, at 62–65 (discussing the motivation for the tax holding); Pushaw & Nelson, *supra* note 2, at 996 ("Roberts's odd embrace of virtually plenary taxing authority rendered largely nugatory

commerce and taxing power holdings seemed to generate much of the discussion, the Necessary and Proper Clause analysis captured all of my interest,<sup>7</sup> for the Court's departure from existing precedent has the potential to severely limit the reach of federal power.<sup>8</sup> As Professors Robert J. Pushaw, Jr. and Grant S. Nelson noted, the Court's "newly muscular approach to judicial review suddenly makes many federal laws vulnerable to attack."<sup>9</sup> This Article seeks to predict the degree of such vulnerability and, thus, *NFIB*'s impact on the future scope of the necessary and proper power.

Despite a long line of cases confirming the breadth and flexibility of the power,<sup>10</sup> the *NFIB* Court ruled that the Necessary and Proper Clause did not support the

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the restrictions that he and the four conservatives had placed on the Commerce and Necessary and Proper Clauses." (citation omitted)); Shapiro, *supra* note 2, at 18–22 (discussing Chief Justice Roberts's decision to uphold the mandate); Andrew Koppelman, *Roberts' Crafty Victory: Conservatives Complaining About John Roberts Don't Understand the Win He Handed Them*, SALON (July 5, 2012, 2:30 PM), [http://www.salon.com/2012/07/05/roberts\\_crafty\\_victory](http://www.salon.com/2012/07/05/roberts_crafty_victory) [<http://perma.cc/5KVH-NBU8>] [hereinafter Koppelman, *Roberts' Crafty Victory*] (same).

<sup>7</sup> I was not alone in my interest. Professor Gary Lawson views the necessary and proper analysis as "the most noteworthy discussion" in the decision because both the Chief Justice's opinion and that of the joint dissent "advance important propositions about the Necessary and Proper Clause." Gary Lawson, *Night of the Living Dead Hand: The Individual Mandate and the Zombie Constitution*, 81 *FORDHAM L. REV.* 1699, 1701–07 (2013) (citation omitted); see also Fried, *The June Surprises*, *supra* note 2, at 55 (describing the Chief Justice's necessary and proper discussion as "[p]articularly eye-catching"); Pushaw & Nelson, *supra* note 2, at 994–95 (noting the importance of Chief Justice Roberts's necessary and proper analysis); Shapiro, *supra* note 2, at 5 ("The Court's ruling was even more striking with regard to the Necessary and Proper Clause . . ."); Somin, *The Individual Mandate*, *supra* note 3, *passim* (discussing the Necessary and Proper Clause analysis and its implications).

<sup>8</sup> See Pushaw & Nelson, *supra* note 2, at 994 ("National Federation was unprecedented insofar as a majority of Justices claimed that they could substitute their prudential judgments for Congress's about the propriety of a statute based on their contestable notions of federalism." (citation omitted)); see also *infra* notes 16–28 and accompanying text.

<sup>9</sup> Pushaw & Nelson, *supra* note 2, at 994–95.

<sup>10</sup> See *United States v. Comstock*, 560 U.S. 126, 133 (2010) (acknowledging that "the Necessary and Proper Clause grants Congress broad authority to enact federal legislation" and citing numerous cases supporting that point); *id.* at 133–37 (describing broad scope of power); *id.* at 149 ("[T]he Necessary and Proper Clause is part of 'a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs.'" (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819))); see also Greene, *supra* note 2, at 276 ("At the start of the litigation, there was no case holding, even remotely, that either the constitutional structure or the Tenth Amendment itself prevents the federal government from conscripting individuals into acting against their will to accomplish some federal regulatory objective." (citation omitted)). *But see* Ilya Somin, *Comstock, Bond and Predictions About the Individual Mandate Case*, VOLOKH CONSPIRACY (Feb. 22, 2013, 11:54 PM), <http://www.volokh.com/2013/02/22/comstock-bond-and-predictions-about-the-individual-mandate-case/> [<http://perma.cc/7CHL-DQ24>] [hereinafter Somin, *Comstock, Bond*] ("*Comstock* . . . should have alerted observers to the likelihood that the individual mandate litigation would not be an easy win for the federal government.").

individual mandate.<sup>11</sup> According to Chief Justice Roberts, who delivered the judgment of the Court,<sup>12</sup> the individual mandate was not “an essential component of the [Patient Protection and Affordable Care Act’s (ACA)] insurance reforms,” because it was not a “derivative of, and in service to,” an enumerated power.<sup>13</sup> And even if he could be persuaded that it was “‘necessary’ to the Act’s insurance reforms,”<sup>14</sup> it was not “proper” because it was neither “narrow in scope” nor “‘incidental’ to the exercise of the commerce power,” and, thus, would dramatically expand federal power at the expense of the states.<sup>15</sup> In the end, the individual mandate failed under the Necessary and Proper Clause for the precise reason it failed under the commerce power—it simply went too far.

*NFIB* introduced new and stringent limits on the necessary and proper power.<sup>16</sup> It applied the “necessary” prong in a rigid manner, requiring a tight fit between the means and the enumerated power.<sup>17</sup> But such rigidity is inconsistent with the general understanding—since *McCulloch v. Maryland*<sup>18</sup>—that necessity is a broad, flexible concept<sup>19</sup> left largely up to Congress.<sup>20</sup> “Ever since Chief Justice John Marshall’s

<sup>11</sup> *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. 2566, 2591–93 (2012); *id.* at 2644–48 (joint dissent).

<sup>12</sup> Chief Justice Roberts wrote an opinion announcing the judgment, but none of the other four Justices who agreed with the necessary and proper result joined his opinion. *Id.* at 2577. Instead, Justices Scalia, Kennedy, Thomas and Alito wrote a joint dissent on necessary and proper (and other) grounds. *Id.* at 2642.

<sup>13</sup> *Id.* at 2592.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* (citation omitted).

<sup>16</sup> See Koppelman, *Terrible Arguments*, *supra* note 2 (“The [C]ourt . . . for the first time[] imposed limits on Congress’s broad powers under the Necessary and Proper Clause . . .”).

<sup>17</sup> *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2647 (joint dissent) (rejecting the mandate because “there are many ways other than this unprecedented Individual Mandate by which the regulatory scheme’s goals of reducing insurance premiums and ensuring the profitability of insurers could be achieved”); see, e.g., Reynolds & Denning, *supra* note 2, at 830 (noting that the Court’s analysis “is a far cry from prior decisions whose scrutiny of congressional claims of necessity was less than rigorous” (citation omitted)). Robert N. Weiner correctly notes that Chief Justice Roberts’s opinion “reiterated Congress’s broad discretion in choosing how to effectuate its enumerated powers.” Robert N. Weiner, *Much Ado: The Potential Impact of the Supreme Court Decision Upholding the Affordable Care Act*, in *THE HEALTH CARE CASE: THE SUPREME COURT’S DECISION AND ITS IMPLICATIONS* 69, 74 (Nathaniel Persily, Gillian E. Metzger & Trevor W. Morrison eds., 2013) [hereinafter Weiner, *Much Ado*] (citation omitted). The problem, however, is that the opinion fails to give deference to that “broad discretion.” Instead, it simply asserts without analysis that the means are not sufficiently related to the ends. See *infra* notes 135–39 and accompanying text.

<sup>18</sup> 17 U.S. (4 Wheat.) 316 (1819).

<sup>19</sup> *United States v. Comstock*, 560 U.S. 126, 133–34 (2010) (“[T]he Necessary and Proper Clause makes clear that the Constitution’s grants of specific federal legislative authority are accompanied by broad power to enact laws that are ‘convenient, or useful’ or ‘conducive’ to the authority’s ‘beneficial exercise.’” (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 413, 418)).

<sup>20</sup> *Id.* at 135 (“If it can be seen that the means adopted are really calculated to attain the end, the degree of their necessity, the extent to which they conduce to the end, the closeness

famous opinion in *McCulloch v. Maryland*, which construed the Sweeping Clause to require only a minimal ‘fit’ between legislatively chosen means and a valid governmental end, the clause has not been widely viewed as a significant substantive limitation on congressional authority.”<sup>21</sup>

More striking, however, is *NFIB*’s invalidation of the mandate under the “proper” prong—a prong that has not been a primary focus in the Court’s Necessary and Proper Clause jurisprudence.<sup>22</sup> The Chief Justice’s characterization of the mandate as “work[ing] a substantial expansion of federal authority”<sup>23</sup> echoes the now familiar warning from *United States v. Lopez*<sup>24</sup> that Congress lacks “a general police power of

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of the relationship between the means adopted and the end to be attained, are matters for congressional determination alone.” (quoting *Burroughs v. United States*, 290 U.S. 534, 547–48 (1934)). *But see* Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. PA. J. CONST. L. 183, 207–08 (2003) (arguing that Chief Justice Marshall articulated and intended a tighter means/ends test in *McCulloch*).

<sup>21</sup> Gary Lawson & Patricia B. Granger, *The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 271 (1993) (citations omitted); *see* Koppelman, *Necessary, Proper*, *supra* note 2, at 109 (“*McCulloch* has since been read to say that Congress has a broad choice of means.”); *cf.* *United States v. Lopez*, 514 U.S. 549, 588 (1995) (Thomas, J., concurring) (“[O]n this Court’s understanding of congressional power under [the Commerce and Necessary and Proper] Clauses, many of Congress’ other enumerated powers under Art. I, § 8, are wholly superfluous.”).

<sup>22</sup> *See* Somin, *The Individual Mandate*, *supra* note 3, at 146 (“[I]n the first 220 years of its history, the Supreme Court never gave us anything approaching a comprehensive analysis of what it means for a law to be ‘proper.’”); *id.* at 149–50 (“[T]he Court has been far less clear on the meaning of ‘proper.’”); *see also* Lawson, *supra* note 7, at 1703 (“Until *NFIB*, the only instances in which the Court expressly applied this understanding of [‘proper’] involved direct regulation of states or state officials.”); Lawson & Granger, *supra* note 21, at 291 (noting that “ever since the Court’s decision in *McCulloch*,” the term “proper” has related to “[f]it,” just like the “now-accepted construction of ‘necessary’” (citation omitted)); Mashaw, *supra* note 2, at 264 (arguing that the Chief Justice’s opinion “now invite[s] [lower courts] . . . to take an approach to the necessary and proper clause that has never been law at all”); Shapiro, *supra* note 2, at 6 (“This is the first modern acceptance of the idea that even if something might be necessary it might not be proper.” (citation omitted)); *id.* (“[W]hile the challengers and especially certain amici had been arguing that the ‘proper’ part of the Necessary and Proper Clause had to be considered separately, no court had ever held that.”); *cf.* Mashaw, *supra* note 2, at 262 (Chief Justice Roberts “imagines that proper in the necessary and proper clause encompasses some test other than the constitutional propriety of the congressional action. For nearly two hundred years, *proper* in the necessary and proper clause has meant only that the congressional action must not violate some other constitutional prohibition.” (citation omitted)).

Although Professor Somin acknowledges that the Court has not provided a clear meaning of “proper,” he argues that the treatment of necessary and proper as two distinct concepts began in *McCulloch*. Somin, *The Individual Mandate*, *supra* note 3, at 149–51. *But see* Mark A. Hall, *Commerce Clause Challenges to Health Care Reform*, 159 U. PA. L. REV. 1825, 1854 (2011) (asserting that necessary and proper are “a single construct”).

<sup>23</sup> *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2592 (2012).

<sup>24</sup> 514 U.S. 549 (1995).

the sort retained by the States,”<sup>25</sup> and to that extent it plows no new ground. The new ground comes from the rejection of the mandate because it would allow “Congress [to] reach beyond the natural limit of its authority and draw within its regulatory scope those who otherwise would be outside of it.”<sup>26</sup> In other words, because Congress could not reach inactivity (“the failure to purchase [health] insurance”)<sup>27</sup> under the commerce power, it could not do so under the necessary and proper power.<sup>28</sup> To be sure, the Court recently warned that federalism limits the reach of the necessary and proper power.<sup>29</sup> But it has not, until *NFIB*, gone as far as saying that Congress may not regulate indirectly through the necessary and proper power that which it may not regulate directly through an enumerated power. Professor Andrew Koppelman is correct; this sort of reasoning “reads the Necessary and Proper Clause out of the Constitution completely.”<sup>30</sup>

After *NFIB*, many observers doubtless found themselves asking the same questions they were asking in 1995 when the Supreme Court drew a line in the sand in *Lopez* after sixty years of imposing virtually no limits on the federal commerce power<sup>31</sup>: Was the Court really serious about imposing vigorous federalism limits on one of Congress’s

<sup>25</sup> *Id.* at 567.

<sup>26</sup> *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2592.

<sup>27</sup> *Id.* at 2585.

<sup>28</sup> See *infra* note 122 and accompanying text; see also Bruce F. Howell & Michael A. Clark, “*If It Quacks Like a Duck...*” *An Analysis of the United States Supreme Court Decision in National Federation of Independent Business v. Sebelius*, 24 HEALTH L. 18, 21 (2012) (recognizing that “a majority of the justices concluded that because the individual mandate cannot be authorized under the Commerce Clause, the Necessary and Proper clause was powerless to justify it”).

<sup>29</sup> See, e.g., *United States v. Comstock*, 560 U.S. 126, 153 (2010) (Kennedy, J., concurring) (“It is of fundamental importance to consider whether essential attributes of state sovereignty are compromised by the assertion of federal power under the Necessary and Proper Clause; if so, that is a factor suggesting that the power is not one *properly* within the reach of federal power.” (emphasis added)); *id.* at 158 (Alito, J., concurring) (“The Necessary and Proper Clause does not give Congress *carte blanche*. Although the term ‘necessary’ does not mean ‘absolutely necessary’ or indispensable, the term requires an ‘appropriate’ link between a power conferred by the Constitution and the law enacted by Congress.” (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819))); *Gonzales v. Raich*, 545 U.S. 1, 39 (2005) (Scalia, J., concurring) (explaining federalism limits on the Necessary and Proper Clause); *Printz v. United States*, 521 U.S. 898, 923–24 (1997) (“When a ‘La[w] . . . for carrying into Execution’ the Commerce Clause violates the principle of state sovereignty reflected in the various constitutional provisions we mentioned earlier . . . it is not a ‘La[w] . . . proper for carrying into Execution the Commerce Clause.’” (alteration in original) (citation omitted)).

<sup>30</sup> Andrew Koppelman, *Bad News for Mail Robbers: The Obvious Constitutionality of Health Care Reform*, 121 YALE L.J. ONLINE 1, 8 (2011) [hereinafter Koppelman, *Bad News for Mail Robbers*] (addressing the reasoning in lower court decisions concerning the constitutionality of the individual mandate).

<sup>31</sup> See, e.g., Symposium, *The New Federalism after United States v. Lopez*, 46 CASE W. RES. L. REV. 635 (1996) (discussing the possible impact and meaning of *Lopez*).

biggest powers?<sup>32</sup> What is the impact on the doctrine, the scope of federal power, and the role of the judiciary?<sup>33</sup> As a broad power, the Necessary and Proper Clause would be a natural target for those Justices interested in curbing federal authority, but was the Court *really* serious about reining in the Necessary and Proper Clause *that much*?

Professors Glenn H. Reynolds and Brannon P. Denning argue that the Chief Justice's opinion in *NFIB* might actually make advances in vindicating federalism even though it upheld the ACA.<sup>34</sup> They posit that the Chief Justice remains committed to federalism and argue that his *NFIB* decision could be viewed as "a shrewd opening gambit by someone playing a long game."<sup>35</sup> On the other hand, while recognizing the potential for a serious cutback in federal power,<sup>36</sup> Professors Pushaw and Nelson predict that *NFIB* ultimately will have little impact on federal authority, because either a change in personnel on the Court would create an opportunity to cut back on the ruling, the Court lacked the fortitude to reconsider and overrule decades of precedent, or the Court was unable to hang onto the federalism gains initiated by its decisions in *Lopez* and *United States v. Morrison*.<sup>37</sup> They predict that "the Court will likely revert to its traditional practice of deferring to such congressional judgments because they tend to be subjective and policy-laden."<sup>38</sup>

This Article agrees that the Chief Justice remains committed to judicial enforcement of federalism limits, but does not go so far as to suggest that his opinion sets the stage for dramatic long-term change in necessary and proper doctrine. Indeed, although the Article disagrees that the Court will resume a deferential posture toward congressional policy choices across the board, it predicts that in many cases *NFIB* will have almost no discernable impact on necessary and proper doctrine, even if the

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<sup>32</sup> Chief Justice Roberts opened his *NFIB* opinion in much the same way as did Chief Justice Rehnquist in *Lopez*—emphasizing that "[t]he Federal Government is . . . 'one of enumerated powers,'" and that this "enumeration presupposes something not enumerated." *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2577. One might reasonably view this as a reliable indicator of the Chief Justice's seriousness. But as explained in Part II, his seriousness relates to the general need for judicial enforcement of federalism limits, not an ultra-narrow interpretation of the necessary and proper power. *See infra* Part II.

<sup>33</sup> *See* Shapiro, *supra* note 2, at 2 (characterizing the *NFIB* litigation as "a case that comes along once every generation," because it involves the great and important issues of federalism, "the role of the judiciary in saying what the law is and checking the political branches and the scope of and limits to all three branches' powers").

<sup>34</sup> Reynolds & Denning, *supra* note 2, at 831 ("Chief Justice Roberts' opinion (and that of the joint dissenters) suggests that judicially enforced federalism has some life yet.").

<sup>35</sup> *Id.* at 828; *see id.* at 830 (describing the Chief Justice's necessary and proper analysis as "a far cry from prior decisions whose scrutiny of congressional claims of necessity was less than rigorous" (citation omitted)).

<sup>36</sup> Pushaw & Nelson, *supra* note 2, at 994–95 ("Because the 'substantial effects' test rests heavily upon the Necessary and Proper Clause, this newly muscular approach to judicial review suddenly makes many federal laws vulnerable to attack." (citation omitted)).

<sup>37</sup> 529 U.S. 598 (2000); *see also* Pushaw & Nelson, *supra* note 2, at 995–96.

<sup>38</sup> Pushaw & Nelson, *supra* note 2, at 996 (citation omitted).

Court remains committed to judicial enforcement of federalism, and even in the absence of personnel change on the Court.<sup>39</sup> But it also predicts that, in some cases, particularly those involving a combination of the commerce and necessary and proper powers, *NFIB* could have a noticeable impact (assuming the Court retains a federalism majority). This is because the Court's necessary and proper holding was not really about imposing drastic restrictions on the necessary and proper power; it was about reinvigorating limits on Congress's commerce power—the enormous federal power that has long been the on-again, off-again focus of the Court's federalism attention.<sup>40</sup> In other words, the Necessary and Proper Clause was not the *target* of the Court's federalism ire in *NFIB*, but rather was the *victim* of the Court's current federalism campaign to rein in the federal commerce power.<sup>41</sup>

Relying on the Court's treatment of the Necessary and Proper Clause since *Lopez*, Part I shows that the Court did not have the Necessary and Proper Clause in its cross-hairs before *NFIB*, lending credence to the theory that it could not have been serious about imposing the limits applied in *NFIB* to all future exercises of the necessary and proper power. Part II begins with a close look primarily at Chief Justice Roberts's opinion, arguing that it reveals not so much a preoccupation with the necessary and proper power as with the commerce power and, as a result, with the *combination* of the two powers. The passage of time supports this assessment, for as Part II explains, in the three years since *NFIB* was handed down the Court declined two significant opportunities to restrict Congress's exercise of the Necessary and Proper Clause, neither of which involved the commerce power.<sup>42</sup>

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<sup>39</sup> Professor Lawson argues that the “doctrinal consequences [of the decision] are difficult to gauge” and warns that “future predictions of doctrinal development are treacherous at best.” Lawson, *supra* note 7, at 1700. With respect to the necessary and proper and commerce holdings, he suggests that they “may or may not survive the next vacancy on the Supreme Court . . .” *Id.* Several other scholars make a similar observation. See, e.g., Barnett, *No Small Feat*, *supra* note 3, at 1341 (“Of course a change in the Justices could negate the importance of the *NFIB* decision, but that could happen with any doctrine.”); Pushaw & Nelson, *supra* note 2, at 993–94 (noting that “the durability of *National Federation*'s Commerce Clause holding, as well as the *Lopez/Morrison* stricture against regulating ‘noncommercial’ activity, depends on whether the five Republican Justices continue serving (or are replaced by like-minded jurists)” (citation omitted)); Somin, *The Individual Mandate*, *supra* note 3, at 161 (“Ultimately, much will depend on who gets appointed to the Supreme Court in the next few years.”). All are correct. This Article attempts to discern what the current Court meant with respect to the necessary and proper power and, accordingly, how it (or a similarly constituted Court) might treat it in the future. Loss of a federalism majority could impact some of its predictions. See *infra* notes 206–07 and accompanying text.

<sup>40</sup> See *Lopez*, 514 U.S. at 552–60 (describing the history of the Court's treatment of the commerce power).

<sup>41</sup> Cf. Jackson, *supra* note 2, at 12 (describing *NFIB*'s commerce holding as “another in a series of cases reversing a consensus held among members of the Supreme Court for two generations on the breadth of Congress's power under the Commerce Clause”).

<sup>42</sup> In *United States v. Kebodeaux*, 133 S. Ct. 2496 (2013), seven members of the Court voted to uphold a broad exercise of the power without a single citation to *NFIB*. See *infra*

Considering *NFIB* in the light of decisions handed down both before and after it, Part II concludes that a majority of the Court was serious about two things: (1) continuing the specific mission it began in *Lopez* to contain the scope of the federal commerce power; and (2) continuing the more general *Lopez* mission of preventing the use of *any* federal power if it results in a general federal police power. Part II predicts that necessary and proper doctrine likely will undergo some, but not drastic, change. It should be business as usual in cases where Congress seeks to enforce an enumerated power other than commerce, which means deference to Congress in choice of means and the ability to regulate areas that cannot be reached under an enumerated power. This should be true whether or not the Court keeps its federalism majority. But if the power is used so aggressively as to transform the Necessary and Proper Clause into a general police power, then a majority of the current Court will be inclined to invalidate it as “improper,” no matter what enumerated power Congress is trying to enforce. Finally, use of the power in combination with the commerce power likely will trigger closer scrutiny, at least where Congress’s selected means are unusual, as in *NFIB*, or involve local non-economic activity, as in *Lopez* and *Morrison*.

#### I. BETWEEN *LOPEZ* AND *NFIB*: NO SERIOUS TARGET PRACTICE WITH THE NECESSARY AND PROPER POWER

The extent to which *NFIB* will impact necessary and proper doctrine depends on whether the Court was serious about cutting back the necessary and proper power. The answer to this question begins not with *NFIB*, but with the necessary and proper decisions handed down in the seventeen years between *Lopez* and *NFIB*.<sup>43</sup> With four

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notes 158–78 and accompanying text. And in *Bond v. United States*, 134 S. Ct. 2077 (2014), the Court sidestepped the necessary and proper issue, ruling that the statute did not apply to the petitioner’s conduct. See *infra* notes 179–89 and accompanying text.

<sup>43</sup> The discussion in Part I does not include *Watters v. Wachovia Bank*, 550 U.S. 1 (2007), which contains only a cursory reference to the necessary and proper power at the end of its opinion. *Id.* at 22 (rejecting petitioner’s “alternative argument” because “[r]egulation of national bank operations is a prerogative of Congress under the Commerce and Necessary and Proper Clauses”). Nor does it include *United States v. Morrison*, 529 U.S. 598 (2000), which, like *Lopez*, was framed as a Commerce Clause case. *Id.* at 607 (“[W]e turn to the question whether [the law] falls within Congress’ power under Article I, § 8, of the Constitution. [Petitioners] rely upon the third clause of the section, which gives Congress power ‘[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.’” (fourth alteration in original) (quoting U.S. CONST. art I, § 8, cl. 3)); *id.* at 608–19 (discussing the commerce power)); see *Lopez*, 514 U.S. at 551 (“We hold that the Act exceeds the authority of Congress ‘[t]o regulate Commerce . . . among the several States . . . .’” (alteration in original) (quoting U.S. CONST. art. I, § 8, cl. 3)); *id.* at 552–53 (explaining history and scope of commerce power). It is true that Justice Scalia, among others, views both *Lopez* and *Morrison* as involving a combination of the necessary and proper and commerce powers. See *infra* notes 83–88, 212 and accompanying text. But even if we include *Morrison* (and *Lopez*) in the discussion of necessary and proper cases handed down before *NFIB*, neither case would undermine the argument that the Court was uninterested in drastically cutting back on the necessary and proper power. In fact, both cases support this Article’s assertion that enforcement

cases in that time period specifically addressing the scope of the Necessary and Proper Clause as the main issue,<sup>44</sup> one could reasonably conclude that the Court had *some* interest in the Clause. As it turns out, however, during the post-*Lopez* age of judicially enforced federalism limits, the Court as a whole displayed no serious interest in a general scaling back of the power, and the necessary and proper power survived fairly intact.

To be sure, we see a concern for federalism. The Court confirmed, for example, that “necessary” and “proper” represent separate limits on federal power, both of which are designed to enforce federalism.<sup>45</sup> And in two cases—*Printz v. United States*<sup>46</sup> and *Alden v. Maine*<sup>47</sup>—the Court rejected the challenged federal laws as improper. As *Printz* explained, when a federal law designed to execute an enumerated power “violates the principle of state sovereignty . . . it is not a ‘La[w] . . . proper for carrying into Execution’” the enumerated power.<sup>48</sup> Both *Printz* and *Alden* involved significant incursions on state sovereignty—commandeering state executives (*Printz*)<sup>49</sup> and abrogating state sovereign immunity in state courts (*Alden*),<sup>50</sup> rendering the laws in each case improper under the Clause.<sup>51</sup> Thus, both underscore the Court’s view of the “proper”

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at the outer boundaries is precisely the type of enforcement to which the Court remains committed, as the legislation in both cases exceeded the outer boundaries of federal power and would have transformed federal power into a general police power. See Fried, *The June Surprises*, *supra* note 2, at 52 (“[P]enalizing beating up a girlfriend [(*Morrison*)] or carrying a gun near a school [(*Lopez*)] . . . could not without a very long stretch be characterized as economic regulation.”); see also Akhil Reed Amar, Opinion, *Constitutional Showdown*, L.A. TIMES, Feb. 6, 2011, at A25 (“Neither of the laws at issue in [*Lopez* and *Morrison*] plausibly fell within the Constitution’s grant of congressional power to regulate ‘commerce among the several states’ . . .”).

<sup>44</sup> See *United States v. Comstock*, 560 U.S. 126 (2010) (federal law authorizing civil commitment of certain federal prisoners beyond date they otherwise would be released proper exercise of necessary and proper power); *Gonzales v. Raich*, 545 U.S. 1 (2005) (federal law criminalizing intrastate use and possession of medical marijuana proper exercise of commerce and necessary and proper powers); *Sabri v. United States*, 541 U.S. 600 (2004) (federal law forbidding bribery of officials of state and local entities that receive at least \$10,000 in federal funding proper exercise of necessary and proper power); *Jinks v. Richland Cty.*, 538 U.S. 456 (2003) (federal statute tolling state statute of limitations proper exercise of Necessary and Proper Clause).

<sup>45</sup> *Jinks*, 538 U.S. at 462–64 (emphasizing separate requirements of necessary and proper); *Alden v. Maine*, 527 U.S. 706, 732–33 (1999) (separate consideration of proper); *Printz v. United States*, 521 U.S. 898, 923–24 (1997) (separate consideration of proper); Somin, *The Individual Mandate*, *supra* note 3, at 150 (explaining that *Printz* and *Alden* make clear that the proper prong “imposes a limit on federal power distinct from that of necessity”).

<sup>46</sup> 521 U.S. 898.

<sup>47</sup> 527 U.S. 706.

<sup>48</sup> *Printz*, 521 U.S. at 923–24 (alteration in original) (citation omitted).

<sup>49</sup> *Id.* at 935.

<sup>50</sup> *Alden*, 527 U.S. at 732–33.

<sup>51</sup> *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2627 (2012) (Ginsburg, J., dissenting in part and concurring in part) (“[C]ompell[ing] state officials to act on the Federal

prong as a federalism enforcement tool.<sup>52</sup> But nothing in the very short discussions in those cases suggests that the Court intended to use this tool to cut back drastically on the traditional scope of federal power under the Necessary and Proper Clause.<sup>53</sup>

Meanwhile, in the four cases discussed below, each of which features the necessary and proper power as the main issue (unlike *Printz* and *Alden*),<sup>54</sup> we see plenty of evidence suggesting a fairly robust power, including recognition of the important role the Necessary and Proper Clause plays in assisting Congress in its efforts to address the myriad of problems facing our nation, as well as a corresponding confirmation of the breadth and scope of the power.<sup>55</sup> In each case, a majority of the Court endorsed the flexible nature of “necessary” with analysis that is familiarly loose and deferential.<sup>56</sup> This is true whether the underlying enumerated power is the commerce

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Government’s behalf . . . ‘violate[s] state sovereignty and [is] thus not in accord with the Constitution.’” (emphasis omitted) (citations omitted)); Koppelman, *Necessary, Proper*, *supra* note 2, at 111 (explaining that both *Printz* and *Alden* “relied on state sovereignty” to support violations of the “proper” prong).

<sup>52</sup> Somin, *The Individual Mandate*, *supra* note 3, at 150, 153 (discussing the Court’s use of “proper” to protect federalism and invalidate federal laws at issue in *Printz* and *Alden*); see also Koppelman, *Necessary, Proper*, *supra* note 2, at 111 (stating that *Printz* and *Alden* “show that ‘proper’ is a limit on Congress’s choice of means”).

<sup>53</sup> *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2626–27 (Ginsburg, J., dissenting in part and concurring in part) (emphasizing the limited nature of *Printz*’s reading of “proper” and explaining that it prohibited federal laws that invaded state sovereignty by “compell[ing] state officials to act on the Federal Government’s behalf,” not laws such as the individual mandate that acted “directly upon individuals, without employing the States as intermediaries” (citations omitted)); Koppelman, *Necessary, Proper*, *supra* note 2, at 111 (explaining that *Printz* and *Alden* “relied on state sovereignty” to define proper, “which was not at issue in *NFIB*”). *But see* Somin, *The Individual Mandate*, *supra* note 3, at 150 (“Nothing in the Court’s analysis [in *Printz*] suggests that a law is only improper if it somehow threatens state sovereignty.”).

<sup>54</sup> For the discussion on *Jinks v. Richland County*, see *infra* notes 57–63; on *Sabri v. United States*, see *infra* notes 64–72; on *Gonzales v. Raich*, see *infra* notes 73–96; and on *United States v. Comstock*, see *infra* notes 97–117.

<sup>55</sup> See *United States v. Comstock*, 560 U.S. 126, 142–43 (2010) (explaining that the “Federal Government is the custodian of its prisoners” and thus the Necessary and Proper Clause enables Congress to “confine an individual whose mental illness threatens others”); *Gonzales v. Raich*, 545 U.S. 1, 10 (2005) (describing the disputed legislation as an effort by Congress to “consolidate various drug laws on the books into a comprehensive statute, provide meaningful regulation over legitimate sources of drugs to prevent diversion into illegal channels, and strengthen law enforcement tools against the traffic in illicit drugs”); *Sabri v. United States*, 541 U.S. 600, 605 (2004) (holding that the Necessary and Proper Clause enables Congress “to see to it that taxpayer dollars appropriated under [the Spending Clause] are in fact spent for the general welfare”); *Jinks v. Richland Cty.*, 538 U.S. 456, 462 (2003) (explaining that the Necessary and Proper Clause allows Congress to pass legislation that will “carry[ ] into execution [its] power ‘[t]o constitute Tribunals inferior to the supreme Court’” as provided in Article I of the Constitution (third alteration in original)).

<sup>56</sup> See *Comstock*, 560 U.S. at 133 (beginning its legal analysis with the assertion that “the Necessary and Proper Clause grants Congress broad authority to enact federal legislation”); *Raich*, 545 U.S. at 17 (explaining that “Congress [does not need] to legislate with scientific

power or some other power. And although the Court (or some of the Justices) addressed the issue of propriety, in none of these four cases did the Court invalidate congressional action as improper and nothing suggested that the Court interpreted the term to prohibit Congress from regulating indirectly that which it could not regulate directly. *NFIB*'s necessary and proper ruling, therefore, was not the culmination of an almost two-decades-long plan to significantly shrink the necessary and proper power.

Decided in 2003, *Jinks v. Richland County*<sup>57</sup> involved an exercise of the necessary and proper power to execute two federal powers—Congress's power to establish lower federal courts and the judiciary's power to decide Article III cases and controversies.<sup>58</sup> The federal law at issue tolled state statutes of limitations governing certain disputes while they were pending in federal court.<sup>59</sup> The Court unanimously upheld the law even though it was not vital to the "exist[ence] and function" of the federal courts—Congress can establish federal courts and the federal judiciary can exercise its Article III power without such a law.<sup>60</sup> As the Court explained, it "long ago rejected the view that the Necessary and Proper Clause demands that an Act of Congress be 'absolutely necessary'" to the exercise of an enumerated power.<sup>61</sup> In this case, the law satisfied the necessity requirement because it was "'conducive to the due administration of justice' in federal court" and was "'plainly adapted' to that end."<sup>62</sup> Although the Court recognized outer limits—the means must be proper and cannot be "so attenuated as to undermine the enumeration of powers set forth in Article I, § 8"<sup>63</sup>—nothing in the Court's analysis suggests the impropriety of regulating that which cannot be regulated under an enumerated power alone, a general tightening up of the means/ends connection, or a decrease in deference to congressional selection of means.

One year after *Jinks*, the Court had no difficulty upholding a broad exercise of the Necessary and Proper Clause, this time in conjunction with the spending power. In *Sabri v. United States*,<sup>64</sup> the Court upheld a federal law criminalizing bribery involving entities that receive a minimum of \$10,000 in federal money, even when the bribe is unrelated to the federal money.<sup>65</sup> Just as Congress has authority under the Clause to "see to it that taxpayer dollars appropriated under [the spending] power

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exactitude"); *Sabri*, 541 U.S. at 606 (highlighting that "Congress does not have to sit by and accept the risk of operations thwarted by local and state improbity"); *Jinks*, 538 U.S. at 462 (explaining that acts of Congress need not be "'absolutely necessary' to the exercise of an enumerated power" (citation omitted)).

<sup>57</sup> 538 U.S. 456.

<sup>58</sup> *Id.* at 462.

<sup>59</sup> *Id.* at 458.

<sup>60</sup> *Id.* at 462.

<sup>61</sup> *Id.* (alteration in original) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 414–15 (1819)).

<sup>62</sup> *Id.* (quoting *McCulloch*, 17 U.S. at 417).

<sup>63</sup> *Id.* at 464 (citation omitted).

<sup>64</sup> 541 U.S. 600 (2004).

<sup>65</sup> *Id.* at 602, 604.

are in fact spent for the general welfare, and not frittered away in graft,” it also has authority to “protect spending objects from the menace of local administrators on the take.”<sup>66</sup> The Court rejected comparisons to *Lopez* and *Morrison*, explaining that “the effects of [the regulated] activities on interstate commerce [in those cases were] insufficiently robust.”<sup>67</sup> By contrast, the “reliability of those who use public money is bound up with congressional authority to spend in the first place,” making regulation of corrupt conduct a useful means of effectuating exercises of the spending power, even if the corruption is unconnected to public money.<sup>68</sup>

The majority’s opinion, which cited *McCulloch* as authorizing “means-ends rationality” review in necessary and proper cases,<sup>69</sup> drew a concurrence from Justice Thomas, who refused to join the opinion because he thought it endorsed a “questionable” reach of the necessary and proper power.<sup>70</sup> Justice Thomas disagreed that *McCulloch* required only rationality review, arguing instead that it required an “obvious” or “clear” link between the means and the enumerated power.<sup>71</sup> Using this test, he “doubt[ed] that” the federal bribery law at issue was “a proper use of the Necessary and Proper Clause as applied to Congress’ power to spend.”<sup>72</sup> This is exactly the kind of interpretation of the necessary and proper power one would expect from a Justice committed to more rigorously limiting the reach of federal power in the name of federalism. Yet no other Justice joined Justice Thomas in criticizing the rationality test and calling for much closer scrutiny of congressional means.

Not much changed one year later in *Gonzales v. Raich*,<sup>73</sup> where the Court continued to apply a deferential rationality analysis, allowing Congress to reach purely local activity as a necessary and proper means of executing Congress’s commerce power.<sup>74</sup> *Raich* involved application of the Controlled Substances Act (CSA)<sup>75</sup> to purely intrastate production, consumption, and possession of medical marijuana.<sup>76</sup> The Court upheld such application as a reasonable means of effectuating the CSA, which was designed to eliminate the interstate market in illegal drugs, a goal “well

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<sup>66</sup> *Id.* at 605, 608.

<sup>67</sup> *Id.* at 607. The Court addressed *Lopez* and *Morrison* in response to petitioner’s argument that the legislation at issue in his case was “all of a piece” with that in *Lopez* and *Morrison*. *Id.* It is unclear whether the *Sabri* Court considered those two cases as purely commerce cases or a combination of necessary and proper and commerce. For an explanation of whether they ought to be viewed as the latter, see *Gonzales v. Raich*, 545 U.S. 1, 34–35 (2005) (Scalia, J., concurring), and also *infra* notes 83–88, 212 and accompanying text.

<sup>68</sup> *Sabri*, 541 U.S. at 608.

<sup>69</sup> *Id.* at 605.

<sup>70</sup> *Id.* at 611–14 (Thomas, J., concurring).

<sup>71</sup> *Id.* at 612–13.

<sup>72</sup> *Id.* at 613. He declined to decide the issue, though, as he concluded that the federal bribery law was in line with the Court’s Commerce Clause precedent. *Id.* at 614.

<sup>73</sup> 545 U.S. 1 (2005).

<sup>74</sup> *Id.* at 17–19, 22.

<sup>75</sup> 21 U.S.C. § 801 (1970).

<sup>76</sup> *Raich*, 545 U.S. at 7.

within Congress' commerce power."<sup>77</sup> The Court recognized Congress's power to regulate local activities that, in the aggregate, "pose[] a threat to a national market."<sup>78</sup> "Congress [does not need] to legislate with scientific exactitude"<sup>79</sup> by compiling a factual record to support the reach of the law; all that is necessary is that "Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA."<sup>80</sup> Having "no difficulty concluding" that Congress had such a rational basis, the Court upheld application of the CSA to purely local, otherwise off-limits conduct.<sup>81</sup>

Justice Scalia concurred in the judgment, finding that Congress had authority to reach local production, possession, and consumption of medical marijuana as a means of facilitating Congress's efforts under the Commerce Clause "to extinguish the interstate market in . . . controlled substances."<sup>82</sup> He wrote separately, however, to clarify "the doctrinal foundation" for the decision<sup>83</sup> and the relationship between the necessary and proper power and the commerce power.<sup>84</sup> The majority's analysis centered on the so-called "category three" of a traditional commerce analysis, which allows regulation of intrastate activity that either "substantially affect[s] interstate commerce"<sup>85</sup> or is "necessary to mak[ing] a regulation of interstate commerce effective."<sup>86</sup> But as Justice Scalia explained, the "category three" analysis is actually a necessary and proper analysis: "[A]ctivities that substantially affect interstate commerce are not themselves part of interstate commerce, and thus the power to regulate them cannot come from the Commerce Clause alone. Rather, . . . Congress's regulatory authority over intrastate activities that are not themselves part of interstate commerce . . . derives from the Necessary and Proper Clause."<sup>87</sup> Thus, the "Necessary and Proper Clause . . . empowers Congress to enact laws in effectuation of its enumerated powers

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<sup>77</sup> *Id.* at 15.

<sup>78</sup> *Id.* at 17.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 22.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 39 (Scalia, J., concurring).

<sup>83</sup> *Id.* at 33.

<sup>84</sup> Although the majority framed the issue as involving both the necessary and proper and commerce powers, see *id.* at 5, 22, the bulk of its discussion referenced the rational basis test in connection with the commerce power, which might lead one to conclude that *Raich* is a Commerce Clause case. See, e.g., *id.* at 22 (explaining that it "ha[d] no difficulty concluding that Congress had a rational basis" for regulating the "intrastate manufacture and possession of marijuana" in accordance with the Commerce Clause). Justice Scalia wrote "separately because [his] understanding of the doctrinal foundation on which th[e] holding rests is, if not inconsistent with that of the Court, at least more nuanced." *Id.* at 33 (Scalia, J., concurring).

<sup>85</sup> *Id.* at 34 (Scalia, J., concurring) (citation omitted).

<sup>86</sup> *Id.* at 35.

<sup>87</sup> *Id.* at 34; see Lawson, *supra* note 7, at 1708 (explaining that evaluation of "noninterstate-commerce-but-interstate-commerce-affecting activity . . . must center on the Necessary and Proper Clause, not the Commerce Clause").

that are *not within its authority to enact in isolation*.<sup>88</sup> No clearer expression of the reach of the necessary and proper power is possible.<sup>89</sup>

We have federalism dissenters, but nothing that suggests a groundswell of support for a drastic scaling back on the necessary and proper power. Justice O'Connor dissented, joined by Chief Justice Rehnquist and Justice Thomas, balking at the idea that Congress can regulate local activity just because the government says it is related to “comprehensive regulatory schemes.”<sup>90</sup> Such a rule, she argued, “allows Congress to regulate intrastate activity without check.”<sup>91</sup> But Justice O'Connor did not argue that Congress could *never* reach local activity. Instead, the federal balance requires *demonstrated need* for the regulation of local activity, something she found lacking in *Raich*.<sup>92</sup> Justice Thomas wrote a separate dissent raising a similar concern about lack of proof, but his dissent went a little further.<sup>93</sup> He argued that even if regulation of local medical marijuana use was *necessary* to a regulation of interstate commerce, it would not be *proper* because it “encroached on States’ traditional police powers . . . .”<sup>94</sup> He assuredly is concerned about enforcing “meaningful limits”<sup>95</sup> on the necessary and proper and commerce powers, and his reliance on “proper” to prevent a “general ‘police power’”<sup>96</sup> gets us closer, but not all the way, to the narrow interpretation of the necessary and proper power articulated by the Chief Justice in *NFIB*.

In its 2010 decision in *United States v. Comstock*,<sup>97</sup> the Court embraced a breathtaking vision of the Necessary and Proper Clause, confirming not only Congress’s “broad authority to enact federal legislation,”<sup>98</sup> but also its own tradition of deference to Congress in selecting the means and assessing necessity.<sup>99</sup> There, the Court upheld

<sup>88</sup> *Raich*, 545 U.S. at 39 (Scalia, J., concurring) (emphasis added).

<sup>89</sup> Indeed, Justice Ginsburg quoted this very language in her *NFIB* dissent when explaining the scope of the Necessary and Proper Clause. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2625 (2012) (Ginsburg, J., dissenting in part and concurring in part).

<sup>90</sup> *Raich*, 545 U.S. at 43 (O’Connor, J., dissenting).

<sup>91</sup> *Id.* at 46.

<sup>92</sup> *Id.* at 52 (“[S]omething more than mere assertion is required when Congress purports to have power over local activity whose connection to an interstate market is not self-evident. Otherwise, the Necessary and Proper Clause will always be a back door for unconstitutional federal regulation.”); *id.* at 53 (“There is simply no evidence that homegrown medicinal marijuana users constitute, in the aggregate, a sizable enough class to have a discernable, let alone substantial, impact on the national illicit drug market—or otherwise to threaten the CSA regime.”).

<sup>93</sup> *Id.* at 60–64 (Thomas, J., dissenting) (“Congress cannot define the scope of its own power merely by declaring the necessity of its enactments.”).

<sup>94</sup> *Id.* at 66.

<sup>95</sup> *Id.* at 65.

<sup>96</sup> *Id.* (citation omitted).

<sup>97</sup> 560 U.S. 126 (2010).

<sup>98</sup> *Id.* at 133.

<sup>99</sup> *Id.* at 134–35; see Koppelman, *Bad News for Mail Robbers*, *supra* note 30, at 5 (“The basic rule of *McCulloch* was reaffirmed by the Court as recently as May 2010 in *United States v. Comstock*.” (citation omitted)).

a federal law authorizing civil commitment of certain federal prisoners beyond their release date if, because of a “serious mental illness, abnormality, or disorder,” there is a serious likelihood they would engage in “sexually violent conduct or child molestation.”<sup>100</sup> Even though Congress lacks the direct power to criminalize *all* sexually violent conduct and child molestation, it can seek to prevent such conduct as a means of enforcing Congress’s implied power to regulate for the safety of “prisoners, prison workers[,] . . . visitors, and those in surrounding communities,”<sup>101</sup> which helps ensure a safe and effective system of imprisonment, which helps enforce the criminal laws, which helps enforce an enumerated power.<sup>102</sup> In so holding, the Court explicitly “reject[ed] [the] argument that the Necessary and Proper Clause permits no more than a single step between an enumerated power and an Act of Congress.”<sup>103</sup> Although the means selected by Congress must “ultimately . . . ‘derive[] from’ an enumerated power,” there can be several exercises of the necessary and proper power in between the law at issue and the enumerated power Congress is trying to execute.<sup>104</sup> Each exercise of the necessary and proper power facilitates the next, until we reach the end of the chain: the enumerated power.

The principles applied in *Comstock* are hardly new, as the Court recognized.<sup>105</sup> Still, the Court’s articulation of these principles in *Comstock* is immensely important because it endorsed an enormous reach of the necessary and proper power—even when used with the commerce power (the enumerated power often used to justify criminal laws)<sup>106</sup>—at a time when the Court was thought to be preoccupied with limiting federal power. True, *Comstock* acknowledged federalism limitations, noting a particular concern with the federal government wielding “a general ‘police power.’”<sup>107</sup> And it took pains to explain why the law did not cross the line, laying out “five considerations” that support its holding, three of which speak directly to federalism interests.<sup>108</sup>

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<sup>100</sup> *Comstock*, 560 U.S. at 130.

<sup>101</sup> *Id.* at 137.

<sup>102</sup> *Id.* at 142–43 (stating that the federal law at issue “is ‘reasonably adapted,’ to Congress’ power to act as a responsible federal custodian (a power that rests, in turn, upon federal criminal statutes that legitimately seek to implement constitutionally enumerated authority).” (citations omitted)).

<sup>103</sup> *Id.* at 148.

<sup>104</sup> *Id.* at 147 (citations omitted).

<sup>105</sup> *Id.* at 146–48 (discussing *Sabri v. United States*, 514 U.S. 600 (2004); *United States v. Hall*, 98 U.S. 343 (1879); and *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) as examples).

<sup>106</sup> *Id.* at 147–48 (noting that “Congress relies on different enumerated powers (often, but not exclusively, its Commerce Clause power) to enact its various federal criminal statutes”).

<sup>107</sup> *Id.* at 148 (citation omitted).

<sup>108</sup> *Id.* at 133, 149. The five considerations are:

(1) the breadth of the Necessary and Proper Clause, (2) the long history of federal involvement in this arena, (3) the sound reasons for the statute’s enactment in light of the Government’s custodial interest in safeguarding the public from dangers posed by those in federal custody, (4) the

But such federalism rumblings are drowned out by the Court's actual holding (which allowed Congress to seek to prevent conduct that it could not reach under an enumerated power),<sup>109</sup> as well as its recognition of "the breadth of the Necessary and Proper Clause,"<sup>110</sup> and its parting reminder that the Constitution was drafted to accommodate change, even if that meant an "expansion of the Federal Government's role."<sup>111</sup>

Justices Kennedy and Alito each concurred in the judgment, warning that the Necessary and Proper Clause is not limitless and that it demands a more rigorous assessment of necessity.<sup>112</sup> Notably, however, Chief Justice Roberts joined the majority without writing separately to share the same warning. Professor Ilya Somin suggests that "the inclusion of the five factor test in the opinion may have been the price that Chief Justice John Roberts forced the four liberal justices to pay for casting the decisive fifth vote in favor of the majority opinion."<sup>113</sup> But even if Professor Somin is correct that Chief Justice Roberts insisted on the five factors, the fact is he remained silent in the face of very broad language about the power—language that prompted two of his colleagues to write concurrences and join only the judgment. And even with the five factors, the bottom line is that the Court *upheld* the civil commitment of any federal

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statute's accommodation of state interests, and (5) the statute's narrow scope.

*Id.* at 149. Factors (2), (4), and (5) reveal federalism concerns.

<sup>109</sup> *Id.* at 130, 147–48 ("[E]very such statute must itself be legitimately predicated on an enumerated power. And the same enumerated power that justifies the creation of a federal criminal statute, and that justifies . . . additional implied federal powers . . . justifies civil commitment under [the statutory provision] as well.")

<sup>110</sup> *Id.* at 149.

<sup>111</sup> *Id.* As the Court explained:

The Federal Government undertakes activities today that would, have been unimaginable to the Framers in two senses; first because the Framers would not have conceived that *any* government would conduct such activities; and second, because the Framers would not have believed that the *Federal* Government, rather than the States, would assume such responsibilities. Yet the powers conferred upon the Federal Government by the Constitution were phrased in language broad enough to allow for the expansion of the Federal Government's role.

*Id.* at 148–49 (quoting *New York v. United States*, 505 U.S. 144, 157 (1992)).

<sup>112</sup> Justice Kennedy wrote separately to emphasize two things: (1) the need for a more rigorous rational basis test, such as that used in the commerce power cases; and (2) an invasion of "essential attributes of state sovereignty" by an exercise of the Necessary and Proper Clause could be considered an improper exercise of the power. *Id.* at 150–53 (Kennedy, J., concurring). Justice Alito wrote separately to express "concern[ ] about the breadth of the Court's language and the ambiguity of the standard that the Court applies." *Id.* at 155 (Alito, J., concurring) (citations omitted). He reiterated that the "[t]he Necessary and Proper Clause does not give Congress *carte blanche*," and that "the term 'necessary' . . . requires an 'appropriate' link between a power conferred by the Constitution and the law enacted by Congress." *Id.* at 158 (citation omitted).

<sup>113</sup> Somin, Comstock, Bond, *supra* note 10.

prisoner beyond his release date if the involved state(s) will not “assume responsibility for his custody, care, and treatment” and the prisoner “(1) has previously ‘engaged or attempted to engage in sexually violent conduct or child molestation,’ (2) currently ‘suffers from a serious mental illness, abnormality, or disorder,’ and (3) ‘as a result of’ that mental illness, abnormality or disorder is ‘sexually dangerous to others’” (e.g., likely to commit a state or federal sexual crime).<sup>114</sup> It is difficult to characterize this as a limited holding.<sup>115</sup>

The strongest objection came from Justice Thomas, who mainly argued that the law served no legitimate enumerated end and that there can be no more than one step in between the exercise of an implied power and the enumerated power it supports.<sup>116</sup> Justice Scalia joined Justice Thomas on the first point but not the second.<sup>117</sup> So at the end of the day we have four Justices seeking to apply a more rigorous analysis, though only two saw fit to dissent. Although the decision might remind us that the Court will enforce the outer boundaries on federal power, and that some Justices wish to tighten up the analysis even more, it does not foretell a drastic cutback on the power.

Altogether, the post-*Lopez* decisions confirm the breadth of the power, while at the same time warning that the Court will police the outer federalism boundary to prevent creation of a federal police power and incursions onto state sovereignty. Although the federalism discussion gets a little louder as we move closer in time to *NFIB*, it is not so loud as to suggest a major shift in doctrine.

## II. *NFIB*'S TRUE TARGET: THE COMMERCE POWER

The Chief Justice rejected the individual mandate under the Necessary and Proper Clause, reasoning that “[e]ven if [it] is ‘necessary’ to the Act’s insurance reforms, [it] is not a ‘proper’ means for making those reforms effective.”<sup>118</sup> Why? Because the mandate was neither “narrow in scope” nor “‘incidental’ to the exercise of the commerce power.”<sup>119</sup> If upheld, the mandate

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<sup>114</sup> *Comstock*, 560 U.S. at 130–31 (citations omitted).

<sup>115</sup> For an argument that *Comstock* is a broad holding, even under Chief Justice Roberts’s reading of the case in *NFIB*, see Koppelman, *Necessary, Proper, supra* note 2, at 114–15.

<sup>116</sup> See *Comstock*, 560 U.S. at 163–65, 167–70 (Thomas, J., dissenting).

<sup>117</sup> *Id.* at 158.

<sup>118</sup> *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2592 (2012).

<sup>119</sup> *Id.* (quoting *Comstock*, 560 U.S. at 148, and *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 418 (1819)). Relying on *McCulloch*, 17 U.S. (4 Wheat.) at 411, 418, the Chief Justice distinguished between “incidental” power on the one hand and “great substantive and independent power” on the other. *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2591–93. For a scholarly debate about such a distinction, compare Gary Lawson & David B. Kopel, *Bad News for Professor Koppelman: The Incidental Unconstitutionality of the Individual Mandate*, 121 YALE L.J. ONLINE 267, 270 (2011) (arguing that the “Necessary and Proper Clause . . . embodies the venerable doctrine of *principals and incidents*: a law enacted under the Clause must exercise a subsidiary rather than an independent power”), and *id.* at 271 (arguing that “the power to order someone to purchase a product is not a power subordinate or inferior to other powers. It is a power at least as significant . . . as the power to regulate

would work a substantial expansion of federal authority. No longer would Congress be limited to regulating under the Commerce Clause those who by some preexisting activity bring themselves within the sphere of federal regulation. Instead, Congress *could reach beyond the natural limit of its authority and draw within its regulatory scope those who otherwise would be outside of it.*<sup>120</sup>

In the end, the Chief Justice concluded: “Just as the individual mandate cannot be sustained as a law regulating the substantial effects of the failure to purchase health insurance, neither can it be upheld as a ‘necessary and proper’ component of the insurance reforms. The *commerce power* thus does not authorize the mandate.”<sup>121</sup> Translation: the necessary and proper power reaches as far as the enumerated power it enforces, and no farther. In this case, because Congress could not reach inactivity under its commerce power, it could not reach it under the necessary and proper power, as doing so would expand the commerce power beyond constitutional limits.<sup>122</sup>

Although such a restrictive reading of “proper” has been endorsed by a few commentators,<sup>123</sup> it contradicts long-established precedent that consistently reaffirmed

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insurance pricing and rating practices” (citation omitted)), with Andrew Koppelman, *Bad News for Everybody: Lawson and Kopel on Health Care Reform and Originalism*, 121 YALE L.J. ONLINE 515, 518–20 (2012) (arguing against adopting interpretation of the Necessary and Proper Clause proposed by Professors Lawson and Kopel), and *id.* at 522 (“The rules that Lawson and Kopel’s originalist research claims to have uncovered, if implemented, would seem to accomplish just what I have said that other arguments against the mandate would do: ‘randomly blow up large parts of the U.S. Code.’” (citations omitted)). For further discussion, see also Somin, *The Individual Mandate*, *supra* note 3, at 161 (arguing that the distinction between independent and incidental powers “could have significant impact in the future,” but also recognizing that Chief Justice Roberts fails to explain how to differentiate the two).

<sup>120</sup> *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2592 (emphasis added).

<sup>121</sup> *Id.* at 2593 (emphasis added).

<sup>122</sup> Professors Pushaw and Nelson would seem to agree with this translation, as they “applaud [*NFIB*’s necessary and proper ruling] because we have long urged the Court, consistent with the Constitution’s original meaning, to prevent Congress from relying upon the Necessary and Proper Clause as a bootstrap to *aggrandize power it does not possess under the Commerce Clause.*” Pushaw & Nelson, *supra* note 2, at 994 (emphasis added) (citation omitted).

<sup>123</sup> See, e.g., *supra* note 122; Lawson & Granger, *supra* note 21, at 330 (“An executory law that regulates subjects outside Congress’s enumerated powers is not ‘proper’ and therefore not constitutional. The Tenth Amendment, as with the rest of the Bill of Rights, is thus declaratory of principles already contained in the unamended Constitution via the Sweeping Clause.”); see also *id.* at 331 (“[E]xecutory laws may not regulate or prohibit activities that fall outside the subject areas specifically enumerated in the Constitution.”); *id.* at 274 n.21 (“[T]he requirement that executory laws be ‘proper’ prevents the national government from using the Sweeping Clause to regulate indirectly subjects over which it does not have direct jurisdiction.”); *id.* at 331 (“To carry a law or power into execution . . . does *not* mean to regulate unenumerated subject areas to make the exercise of enumerated powers more efficient.” (citation omitted)).

Congress's power to regulate activities *outside* the reach of an enumerated power when necessary to "carry[] into Execution"<sup>124</sup> that enumerated power.<sup>125</sup> Indeed, that is the whole point of the Necessary and Proper Clause. If Congress *had* authority under an enumerated power, it would not need to reach for the necessary and proper power.<sup>126</sup> As the Court recognized in *Comstock*, even though the Constitution does not "speak[] explicitly" about the general power "to criminalize conduct, . . . to imprison individuals who engage in that conduct, . . . [or] to enact laws governing prisons and prisoners," such powers exist under "authority granted by the Necessary and Proper Clause."<sup>127</sup> And in *Raich*, Justice Scalia clearly explained that the Necessary and Proper Clause "empowers Congress to enact laws in effectuation of its enumerated powers that *are not within its authority to enact in isolation*."<sup>128</sup> If the Chief Justice's statements in *NFIB* are to be taken at face value, then *Comstock* and *Raich* are both wrong. Indeed, the list of decisions undermined by this reading of *NFIB* is quite long.<sup>129</sup>

So the big question is whether this translation is correct. Was the Court (in particular, the Chief Justice) serious about steering the Necessary and Proper Clause in a new and much narrower direction?<sup>130</sup> Yes, the Court invalidated the individual

<sup>124</sup> U.S. CONST. art. I, § 8, cl. 18.

<sup>125</sup> Professor Mashaw argues that the opinion "invite[s] [lower courts] . . . to take an approach to the necessary and proper clause that has never been law at all." Mashaw, *supra* note 2, at 264. Congress has long been able to regulate something indirectly under the necessary and proper power, even though it could not regulate it directly under an enumerated power such as the commerce power. *See id.* at 260 (explaining that the regulated activity "need [not] be commerce at all if its regulation is necessary and proper to a broader scheme of interstate commerce regulation" (citing *Perez v. United States*, 402 U.S. 146, 154 (1971))).

<sup>126</sup> Robert N. Weiner, a former Associate Deputy Attorney General for the U.S. Department of Justice, had the same reaction to the Chief Justice's necessary and proper language: "But if a particular piece of legislation were already within the scope of Congress's enumerated power, there would be no need to invoke the Necessary and Proper Clause." Weiner, *Much Ado*, *supra* note 17, at xiv, 77. Like this Article, see *infra* notes 133–49 and accompanying text, he declines to read the Chief Justice's language literally, concluding that "what the Chief Justice appears to be saying is that, whether necessary or not, this particular provision simply strays uncomfortably far beyond the commerce power." *Id.* at 77.

<sup>127</sup> *United States v. Comstock*, 560 U.S. 126, 135–37 (2010).

<sup>128</sup> *Gonzales v. Raich*, 545 U.S. 1, 39 (2005) (Scalia, J., concurring) (emphasis added).

<sup>129</sup> *Cf.* Pushaw & Nelson, *supra* note 2, at 995 ("doubt[ing] that such revolutionary changes will occur," partly because "it is too late for the Court to overturn its cases rubber-stamping all New Deal and Great Society legislation—or even its decisions in the 1970s and 1980s approving comprehensive environmental and criminal laws" (citation omitted)); Lawson & Granger, *supra* note 21, at 331–32 (arguing that the law upheld in *Wickard v. Filburn*, 317 U.S. 111 (1942), "is plainly not 'proper for carrying into Execution' the federal commerce power").

<sup>130</sup> Professor Somin discusses a "less restrictive" reading of "proper," which would "only bar[] statutes whose rationale leads to unlimited congressional power or renders large parts of the rest of Article I redundant." Somin, *The Individual Mandate*, *supra* note 3, at 159. Although he argues that the mandate fails under this "less restrictive" reading, he posits that Chief

mandate under the Necessary and Proper Clause.<sup>131</sup> And yes, Chief Justice Roberts used sweeping language to explain his reasoning.<sup>132</sup> But as explained below, although the Chief Justice *is* concerned about the reach of the necessary and proper power, a close reading of his opinion suggests that his primary concern involves congressional use of the *commerce power* as “a general license to regulate an individual from cradle to grave . . . .”<sup>133</sup> Thus, the language in his opinion should not be interpreted as a signal of significant change in necessary and proper doctrine across the board.<sup>134</sup>

### A. Reading Between the Lines

A sure signal that commerce, rather than the necessary and proper power, was the true target in the Chief Justice’s opinion appeared in its means analysis. A traditional necessary and proper analysis involves an evaluation of whether the mandate was necessary to enforcing the guaranteed-issue and community-rating provisions in the ACA<sup>135</sup>—provisions that are themselves proper exercises of the commerce power.<sup>136</sup> Nevertheless, the Chief Justice’s opinion makes *no attempt* to evaluate the relationship

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Justice Roberts’s opinion in *NFIB* might have embraced a “broader reading of propriety,” one that “would bar any new claims of authority that are major independent powers as opposed to mere ‘incidents’ of one of the other enumerated powers.” *Id.* (citation omitted). However, this Article argues that Chief Justice Roberts is concerned primarily about preventing a general federal police power, which seems more in line with Professor Somin’s “less restrictive” reading of the term “proper.” See *infra* notes 133, 169–73 and accompanying text.

<sup>131</sup> *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2592 (2012) (“[T]he individual mandate cannot be sustained under the Necessary and Proper Clause . . . .”).

<sup>132</sup> See *supra* notes 23–28 and accompanying text.

<sup>133</sup> *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2591; see Weiner, *Much Ado*, *supra* note 17, at 77–78 (reaching same conclusion).

<sup>134</sup> *But cf.* Lawson, *supra* note 7, at 1706 (praising Chief Justice Roberts’s necessary and proper analysis because “[t]he short-term consequence of [his] opinion is to bring to the forefront the agency-law origins of the Necessary and Proper Clause and the importance of determining, as a threshold matter, whether any claimed exercise of congressional authority under that Clause seeks to exercise a principal rather than incidental power”); *id.* at 1700–07 (explaining basis for praise).

<sup>135</sup> The guaranteed-issue provision prohibited “insurers from denying coverage to any person on account of that person’s medical condition or history,” and the community-rating provision prohibited “insurance companies from charging higher premiums to those with pre-existing conditions.” *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2613 (Ginsburg, J., concurring in part and dissenting in part) (discussing 42 U.S.C. §§ 300gg, 300gg-1, 300gg-3, 300gg-4(a) (2006 ed., Supp. IV)).

<sup>136</sup> As Justice Ginsburg explained: “Recall that one of Congress’ goals in enacting the Affordable Care Act was to eliminate the insurance industry’s practice of charging higher prices or denying coverage to individuals with preexisting medical conditions . . . . The commerce power allows Congress to ban this practice, *a point no one disputes.*” *Id.* at 2626 (emphasis added) (citation omitted); see *id.* at 2644 (joint dissent) (“We do not doubt that the buying and selling of health insurance contracts is commerce generally subject to federal regulation.”).

between the mandate and these other insurance reforms. Although Chief Justice Roberts invokes *Comstock*, *Jinks*, and *Sabri*, explaining that those cases “involved exercises of authority derivative of, and in service to, a granted power,”<sup>137</sup> he fails to perform a similar examination of the mandate.<sup>138</sup> Rather than assessing the individual mandate as it relates to the guaranteed-issue and community-rating provisions, he considers the mandate in complete isolation, concluding that the mandate is unconstitutional because it “vests Congress with the extraordinary ability to create the necessary predicate to the exercise of an enumerated power.”<sup>139</sup>

But that is not a necessary and proper analysis; it is a *commerce* analysis. A “necessary predicate” to the exercise of the necessary and proper power is a separate exercise of an enumerated power, which in this case would be the guaranteed-issue and community-rating provisions.<sup>140</sup> The mandate did not “create” those provisions; they were separate provisions within the ACA. And the Court’s job was to assess its

<sup>137</sup> *Id.* at 2573.

<sup>138</sup> Justice Ginsburg noted a related problem with the Chief Justice’s necessary and proper analysis—his failure “to explain *why* the power to direct either the purchase of health insurance or, alternatively, the payment of a penalty collectible as a tax is more far-reaching than other implied powers this Court has found meet under the Necessary and Proper Clause.” *Id.* at 2627 (Ginsburg, J., concurring in part and dissenting in part).

<sup>139</sup> *Id.* at 2592. Professor Koppelman noticed a similar defect in reasoning by a federal district judge who ruled the mandate unconstitutional. Koppelman, *Bad News for Mail Robbers*, *supra* note 30, at 8 (criticizing the lower court’s conclusion that mandate was unconstitutional under the necessary and proper power because the end was “not within Congress’s enumerated powers,” even though the court had previously concluded that “‘regulating the health care insurance industry’ is a legitimate end” (quoting Florida *ex rel.* Bondi v. U.S. Dep’t of Health & Human Servs., 780 F. Supp. 2d 1256, 1298 (N.D. Fla. 2011) *aff’d in part, rev’d in part sub nom.* Florida *ex rel.* Att’y Gen. v. U.S. Dep’t of Health & Human Servs., 648 F.3d 1235 (11th Cir. 2011))).

The joint dissent examined the relationship between the mandate and the guaranteed-issue and community-rating provisions, concluding that the former is unnecessary to the latter. *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2645–46. Other parts of its necessary and proper analysis, however, suggest a primary concern with the commerce power. *See infra* notes 150–51 and accompanying text.

<sup>140</sup> Professor Koppelman reads the “necessary predicate” language differently, arguing that the Chief Justice meant that “Congress cannot arrogate to itself the power to solve problems that are of its own making.” Koppelman, *Necessary, Proper*, *supra* note 2, at 114 (citation omitted). I agree that if this is what the Chief Justice meant, it would be inconsistent with precedent. *Id.* at 114–15. But I don’t think that is what he meant. The Chief Justice complained that the “*mandate . . . create[d] the necessary predicate to the exercise of an enumerated power.*” *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2592 (emphasis added). The mandate, of course, did not create the problems that triggered the need for an exercise of the necessary and proper power; other provisions in the ACA created such problems and the mandate was Congress’s proposed *solution*. *Id.* at 2613–14 (Ginsburg, J., concurring in part and dissenting in part) (explaining how guaranteed-issue and community-rating provisions created problems solvable by individual mandate). The mandate did, however, create the “necessary predicate” to an exercise of the commerce power—activity. *Id.* at 2592. Thus, I think the language is better interpreted as nothing more than a reprise of the Chief Justice’s Commerce Clause argument.

relationship to the mandate. The “necessary predicate” to an exercise of the enumerated *commerce* power is activity. As Chief Justice Roberts explained in his earlier commerce analysis: “The power to *regulate* commerce presupposes the existence of commercial activity to be regulated. If the power to ‘regulate’ something included the power to *create* it, many of the provisions in the Constitution would be superfluous.”<sup>141</sup> So to the extent the mandate created *activity*, it created the “necessary predicate” to the exercise of the *commerce power*.<sup>142</sup> That doomed the exercise of the commerce power, but it should not have doomed the exercise of the necessary and proper power, at least under the necessity prong.

We again see the conflation of the two powers at the end of the necessary and proper discussion where the Chief Justice stated that “[t]he *commerce power* thus does not authorize the mandate.”<sup>143</sup> Just as the means analysis is really a commerce analysis, this conclusion is really a commerce conclusion. If the Commerce Clause does not *authorize* the mandate, it is because either the mandate, as a combined exercise of the necessary and proper and commerce powers, seeks to execute an end not within the enumerated commerce power or the mandate is improper under the commerce power standing alone (which the Chief Justice had already concluded).<sup>144</sup> But as explained above, the mandate sought to execute other provisions of the ACA concededly within the commerce power.<sup>145</sup> So if the commerce power does not authorize the mandate, it has to be because the mandate is improper under commerce alone. This answers the commerce question, but not the necessary and proper question.

Finally, embedded within both the Chief Justice’s and the joint dissent’s necessary and proper discussion is a focus on the growing commerce power. Although Chief Justice Roberts expressed concern that the mandate “would work a substantial expansion of federal authority,” he also expressed particular concern that if the mandate were upheld,

[n]o longer would Congress be limited to regulating under the *Commerce Clause* those who by some preexisting activity bring themselves within the sphere of federal regulation. Instead, Congress could reach beyond the natural limit of its authority and draw within its regulatory scope *those who otherwise would be outside of it*.<sup>146</sup>

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<sup>141</sup> *Id.* at 2586 (second emphasis added).

<sup>142</sup> The joint dissent makes a similar point about the mandate: “We do not doubt that the buying and selling of health insurance contracts is commerce generally subject to federal regulation. But when Congress provides that (nearly) all citizens must buy an insurance contract, it goes beyond ‘adjust[ing] by rule or method’ . . . *it directs the creation of commerce.*” *Id.* at 2644 (joint dissent) (emphasis added) (citation omitted).

<sup>143</sup> *Id.* at 2593 (Roberts, C.J.) (plurality opinion) (emphasis added).

<sup>144</sup> *See id.* (stating that the “commerce power . . . does not authorize the mandate”).

<sup>145</sup> *See supra* notes 137–43 and accompanying text.

<sup>146</sup> *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2592 (emphasis added).

The concern about whether the mandate regulates something *outside* of commerce, however, seems more appropriate in a commerce analysis than a necessary and proper analysis. Indeed—it is the *exact* concern the Chief Justice expressed in his commerce power discussion.<sup>147</sup> Congress reaches for the necessary and proper power precisely because it cannot use the enumerated power alone.<sup>148</sup> Combining the necessary and proper power with an enumerated power will technically increase the reach of the enumerated power.<sup>149</sup> But if that is the primary concern, then *every* use of the necessary and proper power is unconstitutional.

For its part, the joint dissent expressed concern that “[i]f Congress can reach out and command even those furthest removed from an interstate market to participate in the market, then the *Commerce Clause* becomes a font of unlimited power . . . .”<sup>150</sup> Rejecting a comparison to *Raich*, it also argued that “mandating . . . economic activity [stretches federal power into] a field so limitless that it converts the *Commerce Clause* into a general authority to direct the economy . . . .”<sup>151</sup> But the natural focus in a necessary and proper analysis ought to be, as Chief Justice Roberts initially noted in the quoted material above,<sup>152</sup> whether the Necessary and Proper Clause, as used in the particular manner under scrutiny, unduly expands *federal reach in general*.<sup>153</sup> Interestingly, when discussing how exercises of the necessary and proper power might lead to federalism violations, *Sabri*, *Jinks*, *Raich*, and *Comstock* all used language that focused more generally on whether Congress’s selected means undermines the general federal structure, rather than what will happen to the particular enumerated power.<sup>154</sup> The joint dissent is not *wrong*, of course, to focus on what happens to the

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<sup>147</sup> *Id.* at 2590 (“But we have never permitted Congress to anticipate that activity itself in order to regulate individuals not currently engaged in commerce.”).

<sup>148</sup> See Koppelman, *Bad News for Mail Robbers*, *supra* note 30, at 8 (criticizing a district court’s conclusion that if Congress may not reach something with the commerce power, it likewise may not reach it with necessary and proper power); *cf.* Mashaw, *supra* note 2, at 260 (noting that “an action need not be . . . commerce at all if its regulation is necessary and proper to a broader scheme of interstate commerce regulation” (citation omitted)).

<sup>149</sup> Justice O’Connor recognized this concept in her description of Congress’s commerce and spending powers in *New York v. United States*, 505 U.S. 144 (1992): “The Court’s broad construction of Congress’ power under the Commerce and Spending Clauses has of course been guided, as it has with respect to Congress’ power generally, by the Constitution’s Necessary and Proper Clause . . . .” *Id.* at 158.

<sup>150</sup> *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2646 (emphasis added).

<sup>151</sup> *Id.* (emphasis added).

<sup>152</sup> *Id.* at 2592; see also *supra* note 146 and accompanying text.

<sup>153</sup> See Somin, *The Individual Mandate*, *supra* note 3, at 159 (applying a “minimalistic definition of propriety that only bars statutes whose rationale leads to unlimited congressional power or renders large parts of the rest of Article I redundant,” but acknowledging that a more stringent definition is possible).

<sup>154</sup> See *United States v. Comstock*, 560 U.S. 126, 148 (2010) (concluding that a civil commitment statute did not “confer[] on Congress a general ‘police power, which the Founders denied the National Government and reposed in the States’” (quoting *United States v. Morrison*, 529 U.S. 598, 618 (2000))); *Gonzales v. Raich*, 545 U.S. 1, 38–40 (2005) (Scalia, J., concurring)

commerce power when assessing whether Congress has properly used its necessary and proper power. A too drastic increase in the commerce power when accompanied by the necessary and proper power could very well create a federalism violation, and that clearly is the concern. The point is that the linguistic shift of focus, particularly when compared to earlier necessary and proper decisions, provides a further signal that the Court's mission is a commerce-based one.

*B. Back to Business as Usual*

If the *NFIB* Court were indeed serious about cutting back on the scope of the necessary and proper power across the board, one would expect to see evidence of this in the two post-*NFIB* necessary and proper decisions. Although both cases—*United States v. Kebodeaux*<sup>155</sup> and *Bond v. United States*<sup>156</sup>—provided real opportunities to continue applying rigorous limits on the power, a majority of the Court, including several Justices who voted against the mandate in *NFIB*, did not pursue them.

Just one year after its decision in *NFIB*, seven members of the Court upheld a broad exercise of the necessary and proper power with *no mention whatsoever of NFIB*. *Kebodeaux* involved application of the sex offender registration requirements contained in the Sex Offender Registration and Notification Act (SORNA)<sup>157</sup> to a military sex offender who had completed his federal sentence and had been discharged from the armed forces.<sup>158</sup> The Court upheld SORNA's application in these circumstances, explaining first that the pre-existing federal registration requirements, to which *Kebodeaux* was subject when SORNA was enacted, were constitutional as a necessary and proper means of executing Congress's power to "make Rules for the . . . Regulation of the land and naval Forces."<sup>159</sup> Congress may use the Military Regulation Clause to prohibit certain conduct by those in the armed forces, and then invoke the Necessary and Proper Clause to enforce those prohibitions with punishments, including criminalizing the conduct, incarcerating the violator, and "impos[ing] restrictions on [him] even years after . . . unconditional release . . ."<sup>160</sup>

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(exercise of necessary and proper power held unconstitutional when it "threatens to obliterate the line between 'what is truly national and what is truly local'" or "[w]hen [it] violates [a constitutional] principle of state sovereignty") (quoting *United States v. Lopez*, 514 U.S. 549, 567–68 (1995), and *Printz v. United States*, 521 U.S. 898, 923–24 (1997)); *Sabri v. United States*, 541 U.S. 600, 608 (2004) (federal bribery law did not create "general police power" because it was "bound up with congressional authority to spend in the first place"); *Jinks v. Richland Cty.*, 538 U.S. 456, 464 (2003) (concluding that "the connection between [the means] and Congress's authority over the federal courts" is not "so attenuated as to undermine the enumeration of powers set forth in Article I, § 8" (citation omitted)).

<sup>155</sup> 133 S. Ct. 2496 (2013).

<sup>156</sup> 134 S. Ct. 2077 (2014).

<sup>157</sup> 42 U.S.C. § 16913 (2012).

<sup>158</sup> *Kebodeaux*, 133 S. Ct. at 2499–500.

<sup>159</sup> *Id.* at 2502 (quoting U.S. CONST. art. I, § 8, cl. 14).

<sup>160</sup> *Id.* at 2507 (Roberts, C.J., concurring).

Second, the Court explained that SORNA's provisions, as amendments to the pre-existing requirements, likewise were necessary and proper means of enforcing the prohibitions executed under the Military Regulation Clause and, thus, could be applied to "an individual already subject to federal registration requirements . . . ."<sup>161</sup>

*Keboeaux* is a significant decision for several reasons, not the least of which is the breadth of Congress's reach—legislation designed to enforce military conduct regulations can be applied to an individual no longer associated with the military. Equally significant (and related to the first point) is that the Court allowed Congress to employ its necessary and proper power to regulate that which it could not regulate using an enumerated power alone.<sup>162</sup> Although the Military Regulation Clause does not allow Congress to regulate someone *no longer associated* with the armed forces,<sup>163</sup> the Necessary and Proper Clause, in conjunction with Military Regulation Clause, does allow Congress to do so.<sup>164</sup> Also important is the language used by the majority, which echoes that of *Comstock* and other pre-*NFIB* cases. The Court described the necessary and proper power as "broad" and admitted that the power "leav[es] to Congress a large discretion as to the means that may be employed in executing a given power."<sup>165</sup> The Court's analysis focused on the necessity prong—the reasonableness of the registration requirement as a means of enforcing military conduct regulations<sup>166</sup>—with little discussion about the scope of the Military Regulation Clause<sup>167</sup> and no discernable discussion about whether the registration requirement would unconstitutionally increase that power.

Chief Justice Roberts concurred in the judgment because he agreed that

Congress can give th[e] [military conduct] rules force by imposing consequences on members of the military who disobey them. . . . A servicemember will be less likely to violate a relevant military regulation if he knows that, having done so, he will be required to register as a sex offender years into the future.<sup>168</sup>

He wrote separately, not to discuss the dangers of the necessary and proper power *increasing* Congress's power to regulate the armed forces, but rather to remind us that the necessary and proper power does not authorize a federal police power.<sup>169</sup>

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<sup>161</sup> *Id.* at 2504.

<sup>162</sup> *Id.* at 2502–03.

<sup>163</sup> *Id.* at 2512–13 (Thomas, J., dissenting) ("Congress does not retain a general police power over every person who has ever served in the military." (citing *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 14 (1955))).

<sup>164</sup> *Id.* at 2503.

<sup>165</sup> *Id.* at 2502–03 (citation omitted).

<sup>166</sup> *Id.* at 2503–05.

<sup>167</sup> *See id.* at 2503.

<sup>168</sup> *Id.* at 2506 (Roberts, C.J., concurring) (citation omitted).

<sup>169</sup> *Id.* at 2507.

Language in the majority opinion discussing the general public safety benefits flowing from SORNA's registration requirements, he explained, could cause "incautious readers [to] think they have found in the majority opinion something they would not find in either the Constitution or any prior decision of ours: *a federal police power*."<sup>170</sup> The "[power to] 'help protect the public . . . and alleviate public safety concerns'"<sup>171</sup> would transform the nature of federal authority into such a power and, thus, "is not 'consist[ent] with the letter and spirit of the constitution.'"<sup>172</sup>

The Chief Justice's focus on the creation of a federal police power as the line of demarcation between constitutional and unconstitutional exercises of the necessary and proper power nicely tracks the pre-*NFIB* cases,<sup>173</sup> suggesting that he is interested in minding the outer boundaries of the necessary and proper power, rather than dramatically restricting it. Curiously, although Chief Justice Roberts's reminder about the limits of federal power is both important and correct, no one joined his concurrence, not even Justice Kennedy, who joined the majority opinion without comment despite previously having raised concerns about a creeping necessary and proper power.<sup>174</sup>

The remaining concurring and dissenting opinions reveal no serious threat to the necessary and proper power. Justice Alito concurred in the judgment, writing separately to explain why he believed the registration requirement was necessary to enforcing the Military Regulation Clause.<sup>175</sup> Interestingly, his position arguably is not all that narrow, allowing the registration requirement because it "tr[ie]d to eliminate or at least diminish [a] danger" created by Congress's use of military tribunals.<sup>176</sup> Justices Scalia and Thomas dissented, arguing that the registration requirements are not designed to execute an enumerated power, but are "instead aimed at protecting society from sex offenders and violent child predators," a power not vested in Congress.<sup>177</sup> Only Justice Thomas articulated a very narrow vision of the power, repeating his position

<sup>170</sup> *Id.* (emphasis added).

<sup>171</sup> *Id.* at 2506 (quoting *id.* at 2503 (majority opinion)).

<sup>172</sup> *Id.* at 2507 (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819)).

<sup>173</sup> *See supra* note 154.

<sup>174</sup> *See supra* note 112.

<sup>175</sup> *Kebodeaux*, 133 S. Ct. at 2508 (Alito, J., concurring).

<sup>176</sup> *Id.* at 2509 ("When Congress, in validly exercising a power expressly conferred by the Constitution, creates or exacerbates a dangerous situation (here, the possibility that a convicted sex offender may escape registration), Congress has the power to try to eliminate or at least diminish that danger." (citations omitted)). Professor Koppelman reads the Chief Justice's opinion in *NFIB* to deny that power to Congress, and then explains why the Chief Justice's position is wrong. Koppelman, *Necessary, Proper*, *supra* note 2, at 114 (arguing that Congress has power to address the negative consequences flowing from a "statutory scheme" and disagreeing with Chief Justice Roberts on that point).

<sup>177</sup> *Kebodeaux*, 133 S. Ct. at 2513 (Thomas, J., dissenting) (citation omitted); *id.* at 2509–10 (Scalia, J., dissenting) (arguing that the majority did not "establish . . . that the [pre-existing] registration requirement was itself a valid exercise of any federal power, or that SORNA is designed to carry the [pre-existing registration requirement] into execution").

in *Comstock* that “[t]he Necessary and Proper Clause does not provide Congress with authority to enact any law simply because it furthers *other laws* Congress has enacted in the exercise of its incidental authority . . . .”<sup>178</sup> With no one joining him on that point (again), it provides no real evidence of a likelihood of significant future restriction.

Two years after *NFIB*, the Court again missed an opportunity to cut back on the necessary and proper power. *Bond v. United States* involved a challenge to the Chemical Weapons Convention Implementation Act of 1998,<sup>179</sup> which was enacted to implement a treaty.<sup>180</sup> The centerpiece of the challenge was whether the necessary and proper power authorized Congress to criminalize local conduct<sup>181</sup> as a means of “executing the National Government’s power to make treaties,”<sup>182</sup> even though Congress lacked authority to regulate such local conduct in the absence of the treaty.<sup>183</sup> The court of appeals ruled that *Missouri v. Holland*,<sup>184</sup> decided more than ninety years earlier, answered the question affirmatively,<sup>185</sup> and petitioner urged the Court to “limit[] or overrule[]” that decision.<sup>186</sup> Thus, *Bond* provided a big target for any Justice interested in limiting the scope of the Necessary and Proper Clause. Chief Justice Roberts authored the majority opinion and declined to take aim. Avoiding the constitutional issue, he resolved the dispute by ruling that the statute did not reach petitioner’s conduct.<sup>187</sup>

Unlike Chief Justice Roberts, Justice Scalia (joined by Justice Thomas) did take aim, characterizing *Holland* as “*ipse dixit*” and arguing that the necessary and proper power can only be used to *make* treaties, not implement them.<sup>188</sup> But they stood

<sup>178</sup> *Id.* at 2515 (Thomas, J., dissenting) (quoting *United States v. Comstock*, 560 U.S. 126, 168 (2010) (Thomas, J., dissenting)). Justice Scalia declined to join this portion of Justice Thomas’s dissent. *Id.* at 2509 (Scalia, J., dissenting).

<sup>179</sup> 18 U.S.C. § 229 (1998).

<sup>180</sup> *See* *Bond v. United States*, 134 S. Ct. 2077, 2080–81 (2014); *see also* Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, *opened for signature* Jan. 13, 1993, S. TREATY DOC. NO. 103-21, 1974 U.N.T.S. 317 (entered into force Apr. 29, 1997).

<sup>181</sup> The local conduct in *Bond* involved “an amateur attempt by a jilted wife to injure her husband’s lover, which ended up causing only a minor thumb burn readily treated by rinsing with water.” *Id.* at 2083.

<sup>182</sup> *Id.* at 2087.

<sup>183</sup> *See id.* (“[T]he parties have devoted significant effort to arguing whether [the statutory provision], as applied to Bond’s offense, is a necessary and proper means of executing the National Government’s power to make treaties.” (citation omitted)).

<sup>184</sup> 252 U.S. 416 (1920).

<sup>185</sup> *See Bond*, 134 S. Ct. at 2086.

<sup>186</sup> *Id.* at 2087.

<sup>187</sup> *Id.* (“[I]t is ‘a well-established principle governing the prudent exercise of this Court’s jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case.’” (quoting *Escambia Cty. v. McMillan*, 466 U.S. 48, 51 (1984) (per curiam))).

<sup>188</sup> *Id.* at 2098 (Scalia, J., concurring). As Justice Scalia explained:

alone with that argument. Justice Alito joined the part of Justice Scalia's concurrence explaining why the statute applied to the local conduct at issue, but he declined to join the part articulating the narrow vision of the necessary and proper power.<sup>189</sup>

In the end, *Bond* represented an opportunity to cut back on the necessary and proper power by overruling *Holland*, an opportunity that should have been tempting for federalism-minded Justices, particularly because it involved federal regulation of local criminal conduct—conduct traditionally reserved to the states. Their failure to take advantage of it suggests that a majority of the Court is not bent on drastically scaling back the power.

### C. *The Future Scope of the Necessary and Proper Clause*

Examined in isolation, the *NFIB* decision can be interpreted to call for a dramatic narrowing of the necessary and proper power. Indeed, the Chief Justice's opinion, in particular, seemingly disables Congress from reaching anything with its necessary and proper power that it could not reach with an enumerated power alone. Considered in a broader context, however, a much different picture emerges. Although the power will not be free and clear of federalism restrictions, it seems likely that *NFIB* was not the beginning of significant tightening of both prongs of the necessary and proper power.

The pre-*NFIB* federalism rumblings were louder from some Justices than others, but the common theme of most of these rumblings was concern about congressional use of the necessary and proper power to create a general federal police power, not a desire to restrict the power's traditional reach.<sup>190</sup> *NFIB* definitely increased the federalism volume, but the real vehemence seems aimed at Congress's use of its commerce power and, hence, its use of the necessary and proper power *in conjunction*

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Read together, the two Clauses empower Congress to pass laws “necessary and proper for carrying into Execution . . . [the] Power . . . to make treaties.”

It is obvious what the Clauses, read together, do *not* say. They do not authorize Congress to enact laws for carrying into execution “Treaties,” even treaties that do not execute themselves . . . .

*Id.*; see also *id.* at 2098–102 (explaining reasoning). Justice Thomas also wrote “separately to suggest that the Treaty Power is itself a limited federal power.” *Id.* 2103 (Thomas, J., concurring) (citation omitted). He was joined by Justice Scalia in full and Justice Alito in part. *Id.* at 2102.

<sup>189</sup> See *id.* at 2094 (Scalia, J., concurring) (noting that Justice Alito joins only Part I of Justice Scalia's concurrence, which discusses the statutory interpretation question, not the necessary and proper question). Justice Alito ultimately concluded that the treaty, to the extent “[it] may be read to obligate the United States to . . . criminaliz[e]” local conduct, “exceeds the scope of the treaty power.” *Id.* at 2111 (Alito, J., concurring) (emphasis added). As a result, the statutory provision at issue “cannot be regarded as necessary and proper to carry into execution the treaty power . . . .” *Id.*

<sup>190</sup> See *supra* note 173 and accompanying text.

with the commerce power. Post-*NFIB*, the Court upholds a broad combined exercise of necessary and proper and military regulation powers with a loose necessary analysis, and fails to even take a swipe at the power when used in conjunction with the treaty power.<sup>191</sup>

From this emerges a conclusion and a few predictions: The Court as a whole is not interested in seriously cutting back both prongs of the necessary and proper power, though a majority of Justices remain committed to the mission begun in *Lopez*—controlling the size of federal power, particularly the commerce power.<sup>192</sup> The Court will be on the lookout for overreaching, but generally at the outer boundaries<sup>193</sup> of the power—i.e., exercises of the necessary and proper power so large as to disrupt the federal balance.<sup>194</sup> Moreover, exercises of the commerce power seem to garner closer attention, which means exercises of the necessary and proper power as a means of executing the commerce power probably will also garner such attention.

Accordingly, it should be business as usual with most exercises of the necessary and proper power that seek to enforce any enumerated end other than commerce. *Kebedeaux* is a good example of this, as seven Justices upheld a broad exercise of the power to execute the Military Regulation Clause without mentioning *NFIB*.<sup>195</sup>

<sup>191</sup> See *supra* notes 162–89.

<sup>192</sup> Indeed, Chief Justice Roberts opened his opinion in *NFIB* with a reminder that the scope of federal power vis-à-vis the states “is perpetually arising, and will probably continue to arise, as long as our system shall exist,” *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2577 (2012) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819)), strongly suggesting that the Court will continue to be on the lookout for federal overreaching.

<sup>193</sup> The joint dissent describes the Court’s modern approach in this manner, stating that “[a]t the outer edge of the commerce power, this Court has insisted on careful scrutiny of regulations that do not act directly on an interstate market or its participants.” *Id.* at 2646 (joint dissent) (describing *United States v. Morrison*, 529 U.S. 598 (2000); *Printz v. United States*, 521 U.S. 898 (1997); *United States v. Lopez*, 514 U.S. 549 (1995); *New York v. United States*, 505 U.S. 144 (1992)); cf. *Pushaw & Nelson*, *supra* note 2, at 979 (describing *Lopez* as an “attempt to enforce an outer boundary on Congress’s power . . .”). Professor Theodore W. Ruger describes the Court’s approach as “frontier federalism,” explaining that “[f]or almost two decades . . . many of the justices on both the Rehnquist and Roberts Courts have chosen to mend fences at the far boundaries of federal power, seeking to delimit the thin sliver of authority that remains ‘truly local’ and thus completely beyond federal attention.” Theodore W. Ruger, *Health Policy Devolution and the Institutional Hydraulics of the Affordable Care Act*, in *THE HEALTH CARE CASE: THE SUPREME COURT’S DECISION AND ITS IMPLICATIONS* 359, 359–60 (Nathaniel Persily, Gillian E. Metzger & Trevor W. Morrison eds., 2013).

<sup>194</sup> Justice Kennedy perhaps said it best in his concurrence in *Lopez*:

Although it is the obligation of all officers of the Government to respect the constitutional design, . . . the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government *has tipped the scales too far*.

*Lopez*, 514 U.S. at 578 (Kennedy, J., concurring) (emphasis added) (citation omitted).

<sup>195</sup> See *United States v. Kebedeaux*, 133 S. Ct. 2496 (2013).

As long as Congress's selected means reasonably help achieve an enumerated power, the Court is very likely to review the exercise with deference.<sup>196</sup>

It is now clear, however, that a majority of the current Court views the term "proper" as a judicially enforceable internal limit on the necessary and proper power, and these federalism-minded Justices will not hesitate to invoke that limit with any exercise of the power that looks like it would transform the Necessary and Proper Clause into a general police power. If the law is aimed at effectuating an enumerated power, but appears to "obliterate the distinction between what is national and what is local and create a completely centralized government,"<sup>197</sup> the Court is going to invalidate the law after taking a good, hard look at it.<sup>198</sup> Similarly, if the Court finds that Congress's actual goal is unenumerated (such as the desire to increase public safety) or that Congress has invoked an enumerated power as a "pretext"<sup>199</sup> for achieving something unenumerated (again, public safety), the Court will invalidate it. Congress side-stepped these problems in *Kebodeaux*, because its actual goal was execution of its power to regulate the armed forces and the means were reasonably related to that end.<sup>200</sup> Nothing Congress said or did triggered Chief Justice Roberts's concurrence; he wrote separately because some language in the majority opinion could be interpreted as authorizing a federal police power.<sup>201</sup> Because he agreed that the sex offender

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<sup>196</sup> Justice Scalia's dissent in *Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015), supports this prediction, as he embraces a deferential approach to the necessary prong in a case involving execution of Congress's power over naturalization. *See id.* at 2117 (Scalia, J., dissenting) (noting that "when faced with alternative ways to carry its powers into execution, Congress has the 'discretion' to choose the one it deems 'most beneficial to the people'" (citation omitted)). In that same case, Justice Thomas (alone) maintained his very narrow view of the Necessary and Proper Clause, requiring the means to "be 'directly link[ed]' to the enumerated power." *Id.* at 2105 (Thomas, J., concurring in part and dissenting in part) (quoting *United States v. Comstock*, 560 U.S. 126, 169 n.8 (2010) (Thomas, J., dissenting)); *see id.* at 2126 (Scalia, J., dissenting) (criticizing Justice Thomas's "parsimonious interpretation of Congress's authority to enact laws 'necessary and proper for carrying into Execution' the President's executive powers" (citation omitted)). The majority did not discuss the necessary and proper power as a basis for upholding the federal law, as it ruled that the Executive has exclusive authority over recognition of foreign nations. *See id.* at 2083–94.

<sup>197</sup> *Lopez*, 514 U.S. at 557 (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)).

<sup>198</sup> *See Barnett, No Small Feat, supra* note 3, at 1349 (explaining that the "rationales offered by the government and by many law professors [in *NFIB*] fell on five deaf ears" because "these rationales, if accepted, would lead to a national police power qualified only by the Bill of Rights . . ."); *id.* (describing "New Federalism" as prohibiting "[a]ny purported justification that would lead to an unlimited reading of Congress's Article I, Section 8 powers . . ."); *cf. id.* at 1333 (arguing that "[h]ad we not contested this power grab [i.e., the individual mandate], Congress's regulatory powers would have been rendered limitless").

<sup>199</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

<sup>200</sup> *See Kebodeaux*, 133 S. Ct. at 2503–04.

<sup>201</sup> *Id.* at 2506–07.

registration requirements served to enforce military conduct regulations, he voted to uphold the law.<sup>202</sup>

It is tempting to predict that exercises of the necessary and proper power to execute the commerce power will receive less scrutiny if they represent traditional combinations of the two powers. For example, *Comstock* recognized that “Congress routinely exercises its authority to enact criminal laws in furtherance of” several enumerated powers, including the commerce power.<sup>203</sup> Such laws are not only familiar but also ubiquitous.<sup>204</sup> Indeed, the law in *Raich*, which criminalized local activity in order to effectuate a larger regulation of commercial activity, escaped close scrutiny on the necessity prong, even by Justice Kennedy, who joined the majority.<sup>205</sup> But that might not be the case any longer (unless of course the Court loses its federalism majority) because five years later in *Comstock*, Justice Kennedy called for a tighter means/ends analysis, “at least as exacting as it has been in the Commerce Clause cases, if not more so.”<sup>206</sup> And in *NFIB*, the joint dissent made clear that it reads *Raich* as involving a tight means/ends analysis, explaining that “the growing and possession prohibitions were the *only practicable way* of enabling the prohibition of interstate traffic in marijuana.”<sup>207</sup> Given the demonstrated interest in controlling the creep of the commerce power, it is possible that the five Justices who voted against the commerce and necessary and proper powers in *NFIB* will heed the call and more rigorously apply the necessity prong in instances when Congress seeks to execute the commerce power.

This is not to say that they will do so in every case, however, or that such review will always be fatal. The more familiar the exercise, the less likely it will be closely scrutinized and/or invalidated. As others have pointed out, a majority of the Court is probably disinclined to invalidate decades-old precedent.<sup>208</sup> That said, there are

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<sup>202</sup> *Id.* at 2505–06.

<sup>203</sup> *United States v. Comstock*, 560 U.S. 126, 136 (2010).

<sup>204</sup> *See id.* at 147–48 (“Neither we nor the dissent can point to a single specific enumerated power ‘that justifies a criminal defendant’s arrest or conviction[ ]’ . . . in *all* cases because Congress relies on different enumerated powers (*often, but not exclusively, its Commerce Clause power*) to enact its various federal criminal statutes.” (second emphasis added) (citation omitted)).

<sup>205</sup> *See Gonzales v. Raich*, 545 U.S. 1, 3, 17 (2005).

<sup>206</sup> *Comstock*, 560 U.S. at 152 (Kennedy, J., concurring).

<sup>207</sup> *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2647 (2012) (emphasis added) (citations omitted). This tight means/ends analysis is inconsistent with the traditional deference accorded Congress. Koppelman, *Necessary, Proper*, *supra* note 2, at 115 (noting that the “joint dissenters seem to think that *McCulloch* adopted the rule that the decision specifically rejected . . . .”); Weiner, *Much Ado*, *supra* note 17, at 79 (noting that the joint dissent’s “approach would have overruled *McCulloch v. Maryland*, which for 193 years has stood for the proposition that the clause did not impose a standard of necessity” (citations omitted)).

<sup>208</sup> *See Pushaw & Nelson*, *supra* note 2, at 995 (expressing “doubt that such revolutionary changes will occur,” in part because of “the Court’s near-perfect track record over seventy-five years of upholding Acts of Congress passed pursuant [to] Article I, typically the Commerce

two types of cases that likely will trigger closer scrutiny by the current federalism majority: (1) any combination of the two powers that looks unfamiliar;<sup>209</sup> and (2) any regulation of local non-economic activity that is alleged to substantially affect commerce or to be an essential component of a larger economic regulation. *NFIB* represents the first type of case, as it involved an unusual law—regulation of inactivity.<sup>210</sup> The second type represents cases falling under “category three” of the traditional commerce power test. Although such cases have been framed as commerce power cases,<sup>211</sup> Justice Scalia has explained that they are more appropriately viewed as a combination of the necessary and proper and commerce powers.<sup>212</sup> The joint dissent

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and Necessary and Proper Clauses,” and in part because “it is too late for the Court to overturn its cases rubber-stamping all New Deal and Great Society legislation—or even its decisions in the 1970s and 1980s approving comprehensive environmental and criminal laws” (citations omitted); *id.* at 979 (asserting that “the Court would risk legal, political, social, and economic chaos by rolling back its precedent allowing such important federal laws,” and that “at most the conservative Justices can try to stem the tide of new Commerce Clause statutes” (citation omitted)); *cf.* Jackson, *supra* note 2, at 18 (arguing against “[j]ettisoning the [substantial effects] test [because it] would undermine a significant amount of national regulation” and “the events of 2008 and after demonstrate the need for a flexible constitutional approach to the national economy and the substantial effects test provides that flexibility”).

<sup>209</sup> Invoking “an alternate interpretation of the New Deal Settlement,” Professor Barnett argues that *all* assertions of unfamiliar federal power will receive tighter scrutiny. Barnett, *No Small Feat*, *supra* note 3, at 1348. As he explained:

[F]or better or worse, all of the powers that were approved by the New Deal and Warren Courts are now to be taken as constitutional. But any claim of additional *new* powers still needs justification. Put another way, the expansion of congressional power authorized by the New Deal and Warren Courts established a new high-water mark of constitutional power. Going any higher than this, however, requires special justification.

*Id.*

<sup>210</sup> See, e.g., *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2586 (noting that “Congress has never attempted to rely on that power to compel individuals not engaged in commerce to purchase an unwanted product,” and that “sometimes ‘the most telling indication of [a] severe constitutional problem . . . is the lack of historical precedent’ . . .” (alterations in original) (citation omitted)); Barnett, *No Small Feat*, *supra* note 3, at 1333 (noting that the individual mandate “was literally and legally unprecedented” (citation omitted)); Pushaw & Nelson, *supra* note 2, at 995 (noting that “the ACA is the only Commerce Clause statute in over two centuries that purported to regulate ‘inactivity’ by mandating the purchase of a product” (citation omitted)); Weiner, *Much Ado*, *supra* note 17, at 75 (noting that both the Chief Justice and the joint dissenters “emphasized the novelty of the individual mandate”).

<sup>211</sup> See *supra* note 43 and accompanying text.

<sup>212</sup> See *supra* notes 83–88 and accompanying text; *Gonzales v. Raich*, 545 U.S. 1, 34–38 (2005) (Scalia, J., concurring); see also *id.* at 43 (O’Connor, J., dissenting) (discussing *Lopez* and noting that power to regulate intrastate activities that substantially affect commerce “derives from the conjunction of the Commerce Clause and the Necessary and Proper Clause” (citations omitted)); Jackson, *supra* note 2, at 13 (noting that “the Necessary and Proper Clause has been interpreted as allowing Congress to regulate those activities that substantially affect

in *NFIB* made clear that the Court carefully examined regulations “[a]t the outer edge of the commerce power,”<sup>213</sup> citing *Lopez* and *Morrison* as examples,<sup>214</sup> both of which are “category three” cases involving regulation of local non-economic activity.<sup>215</sup> And the joint dissent viewed *Lopez* and *Morrison* (as well as others) as teaching that “the *Necessary and Proper Clause* [ ] is not *carte blanche* for doing whatever will help achieve the ends Congress seeks by the regulation of commerce.”<sup>216</sup> Thus, the Court seems poised to use the necessary and proper power, rather than commerce alone, as the vehicle for closely examining federal regulation of local non-economic activity.<sup>217</sup> Doing so will change our understanding of the scope of the necessary and proper power, as its reach will shrink. But it will not change our current understanding of federal power in general, for even before *NFIB* such regulations received the full attention of federalism-minded Justices under the Commerce Clause.<sup>218</sup>

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Commerce among the several states” (citations omitted)); Lawson, *supra* note 7, at 1708–09 (“Congress may well be able to regulate noninterstate-commerce activities that substantially affect interstate commerce, but only under the Necessary and Proper Clause (and consistent with all of the limitations on the scope of the power granted by that Clause), not under the Commerce Clause itself.”); Pushaw & Nelson, *supra* note 2, at 994–95 (recognizing that “the ‘substantial effects’ test rests heavily upon the Necessary and Proper Clause . . . .” (citation omitted)); Shapiro, *supra* note 2, at 5–7 (noting the relationship between necessary and proper power and “substantial effects doctrine” used with commerce power); *cf.* Lawson, *supra* note 7, at 1703 (“While *Lopez* and *Morrison* did not expressly invoke this reading of the Necessary and Proper Clause, the joint opinion [in *NFIB*] clarifies that such a reading was implicit in and underlies those decisions.”).

Not everyone agrees with Justice Scalia on this point. In his *Comstock* concurrence, Justice Kennedy describes *Lopez* and *Raich* as “Commerce Clause cases.” *United States v. Comstock*, 560 U.S. 126, 152 (2010) (Kennedy, J., concurring). Similarly, Chief Justice Roberts uses *Lopez* in his commerce discussion, suggesting he might view it as a commerce power case as well. *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2587. For a detailed discussion of “[t]he influence of the Necessary and Proper Clause on the Court’s Commerce Clause jurisprudence,” see David Loudon, *When Do the Ends Justify the Means?: The Role of the Necessary and Proper Clause in the Commerce Clause Analysis*, 10 U. MASS. L. REV. 294, 305, 305–22 (2015); *see id.* at 299 (noting that “the Court has rarely addressed the relationship between the two clauses . . . .”).

<sup>213</sup> *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2646.

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

<sup>215</sup> *See United States v. Morrison*, 529 U.S. 598, 609–19 (2000) (analyzing law under substantial effects test); *United States v. Lopez*, 514 U.S. 549, 560–68 (1995) (same).

<sup>216</sup> *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2646 (first emphasis added).

<sup>217</sup> For a critique of how the various opinions in *NFIB* treated the Necessary and Proper Clause, as well as a proposed means/ends test for the Clause when used to execute the commerce power that “gives Congress the flexibility to choose the means of executing its powers without giving it a national police power,” see Loudon, *supra* note 212, at 322–43.

<sup>218</sup> *See supra* note 43 and accompanying text. Justice Kennedy characterized *Lopez* as a commerce power case, *supra* note 212, and viewed it as applying a more rigorous analysis than is usually associated with the rational basis test. *United States v. Comstock*, 560 U.S. 126, 152 (2010) (Kennedy, J., concurring) (“Those precedents require a tangible link to commerce,

The bottom line is that *NFIB* did not signal radical change ahead with respect to the necessary and proper power. The decision did signal, however, that five Justices remain committed to enforcing federalism limits on federal power in general and the commerce power in particular. Thus, the Court likely will continue to apply a deferential necessary and proper analysis to laws seeking to enforce enumerated powers other than the commerce power (unless the laws appear to transform the federal power into a general police power), but likely will up the ante with laws seeking to enforce the commerce power.

#### CONCLUSION

The Court's invalidation of the individual mandate under the Necessary and Proper Clause immediately grabbed my attention, for it suggested a new and dramatic change in doctrine. Most significantly, language in the Chief Justice's opinion suggested that the necessary and proper power could no longer be used to reach anything outside of an enumerated power, rendering a once *huge* power fairly tiny. So the decision left me wondering: Did *NFIB* inflict a life-altering knock-out punch or just a superficial cut?

Examined in isolation, one could argue that it was the former. Examined in a much larger context, including the decisions leading up to and following *NFIB*, it appears to be closer to the latter. Before *NFIB*, the Court warned about using the necessary and proper power as a general police power, putting everyone on notice that the Court would enforce federalism limits,<sup>219</sup> at least at the margins. Although *NFIB* suggests much stronger enforcement of federalism limits, a close reading reveals continued frustration with congressional overreaching with the *commerce power*,<sup>220</sup> and this frustration spills over into the necessary and proper analysis. In other words, the commerce power was the true target of the Court's ire, not the necessary and proper power. *NFIB* was simply a continuation of the specific mission begun in *Lopez*—to contain the reach of the commerce power. A decision handed down just one year after *NFIB* reinforces this conclusion, as seven Justices upheld a broad exercise of the necessary and proper power in connection with the Military Regulation Clause using a traditional deferential analysis with no mention of *NFIB*.<sup>221</sup>

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not a mere conceivable rational relation . . . .”). Thus, even if “category three” cases are treated under the commerce power alone, rather than a combination of the necessary and proper and commerce powers, they will receive less deference.

<sup>219</sup> Somin, Comstock, Bond, *supra* note 10 (“*Comstock* and especially [the Court’s first decision in *Bond* addressing standing to raise federalism challenges] should have alerted observers to the likelihood that the individual mandate litigation would not be an easy win for the federal government.”).

<sup>220</sup> See Devins, *supra* note 2, at 1846 (“Indeed, against the backdrop of congressional inattention to the Constitution, including constitutional fact-finding, it is hard to find fault with the five Justices who wanted to slap Congress (even if another form of boundary control might have been preferable).” (citation omitted)).

<sup>221</sup> See *United States v. Kebodeaux*, 133 S. Ct. 2496 (2013).

So with time for reflection, the message from *NFIB* seems not so ominous. In fact, it seems not much different from the message the Court has been sending since *Lopez* was decided in 1995. A majority of Justices on the current Court are serious about minding the federal balance, particularly when it comes to the commerce power, and they will do so when necessary to prevent federal power from transforming into a general police power. Thus, exercises of the necessary and proper power intended to enforce the commerce power likely will trigger closer scrutiny. Significant narrowing across the board, however, is unlikely. Unless they create or threaten to create a general federal police power, exercises of the necessary and proper power to enforce any enumerated power other than commerce should continue to receive the traditionally deferential analysis. In other words, for the most part it should be business as usual.