2014

The Conflict of Visions in *NFIB v. Sebelius*

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ABSTRACT

In 2010, few anticipated the fate of health care reform would rest with the Supreme Court. Yet National Federation of Independent Business v. Sebelius emerged as a watershed case that could remake the constitutional landscape. NFIB presented a conflict between two constitutional visions of federal power, and the role of the courts in policing such limits – an unconstrained vision, under which limits on federal power are enforced primarily through the political process, and a constrained vision, under which constitutional limits on federal power are enforced by the courts. The contrasting views of the constitutionality of the individual mandate and the Medicaid expansion did not reflect different applications of settled principles so much as allegiance to competing visions of federal power. This essay details this conflict, its resolution by the NFIB, and possible future implications.

TABLE OF CONTENTS

I. INTRODUCTION

In 2008, few anticipated that the fight over healthcare reform would lead to One First Street. Then-Senator Barack Obama pledged to fix America's "broken" healthcare system and "make sure that we have a health care system that allows

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for everyone to have basic coverage."[1] The details of his proposed fix remained somewhat opaque,[2] but most assumed the fate of healthcare reform would be decided in the halls of Congress, not the courts.[3] Some raised constitutional objections as the bills were being debated,[4] but few anticipated that the underlying constitutional questions would be decided by the U.S. Supreme Court.[5] Even after the Affordable Care Act (ACA) was signed into law in March 2010, many could not fathom that it presented any challenging constitutional questions.[6]

1. JOSH BLACKMAN, UNPRECEDENTED: THE CONSTITUTIONAL CHALLENGE TO OBAMACARE 21 (2013) (internal quotation marks omitted).

2. The evolution of then-Senator Obama's healthcare proposals over the course of the presidential campaign is summarized in BLACKMAN, *supra* note 1, at 12–29.

3. *National Federation of Independent Business v. Sebelius* was the Supreme Court's first decision concerning the ACA, but it is unlikely to be the last. At the time of this writing, the Supreme Court had just ruled on a pair of challenges to the so-called contraception mandate—and additional challenges to various aspects of the ACA and its implementation are pending in federal court. *See generally* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014); Halbig v. Burwell, 758 F.3d 390 (D.C. Cir.), *reh'g en banc granted, judgment vacated* (2014); King v. Burwell, 759 F.3d 358 (4th Cir. 2014); Jonathan H. Adler, *The Future of Health Care Reform Remains in Federal Court*, *in* THE FUTURE OF HEALTH CARE REFORM IN THE UNITED STATES (M. Schill & A. Malani eds., forthcoming).

4. Some had even raised constitutional objections to a healthcare mandate far earlier. *See, e.g.*, David B. Rivkin, Jr., *Health Care Reform v. The Founders*, WALL ST. J., Sept. 29, 1993, http://online.wsj.com/news/articles/SB10001424052702303640804577490971369614332; *see also* David E. Bernstein, *Origins of Commerce Clause Objections to the Individual Mandate*, *in* A CONSPIRACY AGAINST OBAMACARE: THE VOLOKH CONSPIRACY AND THE HEALTH CARE CASE 212, 212–13 (Trevor Burrus ed., 2013) [hereinafter CONSPIRACY].

5. *See* BLACKMAN, *supra* note 1, at 35 ("During the summer of 2009, beyond the fields of the Tea Party, the constitutionality of the ACA went largely unquestioned."); Mark A. Hall, *Health Care Reform—What Went Wrong on the Way to the Courthouse*, 364 NEW ENG. J. MED. 295, 295 (2011) ("Before health care reform was enacted, Democratic lawmakers and most legal scholars were confident of its constitutionality.").

6. When asked whether the proposed healthcare reform law was constitutional at a town hall meeting, Speaker of the House Nancy Pelosi incredulously responded, "Are you serious? Are you serious?" *See* BLACKMAN, *supra* note 1, at 37–38 (internal quotation marks omitted). Hers was not an isolated view. As Professor David Hyman recounted, "[L]aw professors were openly contemptuous of the suggestion that the ACA raised serious constitutional issues." David A. Hyman, *The Supreme Court's PPACA Decision: Something Went Wrong on the Way to the Courthouse*, 38 J. HEALTH POL. POL'Y & L. 243, 245 (2013); *see also* James Rosen, *Experts Say States' Health Care Lawsuits Don't Stand a Chance*, MCCLATCHY DC (Mar. 23, 2010), http://www.mcclatchydc.com/2010/03/23/90934/states-lawsuits-not-likely-to.html ("[T]here are significant legal hurdles in establishing the states' standing to challenge the health-care law and in persuading federal judges that it violates the Constitution."); Timothy Stoltzfus Jost, *Healthcare: Is "Mandatory Insurance" Unconstitutional?*, POLITICO (Sept. 18, 2009), http://www.politico.com/arena/perm/Timothy_Stoltzfus_Jost_720E1BE2-3EFE-448A-A519-

By 2012, opinions had changed.[7] When *National Federation of Independent Business v. Sebelius* was argued before the U.S. Supreme Court that spring, it was universally recognized as a watershed case that could remake the constitutional landscape.[8] At stake was a President's signature domestic policy achievement—arguably the most significant piece of social legislation enacted in almost 50 years—along with a vision of the Constitution, its limits on federal power, and the role of the courts in policing those limits.[9] The arguments levied against the ACA "challenged th[e] basic constitutional consensus" of the post-New Deal framework "with the most significant social welfare reform legislation in decades hanging in the balance."[10]

Yet the "basic constitutional consensus" was actually not much of a consensus in that it was not universally accepted that Congress had free rein to regulate as it saw fit. There was no question that prior Supreme Court decisions had approved the dramatic expansion of federal power over the course of the 20th century.[11] Yet there was still substantial disagreement as to whether the Court's

968F31212226.html [hereinafter *Mandatory Insurance*] ("You are correct to invite your political experts to respond, because this is not a serious legal issue."); *see also* Timothy S. Jost, *Pro & Con: State Lawsuits Won't Succeed in Overturning the Individual Mandate*, 29 HEALTH AFF. 1225, 1225 (2010) [hereinafter *State Lawsuits*] ("These challenges have no legal merit and are a serious distraction from the real work that lies before the states."). Some even suggested that antimandate arguments were so frivolous that those pressing legal challenges should be subject to sanctions. *See* Brian D. Galle, *Why Tax Cheats Love the AG Suits Challenging Health Care Reform*, PRAWFSBLAWG (Apr. 3, 2010), http://prawfsblawg.blogs.com/prawfsblawg/2010/04/why-tax-cheats-love-the-ag-suits-challenging-health-care-reform.html ("I fully expect the lawyers who sign the briefs to face a motion for Rule 11 sanctions and, if they appeal to a federal court of appeals, for costs."); *see also* Simon Lazarus & Alan Morrison, *Lawsuit Abuse, GOP Style*, SLATE (May 5, 2010), http://www.slate.com/articles/news_and_politics/jurisprudence/2010/05/lawsuit_abuse_gop_style.html (emphasizing the frivolousness of constitutional claims brought against "the new health care reform law").

7. *See, e.g.*, Mark A. Hall, *Supreme Court Arguments on the ACA—A Clash of Two World Views*, 366 NEW ENG. J. MED. 1462, 1462 (2012).

8. *See id.* ("Constitutional lawyers consider this to be the Court's most important case since *Bush v. Gore*, but for health policy it's the case of the century.").

9. As Lawrence Solum would write later, the *NFIB* decision "destabilizes what we can call the 'constitutional gestalt' regarding the meaning and implications of what is referred to as the 'New Deal Settlement.'" Lawrence B. Solum, *How* NFIB v. NFIB *Affects the Constitutional Gestalt*, 91 WASH. U. L. REV. 1, 2 (2013) (footnote omitted).

10. *See* Gillian E. Metzger, *To Tax, To Spend, To Regulate*, 126 HARV. L. REV. 83, 83–84 (2012), *see also* Solum, *supra* note 9, at 3 ("Before *NFIB*, the consensus understanding was that the New Deal and Warren Court cases had established a constitutional regime of plenary and virtually unlimited national legislative power under the Commerce Clause . . . .").

11. *See, e.g.*, Wickard v. Filburn, 317 U.S. 111, 125, 127–28 (1942) (citations

decisions green-lighting the growth of government power had been correctly decided,[12] as well as whether meaningful constraints on federal power remained.[13] Numerous cases in the preceding two decades presented the Court with opportunities to extricate itself from the task of policing the limits of federal power, but the Court had not taken them.[14] While some believed questioning the constitutionality of the ACA would require the courts "to jettison nearly two centuries of settled constitutional law,"[15] others saw the ACA as stepping beyond the furthest reaches of federal power previously approved by the federal courts.[16]

omitted). *But see* United States v. Morrison, 529 U.S. 598, 617–18 (2000) (citing United States v. Lopez, 514 U.S. 549, 568 (1995)).

12. For example, several have argued that pre-New Deal jurisprudence was closer to the original public meaning of the Commerce Clause. *See, e.g.*, *Lopez*, 514 U.S. at 584 (Thomas, J., concurring); *see also* Robert G. Natelson, *The Legal Meaning of "Commerce" In the Commerce Clause*, 80 ST. JOHN'S L. REV. 789, 799 (2006); Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 ARK. L. REV. 847, 848–49 (2003) (citing *Lopez*, 514 U.S. at 585 (Thomas, J., concurring)); Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 147 (2001) ("What has been established here is that those who have claimed that the original meaning of the Commerce Clause was narrow are right and their critics are wrong."); Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1395 (1987) ("The term commerce in this commerce provision does not carry with it the extensive baggage placed upon it by the better-known New Deal cases concerning the commerce clause."). *But see* Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 4 (2010) ("[F]idelity to original meaning does not require fidelity to the original expected applications of text and principle."). Similar critiques have been made about the Court's expansive spending power jurisprudence. *See, e.g.*, Robert G. Natelson, *The General Welfare Clause and the Public Trust: An Essay in Original Understanding*, 52 U. KAN. L. REV. 1, 4 (2003) [hereinafter Natelson, *General Welfare Clause*] (critiquing the interpretation that the General Welfare Clause provides "a plenary grant of regulatory and spending power"); John C. Eastman, *Restoring the "General" to the General Welfare Clause*, 4 CHAP. L. REV. 63, 67 (2001).

13. *See* Ilya Somin, *The Myth of An Expert Consensus on the Constitutionality of an Individual Health Insurance Mandate*, *in* CONSPIRACY, *supra* note 4, at 22, 22.

14. *See, e.g.*, Rapanos v. United States, 547 U.S. 715, 737–38 (2006); Gonzales v. Oregon, 546 U.S. 243, 269–70 (2006); Gonzales v. Raich, 545 U.S. 1, 25–33 (2005); Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 173–74 (2001); Jones v. United States, 529 U.S. 848, 857–59 (2000); United States v. Morrison, 529 U.S. 598, 617–19 (2000); Reno v. Condon, 528 U.S. 141, 146 (2000); Alden v. Maine, 527 U.S. 706, 730–31, 758–59 (1999); Printz v. United States, 521 U.S. 898, 935 (1997); Seminole Tribe v. Florida, 517 U.S. 44, 47, 57–73 (1996); *Lopez*, 514 U.S. at 559–68; New York v. United States, 505 U.S. 144, 166–69 (1992).

15. *See* Open Letter, Over 100 Law Professors Agree on Affordable Care Act's Constitutionality, *available at* https://www.acslaw.org/files/LegalScholars_HealthCare_Constitutional.pdf [hereinafter Open Letter].

16. *See, e.g.*, Randy E. Barnett, *In What Sense is the Personal Health Insurance Mandate "Unconstitutional"?*, *in* CONSPIRACY, *supra* note 4, at 38, 38 (discussing the

The claims in *NFIB* did not threaten a settled constitutional order so much as they presented a conflict between two constitutional visions of federal power. A constrained vision that emphasized structural limits on federal authority, subject to judicial enforcement, was presented in stark contrast with an unconstrained vision that would leave Congress as the primary arbiter of its own authority, subject only to political checks.[17] Under the former, the Constitution was understood to contain internal structural limits on the enumerated powers of the federal government, which needed to be judicially enforced. Under the latter, the primary checks on federal power were thought to be found not in the judiciary but in the political process and the judgment of Congress, and constitutional limits on federal power were to be found external from the enumerating clauses in other sources such as in the Bill of Rights and the Fourteenth Amendment.[18] This conflict was not new.[19] The proper scope of federal power has been a matter of debate since the nation's founding.[20] Over time the terrain shifted, as did some of the contending coalitions, but the battle continued.

The enactment of a requirement that all Americans purchase qualifying health insurance raised the question anew and forced the Court to reconsider questions that some thought were long settled.[21] The Great Society was enacted at a time when the dominant constitutional vision embraced expansive federal power. In the wake of the New Deal, it was widely accepted that the national government had ample constitutional authority to address national problems. The power to regulate commerce among the several states had become the power to regulate all

"unprecedented nature of this claim of power by Congress.").

[17] On "constrained" versus "unconstrained" visions, see generally THOMAS SOWELL, A CONFLICT OF VISIONS: IDEOLOGICAL ORIGINS OF POLITICAL STRUGGLES 9–35 (2007).

18. *See* John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1315–21 (1997). It is worth noting that such external limitations on federal power are largely checks on government power at all levels. Thus, insofar as the Fourteenth Amendment and the Bill of Rights are read to constrain the federal government, under current doctrine they also constrain state and local governments. *See id.* at 1397–405.

19. *See* Metzger, *supra* note 10, at 83 ("This conflict over the federal government's proper role is, of course, not new; it has played out repeatedly over our nation's past.").

20. *See, e.g.*, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819) (observing that "the question respecting the extent of the powers actually granted" to the federal government by the Constitution "is perpetually arising, and will probably continue to arise, as long as our system shall exist."); *see also* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2577 (2012) (quoting the same passage from *McCulloch*, 17 U.S. (4 Wheat.) at 405).

21. *See NFIB*, 132 S. Ct. at 2577 ("In this case we must again determine whether the Constitution grants Congress powers it now asserts, but which many States and individuals believe it does not possess.").

manner of economic activities.[22] Perhaps more significant for the Great Society, the taxing and spending powers were recognized as vast sources of federal power granting Congress the authority to provide a broad social safety net, redistribute wealth, and induce state cooperation with federal programs.[23] It appeared that insofar as federal power was to be restrained, it would be by the political process, not the courts. The constitutional challenges to the ACA confronted the prevailing conception of federal power with an alternative constitutional vision. The contrasting views of the constitutionality of the individual mandate and the Medicaid expansion did not reflect different applications of settled principles so much as an allegiance to competing principles.

Part II of this Article traces the vision of federal power under the Constitution that had evolved by the time of the Great Society. This was a vision of broad federal power constrained primarily, if not exclusively, by the political process. This is not the only vision, however. Part III outlines the alternative vision suggested by the Rehnquist Court's "New Federalism" and embraced by the ACA's challengers. This vision emphasized the inherently limited nature of the federal government's enumerated powers and the need for judicial enforcement of those limits. These two visions confronted one another in *NFIB* as described in Part IV, and as explained in Part V, the more constrained vision of federal power prevailed. Part VI then looks to the future and considers the implications of *NFIB* for federal power going forward.

22. As one federal judge quipped, the Commerce Clause was often treated like a "Hey, you-can-do-whatever-you-feel-like Clause." Alex Kozinski, *Introduction to Volume Nineteen*, 19 HARV. J.L. & PUB. POL'Y 1, 5 (1995); *see also* Ilya Somin, *Does a Federal Mandate Requiring the Purchase of Health Insurance Exceed Congress's Powers Under the Commerce Clause?*, *in* CONSPIRACY, *supra* note 4, at 15, 15 (lamenting the fact that "Current Supreme Court precedent allows Congress to regulate virtually anything that has even a remote connection to interstate commerce.").

23. *See* South Dakota v. Dole, 483 U.S. 203, 207 (1987).

> The breadth of this power was made clear in *United States v. Butler*, 297 U.S. 1, 66 (1936), where the Court, resolving a longstanding debate over the scope of the Spending Clause, determined that "the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution." Thus, objectives not thought to be within Article I's "enumerated legislative fields," may nevertheless be attained through the use of the spending power and the conditional grant of federal funds.

Id. (citation omitted).

II. THE VISION OF THE GREAT SOCIETY

The Constitution created a federal government of limited and enumerated powers. As Chief Justice John Marshall explained in *Marbury v. Madison*, "The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written."[24] That the Constitution expressly enumerates the federal government's powers is, in itself, an indication that these powers are inherently limited.[25] But to say that the legislature's powers are limited is not sufficient to identify the scope of the limits.

For several decades after the Constitution was ratified, Congress was relatively modest in its assertion of federal power, and the Supreme Court had little occasion to address the scope of federal power. The power "[t]o regulate Commerce . . . among the several States"[26] was used primarily to regulate interstate commercial activity. Chief Justice Marshall proclaimed that the Commerce Clause power, "like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution."[27] Yet as expansive as the commerce power may be, it is not without limits. In Chief Justice Marshall's famous formulation, the enumeration of powers in Article I, section 8 "presupposes something not enumerated."[28] The power to regulate commerce, though broad, did not necessarily extend to all economic activity. The identification of commerce "among the several states" presupposed that some commerce—that occurring wholly within a single state—was not included.[29] Demarcating the precise boundary line at which federal power ceased and state authority began was difficult, to be sure, but that did not mean such a line did not, or should not, exist.

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24. Marbury v. Madison, 5 U.S. (1 Cranch.) 137, 176 (1803).

25. As the Court explained in *Gibbons v. Ogden*, "The enumeration presupposes something not enumerated." 22 U.S. (9 Wheat.) 1, 195 (1824).

26. U.S. CONST. art. I, § 8, cl. 3.

27. *Gibbons*, 22 U.S. at 196.

28. *Id.* at 195.

29. *See id.* at 194–95.

> Comprehensive as the word "among" is, it may very properly be restricted to that commerce which concerns more States than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a State, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce, to which the power was to be extended, would not have been made, had the intention been to extend the power to every description.

Id.

At the time of the founding, Congress had relatively little to say about health law, and throughout most of the nation's history, questions of health and social welfare were left to state and local governments.[30] The issue of whether the federal government had the power to impose quarantines—which became a pressing issue when quarantine authority became necessary to control yellow fever—divided Congress in 1796.[31] After extensive debate, Congress concluded that such authority rested properly in the states.[32] Chief Justice Marshall endorsed this conclusion in *Gibbons v. Ogden* when he affirmed that "[i]nspection laws, quarantine laws, [and] health laws of every description" were within "that immense mass of legislation . . . not surrendered to the general government."[33]

Although, for a time, "quarantine authority remained firmly in the hands of the states," there would be pressure to expand the federal government's role in protecting public health.[34] After a yellow fever epidemic in the 1870s, Congress created the National Board of Health and gave it some quarantine authority[35] despite the prohibitory language of *Gibbons*. Shortly thereafter, the Supreme Court upheld a Louisiana law requiring inspections of ships traveling on the Mississippi River as a component of local quarantine enforcement.[36] By the turn of the century,

30. *Cf.* Richard H. Leach, *The Federal Role in the War on Poverty Program*, 31 LAW & CONTEMP. PROBS. 18, 18 (1966) ("For most of American history, the federal government was content to leave the relief of the distress caused by poverty to state and local units of governments or to private welfare organizations.").

31. Carleton B. Chapman & John M. Talmadge, *Historical and Political Background of Federal Health Care Legislation*, 35 LAW & CONTEMP. PROBS. 334, 334–35 (1970).

32. *Id.* at 335 (citing Act of May 27, 1796, ch. 31, 1 Stat. 474); *see* DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789–1801 227 (1999) (footnote omitted) ("In the end a bill was enacted merely empowering the President to enforce state quarantine laws; the result was yet another victory for states' rights in the House.").

33. *Gibbons*, 22 U.S. at 203.

34. *See* Chapman & Talmadge, *supra* note 30, at 335.

35. *See id.* at 337 (discussing the yellow fever epidemic beginning in the summer of 1878 that claimed the lives of "twenty to thirty thousand" and led Congress to pass "a bill to create a National Board of Health, with supervisory quarantine authority," which became law on March 3, 1879).

36. *See* Morgan's S.S. Co. v. La. Bd. of Health, 118 U.S. 455, 464 (1886).

> [I]t may be conceded that whenever Congress shall undertake to provide for the commercial cities of the United States a general system of quarantine, or shall confide the execution of the details of such a system to a National Board of Health, or to local boards, as may be found expedient, all State laws on the subject will be abrogated, at least so far as the two are inconsistent. But, until this is done, the laws of the State on the subject are valid.

federal authority to quarantine was well cemented,[37] but the federal government's role in health policy remained quite limited.

Throughout the late 19th and early 20th centuries, there was much dispute over the proper scope of federal power. Many regulatory schemes enacted during this period were expressly limited to interstate commerce.[38] Over time, Congress became more ambitious, and the Supreme Court eventually stepped aside. Beginning in 1937 with *NLRB v. Jones & Laughlin Steel* the Court began to uphold the regulation of intrastate activities that had a "substantial relation" to interstate commerce.[39]

The Supreme Court's acquiescence to the expansion of federal power during the New Deal seemed to resolve the debate over the proper scope of federal power.[40] In a series of decisions, the Court recognized what appeared to be a nearly unlimited power over economic affairs.[41] As the Court concluded in *United States*

Id.; *see also* Chapman & Talmadge, *supra* note 30, at 338 (noting that dicta in *Morgan's S.S. Co.* "virtually invited Congress to pass an effective quarantine law").

37. *See* Chapman & Talmadge, *supra* note 30, at 340 (pointing to the passage of a quarantine law in 1893 in response to an overhyped cholera scare as the moment when "[t]he federal government finally took over quarantine authority, partly because public fear of epidemics made it politically feasible to do so, and partly because the political climate itself was changing").

38. *See, e.g.*, Pure Food and Drug Act of 1906, § 2, 34 Stat. 768, 768 ("That the introduction into any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia . . . of any article of food or drugs which is adulterated or misbranded, within the meaning of this Act, is hereby prohibited . . . ."); Act of Sept. 1, 1916, ch. 432, 39 Stat. 675, 675 (Comp. St. 1916, § 8819a) ("An Act To prevent interstate commerce in the products of child labor, and for other purposes."); Act of Mar. 2, 1895, ch. 191, 28 Stat. 963, 963 ("An Act for the suppression of lottery traffic through national and interstate commerce and the postal service subject to the jurisdiction and laws of the United States."); Act of July 2, 1890, ch. 647, 26 Stat. 209, 209 ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is hereby declared to be illegal. . . . Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, . . . shall be deemed guilty of a misdemeanor . . . ."); Act to Regulate Commerce, §§ 1, 11–12, 24 Stat. 379, 379–80 (1887) (creating the Interstate Commerce Commission and setting forth that its authority to regulate common carriers only extends to those common carriers that transport passengers or property in interstate commerce).

39. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937).

40. *See, e.g.*, BRUCE ACKERMAN, 1 WE THE PEOPLE 105 (1991) (noting that after the New Deal "[a] commitment to federalism . . . was no longer thought to require a constitutional strategy that restrained the national government to a limited number of enumerated powers over economic and social life").

41. *See, e.g.*, ARCHIBALD COX, THE COURT AND THE CONSTITUTION 166 (1987)

v. Darby, "regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause."[42] Although the Supreme Court had previously suggested that insurance lay beyond the federal government's reach—as insurance was not "commerce"[43]—in 1944 the Court expressly concluded that the Commerce Clause power could be used to authorize regulation of insurance company practices.[44]

Taken together, the New Deal Court's decisions "recognized Congress' large authority to set the Nation's course in the economic and social welfare realm."[45] Throughout these decisions the Supreme Court repeatedly reaffirmed the limited scope of the Commerce Clause power.[46] Yet it only honored these limitations in the breach. As Justice William Rehnquist observed in 1981, "one could easily get the sense from this Court's opinions that the federal system exists only at the sufferance of Congress."[47]

Much of the Great Society was not enacted through Congress's Commerce Clause authority but through the powers to tax and spend. Article I, Section 8 of the Constitution empowers Congress to "lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States."[48] At the time of the founding, there was substantial debate as to the breadth of the power authorized by this Clause. James Madison, for example, argued that the Clause only empowered Congress to pursue those ends specifically identified in Article I.[49] To Madison, the phrase "general welfare"

(noting the Court, in the late 1930s, suddenly recognized "virtually unlimited congressional power to regulate business activities under the Commerce Clause").

42. United States v. Darby, 312 U.S. 100, 115 (1941).

43. *See* Paul v. Virginia, 75 U.S. (8 Wall.) 168, 183 (1869) ("Issuing a policy of insurance is not a transaction of commerce.").

44. *See* United States v. Se. Underwriters Ass'n, 322 U.S. 533, 545 (1944) (refusing "to narrow the scope of the federal power to regulate the activities of a great business carried on back and forth across state lines" and upholding Congress's power to regulate "the methods by which interstate insurance companies do business").

45. Nat'l Fed. of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2609 (2012) (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

46. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937) ("That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system."); *see also* Maryland v. Wirtz, 392 U.S. 183, 196 (1968) ("This Court has always recognized that the power to regulate commerce, though broad indeed, has limits.").

47. Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 308 (1981) (Rehnquist, J., concurring).

48. U.S. CONST. art. I, § 8, cl. 1.

49. *See* Eastman, *supra* note 12.

did not license Congress to pursue any end it thought was "in the best interest of the nation."[50] That interpretation, in Madison's view, would grant "Congress a general power of legislation, instead of the defined and limited one hitherto understood to belong to them."[51]

James Madison's position may have been more representative of the original understanding,[52] but it was not a consensus view. Alexander Hamilton contended that there were few, if any, substantive limitations on the spending power.[53] The power to raise money was "*plenary*, and *indefinite*," and the range of purposes for which money could be spent "no less comprehensive," so long as appropriations were "made [to] be *General* and not *local*."[54] In Hamilton's view, the Clause conferred an independent and distinct power, not limited by the other affirmative grants of power enumerated in Article I, Section 8.[55]

This debate, too, appeared to be resolved during the New Deal. In 1936, in *United States v. Butler*, the Supreme Court explicitly embraced a Hamiltonian interpretation of the spending power as "the correct one."[56] According to the *Butler* Court, "the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution."[57] Madison's definition, on the other hand, was rejected in *Butler* because it would reduce the enumeration of the taxing and spending power to a "mere tautology."[58] Similarly, in *Helvering v. Davis*, the Court held that Congress has broad discretion to determine whether a given incident of taxation or spending

50. *See id.*

51. 30 ANNALS OF CONG. 212 (1817).

52. *See* Natelson, *General Welfare Clause*, *supra* note 12, at 24 (discussing how proposals that "would have granted Congress legislative authority without limit" were "quietly laid aside" during the drafting of Congress's enumerated powers); Eastman, *supra* note 12, at 66–67 (footnote omitted) ("Although some of the founders, most notably Alexander Hamilton, expansively interpreted the clause in a way similar to the current understanding, most did not.").

53. *See* ALEXANDER HAMILTON, REPORT ON MANUFACTURES (1791), *reprinted in* 2 THE FOUNDERS' CONSTITUTION 446, 446–47 (Philip B. Kurland & Ralph Lerner eds., 1987).

54. *Id.*

55. *See* United States v. Butler, 297 U.S. 1, 65 (1936) (noting "Hamilton . . . maintained the clause confers a power separate and distinct from those later enumerated, [and] is not restricted in meaning by the grant of them").

56. *Id.* at 66. The Court also rejected the view that the Spending Clause grants an independent power to pursue the general welfare apart from taxing and spending. *Id.* at 65–67; s*ee also* David E. Engrail, *The Spending Power*, 44 DUKE L.J. 1, 5 (1994) ("No one today candidly denies that Hamilton's view of the spending power was correct.").

57. *Butler*, 297 U.S. at 66.

58. *Id.* at 65. The Court reasoned that "[t]hese words cannot be meaningless, else they would not have been used." *Id.*

is within its power to pursue the general welfare.[59] According to the *Helvering* Court, "When money is spent to promote the general welfare, the concept of welfare or the opposite is shaped by Congress, not the states."[60]

When Congress enacted the Social Security Act of 1935, there was some question as to its constitutionality.[61] Nonetheless, it passed Congress overwhelmingly and was upheld by the Supreme Court in *Steward Machine Co. v. Davis*.[62] As interpreted by the Court, the spending power is not merely the power to appropriate federal money for federal purposes. It is also the power to induce private or state action by attaching conditions to the expenditure of federal money.[63] The Clause empowers Congress to impose conditions on the use of federal funds "to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives."[64]

When President Lyndon Johnson proposed various programs through which the federal government would play a greater role in the funding of healthcare for seniors and vulnerable populations, relatively few constitutional objections were raised.[65] By 1950, many had concluded that the Supreme Court would uphold a system of national health insurance if only it could be enacted by Congress.[66] Decisions such as *Helvering* and *Steward Machine Co.* were "all but conclusive authority in support of the power of Congress to enact health insurance."[67] By the

59. *See* Helvering v. Davis, 301 U.S. 619, 640–41 (1937) (holding that the discretion to determine when spending would help provide for the general welfare, and thus the discretion to determine the constitutionality of that spending, "belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, [or] not an exercise of judgment").

60. *Id.* at 645.

61. *See* COX, *supra* note 41, at 169–70 (discussing the reaction to *Butler* and Roosevelt's supporters' "fears that the Court would also invalidate the Social Security Act").

62. Steward Mach. Co. v. Davis, 301 U.S. 548, 588–98 (1937).

63. *See id.* at 589 ("If Congress believed that the general welfare would better be promoted by relief through local units than by the system then in vogue, the cooperating localities ought not in all fairness to pay a second time.").

64. Fullilove v. Klutznick, 448 U.S. 448, 474 (1980).

65. Some conservative thinkers did raise constitutional objections, but these objections were not particularly widespread. *See, e.g.*, Will Herberg, *The Great Society and the American Constitution Tradition*, MODERN AGE, Summer 1967, at 231, 231 ("The Great Society, as concept and project, is fundamentally *ultra vires* for a constitutional government such as ours.").

66. *See, e.g.*, Oscar R. Ewing, *National Health Insurance: A Reply*, 36 A.B.A. J., Mar. 1950, at 199, 199 (March 1950) ("[T]here is little chance that the courts will strike down national health insurance if it is enacted by Congress.").

67. *Id.* at 200 & n.6.

1960s, the expansion of government power at all levels was largely a *fait accompli*.[68] Indeed, by some accounts, the Court's decisions upholding Social Security and the Wagner Labor Act left the "entire system of constitutional interpretation touching the Federal System . . . in ruins."[69]

While there was some opposition to President Johnson's proposed expansion of the welfare state, this opposition was largely expressed in political—rather than constitutional—terms. Even those who were concerned that some of the proposals would intrude too far into matters best left in the hands of state or local governments largely made prudential arguments.[70] In the years that followed, the most serious constitutional challenges to Great Society programs came in the form of due process or equal protection challenges, not frontal assaults on the power of the federal government to enact the programs at all.[71] After Johnson left office and Congress turned to environmental legislation in line with what he had advocated, the most serious constitutional questions raised surrounded the potential effect of the Takings Clause on expansive federal regulation, not whether such laws would extend beyond the power to regulate commerce among the states.[72] Since then, the

68. *See* Robert B. McKay, *Taxing and Spending for the General Welfare: A Reply to Mr. Nilsson*, 48 A.B.A. J., Jan. 1962, at 38, 38 ("[I]t is sobering to observe that *all* government in the United States has expanded enormously in this century, and at an accelerating rate.").

69. *See* Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 17 (1950).

70. *See* Leach, *supra* note 29, at 35–36.

> The Democratic Party has made the elimination of poverty an article of faith and has pledged its efforts toward making sure that the federal government does whatever is necessary to win the war against it. While the Republicans can hardly—and, indeed, have not—come out against the objective of the war, they have been increasingly astringent in their remarks about how the war is being waged. . . .
>
> Whatever the outcome of the political battle over the conduct of the war on poverty, it would seem to be a necessary conclusion from even a cursory study of the problem it is attacking that, if the war is finally to be won, the federal role in both its planning and its execution can only grow larger and more powerful in the years ahead.

Id.

71. *See, e.g.*, New Jersey Welfare Rights Org. v. Cahill, 411 U.S. 619, 619–21 (1973) (equal protection challenge to limitation on welfare benefits); Goldberg v. Kelly, 397 U.S. 254, 260–61 (1970) (procedural due process challenge to termination of welfare benefits).

72. *See* Denis Binder, *The Spending Clause as a Positive Source of Environmental Protection: A Primer*, 4 CHAP. L. REV. 147, 147–148 (2001) (footnote omitted) ("The underlying assumption [wa]s that the Commerce Clause grant[ed] virtually carte blanche authority to Congress to legislate for environmental protection."); Philip Soper, *The Constitutional Framework of Environmental Law*, *in* FEDERAL ENVIRONMENTAL LAW 20, 24–

Commerce Clause has been used as the source of authority for all manner of federal regulatory programs,[73] and the spending power has been used to authorize a wide range of social welfare programs.[74]

Implicit in the dominant constitutional vision during the later years of the New Deal and throughout the duration of the Great Society was the idea that the primary constraints on federal power were political, rather than judicial.[75] This was made explicit in *Garcia v. San Antonio Metropolitan Transit Authority* when the Court declared that "[s]tate sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power."[76] If federal authority were to be limited, it would be the consequence of elections, combined with the continuation of state representation in the Senate and the various "vetogates"[77] and procedural means to block legislative initiatives. Federalism was not really a matter for the federal courts.

27 (Erica L. Dolgin & Thomas G. P. Guilbert eds., 1974) (observing that applying contemporary Commerce Clause jurisprudence "to the environmental context results in a picture of congressional power that appears practically unbounded at least as far as concerns control over the typical areas of pollution"). *But see id.* at 21–22 (citing commentators who argued, in the 1960s, that some environmental concerns may lie beyond the scope of federal power). Insofar as policy makers were concerned about constitutional constraints on the federal government's authority to enact environmental legislation, they tended to focus on the Fifth Amendment's Takings Clause. *See, e.g.*, FRED BOSSELMAN ET AL., THE TAKING ISSUE 318–29 (1973) (concluding an extensive analysis of recent Takings Clause jurisprudence and concluding that "[t]he taking clause is a serious problem wherever there is substantial pressure for urban growth, and particularly where the environment is sensitive").

73. This is the case with, for example, most federal environmental laws. *See* Steven R. McAllister & Robert L. Glicksman, *State Liability for Environmental Violations: The U.S. Supreme Court's New Federalism*, 29 ENVTL. L. REP. 10665, 10666 (1999) ("[F]ederal environmental laws generally are premised on Congress' Article I power to regulate interstate commerce . . . .").

74. *See* Samuel R. Bagenstos, *The Anti-Leveraging Principle and the Spending Clause After* NFIB, 101 GEO. L.J. 861, 864 (2013) ("An enormous amount of the New Deal/Great Society state is built on conditional spending statutes.").

75. *See generally* Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the Federal Government*, 54 COLUM. L. REV. 543, 544 (1954) ("The actual extent of central intervention in the governance of our affairs is determined far less by the formal power distribution than by the sheer existence of the states and their political power to influence the action of the national authority."); *cf.* Yoo, *supra* note 17, at 1334 (documenting the Court's subsequent rejection of the "political safeguards" approach to federalism).

76. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 552 (1985).

77. *See generally* William S. Eskridge, Jr., *Vetogates, Chevron, Preemption*, 83 NOTRE DAME. L. REV. 1441 (2008).

III. THE VISION OF THE REHNQUIST COURT

Although widely accepted in the academy and the courts, the expansive vision of federal power embodied in the Court's New Deal jurisprudence and subsequent Great Society programs was not uncontested.[78] During the 1990s, the Supreme Court reasserted the need for limits to federal power.[79] In a series of decisions, the Rehnquist Court forcefully reaffirmed the principle that the federal government has only limited and enumerated powers.[80] Repairing to "first principles,"[81] the Court invalidated a handful of federal statutes and pronounced

78. *See Garcia*, 469 U.S. at 565 n.9 (Powell, J., dissenting).

> At one time in our history, the view that the structure of the Federal Government sufficed to protect the States might have had a somewhat more practical, although not a more logical, basis. . . . Not only is the premise of this view clearly at odds with the proliferation of national legislation over the past 30 years, but "a variety of structural and political changes occurring in this century have combined to make Congress particularly *insensitive* to state and local values."

Id. (quoting ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, REGULATORY FEDERALISM: POLICY, PROCESS, IMPACT AND REFORM 50 (1984)); *see also* Solum, *supra* note 9, at 4 (noting "the alternative understanding" that the New Deal only established "the constitutionality of particular federal programs" and did not extinguish judicially enforceable limits on federal power).

79. It is remarkable now to note that the Supreme Court did not strike down a single federal statute for exceeding the scope of Congress's enumerated powers between 1936 and 1995. In 1976, the Court ruled 5–4 that Congress could not require state governments to pay state employees the minimum wage in *National League of Cities v. Usery*. *See* 426 U.S. 833, 852 (1976). Within a few years, however, the Court began to whittle away at the *National League of Cities* holding, ultimately overturning it in *Garcia*. *See* 469 U.S. 528, 555–57 (1985). After that holding, the Court did not enforce limits on Congress's power under the Commerce Clause again until it struck down the Gun-Free School Zones Act (GFSZA). *See* United State v. Lopez, 514 U.S. 549, 551 (1995).

80. The reemergence of judicially enforced limits on federal power was such a turning point that many characterized it as a revolution. *See, e.g.*, Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1053–56 (2001) (characterizing the cumulative effect of the Rehnquist Court's federalism decisions as a "constitutional revolution"); Erwin Chemerinsky, *The Federalism Revolution*, 31 N.M. L. REV. 7, 7 (2001) ("[T]here has been a revolution with regard to the structure of the American government because of the Supreme Court decisions in the last few years regarding federalism."). Writing in the *New York Times*, Linda Greenhouse proclaimed "it is only a slight exaggeration to say that . . . the Court [is] a single vote shy of reinstalling the Articles of Confederation." Linda Greenhouse, *Focus on Federal Power*, N.Y. TIMES, May 24, 1995, at A1, http://www.nytimes.com/1995/05/24/us/focus-on-federal-power.html.

81. *See* United States v. Lopez, 514 U.S. 549, 552 (1995) ("We start with first principles. The Constitution creates a Federal Government of enumerated powers."); *see also*

the need for limits even as it upheld others.[82] While these decisions did not threaten the decisions of the New Deal Court, they refused to extend them into uncharted waters. More broadly, they represented an alternative constitutional vision, one that rejected the notion that courts should defer to assertions of federal authority and proclaimed that federal power had reached its outer limits.[83] They were, in a sense, a pronouncement that federal power had reached its zenith, and could go no further without a particularly compelling justification.

In *United States v. Lopez*, the Court held that the Gun-Free School Zones Act (GFSZA), which prohibited the knowing possession of a gun within 1,000 feet of a school, exceeded the scope of the commerce power.[84] Stressing that "[t]he Constitution creates a Federal Government of enumerated powers,"[85] the Court rejected the argument that Congress could regulate intrastate activities with only a tenuous connection to interstate commerce.[86] Five years later, the Court reaffirmed this holding in *United States v. Morrison*, striking down provisions of the Violence Against Women Act (VAWA) that, like the GFSZA, were insufficiently connected to interstate commerce.[87]

As the Court explained in *Lopez* and reiterated in *Morrison*, the commerce power authorized Congress to regulate the use of the channels of interstate

Richard W. Garnett, *The New Federalism, the Spending Power, and Federal Criminal Law*, 89 CORNELL L. REV. 1, 12 (2003) ("[I]t is a hallmark—and perhaps the legacy—of the Rehnquist Court to have brought back to the public-law table the notion that the Constitution is a charter for a government of limited and enumerated powers . . . .").

82. *See, e.g.*, United States v. Morrison, 529 U.S. 598, 601–02 (2000); Printz v. United States, 521 U.S. 898, 935 (1997); City of Boerne v. Flores, 521 U.S. 507, 511 (1997); New York v. United States, 505 U.S. 144, 149 (1992).

83. *See* Solum, *supra* note 9, at 50 (noting that the Rehnquist Court's federalism decisions "reasoned from premises that were inconsistent with the then prevailing constitutional gestalt").

84. *Lopez*, 514 U.S. at 551, 564, 567–68.

85. *Id.* at 552.

86. *Id.* at 564–68.

87. *Morrison*, 529 U.S. at 602, 617–19. By some accounts, *Morrison* was the more significant decision of the two in that it was written in more forceful terms, lacked a moderating concurring opinion, and demonstrated the Court's willingness to follow through on what was suggested in *Lopez*. *See* Adrian Vermeule, *Does Commerce Clause Review Have Perverse Effects?*, 46 VILL. L. REV. 1325, 1327 (2001) ("[T]he warning shot across Congress' bow in *Lopez* has been followed by the full-out broadside of *United States v. Morrison*."); *see also* Jonathan H. Adler, *Is* Morrison *Dead? Assessing a Supreme Drug (Law) Overdose*, 9 LEWIS & CLARK L. REV. 751, 759 (2005) ("While most associate the reinvigoration of Commerce Clause scrutiny with *Lopez*, *Morrison* was the real breakthrough for enumerated powers jurisprudence.").

commerce, the instrumentalities of interstate commerce, and persons or things in interstate commerce.[88] Thus, for example, Congress may regulate or prohibit the sale of driver's license information and other personal data collected by public and private entities because such information is bought and sold in interstate commerce.[89]

More broadly, the Court noted that the commerce power had also been interpreted to authorize regulation of those activities that "substantially affect" interstate commerce.[90] This authority could be inconceivably broad, as just about everything has some effect on interstate commerce, particularly if individual instances are aggregated together.[91] Yet the Court was also concerned with limits. As described and applied in *Lopez* and *Morrison*, the substantial effects test meant that Congress could reach not only those activities that are themselves related to "'commerce' or any sort of economic enterprise," but also instances of noneconomic intrastate activity in which the regulation is "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated."[92] Conversely, the Court reasoned, the fact that a given noneconomic activity might have a substantial economic impact when aggregated with all other instances of like conduct was insufficient to bring that noneconomic activity within Congress's regulatory jurisdiction under the Commerce Clause.[93] Thus, Congress could regulate intrastate activities that were themselves "economic in nature,"[94] such as industrial

88. *Morrison*, 529 U.S. at 607–09; *Lopez*, 514 U.S. at 552–55.

89. *See* Reno v. Condon, 528 U.S. 141, 148 (2000) (upholding the Driver's Privacy Protection Act as a proper exercise of Congress's Commerce Clause power).

90. *See Lopez*, 514 U.S. at 558–59 ("Within this final category, admittedly, our case law has not been clear whether an activity must 'affect' or 'substantially affect' interstate commerce in order to be within Congress' power to regulate it under the Commerce Clause.").

91. *See* Brzonkala v. Va. Polytechnic Inst., 169 F.3d 820, 839 (4th Cir. 1999) (en banc) (illustrating the extent to which aggregation would permit Congress to regulate noneconomic activities under the guise of the Commerce Clause by citing estimates that insomnia has an estimated $92.5 to $107.5 billion annual impact on the U.S. economy), *aff'd sub nom.* United States v. Morrison, 529 U.S. 598 (2000).

92. *Lopez*, 514 U.S. at 561.

93. In *Morrison* the Court explicitly rejected "the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce." *Morrison*, 529 U.S. at 617.

94. *See id.* at 613.

mining[95] or loan-sharking,[96] but not gender-motivated violence[97] or gun possession near a school.[98]

While the Rehnquist Court enforced limits on the exercise of the commerce power and also acted to protect state sovereign immunity and safeguard state autonomy against commandeering,[99] it was more circumspect about the power to spend. In 1987, in *South Dakota v. Dole*, the Court identified a series of restraints on Congress's authority to impose conditions on the receipt of federal funds designed to ensure that federal pressure would not turn into compulsion, but nonetheless upheld an expansive use of such conditions.[100] And although the Court would reiterate that there were constitutional limits on the amount of pressure the federal government could impose on states when seeking their cooperation, it routinely upheld conditional funding provisions.[101] Indeed, until *NFIB* the Court had never struck down conditional spending on such grounds.[102]

In *Dole*, the Court identified several constraints on congressional use of conditional federal spending to induce state cooperation. First, the appropriation of funds must be for the general welfare[103] and not transgress any other

95. *See* Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 268 (1981).

96. *See* Perez v. United States, 402 U.S. 146, 156–57 (1971).

97. *Morrison*, 529 U.S. at 601–02.

98. United States v. Lopez, 514 U.S. 549, 551 (1995). It is worth noting that Alfonso Lopez was engaged in economic activity, as he had brought the gun to school as part of a gun sale. *See* United States v. Lopez, 2 F.3d 1342, 1345 (5th Cir. 1993). The GFSZA was nonetheless unconstitutional, as the activity subject to regulation—possession of a gun near a school—was not economic. A similarly formalistic analysis would inform the Chief Justice's analysis of the individual mandate. *See* Jonathan H. Adler, *Judicial Minimalism, the Mandate, and Mr. Roberts*, *in* THE HEALTH CARE CASE: THE SUPREME COURT'S DECISION AND ITS IMPLICATIONS 171, 177 (Nathaniel Persily, et al. eds., 2013) [hereinafter THE HEALTH CARE CASE].

99. *See, e.g.*, Alden v. Maine, 527 U.S. 706, 715 (1999); Printz v. United States, 521 U.S. 898, 935 (1997); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 47 (1996); New York v. United States, 505 U.S. 144, 174–75 (1992).

100. South Dakota v. Dole, 483 U.S. 203, 211–12 (1987).

101. *See, e.g.*, Sabri v. United States, 541 U.S. 600, 608 (2004); *New York*, 505 U.S. at 173.

102. *See* Nat'l Fed. of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2630 (2012) (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("The Chief Justice therefore—*for the first time ever*—finds an exercise of Congress' spending power unconstitutionally coercive."); *see also* Elizabeth Weeks Leonard, *Crafting a Narrative for the Red State Option*, 102 KY. L. J. 381, 384 (2014) ("The *NFIB* Medicaid decision was unprecedented as a matter of federalism jurisprudence.").

103. *Dole*, 483 U.S. at 207 (citing Helvering v. Davis, 301 U.S. 619, 640–41 (1937)).

constitutional limit on government power that acts as an "independent bar."[104] The Court further explained that any conditions imposed upon the receipt of federal funds must be clear and unambiguous so that recipient states have clear notice of any obligations imposed.[105] There must also be a sufficient nexus between the substance of the conditions imposed and the purpose of the federal spending.[106]

Finally, the *Dole* Court suggested that conditional spending could be unconstitutional if "the financial inducement offered by Congress" was "so coercive as to pass the point at which 'pressure turns into compulsion.'"[107] While not explaining what degree of financial inducement would be necessary to cross this line, the Court stressed that the relatively small amount of money at stake provided "relatively mild encouragement to the States" and was not coercive.[108] Left unsaid was whether placing conditions on a much larger amount of money would be coercive in itself or whether this would merely influence the degree of scrutiny with which the other prongs of the *Dole* test would be applied.

A recurring theme throughout the Rehnquist Court's federalism decisions is the need to maintain judicially enforceable limits on federal power.[109] These limits, even if rather modest, are necessary to maintain the underlying constitutional structure of limited, separated, and enumerated powers. Thus, in *Lopez*, the Court stressed that the federal government failed to offer any limit on the asserted scope of Congress's commerce power.[110] Although the Rehnquist Court was willing to uphold an expansive conception of federal authority, there needed to be a limit.

While the Rehnquist Court's rhetoric stressed the need for limits, the Court's

104. *Id.* at 208 (citing Lawrence Cnty. v. Lead-Deadwood Sch. Dist., 469 U.S. 256, 269–70 (1985)).

105. *Id.* at 207 (quoting Pennhurst State Sch. and Hosp. v. Halderman, 451 U.S. 1, 17 (1981)).

106. *Id.* at 207–08; *see also New York*, 505 U.S. at 167 ("Such conditions must . . . bear some relationship to the purpose of the federal spending; otherwise, of course, the spending power could render academic the Constitution's other grants and limits of federal authority." (citations omitted)).

107. *Dole*, 483 U.S. at 211 (quoting Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937)).

108. *Id.*

109. *See* Bagenstos, *supra* note 74, at 899 ("Since the beginnings of the 'Federalist Revival' in the Rehnquist Court, the notion that there must be *some* judicially enforceable federalism-based limits to Congress's authority has been a driving force of the Court's jurisprudence.").

110. United States v. Lopez, 514 U.S. 549, 564 (1995) ("[I]f we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.").

seeming reluctance to enforce these limits with much rigor left some doubt as to whether the rhetoric was believable. After all, even during the New Deal, the Court often reiterated the need to keep congressional authority within constitutional bounds, even as it approved one expansive exercise of federal authority after another.[111] By the time of the Great Society, the Court had little difficulty approving expansive assertions of federal power.[112] Against this backdrop, it was easy to read *Lopez* and the Rehnquist Court's other federalism decisions as minor exceptions to a general rule permitting Congress to exercise expansive federal power.[113] Lower courts, already reluctant to invalidate federal statutes for exceeding the scope of Congress's enumerated powers, certainly took this view. Other than the Fourth Circuit,[114] no appellate court struck down a federal statute on Commerce Clause grounds between 1995 and 2000,[115] and *Morrison* did little to change this pattern.[116]

111. *See, e.g.*, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937) ("The authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce 'among the several States' and the internal concerns of a State.").

112. *See, e.g.*, Perez v. United States, 402 U.S. 146, 156–57 (1971) (upholding Congress's authority to regulate intrastate loan-sharking under the Consumer Credit Protection Act as a valid exercise of the Commerce Clause).

113. *See, e.g.*, Garnett, *supra* note 81, at 5 ("*Lopez* and other New Federalism salvos notwithstanding, it remains settled law that Congress may spend money on projects and in pursuit of ends that are not authorized explicitly in Article I, and also may enthusiastically promote policy goals that might lie beyond the reach of its enumerated powers merely by attaching conditions to the money it spends.").

114. *See* Brzonkala v. Va. Polytechnic Inst., 169 F.3d 820, 839 (4th Cir. 1999) (en banc), *aff'd sub nom.* United States v. Morrison, 529 U.S. 598 (2000) (holding that "*Lopez* clearly forecloses . . . congressional regulation of *noneconomic* activities such as the conduct reached by section 13981" under the guise of an exercise of Commerce Clause powers).

115. *See* Glenn H. Reynolds & Brannon P. Denning, *Lower Court Readings of* Lopez*, or What if the Supreme Court Held a Constitutional Revolution and Nobody Came?*, 2000 WIS. L. REV. 369, 385 n.85 (2000).

116. After *Morrison* there were a handful of cases in which federal courts upheld as-applied Commerce Clause challenges to federal statutes. *See, e.g.*, Raich v. Ashcroft, 352 F.3d 1222, 1234 (9th Cir. 2003) (upholding an as-applied Commerce Clause challenge to the application of the federal Controlled Substances Act to medical marijuana), *vacated*, Gonzales v. Raich, 545 U.S. 1 (2005); Stewart v. United States, 348 F.3d 1132, 1141–42 (9th Cir. 2003) (upholding a Commerce Clause challenge to a federal prohibition of the possession of fully automatic weapons as applied to a homemade firearm), *vacated*, United States v. Steward, 545 U.S. 1112 (2005); United States v. McCoy, 323 F.3d 1114, 1129–30 (9th Cir. 2003) (upholding a Commerce Clause challenge to a federal prohibition on the possession of child pornography as applied to a family photo), *overruled by* United States v. McCalla, 545 F.3d 750 (9th Cir. 2008).

This interpretation of the Court's jurisprudence was reinforced by the Court's decision upholding the application of the Controlled Substances Act to the noncommercial, intrastate possession of marijuana for medical purposes in *Gonzales v. Raich*.[117] The expansive formulations in Justice John Paul Stevens's majority and Justice Antonin Scalia's concurrence seemed to back away from the Court's insistence that the power to regulate commerce was limited.[118] This served to create some doubt as to whether the Rehnquist Court's limitations on federal power were real. Indeed, after *Raich*, there would not be another federal statute invalidated by a federal appellate court for exceeding the scope of the federal government's enumerated powers until the ACA was struck down by the Eleventh Circuit.[119]

IV. THE COMPETING VISIONS OF OBAMACARE

NFIB set up a contest of constitutional visions because it presented the Court with novel assertions of federal power that forced the Court to consider anew the extent to which courts should enforce constitutional limits on enumerated powers. The debate over the constitutionality of the individual mandate, and to a lesser degree the Medicaid expansion, became a debate over competing constitutional visions.[120] Partisans in the debate over the mandate did not disagree on the application of clearly settled precedents so much as they disagreed over the meaning of those precedents and the underlying nature of federal power.

Those who supported the mandate's constitutionality viewed it as nothing more than the federal government's latest effort to regulate an important sector of the economy for the purpose of expanding the social safety net.[121] The purchase of

117. *See* Gonzales v. Raich, 545 U.S. 1, 9 (2005).

118. *See* Douglas W. Kmiec, Gonzales v. Raich*:* Wickard v. Filburn *Displaced*, 2004–2005 CATO SUP. CT. REV. 71, 92 ("For the majority and Scalia, federal power over interstate commerce marijuana is without limit, even if the state has identified a discrete subpart (noncommercial, medicinal uses) over which federal power is not appropriate."); *see also* Adler, *supra* note 87, at 762–63 (2005) ("Both the majority and concurring opinions hollowed out *Morrison*'s core—leaving it without any substance, if any life at all.").

119. *See* Florida v. U.S. Dep't of Health and Human Servs., 648 F.3d 1235, 1328 (11th Cir. 2011).

120. The debate over the Medicaid expansion presented the conflict of visions less starkly because there was much less debate over these provisions. Most discussion over the constitutionality of the ACA focused on the individual mandate, not the Medicaid provisions. *See generally* CONSPIRACY, *supra* note 4, at 179–220. Moreover, whereas some lower courts had invalidated the minimum coverage requirement, no lower court had invalidated the Medicaid expansion for exceeding the scope of federal power.

121. *See* Orin S. Kerr, *Some Tentative Thoughts on the Constitutionality of the*

healthcare and the provision of health insurance were indisputably economic activities subject to regulation, so a requirement that individuals purchase health insurance was also a form of economic regulation.[122] Moreover, the purpose and effect of the requirement were both clearly economic, insofar as they were designed to ensure that more younger and healthier individuals participated in the individual market for health insurance so as to help offset the consequences of requiring insurance companies to issue policies and disregard preexisting conditions.[123] Finally, it seemed rather clear that the requirement to purchase insurance was an integral part of a broader regulatory scheme—it was not adopted for its own sake so much as it was adopted to ensure the smooth operation of the other reforms Congress enacted.[124] It was a necessary and proper means of ensuring that insurance markets did not collapse in response to the imposition of new, and clearly constitutional, regulatory measures.

If one started from the premise that Congress has plenary authority to regulate economic activity so long as it does not transgress any of the limitations on government power provided by the Fourteenth Amendment or the Bill of Rights, the case for the constitutionality of the mandate was open and shut. Whatever doubt there may have been about the constitutionality of such a provision after *Lopez* and *Morrison*, the Court's embrace of expansive federal regulation and insistence that courts not excise individual provisions from broader economic regulatory schemes in *Raich* seemed to make the case for the mandate easily settled.[125]

From another vantage point, however, the ACA represented an

Individual Mandate Under Current Supreme Court Doctrine, *in* CONSPIRACY, *supra* note 4, at 46, 47 ("As I understand it, the basic idea was to stop people from burdening the health care system with the costs of emergency care that resulted when people opted out of health insurance. Whether that was wise or not, it's a genuine effort to regulate interstate commerce.").

122. *See* Mark A. Hall, *The Constitutionality of Mandates to Purchase Health Insurance*, 37 J.L. MED. & ETHICS 40, 42 (2009) ("It is manifest that health insurance deals with economic transactions and substantially affects interstate commerce.").

123. *See* BLACKMAN, *supra* note 1, at 4 ("The individual mandate is primarily aimed at the young and healthy, a group that poses a very low risk of incurring health care costs and would be cheap to insure.").

124. *See* David B. Kopel, *Destroying the Constitution's Structure is Not Constitutional*, *in* CONSPIRACY, *supra* note 4, at 34, 37 ("[T]he main provision of Obamacare—turning private insurance companies into ultraregulated public utilities—makes no sense without the individual mandate.").

125. *See* Hall, *supra* note 122, at 41–42 (arguing that "absent any special states' rights concerns under the 10th Amendment," it was already "clear and well settled that Congress has the power to mandate the purchase of health insurance"); *see also* Mark A. Hall, *Commerce Clause Challenges To Health Care Reform*, 159 U. PA. L. REV. 1825, 1825–27 (2011).

unprecedented expansion of federal power, a novel exercise of regulatory authority, a naked mandate imposed on all those within the nation, and an effort to create commerce that could then be regulated. If nothing else, such an unprecedented assertion of federal power increased the burden on the government to establish its fidelity to the principles of enumerated powers.[126]

For the first time, Congress sought to require individuals to purchase a good or service from a private company.[127] Indeed, mandating individuals to engage in economic activity of any sort had never been done before. Through the minimum coverage provision, Congress sought to impose an affirmative legal obligation on all those in the country, without regard for whether they had elected to engage in economic activity. As in *Wickard v. Filburn* and *Raich*, the mandate was part of a broader regulatory scheme, but in both of those cases, an individual only became subject to federal regulation by choosing to engage in activity able to be regulated—growing wheat or possessing marijuana, respectively.[128] Had Roscoe Filburn or Angel Raich not taken such steps, federal regulation would have been avoided.[129]

Though the arguments in favor of the mandate's constitutionality seemed straightforward, particularly in light of *Raich*, those of us who came to doubt the mandate's constitutionality worried the arguments offered on behalf of the ACA lacked inherent limits. The federal government's strongest argument is that the individual mandate is necessary to facilitate other aspects of healthcare reform, and thus, must be valid as "necessary and proper" to the regulation of health insurance markets.[130] But this argument proves to be too much. The individual mandate does not, as written, truly solve the adverse selection problem created by other aspects

126. *See* Bernstein, *supra* note 4, at 212 ("Democrats in Congress essentially ignored plausible constitutional objections to the ACA's individual mandate, and therefore have only themselves to blame if the law is declared unconstitutional.").

127. *See* Kopel, *supra* note 124, at 36 ("No prior case stands for the proposition that Congress may use the interstate commerce power to order persons to buy a particular product, or may use the tax power to punish people for choosing not to purchase a particular product.").

128. *See* Gonzales v. Raich, 545 U.S. 1, 6–7 (2005); Wickard v. Filburn, 317 U.S. 111, 113 (1937).

129. *See* Commonwealth *ex rel*. Cuccinelli v. Sebelius, 728 F. Supp. 2d 768, 780 (E.D. Va. 2010) ("In both cases, the activity under review was the product of a self-directed affirmative move to cultivate and consume wheat or marijuana. This self-initialed change of position voluntarily placed the subject within the stream of commerce. Absent that step, governmental regulation could have been avoided.").

130. *See* Ilya Somin, *Necessary and Proper Clause Doctrine and the Individual Mandate*, *in* CONSPIRACY, *supra* note 4, at 48.

of healthcare reform.[131] It only helps on the margin. That is, it modestly ameliorates the adverse selection problem created by the elimination of medical underwriting.[132] If this is enough to satisfy the Necessary and Proper Clause, then Congress could mandate that all individuals engage in any behavior that helps keep health insurance costs down by increasing the participation of healthy people in insurance pools or improving the health of those already in the pool.[133] So, for instance, Congress could mandate all Americans join health clubs or even purchase fruits and vegetables, for these too would help lower healthcare costs on the margin—albeit to a much smaller degree—and facilitate achievement of healthcare reform's goals.[134]

Some argued Congress may have the power to mandate health club memberships or some related thing but that it would never do so because such an extreme step would be so politically unpopular (presumably more unpopular than the mandate at the time of its adoption).[135] Thus, courts need not worry about such extreme, and extremely unlikely, scenarios. This is a coherent argument, but it is one that implicitly assumes the unconstrained vision of federal power is correct. It is the argument Justice Harry Blackmun made for the Court in *Garcia*,[136] embraced

131. *See* Balkin, *supra* note 12, at 46 (noting that the ACA's promise of guaranteed coverage for all who apply for health insurance created "a problem of adverse selection" because "many people will wait until they become ill to purchase health insurance, knowing that they cannot be turned down").

132. *See* Andrew Koppelman, *"Necessary," "Proper," and Health Care Reform*, *in* THE HEALTH CARE CASE, *supra* note 98, at 105, 106–07 ("The ACA's mandate was just another technique for financing broad coverage, adopted, despite its unpopularity, because all the other options had proven politically impossible or practically inadequate.").

133. *See, e.g.*, Jonathan H. Adler, *Is the Individual Mandate Necessary?*, VOLOKH CONSPIRACY, (Oct. 14, 2010), http://www.volokh.com/2010/10/14/is-the-individual-mandate-necessary/.

134. *See* Ilya Somin, *Broccoli, Slippery Slopes, and the Individual Mandate*, *in* CONSPIRACY, *supra* note 4, at 91, 92 ("Forcing people to purchase broccoli or other food could be defended as a public health measure. . . . The logic of the pro-health care mandate argument can justify virtually any mandate to purchase or do anything.").

135. *See, e.g.*, Andrew Koppelman, *Health Care Reform: The Broccoli Objection*, BALKINIZATION, (Jan. 19, 2011), http://balkin.blogspot.com/2011/01/health-care-reform-broccoli-objection.html (attacking the "Broccoli Objection" to the individual mandate because "Congress is never going to force you to eat your broccoli").

136. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 554 (1985).

by the dissenters in *Lopez*[137] and *Morrison*,[138] as well as in other federalism cases.[139]

Yet if one sees *Lopez* and *Morrison* as repudiating this vision and endorsing the need for judicially enforceable limits, it makes no difference whether Congress *would* mandate the purchase of GM cars, health-club memberships, or even broccoli. For those who maintain a constrained vision of federal power, political safeguards are not enough. What matters is whether there is a judicially administrable limit on federal power consistent with the Court's precedents.[140] Similarly, the argument that healthcare is "different," however persuasive as a matter of policy, does not satisfy the call for more formal limits on the scope of federal power as suggested by at least one reading of the Rehnquist Court's federalism opinions.[141]

In many respects, *NFIB* presented the judiciary with a replay of *Lopez*.[142] The Court's expansive precedents had been given even more expansive interpretations by the majority of academic commentators who defended the ACA's individual mandate, but the Court consistently maintained that federal regulatory authority has judicially enforceable limits and that upholding the individual mandate—much like upholding the GFSZA—would make any of these limits difficult, if not impossible, to discern.[143] What Chief Justice Rehnquist wrote

137. *See* United States v. Lopez, 514 U.S. 549, 604 (1995) (Souter, J., dissenting) (suggesting that judicial review under the Commerce Clause must defer to Congress's "rationally based legislative judgments" and that the check on the exercise of Congress's power comes from its "political accountability").

138. United States v. Morrison, 529 U.S. 528, 649 (2000) (Souter, J., dissenting) ("As with 'conflicts of economic interest,' so with supposed conflicts of sovereign political interests implicated by the Commerce Clause: the Constitution remits them to politics.").

139. *See, e.g.*, Gonzales v. Raich, 545 U.S. 1, 33 (2005) (upholding Congress's power to enforce the CSA, but implying that opposition to the CSA should turn to "the democratic process, in which the voices of voters allied with these respondents may one day be heard in the halls of Congress").

140. *See* Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate Is Unconstitutional*, 5 N.Y.U. J.L. & LIBERTY 581, 606–07 (2010) ("Accepting this theory would open the door for an infinite variety of mandates in the future.").

141. *Cf. Morrison*, 529 U.S. at 627 (acknowledging that "no civilized system of justice could fail to provide [Brzonkala] a remedy" but stating that "under our federal system that remedy must be provided by the Commonwealth of Virginia, and not by the United States").

142. *See* Jonathan H. Adler, *The Individual Mandate as a Replay of* United States v. Lopez, VOLOKH CONSPIRACY (Oct. 15, 2010), http://www.volokh.com/2010/10/15/the-individual-mandate-debate-as-a-replay-of-united-states-v-lopez/.

143. *See* Jonathan H. Adler, *Guns, Broccoli, and the Individual Mandate: Thoughts on the Eve of Argument*, *in* CONSPIRACY, *supra* note 4, at 176, 176 (comparing *Lopez* to the

in *Lopez* was arguably true in *NFIB* as well: "if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate."[144]

While academics were generally—though not universally—disdainful of the need for limits, those defending the ACA in federal court saw a need to identify judicially enforceable limits on federal power.[145] Unlike the solicitors general who had tried to defend the GFSZA and VAWA, those defending the ACA recognized the need to explain why allowing the mandate would not open the door to nearly unlimited federal power.[146] Mandate opponents identified potential limits, such as the distinction between activity and inactivity or that between regulating preexisting conduct and mandating that given conduct occur in the first place.[147] Based on these distinctions, a Court could conclude that the individual mandate exceeded the scope of federal power under the Commerce Clause—as supplemented by the Necessary and Proper Clause—without undermining any other portions of the U.S. Code.[148] Whether it is necessary to identify such a limit on federal power, however, depends on which vision of the Constitution prevails.

Some academics recognized that a majority of the Court was likely to insist on identifying a meaningful limit on federal power that would remain if a mandate to purchase health insurance were upheld. The Rehnquist Court's opinions seemed to require as much,[149] but it remained difficult to identify a line without upending settled precedent. Professors Neil Siegel and Robert Cooter, for example,

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then-ongoing *NFIB* case and observing that "then, as now, defenders of the federal law have a difficult time reconciling their arguments with meaningful limits on federal power").

144. United States v. Lopez, 514 U.S. 549, 564 (1995).

145. *See* David E. Bernstein, *Has the Pro-ACA Side Come Up with a "Limiting Principle"?*, *in* CONSPIRACY, *supra* note 4, at 182, 183 ("So far, we seem to be left with the 'health care is special' argument, which is not a limiting *principle* but could persuade a conservative justice or two to join a limited *holding*. Yet Justice Kennedy suggested today that if the ACA is upheld, the government will soon be back arguing that some other sector of the economy is 'special.'").

146. *See* BLACKMAN, *supra* note 1, at 134–39. As Blackman notes, the Office of the Solicitor General eventually abandoned the search for a limit on the federal commerce power, under the assumption that it could not identify a limit that was likely to satisfy those Justices who believed it was necessary to identify such a limit. Instead, the office sought to cultivate support for upholding the mandate as an exercise of the taxing power. *Id.* at 159–66.

147. *See, e.g.*, Jonathan H. Adler, *Baffled that Anyone is Baffled by the Activity-Inactivity Distinction*, *in* CONSPIRACY, *supra* note 4, at 104, 104–06 ("One way to think about the activity-inactivity distinction is to recognize the difference between prohibiting conduct or imposing conditions on conduct, on the one hand, and mandating conduct on the other.").

148. *See* Neil S. Siegel, *None of the Laws but One*, 62 DRAKE L. REV. ___ (2014).

149. *See supra* Part III.

articulated a theory of "collective action federalism" that could justify the mandate without freeing federal power from constitutional constraint.[150] Under this theory, the federal government is empowered to act when collective action problems prevent individual states from acting on their own.[151] Thus, if states are wary of enacting certain types of health insurance reforms on their own for fear that they would be forced to shoulder disproportionate costs if their neighbors do not follow suit, federal intervention would be justified.[152]

The Siegel–Cooter theory outlines an elegant and internally coherent constitutional architecture that observes the need to keep federal power within articulable limits. At first glance, it seems to offer a plausible account of the Court's Commerce Clause decisions.[153] Neither the GFSZA nor VAWA addressed a collective action problem,[154] whereas the Agricultural Adjustment Act and Controlled Substances Act dealt with national markets in commodities that states could not effectively regulate on their own—or so our federal representatives could have rationally concluded.[155] Yet it does not fully answer the constrained vision's call for limits because it cannot provide a plausible account of the Court's current federalism jurisprudence beyond these cases. Were the Supreme Court to have upheld the individual mandate on the grounds Siegel and Cooter suggested, it would necessarily repudiate the rationales underlying some of the Court's other federalism decisions.[156]

150. *See* Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115, 164–65 (2010) (arguing that "the phrase 'among the several States' references a problem of collective action involving at least two states" and that the Commerce Clause should be construed accordingly "to give Congress the authority to solve collective action problems").

151. *See id.* at 159–66 (framing the Court's Commerce Clause jurisprudence in terms of "a more functional logic" that "may in fact have animated the Court" to reach seemingly inconsistent results "in *Lopez*, *Morrison*, and *Raich*").

152. *See id.* at 159 (arguing that "Congress should exercise its constitutional power" when "the need for cooperation involves numerous states, or when states face historical or political obstacles to cooperation").

153. *See id.* at 159–66.

154. *See id.* at 163 (highlighting the fact that *Lopez* did not involve an attempt to solve a collective action problem—"the absence of regulation of guns near schools in one state would not undercut the effectiveness of regulations prohibiting them in other states").

155. *See id.* at 160 (framing *Wickard* in collective action terms as a case in which "Congress perceived a national problem of overproduction of wheat," but determined that only "national regulation could effectively reduce production"); *id.* at 164 (noting that *Raich* presented "a potential spillover problem" because "the market for marijuana disrespects state borders").

156. Of note, some of these cases, such as *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 898 (1997), are not cited at all in the Siegel and

First, the Court's anticommandeering decisions—*New York v. United States* and *Printz v. United States*—suggest that a collective action problem may be necessary, but still not sufficient, to render an exercise of the commerce power to be necessary and proper.[157] Both cases involved clear collective action problems related to economic activities, and in both cases, the laws were struck down on federalism grounds. The law at issue in *New York* was an effort to induce states to provide for the disposal of low-level radioactive waste, which no state wanted to do on its own.[158] It was based on an agreement among several states expressly predicated on the idea that collective action was necessary to solve the problem.[159] But it was still unconstitutional because it sought to commandeer the states.[160] The law in *Printz* could likewise be seen as an effort to solve a collective action problem, as no state would be able to prevent the purchase of guns without a background check if individuals could easily cross state lines to purchase a gun in a state without a background check requirement.[161]

In neither case was the existence of a collective action problem enough to save the law. In each case the Court concluded that the federal law at issue, no matter how necessary, was not proper for carrying into execution an exercise of the federal government's power to regulate commerce among the states, despite the existence of a collective action problem.[162] So while the collective action theory would be enough to justify much federal regulation of health insurance, it would not necessarily be enough to justify the individual mandate, particularly if one were concerned with the propriety of mandating activity for the purpose of regulation or otherwise saw the mandate as an effort to commandeer the people.[163]

The Siegel–Cooter collective action theory also has problems explaining the outcomes of recent decisions in which the Court construed the scope of federal

Cooter article. *See generally* Cooter & Siegel, *supra* note 150, at 159–66.

157. *See Printz*, 521 U.S. at 923–24; *New York*, 505 U.S. at 166.

158. *See New York*, 505 U.S. at 174–76.

159. *See id.* at 196–99 (White, J., concurring in part and dissenting in part) (detailing the history of the provision in question and concluding that "these statutes are best understood as the products of collective state action").

160. *See id.* at 176–77.

161. *See Printz*, 521 U.S. at 904.

162. *Printz*, 521 U.S. at 931–33 ("It is the very *principle* of separate state sovereignty that such a law offends, and no comparative assessment of the various interests can overcome that fundamental defect."); *New York*, 505 U.S. at 177–80 (holding that independent limits on the exercise of Congress's enumerated powers still apply "whether or not a particularly strong federal interest enables Congress to bring state governments within the orbit of generally applicable *federal* regulation").

163. *See generally*, Barnett, *supra* note 140, at 629.

statutes narrowly so as to avoid potential constitutional problems. In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* and *Rapanos v. United States*, a majority of the Court adopted a narrowing interpretation of the scope of regulatory jurisdiction over "waters of the United States" under the Clean Water Act to avoid an interpretation of the Act that could exceed the scope of the federal government's Commerce Clause power.[164] The theory of federal power necessary to uphold such a broad assertion of regulatory authority could likewise justify federal regulation of local land use.[165] Yet under the collective action theory of federalism, federal legislators would have been justified in authorizing federal-level action if they could reasonably believe that states would not adopt sufficiently stringent regulations governing water pollution, wetlands development, or even land use generally, due to fears of interstate competition.[166] Again, the collective action theory of federalism would readily embrace assertions of federal power the Supreme Court has recently rejected. So, while upholding the mandate on a collective action theory of Congress's powers would have respected the need for limits, it would have resulted in limits on federal power quite different from those identified by the Court in the federalism decisions of the past 20 years. Thus, if a majority of the Court wanted to find a limiting principle for the scope of federal power that would both uphold the individual mandate as an exercise of the commerce power and be consistent with existing precedent, it would have to look elsewhere.

In the case of the spending power, the conflict of visions was less acute, but only because there was less need to reconcile potentially competing lines of cases. Since the New Deal, the Court had reiterated the need to constrain the federal government's ability to induce states to engage in conduct that Congress could not compel, but it had not enforced these limits. Conditioning the receipt of federal

164. Rapanos v. United States, 547 U.S. 715, 738–39 (2006); Solid Waste Agency of N. Cook Cnty., 531 U.S. 159, 173–74 (2001).

165. *See Rapanos*, 547 U.S. at 755–56.

166. Collective action federalism theory suggests that Congress would be permitted to "regulate noncommercial harms that spill over state boundaries, such as certain environmental problems." Cooter & Siegel, *supra* note 150, at 120, 176–78 (emphasis removed). The potential existence of collective action problems is a commonly offered rationale for the adoption of federal environmental regulations. *See, e.g.*, Peter P. Swire, *The Race to Laxity and the Race to Undesirability: Explaining Failures in Competition Among Jurisdictions in Environmental Law*, 14 YALE J. ON REG. 67, 99–100 (1996). *But see* Richard Revesz, *The Race to the Bottom and Federal Environmental Regulation: A Response to Critics*, 82 MINN. L. REV. 535, 540–42 (1997). There are also reasons to question whether federal intervention solves such collective action problems. *See* Jonathan H. Adler, *When Is Two a Crowd? The Impact of Federal Action on State Environmental Regulation*, 31 HARV. ENVTL. L. REV. 67, 94–106 (2007).

money on state cooperation was not new—not even for the Medicaid program.[167] In the ACA, Congress went further than it had before, at least as measured by the amount of money at stake.[168] Moreover, with the Medicaid expansion, Congress sought to leverage state reliance on the prior receipt of funds to ensure cooperation.[169] This combination, much like a mandate to purchase a good or service, was unprecedented. On this basis, some two dozen states argued that here, too, Congress had asserted an unconstrained power to leverage public funds to achieve political ends.[170] Pushing in the other direction, however, was the fact that the Court had never held that the imposition of conditions on a state's receipt of federal funds was unconstitutionally coercive.[171] After all, even if Congress presented states with an unpleasant choice, they still had a choice.

V. THE VISION OF *NFIB*

For those who opposed the individual mandate and believed it to be an unconstitutional assertion of federal power, the Court's decision in *NFIB* was a disappointment. Yet for those who hoped the Court would reaffirm that the Constitution creates a federal government of limited and enumerated powers and that it is the responsibility of the Court to enforce such limits, there was much to like in the decision. While the Court upheld the mandate—or, more properly, upheld the financial assessment for failing to purchase health insurance as an exercise of the taxing power—it reaffirmed the principle that federal power is subject to judicially enforceable limits and that the federalism decisions of the Rehnquist Court were not aberrations. In this respect, the *NFIB* decision embraced the constrained vision, even as it upheld nearly all of the ACA against

167. *See* Leonard, *supra* note 102, at 391 ("Unlike prior federal conditional spending programs, which operated as limited grants-in-aid to states, Medicaid was created and continues to offer open-ended federal funding to the states so long as they comply with broad federal requirements under the Medicaid Act.").

168. *See* Nicole Huberfeld, Elizabeth Weeks Leonard & Kevin Outterson, *Plunging into Endless Difficulties: Medicaid and Coercion in National Federation of Independent Businesses v. Sebelius*, 93 B.U. L. REV. 1, 25 (2013) (noting that the ACA "effectively rais[ed] the income threshold" for Medicaid eligibility "to 138% [of the federal poverty level]," representing a dramatic expansion in the amount of people covered—and the amount of federal funds involved).

169. *See* BLACKMAN, *supra* note 1, at 133 ("The only problem with declining the new funding, the challengers argued, was that failure to accept this new Medicaid program would also eliminate *all* of the previous funding they had grown accustomed to receiving.").

170. *See* Jost, *State Lawsuits*, *supra* note 6, at 1227 ("[A]ttorneys general in twenty-one states have asked the courts to declare the act unconstitutional, in a suit initially filed by Florida and twelve other states.").

171. *See* BLACKMAN, *supra* note 1, at 134.

constitutional challenge.[172]

The opening of Chief Justice John Roberts's opinion for the Court is a clear and forceful restatement of the principle of limited and enumerated powers.[173] "The enumeration of powers is also a limitation of powers," he wrote,[174] echoing Chief Justice Marshall.[175] He noted that the Bill of Rights, however important, is not the only limitation on federal power. "If no enumerated power authorizes Congress to pass a certain law, that law may not be enacted, even if it would not violate" individual rights protected under the Constitution or the Court's precedents.[176] This inherent limitation on federal power, the Chief Justice continued, is essential for the preservation of state sovereignty, which, in turn, "is not just an end in itself" but rather the means to "secure[] to citizens the liberties that derive from the diffusion of sovereign power."[177] And while the judiciary is to play a "limited role in policing" the boundaries of federal power, the Chief Justice stressed that the Court's "respect for Congress's policy judgments" only goes so far, as "it is the responsibility of this Court to enforce the limits on federal power by striking down acts of Congress that transgress those limits."[178] In opening his opinion for the Court in this way, the Chief Justice effectively finalized the Court's repudiation of the political safeguards theory of federalism briefly embraced in *Garcia*.[179]

The mandate, as seen by the Chief Justice and the joint dissenters, "does not

172. *See generally*, 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, 1340–43 (2013) (commenting that although "Chief Justice Roberts's decision made bad law" in some respects, it affirmed the all-important proposition "that the powers of Congress were limited by Article I of the Constitution").

173. Nat'l Fed. of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2577 (2012) ("In our federal system, the National Government possess only limited powers; the States and the people retain the remainder.").

174. *Id.*

175. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 195 (1824) ("The enumeration presupposes something not enumerated . . . .").

176. *NFIB*, 132 S. Ct. at 2577.

177. *Id.* at 2578 (quoting New York v. United States, 505 U.S. 144, 181 (1992)).

178. *Id.* at 2577, 2579–80 (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 175–76 (1803)).

179. Not only did the Chief Justice and joint dissenters reject the premise of *Garcia*, but Justice Ruth Bader Ginsburg's dissent did not expressly endorse *Garcia* either. *See id.* at 2609–42 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part); *see also* Metzger, *supra* note 10, at 98 ("*Garcia* did not even surface in Justice Ginsburg's opinion, demonstrating how far the Court has moved over the last twenty-five years toward judicial enforcement of constitutional federalism.").

regulate existing commercial activity."[180] Instead, it compels individuals to engage in commerce, "on the ground that their failure to do so affects interstate commerce."[181] Such a conception of the commerce power could not be squared with the text or the doctrine of limited and enumerated powers. "The power to *regulate* commerce presupposes the existence of commercial activity to be regulated," the Chief Justice stated.[182] However expansive the Court's conception of the commerce power in *Wickard*, Roscoe Filburn "was at least actively engaged in the production of wheat"[183]—and for commercial purposes, no less.[184] Further, "[i]f the power to 'regulate' something included the power to create it, many of the provisions in the Constitution would be superfluous," such as the power to "coin Money" and "regulate the Value thereof."[185] If, as Chief Justice Roberts suggested, an analysis of the government's power had to begin with the relevant text and the fact of enumeration, this was a problem.

Upholding the government's arguments in support of the mandate would, according to the Chief Justice, give Congress a vast, new power.[186] After all, each day, "individuals do not do an infinite number of things."[187] They do not purchase a nearly infinite number of goods or engage in myriad economic transactions in which they could have engaged, and these economic actions-that-never-were, taken together, surely have as much of an effect on commerce as the failure to purchase federally approved health insurance. Such a doctrine would give Congress authority over "countless decisions" individuals make each day and "empower Congress to make those decisions" for them.[188] Whether justified under the Commerce Clause standing alone, or in combination with the Necessary and Proper Clause, such an expansive power would make a mockery of the notion of *limited* enumerated powers and "fundamentally chang[e] the relation between the citizen and the Federal Government."[189] The result, according to Chief Justice

180. *NFIB*, 132 S. Ct. at 2587.

181. *Id.*

182. *Id.* at 2586.

183. *Id.* at 2588.

184. *See* Jim Chen, *The Story of* Wickard v. Filburn*: Agriculture, Aggregation, and Congressional Power over Commerce*, *in* CONSTITUTIONAL LAW STORIES 69, 83–86 (Michael C. Dorf ed. 2009).

185. *NFIB*, 132 S. Ct. at 2586 (internal quotation marks omitted).

186. *Id.* at 2587 ("Construing the Commerce Clause to permit Congress to regulate individuals precisely *because* they are doing nothing would open a new and potentially vast domain to congressional authority.").

187. *Id.*

188. *Id.*

189. *Id.* at 2589.

Roberts, would "not [be] the country the Framers of our Constitution envisioned."[190]

Chief Justice Roberts nonetheless voted to uphold the penalty for failing to purchase health insurance as a constitutional exercise of the taxing power.[191] While disappointing to those who argued that the mandate should be struck down, this holding does little, if anything, to expand the scope of federal power and has the effect of eliminating the "mandate" as a mandate.[192] Congress regularly enacts laws under which an individual's tax burden is higher or lower based upon whether the individual engages in activities of which the federal government approves. Viewed in economic terms, the consequence of the tax for failing to purchase qualifying health insurance is that an individual who purchases such insurance has a lower tax burden than a person who does not. The same advantage is gained by an individual who installs solar panels of energy-efficient appliances in their home,[193] purchases an alternative fuel vehicle,[194] or gives to charity.[195]

The question in *NFIB* was not whether Congress can impose differential tax burdens based upon whether individuals comply with the government's dictates but whether, in this case, Congress actually used the tax power to accomplish this goal. The joint dissenters rejected the Chief Justice's argument because those who supported the ACA routinely disclaimed any reliance on the taxing power and because of questions as to whether the penalty actually complied with other constitutional requirements for taxes.[196] Whether or not these criticisms of the Court's majority on this issue are persuasive, the point here is merely that the

190. *Id.*

191. *Id.* at 2593–600.

192. *See* Barnett, *supra* note 172, at 1338 ("To 'save' the rest of the ACA, the Chief Justice essentially deleted the 'requirement' part. So the mandate *qua* mandate is gone. What is left is a tax.").

193. *See* 26 U.S.C. § 25D(a)(1) (2012) ("In the case of an individual, there shall be allowed as a credit against the tax imposed by this chapter for the taxable year an amount equal to the sum of 30 percent of the qualified solar electric property expenditures made by the taxpayer during such year . . . .").

194. *See* 26 U.S.C. § 30B(e) (2012) ("[T]he new qualified alternative fuel motor vehicle credit determined under this subsection is an amount equal to the applicable percentage of the incremental cost of any new qualified alternative fuel motor vehicle placed in service by the taxpayer during the taxable year.").

195. *See* 26 U.S.C. § 170(a)(1) (2012) ("There shall be allowed as a deduction any charitable contribution . . . payment of which is made within the taxable year. A charitable contribution shall be allowable as a deduction only if verified under regulations prescribed by the Secretary.").

196. *NFIB*, 132 S. Ct. at 2598 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).

Court's willingness to uphold the penalty as a tax does not in any way indicate a rejection of the constrained vision of federal power. Further, in treating the penalty for failing to purchase health insurance as a tax, the Court subjected it to additional constitutional constraints.[197]

Some have suggested the Chief Justice's discussions of the Commerce and Necessary and Proper Clauses are mere dicta.[198] Yet these analyses form an essential predicate to his ultimate conclusion that the mandate could be upheld as a tax, as some lower courts have already recognized.[199] The entire Court accepted that the most natural reading of the minimum coverage provision is as an economic mandate adopted pursuant to the Commerce Clause.[200] It was only after rejecting the possibility that the mandate could be justified in this manner that the Chief Justice returned to the text to see if it was susceptible to an alternative construction.[201] Thus, the only reason the Chief Justice even considered whether the mandate could be considered a tax, the statutory text notwithstanding, is because of his prior conclusion that the Commerce Clause and Necessary and Proper Clause were insufficient. Thus this decision provides five firm votes for meaningful limits on the most expansive of Congress's powers.

The Court's Spending Clause holding only serves to underline how *NFIB* embraced a constrained vision of federal power. As noted above, *NFIB* marked the first time the Court had ever held that the imposition of conditions on the receipt of federal spending was unconstitutionally coercive.[202]

197. *See id.* (majority opinion) ("Even if the taxing power enables Congress to impose a tax on not obtaining health insurance, any tax must still comply with other requirements in the Constitution."); *see also* Barnett, *supra* note 172, at 1340 (noting that, per Chief Justice Roberts's opinion, in order to be a tax, the payment must be small enough in relation to the cost of health insurance to preserve the taxpayer's ability to choose "to obey or pay").

198. *See, e.g.*, David Post, *Commerce Clause "Holding v. Dictum Mess" Not So Simple*, THE VOLOKH CONSPIRACY, (July 3, 2012), http://www.volokh.com/2012/07/03/commerce-clause-holding-v-dictum-mess-not-so-simple/ ("Courts don't have to be obeyed when they propound on something they didn't have to propound upon for the purpose of deciding the case the way they decided it.").

199. *See, e.g.*, United States v. Rose, 714 F.3d 362, 370–01 (6th Cir. 2013) (quoting *NFIB*, 132 S. Ct at 2591) (internal quotation marks omitted) (noting *NFIB* held that the individual mandate "cannot be sustained" as an exercise of the commerce power.).

200. *See NFIB*, 132 S. Ct. at 2593.

201. *Id.* ("Because the Commerce Clause does not support the individual mandate, it is necessary to turn to the Government's second argument: that the mandate may be upheld as within Congress's enumerated power to 'lay and collect Taxes.'" (quoting U.S. CONST. art. I, § 8, cl. 1)).

202. *See supra* notes 99–102 and accompanying text.

At issue here was the so-called Medicaid expansion, through which Congress sought to expand Medicaid to cover all adults who were at or below 133 percent of the poverty line.[203] However, Medicaid has always been a program of "cooperative federalism."[204] The federal government underwrites much of Medicaid's cost, but states implement the program.[205] Administering a program of this size and scale is not without cost, so the federal government had to make it worth the states' while. It did this first by promising generous amounts of funding for states that agreed to the expansion.[206] More ominously, the ACA threatened to cut off *all* Medicaid funding to any state that did not go along with the expansion.[207] By leveraging state reliance on existing state funding to induce state cooperation with the expansion, state petitioners argued, the federal government was engaging in unconstitutional coercion of the states—and seven Justices agreed.

In striking down the conditions imposed on the Medicaid expansion, Chief Justice Roberts reaffirmed the five requirements of conditional spending outlined in *Dole* and reiterated that Spending Clause legislation is "much in the nature of a *contract*."[208] The conditions placed on the Medicaid expansion easily satisfied most of the *Dole* requirements. The spending was for the general welfare, at least as far as the term has long been understood, and did not require states to engage in unconstitutional conduct as a condition of receiving the funds.[209] The conditions placed on the spending were also clearly related to the purpose of the spending: increasing the availability of healthcare services to those in need.

The Medicaid expansion ran into trouble in that it arguably represented a

203. *See* Huberfeld et al., *supra* note 168, at 12 n.55 ("The original language established an income threshold of 133%, but that was effectively increased to 138% through a 5% income disregard in section 1004(e) of the Health Care and Education Reconciliation Act of 2010.").

204. *See* Wisc. Dept. of Health and Family Servs. v. Blumer, 534 U.S. 473, 485 (2002).

205. *See* Leonard, *supra* note 102, at 400–03.

206. *See id.* at 401 ("Compared to traditional federal Medicaid matching rates of 50% to just over 73%, under the ACA the federal government will match state spending on newly eligible beneficiaries at no less than 90%.").

207. Nat'l Fed. of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2605 (2012) ("The threatened loss of over 10 percent of a State's overall budget, in contrast, is economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion.").

208. *Id.* at 2602 (quoting Barnes v. Gorman, 536 U.S. 181, 186 (2002) (internal quotation marks omitted)).

209. United States v. Dole, 483 U.S. 203, 208–10 (1987).

fundamental change in the nature of the contract between states and the federal government. The Medicaid expansion was, in the Court's eyes, "a shift in kind, not merely degree."[210] Further, the sheer amount of money at stake made this effort to leverage state reliance unduly coercive.[211] As Chief Justice Roberts explained, the federal government was doing far more than conditioning the receipt of new funds on state willingness to comply with conditions on how those funds would be used. Rather, Congress was leveraging state reliance on prior funding to induce states to participate in a new program.[212] There was no purpose for the condition other than to induce compliance. Chief Justice Roberts noted that when "conditions take the form of threats to terminate other significant independent grants, the conditions are properly viewed as a means of pressuring the States to accept policy changes."[213] While recognizing that the spending power is broad, the Chief Justice also recognized that it is not unlimited—indeed, that it cannot be unlimited without undoing the anticommandeering principle and other previously recognized limits on federal power.[214]

While the Court struck down the conditions placed on the Medicaid expansion as going too far, it did not identify the precise point at which constitutionally permissible pressure becomes unconstitutional coercion. Chief Justice Roberts was explicit on this point, noting the Court had "no need to fix a line" in this case.[215] It was sufficient to note that "wherever that line may be, this statute is surely beyond it."[216] In this manner the Court reaffirmed the need for a limit on the federal government's spending power, even if it could not identify precisely where that limit was.

In rejecting both the Commerce Clause justification for the mandate and the use of the spending power to induce state participation in the newly expanded Medicaid program, the Court was, in effect, announcing that Congress could go as far as it had before, but no further.[217] Novel or more far-reaching assertions of

210. *NFIB*, 132 S. Ct. at 2605.

211. *See id.* at 2604 ("Medicaid spending accounts for over 20 percent of the average State's total budget, with federal funds covering 50 to 83 percent of those costs.").

212. *See id.* at 2606 ("It is no longer a program to care for the neediest among us, but rather an element of a comprehensive national plan to provide universal health insurance coverage.").

213. *Id.* at 2604.

214. *See* Bagenstos, *supra* note 74, at 899 (noting that both Chief Justice Roberts's opinion and the joint dissent start with "the premise that the coercion doctrine must be interpreted as imposing *some* meaningful limit" on Congress's spending power).

215. *NFIB*, 132 S. Ct. at 2606.

216. *Id.*

217. *See* Barnett, *supra* note 172, at 1348; *see also* John Valauri, *Baffled by Inactivity:*

federal authority would require more persuasive justifications than had been accepted in the past.[218] In this sense, a majority of the Court sided with the constrained vision of federal power and reaffirmed the need for limits on federal power.[219] Yet in embracing limits on federal authority, the Court did not threaten existing federal programs or powers that have been routinely exercised since the New Deal. Although the *NFIB* Court rejected the Great Society's vision of federal power, it did not threaten the legacy of the Great Society itself. None of the programs enacted as part of the Great Society are constitutionally suspect as a result of *NFIB*.[220] What, then, are the consequences of this momentous decision?

VI. THE CONSEQUENCES OF *NFIB*

Before *NFIB* was decided, many legal commentators predicted disastrous consequences should the constitutional challenges prevail. A conclusion that the individual mandate exceeded the scope of federal regulatory authority would roll back decades of federal enactments, threatening not only the Great Society, but the New Deal as well.[221] In hindsight, these arguments look nothing short of hysterical, even if they were made by prominent constitutional authorities.

In reality, the result of the *NFIB* decision is not a rollback of federal law. The decision scarcely modified the ACA. Rather, the greatest effect of the *NFIB* decision is more indirect.[222] The effect will not be felt on a specific statute or existing program, as it is not clear that many programs, if any, are threatened by the majority's holding, particularly on the most hard-fought question of the federal government's power to regulate commerce. Rather, the primary effect comes from the decision's clear endorsement of an alternative vision of the Constitution—one that recognizes a need for limits on federal power and that remains skeptical of new assertions of federal authority. As Professor Laurence Solum observes, "*NFIB* destabilizes what we can call the 'constitutional gestalt' regarding the meaning and implications of what is referred to as the 'New Deal Settlement.'"[223] Though *NFIB*

The Individual Mandate and the Commerce Power, 10 GEO. J.L. & PUB. POL'Y 51, 52 (2012).

218. *See* Barnett, *supra* note 172, at 1348.

219. *See id.* at 1349 (internal quotation marks omitted) (noting that an "unlimited reading" of federal power would contradict the "first principles" of the Rehnquist Court's federalism jurisprudence).

220. "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.* at 1348.

221. *See, e.g.*, Open Letter, *supra* note 15.

222. Solum, *supra* note 9, at 2 ("[T]he most important and far-reaching legal effects of *NFIB* are likely to be indirect.").

223. *Id.* (footnote omitted).

rejects the constitutional vision dominant at the time of the Great Society's enactment, it does not challenge or in any way threaten the Great Society itself. It is a vision of limitation, not of revocation.

The Court's conclusion that a mandate to purchase federally approved health insurance exceeds the scope of authority delegated by the Commerce Clause—whether taken alone or in combination with the Necessary and Proper Clause—does not directly threaten any other federal statute. This is because no other federal statute has ever been enacted that was premised on the government's authority to impose such a mandated purchase on all individuals. While the federal government enforces countless laws regulating commercial, and even some noncommercial, activity, no other statute seeks to compel activity so that it may then be regulated.

Insofar as the Commerce Clause and Necessary and Proper Clause holdings have an effect on future cases, it may be due to the signal the Court's decision sends. After the Court struck down the GFSZA in *Lopez*, only one federal appellate court was willing to invalidate a federal statute on Commerce Clause grounds, and that case led to *Morrison*.[224] After *Morrison*, lower federal courts remained reluctant to join the federalism revolution.[225] After *Raich*, the willingness of federal appellate courts to impose meaningful Commerce Clause scrutiny on federal statutes all but disappeared.[226]

By holding that the Commerce Clause could not be used to justify the individual mandate, the Court has sent a signal to lower courts that the federalism principles that animated the Rehnquist Court are alive and well. This does not compel lower courts to invalidate any federal statutes, but it is likely to induce some to consider Commerce Clause questions with an extra degree of care. Insofar as there are some federal statutes—such as the Endangered Species Act[227] or the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act[228]—that press the limits of federal regulatory authority, lower courts are on notice that federalism constraints are for real.

224. *See supra* notes 84–91, 114–15 and accompanying text.

225. *See supra* notes 116–18 and accompanying text.

226. *See supra* note 119 and accompanying text.

227. *See, e.g.*, Rancho Viejo, LLC v. Norton, 323 F.3d 1062, 1069 (D.C. Cir. 2003); GDF Realty Invs., Ltd. v. Norton, 326 F.3d 622, 628 (5th Cir. 2003); Gibbs v. Babbitt, 214 F.3d 483, 493 (4th Cir. 2000); Nat'l Ass'n of Home Builders v. Babbitt, 130 F.3d 1041, 1045–46 (D.C. Cir. 1997); *see also* Jonathan Adler, *Judicial Federalism and the Future of Federal Environmental Regulation*, 90 IOWA L. REV. 377, 390–95 (2005) (discussing Endangered Species Act cases raising Commerce Clause issues).

228. *See* 18 U.S.C. § 249(a)(2) (2012); *see, e.g.*, United States v. Mullett, 868 F. Supp. 2d 618, 621–23 (N.D. Ohio 2012).

While commentators largely focused on the Commerce Clause and on the Necessary and Proper Clause, the Court's treatment of the spending power is likely to have the greatest practical effect. For years the Court has insisted that Congress's power to impose conditions on the receipt of federal funds is limited without ever finding a limit it would enforce. The *Dole* test was never particularly stringent, at least not in application. In *NFIB*, however, seven Justices concluded that Congress could not condition the receipt of existing Medicaid funds on state acceptance of a Medicaid expansion. This put teeth into *Dole*'s admonition that Congress could not use the promise of federal funds to coerce state obedience, even if the Court did not make the basis for its conclusion fully clear.[229]

The Court's decision on the Medicaid expansion dramatically reduces the pressure for states to accept this part of the ACA. It will also limit the federal government's ability to direct state implementation in other areas by threatening the withdrawal of federal funds. Given the frequency with which Congress uses the power of the purse to induce state cooperation, new rounds of litigation on the Spending Clause are sure to follow. *Dole* upheld a threat to withhold 5 percent of federal highway funds if states refused to adopt a minimum drinking age of 21 years old.[230] But would courts uphold a threat from the Environmental Protection Agency to shut off the lion's share of highway funds should states not adopt sufficiently stringent pollution controls on local businesses? Perhaps not.[231]

NFIB is not the last word on judicially enforced federalism. It is only the latest statement in a long-running debate over the scope of federal regulatory authority and the role of the judiciary in enforcing whatever limits the Constitution contains. The Court's narrow split, particularly on the scope of the commerce power, "leaves constitutional law in a peculiarly unsettled state."[232] The boundaries of this holding will be challenged, and there is no doubt some of the Justices believe the Court's conclusion on this point was a mistake.[233] While *NFIB*

229. *See* Bagenstos, *supra* note 74, at 870–71; Huberfeld, et al., *supra* note 168, at 50–71; Bradley W. Joondeph, *The Health Care Cases and the New Meaning of Commandeering*, 91 N.C. L. REV. 811, 832–36 (2013).

230. *See* South Dakota v. Dole, 483 U.S. 203, 211–12 (1987).

231. *See* Adler, *Judicial Federalism*, *supra* note 227, at 447–52 (arguing, before *NFIB*, that these provisions are "particularly suspect under *Dole*"); Bagenstos, *supra* note 74, at 916–20 (suggesting vulnerability of Clean Air Act highway fund sanctions after *NFIB*). *But see* Erin Ryan, *The Spending Power and Environmental Law After* Sebelius, 85 U. COLO. L. REV. 1003, 1054–59 (2014) (arguing highway fund sanctions remain constitutional after *NFIB*).

232. *See* Solum, *supra* note 9, at 57.

233. *See* Nat'l Fed. of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2625 (2012) (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("As our national economy grows and changes, we have recognized, Congress must adapt to the

represents a triumph for a particular constitutional vision, only time will tell whether that vision will truly take hold or whether it will be fleeting.

changing 'economic and financial realities.' Hindering Congress' ability to do so is shortsighted; if history is any guide, today's constriction of the Commerce Clause will not endure." (citation omitted)).