

4-20-2013

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Recommended Citation

Robert J. Pushaw Jr. and Grant S. Nelson *The Likely Impact of National Federation on Commerce Clause Jurisprudence*, 40 Pepp. L. Rev. 4 (2013)

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The Likely Impact of *National Federation* on Commerce Clause Jurisprudence

Robert J. Pushaw, Jr.* & Grant S. Nelson**

INTRODUCTION

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INTRODUCTION

In *National Federation of Independent Businesses v. Sebelius*,¹ the Supreme Court exhaustively analyzed Congress's constitutional power to enact the watershed Patient Protection and Affordable Care Act (ACA or "Obamacare").² The ACA requires health insurance companies to issue

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This article grew out of several presentations we made at Pepperdine in 2011–12, and we are grateful to the *Pepperdine Law Review* editors for offering to publish it and for their editorial assistance.

1. 132 S.Ct. 2566 (2012).

2. Pub. L. No. 111-148, 124 Stat. 119 (2010), amended by the Health Care and Education Reconciliation Act, Pub. L. No. 111-152, 124 Stat. 1029 (2010).

policies to all applicants, without adjusting the price to reflect individualized consideration of risk factors such as pre-existing medical conditions.³ Standing alone, this requirement would discourage younger and healthier people from purchasing such insurance unless or until they became seriously ill or injured, at which point insurers would have to cover them—a result that would effectively shift billions in costs to those who had maintained insurance all along.⁴ To solve this problem, Obamacare imposes a “shared responsibility requirement,” popularly known as the “Individual Mandate” (IM), which forces Americans to buy medical insurance or pay a “penalty.”⁵

The ACA’s text and legislative history, as well as the public defenses of it by President Obama and his supporters, consistently described the IM not as a “tax” but rather as a valid exercise of Congress’s power “[t]o regulate Commerce . . . among the several States.”⁶ This reliance on the Commerce Clause was understandable, as it has been interpreted since 1937 as giving Congress virtually plenary authority.⁷ Indeed, the modern Court has upheld every federal statute (with two trivial exceptions) after applying an extremely deferential standard of review: Could Congress have had a rational basis for concluding that the activity regulated, taken in the aggregate nationwide, “substantially affects” interstate commerce?⁸ This judicially-approved legislation addressed not merely national economic matters (such as industrial and labor relations, agricultural commodities, and banking), but also seemingly non-commercial subjects like civil rights, crime, the environment, and health and safety.⁹

In *National Federation*, Justices Ginsburg, Breyer, Sotomayor, and Kagan sought to continue this lenient approach by ruling that Congress could reasonably have determined that Americans’ decisions about health insurance (including the failure to obtain it), when added up nationally,

3. See ACA, 26 U.S.C. §§ 36B and 300gg (West, Westlaw through P.L. 112-207). In technical terms, the ACA requires “guaranteed issue” of insurance coverage and “community rating” to prohibit pricing based on individual characteristics. *Nat’l Fed’n*, 132 S.Ct. at 2585 (Roberts, C.J.) (citing statute).

4. See ACA, 42 U.S.C. §18091(a)(2) (West, Westlaw through P.L. 112-207) (congressional findings).

5. See ACA, 26 U.S.C. § 5000A (West, Westlaw through P.L. 112-207). Obamacare is a lengthy statute, and we have highlighted only those provisions that are directly relevant to Congress’s power to regulate interstate commerce.

6. See *Nat’l Fed’n*, 132 S.Ct. at 2644–50 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (discussing how Congress enacted the ACA under the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3); see also *id.* at 2650–55 (explaining why the IM could not sensibly be treated as a “tax”).

7. See *infra* Part I.

8. See, e.g., *Gonzales v. Raich*, 545 U.S. 1, 13–27 (2005) (examining the pertinent cases). The Court created the “substantial effects” test in 1937, added the “aggregation” principle five years later, and announced the “rational basis” standard in 1964. See *infra* notes 39–45 and accompanying text.

9. See Robert J. Pushaw, Jr., *The Medical Marijuana Case: A Commerce Clause Counter-Revolution?*, 9 LEWIS & CLARK L. REV. 879, 889–909 (2005) [hereinafter Pushaw, *Medical Marijuana Case*] (summarizing and analyzing this precedent).

substantially affect the interstate economy.¹⁰ However, Chief Justice Roberts and his four conservative Republican colleagues held that the IM had exceeded the bounds of the Commerce Clause, which restricted Congress to regulating interstate commercial “activity”—as contrasted with the IM’s novel attempt to compel Americans who were inactive in a market to buy something they did not want.¹¹ Moreover, the majority would not allow Congress to avoid this result by invoking the Necessary and Proper Clause, since the IM was not a “proper” means of effectuating the Commerce Clause because it undermined the Constitution’s very structure, especially the fundamental principle of limited and enumerated federal powers.¹²

The Chief Justice then unexpectedly joined the four liberal Democrats in holding that the IM could plausibly be construed as a “tax” on those who did not buy medical insurance and therefore could be sustained under Congress’s power to “Lay and Collect Taxes.”¹³ Justices Scalia, Kennedy, Thomas, and Alito assailed this interpretation because Congress had expressly disavowed that the IM was a “tax,” and instead had characterized this mandate as a “penalty” for violating its Commerce Clause regulation requiring the purchase of insurance.¹⁴

These four dissenters barely concealed their anger at Chief Justice Roberts for switching sides (apparently at the eleventh hour due to intense political pressure) to save Obamacare on dubious Taxing Power grounds.¹⁵

10. See *Nat’l Fed’n*, 132 S.Ct. at 2609–28 (Ginsburg, J., concurring in part, and dissenting in part).

11. See *id.* at 2585–93 (Roberts, C.J.); *accord id.* at 2644–50 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

12. See *id.* at 2592–93 (Roberts, C.J.); *id.* at 2646 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

13. See *id.* at 2593–2600 (Roberts, C.J.); *accord id.* at 2629 (Ginsburg, J., concurring in part, dissenting in part). The Court also invalidated an ACA provision that ordered states to either provide health care to their poor citizens or lose all their federal Medicaid funds, because Congress lacked power under the Spending Clause to coerce states to obey federally imposed conditions. See *id.* at 2601–08 (Roberts, C.J., joined by Breyer & Kagan, JJ.); *accord id.* at 2656–67 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting). I will not dwell on the taxing or spending issues, but instead will concentrate on the Commerce Clause.

14. See *id.* at 2650–55 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (citing the ACA’s text and legislative history).

15. A respected legal journalist reported, based on confidential sources inside the Court, that Roberts had intended to invalidate the ACA for two months after the March oral arguments but had had a change of heart in May—much to the dismay of his conservative brethren. See Jan Crawford, *Roberts Switched Views to Uphold Health Care Law*, CBSNEWS.COM (July 1, 2012), http://www.cbsnews.com/8301-3460_162-57464549/roberts-switched-views-to-uphold-health-care-law/. The four other Republican Justices did not explicitly mention this flip-flop, but instead subtly signaled that it had occurred by issuing a very unusual opinion.

Most Republican legal analysts had a similar reaction.¹⁶ A few such commentators, however, adopted the positive spin that Roberts had cleverly handed liberal Democrats a short-term victory, but promoted conservative Republican goals in the long run by significantly curtailing Congress's power under the Commerce and Necessary and Proper Clauses.¹⁷ Interestingly, the four liberal Justices and their scholarly defenders echoed that worry.¹⁸ They fretted that the Court had radically altered its Commerce

For example, they began with an unprecedented caption: "Justice Scalia, Justice Kennedy, Justice Thomas, and Justice Alito, dissenting." *Nat'l Fed'n*, 132 S.Ct. at 2642. Traditionally, however, only one Justice signs a dissent, which is then joined by the others. More tellingly, these four Justices styled their opinion as a "dissent," despite the fact that they actually *concurred* with the Chief Justice on every issue except the Taxing Clause—and therefore largely repeated his arguments on the Commerce and Spending Clauses. Indeed, the dissent is written as though it were a majority opinion. See John C. Eastman, *Hidden Gems in the Historical 2011-2012 Term, and Beyond*, 7 CHARLESTON L. REV. 1, 17-18 (2012) (citing numerous examples of phrasing that are indicative of a majority opinion); see also *id.* at 18-19 (quoting several statements by Justices Scalia, Kennedy, Thomas, and Alito that are harshly critical of the majority, which appear to have been tacked on to their original draft "as though to highlight the dissenters' pique at what had transpired"). Another clue about Roberts's shift is that the other four Republican Justices repeatedly referred to Justice Ginsburg's concurrence as a "dissent"—and that her opinion does read like a dissent. *Id.* at 19. Overall, the evidence indicates that Roberts initially embraced his fellow conservatives' entire opinion, and that they refused to materially change it after he defected. See David Bernstein, *More Hints That Roberts Switched his Vote*, VOLOKH CONSPIRACY (June 28, 2012), <http://www.volokh.com/2012/06/28/>.

16. See, e.g., Eastman, *supra* note 15, at 16-22 (suggesting that Chief Justice Roberts succumbed to partisan attacks by President Obama and his acolytes by switching his vote and sustaining the ACA on the basis of an "uncharacteristically weak" and "contrived" opinion on Congress's power to tax).

Of particular interest is the response of Randy Barnett. Beginning shortly after the introduction of Obamacare, he published numerous short pieces challenging the constitutionality of Congress's attempt to regulate inactivity through a mandate, which were later summarized in Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate is Unconstitutional*, 5 N.Y.U. J. L. & LIBERTY 581 (2011) [hereinafter Barnett, *Commandeering*]. Professor Barnett also served as the attorney who spearheaded the litigation aimed at invalidating the ACA. After *National Federation* came down, he lamented that Chief Justice Roberts had apparently changed his vote because of political pressure and institutional considerations (preserving the Court's perceived commitment to "judicial restraint" by deferring to the democratic process) and had upheld the IM through a strained reading of the ACA and the Taxing Clause. See Randy E. Barnett, *The Wages of Crying "Restraint,"* AMERICAN SPECTATOR 6-7 (Sept. 28, 2012), <http://spectator.org/people/randy-e-barnett/article.xml>. [hereinafter Barnett, *Wages*]. Nonetheless, he praised the Court for reaffirming the basic constitutional precept of limited and enumerated federal powers by rebuffing Congress's assertion of authority to enact the IM under the Commerce, Necessary and Proper, and Spending Clauses. See *id.* at 6-7.

17. See Gillian E. Metzger, *To Tax, To Spend, To Regulate*, 126 Harv. L. Rev. 83, 87 n.20 (2012) (noting that conservatives such as Randy Barnett, Jonathan Adler, and Ilya Shapiro had taken this position). George F. Will, *Conservatives' Consolation Prize*, WASH. POST (June 28, 2012), <http://www.washingtonpost.com/opinions/george-will-supreme-court-gives-conservatives-a-consolation-prize/2012/06/28> (maintaining that Roberts's rejection of the Commerce Clause rationale for the IM will be a long-haul victory for conservatives); Charles Krauthammer, *Why Roberts Did It*, WASH. POST (June 28, 2012), <http://www.washingtonpost.com/2012-06-28/opinions/35462722/obamacare-health-insurance-national-health-care> (arguing that Roberts' opinion promoted his overall conservative ideology while maintaining the Court's neutrality).

18. See *Nat'l Fed'n*, 132 S. Ct. at 2609, 2615-19 (Ginsburg, J., concurring in part, and

Clause jurisprudence by refusing to defer to Congress's policy judgments about an important national economic and social issue, which would invite similar challenges.¹⁹

It is impossible to say with any certitude whether such concerns are warranted. Liberals are understandably alarmed by the holding that the ACA did not fall within Congress's power to regulate interstate commerce—the first major federal statute to meet that fate since 1936.²⁰ It may be that *National Federation* portends a shift to increasingly aggressive judicial imposition of serious Commerce Clause restraints. On balance, however, history and pragmatism suggest that this case will have a marginal jurisprudential impact.

This conclusion rests primarily on the fact that, since the New Deal era, the Court has sustained all major Commerce Clause legislation, which forms the foundation of the modern administrative and social welfare state.²¹ Realistically, the Court would risk legal, political, social, and economic chaos by rolling back its precedent allowing such important federal laws.²² Thus, at most the conservative Justices can try to stem the tide of new Commerce Clause statutes.²³ Yet recent experience suggests that even that modest goal will prove difficult to achieve, as the Rehnquist Court's lone attempt to enforce an outer boundary on Congress's power—that it could regulate only subjects that were “commercial” in nature—fizzled out within a decade.²⁴

Likewise, *National Federation*'s new “activity” limit will probably have little lasting relevance, for three reasons. First, the ACA represented

dissenting in part); *see also* Metzger, *supra* note 17, at 87 n.21 (citing liberal law professors like Pamela Karlan and Andrew Koppelman, who expressed the fear that their side may have won the case but lost the larger fight to prevent the court from hobbling Congress's ability to enact progressive legislation); Laurence Tribe, *Chief Justice John Roberts's Ruling Restores Faith in the Court's Neutrality*, <http://www.dailybeast.com/articles/2012/06/28chief-justice-john-roberts-ruling-restores-faith-3-6> (applauding Roberts for sustaining the IM as a valid tax and thereby helping to bring back public trust in the Court's impartiality, but cautioning that the Court's “wrong” interpretation of the Commerce and Necessary and Proper Clauses might have a long-term deleterious effect, depending on which Justices are on the bench).

19. *See Nat'l Fed'n*, 132 S.Ct. at 2609, 2615–19 (Ginsburg, J., concurring in part, and dissenting in part).

20. *See supra* note 7 and accompanying text.

21. *See infra* Part I.B.

22. *See* Robert J. Pushaw, Jr. & Grant S. Nelson, *A Critique of the Narrow Interpretation of the Commerce Clause*, 96 NW. U. L. REV. 695, 697–99, 714–19 (2002).

23. *See* Barnett, *Wages*, *supra* note 16, at 3–7 (contending that the Court's “New Federalism” involves accepting the New Deal and Warren Court decisions, but requiring Congress to justify its exercise of novel powers by explaining how they can be reconciled with the constitutional tenet of limited and enumerated powers).

24. *See infra* notes 47–63 and accompanying text.

Congress’s only attempt in over two centuries to use the Commerce Clause to regulate “inactivity,”²⁵ and there do not appear to be any similar federal statutes in existence or on the horizon. Second, even if Congress were to enact such a law, it would be invalidated only if five conservative Republican Justices happened to be on the Court. If one such Justice were replaced by a Democrat (a certainty if such a vacancy occurs in the next three years), the new appointee would almost surely join the four other liberals to reverse *National Federation*. No Democratic Justice in eight decades has voted to constrain the Commerce Power, and four liberal Justices have bitterly dissented from the Court’s recent attempts to do so through the “commercial” and “activity” touchstones.²⁶ Third, the latter restriction on the Commerce Clause did not put a dent in Congress’s overall power, because Chief Justice Roberts peeled off to uphold the ACA through his creative interpretation of the Taxing Power. The Court will likely remain unwilling to strike down non-trivial federal statutes.

The aforementioned points will be developed in four Parts. Part I provides an overview of Commerce Clause precedent. Part II summarizes *National Federation*. Part III identifies the key problems with this decision and argues that its real-world effect will likely be minimal. Part IV proposes a different approach to the Commerce Clause that is rooted in its text, history, and underlying political theory. Those legal materials reveal that Congress can regulate only the *voluntary* sale of goods or services and all accompanying activities geared toward the market, and accordingly cannot mandate the purchase of insurance or anything else.

I. THE COURT’S INTERPRETATION OF THE COMMERCE CLAUSE

The IM marks the first time Congress exercised its power “[t]o regulate Commerce . . . among the several States”²⁷ to reach inactivity—not having health insurance—by forcing individuals to purchase this product.²⁸ A bare majority held that Congress lacked such power,²⁹ whereas the dissenters reached the opposite conclusion on the rationale that the failure of millions of Americans to purchase medical insurance “substantially affected” interstate commerce.³⁰ These divergent opinions reflect differing

25. The majority stressed this novelty. *See id.* at 2586–87 (Roberts, C.J.); *accord id.* at 2644–46 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

26. *See infra* notes 49, 77–87 and accompanying text.

27. U.S. CONST. art. I, § 8, cl. 3.

28. *See* Patient Protection and Affordable Care Act § 1501, 26 U.S.C.A. § 5000A (West, Westlaw through P.L. 112-207).

29. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2585–93 (2012) (Roberts, C.J.); *accord id.* at 2644–50 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting). The Court adopted the argument that had been developed by Barnett, *Commandeering*, *supra* note 16, at 587–607, 614–37.

30. *Nat’l Fed’n*, 132 S. Ct. at 2609–25 (Ginsburg, J., concurring in part, and dissenting in part).

understandings of the Court's precedent. It is therefore helpful to begin by summarizing these cases, which can usefully be grouped into three periods: the nineteenth and early twentieth centuries; the New Deal era and subsequent six decades of total deference; and the Rehnquist Court's aborted attempt to craft limitations.

A. *Early Precedent*

During America's first century, Congress exercised its power to regulate interstate commerce cautiously, and hence litigation was rare. In fact, there was only one landmark case: *Gibbons v. Ogden*.³¹ Ogden claimed that his monopoly on his New York-to-New Jersey ferry route, conferred by the New York Legislature, had been infringed when Gibbons began to operate his ferry under a license granted pursuant to a 1793 federal statute regulating "vessels to be employed in the coasting trade."³² In an opinion by Chief Justice Marshall, the Court rejected Ogden's argument that Congress had exceeded its power because "commerce" exclusively concerned "traffic" (buying, selling, or exchanging commodities) and thus did not include navigation: "Commerce, undoubtedly, is traffic, but it is something more It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse."³³ Marshall also defined "among the several States" as including only commerce which concerns more than one state, as contrasted with wholly internal state commerce.³⁴

The Court did not revisit *Gibbons* until the late nineteenth century, when Congress enacted legislation to deal with pressing economic issues such as railroads and monopolies.³⁵ The Court sought to restrict Congress, mainly by defining "commerce" to include only trade and transportation—not productive activities such as manufacturing and labor.³⁶

31. 22 U.S. (9 Wheat.) 1 (1824).

32. *Id.* at 2.

33. *See id.* at 189–90; *see also id.* at 193 (The Commerce Clause has "been universally admitted [to] . . . comprehend every species of commercial intercourse," including navigation.). Although Marshall properly confined his opinion to the disputed issue of shipping, Justice Johnson declared that the broad intended scope of "commerce" included activities such as paid labor and other services, "mediums of exchange" like commercial paper, communications, and related operations. *See id.* at 229–30 (Johnson, J., concurring).

34. *Id.* at 195, 203.

35. *See* Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues*, 85 IOWA L. REV. 1, 67–79 (1999) (citing legislation and cases).

36. *See, e.g.,* *Hammer v. Dagenhart*, 247 U.S. 251, 272–76 (1918) (holding that Congress could

B. *The New Deal Revolution and its Aftermath*

A majority of Justices persisted with this narrow construction in striking down New Deal laws, championed by President Franklin Roosevelt, dealing with problems such as agricultural overproduction, labor strife, and industrial woes.³⁷ In 1936, however, voters decisively reelected Roosevelt and a clear majority of his Democratic allies in Congress.³⁸

The Court read the tea leaves and reversed course. In 1937, it upheld the National Labor Relations Act on the ground that Congress, pursuant to the Commerce and Necessary and Proper Clauses, could regulate any activity—even noncommercial or intrastate—that “substantially affected” interstate commerce.³⁹ More importantly, in *Wickard v. Filburn*,⁴⁰ the Court allowed the Agricultural Adjustment Act to be applied to a small farmer who had grown wheat in excess of his federally-imposed quota and had used it for home consumption,⁴¹ even though the farmer (1) had not been engaged in “commerce” (raising wheat for sale), and (2) had acted within one state (indeed, only on his farm).⁴² Furthermore, the Court did not care about the farmer’s “trivial” impact on interstate commerce, because Congress could determine the “substantial effect” by aggregating all of the regulated activity (here, home-grown wheat) nationwide.⁴³

As the Justices knew, virtually all statutes would meet this toothless “substantial effects”/“aggregate” test, and they did.⁴⁴ Remarkably, the Court weakened that test even further in sustaining the Civil Rights Act of 1964 by asserting that Congress did not have to demonstrate the “substantial effect” on interstate commerce; rather, it was sufficient that some “rational basis”

not ban child labor); *United States v. E.C. Knight Co.*, 156 U.S. 1, 2–9 (1895) (ruling that Congress lacked power under the Commerce Clause to extend antitrust laws to a national corporation’s purchase of sugar refineries that gave it control of 98% of the sugar market, because manufacturing was not “commerce”).

37. See *Carter v. Carter Coal*, 298 U.S. 238, 297–310 (1936) (citing cases endorsing this cramped understanding of commerce to justify invalidating a federal statute regulating production and labor in the coal industry); *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (striking down the National Industrial Recovery Act, which sought to control many industries and trades—even small and local outfits—by establishing “fair competition” codes and regulating employees’ wages and hours).

38. See BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 50–57, 61–66, 101–22, 129–30 (1991) (describing the profound effect of this election on the Court).

39. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 34–40 (1937). The Court concluded that Congress could reach even non-commercial or local activities if doing so was “necessary and proper” to carry into effect its regulations of interstate commerce. See *id.* at 36–37; see also *United States v. Darby*, 312 U.S. 100, 113–19 (1941) (approving the Fair Labor Standards Act on a similar rationale).

40. 317 U.S. 111 (1942).

41. *Id.* at 113–28.

42. *Id.* at 120–25.

43. *Id.* at 127–28.

44. Indeed, the Court upheld every federal law enacted under the Commerce Clause from 1937 until 1994. See Nelson & Pushaw, *supra* note 35, at 79–88 (citing cases).

could be conceived for it.⁴⁵ Not surprisingly, for three decades the Court rubber-stamped every challenged federal statute, such as novel criminal and environmental laws.⁴⁶

C. The Rehnquist Court's Rediscovery of Commerce Clause Limits

This judicial abdication ended with *United States v. Lopez*,⁴⁷ when Chief Justice Rehnquist and four other conservatives invalidated the Gun-Free School Zones Act (GFSZA), which criminalized possession of a firearm near a school.⁴⁸ Creatively reinterpreting its precedent,⁴⁹ the Court announced that when Congress regulated an area of “traditional state concern” (like crime or education), the “rational basis”/“substantial effects” test could be applied to strike down statutes like the GFSZA that did not regulate activity that was “commercial,” either of itself or as “an essential part of a larger regulation of economic activity.”⁵⁰

Lopez generated confusion. Most troubling was Chief Justice Rehnquist's failure to explain which federal statutes interfering with “traditional state concerns” would warrant heightened scrutiny or why the Court had permitted Congress to enact thousands of criminal and educational laws.⁵¹ Compounding this problem, the Chief Justice expressly refused to define “commerce” (e.g., as limited to trading and transporting goods, as Justice Thomas suggested⁵²), and instead left the meaning of this

45. See *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 255–58 (1964); *Katzenbach v. McClung*, 379 U.S. 294, 298–305 (1964).

46. See, e.g., *Hodel v. Indiana*, 452 U.S. 314, 321–29 (1981) (sustaining a statutory provision regulating a mining technique that threatened a minuscule amount of farmland); *Perez v. United States*, 402 U.S. 146, 147–58 (1971) (affirming the conviction of a small-time loan shark who operated exclusively within New York on the ground that Congress could rationally have determined that all loan sharking, added up nationwide, substantially affected interstate commerce).

47. 514 U.S. 549 (1995).

48. *Id.* at 556–68.

49. *Lopez* was in tension with longstanding doctrine, as Congress could reasonably have found that the possession and use of guns near schools, considered cumulatively across America, substantially affected interstate commerce (e.g., by adversely affecting education, which decreased students' economic opportunities). See *id.* at 602–03 (Stevens, J., dissenting); *id.* at 603–15 (Souter, J., dissenting); *id.* at 615–44 (Breyer, J., dissenting). (Note that Justice Ginsburg joined each of these dissents.) In fact, the Court had specifically upheld Congress's power to prohibit the possession of firearms (e.g., by felons). *Scarborough v. United States*, 431 U.S. 563, 569–77 (1977). The majority unpersuasively purported to distinguish, rather than reverse, such case law.

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

51. See Robert J. Pushaw, Jr., *Does Congress Have the Constitutional Power to Prohibit Partial-Birth Abortion?*, 42 HARV. J. ON LEGIS. 319, 331–32 (2005).

52. *Lopez*, 514 U.S. at 584–602 (Thomas, J., concurring).

word to be worked out on a case-by-case basis.⁵³ Finally, *Lopez* did not set forth any neutral criteria (e.g., dollar thresholds) for distinguishing “substantial” effects on interstate commerce from “insubstantial” ones.⁵⁴ The majority’s vague standards invited more litigation.

A few years later, in *United States v. Morrison*,⁵⁵ the same majority invalidated a provision of the Violence Against Women Act (VAWA), which created a federal tort cause of action for victims of gender-motivated assaults.⁵⁶ The Court concluded that Congress had invaded an area of “traditional state concern” (criminal and tort law) and had no rational basis for determining that gender-based violence was “commerce” (either inherently or as part of a larger economic regulatory scheme) or “substantially affected” interstate commerce.⁵⁷

Lopez and *Morrison* were modest rulings that struck down two novel, largely symbolic statutes that duplicated existing state legislation.⁵⁸ But when the opportunity arose to topple a longstanding and critical federal statute, one dealing with drugs, Justices Scalia and Kennedy blinked. In *Gonzales v. Raich*,⁵⁹ they joined with the four *Lopez/Morrison* dissenters in ruling that Congress could have rationally found that it must prohibit even non-commercial, intrastate conduct—the growth, possession, and use of marijuana for medical purposes as authorized by state law—because doing so was essential to effectuating its larger regulation of interstate economic activity (the multibillion dollar marijuana trade).⁶⁰ Critics charged Justices Scalia and Kennedy with abandoning their legal commitment to federalism to achieve the Republican policy goal of fighting the War on Drugs without carving any exceptions.⁶¹

The *Raich* Court did not overrule *Lopez* or *Morrison*, but appeared to confine those cases to federal statutes that (1) have been recently enacted and thus never challenged (as contrasted with laws that had been previously sustained, such as those concerning drugs, civil rights, and the environment), and (2) attempted to reach activity that cannot plausibly be characterized as “commercial,” either by itself or as part of a larger economic regulatory scheme.⁶² Because such federal legislation is extremely rare, most scholars

53. Pushaw, *supra* note 51, at 331.

54. *See id.*

55. 529 U.S. 598 (2000).

56. *Id.* at 601–19.

57. *Id.* at 617–18.

58. *See* Pushaw, *Medical Marijuana Case*, *supra* note 9, at 882, 892–97.

59. 545 U.S. 1 (2005).

60. *See id.* at 5–33. *But see id.* at 42–57 (O’Connor, J., dissenting, joined by Rehnquist, C.J.) (arguing that Congress had infringed upon subjects of traditional state concern—criminal law and medical care—and that the defendants had not engaged in any “commercial” activity because they had used the marijuana for personal medical purposes, not for sale).

61. *See* Randy E. Barnett, *Limiting Raich*, 9 LEWIS & CLARK L. REV. 743 (2005).

62. *See Raich*, 545 U.S. at 15–32.

predicted that the Court would revert back to its preferred approach to the Commerce Clause: supine deference to Congress.⁶³ The conservative Justices, however, imposed new limits in the Obamacare case.

II. THE NATIONAL FEDERATION DECISION

A. The Majority Opinion

Chief Justice Roberts and his four fellow Republicans held that the IM had exceeded Congress's authority under the Commerce and Necessary and Proper Clauses.⁶⁴ They set forth a four-step analysis.

First, Congress had never before invoked the Commerce Clause "to compel individuals not engaged in commerce to purchase an unwanted product."⁶⁵ That novel assertion of power conflicted with the meaning of the phrase "to regulate Commerce," which assumes the existence of commercial activity to be regulated—as contrasted with directing the creation of such commerce.⁶⁶

Second, and relatedly, the Court had always interpreted the Commerce Clause as reaching only commercial "activity," not *inactivity*.⁶⁷ Approving

63. See Pushaw, *Medical Marijuana Case*, *supra* note 9, at 883–84, 907–08 (summarizing, but rejecting, this prevailing opinion).

64. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2585–93 (2012) (Roberts, C.J.); *accord id.* at 2644–50 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

65. See *id.* at 2586 (Roberts, C.J.); *accord id.* at 2644–46 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting). Although Congress had sometimes required certain conduct (e.g., jury duty, draft registration, filing taxes, and buying a firearm for militia service), none of those mandates were enacted pursuant to the Commerce Clause. *Id.* at 2586 n.3 (Roberts, C.J.). Moreover, all of those directives concerned basic duties that citizens owe their government. See Barnett, *Commandeering*, *supra* note 16, at 630–32. But see Dan T. Coenen, *Originalism and the "Individual Mandate": Rounding Out the Government's Case for Constitutionality*, 107 NW. U. L. REV. COLLOQUY 55, 64–65 (2012) (asserting that Congress had the same power to impose mandates as a means to implement its power under the Commerce Clause as it did under all other Article I provisions, including those dealing with military affairs).

66. The phrase "to regulate" means "to adjust by rule," which contemplates preexisting conduct that must be adjusted. See *Nat'l Fed'n*, 132 S. Ct. at 2586 (Roberts, C.J.); *id.* at 2644 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting). The majority noted that, if the power to "regulate" included the ability to "create," many constitutional provisions would be redundant. See *id.* at 2587 (Roberts, C.J.); *id.* at 2644 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting). For instance, the Constitution grants Congress power to create an army and navy, then confers a separate power to regulate such armed forces. *Id.* at 2586 (Roberts, C.J.) (citing the pertinent constitutional clauses and providing other examples, such as Congress's distinct powers to coin money and to regulate its value).

67. See *id.* at 2587–91 (Roberts, C.J.) (citing *Raich*, 545 U.S. 1; *United States v. Lopez*, 514 U.S. 549 (1995); *Perez v. United States*, 402 U.S. 146 (1971); *Wickard v. Filburn*, 317 U.S. 111 (1942); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937)); *id.* at 2643, 2646, 2648–50

the ACA’s innovative attempt to address the failure to act through the IM would enable Congress to order Americans to buy any other products (for instance, vegetables to improve health or new automobiles to boost that industry) and assert that its own requirement “substantially affects” interstate commerce.⁶⁸ *Filburn* did not go that far, as it concerned regulating farmers who performed the commercial activity of growing wheat and whose conduct (including raising excess wheat) substantially affected interstate commerce—not forcing farmers to grow wheat or consumers to buy it.⁶⁹ Therefore, even though inactivity (considered in the aggregate) may greatly affect the interstate economy, permitting Congress to control it would destroy our Constitution of limited and enumerated powers and “fundamentally chang[e] the relation between the citizen and the Federal Government.”⁷⁰

Third, the inactivity of the uninsured could not plausibly be recharacterized as the “activity” of self-insuring (or relying on others) to pay for medical care when the need later arose.⁷¹ Congress could regulate only people who were currently involved in commercial health care activity, rather than a class of individuals (like the uninsured) who remained passive but might participate in such activity at an uncertain future date:⁷²

The Commerce Clause is not a general license to regulate an individual from cradle to grave, simply because he will predictably engage in particular transactions. Any police power to regulate individuals as such, as opposed to their activities, remains vested in the States.⁷³

(Scalia, Kennedy, Thomas, and Alito, JJ., dissenting). This argument was originally developed by Barnett, *Commandeering*, *supra* note 16, at 587–607.

68. See *Nat’l Fed’n*, 132 S. Ct. at 2587–88 (Roberts, C.J.) (warning that allowing Congress to address inaction—the countless decisions individuals could potentially make, all of which might affect interstate commerce—by mandating particular conduct would open the door to virtually untrammelled federal authority); see also *id.* at 2649–50 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (to similar effect). “If all activity affecting commerce is commerce, commerce is everything.” *Id.* at 2649.

69. See *id.* at 2587–88 (Roberts, C.J.) (citing *Wickard*, 317 U.S. at 127–29); see also *id.* at 2643, 2648 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (likewise distinguishing *Wickard*).

70. See *id.* at 2588 (Roberts, C.J.); see also *id.* at 2645–49 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting). The Chief Justice declared: “The Framers gave Congress the power to *regulate* commerce, not to *compel* it, and for over 200 years both our decisions and Congress’s actions have reflected this understanding.” *Id.* at 2588.

71. See *id.* at 2589–90 (Roberts, C.J.); *id.* at 2647–49 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

72. See *id.* at 2590–91 (Roberts, C.J.) (citing precedent establishing that Congress could address only classes of existing commercial *activities*, such as loan sharking and marijuana trafficking, not classes of *individuals* whose defining feature was their *inactivity*); see also *id.* at 2647–48 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (stressing that the IM targets those people who are not participants in the health care market).

73. See *id.* at 2591 (Roberts, C.J.). Similarly unavailing was the Government’s claim that the

Fourth, the Necessary and Proper Clause enabled Congress to enact laws “derivative of” and “incidental to” an enumerated power (such as the Commerce Clause)—not to assert new and independent substantive powers (here, targeting individuals not involved in commercial activity).⁷⁴ Put differently, the IM was not a “proper” means of effectuating the Commerce Clause because it undermined the Constitution’s very structure, especially limited and enumerated powers.⁷⁵ Finally, Congress had other ways to achieve its goals, whereas in *Raich* the ban on possessing and consuming marijuana was the only practical means to implement the overall scheme regulating interstate commerce in that drug.⁷⁶

Overall, the Court rejected the notion that the Commerce Clause authorized the regulation of inactivity by mandating the purchase of a product. Moreover, Congress could not circumvent this limitation by invoking the Necessary and Proper Clause.

B. The Dissent

Justice Ginsburg, joined by Justices Breyer, Sotomayor, and Kagan, accused the majority of abandoning post-1937 case law, which counseled the Court to defer to Congress’s judgments about national economic and social welfare.⁷⁷ In Justice Ginsburg’s view, this precedent dictated a holding that Congress could have had a rational basis for determining that the ACA (including the IM) regulates economic matters that, taken in the aggregate, substantially affect interstate commerce.⁷⁸ This conclusion depended upon

Court should ignore these basic principles because health insurance was unique and integrally related to medical care consumption and financing. *See id.* Insurance and health care services are different products involving separate transactions made at distinct times with different companies. *See id.*; *see also* Barnett, *Commandeering*, *supra* note 16, at 619–20 (rejecting the Government’s “market uniqueness” claim on the ground that it would not limit Congress, which would have discretion to mandate the purchase of nearly any product or service that it deemed helpful to the economy).

74. *See Nat’l Fed’n*, 132 S. Ct. at 2591–93 (Roberts, C.J.); *id.* at 2646 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

75. *See id.* at 2592–93 (Roberts, C.J.); *id.* at 2646 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting). The Court cribbed the specific argument set forth by Barnett, *Commandeering*, *supra* note 16, at 595–601, 604–07, 618–37. The general thesis about the limitations inherent in the word “proper” was originally developed in Gary Lawson & Patricia B. Granger, *The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267 (1993) (contending that the Necessary and Proper Clause prohibited federal laws that were not “proper” because they expanded federal power, invaded state prerogatives, or infringed individual liberty).

76. *See Nat’l Fed’n*, 132 S. Ct. at 2591–93 (Roberts, C.J.); *id.* at 2646–47 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

77. *See id.* at 2609, 2615–17, 2619 (Ginsburg, J., concurring in part, and dissenting in part).

78. *See id.* at 2609–28.

portraying the IM as concerning not insurance, but rather broader decisions about how to pay for health care services and goods—a market in which everyone will participate at some point.⁷⁹ Justice Ginsburg noted that average Americans cannot afford to purchase non-routine medical care from their assets, and that therefore most people obtain insurance.⁸⁰ She emphasized, however, that millions of uninsured people simply consume health care services (often by going to emergency rooms where they cannot legally be turned away) and never pay, which shifts billions in costs to the insured (who get stuck with higher premiums) or taxpayers.⁸¹ Justice Ginsburg found that the uninsured thereby exerted a substantial, multibillion dollar effect on interstate commerce which justified congressional intervention.⁸²

Moreover, she contended that the Commerce Clause’s text and precedent nowhere distinguished “activity” from “inactivity.”⁸³ On the contrary, the Court in *Wickard* recognized that Congress could regulate interstate commerce in wheat by “forcing some farmers into the market to buy what they could provide for themselves.”⁸⁴ Similarly, cases like *Wickard* and *Raich* permitted federal regulation of current conduct (even non-commercial) because of its predicted future impact on interstate commerce.⁸⁵

Alternatively, Justice Ginsburg argued that, even if the IM itself were deemed to reach non-commercial and local matters, under the Necessary and Proper Clause Congress could reasonably have concluded that the mandate was “an essential part of a larger regulation of economic activity, in which

79. See *id.* at 2610–11, 2620; see also *id.* at 2617, 2634 (claiming that foregoing insurance is an “economic” decision).

80. See *id.* at 2610.

81. See *id.* at 2610–11, 2619–20, 2623 (making this point, and noting that this “free ride” was not true of any other market, so that the IM was not a precedent to impose mandates in other industries such as autos or food); see also *id.* at 2611–12 (stressing that the uninsured also skip preventative care, which later massively increases costs); see also Patient Protection and Affordable Care Act § 10106, 42 U.S.C.A. § 18091(a)(2)(F), (G) (West, Westlaw through P.L. 112-207) (congressional findings that the provision of uncompensated medical care to the uninsured costs \$43 billion annually and that these costs were shifted to the insured through higher premiums or to taxpayers).

82. See *Nat’l Fed’n*, 132 S. Ct. at 2612–15 (Ginsburg, J., concurring in part, and dissenting in part); see also *id.* at 2612 (asserting that states acting individually cannot solve this problem, because providing the uninsured with health care coverage puts them at a competitive disadvantage).

83. See *id.* at 2621–23.

84. See *id.* at 2621 (citing *Wickard v. Filburn*, 317 U.S. 111, 129 (1942)).

85. See *id.* at 2617–20. Justice Ginsburg demonstrated that the line between “activity” and “inactivity” was not always as obvious as the majority supposed, especially in the context of regulating interstate commerce. She properly focused on the failure to buy health insurance, but other examples could be adduced, such as passively holding stocks or commodities instead of marketing them based on the calculation that they will appreciate in value. Thus, in future cases, the “activity vs. inactivity” distinction may prove difficult to maintain. See Metzger, *supra* note 17, at 93–95, 98–99.

the regulatory scheme could be undercut unless the intrastate activity were regulated.”⁸⁶ Congress rationally determined that the IM was crucial to carry into effect its overall regulatory program of reforming health insurance, because otherwise its goal of universal and affordable coverage would be thwarted, and the statutory guarantee of obtaining insurance would reward those who chose to wait until they had a major illness to buy a policy.⁸⁷

In sum, Justice Ginsburg maintained that the IM was a valid exercise of Congress’s power under the Commerce Clause, considered either by itself or in conjunction with the Necessary and Proper Clause.

III. A CRITIQUE OF *NATIONAL FEDERATION*

The Court’s treatment of the Commerce Clause in this case can most usefully be examined from two perspectives. First, we will discuss the intractable jurisprudential problems that *National Federation* illuminates. Second, we hope to demonstrate that these difficulties will likely ensure that this decision has a very small long-range impact.

A. Problems with the Court’s Commerce Clause Analysis

National Federation illustrates the glaring flaws in the Court’s Commerce Clause approach⁸⁸ and confirms the thoughts that one of us expressed shortly after the *Raich* decision, which commentators of all political stripes had erroneously interpreted as signifying the demise of the Court’s effort to craft and enforce genuine restrictions on Congress:

[I]t is impossible to determine whether the majority or the dissent [in *Raich*] correctly applied the *Lopez* or *Morrison* standards, because they are so malleable as to justify either result. Moreover, as the Justices implement these standards prudentially on a case-by-case basis, it is unwise to extrapolate far-reaching implications from any single decision. Just as many scholars prematurely heralded *Lopez* as the beginning of a Commerce Clause revolution, others

86. See *id.* at 2625–26 (citing *United States v. Lopez*, 514 U.S. 549, 561 (1995)); see also *id.* at 2626–27 (rejecting Chief Justice Roberts’s claim that the IM is not “proper” and dismissing as untenable his distinction between “incidental” and “substantive” powers).

87. See *id.* at 2613–15, 2617, 2625–26. Thus, the IM did not compel the purchase of an unwanted product, because everyone will need (and want) health care, and Congress merely determined that they must pay for it in advance through insurance. *Id.* at 2617–20.

88. See Robert J. Pushaw, Jr., *Obamacare and the Original Meaning of the Commerce Clause: Identifying Historical Limits on Congress’s Powers*, 2012 U. ILL. L. REV. 1703, 1707–08, 1743–53 (detailing this argument).

now may be too quick to characterize *Raich* as the end. Finally, the Court's discretionary application of protean standards guarantees both accusations of political manipulation and continuous uncertainty for Congress, lower court judges, and lawyers.⁸⁹

The ACA starkly exposed such difficulties because it presented a novel issue: Could Congress invoke the Commerce Clause to require citizens to purchase goods or services?⁹⁰ Even if the case law were cogent, it could not answer that precise question, because the Court had never before considered an individual mandate. Therefore, it was entirely predictable that the Justices would apply that precedent differently in *National Federation*.

The majority stressed that both Congress and the Court had always construed the Commerce Clause as allowing only the regulation of existing commercial "activity," not "inactivity."⁹¹ This conclusion finds support in the language repeated in every major Commerce Clause opinion that Congress can regulate "activity" that substantially affects interstate commerce.⁹² In those cases, however, the Court did not use the word "activity" to draw a contrast with "inactivity," for the simple reason that none of the challenged statutes addressed the failure to act.⁹³ Instead, the Court (especially in *Lopez* and its progeny) was contrasting "*commercial*" activity with "*noncommercial*" activity.⁹⁴ Thus, it was not clear whether Congress could reach "inactivity."

Likewise, the applicability of *Wickard* and *Raich* was open to debate. Justice Ginsburg echoed the judges and scholars who had argued that these decisions were directly on point and required sustaining the ACA under the Commerce Clause.⁹⁵ The majority, however, distinguished those cases.⁹⁶ For example, *Wickard* involved a man who was engaged in the business of farming, even though the specific AAA provision invoked against him

89. See Pushaw, *Medical Marijuana Case*, *supra* note 9, at 884.

90. See *Nat'l Fed'n*, 132 S. Ct. at 2642 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

91. See *supra* notes 65–73 and accompanying text.

92. See, e.g., *Gonzales v. Raich*, 545 U.S. 1, 17–18, 20–26, 28–30, 32 (2005); *United States v. Morrison*, 529 U.S. 598, 607–27 (2000); *United States v. Lopez*, 514 U.S. 549, 552–67 (1995); *Wickard v. Filburn*, 317 U.S. 111, 118–29 (1942); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937).

93. See *Florida v. U.S. Dep't of Health & Human Servs.*, 780 F. Supp. 2d 1256, 1285–86 (N.D. Fla. 2011).

94. See *supra* notes 50, 57, 60, 62 and accompanying text; see also Leslie Meltzer Henry & Maxwell L. Stearns, *Commerce Games and the Individual Mandate*, 100 GEO. L.J. 1117, 1127–29 (2012) (arguing that the Court in *Lopez* and later cases intended to limit Congress to regulating only "commercial" or "economic" matters and did not express any opinion as to whether the regulatory subject took an active or passive form).

95. See *Nat'l Fed'n*, 132 S. Ct. at 2616–21; see also *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 542–47 (6th Cir. 2011); *Mead v. Holder*, 766 F. Supp. 2d 16, 29–40 (D.D.C. 2011); *Liberty Univ., Inc. v. Geithner*, 753 F. Supp. 2d 611, 630–34 (W.D. Va. 2010); Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 46–47 (2010); Coenen, *supra* note 65, at 57, 71–72.

96. *Nat'l Fed'n*, 132 S. Ct. at 2590–93 (Roberts, C.J.).

covered his non-commercial activity of growing wheat for personal consumption.⁹⁷ *Raich* pushed the ball further, because it allowed the extension of federal drug laws to women who did not buy or sell marijuana, but rather merely grew, possessed, and smoked it for personal medicinal purposes.⁹⁸ Obamacare required another, and bolder, leap: permitting the federal government to get at people who have done absolutely nothing.⁹⁹ Congress's own legal researchers recognized that the IM thereby broke new ground.¹⁰⁰

The ACA's novelty, however, is not dispositive. On the one hand, the majority maintained that Congress's failure to ever assert a particular power (such as ordering people to buy a product to facilitate interstate commerce) indicates that Congress lacks such power.¹⁰¹ On the other hand, that same charge could be leveled at every major piece of Commerce Clause legislation—labor and employment statutes, the Civil Rights Act, environmental laws, and the like. All new laws are, by definition, novel. Thus, the IM's innovative nature does not necessarily make it unconstitutional.¹⁰²

In short, reasonable people can differ as to how Commerce Clause case law should have been applied in *National Federation*. Nonetheless, Justice Ginsburg's opinion sets forth the more persuasive treatment of precedent.

The Court's analysis in *Lopez*, *Morrison*, and *Raich* centered on whether the federal regulatory scheme, considered as a whole, was "commercial" and

97. See *Wickard*, 317 U.S. at 113–28.

98. See *Gonzales*, 545 U.S. at 5–33.

99. Thus, cases such as *Wickard* and *Raich* did not involve congressional attempts to compel individuals to buy products or services. See *Nat'l Fed'n*, 132 S. Ct. at 2587–88, 2590–93; Barnett, *Commandeering*, *supra* note 16, at 605, 615–20.

100. They concluded:

While in *Wickard* and *Raich*, the individuals were participating in their own home activities (i.e., producing wheat for home consumption and cultivating marijuana for personal use), they were acting of their own volition, and this activity was determined to be economic in nature and affected interstate commerce. However, [the mandate] could be imposed on some individuals who engage in virtually no economic activity whatsoever. This is a novel issue: whether Congress can use its Commerce Clause authority to require a person to buy a good or service and whether this type of required participation can be considered economic activity.

CONGRESSIONAL RESEARCH SERV., REQUIRING INDIVIDUALS TO OBTAIN HEALTH INSURANCE: A CONSTITUTIONAL ANALYSIS 6 (July 24, 2009).

101. See *Nat'l Fed'n*, 132 S. Ct. at 2586 (Roberts, C.J.) (citing *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3159 (2010)).

102. See Coenen, *supra* note 65, at 63–64 (contending that the Framers intended the Necessary and Proper Clause to give Congress the flexibility to adopt creative means to best achieve future legislative objectives that could not possibly be predicted).

substantially affected the interstate economy.¹⁰³ If not, Congress could not legislate. If so, Congress could choose any means (even those that were non-commercial or intrastate, or both) that it reasonably determined were necessary to carry into effect its overall regulatory system. For instance, in *Morrison*, the Court found that VAWA's comprehensive scheme for preventing gender-motivated violence did not concern "commerce" or conduct that had interstate ramifications.¹⁰⁴ Conversely, *Raich* held that the general regulatory framework did address interstate commerce (the marijuana trade) and therefore allowed Congress to select the means—prohibiting even the non-commercial, intrastate possession and use of marijuana—that it deemed necessary to implement that larger scheme.¹⁰⁵ Likewise, the Court in *Wickard* deferred to Congress's decision to ban the non-commercial, local cultivation of wheat to effectuate its overall regulatory program of reducing the national wheat supply to increase prices.¹⁰⁶

Applying the foregoing analysis to the ACA, Congress's comprehensive regulatory scheme plainly dealt with "commerce" (medical insurance) that had a multibillion dollar interstate economic impact.¹⁰⁷ Consequently, the sole issue was whether Congress had reasonably concluded that the IM was a necessary and appropriate means to implement that overall regulatory framework. The Court has acceded to such discretionary legislative judgments for two centuries.¹⁰⁸ This history of judicial deference led even two conservative Republican Circuit Court judges, Jeffrey Sutton and Laurence Silberman, to uphold the ACA as a valid exercise of the

103. *United States v. Lopez*, 514 U.S. 549, 556–68 (1995); *United States v. Morrison*, 529 U.S. 598, 601–19 (2000); *Raich*, 545 U.S. at 5–33.

104. *Morrison*, 529 U.S. at 613–19.

105. *Raich*, 545 U.S. at 18–27.

106. *Wickard*, 317 U.S. at 124–29.

107. See Patient Protection and Affordable Care Act § 10106, 42 U.S.C. § 18091(a)(2) (West, Westlaw through P.L. 112-207) (congressional findings). No one in the litigation contested this fact.

108. The Rehnquist Court established that Congress could legislate only as to conduct that was "commercial," either of itself or as "an essential part of a larger regulation of economic activity." See *Lopez*, 514 U.S. at 561; see also *Raich*, 545 U.S. at 24; *Morrison*, 529 U.S. at 617–18. Nonetheless, if Congress was regulating interstate commerce, the Commerce and Necessary and Proper Clauses authorized Congress to choose any means that were reasonably related to achieving a legitimate legislative end—a very deferential standard of judicial review that originated in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 406–15 (1819).

Thus, in the Obamacare case, the four liberal Justices cited cases stretching from *McCulloch* to the present to accuse the majority of refusing to respect Congress's policy judgment that the IM was a reasonable means of effectuating its valid objective of providing universal and affordable health insurance. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2615–17, 2625–27 (2012) (Ginsburg, J., concurring in part, and dissenting in part); see also Coenen, *supra* note 65, at 57, 69–66 (contending that the IM can be justified under a straightforward application of *McCulloch*, which correctly captured the Founders' understanding that the Necessary and Proper Clause gave Congress broad power to enact "all Laws" that it deemed beneficial to implement its Commerce Clause legislation).

Commerce Power.¹⁰⁹ Their opinions disturbingly suggest that lower federal courts respect Supreme Court precedent more than the Justices themselves—or perhaps that the case law is so malleable that it can be molded to justify any result.

To recap, in *National Federation* a bare majority ruled that the Commerce Clause empowered Congress to regulate only existing commercial activity, even when inactivity (such as failing to buy health insurance) “substantially affected” interstate commerce.¹¹⁰ Although this decision reasonably applied the relevant case law, that precedent is so vague that the dissenters’ opposite conclusion was at least equally plausible.¹¹¹ It is also worth noting that the Court reaffirmed the *Lopez* holding that Congress could reach only “commercial” activity.¹¹²

B. The Probable Impact of National Federation

The four liberal Justices and their scholarly supporters expressed alarm that the Court had sharply broken from its precedent by overturning Congress’s policy judgments about a critical national economic and social issue, thereby paving the way for similar challenges to other federal statutes.¹¹³ Meanwhile, some conservative commentators have asserted that Chief Justice Roberts adroitly gave liberal Democrats a temporary win but furthered long-range conservative Republican aims by placing a big restriction on Congress: prohibiting it from imposing requirements on people who were not currently engaged in commercial “activity.”¹¹⁴

Such predictions that *National Federation* will spark major changes ignore the pitfalls of trying to discern broad future trends based upon a single case, especially one that split the Court so badly.¹¹⁵ Indeed, the durability of *National Federation*’s Commerce Clause holding, as well as the *Lopez/Morrison* stricture against regulating “noncommercial” activity, depends on whether the five Republican Justices continue serving (or are

109. See *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 554-66 (6th Cir. 2011) (Sutton, J., concurring); *Seven-Sky v. Holder*, 661 F.3d 1, 14-20 (D.C. Cir. 2011).

110. See *supra* Part II.A.

111. See *Nat’l Fed’n*, 132 S. Ct. at 2609-25 (Ginsburg, J., concurring in part and dissenting in part).

112. See *id.* at 2586-90 (Roberts, C.J.); *id.* at 2643-44, 2648-49 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

113. See *supra* notes 77-78 and accompanying text.

114. See *supra* note 17 and accompanying text.

115. See *supra* notes 10-12 and accompanying text.

replaced by like-minded jurists).¹¹⁶ The four liberals have never accepted *Lopez* and are likewise adamantly opposed to *National Federation*'s "activity" limit on the Commerce Power.¹¹⁷ Therefore, if a liberal Democratic appointee replaces a Republican one (a certainty if a vacancy arises in the next three years), all of these decisions will undoubtedly be reversed or severely circumscribed. If the razor-thin Republican majority remains intact, however, *National Federation* may well lead to further cutbacks, for two reasons.

First, the Court applied its new Commerce Clause "activity" limitation to legislation that was of monumental importance, unlike the inconsequential statutes struck down in *Lopez* and *Morrison*.¹¹⁸ Thus, *National Federation* is truly pathbreaking because it is the only case since 1936 in which the Court has found that a non-trivial law fell outside the scope of Congress's Commerce Power.¹¹⁹

Second, Chief Justice Roberts and his Republican colleagues asserted that, even if Congress had determined that a particular means (such as the IM) was "necessary" to carry into effect its overall legislative scheme, such a means was not "proper" if it undercut the Constitution's federalist structure.¹²⁰ We applaud this decision because we have long urged the Court, consistent with the Constitution's original meaning, to prevent Congress from relying upon the Necessary and Proper Clause as a bootstrap to aggrandize power it does not possess under the Commerce Clause.¹²¹ Nonetheless, the Court for well over a century has interpreted the Necessary and Proper Clause as conferring plenary authority on Congress to select the means best suited to accomplish its legislative objectives.¹²² Hence, *National Federation* was unprecedented insofar as a majority of Justices claimed that they could substitute their prudential judgments for Congress's about the propriety of a statute based on their contestable notions of federalism.¹²³ Because the "substantial effects" test rests heavily upon the

116. See *supra* notes 63, 89 and accompanying text.

117. Justice Ginsburg joined each of the three *Lopez* dissenting opinions. See *United States v. Lopez*, 514 U.S. 549, 602-03 (1995) (Stevens, J., dissenting); *id.* at 603-15 (Souter, J., dissenting); *id.* at 615-44 (Breyer, J., dissenting). These four Justices reaffirmed their position in *United States v. Morrison*, 529 U.S. 598 (2000). See *id.* at 628-55 (Souter, J., dissenting); *id.* at 655-64 (Breyer, J., dissenting). They then persuaded Justices Scalia and Kennedy to join them in upholding Congress's Commerce Clause power to make it a crime to grow, possess, and use marijuana in *Gonzales v. Raich*, 545 U.S. 1, 5-33 (2005). Justices Stevens and Souter have been replaced by Justices Sotomayor and Kagan, who joined Justice Ginsburg's opinion endorsing unfettered power to regulate interstate commerce in *National Federation*. See *supra* notes 77-87 and accompanying text. It is wishful thinking to imagine that they will change their minds.

118. See *supra* notes 48-58 and accompanying text.

119. See *supra* notes 20, 37 and accompanying text.

120. See *supra* notes 74-76 and accompanying text.

121. See Nelson & Pushaw, *supra* note 35, at 29, 56-57, 83, 98-100.

122. See *supra* note 108 and accompanying text.

123. See *supra* notes 74-76, 86-87, 102-12 and accompanying text; see also Coenen, *supra* note

Necessary and Proper Clause,¹²⁴ this newly muscular approach to judicial review suddenly makes many federal laws vulnerable to attack.

In short, *National Federation* may signal that the five conservative Republican Justices are prepared to dramatically scale back Congress's power to regulate interstate commerce. Nonetheless, we doubt that such revolutionary changes will occur, for both historical and practical reasons.

Our skepticism reflects the Court's near-perfect track record over seventy-five years of upholding Acts of Congress passed pursuant Article I, typically the Commerce and Necessary and Proper Clauses.¹²⁵ The only Justice who has questioned such precedent is Clarence Thomas, and even he has acknowledged that its reversal is a pipe dream because of *stare decisis* and attendant reliance interests.¹²⁶ Put bluntly, it is too late for the Court to overturn its cases rubber-stamping all New Deal and Great Society legislation—or even its decisions in the 1970s and 1980s approving comprehensive environmental and criminal laws.¹²⁷ Consequently, the conservative Justices' only feasible strategy is to try to thwart new Commerce Clause statutes.¹²⁸ But even that unambitious agenda may not succeed, as the Court's only post-1936 attempt to rein in Congress—confining it to the regulation of interstate “commercial” matters in *Lopez* and *Morrison*—collapsed within a decade.¹²⁹ Similarly, *National Federation*'s “activity” limit will probably have little lasting influence, for four reasons.

First, the ACA is the only Commerce Clause statute in over two centuries that purported to regulate “inactivity” by mandating the purchase of a product.¹³⁰ Congress may never employ this device again, which would make *National Federation* a one-shot curiosity.

Second, even if Congress were to enact such a law, it would be struck down only if five conservative Republican Justices happened to be on the Court, and they were willing to adhere to *National Federation*. Neither of these scenarios may come to pass. Indeed, *National Federation* (like *Raich*) illustrates the unwillingness of all five Justices to simultaneously “cross the

65, at 59-70 (arguing that the Necessary and Proper Clause has always been understood as (1) granting Congress plenary power to enact “all Laws” that it determines are most beneficial in effectuating its exercise of other constitutional powers, and (2) not imposing nebulous limits on Congress to promote the Justices' vision of “federalism” and “liberty”).

124. See *supra* notes 8-9, 12, 17, 39-46, 74-76, 86-87, 102-12 and accompanying text.

125. See *supra* notes 8-9, 21-22, 26, 39-46 and accompanying text.

126. See *United States v. Lopez*, 514 U.S. 549 (1995).

127. See *supra* notes 39-46 and accompanying text.

128. See *supra* notes 16, 22-23 and accompanying text.

129. See *supra* notes 48-63 and accompanying text.

130. See *Nat'l Fed'n*, 132 S. Ct. at 2586-87 (Roberts, C.J.); *accord id.* at 2644-46 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting); Metzger, *supra* note 17, at 98-99.

Rubicon” and invalidate a crucial federal statute.

Third, and relatedly, Chief Justice Roberts ultimately concluded that Congress could regulate “inactivity,” albeit under the Taxing Power rather than the Commerce Clause.¹³¹ Roberts’s odd embrace of virtually plenary taxing authority rendered largely nugatory the restrictions that he and the four conservatives had placed on the Commerce and Necessary and Proper Clauses.¹³²

Fourth, looking beyond the specific “inactivity” issue, I would be shocked if the Court started to frequently second-guess Congress’s determinations about whether a law is “necessary and proper” to carry into effect its legislative program. Rather, the Court will likely revert to its traditional practice of deferring to such congressional judgments because they tend to be subjective and policy-laden.¹³³

Overall, *National Federation* will probably not appreciably alter the Court’s cautious approach of retaining its basic Commerce Clause jurisprudence and making incremental changes at the margins.¹³⁴ Even the five conservative Republican Justices seem unwilling to deal with the negative (and possibly catastrophic) political and practical ramifications that would flow from radical doctrinal changes.

IV. LIMITING CONGRESS TO THE REGULATION OF VOLUNTARY, MARKET-ORIENTED ACTIVITY

The politicization of modern Commerce Clause jurisprudence is hardly a recent phenomenon. For example, pressure from New Deal Democrats induced the Court to make up the “substantially affects” and “aggregate” tests.¹³⁵ Likewise, ideological sympathy to Great Society legislation (especially the Civil Rights Act) explains why the Warren Court gave Congress free rein by adding the toothless “rational basis” standard of

131. See *supra* notes 13–14 and accompanying text.

132. See *supra* notes 11–15, 26 and accompanying text. We should clarify that the Chief Justice did not say that the power to tax was absolute. Rather, he would not allow Congress to levy a purported “tax” that (unlike the IM) was so high as to be in reality a “penalty.” *Nat’l Fed’n*, 132 S. Ct. at 2595–96. This proposed limit, however, should have been irrelevant because the IM did not involve a “tax” at all, so there was no reason to consider its magnitude. Rather, the IM was a “penalty” for violation of the Commerce Clause regulation mandating the purchase of insurance. See *supra* notes 13–14 and accompanying text. Chief Justice Roberts simply rewrote the ACA by changing the IM into a “tax” for the sole purpose of enabling him to uphold it under the Taxing Clause. Roberts’s decision to do so reduced to empty rhetoric his statements elsewhere in his opinion that the Constitution limits the federal government to its enumerated powers and leaves all other powers to the states or the People collectively. See *supra* notes 70–76 and accompanying text.

133. See *supra* notes 108–09 and accompanying text.

134. See Metzger, *supra* note 17, at 87, 113 (similarly predicting that the case will have a modest impact).

135. See *supra* notes 37–47 and accompanying text.

review.¹³⁶ And, from the opposite end of the political spectrum, the Court's recent doctrinal innovations—prohibiting Congress from regulating “noncommercial” matters (*Lopez*) and “inactivity” (*National Federation*)—advance the aims of conservative Republicans, who have advocated restrictions on the federal government and reinvigorated state autonomy.¹³⁷

Further case-by-case adjustments to the present Commerce Clause standards would merely prolong this partisan wrangling. Accordingly, the Court should adopt a fresh approach based on legal principles, which can be derived by applying the two-step Neo-Federalist methodology that we have previously set forth.¹³⁸ First, we recaptured the Commerce Clause's original “meaning” (the ordinary definition of its words in 1787), “intent” (its Framers' objectives), and “understanding” (the sense of its Ratifiers).¹³⁹ Second, we examined those Federalist precepts in light of over two centuries of legislative and judicial construction to develop legal rules that could be employed today in a practical way (i.e., without dismantling the modern federal administrative and social welfare state).¹⁴⁰

This investigation yielded clear legal rules that can be applied consistently and in an apolitical manner. At the threshold, Congress can only regulate “commerce,” defined as “the voluntary sale or exchange of property and all accompanying market-based activities, enterprises, relationships, and interests.”¹⁴¹ If a statute meets this requirement, the commerce must be “among the several States”—that is, it must either cross a state line or occur within one state but affect others.¹⁴² Such an interstate impact is almost inevitable in America's interdependent national economy.

Application of our framework would result in sustaining most Commerce Clause legislation, such as that concerning (1) the sale of goods and their production through manufacturing, mining, farming, fishing, and forestry—including environmental, safety, and health byproducts of those

136. See *supra* notes 45–46 and accompanying text.

137. See *supra* notes 47–58, 65–76 and accompanying text.

138. See Nelson & Pushaw, *supra* note 35, at 8–13, 107. For general descriptions of the Neo-Federalist approach, see, e.g., Robert J. Pushaw, Jr., *A Neo-Federalist Analysis of Federal Question Jurisdiction*, 95 CAL. L. REV. 1515, 1541–42 (2007); Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447, 448–49, 456–68 (1994). This methodology can usefully be applied to all constitutional provisions, with the possible exception of those involving war powers. See Robert J. Pushaw, Jr., *The “Enemy Combatant” Cases in Historical Context: The Inevitability of Pragmatic Judicial Review*, 82 NOTRE DAME L. REV. 1005, 1017–18 n.38 (2007).

139. See Nelson & Pushaw, *supra* note 35, at 8–9.

140. See *id.* at 9.

141. *Id.*; see also *id.* at 107–10 (fleshing out this definition).

142. *Id.* at 10–11, 110–11.

activities; (2) business services such as banking, insurance, paid transportation, and public accommodations—as well as antitrust and antidiscrimination laws that facilitate a free market in such services; (3) crimes that entail the voluntary sale of goods (such as illegal drugs) and services (gambling, prostitution, loan sharking, and the like); and (4) the protection of specific commercial transactions and entities (such as banks and abortion clinics) against criminal or tortious misconduct.¹⁴³

Our market-oriented approach, while broad, did recognize certain boundaries. Most pertinently, “commerce” extends only to voluntary—not compelled—market transactions.¹⁴⁴ Furthermore, this word cannot plausibly be stretched to cover actions taken merely to fulfill personal or household needs, such as growing wheat or marijuana for home consumption (contrary to the holdings in *Wickard* and *Raich*). Finally, the Commerce Clause, read in light of the Constitution’s structure of limited federal government authority and reserved state powers, prohibits Congress from reaching its tentacles into matters of wholly moral, social, or cultural concern (like violent crime).¹⁴⁵

The foregoing Commerce Clause analysis would have resulted in upholding all of the ACA provisions except for the individual mandate. Initially, Congress can regulate the general subjects of health care and insurance because they concern the sale of products and services in the marketplace. In fact, we have consistently argued that Congress can address the specific business of insurance, which for hundreds of years has been deemed a major “branch of commerce.”¹⁴⁶ Moreover, the markets for health care and insurance obviously have interstate impacts. Nevertheless, Congress cannot compel Americans to purchase insurance because such transactions would not be *voluntary* sales of property or services in the market. Thus, the IM is not a regulation of “commerce” within the meaning of the Commerce Clause.¹⁴⁷ As such, there is no need to go further and evaluate the IM’s interstate effects.

143. *Id.* at 9–12, 107–13, 119–27, 136–52, 158–63 (citing numerous examples).

144. *Id.* at 9, 107.

145. *Id.* at 10–12, 21, 27, 41, 78, 109–10.

146. *Id.* at 10, 13, 15, 17, 19, 85, 108.

147. The IM clearly is not “voluntary” because it expressly forces Americans to buy something against their will. A harder case would arise if Congress sought to achieve the same result indirectly, such as through a prohibition that had the practical effect of compelling people to make particular purchases. We would not, however, permit such clever subterfuges. We admit that the distinction between “voluntary” and “involuntary” transactions might sometimes be hard to draw, but that difficulty does not justify giving Congress *carte blanche* to impose commercial mandates. See Pushaw, *supra* note 88, at 1752 n.302.

Furthermore, we acknowledge that Congress might be able to require certain actions pursuant to other Article I clauses. For instance, Congress might exercise its power to tax and spend for the “general welfare” by providing funds for mandatory vaccinations to halt the national spread of a virulent disease.

For over two centuries, Congress implicitly understood this “voluntariness” dimension because it never ordered people to make purchases and then asserted that its own mandate was commerce that exerted substantial interstate effects. Discarding the volitional aspect of “commerce” would make Congress’s power absolute, as it could then force everyone against their will into any market—be it for domestic automobiles, avocados, accountant services, or tattoo parlors—on the ground that consumers’ countless non-decisions are actually “commercial” activities that have a “substantial effect” on the interstate economy.¹⁴⁸

In sum, the Nelson/Pushaw approach would have led to the same result as that reached by Chief Justice Roberts and his Republican cohorts, but through a straightforward application of clear legal rules rooted in the Commerce Clause. Because we set forth our analysis long before Obamacare was enacted, we cannot be accused of inventing a new test (such as the “activity vs. inactivity” distinction) to justify a preferred political outcome. The Court would be wise to “tie itself to the mast” in a similar manner by pre-committing itself to abide by fixed legal rules. Sadly, it is unlikely to do so.

V. CONCLUSION

We would be surprised if *National Federation* presages the transformation of Commerce Clause jurisprudence, mainly because all of the Justices (except Thomas) have accepted the established analytical framework: Congress merely needs a rational basis for determining that the activity regulated, considered in the aggregate, substantially affects interstate

148. The principal objection to my suggested approach is that striking down the IM would have undermined the ACA’s overall regulatory scheme. *See supra* notes 86–87, 103–47 and accompanying text. That is correct, but a similar argument could be made about any attempt to impose meaningful legal restraints under the Commerce Clause. For instance, the Nelson/Pushaw proposal would necessitate the invalidation of federal statutory provisions prohibiting the mere possession (as contrasted with sale) of items such as wheat, guns, or marijuana.

We admit that such exceptions keep Congress from legislating about everything in any way it pleases. Such restraints, however, must be identified and enforced to maintain a written Constitution that enumerates and limits the federal government’s powers. Thus, if Congress wants to address medical insurance, it must do so consistently with the Commerce Clause. If that Clause (alone, or in conjunction with the Necessary and Proper Clause) grants Congress complete freedom to select any means to implement its larger regulation of health insurance, then Congress can require not only the purchase of an insurance policy but also food items, gym memberships, and innumerable other things. Such untrammelled federal power is not “proper,” as it would eliminate all limits on the federal government (and the individual liberty that those constraints aim to protect). *See* Pushaw, *supra* note 88, at 1753 (summarizing the foregoing argument).

commerce.¹⁴⁹ Over the past seventeen years, five conservative Republican Justices have announced that this deferential standard of review does have two outer limits.¹⁵⁰ First, *Lopez* held that Congress can legislate only as to activity that is “commercial,” either of itself or as part of a larger economic regulatory scheme.¹⁵¹ Second, *National Federation* ruled that the Commerce Clause did not extend to commercial “inactivity.”¹⁵² Even those two modest restrictions prompted acrimonious dissents by four liberal Justices, who are firmly committed to granting Congress plenary power to regulate anything that might affect the national economy.¹⁵³

Furthermore, the conservative Justices’ bark is much worse than their bite. Most notably, they have collectively shown no inclination to overturn any Commerce Clause cases decided between 1937 and 1994.¹⁵⁴ Moreover, as a group they cannot maintain the unity necessary to consolidate even their small recent gains. For example, in *Raich*, Justices Kennedy and Scalia would not follow the logic of *Lopez* and *Morrison* because doing so would have resulted in the invalidation of a significant statute.¹⁵⁵ Similarly, in *National Federation*, the five Republicans agreed that the ACA had exceeded the bounds of the Commerce Clause, but Chief Justice Roberts could not bring himself to strike down a law as important as Obamacare.¹⁵⁶

Of course, the turncoat Justices rationalized their decisions through clever interpretations of the relevant precedent, which sets forth flexible standards that can easily be manipulated on a case-by-case basis to achieve political or ideological goals.¹⁵⁷ The Court obviously prefers this discretionary common law approach to one based upon clear legal rules, such as Justice Thomas’s proposed limitation of Commerce Clause regulation to trade and transportation¹⁵⁸ or the Nelson/Pushaw “market” thesis.¹⁵⁹

In short, *National Federation* does not strike me as a harbinger of a revolution in Commerce Clause jurisprudence. Rather, the Court’s “activity vs. inactivity” distinction will likely prove to be a minor skirmish in a war to restrain Congress that was lost long ago.

149. See *supra* notes 6–9, 125–27 and accompanying text.

150. See *supra* notes 47–58 and accompanying text.

151. See *United States v. Lopez*, 514 U.S. 549 (1995), discussed *supra* notes 47–54 and accompanying text.

152. See *Nat’l Fed’n of Independent Businesses v. Sebelius*, 132 S. Ct. 2566 (2012).

153. See *supra* notes 26, 49, 77–87, 108, 117 and accompanying text.

154. See *supra* notes 21–22, 39–45, 49, 62, 125–29 and accompanying text.

155. See *supra* notes 59–61 and accompanying text.

156. See *supra* notes 11–17, 64–76, 114, 131–32 and accompanying text.

157. See *supra* notes 51–63 and accompanying text.

158. See *supra* note 52 and accompanying text.

159. See *supra* notes 138–45 and accompanying text.