

# The Commerce Power and Congressional Mandates

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## ABSTRACT

*In National Federation of Independent Business v. Sebelius, a five-Justice majority concluded that the commerce power did not support enactment of the so-called “individual mandate,” which imposes a penalty on many persons who fail to buy health insurance. That ruling is sure to spark challenges to other federal laws on the theory that they likewise mandate individuals or entities to take certain actions. Federal laws founded on the commerce power, for example, require mine operators to provide workers with safety helmets and (at least as a practical matter) require mine workers to wear them. Some analysts will say that laws of this kind are distinguishable from the health care mandate because they reach only actors who have injected themselves into commerce by engaging in mining. There is a problem with this distinction, however, because the health care mandate itself does not apply to everyone. Instead, it takes aim only at citizens who inject themselves into commerce to such an extent that they generate a minimum annual income.*

*In this Article, I seek to untangle the Court’s new anti-mandate principle. I suggest that future cases implicating this principle will present two central questions. First, courts will have to decide whether the challenged law embodies a mandate. Second, if it does, they will have to determine whether that mandate is sustainable under the commerce power, notwithstanding the limits laid down in the health care case. I argue that answering this second question will require consideration of four analytical touchstones—what I call (1) escapability, (2) relatedness, (3) invasiveness, and (4) policy sensitivity. The operation of these four factors—each of which presents its own analytical complexities—signals the difficulties that courts will face in future mandate cases. And the presence of these difficulties highlights the need for the sort of structured analysis I offer here.*

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## INTRODUCTION

In *National Federation of Independent Business v. Sebelius* (“*NFIB*”),<sup>1</sup> the Supreme Court upheld the so-called “individual mandate,” which subjects most Americans to a penalty administered through the taxing system if they do not maintain health insurance.<sup>2</sup> The government’s defense of that law, however, did not produce an unalloyed victory. Four members of the Court—Justices Ginsburg, Breyer, Sotomayor, and Kagan—voted to uphold the measure as a proper exercise of both the taxing power and the commerce power.<sup>3</sup> Four other members of the Court—Justices Scalia, Kennedy, Thomas, and Alito (hereinafter the “joint opinion writers”)—deemed it unsustainable on either basis.<sup>4</sup> In a determinative opinion, Chief Justice Roberts steered a middle course, concluding that the provision was a valid exercise of Congress’s power to tax<sup>5</sup> but not a permissible exercise of Congress’s power under the Commerce and Necessary and Proper Clauses.<sup>6</sup>

<sup>1</sup> Nat’l Fed’n of Indep. Bus. v. Sebelius (*NFIB*), 132 S. Ct. 2566 (2012).

<sup>2</sup> See *id.* at 2580, 2608.

<sup>3</sup> See *id.* at 2609 (Ginsburg, J., concurring in part and dissenting in part).

<sup>4</sup> See *id.* at 2642 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) [hereinafter joint dissent].

<sup>5</sup> See *id.* at 2600 (majority opinion).

<sup>6</sup> See *id.* at 2591–93 (opinion of Roberts, C.J.).

*NFIB* has already triggered a search for new theories to constrain federal legislative power,<sup>7</sup> and a key source of such theories is not hard to spot: It lies in the five-Justice ruling that rejected the government's commerce power argument. The Court's handling of that argument is important, because the Commerce Clause and Necessary and Proper Clause support a vast array of federal laws—laws, for example, that ensure workplace safety, establish minimum product-quality standards, govern banks and public corporations, criminalize market-related activity, and protect our environment.<sup>8</sup> Many of these laws also impose mandates, or at least arguably do so.

In this Article, I explain why the Court's ruling in *NFIB* raises constitutional problems for a variety of measures founded on the commerce power. In one sense, this observation lacks originality, because many observers have predicted that *NFIB* may portend judicial retrenchment in the commerce power field.<sup>9</sup> In another sense, however, my message breaks new ground. Rather than offering only sound-bite prognostications, I identify actual or potential federal laws that now present constitutional difficulties in light of *NFIB*. The diversity of these laws—ranging from criminal possession bans to prohibitions on discrimination to public health measures to plant closing statutes (and on and on)—leaves no doubt that efforts to leverage the Court's anti-mandate ruling will arise in many settings. Moreover, for two reasons, the Court's broadening of the taxing power will not render its narrowing of the commerce power a matter of little practical concern, notwithstanding the suggestions of some to the contrary.<sup>10</sup> First, many

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<sup>7</sup> See, e.g., Gillian E. Metzger, *To Tax, To Spend, To Regulate*, 126 HARV. L. REV. 83, 112–16 (2012) (considering the future impact of *NFIB*).

<sup>8</sup> See generally DAN T. COENEN, *Constitutional Law: The Commerce Clause* 3, 30–31 (2004).

<sup>9</sup> See, e.g., James B. Stewart, *In Obama's Victory, A Loss for Congress*, N.Y. TIMES, June 30, 2012, at B1 (noting that “conservatives and libertarians lost their legal battle” but “may have won a bigger war”); Ilya Somin, *Do the Court's Commerce Clause and Necessary and Proper Clause Rulings in the Individual Mandate Case Matter?*, VOLOKH CONSPIRACY (June 29, 2012, 2:44 PM), <http://www.volokh.com/2012/06/29/do-the-courts-commerce-clause-and-necessary-and-proper-clause-rulings-in-the-individual-mandate-case-matter/> (“[F]ive justices were willing to endorse a strong substantive limit on these [commerce] powers. That is both symbolically significant and a potential signal for future cases.”). See generally Robert J. Pushaw, Jr. & Grant S. Nelson, *The Likely Impact of National Federation on Commerce Clause Jurisprudence*, 40 PEPP. L. REV. 975, 978 (2013) (noting views of some conservatives that *NFIB* was a stage-setter for “significantly curtailing Congress's power” in “the long run,” and also observing that “the four liberal Justices and their scholarly defenders echoed that worry”). For additional commentary along these lines, see *infra* note 15.

<sup>10</sup> See, e.g., Robert N. Weiner, *Much Ado: The Potential Impact of the Supreme Court Decision Upholding the Affordable Care Act*, in THE HEALTH CARE CASE 69, 75 (Nathaniel Persily et al. eds., 2013) (“Particularly given that the Court has now provided a road map to

existing laws were put in place solely under the commerce power, so that no argument for sustaining them under the taxing power will be available if and when they are challenged.<sup>11</sup> Second, it is always politically difficult for Congress to pass laws under the taxing power.<sup>12</sup> Thus, with regard to any potential new law—whether designed to cure defects in an already existing statute or to launch a previously untried legal program—the anti-mandate principle will exert a constraining influence.<sup>13</sup>

The practical significance of the Court’s anti-mandate principle suggests the need to construct an overarching methodology for its application in future cases. In this Article, I propose one. Under my methodology, decisionmakers confronted with anti-mandate arguments should undertake a two-part inquiry. First, they should ask whether the challenged law imposes a mandate. Second, if it does, they should evaluate whether that mandate runs afoul of the teaching

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avoid constitutional infirmity by proceeding under the taxing power, Congress should have little reason to enact any provision remotely akin to a mandate under the Commerce Clause.”).

<sup>11</sup> See, e.g., *Katzenbach v. McClung*, 379 U.S. 294, 301–05 (1964) (addressing the constitutionality of the Civil Rights Act of 1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 253–57 (1964) (same).

<sup>12</sup> See, e.g., Brief for State Respondents on the Minimum Coverage Provision at 2, *U.S. Dep’t of Health & Human Servs. v. Florida*, 132 S. Ct. 2566 (2012) (No. 11-398) [hereinafter *State Brief*] (“Legislation, especially legislation raising taxes, is supposed to be difficult to pass. . . . [I]f taxes can be disguised as mandates . . . the normal democratic process cannot perform its vital and intended limiting function.”); Weiner, *supra* note 10, at 81 (noting “an axiom of American politics—people do not like to pay taxes”). Indeed, this political reality played an important role in the crafting of the individual mandate itself. See Charles Fried, *The June Surprises: Balls, Strikes, and the Fog of War*, in *THE HEALTH CARE CASE*, *supra* note 10, at 51, 58 (“Congress had deliberately and on evident political grounds declined to designate the mandate and the consequences for noncompliance a tax . . . .”); Michael J. Graetz & Jerry L. Mashaw, *Constitutional Uncertainty and the Design of Social Insurance: Reflections on the ACA Case*, in *THE HEALTH CARE CASE*, *supra* note 10, at 300, 310 (noting that the “allergic reaction of congressmen . . . to the ‘T’ word . . . caused the ACA ‘tax’ to be presented as a ‘penalty’”); see also Jack Balkin, *Teaching Materials for NFIB v. Sebelius*, BALKINIZATION (July 17, 2012, 8:50 AM), <http://balkin.blogspot.com/2012/07/teaching-materials-for-nfib-v-sebelius.html> (noting “that the Democrats were . . . afraid to call [the health care bill] a tax” and thus “fought the entire litigation with one hand tied behind their back”).

<sup>13</sup> There is another point, too. Chief Justice Roberts upheld the tax imposed on failing to acquire insurance only because it was not so onerous that it foreclosed individuals from having a meaningful choice with regard to whether to obtain coverage or pay the tax. See *NFIB*, 132 S. Ct. 2566, 2595–96 (2012) (majority opinion). As a result, it may well be that Congress’s taxing power may not in the future provide a big enough stick to induce individuals to engage in forms of behavior that Congress in fact seeks to mandate. See Randy E. Barnett, *Who Won the Obamacare Case?*, in *THE HEALTH CARE CASE*, *supra* note 10, at 17, 25 (“Suppose that Congress were now to . . . decide to greatly increase the ‘tax’ on the status of failing to have health insurance. Would law professors dismiss a constitutional challenge to these measures as ‘frivolous’? I doubt it.”).

of *NFIB*. In the pages that follow, I explain how four key factors will press for attention as this second inquiry unfolds—factors that I call escapability, relatedness, invasiveness, and policy sensitivity. At the heart of this project lies the idea that our law will profit if courts bring these considerations into the light. My concern is that, if courts fail to do so, these factors will nonetheless exert an influence in these kinds of cases. Put another way, the four-factor analysis offered here—or something like it—will operate either in the open or in the shadows. For this reason, a studied assessment of these factors is a matter worthy of close consideration.

My analysis of the anti-mandate principle is set forth in six parts. In Part I, I outline the Court's treatment of the commerce power issue in *NFIB*, thus setting the stage for an evaluation of its future effects. In Part II, I introduce my two-part test for applying the anti-mandate principle, identifying four factors that courts should consider at the second stage. In Part III, I direct attention to the subset of cases in which the mandate label most readily applies—namely, cases that involve the imposition of affirmative duties that are inescapable. In Part IV, I turn to cases in which the mandate label applies more loosely because the duties imposed by law are conditional in character. In Part V, I touch on a range of new problems that *NFIB*'s anti-mandate principle has raised. And, in Part VI, I explain why judges should apply this principle with extreme caution as a general matter.

Some observers have claimed that the Supreme Court's treatment of the commerce power issue in *NFIB* was so narrow that it will have little impact in future cases.<sup>14</sup> Others, however, have issued

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<sup>14</sup> See, e.g., Weiner, *supra* note 10, at 69 (viewing “the legal ruling upholding the individual mandate” as “largely inconsequential in the evolution of constitutional law”); A. Christopher Bryant, *Constitutional Newspeak: Learning to Love the Affordable Care Act Decision*, 39 J. LEGIS. 15, 37 (2012–2013) (suggesting that future uses of *NFIB*'s anti-mandate principle will be “exceedingly rare”); Bradley W. Joondeph, *The Affordable Care Act and the Commerce Power: Much Ado About (Nearly) Nothing*, J. HEALTH & LIFE SCI. L., Feb. 2013, at 1, 6 (claiming that the Court's Commerce Clause ruling “will not operate as a meaningful constraint on Congress's future lawmaking”); Aziz Huq, *The Nation: Threats in the Health Care Ruling*, NPR (July 2, 2012, 8:41 AM), <http://www.npr.org/2012/07/02/156104486/the-nation-threats-in-the-health-care-ruling> (“[T]his new activity/inactivity distinction will not touch most federal regulation . . . .”); Steven D. Schwinn, *Did Chief Justice Roberts Craft a New, More Limited Commerce Clause?*, CONSTITUTIONAL LAW PROF BLOG (June 29, 2012), <http://lawprofessors.typepad.com/conlaw/2012/06/did-chief-justice-roberts-craft-a-new-more-limited-commerce-clause.html> (suggesting that “this restriction [on regulating inactivity] will have no effect on congressional authority”); Drew Singer & Terry Baynes, *Analysis: Legal Eagles Redefine Healthcare Winners, Losers*, REUTERS (July 3, 2012, 6:32 PM), <http://www.reuters.com/article/2012/07/03/us-usa-healthcare-court-idUSBRE8621A520120703> (quoting Geoffrey Stone as predicting that the health care ruling “won't have much impact [because the conservatives] won an argument, but it's not an

warnings that the majority may have put in place a doctrinal Trojan Horse, cleverly constructed to facilitate a down-the-road assault on key features of the Court's post-New Deal jurisprudence.<sup>15</sup> Only time will tell which of these views is more prescient.<sup>16</sup> One thing, however, is clear right now: Both lawyers duty-bound to represent clients zealously and academic disciples of libertarianism and state autonomy will work hard to forge from the Court's ruling new tools for cutting back on congressional power.<sup>17</sup> As a result, both judges and lawyers—with the guidance of legal scholars—must begin to think carefully about how *NFIB*'s anti-mandate principle should apply in future cases.

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argument that's likely to occur very often"); Laurence H. Tribe, fcis]Chief Justice Roberts Comes into His Own and Saves the Court While Preventing a Constitutional Debacle, SCOTUSBLOG (June 28, 2012, 3:41 PM), <http://www.scotusblog.com/2012/06/chief-justice-roberts-comes-into-his-own-and-saves-the-court-while-preventing-a-constitutional-debacle/> ("[T]he dubious action-inaction distinction endorsed by today's decision will likely do little to tie Congress's hands going forward.").

<sup>15</sup> See, e.g., Nathaniel Persily et al., *Introduction to THE HEALTH CARE CASE*, *supra* note 10, at 1, 5 (noting that some view the Court's ruling "as a long-term promise to conservatives"); Ilya Somin, *The Individual Mandate and the Proper Meaning of "Proper," in THE HEALTH CARE CASE*, *supra* note 10, at 146, 147 ("[I]t is possible that the ruling will have a noteworthy impact in curtailing future federal mandates."); *id.* at 161 ("Roberts's endorsement of the 'incidental powers' theory of propriety could have significant impact in the future, depending on the definition of what counts as an independent power . . ."). The potential for retrenchment is also suggested by Justice Ginsburg's dissent. See *NFIB*, 132 S. Ct. at 2609 (Ginsburg, J., concurring in part and dissenting in part) (describing the majority's approach to the Commerce Clause as reflecting a "crabbed reading" that is "stunningly retrogressive"); see also Pamela S. Karlan, Op-Ed., *No Respite for Liberals*, N.Y. TIMES, July 1, 2012, at SR1 ("The Supreme Court has given Americans who care about economic and social justice a reason to worry this Fourth of July. The court's guns have been loaded; it only remains to be seen whether it fires them."); David Bernstein, *Is This 1936?*, SCOTUSBLOG (June 29, 2012, 9:32 AM), <http://www.scotusblog.com/2012/06/is-this-1936/> ("[T]he ACA litigation shows that ideas once deemed beyond the pale in 'respectable' legal circles have now become mainstream among elite conservative lawyers. . . . [D]espite the Obama administration's victory today, we may be on the cusp of [a] new and unpredictable era in conservative jurisprudence."); Carrie Johnson, *How the Health Care Ruling Might Affect Civil Rights*, NPR (July 6, 2012, 2:39 PM), <http://www.npr.org/2012/07/06/156378347/how-the-health-care-ruling-might-affect-civil-rights> (quoting Washington lawyer Robert Driscoll's observation that the Commerce Clause "has traditionally formed the basis for many civil rights statutes [and that] civil rights statutes generally would not have a taxing provision which could provide the kind of save of the statute that happened for the health care case").

<sup>16</sup> See David A. Strauss, *Commerce Clause Revisionism and the Affordable Care Act*, 2012 SUP. CT. REV. 1, 26 (emphasizing this point); see also *infra* note 64 (collecting authorities highlighting the uncertainty engendered by *NFIB*).

<sup>17</sup> See, e.g., David Driesen, *Health Care's New Commerce Clause: Implications for Environmental Law*, CPRBLOG (June 29, 2012), <http://www.progressivereform.org/CPRBlog.cfm?id=Blog=38387E13-FBA5-918D-9C7E50D3ADCF23C> (suggesting that "this new front on the regulatory battlefield will likely enrich a lot of lawyers"); see also Mark A. Hall, *Commerce Clause Challenges to Health Care Reform*, 159 U. PA. L. REV. 1825, 1829 (2011) (suggesting that the mandate to buy insurance is functionally indistinguishable from other congressional mandates already in force).

## I. THE COMMERCE CLAUSE RULING IN *NFIB*

In *NFIB*, Chief Justice Roberts and the four joint opinion writers came together on a critical point of law: Whatever authority Congress might possess under the taxing power, it lacks authority under the commerce power to attach a penalty to a citizen's failure to acquire health insurance.<sup>18</sup> To understand this ruling, it is helpful to begin with the commerce power defense of the individual mandate put forward by the Solicitor General. He argued first that the mandate was a critical piece of a broader statutory scheme, shaped by Congress in the Affordable Care Act ("ACA"),<sup>19</sup> to address far-reaching marketplace problems in providing and paying for health care services.<sup>20</sup> The essential difficulty was that uninsured Americans were shifting massive costs to insured Americans due to the widespread availability of unpaid-for health care services.<sup>21</sup> The ACA targeted this free-riding problem by requiring insurers to sell their products at nondiscriminatory prices, including to buyers with preexisting conditions—thus creating the opportunity for much-expanded health insurance coverage.<sup>22</sup> These nondiscrimination rules, however, created problems of their own because (1) inclusion in the insurance pool of high-risk purchasers threatened to drive up policy prices to unaffordable levels for many buyers<sup>23</sup> and (2) a right to secure insurance regardless of preexisting conditions created an incentive for individuals not to obtain policies until they became ill.<sup>24</sup> The individual mandate addressed these problems by bringing healthy persons into the risk pool, while simultaneously stemming strategic delays in obtaining coverage.<sup>25</sup> For this

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<sup>18</sup> See *NFIB*, 132 S. Ct. at 2608 (opinion of Roberts, C.J.); *id.* at 2643 (joint dissent).

<sup>19</sup> Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

<sup>20</sup> See *NFIB*, 132 S. Ct. at 2609–14 (Ginsburg, J., concurring in part and dissenting in part); Brief for Petitioners (Minimum Coverage Provision) at 17–18, 24–25, Dep't of Health & Human Servs. v. Florida, 132 S. Ct. 2566 (2012) (No. 11-398) [hereinafter Petitioners' Brief].

<sup>21</sup> See *NFIB*, 132 S. Ct. at 2585 (opinion of Roberts, C.J.) (describing the "cost-shifting problem" caused by individuals who secure free medical care despite their inability to pay and lack of insurance, which results in "higher premiums" for policyholders).

<sup>22</sup> See *id.* (outlining the operation of the "'guaranteed-issue' and 'community-rating' provisions"); Petitioners' Brief, *supra* note 20, at 10. Other means of addressing these problems involved the provision of subsidies for health insurance purchases and the broadening of coverage through expansion of the Medicaid program. See 42 U.S.C. § 18071 (2012) (offering subsidies to qualifying individuals); *NFIB*, 132 S. Ct. at 2581–82 (describing Medicaid expansion).

<sup>23</sup> See *NFIB*, 132 S. Ct. at 2585 (opinion of Roberts, C.J.).

<sup>24</sup> See *id.*

<sup>25</sup> See *id.* at 2585; *id.* at 2613–15 (Ginsburg, J., concurring in part and dissenting in part); Petitioners' Brief, *supra* note 20, at 18. There was, according to defenders of the individual mandate, another problem too: Any individual state would balk at expanding affordable coverage for the uninsured, even if that state viewed legislation to this effect in a positive light. See

reason, the government argued, the provision was “necessary and proper”—in the relevant legal sense of being “useful” or “convenient”<sup>26</sup>—in rendering effective Congress’s regulation of interstate commerce via the ACA’s concededly permissible nondiscrimination rules.<sup>27</sup>

In addition, the Solicitor General contended that the individual mandate reflected a logical extension of Congress’s acknowledged authority to require payment for health care services with insurance proceeds, rather than by way of direct payment.<sup>28</sup> While acknowledging that Congress could not force individuals to buy any product at any time, the Solicitor General emphasized that every individual needs health care services, often in the near term. As a result, so the argument went, Congress could require the purchase of health insurance because every individual is, for practical purposes, operating in the very market in which payment by way of insurance can be required.<sup>29</sup>

Chief Justice Roberts did not question the underlying premises of the government’s arguments, including that the individual mandate played a key role in allowing the ACA’s nondiscrimination rules to work.<sup>30</sup> Even so, he concluded that the mandate was not sustainable under Congress’s authority to deal with matters that substantially affect interstate commerce.<sup>31</sup> The key problem was textual. According to the Chief Justice, the granted power to “*regulate* commerce” authorized the imposition of rules only on “existing commercial activity,”<sup>32</sup> so that Congress could not invoke that power to “create” commerce,<sup>33</sup> including by “compel[ling] individuals not engaged in commerce to purchase an unwanted product.”<sup>34</sup> The Chief Justice also relied on constitutional history, pointing in particular to James Madison’s observation in *The Federalist No. 45* that the Commerce

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*NFIB*, 132 S. Ct. at 2612 (Ginsburg, J., concurring in part and dissenting in part). This result would take hold because any such reform would render the state a magnet for the needy from other states, thus indicating that a workable solution to the health care crisis could be forged only at the federal level. *See id.*

<sup>26</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 324–25, 367 (1819).

<sup>27</sup> *See NFIB*, 132 S. Ct. at 2625–28 (Ginsburg, J., concurring in part and dissenting in part); *see also* Strauss, *supra* note 16, at 7 (noting that the constitutionality of the guaranteed-issue and community-rating provisions was not at issue in *NFIB*).

<sup>28</sup> *See NFIB*, 132 S. Ct. at 2589–90 (opinion of Roberts, C.J.); Petitioners’ Brief, *supra* note 20, at 18–19.

<sup>29</sup> *See* Petitioners’ Brief, *supra* note 20, at 35–36, 50–52.

<sup>30</sup> *See NFIB*, 132 S. Ct. at 2585 (opinion of Roberts, C.J.).

<sup>31</sup> *See id.* at 2588–91.

<sup>32</sup> *See id.* at 2586–87.

<sup>33</sup> *See id.* at 2586.

<sup>34</sup> *Id.*



Clause embodied an addition to federal powers “from which no apprehensions are entertained.”<sup>35</sup> According to the Chief Justice, such a peaceful, easy feeling about the clause was not reconcilable with reading it to alter “the relation between the citizen and the Federal Government”<sup>36</sup> in such a fundamental way that the “distinction between doing something and doing nothing” would be obliterated.<sup>37</sup> He added that the Solicitor General’s regulating-includes-compelling theory would permit Congress even to mandate “everyone to buy vegetables.”<sup>38</sup> Nor was this difficulty removed by the government’s claim that all citizens were in effect active in the health care market because of their inevitable need for health care services.<sup>39</sup> As he explained, “[t]he phrase ‘active in the market’ cannot obscure the fact that most of those regulated by the individual mandate are not currently engaged in any commercial activity involving health care.”<sup>40</sup>

The Chief Justice also rebuffed the government’s claim that the individual mandate constituted a “necessary and proper” measure for implementing the ACA’s nondiscrimination provisions.<sup>41</sup> The problem with this argument was that the mandate did not qualify as “proper.”<sup>42</sup> In particular, *McCulloch v. Maryland*<sup>43</sup> indicated that the Necessary and Proper Clause supports only the enactment of laws “‘incidental to’” an enumerated power, as opposed to “the exercise of any ‘great substantive and independent power[s].’”<sup>44</sup> The individual mandate failed this test because it was not “narrow in scope.”<sup>45</sup> Rather, it purported to “vest[ ] Congress with the extraordinary ability to create the necessary predicate to the exercise of [the commerce] power.”<sup>46</sup> Under the government’s theory, the Chief Justice explained, “Congress could reach beyond the natural limit of its authority” because it would “[n]o longer . . . be limited to regulating under the Commerce Clause those who by some preexisting activity bring

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<sup>35</sup> *Id.* at 2589 (quoting THE FEDERALIST NO. 45, at 293 (James Madison) (Clinton Rossiter ed., 1961)).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 2588.

<sup>39</sup> *See id.* at 2590.

<sup>40</sup> *Id.*

<sup>41</sup> *See id.* at 2591–93.

<sup>42</sup> *See id.* at 2592.

<sup>43</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

<sup>44</sup> *NFIB*, 132 S. Ct. at 2591 (alteration in original) (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 411, 418, 421).

<sup>45</sup> *Id.* at 2592.

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

themselves within the sphere of federal regulation.”<sup>47</sup> In sum, the minimum coverage provision could not be sustained under the Necessary and Proper Clause because it was not “‘consist[ent] with the . . . spirit of the constitution,’” as required by *McCulloch*.<sup>48</sup>

The four joint opinion writers did not sign onto any portion of the Chief Justice’s opinion, but their commerce power reasoning tracked many elements of his analysis.<sup>49</sup> Pointing to pre-1800 dictionary definitions,<sup>50</sup> they agreed that the power to “regulate” commerce did not permit Congress to “direct[ ] the creation of commerce.”<sup>51</sup> For them, the same conclusion found support in a functional consideration—namely, that recognizing a power to regulate the “failure to engage in economic activity” would in effect “make mere breathing in and out the basis for federal prescription.”<sup>52</sup> Nor did it work for Congress to use the “device of defining participants [in the health care market] to include all those who will, later in their lifetime, probably purchase the goods or services covered by the mandated insurance.”<sup>53</sup> Reasoning by analogy, the joint opinion writers emphasized that “[a]ll of us consume food”; yet “the mere fact that we . . . are thus, sooner or later, participants in the ‘market’ for food, does not empower the Government to say when and what we will buy.”<sup>54</sup>

The joint opinion writers also rejected efforts to defend the individual mandate as a necessary and proper means for implementing the ACA’s bans on discrimination. To be sure, the mandate helped make those bans work.<sup>55</sup> But Congress went too far when it “impressed into service . . . healthy individuals who could be but are not customers of the relevant industry, to offset the undesirable consequences” of commerce-regulating rules.<sup>56</sup> That assertion of authority had to fail, because otherwise Congress could control “a field so limitless” that it would transform the Commerce Clause “into a general authority to direct the economy.”<sup>57</sup> In short, “it must be *activity* affecting com-

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.* (alteration in original) (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 421).

<sup>49</sup> *See id.* at 2644–50 (joint dissent).

<sup>50</sup> *See id.* at 2644.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 2642–43; *see also id.* at 2649 (reasoning that the minimum coverage provision “rests upon a theory that everything is within federal control simply because it exists”).

<sup>53</sup> *Id.* at 2648.

<sup>54</sup> *Id.*

<sup>55</sup> *See, e.g., id.* at 2647.

<sup>56</sup> *Id.* at 2646.

<sup>57</sup> *Id.*

merce that is regulated, and not merely the failure to engage in commerce.”<sup>58</sup>

## II. POST-*NFIB* MANDATE ANALYSIS

A majority of Justices in *NFIB* found that the individual mandate fell beyond the federal commerce power. But what are the contours of the principle that drove the decision? One might conclude that no commerce power principle of any kind can be derived from the Court’s ruling because no group of five Justices signed onto a single opinion.<sup>59</sup> Few lower courts, however, are likely to take such a dismissive view of a landmark decision, especially when existing law instructs them to distill controlling principles from Supreme Court rulings even when those rulings do not produce a unified majority.<sup>60</sup>

From another perspective, *NFIB* says nothing special about mandates at all. On this view, the Court’s key move involved its invigoration of the word “proper” as used in the Necessary and Proper Clause.<sup>61</sup> It follows, so the argument goes, that *NFIB* exposes all laws, not only mandates, to invalidation if they offend the “spirit of the constitution.”<sup>62</sup> But this observation, even if true, misses a key point: Five Justices found that the individual mandate crossed the proper/improper dividing line precisely because it embodied a mandate—a point made clear by the use of the word “mandate” and its cognate forms more than 100 times in the opinions of the Chief Justice and the

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<sup>58</sup> *Id.* at 2649.

<sup>59</sup> *See, e.g.*, *United States v. Kiste*, No. 3:12-CR-113 JD, 2013 WL 587556, at \*4 (N.D. Ind. Feb. 13, 2013) (noting courts’ debate on whether the Chief Justice’s Commerce Clause holding is dicta or binding precedent); Gregory P. Magarian, *Chief Justice Roberts’s Individual Mandate: The Lawless Medicine of NFIB v. Sebelius*, 108 Nw. U. L. REV. COLLOQUY 15, 19 (2013), available at <http://www.law.northwestern.edu/lawreview/colloquy/2013/4/LRColl2013n4Magarian.pdf> (“Why did the four joint dissenters, who echo the Chief Justice’s restrictive federal power analysis, decline even to concur in his judgment? Presumably because this part of the Chief Justice’s opinion announces no judgment in which to concur.”); Balkin, *supra* note 12 (explaining that “the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds,” but that in *NFIB* the Justices who agreed with the Chief Justice in “limiting the Commerce Clause and the Necessary and Proper Clause do not concur in the judgment; they dissent” (quoting *Marks v. United States*, 430 U.S. 188, 193 (1977))).

<sup>60</sup> *See Marks v. United States*, 430 U.S. 188, 193 (1977) (noting that the narrowest concurring view constitutes the holding in a split decision); *see also* Samuel R. Bagenstos, *The Anti-Leveraging Principle and the Spending Clause After NFIB*, 101 GEO. L.J. 861, 868 & n.24 (2013) (reasoning that, “as a practical matter, lower courts can be expected to seek to identify and apply those propositions that would command the assent of five Justices to avoid reversal”).

<sup>61</sup> *See* Somin, *supra* note 15, at 146.

<sup>62</sup> *See supra* note 48 and accompanying text.

joint opinion writers.<sup>63</sup> In other words, whatever one might conclude about other types of laws, the fact that the “individual mandate” was a mandate gave rise to a distinct constitutional problem for a majority of the Court. And so the Court’s ruling reflected a new and specialized anti-mandate principle of some sort.

The boundaries of this principle are far from clear,<sup>64</sup> and I argue in the final part of this paper that courts should apply it with caution. Some courts, however, may reject this narrow-interpretation approach. Other courts, while adopting narrow-interpretation rhetoric, might nonetheless read *NFIB* to expose many laws to invalidation.<sup>65</sup> Even courts that take a decidedly narrow view of the anti-mandate principle will inevitably have to face tough questions about what laws fall within its domain.<sup>66</sup>

These realities indicate the need to develop an overarching methodology for evaluating challenges to federal laws based on the Court’s new anti-mandate principle. In the pages that follow, I suggest what the basic structure of that methodology should look like. This methodology requires courts to ask two questions. The first focuses on

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<sup>63</sup> See generally *NFIB*, 132 S. Ct. 2566 (2012).

<sup>64</sup> See *Kiste*, 2013 WL 587556, at \*5 (“*NFIB* provides little guidance as to how lower courts should distinguish between activity or inactivity or between regulating activity and compelling it.”); Jack M. Balkin, *The Court Affirms the Social Contract*, in *THE HEALTH CARE CASE*, *supra* note 10, at 11, 15 (asserting that the future impact of *NFIB* “will depend on who wins the next several presidential elections” and that “[i]f the Republicans dominate American politics in the decades to come, Roberts’s opinion will seem much more conservative than it does now”); Graetz & Mashaw, *supra* note 12, at 300, 310; Neil S. Siegel, *More Law Than Politics: The Chief, the “Mandate,” Legality, and Statesmanship*, in *THE HEALTH CARE CASE*, *supra* note 10, at 192, 204 (noting that “Roberts’s language is vague and difficult to apply” and wondering how “Congress and the courts [will] distinguish between a ‘great substantive and independent power’ beyond those enumerated in the Constitution, and a power merely ‘derivative of, and in service to, a granted power’” (quoting *NFIB*, 132 S. Ct. at 2591–93)); Somin, *supra* note 15, at 159 (“The future effects of *NFIB*’s Necessary and Proper holding are difficult to predict. It is possible that it will have a significant impact, but also possible that its effects will be extremely limited.”); Weiner, *supra* note 10, at 77–78 (describing the Chief Justice’s reasoning as based on a lack of comfort with the individual mandate, providing an unworkable standard, and leaving courts with a “blank slate” to work with as they choose); Lawrence B. Solum, *How NFIB v. Sebelius Affects the Constitutional Gestalt* 1–2 (Georgetown Univ. Law Ctr. Pub. Law & Legal Theory Research Paper Grp., Paper No. 12-152, 2013) (“[T]he direct legal effects [of *NFIB*’s Commerce Clause and Necessary and Proper Clause holdings] are complex and likely to be disputed.”).

<sup>65</sup> See, e.g., Erwin Chemerinsky, *Political Ideology and Constitutional Decisionmaking: The Coming Example of the Affordable Care Act*, 75 LAW & CONTEMP. PROBS. 1, 13–14 (2012) (arguing that an activity-versus-inactivity distinction could lead to the invalidation of pollution regulations); see also *infra* notes 72–74 and accompanying text (discussing antidiscrimination laws).

<sup>66</sup> See Driesen, *supra* note 17 (positing that *NFIB* will “spur more litigation than direct results” and “enrich a lot of lawyers”).

whether the challenged law imposes a mandate. The second asks whether, if a law does impose a mandate, it falls inside or outside *NFIB*'s condemnatory reach.<sup>67</sup>

A. *Is It a Mandate?*

A majority of the Court condemned the so-called “minimum coverage provision” because it embodied a “mandate,” as opposed to another form of government intervention. The propriety of this characterization was not self-evident. Justice Ginsburg, for example, suggested that the law could be viewed as a prohibition on self-insuring.<sup>68</sup> This depiction highlights a broader problem—namely, that murkiness has always shrouded the dividing line between mandates and prohibitions because it is almost always possible to characterize putative inactivity as some form of activity.<sup>69</sup> To take a simple example, does a rule that requires the use of safety helmets in mines impose a mandate to wear helmets or a prohibition on working in mines without them?<sup>70</sup> The difficulty posed by such questions has led some scholars to dismiss them as involving nothing more than “semantics.”<sup>71</sup>

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<sup>67</sup> I note here that some courts may seek to collapse these two questions into one—perhaps, for example, by deeming all mandates outside the commerce power and applying the four-factor analysis in deciding whether to apply the mandate characterization. In my view, the Court's opinions (including the Chief Justice's implication that some mandates might qualify as “proper,” see *NFIB*, 132 S. Ct. at 2592–93 (opinion of Roberts, C.J.)) signal a gravitation toward the sort of two-step methodology I propose here. But even if I am wrong, the ideas developed in this Article are of critical importance. This is the case because the focus here is on the four key forces that may well guide the operation of the anti-mandate principle, and those forces are likely to influence whether courts called on to apply that principle engage in a one-step or a two-step dance.

<sup>68</sup> See *NFIB*, 132 S. Ct. at 2622 (Ginsburg, J., concurring in part and dissenting in part).

<sup>69</sup> See, e.g., *Archie v. City of Racine*, 847 F.2d 1211, 1213 (7th Cir. 1988) (noting that the difference between a positive right to have the government do something and a negative right to be left alone by the government is often a matter of perspective); *United States v. Lott*, 912 F. Supp. 2d 146, 154 (D. Vt. 2012) (highlighting the murkiness underlying the activity/inactivity and regulating/compelling distinctions); Strauss, *supra* note 16, at 19–23 (discussing “the arbitrary distinction between action and inaction” that was “the key to [the Court's] limiting principle” in *NFIB*; reasoning that “[e]ven ‘inaction’ involves a choice and, in that sense, is an action”). See generally J.M. Balkin, *The Rhetoric of Responsibility*, 76 VA. L. REV. 197, 228–30 (1990) (explaining how the omission/commission distinction can be manipulated); Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 637–39 (1981) (describing the “blurry” line between commission and omission).

<sup>70</sup> See 30 C.F.R. § 77.1710 (2013) (setting forth mining helmet requirement).

<sup>71</sup> See Jamal Greene, *The Missing Due Process Argument*, in *THE HEALTH CARE CASE*, *supra* note 10, at 91, 94.

Consider also the Court's landmark decision in *Katzenbach v. McClung*.<sup>72</sup> After *NFIB*, would the Court say that application of the Civil Rights Act of 1964<sup>73</sup> to Ollie's Barbecue involved a mandate to seat black customers, as opposed to a prohibition on excluding them from the restaurant?<sup>74</sup> Other problems of characterization recur in applying the mandate/non-mandate distinction, and I touch on several of them in the pages that follow. For now, it suffices to recognize three key points about this initial inquiry. First, as we have seen, the characterization of particular rules as mandates or as non-mandates often will present analytical challenges. Second, the health care decision offers limited guidance for dealing with those challenges, apart from establishing that the ACA's minimum coverage provision itself qualifies as a mandate. Third, the practical impact of the Court's new anti-mandate principle will hinge in no small measure on how far the mandate label reaches. Put simply, the larger the number of laws that qualify as mandates, the larger will be the number of laws that might run afoul of the Court's new anti-mandate principle.

### B. The Four-Factor Inquiry

Once a court decides that a law imposes a mandate, it must next ask whether that mandate contravenes the teaching of *NFIB*. Consider two laws: (1) the now-familiar regulation that requires persons who work in mines to wear safety equipment;<sup>75</sup> and (2) the statute at issue in *NFIB* itself, which (for purposes of the commerce power, as opposed to the taxing power) requires persons who make more than a

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<sup>72</sup> *Katzenbach v. McClung*, 379 U.S. 294, 296–97, 304–05 (1964) (upholding the public accommodations provisions of the Civil Rights Act of 1964 under the commerce power).

<sup>73</sup> Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

<sup>74</sup> See Chemerinsky, *supra* note 65, at 13 (“Title II of the 1964 Civil Rights Act regulates inactivity, requiring that hotels and restaurants serve African-American customers even if they do not want to do so.”); Strauss, *supra* note 16, at 14–15 (“Title II [of the Civil Rights Act of 1964] was a mandate . . . . The owner of a restaurant had to serve racial minorities, whether he wanted to or not. Many antidiscrimination laws share this feature.”); Weiner, *supra* note 10, at 75 (asserting that “[a] prohibition on discriminating in providing accommodations is a mandate to treat people equally, and in particular, to engage in commerce with them”; adding that “[t]o argue that a motel owner can avoid the mandate by not operating a motel—in other words, by giving up his livelihood—hardly frames a realistic choice”); see also Richard A. Posner, *Supreme Court Year in Review: The Commerce Clause Was Clearly Enough to Uphold the Affordable Care Act*, SLATE (June 28, 2012, 5:38 PM), [http://www.slate.com/articles/news\\_and\\_politics/the\\_breakfast\\_table/features/2012/\\_supreme\\_court\\_year\\_in\\_review/affordable\\_care\\_act\\_upheld\\_why\\_the\\_commerce\\_clause\\_should\\_have\\_been\\_enough.html](http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2012/_supreme_court_year_in_review/affordable_care_act_upheld_why_the_commerce_clause_should_have_been_enough.html) (indicating the same view of Title II).

<sup>75</sup> See *supra* note 70.

specified amount of money to acquire health insurance.<sup>76</sup> We know that the Court in *NFIB* held that the latter mandate is not a permissible exercise of the commerce power. But what about the former? In other words, assuming our miner-helmet law is viewed as imposing a mandate on individual miners, does the law nonetheless fall outside of the anti-mandate principle of *NFIB*?

Most of us will sense—indeed, assume—that the answer is yes. But it is not apparent how courts will find their way to this result. One possibility is that they will affix to the anti-mandate principle a bright-line limit that fences out from its operation many federal statutes and regulations, including our miner-helmet law. At least three such limits seem possible, but each stands open to serious criticism.

First, a court might say that *NFIB* outlaws only the use of mandates put in place as necessary prerequisites to the installation of companion regulatory controls (in *NFIB*, the ACA's antidiscrimination provisions). On this view, mandates are unconstitutional only when they have a double-whammy effect, in the sense that they produce federal intervention by way of both the mandate itself and the broader set of non-mandate laws that the mandate is needed to prop up.<sup>77</sup> This interpretation builds on the Chief Justice's assertion that governing law precludes Congress from "creat[ing] the necessary predicate to . . . exercise" the commerce power.<sup>78</sup> But it is far from clear that the Chief Justice meant to use this terse phrase to operate in this far-reaching way. Moreover, adopting this double-whammy limitation would clash with other parts of the Court's rationale, including by leaving unscathed the hypothetical freestanding congressional command to buy vegetables, which five Justices unabashedly condemned.<sup>79</sup>

Second, a court might conclude that *NFIB* outlaws requirements to buy or sell goods or services—but not mandates of any other kind.<sup>80</sup> This view draws support from passages in the opinions that condemn

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<sup>76</sup> 26 U.S.C. § 5000A (2012).

<sup>77</sup> See Andrew Koppelman, "Necessary," "Proper," and Health Care Reform, in *THE HEALTH CARE CASE*, *supra* note 10, at 105, 114 (asserting that Chief Justice Roberts's "claim . . . is that Congress cannot arrogate to itself the power to solve problems that are of its own making").

<sup>78</sup> *NFIB*, 132 S. Ct. 2566, 2592 (2012) (opinion of Roberts, C.J.).

<sup>79</sup> See *supra* notes 38, 54 and accompanying text.

<sup>80</sup> Siegel, *supra* note 64, at 205 (reading the Roberts opinion "as prohibiting Congress from imposing purchase mandates, not as prohibiting Congress from ever regulating 'inactivity'"; adding, for example, that "[f]ederal power to quarantine or mandate vaccination might be critical in a public health emergency, such as a flu pandemic that disrespects state borders").

“compel[ling] individuals to become active in commerce,”<sup>81</sup> to buy an “unwanted product,”<sup>82</sup> or to purchase an “unwanted suite of products.”<sup>83</sup> Thus, the argument continues, though there are limits on congressional authority to compel the making of a purchase or a sale, nothing stands in the way of a mandate to wear safety equipment, because simply wearing equipment does not involve a commercial transaction at all.<sup>84</sup> There is, however, a significant difficulty with this effort to limit the scope of the anti-mandate principle. To be sure, the Court in *NFIB* focused on the idea that the power to regulate commerce does not include the power to create commerce. But the creation of commerce at least has *something* to do with commerce, and thus with the subject of the Commerce Clause. It would seem to follow from this idea that mandates that compel activities that are not commercial at all generate problems under the Commerce Clause that are at least as great as (if not greater than) the problems generated by mandates that create commerce itself.<sup>85</sup> And under this logic, all mandates—whether to engage in commerce or to do something else—should fall within the ambit of *NFIB*’s anti-mandate principle.

Finally, a court might conclude that only totally unconditional mandates are susceptible to invalidation under the principle of *NFIB*. In other words, so long as the mandate is attached to a person’s commercial activity (such as taking employment with a mining company), the mandate itself is ipso facto a permissible exercise of the commerce power. As it turns out, however, there are two problems with this reading of *NFIB*. First, as a real-world matter, the individual mandate

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<sup>81</sup> *NFIB*, 132 S. Ct. at 2587 (opinion of Roberts, C.J.) (emphasis omitted).

<sup>82</sup> *See id.* at 2586 & n.3.

<sup>83</sup> *See id.* at 2648 n.2 (joint dissent).

<sup>84</sup> *See* Koppelman, *supra* note 77, at 105 (noting that parts of the Chief Justice’s arguments represented a “raw intuition that being required to enter into a contract is an extraordinary burden”); *see also* *United States v. Sterling Centrecorp Inc.*, 960 F. Supp. 2d 1025, 1053 (E.D. Cal. 2013) (seeming to conclude that no anti-mandate problem arose where penalties were triggered by a decision to “ignore the continuous discharges of contaminated water into the environment, or to allow the timber dam to deteriorate to the point of failure” because a government rule with respect to these choices did not involve compelling someone “to purchase an unwanted product” (internal quotation marks omitted)).

<sup>85</sup> *See* *United States v. Lott*, 912 F. Supp. 2d 146, 155 (D. Vt. 2012) (noting the oddity of any distinction that would permit Congress to compel noneconomic activity but not economic activity); Corey Rayburn Yung, *The Incredible Ordinarity of Federal Penalties for Inactivity*, 2012 Wis. L. REV. 841, 868 (arguing that if noncommercial mandates are proper, then the ACA’s commercial mandate is proper because, as a commercial mandate, it has a “tighter nexus” to interstate commerce); *see also* Theodore W. Ruger, *Health Policy Devolution and the Institutional Hydraulics of the Affordable Care Act*, in *THE HEALTH CARE CASE*, *supra* note 10, at 359, 359 (highlighting that the Chief Justice’s controlling opinion focused on “the kinetic requirement of physical activity as opposed to inactivity”).



itself was not unconditional. Rather, persons were subject to a penalty for violating it only if they engaged in enough commercial activity to generate personal income in excess of a threshold amount.<sup>86</sup> Second, the four joint opinion writers appeared to reject the unconditional-mandate limit when they wrote, “the mere fact that we all consume food and are thus, sooner or later, participants in the ‘market’ for food, does not empower the Government to say when and what we will buy.”<sup>87</sup> This language suggests that Congress cannot impose mandates as to “what we will buy” even if those mandates are conditioned on the commercial act of buying food.<sup>88</sup>

Confronted with the challenges of validating the miner-helmet law under a ready-made, bright-line test, courts would have to find another way to sustain it. Picking up on the rationale of *NFIB* itself, they could say that the miner-helmet law is distinguishable from the individual mandate because it does not involve the exercise of a “great substantive” power.<sup>89</sup> But any analysis at this level of generality simply begs the question. A sound treatment would have to go further in identifying functional differences between the cases. And as it turns out, functional differences do exist.

The first concerns what I call “escapability.” This consideration—which directs attention to whether the target of a mandate can readily elude it—distinguishes our two cases in a powerful way. People, after all, do not have to work in mines. Even if they take employ-

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<sup>86</sup> See 26 U.S.C. § 5000A(e)(2) (2012); see also *NFIB*, 132 S. Ct. at 2580 (noting the inapplicability of the ACA penalty provision to individuals “with income below a certain threshold”). See generally *infra* note 90 and accompanying text (elaborating on this point).

<sup>87</sup> *NFIB*, 132 S. Ct. at 2648 (joint dissent).

<sup>88</sup> See also Yung, *supra* note 85, at 868 (arguing that attaching an otherwise impermissible mandate to any “innocuous activity” would render *NFIB* a “matter of hyper-formalism”). There is another possible categorical limit on the anti-mandate principle, though not one that would remove it from our miner-helmet law. A court might conclude that the principle attaches only to compelled interactions with private parties, and not to compelled interactions with the government. Some support for this notion might be drawn from footnote five of Chief Justice Roberts’s opinion. There, he distinguished the individual mandate from supposedly analogous mandates, in the form of condemnations of private property, by reasoning that condemnations do not involve a “commercial transaction between the landowner and the Government, let alone a government-compelled transaction between the landowner and a third party.” *NFIB*, 132 S. Ct. at 2587 n.5 (opinion of Roberts, C.J.). This language might be read to suggest that federal mandates do not fall within the anti-mandate principle unless they involve a compelled transaction with “a third party.” See Fried, *supra* note 12, at 57 (suggesting that the offense to individual liberty posed by the individual mandate was the requirement to buy something from a “nongovernmental purveyor”). To extract such an idea from a brief passage in one footnote signed onto by only one Justice, however, involves a long analytical leap.

<sup>89</sup> See *supra* note 44 and accompanying text (noting the Chief Justice’s reliance on this concept).

ment with mining companies, they can do so in ways that do not involve mining itself. They also can pursue entirely different lines of work, including by moving to geographical areas where mining does not dominate the local economy. As it turns out, many people born into mining communities do just that, especially under modern conditions that permit easy relocation, job retraining, and the like. On the other hand, very few citizens have a similar opportunity to sidestep the ACA's individual mandate. To be sure, that mandate is not entirely inescapable because people can dodge it by reducing their annual income to around a bottom-13% level.<sup>90</sup> But it is not plausible to expect people to do so because of the real-world burden that making such a move would impose. The health care mandate thus raises much more pressing concerns about escapability than does the miner-helmet law.

A second factor focuses attention on "relatedness." Assume, for example, that Congress passed a law that required persons who work in mines to buy broccoli once a week. This law would be no less escapable than the miner-helmet law because miners in both cases could avoid the mandate by changing their line of work. Most of us will sense, however, that the conditional miners-must-buy-broccoli mandate is more problematic than the mandate of in-mine helmet use. The reason is that the use of helmets bears a sensible relationship to working in mines, whereas the buying of broccoli does not. Indeed, judicial attentiveness to relatedness runs throughout our constitutional doctrines—making appearances in such diverse areas as the law

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<sup>90</sup> See *NFIB*, 132 S. Ct. at 2599 (majority opinion) (noting that the mandate's penalty-imposing operation was "triggered by specific circumstances—earning a certain amount of income but not obtaining health insurance"); see also *How Much Is the Obamacare "Tax"?*, FACTCHECK.ORG, <http://www.factcheck.org/2012/06/how-much-is-the-obamacare-tax/> (last updated Dec. 20, 2013) (noting that the individual mandate only applies to those with "household income[s] that exceed[ ] the income threshold for filing a tax return," which was "\$9,500 for a single person under age 65, and \$19,000 for a married person filing jointly with a spouse" in 2011); *Income Breaks, 2011*, TAX POLICY CTR. (May 12, 2011), <http://taxpolicycenter.org/numbers/displayatab.cfm?Docid=2970> (indicating that, in 2011, a \$9,500 income represents the bottom 25% (20.65 million) of the 82.6 million single earners and a \$19,000 income represents the bottom 7–8% (11.67–13.34 million) of the 166.7 million married persons filing jointly, corresponding to roughly 12.97–13.63% of these 249.3 million earners). Relevant statutory language appears at 26 U.S.C. § 5000A(e)(1)–(2). See generally Weiner, *supra* note 10, at 86 n.64 (noting that "one could argue that individuals could avoid the mandate by choosing not to earn income, because those who make too little to file a tax return are exempt from the penalty [because] the penalty is the only legal consequence of not purchasing insurance"); Dan T. Coenen, *The Originalist Case for the "Individual Mandate": Rounding out the Government's Argument in the Health Care Case* 5 n.10 (Univ. of Ga. Sch. of Law Legal Studies Research Paper Series, Paper No. 12-05, 2012) [hereinafter Coenen, *Originalist Case*], available at <http://ssrn.com/abstract=2053795> (outlining income-based exemptions from the penalty).

of conditional spending,<sup>91</sup> the market participant exception to the dormant Commerce Clause,<sup>92</sup> and the field of unconstitutional conditions.<sup>93</sup> No less important, both the Chief Justice and his four commerce power compatriots in *NFIB* indicated that relatedness had some role to play in mandate cases.<sup>94</sup> And once one accepts the relevance of relatedness in assessing federal mandates under the commerce power, distinguishing our two cases on this ground presents little difficulty. No one needs an advanced degree, after all, to see that wearing a mining helmet bears a closer relation to working in a mine than buying health insurance (as opposed to buying anything else) bears to simply earning a base-level amount of money.

A third factor centers on “invasiveness”—that is, the degree to which a challenged mandate trenches on individual liberty. Notably, both the Chief Justice and the joint opinion writers recoiled at the intensity of the invasion worked on individuals by the ACA’s individual mandate. In effect, they asserted that it was a severe intrusion for the government to compel citizens to spend large sums of their money on products they did not want to buy at all. Indeed, summoning up images of the most oppressive communist dictatorships, the four joint opinion writers assailed the individual mandate as defensible only if one were ready to vest in Congress a “general authority to direct the economy.”<sup>95</sup> Whatever one thinks about this depiction, it casts no shadow over the miner-helmet mandate. That law, after all, imposes no meaningful cost on mine workers at all. Instead, it imposes a low-

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<sup>91</sup> See *South Dakota v. Dole*, 483 U.S. 203, 207 (1987).

<sup>92</sup> See *S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 93–99 (1984) (imposing same-market test in applying the market participant rule).

<sup>93</sup> See, e.g., *Agency for Int’l Dev. v. Alliance for Open Soc’y Int’l, Inc.*, 133 S. Ct. 2321, 2332 (2013) (finding the conditional speech requirement so loosely related to the purpose of the federal funding program that it abridged First Amendment rights); *United States v. Am. Library Ass’n*, 539 U.S. 194, 217–28 (2003) (Breyer, J., concurring) (declaring that the Court considers “whether the statute works speech-related harm that, in relation to [the statute’s] objective, is out of proportion”); *Dolan v. City of Tigard*, 512 U.S. 374, 386 (1994) (requiring an “essential nexus” between a state interest said to impede the granting of a land-use permit and any condition imposed on that permit’s issuance).

<sup>94</sup> See *infra* notes 179–80 and accompanying text.

<sup>95</sup> *NFIB*, 132 S. Ct. at 2646 (joint dissent); see *id.* (“If Congress can reach out and command even those furthest removed from an interstate market to participate in the market, then the Commerce Clause becomes a font of unlimited power . . . .”); see also Michael C. Dorf, *Commerce, Death Panels, and Broccoli: Or Why the Activity/Inactivity Distinction in the Health Care Case Was Really About the Right to Bodily Integrity*, 29 GA. ST. U. L. REV. 897, 897 (2013) (suggesting that the case against the individual mandate gained traction because of fears “that upholding the law’s so-called individual mandate would permit the government to require people to eat broccoli”).

impact, use-related rule that operates only for the time the miner is on the job and already under work-related supervision.

A final factor directs attention to what we might call “policy sensitivity.” Because this factor has a nebulous quality, courts may (and probably should) hesitate to give it a preponderating influence. But its practical effect cannot be ignored, and therefore it merits inclusion on our list. Some analysts might conclude, for example, that the conditional nature of the health care mandate, if upheld, would encourage some citizens to escape it by striving to earn less money, thus reducing national productivity and a salutary commitment to the individual work ethic. In addition, they might say that considerations of fairness cut for—not against—the miner-helmet mandate, in part because everyone recognizes that the mining industry is one in which government controls are understandably expected and therefore fairly imposed.<sup>96</sup> In contrast, a majority of Justices in the health care case looked askance at the minimum coverage provision in large measure because they saw it as a “novelty”<sup>97</sup> and “unprecedented.”<sup>98</sup>

The foregoing analysis suggests why courts are likely to pay heed to escapability, relatedness, invasiveness, and policy sensitivity in commerce power mandate cases. No less important, it indicates why Supreme Court precedents, especially *NFIB* itself, support this approach. How these four factors will interact in future cases is not easy to predict. There is reason to believe, however, that courts will focus at the outset on escapability, in part because it is intrinsically tied to whether a law imposes a mandate at all. Picking up on this idea, I turn first to federal laws that establish the purest form of mandate because they are entirely inescapable.

### III. PROBLEMS OF PURE INESCAPABILITY

As we have seen, the individual mandate was conditional in nature.<sup>99</sup> Even so, it had such a low level of escapability that it raised insuperable problems under the anti-mandate principle. Some mandates, however, rank even lower on the escapability index. This is the case because they are *entirely* unconditional and thus not escapable at all. Consider, for example, proposals for the establishment of a na-

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<sup>96</sup> For an illustration of this style of analysis in the Contracts Clause context, see *Energy Reserves Grp., Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 409–19 (1983) (focusing on extensive past regulation of the industry in finding that no “substantial impairment” of contractual rights had occurred).

<sup>97</sup> See *NFIB*, 132 S. Ct. at 2586 (opinion of Roberts, C.J.).

<sup>98</sup> See *id.* at 2648 (joint dissent).

<sup>99</sup> See *supra* notes 86, 90 and accompanying text.

tional service program, under which all young Americans would have to engage in a year or two of public service work once they reach the age of eighteen.<sup>100</sup> After *NFIB*, any such program would present a profound constitutional problem. The difficulty is that aging is an inevitable part of living, so that such a law would involve *pure inescapability*. In this Part, I examine three other forms of government control that impose mandates marked by this analytically important trait—namely, mandates associated with (1) programs that compel the taking of actions related to public health, (2) certain applications of possessory-crime statutes, and (3) government takings of property for transfer to private developers. In each of these areas, the Court's path-breaking decision in *NFIB* gives rise to previously unrecognized constitutional problems.

#### A. Public Health Programs

Six years ago, in a highly publicized action, the national Centers for Disease Control and Prevention ("CDC") issued a compulsory isolation order to an Atlanta attorney named Andrew Speaker.<sup>101</sup> Speaker had been diagnosed (incorrectly, it turned out) with a rare form of drug-resistant tuberculosis.<sup>102</sup> Fearful that this disease might spread, the CDC subjected Speaker to isolation under 42 U.S.C. § 264, a federal statute adopted pursuant to the Commerce Clause.<sup>103</sup> In effect, the statute authorizes the agency to mandate, at a minimum, the sequestration and examination of patients who threaten to spread diseases across state or national borders.<sup>104</sup>

*NFIB* raises new questions about the constitutionality of § 264 and similar laws. Is an isolation order properly characterized as a prohibition or a mandate? Assuming it is otherwise a prohibition, does it become a mandate if accompanied by a requirement that the patient report to a particular location, submit to a physical examination, receive medical treatment, or wear a respiratory mask? Is the exertion of federal control over someone like Speaker subject to challenge be-

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<sup>100</sup> See, e.g., Thomas E. Ricks, Op-Ed., *Let's Draft Our Kids*, N.Y. TIMES, July 10, 2012, at A21 (proposing that every eighteen-year-old work on behalf of the nation for eighteen months).

<sup>101</sup> See, e.g., Vikki Valentine, *A Timeline of Andrew Speaker's Infection*, NPR (June 6, 2007), <http://www.npr.org/news/specials/tb/>.

<sup>102</sup> See *id.*

<sup>103</sup> See Ctrs. for Disease Control & Prevention, *Legal Authorities for Isolation and Quarantine* (June 28, 2013), <http://www.cdc.gov/quarantine/aboutlawsregulationsquarantineisolation.html> (explaining constitutional authority for the law).

<sup>104</sup> See Public Health Service Act § 361(d), 42 U.S.C. § 264(d) (2012) (allowing the Surgeon General to make regulations authorizing the "apprehension and examination" of individuals with infectious diseases, who can be detained until no longer infectious).

cause it regulates (to use the joint opinion writers' phrase) "mere breathing in and out"?<sup>105</sup> Should it matter that the subject of the order may soon cross, or has recently crossed, state or national borders?<sup>106</sup>

A kindred line of questioning made an appearance during oral argument in the health care case. Expressing concern about invalidating the minimum coverage provision, Justice Breyer asked counsel for the law's challengers whether, "if it turned out there was some terrible epidemic sweeping the United States, . . . you'd say the Federal Government doesn't have the power to get people inoculated."<sup>107</sup> Counsel replied: "[N]o, they couldn't do it."<sup>108</sup> This exchange highlights the now-looming question whether Congress could invoke the commerce power to require all citizens, or a portion of the general population, to receive injections or take other unwanted steps to stem the spread of a devastating disease.

How would such a program fare under our four-factor analysis? To begin with, it would present acute problems of inescapability because individuals would have to submit to it regardless of personal choice. Meanwhile, the relatedness factor would not operate here (at least in an ordinary sense) precisely because the mandate is inescapable. Put another way, what makes a mandate inescapable is that it operates independently of any condition that is based on the voluntary conduct of the mandate's target. And what determines relatedness is the nexus between the legally imposed mandate and the voluntary conduct that triggers its operation. Because in this case (as in other cases of pure inescapability) there is no voluntary conduct in the picture, the question of relatedness simply falls away.<sup>109</sup>

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<sup>105</sup> *NFIB*, 132 S. Ct. 2566, 2643 (2012) (joint dissent).

<sup>106</sup> See COENEN, *supra* note 8, at 38–39, 64–70 (discussing potentially broad congressional power to prevent interstate shipment of persons and goods).

<sup>107</sup> Transcript of Oral Argument at 86–87, *Dep't of Health & Human Servs. v. Florida*, 132 S. Ct. 2566 (2012) (No. 11-398) [hereinafter Oral Argument], available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/11-398-Tuesday.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-398-Tuesday.pdf).

<sup>108</sup> *Id.* at 87. The reason, he explained, is that Congress cannot act under the commerce power simply to generate "beneficial downstream effects" on commerce, as shown (so it was said) by the Court's earlier decision invalidating a federal ban on gender-based violence. See *id.* at 88 (referring to *United States v. Morrison*, 529 U.S. 598, 617 (2000), which rejected regulation of "noneconomic . . . conduct based solely on that conduct's aggregate effect on interstate commerce"). After all, counsel explained, the Court intervened in that case even though Congress had addressed a subject that exerts a "very profound effect" on national health and commerce. *Id.* at 88.

<sup>109</sup> It bears emphasis that there are potentially complicating factors here. As to inescapability, one might note that some public health interventions will target only persons who have already contracted diseases (as was the case with Mr. Speaker). See *supra* note 101 and

As a result, application of the four-factor analysis in cases of this kind will quickly move to consideration of invasiveness and policy sensitivity. The invasiveness factor offers room for argument on each side when it comes to federal public health programs, particularly the sort of inoculation measures described by Justice Breyer.<sup>110</sup> Some analysts will deem these programs highly invasive because they involve an unconsented-to affront to a person's body,<sup>111</sup> in contravention of generally governing norms of tort and constitutional law.<sup>112</sup> Others, however, will say that even mandated inoculations involve only a momentary and limited intrusion—especially if the safety of the treatment has already been established and its side effects are demonstrably minor. In the end, as Justice Breyer's question suggests, many judges are likely to accord controlling effect to policy sensitivity in this context. Along the way, they might well emphasize that protections of bodily integrity often give way to countervailing public needs.<sup>113</sup> And here, a program of compulsory inoculation might safeguard the health of the entire American workforce, or even stave off economic collapse.

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accompanying text. Moreover, some such persons may have engaged in risky behavior that resulted in the infection, thus raising questions about whether the condition that triggered the mandate should be characterized as inescapable, even if it was not a desired object of a personal choice. As to relatedness, some mandates will be conditioned on facts that bear no relationship to voluntary choices—including when a duty to receive treatment is conditioned on having a disease, or unluckily happening to be located in a small geographic area. Courts applying the anti-mandate principle may well take account of the degree of relatedness between these sorts of conditions and the federal mandate. (For example, it would make little sense for the federal government to extend a curative mandate properly directed at already-ill persons to large numbers of others who are not ill at all.) Our hypothesized case involving wide-scale prophylactic inoculations, however, does not involve this type of relatedness question.

<sup>110</sup> See *supra* note 107 and accompanying text.

<sup>111</sup> See *Missouri v. McNeely*, 133 S. Ct. 1552, 1558 (2013) (noting that drawing blood to test for alcohol implicates concerns of bodily integrity).

<sup>112</sup> See *Washington v. Glucksberg*, 521 U.S. 702, 724 (1997) (describing the relationship between informed consent and the common law tort of battery); *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 269–70, 282–86 (1990) (recognizing traditional requirement of consent for medical treatment); *Rochin v. California*, 342 U.S. 165, 174 (1952) (ruling that the taking of capsules from stomach of arrestee violated Fourteenth Amendment); see also Greene, *supra* note 71, at 97 (“[F]orced vaccination implicates bodily integrity and so is arguably more intrusive than a forced insurance purchase . . .”). In addition, at least if it required targeted populations to contribute to the cost of treatment, such a program would operate to “compel individuals . . . to purchase an unwanted product.” *NFIB*, 132 S. Ct. 2566, 2586 (2012) (opinion of Roberts, C.J.).

<sup>113</sup> See, e.g., *Schmerber v. California*, 384 U.S. 757, 770–72 (1966) (upholding a blood test to check defendant's blood alcohol concentration where the officer might have reasonably perceived an emergency and the test was performed in a reasonable manner; reasoning that “the Constitution does not forbid the States minor intrusions into an individual's body under stringently limited conditions”).

As we have seen, however, many courts may care little about policy arguments of this kind, opting instead for a more formal inquiry into whether compulsory inoculation involves the use of a “great substantive” or only an “incidental” power.<sup>114</sup> And there is language in the health care decision that will offer aid to challengers of even the most critical public health measure. As the Chief Justice observed: “The peculiar circumstances of the moment may render a measure more or less wise, but cannot render it more or less constitutional.”<sup>115</sup> The current Court, or some future Court, could draw upon this rhetoric in rejecting appeals on behalf of an inoculation program designed to stem even a looming catastrophe.

Under modern conditions of urban living, the globalization of markets, and routine international travel, the dangers posed by transmittable maladies such as “bird flu” or SARS are increasingly grave.<sup>116</sup> Moreover, our history shows that courts—notwithstanding the rhetoric of the Chief Justice in *NFIB*—often moderate the operation of constitutional constraints in the face of pressing public needs.<sup>117</sup> It thus may be that future rulings on public health programs will hinge on contextual considerations, including the level of threat to the national economy.<sup>118</sup> In all cases, however, *NFIB* will present new obstacles to crafting federal responses to contagious diseases.

### B. Problems with Possession Bans

In *United States v. Lopez*,<sup>119</sup> the Court struck down a federal ban on the possession of guns in or near a school.<sup>120</sup> The law, the Court reasoned, exceeded the commerce power because it targeted

<sup>114</sup> See *NFIB*, 132 S. Ct. at 2592–93 (opinion of Roberts, C.J.) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 411, 418 (1819)).

<sup>115</sup> *Id.* at 2579 (quoting John Marshall, *A Friend of the Constitution No. V*, ALEXANDRIA GAZETTE, July 5, 1819, reprinted in JOHN MARSHALL’S DEFENSE OF *McCulloch v. Maryland* 184, 190–91 (Gerald Gunther ed., 1969)).

<sup>116</sup> See, e.g., David Quammen, Op-Ed., *The Next Pandemic: Not If, but When*, N.Y. TIMES, May 10, 2013, at A29 (highlighting the ease with which illnesses may spread in light of globalization).

<sup>117</sup> See, e.g., *Korematsu v. United States*, 323 U.S. 214, 219–20 (1944) (upholding conviction of a Japanese-American for violating a wartime relocation order, notwithstanding application of “strict scrutiny” to an ethnicity-based program that impinged on fundamental rights).

<sup>118</sup> See Mark A. Hall, *Constitutional Mortality: Precedential Effects of Striking the Individual Mandate*, 75 LAW & CONTEMP. PROBS. 107, 107 (2012) (describing as “chilling” the potential loss of life if the federal government cannot impose public health mandates); Weiner, *supra* note 10, at 76 (arguing that courts are not likely to impede the federal government’s handling of crises, such as a pandemic).

<sup>119</sup> *United States v. Lopez*, 514 U.S. 549 (1995).

<sup>120</sup> See *id.* at 567–68.



noneconomic activity.<sup>121</sup> In *Gonzales v. Raich*,<sup>122</sup> however, the Court limited the holding of *Lopez* when it sustained a federal prohibition on possessing marijuana.<sup>123</sup> The Court reasoned that the marijuana law was distinguishable from the gun law because it helped to effectuate companion restrictions on drug selling and buying as part of a “comprehensive regulatory regime.”<sup>124</sup> *Raich* opened the door for the enactment of federal possession bans of many sorts. On one reading of the decision, Congress can evade the trap laid down in *Lopez* so long as it couples any ban on possessing any good with restrictions on its sale and purchase.<sup>125</sup>

The Court’s ruling in *NFIB*, however, may create an exception to the exception set forth in *Raich*. Indeed, it may create two such exceptions—one involving the phase-in of new possession bans and the other involving the regulation of possession that follows innocent acquisition of a controlled item.

### 1. Possession Ban Phase-Ins

Assume that tomorrow Congress passes a law that prohibits, for the first time, the possession—as well as the purchase and sale—of a recently engineered recreational drug named “chemo-pot.” Assume also that, on the day the law takes effect, John Q. Schmoeky (like many others) is in possession of this intoxicant. In light of *Raich*, we can declare with confidence that the new law is constitutional as applied to persons who knowingly take possession of the banned substance after the law’s effective date. But what about Schmoeky? Must he get rid of the chemo-pot he already possessed when the law took hold? After *NFIB*, the answer is not clear. If Schmoeky is prosecuted for continued possession, he will argue that the law is unconstitutional as applied to him because it subjects him to an individual mandate—that is, a mandate to take affirmative steps to rid himself of the now-banned substance. Put another way, he will argue that the

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<sup>121</sup> See *id.* at 567 (emphasizing that “possession of a gun in a local school zone is in no sense an economic activity”).

<sup>122</sup> *Gonzales v. Raich*, 545 U.S. 1 (2005).

<sup>123</sup> See *id.* at 23–25.

<sup>124</sup> See *id.* at 27.

<sup>125</sup> See, e.g., *United States v. Rose*, 714 F.3d 362, 371 (6th Cir. 2013) (describing in broad terms the operation of *Raich* to authorize possession bans—here, of child pornography); *United States v. Henry*, 688 F.3d 637, 641 (9th Cir. 2012) (indicating that the principle of *Raich* extends to guns with a unique design, thus covering more than fungible items); *United States v. Rene E.*, 583 F.3d 8, 18 (1st Cir. 2009) (relying on *Raich* to declare that bans on gun possession “suppress[] demand and therefore [are] an essential part of regulating the national market in firearms”).

new law runs afoul of the commerce power because it punishes mere “inactivity” in the form of failing to dispose of chemo-pot after the new law comes into effect.<sup>126</sup>

Schmoeky’s argument might go up in smoke. Some judges, for example, will say that the chemo-pot statute does not subject Schmoeky to a mandate at all because on its face it imposes a criminal prohibition—indeed, the very common form of criminal prohibition that bars the possession of a particular intoxicant. They might add that the prohibition label fits comfortably because Schmoeky’s post-effective-date possession constitutes an action—indeed, the *actus reus* of the crime.<sup>127</sup> At the least, the chemo-pot statute is distinguishable from the previously considered federal inoculation and national service programs because every application of those programs involves the imposition of an individual mandate in a direct and uncomplicated form. The Schmoeky case, in contrast, involves an effort to argue that a generally valid prohibitory statute operates in practical effect to impose a mandate only as applied to the limited number of cases that involve pre-enactment chemo-pot acquisition.

But so what? The Court often has recognized that particular applications of statutes may be unconstitutional even if the statute can stand as a general matter.<sup>128</sup> The Court also has declared that judicial inquiries should focus not on the form of a statute but on its “practical operation.”<sup>129</sup> Based on these principles, Schmoeky will argue that the new law, as applied to him, is unconstitutional because, as a functional matter, it mandates that he get rid of his chemo-pot.

Assume that a court concludes that the new chemo-pot statute does impose a mandate on persons such as Schmoeky. How would the challenge to his prosecution hold up under the four-factor analysis

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<sup>126</sup> See *NFIB*, 132 S. Ct. 2566, 2590 (2012) (opinion of Roberts, C.J.); *United States v. Alexander*, 516 F. App’x 368, 369 (5th Cir. 2013) (noting claim by defendant, though not properly raised below, that after *NFIB*, “possession, to be considered ongoing commerce, must be tethered to some requirement that the firearm has been purchased, sold, or transported within a specified time period”); see also Yung, *supra* note 85, at 850–51 (arguing more generally that “possession crimes do not actually punish any affirmative conduct”).

<sup>127</sup> See *United States v. Roszkowski*, 700 F.3d 50, 58 (1st Cir. 2012) (“In stark contrast to the individual mandate in *Sebelius*, [possession] statutes do not ‘compel[ ] individuals to become active in commerce’; rather, they *prohibit* affirmative conduct that has an undeniable connection to interstate commerce.”) (second alteration in original).

<sup>128</sup> See, e.g., *Moore v. City of E. Cleveland*, 431 U.S. 494, 495–99, 504–06 (1977) (holding unconstitutional the application of a generally valid city housing ordinance because it prevented a cousin from living with his extended family).

<sup>129</sup> *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359, 363 (1941). Indeed, both of these principles figured prominently in *NFIB* itself. See, e.g., *NFIB*, 132 S. Ct. at 2595, 2597–98.

put forward here? As to escapability, an uncaredful analyst might assert that the chemo-pot ban is readily escapable because Schmoeky can simply throw his drugs in a waste basket. But that analysis reflects confusion. Put simply, if the chemo-pot possession statute imposes a mandate on Schmoeky, the only way to “escape” it is to comply with it by disposing of the drugs. Such a mandate—that is, one whose sting can be avoided only by compliance—is in its nature marked by pure inescapability.

This is not to say, however, that ease of compliance with a mandate counts for nothing in cases of this kind. In fact, it does count because it bears on the question of invasiveness. If the law imposes a mandate, but that mandate is no big deal, then concerns about individual liberty become a matter of reduced importance. In the case of Schmoeky, for example, it may well be that disposing of chemo-pot is so costless—and therefore so lacking in invasiveness—that any mandate as applied to him is constitutional notwithstanding *NFIB*.

Considerations of policy sensitivity offer support for the same conclusion. First, it may be fair to apply a disposal mandate to Schmoeky on the theory that a later outlawing of the chemo-pot was reasonably foreseeable on the date of acquisition precisely because of its intoxicating qualities.<sup>130</sup> There is a second point, too. The ruling in *Raich* found support in a practical concern about difficulties faced by the government in regulating fungible contraband, and this same concern may complicate Schmoeky’s effort to elude prosecution.<sup>131</sup> This complication arises because if Schmoeky’s mandate argument succeeds, the resulting judicial ruling will have spillover effects that protect defendants who never were subjected to a mandate at all. This is the case because an embrace of Schmoeky’s theory in effect will re-

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<sup>130</sup> Compare *Am. Trucking Ass’n v. Smith*, 496 U.S. 167, 182 (1990) (“Where a State can easily foresee the invalidation of its tax statutes, its reliance interests may merit little concern . . .”), with *Chevron Oil Co. v. Huson*, 404 U.S. 97, 105–09 (1971) (refusing to retroactively apply a state’s statute of limitations where the “superseding legal doctrine . . . unforeseeabl[y] . . . overruled a long line of decisions”). Notably, one might argue that the foreseeability of the possession law renders the posited chemo-pot disposal mandate one that was escapable, or at least outside the universe of mandates marked by *pure* inescapability. In my view, courts are not likely to go down this path. To do so, after all, they would have to conclude that a mandate was somehow escapable before the mandate even came to exist.

<sup>131</sup> See *Gonzales v. Raich*, 545 U.S. 1, 22 (2005); cf. *Andrus v. Allard*, 444 U.S. 51, 58 (1979) (noting, in upholding a generalized ban on the sale of eagle feathers, that “feathers recently taken can easily be passed off as having been obtained long ago”). Apart from questions under the commerce power, application of possession bans to items acquired before a statute is enacted may raise issues under the Takings Clause. See *Andrus*, 444 U.S. at 65 (noting, in this regard, that regulations that banned the future sale of already acquired bird feathers did “not compel the surrender of the artifacts”).

quire prosecutors to prove an element of the chemo-pot possession crime that is not set forth in the statute itself—namely, an element that concerns the date of acquisition. And prosecutors may often lack an ability to rebut the claims of defendants that they secured the contraband before the ban on its possession took effect. In short, *NFIB* could foreclose federal prosecutions for many properly prosecutable possessory crimes because, while possession itself might be easy to prove, the date of taking possession might not be.

As usual, there is a case to be made on the other side. As to invasiveness, for example, it may be that disposing of chemo-pot is far from costless, because acquiring even small amounts required substantial cash outlays or because a particular possessor acquired (at whatever per-unit price) an unusually large supply prior to enactment of the possession ban. Even absent these complications, some analysts will view application of the new statute to Schmoeky as deeply unfair on the theory that it involves a form of retroactive lawmaking.<sup>132</sup> At the least, they will say, Congress should have built into the new prohibition a phase-in period, so as to allow most chemo-pot possessors (including Schmoeky) to use up the product they had legally purchased before the ban kicked in. Here, as elsewhere, it is hard to predict how courts will sort through this jumble of considerations. The Schmoeky case, however, reveals one key point: Although individuals and groups often identified as “conservative” led the charge against the so-called “Obamacare” program, the commerce-power ruling they secured in *NFIB* now lies open for use by individuals and groups often identified as “liberal,” including defense lawyers bent on reining in the nation’s drug laws.

## 2. *Innocent Receipt of Contraband*

It is not unusual for authorities to prosecute possessory crimes on the theory that the defendant “was aware of his control [of the item] for a sufficient period to have been able to terminate his possession.”<sup>133</sup> These cases may involve claims by defendants that they came into possession of the banned substance in a nonculpable way. A corrupt law enforcement officer, for example, might sneak an illegal fire-

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<sup>132</sup> See *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994) (“[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence.”); cf. Bradley Scott Shannon, *The Retroactive and Prospective Application of Judicial Decisions*, 26 HARV. J.L. & PUB. POL’Y 811, 812–14 (2003) (recognizing an unfairness argument to “retroactive application of judicial decisions” based on a reliance interest in the “old” law).

<sup>133</sup> See MODEL PENAL CODE § 2.01(4) (1962).

arm into a passerby's coat pocket, or a passenger might throw a bag of cocaine into the hands of the driver while suddenly exiting a car. Under governing law, if the passerby or driver thereafter retains possession of the transferred item, each may be guilty of a federal offense. Federal law, after all, outlaws knowing possession; it does not require as an element of the offense that the defendant initiated the possessory act.<sup>134</sup>

*NFIB* gives rise to a new constitutional question in cases of this kind. The question is this: Once a person learns of the holding of contraband that the person involuntarily acquired, must that person take affirmative steps to get rid of it to avoid prosecution for the possessory crime? In the wake of *NFIB*, defendants will argue that the answer is no. To require such action, they will say, would impose an individual mandate in that it would punish the defendant for "doing nothing."<sup>135</sup> They have a point. We have just seen why a plausible argument exists for applying the anti-mandate principle to possessory-crime cases in which defendants acquired drugs innocently because no prohibition existed when the taking of possession occurred. No apparent reason suggests why that form of innocent acquisition is functionally different from the manner of innocent acquisition present in our uninvited-delivery cases. The argument for applying the mandate label thus seems similarly plausible in both settings.<sup>136</sup>

There are also several overlaps in applying our four-factor review to the two cases. To begin with, each case seems to involve pure inescapability and a resulting inoperativeness of the relatedness factor. Likewise, in both contexts, there is reason to assume that the degree of invasiveness is small because dispossessing oneself of drugs or other contraband seems (at least as a general matter) easy to do. As to policy sensitivity, cross-cutting considerations are at work. On the one

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<sup>134</sup> See, e.g., *United States v. Sabhnani*, 599 F.3d 215, 238 n.13 (2d Cir. 2010) ("[O]ne could violate [the statute] by forming the specific intent to possess the immigration documents of another while having knowing control over them . . . without taking any affirmative act."); *United States v. Holloway*, 744 F.2d 527, 532 (6th Cir. 1984) (finding that knowing and purposeful possession of heroin, regardless of the manner or purpose of acquisition, was sufficient to establish a violation of the possession ban set forth in 21 U.S.C. § 844(a)).

<sup>135</sup> See *NFIB*, 132 S. Ct. 2566, 2587 (2012) (opinion of Roberts, C.J.).

<sup>136</sup> See, e.g., Yung, *supra* note 85, at 852 (suggesting, among other things, that finding the minimum coverage provision unconstitutional would raise difficulties in prosecuting persons who "come to acquire marijuana plants on their property simply by natural forces" if such a person "does not take action to destroy the illegal plants" after learning of their presence); see also Weiner, *supra* note 10, at 86 n.66 (in assessing the constitutionality of a hypothesized environmental law, asserting that "[h]aving a chimney is not 'activity' under any common meaning of the word").

hand, unlike in Schmoeky-type situations, cases of uninvited possession never arise out of the voluntary acquisition of a now-banned item. Ridding oneself of contraband in these cases thus does not call for—as was the case with Schmoeky—throwing away the fruits of one’s innocently-expended, hard-earned cash. On the other hand, the person caught in the law’s web in uninvited-possession cases has no choice but to take possession of the goods, whereas the acquirer of the later-illegalized items in Schmoeky-type cases at least acted voluntarily in taking possession before the prohibition took hold. What is more, as we have seen, this distinction could have particular significance in a case such as Schmoeky’s, on the ground that he might reasonably have foreseen the government’s later decision to outlaw chemo-pot.<sup>137</sup>

Fact-specific complications may also arise. For example, disposal of contraband will be distinctively problematic in some uninvited-delivery cases—as when receipt of the banned goods comes from a violence-prone acquaintance who might later seek to reclaim them. As a general rule, however, cases that involve application of possession bans in the uninvited-delivery context appear to be unlikely candidates for successful invocation of the *NFIB* anti-mandate principle. As we have seen, courts might well conclude that these cases do not involve application of a mandate at all.<sup>138</sup> And if courts do find a mandate to be operating, they might emphasize (as in *Raich*) the need to ensure the effectiveness of companion purchase and sale prohibitions,<sup>139</sup> especially because no “investment-backed expectations” are in the picture.<sup>140</sup>

### C. *Limits on the Federal Takings Power*

In *Kelo v. City of New London*,<sup>141</sup> the Supreme Court divided sharply on an issue that aroused intense public reaction: Can the government force a private citizen to surrender her home—even for just compensation—to provide land for a private development project designed to broaden the employment and tax base of an economically depressed community?<sup>142</sup> In the case, Susette Kelo argued that this form of forced transfer, in effect from one private person to another,

<sup>137</sup> See *supra* note 130 and accompanying text.

<sup>138</sup> See *supra* note 127 and accompanying text.

<sup>139</sup> See *supra* note 131 and accompanying text.

<sup>140</sup> See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 123–31 (1978) (focusing on this consideration in applying the Fifth Amendment’s Takings Clause).

<sup>141</sup> *Kelo v. City of New London*, 545 U.S. 469 (2005).

<sup>142</sup> See *id.* at 472.

did not qualify as a “public use” for purposes of the Fifth Amendment’s Takings Clause. In a five-to-four decision, however, the Court disagreed, thus holding that no unconstitutional taking had occurred.<sup>143</sup>

At first glance, *Kelo* seems far-removed from the health care case. But first glances can be deceiving. To begin with, the Court in *Kelo* dealt with a forced transfer of land by an objecting homeowner, and so conventional understanding suggests that the case involved an individual mandate. Put another way, it seems very strange to describe the government’s action in *Kelo* as imposing a prohibition—that is, a prohibition on the homeowner’s continued ownership of the homeowner’s own home. To be sure, *Kelo* itself did not bring into play the commerce-power-driven anti-mandate principle because the compelled transfer in that case was undertaken by an arm of a state—rather than the federal—government. Takings undertaken pursuant to congressional authorization, however, are at least potentially subject to the anti-mandate principle, even if they are not subject to a Fifth Amendment challenge because of *Kelo*’s accommodating treatment of the public use requirement.

Moreover, federal authorities might well pursue the taking of property to facilitate private development efforts. Consider, for example, a federally ordered surrender of homes located on land targeted by the federal government to facilitate the building of a privately owned nuclear power plant; to put in place an industrial park to support the operations of such a nuclear power plant or some other multistate business operation; or to make way for construction of a privately owned factory, shipping hub, or major office-building complex to kick-start interstate trade (much as was the case in *Kelo* itself).<sup>144</sup> Given *Kelo*, any one of these programs should satisfy the “public use” requirement of the Fifth Amendment. Also, under modern Commerce Clause doctrine, each of these programs could be seen as involving “economic activity” that substantially affects interstate commerce, thus satisfying traditional pre-*NFIB* commerce power requirements.<sup>145</sup> But would the forced transfer of homes by their pri-

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<sup>143</sup> See *id.* at 484.

<sup>144</sup> See *supra* notes 142–43 and accompanying text.

<sup>145</sup> See *Gonzales v. Raich*, 545 U.S. 1, 15–22 (2005) (“Our case law firmly establishes Congress’ power to regulate purely local activities that are part of an economic ‘class of activities’ that have a substantial effect on interstate commerce.”). In addition, even if such mandates were deemed to target something other than “economic activity,” thus rendering them unjustifiable under a typical post-*Lopez* application of the “substantial effects” test, they might be deemed

vate-citizen owners qualify as an individual mandate that is constitutionally out of bounds under *NFIB*?

Not surprisingly, defenders of the ACA's individual mandate argued that its challengers should fail because the Court had long countenanced mandates in the form of federal takings implemented pursuant to the commerce power—for example, to facilitate the building of roads and canals.<sup>146</sup> In dealing with this argument, the four joint opinion writers employed some fancy analytical footwork. In effect, they asserted that a taking of property does not involve an individual mandate because it operates in rem (that is, against the property), rather than in personam (that is, against the individual).<sup>147</sup> This line of reasoning, if read for all it is worth, would exempt *Kelo*-type takings from attack under *NFIB* on the theory that such takings involve in rem actions against homeowners' properties no less than the most orthodox exercises of the power of eminent domain. In other words, if the principle of *NFIB* focuses on whether property condemnations are in their nature in rem (rather than in personam) proceedings, then the sort of use for which the taken property is condemned—that is, for roads or canals and the like, or for commerce-stimulating private development as in *Kelo*—should be beside the point.

But there is no guarantee that either the current Court or a future Court would read this in rem reasoning for all that it is worth. Neither the Chief Justice nor the joint opinion writers declared that *every* exercise of the eminent domain power that satisfies the now-embracing “public use” standard under the Fifth Amendment is exempt from invalidation under *NFIB*'s anti-mandate principle. In a later case, the Court therefore might say that any otherwise applicable in rem exception to the anti-mandate principle of *NFIB* simply does not apply to takings that in effect force one private party to transfer property to another private party. Alternatively, the Court might say that, even if *Kelo*-type takings have an in rem character, they still can fail to qualify as “proper” exercises of the Necessary and Proper Clause.<sup>148</sup> The bottom line is this: Many Americans sense that the sort of growth-stimulating takings exemplified by *Kelo* differ in a qualitative way from more traditional condemnations undertaken, for example, to build a bridge or a park, or even to do away with “blighted urban

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defensible as permissibly “necessary and proper” steps for pursuing the larger federal project. See *id.* at 36–37 (Scalia, J., concurring in the judgment).

<sup>146</sup> See, e.g., Hall, *supra* note 17, at 1856–57 (raising this argument).

<sup>147</sup> See *NFIB*, 132 S. Ct. 2566, 2649 n.3 (2012) (joint dissent).

<sup>148</sup> See *supra* notes 41–48 and accompanying text.



areas.”<sup>149</sup> Building on this idea, the Court might jump at the chance to invoke *NFIB* to restrict *Kelo*-type takings undertaken by the federal government.<sup>150</sup>

So what about *Kelo*-type takings and our four-factor analysis? As to escapability, one could say that every acquirer of land (or perhaps every acquirer of any kind of property) takes title with the knowledge that the government might later condemn it. But it surely was not on Ms. Kelo’s radar screen when she took title to her house that the City of New London would later force her to sell it so that a major pharmaceutical firm could build a sprawling business complex in the area. To say that mandates of this sort are escapable because would-be land buyers can choose never to buy land is a bit like saying that bad experiences are escapable because one can choose to live in a bubble. Thus, except in extraordinary cases, the argument for characterizing a *Kelo*-type land-transfer mandate as inescapable is strong as a matter of conventional understanding.<sup>151</sup>

What about invasiveness? In cases of this kind, the magnitude of invasiveness will often be of the highest order. *Kelo* itself involved the taking of a person’s home, and the Court has often recognized the deep connection between one’s home and one’s identity and autonomy.<sup>152</sup> In addition, the forced loss of one’s home—and the intangible sense of security and connectedness it engenders—may not be susceptible to meaningful recompense,<sup>153</sup> particularly when the law requires the government to pay no more than market value as “just compensa-

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149 See *Berman v. Parker*, 348 U.S. 26, 34–36 (1954) (upholding such takings as consistent with the public use requirement); see also *Kelo v. City of New London*, 545 U.S. 469, 497–501 (2005) (O’Connor, J., dissenting) (distinguishing the taking in *Kelo* from takings to create public ownership or relieve blight).

150 See *NFIB*, 132 S. Ct. at 2587 n.5 (opinion of Roberts, C.J.) (suggesting that a distinction may exist between “a commercial transaction between the landowner and the Government” and “a government-compelled transaction between the landowner and a third party”).

151 See *id.* at 2621 (Ginsburg, J., concurring in part and dissenting in part) (describing land owners subjected to government takings as “inactive”).

152 See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (emphasizing the “extent of the liberty at stake” when laws reach into “the most private of places, the home”); *O’Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 792 & n.2 (1980) (Blackmun, J., concurring in the judgment) (emphasizing the “substantial force” of asserted property interests in a home and the historically significant role of the home at the “center” of the interests protected by due process protections); *Stanley v. Georgia*, 394 U.S. 557, 565 (1969) (recognizing the “drastic invasion of personal liberties guaranteed by the First and Fourteenth Amendments” effected by the enforcement of otherwise justifiable obscenity statutes when the enforcement “reach[es] into the privacy of one’s own home”).

153 See *Kelo*, 545 U.S. at 521 (Thomas, J., dissenting) (“[N]o compensation is possible for the subjective value of these lands to the individuals displaced and the indignity inflicted by uprooting them from their homes.”).

tion.”<sup>154</sup> As a result, at least in cases that involve the taking of an individual’s home, the argument for characterizing the government’s action as involving a significant measure of invasiveness carries much weight.

Policy sensitivity also may present a problem for federal authorities in cases of this kind. To begin with, *Kelo*-type takings are probably unusual at the federal level, thus reinforcing the suggestion that the homeowner will have had no meaningful notice at the time of purchase that a later compelled dispossession might occur.<sup>155</sup> On the other hand, the government will argue that such takings may pave the way for generating wide-ranging public benefits.<sup>156</sup> But skeptics will respond—as did Justice Thomas in *Kelo* itself—that *Kelo*-style takings tend to place the greatest burdens on poor citizens and racial minorities, while benefitting the politically savvy and well-heeled mega-corporations.<sup>157</sup> There is no way to know how these cross-cutting considerations will play out in the end. But it would come as no surprise if the five Justices who joined together to rein in the commerce power in *NFIB* sought one day to leverage that precedent to cut down on *Kelo*’s impact at the federal level.

#### IV. CONDITIONAL MANDATES

Federal law requires persons to take many actions they do not wish to take. Environmental laws require polluters to install abatement equipment.<sup>158</sup> Workplace safety laws require factories to file accident reports.<sup>159</sup> Consumer protection laws require pharmacies to

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<sup>154</sup> See, e.g., *United States v. Miller*, 317 U.S. 369, 373–74 (1943) (noting that “just compensation,” for Takings Clause purposes, means “fair market value”).

<sup>155</sup> See *supra* note 130 and accompanying text.

<sup>156</sup> See *Kelo*, 545 U.S. at 483–89 (noting the longstanding judicial practice of “affording legislatures broad latitude in determining what public needs justify the use of the takings power,” by deferring to government decisions “as to what lands it needs” to further the public interest).

<sup>157</sup> See *id.* at 521–22 (Thomas, J., dissenting). This argument builds on *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), which recognized the possibility of a “more searching judicial inquiry” for legislation directed at “discrete and insular minorities” otherwise confronted with special difficulties in protecting themselves via the normal “political processes.” *Id.* at 152 n.4.

<sup>158</sup> See, e.g., EPA Air Programs Rule, 40 C.F.R. § 62.14356 (2013); see also Driesen, *supra* note 17 (“[T]he government has the authority to order a company to install a pollution control device. Does use of this authority compel a firm . . . to become a market participant against their will in violation of the health care ruling?”).

<sup>159</sup> See, e.g., OSHA Recording and Reporting Occupational Injuries and Illnesses Rule, 29 C.F.R. §§ 1904.4–.7, .46 (2013).

label prescription drugs.<sup>160</sup> Gun laws require sellers to undertake background checks.<sup>161</sup> Securities laws require disclosure of information that is material to investment decisions.<sup>162</sup> Product safety laws require recalls of dangerous items.<sup>163</sup> And on and on.

The challengers of the ACA argued that all of these measures were distinguishable from the individual mandate because none of them operated to create commerce;<sup>164</sup> instead, each of these laws targeted persons that were “already” engaged in commercial transactions.<sup>165</sup> Chief Justice Roberts’s opinion sounded in the same key. He reasoned that “[t]he language of the Constitution reflects the natural understanding that the power to regulate assumes there is *already something* to be regulated.”<sup>166</sup> Thus: “As expansive as our cases construing the scope of the commerce power have been, they all have one thing in common: They uniformly describe the power as reaching ‘activity.’”<sup>167</sup> Put another way, if the federal government conditions the operation of a mandate on engaging in commercial activity of some sort, the case for applying any anti-mandate rule is greatly weakened. In short, conditional mandates, if they qualify as mandates at all, are in their nature very different from, and more defensible than, unconditional mandates.

But just how different and more defensible? Some observers might suppose that the distinction reaches so far as to save all conditional mandates, at least if their operation is triggered by engagement in commercial activity.<sup>168</sup> For many analysts, however, it will not work to say that any act of participating in commerce opens the door to the imposition of any federal contractual mandate.<sup>169</sup> Indeed, *NFIB* itself

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<sup>160</sup> See, e.g., FDA Labeling Rule, 21 C.F.R. §§ 201.50–.58 (2013).

<sup>161</sup> See, e.g., ATF Firearms and Ammunition Rule, 27 C.F.R. § 478.102 (2014).

<sup>162</sup> See, e.g., SEC Regulation FD, 17 C.F.R. § 243.100 (2013).

<sup>163</sup> See, e.g., 15 U.S.C. § 2064(c)–(d) (2012); see also Consumer Product Safety Commission Substantial Product Hazard Reports Rule, 16 C.F.R. § 1115.25 (2014).

<sup>164</sup> See State Brief, *supra* note 12, at 21–22 (distinguishing a law that “simply *compels* individuals to enter into commerce” from the many “provisions regulating the conduct of individuals who engage in commercial transactions”).

<sup>165</sup> See *id.* at 7–8 (suggesting that an “already-existing activity or undertaking” is “a prerequisite to the exercise of commerce power” (internal quotation marks omitted)).

<sup>166</sup> *NFIB*, 132 S. Ct. 2566, 2586 (2012) (opinion of Roberts, C.J.) (emphasis added).

<sup>167</sup> *Id.* at 2587.

<sup>168</sup> See, e.g., Ann Carlson, *Another (Mostly) Uninformed Post About the Health Care Cases and Environmental Law*, LEGAL PLANET (June 28, 2012), <http://legalplanet.wordpress.com/2012/06/28/another-mostly-uninformed-post-about-the-health-care-cases-and-environmental-law/> (arguing that *NFIB* should not jeopardize environmental laws because they “don’t force people into commerce; instead they attempt to regulate the negative consequences of commerce”).

<sup>169</sup> See, e.g., Dawn Reeves, *Health Care Ruling to Spur Challenges to EPA Air Act Penalty*

is hard to square with this result, because not all insurance-eschewing individuals are subject to the penalty put in place by the ACA; rather (as was noted before), individuals are subject to the individual mandate only if they engage in commerce in such a way that they generate a base level of annual income.<sup>170</sup> Given this feature of the statute, the health care case seems to establish that not every act by which a person opts into commercial activity suffices to subject that person to any form of federal mandate. Common sense supports the same conclusion because few of us never enter into commerce at all. Thus, unless some principle limits the government's power to impose mandates on persons based simply on their participation in commerce, Congress could render the anti-mandate holding of *NFIB* a dead letter by tying any mandate (including a mandate to purchase health insurance) to the acquisition of food, water, transportation, or goods or services of any kind.<sup>171</sup>

Recognizing that some conditional mandates will run afoul of the limiting principle of *NFIB* raises a rich variety of questions because it opens up the possibility of constitutional challenges to many federal statutes and regulations. Here, as elsewhere, predicting the path of the law is tricky. But the ground already covered in this Article suggests the ways in which courts will approach these questions—that is, by focusing on escapability, relatedness, invasiveness, and policy sensitivity.

#### A. *All-But-Inescapable Mandates*

Some conditional mandates imposed on individuals are almost certain to run afoul of *NFIB*'s limiting rule. Consider the famously hypothesized—and unconditional—broccoli-purchase mandate.<sup>172</sup> The five-Justice majority on the commerce power issue was confident

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*Process*, INSIDEEPA.COM (June 28, 2012), <http://insideepa.com/Inside-EPA-General/Inside-EPA-Public-Content/health-care-ruling-to-spur-challenges-to-epa-air-act-penalty-process/menu-id-565.html> (“[C]onservative legal scholars now say the ruling could drive challenges to Clean Air Act provisions . . .”); Jonathan Zasloff, *The Health Care Cases: Instant Uninformed Reaction!!*, LEGAL PLANET (June 28, 2012), <http://legalplanet.wordpress.com/2012/06/28/the-health-care-cases-instant-uninformed-reaction/> (suggesting that “[e]nvironmental lawyers will need to look at this decision very carefully” because, as to environmental regulations, it remains to be seen “[h]ow much the opinion cuts these things back”).

<sup>170</sup> See *supra* notes 86, 90 and accompanying text.

<sup>171</sup> See *NFIB*, 132 S. Ct. at 2648 (joint dissent) (noting that “it is inevitable that each American will affect commerce and become a part of it, even if not by choice”).

<sup>172</sup> See *id.* at 2624 (Ginsburg, J., concurring in part and dissenting in part) (discussing “the broccoli horrible”); see also notes 38, 54 and accompanying text.

that Congress could not enact such a law,<sup>173</sup> and even the four-Justice minority seemed sympathetic to this position.<sup>174</sup> This unconditional broccoli-purchase law, however, could easily be transformed into a conditional mandate. Would a “you-must-buy-broccoli” federal law become constitutional, for example, if Congress applied it only to persons who purchase groceries?

Any effort to answer this question must begin with a recognition that this conditional mandate—precisely because it is a conditional mandate—does not have the characteristic of pure inescapability. Individuals might evade this version of the broccoli-purchase requirement, for instance, by growing food at home or eating out for every meal. Even so, the mandate is marked by an extremely low level of escapability. The critical fact is that nearly all of us buy groceries and have no real choice but to do so.<sup>175</sup> As a result, it smacks of overreaching to say that Congress may freely impose the mandate on its intended targets (that is, virtually all citizens of the United States) because they have voluntarily injected themselves into the commercial sphere of purchasing food products.<sup>176</sup> Put another way, at least with respect to escapability, a mandate placed on all individuals who buy groceries seems all but identical to a mandate placed on everyone. So, if a mandate to buy broccoli made applicable to everyone lies beyond the federal power, it would seem to follow that such a mandate is unconstitutional—or at least presumptively so—even though it applies “only” to grocery buyers.

There is, however, an argument for upholding the all-but-inescapable conditional broccoli-purchase mandate that springs from our second analytical touchstone—that is, the touchstone of relatedness. This argument is available in part because the ACA’s challengers made a significant concession: They never disputed the government’s claim that the federal government could require actual buyers of health care services to pay for those services with insurance, as opposed to paying with cash or credit cards or cows. In other words, the

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<sup>173</sup> See *NFIB*, 132 S. Ct. at 2591 (opinion of Roberts, C.J.) (criticizing the government’s efforts to distinguish the purchasing of “broccoli” and the purchasing of “health insurance”); *id.* at 2650 (joint dissent) (reasoning that the failure to purchase health insurance and the failure to purchase broccoli both qualify as “inactivities” that Congress cannot regulate).

<sup>174</sup> See, e.g., *id.* at 2624–25 (Ginsburg, J., concurring in part and dissenting in part) (distinguishing the broccoli-mandate statute without defending Congress’s power to enact it).

<sup>175</sup> *Id.* at 2590 (opinion of Roberts, C.J.) (“Everyone will likely participate in the markets for food . . . .”); *id.* at 2648 (joint dissent) (“[T]he mere fact that we all consume food and are thus, sooner or later, participants in the ‘market’ for food, does not empower the Government to say when or what we will buy.”).

<sup>176</sup> See *supra* note 171 and accompanying text.

law's challengers accepted the constitutionality of at least one mandate-type law that was unquestionably conditional—that is, a federal law that compelled payment with insurance whenever an individual secures health care services.<sup>177</sup> Notably, this hypothesized mandate carried with it a very high level of inescapability. Indeed, one of the federal government's central arguments in *NFIB* was that the hypothesized must-pay-with-insurance mandate was not functionally distinguishable from the actual must-acquire-insurance-even-now mandate because, as a practical matter, everyone would have to pay for medical care at some future time.<sup>178</sup>

In rejecting the government's argument, the majority in effect found these two laws (that is, a law that requires paying for health services with insurance and a law that requires simply acquiring health insurance) to be distinguishable on relatedness grounds. In particular, both the Chief Justice and the joint opinion writers suggested that a mandate to buy insurance was only loosely tethered to buying health care services because the insurance buyer might never actually secure such services, or at least might not secure them for a long time.<sup>179</sup> In contrast, a requirement that a patient pay for a particular provision of medical care with insurance is directly related to the patient's engagement in commerce because it is a part of the very commercial transaction that triggers the duty to pay. If we were looking to label this relationship, we might say that the pay-with-insurance mandate is marked by *transactional relatedness* because the condition and the duty are part of the very same transaction. In the eyes of all the parties in the health care case, this extremely close form of relatedness between the triggering event (acquiring health care services) and the mandate (to pay for those very services by way of insurance) rendered

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<sup>177</sup> See, e.g., State Brief, *supra* note 12, at 25 (noting a “critical difference between a mandate that individuals obtain insurance and a mandate that individuals who obtain health care services use insurance when they do so”); Oral Argument, *supra* note 107, at 55–57 (conceding that Congress could require payment by way of insurance when an individual secures emergency room services).

<sup>178</sup> See Oral Argument, *supra* note 107, at 12 (“[A]ll this minimum coverage provision does is say that, instead of requiring insurance at the point of sale, that Congress has the authority under the commerce power . . . to ensure that people have insurance in advance of the point of sale because . . . virtually everybody in society is in this market.”).

<sup>179</sup> See *NFIB*, 132 S. Ct. at 2589–90 (opinion of Roberts, C.J.) (rejecting the government's “active in the market” theory by asserting that “[t]he individual mandate's regulation of the uninsured as a class is . . . divorced from any link to existing commercial activity” (internal quotation marks omitted)); *id.* at 2647–48 (joint dissent) (rejecting the government's “essentially universal participation” argument as “not true” because “the Individual Mandate . . . principally consists of goods and services that . . . young people . . . *do not purchase*” (internal quotation marks omitted)).

this hypothesized mandate a permissible exercise of the commerce power, even though it was highly inescapable.<sup>180</sup> And it might seem to follow from this analysis that all conditional mandates marked by transactional relatedness will escape the anti-mandate principle.

Most of them will. There is reason to believe, however, that the Court will not travel all the way down this road. What if, for example, Congress passed a law that required everyone who leases housing to secure health insurance for—but only for—the period of the lease? Would such a law be distinguishable from the law found to exceed the commerce power in *NFIB* because it is marked by transactional relatedness? Some analysts will conclude that the answer is no because housing and health insurance have very little to do with one another. Indeed, one line of argument put forward by the respondents in *NFIB* was that Congress could not tie the present purchase of health insurance to the future acquisition of health care services because health care services and health insurance are sold in different markets.<sup>181</sup> The same thing can be said a fortiori about health care insurance and housing. In short, it is far from clear that the presence of transactional relatedness will always work to place a challenged mandate outside the limiting principle of *NFIB*.

What if a mandate is marked by both transactional relatedness and the imposition of a duty to engage in a transaction in the same market the buyer has entered? This question circles us back to our buy-broccoli-when-you-buy-groceries mandate. Many of us will recoil in horror at the thought of such a law. But this measure is marked by both transactional relatedness and same-market features. In other words, if a “same market” test is decisive when transactional relatedness is present, then our you-must-buy-broccoli-when-you-buy-groceries mandate would seem to pass constitutional muster. The critical point is that broccoli *is* sold in the retail food market. In particular—and unlike with housing and health insurance—broccoli is a potential substitute for other groceries, and vice versa. Thus, one might say that, notwithstanding its high degree of inescapability, our conditional broccoli-purchase mandate is constitutional under the same-market/different-market logic that the challengers of the ACA’s individual mandate themselves advanced.<sup>182</sup>

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<sup>180</sup> See *supra* note 177 and accompanying text.

<sup>181</sup> See State Brief, *supra* note 12, at 25 (“The mandate neither addresses the ‘health care services’ market nor regulates the method of financing purchases in that market.”).

<sup>182</sup> See *supra* note 181.

Overhanging this analysis, however, are two significant complications. First, it may be that broccoli is not traded in the same market—at least in a strong sense—as many other foods—for example, Cheetos or Cap’n Crunch. Second, even if a court concludes that broccoli and other groceries are sold in the same market, that fact alone may not provide the best indicator of relatedness for purposes of the four-factor test. Rather, the operative inquiry might more soundly focus on whether the mandate (here, to buy broccoli) has a connection to the activity that triggers that mandate (here, to buy groceries) in the sense that there is a relation between the two things based on fairness, logic, or the like. From this perspective, there is reason to question the presence of strong relatedness in a mandate to buy broccoli that is conditioned on buying groceries. After all, even if the government sees fit to attach a same-market mandate to the purchase of food, why should it single out broccoli as vegetable-in-chief? What useful purpose does the forced acquisition of this one food source serve? Will the acquisition of this legally celebrated item advance the government’s purpose in some meaningful respect?<sup>183</sup> Put another way, the requirement that individuals pay cash for broccoli whenever they buy groceries has a bizarre and random quality. And it is that quality that raises red flags about the presence of *functional relatedness* between optional grocery buying in general and mandated broccoli buying in particular.

With regard to invasiveness, our conditional broccoli-purchase mandate presents a mixed bag. On the one hand, this mandate raises much the same problem of invasiveness as did the minimum coverage provision because it, too, compels the purchase of an “unwanted product.”<sup>184</sup> Indeed, the magnitude of the affront to liberty may be heightened in the broccoli case, in part because people forced to buy broccoli might have little practical choice, in light of financial constraints, but to eat the broccoli they have purchased. And if that is the case, legal norms that stand against government efforts to dictate what one puts in one’s body might come into play.<sup>185</sup> On the other hand, persons compelled to buy broccoli when they buy groceries do not have to enter an entirely new realm of commerce in a way that forces

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<sup>183</sup> See *NFIB*, 132 S. Ct. at 2623–24 (Ginsburg, J., concurring in part and dissenting in part) (questioning the soundness, and the analogousness to the ACA’s individual mandate, of the hypothetical “vegetable-purchase mandate” because of the “chain of inferences” required “to conclude that [it is] likely to have a substantial effect on . . . health-care costs”).

<sup>184</sup> See *id.* at 2586 & n.3 (opinion of Roberts, C.J.); *id.* at 2648–50 & n.2 (joint dissent).

<sup>185</sup> See *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 279 (1990) (citing “constitutionally protected right to refuse lifesaving hydration and nutrition”).



them to incur an entirely new set of significant expenditures. Rather (and precisely because broccoli and other foods are sold in the same market), food buyers who must put broccoli in their carts might be seen as merely having to swap out one food purchase for another. Nor are broccoli buyers legally compelled to eat broccoli if they do not want to; they retain the right to discard it or to sell it to their neighbors.

A look at policy responsiveness also discloses conflicting signals as to constitutionality. Dieticians might claim that even a modest effort in the direction of creating nutritional balance in food buying reflects a reasonable—if not critical—reform to our public health laws.<sup>186</sup> Critics will respond, however, that such exercises in paternalism are unlikely to increase public health; instead, their primary effect will be to undermine greatly public respect for the law. The singling out of broccoli also raises suspicions about the sort of naked interest-group favoritism—here, favoritism for broccoli farmers—at which our law looks askance.<sup>187</sup>

Whatever one concludes about all of this, we are left with the same intuition with which this analysis began: It is hard to imagine that the same five Justices who decried an unconditional broccoli-purchase mandate would place their stamp of approval on a broccoli-purchase mandate conditioned on the act of grocery buying. We cannot know just how the Court would explain its placement of the unconditional and conditional broccoli-purchase mandates in the same basket. But, almost surely, the all-but-inescapable character of a grocery-getters-must-buy-broccoli law would figure in its rationale.

#### B. “Back Door” Individual Mandates

Let us assume that we are correct in positing that the current Supreme Court would not uphold a federal law that mandates grocery buyers to include broccoli on their shopping lists. A Congress hell-bent on promoting broccoli purchases might seek to develop a work-around that achieves the same result in a different way. One possibility would be to place a mandate on sellers rather than buyers. Federal

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<sup>186</sup> See, e.g., *NFIB*, 132 S. Ct. at 2588 (opinion of Roberts, C.J.) (“[M]any Americans do not eat a balanced diet. . . . The failure of that group to have a healthy diet increases health care costs[ ] to a greater extent than the failure of the uninsured to purchase insurance.” (citing Eric A. Finkelstein et al., *Annual Medical Spending Attributable to Obesity: Payer- and Service-Specific Estimates*, 28 *HEALTH AFFAIRS* w822 (2009))).

<sup>187</sup> See Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 *COLUM. L. REV.* 1689, 1693–95 (1984) (distinguishing political choices based on “naked preferences”—or “raw political power”—from those that are based on “public values”).

law, after all, requires many sellers to honor minimum quality standards with regard to the products they market. Car makers and dealers, for example, must include seatbelts in the vehicles they sell.<sup>188</sup> Building on this idea, could Congress require all grocery sellers to include one crown of broccoli in every package of food they purvey? The hypothesized law on which this question focuses might seem far-fetched. But variations on the law, as we soon shall see, are not far-fetched at all, thus rendering it advisable to consider the question with care.

At an intuitive level, it seems likely that the Court that recoiled at a compelled-broccoli-purchase law would likewise look unkindly on this newfangled broccoli-sale mandate. No less important, these intuitions have a solid grounding in business realities. Those realities suggest that thus-regulated sellers would respond to such a law by simply raising other prices to make up for the “free” broccoli transfers the law requires them to make; and buyers—who have no practical choice but to acquire groceries—would then have to pay those added costs as a practical matter. Put another way, this law might impose a *de jure* sales mandate on grocery sellers, but it would impose a *de facto* purchase mandate on grocery buyers. And if this *de facto* purchase mandate is unconstitutional, how far down the slippery slope does that conclusion take us?

Congress, while unlikely to enact a stores-must-put-broccoli-in-the-grocery-bag mandate, might enact other mandates that critics will say are functionally the same. Seatbelt laws provide an example, although courts are likely to distinguish them by reasoning (among other things) that people do not have to buy cars in the same way they have to buy groceries.<sup>189</sup> But what about, for example, product-quality mandates associated with the sale or leasing of homes? Are such mandates more like our law that impermissibly requires the inclusion of broccoli in grocery bags or more like the law that permissibly requires the inclusion of seatbelts in cars?

Assume that the federal government required all newly sold or rented homes to include smoke detectors. Perhaps courts would conclude that such a law is a permissible exercise of the commerce power

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<sup>188</sup> 49 C.F.R. § 571.208 (2013).

<sup>189</sup> See Oral Argument, *supra* note 107, at 90 (arguing that Congress may mandate antipollution devices on cars for those who have “entered the market” but may not “compel [one] to enter the market”). But see Posner, *supra* note 74 (highlighting the functional inescapability of duties imposed on drivers, because forcing Americans not to drive to avoid such duties is akin to forcing Americans to “cut off their feet in order to escape sales tax on shoes”).

because it targets commercial actors that have “already” entered into commerce by choosing to market residential property. In doing so, however, those courts would have to deal with the must-sell-broccoli mandate (which likewise targets persons “already” selling groceries) and the predictable assertion that (in contrast to the situation with automobiles) everyone must secure housing, much as everyone must secure food. Again, the point is that the law concerning smoke detectors—though technically directed at housing transferors—might be said to impose a de facto mandate on “nearly . . . all citizens,” because almost every citizen is a housing transferee and any government-imposed costs imposed on those who market residential properties inevitably are passed on to buyers and lessees.<sup>190</sup>

Laws of this kind could reach beyond smoke detectors. They might involve the compulsory pre-sale or pre-rental installation of types of insulation, glass, piping, or flooring that meet exacting quality standards.<sup>191</sup> They might also include items, such as fire extinguishers, that are not built into the dwelling itself. In each case, the argument is predictable that—as with broccoli that a grocer must hypothetically include in food sales—housing transferees are in practical effect being mandated to pay out money for “an unwanted product.”<sup>192</sup> And time and again, it was emphasized in *NFIB* that “realities,” rather than “labels,” should govern constitutional analysis.<sup>193</sup>

It is not clear how courts will deal with future claims that federal laws nominally targeted at sellers impose backdoor mandates on individual purchasers. There is strong reason to think, however, that courts will not invoke *NFIB* to strike down federally imposed product-quality standards as a general rule.<sup>194</sup> Assuming such laws are seen as imposing mandates at all, most of them are escapable, as our

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<sup>190</sup> *NFIB*, 132 S. Ct. at 2644 (joint dissent).

<sup>191</sup> See *supra* notes 158–67 and accompanying text (discussing federal authority to impose mandates on entities already engaged in business operations).

<sup>192</sup> See *NFIB*, 132 S. Ct. at 2586 (opinion of Roberts, C.J.).

<sup>193</sup> See *id.* at 2595 (majority opinion) (ignoring “the designation of the exaction, and viewing its substance and application” in deciding whether to deem it a tax (quoting *United States v. Constantine*, 296 U.S. 287, 294 (1935))); *id.* at 2597 (criticizing the view “that even if the Constitution permits Congress to do exactly what [the Court] interpret[s] this statute to do, the law must be struck down because Congress used the wrong labels” and adding that “labels should not control”).

<sup>194</sup> Indeed, eight Justices in the health care case appeared to endorse this conclusion. See *id.* at 2620 (Ginsburg, J., concurring in part and dissenting in part) (citing the joint opinion writers as “recognizing that ‘the Federal Government can prescribe [a commodity’s] quality’” (alteration in original) (quoting *NFIB*, 132 S. Ct. at 2648 (joint dissent))); *id.* at 2648 (joint dissent) (noting that, when we buy food, “the Federal Government can prescribe what its quality must be”).

car seatbelt law illustrates.<sup>195</sup> Moreover, product-quality rules virtually always involve a high level of relatedness because they attach a quality requirement to the very item that the seller is engaged in placing on the market. (In contrast, as we saw earlier, courts might well say that a broccoli-sale mandate bears only a weak functional relationship to the buying and selling of groceries.<sup>196</sup>) Product-quality standards also present less invasiveness than the ACA's individual mandate in one important sense. In the health care case, the Court encountered a situation in which healthy individuals had to pay *above-market* rates for the insurance policies foisted upon them; indeed, that was the very purpose of the law.<sup>197</sup> No similar problem of expanding an insurance risk pool—and thus imposing heightened costs on low-risk buyers—is presented when sellers honor generally applicable minimum product standards. Finally, in this context more so than in others, policy sensitivity may play a supportive role. Minimum quality standards, after all, tend to promote social interests by ensuring that buyers are not exposed to unreasonable and often hidden risks that sellers can guard against in an efficient manner. What is more, government-imposed product standards are hardly “novel.”<sup>198</sup> To the contrary, their common and longstanding presence in our law renders them unsurprising, and thus less harsh of an imposition to direct at regulated persons.<sup>199</sup>

### C. *Mandates Imposed on Workers*

One type of individual mandate requires special attention—the individual mandate imposed on individual workers. Many such mandates will pose no constitutional problem. We have seen, for example, that a law that requires miners to wear helmets seems unobjectionable under *NFIB* because (even assuming it establishes a mandate) all of the factors that guide analysis in this field cut in favor of its constitutionality.<sup>200</sup> But how far does the principle of our miner-helmet law reach? This question turns out to be complex. A basic point, however, is that an important line divides two categories of worker man-

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<sup>195</sup> See *supra* notes 188–89 and accompanying text.

<sup>196</sup> See *supra* note 183 and accompanying text.

<sup>197</sup> See *NFIB*, 132 S. Ct. at 2585 (opinion of Roberts, C.J.) (“[T]he mandate forces into the insurance risk pool more healthy individuals, whose premiums on average will be higher than their health care expenses.”).

<sup>198</sup> See *id.* at 2586, 2599.

<sup>199</sup> See *supra* note 96 and accompanying text.

<sup>200</sup> See *supra* notes 90–98 and accompanying text (evaluating the miner-helmet law under the proposed four-factor analysis).

dates. It is the line between those mandates that target specialized groups of workers (as the miner-helmet law does) and those mandates that target workers in general (as the miner-helmet law does not). I briefly consider each such category of laws—a process that brings important implications of *NFIB* into view.

### 1. Targeted Worker Mandates

Consider a familiar feature of federal labor law. The National Labor Relations Act<sup>201</sup> permits unions and employers to specify in collective bargaining agreements that nonunion members must make payments that parallel union dues.<sup>202</sup> The practical effect of this law is to force most nonunion members who work in unionized settings to pay money to unions even though they wish not to do so. Nonetheless, the law probably does not impose a mandate because it focuses on the proper subjects of private collective bargaining. In other words, it does not set forth an outright, governmentally imposed mandate that nonunion members must pay so-called “agency fees”; instead, it merely permits private employers to incorporate certain terms into their contracts with unions.

But what if federal law did directly mandate that all nonunion workers pay agency fees if they work in unionized settings? Or what if a court concluded that in practical effect—and thus for controlling constitutional purposes—existing federal labor law imposes such a fee-payment mandate? Under our four-factor analysis, escapability is present, just as it is with the miner-helmet law, because no one has to work in a unionized shop. (To be sure, this argument may be weakened in some settings—for example, when a plant is unionized only after nonunion members have built up many years of seniority. But the same dynamic might well operate with regard to the miner-helmet law, and in other settings in which new rules impose previously unexpected burdens on long-employed workers.) The relatedness factor also supports constitutionality, especially because transactional relatedness marks this posited mandate; after all, any fee-payment requirement directed at the nonunion member would operate only so long as that employee worked in the unionized facility. (On the other hand, as we have seen, transactional relatedness does not necessarily re-

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<sup>201</sup> National Labor Relations Act, 29 U.S.C. §§ 151–169 (2012).

<sup>202</sup> See *Comm’n Workers of Am. v. Beck*, 487 U.S. 735, 745–63 (1988) (authorizing the exaction of fees from nonunion members for the union’s “perform[ance of] the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues”).

move all problems under the anti-mandate principle.<sup>203</sup> But transactional relatedness is supplemented in this setting with logical relatedness, in light of the services the union effectively provides to all workers, including nonmembers.) Invasiveness also poses only a limited problem in this case, at least if one accepts the premise that dues-like payments generate a reciprocal benefit for nonunion members. (One might respond that a reciprocal benefit was also present in the health care case, but the reciprocal benefit provided under the ACA was arguably smaller because in effect it compelled full-cost purchases even by buyers who had only the most limited need for health care services.<sup>204</sup>)

Finally, for two separate reasons, policy sensitivity may support the constitutionality of even an outright mandate that nonunion members pay agency fees. First, the interests of nonunion members in avoiding burdensome payment obligations will be vicariously represented by union members who share that same interest. Second, the must-pay rule addresses obvious and serious free-rider problems. (On the other hand, free-rider problems were also present in *NFIB*.<sup>205</sup>) In the end, this discussion of a must-pay-union-dues rule seems to reinforce the take-away from our earlier analysis of the miner-helmet case—namely, that courts should and will be hesitant to apply the anti-mandate principle to work-related laws that target only those individuals who choose to ply their trade in a particular setting.<sup>206</sup>

## 2. *General Worker Mandates*

A different calculus comes into play when laws target workers in general. Assume, for example, that in crafting the ACA, Congress had specified that only (but all) persons who hold jobs must acquire health insurance for themselves and their families. Would this tweak have saved the individual mandate from the dustbin of failed commerce power experiments?

Offering support for a finding of constitutionality is the fact that this version of the individual mandate lacks the characteristic of pure inescapability; rather, it is escapable in the sense that only those who choose to work come within its grasp. Even so, this mandate poses a much greater problem with regard to escapability than is posed, for

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<sup>203</sup> See *supra* note 181 and accompanying text.

<sup>204</sup> See *supra* note 21 and accompanying text.

<sup>205</sup> See *supra* notes 25, 56 and accompanying text.

<sup>206</sup> See *supra* notes 90–98 and accompanying text (explaining why the miner-helmet law would fare positively under the escapability and relatedness factors).

example, by the miner-helmet law. The reason is that individuals can choose with little difficulty not to work in mining or any other particular field. But it is not easy for most of us to forego work altogether. As a result, any mandate that extends to all workers raises special problems as to escapability. Indeed, some commentators seem to have assumed that courts will treat mandates that are imposed on all or most workers the same as mandates that are imposed on everyone.<sup>207</sup>

Questions about relatedness also await our hypothesized workers-must-buy-health-insurance law. On the one hand, transactional relatedness marks this measure because the worker must retain insurance only so long as the worker holds a job. In addition, as a matter of common understanding, the acquisition of health insurance is often connected with employment,<sup>208</sup> and there are logical reasons why this is so. For example, having health insurance may enhance employee productivity by fostering the use of preventive care, by minimizing family disruptions attributable to poor health, and by reducing lost work days when illness or injury strikes. On the other hand, there are reasons to question the presence of strong relatedness in this setting. Some courts might say that selling labor occurs in one market and buying insurance occurs in another—especially when the insurance-purchase obligation goes so far as to become a whole-family affair. Critics also might claim that the functional connection between having health insurance and having a job is more attenuated than (for example) the obvious functional connection between wearing a helmet and working in a mine.

The invasiveness of our workers-must-get-health-insurance mandate is significant because it involves the forced purchase of the very same product involved in *NFIB* itself. The minimum coverage provision and our hypothesized workers-must-get-health-insurance mandate also present similar concerns with regard to policy sensitivity because in each there is a danger that the must-insure mandate will discourage productive activity. Indeed, a mandate triggered by employment seems even more problematic from this perspective than the mandate triggered by income generation at issue in *NFIB*. This is so

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<sup>207</sup> See, e.g., Graetz & Mashaw, *supra* note 12, at 309 (suggesting that “[m]andatory personal accounts . . . for all workers” could be accomplished after *NFIB* “only indirectly through the Taxing and Spending Clauses”). See generally *infra* note 237 (collecting authorities that raise questions about privatized social security systems).

<sup>208</sup> See Katie Thomas, *Self-Insured Complicate Health Deal*, N.Y. TIMES, Feb. 16, 2012, at B1 (indicating that “most large employers” and “religiously affiliated organizations” provide insurance directly to their employees).

because the job-related mandate does not attach to securing income in any way whatsoever (including by sitting on a couch as passive interest income rolls in); instead, that mandate attaches a burden directly to, and thus may discourage one pointedly from, the very act of working.

On balance, there are strong reasons to conclude that generally applicable worker mandates should typically escape invalidation under *NFIB*'s anti-mandate principle. By taking paid positions, after all, workers both engage in a commercial exchange and undertake to promote their employer's commerce-related activity. Meanwhile, arguments based on inescapability and policy sensitivity will always be in tension in this context, because the strong general desire to secure work (as posited by the argument related to inescapability) suggests that would-be employees will not shun jobs because of conditional duties (as posited by the argument related to policy sensitivity). In addition, one key element of the argument for the validity of these laws based on the relatedness factor simultaneously operates to hold down problems of invasiveness. Why? Because the sort of transactional relatedness present in these cases renders the costs imposed by the mandate operative only while an individual is gainfully employed and therefore best positioned to take those burdens on. Finally, here as elsewhere, the attachment of federal duties to the taking of employment is a matter that is far from "novel"—as evidenced by the long-standing operation of the Social Security system and federal labor laws in general.<sup>209</sup>

Even so, the possibility that some courts will apply the anti-mandate principle in this setting should not be underestimated. Patrons of limiting federal power, for example, will argue against the constitutionality of the workers-must-buy-health-insurance law on the ground that the ACA itself operated as a practical matter to lay its burden on workers.<sup>210</sup> And if the Supreme Court gravitates to this argument, *NFIB* could produce sleepless nights for liberals and conservatives alike. Liberals might come to worry about the constitutionality of even the federal minimum wage law,<sup>211</sup> while conservatives might find themselves fretting over new obstacles to the project of privatizing Social Security.<sup>212</sup>

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<sup>209</sup> See *supra* notes 198–99 and accompanying text.

<sup>210</sup> See *supra* notes 96–97 and accompanying text.

<sup>211</sup> 29 U.S.C. § 206 (2012).

<sup>212</sup> See generally Jagadeesh Gokhale, *Social Security Reform: Does Privatization Still Make Sense?*, 50 HARV. J. ON LEGIS. 169, 189–90 (2013) (discussing the rationale behind privatization).



### 3. *The Minimum Wage Mandate*

Few analysts would go so far as to say that *NFIB* renders invalid the basic duty imposed by the Fair Labor Standards Act (“FLSA”)<sup>213</sup>—that is, the duty that employers must offer workers a federally specified minimum hourly wage.<sup>214</sup> Challengers of the law, however, might take a different tack by arguing that the FLSA does impose an individual mandate because it mandates that individual workers *accept* the minimum wage.<sup>215</sup> These critics might note that our earlier discussion of the conditional you-must-buy-broccoli-with-groceries law suggests that the unlawful-mandate shoe can fit even if placed on only one term of a larger contractual exchange.<sup>216</sup> Indeed, they might say that the minimum wage law operates to “create” commerce in an especially problematic sense because at bottom it mandates the transfer of a significant increment of money from one party to another even though neither of the parties wants to make that commercial transfer at all.<sup>217</sup>

The problems with this argument are many. First, it seems likely that the FLSA does not impose a mandate in the first place; rather, it imposes a prohibition on the deployment of wrongful low-pay contract provisions,<sup>218</sup> in keeping with the proposition that general con-

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<sup>213</sup> Fair Labor Standards Act, 29 U.S.C. §§ 201–219 (2012).

<sup>214</sup> *Id.* § 206(a); see *Liberty Univ. v. Geithner*, 753 F. Supp. 2d 611, 635–36 (W.D. Va. 2010) (“The requirement imposed by the [Affordable Care] Act on employers to offer a minimum level of health insurance resembles the requirement imposed by the FLSA on employers to offer a minimum wage . . . . Employers regulated under [the ACA] are already engaged in commerce . . .”).

<sup>215</sup> See *Barrentine v. Ark.-Best Freight Sys., Inc.*, 450 U.S. 728, 740 (1981) (“Th[e] Court’s decisions . . . have frequently emphasized the nonwaivable nature of an individual employee’s right to a minimum wage . . . under the Act.”).

<sup>216</sup> One might respond by observing that a mandated payment term in a unitary labor contract differs on its face from the mandated purchase of one identifiable product (broccoli) when one buys other entirely separate items (say, apples, noodles, potatoes, and ice cream). But it is not apparent why labor contracts are “unitary” while grocery purchases are not; indeed, the minimum wage law’s challenger will argue that each case involves the same thing—namely, the forced taking of more of something (more pay in one case and more broccoli in the other) than one wishes to trade for.

<sup>217</sup> See *supra* note 33 and accompanying text.

<sup>218</sup> Another helpful analogy may be offered by a set of cases at which we have already looked—namely, those that involve the many federal laws that require sellers of goods to send into the marketplace only products that meet minimum quality standards. See *supra* notes 196–99 and accompanying text. One such law, for example, requires toy sellers to adorn their products only with non-lead-based paint. 16 C.F.R. § 1303.1 (2013). As a result, toy buyers have no choice but to secure products that conform to these standards. But few of us would view such a law as imposing a mandate on buyers, even though buyers cannot “waive” the “right” to obtain the protections those laws provide. See *supra* notes 188–89 and accompanying text (discussing seat belt installation rules).

tract law often disallows the use of terms that are illegal or contrary to public policy.<sup>219</sup> In addition, the minimum wage law (which operates to outlaw certain provisions in a contract that two people voluntarily make) differs in an obvious way from the minimum coverage provision (which mandates the making of a contract that one party does not wish to enter into at all).<sup>220</sup>

Assuming our four-factor analysis nonetheless comes into play, already identified problems with escapability may well be offset by the high degree of relatedness that the minimum wage law entails. This law, after all, embodies transactional relatedness because it operates only so long as the worker is employed. It also involves a high degree of functional relatedness because it seeks to create fairness—which is otherwise at risk because of employers’ built-in bargaining advantages—in the very contractual relationships it operates to control.<sup>221</sup> The invasiveness factor supports constitutionality because the whole point of the law is to ensure that workers get the advantage of more pay, rather than less pay, for their work. To be sure, some employees might urge that the FLSA does not help them—because, for example, they could get more working hours if they were not mandated to take the minimum wage. But a compelling argument from policy sensitivity cuts the other way: If workers were permitted to waive minimum wage protections, the entire system could well collapse as a domino effect of waivers took hold, encouraged (at least implicitly) by self-interested employers.

Given these considerations, as well as the Supreme Court’s long-standing acceptance of the FLSA, many of us will write off any future *NFIB*-based challenge to the minimum wage law as outlandish, if not outrageous.<sup>222</sup> It should not be forgotten, however, that early constitutional attacks on the ACA’s individual mandate sparked a similar chorus of naysaying.<sup>223</sup> At the least, this discussion reveals just how

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<sup>219</sup> See, e.g., E. ALLAN FARNSWORTH & WILLIAM F. YOUNG, *CASES AND MATERIALS ON CONTRACTS* § 5.1 (3d ed. 1980).

<sup>220</sup> Of particular significance in this regard, a requirement as to how much one charges for labor seems not far removed from the sort of outright price control that even the four joint opinion writers viewed as constitutionally permissible. See *NFIB*, 132 S. Ct. 2566, 2648 (2012) (joint dissent) (noting that Congress “can prescribe . . . even how much we must pay” for food).

<sup>221</sup> See *United States v. Darby*, 312 U.S. 100, 122 (1941) (noting that the minimum wage law is “directed at the suppression of a method or kind of competition . . . condemned as ‘unfair’”).

<sup>222</sup> See *id.* at 125 (“[I]t is no longer open to question that the fixing of a minimum wage is within the legislative power . . .”).

<sup>223</sup> See, e.g., Jack M. Balkin, *From off the Wall to on the Wall: How the Mandate Challenge Went Mainstream*, THE ATLANTIC (June 4, 2012, 2:55 PM), <http://www.theatlantic.com/national/archive/2012/06/from-off-the-wall-to-on-the-wall-how-the-mandate-challenge-went-mainstream/>

far efforts to apply the Court's anti-mandate principle ruling might be pushed. Another—and a potentially more fruitful—invocation of the principle may well gain traction as debate continues to rage over the privatization of Social Security.

#### 4. *Privatizing Social Security and Beyond*

Our current Social Security system imposes a mandate—namely, a mandate that present-day workers pay the government a part of their wages as the price of enjoying future-day retirement benefits. Even so, the existing Social Security system is constitutional, albeit not necessarily under the commerce power. Instead, it is constitutional under the taxing and spending powers because the government collects Social Security payments as taxes and then pays out program funds in keeping with statutory requirements.<sup>224</sup>

Of no small importance, it is precisely this method of operation at which critics of the Social Security system have taken aim. In recent decades, leaders ranging from George W. Bush to Mitt Romney to Paul Ryan have advocated “privatizing” Social Security.<sup>225</sup> These would-be reformers, however, now face more than only political resistance to their arguments for a new approach. In the aftermath of *NFIB*, they also must navigate their way around the Court's new anti-mandate principle.

There is complexity here, because Congress could move toward privatization in many ways. If it continued to collect funds from workers and then paid them out either directly to recipients for reinvestment or to designated private-firm account managers, the taxing and spending powers would seem to support the government program no less than they do today. Under this sort of revision, after all, the federal government would still collect taxes and still pay out treasury money, albeit in a modified manner. One can imagine the rejoinder

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258040/ (noting that three years prior to the *NFIB* decision the idea of challenging the mandate was “simply crazy”); Erwin Chemerinsky, *Health Care Reform Is Constitutional*, POLITICO (Oct. 23, 2009, 4:59 AM), <http://dyn.politico.com/printstory.cfm?uuid=7DFE7C51-18FE-70B2-A81B83D9F09A146F> (“Those who object to the health care proposals on constitutional grounds are making an argument that has no basis in the law.”); see also Persily et al., *supra* note 15, at 1–2 (noting that the “arguments that eventually won a majority of the Court, under the Commerce and Spending Clauses, were barely on the radar screen when the legislation was drafted”).

<sup>224</sup> See *Helvering v. Davis*, 301 U.S. 619, 640–46 (1937).

<sup>225</sup> See Nancy J. Altman, *The Striking Superiority of Social Security in the Provision of Wage Insurance*, 50 HARV. J. ON LEGIS. 109, 149, 152–53 (2013). See generally Michael D. Tanner, *Privatizing Social Security: A Big Boost for the Poor*, CATO PROJECT ON SOC. SECURITY CHOICE (July 26, 1996), <http://object.cato.org/sites/cato.org/files/pubs/pdf/ssp4.pdf> (discussing the benefits and mechanisms of privatizing social security).

that such a program would involve only a pretextual use of the taxing and spending powers, cleverly designed to disguise a government effort simply to force individuals to purchase private retirement-related services.<sup>226</sup> Arguments of this sort, however, confront major obstacles under existing doctrine, including doctrine laid down in the health care case itself.<sup>227</sup> Even more important, such a program would continue to involve an expansive on-the-ground role for the federal government in collecting and disbursing funds. Thus, any effort to cast it as only a sleight-of-hand mandate to launch private business relationships is unlikely to make much headway.<sup>228</sup>

Congress, however, could also move toward privatization by abandoning the taxing-and-spending model altogether. Under such a system, workers would not make payments to the government at all. Instead, federal law would require them to pay money (most likely via mandatory paycheck reductions) into privately administered retirement accounts, akin to now-commonplace 401(k) plans, out of which payments would come back to workers once they reached a statutory retirement age. Any system of this sort would bear many similarities to the existing Social Security program: Workers would have to make contributions, those contributions would plant the seed for the later receipt of monetary benefits, employers would participate in the system through paycheck reductions and payouts, and entitlements to benefits would attach upon reaching a landmark birthday. As a legal matter, however, this substitute system would present constitutional questions far more problematic than those posed by the existing Social Security program. In particular, it would lack a grounding in the taxing and spending powers, so that it would have to find its constitutional footing in the Commerce and Necessary and Proper Clauses.

Justifying this program on that theory would present major problems after *NFIB*.<sup>229</sup> The new law, after all, would mandate that individuals buy retirement fund services from private providers, just as the ACA mandates that individuals buy insurance services from private firms. To be sure, this retirement fund mandate would cover only

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<sup>226</sup> See, e.g., *supra* note 193 and accompanying text (emphasizing the centrality of substance-over-form reasoning in *NFIB*).

<sup>227</sup> See, e.g., *NFIB*, 132 S. Ct. 2566, 2596 (2012) (“Some of our earliest federal taxes sought to deter the purchase of imported manufactured goods in order to foster the growth of domestic industry.”); *id.* (“Indeed, [e]very tax is in some measure regulatory.” (alteration in original) (internal quotation marks omitted)).

<sup>228</sup> See *id.* (finding the ACA’s “penalty” to be a tax in part because “the payment is collected solely by the IRS through the normal means of taxation”).

<sup>229</sup> See *infra* note 237 (collecting authorities).

those persons who inject themselves into commerce by entering into the labor force. But, as we have seen, that difference may not give rise to a controlling distinction because not every conditional mandate—and particularly not every work-related mandate—is likely to dodge constitutional problems under the anti-mandate principle.<sup>230</sup>

How might a court analyze this form of privatized Social Security program under our four-factor analysis? Problems would begin with escapability, because (as we have seen) “nearly . . . all citizens” must work.<sup>231</sup> A retirement-account mandate would also involve much the same measure of invasiveness as the ACA’s minimum coverage provision. In particular, the former—just like the latter—would require substantial cash outlays for later-to-be-realized contingent financial payouts, which the worker might well not want to buy. To be sure, such a law would involve transactional relatedness because employees would have to make contributions to retirement accounts only so long as they worked.<sup>232</sup> On the other hand, paying for retirement benefits might be seen as having only a limited functional relatedness because the post-work nature of the benefit may distance paying for it from the act of working itself. In particular, the connection between the triggering act (working) and the mandate (paying for post-working-age benefits) may be seen as involving far less relatedness than (for example) our miners-must-wear-helmets-while-mining law.<sup>233</sup>

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<sup>230</sup> See *supra* notes 90–94 and accompanying text.

<sup>231</sup> *NFIB*, 132 S. Ct. at 2644 (joint dissent). See generally *supra* notes 90, 207 and accompanying text (noting this practical reality).

<sup>232</sup> Moreover, this fact might create a functional point of distinction from the ACA case. According to this argument, the Court in *NFIB* confronted a mandate that applied on an ongoing basis throughout one’s lifetime. A mandate tied to a wholly privatized Social Security system, however, would operate only for those periods during which the individual actually worked. In the view of at least some judges, this difference might matter on the theory that a mandate that operates only so long as an individual works is marked by a self-limiting proportionality. See *NFIB*, 132 S. Ct. at 2591 (opinion of Roberts, C.J.) (“The Commerce Clause is not a general license to regulate an individual from cradle to grave . . .”); *Florida v. U.S. Dep’t of Health & Human Servs.*, 648 F.3d 1235, 1313 (11th Cir. 2011) (expressing concern that the mandate extends “for the entire duration of [Americans’] lives”), *aff’d in part and rev’d in part sub nom. NFIB*, 132 S. Ct. 2566 (2012). One difficulty with this argument, however, is that many adults in fact work on a continuous basis. Another problem is that the minimum coverage provision itself was tied to the production of income and thus could be seen as effectively tied to working. See *supra* notes 86, 90 and accompanying text.

<sup>233</sup> Indeed, the minimum coverage provision had a measure of functional relatedness to earning a specified income that buying retirement protection does not have to working in an office or factory. This is so because, whereas securing health insurance tends to facilitate work by those who have employment, see *supra* note 208 and accompanying text, it is not clear why paying for retirement benefits helps to ensure that workers show up and work more productively on a daily basis.

Policy sensitivity cuts both ways. The long-term success of the Social Security system in providing a basic quality of life for retirees signals the value of maintaining some form of mandatory retirement contribution program. And there may be much to be said for privatization because private-market forces could discipline service providers, generate higher returns, and give the entire system a self-funding quality that it lacks today.<sup>234</sup> On the other hand, privatizing the system would create new risks that retirement benefits might be lost or compromised as a result of poor investment decisions made by individuals or their private fund managers. Privatization critics are sure to say that this possibility would rob the Social Security system of the dependability that has been its hallmark quality for the past eighty years.<sup>235</sup>

The cloudy constitutional picture presented by the proposed privatization of Social Security is made cloudier still because privatization efforts could take other, more complex forms. Congress, for example, might give workers a private-contribution option while keeping the existing program in place for those who prefer it. It might also structure such an optional program in a way that renders the use of private retirement accounts particularly attractive, or that defaults workers into private plans rather than the traditional public-system alternative. Such hybridized programs would present distinct constitutional problems, particularly as to how tax-based and non-tax-based retirement-funding systems relate to each other for purposes of legislative-power analysis.<sup>236</sup> The key point is that any effort to privatize

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<sup>234</sup> E.g., Graetz & Mashaw, *supra* note 12, at 309. For further development of this idea and related matters, see generally Michael J. Graetz & Jerry L. Mashaw, *Constitutional Uncertainty and the Design of Social Insurance: Reflections on the Obamacare Case*, 7 HARV. L. & POL'Y REV. 343 (2013).

<sup>235</sup> See, e.g., Paul Krugman, Op-Ed., *Social Security Scares*, N.Y. TIMES, Mar. 5, 2004, at A23 (highlighting the dependability of Social Security); see also THE DEMOCRATIC NAT'L COMM., MOVING AMERICA FORWARD: 2012 DEMOCRATIC NATIONAL PLATFORM, available at <http://assets.dstatic.org/dnc-platform/2012-National-Platform.pdf> (“[W]e will find a solution to protect Social Security for future generations. We will block Republican efforts to subject Americans’ guaranteed retirement income to the whims of the stock market through privatization.”).

<sup>236</sup> Perhaps courts would deem quasi-privatization permissible under the commerce power because making private agreements would not be “compelled” in light of the option to remain in the government program. See *NFIB*, 132 S. Ct. at 2591 (opinion of Roberts, C.J.) (describing the minimum coverage provision, for commerce power purposes, as bringing about a “compelled purchase”). On the other hand, courts could reject this argument by characterizing the program as “creating” private commerce, even if it does not “compel” such commerce. See *supra* note 33 and accompanying text.

the Social Security system will present new and troublesome complexities in the wake of *NFIB*.<sup>237</sup>

Moreover, the constitutional difficulties that now surround Social Security privatization efforts may also come to bear on other reforms to government benefit programs. In recent years, for example, thoughtful scholars have urged Congress to take a fresh look at unemployment compensation. In particular, they suggest that the nation's existing hodge-podge of state-run unemployment compensation systems should be scrapped in favor of a centralized federal program that would (among other things) mandate that workers fund retirement and unemployment compensation accounts that are linked.<sup>238</sup> Such a move, they claim, would spread the costs of unemployment far more efficiently than is the case today, while also dampening program beneficiaries' incentives to free-ride on government largess.<sup>239</sup> This sweeping reform proposal has much to commend it. *NFIB*, however, may stop it dead in its tracks.<sup>240</sup> The basic difficulty is that a mandate to set up these accounts (at least if they are to be established with private financial services firms) smacks of a command to purchase an "unwanted product."<sup>241</sup>

This discussion of potential unemployment compensation reforms provides a reminder that economic and social problems continuously push thoughtful policy makers to fashion innovative programs designed to bring together the separate energies of private markets and

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<sup>237</sup> See Graetz & Mashaw, *supra* note 12, at 308–10 (arguing that mandatory retirement accounts would be unconstitutional under the commerce power after *NFIB*); Aziz Huq, *In the Healthcare Decision, a Hidden Threat?*, NATION (June 29, 2012), <http://www.thenation.com/article/168677/healthcare-decision-hidden-threat> (declaring that "a federal mandate to purchase a private retirement account" is "now out of bounds, at least under the Commerce Clause"); Paul Starr, *Supreme Surprise*, AM. PROSPECT (June 29, 2012), <http://prospect.org/article/supreme-surprise> (noting that a ruling against the government in *NFIB* under both the commerce and taxing powers could have doomed Social Security privatization); Steven Teles, *Roberts' Health Care Decision: Statesmanship, Not Jurisprudence*, SCOTUSREPORT (July 12, 2012, 1:04 PM), <http://www.scotusreport.com/2012/07/12/roberts-health-care-decision-statesmanship-not-jurisprudence/> (suggesting that "mandatory privatized Social Security accounts" would face additional hurdles after the *NFIB* decision). Of particular significance, because other nations' pension systems involve contractual mandates, see Graetz & Mashaw, *supra* note 12, at 304, any new reforms modeled after these systems will face problems under *NFIB*.

<sup>238</sup> See Graetz & Mashaw, *supra* note 12, at 310–12 (making the case for a system of individual accounts).

<sup>239</sup> See *id.* at 311–12 (suggesting that forced reductions to these linked accounts to help replace lost wages during periods of unemployment, and the resulting loss of future retirement income, would discourage free-riding on government-paid-for unemployment benefits).

<sup>240</sup> See *id.* at 312 (stating that this reform would have to be implemented under the taxing power, presumably because *NFIB* prevents such enactment under the commerce power).

<sup>241</sup> *NFIB*, 132 S. Ct. at 2586 (opinion of Roberts, C.J.).

government controls.<sup>242</sup> It also makes a point of enduring significance: Even the most far-reaching and consequential of these programs may face constitutional obstacles in the wake of *NFIB*.<sup>243</sup>

## V. OTHER LOOMING MANDATE PROBLEMS

The foregoing discussion leaves no doubt that many real-world issues lie in the train of the Court's treatment of the commerce power in the health care case. Even the many issues identified so far, however, represent only a limited sampling. Consider the following:

1. In *NFIB*, the Justices saw themselves as evaluating the constitutionality of an “individual mandate.”<sup>244</sup> Indeed, the term “individual” appears in the opinions of Chief Justice Roberts and the joint opinion writers no fewer than 220 times.<sup>245</sup> This rhetoric raises obvious questions about how the anti-mandate principle applies to organized business entities, particularly corporations. Fans of the principle may well rely on *Citizens United v. FEC*<sup>246</sup>—the Roberts Court's decision second in fame only to *NFIB*—to argue that, because “corporations are people,”<sup>247</sup> a commerce power ban on individual mandates should extend to corporate mandates as well.<sup>248</sup> Many counterargu-

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<sup>242</sup> Indeed, as many observers in the run-up to the Court's ruling in *NFIB* noted, the individual mandate originally was “the brainchild of conservative economists” who sought to address market failures in the healthcare field with a blend of government and private-industry involvement. See N.C. Aizenman, *Provision at Center of Debate Was a Republican Idea*, WASH. POST, Mar. 26, 2012, at A7 (adding that “[t]he individual insurance mandate . . . was . . . embraced by some of the nation's most prominent Republicans for nearly two decades”).

<sup>243</sup> See Eric Randall, *What Analysts Are Saying: Roberts to the Rescue of Liberals*, WIRE (June 28, 2012, 10:31 AM), <http://www.thewire.com/politics/2012/06/what-analysts-are-saying-roberts-rescue-liberals/53997/> (quoting Lyle Denniston as arguing that the Commerce Clause rejection is a major blow to Congress's ability to pass social welfare laws).

<sup>244</sup> See *NFIB*, 132 S. Ct. at 2587 (opinion of Roberts, C.J.) (emphasis added). The problem, the Chief Justice decreed, was that this mandate “compels *individuals* to become active in commerce,” thus reflecting a congressional effort to “regulate *individuals* precisely because they are doing nothing.” *Id.* (emphasis added and omitted).

<sup>245</sup> See generally *id.* at 2577–2608; *id.* at 2642–77 (joint dissent).

<sup>246</sup> *Citizens United v. FEC*, 558 U.S. 310 (2010).

<sup>247</sup> See Ashley Parker, “Corporations Are People,” *Romney Tells Iowa Hecklers Angry over His Tax Policy*, N.Y. TIMES, Aug. 12, 2011, at A16 (quoting presidential candidate as saying: “Corporations are people, my friend.”); Ross Ramsey, *Court Stays the Course on Politics and Business*, N.Y. TIMES, June 29, 2012, at A19A (expressing the view that “[t]he ‘corporations are people’ movement got a boost this week when the nation's highest court reasserted a two-year-old ruling allowing corporations to pay for political ads”).

<sup>248</sup> Professor Pushaw, for example, seems to conclude that some laws aimed at “forcing sellers to deal with customers” would be unsustainable under the commerce power. 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, 1740 n.231 (suggesting in particular that, though the 1964 Civil Rights Act is constitutional because it promotes “a free market in



ments to this line of analysis are available, including that (1) conducting business (especially in the benefits-generating corporate form) directly involves “engag[ing] in commerce,” rather than “abstain[ing]” from it,<sup>249</sup> and (2) *Citizens United* focused on considerations specifically tied to the First Amendment, and therefore is of no significance in measuring the reach of the Commerce and Necessary and Proper Clauses.<sup>250</sup> Even so, some tricky questions about the anti-mandate principle and business entities will inevitably arise, as the next point illustrates.

2. Even if the anti-mandate principle is inapplicable to business entities as a general matter, it may take hold in some circumstances. In particular, as earlier analysis suggests, the case for applying the anti-mandate principle gains force as the relation between the condition-triggering activity and the challenged mandate becomes more attenuated.<sup>251</sup> What if, for example, Congress required all corporations with more than \$10 million in annual revenue to channel at least one percent of that revenue to firms that qualify as “small service-providing businesses”? At first blush, such a law might seem defensible under the commerce power in light of the critical role that small firms play in incubating business activity, decentralizing the delivery of commercial services, invigorating local communities, fostering entrepreneurship, and the like.<sup>252</sup> But just because a firm generates \$10 million in annual revenue does not mean that it has entered into the market for contracting with outside service providers, far less “small service-providing businesses.” As a result, at least in the eyes of the present-day Court, a resulting lack of relatedness may pose problems for this conditional mandate.<sup>253</sup> At the least, it remains uncertain how the relatedness principle will operate as Congress directs a wide vari-

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interstate commerce, undistorted by state practices,” such a rationale does not support, for example, federal legislation that forces “ordering motels to rent rooms even to intoxicated people”).

<sup>249</sup> *NFIB*, 132 S. Ct. at 2590 (opinion of Roberts, C.J.); *id.* at 2599 (majority opinion); *see, e.g., Liberty Univ., Inc. v. Geithner*, 753 F. Supp. 2d 611, 636 (W.D. Va. 2010) (indicating that Congress can direct minimum wage and other worker-benefiting laws, including purported mandates, at business operators because those “[e]mployers . . . are already engaged in commerce”).

<sup>250</sup> *See Citizens United*, 558 U.S. at 339, 343 (determining that a “prohibition on corporate independent expenditures is . . . a ban on speech” and concluding “that political speech of corporations . . . should [not] be treated differently [than the political speech of individuals] under the First Amendment”).

<sup>251</sup> *See supra* notes 91–94 and accompanying text.

<sup>252</sup> *See, e.g., George L. Priest, Small Business, Economic Growth, and the Huffman Conjecture*, 7 J. SMALL & EMERGING BUS. L. 1, 2 (2003).

<sup>253</sup> *See supra* notes 91–94 and accompanying text.

ety of mandates at corporations and other organized business entities—especially when significant invasiveness and reinforcing policy sensitivity concerns are present.<sup>254</sup>

3. Another problem not addressed in the preceding pages involves the duration of mandates, including mandates directed at corporations. One statute enacted under the commerce power, for example, requires business owners to provide workers with notice of the shut-down of a major plant, and thereafter to keep it operating for at least sixty days.<sup>255</sup> Is this sixty-day rule a mandate, and if so, is it valid? What if Congress substituted a plant-operation requirement of one year? Six years? Sixteen years? How are such lines to be drawn?

4. A related temporal problem concerns mandates that are triggered by actions that occurred before the mandate-imposing statute was enacted.<sup>256</sup> Congress, for example, relied on the commerce power to justify many applications of the high-profile Sex Offender Registration and Notification Act (“SORNA”).<sup>257</sup> In particular, SORNA mandates that persons who previously committed federal sex crimes—such as crossing a state line to sexually abuse a child—notify authorities whenever they relocate (including within a state) following their release from incarceration.<sup>258</sup> Although SORNA reaches persons who committed their offenses and were released prior to the law’s effective date, the Court has indicated that this retroactive operation of the statute does not offend the Ex Post Facto Clause.<sup>259</sup> Perhaps, how-

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<sup>254</sup> See *supra* notes 65, 72, 157 and accompanying text (noting questions raised by others about the post-*NFIB* constitutionality of antidiscrimination laws and pollution regulations applicable to business operators).

<sup>255</sup> See 29 U.S.C. § 2102(a)(1) (2012).

<sup>256</sup> See *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 560 (6th Cir. 2011) (raising question whether Congress could have imposed the ACA individual mandate under the commerce power on persons who had previously maintained coverage for a limited period, perhaps even prior to the ACA’s enactment), *cert. denied*, 133 S. Ct. 61 (2012), *overruled in part by NFIB*, 132 S. Ct. 2566 (2012); see also *Weiner*, *supra* note 10, at 76 (posing several questions about temporal problems presented by *NFIB*, including: “[I]f an individual enters the healthcare market, is she in it forever?”).

<sup>257</sup> Sex Offender Registration and Notification Act (SORNA), 42 U.S.C. §§ 16901–16991 (2012); see *United States v. Guzman*, 591 F.3d 83, 89–91 (2d Cir. 2010) (relying on the Commerce Clause to uphold SORNA’s registration clause and collecting cases upholding other parts of SORNA under that grant of power).

<sup>258</sup> See 42 U.S.C. § 16913. See generally *United States v. Lott*, 912 F. Supp. 2d 146, 155 (D. Vt. 2012) (discussing the potential for characterizing the SORNA registration requirement as a mandate, on the theory that, like the ACA, it is violated by a “failure to take an affirmative act”).

<sup>259</sup> See *Smith v. Doe*, 538 U.S. 84, 105–06 (2003) (finding no Ex Post Facto Clause violation in retroactive application of Alaska’s analogous Sex Offender Registration Act); see also *United States v. Felts*, 674 F.3d 599, 605–06 (6th Cir. 2012) (applying *Smith* in upholding the federal sex

ever, retroactive application of SORNA now violates the anti-mandate principle of *NFIB*. In that case, after all, Chief Justice Roberts signaled that Congress could direct mandates only at persons who are “currently engaged in . . . commercial activity.”<sup>260</sup> And that description does not comfortably fit someone whose relevant commercial activity (for example, crossing a state line to commit a sex crime) occurred decades ago, long before Congress passed SORNA. It is unclear how courts will handle these commerce-before-enactment cases.<sup>261</sup> But a recent decision suggests that the anti-mandate principle may give new hope to challengers of backward-reaching applications of SORNA, and other federal statutes as well.<sup>262</sup>

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offender statute against Ex Post Facto Clause challenge and collecting other cases reaching the same result).

<sup>260</sup> *NFIB*, 132 S. Ct. 2566, 2590 (2012) (opinion of Roberts, C.J.) (emphasis added); see also *id.* at 2586 (“The power to regulate commerce presupposes the existence of commercial activity to be regulated.” (emphasis omitted)); *United States v. Rose*, 714 F.3d 362, 371 (6th Cir. 2013) (suggesting that mandates can be placed only on one who “is actively engaged in an economic class of activities”).

<sup>261</sup> See, e.g., *United States v. Cabrera-Gutierrez*, 718 F.3d 873, 879 (9th Cir. 2013) (rejecting *NFIB*-based challenge to SORNA because “SORNA does not regulate individuals precisely because they are doing nothing”; rather, “registration is required only of those individuals who, through being criminally charged and convicted, have placed themselves in a category of persons who pose a specific danger to society” (internal quotation marks omitted)); *United States v. Sterling Centrecorp Inc.*, 960 F. Supp. 2d 1025, 1053 (E.D. Cal. 2013) (worrying about a result under which CERCLA would “be unconstitutional where an owner’s only activity is to purchase land”—apparently including where the purchase occurred before CERCLA’s enactment—because “no court has ever suggested that an owner of contaminated property cannot be compelled to assist in its cleanup”).

<sup>262</sup> The case is *United States v. Kebodeaux*, 133 S. Ct. 2496 (2013). In it, the Court dealt with the application of SORNA’s registration requirement in a situation where the Act took effect long after a former military service member had finished serving his time for an earlier-committed sex offense. See *id.* at 2505. The government argued that this application of SORNA was permissible under the Necessary and Proper Clause, coupled with Congress’s enumerated power “[t]o make Rules for the Government and Regulation of the land and naval Forces.” U.S. CONST. art. 1, § 8, cl. 14. In sustaining the government’s position, however, the Court emphasized that SORNA’s reach-back to pre-enactment activity was not objectionable, because this particular service member already had an expansive duty—which arose out of his service activity under the separate Wetterling Act, which existed at the time of his earlier offenses—to report on his location, wholly apart from the operation of SORNA. See *Kebodeaux*, 133 S. Ct. at 2502. *Kebodeaux* thus leaves open the possibility that the Court in the future will invalidate registration mandates applied to sex offenders based on pre-SORNA (as opposed to post-SORNA) crimes, including crimes established by statutes enacted under the Commerce Clause, to the extent that the Wetterling Act is inapplicable. See Steven Schwinn, *Opinion Analysis: A Modest Ruling, or Vast Federal Authority?*, SCOTUSBLOG (June 24, 2013, 6:13 PM), <http://www.scotusblog.com/2013/06/opinion-analysis-a-modest-ruling-or-vast-federal-authority/> (noting *NFIB*’s potential application in this situation, that the Court “dodged that question [in *Kebodeaux*],” and that *Kebodeaux* will “provide fodder to both sides in the ongoing debate[] over the scope of congressional authority”). But cf. *United States v. Howell*, 552 F.3d 709, 713–17 (8th Cir. 2009)

5. As the preceding paragraphs suggest, some federal mandates may give rise to “as applied” constitutional challenges.<sup>263</sup> Consider the law that mandates airport screenings, which are now so invasive that they can reveal images of one’s genitals or force a passenger to submit to a pat-down of the entire body.<sup>264</sup> At first blush, such a screening seems distinguishable from the compelled purchase of insurance because airport users actively engage in commerce when they choose to fly. For some targets of airport screening mandates, however, this depiction turns out to be strained. They may be headed for planes only because the government itself compelled the journey—for example, by subpoenaing the individual to appear as a witness halfway across the country—or they may not be passengers at all. Consider local fire department employees. Can the federal government subject them to mandatory screenings before they enter gate areas to conduct state-required fire safety inspections? The answer may prove to be yes. If that is so, however, it probably will not be because these individuals have voluntarily opted into federally mandated electronic strip searches simply by choosing to become local firefighters. In such cases, will courts reason that the Necessary and Proper Clause permits a measure of overinclusiveness to avoid administrative problems in the mandate’s operation? Will they address concerns about escapability, relatedness, intrusiveness, and policy sensitivity on a case-by-case basis, or by looking at the mandate’s most common applications? In the end, the answers to these questions will hinge on how aggressively the Justices choose to apply the anti-mandate principle.

6. A final post-*NFIB* puzzle involves how the anti-mandate principle applies to state governments. One federal law based on the commerce power, for example, mandates that states negotiate with Native American tribes about forming gambling-related compacts.<sup>265</sup> Another mandates that state and local authorities supply information about missing children to the Federal Department of Justice.<sup>266</sup> It may be that these laws do not run afoul of the anticommandeering princi-

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(reasoning that retroactively imposed registration requirements based on intrastate movements is a necessary and proper means of helping to effectuate a separate and permissible mandate to report interstate relocation).

<sup>263</sup> See *supra* note 128 and accompanying text.

<sup>264</sup> See 49 C.F.R. § 1540.107 (2013) (requiring passengers to submit to screenings); Tom Cohen, *Enhanced Pat-Downs Necessary for Now, TSA Chief Says*, CNN.COM (Nov. 21, 2010, 8:22 PM), [http://articles.cnn.com/2010-11-21/travel/tsa.pat.downs\\_1\\_pat-down-screening-explosives](http://articles.cnn.com/2010-11-21/travel/tsa.pat.downs_1_pat-down-screening-explosives) (summarizing highly invasive screenings).

<sup>265</sup> 25 U.S.C. § 2710(d)(3)(A) (2012).

<sup>266</sup> 42 U.S.C. § 5779(a) (2012).

ple of *Printz v. United States*.<sup>267</sup> In particular, a court might reason that these provisions (unlike in *Printz*) do not compel the state to “administer or enforce a federal regulatory program” aimed at controlling private persons;<sup>268</sup> rather, they simply impose federal-law duties directly on state governments themselves. These laws, however, do mandate that states take action—to enter into negotiations in one case and to transmit information in the other—thereby potentially bringing the anti-mandate principle of *NFIB* into play.<sup>269</sup> To be sure, states are not individuals. But they are also not corporations voluntarily established by profit-seeking groups of persons for the very purpose of pursuing commercial ventures. The uncertain application of the anti-mandate principle to state governments exemplifies the mix of knotty problems that *NFIB* has brought to the fore.

## VI. THE FUTURE OF THE ANTI-MANDATE PRINCIPLE

The foregoing discussion points to a wide range of possible applications of the new anti-mandate principle set forth in *NFIB*. As that discussion shows, future deployments of this principle are likely to focus on two questions: Does the law establish a mandate, and if so, should courts invalidate that mandate in light of considerations of escapability, relatedness, invasiveness, and policy sensitivity? To recognize these forces in our law is to take an important first step. But that step takes us only so far.

The reason why is that the judicial choices about how to apply constitutional decision rules inevitably hinge on such forces in the law as institutional considerations, methodological approaches, and background values reflected in earlier rulings. These drivers will dictate whether courts come to take a broad approach or a narrow approach, or something in between, as they grapple with applying *NFIB*’s anti-mandate norm. As a general matter, however, four reasons suggest that judges should act with great caution when called on to invalidate acts of Congress under this new limiting principle.

First, the majority’s view of congressional power in *NFIB* pushed a constitutional edge.<sup>270</sup> To begin with, the individual mandate was one component of a program designed to address the sort of systemic

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<sup>267</sup> *Printz v. United States*, 521 U.S. 898 (1997).

<sup>268</sup> *Id.* at 935.

<sup>269</sup> See *Senne v. Vill. of Palatine*, 695 F.3d 617, 620 (7th Cir. 2012) (noting that prohibition on disclosing driver information does not implicate *NFIB* because “[h]ere, there is no instance of the federal government forcing a state or an individual to participate in an interstate market”).

<sup>270</sup> See *supra* note 223 and accompanying text.

market failure that the Court had permitted Congress to deal with in the past.<sup>271</sup> In addition, the Court's ruling rubbed up hard against the idea that Congress can stabilize the national economy by implementing social welfare programs in ways that sensibly blend federal, state, and private market participation.<sup>272</sup> Finally, the ruling in *NFIB* confronted serious difficulties under the originalist methodology. I have covered this ground elsewhere.<sup>273</sup> But among the critical points are these: The ratifying community well understood the "[s]weeping" power that the Necessary and Proper Clause gave Congress to address then-unforeseen problems that were national in character.<sup>274</sup> For this reason, antifederalist critics of the Constitution pushed hard to counteract its empowerment of the Federal Congress.<sup>275</sup> Their strategy for doing so, however, centered on crafting a Bill of Rights, as opposed to narrowing the reach of the Necessary and Proper Clause itself. Against this backdrop, it is not surprising that an early Congress enacted an individual mandate that required citizens to secure guns and ammunition.<sup>276</sup> This law comported with Publius's earlier insistence in *The Federalist No. 23* that the Necessary and Proper Clause vests in Congress a power "to pass *all* laws"—thus including mandates—"which have relation to" its military powers.<sup>277</sup> But Publius went further than that, emphasizing that "[t]he same must be the

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<sup>271</sup> See, e.g., Fried, *supra* note 12, at 52 ("[S]ince 1937 the Court had not come even close to invalidating on Commerce Clause grounds a statute that was without question one of economic regulation."); see also Strauss, *supra* note 16, at 2 (noting that "in a highly integrated economy, anything important enough to attract Congress's attention is likely to be connected, in a meaningful way, to interstate commerce").

<sup>272</sup> See Pushaw & Nelson, *supra* note 9, at 994 ("*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.").

<sup>273</sup> See generally Dan T. Coenen, *Originalism and the "Individual Mandate": Rounding Out the Government's Case for Constitutionality*, 107 NW. U. L. REV. COLLOQUY 55, 60–64 (2012), available at <http://www.law.northwestern.edu/lawreview/colloquy/2012/10/LRColl2012n10Coenen.pdf> (outlining "six separate elements of the framing history" that are "at odds" with the challenge leveled at the individual mandate); Coenen, *Originalist Case*, *supra* note 90, at 36–45 (discussing the defects in the "it's-not-proper argument"). But see Richard A. Epstein, *A Most Improbable 1787 Constitution: A (Mostly) Originalist Critique of the Constitutionality of the ACA*, in *THE HEALTH CARE CASE*, *supra* note 10, at 28, 32–37 (criticizing the ACA on originalist grounds).

<sup>274</sup> THE FEDERALIST NO. 33, at 203 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>275</sup> See, e.g., John T. Valauri, *The Clothes Have No Emperor, or, Cabining the Commerce Clause*, 41 SAN DIEGO L. REV. 405, 429 (2004).

<sup>276</sup> Militia Act of May 8, 1792, ch. 33, § 1, 1 Stat. 271 (repealed 1903); see Hall, *supra* note 17, at 1856 (discussing this early mandate).

<sup>277</sup> THE FEDERALIST NO. 23, at 155 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis added).

case, in respect to commerce, and to every other matter to which its jurisdiction is permitted to extend.”<sup>278</sup> The Framers also envisioned that Congress could invoke the Necessary and Proper Clause to wield the same range of implementary powers that were available to the state legislatures, again including the power to impose mandates.<sup>279</sup> All of this history suggests at least that courts should apply with great circumspection the anti-mandate principle established in *NFIB*.

Second, the Court’s holding in *NFIB* ultimately hinged on its conclusion that the individual mandate was not a “proper” exercise of the Necessary and Proper Clause.<sup>280</sup> Never before in the history of the Court had it invoked this distinctively opaque text to strike down a law directed at private persons, as opposed to states as states.<sup>281</sup> And that pattern of decisionmaking was hardly surprising. Put simply, courts should apply any anti-mandate principle narrowly for the same reason that they always have hesitated to invalidate federal laws on the ground they are not “proper.” Otherwise, as Professor Randy Beck has observed, the Constitution will serve as “an empty glass into which one may pour whatever social, economic or political theory one desires.”<sup>282</sup> Indeed, this Article should serve to bring this point home. It demonstrates that the anti-mandate principle has created many still-below-the-radar opportunities to challenge federal laws, including laws of longstanding and far-reaching importance. Consequently, unless that principle is given only a narrow compass of operation, it will threaten much disruption of our existing legal order while impeding efforts to bring improvement to critical federal programs.

Third, a disinclination to apply special limits to so-called “mandates” will hardly exempt them from constitutional scrutiny. To the extent that federal laws severely impinge on personal liberties, or compel speech or the surrender of property, the Bill of Rights stands

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<sup>278</sup> *Id.* (emphasis added).

<sup>279</sup> See THE FEDERALIST NO. 16, at 116 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“The government of the Union, like that of each State, must be able to address itself immediately to the hopes and fears of individuals . . . . It must, in short, possess *all the means*, and have a right to resort to *all the methods*, of executing the powers with which it is intrusted, that are possessed and exercised by the governments of the particular States.” (emphasis added)).

<sup>280</sup> See *supra* notes 42–48 and accompanying text.

<sup>281</sup> See, e.g., Fried, *supra* note 12, at 56 (noting that before *NFIB* “[t]he propriety of the reach has been thought to be a question of whether the claim bumps up against an explicit or implicit constitutional barrier”).

<sup>282</sup> J. Randy Beck, *The New Jurisprudence of the Necessary and Proper Clause*, 2002 U. ILL. L. REV. 581, 640; see also Fried, *supra* note 12, at 57 (describing the new “proprietary” requirement as “dangerous” because it is so “open-ended”).

ready to fend off federal overreaching.<sup>283</sup> In addition, pre-*NFIB* commerce power law provides avenues for constraining federal legislative authority. To be sure, in keeping with the Framers' intentions, the Court has long deferred to congressional judgments about the compatibility of federal economic controls with the commerce power.<sup>284</sup> But this deference has never been total, and the modern Court has blocked federal overreaches without the need to apply any anti-mandate principle.<sup>285</sup> In short, already recognized means of policing federal abuses blunt the need for sweeping application of the commerce power holding of *NFIB*.

Finally, the Court itself signaled the propriety of a go-slow approach even as it concluded that Congress had exceeded its commerce power in the health care case. Of particular importance, the Justices highlighted the historical singularity of the individual mandate.<sup>286</sup> The idea was conveyed in part by their repeated emphasis of the distinctive features that marked this law: It was directed at individuals—indeed, at “nearly . . . every citizen” of the nation;<sup>287</sup> it compelled entirely new commerce as a tool for effectuating otherwise-hard-to-implement regulations of already existing commerce;<sup>288</sup> it mandated the making of an “unwanted contract” (as opposed, for example, to simply attaching unwanted terms to contracts that parties were otherwise poised to make);<sup>289</sup> it operated in a field traditionally overseen by the states;<sup>290</sup> and it was not irreplaceable in that other means were

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<sup>283</sup> See U.S. CONST. amend. I; U.S. CONST. amend. V.

<sup>284</sup> See *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729 (1984) (“[S]trong deference [is] accorded legislation in the field of national economic policy . . .”); see also *United States v. Lopez*, 514 U.S. 549, 570–74 (1995) (Kennedy, J., concurring) (providing a history of the Court’s deferential approach to congressional judgment as to economic regulation).

<sup>285</sup> See, e.g., *United States v. Morrison*, 529 U.S. 598, 598–99 (2000) (invalidating a law subjecting private parties to suit for gender-motivated violence because such action is “noneconomic in nature”); *Lopez*, 514 U.S. at 567–68 (invalidating a ban on possession of firearms in or near a school).

<sup>286</sup> See *NFIB*, 132 S. Ct. 2566, 2586 (2012) (opinion of Roberts, C.J.) (noting the “[l]egislative novelty” of the individual mandate); see also *supra* notes 97–98 and accompanying text (noting other similar descriptions).

<sup>287</sup> *NFIB*, 132 S. Ct. at 2644 (joint dissent).

<sup>288</sup> See *supra* note 46 and accompanying text.

<sup>289</sup> See *NFIB*, 132 S. Ct. at 2586 (opinion of Roberts, C.J.) (condemning laws “compel[ling] individuals not engaged in commerce to purchase an unwanted product”); *id.* at 2648 n.2 (joint dissent) (describing the ACA as “mandating the purchase of an unwanted suite of products”); *id.* at 2649 n.3 (refuting “the power to compel purchase of unwanted goods”).

<sup>290</sup> *Id.* at 2591 (opinion of Roberts, C.J.); see Fried, *supra* note 12, at 56 (claiming that the “Chief Justice reached for the notion that the extension was improper . . . because there was something particularly inappropriate about this reach, and that was found in the notion that the



available to Congress to pursue its underlying regulatory objectives.<sup>291</sup> These features and others resulted in descriptions of the individual mandate as a “novel”<sup>292</sup> and “extraordinary”<sup>293</sup> innovation that Congress had “never before used.”<sup>294</sup> Nor did this limiting language come out of the blue. It was crafted against a backdrop of judicial pronouncements, dating back to the days of Chief Justice Marshall, suggestive of the need for courts to defer to congressional choices in overseeing the national economy.<sup>295</sup> Especially in light of this history, the majority’s repeated focus on the “unprecedented” character of the minimum coverage provision carries with it an important message.<sup>296</sup> It signals that the Court’s fractionated ruling on the commerce power issue was not itself meant to supply a precedent for a sweeping new constraint on congressional authority.

#### CONCLUSION

The decisions of courts, Walter Oberer once wrote, create “tools” more so than “rules.”<sup>297</sup> This observation applies with special force to the work of the United States Supreme Court, which must be translated by lower courts in every corner of the nation as “facts permute infinitely.”<sup>298</sup> This Article suggests that the Court’s treatment of the commerce power in *NFIB* offers a new tool for creative lawyers to use as they strive to scale back the scope of federal legislative authority. The opportunities for putting that tool to work are wide-ranging. They reach across antidiscrimination bans to health-treatment re-

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regulation of medical systems and practice was a particular and traditional realm of state responsibility”).

<sup>291</sup> See *NFIB*, 132 S. Ct. at 2647 (joint dissent) (“[T]here are many ways other than [the] Individual Mandate by which the regulatory scheme’s goals of reducing insurance premiums and ensuring the profitability of insurers could be achieved. For instance, those who did not purchase insurance could be subjected to a surcharge when they do enter the health insurance system. Or they could be denied a full income tax credit given to those who do purchase the insurance.”); see also Weiner, *supra* note 10, at 79 (noting that the joint dissenters argued that the individual mandate was not the only practical way to reform the health insurance system).

<sup>292</sup> *NFIB*, 132 S. Ct. at 2599.

<sup>293</sup> *Id.* at 2592 (opinion of Roberts, C.J.).

<sup>294</sup> *Id.* at 2649 (joint dissent).

<sup>295</sup> See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196–97 (1824) (reasoning that the commerce power is “plenary,” that it “may be exercised to its utmost extent,” and that the “sole restraints” of its abuse lie in “[t]he wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections”).

<sup>296</sup> See *NFIB*, 132 S. Ct. at 2647–48, 2677 (joint dissent).

<sup>297</sup> See Walter E. Oberer, *On Law, Lawyering, and Law Professing: The Golden Sand*, 39 J. LEGAL EDUC. 203, 204–05 (1989).

<sup>298</sup> See *id.* at 204.

quirements to possessory crimes to *Kelo*-like takings to product-quality rules to union dues payments to privatizing Social Security to sex-offender registration requirements. In each of these contexts, and others as well,<sup>299</sup> courts will have to grapple with *NFIB*'s new anti-mandate principle. In doing so, they first will have to determine whether the challenged law imposes a mandate, rather than another form of legal restriction. And if it does, they will next have to ask whether it qualifies as the sort of mandate that the Court's ruling in *NFIB* disallows. The answer to that question, I have suggested, will hinge primarily on how escapable the mandate is, how closely it relates to any condition that triggers its operation, how greatly the mandate invades private liberty, and surrounding policy considerations that cut for and against its operation. In all of this, there is room for judgment, and different courts will reach different conclusions as they address down-the-road issues. All courts, however, should tread carefully in putting the anti-mandate principle to use. Of particular importance, the Justices in *NFIB* emphasized that the individual mandate was constitutionally vulnerable precisely because it was "unprecedented."<sup>300</sup> This reasoning suggests that, while *NFIB* provides lawyers with a new tool to wield on behalf of their clients, that tool was not fashioned by the Court to cut away large swaths of existing law.

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<sup>299</sup> See, e.g., Yung, *supra* note 85, at 858 (also considering, for example, misprision of felony laws).

<sup>300</sup> See *supra* note 98.