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Foreword: Federalism Points and the Sometime Recognition of Essential Federal Power

Jonathan D. Varat

SUPREME COURT FOREWORD, OCTOBER TERM 2011: FEDERALISM POINTS AND THE SOMETIME RECOGNITION OF ESSENTIAL FEDERAL POWER

*Jonathan D. Varat**

For some time now, a narrow but persistent majority of the Supreme Court has undertaken the project of circumscribing federal power. Marching under the banner of state sovereignty, this majority has attacked the flanks of congressional power in at least three areas: its enumerated powers, its power to direct the state administration of federal programs, and its power to abrogate state immunity from suit. During the October Term 2011, the battle over the appropriate balance of federal power and state sovereignty continued in earnest on all three fronts. This Foreword examines the Court's 2011 term to find those points where contested federal power was upheld and reinforced and those where state sovereignty prevailed. These points tell us a great deal about the current state of affairs and the nature of the Court's ongoing conflict, revealing that while some important federal strongholds held well, the state sovereignty forces rather clearly advanced further, though not always in lockstep either substantively or strategically.

* Professor of Law, University of California, Los Angeles School of Law.

TABLE OF CONTENTS

I. INTRODUCTION

For some time now, particularly after the replacement of Justice Thurgood Marshall by Justice Clarence Thomas in 1991, a newly oriented, narrow, but persistent majority of the Supreme Court has undertaken the project of moving our constitutional landscape in the direction of circumscribing the power of Congress and enhancing state sovereignty. It has done so in a form of pincer movement, with the majority forces that march under the banner of state sovereignty attacking the flanks of federal power in at least three ways: (1) by limiting the scope of some of the most significant of the enumerated powers of Congress, (2) by enhancing the litigation immunity of the States under the Tenth and Eleventh Amendments, and (3) by restricting the power of Congress to regulate the States qua States in the name of defending the core of state legislative and executive autonomy. It has advanced in fits and starts, sometimes pursuing evolutionary and sometimes more revolutionary campaigns, but its accumulated progress in the last two decades has been substantial. The significance of each advance, and all the advances taken together thus far, is a matter of opinion, but the overall direction is clear enough, and it is unlikely to change, much less reverse, without judicial reinforcements added to the ranks of the defenders of congressional prerogative.

In launching and sustaining this assault, moreover, this slender—if changing—state sovereignty majority of five Justices has enforced its vision of the structural protections of federalism at least as energetically as the Court often has enforced the antimajoritarian, individual rights protections of the Constitution. In particular, it has acted without much regard for the protective role played by the political safeguards of federalism;[1] it has relied instead on what fairly can be called the judicial safeguards of federalism, wielded essentially in the same fashion as the judicial safeguards of individual rights. Deference to Congress has been grudging, apparently because belief in the fundamental importance of state sovereignty is so strong, and because of the majority's perception

1. The classic statement of this idea is found in Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954). The Court employed the idea in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), in the process of rejecting a claim of state regulatory immunity from federal regulation.

that Congress too cavalierly has usurped power that does not belong to it, throwing out of balance the proper relationship between the dual sovereigns.

Precedent sometimes has slowed the advance, but it hardly has been an impenetrable fortification. More potent for the defenders of federal power has been the Court's likely unanimous belief that the objective has never been the unconditional surrender of all federal power, but the more limited objective of containment—of reigning in perceived congressional excesses without losing sight of the reality that national power is often needed to govern wide swaths of a globally, much less nationally, interdependent economy; that a unified nation must be maintained in the face of potentially dangerous centrifugal forces; that explicit enforcement authority for the protection of specified civil rights must be acknowledged, to some extent at least; and that the nation's capacity for unified responses to geopolitical challenges must be preserved and supported.

During the Court's 2011 term, the battle over the appropriate balance of federal power and state sovereignty continued in earnest on all three fronts: the scope of Congress's enumerated power, its power to abrogate state immunity from suit, and its power to direct state administration of federal programs. Taking stock of the decisive encounters, the pattern of the last two decades persisted. The state sovereignty forces rather clearly advanced further, though not always in lockstep either substantively or strategically. Yet some important federal strongholds held as well. In the end, there were notable affirmations and notable limitations of federal power—a mixed set of results that rather unmistakably still points toward future gains on behalf of state sovereignty at the expense of congressional power.

The aim of this Foreword is to highlight and examine the "federalism points" where contested federal power was upheld and reinforced and those where state sovereignty prevailed. Those "points"—both in the sense of cartographic points on the newly drawn map where each sovereign is allowed to govern following the term's federal and state struggles, and in the sense of the points made or scored by various Justices in the process of disagreement—tell us a great deal about the current state of affairs and the nature of the Court's ongoing conflict. I use the Court's deeply divided decision upholding the Patient Protection and Affordable Care Act of 2010

(the ACA),[2] its equally divided decision holding that Congress lacked constitutional authority to abrogate state sovereign immunity from damages suits under the self-care provision of the Family and Medical Leave Act,[3] and the term's preemption decisions—especially the successful challenge to three of four provisions of the stringent Arizona law aimed at restricting aliens not lawfully present in the United States[4]—to identify and critique these federalism points.

II. FEDERAL POWER, STATE SOVEREIGNTY, AND THE ACA

The 900-plus page ACA is one of the most complex and politically controversial pieces of legislation ever enacted. It sets out a comprehensive program seeking to produce health insurance coverage for millions of people who lack it and simultaneously reduces the cost of health care. Among the ACA's multitude of provisions, federalism-based constitutional challenges to Congress's power were leveled at two key ones: (1) the so-called individual mandate provision that requires most, but not all, of the populace either to maintain "minimum essential" health insurance coverage or, for those who fail to do so and are not exempt (primarily because their income is too low), to make a "shared responsibility payment"—described by the ACA as a "penalty"—to the IRS; and (2) the Medicaid expansion provision, requiring States to expand the scope and coverage of their existing, largely federally funded Medicaid programs—which help provide medical care to pregnant women, children, needy families, the blind, the elderly, and the disabled—to now cover a much larger segment of the population (primarily a much larger group of the poor) as well. The ACA offers to pay for most, but not all, of the required expansion, and it provides that a State failing to comply with the new coverage requirements risks losing not just the funds for the required expansion, but all of its federal Medicaid funds.

The ACA addressed a wide range of health insurance issues, at least two of which prompted the adoption of the individual mandate—the costly use of emergency medical care by those without

2. Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB*), 132 S. Ct. 2566 (2012).
3. Coleman v. Court of Appeals of Md., 132 S. Ct. 1327 (2012).
4. Arizona v. United States, 132 S. Ct. 2492 (2012).

insurance who by virtue of federal and state law could not be denied care, and the inability of individuals with pre-existing serious health conditions to obtain affordable or any insurance. Congress enacted the "guaranteed issue" requirement to prohibit insurers from limiting or denying altogether health insurance for individuals with pre-existing conditions, and it adopted the "community rating" requirement for insurance policy pricing to prohibit insurers from charging higher premiums to those individuals. As several States had discovered earlier, however, those measures introduced a strong incentive for uninsured individuals to wait until they became ill before buying the insurance that could no longer be denied them. The individual mandate sought to enlarge the insurance risk pool to include more currently healthy people so that insurers would not be placed in a financially unviable situation that would lead them either to leave the market or to charge even higher insurance premiums to those who maintained insurance.

Twenty-six states, some private individuals, and the National Federation of Independent Business (NFIB) sued, seeking to have the individual mandate and the Medicaid expansion provisions invalidated for lack of federal power to adopt them, and then to have the entire ACA invalidated on the ground that these provisions could not be severed from the remainder of the Act. The Court heard a remarkable three days of oral argument on whether the Tax Anti-Injunction Act barred the suit as a prohibited effort to restrain collection of a tax before it is paid; whether Congress had the authority to enact the individual mandate pursuant to any or all of its enumerated commerce, necessary and proper, or taxing powers; whether its spending power allowed the Medicaid expansion program, with its particular enforcement mechanism; and whether, if the Court concluded that one or both of these central parts of the ACA were unconstitutional, it would be appropriate to sever whatever was held invalid from the many remaining provisions, without doing violence to the ACA's overall scheme.

On the final day of the term, the Court issued its sharply divided ruling in the already famous case of *National Federation of Independent Business v. Sebelius* (*NFIB*).[5] Technically, Chief Justice Roberts authored an opinion for a majority of the Court (comprised

5. 132 S. Ct. 2566 (2012).

of himself and Justices Ginsburg, Breyer, Sotomayor, and Kagan) resolving only two issues in the case. First, the majority held that the Anti-Injunction Act did not apply because the suit was not one to restrain collection of a tax within the meaning of that *statute*.[6] Second, reaching the merits, the Court held that the individual mandate reasonably could be—and therefore should be—construed for *constitutional* purposes to be an exercise of Congress's power to tax and that, as such, Congress had ample authority to adopt it.[7]

The remainder of the Chief Justice's lead opinion did not officially garner a majority, but the Court as a whole reached other majority conclusions, despite the absence of a majority opinion. Justices Scalia, Kennedy, Thomas, and Alito filed a joint dissent arguing in favor of invalidating the entire ACA, because in their view Congress lacked power to adopt either the individual mandate or the Medicaid expansion, and those provisions could not be severed from the rest of the ACA. Probably out of pique that Chief Justice Roberts was not willing to go nearly as far as they would, the joint dissenters conspicuously did not join any aspect of his lead opinion and officially withheld any concurrence in his opinion at all, even though the dissent, in at least some respects, essentially mirrored some of the Chief Justice's conclusions and reasoning. Like Chief Justice Roberts, and for the same reasons—and unlike the four who joined him in upholding the individual mandate as a permissible exercise of the taxing power—they found that Congress could not enact the individual mandate under its commerce and necessary and proper powers. Also, and again for virtually the same reasons, like the Chief Justice (who, in this respect, was joined by Justices Breyer and Kagan), the joint dissenters concluded that Congress lacked power under the Spending Clause to threaten states choosing not to

6. *Id.* at 2582–84.

7. *Id.* at 2600. Although many professional and lay critics—including the joint dissenters, *id.* at 2656 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting)—apparently thought that treating the individual mandate provision as not a tax for purposes of the Anti-Injunction Act, but as a tax for purposes of whether Congress had power to enact it, was verbal legerdemain, the use of the same language in different ways in statutory and constitutional contexts is hardly new. Perhaps the most dramatic example involves Article III of the Constitution and the congressional grant of federal question jurisdiction in 28 U.S.C. § 1331. Although they "use nearly identical language in conferring jurisdiction over actions arising under the Constitution, laws or treaties of the United States, it is now well-established that the constitutional language reaches considerably more broadly than does the language of § 1331." RICHARD H. FALLON ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 748 (6th ed. 2009).

comply with the ACA's Medicaid expansion requirements with the loss of all their pre-existing Medicaid funding. For the first time ever, largely because Medicaid funding makes up such a large portion of state budgets, the Court held a spending power condition too "coercive" of state sovereignty.[8] In fact, on this point the dissenters, despite withholding their official concurrence, were explicit in noting that "[s]even Members of the Court agree that the Medicaid Expansion, as enacted by Congress, is unconstitutional."[9] Furthermore, because they disagreed with the majority's conclusion that the individual mandate could properly be understood as a permissible exercise of the taxing power, they also determined that, since the mandate was not a tax, the Tax Anti-Injunction Act was clearly inapplicable.[10] For different reasons, then, the Court was unanimous in concluding that the constitutional merits of the case were properly before it.

How to respond to the conclusion by seven Justices that the Medicaid expansion enforcement provision was unduly coercive of state sovereignty was the final dividing point. As noted, the joint dissenters believed the Medicaid expansion provision as a whole should be invalidated. Chief Justice Roberts, together with Justices Breyer and Kagan, concluded that it was enough to invalidate the authorization for withholding all Medicaid funds from states that did not choose to expand Medicaid in accordance with the ACA requirements, and to allow Congress to leave the states free to choose whether to accept the additional federal funding for Medicaid expansion in accordance with ACA requirements. Justices Ginsburg and Sotomayor contended that Congress had not exceeded its spending power in any respect, but—having lost on that point—they concurred in the judgment "that Congress may offer States funds 'to expand the availability of health care, and requir[e] that States accepting such funds comply with the conditions on their use'" contained in the ACA.[11]

When all was said and done, the Court had upheld all of the ACA except for the provision allowing (though not compelling) the Secretary of Health and Human Services to withhold from states that

8. *NFIB*, 132 S. Ct. at 2601–07 (opinion of Roberts, C.J., joined by Breyer & Kagan, JJ.).
9. *Id.* at 2666–67 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).
10. *Id.* at 2656.
11. *Id.* at 2642 (Ginsburg & Sotomayor, JJ., concurring in part and dissenting in part).

do not comply with the ACA's "new coverage requirements . . . not only the federal funding for those requirements, but all . . . federal Medicaid funds."[12] The power of Congress to use its taxing authority to support a mandate to buy health insurance by imposing a tax "penalty" for those who do not, and the power of Congress to use its conditional spending authority to induce States to undertake federal programs in accordance with federal requirements, so long as the federal funding offer is not coercively deployed, were reaffirmed. Still, for the first time ever, the Court held a federal spending condition invalid as too invasive of state autonomy. Moreover, a majority of Justices, whether in dictum or not—and to the surprise of many on all sides—rejected the power of Congress under both the Commerce Clause and the Necessary and Proper Clause to compel economic activity, even where Congress believed that such compulsion was necessary as part of a comprehensive effort to improve the financial condition of a vast national market involving health providers, consumers, and insurers.

Much already has been written, and much more will be, about this major federalism episode. For some, including me, the majority's unwillingness to uphold the individual mandate under the Commerce Clause and the Necessary and Proper Clause comes as an unwelcome and unpersuasive surprise, with quite uncertain implications for the future of congressional power. For others, most obviously the joint dissenters, the bigger surprise was that Chief Justice Roberts, having reached that conclusion, nonetheless was willing to uphold the individual mandate as an exercise of Congress's taxing power. For now, leaving to others a more detailed analysis of the various elements of *NFIB*,[13] what follows are some selective reflections on the major elements of, and questions raised by, this momentous decision.

12. *Id.* at 2582 (majority opinion).

13. Indeed, Professor Brietta Clark has conducted one such analysis in this issue of the *Loyola of Los Angeles Law Review*. Brietta Clark, *Safeguarding Federalism by Saving Health Reform: Implications of* National Federation of Independent Business v. Sebelius, 46 LOY. LA. L. REV. 541 (2013).

A. Why Did Chief Justice Roberts Vote and Write As He Did?

With four Justices deeply committed to upholding the individual mandate under any and all of the powers invoked on behalf of Congress, and four Justices equally committed to invalidating the mandate for having no source of power that justified it, speculation has abounded concerning Chief Justice Roberts's divided stance, standing shoulder to shoulder with his more frequent allies in declaring new limits on the powers of Congress under the Commerce and Necessary and Proper Clauses, but with those more inclined to favor federal power on the ultimately determinative reliance on the Taxing Clause. The Chief Justice was also the decisive vote, given the same split among the other eight Justices, in determining that what seven Justices thought was an unconstitutionally coercive use of the conditional spending power could be remedied by removing the coercive part only and did not require invalidating the conditional spending Medicaid expansion program as a whole.

Consider a number of possibilities.[14] First is simply the straightforward notion that the Chief Justice was not acting especially strategically, but instead is genuinely committed to deferring to the powers of Congress so long as—and only so long as—Congress acts within historically understood boundaries, not when it attempts to exercise what he perceives to be new forms of authority that threaten to convert its limited, enumerated power into an unlimited general police power. After all, he elsewhere has supported federal power more unreservedly than most of his state sovereignty brethren in cases such as *United States v. Comstock*[15] and *Arizona v. United States*.[16] Moreover, as to the holding on the taxing power, it is well established that the "Federal Government may enact a tax on an activity that it cannot authorize, forbid or otherwise control";[17] that if a legislative measure reasonably can be

14. For a lengthy analysis in support of the proposition that "[a]lthough Roberts was clearly pursuing legal policy goals, the fact that he was willing to vote to uphold the individual mandate without a clear majority for his conservative legal innovations reaffirms that his dominant interest was institutional rather than doctrinal," see Tonja Jacobi, *Strategy and Tactics in* NFIB v. Sebelius 7 (Nw. Univ. Sch. of Law, Law and Econ. Series, No. 12-14), *available at* http://ssrn.com/abstract=2133045.

15. 130 S. Ct. 1949 (2010).

16. 132 S. Ct. 2492 (2012), discussed *infra* pp. 442–53.

17. *NFIB*, 132 S. Ct. at 2579.

construed in a way that will preserve its constitutionality, it should be;[18] that even if an exaction is not labeled a tax, it should be understood to be a tax if it functions like one;[19] and that a tax may have regulatory aims so long as it also raises revenue.[20] Given that the individual mandate was structured in the alternative as a requirement to purchase health insurance or to pay a "penalty" to the IRS in a manner that operates a lot like taxes do, that a failure to buy health insurance triggers no other "negative legal consequences . . . beyond requiring a payment to the IRS,"[21] and that Congress expected the "shared responsibility payment" to be paid by some four million people a year,[22] reaching the conclusion that the individual mandate fell within Congress's power to tax was hardly revolutionary. Even the joint dissenters did not say Congress could not have imposed the payment as a tax. They argued instead that Congress had enacted a requirement with a penalty and not a tax, so it could not rely on its taxing power.[23] A little more deference to Congress, embracing a functional, rather than a formalistic, assessment of the individual mandate "penalty," rather easily and reasonably renders it a tax on not buying health insurance. Perhaps more generally, Chief Justice Roberts is willing to extend that deference in circumstances that do not call for any real expansion of congressional authority.[24]

Similarly, acting to preserve the conditional spending provisions for Medicaid expansion without putting the states that decline to

18. *Id.* at 2593–94.
19. *Id.* at 2595–96.
20. *Id.* at 2596.
21. *Id.* at 2597.
22. *Id.*
23. *Id.* at 2651 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).
24. Chief Justice Roberts did resolve a new question in favor of Congress—namely, that the individual mandate, considered as a tax, was not a "direct" tax required to be "apportioned so that each State pays in proportion to its population" under Article I, Section 9, Clause 4 of the U.S. Constitution. *Id.* at 2598 (majority opinion). Although the joint dissenters thought that might be "a difficult constitutional question" that they had "no need to address," *id.* at 2655 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting), Chief Justice Roberts rather easily concluded that a "tax on going without health insurance does not fall within any recognized category of direct tax," because it was not a "capitation" and "plainly not a tax on the ownership of land or personal property." *Id.* at 2599 (majority opinion). Finally, the tax was permitted because, unlike the use of the regulatory power, "the Constitution does not guarantee that individuals may avoid taxation through inactivity"; although the Taxing power may not be used as a penalty that is the equivalent of regulation, there was no such danger here, and the Taxing power "does not give Congress the same degree of control over individual behavior" that the regulatory power does. *Id.* at 2599–600.

expand it at risk of losing all their Medicaid funding may be understood not as a strategic effort to preserve the ACA, but rather as the appropriately proportionate response to the offending enforcement mechanism. Remedying only the condition that is thought to offend the Constitution is hardly a new concept,[25] and for the Chief Justice to rely on the severability clause set forth in the chapter that authorized the withholding of all Medicaid funds, and to conclude that Congress would have wanted to preserve the Medicaid expansion program even without the stricter enforcement threat,[26] was more than reasonable—and completely consistent with adhering to state sovereignty values that left the States free to choose whether to accept or decline the expansion and the money that comes with it.

Second, or possibly a more pointed way of saying the same thing, perhaps the Chief Justice chose to provide Congress no power it did not already possess, while successfully declaring new limits on the scope of congressional power in the name of a more robust state sovereignty. If his purpose was both to preserve a sense of judicial deference to the lawmaking powers of the Court's co-equal branches and to further the state sovereignty agenda, he came as close to a Solomonic solution as he probably could. For a pragmatist promoting that particular agenda, it is doubtful that the ultimate target would be invalidation of the ACA *per se* rather than the curtailment of congressional power generally.

Third, as many have speculated, the Chief Justice might well have borrowed from the constitutional maneuver his predecessor Chief Justice John Marshall deployed in *Marbury v. Madison*[27] and declared limits on congressional power—and a robust role for the judiciary to enforce those limits (federalism limits this time)—without risking the sort of popular backlash that could call forth serious reactions that might put the Court's legitimacy at risk. Already having provoked powerful negative reactions from its decisions in *Bush v. Gore*[28] and *Citizens United v. Federal Election Commission*,[29] the Court might have seemed gratuitously provocative had it invalidated the signature accomplishment of the administration

25. *See, e.g.*, Milliken v. Bradley, 418 U.S. 717, 738 (1974).
26. *NFIB*, 132 S. Ct. at 2607–08 (opinion of Roberts, C.J., joined by Breyer & Kagan, JJ.).
27. 5 U.S. (1 Cranch) 137 (1803).
28. 531 U.S. 98 (2000).
29. 558 U.S. 310 (2010).

of President Obama, and the Democratic majority that had been in place when the ACA was enacted, in the midst of the 2012 presidential campaign where the question of whether to repeal or continue with the ACA was a hotly contested national issue dividing the political parties and the populace. Given what the Chief Justice otherwise could accomplish, why risk making the Court's behavior itself more of a campaign issue? There is no reason to doubt that the Chief Justice's regard for the Supreme Court as an institution is both deep and authentic, so even if there was little risk of defiance of a judgment invalidating the ACA, there was every reason to avoid inciting unnecessary antagonism toward the Court.

Fourth, it is also possible that the Chief Justice recoiled somewhat from what seemed to be a relentless and determined quest of the joint dissenters to destroy the ACA altogether. At each turn, the opinion of the joint dissenters aggressively resists the ACA: they found the individual mandate beyond the commerce and necessary and proper powers of Congress and refused to accept that it could be understood as an exercise of the taxing power; they found not only that the Medicaid expansion enforcement provision exceeds the conditional spending power of Congress, but that the only proper remedy would be to strike the whole Medicaid expansion policy, because otherwise "States that decline the Medicaid Expansion must subsidize, by the federal tax dollars taken from their citizens, vast grants to the States that accept the Medicaid Expansion";[30] and, having found both the individual mandate and the Medicaid expansion provisions unconstitutional, they determined that Congress would not have wanted the rest of the ACA's wide-ranging provisions to stand. The fact that the joint dissent followed this "for want of a nail, the kingdom was lost" course of reasoning and then asserted that its approach was the judicially modest one—in contrast to the approach the Chief Justice ultimately took for a majority, which the joint dissent described as "vast judicial overreaching" because it created "a debilitated, inoperable version of health-care regulation that Congress did not enact and the public does not expect"[31]—easily could have prompted the reaction that judicial modesty did, indeed, lie in something less than wholesale undoing of

30. *NFIB*, 132 S. Ct. at 2676 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).
31. *Id.*

what Congress had labored long and hard—and yes, controversially—to do. To be sure, the individual mandate and the Medicaid expansion components of the ACA were much more than just horseshoe nails in relation to a kingdom, but had the joint dissent been the majority opinion, the Chief Justice might well have thought—as many in the public undoubtedly would have thought—that the overweening attack on the constitutional underpinnings of the ACA went beyond constitutional principle—and certainly beyond any sense of judicial modesty—to choosing sides in the partisan debate about the desirability of the ACA. For many, perhaps including the Chief Justice, the joint dissent's harsh approach might have reinforced the sense that judicial modesty would be better served by striking less of the ACA rather than more.

Finally, consider a fifth variation with a somewhat more affirmative cast. Suppose that Chief Justice Roberts sought to choose an approach that left maximum space for encouraging political participation by the electorate at the same time that he enforced what he perceived to be essential limits on the power of Congress. His opinion certainly is written to educate not just the professional readers of Court opinions, but also the broader public, about the Court's limited role. It emphasizes that the Members of the Court "possess neither the expertise nor the prerogative to make policy judgments. Those decisions are entrusted to our Nation's elected leaders, who can be thrown out of office if the people disagree with them. It is not our job to protect the people from the consequences of their political choices."[32] And at the close of his opinion, the Chief Justice reminds readers that "the Court does not express any opinion on the wisdom of the Affordable Care Act. Under the Constitution, that judgment is reserved to the people."[33]

This might seem like standard fare whenever the Court wishes to express the important distinction between matters of public policy and matters of constitutional concern, although the language does tend to convey a little more forcefully than is sometimes the case that the people have their own responsibilities for the electoral choices they make. Another part of his opinion adds a further note of political responsibility, however, that might be thought to reinforce

32. *Id.* at 2579 (opinion of Roberts, C.J.).
33. *Id.* at 2608 (opinion of Roberts, C.J., joined by Breyer & Kagan, JJ.).

the sense that promoting "active liberty," to use one of Justice Breyer's developed notions,[34] could have been one of Chief Justice Roberts's aims in taking the position he did. Before explaining why the Medicaid expansion provision was unduly coercive, his opinion says this:

> Congress may attach appropriate conditions to federal taxing and spending programs to preserve its control over the use of federal funds. In the typical case we look to the States to defend their prerogatives by adopting "the simple expedient of not yielding" to federal blandishments when they do not want to embrace the federal policies as their own. The States are separate and independent sovereigns. Sometimes they have to act like it.[35]

There is something in his seeming appeal to the public and the state authorities to undertake responsibility for public policy decisions with which they may disagree that can be thought to suggest that reliance on the Court to save them from themselves is inadequate and probably inappropriate. Basic ground rules may come from the Court, but political actors must shoulder responsibility themselves.

No doubt there may be other explanations for why the Chief Justice followed the approach he did in *NFIB*. Certainly, the suggestions I have offered are not contradictory to each other, and each could form an ingredient contributing to his overall viewpoint. In any event, his future decisions may bear watching with some or all of them in mind.

B. The Majority View That Congress Could Not Impose the Individual Mandate Using Its Commerce and Necessary and Proper Powers

The opinion of the joint dissenters and that of the Chief Justice, taken together, constituted a majority view rejecting the government's two basic arguments that Congress possessed ample power under the Commerce and Necessary and Proper Clauses to

34. STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005).

35. *NFIB*, 132 S. Ct. at 2603 (opinion of Roberts, C.J., joined by Breyer & Kagan, JJ.) (quoting Massachusetts v. Mellon, 262 U.S. 447 (1923)).

impose on individuals a requirement to purchase health insurance.[36] Those Justices argued that the individual mandate could not be justified either on the basis that the cumulative failure of many people to purchase health insurance substantially affects interstate commerce in the economically dominant healthcare and health insurance markets, or on the ground that the mandate was a necessary and proper means to further the ACA's "guaranteed issue" and "community rating" reforms adopted to improve the functioning of those markets—reforms that clearly do regulate the economic activity of health insurers and thus fall within the commerce power.

The fundamental fault these Justices perceived was that while Congress may regulate pre-existing activity that in the aggregate substantially affects interstate commerce, it may not compel people who choose to refrain from entering a market to engage in economic activity in the first place. Ordering unwilling or uninterested buyers to purchase a product does not fall within the power "to regulate Commerce," they asserted, because that regulatory power applies only to control of those who engage in activity and not those who, for their own reasons, are inactive in a particular market. So even if it is true that the failure of many people to buy health insurance exerts a powerful economic effect on the cost of health insurance premiums to many others, and may have other substantial detrimental effects on interstate commerce, Congress lacks power to direct those people to become participants in the market.

The driving force behind this conclusion evidently was the fundamental structural principle that the federal government is one of limited, enumerated powers, which these Justices believed would be violated if Congress could compel unwanted economic transactions, because in their view Congress would then possess unlimited regulatory authority. Adherence to that view also then defeated the Necessary and Proper Clause argument, because even if the individual mandate was necessary or useful to make effective the ACA's other insurance reforms designed to end the practice of denying, or rendering unaffordable, health insurance for people with pre-existing conditions, it was not a "proper" means for accomplishing those goals, since it entailed "violat[ing] the

36. *See id.* at 2584–93 (opinion of Roberts, C.J.), 2644–50 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).

background principle of enumerated (and hence limited) federal power," as the joint dissenters put it.[37] Moreover, only from that perspective can one make sense of Chief Justice Roberts's otherwise remarkable concession that "[t]o an economist, perhaps, there is no difference between activity and inactivity; both have measurable economic effects on commerce. But the distinction between doing something and doing nothing would not have been lost on the Framers."[38]

Nor were these Justices willing to accept the possibility that a health insurance mandate could be distinguished from other purchase mandates based on its claimed unique characteristics—namely, that it would finance health care that virtually everyone will need at some unpredictable time, and that, unlike any other product or service, state and federal law require "a certain degree" of health care to be provided even to those who cannot pay.[39] An exception for health insurance as a unique product could have allowed Congress to compel purchase here without allowing it to mandate purchases generally and thus to honor the concern about federal power becoming unlimited, but the joint dissenters and Chief Justice Roberts refused to accept that argument either.

This is not the place to delve deeply into the course on which this majority may have set the Court in future challenges to congressional exercises of the commerce and necessary and proper powers. It is enough to make a few key observations. Nonobvious lines will have to be drawn between activity and inactivity, so that permissible regulations and prohibitions can be distinguished from impermissible requirements to enter commerce. More significant, perhaps, is the wide range of potential implications for congressional power when future challenges are premised on the claim that a congressional act violates background principles of limited federal power. The structural principle invoked has an elasticity to it that could encompass an awful lot of judicial discretion to restrict congressional power, and that especially might be so if it is invoked not only to reduce the scope of the commerce power, but almost by definition to curtail the scope of the necessary and proper power as well. Indeed, enforced in an aggressive manner, this understanding of

37. *Id.* at 2646 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).
38. *Id.* at 2589 (opinion of Roberts, C.J.).
39. *Id.* at 2585–87.

the necessary and proper power could make it a "truism" that whatever regulation is not found to fit within an independent power of Congress cannot be justified under the necessary and proper power either.[40]

As Charles Black reminded us long ago,[41] structural constitutional interpretation done well has much to commend it. But was the structural interpretation of the majority here done well?

Consider several reasons for skepticism. To begin with, the majority perceived the individual mandate to be an aggressive new attempt on the part of Congress to expand its power, heightening the sense that Congress was reaching toward an unlimited regulatory authority. Chief Justice Roberts acknowledged that "[l]egislative novelty is not necessarily fatal; there is a first time for everything."[42] But, he argued, "new conceptions of federal power" should be assessed cautiously.[43] Professor Einer Elhauge has disputed the novelty claim, however, pointing out that "[i]n 1790, the very first Congress—which incidentally included 20 framers [of the Constitution]—passed a law that included a mandate: namely, a requirement that ship owners buy medical insurance for their seamen," and that "in 1798, Congress addressed the problem that the employer mandate to buy medical insurance for seamen covered drugs and physician services but not hospital stays" by "enact[ing] a federal law requiring the seamen to buy hospital insurance for themselves."[44] Perhaps (although not obviously) that individual insurance mandate might have been thought justified by the commerce power in a way that could distinguish it from the ACA mandate, or by another power of Congress, such as the power to regulate maritime matters. Nevertheless, Professor Elhauge is

40. A far different "truism" was famously declared by the Court in *United States v. Darby*, 312 U.S. 100 (1941), where Justice Stone wrote that the Tenth Amendment "states but a truism that all is retained which has not been surrendered." *Id.* at 124.

41. *See generally* CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (Ox Bow Press 1985) (1969) (arguing that constitutional interpretation may and often should be predicated upon inferences drawn from the structural features of the governmental branches and sovereigns recognized in the Constitution and the relationships among them).

42. *NFIB*, 132 S. Ct. at 2586 (opinion of Roberts, C.J.).

43. *Id.*

44. Einer Elhauge, *If Health Insurance Mandates Are Unconstitutional, Why Did the Founding Fathers Back Them?*, NEW REPUBLIC (Apr. 13, 2012), http://www.newrepublic.com/article/politics/102620/individual-mandate-history-affordable-care-act, *reprinted in* OBAMACARE ON TRIAL 2, 2 (Smashwords ed. 2012).

persuasive in arguing that these early episodes at least demonstrate that close to the Founding there was no dispute as to whether an individual insurance mandate was a "proper" means of exercising federal power[45]—and certainly an individual mandate was not opposed as a severe threat to the structural division of power between the nation and the states.

More fundamentally, the claim that upholding the individual mandate would remove any limits on the power of Congress under the Commerce Clause is highly implausible. Leaving aside for the moment the more than reasonable possibility of distinguishing the mandate to buy health insurance from mandates to buy other goods or services, the Court's decisions in *United States v. Lopez*[46] and *United States v. Morrison*[47] impose judicially enforceable limits on the commerce power that easily would have survived upholding the mandate. In those cases, the Court majority thought the local activities regulated—gun possession near schools in the former, and gender-motivated violence in the latter—were insufficiently economic in themselves, and too remotely connected from impacts on interstate commerce, to justify their regulation by Congress.[48] The individual mandate, by contrast, represents an economic subject of regulation closely connected to a significant impact on the interstate insurance and healthcare markets.[49] Far from being an arguably gratuitous, pretextual exercise of the commerce power in the interest of controlling noneconomic behavior, the individual mandate is squarely aimed at solving a national economic problem of huge proportions.

Furthermore, the line between economic activity and economic inactivity at bottom is a poor proxy for what should distinguish those regulatory objects that do and do not fall within the commerce

45. Einer Elhauge, *A Response to Critics on the Founding Fathers and Health Insurance Mandates*, NEW REPUBLIC (Apr. 19, 2012), http://www.newrepublic.com/article/politics/102739/individual-mandates-history-maritime-law, *reprinted in* OBAMACARE ON TRIAL 4, 4 (Smashwords ed. 2012); Einer Elhauge, *A Further Response to Critics on the Founding Fathers and Insurance Mandates*, NEW REPUBLIC (Apr. 21, 2012), http://www.newrepublic.com/article/politics/102840/health-insurance-individual-mandate-obamacare-constitutionality-framers, *reprinted in* OBAMACARE ON TRIAL 7, 7–8 (Smashwords ed. 2012).

46. 514 U.S. 549 (1995).

47. 529 U.S. 598 (2000).

48. *NFIB*, 132 S. Ct. at 2623–24 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

49. *Id.* at 2611.

power. Consider, for example, that under *Wickard v. Filburn*,[50] Congress was authorized to prohibit the production of wheat to be consumed locally on the farm, in part to influence the farmer to purchase wheat in the interstate market when he would prefer to refrain from that purchase,[51] because the "stimulation of commerce is a use of the regulatory function quite as definitely as prohibitions or restrictions thereon,"[52] whereas under a majority view in *NFIB* the individual mandate is held not to be. To be sure, in the former there is no absolute coercion to buy, but the practical difference is small, and the economic objective is the same. More fundamentally, if there is to be judicial enforcement limiting the scope of congressional power "to regulate Commerce," rather than reliance on the political safeguards of federalism to police the definition of acceptable forms of regulation,[53] the proper structural principle, in the words of Chief Justice Rehnquist in *Morrison*, "requires a distinction between what is truly national and what is truly local."[54] Any correspondence between the activity/inactivity distinction and the truly national/truly local distinction would be coincidental, however, and the individual insurance mandate in the context of the ACA surely could be presented as a prime instance of where the economic inactivity of millions who fail to purchase health insurance is a severe and direct threat to the national economy.

The joint dissent explicitly disputes the notion that the powers of Congress should be interpreted with an eye toward facilitating its capacity to solve national economic problems, however serious. It firmly asserts that "Article I contains no whatever-it-takes-to-solve-a-national-problem power."[55] This may be fine rhetoric, but is it good constitutional law, especially as applied in the interstate health insurance context?

The Constitutional Convention initially approved conferring on Congress power to serve "the general interests of the Union," before the Committee of Detail later drafted—without the slightest

50. 317 U.S. 111 (1942).

51. *Id.* at 127.

52. *Id.* at 128.

53. *See NFIB*, 132 S. Ct. at 2624 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 197–98 (1824).

54. United States v. Morrison, 529 U.S. 598, 617–18 (2000).

55. *NFIB*, 132 S. Ct. at 2650.

indication that it was revising the earlier consensus—the list of enumerated powers in Article I that was ultimately adopted; and from that time forward, our nation has continued to debate whether those enumerated powers should be construed expansively enough to further the aim of empowering Congress to be able to address "the general interests of the Union," or more restrictively to further the aim of circumscribing national power.[56] That is not to abjure the structural principle that there are limits on the commerce power, but rather to suggest that there is also an opposing structural principle that those limits should not be interpreted so stringently as to hamstring Congress's ability to attend to "the general interests of the Union." Ultimately, the Court is responsible for identifying the appropriate balance between these two structural imperatives, and it will be interesting to see whether Justice Ginsburg's dissenting prediction proves correct that, "if history is any guide," the majority's categorical stance against purchase mandates "will not endure."[57]

C. The State Sovereignty Limit on Congress's Spending Power

The constitutional holding that garnered the support of the most Justices in *NFIB* is also the holding most likely to generate more litigation. The Court had never before held unconstitutional on federalism grounds a threat by Congress to withhold funding from states that refused to implement a federal program. Although the Court previously had made clear that the power of Congress to spend its revenue "for the . . . general Welfare of the United States"[58] includes the power to offer federal funds on conditions that would influence or induce states to regulate in ways that Congress desired, it also had indicated that at some point funding pressure could be so coercive as to become the equivalent of an impermissible, involuntary mandate for states to do the bidding of Congress. In

56. *See* JONATHAN D. VARAT ET AL., CONSTITUTIONAL LAW: CASES AND MATERIALS 130–34 (13th ed. 2009).; *see also NFIB*, 132 S. Ct. at 2615 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (citing *N. Am. Co. v. Sec. Exch. Comm'n*, 327 U.S. 686, 705 (1946), for the proposition that "[the commerce power] is an affirmative power commensurate with the national needs").

57. *NFIB*, 132 S. Ct. at 2625 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

58. U.S. CONST. art. I, § 8, cl. 1.

Steward Machine Co. v. Davis,[59] for example, which rejected a claim of coercion of state policy choices, the Court first raised the question of whether "the exertion of a power akin to undue influence . . . can ever be applied with fitness to the relations between state and nation," but then said that "[e]ven on that assumption the location of the point at which pressure turns into compulsion, and ceases to be inducement, would be a question of degree,—at times, perhaps, of fact."[60] The Court was convinced that the congressional spending program to induce the creation of state unemployment compensation systems meeting federal criteria did "not go beyond the bounds of power."[61] As for where the boundary might lie, the Court demurred: "[w]e do not fix the outermost line. Enough for present purposes that wherever the line may be, this statute is within it. Definition more precise must abide the wisdom of the future."[62]

Two such subsequent cases, *South Dakota v. Dole*[63] and *New York v. United States*,[64] also declined to find that federal spending conditions had crossed the line, and they found no need to fix the line either. In *Dole*, the Court found "the argument as to coercion . . . to be more rhetoric than fact" because Congress had "offered relatively mild encouragement to the States to enact higher minimum drinking ages than they would otherwise choose."[65] In *New York*, the Court held, among other things, that the "Federal Government may not compel the States to enact or administer a federal regulatory program"[66] and that a requirement that states either regulate the disposal of low-level radioactive waste in conformity with federal policy, or take title to the waste generated within their borders, was the equivalent of the forbidden compulsion.[67] Of particular relevance here, the Court also concluded that Congress was well within its spending power to offer financial incentives to states to achieve federally prescribed deadlines for addressing the radioactive waste problem.[68]

59. 301 U.S. 458, 590 (1937).
60. *Id.* at 590.
61. *Id.* at 591.
62. *Id.*
63. 483 U.S. 203 (1987).
64. 505 U.S. 144 (1992).
65. *Dole*, 483 U.S. at 211.
66. *New York*, 505 U.S. at 188.
67. *Id.* at 174–77.
68. *Id.* at 171–73.

In the portion of his *NFIB* opinion joined by Justices Breyer and Kagan, Chief Justice Roberts first articulated the importance of "ensuring that Spending Clause legislation does not undermine the status of the states as independent sovereigns in our federal system."[69] Previous exercises of conditional federal spending programs were distinguishable from the Medicaid expansion provisions of the ACA, he argued, because of the nature and size of the threat of having all Medicaid funds removed if states did not go along:

> We have upheld Congress's authority to condition the receipt of funds on the States' complying with restrictions on the use of those funds, because that is the means by which Congress ensures that the funds are spent according to its view of the "general Welfare." Conditions that do not here govern the use of the funds, however, cannot be justified on that basis. When, for example, such conditions take the form of *threats to terminate other significant independent grants*, the conditions are properly viewed as a means of pressuring the States to accept policy changes.[70]

Unlike the spending condition in *Dole*, "the 'financial inducement' Congress has chosen is much more than 'relatively mild encouragement'—it is a gun to the head."[71] The "threatened loss of less than half of one percent of South Dakota's budget left that State with a 'prerogative' to reject Congress's desired policy, 'not merely in theory but in fact.'"[72] In contrast, the "threatened loss of over 10 percent of a State's overall budget . . . is economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion."[73] Like the Court in *Steward Machine*, the Chief Justice found "no need to fix a line either. It is enough for today that wherever that line may be, this statute is surely beyond it."[74]

The joint dissenters essentially agreed, but they took into account a somewhat different range of considerations. They emphasized that "Congress effectively engages in . . . impermissible

69. *NFIB*, 132 S. Ct. 2566, 2602 (2012) (opinion of Roberts, C.J., joined by Breyer & Kagan, JJ.).

70. *Id.* at 2603–04 (emphasis added).

71. *Id.* at 2604.

72. *Id.* at 2604–05.

73. *Id.* at 2605.

74. *Id.* at 2606.

compulsion when state participation in a federal spending program is coerced, so that the States' choice whether to enact or administer a federal regulatory program is rendered illusory."[75] They said that "[w]hether federal spending legislation crosses the line from enticement to coercion is often difficult to determine, and courts should not conclude that legislation is unconstitutional on this ground unless the coercive nature of an offer is unmistakably clear."[76] Here, though, "there can be no doubt."[77] That was in part because "Medicaid has long been the largest federal program of grants to the States"[78] and the "States are far less reliant on federal funding for any other program."[79] It was in part because states "forced out of the Medicaid program would face burdens in addition to the loss of federal Medicaid funding," since other funded programs rely on the assumption of Medicaid.[80] And it was also in part because Congress expressly assumed, as part of its goal of near-universal health care coverage, "that no State could possibly refuse the offer that the ACA extends."[81]

Left somewhat unclear are a few matters likely to be the subject of future litigation. Most obviously, if one half of one percent of a state's budget is considered way too little inducement to constitute compulsion, and more than ten percent is considered way too much, at what point in between will the balance tip? Is any threat of losing federal funds that exceed the amount offered to support the federal program enough to make the threat coercive? Is it a question of how reliant the state is on the particular federal dollars at risk? How big a proportion of a state's budget is at stake? And what weight should be given to the expectations of Congress as to the likelihood that states will be able to resist the influence of the federal funding?

In her dissent, joined by Justice Sotomayor, Justice Ginsburg contended that the "coercion inquiry . . . appears to involve political judgments that defy judicial calculation."[82] She anticipated that

75. *Id.* at 2660 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).
76. *Id.* at 2662.
77. *Id.*
78. *Id.*
79. *Id.* at 2663.
80. *Id.* at 2664.
81. *Id.*
82. *Id.* at 2641 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

"future Spending Clause challenges" are now likely to arrive, and she asked some of the questions raised in the previous paragraph about how the Court will go about answering them, as well as a few others, such as whether it matters if a state has unused state tax alternatives to make up for federal revenue that might be lost, and whether state officials might feel coerced into accepting politically popular federal grants for fear of losing re-election.[83]

Perhaps there in fact will be more litigation in the future about the permissibility of federal spending conditions as a result of *NFIB*, and perhaps some of those challenges will be quite difficult to resolve. Yet it seems unlikely that resolving them will be inordinately or uniquely difficult. Following the joint dissent's suggestion that only "unmistakably clear" instances of coercion should be held impermissible could go a long way toward ameliorating concerns of judicial overreaching. Moreover, if the Court is to enforce what it perceives to be core structural federalism principles as effectively as it does core individual rights principles, those sorts of difficult decisions are likely necessary and attainable.

It may be worth noting that in the context of the exercise of constitutionally protected individual liberties, the Court also has drawn a sharp distinction between refusing to subsidize the exercise of such liberties, on the one hand, and penalizing them by withdrawing unrelated government financial support, on the other. So, for example, in the process of rejecting the claim that Congress had unconstitutionally "penalized" a woman's choice to abort her fetus by repeatedly enacting the Hyde Amendment, which prohibits the use of federal funds to reimburse the cost of abortions under the Medicaid program, the Court made the following relevant observations:

> A substantial constitutional question would arise if Congress had attempted to withhold all Medicaid benefits from an otherwise eligible candidate simply because that candidate had exercised her constitutionally protected freedom to terminate her pregnancy by abortion. This would be analogous to *Sherbert v. Verner*, 374 U.S. 398, where this Court held that a State may not, consistent with the First and Fourteenth Amendments, withhold *all*

83. *Id.* at 2640–41.

> unemployment compensation benefits from a claimant who would otherwise be eligible for such benefits but for the fact that she is unwilling to work one day per week on her Sabbath. But the Hyde Amendment, unlike the statute at issue in *Sherbert*, does not provide for such a broad disqualification from receipt of public benefits. Rather, the Hyde Amendment . . . represents simply a refusal to subsidize certain protected conduct. A refusal to fund protected activity, without more, cannot be equated with the imposition of a "penalty" on that activity.[84]

Likewise, it should not be that surprising to expect that when the Court is constitutionally committed to protecting the regulatory and fiscal autonomy of the states from impairment by Congress through the manipulation of its conditional spending power, the Court would embrace the same distinction between permissible refusals to fund and impermissible leveraging of financial influence to penalize states who refuse to go along with the ACA's Medicaid expansion by withholding more than the funds for the expansion program—in this case, a lot more. For Congress "to withhold all Medicaid benefits from an otherwise eligible [state] simply because that [state] had exercised [its] constitutionally protected freedom" to make its own policy choices pursuant to a fundamental structural principle of state autonomy also raises a "substantial constitutional question."[85] It is the "*broad disqualification* from receipt of public benefits" that can turn permissible influence into impermissible coercion.[86]

The emphasis that Chief Justice Roberts placed on spending conditions that "take the form of threats to terminate other significant independent grants"[87] is fully in accord with the Court's approach to penalties on the exercise of protected individual rights, both in holding unduly coercive the threat to withdraw all Medicaid funding from states that would not agree to the expansion, and in concluding that all that was necessary to remedy the constitutional violation was removal of that threat. Perhaps that is why, in addition to the "active

84. Harris v. McRae, 448 U.S. 297, 317 n.19 (1980).

85. *Id.*

86. *Id.* (emphasis added).

87. *See NFIB*, 132 S. Ct. at 2603–04 (opinion of Roberts, C.J., joined by Breyer & Kagan, JJ.); *supra* p. 425.

liberty" point made earlier,[88] Justices Breyer and Kagan concurred in that portion of Chief Justice Roberts's opinion.

III. CONGRESS'S CIVIL RIGHTS ENFORCEMENT POWER EBBS, AS STATE IMMUNITY SWELLS

Unlike the outcome in *NFIB*, another of the Court's decisions this past Term, *Coleman v. Court of Appeals of Maryland*,[89] was a complete victory for state sovereignty. The Court, with no majority opinion and four expected dissenters,[90] held that Congress exceeded its power under section 5 of the Fourteenth Amendment when it sought to authorize suits for damages against state employers who failed to comply with that part of the Family and Medical Leave Act of 1993 (FMLA) that generally requires all employers to grant unpaid leave to employees with a serious medical condition so that they might care for themselves.[91] Justice Kennedy announced the Court's judgment and authored a plurality opinion joined by Chief Justice Roberts and Justices Thomas and Alito, but Justice Scalia concurred only in the judgment, taking an even narrower view of Congress's power to abrogate state immunity than the plurality did.[92]

Fifteen years ago, a majority of the Court, in the path-changing decision in *City of Boerne v. Flores*,[93] introduced a new effort to confine the power of Congress under section 5 of the Fourteenth Amendment, which grants Congress power to "enforce, by appropriate legislation, the provisions" of the Amendment.[94] The author there, too, was Justice Kennedy, who construed the scope of, and judicially enforceable limits on, the section 5 power in these terms:

> Congress' power under § 5 . . . extends only to "enforc[ing]" the provisions of the Fourteenth Amendment. The Court has described this power as "remedial" . . . . The

88. *See supra* p. 425.

89. 132 S. Ct. 1327 (2012).

90. Justice Ginsburg wrote the dissent, joined in full by Justice Breyer, and by Justices Sotomayor and Kagan in all but footnote 1, which reiterated the view, previously rejected by the Court, that "Congress can abrogate state sovereign immunity pursuant to its Article I Commerce Clause power." *Id.* at 1339 n.1 (Ginsburg, J., dissenting).

91. *Id.* at 1338 (plurality opinion).

92. *Id.* at 1338–39 (Scalia, J., concurring in the judgment).

93. 521 U.S. 507 (1997) (holding that Congress had exceeded its constitutional authority when it enacted the Religious Freedom Restoration Act).

94. U.S. CONST. amend. XIV, § 5.

> design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States . . . Congress does not enforce a constitutional right by changing what the right is. It has been given the power "to enforce," not the power to determine what constitutes a constitutional violation . . . .
>
> While the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies, the distinction exists and must be observed. There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect.[95]

At least two sorts of restrictions on congressional power were introduced by this approach. First, and most fundamentally, Congress could not enforce what it might believe, contrary to the Court's view, the Fourteenth Amendment properly should be understood to forbid.[96] Second, despite the promise that Congress "must have wide latitude in determining" where the line between remedying or preventing unconstitutional actions and substantively changing the meaning of the Fourteenth Amendment lies, the Court has administered the "congruence and proportionality" standard in a fashion that places an increasingly heavy burden on Congress to demonstrate with substantial evidence that its measures are remedial or preventative.[97]

95. *City of Boerne*, 521 U.S. at 519–20 (citation omitted).

96. For a fully developed contrary perspective proposing that "for purposes of Section 5 power the Constitution should be regarded as having multiple interpreters, both political and legal" and that specifically would attribute "equal interpretive authority to Congress and to the Court," grounded in the view that this "model of polycentric constitutional interpretation . . . more accurately reflects the understandings and practices that make up our constitutional practice than does the enforcement model," see Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 1947 (2003).

97. *See id.* at 1964 ("As the Rehnquist Court has begun to insist that the term 'enforce' excludes the power to 'interpret,' it has also begun decisively to repudiate the deferential

The "congruence and proportionality" hurdle that Congress must overcome applies not only to its direct efforts to define the scope of the rights to equal protection and due process contained in section 1 of the Fourteenth Amendment, but also to the power of Congress—as a remedial or preventive measure to enforce Fourteenth Amendment rights—to remove whatever immunity to suit the States otherwise would have. That was the issue in *Coleman*, as it had been in a number of earlier cases,[98] particularly in *Nevada Department of Human Resources v. Hibbs*,[99] which held, 6–3, that Congress possessed section 5 power to abrogate state sovereign immunity and authorize suits for damages against state employers who violated the provisions of the FMLA requiring them to provide unpaid leave to employees seeking time off for family care, rather than self-care.

Justice Kennedy's plurality opinion in *Coleman* distinguished *Hibbs* (from which Justice Kennedy, joined by Justices Scalia and Thomas, had dissented) on the basis that in *Hibbs* there was "evidence that States had family-leave policies that differentiated on the basis of sex and that States administered even neutral family-leave policies in ways that discriminated on the basis of sex,"[100] whereas in *Coleman* there was no such evidence of sex discrimination in the administration of sick leave. Unlike with family-leave practices, which Congress found to be administered based on a pervasive sex-role stereotype that caring for family members is women's work, the evidence before Congress suggested that men and women took medical leave approximately equally, and public employers treated self-care requests from men and women without gender stereotypes. Although "the self-care provision offers some women a benefit by allowing them to take leave for pregnancy-related illnesses[,] . . . as a remedy, the provision is not congruent and proportional to any identified constitutional violations" since

McCulloch standard."); *see also* 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 958–59 (3d ed. 2000) ("Thus have laws enacted by Congress pursuant to § 5 suddenly been saddled with something between intermediate and strict scrutiny, effectuating what can only be understood as a substantial, albeit not conclusive, presumption of unconstitutionality.").

98. *See, e.g.*, Tennessee v. Lane, 541 U.S. 509 (2004); Bd. of Trs. v. Garrett, 531 U.S. 356 (2001); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000); Alden v. Maine, 527 U.S. 706 (1999); Fla. Prepaid Postsecondary Educ. Expenses Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999). For an early, critical view of the *Florida Prepaid* and *Alden* decisions, see TRIBE, *supra* note 97, at 1374–81.

99. 538 U.S. 721 (2003).

100. Coleman v. Court of Appeals of Md., 132 S. Ct. 1327, 1332 (2012).

"Congress did not document any pattern of States excluding pregnancy-related illnesses from sick-leave or disability-leave policies."[101] Nor did the plurality accept the argument that the self-care provision was needed to make the family-care provisions effective based on the notion that the right to self-care would make it less likely that employers would discriminate against hiring women in the first place—the theory being that the more the anticipated leave requests by men and women seemed similar, the less likely employers would be to factor the fear of disproportionate leave requests by women into their hiring calculations.[102] Finally, the plurality rejected the claim that the self-care provision was justified to help single parents, most of whom are women, retain their jobs when they become ill, for on that view Congress would have been targeting "neutral leave policies with a disparate impact on women," which meant that the self-care provision was "not directed at a pattern of constitutional violations."[103]

Justice Scalia's concurrence in the judgment reiterated his view that Congress's power under section 5 should be limited "to the regulation of conduct that *itself* violates the Fourteenth Amendment."[104] Since failure to grant state employees leave for self-care did not even "come close" to that, Congress lacked the power to abrogate state immunity.[105] Interestingly, Justice Scalia again called for abandonment of the "congruence and proportionality" test, this time based in part on his perception that the differing applications of it by the plurality and the dissent were both "faithful" to it.[106] He thought the "varying outcomes" the Court arrived at using it made "no sense" and that the test itself both invited judicial arbitrariness and required inappropriate "scour[ing of] the legislative record in search of evidence that supports the congressional action."[107]

As for Justice Ginsburg's dissent, which is especially interesting given her paramount role as a woman's rights advocate in the Supreme Court beginning in the 1970s, it noted the FMLA's repeated emphasis on the overall goal of reducing gender-based

101. *Id.* at 1335.
102. *Id.* at 1335–37.
103. *Id.* at 1337.
104. *Id.* at 1338 (Scalia, J., concurring in the judgment).
105. *Id.* at 1338–39.
106. *Id.* at 1338.
107. *Id.*

employment discrimination.[108] It summarized the history of disagreements between "equal-treatment" feminists and "equal-opportunity" feminists that resulted in the ultimately successful former group developing—and Congress embracing—"a gender-neutral leave model, which eventually became the FMLA," as a better mechanism to fight pregnancy discrimination.[109] It urged a reconsideration of the Court's decision in *Geduldig v. Aiello*[110] that pregnancy discrimination is not the same as sex discrimination.[111] And it contended that even if *Geduldig* "senselessly holds sway,"[112] Congress's adoption of the self-care leave provision was "a key part of Congress' endeavor to make it feasible for women to work and have families,"[113] because it would reduce the incentives employers might have, based on stereotypical assumptions that women disproportionately are inclined to ask for family leave, to not hire women, who were no more likely than men—and perhaps even less likely, if they did take more family leave—to ask for self-care leave.

By disaggregating the self-care provision of the FMLA from the family-care provisions upheld in *Hibbs*, the Court obviously restricted Congress's section 5 power further in the interest of bolstering state sovereign immunity. That the three dissenters in *Hibbs* were in the majority in *Coleman*, together with Chief Justice Roberts (who replaced Chief Justice Rehnquist, the author of *Hibbs*) and Justice Alito (who replaced Justice O'Connor, who had joined the majority in *Hibbs*), comes as no surprise. Although it is difficult to say with certainty, the new majority alignment might also be expected to limit Congress's section 5 power even more in the future—even if they cannot exactly agree on how much, or on what the proper criteria for evaluation should be.

The severity of the demands imposed on Congress by the *Coleman* plurality to justify the exercise of its enforcement powers is somewhat disturbing. It is at least a little ironic that a Court that insists in the context of affirmative action policies that race-neutral

108. *Id.* at 1340 (Ginsburg, J., dissenting) ("The FMLA's purpose and legislative history reinforce the conclusion that the FMLA, in its entirety, is directed at sex discrimination.").

109. *Id.* at 1340–42.

110. 417 U.S. 484 (1974).

111. *See Coleman*, 132 S. Ct. at 1344–45 (Ginsburg, J., dissenting).

112. *Id.* at 1347.

113. *Id.* at 1349.

means be preferred to race-conscious ones[114] should be so begrudging about Congress's use of sex-neutral means to address its overall concerns about sex discrimination in the workplace through all the provisions of the FMLA operating together. In any event, *Coleman* appears to move further down the path of judicial limitation of congressional power in order to enhance state sovereign immunity, and seems to have largely abandoned the promise that, even under the "congruence and proportionality" test, Congress would be afforded deference, much less "wide latitude." Further steps down that path may be anticipated, whether in this context or in others.

IV. OF PRECEDENT AND PREEMPTION

The preemption doctrine, which asks whether particular elements of state law are superseded under the Supremacy Clause[115] by federal law or policy, naturally is an important battle site where federal power and state sovereignty forces clash. Professor Ernest Young suggests, in fact, "that while cases about the reach of the Commerce Clause or the scope of state sovereign immunity grab the headlines, preemption cases make up the functional heart of the Court's federalism doctrine."[116] Whether that is a fully accurate assessment or not, or is in any event subject to change as the Court introduces more limits on the scope of congressional power, as it did this past Term, there is no doubt of preemption's importance for understanding our constitutional federalism.[117]

The Court decided three preemption cases in October Term 2011, sustaining almost all the claims in each that federal law

114. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

115. U.S. CONST. art. VI, cl. 2.

116. Ernest A. Young, *"The Ordinary Diet of the Law": The Presumption Against Preemption in the Roberts Court*, 2011 SUP. CT. REV. 253, 254 (2012).

117. Professor Young believes that it "is critical to approach preemption questions in ways that cohere with the broader concerns of constitutional federalism doctrine" and that—at least prior to the Court's opinions in *NFIB*—preemption had "become the central question of our federalism" in large part because "the enumerated limits of Congress's powers now play an extremely limited role in preserving the federal balance." *Id.* at 306. Because of his sense that the Court's post–New Deal recognition of broad congressional power produced an opposing reaction of greater sensitivity to interpreting Congress's preemptive intent more narrowly so that state authority is not too easily eliminated, one might wonder whether he thinks the converse also might be true; that is, as the Court in cases like *NFIB* moves toward circumscribing the powers of Congress, should the preemptive intent of Congress when exercising power it does possess be read more broadly, still more narrowly, or not any differently?

rendered the application of challenged state law impermissible. In two of the cases, one well-established precedent—though a different precedent in each—was effectively determinative within its sphere of influence in support of the preemption result.[118] A different minority group of Justices in each case resisted that determinative influence, however, and a close look at the Justices' varying responses to precedents that all agreed were relevant offers a revealing glimpse of underlying conceptions of the proper interaction of federal and state authority in the preemption context, not to mention some insight into the perceived force of stare decisis.

Certainly the more noticed of the two cases—involving an immigration regulation controversy that has attracted a huge amount of public attention—was *Arizona v. United States*.[119] In a pre-enforcement, facial preemption challenge brought by the United States, a majority of the Court addressed four provisions of Arizona's S.B. 1070, a law expressly designed to "discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States."[120] By a 5–3 vote,[121] the Court, in an opinion by Justice Kennedy, held that federal law preempted three provisions of the Arizona law: section 3, which made failure to comply with *federal* alien registration requirements a *state* misdemeanor; section 5(C), which created another state misdemeanor for an unauthorized alien to seek or engage in work in Arizona; and section 6, which authorized state and local police officers to arrest without a warrant any person an officer "has probable cause to believe . . . has committed any public offense that makes [that person] removable from the United States" under federal

118. In the third decision, *National Meat Ass'n v. Harris*, 132 S. Ct. 965 (2012), the Court unanimously held that the express preemption provision of the Federal Meat Inspection Act (FMIA) prohibited application of a recent California statute that sought to control how an FMIA-regulated slaughterhouse deals with nonambulatory pigs. The FMIA's express preemption clause "prevents a State from imposing any additional or different—even if nonconflicting—requirements that fall within the scope of the Act and concern a slaughterhouse's facilities or operations." *Id.* at 970. Thus, the California regulatory scheme was preempted, because it called for different treatment than that allowed by the FMIA. *Id.* at 975. The decision turned on the proper interpretation of the scope of the FMIA express preemption provision and did not require engagement with any particular judicial precedent.

119. 132 S. Ct. 2492 (2012).

120. *Id.* at 2497 (quoting the note following ARIZ. REV. STAT. ANN. § 11-1051 (2012)).

121. *Id.* Justice Kagan did not participate, presumably because of her involvement with the suit filed by the United States against Arizona when she was solicitor general.

law.[122] The majority rejected, however, the facial preemption challenge to section 2(B)—the colloquially named "show me your papers" provision of S.B. 1070—which requires police officers in most circumstances to make a "reasonable attempt . . . to determine the immigration status" of anyone they stop, detain, or arrest "in the enforcement of any other [state or local] law or ordinance . . . where reasonable suspicion exists that the person is an alien and is unlawfully present in the United States."[123] Largely for three reasons the Court declined to assume that the state courts would construe section 2(B) "in a way that creates a conflict with federal law." [124] First, Congress had encouraged through statute the sharing of information about possible immigration violations between federal and state authorities.[125] Second, under state law a valid Arizona driver's license would satisfy the inquiry, and racial profiling and inconsistency with federal immigration regulations and federal civil rights guarantees were prohibited in the implementation of section 2(B).[126] Finally, the state courts had not had an opportunity to interpret the provision to allay concerns either about possible detentions for the *sole purpose* of verifying immigration status or about possible unduly prolonged detentions not justified by other state or local law,[127] The majority was keen to say, however, that "[t]his opinion does not foreclose other preemption and constitutional challenges to the law as interpreted and applied after it goes into effect."[128]

Unsurprisingly, in order to decide these preemption challenges, the Court (and the parties) invoked *Hines v. Davidowitz*,[129] the classic 1941 decision that was the most obvious precedent to be addressed. *Hines*, which invalidated a Pennsylvania alien registration law whose substantive requirements differed from those of the federal alien registration scheme in place at the time, was characterized (not for the first time) as "a field preemption case."[130]

122. *Id.* at 2497–98.
123. *Id.* at 2515 (Scalia, J., concurring in part and dissenting in part).
124. *Id.* at 2510.
125. *Id.* at 2508 (majority opinion).
126. *Id.* at 2507–08.
127. *Id.* at 2509.
128. *Id.*
129. 312 U.S. 52 (1941).
130. *Arizona*, 132 S. Ct. at 2502.

Under "field" preemption, state regulation of anything in the defined field is prohibited because Congress has determined that the field must be regulated by its exclusive governance.[131] According to the majority, because the current federal statutory framework for alien registration remains "comprehensive," and "[w]here Congress occupies an entire field, as it has in the field of alien registration, even complementary state regulation is impermissible,"[132] Arizona could not punish failure to comply with federal registration requirements. To allow Arizona—and every other state—to do so would diminish federal control over enforcement.

Justice Kennedy rejected Arizona's contention "that § 3 can survive preemption because [it] has the same aim as federal law and adopts its substantive standards."[133] That argument "ignores the basic premise of field preemption—that States may not enter, in any respect, an area the Federal Government has reserved for itself."[134] Allowing section 3 to operate would recognize state power "to bring criminal charges . . . for violating a federal law even in circumstances where federal officials in charge of the comprehensive scheme determine that prosecution would frustrate federal policies."[135] Besides, unlike the federal regulatory regime, section 3 precluded probation and the possibility of a pardon.[136]

The three separate concurring and dissenting opinions are particularly noteworthy for their treatment of *Hines* as applied to section 3. Justice Scalia would have upheld section 3 despite *Hines*. He denied that *Hines* established "a 'field preemption' that implicitly eliminates the States' sovereign power to exclude those whom federal law excludes."[137] Rather, in his view, *Hines* only "held that the States are not permitted to establish 'additional or auxiliary' registration requirements for aliens."[138] Arizona did not do that; it

131. *Id.* at 2501 (citing Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 115 (1992)).
132. *Id.* at 2502.
133. *Id.*
134. *Id.*
135. *Id.* at 2503.
136. *Id. Hines* is also the source of the category of "obstacle preemption," said to be a particular species of "conflict preemption," where state law is preempted if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines*, 312 U.S. at 67. The challenges to sections 5(C), 6, and 2(B) were addressed under that rubric. *Arizona*, 132 S. Ct. at 2503–10.
137. *Arizona*, 132 S. Ct. at 2518 (Scalia, J., dissenting).
138. *Id.*

"merely ma[de] a violation of state law the *very same* failure to register and failure to carry evidence of registration that are violations of federal law."[139] Borrowing from Justice Stone's dissenting opinion in *Hines*, Justice Scalia interpreted *Hines* to allow a state to rely on the federal registration system to aid in the enforcement of state laws that constitutionally could be applied to aliens, such as Arizona's law denying unemployment benefits to illegal aliens.[140] He dismissed the majority's concern that more vigorous state enforcement of federal registration requirements might frustrate federal enforcement choices, because such state power would be "entirely appropriate when the State uses federal law (as it must) as the criterion for the exercise of *its own power*, and the implementation of *its own policies* of excluding those who do not belong there."[141]

Justice Thomas, in his separate concurring and dissenting opinion, also thought that "*Hines* at most holds that federal law pre-empts the States from creating additional registration requirements," and "here, Arizona is merely seeking to enforce the very registration requirements that Congress created."[142] Thus, section 3 was valid, because "nothing in the text of the relevant federal statutes indicates that Congress intended enforcement of its registration requirements to be exclusively the province of the Federal Government."[143] Like Justice Scalia, in other words, Justice Thomas defined more narrowly than the majority the "field" that *Hines* said Congress had occupied.

Unlike Justices Scalia and Thomas, who would have upheld all the challenged provisions of S.B. 1070, Justice Alito, in his separate concurring and dissenting opinion, agreed with the Court that section 3 was preempted "by virtue of our decision in *Hines*," because "[o]ur conclusion in that case that Congress had enacted an 'all-embracing system' of alien registration and that States cannot 'enforce additional or auxiliary regulations' . . . forecloses Arizona's attempt here to impose additional, state-law penalties for violations of the federal registration scheme."[144] Justice Alito elaborated that

139. *Id.*
140. *Id.*
141. *Id.* at 2519.
142. *Id.* at 2523 (Thomas, J., concurring in part and dissenting in part).
143. *Id.*
144. *Id.* at 2524–25 (citation omitted).

"[a]lthough there is some ambiguity in *Hines*, the Court largely spoke in the language of field pre-emption."[145] And he was clear that "[i]f we credit our holding in *Hines* that Congress has enacted 'a single integrated and all-embracing system' of alien registration and that States cannot 'complement' that system or 'enforce additional or auxiliary regulations,' then Arizona's attempt to impose additional, state-law penalties for violations of federal registration requirements must be invalidated."[146]

Did Justices Scalia and Thomas fail to "credit" the holding in *Hines*? If so, what might have accounted for their deviation from the force of precedent? And, was the deviation—or at least such a crabbed reading of that precedent—justified absent any suggestion that *Hines* should be reconsidered?

Before undertaking that examination, however, it may be useful to contrast the Justices' respective approaches to *Arizona v. United States* with their approaches to another preemption case from last term that lacked such high visibility. Strikingly, Justice Thomas authored the majority opinion for six Justices that included Justice Scalia in *Kurns v. Railroad Friction Products Corp.*,[147] holding that state-law tort claims for both defective design and failure to warn were preempted by the federal Locomotive Inspection Act (LIA), because under a 1926 precedent, *Napier v. Atlantic Coast Line Railraod Co.*,[148] Congress had preempted the entire field of regulating locomotive equipment.[149] The tort suit alleged that a welder and machinist had contracted malignant mesothelioma while working with locomotive brakeshoes and engine valves that contained asbestos, and that the manufacturers' defective design of those products and failure to warn of their danger and how to use them safely rendered them liable for his injuries. Justice Thomas noted that the claimants "do not ask us to overrule *Napier* and thus do not seek to overcome the presumption of stare decisis that attaches to this 85-year-old precedent."[150] And he rejected all their attempts to suggest that their claims "fall outside of the field pre-

145. *Id.* at 2529.
146. *Id.* at 2530 (citation omitted).
147. 132 S. Ct. 1261 (2012).
148. 272 U.S. 605 (1926).
149. *Kurns*, 132 S. Ct. at 1264.
150. *Id.* at 1267.

empted by the LIA, as it was defined in *Napier*."[151] In particular, the Court refused to narrow the preempted field to exclude "hazards arising from repair and maintenance (as opposed to those arising from use on the line)"[152] or to exclude at least the failure-to-warn claims, which, in the majority's view were "directed at the equipment of locomotives" and, thus, "fall within the pre-empted field defined by *Napier*."[153]

Justice Sotomayor, joined by Justices Ginsburg and Breyer, concurred in part, agreeing that the LIA preempted the defective-design claims, but she dissented from the decision to preempt the failure-to-warn claims.[154] She suggested that the Court "might decide *Napier* differently today," because it "implied field preemption from the LIA's mere delegation of regulatory authority to the Interstate Commerce Commission" and the LIA lacked either textual language expressly requiring field preemption or *any* substantive regulations, "let alone a 'scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.'"[155] Even accepting the force of this long established precedent and the value of "statutory stare decisis," as did the majority, and concluding therefore that the "defective-design claims fall within the pre-empted field because they would impose state-law requirements on a locomotive's physical makeup," Justice Sotomayor nonetheless argued that the "failure-to-warn claims . . . proceed on a fundamentally different theory of tort liability that does not implicate a product's physical composition at all."[156] Accordingly, she thought the majority extended the field preemptive effect of the LIA "well beyond what *Napier* requires."[157]

Justice Kagan, who later did not participate in *Arizona v. United States*, expressed doubts similar to those expressed by Justice Sotomayor about whether *Napier* would be decided the same way today, because its field preemption conclusion was "based on nothing more than a statute granting regulatory authority over [the]

151. *Id.*
152. *Id.* at 1267–68.
153. *Id.* at 1268.
154. *Id.* at 1271 (Sotomayor, J., concurring in part and dissenting in part).
155. *Id.* at 1271–72.
156. *Id.* at 1272.
157. *Id.* at 1275.

subject matter [of locomotive equipment] to a federal agency."[158] But she concluded that *Napier* meant that "the scope of the agency's power" under the LIA determined "the boundaries of the preempted field," and that meant, in turn, that because the agency had authority both to regulate the design of locomotive equipment and to require warnings about their safe use, both the defective-design and failure-to-warn claims fell into the preempted field.[159]

In the end, differing Court majorities gave both *Hines* and *Napier* their fullest due in *Arizona v. United States* and *Kurns*, respectively, applying their precedential scope broadly when defining the "field" that Congress had preempted. Chief Justice Roberts and Justices Kennedy and Alito (at least with respect to section 3 of S.B. 1070) followed that approach in both cases, and one might surmise that Justice Kagan likely would have as well, had she participated in both. But what about Justices Scalia and Thomas, who were anxious to limit the scope of field preemption in *Arizona* but not in *Kurns*? Or Justices Sotomayor, Ginsburg, and Breyer, who took the exact opposite position? Here lies a potentially illuminating entry into these cases.

In several respects, the Scalia and Thomas approaches to the two cases are more difficult to fathom. After all, in both *Hines* and *Arizona*, the context is regulation of a group of people—aliens—whose treatment inevitably might implicate sensitive foreign policy concerns of the United States, where singular treatment by the federal government is more likely to be desired. That might lead one to expect that any thumb on the scale of the federal/state balance likely would be placed on the federal preemption side, as the majorities in both cases did in reaching the conclusion both that Congress had occupied the field of alien registration regulation and that the scope of the field should be defined broadly enough to be responsive to those imperatives.[160] By contrast, the federal interest in

158. *Id.* at 1270 (Kagan, J., concurring).

159. *Id.* Justice Sotomayor responded that if the power to require warnings existed, that power was limited to "warnings that impose direct requirements on the physical composition of locomotive equipment" and did not extend to the failure-to-warn claims asserted in this case. *Id.* at 1275 n.3 (Sotomayor, J., concurring in part and dissenting in part).

160. Justice Kennedy's majority opinion in *Arizona* emphasized not only the power of Congress over naturalization and its inherent sovereign power to conduct foreign relations, but also the importance of discretion in the executive branch when enforcing immigration law, especially since "[s]ome discretionary decisions involve policy choices that bear on this Nation's international relations." Arizona v. United States, 132 S. Ct. 2492, 2499 (2012).

Napier and *Kurns* implicates only ordinary domestic concerns, important perhaps, but not so much so that, where an interpretive choice is to be made, the implicated federal interest necessarily should be thought to overcome the usual presumption against the preemption of state law.[161]

Furthermore, there was little disagreement in *Arizona* that "[f]ederal governance of immigration and alien status is extensive and complex."[162] Indeed, whatever the full scope of the field of federal alien registration regulation might be, there was no doubt that Congress had enacted many statutes of relevance in the area. Even the survival of section 2(B) was the product of yet further congressional legislation governing cooperation in information sharing between federal and state authorities about the legal status of individual aliens.[163] By comparison, *Kurns*, like *Napier*, drew on the LIA's delegation of authority to the regulatory agency, rather than its extensive exercise, when defining its broad scope of field preemption.

Nor can the difference be explained by the fact that no party in *Kurns* had asked for reconsideration of *Napier*, as Justice Thomas noted. Neither Justice Scalia, Justice Thomas, nor anyone else suggested in Arizona that *Hines* be reconsidered rather than narrowly construed.

If the federal side of the equation leaned more in the direction of preemption in *Arizona* than *Kurns*, then what about the state side of

161. The classic formulation of these notions comes from *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947), where the Court explained its approach when Congress has legislated "in a field which the States have traditionally occupied":

> [W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. . . . Such a purpose may be evidenced in several ways. The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. . . . *Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.* Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. . . . Or the state policy may produce a result inconsistent with the objective of the federal statute. . . . It is often a perplexing question whether Congress has precluded state action or by the choice of selective regulatory measures has left the police power of the States undisturbed except as the state and federal regulations collide.

Id. at 230–31 (emphasis added).

162. *Arizona*, 132 S. Ct. at 2499.

163. *Id.* at 2508.

the equation? Here is where Justice Scalia in particular took a robust stand. His opinion argues aggressively that Arizona, like all the states in the Union, possesses "the defining characteristic of sovereignty: the power to exclude from the sovereign's territory people who have no right to be there."[164] Although he acknowledged that since the founding era "primary responsibility for immigration policy has shifted from the States to the Federal Government," he argued that "[i]mplicit 'field preemption' will not do" to remove "the *core* of state sovereignty: the power to exclude."[165] He denigrated the majority's willingness to draw support for its field preemption conclusion from the Federal Government's sensitivity to the concerns of "foreign countries . . . about the status, safety, and security of their nationals in the United States,"[166] declaring that "[e]ven in its international relations, the Federal Government must live with the inconvenient fact that it is a Union of independent States, who have their own sovereign powers."[167] For Justice Scalia, only where Arizona law might conflict with federal immigration law would there be preemption. He found no conflict in any of the challenged parts of S.B. 1070 and no field preemption "of additional state penalties" for federal immigration violations.[168]

Justice Thomas reached the same conclusion, but in a much simpler way. He refused to hold that Congress preempted the field of enforcing federal registration standards by following his proposed general approach that preemption should follow only from conflicts "between the 'ordinary meanin[g]' of the relevant federal laws" and the challenged state law provisions.[169] Since "nothing in the *text* of the relevant federal statutes indicates that Congress intended enforcement of its registration requirements to be exclusively the province of the Federal Government," section 3 was not preempted.[170]

A charitable reading of his opinion for the Court in *Kurns* (which Justice Scalia joined), one that would make it consistent with

164. *Id.* at 2511 (Scalia, J., concurring in part and dissenting in part).
165. *Id.* at 2513–14.
166. *Id.* at 2498 (majority opinion).
167. *Id.* at 2514–15 (Scalia, J., concurring in part and dissenting in part).
168. *Id.* at 2519.
169. *Id.* at 2522 (Thomas, J., concurring in part and dissenting in part) (quoting Wyeth v. Levine, 555 U.S. 555, 588 (2009) (Thomas, J., concurring)).
170. *Id.* at 2523 (emphasis added).

his opinion in *Arizona*, would suggest that it was only the textual interpretation of the LIA in *Napier* that led to his view that the failure-to-warn, as well as the defective-design, claims were preempted in the former. The difference between his majority opinion and that of the concurring and dissenting Justices, then, would reduce to what the "ordinary meaning" of the LIA is. Although he invoked the special force of "statutory stare decisis" in *Kurns*, it is unclear why that force should not have applied equally in *Arizona*. Realistically, moreover, what the "ordinary meaning" is itself is a matter of some discretionary interpretive choice. No doubt the textualist approach is grounded in part on a belief that a linguistic interpretive choice is less likely to allow for judicial policy discretion than is an interpretive choice based on "judicially divined legislative purposes"[171] that take account of background policies and contexts. And interestingly, there was no reference in *Kurns* to the presumption against preemption. Had there been, one might have thought that preserving a traditional state tort law cause of action might have bolstered the desire to preserve as much of state law as possible, as the concurring and dissenting Justices would have done by holding that federal law did not preempt the failure-to-warn claims. Certainly one might imagine the possibility that Justice Scalia, at least, who was so anxious in *Arizona* to preserve state power to exclude aliens unlawfully present under federal law, might have approached the preservation of state common law causes of action in similar fashion. Whether or not Justice Sotomayor's opinion in *Kurns* is a better reading of the scope of the LIA's preemptive effect as interpreted by *Napier* than the majority's, it is at least a plausible reading, and the presumption against preemption, if applied, might have made all the difference in the case. As it was, reading *Napier* for all it was worth tended to serve the interest in reducing the potential liability of certain businesses, perhaps a not unwelcome consequence to a number of Justices in the majority in *Kurns*.

In the end, the comparison of the multiple opinions in *Arizona* and *Kurns* highlights several points. First, the doctrines of "field preemption" and "obstacle" preemption are alive and well, in significant part due to well-established precedent. Second,

171. *Id.* at 2524.

preemption doctrine generally continues to consist of several strands. Dominant federal interests, pervasiveness of federal regulation, inquiries into federal purposes, the nature and strength of the particular state interests that would be sacrificed if preemption is found, and concerns about excessive judicial policymaking all remain grist for the preemption mill. Third, with the exception of Justice Alito, who complained in his concurring and dissenting opinion in *Arizona* that the Court there gave "short shrift to our presumption *against* pre-emption,"[172] that presumption was largely absent in the analyses. In *Arizona*, that might signify what seems to be a pretty consistent Court view that when "the field is one that is traditionally deemed 'national,' the Court is more vigilant in striking down what would amount to state incursions into subjects that Congress may have validly reserved to itself."[173] Foreign policy and immigration policy are among those national subjects, as the Court emphasized.[174] And perhaps *Kurns* offers supporting evidence for Professor Young's view that whether or not the Court finds preemption, "when the Justices think that the preemption question is not a close one, they often choose not to invoke *Rice*'s tiebreaker rule."[175] Fourth, perhaps stare decisis exerts more influence in preemption cases than in other contexts. Fifth, the "generally deregulatory" effect of federal preemption[176] may have rendered preemption more attractive to Justices Thomas, Scalia, and Alito when it was businesspeople rather than unauthorized aliens who would be deregulated by preemption. Finally, for those dissenters in *Arizona*, the pull of state sovereignty was vastly stronger than in *Kurns*.

V. CONCLUSION

When the results of the battles between state sovereignty and federal power in the October Term 2011 of the Supreme Court are tallied, and the smoke has cleared, the federal taxing power, the

172. *Id.* at 2530 (Alito, J., concurring in part and dissenting in part).

173. TRIBE, *supra* note 97, at 1210.

174. Similarly, on a previous occasion Justice Kennedy had emphasized for a unanimous Court in *United States v. Locke*, 529 U.S. 89, 108 (2000), with respect to the subject of "national and international maritime commerce[,]" that "there is no beginning assumption that concurrent regulation by the State is a valid exercise of its police powers.") *Id.* at 108.

175. Young, *supra* note 116, at 308.

176. *Id.* at 342.

preemptive force of the federal immigration power, and at least to a significant extent, the federal conditional spending power have withstood state sovereignty assaults. On the other hand, the federal commerce power, the necessary and proper power, the federal spending power (to a certain but probably limited extent), and the Section 5 enforcement power suffered meaningful losses. The tilt is clear, and the strength of the state sovereignty forces remains undiminished, as it has since Justice Thomas replaced Justice Marshall.

It is true and of interest that noticeable and important differences in how far the federal power containment campaign should go emerged within the governing state sovereignty majority, most dramatically with the decision of Chief Justice Roberts in *NFIB* to pull back and uphold nearly all of the ACA, and to a significant extent with the immigration preemption rulings supported by the Chief Justice and Justice Kennedy in the *Arizona* decision. Justice Scalia's unyielding state sovereignty positions in *NFIB*, *Coleman*, and *Arizona* seem to represent the most aggressive—and in the latter two cases, the most singular—attacks on federal power, although Justice Thomas remains willing to go further in one respect and reconsider the long-established power of Congress to regulate commerce among the States based on the substantial cumulative effect of local activity, while he continues for the time being to adhere to the "congruence and proportionality" approach to Congress's power under section 5 of the Fourteenth Amendment. Chief Justice Roberts appears at the moment to be the most deferential toward federal power of the governing state sovereignty majority, whether for reasons of institutional strategy, stare decisis, or (more likely in my view) his genuine belief that federal authority has more compelling claims to recognition in some respects than his state sovereignty brethren hold. Justices Kennedy and Alito continue to push more strongly than the Chief Justice would toward limiting federal power, though not as much as Justices Scalia and Thomas. Still, overall the federal power containment project continues.

What does this portend for the future? Further curtailment of congressional power seems likely. In its 2009 decision in *Northwest Austin Municipal Utility District No. One v. Holder*,[177] the Court

177. 557 U.S. 193 (2009).

offered strong hints that it might determine Congress's 2006 reauthorization of section 5 of the Voting Rights Act of 1965 (VRA) to be an unconstitutional exercise of the congressional power to enforce the Fifteenth Amendment's ban on racial discrimination in voting, largely on the basis that Congress, in light of intervening changes since 1965, no longer had a sufficient evidentiary record of continued disenfranchisement of racial minorities by covered jurisdictions before it in 2006 to justify the stringent remedial measures prescribed by the VRA's section 5. Such a decision would fit well with the implications of *City of Boerne* and its most recent incarnation in *Coleman*.[178]

The line between permitted inducement and forbidden coercion resulting from federal spending conditions is likely to be tested further, but it is not yet evident that the outcome will amount to a significant incursion into Congress's ability quite effectively to influence state behavior through funding policies. More likely to lead to significant further restrictions on congressional power are the combined majority's articulations in *NFIB* of why neither the Commerce Clause nor the Necessary and Proper Clause—either independently or taken together—could support the ACA's individual mandate. That is not because it seems at all probable that Congress will enact further individual mandates. Indeed, the paucity of such mandates in the past might be understood to reflect a sense in Congress, not so much that they always were constitutionally dubious (as the Chief Justice would have it), but that their likely unpopularity means that the political check on Congress is more than adequate to prevent their adoption except for the most compelling of reasons. Nonetheless, if—especially after the *NFIB* decision—that particular form of regulation is not likely to recur, the broader structural state sovereignty underpinnings of the majority's approach to the commerce and necessary and proper powers of Congress seem likely to be invoked in other limiting forms. In what contexts, in what forms, and to what degree remain uncertain, but the ongoing

178. The Court recently granted certiorari in *Shelby County, Alabama v. Holder*, No. 12–96, 2012 WL 3018430, at *1 (U.S. Nov. 9, 2012), "limited to the following question: Whether Congress' decision in 2006 to reauthorize Section 5 of the Voting Rights Act under the pre-existing coverage formula of Section 4(b) of the Voting Rights Act exceeded its authority under the Fourteenth and Fifteenth Amendments and thus violated the Tenth Amendment and Article IV of the United States Constitution."

drive to contain the power of Congress in the name of replenishing the forces of state sovereignty seems embedded for now.