

2014

The Shadow Powers of Article I

Alison LaCroix

Follow this and additional works at: [https://chicagounbound.uchicago.edu/
public_law_and_legal_theory](https://chicagounbound.uchicago.edu/public_law_and_legal_theory)

 Part of the [Law Commons](#)

Chicago Unbound includes both works in progress and final versions of articles. Please be aware that a more recent version of this article may be available on Chicago Unbound, SSRN or elsewhere.

Recommended Citation

Alison LaCroix, "The Shadow Powers of Article I" (University of Chicago Public Law & Legal Theory Working Paper No. 457, 2014).

This Working Paper is brought to you for free and open access by the Working Papers at Chicago Unbound. It has been accepted for inclusion in Public Law and Legal Theory Working Papers by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.

CHICAGO

PUBLIC LAW AND LEGAL THEORY WORKING PAPER NO. 457



THE SHADOW POWERS OF ARTICLE I

Alison L. LaCroix

THE LAW SCHOOL
THE UNIVERSITY OF CHICAGO

April 2014

This paper can be downloaded without charge at the Public Law and Legal Theory Working Paper Series:
<http://www.law.uchicago.edu/academics/publiclaw/index.html>
and The Social Science Research Network Electronic Paper Collection.

THE YALE LAW JOURNAL

ALISON L. LACROIX

The Shadow Powers of Article I

ABSTRACT. This essay argues that the interpretive struggle over the meaning of American federalism has recently shifted from the Commerce Clause to two textually marginal but substantively important battlegrounds: the Necessary and Proper Clause and, to a lesser extent, the General Welfare Clause. For nearly a decade, these quieter, more structurally ambiguous federal powers—the “shadow powers,” as I term them—have steadily increased in prominence. Beginning with *Gonzales v. Raich* (2005) and continuing through and beyond *National Federation of Independent Business v. Sebelius* (2012), the Supreme Court’s federalism jurisprudence has shifted from its once-typical form of inquiry into the scope of Congress’s commerce power, refracted through the Tenth Amendment, to become an inquiry into the transsubstantive reasons for allowing Congress to regulate at all. Paradoxically, the growth of shadow powers analysis has tended to narrow the permissible scope of congressional regulatory power. The novelty of shadow powers analysis lies in the sharp line the Court appears increasingly willing to draw between solid, if controversial, Article I powers such as the commerce power, and auxiliary Article I powers such as the necessary and proper power. The invocation of the shadow powers has helped the Court find room to maneuver within its federalism analysis, while also appearing to maintain its commitment to an apparently unmoving baseline of a narrow commerce power. The growth of shadow powers analysis has obscured the outlines of federalism’s map—to shroud genuine (and perhaps salutary) doctrinal changes within a fog of constitutional text, insufficiently overruled precedents, and acontextual readings of foundational cases.

AUTHOR. Professor of Law and Ludwig and Hilde Wolf Teaching Scholar, University of Chicago Law School; Associate Member, Department of History, University of Chicago. I am grateful to my fellow contributors to this Feature, Jessica Bulman-Pozen, Heather Gerken, Abbe Gluck, and Cristina Rodríguez, and to William Birdthistle, Aziz Huq, Genevieve Lakier, Charles Morse, H. Jefferson Powell, Judith Resnik, David Strauss, and the participants in the 2013 University of Wisconsin Discussion Group on Constitutionalism and DePaul University College of Law Faculty Seminar for helpful discussion and comments. I thank Abigail Molitor for excellent research assistance. I am pleased to acknowledge the support of the Mayer Brown Faculty Research Fund.

INTRODUCTION

What does American federalism require? Most observers agree on a few general principles: federalism in some form is a fundamental ingredient of the U.S. Constitution; at minimum, federalism means that the powers of the federal government are not unlimited; the exercise of those powers must be grounded in text, structure, or practice; and the states should be understood as having a definite and meaningful identity, ranging from co-equal sovereign to regulatory partner. A commitment to federalism requires, in short, that Americans constantly measure their messy legal and political structure against a hazily defined and capacious idea upon which there is little agreement beyond the fact that many of the Founders regarded federalness as one of the nation's essential attributes. Today, federalism means, at a minimum, viewing both the states and the federal government as legitimate sources of legal and political authority, but little consensus exists as to what that general principle of multiplicity should mean in practice.¹

Where is American federalism to be found in the Constitution? The word is never mentioned in the document itself, in either the 1787 text or the amendments. But commentators have long recognized that the text, structure, and underlying logic of the Constitution assume and endorse a federal system of government.² Modern constitutional law typically focuses on three main textual and doctrinal sources of federalism: (1) the enumeration principle (Article I); (2) judicial review of state law by the Supreme Court (Article III plus the Supremacy Clause of Article VI, Clause 2); and (3) the Supremacy Clause itself, especially the requirement that the Constitution, laws, and treaties of the U.S. are the supreme law of the land and bind judges in the states.³

A related but distinct potential locus of federalism in both text and doctrine is the Tenth Amendment, which states, “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are

-
1. See ALISON L. LACROIX, *THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM* 6-9 (2010) (discussing the foundational federal principle of multiplicity).
 2. See *THE FEDERALIST* NO. 39, at 257 (James Madison) (Jacob E. Cooke ed., 1961) (describing the constitutional system as “partly federal, and partly national”).
 3. At least three additional and important textual and doctrinal sites of federalism doctrine should be mentioned: state sovereign immunity under the Eleventh Amendment; the Reconstruction amendments, especially section 5 of the Fourteenth Amendment; and abstention doctrines that rely on principles of equity and “Our Federalism.” See *Younger v. Harris*, 401 U.S. 37, 44 (1971).

reserved to the States respectively, or to the people.”⁴ Beginning in the 1930s, and gaining new vigor in the 1970s, the Tenth Amendment became the touchstone for the view that federalism means taking the states seriously as sovereigns.⁵ Indeed, for many judges and commentators, the mere invocation of the Tenth Amendment amounts to a normative statement about the value of the states in the federal structure and the concomitant limits on federal power.⁶ In some cases, the Tenth Amendment is treated as a constitutional guarantee of “the province of state sovereignty”⁷ and “local power always existing” in the states;⁸ in others, it is “but a truism that all is retained which has not been surrendered.”⁹

How do we know what federalism ought to look like today? Following the invalidation of the Child Labor Act in *Hammer v. Dagenhart* in 1918, and continuing for much of the twentieth century, the paradigmatic federalism question as framed by the Supreme Court was the correct balance between Congress’s power to legislate under Article I, on one hand, and the states’ large, ill-defined, and perhaps exclusive regulatory domain on the other.¹⁰ In

4. U.S. CONST. amend. X.

5. See *New York v. United States*, 505 U.S. 144, 157 (1992) (“The Tenth Amendment thus directs us to determine, as in this case, whether an incident of state sovereignty is protected by a limitation on an Article I power.”); *Nat’l League of Cities v. Usery*, 426 U.S. 833, 852 (1976) (describing “the States’ freedom to structure integral operations in areas of traditional governmental functions”), *overruled by* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985); see also Richard H. Fallon, Jr., *The “Conservative” Paths of the Rehnquist Court’s Federalism Decisions*, 69 U. CHI. L. REV. 429 (2002); Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180 (1998); Larry D. Kramer, *The Supreme Court 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 4 (2001).

6. See *New York*, 505 U.S. 144; *Usery*, 426 U.S. 833; see also Ann Althouse, *Variations on a Theory of Normative Federalism: A Supreme Court Dialogue*, 42 DUKE L.J. 979 (1993); Sotirios A. Barber, *National League of Cities v. Usery: New Meaning for the Tenth Amendment?*, 1976 SUP. CT. REV. 161 (1976).

7. *New York*, 505 U.S. at 145.

8. *Hammer v. Dagenhart*, 247 U.S. 251, 274 (1918), *overruled in part by* *United States v. Darby*, 312 U.S. 100 (1941); see also Judith Resnik, *The Internationalism of American Federalism: Missouri and Holland*, 73 MO. L. REV. 1105, 1119–21 (2009) (advising caution when distinguishing between the “national” and the “local”).

9. *Darby*, 312 U.S. at 124; see also Margaret Hu, *Reverse-Commandeering*, 46 U.C. DAVIS L. REV. 535, 549 (2012) (discussing the Court’s treatment of the Tenth Amendment as a “tautology” or a “truism”).

10. See *Hammer*, 247 U.S. 251.

Hammer, Justice Day, writing for the Court, set forth the robust view of the Tenth Amendment that echoed down through decades of case law:

In interpreting the Constitution, it must never be forgotten that the nation is made up of states to which are entrusted the powers of local government. . . . The power of the states to regulate their *purely internal affairs* by such laws as seem wise to the local authority is *inherent* and has never been surrendered to the general government.¹¹

Justice Holmes’s dissenting opinion, in contrast, crystallized the opposing argument from Article I:

I should have thought that the most conspicuous decisions of this Court had made it clear that the power to regulate commerce and other constitutional powers could not be cut down or qualified by the fact that it might interfere with the carrying out of the domestic policy of any State.¹²

After 1937, as is well known, the Court adopted an increasingly deferential stance toward congressional regulation under the commerce power; as part of this shift, the Court overturned its decision in *Hammer*.¹³ But the *Hammer* Court’s framing of the debate—inherent state authority over internal affairs on one hand, plenary federal power within a defined Article I sphere on the other—continued to structure the debate for decades. Throughout the 1980s and 1990s, the federalism debate repeatedly returned to the Tenth Amendment side of the *Hammer* analysis. As part of the “federalism revolution” of the Court under Chief Justice William Rehnquist, several Justices routinely emphasized the role of the Tenth Amendment in limiting Congress’s power, most notably its power to regulate interstate commerce.¹⁴ Over and over again, the Court stressed the “boundaries between the spheres of federal and state authority.”¹⁵

The message seemed clear: in order to understand the meaning of federalism, one had to begin from the premise that the domains of state and

11. *Id.* at 275 (emphasis added).

12. *Id.* at 278 (Holmes, J., dissenting) (emphasis added).

13. *Darby*, 312 U.S. 100. On 1937 and the “switch in time,” see ROBERT G. McCLOSKEY, *THE AMERICAN SUPREME COURT* 117–19 (Sanford Levinson ed., 5th ed. 2010).

14. U.S. CONST. art. I, § 8, cl. 2; see *United States v. Lopez*, 514 U.S. 549 (1995).

15. *Lopez*, 514 U.S. at 577 (Kennedy, J., concurring).

federal power were fundamentally and forever distinct. Concurrent power was downplayed and sometimes derided as impractical; experiments with overlapping state and federal authority were frequently deemed hazardous to the correct constitutional structure.¹⁶ The state and the federal bailiwicks were regarded as separate spheres,¹⁷ and the Tenth Amendment functioned as a shield around the “States’ freedom to structure integral operations in areas of traditional governmental functions,”¹⁸ functions that were “essential to [the] separate and independent existence” of the states.¹⁹ The terms of the federalism debate appeared to be set: a majority of the Justices would analyze Congress’s Article I powers, especially the commerce power, through the lens of the Tenth Amendment, with a baseline commitment to protecting the special domain of state regulatory authority.²⁰

16. See *New York v. United States*, 505 U.S. 144, 182 (1992) (stating that “[t]he constitutional authority of Congress cannot be expanded by the ‘consent’ of the governmental unit whose domain is thereby narrowed, whether that unit is the Executive Branch or the States”); see also Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950); Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and “Dual Sovereignty” Doesn’t*, 96 MICH. L. REV. 813 (1998). But see *New York*, 505 U.S. at 194 (White, J., dissenting) (arguing that the Low-Level Radioactive Waste Policy Amendments Act of 1985 was “very much the product of cooperative federalism, in which the States bargained among themselves to achieve compromises for Congress to sanction”); see also SOTIROS A. BARBER, *THE FALLACIES OF STATES’ RIGHTS* 30–32 (2013) (equating “dual federalism” with “states’ rights federalism” and critiquing both as insufficiently attentive to the nation’s public good).

An important and growing body of scholarship provides a richer analysis of concurrent power. See, e.g., Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 COLUM. L. REV. 459, 459 (2012) (arguing that state administration of federal law “counteracts the tendency of statutory ambiguity and broad delegations of authority to enhance federal executive power”); Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009) (discussing the ways in which states can resist federal policy).

17. See *Lopez*, 514 U.S. at 577 (Kennedy, J., concurring) (“Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the *spheres of federal and state authority* would blur and political responsibility would become illusory.” (emphasis added)); see also Robert Post, *Federalism in the Taft Court Era: Can it Be “Revived”?*, 51 DUKE L.J. 1513, 1527 (2002) (“For generations the Court had conceived the constitutional values of federalism as served by the maintenance of separate and incompatible spheres of state and federal authority.”).
18. *Nat’l League of Cities v. Usery*, 426 U.S. 833, 852 (1976), *overruled by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).
19. *Id.* at 845 (quoting *Coyle v. Smith*, 221 U.S. 559, 695 (1911)).
20. See *Lane Cnty. v. Oregon*, 74 U.S. 71, 76 (1868) (“[I]n many articles of the Constitution the

But the terms of the federalism debate have recently changed, with important and potentially far-reaching consequences that have not been fully appreciated—even by the Court itself. The interpretive struggle over the meaning of American federalism has shifted from the Commerce Clause to two textually marginal but substantively important battlegrounds: the Necessary and Proper Clause²¹ and, to a lesser extent, the General Welfare Clause.²² To be sure, the higher-profile commerce power continues to attract an enormous amount of judicial attention and scholarly commentary.²³ But for nearly a decade, the quieter, more structurally ambiguous federal powers listed at the head and foot of Article I have steadily increased in prominence. Today, the battles of judicial federalism are fought not across the well-trampled no-man’s-land of the commerce power or the Tenth Amendment, but in the less trafficked doctrinal redoubts of what I term the “shadow powers.” This expansion of the battlefield carries important consequences for the meaning of modern federalism.

Beginning with *Gonzales v. Raich*²⁴ in 2005 and continuing through *United States v. Comstock*,²⁵ *National Federation of Independent Business v. Sebelius*,²⁶ and *United States v. Kebodeaux*,²⁷ the Supreme Court’s “federalism revolution”²⁸ has

necessary existence of the states . . . is distinctly recognized. To them nearly the whole charge of interior regulation is committed or left; to them and to the people all powers not expressly delegated . . . are reserved.”). The paradigmatic example of invalid federal incursion on the sovereign power of the “States qua States” comes in the “anticommandeering” realm, in which the Court has held that Congress may not compel state legislatures or executive officials to carry out federal programs. *See, e.g.,* *Printz v. United States*, 521 U.S. 898, 925 (1997) (“[T]he Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs.”). Moreover, as recent scholarship demonstrates, the on-the-ground conditions of federalism sometimes diverge significantly from the Court’s sharply defined scheme. *See* Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 *YALE L.J.* 534 (2011).

21. U.S. CONST. art. I, § 8, cl. 18.

22. U.S. CONST. art. I, § 8, cl. 1.

23. *See, e.g.,* Jack M. Balkin, *Commerce*, 109 *MICH L. REV.* 1 (2010).

24. 545 U.S. 1 (2005) (upholding penalties against the production and use of home-grown medicinal marijuana under the federal Controlled Substances Act).

25. 560 U.S. 126 (2010) (upholding federal civil commitment of sex offenders already in federal custody).

26. 132 S. Ct. 2566 (2012) (upholding the individual mandate provision of the Patient Protection and Affordable Care Act but invalidating the Medicaid expansion provision).

27. 133 S. Ct. 2496 (2013) (upholding federal post-court-martial sex-offender registration requirements).

taken on a new form. The Court's federalism jurisprudence has shifted from its once-typical form of inquiry into the scope of Congress's power to regulate interstate commerce, refracted through the Tenth Amendment,²⁹ to become an inquiry into the transsubstantive reasons for allowing Congress to regulate at all. This transformation has been especially significant when the Court views Congress as venturing into a domain not explicitly specified in the text of Article I. Analytically, the Justices in the majority in these cases seem to be motivated more by a concern about the expansion of federal regulatory power itself, and somewhat less by a "new federalist"³⁰-style belief in a categorical distinction between the proper spheres of state and federal power.

The return to prominence of this pair of ill-defined but foundational provisions of Article I means many things: doctrinal instability, opportunities for creative litigation, opaque or oracular or overly tentative pronouncements by the Justices. But it also provides a moment to think structurally about the Constitution, and perhaps to reach some conclusions about what federalism does and does not require. The resurgence of the Necessary and Proper and General Welfare Clauses in the doctrine is not a sign of intellectual impoverishment or a mere result of crafty litigation strategies; neither is it a retreat to the weedy curtilage of the federalism field. Instead, the return of the shadow powers heralds an opportunity to take up a central question of federalism: Is it possible to conceive of the states as having significance while also recognizing the logic of Holmes's point in *Hammer*? Holmes's dissent insisted that federalism concerns were irrelevant to determining whether a particular act was within Congress's power.³¹ Thus, he maintained, a court

28. Fallon, *supra* note 5, at 430 (internal quotation marks omitted) (noting widespread scholarly focus on the Court's federalism case law); *see also* Jackson, *supra* note 5, at 2181-82 (1998) (discussing the Court's "federalist revival").

29. *See, e.g.*, United States v. Morrison, 529 U.S. 598 (2000); United States v. Lopez, 514 U.S. 549 (1995).

30. *See, e.g.*, ERIN RYAN, FEDERALISM AND THE TUG OF WAR WITHIN 97 (2012) (discussing the emergence of "New Federalism" theories, "first as a political movement in the 1970s and 1980s, and then as the judicial revolution of the 1990s"); *see also* Neil S. Siegel, *Commandeering and Its Alternatives: A Federalism Perspective*, 59 VAND. L. REV. 1629, 1648-50 (2006) (describing the benefits of federalism); Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 51-64 (2004) (evaluating the Court's treatment of "the values that motivate our attachment to federalism in the first place").

31. *Hammer v. Dagenhart*, 247 U.S. 251, 277 (1918) (Holmes, J., dissenting) (stating that "if an act is within the powers specifically conferred upon Congress . . . it is not made any less constitutional because of the indirect effects that it may have, however obvious it may be

need not conduct a separate Tenth Amendment analysis in order to satisfy federalism's demands.³² According to this view, if a particular act of Congress is within the domain of Congress's power, then one need not keep probing to ask about an amorphous conception of state sovereignty.

Recent doctrine has thus partially revived Justice Holmes's conviction that the best way to approach the federalism question is by inquiring into the scope of Congress's powers. This inquiry increasingly focuses on the shadow powers of Article I: the taxing and spending powers of the General Welfare Clause, and the necessary and proper power. The revival is only partial, however, because a majority of the Justices appears to believe, unlike Justice Holmes, that the real peril is the growth and judicial legitimation of plenary federal power, or a "federal police power."³³ Concern about the growth of federal power (via the expansion of congressional power) is articulated in terms of concern about the expansion of Congress's power under Article I, rather than in previous decades' "new federalist" terms, which focused on the erosion of the states' power.³⁴ As a matter of interpretation, Article I has returned to center stage, and the Tenth Amendment is a secondary player. But unlike Justice Holmes's *Hammer* dissent, which offered a broad reading of Article I in support of the federal regulation at issue, the current Court's shadow powers analysis tends, paradoxically, to constrain federal power.

My descriptive claim is that the clauses operate as shadow powers of Article I, and that their return to the center of debate in the Court and in the broader public sphere can provide both a problem and an opportunity for understanding how the United States' federal structure should operate. Both powers have a potentially capacious quality, unlike the other Article I powers,

that it will have those effects"), *overruled in part by* United States v. Darby, 312 U.S. 100 (1941).

32. *Id.* at 281 (stating that Congress "may carry out its views of public policy whatever indirect effect they may have upon the activities of the States. Instead of being encountered by a prohibitive tariff at her boundaries the State encounters the public policy of the United States which it is for Congress to express"); *see also* Edward S. Corwin, *The Spending Power of Congress—Apropos the Maternity Act*, 36 HARV. L. REV. 548, 550 (1923) (arguing that the "very phraseology" of the Tenth Amendment "makes clear its inapplicability as a test of the scope of the delegated powers of the national government").
33. United States v. Kebodeaux, 133 S. Ct. 2496, 2507 (2013) (Roberts, C.J., concurring in the judgment) ("I worry that incautious readers will think they have found in the majority opinion something they would not find in either the Constitution or any prior decision of ours: a federal police power.").
34. *See, e.g.,* Nat'l League of Cities v. Usery, 426 U.S. 833, 855 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 549-54 (1985).

which are much more bounded and subject-specific (e.g., “[t]o borrow [m]oney on the credit of the United States”;³⁵ “[t]o coin [m]oney”;³⁶ “[t]o constitute [t]ribunals inferior to the [S]upreme Court”³⁷). The shadow powers tend to become contested, and to become the linchpins of judicially enforced federalism, when contemporary legal and political players determine—for a variety of reasons, from overly rigid case law to political expediency—that there is no more room to move the doctrine in the domain of “real” enumerated powers, such as the commerce power.

In addition to describing the shadow powers and explaining their doctrinal evolution, I also make a normative argument. A description of shadow powers analysis might initially lead one to believe that the Court is using the shadow powers to expand, quietly, Congress’s power beyond the ostensible limits set forth in other doctrinal areas.³⁸ But such a conclusion reads the direction of the doctrinal change exactly backward. Paradoxically, the growth of shadow powers analysis has tended to narrow the permissible scope of congressional regulatory power.

But my critique of shadow powers analysis as deployed by the Court is not based on its direction alone. The prominent role of the shadow powers in the Court’s recent decisions is both a doctrinally unprecedented and an unhelpful development that fails to set meaningful standards for how federalism should work in practice. As I will demonstrate, the novelty of shadow powers analysis lies in the sharp line the Court appears increasingly willing to draw between solid, if controversial, Article I powers such as the commerce power, and auxiliary Article I powers such as the necessary and proper power.³⁹ In recent doctrine, the invocation of the shadow powers has helped the Court find room to maneuver within its federalism analysis, while also appearing to maintain its commitment to an apparently unmoving post-*Lopez* baseline of a narrow commerce power. This maneuvering might be productive if it were carried out explicitly, with some discussion by the Justices of the reasons for preferring to

35. U.S. CONST. art. I, § 8, cl. 2.

36. *Id.* cl. 5.

37. *Id.* cl. 9.

38. See, e.g., *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 278 (1964) (Black, J., concurring) (noting, in upholding Title II of the Civil Rights Act of 1964 as an exercise of the commerce power rather than Congress’s power under Section 5 of the Fourteenth Amendment, that “nothing in the *Civil Rights Cases*, . . . which invalidated the Civil Rights Act of 1875, gives the slightest support to the argument that Congress is without power under the Commerce Clause to enact the present legislation”).

39. See *infra* Section II.B, Part III.

adjudicate federalism at its doctrinal and textual periphery rather than at its center. But the result of the growth of shadow powers analysis has in fact been to obscure the outlines of federalism’s map—to shroud genuine (and perhaps salutary) doctrinal changes within a fog of constitutional text, under-ruled precedents, and acontextual readings of foundational cases such as *McCulloch v. Maryland*.⁴⁰

This essay proceeds in four Parts. In Part I, I explain the meaning of the phrase “shadow powers” and explore the connections among the shadow powers and the other frequently invoked categories of federal power—implied powers, incidental powers, and enumerated powers. Parts II and III discuss the two principal shadow powers: the necessary and proper power and the taxing and spending powers contained within the general welfare power. Part IV examines the consequences of the emergence of the shadow powers for the development of federalism doctrine. It also argues that the concept of “union” could serve as a productive means of reframing the debates over federalism and might provide a “rule of engagement” for courts and other interpreters dealing with questions of federalism.

I. THE CONTOURS OF THE SHADOW POWERS

To ask what it means to have the power to “make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers”⁴¹ and to “lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States”⁴² is to ask existential questions about the scope of federal power—and, therefore, about the meaning of the Union. One reason for viewing the necessary and proper power and the general welfare power as “shadow powers” is that they have a similar status among the Article I powers, both structurally and doctrinally. Both potentially give Congress a broad regulatory ambit beyond the typical powers over commerce, money, the army, post offices and post roads, and the like.

Since the Founding, and even during the Philadelphia Convention and the state ratifying conventions, there have been debates about (1) what each clause’s language means (what exactly does it mean for a measure to be

40. 17 U.S. 316 (1819).

41. U.S. CONST. art. I, § 8, cl. 18.

42. *Id.* cl. 1.

“necessary” and “proper,” and what is the “general welfare of the United States”?), and (2) how the powers set forth in each clause relate to the other enumerated powers. The second question is fundamentally a question about how the Necessary and Proper and General Welfare Clauses fit into the broader scheme of congressional power, and therefore into the structure of federalism. The clauses’ impact can be viewed relatively narrowly, as concerning only the power of Congress, or more broadly, as implicating the entire architecture of federalism. For some Justices and commentators, this latter view necessarily implicates a mirror-image shadow power on behalf of the states that is lodged in the Tenth Amendment.⁴³

To begin, the clauses are historically linked. Although the records of the Constitutional Convention shed little light on what, if any, debates surrounded the drafting of the Necessary and Proper Clause, the sources are more forthcoming in their discussion of the origins of the General Welfare Clause. Equally important are the pre-1787 precedents for the powers. An antecedent use of the phrase “necessary and proper” can be found in a 1765 pamphlet written by the Maryland lawyer and colonial official Daniel Dulany.⁴⁴ As part of a broad critique of the Stamp Act, Dulany argued that Parliament had misunderstood the constitutional basis of the British Empire. The North American colonies were concededly “Dependent upon *Great-Britain*,” Dulany observed.⁴⁵ But only the colonies’ own local legislatures possessed the authority to levy “internal Taxes.”⁴⁶ As a solution to the mounting confrontation between the colonies and their metropolitan cousins, Dulany proposed allocating the power to lay internal taxes to the colonial legislatures, and the power to tax for broader, imperial purposes to Parliament. “May not then the

43. See, e.g., *Printz v. United States*, 521 U.S. 898, 931 n.15 (1997) (describing the Tenth Amendment as one of “the Constitution’s guarantees of federalism”); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 579 (1985) (Powell, J., dissenting) (stating that congressional overreach under the commerce power would “devour the essentials of state sovereignty, though that sovereignty is attested by the Tenth Amendment”); see also Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 78 n.15 (2001) (describing the Tenth Amendment, along with the Eleventh Amendment, as “provisions clearly meant to limit the central government’s authority”).

44. DANIEL DULANY, CONSIDERATIONS ON THE PROPRIETY OF IMPOSING TAXES IN THE BRITISH COLONIES, FOR THE PURPOSE OF RAISING A REVENUE, BY ACT OF PARLIAMENT 15 (Annapolis, Jonas Green 2d ed. 1765); see also LACROIX, *supra* note 1, at 50-51 (discussing Dulany’s views on the division of political and legal authority between the colonies and the metropole in Britain’s North American empire).

45. DULANY, *supra* note 44, at 15.

46. *Id.* at 15.

Line be distinctly and justly drawn between such Acts as are *necessary, or proper*, for preserving or securing the Dependence of the Colonies, and such as are not *necessary or proper* for that very important Purpose?”⁴⁷ The idea that legislation might have to satisfy a test of necessity and propriety in order to be valid was thus present in Anglo-American constitutional argument more than two decades before the Constitution was drafted. These precedents are useful not to establish a causal intellectual lineage between colonial commentators and the drafters of the Constitution, but rather to suggest that the phrases were already becoming recognized legal terms of art well before the Revolution.

Two years later, in response to the Townshend Acts of 1767, the Philadelphia lawyer John Dickinson’s *Letters from a Farmer* invoked the “general welfare” of the empire as a permissible justification for Parliament to tax the colonies.⁴⁸ Prior to the Stamp Act of 1765, Dickinson argued, “every statute relating to these colonies from their first settlement to this time” was “calculated to preserve or promote a mutually beneficial intercourse between the several constituent parts of the empire.” To be sure, many of those acts had levied trade duties on the colonies. “[Y]et those duties were always imposed *with design* to restrain the commerce of one part that was injurious to another, and thus to promote the *general welfare*.”⁴⁹ Taxation that was explicitly intended to harmonize trade within the empire, and thus to balance intra-imperial interests against one another, was permissible. The problem with the Stamp Act, however, was its overt and unprecedented goal of “raising a revenue.”⁵⁰

As the examples of Dulany and Dickinson demonstrate, some conception of both powers predated the drafting of the Constitution.⁵¹ The idea that one

47. *Id.* (emphasis added).

48. JOHN DICKINSON, LETTERS FROM A FARMER, IN PENNSYLVANIA, TO THE INHABITANTS OF THE BRITISH COLONIES 16 (Philadelphia, J. Almon 1774); see also LACROIX, *supra* note 1, at 60-64 (discussing Dickinson’s theories of taxation).

49. DICKINSON, *supra* note 48, at 13-16.

50. *Id.* at 16.

51. See also ARTICLES OF CONFEDERATION of 1781, art. III (1777) (stating that “[t]he said states hereby severally enter into a firm league of friendship with each other, for their common defence, the security of their Liberties, and their mutual and general welfare”); *An Act for Ascertaining the Rates of Foreign Coins in Her Majesties Plantations in America*, in ACTS AND LAWS OF HIS MAJESTY’S PROVINCE OF NEW HAMPSHIRE IN NEW ENGLAND 140, 142 (Portsmouth, Daniel Fowle 1761) (“[N]othing in this Act . . . shall extend or be construed to restrain her Majesty from regulating, and settling the several rates of the said species of foreign silver coins within any of the said colonies or plantations . . . according to such other

might assess legislative power as “necessary and proper” or in service of the “general welfare” was available to British North Americans at least two decades before the members of the Constitutional Convention included the phrases in Article I. Both notions were part of the intellectual portmanteau that contemporary observers used to understand how political unions based on a significant degree of centralized legislative authority ought function.

The meaning of both clauses has been the subject of significant debate from the Founding to the present day, as commentators have tried to determine whether they were lesser, auxiliary powers that must be attached to another, underlying power or whether they are standalone powers in their own right (albeit with some limits).⁵² The broad phrasing of the clauses, as well as their bracketing locations at the beginning and end of Article I, suggests that they are in some sense fundamental congressional powers. The course of their doctrinal development has been as uneven and disputed as this description suggests. Commentators have argued not only about the proper subject of each clause, but also about each clause’s structural and theoretical connection to the rest of Article I, and hence to the Constitution as a whole.⁵³

The clauses are also similar in their relationship to the rest of Article I. Commentators typically use the phrase “enumerated powers of Article I” to refer to a specific set of clauses granting authority to Congress.⁵⁴ Among the powers housed in Article I, the most commonly invoked are the commerce power and the taxing and spending powers. Other frequently cited powers include the treaty power, the war power, the power to regulate immigration and citizenship, and the set of powers over domestic affairs such as bankruptcy law and the coining of money.⁵⁵ Clearly, all these are enumerated powers, in that they are listed in the text of Article I, Section 8, which begins “Congress shall have power.” But the nature of the General Welfare Clause and the

rates and proportions as her Majesty . . . shall from time to time judge proper and necessary”); cf. GARY LAWSON ET AL., *THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE* (2010) (tracing the clause’s origins to English and colonial principles of fiduciary responsibility).

52. See *infra* Parts II-III.

53. See, e.g., John Harrison, *Enumerated Federal Power and the Necessary and Proper Clause*, 78 U. CHI. L. REV. 1101 (2011).

54. See, e.g., ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 242 (3d ed. 2006) (“Article I, §8, of the Constitution contains 18 clauses enumerating specific powers of Congress.”).

55. See *id.* at 233-335 (focusing on these powers in a chapter titled “The Federal Legislative Power”).

Necessary and Proper Clause is more ambiguous. True, both clauses describe powers of Congress, rather than limitations on power elsewhere granted.⁵⁶ And the taxing and spending powers, which are the modern doctrinal nodes of the General Welfare Clause, are typically denominated as enumerated powers.⁵⁷ But neither clause refers specifically to a power of government over a particular domain, such as post offices or the coining of money. Moreover, each clause describes the general contours of some permissible types of congressional regulation, but not all regulation by Congress under its enumerated powers must conform to the contours of one or the other of these two clauses. Instead, the clauses appear to offer alternative categories of regulation, in addition to the narrower subjects listed in the rest of Section 8. Most striking is the opacity of the clauses' language: "the common Defence and general Welfare of the United States" and "all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers" are phrases that invite—and perhaps even require—interpretation.

The clauses do differ from each other in important respects, however. Significantly, the Necessary and Proper Clause refers explicitly to the powers listed in the preceding seventeen clauses of Article I, Section 8, and defines the necessary and proper power with reference to those "foregoing powers." The necessary and proper power is therefore by its own terms connected with the other sources of congressional regulatory authority; its purpose, according to current doctrine, is to enable Congress to carry out those other powers.⁵⁸ The General Welfare Clause, in contrast, stands on its own among the Article I powers, on an equal footing with the commerce, naturalization, and other powers, rather than dependent on those powers as necessary predicates to its own exercise. If the necessary and proper power is best understood as an auxiliary power to Congress's primary powers under Article I,⁵⁹ the General Welfare Clause—especially when broken down into its modern doctrinal components, the taxing and spending powers—is just such a primary power. The ability to tax and spend, even if the permissible goals of that taxing and

56. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 420 (1819) (listing the "necessary and proper" clause among the grants of power rather than limits).

57. See *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937) (spending); *United States v. Butler*, 297 U.S. 1 (1936) (taxing).

58. This view has not always been the understanding of the purpose of the necessary and proper power. During the founding period, commentators offered numerous interpretations of the power, many of which have since been rejected. See *infra* Part II.

59. See Harrison, *supra* note 53, at 1122 (distinguishing between "main power[s]" and "incidents").

spending are limited to the common defense and general welfare,⁶⁰ is an independent Article I power in a way that the necessary and proper power has never been held to be.⁶¹

A related distinction follows from what modern doctrine regards as the auxiliary status of the necessary and proper power, as contrasted with the primary nature of the taxing and spending powers under the General Welfare Clause. This distinction turns not on the particular power's ability to stand on its own as a basis of congressional regulation (the primary/auxiliary question), but rather on how we conceptualize the source of the power—whether it derives its authority from the text itself, or whether the text requires something more, such as common law judicial interpretation or historical practice.⁶²

The enumerated powers of Article I are typically regarded as deriving their authority from the fact of their enumeration: they exist because they are listed in the text of Article I, which created the powers as well as the institution (Congress) that wields them.⁶³ During the controversies of the late eighteenth and early nineteenth centuries surrounding the scope of the taxing and spending powers contained within the General Welfare Clause,⁶⁴ the disagreement centered on the meaning of the phrase “general welfare,” not on the ultimate source of authority behind the provision in Article I. Certainly, commentators wrangled over the relationship between the concept of the “general welfare” and the more specific powers set forth in the other clauses.⁶⁵

60. See *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (“[T]he exercise of the spending power must be in pursuit of ‘the general welfare.’”); *Steward Machine Co.*, 301 U.S. at 586.

61. See, e.g., *United States v. Comstock*, 130 S. Ct. 1949, 1956 (2010) (noting that the Necessary and Proper Clause gives Congress authority to enact statutes that are “rationally related to the implementation of a constitutionally enumerated power”); *McCulloch*, 17 U.S. at 323-25.

62. On common law constitutional interpretation, see DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010). On historical practice, see Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411 (2012); and Alison L. LaCroix, *Historical Gloss: A Primer*, 126 HARV. L. REV. F. 75 (2012).

63. This positivist interpretation of Article I as in itself a source of law can be contrasted with some commentators' view of Article II as a restatement of inherent executive authority. According to this argument, presidential power under Article II is broader than congressional power under Article I because Article I refers to “legislative powers herein granted,” while Article II refers only to “the executive power.” See LOUIS FISHER, *THE LAW OF THE EXECUTIVE BRANCH: PRESIDENTIAL POWER* 63-68 (2014).

64. See *infra* Part III.

65. See PAULINE MAIER, *RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787-1788*, at 181 (2010) (describing Antifederalists' concerns about the breadth of the taxing power of Article I, in particular the fact that it permitted Congress to “raise funds to pay the debts and

But they did not appear to question the theoretical justification for the Constitution's grant to Congress of some general welfare power (whatever the scope of that power turned out to be). The fact of the enumeration was sufficient to grant Congress some set of powers to tax and spend, with some connection to a notion of the "general welfare of the United States." The battle concerned the scope of the power, not its source.

This positivist vision of enumeration becomes more complicated, however, when applied to the language of the Necessary and Proper Clause. Given that the Necessary and Proper Clause incorporates the preceding seventeen clauses by reference ("carrying into execution the foregoing powers"), one might ask whether the necessary and proper power is an enumerated power. It might be something else altogether, categorically distinct: an "implied" or an "incidental" power,⁶⁶ or a "non-enumerated" power.⁶⁷ To be sure, the overarching power—to "make all laws which shall be necessary and proper for carrying into execution the foregoing powers"—is plainly enumerated in the text of Article I. But the subjects to which that power should be applied, and the ends to which the power should be put, are not enumerated.⁶⁸ Unlike the Commerce Clause, which tells us that Congress possesses the power to regulate

provide for the 'common welfare' of the United States, but the debts were not confined to those already contracted, and the term 'general welfare' could cover 'any expenditure whatsoever').

66. See *James Everard's Breweries v. Day*, 265 U.S. 545, 558 (1924) (referring to the necessary and proper power as a "non-enumerated or 'implied'" power). The case consolidated two appeals from the Southern District of New York brought by "manufacturers and dealers in intoxicating malt liquors" to enjoin the Commissioner of Internal Revenue from enforcing the Supplemental Prohibition Act of 1921, which prohibited physicians from prescribing intoxicating malt liquors (including "Guinness's Stout") for medicinal purposes. *Id.* at 546 (argument for appellant). In addition to referring to the necessary and proper power as an "implied" power, the appellants argued that the "incidental power of Congress to give full effect to a delegated power" could not, consistent with the Tenth Amendment, "wholly deprive the States of the power which that amendment reserves to them." *Id.* at 548.
67. See *id.* at 558 (majority opinion) (stating that "the Constitution confers upon Congress the power to make all laws necessary and proper for carrying into execution all powers that are vested in it" and describing these powers as "non-enumerated or 'implied' powers").
68. This fact was precisely what worried Antifederalists such as George Mason. GEORGE MASON, OBJECTIONS TO THIS CONSTITUTION OF GOVERNMENT (1787), <http://www.gunstonhall.org/library/archives/manuscripts/objections.html> ("Under their own Construction of the general Clause at the End of the enumerated powers the Congress may grant Monopolies in Trade and Commerce, constitute new Crimes, inflict unusual and severe Punishments, and extend their Powers as far as they shall think proper; so that the State legislatures have no Security for the Powers now presumed to remain to them; or the People for their Rights.").

commerce among the several states, the Necessary and Proper Clause describes a power that potentially touches all the domains of congressional regulation, but that does not itself describe such a domain.⁶⁹ The necessary and proper power is therefore enumerated, in the sense that it originates in words contained in Article I, but the level of the enumeration seems qualitatively different from that of other Article I powers, including those contained in the General Welfare Clause.⁷⁰

II. THE NECESSARY AND PROPER CLAUSE

A. Theory and History

To see how the shadow powers have returned to the center of the doctrinal conversation, we can look to recent case law surrounding the Necessary and Proper Clause. Before 2005, one would have been hard pressed to identify a body of doctrine on the necessary and proper power. Unlike the commerce power, which in a series of doctrinal boluses has expanded and contracted the permissible scope of federal regulation of the economic realm, the necessary and proper power has tended to ride along as a quieter, sometimes overlooked presence in the case law—the perpetual bridesmaid to the commerce power’s bride. For decades, commentators essentially threw up their hands in explaining the clause, which was seen as “haunt[ing] constitutional theory from its perch in interpretive limbo.”⁷¹ In recent years, however, the Court has increasingly brought the necessary and proper power to the center of federalism doctrine. Because the power is relatively undertheorized, it provides new avenues for doctrinal development, sometimes in surprising directions.

69. As commentators have noted, Congress’s necessary and proper power likely extends to include legislation that executes powers vested elsewhere in the national government, given the clause’s reference to “all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.” U.S. CONST. art. I, § 8, cl. 18; see, e.g., William W. Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of the Sweeping Clause*, 40 LAW & CONTEMP. PROB. 102 (1976).

70. *But cf.* United States v. Comstock, 130 S. Ct. 1949, 1966 (2010) (Kennedy, J., concurring) (suggesting that the necessary and proper power is not an enumerated power, but appearing to blur the enumeration/non-enumeration distinction with the primary/auxiliary distinction); Gonzalez v. Raich, 545 U.S. 1, 35 (2005) (Scalia, J., concurring) (setting forth the “two general circumstances” in which “the regulation of intrastate activities may be necessary to and proper for the regulation of interstate commerce”).

71. Mark A. Graber, *Unnecessary and Unintelligible*, 12 CONST. COMMENT. 167, 169 (1995).

Perhaps most surprising is the steady transmutation of the necessary and proper power from a regulatory and interpretive device that tended to expand federal power into a tool for checking that same power.

Since 1819, the lodestar for understanding the clause has been Chief Justice Marshall's opinion in *McCulloch v. Maryland* upholding the constitutionality of the Second Bank of the United States as a valid exercise of Congress's power.⁷² In *McCulloch*, Marshall sketched a broad—but not unlimited—necessary and proper power, which he described as an “incidental or implied” power.⁷³ In so doing, Marshall planted the seed of the modern notion that the necessary and proper power is somehow not an enumerated power, even though it is plainly listed in Article I.⁷⁴ Marshall framed the inquiry as whether Congress was acting within one of its enumerated Article I powers in a given case (here, in establishing the Bank); if so, then Congress had broad discretion to select the regulatory means by which it carried out that power. Hence Marshall's famous statement: “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”⁷⁵

Marshall's opinion devoted little discussion to principles of state sovereignty or the Tenth Amendment. Indeed, he rejected the argument that the Tenth Amendment's presence in the Constitution “excludes incidental or implied powers” or “requires that every thing granted shall be expressly and minutely described.”⁷⁶ Limits on Congress's regulatory power should be seen as incorporated into the federal structure via the enumeration principle. When Congress regulated within the realm of one of its enumerated powers, therefore, its action could not be challenged based on non-Article I federalism imperatives such as those that Maryland argued had been textualized in the Tenth Amendment. Maryland might insist that the presence of the Bank and the prohibition on state taxation of the Bank compromised its sovereignty as a

72. 17 U.S. (4 Wheat.) 316 (1819).

73. *Id.* at 406 (“But there is no phrase in the instrument which, like the [A]rticles of [C]onfederation, excludes incidental or implied powers; and which requires that every thing granted shall be expressly and minutely described.”).

74. *See id.* at 411-12 (“To its enumeration of powers is added that of making ‘all laws which shall be necessary and proper, for carrying into execution the foregoing powers.’”) (quoting U.S. CONST. art. I, § 18, cl. 8).

75. *Id.* at 421.

76. *Id.* at 406.

state. But Marshall insisted that the enumerated (“great”⁷⁷) powers “to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies” necessarily entailed an implied or incidental power to establish a corporation (the Bank) to execute those powers.⁷⁸ The nexus between the underlying enumerated powers and the implied or incidental power to carry them out effectively blocked the states from objecting that their domain had been invaded. The “government of the Union, though limited in its powers,” was “supreme within its sphere of action,” Marshall insisted.⁷⁹ In other words, if an exercise of federal power fit within the bounds of Article I, it could not be challenged as an overreach or a violation of the states’ authority. The Union had a discrete sphere of action, and within that sphere, the states’ cries of trammled sovereignty would be unavailing – perhaps even unconstitutional.

Chief Justice Marshall’s choice of terminology in *McCulloch* was intricate, perhaps even slippery, but it shaped the doctrinal world in which we still live today. Marshall termed what I have called the primary powers of Article I (to tax, to borrow money, to regulate commerce, to declare and conduct war, and to raise and support armies and navies) “great substantive and independent power[s]” because of their status as distinct heads of congressional power, as that power was created in Article I.⁸⁰ “Greatness” was a category within the Constitution itself, not an assessment of the relative importance of a particular power as applied to governments generally.⁸¹ Marshall’s use of the phrase “great substantive and independent power” to describe “the power of making war or levying taxes or of regulating commerce” demonstrates his sense that the enumerated/non-enumerated distinction did not quite capture the difference between the primary powers of Article I (war, commerce, taxation) and the implementing power described in the Necessary and Proper Clause. The great powers were what Article I said they were, and only what Article I

77. *Id.* at 407.

78. *Id.*

79. *Id.* at 405.

80. *Id.* at 411.

81. See *infra* text accompanying notes 147-151 (summarizing *NFIB*’s decontextualization of *McCulloch*’s “great substantive and independent power” language). But see William Baude, *Rethinking the Federal Eminent Domain Power*, 122 *YALE L.J.* 1738, 1749 (2013) (“[S]ome powers are so great, so important, or so substantive, that we should not assume that they were granted by implication, *even if* they might help effectuate an enumerated power. These powers, sometimes called ‘great powers,’ are the kinds of powers we would expect the Constitution to mention if they were granted.”).

said they were; the necessary and proper power was an explicit statement of the basic interpretive principle that, as Marshall put it, “the powers given to the government imply the ordinary means of execution.”⁸²

The idea of a power necessarily implying the power to execute it is connected to another important point about the foundational reading of the Necessary and Proper Clause in *McCulloch*. A careful reading of the opinion demonstrates that, for Marshall, the necessary and proper power was an enumerated power, not an implied power, of the federal government. It was an enumerated power because it was listed in Article I. But it was not a primary power. Enumerated powers might be primary powers, but they might also be auxiliary or implementing powers.

The case of the necessary and proper power, however, was even more complex: it was an enumerated, auxiliary power that gave Congress some additional quantum of authority besides that which it would already have in order to execute the primary powers underlying the creation of the Bank (tax, borrowing, commerce, war, armies and navies). The late-eighteenth-century mind could easily conceive of primary powers as necessarily containing the power to execute those powers,⁸³ but the Constitution made that common law interpretive principle explicit by committing it to words in Article I. As Akhil Amar notes, “Marshall suggested that perhaps the clause was merely *declaratory* of what would have been the best reading of the Constitution even had the clause not existed.”⁸⁴ This interpretation is borne out by James Wilson’s comments in the Pennsylvania ratifying convention. Responding to a delegate

82. *McCulloch*, 17 U.S. (4 Wheat.) at 409.

83. See, e.g., THE FEDERALIST NO. 44, *supra* note 2, at 304-05 (James Madison) (“No axiom is more clearly established in law, or in reason, than that wherever the end is required, the means are authorised; wherever a general power to do a thing is given, every particular power necessary for doing it, is included.”); see also *McCulloch*, 17 U.S. (4 Wheat.) at 422 (describing the Constitution as “omitting, and wisely omitting, to enumerate all the means for carrying into execution the great powers vested in government”).

84. AKHIL REED AMAR, AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 28 (2012). I disagree, however, with what appears to be Amar’s categorization of the Necessary and Proper Clause as a non-enumerated power. See *id.* at 27 (“With this analysis of enumerated powers in mind, let’s now return to Marshall’s discussion of the necessary-and-proper clause.”). Marshall’s analysis would likely have led him to uphold the Bank even absent the Necessary and Proper Clause, because he would have viewed it as a necessary means of executing the taxation-borrowing-commerce-war-armies/navies powers. But the fact that Marshall relied at least in part on an arguably unwritten interpretive principle does not alter the fact that the necessary and proper power is explicitly granted and listed in Article I.

who argued that “the general clause at the end of the eighth section gives to Congress a power of legislating generally,” Wilson insisted that the clause was not “capable of giving them general legislative power.” The clause meant instead that “they shall have the power of carrying into effect the laws which they shall make under the powers vested in them by this Constitution.”⁸⁵

For most of the early twentieth century, the necessary and proper power made occasional and relatively uncontroversial appearances, typically operating in tandem with the commerce power. An important line of cases upheld congressional regulation of railroad rates, milk prices, and labor standards based on a blend of commerce power and necessary and proper power analyses.⁸⁶ The decisions did not separate the two doctrinal strands. Frequently, they mixed discussions of the regulation of interstate commerce itself with references to intrastate regulation that was an “appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce.”⁸⁷ This conceptual melding of the two species of power continued into the New Deal era, leading Justices and scholars to posit that the New Deal expansion of the commerce power was powered by an expansion of the necessary and proper power.⁸⁸

85. James Wilson, *Pennsylvania Ratifying Convention, Dec. 1, 1787*, in 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 448-49 (Jonathan Elliot ed., 2d ed. 1888); see also THE FEDERALIST NO. 33, *supra* note 2, at 205 (Alexander Hamilton) (describing the clause as potentially “chargeable with tautology or redundancy,” but noting that it was included in the text “for greater caution, and to guard against all cavilling refinements in those who might hereafter feel a disposition to curtail and evade the legitimate authorities of the Union”); THE FEDERALIST NO. 44, *supra* note 2, at 304 (James Madison) (noting that even “[h]ad the Constitution been silent on this head, there can be no doubt that all the particular powers, requisite as means of executing the general powers, would have resulted to the government, by unavoidable implication”).

86. I am grateful to Genevieve Lakier for discussions on this point.

87. *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942); see also *United States v. Darby*, 312 U.S. 100, 118-19 (1941) (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819)); *The Shreveport Rate Cases*, 234 U.S. 342, 353 (1913) (stating that the Necessary and Proper Clause does not give “Congress . . . the authority to regulate the internal commerce of a State, as such,” but does allow Congress “to take all measures necessary or appropriate to” the effective regulation of the interstate market “although intrastate transactions . . . may thereby be controlled”).

88. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 584-85 (1985) (O’Connor, J., dissenting) (describing the expansion of the Commerce Clause created by the post-New Deal cases as “based on . . . the authority of Congress, through the Necessary and Proper Clause, to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end” (internal quotation marks and citation omitted));

Today, the auxiliary status of the necessary and proper power is a settled doctrinal fact.⁸⁹ Even after the Court began limiting Congress's commerce power in a series of cases beginning with *United States v. Lopez*⁹⁰ in 1995, the necessary and proper power appeared to be something of a doctrinal backwater. Indeed, the auxiliary nature of the power ensured that it was always overshadowed by the primary Article I power to which it was attached in any given statute or case. Parties challenging federal regulation therefore tended to focus their arguments on the primary power, reinvigorated by the Court's holding in *Lopez* that only activity that was itself "economic" or "commercial" in nature could validly support congressional regulation under the Commerce Clause. Arguments based on the necessary and proper power tended to be viewed as at best routine, at worst an attempt to conjure Article I power where none actually existed. "Since the time of *McCulloch v. Maryland*, it has been clear that the [Necessary and Proper] Clause presents no formidable barrier to legislative activity," one commentator noted in 1983. "The terms of the clause have always been read broadly."⁹¹ Justice Scalia, for his part, has deemed arguments based on the clause "the last, best hope of those who defend ultra vires congressional action."⁹² It is a hornbook axiom that Congress cannot regulate under the necessary and proper power alone; it must base an exercise

Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795, 807-08 (1996) (noting that the New Deal Court "did not simply and directly enlarge the scope of the Commerce Clause itself, as is often believed. Rather, it upheld various federal enactments as necessary and proper means to achieve the legitimate objective of regulating interstate commerce").

89. See *United States v. Kebodeaux*, 133 S. Ct. 2496, 2503 (2013) (noting that the Necessary and Proper Clause "authorizes Congress, in the implementation of other explicit powers, to create federal crimes, to confine offenders to prison," and to enact several other provisions relating to the federal prison system); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2591 (2012) (describing the necessary and proper power as vesting Congress with authority to enact provisions "incidental to the [enumerated] power, and conducive to its beneficial exercise" (brackets in original) (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 418 (1819))); *United States v. Comstock*, 560 U.S. 126, 134 (2010) (describing the test for Congress's exercise of its necessary and proper power as "whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power").
90. 514 U.S. 549, 560 (1995) ("Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.").
91. Stephen L. Carter, *The Political Aspects of Judicial Power: Some Notes on the Presidential Immunity Decision*, 131 U. PA. L. REV. 1341, 1378 (1983).
92. *Printz v. United States*, 521 U.S. 898, 923 (1997).

of that power on an underlying enumerated power.⁹³ The question whether the necessary and proper power “counts” as one of Congress’s enumerated powers continues to plague the doctrine, however.

Indeed, this lingering uncertainty about the status and scope of the necessary and proper power has become even more acute as a consequence of recent Supreme Court decisions. In a handful of cases since 2005, the Court has highlighted a new set of doctrinal consequences of Marshall’s cleverness in *McCulloch*. Few of these consequences, however, comport with the expansive vision of federal power as “supreme within its sphere” that Marshall limned. In beginning his justification for Congress’s chartering of the Bank with the implied powers argument—that all Article I powers include the means of exercising them—Marshall grasped for the biggest limb on the interpretive tree. Before he even reached the specific grant of power in the Necessary and Proper Clause, Marshall had essentially disposed of the issue on the basis of Congress’s implied powers. Recall his statement that “the constitution of the United States has not left the right of Congress to employ the necessary means, for the execution of the powers conferred on the Government to general reasoning. To its enumeration of powers is added” that of the Necessary and Proper Clause.⁹⁴ Because Marshall appears to have based some significant part of his decision on the implied-powers principle, the scope of the enumerated necessary and proper power has remained vague and largely undefined in the doctrine, even as judges and commentators have continued to lard the clause into their opinions and articles alongside discussions of the primary enumerated powers.

Why does this latent uncertainty about the enumerated or non-enumerated nature of the Necessary and Proper Clause matter? The answer lies in the modern black-letter law that the necessary and proper power can be validly used only as an auxiliary to one of the primary enumerated powers.⁹⁵ In periods of judicial deference to congressional legislation under those primary powers (for example, the period between the New Deal expansion of the commerce power in 1937 and its constriction in 1995 in *United States v.*

93. *Comstock*, 560 U.S. at 134.

94. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 411-12 (1819).

95. See, e.g., Harrison, *supra* note 53, at 1104 (“The Necessary and Proper Clause is about means-ends connections. It authorizes Congress to pass laws in order to do something. Usually, Congress is authorized to pursue some primary goal by a provision of the Constitution other than the Necessary and Proper Clause, frequently one of its other enumerated powers.”).

*Lopez*⁹⁶), the fuzzy status of the necessary and proper power is difficult to discern and appears to have little significance. In periods of intensified judicial scrutiny of such legislation, however, the situation is quite different.

When the Court narrows the commerce power (as it did in *Lopez*), the relationship between that power and the necessary and proper power matters a great deal. If our view of the necessary and proper power derives from the strong implied-powers version of *McCulloch*, according to which the Bank was constitutional because it was an implied means by which Congress could exercise its primary Article I powers (taxation, borrowing, commerce, war, armies/navies), then the scope of the necessary and proper power at any given moment follows directly from the scope of the primary power to which it is attached. If the Court narrows the commerce power, what happens to the argument that Congress must have an implied means of exercising that power? Almost certainly, the implied-power extension of that primary power would also be narrowed. If, on the other hand, the necessary and proper power is viewed as an enumerated power, and—importantly— even if we accept that it is auxiliary rather than primary, its basis in the text of the Constitution would likely afford it greater judicial deference than if its scope was seen as entirely dependent on the scope of the primary power.

Indeed, recent doctrinal developments bear out the hypothesis. The way the necessary and proper power has come down to us from Marshall—and specifically its ambiguous enumerated/non-enumerated status—has permitted the Court to confine it to a few specific regulatory domains, which rely on a few interconnected primary powers. Paradoxically, some of these putative primary underlying powers are themselves non-enumerated, the most notable being Congress’s power to establish a body of federal criminal law.⁹⁷ Within those areas, the clause has been read fairly broadly, but the fact that it is cabined in those areas necessarily limits its overall reach. The uncertain scope and status of the necessary and proper power have permitted the Court to use the power as a means of constraining federal regulatory power, rather than—as the Antifederalists feared, and as Marshall hoped—as a textual and structural foundation for the principle that the government of the Union is supreme within its defined sphere. To see how this result came about, let us examine the case law.

96. 514 U.S. 549, 559 (1995).

97. See, e.g., *United States v. Kebodeaux*, 133 S. Ct. 2496, 2503 (2013); *Comstock*, 560 U.S. at 136-37.

B. *Recent Doctrine*

The Necessary and Proper Clause returned to center stage in 2005, in the somewhat surprising vehicle of Justice Scalia's concurrence in the judgment in *Gonzales v. Raich*.⁹⁸ In permitting the federal Controlled Substances Act to override California's medical marijuana statutes, Justice Scalia recast much of the twentieth-century commerce power case law as turning in fact on the necessary and proper power.⁹⁹ The crucial point for Scalia was that in the all-important regulatory arena of activities that substantially affect interstate commerce, the real source of Congress's power was in fact the Necessary and Proper Clause, not the Commerce Clause.¹⁰⁰ Whenever Congress was a step removed from an enumerated power, Justice Scalia argued, in order for its regulatory action to be valid, that action had to be based on the necessary and proper power.¹⁰¹ To the extent that prior cases had treated the "substantial effect" inquiry as part of Commerce Clause doctrine, they were "*incomplete*" because the authority to enact laws necessary and proper for the regulation of interstate commerce is not limited to laws governing intrastate activities that substantially affect interstate commerce," Justice Scalia observed.¹⁰²

Indeed, on Justice Scalia's reading, the necessary and proper power greatly expanded the reach of Congress's regulatory power: "Where necessary to make a regulation of interstate commerce effective, Congress may regulate even those intrastate activities that do not themselves substantially affect interstate commerce."¹⁰³ But the Article I power that enabled that regulation came from the Necessary and Proper Clause, not the Commerce Clause. This distinction separated Justice Scalia's reasoning from that of the other five Justices in the majority, all of whom took the view that Congress's commerce power included

98. 545 U.S. 1, 34 (2005) (Scalia, J., concurring in the judgment).

99. *Id.* at 33-34 (describing as "mechanical[] recit[ation]" and "misleading and incomplete" previous cases' inclusion of activities that "substantially affect" interstate commerce in the three categories of permissible regulation under the Commerce Clause).

100. *Id.*

101. *Id.* at 34 ("[U]nlike the channels, instrumentalities, and agents of interstate commerce, activities that substantially affect interstate commerce are not themselves part of interstate commerce, and thus the power to regulate them cannot come from the Commerce Clause alone. . . . Congress's regulatory authority over intrastate activities that are not themselves part of interstate commerce (including activities that have a substantial effect on interstate commerce) derives from the Necessary and Proper Clause.").

102. *Id.* at 34-35.

103. *Id.* at 35.

“the power to prohibit the local cultivation and use of marijuana in compliance with California law.”¹⁰⁴ The five Justices who joined the majority opinion¹⁰⁵ implicitly endorsed *McCulloch*’s implied-powers argument, insofar as they based their view principally on the commerce power, with the necessary and proper power mentioned almost as an afterthought. Writing for the Court, Justice Stevens blended the commerce and necessary and proper discussions to such a degree that his opinion reads as though they were a single unit of analysis.¹⁰⁶ Justice Scalia’s concurrence, in contrast, treated the necessary and proper power as a discrete power that, while auxiliary, amounted to a distinct source of congressional authority.

Justice Scalia’s *Raich* concurrence appeared as though it might open doctrinal space for a broader reading of the necessary and proper power, especially as the Court held to its narrow reading of the commerce power in cases following *Lopez*.¹⁰⁷ As the doctrine subsequently unfolded, however, it became clear that a necessary and proper power that was closely tied to the commerce power—and perhaps too casually theorized—was susceptible to the same constrictions as the commerce power. In cases following *Raich*, several Justices picked up Justice Scalia’s necessary and proper analysis and applied it in other contexts to uphold congressional regulation, with the result that a distinct body of Necessary and Proper Clause doctrine and commentary appeared to be developing for the first time since *McCulloch*.¹⁰⁸ But the status of the necessary and proper power remained unsettled. Moreover, it was difficult to rationalize the state of the doctrine: was it really sensible to have a

^{104.} *Id.* at 5 (majority opinion).

^{105.} The *Raich* majority comprised Justices Stevens, Scalia, Kennedy, Souter, Ginsburg, and Breyer. Chief Justice Rehnquist and Justices O’Connor and Thomas dissented.

^{106.} Tellingly, Justice Stevens did not cite the two as separate clauses of Article I, Section 8. See *Raich*, 545 U.S. at 22. He did, however, cite *Wickard v. Filburn*, the 1942 case that is typically regarded as the high-water mark of the Court’s deference to Congress’s assessment that intrastate, nonmarket activity may nonetheless be reached when it is a “‘necessary and proper’ implementation of the power of Congress over interstate commerce,” 317 U.S. 111, 119 (1942). See *Raich*, 545 U.S. at 22 (“Thus, as in *Wickard*, when it enacted comprehensive legislation to regulate the interstate market in a fungible commodity, Congress was acting well within its authority to ‘make all Laws which shall be necessary and proper’ to ‘regulate Commerce . . . among the several States.’”).

^{107.} See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000) (striking down the civil remedy provision of the Violence Against Women Act as aimed at conduct insufficiently connected to interstate commerce to justify regulation under the commerce power).

^{108.} See, e.g., H. Jefferson Powell, *The Regrettable Clause: United States v. Comstock and the Powers of Congress*, 48 SAN DIEGO L. REV. 713 (2011).

broad necessary and proper power at the same time as a narrow commerce power? The difference might have been ascribed to shifting majorities on the Court, but for the crucial role Justice Scalia's *Raich* concurrence had played in launching the new developments.

The newly prominent Necessary and Proper Clause again proved dispositive to the Court's analysis five years later, in *United States v. Comstock*.¹⁰⁹ In *Comstock*, the Court relied on the necessary and proper power in upholding a federal civil commitment statute for persons convicted of federal sex offenses.¹¹⁰ Writing for the Court, Justice Breyer held that the statute was a valid extension of Congress's authority to establish federal criminal law; the fact that the federal criminal law was itself based on an implied power of Article I did not trouble the Court.¹¹¹ The Court rejected the argument that "when legislating pursuant to the Necessary and Proper Clause, Congress's authority can be no more than one step removed from a specifically enumerated power,"¹¹² calling such an argument "irreconcilable with our precedents."¹¹³ Justice Breyer's opinion pointed out that even the dissenting justices acknowledged

that Congress has the implied power to criminalize any conduct that might interfere with the exercise of an enumerated power, and also the additional power to imprison people who violate those (inferentially authorized) laws, and the additional power to provide for the safe and reasonable management of those prisons, and the additional power to regulate the prisoners' behavior even after their release.¹¹⁴

Justice Kennedy's concurrence took a similar approach, stating that analysis under the Necessary and Proper Clause "depends not on the number of links in the congressional-power chain but on the strength of the chain."¹¹⁵ Here, he

^{109.} 130 S. Ct. 1949 (2010).

^{110.} *Id.* at 1964-65.

^{111.} *Id.* at 1964.

^{112.} *Id.* at 1963-64.

^{113.} *Id.* at 1963 ("[F]rom the implied power to punish we have *further* inferred both the power to imprison and . . . the federal civil-commitment power." (citations omitted)).

^{114.} *Id.* at 1964.

^{115.} *Id.* at 1966 (Kennedy, J., concurring in the judgment). Justice Kennedy noted that he wrote separately in order to emphasize the importance of Tenth Amendment federalism concerns in analyzing regulation under the necessary and proper power. His view thus blended the two sides of the *Hammer v. Dagenhart* analysis: look to Article I (Holmes) but also the Tenth

found that the chain connecting Congress’s authority to establish the federal criminal law was sufficiently robust also to permit it to mandate federal civil commitment for some convicted sex offenders.

The result in *Comstock* led some observers to wonder whether the Necessary and Proper Clause of the aughts would reprise the high-profile commerce power of the period between 1937 and 1995.¹¹⁶ The Court appeared to anticipate this concern and took steps in its opinion to alleviate it, stating, “[n]or need we fear that our holding today confers on Congress a general police power, which the Founders denied the National Government and reposed in the States.”¹¹⁷

But Justice Scalia appeared not to share this comfort with the *Comstock* holding. Despite his crucial role in reviving the doctrinal force of the necessary and proper power in his *Raich* concurrence, Justice Scalia joined Justice Thomas in dissenting from the Court’s application of the power to the civil commitment statute. The dissent cited the *Raich* concurrence for the principle that although the Necessary and Proper Clause “‘empowers Congress to enact laws . . . that are not within its authority to enact in isolation,’ those laws must be in ‘effectuation of [Congress’s] enumerated powers.’”¹¹⁸ Having launched the second career of the Necessary and Proper Clause in the context of federal drug regulation (a decision from which Justice Thomas had also dissented), Justice Scalia took a different view of the power in relation to federal civil commitment of sexually dangerous persons. The dissenters’ principal objection to the statute at issue in *Comstock* was its attenuated relationship to any particular enumerated power.¹¹⁹ Absent such a connection, the dissenters appeared to view the case as though Congress had based the statute on a bare assertion of the necessary and proper power, and nothing else—that is, as

Amendment (majority). *See id.* at 1967-68 (“It is correct in one sense to say that if the National Government has the power to act under the Necessary and Proper Clause then that power is not one reserved to the States. But . . . [i]t is of fundamental importance to consider whether essential attributes of state sovereignty are compromised by the assertion of federal power under the Necessary and Proper Clause; if so, that is a factor suggesting that the power is not one properly within the reach of federal power.”).

116. *See, e.g.,* Powell, *supra* note 108, at 715 (describing the Justices in *Comstock* as “taking sides in an ancient debate” and, in so doing, “reopen[ing] an issue that ought to be deemed long settled”).

117. *Comstock*, 130 S. Ct. at 1964 (majority opinion) (internal quotation marks omitted).

118. *Id.* at 1973 (Thomas, J., dissenting) (alteration and omission in original) (quoting *Gonzales v. Raich*, 545 U.S. 1, 39 (2005) (Scalia, J., concurring in the judgment)).

119. *Id.* (“The Government identifies no specific enumerated power or powers as a constitutional predicate for §4248, and none are readily discernable.”).

though a decision to uphold the regulation would transform the power from an auxiliary into a primary tool. Indeed, the dissent expressed skepticism that a claim of congressional power grounded in the Necessary and Proper Clause might ever pass constitutional muster.¹²⁰

The specter of the commerce power haunts the analysis in *Comstock*, with unfortunate and muddying consequences for the doctrine. At oral argument, the Justices and the advocates circled around the commerce power, sometimes distinguishing it from the necessary and proper power and sometimes using it as an analogue. Justice Kennedy pressed then-Solicitor General Elena Kagan to make the commerce power argument for the civil commitment statute; in response, Kagan noted that “the government has never argued the Commerce Clause here in the sense that it has never argued that these activities have a substantial effect on interstate commerce, and it hasn’t done so because of . . . the *Morrison* precedent.”¹²¹ The government appeared to have made a policy decision in *Comstock* not to challenge the applicability of *Morrison*’s narrow reading of the commerce power to the civil commitment statute, but the Justices and advocates alike seem to have recognized the awkward analytical results for the later case.¹²² One example was the government’s somewhat strained connection between the individual being subjected to civil commitment and the federal criminal justice system as the crucial tie between the regulation and a primary Article I power.¹²³ But using an existing physical

120. *Id.* at 1983 (“Not long ago, this Court described the Necessary and Proper Clause as ‘the last, best hope of those who defend ultra vires congressional action. *Printz*.’ . . . Regrettably, today’s opinion breathes new life into that Clause, and—the Court’s protestations to the contrary notwithstanding . . . —comes perilously close to transforming the Necessary and Proper Clause into a basis for the federal police power that ‘we *always* have rejected.’”). *But see* Powell, *supra* note 108, at 761-71 (criticizing the *Comstock* opinions for reopening a Jeffersonian versus nationalist debate over congressional authority).

121. Transcript of Oral Argument at 21-22, *Comstock*, 560 U.S. 126 (No. 08-1224) (citing *United States v. Morrison*, 529 U.S. 598 (2000) (striking down remedy provision of the Violence Against Women Act as beyond the scope of the commerce power)).

122. Consider Justice Kennedy’s use of the commerce power as both an analogy and a disanalogy for the standard of review to be applied in cases under the necessary and proper power. *See Comstock*, 130 S. Ct. at 1966-67 (Kennedy, J., concurring in judgment); *see also* Aziz Z. Huq, *Tiers of Scrutiny in Enumerated Powers Jurisprudence*, 80 U. CHI. L. REV. 575, 588 (2013) (examining the use of tiers of scrutiny in cases under Article I).

123. *See* Transcript of Oral Argument, *supra* note 121, at 23-24 (argument of Solicitor General Elena Kagan) (“[T]he essential tie to a congressional power is the tie of these people to the Federal criminal justice system because they are in Federal custody.”); *cf.* *Sabri v. United States*, 541 U.S. 600 (2004) (upholding Congress’s criminalization of bribes involving organizations receiving federal funds). Justice Stevens replied skeptically: “But isn’t it true

link between the individual being regulated and a location of federal power (here, a federal prison) as evidence that the individual should continue to be the subject of federal power is a conceptually different type of connection than the classic *McCulloch*-style inquiry into the nexus between the regulation (e.g., Congress's creation of the Bank) and an enumerated power (e.g., the powers to borrow, tax, regulate commerce, make war, and raise armies and navies).

The question of the proper level of generality at which the link between the regulated activity and the relevant enumerated power ought to be evaluated has continued to bedevil the necessary and proper doctrine. The power made a brief but important appearance in the Court's 2012 decision in *National Federation of Independent Business v. Sebelius*¹²⁴ (*NFIB*), in the section of the healthcare case concerning the individual mandate provision of the Patient Protection and Affordable Care Act (commonly referred to as the ACA). The analysis in *NFIB* demonstrated the powerful consequences of Justice Scalia's revival of the necessary and proper power in his *Raich* concurrence. Chief Justice Roberts's opinion for the Court held that the individual mandate was not a "proper" means of carrying out Congress's enumerated powers because it would "draw within [Congress's] regulatory scope those who would otherwise be outside of it."¹²⁵ The result in *NFIB* surprised many commentators, who had assumed that the Court's broad reading of the necessary and proper power in *Comstock* would lead it to uphold the individual mandate.¹²⁶

The Chief Justice then devoted the remainder of his three-page discussion of the necessary and proper power to distinguishing *NFIB* from *Raich* and *Comstock*. Despite these efforts at distinction, however, the Court imported two of the most questionable elements from those cases. First, the Court's main objection to the individual mandate again blurred the line between the necessary and proper power and the commerce power, as the *Raich* majority

that this statute applies even if a person has not been a sexual offender in the past?" Solicitor General Kagan replied, "It . . . does, Justice Stevens." Transcript of Oral Argument, *supra* note 121, at 24.

124. 132 S. Ct. 2566 (2012).

125. *Id.* at 2573; see Andrew Koppelman, "Necessary," "Proper," and Health Care Reform, in *THE HEALTH CARE CASE: THE SUPREME COURT'S DECISION AND ITS IMPLICATIONS* 111 (Nathaniel Persily, Gillian Metzger & Trevor Morrison eds., 2013) (noting two prior decisions in which the Court held that a law might be necessary but not proper).

126. See, e.g., Kevin Sack, *Legal Memo: Terrain Shifts in Challenges to the Health Care Law*, N.Y. TIMES, Dec. 28, 2010, <http://www.nytimes.com/2010/12/29/health/policy/29legal.html>; see also Koppelman, *supra* note 125, at 105 (stating that under "the settled law" of Necessary and Proper Clause jurisprudence, the Affordable Care Act was "obviously constitutional" at the time it was enacted).

had done. Second, the Court adopted the *Comstock* Court's approach to assessing the connection between the activity to be regulated and the enumerated power to which that activity was tied. Both these analytical strands came together in a single paragraph of the decision:

This is in no way an authority that is "narrow in scope," *Comstock*, or "incidental" to the exercise of the commerce power, *McCulloch*. Rather, such a conception of the Necessary and Proper Clause would work a substantial expansion of federal authority. No longer would Congress be limited to regulating under the *Commerce Clause* those who by some *preexisting activity* bring themselves within the sphere of federal regulation.¹²⁷

If *Comstock* gave us the Court adjudicating in the shadow of the Commerce Clause, *NFIB* brought the narrow post-*Lopez/Morrison* commerce power back into the doctrinal fray and made it an integral part of the necessary and proper power analysis.¹²⁸ Consider Chief Justice Roberts's statements in the quoted paragraph: upholding the individual mandate under the necessary and proper power would automatically expand the scope of the commerce power as well. There is some irony here with respect to the legacy of Justice Scalia's expansive necessary and proper power in *Raich*. In *Raich*, Justice Scalia (but not the majority) had separated the necessary and proper power from the commerce power, insisting that any regulation under the "effect on interstate commerce" prong of *McCulloch* and *Lopez* was in fact an exercise of the necessary and proper power, not the commerce power.¹²⁹ That analysis made it theoretically possible to sustain a regulation under the necessary and proper power as an auxiliary to the commerce power, even though that regulation could not be sustained under the commerce power itself. Although Justice Scalia had not gone so far as to categorize the necessary and proper power as itself an enumerated power,¹³⁰ he had presented it as an analytically distinct element of

127. *NFIB*, 132 S. Ct. at 2592 (emphasis added) (citations omitted).

128. See also David A. Strauss, *Commerce Clause Revisionism and the Affordable Care Act*, 2012 SUP. CT. REV. 1, 4 (2013) (critiquing the Court's reasoning in *NFIB* for paying too little attention to post-*Lopez* principles and instead "return[ing] to the days before 1937 to hold, on the basis of arguments that do not withstand analysis, that the Commerce Clause did not authorize a major piece of federal legislation").

129. See *supra* text accompanying notes 98-108.

130. See *Gonzales v. Raich*, 545 U.S. 1, 34 (2005) (Scalia, J., concurring in the judgment) (stating that "activities that substantially affect interstate commerce are not themselves part of

Congress's authority. The Court had extended this interpretation in *Comstock*. In *NFIB*, however, Chief Justice Roberts recombined the two strands.¹³¹ Once the Court had held the ACA invalid under the commerce power, the necessary and proper portion of the opinion followed. The contours of the necessary and proper power largely tracked those of the commerce power.

Similarly, consider the Chief Justice's statement that Congress must be limited to regulating individuals "who by some preexisting activity bring themselves within the sphere of federal regulation."¹³² In *Comstock*, the preexisting connection between the regulated activity and the federal sphere was the individual's presence in federal custody. In *NFIB*, the individual mandate failed this test because it sought to "vest[] Congress with the extraordinary ability to create the necessary predicate to the exercise of an enumerated power."¹³³ In other words, Congress got the timing wrong. The implication of the Court's argument was clear: Congress would not be permitted to bootstrap a substantial effect on interstate commerce out of the very regulation at issue in the case. But recall the skepticism with which the Court greeted the government's claim in *Comstock* that the entire civil commitment scheme rested on the fact that the individuals in question were in federal custody at the time the ongoing commitment was ordered. The traditional necessary and proper framework dating from *McCulloch* had not looked to the nexus between particular individuals and federal power; it was not analogous to a question of personal jurisdiction. (If that had been the case, it is difficult to see how the newly created Second Bank of the United States could have been upheld—because it continued to hold assets that had once been held by the First Bank? Surely that fact alone would not have sufficed.) On the contrary, the inquiry turned on the link between the activity to be regulated and the particular primary Article I power cited as the source of the regulation.

In the brief period since the *NFIB* decision, the Court has continued to endorse an approach to the necessary and proper power that focuses on the regulated individual's relationship to federal power. Timing, and a special

interstate commerce, and thus the power to regulate them cannot come from the Commerce Clause *alone*" (emphasis added)).

131. One might ask whether Chief Justice Roberts would even have devoted a separate section of the *NFIB* opinion to the Necessary and Proper Clause were it not for Justice Scalia's highlighting of it as a distinct head of regulatory power in *Raich*.

132. *NFIB*, 132 S. Ct. at 2592.

133. *Id.*

relationship to federal power, again proved dispositive in *United States v. Kebodeaux*,¹³⁴ in which the Court upheld the application of the Sex Offender Registration and Notification Act (SORNA) to an individual who had been convicted by a special court-martial of a sex offense. As in *Comstock*, the Court upheld Congress's exercise of the necessary and proper power in the realm of federal criminal law, with the additional weight in *Kebodeaux* of the Military Regulation Clause.¹³⁵ Again, the tie to a permissible Article I purpose came not from the connection between the activity Congress sought to regulate and a specific, primary congressional power, but from a particular individual's prior presence within the federal system.

Yet Justice Breyer's opinion for the Court in *Kebodeaux* suggested a broader vision of the Necessary and Proper Clause, hearkening to Holmes's dissent in *Hammer* and the view that the scope of Article I should be determined on the basis of Article I alone, and not influenced by concerns about preserving a sphere of state sovereignty. To support this point, Justice Breyer cited a 1924 decision upholding a federal Prohibition statute for the proposition that the Necessary and Proper Clause permits Congress to "adopt any means, appearing to it most eligible and appropriate, which are adapted to the end to be accomplished and consistent with the letter and spirit of the Constitution."¹³⁶

Despite the differing holdings in *NFIB* and *Kebodeaux*, these two most recent analyses by the Court of the Necessary and Proper Clause demonstrate the clause's increased importance for modern debates about the meaning of federalism. As part of the *NFIB* analysis, the Court explicitly linked the necessary and proper power and the commerce power. In so doing, the Court demonstrated the way in which Chief Justice Marshall's implied-powers reasoning in *McCulloch*, which in that case had supported Congress's creation of the Bank, could be redirected toward a constriction of federal power. If the scope of the auxiliary necessary and proper power was analytically connected to the primary power to regulate commerce, then the Court's decision to constrain the commerce power would also narrow the necessary and proper power.

The outcome of these cases suggests a paradoxical conclusion: Chief Justice Marshall's broad reading of Article I, according to which all the primary

134. 133 S. Ct. 2496 (2013).

135. U.S. CONST. art. I, § 8, cl. 14.

136. *Kebodeaux*, 133 S. Ct. at 2503 (citing *James Everard's Breweries v. Day*, 265 U.S. 545, 559 (1924)).

powers include the means of exercising them, made it possible for a later Court to restrict the reach of the necessary and proper power as a derivative of the commerce power, and in so doing to shrink the permissible domain of congressional regulation. Perhaps even more surprising is that the alternative to Chief Justice Marshall's implied-powers argument came from Justice Scalia, whose concurrence in *Raich* offered a way to view the necessary and proper power as auxiliary but also as a meaningful source of federal regulatory authority beyond the scope of the primary Article I powers.¹³⁷ Justice Scalia's *Raich* concurrence set the stage for the inferential reasoning that supported the Court's decision to uphold the civil commitment statute in *Comstock* and the notification requirement in *Kebodeaux*. In the latter cases, however, the concurrence's author attempted to contain the consequences of his analysis by arguing that the exercise of the auxiliary power was too many steps removed from any identifiable primary power.¹³⁸

As these cases demonstrate, working through the Necessary and Proper Clause has again become a required step in judicially enforced federalism. Contrary to its early days, however, the clause has increasingly been used to avoid the crucial issue of the proper scope of Congress's Article I power; in some cases, it has functioned as a tool for the Court to check federal power, either by tying the clause directly to a narrowed commerce power, or else by confining the clause's operation to situations involving a formalistic, quasi-jurisdictional nexus between specific individuals and federal instrumentalities. In short, far from the fount of federal police power that some observers have feared the Necessary and Proper Clause might become,¹³⁹ the clause has become a subtle doctrinal hurdle to congressional regulation.

137. See *Gonzales v. Raich*, 545 U.S. 1, 37 (2005) (Scalia, J., concurring in the judgment) (distinguishing between the "power to make regulation effective" and "the authority to regulate economic activities that substantially affect interstate commerce," both of which Justice Scalia argued were properly understood as stemming from the Necessary and Proper Clause; in his view, the federal Controlled Substances Act fell under the former category).

138. See *Kebodeaux*, 133 S. Ct. at 2509-10 (Scalia, J., dissenting) (rejecting the majority's conclusion that the defendant was already subject to a valid exercise of federal power at the time the SORNA requirement was applied to him); *United States v. Comstock*, 560 U.S. 126, 159 (2010) (Thomas, J., dissenting, joined by Scalia, J.) (stating that § 4248 "[e]xecut[es] no enumerated power" (alterations in original)).

139. See, e.g., *Kebodeaux*, 133 S. Ct. at 2507 (Roberts, C.J., concurring in the judgment) ("I worry that incautious readers will think they have found in the majority opinion something they would not find in either the Constitution or any prior decision of ours: a federal police power."); see also MASON, *supra* note 68. But see *Kebodeaux*, 133 S. Ct. at 2503 (noting that the Necessary and Proper Clause authorizes Congress to, inter alia, "create federal crimes, to

Indeed, the same Justices who are committed to hewing to limits on the commerce power have also tended to offer the most creative readings of the shadow powers. Consider, for example, the arc traveled by the necessary and proper power from *Lopez* to *Raich* to *Comstock*. The majority opinion in *Lopez*, which Justice Scalia joined, contained no reference to the Necessary and Proper Clause; the Court did not discuss whether the Gun-Free School Zones Act of 1990 might be permissible under that power.¹⁴⁰ Instead, the majority confined its analysis to the commerce power and held that the statute was invalid because it was not a regulation of economic activity.¹⁴¹ In *Raich*, however, the Necessary and Proper Clause was the pivotal ingredient in both the majority opinion and Justice Scalia's concurrence.¹⁴² After *Raich*, the necessary and proper power appeared to be an avenue of potentially broad congressional power that survived the Court's avowedly stringent commerce-power reasoning in *Lopez*.¹⁴³ The Court's decision in *Comstock* upholding the civil commitment provision continued this expansive reading of the necessary and proper power, building on the sharp bifurcation between the necessary and proper power and the commerce power that Justice Scalia set forth in his *Raich* concurrence.¹⁴⁴ The result in *Comstock* demonstrated the power of Justice Scalia's distinction between the powers. Paradoxically, moreover, Justice Scalia's dissent from the *Comstock* majority¹⁴⁵—and his apparent skepticism at

confine offenders to prison, to hire guards and other prison personnel" in the execution of its enumerated powers).

140. See *United States v. Lopez*, 514 U.S. 549 (1995). The three dissenting opinions were similarly silent on the subject of the necessary and proper power.

141. *Id.* at 567.

142. See *Raich*, 545 U.S. at 22 (holding that "Congress was acting well within its authority to make all laws which shall be necessary and proper to regulate commerce . . . among the several states" when it enacted comprehensive regulation of the intrastate market in marijuana) (internal quotation marks and citations omitted); *but cf.* Barry Friedman & Genevieve Lakier, "To Regulate," Not "To Prohibit": *Limiting the Commerce Power*, 2012 SUP. CT. REV. 255, 258-59 (questioning whether the Commerce Clause, properly understood, "includes the power not only to . . . 'protect' interstate markets but also to 'eradicate' them").

143. See *Lopez*, 514 U.S. at 567 ("Admittedly, some of our prior cases have taken long steps down t[he] road [of a congressional police power], giving great deference to congressional action. The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further.").

144. Note again that Justice Scalia signed on to Justice Thomas's dissent in *Comstock*.

145. See *United States v. Comstock*, 560 U.S. 126, 180 (2010) (Thomas, J., dissenting, joined by Scalia, J., in part) ("Not long ago, this Court described the Necessary and Proper Clause as

oral argument of the government’s argument that the civil commitment provision was a permissible exercise of the necessary and proper power¹⁴⁶ — served to highlight the Necessary and Proper Clause’s doctrinal transformation from a murky commerce power addendum to a distinct, visible, and therefore controversial source of congressional power.

A broad reading of a shadow power similarly accompanied, and arguably enabled, a narrow reading of a primary power in *NFIB*. Consider the progression of Chief Justice Roberts’s analysis of the individual mandate provision, from the commerce power to the necessary and proper power to the taxing power. Having determined that the individual mandate was not a permissible exercise of the commerce power because it failed the *Lopez* test of regulating economic activity,¹⁴⁷ Chief Justice Roberts next moved to the necessary and proper power as a separate step of analysis. Here, again, the individual mandate failed to pass muster. Chief Justice Roberts seized on a phrase from *McCulloch v. Maryland*¹⁴⁸ and decontextualized it to create a new limitation on the necessary and proper power. The individual mandate was not analogous to the regulation of the intrastate marijuana market in *Raich* because “*Raich* . . . did not involve the exercise of any ‘great substantive and independent power,’ of the sort at issue here.”¹⁴⁹ Why the regulation of the intrastate market in healthcare (or, more precisely, self-insurance) amounted to a “great substantive and independent power” was left unclear. Also

‘the last, best hope of those who defend ultra vires congressional action.’ Regrettably, today’s opinion breathes new life into that Clause, and—the Court’s protestations to the contrary notwithstanding—comes perilously close to transforming the Necessary and Proper Clause into a basis for the federal police power that ‘we *always* have rejected.’” (citations omitted)).

146. See Transcript of Oral Argument, *supra* note 121, at 13 (“Justice Scalia: General Kagan, you are relying on the Necessary and Proper Clause, right? . . . Now, why is this necessary for the execution of any Federal power? . . . You could say it’s necessary for the good of society, but that’s not what the Federal Government is charged with. Why is it necessary to any function that the Federal Government is performing?”).

147. 132 S. Ct. 2566, 2587 (2012).

148. 17 U.S. (4 Wheat.) 316, 411 (1819) (“The power of creating a corporation, though appertaining to sovereignty, is not, like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers, or used as a means of executing them.”). Interpreted in context, and with a proper understanding of historical speech, it is clear that Chief Justice Marshall was using the phrase “great substantive and independent power” to mean “powers already explicitly enumerated in Article I.” He was not establishing an extra-textual category of unnecessary and improper, or otherwise un-impliable, powers.

149. *NFIB*, 132 S. Ct. at 2593 (citation omitted).

unacknowledged was the sudden appearance of a new distinction in the case law between permissible uses of the necessary and proper power (e.g., to plug holes in existing regulatory schemes¹⁵⁰) and uses that appeared, in some vaguely defined way, to be simply too large in scale to be permitted by such a potentially expansive provision as the Necessary and Proper Clause.¹⁵¹

The problem with the trajectory of shadow powers analysis is that it combines a claim of doctrinal stringency in one area (the post-*Lopez* commerce power) with an unacknowledged doctrinal slipperiness in another area (the necessary and proper power). Moreover, the Court's increasingly sharp separation between the two powers suggests that regulations under the Necessary and Proper Clause are less constitutionally firm than those authorized by the Commerce Clause. But, as the long line of decisions dating from the early twentieth century demonstrates,¹⁵² the commerce power and the necessary and proper power have a long history of conceptual and doctrinal overlap. Because the necessary and proper power has traditionally been understood as an auxiliary of the commerce power, recent decisions that treat the former as a distinct basis of congressional regulation inevitably search in vain for firm precedents that contain reasoning specific to the Necessary and Proper Clause. The result is to undermine the necessary and proper power while appearing to treat it as equal in weight to the commerce power.

Both the General Welfare Clause and the Necessary and Proper Clause thus might be thought of as doctrinal workarounds,¹⁵³ tools for the Court to find pressure points in the case law in order to yield new insights about the

150. Chief Justice Roberts's necessary and proper analysis was thus also premised on a temporal distinction between different types of federal regulatory schemes. See *id.* at 2592 (distinguishing the "continued confinement of those *already in federal custody*" (*Comstock*) and "those who by some preexisting activity bring themselves within the sphere of federal regulation" (*Comstock* and *Gonzales v. Raich*, 545 U.S. 1 (2005)) from "vest[ing] Congress with the extraordinary ability to create the necessary predicate to the exercise of an enumerated power" (the individual mandate)).

151. Chief Justice Roberts's opinion can be seen as the apogee of shadow powers analysis, insofar as the individual mandate was upheld as an exercise of the taxing power after having failed to meet the criteria for the commerce power or the necessary and proper power. The shadow power of the General Welfare Clause thus prevailed where the shadow power of the Necessary and Proper Clause did not.

152. See *supra* text accompanying notes 86-88.

153. See Alison L. LaCroix, *The Interbellum Constitution and the Spending Power* 5, 31 (Univ. of Chi. Pub. Law Working Paper No. 420, 2013) (discussing nineteenth-century constitutional workarounds). See generally Mark Tushnet, *Constitutional Workarounds*, 87 TEX. L. REV. 1499 (2009) (describing workarounds as tools for achieving particular goals that are politically popular but prohibited by certain constitutional provisions).

permissible scope of congressional power.¹⁵⁴ They are shadowy, however, because of their textual and structural ambiguity, because it is not clear that they can bear the interpretive weight being placed upon them, and because their new prominence is based on unarticulated premises yet presented as dictated by precedent.

III. THE GENERAL WELFARE CLAUSE

Like the necessary and proper power, the powers housed in the General Welfare Clause of Article I¹⁵⁵ have assumed a newly prominent role in the Supreme Court's recent decisions concerning the scope of congressional power. As is also the case for the Necessary and Proper Clause, the General Welfare Clause contains ambiguous language regarding the means and ends of permissible congressional regulation. The clause is the opening provision of Article I, Section 8. It states, "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States."¹⁵⁶ Are the taxing and spending powers the means to achieving the ends of common defense and general welfare for the nation? Or is providing for the common defense and general welfare another means, an additional source of authority for Congress to regulate toward some other (unstated) end? Unlike the necessary and proper power, which has throughout its history been understood as auxiliary, the taxing and spending powers have traditionally been listed among the primary, enumerated powers of Congress.¹⁵⁷ But the two clauses are similar in that both have resurfaced in recent doctrine as the Court tries different approaches to the

154. As David Strauss notes, the Necessary and Proper and General Welfare Clause analyses set forth in *NFIB* may have different consequences for future federal legislation. The limits on the commerce and necessary and proper powers set forth in *NFIB* will cabin congressional power "only when the government tries to involve private parties, and therefore may have to resort to the Commerce Clause." If a given program is funded by tax revenues, however, the enacting legislation would presumably rely on the taxing power. Thus "the more the government is involved in a program, the less *NFIB* will affect it; *NFIB* will come into play, if at all, when the government increases the role of the private sector." Strauss, *supra* note 128, at 28.

155. U.S. CONST. art. I, § 8, cl. 1.

156. *Id.*

157. See, e.g., *United States v. Butler*, 297 U.S. 1, 66 (1936) (adopting the Hamiltonian view of the General Welfare Clause and concluding that "[w]hile . . . the power to tax is not unlimited, its confines are set in the clause which confers it, and not in those of § 8 which bestow and define the legislative powers of the Congress").

old problem of assessing congressional regulation's congruence with the Constitution's commitment to federalism.¹⁵⁸

The taxing and spending powers of the General Welfare Clause may fairly be termed shadow powers because although they appear uncontroversial, secondary, and innocuous compared to their polarizing Article I companion, the commerce power, they nevertheless contain the potential for both doctrinal expansion and contraction. Like the Necessary and Proper Clause, the General Welfare Clause appears to have a non-substantive, almost neutral orientation; neither is "about" a specific subject or establishes a particular domain for Congress. The power to tax and spend in some form is a basic tool of government generally, and the necessary and proper power is an instruction (perhaps a tautology,¹⁵⁹ perhaps not) to the federal government that it can execute the powers confided to it.

The path of the General Welfare Clause began in early controversy, traversed a lengthy period of settlement, and has recently reached a new ground of contestation and uncertainty. Following several decades in the founding and early national periods in which the meaning of the clause—specifically, the connection between the taxing and spending powers and the "general welfare of the United States"—was hotly debated,¹⁶⁰ the clause settled down in the early twentieth century to become arguably the second most important source of enumerated congressional authority after the commerce power.¹⁶¹

From the founding era through the early nineteenth century, commentators such as James Madison, Alexander Hamilton, and Thomas Jefferson argued over what the General Welfare Clause meant. Three main views emerged, holding that the clause ought to be understood as (1) a freestanding power to regulate for the common defense and general welfare (a

158. See *United States v. Comstock*, 130 S. Ct. 1949, 1967 (2010) (Kennedy, J., concurring in the judgment) (drawing a parallel between the necessary and proper power and the spending power in discussing the relevant standards to be applied to each).

159. See THE FEDERALIST NO. 33, *supra* note 2, at 202 (Alexander Hamilton) (describing the clause as potentially "chargeable with tautology or redundancy").

160. See LaCroix, *supra* note 153 (examining early-nineteenth-century debates about the scope of the clause, especially the spending power).

161. See Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911 (1995); David E. Engdahl, *The Spending Power*, 44 DUKE L.J. 1 (1994); Thomas R. McCoy & Barry Friedman, *Conditional Spending: Federalism's Trojan Horse*, 1988 SUP. CT. REV. 85; see also Edward S. Corwin, *supra* note 32, at 552 (arguing that the general welfare power should be viewed as "not an independent grant of power, but a qualification of the taxing power").

view that was not widely held but that was nevertheless frequently invoked in debate);¹⁶² (2) a statement that Congress might tax and spend for the common defense and general welfare (Alexander Hamilton's view);¹⁶³ or (3) a statement that Congress might tax and spend only in pursuit of its other enumerated powers (James Madison's view).¹⁶⁴ According to all three views, the taxing and spending powers contained in the General Welfare Clause were enumerated; the difference concerned whether they were primary (Addison and Hamilton) or merely auxiliary (Madison).

In 1936, the Court adopted what it termed the Hamiltonian view of the General Welfare Clause (although the Justices went on to invalidate the tax at issue as impermissible "regulation").¹⁶⁵ On this view, the Court stated, "the clause confers a power separate and distinct from those later enumerated, is not restricted in meaning by the grant of them, and Congress consequently has a substantive power to tax and to appropriate."¹⁶⁶ Over the course of the twentieth century, therefore, the General Welfare Clause came to be awkwardly divided between the two doctrinal paths of the taxing power and the spending power.¹⁶⁷ Beginning in the 1930s, taxing power cases typically

-
162. One of the main proponents of this view was the Pennsylvania judge Alexander Addison, who argued that the clause granted Congress three distinct powers: to tax, to spend, and to legislate for the general welfare. See Alexander Addison, *Analysis of the Report of the Committee of the Virginia Assembly*, in 2 AMERICAN POLITICAL WRITINGS DURING THE FOUNDING ERA, 1760-1805, at 1055 (Charles S. Hyneman & Donald S. Lutz eds., 1983); see also JEFFERSON POWELL, *LANGUAGES OF POWER: A SOURCE BOOK OF EARLY AMERICAN CONSTITUTIONAL HISTORY* 3, 32 (1991) (describing Addison's views).
163. Alexander Hamilton, *Opinion on the Constitutionality of an Act to Establish a Bank* (Feb. 23, 1791), in 8 THE PAPERS OF ALEXANDER HAMILTON 129 (Harold C. Syrett ed., 1965) ("The constitutional test of a right application must always be whether it be for a purpose of *general* or *local* nature. If the former, there can be no want of constitutional power. The quality of the object, as how far it will really promote or not the welfare of the union, must be matter of conscientious discretion.").
164. James Madison, *The Bank Bill* (Feb. 2, 1791), in 13 THE PAPERS OF JAMES MADISON 375 (Charles F. Hobson & Robert A. Rutland eds., 1981) (arguing that a broad interpretation of the General Welfare Clause "would render nugatory the enumeration of particular powers").
165. *United States v. Butler*, 297 U.S. 1, 65 (1936).
166. *Id.* at 61; see also *South Dakota v. Dole*, 483 U.S. 203, 207-08 (1987) (adopting the four-part test of *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937), according to which the exercise of the spending power must be in pursuit of the general welfare, the condition must be unambiguous, the condition must have some relation to the federal interest in a particular program, and the condition cannot violate any other constitutional provision).
167. See *Dole*, 483 U.S. 203 (upholding a program that conditioned federal funds to states on

focused on federal taxation of individuals,¹⁶⁸ while spending power cases tended to concern Congress's authority to use federal funds to encourage states to adopt particular programs or policies.¹⁶⁹ These conditional spending programs and the bargains they entailed became a key tool in Congress's regulatory arsenal and a way of working around objections to direct regulation of states *qua* states, although they sometimes prompted the objection that states were being coerced.¹⁷⁰ The taxing power, meanwhile, was seen as relatively uncontroversial, albeit powerful.¹⁷¹

Today, however, the meaning of the General Welfare Clause is again in transition, as the doctrine works through a period of crisis of a type not seen since the 1930s, when the question of the federal government's power to regulate the broader economy consumed both political and constitutional debates.¹⁷² A syntactically challenging clause that had, over the course of the twentieth century, achieved the status of an escape hatch for Congress became the focus of intense scrutiny in the Court's 2012 decision in *NFIB v. Sebelius*.¹⁷³

states' compliance with minimum legal drinking age); *Butler*, 297 U.S. 1 (striking down the tax provision of the Agricultural Adjustment Act of 1933); *Steward Machine*, 301 U.S. 548 (upholding the unemployment compensation provisions of the Social Security Act of 1935).

168. See, e.g., *Butler*, 297 U.S. at 75, 78 (invalidating tax on agricultural commodities under the Agricultural Adjustment Act of 1933 as beyond the scope of the "taxing and spending power"); see also *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2600 (2012) (upholding the individual mandate provision of the Affordable Care Act under the taxing power).
169. See, e.g., *NFIB*, 132 S. Ct. at 2603, 2607 (upholding in part and invalidating in part the ACA's expansion of state-run Medicaid programs); *Steward Machine*, 301 U.S. 548 (upholding the Social Security Act's scheme of encouraging employers to pay taxes to state unemployment compensation fund). Insofar as the ACA's individual mandate was an exercise of the taxing power, while the Medicaid expansion was a conditional spending program, *NFIB* represented the melding of what had been two distinct lines of reasoning about regulation of individuals versus regulation of states.
170. See *Steward Machine*, 301 U.S. at 590 (discussing the point at which "pressure turns into compulsion"); see also *Dole*, 483 U.S. at 215 ("There is a clear place at which the Court can draw the line between permissible and impermissible conditions on federal grants.").
171. See Ruth Mason, *Federalism and the Taxing Power*, 99 CALIF. L. REV. 975 (2011) (arguing for reconceiving the taxing power as having potentially as broad a scope as the spending power).
172. See Gillian E. Metzger, *To Tax, To Spend, To Regulate*, 126 HARV. L. REV. 83, 84 (2012) (describing *NFIB* as "challeng[ing] th[e] basic constitutional consensus" that "the fight over the federal government's proper role in the economic sphere" is "largely political, not constitutional"). See generally THE HEALTH CARE CASE, *supra* note 125 (discussing constitutional issues surrounding *NFIB*).
173. *NFIB*, 132 S. Ct. at 2593-609.

In upholding the ACA's individual mandate under the taxing power component of the General Welfare Clause¹⁷⁴ but striking down the act's Medicaid expansion provision under the spending power,¹⁷⁵ the Court revived an earlier, more stringent version of its spending power analysis while also expanding Congress's taxing power. *NFIB*, then, was a split decision for the General Welfare Clause as a whole. But the decision plants a marker for future federalism analysis. The taxing power and the spending power, and the underlying idea that there is something called "the general welfare of the United States," will likely be prominent sites of debates over federalism in the coming years.

The most striking element of the *NFIB* decision, for purposes of shadow powers analysis, is the Court's apparent desire to use roundabout doctrinal means to test the overall quantum of federalism in the current American system. The majority opinion canvasses virtually the entire relevant landscape of Article I, trying every available doctrinal door in order to arrive at its conclusions. Two points are particularly noteworthy for this discussion: first, the change to existing spending power doctrine that the decision brought about; second, the dearth of references to the Tenth Amendment in the majority's opinion.

In invalidating the conditional spending program attached to the ACA's Medicaid expansion,¹⁷⁶ the Court revived an inquiry into the potentially coercive nature of such programs that it had all but discarded in the decades since the 1930s,¹⁷⁷ when it announced the coercion test in *United States v.*

174. *Id.* at 2600 (upholding the ACA's requirement that individuals pay a penalty for not obtaining insurance).

175. *Id.* at 2603 (invalidating a provision permitting the Secretary of Health and Human Services to withdraw existing Medicaid funds from states that fail to comply with the ACA's requirements).

176. See *NFIB*, 132 S. Ct. at 2603 ("[The States] object that Congress has crossed the line distinguishing encouragement from coercion in the way it has structured the funding Given the nature of the threat and the programs at issue here, we must agree." (citations and internal quotation marks omitted)).

177. See Mitchell N. Berman, *Coercion, Compulsion, and the Medicaid Expansion: A Study in the Doctrine of Unconstitutional Conditions*, 91 TEX. L. REV. 1283, 1342 (2013) (referring to "the discredited doctrine of *United States v. Butler* that Congress may not use its spending power to 'purchase a compliance which Congress is powerless to command'"); David E. Engdahl, *The Spending Power*, 44 DUKE L.J. 1, 3 (1994) (noting that the *Butler* Court "declared that Hamilton had it right but so misunderstood him that they actually decided the case according to the contrary, restrictive Madisonian view").

Butler.¹⁷⁸ The return of coercion to the doctrine, after decades of conditional spending cases in which the Court upheld regulation despite only a nominal connection between the imposed condition and Congress's regulatory end,¹⁷⁹ suggests that the Court is not averse to reexamining doctrinal elements that many commentators had assumed were no longer contested.¹⁸⁰ Especially noteworthy is the return of *Butler*, a pre-1937 precedent in which the Court held not only that a key piece of New Deal legislation "invades the reserved rights of the States," but also that the "plan of regulation" contained in the act was not a permissible exercise of Congress's taxing power.¹⁸¹ In *NFIB* the Court acknowledged that all taxes were potentially regulatory,¹⁸² but the adoption of a test derived from a period when a more formalist distinction between taxation and regulation obtained was still startling.¹⁸³ Moreover, the *Butler* Court had developed the coercion analysis in the context of a tax provision, not a conditional spending program. Yet the *NFIB* majority imported the *Butler* coercion test from its origin in the taxing power, in an era of suspicion about taxes, into the modern conditional spending realm, despite the fact that the conditional spending power had previously been understood as offering the broadest avenue for congressional regulation under Article I.¹⁸⁴

178. *United States v. Butler*, 297 U.S. 1, 71 (1936) (describing the statute at issue as "coercion by economic pressure" because "[t]he asserted power of choice is illusory").

179. *See, e.g., South Dakota v. Dole*, 483 U.S. 203 (1987) (highway funding and minimum drinking age).

180. *See, e.g., Neil S. Siegel, Commandeering and Its Alternatives: A Federal Perspective*, 59 VAND. L. REV. 1629, 1656 (2006) (noting that "commentators have debated vigorously whether many forms of conditional federal spending are actually mandatory in practice because the Rehnquist Court declined to put teeth into *Dole's* non-coercion requirement").

181. *Butler*, 297 U.S. at 59, 68. The analysis in *Butler* focused on the taxing power rather than conditional spending. The opinion of the Court was written by Justice Owen Roberts, subsequently identified as the Justice responsible for the "switch in time that saved nine." *See MCCLOSKEY, supra* note 13, at 118.

182. *See NFIB*, 132 S. Ct. 2566, 2596 (2012) (noting that "taxes that seek to influence conduct are nothing new").

183. Recall John Dickinson's argument in 1765 that taxation of the colonies for the purpose of empire-wide regulation was permissible, but that taxation merely to raise revenue was not—i.e., the opposite of the Court's conclusion in *Butler*. *See supra* text accompanying notes 48–50.

184. *See Dole*, 483 U.S. at 207 (stating that "objectives not thought to be within Article I's enumerated legislative fields may nevertheless be attained through the use of the spending power and the conditional grant of federal funds" (internal citations and quotation marks omitted)).

The lack of references to the Tenth Amendment in the Court's opinion is also striking. With the exception of a single citation in its preliminary description of the Eleventh Circuit's decision,¹⁸⁵ the majority did not refer to the textual and doctrinal provision at the center of the Court's "federalism revolution" of the 1980s and 1990s.¹⁸⁶ Instead, the Court couched its discussion of the Medicaid conditional spending provision in terms of contract and individual freedom.¹⁸⁷ Quoting an earlier decision holding that Congress could not "commandeer" state legislatures in which the Court had relied heavily on a robust reading of the Tenth Amendment, the Court in *NFIB* appeared to downplay the state sovereignty argument in favor of the individual liberty argument.¹⁸⁸ Despite the fact that previous decisions invalidating congressional acts as unauthorized by the Commerce Clause discussed the Tenth Amendment frequently and at length,¹⁸⁹ and despite the obvious relevance of the Court's anticommandeering precedents to its decision about the Medicaid provision, the *NFIB* Court declined to discuss the Amendment.¹⁹⁰

The lack of any substantive reference to the Tenth Amendment in the decision is additional evidence that the current form of the federalism debate has cycled back to its 1930s incarnation, rather than continuing in the line laid down by the "new federalism" cases of the 1980s and 1990s. Justice Holmes's emphasis on Article I in his dissent in *Hammer v. Dagenhart* has returned to the forefront of the Court's approach to federalism questions involving congressional regulation, but with a newly stringent application. The Court evaluated the ACA through the lenses of the commerce, necessary and proper,

185. See *NFIB*, 132 S. Ct. at 2582.

186. See *supra* text accompanying notes 14-22.

187. *NFIB*, 132 S. Ct. at 2602.

188. See *id.* at 2578 ("State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.") (quoting *New York v. United States*, 505 U.S. 144, 181 (1992)). On the developing doctrinal link between federalism and individual rights, see Aziz Z. Huq, *Standing for the Structural Constitution*, 99 VA. L. REV. 1435 (2013).

189. See, e.g., *United States v. Lopez*, 514 U.S. 549, 589 (1995) (Thomas, J., concurring); *Nat'l League of Cities v. Usery*, 426 U.S. 833, 842-43 (1976), *overruled by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

190. The dissenters discussed the amendment in terms familiar from the Court's previous decisions. See *NFIB*, 132 S. Ct. at 2643 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) (describing the existence of "structural limits upon federal power" as "absolutely clear, affirmed by the text of the 1789 Constitution, by the Tenth Amendment ratified in 1791, and by innumerable cases of ours in the 220 years since").

taxing, and spending powers, and found the act deficient in three of those four categories. Again, the narrowed commerce power—here actually present before the Court—appeared to guide the majority’s analysis of the other Article I powers. Moreover, the spending power issue directly implicated the states as states, but the Court’s emphasis on contract and individual liberty allowed it to avoid the potentially unproductive Tenth Amendment analysis of previous decades. Here again, the shadow powers of Article I entered into the doctrine when the direct lines of analysis—the Commerce Clause and the Tenth Amendment—appeared to have reached the limits of their usefulness. And yet again, the shadow powers pushed the Court toward Justice Holmes’s Article I approach in *Hammer* rather than the *Hammer* majority’s focus on the Tenth Amendment, with the counterintuitive result that the Court held the Act insufficient to meet the requirements for three of the four Article I powers at issue. In short, the *NFIB* decision demonstrated that it was possible to adopt Justice Holmes’s technique of analyzing the powers of Congress detached from state sovereignty concerns without also endorsing Justice Holmes’s conclusion that the Court should defer to Congress’s reasonable assessment of the scope of its powers.¹⁹¹ As with the return of the necessary and proper power, the Court’s interpretation of the taxing and spending powers in *NFIB* pushes the doctrine back toward the Article I methodology of the *Hammer* analysis, but with a very different result.

IV. THE SHADOW POWERS AND THE UNION

What, then, is the significance of the shadow powers for modern federalism doctrine? And why should it matter whether the Court upholds a particular provision under the Necessary and Proper Clause or the General Welfare Clause as opposed to the Commerce Clause?

191. See *Hammer v. Dagenhart*, 247 U.S. 251, 280-81 (1918) (Holmes, J., dissenting) (“I had thought that the propriety of the exercise of a power admitted to exist in some cases was for the consideration of Congress alone and that this Court had always disavowed the right to intrude its judgment upon questions of policy or morals. . . . The act does not meddle with anything belonging to the States. They may regulate their internal affairs and their domestic commerce as they like. But when they seek to send their products across the state line they are no longer within their rights.”); accord *James Everard’s Breweries v. Day*, 265 U.S. 545, 558 (upholding Prohibition regulation on the ground that “if the act is within the authority delegated to Congress by the Eighteenth Amendment, its validity is not impaired by reason of any power reserved to the States”).

Viewed from a distance, the decision of the Court in *NFIB* that the individual mandate was a permissible exercise of the taxing power, but not the commerce or necessary and proper powers, might have little significance for the overall quantum of federal regulation. Viewed from the closer perspective of a potential litigant or an advocate, however, the choice of doctrinal pathway matters enormously for how a claim is structured. Viewed from inside Congress, moreover, the Court's interpretive stance affects how legislation is drafted, what (if any) findings are included, and whether jurisdictional hooks such as requiring that a particular item (e.g., a gun¹⁹²) have traveled in interstate commerce are incorporated. And viewed from the perspective of the Constitution's deep background commitment to a principle of federalism, the Court's choice to use the textually and structurally ambiguous Necessary and Proper Clause or General Welfare Clause in a given case should be seen as an indication that the Court is using Article I to sound, and perhaps change, the contours of federal regulatory power.¹⁹³ The powers set forth in the clauses are shadow powers because they appear less controversial than their substantively specific Article I neighbor, the commerce power, but they nevertheless implicate foundational questions of how federalism works—and how it ought to work—in practice.

For the Founders, Federalists and Antifederalists alike, the key issue was how to build a *union*. They had many different ideas of what that union might look like. The broad array of possibilities available to them included a commonwealth with a single sovereign monarch but separate legislatures, like Scotland and England between 1603 and 1707; a shared, sovereign, and entirely new legislature, like Great Britain after 1707; or a general government to handle external affairs with colonial or state governments retaining authority over internal matters, like the *de facto* situation of British North America and the United States under the Articles of Confederation.¹⁹⁴ But their focus was on

192. Consider the post-*Lopez* retooling of the Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q) (2006), to include a requirement that the firearm in question “has moved in or otherwise affects interstate commerce.”

193. Cf. Powell, *supra* note 108, at 771 (noting that “questions involving the interpretation of the [Necessary and Proper C]lause unavoidably present the issue of how we are to understand more generally the scope of legislative power under the Constitution”).

194. See LACROIX, *supra* note 1, at 20-29 (discussing North American colonists' experiences with various provincial unions and contemporary precedents involving Scotland and Ireland); see also Alison L. LaCroix, *Rhetoric and Reality in Early American Legal History: A Reply to Gordon Wood*, 78 U. CHI. L. REV. 733 (2011) (discussing the many theories and practices of multiple sources of legal authority circulating in late-eighteenth-century British North America).

making a union, not on maintaining the states as states. The novelty for the Founders was conceiving of the United States as a distinct entity that might have a distinct general welfare. Recall Dickinson's citation in 1765 of the "general welfare" of the greater British Empire as a permissible justification for previous taxes levied on the colonies by Parliament.¹⁹⁵ Dickinson invoked the general welfare of the entire empire as a legitimate purpose of trade regulation, including taxation, by Parliament. "We are but parts of a *whole*; and therefore there must exist a power somewhere, to preside, and preserve the connection in due order."¹⁹⁶ Not only the power, but also the duty of the central legislature, then, was to make such regulations as were "necessary for the common good of all."¹⁹⁷ Notably, both Dickinson's "general welfare" and Dulany's "necessary or proper" emerged in the context of taxation, the original concurrent power that virtually all participants in the imperial and founding-era debates believed must be held concurrently by legislative bodies at both the center and the periphery.

When modern judicial federalists take as their mission the preservation of state sovereignty, they tend to look to history, particularly that of the Founding Era, for support.¹⁹⁸ But more often than not, they misread that history. To the extent one can reasonably generalize about the views of late-eighteenth-century North American commentators, their focus on federalism derived from their preoccupation with the problem of forming a viable and enduring union. Federalism was their particular answer to the question of how to build a union. It was a tool, and later a normative value, but it was not an end in and of itself.¹⁹⁹ As the Dickinson example demonstrates, the imperative of building a

195. See DICKINSON, *supra* note 48, at 16.

196. *Id.* at 12-13.

197. *Id.* at 12.

198. See, e.g., *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2589 (2012) ("Under the Government's logic, that authorizes Congress to use its commerce power to compel citizens to act as the Government would have them act. That is not the country the Framers of our Constitution envisioned."); *Printz v. United States*, 521 U.S. 898, 919 (1997) (stating that "the Framers rejected the concept of a central government that would act upon and through the States").

199. See LACROIX, *supra* note 1, at 216-18 (giving examples of contemporary views of federalism defined in relation to particular types of union); see also Alison L. LaCroix, *Commandeering Federalism*, BALKINIZATION (Apr. 7, 2010, 11:33 PM), <http://balkin.blogspot.com/2010/04/commandeering-federalism.html> (noting as one of the lessons of federalism's history for modern doctrine the fact that "uncertainty about the 'real' meaning of federalism in practice has as long a lineage as federal ideas themselves" insofar as "[s]imilar debates to the ones

union was felt strongly by the members of the founding generation.²⁰⁰ Moreover, the Tenth Amendment was initially promoted by Federalists who feared that the enumeration of rights contained in the Bill of Rights would be read as an exhaustive list, rather than by the Antifederalists or Jeffersonians, who are often lionized by the “new federalists.”²⁰¹

Indeed, by the early nineteenth century, appeals to an almost mystical conception of “the Union” increased in frequency and fervor, eventually replacing earlier decades’ invocations of “the Republic” with a phrase and a concept that spoke directly to the complexities of federal-state relations. As Abraham Lincoln put it in his speech before the Young Men’s Lyceum of Springfield, Illinois, in 1838, American government was sustained by “the *attachment* of the People” and was therefore imperiled when citizens suffered the “alienation of their affections from the Government.”²⁰² Lincoln’s solution was for the chief texts of the Union, the “Constitution and Laws,” to join the Declaration of Independence to comprise the “*political religion*” of the nation.²⁰³ No less a devotee of state sovereignty than John C. Calhoun saw himself as a Union man, engaged in a dialogue with the Founders and contributing to an ongoing founding moment even after he foreswore his membership in the Federalist Party.²⁰⁴ At the outbreak of the Civil War, President Lincoln would invoke no less authority in his first inaugural address than “universal law and . . . the Constitution” to argue that “the Union of these States is perpetual.”²⁰⁵

To the extent that modern federalism doctrine relies on some combination of historical sources, originalist interpretation, and historical practice, it is crucial to understand that precedents for both the Necessary and Proper and

that played out in the Court’s classic anticommandeering cases . . . took place in the first few decades of the Republic’s existence”).

200. See LACROIX, *supra* note 1, at 113–20, 123–24 (discussing concepts of union as they were developed by Thomas Jefferson and by members of the Continental Congress in the 1770s).

201. See MAIER, *supra* note 65, at 451.

202. Abraham Lincoln, Address Before the Young Men’s Lyceum of Springfield (Jan. 27, 1838), in THE POLITICAL THOUGHT OF ABRAHAM LINCOLN 11, 15–16 (Richard N. Current ed., 1967).

203. *Id.* at 16–17; see also Abraham Lincoln, Speech at Peoria, Illinois (Oct. 16, 1854), in 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 247, 270 (Roy P. Basler ed., 1959) (evaluating the “Union-saving measure” of the Kansas-Nebraska Act and concluding, “[m]uch as I hate slavery, I would consent to the extension of it rather than see the Union dissolved”).

204. See, e.g., John C. Calhoun, *The South Carolina Exposition and Protest* (1828), in 10 THE PAPERS OF JOHN C. CALHOUN 442, 507–29 (Clyde N. Wilson & W. Edwin Hemphill eds., 1977).

205. Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), in THE POLITICAL THOUGHT OF ABRAHAM LINCOLN, *supra* note 202, at 168.

General Welfare Clauses emerged as part of arguments for centralized legislative authority over matters pertaining to the empire, and later the Union, as a whole. Another way to put this argument is to say that American federalism has historically assumed a meaningful scope of operations in which the power of the Union will operate. Still another way to put it is to say that some areas of government power are aimed at what Dickinson termed “the common good of all,”²⁰⁶ and what we might also call the general welfare of the United States. Within those areas, the federal government must have the power to act—not necessarily exclusive power, but some meaningful amount of power. This is the enumeration principle of Article I—derived from pre-revolutionary sources, glossed by Marshall in *McCulloch*, and extended by Holmes in his *Hammer* dissent.

From a structural perspective, moreover, one justification for the Court to apply forceful limits to federal power is the belief that the states have a discrete domain or “sphere” of regulatory autonomy.²⁰⁷ Even if this claim is accurate, however, it does not preclude the existence of a specific sphere of federal regulatory authority. The whole purpose of a union, in the colonial and founding eras as today, was not to have a consolidated, unitary government, but rather to bring a group of entities together under a single overarching authority.²⁰⁸ Within the defined sphere of its powers and duties, that union-level government must have the means of carrying out the ends confided to it. Indeed, in *McCulloch*, Marshall made this point explicitly: “[T]he Government of the Union, though limited in its powers, is supreme within its sphere of action. . . . The nation, on those subjects on which it can act, must necessarily bind its component parts.”²⁰⁹ The government of the United States was established in order to create a species of polity denominated as a union. The purpose of that union was to function as a nation with respect both to external affairs and to a somewhat defined set of internal affairs.²¹⁰ While these facts do

206. DICKINSON, *supra* note 48, at 12.

207. See, e.g., *United States v. Lopez*, 514 U.S. 549, 577 (1995) (Kennedy, J., concurring) (“Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory.”); see also BARBER, *supra* note 16, at 89–121 (discussing and critiquing “states’ rights federalism”).

208. See also Heather K. Gerken, *The Supreme Court 2009 Term—Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 6, 44 (2010) (describing a “nationalist account” of federalism).

209. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819).

210. See MAX M. EDLING, *A REVOLUTION IN FAVOR OF GOVERNMENT: ORIGINS OF THE U.S.*

THE SHADOW POWERS OF ARTICLE I

not necessarily establish that the federal government was intended as the equivalent of a national government, they do demonstrate that a key purpose of federalism has always been to provide a basis for a union and for a nation. The question for federalism, then and now, is what the best conception of *federal union* should be. Federalism, in other words, has always been the United States' distinctive species of nationalism.

CONSTITUTION AND THE MAKING OF THE AMERICAN STATE (2003); DAVID C. HENDRICKSON, PEACE PACT: THE LOST WORLD OF THE AMERICAN FOUNDING 259 (2003) (describing the federalist scheme of the U.S. Constitution as “the reasoned response to a serious security problem that espied a sequence in which internal division and the intervention of external powers would create the same whirlwind in America that had undone Europe”); David Armitage, *The Declaration of Independence and International Law*, 59 WM. & MARY Q. 39 (3d ser. 2002).

Readers with comments may address them to:

Professor Alison L. LaCroix
University of Chicago Law School
1111 East 60th Street
Chicago, IL 60637
lacroix@uchicago.edu

The University of Chicago Law School
Public Law and Legal Theory Working Paper Series

For a listing of papers 1–400 please go to <http://www.law.uchicago.edu/publications/papers/publiclaw>.

401. Gary Becker, François Ewald, and Bernard Harcourt, “Becker on Ewald on Foucault on Becker” American Neoliberalism and Michel Foucault’s 1979 *Birth of Biopolitics* Lectures, September 2012
402. M. Todd Henderson, Voice versus Exit in Health Care Policy, October 2012
403. Aziz Z. Huq, Enforcing (but Not Defending) “Unconstitutional” Laws, October 2012
404. Lee Anne Fennell, Resource Access Costs, October 2012
405. Brian Leiter, Legal Realisms, Old and New, October 2012
406. Tom Ginsburg, Daniel Lnasberg-Rodriguez, and Mila Versteeg, When to Overthrow Your Government: The Right to Resist in the World’s Constitutions, November 2012
407. Brian Leiter and Alex Langlinais, The Methodology of Legal Philosophy, November 2012
408. Alison L. LaCroix, The Lawyer’s Library in the Early American Republic, November 2012
409. Alison L. LaCroix, Eavesdropping on the Vox Populi, November 2012
410. Alison L. LaCroix, On Being “Bound Thereby,” November 2012
411. Alison L. LaCroix, What If Madison had Won? Imagining a Constitution World of Legislative Supremacy, November 2012
412. Jonathan S. Masur and Eric A. Posner, Unemployment and Regulatory Policy, December 2012
413. Alison LaCroix, Historical Gloss: A Primer, January 2013
414. Jennifer Nou, Agency Self-Insulation under Presidential Review, January 2013
415. Aziz Z. Huq, Removal as a Political Question, February 2013
416. Adam B. Cox and Thomas J. Miles, Policing Immigration, February 2013
417. Anup Malani and Jonathan S. Masur, Raising the Stakes in Patent Cases, February 2013
418. Ariel Porat and Lior Strahilevits, Personalizing Default Rules and Disclosure with Big Data, February 2013
419. Douglas G. Baird and Anthony J. Casey, Bankruptcy Step Zero, February 2013
420. Alison L. LaCroix, The Interbellum Constitution and the Spending Power, March 2013
421. Lior Jacob Strahilevitz, Toward a Positive Theory of Privacy Law, March 2013
422. Eric A. Posner and Adrian Vermeule, Inside or Outside the System? March 2013
423. Nicholas G. Stephanopoulos, The Consequences of Consequentialist Criteria, March 2013
424. Aziz Z. Huq, The Social Production of National Security, March 2013
425. Aziz Z. Huq, Federalism, Liberty, and Risk in *NIFB v. Sebelius*, April 2013
426. Lee Anne Fennell, Property in Housing, April 2013
427. Lee Anne Fennell, Crowdsourcing Land Use, April 2013
428. William H. J. Hubbard, An Empirical Study of the Effect of *Shady Grove v. Allstate* on Forum Shopping in the New York Courts, May 2013
429. Daniel Abebe and Aziz Z. Huq, Foreign Affairs Federalism: A Revisionist Approach, May 2013
430. Albert W. Alschuler, *Lafler* and *Frye*: Two Small Band-Aids for a Festering Wound, June 2013
431. Tom Ginsburg, Jonathan S. Masur, and Richard H. McAdams, Libertarian Paternalism, Path Dependence, and Temporary Law, June 2013
432. Aziz Z. Huq, Tiers of Scrutiny in Enumerated Powers Jurisprudence, June 2013

433. Bernard Harcourt, Beccaria's *On Crimes and Punishments*: A Mirror of the History of the Foundations of Modern Criminal Law, July 2013
434. Zachary Elkins, Tom Ginsburg, and Beth Simmons, Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice, July 2013
435. Christopher Buccafusco and Jonathan S. Masur, Innovation and Incarceration: An Economic Analysis of Criminal Intellectual Property Law, July 2013
436. Rosalind Dixon and Tom Ginsburg, The South African Constitutional Court and Socio-Economic Rights as 'Insurance Swaps', August 2013
437. Bernard E. Harcourt, The Collapse of the Harm Principle Redux: On Same-Sex Marriage, the Supreme Court's Opinion in *United States v. Windsor*, John Stuart Mill's essay *On Liberty* (1859), and H.L.A. Hart's Modern Harm Principle, August 2013
438. Brian Leiter, Nietzsche against the Philosophical Canon, April 2013
439. Sital Kalantry, Women in Prison in Argentina: Causes, Conditions, and Consequences, May 2013
440. Becker and Foucault on Crime and Punishment, A Conversation with Gary Becker, François Ewald, and Bernard Harcourt: The Second Session, September 2013
441. Daniel Abebe, One Voice or Many? The Political Question Doctrine and Acoustic Dissonance in Foreign Affairs, September 2013
442. Brian Leiter, Why Legal Positivism (Again)? September 2013
443. Nicholas Stephanopoulos, Elections and Alignment, September 2013
444. Elizabeth Chorvat, Taxation and Liquidity: Evidence from Retirement Savings, September 2013
445. Elizabeth Chorvat, Looking Through' Corporate Expatriations for Buried Intangibles, September 2013
446. William H. J. Hubbard, A Theory of Pleading, Litigation, and Settlement, November 2013
447. Tom Ginsburg, Nick Foti, and Daniel Rockmore, "We the Peoples": The Global Origins of Constitutional Preambles, March 2014
448. Lee Anne Fennell and Eduardo M. Peñalver, Exactions Creep, December 2013
449. Lee Anne Fennell, Forcings, December 2013
450. Jose Antonio Cheibub, Zachary Elkins, and Tom Ginsburg, Beyond Presidentialism and Parliamentarism, December 2013
451. Nicholas Stephanopoulos, The South after Shelby County, October 2013
452. Lisa Bernstein, Trade Usage in the Courts: The Flawed Conceptual and Evidentiary Basis of Article 2's Incorporation Strategy, November 2013
453. Tom Ginsburg, Political Constraints on International Courts, December 2013
454. Roger Allan Ford, Patent Invalidity versus Noninfringement, December 2013
455. M. Todd Henderson and William H.J. Hubbard, Do Judges Follow the Law? An Empirical Test of Congressional Control over Judicial Behavior, January 2014
456. Aziz Z. Huq, Does the Logic of Collective Action Explain Federalism Doctrine? January 2014
457. Alison L. LaCroix, The Shadow Powers of Article I, April 2014
458. Eric A. Posner and Alan O. Sykes, Voting Rules in International Organizations, January 2014
459. John Rappaport, Second-Order Regulation of Law Enforcement, February 2014
460. Nuno Garoupa and Tom Ginsburg, Judicial Roles in Nonjudicial Functions, February 2014
461. Aziz Huq, Standing for the Structural Constitution, February 2014
462. Jennifer Nou, Sub-regulating Elections, February 2014
463. Albert W. Alschuler, Terrible Tools for Prosecutors: Notes on Senator Leahy's Proposal to "Fix" *Skilling v. United States*, February 2014

464. Aziz Z. Huq, *Libertarian Separation of Powers*, February 2014
465. Brian Leiter, *Preface to the Paperback Edition of Why Tolerate Religion?* February 2014
466. Jonathan S. Masur and Lisa Larrimore Ouellette, *Deference Mistakes*, March 2014
467. Eric A. Posner, *Martti Koskenniemi on Human Rights: An Empirical Perspective*, March 2014