NOTES

RED FLAGS IN FEDERAL QUARANTINE: THE QUESTIONABLE CONSTITUTIONALITY OF FEDERAL QUARANTINE AFTER *NFIB V. SEBELIUS*

*Arjun K. Jaikumar**

The Public Health Service Act (PHSA), codified at 42 U.S.C. §§ 201–300, confers federal authority to institute medical quarantine and isolation measures in response to outbreaks of specific infectious diseases. Congress's authority to pass the PHSA is derived from the Commerce Clause of the U.S. Constitution. Until recently, the constitutionality of the PHSA's quarantine provisions had not been extensively analyzed or seriously questioned in the academic literature. However, this Note argues that recent Commerce Clause jurisprudence from the Supreme Court, most notably the Court's 2012 decision in National Federation of Independent Business v. Sebelius*, calls the constitutional validity of the PHSA's quarantine provisions into question. Specifically, this Note argues,* NFIB *may preclude Congress's authority to quarantine individuals not engaged in economic activity or interstate travel.*

This Note analyzes the history of quarantine and isolation regulations in the United States and the Court's fractured decision in NFIB*, concluding that a reading of* NFIB *that removes all regulation of inactivity from Congress's jurisdiction under the Commerce Clause would indeed endanger the PHSA's quarantine provisions. However, this Note argues, federal quarantine may survive* NFIB *based on a narrower reading limiting* NFIB*'s holding to purchase mandates and the compulsion of economic activity; based on the "aggregation" loophole announced in* United States v. Morrison*; or based on the second prong of Commerce Clause analysis announced in* United States v. Lopez*, which confers exceptionally broad authority on Congress to protect the instrumentalities of interstate commerce.*

INTRODUCTION

On May 30, 2007, *The New York Times* first reported that an individual carrying a rare and potentially deadly strain of drug-resistant tuberculosis had left his home in Atlanta, flown internationally for two weeks, and reentered the United States, all against the advice of state, local, and fed-

* J.D. Candidate 2014, Columbia Law School.

eral public health authorities.[1] Upon his return to the United States, Andrew Speaker became the first individual placed under federal quarantine since 1963.[2] His case reveals both the remarkable success of American disease control during the second half of the twentieth century[3] as well as continued American vulnerability to new strains of infectious disease. Since the September 2001 terrorist attack and subsequent anthrax scares, several proposals have been made to enhance disease control and quarantine authority as the threat of bioterrorism becomes increasingly more concrete.[4] Speaker's case, when coupled with the recent outbreaks of SARS and avian influenza,[5] serves as a reminder that despite effective disease control and good fortune in the Western world in recent years, the possibility of a crippling infectious disease pandemic—whether bioterrorist or natural in origin—remains very real.

Historically, quarantine and isolation[6] have been the most immediate and universal measures employed to combat new infectious diseases.[7]

---

1. E.g., Lawrence K. Altman, TB Patient Is Isolated After Taking Two Flights, N.Y. Times (May 30, 2007), http://www.nytimes.com/2007/05/30/us/30tb.html (on file with the *Columbia Law Review*); see also John Schwartz, Tuberculosis Case Leads to International Finger-Pointing, N.Y. Times (June 2, 2007), http://www.nytimes.com/2007/06/02/world/americas/02iht-health.1.5972185.html (on file with the *Columbia Law Review*).

2. E.g., David P. Fidler et al., Through the Quarantine Looking Glass: Drug-Resistant Tuberculosis and Public Health Governance, Law, and Ethics, 35 J.L. Med. & Ethics 616, 618 (2007).

3. This period marked, among other medical successes, the eradication of smallpox and polio in the United States. See, e.g., Emergency Preparedness and Response: What CDC Is Doing to Protect the Public from Smallpox, Ctr. for Disease Control & Prevention, http://emergency.cdc.gov/agent/smallpox/prep/cdc-prep.asp (on file with the *Columbia Law Review*) (last updated Dec. 29, 2004) (describing successful global eradication of smallpox by 1980); A Polio-Free US Thanks to Vaccine Efforts, Ctr. For Disease Control & Prevention, http://www.cdc.gov/Features/PolioFacts/ (on file with the *Columbia Law Review*) (last updated Nov. 12, 2013) (describing elimination of polio in United States).

4. See, e.g., Philip Bobbitt, Terror and Consent 417 (2008) [hereinafter Bobbitt, Terror and Consent] (calling for federal isolation and quarantine statute based on Model Emergency Health Powers Act (MEHPA), specifically to deal with threat of bioterrorism); Lawrence O. Gostin et al., The Model State Emergency Health Powers Act: Planning for and Response to Bioterrorism and Naturally Occurring Infectious Diseases, 288 J. Am. Med. 622, 623–26 (2002) (arguing for state versions of MEHPA and associated quarantine powers).

5. See, e.g., David P. Fidler, SARS: Political Pathology of the First Post-Westphalian Pathogen, 31 J.L. Med. & Ethics 485, 486–90 (2003) (describing danger presented by SARS as "landmark event in global public health" and comparing threat to that posed by 1918–1919 avian influenza); David P. Fidler, Risky Research and Human Health: The Influenza H5N1 Research Controversy and International Law, Am. Soc'y Int'l L. Insights (Jan. 19, 2012), http://www.asil.org/insights/volume/16/issue/2/risky-research-and-human-health-influenza-h5n1-research-controversy-and (on file with the *Columbia Law Review*) (describing virulence of 2003–2004 avian influenza as resulting in "mortality rate of approximately 60%").

6. The Centers for Disease Control and Prevention (CDC) define isolation and quarantine slightly differently, describing isolation as "separat[ing] ill persons who have a communicable disease from those who are healthy" and quarantine as "separat[ing] and

Since 1944, the federal government has enjoyed the authority to detain any individual carrying one of a short list of diseases,[8] provided the individual is a "probable source of infection" to anyone traveling between states or internationally.[9] Despite occasional proposals for mass quarantine—most notably, and controversially, during the AIDS crisis of the 1980s[10]—invocation of that authority has been extremely rare.[11] Nevertheless, preserving limited quarantine authority remains a primary line of defense against new disease threats, particularly while medical researchers are still developing a course of action for effective, widespread treatment.[12] In the future, should another serious case of influenza or drug-resistant tuberculosis threaten the U.S. population, quarantine may be a critical interim tactic to prevent future Andrew Speakers from boarding aircraft and spreading disease to new cities, states, countries, and continents.[13]

---

restrict[ing] the movement of well persons who may have been exposed to a communicable disease to see if they become ill." CDC, Legal Authorities for Isolation and Quarantine 1 [hereinafter CDC, Legal Authorities], available at http://www.cdc.gov/quarantine/pdfs/legal-authorities-isolation-quarantine.pdf (on file with the *Columbia Law Review*) (last visited Jan. 29, 2014). Since this Note deals with the constitutionality of the Public Health Service Act's (PHSA) detention provisions, which cover any individual infected with a particular communicable disease in a "qualifying stage," the distinction is not critical for the purposes of this Note as the PHSA's detention provisions cover both. See, e.g., infra notes 92–95 and accompanying text (discussing PHSA's provisions for detention and examination, and inclusion of individuals in both communicable and precommunicable stages of infection). For the sake of clarity, the term "quarantine" will be used interchangeably with quarantine and isolation throughout this Note.

7. See, e.g., infra Part I.B (discussing historical use of quarantines in Europe and America dating back to fourteenth-century Croatia).

8. These enumerated diseases are specified by Executive Orders. Exec. Order No. 13,375, 70 Fed. Reg. 17,299, 17,299 (Apr. 1, 2005) (adding "[i]nfluenza caused by novel or reemergent influenza viruses that are causing, or have the potential to cause, a pandemic" to list of enumerated diseases); Exec. Order No. 13,295, 68 Fed. Reg. 17,255, 17,255 (Apr. 4, 2003) (listing communicable diseases quarantinable by Department of Health and Human Services (HHS) under authority of PHSA).

9. Public Health Service Act, Pub. L. No. 78-410, 58 Stat. 682 (1944) (codified as amended at 42 U.S.C. §§ 201–300 (2006)).

10. See, e.g., Kathleen M. Sullivan & Martha A. Field, AIDS and the Coercive Power of the State, 23 Harv. C.R.-C.L. L. Rev. 139, 144 (1988) ("Current proposals for AIDS quarantines . . . have made some headway . . . . Although one notorious pro-quarantine initiative went down to two-to-one defeat at the polls in California, several states have quietly enacted amendments to their public health laws that authorize some form of isolation for at least some AIDS carriers." (footnote omitted)).

11. See, e.g., Richard A. Epstein, In Defense of the "Old" Public Health, 69 Brook. L. Rev. 1421, 1457 (2004) [hereinafter Epstein, Defense] ("Quarantines proper have not been used in recent years because of our general success in controlling contagious (e.g., airborne) diseases.").

12. See, e.g., id. at 1446 ("Quarantine is especially important when the fact of infection and contagion is known but little can be done to fight it piecemeal.").

13. See, e.g., Hilary A. Fallow, Comment, Reforming Federal Quarantine Law in the Wake of Andrew Speaker: The "Tuberculosis Traveler," 25 J. Contemp. Health L. & Pol'y

Until recently, federal quarantine authority was generally accepted as falling within Congress's authority to regulate interstate commerce. The Supreme Court has stated in dicta several times that the substantial effects of disease upon interstate and international commerce place the authority to quarantine squarely within Congress's power.[14] However, the Court's decision in *United States v. Lopez*[15] raised the question of whether the Public Health Service Act's (PHSA)[16] quarantine provisions are overly broad as they allow the executive to detain anyone considered a "probable source of infection" to interstate travelers, which functionally includes almost everyone.[17] Most recently, the Court's decision in *National Federation of Independent Business v. Sebelius* (*NFIB*) implies that Congress cannot regulate "inactivity" under the auspices of the Commerce Clause,[18] raising the question of whether the PHSA's quarantine provisions, as written, may in fact be unconstitutional despite more than a century of Supreme Court acceptance of federal quarantine authority under the Commerce Clause.

This Note argues that a strict and literal reading of the Court's holding in *NFIB*, as applied to current interpretations of the PHSA, may render the federal quarantine power unconstitutional. Given the valued role that quarantine and isolation play in disease control and public health, it behooves federal authorities to develop alternative interpretations or constitutional justifications to maintain a degree of federal quarantine authority. Part I examines the history of Commerce Clause interpretation and the history of quarantine law, and identifies both academic and judicial support for a continued, broad quarantine power. Part II examines the Court's recent decision in *NFIB* and its application to quarantine law under contemporary Commerce Clause doctrine. Part III explores alternative remedies for this unforeseen constitutional problem.

83, 86 (2008) (arguing for strengthened federal quarantine authority since Speaker's quarantine).

14. See The Minn. Rate Cases, 230 U.S. 352, 407 (1913) ("[Q]uarantine laws producing such effect on legitimate interstate commerce are not in conflict with the Constitution."); Compagnie Francaise de Navigation a Vapeur v. La. State Bd. of Health, 186 U.S. 380, 391 (1902) (holding state power to enact quarantines "exists until Congress has acted"); Morgan's S.S. Co. v. La. Bd. of Health, 118 U.S. 455, 464 (1886) ("[W]henever [C]ongress shall undertake to provide . . . a general system of quarantine . . . all state laws on the subject will be abrogated, at least so far as the two are inconsistent; but until this is done, the laws of the state on the subject are valid.").

15. 514 U.S. 549 (1995).

16. Public Health Service Act, Pub. L. No. 78-410, 58 Stat. 682 (1944) (codified as amended at 42 U.S.C. §§ 201–300 (2006)) (permitting detention of individuals in "qualifying stage" of limited number of diseases).

17. John Thomas Clarkson, Note, Phase Six Pandemic: A Call to Re-Evaluate Federal Quarantine Authority Before the Next Catastrophic Outbreak, 44 Ga. L. Rev. 803, 820–24 (2010) (quoting 42 U.S.C. § 264(d)(1)) (arguing third prong of *Lopez* test, permitting Congress to regulate activities having substantial effect on interstate commerce, justifies large-scale federal quarantine authority).

18. 132 S. Ct. 2566, 2589–91 (2012) (opinion of Roberts, C.J.).

I. THE HISTORY OF QUARANTINE LAW AND THE COMMERCE CLAUSE

The PHSA, passed under the authority granted by the Commerce Clause, provides the statutory basis for federal quarantine.[19] This Part analyzes the legal history of the Commerce Clause, of quarantine law in America, and of the intersection between the two. Part I.A provides a brief history of Commerce Clause interpretation prior to *NFIB*. Part I.B provides a history of quarantine law in America and an account of the gradual and moderate federalization of quarantine authority. Part I.C describes the relevant provisions of the Public Health Service Act of 1944, the primary source of federal quarantine power, and provides an account of quarantine law today and of the role that quarantine plays in contemporary public health institutions.

A. *History of the Commerce Clause*

Article I, section 8 of the Constitution grants Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes."[20] Since 1824, Chief Justice John Marshall's seminal opinion in *Gibbons v. Ogden* has served as the basis for Commerce Clause doctrine.[21] However, until the 1880s, Congress used its Commerce Clause power sparingly.[22] The Court conclusively embraced

---

19. See, e.g., CDC, Legal Authorities, supra note 6, at 1 ("The federal government derives its authority for isolation and quarantine from the Commerce Clause of the U.S. Constitution."). The CDC and HHS derive their delegated authority via section 361 of the PHSA. Id.

20. U.S. Const. art. I, § 8, cl. 3. The general scope of federal power under the Commerce Clause has been developed doctrinally by the Supreme Court and explicated by academics at profound length, and needs little additional explanation here. Since this Note deals with federal quarantine power, however—a power historically dependent on the power to regulate interstate commerce, and one that has expanded on the same timeline as the commerce power—it is instructive to review the evolution of Commerce Clause doctrine in tandem with quarantine law.

21. 22 U.S. 1, 187–88 (1821). Chief Justice Marshall wrote first that the Commerce Clause ought not to be construed strictly. Id. He defined "commerce" not merely as trade or traffic, but as "the commercial intercourse between nations, and parts of nations, in all its branches," including, in that case, navigation, and the regulation of commerce as any rules governing that intercourse. Id. at 189–90. With respect to the definition of "among the several states," Chief Justice Marshall ruled that this language encompassed "that commerce which concerns more States than one" but did not extend to purely intrastate commerce unless that commerce itself had an effect on interstate or foreign commerce. Id. at 194.

22. When the question of the Commerce Clause's reach did arise, the Court maintained that the Clause "authorizes all appropriate legislation for the protection or advancement of either interstate or foreign commerce." The Daniel Ball, 77 U.S. 557, 564 (1871). After a series of federal economic regulations in the last years of the nineteenth century, the Court began to interpret the Commerce Clause far more restrictively, both in terms of defining "commerce" narrowly, and in defining "interstate" commerce narrowly. See, e.g., Carter v. Carter Coal Co., 298 U.S. 238, 309–10 (1936) (striking down wage and collective bargaining provisions of Bituminous Coal Conservation Act on grounds that

an expansive interpretation of Commerce Clause power in 1942 with its decision in *Wickard v. Filburn*.[23] At issue was a provision of the Agricultural Adjustment Act that imposed a penalty for farmers who grew wheat in excess of established quotas, even if the excess wheat was not sold on the commercial market.[24] The Court established that any activity having a "substantial economic effect" on interstate commerce—even if it was not commercial activity—was subject to regulation under the Commerce Clause.[25]

In 1995, the Court pared back Congress's Commerce Clause power in *United States v. Lopez*.[26] *Lopez* entailed a challenge to the Gun-Free School Zones Act, which made possession of a firearm within 1,000 feet of a school a federal crime. The Court identified three broad categories that could be regulated under the Commerce Clause: (1) "the use of the

---

wages and labor conditions have "indirect" effect on interstate commerce); Hammer v. Dagenhart, 247 U.S. 251, 277 (1918) (holding commerce power does not afford Congress authority to regulate child labor for products not crossing state lines); United States v. E.C. Knight Co., 156 U.S. 1, 45 (1895) (stating Congress's commerce power does not destroy state police power). The Court ultimately returned to an expansive view of congressional Commerce Clause power during the New Deal era. See, e.g., Wickard v. Filburn, 317 U.S. 111, 124 (1942) ("The power of Congress over interstate commerce is plenary and complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution."); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 36 (1937) ("The congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions which can be deemed to be an essential part of a 'flow' of interstate or foreign commerce."). Supporters of the regulatory state generally cite the permissive post-New Deal take on the Commerce Clause as keeping with Chief Justice Marshall's relatively broad assessment of federal power in *Gibbons*. See, e.g., Laurence Tribe, American Constitutional Law § 5-4, at 808 (3d ed. 2000) (arguing under Chief Justice Marshall's conception, commerce power "would be plenary: absolute within its sphere, subject only to the Constitution's affirmative prohibitions on the exercise of federal authority"). For an alternative interpretation of *Gibbons* and the post-1937 developments in Commerce Clause interpretation, see Richard A. Epstein, The Proper Scope of the Commerce Power, 73 Va. L. Rev. 1387, 1400 (1987), which states, "The New Deal was not a reformation, but a sharp departure from previous case law, and one that moved federal power far beyond anything Chief Justice Marshall had in mind." See also John Paul Stevens, "Charlie's Rule," 78 Mich. B.J. 1402, 1404–05 (1999) (arguing New Deal interpretation of Commerce Clause and associated regulatory state reflected inevitability of increasingly nationalized economy).

23. 317 U.S. 111.

24. The plaintiff protested that the excess wheat he grew was used for home consumption and to feed his livestock, and that the statute regulated the "production and consumption" of wheat, which had at best an "indirect" effect on interstate commerce. Id. at 119.

25. Id. at 125 ("[E]ven if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce . . . ."). Home consumption of wheat, in the aggregate, had a substantial effect on interstate commerce even if it did not in any isolated case. Id. at 127–28 (noting home consumption of wheat in aggregate constituted "most variable factor in the disappearance of the wheat crop").

26. 514 U.S. 549 (1995). *Lopez* marked the first time since the 1930s that the Court struck down a federal statute on Commerce Clause grounds.

channels of interstate commerce"; (2) activity relating to "the instrumentalities of interstate commerce, or persons and things in interstate commerce"; and (3) "those activities that substantially affect interstate commerce."[27] The Court cited *Wickard* as "perhaps the most far reaching example of Commerce Clause authority over intrastate activity" but concluded that *Wickard* dealt with genuinely "economic" activity in a way that the Gun-Free School Zones Act did not.[28] The statute in this case did not regulate any expressly commercial activity, nor did it limit the statute to guns that had traveled in interstate commerce.[29] On this basis, the Court invalidated the Gun-Free School Zones Act.[30]

Five years later, the Court revisited the scope of the Commerce Clause in *United States v. Morrison*.[31] In *Morrison*, as in *Lopez*, the provision in question was not commercial in nature; it provided a civil damages remedy for victims of domestic violence and sexual assault.[32] The Court found that because the regulated activity (violence against women) was intrastate in nature, the fact that it had a causal effect on interstate commerce (affecting the ability of domestic violence victims to travel between states and engage in interstate commerce) was not, by itself, sufficient to justify federal regulation as the regulation infringed upon the police power traditionally reserved to states.[33] The Court held that the Constitution "requires a distinction between what is truly national and truly local."[34] Further, the Court found that the *noneconomic* nature of the activity in question meant that it could not be regulated under the Commerce Clause if it were merely intrastate in nature, although the

---

27. Id. at 558–59.

28. Id. at 560.

29. Id. at 567–68.

30. The Act itself was passed again, this time with the jurisdictional hook Chief Justice Rehnquist required in *Lopez*—the new law governs only guns that have traveled in interstate commerce. 18 U.S.C. § 922 (2012) ("It shall be unlawful for any individual knowingly to possess a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the individual knows, or has reasonable cause to believe, is a school zone."). Though the law regulates the same kind of noneconomic "activity"—possession of a particular item in the wrong place at the wrong time—as the invalidated statute did, six circuit courts of appeals have held that the new Gun-Free School Zones Act is indeed constitutional. See, e.g., United States v. Dorsey, 418 F.3d 1038, 1045–46 (9th Cir. 2005) (upholding constitutionality of amended Gun-Free School Zones Act); United States v. Danks, 221 F.3d 1037, 1038–39 (8th Cir. 1999) (same); see also United States v. Nieves-Castano, 480 F.3d 597, 602–04 (1st Cir. 2007) (upholding Gun-Free School Zones Act against due process challenge).

31. 529 U.S. 598 (2000).

32. Id. at 605–07.

33. Id. at 617–19 ("Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.").

34. Id. at 617–18.

Court left open the possibility that aggregated noneconomic activity could be regulated in certain circumstances.[35]

Four years later, the Court seemingly returned to a more expansive Commerce Clause interpretation in *Gonzales v. Raich*, holding that the Commerce Clause enabled Congress to regulate the growth and possession of small amounts of marijuana for medical purposes.[36] Though the marijuana was homegrown and not sold even on an intrastate market, the Court concluded that the growth of marijuana for personal medical use would substantially affect interstate commerce. The Court relied on *Wickard* to establish that since the commodity in question was sold in interstate commerce generally, the growth of marijuana in aggregate terms constituted economic activity even when the particular marijuana in question was not actually bought or sold.[37] With *Raich*, the Court seemed to be substantially reaffirming the broad Commerce Clause approach of *Wickard*, an approach that would continue to govern Commerce Clause law until the Court's recent decision in *NFIB*.[38]

B. *History of Quarantine Law*

Though seldom employed today due to advances of modern medicine, medical quarantines have a long historical pedigree in European and American law. Historically, medical quarantine and isolation were popular and effective means of counteracting the outbreak of contagious diseases.[39] First employed in fourteenth-century Italy and Croatia, quarantine quickly became the default mechanism for containing untreatable diseases and was the primary mechanism for controlling European outbreaks of tuberculosis and the bubonic plague (commonly known as the "Black Death").[40]

---

35. See id. at 613 ("While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.").

36. 545 U.S. 1, 15–17 (2005).

37. Id. at 17–20.

38. See infra Part II for discussion of *NFIB* and its possible effects upon quarantine authority.

39. See, e.g., Michelle A. Daubert, Comment, Pandemic Fears and Contemporary Quarantine: Protecting Liberty Through a Continuum of Due Process Rights, 54 Buff. L. Rev. 1299, 1301 (2007) ("For centuries, isolation and quarantine have proven effective in controlling the spread of infectious diseases by increasing social distance between healthy individuals and those who are infected or have been exposed."). But see Wendy K. Mariner, George J. Annas & Leonard H. Glantz, *Jacobson v. Massachusetts*: It's Not Your Great-Great-Grandfather's Public Health Law, 95 Am. J. Pub. Health 581, 587 (2005) ("[H]istorically, large-scale quarantines have had little positive effect on epidemics . . . .").

40. See Maria Cristina Valsecchi, Mass Plague Graves Found on Venice "Quarantine" Island, Nat'l Geographic News (Aug. 29, 2007), http://news.nationalgeographic.com/news/2007/08/070829-venice-plague.html (on file with the *Columbia Law Review*) (noting discovery of sixteenth-century quarantine colony reserved for victims of bubonic plague).

Due to the relative effectiveness of quarantine in containing potentially fatal infections, the American colonies instituted maritime and internal quarantine regulations as early as the mid-seventeenth century.[41] They were adopted primarily as reactive, ad hoc regulations.[42] The authority to regulate public health in general, and quarantine specifically, remained largely in the hands of local authorities after the American Revolution.[43] During the Revolution, then-General George Washington, heading a Continental Army battered by smallpox, instituted military hospital quarantines and inoculations to control the disease's devastation within the armed forces,[44] but coordinated national action in the Continental Army did not influence the behavior of the civilian population, where disease control remained an issue of local rather than national concern.[45] This was out of practicality as much as an overriding concern for state autonomy; the constraints of eighteenth-

---

Though the first documented uses of quarantine occurred in fourteenth-century Dubrovnik, Daubert notes that references to quarantine-type isolation of the sick date at least as far back as the Book of Leviticus. Daubert, supra note 39, at 1302 n.7 ("'All the days wherein the plague shall be in him he shall be defiled; he is unclean: he shall dwell alone; without the camp shall his habitation be.'" (quoting Leviticus 13:46)).

41. See, e.g., Laura K. Donohue, Biodefense and Constitutional Constraints, Nat'l Security & Armed Conflict L. Rev. (forthcoming 2014) (manuscript at 8–18), available at http://ssrn.com/abstract=1882506 (on file with the *Columbia Law Review*) (describing medical quarantine regulations in pre-Revolution Massachusetts, Pennsylvania, Delaware, Virginia, South Carolina, New York, Maryland, and Rhode Island).

42. See id. Such regulations were frequently against the wishes of British authority. The British Privy Council objected to the Massachusetts Bay Colony's liberal use of maritime quarantine after a 1699 outbreak of yellow fever in the American colonies, due to its adverse effects on maritime trade with England. See, e.g., id. (manuscript at 10–11) ("Being able to retain a ship, indefinitely, simply because of the presence of any contagious disease, coupled with a significant fine for failing to observe such measures, fell beyond the Pale.").

43. This was not because the potential national scope of infectious disease was lost on colonial authorities. On the contrary, deadly attacks of smallpox during the Revolutionary War had accounted for over 130,000 deaths. Local colonial isolation and quarantine were in fact used preferentially to the then-fledgling concept of inoculation. When Massachusetts's Cotton Mather attempted to introduce inoculation to counter an outbreak of smallpox in 1721, he was met with profound resistance, so profound that an irate Bostonian attempted to bomb his home. See Elizabeth A. Fenn, Pox Americana: The Great Smallpox Epidemic of 1775–82, at 33–36, 273 (2001) (describing Mather's smallpox inoculation program and Bostonian's attempted bombing).

44. It was widely believed at the time that the smallpox outbreak during the Revolutionary War was specifically engineered by British General Lord Cornwallis as a military tactic. See, e.g., id. at 88–91 (noting widespread suspicion of British military involvement in smallpox outbreak). The nexus of contagious disease and national security continues to underlie public health lawmaking and legal interpretation today. See, e.g., Bobbitt, Terror and Consent, supra note 4, at 402–04 (arguing coordinated national action and quarantine authority is necessary to counter contemporary threat of bioterrorist attacks).

45. See, e.g., Donohue, supra note 41, at 19–24 (discussing state-based quarantine regulations subsequent to Revolutionary War).

century travel and the absence of a rapid communications infrastructure made localized responses preferable to nationalized authority.[46]

Following the ratification of the Constitution, however, the new national government quickly began to consider the possibility of federal public health legislation. Members of Congress, as well as Presidents John Adams and Thomas Jefferson, sought to use the federal Commerce Clause power to justify legislation involving public health regulations, although these efforts had limited success.[47] Congress used its authority under the Commerce Clause to pass the first federal quarantine-related law in 1796, after a deadly outbreak of yellow fever.[48] Notably, this law did *not* permit federal authorities to institute quarantines of their own accord, but merely allowed them to assist state officials in enforcing declared state and local quarantines, and even then, only upon request. Congress expressly rejected an alternative bill that would have provided the executive with authority to declare and enforce quarantines of foreign commercial goods and shipping on the grounds that it would interfere with the state police power; the bill was defeated in the House by a two-to-one margin.[49] Supporters raised the Commerce Clause as a possible justification for the law's constitutionality, but were overwhelmed by the bill's opponents, who protested that the Commerce Clause was being invoked as a mere pretext to regulate public health, an area that was clearly in the domain of the states.[50]

---

46. See 5 Annals of Cong. 1350–51 (1796) (statement of Rep. John Milledge) (noting Georgia "was one thousand miles from the seat of Government . . . and, if they were to wait until information could be given to the President of their wish to have quarantine performed . . . the greatest ravages might, in the mean time, take place").

47. Adams actively sought to pass a quarantine bill through Congress. See, e.g., infra notes 51–54 and accompanying text; see also John Adams, President, Second Annual Address (Dec. 8, 1798), *in* The Addresses and Messages of the Presidents of the United States, from Washington to Harrison 81, 81 (Edward Walker ed., 1841) [hereinafter Addresses & Messages]. Jefferson, having noted the Federalists' failure to pass a strong public health law, took a more measured response, merely expressing his sentiment that "[a]lthough the health laws of the states should be found to need no present revisal by Congress, yet commerce claims that their attention be ever awake to them." Thomas Jefferson, President, Fifth Annual Message (Dec. 3, 1805), *in* Addresses & Messages, supra, at 114, 114–15.

48. Act of May 27, 1796, ch. 31, 1 Stat. 474 (repealed 1799) (establishing executive power to assist state quarantine initiatives with state approval); cf. Edwin Maxey, Federal Quarantine Laws, 43 Am. L. Rev. 382, 383–84 (1909) ("An epidemic of yellow fever in [1796] proved that the quarantine regulations provided by the States were grossly inadequate.").

49. Maxey, supra note 48, at 383–84.

50. 5 Annals of Cong. 1353 (1796) (statement of Rep. Albert Gallatin) ("[T]he regulation of quarantine had nothing to do with commerce. It was a regulation of internal police. It was to preserve the health of a certain place, by preventing the introduction of pestilential diseases, by preventing persons coming from countries where they were prevalent."); id. ("Whether such persons came . . . for commerce or for pleasure, was of no importance. They were all matters of police."). The argument that state regulation ostensibly justifiable under the Commerce Clause might be invalid as mere pretext for

Thanks to renewed efforts by President John Adams to pass a stronger quarantine bill,[51] this weak quarantine law was repealed three years later and supplanted by a statute that slightly expanded federal authority.[52] This 1799 statute again did not grant the federal government power to institute quarantine, but gave federal officials the authority to assist state officials in enforcing local and state quarantine regulations at the direction of the Secretary of the Treasury, rather than at the request of the states.[53] President Adams signed the statute into law, having stated previously that communicable disease, as it was communicated "through the channels of commerce," necessitated some measure of federal action under the Commerce Clause.[54]

Until Reconstruction, that would be the end of federal attempts to regulate quarantine and public health under the authority of the Commerce Clause.[55] Despite the failure of state and local authorities to control outbreaks of smallpox and yellow fever and a growing recognition of the need for federal resources to ensure public health, quarantine laws were perceived as falling within the states' general police power barring a clear commercial connection.[56] As an example of this widely accepted pre-Reconstruction perception, Chief Justice John Marshall's opinion for the Court in *Gibbons v. Ogden* referred specifically to quarantine as falling within the province of the states:

> [T]hat immense mass of legislation, which embraces every thing within the territory of a State, not surrendered to the general government: all which can be most advantageously exercised by the States themselves. *Inspection laws, quarantine laws, health laws of every description*, as well as laws for regulating the internal

---

some forbidden form of regulation would resurface over a century later with respect to child labor laws, during an era of restrictive Commerce Clause interpretation. See Hammer v. Dagenhart, 247 U.S. 251, 276 (1918) (finding regulation of products manufactured via child labor to be pretext for regulation of child labor itself).

51. In late 1798, Adams stated:

> I think it my duty to invite the legislature of the Union to examine the expediency of establishing suitable regulations in aid of the health laws of the respective States; for these being formed on the idea that contagious sickness may be communicated through the channels of commerce, there seems to be a necessity that Congress, who alone can regulate trade, should frame a system which, while it may tend to preserve the general health, may be compatible with the interests of commerce and the safety of the revenue.

Adams, supra note 47, at 81.

52. Maxey, supra note 48, at 383 ("This sham provision . . . was repealed [in 1799] and a far more effective measure put in its stead.").

53. Act of Feb. 25, 1799, ch. 12, 1 Stat. 619.

54. Adams, supra note 47, at 81.

55. E.g., Maxey, supra note 48, at 385 ("This act for the purpose of supplementing the quarantine regulations of the States is all the federal regulation we have on the subject down to 1866.").

56. E.g., Donohue, supra note 41, at 31–33 (discussing emerging necessity for federal authority over quarantine).

> commerce of a State . . . are component parts of this mass. No direct general power over these objects is granted to Congress; and, consequently, they remain subject to State legislation.[57]

This language is often interpreted as reserving primary public health authority for the states and was cited as such in amicus briefs for the most recent Commerce Clause case, *NFIB*.[58] However, Chief Justice Marshall's opinion does not end there and the subsequent paragraph indicates his acknowledgement of federal power in traditional state realms:

> If the legislative power of the Union can reach them, it must be for national purposes; it must be where the power is expressly given for a special purpose, or is clearly incidental to some power which is expressly given. It is obvious, that the government of the Union, in the exercise of its express powers, *that, for example, of regulating commerce with foreign nations and among the States*, may use means that may also be employed by a State, in the exercise of its acknowledged powers . . . .[59]

Thus, Chief Justice Marshall's opinion as a whole could be interpreted to mean that quarantine and public health laws could, in theory, be within the power of Congress to regulate, so long as they regulate activity substantially related to interstate commerce or some other power "expressly given" to federal authority. Though quarantine was placed "at the heart" of those powers expressly reserved to states, the effects of disease on shipping, the consumer market, and the labor market established an arguable nexus with interstate commerce that would be increasingly difficult to ignore as the American economy became more and more nationalized.[60]

Despite increasing concern about the capacity of states and localities to deal with infectious disease outbreaks,[61] Congress did not revisit the possibility of a commerce/quarantine nexus until after the Civil War. The Civil War, like the Revolutionary War, highlighted the inadequacies of state public health regulations.[62] After an 1865 outbreak of cholera in New York, Congress attempted once more to pass a statute permitting

---

57. 22 U.S. 1, 203 (1821) (emphasis added).

58. See, e.g., Brief of the Missouri Attorney General as Amicus Curiae in Support of Respondents Regarding the Unconstitutionality of the Minimum Coverage Provision at 8, HHS v. Florida, 132 S. Ct. 604 (2011) (No. 11-398), 2012 WL 454628 (arguing quarantine laws and public health laws fall within state's police power and, thus, federal government enjoys no such power).

59. *Gibbons*, 22 U.S. at 203–04 (emphasis added).

60. E.g., Donohue, supra note 41, at 33–35.

61. Id.

62. See, e.g., id. at 35–36 ("The course of the war underscored the extent to which the states were dependent on other localities to stem the tide of disease."). Over 400,000 soldiers died of disease during the Civil War, double the battlefield total. Jeffrey S. Sartin, Infectious Diseases During the Civil War: The Triumph of the "Third Army," 16 Clinical Infectious Diseases 580, 580 (1993).

national regulation of quarantine via *cordon sanitaire*,[63] but the bill died in the Senate due to concerns about state sovereignty and executive overreach.[64] The nation's first Supervising Surgeon General, John Maynard Woodworth, described federal quarantine laws as a "dead letter."[65]

Over the subsequent decade, yellow fever crises forced Congress to reexamine the necessity of federal action.[66] Congress used its Commerce Clause authority to assume partial control of maritime quarantines in 1878.[67] The Supreme Court first dealt with the new federal statute and its presumed supremacy in *Morgan's Steamship Co. v. Louisiana Board of Health*.[68] The plaintiff, a steamship company, argued that Louisiana's existing quarantine statute was unconstitutional as applied to steamships, as it constituted an interference with federal power to regulate interstate commerce.[69] Citing *Gibbons v. Ogden*, and noting puckishly that "[i]f there is a city in the United States which has need of quarantine laws it is New Orleans," the Court held that the state statute was constitutional insofar as it did not directly contravene any federal law.[70] The Court maintained, however, that state quarantine laws, at least in the maritime context, were in *effect* regulations of commerce and could indeed be

---

63. S. Res. 38, 39th Cong. (1866). *Cordon sanitaire* loosely translates as "quarantine line."

64. Cong. Globe, 39th Cong., 1st Sess. 2446 (1866) (statement of Sen. James Grimes) ("Let us go back to the original condition of things, and allow the States to take care of themselves as they have been in the habit of taking care of themselves."); id. ("In my locality we are familiar with this disease . . . and we do not want to have our liberty restrained, nor do we want our privilege of locomotion restrained, nor do we want to have the Treasury afflicted by any such bill as this."). Subsequently, however, Congress did make its first appropriation for the enforcement of existing quarantine laws, though no policymaking authority was granted to the executive. Maxey, supra note 48, at 385 ("The general policy to be pursued was . . . still left entirely in the hands of the States.").

65. Felice Batlan, Law in the Time of Cholera: Disease, State Power, and Quarantines Past and Future, 80 Temp. L. Rev. 53, 65 (2007).

66. Maxey, supra note 48, at 385 ("[I]t is doubtful if the federal government would have done anything more . . . in aiding State regulation, had not the recurring epidemics of yellow fever in the sixties, seventies and eighties created a popular sentiment which forced Congress to do something more than 'second the motion.'"). In 1870, Congress deputized an army medical officer to report on public health conditions in the states and determine whether popular sentiment would support the nationalization of quarantine laws. He reported back that a national system of quarantine was necessary to effectively combat the spread of disease. Id. at 386 ("After studying conditions carefully at close range, he reached the conclusion that, to deal with the situation efficiently, unity of control was necessary. He therefore recommended that a national system of quarantine be substituted for the varied local systems.").

67. Act of Apr. 29, 1878, ch. 66, 20 Stat. 37 (preventing introduction of contagious or infectious diseases into United States).

68. 118 U.S. 455 (1886).

69. Id. at 457.

70. Id. at 459–60.

preempted by Congress if it so desired.[71] Whereas *Gibbons* relegated quarantine and public health laws to the state police power while reserving the possibility of federal intervention given a sufficient nexus with interstate commerce (albeit in dicta), *Morgan's Steamship* established the presumption that quarantine, at least within the maritime context, *necessarily* implicated interstate commerce.

Meanwhile, Congress slowly expanded federal quarantine authority. In 1879, Congress enacted what was to become a highly influential statute defining three particular diseases—cholera, smallpox, and yellow fever—as subject to federal regulation, and establishing a national board of health for this purpose.[72] The statute limited the board's authority to assisting states in enforcing their own regulations, rather than preempting them with new regulations. Finally, it established the mechanism through which state quarantine power would slowly be transferred to national authorities over the next several decades; it enabled states and localities to essentially sell their quarantine stations to the Treasury Department, allowing them to avoid both the costs and responsibility of quarantine enforcement.[73] In 1890, Congress passed "An Act to Perfect the Quarantine Service of the United States," which granted the Secretary of the Treasury the authority to develop rules and regulations to prevent the spread of disease *beyond* the maritime context.[74] Three years later, Congress passed a statute permitting the Treasury Department to enact additional rules—though only where state laws were nonexistent or inadequate—to prevent the spread of infectious disease.[75]

---

71. Id. at 465 ("But, aside from this, quarantine laws belong to that class of State legislation which, whether passed with intent to regulate commerce or not, must be admitted to have that effect, and which are valid until displaced or contravened by some legislation of Congress."). The Court, however, cited Congress's century-long acquiescence to state regulation of public health as supportive of at least concurrent jurisdiction over the field. Id. at 466.

72. Act of Mar. 3, 1879, ch. 202, 20 Stat. 484 (repealed 1893).

73. Id. Unsurprisingly, the 1879 statute was not without controversy and met with substantial resistance in Congress, particularly from Southern states wary of federal control by the Republican-dominated post-Reconstruction government. Some argued that federal involvement in quarantine and public health regulation was an impermissible extension of the Commerce Clause, an argument with which the Supreme Court was shortly to disagree. See, e.g., Polly J. Price, Federalization of the Mosquito: Structural Innovation in the New Deal Administrative State, 60 Emory L.J. 325, 342–43 (2010) (discussing Southern opposition to 1879 statute and general opposition to national quarantine measure).

74. Act of Mar. 27, 1890, ch. 51, 26 Stat. 31.

75. Act of Feb. 15, 1893, ch. 114, § 9, 27 Stat. 449, 452 (repealing Act of Mar. 3, 1879, ch. 202, 20 Stat. 484). The statute also established fines for vessels that entered American ports without a clean bill of health and limited surveillance of disease abroad, requiring diplomatic officers abroad to report the status of infectious disease in the countries of their posting (whether an epidemic existed or not). Id. §§ 1–2, 4, 27 Stat. at 450–51, Finally, like the 1879 statute, the 1893 statute encouraged states to surrender partial jurisdiction over public health to federal authorities by selling their quarantine stations to the federal government. Id. § 3, 27 Stat. at 450–51.

However, critics of state responses to disease outbreak remained dissatisfied by this modest level of federalization.[76]

In 1902, the Supreme Court reaffirmed its position from *Morgan's Steamship* in *Compagnie Francaise de Navigation a Vapeur v. Louisiana State Board of Health*.[77] As in *Morgan's Steamship*, the Court found state regulation constitutional due to the absence of a superseding federal statute, but left open the possibility—indeed, strongly suggested the possibility—that federal action under the Commerce Clause could preempt such a statute.[78] In neither case did the parties, or the Court, contest that Congress lacked authority to regulate quarantine under the Commerce Clause, despite the Court's rather restrictive interpretation of the Commerce Clause during the pre-New Deal era.[79] This may have been because of the origins of federal quarantine in maritime regulation (a field obviously intertwined with interstate and foreign commerce) or because the public safety implications of quarantine regulations imbued them with a legitimacy the Court did not see in child labor laws.[80]

---

76. Interestingly, the Chamber of Commerce, an organization that would become one of the most passionate opponents of congressional exercise of Commerce Clause power in *NFIB*, was an ardent supporter of the federalization of quarantine a century earlier. See Batlan, supra note 65, at 95 (noting Chamber of Commerce's advocacy for federalized quarantine laws after 1892 New York cholera outbreak).

77. 186 U.S. 380 (1902).

78. Id. at 391 ("[U]ntil Congress has acted under the authority conferred upon it by the Constitution, such state health and quarantine laws producing such effect on legitimate interstate commerce are not in conflict with the Constitution.").

79. In fact, the plaintiffs in both *Morgan's Steamship* and *Compagnie Francaise* protested that they could not be quarantined by states because such quarantines necessarily interfered with the commerce power. *Compagnie Francaise*, 186 U.S. at 382–83 ("It was averred that the action . . . was not authorized by the state law, and if it was, such law was void because repugnant [sic] to the provision of the Constitution . . . [granting] Congress power 'to regulate commerce with foreign nations, and among the several states and with the Indian tribes.'" (quoting U.S. Const. art. I, § 8)); Morgan's S.S. Co. v. La. Bd. of Health, 118 U.S. 455, 456 (1886) ("The amended petition of plaintiffs respectfully represents [t]hat all the statutes . . . for collection of quarantine and fumigation fees are null and void, because they violate . . . Article first, section 8, paragraph 3, vesting in Congress the power to regulate commerce, which power is exclusively so vested." (quoting petition from lower court) (internal quotation marks omitted)).

80. The pre-1937 Court was quite willing to strike down economic regulations as unrelated to interstate commerce. See, e.g., supra Part I.A (discussing *Lochner*-era Court's antipathy to business regulation). However, the Court frequently upheld Commerce Clause regulations when issues of public morals were involved. See, e.g., Caminetti v. United States, 242 U.S. 470, 491–92 (1917) (upholding federal law criminalizing transport of women across state lines for immoral purposes); Champion v. Ames, 188 U.S. 321, 363–64 (1902) (upholding federal regulation prohibiting lotteries). The Court's apparent comfort with public health regulation under the Commerce Clause reflects a general willingness to allow federal regulation under the Commerce Clause in noneconomic arenas.

The Court followed *Compagnie Francaise* with *Jacobson v. Massachusetts*.[81] Jacobson had refused to comply with a city-regulated mandatory smallpox vaccination, protesting that the city ordinance violated the Fourteenth Amendment and "the spirit of the Constitution."[82] The Court, citing *Gibbons*, ruled that the vaccination statute fell within the scope of the police power and was permissible for the city to enact.[83] However, it reaffirmed *Gibbons*, *Morgan's Steamship*, and *Compagnie Francaise* in finding that federal regulation under an enumerated power could trump state public health regulation.[84] Though *Jacobson* affirmed the locus of quarantine authority within a state's general police power, the subsequent *Minnesota Rate Cases*, decided in 1913, continued the trend toward permitting federalization of quarantine.[85] As in *Morgan's Steamship* and *Compagnie Francaise*, the Court raised the specter of federal preemption in the realm of public health. The *Minnesota Rate Cases* went one step further, however, holding that "[q]uarantine regulations are essential measures of protection which the States are free to adopt when they do not come into conflict with Federal action."[86] The Court noted that quarantine laws "undoubtedly operate upon interstate and foreign

---

81. 197 U.S. 11 (1905). *Jacobson* is less celebrated for its affirmation of state police power than for its analysis of civil liberties as subject to overriding public health concerns—concerns that could require the *coercive* powers of the state for enforcement. In weighing Jacobson's individual liberty against the acknowledged public health interests of the state, the Court cited quarantine regulations, along with military conscription, as the archetypal examples of when individual liberty must be forcibly subjugated to reasonable restraint in the interests of public safety and national security. The Court opined, in oft-quoted dictum, that even an individual who did not carry disease "may yet, in some circumstances, be held in quarantine against his will on board of [a] vessel or in a quarantine station, until it be ascertained by inspection, conducted with due diligence, that the danger of the spread of the disease among the community at large has disappeared." Id. at 29. Lower courts, however, acknowledged that serious civil rights concerns could abrogate the state police power with respect to quarantine, particularly when racial prejudice was implicated. See, e.g., Jew Ho v. Williamson, 103 F. 10, 24 (N.D. Cal. 1900) (invalidating San Francisco ordinance requiring vaccination of Chinese residents for bubonic plague on equal protection grounds); Wong Wai v. Williamson, 103 F. 1, 10 (N.D. Cal. 1900) (issuing injunction against San Francisco ordinance as racially discriminatory).

82. *Jacobson*, 197 U.S. at 14.

83. Id. at 25 ("According to settled principles the police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety.").

84. Id. ("A local enactment or regulation, even if based on the acknowledged police powers of a State, must always yield in case of conflict with the exercise by the General Government of any power it possesses under the Constitution, or with any right which that instrument gives or secures."). Unlike in *Morgan's Steamship* and *Compagnie Francaise*, however, the Court did not reach the question of whether the Commerce Clause necessarily touched public health issues and whether public health preemption was possible under its specific authority.

85. 230 U.S. 352 (1913).

86. Id. at 406.

commerce. They could not be effective otherwise."[87] The Court went so far as to state that Congress's authority in quarantine, should it decide to exercise control, would be "paramount."[88]

With the *Minnesota Rate Cases* as a backdrop, federal authorities continued to nationalize some degree of disease control authority. The outbreak of the devastating Spanish influenza in 1918 and 1919, which killed 550,000 Americans, underscored the successes of coordinated and timely public health responses, as well as the devastation caused by delayed action.[89] In 1921, New York became the last state to transfer its quarantine stations to federal authority and supervision.[90] With the Second World War highlighting the national security exigencies of public health regulation, Congress enacted the Public Health Service Act in 1944.[91]

C. *The Public Health Service Act and Contemporary Quarantine Law*

Passed two years after the Supreme Court's famous Commerce Clause decision in *Wickard v. Filburn*[92] (the Court's strongest affirmation of expansive federal power via the Commerce Clause), the Public Health Service Act (PHSA) gives a federal agency authority to institute quarantines of its own accord.[93] The PHSA provides the Surgeon General, with the approval of the Secretary of HHS, with plenary authority to devise such regulations as may be necessary to prevent the spread of nine specific communicable diseases.[94] The segment of the statute devoted to civilian quarantine and isolation is codified at 42 U.S.C. § 264(d)(1):

---

87. Id.

88. Id. at 433 ("Nor, in the absence of Federal action, may we deny effect to the laws of the State enacted within the field which it is entitled to occupy until its authority is limited through the exertion by Congress of its paramount constitutional power.").

89. See, e.g., Coco Masters, Study: Quarantines Work Against Pandemics, Time (Aug. 7, 2007), http://www.time.com/time/health/article/0,8599,1650634,00.html (on file with the *Columbia Law Review*) (describing varied responses in urban areas to Spanish influenza pandemic and comparing casualty rates in New York and St. Louis, which reacted quickly and effectively, with those of Pittsburgh, which reacted slowly).

90. E.g., Michael Les Benedict, Contagion and the Constitution: Quarantine Agitation from 1859 to 1866, 25 J. Hist. Med. & Allied Sci. 177, 193 (1970); see also Donohue, supra note 41, at 45 ("In 1921, the last state transferred its holdings and the authority to regulate them, to the federal government, bringing the total to approximately 100 quarantine stations.").

91. Public Health Service Act, Pub. L. No. 78-410, 58 Stat. 682 (1944) (codified as amended at 42 U.S.C. §§ 201–300 (2006)).

92. 317 U.S. 111 (1942).

93. See, e.g., Price, supra note 73, at 356 (noting PHSA authorized Surgeon General to regulate "interstate transmission of communicable diseases").

94. 42 U.S.C. § 264(a). This list can be revised by executive order. As of Executive Order 13,295, the list of quarantinable diseases includes cholera, diphtheria, infectious tuberculosis, plague, smallpox, yellow fever, viral hemorrhagic fevers, influenza (provided it can cause a pandemic), and severe acute respiratory syndrome (SARS), the latter two being the most recent additions to the list. Exec. Order No. 13,295, 68 Fed. Reg. 17,255, 17,255 (Apr. 4, 2003). The scope of federal regulation of emergency powers is extensively

> Regulations prescribed under this section may provide for the apprehension and examination of any individual reasonably believed to be infected with a communicable disease in a qualifying stage and (A) to be moving or about to move from a State to another State; or (B) to be a probable source of infection to individuals who, while infected with such disease in a qualifying stage, will be moving from a State to another State. Such regulations may provide that if upon examination any such individual is found to be infected, he may be detained for such time and in such manner as may be reasonably necessary.[95]

This subsection provides a statutory "hook" to interstate commerce by "limiting" apprehension to those individuals traveling between states or who are "probable sources of infection" to individuals traveling between states. As some have observed, this language is so broad that it would include virtually any infected American at any time.[96]

Since the passage of the PHSA, federal quarantines have been quite rare due to the general decrease in outbreaks of highly infectious diseases since 1944.[97] In keeping with Supreme Court doctrine pre-*NFIB*, few legal scholars or judges have questioned the constitutionality of the PHSA's quarantine provisions, perhaps in part because of the success in controlling the spread of airborne diseases over the past half-century.[98]

---

discussed in the academic literature and beyond the scope of this Note; further, because emergency quarantine powers were, like the PHSA, passed pursuant to the commerce power, the possible arguments against its constitutionality mirror those against the PHSA's.

95. 42 U.S.C. § 264(d)(1). The term "qualifying stage" is defined under the PHSA as both communicable and precommunicable stages. Id. § 264(d)(2).

96. See, e.g., Adam Klein & Benjamin Wittes, Preventive Detention in American Theory and Practice, 2 Harvard Nat'l Security J. 85, 174–75 (2011) (noting federal quarantine restriction refers in practice to "just about anyone").

97. Indeed, only two federal quarantines have been challenged in federal court, neither of which facially challenged Congress's authority to quarantine and isolate individuals. United States ex rel. Siegel v. Shinnick, 219 F. Supp. 789, 790–91 (E.D.N.Y. 1963), involved a daughter's challenge to her mother's quarantine. The mother, a New York resident, had traveled to Stockholm, which was at the time considered a smallpox-infected area. Upon her return to the United States, she was unable to establish documentation of a smallpox vaccination and was consequently detained for fourteen days by federal authorities. Id. at 790. The plaintiff did not challenge the statutory authority of the PHSA but maintained it had been misapplied to her mother, as the government did not establish that the mother in fact carried smallpox, merely that she had been exposed to it. Id. Concluding that the isolation of the plaintiff had been conducted in good faith, the district court ruled that the detention was permissible and that broad latitude was to be given to federal agents under the PHSA. The court deferred to the expertise of health officials in determining the gravity of public health threats and warned that "the consequences of mistaken indulgence can be irretrievably tragic." Id.; see also Speaker v. U.S. Dep't of Health & Human Servs. Ctrs. for Disease Control & Prevention, 623 F.3d 1371, 1374 (11th Cir. 2010) (involving plaintiff's challenge to federal quarantine based on alleged leak of identity to media).

98. See, e.g., Epstein, Defense, supra note 11, at 1457 (noting sharp decline in use of quarantine in recent years). Due to the occasional emergence of potential public health

During the War on Terror, proponents of preventative detention for suspected terrorists frequently cited quarantine law as providing a doctrinal basis for detention of terrorists. For example, Klein and Wittes cite quarantine regulation as "one of the most powerful rebuttals to the notion that American law does not condone detention without extensive due process protections or even imputation of wrongdoing."[99] Klein and Wittes not only take the constitutionality of quarantine under the Commerce Clause for granted, but also use the statute's legitimacy to establish the constitutionality of other more controversial, and possibly more intrusive, government initiatives.[100] Other scholars have criticized the PHSA for its lack of sufficient due process provisions, despite taking for granted the legitimacy of its Commerce Clause pedigree.[101] Of those, some have opined that the PHSA, while providing critical and necessary quarantine authority to the federal government, is outdated and does not grant sufficient means to federal authorities to combat public health threats.[102] Since the advent of the War on Terror, there has been increasing support in academic circles for new quarantine legislation to *supplement* the PHSA, modeled on the Model Emergency Health Powers Act (MEHPA) promulgated by the CDC.[103]

Since *Lopez*, only a handful of commentators have even questioned whether the current Court's more limited conception of the Commerce Clause affects the constitutionality of the PHSA.[104] Others have concluded that the PHSA indeed survives *Lopez* based on the third prong of

---

crises (such as AIDS, SARS, and avian influenza), as well as the developing threat of bioterrorism, quarantine is still frequently debated in legal academia on national security and civil liberties grounds. See, e.g., Fidler et al., supra note 2, at 621–24 (arguing PHSA's quarantine provisions may be unconstitutional due to lack of guaranteed due process).

99. Klein & Wittes, supra note 96, at 170.

100. Id. at 172, 174 (discussing Commerce Clause origins of quarantine power).

101. See, e.g., Daubert, supra note 39, at 1311 (citing example of Mary Mallon, commonly known as "Typhoid Mary," healthy typhoid carrier and Irish immigrant who worked as cook in New York, who was isolated for twenty-six of last thirty-eight years of her life without having broken any law).

102. See, e.g., Fidler et al., supra note 2, at 622–24 (arguing PHSA may be unconstitutional from due process perspective and does not provide sufficient measures to federal authorities to safeguard public health in case of drug-resistant tuberculosis outbreak).

103. See, e.g., Bobbitt, Terror and Consent, supra note 4, at 417 (calling for federal isolation and quarantine statute modeled on MEHPA, specifically to deal with threat of bioterrorism); Gostin et al., supra note 4, at 623–26 (arguing for state version of MEHPA and associated quarantine powers). Considering the proposed MEHPA is outside the scope of this Note, particularly as it has yet to be adopted by Congress, but the constitutional arguments on its behalf—or against its legitimacy—would be the same as for the PHSA's quarantine provisions.

104. Laura Donohue notes that the federal courts "have yet to rule on whether federal *cordon sanitaire* would withstand constitutional challenge" and that *Lopez* represents a willingness to recognize limits on Commerce Clause authority, but reaches no conclusion on whether a constitutional challenge to the PHSA might succeed. Donohue, supra note 41, at 47.

the *Lopez* test (its substantial effect on interstate commerce); as the Supreme Court opined in dicta in *Morgan's Steamship*, *Compagnie Francaise*, and the *Minnesota Rate Cases*, quarantine has a substantial effect on interstate commerce consistent with *Lopez*.[105]

II. THE STATE OF THE PHSA AFTER *NFIB*

Lopez, *Morrison*, and *Raich* are not the final word on contemporary Commerce Clause jurisprudence. This Part discusses whether the PHSA's quarantine provisions remain constitutional under the new precedent of *NFIB*.[106] Part II.A addresses the recent history of the quarantine power and its place in contemporary Commerce Clause jurisprudence prior to *NFIB* and in the national defense structure. Part II.B discusses the background and holding of *NFIB*. Part II.C addresses the scope of *NFIB*'s holding with respect to possible effects on the PHSA.

A. *Quarantine Law and Disease Control Prior to* NFIB

Prior to 2012, the predominant criticism of federal quarantine law was that quarantine authority was not sufficiently centralized under federal authority.[107] As discussed earlier, state authorities themselves had long cooperated in the gradual transfer of state quarantine stations to federal authority.[108] The Supreme Court has never ruled on the constitutionality of the PHSA under the Commerce Clause, including in the interim between *Lopez* and *NFIB*. However, at least two conservative members of the current Court—both members of the *Lopez* majority—opined during oral arguments in *United States v. Comstock* that regulating communicable disease, and the power to quarantine, fell squarely within

---

105. Clarkson, supra note 17, at 820–24 (discussing profound impact of quarantines on interstate economy).

106. 132 S. Ct. 2566 (2012).

107. See, e.g., Bobbitt, Terror and Consent, supra note 4, at 417 (arguing for expansion of federal quarantine statute in order to enhance government capacity to deal with bioterrorism); George J. Annas, Blinded by Bioterrorism: Public Health and Liberty in the 21st Century, 13 Health Matrix 33, 53–54 (2003) (suggesting updated *federal* quarantine laws to counter bioterrorism); Batlan, supra note 65, at 90, 95 (noting Chamber of Commerce, as early as 1892, warned states lacked expertise and resources to deal with disease outbreaks); id. at 113 (arguing federal government must take primary authority in pandemics as states lack resources and coordination to respond); Klein & Wittes, supra note 96, at 170 (noting quarantine statutes "represent an almost pure case of necessity's driving the scope of detention powers[] [and] case law, in fact, says quite directly that in this area, the necessary bounds the lawful"); id. at 174–75 ("[F]ederal authorities have been largely moribund for decades . . . ."); Carrie Lacey, Abuse of Quarantine Authority, 24 J. Legal Med. 199, 204–05 (arguing for federalization of quarantine power and claiming state abuses in quarantine); see also supra Part I.B (discussing perceived inadequacy of state-based quarantine laws during late nineteenth and early twentieth centuries).

108. See, e.g., supra note 90 and accompanying text.

the federal government's Commerce Clause authority.[109] Then-Solicitor General Elena Kagan posed the following question to the Court in *Comstock*:

> I mean, suppose that there was some very contagious form of drug-resistant tuberculosis that had—had become prevalent in the prison system, and States were not able to deal with . . . quarantining these people . . . and Congress said: You know, the best thing to do is to have the Federal Government act as the appropriate quarantining authority because we don't think that States are able to step up and deal with this problem.
>
> Would anybody say that the Federal Government would not have Article I power to effect that kind of public safety measure?[110]

Justice Anthony Kennedy responded that the Commerce Clause would provide the authority for such a program: "Well, when I was thinking about your hypothetical, I thought, well, that's a pretty easy commerce power argument . . . [though] we've got Morrison . . . looking at you and Printz . . . ."[111] Justice Antonin Scalia went one step further, declaring that "if anything relates to interstate commerce, it's communicable diseases, it seems to me."[112] These two Justices' comments indicate the presumptive support for federal quarantine power on Commerce Clause grounds leading up to the Court's recent decision in *NFIB*.[113]

B. NFIB *and New Restrictions on the Commerce Power*

In 2010, Congress passed another public health-related law that became a touchstone for debate on the scope of Congress's Commerce Clause power: the Patient Protection and Affordable Care Act (ACA).[114] The ACA seeks to provide health insurance to all Americans while keeping the health insurance industry almost entirely privatized. In order to do so, the Act institutes an "individual mandate" that compels individuals to buy health insurance if they can afford to do so, with a federally levied penalty if they do not.[115]

After passage of the ACA, several state attorneys general and governors, in addition to a number of conservative nonprofit organizations,

---

109. 130 S. Ct. 1949 (2010).

110. Transcript of Oral Argument at 21, *Comstock*, 130 S. Ct. 1949 (No. 08-1224).

111. Id. at 21–22 (citing United States v. Morrison, 529 U.S. 598 (2000); Printz v. United States, 521 U.S. 898 (1997)).

112. Id. at 30.

113. 132 S. Ct. 2566 (2012).

114. Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 26 U.S.C., 42 U.S.C., and 49 U.S.C.).

115. E.g., *NFIB*, 132 S. Ct. at 2580. The Act also expands Medicaid to provide additional coverage for those at the low end of the economic spectrum, id. at 2581, and establishes health insurance "exchanges" to provide affordable care, id. at 2673 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

filed suit. They argued Congress could not, under the Commerce Clause, compel individuals to enter into interstate commerce by purchasing health insurance, even though it was acknowledged that it was well within Congress's power to regulate health insurance if they did indeed choose to buy it.[116] While Congress could regulate a class of economic activity—active participation in the health insurance market—it could not regulate inactivity by compelling individuals to participate in the market.[117] Several courts either upheld the mandate or dismissed for lack of standing,[118] but the Eleventh Circuit heard the case on its merits and subsequently held the mandate unconstitutional.[119] In November 2011, the Supreme Court agreed to hear oral arguments on the case, eventually retitled *National Federation of Independent Business v. Sebelius*.[120]

In June 2012, the Court issued its opinion on the ACA. Chief Justice John Roberts, in his opinion, upheld the constitutionality of the individual mandate, but under Congress's power to tax and spend rather than under traditional Commerce Clause doctrine.[121] In a segment of his opinion joined by no other members of the majority of the Court—but echoed in the dissents of Justices Alito, Kennedy, Scalia, and Thomas[122]—Chief Justice Roberts wrote that Congress's Commerce Clause powers

---

116. See, e.g., Randy Barnett, Nathaniel Stewart & Todd F. Gaziano, Why the Personal Mandate to Buy Health Insurance Is Unprecedented and Unconstitutional, Heritage Found. (Dec. 9, 2009), http://www.heritage.org/research/reports/2009/12/why-the-personal-mandate-to-buy-health-insurance-is-unprecedented-and-unconstitutional (on file with the *Columbia Law Review*) ("By boldly asserting that the authority to regulate interstate commerce includes the power to regulate not merely voluntary activity that is commercial . . . but *inactivity* . . . designed to avoid entry into the relevant market, this theory effectively removes any boundaries to Congress's commerce power—Congress could mandate anything.").

117. Id. (arguing limitless Commerce Clause was "proposition [Supreme Court] rejected in *Lopez* and *Morrison*"). Other legal scholars countered that Congress's authority to regulate "inactivity" was well established. See, e.g., Rick Hills, What Does It Mean to Have a Theory of Federalism?, PrawfsBlawg (Dec. 17, 2010, 1:56 PM), http://prawfsblawg.blogs.com/prawfsblawg/2010/12/what-does-it-mean-to-have-a-theory-of-federalism.html (on file with the *Columbia Law Review*) (arguing action/inaction distinction is "senseless" in context of defining commerce power limitations). Erwin Chemerinsky wrote that Congress had used its Commerce Clause power to regulate inactivity in passing the Civil Rights Act, which prevented private actors from discriminating on the basis of race. Erwin Chemerinsky, Political Ideology and Constitutional Decisionmaking: The Coming Example of the Affordable Care Act, 75 Law & Contemp. Probs., no. 3, 2012, at 1, 13.

118. E.g., Seven-Sky v. Holder, 661 F.3d 1, 20 (D.C. Cir. 2011) (upholding individual mandate as constitutional); Liberty Univ., Inc. v. Geithner, 671 F.3d 391, 436 (4th Cir. 2011) (dismissing for failure to state legally sufficient claim); Thomas More Law Ctr. v. Obama, 651 F.3d 529, 549 (6th Cir. 2011) (upholding individual mandate as constitutional); Mead v. Holder, 766 F. Supp. 2d 16, 33–35 (D.D.C. 2011) (same).

119. Florida ex rel. Att'y Gen. v. HHS, 648 F.3d 1235, 1328 (11th Cir. 2011).

120. 132 S. Ct. 2566.

121. Id. at 2601 (opinion of Roberts, C.J.).

122. Id. at 2642–43 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

were indeed limited to regulation of economic activity and could not be extended to regulate inactivity:

> The individual mandate, however, does not regulate existing commercial activity. It instead compels individuals to *become* active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce. Construing the Commerce Clause to permit Congress to regulate individuals precisely *because* they are doing nothing would open a new and potentially vast domain to congressional authority . . . . Allowing Congress to justify federal regulation by pointing to the effect of inaction on commerce would bring countless decisions an individual could *potentially* make within the scope of federal regulation . . . .[123]

Chief Justice Roberts conceded that inactivity could indeed have a substantial effect on interstate commerce in the aggregate.[124] Nevertheless, he opined, regulation of inactivity was not within Congress's constitutional sphere of influence, at least not under the Commerce Clause.[125]

The four dissenters in *NFIB*, in a separate opinion, railed not only that the ACA was invalid under the Commerce Clause, but that it exceeded its authority under the Taxing and Spending Power as well.[126] The four dissenting Justices—two of whom had previously and expressly spoken favorably of Congress's quarantine powers under the Commerce Clause[127]—wrote that it was impermissible to interpret the Commerce Clause as granting the power to regulate inactivity: "To go beyond [*Wickard*], and to say the *failure* to grow wheat (which is *not* . . . any activity at all) . . . can be federally regulated, is to make mere breathing in and out the basis for federal prescription and to extend federal power to virtually all human activity."[128] Chief Justice Roberts made it clear that even if providing affordable health insurance was a national problem (one for which the solution may be a necessary component of addressing a serious public health crisis),[129] the Commerce Clause could not be employed to regulate noncommercial activity in order to address it.[130] The

---

123. Id. at 2587 (opinion of Roberts, C.J.).

124. Id. at 2589 ("People, for reasons of their own, often fail to do things that would be good for them or good for society. Those failures—joined with the similar failures of others—can readily have a substantial effect on interstate commerce.").

125. Id.

126. Id. at 2643 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

127. See, e.g., supra notes 111–112 and accompanying text (discussing Justices Kennedy and Scalia's comments during oral arguments of *Comstock*).

128. *NFIB*, 132 S. Ct. at 2643.

129. See, e.g., Philip C. Bobbitt, Brief for Professor Philip C. Bobbitt as Amicus Curiae in Support of Petitioners with Respect to the Individual Mandate 9–10 (2012), available at http://www.yale.edu/lawweb/jbalkin/files/Philip_Bobbitt_Healthcare_Brief.pdf (on file with the *Columbia Law Review*) (arguing, in unfiled draft amicus brief, universal health coverage is necessary to counteract effects of biological attacks).

130. *NFIB*, 132 S. Ct. at 2589 (opinion of Roberts, C.J.).

majority did not deny that inactivity could have substantial effects on interstate commerce, but merely that regulation of economic inactivity was a step beyond the outer limits of the Commerce Clause interpretation explored in *Wickard*.[131]

It is unclear whether the Court's decision in *NFIB* is binding with respect to the Commerce Clause, or whether the holding extends to the regulation of all inactivity or merely to purchasing mandates such as those in the ACA. The Chief Justice's opinion spoke for the Court with regard to Parts I, II, and III-C, but Part III-A, addressing the inapplicability of the Commerce Clause, was not joined by any other member of the Court.[132] Commentators disagree on whether Part III-A is in fact dictum,[133] or whether it is binding under the theory that the decision regarding constitutionality under the taxing power could not have been reached were the mandate constitutional under the Commerce Clause.[134]

The Ninth Circuit seemed somewhat confused as to the scope of *NFIB*'s potential limitations on the Commerce Clause subsequent to the Supreme Court decision. In *United States v. Henry*, the Ninth Circuit considered whether Congress's ban on the sale and possession of machine guns exceeded its power under the Commerce Clause.[135] Noting that "[t]here has been considerable debate about whether the statements about the Commerce Clause are dicta or binding precedent," the court declined to reach the question.[136] District court judges have also confronted the question of whether the Chief Justice's opinion is in fact binding with respect to the Commerce Clause.[137]

---

131. Id.

132. Id. at 2577 (majority opinion).

133. See, e.g., David Post, Dicta on the Commerce Clause, Volokh Conspiracy (July 1, 2012, 6:40 PM), http://www.volokh.com/2012/07/01/dicta-on-the-commerce-clause/ (on file with the *Columbia Law Review*) (arguing Part III-A "was not necessary to the court's judgment in the case that the mandate is constitutional—the very definition of nonbinding dicta").

134. Randy Barnett, Op-Ed., We Lost on Healthcare. But the Constitution Won, Wash. Post (July 1, 2012), http://articles.washingtonpost.com/2012-06-29/opinions/35461381_1_individual-mandate-insurance-mandate-proper-clause (on file with the *Columbia Law Review*) ("In perhaps the most important passage of his opinion, Roberts insisted that 'without deciding the Commerce Clause question, I would find no basis to adopt such a saving construction' of the penalty. This makes his analysis of the commerce clause a binding holding for future courts to follow." (quoting *NFIB*, 132 S. Ct. at 2601 (opinion of Roberts, C.J.))). But see Post, supra note 133 ("Roberts' formulation makes it looks [sic] as though the Court *first* has to decide 'whether it would otherwise violate the Constitution,' and *then* (if it answers that first question in the affirmative) whether it's a proper exercise of the taxing power . . . . [T]hat's not a fair description of the Court's task . . . .").

135. 688 F.3d 637, 638 (9th Cir. 2012).

136. Id. at 641 n.5.

137. E.g., United States v. Lott, 912 F. Supp. 2d 146, 152–53 n.8 (D. Vt. 2012) ("[T]he entirety of the Chief Judge's [sic] opinion, including the portions that address the Commerce Clause, is binding on this Court.").

Professor Ilya Somin noted that Part III-C of the Chief Justice's opinion *was* joined by a majority of the Court and argued that, therefore, since Part III-C referenced the Commerce Clause argument of Part III-A, Part III-A was itself a holding of the Court.[138] He contended that despite the fact that none of the four Justices who joined the Chief Justice in this segment of the opinion actually supported the Chief Justice's reasoning in Part III-A, those four Justices recognized that there were indeed five votes to restrict the commerce power and that the Court had functionally done so.[139] Whether or not the Chief Justice's opinion is "binding" with respect to the Commerce Clause, Somin is quite correct in noting that five votes exist on the current Court to restrict the definition of "commerce" to economic activity,[140] barring inactivity and other kinds of non-economic intercourse from regulation. Even if the Court did not expressly hold as such in *NFIB*, the votes exist to ensure such a holding could happen tomorrow.[141] For now, with the Court's current composition, the future of regulation of "inactivity" under the Commerce Clause without some kind of limiting principle appears to be in jeopardy.[142]

It is possible that if the Commerce Clause section is indeed part of the holding, its scope will be limited to *purchase* mandates, leaving the regulation of several other kinds of inactivity permissible.[143] This would

---

138. Ilya Somin, A Simple Solution to the Holding vs. Dictum Mess, Volokh Conspiracy (July 2, 2012, 3:47 PM), http://www.volokh.com/2012/07/02/a-simple-solution-to-the-holding-vs-dictum-mess/ (on file with the *Columbia Law Review*) ("'The Court today holds that our Constitution protects us from federal regulation under the Commerce Clause so long as we abstain from the regulated activity.'" (quoting *NFIB*, 132 S. Ct. at 2599 (majority opinion))).

139. Id.

140. The Chief Justice's opinion distinctly references economic activity as the type of activity regulable under the Commerce Clause and conflates "economic" activity with "commercial" activity. *NFIB*, 132 S. Ct. at 2590 (opinion of Roberts, C.J.).

141. See, e.g., Martha Minow, Affordable Convergence: "Reasonable Interpretation" and the Affordable Care Act, 126 Harv. L. Rev. 117, 145 (2012) (referring to Chief Justice Roberts's opinion as "securing explicit endorsement in part by one group of Justices, and legal authority for other parts when observers 'count up the votes'").

142. The Court drew the line seemingly at "inactivity" in order to establish a limiting principle on potentially unchecked power under the Commerce Clause. The Court's opinion warned that a license to regulate inactivity, even if such inactivity had substantial effects on interstate commerce, would give Congress carte blanche to regulate almost anything. *NFIB*, 132 S. Ct. at 2588 ("Indeed, the Government's logic would justify a mandatory purchase to solve almost any problem."); id. ("Accepting the Government's theory would give Congress the same license to regulate what we do not do, fundamentally changing the relation between the citizen and the Federal Government."); see also Mark A. Hall, Commerce Clause Challenges to Health Care Reform, 159 U. Pa. L. Rev. 1825, 1839 (2011) [hereinafter Hall, Challenges] ("Without any discernible conceptual boundaries on the types of products whose purchase might be mandated, defenders of this power can only resort to the political process to set limits.").

143. See, e.g., Neil S. Siegel, More Law than Politics: The Chief, the "Mandate," Legality, and Statesmanship, *in* The *Health Care Case*: The Supreme Court's Decision and Its Implications 192, 204–05 (Nathaniel Persily, Gillian E. Metzger & Trevor W. Morrison

leave existing regulation of inactivity unaffected—both economic "inactivity" such as that regulated by the Civil Rights Act,[144] and noneconomic inactivity that has a substantial aggregate effect on interstate commerce. This would consequently leave an opening for quarantine laws, as Professor Siegel notes.[145] While this interpretation is a plausible one and, as discussed in Part III, may be employed in the future by the Court to preserve regulation of some inactivity,[146] there is as yet no indication that this is the current view of the Court. Prior to *NFIB* there was no express distinction between the regulation of activity and inactivity at all, and thus the Court has not yet fully explored the contours of this distinction.[147]

Chief Justice Roberts's opinion also arguably restricts congressional power via the Necessary and Proper Clause.[148] Chief Justice Roberts, in rather summary fashion, disposes of the government's contention that the regulation of inactivity could be sustained under the Necessary and Proper Clause.[149] The Chief Justice asserts that the individual mandate

---

eds., 2013) [hereinafter Health Care Case] (maintaining Chief Justice's opinion on "inactivity" is likely limited to purchase mandates and would not extend to quarantines).

144. See, e.g., Chemerinsky, supra note 117, at 13 ("Title II of the Civil Rights Act regulates inactivity, requiring that hotels and restaurants serve African-American customers even if they do not want to do so.").

145. Siegel, supra note 143, at 205 ("Federal power to quarantine or mandate vaccination might be critical in a public health emergency . . . .").

146. Infra Part III.A (describing advantages of limiting scope of *NFIB* to purchase mandates); see also Hall, Challenges, supra note 142, at 1865 (rejecting slippery slope argument against regulation of inactivity because "in terms of pure logic, regulating inactivity is no more unlimited than regulating activity, as long as the same limits apply to each").

147. It is not clear from the Court's opinion whether all mandates, or merely purchase mandates, are unconstitutional regulation under the Commerce Clause. Professor Mark Hall writes that quarantines themselves involve several mandated activities, such as wearing masks, reporting symptoms, and turning over potentially infected property to government authorities for disinfection or destruction. Mark A. Hall, Constitutional Mortality: Precedential Effects of Striking the Individual Mandate, 75 Law & Contemp. Probs., no. 3, 2012, at 107, 110 [hereinafter Hall, Mortality] ("For federal response to be effective, these emergency Commerce Clause powers must include authority to mandate citizen behavior, regardless of engagement in commerce.").

148. For a fuller analysis of the Court's opinion on the Necessary and Proper Clause and its implications beyond quarantine law, see generally Andrew Koppelman, "Necessary," "Proper," and Health Care Reform, *in* Health Care Case, supra note 143, at 105.

149. The government argued that since it could legally regulate health insurance markets under the Commerce Clause, it could command the purchase of health insurance as a necessary and proper adjunct to this power. The Chief Justice contended, "Each of our prior cases upholding laws under that Clause involved exercises of authority derivative of, and in service to, a granted power." Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB*), 132 S. Ct. 2566, 2592 (2012) (opinion of Roberts, C.J.). As with his Commerce Clause opinion, this segment was not joined by any other member of the Court, but was largely agreed with by the dissenting Justices. Id. at 2646–47 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

was a "substantial expansion of federal authority," and distinguishs it from prior cases upholding authority under the Necessary and Proper Clause on the grounds that "[t]he individual mandate, by contrast, vests Congress with the extraordinary ability to create the necessary predicate to the exercise of an enumerated power."[150] As Justice Ginsburg points out in her concurring opinion, this leaves a somewhat unclear standard in place for future courts; the Chief Justice's opinion gives few guidelines for determining what constitutes an "improper" piece of legislation.[151] Essentially, the Chief Justice indicated that this particular piece of legislation was overbroad, and improper even if it was necessary,[152] but did not provide a framework for determining overbreadth or propriety in the future.[153] Perhaps even more so than the future of Commerce Clause jurisprudence, the scope of *NFIB*'s effect upon the Necessary and Proper Clause remains unclear and might for some time. It is difficult to tell exactly what limitations the Chief Justice's treatment of the Necessary and Proper Clause established, as it lacks the clear distinction between activity and inactivity present in the Commerce Clause analysis and is potentially dependent on ad hoc judgments of propriety.[154] It is certainly

---

150. Id. at 2592 (opinion of Roberts, C.J.).

151. Id. at 2627–28 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("How is a judge to decide . . . whether Congress employed an 'independent power,' . . . or merely a 'derivative' one . . . [?] Whether the power used is 'substantive,' . . . or just 'incidental'? The instruction THE CHIEF JUSTICE, in effect, provides lower courts: You will know it when you see it." (citations omitted)).

152. Id. at 2592 (opinion of Roberts, C.J.) ("Even if the individual mandate is 'necessary' to the Act's insurance reforms, such an expansion of federal power is not a 'proper' means for making those reforms effective.").

153. Id. Further complicating the opinion is the doctrinal history of the Necessary and Proper Clause. Congressional acts based on the Necessary and Proper Clause have traditionally been invalidated only on the basis of federalism concerns; the Chief Justice's opinion in *NFIB* is sui generis in that it bars application of the Necessary and Proper Clause to action on individuals, rather than states. See id. at 2626–27 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (describing cases treated as precedential by Chief Justice and arguing "minimum coverage provision, in contrast, acts 'directly upon individuals, without employing the States as intermediaries,'" making "[t]he provision . . . entirely consistent with the Constitution's design" (quoting New York v. United States, 505 U.S. 144, 164 (1992))); see also Koppelman, supra note 148, at 111 (discussing new precedential effect of deeming "improper" statutes that do not compel states).

154. Prior to *NFIB*, the Court seemed to adopt a very broad interpretation of necessary and proper means to legitimate congressional ends. See, e.g., United States v. Comstock, 130 S. Ct. 1949, 1956 (2010) ("We have . . . made clear that, in determining whether the Necessary and Proper Clause grants Congress the legislative authority to enact a particular federal statute, we look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power."); Gonzales v. Raich, 545 U.S. 1, 36 (2005) (Scalia, J., concurring in the judgment) ("Congress's authority to enact laws necessary and proper for the regulation of interstate commerce is not limited to laws directed against economic activities . . . . [W]here Congress has the authority to enact a regulation of interstate commerce, 'it possesses every power needed to make that regulation effective.'" (quoting United States v. Wrightwood

arguable that quarantine of nontravelers, for example, could be justified as a necessary and proper adjunct to quarantine of interstate travelers.[155] *NFIB* indicates, however, that the Necessary and Proper Clause is an uncertain ground for establishing the constitutionality of anything that is not independently constitutional under another power. The scope of *NFIB*'s holding with respect to the Necessary and Proper Clause remains unclear and does not provide an articulated rule of law that obviously bars or obviously permits application to quarantine or other congressional powers that may not be sanctioned under a strict Commerce Clause analysis.

C. *The Effect of* NFIB *on the PHSA*

If "mere breathing in and out" is not regulable activity under the Commerce Clause,[156] the PHSA's quarantine provisions, passed under the authority conferred by the Commerce Clause, may not withstand the Court's opinions in *NFIB*—despite the fact that the Court, if only in dicta, has consistently held federal quarantine authority to be constitutional under the commerce power.[157] Quarantine and isolation statutes—

Dairy Co., 315 U.S. 110, 118–19 (1942))). However, the Chief Justice's opinion in *NFIB* seems to undercut this logic, as Congress ostensibly had the authority to regulate interstate markets under the Commerce Clause, but apparently did not possess the authority to compel the purchase of insurance as a necessary and proper adjunct to that regulation.

155. The Court held in *Comstock* that the federal government enjoys authority under the Necessary and Proper Clause to detain dangerous federal prisoners via civil commitment, even beyond their release dates, on the grounds that they would present a serious danger to public safety if released. *Comstock*, 130 S. Ct. at 1965 (upholding Congress's authority "to create federal criminal laws, to punish their violation, to imprison violators, to provide appropriately for those imprisoned, and to maintain the security of those who are not imprisoned but who may be affected by the federal imprisonment of others"). The Court held further that Congress enjoyed the authority under the Commerce Clause to criminalize the particular behavior for which the prisoners in question were initially convicted (possession of child pornography and sexual abuse of a minor). Id. at 1964–65. It is not too much of a stretch from *Comstock*'s upholding of civil commitment statutes to contend that similar civil commitments—without regard to due process concerns outside the scope of this Note—might be permissible in the case of a pandemic as necessary and proper to congressional public health authority under the Commerce Clause. A possible stumbling block for this argument is that it has been floated before—in the oral arguments for *Comstock*. See, e.g., supra notes 109–112 and accompanying text (discussing oral arguments). At the time, Justices Kennedy and Scalia, both of whom supported a restrictive interpretation of the Commerce Clause in *NFIB*, downplayed the suggestion by then-Solicitor General Elena Kagan that the Necessary and Proper Clause might extend to cover federal quarantines, opining instead that the Commerce Clause provided ample authority for quarantine. See, e.g., supra notes 111–112 and accompanying text (discussing oral argument in *Comstock*). The Court's holding in *Comstock*, however, coupled with the Commerce Clause restrictions in *NFIB*, suggests that the opposite may now be the case.

156. *NFIB*, 132 S. Ct. at 2643 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

157. It may also be that, since much of quarantine law has historically concerned the quarantine of disease-carrying goods, such as livestock or vegetables, the commercial connection was clear enough in the minds of the *Lochner*-era Court to justify an obvious

including the PHSA—regulate based not on economic activity but because of a particular condition or status (albeit a condition that spreads, potentially *without* human agency or activity). They regulate a condition that could be contracted merely by the very act of "breathing in and out."[158] It is difficult to imagine a more inactive endeavor than the contraction or communication of an infectious disease; virtually no one contracts or spreads a dangerous infectious disease as a matter of choice. It would perhaps be one thing if the PHSA were limited to individuals themselves traveling between states or somehow actively engaged in interstate commerce; the statute, however, extends federal quarantine authority to any person who is a "probable source of infection" to those traveling in interstate commerce—including nontravelers.[159]

Under *Lopez*, there would be little reason to suspect that the PHSA's quarantine and isolation provisions were not constitutional. Serious infectious diseases certainly pass a "substantial effects" test for interstate commerce.[160] They present a problem that is not only national, but even international in scope—pathogens know neither borders nor regional limitations.[161] Quarantine's connection to interstate commerce is based on the *effects* of disease upon interstate commerce—upon the labor market, the consumer class, the availability of goods, and so forth—not upon any pretense that potentially quarantined or isolated individuals were active in their participation in interstate commerce.[162] There is no re-

---

Commerce Clause hook even though such a hook may be less obvious today, and less obvious in the context of quarantine of persons rather than goods. See, e.g., supra notes 66–88 and accompanying text (discussing judicial approval of expanding federal quarantine authority during late nineteenth and early twentieth century).

158. See, e.g., Wendy E. Parmet, The Individual Mandate: Implications for Public Health Law, 39 J.L. Med. & Ethics 401, 405 (2011) ("[Q]uarantine laws historically authorized the confinement of people thought to have a contagious disease, such as smallpox or leprosy, even if they had not committed any prohibited voluntary action.").

159. 42 U.S.C. § 264(d)(1) (2006). As discussed previously, this could be a backdoor into regulation of virtually all individuals. See, e.g., Klein & Wittes, supra note 96, at 174–75.

160. See, e.g., Clarkson, supra note 17, at 820–22 (arguing large-scale quarantines would properly be analyzed under third *Lopez* prong in terms of their substantial effects on interstate commerce). The Court's past opinions touching on quarantine have all analyzed the possibility of federal quarantine in terms of the *effects* of disease and quarantine upon interstate commerce. E.g., infra note 162 and accompanying text.

161. For example, HIV/AIDS, the most prolific killer among recently discovered infectious diseases in the United States over the past four decades, has been traced to the Congo River Valley in Central Africa. E.g., Paul M. Sharp & Beatrice H. Hahn, Prehistory of HIV-1, Nature, Oct. 2008, at 605, 605–06 (reviewing origins, geography, and timescale of HIV/AIDS).

162. See, e.g., The Minn. Rate Cases, 230 U.S. 352, 408 (1913) (analyzing state statutes in terms of effects on interstate commerce); Compagnie Francaise de Navigation a Vapeur v. La. State Bd. of Health, 186 U.S. 380, 391 (1902) (upholding state quarantines absent explicit federal preemption "although they affect foreign and domestic commerce"); Morgan's S.S. Co. v. La. Bd. of Health, 118 U.S. 455, 464–66 (1886)

quirement in the PHSA's quarantine provisions that an individual actually be participating in interstate commerce in any way.[163] To be sure, the substantial effects test may not necessarily be dead, but *NFIB* argues that the effects of *inactivity* are not regulable in the same way that the effects of activity are.[164]

One could argue that it is not the condition of illness *itself* that would be regulated by a federal quarantine, but the *activity* of egress from a specified location.[165] Rather than the regulation of breathing, quarantines regulate breathing in certain places and contexts that render the individual dangerous to the population at large.[166] Defined on such terms, however, quarantine would regulate virtually all activity of an individual, whether economic or interstate in nature or not. *NFIB* itself suggests such regulation might be overbroad; regulation of *all* of a person's activities might amount to regulation of the person herself or himself, which *NFIB* deemed beyond Congress's power.[167] Unlike in *Raich*, Congress is not regulating a *discrete* activity or class of activities like the

---

(discussing possible preemption of state quarantine laws in terms of effects of such laws upon interstate commerce).

163. See, e.g., supra notes 94–96 and accompanying text (describing broad applicability of PHSA's quarantine provisions to all individuals, not merely those engaged in interstate commerce).

164. Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB*), 132 S. Ct. 2566, 2589 (2012) (opinion of Roberts, C.J.) ("To an economist, perhaps, there is no difference between activity and inactivity; both have measurable economic effects on commerce. But the distinction between doing something and doing nothing would not have been lost on the Framers, who were 'practical statesmen,' not metaphysical philosophers.").

165. The Chief Justice suggests that regulation of some noneconomic *activity* might be permissible under the commerce power. In several places the Chief Justice speaks only of the regulation of activity, not economic activity per se. E.g., id. at 2587 ("As expansive as our cases construing the scope of the commerce power have been, they all have one thing in common: They uniformly describe the power as reaching 'activity.'"); id. at 2589 ("Congress already enjoys vast power to regulate much of what we do. Accepting the Government's theory would give Congress the same license to regulate what we do not do, fundamentally changing the relation between the citizen and the Federal Government."); id. at 2590 ("Each one of our cases, including those cited by Justice Ginsburg, involved preexisting economic activity.").

166. The First Circuit has opined that *NFIB*'s holding only limits *compelling* individuals to participate in interstate commerce, not the prohibition of activity that has an obvious connection to interstate commerce. United States v. Roszkowski, 700 F.3d 50, 58 (1st Cir. 2012) (holding *NFIB* did not bar regulation of firearms that had traveled in interstate commerce because "[i]n stark contrast to the individual mandate in *Sebelius*, these statutes do not 'compel[] individuals to become active in commerce'; rather, they *prohibit* affirmative conduct that has an undeniable connection to interstate commerce" (quoting *NFIB*, 132 S. Ct. at 2587)).

167. *NFIB*, 132 S. Ct. at 2591 ("The Commerce Clause is not a general license to regulate an individual from cradle to grave, simply because he will predictably engage in particular transactions. Any police power to regulate individuals as such, as opposed to their activities, remains vested in the States.").

growing of marijuana,[168] but any activity outside the quarantine station in question—a type of regulation of which the four joint dissenters in *NFIB* expressly disapproved.[169] Further, as at least one academic notes, quarantines not only restrict, but compel certain activities.[170] Thus, if *NFIB* absolutely bars the regulation of inactivity or the compulsion of activity as a regulation of commerce, it may bar federal quarantine.

III. ALTERNATIVE CONSTITUTIONAL JUSTIFICATIONS FOR THE PHSA GIVEN THE UNFORESEEN CONSEQUENCES OF *NFIB*

Assuming that *NFIB* affects the stated Commerce Clause justification for the PHSA, the possible exigencies of a pandemic call for an alternative justification for federal quarantine. The history of American disease control and contemporary assessments indicate that the existing "hodgepodge" of state and local public health regulations may be inadequate to issue a coordinated response to a future pandemic without federal action.[171]

This Part discusses three possible Commerce Clause justifications for federal quarantine power consistent with the opinions of Chief Justice Roberts and the dissenters in *NFIB*. Part III.A discusses the possibility of limiting the scope of *NFIB* to purchase mandates, leaving open the possibility of regulating other kinds of inactivity. Part III.B discusses the possibility that *United States v. Morrison* provides jurisprudential room for limited regulation of noneconomic activity with a particularly significant impact on commerce. Part III.C discusses the possibility that quarantine can be justified as a protection of the instrumentalities of interstate commerce, rather than analyzed in terms of *effects* on commerce.[172]

---

168. Gonzales v. Raich, 545 U.S. 1, 18 (2005) ("*Wickard* thus establishes that Congress can regulate purely intrastate activity that is not itself 'commercial,' in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity."); id. at 23 ("[W]e have often reiterated that '[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power "to excise, as trivial, individual instances" of the class.'" (second alteration in *Gonzales*) (quoting Perez v. United States, 402 U.S. 146, 154 (1971))).

169. *NFIB*, 132 S. Ct. at 2643 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

170. Hall, Mortality, supra note 147, at 110 ("For federal response to be effective, these emergency Commerce Clause powers must include authority to mandate citizen behavior, regardless of engagement in commerce."). Hall cites the wearing of masks, reporting requirements, and inspecting of property as necessary mandates. Id. at 110–11.

171. Bobbitt, Terror and Consent, supra note 4, at 417.

172. This Part will *not* address in great depth the possibility of an inherent executive power to quarantine, though it is not only possible, but quite likely, that in the event of a serious pandemic threatening public health and national security, the President would act whether or not the PHSA itself were upheld as a constitutional exercise of Commerce Clause authority. One example of the President acting to address a national security crisis without explicit statutory authority or congressional assent is President Abraham Lincoln's suspension of habeas corpus during the Civil War. The possible extent of executive power

A. *Limiting* NFIB *to Purchase Mandates*

It is possible that the Supreme Court's traditional Commerce Clause interpretation accommodating federal quarantine authority might survive *NFIB* if, as Professor Siegel writes, *NFIB*'s restrictions are limited to purchase mandates as opposed to all "inactivity" regulated under the Commerce and Necessary and Proper Clauses.[173] The Supreme Court's existing dicta regarding federal quarantine authority supports this particular approach,[174] as does the fact that two of the dissenters in *NFIB*—Justices Kennedy and Scalia—have both previously opined that federal quarantine power is situated within the Commerce Clause.[175] Further supporting the theory of limiting *NFIB* to purchase mandates is one critical distinction between the PHSA and the ACA: The PHSA seeks to restrict activity, rather than compel it, whereas with the ACA it was largely the compulsion of activity that rendered the legislation troublesome in Chief Justice Roberts's view.[176] Thus, it is possible the Court might view Congress's authority to restrict activity differently than its authority to

---

in case of emergencies is covered extensively in the academic literature and is well beyond the scope of this Note. See, e.g., Henry P. Monaghan, The Protective Power of the Presidency, 93 Colum. L. Rev. 1, 34–37 (1993) (discussing possible scope of emergency powers President may execute absent explicit statutory authorization); id. at 65–70 (arguing inherent executive power exists independent of statutory authority to protect "personnel, property and instrumentalities of the United States"); Memorandum from William J. Haynes, II, Gen. Counsel, Dep't of Def., to Alberto R. Gonzales, Counsel to the President 4–14 (Oct. 23, 2001), available at 2001 WL 36190674 (on file with the *Columbia Law Review*) (arguing Article II of Constitution vests President with power to respond to emergency threats to national security). This Note seeks to address judicial and legislative solutions to what appears to be a judicially and legislatively created problem, and is primarily concerned with the Commerce Clause implications of *NFIB* and possibly unforeseen effects upon quarantine and similar statutes. Further, the possible extent of *Congress's* power to institute quarantine is not irrelevant to the President's power to do so; even with respect to issues involving public safety and national security, the President's inherent authority is not limitless, and implicit or explicit congressional assent to executive action might be required to uphold the constitutionality of a quarantine. See, e.g., Hamdan v. Rumsfeld, 548 U.S. 557, 617–25 (2006) (finding military commissions established by executive unlawful in part because contrary to congressional statute).

173. Siegel, supra note 143, at 205.

174. See, e.g., supra notes 68–88 and accompanying text (discussing *Morgan's Steamship* line of cases).

175. See, e.g., supra notes 109–113 and accompanying text (discussing oral arguments in *Comstock*).

176. In interpreting the scope of *NFIB*, the First Circuit has opined that *NFIB* only limits *compulsion* of activity. United States v. Roszkowski, 700 F.3d 50, 58 (1st Cir. 2012) ("In stark contrast to the individual mandate in *Sebelius*, these statutes do not 'compel[] individuals to *become* active in commerce'; rather, they *prohibit* affirmative conduct that has an undeniable connection to interstate commerce." (quoting Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB*), 132 S. Ct. 2566, 2587 (2012) (opinion of Roberts, C.J.))). Consequently a quarantine statute might be held constitutional on the theory that it merely restricts activity and does not compel it. However, as Mark Hall notes, quarantines inevitably do involve *some* degree of compulsion of activity, even if they do not compel *economic* activity. Hall, Mortality, supra note 147, at 110.

compel activity.[177] Lower courts have readily adopted this interpretation of *NFIB*. The Sixth Circuit, in *United States v. Rose*, interpreted *NFIB* to forbid only the compulsion of commerce, not all regulation of intrastate or noneconomic activities,[178] and the First Circuit, in *United States v. Roszkowski*, agreed that *NFIB* prohibits only compulsion of activity.[179]

Such an interpretation, for better or worse, would leave *NFIB*'s effect largely isolated to its facts; the drawback for the *NFIB* dissenters and Chief Justice Roberts might be that if *NFIB*'s limiting principle is applied merely to purchase mandates, it is a rather hollow limiting principle.[180] Another chief objection to such an interpretation would be that the restriction of liberty is potentially far more severe in the case of quarantines than it is in the case of a purchase mandate,[181] depending on the extent and severity of the quarantine itself.[182] As Professor Siegel writes, it is unlikely that Congress will seek to pursue very many purchase mandates in the future; were the Court to uphold the PHSA because it is not

177. Though this Note does not propose criminal sanctions for violating federal quarantine, there is authority in *state* law to restrict knowing exposure of others to dangerous infections. For example, states have criminalized knowingly exposing a sexual partner to HIV without previously informing the partner. See, e.g., Ark. Code Ann. § 5-14-123 (2006) ("A person commits the offense of exposing another person to [HIV] if the person knows he or she has tested positive for [HIV] and . . . engages in sexual penetration with another person without first having informed the other person of the presence of [HIV]."); N.J. Stat. Ann. § 2C:34-5(b) (West 2005) ("A person is guilty of a crime . . . who, knowing that he or she is infected with [HIV] . . . , commits an act of sexual penetration without the informed consent of the other person."). Of course, the state police power is far broader than Congress's criminal authority under the Commerce Clause.

178. 714 F.3d 362, 371 (6th Cir. 2013). *Rose* involved a facial challenge to the constitutionality of 18 U.S.C. § 2251 (2012), which criminalizes the production of child pornography. Id. at 365, 370. The Sixth Circuit held that *NFIB* forbade "forc[ing] into commerce individuals who have elected to refrain from such commercial activity" but had no effect on the regulation of intrastate activities that did not involve the compulsion of commerce. Id. at 371.

179. 700 F.3d at 58.

180. The opinions of both the Chief Justice and the joint dissent suggest that the presence of some limiting principle on the commerce power is critical. See, e.g., supra notes 122–128 and accompanying text (outlining Chief Justice's and dissenting Justices' reasoning in *NFIB* to require limiting principle on commerce power).

181. Hall, Mortality, supra note 147, at 111 ("It would be a very peculiar Constitution, though, that permitted quarantine but forbade much milder mandates . . . .").

182. There is a fairly broad continuum of quarantines practiced by state and local authorities—anything from quarantining a college dorm for a few days due to a flu outbreak, to placing an individual with drug-resistant tuberculosis in a prison cell for several months. Lawrence O. Gostin, Scott Burris & Zita Lazzarini, The Law and the Public's Health: A Study of Infectious Disease Law in the United States, 99 Colum. L. Rev. 59, 71 (1999) (noting "occasional quarantine of a college dorm for measles inspires no protest" whereas "people living with HIV and their advocates" may perceive such measures as "profoundly threatening"); Wendy E. Parmet, Dangerous Perspectives: The Perils of Individualizing Public Health Problems, 30 J. Legal Med. 83, 87–88 (2009) (describing state quarantine and imprisonment of Robert Daniels after incorrect diagnosis of tuberculosis).

a purchase mandate, while conceding that it regulates inactivity, the door to regulation of a great deal of "what we do not do" would reopen.[183] Since the activity/inactivity distinction is fairly new, however, federal courts would have broad authority to carve out exceptions based on additional aggravating factors beyond the effects on interstate commerce alone—such as national security and public safety.

B. Morrison *and Regulation of Noneconomic Activity*

Alternatively, as discussed in Part II, quarantine could be considered regulation of activity—the regulation of the *mobility* of persons as opposed to regulation based on their medical condition itself. However, it would still be regulation of noneconomic activity. As some scholars have noted, *United States v. Morrison* provides some room for regulation of such noneconomic activity if the ultimate impact on economic activity is sufficiently significant.[184] Congress has indeed passed statutes regulating noneconomic activity (both prior to and since *Morrison*) due to those activities' substantial impact upon public safety. The Racketeer Influenced and Corrupt Organizations Act (RICO), for example, counts several noneconomic activities, including terrorism, as predicate offenses for a

---

183. See, e.g., Siegel, supra note 143, at 200–04 (arguing, even had Congress upheld ACA under commerce power, "it is unlikely that Congress would have imposed purchase mandates in the future"); see also Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB*), 132 S. Ct. 2566, 2589 (2012) (opinion of Roberts, C.J.) ("Accepting the Government's theory would give Congress the same license to regulate what we do not do . . . .").

184. 529 U.S. 598, 613 (2000) ("[W]e need not adopt a categorical rule against aggregating the effects of *any* noneconomic activity . . . ." (emphasis added)); see also Christy H. Dral & Jerry J. Phillips, Commerce by Another Name: The Impact of *United States v. Lopez* and *United States v. Morrison*, 68 Tenn. L. Rev. 605, 612 n.77 (2001) (speculating Chief Justice Rehnquist's opinion in *Morrison* was "leaving . . . a loophole in case there is some legislation he has not thought of in which he might want to aggregate"); Joshua A. Klein, Note, Commerce Clause Questions After *Morrison*: Some Observations on the New Formalism and the New Realism, 55 Stan. L. Rev. 571, 581–82 & n.66 (2002) ("One wonders why the Court hedged its bets in announcing the rule. It is possible that the Court believed a flat ban on aggregation for noneconomic activity would have specific unintended consequences, like rendering certain federal drug laws unconstitutional."); Michael Paisner, Note, *Boerne* Supremacy: Congressional Responses to *City of Boerne v. Flores* and the Scope of Congress's Article I Powers, 105 Colum. L. Rev. 537, 577 (2005) ("[T]he *Lopez* and *Morrison* Courts left unclear whether the regulated activity itself had to be economic in nature."); Scott T. Powers, Case Note, Commerce—A Retreat from Clarity: The Supreme Court Adds a Wrinkle to the "Aggregated Effects" Doctrine of Its Commerce Clause Jurisprudence—*United States v. Morrison*, 519 U.S. 598 (2000), 75 Temp. L. Rev. 163, 194 (2002) ("This . . . language gives the Court 'wiggle room' to distinguish a future case from *Morrison* or to justify any future decision that appears to contradict with [sic] *Morrison*."). But see Julie Goldscheid, *United States v. Morrison* and the Civil Rights Remedy of the Violence Against Women Act: A Civil Rights Law Struck Down in the Name of Federalism, 86 Cornell L. Rev. 109, 123 (2000) ("Although it declined to adopt a categorical rule against aggregating the effects of noneconomic activity, by interpreting prior case law as a limit on Congress's power to aggregate the effects of intrastate activity, the Court effectively created the categorical rule it expressly disclaimed.").

RICO prosecution or civil suit.[185] RICO has in fact been employed in the past to prosecute terrorist conspiracies,[186] and the Supreme Court has accepted the application of RICO to acts for which no economic purpose could be discerned.[187]

The PATRIOT Act also appears to rely upon the Commerce Clause for its authority to prohibit terrorist acts against mass transportation systems and cyberterrorism.[188] The PATRIOT Act specifically criminalizes possession of a biological agent or toxin by a specific list of "restricted persons,"[189] suggesting that the unknowing or unintentional "possession" of a dangerous biological agent (by a carrier of a dangerous disease) might also be substantially regulated by Congress. The Supreme Court has never explicitly upheld the constitutionality of the PATRIOT Act in a facial Commerce Clause challenge, but the Court has implicitly approved of the Act on multiple occasions and has never questioned the Act's constitutionality under the commerce power.[190]

---

185. Racketeer Influenced and Corrupt Organizations Act (RICO), Pub. L. No. 91-452, tit. IX, 84 Stat. 922, 941–48 (1970) (codified as amended at 18 U.S.C. §§ 1961–1968 (2012)) (including inter alia as predicate offenses acts of terrorism indictable under PATRIOT Act, use or possession of chemical or biological weapons, arson, and sexual exploitation of children). For an extensive analysis of the broad application of RICO to various predicate offenses, see generally Gerard E. Lynch, RICO: The Crime of Being a Criminal, Parts I & II, 87 Colum. L. Rev. 661 (1987).

186. E.g., United States v. Bagaric, 706 F.2d 42, 58 (2d Cir. 1983) (declining to "impose upon the Government an obligation to show pure or ultimate economic motive" for RICO prosecutions). Some have observed that RICO enables the punishment of suspected members of terrorist organizations even if their own terrorist activity cannot be proven. E.g., Michael J. Ellis, Comment, Disaggregating Legal Strategies in the War on Terror, 121 Yale L.J. 237, 240–41 (2011) ("Under RICO, an individual can be convicted for mere membership in an organization that commits two or more predicate criminal acts . . . .").

187. E.g., Nat'l Org. for Women, Inc. v. Scheidler, 510 U.S. 249, 260–62 (1994) (holding RICO civil suits require no economic purpose or motive behind predicate acts of racketeering organization).

188. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (PATRIOT) Act of 2001, Pub. L. No. 107-56, §§ 373, 801, 808, 814, 817, 1012, 115 Stat. 272, 339–40, 374–76, 378–79, 382–84, 385–86, 396–98 (codified in scattered titles of U.S.C.) (regulating or criminalizing money-transmitting businesses affecting interstate commerce, attacks against mass transportation systems involved in interstate commerce, arson and bombing of property used in interstate commerce, computers used in manner affecting interstate commerce, and transportation in interstate commerce of biological agents and hazardous materials).

189. Id. § 817 (codified at 18 U.S.C. § 175b (2012)) ("No restricted person shall ship or transport in or affecting interstate or foreign commerce, or possess in or affecting commerce, any biological agent or toxin, or receive any biological agent or toxin that has been shipped or transported in interstate or foreign commerce . . . .").

190. Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2731 (2010) (upholding constitutionality of PATRIOT Act in as-applied challenge on First and Fifth Amendment grounds); Clark v. Martinez, 543 U.S. 371, 386 n.8 (2005) (citing PATRIOT Act as example of appropriate legislative response to judicial statutory interpretation); Hamdi v. Rumsfeld, 542 U.S. 507, 551 (2004) (Souter, J., concurring in part and dissenting in part)

If noneconomic criminal activities (such as those interdicted by RICO and the PATRIOT Act) can be regulated under the Commerce Clause due to their effects upon interstate commerce, it seems reasonable to infer that restricting activity via quarantine in cases of very serious disease would likewise be permissible. Biological toxins carried by a would-be terrorist and biological toxins carried by an individual who happened to catch an infectious disease would be functionally similar in terms of their effects on interstate commerce.

C. Lopez *and the Instrumentalities of Commerce*

A third solution comes from *Lopez*. While Congress enjoys the authority to regulate activities having a substantial effect on interstate commerce, it enjoys even broader authority to regulate *and protect* the instrumentalities of interstate commerce, according to the Court's opinion in *United States v. Lopez*.[191] With respect to instrumentalities, Congress appears to hold a proactive, protective power it does not enjoy with respect to the other two prongs of the *Lopez* test.[192] Quarantine has traditionally been interpreted to fall under the third "substantial effects" prong of *Lopez*,[193] but may also come within the protection of the *second* prong.[194] Thus, Congress could legitimately authorize an agency to institute quarantine in order to protect an airplane, airport, railroad, or

---

(citing PATRIOT Act's limitations on detention of alien terrorists as evidence Congress did not intend to allow indefinite detention of American-born suspected terrorists).

191. 514 U.S. 549, 558 (1995) ("Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities.").

192. For interpretations of the broader extent of Congress's regulatory and protective power under the instrumentalities prong, see Richard A. Epstein, The Federalism Decisions of Justices Rehnquist and O'Connor: Is Half a Loaf Enough?, 58 Stan. L. Rev. 1793, 1802–03 (2006) (arguing *Lopez* Court "adopts a broad definition of protection that includes among 'threats' competition from intrastate activities"); Robert J. Pushaw Jr. & Grant S. Nelson, A Critique of the Narrow Interpretation of the Commerce Clause, 96 Nw. U. L. Rev. 695, 698 n.28 (2002) (critiquing federal carjacking statutes because "'instrumentalities' doctrine permits federal regulation of all vehicles (including people and items inside), regardless of whether they move interstate").

193. See The Minn. Rate Cases, 230 U.S. 352, 408 (1913) (holding state quarantines were permissible when not preempted by federal regulation despite effects of quarantine on interstate commerce); Compagnie Francaise de Navigation a Vapeur v. La. State Bd. of Health, 186 U.S. 380, 391 (1902) (upholding state quarantines absent explicit federal preemption "although they affect foreign and domestic commerce"); Morgan's S.S. Co. v. La. Bd. of Health, 118 U.S. 455, 464–66 (1886) (discussing possible preemption of state quarantine laws in terms of effects of such laws upon interstate commerce).

194. The CDC has, in fact, argued on one occasion that the first and second *Lopez* prongs provide substantial constitutional justification for regulations pursuant to section 361 of the PHSA. Control of Communicable Diseases, 70 Fed. Reg. 71,892, 71,894 (Nov. 30, 2005) (codified at 42 C.F.R. pts. 70–71 (2012)) ("The proposed regulation is consistent with the scope of the federal government's commerce power because it seeks to regulate . . . the instrumentalities of foreign and interstate commerce (e.g., airlines with flights arriving into the U.S. or traveling from one state or possession into another).").

highway.[195] Since *NFIB* placed no explicit restrictions on the regulation of instrumentalities of interstate commerce,[196] economic activity may not be required for the exercise of such authority.[197] Regulation of any activity—or perhaps inactivity—that is necessary and proper to *protect* the instrumentalities of interstate commerce might be sufficient. A genuine pandemic might easily affect the instrumentalities of interstate commerce by making airports or rail stations sufficiently dangerous to adversely affect travel or interstate commerce or impede interstate traffic by infecting drivers, pilots, and passengers.

It is unclear from the instrumentalities doctrine, however, just how proactive Congress can be in protecting the instrumentalities of interstate commerce.[198] Congress has used its authority under this prong to regulate intrastate, noneconomic criminal activity affecting the instrumentalities of interstate commerce[199] and has also arguably regulated *inactivity* under the same authority through statutes compelling convicted sex offenders to register with local authorities upon their release from

---

195. It might be argued that Congress is not protecting an airplane, for example, in its regulation of disease carriers, since the disease causes no structural damage to the instrumentality of commerce—the airplane itself (even though a serious pandemic would have a severe effect on air travel). But the second clause of the second *Lopez* prong—that Congress can regulate and protect "persons or things in interstate commerce" pursuant to the power to regulate instrumentalities—seems to provide room for Congress to regulate disease (as regulation of sick nontravelers may be necessary to regulate travelers). *Lopez*, 514 U.S. at 558.

196. In fact, none of the *NFIB* opinions mentions the second *Lopez* prong—regulation and protection of the instrumentalities of interstate commerce.

197. Criminal activity, even noneconomic criminal activity, has been regulated by Congress under its authority to regulate and protect the instrumentalities of interstate commerce. E.g., 18 U.S.C. § 32 (2012) (criminalizing intentional damage to, or destruction of, aircraft); id. § 659 (criminalizing theft of interstate shipment or baggage possessed by common carrier). The Supreme Court has cited these statutes as paradigmatic examples of Congress's authority to protect the instrumentalities of interstate commerce. E.g., Perez v. United States, 402 U.S. 146, 150 (1971) (holding Commerce Clause "reaches" § 32 as "instrumentalities of interstate commerce" and § 659 as "things in commerce").

198. See, e.g., Klein, supra note 184, at 584 (arguing, as currently interpreted, broad scope of instrumentalities prong "may permit extensive federal intrusion into areas where the Court considers states to be the primary authorities").

199. E.g., Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (codified as amended in scattered sections of 18 U.S.C. and 42 U.S.C.) (allowing for federal prosecution of kidnappers who make any use of instrumentalities of interstate commerce even if activity is exclusively intrastate). The constitutionality of some of the Adam Walsh Act's provisions was upheld in United States v. Comstock, 130 S. Ct. 1949, 1954 (2010). The plaintiffs did not issue a facial Commerce Clause challenge to the Act in its entirety in front of the Court, nor did the Court suggest that one would be viable. Id.; see also Michele Martinez Campbell, The Kids Are Online: The Internet, the Commerce Clause, and the Amended Federal Kidnapping Act, 14 U. Pa. J. Const. L. 215, 237 (2011) (referring to Adam Walsh Act's "inarguable status as a Lopez Second Category statute").

prison.[200] It is unclear if *NFIB*'s activity/inactivity distinction would be applied to rein in congressional power to protect the instrumentalities of commerce as well.[201] *NFIB* itself was not expressly concerned with the second prong of *Lopez*, but also did not explicitly limit its scope to the third prong of *Lopez*.[202] And lower courts have so far declined to extend *NFIB*'s holding to the first and second *Lopez* prongs.[203] If not expressly barred by *NFIB*, the instrumentalities prong would give courts an elegant and minimally invasive solution for upholding the PHSA.

CONCLUSION

Though the PHSA's quarantine provisions have survived unchallenged for nearly seven decades, the Court's recent turn in Commerce Clause interpretation has thrown into doubt the constitutionality of a once widely accepted federal power. One of many potential unforeseen consequences of the Court's recent decision in *NFIB*, and the activity/inactivity distinction drawn, is that federal quarantines may no longer rely on the Commerce Clause for constitutional legitimacy. Nevertheless, the precedents of *Lopez* and *Morrison*, as well as the ambiguity of *NFIB*'s scope and effect with respect to the Commerce Clause and Necessary and Proper Clause doctrines, suggest that the power can, and likely will, still be sustained in the event of a future constitutional challenge.

---

200. Sex Offender Registration and Notification Act (SORNA), Pub. L. No. 109-248, tit. I, 120 Stat. 590, 593–94 (2006) (codified as amended in scattered sections of 18 U.S.C. and 42 U.S.C.) (requiring convicted sex offenders to register with local authorities in every locality where offender lives, works, or studies). Since *NFIB*, several district courts, as well as the Ninth Circuit, have considered the constitutionality of SORNA's registration requirements. They are, so far, unanimous in upholding SORNA. E.g., United States v. Elk Shoulder, 738 F.3d 948, 959–60 (9th Cir. 2013); United States v. Cabrera-Gutierrez, 718 F.3d 873, 876–77 (9th Cir. 2013); United States v. Kiste, No. 3:12-CR-113 JD, 2013 WL 587556, at *6 (N.D. Ind. Feb. 13, 2013); United States v. Loudner, No. CR 12-30144-RAL, 2013 WL 357494, at *5 (D.S.D. Jan. 29, 2013); United States v. Lott, 912 F. Supp. 2d 146, 151–56 (D. Vt. 2012).

201. *NFIB* itself drew no distinctions between regulation under the *Lopez* prongs with respect to Congress's power to regulate inactivity, though the scope of the second prong was not itself contested in the case. Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB*), 132 S. Ct. 2566, 2591 (2012) (opinion of Roberts, C.J.) ("The Commerce Clause is not a general license to regulate an individual from cradle to grave, simply because he will predictably engage in particular transactions. Any police power to regulate individuals as such, as opposed to their activities, remains vested in the States.").

202. Id. at 2585 (noting Government argued for constitutionality of statute based on substantial effects upon interstate commerce).

203. *Cabrera-Gutierrez*, 718 F.3d at 876–77 (upholding registration requirements of SORNA because first and second prong justifications for SORNA were unaffected by *NFIB*); *Lott*, 912 F. Supp. 2d at 150 ("No portion of the Supreme Court's decision in [*NFIB*] casts doubt on the ability of Congress to regulate the channels or instrumentalities of interstate commerce.").