University of Miami Law Review

Volume 66
Number 1 *Volume 66 Number 1 (Fall 2011)*

Article 10

10-1-2001

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Fundamental Mismatch: The Improper Integration of Individual Liberty Rights into Commerce Clause Analysis of the Patient Protection and Affordable Care Act

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> At the beginning Chief Justice Marshall described the federal commerce power with a breadth never yet exceeded. . . . He made emphatic the embracing and penetrating nature of this power by warning that effective restraints on its exercise must proceed from political rather than from judicial processes.
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> —Justice Jackson[1]

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1. Wickard v. Filburn, 317 U.S. 111, 120 (1942) (discussing Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 194–95 (1824)).

I. INTRODUCTION

The Patient Protection and Affordable Care Act of 2010 (PPACA) was enacted on March 23, 2010.[2] Since then, the constitutionality of the PPACA has been the subject of conflicting rulings in the courts,[3] a source of major public criticism in the media,[4] and debate among legal academics.[5] Even though the PPACA faces challenges on a number of legal grounds,[6] the one drawing the greatest amount of public attention centers on the requirement—popularly known as the "individual mandate"—that most Americans purchase health insurance. The individual mandate has been challenged on the ground that Congress's power under Article I of the Constitution to regulate interstate commerce does not extend to requiring the purchase of health insurance. Given the immense political and practical significance of the PPACA, any Supreme Court resolution of this issue will almost certainly constitute a major event in the history of the Court's Commerce Clause jurisprudence.[7]

In particular, this note focuses on three distinctions that have played key roles in debates over the mandate's constitutionality. The first distinction—and most important—is one between activity and inactivity. Critics of the PPACA assert that Congress does not have power under the Commerce Clause to regulate "inactivity," and that the man-

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2. Sheryl Gay Stolberg & Robert Pear, *Obama Signs Health Care Overhaul Bill, with a Flourish*, N.Y. TIMES, Mar. 24, 2010, at A19.

3. *See, e.g.*, Florida *ex rel.* Bondi v. U.S. Dep't of Health & Human Servs., No. 3:10-CV-91-RV/EMT, 2011 WL 285683 (N.D. Fla. Jan. 31, 2011) (striking down the PPACA as unconstitutional at the District Court); Liberty Univ., Inc. v. Geithner, 753 F. Supp. 2d 611 (W.D. Va. 2010) (upholding the constitutionality of the PPACA); Virginia *ex rel.* Cuccinelli v. Sebelius, 728 F. Supp. 2d 768, 778–79 (E.D. Va. 2010) (striking down the PPACA because it forces individual into a market regulated by Congress).

4. *See, e.g.*, David M. Herszenhorn, *A Question of Fairness Among States*, N.Y. TIMES, Jan. 26, 2010, at A16.

5. *See, e.g.*, David B. Rivkin, Jr., Lee A. Casey & Jack M. Balkin, Debate, *A Healthy Debate: The Constitutionality of an Individual Mandate*, 158 U. PA. L. REV. PENNUMBRA 93 (2009), http://www.pennumbra.com/debates/pdfs/HealthyDebate.pdf (debating the constitutionality of the PPACA); Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate Is Unconstitutional*, 5 N.Y.U. J. L. & LIBERTY 581, 626–29 (2010) (concluding that the PPACA is unconstitutional as enacted). Additionally, there have also been legislative attempts to repeal the PPACA. *See, e.g.*, Revoke Excessive Policies that Encroach on American Liberties (REPEAL) Act of 2011, H.R. 145, 112th Cong. (2011).

6. *See, e.g.*, *Liberty Univ.*, 753 F. Supp. 2d at 641–44 (challenge under the Free Exercise Clause and Religious Freedom Restoration Act); Florida *ex rel.* McCollum v. U.S. Dep't of Health & Human Servs., 720 F. Supp. 2d 1120, 1156–61 (N.D. Fla. 2010) (challenge under the Tenth Amendment of coercion and commandeering); Florida *ex rel.* McCollum v. U.S. Dep't of Health & Human Servs., No. 3:10-CV-91-RV/EMT, 2010 U.S. Dist. LEXIS 55270, at *5 (N.D. Fla. Apr. 23, 2010) (challenge that "the Act is invalid because Obama was purportedly not born in the United States, so he is ineligible to be President and could not sign the bill into law").

7. *See infra* Part III.A.

date represents a regulation of such inactivity.[8] The second distinction is one between voluntary and involuntary participation in commerce. Critics of the individual mandate claim that Congress lacks the power to force people to enter the market and purchase a good or service.[9] The third distinction turns on the alleged presence of unique circumstances. In contrast to the first two, both sides of the debate invoke this distinction. Critics of the PPACA argue that the mandate is an unprecedented, unique exercise of congressional powers—imposing a requirement "simply for being alive"—and take this uniqueness to make the mandate questionable at root.[10] Supporters of the PPACA claim that Congress determined that regulation of the health care market poses unique regulatory challenges, which the mandate can resolve only if the judiciary exercises restraint and does not second-guess Congress.[11]

None of these distinctions, this note will argue, holds up under close analysis. More important, their introduction as key distinctions in the analysis of Congress's Commerce Clause power is unsupported by the text of the Constitution or existing case law. And most important, they represent an effort to import into the Commerce Clause a notion like the conception of individual liberty rights in the *Lochner* era.[12]

The Commerce Clause, however, is not about protecting individual liberty—at least not directly. Its central function is to maintain an appropriate balance between federal and state authority.[13] Maintaining that balance may *indirectly* protect individual liberty by countering the

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8. *See, e.g.*, Barnett, *supra* note 5; *Bondi*, 2011 WL 285683, at *21 (holding that the individual mandate is unconstitutional because it regulates inactivity).

9. *See, e.g.*, Virginia *ex rel.* Cuccinelli v. Sebelius, 728 F. Supp. 2d 768, 778–79 (E.D. Va. 2010) (holding that the individual mandate is unconstitutional because it forces individual into a market regulated by Congress).

10. *See, e.g.*, Brief of Petitioner-Appellee at 19, Florida *ex rel.* Bondi v. U.S. Dep't of Health & Human Servs., No. 3:10-CV-91-RV/EMT (11th Cir. May 4, 2011) ("Simply for being alive, an individual, by federal directive, must purchase qualifying health insurance. . . ."); *see also* Barnett, *supra* note 5, at 626–29 (claiming that the individual mandate is an unprecedented threat to individual liberty).

11. *See, e.g.*, Memorandum in Support of Defendants' Motion for Summary Judgment at 34, Florida *ex rel.* McCollum v. U.S. Dep't of Health & Human Servs., No. 3:10-CV-91-RV/EMT, 2010 WL 4564357, at *34 (N.D. Fla. Nov. 4, 2010) ("[I]t is the job of Congress, not the courts, to determine the appropriate response to an unprecedented economic crisis in the health care market that accounts for one sixth of the American economy. Once Congress has made that determination, *be it novel or not*, the Court must accord it substantial deference.") (emphasis added).

12. *See* Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 42 (2010) [hereinafter Balkin, *Commerce*] ("The *Lochner*-era Court viewed manufacturing and labor relations as traditional areas of state regulation.").

13. *See* United States v. Lopez, 514 U.S. 549, 574–79 (1995) (Kennedy, J., concurring) (discussing the "imprecision of content-based boundaries" in finding the "federal and state balance").

potential tyranny of an overly centralized government.[14] It may also, as Justice Kennedy claims, promote democracy by ensuring political accountability through demarcation of federal and state authority.[15]

Importing the protection of liberty rights directly into the Commerce Clause is another matter entirely, however. It would lead to a grave mismatch between the Commerce Clause and its functions. Suppose, for example, that the PPACA included a provision outlawing the sale of books critical of the new health care plan. Because there is a national market for the purchase and sale of books, its regulation would plainly fall within Congress's Commerce Clause power. Holding otherwise out of a concern to protect individuals from federally imposed censorship would leave them unprotected from state-imposed censorship. The true constitutional barrier to any such requirement would lie in the First Amendment, which applies to states as well as the federal government.[16]

Similarly, if a mandate to buy and eat broccoli represents the kind of threat to individual liberty that a Florida District Court believed it to pose,[17] the constitutionality of the mandate should not turn on whether it is the federal or the state government embracing the role of the "nanny state," to use a term favored by libertarians.[18] A mandate to buy goods or services would, in this view, be equally threatening if enacted by a state government—as Massachusetts did in the case of health insurance.[19] Yet unless it is radically reinterpreted, the Commerce Clause

14. The fundamental concern of the Commerce Clause is to maintain the appropriate allocation of power between the federal government and the state. *See id.* at 574 (discussing the "subject of the federal and state balance").

15. *Id.* at 576 ("The theory that two governments accord more liberty than one requires for its realization two distinct and discernable lines of political accountability: one between the citizens and the Federal Government; the second between the citizens and the States.").

16. *See, e.g.*, 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 516 (1996) (noting that the First Amendment is made applicable to the States by the Due Process Clause of the Fourteenth Amendment).

17. The United States District Court for the Northern District of Florida drew a comparison between a mandate to buy and eat broccoli and the PPACA's individual mandate to maintain minimum health insurance coverage. *See* Florida *ex rel.* Bondi v. U.S. Dep't of Health & Human Servs., No. 3:10-CV-91-RV/EMT, 2011 WL 285683, at *24 (N.D. Fla. Jan. 31, 2011) (questioning whether "Congress could require that people buy and consume broccoli at regular intervals"); *id.* (noting that such a requirement could pose "personal liberty" issues (quoting Dean Chemerinsky)).

18. *See, e.g.*, David Bergland, *Libertarianism, Natural Rights and the Constitution: A Commentary on Recent Libertarian Literature*, 44 CLEV. ST. L. REV. 499, 505 (1996).

19. In 2008, Massachusetts enacted a statute imposing a required minimum level of health insurance coverage. *See* MASS. STAT. TIT. 16 ch. 111M, § 2 (2008) (requiring individuals over the age of eighteen to "obtain and maintain creditable coverage" subject to certain exemptions). Both the PPACA and the Massachusetts statute enforce the requirement by imposing a penalty on individuals who fail to meet the required amount of health insurance coverage, which is imposed through taxes. *Compare* I.R.C. § 5000A(a) (West 2010) (imposing a penalty through an

would have nothing to say about a state mandate, for it limits the powers of Congress—not the states.[20]

In short, if there is any constitutional impediment to an individual mandate to buy health insurance, it arises from some substantive due process right not to do so. As this note will show, the case for such a right is far from clear. What is incontestable, however, is that analysis of that question is not aided by attempts to amalgamate it with the core federalism concerns of the Commerce Clause.[21]

Part II of this note explains key provisions of the PPACA and the legal challenges it faces. Part III analyzes the constitutionality of the PPACA under the Commerce Clause by discussing relevant Commerce Clause jurisprudence, emphasizing the importance of the current challenges to the PPACA, and then explaining why the new distinctions in the Commerce Clause challenges to the PPACA are improper. Part IV explains the misconceived new distinctions as exemplifying the liberty claim underlying the constitutional challenges to the PPACA. This note concludes that under well-settled Commerce Clause doctrine governing the balance between federal and state power, the federal power surely encompasses the regulation of a multi-billion dollar market in private health insurance. Thus, the individual mandate provisions of the PPACA should be upheld.

II. THE PPACA AND THE LEGAL CHALLENGES IT FACES

The Patient Protection and Affordable Care Act of 2010 has been

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individual's tax return), *with* MASS. STAT. TIT. 16 ch. 111M, § 2 (2008) (imposing a penalty as a loss of personal tax exemption).

20. The Dormant Commerce Clause—as inferred by the Court from the power granted to Congress in Article I—does limit powers reserved to the states, but there is no reason to believe a state mandate would fail under the Court's balancing test. *See* Exxon Corp. v. Maryland, 437 U.S. 117, 125–29 (1978) (upholding a facially neutral state law). In any event, Congress has the power to authorize any state law found by the Court to violate the Dormant Commerce Clause, so any conceivable judicial invalidation of a state law mandate would not provide any liberty protection. *See* Quill Corp. v. North Dakota, 504 U.S. 298, 318 (1992). Significantly, in setting out limits to state taxation of interstate commerce, the Court has emphasized that rights protection (in the form of due process) should be kept separate from federalism concerns. *See id.* at 312 ("Due process centrally concerns the fundamental fairness of governmental activity. . . . In contrast, the Commerce Clause and its nexus requirement are informed not so much by concerns about fairness for the individual defendant as by structural concerns about the effects of state regulation on the national economy."). Even though it would be logically possible to do so, it would be odd to import individual rights into the Commerce Clause in determining the scope of *Congress's* power to regulate interstate commerce, while maintaining a clear distinction between them when determining the scope of *state* power to regulate interstate commerce.

21. *See* Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1389–90 (1987) (noting that the "Constitution contains two general types of provisions; the first class is structural and was designed to divide powers between state and federal government . . . . The second class was designed to protect individual rights against wrongdoing by government.").

called "the most expansive social legislation enacted in decades."[22] The statute is enormously complex, totaling nearly 2,700 pages.[23] The provision that has garnered the most intense political opposition is the requirement that individuals maintain a minimum level of health insurance coverage.[24] This provision has also been a key focus of the legal challenges to the PPACA.[25]

The PPACA was first introduced in the House on September 17, 2009.[26] In enacting the PPACA, Congress considered the large impact that the current health care system had on the economy. For example, Congress specifically found that in 2009, health insurance and health care services composed 17.6 percent of the national economy, and that nearly half of all personal bankruptcies were the result of medical expenses.[27] Additionally, Congress estimated that health care reform would save the federal budget billions of dollars.[28]

On March 23, 2010, President Obama signed the Patient Protection and Affordable Care Act of 2010 into law.[29] As noted, the "requirement to maintain minimum essential coverage," more often referred to as the

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22. Stolberg & Pear, *supra* note 2.

23. *See, e.g.*, Florida *ex rel.* McCollum v. U.S. Dep't of Health & Human Servs., 716 F. Supp. 2d. 1120, 1128 (noting that "[a]t nearly 2,700 pages, the Act is very lengthy and includes many provisions").

24. *See* Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, § 1501, 124 Stat. 119 (2010).

25. *See, e.g.*, Thomas More Law Ctr. v. Obama, 720 F. Supp. 2d 882, 890–91 (E.D. Mich. 2010), *aff'd*, No. 10-2388, 2011 U.S. App. LEXIS 13265 (6th Cir. June 29, 2011) (discussing the individual mandate); Florida *ex rel.* Bondi v. U.S. Dep't of Health & Human Servs., No. 3:10-CV-91-RV/EMT, 2011 WL 285683, at *7–29 (N.D. Fla. Jan. 31, 2011) (same).

26. *See* H.R. 3590, 111th Cong. (1st Sess. 2010).

27. *See* 42 U.S.C.A § 18091(a)(2) (West 2010).

28. *See, e.g.*, Douglas W. Elmendorf, *Preliminary Analysis of the Affordable Health Care for America Act as Introduced in the House of Representatives on October 29*, CONG. BUDGET OFFICE DIRS. BLOG (Oct. 29, 2009, 4:39 PM), http://cboblog.cbo.gov/?m=200910 (noting that "enacting [this plan for health care reform] would result in a net reduction in federal budget deficits of $104 billion over the 2010–2019 period").

29. Seven days after its enactment, the PPACA was amended. *See* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), *amended by* Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010). However, this amendment did not materially change who is affected by the PPACA or the mechanics of how it functions. A vast majority of the changes only affected the amounts of money and dates applicable to a provision. *See, e.g.*, Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029, 1030–32 (2010) (changing the amount of the premium tax credits); *id.* 124 Stat. at 1033 (changing the numbers used for calculating the penalties for the employer responsibility requirements); *id.* 124 Stat. at 1034–36 (replacing the term "modified gross income" with "adjusted gross income"); *id.* 124 Stat. at 1047 (changing the applicable years and ratio amount used to calculate savings from limits on MA Plan administrative costs); *id.* 124 Stat. at 1201 (changing the amount of the increase in federal funding for states' medical assistance programs); *id.* 124 Stat. at 1075 (adding new date restrictions to the definition of "graduate" for the termination of FFEL PLUS loans).

individual mandate,[30] is a key provision of the PPACA.[31] The general idea is to require nearly everyone to have health insurance coverage. Specifically, "applicable individuals" are required to maintain "minimum essential coverage."[32]

The scope of the requirement is not quite as universal as first appears for two reasons. First, not all persons are encompassed within the term "applicable individuals." That term excludes those who have a religious-based objection to coverage, those who are covered by a "health care sharing ministry," individuals not lawfully present in the United States, and prisoners.[33] Second, people who fall within the term "applicable individuals" are nevertheless exempt from the penalty if they cannot afford coverage, fall below a filing threshold,[34] belong to an Indian tribe, or go without coverage for only a few months.[35] Everyone else—that is, all non-exempt applicable individuals—must maintain "minimum essential coverage." This requirement is satisfied by coverage through select government-sponsored programs, employer-sponsored plans, plans in the individual market, grandfathered health plans, and "other coverage."[36]

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30. *See, e.g.*, Virginia *ex rel.* Cuccinelli v. Sebelius, 728 F. Supp. 2d 768, 786 (E.D. Va. 2010) (using the term "individual mandate"). This term has been the source of some controversy. *See infra* note 36.

31. *See* Pub. L. No. 111-148, § 1501, 124 Stat. 119 (2010).

32. I.R.C. § 5000A(a) (West 2010) ("An applicable individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is *covered* under minimum essential *coverage* for such month.") (emphasis added). An "applicable individual" who does not possess the minimum essential coverage must pay a "penalty." *Id.*

33. *Id.* § 5000A(d).

34. *See* Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, 124 Stat. 119, 247 (2010), *amended by* Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029, 1032 (2010) (striking "under 100 percent of poverty line" and inserting "below filing threshold").

35. I.R.C. § 5000A(e).

36. *Id.* § 5000A(d)–(e). Some commentators have objected to using the term "individual mandate" on the ground that it overstates the scope of the mandate. *See* Balkin, *Commerce*, *supra* note 12, at 45 (calling "individual mandate" misleading because of those who are exempted from the requirement); *see also* Gayland O. Hethcoat II, Note, *Plaintiff Standing in* Florida ex rel. Bondi *and the Challenges to the Patient Protection and Affordable Care Act*, 65 U. MIAMI. L. REV. 1241, 1246 n.26 (2011) (describing the "individual mandate" as "overbroad"). For example, Professor Balkin states that "[t]he mandate would not apply to dependents, persons receiving Medicare or Medicaid, military families, persons living overseas, persons with religious objections, or persons who already get health insurance from their employers under a qualified plan." Jack M. Balkin, *The Constitutionality of the Individual Mandate for Health Insurance*, N. ENG. J. MED., Jan. 13, 2010, http://www.nejm.org/doi/pdf/10.1056/NEJMp1000087?ssource=hcrc [hereinafter Balkin, *Individual Mandate*]. This objection seems misplaced. For one thing, it is irrelevant. A mandate that applied to every individual would still fall within Congress's Commerce Clause powers. To illustrate, Congress could, if it chose, abolish Medicare, Medicaid, and employer-based health insurance plans, and then require all individuals to purchase individual plans. The objection also reflects a misreading of the statute. Individuals who are covered by

In approving the PPACA, Congress found that "the requirement is essential to creating effective health insurance markets."[37] Indeed, Congress explicitly determined that ". . . [i]n the absence of the requirement, some individuals would make an economic and financial decision to forgo health insurance coverage and attempt to self-insure, which increases financial risks to households and medical providers."[38]

Reasonable persons might disagree over how necessary the mandate is in fact to the success of health care reform. The Massachusetts health care reform provides some evidence that a mandate was effective in broadening participation in private health insurance, which can help reduce its cost.[39] However, there is a concern that the fragmented nature of the national health insurance market may undercut the efficacy of the individual mandate in helping to keep health care costs down.[40]

Moreover, the best way to address the many problems facing the health care industry is unclear and has been the subject of debate for decades.[41] Not surprisingly, the PPACA itself was hotly contested in Congress.[42] It took twenty-five days for the bill to pass the Senate by a strict 60–39 party-line vote.[43] Four months later, even with unanimous

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employer-based health care plans, for example, are subject to the mandate; it is just that their enrollment in the plan satisfies the requirement of "minimum essential coverage." *See* I.R.C. § 5000A(f).

37. *See* 42 U.S.C.A. § 18091(a)(2)(G) (West 2010). Additionally, the PPACA lacks a severability provision, which could result in the entire Act being invalidated if the individual mandate is found unconstitutional. *See* Virginia *ex rel.* Cuccinelli v. Sebelius, 728 F. Supp. 2d 768, 790 (E.D. Va. 2010) (finding that the PPACA lacked a severability provision, but still severed the individual mandate based on case law). *But see* Florida *ex rel.* Bondi v. U.S. Dep't of Health & Human Servs., No. 3:10-CV-91-RV/EMT, 2011 WL 285683, at *39 (N.D. Fla. Jan. 31, 2011) (finding that because "the individual mandate and the remaining provisions are all inextricably bound together," the entire Act must be struck down as unconstitutional after holding the individual mandate unconstitutional). The issue of severability is beyond the scope of this note, but it is important to be cognizant of the issue because it may affect the impact of the inevitable Supreme Court decision.

38. 42 U.S.C.A. § 18091(a)(2).

39. *See* Amitabh Chandra et al., *The Importance of the Individual Mandate—Evidence from Massachusetts*, N. ENG. J. MED., Jan. 12, 2011, http://healthpolicyandreform.nejm.org/?p=13572&query=home (finding that "the mandate had a causal role in improving risk selection").

40. *See* Allison K. Hoffman, *Oil and Water: Mixing Individual Mandates, Fragmented Markets, and Health Reform*, 36 AM. J.L. & MED. 7, 48–49 (2010). Further, it is not certain whether the mandate will work as expected. *Id.* at 76–77.

41. *See, e.g.*, Gwen Ifill, *New Health Plan, Old Abortion Fight*, N.Y. TIMES, Oct. 4, 1993, at A14 (discussing the inability to reach a consensus opinion on President Clinton's health care plan); Robert Pear, *Bipartisan Medicare Panel to Call for More Spending*, N.Y. TIMES, Jan. 21, 2002, at A5 (discussing the inability to reach a consensus opinion on President Bush's spending on health care).

42. *See* Robert Pear & David M. Herszenhorn, *Key Democrat Reports Progress in Health Bill Talks*, N.Y. TIMES, Dec. 19, 2009, at A15 (discussing the difficulty in reaching an agreement in the Senate as "Republicans have said they will use every tool to block the bill").

43. Robert Pear, *Senate Passes Health Care Overhaul on Party-Line Vote*, N.Y. TIMES, Dec. 25, 2009, at A1.

Republican opposition, the bill passed the House by a vote of 219–212.[44] Instead of ceasing after President Obama signed the PPACA into law, much of the legislative opposition shifted toward repeal attempts.[45] On January 19, 2011, the House of Representatives approved a bill repealing the PPACA;[46] the Senate subsequently rejected the repeal effort.[47]

The very fact of this controversy should play a central role in any analysis of the constitutionality of the PPACA. The question for the Court is not whether in fact the PPACA will improve health care, or whether the individual mandate is necessary to health care reform, but is whether Congress might rationally believe so—which it certainly could. Only this proper framing of the question before the Court ensures that fundamental—and controversial—questions of economic and social policy are resolved through the political process rather than by the courts.

At least fourteen legal challenges to the PPACA have been filed, with some cases pending in multiple federal appellate courts.[48] Three major issues predominate in these challenges. The first issue is whether the individuals and the States that have challenged the constitutionality of the Act have standing to do so.[49] The second is whether the individual mandate violates the Commerce Clause or other constitutional provisions.[50] The third issue is whether the PPACA fundamentally changes the Medicaid program in a manner that reaches the unconstitutional level of "coercion and commandeering" of the states—and so violates the

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44. Robert Pear & David M. Herszenhorn, *Obama Hails Vote on Health Care as Answering 'the Call of History,'* N.Y. TIMES, Mar. 22, 2010, at A1.

45. *See* David M. Herszenhorn & Robert Pear, *House Votes for Repeal of Health Law*, N.Y. TIMES, Jan. 20, 2011, at A1.

46. *See id.*

47. David M. Herszenhorn, *Senate Rejects Repeal of Health Care Law*, N.Y. TIMES, Feb. 3, 2011, at A20.

48. *See* Bradley W. Joondeph, *ACA Litigation Blog: The First Bit of ACA Litigation to Reach the Supreme Court*, ACA LITIG. BLOG http://acalitigationblog.blogspot.com, (last visited May 21, 2011) (discussing the legal challenges to the PPACA before the Third, Fourth, Ninth, and Eleventh Circuit Courts of Appeals among others).

49. *See, e.g.*, N.J. Physicians, Inc. v. Obama, 757 F. Supp. 2d 502 (D.N.J. 2010) (dismissing the suit for lack of standing); Baldwin v. Sebelius, No. 10CV1033-DMS(WMC), 2010 U.S. Dist. LEXIS 89192, at *13–14 (S.D. Cal. Aug. 27, 2010) (dismissing the suit for lack of standing). One commentator argues that the issue of standing could fundamentally affect the shape of the challenge within the Eleventh Circuit. *See generally* Hethcoat, *supra* note 36.

50. *See, e.g.*, Florida *ex rel.* Bondi v. U.S. Dep't of Health & Human Servs., No. 3:10-CV-91-RV/EMT, 2011 WL 285683, at *7–29 (N.D. Fla. Jan. 31, 2011) (accepting plaintiffs' challenges under the Commerce Clause); Liberty Univ., Inc. v. Geithner, 753 F. Supp. 2d 611, 641–44 (W.D. Va. 2010) (rejecting plaintiffs' challenges under the Free Exercise Clause and Religious Freedom Restoration Act); Florida *ex rel.* McCollum v. U.S. Dep't of Health & Human Servs., No. 3:10-CV-91-RV/EMT, 2010 U.S. Dist. LEXIS 55270, at *5 (N.D. Fla. Apr. 23, 2010) (rejecting intervening plaintiffs' challenge that the PPACA is "invalid because Obama was purportedly not born in the United States, so he is ineligible to be President and could not sign the bill into law").

Tenth Amendment.[51]

III. THE CONSTITUTIONALITY OF THE INDIVIDUAL MANDATE UNDER THE COMMERCE CLAUSE

The PPACA is poised to become the subject of the next landmark case in a long line of Supreme Court cases delineating the scope of the Commerce Clause. As a brief examination of the history of these cases shows, the deference the Court has given Congress under the Commerce Clause has varied considerably since *Gibbons v. Ogden*,[52] decided almost two centuries ago. In resolving the challenges to the PPACA, the central question for the Court will be whether it decisively returns Commerce Clause jurisprudence to an earlier, pre-New Deal era in which the Court significantly limited Congress's regulatory powers, or whether it affirms the leading role of Congress in determining the scope of the Commerce Clause.

A. *Commerce Clause Jurisprudence*

Article I, Section 8 of the Constitution gives Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[53] Further, Congress has the power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . . ."[54] The jurisprudence of what "commerce" truly is and thus the extent of Congress's power under the Commerce Clause can be broken into roughly four different eras.[55]

The Court took a fairly deferential stance in evaluating the constitutionality of Congress's exercise of its Commerce Clause powers throughout the first era. Writing for the Court in *Gibbons v. Ogden*, Chief Justice John Marshall held that Congress had the power to regulate a steamboat service operating between New Jersey and New York under the Commerce Clause.[56] He expansively defined commerce by rejecting the claim that commerce is limited "to traffic, to buying and selling, or the interchange of commodities . . . ."[57] Justice Marshall reasoned that:

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51. Florida *ex rel.* McCollum v. U.S. Dep't of Health & Human Servs., 720 F. Supp. 2d 1120, 1156–61 (N.D. Fla. 2010) (allowing a challenge of "coercion and commandeering" to initially survive a motion to dismiss); *cf. Liberty Univ.*, 753 F. Supp. 2d at 635–37 (rejecting a challenge of unlawful coercion).

52. 22 U.S. (9 Wheat.) 1 (1824).

53. U.S. CONST. art. I, § 8, cl. 3.

54. U.S. CONST. art. I, § 8, cl. 18.

55. For a sharply different account, see Epstein, *supra* note 21, at 1399–1454.

56. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 221–22 (1824).

57. *Id.* at 189.

> This would restrict a general term, applicable to many objects, to one of its significations . . . it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse.[58]

With the rise of industrialization and greater federal regulation in the late nineteenth century, the Court began to show much less deference to Congress. To be sure, it did not always strike down Congress's regulations under the Commerce Clause.[59] In general, however, it narrowly interpreted the scope of Congress's power under the Commerce Clause.[60] In particular, it drew several key distinctions between what Congress could regulate and what it could not. First, "commerce" could be regulated, but "manufacturing" or "mining" could not.[61] Second, local activities that had only an "indirect"—rather than a "direct"—effect on interstate commerce could not be regulated.[62] Third, activities in the "stream of commerce" could be regulated even if they were local,[63] but activities outside of the stream of commerce could not.[64] Last, regulations of interstate commerce could be invalidated if they were a "pretext" for an illicit extension of congressional authority to local matters.[65]

The third era commenced in the 1930s, as Congress resorted to expanding the use of federal power to combat the Great Depression. Starting with its decision in *National Labor Relations Board v. Jones & Laughlin Steel Corp.*,[66] the Court's previous hostility to economic regulation and its apparent preference for a laissez-faire economy eroded. With the Court's return to Chief Justice Marshall's approach in *Gibbons v. Ogden*, an expansive view of Congress's Commerce Clause power

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58. *Id.*

59. *See, e.g.*, Champion v. Ames, 188 U.S. 321, 330 (1903) (upholding federal ban on interstate sale of foreign lottery tickets).

60. *See, e.g.*, A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 551 (1935) (holding that Congress cannot regulate chicken slaughterhouses because they only indirectly affect interstate commerce).

61. *See, e.g.*, United States v. E.C. Knight Co., 156 U.S. 1, 17 (1895) (holding that Congress cannot stop a monopoly in the sugar refining industry because manufacturing only has an indirect effect on commerce); Carter v. Carter Coal Co., 298 U.S. 238, 303–04 (1936) (holding that Congress cannot regulate mining because it is "purely local in character").

62. *See, e.g.*, *Schechter*, 295 U.S. at 551 (holding that Congress cannot regulate chicken slaughterhouses because they only indirectly affect interstate commerce).

63. *See, e.g.*, Stafford v. Wallace, 258 U.S. 495, 518–19 (1922) (holding that Congress can regulate stockyards and meat-packing because of their effects on the "stream of commerce").

64. *See, e.g.*, *Schechter*, 295 U.S. at 551 (holding that Congress cannot regulate chicken slaughterhouses because they are not within the "stream of commerce").

65. *See, e.g.*, Hammer v. Dagenhart, 247 U.S. 251, 271–72 (1918) (holding that Congress cannot regulate child labor because its aim is to regulate manufacturing).

66. 301 U.S. 1 (1937) (upholding the National Labor Relations Act of 1935).

dominated the case law for the next sixty years.[67] The categorical distinctions the Court drew in the second era were largely replaced with a deferential approach.[68]

Wickard v. Filburn[69] epitomizes the Court's Commerce Clause analysis during the third era. In *Wickard*, the Supreme Court upheld a federal statute penalizing a wheat farmer for producing more wheat than was permitted under his individual allotment.[70] The farmer asserted that Congress had no power to regulate wheat produced and consumed on his farm without ever being brought to the market.[71] Noting that the Agricultural Adjustment Act's goal was to limit wheat production in order to drive up prices, the Court upheld the penalty on the ground that Congress might rationally conclude that the aggregate effect of the production of wheat for consumption on the farm could bring wheat prices down, thus undermining the efficacy of the federal price stabilization scheme.[72] Justice Jackson's opinion explained that "[t]he effect of the statute before us is to restrict . . . the extent . . . to which one may forestall resort to the market by producing to meet his own needs."[73] As the Court expressly stated, the statute effectively mandated that farmers purchase wheat for in-farm consumption instead of growing it at home.[74]

In 1995, the Court shifted views once again and somewhat narrowed the scope of Congress's power under the Commerce Clause. In *United States v. Lopez*,[75] the first case in the fourth—and current—era of the Supreme Court's interpretation of the Commerce Clause, the Court struck down a federal statute that criminalized possession of a gun within a school zone. Possession of a gun is not "commerce" or an "economic" act, the Court ruled, and so the Court declined to uphold the statute because of possible aggregate effects on the economy of possessing guns in local school zones. The adverse economic effects were so far attenuated that the statute ultimately could not be said to regulate an

67. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

68. Not one federal law was held unconstitutional as exceeding the scope of Congress's commerce power during the third era. *See, e.g.*, *Jones & Laughlin Steel Corp.*, 301 U.S. at 49 (upholding the National Labor Relations Act of 1935); United States v. Darby, 312 U.S. 100, 126 (1941) (upholding the Fair Labor Standards Act); Wickard v. Filburn, 317 U.S. 111, 127–28 (1942) (upholding the Agricultural Adjustment Act of 1938); Perez v. United States, 402 U.S. 146, 156–57 (1971) (upholding the Consumer Credit Protection Act).

69. 317 U.S. 111 (1942).

70. *Id.* at 127–28.

71. Both the growing and the consumption of wheat occurred entirely within the state on the farmer's own land.

72. *Id.* at 127–29.

73. *Id.* at 127.

74. *Id.* at 128–29.

75. 514 U.S. 549 (1995).

economic activity substantially affecting interstate commerce.[76] The majority in *Lopez* also indicated that legislation regulating conduct "traditionally" left to the states is very likely to be struck down under the Court's Commerce Clause analysis.[77]

Five years later, in *United States v. Morrison*,[78] the Court held that a federal statute providing a civil remedy for gender-motivated violence was beyond Congress's Commerce Clause authority. The regulation's link to economic activity was based on speculative assumptions.[79] The Court strongly emphasized that historically, intrastate regulations enacted under the Commerce Clause were upheld only where the activity was economic in nature, though the Court refrained from definitively adopting "a categorical rule against aggregating the effects of any noneconomic activity."[80]

Lopez and *Morrison* seemed to signal a return to the categorical approach of the second era, with the adoption of a distinction between "economic" and "noneconomic" activity. The Court also placed weight in both cases on the claim that the regulations impinged on areas "traditionally" left to state regulation.[81] These included family law, education, and crime.[82]

In *Gonzales v. Raich*,[83] however, the Court signaled limits to its new, more vigorous scrutiny of federal legislation under the Commerce Clause. The Court upheld a federal statute outlawing the cultivation of marijuana grown for home-consumption.[84] The growing of medical marijuana in one's backyard, purely for personal consumption, fell within Congress's Commerce Clause authority. Congress, the Court held, could rationally conclude that it needed to reach even seemingly local noneconomic activity because of California's exemptions to the prohibition would "have a significant impact on both the supply and demand sides of the market for marijuana."[85] Justice Stevens's opinion for the *Raich* Court once again demonstrated the broad reach of the

76. *Id.*

77. *Id.* at 611 ("The Court does not assert (and could not plausibly maintain) that the commerce power is wholly devoid of congressional authority to speak on any subject of traditional state concern; but if congressional action is not forbidden absolutely when it touches such a subject, it will stand or fall depending on the Court's view of the strength of the legislation's commercial justification.").

78. 529 U.S. 598 (2000).

79. *Id.* at 615.

80. *Id.* at 613 (citing *Lopez*, 514 U.S. at 559–60).

81. *See* United States v. Lopez, 514 U.S. 549, 577 (1995) (Kennedy, J., concurring) (assessing the regulation of "entire areas of traditional state concern").

82. *See Morrison*, 529 U.S. at 615–16; *Lopez*, 514 U.S. at 563–64 (majority opinion).

83. 545 U.S. 1 (2005).

84. *Id.*

85. *Id.* at 30–33.

Commerce Clause. Indeed, *Wickard* and *Raich* together represent the current outer limits of the broad interpretation of Congress's Commerce Clause power.[86]

B. *The Importance of the Commerce Clause Challenges*

Of all the challenges to the PPACA, the Commerce Clause challenges to the individual mandate are of greatest doctrinal importance. As noted, the Court demonstrated a more active role in enforcing federalism limits on Congress's power since 1995.[87] The challenges to the individual mandate will likely dictate the current federalism limits placed on Congress's power. A decision to strike down the statute or a key provision—the individual mandate—would place the Supreme Court in the position of invalidating a major policy initiative.[88] While the Gun-Free School Zones Act,[89] the Brady Handgun Violence Prevention Act,[90] and the Controlled Substances Act[91] are by no means trivial, none compares in importance and scale to the PPACA. This legislation represents a comprehensive effort to reform an industry of immense national importance because the health care industry is vital to the economy.[92] The United States economy loses $207 billion annually "because of the poorer health and shorter lifespan of the uninsured."[93] To remedy the national problems of rising health care costs, Congress enacted the PPACA with the prediction that it would "result in a net reduction in federal budget deficits of $104,000,000,000 over the 2010–2019 period."[94]

Invalidating the PPACA or any key portion of it could prevent these changes and have a lasting impact on the future of health care and the economy in the United States. In fact, doing so would have more practical significance even than *A.L.A. Schechter Poultry Corp. v.*

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86. Virginia *ex rel.* Cuccinelli v. Sebelius, 728 F. Supp. 2d 768, 780 (E.D. Va. 2010) (noting that "*Wickard* and *Gonzales* . . . staked out the outer boundaries of Commerce Clause power").

87. *See, e.g.*, United States v. Lopez, 514 U.S. 549 (1995) (striking down the federal statute); Printz v. United States, 521 U.S. 898 (1997) (striking down the federal statute). *But see Raich*, 545 U.S. at 41–42 (upholding the federal statute).

88. David Leonhardt, *A Piece Missing in the Reform*, N.Y. TIMES, Jan. 13, 2010, at B1 (calling the PPACA "the most ambitious domestic policy legislation in decades").

89. *See Lopez*, 514 U.S. at 551.

90. *See Printz*, 521 U.S. at 902.

91. *See Raich*, 545 U.S. at 8.

92. 42 U.S.C.A. § 18091(a)(2)(B) (West 2010) ("National health spending is projected to increase from $2,500,000,000,000, or 17.6 percent of the economy, in 2009 to $4,700,000,000,000 in 2019.").

93. 42 U.S.C.A. § 18091(a)(2)(E).

94. *See* Elmendorf, *supra* note 28.

United States,[95] one of the cases that triggered President Roosevelt's "court-packing" plan.[96] The National Industrial Recovery Act was to expire in a few short weeks after the decision was rendered.[97] In contrast, most of the provisions within the PPACA do not even come into effect until 2014.[98] Invalidating the PPACA could render stillborn a major, comprehensive reform enacted by Congress.

The political impact might be lessened if, at the time the Supreme Court rules, public opinion shifts decisively against the PPACA. Only five months before the bill passed the House,[99] public approval of President Obama's health care plan dropped below fifty percent for the first time since beginning his presidency.[100] Approval of President Obama, a clear advocate for the health care reform, declined from December 2009 until December 2010, but has been steadily increasing in 2011.[101] Yet even if public opinion shifted decisively against the PPACA, its popularity might grow as it takes effect.[102] A Supreme Court decision striking down the mandate or the entire PPACA before its primary features take effect in 2014 would mean that the statute's support would never be fully tested, in the eyes of its supporters. Further, the likely coincidence of a pending Supreme Court decision on the PPACA and the 2012 presidential election will certainly exacerbate the political impact of the PPACA. For all of these reasons, the political significance of a decision

95. 295 U.S. 495 (1935) (holding that key portions of the National Industrial Recovery Act were unconstitutional).

96. *See* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 203 (6th ed. 2009).

97. *See id.* at 202 (noting that the Act "was due to expire a few weeks after Schechter was decided, and there had been no effort to extend its life even before the decision").

98. *See, e.g.*, 42 U.S.C.A. § 18091(a)(2) (West 2010) (stating that waiver for state innovation with respect to health insurance coverage requirements begin in 2014); *id.* § 18091(c)(1)(A) (stating that the essential health care benefits for cost sharing and their corresponding requirements begin in 2014); I.R.C. § 5000A(c)(2) (West 2010) (stating that the calculations for the monthly penalty amounts begin in 2014).

99. *See* Pear & Herszenhorn, *supra* note 44.

100. Dan Balz & Jon Cohen, *Approval Ratings Drop for Obama on Health Care, Other Issues*, WASH. POST, July 20, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/07/19/AR2009071902176.html. However, these measurements are not necessarily indicative of the public opinion on the PPACA before the expected Supreme Court review.

101. *See* Chris Weigant, *A Deep Dive into President Obama's Public Approval Ratings*, BUS. INSIDER (Mar. 3, 2011, 10:02 AM), http://www.businessinsider.com/a-deep-dive-into-president-obamas-public-approval-ratings-2011-3.

102. Supporters of the PPACA argue that as its features take effect, the public will have a better understanding of what changes the health care reform makes, which will consequently increase its popularity. *See* Robert Pear, *Making Exceptions in Obama's Health Care Act Draws Kudos, and Criticism*, N.Y. TIMES, Mar. 21, 2011, at A21. Senator Max Baucus, Democrat of Montana, and also a legislator who helped write the law as chairman of the Finance Committee, commented on some of the disapproval of the PPACA, saying "[a] lot of Americans just don't know about some of the benefits." *Id.*

invalidating the PPACA on Commerce Clause grounds would be immense.

Some commentators have suggested that the Supreme Court may rule on the PPACA's constitutionality under Congress's taxing power.[103] District Court decisions have already addressed this possibility.[104] A ruling under Congress's taxing power might be attractive to the Supreme Court as a way of avoiding a sharp confrontation with the political branches over the Commerce Clause. Briefly, the argument is that that the PPACA is valid under Congress's power to impose taxes for the general welfare.[105] This is a broad power, which gives Congress the authority to act in situations where it might otherwise lack authority under the Commerce Clause.[106]

One argument against upholding the mandate as a tax is that the statutory provisions creating the individual mandate explicitly use the term "penalty" rather than "tax."[107] When assessing the constitutionality of an exercise of Congress's taxing power, however, the Court should heed its own admonition that "[i]nquiry into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it is beyond the competency of the courts."[108] Interestingly, the argument has been rejected by most courts to consider this issue.[109]

An analysis of the taxing power is beyond the scope of this note.[110]

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103. *See, e.g.*, Balkin, *Commerce*, *supra* note 12, at 45 (claiming that the individual mandate is a valid tax); Edward D. Kleinbard, *Constitutional Kreplach*, 128 TAX NOTES 755 (2010) (claiming that the penalty to enforce the individual mandate is a valid use of Congress's taxing power); Balkin, *Individual Mandate*, *supra* note 36 (claiming that "[t]he individual mandate is a tax" and valid under Congress's taxing power). *But see* Barnett, *supra* note 5, at 609–10 (claiming that the individual mandate "cannot possibly be construed as a tax").

104. *See* Virginia *ex rel.* Cuccinelli v. Sebelius, 728 F. Supp. 2d 768, 778–79 (E.D. Va. 2010) (rejecting the argument that the individual mandate is a valid use of Congress's taxing power).

105. U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the . . . general Welfare.").

106. *See Cuccinelli*, 728 F. Supp. 2d at 783 (noting that "[t]he Secretary also reiterates that Congress may use its power under the tax clause even for purposes that would exceed its power under other provisions of Article I").

107. *See* Barnett, *supra* note 5, at 610 (2010) ("[T]he penalty does not even purport to be a tax. It is called a 'penalty.'"). *See generally* I.R.C. § 5000A (West 2010) (describing the amount an applicable individual failing to meet the required minimum level of health insurance has to pay as a "penalty").

108. Sonzinsky v. United States, 300 U.S. 506, 513–14 (1937).

109. *See, e.g.*, Thomas More Law Ctr. v. Obama, 720 F. Supp. 2d 882, 890–91 (E.D. Mich. 2010), *aff'd*, No. 10-2388, 2011 U.S. App. LEXIS 13265 (6th Cir. June 29, 2011); Goudy-Bachman v. U.S. Dep't of Health & Human Servs., 764 F. Supp. 2d 684, 694–97 (M.D. Pa. 2011); *Cuccinelli*, 728 F. Supp. 2d at 786–88; Liberty Univ., Inc. v. Geithner, 753 F. Supp. 2d 611, 627–29 (W.D. Va. 2010); U.S. Citizens Ass'n v. Sebelius, 754 F. Supp. 2d 903, 909–10 (N.D. Ohio 2010).

110. Two judges on the Sixth Circuit panel expressed the view that the mandate could not be upheld under Congress's taxing power. *See* Thomas More Law Ctr. v. Obama, No. 10-2388, 2011 U.S. App. LEXIS 13265, at *49–64 (6th Cir. June 29, 2011) (Sutton, J., concurring).

What is clear, however, is that the potential for upholding the individual mandate under Congress's taxing power does not obviate the importance of the Commerce Clause issue. Commentary on the constitutionality of the PPACA—when analyzed under the Commerce Clause as well as Congress's other powers—spills far more ink on the Commerce Clause issue.[111] Granted, the Commerce Clause issue may just be the most interesting to some scholars. However, it seems more likely that the reason for the vast disparity in the amount of commentary analyzing the PPACA under the Commerce Clause rather than under the taxing power is that, to some, the Commerce Clause issue is a more difficult question. If the Supreme Court were to take a similar position, and subsequently avoid deciding the Commerce Clause question by treating the matter as a valid exercise of the power to tax, this would still be making a major statement about the Commerce Clause.[112]

This note argues that existing Commerce Clause doctrine provides ample support for Congress's authority to pass the PPACA and the individual mandate. Avoiding any resolution of the Commerce Clause challenge, by relying instead on Congress's taxing power, would amount to an implicit determination by the Court that the Commerce Clause issue was in fact a close and difficult question. In light of this possibility, as this note argues, that position would be a significant departure from existing case law.

C. *New Distinctions Within the Commerce Clause Challenges*

Today, the Supreme Court uses a three-pronged analysis to determine if a federal law has been properly enacted under the Commerce Clause.[113] The *Lopez* analysis presumes that Congress may: (1) regulate "the use of the channels of interstate or foreign commerce" (for example, by banning the interstate shipment of stolen goods); (2) protect "the instrumentalities of interstate commerce" (for example, by criminalizing theft of goods in interstate commerce); and (3) regulate "those activities that substantially affect interstate commerce" (for example, by prohibiting unfair labor practices impacting interstate commerce).[114] This third

111. In one commentator's article addressing the constitutionality of the PPACA, less than three pages even discuss the taxing power issue, while the other forty-eight pages focus on the Commerce Clause issue. *See* Balkin, *Commerce*, *supra* note 12, at 46–47.

112. The same would be true of a ruling that relied critically on the Necessary and Proper Clause to uphold the individual mandate. For one such analysis, see Mark A. Hall, *Commerce Clause Challenges to Health Care Reform*, 159 U. PENN. L. REV. (forthcoming 2011) (manuscript at 24), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1747189. It would amount to a conclusion that the Commerce Clause alone provided insufficient or doubtful basis for the individual mandate.

113. *See* United States v. Lopez, 514 U.S. 549, 558 (1995).

114. *Id.* at 558–59.

prong is often considered the "most hotly contested facet of the commerce power," and it is the one likely to be relevant to any Supreme Court ruling on the constitutionality of the mandate.[115]

Under this analysis, the purchase and sale of health insurance—a major national industry in itself—is clearly an economic activity.[116] Further, the fact that many individuals are uninsured has a substantial effect on interstate commerce.[117] Those who choose to self-insure reduce the total number of people in an insurance plan. A smaller pool of insured individuals results in less people to spread costs amongst, which forces insurers to raise premiums.[118] Individual decisions not to purchase insurance thus have a cumulative and substantial effect on interstate commerce. Therefore, the individual mandate is "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity was regulated."[119]

For these reasons, the individual mandate to purchase health insurance would appear to be a valid use of Congress's Commerce Clause power under *Lopez* and its progeny to regulate the health insurance and

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115. *See* Florida *ex rel.* Bondi v. U.S. Dep't of Health & Human Servs., No. 3:10-CV-91-RV/EMT, 2011 WL 285683, at *10 (N.D. Fla. Jan. 31, 2011) (quoting Garcia v. Vanguard Car Rental USA, Inc., 540 F.3d 1242, 1250 (11th Cir. 2008)).

116. *See, e.g.*, *supra* text accompanying note 92; JENNIFER STAMAN ET AL., CONG. RESEARCH SERV., R40725, REQUIRING INDIVIDUALS TO OBTAIN HEALTH INSURANCE: A CONSTITUTIONAL ANALYSIS 12 (2010) (noting that "health care expenditures in the United States grew 4.4% to $2.3 trillion, or $7,681 per person" in 2008); United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 553 (1944) (noting that insurance is commerce); *cf.* United States v. Morrison, 529 U.S. 598, 613 (2000) (striking down the Violence Against Women Act of 1994 because "[g]ender-motivated crimes of violence are not, in any sense of the phrase, *economic* activity) (emphasis added); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 28 (1937) (upholding the National Labor Relations Act of 1935 because the steel company operated nationwide).

117. *See* US CENSUS BUREAU, CURRENT POPULATION REPORTS, INCOME POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2007 23 (2008) (noting that nearly one-fifth of Americans are uninsured).

118. *See* Hoffman, *supra* note 40, at 55 ("With fewer healthy people in the large group insurance pools, the goals of regulation . . . through the individual mandate, which rely upon broad risk pooling, are impeded."). Additionally, this occurrence is especially true because those with the greatest medical needs are the most likely to seek insurance.

119. *See* Gonzales v. Raich, 545 U.S. 1, 24 (2005) (quoting *Lopez*, 514 U.S. at 561); *see also* Hoffman, *supra* note 40, at 27 (claiming that "the individual health insurance mandate might serve several efficiency objectives"). The "essential" aspect of the individual mandate merits an additional note. President Obama is "willing to amend the measure to give states the ability to opt out of its most controversial requirements from the start, including the mandate that most people buy insurance." Sheryl Gay Stolberg & Kevin Sack, *Obama Backs Easing State Health Law Mandates*, N.Y. TIMES, Mar. 1, 2011, at A1. In one respect, this could be completely irrelevant. If the mandate were held to be an unconstitutional reach of Congress's power under the Commerce Clause, then an exception to an already invalid exercise of power would not validate it. However, if the mandate were held to be within Congress's power under the Commerce Clause, then this could be an illustrative example of sensitivity to the states. President Obama described this as "a reasonable proposal," which would be in line with maintaining the balance of power between the state government and the federal government. *See id.*

health care markets.[120] Nevertheless, the constitutionality of the individual mandate has been strongly challenged.[121] The legal challenges rely on introducing three new distinctions to Commerce Clause doctrine: (1) regulating an activity versus an inactivity;[122] (2) regulating voluntary versus involuntary conduct;[123] and (3) regulating a unique market or in a unique way.[124]

None of these distinctions is helpful conceptually. On the contrary, each one introduces a host of philosophical and practical questions that would be distracting, at best, to courts attempting to determine the constitutionality of congressional legislation. Further, none of these distinctions is warranted under governing case law. Not only would integrating these new distinctions needlessly complicate Commerce Clause doctrine, but they also would unjustifiably extend the Court's supervision of elected officials making basic policy decisions.

1. Activity and Inactivity

The first distinction drawn in challenges to the constitutionality of the individual mandate is between activity and inactivity. The United States District Court for the Northern District of Florida adopted this distinction because it would have been a "radical departure from existing case law to hold that Congress can regulate inactivity under the Commerce Clause."[125] The court declared, "The threshold question that must be addressed is whether activity is required before Congress can exercise its power under the Commerce Clause," and answered the question in the affirmative.[126] On the contrary, the United States District Court for the Eastern District of Michigan found that adopting the distinction was irrelevant to a ruling on the constitutionality of the individual mandate

120. The notion that the Court will not view regulations favorably if they touch on areas traditionally left to the States and the subsequent discussion on what is "traditionally" left to the States is outside the scope of this note. It is clear, however, that well before the enactment of the PPACA, health care was a field in which the federal government was extensively involved. As the Sixth Circuit opinion noted, moreover, the PPACA regulates both the health insurance market and the health care market as a whole. *See* Thomas More Law Ctr. v. Obama, No. 10-2388, 2011 U.S. App. LEXIS 13265, at *30–32 (6th Cir. June 29, 2011).

121. Florida *ex rel.* Bondi v. U.S. Dep't of Health & Human Servs, No. 3:10-CV-91-RV/EMT, 2011 WL 285683, at *10 (N.D. Fla. Jan. 31, 2011).

122. *See id.* at *21 (noting that "[the Supreme Court] has never been called upon to consider if 'activity' is required").

123. *See* Virginia *ex rel.* Cuccinelli v. Sebelius, 702 F. Supp. 2d 598, 778–79 (E.D. Va. 2010) (describing the failure to purchase health care as an involuntary act).

124. *Bondi*, 2011 WL 285683, at *23.

125. *Bondi*, 2011 WL 285683, at *22.

126. *Id.* at *21–22 (adopting the distinction because "'activity' is an indispensable part [of] the Commerce Clause analysis"); *see also Virginia ex rel. Cuccinelli*, 702 F. Supp. 2d at 781 (adopting the distinction because federal regulations "must involve activity").

because the "characterization of the Commerce Clause reaching economic *decisions* is more accurate."[127] Inconsistent application of the activity and inactivity distinction reflects the conceptual flaw in its reasoning. Moreover, there is no support for it in the Court's case law, and no reason for changing the case law to now include it.

a. Conceptual Analysis

Conceptually, the distinction between activity and inactivity is fraught with ambiguities and uncertainties that make it a poor choice for a key factor in Commerce Clause analysis. What determines whether something is activity or inactivity is always subject to interpretation. Virtually any conduct can be characterized either way.[128] Consider an individual who has a health insurance policy that automatically renews annually unless the individual cancels it. If the individual does nothing on the renewal date, does this constitute activity (purchasing another year of insurance coverage) or inactivity (failing to cancel the coverage for the coming year)?[129]

The ambiguity in this distinction also bedevils other areas of the law. Criminal law contains countless decisions focused on determining whether an act was committed.[130] In general, a crime requires some act, also known as an *actus reus*:[131] Consider a mother who fails to take care of her child. Would this be a criminal violation because she spent the day taking care of herself instead of the child (activity)? Or is it because

127. Thomas More Law Ctr. v. Obama, 720 F. Supp. 2d 882, 894 (E.D. Mich. 2010); *see also* Liberty Univ., Inc. v. Geithner, 753 F. Supp. 2d 611, 633 (W.D. Va. 2010) (finding the distinction irrelevant because "individuals' decisions about how and when to pay for health care are activities").

128. *Cf.* Thomas More Law Ctr. v. Obama, No. 10-2388, 2011 U.S. App. LEXIS 13265, at *82 (6th Cir. June 29, 2011) (Sutton, J., concurring) ("A drug-possession law amounts to forced inaction in some settings (those who do not have drugs must not get them), and forced action in other settings (those who have drugs must get rid of them).").

129. *Cf. id.* ("What of individuals who voluntarily have insurance on the day the mandate goes into effect? . . . It is not clear what the action/inaction line means in a setting in which an individual voluntarily (and actively) obtains coverage and is required only to maintain it thereafter."); *see also id.* at *86–87 (noting that individuals compelled by state law to purchase insurance would already appear to be active in the market).

130. *See, e.g.*, Robinson v. California, 370 U.S. 660, 666 (1962) (holding that the state may not outlaw the condition of narcotics addiction because there is no act); Proctor v. State, 176 P. 771, 774 (Okla. Crim. App. 1918) (holding that the state may not outlaw "keeping a place" with an unlawful intent because there is no act).

131. Powell v. Texas, 392 U.S. 514, 533 (1968) ("[C]riminal penalties may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing, or perhaps in historical common law terms, has committed some actus reus."). Interestingly, an omission or a failure to act can also meet the requirements of a criminal violation. *See, e.g.*, Commonwealth v. Welansky, 55 N.E.2d 902, 911–12 (1944) (convicting a bar owner of manslaughter for the death of patrons in his establishment because his "[w]anton or reckless conduct is the legal equivalent of intentional conduct").

she failed to feed the child (inactivity)? Criminal law may have different underlying policies from those underlying the Commerce Clause, but the same difficulty in distinguishing between activity and inactivity is as clear as in any other context—the seemingly arbitrary manner in which something is framed dictates the distinction.

The fundamental reason for this ambiguity is that the conduct inevitably takes place within a larger framework. This framework can often be a legal one. For example, not eating broccoli might be viewed as inactivity—the failure to consume something. But if there were a legal requirement to eat broccoli, failure to do so might easily be construed as defiance of the law, especially if the failure to consume it was deliberate. Defiance might well appear to be an activity. Whether something is activity or inactivity, then, may turn on what the law provides. Consequently, making the validity of a law depend on a characterization of something as activity or inactivity risks being circular.

The framework can also be the market itself. Professor Barnett, the most prominent commentator on challenges to the constitutionality of the mandate, "insists that an individual's decision *not* to buy health insurance, or any product, cannot be considered activity, just as an individual's decision not to sell a house is not activity—even though, multiplied many times over, it has a substantial effect on the housing market."[132] The United States District Court for the Northern District of Florida struck down the individual mandate relying on a similar housing market analogy in its opinion.[133] But in this housing market analogy, both Professor Barnett and the Florida District Court concede that the regulation is derived from an economic effect on the housing market.[134] Moreover, in the context of a well-developed private housing market, a house is an economic asset that can be sold at any time. Thus not selling

132. Joan Indiana Rigdon, *Does Obamacare Violate the Constitution?*, WASH. LAWYER, Jan. 2011, at 25 (quoting Professor Barnett); *see also* Barnett, *supra* note 5, at 605 (discussing whether a "decision not to sell your house" is an "activity . . . that can be mandated by Congress").

133. *See* Florida *ex rel.* Bondi v. U.S. Dep't of Health & Human Servs., No. 3:10-CV-91-RV/EMT, 2011 WL 285683, at *24 (N.D. Fla. Jan. 31, 2011) ("Should Congress thus have the power under the Commerce Clause to preemptively regulate [the housing market] . . . on the theory that most everyone is currently, or inevitably one day will be, active in the housing market?"). This court cited Professor Barnett in multiple opinions. *See, e.g.*, Florida *ex rel.* McCollum v. U.S. Dep't of Health & Human Servs., 716 F. Supp. 2d 1120, 1160 n.18 (citing Professor Barnett affirmatively in analysis of the individual mandate as a tax); *Bondi*, 2011 WL 285683, at *11 (citing Professor Barnett affirmatively in analysis of the "Commerce Clause in its [h]istorical [c]ontext"); *id.* at *14 (citing Professor Barnett affirmatively in analysis of the "[e]volution of Commerce Clause [j]urisprudence").

134. However, these concessions are hedged with assertions that the relation to the economic effect on the housing market would be attenuated. *See* Rigdon, *supra* note 132, at 25 (conceding that there could be a "substantial effect on the housing market"); *Bondi*, 2011 WL 285683, at *24 (conceding that the regulation could be based on its connection to "add[ing] stability to the housing and financial markets").

a home inevitably involves a calculus—explicit at some times, implicit at others—that continuing to live in a house or rent it out rather than sell it is the preferable course of action. Unless the homeowner is dead, it is hard to see how the homeowner is not engaged in decision making at all times. And the activity of deciding whether to hold on to a house or to sell it plainly has the kind of aggregate economic effect that brings the matter within Congress's power under well-settled Commerce Clause doctrine. To limit Congress's power by a conceptual distinction so easily manipulated would be to practice constitutional law by proclamation.

b. Constitutional Analysis

The Sixth Circuit recently noted that the text of the Commerce Clause makes no distinction between action and inaction.[135] Further, the labeling of something as an activity or inactivity as a key step in constitutional analysis under the Commerce Clause has no basis in the Court's precedent.[136] The Court's terminology certainly provides no basis for creating a sharp legal divide between the regulation of activity and inactivity. Its rulings have frequently described what Congress may regulate under the Commerce Clause in terms of different categories of activity.[137] The Court, however, has frequently used other terms as well to describe what Congress may regulate—including "transactions,"[138] "obstructions in commerce,"[139] "refusals of service,"[140] and "dangers" to interstate commerce.[141] More often than not, precedent focuses on the economic effects of a regulation without explicitly stating whether the regulation implicates a specific activity.[142] Further, there are times when it is unclear what factor is determinative under a Commerce Clause analysis, such as when the Court intermixes references to economic factors with references to activity.[143] Other formulations simply dispense with

135. Thomas More Law Ctr. v. Obama, No. 10-2388, 2011 U.S. App. LEXIS 13265, at *49–64 (6th Cir. June 29, 2011) (Sutton, J., concurring).

136. *See* Thomas More Law Ctr. v. Obama, 720 F. Supp. 2d 882, 893 (E.D. Mich. 2010) (noting that the Court has "never needed to address the activity/inactivity distinction").

137. *See, e.g.*, United States v. Morrison, 529 U.S. 598, 613 (2000) ("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.") (emphasis added).

138. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 36 (1937); Hous., E. & W. Tex. Ry. v. United States, 234 U.S. 342, 351–52 (1914).

139. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 253–61 (1964).

140. Katzenbach v. McClung, 379 U.S. 294, 303 (1964).

141. *Jones & Laughlin Steel Corp.*, 301 U.S. at 36–37.

142. *Morrison*, 529 U.S. at 617–18 ("We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local." (citing United States v. Lopez, 514 U.S. 549, 568 (1995))).

143. *Id.* at 610 ("But a fair reading of *Lopez* shows that the *noneconomic*, criminal nature of

any reference to specific factors that could be labeled as an activity or otherwise. In *Jones & Laughlin Steel Corp.*, for example, the Court referred simply to the "the fundamental principle . . . that power to regulate commerce is the power to enact all appropriate legislation for its protection or advancement."[144]

Moreover, even where the Court has used words like "activity" or "acts," it has applied them to states of affairs that could be characterized equally as acts or omissions. A close examination of some of the Court's leading Commerce Clause cases makes clear that its expressed disdain for "attaching constitutional significance to a semantic difference" should apply with full force to the PPACA and the individual mandate.[145]

In *Jones & Laughlin Steel Corp.*, the Court sustained Congress's power to outlaw the firing of employees seeking to unionize.[146] It would be easy to pigeonhole the case as one in which activity (firing workers) was regulated. However, firing employees could also be viewed as inactivity (failing to continue to employ them). The Court, however, was clear that the statute could equally be upheld as falling within Congress's power to prevent or reduce the instances of strikes. Referring to a strike as a "stoppage" of work, the Court discussed the "paralyzing consequences of industrial war" for interstate commerce.[147] In turn, the Court noted that employers' "[r]efusal to confer and negotiate has been one of the most prolific causes of the strife."[148] References to "stoppage," "paralysis," and "refusal to confer and negotiate" could easily suggest that Congress was regulating inactivity. On the other hand, a strike or refusal to bargain could, with equal ease, be viewed as activity. What matters is that nowhere in the opinion did the Court make its holding contingent on a conclusion that what was being regulated constituted activity as opposed to inactivity.

Nearly thirty years later, in *Heart of Atlanta Motel, Inc. v. United States*,[149] the Court remained indifferent to the activity and inactivity

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the conduct at issue was central to our decision in that case. . . . 'The Act [does not] regulat[e] a commercial *activity*.'") (emphasis added).

144. *Jones & Laughlin Steel Corp.*, 301 U.S. at 36–37 (internal quotation marks omitted).

145. Quill Corp. v. North Dakota, 504 U.S. 298, 310 (1992) (quoting Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 285 (1977)).

146. *Jones & Laughlin Steel Corp.*, 301 U.S. at 24 n.2 (referencing congressional findings that the National Labor Relations Act of 1935 "encourag[ed] practices fundamental to the friendly adjustment of industrial disputes").

147. *Id.* at 41.

148. *Id.* at 42.

149. 379 U.S. 241, 253 (1964). The Civil Rights Act of 1964 made it illegal for places of public accommodation to discriminate on the basis of race, color, religion, or national origin. *Id.* at 245. Is the refusal to serve someone because of race an activity or inactivity? One could say that it

distinction. The Court held that Congress could prohibit racial discrimination by a local motel under the Commerce Clause because discrimination by motels had an effect on the interstate movement of persons and goods.[150] The same day that the Court rendered its opinion in *Heart of Atlanta Motel*, it declined to draw an activity and inactivity distinction in *Katzenbach v. McClung*[151] as well by holding that "refusals of service" based on racial discrimination had an effect on interstate commerce. In short, the Court's consistent indifference to the distinction in using the term "activity" is a strong signal that it has in no way made any activity and inactivity distinction central to Congress's Commerce Clause power.

Similarly unavailing are attempts to refocus the regulations in *Wickard* and *Raich* in a manner that makes those decisions turn on an activity and inactivity distinction.[152] The regulation in *Wickard* was aimed at limiting wheat production in order to raise wheat prices.[153] The farmer had grown more wheat than his permitted allotment under the federal statute, but claimed that Congress could not penalize him for the excess because he used it on his farm rather than sell it on the market.[154] The Court did not hold that because the farmer was growing wheat he was engaged in an activity, thereby validating the regulation under the Commerce Clause. Instead, the Court focused on the notion that "the power to regulate commerce includes the power to regulate the prices at which commodities in that commerce are dealt in and practices affecting such prices."[155] Under Commerce Clause analysis, *Wickard* stands for the notion that if something in the aggregate has a "substantial effect in defeating and obstructing" the act in question's purpose, then Congress has the power to regulate.[156] The operative words of this rationale are not reliant on whether something is an activity or inactivity, but rather on whether the efficacy of the regulation is substantially affected.

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is the activity of discriminating or the activity of refusing to provide a room. However, one could also say that it is the inactivity of failing to provide a room or restaurant service.

150. *Id.* at 260–62.

151. 379 U.S. 294, 303 (1964). Here too, one could have the same sterile debate—whether this is the activity of refusing or the inactivity of failing to serve someone. Significantly, the Court noted that "established restaurants in such areas sold less interstate goods because of the discrimination." *Id.* at 300. This could suggest inactivity—goods not being sold.

152. *See* Florida *ex rel.* Bondi v. U.S. Dep't of Health & Human Servs., No. 3:10-CV-91-RV/EMT, 2011 WL 285683, at *20 n.14 (N.D. Fla. Jan. 31, 2011) ("The individual mandate differs from the regulations in *Wickard* and *Raich*, for example, in that the individuals being regulated in those cases were engaged in an *activity* . . . and each had the choice to discontinue that *activity* and avoid penalty.") (emphasis added).

153. Wickard v. Filburn, 317 U.S. 111, 126 (1942).

154. *Id.* at 118–20.

155. *Id.* at 128.

156. *Id.* at 129.

The argument that the Commerce Clause may only regulate activity is slightly more believable in the context of *Raich* than it was in *Wickard*, but the argument still lacks a constitutional basis.[157] In *Raich*, the Court declared that Congress has the "power to regulate purely local activities that are part of an economic '*class of activities*' that have a substantial effect on interstate commerce."[158] While it may be true that the Court used the distinct label of "activities," the holding emphasized the substantial effect on the national marijuana market.[159] Justice Stevens analogized the facts of *Raich* to *Wickard* by comparing the home-consumed wheat in *Wickard* to the home-consumed marijuana in *Raich*.[160] Therefore, even if something may or may not explicitly be declared an "activity," the constitutionality of an act under the Commerce Clause is determined irrespective of this declaration.[161]

Even if the activity and inactivity distinction possessed a constitutional basis, there are still valid reasons to believe that Congress has the power to force someone into activity and regulate inactivity. In *Champion v. Ames*,[162] the Court held that Congress may prohibit the transportation of lottery tickets from one state to another under the Commerce Clause. Further, the Court rejected the contention that Congress may only *regulate* commerce, not prohibit it.[163] If the commerce regulated—the activity—was playing the lottery, then Congress arguably has the power to force someone into inactivity by not allowing that person to play the lottery. Forcing someone into inactivity would seem in itself to be a regulation of inactivity, but even if that view were rejected, it is hard to see why, if Congress can force someone into *inactivity*, it should be barred from forcing that person into *activity*.[164] Significantly, the Court in *Wickard* stated that "[t]he stimulation of commerce is a use of

157. *See* Gonzales v. Raich, 545 U.S. 1, 17 (2005).

158. *Id.* (emphasis added).

159. *See id.* at 32–33.

160. *Id.* at 18–19 ("Just as the Agricultural Adjustment Act was designed to control the volume [of wheat] moving in interstate and foreign commerce in order to avoid surpluses . . . and consequently control the market price . . . a primary purpose of the [federal regulation here] is to control the supply and demand of controlled substances in both lawful and unlawful drug markets.") (internal quotation marks omitted).

161. It is telling, moreover, that in his dissent in *Thomas More Law Center v. Obama*, Judge Graham repeatedly cited or referred to Justice O'Connor's dissenting opinion in *Raich*, virtually characterizing *Raich* as an aberration. *See* Thomas More Law Ctr. v. Obama, No. 10-2388, 2011 U.S. App. LEXIS 13265, at *115–20 (6th Cir. June 29, 2011) (Graham, J., dissenting) (claiming that "[n]otwithstanding *Raich*, I believe the Court remains committed to the path laid down by Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas . . .").

162. 188 U.S. 321 (1903).

163. *Id.* at 328 (noting that "regulation may sometimes appropriately assume the form of prohibition").

164. Similarly, neither is it sufficient to uphold a regulation because it forces someone into activity or inactivity. The distinction is simply not determinative of Congress's power.

the regulatory function quite as definitely as prohibitions or restrictions thereon."[165]

Plainly, the Court's Commerce Clause case law manifests a consistent rejection of hard and fast distinctions.[166] The activity and inactivity distinction should not be adopted because the validity of a congressional act under the Commerce Clause often turns on whether there is a cumulative substantial economic effect—never whether there is an activity or inactivity.[167] Moreover, it is not logical to suppose that the Court would reject the old typology of "production" versus "manufacturing" or that of "direct" and "indirect" effects, but still intend to adopt an equally formalistic distinction between "activity" and "inactivity."[168] More than half a century ago it was already a "late day" to take "that long backward step."[169] The closest the Court has come to adopting such a formalistic distinction in modern times is that drawn in *Lopez* and *Morrison* between economic and noneconomic activity. In both cases, the Court concluded that the activity in question was noneconomic and declined to allow its aggregate effects to serve as the basis for federal regulation. The Court was careful, however, to emphasize that the distinction is not absolute.[170]

Similarly, turning to the individual mandate, any distinction between activity and inactivity contributes nothing to the analysis of its constitutionality. The purchase of insurance under the individual mandate could be viewed either as activity or as inactivity. Not purchasing

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165. Wickard v. Filburn, 317 U.S. 111, 128 (1942).

166. *See id.* at 124 ("Whether the subject of the regulation in question was 'production,' 'consumption,' or 'marketing' is, therefore, not material for purposes of deciding the question of federal power before us."); *see also 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 and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'").

167. *See id.* at 126 (regulating home-consumed wheat because it had a substantial economic effect on the market price in the aggregate).

168. *See* Thomas More Law Ctr. v. Obama, No. 10-2388, 2011 U.S. App. LEXIS 13265, at *107–08 (6th Cir. June 29, 2011) (Graham, J., dissenting) (noting that the "distinction would suffer from the same failings as the 'direct' and 'indirect' effects test of prior Commerce Clause jurisprudence").

169. Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co., 334 U.S. 219, 234–35 (1948) (rejecting the sharp distinction between production and manufacturing, because "[a]t this late day we are not willing to take that long backward step"); *id.* at 229 ("The artificial and mechanical separation of 'production' and 'manufacturing' from 'commerce,' without regard to their economic continuity, the effects of the former two upon the latter, and the varying methods by which the several processes are organized, related and carried on in different industries or indeed within a single industry, no longer suffices to put either production or manufacturing and refining processes beyond reach of Congress' authority . . . .").

170. United States v. Morrison, 529 U.S. 598, 613 (2000) (noting that "we need not adopt a categorical rule against aggregating the effects of any noneconomic activity").

insurance could be viewed as doing nothing.[171] It could also be viewed as the activity of self-insuring.[172] If Congress can prohibit the interstate transportation of lottery tickets, why could it not prohibit the activity of self-insuring? Health care expenses from emergency room visits, annual checkups at a primary care physician, buying Tylenol at the grocery store, and borrowing money from family members for an elective procedure all have an economic effect. The cumulative economic effects of those who self-insure (and in many cases simply shift costs onto others) are enormous and doubtless far greater than those of the lottery tickets at issue in *Champion v. Ames*.[173] Because individuals' lack of insurance contributes to a national economic problem, Congress may regulate the decision whether to purchase insurance as a part of a national solution in the form of the PPACA and the individual mandate.

Of course, the Court need not agree with Congress's assessment of the cause, extent, or importance of a problem in order to uphold a legislative response to it.[174] The Commerce Clause does not give the judiciary the power to second-guess legislative policy determinations as to the *most* appropriate way to deal with a national problem.[175] *Wickard* did not hold that the regulatory scheme at issue would in fact raise wheat prices or that raising wheat prices was a good way to combat the Depression.[176] Rather, it:

> had no difficulty concluding that Congress had a rational basis for believing that, when viewed in the aggregate, leaving home-consumed wheat outside the regulatory scheme would have a substantial influence on price and market conditions. [In *Raich*] too, Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would similarly affect price and market conditions.[177]

As Chief Justice Marshall observed in *McCulloch v. Maryland*, "the sound construction of the constitution must allow to the national

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171. Though as noted earlier, in some instances—cancelling a policy—it could be viewed as doing something. *See supra* Part III.C.1.

172. *See* Balkin, *Commerce*, *supra* note 12, at 46–47.

173. *See* 42 U.S.C.A § 18091(a)(2)(D) (West 2010) ("[T]he cost of providing uncompensated care to the uninsured was $43,000,000,000 in 2008.").

174. *See* Balkin, *Commerce*, *supra* note 12, at 33 (noting that "[t]he Commerce Clause does not require any particular answer to this question; it simply gives Congress the ability to solve problems that it *reasonably believes to exist*") (emphasis added).

175. *Id.* at 34 ("By resolving the policy debate, Congress also resolves the constitutional question, unless its conclusion is completely unreasonable.").

176. *See* Wickard v. Filburn, 317 U.S. 111, 128–29 (1942) ("This record leaves [the Court] in no doubt that Congress may properly have considered that wheat consumed on the farm . . . would have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices.").

177. Gonzales v. Raich, 545 U.S. 1, 19 (2005).

legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution."[178] Importing an easily manipulated distinction between activity and inactivity into Commerce Clause analysis not only is without basis in the Court's case law, but also invites unwarranted judicial restriction of legislative flexibility to deal with important social and economic problems.

2. VOLUNTARY AND INVOLUNTARY

The second distinction drawn in challenges to the constitutionality of the individual mandate is that between voluntary and involuntary conduct as the subject or instance of regulation. The significance of this distinction seems to be that because the mandate "compels an unwilling person to perform an *involuntary* act," which in turn submits the person to Commerce Clause regulation, it is therefore beyond Congress's power (or at least constitutionally suspect).[179] The involuntariness of the individual mandate is then distinguished from the regulations in *Wickard* and *Raich* by claiming that growing wheat or marijuana represented conscious decisions by which the individuals "*voluntarily* placed themselves within the stream of interstate commerce."[180] The involuntariness of the act is further highlighted by claims that the requirement to buy insurance stems not from any voluntary act, but is imposed "just for being alive."[181]

Some courts have accepted this argument.[182] Other courts have rejected the conclusion that the individual mandate is unconstitutional, but have seemingly embraced the voluntary and involuntary distinction in doing so. One court, for example, observed in the course of upholding the individual mandate that the decision not to purchase health insurance was a voluntary choice as to how—not whether—a person participates in the health care market because "nearly everyone is a participant."[183]

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178. 17 U.S. (4 Wheat.) 316, 421 (1819).

179. *See* Virginia *ex rel.* Cuccinelli v. Sebelius, 702 F. Supp. 2d 598, 779 (E.D. Va. 2010) (emphasis added).

180. *See id.* (emphasis added); *see also* Florida *ex rel.* Bondi v. U.S. Dep't of Health & Human Servs, No. 3:10-CV-91-RV/EMT, 2011 WL 285683, at *23 (N.D. Fla. Jan. 31, 2011) (noting that "Congress has used its authority under the Commerce Clause to regulate individuals, employers, and others who *voluntarily* take part in some type of economic activity") (emphasis added).

181. *See Bondi*, 2011 WL 285683, at *20 ("Never before has Congress required that everyone buy a product from a private company (essentially for life) just for being alive and residing in the United States.").

182. *See, e.g., id.* at *21 (holding the individual mandate unconstitutional because it regulates inactivity); *Cuccinelli*, 702 F. Supp. 2d at 778–79 (holding the individual mandate unconstitutional because it forces individual into a market regulated by Congress).

183. Liberty Univ., Inc. v. Geithner, 753 F. Supp. 2d 611, 633 (W.D. Va. 2010) ("Regardless of whether one relies on an insurance policy, one's savings, or the backstop of free or reduced-cost emergency room services, one has made a choice regarding the method of payment for the

The distinction between voluntary and involuntary conduct is no more sound conceptually or defensible doctrinally than the distinction between activity and inactivity.

a. Conceptual Analysis

The problem with a distinction between voluntary and involuntary conduct is not that it is utterly impossible to formulate any difference at all between them. The Court's own experience with this distinction in other areas of the law, however, strongly suggests that the problems it creates are vexing. Unless there is a good reason for introducing the distinction into the Commerce Clause—and there is not—it should be avoided.

There are at least two areas where current constitutional doctrine does draw a distinction between voluntary and involuntary conduct. Both relate to attempts to distinguish government-provided benefits from governmental coercion. Determining whether a federal regulation "coerces" the subject of a regulation or provides a choice—often a difficult choice—turns out to be a matter of fine line-drawing at best.

The distinction between voluntary and involuntary conduct at the individual level has bedeviled the whole area of the "unconstitutional conditions" doctrine.[184] Governments frequently place conditions on the provision of a benefit. Whether the condition is upheld depends in part on whether the government is seen to be encouraging an activity or is coercing the individual.[185] This distinction between encouragement and imposition—between voluntary acceptance of a condition and involuntary subjection to a mandate—shows up as well in the issue of federal aid to the states.[186] As commentators have noted, drawing distinctions between unconstitutional coercion and constitutional conditioning of benefits has proven difficult, to say the least.[187]

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health care services one expects to receive."); *see also* Thomas More Law Ctr. v. Obama, 720 F. Supp. 2d 882, 893 (E.D. Mich. 2010) (noting that the individual mandate "addresses economic decisions regarding health care services that everyone eventually, and inevitably, will need").

184. STONE ET AL., *supra* note 96, at 1598–99 (discussing the "constitutionally troublesome strings to government benefits" often associated with unconstitutional conditions and the benefit and burden distinction).

185. *See, e.g.*, Maher v. Roe, 432 U.S. 464, 476 (1977) ("Constitutional concerns are greatest when the State attempts to impose its will by force of law; the State's power to encourage actions deemed to be in the public interest is necessarily far broader.").

186. *See* South Dakota v. Dole, 483 U.S. 203, 211 (1987) (upholding a federal statute where the government imposed conditions on federal highway funding).

187. *See, e.g.*, Lynn A. Baker, *Conditional Federal Spending After* Lopez, 95 COLUM. L. REV. 1911, 1972–74 (1995); David E. Engdahl, *The Spending Power*, 44 DUKE L.J. 1, 81 (1994) (claiming that the difficulty with this distinction is why the Court gives it no more than "lip service" in practice); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989); Richard Epstein, *The Supreme Court, 1987 Term—Foreword: Unconstitutional*

The same conceptual difficulties arise in the area of federal-state relations. Under the Tenth Amendment, Congress may not commandeer states, but it can induce them voluntarily to undertake action.[188] It may also induce individuals to undertake actions that, if made obligatory, would fall outside the federal government's jurisdiction. Consider *United States v. Butler*,[189] where the Court held that a regulation under the Agricultural Adjustment Act of 1933 was coercive because it was "not in fact voluntary."[190] The Act effectively placed a tax on farmers, which was then used to fund subsidies to farmers who limited their permitted level of production. Under then-prevailing Commerce Clause doctrine, Congress lacked the power to regulate farm production, but the Act was defended in part on the ground that it did not amount to a regulation of farmers at all; farmers could voluntarily choose whether to accept the subsidy and limit production, or reject it and grow as much as they wanted.[191] The Court noted this argument, but held that this choice was "illusory" because not accepting the subsidy would cause "financial ruin."[192] In dissent, Justice Stone countered that "[t]hreat of loss, not hope of gain, is the essence of economic coercion," and rejected the assertion that the farmers' decisions were not voluntary.[193] Notably, the Court did not provide guidance on what level of economic pressure would be consistent with true choice.

In contrast, another Tenth Amendment case decided one year after *Butler* failed to find an impermissible level of coercion when a federal unemployment tax gave employers a ninety-percent credit against the federal tax for any state unemployment tax they had paid, but only on

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Conditions, State Power, and the Limits of Consent, 102 HARV. L. REV. 4 (1988); Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103, 1107–08 (1987).

188. New York v. United States, 505 U.S. 144, 169–72 (1992) (striking down a federal statute requiring states to "take title" to nuclear waste, but acknowledging that Congress may impose conditions that are not unreasonable); South Dakota v. Dole, 483 U.S. 203, 211 (1987) (upholding a federal statute where the government imposed conditions on federal highway funding). The Tenth Amendment is addressed here simply as a useful example of the conceptual difficulties a voluntary and involuntary conduct distinction possesses. However, it should be noted that there have been legal challenges under the Tenth Amendment to the PPACA. *See, e.g.*, Complaint at 16, Florida *ex rel.* McCollum v. U.S. Dep't of Health & Human Servs., 720 F. Supp. 2d 1120 (N.D. Fla. 2010) (No. 3:10-CV-91-RV/EMT), 2010 WL 1038209 (claiming that the Medicaid expansion violates the Tenth Amendment). Nevertheless, this note does not specifically address the legal challenges under the Tenth Amendment. For an analysis of those issues, see Renée M. Landers, *"Tomorrow" May Finally Have Arrived—The Patient Protection and Affordable Care Act: A Necessary First Step Toward Health Care Equity in the United States*, 6 J. HEALTH & BIOMED. L. 65 (2010).

189. 297 U.S. 1.

190. *Id.* at 70 (striking down the federal regulation).

191. *Id.* at 70–71.

192. *Id.*

193. *Id.* at 81 (Stone, J., dissenting).

the condition that the state unemployment tax system met federal guidelines.[194] Even though this scheme put enormous pressure on states to conform their laws to the federal model, the Court rejected the claim that states had been coerced into doing so.[195] Continuing this reasoning, the Court later upheld a federal statute that would result in withholding five percent of federal highway funds from states that did not prohibit the purchase of alcohol by people under the age of twenty-one in *South Dakota v. Dole*.[196] This reduction in funds was not "so coercive as to pass the point at which 'pressure turns into compulsion.'"[197] The Court did not address whether, for example, withholding ten percent—or even thirty percent—*would* be coercive. Instead, the Court emphasized that withholding five percent of the federal funding was not an unconstitutional "compulsion."[198] As commentators have noted, distinguishing coercion from inducement of voluntary conduct is exceedingly difficult.[199]

The question of whether the individual mandate is voluntary is by no means immune from these difficulties. In one respect, the individual mandate is entirely voluntary—the consequence of a failure to purchase the minimum level of insurance is simply payment of a penalty.[200] An individual might choose either to purchase insurance or to pay the penalty, the difference lying only in the amount of money involved.[201] In another respect, the individual mandate is involuntary—individuals might choose not to purchase insurance if there were no mandate, but now are involuntarily forced to make this purchase in lieu of violating federal law and suffering the imposition of a fine. The ease with which the mandate can be seen as voluntary or involuntary undermines any effort to draw a sharp distinction.

Under relevant precedent, could the PPACA's penalty be an eco-

194. Steward Mach. Co. v. Davis, 301 U.S. 548, 574–76 (1937).

195. *Id.* at 589 ("Who then is coerced through the operation of this statute? Not the taxpayer. He pays in fulfillment of the mandate of the local legislature. Not the state. Even now she does not offer a suggestion that in passing the unemployment law she was affected by duress.").

196. South Dakota v. Dole, 483 U.S. 203, 211–12 (1987).

197. *Id.* at 211 (quoting *Steward Mach. Co.*, 301 U.S. at 590).

198. *Id.* (citing *Steward Mach. Co.*, 301 U.S. at 590).

199. *See* sources cited *supra* note 187.

200. I.R.C. § 5000A(a) (West 2010) (stating that the PPACA imposes a penalty through an individual's tax return).

201. *See* I.R.C. § 5000A(c) (stating the amount of the penalty). This thought process is similar to Justice Holmes's "bad man." *See* Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897) ("If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material *consequences* which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.") (emphasis added).

nomic pressure resulting in financial ruin?[202] The congressional findings in no way suggest that the penalty would be unduly burdensome on the public to pay, but rather implicitly suggest that it does not reach the level of compulsion because individuals who may have had the most difficulties with paying the penalty are exempted.[203] The unnecessary distinction between voluntary and involuntary conduct and what economic pressures may constitute an unconstitutional level of coercion counsel strongly against adding this distinction to Commerce Clause doctrine.

b. Constitutional Analysis

Beyond the elusiveness of the distinction between voluntary and involuntary conduct, the Constitution does not expressly prohibit coerciveness under the Commerce Clause. On the contrary, coercion is the essence of countless federal regulations. In fact, in *Wickard v. Filburn*, the Court held that Congress had the power under the Commerce Clause to force a wheat farmer into the market.[204] This federal regulation was valid because, in the aggregate, individual decisions to avoid the wheat market would have a substantial effect on the "large and important" wheat industry.[205] Consequently, there inevitably would be individuals who may be restrained in order to maintain advantages for most in one market.[206]

Further constitutional support for Congress's ability to "force" individuals into some action is drawn from the Takings Clause of the Fifth Amendment.[207] The Takings Clause provides that "private property [shall not] be taken for public use, without just compensation."[208] Prop-

202. *See* United States v. Butler, 297 U.S. 1, 70–71 (1936) (striking down the federal regulation because the result of electing not to accept the benefits may be "financial ruin").

203. *See* I.R.C. § 5000A(e).

204. Wickard v. Filburn, 317 U.S. 111, 129 (1942) ("It is said, however, that this Act, *forcing some farmers into the market* to buy what they could provide for themselves, is an unfair promotion of the markets and prices of specializing wheat growers.") (emphasis added).

205. *Id.* at 125.

206. *Id.* at 129 ("It is of the essence of regulation that it lays a restraining hand on the selfinterest of the regulated and that advantages from the regulation commonly fall to others.").

207. *See* Rigdon, *supra* note 132, at 25. The comparison to the Takings Clause is done solely to illustrate the notion of constitutional authority to "force" an individual into a market. It was evident even before the enactment of the PPACA that the individual mandate would not be an unconstitutional taking because the benefit obtained with the purchase of insurance would necessarily offset the economic impact of the regulation. *See* JENNIFER STAMAN & CYNTHIA BROUGHER, CONG. RESEARCH SERV., R40725, REQUIRING INDIVIDUALS TO OBTAIN HEALTH INSURANCE: A CONSTITUTIONAL ANALYSIS 13 (2009) (relying on Penn Cent. Transp. Co. v. New York, 438 U.S. 104, 137 (1978)). Nevertheless, whether or not the requirement to purchase insurance under the individual mandate is an unconstitutional taking is irrelevant to the purpose of this note.

208. U.S. CONST. amend. V. Modern justifications for the forced exchange of property by an individual to the government is based on a monopoly theory, which seeks to prevent an undue

erty can be taken for public purposes (with just compensation), and a forced transfer of private property from one private owner to another can serve a public purpose, as *Kelo v. City of New London* illustrates.[209] *Kelo* thus stands for the proposition that, consistent with the Constitution, an individual can be forced to sell to another private person.[210]

To be sure, not every conceivable forced sale of property by one individual to another would be upheld. *Kelo* would invalidate a taking "for the purpose of conferring a private benefit on a particular private party," which would be "a purely private taking."[211] What would invalidate the governmental action, however, is not the fact that an individual was being forced to sell his or her property, but rather that the particular type of transfer would not satisfy the "public use" requirement.[212] Where the "public use" requirement is satisfied, however, forcing an individual to sell to another private person is constitutionally valid—a proposition with which eight of the nine Justices agreed.[213]

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burden on taxpayers. *See* DAVID A. DANA & THOMAS W. MERRILL, PROPERTY: TAKINGS 27–32 (2002). An individual has a monopoly power when a voluntary exchange is not feasible. *Id.* ("Eminent domain offers a solution to this kind of monopoly problem. If the government condemns the land, it can acquire a needed resource without providing a windfall to the landowner or without imposing an *undue burden on taxpayers*.") (emphasis added). The PPACA has been challenged as an unlawful taking in violation of the Takings Clause of the Fifth Amendment. *See, e.g.*, Bryant v. Holder, No. 2:10-CV-76-KS-MTP, 2011 WL 710693, at *2 (S.D. Miss. Feb. 3, 2011) (discussing claims that the PPACA is an "unconstitutional taking").

209. *See* Kelo v. New London, 545 U.S. 469 (2005). In 2005, the city of New London, Connecticut approved a large economic development plan to revitalize the city's economy. *Id.* at 473. In assembling the land required for the project, the city's development agent would purchase property voluntarily from willing sellers. *Id.* at 472. More important, the agent planned to use the power of eminent domain to acquire property from owners who would not voluntarily sell their homes. *Id.* Those unwilling owners were forced to enter a transaction of selling their homes in exchange for "just compensation." *Id.* The primary issue in *Kelo* was defining what actions satisfy the "public use" requirement of the Fifth Amendment. *Id.* at 477. In a 5–4 decision, the Court held that the city's use of the eminent domain power in furtherance of an economic development plan satisfied the "public use" requirement of the Takings Clause. *Id.* at 489.

210. *See id.* at 489. *Kelo* involved a taking by a local government, which was subject to the Fifth Amendment through its incorporation by the Fourteenth Amendment, but the same standard would apply in the case of the federal government. *See* Berman v. Parker, 348 U.S. 26 (1954).

211. *See Kelo*, 545 U.S. at 477 (quoting Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 245 (1984)).

212. *Id.* at 486–87.

213. Justice Kennedy signed with the majority, but his separate concurrence is in line with this proposition. *Kelo*, 545 U.S. at 492–93 (Kennedy, J., concurring) (noting that "private transfers" are valid but their purposes are likely to be inherently more suspect than a government taking). Justice O'Connor's dissent would also allow the government to take property and transfer it to private parties if the initial taking eliminated some "harmful property use." *Id.* at 501 (O'Connor, J., dissenting). Only Justice Thomas's separately written dissent would not agree with the proposition. *Id.* at 521 (Thomas, J., dissenting). His opinion does not have any exceptions or contingencies to the general rule with regard to private takings, by firmly stating that "the government may take property only if it actually uses or gives the public a legal right to use the property." *Id.*

If an individual can be forced to sell property to another private individual or entity in order to achieve some public benefit, it is hard to see why the Constitution would flatly prohibit forcing an individual to purchase something from another private entity. To put it another way, there is no reason why the power to force individuals into the market should be deemed consistent with the Constitution when the forced transaction is a sale, but denied when it is a purchase. Granted, *Kelo* concerned the Fifth Amendment, not the Commerce Clause.[214] The Fifth Amendment, however, is part of the Bill of Rights. It is hard to see why a forced sale would be within the federal government's power under the Bill of Rights—designed to protect individual liberty—but forbidden by the Commerce Clause—designed to address federalism concerns.

3. UNIQUENESS

The third distinction drawn in challenges to the individual mandate rests on contentions about uniqueness. The Sixth Circuit referred to the unique nature of the market.[215] In contrast to the distinctions between activity and inactivity or voluntariness and involuntariness, this distinction has played a role in arguments supporting the individual mandate as well as arguments challenging it. Either way, however, the distinction has nothing to add to Commerce Clause analysis.

One argument focuses on the claimed uniqueness of the market regulated by the PPACA. From this perspective, the health care market is unique because of billions of dollars involved in the "phenomenon of cost-shifting."[216] The prospect of cost-shifting on such a large scale is said to create a unique problem, which Congress must have the power to address.[217] An opposing perspective focuses on the alleged uniqueness

214. *See id.* at 477 (majority opinion).

215. *See* Thomas More Law Ctr. v. Obama, No. 10-2388, 2011 U.S. App. LEXIS 13265, at *47 (6th Cir. June 29, 2011) ("The vast majority of individuals are active in the market for health care delivery because of two unique characteristics of this market: (1) virtually everyone requires health care services at some unpredictable point; and (2) individuals receive health care services regardless of ability to pay."). *But see id.* at 117–19 (Graham, J., dissenting) (rejecting relevance of claim uniqueness of the market).

216. Thomas More Law Ctr. v. Obama, 720 F. Supp. 2d 882, 894 (E.D. Mich. 2010) (claiming that "by choosing to forgo insurance plaintiffs are making an economic decision to try to pay for health care services later, out of pocket, rather than now through the purchase of insurance, collectively shifting billions of dollars, $43 billion in 2008, on to other market participants").

217. Congress expressly stated that the individual mandate was "essential" to the success of the PPACA. 42 U.S.C.A. § 18091(a)(2)(G) (West 2010) (stating that "the requirement is *essential* to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold") (emphasis added). The government has relied on this contention by arguing that the individual mandate "is a necessary measure to ensure success of its larger reforms of the interstate health insurance market." *See* Virginia *ex rel.* Cuccinelli v. Sebelius, 728 F. Supp. 2d 768, 776 (E.D. Va. 2010). However, not every court upholding the mandate has viewed the alleged uniqueness of the market

of the individual mandate itself. The mandate is often described as an unprecedented—or unique—federal intrusion into individuals' lives.[218] The uniqueness of the exercise of congressional power is said, at the very least, to cast grave doubt on its validity.

Whether offered in support of or in opposition to the constitutionality of the individual mandate, this focus on uniqueness is deeply misguided. The claims of uniqueness on either side are not supportable under Commerce Clause doctrine. Moreover, to focus on the nature of the market or the regulatory imposition as "unique" is to miss the core of Commerce Clause analysis, which concerns maintaining the appropriate balance between state and federal power.

a. Uniqueness of the Market

Introducing a distinction between unique markets and other markets would be unhelpful to Commerce Clause doctrine for several reasons. First, the health care market is not the only market that could be called "unique;" to put it another way, regulation often faces what might plausibly be called unique challenges.[219] Courts that call a market or a prob-

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as decisive. *See* Liberty Univ., Inc. v. Geithner, 753 F. Supp. 2d 611, 633 (W.D. Va. 2010) (upholding the individual mandate based on "the well-settled principles expounded in *Raich* and *Wickard*"); Florida *ex rel.* Bondi v. U.S. Dep't of Health & Human Servs., No. 3:10-CV-91-RV/EMT, 2011 WL 285683, at *33 (N.D. Fla. Jan. 31, 2011) (striking down the mandate despite accepting that it was "essential").

218. *See Thomas More Law Ctr.*, 2011 U.S. App. LEXIS 13265, at *77; *Bondi*, 2011 WL 285683, at *20 ("Never before has Congress required that everyone buy a product from a private company (essentially for life) just for being alive and residing in the United States."); *Thomas More Law Ctr.*, 720 F. Supp. 2d at 893 (noting that the regulation "arguably presents an issue of first impression"). The idea that an individual mandate might be unique long predates the current controversy. *See* Memo, Cong. Budget Office, *The Budgetary Treatment of an Individual Mandate to Buy Health Insurance*, Aug. 1994 ("A mandate requiring all individuals to purchase health insurance would be an unprecedented form of federal action.").

219. *See, e.g.*, United States v. Nat'l Ass'n of Secs. Dealers, Inc., 422 U.S. 694, 729 (1975) (noting that the Investment Company Act immunizes mutual funds from antitrust liability under certain circumstances because "Congress has made a judgment that these restrictions on competition might be necessitated by the unique problems of the mutual-fund industry"); Ricci v. Chi. Mercantile Exch., 409 U.S. 289, 305 (1973) (deferring to Commodity Exchange Commission because it was "familiar with the customs and practices of the industry and of the unique marketplace involved in this case"); Fed. Mar. Comm'n v. Aktiebolaget Svenska Amerika Linien (Swedish Am. Line), 390 U.S. 238, 253 (1968) (Harlan, J., concurring) (arguing that the Act was "intended to comprehend factors unique to the shipping industry"); United States v. Drum, 368 U.S. 370, 384 (1962) (upholding ICC determination that certain truck drivers were "contract carriers" subject to federal permit requirement where the ICC "allowably dealt with this novel situation as an integral and unique problem in judgment, rather than simply as an exercise in counting common-places"); United States v. Five Gambling Devices, 346 U.S. 441, 454–63 (1953) (Clark, J., dissenting) (arguing for congressional power to regulate certain gambling devices in part on the ground that "the situation here is unique"); Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co., 334 U.S. 219, 239–40 (1948) (taking the sugar beet industry's "unique character" into account in finding it subject to federal antitrust law).

lem unique are best understood as imprecisely expressing the issue of how much discretion Congress should have under the Commerce Clause to resolve difficult practical problems. If anything, as Justice Frankfurter observed, the sense that a problem is unique should counsel against application of rigid tests and distinctions.[220] To turn uniqueness into a general assessment of Congress's power would require developing a test of what is truly unique—a daunting and likely unproductive task. Most likely, any court that incorporated uniqueness into Commerce Clause doctrine would in effect grant itself nearly unlimited discretion to pass on the wisdom of the regulation.

Second, even if a principled version of such a test could be developed, it would play no useful role in legal analysis under the Commerce Clause. Uniqueness of a market or problem could not possibly be a *necessary* condition for the exercise of federal power. It would make no sense to rule out federal regulation on the ground that the market or problem addressed exhibited no unique characteristics. More important, it should not be a *sufficient* condition for the exercise of federal power. As the Supreme Court stated in *Home Building & Loan Ass'n v. Blaisdell*,[221] an emergency does not create regulatory power. If an emergency does not do so, it is difficult to see why uniqueness should.[222]

For a court to observe that comprehensive regulation of the private health insurance market poses complex and interrelated problems, the resolution of which should be left primarily to Congress, is one thing. To justify the exercise of that power on the ground of the uniqueness of

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220. Powell v. U.S. Cartridge Co., 339 U.S. 497, 529 (1950) (Frankfurter, J., dissenting) (noting that in "unique situations especially we should heed our admonition against perverting 'the process of interpretation by mechanically applying definitions in unintended contexts.' In law as elsewhere words of many-hued meanings derive their scope from the use to which they are put." (quoting Farmers Reservoir & Irrigation Co. v. McComb, 337 U.S. 755, 764 (1949))).

221. 290 U.S. 398, 425 (1934) ("Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency.").

222. As Judge Graham put it in his dissent:

> The government recites the common refrain that the health insurance market is unique and attributes this to some blend of free-riding, adverse selection, universal participation, and unpredictability as to when and how much care might be needed. This should comfort the court, the government says, because Congress will not need to resort to such measures as the mandate again, or at least not very often.
>
> This assurance is troubling on many levels and should hardly be heard to come from a body with limited powers. The uniqueness that justifies one exercise of power becomes precedent for the next contemplated exercise. And permitting the mandate would clear the path for Congress to cause or contribute to certain "unique" factors, such as free-riding and adverse selection, and then impose a solution that is ill-fitted to the others.

Thomas More Law Ctr., 2011 U.S. App. LEXIS 13265, at *77 (Graham, J., dissenting) (footnotes omitted).

the problem or the market is another. Commerce Clause analysis of the individual mandate is best left with the focus on whether the PPACA's reforms of the private health insurance market, including the imposition of the individual mandate, constitute "appropriate legislation" for the "protection or advancement" of commerce.[223]

b. Uniqueness of the Regulation

The alleged uniqueness of the individual mandate itself should equally be irrelevant to Commerce Clause analysis. Here, too, the conceptual difficulties are daunting. What constitutes uniqueness is a matter of category. If the category is "required purchases of insurance," there is nothing unique about the mandate. Individuals are routinely required to purchase automobile insurance. If the category is "required acts or omissions imposed on individuals just for being alive," mandates to buy health insurance and to refrain from killing others both fall in this category.[224] Of course, if the category is "required purchases of health insurance," by definition the regulation is unique. But then so is any other federal regulation if phrased in sufficiently specific terms.

To pick and choose among such easily manipulated categorical definitions of this type is to risk straying from sound constitutional analysis toward judicial activism. Any concerted attempt to distinguish between ordinary or familiar kinds of congressional regulation and unique or unprecedented exercises of federal power would encounter precisely the same problems that led the Court to relinquish its decade-long effort to distinguish between "traditional governmental functions" and other functions under the Tenth Amendment. In 1976, the Court ruled in *National League of Cities v. Usery* that Congress could not regulate state activities when states engaged in "traditional governmental functions."[225] Nine years later, the Court overturned *Usery*, because the distinction between what was "traditional" and what was not simply invited judicial activism.[226] Having buried one untenable distinction relating to the nature of the governmental power exercised, the Court should not introduce a new one with the same elasticity.

In sum, the uniqueness distinction in the market or the regulation

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223. *See* NRLB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 36–37 (1937).

224. *See* Florida *ex rel.* Bondi v. U.S. Dep't of Health & Human Servs., No. 3:10-CV-91-RV/EMT, 2011 WL 285683, at *20 (N.D. Fla. Jan. 31, 2011) (claiming that the mandate affects people "just for being alive and residing in the United States").

225. Nat'l League of Cities v. Usery, 426 U.S. 833, 854 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

226. *Garcia*, 469 U.S. at 546 ("Any rule of state immunity that looks to the 'traditional,' 'integral,' or 'necessary' nature of governmental functions inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes.").

itself has no constitutional basis under the Commerce Clause. Uniqueness should be invoked neither in support of the individual mandate, nor against it. As with the previously discussed distinctions regarding activity and voluntariness, the alleged uniqueness of a market or a regulation simply misses the point of constitutional authority under the Commerce Clause.

IV. THE LIBERTY CLAIM UNDERLYING CHALLENGES TO THE CONSTITUTIONALITY OF THE PPACA

What explains the emphasis on these new distinctions? The conceptual difficulties and lack of constitutional support under the Commerce Clause certainly are not sufficient to do so. Instead, these distinctions represent an attempt to shift Commerce Clause analysis away from its well-settled federalism principles to a focus on individual liberty. This effort is nothing new. There is a history of efforts to show that congressional legislation enacted pursuant to the Commerce Clause violates some implicit—and typically poorly articulated—liberty right.[227] The Court has rejected these claims in the past and should do so here with respect to the individual mandate.

Any claim that the mandate infringes on the Constitution should be articulated squarely in terms of an individual substantive due process right that encompasses the right not to purchase health insurance. While this note will not seek to show whether or not that substantive due process right exists, it will demonstrate that the argument for it is far from clear. And that is what counts. Articulating it as a substantive due process right exposes its weakness; smuggling it in as a Commerce Clause argument obscures it. Sound constitutional analysis proceeds in a manner that exposes rather than hides the fundamental—and difficult—questions.

A. *The Relationship Between Federalism Concerns and Individual Liberty Rights in the Commerce Clause*

Judicial enforcement of both the Commerce Clause and the Tenth Amendment is, in the first instance, about enforcing the proper balance between state and federal power. The Court struck down the Brady Handgun Violence Prevention Act to enforce this balance in *Printz v. United States*.[228] Enacted pursuant to Congress's Commerce Clause authority, the Brady Act required state officials to run background

227. *See, e.g.*, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258–60 (1964) (rejecting a claimed liberty right in a case based on whether the "racial discrimination by motels affected commerce").

228. *See* 521 U.S. 898 (1997).

checks on prospective handgun purchasers as part of a national federal scheme for distribution of firearms.[229] The Court held that such commands are "fundamentally incompatible with our constitutional system of dual sovereignty."[230]

This balance maintains the accountability central to democracy. In *New York v. United States*,[231] the Court struck down a federal regulation of nuclear waste on this accountability basis. The Low-Level Radioactive Waste Policy Amendments Act of 1985 required states to provide for disposal of waste generated within their borders; those not in compliance would be forced to "take title" to all waste generated within the state or regulate it according to federal criteria.[232] Either way, states were not simply encouraged by the federal government to regulate, but were compelled to do so.[233] Allowing such compulsion, the Court reasoned, diminished "the accountability of both state and federal officials."[234] Moreover, the importance of maintaining this accountability remains in the Court's Commerce Clause cases as well.[235] To some extent this accountability is maintained by the national political process, which, as the Court observed in *Garcia v. San Antonio Metropolitan Transit Authority*, "systematically protects States from the risk of having their functions in that area handicapped by Commerce Clause regulation."[236] But as *New York* and *Printz* make clear, the Court also has a role in protecting accountability.

The judicial protection of accountability *indirectly* helps preserve individual liberty. In the extreme instance, it may prevent the federal government from becoming tyrannical.[237] More generally, accountability promotes democracy, and democracy tends to help protect individual

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229. *Id.* at 902–04.

230. *Id.* at 935.

231. 505 U.S. 144 (1992).

232. *Id.* at 150–54.

233. *See id.* at 174–75 (holding that the "take title" provision "crossed the line distinguishing encouragement from coercion").

234. *Id.* at 168.

> But where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation.

Id. at 169.

235. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 552 (1985) (noting that the "effectiveness of the federal political process in preserving the States' interests is apparent even today in the course of federal legislation").

236. *Id.* at 555.

237. *See* Ann Althouse, *The Vigor of Anti-Commandeering Doctrine in Times of Terror*, 69 BROOK. L. REV. 1231, 1274–75 (2004) (arguing that Tenth Amendment limitations on the federal

rights. This series of steps from judicial protection of accountability to individual rights, however, hardly supports an argument that the Commerce Clause or the Tenth Amendment *directly* preserves individual liberty.[238]

Nevertheless, there is a history of liberty-based attacks on congressional exercises of power under the Commerce Clause focusing on the Thirteenth Amendment, which prohibits slavery.[239] In the first half of the twentieth century, labor unions repeatedly challenged federal court injunctions against strikes as violations of the Thirteenth Amendment. These arguments were uniformly rejected by the Court.[240] The civil rights legislation of the 1960s was also challenged as a violating the Thirteenth Amendment. In *Heart of Atlanta Motel, Inc. v. United States*, the motel owner argued that application of the Civil Rights Act required the motel to provide accommodation to African-Americans and "against its will," which, the motel owner asserted, constituted "involuntary servitude."[241] The Court summarily rejected this claim too.[242] The congressional mandate that local law enforcement officers run a background check on gun purchasers was likewise challenged in federal district court

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government's power to commandeer the states could protect liberty in times of national emergency, when the threat to individual rights from an over-reaching government is at its peak).

238. Of course, as a matter of standing, the Commerce Clause can be invoked by individuals to protect them from federal legislation. Consequently, this might, for that individual, directly protect liberty. To illustrate, Alfonso Lopez, Jr. was shielded from prosecution and imprisonment under the Gun-Free School Zones Act of 1990 by virtue of its invalidity under the Commerce Clause. *See* United States v. Lopez, 514 U.S. 549 (1995). But the substantive analysis in the case concerned the maintenance of a "healthy balance of power between the States and the Federal Government," not the direct protection of an individual right to carry a gun. *Id.* at 552 (quoting Gregory v. Ashcroft, 501 U.S. 452, 458 (1991)). In contrast, the analysis in District of Columbia v. Heller, 554 U.S. 570 (2008), decided under the Second Amendment, concerned precisely that individual right.

239. *See* U.S. CONST. amend. XIII ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.").

240. *See* James Gray Pope, *The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921–1957*, 102 COLUM. L. REV. 1, 104–12 (2002); *see also* Risa L. Goluboff, *The Thirteenth Amendment and the Lost Origins of Civil Rights*, 50 DUKE L.J. 1609, 1674–80 (2001) (noting that in the 1940s and 1950s, the U.S. Justice Department's Civil Rights Section saw the Thirteenth Amendment as protecting the rights of workers to unionize); *id.* at 1676 ("When the Section broadened the definition of involuntary servitude to include 'peonage-like' and abhorrent conditions, it targeted not only legal but also social and economic obstacles to free labor."); *id.* at 1683 (noting the "Thirteenth Amendment's doctrinal eclipse" from the mid-1950s on).

241. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 244 (1964).

242. *Id.* at 261. Using the Thirteenth Amendment to attack civil rights legislation is ironic because, if anything, the Thirteenth Amendment might provide an alternative basis for *upholding* it. *See* Alexander Tsesis, *Furthering American Freedom: Civil Rights & the Thirteenth Amendment*, 45 B.C. L. REV. 307, 352 (2004) (noting that "[o]ddly, it was the Motel that raised the Thirteenth Amendment claim").

as violating the Thirteenth Amendment.[243] In rejecting the claim, the court made clear that Congress could require a "painful" choice on the part of a local law enforcement officer to comply with the law or to resign as sheriff; the existence of that choice precluded it from triggering a Thirteenth Amendment violation.[244]

Conceptually, the legal challenges to the individual mandate as coercing individuals into activity amount to a veiled form of the earlier Thirteenth Amendment arguments.[245] The argument would be that being forced to purchase health insurance—an obligation imposed on individuals just for existing—constitutes involuntary servitude.[246] For opponents of the individual mandate, the argument would carry a powerful attraction, making the mandate presumptively beyond Congress's power by lumping it in with slavery.

The argument would fail, however, for two reasons. First, as noted earlier, encouragement—some level of coercion—is the essence of regulation.[247] Applying a presumption of unconstitutionality to a regulation because it coerces individuals implicitly amounts to the application of strict scrutiny, which has no place in Commerce Clause doctrine. Second, the mandate is not coercive in any sense related to the evils the Thirteenth Amendment was intended to abolish. For one thing, individuals subject to the mandate do not have to purchase insurance; they simply have to pay a fine if they do not. Even if the penalty were imprisonment, however, being forced to buy insurance could not reasonably be compared to being enslaved.

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243. Mack v. United States, 856 F. Supp. 1372, 1382 (D. Ariz. 1994), *rev'd on other grounds*, 66 F.3d 1025 (9th Cir. 1995), *rev'd sub nom.* Printz v. United States, 521 U.S. 898 (1996). A violation of an individual's Thirteenth Amendment right requires proof that of being "'forced to work for the defendant by the use or threat of physical restraint or physical injury' or by law, rather than mere psychological coercion." *Mack*, 856 F. Supp. at 1382 (quoting United States v. Kozminski, 487 U.S. 931, 952 (1988)). Additionally, the Thirteenth Amendment is not violated if an individual can "refuse to work without incurring legal sanctions . . . even if the choice is a painful one." *Id.*

244. *See Mack*, 66 F.3d at 1034 (noting that "[u]nlike a slave, however, Mack can quit work at any time"); *see also id.* (discussing how performing "certain duties as a condition of his employment, does not violate the Thirteenth Amendment") (citing United States v. 30.64 Acres of Land, 795 F.2d 796, 800–01 (9th Cir. 1986) (noting that "requiring lawyers to perform *pro bono* services does not violate Thirteenth Amendment because requirement is a condition of practicing law")).

245. Thus, Professor Barnett's "anti-commandeering" argument is nothing more than the discredited claim that forcing motel owners to provide rooms to people they would rather exclude is involuntary servitude. *See Heart of Atlanta Motel*, 379 U.S. at 244 (rejecting the motel owner's involuntary servitude argument).

246. This argument would at least have the merit of applying both to the state and federal governments.

247. *See, e.g.*, South Dakota v. Dole, 483 U.S. 203, 211 (1987) (upholding a federal statute where the government imposed conditions on federal highway funding).

Certainly there is no reason to think that a Thirteenth Amendment argument against the PPACA would meet a different fate from its earlier incarnations. The Court would summarily reject it. Not surprisingly, the Thirteenth Amendment has played no role in the legal challenges to the individual mandate before the courts,[248] though it is a common argument in the blogosphere.[249]

The interest of the Thirteenth Amendment lies not in any possibility that the Court will find the individual mandate to violate it. Rather, it lies in the fact that the argument of the most prominent proponent of the unconstitutionality of the individual mandate amounts to the same thing in different language. Professor Barnett argues eloquently that the individual mandate violates an "anti-commandeering" principle of the Constitution.[250] He draws on a variety of sources to create this theory and grounds the principle in the "substantial effects" prong of the Commerce Clause, which he considers derived from the Necessary and Proper Clause of the Constitution.[251] This "substantial effects" doctrine "implicitly limit[s] the use of 'necessary and proper' means to execute Congress's power over interstate commerce."[252] Even if the individual mandate is "necessary," Professor Barnett claims that the individual mandate must "also [be] a 'proper' means to the end of regulating interstate commerce."[253] It is not proper because the Constitution does not

248. *See, e.g.*, Complaint for Declaratory & Injunctive Relief, Virginia *ex rel.* Cuccinelli v. Sebelius, 728 F. Supp. 2d 768 (E.D. Va. 2010) (No. 3:10-CV-188-HEH), 2010 WL 1038397 (failing to allege a Thirteenth Amendment violation); First Amended Complaint for Declaratory, Preliminary & Permanent Injunctive Relief, Liberty Univ., Inc. v. Geithner, 753 F. Supp. 2d 611 (W.D. Va. 2010) (No. 6:10-CV-00015-NKM), 2010 WL 5867473 (same).

249. *See, e.g.*, *Does the Individual Mandate Abolish the 13th Amendment?*, SODAHEAD (Feb. 3, 2011), http://www.sodahead.com/united-states/does-the-individual-mandate-abolish-the-13th-amendment-if-government-can-force-you-to-buy-insuranc/question-1488353/; Anthony Gregory, *Judge Hudson is Right About the Individual Mandate*, TENTH AMENDMENT CTR. BLOG (Dec. 14, 2010, 7:34 AM), http://blog.tenthamendmentcenter.com/2010/12/judge-hudson-is-right-about-the-individual-mandate/ (noting that "being forced to fill out forms to apply for insurance is in tension with the 13th Amendment's prohibition of 'involuntary servitude'"). It is most commonly found in comments on blogs. *See, e.g.*, JamesJoyce, Comment to *Progressives Shouldn't Defend the Individual Mandate: The Difference Between Ideology and Blind Partisan Defense*, FDL (Aug. 6, 2010, 4:29 PM), http://fdlaction.firedoglake.com/2010/08/06/progressives-shouldnt-defend-the-individual-mandate-the-difference-between-ideology-and-blind-partisan-defense/ (noting that "[t]he 13th Amendment along with the Equal Protection Clause of the 14th Amendment makes the present federal Healthcare Reform Law's Individual mandate unconstitutional. State requirements imposing [the] same are also unconstitutional").

250. *See* Barnett, *supra* note 5, at 621–34. Professor Barnett also addresses the taxing power. *See id.* at 607–13. However, a complete analysis of this issue is not necessary for this note's purpose. *See supra* Part III.B.

251. *See* Barnett, *supra* note 5, at 604 (claiming that "the substantial effects doctrine is not a pure application of the Commerce Clause, but is actually an assertion of the Necessary and Proper Clause to reach activity that is neither interstate nor commerce").

252. *Id.* at 591–92.

253. *Id.* at 621.

permit the imposition of duties on individuals just for being citizens—as opposed to duties contingent on engaging in an activity.[254]

Professor Barnett then lists exceptions to this principle. They fall into a narrow class derived from "traditionally recognized fundamental duties of citizenship" and include duties to "register for the draft and serve if called, sit on a jury, fill out a census form, and file a tax return."[255] These exceptions are contrasted with other provisions of the Constitution that, he claims, reflect an anti-commandeering principle. The first provision—and the main one—is the Tenth Amendment, which the Court has read to prohibit the federal government from commandeering the states.[256] Because the Tenth Amendment reserves powers not delegated to the federal government to the states or the people, he reads it as embodying a prohibition on "commandeering" the people.[257] Second, Professor Barnett refers to other "express prohibitions on commandeering the people" in the text of the Bill of Rights.[258] Revealingly, he also grounds his principle in the Thirteenth Amendment.[259]

The anti-commandeering principle may have garnered some support in federal courts, but the theory has two fundamental problems.[260] First, any attempt to found it in the Necessary and Proper Clause is misconceived. Professor Barnett overlooks the holding in *McCulloch v. Maryland* that the Necessary and Proper Clause is not a limitation on congressional power.[261] Consistent with nearly 200 years of case law, the Supreme Court recently gave the Necessary and Proper Clause an expansive reading.[262] Yet, Professor Barnett claims that *United States v. Comstock* "offers little, if any, support for the individual mandate."[263] Instead, he supports his reading of the clause with Justice Scalia's con-

254. *See id.* at 630 (claiming that "mandates are different than regulations that tell persons who choose to engage in economic activity how they must do so—or that prohibit certain activities altogether").

255. *Id.* at 630–31.

256. *See id.* at 622 (citing New York v. United States, 505 U.S. 144, 161 (1992)).

257. *See id.* at 626 (claiming that "the letter of the Tenth Amendment is not limited to states").

258. *Id.* at 629–30 (discussing the prohibition to mandate the quartering of soldiers during times of peace, testifying against themselves in a criminal case, and "commandeer[ing] private property for private use").

259. *Id.* at 631 (claiming that "unless the Court could find an affirmative duty of citizenship on which to base conscription, the Thirteenth Amendment's general prohibition on commandeering the labor of the people would clearly apply").

260. *See, e.g.*, Florida *ex rel.* McCollum v. U.S. Dep't of Health & Human Servs., 716 F. Supp. 2d 1120, 1160 (N.D. Fla. 2010) (citing to a forthcoming draft of Professor Barnett's article in support of the court's ruling).

261. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 419 (1819) ("The clause is placed among the powers of congress, not among the limitations on those powers.").

262. *See* United States v. Comstock, 130 S. Ct. 1949 (2010). Professor Barnett concedes that the opinion was an "expansive reading." *See* Barnett, *supra* note 5, at 625.

263. Barnett, *supra* note 5, at 625.

currence in *Gonzales v. Raich*.[264] He minimizes the significance of the majority opinions of *Comstock* and *Raich* on the ground that Justice Breyer (in *Comstock*) and Justice Stevens (in *Raich*) allegedly diluted the holdings to attract votes.[265] This bold assertion cannot suffice to elevate Justice Scalia's concurrence in *Raich* over actual precedent. But even so, Justice Scalia may have been saying that the Necessary and Proper Clause cannot be used as some amorphous basis for upholding congressional power.[266] Interpreting Justice Scalia's concurrence in this manner is different from Professor Barnett's effort to use the Necessary and Proper clause as a limitation on Congress's power.[267]

This basic misreading of the Necessary and Proper Clause might not, however, prove fatal to Professor Barnett's anti-commandeering argument because his theory could also be grounded in the Tenth Amendment.[268] However, the argument under the Tenth Amendment fails for three reasons. First, the text of the Amendment has been referred to by the Court as a "truism" over the years for good reason.[269] Only the "powers not delegated to the United States by the Constitution" are reserved to the states or to the people.[270] As shown in Part III, however, the power to regulate the health insurance market, including the power to mandate individuals to purchase insurance, *is* delegated to the federal government under the Commerce Clause.[271] Thus the Tenth Amendment is inapplicable. Holding otherwise would be inconsistent with *Garcia v. San Antonio Metropolitan Transit Authority*.[272] In that case, which Professor Barnett fails to cite, the Court rejected the use of the Tenth Amendment as a substantive limit on the scope of Congress's regulatory powers under the Commerce Clause.[273] A decade earlier in *National League of Cities v. Usery*, the Court had ruled that Congress did not have the power to regulate wages paid to state employees, at

264. *Id.* at 624 (citing Gonzales v. Raich, 545 U.S. 1, 39 (2005) (Scalia, J., concurring)).

265. *Id.* at 602 (claiming that the majority opinion of *Raich* "had to be written in such a fashion as to attract Justice Kennedy's fifth vote, which it did"); *id.* at 624–25 (claiming that the majority opinion of *Comstock* "may well have been so written to attract the vote of Chief Justice Roberts").

266. *See Raich*, 545 U.S. at 39 (Scalia, J., concurring) (noting that "the nature of the Necessary and Proper Clause . . . empowers Congress to enact laws in effectuation of its enumerated powers that are not within its authority to enact in isolation").

267. *See* Barnett, *supra* note 5, at 624–25 (citing *Raich*, 545 U.S. at 39 (Scalia, J., concurring)).

268. *Id.* at 624 (claiming that the "doctrine barring the commandeering of states has, however, come to be associated primarily with the Tenth Amendment").

269. *See, e.g.*, United States v. Darby, 312 U.S. 100, 123–24 (1941) (noting that "[t]he amendment states but a truism . . ."); New York v. United States, 505 U.S. 144, 156 (1992) (noting that "it is in this sense that the Tenth Amendment 'states but a truism . . .'") (quoting *Darby*, 312 U.S. at 124).

270. U.S. CONST. amend. X.

271. *See supra* Part III.B.

272. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

273. *Id.* at 555.

least where the employees engaged in an activity that was part of a "traditional government function."[274] *Garcia* overruled *Usery* and once again upheld the plenary reach of Congress's regulatory power under the Commerce Clause.[275]

Second, the non-textual principle on which the Court has grounded its "Tenth Amendment" prohibition on commandeering the states is fundamentally a structural matter—not one of directly protecting individual liberty rights.[276] The Court made it clear in *New York* and *Printz* that what the Tenth Amendment protects is a meaningful role for the states in a federal system.[277] It has recognized this principle in part to respect the Framers' intent,[278] and in part to maintain political accountability.[279] There simply is nothing in the Court's Tenth Amendment cases that speaks of a general principle prohibiting the "commandeering" of individuals.[280]

In an effort to address this problem, Professor Barnett draws an analogy to the prohibition of federal authority to commandeer a state to enact legislation in *New York*, calling individual decision-making power

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274. Nat'l League of Cities v. Usery, 426 U.S. 833, 852 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

275. *Garcia*, 469 U.S. at 557.

276. *See* New York v. United States, 505 U.S. 144, 177 (1992) ("Whether one views the take title provision as lying outside Congress' enumerated powers, or as infringing upon the core of state sovereignty reserved by the Tenth Amendment, the provision is inconsistent with the federal structure of our Government established by the Constitution.").

277. *See New York*, 505 U.S. at 157 (claiming that the "Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States"); Printz v. United States, 521 U.S. 898, 927 (1997) (discussing the principles of federalism and how it "is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority").

278. *See Printz*, 521 U.S. at 919–20 (discussing how the "Framers rejected the concept of a central government that would act upon and through the States, and instead designed a system in which the State and Federal Governments would exercise concurrent authority over the people").

279. *See New York*, 505 U.S. at 168 (discussing the importance of maintaining "the accountability of both state and federal officials").

280. Professor Hall makes an excellent point that Justice Scalia—whom Professor Barnett often appears to rely for his argument—wrote the majority opinion in *District of Columbia v. Heller*, which explicitly noted that the Tenth Amendment does not apply to individual rights:

> [The First, Fourth and Ninth Amendments] unambiguously refer to individual rights, not "collective" rights, or rights that may be exercised only through participation in come corporate body.
>
> Three provisions of the Constitution refer to "the people" in a context other than "rights"—the famous preamble ("We the people"), § 2 of Article I (providing that "the people" will choose members of the House), and the Tenth Amendment (providing that those powers not given the Federal Government remain with "the States" or "the people"). Those provisions arguably refer to "the people" acting collectively—but they deal with the exercise or reservation of powers, not rights.

Hall, *supra* note 112 at 24 (citation omitted).

a "private legislative power."[281] But this type of analogy has no limits. For example, is the exercise of this "private legislative power" subject to the strictures of the Bill of Rights? A negative answer undercuts the whole analogy. An affirmative answer would destroy the distinction between state action and private conduct—a distinction that has been embedded in the Court's case law since *The Civil Rights Cases*.[282]

Professor Barnett further argues that the individual mandate undermines political accountability because Congress should have imposed a tax on individuals rather than "compelling citizens to make payments directly to private companies."[283] However, this flatly contradicts the political reality that of the PPACA's many provisions, the individual mandate has been the most controversial. All evidence points to the conclusion that people know perfectly well that Congress is responsible for the fact that they will have to carry health insurance or pay a penalty.[284] To suggest an accountability problem like the one in *New York* is to revel in the same obliviousness to reality that the Court has dismissed in the past.[285]

Third, even if there were an anti-commandeering principle with respect to individuals, Professor Barnett notes that it is subject to exceptions. Could not the duty to purchase health insurance be one of them? In concluding that "Americans instinctively sense that empowering Congress to commandeer the people to engage in economic activities would fundamentally change the relationship between themselves and their government," Professor Barnett fails to notice that it was these allegedly commandeering-averse Americans who elected the Congress that approved the individual mandate.[286] A more reasonable approach would recognize that at least some significant segment of the public might regard health care as a fundamental right, and view the task of making sure it is available to all a basic function of the government. Consider an American's right to a trial by jury. This entails an obligation to serve on a jury. Similarly, so might a right to health care entail an obligation not

281. *See* Barnett, *supra* note 5, at 629 ("Mandating that individuals exercise their private legislative power is as fundamental an intrusion into popular sovereignty as mandating that states employ their legislative powers violates state sovereignty."); *see also New York*, 505 U.S. at 175.

282. *See* 109 U.S. 3 (1883).

283. *See* Barnett, *supra* note 5, at 632.

284. *See* Carl Hulse et al., *After Health Vote, Democrats are Threatened with Violence*, N.Y. TIMES, Mar. 25, 2010, at A18 (reporting death threats to members of Congress who voted in favor of the bill).

285. *See* Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co., 334 U.S. 219, 228 (1948) (observing, in rejecting beet sugar refiners' attempt to limit the scope of the Sherman Act, that the refiners' proposed reading of the Act and the Commerce Clause "very nearly denies that sugar beets contain sugar").

286. *See* Barnett, *supra* note 5, at 631.

to shift costs onto others by self-insuring and then relying on others to pay for medical care in case of emergency or life-threatening illness.

The evidence that a substantial segment of the public might view health care as a fundamental right is not hard to find. One of the traditional "police powers" of states is the protection of public health.[287] Nearly a third of states' constitutions recognize a right to health care, either implicitly or explicitly.[288] In his famous State of the Union address in 1944, President Roosevelt declared that Americans have a "right to adequate medical care and the opportunity to achieve and enjoy good health."[289] The United States Conference of Catholic Bishops recently reaffirmed that "access to health care is a basic human right and a requirement of human dignity."[290] The Universal Declaration of Human Rights—the promotion of which the United States State Department describes as a "central goal of U.S. foreign policy"[291]—also recognizes a right to medical care.[292]

In contrast, Professor Barnett offers a version of the "American exceptionalism" that has lately become a rallying cry for some conservative politicians.[293] He asserts that "[w]hat separates the United States

287. Jacobson v. Massachusetts, 197 U.S. 11, 25 (1905) (upholding mandatory vaccinations as part of the "police powers" of a state). Granted, states, not the federal government, have police powers. But in deciding whether there is some fundamental limit on commandeering individuals—a limit that would logically be applicable to both the states and the federal government—the scope of the police power is surely relevant.

288. Elizabeth Weeks Leonard, *State Constitutionalism and the Right to Health Care*, 12 U. PA. J. CONST. L. 1325, 1328 (2010).

289. President's Message to Congress on the State of the Union, 12 PUB. PAPERS 41 (Jan. 11, 1944).

290. *Archbishop Dolan Outlines U.S. Bishops' Legislative 'Principles and Priorities' for New Congress*, TARGETED NEWS SERV., Jan. 18, 2011.

291. U.S. DEP'T OF STATE, http://www.state.gov/g/drl/hr/ (last visited July 17, 2011).

292. Universal Declaration of Human Rights, art. 25, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. Metg., U.N. Doc. A/810 (Dec. 12, 1948); *see also* James A. Morone, *The Bias of American Politics: Rationing Health Care in a Weak State*, 140 U. PA. L. REV. 1923, 1926 (1992) (noting that while the ideology of American exceptionalism has deep roots, "[t]here are other legacies in American political history" as well, and that "anti-statist rhetoric failed to bury . . . social security, Medicare, protecting voting rights, business regulation, and water fluoridation"). As Professor Morone notes, "[t]he American fear of government matters, but it is only part of the political story." *Id.* at 1927. The "skeptical view of government" reflected in American politics has hindered agreements on health care policy, but, "[e]ven so, American political history is full of great reforming battles that resulted in effective and popular programs." *Id.* at 1938. Professor Barnett's story has a legitimate place in politics; for the Court to impose his story on the American people would be profoundly illegitimate.

293. *See, e.g.*, Karen Tumulty, *Conservatives' New Focus: America, the Exceptional*, WASH. POST, Nov. 29, 2010, at A1 (claiming that "the idea that the United States is inherently superior to the world's other nations has become the battle cry"); NEWT GINGRICH, A NATION LIKE NO OTHER: WHY AMERICAN EXCEPTIONALISM MATTERS 13 (2011) (noting that the book "is dedicated to the proposition that American Exceptionalism is so central to our nation's survival that every generation must learn why being an American is a unique and precious experience"). Yet, this appears to be a very narrow version of American exceptionalism, considering that until a few

from other countries is the minimal and fundamental nature of the duties its citizens owe the state."[294] It takes a particularly narrow view of American culture and history not to wonder why a legislative effort to achieve universal health care is anathema to a minimalist approach to government, simply because it requires many people to fund their medical costs through private health insurance rather than at the expense of emergency providers or the state. But rather than confront the potential bases that support a right to health care, Professor Barnett simply claims that requiring individuals to purchase health insurance is not one of the duties Americans recognize.[295]

Justice Holmes would know how to answer the claim that the Constitution precludes a mandate to purchase health insurance. Dissenting in *Lochner v. New York*, he stated:

> [A] Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.[296]

The choice between American exceptionalism and health care as a fundamental right should be made by the people through their elected representatives—not the courts.

In sum, judicial enforcement of both the Commerce Clause and the Tenth Amendment is not *directly* about preserving individual liberty. Professor Barnett's anti-commandeering argument misses this, leaving his argument to be best understood as a continuation of the earlier—uniformly rejected—efforts to use the Thirteenth Amendment to limit congressional regulatory power in areas that have nothing to do with the historical institution of slavery. The futility of these efforts cannot be remedied by invoking the Necessary and Proper Clause or by drawing analogies to the Tenth Amendment. A vague anti-commandeering prohibition in relation to the scope of Congress's power to regulate individuals is fundamentally flawed and should be disregarded by the Supreme Court.

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years ago, many conservatives as well as liberals supported the mandate on the ground of fostering personal responsibility rather than "free riding." *See* Ryan Lizza, *Romney's Dilemma: How His Greatest Achievement Has Become His Biggest Liability*, THE NEW YORKER, June 6, 2011, at 40–41.

294. Barnett, *supra* note 5, at 631.

295. *Id.* at 631–34 (discussing the other recognized duties before cursorily concluding that "with the individual mandate there is no traditionally recognized pre-existing duty").

296. Lochner v. New York, 198 U.S. 45, 75–76 (1905) (Holmes, J., dissenting).

B. *The Substantive Due Process Right Challenge to the Individual Mandate*

If there were any basis for finding the individual mandate unconstitutional, it would lie in a substantive due process right. The question has been raised by the "buy and eat" broccoli argument—which should be addressed cognizant of the separate distinctions between a mandate to *buy* and to *eat*.[297] The purpose of this section is not to provide an exhaustive analysis of this issue, but rather to show that the answer is far from certain.

The United States District Court for the Northern District of Florida was the first court to recognize the "Broccoli Revolution."[298] The court reasoned that "Congress could require that people buy and consume broccoli at regular intervals, not only because the required purchases will positively impact interstate commerce, but also because people who eat healthier tend to be healthier, and are thus more productive and put less of a strain on the health care system."[299] In support, the court referenced Dean Chemerinsky's thoughts on the matter that "what people choose to eat well *might* be regarded as a personal liberty."[300] The assumption that Congress's power must hit a limit when it comes to buying and eating broccoli rests on three basic misconceptions.

First, Congress is not going to make everyone buy and eat broccoli. The moment a court loses sight of this fact, it trades constitutional law for fantasy. Dissenting in *Champion v. Ames* from the Court's ruling that Congress could ban the interstate transportation of foreign lottery tickets, Chief Justice Fuller worried that the majority's holding meant that Congress could now also regulate "[a]n invitation to dine, or to take a drive, or a note of introduction."[301] The majority acknowledged the power of Chief Justice Fuller's imagination, but politely dismissed its utility as an interpretive device.[302]

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297. *See* Florida *ex rel.* Bondi v. U.S. Dep't of Health & Human Servs., No. 3:10-CV-91-RV/EMT, 2011 WL 285683, at *24 (N.D. Fla. Jan. 31, 2011) (noting claims made during oral argument that "Congress could require that people buy and consume broccoli").

298. *See* Andrew Koppelman, *Bad News for Mail Robbers: The Obvious Constitutionality of Health Care Reform*, 121 YALE L.J. ONLINE 1, 18–23 (2011) (labeling the issue as the "Broccoli Revolution").

299. *Bondi*, 2011 WL 285683, at *24.

300. *Id.* (quoting Dean Chemerinsky).

301. Champion v. Ames, 188 U.S. 321, 371 (1903) (Fuller, C.J., dissenting).

302. *Id.* at 363 (noting that "[i]t would not be difficult to imagine legislation that would be justly liable" to the charge of arbitrariness, but "the possible abuse of a power is not an argument against its existence"); *id.* (citing Chief Justice Marshall's admonition that the remedy to "unwise or injurious" exercises of power encompassed by the Commerce Clause lies in the "wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections") (quoting Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 197 (1824)); *see also* Calder v. Bull, 3 U.S. (3 Dall.) 386, 400 (1798) (Iredell, J., concurring) ("It is not

Second, arguments in favor of a right to not be required to *eat* broccoli—a right that ought to be considered separately from a duty to *purchase* it—do have some plausibility, given that what an individual eats is often a highly personal choice, but the case is far from open and shut. This personal choice has been protected when certain dietary prohibitions are derived from religious beliefs.[303] Further, an individual has a right to refuse unwanted medical care.[304] However, no right is absolute. The Takings Clause illustrates that the right to property is not absolute.[305] The government surely has the power to regulate the production and sale of food with an end to discouraging consumption of some foods and encouraging the consumption of others—as in anti-obesity campaigns.[306] *Washington v. Glucksberg*[307] shows that individuals do not have absolute rights to access medicines or medical treatment. Further, *Jacobson v. Massachusetts*[308] shows that the right to decline medical treatment is not absolute.

At times, involuntary conduct—mandates—can actually serve liberty rights by addressing collective action problems. For example, the involuntary sale of property through eminent domain can remedy the problem of bilateral monopolies in which two owners are unable to come to an agreement through private bargaining.[309] The individual mandate in Massachusetts addressed, among other issues, "obvious collective action problems," which would have prevented a greater amount of the public from living their lives as they may wish.[310] Just as the individual mandate would require those non-exempt citizens to purchase

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sufficient to urge, that the power may be abused, for, such is the nature of all power, such is the tendency of every human institution . . . . We must be content to limit power where we can, and where we cannot, consistently with its use, we must be content to repose a salutary confidence.").

303. *See* United States v. Kahane, 396 F. Supp. 687 (E.D.N.Y. 1975) (holding that the government must accommodate an ordained orthodox rabbi prisoner's kosher diet).

304. *See* Cruzan v. Mo., Dep't of Health, 497 U.S. 261 (1990) (holding that the government must recognize the personal choice to not be kept on life support).

305. *See* Kelo v. New London, 545 U.S. 469, 469 (2005) (noting that "[t]he Fifth Amendment to the Constitution, made applicable to the States by the Fourteenth Amendment, provides that 'private property [shall not] be taken for public use, without just compensation' ").

306. *See* Paul A. Diller & Samantha Graff, *Regulating Food Retail for Obesity Prevention: How Far Can Cities Go?*, 39 J.L. MED. & ETHICS 89 (2011) (surveying retail food regulations intended to aid anti-obesity campaigns).

307. 521 U.S. 702 (1997) (upholding a statute banning assisted suicide).

308. 197 U.S. 11, 25 (1905) (upholding mandatory vaccinations as a part of the state's "police powers"). Even though there is no current federal law that requires vaccination, every state requires children receive certain vaccinations before entering public school. *See Vaccines: VacGen/Laws/State Requirements*, CTRS. FOR DISEASE CONTROL & PREVENTION (June 7, 2010), http://www.cdc.gov/vaccines/vac-gen/laws/state-reqs.htm.

309. *See* DANA & MERRILL, *supra* note 208, at 27–32.

310. *See* Balkin, *Commerce*, *supra* note 12, at 46 (noting that "[p]eople with health problems will have incentives to move to a state where they cannot be turned down, raising health care costs for everyone, while insurers will prefer to do business in states where they can avoid more

health insurance, thereby promoting vindication of what some might regard as a fundamental right to health care, vaccinations mandated by the State force those individuals to purchase a form of health care, with a collective benefit that might well not be obtained if vaccinations were left entirely to individual choice. In short, all that can be said is that there might be some case to either side of the Broccoli Revolution, but it is far from automatic.

Third, arguments against a mandate to *purchase* broccoli would be asserting an economic liberty under substantive due process. The Supreme Court took this route with *Allgeyer v. Louisiana*[311] and *Lochner v. New York*.[312] The first case brought to the Supreme Court to interpret the word "liberty" in the Due Process Clause was *Allgeyer*.[313] There the Court described the protected liberty as:

> not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but [also] . . . the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned.[314]

In *Lochner*, the Court struck down a state law limiting working hours on the basis of the freedom of contract.[315] However, the Supreme Court brought the *Lochner* era to an end in the 1930s with *Nebbia v. New York*[316] and *West Coast Hotel Co. v. Parrish*.[317] Justice Scalia recently observed that the Court has "held for many years (logically or not) that the 'liberties' protected by Substantive Due Process do not include economic liberties."[318] Doing so now, he added, would be a step of "great[ ] novelty."[319] To be sure, Justice Kennedy was prepared to take that step in the context of property rights.[320] If one gives in to the impulse to

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expensive patients with pre-existing conditions, and younger and healthier people may leave for jurisdictions where they can avoid paying for health insurance").

311. 165 U.S. 578 (1897).

312. 198 U.S. 45 (1905).

313. *Allgeyer*, 165 U.S. at 590–91 (holding that liberty under the Fourteenth Amendment was economic liberty).

314. *Id.* at 589.

315. *Lochner*, 198 U.S. at 60 (discussing the "protection of the Federal Constitution from undue interference with liberty of person and freedom of contract").

316. 291 U.S. 502 (1934) (upholding price regulations of milk).

317. 300 U.S. 379 (1937) (upholding minimum wage regulations for women and minors).

318. Stop the Beach Renourishment, Inc. v. Florida Dep't of Env't Prot., 130 S. Ct. 2592, 2606 (2010) (plurality opinion).

319. *Id.*

320. *Id.* at 2614 (Kennedy, J., concurring) ("If a judicial decision, as opposed to an act of the

fantasize, a statute requiring everyone to purchase broccoli could present a circumstance where something like an economic substantive due process right might have some merit. If Congress ever enacts such a statute, there will be "time enough" for the Court to decide what the Constitution says about it.[321]

Once again, this note does not present a full analysis of the claim that there is a substantive due process right to not purchase health insurance. What is relevant for discussion is simply that the existence of such a right is, at best, contestable. In turn, this makes it all the more important to address the question forthrightly—rather than smuggle it into the analysis under the guise of the Commerce Clause or the Tenth Amendment.

V. CONCLUSION

The Commerce Clause provides that Congress may: "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[322] Powers granted under the Commerce Clause have varied vastly from regulating all intercourse,[323] to only items having a direct effect on interstate commerce,[324] to intrastate activities that would have a substantial economic effect in the aggregate,[325] and to intrastate activities that would undercut a broader regulatory scheme.[326]

Despite these changes, all of these distinctions were determined in accordance with principles of federalism.[327] Under a system of dual fed-

executive or the legislature, eliminates an established property right, the judgment could be set aside as a deprivation of property without due process of law.").

321. *See* Champion v. Ames, 188 U.S. 321, 362 (1903) ("It will be time enough to consider the constitutionality of such legislation when we must do so. The present case does not require the court to declare the full extent of the power that Congress may exercise in the regulation of commerce among the states.").

322. U.S. CONST. art. I, § 8, cl. 3.

323. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 222 (1824) (holding that the Commerce Clause provides Congress with the power to regulate "intercourse").

324. United States v. E.C. Knight Co., 156 U.S. 1, 17 (1895) (holding that the Commerce Clause does not provide Congress with the power to stop a monopoly in the sugar refining industry because manufacturing has an indirect effect on commerce).

325. Wickard v. Filburn, 317 U.S. 111, 126 (1942) (holding that the Commerce Clause provides Congress with the power to regulate intrastate wheat grown and consumed because of the substantial economic effects this would have had on the market price of wheat in the aggregate).

326. Gonzales v. Raich, 545 U.S. 1, 41–42 (2005) (holding that the Commerce Clause provides Congress with the power to regulate home-grown marijuana in order to maintain the efficacy of the Controlled Substances Act).

327. *See* United States v. Darby, 312 U.S. 100, 114–15 (1941) (noting that "[s]uch regulation is not a forbidden invasion of a state power merely because either its motive or its consequence is to restrict the use of articles of commerce within the states"). This illustrates the idea that the aim of the Commerce Clause is to maintain an appropriate federal-state balance and to prevent the federal government from overwhelming the states.

eralism, there are "two distinct and discernable lines of political accountability: one between the citizens and the Federal Government; the second between the citizens and the States."[328] These lines require the balancing between the levels of power and interaction between the state and federal governments.[329] The Court's interpretation of the Commerce Clause has frequently been narrowed or expanded in order to maintain this balance.[330] Achieving the right balance has always been a challenge to the institutional capacity of the Court.[331]

The federal courts should not make this challenge even more complex by introducing a new element into Commerce Clause analysis: the direct protection of liberty rights. Of course, the protection of federalism may well promote individual liberty *indirectly*, to the extent that a divided government may be less able to intrude comprehensively into individual rights. But protection of individual liberty has never been a *direct* concern of the Commerce Clause.

There are two reasons for rejecting the interjection of a new dimension to Commerce Clause analysis. First, the balance in power between the federal government and the states has been achieved only through a grueling evolution in Commerce Clause doctrine, and there is an "immense stake in [its] stability."[332] Granted, the judiciary's responsibility to "expound and interpret" the law can include modification of the law over time, as has happened with the Commerce Clause in the past.[333] Any such change, however, should not be adopted without the most compelling of reasons.

Second, it would be a major mistake for the courts to strike down the individual mandate on the basis of importing a new liberty right into the Commerce Clause. The question is not one of getting health care policy right, but of respecting Congress's primary role in determining the degree of federal involvement needed. The PPACA represents a determination that a major national problem—access to health care—requires a national solution, and that the solution can work only under conditions in which everyone has health insurance. It further represents a determination that achieving this aim through the market, rather than

328. United States v. Lopez, 514 U.S. 549, 576–77 (1995) (Kennedy, J., concurring).

329. *See* Balkin, *Commerce*, *supra* note 12, at 1 ("Properly understood, the commerce power authorizes Congress to regulate problems or activities that produce spillover effects between states or generate collective action problems that concern more than one state.").

330. *Lopez*, 514 U.S. at 568–74 (Kennedy, J., concurring).

331. *Id.* at 579 ("The substantial element of political judgment in Commerce Clause matters leaves our institutional capacity to intervene more in doubt than when we decide cases, for instance, under the Bill of Rights even though clear and bright lines are often absent in the latter class of disputes.").

332. *Id.* at 574.

333. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

through a direct government provision of health care, is the best approach. Congress's power over a multi-billion dollar market in private health insurance that impacts every United States citizen is clearly within well-settled and principled Commerce Clause doctrine.

The federal courts must be mindful that responsibility for defending the United States's integral system of dual federalism does not fall solely on the judiciary. Structural elements of the Constitution create a separation of powers and a system of checks and balances.[334] The truth is, "[w]hatever the judicial role, it is axiomatic that Congress does have substantial discretion and control over the federal balance."[335] This alone—not misplaced liberty rights—is sufficient. Judicial attempts to strike down the individual mandate through these liberty arguments masquerading as Commerce Clause claims will have longer lasting implications on future Commerce Clause analysis than any type of health care reform ever would. The constitutionality of the individual mandate provision of the PPACA should not be a close question. The Supreme Court should respect its proper role under the Constitution and uphold the mandate.

334. *See Lopez*, 514 U.S. at 575 (Kennedy, J., concurring).
335. *Id.* at 577.