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“ARE YOU SERIOUS?”: EXAMINING THE  
CONSTITUTIONALITY OF AN INDIVIDUAL  
MANDATE FOR HEALTH INSURANCE

*Ryan C. Patterson\**

Are you serious? Are you serious?

Nancy Pelosi, Speaker of the House, responding to a question about the constitutionality of an individual mandate for health insurance<sup>1</sup>

INTRODUCTION

The Patient Protection and Affordable Care Act (PPACA)<sup>2</sup> has significantly reformed the U.S. health care system. As a result, nearly all Americans will be required to purchase health insurance.<sup>3</sup> An individual mandate for health insurance is not a new idea. In 1993, the Senate Republican Task Force drafted a health care reform bill that included an individual mandate.<sup>4</sup>

As the debate over health care reform has unfolded, questions have been raised about whether the Constitution grants Congress the power to impose an individual mandate to purchase health insurance.<sup>5</sup> In 1994, the Congressional Budget Office addressed the issue,

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1 Donald Lambro, *Constitutionality of Health Overhaul Questioned*, WASH. TIMES, Oct. 28, 2009, at A1 (quoting Nancy Pelosi, Speaker of the House, U.S. House of Representatives), available at <http://www.washingtontimes.com/news/2009/oct/28/constitutionality-of-health-overhaul-questioned>.

2 See H.R. 3590, 111th Cong. § 5000A (2010) (establishing an individual mandate for a majority of Americans to purchase health insurance), amended by Health Care and Education Reconciliation Act of 2010, H.R. 4872, 111th Cong.

3 See *id.*

4 See S. 1770, 103d Cong. § 100 (1993); see also Candice Hoke, *Constitutional Impediments to National Health Reform: Tenth Amendment and Spending Clause Hurdles*, 21 HASTINGS CONST. L.Q. 489, 515–18 (1994) (summarizing the bill).

5 Commentators have come down on both sides of the issue. For arguments that an individual mandate is unconstitutional, see Andrew P. Napolitano, *Health-Care*

concluding that “[a] mandate requiring all individuals to purchase health insurance would be an unprecedented form of federal action.”<sup>6</sup> More recently, the Congressional Research Service concluded that Congress might have the power to enact an individual mandate “as part of its taxing and spending power, or its power to regulate interstate commerce.”<sup>7</sup> However, it acknowledged that “[w]hether such a requirement would be constitutional under the Commerce Clause is perhaps the most challenging question posed by such a proposal, as it is a novel issue whether Congress may use this clause to require an individual to purchase a good or a service.”<sup>8</sup>

This Note analyzes whether Congress has the power to enact an individual mandate for health insurance under the Taxing and Spending Clause and Commerce Clause.<sup>9</sup> Part I examines the

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*Reform and the Constitution*, WALL ST. J., Sept. 15, 2009, at A19, arguing that it exceeds the scope of the commerce power; David B. Rivkin, Jr. & Lee A. Casey, *Mandatory Insurance Is Unconstitutional*, WALL ST. J., Sept. 18, 2009, at A23, arguing that it exceeds the scope of the commerce and tax powers; Randy Barnett, *Is Mandatory Health Insurance Unconstitutional?*, THE VOLOKH CONSPIRACY (Sept. 18, 2009, 12:17 PM), <http://www.volokh.com/posts/1253290664.shtml>, arguing that there is no textual basis in the Constitution for using the commerce or tax powers to enact an individual mandate. For arguments that an individual mandate is constitutional, see Mark A. Hall, *The Constitutionality of Mandates to Purchase Health Insurance*, 37 J.L. MED. & ETHICS 40, 40–48 (2009), arguing it is within the scope of the commerce and tax powers; Daniel Gottlieb, Note, *You Can Take This Health Insurance and . . . Mandate It?*, 33 SETON HALL LEGIS. J. 535, 553–63 (2009), arguing it is within the scope of the commerce power; Erwin Chemerinsky, *The Constitutionality of Healthcare*, L.A. TIMES, Oct. 6, 2009, at A23, arguing it is within the scope of the commerce and tax powers; Jonathan Adler, *Is ObamaCare Unconstitutional?*, THE VOLOKH CONSPIRACY (Aug. 22, 2009, 6:50 PM), <http://www.volokh.com/posts/1250981450.shtml>, reaching the same conclusion as Chemerinsky; Michael C. Dorf, *The Constitutionality of Health Insurance Reform, Part II: Congressional Power*, FINDLAW (Nov. 2, 2009), <http://writ.news.findlaw.com/dorf/20091102.html>, reaching the same conclusion as Adler and Chemerinsky.

6 CONG. BUDGET OFFICE, THE BUDGETARY TREATMENT OF AN INDIVIDUAL MANDATE TO BUY HEALTH INSURANCE 1 (1994), available at <http://www.cbo.gov/ftpdocs/48xx/doc4816/doc38.pdf>.

7 JENNIFER STAMAN & CYNTHIA BROUGHER, CONG. RESEARCH SERV., REQUIRING INDIVIDUALS TO OBTAIN HEALTH INSURANCE: A CONSTITUTIONAL ANALYSIS 18 (2009), available at [http://assets.opencrs.com/rpts/R40725\\_20090724.pdf](http://assets.opencrs.com/rpts/R40725_20090724.pdf).

8 *Id.* at 3.

9 The scope of this Note is limited in two ways. First, I analyze only the internal limits of the taxing and commerce powers; external limits on Congress’s power to enact an individual mandate will not be addressed. For a definition of internal and external limits, see *infra* note 127 and accompanying text. Commentators have identified several possible external limits on an individual mandate to purchase health insurance. For a discussion of whether an individual mandate violates the Takings Clause, see STAMAN & BROUGHER, *supra* note 7, at 12–13, concluding it is unlikely a court would consider requiring individuals to purchase health insurance a taking;

problems with our current health care system and the policy argument for an individual mandate. Part II addresses the complaint that an individual mandate would be an unprecedented assault on individual liberty. It compares the effects that prohibitions and mandates have on personal freedom and notes that there is precedent for the federal government mandating action as a condition of citizenship. Part III examines whether Congress can enact an individual mandate under its taxing power. Finally, Part IV analyzes whether an individual mandate can be enacted under Congress's power to regulate interstate commerce.

#### I. A BRIEF EXAMINATION OF HEALTH CARE IN THE UNITED STATES AND THE ARGUMENT FOR AN INDIVIDUAL MANDATE

The rising cost of health care and the number of Americans without health insurance are two of the main concerns that drove the push for health care reform.<sup>10</sup> In 2007, health care spending in the United States was equivalent to 16.2% of gross domestic product (GDP).<sup>11</sup> This total is expected to rise to 25% of GDP by 2025 if our current health care system is not reformed.<sup>12</sup> Since 1980, the annual rate of growth in medical care prices was 4.7%—almost double the annual rate of inflation.<sup>13</sup> The cost of obtaining health insurance has

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Hall, *supra* note 5, at 45–47, arguing that it is not a regulatory taking. For a discussion of whether an individual mandate violates substantive due process rights, see STAMAN & BROUGHER, *supra* note 7, at 9–11, noting that the Supreme Court has not recognized a fundamental right to be uninsured and evaluating an individual mandate as economic legislation; Hall, *supra* note 5, at 45, arguing it does not violate substantive due process rights. For a discussion of whether the individual mandate and religious exemptions violate the First Amendment's religion clauses, see STAMAN & BROUGHER, *supra* note 7, at 13–18. For a discussion of whether an individual mandate violates the Equal Protection Clause, see *id.* at 11–12. Second, I confine my analysis to the interpretation of the taxing and commerce powers established by Supreme Court precedent. I do not address the question of whether the Supreme Court has properly interpreted the Commerce Clause and Taxing and Spending Clause.

10 See BOB LYKE, CONG. RESEARCH SERV., HEALTH CARE REFORM 1 (2009), available at <http://fpc.state.gov/documents/organization/122947.pdf>. The quality of health care is also a driving factor. Despite the United States spending "substantially more on health care per person than other industrialized countries, it scores only average or somewhat worse on many quality of care indicators." *Id.*

11 *Id.* at 4.

12 *Id.*

13 *Id.* The development of new drugs and other advancements in medical technology is regarded by many economists as the primary cause for the increase in health care spending. See *id.* at 5.

increased significantly in the last decade, making it difficult for some Americans to afford health insurance.<sup>14</sup>

In 2007, 45.7 million Americans were uninsured at some point during the year.<sup>15</sup> Over ninety-eight percent of the uninsured are under age sixty-five.<sup>16</sup> The two main groups of the uninsured are low-wage workers who do not receive health insurance through their employers and healthy young people unwilling to buy insurance at its current price.<sup>17</sup> Thirty-nine percent of the uninsured are nineteen to thirty-five years old,<sup>18</sup> and sixteen percent of the uninsured earn at least \$50,000 per year in household income.<sup>19</sup> One recent study estimates that forty-three percent of uninsured Americans have enough disposable income to afford health insurance but voluntarily choose not to purchase it.<sup>20</sup>

Being uninsured can adversely affect an individual's health. The uninsured have a higher premature mortality rate than people with health insurance.<sup>21</sup> They are less likely to receive preventative care and more likely to postpone seeking treatment for an illness than the insured.<sup>22</sup> As a result, their medical problems are more serious by the

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14 See LUCIEN WULSIN, JR. & ADAM DOUGHERTY, CAL. RESEARCH BUREAU, INDIVIDUAL MANDATE: A BACKGROUND REPORT 3 (2009), available at <http://www.library.ca.gov/crb/09/09-007.pdf> (noting that health insurance "premiums have outpaced wages three-fold since 2000").

15 CARMEN DENAVAS-WALT ET AL., U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2007, at 19 (2008), available at <http://www.census.gov/prod/2008pubs/p60-235.pdf>. It is thought that another seventeen million Americans are underinsured. Jonathan M. Kucskar, Comment, *Laboratories of Democracy: Why State Health Care Experimentation Offers the Best Chance to Enact Effective Federal Health Care Reform*, 11 J. HEALTH CARE L. & POL'Y 377, 383-84 (2008) (defining "underinsured" as having insufficient health insurance coverage).

16 LYKE, *supra* note 10, at 13 app. A (noting that only 1.9% of individuals age sixty-five or older are uninsured).

17 WULSIN & DOUGHERTY, *supra* note 14, at 2.

18 *Id.*

19 LYKE, *supra* note 10, at 14 app. B. Within this group, almost nineteen percent had household incomes between \$75,000 and \$99,999 and twenty-five percent had annual household incomes greater than \$100,000. See *id.*

20 JUNE E. O'NEILL & DAVE M. O'NEILL, EMP'T POLICIES INST., WHO ARE THE UNINSURED? AN ANALYSIS OF AMERICA'S UNINSURED POPULATION, THEIR CHARACTERISTICS AND THEIR HEALTH 5 (2009), available at [www.epionline.org/studies/oneill\\_06-2009.pdf](http://www.epionline.org/studies/oneill_06-2009.pdf).

21 See WULSIN & DOUGHERTY, *supra* note 14, at 1.

22 See LYKE, *supra* note 10, at 3; see also O'NEILL & O'NEILL, *supra* note 20, at 20-21 (presenting data that show the uninsured are less likely to have their blood pressure checked and less likely to get a routine check-up, flu shot, pap smear, PSA test, or mammogram than people with health insurance).

time they seek treatment,<sup>23</sup> which they often receive in a hospital emergency room.<sup>24</sup> The Institute of Medicine estimates that "20,000 uninsured Americans die each year because the lack of health insurance prevents timely and routine medical care."<sup>25</sup>

In addition to the individual health consequences, being uninsured imposes significant costs on society. The uninsured often receive medical care from the most expensive places.<sup>26</sup> As a result, they are not able to adequately compensate their health care provider for the care they receive.<sup>27</sup> The cost of this uncompensated care is shifted to others in the form of higher insurance premiums and higher taxes.<sup>28</sup> An estimated two to ten percent of the cost of private health insurance premiums covers uncompensated care for the uninsured.<sup>29</sup> Annually, uncompensated care accounts for about three percent of health care spending in the United States.<sup>30</sup>

Failures in the health insurance market contribute to the rising cost of insurance premiums and the number of uninsured Americans. One of the market failures is adverse selection.<sup>31</sup> The "basic concept of insurance is to spread individual risk across a broad range of enrollees."<sup>32</sup> For health insurance, this requires a large number of healthy people to balance the risk posed to insurance companies by people with serious illnesses.<sup>33</sup> Adverse selection refers to the ability of a well-balanced risk pool to devolve into a pool composed mainly of high-risk individuals.<sup>34</sup> Our current system allows individuals to freely

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23 See WULSIN & DOUGHERTY, *supra* note 14, at 1.

24 See LYKE, *supra* note 10, at 3.

25 WULSIN & DOUGHERTY, *supra* note 14, at 1 n.2 (citing INST. OF MED., AMERICA'S UNINSURED CRISIS (2009); INST. OF MED., CARE WITHOUT COVERAGE (2009)).

26 Susan A. Channick, *Can State Health Reform Initiatives Achieve Universal Coverage? California's Recent Failed Experiment*, 18 S. CAL. INTERDISC. L.J. 485, 495 (2009).

27 See C.J. Stimson, *Health Care Reform in 2009: The Individual Mandate and the Tax Exclusion for Employer-Provided Health Care Benefits*, 1 VAND. HEALTH L. & PUB. POL'Y F. 12, 14 (2009), <http://law.vanderbilt.edu/student-resources/student-organizations/health-law-society/health-law-forum/download.aspx?id=4189>.

28 See WULSIN & DOUGHERTY, *supra* note 14, at 4; Stimson, *supra* note 27, at 14.

29 WULSIN & DOUGHERTY, *supra* note 14, at 4; *see also* Stimson, *supra* note 27, at 14 (estimating that, on average, \$1100 from every family's health insurance premium will be used to account for uncompensated care in 2009).

30 WULSIN & DOUGHERTY, *supra* note 14, at 4 (estimating the cost at thirty-eight billion dollars per year).

31 *See id.* at 3.

32 *Id.*

33 *See id.* Almost seventy percent of annual health system costs are associated with ten percent of the population. *Id.*

34 *See* Stimson, *supra* note 27, at 14.

enter or exit insurance risk pools.<sup>35</sup> Healthy people rationally may choose not to purchase health insurance until they need it.<sup>36</sup> Without these low-risk individuals, the medical loss ratios of health insurance companies will increase due to an increased percentage of high-risk individuals in the risk pool.<sup>37</sup> Insurance companies are then forced to increase premiums to offset these losses.<sup>38</sup> However, the increase in premiums may cause healthy people with insurance to cancel their policies, starting the cycle over again.<sup>39</sup>

Another health insurance market failure is the free-rider problem.<sup>40</sup> Free riders are people with the financial ability “to purchase health insurance [that] choose not to, knowing they can get emergency care when they need it.”<sup>41</sup> When they need expensive care and are unable to pay for it, the cost of their uncompensated care is shifted to others through increased health insurance premiums and higher taxes.<sup>42</sup>

Proponents of an individual mandate for health insurance believe that it will effectively address the cost and coverage concerns that drove the push for health care reform.<sup>43</sup> Requiring individuals to purchase health insurance will address the problem of adverse selection by forcing healthy people into insurance risk pools.<sup>44</sup> Health insurance premiums should decrease as insurance companies are able to spread the risk posed by seriously ill enrollees across a larger number of healthy individuals.<sup>45</sup> An individual mandate also addresses the

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35 See WULSIN & DOUGHERTY, *supra* note 14, at 3.

36 See Stimson, *supra* note 27, at 14.

37 See *id.*

38 See *id.*

39 See *id.*

40 See WULSIN & DOUGHERTY, *supra* note 14, at 4.

41 *Id.*

42 See *id.*

43 There is by no means a consensus that an individual mandate will actually decrease the spending on health care, the cost of health insurance premiums, or the number of people without health insurance. Some argue that an individual mandate will actually increase the cost of health insurance. See Glen Whitman, *Hazards of the Individual Health Care Mandate*, CATO POL’Y REP., Sept.–Oct. 2007, at 10–11 (arguing that lobbying will increase the number of mandated benefits an insurance policy must provide, which will drive up insurance premiums). Others doubt that the government will be able to effectively enforce the individual mandate. See WULSIN & DOUGHERTY, *supra* note 14, at 4, 17–18 (noting skepticism based upon past experiences with enforcing mandates for car insurance (the national average of uninsured motorists in states mandating insurance is fifteen percent) and paying income taxes (15.5% of Americans failed to pay their taxes on time in 1998)).

44 See Stimson, *supra* note 27, at 14.

45 See *id.*

free-rider problem by decreasing the amount of uncompensated care that health care providers deliver to patients.<sup>46</sup> This should produce a decrease in the average health insurance premium.<sup>47</sup> Due to these projected benefits, an individual mandate is a central feature of the PPACA.

## II. THE NATURE OF AND PRECEDENT FOR MANDATES

In its 1994 evaluation of proposed health care reform bills containing individual mandates, the Congressional Budget Office noted "[a] mandate requiring all individuals to purchase health insurance would be an unprecedented form of federal action. The government has never required people to buy any good or service as a condition of lawful residence in the United States."<sup>48</sup> One senator has described it as "'a stunning assault on liberty."<sup>49</sup> Before examining the constitutionality of the individual mandate it is useful to review the difference between prohibitions and mandates as well as the precedent for mandates.

To prohibit is to prevent someone from doing something.<sup>50</sup> In effect, it means that an individual can do everything but *X*. To mandate is to order or require that something be done.<sup>51</sup> In effect, it means that an individual must do *Y*. It is widely accepted that Congress has the power to prohibit. A mandate is more controversial. Generally, a prohibition will be less intrusive on a person's freedom than a mandate.<sup>52</sup> Although the freedom to do *X* has been restricted, the individual still has the freedom to do *Y*, *Z*, and any other thing that is not *X*.

As the ways to comply with a prohibition decrease, however, the prohibition begins to have an effect on individual freedom similar to that of a mandate. For example, the Civil Rights Act of 1964<sup>53</sup> prohibited the restriction of access to places of public accommodation based

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46 *See id.*

47 *See* WULSIN & DOUGHERTY, *supra* note 14, at 4.

48 CONG. BUDGET OFFICE, *supra* note 6, at 1.

49 Michael C. Dorf, *The Constitutionality of Health Insurance Reform, Part I: The Misguided Libertarian Objection*, FINDLAW (Oct. 21, 2009), <http://writ.news.findlaw.com/dorf/20091021.html> (quoting Sen. Minority Whip John Kyl).

50 WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1813 (1986).

51 *Id.* at 1373.

52 *Cf.* Stimson, *supra* note 27, at 14 (noting conservatives contend that the governmental intrusion into private decisionmaking through use of an individual mandate violates basic notions of individual freedom).

53 42 U.S.C. §§ 2000a–2000h-6 (2006 & Supp. III 2009).



upon racial discrimination.<sup>54</sup> The only way for innkeepers or restaurant owners to comply with this prohibition was to serve African Americans that entered their establishments. Although styled as a prohibition, it had the functional effect of a mandate.<sup>55</sup> Prohibitions and mandates are two sides of the same regulatory coin, and Congress has the authority to do either if it is within the scope of one of its enumerated powers.

The Congressional Budget Office is correct that “[t]he government has never required people to buy any good or service as a condition [of citizenship].”<sup>56</sup> However, there is precedent for the federal government mandating individual action as a condition of citizenship. All Americans are required to pay income taxes<sup>57</sup> and have an obligation to serve as jurors when called.<sup>58</sup> Also, all American males ages eighteen to twenty-five must register with the Selective Service System.<sup>59</sup> Notably, none of the mandates have been enacted using the commerce power.

Some commentators have pointed to the requirement that people purchase car insurance to lawfully drive a motor vehicle as precedent for an individual mandate to purchase health insurance.<sup>60</sup> This analogy is flawed for two reasons. First, the car insurance mandate is a product of state law.<sup>61</sup> Since an individual mandate for health insurance will be enacted through federal law, the analogy fails. A car insurance mandate enacted under state law has no bearing on whether Congress can pass an individual mandate for health insurance using its limited and enumerated powers. Second, the requirement that drivers have car insurance is a conditional mandate. If a citizen does not wish to purchase car insurance, he can comply with

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54 *Id.* § 2000a.

55 To be clear, I am not suggesting that the Civil Rights Act of 1964 was an undesirable infringement on personal liberty. I use it merely to illustrate that the line between a prohibition and mandate blurs when there are limited ways to comply with a prohibition.

56 CONG. BUDGET OFFICE, *supra* note 6, at 1.

57 *See* U.S. CONST. amend. XVI; Dorf, *supra* note 49. The government has imposed special taxes on income to fund Social Security and Medicare. *See* Federal Insurance Contributions Act, 26 U.S.C. §§ 3101–3125 (2006).

58 28 U.S.C. § 1861 (2006); *see* Dorf, *supra* note 49.

59 50 U.S.C. app. § 453 (2006); *see* CONG. BUDGET OFFICE, *supra* note 6, at 2.

60 *See* Hoke, *supra* note 4, at 516 n.108 (drawing the analogy); David G. Savage, *Health Insurance Mandate Alarms Some*, L.A. TIMES, Nov. 1, 2009, <http://articles.latimes.com/2009/nov/01/nation/na-mandate1> (noting that President Obama and other supporters of the individual mandate have drawn the analogy).

61 *See* WULSIN & DOUGHERTY, *supra* note 14, at 17 (noting that by 2006, forty-seven states and the District of Columbia had enacted the mandate).

the mandate by simply refusing to drive.<sup>62</sup> Citizens do not have a similar option to comply with a health insurance mandate without facing a penalty. They must either purchase health insurance or pay a fine imposed in the form of higher income taxes.<sup>63</sup> Due to these differences, the car insurance mandate should not be viewed as precedential support for a health insurance mandate.

### III. CONGRESS'S ABILITY TO ENACT AN INDIVIDUAL MANDATE FOR HEALTH INSURANCE USING ITS TAXING POWER

Congress has the "Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States."<sup>64</sup> The taxing power is one of the most important congressional powers.<sup>65</sup> This Part will explore the scope of the taxing power, the ability of Congress to enact regulatory taxes, and the ability of Congress to enact an individual mandate to purchase health insurance through income taxes.

#### A. *The Scope of the Taxing Power*

Does Congress have broad power to tax and spend for the general welfare, or is it limited to using this power only to carry out its other enumerated powers?<sup>66</sup> Until 1936, the scope of the taxing and spending power was unclear. The debate over the proper way to interpret the Taxing Clause traces back to the founding of the nation.<sup>67</sup> James Madison argued, "as the United States is a government of limited and enumerated powers, the grant of power to tax and spend for the general national welfare must be confined to the enumerated legislative fields committed to the Congress."<sup>68</sup> Alexander Hamilton dis-

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62 See Kucskar, *supra* note 15, at 400.

63 See Patient Protection and Affordable Care Act, H.R. 3590, 111th Cong. § 5000A (2010) (establishing an individual mandate for a majority of Americans to purchase health insurance), amended by Health Care and Education Reconciliation Act of 2010, H.R. 4872, 111th Cong. (2010) (imposing a tax penalty for failing to purchase health insurance).

64 U.S. CONST. art. I, § 8, cl. 1. Originally, direct taxes, such as an income tax, were required to be apportioned equally among the states based upon their respective populations. *Id.* art. I, § 2, cl. 3. However, the Sixteenth Amendment exempted income taxes from this requirement. *Id.* amend. XVI.

65 See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 273 (3d ed. 2006). Alexander Hamilton described the power to tax as the most important legislative power. THE FEDERALIST NO. 33 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

66 See CHEMERINSKY, *supra* note 65, at 274.

67 See *United States v. Butler*, 297 U.S. 1, 65 (1936).

68 *Id.*

puted Madison's interpretation, arguing that "the clause confers a power separate and distinct from [other enumerated powers] . . . [and is] limited only by the requirement that it shall be exercised to provide for the general welfare of the United States."<sup>69</sup>

In 1936, the Supreme Court addressed the scope of the taxing and spending power in *United States v. Butler*.<sup>70</sup> Congress passed the Agricultural Adjustment Act of 1933<sup>71</sup> in an attempt to stabilize the price and production levels of agricultural commodities.<sup>72</sup> A processing tax on agricultural commodities and a floor tax on the items produced by the processing of an agricultural commodity "play[ed] an indispensable part in the plan of regulation."<sup>73</sup> After reviewing the interpretations advocated by Madison and Hamilton, the Court endorsed Hamilton's view.<sup>74</sup> Congress's power to tax is limited by the requirement that it be exercised for the general welfare and common defense, not the other enumerated powers.<sup>75</sup> Therefore, "Congress has broad power to tax and spend for the general welfare so long as it does not violate other constitutional provisions."<sup>76</sup>

### B. Regulatory Taxes

The Supreme Court used to limit Congress's ability to impose taxes by distinguishing between revenue-raising taxes, which were permissible, and regulatory taxes, which were not.<sup>77</sup> The *Child Labor Tax*

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69 *Id.* at 65–66.

70 297 U.S. 1.

71 Agricultural Adjustment Act of 1933, ch. 25, 48 Stat. 31, *invalidated by Butler*, 297 U.S. 1.

72 *See Butler*, 297 U.S. at 53–54.

73 *Id.* at 55–56, 59.

74 *See id.* at 66 (describing Hamilton's position as "the correct one"). The Court reaffirmed *Butler's* holding on the scope of the taxing and spending power in *South Dakota v. Dole*, 483 U.S. 203, 207 (1987).

75 *See Butler*, 297 U.S. at 66. After endorsing Hamilton's position, the Court declared the Agricultural Adjustment Act unconstitutional on the grounds that it violated the Tenth Amendment. It held that the regulation of production was left to the states and that "Congress is not empowered to tax for those purposes which are within the exclusive province of the states." *Id.* at 69 (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 224 (1824)). This aspect of *Butler* has never been followed. However, its "holding concerning the scope of the taxing and spending powers remains good law." CHEMERINSKY, *supra* note 65, at 274.

76 CHEMERINSKY, *supra* note 65, at 274.

77 *See id.* at 276–77 (noting that the distinction was judicially created and describing cases where the Court enforced this distinction); *see also* *United States v. Constantine*, 296 U.S. 287, 296 (1935) (invalidating a federal tax on liquor dealers that violated state liquor laws); *Hill v. Wallace*, 259 U.S. 44, 66–68 (1922) (invalidating a

*Case*<sup>78</sup> is an example of the Court enforcing this distinction. After its attempt to regulate child labor under the Commerce Clause was found to be unconstitutional,<sup>79</sup> Congress passed the Child Labor Tax Law,<sup>80</sup> which imposed a ten percent excise tax on the net profits of businesses that employed children.<sup>81</sup> The Court rejected this effort to regulate child labor under the tax power.<sup>82</sup> Although a tax may have a secondary purpose of regulating activity, it becomes unconstitutional when, "in the extension of the penalizing features of the so-called tax[,] . . . it loses its character as [a revenue-raising tax] and becomes a mere penalty with the characteristics of regulation and punishment."<sup>83</sup> Thus, the Court held Congress does not have the power to enact taxes for the primary purpose of regulating activity.

Some commentators have criticized the distinction that the Court drew between revenue-raising taxes and regulatory taxes as a basis for using the taxing power.<sup>84</sup> They question whether the distinction is still valid and, if so, whether it has any practical significance.<sup>85</sup> Subsequent cases indicate that the Court will allow taxes that have a regulatory effect as long as they produce some revenue.

The Court addressed the constitutionality of a provision in the National Firearms Act<sup>86</sup> imposing a \$200 annual license tax on firearms dealers in *Sonzinsky v. United States*.<sup>87</sup> Although the tax had a

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federal tax sanctioned by the U.S. Department of Agriculture on grain futures contracts that were not approved by a board of trade).

78 *Bailey v. Drexel Furniture Co. (Child Labor Tax Case)*, 259 U.S. 20 (1922).

79 Congress passed the Keating-Owen Act of 1916, ch. 432, 39 Stat. 675, *invalidated by Hammer v. Dagenhart*, 247 U.S. 251 (1918), *overruled by United States v. Darby*, 312 U.S. 100 (1941), prohibiting goods produced in factories by children from being shipped in interstate commerce. In *Hammer*, the Court held that Congress lacked the power to regulate child labor under the Commerce Clause because it was a matter of "purely state authority." *Hammer*, 247 U.S. at 276.

80 Act of Feb. 24, 1919, ch. 139, 40 Stat. 1057, *invalidated by Child Labor Tax Case*, 259 U.S. 20.

81 *Id.*

82 *Child Labor Tax Case*, 259 U.S. at 43–44.

83 *Id.* at 38.

84 *See, e.g., Chemerinsky, supra* note 65, at 277. Dean Chemerinsky has criticized the case on two grounds: (1) it draws an arbitrary distinction between revenue-raising and regulatory taxes because a tax can simultaneously raise revenue and regulate activity; and (2) it does not address which constitutional principle supports the claim that Congress cannot use taxes for regulatory purposes. *See id.*

85 *See id.* at 276; *see also Adler, supra* note 5 (noting that the case is largely irrelevant today).

86 Pub. L. No. 73-474, § 2, 48 Stat. 1236, 1237 (1934) (codified as amended at 18 U.S.C. § 922 (2006 & Supp. III 2009) and 26 U.S.C. § 5861 (2006)).

87 300 U.S. 506 (1937). A separate provision of the National Firearms Act imposed a \$200 tax on firearms dealers for *each* sale of a firearm. *See National Fire-*

regulatory effect, the Court explained that “[e]very tax is in some measure regulatory . . . [in that] it interposes an economic impediment to the activity taxed . . . . But a tax is not any the less a tax because it has a regulatory effect.”<sup>88</sup> Congress’s motives for enacting the tax are irrelevant as long as the tax produces some revenue.<sup>89</sup> Since the tax had produced some revenue, it was constitutional.<sup>90</sup>

Congress’s ability to enact regulatory taxes as long as they produce some revenue was reaffirmed in *United States v. Kahriger*.<sup>91</sup> The Revenue Act of 1951<sup>92</sup> regulated gambling by imposing a ten percent excise tax on each wager and a fifty-dollar annual tax on bookmakers.<sup>93</sup> The Court upheld the constitutionality of the tax because it produced some revenue.<sup>94</sup> It held that regulatory taxes are valid “[u]nless there are provisions extraneous to any tax need.”<sup>95</sup> Absent that, “courts are without authority to limit the exercise of the taxing power.”<sup>96</sup>

The distinction between revenue-raising and regulatory taxes established by the *Child Labor Tax Case* is still valid, but it is clear that, after *Sonzinsky* and *Kahriger*, it no longer does much work. Congress’s purpose in enacting the tax is no longer relevant.<sup>97</sup> As long as a regulatory tax raises some revenue, it is valid.<sup>98</sup> This is not a difficult stan-

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arms Act § 3 (current version at 18 U.S.C. § 922(t)(5)); *Sonzinsky*, 300 U.S. at 512. The Court did not address the constitutionality of the provision because *Sonzinsky* was only convicted of failing to pay the annual license tax. *Sonzinsky*, 300 U.S. at 511–12.

88 See *Sonzinsky*, 300 U.S. at 513.

89 See *id.* at 513–14. This represents a departure from the inquiry into congressional motives by the Court in the *Child Labor Tax Case*. See *supra* notes 78–83 and accompanying text.

90 See *id.* at 514. Only twenty-seven dealers in 1934 and twenty-two dealers in 1935 paid the annual license tax. This suggests the standard for what constitutes “some revenue” is not very high.

91 345 U.S. 22 (1953).

92 Pub. L. No. 82-183, 65 Stat. 452 (1951).

93 *Id.* § 301, 65 Stat. at 480; see *Kahriger*, 345 U.S. at 23–24.

94 See *Kahriger*, 345 U.S. at 28. *Kahriger* argued that the wagering tax was improper because it only raised \$4,371,869—revenue that paled in comparison to the estimated \$400 million that Congress had projected it would raise. The Court rejected this argument, noting that the amount was greater than the \$3501 collected from a tax on butter and filled cheese. *Id.* at 28 n.4.

95 *Id.* at 31.

96 *Id.*

97 See *supra* note 89 and accompanying text.

98 See *supra* note 90 and accompanying text.

dard to meet. Additionally, courts adopt a presumption of constitutionality when reviewing most taxes.<sup>99</sup>

Tax legislation will only be held unconstitutional when there is no reasonable possibility that the legislation is within Congress's power.<sup>100</sup> In theory, a tax would be struck down under the *Sonzinsky* and *Kahriger* standard if there was no reasonable possibility that it would raise any revenue. For example, a policy expert recently proposed a national tax of one cent per ounce on sugar-sweetened beverages to combat childhood obesity.<sup>101</sup> What if Congress instead passed a \$1000-per-ounce tax? Presumably, this would be an unconstitutional regulatory tax because it would fail to produce any revenue. Practically, however, it is hard to imagine Congress enacting a regulatory tax—no matter how punitive—that fails to raise *any* revenue. As a result, it is unlikely that any regulatory tax passed by Congress will exceed its taxing power. Precedent bears this out. In the past seventy years, “no federal taxing or spending program has been declared to exceed the scope of Congress's powers.”<sup>102</sup>

### C. *The Taxing Power and an Individual Mandate to Purchase Health Insurance*

The PPACA imposes a regulatory tax on individuals without health insurance.<sup>103</sup> Functionally, this tax imposes an individual mandate to purchase health insurance. Can Congress enact the individual mandate solely through the use of its taxing power? In order to be constitutional, the individual mandate must be within the scope of the taxing power and a valid regulatory tax.

Taxing individuals without health insurance is within the scope of the taxing power. Congress's use of the taxing power is not limited by

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99 See Tracy A. Kaye & Stephen W. Mazza, *United States—National Report: Constitutional Limitations on the Legislative Power to Tax in the United States*, 15 MICH. ST. J. INT'L L. 481, 481 (2007).

100 See *Helvering v. Davis*, 301 U.S. 619, 640–41 (1937).

101 See RUDD CTR. FOR FOOD POLICY & OBESITY, YALE UNIV., *SOFT DRINK TAXES: A POLICY BRIEF 2* (2009), available at <http://www.yaleruddcenter.org/resources/upload/docs/what/reports/RuddReportSoftDrinkTaxFall2009.pdf>.

102 Chemerinsky, *supra* note 5.

103 See Patient Protection and Affordable Care Act, H.R. 3590, 111th Cong. § 5000A (2010), amended by Health Care and Education Reconciliation Act of 2010, H.R. 4872, 111th Cong. (2010) (imposing a tax penalty for failing to purchase health insurance). The legislation exempts certain individuals from the mandate, such as American Indians, those who meet the hardship criteria, and those who object for religious religious or who have an income below the poverty line. See *id.* § 5000A(e).

its other enumerated powers.<sup>104</sup> Instead, it has broad power to tax in order to provide for the general welfare.<sup>105</sup> The key question is whether taxing individuals without health insurance provides for the general welfare. The answer is clearly yes. Uninsured individuals impose significant costs on society in the form of increased taxes and higher insurance premiums.<sup>106</sup> These costs are sufficient to establish that taxing uninsured individuals provides for the general welfare under the deferential standard of review used by courts to evaluate tax legislation.<sup>107</sup> Therefore, the individual mandate is within the scope of the taxing power.

Additionally, taxing individuals without health insurance is a valid regulatory tax. The distinction between revenue-raising and regulatory taxes is still valid, but it is very easy to satisfy.<sup>108</sup> In order to be constitutional, a regulatory tax must generate some revenue.<sup>109</sup> The PPACA imposes an income tax penalty of \$750 per adult or \$1500 per household.<sup>110</sup> To be sure, these penalties are punitive measures intended to force people to purchase health insurance. However, they are likely to raise some revenue. As long as some revenue is raised, the individual mandate is a valid regulatory tax.<sup>111</sup> Therefore, Congress has the power to enact an individual mandate for health insurance solely through the taxing power.

#### IV. CONGRESS'S ABILITY TO ENACT AN INDIVIDUAL MANDATE FOR HEALTH INSURANCE USING ITS POWER TO REGULATE COMMERCE

Congress has the power to “regulate Commerce with foreign Nations, and among the several States.”<sup>112</sup> The ability to regulate

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104 Some have argued that Congress may only impose regulatory taxes on activities it can regulate through its other enumerated powers. *See, e.g.*, David B. Rivkin, Jr. & Lee A. Casey, *Illegal Health Reform*, WASH. POST, Aug. 22, 2009, at A15. However, this argument is in direct conflict with the broad interpretation of the taxing power adopted by the Court in *Butler*. *See* *United States v. Butler*, 297 U.S. 1, 66 (1936) (rejecting the argument that the taxing power is limited by other enumerated powers).

105 *See Butler*, 297 U.S. at 66.

106 *See supra* note 28 and accompanying text.

107 *See supra* notes 98–99 and accompanying text.

108 *See supra* notes 97–102 and accompanying text.

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

110 *See* Patient Protection and Affordable Care Act, H.R. 3590, 111th Cong. § 5000A(c) (2010), *amended by* Health Care and Education Reconciliation Act of 2010, H.R. 4872, 111th Cong. (2010).

111 *See Sonzinsky*, 300 U.S. at 513–14.

112 U.S. CONST. art. I, § 8, cl. 3.

commerce is the most important of Congress's enumerated powers.<sup>113</sup> This Part will provide a brief history of commerce clause jurisprudence, discuss the current analytical framework established by the *Lopez-Morrison-Raich* trilogy, and examine whether Congress may use its commerce power to enact an individual mandate to purchase health insurance.

#### A. *A Brief History of Commerce Clause Jurisprudence Pre-Lopez*

The Constitution established a government of limited and enumerated powers.<sup>114</sup> Powers not granted to the federal government are reserved to the states.<sup>115</sup> Since the Founding, the extent of Congress's power to regulate interstate commerce has been difficult to define. A broad interpretation of the commerce power would grant Congress a virtually limitless power to regulate anything, undermining the federalist structure established by the Constitution.<sup>116</sup> Alternatively, narrowly interpreting the commerce power may strip Congress of an enumerated power and impede the ability of the government to function effectively.<sup>117</sup> Throughout history, the Court has struggled to find judicially enforceable limits on the commerce power.

*Gibbons v. Ogden*,<sup>118</sup> decided in 1824, forms the basis for all of the Court's subsequent Commerce Clause jurisprudence.<sup>119</sup> The issue before the Court was whether a 1793 federal law that authorized Gibbons to operate a ferry in New York waters was a valid use of the commerce power.<sup>120</sup> In upholding the constitutionality of the federal law, Chief Justice Marshall established three key principles about the scope of Congress's commerce power. First, "commerce" refers to transportation and commercial intercourse.<sup>121</sup> It "includes all phases of busi-

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113 See CHEMERINSKY, *supra* note 65, at 242.

114 See THE FEDERALIST NO. 45, at 260 (James Madison) (Clinton Rossiter ed., 1961) (noting that "[t]he powers delegated by the proposed Constitution to the federal government are few and defined").

115 U.S. CONST. amend. X.

116 See *United States v. Patton*, 451 F.3d 615, 622 (10th Cir. 2006).

117 See *id.* at 622–23.

118 22 U.S. (9 Wheat.) 1 (1824).

119 See CHEMERINSKY, *supra* note 65, at 243 ("To this day, Supreme Court cases concerning the Commerce Clause begin their analysis by considering *Gibbons v. Ogden*.").

120 See *Gibbons*, 22 U.S. (9 Wheat.) at 1–2.

121 See *id.* at 193. The proper meaning of "commerce" is still the subject of scholarly debate: some argue that its original meaning is limited to the trade and exchange of goods and transportation for those purposes, while others argue the original meaning includes all gainful activity. Compare *United States v. Lopez*, 514 U.S. 549, 585–87 (1995) (Thomas, J., concurring) ("At the time the original Constitution was ratified,



ness, including navigation.”<sup>122</sup> Second, “among the several states” refers to activities that impact interstate commerce, including intrastate activities.<sup>123</sup> However, the commerce power cannot be used to regulate “[t]he completely internal commerce of a State.”<sup>124</sup> Finally, state sovereignty is not a limit on Congress’s enumerated powers.<sup>125</sup> When an activity affects interstate commerce, the commerce power has “no limitations, other than [those] prescribed in the constitution.”<sup>126</sup> In sum, *Gibbons* adopted a broad interpretation of the commerce power, while also establishing internal and external limits.<sup>127</sup> However, would the Court be able to effectively enforce these limits?

During the Progressive Era, the Court attempted to enforce internal and external limits on the commerce power.<sup>128</sup> The Court held that Congress could not use the commerce power to regulate manu-

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‘commerce’ consisted of selling, buying, and bartering, as well as transportation for these purposes.”), and RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION* 278–91, 295–97 (2004) (arguing that the original meaning of commerce is the trade, exchange, and transportation of goods, reporting that he found no unambiguous example of a broader meaning of commerce used in sources contemporaneous to the Constitution, and criticizing the methodologies of several scholars asserting evidence of a broader meaning), with *Patton*, 451 F.3d at 624 (“The best historical scholarship indicates that in addition to its primary sense of buying, selling, and transporting merchandise, the term ‘commerce’ was understood at the Founding to include the compensated provision of services as well as activities in preparation for selling property or services in the marketplace, such as the production of goods for sale.”), MICHAEL CONANT, *THE CONSTITUTION AND ECONOMIC REGULATION* 86 (2008) (noting “[l]egal historians present massive evidence that the idea of general commerce included all gainful activity”), and Robert J. Pushaw, Jr., *The Medical Marijuana Case: A Commerce Clause Counter-Revolution?*, 9 LEWIS & CLARK L. REV. 879, 886 (2005) (arguing that, in addition to its primary original meaning, commerce had a “firmly established secondary definition” of “all gainful activities intended for the marketplace, such as the production of goods for sale and the compensated provision of services”).

122 CHEMERINSKY, *supra* note 65, at 244.

123 See *Gibbons*, 22 U.S. (9 Wheat.) at 194 (“Commerce among the States[ ] cannot stop at the external boundary line of each State, but may be introduced into the interior.”).

124 *Id.* at 195.

125 See *id.* at 196–97. Marshall notes that the commerce power “would be a very useless power” if it could not regulate intrastate activity. *Id.* at 195.

126 *Id.* at 196.

127 An internal limit is based upon the definition of the power, while an external limit is based upon a separate constitutional provision or an outside source. In *Gibbons*, the definitions of “commerce” and “among the several states” are internal limits on the commerce power, while other provisions in the Constitution are external limits.

128 For a detailed description of attempts to enforce limits on the commerce power during the Progressive Era, see CHEMERINSKY, *supra* note 65, at 247–54, summarizing the Court’s Commerce Clause jurisprudence from 1887–1937.

facturing, which was not commerce,<sup>129</sup> or child labor, which fell under the scope of the police power reserved to the states by the Tenth Amendment.<sup>130</sup> However, from 1937–1942, the New Deal Court rejected the attempt by the Progressive Era Court to enforce internal and external limits on the commerce power.<sup>131</sup> It adopted a policy of near-absolute deference to Congress with respect to the commerce power in *Wickard v. Filburn*,<sup>132</sup> which held that Congress may regulate any activity as long as it has a rational belief that the activity, in the aggregate, has a substantial effect on interstate commerce.<sup>133</sup> Under this standard, “it is difficult to imagine anything that Congress could not regulate under the commerce clause so long as it was not violating another constitutional provision.”<sup>134</sup> After *Wickard*, Congress, taking advantage of the Court’s extraordinarily broad interpretation, used the commerce power to pass regulatory, criminal, and civil rights laws.<sup>135</sup>

### B. *The Lopez-Morrison-Raich Trilogy*

From 1936 until 1995, no federal laws were held by the Supreme Court to be an unconstitutional use of the commerce power.<sup>136</sup> That streak ended with *United States v. Lopez*,<sup>137</sup> in which the Rehnquist Court attempted to establish a judicially enforceable limit on Congress’s ability to regulate interstate commerce.

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129 See *United States v. E.C. Knight Co.*, 156 U.S. 1, 13–14 (1895).

130 See *Hammer v. Dagenhart*, 247 U.S. 251, 276 (1918), *overruled by* *United States v. Darby*, 312 U.S. 100 (1941).

131 See *Darby*, 312 U.S. at 115–16; *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 36–38 (1937) (holding Congress can regulate manufacturing if it affects interstate commerce). For a detailed description of changes in Commerce Clause jurisprudence during the New Deal Court, see CHEMERINSKY, *supra* note 65, at 254–59.

132 317 U.S. 111 (1942).

133 See *id.* at 127–29; BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT* 218 (1998) (quoting Justice Jackson’s memorandum to his colleagues in which he wrote that the Court’s holding in *Wickard* meant “the extent of the commerce power depends upon the facts of each case and that Congress is the primary and final judge of the meaning of those facts”); Pushaw, *supra* note 121, at 890 (noting that judicial review after *Wickard* “became an empty formality”).

134 CHEMERINSKY, *supra* note 65 at 260.

135 See *id.* (discussing these laws and asking whether such a broad definition of the commerce power is desirable).

136 See *id.* at 264.

137 514 U.S. 549 (1995).

### 1. *United States v. Lopez*

The Gun-Free School Zone Act of 1990 (GFSZA)<sup>138</sup> used the commerce power to make it a federal crime for an individual to “possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone.”<sup>139</sup> Lopez, a twelfth-grade student, was convicted for carrying a concealed handgun into his high school.<sup>140</sup> The Supreme Court granted certiorari after the Fifth Circuit Court of Appeals held that the statute was unconstitutional.<sup>141</sup>

Writing for the majority, Chief Justice Rehnquist “start[ed] with first principles,” noting that the federal government is one of limited and enumerated powers.<sup>142</sup> He then summarized the Court’s Commerce Clause jurisprudence and, in doing so,

identified three broad categories of activity that Congress can regulate under its commerce power. First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce. Finally, Congress’ commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce.<sup>143</sup>

In order to satisfy the third category, economic activity must substantially affect interstate commerce.<sup>144</sup> After establishing this analytical framework, Rehnquist applied it to the GFSZA. The statute did not fall within the first two categories.<sup>145</sup> It also did not have a substantial relation to interstate commerce:

Section 922(q) is a criminal statute that, by its terms, has nothing to do with “commerce” or any sort of economic enterprise, however broadly one might define those terms. Section 922(q) is not an essential part of a larger regulation of economic activity, in which

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138 Pub. L. No. 101-647, § 1702, 104 Stat. 4789, 4844–45 (1990), *invalidated by Lopez*, 514 U.S. 549.

139 *Id.* § 1702(b)(1), 104 Stat. at 4844.

140 *Lopez*, 514 U.S. at 551–52.

141 *Id.* at 552.

142 *Id.*

143 *Id.* at 558–59 (citations omitted). The first category that Rehnquist identified allows Congress to prevent classes of goods or people from entering the channels of interstate commerce. *See United States v. Patton*, 451 F.3d 615, 621 (10th Cir. 2006). Under the second category, Congress can regulate things that are actually being moved in interstate commerce and the means by which they are moved, e.g., by railroad or ship. *See id.* at 621–22.

144 *Lopez*, 514 U.S. at 560.

145 *Id.* at 559.

the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained.<sup>146</sup>

In explaining why the statute had nothing to do with commerce, Rehnquist noted that the GFSZA did not contain a jurisdictional element or any congressional findings about a connection to interstate commerce.<sup>147</sup> He rejected the government's attempt to establish a connection in its brief, claiming it required the Court to "pile inference upon inference in a manner that would . . . convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States."<sup>148</sup> After acknowledging that "prior cases have taken long steps down that road," Rehnquist refused "to proceed any further," arguing that doing so would grant Congress unlimited power.<sup>149</sup>

*Lopez* is notable for several reasons. First, it was the first time in almost sixty years that the Supreme Court held Congress's use of its commerce power to be unconstitutional.<sup>150</sup> Second, the Court attempted to create two judicially enforceable limits on the commerce power. Now, in order to be within the scope of the commerce power, an activity must fall within one of the three categories identified in *Lopez*.<sup>151</sup> More importantly, *Lopez* attempted to limit the substantial effects doctrine adopted in *Wickard* by distinguishing between eco-

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146 *Id.* at 561 (footnote omitted).

147 *See id.* at 561–63.

148 *Id.* at 563–64, 567. For a summary of the government's argument in *Lopez*, see Dorf, *supra* note 5: "Guns near schools intimidate children; intimidated children have a hard time concentrating on their studies; they learn less; they then grow up to be less productive members of society; and thus the national economy suffers."

149 *Lopez*, 514 U.S. at 567.

150 *Lopez* produced strong reactions from commentators who worried that the case, coupled with the Court's other recent federalism decisions, was the bellwether of a radical departure from the modern understanding of the Constitution. See Jonathan H. Adler, *Is Morrison Dead? Assessing a Supreme Drug (Law) Overdose*, 9 LEWIS & CLARK L. REV. 751, 755 (2005). But see *id.* at 755–59 (arguing that *Lopez* was a particularly modest opinion).

151 Several scholars have criticized the tripartite framework established by Rehnquist as "doctrinal sleight of hand." See Thomas W. Merrill, *Rescuing Federalism After Raich: The Case for Clear Statement Rules*, 9 LEWIS & CLARK L. REV. 823, 839–43 (2005). Professor Merrill argues that Rehnquist cleverly transformed the tripartite classification first described in *Perez v. United States*, 402 U.S. 146 (1971), as a summary of prior precedent into a "fixed menu of permissible options." *Id.* at 839. He criticizes the classification for failing to properly summarize Commerce Clause jurisprudence, lacking normative force, and failing to include entrenched, popular regulatory programs such as environmental laws and the war on drugs. See *id.* at 839–43; cf. Pushaw, *supra* note 121, at 894 (criticizing *Lopez* as an attempt to keep prior precedent intact while avoiding its plain implication that Congress's commerce power is plenary).

conomic and noneconomic activity.<sup>152</sup> As far as the Court was concerned, the substantial effects doctrine and aggregation principle still applied to economic and interstate activities. However, the Court did not apply it to the noneconomic, intrastate activity at issue in *Lopez*. Therefore, in order for Congress to regulate these activities, a connection to interstate commerce must be shown that does not rely on a piling of inferences.

## 2. *United States v. Morrison*

In *United States v. Morrison*,<sup>153</sup> the Rehnquist Court proved that *Lopez* was not an aberration. Section 13981 of the Violence Against Women Act of 1994 (VAWA)<sup>154</sup> created a federal civil remedy for victims of gender-motivated violence.<sup>155</sup> A freshman at Virginia Polytechnic Institute brought a lawsuit under this civil remedy provision against two students she alleged had raped her.<sup>156</sup> The Supreme Court granted certiorari after the district and appellate courts both held that Congress lacked the authority under the commerce clause to enact § 13981.<sup>157</sup> The government argued that the civil remedy could be enacted using the commerce power because gender-motivated violence has a substantial effect on the national economy.<sup>158</sup>

Chief Justice Rehnquist, again writing for the majority, began by reaffirming the three-category framework established by *Lopez*.<sup>159</sup> He then proceeded to list four factors used by the Court to determine whether an activity has a substantial relation to interstate commerce. First, the nature of the activity is determined.<sup>160</sup> For example, in *Lopez*, the “noneconomic, criminal nature of the conduct at issue was

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152 The economic/noneconomic activity distinction has also been criticized. See *United States v. Morrison*, 529 U.S. 598, 656–59 (2000) (Breyer, J., dissenting) (arguing that the distinction is difficult to apply); Merrill, *supra* note 151, at 840–41 (arguing that Rehnquist created the distinction through “sleight of hand” by shifting the use of “economic” in *Wickard* from applying to the effect of the regulation to a description of the activity regulated); Pushaw, *supra* note 121, at 895–96 (suggesting that the distinction was a fundamentally flawed attempt to limit the commerce power because “economic” is an “umbrella term that covers anything—commercial or not”).

153 529 U.S. 598 (2000).

154 Pub. L. No. 103-322, tit. IV, 108 Stat. 1902 (1994).

155 42 U.S.C. § 13981 (2000), *invalidated by Morrison*, 529 U.S. 598.

156 *Morrison*, 529 U.S. at 602–03.

157 *Id.* at 604–05. Both the district and appellate courts concluded that Congress also lacked the power to enact § 13981 under Section 5 of the Fourteenth Amendment.

158 See CHEMERINSKY, *supra* note 65, at 267–68.

159 *Morrison*, 529 U.S. at 608–09.

160 *Id.* at 610–13.

central [to the Court's decision]."<sup>161</sup> Second, the presence of a jurisdictional element is considered.<sup>162</sup> Third, congressional findings about the effect of the activity on interstate commerce, if present, are examined.<sup>163</sup> Finally, the strength of the link between the activity and interstate commerce is analyzed.<sup>164</sup> The link must not rely on a piling of inferences that, if adopted, would grant Congress unlimited regulatory power.<sup>165</sup>

After establishing the analytical framework for the third category, Rehnquist applied it to § 13981. In the Court's view, gender-motivated crimes "are not, in any sense of the phrase, economic activity."<sup>166</sup> While the Court did not adopt a categorical rule against aggregating noneconomic activity, it noted that in all previous cases in which the Commerce Clause regulation was upheld, the intrastate activity was economic in nature.<sup>167</sup>

Section 13981 did not contain a jurisdictional element. Unlike *Lopez*, however, Congress included extensive factual findings about the effect of gender-motivated violence on interstate commerce.<sup>168</sup> The existence of congressional findings failed to establish a substantial relation to interstate commerce because they relied "so heavily on a method of reasoning that we have already rejected as unworkable if we are to maintain the Constitution's enumeration of powers."<sup>169</sup> The Court refused to apply the substantial effects doctrine and aggregation principle to "noneconomic, violent criminal conduct."<sup>170</sup> For the second time in five years, the Court held a statute was unconstitutional because it exceeded the scope of Congress's commerce power.<sup>171</sup>

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161 *Id.* at 610.

162 *Id.* at 611.

163 *Id.* at 612 (noting that Congress is not required to make factual findings about a connection to interstate commerce).

164 *Id.*

165 *Id.* at 613.

166 *Id.*

167 *Id.*

168 *Id.* at 614. Congress found that gender-motivated violence affected interstate commerce by deterring potential victims from traveling interstate, working at interstate businesses, or dealing with businesses engaged in interstate commerce. According to Congress, it also diminished national productivity, increased medical costs, and adversely affected the supply of and demand for interstate products. *Id.* at 615.

169 *Id.* at 615.

170 *Id.* at 617. However, Congress can regulate and punish intrastate violence if it is "directed at the instrumentalities, channels, or goods involved in interstate commerce." *Id.* at 618.

171 *Id.* at 619. The Court also held that Congress lacked the power to create a civil remedy for gender-motivated violence under Section 5 of the Fourteenth Amendment. *Id.* at 627.

*Morrison* had several important consequences. First, by holding that § 13981 was unconstitutional, the Court indicated it was serious about enforcing limits on the commerce power.<sup>172</sup> Second, it established a four-factor test to determine if an activity substantially affects interstate commerce, with the first and fourth factors being the most important.<sup>173</sup> Although it did not adopt a categorical rule against applying the aggregation principle to noneconomic activity, it noted that no prior cases had done so. Finally, *Morrison* strongly suggested that the Court would impose a higher standard of judicial scrutiny on the regulation of noneconomic, intrastate activity than a rational basis review.<sup>174</sup> The Court rejected congressional findings that would have been sufficient to establish that Congress had a rational basis for believing gender-motivated violence had a substantial effect on interstate commerce.<sup>175</sup> In doing so, *Morrison* went further than *Lopez* in limiting the scope of the commerce power.<sup>176</sup>

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172 See Adler, *supra* note 150, at 758–62. Professor Adler argues that *Morrison*, not *Lopez*, was “the real breakthrough for enumerated powers jurisprudence.” *Id.* at 759. Due to the modesty of the opinion in *Lopez*, federal district and appellate courts “proved themselves completely uninterested in striking down additional federal laws.” *Id.* at 758. *Morrison* indicated the Court was serious about judicial safeguards for federalism and would no longer merely rely on political safeguards. As a result, federal courts became increasingly willing to uphold as-applied Commerce Clause challenges. *Id.* at 758. *But see* Glenn H. Reynolds & Brannon P. Denning, *What Hath Raich Wrought? Five Takes*, 9 LEWIS & CLARK L. REV. 915, 930–31 (2005) (arguing that *Lopez* and *Morrison*—not *Raich*—are the outliers in the Rehnquist Court’s Commerce Clause jurisprudence).

173 See Adler, *supra* note 150, at 759–61.

174 See *Morrison*, 529 U.S. at 637 (Souter, J., dissenting) (“Although a new jurisprudence has not emerged with any distinctness, it is clear that some congressional conclusions about obviously substantial, cumulative effects on commerce are being assigned lesser values than the once-stable doctrine would assign them. These devaluations are accomplished not by any express repudiation of the substantial effects test or its application through the aggregation of individual conduct, but by supplanting rational basis scrutiny with a new criterion of review.”); *see also* Ilya Somin, *Gonzales v. Raich: Federalism as a Casualty of the War on Drugs*, 15 CORNELL J.L. & PUB. POL’Y 507, 518 (2006) (“Although *Morrison* did not explicitly reject the rational basis test, the majority’s failure to apply the test and their explicit imposition of a considerably higher standard of scrutiny strongly suggested that, at the very least, rational basis analysis does not apply to regulations of intrastate, ‘noneconomic’ activity.”).

175 See *Morrison*, 529 U.S. at 637 (Souter, J., dissenting) (noting that the statute “would have passed muster at any time between *Wickard* in 1942 and *Lopez* in 1995”).

176 See CHEMERINSKY, *supra* note 65, at 269.

### 3. *Gonzalez v. Raich*

After *Lopez* and *Morrison*, it appeared that, in addition to the political process,<sup>177</sup> Congress’s commerce power was also subject to judicially enforceable limits. That appearance turned out to be a mirage after *Gonzalez v. Raich*.<sup>178</sup>

Congress passed the Comprehensive Drug Abuse Prevention and Control Act of 1970<sup>179</sup> to aid in the “war on drugs” by enhancing federal drug enforcement powers.<sup>180</sup> The Act consisted of three titles, including the Controlled Substances Act (CSA),<sup>181</sup> which sought to control legitimate and illegal traffic in controlled substances.<sup>182</sup> It categorized all controlled substances into five schedules and made it illegal to manufacture, distribute, dispense, or possess any controlled substance in a way that was not authorized by the CSA.<sup>183</sup> Marijuana was classified as a Schedule I drug due to its high potential for abuse and lack of any accepted medical use.<sup>184</sup> As a result, it was illegal under federal law to manufacture, distribute, or possess marijuana unless it was for a preapproved Food and Drug Administration research study.<sup>185</sup>

In 1996, California passed the Compassionate Use Act of 1996 (CUA)<sup>186</sup> to provide seriously ill residents access to marijuana for medicinal purposes.<sup>187</sup> The Act prevented the criminal prosecution of, among other parties, patients who possess or grow marijuana for medicinal purposes.<sup>188</sup> Angel Raich and Diane Monson were both seriously ill California residents who possessed and used marijuana

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177 See generally Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954) (arguing that courts do not need to enforce federalism as a limit on congressional action because the political process will adequately protect the interests of the states).

178 545 U.S. 1 (2005).

179 Pub. L. No. 91-513, 84 Stat. 1236 (codified as amended in scattered sections of 21 and 42 U.S.C.).

180 See *Raich*, 545 U.S. at 12–13.

181 Pub. L. No. 91-513, tit. II, 84 Stat. 1242 (1970) (codified as amended at 21 U.S.C. §§ 801–971 (2006 & Supp. III 2009)).

182 *Id.*

183 *Id.*

184 *Id.*

185 *Id.*

186 CAL. HEALTH & SAFETY CODE § 11362.5 (West Supp. 2005).

187 *Id.*

188 *Id.* Under the statute, the patient’s use of marijuana must be recommended or approved by a doctor. *Id.*



validly under the CUA.<sup>189</sup> They sought injunctive relief after federal agents seized their marijuana.<sup>190</sup> The Court of Appeals for the Ninth Circuit ordered the district court to issue a preliminary injunction, holding that Raich and Monson were likely to prevail on their as-applied Commerce Clause challenge to the CSA.<sup>191</sup> The Supreme Court granted certiorari.<sup>192</sup>

Justice Stevens, who had dissented in *Lopez* and *Morrison*, wrote the majority opinion. He began by acknowledging the validity of the three-category framework for Commerce Clause regulation set forth in *Lopez*.<sup>193</sup> After analogizing the facts of the present case to *Wickard*,<sup>194</sup> Stevens analyzed the possession and production of marijuana for medicinal use under the third category. First, he stressed that a rational basis inquiry is the proper standard of review for determining whether an activity substantially affects interstate commerce.<sup>195</sup> Next, he distinguished *Raich* from *Lopez* and *Morrison*. Seizing upon the Court's statement in *Lopez* that "[s]ection 922(q) is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated," Stevens concluded that the classification of marijuana as a Schedule I drug "was merely one of many" essential parts of the Comprehensive Drug Abuse Prevention and Control Act of 1970.<sup>196</sup> Additionally, Stevens concluded that the activities regulated by the CSA, unlike those in the GFSZA or VAWA, "are quintessentially economic."<sup>197</sup> To prove this, he defined "economics" as "the production, distribution, and consumption of commodities."<sup>198</sup> Therefore, since regulating the production of marijuana was an essential part of a larger regulatory scheme and also economic activity, the substantial effects doctrine and aggregation principle applied. The Court upheld the constitutionality of the CSA as applied to Raich and Monson. At the end of his opinion, Stevens noted that although judicial relief was

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189 *Gonzales v. Raich*, 545 U.S. 1, 6–7 (2005).

190 *Id.* at 7.

191 *Id.* at 8–9 (summarizing the Ninth Circuit's ruling that Raich's and Monson's possession of marijuana was not covered by the CSA because it was not drug trafficking and did not enter the stream of commerce).

192 *Id.* at 9.

193 *Id.* at 16–17.

194 *Id.* at 17–19 (noting that both cases involved the homegrown consumption of commodities and regulations designed to control supply and demand).

195 *See id.* at 24.

196 *Id.* at 24–25.

197 *Id.* at 25.

198 *Id.* at 25–26 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 720 (1966)).

unavailable, perhaps a more important avenue of relief was available in the form of "the democratic process, in which the voices of voters allied with these respondents may one day be heard in the halls of Congress."<sup>199</sup>

*Raich* undermined the Rehnquist Court's attempt to establish judicially enforceable limits on the commerce power in several ways. First, it asserted that a rational basis standard of review would be used to determine whether an activity substantially affects interstate commerce, regardless of whether the activity is economic.<sup>200</sup> Although *Morrison* did not expressly reject rational basis review for noneconomic intrastate activity, it strongly implied that a higher standard of review was appropriate.<sup>201</sup> Under a rational basis standard of review, Congress can effectively regulate any noneconomic intrastate activity as long as it does not violate another constitutional provision. Second, it established an exception to the *Lopez* framework that allows Congress to regulate noneconomic intrastate activity in the third category if it is essential to a larger regulatory scheme.<sup>202</sup> This encourages Congress to draft broad legislation to ensure the constitutionality of suspect provisions.<sup>203</sup> Under this exception, regulation of the activities in *Lopez* and *Morrison* would presumably have been valid if they had been part of a larger regulatory scheme. Finally, *Raich* rendered the distinction between economic and noneconomic activity virtually meaningless through its definition of "economic."<sup>204</sup> While some

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199 *Id.* at 33.

200 *See* Somin, *supra* note 174, at 518 (arguing that the Court's failure to "explicitly repudiate the rational basis standard allowed the *Raich* majority to make use of it without even considering the possibility that it might no longer be applicable").

201 *See supra* notes 174–76 and accompanying text.

202 One scholar has suggested that *Raich* may be read as elevating activities that are an essential part of a large regulatory scheme to the status of a fourth category of permissible regulation. *See* Merrill, *supra* note 151, at 843.

203 *See Raich*, 545 U.S. at 46–47 (O'Connor, J., dissenting). In her dissent, Justice O'Connor argued that the exception reduced *Lopez* to a drafting guide for Congress and invited increased federal regulation of local activity. Moreover, O'Connor explained that she

did not understand our discussion of the role of courts in enforcing the outer limits of the Commerce Clause for the sake of maintaining the federalist balance our Constitution requires as a signal to Congress to enact legislation that is more extensive and more intrusive into the domain of state power.

*Id.* at 47 (citation omitted); *see also* Reynolds & Denning, *supra* note 172, at 922–23 (agreeing with Justice O'Connor's criticism).

204 *See Raich*, 545 U.S. at 49 (O'Connor, J., dissenting) ("[T]he Court's definition of economic activity for the purposes of Commerce Clause jurisprudence threatens to sweep all of productive human activity into federal regulatory reach.").

activities may fail to fall within this definition, the definition itself does little to limit Congress's ability to regulate using the commerce power.<sup>205</sup>

Although *Raich* did not overrule *Lopez* and *Morrison*, it marked a clear departure from the Court's prior efforts to establish judicially enforceable limits on the commerce power. Indeed, some wonder whether anything is left of either *Lopez* or *Morrison*, and, more broadly, the Rehnquist Court's efforts to protect federalism through judicial review.<sup>206</sup>

### C. *The Commerce Power and an Individual Mandate to Purchase Health Insurance*

Congress has never used its commerce power to require individuals to purchase a private good or service as a condition of citizenship.<sup>207</sup> Can the power to regulate interstate commerce be used to impose an individual mandate to purchase health insurance? Since the individual mandate does not fall within the first two categories of the *Lopez-Morrison-Raich* framework, this subpart will focus on whether an individual's decision not to purchase health insurance is substantially related to interstate commerce.

There are two ways to establish a substantial relation to interstate commerce. First, as long as Congress has a rational basis for believing an economic activity has a substantial effect on interstate commerce in the aggregate, the Court will uphold the regulation as constitutional.<sup>208</sup> In *Raich*, the Court defined "economic" as "the production,

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205 See *United States v. Patton*, 451 F.3d 615, 625 (10th Cir. 2006) (holding that possession of body armor is not economic activity); Randy E. Barnett, *Foreword: Limiting Raich*, 9 LEWIS & CLARK L. REV. 743, 749 (2005) (arguing that personal conduct such as sex, reading a book, and most violent crimes are not covered by the definition). But see Somin, *supra* note 174, at 514–15 (arguing that the definition could allow the regulation of sex because it is a commodity in the economic sense of the term, and possibly violent crimes such as rape, which could be characterized as theft of a commodity).

206 See *Raich*, 545 U.S. at 70 (Thomas, J., dissenting) (noting that "[o]ne searches [the majority opinion in *Raich*] in vain for any hint of what aspect of American life is reserved to the States"); see also Reynolds & Denning, *supra* note 172, at 932 ("[I]t seems the Rehnquist Court conjured a *zombie federalism* that wandered aimlessly for a while, killing off the occasional federal statute drafted with no thought as to constitutionality (akin to the usual horror movie zombie victims who wander away from the group), but which, in the end, was pretty easy to kill without even the aid of a shotgun-wielding action hero.").

207 See *supra* Part II.

208 See *Raich*, 545 U.S. at 17, 22.

distribution, and consumption of commodities."<sup>209</sup> Although this definition is extraordinarily broad, it probably does not include an individual's decision not to purchase health insurance. No commodity is produced, distributed, or consumed when a person decides not to purchase health insurance. However, several scholars have argued for a less rigid application of the *Raich* definition.<sup>210</sup> Professor Jack Balkin considers the failure to purchase health insurance a form of self-insurance from an economic standpoint.<sup>211</sup> He argues this is economic activity because

[f]irst, the decision to self-insure (i.e., not to purchase insurance) is part of a larger set of individual budgetary calculations about consumption and employment choices. Second, uninsured persons substitute the purchase and use of emergency medical services and over-the-counter health remedies, which is clearly economic activity under *Raich* and cumulatively affects interstate commerce.<sup>212</sup>

The difference between these approaches is one of perspective. The first approach focuses on the decision not to purchase health insurance itself, while Professor Balkin's focuses on the broader context in which the decision is made. The latter approach implicates the concern of several Justices that the *Raich* definition of economics "threatens to sweep all of productive human activity into federal regulatory reach."<sup>213</sup> It is difficult to imagine *any* decision not to purchase a good or service that cannot be characterized as "part of a larger set of individual budgetary calculations about consumption and employment choices."<sup>214</sup> As a result, it moves closer to granting Congress an unlimited power to regulate using the commerce power.

Under Professor Balkin's approach, the substantial effects doctrine and aggregation principle will apply. In light of the costs

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209 *Id.* at 25–26.

210 See Ilya Somin, *Does a Federal Mandate Requiring the Purchase of Health Insurance Exceed Congress' Powers Under the Commerce Clause?*, THE VOLOKH CONSPIRACY (Sept. 20, 2009, 7:28 PM), <http://www.volokh.com/posts/1253489281.shtml> (suggesting that, under *Raich*, the decision whether to purchase health insurance is probably economic activity because it is contracting for the provision of medicine and other commodities in the event of sickness); see also Jack M. Balkin, *Rebuttal: The Constitutionality of an Individual Mandate for Health Insurance*, 158 U. PA. L. REV. PENNUMBRA 102, 106–08 (2009), <http://www.pennumbra.com/debates/pdfs/HealthyDebate.pdf> (presenting arguments for considering the decision whether to purchase health insurance as an economic activity).

211 See Balkin, *supra* note 210, at 108.

212 *Id.*

213 *Raich*, 545 U.S. at 49 (O'Connor, J., dissenting). Chief Justice Rehnquist and Justice Thomas joined Justice O'Connor's opinion.

214 Balkin, *supra* note 210, at 108.

imposed by the adverse selection and free-rider problems in the insurance market,<sup>215</sup> there will be little difficulty in establishing that Congress had a rational basis to believe individual decisions not to purchase health insurance substantially affect interstate commerce in the aggregate. However, if such decisions are not classified as economic activities, the constitutionality of an individual mandate enacted using the commerce power will turn on whether Congress can regulate them as noneconomic activities.

A substantial relation to interstate commerce can be established in another way. Congress can regulate noneconomic activity if it has a rational basis to believe it is an essential part of a larger regulatory scheme.<sup>216</sup> An individual mandate is one part of comprehensive health care reform legislation. The key question is whether Congress has a rational basis to believe it is an essential part of that legislation. As discussed in Part I, health care spending in the United States was equivalent to 16.2% of GDP in 2007. Uninsured Americans are contributing to the rising costs of health care and insurance premiums due to their inability to adequately compensate health care providers for the care they receive. Additionally, the ability to freely enter and exit health insurance risk pools is contributing to rising insurance premiums through adverse selection. Proponents of the individual mandate argue that it will help restrain the rise in health care spending and insurance premiums by addressing the free-rider problem and adverse selection. This is sufficient to establish Congress had a rational basis to believe an individual mandate is an essential part of comprehensive health care reform. Therefore, under *Raich*, Congress can impose an individual mandate using its commerce power.

Some commentators argue that an individual mandate is unconstitutional within the *Lopez-Morrison-Raich* framework. Instead of classifying the decision not to purchase health insurance as an economic or noneconomic activity, they claim it is not an "activity" at all.<sup>217</sup> Therefore, Congress cannot regulate it under the Commerce Clause because a substantial relation to interstate commerce cannot be established.<sup>218</sup> Although this distinction may be intuitively appealing, it is difficult to enforce in practice. As Professor Balkin demonstrated, the decision to not purchase health insurance can be described as an activity when it is considered in the broader context of individual

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215 See *supra* Part I.

216 See *Raich*, 545 U.S. at 22–25.

217 See Rivkin & Casey, *supra* note 5.

218 See *id.*

budgetary calculations.<sup>219</sup> This makes the distinction ill suited to be a judicially enforceable limit on the commerce power.

Since Congress can require individuals to purchase insurance by using its taxing power,<sup>220</sup> the individual mandate provides the Court with an opportunity to limit *Raich* without invalidating the legislation. In order to restore judicially enforceable limits on the commerce power, the Court could adopt a narrower definition of economic activity,<sup>221</sup> a higher standard of review for regulation of noneconomic intrastate activity than a rational basis inquiry,<sup>222</sup> or define what constitutes a substantial effect on interstate commerce.<sup>223</sup> If it chooses not to do so, the political process will remain the only functional limit on Congress's ability to regulate using the commerce power.

### CONCLUSION

Under current Supreme Court precedent, it appears that House Speaker Nancy Pelosi's response to the question about the constitutionality of an individual mandate for health insurance was justified. In light of the Court's broad interpretation of the taxing and commerce powers, and the standard of rational basis judicial review, there are few judicially enforceable limits on Congress's ability to impose taxes and regulate behavior affecting interstate commerce. A tax on individuals without health insurance would raise revenue, and there is little doubt that uninsured Americans, in the aggregate, substantially affect interstate commerce. Therefore, Congress has the power to enact an individual mandate for health insurance using either its commerce or taxing powers.

This Note has not addressed whether the Court has properly interpreted the Taxing and Spending Clause and the Commerce Clause. However, I will highlight one criticism of the Court's interpretation that may be applicable in light of Speaker Pelosi's response to the individual mandate question. The rational basis standard of

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219 See *supra* notes 210–12 and accompanying text.

220 See *supra* Part III.C.

221 See Barnett, *supra* note 205, at 749 (noting that the Court gave no explanation for why it adopted a broad definition of "economic activity" over several narrower ones and suggesting that the definition could be treated as dicta in the future).

222 See *id.* at 747 (describing the decision to apply rational basis review to non-economic intrastate activity as "one of the less well-theorized or defended aspects of the Court's opinion" and suggesting that if "*Raich* has a point that is vulnerable to future revision by the Court, this is it").

223 See Pushaw, *supra* note 121, at 895 (criticizing the Court for failing to "provide any concrete guidelines for determining what counts as 'substantial' or how this effect should be calculated").

review used by the Court to review the commerce and taxing powers shows substantial deference to Congress's assessment of the constitutionality of its legislation. Congress has a duty to interpret whether its legislation is consistent with the powers enumerated in the Constitution. If Congress instead defers to the Supreme Court's assessment, the individual mandate for health insurance in the PPACA will be upheld without either body examining its constitutionality.<sup>224</sup>

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<sup>224</sup> See Randy Barnett, "*Constitutionality*" and the Real Constitution, THE VOLOKH CONSPIRACY (Sept. 22, 2009, 11:00 AM), <http://volokh.com/posts/1253566626.shtml> (arguing that this is an accurate description of the current state of American constitutional law).