Commerce Games and the Individual Mandate

LESLIE MELTZER HENRY* & MAXWELL L. STEARNS**

While the Supreme Court declined an early invitation to resolve challenges to the Patient Protection and Affordable Care Act (ACA or the Act), a split between the United States Courts of Appeals for the Sixth Circuit (sustaining the ACA's "individual mandate") and the Eleventh Circuit (striking it down) ultimately compelled the Court to grant certiorari in a series of cases challenging the constitutional validity of the new federal health care law. In addition to deciding the fate of this centerpiece of the Obama Administration's regulatory agenda, the Court's decision will likely affect Commerce Clause doctrine—and related doctrines—for years or even decades to come.

Litigants, judges, and academic commentators have focused on whether the Court's "economic activity" test, as set forth in United States v. Lopez*, permits the individual mandate. This Article approaches the constitutionality of that provision from a novel perspective, one that proves essential in applying past Commerce Clause decisions, including* Lopez*, to the ACA and in appreciating the real stakes involved in upending the individual mandate. By analyzing the Court's Commerce Clause jurisprudence through the lens of game theory, we expose common features of games that have resulted in limiting state powers on the dormant side of Commerce Clause doctrine, and in sustaining and restricting congressional powers on the affirmative side. Applying such games as "the prisoners' dilemma," "the driving game," and "the battle of the sexes" yields critical insights about the nature and limits of state and federal regulatory powers.*

Our game-theoretical analysis shows that although debates have centered on the role of the individual mandate in solving a micro-level separating game among low-risk individuals who do not purchase insurance and high-risk individuals who cannot afford it, a more compelling account focuses on the Act's role in solving a macro-level separating game played among the states. By comparing the ACA to several important historical policy splits among states—public accommodations laws, abortion funding, the death penalty, civil remedies for violent crimes against women, and same-sex marriage—we demonstrate

* Assistant Professor of Law, University of Maryland Francis King Carey School of Law; Associate Faculty, Johns Hopkins Berman Institute of Bioethics. J.D. Yale Law School; M.Sc. University of Oxford; B.A. University of Virginia.

** Professor of Law and Marbury Research Professor, University of Maryland Francis King Carey School of Law. J.D. University of Virginia School of Law; B.A. University of Pennsylvania. We benefitted from helpful comments provided by Brian Galle, Barak Orbach, and Daniel Sokol, in addition to those provided by participants at Professor Henry's presentation at the University of Maryland Francis King Carey School of Law Junior Faculty Workshop. We thank Michael Bakhama, Lauren Elfner, Diana Kugel, Nikola Nable-Juris, George Neyarapally, Gayatri Patel, Carrie Scufari, and Christine White for their invaluable research assistance. Susan McCarty and Alice Johnson, as always, provided excellent library support.

that the Act, including the individual mandate, fits well within those cases for which congressional commerce power is justified to avoid the risk that competing state policies will force other states into a problematic separating game, thereby undermining the selected regulatory policy. Our analysis reconciles congressional power to implement the ACA with the post-New Deal expansions and recent retrenchments of Congress's Commerce Clause powers, and compellingly reconciles the dormant and affirmative sides of the Supreme Court's Commerce Clause jurisprudence.

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INTRODUCTION

Even before the case landed on the Supreme Court docket, legal challenges to the Patient Protection and Affordable Care Act (ACA or the Act)[1] generated extensive commentary in the academic and popular press.[2] The Supreme Court declined an early invitation to dive in,[3] forcing lower courts to test the waters of the newly constructed health insurance pools.[4] The resulting circuit split ulti-

1. 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 (to be codified in scattered sections of 21, 25, 26, 29 and 42 U.S.C.).

2. For a variety of perspectives, see Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate Is Unconstitutional*, 5 N.Y.U. J. L. & LIBERTY 581, 605 (2010); Patrick McKinley Brennan, *The Individual Mandate, Sovereignty, and the Ends of Good Government: A Reply to Professor Randy Barnett*, 159 U. PA. L. REV. 1623, 1624–25 (2011); Mark A. Hall, *Commerce Clause Challenges to Health Care Reform*, 159 U. PA. L. REV. 1825, 1829–40 (2011); Timothy S. Jost, *State Lawsuits Won't Succeed in Overturning the Individual Mandate*, 29 HEALTH AFF. 1225, 1226–28 (2010); Andrew Koppelman, *Bad News for Mail Robbers: The Obvious Constitutionality of Health Care Reform*, 121 YALE L.J. ONLINE 1, 6–7 (2011), http://yalelawjournal.org/2011/04/26/koppelman.html; Ilya Shapiro, *State Suits Against Health Reform Are Well Grounded in Law—And Pose Serious Challenges*, 29 HEALTH AFF. 1229, 1229–30 (2010).

3. *See* Baldwin v. Sebelius, No. 10CV1033 DMS (WMC), 2010 WL 3418436 (S.D. Cal. Aug. 27, 2010), *cert. denied*, 131 S. Ct. 573 (2010), *aff'd*, 654 F.3d 877 (9th Cir. 2011); *see also* Virginia *ex rel.* Cuccinelli v. Sebelius, 702 F. Supp. 2d 598 (E.D. Va. 2010), *cert. denied*, 131 S. Ct. 2152 (2011) (denying Virginia's "[p]etition for writ of certiorari before judgment to the United States Court of Appeals for the Fourth Circuit"), *rev'd*, 656 F.3d 253 (4th Cir. 2011), *petition for cert. filed*, 80 U.S.L.W. 3221 (U.S. Sept. 30, 2011) (No. 11-420).

4. *See, e.g.*, Mead v. Holder, 766 F. Supp. 2d 16 (D.D.C. 2011), *aff'd sub nom.* Susan Seven-Sky v. Holder, 661 F.3d 1 (D.C. Cir. 2011), *petition for cert. filed*, 80 U.S.L.W. 3359 (U.S. Nov. 30, 2011) (No. 11-679); Virginia *ex rel.* Cuccinelli v. Sebelius, 728 F. Supp. 2d 768 (E.D. Va. 2010), *vacated*, 656 F.3d 253 (4th Cir. 2011), *petition for cert. filed*, 80 U.S.L.W 3221 (U.S. Sept. 30, 2011) (No. 11-420); Liberty Univ., Inc. v. Geithner, 753 F. Supp. 2d 611 (W.D. Va. 2010), *vacated*, No. 10-2347, 2011 WL

mately guaranteed that the Court would decide the fate of this centerpiece of the Obama Administration's regulatory agenda.[5] On November 14, 2011, the Court granted certiorari in three cases challenging the Act, and it set aside an historic five-and-one-half hours for oral arguments, held in March 2012 as this Article went to press.[6] Whatever the outcome, the ripples will likely affect the Commerce Clause and related doctrines for many years to come.

Although the Supreme Court granted certiorari on a variety of challenges to the ACA,[7] this Article focuses on what we and many other scholars and commentators believe to be the most significant constitutional question: Can a federal statute enacted pursuant to the Commerce Clause compel individuals to purchase health insurance if they would not otherwise do so? Thus far, scholars answering this question have focused on whether the Court's "economic activity" test, set forth in *United States v. Lopez*,[8] permits the ACA's individual mandate.[9] This Article approaches the question from a fundamentally novel perspective that proves essential in applying past Commerce Clause decisions to the ACA and in grasping the true stakes of these challenges.

By applying game theory to the Commerce Clause doctrine, we identify the common features of cases through which the Court has limited state powers on the dormant side, and has sustained or restricted congressional powers on the affirmative side of its jurisprudence. Evaluating Commerce Clause precedents through such games as "the prisoners' dilemma," "the driving game," and "the

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3962915 (4th Cir. Sept. 8, 2011), *petition for cert. filed*, 80 U.S.L.W. 3240 (U.S. Oct. 7, 2011) (No. 11-438); Florida *ex rel.* McCollum v. U.S. Dep't of Health & Human Servs., 716 F. Supp. 2d 1120 (N.D. Fla. 2010); Thomas More Law Ctr. v. Obama, 720 F. Supp. 2d 882 (E.D. Mich. 2010).

5. *See* Thomas More Law Ctr. v. Obama, 651 F.3d 529, 549 (6th Cir. 2011) (rejecting challenge to individual mandate), *petition for cert. filed*, 70 U.S.L.W. 3065 (U.S. July 26, 2011) (No. 11-117); Florida *ex rel.* Attorney Gen. v. U.S. Dep't of Health & Human Servs., 648 F.3d 1235, 1325 (11th Cir. 2011) (sustaining challenge, but severing individual mandate), *cert. granted sub nom.* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 603 (Nov. 14, 2011) (No. 11-393), *and* 132 S. Ct. 604 (Nov. 14, 2011) (No. 11-398), *and* 132 S. Ct. 604 (Nov. 14, 2011) (No. 11-400).

6. *Florida*, 648 F.3d 1235, *cert. granted sub nom.* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 603 (Nov. 14, 2011) (No. 11-393), *and* 132 S. Ct. 604 (Nov. 14, 2011) (No. 11-398), *and* 132 S. Ct. 604 (Nov. 14, 2011) (No. 11-400). The Court will hear oral arguments between March 26 and March 28, 2012. *See Supreme Court of the United States, October Term 2011—For the Session Beginning March 19, 2012*, SUPREME COURT OF THE UNITED STATES (Dec. 19, 2011), http://www.supremecourt.gov/oral_arguments/argument_calendars/MonthlyArgumentCalMAR2012.pdf.

7. *See Florida*, 648 F.3d 1235, *cert. granted sub nom.* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 603 (Nov. 14, 2011) (No. 11-393) (whether the individual mandate is severable from the rest of the Act), *and* 132 S. Ct. 604 (Nov. 14, 2011) (No. 11-398) (whether the individual mandate is a valid exercise of Congress's Commerce Clause power and whether the Anti-Injunction Act precludes legal challenges to the mandate), *and* 132 S. Ct. 604 (Nov. 14, 2011) (No. 11-400) (whether the Act's expansion of Medicaid violates limitations on Congress's spending power and whether the individual mandate is severable from the rest of the Act).

8. 514 U.S. 549, 560 (1995) ("Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.").

9. *See, e.g.*, Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 46–47 (2010) (relying on cumulative economic impact of uninsured); Barnett, *supra* note 2 (relying on action/inaction distinction); Hall, *supra* note 2, at 1831–38 (rejecting action/inaction distinction); Koppelman, *supra* note 2 (suggesting that nonpurchase may be free-riding economic activity).

battle of the sexes," yields critical insights about the nature and limits of state and federal powers affecting commerce.[10]

Our analysis demonstrates that the criterion separating successful and unsuccessful Commerce Clause challenges is whether the contested law implicates only economic externalities, meaning effects on private parties, or implicates political externalities, meaning effects on the laws of other states. On each side of its Commerce Clause jurisprudence respectively, the Court has declined to strike down challenged state policies or to permit congressional regulation based solely on economic externalities. By contrast, on the dormant side, the Court has prevented states from generating problematic political externalities, and on the affirmative side, has permitted congressional regulation reasonably targeted to overcoming such externalities.

While most analyses of the ACA have focused on how the individual mandate solves a micro-level separating equilibrium game,[11] one between

10. *See infra* Part II.

11. *See* ERIC RASMUSEN, GAMES AND INFORMATION: AN INTRODUCTION TO GAME THEORY 247 (4th ed. 2007) (distinguishing separating and pooling equilibria); Marie Allard, Jean-Paul Cresta & Jean-Charles Rochet, *Pooling and Separating Equilibria in Insurance Markets with Adverse Selection and Distribution Costs*, 22 GENEVA PAPERS ON RISK & INS. THEORY 103 (1997) (analyzing pooling and separating equilibria in the context of health insurance).

Several commentators have thus framed the debate over the ACA's individual mandate in terms of a free-rider problem. Free riding describes the failure of some who enjoy the benefits of a public good to contribute to its procurement. Not surprisingly, free riding therefore tends to discourage the supply of public goods. MAXWELL L. STEARNS & TODD J. ZYWICKI, PUBLIC CHOICE CONCEPTS AND APPLICATIONS IN LAW 14 (2009) (describing free riding and offering illustrations). In this context, the argument is that those who fail to purchase health insurance can be described as free riding on the overall health system when they seek medical services at the time of need—for example, through emergency-room care—with costs passed on to the insured in the form of inflated premiums. For recent commentary, see Douglas A. Kahn & Jeffrey H. Kahn, Commentary, *Free Rider: A Justification for Mandatory Medical Insurance Under Health Care Reform?*, 109 MICH. L. REV. FIRST IMPRESSIONS 78, 80–82 (2011), http://www.michiganlawreview.org/assets/fi/109/kahn.pdf (calling the individual mandate's free-rider justification exaggerated because the mandate will simply reallocate the costs of those who legitimately cannot afford coverage from the insured, through premium increases, to taxpayers, through program subsidies); Nicholas Bagley & Jill R. Horwitz, Commentary, *Why It's Called the Affordable Care Act*, 110 MICH. L. REV. FIRST IMPRESSIONS 1, 3–5 (2011), http://www.michiganlawreview.org/assets/fi/110/bagleyhorwitz.pdf (rejecting the characterization of free riding employed by Kahn and Kahn and arguing that the individual mandate's forced risk spreading reduces the adverse consequences of those forced to free ride due to, among other reasons, financial inability to insure); Douglas A. Kahn & Jeffrey H. Kahn, Commentary, *The Unaffordable Health Act: A Response to Professors Bagley and Horwitz*, 110 MICH. L. REV. FIRST IMPRESSIONS 16 (2011), http://www.michiganlawreview.org/assets/fi/110/Kahn2.pdf (defending their refutation of the free-rider characterization of the individual mandate).

While risk spreading potentially ameliorates some of the difficulties that can be described as free riding, absent a more specific game implicating commerce, this insight alone is insufficient to justify congressional reliance on the Commerce Clause to implement the individual mandate scheme. That is because in the course of exercising police powers, states routinely address matters of public policy that also implicate the problem of free riding. And yet, the existence of state regulatory powers does not, of its own force, justify congressional reliance on the Commerce Clause to address the same substantive subject matter. Free riding in insurance markets, for example, can be a state regulatory problem, a federal regulatory problem, or both, depending on the specific game implicated in the relevant insurance context. In Parts II and III, *infra*, we assess the games that Congress has implicitly relied upon the Commerce Clause to remedy as a means of identifying the specific game that Congress seeks

low-risk individuals who do not purchase insurance and high-risk individuals who cannot afford it,[12] this Article shows that for Commerce Clause purposes, the ACA addresses another, more significant separating-equilibrium game among the states.[13] Like other games that Congress has historically been permitted to address through its commerce power, this macro-level separating game rests on the very sort of political externalities that states are structurally unable to resolve.

Our approach accomplishes three simultaneous goals. First, it reconciles the historical expansion of congressional post-New Deal Commerce Clause powers with the Rehnquist Court's retrenchments on those powers.[14] Second, it shows why recent doctrinal limits do not mandate striking down the individual mandate. And third, it demonstrates doctrinal coherence, not merely doctrinal convenience or creativity. The most persuasive test of doctrinal coherence is the ability to reconcile both sides of the Commerce Clause—dormant and affirmative—with a single overarching theory, one that also offers a compelling

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to resolve through the individual mandate. We then demonstrate how this particular game implicates not only economic, but more importantly, political externalities among states, thus justifying reliance on congressional Commerce Clause powers.

Neil Siegel has recently expanded upon his earlier thoughtful work with Robert Cooter arguing that, properly read, Article I, Section 8 empowers Congress to enact those policies that individual states are structurally ill-suited to resolve as a result of interstate externalities. *See* Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115, 144–50 (2010) (devising a comprehensive theory of collective-action federalism). Siegel maintains that the individual mandate prevents individuals from free riding on benevolence by forcing beneficiaries of health care services to internalize costs, and that because complex insurance markets operate interstate, states cannot force this internalization on their own. *See* Neil S. Siegel, *Free Riding on Benevolence: Collective Action Federalism and the Individual Mandate*, 75 LAW & CONTEMP. PROBS. (forthcoming 2012) (manuscript at 37–54), *available at* http://papers.ssrn.com/abstract_id=1843228 (expanding a theory of collective action federalism to defend the individual mandate). In contrast to the approach taken by these scholars, our approach specifically focuses on the role of Commerce Clause doctrine, affirmative and dormant, and the importance of distinguishing political from economic externalities, both of which can extend beyond the borders of particular states. Our analysis demonstrates that the critical feature that distinguishes when congressional reliance on the Commerce Clause is or is not justified does not depend merely on whether the effect of the regulated subject matter is contained within a state, but rather, on whether the effect undermines the coordinated legal regimes of other states or would, if permitted to stand, encourage other states to replicate the challenged policy, thus promoting a regime of mutual defection among states. This analysis further allows us to devise a common theory, one that embraces both sides of the Commerce Clause and that ties Congress's reliance on its commerce power to enact the individual mandate to the theory of political, rather than economic, union. *See infra* Part II (employing game theory to analyze Commerce Clause doctrines and to distinguish political and economic externalities); *infra* Part III (extending the theory to defend the individual mandate and ACA based upon a theory of political union developed in Part II).

12. *See, e.g.*, MATTHEW BUETTGENS, BOWEN GARRETT & JOHN HOLAHAN, URBAN INST., WHY THE INDIVIDUAL MANDATE MATTERS: TIMELY ANALYSIS OF IMMEDIATE HEALTH POLICY ISSUES 7–8 & tbl.5 (Dec. 2010), http://www.rwjf.org/files/research/71601.pdf (observing that the individual mandate lowers premiums by reducing adverse selection).

13. *See infra* Part III.

14. There are two relevant sets of doctrinal retrenchments—the "anticommandeering doctrine" arising from *New York v. United States*, 505 U.S. 144, 175–76 (1992), and *Printz v. United States*, 521 U.S. 898, 935 (1997), and the "economic activity" test associated with *United States v. Lopez*, 514 U.S. 549, 560 (1995), and *United States v. Morrison*, 529 U.S. 598, 613 (2000).

resolution to the pending challenges to the ACA.

This Article proceeds as follows: Part I examines the ACA as a response to a micro-level separating equilibrium game. Part II reviews the history of Commerce Clause doctrine, both dormant and affirmative, through the lens of such games as the prisoners' dilemma, the driving game, and the battle of the sexes. Part III applies the main lesson of the models developed in Part II to the individual mandate. The analysis demonstrates that, like other games that have justified the exercise of congressional commerce powers, the ACA, including especially the individual mandate, is designed to avoid a separating equilibrium game that the states acting on their own cannot cure. The Act is therefore an appropriate exercise of congressional commerce power.

I. HEALTH ECONOMICS

During the 2008 presidential primaries, candidates from both ends of the political spectrum agreed on one thing: The American health care system was broken and demanded urgent reform.[15] The United States was spending 16.6% of its gross domestic product (GDP) on health care,[16] more than it spent in any other sector of the economy,[17] and more per capita than any other developed country.[18] Health expenditures were projected to consume 25% of the country's GDP by 2025.[19]

Amid rising costs, approximately 46.3 million Americans, or 15.4% of the population, lacked health insurance.[20] Numerous factors contributed to the rising number of uninsureds, including prohibitive premiums,[21] lack of insur-

15. *See* SARA R. COLLINS & JENNIFER L. KRISS, THE COMMONWEALTH FUND, ENVISIONING THE FUTURE: THE 2008 PRESIDENTIAL CANDIDATES' HEALTH REFORM PROPOSALS 3–15 (Jan. 2008), http://www.commonwealthfund.org/~/media/Files/Publications/Fund%20Report/2008/Jan/Envisioning%20the%20Future%20The%202008%20Presidential%20Candidates%20Health%20Reform%20Proposals/Collins_envisioningfuture2008candplans_1092%20pdf.pdf (comparing the health care policy proposals of four Republican and four Democratic candidates).

16. CTRS. FOR MEDICARE & MEDICAID SERVS., U.S. DEP'T OF HEALTH & HUMAN SERVS., NATIONAL HEALTH EXPENDITURE PROJECTIONS 2008–2018, at 1, http://www.cms.hhs.gov/NationalHealthExpendData/downloads/proj2008.pdf (last visited Dec. 30, 2011). National health expenditures include private health spending, government public health spending, and government investment in medical research and development. *See id.* at 2, 4 tbl.2.

17. *Cf.* CONG. BUDGET OFFICE, THE BUDGET AND ECONOMIC OUTLOOK: AN UPDATE 9 tbl.1-3 (Aug. 2011), http://www.cbo.gov/ftpdocs/123xx/doc12316/08-24-BudgetEconUpdate.pdf.

18. *Health Care Spending in the United States and Selected OECD Countries*, THE HENRY J. KAISER FAMILY FOUND. (Apr. 28, 2011), http://www.kff.org/insurance/snapshot/OECD042111.cfm.

19. *The Long-Term Outlook for Health Care Spending*, CONG. BUDGET OFFICE, http://www.cbo.gov/ftpdocs/87xx/doc8758/MainText.3.1.shtml (last visited Dec. 10, 2011).

20. CARMEN DENAVAS-WALT, BERNADETTE D. PROCTOR & JESSICA C. SMITH, U.S CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2009, at 22 (Sept. 2010), http://www.census.gov/prod/2010pubs/p60-238.pdf.

21. In 2008, premium increases outpaced growth in worker's earnings by more than three to one. *See* THE HENRY J. KAISER FAMILY FOUND., HEALTH CARE COSTS: A PRIMER, 10 fig.9 (Mar. 2009), http://www.kff.org/insurance/upload/7670_02.pdf.

ance portability,[22] and qualification barriers in the individual market due to preexisting conditions or health status.[23] A smaller portion of Americans, mostly healthy young people, were uninsured by choice, believing that they would not need costly care,[24] or that when they did, it would be provided to them regardless of their inability to pay.[25] Together in 2008, the uninsured consumed $56 billion in uncompensated care.[26] These costs ultimately were passed from governments, hospitals, and insurers to Americans though tax increases, higher overall pricing, and rising premiums.[27] When President Obama signed the ACA into law, the statistics had become even more sobering,[28] and the debate about reform more divisive.[29]

A. THE ACA'S PROVISIONS IN BRIEF

The ACA is expected to extend health coverage to between thirty-two and thirty-four million currently uninsured individuals.[30] While the Act targets insurers, employers, and individuals, the most important obligation for purposes of pending constitutional challenges is the individual mandate. Technically, the mandate does not require uninsureds to purchase insurance. Instead, beginning January 1, 2014, taxpayers failing to meet the narrow exemptions will suffer a

22. *See* Chichun Fang, *The Dynamics of Health Insurance Coverage*, *in* LABOR AND EMPLOYMENT RELATIONS ASSOCIATION SERIES: PROCEEDINGS OF THE 62D ANNUAL MEETING 33, 41–42 (Françoise Carré & Christian Weller eds., 2010), *available at* http://leraweb.org/sites/leraweb.org/files/publications/Proceedings/Proceed2010.pdf (noting that the lack of effective insurance portability—COBRA eligibility is limited to 10% of workers and only 20% of those eligible actually use it—led to temporary gaps in coverage of nearly 30% of the working population over the course of ten years).

23. *See At Risk: Pre-Existing Conditions Could Affect 1 in 2 Americans*, HEALTHCARE.GOV., http://www.healthcare.gov/center/reports/preexisting.html (last visited Dec. 10, 2011).

24. *See* David Amsden, *The Young Invincibles*, N.Y. MAG., Apr. 2, 2007, *available at* http://nymag.com/news/features/29723/.

25. *See id.* (quoting the President of the Commonwealth Fund, who stated that "[t]he most common misperception [among uninsured young adults] is that . . . [they] end up getting decent care without insurance" because even though an individual injured in an accident "won't be left in the street[,]" that individual may not receive "good rehab" after emergency treatment); *see also* Emergency Medical Treatment and Labor Act, 42 U.S.C. § 1395dd (2006) (amended 2011) (prohibiting hospitals from transferring patients to other facilities or denying certain emergency care on the basis of a patient's inability to pay). In 2008, uninsured patients in the United States accounted for 19 million emergency-room visits. NAT'L CTR. FOR HEALTH STATISTICS, CTRS. FOR DISEASE CONTROL & PREVENTION, NATIONAL HOSPITAL AMBULATORY MEDICAL CARE SURVEY: 2008 EMERGENCY DEPARTMENT SUMMARY TABLES 6 tbl.6 (2008), *available at* http://www.cdc.gov/nchs/data/ahcd/nhamcs_emergency/nhamcsed2008.pdf.

26. *See* Jack Hadley et al., *Covering the Uninsured in 2008: Current Costs, Sources of Payment, and Incremental Costs*, 27 HEALTH AFF. w399, w403 (2008) (basing the cost of uncompensated care in 2008 on independent data from health care providers and government sources).

27. *See id.* at w403–07.

28. "The number of uninsured people increased to 50.7 million in 2009 from 46.3 million in 2008 . . . ." DENAVAS-WALT, PROCTOR & SMITH, *supra* note 20, at 22.

29. *See* Sheryl Gay Stolberg & David M. Herszenhorn, *Obama Lays Out His Health Plan*, N.Y. TIMES, Feb. 23, 2010, http://query.nytimes.com/gst/fullpage.html?res=9C06E0DB1F3BF930A15751C0A9669D8B63&pagewanted=all (describing the health care debate as a "bitterly divisive yearlong clash").

30. Wilson Huhn, *Constitutionality of the Patient Protection and Affordable Care Act Under the Commerce Clause and the Necessary and Proper Clause*, 32 J. LEGAL MED. 139, 139 (2011).

tax penalty if they (and their dependents) do not have "minimum essential coverage."[31] The Act imposes a parallel obligation on large employers to cover their employees.[32]

The ACA also expands Medicaid. Beginning in 2014, people with incomes up to 133% of the federal poverty line (FPL) will qualify for Medicaid coverage.[33] Ineligible individuals who fall below 400% of the FPL[34] will receive tax credits to offset health-insurance premiums.[35]

The Act further enlarges the pool of insureds by prohibiting private insurers from denying coverage based on preexisting conditions or health status.[36] Although some states had enacted similar rules before the ACA,[37] the vast majority had not, resulting in insurance denials or high premiums for people with problematic health histories. Under the ACA, insurers are not permitted to set "discriminatory premium rates"[38] or otherwise discriminate "based on health status."[39]

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31. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1501(b), 124 Stat. 119, 244–50 (2010), *amended by* Health Care and Education Reconciliation Act, Pub. L. No. 111-152, § 1002, 124 Stat. 1029, 1032 (2010) (to be codified at 26 U.S.C. § 5000A). The Act provides exemptions to, among others, persons receiving benefits under Medicare or Medicaid and persons with religious objections. § 1501(b), 124 Stat. at 246–48 (to be codified at 26 U.S.C. § 5000A(d)–(f)). The term "minimum essential coverage" is defined statutorily. § 1501(b), 124 Stat. at 248 (to be codified at 26 U.S.C. § 5000A(f)).

32. § 1513(a), 124 Stat. at 253–56 (to be codified at 26 U.S.C. § 4980H) (specifying penalties for noncompliance for firms employing more than fifty people). Some commentators have argued that the relative costs of coverage versus penalties might produce a loophole that could unravel employer-backed coverage. *See* Amy Monahan & Daniel Schwarcz, *Will Employers Undermine Health Care Reform by Dumping Sick Employees?*, 97 VA. L. REV. 125, 127 & n.5 (2011) (citing KENNETH S. ABRAHAM & DANIEL SCHWARCZ, ABRAHAM'S INSURANCE LAW AND REGULATION 32 (5th ed. Healthcare Supp. 2010)). Others have claimed this concern to be overstated. *See* David A. Hyman, Response, *PPACA in Theory and Practice: The Perils of Parallelism*, 97 VA. L. REV. IN BRIEF 83, 104–05 (2011), http://www.virginialawreview.org/inbrief/2011/11/04/hyman.pdf.

33. § 2001(a)(1)(C), 124 Stat. at 271 (to be codified at 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII)) (amending section 1902(a)(10)(A)(i) of the Social Security Act). In 2011, the poverty guideline for a family of four was $22,350; 133% of this guideline was $29,726 for a family of four. *The 2011 HHS Poverty Guidelines*, U.S. DEP'T OF HEALTH & HUMAN SERVS. (Jan. 21, 2011), http://aspe.hhs.gov/poverty/11poverty.shtml.

34. In 2011, this was $43,560 for an individual and $89,400 for a family of four. *See* U.S. DEP'T OF HEALTH & HUMAN SERVS., *supra* note 33.

35. *See* Health Care and Education Reconciliation Act § 1001(a)(1)(A) (to be codified at 26 U.S.C. § 36B(b)(3)(A)(i)).

36. Patient Protection and Affordable Care Act § 1201(4), 124 Stat. at 156 (to be codified at 42 U.S.C. § 300gg-1(a)) (amending section 2702 of the Public Health Service Act).

37. *See infra* section III.B.4.

38. Patient Protection and Affordable Care Act § 1201(4), 124 Stat. at 155 (to be codified at 42 U.S.C. § 300gg) (amending section 2701(a)(1) of the Public Health Service Act).

39. § 1201(4), 124 Stat. at 156 (to be codified at 42 U.S.C. § 300gg-4) (amending section 2705 of the Public Health Service Act). The ACA does, however, allow plans to use differential pricing based on the following factors: marital status, geography, age, and tobacco use. § 1201(4), 124 Stat. at 155 (to be codified at 42 U.S.C.§ 300gg(a)(1)(A)) (amending section 2701(a)(1)(A) of the Public Health Service Act). Pricing effects are limited. The oldest individuals in a plan cannot be charged more than three times the premium for the youngest, and tobacco users cannot be charged more than one-and-a-half times the premium for comparable nontobacco users. *Id.*

B. HEALTH INSURANCE AS A SEPARATING EQUILIBRIUM GAME

Together, the individual mandate and the prohibition on discriminatory coverage are designed to solve the problem of risk pooling. Providing insurance is only cost-effective if there are enough low-risk individuals in the "pool" to make the aggregate actuarial risk for the insurer lower than the expected payoffs to all insureds. In a world of risk neutrality, this would be a losing venture because no one would take a probabilistic losing bet.[40] The whole notion of insurance, however, rests on the assumption that most people are risk averse and willing to pay a premium to spread their risk over a larger pool.[41]

In the health-insurance context, the game is complicated by information asymmetries concerning individual health risks.[42] Prospective insureds generally are better informed than potential insurers about their health history and risk factors. Before the ACA, insurers attempted to solve this problem through required disclosures, including documentation of past medical history and medical tests designed to identify particular risk factors.[43] Improving the overall health composition of their pool or, conversely, raising premiums for high-risk insureds, makes selling insurance more profitable.

The real competition respecting disclosures, however, is not between the insurers and the insureds; rather, it is among the insureds. Low-risk individuals are strongly motivated to provide benign health disclosures or otherwise signal low risk, while high-risk individuals cannot do so. The resulting micro-level separating equilibrium game—which groups low-risk insureds with low premiums and high-risk insureds with often prohibitive premiums—in theory threatens to undermine risk pooling.[44]

The ACA's provisions aim to improve pooling by enhancing the stickiness of the health-insurance market. By mandating that most individuals obtain health

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40. Of course, some bets will pay off for insureds even if, ex ante, the bet favors the insurer. The vast majority of prospective insureds, however, purchase coverage even knowing that ex ante the terms favor the insurer.

41. This is slightly oversimplified. The premium covers two major components: the expected payout value of insurance coverage and the risk premium, which reflects the difference in risk aversion as between the insured and the insurer. For a general discussion, see STEVEN SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW 186–205 (1987).

42. *See id.* at 195–99; *see also* LIONEL MACEDO, WORLD BANK, THE ROLE OF THE UNDERWRITER IN INSURANCE 4 (2009), http://siteresources.worldbank.org/EXTFINANCIALSECTOR/Resources/282884-1242281415644/Role_of_Underwriter_Insurance.pdf ("Another important aspect that underwriters have to deal with while assessing an application is the asymmetric knowledge of the risk. Individuals will always know more than anyone else about the perils to which their own goods, businesses or health are exposed . . . .").

43. *Cf.* MACEDO, *supra* note 42, at 5 (describing the process used to underwrite life-insurance policies).

44. For a classic treatment demonstrating an inevitable insurance separation equilibrium, see Michael Rothschild & Joseph Stiglitz, *Equilibrium in Competitive Insurance Markets: An Essay on the Economics of Imperfect Information*, 90 Q.J. ECON. 629, 634–37 (1976). For an article discussing how distribution costs and stickiness, created by practical factors, such as employer-provided insurance and family coverage, allow for pooling, rather than separating, equilibria, see Allard, Cresta & Rochet, *supra* note 11.

insurance through their employer, government programs, or private purchases,[45] the Act expands not only the number but also the health diversity of people in the pool. Two provisions—the individual mandate and the provision allowing parents to cover their children until the age of twenty-six[46]—target "the young invincibles,"[47] meaning healthy adults under thirty who are both unlikely to suffer any serious illness and unlikely to purchase insurance. Forcing these individuals into the pool further undermines pure health-based sorting. The prohibition on exclusions for preexisting conditions further counters the actuarial tendency toward a separating equilibrium. The individual mandate and the prohibition on discriminatory coverage decisions are mutually reinforcing features of a combined financial package.[48]

C. THE ACTIVITY–INACTIVITY DISTINCTION AND THE DANGER OF DICTUM

Just one month after President Obama signed the ACA into law, Justice Stephen Breyer correctly predicted that challenges to the Act's constitutionality ultimately would reach the Supreme Court.[49] Shortly after the enactment of the ACA, three federal district courts plus the Sixth Circuit and the D.C. Circuit rejected Commerce Clause challenges to the individual mandate,[50] and two federal district courts plus the Eleventh Circuit reached the opposite result.[51]

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45. *See supra* section I.A and accompanying notes.

46. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1001(a)(5), 124 Stat. 119, 132 (2010) (to be codified at 42 U.S.C. § 300gg-14) (amending section 2714(a) of the Public Health Service Act).

47. Amsden, *supra* note 24 (coining the term).

48. The Act also provides risk adjustments to plans based on the aggregate risk profile of plan participants. Beginning in 2014, financial transfers will be made from plans with lower-risk members to plans with higher-risk members to equalize premiums across pools. *See* Patient Protection and Affordable Care Act § 1343(a), 124 Stat. at 212 (to be codified at 42 U.S.C. § 18063(a)).

49. *Financial Services and General Government Appropriations for 2010: Hearings Before the Subcomm. on Fin. Servs. & Gen. Gov't of the H. Comm. on Appropriations*, 111th Cong. (2010) (statement of Stephen G. Breyer, Associate Justice, United States Supreme Court), *available a*t LEXIS, CQ Transcriptions database ("Doesn't [a lawmaker] know every word in a bill is a subject for an argument in court and a decision? . . . And now you, I gather, have passed a law with 2,400 pages. If you have passed a law with 2,400 pages it probably has a lot of words.").

50. Susan Seven-Sky v. Holder, 661 F.3d 1 (D.C. Cir. 2011), *petition for cert. filed*, 80 U.S.L.W. 3359 (U.S. Nov. 30, 2011) (No. 11-679); Thomas More Law Ctr. v. Obama, 651 F.3d 529 (6th Cir. 2011*), petition for cert. filed*, 70 U.S.L.W. 3065 (U.S. July 26, 2011) (No. 11-117); Mead v. Holder, 766 F. Supp. 2d 16 (D.D.C.), *aff'd sub nom.* Susan Seven-Sky v. Holder, 661 F.3d 1 (D.C. Cir. 2011); Liberty Univ., Inc. v. Geithner, 753 F. Supp. 2d 611 (W.D. Va. 2010), *vacated*, No. 10-2347, 2011 WL 3962915 (4th Cir. Sept. 8, 2011), *petition for cert. filed*, 80 U.S.L.W. 3240 (U.S. Oct. 7, 2011) (No. 11-438); Thomas More Law Ctr. v. Obama, 720 F. Supp. 2d 882 (E.D. Mich. 2010).

51. Florida *ex rel.* Attorney Gen. v. U.S. Dep't of Health & Human Servs., 648 F.3d 1235 (11th Cir. 2011), *cert. granted sub nom.* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 603 (Nov. 14, 2011) (No. 11-393), *and* 132 S. Ct. 604 (Nov. 14, 2011) (No. 11-398), *and* 132 S. Ct. 604 (Nov. 14, 2011) (No. 11-400); Florida *ex rel.* Bondi v. U.S. Dep't of Health & Human Servs., 780 F. Supp. 2d 1256 (N.D. Fla. 2011), *aff'd in part*, *rev'd in part sub nom.* Florida *ex rel.* Attorney Gen. v. U.S. Dep't of Health & Human Servs., 648 F.3d 1235 (11th Cir. 2011); Virginia *ex rel.* Cuccinelli v. Sebelius, 728 F. Supp. 2d 768 (E.D. Va. 2010), *vacated,* 656 F.3d 253 (4th Cir. 2011), *petition for cert. filed*, 80 U.S.L.W 3221 (U.S. Sept. 30, 2011) (No. 11-420).

Although the Fourth Circuit declined to consider a pair of challenges to the ACA,[52] the split between the Sixth Circuit and Eleventh Circuit, coupled with the Justice Department's decision not to seek en banc review of the Eleventh Circuit's decision,[53] likely encouraged the Court's decision to grant certiorari for challenges in the three ACA cases.[54]

At the crux of these cases is a sharp disagreement about whether the individual mandate regulates economic activity, as formulated by the Court in *United States v. Lopez*.[55] The federal courts that have deemed the individual mandate unconstitutional contend that Congress is permitted to regulate "economic activity" but that failing to purchase health insurance is regulation of "inactivity" and thus beyond Congress's reach.[56] Judges upholding the individual mandate have instead reasoned that because all individuals need health coverage at some point, declining to obtain coverage, "[f]ar from 'inactivity,'" constitutes an economic decision to self-insure.[57]

Academic commentators have similarly focused on the activity–inactivity

52. Liberty Univ., Inc. v. Geithner, No. 10-2347, 2011 WL 3962915, at *1 (4th Cir. Sept. 8, 2011) (ruling that the Anti-Injunction Act bars lawsuits seeking to nullify a tax measure before it becomes effective), *petition for cert. filed*, 80 U.S.L.W. 3240 (U.S. Oct. 7, 2011) (No. 11-438); Virginia *ex rel.* Cuccinelli v. Sebelius, 656 F.3d 253, 266–67 (4th Cir. 2011) (ruling that the state of Virginia, as opposed to residents of Virginia, is not injured by the ACA's individual mandate provision and therefore lacks standing to challenge the Act), *petition for cert. filed*, 80 U.S.L.W 3221, (U.S. Sept. 30, 2011) (No. 11-420).

53. *See* Press Release, U.S. Dep't of Justice, Justice Department Asks the Supreme Court To Review the Affordable Care Act (Sept. 28, 2011), *available at* http://blogs.usdoj.gov/blog/archives/1606 (announcing the Justice Department's decision to petition the Court for certiorari); *see also* David G. Savage, *Supreme Court Could Rule on Healthcare Law Early Next Year*, L.A. TIMES, Sept. 26, 2011, http://www.latimes.com/news/politics/la-pn-healthcare-scotus-20110926,0,675007.story ("The Justice Department announced it will forgo an appeal to the full U.S. 11th Circuit Court of Appeals in Atlanta. Such an appeal to the 11-member court could have taken months and delayed a final decision from the high court until at least 2013.").

54. *Florida*, 648 F.3d 1235, *cert. granted sub nom.* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 603 (Nov. 14, 2011) (No. 11-393), *and* 132 S. Ct. 604 (Nov. 14, 2011) (No. 11-398), *and* 132 S. Ct. 604 (Nov. 14, 2011) (No. 11-400).

55. 514 U.S. 549, 559–61 (1995).

56. *See* Florida *ex rel.* Bondi v. U.S. Dep't of Health & Human Servs., 780 F. Supp. 2d 1256, 1286 (N.D. Fla. 2011) ("It would be a radical departure from existing case law to hold that Congress can regulate inactivity under the Commerce Clause."), *aff'd in part, rev'd in part sub nom.* Florida *ex rel.* Attorney Gen. v. U.S. Dep't of Health & Human Servs., 648 F.3d 1235 (11th Cir. 2011); Virginia *ex rel.* Cuccinelli v. Sebelius, 728 F. Supp. 2d 768, 788 (E.D. Va. 2010) (questioning Congress's power under the Commerce Clause to "regulat[e] . . . a person's decision not to purchase a product"), *vacated*, 656 F.3d 253 (4th Cir. 2011), *petition for cert. filed*, 80 U.S.L.W 3221, (U.S. Sept. 30, 2011) (No. 11-420).

57. *See* Liberty Univ., Inc. v. Geithner, 753 F. Supp. 2d 611, 633 (W.D. Va. 2010) (stating that "by choosing to forgo insurance, Plaintiffs are making an economic decision to try to pay for health care services later"), *vacated*, No. 10-2347, 2011 WL 3962915 (4th Cir. Sept. 8, 2011), *petition for cert. filed*, 80 U.S.L.W. 3240 (U.S. Oct. 7, 2011) (No. 11-438); *see also* Thomas More Law Ctr. v. Obama, 651 F.3d 529, 543 (6th Cir. 2011) (describing the individual mandate "as a regulation on the activity of participating in the national market for health care delivery, and specifically the activity of self-insuring for the cost of these services"), *petition for cert. filed*, 70 U.S.L.W. 3065 (U.S. July 26, 2011) (No. 11-117); Mead v. Holder, 766 F. Supp. 2d 16, 33 (D.D.C. 2011) (explaining that "[b]oth the decision to purchase health insurance and its flip side—the decision not to purchase health insurance—therefore relate to the consumption of a commodity: a health insurance policy"), *aff'd sub nom.* Susan Seven-Sky

distinction, which they too trace to *Lopez*.[58] As a doctrinal matter, however, *Lopez* had nothing to do with whether Congress can regulate inactivity. In his well-known, and often-criticized, majority opinion in *Wickard v. Filburn*, Justice Robert Jackson permitted congressional regulation of activity, "whatever its nature, . . . if it exerts a substantial economic effect on interstate commerce."[59] Chief Justice Rehnquist, in *Lopez*, instead limited congressional Commerce Clause regulations as follows: "Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained."[60]

Rehnquist's doctrinal maneuver involves a seemingly minor, but potentially significant, word-order change. The *Lopez* Court shifted "economic" from an adjective modifying a regulated activity's effect on commerce (the *Wickard* formulation) to an adjective modifying the regulated activity itself. This maneuver, which was almost certainly deliberate,[61] limited the scope of Congress's commerce power.[62] Writing for the Court in *Lopez*, and again in *United States v. Morrison*,[63] Rehnquist relied upon the newly minted economic-activity test to determine that the activity in question—carrying guns near schools and engaging in gender-motivated violent crime—was not economic and was thus outside congressional Commerce Clause powers.[64] The doctrinal maneuver involved relocating the adjective "economic" to qualify whatever subject matter Congress chose to regulate, with the passive reliance on the noun "activity" as no more than an historically informed place holder; nothing in the facts or analyses of *Lopez* or *Morrison* suggests that the phrase "economic activity" involved an advertent decision to prospectively limit the scope of congressional powers based upon whether the regulatory subject matter took active or passive form.

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v. Holder, 661 F.3d 1 (D.C. Cir. 2011), *petition for cert. filed*, 80 U.S.L.W. 3359 (U.S. Nov. 30, 2011) (No. 11-679).

58. Randy Barnett has voiced the strongest opposition to congressional commerce power to regulate inactivity. *See* Barnett, *supra* note 2, at 618–19. Several notable commentators have expressed agreement. *See* Jonathan Adler, *What Does the Mandate Regulate?*, SCOTUSBLOG (Aug. 10, 2011, 10:52 AM), http://www.scotusblog.com/2011/08/what-does-the-mandate-regulate/; Robert A. Levy, *PPACA's Mandate: Not Commerce, Not Interstate, Not Necessary, Not Proper*, SCOTUSBLOG (Aug. 2, 2011, 11:48 AM), http://www.scotusblog.com/2011/08/ppaca%e2%80%99s-mandate-not-commerce-not-interstate-not-necessary-not-proper/; Ilya Somin, *Will the Supreme Court Give Congress an Unlimited Mandate for Mandates?*, SCOTUSBLOG (Aug. 10, 2011, 2:44 PM), http://www.scotusblog.com/2011/08/will-the-supreme-court-give-congress-an-unlimited-mandate-for-mandates/. Other scholars reject the premise that the individual mandate regulates inactivity. *See* Hall, *supra* note 2, at 1829–38; Koppelman, *supra* note 2; Abbe R. Gluck & Gillian Metzger, *Just the Facts: Health Economics and Constitutional Doctrine*, SCOTUSBLOG (Aug. 4, 2011, 9:37 AM), http://www.scotusblog.com/2011/08/just-the-facts-health-economics-and-constitutional-doctrine/.

59. 317 U.S. 111, 125 (1942).

60. United States v. Lopez, 514 U.S. 549, 560 (1995).

61. *See id.* at 628 (Breyer, J., dissenting) (critiquing the reformulation of the substantial activities test).

62. *See id.* at 560 (majority opinion) ("Even *Wickard*, which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that the possession of a gun in a school zone does not.").

63. 529 U.S. 598 (2000).

64. *See Morrison*, 529 U.S. at 617; *Lopez*, 514 U.S. at 561.

The problem with relying on the activity–inactivity distinction to evaluate the individual mandate's permissibility under the Commerce Clause is not merely that the dichotomy places controlling weight on dictum but rather that the dictum itself was entirely incidental; it was not offered in anticipation of a future case of this kind. Invoking "economic activity" demonstrates no more than passive reliance on sixty-year-old language that, when formulated, and up to and including *Lopez*, *Morrison*, and even *Gonzales v. Raich*,[65] never implicated an action–inaction distinction.

The stakes are too high to give controlling significance to dictum that was not even designed to address the central question. The real question is which outcome—finding Congress does or does not have the power to enact the individual mandate—rests more comfortably within the overall framework and normative goals of existing Commerce Clause doctrine. While some commentators claim that sustaining the individual mandate is tantamount to removing any limits on congressional Commerce Clause powers,[66] as the next Part demonstrates, that concern is almost certainly overblown. Even if Congress has the power to compel private commercial transactions under the Commerce Clause, it still requires an independent normative justification arising from political externalities that would prevent states from implementing the selected policy on their own.[67]

II. THE COMMERCE CLAUSE DOCTRINE IN GAME-THEORETICAL PERSPECTIVE

In *New York v. United States*, Justice O'Connor described inquiries into the scope of congressional Commerce Clause powers and reserved state powers under the Tenth Amendment as "mirror images of each other."[68] Her intuition was straightforward: Because the Commerce Clause has proved to be the most expansive provision for stripping powers from states and conferring them upon Congress, the powers that clause (or any other Article I, Section 8 clause) delegates to Congress are not reserved to the states under the Tenth Amendment. Conversely, those powers not delegated to Congress are reserved to the states.[69]

One difficulty is that this formulation affords the Tenth Amendment no independent, or at least no judicially enforceable, content separate from determinations on the scope of commerce or other delegated powers. Justice O'Connor

65. 545 U.S. 1 (2005) (allowing Congress to ban medical marijuana because growing marijuana is an economic activity). For further discussion, see *infra* section II.C.4.

66. *See* Barnett, *supra* note 2; Shapiro, *supra* note 2.

67. *See* Koppelman, *supra* note 2.

68. 505 U.S. 144, 156 (1992).

69. *See id.* This division excludes the narrow category of aboriginal powers, which states could not retain because they came into being only with the creation of the federal government. *See* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 802 (1995) ("As Chief Justice Marshall pointed out, an 'original right to tax' such federal entities 'never existed, and the question whether it has been surrendered, cannot arise.'" (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 430 (1819))).

recognized this, adding: "The Tenth Amendment likewise restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which . . . is essentially a tautology."[70]

After a brief discussion of the relationship between the two sides of the Supreme Court's Commerce Clause jurisprudence in section A, this Part proceeds as follows: Section B relies on the prisoners' dilemma to evaluate successful and unsuccessful challenges under the dormant Commerce Clause doctrine. Section C extends the game-theoretical analysis to evaluate cases on the affirmative side of the Supreme Court's Commerce Clause jurisprudence. First we consider the relationships between the driving game and the battle of the sexes in evaluating cases arising on both the dormant and affirmative sides of the Commerce Clause doctrine. Then we evaluate recent doctrinal retrenchments on the scope of Congress's Commerce Clause powers based on these combined games. The analysis reveals the importance of distinguishing between political and economic externalities in defining the limits of state powers based on the Commerce Clause and the permissible scope of congressional powers based on the Commerce Clause. In Part III, we then extend this core insight by applying the separating equilibrium game to evaluate the role of political externalities in justifying congressional reliance on the Commerce Clause to enact the individual mandate and the ACA.

A. CONNECTING THE TWO SIDES OF THE COMMERCE CLAUSE

The relationship between the two sides of the Court's Commerce Clause jurisprudence—the dormant and affirmative doctrines—can likewise be expressed as "mirror images," but doing so goes beyond a tautology. This framing sharpens the focus on the dormant and affirmative Commerce Clause doctrines, grounding both in a theory of political union. On the dormant side, the analysis focuses on how state laws that are successfully challenged adversely affect the relationships between and among states, thus producing what we term "political externalities."[71] By contrast, the Court does not use this clause to police state laws that produce what we term "economic externalities," meaning laws that are inefficient, that confer rents on industry at the expense of out-of-state industry with costs passed on to in-state consumers, or that otherwise redistribute in-state wealth.[72]

Although the dormant Commerce Clause doctrine sometimes appears incoher-

70. *New York*, 505 U.S. at 156–57.

71. For a related distinction between environmental and political externalities, see Todd J. Zywicki, *Environmental Externalities and Political Externalities: The Political Economy of Environmental Regulation and Reform*, 73 TUL. L. REV. 845 (1999). *See also* Saul Levmore, *Interstate Exploitation and Judicial Intervention*, 69 VA. L. REV. 563, 570–75 (1983) (distinguishing policies through which states impermissibly exploit other states in commerce from regulatory regimes through which states permissibly interfere with commerce).

72. *See* Maxwell L. Stearns, *A Beautiful Mend: A Game Theoretical Analysis of the Dormant Commerce Clause Doctrine*, 45 WM. & MARY L. REV. 1, 11–15 (2003) (distinguishing rent-seeking laws from those affecting laws in other states).

ent,[73] simple game-theoretical tools prove robust in sorting those laws likely either to buckle under or withstand a dormant Commerce Clause challenge. In general, the Court has carved out two relatively narrow categories of challenged state laws as presumptively problematic under the Commerce Clause. First, the Court generally strikes down challenged state laws adversely affecting commerce that, if sustained, would encourage similar laws in other states.[74] Such laws place states within a prisoners' dilemma and risk mutual defection as the dominant strategy, thus producing balkanized markets.[75] Second, the Court generally strikes down challenged state laws that obstruct benign coordinated regulatory regimes among states that facilitate the flow of commerce.[76] These laws place states in a driving game, with the corresponding risk that a nonconforming state law will displace a benign coordinated regime with a discordant regime.[77] Some driving games become transformed into a battle of the sexes game, which combines elements of pure coordination with competing preferences on substantive policy.[78] In contrast with cases in these categories, the Court generally does not rely on the Commerce Clause to strike down challenged state laws that merely confer rents on in-state industry, with costs passed on to in-state consumers, or that otherwise transfer wealth from diffuse to concentrated in-state beneficiaries.[79]

While this simple three-category scheme cannot capture all complexities of the rich canon of dormant Commerce Clause case law,[80] it lays the foundation

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73. *See, e.g.*, Tyler Pipe Indus., Inc. v. Wash. State Dep't of Revenue, 483 U.S. 232, 260 (1987) (Scalia, J., concurring in part and dissenting in part) (lamenting that applications of the dormant Commerce Clause doctrine, "not to put too fine a point on the matter, made no sense").

74. *See infra* section II.B.2 (describing examples).

75. *See infra* section II.B.1 (presenting prisoners' dilemma and defining terms). The prisoners' dilemma is a coordination game in which the dominant strategy, or pure Nash equilibrium, results in both players defecting from a cooperative strategy despite the fact that had they cooperated, each would have obtained a higher payoff. For a discussion of Nash equilibrium, see *infra* note 101 and accompanying text.

76. *See infra* section II.C.2 (describing cases).

77. *See infra* section II.C.2 (presenting the driving game and defining terms). The driving game is a simple coordination game with two pure Nash-equilibrium strategies, which in contrast with the two mixed Nash-equilibrium strategies, correspond to the players adopting a common driving regime, thus reducing vehicular risks and raising player payoffs.

78. *See infra* section II.C.3 (presenting the battle of the sexes). The battle of the sexes is a more complex coordination game in which each side holds a substantive preference for a particular policy that differs from that preferred by the other player, but where each player values coordination with the other player more highly than separately pursuing even his or her preferred policy. In the battle of the sexes, pure Nash outcomes correspond to both players adopting a common strategy and mixed Nash strategies correspond to each player pursuing a different strategy.

79. Stated differently, the dormant Commerce Clause doctrine does not serve the purpose of the now-discredited doctrine of economic substantive due process. *See, e.g.*, Lochner v. New York, 198 U.S. 45 (1905).

80. As shown in section III.B, the listed games are not exhaustive. Rather, they illustrate the conditions justifying judicially imposed limits on state regulatory powers affecting commerce and the conditions justifying expansive historical congressional commerce powers. For a more detailed review, see Stearns, *supra* note 72 (applying game theory to explain the dormant Commerce Clause doctrine cases and related doctrines).

for synthesizing the two sides of the Commerce Clause doctrine and then applying the game-theoretical framework to the individual mandate. On the affirmative side, inquiries into the Commerce Clause are generally framed in terms of the scope of congressional powers: Does the Commerce Clause provide Congress the power to regulate x, y, or z? Since the New Deal, the Court has rarely imposed limits on such powers.[81] Because the limiting cases are fairly recent, those challenging the individual mandate emphasize them.[82] And yet, *United States v. Lopez*,[83] the landmark case retrenching on the substantive scope of congressional Commerce Clause powers, did not go very far. While characterizing *Wickard v. Filburn*[84] as "perhaps the most far reaching example of Commerce Clause authority over intrastate activity,"[85] the *Lopez* Court declined to overturn even that case.[86]

The *Lopez* Court, while acknowledging the expanded breadth of Congress's post-New Deal Commerce Clause powers, claimed to cabin those powers as follows:

> 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, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce.[87]

Chief Justice Rehnquist went on to hold that "[w]here economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained."[88] The substantial effects category has proven the most expansive, and thus controversial, category. And yet, as shown below, this Article's game-theoretical analysis reconciles that expansion with a compelling account of congressional commerce powers.

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81. *See infra* section II.C.4 (discussing *New York v. United States*, *United States v. Lopez*, and *United States v. Morrison*).

82. *See* sources cited *supra* note 2 (listing articles assessing the constitutionality of the individual mandate based on recent doctrinal retrenchments on congressional commerce power); *see also infra* Part III (presenting a game-theoretical analysis that justifies reliance on Commerce Clause to enact the individual mandate).

83. 514 U.S. 549 (1995).

84. 317 U.S. 111 (1942).

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

86. *See id.* at 559–62. Thus, the Court rejected Justice Thomas's call for a wholesale retreat in the substantial effects category, based on *Wickard*'s "aggregation principle," which he described as "clever," but without a "stopping point." *Id.* at 600 (Thomas, J., concurring).

87. *Id.* at 558–59 (majority opinion) (citations omitted).

88. *Id.* at 560. This statement is the holding because the wording change, inserting "economic" before "activity," was necessary to classify regulating guns near schools as noneconomic activity that was thus beyond Congress's Commerce Clause powers. For a discussion of the activity–inactivity distinction, see *supra* section I.C.

B. PRISONERS' DILEMMAS ON THE DORMANT SIDE OF THE COMMERCE CLAUSE

Because the prisoners' dilemma is well-known, there is a risk of wrongly seeing it everywhere.[89] In the Commerce Clause context, especially on the dormant side, the risk is reversed: Because interstate prisoners' dilemma games are so intuitive, we might assume that the problem is more easily solved than is actually the case. The prisoners' dilemma helps frame the basic doctrine, but a more nuanced analysis is required to appreciate various doctrinal exceptions and seemingly conflicting case results.

As Justice Stevens recognized, the problem of patently discriminatory laws in commerce, most notably tariffs against out-of-state goods, is so well-known that the Court virtually never sees a case challenging one.[90] Rather than demonstrating no prisoners' dilemma, however, this ultimately reveals that states are clever in masking defection.

1. The Special Problem of Waste in Commerce

One notable exception in which patently discriminatory laws arise in commerce involves the peculiar context of waste disposal, specifically discrimination against out-of-state waste. An important doctrinal question is whether waste is an article in commerce given that the goal of waste trafficking is disposal, not acquisition. Although Justice Stewart, writing for the majority in *City of Philadelphia v. New Jersey*, posited that waste's negative value does not preclude its status as an article in commerce,[91] Justice Kennedy, writing for the majority in *C & A Carbone, Inc. v. Town of Clarkstown, New York*, recognized more intuitively that the real objects of commerce in the interstate waste market are the processing and disposal services, notwithstanding that waste travels to the relevant facilities at which those services are provided.[92]

The waste cases help frame the Commerce Clause prisoners' dilemma because they reveal that not all balkanization is created equal. Consider the following: On both sides of the Commerce Clause, the Court has prevented regulatory schemes allowing states to capture the benefit of rents resulting from

89. *See* STEARNS & ZYWICKI, *supra* note 11, at 170–71 (explaining overreliance on the prisoners' dilemma game and introducing additional games important to the study of law and public policy); Richard H. McAdams, *Beyond the Prisoners' Dilemma: Coordination, Game Theory, and Law*, 82 S. CAL. L. REV. 209, 216 (2009) (noting "how scholars misdescribe and misapply the game," thereby indicating "excessive attention" to the prisoners' dilemma); *see also* D. Daniel Sokol, *Explaining the Importance of Public Choice for Law*, 109 MICH. L. REV. 1029, 1037 (2011) (reviewing STEARNS & ZYWICKI, *supra* note 11) (explaining the importance of employing various games in analyzing law and public policy).

90. *See* W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 193 (1994) ("In fact, tariffs against the products of other States are so patently unconstitutional that our cases reveal not a single attempt by any State to enact one.").

91. 437 U.S. 617, 622 (1978) ("[W]e reject the state court's suggestion that the banning of 'valueless' out-of-state wastes . . . implicates no constitutional protection [under the Commerce Clause].").

92. 511 U.S. 383, 391 (1994) ("[T]he article of commerce is not so much the solid waste itself, but rather the service of processing and disposing of it.").

self-sufficiency in waste processing and disposal.[93] This includes solid and liquid waste and also low-level radioactive waste.[94] These rulings have not led to an increase in waste-disposal facilities; nor have they promoted specialization and exchange, the primary justification for expansive markets.[95] The Court's complex waste doctrines have instead created a theoretical free market in waste disposal coupled with a disincentive on the part of states to expand approved waste facilities.[96]

Allowing states to close their borders to out-of-state waste risks mutual defection among states, although it might increase available waste facilities. Any given state is less likely to avail itself to out-of-state waste if other states limit their disposal facilities to in-state waste.[97] This is evident from cases on both sides of the Commerce Clause doctrine. Although *City of Philadelphia* prevented New Jersey from closing its market to out-of-state liquid and solid waste,[98] *New York* prevented Congress from penalizing states whose legislatures had not taken specified affirmative steps to ensure self-sufficiency respecting low-level radioactive waste.[99] These cases reveal an underlying prisoners' dilemma respecting waste in commerce.

The following matrix depicts the prisoners' dilemma game:

Table 1. Prisoners' Dilemma in Waste Disposal

Payoffs for (A,B)	B cooperates	B defects
A cooperates	20,20	5,30
A defects	30,5	**8,8**

93. Rent refers to a return on land or other productive assets above opportunity cost. *See* Armen A. Alchian, *Rent*, *in* 4 THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS 141, 141–42 (John Eatwell et al. eds., 1987). Approved waste-storage facilities confer rents as compared with other potential uses of allocated lands.

94. *See* New York v. United States, 505 U.S. 144, 188 (1992) (striking down a federal statute designed to encourage state self-sufficiency in low-level radioactive waste disposal); *City of Phila.*, 437 U.S. at 628–29 (rejecting state ban on out-of-state solid- and liquid-waste disposal).

95. For a classic economics text structured around this theme, see ARMEN ALCHIAN & WILLIAM R. ALLEN, EXCHANGE & PRODUCTION: COMPETITION, COORDINATION, & CONTROL (3d. ed. 1983).

96. For related arguments, see Paul E. McGreal, *The Flawed Economics of the Dormant Commerce Clause*, 39 WM. & MARY L. REV. 1191, 1195–202 (1998) (arguing that game theory, rather than neoclassical economics, provides better tools for analyzing the regulation of waste in commerce because game theory avoids the premise that open borders optimize resource allocation), and Stearns, *supra* note 72, at 31–38 (providing a game-theoretical critique of waste disposal in commerce doctrine).

97. Indeed, in 1979, the Governor of South Carolina threatened a fifty percent intake reduction, anticipating that his state would remain the only state with a disposal facility for low-level radioactive waste. *See New York*, 505 U.S. at 150.

98. 437 U.S. at 628–29.

99. 505 U.S. at 174–77. Specifically, the case struck down a provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985, Pub. L. No. 99-240, 99 Stat. 1842 (1986), which required states to take title to waste or compensate producers for resulting losses when those states had failed to either create an in-state waste outlet or to join a regional pact. *New York*, 505 U.S. at 153 (quoting provision).

In this game, cooperation means opening borders to neighboring-state waste, and defection means closing borders and thus permitting only in-state waste disposal. In an ideal world, open waste-disposal markets would encourage specialization and exchange, allowing states with better lands for waste disposal to charge an appropriate premium, which those states with lands more highly valued for other uses would willingly pay. This insight applies generally across markets and can be extended from two states, as shown in Table 1, to multiple states. In the waste context, open markets would, in theory, promote efficient waste transportation and disposal without regard to arbitrary state borders.

By cooperating, and thus opening borders to trade, each state receives a higher payoff, 20, whereas by defecting, and thus closing borders to trade, each receives the lower payoff of 8. And yet, absent an ability to coordinate and enforce agreements,[100] regardless of what the other state does, it is rational for each state to defect. If state *A* opens its borders to trade, state *B* can improve its payoff from 20 to 30 by defecting. And if state *A* defects, state *B* can improve its payoff from 5 to 8 by defecting. Because these payoffs are reciprocal, each state rationally defects regardless of what the other state does. Mutual defection, captured in bold in the lower right box, is thus the dominant or pure Nash-equilibrium strategy,[101] even though mutual cooperation would provide each state with higher payoffs, shown in the upper left box.

The Commerce Clause reflects the intuition that, holding all else constant, open markets are superior to closed markets. Perhaps for that reason, the most obvious forms of protectionism are rarely observed.[102] The waste cases show that all else is not always equal. Because waste is a negative-value good and because states tend to justify waste-based protectionism based on environmental, rather than financial, concerns, this is a rare area in which states have attempted rank discrimination.

Writing for the *City of Philadelphia* majority, Justice Stewart identified two conditions that subject state laws to a "virtually *per se* rule of invalidity": overt protectionism coupled with a financial motivation.[103] Although the Court struck down the New Jersey waste restriction, it is less clear that it applied that test. Because the Court acknowledged at least one legitimate interest, protecting the

100. Standard presentations include the inability to communicate and to enforce agreements. STEARNS & ZYWICKI, *supra* note 11, at 171–72. The decisive criterion, however, is an inability to coordinate, which explains why competitive markets place buyers, on one side, and sellers, on the other, within benign prisoners' dilemmas. *See id.* at 193.

101. *See id.* at 170–71 (defining Nash equilibrium as "the outcome or set of outcomes that follow from each player's rational strategy in the absence of coordination with the other player or specific information concerning the other player's strategy, and in which no player has an incentive to deviate given the other player's strategy"); *see also* KEN BINMORE, FUN AND GAMES: A TEXT ON GAME THEORY 12 n.8 (1992) (defining Nash equilibrium as the outcome that "arises when each player's strategy choice is a best reply to the strategy choices of the other players").

102. *See supra* note 90 and accompanying text.

103. *See* 437 U.S. at 624.

environment,[104] the Court instead might have applied strict scrutiny in striking the law down. Certainly, there were nondiscriminatory alternatives. For example, the state could have prolonged the life of the disposal sites by limiting waste intake without regard to point of origin.

2. The Essential Structure of the Dormant Commerce Clause Doctrine

In general, the Supreme Court applies strict scrutiny when presented with a challenged state law that exhibits a discriminatory intent or effect but lacks one of the two triggers for the per se rule of invalidity—overt discrimination or a financial motivation. Thus, the Court applies strict scrutiny when an overtly discriminatory statute is coupled with a legitimate governmental interest[105] or when a facially neutral law appears to further protectionist goals.[106] Finally, absent either an illicit motive or facial discrimination, the Court applies a lower level of scrutiny, either a balancing or rational-basis test.[107] While this basic doctrinal structure is subject to important exceptions, these can generally be reconciled by applying the prisoners' dilemma or by introducing another game, most notably the driving game.[108]

To prevent balkanized state markets it is important to send clear signals against discriminatory state laws that, if permitted to stand, would encourage reciprocal defection among states. For that reason, state laws that carry the two problematic features—overt discrimination and a protectionist motive—are subject to the per se rule. Because this rule is so clear, there are very few observed violations. Instead, states accomplish their objectives in more nuanced ways—for example, by claiming a legitimate motivation for the challenged law, such as environmental protection, or by articulating the law in a neutral, nondiscriminatory manner, even though the effects fall disproportionately on out-of-state businesses, with costs passed on to diffuse in-state consumers.[109] The Court recognizes these efforts and thus subjects the resulting statutes to a strong presumption of invalidity, albeit one that the states can overcome if they satisfy the stringent requirements of strict scrutiny.[110] Finally, absent either criterion

104. *Id.* at 626 ("[W]e assume New Jersey has every right to protect its residents' pocketbooks as well as their environment.").

105. *See* Maine v. Taylor, 477 U.S. 131, 138 (1986). Under this test, the Court inquires whether the state has a legitimate interest and confirms the absence of a nondiscriminatory alternative. *Id.*

106. For illustrations, see *infra* section II.B.4 (discussing Exxon Corp. v. Governor of Md., 437 U.S. 117 (1978), and Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333 (1977)).

107. *See* Kassel v. Consol. Freightways Corp., 450 U.S. 662, 670–71 (1981) (plurality opinion) (applying a balancing test, which weighs alleged safety benefits against burdens on commerce); *id.* at 685–87 (Brennan, J., concurring in the judgment) (applying a rational-basis test but concluding that the actual justification was protectionism, which is per se invalid).

108. *See infra* section II.D (introducing the driving game to resolve the doctrinal anomaly of striking the trucking restriction in *Kassel* and similar cases under various formulations of nominally low-level scrutiny).

109. *See infra* section II.B.4 (providing illustrative cases).

110. *See, e.g.*, *Taylor*, 477 U.S. at 151–52 (sustaining facially discriminatory ban on imported live baitfish, which potentially introduced non-native parasites into the state's fragile ecosystem.).

signaling a risk that the law, if sustained, would encourage reciprocal defection among states, the Court shifts the presumption in favor of the law, thus applying lax scrutiny.[111]

3. The Market Participant Exception to the Per Se Rule of Invalidity

Although the preceding basic framework is laden with exceptions, the purpose here is not a comprehensive review. Instead, we offer a few prominent illustrations that explain how the combined doctrines further political union. The cases that follow illustrate the presumption against laws that produce political externalities, meaning burdens on procommerce lawmaking processes in other states, and the contrary presumption permitting laws that produce only economic externalities, meaning burdens on firms or individuals as a consequence of reduced competition or rent seeking.

Contrary to the per se rule of invalidity, the market-participant doctrine allows states to engage in financially motivated facial discrimination. Under this doctrine, when a state or municipality favors local workers,[112] in-state commodities,[113] or in-state services,[114] burdened out-of-staters have generally not been successful in seeking relief under the dormant Commerce Clause doctrine. Despite the two factors triggering the per se rule—overt discrimination and a protectionist motive—the Court permits states operating in an entrepreneurial capacity to choose with whom to deal, just like their private-market counterparts.

At once, this doctrine is intuitive and disturbing. Entrepreneurs are generally free to choose with whom to transact but are disciplined by competitive market pressures should they make entirely arbitrary choices. By contrast, states and municipalities often hold market power over their goods and services and thus are substantially insulated from market pressures.[115]

Despite the different pressures on entrepreneurs and states, the market-participant exception operates consistently with the basic game-theoretical struc-

111. For a discussion of cases in which the challengers overcome the burden of deferential scrutiny, see *infra* section II.C.2 (discussing Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959), and *Kassel*, 450 U.S. 662).

112. *See, e.g.*, White v. Mass. Council of Constr. Emp'rs, Inc., 460 U.S. 204, 214–15 (1983) (sustaining Boston worker-preference program based on market-participant doctrine). For a contrary result based on Article IV's Privileges and Immunities Clause, see United Bldg. & Constr. Trades Council v. Mayor of Camden, 465 U.S. 208, 221–22 (1984) (striking down Camden's residential worker-preference program).

113. *See* Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 813–14 (1976) (sustaining Maryland's purchasing program for junked cars that paid a premium for those with in-state plates).

114. *See* S.-Cent. Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 98–99 (1984) (rejecting the application of the market-participant doctrine to Alaska's in-state timber-processing requirement for purchased Alaska timber on the ground that sales and processing fell within separate markets).

115. *See* Maxwell L. Stearns, *A Private-Rights Standing Model To Promote Public-Regarding Behaviour by Government Owned Corporations*, *in* FROM BUREAUCRACY TO BUSINESS ENTERPRISE: LEGAL AND POLICY ISSUES IN THE TRANSFORMATION OF GOVERNMENT SERVICES 121 (Michael J. Whincop ed., 2003) (exploring the limits of the entrepreneurial analogy to states as market actors).

ture. Whereas some outright barriers to competition, for example in-state tax breaks, remain on the books unless repealed, other barriers, including subsidies and local-worker hiring preferences, involve annual budgetary appropriations.[116] Because appropriations are more costly politically to obtain—not only because they involve actual expenditures but also because they must be procured annually—there is less chance that sustaining them will incite mutual defection among states as compared with other instances of overt discrimination.

For example, within Table 1, it is less likely that state *A*, observing state *B*'s municipal employment program, will mimic what appears to be a costly subsidy than it is that state *A*, observing state *B*'s conferral of a tax break for local industry that remains embedded in the code, will buckle to political pressures to respond in kind. The market-participant doctrine implicitly recognizes that employee-preference programs distribute resources from diffuse in-state taxpayers to concentrated local employees in the form of reduced competition from out-of-state workers, and thus, higher wages. Restricting competitive job markets is undoubtedly inefficient, and private firms would likely suffer in the marketplace were they to follow suit. Despite this, the Court rejects such challenges under the Commerce Clause[117] because, even if sustained, the challenged laws produce economic, not political, externalities and are thus unlikely to affect the legal policies in other states.

4. Distinguishing Political and Economic Externalities in Strict Scrutiny Cases

Comparing two cases that fall within the strict scrutiny category further demonstrates the important distinction between these two forms of externalities. In *Exxon Corp. v. Governor of Maryland*, Maryland law prohibited oil-refining companies from owning and operating Maryland retail service stations.[118] Although the law was facially neutral, and thus applied to all oil-refining companies regardless of location, the business effects were borne entirely out-of-state because there were no oil refineries in Maryland.[119] In *Hunt v. Washington State Apple Advertising Commission*, the state of North Carolina enacted a statute that banned any shipped containers of apples from bearing grading labels other than USDA standards.[120] Washington's alternative grading system allowed its producers to signal superior gradations within the top scale.[121] The challenged North Carolina law was also facially neutral, applying to both in- and out-of-state apple producers, but clearly operated to the

116. *See* Dan T. Coenen, *Business Subsidies and the Dormant Commerce Clause*, 107 YALE L.J. 965, 984–96 (1998) (exploring the implications of differences in obtaining tax breaks versus subsidies).

117. *See supra* note 112 (introducing Article IV's privileges and immunities exception, which, in effect, restores the scrutiny removed by the market-participant exception for near-border cities).

118. 437 U.S. 117, 119–20 (1978).

119. *Id.* at 125.

120. 432 U.S. 333, 335 (1977).

121. *Id.* at 336.

detriment of Washington producers.[122] Justice Stevens, writing for the *Exxon* majority, sustained the Maryland statute, focusing on its neutrality,[123] and Chief Justice Burger, writing for the *Hunt* majority, struck down the challenged law, concluding that it was motivated by protectionism favoring domestic apple growers.[124]

Although the cases were decided in opposite fashion, both laws were the product of in-state rent-seeking by a concentrated domestic industry with costs borne by out-of-state firms and passed on to the diffuse consuming public. In *Exxon*, independent service stations sought to eliminate vertically owned service stations, which could better absorb price shocks in a period of sharp gas-price increases and thus offer more predictable gas supplies at lower prices. In *Hunt*, North Carolina apple producers sought to prevent Washington competitors from signaling superior-grade apples to in-state purchasers.

The differential outcomes reflect the insight that the dormant Commerce Clause doctrine protects against political, rather than economic, externalities. Unlike *Exxon*, where the challenged law imposed costs on out-of-state refiners and in-state consumers, thus posing a set of economic externalities, in *Hunt*, the challenged law undermined a legal regime in Washington that benefitted consumers in several states and that facilitated a complex grading and marketing scheme for superior-grade apples. Once again, absent political externalities, the Commerce Clause has not been used to police costly or inefficient state policies.

C. GAMES ON THE AFFIRMATIVE SIDE OF THE COMMERCE CLAUSE

1. *Wickard* and the Prisoners' Dilemma Revisited

A helpful starting point in demonstrating the mirror quality of the two sides of the Commerce Clause is the much criticized, yet often misunderstood, case of *Wickard v. Filburn*.[125] Filburn, who owned a small farm, challenged a quota imposed by the Secretary of Agriculture pursuant to the Agriculture Adjustment Act, limiting him to sowing 11.1 acres and a normal yield of 20.1 bushels of wheat during a wheat glut.[126] Filburn exceeded his quota, harvesting 23 acres, and was fined $117.11.[127] He challenged the quota as applied to him, claiming that the small scale of his farm placed it beyond Congress's regulatory power.[128]

Writing for a majority, Justice Jackson rejected the challenge, relying in part on the heavily criticized multiplier analysis. Jackson stated: "That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribu-

122. *See id.* at 337.
123. 437 U.S. at 125–29.
124. 432 U.S. at 350–54.
125. 317 U.S. 111 (1942).
126. *Id.* at 114.
127. *Id.* at 114–15.
128. *Id.* at 119.

tion, taken together with that of many others similarly situated, is far from trivial."[129] After observing that homegrown wheat is the most variable factor competing with wheat in commerce, Jackson explained that even a small farmer could affect commerce if everyone followed suit.[130]

As Justice Thomas observed in his concurring opinion in *United States v. Lopez*, the multiplier analysis, although "clever, . . . has no stopping point."[131] Any small-scale activity can become large if enough people mimic it. And yet, a fair reading of *Wickard* demonstrates more solid footing for rejecting Filburn's claim. Jackson demonstrated the need for federal implementation of the quota scheme and for enforcement against a small, covered violator to avoid having the scheme break down. Although Jackson did not employ game-theoretical terminology, which was only then being formalized,[132] his carefully reasoned opinion explains how the scheme avoided political externalities among states.

Jackson observed that "[i]t is interesting to note that all [wheat net exporter nations] have federated systems of government . . . . In all of them wheat regulation is by the national government."[133] He added that "[i]t is agreed that as a result of the wheat programs [Filburn] is able to market his wheat at a price 'far above any world price based on the natural reaction of supply and demand.'"[134] And finally, Jackson stated: "The effect of consumption of homegrown wheat on interstate commerce . . . constitutes the most variable factor in the disappearance of the wheat crop."[135]

These passages paint a compelling picture supporting both congressional implementation of the scheme and enforcement against a low-level violator. To be clear, the issue is not whether the quota is good or bad policy. After all, Congress is empowered to determine the merits of its selected policy choices. The case against quotas is easy: The scheme benefits farmers, allowing them to reduce outputs and raise prices to monopolistic levels, but it harms consumers. In effect, the scheme implemented a cartel that wheat farmers could not have implemented themselves. Cartels are notoriously unstable because members have a strong incentive to cheat. But if everyone cheats, prices return to competitive levels.

Thus, cartel members are in a prisoners' dilemma. In this game, cooperation means adhering to the quota (selling less at the higher price) and defection means cheating (selling above allotment while the price remains high). The ideal solution for each farmer is unilateral defection—sell just a bit more than

129. *Id.* at 127–28. For an earlier case rejecting a similar multiplier analysis, see Carter v. Carter Coal Co., 298 U.S. 238, 308 (1936).

130. *See Wickard*, 317 U.S. at 127–29.

131. 514 U.S. 549, 600 (1995) (Thomas, J., concurring).

132. In fact, the first major book treatment of game theory was published two years later. *See* JOHN VON NEUMANN & OSKAR MORGENSTERN, THEORY OF GAMES AND ECONOMIC BEHAVIOR (1944).

133. *Wickard*, 317 U.S. at 126 n.27.

134. *Id.* at 130–31.

135. *Id.* at 127.

permitted, hoping that others restrict output, keeping prices high. This corresponds to the upper-right or lower-left corner in Table 1.[136] Because incentives are reciprocal, the dominant strategy is mutual defection, which restores prices to depressed levels, corresponding to the lower right, bolded corner. This result is the pure Nash equilibrium despite the higher payoffs (depicted in the upper left box) associated with mutual cooperation.

A possible solution is to have states enforce the cartel. After all, state legislators would be happy to reduce domestic farmers' outputs and confer rents, especially during a wheat glut. Jackson's *Wickard* opinion, however, acknowledged that this result is also unstable. He observed that among the four net-wheat-exporter nations, all had federalist systems and each imposed the quota scheme at the national level.[137] The reason is now clear. Like the wheat farmers themselves, the states were in a prisoners' dilemma. Assume that ten wheat-farming states confront a wheat glut with correspondingly depressed prices. Each state agrees to implement quotas to benefit its farmers, and those quotas combine to benefit all farmers. After the states agree, each has an incentive to relax enforcement because doing so will benefit in-state farmers, albeit at out-of-state farmers' expense. Once again, each state most prefers unilateral defection so that the other states keep the prices high, while allowing its own farmers to cheat. Because the incentives are reciprocal, this enforcement scheme also falls apart.

Although this justifies congressional implementation, it does not explain enforcement against Filburn. Jackson observed that Filburn, and similarly situated farmers, stood to gain by selling at prices that could not be obtained within competitive markets.[138] The Secretary of Agriculture could enforce against the largest violators and work down, or instead begin with the lowest covered violator. The first strategy, a triage approach, sends an unintended signal: Those below the enforcement radar can get away with cheating. The second strategy, by contrast, signals to all would-be cheaters not to bother trying. If the government will pursue Filburn, it also will pursue you.

Although *Wickard* has long been something of a sport for constitutional law professors, the criticism is not quite fair. The case involved a high-stakes signaling game designed to avoid mutual defection in a prisoners' dilemma. Although the *Lopez* Court sought to impose some limits on the scope of congressional Commerce Clause powers, it also declined to overturn *Wickard*.

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136. *See supra* Table 1. The actual numbers in the table are unimportant; what is important are the relationships among the numbers and that those relationships demonstrate mutual defection as the dominant combined strategy despite the possibility that mutual cooperation would provide each player higher payoffs as compared with mutual defection.

137. *Wickard*, 317 U.S. at 125–26 (listing Argentina, Australia, Canada, and the United States). Of course, that these government systems were federalist was coincidental, but for reasons explained in the opinion, the choice of national implementation of the quota scheme was not. *See id.* at 126–27 & 126 n.27.

138. *Id.* at 130–31.

This analysis explains why. It also demonstrates that rather than resting on the periphery of Commerce Clause doctrine, *Wickard* is at the epicenter.

The same analysis explains two other important bodies of Commerce Clause case law. First, the Court has sustained congressional power to regulate working conditions, including minimum wages, hour restrictions, and health- and safety-regulations.[139] Second, the Court has allowed Congress to regulate environmental protection, including air, water, and the habitats of endangered species.[140] In each instance, the dynamics that give rise to the regulations, and to the presumption in favor of constitutionality, track the preceding analysis.

These laws rest on debatable premises and are not obviously grounded in concerns for efficiency, as opposed to other values.[141] Indeed, these programs impose substantial costs on industry, which are then passed on to consumers, to further competing policy concerns. Because the Commerce Clause rests on a theory of political union, however, the issue is not the efficiency, or even the merits, of the underlying policies; rather, it is whether there are structural reasons favoring federal, rather than state, implementation once the policy is chosen.

Imagine a decision to implement any one of these policies either at the level of the firm or the state. However public-spirited the firms might be, these policies impose costs that other firms would not bear, including higher wages or reduced hours (and thus more employees and shifts); more costly employee safeguards or equipment; and avoiding potentially lucrative projects that threaten endangered species or habitats, air, or water. Among firms, there is a strong incentive to defect without regard to what other firms do. And among states that agreed to implement such policies, given the costs to local industry, there is a corresponding incentive to cheat. Just as the wheat cartel requires top-down enforcement to avoid the problem of mutual defection in a prisoners' dilemma game, as a general matter, so too do laws protecting working conditions and the environment.

2. The Driving Game: Linking the Dormant and Affirmative Commerce Clause Doctrines

The *Lopez* Court recognized Congress's power to regulate channels or instrumentalities of interstate commerce, both of which promote the flow of commerce by avoiding obstructive state tactics that undermine positive network externalities among states.[142] The Court confronted such difficulties as early as

139. *See generally* Maxwell L. Stearns, *The New Commerce Clause Doctrine in Game Theoretical Perspective*, 60 VAND. L. REV. 1, 61–62 (2007) (applying prisoners' dilemma to wage and hour regulations).

140. *Id.* at 63–66 (applying prisoners' dilemma to environmental coordination).

141. For a general discussion of problems of incommensurability in law, see generally Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779 (1994).

142. Positive network externalities arise when later entrants follow an early lead respecting the choice of technology, thus increasing marginal benefits for those who now enjoy the common approach.

Gibbons v. Ogden.[143] In *Gibbons*, Chief Justice Marshall sustained congressional power to license vessels in the coasting trade pursuant to the Commerce Clause.[144] Writing separately, Justice Johnson concluded that, with or without the federal statute, New York's exclusive license obstructed interstate navigable waters and therefore could not stand. Johnson recognized that a single state, through the grant of an "exemption" from a complete ban on interstate traffic, undermined the efforts of other states, or the power of the United States, to ensure a benign, procommerce strategy respecting navigable waters.[145]

Modern cases implicating the problem of state interference with geographic coordination present similar doctrinal challenges. In general, such laws lack either of the features needed to trigger strict dormant Commerce Clause scrutiny, namely overt discrimination or a protectionist motivation, as opposed to a legitimate governmental interest.[146] Consider *Kassel v. Consolidated Freightways Corp.*[147] and *Bibb v. Navajo Freight Lines, Inc.*,[148] both of which prevented a single state from imposing a regulatory standard on trucks out of keeping with that of contiguous states.[149] While nominally applying deferential scrutiny, each case nonetheless struck down the nonconforming law.

These cases appear problematic because there is nothing inherently offensive about the challenged legal policy—for example, the ban on sixty-five-foot twin trailers in *Kassel*,[150] or the requirement of curved mud flaps in *Bibb*[151]—and because state highway safety is a traditional area of state regulatory powers. The difficulty arises because the doctrinal framework is motivated by the dynamics of the prisoners' dilemma, but instead these cases implicate the driving game.

To illustrate, imagine *Bibb* with the facts reversed. Had surrounding states instead embraced the challenged policy, insisting on curved mud flaps, and had Illinois defected by demanding straight mud flaps, the outcome—striking down the challenged law—would almost certainly have been the same. The same applies with respect to Iowa's disruptive ban on sixty-five-foot twin trailers in *Kassel*. The difficulty in each case is not the merit of the challenged legal policy but rather that the policy is nonconforming. The Commerce Clause does not speak to mud flaps or trailer rigs, but it does speak to the problems of disrupting benign interstate coordination affecting commerce. In these cases, the Court has

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See STEARNS & ZYWICKI, *supra* note 11, at 200–02 (providing illustrations and linking the concept to path dependence).

143. 22 U.S. (9 Wheat.) 1 (1824).

144. *Id.* at 1.

145. *See id.* at 231–32 (Johnson, J., concurring) ("One half the doubts in life arise from the defects of language, and if this instrument had been called an *exemption* instead of a license, it would have given a better idea of its character.").

146. *See supra* section II.B.2.

147. 450 U.S. 662 (1981).

148. 359 U.S. 520 (1959).

149. *See Kassel*, 450 U.S. at 678–79; *Bibb*, 359 U.S. at 530.

150. 450 U.S. at 665–66 (describing truck rig ban).

151. 359 U.S. at 522–23 (describing mudguard requirement).

struggled to articulate a governing rationale.[152] That is because the laws did not employ obvious protectionist tactics[153]—for example a trade barrier or subsidy—and because they operated in an area of presumptive state regulatory power.[154]

These cases illustrate the driving game.[155] If we imagine a binary choice—driving on the left (with steering wheels on the right) or driving on the right (with steering wheels on the left)—then we can imagine a total of four combinations for any two drivers or two geographical locations. Table 2 depicts the choices with the pure Nash equilibrium strategies in bold.[156]

Table 2: The Driving Game

Payoffs to (A,B)	B drives right	B drives left
A drives right	**100,100**	0,0
A drives left	0,0	**100,100**

Although the prisoners' dilemma game has a single pure Nash equilibrium—mutual defection—this game has two equilibria, corresponding to both players driving right or driving left. Conversely, if one of the drivers fails to correctly anticipate the other's behavior,[157] such that one drives left while the other drives right, or the reverse, then the result is a mixed-strategy equilibrium with lower payoffs and potentially deadly consequences. As played among states, this game demonstrates why coordinated regulatory structures, corresponding to a pure Nash strategy, provide higher payoffs than different regulatory structures, corresponding to a mixed strategy.

When states coordinate their regulatory regimes that affect commerce, they experience positive network externalities,[158] meaning increased marginal payoffs as others join the common regulatory framework, lowering the cost of

152. For an analysis of the breakdown of the opinions in *Kassel*, see STEARNS & ZYWICKI, *supra* note 11, at 438–42 (demonstrating the *Kassel* cycle), and Maxwell L. Stearns, *The Misguided Renaissance of Social Choice*, 103 YALE L.J. 1219, 1256–57 (1994) (same).

153. The *Kassel* case did involve some specific in-state exemptions, making the case against the rig ban all the more compelling. 450 U.S. at 666 (listing exemptions for border cities, for Iowa truck manufacturers, and for mobile homes moving from point to point in Iowa).

154. *See id.* at 675 ("The Court normally does accord 'special deference' to state highway safety regulations." (quoting Raymond Motor Transp., Inc v. Rice, 434 U.S. 429, 444 n.18 (1978))); *Bibb*, 359 U.S. at 523 ("The power of the State to regulate the use of its highways is broad and pervasive.").

155. The driving game can be presented: with two drivers at an incipient stage of automobiles; with two contiguous jurisdictions, for example, states or municipalities; or with contiguous nations. For a recent illustration involving conforming a right-of-way law to noncontiguous nations to reduce accident risks, see *Give Way Rules to Change*, NAT'L BUS. REV. (Sept. 29, 2010), http://www.nbr.co.nz/article/give-way-rules-change-130699 (discussing New Zealand's reversal of outlier right-of-way law) (last visited Sept. 12, 2011) (New Zealand, sadly, last visited by Max Stearns in October 2010).

156. *See supra* note 101 (defining Nash equilibrium).

157. If they both fail to anticipate the other's behavior then the mistakes cancel out, restoring a pure Nash equilibrium.

158. *See supra* note 142 (defining positive network externalities and providing authorities).

commerce for all members. Coordinated regimes also present opportunities for strategic behavior through which a single state can transform what had been a benign coordination game into a harmful rent-seeking game.[159] Once again, consider *Kassel* and *Bibb*. In each case, the state defended its nonconforming law on alleged safety grounds,[160] but the Court rejected the claims, restoring uniformity among states.

Assume that both Iowa and Illinois each sought to offload certain burdens of commerce, for example by maintaining state highways with taxpayer dollars to promote through traffic, which benefits sellers in one state and purchasers in another. Imagine that the neighboring states enact either of two competing policies (corresponding to right or left driving, with left or right steering wheels). If the neighboring states opt for *B* (right driving, left steering wheels), Iowa or Illinois could succeed in their objective by adopting the contrary policy *A* (left driving, right steering wheels). And if neighboring states had instead opted for *A*, Iowa or Illinois could achieve the same result by opting for *B*.

Despite applying nominally low-level scrutiny in *Bibb* and *Kassel*, the outcomes reflect the intuition that the choice of policy by the nonconforming state was not merit base; instead, it was chosen precisely because it was nonconforming. In effect, the dormant Commerce Clause doctrine disallows a single state to disrupt a benign coordination game among states.[161] Justice Douglas, writing for the *Bibb* majority, nicely captured this intuition, describing *Bibb* as "one of those cases—few in number—where local safety measures that are nondiscriminatory place an unconstitutional burden on interstate commerce."[162]

These cases help to explain the default nature of the dormant Commerce Clause doctrine and thus the relationship between the two sides of the Court's Commerce Clause jurisprudence. While *Bibb* and *Kassel* present doctrinal challenges on the dormant side, *Lopez* makes plain that Congress could regulate the same result—or the opposite result—on the affirmative side. After all, these cases involve the regulation of "instrumentalities of interstate commerce."[163]

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159. Technically, the game allows the defecting state to seek appropriable quasi-rents—here, meaning temporary rents that arise from the unique opportunity for strategic behavior that other states, with the common regulatory structure, would not have agreed to ex ante. *See* Alchian, *supra* note 93 (defining various forms of rent).

160. *See* Kassel v. Consol. Freightways Corp., 450 U.S. 662, 671–72 (1981) (reviewing Iowa's safety defense of its truck-rig ban); Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 525 (1959) (reviewing Illinois's safety defense of its curved mud flap requirement).

161. Another way to view this is by considering the game ex ante as a driving game, and ex post, after the opportunity for the state to exact a form of rent, as an alternative rent-seeking game. No group of states would agree ex ante to allow a single state to disrupt a coordinated regime after the fact. For related analyses describing analogous regulatory challenges as a holdout game in which a single state or group of states declines to contribute its fair share to a common public good among states, see Dan L. Burk, *Federalism in Cyberspace*, 28 CONN. L. REV. 1095, 1123–26 (1996), and Richard A. Epstein, *Exit Rights Under Federalism*, 55 LAW & CONTEMP. PROBS. 147, 159–61 (1992). *See also* Stearns, *supra* note 72, at 130–33 (comparing the holdout game and the driving game in assessing *Kassel* and *Bibb*).

162. 359 U.S. at 529.

163. United States v. Lopez, 514 U.S. 549, 558 (1995).

More significantly, Congress could overturn *Kassel* and *Bibb* through ordinary legislation.[164] Although one scholar has recently criticized this feature of the dormant Commerce Clause doctrine,[165] these cases provide a compelling normative justification for the doctrine's default nature.

Because the driving game presents two pure Nash strategies, the game provides an advantage to early movers. To benefit from coordination, later entrants mimic earlier states' policy choices. Over time, however, what began as a pure coordination game might change if the early regulatory regime proves inferior to a later-rejected nonconforming regime. Even if the later-adopted regime is in some sense superior, however, the benefits of coordination might still outweigh the costs of noncoordination. When this occurs, what started as a driving game becomes instead a battle of the sexes.[166]

3. When the Driving Game Becomes a Battle of the Sexes

In the battle of the sexes game, a husband and wife each prefer different activities. For example, the wife prefers soccer and the husband prefers baseball, but both spouses prefer attending the chosen sport as a couple to attending even their preferred sport alone.

Table 3: The Battle of the Sexes

Payoffs to (H,W)	W attends Baseball	W attends Soccer
H attends baseball	**10,7**	5,5
H attends soccer	3,3	**7,10**

These preferences are reflected in higher payoffs when both the husband and wife attend soccer or baseball together, in correspondingly lower payoffs when each attends a first-choice sport alone, and in even lower payoffs when each attends the other's first-choice sport alone. Unlike the driving game, which involves pure coordination, this game combines coordination with opposing substantive preferences.

In this game, the pure Nash results arise when the two join together for either sport, with the highest payoff of ten for the spouse who prefers that sport and

164. Congress did just this in the Surface Transportation Assistance Act of 1982, which eliminated state restrictions on twin trailers in exchange for other provisions that resulted in tax burdens on truckers. *See* Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, 96 Stat. 2097 (repealed 1994). Congress later retrenched on some of these gains to truckers by granting the Secretary of Transportation authority to take petitions by state governors that showed safety justification for banning doubles. For a more detailed discussion, see Stearns, *supra* note 72, at 135 n.362.

165. *See* Norman R. Williams, *Why Congress May Not "Overrule" the Dormant Commerce Clause*, 53 UCLA L. REV. 153, 176–88 (2005) (arguing that the Court should not be able to override limitations based on the dormant Commerce Clause).

166. For a more detailed presentation, see STEARNS & ZYWICKI, *supra* note 11, at 209–14.

the lower payoff of seven for the joining spouse, as seen in the upper-left and lower-right boxes, presented in bold. The mixed strategies arise when each attends his or her first-choice sport alone, with payoffs of five for each spouse, as seen in the upper-right box, or when each attends the other's first-choice sport alone, with payoffs of three for each spouse, as seen in the lower-left box.[167] When the two attend the same game together, even the spouse who is attending his or her second-choice activity receives a higher payoff of seven, as compared with attending a first-choice activity alone, with a payoff of five.

As applied to interstate commerce, even if the nonconforming regulatory policy is superior to that of the surrounding states, the switch is beneficial only if coordinated with other states. Otherwise, the nonconforming state introduces a mixed-strategy equilibrium with correspondingly lower payoffs for all states. When such circumstances arise, the federal judiciary confronts two important challenges. First, it lacks the institutional competence with which to evaluate the competing policies.[168] Second, even the Supreme Court lacks the power to use a dormant Commerce Clause case to impose the challenged minority rule on surrounding jurisdictions. Although such a move would be unimaginable for a federal court, this is precisely the power that default dormant Commerce Clause doctrine affords Congress.

Because the Commerce Clause is a delegation of regulatory power to Congress, Congress need not await a judicial ruling under the dormant Commerce Clause doctrine prior to imposing a uniform regulatory policy in place of potentially competing state regulatory policies with respect to matters affecting commerce. An important historical illustration of this point involves the context of civil rights.

In both *Heart of Atlanta Motel, Inc. v. United States*,[169] and *Katzenbach v. McClung*,[170] the Court ruled on Congress's mandate that places of public accommodation over a certain size not discriminate on the basis of race. The Court rejected challenges claiming that Congress could not deal categorically with the problem of race discrimination in commerce, as opposed to creating a regime for case-by-case determinations as to whether a given place of public accommodation affects commerce.[171] In rejecting this claim, the *Katzenbach* Court relied in part on the *Wickard* multiplier analysis as applied to goods traveling in commerce.[172] Just as many farmers violating their wheat quota can affect commerce, so too can a large number of restaurants or hotels. Although

167. While the latter might seem to be a null set, it is not. Imagine that each intends to surprise the other by showing up at the other's preferred activity. For a romantic literary illustration, see O. HENRY, *The Gift of the Magi*, *in* THE COMPLETE WORKS OF O. HENRY 7 (Doubleday, Page & Co. 1926) (1899).

168. This is reflected in the nominally deferential standard applied in *Bibb* and *Kassel*, and the balancing test applied in *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 443–47 (1978).

169. 379 U.S. 241 (1964).

170. 379 U.S. 294 (1964).

171. *See id.* at 302–03.

172. *See id.* at 300–01.

this avoids the impact-on-commerce problem, game theory reveals a more compelling account. In fact, we will offer two different games to explain these cases, which prove helpful in assessing the individual mandate.[173]

The public accommodations provisions of the Civil Rights Act of 1964[174] solve a coordination difficulty that states would confront had they attempted to solve the problem of racial discrimination in places of public accommodation on their own. Even apart from the moral repugnance of racially discriminatory policies of the sort these cases address, a central policy difficulty Congress sought to address through these laws was the inconvenience, and danger, that African-Americans routinely confronted when traveling interstate as a result of the paucity, and poor quality, of available restaurants and lodgings. The well-documented history of this problem was the focus of congressional hearings,[175] and the evidence showed that many African-Americans tended to travel at night, for unsafe distances, and, when necessary, ate and slept in generally marginal and inconvenient locations.

Even if we assume that a group of enlightened states sought to solve this interstate-travel problem by banning racial discrimination in places of public accommodation, this would not necessarily solve the traveling difficulties confronting African-Americans in the South. A single nonconforming state could disrupt this hypothetical benign scheme by declining to go along. This raises similar concerns to the driving game in which a single state can potentially disrupt what appears as a pure coordination problem among states simply by adopting a contrary regime.

This coordination story offers substantial benefits in explaining these cases. First, it avoids reliance on *Wickard*'s much-criticized multiplier analysis. Second, it provides a far more compelling rationale that justifies central regulatory authority to solve what is ultimately an interstate problem. Finally, it amplifies the role of Congress, relying on the Commerce Clause, in furthering political union by demonstrating the danger that even a single state can disrupt a potential benign coordinated regime among states.

Of course, southern states had not elected to eradicate discrimination in places of public accommodation on their own. Instead, the states were separating by region on their willingness to ensure reasonable accommodations for African-American travelers. Another way to frame this game, which proves particularly helpful in thinking through the individual mandate,[176] involves a separating-versus-pooling equilibrium.[177] Those states that condoned racial discrimination in places of public accommodation throughout the South threatened to form, if they had not done so already, a separating equilibrium with those

173. *See infra* section III.B.4.

174. Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 201–207, 78 Stat. 241, 243–46 (codified as amended at 42 U.S.C. § 2000a to a-6 (2006))

175. For a discussion of the legislative testimony, see *Katzenbach*, 379 U.S. at 290–300.

176. *See infra* section III.B.

177. For a description of the game, see *supra* section I.B.

states in the North that were (at least formally) more inviting to African-American travelers. Congress sought to avoid a game that resulted in states eventually choosing sides in a matter involving the flow of persons between and among states in a manner affecting commerce. Congress chose a solution favoring a (near) universal ban on discriminatory practices, thus imposing the northern regime on the nation as a whole.

This framing once again reinforces the role of the Commerce Clause in policing political externalities. Sustaining state policies allowing such discrimination would spur other states with firms profiting from patrons who favor segregated restaurants and hotels to mimic those policies. It would also threaten to encourage states that had not already done so to choose between two competing regimes. In short, although the public accommodations provisions of the Civil Rights Act of 1964 sought to remedy a micro-level problem affecting African-American travelers, it was clearly justified on Commerce Clause grounds because it prevented a macro-level separating equilibrium game among states.

4. Recent Retrenchments on Congressional Commerce Clause Powers

Although the preceding analysis explains the nature of Congress's expansive post-New Deal Commerce Clause powers, challenges to the ACA's individual mandate have centered on the more recent retrenchments on that power. One argument claims that the individual mandate runs afoul of the anticommandeering doctrine set out in the 1992 decision, *New York v. United States*,[178] as applied to individuals. In that case, Justice O'Connor, writing for the majority, prevented Congress from using its commerce power to "commandeer" state legislatures into implementing its regulatory schemes.[179]

The challenged statute sought to ensure self-sufficiency among states respecting low-level radioactive-waste disposal following the threatened closure of the last remaining facility, which was located in South Carolina.[180] The most controversial provision, which the Court struck down, penalized states that failed to become self-sufficient in storing such waste by creating an in-state facility or joining an approved regional pact. Such states were required to either compensate producers for the resulting costs or to take title to the waste.[181] Justice O'Connor struck down the take-title provision, reasoning that it required states to implement a congressional regulatory policy. Although states had several choices in implementing the federal policy, Justice O'Connor explained that this merely emphasized the one option state legislatures lacked: The power to do nothing.[182]

In addition to a contested historical account of the transition from the Articles

178. 505 U.S. 144 (1992).
179. *Id.* at 161 (quoting Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288).
180. *Id.* at 149–50.
181. *Id.* at 153–54.
182. *See id.* at 187–88.

of Confederation to the Constitution,[183] Justice O'Connor rested her analysis on concerns over political accountability. Justice O'Connor posited that, when Congress commandeers state legislatures for the implementation of a federal regulatory scheme, those burdened by the scheme will be uncertain who to blame.[184] One problem with relying on *New York* to argue that the individual mandate commandeers individuals is that the Tenth Amendment protects state powers, not individual rights.[185]

Because the take-title provisions solved a collective-action problem among states, this might call into question the preceding game-theoretical account, resting on the difference between political and economic externalities. But the difficulty in *New York* was not the subject matter of the underlying regulation. Congress's power to regulate for environmental safety is clear.[186] The *New York* Court imposed a limit on Congress's regulatory authority in spite of, not because of, the underlying subject matter, and it did so based on the statute's manner of implementation. Congress can solve collective-action problems of the sort at issue in *New York* provided that it makes clear who is responsible for the resulting federal regulatory obligations.[187]

The more significant arguments against the individual mandate rest on the *Lopez* reformulation of the substantial-activities test. The *Lopez* Court's newly constructed economic-activities test was anomalous. The earliest Commerce Clause cases struggled with devising limitations on the scope of congressional Commerce Clause powers while satisfying the perceived need for federal regulatory intervention.

In *Gibbons v. Ogden*, Chief Justice John Marshall laid the foundation for what became a regime of temporal formalism.[188] The concept was simple: To permit congressional regulation of activities taking place within the state that affect commerce, the Court must identify certain traditional state regulatory activities as touching on goods before they enter commerce. This approach

183. *See id.* at 163–66; *see also id.* at 210–11 (Stevens, J., concurring in part and dissenting in part) (disagreeing with Justice O'Connor's interpretation of the historical significance of the transition); Erik M. Jensen & Jonathan L. Entin, *Commandeering, the Tenth Amendment, and the Federal Requisition Power:* New York v. United States *Revisited*, 15 CONST. COMMENT. 355 (1998) (critiquing Justice O'Connor's historical account).

184. *See New York*, 505 U.S. at 182–83 (majority opinion).

185. *See* Koppelman, *supra* note 2, at 22–23. This holds even though, as Justice O'Connor observed, the Constitution reserves state powers for the benefit of individuals who, absent clear boundaries, would be poorly suited to hold their respective governments accountable. *See New York*, 505 U.S. at 168–69. Many structural aspects of governance, including the separation of powers, benefit individuals without transforming violations of those structures into individual rights.

186. *See supra* note 140 and accompanying text (discussing federal environmental regulation).

187. To the extent that the *New York* arguments result in congressional avoidance of responsibility by moving costs off book, this more closely implicates problems of nondelegation. In the case of the individual mandate, the difficulty is not so much the doctrine's moribund status but rather the claim itself. Power has not been delegated absent an "intelligible principle." *See* J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928). Rather, clear burdens have been placed on insurers and individuals, which those challenging the scheme oppose.

188. 22 U.S. (9 Wheat.) 1 (1824).

allowed Marshall, for example, to cordon off state inspection laws from regulations on navigation even if both affected some purely intrastate activity.[189]

In the era of early industrialization, the Court developed this framework to impose actual restrictions on the scope of congressional Commerce Clause powers. The most notable examples include *United States v. E.C. Knight Co.*, preventing Congress from applying antitrust laws to the sugar monopoly,[190] and *Hammer v. Dagenhart*, striking down the federal child-labor laws.[191] Eventually the Court displaced these problematic doctrines with substitutes. Newly devised—and later rejected—formulations included direct-versus-indirect effects on commerce,[192] intent to affect commerce,[193] and regulating activities at differing points along the stream of commerce.[194] The history of early Commerce Clause doctrine is the history of using formalist labels as artificial boundaries demarcating permissible congressional regulations from reserved state powers. The trick to this approach, if it can be so labeled, is that, with the rare exception of *Hammer*, which eventually fell,[195] most of the doctrines actually sustained the challenged congressional regulation.

In one sense, *Lopez* falls within this tradition: There, the Court constructed a new formalist line. Congress can regulate economic activities; the regulation of noneconomic activities is reserved to the states. And yet, this reversion to formalism proved ironic. Whereas earlier generations of formalism—from *Gibbons* through the New Deal—allowed Congress to regulate activity within, but not preceding, commerce, including most notably production,[196] the Rehnquist formulation places production, because it is economic, squarely within the permissible scope of congressional Commerce Clause powers. This became evident in *Gonzales v. Raich*, where Rehnquist dissented from Justice Stevens's majority opinion that allowed Congress to ban medical marijuana because growing marijuana is an economic activity.[197]

At least one commentator has claimed that *Lopez* ultimately stands for the

189. *Id.* at 79.

190. 156 U.S. 1, 16–17 (1895).

191. 247 U.S. 251, 275–77 (1918), *overruled in part by* United States v. Darby, 312 U.S. 100 (1941).

192. *Compare* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 550 (1935) (rejecting the effect of production on commerce as indirect), *with* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 40–41 (1937) (sustaining an application of labor regulations to a steel mill given the scope of operations and the resulting direct effect on commerce).

193. *See* Coronado Coal Co. v. United Mine Workers of Am., 268 U.S. 295, 310 (1925) (upholding the application of antitrust law to a strike based on an intent to affect commerce).

194. *See, e.g.*, *id.* (sustaining the application of antitrust law to the mining industry, before the entry of goods into commerce); Stafford v. Wallace, 258 U.S. 495, 516–17 (1922) (allowing regulation at stockyards, which are "but a throat" of commerce); Hipolite Egg Co. v. United States, 220 U.S. 45, 57–58 (1911) (allowing inspections at the end of commerce).

195. *See Darby*, 312 U.S. at 116–17 (overruling *Hammer*, 247 U.S. 251).

196. *See supra* notes 188–95 and accompanying text.

197. 545 U.S. 1 (2005). *Compare id.* at 9 (Stevens, J., writing for the Court), *with id.* at 42 (O'Connor, J., dissenting).

hollow proposition that without limits there would be no limits.[198] Despite the test's admitted imprecision, this Article's game-theoretical analysis provides a more generous account. The Gun-Free School Zones Act at issue in *Lopez* does not involve a policy that risks mutual defection among states in a prisoners' dilemma game. A different approach to the regulatory problem in Virginia—for example, a regime of enhanced penalties for all crimes on school property—would in no way undermine a contrary Maryland scheme.[199] In addition, the Act does not involve a policy that requires interstate coordination for its implementation, as in the driving game, and thus it would not be compromised if an individual state adopted a contrary policy.

The economic-activities test captures the intuition that some substantive policy areas do not create or require regulatory interdependency among states. The phrasing is imprecise, however, because the real issue is not the economic quality of the regulated activity but rather the structural relationship among states respecting that policy's implementation. Because most political externalities among states involve subject matter that can be labeled *economic*, that term is generally capacious enough to account for historical applications of congressional commerce powers. As *Raich* demonstrates, the problem with the economic-activities test is generally not accounting for these historical expansions; rather, it is failing to exclude classes of activities that traditionally would be off limits.[200]

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198. *See* Louise Weinberg, *Fear and Federalism*, 23 OHIO N.U. L. REV. 1295, 1323 (1997) ("The actual limiting principle . . . in *Lopez*, is the weirdly circular proposition that there must *be* a limiting principle.").

199. Of course other states might mimic the program, if successful, or avoid it, if unsuccessful. The game-theoretical question is, instead, whether there is a structural reason why one state's law would affect the decision of another.

200. Because *United States v. Morrison*, 529 U.S. 598 (2000), also implicates another game, we present that case in more detail *infra* section III.B.3.

The Necessary and Proper Clause, U.S. CONST. art. I, § 8, cl. 18, only further bolsters our conclusion that congressional commerce power amply supports the ACA, including the controversial individual-mandate provision. Because our analysis is designed to demonstrate the nature of games that Congress can and cannot address using its Commerce Clause powers, based upon the distinction between political and economic externalities, we do not separately consider the Necessary and Proper Clause as an independent basis for sustaining the ACA against the pending constitutional challenges. For articles taking competing views on that question, compare Koppelman, *supra* note 2 (arguing that the clause justifies the individual mandate), with Gary Lawson & David B. Kopel, *Bad News for Professor Koppelman: The Incidental Unconstitutionality of the Individual Mandate*, 121 YALE L.J. ONLINE 267 (2011), http://yalelawjournal.org/images/pdfs/1025.pdf (presenting a restrictive construction of the clause in opposition to the individual mandate).

As early as *McCulloch v. Maryland*, 17 U.S. 316 (4 Wheat.) (1819), which rejected a constitutional challenge to the Second Bank of the United States, Chief Justice John Marshall recognized that the Necessary and Proper Clause was included among Congress's delegated powers in Article I, Section 8 to convey to Congress a choice of means respecting the implementation of policy pursuant to the exercise of its delegated powers. *Id.* at 323–24. In *United States v. Comstock*, 130 S. Ct. 1949 (2010), Justice Breyer, writing for a majority, reaffirmed this broad reading by devising a five-part balancing test used to sustain a federal statute empowering the Department of Justice to authorize the continued detention of a violent sex offender determined to pose an ongoing societal threat. *See id.* at 1965. Breyer's analysis, which balanced the exercise of congressional power against the convicted criminal's

III. THE INDIVIDUAL MANDATE IN GAME-THEORETICAL PERSPECTIVE

The principal games used to classify the two sides of the Supreme Court's Commerce Clause doctrine—the prisoners' dilemma, the driving game, and the battle of the sexes—were not intended to be exhaustive. The important point is how these games distinguish economic and political externalities in defining the scope and limits of state and congressional regulatory powers affecting commerce. In this Part, we consider several case studies that reveal a separating–pooling equilibrium game. While not all games that appear to fit within this category produce political externalities, some do. Determining which do and which do not proves helpful in assessing the historical scope of Congress's Commerce Clause powers and in informing the application of that power to the ACA. After reviewing studies falling into both extremes, along with some intermediate cases, we once more turn our attention to the Act and its controversial individual-mandate provision.

A. IDENTIFYING THE ACA GAME

Commentators have recognized that the individual mandate solves a coordination problem among states and is therefore distinguishable from the Gun-Free School Zones Act at issue in *Lopez*.[201] But without a more specific analysis of the structural impediment to coordination, it is not possible to determine whether the individual mandate is a justified exercise of congressional commerce powers. States routinely solve coordination games.[202] And yet, there are coordination games that the states are structurally ill-suited to solve.[203] The issue is not merely coordination but rather whether the coordination difficulty

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due process rights, considered among other factors the narrow applicability of potential extended detentions. *See id.* By contrast, Justice Scalia, writing separately in *Gonzales v. Raich*, 545 U.S. 1 (2005), viewed the same clause from an opposite perspective. Whereas the *Raich* majority, in an opinion by Justice Stevens, sustained the application of the Controlled Substances Act to prevent any permissible use for marijuana as applied against the California Compassionate Use Act, which permitted medical marijuana on advice of a physician, *id.* at 1, 9, Scalia instead reached the same result based on the Necessary and Proper Clause in combination with the Commerce Clause. *Id.* at 34–35 (Scalia, J., concurring). Scalia reasoned that because growing marijuana neither substantially affects commerce nor is an obvious economic activity, the marijuana ban could only be sustained as a necessary and proper component of a broader federal regulatory scheme. *Id.*

None of the cases pending before the Supreme Court present challenges to the ACA based on individual rights, and therefore, these cases do not implicate the concerns contained in Breyer's *Comstock* analysis, even in dictum. The remaining constructions treat the Necessary and Proper Clause as bolstering Congress's choice of means in implementing its delegated powers, which include, most notably, the Commerce Clause.

201. For general references to the literature, see sources cited *supra* notes 2 and 9.

202. For another example in the medical context, consider *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), which allowed Massachusetts to solve a regulatory prisoners' dilemma respecting a vaccine.

203. Thus, as with the free-rider analysis upon which other scholars have relied to defend the ACA, the issue here is whether the particular game implicates political externalities, thus justifying congressional Commerce Clause powers, as opposed to implicating a collective-action problem more generally, which might instead justify state reliance on police powers for an appropriate regulatory solution. For a related discussion, see *supra* note 11.

results from political externalities, thus preventing states from solving the policy issue on their own. Resolving this issue requires careful attention to the precise game Congress was attempting to solve.

The ACA might appear to present a driving game. Some states choose to impose obligations to cover high-risk insureds, while others seek to bar obligations under the individual mandate. An outlier state disrupts the coordinated regime of other states. This game, however, fails to explain the ACA. If most states declined to impose a coverage obligation, a defecting state that imposed strict coverage obligations would not thwart the scheme. It would instead harm its own residents by making the state less friendly toward insurers. Conversely, if most states imposed coverage obligations on insurers, a defecting state might attract insurers, but it is less clear that it would undermine a coordinated state scheme. After all, an isolated state, or even a minority of states, selecting a relaxed regulatory policy will not encourage insurers to flee if doing so dramatically reduces the potential pool of insureds. This policy choice does not fit an interstate driving game.

The prisoners' dilemma also fails to capture the ACA's individual mandate. Substantial burdens are imposed on insurance companies to cover high-risk insureds, but this obligation is coupled with a quid pro quo, namely requiring that low-risk insureds enter the pool. If the insurance-coverage obligation were principally imposed on employers, for example, to provide coverage for presently ineligible employees, then the resulting additional costs would place these firms in a prisoners' dilemma. Each firm would prefer to avoid the underlying obligation, which raises costs, hoping that other firms will adhere to the additional coverage requirements, resulting in mutual defection. Similarly, if states sought to impose obligations on employers, the game would simply reemerge among states, each of which would prefer relaxed enforcement against its firms, hoping, once more, that other states strictly enforce the regime. This hearkens back to the prisoners' dilemma game justifying congressional intervention respecting, for example, child-labor and minimum-wage laws.[204]

Instead, the challenged features of the ACA impose insurance obligations on insurers—to cover those at high risk—and prospective insureds—to obtain coverage even if at low risk. As applied to insurers, no firm would undertake the additional costly obligation absent the reciprocal benefit of an expanded insurance pool. Although insurers would prefer the pool expansion minus the additional coverage obligation, they have no power to coerce individuals to enter the pool. The problem, therefore, is not mutual defection among insurers in a prisoners' dilemma because they are not collectively better off in a regime of mutual cooperation. Instead, even collectively, they are better off excluding high-risk persons, at least unless they are somehow compensated.

The game among states is more complex. If states merely imposed coverage obligations on insurers, they would risk an alternative separating-equilibrium

204. *See supra* section II.C (discussing cases).

game in which insurers would prefer low-regulation states and high-risk insureds would prefer high-regulation states. States might, in theory, offer firms the quid pro quo through a state-level individual mandate to force low-risk insureds into the pool to offset newly imposed coverage obligations for those at high risk. Although Massachusetts did just that, as shown below,[205] most states lack power to implement such a regime. Of course the scheme only works if the risk pool is enlarged, a result undermined by the state-level separating game. The question is whether this game falls into the permissive category for congressional commerce powers.

B. DETERMINING WHEN FEDERAL INTERVENTION IS JUSTIFIED IN SEPARATING GAMES

One difficulty with resting the analysis of the ACA and the individual mandate on a separating-equilibrium game is that there are many areas of state law that demonstrate major policy splits. Those splits might reflect structural dynamics that force each state eventually to take sides, thus forming a true separating equilibrium. Alternatively, they might reflect ideological or other substantive differences respecting how to approach any number of public policy questions. And yet, within our federalist system, it seems unlikely that Congress, relying on its commerce power, can regulate under the Commerce Clause in any policy area about which the states disagree. Identifying which separating-policy results among states justify the exercise of congressional commerce powers and which results do not returns us to the presence or absence of political externalities arising from conflicting state policies.

In this part, we present three categories of case studies. In the first category, which revisits the public accommodations provisions of the Civil Rights Act of 1964, the emerging split among states resulted in identifiable political externalities that clearly justified congressional regulatory intervention. In the second category, at the opposite extreme, we consider abortion-funding restrictions and the death penalty, two areas that generate substantial philosophical disagreements but that do not produce political externalities justifying congressional intervention under the Commerce Clause. In the third category, we present two intermediate case studies: the Civil Rights Remedy of the Violence Against Women Act and same-sex marriage. These illustrations contain features of both pure economic externalities, placing them outside the scope of congressional commerce powers, and possible political externalities, which cut in the other direction. After reviewing these case studies, we reconsider the ACA to demonstrate that it best fits within the first category, in which identifiable political externalities justify Congress's effort to resolve what, absent federal intervention, would manifest a structural separating equilibrium among states.

205. *See infra* section III.B.4.

1. Public Accommodations Revisited

For much of the century leading up to the Civil Rights Act of 1964,[206] racial segregation separated African-Americans from the general population not only at state facilities, such as schools, parks, water fountains, and even prisons, but also in private businesses that served the public, such as restaurants, motels, and movie theaters.[207] Although the Court held racial discrimination unconstitutional in a series of cases involving public schools in the 1950s,[208] many states maintained segregation in other public contexts,[209] and certainly *Brown v. Board of Education* and its progeny did not speak to privately owned public accommodations.[210]

Congress considered the Civil Rights Act of 1964 amid an unmistakable separating equilibrium among states respecting racial segregation in places of public accommodation. At one extreme were states like South Carolina, which legally required segregation in certain public facilities.[211] At the other extreme were thirty-two states, including California, New Jersey, and New York, which banned this form of racial discrimination.[212] Many jurisdictions fell somewhere in between. Maryland, for instance, had an antidiscrimination law but upheld segregation at an amusement park.[213]

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206. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. § 2000 (2006)).

207. *See, e.g.*, An Act To Regulate Elections in the State of Arkansas, 1891 Ark. Acts 32, 36 (precincts with more than one hundred voters required to have "persons of the white and colored races to cast their votes alternatively"); FLA. COMP. GEN. LAWS § 6625 (1927) (requiring railroad companies to provide "[s]eparate waiting rooms and ticket windows for white and negro passengers"); GA. CODE ANN. § 84-1603 (1935) (billiards room licenses could not be issued to white owners for a "billiard room to be used, frequented, or patronized by persons of the Negro race"); LA. GEN. STAT. § 9791 (1939) (requiring segregation of races at circuses and tent exhibitions); OKLA. STAT. tit. 74, § 351j (1937) (segregated boating, fishing, and bathing facilities). *See generally* GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 575–77 (1944) (describing segregation in churches, theaters, restaurants, trains, streetcars, and buses); C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 97–102 (3d rev. ed. 1974) (describing "[t]he mushroom growth of discriminatory and segregation laws during the first two decades of [the twentieth] century").

208. *See* Brown v. Bd. of Educ., 347 U.S. 483, 494–95 (1954) (overturning the "separate but equal" holding of *Plessy v. Ferguson*, 163 U.S. 537 (1896)); McLaurin v. Okla. State Regents for Higher Educ., 339 U.S. 637, 642 (1950) (requiring equal treatment of an African-American graduate student enrolled in a state university); Sweatt v. Painter, 339 U.S. 629, 636 (1950) (holding that the Equal Protection Clause required that the petitioner, an African-American, be admitted to the state's law school).

209. *See* Palmer v. Thompson, 403 U.S. 217, 226 (1971) (finding that a city council's decision to close public swimming pools in order to avoid a desegregation order did not violate the Equal Protection Clause). *But see* Dawson v. Mayor of Balt. City, 220 F.2d 386, 387–88 (4th Cir. 1955) (per curiam) (holding that the city's enforcement of racial segregation of public beaches and bathhouses was not a proper exercise of state police power), *aff'd*, 350 U.S. 877 (1955).

210. *See* 347 U.S. 483.

211. *See* S.C. CODE § 9316 (1942) ("Joint use of parks, amusement or recreation centers, and bathing beaches by white and colored races prohibited in counties with city over 60,000.").

212. *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 259 n.8 (1964) (listing an executive order and statutes of thirty-two states with public accommodations laws prohibiting discrimination).

213. *See id.*; Drews v. State, 204 A.2d 64, 66–67 (Md. 1964).

Congress could have allowed the states to continue this self-sorting process until a full separating equilibrium emerged. Its decision to intervene earlier reflects public embarrassment and political pressures resulting from what threatened to produce a two-nation solution—one relatively accessible to, and the other quite clearly hostile to, African-American travelers. Indeed, had Congress declined to act, and had the South Carolina regime been sustained, the split would have arisen even if only a subgroup of states mimicked that state's policy. Contrary state laws are unnecessary. But to be clear, rather than demonstrating the absence of political externalities, this highlights the brute force of such externalities.

The burden that these state laws pose is not limited to the adverse effects on African-American travelers, though those externalities are indeed serious. Rather, the southern-state policies packed sufficient punch that inertia was equivalent to adopting a contrary liberal travel regime. Those seeking to avoid that contrary regime were motivated to act affirmatively.

The history of the public accommodations provisions as surveyed in two landmark decisions, *Heart of Atlanta Motel* and *Katzenbach*, corroborates this account. These cases emphasized that segregated accommodations posed genuine deterrents to African-American travelers,[214] who spent less per capita in restaurants, theaters, and hotels than their white counterparts even within the same socio-economic cohort.[215] The cases also reveal that these discriminatory practices imposed costs on businesses that, responding to societal pressures condoning or encouraging private discrimination, closed themselves to a considerable population who would happily have patronized them.[216] Although the public accommodations provisions of the Civil Rights Act of 1964 certainly remedied these micro-level economic externalities, a more compelling justification for congressional intervention specifically under the Commerce Clause involves its avoiding the emerging separating-equilibrium game that ongoing divisions—state by state—threatened for the nation as a whole.[217]

2. Abortion Funding and the Death Penalty

In *Carter v. Carter Coal Co.*, Justice Sutherland observed:

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214. *See* Katzenbach v. McClung, 379 U.S. 294, 300 (1964); *Heart of Atlanta Motel*, 379 U.S. at 252–53.

215. *Katzenbach*, 379 U.S. at 299.

216. *See id.* at 300–01. Calculating costs is made difficult by contemporaneous preferences of many whites not to comingle with African-Americans. And yet, if firms were banned from discrimination, these so-called losses would have been effectively eliminated as the option to patronize a discriminatory institution would have been foreclosed.

217. Thus, for example, Justice Douglas in *Heart of Atlanta Motel* would have preferred to rely on congressional enforcement power under the Fourteenth Amendment. 379 U.S. at 286 (Douglas, J., concurring) ("[O]ur decision should be based on the Fourteenth Amendment, thereby putting an end to all obstructionist strategies and allowing every person—whatever his race, creed, or color—to patronize all places of public accommodation without discrimination whether he travels interstate or intrastate.").

> There are many subjects in respect of which the several states have not legislated in harmony with one another, and in which their varying laws and the failure of some of them to act at all have resulted in injurious confusion and embarrassment. The state laws with respect to marriage and divorce present a case in point; and the great necessity of national legislation on that subject has been from time to time vigorously urged. Other pertinent examples are laws with respect to negotiable instruments, desertion and nonsupport, certain phases of state taxation, and others which we do not pause to mention. In many of these fields of legislation, the necessity of bringing the applicable rules of law into general harmonious relation has been so great that a Commission on Uniform State Laws . . . has for many years been industriously and successfully working to that end . . . . If there be an easier and constitutional way to these desirable results through congressional action, it thus far has escaped discovery.[218]

Although the *Carter* case is now discredited, Justice Sutherland's essential insight has only been reinforced by history. The mere existence of divisions among states respecting the listed policies, and others, does not of its own force justify congressional regulation under the Commerce Clause. As the Rehnquist Court implicitly recognized, despite the long history of post-New Deal expansion of congressional commerce power, the desire for uniform policy does not, of its own force, justify Congress's reliance on Commerce Clause powers.[219]

Like "[w]ater, water everywhere,"[220] there is a corresponding risk that "testable" illustrations of this seemingly self-evident proposition will prove elusive. Still, there are demonstrable examples of policy splits among states that most would agree do not appear to justify congressional intervention under the Commerce Clause. To be clear, the policy areas implicated in these illustrations—abortion funding and the death penalty—are controversial. And we do not claim that there are no other possible bases for judicial, or even congressional, intervention. Rather, our claim is narrow, but important. The mere existence of a policy split among states in these two areas does not justify congressional reliance on the Commerce Clause to affect a pooling solution to the apparent separating-policy equilibrium.

We begin with the Supreme Court's decision in *Roe v. Wade*.[221] That case spawned a national debate that continues today about whether abortion should be constitutionally protected;[222] how, and when, it ought to be regulated;[223]

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218. 298 U.S. 238, 292–93 (1936) (citation omitted).

219. *See* United States v. Lopez, 514 U.S. 549, 556–58 (1995) (discussing the "outer limits" of congressional power under the Commerce Clause).

220. "Nor any drop to drink." SAMUEL TAYLOR COLERIDGE, THE RIME OF THE ANCIENT MARINER, *reprinted in* THE RIME OF THE ANCIENT MARINER, CHRISTABEL, AND OTHER POEMS 52 (Julian W. Abernethy ed., Charles E. Merrill Co. 1907).

221. 410 U.S. 113 (1973).

222. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 844–45 (1992).

223. *See* Gonzales v. Carhart, 550 U.S. 124, 132–33 (2007); Stenberg v. Carhart, 530 U.S. 914, 921–22 (2000); *Casey*, 505 U.S. at 844–45. Although Congress enacted the Partial-Birth Abortion Ban

which constitutional doctrines, if any, apply in relevant cases;[224] and whether federal and state funds should pay for the procedure.[225] It is not surprising to find widely divergent state laws on these controversial issues.[226] Narrowing our attention to the question raised by abortion funding reveals that not all potential separating-equilibrium games result from political externalities, which are required to justify congressional interference under the Commerce Clause.

In the immediate aftermath of *Roe*, most states covered medically necessary abortions under Medicaid, a joint federal–state health-insurance program for low-income individuals.[227] That trend was upended in 1976 when Congress, relying on the Spending Clause,[228] passed the Hyde Amendment, which prohibited federal funding for abortions except when necessary to save a woman's life. The Amendment was attached as a rider to the Department of Health, Education, and Welfare appropriations bill, which, among other programs, covered Medicaid.[229] Because the Medicaid Act provides federal reimbursement to states only for medical care rendered in compliance with the Act,[230] the Amendment ended Medicaid payments to states for abortions performed for any reason other than to save a woman's life. "[B]y 1979, forty states had terminated state coverage for abortions" that were ineligible for federal Medicaid reimbursement.[231]

Act under the Commerce Clause, the Court did not address the merits of congressional commerce power when sustaining the Act in *Gonzales*. Instead, in rejecting a privacy-based challenge, the Court merely acknowledged that Congress enacted the statute under the Commerce Clause. *Gonzales*, 550 U.S. at 166. Abortion law is sufficiently complex that different aspects warrant different game-theoretical analysis. Without providing such an analysis here, it is possible to imagine that a multistate ban on partial-birth abortion (the procedure at issue in *Gonzales* and *Stenberg*) could encourage states yet to resolve this regulatory issue to respond to political pressures in either direction, lest the decision not to regulate renders those states an unwitting safe haven for an increasingly controversial medical procedure. Once again, separate action by permissive states is not necessary to forge this hypothetical separating equilibrium.

224. *See* LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 101–05 (2d ed. 1992) (noting the debate as to whether abortion rights implicate the liberty and equal protection clauses of the Fourteenth Amendment).

225. *See* Harris v. McRae, 448 U.S. 297, 310 (1980) (holding that "even if a State were otherwise required to include medically necessary abortions in its Medicaid plan, the withdrawal of federal funding under the Hyde Amendment would operate to relieve the State of that obligation for those abortions for which federal reimbursement is unavailable"); Maher v. Roe, 432 U.S. 464, 479–80 (1977) (holding that the Equal Protection Clause does not require a state that participates in Medicaid to fund "nontherapeutic abortions").

226. *See State Policies in Brief: An Overview of Abortion Laws*, GUTTMACHER INST. (Jan. 1, 2012), http://www.guttmacher.org/statecenter/spibs/spib_OAL.pdf (providing an overview of disparities in abortion laws among all relevant jurisdictions).

227. *See* Jon F. Merz et al., *A Review of Abortion Policy: Legality, Medicaid Funding, and Parental Involvement, 1967–1994*, 17 WOMEN'S RTS. L. REP. 1, 6–7 (1995).

228. U.S. CONST. art. 1, § 8, cl. 1.

229. *See* Departments of Labor and Health, Education, and Welfare Appropriation Act, 1977, Pub. L. No. 94-439, § 209, 90 Stat. 1418, 1434 (1976).

230. 42 U.S.C. § 1396 (2006).

231. Nicole Huberfeld, *Conditional Spending and Compulsory Maternity*, 2010 U. ILL. L. REV. 751, 771 (2010).

Although the Amendment faced early legal challenges, the Supreme Court made clear in *Maher v. Roe*[232] and *Harris v. McRae*[233] that neither states nor the federal government are obligated to fund abortions under Medicaid, even when they provide prenatal and maternity care under that program.[234] With the Court's approval, Congress has renewed the Amendment for each of the last thirty-five years, attaching it as a rider to funding for the Department of Health and Human Services. In the course of annual renegotiations, the Amendment has been modified, most notably in 1976 to permit federal funding in cases of rape and incest.[235] The current Amendment does not cover the health of the mother or fetal abnormalities.[236]

Significantly, the Amendment only restricts federal Medicaid reimbursements to states, thus leaving states free to use their own funds to cover abortions. That said, states have no obligation to pay for abortions outside of those for which federal funding is permitted.[237] This funding regime has produced an apparent macro-level separating equilibrium in which most states have chosen either to pay for abortions only in circumstances covered under the Hyde Amendment or to provide more generous state funding. Twenty-seven states, plus the District of Columbia, fall into the first category, funding abortions only in circumstances for which federal coverage is permitted.[238] Seventeen states fall into the second category and use state funds to pay for all or most medically necessary abortions that fall outside the federally permitted exceptions.[239] Five states do not fit strictly within either category because they provide state funding only in specified circumstances.[240] One noncompliant state, South Dakota, does not pay for abortion even in cases of rape or incest.[241]

Impact studies reveal that these conflicting policies produce considerable economic externalities. Impoverished women seeking abortions not covered under the Amendment in funding-restrictive states must either carry their pregnancies to term or find alternative funding sources. Several studies estimate that as many as one-third of women on Medicaid who would otherwise seek

232. 432 U.S. 464 (1977).

233. 448 U.S. 297 (1980).

234. *Harris*, 448 U.S. at 310; *Maher*, 432 U.S. at 479–80.

235. 42 C.F.R. § 441.205 (1978).

236. Some states do make funding exceptions for fetal abnormalities. *See, e.g.*, MISS. CODE ANN. § 41-41-91(c) (2009); VA. CODE ANN. § 32.1-92.2 (West 2009).

237. *See Harris*, 448 U.S. at 309; *Maher*, 432 U.S. at 480.

238. *State Policies in Brief: State Funding of Abortion Under Medicaid*, GUTTMACHER INST. (Jan. 1, 2012), http://www.guttmacher.org/statecenter/spibs/spib_SFAM.pdf (listing states).

239. *Id.* Four of the listed states (Hawaii, Maryland, New York, and Washington) adopted their policies voluntarily, whereas the remaining states did so following a court order based on the relevant state constitutions. *Id.*

240. *See id.*; *see also* IND. CODE § 16-34-1-2 (LexisNexis 2011) (danger to woman's physical health); MISS. CODE ANN. § 41-41-91(c) (2009) (fetal impairment); UTAH CODE ANN. § 76-7-331(2) (West 2008) (danger to woman's physical health); VA. CODE ANN. § 32.1-92.2 (West 2009) (fetal impairment); WIS. STAT. § 20.927(2)(b) (2009–2010) (danger to woman's physical health).

241. *See* S.D. CODIFIED LAWS § 28-6-4.5 (2011) (only funding abortions when "necessary for the preservation of the life of the person upon whom the abortion is performed").

abortions decline to do so due to state-funding restrictions.[242] Although such restrictions undoubtedly impose substantial economic externalities on affected women and their families, it is more difficult to translate this into the sort of separating-equilibrium game among states that has historically justified congressional commerce regulation.

Unlike the racially discriminatory practices at issue in *Heart of Atlanta Motel* and *Katzenbach*, which produced identifiable political externalities among states, the different abortion state-funding schemes are relatively self-contained. In fact, these separate state-funding schemes are in some respects analogous to state laws exempted from strict scrutiny on the dormant side of the Commerce Clause. For example, state decisions to go beyond the Hyde Amendment and provide state-only funding for uncovered abortions is similar to state policies to benefit municipally preferred employees under the market participant doctrine,[243] or to subsidize certain industries at taxpayer expense.[244] These and other potentially costly state policies that subsidize identifiable constituencies at a cost borne by the general public are unlikely to affect the decisions of neighboring states respecting such policies.

Because state Medicaid programs only fund in-state residents,[245] there is little risk that a woman from an Amendment-compliant state like Maine would travel to a more permissive state like Vermont to procure a Medicaid-funded abortion.[246] The funding-policy decisions in individual states more likely respond to internal political pressures, including advocates for low-income women seeking coverage for costly procedures, on the one hand, versus advocates for funding restrictions based on contrary moral or financial considerations, on the other.

The death penalty further demonstrates that not all apparent separating equilibria among states justify congressional Commerce Clause intervention. In 1972, the Supreme Court held in *Furman v. Georgia* that the Georgia death penalty scheme constituted "cruel and unusual punishment" under the Eighth Amendment as applied to the states by the Fourteenth Amendment.[247] The 5–4 per curiam opinion did not specify the nature of the constitutional defect or how

242. For a discussion of the financial dislocations that attempts to fund private abortions pose for low-income women, see STANLEY K. HENSHAW ET AL., GUTTMACHER INST., RESTRICTIONS ON MEDICAID FUNDING FOR ABORTIONS: A LITERATURE REVIEW 18–21 (June 2009), http://www.guttmacher.org/pubs/MedicaidLitReview.pdf.

243. *See supra* section II.B.3 (discussing the market participant doctrine).

244. *See supra* note 116 and accompanying text.

245. *See* 42 U.S.C. § 1396a(a)(16) (2006) ("A State plan for medical assistance must . . . provide for inclusion, to the extent required by regulations prescribed by the Secretary, of provisions (conforming to such regulations) with respect to the furnishing of medical assistance under the plan to individuals who are residents of the State but are absent therefrom."). Furthermore, any plan that conditions eligibility for medical assistance on a "residence requirement which excludes any individual who resides in the State, regardless of whether or not the residence is maintained permanently or at a fixed address," will not be approved by the Secretary. *Id.* § 1396a(b)(2).

246. It is possible that a woman from one state might travel to another because the neighboring state has less expensive private abortions, but that is at most an economic, rather than political, externality.

247. 408 U.S. 238, 239–40 (1972) (per curiam).

to cure it; instead, the Justices produced separate concurrences and dissents that the states then sought to reconcile.[248]

Following *Furman*, at least thirty-five states, including Georgia, enacted statutes that either mandated the death penalty for certain crimes or specified capital sentencing procedures.[249] The remaining states either were non-death-penalty states before *Furman* and remained so,[250] or were death penalty states that interpreted *Furman* as a de facto moratorium on executions.[251]

This emerging policy split among states gained momentum after the Court's 1976 decision in *Gregg v. Georgia*, upholding Georgia's revised death penalty scheme against an Eighth Amendment challenge.[252] Today, thirty-four states have the death penalty; sixteen states plus the District of Columbia do not.[253] Seven of the latter states abolished the death penalty, either legislatively or judicially, after *Gregg*.[254]

The resulting state-policy separation concerning the death penalty reflects myriad considerations, including strong ideological commitments on both sides, divisions on theories of culpability and forgiveness, and considerations of race and the fairness of imposing sanctions based on access to quality counsel. Undoubtedly, opposing viewpoints correlate to other ideological perspectives respecting such divisive matters as abortion, affirmative action, and same-sex marriage. The more difficult question is whether this policy separation goes beyond deep-seated differences in world views, which often correlate with identifiable geographic regions, or whether it also is driven by political externalities. As with abortion funding, political externalities seem unlikely. Whatever complex motives inform any given state's decision on the death penalty, the policy choice is far more likely informed by internal political dynamics than it

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248. Justices Brennan, Douglas, Marshall, Stewart, and White each wrote individual concurring opinions. *Id.* at 240–374. Justices Stewart and White agreed on the narrowest grounds. They found the application of the death penalty in the instant cases unconstitutional, not because it was "pregnant with discrimination," as Justice Douglas determined, *id.* at 257 (Douglas, J., concurring), but rather because the death penalty was applied too infrequently to serve any retributive purpose. *See id*. at 310 (Stewart, J., concurring); *id.* at 313 (White, J., concurring).

249. Gregg v. Georgia, 428 U.S. 153, 179–80 & n.23 (1976) (listing the statutory schemes adopted by thirty-five states after *Furman*).

250. Alaska, Hawaii, Iowa, Maine, Michigan, Minnesota, Vermont, West Virginia, and Wisconsin each abolished the death penalty before 1972. *States With and Without the Death Penalty*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/states-and-without-death-penalty (last visited Jan. 17, 2011).

251. *See* Corinna Barrett Lain, *Deciding Death*, 57 DUKE L.J. 1, 8–24 (2007) (describing the impact of *Furman* and *Gregg* on state death-penalty schemes). The District of Columbia, Massachusetts, and New Jersey kept their death penalty statutes unchanged after *Furman* but eventually abolished the death penalty. *See Gregg*, 428 U.S. at 179 n.23 (listing states that adopted death penalty statutes post-*Furman*); DEATH PENALTY INFO. CTR., *supra* note 250.

252. *Gregg*, 428 U.S. at 207.

253. DEATH PENALTY INFO. CTR., *supra* note 250.

254. Illinois, Massachusetts, New Jersey, New Mexico, New York, Rhode Island, and the District of Columbia abolished the death penalty after 1976. *Id.* New Jersey, New Mexico, and Illinois have abolished the death penalty legislatively. *See Part I: History of the Death Penalty*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/part-i-history-death-penalty#reinst (last visited Jan. 17, 2011).

is by external state-driven pressures.

Abortion funding and the death penalty are but two illustrations of the sorts of legal policies that are unlikely to generate political externalities. There are undoubtedly many others, some alluded to in the Justice Sutherland quote.[255] That said, it is important to emphasize that what might appear not to create political externalities in one period could do so in later periods. Laws on desertion and nonsupport, for example, might remain insular in periods of limited interstate mobility, yet generate interstate effects warranting federal regulatory intrusion under the Commerce Clause in periods of increased mobility that risk migration of truant parents to lenient jurisdictions.[256] This explains why the dynamic game-theoretical approach to developing categories for permissible Commerce Clause intervention is ultimately more helpful than the subject-driven approach upon which Justice Sutherland relied in *Carter*.

3. Hybrid-Separating Equilibrium Games: Violent Crimes Against Women and Same-Sex Marriage

The prior case studies are helpful not only because they are relatively recent but also because each has produced some degree of federal involvement, including judicial decision making, congressional lawmaking, or both. The question, however, is not simply whether these state policies implicate federal concerns. Rather, it is whether they specifically justify congressional intervention under the Commerce Clause. Although the case studies thus far demonstrate the extremes, some separating equilibria among states appear as hybrids, with credible arguments characterizing the emerging split as generating political externalities or, alternatively, as producing purely economic externalities. Prominent illustrations include violent crimes against women and same-sex marriage.

In *United States v. Morrison*,[257] the Court considered the Civil Rights Remedy,[258] a key provision of the Violence Against Women Act (VAWA),[259] which created a federal private right of action against any "person . . . who commits a crime of violence motivated by gender."[260] Congress enacted this remedy in response to evidence that states were providing uneven, and often inadequate, redress to female violent-crime victims. When Congress first considered the bill in 1990, ten states prohibited women from bringing tort actions against their

255. *See supra* note 218 and accompanying text.

256. *See* Parental Kidnapping Prevention Act of 1980, 28 U.S.C. § 1738A(a) (2006) (requiring states to enforce custody and visitation determinations of other state courts); UNIF. CHILD CUSTODY JURISDICTION & ENFORCEMENT ACT, 9 (pt. IA) U.L.A. 655 (1998 & Supp. 2011).

257. 529 U.S. 598 (2000).

258. Civil Rights Remedies for Gender-Motivated Violence Act, Pub. L. No. 103-322, § 40302, 108 Stat. 1941 (1994) (codified at 42 U.S.C. § 13981 (2006)).

259. Violence Against Women Act of 1994, Pub. L. No. 103-322, § 40001–40703, 108 Stat. 1902 (codified in scattered sections at 18 U.S.C. and 42 U.S.C.) [hereinafter VAWA].

260. 42 U.S.C. § 13981(c) (2006).

abusive spouses,[261] seven states disallowed marital rape prosecutions,[262] and twenty-six states permitted such prosecutions under limited circumstances, such as when there was evidence of force and physical injury.[263] Although most states had hate-crime statutes in 1990, fewer than a dozen such laws addressed gender animus.[264] Evidence from seventeen states' Gender Bias Task Forces illustrated that even when states had women-protective criminal and tort laws, police, prosecutors, and judges often treated crimes targeting women less seriously than other violent crimes.[265]

Congress's justification for enacting the Civil Rights Remedy was not the lack of uniformity among state laws per se, but rather the private externalities affecting women, their families, and their employers, resulting from insufficient state attention to such crime. According to congressional testimony, female violent-crime victims frequently left their jobs, their state, or both as a consequence not only of the crime, but also of the ineffective response at the hands of the state. Several witnesses testified that as a result of rape, sexual assault, or domestic abuse, they were fired from or abandoned their employment.[266] Some women described how their husbands or boyfriends forced them to join in their own moves out of state to elude the police following problems with the law, whereas other women testified that they sought to cross state lines to escape their abusive husbands or boyfriends.[267] Either way, the forced mobility of

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261. *Women and Violence: Hearing Before the S. Comm. on the Judiciary*, 101st Cong. 64 (1990) (statement of Helen R. Neuborne, Executive Director, NOW Legal Defense and Education Fund).

262. S. REP. NO. 102-197, at 45 & nn.49–50 (1991); *see also* S. REP. NO. 103-138, at 42 (1993) (explaining the various state criminal approaches to marital rape); S. REP. NO. 101-545, at 40–41 (1990) (explaining that "when [an] assault is gender-motivated, and it takes place in the home or is sexual in nature, the criminal justice system, in many instances, has not recognized the crime"). Some states also immunized former husbands or cohabitants from prosecution for sexual assault. S. REP. NO. 102-197, at 45 n.50.

263. S. REP. NO. 102-197, at 45 n.50.

264. S. REP. NO. 103-138, at 48 & n.47. "According to the Anti-Defamation League of B'nai B'rith, only 10 States . . . now include gender bias in their hate crimes laws." *Id.* at 48 n.47 (citing STEVEN M. FREEMAN ET AL., ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, HATE CRIMES STATUTES: A 1991 STATUS REPORT: INCLUDING ADL MODEL LEGISLATION (1991)).

265. S. REP. NO. 102-197, at 43 ("[C]rimes disproportionately affecting women are often treated less seriously than comparable crimes against men."); *see also* S. REP. NO. 103-138, at 42 (identifying excuses and tactics for diminishing seriousness of violent crimes against women).

266. *See, e.g.*, S. REP. NO. 103-138, at 54 ("Even the fear of gender-based violence affects the economy because it deters women from taking jobs in certain areas or at certain hours that pose a significant risk of such violence.").

267. *See, e.g.*, *Domestic Violence: Not Just a Family Matter: Hearing Before the Subcomm. on Crime & Criminal Justice of the H. Comm. on the Judiciary*, 103d Cong. 15 (1994) (statement of Karla M. Digirolamo, Executive Director, N.Y. State Office of the Prevention of Domestic Violence) (testifying that she fled with child out of state); *Violent Crimes Against Women: Hearing Before the S. Comm. on the Judiciary*, 103d Cong. 75 (1993) (statement of Dr. John Nelson, Deputy Director, Department of Health, Salt Lake City, UT) (describing a woman who had fled across seven states with her eighteen-month-old child before her husband tracked her down and shot the child in the head, killing him); *Violence Against Women: Hearing Before the Subcomm. on Crime & Criminal Justice of the H. Comm. on the Judiciary*, 102d Cong. 55 (1992) (statement of Jane Doe) (relating that she was battered in four different states and seven different cities); *Domestic Violence: Terrorism in the Home:*

women resulted in considerable personal suffering in addition to economic externalities on affected businesses and family members. The interstate nature of these burdens also presented serious state-level enforcement difficulties,[268] persuading Congress that sex-related violence would continue to "overhang[] the market" absent federal legislation.[269]

At one level, the Civil Rights Remedy resembles the public accommodations provisions sustained in *Heart of Atlanta Motel* and *Katzenbach*. Both sets of underlying legal policies are intended to lift the burdens suffered by individuals based on arbitrary characteristics—race and sex—in a manner that inhibits economic participation and interstate travel.[270] It might appear that even accepting *Lopez*, VAWA's Civil Rights Remedy falls within a venerable tradition of federal civil rights laws that solve "artificial restriction[s] on the market."[271]

Alternatively, the *Morrison* result might rest on either of two distinctions. First, at the time of the civil rights cases, vehicular transit across state lines in the South by African-Americans was commonplace, and the failure of accessible, clean, and high-quality accommodations was widely known. In fact, these difficulties were sufficiently well-known that they often inhibited travel or forced night travel. Second, in that context, the failure of even a single state to enact a public accommodations law could undermine a benign regime among other states, assuming, contrary to history, that most states had provided relief. By contrast, the decision to decline adding civil remedies to state criminal sanctions against gender-motivated crime is substantially less likely to undermine coordinated state laws. This is due to an important difference between the race and sex contexts. Although men and women have always tended to travel together, in the civil rights era especially, the races did not. Permitting places of

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Hearing Before the Subcomm. on Children, Family, Drugs & Alcoholism of the S. Comm. on Labor & Human Res., 101st Cong. 32 (1990) (statement of Sarah M. Buel) (explaining that she fled from New York City to New Hampshire, and, after her husband hunted her down, moved "virtually every year" of her son's then-fifteen years of life).

268. Forty-one state Attorneys General from thirty-eight states urged Congress to enact the Civil Rights Remedy on the ground that states could not solve the problem of gender-motivated violence on their own. *Crimes of Violence Motivated by Gender: Hearing Before the Subcomm. on Civil & Constitutional Rights of the H. Comm. on the Judiciary*, 103d Cong. 34–36 (1993) (Attorneys General Letter).

269. *See Violence Against Women: Victims of the System: Hearing Before the S. Comm. on the Judiciary*, 102d Cong. 116 (1991) (statement of Cass R. Sunstein, Professor, University of Chicago) (noting that "sex-related violence . . . discourages women from working in jobs and travelling to places in which sex-related violence occurs").

270. *Compare* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 253 (1964) (referring to racial discrimination in public accommodations as a "nationwide" problem that "had the effect of discouraging travel on the part of a substantial portion of the Negro community"), *with* S. REP. NO. 103-138, at 54 ("Gender-based crimes and the fear of gender-based crimes restricts movement, reduces employment opportunities, increases health expenditures, and reduces consumer spending, all of which affect interstate commerce and the national economy."), *and* S. REP. NO. 101-545, at 43 (same).

271. Katzenbach v. McClung, 379 U.S. 294, 299 (1964) (quoting Attorney General) (internal quotation marks omitted); *see also* United States v. Lopez, 514 U.S. 549, 574 (1995) (Kennedy, J., concurring) (explaining that Congress can regulate on the basis that "we have a single market and a unified purpose to build a stable national economy").

public accommodation to exclude blacks actually resulted in having blacks legally excluded. Invalidating the VAWA Civil Rights Remedy did not legalize gender-motivated crime; rather, it removed a supplemental remedy. The point is not to criticize VAWA or to defend *Morrison*. Instead, it is to demonstrate the classification difficulty that the civil remedies provision presents.

Laws respecting same-sex marriage are also difficult to classify. During the last twenty years, the number of states explicitly affirming or rejecting same-sex marriage has increased exponentially. The initial impetus was a 1993 Hawaii Supreme Court decision holding that the state's marriage law, which prohibited same-sex marriage, was subject to strict scrutiny because it discriminated on the basis of sex.[272] In 1996, anticipating that Hawaii would soon recognize same-sex marriage and aware that public-opinion polls suggested strong opposition,[273] Congress enacted the Defense of Marriage Act (DOMA),[274] pursuant to Article IV's Full Faith and Credit Clause.[275] The statute defines marriage for federal purposes as "only a legal union between one man and one woman as husband and wife,"[276] and authorizes states to deny full faith and credit to same-sex marriage decrees from other states based on contrary public policy.[277]

DOMA's passage set off two distinct chain reactions at the state level. As of 2006, forty states enacted so-called "mini-DOMAs," opposing same-sex marriage decrees from other states on policy grounds.[278] A minority of states, however, moved in the opposite direction.[279] Nine jurisdictions—Connecticut, the District of Columbia, Iowa, Maryland, Massachusetts, New Hampshire, New York, Vermont, and Washington—now permit same-sex marriage, five based on legislation and three following judicial decisions.[280] Ten additional

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272. Baehr v. Lewin, 852 P.2d 44, 67 (Haw. 1993).

273. In 1996, sixty-five percent of the public polled opposed same-sex marriage. David Masci, *Public Opinion on Gay Marriage: Opponents Consistently Outnumber Supporters*, THE PEW FORUM ON RELIGION & PUB. LIFE (July 9, 2009), http://pewforum.org/Gay-Marriage-and-Homosexuality/Public-Opinion-on-Gay-Marriage-Opponents-Consistently-Outnumber-Supporters.aspx#1.

274. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2006) and 28 U.S.C. § 1738C (2006)) ("No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.").

275. *See* U.S. CONST. art. IV, § 1.

276. 1 U.S.C. § 7 (2006).

277. *See* 28 U.S.C. § 1738C (2006).

278. ANDREW KOPPELMAN, SAME SEX, DIFFERENT STATES: WHEN SAME SEX MARRIAGES CROSS STATE LINES 8 (2006).

279. Notably, Hawaii was not one of these states. While *Baehr* was on appeal, "sixty-nine percent of the citizens of Hawai'i voted to ratify what is now article I, section 23 of the Hawai'i Constitution: 'The legislature shall have the power to reserve marriage to opposite-sex couples.'" David Orgon Coolidge, *The Hawai'i Marriage Amendment: Its Origins, Meaning and Fate*, 22 U. HAW. L. REV. 19, 20 (2000) (quoting HAW. CONST. art. I, § 23).

280. D.C. CODE § 46-401(a) (Supp. 2011); N.H. REV. STAT. ANN. § 457:1-a (LexisNexis Supp. 2010); N.Y. DOM. REL. LAW § 10-a (McKinney Supp. 2012); VT. STAT. ANN. tit. 15, § 8 (2010); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 482 (Conn. 2008); Varnum v. Brien, 763 N.W.2d 862, 907

states have, or will soon allow, "domestic partnerships" or "civil unions," conferring many of the same state benefits as marriage but without the symbolic benefit of conveying full marriage rights.[281] California has, at different times, bridged both sides of the apparent separating equilibrium: Through a judicial decision, it briefly permitted same-sex marriage in 2008,[282] and then, following an initiative, it approved Proposition 8, restricting marriage to opposite-sex couples.[283] As this Article goes to press, a split panel of the United States Court of Appeals for the Ninth Circuit struck down Proposition 8,[284] a result that is almost certain to be the subject of either mini-en banc review within the Ninth Circuit or of a petition for writ of certiorari to the United States Supreme Court.[285]

The many externalities that the California law poses—encouraging same-sex couples to seek marriage out of state, even if those marriages are not recognized in California,[286] and promoting same-sex-marriage-related industries in other states[287]—are primarily economic. The costs generally fall on private parties without adversely affecting the laws of other states. Traditionally, such laws

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(Iowa 2009); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 969 (Mass. 2003); Nicole Neroulias, *Washington Gay Marriage Debate Not Yes or No, but Both*, REUTERS, Feb. 16, 2012, http://www.reuters.com/article/2012/02/16/us-usa-gaymarriage-washington-idUSTRE81F10T20120216. The Governor of Maryland signed the same-sex marriage bill on March 1, 2012, but "[t]he law doesn't take effect until 2013, and opponents have started the process to collect signatures for an attempt to repeal the measure in November." Annie Linskey, *Same-sex Marriage Bill Is Signed into Law; Measure Is Expected to Have an Impact Beyond the State's Borders*, BALT. SUN, Mar. 2, 2012, at A1.

281. *See, e.g.*, CAL. FAM. CODE §§ 297–299.6 (Deering 2006 & Supp. 2011); ME. REV. STAT. tit. 22, § 2710 (Supp. 2010); NEV. REV. STAT. § 122A (2011); N.J. STAT. ANN. § 26:8A (West 2007); OR. REV. STAT. §§ 106.300–.340 (2009); R.I. GEN. LAWS § 15-3.1 (Supp. 2011); WIS. STAT. § 770.001 (2009–2010). Delaware began to recognize same-sex civil unions on January 1, 2012, pursuant to the passing of Civil Union and Equality Act of 2011. 78 Del. Laws ch. 22. Civil unions became available in Hawaii on January 1, 2012, pursuant to the passing of Senate Bill 232, which is currently known as Act 1. 2011-1 Haw. Rev. Stat. Ann. Adv. Legis. Serv. 1 (LexisNexis). Illinois Senate Bill 1716 was passed in January 2011, and the Illinois Religious Freedom Protection and Civil Union Act came into effect on June 1, 2011. 2010 Ill. Legis. Serv. 4349 (West). As a consequence of DOMA's definitional provision, same-sex couples domiciled in permissive states cannot enjoy federal marital benefits, including those arising from joint tax returns, Social Security, the Family and Medical Leave Act, and Federal Employees Health Benefits and Group Life Insurance programs. Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act Is Unconstitutional*, 83 IOWA L. REV. 1, 3–4 (1997).

282. *In re* Marriage Cases, 183 P.3d 384, 409, 440–44 (Cal. 2008) (striking down provisions in the California Family Code limiting marriage to a union "between a man and a woman" based on California's equal protection requirement).

283. CAL. CONST. art. I, § 7.5.

284. Perry v. Brown, No. 10-16696, 2012 WL 372713 (9th Cir. Feb. 7, 2012).

285. Adam Nagourney, *California Ban on Gay Unions Is Struck Down*, N.Y. TIMES, Feb. 8, 2012, at A1.

286. "Pursuant to section 308.5 [of California's "mini-DOMA" initiative], California will not recognize same-sex marriages even if those marriages are validly formed in other jurisdictions." Knight v. Superior Court, 26 Cal. Rptr. 3d 687, 691 (Cal. Ct. App. 2005).

287. On the first day of legal same-sex marriages in New York, 107 of the 659 couples that obtained marriage licenses in New York City were nonresidents. Michael Barbaro, *After Long Wait, Same-Sex Couples Marry in New York*, N.Y. TIMES, July 24, 2011, http://www.nytimes.com/2011/07/25/nyregion/after-long-wait-same-sex-couples-marry-in-new-york.html.

have not been sufficient to justify congressional Commerce Clause regulation.[288] It is less apparent that Proposition 8 affects structural shifts in legal policies among states. Unlike in *Bibb* and *Kassel*, there is no evident benign coordination among state policies respecting same-sex marriage that the change in California law disrupts. To the contrary, the trend is already toward a policy split in which some states favor and others oppose same-sex marriage. It is not at all clear that any particular state law on the subject is motivated by the same, or contrary, policy on that issue in other states, as opposed to a response to domestic political pressures respecting an important, and highly partisan, issue.

One indication that Congress regarded itself as lacking the authority to enact an outright ban on same-sex marriage is DOMA itself. Although that statute has come under increasing scrutiny from the left since enactment, the statute expressly ensured that the issue of same-sex marriage would remain with the states. It appears that the state-level resolution of this issue is likely the result of internal political dynamics rather than external pressures brought on by enactments in other states. As we have previously observed, however, these dynamics can change over time.[289]

4. The Individual Mandate

Along the spectrum of the prior case studies, the individual mandate, like the public accommodations provision, presents a strong case justifying congressional power to intervene in an emerging separating-equilibrium game among states. State policies, whether imposing additional coverage obligations on insurers, not only produce economic externalities, including mobility by insurance companies and high-risk persons seeking coverage, but also political externalities, encouraging states that have not weighed in to select their regime in response to those of other states. The ACA is frequently understood as solving a separating-equilibrium game at the micro-level: In the absence of the individual mandate, low-risk individuals often self-insure, whereas high-risk individuals fail to obtain health insurance or pay enormously high premiums. A system largely dependent on employer-provided, family-based coverage infuses sufficient stickiness to avoid a total separating equilibrium,[290] and yet the United States regime has undermined pooling by discouraging a large number of young and healthy persons from obtaining coverage at all and by preventing too many high-risk persons from affording coverage.[291] If insurers are obligated to provide coverage to those at high risk, the resulting premium differential is exacerbated by the disincentive of all but those in immediate need to obtain coverage. Of course, delaying coverage until needed entirely defeats risk pooling.

288. *See generally supra* Part II.
289. *See* discussion *supra* section III.B.2.
290. *See* Allard, Cresta & Rochet, *supra* note 11.
291. *See supra* section I.B.

Although debates concerning the ACA have largely focused on the efficacy of the individual mandate at a micro-level, advocates and detractors alike have failed to appreciate that the Act addresses a more significant state-level macro game. The complex scheme of forcing additional coverage obligations on insurers, and obligations to purchase insurance on those at low risk, reduces incentives for high-risk individuals to seek out high-regulation states and for insurers to seek out low-regulation states. When states attempt to resolve the micro-level separating game, they instead generate a macro-level separating game. This game, which operates in parallel with the one at issue in *Heart of Atlanta Motel* and *Katzenbach*, falls within the ambit of policies Congress can resolve under the Commerce Clause.

In the pre-ACA era, states responded to the health-insurance crisis in one of three ways: Some states neither required individuals to purchase insurance nor insurers to provide it (the majority approach); others required insurers to provide universal coverage without mandating that individuals obtain coverage (Kentucky, Maine, New Hampshire, New Jersey, New York, Vermont, and Washington);[292] and a single state both required insurance companies to provide coverage without regard to risk and required all individuals to purchase insurance (Massachusetts).[293] Because most states fell into the first category, most health-insurance policy discussions focused on two types of economic externalities, both affecting individuals and resulting from the failure simultaneously to regulate insurers and prospective insureds.

First, unregulated insurers in the majority of states could inquire about an applicant's health status, classify the applicant, and base premiums accordingly. This underwriting practice precluded coverage for those at high risk or produced prohibitive premiums despite exclusions for known preexisting conditions.[294] Consequently, many high-risk individuals lacking employer- or government-provided health insurance who could not afford the premiums joined the ranks of the uninsured.[295] Second, because the majority of states did not require individuals to purchase insurance, many chose to self-insure, pay for care as needed, or remain uninsured. In the event of an emergency and a lack of personal funds, many have relied on public hospitals as a safety net.[296] Because

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292. *See* KY. REV. STAT. ANN. § 304.17A-070(2)(m) (LexisNexis 2011) (repealed 1998); ME. REV. STAT. ANN. tit. 24-A, § 2736-C(3) (2000 & Supp. 2011); N.H. REV. STAT. ANN. § 420-G:6 (LexisNexis Supp. 2010); N.J. STAT. ANN. § 17B:27A-22 (West 2006); N.Y. INS. LAW §§ 3231, 3232 (McKinney 2010 & Supp. 2012); VT. STAT. ANN. tit. 8, § 4080b(d)(1) (Supp. 2010); WASH. REV. CODE ANN. § 48.43.012(1) (West 2008 & Supp. 2012).

293. An Act Providing Access to Affordable, Quality, Accountable Health Care, 2006 Mass. Acts 77, *available at* http://www.malegislature.gov/Laws/SessionLaws/Acts/2006/Chapter58.

294. THE HENRY J. KAISER FAMILY FOUND., HOW PRIVATE HEALTH COVERAGE WORKS: A PRIMER, 2008 UPDATE 6–7 (2008), http://www.kff.org/insurance/upload/7766.pdf; *see also* Tom Baker & Jonathan Simon, *Embracing Risk*, *in* EMBRACING RISK: THE CHANGING CULTURE OF INSURANCE AND RESPONSIBILITY 1, 11–12 (Tom Baker & Jonathan Simon eds., 2002) (discussing risk and insurance).

295. *See supra* notes 21–23 and accompanying text.

296. *See supra* notes 24–25 and accompanying text.

uninsureds are more likely to postpone medical care, eventual medical needs, and costs, rise.[297] Health care providers shift those costs onto insureds, raising premiums.[298] Although these troublesome economic externalities explain the policy decision to couple an individual mandate with universal coverage, the political externalities that threaten a separating equilibrium among states explain why such a policy must necessarily be implemented by Congress pursuant to the Commerce Clause.

The unusual circumstances in Massachusetts ultimately support our claim that state-level policy making is inadequate to address this issue effectively. In 1996, when Massachusetts undertook significant health care reform, it not only was one of the wealthiest states in the country; it also was one of the healthiest. Massachusetts was ranked third in the nation for per capita income and was experiencing personal income growth that far outpaced the national average.[299] Its unemployment rate was falling,[300] and although Massachusetts had a higher cost of living than the national average, its poverty rates were substantially lower than the national average.[301] And the state's economic well-being was reflected in the good health of its citizens. As compared to their counterparts in other states, adults in Massachusetts were less likely to be in poor health, overweight, or smokers,[302] and were more likely to receive preventative and specialty medical care, engage in exercise, and eat healthily.[303]

Notably, Massachusetts also benefitted from several financial factors that eased its path to universal health care coverage. In 1996, the number of uninsured individuals in Massachusetts was "only about two-thirds of the national average,"[304] which left the state with fewer individuals to subsidize under its proposed individual mandate and universal coverage provisions. Although often overlooked as a reason for Massachusetts's success in passing reform legislation, the fact that the state had substantial funding support for its

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297. *Cf.* COMM. ON THE CONSEQUENCES OF UNINSURANCE, INST. OF MED., HEALTH INSURANCE IS A FAMILY MATTER 7, 117 (2002) (noting that "families without health insurance are more likely to have health expenses that exceed 5 or 10 percent of their income" and "[u]ninsured, lower-income children were more likely to . . . postpone or forgo medical . . . care").

298. BEN FURNAS & PETER HARBAGE, CTR. FOR AM. PROGRESS ACTION FUND, THE COST SHIFT FROM THE UNINSURED 1–2 (Mar. 24, 2009), http://www.americanprogressaction.org/issues/2009/03/pdf/cost_shift-.pdf (finding an eight percent increase in the average premiums from cost shifting).

299. Between 1990 and 2004, Massachusetts experienced an eighty percent increase in per capita personal income, whereas the average per capita income growth across the country was sixty-eight percent. MASS. DIV. OF HEALTH CARE FIN. & POLICY, MASSACHUSETTS HEALTH CARE TRENDS: 1990–2005, at 15 & fig.1.10 (3d ed. 2006).

300. *Id.* at 16.

301. *Id.*

302. *See Massachusetts—The Rankings*, UNITED HEALTH FOUND., http://www.americashealthrankings.org/MA/1996 (last visited Jan. 18, 2012).

303. *See id.*; *see also* MASS. DIV. OF HEALTH CARE FIN. & POLICY, *supra* note 299, at 38 (illustrating the strong presence of medical specialists in Massachusetts).

304. Gail R. Wilensky, *The Massachusetts Experience: Can It Inform the National Debate?*, HEALTHCARE FIN. MGMT., June 2009, at 32, 33; MASS. DIV. OF HEALTH CARE FIN. & POLICY, *supra* note 299, at 21 & fig.2.1.

reform measures is significant. Massachusetts, which received federal benefits under a Medicaid Section 1115 waiver, negotiated an arrangement with the federal government to funnel those payments, which were scheduled to end in 2005 and worth $385 million, into a state health plan for low-income, uninsured individuals.[305] The state also was able to dedicate substantial funding from its previous uncompensated care fund to its new reform effort.[306] Although none of these factors standing alone make Massachusetts unique, the combined effect produced a regulatory environment that other states did not experience and almost certainly could not replicate.

Massachusetts now boasts the lowest percentage of uninsured residents per capita of any state in the country by a considerable margin.[307] But that statistical feat was costly. The Massachusetts plan, which remains in effect, requires uninsured individuals and specified employers to purchase a minimum level of health insurance for themselves or their employees, respectively, or face tax penalties.[308] The state provides completely subsidized, comprehensive health insurance to adults earning up to 150% of the federal poverty level (FPL) and partially subsidized insurance to adults earning up to 300% of the FPL.[309] Low-income individuals who do not meet these cutoffs and who are not eligible for employer-provided insurance benefit from lower premiums generated by the state-mandated merger of group and individual health-insurance plans.[310] The Massachusetts plan also prohibits insurance companies from rejecting an application for coverage on the basis of health status.[311] Because insurers ultimately must guarantee policies to all consumers without regard to preexisting conditions,[312] many pre-reform insurance providers have left the state.[313]

This political externality was magnified in the seven states that, pre-ACA, prohibited insurance companies from excluding people from coverage on the

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305. Wilensky, *supra* note 304, at 33.

306. *Id.* The uncompensated care pool was equal to about $232 million in fiscal year 2006. *Id.*

307. In 2009, 83.3% of Americans had health insurance coverage. DENAVAS-WALT, PROCTOR & SMITH, *supra* note 20, at 71 tbl.C-1. However, in 2010, 98.1% of Massachusetts residents were covered under a health insurance plan. MASS. DIV. OF HEALTH CARE FIN. & POLICY, HEALTH INSURANCE COVERAGE IN MASSACHUSETTS: RESULTS FROM THE 2008–2010 MASSACHUSETTS HEALTH INSURANCE SURVEYS 1 (2010).

308. KAISER COMM'N ON MEDICAID & THE UNINSURED, THE HENRY J. KAISER FAMILY FOUND., MASSACHUSETTS HEALTH CARE REFORM PLAN: AN UPDATE 1 (June 2007), http://www.kff.org/uninsured/upload/7494-02.pdf.

309. *Id.*

310. *See, e.g.*, MASS. HEALTH CONNECTOR, HEALTH REFORM FACTS AND FIGURES, (2011), https://www.mahealthconnector.org/portal/binary/com.epicentric.contentmanagement.servlet.ContentDeliveryServlet/Health%2520Care%2520Reform/Facts%2520and%2520Figures/Facts%2520and%2520Figures.pdf.

311. MASS. GEN. LAWS ch. 176Q, § 5(c) (West 2010).

312. MASS. GEN. LAWS ch. 176J, § 5(b). ("Pre-existing conditions provisions shall not exclude coverage for a period beyond 6 months after the individual's effective date of enrollment . . . .").

313. Adele M. Kirk, *Riding the Bull: Experience with Individual Market Reform in Washington, Kentucky, and Massachusetts*, 25 J. HEALTH POL. POL'Y & L. 133, 166 (2000) (noting that "none of the commercial insurers in the 1995 nongroup market [in Massachusetts] chose to offer reform policies, and have instead closed their books").

basis of preexisting conditions but lacked minimum coverage provisions requiring individuals or employers to purchase insurance. In Kentucky, which eventually repealed its 1994 plan,[314] nearly all insurers exited the market,[315] blaming the state's preexisting conditions provision.[316] Insurers also fled Maine due to its preexisting-condition provision. The Maine Bureau of Insurance concluded in 2001 that thirteen of its eighteen pre-reform insurers had left the state[317] and that its remaining insurers had drastically increased premiums due to the higher-risk pool.[318] New York, New Jersey, and Vermont experienced similar post-reform outcomes.[319]

New Hampshire and Washington experienced even more dire results. When its largest insurer, Blue Cross Blue Shield, exited the state, New Hampshire had so few remaining insurers that it induced return with financial incentives,[320] and also allowed exclusions for preexisting conditions for up to nine months.[321] Likewise, when Washington's largest insurer stopped underwriting individual policies,[322] the state allowed insurers to deny coverage to many at high-risk.[323] These cases demonstrate that when insurers face coverage obligations in some states but not others, they exit the high-cost market, thus placing political pressure on those states to modify or eliminate their coverage requirements. In addition, these moves pressure other states to avoid imposing comparable obligations lest they too lose their insurers.

The economic effects of state-level policymaking efforts to increase the number of insureds are significant and are felt by insurers and insureds alike. The question for Commerce Clause purposes, however, is not the scope or magnitude of these effects. Nor is it the merit of the chosen regulatory policy. As the Court noted as early as *McCulloch v. Maryland*, the Necessary and

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314. 1998 Ky. Laws Ch. 496 (H.B. 315).

315. By 1997, there were only two companies selling new individual policies, a stark decline from the more than forty insurers in the market before the reform. *See* Kirk, *supra* note 313, at 152.

316. *See id.* at 153.

317. *See* ME. BUREAU OF INS., ME. DEP'T OF PROF'L & FIN. REGULATION, WHITE PAPER: MAINE'S INDIVIDUAL HEALTH INSURANCE MARKET 8 tbl.C (Jan. 22, 2001), http://www.maine.gov/pfr/legislative/documents/indiv_health_2001.pdf.

318. *See id.* at 6 tbl.A, 7 tbl.B, 10 (describing how many of the remaining insurers doubled their premiums in less than three years).

319. New York's insurance reform resulted in a higher-than-average increase in uninsured individuals. Mark A. Hall, *An Evaluation of New York's Reform Law*, 25 J. HEALTH POL. POL'Y & L. 71, 76–77 (2000). In New Jersey and Vermont, insurance premiums multiplied exponentially as a result of reform. *See* Mark A. Hall, *An Evaluation of Vermont's Reform Law*, 25 J. HEALTH POL. POL'Y & L. 101, 115 (2000); Alan C. Monheit et al., *Community Rating and Sustainable Individual Health Insurance Markets in New Jersey*, 23 HEALTH AFF. 167, 169–70 & exhibit 3 (2004).

320. New Hampshire assessed its group insurers and excess-loss carriers an amount per covered person (thirty-six cents monthly in 2000), and then distributed that money to individual carriers with large losses. ME. BUREAU OF INS., *supra* note 317, at 5 (raising concerns about the outcome in New Hampshire).

321. N.H. REV. STAT. ANN. § 420-G:7(I) (LexisNexis 2009).

322. Premera Blue Cross announced in 1998 that it would no longer sell individual policies in Washington. Kirk, *supra* note 313, at 140.

323. *See* ME. BUREAU OF INS., *supra* note 317, at 5, 31 (describing Washington's reform experience).

Proper Clause affords Congress ample choice of means provided the subject falls within the ambit of federal regulatory authority.[324] The Court has long construed that clause expansively, allowing broad range in implementing federal policy.[325] As applied to the ACA, the question is not whether the decision to address the growing concern of a large subpopulation of uninsureds is wise or the means ill-conceived. The question is simply this: Did Congress have a rational basis for concluding that federal regulatory intervention was required to address this policy?

The answer is clearly yes. The difficulty with allowing states to sort out the problem of increased coverage is that, as the public accommodations provisions of the Civil Rights Act show, the predictable result is a separating equilibrium. The resulting state split, unlike those involved in abortion funding or the death penalty, does not merely reflect policy differences, however deeply held. Rather, this separating equilibrium is attributable to a structural problem that the states cannot solve on their own.

The several states that attempted to coerce coverage of high-risk insureds witnessed firsthand the exit of insurers to low-regulation jurisdictions. Although data are not available, Congress could reasonably intuit that high-risk insureds would seek to move in the opposite direction, toward states imposing high-coverage obligations. It might appear that Massachusetts proves that states can solve this regulatory problem by coupling obligations to cover high-risk insureds with corresponding obligations on low-risk insureds to seek coverage, but it is far more likely that the Massachusetts exception points to the more general rule.

One might speculate as to why Massachusetts was able to impose the two-edged regulatory obligations when other states, even if they tried some reform, did not go so far. Although it is possible to ascribe this to the greater creativity of the Massachusetts General Assembly, this is not only unfair to those in other states, but it is also unconvincing. The far more likely explanation is that Massachusetts, for any number of reasons, has a stronger ability to capture its residents and insurers than other jurisdictions. This might hold true as well for a small number of states that offer special geographical, educational, or other advantages that translate into a form of state market power. But if we set these exceptions aside, we can appreciate the game that states generally confront.

If we assume that states generally lack the power to impose individual mandates, then not selecting a regime at all is equivalent to choosing low regulation. Only by imposing regulatory obligations on insurers do states signal the opposing high-regulation regime. The low-regulation regimes will attract insurers and the high-regulation regimes will attract high-risk insureds. The micro-level separating equilibrium game that is the focus of the ACA statutory

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324. 17 U.S. (4 Wheat.) 316, 323–25 (1819).

325. *See id.* at 325–26; United States v. Comstock, 130 S. Ct. 1949, 1952 (2010); *see also supra* note 200 (explaining in further detail these applications of the Necessary and Proper Clause).

policy becomes embedded within this larger state-driven separating-equilibrium game. States cannot solve this regulatory problem because states—and, more specifically, political externalities driven by state policies—are the problem.

As more states explicitly opt for one regime or the other in the absence of the ACA, the remaining states will perceive an obligation to take sides in an emerging split—which can be manifested through direct actions against the default rule or alternatively through inaction—between these two competing policies. Whatever market power Massachusetts holds, and for whatever reasons, one thing is clear: The federal government has far greater market power over the nation as a whole. Its ability to capture both insurers and insureds is sufficient to put in place a scheme that the states acting on their own cannot. Because Congress can thus restore a pooling equilibrium to what otherwise emerges as a separating-equilibrium game, Congress's reliance on the Commerce Clause falls within a long tradition of case law recognizing this vital congressional power.

CONCLUSION

This Article does not pass judgment on the merits of the ACA as a matter of policy. Instead, it demonstrates two essential facts. First, the individual mandate is a necessary feature of the larger federal regulatory effort to expand coverage for uninsureds while forcing insurers to cover those at high risk. And second, as a consequence of political externalities that would confront state efforts to implement this scheme, the ACA falls well within Congress's Commerce Clause powers.

In reviewing the ACA, we observed that the federal government has market power over firms and individuals that virtually no single state shares. It is naïve to imagine, however, that even the power of federal capture is limitless. Although it is fanciful to imagine that citizens will flee the United States for imposing minimum coverage obligations—given that we were among the last of the developed nations boarding this train, where would they go?—it is less obvious that firms could not rebel. Multinational firms demonstrate the prospects for capital mobility in our increasingly small world. But one need not even go quite that far to see the point. Insurance companies can simply stop underwriting policies if the conditions under which they are operating are no longer financially viable, thereby placing greater stress on states, and perhaps ultimately Congress, to recognize the substantial hidden costs of the individual mandate. Or, perhaps more optimistically, the regime will prove worth the cost, even admitting that substantial adjustments will be required along the way.

The major point is that the constitutionality of the ACA and the merits of the individual mandate are different questions. Democracies are allowed to experiment, and with experimentation comes the risk of getting things wrong. Democracy also holds the promise of sometimes getting things unexpectedly right. Assuming the Court upholds the ACA—as we believe it should—only time will tell into which category this statute will eventually fall.