



THE SIXTH ANNUAL  
FRIEDRICH A. VON HAYEK LECTURE

COMMANDEERING THE PEOPLE:  
WHY THE INDIVIDUAL HEALTH  
INSURANCE MANDATE IS  
UNCONSTITUTIONAL

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**ABSTRACT:** The “Patient Protection and Affordable Care Act” includes what is called an “individual responsibility requirement” or mandate that all persons buy health insurance from a private company and a separate “penalty” enforcing this requirement. In this paper, I do not critique the individual mandate on originalist grounds. Instead, I explain why the individual mandate is unconstitutional under the existing doctrine by which the Supreme Court construes the Commerce and Necessary and Proper Clauses and the tax power. There are three principal claims.

First (Part II), since the New Deal, the Supreme Court has developed a doctrine allowing the regulation of wholly intrastate activity: the substantial effects doctrine. Although commonly conceived as a Commerce Clause doctrine, from its inception this doctrine has been grounded in the Necessary and Proper Clause. In the 1990s, the Supreme Court developed a judicially administrable test for whether it is “necessary” for Congress to reach intrastate activity that substantially affects interstate commerce: the distinction between economic and noneconomic intrastate activity. Because the individual mandate fails to satisfy the requirements of this test as understood under existing doctrine, it exceeds the power granted to Congress by the Commerce and Necessary and Proper Clauses as currently construed by the Supreme Court. The mandate also fails to satisfy an alternative to the substantial effects doctrine that was proposed by Justice Scalia in a concurring opinion in *Gonzales v. Raich* because it extends beyond the regulation of intrastate activity to reach inactivity.

Second (Part III), because the “individual responsibility requirement” purports to be a regulation of commerce and cannot possibly be construed as a tax, it is not justified under the tax power of Congress; and, if the “requirement” or mandate is an unconstitutional regulation, there is nothing for the “penalty” to enforce. Neither is the penalty, considered apart from the regulatory requirement, a tax under current doctrine.

Third (Part IV), the Supreme Court should not further expand Congress’s power beyond existing doctrine to allow it to mandate that individuals engage in economic activity by entering into contracts with private companies. Such economic mandates are directly analogous to the commandeering of the states that the Supreme Court has held to be an improper exercise of the commerce power. The very few mandates that are imposed on the people pertain to

their fundamental duties as citizens of the United States, such as the duty to defend the country or to pay for its operation. A newfound congressional power to impose economic mandates to facilitate the regulation of interstate commerce would fundamentally alter the relationship of citizen and state by unconstitutionally commandeering the people.

In Part V, I conclude with a “realist” assessment of the likelihood that the Supreme Court will actually find the mandate to be unconstitutional.

### I. INTRODUCTION: WHAT THE CONSTITUTION SAYS

The “Patient Protection and Affordable Care Act” includes what is called an “individual responsibility requirement” that all persons buy health insurance from a private company.<sup>1</sup> Is this requirement constitutional? There are three ways to analyze whether a law is constitutional or not. Does it conflict with what the Constitution says? Does it conflict with what the Supreme Court has said? Are there five votes for a particular result? Unless we are clear about which sense of “unconstitutional” we are using, we are likely to talk past each other.

In my book *Restoring the Lost Constitution*,<sup>2</sup> I defend interpreting the text of the Constitution according to its original public meaning. I also contend that the evidence is overwhelming that the core original public meaning of “commerce” was trade or exchange of goods, including their transportation. Commerce means “with merchandise” and shares the same root as “merchants.” Even broadened to include all “intercourse” between states, commerce is still confined to the communication of something—whether goods, people, or messages—from one state to another. Commerce constitutes a subset of economic activity that is distinct from the economic activities of manufacturing or agriculture, both of which involve the production of the things to be transported or communicated from

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<sup>1</sup> Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1501, 124 Stat. 119 (2010).

<sup>2</sup> RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2005).

one state to another.

Not only was this the original meaning of “commerce,” but the Supreme Court has never expressly updated or broadened its meaning of the Commerce Clause, which says that Congress has the power “to regulate Commerce . . . among the Several states.”<sup>3</sup> Instead, during the New Deal, the Supreme Court used the Necessary and Proper Clause to allow Congress to regulate economic activities that were neither interstate nor commerce because such activities had a substantial effect on interstate commerce.

Under the original meaning of “commerce,” insurance contracts did not qualify. Such contracts are mere promises to pay money upon the occurrence of specified conditions, and do not involve the conveyance of goods or other items from one state to another. And so the Supreme Court held in the 1869 case of *Paul v. Virginia* that “issuing a policy of insurance is not a transaction of commerce.”<sup>4</sup> As the Court in *Paul* elaborated:

The policies are simple contracts of indemnity against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one State to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration.<sup>5</sup>

What is more, the Court further held that the fact that an insurance company and the insured were in different states did not render an insurance contract interstate commerce.

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<sup>3</sup> U.S. CONST. art. I, § 8 cl. 3.

<sup>4</sup> *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 183 (1868).

<sup>5</sup> *Id.*

Such contracts are not interstate transactions, though the parties may be domiciled in different States. The policies do not take effect—are not executed contracts—until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law. They do not constitute a part of the commerce between the States any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York whilst in Virginia would constitute a portion of such commerce.<sup>6</sup>

It is worth noting that *Paul* was decided in 1869, well before what came to be derisively called the Lochner Era. Thus, under the original meaning of the Commerce Clause, as affirmed by the Court, Congress lacks any power over the health insurance business. The insurance business, like the businesses of manufacturing or agriculture, is to be regulated exclusively by the states.

And so matters stood for 75 years—or more accurately for 150 years since the Founding—until the New Deal Supreme Court revisited the issue in 1944. In *United States v. South-Eastern Underwriters*,<sup>7</sup> the Court for the first time allowed Congress to regulate the interstate insurance business. In his opinion, Justice Black purported to adhere to original meaning: “Ordinarily courts do not construe words used in the Constitution so as to give them a meaning more narrow than one which they had in the common parlance of the times in which the Constitution was written.”<sup>8</sup> He then concluded that, “[t]o hold that the word ‘commerce’ as used in the Commerce Clause does not include a business such as insurance would do just that.”<sup>9</sup> Based only on a solitary passing observation by Alexander Hamilton concerning insurance, and the fact that “the

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<sup>6</sup> *Id.*

<sup>7</sup> *United States v. Se. Underwriters*, 322 U.S. 533 (1944).

<sup>8</sup> *Id.* at 539.

<sup>9</sup> *Id.*

dictionaries, encyclopedias, and other books of the period show that it included trade,"<sup>10</sup> Justice Black contended that

a heavy burden is on him who asserts that the plenary power which the Commerce Clause grants to Congress to regulate 'Commerce among the several States' does not include the power to regulate trading in insurance to the same extent that it includes power to regulate other trades or businesses conducted across state lines.<sup>11</sup>

But what of *Paul* and the seventy-five years' worth of cases that relied on it as precedent? Justice Black made short work of the now-hallowed doctrine of *stare decisis*. All of these cases, he contended, involved upholding state insurance regulations that had been essential in the absence of congressional regulation. The existence of these state regulatory schemes did not deprive Congress of its power to enter the field. And so was born the authority for Congress to regulate health insurance companies that had, until then, been exclusively regulated by the states.<sup>12</sup>

It is not my purpose here to demonstrate that the New Deal Court was wrong and even disingenuous when it claimed that the power to regulate the insurance business was justified by original meaning, though I do not mind recalling the Court's willingness to ignore a seventy-five-year-old well-entrenched precedent to uphold the post-New Deal powers of Congress. Nor will I be contesting the constitutionality of the individual mandate on the ground that it violates the original meaning of what *the Constitution* says.

Instead, my claim is that the mandate is unconstitutional in the second sense: based on what *the Supreme Court has said* in its Commerce and Necessary and Proper Clause decisions, presented in Part II—and also in its tax power decisions, presented in Part III.

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.* (footnote omitted).

<sup>12</sup> Immediately after *South-Eastern Underwriters*, Congress passed the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (1945) in order to preserve the existing state regulatory schemes.

Existing doctrine reveals the individual mandate is unconstitutional even if we assume that Congress has the power to regulate the insurance business that the New Deal Supreme Court gave it in *South-Eastern Underwriters*.

My position rests entirely on post-New Deal constitutional cases and doctrine, except where that doctrine does not reach a definitive conclusion so new reasoning is required. In Part IV, I contend that the Supreme Court should not extend the powers of Congress beyond what is authorized by existing law to uphold a mandate on individuals to engage in economic activity. Finally, in Part V, I conclude by briefly addressing the likelihood that the Supreme Court would actually hold the mandate unconstitutional.

## II. THE INDIVIDUAL MANDATE AND EXISTING COMMERCE AND NECESSARY AND PROPER CLAUSE DOCTRINE

### A. Existing Commerce and Necessary and Proper Clause Doctrine

#### 1. THE LAW PROFESSORS' UNDERSTANDING.

Let me begin by telling the story of the Supreme Court's Commerce Clause doctrine the way that most law professors today both teach and understand it. Until 1995, law professors believed that, beginning in 1937 with cases such as *NLRB v. Jones & Laughlin Steel*,<sup>13</sup> *United States v. Darby*,<sup>14</sup> and *Wickard v. Filburn*,<sup>15</sup> the Supreme Court had so expanded the scope of the commerce power of Congress that Congress could do anything it wanted provided it was not violating some other constitutional constraint, like the First Amendment.

Law professors were shocked, then, when the Supreme Court in 1995 held in *United States v. Lopez*<sup>16</sup> that the Gun Free School Zone Act unconstitutionally exceeded the commerce power of Congress. They interpreted this case as an aberration. By 1995, Congress had

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<sup>13</sup> *NLRB v. Jones & Laughlin Steel*, 301 U.S. 1, 37 (1937).

<sup>14</sup> *United States v. Darby*, 312 U.S. 100, 114 (1941).

<sup>15</sup> *Wickard v. Filburn*, 317 U.S. 111 (1942).

<sup>16</sup> *United States v. Lopez*, 514 U.S. 549 (1995).

become so complacent about the scope of its powers that it did not even bother to make findings about why the act was within its commerce power. Most law professors were confident that, in the future, the Court would uphold any law if Congress made adequate findings that the activity it sought to regulate had a substantial effect on interstate commerce.

So law professors were, once again, surprised when the Supreme Court in 2000 held in *United States v. Morrison*<sup>17</sup> that the Violence Against Women Act was unconstitutional— notwithstanding extensive hearings and findings about the substantial effects of violence against women on interstate commerce. In the wake of *Morrison*, law professors started to believe that the Court just might be serious about drawing a line between what is national and what is local, and lower courts started to be more receptive to Commerce Clause challenges.

In one such case I helped bring on behalf of Angel Raich and Diane Monson, the Ninth Circuit held that the Controlled Substances Act was unconstitutional as applied to marijuana grown at home for medical use as authorized by state law.<sup>18</sup> When the Supreme Court in *Gonzales v. Raich*<sup>19</sup> turned away this challenge, however, law professors breathed a sigh of relief that they had been right all along. They reverted to their pre-*Lopez* understanding that Congress can do pretty much whatever it wants under its commerce power.

Indeed, the new conventional wisdom is that, so long as Congress establishes a sweeping and ambitious regulatory scheme, it can reach any activity— whether economic or not— that it deems to be essential to that scheme. In other words, the more grandiose the claim of power by Congress, the stronger is its claim of constitutionality.

Hence some law professors have confidently asserted that Congress may, for the first time in American history, use its commerce

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<sup>17</sup> *United States v. Morrison*, 529 U.S. 598 (2000).

<sup>18</sup> *Raich v. Ashcroft*, 352 F.3d 1222 (9th Cir. 2003).

<sup>19</sup> *Gonzalez v. Raich*, 545 U.S. 1 (2005).



power to mandate that all individuals in the United States engage in economic activity.<sup>20</sup> After all, this mandate is essential to Congress's grandiose new scheme regulating private insurance companies, so under *Raich*, it must be constitutional.

Of course, when evaluating the individual mandate, five Justices are always free to disregard what the Court has previously said, just as Justice Black and a majority of Justices did in *South-Eastern Underwriters*. But this raises the third sense of constitutionality: what we can predict five Justices will do. Before we get to that issue, we need first to examine what the Supreme Court has said and what it has not said about the Commerce Clause. It is to this question I now turn.

## 2. THE NEW DEAL AND WARREN COURT'S CASES.

Before 1937, the Supreme Court had held that Congress could not use its power over interstate commerce as a pretext to reach such economic but noncommercial intrastate activities as manufacturing or agriculture, activities which were instead within the police power of states to regulate.<sup>21</sup> In 1937, in *NLRB v. Jones & Laughlin Steel*,<sup>22</sup> the Supreme Court held for the first time that Congress could regulate the labor relations of manufacturers and their workers because labor strife affected interstate commerce by obstructing the flow of manufactured goods bound for the interstate market. As the Court stated, "acts which directly burden or obstruct interstate or foreign commerce, or its free flow, are within the reach of the congressional power."<sup>23</sup> Such acts "are not rendered immune because they grow out of labor disputes. It is the effect upon commerce, not the source of the injury, which is the criterion."<sup>24</sup>

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<sup>20</sup> See, e.g., Mark A. Hall, *The Constitutionality of Mandates to Purchase Health Insurance* (The O'Neill Institute for National and Global Health Law, Wake Forest Univ. Legal Studies Paper No. 1334955), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1334955](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1334955).

<sup>21</sup> *United States v. E. C. Knight Co.*, 156 U.S. 1 (1895).

<sup>22</sup> *NLRB v. Jones & Laughlin Steel*, 301 U.S. 1 (1937).

<sup>23</sup> *Id.* at 31.

<sup>24</sup> *Id.* at 31-32.

In other words, although the activity being regulated was not commerce, it could be reached because of its *effects* on commerce. “Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control.”<sup>25</sup> Nevertheless, the Court concluded its opinion by offering the following reaffirmation of the scheme of limited and enumerated powers: “Undoubtedly the scope of this power must be considered in the light of our dual system of government,” wrote Chief Justice Hughes, “and may not be extended so as to embrace effects upon interstate commerce *so indirect and remote* that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.”<sup>26</sup>

Then in 1941, in *United States v. Darby*<sup>27</sup> the Court further expanded the power of Congress. Exactly how it did so will prove important in assessing the constitutionality of the individual mandate. In *Darby*, the Court separately considered two distinct powers asserted by Congress in the Fair Labor Standards Act. First was the “power to prohibit the shipment in interstate commerce of lumber manufactured by employees whose wages are less than a prescribed minimum or whose weekly hours of labor at that wage are greater than a prescribed maximum.”<sup>28</sup> In assessing this claim of power, as in *Jones & Laughlin Steel*, the Court in *Darby* did not reject the original meaning of “commerce.” Instead, it said that, “[w]hile manufacture *is not of itself interstate commerce* the shipment of manufactured goods interstate *is such commerce* and the prohibition of such shipment by Congress is indubitably a regulation of the com-

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<sup>25</sup> *Id.* at 37.

<sup>26</sup> *Id.* (emphasis added).

<sup>27</sup> *United States v. Darby*, 312 U.S. 100 (1941).

<sup>28</sup> *Id.* at 108.

merce.”<sup>29</sup> As authority for this proposition the Court relied heavily on Chief Justice Marshall’s evaluation of the Commerce Clause in *Gibbons v. Ogden*.<sup>30</sup> In sum, the prohibition on shipping specified goods in interstate commerce was a direct exercise of Congress’s power over interstate commerce.

Yet, although *Darby* did not expand the meaning of “commerce” to uphold this part of the statute, it did importantly expand the power of Congress by refusing to examine whether the Congressional assertion of its commerce power was a *pretext* for reaching activity that fell within the police power of states: “The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control,”<sup>31</sup> wrote Justice Stone. “Whatever their motive and purpose, regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause.”<sup>32</sup>

The Court then turned its attention to a different claim of power, the power “to prohibit the employment of workmen in the production of goods ‘for interstate commerce’ at other than prescribed wages and hours.”<sup>33</sup> In assessing “whether such restriction on the production of goods for commerce is a permissible exercise of the commerce power,” the Court held that the “power of Congress over interstate commerce is *not confined to the regulation of commerce among the states*.”<sup>34</sup> The power also “extends to those activities intrastate which *so affect interstate commerce or the exercise of the power of Congress over it* as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce.”<sup>35</sup>

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<sup>29</sup> *Id.* at 113 (emphases added).

<sup>30</sup> *See id.* at 113–14.

<sup>31</sup> *Id.* at 115.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 105.

<sup>34</sup> *Id.* at 118 (emphasis added).

<sup>35</sup> *Id.*

As authority for this principle, the Court relied not on the Commerce Clause case of *Gibbons* but instead upon the Necessary and Proper Clause Case of *McCulloch v. Maryland*.<sup>36</sup> This tells us that the “substantial effects” doctrine established by the New Deal Court concerns the application of the Necessary and Proper Clause in the context of the commerce power. In other words it is a doctrine applying, explaining, and implicitly limiting the use of “necessary and proper” means to execute Congress’s power over interstate commerce.

This was big. To uphold the first of these claims of power, the Court abandoned one of the principal limits on the Necessary and Proper Clause that Chief Justice John Marshall had asserted in *McCulloch*:

Should Congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should Congress, *under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government*; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land.<sup>37</sup>

So important was this qualification to Marshall that he invoked this passage in defense of his decision in *McCulloch* when writing anonymously as “A Friend of the Constitution.”<sup>38</sup> So, by discarding this aspect of *McCulloch*, the Supreme Court in *Darby* again broke sharply from over one-hundred years of its own doctrine.

*Darby* is also big because, to uphold the second claim of power, the Court allowed Congress to regulate wholly intrastate activities under the Necessary and Proper Clause that it could not justify as a regulation of interstate commerce itself. The doctrine allowing Con-

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<sup>36</sup> *See id.*

<sup>37</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819) (emphasis added).

gress to regulate intrastate activity that substantially affects interstate commerce, therefore, defines the scope of the Necessary and Proper Clause. Therefore, all future cases applying this doctrine are not, strictly speaking, “Commerce Clause cases.” Instead, they are “Necessary and Proper Clause cases” in the context of the regulation of interstate commerce.<sup>39</sup>

Then came *Wickard v. Filburn*,<sup>40</sup> in which the Court upheld the provisions of the Agricultural Adjustment Act, which limited the quantity of wheat that an individual farmer could grow, not to sell on the interstate market, but to consume on the farm by feeding his livestock and his family. As historian Barry Cushman has chronicled,<sup>41</sup> the implications of upholding this claim of power were so disturbing to the New Deal Justices that they held the matter over for reargument. Yet, Justice Jackson’s opinion made the case seem like a natural application of the Necessary and Proper Clause. “The question would merit little consideration since our decision in *United States v. Darby*, sustaining the federal power to regulate production of goods for commerce,” he wrote, “except for the fact that this Act extends federal regulation to production not intended in any part for commerce but wholly for consumption on the farm.”<sup>42</sup>

Once again, the Court did not expand the meaning of “commerce” beyond its original meaning when upholding the power of Congress to reach intrastate activity that is not itself commerce: “[E]ven if appellee’s activity be local and *though it may not be regarded as commerce*, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate

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<sup>38</sup> John Marshall, *A Friend of the Constitution*, ALEXANDRIA GAZETTE, July 5, 1819, reprinted in JOHN MARSHALL’S DEFENSE OF MCCULLOCH V. MARYLAND 187 (Gerald Gunther ed., Stanford University Press 1969).

<sup>39</sup> See J. Randy Beck, *The New Jurisprudence of the Necessary and Proper Clause*, 2002 U. ILL. L. REV. 581, 619 (2002) (“[T]he ‘affecting commerce’ cases derive from the Necessary and Proper Clause . . . .”); and *id.* at 618–19 (discussing *Darby*).

<sup>40</sup> *Wickard v. Filburn*, 317 U.S. 111 (1942).

<sup>41</sup> BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION 212–19 (1998).

<sup>42</sup> *Wickard*, 317 U.S. at 118.

commerce. . . .”<sup>43</sup> It then adopted the principle that the fact that Roscoe Filburn’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 contribution, taken together with that of many others similarly situated, is far from trivial.”<sup>44</sup>

In *Wickard*, the government contended that “the statute . . . is sustainable as a ‘necessary and proper’ implementation of the power of Congress over interstate commerce.”<sup>45</sup> Once again, the Court in *Wickard* relied not only on *Gibbons*, but on *McCulloch* as well.<sup>46</sup> In short, like *Darby*, *Wickard* is both a Commerce Clause and a Necessary and Proper Clause case. So too were the civil rights cases of *Heart of Atlanta Motel v. United States*<sup>47</sup> and *Katzenbach v. McClung*.<sup>48</sup>

In *Heart of Atlanta*, the Court found that because Congress had the power to regulate and protect the interstate flow of persons, racial discrimination in the provision of public accommodations burdened that flow and Congress therefore had the power to reach this otherwise intrastate activity. “[T]he power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof, including local activities in both the States of origin and destination, which might have a substantial and harmful effect upon that commerce.”<sup>49</sup> In response to the objection that “the operation of the motel here is of a purely local character,” the Court quoted the passage from *Darby* that relied on *McCulloch*, including the citation to the case.<sup>50</sup> Likewise, in *McClung*, when the Court turned its consideration to “The Power of Congress to Regulate Local Activities,”<sup>51</sup> it rested the power of Congress to reach intrastate activities on the power of Congress “[t]o regulate Commerce .

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<sup>43</sup> *Id.* at 125 (emphasis added).

<sup>44</sup> *Id.* at 127–28.

<sup>45</sup> *Id.* at 119 (citing U.S. CONST. art. I, § 8, cl. 18).

<sup>46</sup> *Id.* at 129, n.29.

<sup>47</sup> *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964).

<sup>48</sup> *Katzenbach v. McClung*, 379 U.S. 294 (1964).

<sup>49</sup> *Heart of Atlanta*, 379 U.S. at 258.

<sup>50</sup> *See id.* (quoting *United States v. Darby*, 312 U.S. 100, 118 (1941)).

. . . among the several States' and . . . the power '[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers. . . .'"<sup>52</sup>

### 3. THE REHNQUIST COURT CASES.

With these canonical cases in mind, let us now fast forward to consider how the Supreme Court interpreted its own substantial effects doctrine in *Lopez*, *Morrison* and *Raich*. In *Lopez*, Chief Justice Rehnquist famously affirmed that "[w]e start with first principles. The Constitution creates a Federal Government of enumerated powers. . . . As James Madison wrote, 'the powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.'"<sup>53</sup>

The Chief Justice then identified "three broad categories of activity that Congress may regulate under its commerce power."<sup>54</sup> First, "Congress may regulate the use of the channels of interstate commerce."<sup>55</sup> 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."<sup>56</sup> Finally, "Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce . . . those activities that substantially affect interstate commerce."<sup>57</sup>

Turning to the third of these categories, Chief Justice Rehnquist offered the following summary of the "substantial effects" cases decided since the New Deal: "[W]e have upheld a wide variety of congressional Acts regulating intrastate economic activity where we have concluded that the activity substantially affected interstate

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<sup>51</sup> *Katzenbach*, 379 U.S. at 301-02.

<sup>52</sup> *Id.* (quoting U.S. CONST. art. I, § 8, cl. 3, 18).

<sup>53</sup> *United States v. Lopez*, 514 U.S. 549, 552 (1995) (Rehnquist, C.J.).

<sup>54</sup> *Id.* at 558.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 558-59.

commerce.”<sup>58</sup> He then provided the following examples: “the regulation of intrastate coal mining, intrastate extortionate credit transactions, restaurants utilizing substantial interstate supplies, inns and hotels catering to interstate guests, and production and consumption of home-grown wheat.”<sup>59</sup> From these, he concluded that “the pattern is clear. Where *economic activity* substantially affects interstate commerce, legislation regulating that activity will be sustained.”<sup>60</sup> Because the Gun Free School Zone Act regulated a “class of activity” that lay outside the scope of this doctrine—the noneconomic activity of possessing a gun within 1000 feet of a school—it was held to be unconstitutional.

The above analysis of *N.L.R.B., Darby, Wickard, Heart of Atlanta*, and *McClung* reveals that the judicial doctrine by which Congress may reach intrastate economic activity that substantially affects interstate commerce rested on the Necessary and Proper Clause. Then, in *Lopez*, the Court restricted this combined power to the regulation of economic activity. “Even *Wickard*,” wrote Chief Justice Rehnquist, “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.”<sup>61</sup> In this way the distinction between economic and noneconomic intrastate activity provided a limiting doctrine on the reach of the Necessary and Proper Clause.

In his dissenting opinion, Justice Breyer objected to the majority’s distinction between “economic” and “noneconomic” intrastate activity. “Although the majority today attempts to categorize *Perez, McClung*, and *Wickard* as involving intrastate ‘economic activity,’ the Courts that decided each of those cases did not focus upon the economic nature of the activity regulated. Rather, they focused upon whether that activity affected interstate or foreign com-

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<sup>58</sup> *Id.* at 559.

<sup>59</sup> *Id.* at 559–60 (citations omitted).

<sup>60</sup> *Id.* at 560 (emphasis added).

<sup>61</sup> *Id.*



merce.”<sup>62</sup> To this Chief Justice Rehnquist responded that, by the reasoning of the government and Justice Breyer, “we are hard pressed to posit any activity by an individual that Congress is without power to regulate.”<sup>63</sup>

In order to preserve the constitutional scheme of limited and enumerated powers, some line was needed to separate wholly intrastate activities that Congress could reach from intrastate activities that were solely within the police power of states. Chief Justice Rehnquist identified this line by looking back over all the previous substantial effects cases to see what they had in common: the regulation of intrastate economic activity. And he drew this line notwithstanding Justice Breyer’s objection that the distinction between economic and noneconomic activity had not been highlighted or even discussed in these previous cases.

But why draw the line at noneconomic intrastate activity? To answer this question, we need to revisit the argument over the constitutionality of the national bank that was upheld in *McCulloch v. Maryland*.<sup>64</sup> In response to the argument that such a bank was not truly necessary under the Necessary and Proper Clause, Chief Justice John Marshall famously equated (or seemed to equate) the meaning of “necessary” with “convenient.” “If reference be had to its use, in the common affairs of the world, or in approved authors,” the word “necessary,” “frequently imports no more than that one thing is convenient, or useful, or essential to another. To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end. . . .”<sup>65</sup>

This passage became famous because the matter of convenience would seem to concern policy choices that lie beyond the purview of the courts. As President Madison, who supported the result in *McCulloch*, privately objected: “Does not the court also relinquish, by their doctrine, all control on the legislative exercise of unconsti-

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<sup>62</sup> *Id.* at 628 (Breyer, J., dissenting).

<sup>63</sup> *Id.* at 564 (majority opinion).

<sup>64</sup> *McCulloch v. Maryland*, 17 U.S. 316 (4 Wheat.) (1819).

<sup>65</sup> *Id.* at 413-14.

tutional powers?"<sup>66</sup> When the matter of a measure's necessity "assumes the character of mere expediency or policy," it becomes "evidently beyond the reach of Judicial cognizance. . . . [B]y what handle could the Court take hold of the case?"<sup>67</sup>

In response to stinging public criticisms of the decision, Marshall defended his opinion in a series of newspaper essays writing pseudonymously as "A Friend to the Union," and later as "A Friend of the Constitution."<sup>68</sup> In these essays, Marshall invoked a less well-known passage of *McCulloch* that omitted the word "convenient," and defined "necessary" as "'needful,' 'requisite,' 'essential,' 'conducive to,' . . ."<sup>69</sup> While granting Congress's discretion as to means, Marshall denied that the Court ever said "that the word 'necessary' means whatever may be 'convenient,' or 'useful.' And when it uses 'conducive to,' that word is associated with others plainly showing that *no remote, no distant conduciveness to the object*, is in the mind of the court."<sup>70</sup> In a later letter, Marshall said that the constitutionality of a particular means "depends on their being the natural, direct, and appropriate means, or the *known and usual means*, for the execution of the given power."<sup>71</sup>

In defending his opinion in *McCulloch*, Marshall claimed the authority of the "masterly argument" made years before by then-Secretary of the Treasury Alexander Hamilton in his opinion provided to President Washington on behalf of the constitutionality of the first national bank. Marshall quoted this passage from Hamilton's opinion: "That every power vested in a government, is, in its nature, *sovereign*, and in-

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<sup>66</sup> Letter from James Madison to Judge Spencer Roane (Sept. 2, 1819), in 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 143, 144 (Phila., J.P. Lippincott & Co. 1867).

<sup>67</sup> *Id.*

<sup>68</sup> See John Marshall, Letters to the Editor, "A Friend to the Union", PHILA. UNION, Apr. 24-28, 1819, reprinted in JOHN MARSHALL'S DEFENSE OF MCCULLOCH V. MARYLAND, *supra* note 38, at 78; and John Marshall, "A Friend of the Constitution" essays, ALEXANDRIA GAZETTE, June 30-July 15, 1819, reprinted in JOHN MARSHALL'S DEFENSE OF MCCULLOCH V. MARYLAND, *supra* note 38, at 155.

<sup>69</sup> *McCulloch*, 17 U.S. at 418.

<sup>70</sup> John Marshall, Letter to the Editor, "A Friend to the Union", PHILA. UNION, Apr. 28, 1819, reprinted in JOHN MARSHALL'S DEFENSE OF MCCULLOCH V. MARYLAND, *supra* note 38, at 100 (emphasis added).

<sup>71</sup> *Id.* (emphasis added).

cludes, by force of the term a right to employ all the means requisite and fairly applicable to the attainment of the ends of such power."<sup>72</sup>

In many respects Marshall's opinion on *McCulloch* could be characterized as plagiarizing his mentor Hamilton's opinion on the first bank.<sup>73</sup> Here is how Hamilton defines "necessary": According to "the grammatical" and "popular sense of the term . . . necessary often means no more than *needful, requisite, incidental, useful or conducive to.*"<sup>74</sup> But while Hamilton, like Marshall, strongly rejected an overly strict reading of necessary "as if the word *absolutely*, or indispensably, had been prefixed to it,"<sup>75</sup> he also rejected a completely open-ended reading of "necessary and proper." "It may truly be said of every Government, as well as that of the United States, that it only has a right to pass such laws as are necessary and proper to accomplish the objects intrusted to it: for no government has a right to do *merely what it pleases.*"<sup>76</sup>

Hamilton then considered what should be the legal "test" for whether a measure was necessary under the clause. First, he rejected the idea that such a test should attempt to weigh the degree of necessity. "The degree in which a measure is necessary, can never be a test of the *legal right* to adopt it. That must be a matter of opinion; and can only be a test of expediency."<sup>77</sup> Instead, Hamilton then offered this test: "The relation between the *measure* and the *end*, between the nature of the *mean* employed toward the execution of a power and the *object* of that power, must be the criterion of constitutionality; not the more or less of necessity or utility."<sup>78</sup>

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<sup>72</sup> John Marshall, "A Friend of the Constitution", ALEXANDRIA GAZETTE, July 2, 1819, reprinted in JOHN MARSHALL'S DEFENSE OF MCCULLOCH V. MARYLAND, *supra* note 38, at 176.

<sup>73</sup> See Beck, *supra* note 39, at 600-03 (comparing the two opinions).

<sup>74</sup> Alexander Hamilton, *Opinion on the Constitutionality of a National Bank* (Feb. 23, 1791), in LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES 95, 97 (M. St. Clair Clarke & D. A. Hall eds., Augustus M. Kelley Publishers 1967) (1832).

<sup>75</sup> *Id.* at 98.

<sup>76</sup> *Id.* (emphasis in original).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

In modern parlance, according to Hamilton, there must be an *appropriate fit* between means and ends, which is exactly what the Supreme Court's doctrine distinguishing between economic and noneconomic activity seeks to discern. Rather than allowing Congress to do 'merely what it pleases,' the economic-noneconomic distinction provides a judicially administrable line by which to identify intrastate activities that are likely to be closely enough related to interstate commerce as to make it appropriate for Congress to reach. The distinction is useful because the regulation of intrastate economic activity is far more likely to be closely related to interstate commerce than is the vast array of intrastate noneconomic activity. As Randy Beck has explained, "Given the close relationship between intrastate and interstate economic activity, a statute regulating local economic conduct will usually be calculated to accomplish an end legitimately encompassed within the plenary congressional authority over interstate commerce."<sup>79</sup>

To paraphrase Hamilton, by adopting the distinction between economic and noneconomic activity, the Court provided a workable doctrine by which the necessity of a particular regulation of intrastate activity could be assessed without need for a court to evaluate 'the more or less necessity or utility' of the measure.<sup>80</sup> By limiting the substantial effects doctrine to economic intrastate activity, the Supreme Court provided the modern legal 'test' or 'criterion of constitutionality' for whether a regulation of intrastate activity is what 'may truly be said' to be *necessary* under the Necessary and Proper Clause. By this doctrine Congress is held within its enumerated powers and denied the 'right to do merely what it pleases.'

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<sup>79</sup> Beck, *supra* note 39, at 625. Beck considers this test to be effectuating the requirement that a law be "proper," rather than the requirement that it be "necessary." *See id.* at 648. Assessing whether this claim is correct on originalist grounds would require the examination of a mass of evidence and is beyond the scope of this article. What matters for present purposes is that Beck does not dispute, but instead insists, that the economic-noneconomic distinction in existing "Commerce Clause" doctrine is actually effectuating and limiting the scope of the Necessary and Proper Clause.

<sup>80</sup> *See id.* at 626 (characterizing the *Lopez* decision as an effort to address the degree question "on a more categorical basis, rather than through open-ended, case-by-case consideration.").

Five years later, in *United States v. Morrison*, the Court reaffirmed the economic-noneconomic distinction within its substantial affects doctrine: “While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation’s history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.”<sup>81</sup> And it rejected “petitioners’ reasoning [that] would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption.”<sup>82</sup>

Once again, Justice Breyer questioned the economic-noneconomic distinction. “[W]hy should we give critical constitutional importance to the economic, or noneconomic, nature of an interstate-commerce-affecting *cause*? If chemical emanations through indirect environmental change cause identical, severe commercial harm outside a State, why should it matter whether local factories or home fireplaces release them?”<sup>83</sup> Then Justice Breyer expressly invoked the language of both the Commerce and Necessary and Proper Clauses, which “says nothing about either the local nature, or the economic nature, of an interstate-commerce-affecting cause.”<sup>84</sup>

Justice Breyer was correct to invoke the Necessary and Proper Clause. By rejecting his theory, however, the majority in *Morrison* in effect refused to interpret the Necessary and Proper Clause more expansively than the Court in *Lopez* read the New Deal cases to have done. Indeed, Chief Justice Rehnquist reaffirmed the principle articulated in *N.L.R.B.* that “the Constitution requires a distinction between what is truly national and what is truly local. In recogniz-

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<sup>81</sup> *United States v. Morrison*, 529 U.S. 598, 613 (2000).

<sup>82</sup> *Id.* at 615.

<sup>83</sup> *Id.* at 657 (Breyer, J., dissenting).

<sup>84</sup> *Id.*

ing this fact we preserve one of the few principles that has been consistent since the Clause was adopted.”<sup>85</sup>

So now we come to the 2005 case of *Gonzales v. Raich*. Did *Raich* cast aside the lens adopted by the Court in *Lopez* and *Morrison* through which it interpreted the post-New Deal cases that rested on both the Commerce and Necessary and Proper Clauses? To the contrary. When reading the majority opinion in *Raich*, we must keep in mind that it had to be written in such a fashion as to attract Justice Kennedy’s fifth vote, which it did. (Justice Scalia did not join the Court’s opinion.)

To begin, and most importantly, the majority in *Raich* does not reject the economic-noneconomic distinction, or the reading of *Wickard* that was adopted by the Court in *Lopez*. Instead, the Court holds that the production of marijuana is an economic activity. Here is what Justice Stevens says: “Our case law firmly establishes Congress’ power to regulate purely local activities that are part of an *economic* ‘class of activities’ that have a substantial effect on interstate commerce.”<sup>86</sup> He then quotes the following passage from *Wickard*: “‘even if appellee’s activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce.’”<sup>87</sup>

Justice Stevens explained that *Wickard* “establishes that Congress can regulate purely intrastate activity that is not itself ‘commercial,’ in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity.”<sup>88</sup> He then rejected Angel Raich’s claim that the production of her marijuana was not “economic,” by relying on the definition of “economic” found in a 1966 Webster’s Dictionary. “Unlike those at issue in *Lopez* and *Mor-*

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<sup>85</sup> *Id.* at 617–18 (Rehnquist, C.J.) (internal citations omitted).

<sup>86</sup> *Gonzales v. Raich*, 545 U.S. 1, 17 (2005) (Stevens, J.) (internal citations omitted) (emphasis added).

<sup>87</sup> *Id.* (quoting *Wickard v. Filburn*, 317 U.S. 111, 125 (1942)).

<sup>88</sup> *Gonzales* 545 U.S. at 18.

ri<sup>son</sup>, the activities regulated by the CSA are quintessentially economic. ‘Economics’ refers to ‘the production, distribution, and consumption of commodities.’”<sup>89</sup> So nothing in Justice Stevens’ opinion in *Raich* remotely challenges the framework of *Lopez* or *Morrison*—not even its dictionary definition of “economic.”

Moreover, invoking Webster’s Dictionary allowed the majority to avoid adopting the government’s theory that any activity that substituted for a market activity was economic.<sup>90</sup> The government’s theory resembled *Wickard* insofar as Roscoe Filburn’s farming operation could be regulated because his consumption of wheat on his farm substituted for his buying wheat in interstate commerce. But *Wickard* did not even hint at the proposition that Filburn’s intrastate activity was “economic” activity because it substituted for interstate commerce. No one would have doubted that Roscoe Filburn’s farming operation was economic activity regardless of whether its produce substituted for interstate commerce. The question in *Wickard* was, given that Filburn’s farming operation was not *commerce*, could it nevertheless be reached because it was necessary to the regulation of interstate commerce? Because Filburn’s and countless other farmers’ use of their own wheat, “though it may not be regarded as commerce,”<sup>91</sup> substituted for buying interstate wheat, this wholly intrastate economic activity obstructed Congress’s scheme to increase the price of interstate wheat.<sup>92</sup>

In our briefs and at oral argument in *Raich*,<sup>93</sup> we fought hard against the government’s market substitution theory on the grounds that, by this logic, virtually any activity could be deemed economic. Therefore, if the substitution theory is accepted, the economic-noneconomic distinction would be obliterated. Our ar-

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<sup>89</sup> *Id.* at 25.

<sup>90</sup> Reply Brief for Petitioners, *Gonzales v. Raich*, 545 U.S. 1 (2005) (No. 03-1454).

<sup>91</sup> *Wickard*, 317 U.S. at 125 (1942).

<sup>92</sup> *Id.* at 128–29 (“Congress may properly have considered that wheat consumed on the farm where grown if wholly outside the scheme of regulation would have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices.”).

<sup>93</sup> See Br. for Resp’t at 25, *Gonzales v. Raich*, 545 U.S. 1 (2005) (No. 03-1454).

guments on this point were vindicated by the Court's refusal to accept the government's market substitution theory, adopting Webster's definition of "economic" instead.

*B. Applying Existing Doctrine to the Individual Insurance Mandate*

How does the individual mandate fare under existing Commerce Clause and Necessary and Proper Clause doctrine? First we have to ascertain under which theory Congress purported to act. Does the mandate purport to regulate or protect the instrumentalities of interstate commerce? Does it purport to regulate or protect persons or things in interstate commerce, even though the threat may come only from intrastate activities? Or does it purport to regulate those activities having a substantial relation to interstate commerce, those activities that substantially affect interstate commerce?

In the Act, Congress asserted that "[t]he individual responsibility requirement provided for in this section . . . is commercial and economic in nature, and substantially affects interstate commerce, as a result of the effects described in paragraph (2)."<sup>94</sup> In this finding, Congress confusingly refers to its own requirement as "commercial and economic in nature" and substantially affecting interstate commerce, rather than to the underlying activity being regulated. There is, of course, no such Commerce or Necessary and Proper Clause doctrine. Nonetheless, Congress is clearly trying to invoke the third category identified in *Lopez* and *Morrison*—and preserved in *Raich*: the substantial effects doctrine.

As we have seen, the substantial effects doctrine is not a pure application of the Commerce Clause, but is actually an assertion of the Necessary and Proper Clause to reach activity that is neither interstate nor commerce. Under the existing law assessing whether a law reaching intrastate activity is "necessary" to the regulation of interstate commerce, we must ask, (a) what is the "class of activity"

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<sup>94</sup> Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1501(a)(1), 124 Stat. 119 (2010).



reached by the statute, and (b) is it economic or noneconomic? In answering this question, the first thing to notice about all of the substantial effects cases—including *N.L.R.B.*, *Darby*, *Wickard*, *Heart of Atlanta*, *McClung*, *Lopez*, *Morrison*, and *Raich*—is that each concerns the regulation of a class of activities in which persons have *freely chosen to engage*: manufacturing steel or lumber, operating a hotel or restaurant, possessing a gun, perpetrating gender-motivated violence, or growing marijuana.

In sum, all these cases involve *activity*, not *inactivity*. In none of these cases did the government mandate that citizens engage in economic activity by entering into a contract with a private company. Indeed, Congress implicitly acknowledges that existing doctrine requires economic activity in its first “finding,” when it states: “The requirement regulates *activity* that is commercial and *economic* in nature: economic and financial decisions about how and when health care is paid for, and when health insurance is purchased.”<sup>95</sup>

So Congress is purporting to stay within existing Necessary and Proper Clause doctrine by claiming to regulate a class of economic activity. But what is that class of activity? It is “decisions about how and when health care is paid for, and when health insurance is purchased.” In this way, the statute speciously tries to convert inactivity into the “activity” of making a “decision.” By this reasoning, a “decision” *not* to take a job or *not* to sell your house or *not* to buy a Chevrolet is an “activity that is commercial and economic in nature” that can be mandated by Congress.

Perhaps for this reason, federal District Court Judge George Caram Steeh, in his ruling granting the government’s motion to dismiss the complaint brought against it by the Thomas More Law Center, subtly changes the claim. “While plaintiffs describe the Commerce Clause power as reaching economic *activity*, the government’s characterization of the Commerce Clause reaching economic *decisions* is more accurate.”<sup>96</sup> By this formulation, a

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<sup>95</sup> *Id.* § 1501(a)(2)(A) (emphases added).

<sup>96</sup> *Thomas More Ctr. v. Obama*, No. 10-CV-11156, 2010 U.S. Dist. LEXIS 107416 at \*27 (E.D. Mich., Oct. 7 2010).

“decision” is not being reached because it is an “activity” under existing doctrine. Rather, the district court extended the power of Congress beyond the regulation of intrastate activity to enable it to reach “economic decisions.” By reformulating the government’s theory in this way, and referring to this as an “issue of first impression,”<sup>97</sup> Judge Steeh candidly exposes the novelty of the government’s claim of power, and the need to reach beyond existing doctrine to justify it.

However formulated, this shift from regulating activity to regulating “decisions” to refrain from acting obliterates the well-known and intuitive distinction between acts and omissions. In the main, persons are responsible for their actions, not for their failure to act. Historically, one is not responsible for omissions to act unless one has a preexisting *duty* to act.<sup>98</sup> Keep the word “duty” in mind, as it will be of critical importance in the discussion of whether the Supreme Court should expand the power of Congress still further under the Necessary and Proper Clause. But for now, I will confine myself to the two problems that are most likely to stop the Court from accepting the idea that Congress may use its power over interstate commerce coupled with the Necessary and Proper Clause to compel persons to engage in economic activity.

The first is that such a claim of power has never before been asserted by Congress, much less validated by the Supreme Court. It is literally unprecedented. Consider this: had the Commerce and Necessary and Proper Clauses been used to mandate individual conduct, every citizen would be able to recite all the mandates to which he or she must adhere upon penalty of a fine. Yet, apart from registering for the draft, serving on a jury, submitting a tax

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<sup>97</sup> *Id.* at \*23.

<sup>98</sup> RICHARD A. EPSTEIN, TORTS 8 -86 (1999) (“There is no distinction more deeply rooted in the common law and more fundamental than that between misfeasance and nonfeasance. . . .” (quoting Bohlen, Francis, *The Moral Duty to Aid Others as a Basis of Tort Liability*, 56 U. PA. L. REV. 217, 219 (1908)); *Id.* at 87 (“[C]ases of simple bystander inaction or nonfeasance receive special treatment under the law. . . . The inquiry then turns to the question of whether it is possible to find some independent source for the duty to act.”).

return, and responding to the census, none of us can think of any such personal mandates. In Part V, I shall examine why these mandates differ in kind from a mandate to engage in economic activity.

Which brings me to the second problem: Accepting this theory would open the door for an infinite variety of mandates in the future. Under this theory of “activity,” Congress can mandate individuals do virtually anything at all on the grounds that the failure to engage in economic activity substantially affects interstate commerce. Therefore, it would effectively obliterate, once and for all, the enumerated powers scheme that even the New Deal Court did not abandon.

Such a doctrine would run afoul of what the *Constitution* says about the powers of Congress, what the *Supreme Court* has consistently said about the scope of those powers, and even what Chief Justice Marshall and Alexander Hamilton said about the scope of the Necessary and Proper Clause. Of course, unlike district and circuit courts that are bound to follow existing Supreme Court doctrines, the Supreme Court itself may move beyond what it has previously said about the scope of congressional powers. But, for reasons I shall discuss in the Part VI, I sincerely doubt there are five votes today to take the power of Congress where it has never gone before.

### III. THE INDIVIDUAL MANDATE AND EXISTING TAX POWER DOCTRINE

Unable to produce a single example of Congress having used its Commerce and Necessary and Proper Clause powers in this way, defenders of the personal mandate began to shift grounds. On March 21<sup>st</sup>, the same day the House approved the Senate version of the legislation, the staff of the Joint Committee on Taxation released a 157-page “technical explanation” of the bill.<sup>99</sup> The word “commerce” appeared nowhere therein. Instead, the personal

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<sup>99</sup> JOINT COMM. ON TAXATION, TECHNICAL EXPLANATION OF THE REVENUE PROVISIONS OF THE “RECONCILIATION ACT OF 2010,” AS AMENDED, IN COMBINATION WITH THE “PATIENT PROTECTION AND AFFORDABLE CARE ACT,” JCX-18-10 (2010).

mandate is dubbed an “Excise Tax on Individuals Without Essential Health Benefits Coverage.”<sup>100</sup> But while the enacted bill does impose excise taxes on “high cost,” employer-sponsored insurance plans and “indoor tanning services,”<sup>101</sup> the statute never describes the regulatory “penalty” it imposes for violating the mandate as an “excise tax.” It is expressly called a “penalty.”<sup>102</sup> This shift will not work.

#### A. Existing Tax Power Doctrine

In the 1920s, when Congress wanted to discourage activity that was then deemed to be solely within the police power of states, it tried to penalize the activity using its tax power. In *Bailey v. Drexel Furniture*,<sup>103</sup> the Supreme Court struck down such a penalty saying, “there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment.”<sup>104</sup>

Although the Court has never repudiated this principle,<sup>105</sup> after the New Deal, it so broadly interpreted the commerce power that Congress no longer needed to obviate the limits on its regulatory

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<sup>100</sup> *Id.* at 31.

<sup>101</sup> I.R.C. §5000(B) (2010).

<sup>102</sup> I.R.C. §5000(A) (2010).

<sup>103</sup> *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922). *Bailey* is also referred to as the Child Labor Tax Case.

<sup>104</sup> *Id.* at 38.

<sup>105</sup> *See, e.g., Dept. of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 779 (1994) (raising the issue of whether an exaction labeled a “tax” could in reality be a penalty for purposes of double jeopardy.) Writing for the majority, Justice Stevens reaffirmed *Bailey’s* principle that even an enactment labeled a “tax,” could be found to be a penalty:

We have cautioned against invalidating a tax simply because its enforcement might be oppressive or because the legislature’s motive was somehow suspect. *A. Magnano Co. v. Hamilton*, 292 U.S. 40, 44 (1934). Yet we have also recognized that “there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment.” *Id.* at 46 (citing *Child Labor Tax Case*, 259 U. S. 20, 38 (1922)).

powers by taxing rather than regulating activity. Thus, under the substantial effects doctrine, Congress may regulate or prohibit intrastate economic activity directly without invoking its taxation power. For this reason, the principle for which *Bailey* still stands became moribund. Yet precisely because a mandate to engage in economic activity has never been upheld by the Court, the tax power is once again being used to escape constitutional limits on Congress's regulatory power.<sup>106</sup>

Supporters of the mandate cite *United States v. Kahriger*,<sup>107</sup> a 1953 case where the Court upheld a punitive tax on gambling by saying that "[u]nless there are provisions extraneous to any tax need, courts are without authority to limit the exercise of the taxing power."<sup>108</sup> Yet the Court in *Kahriger* also cited *Bailey* with approval.<sup>109</sup> How can both stances by the Court be reconciled?

The key to understanding *Kahriger* is the proposition the Court there rejected: "it is said that Congress, under the *pretense* of exercising its power to tax has attempted to penalize illegal intrastate gambling through the regulatory features of the Act."<sup>110</sup> In other words, just as in *Darby* where the Court declined to look beyond Congress's assertion that it was exercising its commerce power, the Court in *Kahriger* declined to look behind Congress's assertion that it was exercising its tax power to see whether a measure was really a regulatory penalty. As the New Deal Court said in *Sonzinsky v. United States* (1937): "Inquiry into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it is beyond the competency of courts."<sup>111</sup> But this principle cuts both ways. Neither has the Court ever looked behind Congress's

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<sup>106</sup>See, e.g., Edward D. Kleinbard, *Constitutional Kreplach*, 128 TAX NOTES 755 (2010) (asserting the tax power justification for the penalty enforcing the individual mandate).

<sup>107</sup>*United States v. Kahriger*, 345 U.S. 22 (1953), *overruled by* *Marchetti v. United States*, 390 U.S. 39 (1968).

<sup>108</sup>*Id.* at 31.

<sup>109</sup>*Id.* at 31 n. 10.

<sup>110</sup>*Id.* at 24 (emphasis added).

<sup>111</sup>*Sonzinsky v. United States*, 300 U.S. 506, 513-14 (1937).

inadequate assertion of its commerce power to speculate as to whether a measure could be justified as a tax.

*B. Applying Existing Doctrine to the Individual Insurance Mandate*

Congress simply did not enact the personal insurance mandate pursuant to its tax powers. To the contrary, the statute expressly says the mandate “regulates activity that is commercial and economic in nature.”<sup>112</sup> It never mentions the tax power. The penalty is simply there to enforce the health insurance requirement, which cannot possibly be construed as a tax.

The Court in *Sonzinsky* also offered this observation: “The case is not one where the statute contains *regulatory provisions related to a purported tax* in such a way as has enabled this Court to say in other cases that the latter is a penalty resorted to as a means of enforcing the regulations.”<sup>113</sup> But this exactly describes the relationship between the individual requirement and the so-called tax. The penalty is clearly being “resorted to as a means of enforcing”<sup>114</sup> a regulation of commerce. The reasoning of *Sonzinsky*, therefore, strongly undercuts the claim that the penalty in the Act is a tax.

The constitutionality of the mandate must rise or fall as a regulation. Its constitutionality is not affected or enhanced by its conjunction with a penalty in the Internal Revenue Code. And if the health insurance requirement is unconstitutional because it exceeds the powers of Congress, then there is nothing for the penalty to enforce.

Moreover, unlike *Sonzinsky*, the penalty does not even purport to be a tax. It is called a “penalty.” Although the penalty was inserted into the Internal Revenue Code, Congress then expressly severed the penalty from the normal enforcement mechanisms of the tax code. The failure to pay the penalty “shall not be subject to

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<sup>112</sup> Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1501(a)(2)(A), 124 Stat. 119 (2010).

<sup>113</sup> *Sonzinsky*, 300 U.S. at 513 (emphasis added).

<sup>114</sup> *Id.*

any criminal prosecution or penalty with respect to such failure.”<sup>115</sup> Nor shall the IRS “file notice of lien with respect to any property of a taxpayer by reason of any failure to pay the penalty imposed by this section,”<sup>116</sup> or impose a “levy on any such property with respect to such failure.”<sup>117</sup> All of these restrictions undermine the claim that, because the penalty is inserted into the Internal Revenue Code, that it is a garden variety tax.

We are not without guidance from the Supreme Court about the difference between a tax and a penalty. In *United States v. La Franca*, the Court offered the following distinction: “A tax is an enforced contribution to provide for the support of government; a penalty, as the word is here used, is an exaction imposed by statute as punishment for an unlawful act.”<sup>118</sup> In the words of Justice Souter, relying on *La Franca*, “if the concept of penalty means anything, it means punishment for an unlawful act or omission, and a punishment for an unlawful omission is what this exaction is.”<sup>119</sup> By contrast, “a tax is a pecuniary burden laid upon individuals or property for the purpose of supporting the Government.”<sup>120</sup> Justice Stone described taxes as “pecuniary burdens laid upon individuals or their property, regardless of their consent, for the purpose of defraying the expenses of government or of undertakings authorized by it.”<sup>121</sup>

Considered apart from the penalty, it is obvious that the individual insurance mandate cannot have been imposed to raise revenue and therefore be justified under the power of Congress to tax. The mandate raises no revenue for the government whatsoever. To the contrary, it commands that citizens provide revenue to private insurance companies. But if the mandate is not an exercise of the tax

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<sup>115</sup> I.R.C. §5000A(g)(2)(A) (West 2010).

<sup>116</sup> I.R.C. §5000A(g)(2)(B)(i) (West 2010).

<sup>117</sup> I.R.C. §5000A(g)(2)(B)(ii) (West 2010).

<sup>118</sup> *United States v. La Franca*, 282 U.S. 568, 572 (1931).

<sup>119</sup> *United States v. Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213, 224 (1996).

<sup>120</sup> *Id.* (quoting *New Jersey v. Anderson*, 203 U.S. 483, 492 (1906)).

<sup>121</sup> *City of New York v. Feiring*, 313 U.S. 283, 287 (1941) (Stone, J.).

power, and is not independently constitutional under the Commerce and Necessary and Proper Clauses, then it is unconstitutional and there is nothing for the “penalty” in the “Patient Protection and Affordable Care Act” to enforce.

Given that the mandate cannot possibly be a tax, the argument must be that the “penalty,” standing alone, is a tax. But was the “penalty” enforcing the individual mandate enacted with “the purpose of supporting the government,” or was it instead enacted as “punishment for an unlawful . . . omission”? All of the findings in support of the requirement attempted to justify it exclusively as a regulation of commerce. Nowhere was the purpose of the penalty separately identified as raising revenue.

To the contrary, in Section 9000 et seq of Title IX of the Act, entitled, “Revenue Provisions,”<sup>122</sup> Congress expressly identified all the revenue raising provisions therein including, for example, the “Excise tax on high cost employer-sponsored health coverage.”<sup>123</sup> We know this list was exhaustive because its purpose was to score the cost of the Act when Congress was laboring to bring its price tag below one trillion dollars. The more revenue it could list in Section 9000 et seq, the lower the cost. Yet, the penalty enforcing the mandate is nowhere listed as a source of revenue.

In short, the “penalty” is explicitly justified as a penalty to coerce compliance with a regulation of economic activity and not as a tax. None of the purposes for the penalty involve raising revenue and the section of the Act identifying revenue provisions overlooks the penalty. So while Congress need not specify expressly what power it may be exercising, there is simply no authority for the Court to recharacterize a regulation as a tax when doing so is contrary to the express and actual regulatory purpose of Congress.

We can summarize this analysis as follows. Under existing tax power doctrine: (1) the health insurance mandate does not fit the definition of a tax; (2) when considering whether the penalty is a tax, courts will not look behind the fact that the statute described it

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<sup>122</sup> Pub. L. No. 111-148, §§ 9001-9023, 124 Stat. 119 (2010).

<sup>123</sup> I.R.C. §4980.



as a “penalty” to enforce a regulation of commerce to see if the “penalty” was really a tax; (3) if a court did look behind the labels of “penalty” and “requirement” — as the government would need for it to do — it would then have to decide whether the purpose of the exaction was to raise revenues, or whether it genuinely operates instead as a penalty for failing to adhere to the requirement.

So whether we stick with form or move behind the form to inquire about the substance of the measure, under existing doctrine neither the mandate to buy health insurance, nor the penalty enforcing it, is a tax.<sup>124</sup> Once again, defenders of the mandate are making an unprecedented claim. Never before has the Court looked behind Congress’s unconstitutional assertion of its commerce power to see if a measure could have been justified as a tax. For that matter, never before has a “tax” penalty been used to mandate, rather than discourage or prohibit, economic activity.

But the government’s tax power theory is far more radical than the Commerce and Necessary and Proper Clause theory precisely because the Supreme Court has generally deferred to any invocation of the tax power to raise revenue to spend for the general welfare. This normal deference is why the mandate’s defenders shifted the argument from the Commerce Clause to the tax power. Yet if its theory is accepted, Congress would be able to penalize or mandate any activity by anyone in the country, provided it limited the sanction to a fine enforced by the Internal Revenue Service.

This is a congressional power unknown and unheard of before 2010. It would effectively grant Congress a general police power. And we know what existing doctrine says about such a power: “The Constitution . . . withhold[s] from Congress a plenary police

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<sup>124</sup> Of course, if it is a tax, then it may be neither an income nor an excise tax but instead a direct tax on individuals. If so, then because it is not equally apportioned among the several states, it would be an unconstitutional tax. See Steven J. Willis & Nakku Chung, *Constitutional Decapitation and Healthcare*, 128 TAX NOTES 169 (2010). But I seriously doubt the Court will ever reach this question given (a) the text of the statute, (b) what it has previously said about examining the true motives of Congress and the difference between a tax and a penalty, and (c) the radical implications of accepting the government’s argument.

power that would authorize enactment of every type of legislation.”<sup>125</sup> Such has been the Supreme Court’s position from the Founding until today.

#### IV. ESSENTIAL TO A BROADER REGULATION OF COMMERCE

Confronted with the difficulties of justifying the mandate under existing substantial effects doctrine or the tax power, the government has pressed a third argument: that the mandate is justified under the Necessary and Proper Clause because it is an essential part of a broader regulatory scheme.<sup>126</sup> For example, the new requirement that insurance companies accept all applicants regardless of their pre-existing illnesses is infeasible unless everyone is forced into the insurance pool before they get sick.

Their reasoning has three steps: (a) if Congress has the power to regulate insurance companies under its commerce power—as the Court so ruled in *South-Eastern Underwriters*<sup>127</sup>—and (b) it can use this power to impose regulations banning pre-existing conditions, then (c) it becomes necessary to mandate that everyone buy insurance. Hence, although not itself a regulation of commerce, the mandate is a necessary and proper means to exercise Congress’s power over interstate commerce.

The government’s argument is based on *dicta* in *United States v. Lopez*. In his opinion, Chief Justice Rehnquist noted that the Gun Free School Zone Act was not “an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.”<sup>128</sup> This principle was mentioned again by Justice Stevens writing for the majority in *Raich*.<sup>129</sup> As we already saw, because the activity in *Raich* was

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<sup>125</sup> *United States v. Lopez*, 514 U.S. 549, 566 (1995).

<sup>126</sup> See Reply Memo in Support of Defendant’s Motion to Dismiss at 14, *Virginia v. Sebelius*, Civil Action No. 3:10CV188-HEH (E.D.VA. Aug. 2, 2010).

<sup>127</sup> *United States v. Se. Underwriters*, 322 U.S. 533 (1944).

<sup>128</sup> *Lopez*, 514 U.S. at 561.

<sup>129</sup> See *Gonzales v. Raich*, 545 U.S. 1, 24–25 (2005) (Stevens, J.) (The “classification [of marijuana as a Schedule I substance], unlike the discrete prohibition established by the Gun-Free School Zones Act of 1990, was merely one of many ‘essential part[s]

deemed by the Court to be “economic” in nature, Justice Stevens’ assertion of this principle did not entail it would apply to noneconomic activity.

That Congress could reach intrastate noneconomic activity under this theory was propounded by Justice Scalia in his concurring opinion in *Raich*: “Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce.”<sup>130</sup> And he then grounded this principle in the Necessary and Proper Clause. “As we implicitly acknowledged in *Lopez*, . . . Congress’s authority to enact laws necessary and proper for the regulation of interstate commerce is not limited to laws directed against economic activities that have a substantial effect on interstate commerce.”<sup>131</sup> In this way, Justice Scalia affirmed the understanding that the line of cases upholding the power of Congress to reach wholly intrastate activity are based on the Necessary and Proper Clause.

Of course, a majority of the Supreme Court has yet to adopt Justice Scalia’s theory as a way of reaching intrastate economic and noneconomic activity. But to justify the health insurance mandate, the Supreme Court would have to go beyond anything previously written by Justice Scalia, much less by Chief Justice Rehnquist or Justice Stevens. The Supreme Court would have to rule that Congress can regulate wholly intrastate *inactivity* when doing so is deemed by Congress to be essential to a more general regulation of commerce.

There is nothing in either *Lopez* or *Raich* to warrant the additional step beyond current doctrine to allow Congress to compel that persons engage in economic activity when doing so is essential to a broader regulation of commerce. (And in Part V, I will explain why any such extension would be improper.) In *Raich*, both Justice

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of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.”).

<sup>130</sup> *Id.* at 37.

<sup>131</sup> *Id.* at 36; see also *id.* at 35 (Scalia, J., concurring) (“Our cases show that the regulation of intrastate activities may be necessary to and proper for the regulation of interstate commerce. . .”).

Stevens and Justice Scalia were attempting to deal with a rather technical issue that arises in certain Commerce Clause cases. As Justice Thomas noticed in his dissent,<sup>132</sup> whereas both *Lopez* and *Morrison* were facial challenges, *Raich* involved the constitutionality of the C.S.A. as applied to intrastate use of marijuana for medical use as authorized by state law, on the ground that this subset class was noneconomic.<sup>133</sup>

Once one concedes the facial constitutionality of Congress's power over a statutorily defined class of activities, however, as was conceded in *Raich* with respect to the Controlled Substances Act, how is one to define the relevant subclass of intrastate activities that Congress may reach? Just why is the relevant class the intrastate possession and cultivation of marijuana for medical use as authorized by state law? Why is it not the intrastate cultivation and possession of marijuana for medical use, regardless of whether the state has authorized it? Or why is it not the intrastate cultivation of marijuana for recreational use as authorized by state law?

This is a serious conceptual problem with as-applied Commerce Clause challenges. I believe this was the problem that Justice Scalia was trying to address in his concurring opinion when he invoked the Necessary and Proper Clause to explain why Congress could sometimes reach even noneconomic activity as a means of regulating commerce that was indeed interstate. Justice Scalia would defer

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<sup>132</sup> See *Raich*, 545 U.S. at 61 (Thomas, J., dissenting) ("Because respondents do not challenge on its face the CSA's ban on marijuana, our adjudication of their as-applied challenge casts no doubt on this Court's practice in *United States v. Lopez* and *United States v. Morrison*. In those cases, we held that Congress, in enacting the statutes at issue, had exceeded its Article I powers." (citations omitted)).

<sup>133</sup> See *id.* at 15 (Stevens, J.) ("Respondents in this case do not dispute that passage of the CSA . . . was well within Congress' commerce power. Nor do they contend that any provision or section of the CSA amounts to an unconstitutional exercise of congressional authority. Rather, respondents' challenge is actually quite limited; they argue that the CSA's categorical prohibition of the manufacture and possession of marijuana as applied to the intrastate manufacture and possession of marijuana for medical purposes pursuant to California law exceeds Congress' authority under the Commerce Clause."); *Id.* at 59 (O'Connor, J., dissenting) ("Respondents are correct that the CSA exceeds Congress' commerce power as applied to their conduct, which is purely intrastate and noncommercial.").

to Congress's judgment that, as in *Wickard*, it needed to draw a circle around a class of activity that includes some intrastate non-economic activity.

In this regard, *Raich* truly does represent the same type of problem dealt with in *Wickard*. Once it is conceded that Congress has power under the Commerce Clause over a class of interstate activities – whether regulating the interstate price of wheat or prohibiting the interstate commerce in marijuana – then, according to Justice Scalia, under the Necessary and Proper Clause, it can reach even intrastate activity *of the same kind* if, in its judgment, the failure to reach this activity will undercut its ability to regulate interstate commerce. The need to address the problem of defining the relevant class of activity also explains why Justice Stevens' opinion stressed the fungible nature of marijuana, and even included the production of a “fungible commodity” in his definition of commerce.<sup>134</sup>

Properly understood, then, both *Wickard* and *Raich* deal with an exceedingly narrow problem that arises with as-applied Commerce Clause challenges: defining the relevant class of activities for purposes of the challenge. Had either court fully appreciated the problem it faced, it would not have had to strain so mightily to reach its results.<sup>135</sup> In his concurrence, Justice Scalia came the closest to the mark, but his analysis would have been tighter and more constrained had he confined himself to as-applied challenges to the regulation of the intrastate subset of a class of activities that are largely interstate in nature.

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<sup>134</sup> *Id.* at 22 (Stevens, J.) (“[A]s in *Wickard*, when it enacted comprehensive legislation to regulate the interstate market in a fungible commodity, Congress was acting well within its authority to ‘make all Laws which shall be necessary and proper ‘to regulate Commerce . . . among the Several States.’” (citations omitted)).

<sup>135</sup> Nor would this difficulty arise if Nick Rosenkranz is right that there should be no “as-applied” Commerce Clause challenges given that the subject of the Commerce Clause is Congress and thus the proper constitutional question is whether Congress exceeds its authority when it enacts a statute, not when the statute is applied. See Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209, 1273–79 (2010).

In contrast with *Raich* (and *Wickard*), the lawsuits against the individual mandate are all facial challenges to the “class of activity” defined in the statute. No court is being asked to carve out a noneconomic subset of the class of activities that Congress chose to regulate. No one is conceding that the bulk of this class is within the power of Congress to reach. So neither the majority opinion in *Raich*, nor Justice Scalia’s concurrence, are directly on point. I fully expect that, if confronted with a challenge to the individual mandate, Justice Scalia will appreciate the difference between the class of inactivity being reached by the Act, and the subclass of noneconomic activity prohibited by the C.S.A.

If Justice Scalia’s theory is considered to be existing law, it fails even to hint at a power of Congress to reach inactivity, and mandate economic activity, as a means of regulating interstate commerce. For that matter, neither does Chief Justice Rehnquist’s *dicta* in *Lopez* that Congress can reach activity when doing so is “an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate *activity* were regulated.”<sup>136</sup> Therefore, unless the Supreme Court is prepared to use alchemy to convert a “decision” *not* to act into activity, to uphold the individual mandate would require going beyond both existing Commerce and Necessary and Proper Clause doctrine and Justice Scalia’s concurring opinion in *Raich*.

If and when a majority of the Court does accept Justice Scalia’s “essential to a broader regulatory scheme” rationale for reaching intrastate noneconomic activity, some doctrine limiting “necessity” under this theory will be required. The distinction between economic and noneconomic activity would obviously provide no limit to this doctrine. The whole purpose for his concurring opinion was to question the usefulness of that distinction in dealing with the problems posed by *Raich*. Without some judicially administrable limiting doctrine, however, the fear expressed in *Lopez* and *Morrison*

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<sup>136</sup> United States v. Lopez, 514 U.S. 549, 561 (1995) (emphasis added).

that Congress would then possess a general police power would be realized.

The distinction between activity and inactivity provides the same type of judicially administrable limiting doctrine for what is “necessary” to execute the commerce power under an “essential to a broader regulatory scheme” theory as the economic-noneconomic distinction provides for the substantial effects doctrine. Recall that the economic-noneconomic distinction had not previously been discussed in the substantial effects doctrine cases when Chief Justice Rehnquist looked back at these cases to identify this commonality. Now that Congress has, for the first time, sought to reach inactivity, all the Supreme Court need do is look back at its Necessary and Proper Clause cases to see that every single one involved the regulation of activity, not inactivity.

Limiting Congress to regulating or prohibiting activity under *both* the substantial effects and the essential to a broader regulatory scheme doctrines would serve the same purpose as the economic-noneconomic distinction. Such a formal limitation would help assure that exercises of the Necessary and Proper Clause to execute the commerce power would be truly incidental to that power and not be remote. Doing nothing at all involves not entering into a literally infinite set of economic transactions. Giving a discretionary power over this set to Congress when it deems it essential to a regulation of interstate commerce would give Congress a plenary and unlimited police power over inaction that is typically far removed from interstate commerce.

Of course, like the distinction between economic and noneconomic activity, the activity-inactivity distinction would not perfectly distinguish between incidental and remote exercises of implied powers. But, however imperfect, some such line must be drawn to preserve Article I’s scheme of limited and enumerated powers. Because accepting the Government’s theory in this case would effectively demolish that scheme, the Government’s theory is unconstitutional.

In its current briefs, the Government implicitly acknowledges this problem by its attempt to distinguish the health insurance

business as “unique” in a variety of respects and thereby appear to be providing a limiting principle.<sup>137</sup> But examining the substance of the law in question is precisely the sort of inquiry into the “more or less necessity” of a measure that has been rejected by the Supreme Court since *McCulloch*. Once the power to mandate economic activity is recognized here, the Court will refuse to examine future mandates on a case-by-case basis to see if they are factually like the health insurance mandate. Therefore, if this mandate allowed, Congress will henceforth have the power to impose mandates at its discretion regardless of the “uniqueness” of the market in question. The government’s attempt to limit the doctrine by its factual assertions is chimerical.

To sum up, the distinction between economic and noneconomic activity now provides a judicially administrable limit to the “necessary” prong of the Necessary and Proper Clause power to reach wholly intrastate activity that substantially affects interstate commerce. This limiting doctrine was discovered by looking back to all previous substantial effects cases to notice a commonality among them. The “essential to a broader regulatory” theory of the Necessary and Proper Clause likewise requires a limiting doctrine that can be identified by looking back at all previous cases to see that, to date, the Court has only sanctioned Congress reaching intrastate activity.<sup>138</sup>

In Chief Justice Rehnquist’s words, “the pattern is clear.”<sup>139</sup> Under the “necessary” element of the Necessary and Proper Clause,

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<sup>137</sup> See, e.g., Brief for Defendant at 17, *Florida v. U.S. Dep’t of Health and Human Servs.*, No. 3:10-cv-91-RV/EMT (N.D. Fla. Aug. 27, 2010); Brief for Defendant at 24, *Florida v. U.S. Dep’t of Health and Human Servs.*, No. 3:10-cv-91-RV/EMT (N.D. Fla. Nov. 4, 2010).

<sup>138</sup> In his opinion, Judge Vinson viewed the activity-inactivity distinction as limiting the power of Congress under the Commerce Clause. See *Florida v. U.S. Dep’t of Health and Human Servs.*, No. 3:10-cv-91-RV/EMT, slip op. at 39–44 (N.D. Fla. Jan. 31, 2010). That the substantial effects doctrine was based on the Necessary and Proper Clause, however, suggests that the activity-inactivity distinction can also be viewed as restricting the “necessary” prong of the Necessary and Proper Clause in the context of the commerce power. It is justifiable on the same grounds as was the economic-noneconomic distinction, and identified in the same manner.

<sup>139</sup> *Lopez*, 514 U.S. at 560 (Rehnquist, C.J.).



Congress may only regulate intrastate *activity*, either (a) because such activity is economic in nature and substantially affects interstate commerce or, (b) because, whether such intrastate activity is economic or noneconomic in nature, reaching it is essential to a broader regulation of interstate commerce.

## V. WHY THE INDIVIDUAL MANDATE IS ALSO IMPROPER

### A. *What the Supreme Court Has Said About "Proper"*

The government's theory that Congress can mandate that people engage in economic activity when doing so is essential to a regulatory scheme only gets it past the requirement that the mandate be *necessary* to the execution of the commerce power. But the inquiry would not end there. The Necessary and Proper Clause requires that laws be "proper" as well. Assuming the individual mandate is deemed essential to a broader regulation of interstate commerce and therefore is "necessary," is it also a "proper" means to the end of regulating interstate commerce?

In *McCulloch*, Chief Justice Marshall provided the following rule of law to guide the application of the Necessary and Proper Clause: "Let the end be legitimate, let it be within the scope of the constitution, and all means *which are appropriate*, which are plainly adapted to that end, *which are not prohibited, but consist with the letter and spirit of the constitution*,"<sup>140</sup> The requirement that a law be "plainly adapted to that end," concerns the matter of means-ends fit, discussed above, when assessing a measure's necessity. The italicized portions concern the requirement that a means that may be conducive to an enumerated end and, therefore, necessary must also be appropriate or proper. First, such a means must not be prohibited, and second it must be consistent with the letter and spirit of the constitution.

Of course, because mandating economic activity on the grounds that it is essential to the regulation of commerce is unprecedented, there are no judicial opinions directly addressing whether such an

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<sup>140</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) (emphasis added).

economic mandate is “within the letter and spirit of the Constitution.” But neither has the Supreme Court been entirely silent on the issue of the propriety of means when Congress is seeking to exercise its commerce power. As it happens, the means it held to be improper was a mandate on state governments.

In 1992, Congress used its commerce power to mandate that any state that refused to enter into interstate compacts to dispose of nuclear waste must take title to the nuclear waste itself. In *New York v. United States*,<sup>141</sup> the Court held that this mandate constituted unconstitutional commandeering of state legislatures. In her opinion for the Court, Justice O’Connor explained that “the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress’ instructions.”<sup>142</sup> She characterized this as unconstitutional “commandeering,” a term she took from the 1981 case of *Hodel v. Virginia Surface Mining & Reclamation Ass’n*.<sup>143</sup> “Congress may not simply ‘commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.’”<sup>144</sup> In *New York*, the Court held that “‘the Act commandeers the legislative processes of the States by directly *compelling* them to enact and enforce a federal regulatory program,’ an outcome that has never been understood to lie within the authority conferred upon Congress by the Constitution.”<sup>145</sup>

Then, in 1997, Congress used its commerce power to mandate that local sheriffs run background checks on gun buyers. In *Printz v. United States*,<sup>146</sup> the Supreme Court held that this too constituted improper “commandeering” of state executive branch officials. In his opinion for the Court, Justice Scalia identified a principle of state sovereignty underlying several provisions of the Constitution. These included the prohibition on any involuntary reduction or

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<sup>141</sup> *New York v. United States*, 505 U.S. 144, 161 (1992).

<sup>142</sup> *Id.* at 162 (O’Connor, J.).

<sup>143</sup> *Hodel v. Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 288 (1981).

<sup>144</sup> *New York*, 505 U.S. at 161 (quoting *Hodel*).

<sup>145</sup> *Id.* at 176 (quoting *Hodel*, 452 at 288) (emphasis added).

<sup>146</sup> *Printz v. United States*, 521 U.S. 898 (1996).

combination of a State's territory in Art. IV, §3; the Judicial Power Clause in Art. III, §2, and the Privileges and Immunities Clause in Art. IV, §2, "which speak of the 'Citizens' of the States"<sup>147</sup>; the amendment provision in Article V, "which requires the votes of three-fourths of the States to amend the Constitution"<sup>148</sup>; and the Guarantee Clause in Art. IV, §4.<sup>149</sup>

This doctrine barring the commandeering of states has, however, come to be associated primarily with the Tenth Amendment. "[R]esidual state sovereignty was also implicit, of course, in the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones, Art. I, §8," wrote Justice Scalia, "which implication was rendered express by the Tenth Amendment's assertion that '[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.'"<sup>150</sup>

From the existence of residual state sovereignty expressed in the Tenth Amendment, Justice Scalia concluded that the "Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program."<sup>151</sup> Such commandeering is "fundamentally incompatible with our constitutional system of dual sovereignty."<sup>152</sup>

In his response to the claim that this mandate on states was justified under the Necessary and Proper Clause as a means of effectuating its commerce power, Justice Scalia memorably described the clause as "the last, best hope of those who defend ultra vires congressional action."<sup>153</sup> He then explained: "When a 'Law . . . for carrying into Execution' the Commerce Clause violates the principle of

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<sup>147</sup> *Id.* at 919.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* (quoting U.S. CONST. amend. X).

<sup>151</sup> *Id.* at 935.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 923.

state sovereignty reflected in” the Tenth Amendment and other constitutional provisions, “it is not a ‘Law . . . proper for carrying into Execution the Commerce Clause,’ and is thus, in the words of The Federalist, ‘merely [an] act of usurpation’ which ‘deserves to be treated as such.’”<sup>154</sup> In this way, Justice Scalia made clear that, however necessary Congress might deem it to be, imposing mandates on state legislatures and executive officers was an improper means to the end of regulating commerce among the several states.

Nor has Justice Scalia backed away from this position. In his concurring opinion in *Raich*, referring to the portions of Chief Justice Marshall’s opinion in *McCulloch* emphasized above, he wrote: “These phrases are not merely hortatory. For example, cases such as [*Printz* and *New York*] affirm that a law is not ‘proper for carrying into Execution the Commerce Clause’ ‘[w]hen [it] violates [a constitutional] principle of state sovereignty.’”<sup>155</sup> But this principle did not apply in *Raich*, he said, because “neither respondents nor the dissenters suggest any violation of state sovereignty of the sort that would render this regulation ‘inappropriate’ . . .”<sup>156</sup>

The Supreme Court’s most recent consideration of the meaning of the Necessary and Proper Clause is *United States v. Comstock*,<sup>157</sup> which upheld the constitutionality of a federal statute allowing the civil commitment of sexually dangerous criminals after the expiration of their sentence for the commission of a federal crime. While it gives the Necessary and Proper Clause an expansive reading,

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<sup>154</sup> *Id.* at 923–24. (citations omitted). In support of this conclusion, Justice Scalia then cited Gary Lawson & Patricia B. Granger, *The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267 (1993). Randy Beck disputes both Justice Scalia’s and Lawson & Granger’s reading of “proper” on originalist grounds, but this issue is beyond the scope of this article’s focus on existing doctrine. See Beck, *supra* note 39, at 626–48. Cf. Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. PA. J. CONST. L. 185, 188–215 (2003) (discussing original meaning of “necessary”). As suggested in Part I, both the regulations imposed on insurance companies, and the insurance mandate imposed on individuals, most likely exceed the original scope of the enumerated powers of Congress.

<sup>155</sup> *Gonzales v. Raich*, 545 U.S. 1, 39 (Scalia, J., concurring) (emphasis in original).

<sup>156</sup> *Id.* at 41.

<sup>157</sup> *United States v. Comstock*, 130 S. Ct. 1949 (2010).

*Comstock* offers little, if any, support for the individual mandate. Justice Breyer's opinion, purported to be narrow, identifies five factors that led the Court to its conclusion,<sup>158</sup> and may well have been so written to attract the vote of Chief Justice Roberts. Even so, Justices Kennedy and Alito joined only in the result. In his concurring opinion, Justice Kennedy advocated enhanced scrutiny of the connection between means and ends when considering claims of power under the Commerce Clause,<sup>159</sup> strongly signaling that his joining the majority in *Raich* did not represent his abandonment of his prior stance in *Lopez*.<sup>160</sup>

But for present purposes, the most important thing about *Comstock* is that it said nothing whatsoever about the propriety of the means—incarceration—employed by the statute. Instead, it solely concerned whether there was a direct enough connection between the statute and an enumerated power. The current substantial effects doctrine requires, at minimum, that the intrastate activity being reached is economic in nature and, therefore, likely to be sufficiently connected to interstate commerce. *Comstock* simply does not address the issue of "proper."

*Comstock* is also noteworthy for Justice Thomas's dissenting opinion, not only for what he says, but because it was joined by Justice Scalia, which is a rarity in Commerce Clause cases.<sup>161</sup> In his dissent, Justice Thomas reaffirmed the *McCulloch* standard for assessing propriety: "The means Congress selects will be deemed 'necessary' if they are 'appropriate' and 'plainly adapted'

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<sup>158</sup> See *id.* at 1956-64.

<sup>159</sup> See *id.* at 1967 (Kennedy, J., concurring):

*Raich, Lopez, and Hodel* were all Commerce Clause cases [that] require a tangible link to commerce, not a mere conceivable rational relation, as in *Lee Optical*. . . . The rational basis referred to in the Commerce Clause context is a demonstrated link in fact, based on empirical demonstration. While undoubtedly deferential, this may well be different from the rational-basis test as *Lee Optical* described it.

<sup>160</sup> See *United States v. Lopez*, 514 U.S. 549, 568 (1995) (Kennedy, J., concurring).

<sup>161</sup> Justice Scalia did not join Justice Thomas's originalist concurring opinions in *Lopez* and *Morrison* and he was on the opposite side of *Raich*.

to the exercise of an enumerated power, and ‘proper’ if they are not otherwise ‘prohibited’ by the Constitution and not ‘[in]consistent’ with its ‘letter and spirit.’”<sup>162</sup> He concluded his dissent by quoting from Justice Scalia’s opinion in *Printz*: “Not long ago, this Court described the Necessary and Proper Clause as ‘the last, best hope of those who defend ultra vires congressional action.’”<sup>163</sup> And he lamented the fact that the majority opinion in *Comstock* “breathes new life into that Clause, and – the Court’s protestations to the contrary notwithstanding . . . comes perilously close to transforming the Necessary and Proper Clause into a basis for the federal police power that ‘we *always* have rejected.’”<sup>164</sup>

So too would the use of the Necessary and Proper Clause to uphold the individual mandate.

#### *B. Why the Individual Mandate is an Improper Means to the Regulation of Interstate Commerce*

Because an individual mandate is an unprecedented means of executing the commerce power, the Supreme Court has never opined on whether it is “proper.” When the Supreme Court has been silent on a question, it is time to turn to the Constitution itself to see if it provides any guidance on the propriety of the government’s novel claim of Congressional power.<sup>165</sup>

As we have seen, the anti-commandeering cases that limit the commerce power of Congress were ultimately grounded by the Su-

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<sup>162</sup> *Comstock*, 130 S. Ct. at 1971–72. Notice that Justice Thomas reads “appropriate” as relating to the necessity of a mean rather than its propriety. Nothing of substance turns on whether this is correct.

<sup>163</sup> *Id.* at 1983 (Thomas, J., dissenting).

<sup>164</sup> *Id.* (Thomas, J., dissenting) (quoting his concurring opinion in *Lopez*, 514 U.S. at 584).

<sup>165</sup> In his opinion, Judge Vinson holds that the individual mandate is an “improper” means of executing the commerce power because the rationales by which it is allegedly justified would inevitably undermine the scheme of limited and enumerated powers, and thereby violate the letter and spirit of the Constitution. See *Florida v. U.S. Dep’t of Health and Human Servs.*, No. 3:10-cv-91-RV/EMT, slip op. at 56–63 (N.D. Fla. Jan. 31, 2010). The analysis in this section can be viewed as providing another independent reason to conclude that the mandate is improper.

preme Court in the text of the Tenth Amendment. Yet the letter of the Tenth Amendment is not limited to states. It says that the “powers not delegated by the Constitution to the United States . . . are reserved to the states respectively, or to the people”.<sup>166</sup> As Justice Thomas has written, the Tenth Amendment “avoids taking any position on the division of power between the state governments and the people of the States”<sup>167</sup>—a position he reasserted just last term in his dissenting opinion in *Comstock* in which Justice Scalia joined.<sup>168</sup> In this way, the text of the Tenth Amendment recognizes *popular* as well as state sovereignty.

The Supreme Court has not been silent on the sovereignty of the people. In *Chisholm v. Georgia*,<sup>169</sup> its first great constitutional case, the Supreme Court examined the question of whether states were immune from being sued by individual citizens in federal court. By a vote of four to one, the Supreme Court rejected Georgia’s claim of sovereign immunity and affirmed the power of an individual to sue a state for breach of contract in federal court.

To evaluate Georgia’s claim, the Justices were compelled to examine the concept of sovereignty and its relationship to the power of an individual to sue a state to enforce his individual rights. As Justice Cushing observed: “The rights of individuals and the justice due to them, are as dear and precious as those of States. Indeed the latter are founded upon the former; and the great end and object of them must be to secure and support the rights of individuals, or else vain is Government.”<sup>170</sup>

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<sup>166</sup> U.S. CONST. amend. X. (emphasis added) (The Commonwealth of Virginia initially refused to ratify the Tenth Amendment because it thought the addition of these words to the proposal that its ratification convention had recommended to Congress vitiated the protection of state sovereignty. See Randy E. Barnett, *Kurt Lash’s Majoritarian Difficulty: A Response to A Textual-Historical Theory of the Ninth Amendment*, 60 STAN. L. REV. 937, 952–53 (2008) (describing Virginia’s objection to this language and that of its U.S. Senators)).

<sup>167</sup> *U.S. Term Limits v. Thornton*, 514 U.S. 779, 848 (1994) (Thomas, J., dissenting).

<sup>168</sup> *United States v. Comstock*, 130 S. Ct 1949, 1971 (2010) (Thomas, J., dissenting).

<sup>169</sup> *Chisolm v. Georgia*, 2 U.S. 419 (2 Dall.) (1793).

<sup>170</sup> *Id.* at 468.

Chief Justice John Jay—former president of the Continental Congress, former ambassador to Spain and France, and one of the original co-authors of the Federalist papers—expounded on the nature of sovereignty. “[T]he sovereignty of the nation is in the people of the nation, and the residuary sovereignty of each State in the people of each State. . . . [A]t the Revolution, the sovereignty devolved on the people; and they are truly the sovereigns of the country. . . .”<sup>171</sup> Later in his opinion he referred to “this great and glorious principle, that the people are the sovereign of this country,”<sup>172</sup> and he referred to “the people,” not collectively, but as “*fellow citizens and joint sovereigns.*”<sup>173</sup>

Justice James Wilson—member of the committee of detail at the Philadelphia convention that selected the actual wording of the Constitution—joined Chief Justice Jay in locating sovereignty in the individual citizen. “The only reason, I believe, why a free man is bound by human laws, is, that he binds himself” and he thereby “becomes amenable to the Courts of Justice, which are formed and authorised by those laws.”<sup>174</sup> Wilson then asked, “[i]f one free man, *an original sovereign*, may do all this; why may not an aggregate of free men, *a collection of original sovereigns*, do this likewise?”<sup>175</sup> For Wilson, like Jay, whatever sovereignty states enjoyed was derivative of the ultimate sovereignty of the individual person.

Of course, the Court’s decision in *Chisholm* was effectively reversed by the adoption of the Eleventh Amendment, which barred suits against states in federal court by citizens of other states.<sup>176</sup> And, since the 1890 case of *Hans v. Louisiana*, a majority of the Supreme Court has “understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it

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<sup>171</sup> *Id.* at 471.

<sup>172</sup> *Id.* at 479.

<sup>173</sup> *Id.* (emphasis added).

<sup>174</sup> *Id.* at 456.

<sup>175</sup> *Id.* (emphases added).

<sup>176</sup> See U.S. CONST. amend. XI (“The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against



confirms.”<sup>177</sup> In the words of Chief Justice Rehnquist in *Seminole Tribe of Florida v. Florida*, this presupposition was that, “each State is a sovereign entity in our federal system.”<sup>178</sup>

But in affirming the underlying principle of state sovereignty within the federal system, the Supreme Court has never repudiated its early affirmation of popular sovereignty in *Chisholm*. In *Yick Wo v. Hopkins*,<sup>179</sup> the Supreme court reaffirmed that “in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts.”

If commandeering the states is an improper means of executing a federal power under the “letter” of the Tenth Amendment “and spirit of the Constitution,” might not commandeering the people be improper as well? Put another way, if imposing mandates on state legislatures and executives intrudes improperly into state sovereignty, might mandating the people improperly infringe on popular sovereignty?

As Lon Fuller and other contracts scholars have recognized, by forming a contract persons employ a private law-making power. The “power of the individual to effect changes in his legal relations with others is comparable to the power of a legislature. It is, in fact, only a kind of political prejudice which causes us to use the word ‘law’ in one case and not in the other. . . .”<sup>180</sup> Mandating that individuals exercise their private legislative power is as fundamental an intrusion into popular sovereignty as mandating that states employ their legislative powers violates state sovereignty.

Recall that, in *Printz*, Justice Scalia identified several sections of the Constitution that presupposed the principle expressed in the

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one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”).

<sup>177</sup> *Hans v. Louisiana*, 134 U.S. 1 (1890).

<sup>178</sup> *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996) (Rehnquist, C.J.).

<sup>179</sup> *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (Matthews, J.).

<sup>180</sup> Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 800-07 (1941).

Tenth Amendment.<sup>181</sup> As it happens, the text of the Constitution also contains several express prohibitions on commandeering the people. Persons may not be mandated to quarter soldiers in their homes in time of peace,<sup>182</sup> to testify against themselves in a criminal case,<sup>183</sup> or to labor for another.<sup>184</sup> Although private property may be taken “for public use” if just compensation is made, it may not be commandeered for private use.<sup>185</sup>

These express prohibitions on commandeering the people signal that mandates are different than *regulations* that tell persons who choose to engage in economic activity *how* they must do so – or that prohibit certain activities altogether. To see why, consider the duties the federal government does impose on the people: register for the draft and serve if called, sit on a jury, fill out a census form, and file a tax return. None of these duties are imposed via Congress’s power to regulate economic behavior. Instead, all have traditionally been considered fundamental duties that each person owes to the government by virtue of American citizenship or residency. Each of these duties can be considered essential to the very existence of the government, not merely convenient to the regulation of commerce.

Consider the duty to serve in the military. The Pennsylvania constitution of 1776 declared that “every member of society hath a right to be protected in the enjoyment of life, liberty and property, and therefore is bound to contribute his proportion towards the expense of that protection, and yield his personal service when necessary, or an equivalent thereto.”<sup>186</sup> In upholding the constitutional-

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<sup>181</sup> See *New York v. United States*, 505 U.S. 144, 161–62 (1992); *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264 (1981).

<sup>182</sup> See U.S. CONST. amend. III.

<sup>183</sup> See U.S. CONST. amend. V.

<sup>184</sup> See U.S. CONST. amend. XIII.

<sup>185</sup> See U.S. CONST. amend. V.

<sup>186</sup> PA. CONST. art. 8 (1776), *reprinted in*, 5 THE FEDERAL AND STATE AMERICAN CONSTITUTIONS, COLONIAL CHARTERS AND OTHER ORGANIC LAWS OF THE STATE 3081, 3083 (Thorpe ed., 1909); *see also* VT. CONST. C. 1, art. 9 (1777), *reprinted in*, 6 THE FEDERAL AND STATE AMERICAN CONSTITUTIONS, COLONIAL CHARTERS AND OTHER ORGANIC LAWS OF THE STATE 4747, 3740 (using identical language); N.Y. CONST. art.

ity of the national draft during World War I, the Supreme Court said: "It may not be doubted that the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need, and the right to compel it."<sup>187</sup>

The Court then summarily rejected a Thirteenth Amendment objection to the draft on the ground that it was "unable to conceive upon what theory the exaction by government from the citizen of the performance of *his supreme and noble duty* of contributing to the defense of the rights and honor of the nation, as the result of a war declared by the great representative body of the people, can be said to be the imposition of involuntary servitude. . . ."<sup>188</sup> This assertion of the Thirteenth Amendment in the draft case demonstrates its anti-commandeering nature. For, unless the Court could find an affirmative duty of citizenship on which to base conscription, the Thirteenth Amendment's general prohibition on commandeering the labor of the people *would* clearly apply to the draft.

Can a duty to purchase health insurance from a private company possibly be justified as being on a par with these other traditionally recognized fundamental duties of citizenship? Put another way, does the reason why a mandate is a proper means for carrying into execution the power of Congress to raise and support an army also justify imposing economic mandates on the people that are convenient to its regulation of commerce among the several states? The propriety of the insurance mandate turns on this question.

What separates the United States from other countries is the minimal and fundamental nature of the duties its citizens owe the

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40 (1777) reprinted in, 5 THE FEDERAL AND STATE AMERICAN CONSTITUTIONS, COLONIAL CHARTERS AND OTHER ORGANIC LAWS OF THE STATE, *supra*, at 2637 ("And whereas it is of the utmost importance to the safety of every State that it should always be in a condition of defence; and it is the duty of every man who enjoys the protection of society to be prepared and willing to defend it; this convention therefore . . . doth ordain, determine, and declare that the militia of this State, at all times hereafter, as well in peace as in war, shall be armed and disciplined, and in readiness for service.").

<sup>187</sup> *Selective Draft Law Cases*, 245 U.S. 366, 378 (1918).

<sup>188</sup> *Id.* at 390 (emphasis added).

state. During World War II, the people were not commandeered to work in defense plants or buy war bonds. Even voting is not mandated in the United States. This is why so many Americans instinctively sense that empowering Congress to commandeer the people to engage in economic activities would fundamentally change the relationship between themselves and their government. Conversely, those who are not bothered by the individual mandate likely hold a very capacious notion of the duties owed by the citizen to the state—so capacious that they include ‘the supreme and noble duty’ to engage in any activity that Congress deems to be convenient to its regulation of interstate commerce.

In both *New York* and *Printz*, Justices O’Connor and Scalia supplemented their analysis with pragmatic reasons why state sovereignty is important in a federal system. For example, Justice O’Connor stressed the reduction in accountability “when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not preempted by federal regulation.”<sup>189</sup> Mandates on states are improper because, “where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision.”<sup>190</sup>

Likewise, the proposition that commandeering the people as a means of regulating commerce violates popular sovereignty is also supported by pragmatic considerations. Like mandates on states, economic mandates undermine political accountability, though in a different way. The public is acutely aware of tax increases. Rather than incur the political cost of imposing a general tax on the public using its tax powers, economic mandates allow Congress and the President to escape accountability for tax increases by compelling citizens to make payments directly to private companies.

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<sup>189</sup> *New York v. United States*, 505 U.S. 144, 169 (1992) (O’Connor, J.).

<sup>190</sup> *Id.*

That the individual insurance mandate was designed to obviate political accountability is evidenced by President Obama's high profile denial—while the Act was still pending in the Senate—that the mandate constituted a tax increase. The President needed to avoid accountability for breaking his repeated pledge not to raise taxes on persons making below a certain amount of money, so he vehemently denied that the mandate imposed a tax. “For us to say that you’ve got to take a responsibility to get health insurance is absolutely not a tax increase.”<sup>191</sup> One suspects that this is why the Senate bill was crafted as a regulation of commerce enforced by a penalty, rather than as a revenue-raising tax. As Judge Vinson wrote when dismissing the government's tax power theory on its merits:

Congress should not be permitted to secure and cast politically difficult votes on controversial legislation by deliberately calling something one thing, after which the defenders of that legislation take an “Alice-in-Wonderland” tack and argue in court that Congress really meant something else entirely, thereby circumventing the safeguard that exists to keep their broad power in check.<sup>192</sup>

Once Congress is allowed to avoid invoking its tax power by mandating citizens to engage in economic activity, Congress can engage in all sorts of “off budget” commands that citizens “buy” some goods or services. The problem of accountability caused by mandating that persons pay money to private companies implicates concerns quite similar to those underlying the Takings Clause.<sup>193</sup> In

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<sup>191</sup> Interview by George Stephanopoulos with Barack Obama, U.S. President, (Sept. 9, 2009), available at <http://blogs.abcnews.com/george/2009/09/obama-mandate-is-not-a-tax.html>.

<sup>192</sup> *Florida v. U.S. Dept. of Health & Human Servs.*, 716 F.Supp.2d 1120,1143 (N.D.Fla. 2010).

<sup>193</sup> Whether this mandated payment from private persons to private companies also constitutes a “taking” for purposes of the Fifth Amendment is a complex question that is beyond the scope of this paper. For a suggestive discussion of why regulations compelling payments to a private party could be considered a taking because

the first 150 years of our history, perhaps the most commonly given example of a statute so unjust that it is not properly called a law is the taking from A to give to B. Whether or not economic mandates are technically “takings” under existing doctrine, however, they raise comparable concerns.<sup>194</sup>

For these reasons, therefore, the individual mandate is not merely another regulation among countless ones imposed on the American people by the federal government. It crosses an important line between limited and unlimited government power. If a power to impose an economic mandate because it is “convenient” to the regulation of commerce is upheld here, then Congress could mandate *any* behavior so long as it is cast as part of a broad regulatory scheme. Today it is buying government approved health insurance. Tomorrow it could be having an annual physical or mandating what you eat. What sounds farfetched now can change with the political winds.

Ordinarily, persons are responsible for their failure to act—or omissions—when they have a preexisting duty to act. A mandate to act, therefore, presupposes the existence of a duty, such as the duty of a citizen to defend the country. But with the individual mandate there is no traditionally recognized pre-existing duty. The duty to purchase health insurance is entirely of Congress’s creation. Unless they voluntarily choose to engage in activity that is within Congress’s power to regulate or prohibit, the American people retain their sovereign power to refrain from entering into contracts with private parties, even when commandeering them to do so may be convenient to the regulation of commerce among the several states.

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they undercut political accountability, see Chaim Gordon, Note, *Protecting Peter when the Legislature Robs Peter to Pay Paul after Empress Casino v. Giannoulis*, 63 TAX L. 1299 (2010) (discussing the reasoning of the plurality opinion in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998)).

<sup>194</sup> See, e.g., *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (Chase, J.) (“An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. [For example,] a law that takes property from A. and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it.”).

## VI. CONCLUSION: FROM CITIZENS TO SUBJECTS

The third way of assessing constitutionality is to try to predict whether the Supreme Court will uphold or strike down the individual mandate. As everyone knows, the Supreme Court is loath to strike down any acts of Congress, but especially legislation that enjoys popular approval and acceptance.<sup>195</sup> If when it reaches the Supreme Court, the “Patient Protection and Affordable Care Act” fits this description, I would predict that the Justices will strive mightily to uphold it. I would also predict that, as in *Raich*, they would avoid appearing to adopt a virtually open-ended interpretation of the commerce power as the government had urged. Nor would they adopt the even more radical theory that Congress can use its tax power to penalize any activity or inactivity so long as the penalty is a fine collected by the IRS. Instead, they would likely invoke their already latitudinarian interpretation of the Necessary and Proper Clause to find that the mandate is an essential part of a broader regulatory scheme that would be undercut if this “economic decision” to “self-insure” cannot be regulated.

But suppose that, when the “Patient Protection and Affordable Care Act” reaches the Court, it is perceived by the Justices to be unpopular. Suppose it is also widely perceived to have been adopted by a bare partisan majority employing unusual and suspect parliamentary maneuvers to avoid the consequences of the loss of “Ted Kennedy’s” seat in the Senate—a senatorial election that turned on opposition to this particular measure in Massachusetts of all places.<sup>196</sup> Suppose this Act is also perceived to be an important reason why Democrats lost control of the House of Representatives in an election in which Democrats ran away from the Act to avoid defeat.

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<sup>195</sup> See, e.g., BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (2009).

<sup>196</sup> See Michael Cooper, *G.O.P. Senate Victory Stuns Democrats*, N.Y. TIMES, Jan. 20, 2010, at A1, available at, <http://www.nytimes.com/2010/01/20/us/politics/20election.html>.

Now, I am not suggesting that the Supreme Court would strike down the individual mandate simply because a majority perceived it to be unpopular. But I do think that, if the Court views the Act as manifestly unpopular, there may well be five Justices who are open to valid constitutional objections they might otherwise resist. This then returns us to the dubious justifications of the mandate based on the Commerce and Necessary and Proper Clauses or the tax power.

If the Act continues to be perceived as unpopular, I doubt that a majority of the Court would stretch the “essential to a broader scheme” doctrine to reach inactivity and authorize economic mandates. A majority of the justices would be quite comfortable limiting the power of Congress to reaching activity under the “necessary” prong of the Necessary and Proper Clause since doing so would affect only one law: the Patient Protection and Affordable Care Act.

Perhaps most importantly, none of what is sometimes called by law professors the “New Deal Settlement” would be called into question by refusing to extend the substantial effects doctrine to inactivity or by forbidding the commandeering of the people as a means of regulating interstate commerce, thereby barring economic mandates. The minimalist character of this theory is likely to appeal to Chief Justice Roberts, as well as Justices Kennedy, Alito and Scalia.

Moreover, both Justices Thomas and Scalia would immediately see that an economic mandate must not only be necessary, it must also be proper. These Justices would also realize that the logic of Justice Scalia’s opinion in *Printz* could rather simply be carried over to this novel claim of congressional power. Justice Scalia could write in his sleep the opinion holding that economic mandates in general, and the individual insurance mandate in particular, constitute an improper commandeering of the people.

True, extending its anti-commandeering doctrine from the states to the people would be novel, but this is due entirely to the novelty of the individual mandate itself. Before Congress attempted to commandeer the American people, the Court never needed to explain why such a thing was improper. The same was true when



the Court for the first time developed its anti-commandeering doctrine in the 1990s. As Justice Scalia observed, “[f]ederal commandeering of state governments is such a novel phenomenon that this Court’s first experience with it did not occur until the 1970’s.”<sup>197</sup> The first commandeering of the people as a means of regulating interstate commerce occurred in 2010 and immediately triggered a widespread and sustained popular outcry.

The anti-commandeering principle precisely identifies why the individual mandate has so riled the American people. Ordinarily, persons are responsible for their failure to act—or omissions—when they have a preexisting duty to act. A mandate to act, therefore, presupposes the existence of a duty. But unlike the type of preexisting fundamental duties that have traditionally been recognized, such as the duties to defend one’s country and provide the revenue needed to maintain its governance, there is no fundamental duty of citizenship to enter into contracts with private parties when Congress deems it convenient to the regulation of interstate commerce. Upholding such mandates would truly turn citizens into subjects.

Either the national government has unlimited power over the people or its powers are limited. If the latter, there must be some limit to the Necessary and Proper Clause. Courts could limit its scope by examining the substance of each law to see if it is truly necessary, but this they have declined to do. Instead, the Court has developed formal doctrines to identify when an exercise of power is incidental to the regulation of commerce, and when it is remote and unnecessary. If, however, Congress is allowed to regulate any decision that has an economic effect, or that Congress deems essential to its regulatory ambitions, then the scheme of limited and enumerated powers would be at an end. Because it is both unnecessary under existing doctrine and also improper, the individual health insurance mandate is unconstitutional.

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<sup>197</sup> *Printz v. United States*, 521 U.S. 898, 925 (1996).