
ARTICLE

COMMERCE CLAUSE CHALLENGES TO HEALTH CARE REFORM

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INTRODUCTION

When Congress drafted the Patient Protection and Affordable Care Act (PPACA),¹ Democratic lawmakers and most legal scholars had

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¹ Pub. L. No. 111-148, 124 Stat. 119 (2010) (to be codified as amended in scattered sections of 21, 25, 26, 29, and 42 U.S.C.).

good reason to be confident of its constitutionality.² Under long-established precedent, Congress clearly has the authority, if wanted, to enact a single-payer socialized insurance system³ using its powers to tax and spend for the “general welfare.”⁴ Far short of this, PPACA’s complex blend of regulations, subsidies, and an individual mandate is vastly more protective of insurance markets and individual freedoms than any “Medicare for All” scheme would have been. The idea for an individual mandate originated with Republican lawmakers, who never questioned its constitutionality until now.⁵ Congress has nearly unbridled authority to regulate products sold in or affecting interstate commerce,⁶ and health insurance is clearly one such product.⁷ Fur-

² See, e.g., 155 CONG. REC. S13,766-67 (daily ed. Dec. 22, 2009) (statement of Sen. Max Baucus) (summarizing commentary supporting the proposition that PPACA will withstand constitutional scrutiny); Mark A. Hall, *The Constitutionality of Mandates to Purchase Health Insurance*, 37 J.L. MED. & ETHICS (SPECIAL SUPPLEMENT S2) 38, 41 (2009) (predicting that “either state or federal mandates for either individuals or employers to purchase health insurance will pass scrutiny under the U.S. Constitution”); Seth Stern, *Sharpening Clause*, CQ WKLY., Feb. 7, 2011, at 292, 296 (“[A]fter Florida officials first filed the suit in March 2010, Charles Fried, a Harvard Law School professor and solicitor general during the Reagan administration, called the challenge ‘ridiculous[]’ . . . [and] offered to ‘come on [Fox News] and eat a hat which [he] bought in Australia last month made of kangaroo skin.’”); Andrew Koppelman, *Bad News for Mail Robbers: The Obvious Constitutionality of Health Care Reform* 1, 2, 15 (Nw. Univ. Sch. of Law Pub. Law & Legal Theory Research Paper Series, Research Paper No. 11-25, 2011), available at <http://ssrn.com/abstract=1758986> (opining that the “constitutional objections are silly,” “[t]heir reasoning is bizarre and mischievous,” and “[s]ome of the law’s opponents understand perfectly well that . . . their claims are frivolous”); *Over 100 Law Professors Agree on Affordable Care Act’s Constitutionality*, CTR. FOR AM. PROGRESS, http://www.americanprogress.org/issues/2011/01/pdf/law_professors_ACA.pdf (last visited Mar. 15, 2011) (explaining that current challenges to PPACA “seek to jettison nearly two centuries of settled constitutional law”). But see JENNIFER STAMAN & CYNTHIA BROUGHNER, CONG. RESEARCH SERV., R40725, *REQUIRING INDIVIDUALS TO OBTAIN HEALTH INSURANCE: A CONSTITUTIONAL ANALYSIS* 6-8 (2009) (expressing uncertainty about congressional power to mandate insurance purchases).

³ See *Helvering v. Davis*, 301 U.S. 619, 640-41 (1937) (upholding the constitutionality of the Social Security Act of 1935).

⁴ U.S. CONST. art. I, § 8.

⁵ See Julie Rovner, *Republicans Spurn Once-Favored Health Mandate*, NAT’L PUB. RADIO (Feb. 15, 2010), <http://www.npr.org/templates/story/story.php?storyId=123670612> (noting that Republicans supported a 1993 bill that would have required an individual mandate); see also William H. Frist, Op-Ed., *Frist: An Individual Mandate for Health Insurance Would Benefit All*, U.S. NEWS & WORLD REP. (Sept. 28, 2009), <http://www.usnews.com/opinion/articles/2009/09/28/frist-an-individual-mandate-for-health-insurance-would-benefit-all> (advocating for an individual mandate).

⁶ See *Gonzales v. Raich*, 545 U.S. 1, 15-22 (2005) (summarizing the Supreme Court’s Commerce Clause jurisprudence).

⁷ See *United States v. Se. Underwriters Ass’n*, 322 U.S. 533, 551-53 (1944) (holding that regulating insurance falls within Congress’s commerce power).

ther, considering the well-understood economics of health insurance,⁸ a mandate to obtain insurance is obviously part and parcel of regulating how insurers design, price, and sell their products.

Something went wrong on the way to the courthouse, however. District courts in Virginia and Florida have ruled that Congress lacks the constitutional authority to require legal residents to obtain health insurance.⁹ Three other federal judges have upheld federal authority in cases that special interest groups and individual litigants brought.¹⁰

Despite the split outcomes (which fell along the party lines of the judges' appointing presidents), these courts agreed on several issues. No court thus far has found a violation of individual rights protected by the Bill of Rights, and no court so far has accepted (or indicated much support for) the government's position that Congress's tax power supports the mandate.¹¹ In *Florida ex rel. McCollum v. U.S. Department of Health & Human Services*, the Northern District of Florida rejected the states' arguments that forcing them to implement key PPACA provisions violates the Tenth Amendment.¹² Thus the Commerce Clause

⁸ See, e.g., LINDA J. BLUMBERG & JOHN HOLAHAN, URBAN INST., DO INDIVIDUAL MANDATES MATTER?: TIMELY ANALYSIS OF IMMEDIATE HEALTH POLICY ISSUES 1 (2008), available at http://www.urban.org/UploadedPDF/411603_individual_mandates.pdf (“[M]any individuals will not choose to obtain coverage under a purely voluntary system . . . [and] adverse selection will occur.”).

⁹ *Virginia ex rel. Cuccinelli v. Sebelius*, 728 F. Supp. 2d 768, 788 (E.D. Va. 2010); *Florida ex rel. Bondi v. U.S. Dep’t of Health & Human Servs.*, No. 10-0091, 2011 WL 285683, at *27 (N.D. Fla. Jan. 31, 2011).

¹⁰ *Mead v. Holder*, No. 10-0950, 2011 WL 611139, at *21 (D.D.C. Feb. 22, 2011); *Liberty Univ., Inc. v. Geithner*, No. 10-00015, 2010 WL 4860299, at *16 (W.D. Va. Nov. 30, 2010); *Thomas More Law Ctr. v. Obama*, 720 F. Supp. 2d 882, 895 (E.D. Mich. 2010).

¹¹ But see Brian Galle, *The Taxing Power, the Affordable Care Act, and the Limits of Constitutional Compromise*, 120 YALE L.J. ONLINE 407, 408 (2011), <http://yalelawjournal.org/2011/4/5/galle.html> (arguing that the individual-responsibility requirement “is unquestionably a tax”); David B. Rivkin, Jr., Lee A. Casey & Jack M. Balkin, Debate, *A Healthy Debate: The Constitutionality of an Individual Mandate*, 158 U. PA. L. REV. PENNUMBRA 93, 102, 106 (2009), <http://www.pennumbra.com/debates/pdfs/HealthyDebate.pdf> (Balkin, Rebuttal) (debating both sides of whether the individual mandate falls under the tax power). The Northern District of Florida, for instance, noted that Congress went out of its way to call the assessment a penalty rather than a tax. *Florida ex rel. McCollum v. U.S. Dep’t of Health & Human Servs.*, 716 F. Supp. 2d 1120, 1134-36 (N.D. Fla. 2010). The individual mandate is also distinct from the “play or pay” option that is presented to larger employers. See PPACA §§ 1513, 10106(e)-(f), 26 U.S.C.A. § 4980H (West Supp. 1A 2010) (detailing employer responsibilities). An employer’s option is not framed as a mandate enforced by a penalty; instead, it is an “assessable payment” required of larger employers that opt not to provide coverage. *Id.* Had the individual mandate been framed in that fashion, it would more clearly have fallen under the tax power.

¹² See *McCollum*, 716 F. Supp. 2d at 1154, 1156, 1161. PPACA gives states considerable flexibility in deciding whether and how to establish health insurance exchanges

and the ancillary Necessary and Proper Clause will be the primary focus of ongoing litigation over the constitutionality of health care reform. Conservative legal scholars who have previously criticized the expansive scope of federal commerce power see in this litigation the opportunity to impose new limits on its capaciousness.¹³ Accordingly, the Commerce Clause arguments merit close attention in order to understand their strengths, weaknesses, and implications for other areas of constitutional doctrine and public policy.

This Article begins with the narrow question of whether the Commerce Clause by itself allows Congress to mandate insurance, without regard to any other aspects of PPACA. I then consider whether compulsory insurance might also be justified by the Necessary and Proper Clause, in view of the broader context of what PPACA as a whole aims to achieve and how it is constructed. In brief, plausible arguments can be constructed on both sides of the first issue. The more persuasive positions are that a mandate to obtain insurance constitutes a regulation of commerce and the Commerce Clause's fundamental purposes do not compel limiting congressional authority to regulate inactivity simply for the sake of setting some limit. However, these issues are novel ones that lack controlling precedent, and reasoned arguments can be formulated to the contrary.

Despite uncertainty over the mandate in isolation, the conclusion is unavoidable that compulsory insurance is a "necessary and proper" component of PPACA's broader regulation of the insurance market, which is firmly grounded in the core of the conventional commerce power. Longstanding precedent clearly allows Congress to regulate how health insurers design, market, price, and sell their products,¹⁴

and accompanying insurance regulations. See PPACA § 1311, 42 U.S.C.A. § 18031 (West Supp. 1B 2010); *id.* § 1321, 42 U.S.C.A. § 18041; *id.* § 1332, 42 U.S.C.A. § 18052. Changes to Medicaid are mandatory for states that continue to participate, but states are legally free to withdraw from Medicaid. See Mark A. Hall, *The Factual Bases for Constitutional Challenges to Federal Health Insurance Reform*, 38 N. KY. L. REV. (forthcoming 2011) (manuscript at 43), available at <http://ssrn.com/abstract=1717781>. Moreover, the federal government bears most of the expense of Medicaid and private insurance expansion—both of which relieve states from existing costs of caring for people without insurance. *Id.* at 44. Therefore, the net fiscal impact on states is estimated to be modest and may actually be positive. *Id.* at 44-50.

¹³ See, e.g., Randy E. Barnett, Friedrich A. von Hayek Lecture, *Commandeering the People: Why the Individual Health Insurance Mandate is Unconstitutional*, 5 N.Y.U. J.L. & LIBERTY 581 (2011); Ilya Shapiro, *State Suits Against Health Reform Are Well Grounded in Law—And Pose Serious Challenges*, 29 HEALTH AFF. 1229, 1229-30 (2010).

¹⁴ See *United States v. Se. Underwriters Ass'n*, 322 U.S. 533, 553 (1944) (holding that Congress may regulate insurance under the "power of . . . the Commerce Clause").

and there is no substantial disagreement that PPACA's coverage mandate is essential for these unchallenged regulations to be effective. Therefore, the only plausible basis to reject the mandate is an argument that, for some independent reason, it is constitutionally "improper" to mandate insurance. But no such reason emerges. Following the Court's repudiation of *Lochner* jurisprudence,¹⁵ there is no conceivable basis to argue that the Constitution specially protects an individual's freedom to be uninsured.

Moreover, two centuries of precedent under the Necessary and Proper Clause squarely permit other individual mandates or regulations of pure inactivity that are connected with a range of federal powers.¹⁶ Slippery slope concerns are no greater here than for other longstanding federal powers, and a bar on any regulation of inactivity would preclude federal measures that might, someday soon, be desperately needed. For instance, authority under the commerce power to compel purchases or other actions could well be essential to combat a horrifically lethal pandemic. Unless the Court is willing to foreclose such authority and to overturn or contradict firmly established law, compulsory health insurance, albeit novel, sits comfortably within the full range of modern congressional powers.

I. THE COMMERCE CLAUSE MAZE OF ARGUMENTS: A GUIDED TOUR

To begin with the sharpest attack, challengers pointedly deny that Congress has the power to regulate inactivity, claiming it has never before done so in the purest form.¹⁷ Congress currently regulates many forms of inaction by those engaged in commercial activity,¹⁸ such as re-

¹⁵ See, e.g., *West Coast Hotel Co. v. Parish*, 300 U.S. 379, 391-92 (1937) (abandoning the principles of *Lochner*).

¹⁶ See *infra* Part II.

¹⁷ For a critique of the accuracy of this claim, see *infra* subsection II.C.1.

¹⁸ Indeed, Professor Ruger notes that

the very first federal statute relating to health care was a mandate to purchase health care, applied to ship owners, who were required to provide medicine and insure merchant seamen against the costs of treatment. All ships were required to "provide[] . . . a chest of medicines, put up by some apothecary of known reputation, and accompanied by directions for administering the same." Masters of ships were also required to "provide . . . for all such advice, medicine, or attendance of physicians, as any of the crew shall stand in need of in case of sickness . . . without any deduction from the wages of such sick seaman or mariner."

quiring businesses to serve patrons without discrimination.¹⁹ PPACA, however, mandates insurance based simply on the condition of being a lawful U.S. resident, without regard to any commercial activity.²⁰

Observe, first, that this point of attack employs the same strategy the Court explicitly rejected in *Gonzales v. Raich*, which upheld federal authority to ban medicinal use of home-grown marijuana.²¹ There too challengers sought “to excise individual applications of a concededly valid statutory scheme” by “isolating a ‘separate and distinct’ class of activities that [they claimed] to be beyond the reach of federal power.”²² The Court “refuse[d],” as it “ha[d] done many times before,”²³ to go along with this divide-and-conquer stratagem, holding instead that “comprehensive regulatory statutes”²⁴ must be judged as a whole and that a “subdivided class of activities” should not be separated for constitutional scrutiny if it is “an essential part of the larger regulatory scheme.”²⁵ I return to this more integrated view later, but for now, I consider the challengers’ arguments on their own terms (even though this approach is contrary to *Raich*’s teaching).

Theodore Ruger, *The Centrifugal Constitution of American Health Care* 11 n.25 (Mar. 2, 2011) (unpublished manuscript) (on file with author) (citations omitted) (quoting Act of July 20, 1790, ch. 29, § 8, 1 Stat. 131, 134-35).

¹⁹ See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258-62 (1964) (upholding federal prohibition of discrimination by motels serving interstate travelers).

²⁰ PPACA § 1501(a), 42 U.S.C.A. § 18091 (West Supp. 1B 2010); *id.* § 1501(b), 26 U.S.C.A. § 5000A(d). To be precise, the statute does not mandate the *purchase* of insurance, but only that people obtain insurance coverage, including through Medicaid or through employer sponsorship. The penalty for violation, after phase-in, is the greater of \$695 or 2.5% of taxable income above the personal exemption, but capped at the average national cost of “bronze-level” coverage. *Id.* § 10106(b)(2), 26 U.S.C.A. § 5000A(c)(2); Health Care and Education Reconciliation Act of 2010 (HCERA) § 1002, 26 U.S.C.A. § 5000A (West Supp. 1A 2010). Technically, the mandate applies to all legal residents who are not in prison and who do not claim a religious exemption, but several categories of people are exempt from paying the penalty for noncompliance. PPACA § 1501(b), 26 U.S.C.A. § 5000A(d)–(e) (West Supp. 1A 2010). Exemptions include people whose income is below the tax-filing threshold and people who cannot afford coverage, which is defined as the lowest-priced individual insurance plan costing them more than 8% of their household income. *Id.*, 26 U.S.C.A. § 5000A(e)(1)–(2). Exemptions also extend to members of Indian tribes, to individuals with gaps in coverage of three months or fewer, and to those suffering general hardship as defined by the Department of Health and Human Services. *Id.*, 26 U.S.C.A. § 5000A(e)(3)–(5).

²¹ 545 U.S. 1, 22, 32-33 (2005).

²² *Id.* at 23, 26.

²³ *Id.* at 22.

²⁴ *Id.* at 23.

²⁵ *Id.* at 26-27.

At the outset, there is no established basis for barring the regulation of economic inactivity. Instead, challengers point to the fact that the Court has always considered regulations that involve some type of activity. In doing so, the Court has never articulated, or even suggested, that inactivity is somehow foreclosed from general congressional authority over economic matters that relate to interstate commerce. Some leading precedents repeatedly stress the presence of “economic activity,”²⁶ but the focus in all of these rulings has been on whether the subject matter is “economic” and not on how active or passive the enterprise in question is. “Activity” appears in various permissive or limiting phrases only because activity was what Congress actually regulated in these cases. There is not a breath of suggestion in these decisions that Congress may not reach economic inactivity. The Court simply has never been called upon to decide this issue.²⁷

A. *Is Being Uninsured an Activity?*

The government’s first response to this open issue is to avoid it. Its leading position, which three courts so far have endorsed, is that going without insurance is a decision that is sufficiently active to avoid needing to consider whether the commerce power includes inactivity. The action comes not just from a decision to avoid purchase,²⁸ but also

²⁶ See, e.g., *id.* at 23-25 (noting that prior cases which struck down a congressional action as beyond the commerce power did so because these actions did not regulate economic activity); *United States v. Morrison*, 529 U.S. 598, 656-57 (2000) (explaining that the “‘economic/non-economic’ distinction is not easy to apply”); *United States v. Lopez*, 514 U.S. 549, 559-60 (1995) (“[W]e have upheld a wide variety of congressional Acts regulating intrastate economic activity where we have concluded that the activity substantially affected interstate commerce.”).

²⁷ The situation is similar, then, to an earlier point in constitutional history when Commerce Clause cases only addressed the regulation of goods in transit and not their local manufacture prior to transit. But in those cases, “the Court talked about movement because that was all it needed to talk about to decide the cases before it” and not because it meant to limit the scope of federal power. Robert L. Stern, *That Commerce Which Concerns More States Than One*, 47 HARV. L. REV. 1335, 1361 (1934).

²⁸ See *Mead v. Holder*, No. 10-0950, 2011 WL 611139, at *18 (D.D.C. Feb. 22, 2011) (reasoning that “[i]t is pure semantics to argue that an individual who makes a choice to forgo health insurance is not ‘acting’ Making a choice is an affirmative action, whether one decides to do something or not do something. They are two sides of the same coin. To pretend otherwise is to ignore reality.”).

Professor Carlton Lawson notes that concerted refusals to engage in economic activity in the form of boycotts or strikes are strongly regulated. See Carlton Lawson, *Inactivity and the Commerce Clause*, PRAWFSBLAWG (Jan. 12, 2011, 2:28 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2011/01/inactivity-and-the-commerce-clause.html> (“[C]onsider the case of ‘economic boycotts[]’ [People] are literally doing noth-

from the ensuing consequence that those without insurance will pay for care out of pocket or receive care that others pay for. Factually, this is true.²⁹ But conceptually it is contestable that being uninsured is activity. In theory, failure to purchase many goods or services could be characterized as decisions to do something else instead. Not purchasing a car could be framed as a decision to walk, bike, or take public transport.³⁰ Thus, opponents ask why the commerce power could not be used to mandate the purchase of automobiles, or almost any other consumer good, in order to stimulate the relevant economic sector.

“Aggregation theory” offers one way to parse this conceptual debate. Various Supreme Court decisions address whether wholly local activity is sufficiently part of a broader interstate market to justify aggregating local with interstate commerce. Home-grown wheat and marijuana meet the test, since, as Gertrude Stein reminds us, “a rose is a rose is a rose.”³¹ Thus, in *Wickard v. Filburn* and *Raich*, growing your own wheat or marijuana, rather than purchasing it, can be made a federal offense.³² Challengers object that growing wheat or marijuana is an action, but so is seeking care without insurance. Just as federal regulation aggregated home-grown crops with purchased crops, so too might it aggregate purchasing care out of pocket with health insurance.

ing, yet our widespread terminology explicitly describes this inactivity as ‘economic’ and assumes that the boycott will have an economic effect.”). But, as comments to the blog posting note, these are more active refusals than simply being uninsured, and they have other attributes that expose them to regulation, such as market power, collective action, or preexisting employment. *Id.*

²⁹ “Overall, almost two-thirds (62.6%) of people who are uninsured at a given point in time had at least one visit to a doctor or emergency room within the prior year. . . . [V]irtually all of them (94%) receive some level of medical care at some point.” Hall, *supra* note 12 (manuscript at 30-31). And for this care uninsured people pay for only about a third of the overall costs of the services they receive; the rest is paid by the government, charity, or cost shifting to insured patients. INST. OF MED., INSURING AMERICA’S HEALTH: PRINCIPLES AND RECOMMENDATIONS 50-51 (2004).

³⁰ The Florida court elaborated,

There is quite literally *no* decision that, in the natural course of events, does not have an economic impact of some sort. The decisions of whether and when (or not) to buy a house, a car, a television, a dinner, or even a morning cup of coffee also have a financial impact that—when aggregated with similar economic decisions—affect the price of that particular product or service and have a substantial effect on interstate commerce.

Florida *ex rel.* Bondi v. U.S. Dep’t of Health & Human Servs., No. 10-0091, 2011 WL 285683, at *27 (N.D. Fla. Jan. 31, 2011).

³¹ GERTRUDE STEIN, *Sacred Emily*, in GEOGRAPHY AND PLAYS 178, 187 (1922).

³² *Gonzales v. Raich*, 545 U.S. 1, 19 (2005); *Wickard v. Filburn*, 317 U.S. 111, 127-28 (1942).

The difficulty with this aggregation analogy is that in *Wickard* and *Raich*, it was the federal regulation that aggregated the two domains under the single umbrella of a particular product. Here the domains of purchasing insurance and purchasing health care could easily be considered different, and PPACA does not necessarily aggregate them. Therefore, the argument that nonpurchase of insurance is a commercial action is not compelling. If being uninsured is not part of a broader regulated market in payment for health care, then we need to consider whether the Commerce Clause might cover the inactivity of being uninsured.

B. *Can the Commerce Power Extend to Inactivity?*

Claiming that commerce power has not previously been used to regulate pure inactivity is only one argument against doing so now.³³ Parsing the text of the Commerce Clause is also relevant, starting with the word “regulate.” Some have argued that the meaning of “regulate” was historically far more limited than now, signifying only to modulate or “make regular” but not the power to ban or mandate commerce.³⁴ Such anachronistic arguments have not prevailed, however, nor has modern constitutional jurisprudence taken them seriously. Instead, countless federal laws prohibit rather than simply regulate harmful commerce or mandate measures that improve human welfare related to commerce. Even the very first Congress used its newly minted commerce power to build lighthouses,³⁵ although it was later noted that “[e]recting lighthouses is not ‘regulating commerce,’ properly and strictly speaking.”³⁶ A century and a half later, the *Wickard* Court reminded us that “[t]he stimulation of commerce is a use of the regulatory function quite as definitely as prohibitions or restrictions thereon.”³⁷

³³ For more on this argument, see *infra* note 134 and accompanying text.

³⁴ See Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 112 (2001).

³⁵ See Act of Aug. 7, 1789, ch. 9, 1 Stat. 53; see also J. Randy Beck, *The New Jurisprudence of the Necessary and Proper Clause*, 2002 U. ILL. L. REV. 581, 617 & n.234. One might counter that the spending power allows lighthouse construction even if the commerce power does not, but Congress itself referred to the commerce power at a time when the spending power was not thought to extend any further than Congress’s regulatory powers. *Id.*

³⁶ 22 ANNALS OF CONG. 769 (1811).

³⁷ 317 U.S. at 128.

In *Wickard*, Congress regulated commerce in wheat by limiting consumption of home-grown wheat.³⁸ By the same token, Congress might have considered simply barring people from seeking care if they lacked insurance. Rather than adopt a measure so draconian, Congress chose to require people to obtain insurance or pay a moderate penalty. Based on plausible meanings of “regulate,” there is no reason why a mandate to engage in commerce could not be considered the *regulation* of commerce just as much as a *prohibition* of commerce. A mandate may be a strong form of regulation, but it is no stronger, in the abstract, than a prohibition. Even if a mandate were the strongest form of regulation, this would make it *more* regulatory, not less so. In the words of Chief Justice Marshall, “the power to regulate . . . may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.”³⁹

One attempt to circumvent this argument focuses on the object of regulation. “Commerce” seems to call for some type of action, such as manufacture, distribution, or sale. Because a mandate to purchase applies to someone who has not entered into commerce, one might argue that such a mandate cannot constitute the regulation of *commerce*; instead, a purchase mandate is the regulation of noncommerce.

There is discernible logic to this reasoning, but it is not compelling logic. The clause does not say that action must precede federal intervention, only that federal power may be used to regulate something that can be called commerce. Insurance is commerce. To mandate the purchase of insurance is, grammatically, just as much the regulation of insurance as is a mandate to *sell* insurance, or a prohibition on *buying* insurance. Commerce clearly includes both the purchase of products and their manufacture and sale. Because regulation includes mandating as well as prohibiting behavior related to products, it follows logically that “regulating commerce” can include mandating a purchase.

Even if this rebuttal is not compelling, the premise of the main argument is false. It is not necessary that “commerce” be the object of all regulation under the Commerce Clause. Instead, under the well-established “substantial effects” doctrine, Congress may regulate matters that *affect* interstate commerce.⁴⁰ Therefore, in order for the sta-

³⁸ *Id.*

³⁹ *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824).

⁴⁰ See, e.g., *Wickard*, 317 U.S. at 125 (“But even if appellee’s activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be

tus of being uninsured to fall entirely outside of the commerce power, the Florida court felt it necessary to conclude, starkly, that

the mere status of being without health insurance, in and of itself, has absolutely no impact whatsoever on interstate commerce (not “slight,” “trivial,” or “indirect,” but *no impact whatsoever*)—at least not any more so than the status of being without any particular good or service. If impact on interstate commerce were to be expressed and calculated mathematically, the status of being uninsured would necessarily be represented by zero. Of course, any other figure multiplied by zero is also zero. Consequently, the impact must be zero, and of no effect on interstate commerce.⁴¹

This startling assertion is true only in a highly constrained, almost tautological sense: if one’s concept of causation or attribution insists on some initiating action, then, by definition, not spending money can never affect commerce. But of course, not spending money is a major driver of economic forces and is as much a matter of market dynamics as is spending money. Certainly, this conception prevails in health policy circles and in the Congress that enacted PPACA.

In sum, there is no avoiding the grammatical and conceptual possibility that the power to regulate commerce *could* include the power to mandate a purchase. Selling and purchasing are two sides of the same transactional coin. Thus, if insurers can be forced to sell, subscribers can also be forced to buy, and both may be regarded as a unified regulation of commerce in insurance. The only remaining argument is whether this *should* be allowed or instead forbidden for some reason based in constitutional policy or principle.

C. *Should the Commerce Power Extend to Inactivity?*

One reason to preclude federal regulation of economic inactivity is the need for justiciable limits on the commerce power. As all law students well know, ever since the New Deal era the Court has interpreted the Commerce Clause so broadly that any limits are hard to discern.⁴² Recognizing that Congress’s regulatory authority “is subject to outer limits . . . ‘in the light of our dual system of government,’” the Court more recently sought principles or concepts to limit the commerce

reached by Congress if it exerts a substantial economic effect on interstate commerce . . .”).

⁴¹ Florida *ex rel.* Bondi v. U.S. Dep’t of Health & Human Servs., No. 10-0091, 2011 WL 285683, at *26 (N.D. Fla. Jan. 31, 2011).

⁴² For two reviews of the history, curiously in the same journal with nearly identical titles, see Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 2-3 (2010), and Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674, 674 (1995).

power in order that it “not be extended so as to . . . effectually obliterate the distinction between what is national and what is local and create a completely centralized government.”⁴³

Drawing a line at inaction or nonpurchase is one possible limit. An advantage of this line might be simply its discernability. But how serviceable is the line in actuality? In prior eras, the Court abandoned attempts to categorically distinguish trade from manufacturing,⁴⁴ direct from indirect effects on commerce,⁴⁵ and goods flowing in commerce from goods that have left or not yet entered the stream of commerce.⁴⁶ Each of these lines proved to be unworkable.⁴⁷ Would the action/inaction distinction prove to be any more successful? In a different health care context, Justice Scalia warned us:

It would not make much sense to say that one may not kill oneself by walking into the sea, but may sit on the beach until submerged by the incoming tide; or that one may not intentionally lock oneself into a cold storage locker, but may refrain from coming indoors when the temperature drops below freezing. Even as a legislative matter, in other words, the intelligent line does not fall between action and inaction⁴⁸

⁴³ *United States v. Lopez*, 514 U.S. 549, 557 (1995) (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)).

⁴⁴ *See Hammer v. Dagenhart*, 247 U.S. 251, 276-77 (1918) (holding that Congress could not limit intrastate transportation of goods manufactured using child labor), *overruled by United States v. Darby*, 312 U.S. 100 (1941).

⁴⁵ *See A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 546 (1935), *limited by NLRB*, 301 U.S. 1, and *Wickard*, 317 U.S. 111.

⁴⁶ *See id.* at 543 (“The mere fact that there may be a constant flow of commodities into a State does not mean that the flow continues after the property has arrived”); *see also Carter v. Carter Coal Co.*, 298 U.S. 238, 304 (1936) (noting that labor and other “antecedents of production” do not constitute a “transaction in . . . interstate commerce”), *limited by Darby*, 312 U.S. 100.

⁴⁷ *See Lopez*, 514 U.S. at 556 (noting that prior distinctions “artificially had constrained the authority of Congress to regulate interstate commerce”). *See generally* Barry Cushman, *Formalism and Realism in Commerce Clause Jurisprudence*, 67 U. CHI. L. REV. 1089, 1093 (2000).

⁴⁸ *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 296 (1990) (Scalia, J., concurring); *see also Archie v. City of Racine*, 847 F.2d 1211, 1213 (7th Cir. 1988) (en banc) (“[I]t is possible to restate most actions as corresponding inactions with the same effect, and to show that inaction may have the same effects as a forbidden action.”); PROSSER AND KEETON ON THE LAW OF TORTS § 56, at 374 (W. Page Keeton et al. eds., 5th ed. 1984) (“Failure to blow a whistle or to shut off steam, although in itself inaction, is readily treated as negligent operation of a train, which is affirmative misconduct” (footnote omitted)). For a philosophical critique of the action/inaction distinction, *see generally* JONATHAN BENNETT, *THE ACT ITSELF* (1995). For a legal critique, *see Ernest J. Weinrib, The Case for a Duty to Rescue*, 90 YALE L.J. 247, 247-48 (1980).

Nevertheless, as Justice Scalia acknowledged, the law often does draw a line between action and inaction when there is good reason to do so. But then who should judge how to draw the line that defines pure inaction? As explained above, a reasoned case can be made that being uninsured entails the action of deciding to pay for care out of pocket or with the help of charity. A deferential court would honor reasonable legislative judgments about when economic activity is present.

An activist court could, however, enforce an action/inaction line here. But why should it? Does the active/passive line cohere with the theory, text, history, or doctrine that grants Congress authority over interstate commerce in the first place? This is a sweeping question, which allows for only a sketch of an answer here.

The failure to obtain insurance almost certainly would not fall within the original meaning of commerce,⁴⁹ but then neither might many other areas that Congress now regulates, with explicit Supreme Court endorsement.⁵⁰ Despite the threat of federal power run amok, reversion to the Constitution's original meaning of interstate commerce is beyond almost any jurist's or scholar's contemplation. Doing that would reverse generations, if not centuries, of established precedent and undo critical and firmly ensconced regulatory regimes, including the Food and Drug Administration (FDA), the Environmental Protection Agency, and the Drug Enforcement Agency.

But preventing Congress from going any further is much easier to contemplate than rolling back the tide of seventy-five years or more of history. Critical, then, is whether the action/inaction line has policy relevance to the core structural function the Commerce Clause serves. The clause's core purpose prompted the Court to bar application of the commerce power to local, noneconomic domains that fall within

⁴⁹ See Robert G. Natelson & David B. Kopel, *A "Health Laws of Every Description": John Marshall's Ruling on a Federal Health Care Law*, ENGAGE (forthcoming Apr. 2011), available at <http://ssrn.com/abstract=1751711> (authoring a fictional opinion in Chief Justice Marshall's voice that finds PPACA unconstitutional).

⁵⁰ See *United States v. Comstock*, 130 S. Ct. 1949, 1965 (2010) ("The Federal Government undertakes activities today that would have been unimaginable to the Framers in two senses; first, because the Framers would not have conceived that *any* government would conduct such activities . . . Yet the powers conferred upon the Federal Government by the Constitution were phrased in language broad enough to allow for the expansion of the Federal Government's role." (quoting *New York v. United States*, 505 U.S. 144, 157 (1992))); accord *Barnett*, *supra* note 34, at 104 n.26 ("[E]ven the broadest *original* meaning of the Commerce Clause that can be justified historically is still far narrower than the power the Supreme Court currently allows Congress to exercise.").

the traditional realm of state police power.⁵¹ Mandating health insurance is miles from crossing those outer bounds. Setting tighter boundaries according to action versus inaction would have little to do with the federalism concerns underlying the granting of commerce power. The passivity of decisions not to purchase does not rob them of their inherently economic nature, especially when considering the nonpurchase of insurance, which is a quintessentially economic product. Moreover, a matter is not more or less a subject of state police power because it involves action or inaction. After all, an unqualified purchase mandate is as rare in state law as it is in federal law.⁵²

In limiting the reach of the commerce power, the Court's express objective is to avoid overtaking all of the states' police powers. In contrast, the desire to protect *individual* rights is what motivates challenges against the insurance mandate. As the Eastern District of Virginia candidly expressed: "At its core, this dispute is . . . about an individual's right to choose" to be uninsured.⁵³ But, as the Florida court correctly held, there is no constitutionally protected individual right to be left entirely alone by the government or to spend or save one's money entirely as one pleases.⁵⁴ Courts could construct radically new (or reactionary) jurisprudence along such lines, using the Ninth Amendment for instance,⁵⁵ but nothing in existing Commerce Clause jurisprudence expresses special solicitude toward individual liberties simpliciter.

⁵¹ The leading examples are gun possession near schools and violence against women. See *United States v. Morrison*, 529 U.S. 598, 601-02 (2000) (rejecting Congress's attempt to use the Commerce Clause to create federal civil causes of action for violence against women); *Lopez*, 514 U.S. at 551 (holding that regulating gun possession near schools exceeds Congress's authority under the Commerce Clause).

⁵² See Peter J. Smith, *Federalism, Lochner, and the Individual Mandate* 16-17 (George Washington Univ. Law Sch., Pub. Law & Legal Theory Working Paper No. 534, 2011), available at <http://ssrn.com/abstract=1777208> (explaining why the inactivity distinction is not one "that anyone genuinely interested in formulating sensible and coherent rules of federalism . . . would naturally propose. The fact that the regulated matter is more aptly characterized as passive rather than active bears no relationship at all to the things that matter in determining whether the federal government or instead the states ought to be the presumptive or exclusive regulator." (emphasis omitted)).

⁵³ *Virginia ex rel. Cuccinelli v. Sebelius*, 728 F. Supp. 2d 768, 788 (E.D. Va. 2010).

⁵⁴ See *Florida ex rel. McCollum v. Dept. of Health & Human Servs.*, 716 F. Supp. 2d 1120, 1146 (N.D. Fla. 2010) (rejecting claims that PPACA unconstitutionally infringes on the right to spend money as one wishes); see also Mark A. Hall, *Individual Versus State Constitutional Rights Under Health Care Reform*, 42 ARIZ. ST. L.J. 1233, 1235 (2011) ("[T]here is no constitutional basis for an individually-protected liberty interest to avoid buying health insurance."); sources cited *supra* note 2.

⁵⁵ See *infra* notes 152-57 and accompanying text.

D. *The Slippery Slope Problem*

No matter which view courts take, they lack binding precedent. The Supreme Court has never expressly validated or prohibited Commerce Clause regulation of pure inactivity. The constitutional text could be read either way, but following the modern development of the federal commerce power, allowing this form of regulation is more principled than forbidding it. Some limit on the commerce power is necessary, and more limits might be desirable, but that does not mean that limits should be set willy-nilly. The opportunity to set this particular limit exists mainly because it has not previously been addressed. That is more an accident of history than a creature of logic.⁵⁶

Despite these objections, a court motivated to find limits could plausibly erect an inactivity fence. Doing so would address the slippery slope arguments that, without such a limit, the Commerce Clause absurdly or outrageously could be invoked to mandate the purchase of American cars in order to create jobs, or to mandate health-club memberships to promote worker productivity. Without any discernible conceptual boundaries on the types of products whose purchase might be mandated, defenders of this power can only resort to the political process to set limits. At one point, the Court appeared content to leave commerce power limits largely to political constraints,⁵⁷ but more recently it has reemphasized the judicial role in defining and policing those limits.⁵⁸

⁵⁶ Mocking this point, Andrew Koppelman writes: “The scholarly argument against the mandate pretty much runs this way: (1) There must be some limit on federal power; (2) I can’t think of another one; and therefore, (3) the limit must preclude the individual mandate.” Koppelman, *supra* note 2, at 18. He goes on to say,

It’s actually very easy to think of other ones. . . . [For instance,] Congress cannot enact any legislation that requires the use of instrumentalities that begin with the letter J. Congress cannot enact any legislation that calls for enforcement on Tuesdays. Congress cannot choose any means that weighs more than 346 pounds. All of these would drive back the specter of unlimited Congressional power. The only problem with them is that they are silly and have nothing to do with the underlying reasons for wanting to have limited but effective federal power in the first place. The activity/inactivity distinction has the same problem.

Id. at 18 n.42.

⁵⁷ See, e.g., *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 556-57 (1985) (holding that the political process insulates states from burdensome federal regulation of their internal functions).

⁵⁸ See, e.g., *United States v. Morrison*, 529 U.S. 598, 613-14 (2000) (noting that “[w]hether particular operations affect interstate commerce sufficiently to come un-

How tightly the courts should police the commerce power depends in part on the risk of abuse. Any government power can be taken to the extreme, and opponents of particular measures are never short on outlandish hypothetical extensions. Two centuries ago, defenders of states' rights worried that the federal power "[t]o establish . . . post [r]oads"⁵⁹ could be abused to allow federal takeover of state highways, so they argued for limiting federal authority to only the designation of existing roads for postal routes, rather than the construction of new roads.⁶⁰ Today, should we take any more seriously the speculation that upholding the individual mandate could permit a federal requirement to, for instance, own a General Motors car?⁶¹ One could equally worry that Michigan might do the same under its general police power.⁶² Noting ridiculous possibilities like these has seldom been enough in and of itself to preclude otherwise lawful exercises of the full extent of well-justified government powers. But that begs the question of how well-justified the individual mandate is. Therefore, I return to this slippery slope concern at the end of this Article, after more fully reviewing the extent of federal authority under the Necessary and Proper Clause.

II. NAVIGATING THE NECESSARY AND PROPER CLAUSE

Reasonable positions can be articulated on both sides of whether mandating insurance regulates activity and whether the Commerce Clause permits regulation of inactivity. But even conceding for the sake of argument that the Commerce Clause might not by itself support compulsory health insurance, that is hardly the end of the inquiry. The Constitution also gives Congress authority "To make all Laws which

der" the commerce power "is ultimately a judicial rather than a legislative question" (alteration in original) (quoting *United States v. Lopez*, 514 U.S. 549, 557 n.2 (1995)).

⁵⁹ U.S. CONST. art. I, § 8, cl. 7.

⁶⁰ For more on this fascinating history, see 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1123-1142 (Boston, Hilliard, Gray, & Co. 1833), LINDSAY ROGERS, THE POSTAL POWER OF CONGRESS: A STUDY IN CONSTITUTIONAL EXPANSION (1916), and *Project: Post Office*, 41 S. CAL. L. REV. 643 (1968).

⁶¹ See Randy Barnett, *A Noxious Commandment*, NYTIMES.COM ROOM FOR DEBATE (Dec. 13, 2010), <http://www.nytimes.com/roomfordebate/2010/12/13/a-fatal-blow-to-obamas-health-care-law/an-unconstitutional-commandment> (arguing that upholding the insurance mandate could permit a General Motors mandate).

⁶² This insight comes from Orin Kerr, *Two Variations on "Could the Government Make You Buy a GM Car?"*, VOLOKH CONSPIRACY (Dec. 17, 2010, 6:15 PM), <http://volokh.com/2010/12/17/two-variations-on-could-the-government-make-you-buy-a-gm-car>. Kerr also posits that the unquestioned scope of the conventional federal commerce power over channels of interstate commerce might be used to permit only General Motors cars to cross state lines on U.S. highways. *Id.*

shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States.”⁶³ This clause forms the basis, for instance, of federal criminal laws, since the Constitution does not expressly confer congressional power to create and punish most federal crimes. The Court’s 2010 decision in *United States v. Comstock* went even further, holding that the Necessary and Proper Clause also supports involuntary civil confinement of federal prisoners for psychiatric treatment even after they have fully served their criminal sentences.⁶⁴ Despite the lack of a general federal police power over civil commitment, involuntary treatment was ruled necessary and proper to Congress’s implied authority to punish crimes relating to interstate commerce.⁶⁵

Similarly, it appears inescapable that compulsory insurance is necessary and proper in the particular context of PPACA to achieve Congress’s regulatory goal of requiring health insurers to accept all applicants regardless of health condition. The Commerce Clause clearly gives Congress authority to impose a “guarantee issue” requirement on insurers, and none of the leading lawsuits claim otherwise.⁶⁶ Also, there is no substantial dispute that this fundamental improvement in health insurance products and markets cannot be effectively accomplished without an accompanying coverage mandate. Otherwise, many people would simply wait to purchase insurance until they needed care. This “adverse selection” would force the price of insurance higher for sick people who want to maintain continuous coverage, thus making insurance even more unaffordable than it is currently, and leading more people to drop insurance even when they feel that they need it.⁶⁷

Challengers appear to concede this factual point,⁶⁸ which is amply documented in congressional hearings and health policy literature.⁶⁹

⁶³ U.S. CONST. art. I, § 8, cl. 18.

⁶⁴ 130 S. Ct. 1949, 1965 (2010).

⁶⁵ *Id.*

⁶⁶ The definitive case is *United States v. South-Eastern Underwriters Ass’n*, 322 U.S. 533, 552-53 (1944), which is discussed in the text accompanying *infra* note 86.

⁶⁷ See Hall, *supra* note 12 (manuscript at 9-17).

⁶⁸ One challenger who does not is Jonathan Adler; however, his argument only reinforces the mandate’s necessity by claiming that the current mandate is too weak to work effectively. See Jonathan H. Adler, *Is the Individual Mandate “Necessary”?*, VOLOKH CONSPIRACY (Oct. 14, 2010, 11:08 PM), <http://volokh.com/2010/10/14/is-the-individual-mandate-necessary>.

⁶⁹ For example, adverse selection was a topic in Senate hearings on health care reform:

Indeed, this market-crippling threat has already borne out under PPACA. Three years prior to the individual mandate, early regulations required insurers to accept all children under age nineteen regardless of preexisting conditions. Fearing adverse selection, most major insurers immediately stopped selling child-only coverage.⁷⁰ This confirms what the challengers themselves assert, and the Florida court ruled that compulsory insurance is the “keystone or lynchpin of the entire health reform effort”⁷¹—meaning that much of the rest of the reform could collapse without it. Thus, the Florida court’s remedy was to invalidate all of the Act, including major parts that are clearly constitutional, based on finding that “the individual mandate is indisputably necessary to PPACA’s insurance market reforms, which are, in turn, indisputably necessary to the purpose of the Act.”⁷² This sweeping remedy recognizes the market havoc that would likely ensue from simply striking the mandate in isolation while leaving the insurance regulations in place. Hence, this remedy essentially concedes the mandate’s necessary role in accomplishing the core parts of PPACA that are constitutionally unchallenged.

This Part reviews arguments challengers raise to avoid this seemingly unavoidable conclusion. Entering yet another doctrinal and conceptual maze, this time challengers’ arguments are clearly blocked at each turn. Thus, although the Commerce Clause arguments for rejecting the mandate have an uncertain outcome, there is no plausible path of reasoning under the Necessary and Proper Clause that would

Such an approach [of requiring insurers to cover everyone without requiring people to purchase] would invite egregious adverse risk selection on the part of the insured, who could afford to go without insurance when healthy in the comfort of knowing that they are entitled to health insurance at a community-rated premium when sick. As every economist and actuary appreciates, this type of adverse risk selection ultimately leads to the so-called “death spiral” of the community-rated risk pools.

Health Care Reform: An Economic Perspective: Hearing Before the S. Fin. Comm., 110th Cong. 61 (2008) (statement of Uwe Reinhardt, Professor, Woodrow Wilson School of Public and International Affairs, Princeton University).

⁷⁰ See Janet Adamy & Avery Johnson, *White House Denies Rate Hikes to Private Medicare Plans*, WALL ST. J., Sept. 22, 2010, at A7 (describing companies’ moves to drop child-only policies and criticism of this move).

⁷¹ Florida *ex rel.* Bondi v. U.S. Dep’t of Health & Human Servs., No. 10-0091, 2011 WL 285683, at *35 (N.D. Fla. Jan. 31, 2011). As the court elaborated, “this Act has been analogized to a finely crafted watch, and that seems to fit. It has approximately 450 separate pieces, but one essential piece (the individual mandate) is defective and must be removed. It cannot function as originally designed.” *Id.* at *39.

⁷² *Id.* at *37.

produce a coherent basis for rejecting the mandate.⁷³ To demonstrate this, I first turn to the governing concept of “necessity.”

A. *Is the Mandate “Necessary” Enough?*

Case law and commentators debate the degree of necessity that the Necessary and Proper Clause requires. Regardless, the empirical evidence briefly surveyed above establishes that the mandate easily meets any plausible stringency of “necessity.” No one insists that a measure be *absolutely* essential;⁷⁴ such a requirement would hamstring government too much even for many libertarians and would lead to logical absurdities.⁷⁵ Almost two centuries of precedents have construed “necessary” quite broadly, as meaning merely “‘convenient, or useful’ or ‘conducive’ to the authority’s ‘beneficial exercise’”⁷⁶ of a constitutionally recognized power. This looser construction is much like the meaning of necessary in the familiar insurance construct “medically necessary,” which generally means medically appropriate rather than absolutely essential to life or limb.⁷⁷ The Court’s recent decision in *United States v. Comstock* specified that necessary measures

⁷³ For one failed attempt, see George F. Will, Op-Ed., *The Supreme Court and the Health-Care Mandate Muddle*, WASH. POST (Mar. 13, 2011), <http://www.washingtonpost.com/wp-dyn/content/article/2011/03/11/AR2011031105815.html>.

⁷⁴ See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 413 (1819) (concluding “necessary” does not mean an absolute necessity such that the one thing “cannot exist without the other”).

⁷⁵ For instance, government would be prohibited from doing anything, even in the most critical situations, any time that it had more than one option available, because if “various systems might be adopted for [a] purpose, it might be said with respect to each, that it was not necessary because the end might be obtained by other means.” *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 396 (1805). As Justice Story illustrated,

For instance, Congress possesses the power to make war and to raise armies, and, incidentally to erect fortifications, and purchase cannon and ammunition, and other munitions of war. But war may be carried on without fortifications, cannon, and ammunition. No particular kind of arms, can be shown to be absolutely necessary; because various sorts of arms of different convenience, power, and utility, are or may be resorted to by different nations. What then becomes of the power?

3 STORY, *supra* note 60, § 1240.

⁷⁶ *United States v. Comstock*, 130 S. Ct. 1949, 1956 (2010) (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 413, 418).

⁷⁷ See generally Mark A. Hall & Gerard F. Anderson, *Health Insurers’ Assessment of Medical Necessity*, 140 U. PA. L. REV. 1637, 1638 n.4 (1992) (explaining various meanings of the term “medically necessary”).

need only be “rationally related” to a constitutional power.⁷⁸ Notably, Chief Justice Roberts joined this majority opinion. Concurring Justices Alito and Kennedy wrote separately to object to this loose standard but called only for the somewhat stiffer necessity standards of “a substantial link”⁷⁹ and “a tangible link to commerce . . . based on empirical demonstration.”⁸⁰ The individual mandate easily meets these tests⁸¹ as an integral and essential component of Congress’s comprehensive regulation of health insurance products and markets.

The mandate’s necessity might overcome even the objections of the two dissenters in *Comstock*, Justices Thomas and Scalia. Their opinion noted that the “Government identifies no specific enumerated power or powers as a constitutional predicate” for the federal power in question—civil commitment of mentally ill prisoners who had served their full sentences.⁸² The dissenters objected that this law was several steps removed from the originating congressional power to regulate commerce. The crimes in question related to child pornography, which is often (but not always) transmitted across state lines. Federal imprisonment is a necessary and proper means to punish these crimes. Civil commitment is further necessary because uprooting mentally ill and sexually dangerous prisoners makes either local or home states reluctant to take jurisdiction once these prisoners are released. Accordingly, once criminal confinement ceases, civil commitment is at least two steps removed from the base commerce power.⁸³

No such separation exists for compulsory health insurance. The mandate is the tails side of the single insurance-regulation coin PPACA minted. Some might argue that the heads side itself relies on the Necessary and Proper Clause in order to reach insurance that is not sold across state lines.⁸⁴ But that is not the modern test for the Commerce

⁷⁸ 130 S. Ct. at 1956. As the Court elaborated: “If it can be seen that the means adopted are really calculated to attain the end, the degree of their necessity, the extent to which they conduce to the end, the closeness of the relationship between the means adopted and the end to be attained, are matters for congressional determination alone.” *Id.* at 1957 (quoting *Burroughs v. United States*, 290 U.S. 534, 547-48 (1934)).

⁷⁹ *Id.* at 1970 (Alito, J., concurring).

⁸⁰ *Id.* at 1967 (Kennedy, J., concurring).

⁸¹ See generally Ilya Somin, *Taking Stock of Comstock: The Necessary and Proper Clause and the Limits of Federal Power*, 2009–2010 CATO SUP. CT. REV. 239, 239 (critiquing *Comstock* for setting few limits on Congress’s use of the Necessary and Proper Clause).

⁸² *Comstock*, 130 S. Ct. at 1973 (Thomas, J., dissenting).

⁸³ See Somin, *supra* note 81, at 247-48 (explaining the reasoning of Justice Thomas’s dissent).

⁸⁴ The reasoning of this argument is suggested by Justice Scalia’s notable concurrence in *Gonzales v. Raich*, 545 U.S. 1, 35 (2005), which upheld federal authority to

Clause's scope. Instead, all health insurance easily fits within the core of modern commerce power because it substantially affects regional and national markets in many obvious ways.

Moreover, major aspects of health insurance are not local at all. Even though regulated locally and populated by local subsidiaries, the insurance markets in many states are dominated by insurers owned by large national firms.⁸⁵ Consequently, as the Supreme Court explained in the definitive case, "no modern commercial enterprise directly affects so many persons in all walks of life as does the insurance business."⁸⁶ Much of PPACA's reach then is within the actual flow of interstate commerce.

Even if this were not the case, both the majority in *Comstock* and Justice Kennedy in his concurrence squarely rejected the premise of Justices Scalia and Thomas's dissenting opinion.⁸⁷ The majority (joined by Chief Justice Roberts) stated that it is "irreconcilable" with precedent to argue "that, when legislating pursuant to the Necessary and Proper Clause, Congress' authority can be no more than one step removed from a specifically enumerated power."⁸⁸ The Court stressed this point at some length, referencing *Greenwood v. United States*, a case that upheld the civil commitment of a mentally incompetent defendant accused of robbing a post office.⁸⁹

prohibit marijuana grown at home with local seeds and used only for personal consumption. The majority relied only on the Commerce Clause, noting the potential effects home-grown crops can have on national markets. *Id.* at 18-19 (majority opinion). Justice Scalia, instead, relied on the Necessary and Proper Clause to extend commerce power over purely local crops. *Id.* at 34-35 (Scalia, J., concurring in the judgment). Several commentators urge the Court to generalize this reasoning to other or all applications of the "substantial effects" branch of the commerce power. *See, e.g.*, Barnett, *supra* note 13, at 592-93 ("The doctrine allowing Congress to regulate interstate activity that substantially affects interstate commerce . . . defines the scope of the Necessary and Proper Clause."); John T. Valauri, *The Clothes Have No Emperor, or, Cabin-ing the Commerce Clause*, 41 SAN DIEGO L. REV. 405, 408-09 (2004) (arguing that the entire substantial effects prong of the Commerce Clause doctrine must be founded on the Necessary and Proper Clause).

⁸⁵ See D. ANDREW AUSTIN & THOMAS L. HUNGERFORD, CONG. RESEARCH SERV., R40834, THE MARKET STRUCTURE OF THE HEALTH INSURANCE INDUSTRY 27-29 (2009); James C. Robinson, *Consolidation and the Transformation of Competition in Health Insurance*, HEALTH AFF., Nov.-Dec. 2004, at 11, 11-12.

⁸⁶ *United States v. Se. Underwriters Ass'n*, 322 U.S. 533, 540 (1944).

⁸⁷ *Comstock*, 130 S. Ct. at 1963; *see also id.* at 1965-66 (Kennedy, J., concurring) (rejecting the argument that "congressional authority under the Necessary and Proper Clause can be no more than one step removed from an enumerated power").

⁸⁸ *Id.* at 1963 (majority opinion).

⁸⁹ 350 U.S. 366, 369, 375 (1956).

The underlying enumerated Article I power was the power to “Establish Post Offices and Post Roads.” But, as Chief Justice Marshall recognized in *McCulloch*,

“the power ‘to establish post offices and post roads’ . . . is executed by the single act of *making* the establishment . . . [F]rom this has been inferred the power and duty of *carrying* the mail along the post road, from one post office to another. And, from this *implied* power, has *again* been inferred the right to *punish* those who steal letters from the post office, or rob the mail.”

And, as we have explained, from the implied power to punish we have *further* inferred both the power to imprison and, in *Greenwood*, the federal civil-commitment power.

Our necessary and proper jurisprudence contains multiple examples of similar reasoning.

. . . Thus, we must reject respondents’ argument that the Necessary and Proper Clause permits no more than a single step between an enumerated power and an Act of Congress.⁹⁰

B. Does the Mandate “Carry into Execution” PPACA’s Insurance Regulations?

To avoid the force of these precedents, some challengers have developed an inventive argument that court decisions so far have not explicitly addressed: although the insurance mandate obviously relates in some way to Congress’s power to regulate insurers, it does not “carry[] into Execution”⁹¹ that power.⁹² Instead, Congress attempted to exercise an independent power to regulate *individuals*. The Necessary and Proper Clause authorizes only the implementation of express powers, and so the argument goes, the clause does not support new

⁹⁰ *Comstock*, 130 S. Ct. at 1963-64 (alterations in original) (citations omitted) (quoting U.S. CONST. art. I, § 8, cl. 7, and *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 417 (1819)).

⁹¹ U.S. CONST. art. I, § 8, cl. 18.

⁹² The argument is hinted at by Judge Henry E. Hudson’s inscrutable reasoning that the Necessary and Proper Clause “may only be constitutionally deployed when tethered to a lawful exercise of an enumerated power. . . . The [individual mandate] is neither within the letter nor the spirit of the Constitution. Therefore, the Necessary and Proper Clause may not be employed to implement this affirmative duty to engage in private commerce.” *Virginia ex rel. Cuccinelli v. Sebelius*, 728 F. Supp. 2d 768, 782 (E.D. Va. 2010); *see also Florida ex rel. Bondi v. U.S. Dep’t of Health & Human Servs.*, No. 10-0091, 2011 WL 285683, at *30 (N.D. Fla. Jan. 31, 2011) (explaining that the clause “is not an independent source of federal power; rather, it is simply ‘a caveat that the Congress possesses all the means necessary to . . . carry[] into execution those (powers) otherwise granted’” (internal quotation marks omitted) (quoting *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 247 (1960))).

powers that pursue separate goals. PPACA, it is argued, has at least two separate goals: making everyone eligible for full coverage and covering as many people as possible. Insurance regulation accomplishes the first goal, while the individual mandate pursues the second. The two may be related, but challengers insist that the mandate is not subsidiary to insurance regulation and that it does more than merely execute or implement insurance regulation.⁹³

Early interpretations of the clause suggest this narrow focus on the “execution” of enumerated powers. Founding-era and early nineteenth-century courts and commentators cautiously described only very narrow extensions of express powers as being necessary and proper—extensions that today would easily be seen simply as direct exercises of the express powers that do not require an extender clause. For instance, building a post office was viewed as a necessary extension of the express postal power,⁹⁴ and arming and supporting an army was seen as necessary to carrying out the war power.⁹⁵ In contrast, following the Civil War, the Court initially ruled (but then quickly reversed itself) that declaring paper money to be legal tender does not execute the power either to coin or to borrow money.⁹⁶

Justices Thomas and Scalia attempted to revive a similarly narrow construction in their dissent to the Court’s recent *Comstock* decision, where they stated that “no matter how ‘necessary’ or ‘proper’ an Act of Congress may be to its objective, Congress lacks authority to legislate if the objective is anything other than ‘carrying into Execution’ one or more of the Federal Government’s enumerated powers.”⁹⁷ The Necessary and Proper Clause has not been read so narrowly, howev-

⁹³ Brief of House Republican Leader John Boehner as *Amicus Curiae* in Support of Plaintiff’s Motion for Summary Judgment at 8-13, Florida *ex rel.* McCollum v. U.S. Dep’t of Health & Human Servs., No 10-0091 (N.D. Fla. Jan. 31, 2011), ECF No. 119, available at <http://aca-litigation.wikispaces.com/file/view/Boehner+amicus.pdf>.

⁹⁴ See *McCulloch*, 17 U.S. (4 Wheat.) at 417 (“Take, for example, the power ‘to establish post offices and post roads.’ This power is executed by the single act of making the establishment.”).

⁹⁵ 3 STORY, *supra* note 60, § 1174 (“The power to raise armies is an indispensable incident to the power to declare war . . .”).

⁹⁶ *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603, 625 (1869), *overruled by* *Legal Tender Cases*, 79 U.S. (12 Wall.) 457 (1870). The *Hepburn* Court reasoned that coinage does not refer to paper, and the government can raise funds by issuing paper currency without also having to declare it to be legal tender. 75 U.S. (8 Wall.) at 607-08. A year later, the *Legal Tender Cases* held that this reasoning is obviously too restrictive and contrary to *McCulloch*. 79 U.S. (12 Wall.) at 534-38.

⁹⁷ *United States v. Comstock*, 130 S. Ct. 1949, 1972 (2010) (Thomas, J., dissenting).

er.⁹⁸ Consider, for instance, the postal power. Based solely on the express authority “to establish Post Offices and post Roads,”⁹⁹ the Court has upheld as necessary and proper the unexpressed federal powers to create an exclusive government monopoly in the delivery of letters,¹⁰⁰ to forbid delivery of morally offensive items (such as obscene materials or those that advertise lotteries), and to enforce a host of criminal statutes related to the mail.¹⁰¹

Of late, the *Comstock* decision ruled that committing prisoners for involuntary mental treatment is a proper extension of Congress’s authority to punish federal crimes, even when the commitment occurs only after prisoners have completed serving their sentences.¹⁰² In doing so, the Court implicitly rejected passing language from its decision half a century ago in *Kinsella v. United States ex rel. Singleton*.¹⁰³ This is the same language that both the overturned court of appeals and the dissenting Supreme Court opinions in *Comstock* cited or quoted.¹⁰⁴ In *Kinsella*, the Court reasoned that the Necessary and Proper Clause is “not itself a grant of power, but a *caveat* that the Congress possesses all the means necessary to carry out the specifically granted ‘foregoing’ powers.”¹⁰⁵ However, this is loose language¹⁰⁶ that the Court has never since repeated.¹⁰⁷

⁹⁸ See David G. Wille, *The Commerce Clause: A Time for Reevaluation*, 70 TUL. L. REV. 1069, 1087 (1996) (“[*Reid* and *Kinsella*] cannot be reconciled with the Supreme Court’s current interpretation of the Commerce Clause as expanded by the Necessary and Proper Clause.”).

⁹⁹ U.S. CONST. art. I, § 8, cl. 7.

¹⁰⁰ *Brennan v. U.S. Postal Serv.*, 439 U.S. 1345, 1346-47 (1978) (Marshall, J., in chambers) (denying a request for a stay filed by litigants challenging the constitutionality of granting the United States Postal Service “a monopoly over the conveyance of letter mail”).

¹⁰¹ See ROGERS, *supra* note 60; *Project: Post Office*, *supra* note 60, at 689-702 (detailing classes of “non-mailable” material and describing the function of mail fraud statutes). Postal regulations also prescribe acceptable forms of mailboxes attached to private homes and forbid placing nonposted materials in home mailboxes, all without provoking constitutional objection. See *Residential Mailbox Standards*, U.S. POSTAL SERVICE, <http://www.usps.com/receive/mailboxstandards.htm> (last visited Mar. 15, 2011).

¹⁰² 130 S. Ct. at 1954.

¹⁰³ 361 U.S. 234 (1960).

¹⁰⁴ See *Comstock*, 130 S. Ct. at 1972 (Thomas, J., dissenting); *United States v. Comstock*, 551 F.3d 274, 280-81 (4th Cir. 2009), *rev’d*, 130 S. Ct. 1949 (2010).

¹⁰⁵ 361 U.S. at 247.

¹⁰⁶ This statement accords with other decisions only if one assumes the Court meant that the clause is not a freestanding grant of power but one that depends on extended powers being connected to an enumerated power. See, e.g., *Comstock*, 130 S. Ct. at 1972 (Thomas, J., dissenting) (explaining shortly before citing *Kinsella* that “Federalist supporters of the Constitution . . . [believed] that the Clause did not grant Con-

This understanding is borne out in multiple Supreme Court decisions over the past two centuries, starting with *McCulloch v. Maryland*, in which Chief Justice Marshall emphasized at length that the “terms [of the Necessary and Proper Clause] purport to enlarge, not to diminish, the powers vested in the government. It purports to be an additional power”¹⁰⁸ Justice Scalia, in his influential *Raich* concurrence, confirmed that the clause “empowers Congress to enact laws . . . that are

gress any *freestanding* authority” and that “our precedents uniformly have maintained that the Necessary and Proper Clause is not an *independent* fount of congressional authority” (emphasis added)).

Kinsella can also be reconciled with other, apparently contrary, precedents by viewing it as an implicit application of the “impropriety” constraint explained below in subsection II.C.1. That side constraint applies only in special circumstances where powers impinge on states’ rights or individual rights. *Kinsella* addressed military court jurisdiction over crimes by civilians, which obviously implicates both sets of rights and thus justifies stricter scrutiny of necessity. 361 U.S. at 235. Thus, as Professor Wille explains,

The *Kinsella* holding contradicts the current interpretation of the Commerce Clause in several respects. The quoted passage establishes that for an exercise of power to be valid, the power must be an enumerated one. . . . [This] interpretation of the Necessary and Proper Clause was distinguished from *McCulloch*, because in *McCulloch*, no specific restraints on governmental power stood in the way.

Wille, *supra* note 98, at 1086-87.

¹⁰⁷ The Court also used restrictive language a century ago in *Kansas v. Colorado*, 206 U.S. 46, 88 (1907), stating that this clause “is not the delegation of a new and independent power.” That case refused to let the federal government intervene in a dispute between states over riparian rights in the nonnavigable Arkansas River. *Id.* at 117. The Court stressed “independent,” since the principal holding was that the federal government’s land use powers extend only to navigable waterways, and thus there was no enumerated basis on which the government might seek to intervene. *Id.* at 86. Moreover, in *Kansas v. Colorado* the government had not in fact legislated or attempted to regulate nonnavigable water rights. *Id.* at 85-87. Therefore, the decision is more in the nature of a “Dormant Commerce Clause” analysis—which attempts to preclude state jurisdiction over a matter that federal authority inherently controls—rather than a case that decides what Congress may actively regulate. See A. Dan Tarlock, *The Strange Career of the Dormant Commerce Clause and International Trade Law in the Great Lakes Anti-Diversion Regime*, 2006 MICH. ST. L. REV. 1375, 1382-83. The Necessary and Proper Clause has never been explicitly used to expand dormant federal powers. See generally Cushman, *supra* note 47, at 1137-50 (discussing divergence between active and Dormant Commerce Clause lines of cases).

¹⁰⁸ 17 U.S. (4 Wheat.) 316, 420 (1819). Although Justice Marshall noted that the “power of creating a corporation is never used for its own sake, but for the purpose of effecting something else,” *id.* at 411, he did not limit the scope of the Necessary and Proper Clause to pure means without any substantive ends. Instead, he presented this characterization of corporations to explain why the Constitution does not expressly enumerate an incorporation power and therefore why its omission from the text does not signal an intent to preclude it.

not within its authority to enact in isolation.”¹⁰⁹ This empowering reading fully accords with the wording of the Tenth Amendment, which the Founders debated explicitly in terms of whether Congress can exercise only powers “expressly” conferred, as the Articles of Confederation had said,¹¹⁰ or instead whether the Necessary and Proper Clause permits additional, unexpressed powers.¹¹¹ By avoiding the use of “expressly delegated,” the Tenth Amendment provides both textual and historical support for the accepted reading that the Necessary and Proper Clause has this broader, empowering scope.

Both this long list of examples and the phrasing used to justify these outcomes preclude any attempt to restrict the Necessary and Proper Clause to a narrow and strict implementation of express powers. The Court has repeatedly emphasized Congress’s latitude to determine when legislative measures are a necessary means to an end that is clearly constitutional. The Court has never used the possibility that some means might themselves be characterized as independent ends to disallow those means, as long as their characterization as means is plausible. As just noted, the federal government has used the postal power as a convenient means to pursue other social ends, yet the Court regards this as a perfectly appropriate extension of this power.¹¹² Multiple examples can be listed under the Commerce Clause as well, including laws mandating that private businesses serve customers without regard to their race, gender, or disability.¹¹³ As the Court held in *Heart of Atlanta Motel, Inc. v. United States*,

That Congress was legislating against moral wrongs in many of these areas rendered its enactments no less valid. . . . [T]he disruptive effect that racial discrimination has had on commercial intercourse . . . empowered Congress to enact appropriate legislation, and, given this basis for the exercise of its power, Congress was not restricted by the fact that the particular obstruction to interstate commerce with which it was dealing was also deemed a moral and social wrong.¹¹⁴

In sum, there is no jurisprudence or controlling conceptual schema that requires legislative measures to be categorized as only ends versus

¹⁰⁹ *Gonzales v. Raich*, 545 U.S. 1, 39 (2005) (Scalia, J., concurring in the judgment).

¹¹⁰ ARTICLES OF CONFEDERATION of 1781, art. II.

¹¹¹ See 3 STORY, *supra* note 60, § 1900 (discussing the Founders’ debate over the Tenth Amendment).

¹¹² See, e.g., *In re Rapier*, 143 U.S. 110, 133-35 (1892) (upholding the criminalization of mailing advertisements for lotteries that were otherwise legal).

¹¹³ See, e.g., 42 U.S.C. §§ 2000a to 2000a-6 (2006) (race and gender); *id.* §§ 12181-12189 (disability).

¹¹⁴ 379 U.S. 241, 257 (1964).

only means, or as independent rather than implementation powers.¹¹⁵ The governing standard is whether the authority in question is reasonably needed to make effective use of an express power, subject only to the proviso that the express power or declared purpose not be merely a pretext for implementing the unenumerated power.¹¹⁶

PPACA's structure and content readily support the government's claim that the mandate's purpose includes enabling the regulation of insurers. The mandate's expressed purposes include "creating effective health insurance markets in which improved health insurance products that . . . do not exclude coverage of preexisting conditions can be sold."¹¹⁷ As the Florida court emphasized, "the various insurance provisions . . . are the very heart of the Act itself."¹¹⁸ Requiring insurers to accept all applicants regardless of health condition was a primary goal throughout the legislative debates,¹¹⁹ and the law accomplishes this single goal more than any other. PPACA makes insurance regulation a *fait accompli*, banning virtually all forms of medical screening or exclusions. As for universal coverage, PPACA falls well short of this goal; it reduces the number of uninsured people by only a bit more than half, from fifty-four million to a projected twenty-

¹¹⁵ See, e.g., *Gonzales v. Raich*, 545 U.S. 1, 36 (2005) (Scalia, J., concurring in the judgment) ("[W]here Congress has the authority to enact a regulation of interstate commerce, 'it possesses every *power* needed to make that regulation effective.'" (emphasis added) (quoting *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 118-19 (1942))).

¹¹⁶ See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819) (warning that Congress may not, "under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government").

¹¹⁷ PPACA §§ 1501, 10106, 42 U.S.C.A. § 18091(a)(2)(I) (West Supp. 1B 2010).

¹¹⁸ *Florida ex rel. Bondi v. U.S. Dep't of Health & Human Servs.*, No. 10-0091, 2011 WL 285683, at *36 (N.D. Fla. Jan. 31, 2011).

¹¹⁹ See generally TOM DASCHLE WITH DAVID NATHER, GETTING IT DONE: HOW OBAMA AND CONGRESS FINALLY BROKE THE STALEMATE TO MAKE WAY FOR HEALTH CARE REFORM (2010); LAWRENCE R. JACOBS & THEDA SKOCPOL, HEALTH CARE REFORM AND AMERICAN POLITICS: WHAT EVERYONE NEEDS TO KNOW (2010); STAFF OF THE WASH. POST, LANDMARK: THE INSIDE STORY OF AMERICA'S NEW HEALTH-CARE LAW AND WHAT IT MEANS FOR US ALL (2010). As the Florida court pointedly observed, "In speech after speech President Obama emphasized that the legislative goal was 'health *insurance* reform' and stressed how important it was that Congress fundamentally reform how health insurance companies do business, and 'protect every American from the worst practices of the insurance industry.'" *Bondi*, 2011 WL 285683, at *36 (quoting President Barack Obama, Remarks by the President in the State of the Union Address (Jan. 27, 2010), available at <http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address>).

three million uninsured in 2019.¹²⁰ The insurance-regulation goal occupies the first one hundred or so pages of the bill, whereas the mandate does not appear until Subtitle F, and its operative provisions occupy less than a dozen pages of the mammoth law.¹²¹ Clearly, it would be absurd to suggest that reforming insurance markets is nothing more than an excuse to mandate coverage. Absent mere pretext, the connection between the two goals is tight enough to easily satisfy the precedents applying the Necessary and Proper Clause over the past two centuries.

C. *Is Regulating Inactivity “Proper”?*

1. In General

The mandate is constitutionally “necessary” to regulate insurance, but is it “proper”? Few decisions address the meaning of “proper,” so challengers see some potential to fortify limits on congressional power by giving this term more bite. To succeed, the challengers must ground the basis for impropriety in some other part of the Constitution. Instead, the Florida court used “proper” in an apparently self-referential manner in this key passage:

The defendants have asserted again and again that the individual mandate is absolutely “necessary” and “essential” for the Act to operate as it was intended by Congress. I accept that it is. Nevertheless, the individual mandate falls outside the boundary of Congress’ Commerce Clause authority and cannot be reconciled with a limited government of enumerated powers. By definition, it cannot be “proper.”¹²²

This reading of the clause renders it a virtual nullity: necessary measures are improper if they are not contained within the Constitution’s express provisions. There is no basis in Supreme Court decisions for defining or applying “proper” in this circular and denuding fashion.¹²³ Instead, prior decisions give significance to “proper” only

¹²⁰ See Letter from Douglas E. Elmendorf, Dir., Cong. Budget Office, to Harry Reid, Majority Leader, U.S. Senate 8 (Dec. 19, 2009), available at http://www.cbo.gov/ftpdocs/108xx/doc10868/12-19-Reid_Letter_Managers_Correction_Noted.pdf.

¹²¹ Compare PPACA, Pub. L. No. 111-148, tits. I-II, 124 Stat. 119, 130-353 (2010) (to be codified as amended in scattered sections of 26, 29, and 42 U.S.C.) (insurance regulations), with *id.* §§ 1501–1502, 124 Stat. 242-52 (to be codified as amended at 26 U.S.C. §§ 5000A, 6055, and 42 U.S.C. § 18091) (individual mandate provisions).

¹²² 2011 WL 285683, at *33 (footnote omitted).

¹²³ As Professor Koppelman explains, “Try this reasoning in a few other constitutional contexts. If locking up mail robbers is not part of the operation of a post office,

when legislative measures violate a distinct constitutional norm.¹²⁴ For instance, a necessary measure that “commandeers” state government violates the system of dual sovereignty “reflected throughout the Constitution’s text.”¹²⁵ Similarly, the Court has refused to use the Necessary and Proper Clause to extend military court jurisdiction to crimes by civilians because

[e]very extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts, and, more important, acts as a deprivation of the right to jury trial and of other treasured constitutional protections. Having run up against the steadfast bulwark of the Bill of Rights,

then an attempt to do that under the Necessary and Proper Clause is equally offensive to the Constitution.” Koppelman, *supra* note 2, at 10.

¹²⁴ See Gary Lawson & Patricia B. Granger, *The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 323 (1993) (“[A] law abridging the freedom of speech . . . [or] imposing a cruel or unusual punishment . . . , although rarely explicitly stated in terms of this language, would be improper.”). Professors Lawson and Granger argue that “proper” was used in this way even before the adoption of the Bill of Rights, and thus the Constitution need not specify constitutional side constraints. *Id.* at 273. But they restrict any such unenumerated side constraints to well-developed constitutional principles such as separation of powers, states’ rights, or individual rights. *Id.* at 297.

Ilya Somin argues that failing to give “proper” more significance than this makes it a redundancy, because other constitutional provisions would restrict congressional power by their own force. See Ilya Somin, *Charles Fried on the Constitutionality of the Health Care Mandate*, VOLOKH CONSPIRACY (May 21, 2010, 1:47 PM), <http://volokh.com/2010/05/21/charles-fried-on-the-constitutionality-of-the-health-care-mandate>. This argument is unconvincing. The Constitution, like laws generally, uses redundant terms to remind and reinforce. See Akhil Reed Amar, Seegers Lecture, *Constitutional Redundancies and Clarifying Clauses*, 33 VAL. U. L. REV. 1, 9 (1998) (“A constitutional clause need not add or subtract a new constitutional rule; it is enough if it adds clarity or subtracts confusion.”). Moreover, without the term “proper,” one may debate whether a necessary measure overrides a conflicting provision elsewhere in the Constitution. Using “proper” to incorporate restrictions elsewhere resolves this uncertainty and gives the term independent significance by clarifying that necessary measures do not trump the Bill of Rights, for instance. Finally, Professor Somin’s argument contradicts his own position, argued elsewhere, that the Necessary and Proper Clause as a whole does not expand powers beyond those enumerated. See Brief of Washington Legal Foundation and Constitutional Law Scholars as Amici Curiae in Support of Plaintiff’s Motion for Summary Judgment at 24-25, *Virginia ex rel. Cuccinelli v. Sebelius*, 728 F. Supp. 2d 728 (E.D. Va. 2010) (No. 10-0188), 2010 WL 3952344. It makes little sense to insist that one part of the clause should be given more force while arguing that the clause as a whole has essentially no force.

¹²⁵ See *Printz v. United States*, 521 U.S. 898, 919, 923-24 (1997) (“When a ‘La[w] . . . for carrying into Execution’ the Commerce Clause violates the principle of state sovereignty reflected in the various constitutional provisions we mentioned earlier, it is not a ‘La[w] . . . proper for carrying into Execution the Commerce Clause[]’” (alterations in original) (citation omitted)).

the Necessary and Proper Clause cannot extend the scope of [the Constitution's express power over the military].¹²⁶

This decision explicitly distinguished *McCulloch v. Maryland* based on the fact that “[i]n *McCulloch* this Court was confronted with the problem of determining the scope of the Necessary and Proper Clause in a situation where no specific restraints on governmental power stood in the way.”¹²⁷ The Court explained that “[h]ere the problem is different” because “Art. III, § 2 and the Fifth and Sixth Amendments require that certain express safeguards, which were designed to protect persons from oppressive governmental practices, shall be given in criminal prosecutions—safeguards which cannot be given in a military trial.”¹²⁸ Based on these express limitations of government powers, and not any free-floating propriety concern, the Court concluded that “military trial of civilians is inconsistent with both the ‘letter and spirit of the constitution.’”¹²⁹

Absent overt tension with independent constitutional norms, the Supreme Court has regarded “necessary and proper” as a single construct—similar to other compound legal constructs such as “clear and convincing,” “cruel and unusual,” and “case or controversy.”¹³⁰ Thus, without an independent source of constitutional impropriety for mandating insurance or regulating inactivity, the Court has no grounds on which to categorically exclude these measures from the range of powers that might be necessary to implement other, express constitutional powers.¹³¹ Generic concerns about expansive federal authority do not suffice to declare necessary measures “improper.” The federal gov-

¹²⁶ *Reid v. Covert*, 354 U.S. 1, 21-22 (1957). *Reid* was also the governing precedent for the reasoning and holding in *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 247 (1960), discussed in the text accompanying *supra* note 105.

¹²⁷ *Reid*, 354 U.S. at 22.

¹²⁸ *Id.*

¹²⁹ *Id.*; see also *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603, 621-25 (1869) (holding that making paper currency legal tender for existing debts is not “proper” because this impairs contracts and might violate due process), *overruled by* *Legal Tender Cases*, 79 U.S. (12 Wall.) 457 (1870).

¹³⁰ For a range of perspectives on the meaning of “proper,” both in judicial decisions and in constitutional theory, see GARY LAWSON ET AL., *THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE* (2010), Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. PA. J. CONST. L. 183, 218-20 (2003), J. Randy Beck, *The New Jurisprudence of the Necessary and Proper Clause*, 2002 U. ILL. L. REV. 581, 632-48, and Lawson & Granger, *supra* note 124, at 285-86, 291-97.

¹³¹ See *Gonzales v. Raich*, 545 U.S. 1, 36 (2005) (Scalia, J., concurring in the judgment) (“[W]here Congress has the authority to enact a regulation of interstate commerce, ‘it possesses every power needed to make that regulation effective.’” (quoting *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 118-19 (1942))).

ernment has no general police power to commit people for involuntary mental treatment, but this is still a proper exercise of federal power when necessary to augment the nonenumerated power to confine those who commit federal crimes.¹³² Buying land to build post offices or postal roads was once argued to be an improper invasion of state jurisdiction, but this has long since been regarded as “[o]ne of the best illustrations that we have of the nonsense of which the states-rights metaphysic was capable.”¹³³

The strongest argument for a categorical exclusion of mandatory purchases is simply that Congress has never before regulated inactivity in its purest form under the Commerce Clause. But, as Justice Story explained in his seminal treatise,

This is clearly what lawyers call a *non sequitur*. It might with just as much propriety be urged, that, because congress had not hitherto used a particular means to execute any other given power, therefore it could not now do it. If, for instance, congress had never provided a ship for the navy except by purchase, they could not now authorize ships to be built for a navy, or *à converso*. . . . If they had never erected a custom-house, or court-house, they could not now do it. Such a mode of reasoning would be deemed by all persons wholly indefensible.¹³⁴

Excluding inactivity from the Necessary and Proper Clause would run afoul of several other instances in which individual mandates have long been considered permissible and essential to both the commerce power and other express powers that the clause augments. Even while the Constitution was being debated, Alexander Hamilton pointed to an implied federal power (known as *posse comitatus*) to “requir[e] the assistance of [ordinary] citizens” in civil law enforcement, which he specifically noted was based on the “right to pass all laws *necessary* and *proper* to execute its declared powers.”¹³⁵ He stressed that it “would be absurd” to think otherwise.¹³⁶ Just months after the Bill of Rights was

¹³² See *United States v. Comstock*, 130 S. Ct. 1949, 1965 (2010).

¹³³ Edward S. Corwin, *Book Review*, 10 AM. POL. SCI. REV. 773, 773 (1916) (reviewing ROGERS, *supra* note 60).

¹³⁴ 3 STORY, *supra* note 60, § 1132.

¹³⁵ THE FEDERALIST NO. 29, at 179 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

¹³⁶ *Id.* The first Congress exercised this power in the Judiciary Act of 1789, ch. 20, § 27, 1 Stat. 73, 87. This section created a “duty[] of every citizen, when called upon by the proper officer, to act as part of the *posse comitatus* in upholding the laws of his country.” *In re Quarles*, 158 U.S. 532, 535 (1895). In the Florida litigation, the government argued that this power has been used to enforce a law passed under the Commerce Clause, citing President Jefferson’s order to raise a posse in Vermont to enforce the Embargo Act. Memorandum in Support of Defendants’ Motion for Sum-

ratified, the second Congress adopted the Militia Act of 1792, requiring “every free able-bodied white male citizen” ages eighteen to forty-five to “provide himself with a good musket or firelock, a sufficient bayonet and belt, two spare flints, and a knapsack, a pouch with a box therein to contain not less than twenty-four cartridges” at his own expense in case a need arose to call him into service.¹³⁷ The Constitution’s authority “for calling forth the Militia” provides no such express power to mandate the private purchase of arms.¹³⁸ Therefore, this purchase mandate must have been based, at least in part, on the Necessary and Proper Clause. If a mandate to purchase can augment one enumerated federal power, there is no principled reason it cannot be used to augment the commerce power.

The Constitution also provides no express federal power of eminent domain—a type of forced transaction of longstanding and unquestioned legitimacy.¹³⁹ This power can be inferred, of course, from the Fifth Amendment’s proviso that when the state takes property, it must pay just compensation.¹⁴⁰ But the power has also been upheld as a necessary and proper adjunct to the Commerce Clause when used, for instance, to mandate the transfer of land for bridges, highways, or canals.¹⁴¹ As the Court explained unanimously in one such nineteenth-century decision,

Upon what does the right of Congress to interfere in the matter rest? Simply upon the power to regulate commerce.

. . . It cannot be doubted, in view of the long list of authorities,—for many more might be cited,—that Congress has the power in its discretion to compel the removal of [a] lock and dam as obstructions to the navigation of [a] river, or to condemn and take them for the purpose of promoting its navigability.

mary Judgment at 32-33, Florida *ex rel.* McCollum v. U.S. Dep’t of Health & Human Servs., No 10-0091 (N.D. Fla. Jan. 31, 2011), 2011 WL 4564357.

¹³⁷ Ch. 33, § 1, 1 Stat. 271, 271. See generally Bradley Latino, *The First Individual Mandate: What the Uniform Militia Act of 1792 Tells Us About Fifth Amendment Challenges to Healthcare Reform* (July 9, 2010) (unpublished manuscript), available at <http://ssrn.com/abstract=1624666>.

¹³⁸ U.S. CONST. art. I, § 8, cl. 15.

¹³⁹ See generally William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553 (1972). A “taking” is not the same as a commercial transaction, but it has similar elements: transfer of ownership accompanied by payment of fair market value.

¹⁴⁰ U.S. CONST. amend. V.

¹⁴¹ Lawson & Granger, *supra* note 124, at 270 & n.9; see also Luxton v. N. River Bridge Co., 153 U.S. 525, 529-30 (1894) (collecting cases upholding the use of eminent domain as a means of executing Congress’s Commerce Clause authority).

... Suppose, in the improvement of a navigable stream, it was deemed essential to construct a canal with locks, in order to pass around rapids or falls. Of the power of Congress to [do so] . . . there can be no question¹⁴²

Even earlier, in colonial times, “there were virtually no limits on nonconsensual property transfers between private individuals. The taking of land to build dams and private roads and to drain private land was commonplace.”¹⁴³ “[N]umerous colonial statutes authoriz[ed] transfers from one private party to another if the original owner failed to make productive use of the land. . . . [These forced transfers] were intended to advance communities’ needs for economic development and population growth.”¹⁴⁴ Although the Constitution prohibits such forced transfers without compensation and a public purpose, this colonial history reveals that eminent domain powers have long been used for purposes related to the Commerce Clause.

Similarly, federal powers to compel military service and congressional testimony are not expressed in the Constitution, but instead have long been supported as necessary and proper extensions of re-

¹⁴² *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 335-37 (1893). The Court’s unanimous twentieth-century decision in *Berman v. Parker* echoed this point:

Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end. . . . Here one of the means chosen is the use of private enterprise for redevelopment of the area. Appellants argue that this makes the project a taking from one businessman for the benefit of another businessman. But the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established. The public end may be as well or better served through an agency of private enterprise than through a department of government—or so the Congress might conclude.

348 U.S. 26, 33-34 (1954) (citations omitted).

¹⁴³ Charles E. Cohen, *Eminent Domain After Kelo v. City of New London: An Argument for Banning Economic Development Takings*, 29 HARV. J.L. & PUB. POL’Y 491, 500 (2006) (footnote omitted).

¹⁴⁴ *Id.* at 502-03. Dean William Michael Treanor described some of these laws from the colonial era:

Many colonial laws imposed affirmative obligations on residents to use their property for some specific purpose to advance the overall interests of the community. A Plymouth colony ordinance required those with rights in valuable minerals to exploit their rights or forfeit them. A Maryland law required owners of good mill sites to develop the sites or run the risk of losing their property to someone else who would develop the site.

William Michael Treanor, *The Original Understanding of the Takings Clause*, GEO. U. L. CENTER ENV’T L. PROJECT, 4 (1998), http://www.law.georgetown.edu/gelpi/current_research/documents/RT_Pubs_Policy_OriginalUnderstandingTakings.pdf.

lated war and legislative powers, respectively.¹⁴⁵ In exercising its monetary power, Congress may even “compel all residents of this country to deliver unto the Government all gold bullion, gold coins and gold certificates in their possession” in exchange for equivalent value in dollars.¹⁴⁶ In modern times, another example of regulating pure inactivity is found in the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).¹⁴⁷ Without any constitutional objection as yet, Congress, as an exercise of its commerce power, requires that innocent land owners incur the expense of toxic waste cleanup, even for wastes they did not cause and knew nothing about when they bought the land.¹⁴⁸

The argument here is not that mandating insurance is precisely the same as any of these other individual mandates or regulations of pure inactivity. Instead, it is that these other longstanding and unquestioned mandates, which are at least partly founded in the Necessary and Proper Clause, demonstrate the utter implausibility of arguing that regulation of inactivity is somehow categorically improper, or even suspect, across the full range of federal powers. Instead, the Court has repeatedly said that “where Congress has the authority to enact a regulation of interstate commerce, ‘it possesses *every* power needed to make that regulation effective.’”¹⁴⁹

2. Individual vs. Sovereign Rights

We turn, then, to see if there is a textually grounded source of constitutional impropriety. There is no serious argument that the Fifth Amendment creates an individually protected right to be unin-

¹⁴⁵ See, e.g., *McGrain v. Daugherty*, 273 U.S. 135, 160, 180 (1927) (holding that legislative subpoena power is a necessary and proper exercise of the Senate’s legislative power); *Selective Draft Law Cases*, 245 U.S. 366, 385 (1918) (finding that the compulsory draft was a necessary and proper exercise of federal power).

¹⁴⁶ *Nortz v. United States*, 294 U.S. 317, 328 (1935).

¹⁴⁷ 42 U.S.C. §§ 9601–9675 (2006).

¹⁴⁸ See *id.* §§ 9606–9607; see also *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 845 (4th Cir. 1992) (noting that the property owner’s characterization of his own behavior as “active” or “passive” is irrelevant because otherwise, “an owner could insulate himself from liability by virtue of his passivity”).

¹⁴⁹ *Gonzales v. Raich*, 545 U.S. 1, 36 (2005) (Scalia, J., concurring in the judgment) (emphasis added) (quoting *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 118-19 (1942)); cf. *Stoebuck*, *supra* note 139, at 597 (“Eminent domain poses no special threat to the individual that would require special limitations on the occasions of its exercise. It is not black magic, but merely one of the powers of government, to be used along with the other powers as long as some ordinary purpose of government is served.”).

sured,¹⁵⁰ and most of the leading challenges do not even press this argument. Randy Barnett has constructed the best textual argument for protecting individual rights. He points to the Tenth Amendment's reservation of nondelegated powers "to the States respectively, *or to the people*."¹⁵¹ Creatively, he argues that, just as the Tenth Amendment protects state sovereignty from federal "commandeering," the phrase "to the people" could be invoked to protect *individual* sovereignty from affronts to liberty that amount to "commandeering the people."¹⁵²

This inventive and entirely unprecedented argument is deeply flawed on several levels.¹⁵³ First, it is essentially a repackaging of Professor Barnett's quite similar argument based on the Ninth Amendment's preservation of "rights retained by the people."¹⁵⁴ That route is blocked, however, by the refusal of most jurists (including Justice Scalia) to regard the Ninth Amendment as creating unenumerated rights that can be judicially protected.¹⁵⁵ Moreover, were such rights recognized via the Tenth Amendment, they would obviously constitute a federalized version of *Lochner* that would protect economic liberties from congressional, but not state, action. This form of protection would resemble the notion of substantive due process, which Justice Scalia¹⁵⁶ and others¹⁵⁷ oppose for well-known jurisprudential reasons.

¹⁵⁰ See Hall, *supra* note 2, at 45 ("There is no fundamental right to be uninsured.").

¹⁵¹ Barnett, *supra* note 13, at 627 (quoting U.S. CONST. amend. X).

¹⁵² *Id.* at 628-30.

¹⁵³ See Simon Lazarus, *The Health Care Lawsuits: Unraveling a Century of Constitutional Law and the Fabric of Modern American Government*, AM. CONST. SOC'Y, 14-17 (Feb. 8, 2011), <http://www.acslaw.org/files/Lazarus%20-%20health%20reform%20lawsuits.pdf> (criticizing Barnett's argument for its "Back-door Reinstatement of Activist Substantive Due Process"); see also Smith, *supra* note 52, at 24 (explaining why it would be "doctrinally incoherent" to "in effect ask[] the courts to fashion a limitation that sounds in personal liberty but that, paradoxically, applies only to action by the federal government"). For an earlier scholar in basic agreement, see David Currie's discussion of the Court's nineteenth-century *Legal Tender Cases*, which initially held, but then reversed, that laws contrary to the general "spirit" of the Constitution are not "proper." DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888*, at 321-28 (1985). In Professor Currie's estimation, "there are grave objections to [this] reasoning," which comes "close to saying all bad laws [are] unconstitutional." *Id.* at 326, 328 n.312.

¹⁵⁴ See RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 32-35 (2004).

¹⁵⁵ See generally Symposium, *The Forgotten Constitutional Amendments*, 56 *DRAKE L. REV.* 829 (2008) (debating the Ninth Amendment's meaning).

¹⁵⁶ See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 593 (2003) (Scalia, J., dissenting) ("Our opinions applying the doctrine known as 'substantive due process' hold that . . . *only* fundamental rights qualify for this so-called 'heightened scrutiny' protection All other liberty interests may be abridged or abrogated pursuant to a validly

Not since the early 1930s has the Court set any limits on the Commerce Clause based on protecting individual economic liberty.¹⁵⁸ But, even for Justices who might be open to doing so, the Tenth Amendment is an inhospitable vehicle because it focuses much more on states' rights than individual rights. As explained by Justice Scalia's majority opinion in *District of Columbia v. Heller* (the landmark gun-rights case), the Tenth Amendment does not refer to individual rights:

[The First, Fourth and Ninth Amendments] unambiguously refer to individual rights, not "collective" rights, or rights that may be exercised only through participation in some corporate body.

Three provisions of the Constitution refer to "the people" in a context other than "rights"—the famous preamble ("We the people"), §2 of Article I (providing that "the people" will choose members of the House), and the Tenth Amendment (providing that those powers not given the Federal Government remain with "the States" or "the people"). Those provisions arguably refer to "the people" acting collectively—but they deal with the exercise or reservation of powers, not rights.¹⁵⁹

These wording differences point to a key distinction: in contrast with the Ninth Amendment, the Tenth Amendment speaks of reserving "powers," not "rights." Freedom to abstain from purchasing insurance can only awkwardly be regarded as a "power." More generally, the Tenth Amendment is concerned with state sovereignty rather than

enacted state law if that law is rationally related to a legitimate state interest."); *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 861 (1998) (Scalia, J., concurring in the judgment) (criticizing "highly subjective substantive-due-process methodologies"); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 599 (1996) (Scalia, J., dissenting) (arguing that due process limits on punitive damages are "insusceptible of principled application, . . . constrained by no principle other than the Justices' subjective assessment of the 'reasonableness' of the award").

¹⁵⁷ One critique of substantive due process doctrine comes from *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Management Authority*:

There is a common thread to these arguments: They are invitations to rigorously scrutinize economic legislation passed under the auspices of the police power. There was a time when this Court presumed to make such binding judgments for society, under the guise of interpreting the Due Process Clause. See *Lochner v. New York*, 198 U.S. 45 (1905). We should not seek to reclaim that ground for judicial supremacy under the banner of the dormant Commerce Clause.

550 U.S. 330, 347 (2007).

¹⁵⁸ See *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587, 610 (1936) (holding that the right to contract for wages in return for work "is a part of the liberty protected by the due process clause").

¹⁵⁹ *District of Columbia v. Heller*, 554 U.S. 570, 579-80 (2008) (footnote omitted).

individual liberty.¹⁶⁰ The “people” in the Tenth Amendment rather clearly are the body politic, and so the Tenth Amendment is concerned with political, not individual rights. Including the people alongside the states simply reflects the prevailing libertarian theory that *all* governments inherently have limited powers since even the states’ plenary powers to govern ultimately derive from the consent of the populace at large.¹⁶¹ None of this conceptual landscape offers solid or even plausible grounds to use the Tenth Amendment to protect individual liberties in the same way that it protects states’ sovereignty.

¹⁶⁰ See *New York v. United States*, 505 U.S. 144, 166 (1992) (“[T]he Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States.”).

¹⁶¹ All nine Justices agreed with this basic principle in *U.S. Term Limits, Inc. v. Thornton*. The majority ruled:

The “plan of the convention” as illuminated by the historical materials, our opinions, and the text of the Tenth Amendment draws a basic distinction between the powers of the newly created Federal Government and the powers retained by the pre-existing sovereign States. As Chief Justice Marshall explained, “it was neither necessary nor proper to define the powers retained by the States. These powers proceed, not from the people of America, but from the people of the several States; and remain, after the adoption of the constitution, what they were before, except so far as they may be abridged by that instrument.”

... The text of the Tenth Amendment unambiguously confirms this principle

514 U.S. 779, 801 (1995) (quoting *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 193 (1819)). This principle was also echoed in Justice Thomas’s dissenting opinion:

Our system of government rests on one overriding principle: All power stems from the consent of the people.

....

When they adopted the Federal Constitution, of course, the people of each State surrendered some of their authority to the United States Because the people of the several States are the only true source of power, however, the Federal Government enjoys no authority beyond what the Constitution confers

... [T]he remainder of the people’s powers—“[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States,”—are either delegated to the state government or retained by the people. The Federal Constitution does not specify which of these two possibilities obtains

These basic principles are enshrined in the Tenth Amendment, which declares that all powers neither delegated to the Federal Government nor prohibited to the States “are reserved to the States respectively, or to the people.” With this careful last phrase, the Amendment avoids taking any position on the division of power between the state governments and the people of the States: It is up to the people of each State to determine which “reserved” powers their state government may exercise.

Id. at 846-48 (Thomas, J., dissenting) (citation omitted).

Finally, even if courts were to make this move, it would be truly radical to categorically preclude insurance mandates from the Necessary and Proper Clause, regardless of the strength of the public policy justifications in particular settings. Only direct invasions of state sovereignty receive such absolute prohibition. Even the Court's recent exclusion of noneconomic local matters from the commerce power is not absolute. Justice Scalia repeatedly stressed this point in his *Gonzales v. Raich* concurrence:

Though the conduct in *Lopez* was not economic, the Court nevertheless recognized that it could be regulated as "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.

... [A]s the passage from *Lopez* quoted above suggests, Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce. The relevant question is simply whether the means chosen are "reasonably adapted" to the attainment of a legitimate end under the commerce power.

....

... As *Lopez* itself states, and the Court affirms today, Congress may regulate noneconomic intrastate activities only where the failure to do so "could . . . undercut" its regulation of interstate commerce.¹⁶²

Elsewhere in the Constitution, the most fundamentally protected liberties can sometimes be sacrificed or curtailed for sufficiently compelling reasons. Using the Tenth Amendment to protect "individual sovereignty" to be uninsured would provide more protection than the Constitution affords many fundamental rights. Thus, not only would this reinstate *Lochner*-esque protections of economic liberties, but the modern constraints would be far stronger than those in the *Lochner* era.¹⁶³ A categorical rejection of regulating pure inactivity would appear

¹⁶² 545 U.S. 1, 36-38 (2005) (Scalia, J., concurring in the judgment) (citations omitted) (quoting *United States v. Lopez*, 514 U.S. 549, 561 (1995), and *United States v. Darby*, 312 U.S. 100, 121 (1941)).

¹⁶³ Professor Smith agrees with this prediction about the potential return of *Lochner*:

[I]f the courts import this libertarian objection into federalism doctrine in the fashion . . . urged, the protection for individual liberty—and thus the corresponding limitation on federal authority—will be even greater than it would be if the limitation were imposed as a matter of substantive due process. . . . Congress would be categorically precluded from compelling individuals to take actions that they otherwise would prefer not to take, even if the states were simply unable, because of collective action problems, to address a problem of national scope and importance.

Smith, *supra* note 52, at 24 (emphasis omitted).

to preclude, for instance, federal action to mandate vaccinations or other preventive measures even in the worst conceivable public health emergency, such as an outbreak of the avian flu that realistically might threaten tens of millions of lives.¹⁶⁴ The Fifth or Ninth Amendments would produce no such result because their protections of individual liberties are balanced against legitimate government objectives.¹⁶⁵

When striking this balance with respect to economic (rather than personal or bodily) liberties, the government's objectives need not be compelling. Randy Barnett's analysis under the Ninth Amendment, for instance, speaks in terms of a "*presumption of liberty*"¹⁶⁶—which invokes an intermediate level of scrutiny. The presumption can be rebutted by showing "some degree of fit between means and ends and that the measure is not simply a pretext."¹⁶⁷

In the necessary and proper context, then, the most that could conceivably be accomplished by questioning the constitutional propriety of regulating economic inactivity is to heighten the standard of necessity that the insurance mandate must meet. The Court's recent *Comstock* decision can be read in this light. Its unique multifactor analysis, not present in any prior Necessary and Proper Clause decision, was used as a form of heightened scrutiny because of the special federalism concerns raised by the federal exercise of a civil commitment power that is otherwise the exclusive domain of state police power.¹⁶⁸ This questionable propriety led the Court to take a close and extensive look at the history, justification, and scope of this particular use of the power.

Importantly, though, Supreme Court decisions since the *Lochner* era have not endorsed or even suggested this heightened scrutiny of necessity for purely economic regulation. However, even if this higher scrutiny were employed, *Comstock* does not purport to provide the exclusive form of scrutiny. Therefore, the fact that the individual mandate does

¹⁶⁴ This point is made by Garrett Epps, *What's at Stake in the GOP's Challenge to Health Care Reform*, ATLANTIC (Dec. 15, 2010, 8:00 AM), <http://www.theatlantic.com/national/archive/2010/12/whats-at-stake-in-the-gops-challenge-to-health-care-reform/68022>.

¹⁶⁵ See, e.g., *Jacobson v. Massachusetts*, 197 U.S. 11, 29-30, 38 (1905) (holding that mandatory vaccination laws do not violate constitutionally protected liberty interests).

¹⁶⁶ Randy E. Barnett, *Scrutiny Land*, 106 MICH. L. REV. 1479, 1495 (2008) (emphasis added).

¹⁶⁷ *Id.* at 1499; see also Barnett, *supra* note 130, at 207 ("The appropriate 'level of scrutiny' of a measure's necessity must lie somewhere in between" strict and rational basis); Randy E. Barnett, *The Golden Mean Between Kurt & Dan: A Moderate Reading of the Ninth Amendment*, 56 DRAKE L. REV. 897, 904 (2008) ("[A]ll it means to protect the other liberties retained by the people is to put the government to its proof.").

¹⁶⁸ *United States v. Comstock*, 130 S. Ct. 1949, 1956-65 (2010).

not fully meet each element of *Comstock's* tailor-made scrutiny is of no import, as long as the mandate has strong justification in its own particular context. As previously discussed,¹⁶⁹ a mandate to obtain health insurance meets the highest plausible levels of justification. It is an integral aspect of PPACA's requirement that insurers cover all applicants regardless of their health condition. Without the mandate, all sides of the debate agree that PPACA's other, perfectly valid regulatory provisions would seriously harm the market.¹⁷⁰ In the end, this is all one needs to safely conclude that the individual mandate fits comfortably under the Necessary and Proper Clause. Otherwise, a court would have to conclude, in *Lochner*-esque fashion, that Congress lacks any feasible authority to prohibit medical screening by insurers, regardless of the consequences for national markets in health insurance.

III. LIMITLESS FEDERAL POWER

We now return to the overriding objection that if the individual mandate were allowed, there would be no stopping Congress from mandating the purchase of anything it pleases. Mandatory purchases have substantial economic impact almost by definition; since most goods and services are part of a national market, a mandate to purchase just about any product might be constitutionally justified as an aspect of regulating that market or a related market. Surely, the argument goes, whichever way one reads these two clauses and their precedents, the Constitution cannot allow such a result.

This slippery slope concern is not merely a free-floating anxiety; it plays a fairly precise doctrinal role in two different respects. First, as a public policy concern, a steep slope warns us to avoid construing ambiguous terms and concepts in ways that could have untoward consequences. In this purely public policy mode, the argument's strength depends on the actual risk that Congress might enact oppressive laws. The alternative mode of argument is based mainly on pure logic. This alternative asks whether abuse is a theoretical possibility, with the likelihood of actual abuse having much less relevance. This version of the argument has a syllogistic form that has been labeled the "non-infinity principle."¹⁷¹ Its major premise is that, by constitutional design, feder-

¹⁶⁹ See *supra* notes 66-70 and accompanying text.

¹⁷⁰ See *supra* Section II.A.

¹⁷¹ See Glenn H. Reynolds & Brannon P. Denning, *Lower Court Readings of Lopez, or What if the Supreme Court Held a Constitutional Revolution and Nobody Came?*, 2000 WIS. L. REV. 369, 378 (explaining that, under the non-infinity principle, "any justification for

al powers can never be unlimited. Therefore, any power or rationale that in theory has no bounds cannot be “proper” or “consist[ent] with the letter and spirit of the constitution.”¹⁷² In making this argument, it matters little how unlikely or absurd hypothetical extensions might be as long as they are imaginable. Hence, we see widespread discussion of whether upholding the individual mandate would allow Congress to mandate the purchase of broccoli or other noxious green vegetables.¹⁷³

One effective response to these arguments is simply to note that regulating inactivity does not literally “remove all limits on federal power” or make it “virtually *impossible* to posit *anything* that Congress would be without power to regulate,” as the Florida court surmised.¹⁷⁴ In terms of pure logic, regulating inactivity is no more unlimited than regulating activity, as long as the same limits apply to each. The Court’s decisions in *Lopez* and *Morrison* rejected regulation of local matters that are non-economic.¹⁷⁵ There is no reason to assume this same subject matter limit would not also apply to the regulation of inactivity. If so, allowing Congress to mandate insurance still would not allow it to require the possession of handguns near schools, any more than it can prohibit their possession.

Beyond this noneconomic limit, a long list of other, express constitutional provisions limit even the most expansive federal powers. Comprehensive authority to regulate national markets still does not allow Congress to force people to eat (rather than merely purchase) broccoli, to post billboards on their houses, to open their stores on Sunday mornings, or to obtain insurance only on one side of the Mississippi River or in states that vote for Democrats. Each of these examples, and

congressional power must not be one that would undermine the very notion of enumerated powers. If the definition of ‘commerce’ used to uphold a statute is one that would allow Congress to regulate *everything* under the commerce power, then the statute must fall.”).

¹⁷² *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 420-21 (1819).

¹⁷³ Kevin Sack, *Both Sides See a Nod to the Tea Party in Judge’s Health Care Ruling*, N.Y. TIMES, Feb. 2, 2011, at A16.

¹⁷⁴ *Florida ex rel. Bondi v. U.S. Dep’t of Health & Human Servs.*, No. 10-0091, 2011 WL 285683, at *22, *33 (N.D. Fla. Jan. 31, 2011). The court also concluded, incorrectly, that the government’s defense of the law has “no stopping point” and is “without logical limitation.” *Id.* at *29.

¹⁷⁵ See *supra* note 51; see also *Mead v. Holder*, No. 10-0950, 2011 WL 611139, at *21 (D.D.C. Feb. 22, 2011) (“There is a straightforward response to the ‘parade of horrors’ claim: the limits on Congress’s Commerce Clause power are spelled out clearly in *Lopez* and *Morrison*. These two cases establish that (1) the activity . . . must be economic in nature, [and] (2) the link between the activity and interstate commerce must not be too attenuated . . .” (citations omitted)).

many others, would violate (or raise serious questions under) the First, Fifth, or Fourteenth Amendment. These are just some among the many constitutional norms that continue to fence arbitrary or abusive federal power, even if purchase mandates are permitted.¹⁷⁶

The Necessary and Proper Clause provides a third response to the limitless-power concern. Challengers caricature the government's defense as claiming that mandating insurance is a convenient way to increase coverage or stimulate the health-services economy. That straw man is the premise of challengers' hypotheticals about mandating the purchase of American cars or health-club memberships. But, as the Florida court explained at length, the full-bodied PPACA includes the mandate as an integral aspect of Congress's exercise of an enumerated power—the unquestioned authority to regulate how insurers design, market, and sell their products in interstate commerce.¹⁷⁷ Opponents' hypothetical laws are aimed mostly at freestanding measures for increasing desirable consumer behavior. Thus, they lack the essential attribute of the Necessary and Proper Clause that ties these hypothetical mandates tightly to a distinct and enumerated regulatory power. Even if compulsory health insurance is upheld as necessary and proper, Congress still could not mandate the purchase of broccoli unless doing so is, without piling “inference upon inference,”¹⁷⁸ truly an important part of a larger regulatory scheme that the Commerce Clause independently permits.

Even if we can imagine arguments for other purchase mandates, rejecting the slippery slope argument does not require a guarantee that Congress will never again impose a pure purchase mandate. Instead, it is only necessary to note that upholding this one mandate does not permit *all* others. No matter how many hypotheticals are put forward, they fail to undermine the principle of limited government for the same reason that the laws upheld in *Comstock*, *Raich*, and *Lopez* do not. In each, the Court held or recognized that otherwise disallowed powers are, in some circumstances, “an essential part of a larger regulation of

¹⁷⁶ The Florida court failed to observe the clear constitutional distinction between purchase mandates and consumption mandates when it stated that “it would seem only logical under the defendants’ rationale that Congress may also regulate the ‘economic decisions’ not to go to the doctor for regular check-ups and screenings,” *Bondi*, 2011 WL 285683, at *29 n.25, or that “Congress could require that people buy and consume broccoli at regular intervals,” *id.* at *24.

¹⁷⁷ *Id.* at *37.

¹⁷⁸ See, e.g., *United States v. Lopez*, 514 U.S. 549, 567 (1995).

economic activity, in which the regulatory scheme could be undercut”¹⁷⁹ without the unenumerated power. The very circumstances required to make this so are themselves the limits that prevent the Necessary and Proper Clause from becoming a source of boundless federal powers.

Tying the mandate to PPACA’s insurance regulations limits the plausible range of other hypothetical mandates, not only because of the tightness of the link, but also because there are inherent limits in the base regulatory power itself. Thus, we need not worry that in bizarre circumstances the military power, for instance, might also be invoked to mandate the purchase of broccoli.¹⁸⁰ Although this and many other scenarios are only barely conceivable, they are at least *theoretically* possible, which is all that is needed to argue that the possibility could undermine the law’s constitutional propriety or contravene the Constitution’s spirit. Likewise, one could also use the spending and postal powers to purchase broccoli and mail it to every citizen once a week, for some plausible public purpose. None of these bare theoretical possibilities give us pause when construing the scope of those other, enumerated powers because each power is limited by its core domain, whether it be military purpose, interstate commerce, or general welfare.

Finally, having rejected (on several grounds) the syllogistic argument based on pure logic, all that remains is the generalized policy concern that upholding compulsory health insurance might lead to an actual abuse of power. This pragmatic argument plays only a cautionary doctrinal role; it does not, by itself, determine an outcome. This concern, if realistic, has less force under challenges to the Necessary and Proper Clause than to the core Commerce Clause. This is because allowing an insurance mandate under the enumerated power arguably requires an expansive interpretation of “[t]o regulate Commerce.” However, under the Necessary and Proper Clause, opponents ask the courts to impose a new doctrinal limit—one that either contradicts or goes considerably beyond limits currently recognized under that clause. Pragmatic policy concerns are less compelling when given as reasons to aggressively contract federal power than when used to avoid new expansions.

Under either guise, the democratic process safely checks the realistic threat of abuse. Almost two centuries ago, Justice Joseph Story made

¹⁷⁹ See, e.g., *id.* at 561.

¹⁸⁰ Shortly after the Civil War, the Court upheld the unenumerated power to mandate that paper currency be accepted as legal tender for all debts, based in part on this being a necessary and proper extension of Congress’s war powers. *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 534-38 (1870).

this point eloquently in direct reference to a liberal construction of the Necessary and Proper Clause:

It is no valid objection to this doctrine to say, that it is calculated to extend the powers of the government throughout the entire sphere of state legislation. The same thing may be said, and has been said, in regard to every exercise of power by implication and construction. There is always some chance of error, or abuse of every power; but this furnishes no ground of objection against the power; and certainly no reason for an adherence to the most rigid construction of its terms, which would at once arrest the whole movements of the government. The remedy for any abuse, or misconstruction of the power, is the same, as in similar abuses and misconstructions of the state governments. It is by an appeal to the other departments of the government; and finally to the people, in the exercise of their elective franchises.¹⁸¹

Justice Clarence Thomas expressed the same sentiment early in his Court tenure: “In areas of social and economic policy, . . . [t]he Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process, and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.”¹⁸² Or, as Justice Thurgood Marshall brusquely put it, “The Constitution does not prohibit legislatures from enacting stupid laws.”¹⁸³

Similar slippery slope concerns can and have been made regarding almost any power that Congress possesses. Even as the Constitution was being debated, Alexander Hamilton noted that a “sample of this is to be observed in the exaggerated and improbable suggestions which have taken place respecting the power of calling for the services of the militia.”¹⁸⁴ A century and a half later, those who opposed Social

¹⁸¹ 3 STORY, *supra* note 60, § 1247 (footnote omitted).

¹⁸² FCC v. Beach Commc’ns, Inc., 508 U.S. 307, 313-14 (1993) (quoting Vance v. Bradley, 440 U.S. 93, 97 (1979)). Seven other Justices joined the opinion.

¹⁸³ N.Y. State Bd. of Elections v. Lopez Torres, 552 U.S. 196, 209 (2008) (Stevens, J., concurring).

¹⁸⁴ THE FEDERALIST NO. 29, *supra* note 135, at 178 (Alexander Hamilton). Hamilton elaborated with examples of absurd speculations such as that the militia of

New Hampshire is to be marched to Georgia, of Georgia to New Hampshire, of New York to Kentucky, and of Kentucky to Lake Champlain. Nay, the debts due to the French and Dutch are to be paid in militiamen instead of Louis d’ors and ducats. At one moment there is to be a large army to lay prostrate the liberties of the people; at another moment the militia of Virginia are to be dragged from their homes five or six hundred miles to tame the republican contumacy of Massachusetts; and that of Massachusetts is to be transported an equal distance to subdue the refractory haughtiness of the aristocratic Virginians.

Id. at 182.

Security warned that Congress someday might lower the retirement age to thirty.¹⁸⁵ Congress could use the power to criminalize to make the most trivial of things affecting commerce a federal crime. The tax power could be pushed to the verge of being confiscatory. The eminent domain power, coupled with a broad conception of public purpose, could be used to turn vast swaths of homes and businesses over to private development companies. Some even suspect the mundane postal power of harboring the threat “that Congress could constitutionally nationalize all forms of communication and transportation,”¹⁸⁶ but, as scholars noted long ago, while “[t]his may be true in logic, . . . it has not yet taken place.”¹⁸⁷

Admittedly, modern versions of most federal powers are sweeping, and so it is possible to conjure up seemingly infinite despotic applications. Most recently, one of the same lawyers pursuing the Florida challenge to compulsory health insurance wrote with regard to the constitutionality of FDA regulation, “If government can limit Americans’ choice of effective medical treatments, there’s no limit to its control over our bodies, and the right to bodily autonomy is an illusion.”¹⁸⁸ The Founders, in terms still relevant today, sometimes scorned those who reasoned in this fashion. Hamilton, for instance, responded as follows to those who argued that the federal power to call up the militia could be abused to suppress civil liberties:

There is something so far-fetched and so extravagant in the idea of danager to liberty from the militia [composed of fellow citizens], that one is at a loss whether to treat it with gravity or with raillery; whether to consider it as a mere trial of skill, like the paradoxes of rhetoricians; as a disingenuous artifice to instil[1] prejudices at any price; or as the serious offspring of political fanaticism.

. . . .

¹⁸⁵ Brief for Plaintiff-Appellant-Respondent at 54, *Helvering v. Davis*, 301 U.S. 619 (1937) (No. 08-0910), 1937 WL 40760, at *54 (arguing that if “Congress may impose on a non-wealthy few the support of the many over sixty-five years of age, . . . Congress may do the same as to the support of those over thirty years of age”). The brief continues, “Picture, if you will, the consternation of the men of the thirteen sovereign States, engaged in considering whether or not to enter into the compact of the Constitution, if they had been told that they were handing over to the new Nation the control of the way in which the aged within a State, needy or wealthy, should be supported . . .” *Id.* at 53.

¹⁸⁶ *Project: Post Office*, *supra* note 60, at 715 n.571 (citing *ROGERS*, *supra* note 60, at 151-52, 155-57).

¹⁸⁷ *Id.*

¹⁸⁸ David B. Rivkin Jr. & Elizabeth Price Foley, *‘Death Panels’ Come Back to Life*, WALL ST. J., Dec. 30, 2010, at A15.

. . . Do the persons who rave at this rate imagine that their art or their eloquence can impose any conceits or absurdities upon the people of America . . . ?

. . . Are suppositions of this sort the sober admonitions of discerning patriots to a discerning people? Or are they the inflammatory ravings of incendiaries or distempered enthusiasts?¹⁸⁹

None of these specters of governmental tyranny has materialized, and none will, because elected representatives will not allow it. As Hamilton concluded, “If we were even to suppose the national rulers actuated by the most ungovernable ambition, it is impossible to believe that they would employ such preposterous means to accomplish their designs.”¹⁹⁰ There is nothing about purchase mandates that make them less sensitive than any other legislative measure to rational deliberation and democratic electoral constraints. If anything, the uniqueness of the individual mandate only seems to have added to its social controversy and thus to the heightened political sensitivities about basic libertarian concerns. Whether to repeal or amend the mandate is currently under very active political debate and will likely remain so for several years to come.¹⁹¹

It would clearly be constitutional for Congress to increase taxes or reallocate general revenues in order to expand social insurance, but politics sharply constrain this option. These political constraints were very much on the mind of the district judge in Northern Florida when he rejected the government’s argument that the individual mandate is an exercise of the taxing power. The court reasoned that it “seems likely that the members of Congress merely called it a penalty and did not describe it as revenue-generating to try and insulate themselves from the potential electoral ramifications of their votes.”¹⁹² These same political constraints led Congress instead to require residents to select their own insurance. Thus, it would be blatantly contradictory to cite the intense political climate surrounding the passage of health reform¹⁹³

¹⁸⁹ THE FEDERALIST NO. 29, *supra* note 135, at 181-83 (Alexander Hamilton).

¹⁹⁰ *Id.* at 183.

¹⁹¹ See Henry J. Aaron, *The Midterm Elections—High Stakes for Health Policy*, 363 NEW ENG. J. MED. 1685, 1685 (2010) (“[T]he political battle over health care reform will continue into the 2012 presidential elections and probably beyond.”).

¹⁹² Florida *ex rel.* McCollum v. Dep’t of Health & Human Servs., 716 F. Supp. 2d 1120, 1142 (N.D. Fla. 2010).

¹⁹³ See *id.* (“[T]he Act was very controversial at the time of passage. . . . [T]he legislation required lawmakers in favor of the bill to cast politically difficult and tough votes. . . . [B]y far the most publicized and controversial part of the Act was the individual mandate . . .”).

as a reason to reject one basis of congressional authority and, at the same time, to reject the regulatory path Congress chose because of the imagined inability of the political process to restrain hypothetical future exercises of this alternative federal power. If political forces constrain the taxing power, they will also constrain the commerce power.

CONCLUSION

Writing at this length about these intricate arguments may convey the false impression that the issues are more complicated than they actually are. Accordingly, a useful summary might recapitulate exactly what is at issue and what each side in the litigation must establish in order to prevail. There is no substantial dispute, and even some overt agreement, that PPACA's mandate to obtain health insurance is inextricably intertwined with its other insurance regulations, which are clearly constitutional. But disagreement remains on three questions:

- 1) Does being uninsured entail economic activity?
- 2) May Congress use its commerce power to regulate economic inactivity by requiring most legal residents to obtain a product?
- 3) Is it per se constitutionally "improper" to compel most legal residents to have health insurance?

For challengers to prevail, they must convince courts to rule "no" on the first two questions *and* "yes" on the third. For the government to prevail, it need win only *one* of these points. The first two issues are contestable: the government might, or might not, prevail on one or both of them. The third point has no basis in existing precedent or principle, and reaching this conclusion would contradict centuries of precedent and threaten broad swaths of the modern regulatory state. This radical result may be the goal of at least some challengers, but it is implausible to think they can convince five Justices (or perhaps even a panel of appellate judges), to go along with such a revolutionary jurisprudential move. Slippery slope concerns are significant, but they can be handled in this context at least as well as they have been for a host of other federal powers. Moreover, categorically barring the regulation of inactivity in order to avoid hypothetical concerns at all costs would foolishly hamstring the federal government's ability to counter truly frightening threats to public health.

Thus, in the end, the acknowledged undesirability, if not impossibility, of banning medical screening without a requirement to obtain insurance is the core of the government's strongest defense. Even if the mandate is not squarely within Congress's commerce power, it

meets a high threshold of necessity to accomplish the overall reform scheme, which is clearly within congressional power, to create a market structure in which no one is ever again medically uninsurable.