

2012

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Recommended Citation

Wendy K. Mariner *The Affordable Care Act Individual Coverage Requirement: Ways to Frame the Commerce Clause Issue*, 21 *Annals Health L.* 45 (2012).

Available at: <http://lawcommons.luc.edu/annals/vol21/iss1/7>

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The Affordable Care Act Individual Coverage Requirement: Ways to Frame the Commerce Clause Issue

Wendy K. Mariner, J.D., LL.M., M.P.H.*

“This government is acknowledged by all to be one of enumerated powers. . . . But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist.”¹

I. INTRODUCTION

The central constitutional challenge to the Patient Protection and Affordable Care Act (“ACA”) has been to the requirement that American citizens and legal residents maintain health insurance coverage, whether from public programs or private insurers.² The challengers argue that this requirement is beyond Congress’s power under the Commerce Clause,³ because it regulates individuals within a single state and not having health insurance is neither economic nor activity.⁴

This is indeed a novel issue, but it may not be the correct one. The

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1. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819).

2. Patient Protection and Affordable Care Act, Pub. L. 111-148, § 1501, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. 111-152, 124 Stat. 1029 (2010), (codified at 26 U.S.C. § 5000A) (“an applicable individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage for such month”). Exceptions are included.

3. “Congress shall have power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes.” U.S. CONST., art. I, § 8, cl. 3.

4. Five major decisions were issued before August 15, 2011, with three upholding the requirement (*Thomas More Law Ctr. v. Obama*, No. 10–2388, 2011 WL 2556039 (6th Cir. June 29, 2011); *Mead v. Holder*, 766 F. Supp. 2d 16 (D.D.C. Feb. 22, 2011); *Liberty Univ., Inc. v. Geithner*, 753 F. Supp. 2d 611 (W.D. Va. Nov. 30, 2010)) and two striking it down (*State of Florida v. U.S. Dep’t of Health & Human Serv.*, 2011 WL 3519178 (11th Cir. Aug. 12, 2011); *Commonwealth of Virginia ex rel. Cuccinelli v. Sebelius*, 728 F. Supp. 2d 768 (E.D. Va., Dec. 13, 2010)).

challengers' argument relies on part of a particular three-category formulation of what Congress can regulate by exercising its commerce power, first stated in this particular formulation in *Perez v. United States*:

The Commerce Clause reaches, in the main, three categories of problems. First, the use of channels of interstate or foreign commerce which Congress deems are being misused, as, for example, the shipment of stolen goods . . . or of persons who have been kidnapped Second, protection of the instrumentalities of interstate commerce, as, for example, the destruction of an aircraft . . . , or persons or things in commerce, as, for example, the thefts from interstate shipments Third, those activities affecting commerce.⁵

Challengers argue, and the federal government and most courts seem to accept, that only the third category – activities affecting commerce – is at issue; they have not yet explicitly addressed the first two.⁶ However, there may be other ways to frame the question. The requirement might be analyzed as an incidental – and constitutional – aspect of regulating the national health insurance or healthcare market under the first two categories. Or, the categories themselves may not be so doctrinally separate, but instead broadly descriptive of what counts as commerce that Congress can regulate.

This article examines these alternatives, because how a majority of the Justices frame the doctrinal question is likely to decide the case.⁷ The next section examines the plenary nature of the Commerce Clause, whose scope the Supreme Court has described in various ways, not all of them perfectly congruent with the three-category formulation, and classic examples of regulating commerce, viewed as falling into the first two categories. Part three considers how the requirement could be found constitutional under those categories, while part four explores whether the Necessary and Proper Clause is necessary to do so. Part five considers arguments using the third category, differentiating laws targeting intrastate matters alone from those that include intrastate matters in more comprehensive legislation, and finds that the latter approach implicates arguments that better fit the first two categories. The article concludes that the ACA's individual coverage requirement is best viewed as an ancillary regulation to carry out the ACA's

5. *Perez v. United States*, 402 U.S. 146, 150 (1971) (citations omitted). The parties also cite *United States v. Lopez*, 514 U.S. 549, 558-9 (1995) (restating the third category to include “those activities having a substantial relation to interstate commerce, [citation omitted], i.e., those activities that substantially affect interstate commerce”); *Gonzales v. Raich*, 545 U.S. 1, 20 (2005); *United States v. Morrison*, 529 U.S. 598, 609 (2000).

6. *Thomas More Law Ctr.*, *supra* note 4, at 27; *Mead*, *supra* note 4, at 29.

7. See Anthony Edward Falcone, *Comment: Law and Limits: How Categories Construct Constitutional Meaning*, 8 U. PA. J. CONST. L. 1005 (2006).

goals of making health care affordable, as financed by insurance, and not as an independent intrastate regulation of individuals that must qualify as economic activity.

II. DEFINING COMMERCE: CHANNELS AND INSTRUMENTALITIES AND VARIATIONS ON THOSE THEMES

The ACA should at least raise the question of whether Congress is regulating the use of channels of interstate commerce or instrumentalities, people or things in interstate commerce, rather than only regulating an intrastate matter that may affect interstate commerce. Although an historical analysis of the first two categories is beyond the scope of this article, several conclusions can be drawn without fear of significant disagreement. First, as Chief Justice John Marshall made clear in *Gibbons v. Ogden*, the Commerce Clause grants Congress a plenary power, one that is not subject to any limitations, except those imposed by the Constitution itself, such as prohibitions on violating rights protected by the Amendments to the Constitution:

It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution. . . . If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government. . . .⁸

While we repeat the mantra that the federal government is a government of enumerated powers, we should remember that, with respect to the powers that are enumerated, the federal government is indeed the supreme sovereign.⁹

How, then, might Congress's commerce power be limited? One answer is that, being a sovereign power, it cannot be limited.¹⁰ Otherwise, the best answer appears to lie in the definition of commerce. However, a limited

8. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196-7 (1824).

9. *McCulloch*, *supra* note 1, at 405 ("If any one proposition could command the universal assent of mankind, we might expect it would be this – that the government of the union, though limited in its powers, is supreme within its sphere of action.").

10. Testimony of Charles Fried, U.S. Senate Committee on the Judiciary Hearing: The Constitutionality of the Affordable Care Act (Feb. 2, 2011), <http://judiciary.Senate.gov/hearings/hearing.cfm?id=e655f9e2809e5476862f735da165e3b7>. *But see* RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2005) (arguing for narrower power).

definition of commerce does not limit the power conferred; it defines the sphere in which virtually unlimited power can be exercised.¹¹ Here we might pause to note that the Tenth Amendment cannot serve as an independent limit on the scope of the commerce power, because the commerce power was not reserved to the states.¹² Thus, we are returned to the definition of commerce. Although the Supreme Court has been sensitive to preserve state sovereignty, it has not allowed that sensitivity to override the scope of federal power.¹³

Of course, the conception of commerce evolved over time, as the country industrialized and Supreme Court heard challenges to new national regulation.¹⁴ Nevertheless, the Court accepted that some intrastate activities were part of interstate commerce.¹⁵ By 1941, efforts to limit the definition of commerce were abandoned, and “the broader view of the Commerce Clause announced by Chief Justice Marshall had been restored.”¹⁶ Since that time, the Court has not placed explicit boundaries around the industries, activities, practices, or matters that constitute commerce itself. Instead, it has described commerce in more general terms, later summarized in the first two *Perez/Lopez* categories.

Attempts to assign the targets of regulation to one of the first two categories can be vexing. Few Supreme Court decisions explicitly sorted matters into a single category, even when the Justices agreed that something

11. Gibbons, *supra* note 8, at 35 (“If, as has always been understood, the sovereignty of congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several states, is vested in congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of power as are found in the constitution of the United States”).

12. *New York v. United States*, 505 U.S. 144, 156 (1992) (“If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States”); *Steward Mach. Co. v. Davis*, 301 U.S. 548, 584 (1937) (rejecting argument that Tenth Amendment is a general limit on federal enumerated powers). See Mark A. Hall, *Commerce Clause Challenges to Health Reform*, 159 U. PA. L. REV. 1825, 1859 (2011). But see Randy E. Barnett, *Commandeering the People: Why the Health Insurance Mandate is Unconstitutional*, 5 N.Y.U. J. L. & Liberty 581 (2011).

13. *Virginia Office for Prot. & Advocacy v. Stewart*, 131 S. Ct. 1632, 1640 (April 19, 2011) (“Denial of sovereign immunity, to be sure, offends the dignity of a State; but not every offense to the dignity of a State constitutes a denial of sovereign immunity”).

14. See generally EDWARD L. BARRETT, JR. ET AL., *CONSTITUTIONAL LAW: CASES AND MATERIALS* 186-217 (Lon L. Fuller ed., 1968); John E. Nowak et al., *CONSTITUTIONAL LAW* 161 (2d ed. 1983).

15. See e.g., *Houston E. & W. Texas Ry. Co. v. United States*, 234 U.S. 342, 351 (1914) (intrastate rates) (hereinafter “Shreveport Rate Case”); *Hipolite Egg Co. v. United States*, 220 U.S. 45, 58 (1911) (impure or adulterated food and drugs); *Southern Ry. Co. v. United States*, 222 U.S. 20, 26 (1911) (railroad car safety devices); *Swift & Co. v. United States*, 196 U.S. 375 (1905) (stockyards).

16. *Perez*, *supra* note 5, at 151. See LAWRENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 811 (3d ed. 2000) (commenting that definitions in cases involving only intrastate activities may have seemed too arbitrary to withstand analysis).

qualified as a matter of interstate commerce.¹⁷ People and things that travel across state lines have always been seen as constituting interstate commerce.¹⁸ The routes of that travel – first highways and navigable waters, then wires, radio frequencies, and air, and now fiber optics and cyberspace – provide the “channels” through which commerce is conducted, including routes within a single state that connect with other routes that enter other states. And in *Atlanta Motel, Inc. v. United States*, the Court upheld a prohibition against racial discrimination in the case of a local motel, confirming that “[t]he authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question.”¹⁹

The regulation of “instrumentalities” of interstate commerce suggests an even broader scope. In *The Daniel Ball*, the Court upheld safety regulations on a ship that was used only intrastate on a river in Michigan.²⁰ It was an “instrument” of interstate commerce, because it was used as one segment of the transport for goods being shipped from state to state. Anything that travels these routes could be what the Court called an “instrument of that commerce,”²¹ including personal information,²² and insurance policies.²³ Companies, including producers and manufacturers, that use the channels of interstate commerce can be instruments of commerce.²⁴ The Court has described Congress’s commerce power in broad terms. Even the intrastate business of interstate “instrumentalities” can be regulated when “essential or appropriate . . . to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance.”²⁵

The cases have been more consistent in calling something part of interstate commerce than in specifically categorizing it as a channel,

17. See, e.g., *Shreveport Rate Case*, *supra* note 15, at 342; *Interstate Commerce Comm. v. Illinois C. R. Co.*, 215 U.S. 452, 474 (1910) (upholding Congress’s power to regulate the railway cars used by a railroad company that is engaged in interstate commerce).

18. *Hoke v. United States*, 227 U.S. 308, 325-26 (1913) (upholding the White Slave Act); *Hipolite*, *supra* note 15, at 58; *Champion v. Ames*, 188 U.S. 321, 354 (1903) (upholding prohibition on interstate shipment of lottery tickets) (hereinafter “The Lottery Case”).

19. *Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 256 (1964) (quoting *Caminetti v. United States*, 242 U.S. 470, 491 (1917)).

20. *The Daniel Ball* 77 U.S. (10 Wall.) 557, 564 (1871).

21. *Id.* at 565.

22. *Reno v. Condon*, 528 U.S. 141 (2000).

23. *United States v. Southeastern Underwriters Ass’n*, 322 U.S. 533 (1944).

24. *Mulford v. Smith*, 307 U.S. 38, 47 (1939); *Currin v. Wallace*, 306 U.S. 1, 5 (1939).

25. *Shreveport Rate Case*, *supra* note 15, at 351. See also *United States v. Wrightwood Dairy*, 315 U.S. 110, 119 (1942) (upholding regulation of the price of milk sold intrastate); *United States v. Darby*, 312 U.S. 100, 119 (1941); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 398 (1940).

instrumentality or activity affecting interstate commerce.²⁶ Further complicating the picture are Supreme Court decisions that cite cases that could plausibly fall into the third category as authority for one of the first two categories.²⁷ Litigants have also had trouble slotting their arguments into the correct category. An interesting example of category confusion is *United States v. Robertson*,²⁸ a *per curiam* opinion upholding Robertson's conviction under the Racketeer Influenced and Corrupt Organizations Act (RICO) for his dealings with an investment in a gold mine. The Court pointed out that the parties had been incorrect to argue the case under the third category, because the gold mine was a business engaged in interstate commerce and subject to regulation under the first two categories.

III. VIEWING THE ACA UNDER THE FIRST TWO CATEGORIES

Another conclusion is that the Commerce Clause empowers Congress to regulate the health insurance industry and impose terms and conditions on insurers, how they do business, and their insurance policies.²⁹ In *Southeastern Underwriters*, the Supreme Court did not place insurance in a specific category, perhaps because it was so convinced that the insurance industry was engaged in interstate commerce.³⁰ The Court may have considered insurance companies themselves or their marketing, negotiations, and payments, or the insurance policies or their implementation to be instrumentalities of interstate commerce, or it may have considered insurance companies to be using the channels of interstate commerce to carry out their business. Either way, it was commerce. Moreover, the Court rejected, as “metaphysical separation,” the possibility of separating local activities, such as selling contracts, from interstate activities.³¹ The Court saw insurance as an integrated enterprise engaged in interstate commerce:

26. Lopez, *supra* note 5, at 553-58 (summarizing pre-1971 cases without slotting them into categories).

27. *Id.* at 558 (citing Darby, *supra* note 25 and Heart of Atlanta Motel, *supra* note 19, as examples of regulating “the use of the channels of interstate commerce”).

28. *United States v. Robertson*, 514 U.S. 669, 671 (1995).

29. *Southeastern Underwriters Ass'n*, *supra* note 23, at 583 (upholding the application of the Sherman Antitrust Act to fire insurance companies). Congress has regulated health insurance. *See, e.g.*, Employee Retirement and Income Security Act of 1974, 29 U.S.C. §§ 1001 et seq. (establishing federal requirements for health and other benefit plans offered by private employers); Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936, 42 U.S.C. § 1320d et seq. (establishing requirements for private health insurance plans).

30. *Southeastern Underwriters Ass'n*, *supra* note 23, at 549-50 (“Not only, then, may transactions be commerce though non-commercial; they may be commerce though illegal and sporadic, and though they do not utilize common carriers or concern the flow of anything more tangible than electrons and information.”).

31. *Id.* at 537.

The result is a continuous and indivisible stream of intercourse among the states composed of collections of premiums, payments of policy obligations, and the countless documents and communications which are essential to the negotiation and execution of policy contracts. Individual policyholders living in many different states who own policies in a single company have their separate interests blended in one assembled fund of assets upon which all are equally dependent for payment of their policies. The decisions which that company makes at its home office – the risks it insures, the premiums it charges, the investments it makes, the losses it pays – concern not just the people of the state where the home office happens to be located. They concern people living far beyond the boundaries of that state.³² . . . In short, a nationwide business is not deprived of its interstate character merely because it is built upon sales contracts which are local in nature.³³

The health insurance industry today is engaged in interstate commerce. The top five commercial companies (including Blue Cross) have enrolled about one-third of the United States population (101,784,209 in 2008) in their health insurance plans.³⁴ The top thirty companies cover more than 180 million Americans. The ACA regulates the sale, marketing, administration and content of private, commercial health insurance plans, including required coverage, prohibited exclusions, premium rate corridors, medical loss ratios, co-insurance, and appeal procedures.³⁵ It creates incentives for states to establish health insurance exchanges to facilitate the sale of policies, reserving the power to establish a federal health insurance exchange where states do not create their own.³⁶ It also regulates public health benefit plans – Medicare and Medicaid – expanding eligibility and coordinating with private plans.³⁷

The ACA uses health insurance as a mechanism for financing health care, rather than a target for market price stabilization alone.³⁸ It is premised on the assumption that everyone will need health care at some time³⁹ and

32. *Id.* at 541-2.

33. *Id.* at 546.

34. D. ANDREW AUSTIN & THOMAS L. HUNGERFORD, CONGRESSIONAL RESEARCH SERVICE, THE MARKET STRUCTURE OF THE HEALTH INSURANCE INDUSTRY (Nov. 17, 2009), available at <http://www.fas.org/sgp/crs/misc/R40834.pdf>.

35. 42 U.S.C. § 18022; 42 U.S.C. § 18081(b)(5); 42 U.S.C. § 300gg-17(c)(3); 42 U.S.C. § 1395w-27(e)(4); 42 U.S.C. § 18002 (c)(6).

36. 42 U.S.C. § 18041(c).

37. *See, e.g.*, 42 U.S.C. § 1396a(a)(10)(A)(i)(VII) (Medicaid eligibility for adults up to 133 percent FPL).

38. Wendy K. Mariner, *Health Reform: What's Insurance Got to Do with It? Recognizing Health Insurance as a Separate Species of Insurance*, 36 AM. J. L. & MED. 436 (2010).

39. *See* U.S. DEP'T. HEALTH & HUMAN SRVCS., CTRS. FOR DISEASE CONTROL & PREV., SUMMARY HEALTH STATISTICS FOR U.S. ADULTS: NATIONAL HEALTH INTERVIEW SURVEY,

that health care has become so expensive that few people can pay for that care out of their own resources.⁴⁰ The ACA incorporates multiple provisions intended to limit the costs (or rate of increase) to health insurers, so that their premiums (and Medicare and Medicaid payments) stabilize and increase at a slower rate.⁴¹ These are designed to ensure that insurance financing remains available in the private market. But Congress could have stabilized premium prices and prohibited unfair competition without imposing benefit coverage requirements. The requirements to cover essentially all reasonable care is intended to make sure that everyone has a source of payment for the health care they need.⁴²

The ACA is a complex regulatory scheme, which weaves insurance regulation and the individual coverage requirement into a larger, integrated program regulating federal health benefit programs, providers of health care, employers, and public health services. It should be clear that Congress has the power to enact the ACA regulations of the health insurance industry. But it does not answer the question whether it can require people to buy health insurance policies (or pay a penalty). Of course, the individual coverage requirement was added to preserve affordability by preventing individuals from triggering large losses by buying insurance only when they suffered a costly illness or injury.⁴³ Insurance, whether in the form of private policies or public benefit programs, is a natural source of financing for health care, because it is the preferred mechanism for financing unpredictable losses.⁴⁴ Affordable premiums from a large number

2009 14 (Dec. 2010), available at http://www.cdc.gov/nchs/data/series/sr_10/sr10_249.pdf (less than 1 percent of adults have never used health care). People who refuse medical care for religious reasons, unlawful immigrants, those with very low income, incarcerated prisoners, and Indian Tribe members are exempted from the coverage requirement. 26 U.S.C.A. § 5000A(d) (2010). Those lucky enough not to need care are the exception to the rule.

40. National health expenditures (“NHE”) reached \$2.5 trillion in 2009 (\$8,086 per person), accounting for 17.6 percent of the Gross Domestic Product. U.S. Dep’t. of Health & Human Servs., Ctrs. for Medicare & Medicaid Servs., National Health Expenditure Data, NHE Fact Sheet, (June 14, 2011), https://www.cms.gov/NationalHealthExpendData/25_NHE_Fact_Sheet.asp. These expenditures are expected to grow at more than the rate of inflation in the absence of regulatory controls.

41. In 2009, private health insurance spending was \$801.2 billion (32 percent of NHE), while out-of-pocket expenditures reached \$299.3 billion (12 percent of total NHE), and Medicare and Medicaid accounted for a total of 35 percent of NHE. *Id.*

42. 42 U.S.C. § 18022 (essential health benefits for qualified plans). See INSTITUTE OF MEDICINE, COVERAGE MATTERS: INSURANCE AND HEALTH CARE (2001).

43. See Brief for Economic Scholars as Amici Curiae supporting Respondent, Liberty Univ. v. Geithner, No. 10-2347 (4th Cir., Feb. 25, 2011).

44. See KENNETH S. ABRAHAM, DISTRIBUTING RISK: INSURANCE, LEGAL THEORY AND PUBLIC POLICY (1986); MALCOLM CLARKE, POLICIES AND PERCEPTIONS OF INSURANCE: AN INTRODUCTION TO INSURANCE LAW (1997).

of people can be used to pay for the expensive care needed by the few.⁴⁵ But the requirement that insurers sell to anyone at any time would threaten the affordability of premiums, the financial stability of insurance companies, and the insurance market. Congress could not achieve the goals of both premium affordability and universal coverage without having virtually everyone contribute to the payment scheme, either by buying a policy or paying a penalty.

If Congress can regulate health insurance as part of interstate commerce, then arguably, in the exercise of its plenary power, it can adopt any rule that reasonably furthers its regulation. In 1939, the Court concluded, “[a]ny rule, such as that embodied in the [Agricultural Adjustment] Act, which is intended to foster, protect and conserve that commerce, or to prevent the flow of commerce from working harm to the people of the nation, is within the competence of Congress.⁴⁶ Read literally, this conclusion could encompass the individual coverage requirement – as an ancillary rule that protects the insurance market or even the national health care market.

There is little doubt that Congress can regulate individual behavior.⁴⁷ The harder questions are whether the individuals must already be engaged in interstate commerce or have entered a market and whether there is a constitutionally cognizable difference between prohibiting and requiring action. As to the first question, in many cases decided on the basis of the first two categories, the regulated individuals were engaged in a regulated industry.⁴⁸ It is well established, however, that Congress can prohibit people from taking things across state lines in order to protect the stream of commerce from deleterious items.⁴⁹ The Court has upheld the ban on transporting women across state lines for immoral purposes, finding that Congress can use even means that are typically associated with the states’ police power to regulate interstate commerce.⁵⁰ Many federal laws, both civil and criminal, simply prohibit anyone from taking a specific action.⁵¹

45. See Nat’l Inst. For Health Care Mgmt., *Understanding U.S. Health Care Spending 3* (July 2011), available at <http://nihcm.org/images/stories/NIHCM-CostBrief-Email.pdf> (reporting the proportions of the population accounting for health spending).

46. Mulford, *supra* note 24, at 48.

47. See Hall, *supra* note 12, at 1859.

48. See *e.g.*, *Sunshine Anthracite Coal Co.*, *supra* note 26, at 381.

49. *Brooks v. United States*, 267 U.S. 432, 439 (1925) (driving a stolen car across state lines); *United States v. Simpson*, 252 U.S. 465, 466 – 67 (1920) (carrying whisky across state lines in a private automobile); *The Lottery Case*, *supra* note 18 (interstate shipment of lottery tickets). The Controlled Substances Act, 21 U.S.C. §§ 801 et seq., prohibits the manufacture, distribution, dispensing, or possession of a controlled substance, except in accordance with specific exceptions, such as a physician’s prescription or for research. Raich, *supra* note 5 (no facial challenge to the Act itself).

50. Hoke, *supra* note 18, at 323.

51. See *e.g.*, *Racketeer Influenced and Corrupt Organizations Act*, 18 U.S.C. §§ 1961 et seq. (2010).

Therefore, the more salient question appears to be whether Congress can require people do something.

Federal laws impose requirements on individuals under other enumerated powers. The power to organize, arm and discipline a militia has been used to require individuals to procure their own weapons.⁵² The draft was a valid exercise of the power to raise and support armies.⁵³ The power of eminent domain requires individuals to give up their property.⁵⁴ If Congress can require individuals to do something to carry out its other enumerated powers, can it require individuals to enter a market as part of its enumerated power to regulate that market? And is the relevant market the market for health insurance or health care or both?⁵⁵

More perplexing is whether a requirement can be distinguished from a prohibition. The federal civil commitment that the Court upheld in *United States v. Comstock*⁵⁶ could be seen as prohibiting a person from leaving confinement after his sentence is completed or as requiring a person to enter civil confinement. The distinction undoubtedly makes no difference to the person confined. In *Wickard v. Filburn*, the Court rejected the assertion that the quota on wheat production forced farmers to buy wheat in the market, instead of allowing them to grow their own.⁵⁷ But *Filburn* had a point. Even though he might have been free to buy corn instead of wheat, he had to buy something to eat.

Possessing something may differ little from doing nothing. In *Lopez*, the Court viewed possession of a firearm as distinct from obtaining a firearm from the stream of commerce.⁵⁸ Would the Court consider the crime of possessing marijuana to be a penalty for doing nothing and therefore beyond Congress's power? The Controlled Substances Act's blanket prohibition of possession of controlled substances has not been facially challenged on Commerce Clause grounds.⁵⁹ In *Gonzales v. Raich*, however,

52. U.S. CONST., art. I, § 8, cl. 16.

53. U.S. CONST., art. I, § 8, cl. 12; *Arver v. United States*, 245 U.S. 366 (1918).

54. *United States v. Gettysburg Elec. Ry.*, 160 U.S. 668, 679 (1896) (finding it necessary and proper to carry out other federal powers); *Kohl v. United States*, 91 U.S. 367, 377 (1876) (upholding the power without linking it to an enumerated power).

55. The choice of category for reviewing the cases may depend on which interstate market the ACA's insurance coverage requirement supports. So far, court decisions have split on this question. *State of Florida*, *supra* note 4, at 86 (health insurance market); *Thomas More Law Center*, *supra* note 4 (health insurance and health care markets); *Mead*, *supra* note 4, at 39.

56. *United States v. Comstock*, 130 S. Ct. 1949 (2010).

57. *Wickard v. Filburn*, 317 U.S. 111, 129 (1942).

58. *Lopez*, *supra* note 5, at 561. The Court emphasized the fact that the statute had no jurisdictional element connecting that possession with interstate commerce. *Id.* Congress later amended the statute to govern possession of a "firearm that has moved in or otherwise affects interstate or foreign commerce." 18 U.S.C. § 922(q)(2)(A).

59. *Raich*, *supra* note 5, at 1 (2005) (applied challenge limited to the Act's application to

the Court upheld the application of the prohibition on cultivating marijuana as a necessary element to prohibit the illegal market for marijuana.⁶⁰ A major distinction between the *Lopez* and *Raich* prohibitions appears to be the latter's inclusion in a larger program of regulating interstate commerce. That reasoning should apply to possession as well as cultivation of marijuana. One named respondent did not grow or purchase marijuana, but received it from others for free and merely possessed it, but the Court ignored those facts. This suggests that Congress can regulate possession when the item possessed is subject to regulation in accordance with a larger regulatory program. Does this mean that Congress has the power to regulate individuals who are taking no action at all? Or must a person already possess something to come within the sphere of regulation?

IV. IS THE NECESSARY AND PROPER CLAUSE NECESSARY?

Another difficult question is whether Congress could regulate individuals in the direct exercise of its commerce power alone or whether it could do so only by also exercising the Necessary and Proper Clause.⁶¹ There is an argument that Congress has implied power to choose the means by which it exercises its enumerated powers, even without the Clause.⁶² However, there is little to be gained by not relying on the Clause, because it still grants Congress considerable discretion to choose reasonable means.⁶³ In Chief Justice Marshall's classic words:

But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the

patients using marijuana for medical purposes as authorized by California state law). Possession is a separate offense from sale and distribution. The Controlled Substances Act of 1970, 21 U.S.C. §§ 841(a)(1), 844(a).

60. *Raich*, *supra* note 5, at 37.

61. "Congress shall have power . . . To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof." U.S. CONST., art. 1, § 8, cl. 18.

62. *McCulloch*, *supra* note 1, at 406 ("there is no phrase in the whole instrument [the Constitution] which, like the articles of confederation, excludes incidental or implied powers.").

63. See *Hall*, *supra* note 12, at 1840-64. *But see* Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. PA. J. CONST. L. 183 (2003) (arguing that that the Clause requires more than a rational relationship to the regulatory goal); Gary Lawson & David B. Kopel, *Bad News for Professor Koppelman: The Incidental Unconstitutionality of the Individual Mandate*, 121 YALE L.J. ONLINE 1, available at ssrn.com/abstract=1869243 (same).

scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.⁶⁴

Justice Scalia, in his concurring opinion in *Raich*, said that “the commerce power permits Congress not only to devise rules for the governance of commerce between States but also to facilitate interstate commerce by eliminating potential obstructions, and to restrict it by eliminating potential stimulants.”⁶⁵ This reasoning is worth considering, even if the majority opinion did not adopt it.

Since *Raich*, the Court used the Clause to uphold federal civil commitment of federal prisoners who were sexually dangerous, after their prison terms expire.⁶⁶ Justice Breyer’s majority opinion reasoned that “the statute is a ‘necessary and proper’ means of exercising the federal authority that permits Congress to create federal criminal laws, to punish their violation, to imprison violators, to provide appropriately for those imprisoned, and to maintain the security of those who are not imprisoned but who may be affected by the federal imprisonment of others.”⁶⁷ Justice Kennedy, concurring, wrote, “the analysis depends not on the number of links in the congressional-power chain but on the strength of the chain.”⁶⁸ But, he added, “[t]he inferences must be controlled by some limitations lest, as Thomas Jefferson warned, congressional powers become completely unbounded by linking one power to another *ad infinitum* in a veritable game of ‘this is the house that Jack built.’”⁶⁹ However, no limitations appear in the opinion, and the many links appear rather fragile.⁷⁰

If *Comstock* represents the rule going forward, it should be relatively easy to link the ACA’s requirement to maintain health benefit coverage to the Commerce Clause. Of course, it is possible that most Supreme Court Justices find sexually dangerous persons, like illegal drug users, so offensive that they are willing to stretch constitutional boundaries – or add links to the necessary and proper chain – to uphold federal regulation that they would not countenance if applied to other persons. If so, the Justices should provide a credible distinction that depends on something other than distaste for sexual violence and drugs. In particular, they might consider

64. *McCulloch*, *supra* note 1, at 421.

65. *Raich*, *supra* note 5, at 35 (Scalia, J., concurring).

66. *United States v. Comstock*, 130 S. Ct. 1949 (2010).

67. *Id.* at 1965.

68. *Id.* at 1966 (Kennedy, J., concurring, joined by Alito, J.).

69. *Id.*

70. See Ilya Somin, *Taking Stock of Comstock: The Necessary and Proper Clause and the Limits of Federal Power*, CATO SUP. CT. REV., 2009-2010, at 239, available at <http://www.cato.org/pubs/scr/2010/Somin-on-Comstock.pdf> (arguing that the court’s reasoning stretched the connections too far).

why there has been no challenge to the federal law authorizing the involuntary isolation and quarantine of people entering the U.S. or crossing state lines who are believed to harbor a dangerous, contagious disease.⁷¹

The Court has recognized that Congress can regulate the price of a commodity by regulating either supply or demand, or both.⁷² The ACA coverage requirement regulates demand, while other provisions regulate prices, both directly and indirectly. The states that have tried to establish insurance exchanges without requiring individuals to obtain coverage have not been successful.⁷³ The individual mandate is not a freestanding statute, but a narrow addition to a reticulated statute creating a comprehensive regulatory scheme that is itself wholly within Congress's commerce power. *Indeed, there would be no reason for the mandate in the absence of the rest of the ACA provisions regulating insurance.*

V. THE THIRD CATEGORY: INTRASTATE ACTIVITIES AFFECTING INTERSTATE COMMERCE

So far, all courts that have issued opinions have framed the Commerce Clause question as asking whether the individual mandate meets the criteria of the third category – affecting interstate commerce.⁷⁴ This treats the mandate as though it were an isolated statute regulating one exclusively intrastate matter, as in *Lopez*. The Sixth Circuit Court of Appeals concluded that the third category includes two subcategories: (1) “economic activity, even if wholly intrastate, if it substantially affects interstate commerce”; and (2) “non-economic intrastate activity if doing so is essential to a larger scheme that regulates economic activity.”⁷⁵ Other courts and parties have taken a similar approach, relying on *Wickard* and *Raich*. When *Wickard* was decided, however, the Court's Commerce Clause opinions were more general, and the categories had not been explicitly differentiated. The *Raich* majority claimed to use the third category, but actually decided the case on the above second subcategory.⁷⁶

71. Public Health Service Act, § 361(b), codified at 42 U.S.C. § 264(b). In oral argument in *Comstock*, Justices Scalia and Kennedy made comments indicating their assumption that federal involuntary commitment of people with a contagious disease would be a legitimate exercise of the commerce power, because contagious diseases clearly affect interstate commerce. Justice Scalia said, “I mean, if anything relates to interstate commerce, it's communicable diseases, it seems to me.”

72. See, e.g., *Wickard*, *supra* note 57, at 127 (“The maintenance by government regulation of a price for wheat undoubtedly can be accomplished as effectively by sustaining or increasing the demand as by limiting the supply”).

73. See Brief for the Am. Assoc. of People with Disabilities as Amici Curiae supporting Respondent, *Liberty Univ. v. Geithner*, No. 10-2347 (4th Cir., Feb. 25, 2011).

74. Thomas More Law Center, *supra* note 4, at 27; Mead, *supra* note 4, at 29.

75. Thomas More Law Center, *supra* note 4, at 27.

76. *Raich*, *supra* note 5, at 17.

The first subcategory in the Sixth Circuit’s formulation – intrastate economic activity – appears to explain only those cases in which federal legislation regulates an intrastate activity alone, apart from any other regulation of interstate commerce, as in *Lopez* and *Morrison*. That is not true of the ACA’s individual coverage requirement. As noted above, Congress would not have enacted the requirement by itself. If the first subcategory does not apply, then there is no reason to consider whether the individual coverage requirement is either economic or an activity at all. However, the courts that have upheld the individual coverage requirement have done so, concluding that the choice to obtain or reject coverage is itself an economic decision.⁷⁷ Given uncertainty about whether the Supreme Court’s conception of an economic activity requires affirmative action, instead of more abstract decision-making, it is not surprising that the government also relies on the second subcategory to uphold the coverage requirement.⁷⁸

The second subcategory appears to restate the conclusion that Congress can regulate ancillary intrastate matters as part of its more comprehensive regulation of interstate commerce – commerce that falls within the first two primary categories: uses of channels and instrumentalities of interstate commerce.⁷⁹ For example, cases like the *Shreveport Rate* case and *Southern Railway Co.* are cited as examples of upholding the regulation of instrumentalities (railroads) even though the issue before the Court was solely whether their intrastate activity could be regulated.⁸⁰ Similarly, although *Darby* is cited as an example of upholding the regulation of the use of channels of interstate commerce, the Court considered and upheld only the regulation of employment practices within a state.⁸¹ Congress has plenary power to regulate matters that are clearly part of interstate commerce, like health insurance and probably health care, and that regulation may apply to matters within a state to achieve Congress’s goals, with or possibly without the exercise of the Necessary and Proper Clause

77. Thomas More Law Center, *supra* note 4, at 16. (“the financing of health care services, and specifically the practice of self-insuring, is economic activity.”); Mead, *supra* note 4, at 33; Liberty Univ., *supra* note 4, at 633.

78. See, e.g., Thomas More Law Center, *supra* note 4, at 12-13; Mead, *supra* note 4, at 35 (“the individual mandate is best viewed not as a stand-alone reform, but as an essential element of the larger regulatory scheme contained in the ACA”); Liberty Univ., *supra* note 4, at 634.

79. See Raich, *supra* note 5, at 34 (Scalia, J., concurring) (“the authority to enact laws necessary and proper for the regulation of interstate commerce is not limited to laws governing intrastate activities that substantially affect interstate commerce. Where necessary to make a regulation of interstate commerce effective, Congress may regulate even those intrastate activities that do not themselves substantially affect interstate commerce”).

80. Lopez, *supra* note 5, at 558.

81. See, e.g., Darby, *supra* note 25 (upholding legislation regulating wages and hours for employees).

power. If this interpretation is correct, then the Sixth Circuit's second subcategory is the only relevant category for analyzing the ACA's individual mandate, and the individual mandate could be upheld as an essential element of a broader regulatory scheme on the basis of analyses like those presented in parts three and four above.

A more precise interpretation, however, could view the second subcategory not as part of the third category at all, but rather as the application of constitutional regulation of instrumentalities of interstate commerce to incidental intrastate matters.⁸² Keeping the second subcategory within the confines of the third category runs the risk of conflating the requirements for the two subcategories. This may explain why so much energy has been spent arguing for and against the idea that the individual mandate regulates an economic activity.⁸³ However, if Congress has plenary power to regulate the national market in health insurance, as it surely does, and to protect health insurers and to set standards for the policies they sell, as it surely does, then there does not appear to be anything in the Commerce Clause that would forbid Congress from regulating individuals as one of several means to carry out its comprehensive regulation of interstate commerce. Arguments over "economic" and "activity" are not relevant.⁸⁴

The *Raich* majority noted, "When Congress decides that the 'total incidence' of a practice poses a threat to a national market, it may regulate the entire class."⁸⁵ This appears to fit within the first subcategory of the third category.⁸⁶ But, the Court concluded with a second subcategory summary: "when a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under

82. See *Raich*, *supra* note 5, at 34, 37 (Scalia J., dissenting).

83. See Wendy K. Mariner & George J. Annas, *Health Insurance Politics in Federal Court*, 363 N. ENGL. J. MED. 1300 (2010).

84. The relevance of a distinction between activity and inactivity is being questioned. See *State of Florida*, *supra* note 4, at 109 ("we are not persuaded that the formalistic dichotomy of activity and inactivity provides a workable or persuasive enough answer in this case. Although the Supreme Court's Commerce Clause cases frequently speak inactivity-laden terms, the Court has never expressly held that activity is a precondition for Congress's ability to regulate commerce . . ."); Thomas More Law Center, *supra* note 4, at 9.

85. *Raich*, *supra* note 5, at 17.

86. The *Raich* Court also quoted *Perez*, *supra* note 5, at 154-55, which quoted *Westfall v. United States*, 274 U.S. 256, 259 (1927), as saying "When it is necessary in order to prevent an evil to make the law embrace more than the precise thing to be prevented it may do so." *Raich*, *supra* note 5 at 17. It referred to a "class of activities," which the Court used in earlier decisions to determine whether intrastate matters should be regulated as part of a larger regulation of clearly interstate matters. See, e.g., *Katzenbach v. McClung*, 379 U.S. 294 (1964). It noted that Congress could properly conclude that leaving individual home use of marijuana out of the Controlled Substances Act prohibitions, like leaving home grown wheat out of the Agricultural Adjustment Act's quotas, would destabilize the market. Here, it found that Congress needs only a rational basis for its conclusion. *Raich*, *supra* note 5, at 19.

that statute is of no consequence,”⁸⁷ and “we refuse to excise individual components of that larger scheme.”⁸⁸ The Eleventh Circuit Court of Appeals, however, noted that the *Raich* Court said the Controlled Substances Act created a “closed regulatory system,” whereas the ACA coverage requirement was open-ended and did not apply to everyone.⁸⁹ More importantly, the Eleventh Circuit found that federalism concerns required a more precise principle to limit the reach of the Commerce power over individuals who have not entered a private, commercial market.⁹⁰ But is there a meaningful distinction between regulating people who have already connected with interstate commerce, as by investing in a company that does some interstate business, and requiring people who are statistically likely to buy from a business in interstate commerce in the future (or have in the past) to do so now? Judge Sutton, in a thoughtful concurrence to the Sixth Circuit’s opinion, thought not.⁹¹

Not addressed in the decisions so far is whether the challenge to the ACA’s individual coverage requirement must be analyzed only as a third category question, and if so, whether the Court recognizes two subgroups within the third category, as the Sixth Circuit found. In most cases decided under the third category, the target of federal regulation has been something within a single state alone, whereas in the first and second categories, the target of comprehensive regulation is something that is engaged in interstate commerce. By focusing exclusively on the individual coverage requirement, the challengers characterize the target of regulation as exclusively intrastate, as though the individual mandate were a freestanding statute.

The primary argument against treating the individual mandate as a necessary and proper adjunct to regulating interstate commerce is that there is no principled limit to Congress’s power.⁹² But the same is true of Congress’s other enumerated powers. Justice Scalia dismissed that concern on the ground that the commerce power “can only be exercised in conjunction with congressional regulation of an interstate market, and it extends only to those measures necessary to make the interstate regulation effective.”⁹³ This may not sound very limiting, but it appears to be consistent with Congress’s sovereign commerce power. It does not mean

87. *Raich*, *supra* note 5, at 17 (quoting *Maryland v. Wirtz*, 392 U.S. 183, 196, n. 27 (1968)).

88. *Raich*, *supra* note 5, at 22.

89. *State of Florida*, *supra* note 4, at 13.

90. *Id.* at 33.

91. Thomas More Law Center, *supra* note 4 (Sutton, J., concurring).

92. *Raich*, *supra* note 5, at 46 (O’Connor, J., dissenting). See Wendy K. Mariner et al., *Can Congress Make You Buy Broccoli? And Why That’s a Hard Question*, 364 N. ENGL. J. MED. 201 (2011).

93. *Raich*, *supra* note 5, at 38 (Scalia J., concurring).

that Congress has the police power, because the enumerated powers do not encompass the full spectrum of the states' sovereign police powers, and any federal regulation of individuals could only be justified where necessary to the effective regulation of interstate commerce. Although, in today's economy, commerce includes a vast array of enterprises, it does not include everything governed by the states' police power, such as education, family law and most criminal offenses.

VI. CONCLUSION

The challenges to the individual mandate offer the Supreme Court an opportunity to refine its doctrinal approach to the Commerce Clause. The majority could conclude that it should not expand the reach of the Commerce Clause to uphold the ACA when Congress could have enacted an obviously constitutional program using its Spending Power, such as by expanding Medicare eligibility to cover everyone or by imposing an income tax and granting those with health benefit coverage a tax credit, exemption, or deduction.⁹⁴ One could argue that the Court should not distort constitutional doctrine in order to accommodate a Congress that did not have the political courage to impose a tax.

On the other hand, constitutional doctrine may not need to be distorted to uphold the ACA. The fact that Congress has not used its commerce power to require individuals to have health coverage does not necessarily mean that it cannot do so.⁹⁵ By itself, novelty is not unconstitutional.⁹⁶ The Social Security Act was both novel and controversial when enacted, but the Court upheld it as a valid exercise of Congress's power to tax and spend.⁹⁷ The Court could view the ACA in the same light and find that the requirement to maintain health benefit coverage is an appropriate incidental regulation of the national health care and health insurance industries to enable all

94. Stewart, *supra* note 13, at 1650 (Roberts, C.J., dissenting) ("I am aware of no doctrine to the effect that an unconstitutional establishment is insulated from challenge simply because a constitutional alternative is available").

95. *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U.S. 1, 9 (1877). See Congressional Budget Office Memorandum, *The Budgetary Treatment of an Individual Mandate to Buy Health Insurance* (Aug. 1994), available at <http://www.cbo.gov/ftpdocs/48xx/doc4816/doc38.pdf> ("The government has never required people to buy any good or service as a condition of lawful residence in the United States."); Jennifer Staman & Cynthia Brougher, Congressional Research Service, *Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis*, 3 (July 24, 2009), available at http://assets.opencrs.com/rpts/R40725_20090724.pdf ("it is a novel issue whether Congress may use the clause to require an individual to purchase a good or a service.").

96. Stewart, *supra* note 13, at 1641-42. See also, Hoke, *supra* note 18, at 320 ("in almost every instance of the exercise of the [Commerce] power differences are asserted from previous exercises of it and made a ground of attack").

97. *Helvering v. Davis*, 301 U.S. 619, 641 (1937).

Americans to obtain reasonable health care with affordable financing mechanisms.

Maybe it is time to be explicit that Congress has the authority to regulate individual conduct as part of its plenary power over interstate commerce and not only when that conduct can be characterized as an economic activity that substantially affects interstate commerce. If Congress has the power of a sovereign with respect to its enumerated powers, where is the constitutional limit that bars Congress from regulating individuals? None has been found other than the Necessary and Proper Clause and other constitutional provisions (like the First Amendment and the Due Process Clause). This may be unsettling. But it is the same principle that applies to all other enumerated powers. If correct, the individual coverage requirement must be constitutional. If not, the Supreme Court must explain why Congress can prohibit individual conduct, but cannot compel it, when necessary to regulate interstate commerce.

Taming the Beast of Health Care Costs: Why Medicare Reform Alone is Not Enough

*Susan A. Channick**

I. THE PROBLEM

The Patient Protection and Affordable Care Act¹ (“ACA”) has, as its primary goal, universal access to health insurance for all American citizens and legal residents. When fully implemented, the ACA will provide insurance to an additional 32 million people who are currently uninsured and to many millions of others who are underinsured. While universal health insurance is certainly a public health goal that this country has sought for many decades, the additional lives that will be added to the insurance rolls as well as new minimum coverage requirements mandated by the ACA will create fiscal burdens for the already expensive U.S. healthcare system. In 2009, Americans spent \$2.5 trillion or 17.6 percent of gross domestic product (“GDP”) on health care, a number that is predicted to continue to rise absent serious interventions.² The ever-escalating costs of health care as well as the anticipated costs of healthcare reform for the additional 32 million Americans who will be required to have health insurance by 2014 may well prove to be a crucial tipping point for an already fiscally overblown healthcare system.³

The imperative of cost containment for the entire American healthcare system has been well-documented for quite some time, but recently, spending on federal healthcare programs such as Medicare, Medicaid, and

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1. See generally Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (to be codified at 42 U.S.C. § 18001) [hereinafter ACA].

2. CTRS. FOR MEDICARE & MEDICAID SERVS, NATIONAL HEALTH EXPENDITURES AGGREGATE T1 (2011), available at <http://www.cms.gov/NationalHealthExpendData/downloads/tables.pdf>.

3. The CBO has estimated that health care reform will cost in excess of \$1 trillion over the next decade but eventually reduce the budget deficit because of decreases in the costs of health insurance and other cost saving provisions of the legislation. *CBO's Analysis of the Major Health Care Legislation Enacted in March 2010 Before the Subcomm. on Health & the H. Comm. on Energy & Commerce*, 112th Cong. 3 (Mar. 30, 2011), (statement of Douglas W. Elmendorf, Director, CBO), available at <http://permanent.access.gpo.gov/gpo5690/03-30-HealthCareLegislation.pdf>.