

The Constitutionality of the Individual Mandate

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I. INTRODUCTION

The passing of the Patient Protection and Affordable Care Act¹ (“The Affordable Care Act”/“The Act”) was not easy, and it was not pretty. President Barack Obama angered his opponents with a push for a public option, and angered his base when he abandoned it.² Senators traded the limelight, facing scorn and scrutiny for special treatment like the “Cornhusker Kickback.”³ The debate was acrimonious. Televised town hall meetings showed testy exchanges between congressmen and their constituents. A woman asked Massachusetts Representative Barney Frank how he could support a Nazi policy (referring to health care reform); Frank responded: “Trying to have a conversation with you would be like trying to argue with a dining room table.”⁴ During a speech by Obama, in “an angry and very audible outburst,” South Carolina Representative Joe Wilson shouted “You lie!” at the president when he declared that “Democratic health proposals would not cover illegal

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1. Pub. L. No. 111–148, 124 Stat. 119, *amended by* Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111–152, 214 Stat. 1029.

2. Sheryl Gay Stolberg, ‘Public Option’ in Health Plan May Be Dropped, N.Y. TIMES, Aug. 17, 2009, <http://www.nytimes.com/2009/08/18/health/policy/18talkshows.html?pagewanted=all>.

3. Kevin Sack, *Florida Suit Poses a Challenge to Health Care Law*, N.Y. TIMES, May 11, 2010, at A10.

4. Carolyn Ryan, *The Always Quotable, Not Perfect Gentleman From Massachusetts*, N.Y. TIMES, Dec. 1, 2011, at A25.

immigrants.”⁵

Though the Affordable Care Act somehow emerged as law from this political brouhaha, its saga of controversy has hardly ended. Immediately after the bill became law, attorneys general from states all over the country challenged it. After months of at first District and then Circuit decisions, the question of the Mandate’s constitutionality is headed to the final arbiter of that question—the Supreme Court. The Circuit split involves many discrete issues, some due to factual differences in the cases challenging the Mandate. This article focuses primarily on the question of the constitutionality of the Act’s provision, called the minimum coverage provision and known as the Individual Mandate (“The Mandate”). The Sixth and D.C. Circuits have declared the Mandate constitutional. The Fourth Circuit dismissed a case challenging the Act for a lack of standing. The Eleventh Circuit has declared the Mandate unconstitutional, yet severable from the rest of the Act. The Eleventh Circuit appeal is the one that has been granted *certiorari* in the Supreme Court.

The Patient Protection and Affordable Care Act is a massive regulation, touching on many aspects of the health care and health insurance markets. The offending provision, the Individual Mandate, requires most Americans to maintain a minimum health insurance policy; if they don’t have one, they must purchase one. Specifically, the Mandate is a “[r]equirement to maintain minimum essential coverage.”⁶ “Minimum essential coverage” includes minimum coverage under any number of public and private insurances, including the following: “Government sponsored programs” (such as Medicare and Medicaid); “Employer-sponsored plan[s]”; “Plans in the individual market”; Grandfathered health plan[s]; and “Other coverage.”⁷ The requirement is as follows: “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.”⁸ With exceptions, the Mandate includes a “shared responsibility payment.” This payment is the rub. It a penalty imposed on any applicable individual (or his dependent who is an applicable individual) who fails to maintain minimum essential health coverage.⁹ There are many exceptions to the Mandate’s requirement and the penalty concomitant to noncompliance. In other words, non-applicable individuals are not subject to the Mandate’s requirements. They include “Religious con-

5. Carl Hulse, *In a Lawmaker’s Outburst, a Rare Breach of Protocol*, N.Y. TIMES, Sept. 10, 2009, at A26.

6. 26 U.S.C.A. § 5000A (West 2010).

7. *Id.* § 5000A(f)(1)(A)–(E).

8. *Id.* § 5000A(a).

9. *Id.* § 5000A(b).

science exemption[s],” “Individuals not lawfully present” (notwithstanding Rep. Joe Wilson’s opinion to the contrary), and “Incarcerated Individuals.”¹⁰ Further, the following individuals are exempted from the penalty: “Individuals who cannot afford coverage”; Taxpayers with income below filing threshold”; Members of Indian tribes”; and those who face “Hardships.”¹¹ With respect to enforcement, the Mandate is toothless: it includes a waiver of criminal penalties for any taxpayer failing to pay the penalty, and as it forbids the secretary from assessing any lien or levy on a taxpayer for failure to pay the penalty.¹²

Is the Individual Mandate constitutional? We do not know, and we will not know until the Supreme Court tells us. The Supreme Court is right because it is final, not the other way around. This article proposes how the Mandate ought to be considered in light of the Supreme Court’s Commerce Clause jurisprudence. To answer the constitutional question, I will first examine many of the Supreme Court’s Commerce Clause cases. Then I will discuss how, in light of the Supreme Court’s precedent, the Mandate seems to be a constitutional exercise of the commerce power. I will examine the circuit court cases that have addressed the issue so far, identifying strengths and weaknesses in their arguments for and against a finding of the Mandate’s constitutionality. Specifically, I will demonstrate the error in the efforts to categorize the subject of regulation under the Mandate; I will show how textual and doctrinal arguments fail to attack the Mandate, and how the slippery slope and federalism-based arguments to which the Mandate’s opponents resort are unsupported and unconvincing. Ultimately, I conclude that the Individual Mandate is a constitutional exercise of Congress’s power to regulate interstate commerce. If the Individual Mandate ought to be considered unconstitutional, it is not for any argument I have encountered. If the Individual Mandate is declared unconstitutional, an opinion holding so cannot exist in the same legal universe as certain cases considered valid precedent today.

II. THE STATE OF THE COMMERCE CLAUSE TODAY: WHAT WILL THE SUPREME COURT DO WITH ITS PRECEDENT?

The Commerce Power was once considered a rigid, inflexible power. Exercises of it were analyzed along dichotomies that parsed the power into artificial categories. Over time, the Supreme Court has abandoned such a restrictive approach, and has invalidated such preclusive distinctions. Today, courts understand the Commerce power as plenary,

10. *Id.* § 5000A(d)(1)–(4).

11. *Id.* § 5000A(e)(1)–(3), (5).

12. *Id.* § 5000A(g)(2).

unimpeded by jealous distinctions and far in its reach. The power is subject to certain limitations as defined in recent cases.

Article 1, Section 8, of the Constitution states: “The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes”¹³ At first, the Supreme Court, through Justice Marshall, defined the power—and defined Commerce—broadly, our constitution being “one of enumeration, and not of definition”¹⁴ In the seminal case of *Gibbons v. Ogden*, the Marshall court rejected an argument that commerce did not embrace navigation. “Commerce, undoubtedly, is traffic, but it is something more: it is intercourse.”¹⁵ The Court refused to so confine the commerce power, and defined it as follows: “It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed.”¹⁶

That Justice Marshall broadly defined commerce and Congress’s power to regulate it is in some respects a natural consequence of the way our Constitution is written. “The constitution sets up the conflicting ideals of the community in certain ambiguous categories.”¹⁷ Commerce is one such ambiguous category. However, it is just as natural a consequence that the Supreme Court refined the commerce power in some late-19th, early-20th century decisions. “These categories,” after all, “bring along with them satellite concepts covering the areas of ambiguity.”¹⁸

In *E.C. Knight Co.*, the Court struck down a regulation of sugar monopolies because the regulation reached manufacturing. The Court saw manufacturing as beyond the reach of Congress’s commerce power. The Court reasoned: “Commerce succeeds to manufacture, and is not a part of it.”¹⁹

Carter v. Carter Coal Co. similarly discountenanced the Bituminous Coal Conservation Act of 1935, in part because it regulated mining. The Court defined commerce as “‘intercourse for the purposes of trade,’”²⁰ and excluded mining from this definition. “Mining,” the Court reasoned, “brings the subject-matter of commerce into existence. Commerce disposes of it.”²¹ The Court further distinguished between production and commerce: “[T]he effect of the labor provisions of the act . . .

13. U.S. Const. art. I, § 8, cl. 3.

14. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189 (1824).

15. *Id.* at 189.

16. *Id.* at 196.

17. EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 7 (1949).

18. *Id.* at 7.

19. *United States v. E.C. Knight Co.*, 156 U.S. 1, 12 (1895).

20. *Carter v. Carter Coal Co.*, 298 U.S. 238, 298 (1936).

21. *Id.* at 304.

primarily falls upon production and not upon commerce; and confirms the further resulting conclusion that production is a purely local activity.”²² The Court was concerned about the reach of Congress into purely local activities. Even if such local activities found their way into interstate commerce, “the local character of mining, of manufacturing, and of crop growing is a fact, and remains a fact, whatever may be done with the products.”²³ Though evils may result from such local activities, “the evils are all local evils, over which the federal government has no legislative control.”²⁴

In these early cases, the Supreme Court refined the breadth with which Marshall originally spelled out the commerce power in *Gibbons v. Ogden*, compartmentalizing the commerce power into the satellite concepts of manufacturing, distribution, crop-growing, mining, production, etc. Although the Court allowed Congress to regulate intrastate transactions having an impact on interstate commerce in the *Shreveport Rate Cases*, the Court limited Congress’s reach in *A.L.A. Schechter Poultry Corp.* to intrastate transactions having “[d]irect effects”²⁵ on interstate commerce.²⁶ But this refinement did not last. Starting in 1937 the Supreme Court began to change its course.

In *Jones v. Laughlin Steel Corp.* the Supreme Court began to adopt a broader view of the commerce power, more in line with Marshall’s original delineation: “The fundamental principle is that the power to regulate commerce is the power to enact ‘all appropriate legislation’ for ‘its protection and advancement’; to adopt measures ‘to promote its growth and insure its safety’; ‘to foster, protect, control and restrain.’”²⁷ In *United States v. Darby*,²⁸ the Court overruled *Hammer v. Dagenhart*,²⁹ which held that “Congressional power to prohibit interstate commerce is limited to articles which in themselves have some harmful or deleterious property.”³⁰ The *Darby* Court as well adopted a broad reading of the Commerce Clause: “The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of

22. *Id.*

23. *Id.*

24. *Id.* at 308.

25. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 546 (1935).

26. *Houston, East & West Texas Ry. Co. v. United States*, 234 U.S. 342, 353 (1914).

27. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 12 (1937) (citations omitted).

28. *United States v. Darby*, 312 U.S. 100, 117 (1918).

29. 247 U.S. 251 (1918).

30. *Darby*, 312 U.S. at 116.

the granted power of Congress to regulate interstate commerce.”³¹

Finally, in *Wickard v. Filburn*, the Supreme Court reevaluated “the course of decision under the *Commerce Clause*”³² The Court addressed a challenge to the Agricultural Adjustment Act. The wheat-farmer plaintiff, Filburn, challenged the wheat marketing quota provisions of the act, which restricted his ability to produce wheat, even if that wheat were to be used for home consumption and not for sale. Filburn had harvested 239 bushels in excess of his allotment, and had refused to pay the penalty for doing so—49 cents a bushel. The Court’s decision in *Darby* had made it clear that Congress had the power to regulate production³³; the problem for farmer Filburn was that “this Act extends federal regulation to production not intended in any part for commerce but wholly for consumption on the farm.”³⁴ In line with the restrictive Commerce Clause jurisprudence the Court had previously adopted, Filburn argued that the Act regulated production and consumption—local activities beyond the reach of congressional power, the effects of which are at best indirect.³⁵ The government argued that the Act regulated neither production nor consumption, but marketing.³⁶ The *Wickard* Court recognized that these arguments were in error, and based on an overly restrictive view of the commerce power as enunciated in previous cases. Generously, the Court described the restrictive language in previous cases as “a few dicta and decisions of this Court which might be understood to lay it down”³⁷ that such restrictions are valid. The *Wickard* Court then set the record straight: “We believe that a review of the course of decision under the *Commerce Clause* will make plain, however, that questions of the power of Congress are not to be decided by reference to any formula which would give controlling force to nomenclature such as ‘production’ and ‘indirect’ and foreclose consideration of the actual effects of the activity in question upon interstate commerce.”³⁸ In realizing this, the *Wickard* court upheld the Agricultural Adjustment Act. It mattered not that Filburn’s activity may have been local or not regarded as commerce. It mattered not that the Act would force him into the market to buy wheat he could provide for himself. Whatever the nature of Filburn’s activity, it may “be reached by Congress if it exerts a substantial economic effect on interstate com-

31. *Id.*

32. *Wickard v. Filburn*, 317 U.S. 111, 120 (1942).

33. *Id.* at 118.

34. *Id.*

35. *Id.* at 119.

36. *Id.*

37. *Id.*

38. *Id.* at 120.

merce.”³⁹ After all, “‘commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business.’”⁴⁰ Thus, *Wickard* was able to “bring about a return to the principles first enunciated by Chief Justice Marshall in *Gibbons v. Ogden*”⁴¹ For all of the previous parsing, Filburn’s arguments would no longer do in a Commerce Clause analysis. His wheat competed with interstate commerce in that his consumption of homegrown wheat withdrew from the purchases of wheat in the market that he would otherwise make. The reasoning has come to be known as the aggregation principle, and was formulated in *Wickard* as follows: “That appellee’s own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken to together with that of many others similarly situated, is far from trivial.”⁴² Filburn would have to limit his wheat acreage, or pay his 49 cents a bushel.

The plenary power of Congress, realigned in *Wickard* to conform to the original understanding that Congress’s power to regulate interstate commerce is broad, is perhaps best exemplified by the seminal case of *Heart of Atlanta Motel, Inc. v. United States*.⁴³ There, a hotelier who “had followed a practice of refusing to rent rooms to Negroes”⁴⁴ sought a declaratory judgment “attacking the Constitutionality of Title II of the Civil Rights Act of 1964.”⁴⁵ The hotelier’s contention was that “Congress in passing this [Civil Rights] Act exceeded its power to regulate commerce”⁴⁶ Even though the Civil Rights Act was passed carrying no congressional findings, the Court concluded that “congress possessed ample power in this regard”⁴⁷ to legislate in response to the burdens that racial discrimination had on interstate commerce. The Court assumed it to be true that the Heart of Atlanta Motel was “of a purely local character,” but “[i]f it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.”⁴⁸ “How obstructions in commerce may be removed—what means are to be employed—is within the sound and exclusive discretion of the Congress. It is subject only to one caveat—that the means chosen by it must

39. *Id.* at 125.

40. *Id.* at 122 (citing *Swift & Co. v. United States*, 196 U.S. 375, 398 (1905)).

41. *Id.*

42. *Id.* at 127–28 (citations omitted).

43. 379 U.S. 241 (1964).

44. *Id.* at 243.

45. *Id.* at 242.

46. *Id.* at 243.

47. *Id.* at 252.

48. *Id.* at 258 (quoting *United States v. Women’s Sportswear Mfrs. Ass’n*, 336 U.S. 460, 464 (1949) (alteration in original))

be reasonably adapted to the end permitted by the Constitution. We cannot say that its choice here was not so adapted. The Constitution requires no more.”⁴⁹

It is not as though the commerce power cannot be analyzed beyond the constitutional text that describes it, nor conceptually parsed at all. The ambiguity of the constitutional language requires interpretation, which is why the parsing by previous courts was natural. *Wickard*, however, exemplified the principle that “no satellite concept, no matter how well developed, can prevent the court from shifting its course, not only by realigning cases which impose certain restrictions, but by going beyond realignment back to the over-all ambiguous category written into the document. The constitution, in other words, permits the court to be inconsistent.”⁵⁰ It is against this backdrop of permissible inconsistency, and of the Commerce Clause’s ambiguity, that, starting in the 1990’s, the Supreme Court began again to strike down congressional exercises of its commerce power. Two cases are of particular importance to the courts that have examined the Individual Mandate: *United States v. Lopez*⁵¹ and *United States v. Morrison*.⁵²

In *Lopez*, the Court decided that the Gun-Free School Zones Act of 1990 exceeded congressional authority to regulate commerce. The Act made it a federal offense for any individual to knowingly possess a firearm⁵³ in or near a school zone. The Court’s objection lay in how the act “neither regulates a commercial activity nor contains a requirement that possession be connected in any way to interstate commerce.”⁵⁴ In a move reminiscent of early, restrictive Commerce Clause jurisprudence, the *Lopez* Court distilled prior Commerce Clause cases into three categories of activity that Congress can regulate under its commerce power: channels of commerce, instrumentalities of commerce, and activities affecting interstate commerce.⁵⁵ (With respect to the Individual Mandate, the Circuits agree⁵⁶ that its subject of regulation falls within the third category—“those activities having a substantial relation to interstate commerce.”⁵⁷) The *Lopez* Court concluded that “the proper test [of a regulation’s validity] requires an analysis of whether the regulated

49. *Id.* at 261-62.

50. Levi, *supra* note 17, at 7-8.

51. 514 U.S. 549 (1995).

52. 529 U.S. 598 (2000).

53. *Lopez*, 514 U.S. at 551.

54. *Id.* at 551.

55. *Id.* at 558-59.

56. See *Florida v. U.S. Dep’t of Health and Human Servs.*, 684 F.3d 1235, 1284 n.83 (11th Cir. 2011); *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 567 (6th Cir. 2011).

57. *Lopez*, 514 U.S. at 558-59.

activity ‘substantially affects’ interstate commerce,”⁵⁸ as opposed to whether the regulated activity merely “affects.” The Court rested its analysis on distinctions between economic and non-economic,⁵⁹ and between commercial and non-commercial⁶⁰ subjects of regulation. Ultimately the court refused to uphold what it regarded as the regulation of non-commercial, criminal activity by a statute with no jurisdictional hook, particularly where “neither the statute nor its legislative history contain[s] express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone.”⁶¹

United States v. Morrison also involved the regulation of criminal activity—specifically, 42 U.S.C. § 13981, which “provides a civil remedy for the victims of gender-motivated violence.”⁶² The Court found the act to be an unconstitutional exercise of the commerce power for reasons similar to those the *Lopez* Court adopted in invalidating the Gun-Free School Zones Act. The economic/non-economic distinction was important: “Gender motivated crimes of violence are not, in any sense of the phrase, economic activity.”⁶³ And the Court found as its other limitation the preservation of what is truly national and truly local by guarding against too-attenuated connections between the subject of regulation and interstate commerce: “The Constitution requires a distinction between what is truly national and what is truly local. In recognizing this fact we preserve one of the few principles that has been constant since the clause was adopted.”⁶⁴

The last case to address a challenged exercise of the commerce power was *Gonzalez v. Raich*.⁶⁵ There, plaintiffs sought to prohibit the enforcement of the federal Controlled Substances Act, “to the extent it prevents them from possessing, obtaining, or manufacturing cannabis for their personal medical use”⁶⁶—activity which was then legal under California law. The *Raich* Court upheld the Controlled Substances Act. It found parallels between the facts before it and the facts in *Wickard*. Just like home-consumed wheat would withdraw from the interstate wheat market, thereby bringing it under congressional authority to regulate, home-consumed marijuana would withdraw from the interstate mari-

58. *Id.* at 559.

59. *Id.* at 560 (“Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained”).

60. *Id.* at 565–66 (discussing arguments over whether exercises of the commerce power would “fall on the commercial side of the line”).

61. *Id.* at 562 (alteration in original) (citation omitted).

62. *Morrison*, 529 U.S. at 601.

63. *Id.* at 613.

64. *Id.* at 617–18 (citations omitted).

65. 545 U.S. 1 (2005).

66. *Id.* at 7.

juana market, thereby bringing it under congressional authority to regulate. That the marijuana market is unlawful “is of no constitutional import.”⁶⁷ Like the *Wickard* Court, the *Raich* Court considered it misguided to parse the commerce power, and took a broad view of the Commerce Clause: “In assessing the validity of congressional regulation, none of our *Commerce Clause* cases can be viewed in isolation”; “our understanding of the reach of the *Commerce Clause*, as well as Congress’ assertion of authority thereunder, has evolved over time.”⁶⁸ The Court found the regulation valid, even though it “ensnares some purely local activity.”⁶⁹ The Court invoked the aggregation principle, and declared that “the task before us is a modest one. We need not determine whether respondents’ activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a ‘rational basis’ exists for so concluding.”⁷⁰

A number of principles emerge from the Court’s Commerce Clause jurisprudence. Formulae and rigidity are disfavored. It is not proper to parse the commerce power along artificial distinctions between mining, manufacture, production, agriculture, etc. The three broad categories into which *Lopez* distilled the commerce power are considered valid, though with respect to the Individual Mandate this will likely engender no dispute, as the Circuits are in agreement that the Mandate regulates under the third category—“activities having a substantial relation to interstate commerce.”⁷¹ Although dichotomies and categorization are disfavored, *Lopez* established that economic/non-economic, and commercial/non-commercial distinctions deserve weight in considering a congressional exercise of the commerce power. *Raich* reiterates the “evolved” nature of the Commerce Clause. It firmly reinforces the validity of the aggregation principle, the deference to congressional judgment concerning an activity’s effects on interstate commerce, and allows for the regulation of purely local activity. *Morrison* counsels that such regulation will be valid so long as it does not involve too-attenuated a connection between the subject of regulation and interstate commerce such that it obliterates any distinction between what is truly national and what is truly local.⁷²

Raich is the Supreme Court’s most recent Commerce Clause decision. How should the Supreme Court consider the Individual Mandate in light of its precedents? To see the different possibilities, I turn to an

67. *Id.* at 19.

68. *Id.* at 15–16.

69. *Id.* at 22.

70. *Id.* at 22 (citations omitted).

71. *Lopez*, 514 U.S. at 558–59.

72. *Morrison*, 529 U.S. at 617–18.

examination of the Circuit Court decisions that have so far addressed the Mandate.

III. THE COMMERCE CLAUSE AS APPLIED TO THE INDIVIDUAL MANDATE

Immediately after President Obama signed the Patient Protection and Affordable Care Act, “[a]ttorneys general in more than a dozen states, most Republican, filed lawsuits contending that the measure is unconstitutional.”⁷³ After numerous District Court decisions, appeals were decided by the Fourth, Sixth, Eleventh and D.C. Circuits on various issues. The Sixth and D.C. Circuits rejected challenges to the Act’s constitutionality. The Fourth Circuit dismissed a case challenging the Act for lack of standing. The Eleventh Circuit has declared the Individual Mandate unconstitutional, yet severable from the rest of the Act. The Eleventh Circuit appeal is the one that has been granted *certiorari* in the Supreme Court.⁷⁴ One commonality to emerge from the cases is the rejection of the contention that the individual mandate “is actually a tax that must be paid by individuals who fail to meet a minimum level of health insurance coverage.”⁷⁵ The circuits disagree over whether the Mandate is a constitutional exercise of the commerce power. In answering whether it is or is not, the courts grapple with how to categorize the subject of regulation under the Individual Mandate. It seems not to fit neatly into extant conceptions of commerce. For the Eleventh Circuit, this is fatal; for others—and I argue that this is the correct interpretation—this is irrelevant. The courts also grapple with the outer boundaries of the commerce clause; or more specifically, they worry about how our understanding of the commerce power might change if the Individual Mandate is to be included within it. The courts therefore search for limiting principles to apply to the mandate; otherwise, the fear is that a countenancing of the mandate will implicitly grant Congress a commerce power of unlimited scope. I reject the contention of the Mandate’s opponents, that it contains no limiting principles and will open the door to unlimited congressional authority. Each case is limited at least by its facts. The Individual Mandate is easily distinguishable from future doomsday scenarios that its opponents portend. Another material factor

73. Sheryl Gay Stolberg & Robert Pear, *Obama Signs Health Care Overhaul Bill, With a Flourish*, N.Y. TIMES, March 24, 2010, at A19. For an excellent treatment of the standing issues raised by the Affordable Care Act, see Gayland O. Hethcoat II, *Plaintiff Standing in Florida ex rel. Bondi and the Challenges to the Patient Protection and Affordable Care Act*, 65 U. MIAMI L. REV. 1241, 1258–1276 (2011).

74. 132 S. Ct. 604 (2011).

75. Andrew Koppelman, *Bad News for Mail Robbers: The Obvious Constitutionality of Health Care Reform*, 121 YALE L.J. ONLINE 1, *2 (2011).

in the courts' analysis is that the facts of the Mandate lend themselves readily to a comparison with those in *Wickard*, the question being whether or to what extent the aggregation principle applies to the Mandate. I argue that aggregation applies. Failing on all other points, arguments against the Mandate seem to reduce themselves to slippery slope arguments and loosely defined federalism concerns. Ultimately, none of these arguments are fatal to the Mandate. The sensible conclusion is to consider the Mandate as a valid exercise of the commerce power.

A. *Categorization*

The circuits that have examined the Mandate all grappled (some more than others) with the same question: What exactly does the Mandate regulate? Is it a regulation of inactivity? Of decisions not to purchase health care? Or perhaps of self-insuring? Though I believe the Mandate is not as unprecedented as some commentators have suggested, it certainly strikes the courts as something new under the sun. In this way the Mandate, difficult to pigeonhole as it is, presents an excellent opportunity to see how the courts will follow the course of the Commerce Clause decisions.

To the courts in *Seven-Sky v. Holder*⁷⁶ and in *Thomas More Law Ctr.*, the categorization effort was not too troubling. Both courts faced arguments that the Mandate regulated inactivity, and was therefore impermissible regulation. "Congress's authority," the argument went, "extends only to *existing* commerce; *i.e.* only to individuals who take affirmative acts that bring them into, or substantially affect, an interstate market, and only for the duration of those activities."⁷⁷ The *Seven-Sky* court acknowledged the novelty of the Mandate, but gave the fact of that novelty only so much weight on the constitutional scale:

The mandate, it should be recognized, is indeed somewhat novel, but so too, for all its elegance, is appellants' argument [against it]. No Supreme Court case has ever held or implied that Congress's Commerce Clause authority is limited to individuals who are presently engaged in activity involving, or substantially affecting, interstate commerce.⁷⁸

Starting first with the text of the Commerce Clause, and finding no restriction to "existing activity" there, the *Seven-Sky* court then moved on to the Supreme Court's Commerce Clause decisions. As did the *Wickard* court, the *Seven-Sky* court recognized that the evolution of Commerce Clause jurisprudence was toward the rejection of similar

76. 661 F.3d 1 (D.C. Cir. 2011).

77. *Id.* at 14.

78. *Id.* at 16.

unworkable distinctions.⁷⁹ It quotes *Wickard*: “The stimulation of commerce is a use of the regulatory function quite as definitely as prohibitions or restrictions thereon.”⁸⁰ The *Seven-Sky* court highlights the unworkability of an activity requirement for congressional regulation: “were ‘activities’ of some sort to be required before the *Commerce Clause* could be invoked, it would be rather difficult to define such ‘activity.’”⁸¹

The court in *Florida v. U.S. Dep’t of Health and Human Servs.* showed such difficulty. It dealt with an appeal from a Florida District Court opinion, in which Judge Vinson expressly held that “‘activity’ is an indispensable part [of] the *Commerce Clause* analysis” and that “the Constitutionality of the individual mandate will turn on whether the failure to buy health insurance is ‘activity.’”⁸² The *HHS* court at first disclaimed this activity/inactivity distinction: “Whereas the parties and many commentators have focused on this distinction between activity and inactivity, we find it useful only to a point”⁸³; “we are not persuaded that the formalistic dichotomy of activity and inactivity provides a workable or persuasive enough answer in this case.”⁸⁴ Yet it is clear that, though the *HHS* court dismisses the activity/inactivity distinction in style, it sticks to the distinction in substance. This is most evident in two portions of its opinion: in its discussion of *Wickard*, and in its discussion of the “temporal leap problem.”

“The wheat-acreage regulation imposed by Congress, [in *Wickard*,] even though it lies at the outer bounds of the commerce power, was a limitation—not a mandate—and left *Filburn* with a choice. The Act’s economic mandate to purchase insurance, on the contrary, leaves no choice and is more far-reaching.”⁸⁵ This distinction, the *HHS* court writes, “strikes at the heart of whether Congress has acted within its enumerated power. Individuals subjected to this economic mandate have not made a voluntary choice to enter the stream of commerce, but instead are having that choice imposed upon them by the federal government. This suggests that they are removed from the traditional subjects of Congress’s commerce authority.”⁸⁶ Missing from the court’s analysis

79. *Id.* at 18.

80. *Id.* at 17 (quoting *Wickard*, 317 U.S. at 128) (emphasis in original).

81. *Seven-Sky*, 661 F. 3d at 17. In light of the extant baffled commentary trying to categorize the subject of the Mandate’s regulation, this sentiment sounds nearly humorous when phrased as a hypothetical.

82. *Florida v. U.S. Dep’t of Health and Human Servs.*, 780 F. Supp. 2d 1256, 1287 (N.D. Fla. 2011).

83. *Florida*, 684 F.3d at 1285.

84. *Id.* at 1286.

85. *Id.* at 1291.

86. *Id.* at 1292.

is the fact that the *Wickard* court did assume that the statute would force Filburn to buy wheat in the market. The *Wickard* Court wrote, “It is said, however, that this Act, forcing some farmers into the market to buy wheat they could provide for themselves, is an unfair promotion of the markets and prices of specializing wheat growers.”⁸⁷ Speaking directly to this protest, the *Wickard* Court found that the fact that citizens would have choices imposed upon them in no way removes them from Congress’s commerce authority: “The stimulation of commerce is a use of the regulatory function quite as definitely as prohibitions or restrictions thereon.”⁸⁸ The *HHS* court misses this, and focuses its attention—and its objection—on the fact that the Mandate will force people to *do* something who otherwise would not.

The *HHS* court’s focus on an activity/inactivity dichotomy is also evident when it discusses—and coins—the “temporal leap problem.”⁸⁹ The court describes the “temporal leap problem” as follows:

Because the Supreme Court’s prior Commerce Clause cases all deal with already-existing activity—not the mere *possibility* of *future* activity (in this case, health care consumption) that could implicate interstate commerce—the Court never had to address any temporal aspects of congressional regulation. However, the premise of the government’s position—that most people will, *at some point in the future*, consume health care—reveals that the individual mandate is even further removed from traditional exercises of Congress’s commerce power.⁹⁰

In diagnosing this “temporal leap problem” as a barrier to the validity of the Individual Mandate’s constitutionality, the *HHS* court in effect replaces Judge Vinson’s activity/inactivity dichotomy with an activity/“mere *possibility* of *future* activity” dichotomy.⁹¹ The Mandate, writes the court, is “breathtaking in its expansive scope” because it regulates “those who have not entered the health care market at all.”⁹² The Mandate is overinclusive, writes the court, because it “conflates those who presently consume health care with those who will not consume health care for many years into the future.”⁹³ “Congress may regulate their [uninsureds’] activity at the point of consumption . . . [b]ut the individual mandate does not regulate behavior at the point of consumption.”⁹⁴ Replacing the phrase “inactivity” with “mere *possibility* of *future* activ-

87. *Wickard*, 317 U.S. 111 at 129.

88. *Id.* at 128.

89. *Florida*, 684 F.3d at 1294.

90. *Id.*

91. *Id.*

92. *Id.* at 1295.

93. *Id.*

94. *Id.*

ity” makes the dichotomy no less artificial. As rephrased by the *HHS* court, the dichotomy is no less unprecedented. Importantly, whether unprecedented or not, reformulating the dichotomy does not change its basic flaw: it breaks down completely when one considers that, as a class, the consumption of health care by the uninsured is not a mere possibility but rather a certainty. As the *Seven-Sky* court noted, Congress “is merely imposing the mandate in reasonable anticipation of virtually inevitable future transactions in interstate commerce.”⁹⁵

Attempting to categorize the subject of regulation under the Individual Mandate is no sin. “The determination of similarity or difference is the function of each judge.”⁹⁶ The *HHS* court is right to address the importance of “maintaining the balance of the constitutional grants and limitations” by “the gradual process of inclusion and exclusion.”⁹⁷ But the *HHS* court makes a crazy quilt of a categorization effort; its mistake is in considering the categories it conjures as being fatal to the Mandate. Early in the case the court dismisses the activity/inactivity dichotomy, yet almost completely refrains from referring to the subject of regulation as “activity.” The court refers to it throughout the opinion alternatively as the “subject matter” of regulation,⁹⁸ as “conduct,”⁹⁹ as “decisions *not* to buy insurance,”¹⁰⁰ and, in spite of itself, as “activity.”¹⁰¹ The court even writes that nicety in nomenclature is immaterial: “It is immaterial whether we perceive Congress to be regulating inactivity or a financial decision to forego insurance.”¹⁰² And in what can only be an undermining of its other arguments, the court at one point identifies the future activity “in this case” as “health care consumption.”¹⁰³ I want to emphasize this. In contradiction of so many of its other statements, the court, if inadvertently, writes (admits?) that the regulated activity “in this case” is “health care consumption.”¹⁰⁴

At first the court seems headed down the right track when it recognizes the futility and irrelevance of artificial distinctions between production and distribution, etc., and between activity and inactivity. But the court narrows its view to, and hangs its objections on, the individual

95. *Seven-Sky* at 18; see also *Thomas More Law Ctr.* 651 F.3d at 543 (“Virtually everyone participates in the market for health care delivery, and they finance these services by either purchasing an insurance policy or by self-insuring.”)

96. *Levi*, *supra* note 17, at 2

97. *Florida*, 684 F.3d at 1283.

98. *Id.* at 1286.

99. *Id.* at 1293.

100. *Id.* at 1297.

101. *Id.*

102. *Id.* at 1293.

103. *Id.* at 1294.

104. *Id.*

affected by the Mandate who never will consume health care. For the court, in reaching this individual, the Mandate goes too far because this individual is not engaged in activity. His is only the “mere *possibility* of *future* activity.” The court writes that “the government adroitly and narrowly redefines the regulated activity as the uninsured’s health care *consumption* and attendant *cost-shifting*, or the *timing and method of payment* for such consumption.”¹⁰⁵ Yet defining the regulated activity as the uninsured’s consumption of health care is rather a broad take on the matter. The *HHS* court’s is the narrow understanding of the regulated “activity,” confined as it is to the individual affected by the Mandate who never will consume health care. The court so confines its view apparently because it just cannot get over the idea that the Mandate is regulating inactivity; or, reformulated, the “mere *possibility* of *future* activity.” Yet what this “activity” is, the court is never able to definitively say. The court finds numerous, contradictory ways of describing it, but amid the confusion, provides no answer to what it describes as “the central issue in this case: what is the nature of the conduct being regulated by the individual mandate, and may Congress reach it?”¹⁰⁶ Rather, it expresses concern over and over again that the Mandate’s subject of regulation (whatever it is) seems “removed from the traditional subjects of Congress’s commerce authority of Congress’s Commerce authority.”¹⁰⁷ The *HHS* court does not provide a convincing, principled reason why; it only objects that the Mandate is forcing some people to do something they otherwise might not do. In other words, it regulates inactivity—a constitutionally irrelevant objection.

The best answer to the question of what the Mandate regulates is uninsured’s “health care consumption,”¹⁰⁸ an activity in which uninsured Americans as a class indisputably engage. Most uninsured Americans will consume health care. The Mandate regulates this consumption by requiring most Americans to purchase and maintain minimum essential health coverage. The *HHS* majority’s confusion over what the regulated activity is and how to define it leads to its diverse and inconsistent appellations, including to its (if inadvertent) description of the activity as the consumption of health care. Whether any description of the Mandate’s subject of regulation will ever reign, the lesson to be learned from the Supreme Court’s Commerce Clause decisions is that the definition (or the description, or the category) of the subject of regulation is not of paramount importance. After all, the Constitution is “one of enumera-

105. *Id.* at 1297.

106. *Id.*

107. *Id.* at 1292.

108. *Id.* at 1294.

tion, and not of definition.”¹⁰⁹ Furthermore, “commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business.”¹¹⁰ This wisdom is reflected in the Sixth Circuit’s identification of the “class of activities that the minimum coverage provision regulates”¹¹¹: “set against the Act’s broader statutory scheme, the minimum coverage provision reveals itself as a regulation on the activity of participating in the national market for health care delivery, and specifically the activity of self-insuring for the cost of these services.”¹¹² The court acknowledges the imprecision of its formulation. “We use the term self-insurance for ease of discussion. We note, however, that it is actually a misnomer because no insurance is involved, and might be better described as risk retention.”¹¹³ This is a functional identification of the regulated activity, self-acknowledged as inexact, and placed properly in context of the Act’s “broader statutory scheme.” “Congress reasonably determined that as a *class*, the uninsured create market failures; thus, the lack of harm attributable to any particular uninsured individual, like their lack of overt participation in a market, is of no consequence.”¹¹⁴

B. *Limiting Principles*

The cases addressing the Individual Mandate are concerned (again, some more than others) with limiting principles, and the perceived presence or absence of them. After all, “the kind of reasoning involved in the legal process is one in which the classification changes as the classification is made.”¹¹⁵ When a court validates a congressional exercise of the commerce power, it validates similar exercises of the power as well. Considering the ambiguity present in Congress’s plenary commerce power, the apprehension is that a judicial validation of its exercise, unless properly cabined, will open the door to previously and properly impermissible exercises. The disagreeing Circuits provide different formulations of the limits on the commerce power. They address the lack of limiting principles provided by the government to cabin a judicial validation of the Mandate, but only the Eleventh Circuit considers this fatal.

As an initial matter, it is worth remembering what the limits of the commerce power are, as originally formulated. “This power, [to regulate commerce,] like all others vested in Congress, is complete in itself, may

109. *Ogden*, 22 U.S. (9 Wheat.) at 189.

110. *Swift & Co.*, 96 U.S. at 398.

111. *Thomas More Law Ctr.*, 651 F.3d at 542.

112. *Id.* at 543.

113. *Id.* at 543 n.3.

114. *Seven-Sky*, 661 F.3d at 20.

115. *Levi*, *supra* note 17, at 3.

be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.”¹¹⁶ Of course, in interpreting what those constitutional limits may be, courts over time have countenanced some exercises of the commerce power and discountenanced others. Some previously imposed limits, such as on mining and manufacturing, have been rejected. Other distinctions, such as economic versus non-economic, are recognized in *Lopez* and *Morrison* and are valid precedent.

Recalling the limitations countenanced in *Lopez* and *Morrison*, the *Seven-Sky* court found that “the only recognized limitations [on the commerce power] are that (1) Congress may not regulate non-economic behavior based solely on an attenuated link to interstate commerce, and (2) Congress may not regulate intrastate economic behavior if its aggregate impact on interstate commerce is negligible.”¹¹⁷ The court found with no difficulty that the Individual Mandate “certainly is focused on economic behavior . . . that does substantially affect interstate commerce.”¹¹⁸ This is unsurprising, when one considers the congressional findings: “National health spending is expected to increase from \$ 2,500,000,000,000, or 17.6 percent of the economy, in 2009 to \$ 4,700,000,000,000 in 2019. Private health insurance spending is projected to be \$ 854,000,000,000 in 2009”; “The economy loses up to \$ 207,000,000,000 a year because of the poorer health and shorter lifespan of the uninsured.”¹¹⁹

The *Thomas More* court recognized that the Supreme Court has “emphasized in two recent cases that this [the commerce] power is subject to real limits.”¹²⁰ The court recognized four main factors based on which the statutes in *Lopez* and *Morrison* were struck down:

- (1) the statutes regulated non-economic, criminal activity and were not part of a larger regulation of economic activity;
- (2) the statutes contained no jurisdictional hook limiting their application to interstate commerce;
- (3) any Congressional findings regarding the effects of the regulated activity on interstate commerce were not sufficient to sustain constitutionality of the legislation; and
- (4) the link between the regulated activity and interstate commerce was too attenuated.¹²¹

The Individual Mandate lies safely within these limits. Unless one were to focus, as does the *HHS* court, on only those individuals who do not

116. *Ogden*, 22 U.S. (9 Wheat.) at 196.

117. *Seven-Sky*, 661 F.3d at 16.

118. *Id.*

119. 42 U.S.C.A. § 18091(2)(B), (E).

120. *Thomas More Law Ctr.*, 651 F.3d at 542.

121. *Id.* (citations omitted).

consume health care and never will, the Mandate regulates economic activity, as the *Seven-Sky* court easily found.¹²² The jurisdictional hook poses no problem here; the Affordable Care Act contains many: “The individual responsibility requirement provided for in this section . . . is commercial and economic in nature, and substantially affects interstate commerce”; “Private health insurance spending . . . pays for medical supplies, drugs, and equipment that are shipped in interstate commerce.”¹²³ As aforementioned, there are voluminous congressional findings regarding the effect of the regulated activity on interstate commerce. And a big part of the trouble with the statutes at issue in *Morrison* and *Lopez*, that caused those Courts to find the link to commerce too attenuated, was that they regulated criminal activity. The Affordable Care Act does not regulate criminal activity. Further, health care consumption through insurance is not nearly as tenuously related to commerce as were the plaintiffs’ validly regulated activities in *Wickard* and *Raich*. The *Seven-Sky* court recognized this: “if Congress can regulate even instances of purely local conduct that were never intended for, or entered, an interstate market, we think Congress can also regulate instances of ostensible *inactivity* inside a state.”¹²⁴

The *HHS* Court, for its part, overly emphasizes the Commerce Clause’s limits without demonstrating that the Individual Mandate actually transgresses them. The court reminds us over and over again that the Commerce Clause is “not without limitation”¹²⁵; that “the ‘powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written’”¹²⁶; that “even when the Supreme Court has blessed Congress’s most expansive invocations of the *Commerce Clause*, it has done so with a word of warning.”¹²⁷ The court identifies these limits as follows:

The Supreme Court has placed two broad limitations on congressional power under the Commerce Clause. First, Congress’s regulation must accommodate the Constitution’s federalist structure and preserve “a distinction between what is truly national and what is truly local.” Second, the Court has repeatedly warned that courts may not interpret the Commerce Clause in a way that would grant to Congress a general police power, “which the Founders denied the National Government and reposed in the States.”¹²⁸

122. *Seven-Sky*, 661 F.3d at 16.

123. § 18091(1), (2)(B).

124. *Seven-Sky*, 661 F.3d at 19.

125. *Florida*, 648 F.3d at 1278.

126. *Id.* at 1282 (citations omitted).

127. *Id.* at 1283.

128. *Id.* at 1284 (citations omitted).

So important are limiting principles to the *HHS* that it understands them as the glue that holds all Commerce Clause analytical efforts together. “[C]onfusing though these dichotomies and doctrinal vacillations have been, they appear animated by one overarching goal: to provide courts with meaningful, judicially administrable limiting principles by which to assess Congress’s exercise of its *Commerce Clause* power.”¹²⁹ This is reminiscent of the appellants’ argument in *Seven-Sky*, and it merits that court’s response to it: Since the *HHS* court “cannot find real support for their proposed [activity/inactivity] rule in either the text of the Constitution or Supreme Court precedent, they emphasize both the novelty of the mandate and the lack of a limiting principle.”¹³⁰ Indeed, the *HHS* court takes a tortuous route from emphasizing the limits on the commerce power to concluding that the Mandate transgresses them. It is worth noting that in the *HHS* decision, under the section titled “First Principles” in which its formulation of the Commerce Clause’s limits appear, there is no mention of the economic/non-economic distinction that actually did matter to the *Lopez* and *Morrison* Courts.¹³¹ Instead, the *HHS* court formulates its understanding of the Commerce Clause’s limits, and faults the government for not providing limiting principles inherent in the Mandate that satisfy them. The government describes the factual uniqueness of the health care and health insurance markets. These markets are characterized uniquely by the inevitability of health care need, the unpredictability of such need, high costs, the federal requirement that hospitals treat individuals regardless of ability to pay, and the associated cost-shifting.¹³² The court characterizes this as the government’s “uniqueness argument,”¹³³ and “the government’s proposed limiting factors,”¹³⁴ which it then dismisses. The government’s “proposed limiting factors” have two flaws, according to the court: “The first problem with the government’s proposed limiting factors is their lack of *constitutional* relevance.”¹³⁵ The “second fatal problem with the government’s proposed limits” is “administrability.”¹³⁶

The court suggests that it would not be satisfied that the Mandate is valid unless the government were to provide judicially enforceable limiting principles to cabin the precedent. But the court ascribes too much weight to the government’s responsibility to provide limiting principles.

129. *Id.* at 1287.

130. *Seven-Sky*, 661 U.S. at 18.

131. The court does discuss that distinction later in the opinion. *See* 648 F.3d at 1286.

132. *Id.* at 1295.

133. *Id.* at 1297.

134. *Id.* at 1295.

135. *Id.*

136. *Id.* at 1296.

Saying that the government has not provided limiting principles to couch this particular exercise of the commerce power is not the same as concluding that the Mandate exceeds the commerce power's outer limits. Statutes are entitled to a presumption of constitutionality.¹³⁷ It is proper to overturn a statute only upon a plain showing of its unconstitutionality,¹³⁸ not upon the defendant's failure to conjure "limiting principles" to the satisfaction of the court's formulation. The *Seven-Sky* court addressed the issue as follows:

We acknowledge some discomfort with the Government's failure to advance any clear doctrinal principles limiting congressional mandates that any American purchase any product or service in interstate commerce. But to tell the truth, those limits are not apparent to us, either because the power to require the entry into commerce is symmetrical with the power to prohibit or condition commercial behavior, or because we have not yet perceived a qualitative limitation. That difficulty is troubling, but not fatal. . . .¹³⁹

Indeed, the commerce power "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution."¹⁴⁰ The limits of importance to *Lopez* and *Morrison* were economic versus non-economic and the preservation of what is truly national and what is truly local by guarding against too-attenuated connections between regulated activity and interstate commerce. The *HHS* court's conclusion that the mandate is "non-economic" in nature is undermined by the fact that that it is based on the court's hang-up over inactivity—a constitutionally irrelevant distinction. So too with the alleged attenuation between what the Mandate regulates and interstate commerce. If the wholly intrastate, non-commercial use and possession of marijuana in *Raich* is an appropriate subject for federal regulation based on how it potentially withdraws from the illicit interstate marijuana market, then *a fortiori* is the uninsureds' relationship with health care and health insurance, the current state of which, absent federal regulation, is costing the economy \$207,000,000,000 a year.¹⁴¹ Every case is at least limited by its facts. The Individual Mandate is enacted pursuant to unique factors, and to a massive monetary effect on the economy. A judicial validation of it transgresses no constitutional limits, nor any of those recognized by the Supreme Court.

137. *Seven-Sky*, 661 F.3d at 18.

138. *Florida*, 648 F.3d at 1284.

139. *Seven-Sky*, 661 F.3d at 18.

140. *Ogden*, 22 U.S. (9 Wheat.) at 196.

141. § 42 U.S.C.A. 18091(2)(E).

C. Aggregation

“It is not surprising that *Wickard* . . . provides perhaps the best perspective on an economic mandate.”¹⁴² Because the Mandate regulates a broad class of people—the uninsured—some of whom can arguably be said will never consume health care absent the Mandate, the aggregation principle from *Wickard* is relevant. It was formulated as follows: “That appellee’s own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken to together with that of many others similarly situated, is far from trivial.”¹⁴³ This principle can be applied to the uninsured, even if any one of the uninsured’s consumption of health care is “trivial.” In *Wickard* and *Raich*, the plaintiffs’ home consumption of wheat and marijuana, respectively, withdrew from the respective interstate markets in those commodities. However trivial the individual’s harm to interstate commerce, the regulations were considered valid due to the aggregate effect of all those similarly situated. Here, the uninsured, in the aggregate contribute immense harm to interstate commerce due to the well-documented process of cost-shifting:

The cost of providing uncompensated care to the uninsured was \$ 43,000,000,000 in 2008. To pay for this cost, health care providers pass on the cost to private insurers, which pass on the cost to families. This cost-shifting increases family premiums by on average over \$ 1,000 a year. By significantly reducing the number of the uninsured, the requirement, together with the other provisions of this Act, will lower health insurance premiums.¹⁴⁴

The *HHS* court concludes that the aggregation principle cannot apply. It is clear that the court’s reasoning is again bound up in its hang-up over inactivity. The court recognizes the importance of the regulated activity’s connection to interstate commerce (that it not be too attenuated). It then concludes that aggregation cannot apply, not because the regulated activity’s connection to interstate commerce is too attenuated, but because “the regulated conduct is defined by the *absence* of . . .

142. *Florida*, 648 F.3d at 1291.

143. *Wickard*, 317 U.S. at 127–28 (citations omitted).

144. § 42 U.S.C.A. 18091(2)(F); *see also* § 42 U.S.C.A. 18091(2)(G) (“62 percent of all personal bankruptcies are caused in part by medical expenses.”). In one of the ironies of the Individual Mandate litigation, “respondent Mary Brown” of the *HHS* case (who challenges the constitutionality of the Individual Mandate) “and her husband recently filed a petition for bankruptcy, and they list among their liabilities thousands of dollars in unpaid medical bills, including bills from out-of-state providers. . . . Those liabilities are uncompensated care that will ultimately be paid for by other market participants.” Brief for Petitioner at 44 Dep’t of Health & Human Servs. v. Florida, No. 11-398, 2002 U.S. S. Ct. Briefs LEXIS 1211 at 81 (U.S. argued Mar. 27, 2012).

commerce.”¹⁴⁵ The *HHS* court seems to forget how the *Raich* court cautioned temperence: “We need not determine whether respondents’ activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a ‘rational basis’ exists for so concluding.”¹⁴⁶ The court similarly forgets the broad potential afforded the aggregation principle by the *Morrison* Court: “we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases”¹⁴⁷ Even were the mandate’s subject of regulation not to be considered economic activity (which the *HHS* court fails to establish) or even were the mandate’s subject of regulation not to be considered activity of any kind, precedent does not preclude it from aggregation. “No Supreme Court case has ever held or implied that Congress’s Commerce Clause authority is limited to individuals who are presently engaged in activity involving, or substantially affecting, interstate commerce.”¹⁴⁸

The *Seven-Sky* court rejected reasoning similar to that of the *HHS* court: “Whether any ‘particular person . . . is, or is not, also engaged in interstate commerce,’ the Supreme Court expressly held, is a mere ‘fortuitous circumstance’ that has no bearing on Congress’s power to regulate an *injury* to interstate commerce.”¹⁴⁹ The *Thomas More* court highlights a major flaw in arguments against the Mandate’s constitutionality—that the proper scrutiny for it is a rational basis inquiry.¹⁵⁰ “Congress had a rational basis to believe that the practice of self-insuring for the cost of health care, in the aggregate, substantially affects interstate commerce”¹⁵¹; “Congress found that the aggregate cost of providing uncompensated care to the uninsured in 2008 was \$43 billion”¹⁵²; “the rational basis test applies to Congress’s judgment.”¹⁵³

“Although any decision not to purchase a good or service entails commercial consequences,” the *HHS* court writes, “this does not warrant the facile conclusion that Congress may therefore regulate these decisions pursuant to the *Commerce Clause*.”¹⁵⁴ “Instead,” the court concludes, “what matters is the regulated subject matter’s connection to

145. *Florida*, 648 F.3d at 1293.

146. *Raich*, 545 U.S. at 22 (citations omitted).

147. *Morrison*, 529 U.S. at 613.

148. *Seven-Sky*, 661 F.3d at 16.

149. *Id.* at 19.

150. See *Raich*, 545 U.S. at 22 (“We need not determine whether respondents’ activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a ‘rational basis’ exists for so concluding.”).

151. *Thomas More Law Ctr.*, 651 F.3d at 544.

152. *Id.* at 545.

153. *Id.*

154. 648 F.3d at 1292–93.

interstate commerce. That nexus is lacking here. It is immaterial whether we perceive Congress to be regulating inactivity or a financial decision to forego insurance. Under any framing, the regulated conduct is defined by the *absence* of both commerce or even the ‘production, distribution, and consumption of commodities’—the broad definition of economics in *Raich*.’”¹⁵⁵ In other words, Congress cannot regulate the “conduct” because it lacks a connection to commerce. It lacks a connection to commerce because it is defined as an absence of both commerce and (the definition of) commerce. The dismissal of the government’s argument is devoid of justification and the conclusion is devoid of deduction. It declares that, “even assuming that decisions *not* to buy insurance substantially affect interstate commerce, that fact alone hardly renders them a suitable subject for regulation,”¹⁵⁶ yet does not explain what additional facts (surely there are some) *would* render them a suitable subject for regulation. It concludes that Congress cannot reach the conduct at issue because the conduct lacks a connection to commerce: “[U]nder any framing,” the “conduct” at issue lacks a connection to commerce because it is not commerce. This is pure tautology, and, as such, more “facile” than the government’s argument. In just the previous paragraph the court appears to hang its objection on an overbreadth argument¹⁵⁷ in writing that “any decision not to purchase a good or service entails commercial consequences.”¹⁵⁸ But this contradicts its conclusion that the regulated conduct is defined by an absence of commerce. In doing this the court fails to distinguish the regulated “conduct”—which it describes but never defines—from validly regulated conduct. Preceding the section of the opinion on *Wickard* and aggregation, the court writes that it is “left to apply some basic *Commerce Clause* principles derived largely from *Wickard*, *Lopez*, *Morrison*, and *Raich*.”¹⁵⁹ Instead, it narrows the issue too much and declares that the “basic *Commerce Clause* principle” of aggregation cannot be applied. It tautologically concludes that the “conduct” cannot be regulated because it lacks a connection to commerce because it is defined by an absence of commerce.

The fact is that the uninsured do consume health care services. Most of them eventually will.¹⁶⁰ For precisely this reason, it is inaccur-

155. *Id.* at 1293.

156. *Id.*

157. “Such an argument is prompted by the worry that the linguistic or doctrinal boundaries of the principle or rule under discussion embrace the danger case.” Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361, 366 (1985). The “danger case” is that “hypothetical but potentially real *future state of affairs*” which is “the source of our fears” *Id.* at 365.

158. 648 F.3d at 1292.

159. *Id.* at 1291.

160. *See Seven-Sky*, 661 F.3d at 4 (“Congress found that without the mandate, uninsured individuals, in the aggregate, would consume costly health care services and pass on those costs to

rate to call uninsureds “individuals outside the stream of commerce.” As a class, uninsureds *will* consume health care services, even if not *all* of them will, even though *some* never will. The mandate requires all of them (with many exceptions) to consume their health care services through health insurance, which they must purchase and maintain. The *HHS* court avoids this reality in its analysis by whittling the issue down to the Mandate’s application to those uninsureds who never will consume health care services—a class of individuals smaller than that which the Mandate reaches. Only by doing so can the court characterize “the regulated conduct” as being “defined by the *absence* of . . . commerce.”¹⁶¹

IV. THE SLIPPERY SLOPE AND FEDERALISM CONCERNS

Failing on legal and doctrinal fronts, opponents of the Mandate must rely on arguments of another sort.

A. *The Slippery Slope*

“Both the slippery slope argument and most of its similar but distinguishable compatriots involve a common theme—the contrast between a tolerable solution to a *problem now before us* and an intolerable result with respect to some currently hypothetical but potentially real *future state of affairs*.”¹⁶² The former is the “instant case” and the latter—“the source of our fears”—is the “danger case.”¹⁶³ Many of the objections to the Individual Mandate resort to such slippery slope arguments. If the Individual Mandate is a valid exercise of the commerce power, the argument goes, then Congress will regulate anyone and anything; judicial validation will be the “first step in what will be a long slide.”¹⁶⁴ Here are just a few examples:

“If an individual’s mere decision not to purchase insurance were subject to Wickard’s aggregation principle, we are unable to conceive of any product whose purchase Congress could not mandate under this line of argument.”¹⁶⁵

“Under the government’s proposed limiting principles, there is no reason why Congress could not similarly compel Americans to insure

other market participants.”); 42 U.S.C.A. § 18091(2)(F) (“The cost of providing uncompensated care to the uninsured was \$ 43,000,000,000 in 2008.”).

161. 648 F.3d at 1293.

162. Schauer, 99 HARV. L. REV. at 364–65.

163. *Id.* at 365.

164. William Safire, *On Language; Slippery Slope*, N.Y. TIMES, Apr. 7, 2002, at Section 6, Column 3, Magazine Desk, Pg. 24.

165. *Florida*, 648 F.3d at 1292.

against any number of unforeseeable but serious risks.”¹⁶⁶

“[If the Individual Mandate is a valid exercise of the commerce authority, then] Congress could undoubtedly require every American to purchase liability insurance, lest the consequences of their negligence or inattention lead to unfunded costs (medical and otherwise) passed on to others.”¹⁶⁷

Were we to adopt the “limiting principles” proffered by the government, courts would sit in judgment over every economic mandate issued by Congress, determining whether the level of participation in the underlying market, the amount of cost-shifting, the unpredictability of need, or the strength of the moral imperative were enough to justify the mandate.¹⁶⁸

“If an individual’s decision not to purchase an expensive product is subject to the sweeping doctrine of aggregation, then that purchase decision will almost always substantially affect interstate commerce.”¹⁶⁹

Andrew Koppelman humorously refers to this type of objection to the Mandate as the “Broccoli Objection.”¹⁷⁰ This was inspired by Judge Vinson’s fear that, if the Mandate is constitutional, then “‘Congress could require that people buy and consume broccoli at regular intervals.’”¹⁷¹ This type of objection is a corollary to courts’ focus on the lack of limiting principles offered by defendants. Where will the commerce power end? How does the Mandate define its limits? This is “what the law’s opponents have demanded: an account of the limits of congressional power.”¹⁷² Yet, again, this line of attack is flawed; a failure of government defendants to satisfy this question is not the same as identifying whether or how the Mandate exceeds the commerce power’s outer limits. Opponents to the Mandate have trouble showing exactly how the Mandate does this, so they resort to a slippery slope argument. Koppelman writes that a flaw with such a “Broccoli Objection” is that it involves “treating a slippery slope argument as a logical one, when in fact it is an empirical one.”¹⁷³ It is markedly unrealistic that Congress ever would mandate the purchase of broccoli, even if it could. Therefore, Koppelman writes, “[i]f there is no danger, then the fact that there logically could be has no weight.”¹⁷⁴ This is not right. The fact that there logically could be *is* the danger. In this way the “Broccoli Objection” is

166. *Id.* at 1296.

167. *Id.* at 1296 n.103.

168. *Id.* at 1296–97.

169. *Id.* at 1311.

170. Koppelman, 121 *YALE L.J. ONLINE* at *19.

171. *Id.* at *18 (quoting *U.S. Dep’t of Health and Human Servs.*, 780 F. Supp. 2d at 1289).

172. *Id.* at *3.

173. *Id.* at *20.

174. *Id.* at *20

indeed a logical one, albeit strained. “Logicians are very cautious about slippery slope arguments because it is impossible to know beforehand, with absolute deductive certainty, that an ‘if-then’ statement is true.”¹⁷⁵ Still, it is important and entirely valid to be concerned over the logical extensions of a principle, especially one being enacted into law. For example, it is small comfort that President Obama assures us he won’t detain American citizens indefinitely,¹⁷⁶ when he does so with the same stroke of his pen that appears to codify into law his ability to do so.¹⁷⁷ We may not *expect* Congress to mandate the purchase of broccoli, but we may fear its ability to do so.

Koppelman convinces me that “Congress is never going to try to make you eat your broccoli,”¹⁷⁸ even if it could. Yet to assuage the fears of those who see a logical connection between the Mandate and congressionally mandated broccoli consumption, the Government’s five factors of uniqueness in *HHS* do come in handy. An argument that an enactment of the Individual Mandate leads to congressional omnipotence forgets that cases are limited by their facts as well as their logic. The health care industry *is* unique in many respects, and the factors that the government identifies are significant in that they do cabin the case’s precedent, and undermine slippery slope arguments against the Mandate. “There are manifest differences between broccoli and health insurance: no one unavoidably needs broccoli; it is not unpredictable when one will need broccoli; broccoli is not expensive; providers are permitted by law to refuse it; and there is no significant cost-shifting in the way it is provided.”¹⁷⁹ Suggesting that America will be run over by this photosynthetic parade of horrors immediately upon the enactment of the Individual Mandate ignores these realities. The Mandate can be distinguished in fact and in principle from other hypothetical federal encroachments. Its constitutionality does not stand atop a slippery slope.

B. Federalism Concerns

Arguments against the Mandate rest at last on what the *HHS* court calls “federalism concerns.”¹⁸⁰ “The Supreme Court’s *Commerce Clause*

175. Safire, *supra* note 164, at 24.

176. Barack Obama, *Statement by the President on H.R. 1540* (Dec. 31, 2011), <http://www.whitehouse.gov/the-press-office/2011/12/31/statement-president-hr-1540> (“I want to clarify that my Administration will not authorize the indefinite military detention without trial of American citizens.”).

177. See H.R. 1540, 112th Cong. § 1021(c) (2011).

178. Koppelman, 121 *YALE L.J. ONLINE* at *20.

179. *Id.* at *19–20.

180. *Florida*, 648 F.3d at 1302. *Cf.* Arthur J.R. Baker, *Fundamental Mismatch: The Improper Integration of Individual Liberty Rights into Commerce Clause Analysis of the Patient Protection and Affordable Care Act*, 66 *U. MIAMI L. REV.* 296 (arguing that the attacks on the Affordable

jurisprudence emphasizes that, in assessing the constitutionality of Congress's exercise of its commerce authority, a relevant factor is whether a particular federal regulation trenches on an area of traditional state concern."¹⁸¹ The *HHS* court writes that "insurance qualifies as an area of traditional state regulation" and that the "health care industry also falls within the sphere of traditional state regulation."¹⁸² It concludes that "Congress's encroachment upon these areas of traditional state concern is yet another factor that weighs in the plaintiffs' favor, and strengthens the inference that the individual mandate exceeds constitutional boundaries."¹⁸³ It is not necessary to dwell on the assertion "that health care and health insurance are uniquely state concerns"; as the *Seven-Sky* court notes, "decades of established federal legislation in these areas suggest the contrary."¹⁸⁴ Koppelman sees in such objections "an implicit libertarianism which focuses on the burden a law imposes on individuals and pays no attention at all to legitimate state interests."¹⁸⁵ Such sentiments come through in federalism-based objections to the Mandate, as in Judge Graham's dissent in *Thomas More Law Ctr.*: "Here, Congress's exercise of power intrudes on both the States and the people."¹⁸⁶ These objections are a final leg to stand on where textual and doctrinal arguments fail. They are inchoate, and unconvincing. Of the 27 times the *HHS* court cites to concurring and dissenting opinions (primarily Scalia's and Kennedy's) in its Commerce Clause Analysis, they most heavily rely on them (nine cites) in its section on "Areas of Traditional State Concern."¹⁸⁷

Absent a violation of a constitutional provision, and absent transgressions forbidden by precedent, Courts have treated such government intrusions as a matter of fairness better left to the political process. The *Wickard* Court acknowledged that the Agricultural Adjustment Act would have the effect of "forcing some farmers into the market,"¹⁸⁸ but found no constitutional infirmity there. It said that such effects were unfortunate to those affected by them, but ultimately a question of fairness not to be determined by the Court: "It is the essence of regulation that it lays a restraining hand on the self-interest of the regulated and

Care Act "represent an attempt to shift Commerce Clause analysis away from its well-settled federalism principles to a focus on individual liberty.").

181. *Id.* at 1303 (citations omitted).

182. *Id.* at 1304.

183. *Id.* at 1306.

184. *Seven-Sky*, 661 F.3d at 19 (citing *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 539 (1944); *Florida*, 648 F.3d at 1302–03).

185. Koppelman, 121 *YALE L.J. ONLINE* at *22 (providing examples) (citation omitted).

186. *Thomas More Law Ctr.*, 651 F.3d at 571 (Graham, J., Dissenting).

187. *Florida*, 648 F.3d at 1302.

188. *Wickard*, 317 U.S. 111 at 129.

that advantages from the regulation commonly fall to others. The conflicts of economic interest between the regulated and those who advantage by it are wisely left under our system to resolution by the Congress under its more flexible and responsible legislative process.”¹⁸⁹ The *Seven-Sky* court makes the appropriate observation here: “That a direct requirement for most Americans to purchase any product or service seems an intrusive exercise of legislative power surely explains why Congress has not used this authority before—but that seems to us a political judgment rather than a recognition of constitutional limitations.”¹⁹⁰

V. CONCLUSION

The commerce power knows no limitations other than those that are prescribed in the Constitution. *Lopez* and *Morrison* acknowledge a couple of restrictions. The Individual Mandate appears to violate neither of them. For all of the adjurations by the Mandate’s opponents that the Government provide limiting principles to cabin the precedent, the opponents are unable to show how the Mandate transgresses the outer limits of the Commerce Clause. The best that can be mustered against the Mandate amount to slippery slope arguments and inchoate “federalism concerns,” which are devoid of deduction and represent only a fear of government encroachment; they fail to demonstrate any congressional transgression in enacting the Mandate. If the Individual Mandate is unconstitutional, it is not for any argument that I have encountered.

Is the Individual Mandate an encroachment on individual liberty? Yes, but “it is no more so than a command that restaurants or hotels are obliged to serve all customers regardless of race, that gravely ill individuals cannot use a substance their doctors described as a palliative for excruciating pain, or that a farmer cannot grow enough wheat to support his own family. The right to be free from federal regulation is not absolute, and yields to the imperative that Congress be free to forge national solutions to national problems, no matter how local—or seemingly passive—their individual origins.”¹⁹¹

The “course of decision under the *Commerce Clause*”¹⁹² favors a finding of constitutionality in the congressional exercise of the commerce power called the Individual Mandate. A decision holding other-

189. *Id.*

190. *Seven-Sky*, 611 F.3d at 20.

191. *Seven-Sky*, 661 F. 3d at 20 (footnote omitted) (citing *Heart of Atlanta Motel, Inc.*, 379 U.S. 241, at 258-59; *Raich*, 545 U.S. at 6-7; *Wickard*, 317 U.S. at 128; *Thomas More*, 651 F.3d at 557 (Sutton, J., concurring)).

192. *Wickard*, 317 U.S. at 120.

wise cannot exist in the same legal universe as *Raich*, *Wickard*, *Heart of Atlanta Motel, Inc.*, or the other cases recognizing the plenary nature of Congress's commerce power and its broad reach. The uninsured will have to purchase and maintain minimum essential health coverage. If interstate commerce feels the pinch, it does not matter how passive, or how inactive, the operation that applies the squeeze.