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Litigating Federalism and Broccoli – Constitutional Challenges to the Patient Protection and Affordable Care Act

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Summary

The Patient Protection and Affordable Care Act, a major health insurance overhaul, was signed into law on March 23, 2010. The Act has been challenged on federalism grounds in a number of cases to date. In particular, the lawsuits have targeted the individual mandate provision – a provision that requires most people living in the United States to obtain health insurance coverage or pay a certain amount of money each year. The first purpose of this thesis is to provide an assessment as to whether this provision can be justified under current Supreme Court doctrine.
The constitutional challenges raise interesting questions about the nature of American federalism. For example, which are the underlying values that federalism is supposed to serve? What limitations on federal power must Congress abide by? What kind of federalism-based arguments are legitimate? A second purpose of the thesis is to discuss such questions, as they are reflected in the litigation. By identifying two fundamental objections to the individual mandate and by putting the ongoing litigation into context, the reader will hopefully get an insight into some aspects of American federalism.

Sammanfattning

Den 23 mars 2010 utfärdades “the Patient Protection and Affordable Care Act”. Lagen innebär en omfattande reform av det amerikanska sjukvårdsförsäkringssystemet. Enligt en viss bestämmelse i lagen är envar skyldig att inneha sjukvårdsförsäkring, vid äventyr av böter (26 U.S.C. § 5000A). Bestämmelsens grundlagsenlighet är omtvistad; lagprövning pågår i federala distrikts- och appellationsdomstolar runt om i landet. Högsta domstolen har meddelat prövningstillstånd i ett antal mål och muntlig förhandling är utsatt till mars månad nästa år.
Mot denna bakgrund har uppsatsen två huvudsakliga ambitioner. Den första är att bedöma huruvida 26 U.S.C. § 5000A är förenlig med grundlagen. Vidare avspeglas i processerna flera grundläggande frågor rörande det amerikanska federala systemet. Däribland: Vilka begränsningar i kongressens normgivningsmakt föreligger? Vilka syften är det tänkt att maktdelningen mellan nationell- och delstatsnivå ska tjäna? Vad kännetecknar ett legitimt rättsligt argument i en tvist gällande maktdelning? Genom att identifiera två grundläggande invändningar mot 26 U.S.C. § 5000A och genom att i ett större sammanhang inordna rättsprocesserna dessa invändningar givit upphov till, är uppsatsens andra ambition att ge läsaren en ögonblicksbild av ett främmande federalt system.

Preface

This thesis is dedicated to my intelligent and sensitive mother Ingrid and to my wise father Per. I am forever grateful for your unconditional support.

I would like to take the opportunity to thank Marcus Clarén for his thoughtful feedback and encouragement throughout the writing process. I am also indebted to Helen Zhang. Thank you for helping me with that wonderful thing called American English! Furthermore I thank my supervisor, Associate Professor Vilhelm Persson, for giving the excellent advice to choose a topic that really interests me. Last but not least, a big thanks goes to Professor Gerard J. Clark at Suffolk University Law School for reading and commenting my text. It goes without saying that responsibility for any mistakes remains with the author.

Lund, Saint Lucia's Day 2011

Max Carlin Nilsson

Abbreviations

ex rel.	by the relation of
PPACA	The Patient Protection and Affordable Care Act
U.S.	United States Reports
U.S.C	Code of Laws of the United States of America

1 Introduction

1.1 Background

In the period between the 1880s and the end of World War II, most industrialized nations fashioned some form of universal health care insurance for its citizens.[1] The United States is an exception; as of 2009 about 50 million Americans are left without coverage.[2] Alarmingly, estimates suggest that lack of health insurance is associated with as many as 44,789 deaths per year.[3] Despite these bleak figures, national health care spending constitutes more than one sixth of the nation's GDP.[4] With these facts in mind, it is unsurprising that health care reform has been an important policy goal for a long time. Reaching this goal, however, has proven to be difficult. Indeed, health care reform has been among the most divisive political issues of the last fifty years.[5] In the early 1990s, for example, Congress rejected a proposed major overhaul of the health care system.[6] However in 2010, "the stars align[ed] just right"[7] and Congress was able to pass the comprehensive Patient Protection and Affordable Care Act[8] (hereinafter "PPACA"). President Obama signed his "signature domestic program"[9] into law on March 23, 2010.

During his visit to the United States in the 1830s, Alexis de Tocqueville observed that "[t]here is hardly a political question in the United States which does not sooner or later turn into a judicial one".[10] Visiting the same country some 175 years later, the author of this thesis discovered that the political question of health care reform had turned into a judicial one sooner rather than later. Indeed, the ink on the bill had barely dried as individual citizens, public interest law firms, and eventually more than half the States brought lawsuits requesting that the PPACA be declared unconstitutional. To date, at least 24 different challenges to the law have been filed in federal

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[1] *See* LAWRENCE R. JACOBS & THEDA SKOCPOL, HEALTH CARE REFORM AND AMERICAN POLITICS. WHAT EVERYONE NEEDS TO KNOW 24 (2010).

[2] U.S CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES 23 tbl.12 (2009).

[3] *See* Wilper et al., *Health Insurance and Mortality in US Adults*, 99 AM. J. PUB. HEALTH 2289, 2294 (2009).

[4] 42 U.S.C. § 18091(a)(2)(B).

[5] James G. Hodge, Jr. et. al., *Nationalizing Health Care Reform in A Federalist System*, 42 ARIZ. ST. L.J. 1245, 1246 (2011).

[6] *See* JACOBS & SKOCPOL, *supra,* note 1, at 27.

[7] *Id*.

[8] Pub. L. No. 111-148, 124 Stat. 119 (2010), amended by Healthcare and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010).

[9] Mark A. Hall, *The Factual Bases for Constitutional Challenges to Federal Health Insurance Reform*, 38 N. KY. L. REV. (forthcoming 2011) (manuscript at 1), available at http://ssrn.com/abstract=1717781 [hereinafter *Factual Bases*].

[10] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA. 270 (J.P. Mayer ed., G. Lawrence trans., Doubleday/Anchor 1969) (1835).

district courts across the country.[11] At the time of writing, there is a circuit split[12] as to the constitutionality of the law. As recognized by Judge Sutton, "the court of appeals are not just fallible but utterly non-final in this case"[13], and on November 14, 2011, the U.S. Supreme Court granted certiorari in three pending health care reform cases. The Court is expected to hear oral arguments in March 2012.

1.2 Statement of purpose

The focal point of the constitutional challenge to the PPACA is a provision of the Act, the individual mandate[14], which requires (nearly) all citizens to maintain health insurance coverage. Specifically, plaintiffs assert that Congress exceeded its authority under the Commerce Clause in passing the provision. As we shall see, the Commerce Clause is an arena on which numerous disputes over the nature of American federalism have been fought throughout history. Against this background, the ongoing PPACA litigation represents the latest example in a long line of Commerce Clause-based challenges to federal legislation.[15] The PPACA litigation is therefore a suitable subject for a thesis aimed at shedding some light on the dynamics of American federalism.

The first purpose of this thesis is to offer an assessment as to whether the individual mandate is a lawful exercise of Congress' power to regulate interstate commerce. For this purpose, the following questions will be examined:

- What are the doctrinal justifications for the individual mandate? So far as constitutional doctrine is concerned, what are the main arguments against the mandate? Are these arguments persuasive?

Less than a year has elapsed since the PPACA became law and already the individual mandate has become the subject of much litigation. A second purpose of this thesis is to get some general insights into American federalism by providing a deeper understanding of this litigation. To do so, the following questions are posed:

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[11] 24 CONSTITUTIONAL CHALLENGES TO FEDERAL HEALTH CARE LAWS, http://healthcarereform.procon.org/view.resource.php?resourceID=004134 (last visited Dec. 1, 2011).

[12] That is, circuit courts of appeals have reached different conclusions as to whether the individual mandate is lawful.

[13] Thomas More Law Ctr. v. Obama, 651 F.3d 529, 555 (6th Cir. 2011) (Sutton, J., concurring in part and delivering the opinion of the court in part).

[14] In the Act, the provision is labeled "Requirement to Maintain Minimum Essential Coverage". 26 U.S.C. § 5000A. In the literature however, it is often referred to as "the minimum coverage requirement" or "the individual mandate". The latter label will be used throughout this thesis.

[15] Clearly, the outcome of the PPACA litigation will have significant practical consequences for the future of health care in the United States. The outcome will, in all likelihood, also have an impact on partisan politics, as the Supreme Court will hear arguments during a presidential election year where the incumbent is closely associated with the PPACA.

- What is it, fundamentally, about the mandate that is perceived to be legally objectionable? What can be said about the validity and legitimacy of the objection(s)?

1.3 Disposition

As indicated in the statement of purpose, there are two main *foci* in this thesis: In Chapter 5 the constitutional challenge to the PPACA is presented and analyzed from a doctrinal standpoint, and in Chapter 6 two core concerns animating the PPACA litigation are identified and discussed.
No attempt at understanding the constitutional challenges to PPACA's individual mandate can be made without having a general idea of the legal framework in which the litigation takes place. Thus, the thesis will briefly describe the American model of federalism in Chapter 3. Chapter 4 contains a more thorough review of the relevant constitutional provisions and case law.
Following this introduction, Chapter 2 will offer a brief sketch of the dynamics of the health insurance market and a presentation of how the PPACA is thought to function. Finally, in Chapter 7 the findings are summarized.

1.4 Material and method

The first part of the thesis will present and address arguments put forward by the litigants in their respective briefs. As the topic of individual mandates in health care reform has generated much academic commentary, law review articles on the subject will be studied. Chemerinsky's constitutional law treatise will be used as a general reference throughout the thesis.[16] Because "[i]t is emphatically the duty of the Judicial Department to say what the law is",[17] the opinions issued by courts that have ruled on the matter will stand in the foreground. In addition, since the Supreme Court is the ultimate interpreter of the constitutional order, sufficient attention must be given to governing precedents. While constitutional law to a large extent concerns the interpretation of case law, the actual text of the Constitution remains important.[18] Arguments made in the litigation will therefore be analyzed against the background of relevant constitutional provisions.
As to methodological assumptions, the thesis is traditional up to and including Chapter 5. The analysis here is mainly *de lege lata*. Because some opponents of the PPACA claim the unprecedented nature of the issue at hand call for *lege ferenda* solutions, certain arguments *de lege ferenda* will also be considered. In Chapter 6, the two fundamental objections to the

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[16] CHEMERINSKY, *infra* note 66.
[17] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).; Special attention is given to the thoughtful opinion of Judge Sutton on the United States Court of Appeals for the 6th Circuit.
[18] *See e.g.* Graves v. People of State of New York *ex rel.* O'Keefe, 306 U.S. 466, 491-92 (1939) (Frankfurter, J., concurring) (arguing that "[t]he ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it.").

individual mandate are analyzed and critiqued using a more free methodology.[19]

Finally, a methodological caveat should be kept in mind. When an argument is attributed to "opponents of the individual mandate" or "the plaintiffs", the author does not wish to imply that *all* opponents of the individual mandate or the plaintiffs in *all* PPACA lawsuits would agree with that exact formulation of the argument, only that the argument is representative in general.

1.5 Delimitations

> Talking about federalism feels a bit like joining the proverbial blind men trying to describe an elephant. It's such a big topic, one can't possibly hope to grasp more than a small part of the beast.[20]

The PPACA litigation has generated an immense amount of written material. While this thesis can cover more than a small aspect of the challenges, it cannot offer a complete overview of the ongoing PPACA litigation. Only arguments relating to the constitutional soundness of the individual mandate provision will be discussed. That provision is not the only part of the law being challenged on federalism grounds. Among topics not to be dealt with is whether the PPACA's reform of the Medicaid program amounts to unlawful coercion of the States in violation of the Tenth Amendment.[21]

Furthermore, focus will be on the question of whether the individual mandate is a valid exercise of Congress' power under the Commerce Clause (in isolation and as augmented by the Necessary and Proper Clause). In the on-going litigation, it also argued that Congress' power "[t]o lay and collect Taxes […]"[22] provides an independent basis to uphold the individual mandate.[23] However, since the Commerce Clause argument is the government's frontline contention, the question as to whether the mandate can be upheld on other grounds must remain outside the scope of this limited inquiry.

Generally, procedural questions are of import when it comes to judicial review. The question of standing and the Tax Anti-Injunction Act[24] are especially important in the PPACA litigation. Indeed, about half of the lawsuits challenging the PPACA have been dismissed on procedural

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[19] "There should be much flexibility as to method. Once the central issues of a problem are apprehended the imagination should not be confined by a paper program". Felix Frankfurter, *Conditions for, and the Aims and Methods of, Legal Research*, 15 IOWA. L. REV. 129 (1930).

[20] Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1485 (1994).

[21] *See, e.g.,* Liberty Univ., Inc. v. Geithner, 753 F. Supp. 2D 611, 635–37 (W.D. Va. 2010) (rejecting a challenge of unlawful coercion).

[22] U.S. CONST. art. I, § 8, cl. 1.

[23] For a defense of the individual mandate as an exercise of the taxation power, see Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 45-46 (2010).

[24] 26 U.S.C. § 7421(a).

grounds.[25] Ideally, a more complete description of the PPACA litigation would include a discussion of these issues.

[25] *See, e.g.,* N.J. Physicians, Inc. v. Obama, 757 F. Supp. 2d 502 (D.N.J. 2010) (dismissed for lack of standing).

2 Health insurance reform

The challenged PPACA is a massive piece of legislation, instituting numerous reforms to the health insurance market. The overarching goal of the Act is to reduce the number of uninsured Americans.[26] The PPACA does not create a new health insurance system from scratch; instead it builds on the existing one that is founded on private and public insurance to finance health care. Because the approach embodied in the PPACA is complex, a sketch of the dynamics of the health insurance market is helpful. It will be followed by a presentation of the architecture of PPACA.

2.1 Dynamics of the health insurance market

An "elemental fact of health insurance […] as fundamental as gravity, and as pervasive as the weather" [27] is that 20% of the population account for 80% of all money that is spent on health care, while the remaining 80% of the population account for only 20% of the costs.[28] This "remarkably universal" pattern is an "economic law of nature that arises from the human biological conditions and the vagaries of chance".[29] The fact that a high percentage of expenditures are incurred by a relatively small share of the population "is why we need insurance in the first place".[30] By pooling the expenses across the population, it becomes possible to keep health care affordable for everyone.[31]

The uneven distribution of health risks in the population is reflected both on the supply and demand side of the market: It explains why "insurers stand to gain a great deal by avoiding […] people with higher risk".[32] Conversely, the insurance companies stand to lose if they do not attract people with lower risk. As to the demand side, the uneven risk distribution is linked to the behavior of the prospective policyholders. A rational person tend to avoid purchasing insurance unless he or she expect to need it and individuals with greater need tend to take out more insurance than do individuals who have lower expectations of falling ill. This behavioral phenomenon is an example of what economists call *adverse selection*.[33] Because of adverse selection, insurance companies engage in *medical*

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[26] *See e.g.,* Matthew R. Farley, *Challenging Supremacy: Virginia's Response to the Patient Protection and Affordable Care Act*, 45 U. RICH L. REV. 37, 43 (2010)

[27] *Factual Bases, supra* note 9, at 7.

[28] *Id.,* at 5.

[29] *Id.,* at 6; This "economic law of nature" is an application of the Pareto principle, first observed by Pareto. See VILFREDO PARETO, MANUALE DI ECONOMIA POLITICA CON UNA INTRODUZIONE ALLA SCIENZA SOCIALE (1919).

[30] *Factual Bases, supra* note *9*, at 7.

[31] *Id.*

[32] *Id.,* at 8.

[33] *Id.,* at 9-10.

underwriting.[34] Underwriting is the practice where the insurer evaluates health risks specific to each individual subscriber in order to make a decision whether to deny or offer coverage and to assign the premium rate for the policy. Provocatively stated, medical underwriting helps insurance companies to "cherry-pick healthy people and [...] weed out those who are not as healthy."[35] The obvious downside is that people with a poor health status have a hard time finding health coverage.

Generally, most individuals in the United States receive health insurance as part of employee compensation.[36] There are also a number of public insurance programs available, among them Medicaid that provides health coverage to certain groups of less well-off individuals.[37] Uninsured persons that do not qualify for public insurance programs and who cannot afford to pay out-of-pocket nonetheless continue to receive care.[38] Most hospitals are nonprofit organizations that feel obligated to provide care for a minimal, if any, charge.[39] Even for-profit hospitals engage in similar charity.[40] Furthermore, federal law requires hospitals with emergency rooms to offer emergency care to any patient who arrives, regardless of his or her ability to pay for it.[41]

It was against this background that Congress enacted the PPACA.

2.2 The PPACA – a three-legged stool

Adopting an analogy from Gruber, the core logic of the PPACA can be understood as a three-legged stool.[42] The first leg consists of the actual insurance market reforms, i.e., regulations as to the way health insurance is packaged and sold. The PPACA bars several practices within the industry that have prevented access to coverage, the most important of which is that almost all forms of medical underwriting will be prohibited. Insurance companies may no longer refuse to insure an individual on the basis of his health status, medical condition or disability.[43] Neither can the insurer deny coverage of a pre-existing condition.[44] Furthermore, the insurer may not charge higher rates to persons on the basis of their prior medical history.

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[34] *Id.,* at 8-9.

[35] Memorandum in Support Of Defendant's Motion For Summary Judgment at 7, Virginia *ex rel*. Cuccinelli v. Sebelius, 728 F. Supp. 2d 768 (E.D. Va. 2010) (3:10-cv-188).

[36] *See e.g.,* CONG. BUDGET OFFICE, KEY ISSUES IN ANALYZING MAJOR HEALTH INSURANCE PROPOSALS 4-5 (Dec. 2008) [hereinafter KEY ISSUES].

[37] Medicaid is a means-tested program administered by the States but jointly funded by the federal government and the States. See 42 U.S.C. § 1396 *et seq.* The elderly and disabled can obtain coverage through the federally administered Medicare problem.

[38] *See* KEY ISSUES, *supra* note 36, at 13.

[39] *Id.*

[40] *Id.*

[41] 42 U.S.C. § 1395dd. This requirement only applies to hospitals participating in the Medicare program.

[42] Jonathan Gruber, *The Impacts of the Affordable Care Act: How Reasonable are the Projections?* 4-6 (National Bureau of Economic Research, Working Paper No. 17168, 2011), available at http://econ-www.mit.edu/files/6829.

[43] 42 U.S.C. § 300gg–4(a).

[44] 42 U.S.C. § 300gg–3(a).

Only age, tobacco use, and geographic location may be taken into consideration when determining premiums.[45] The first leg thus seeks to remove a barrier that has kept many individuals from gaining access to health insurance due to bad health.
The second leg is the so-called individual mandate, a *requirement that all U.S. residents (with limited exceptions)[46] maintain health coverage*. Failure to meet the requirement will result in a penalty that is included with the individual's tax return and calculated based on household income.[47] What the mandate generally requires is that uninsured individuals obtain private insurance. Thus, the objective is not to raise revenue for the government but rather to change individual behavior in order to broaden the insurance risk pool and thereby make the health insurance market function better.[48] Individuals who qualify for Medicaid or who already have health insurance through their employers, however, are not required to take further action as a consequence of the mandate.
Currently, many individuals simply cannot afford to obtain health coverage due to the high premiums associated with private health insurance. This is where the third leg of the PPACA enters into the picture. It consists of several measures intended to ensure insurance affordability. Changes in the tax code include tax credits for payment of insurance premiums[49] and the introduction of tax incentives for small businesses to acquire health insurance for their employees.[50] Furthermore, Medicaid eligibility is expanded and will now uniformly cover all citizens and legal residents with incomes below 133% of the federal poverty level.[51]
Having familiarized ourselves with the main elements of the health care reform, it is time to get acquainted with the American model of federalism.

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[45] 42 U.S.C. § 300gg.
[46] A number of categories of individuals are exempted from the mandate. See 26 U.S.C § 5000A(d)(2)-(4), (e).
[47] 26 U.S.C. § 5000. The mandate goes into effect in 2014.
[48] 42 U.S.C. § 18091(a)(2)(I).
[49] 26 U.S.C. § 36B.
[50] 26 U.S.C. § 45R.
[51] 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII).

3 Federalism as enumerated powers

As the challenges to the PPACA are grounded in federalism, this section will introduce and briefly describe relevant aspects of the American model of federalism.
Federalism can be defined as "[t]he legal relationship and distribution of power between the national and regional governments within a federal system of government".[52] The Supreme Court describes the task of "discerning the proper division of authority between the Federal Government and the States" as "perhaps our oldest question of constitutional law".[53] Indeed, federalism is an important feature of American constitutional law but one searches in vain for a *Federalism Clause* in the Constitution. Instead, "[f]ederalism, properly understood, is a descriptive term attached to the Constitution's allocations of powers."[54] The Constitution provides that "[a]ll legislative Powers […] shall be vested in a Congress of the United States".[55] The bulk of Congress' legislative authority is *enumerated* in article I, § 8 of the Constitution.[56] An implicit, but fundamental, principle "derived from the nature of the constitution itself"[57] is that *the federal government may act only if authorized by the Constitution*.[58] For that reason, the federal government is said to be a government "of enumerated powers".[59] The States, on the other hand, "are recognized as governments of unenumerated powers",[60] and are said to possess a general police power. The Tenth Amendment to the Constitution serves as an explicit reminder of the principle of enumerated powers:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

James Madison, commenting on the structure of the federal system, remarked that "[t]he powers delegated by the [...] Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."[61]

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[52] BLACK'S LAW DICTIONARY 687 (9th ed. 2009).
[53] New York v. United States, 505 U.S. 144, 149 (1992).
[54] Michael Stokes Paulsen, *A Government of Adequate Powers* 31 HARV. J. L. & PUB. POL'Y 991, 992 (2008).
[55] U.S. CONST. art I, § 1.
[56] *Nota bene*, other provisions of Constitution also vest powers in the Government, *see e.g.*, U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article").
[57] Gibbons v. Ogden, 22 U.S. 1, 34 (1824).
[58] *See, e.g.,* 16A Am. JUR. 2D *Constitutional Law* § 214 (2d ed. 2011) ("[T]he federal government has no power beyond what has been granted to it through the Constitution").
[59] Gibbons v. Ogden, 22 U.S. 1, 160 (1824).
[60] 16A Am. JUR. 2D *Constitutional Law* § 217 (2d ed. 2011).
[61] THE FEDERALIST No. 45, at. 292-293 (James Madison) (Clinton. Rossiter ed., 1961).

Whenever the federal government exercises one of its enumerated powers, the Supremacy Clause of the Constitution provides that the federal action displaces any contrary action taken by the states: federal law is "the supreme Law of the Land".[62] State laws inconsistent with federal law are thus said to be pre-empted.

In summary, Congress cannot regulate simply because it perceives a problem that needs to be solved. Instead, every federal law "whether reforming health care or building a new interstate highway, must be grounded in one of the specific grants of authority found in the Constitution."[63] The question before the courts, to be discussed in this thesis, is whether Congress remained within its enumerated powers in enacting the PPACA.

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[62] U.S. CONST. art. VI, § 2.

[63] David B. Rivkin, Jr., Lee A. Casey & Jack M. Balkin, *A Healthy Debate: The Constitutionality of an Individual Mandate*, 158 U. PA. L. REV. PENNUMBRA 93, 96 (2009) [hereinafter *A Healthy Debate*].

4 Relevant constitutional provisions and case law

In this section, the powers granted to Congress and other constitutional provisions pertinent to the analysis of the challenge to the PPACA are presented together with associated cases. Section 4.1 will introduce the Commerce Clause. The Necessary and Proper Clause will be discussed in Section 4.2. The Tenth Amendment to the Constitution is examined in Section 4.3. In interpreting the Constitution, the Supreme Court develops doctrines. This exposé of some central federalism cases illustrates how such doctrines function and how the jurisprudence of the Supreme Court has evolved over time.

4.1 The Commerce Clause

> In assessing the validity of congressional regulation, none of our Commerce Clause cases can be viewed in isolation.[64]

At the center of the PPACA litigation is the mere sixteen word long Commerce Clause, of which only seven words are relevant for the issue at hand. It gives Congress the power "[t]o regulate Commerce [...] among the several states".[65]

The foundational[66] Commerce Clause case is *Gibbons v. Ogden.* Beginning with this case and throughout the history of American constitutional law, the Supreme Court has struggled to find a way of determining the scope of Congressional authority to regulate under the Clause. The facts of the case were that Ogden had a monopoly, granted by the State of New York, on the navigation of steamboats in the waters of said State. Gibbons ran a competing service (a ferry navigating between New York City and Elizabethtown in New Jersey) licensed by the United States Congress in regulating interstate commerce.[67] Arguing that Gibbons violated his exclusive rights, Ogden successfully sought injunctive relief against Gibbons in state court.[68] Eventually the case came before the U.S. Supreme Court, which dismissed the injunction against Gibbons after finding the New York monopoly to be pre-empted by federal law. Ogden had argued that the federal government lacked the power to issue Gibbons a license to navigate the waters. In Ogden's view, the meaning of the word "commerce" in the Commerce Clause should be understood to mean "interchange of

[64] Gonzales v. Raich, 545 U.S. 1, 15 (2005).
[65] U.S. CONST. art I, § 8, cl. 3.
[66] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 239 (2d ed. 2002) ("To this day, Supreme Court cases concerning the commerce clause begin their analysis by considering Gibbons v. Ogden.") [hereinafter CHEMERINSKY].
[67] Gibbons v. Ogden, 22 U.S. 1, 2 (1824).
[68] *Id.,* at 2-3.

commodities", thus excluding navigation on the water.[69] The Court, however, responded: "The power of regulating commerce extends to the regulation of navigation" and further held that "[t]he power to regulate commerce is general, and has no limitations but such as are prescribed in the constitution itself."[70]

4.1.1 The rise of the direct-indirect distinction

It wasn't until the latter part of the nineteenth century that Congress began to enact laws pursuant to the Commerce Clause more frequently. One early piece of legislation was the Sherman Anti-Trust Act, passed in 1890 in an effort to curb far-reaching business concentrations that limited competition.
In *United States v. E.C. Knight Co.*[71], the sugar giant American Sugar Refining Company had sought to acquire four competing companies, giving the company control over 98% of the national sugar refinery industry.[72] The government sued under the Sherman Act to stop the acquisition. The Supreme Court however, ruled that the commerce power did not extend to the regulation of *manufacturing*: "Commerce succeeds to manufacturing, and is not a part of it".[73] In other words, because the monopoly was in the manufacture rather than commerce in sugar, it fell outside the scope of federal power. That trade or commerce might be indirectly affected was not enough to trigger Congress' commerce power.[74] Of import to our inquiry is that the Court made a sharp distinction between *commerce* and *manufacture*, where the latter is beyond the reach of Congress. Through this type of reasoning the Court eventually developed a doctrinal distinction between direct and indirect effects on interstate commerce.[75]
In response to the Great Depression that plagued the United States during the decade preceding World War II, a federal recovery plan known as the New Deal was introduced. Much of the New Deal legislation was adopted pursuant to Congress' commerce power. Initially the New Deal faced resistance from the federal bench.[76] Consider *A.L.A. Schechter Poultry Corp. v. United States*[77]. This case is one example of the Supreme Court striking down a key piece of New Deal legislation, the National Industrial Recovery Act[78], *inter alia* on the grounds that Congress had exceeded its powers under the Commerce Clause. One issue before the Court was whether maximum hour and wage regulations for employees of intrastate businesses were constitutional. The Court emphasized the distinction

[69] *See, e.g.*, CHEMERINSKY, *supra* note 66, at 240.
[70] Gibbons v. Ogden, 22 U.S. 1, 3 (1824).
[71] United States v. E. C. Knight Co., 156 U.S. 1 (1895).
[72] *See, id.,* at 3.
[73] *Id.,* at 12.
[74] *Id.,* at 17.
[75] CHEMERINSKY, *supra* note 66, at 245.
[76] This resistance led to a major constitutional crisis that was eventually resolved through the famous "shift in time that saved nine". The interested reader may consult BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT (1998).
[77] 295 U.S. 495.
[78] Officially "Act of June 16, 1933" (Ch. 90, 48 Stat. 195). It was codified at 15 U.S.C. § 703.

between direct and indirect effects on commerce: “[W]here the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of state power”.[79] The Court determined that labor conditions were a matter of local management that only indirectly affected interstate commerce.[80] Consequently, the regulations of fixed hours and wages for employees was found to be beyond the scope of the Commerce Clause. Indeed, the Court declared the direct-indirect distinction to be “essential to the maintenance of our constitutional system”.[81]

4.1.2 The substantial effects doctrine

The watershed case of *National Labor Relations Board v. Jones & Laughlin Steel Corporation*[82] spelled the end of federalism-based resistance towards New Deal legislation. The case concerned the constitutionality of the National Labor Relations Act[83], a law creating the right for employers to bargain collectively and prohibiting discrimination against unionized labor. Further, it vested the National Labor Relations Board with authority to enforce the law. The factual background in the case was that a steel company terminated ten workers after they had moved to organize. The National Labor Relations Board, pursuant to the National Labor Relations Act, ordered the company to rehire the workers. The company responded by challenging the constitutionality of the Act. It argued that labor relations were beyond the scope of the Commerce Clause, as the activity is local in nature. The Supreme Court disagreed:

> Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential, or appropriate, to protect that commerce from burdens and obstructions, Congress has the power to exercise that control.[84]

Thus, the Court disavowed *ALA Schechter Poultry’s* narrow reading of the Commerce Clause and rejected the categorical distinction between direct and indirect effects on interstate commerce.[85] Holding that “the question of Congress´s authority is necessarily one of degree”, the Court adopted what is known as the substantial effects doctrine.[86] In its current form, the doctrine provides that Congress may regulate economic activity, even if wholly intrastate, as long as the activity substantially affects interstate commerce.[87]

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[79] A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 546 (1935).
[80] *Id.,* at 549-50.
[81] *Id.,* at 548.
[82] 301 U.S. 1 (1937).
[83] Pub.L. 74-198, 49 Stat. 449.
[84] N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937).
[85] *See id., at* 36-37.
[86] *Id.,* at 36-38.
[87] *See, e.g*., Gonzales v. Raich, 545 U.S. 1, 25 (2005); United States v. Morrison, 529 U.S. at 610; United States v. Lopez, 514 U.S. at 560.

4.1.3 The aggregation doctrine

Wickard v. Filburne[88] is generally acknowledged to be the case that offers the widest powers to Congress under the Commerce Clause.[89] Here the court created the aggregation doctrine. The case concerned the constitutionality of a federal provision imposing a penalty on farmers that produced more wheat than they were permitted under the New Deal-era adjustments to the Agricultural Adjustment Act of 1938[90]. The plaintiff in the case was a farmer who was *not* going to sell his wheat on the interstate market, but rather, use it on his own farm. The Court nevertheless upheld the provision under the substantial effects doctrine. That the farmer's activity in itself was truly local and trivial was of no concern because the *aggregate* of such activities would affect interstate commerce.[91] The Court reasoned that the farmer, in producing and consuming his own wheat, reduced the amount of produced wheat bought and sold nationally, thereby affecting interstate commerce. Stated in general terms: under the aggregation theory, trivial instances of intrastate activity, that would not trigger the commerce power in isolation, come within Congressional reach if such activities cumulatively affect interstate commerce. Following Balkin, the aggregation doctrine holds:

> if the sum of certain activities is within Congress's powers to regulate – because, for example, it has sufficiently substantial effect on commerce – Congress can regulate each individual instance.[92]

In 1964 Congress enacted the Civil Rights Act[93], in an effort to curb the practice of racial discrimination in the South. Title II of the Act prohibits racial discrimination in public facilities. In *Katzenbach v. McClung*[94] the Supreme Court rejected a Commerce Clause challenge to the Act. The case involved a small restaurant in Alabama that refused to serve African American customers. The McClung family, owners of the restaurant in question, argued, *inter alia*, that the small size of the restaurant meant that it could hardly have an effect on interstate commerce. Declaring that the commerce power "is broad and sweeping"[95], the Court concluded that "refusals of service" based on racial discrimination cumulatively had an effect on interstate commerce.[96]

Significantly*, Katzenbach* (and its companion case *Heart of Atlanta Motel, Inc. v. United States*[97]) established that Congress had the authority under the Commerce Clause to force private businesses to abide by the Civil Rights

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[88] 317 U.S. 111 (1942).

[89] *See e.g*., Florida *ex rel.* Atty. Gen. v. U.S. Dept. of Health & Human Services, 648 F.3d 1235, 1291 (11th Cir. 2011) ("Wickard represents the zenith of Congress's powers under the Commerce Clause").

[90] Pub. L. No. 75-430, 52 Stat. 31.

[91] Wickard v. Filburn, 317 U.S. 111, 127-128 (1942).

[92] Balkin, *supra* note 23, at 43.

[93] Pub.L. 88-352, 78 Stat. 241.

[94] 379 U.S. 294 (1964).

[95] *Id.,* at 305.

[96] *Id.,* at 303.

[97] 379 U.S. 241 (1964).

Act. The cases also illustrates that the commerce clause jurisprudence (at the time) was very deferential to Congress. Indeed, according to Koppelman, there were practically no judicially imposed limits on Congressional legislative authority between the 1930s and the 1990s.[98]

4.1.4 The Rehnquist revolution and the economic-noneconomic dichotomy

> [Why would anyone] make the mistake of calling it the Commerce Clause instead of the Hey,you-can-do-whatever-you-feel-like Clause.[99]

Chemerinsky has suggested that "[w]hen historians look back at the Rehnquist Court, without a doubt they will say that its greatest changes in constitutional law were in the area of federalism".[100] Indeed, Chemerinsky speaks about a "Rehnquist revolution".[101] In the field of Commerce Clause jurisprudence *United States v. Lopez*[102], handed down in 1995, marked the beginning of this revolution. For the first time since 1936, the Court struck down a law on the basis that it exceeded the scope of Congress' powers under the Commerce Clause.[103] The Court made it clear that the commerce power is "not without effective bounds".[104] The case concerned the constitutionality of the Gun-Free School Zone Act of 1990, an act with the sole purpose of criminalizing possession of guns within 1,000 feet of a school. Faced with the challenged Act, Chief Justice Rehnquist reviewed the Commerce Clause precedents and noticed the following:

> [T]he pattern is clear. Where *economic* activity substantially affects interstate commerce, legislation regulating that activity will be sustained. Even *Wickard*, which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved *economic* activity in a way that the possession of a gun in a school zone does not.[105]

Seizing on the fact that all previous cases had involved regulation of some kind of economic activity, the Court moved to adopt a distinction between the regulation of *economic* and *non-economic* activities. Only the former activities would be permissible to regulate under the substantial effect and aggregation doctrines. Put another way, if the activity being regulated is determined to be economic, it can be aggregated to show substantial effects on interstate commerce while non-economic activity may

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[98] Andrew Koppelman, *Bad News for Mail Robbers: The Obvious Constitutionality of Health Care Reform*, 121 YALE L.J. ONLINE 1, 11 (2011).
[99] The Hon. Alex Kozinski, *Introduction to Volume Nineteen*, 19 HARV. J.L. & PUB. POL'Y 1, 5 (1995).
[100] Erwin Chemerinsky, *The Rehnquist Revolution*, 2 PIERCE L. REV. 1 (2004); William Rehnquist served as Chief Justice of the United States from 1986 until his death in 2005.
[101] *Id.*
[102] 514 U.S. 549 (1995).
[103] *See, e.g.,* Jonathan L. Entin, *Introduction*, 46 CASE W. RES. L. REV. 635, 636 (1996).
[104] United States v. Lopez, 514 U.S. 549, 557 (1995).
[105] *Id.,* at 560 (emphasis added).

not be thus aggregated.[106] In his dissenting opinion, Justice Breyer defended the challenged law, making the argument that possession of guns in schools had adverse effect on classroom learning, which in turn is detrimental to interstate commerce in the aggregate, thus triggering the commerce power.[107] To this argument, the majority responded: "[I]f we were to accept [such] arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate."[108] The majority found the link between gun possession in schools and national productivity to be too attenuated and concluded that the activity of carrying a gun to school was a non-economic activity and as such, non-regulable under the Commerce Clause.[109] The economic-noneconomic distinction, accordingly, can be understood "as a proxy to distinguish between activities that substantially affect interstate commerce and those that do not".[110]
Lopez was followed by *United States v. Morrison*[111], where the Supreme Court re-emphasized the distinction between economic and non-economic activity in holding that a law creating a federal cause of action for victims of gender-motivated crimes was unconstitutional under the substantial effects doctrine, with the reasoning that gender-motivated crimes are non-economic activities. The principal reason for striking down the laws at issue in *Lopez* and *Morrison* was to defend the States against federal encroachment, and the Court declared: "the Constitution recognizes a distinction between what is truly national and what is truly local".[112]

4.1.5 Gonzales v. Raich

In 2005, ten years after *Lopez* was handed down, came the decision in *Gonzales v. Raich*[113], which arguably saw the Court return to a more expansive interpretation of the commerce power. Petitioner Angel Raich lived in California and used locally produced marijuana for medical purposes in her home. Her activity was legal under State law but criminalized under the federal Controlled Substances Act (CSA)[114]. As we have seen, a State law contradicting federal law is preempted. However, Raich sought to enjoin the Government from enforcing the prohibition against her under a theory that "the CSA's categorical prohibition […] of marijuana as applied to the intrastate manufacture and possession of marijuana for medical purposes pursuant to California law exceeds

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[106] *See. e.g.*, David W. Scopp, *Commerce Clause Challenges to the Endangered Species Act: The Rehnquist Court's Web of Confusion Traps More Than the Fly*, 39 U.S.F. L. REV. 789, 802 (2005).
[107] *See* United States v. Lopez, 514 U.S. 549, 623-624 (1995).
[108] *Id.,* at 564.
[109] *Id.,* at 567.
[110] Scopp, *supra* note 106, at 802.
[111] 529 U.S. 598 (2000).
[112] United States v. Lopez 514 U.S. at 567-568; Gonzales v. Raich 529 U.S., at 617-618. When referring to Lopez throughout this thesis, both *Lopez* and *Morrison* are generally implicated.
[113] 545 U.S. 1 (2005).
[114] 21 U.S.C. § 801 *et seq*.

Congress' authority under the Commerce Clause".[115]
In rejecting her petition, the Court held that the precedents "firmly establishes Congress' power to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce."[116] The Court emphasized the similarities between the case before them and *Wickard.* In both cases, "the regulation is squarely within Congress' commerce power because production of the commodity meant for home consumption, be it wheat or marijuana, has a substantial effect on supply and demand in the national market for that commodity."[117]
While allowing the federal government to regulate the seemingly non-economic activity of consuming homegrown marijuana, the Court did *not* overrule *Lopez* and its distinction between economic and noneconomic activities. Instead, Justice Stevens, writing for the majority, used a dictionary definition of "economics" that defined the word as "the production, distribution, and consumption of commodities."[118] In contrast to the activities regulated in *Lopez* (i.e. gun possession in schools), the Court concluded: "The activities regulated by the CSA are quintessentially economic."[119] This way, the Court managed to square its holding with the economic-noneconomic distinction.

4.1.6 The larger regulatory scheme doctrine

Justice Scalia wrote a concurring opinion in *Gonzales* suggesting that Congress "may regulate even non-economic local activity if that regulation is a necessary part of a more general regulation of interstate commerce."[120]
What Justice Scalia is referring to is known in the literature as the larger regulatory scheme doctrine. A doctrine of recent vintage, it was first articulated, but not applied, in *Lopez* where the Court suggested that Congress is allowed to regulate activity that is "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated".[121] The doctrine was mentioned again in *Raich,* not only in the concurring opinion by Justice Scalia, but also by the majority.[122] In an opinion issued in the PPACA litigation, Judge Martin offers the following description of the doctrine: "where Congress comprehensively regulates interstate economic activity, it may regulate non-economic intrastate activity if [...] in the aggregate, the failure to do so would undermine the effectiveness of the overlying regulatory scheme".[123]

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[115] Gonzales v. Raich, 545 U.S. 1, 15 (2005).
[116] *Id.,* at 17.
[117] *Id.,* at 18–19.
[118] *Id.,* at 25–26 (quoting WEBSTER'S THIRD NEW INT'L DICTIONARY 720 (1966).
[119] *Id.,* at 25.
[120] Gonzales v. Raich, 545 U.S. 1, 37 (2005) (Scalia, J., concurring).
[121] *See* United States v. Lopez, 514 U.S. 549, 561 (1995).
[122] Gonzales v. Raich, 545 U.S. 1, 24-25 (2005).
[123] Thomas More Law Ctr. v. Obama, 651 F.3d 529, 545-46 (6th Cir. 2011) (Martin, J., concurring).

Confusingly, there is disagreement as to whether the larger regulatory scheme doctrine is a pure Commerce Clause doctrine. According to Justice Scalia, Congressional power to legislate pursuant to the larger regulatory scheme doctrine does not "come from the Commerce Clause alone [… but is derived] from the Necessary and Proper Clause."[124] Thus, we now turn to this Clause.

4.2 The Necessary and Proper Clause

The list of powers granted to Congress by the Constitution in Article I, § 8 ends with the Necessary and Proper Clause. The clause empowers Congress "[t]o 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 [...]". The Clause thus "empowers Congress to enact laws […] that are not within its authority to enact in isolation".[125] Hence, assuming that Congress is seeking to exercise a certain enumerated power, the Necessary and Proper Clause becomes important as an instrument for deciding whether the *means* utilized are constitutionally sound.[126]

In one of the most significant constitutional law cases, *McCulloch v. Maryland*[127], a central question before the Supreme Court was whether Congress acted within its authority when it chartered a federal bank. The Court did not find the power to incorporate a bank "among the enumerated powers of Government [but did] find the great powers, to lay and collect taxes [and] to borrow money".[128] Furthermore the Court observed that, to the enumeration of powers "is added [the Necessary and Proper Clause]".[129] Could the bank be saved by this Clause? Put another way, could the chartering of the bank be considered a necessary and proper means of executing the enumerated power to collect taxes and borrow money? In answering this question, the Court would devote much attention as to how the word *necessary* should be interpreted. That the bank is "a convenient, a useful, and essential instrument in the prosecution of [the Governments'] fiscal operations is not now a subject of controversy", the Court

[124] Gonzales v. Raich, 545 U.S. 1, 34 (2005) (Scalia, J., concurring).; *see also* Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate Is Unconstitutional*, 5 NYU J.L. & LIBERTY 581, 587-89 (2010) (discussing "Law Professors' Understanding" of the relevant doctrine).

[125] Gonzales v. Raich, 545 U.S. 1, 39 (2005) (Scalia, J., concurring).

[126] An often recited formula as to when congressional action is allowed under the Necessary and Proper Clause is: "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are Constitutional." McCulloch v. Md., 17 U.S. 316, 421 (1819); *see also* United States v. Comstock, 130 S. Ct. 1949, 1956 (2010) ("in determining whether the Necessary and Proper Clause grants Congress the legislative authority to enact a particular federal statute, we look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power").

[127] McCulloch v. Md., 17 U.S. 316 (1819).

[128] *Id.* at, 407.

[129] *Id.* at, 411.

determined.[130] But does the fact that a means is *convenient* and *useful* suffice to make it *necessary*? Or, should *necessary* be interpreted as signifying "absolutely necessary"[131], or even "indispensable"[132] (neither of which the bank could be considered to be)? The latter alternative was rejected and the more expansive interpretation of the word *necessary* chosen. To justify why a broad interpretation is more reasonable, the Court, *inter alia*, used the example of how the criminalization of mail-robbery is a necessary means of executing another enumerated power, the power "to establish post-offices and post-roads"[133]:

> This power is executed by the single act of making the establishment [of a post office]. But from this has been inferred the power and duty of carrying the mail along the post road from one post office to another. And from this implied power has again been inferred the right to punish those who steal letters from the post office, or rob the mail. It may be said with some plausibility that the right to carry the mail, and to punish those who rob it, is not indispensably necessary to the establishment of a post office and post road. This right is indeed essential to the beneficial exercise of the power, but not indispensably necessary to its existence.[134]

Normally, the Supreme Court has treated the expression *necessary and proper* as a single construct. In other words, the Court usually does not engage in two separate inquires, first into whether a challenged legislative product is *necessary* and second whether it is *proper*.[135] The exception is that if an otherwise necessary law should violate a constitutional norm, it is nonetheless improper and thus unconstitutional.[136] What could, hypothetically, render a means *improper* under the Necessary and Proper Clause? According to Hall, "[a] law abridging the freedom of speech [or] imposing a cruel or unusual punishment [...,] although rarely explicitly stated in terms of this language, would be improper."[137] The impropriety of such a law would be due to violations of express provisions of the Constitution.[138] But the violation does not have to be related to an explicit constitutional provision; a transgression of a well-developed constitutional principle, such as the separation-of-powers, can also render a law *improper*.[139]

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[130] *Id*. at, 422.
[131] *Id*. at, 415.
[132] *Id*. at, 413.
[133] U.S. CONST. art. I, § 8, cl. 7.
[134] McCulloch v. Md., 17 U.S. 316, 417 (1819).
[135] *See* Mark A. Hall, *Commerce Clause Challenges to Health Care Reform*, 159 U. PA. L. REV. 1825, 1854 (2011).
[136] *Id.,* at 1853; *see also* Barnett, *supra* note 124, at 590-593.
[137] Hall, *supra* note 135, at 1853 (citing Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 323 (1993).
[138] Specifically, this hypothetical law would violate the First and Eight Amendment, respectively.
[139] Hall, *supra* note 135, at 1853; *see also* Balkin, *supra* note 23, at 60 ("The word 'proper' is equally important to understanding the scope of the Necessary and Proper Clause. A regulation is 'proper' if it is consistent with the Constitution, including its underlying structural principles").

Lastly, the Tenth Amendment is of importance to understand the challenge to the PPACA; let us therefore return to this amendment.

4.3 The Tenth Amendment and the anti-commandeering doctrine

Recall that the Tenth Amendment reads:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The Supreme Court has "shifted between two different approaches" in interpreting this Amendment.[140] During the New Deal era, the Court simply viewed the amendment as a reminder that the federal government is one of enumerated powers.[141] However, just as the Rehnquist revolution imposed new limitations on the commerce power in *Lopez*, it also engaged in a reinterpretation of the Tenth Amendment.
In *New York v. United States*[142], the Supreme Court "for only the second time in 55 years […] invalidated a federal law as violating the Tenth Amendment".[143] At issue was the constitutionality of the Low-Level Radioactive Waste Policy Amendments Act[144], enacted by Congress in 1985. The Act created a duty for the several States to enact legislation providing for the disposal of radioactive waste. To ensure that the States would take action, one provision established that should a State fail to provide for the disposal, that State itself would have to take title to the waste. The Court held that the substantial effect doctrine allowed for the regulation of radioactive waste disposal. The *take title* provision, however, was determined so coercive that the state legislature would have no real choice but abide by Congress' will, "an outcome that has never been understood to lie within the authority conferred upon Congress by the Constitution."[145] The Court thus announced the anti-commandeering doctrine:

> Congress may not simply 'commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'[146]

New York was reaffirmed, and the anti-commandeering doctrine further developed, in *Printz v. United States*.[147] The issue before the Court was

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[140] CHEMERINSKY, *supra* note 66, at 304.
[141] *See, e.g*., United States v. Darby Lumber Co., 312 U.S. 100, 124 (1941) ("The Amendment states but a truism that all is retained which has not been surrendered").
[142] New York v. United States, 505 U.S. 144 (1992).
[143] CHEMERINSKY, *supra* note 66, at 315.
[144] Pub. L. No. 99-240, 99 Stat. 1842 (1986).
[145] New York v. United States, 505 U.S. 144, 176 (1992).
[146] *Id.,* at 161 (citing Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264, 288 (1981).
[147] Printz v. United States, 521 U.S. 898, 912 (1997).

whether a federal law, the Brady Handgun Violence Prevention Act[148], was unconstitutional in requiring *State* law enforcers to conduct background checks on handgun buyers. Holding that Congress lacked the power to directly mandate state officials to act, *Printz* extends the anti-commandeering doctrine "to the executive branch of state government as well as the state's legislature".[149] According to the Court, "such commands are fundamentally incompatible with our constitutional system".[150]

With some knowledge of the legal context in which the PPACA is challenged, we are now ready to confront the arguments made in the litigation.

[148] Pub. L. No. 103-159.

[149] Matthew D. Adler, *State Sovereignty and the Anti-Commandeering Cases*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 158, 163 (2001).

[150] Printz v. United States, 521 U.S. 898, 935 (1997).

5 The constitutional challenge to the individual mandate

In the ongoing litigation and amongst legal academics, the individual mandate has been defended and, conversely, challenged both under the substantial effect and larger regulatory scheme doctrines. The most prominent arguments in both contexts will be presented and analyzed.
The Chapter is structured as follows. In Section 5.1 the Government's argument for why the individual mandate is constitutional under the substantial effects doctrine will be presented. Section 5.2 will analyze an argument put forward by plaintiffs – that the individual mandate is an unconstitutional regulation of inactivity. The government is also defending the individual mandate as an essential part of a larger regulatory scheme and/or as a Necessary and Proper means of regulating interstate commerce; these arguments are described in Section 5.3. Arguments put forward by opponents of the individual mandate in response to this defense will be analyzed in Section 5.4.
At the outset, it should be noted that all arguments to the effect that the individual mandate is unconstitutional begin with the observation that the mandate is unlike all prior laws adopted pursuant to the Commerce Clause. Judge Vinson describes the mandate as a "novel" and "unprecedented" exercise of the commerce power.[151] According to the Congressional Research Service, it is indeed "a novel issue whether Congress may use the [commerce] clause to require an individual to purchase a good or a service"[152]. Circuit courts that have reached the merits of the challenges to the mandate agree that the individual mandate is without precedent.[153]

5.1 The individual mandate under the substantial effects doctrine

The first challenge to be discussed is whether the individual mandate is permissible under the substantial effects doctrine. Let us turn to the government's argument.
As we have seen, Congress can regulate activity that substantially affects interstate commerce.[154] What the individual mandate regulates is the decision to buy or not to buy health insurance. According to the Government, this decision is an economic decision that, in the aggregate,

[151] Florida *ex rel.* Bondi v. U.S. Dept. of Health & Human Services, 780 F. Supp. 2d 1256, 1284 (N.D. Fla. 2011) (internal citations and quotations omitted).
[152] CONGRESSIONAL RESEARCH SERVICE, REQUIRING INDIVIDUALS TO OBTAIN HEALTH INSURANCE: A CONSTITUTIONAL ANALYSIS 8–9 (Oct. 15, 2010).
[153] *See e.g.*, Thomas More Law Ctr. v. Obama, 651 F.3d 529, 558 (6th Cir. 2011) and Florida *ex rel.* Atty. Gen. v. U.S. Dept. of Health & Human Services, 648 F.3d 1235, 1289 (11th Cir. 2011).
[154] *See e.g.,* Wickard v. Filburn, 317 U.S. 111, 118-29 (1942).

substantially affects interstate commerce in several ways.[155] As pointed out in the discussion on the dynamics of the health insurance market, individuals that do not have insurance nonetheless continue to receive health care. According to Congress, the cost of this uncompensated care amounted to $43 billion in 2008.[156] Empirical evidence shows that other participants in the health care market are paying most of these costs, a phenomenon known as cost-shifting. For example, it is estimated that hospitals ultimately collect only 10% of the costs of the care they provide uninsured persons. The federal government covers some of the remaining cost through subsidies. The rest, however, falls on health care providers that in turn pass it on to the insurance companies. Eventually, the cost inflates the premiums charged by insurance companies by an average of over $1,000 a year per family.[157] As premiums increase due to cost-shifting, adverse selection problems are exacerbated as more healthy people decide to postpone obtaining coverage until they are older and anticipate needing more care. This in turn narrows the risk pool and, consequently, the premiums rise even further. A "self-reinforcing premium spiral" is at play (that affects interstate commerce in a negative way).[158] Thus the structure of the health care system, by allowing uninsured persons to *free ride* on taxpayers and insured persons, explains why, in the aggregate, a decision not to purchase insurance actually has an effect on interstate commerce.[159]

Furthermore, by definition, the cost of health care incurred by uninsured individuals that is *not* shifted onto others falls on the uninsured themselves. Indeed, 62% of all personal bankruptcies can be traced to unexpected medical expenses.[160] These bankruptcies, in the aggregate, have a negative effect on the national economy.

Lastly, recall that many people rely on employer-sponsored health coverage. This fact, in combination with uncertainty in maintaining coverage (due to the practice of medical underwriting) can lead people with bad health to stay with an employer they would otherwise leave, just in order to maintain health benefits. This phenomenon is called "job lock" and causes inflexibility in the labor market to the detriment of interstate commerce.[161]

For these reasons, the government asserts that the individual mandate is justified under the substantial effects doctrine.[162]

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[155] *See e.g.,* Memorandum in Support Of Defendant's Motion For Summary Judgment at 8-9, Virginia *ex rel.* Cuccinelli v. Sebelius, 728 F. Supp. 2d 768 (E.D. Va. 2010) (3:10-cv-188).

[156] 42 U.S.C. § 18091(a)(2)(F).

[157] 42 U.S.C. § 18091(a)(2)(F).

[158] Memorandum in Support Of Defendant's Motion For Summary Judgment at 10-11, Virginia *ex rel.* Cuccinelli v. Sebelius, 728 F. Supp. 2d 768 (E.D. Va. 2010) (3:10-cv-188) (internal citations omitted).

[159] *See e.g., id.,* at 32-3.

[160] 42 U.S.C. § 18091(a)(2)(G).

[161] *See e.g.,* Memorandum in Support Of Defendant's Motion For Summary Judgment at 8, Virginia *ex rel.* Cuccinelli v. Sebelius, 728 F. Supp. 2d 768 (E.D. Va. 2010) (3:10-cv-188).

[162] *See e.g., id.,* at 8-11.

5.2 The activity-inactivity distinction

Important to the argument *against* the individual mandate is the notion that there is a doctrinal distinction to be made between regulating *activity* and *inactivity.* According to plaintiffs, the individual mandate provision of the PPACA, in requiring uninsured persons to buy insurance, represents a regulation of inactivity:

> the Act seeks to reach not just economic activity, but mere existence and inactivity. Thus, the Act seeks to mandate that Petitioners cease their inactivity, and it further designs a penalty scheme to deprive Petitioners of their liberty to choose *not* to engage in a private commercial transaction.[163]

The plaintiffs put forward that while Congress can regulate economic *activity* under the Commerce Clause, it cannot regulate *inactivity*. This assertion will be referred to as "the activity-inactivity distinction" throughout this thesis. Their contention is based on a reading of *Lopez*. As we have seen, that case signaled that the Supreme Court was serious about providing justiciable limits on Congressional power. Because the limitation on the substantial effects doctrine proclaimed in that case is that Congress's power, at most, extends to regulating only certain economic activities then, *a fortiori*, Congress has no power to regulate inactivity.[164] Put another way, since the substantial effects doctrine at most allow regulation of *economic activity* then, by definition, regulation of inactivity cannot be permissible.
An alternative interpretation of the plaintiffs' contention is to understand it as a strictly textual argument, where the text of relevant precedents is read to imply that some sort of *activity* is a "prerequisite to valid congressional regulation under the commerce power":[165]

> every single other Commerce Clause decision since this Nation's founding unanimously and explicitly hold that congressional power under this clause is strictly and absolutely limited to some kind of affirmative behavior or activity[166]

In the on-going litigation, one plaintiff made the argument that under the substantial effects doctrine, "the operative word is 'activities.' And, of

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[163] Petition for Writ of Certiorari, Thomas More Law Center v. Obama, 2011 WL 3136668 at *22 (No. 11-117); *see also*, *A healthy debate, supra* note 63, at 99 (arguing that "the health care mandate would not regulate any 'activity' at all. Rather, it features an affirmative federal command that parties engage in a particular commercial activity—i.e., a purchase of insurance. It is imposed not because an individual engaged in any particular profession or employment, even so much as growing pot in the bathroom. This regulation would apply to every American simply because they exist").
[164] *See A healthy debate, supra* note *63*, at 98-99; *see also,* Petition for Writ of Certiorari, Thomas More Law Center v. Obama, 2011 WL 3136668 at *19 (No. 11-117). ("The activity must be economic. But this means, at the very least, that there must be some activity to apply the Commerce Clause analysis").
[165] Florida *ex rel.* Atty. Gen. v. U.S. Dept. of Health & Human Services, 648 F.3d 1235, 1285 (11th Cir. 2011).
[166] Petition for Writ of Certiorari, Thomas More Law Center v. Obama, 2011 WL 3136668 at *19 (No. 11-117).

course, the status of being uninsured is inactivity; the opposite of activity."[167]

Thus, by urging the courts to recognize a distinction between activity and inactivity, plaintiffs deny that the substantial effects doctrine, following the limitation introduced in *Lopez,* can justify the individual mandate. In a system of government where the judiciary is policing the division of powers between the federal and State level, clear justiciable limits on federal legislative power does carry some appeal. A categorical distinction between the regulation of activity and inactivity makes common sense and, at first glance, seems to be a discernible line separating permissible from impermissible exercises of congressional authority.[168] Opponents of the individual mandate suggest that a review of Commerce Clause precedents would reveal that all laws upheld by the Supreme Court over the years has involved regulation of *activity*. Hence, the activity-inactivity distinction could be adopted by "looking back" at what the precedents have in common; much like the Rehnquist court did when it adopted the economic - noneconomic dichotomy in *Lopez*.[169] Is there anything to this suggestion? How does the distinction fare when confronted with precedents that have been put forward by the government in support of the constitutionality of the PPACA? Do these cases support the activity-inactivity distinction? Further, is the distinction consistent with the constitutional text? Also, does the individual mandate really seek to regulate inactivity? As a methodological matter, would the activity-inactivity dichotomy be a useful tool when it comes to judicial review? These questions will be discussed in turn.

Because the claim that *activity* is a prerequisite for congressional legislative authority under the Commerce Clause is based on a reading of *Lopez*, closer scrutiny of this opinion is called for. Therefore, let us begin with the question as to whether the *text* of the *Lopez* opinion supports an activity requirement.

5.2.1 *Lopez* as a basis for the activity-inactivity distinction

Contrary to what some plaintiffs claim, there is no Supreme Court case that *explicitly* holds that Congress cannot regulate inactivity.[170] What the

[167] Plaintiff's Memorandum in Opposition to the Secretary's Motion for Summary Judgment, Virginia *ex rel*. Cuccinelli v. Sebelius, 728 F. Supp. 2d 768 (E.D. Va. 2010) (3:10-cv-188).

[168] *See* Hall*, supra* note 132, at 1836 ("Drawing a line at inaction or nonpurchase is one possible limit. An advantage of this line might be simply its discernability.").

[169] *See, e.g*., Barnett, *supra* note 124, at 620 (arguing that the Rehnquist court "discovered" the economic-noneconomic distinction "by looking back to all previous substantial effects cases to notice a commonality among them").

[170] Hall, *supra* note 135, at 1831 ("the Court has never articulated, or even suggested, that inactivity is somehow foreclosed from general congressional authority over economic matters that relate to interstate commerce").; *see also* Peter J. Smith, *Federalism, Lochner, and the Individual Mandate*, 91 B.U. L. REV. 1723, 1730 (2011) ("the Court has never held that Congress lacks power under Article I to regulate 'inactivity'").

Rehnquist court emphasized is that only *economic activity* may be aggregated to show substantial effect on interstate commerce. Recall the following critical passage in *Lopez*: "Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained."[171] Reading that sentence *a contrario,* we conclude that legislation regulating *noneconomic activity* will not be sustained under the substantial effects doctrine. Plaintiffs in the PPACA litigation would, from that sentence (and similar wordings in other cases), further infer that regulation of *inactivity* too is excluded from the commerce power. A more reasonable reading, however, is that the word *activity* in *Lopez* was not used as an antonym for *inactivity*, but simply as a synonym for *conduct*.[172] The opposite conduct, i.e. that which is not regulable under *Lopez*, is not *economic inactivity* but *noneconomic activity*. The word of import in the passage is *economic* and not *activity*.[173]
Closer scrutiny of *Lopez* thus reveals that the proposed distinction between activity and inactivity lacks a convincing foundation in the text of the *Lopez* opinion. Notwithstanding its basis in a questionable reading of *Lopez,* let us now turn to precedents that have been put forward by the government in support of the constitutionality of the PPACA and see if these support the activity-inactivity distinction.

5.2.2 The activity-inactivity distinction and Supreme Court precedents

In *Katzenbach,* the prohibition against racial discrimination in private establishments was *unsuccessfully* challenged as beyond the scope of the commerce power. [174] It can be argued that the petitioners in *Katzenbach,* in failing to serve African American customers, were *inactive* and that the restaurant, thus, was mandated by federal law to cease its *inactivity*. Viewed this way, Congress was regulating the *inactivity* of not selling goods to African Americans. Indeed, *Katzenbach* seems to constitute an obstacle to recognizing an activity-inactivity distinction within the context of substantial effects doctrine.[175] The opponents of the individual mandate seek to distinguish *Katzenbach* from the instant situation on the ground that petitioners in *Katzenbach,* by running a restaurant had chosen to engage in

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[171] United States v. Lopez, 514 U.S. 549, 560 (1995).
[172] *See* Hall, *supra* note 135, at 1831 (arguing that the word *activity* appears in the opinions only because activity was what Congress actually regulated).
[173] Read this way, *Lopez* does not pose a problem for the individual mandate because "[t]he passivity of decisions not to purchase does not rob them of their inherently economic nature". Hall, *supra* note 135, at 1838.
[174] *See also* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (holding that Congress had the power under Commerce Clause to enact provisions of Civil Rights Act of 1964 precluding discrimination in public accommodations).
[175] Similarly, recall the situation in *National Labor Relations Board v. Jones & Laughlin* where the Court upheld Congress's power to prohibit the firing of workers seeking to unionize. While it is possible to say that the case involved the regulation activity (firing workers), to fire workers can as easily be described as inactivity (failing to continue their employment).

economic activity that, due to its effect on interstate commerce, Congress could regulate.[176] Petitioners in *Katzenbach* could, at any time, opt out of the restaurant market and thereby place themselves beyond the reach of Congress. The individual mandate, on the other hand, is different in that it does not require anything more than residency to become applicable. Under the PPACA, Congress regulates persons that are outside the interstate market. Consequently, there is nothing an individual can do to escape the mandate to buy insurance. Thus, the challengers seek to defend the activity-inactivity distinction by defining *activity* as being active in a certain interstate market at the point in time when the federal regulation is first introduced.

Perhaps the most important precedents put forward by the Government to justify the individual mandate as an apt exercise of the commerce power are *Raich* and *Wickard*. Unlike the situation in *Katzenbach*, the plaintiffs in *Raich* and *Wickard* never entered a market (for marijuana and wheat, respectively). Both cases involved growing crops at home for private consumption, "yet Congress regulated them nonetheless".[177] The suggested interpretation of *activity* to denote *activity in interstate market* is therefore hard to square with *Raich* and *Wickard*. To escape *Raich* and *Wickard,* plaintiffs in the PPACA litigation turn to another way of parsing the activity-inactivity distinction. Now they emphasize the *voluntarily* aspect of the conduct involved. The opinion of Judge Hudson is illustrative as it suggests that petitioners in *Raich* and *Wickard*

> made a conscious decision to grow wheat or cultivate marijuana […] Conversely, the [individual mandate] compels an unwilling person to perform an involuntary act and, as a result, submit to Commerce Clause regulation.[178]

Arguably, the challengers successfully manage to distinguish the situation in *Raich* and *Wickard* from the instant situation. Notice, however, that in order to keep the activity-inactivity distinction consistent with controlling cases, opponents of the individual mandate are forced to add exceptions to the distinction, such as accepting that congressional authority in fact *does* reach inactivity, provided that the person being regulated is engaged in a market that is being regulated (the situation *Katzenbach*). In a situation where a person has decided not to enter the interstate market however, it seems that the commerce power would only reach *voluntary* activity (i.e. the situation in *Wichard* and *Raich*). Thus, the activity-inactivity distinction appears less and less as the bright line rule that made it attractive in the first place and, furthermore, the claim that the distinction could be adopted by looking back at Commerce Clause precedents is unpersuasive.

Let us continue by analyzing the distinction in relation to the actual text of the Constitution.

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[176] *See e.g.,* Petition for Writ of Certiorari, Thomas More Law Center v. Obama, 2011 WL 3136668 at *19-23 (No. 11-117).

[177] Thomas More Law Ctr. v. Obama, 651 F.3d 529, 562 (6th Cir. 2011).

[178] Virginia *ex rel*. Cuccinelli v. Sebelius, 728 F. Supp. 2d 768, 779 (E.D. Va. 2010).

5.2.3 The distinction's consistency with the text of the Constitution

The aptness of a distinction between regulating activity and inactivity in Commerce Clause jurisprudence can, to some degree, be measured against its consistency with the constitutional text. In this regard, a comparison of the textual basis of the activity-inactivity dichotomy and the most recently adopted Commerce Clause dichotomy, the distinction between economic and non-economic activity is helpful. The word "commerce" in the Commerce Clause lends some support to the economic-noneconomic distinction, since "commerce" relates to economic practices. The argument that commerce power ought be limited to such practices follows reasonably.[179] We have mentioned that the economic-noneconomic distinction can be justified as a proxy for helping courts to distinguish conduct that typically relates to commerce from such conduct that does not. As to the activity-inactivity distinction, however, it is less evident that the power to "regulate […] Commerce" inescapably must be triggered by some sort of *activity*. After all, "there is no 'activity' clause in the constitution".[180] Nevertheless, in the PPACA litigation it is argued that "the non-purchase of health insurance is not 'commerce,' and the mandate is not 'regulating' commerce." As one plaintiff suggests: "[I]nactivity is the *absence* of [commerce]"[181]

In analyzing the original meaning of the Commerce Clause, Judge Silberman makes use of dictionaries from 1800th century and finds that

> [a]t the time the Constitution was fashioned, to 'regulate' meant, as it does now, '[t]o adjust by rule or method,' as well as '[t]o direct.' To 'direct,' in turn, included '[t]o prescribe certain measure[s]; to mark out a certain course,' and '[t]o order; to command.' In other words, to 'regulate' can mean to require action, and nothing in the definition appears to limit that power only to those already active in relation to an interstate market. Nor was the term 'commerce' limited to only existing commerce.[182]

Judge Silberman concludes that there is "no textual support for" the activity - inactivity distinction.[183]

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[179] *See* Smith, *supra* note 170, at 1739 ("there is an obvious textual argument that Congress's power under the Commerce Clause ought to be limited to commercial matters").

[180] Memorandum in Support of Defendants' Motion For Summary Judgment, Florida *ex rel.* Bondi v. U.S. Dept. of Health & Human Services, 780 F. Supp. 2d 1256, 1297 (N.D. Fla. 2011), 2010 WL 4564357 at *31 (No. 3:10-91).

[181] Brief for Private Plaintiffs-Appellees, at 15, Florida *ex rel.* Atty. Gen. v. U.S. Dept. of Health & Human Services, 648 F.3d 1235 (11th Cir. 2011) (No. 11-11021).

[182] Seven-Sky v. Holder, 2011 WL 5378319, at *12 (C.A.D.C).

[183] *Id.* (internal citations omitted); *see also* Hall, *supra* note 135, at 1834 (arguing that the text of the Commerce Clause "does not say that action must precede federal intervention, only that federal power may be used to regulate something that can be called commerce").

5.2.4 Does the individual mandate really regulate inactivity?

> [T]he Constitutionality of the individual mandate will turn on whether the failure to buy health insurance is "activity".[184]

So far we have discussed whether or not the activity-inactivity distinction *is* of constitutional relevance. Assuming that it is, the question as to whether the individual mandate falls on the inactivity side of the distinction still remains. Indeed, one way to argue for the constitutionality of the individual mandate is to simply accept, *arguendo*, that activity *is* of constitutional relevance but to reject the suggestion that the individual mandate necessarily must be characterized as seeking to regulate inactivity.

The starting point for this defense is to accept that the characterization of behavior as either activity or inactivity is context-dependent. Recognizing that almost all persons at some point in life requires health care, Judge Sutton situates the individual mandate in the context of how an individual decides to manage the (often high and unexpected) costs of health care. In this context, the choice to buy or not buy health insurance simply represents two different strategies of managing financial risk. Judge Sutton goes on to argue that, when it comes to risk management, staying temporarily inactive is a strategy: "inaction *is* action, sometimes for better, sometimes for worse, when it comes to financial risk".[185] He concludes that the decision not to purchase health insurance is a decision to self-insure.[186] Framed this way, the individual mandate does not regulate inactivity and the activity-inactivity distinction becomes irrelevant for the purpose of determining the constitutionality of the PPACA.

Another similar way of parsing the conceptual question as to whether the mandate regulates activity or inactivity, again put against the context that virtually everyone at some point in life seeks health care,[187] is to regard "the *future activity* of obtaining healthcare […] by requiring individuals to make arrangements in advance to ensure an ability to pay for it"[188] as the object being regulated. If we accept that the individual mandate regulates (future) activity, then *Wickard* and *Raich* appear analogous to the case at hand.[189] In the same way as home-grown marijuana and wheat could be

[184] Florida *ex rel*. Bondi v. U.S. Dept. of Health & Human Services, 780 F. Supp. 2d 1256, 1287 (N.D. Fla. 2011).

[185] Thomas More Law Ctr. v. Obama, 651 F.3d 529, 561 (6th Cir. 2011).

[186] *See id*. Opponents of the individual mandate are not persuaded by arguments like the one presented by Judge Sutton. They insist that "previous Commerce Clause cases have all involved physical activity, as opposed to mental activity, i.e., decision-making". Brief Amicus Curiae of the Cato Institute Supporting Plaintiffs-Appellees and Affirmance, Florida *ex rel*. Atty. Gen. v. U.S. Dept. of Health & Human Services, 648 F.3d 1235 (11th Cir. 2011), 2011 WL 2530509 at *3 (Nos. 11-11021, 11-11067).

[187] *See e.g.*, Smith, *supra* note 170, at 1723 (arguing that health care is "essentially inevitable for all of us").

[188] *Id*. (emphasis added).

[189] *But see* Florida *ex rel*. Atty. Gen. v. U.S. Dept. of Health & Human Services, 648 F.3d 1235, 1294 (11th Cir. 2011) ("prior Commerce Clause cases all deal with already-existing

aggregated with crops in interstate commerce to show effects on interstate commerce, so too can paying for health care out-of-pocket be aggregated with health insurance, thus validating the individual mandate under the aggregation doctrine.

Looking at the situation through the prism of aggregation doctrine, Hall points to a weakness in the attempts to describe the individual mandate as regulating *activity* (described above). In his view, the transformation of the *inactivity* of not buying insurance into the *activity* of paying for health care out of pocket requires that one views the market for *health care* and *health insurance* as one. The reason the conduct in *Wickard* and *Raich* could be reached by Congress under the aggregation principle was that it involved a product (wheat and marijuana, respectively) *identical* to the product that was traded on the interstate market.[190] But, as Hall points out, in the instant cases "the domains of purchasing insurance and purchasing health care could easily be considered different, and PPACA does not necessarily aggregate them".[191] Indeed, if the PPACA is understood to regulate the *health insurance market*, then the individual mandate does reach inactivity: individuals without health insurance are by definition inactive on this market. However, if the PPACA is understood as regulating the *market for health care*, then everybody, including people that have chosen to forgo health insurance, is active.

5.2.5 Methodological problems associated with formal distinctions

As the review of Commerce Clause cases revealed, the use of categorical limitations on the commerce power has been both tried and abandoned before.[192] Indeed, the interpretation of the Commerce Clause has "taken some turns".[193] Two different approaches can be extrapolated from the Supreme Court's struggle to put limits on congressional authority under the Commerce Clause. One approach is to define "by semantic or formalistic categories those activities that were commerce and those that were not".[194] The development of dichotomies such as manufacture-commerce in *E.C Knight,* the direct-indirect distinction in *A.L.A Schechter Poultry Corp. v. United States* and the economic-noneconomic distinction in *Lopez* are

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activity—not the mere possibility of future activity (in this case, health care consumption) that could implicate interstate commerce").

[190] *See* Hall, *supra* note 135, at 1832.

[191] *Id.*, at 1832-33.; *But see e.g.,*Thomas More Law Ctr. v. Obama, 651 F.3d 529, 556 (6th Cir. 2011) ("No matter how you slice the relevant market—as obtaining health care, as paying for health care, as insuring for health care—all of these activities affect interstate commerce, in a substantial way").

[192] *See* N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 36-38 (1937). *See also* Wickard v. Filburn, 317 U.S. 111, 120 (1942) (holding that questions of the power under the Commerce Clause "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.")

[193] United States v. Lopez, 514 U.S. 549, 579 (1995) (Kennedy, J., concurring).

[194] *Id.,* at 569.

examples of categorical formalism. Recognizing a doctrinal distinction between activity-inactivity would be yet another such example. *Gibbons v. Ogden*, *NLRB v. Jones*, *Wichard* and *Katzenberg* illustrates another approach. Using a flexible and fact-based method to evaluate the lawfulness of the regulation at issue in these cases, the Court showed practical deference to the judgment of Congress.

Balkin is critical of formal distinctions in Commerce Clause jurisprudence. According to him, such distinctions "frustrated the Constitutions's purposes by limiting federal power in arbitrary ways".[195] Consider, for example, the distinction between regulating manufacture and commerce. Recall that in *E. C Knight*, the Supreme Court held that Congress could not, as a means of limiting monopolistic practices, prevent the acquisition of sugar refineries as this would constitute a regulation of *production* (i.e. manufacture) rather than *commerce* in sugar. The distinction created an arbitrary limitation of federal power because, as Chemerinsky points out, the reason the sugar company desired a monopoly in *production* (i.e. manufacturing) was to benefit from monopoly profits in *commerce*.[196] Similarly, the latest commerce power dichotomy adopted by the Court, the economic-noneconomic distinction, has also been criticized as having the potential to lead to arbitrary limitations on federal power.[197]

Judge Graham suggests that the activity-inactivity distinction would suffer from the same shortcomings as did prior Commerce Clause dichotomies.[198] Certainly, the distinction "seems unlikely to deliver in practice", Judge Sutton concurs.[199] In order to demonstrate conceptual difficulties associated with the dichotomy, Judge Sutton creates a hypothetical example involving Angel Raich, the plaintiff in *Raich*: Suppose Angel Raich decides to sell her home. Without telling the new owner, she leaves behind some marijuana plants. To comply with federal drug laws (adopted pursuant to the Commerce Clause), the new owner is obligated to remove the plants as soon as he finds them.[200] Judge Sutton remarks: "it seems doubtful that [the new owner] could sidestep this obligation on the ground that the law forced him to act rather than leaving him alone to enjoy the fruits of inaction".[201] Indeed, applying the activity-inactivity distinction in this situation would result in an arbitrary limitation on federal power: While a person who *actively* comes into possession of drugs can be held criminally liable under federal law, a person who *inactively* stumbles upon the same drugs may keep both the drugs and himself beyond the reach of Congress. Ultimately, what is so problematic about of the activity-inactivity distinction is, as

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[195] Balkin, *supra* note 23, at 63.

[196] CHEMERINSKY, *supra* note 66, at 245.

[197] *See generally,* Scopp, *supra* note 106; *and see* Koppelman, *supra* note 98, at 3. *But see* Barnett, *supra* note 124, at 600 (arguing that the distinction between economic and noneconomic activity "provided a workable doctrine" by denying Congress "the right to do merely what it pleases" (internal quotations omitted)).

[198] *See e.g*. Thomas More Law Ctr. v. Obama, 651 F.3d 529, 569 (6th Cir. 2011) (Graham, J., concurring in part and dissenting in part) ("That distinction would suffer from the same failings as the 'direct' and 'indirect' effects test of prior Commerce Clause jurisprudence").

[199] Thomas More Law Ctr. v. Obama, 651 F.3d 529, 560 (6th Cir. 2011).

[200] *See* 21 U.S.C. § 844.

[201] Thomas More Law Ctr. v. Obama, 651 F.3d 529, 561 (6th Cir. 2011).

Judge Sutton points out, that legislative proscriptions set forth rules of conduct, some of which require action. A prohibition on drug possession "amounts to forced inaction in some settings (those who do not have drugs must not get them), and forced action in other settings (those who have drugs must get rid of them)".[202] His hypothetical example illustrates that a practical and useful construct of the commerce power must extend to at least some forms of inactivity in order to avoid absurd and arbitrary results.
In 1942, the Supreme Court explained that it rejected the "mechanical application of legal formulas".[203] Handing down *Lopez* in 1995 however, the Supreme Court again applied a formal distinction in its Commerce Clause analysis. Put in a broader context of cases, the activity-inactivity distinction represents a modern example of categorical formalism. Perhaps the outcome of the PPACA litigation will show whether *Lopez* was an anomaly in a longer trend where the Court is moving away from formal distinctions, or whether *Lopez* represented the return of a more mechanical Commerce Clause jurisprudence.

5.3 The individual mandate under the larger regulatory scheme doctrine and/or the Necessary and Proper Clause

As a fallback position, should the defense of the individual mandate under the substantial effect doctrine prove to be unsuccessful, the constitutionality of the individual mandate has also been defended under the larger regulatory scheme doctrine. Opponents of the mandate maintain that not even this doctrine can save the mandate.
As we have seen, there are different takes as to whether the larger regulatory scheme doctrine is based on the Commerce Clause only or rooted in a combination of the commerce power and the Necessary and Proper Clause. At this point, there is no need to take a side in that intricate debate because either way, the analysis of the constitutionality of the individual mandate is similar under both interpretations in so far as the *necessity or essentialness* of the mandate comes into focus. Framed in the language of Commerce Clause doctrine, the question is whether the individual mandate is an *essential* part of the regulation of the health insurance market. The corresponding question, put in the language of the Necessary and Proper Clause, is whether the individual mandate is a necessary and proper means for carrying into execution the power to regulate the health insurance market. Due to the apparent similarities, the two lines of arguments will be presented conjointly.
The starting point for the defense of the individual mandate under the larger regulatory scheme doctrine is that - even if the constitutionality of the

[202] *Id.*
[203] Wickard v. Filburn, 317 U.S. 111, 123-24 (1942).

mandate standing on its own may be uncertain - it is undisputed[204] that the broad portions of the PPACA that directly regulate the terms under which health insurance is sold (i.e. the first leg of the Act) are within the scope of the commerce power. The authority on point is *United States v. S.-E. Underwriters Ass'n*[205], where the argument was brought that the business of insurance was beyond the reach of the commerce power. The Supreme Court responded that "[t]o hold that the word ´commerce´ as used in the Commerce Clause does not include a business such as insurance would [be to] construe words used in the Constitution so as to give them a meaning more narrow than one which they had in the common parlance of the times in which the Constitution was written".[206]

As understood by the government, the larger regulatory scheme doctrine provides that "Congress may reach even wholly intrastate, non-commercial matters when it concludes that the failure to do so would undercut the operation of a larger program regulating interstate commerce."[207] According to the Government, the individual mandate "is an essential part of a larger regulation of interstate commerce [i.e. the PPACA], and thus, under Raich, is well within Congress's Commerce Clause authority."[208] Put another way, while the individual mandate considered in isolation may not be a permissible regulation of commerce, it is nonetheless a necessary (or "essential") part of the PPACA's "comprehensive framework for regulating" healthcare. Because this broad regulation of the interstate health care market is within Congress's authority, so too is the individual mandate.[209]

Expressed in Necessary and Proper Clause terminology, the Government argues that the individual mandate "is a reasonable means to accomplish Congress's goal of ensuring access to affordable coverage for all Americans. It is therefore necessary and proper to the valid exercise of Congress's Commerce Clause power".[210]

To see why the Government considers it *necessary* to regulate the decision to forego insurance, keep the dynamics of the health insurance market in mind and consider a situation without the individual mandate, but with the

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[204] *See e.g*., Florida *ex rel.* Bondi v. U.S. Dept. of Health & Human Services, 780 F. Supp. 2d 1256, 1306 (N.D. Fla. 2011) (stating that "without doubt Congress has the power to reform and regulate this market. That has not been disputed in this case", but concluding that "because the individual mandate is unconstitutional and not severable, the entire Act must be declared void").

[205] United States v. S.-E. Underwriters Ass'n, 322 U.S. 533 (1944).

[206] *Id.,* at 539.

[207] Memorandum in Support of Defendants' Motion to Dismiss at 20-21, Goudy-Bachman v. U.S. Dept. of Health & Human Services, 764 F. Supp. 2d 684 (M.D. Pa. 2011) (1:10-cv-763).

[208] *Id.* at 31.; Note that the government is formulating the doctrine without using the word "activity", even though that word was used in the Raich opinion. If one thinks that the presence of this word remains an important part of the doctrine, I refer to the discussion about the activity-inactivity distinction in Section 5.2.

[209] *Cf.* Gonzales v. Raich, 545 U.S. 1, 24 (2005) (finding the Comprehensive Drug Abuse Prevention and Control Act a "lengthy and detailed statute creating a comprehensive framework" thus upholding federal enforcement against petitioner).

[210] Memorandum in Support of Defendants' Motion to Dismiss at 31, Goudy-Bachman v. U.S. Dept. of Health & Human Services, 764 F. Supp. 2d 684 (M.D. Pa. 2011) (1:10-cv-763).

prohibition on medical underwriting in place. As insurers must accept all applicants irrespective of their pre-existing conditions, it would be irrational for an individual to buy insurance prior to being in the ambulance on the way to the hospital. If you know you are guaranteed to be able to obtain insurance on demand, why buy it before you really need it? Thus, from the perspective of the individual, the mandate can thought of as the quid pro quo for the right to be able to purchase insurance upon demand. The formation of this perverse incentive explains why the PPACA, absent the mandate, would severely aggravate the problem of adverse selection and the self-reinforcing premium spiral that already plagues the health insurance market today. Risks would be spread across a much smaller and less healthy pool of individuals, driving up costs and forcing insurance companies to drastically raise premiums, which would *further* strengthen the disincentive to buy insurance and possibly destroy the market completely. Thereby Congress' efforts to make health insurance available and affordable would be fatally undermined. Hall makes this point using the analogy of the PPACA as a three-legged stool:

> The simple logic imbedded in the [PPACA] is that it is potentially destructive to reform insurance markets without mandating purchase because only the sick buy insurance and prices remain high. […] Without all three legs, the stool – and effective health reform – will not stand.[211]

According to Hall,

> the core logic of mandating insurance coverage is not the purely paternalistic motive of requiring people to purchase a form of health protection they do not believe they need. Instead, the coverage mandate is part and parcel of reshaping the basic market rules for how insurance is priced and sold.[212]

Thus, "the mandate is 'necessary' in a very literal sense, and not just convenient, to regulating how insurance is sold in interstate commerce", Hall concludes.[213]

5.4 Arguments against the individual mandate under the larger regulatory scheme doctrine

Even challengers of the PPACA seems to acknowledge that the individual mandate is necessary in the sense that it is essential for the functioning of the PPACA as a broader scheme of regulation of interstate commerce.[214] To put it in Necessary and Proper Clause terminology: It is undisputed that the individual mandate is a *necessary* means related to the constitutionally permissible end of regulating the health insurance industry. Therefore, the defenders of the individual mandate argue, the inquiry into the

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[211] *Factual Bases, supra* note 9, at 21.
[212] *Id.*, at 11.
[213] *Id.*
[214] *See e.g., A healthy debate, supra* note 63, at 95.

constitutionality of the mandate should be at an end.[215] The opponents however, disagree and argue that additional questions need to be asked. They emphasize that regardless of whether the individual mandate is *necessary* to regulate the health care market; to the extent that the government is invoking the Necessary and Proper Clause, the Constitution also requires that the enacted law be *proper*.
The following question thus presents itself: Given that the mandate is *necessary*, is it moreover a *proper* means by which Congress may exercise its power to regulate interstate commerce?

5.4.1 Bootstrapping

One critique of upholding the individual mandate by application of the larger regulatory scheme doctrine is that doing so would amount to allowing Congress to engage in illegitimate *bootstrapping*.
Bootstrapping refers to a situation where Congress has grounding for doing Z only because it previously has done Y.[216] In this context, Z corresponds to the individual mandate (i.e. the second leg of the PPACA) and Y represents the regulations of the insurance market (i.e. the first leg of the Act), specifically the prohibition against medical underwriting. As we have seen, with only the first but not the second leg in place, the health insurance market could collapse due to adverse selection. From this perspective, the individual mandate becomes necessary *as a result of Congress's own action*. Put another way, "the individual mandate is actually being used as the means to avoid the adverse consequences of the Act itself."[217] Indeed, Judges Dubnia and Hull held that

> the government's contention amounts to a bootstrapping argument. Under the government's theory, Congress can enlarge its own powers under the Commerce Clause by legislating a market externality into existence, and then claiming an extra-constitutional fix is required.[218]

The dangers of bootstrapping in the context of the larger regulatory scheme doctrine have been pointed out prior to the PPACA litigation. In her dissenting opinion in *Raich*, Justice O'Connor warned that the doctrine could give "Congress a perverse incentive to legislate broadly pursuant to the Commerce Clause – nestling questionable assertions of its authority into comprehensive regulatory schemes – rather than with precision."[219] The opponents of the PPACA suggest that the individual mandate represents

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[215] *See e.g.*, Hall, *supra* note 135, at 1842-1843 ("under the Necessary and Proper Clause there is no plausible path of reasoning that would produce a coherent basis for rejecting the mandate").
[216] The definition of bootstrapping is inspired by Benjamin but the legal analysis unrelated in the main. *See* Stuart Minor Benjamin, *Bootstrapping*, 75 LAW & CONTEMP. PROBS. (forthcoming 2012), available at http://ssrn.com/abstract=1950779
[217] Florida *ex rel*. Bondi v. U.S. Dept. of Health & Human Services, 780 F. Supp. 2d 1256, 1297 (N.D. Fla. 2011).
[218] Florida *ex rel*. Atty. Gen. v. U.S. Dept. of Health & Human Services, 648 F.3d 1235, 1295 (11th Cir. 2011).
[219] Gonzales v. Raich, 545 U.S. 1, 43 (2005) (O'Connor, J., dissenting).

precisely such a questionable assertion of authority nestled into a comprehensive regulatory scheme (i.e. the PPACA as a whole).
Invoking the writings of Alexander Hamilton in Federalist No. 33, Judge Vinson analyses the original meaning of the Necessary and Proper Clause with respect to bootstrapping:

> If Congress is allowed to define the scope of its power merely by arguing that a provision is 'necessary' to avoid the negative consequences that will potentially flow from its own statutory enactments the Necessary and Proper Clause runs the risk of ceasing to be the 'perfectly harmless' part of the Constitution that Hamilton assured us it was, and moves that much closer to becoming the 'hideous monster [with] devouring jaws' that he assured us it was not.[220]

Judge Vinson concluded that the Government's defense of the individual mandate as a necessary part of the PPACA amounts to saying that "the more harm the statute does, the more power Congress could assume for itself under the Necessary and Proper Clause […]. Surely this is not […] how that Clause should operate".[221]
Academic commentators have heavily criticized Judge Vinson's analysis. As a factual matter, "it would be absurd to suggest that reforming insurance markets is nothing more than an excuse to mandate coverage", Hall contends.[222] Furthermore, according to Koppelman, the reasoning of Judge Vinson is inconsistent with the holding in *McCullough v. Maryland*.[223] Recall in that case, the Supreme Court explained that the right to punish those who steal letters from the post office is a Necessary and Proper exercise of Congress' power to establish post-offices and post-roads. Plainly, mail robbery is an adverse consequence of "Congress's decision to establish a post office: had it not done that, all those valuable documents would not be gathered together in one place".[224] Just as Congress has the power to establish post offices, it is not disputed that Congress has the power to prohibit the practice of medical underwriting. Thus, under the logic of *McCullough*, Congress also has the authority to address negative side effects that follow from its own statutory scheme. As to the establishment of post-offices, the negative side effect was mail robberies. In reforming the health insurance industry, the side effect is adverse selection.
Its originalist analysis notwithstanding, the opinion of Judge Vinson has a flavor of ipse-dixitism to it. And because "[g]eneric concerns about expansive federal authority do not suffice to declare necessary measures 'improper'",[225] a more persuasive argument to the effect that the individual mandate is unconstitutional will have to be developed.

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[220] Florida *ex rel*. Bondi v. U.S. Dept. of Health & Human Services, 780 F. Supp. 2d 1256, 1298 (N.D. Fla. 2011) (quoting HAMILTON THE FEDERALIST NO. 33, at 204-5).
[221] *Id.,* at 1297; *but see* Benjamin, *supra* note 216, at 12 (arguing that the bootstrapping argument in inconsistent with the text of the constitution because "[t]he language of the Necessary and Proper Clause necessarily means that at least some bootstrapping is constitutionally authorized").
[222] Hall, *supra* note 135, at 1852.
[223] Koppelman, *supra* note 98, at 7-9.
[224] *Id.*, at 9.
[225] Hall, *supra* note 135, at 1854.

5.4.2 Commandeering the People

Barnett has constructed a creative[226] argument against the individual mandate. He contends that the individual mandate is improper under a theory that it constitutes an unconstitutional *commandeering of the people*. As a starting point, Barnett acknowledges the fact that no Supreme Court opinion addresses the propriety of the individual mandate. This should be unsurprising, Barnett argues, because never before has Congress mandated economic activity on the grounds that doing so is essential to the regulation of commerce. However, Barnett continues, the Court has not been "entirely silent on the issue of the propriety of means when Congress is seeking to exercise its commerce power. As it happens, the means it held to be improper was a mandate on state governments."[227] What Barnett is referring to is that the Supreme Court has found laws to be improper on the basis that they violated the anti-commandeering doctrine.[228] Thus, we do know that mandates on *States* are improper means for Congress to exercise its commerce power.

In his next move, Barnett traces the roots of the anti-commandeering doctrine to the Tenth Amendment.[229] He observes that the text of this Amendment reserves power not only to the States but also "to the people".[230] Parsed this way, the text of the amendment "recognizes *popular* as well as state sovereignty".[231] Plainly, the individual mandate commandeers "the people" by making them spend their money on health coverage. Barnett goes on to ask the following question:

> If commandeering the states is an improper means of executing a federal power under the "letter" of the Tenth Amendment […] might not commandeering the people be improper as well? Put another way, if imposing mandates on state legislatures and executives intrudes improperly into state sovereignty, might mandating the people improperly infringe on popular sovereignty?[232]

Barnett would answer the question in the affirmative and conclude that since Congress cannot commandeer states because they are sovereign, so too Congress cannot commandeer "the people" because they are sovereign.

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[226] Barnett concedes that he is arguing *de lege fedenda* but submits that the argument remains relevant due to the unprecedented nature of the legislation he is arguing against. *See* Barnett, *supra* note 124, at 636.
[227] *Id.*, at 622.
[228] *See* Prinz v. United States, 521 U.S. 898, 919, 923-25 (1997).
[229] Barnett, *supra* note 124, at 626-27 ("the anti-commandeering cases that limit the commerce power of Congress were ultimately grounded by the Supreme Court in the text of the Tenth Amendment."); *but see* Patrick McKinley Brennan, *The Individual Mandate, Sovereignty, and the Ends of Good Government: A Reply to Professor Randy Barnett*, 159 U. PA. L. REV. 1623, 1628-1629 (2011) (questioning whether the anti-commandeering doctrine is indeed rooted in the Tenth Amendment).
[230] Barnett, *supra* note 124, at 627 ("the Tenth Amendment 'avoids taking any position on the division of power between the state governments and the people of the States'" (quoting U.S. Term Limits v. Thornton, 514 U.S. 779, 848 (1994) (Thomas, J., dissenting)).
[231] *Id.,* at 627 (emphasis in the original).
[232] *Id.*, at 629.

Barnett is in essence, seeking to extend the anti-commandeering principle of *New York v. United States* and *Printz v. United States*, making it applicable to individuals. Just as those cases established that Congress could not commandeer the states, so do the unprecedented facts presented by the PPACA call for the Court to hold that neither should Congress commandeer individuals.

5.4.2.1 A mandate different than other mandates?

Federal law mandates various kinds of private action.[233] For example, a citizen may be drafted,[234] can be called to sit on a jury,[235] must fill out a census form[236] and is obligated to file a tax return[237]. The constitutional soundness of these mandates is uncontroversial.[238] If, then, it is *proper* to compel individuals to fill out a census form etc., why does it not follow that the individual mandate of the PPACA is also *proper*? Indeed, Barnett responds, "[t]he propriety of the insurance mandate turns on this question".[239]
The key to answering this question, in Barnett's submission, is that a person can be held responsible for a failure to act only when he or she has a preexisting duty to act.[240] Accordingly, a valid federal mandate to act *presupposes* the existence of a duty owed by the citizens to the state.[241] According to Barnett, there are only a handful of duties that a citizen of the United States owes the federal government. Certainly, Barnett proclaims, "[w]hat separates the United States from other countries is the minimal and fundamental nature of the duties its citizens owe the state".[242] Indeed, the aforementioned duties (the draft, jury duty etc.) are all "essential to the very existence of the government".[243] For example, the duty of a citizen to defend the country is what justifies the government to institute a draft. The individual mandate can be distinguished from existing mandates because no "traditionally recognized pre-existing duty to act" is involved.[244] Rather, "[t]he duty to purchase health insurance is entirely of Congress's creation.[245] Thus, Barnett asserts, existing federal mandates are no obstacle to prohibiting the commandeering of the people.

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[233] Restated following Barnett's terminology: there are, currently, examples of Congress commandeering the people.
[234] 50 App. U.S.C. § 453l.
[235] 28 U.S.C. § 1866(g).
[236] 13 U.S.C. § 221(a)-(b).
[237] 26 U.S.C. § 6012
[238] *See e.g.* Smith, *supra* note 170, at 1736 ("is uncontroversial that Congress has authority to require individuals to register for the draft, report for jury service, and respond to the census").
[239] Barnett, *supra* note 124, at 631.
[240] *Id.,* at 634 ("Ordinarily, persons are responsible for their failure to act—or omissions—when they have a preexisting duty to act").
[241] *Id.*, at 631, 634.
[242] *Id.*, at 631-632.
[243] *Id.*, at 630.
[244] *Id.*, at 634.
[245] *Id. See also* Moncrieff, *infra* note 285, at 22-23 (arguing that maintaining health insurance "is certainly not a public duty of citizenship like registering for the draft or serving on a jury").

5.4.2.2 Criticism of the commandeering of the people theory

The commandeering of the people theory has been subject to criticism from legal academics. According to Smith, the suggestion that a law compelling individuals to act (i.e. to commandeer them) would be "improper" under the Necessary and Proper Clause is "simply wrong under current law".[246] Likewise, Hall views Barnett's argument as deeply flawed on many levels.[247] Rehashing the arguments against Barnett's proposition in detail would be superfluous as he is arguing *de lege ferenda.* Only a few comments shall be made here.

As a textual matter, the commandeering of the people theory has a better foundation in the Constitution (by way of the Tenth Amendment) than does the bootstrapping argument as presented by Judge Vinson. On the other hand, it is unconvincing to claim that the minimal number of duties an individual owes the state is what makes the United States citizenship unique. For example, while Barnett is correct in pointing out that "[e]ven voting is not mandated in the United States",[248] this is also true for many other countries (Sweden being one example).

A conceivable "methodological" advantage of the commandeering the people theory, as an argument to the effect that the individual mandate offends the Constitution, is that all Barnett seemingly requests is for the Supreme Court to *extend* an existing federalism doctrine, the anti-commandeering doctrine.[249] As we have seen, the Supreme Court first articulated this doctrine in *New York v. United States*, holding that Congress could not commandeer state legislatures. In *Printz,* the Court extended the prohibition on federal commandeering of state legislatures to also include state officials.[250] Thus, the Court has previously extended the anti-commandeering doctrine. To adopt the commandeering of the people theory, the Court would only have to take the next step and extend the prohibition on commandeering to include also the direct commandeering of the people. But is it reasonable to view the commandeering of the people as an (potential) extension of the existing anti-commandeering doctrine? Attaching similar labels onto doctrines does not necessarily imply an authentic legal link between them. Indeed as the next section will show, the existing anti-commandeering doctrine and the proposed commandeering of the people theory are not only unrelated but fundamentally incompatible.

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[246] Smith, *supra* note 170, at 1736.
[247] Hall, *supra* note 135, at 1859.
[248] Barnett, *supra* note 124, at 632.
[249] *Id.*, at 636-637 ("True, extending its anti-commandeering doctrine from the states to the people would be novel, but this is due entirely to the novelty of the individual mandate itself. Before Congress attempted to commandeer the American people, the Court never needed to explain why such a thing was improper. The same was true when the Court for the first time developed its anti-commandeering doctrine in the 1990s").
[250] Printz v. United States, 521 U.S. 898, 935 (1997) ("We held in New York that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the State's officers directly").

5.4.2.3 The Original understanding of the anti-commandeering doctrine

In articulating the original anti-commandeering principle, the Supreme Court, *inter alia*, found support in the original understanding[251] of the Constitution:

> Indeed, the question whether the Constitution should permit Congress to employ state governments as regulatory agencies was a topic of lively debate among the Framers. […] In the end, [they] opted for a Constitution in which Congress would exercise its legislative authority directly over individuals rather than over States" […] The allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce.[252]

In other words, the framers *made a choice* between a federal government operating upon and through the States or upon the individual citizen. They opted for the later.[253] Continuing the originalist analysis, the Court quoted the description of federal power offered by Oliver Ellsworth, a member of the Constitutional convention:

> This Constitution does not attempt to coerce sovereign bodies, states, in their political capacity [...] *But this legal coercion singles out the [...] individual*.[254]

As indicated by the words of Ellsworth, what is called today the anti-commandeering doctrine rests on the assumption that Congress *has* the power to single out the individual for legal coercion, or, following Barnett's terminology, the right to commandeer the people. It is this power that Congress has utilized to mandate jury-duty, draft, etc. The framers, back in 1787, thus seem to have rejected the theory now being put forward by Barnett.

Hence, the opponents of the individual mandate are left without a persuasive doctrinal argument for rejecting the individual mandate under the larger regulatory scheme doctrine and/or the Necessary and Proper Clause. This finding concludes the first part of the thesis.

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[251] "The term 'original understanding,' as applied to the Constitution, refers to the meaning that was understood at the time of enactment. The meaning is discovered by a process of historical research of sources contemporary to the enactment". Gerard J. Clark *An Introduction to Constitutional Interpretation* 34 SUFFOLK U. L. REV. 485, 488 (2001).

[252] New York v. United States, 505 U.S. 144, 163-166 (1992).

[253] *See id*., at 166 ("[T]he Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States").

[254] New York v. United States, 505 U.S. 144, 165 (1992) (quoting 2 J. ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION 197 (2d ed. 1863) (emphasis added).

6 Fundamental objections to the individual mandate

In the previous Chapter, doctrinal arguments for and against the mandate were presented and analyzed. This Chapter identifies two fundamental objections to the individual mandate as core concerns animating the PPACA litigation. The first is a slippery slope objection, here referred to as the broccoli objection and discussed in Section 6.1. The second fundamental objection has to do with individual liberty concerns and is introduced in Section 6.2. Questions as to the legitimacy of the second objection have been raised within the legal academy, an issue discussed in Sections 6.2.3 through 6.2.5.
For clarity, it should be noted that no sharp dividing line between the two objections should be drawn; in the litigation they are interwoven. Rather, they are analytical concepts used in this thesis to help make better sense of the litigation.

6.1 The Broccoli objection

One basis for the proposition that the individual mandate offends the Constitution is that the *only* possible way for a court to uphold it would be to interpret the constitution such that "the whole concept of the federal government being a government of enumerated and limited powers goes out the window".[255] What is troubling about the PPACA, from this perspective, is not so much the substance of the law but potential future implications should the mandate be upheld.[256] In other words, opponents of PPACA foresees a slippery constitutional slope if such mandates are allowed to bloom. Generally, slippery slope arguments are characterized by this *prophylactic* approach: While the instant case may be benign, it nonetheless increases "the likelihood of doing the wrong thing" in the future.[257]
Koppelman labels the slippery slope argument against the individual mandate the "broccoli objection"[258], echoing Judge Vinson who worried that, should he uphold the mandate, "Congress could require that people buy and consume broccoli at regular intervals".[259] Though it may seem unlikely that Congress would do such a thing, fears that the federal legislative power could be invoked to "mandate the purchase of American cars in order to

[255] *A healthy debate, supra* note 63, at 99.
[256] *See e.g.*, Thomas More Law Ctr. v. Obama, 651 F.3d 529, 573 (6th Cir. 2011) (Graham, J., concurring in part and dissenting in part) ("If [...] the mandate [is] upheld, it is difficult to see what the limits on Congress's […] authority would be. What aspect of human activity would escape federal power?").
[257] Koppelman, *supra* note 98, at 20.
[258] *See*, *id*., at 19.
[259] Florida *ex rel.* Bondi v. U.S. Dept. of Health & Human Services, 780 F. Supp. 2d 1256, 1289 (N.D. Fla. 2011).

create jobs, or to mandate health-club memberships to promote worker productivity" have actually been expressed.[260]

A premise for the broccoli objection, generally stated, is that the federal government is one of enumerated powers. Logically, "[e]numeration presumes that something is unenumerated".[261] It follows that an argument entailing that there is nothing beyond the reach of government, is an argument inconsistent with enumeration and thus invalid.[262] The broccoli objection relates to the doctrinal arguments made in the litigation in various ways. To put the objection into context, a few examples from opinions that have been issued shall be presented.

To the suggestion that the individual mandate can be justified under the substantial effects doctrine, Judges Dubnia and Hull respond:

> The government's position amounts to an argument that the mere fact of an individual's existence substantially affects interstate commerce, and therefore Congress may regulate them at every point of their life. This theory affords no limiting principles in which to confine Congress's enumerated power.[263]

As to the government's theory that the individual mandate is an essential part of a larger regulatory scheme and therefore constitutional, the broccoli objection states that the mandate sets a dangerous precedent for Congress to engage in illegitimate bootstrapping.

Assuming that the government also invokes the Necessary and Proper Clause as a constitutional basis for the individual mandate, the broccoli objection would suggest that the provision is an *improper* means to execute the commerce power since it is impossible to reconcile with a government of enumerated powers. The following passage from the opinion of Judge Vinson illustrates this approach: "the individual mandate […] cannot be reconciled with a limited government of enumerated powers. By definition, it cannot be 'proper'".[264]

Lastly, the concept of police power is used to state the broccoli objection. It is well settled law that the federal government lacks a general police power.[265] Hence, any interpretation of the federal power broad enough to provide the federal government with general police powers will be rejected. In the context of the PPACA litigation, thus, the broccoli objection is that upholding the individual mandate under the theories presented by the government could give rise to a federal police power.[266] Indeed, Judge

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[260] Hall, *supra* note 135, at 1839.

[261] Lawrence Lessig, *Translating Federalism: United States V Lopez*, 1995 SUP. CT. REV. 125, 195 (1995).

[262] *See id.*; This proposition is uncontroversial. The more controversial question is whether it is Congress or the Supreme Court that should get to determine whether a certain law runs afoul of the principle of enumerated powers. *See e.g., id.* at 196.

[263] Florida *ex rel.* Atty. Gen. v. U.S. Dept. of Health & Human Services, 648 F.3d 1235, 1295 (11th Cir. 2011).

[264] Florida *ex rel.* Bondi v. U.S. Dept. of Health & Human Services, 780 F. Supp. 2d 1256, 1298 (N.D. Fla. 2011).

[265] *See e.g.*, United States v. Comstock, 130 S. Ct. 1949, 1964 (2010) ("Nor need we fear that our holding today confers on Congress a general 'police power, which the Founders denied the National Government and reposed in the States'" (internal quotations omitted)).

[266] *See e.g.,* Goudy-Bachman v. U.S. Dept. of Health & Human Services, 2011 WL 4072875, at *2 (M.D. Pa. Sept. 13, 2011) ("Without judicially enforceable limits, the

Graham held that the power to enact the individual mandate "feels very much like the general police power that the Tenth Amendment reserves to the States and the people".[267]

Regardless of *how* it is stated doctrinally, the broccoli objection stresses that the federal legislative power must not be interpreted in a manner that would lead to the collapse of the constitutional scheme of limited and enumerated powers. Indeed, in Siegel's prediction, "[t]he Supreme Court's review of the constitutionality of the [individual mandate] will likely turn on whether there are principled, judicially enforceable limits on the scope of Congress's enumerated powers *that the provision respects*."[268] Thus, an invitation for the government to articulate a limiting principle on federal legislative authority, that addresses the slippery slope problem *while allowing the individual mandate to stand*, presents itself.

6.1.1 Uniqueness as a response to the broccoli objection

In response to the broccoli objection, the government has suggested that the market for healthcare is *sui generis.* The government emphasizes certain factual characteristics that make this market unique. These factors include universal market participation and unpredictability as to when and how much health care is needed. Furthermore, unlike other markets, severe free riding and adverse selection problems plague the health care market. Due to the special nature of said market, the authority to mandate purchase can be limited to this market only. In other words, allowing Congress to enact a purchase mandate within the realm of health care would not have any implications for Congress's power to regulate other markets. Consequently, according to the government, allowing the mandate to stand will not put the scheme of enumerated powers into question.[269] Judge Silberman finds "the Government's failure to advance any clear doctrinal principles limiting congressional mandates […] troubling, but not fatal".[270] In his opinion, "[i]t

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constitutional blessing of the minimum coverage provision, codified at 26 U.S.C. § 5000A, would effectively sanction Congress's exercise of police power under the auspices of the Commerce Clause, jeopardizing the integrity of our dual sovereignty structure").

[267] Thomas More Law Ctr. v. Obama, 651 F.3d 529, 573 (6th Cir. 2011) (Graham, J., concurring in part and dissenting in part).

[268] Niel Siegel, *Four Constitutional Limits that the Minimum Coverage Provision Respects*, 27 CONST. COMMENT. 591, 617-618 (2011) (emphasis added).

[269] For a representation of the Government's argument to this effect, *see e.g.*, Defendants' Surreply to Plaintiffs' Motion for Preliminary Injunction and Brief in Support, 2010 WL 4784263, at *11-12, Thomas More Law Ctr. v. Obama, 720 F. Supp. 2d 882, 887 (No. 10–CV–11156) ("the health care market is unlike other markets. [..] In contrast to the health care market, one who appears without any money at a dealership will not receive a free car and shift its cost to other participants in the market for automobiles. It is this phenomenon of cost-shifting--a phenomenon with proven, substantial, and direct effects on the interstate health care market--that is unique. Regulating the economic decisions that produce these effects does not open the floodgates to regulating non-economic decisions unrelated to methods of payment, or that bear only an attenuated connection to interstate commerce").

[270] Seven-Sky v. Holder, 661 F.3d 1 (slip op., at 33) (C.A.D.C.,2011).

suffices for this case to recognize […] that the health insurance market is a rather unique one".[271]
Other judges, however, have rejected the uniqueness argument. In his dissenting opinion, Judge Graham writes that the argument would not adequately address the slippery slope problem because

> [t]he uniqueness that justifies one exercise of power becomes precedent for the next contemplated exercise. And permitting the mandate would clear the path for Congress to cause or contribute to certain "unique" factors, such as free-riding and adverse selection and then impose a solution that is ill-fitted to the others. [272]

Finding that the unique characteristic of the health care market constitutes "limiting circumstances" rather than a "limiting principle",[273] Judges Dubina and Hull explain: "Ultimately, the government's struggle to articulate cognizable, judicially administrable limiting principles only reiterates the conclusion we reach today: there are none."[274]

6.1.2 The end of limited and enumerated powers?

Should the uniqueness argument prove unsatisfactory, another way for dispensing with the broccoli objection is to question the premise that allowing the mandate to stand would, in fact, spell the end of a government of limited powers. Recall that plaintiffs rely on *Lopez* for the proposition that the individual mandate is unconstitutional. Further recall that *Lopez* did impose a limit on federal legislative authority, namely the economic-noneconomic distinction. We know that this distinction has some teeth; the law under review in *Morrison* did not survive judicial scrutiny. By invoking *Lopez* the opponents of the PPACA actually undermine the broccoli objection to the individual mandate because, following *Lopez,* it is clear that even in the absence of the proposed activity-inactivity distinction (or the commandeering the people theory), there *are* limits on federal power in place today.[275]
More important still, one limitation on Congress' power, "firmly established in the modern jurisprudence of the Supreme Court", is that Congress cannot "impose a regulation that violates constitutional rights, including the right to bodily integrity".[276] The right to bodily integrity is protected by the Fifth Amendment.[277] *If* Congress was to mandate the *consumption*[278] of broccoli,

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[271] *Id.*
[272] Thomas More Law Ctr. v. Obama, 651 F.3d 529, 572 (6th Cir. 2011) (Graham, J., concurring in part and dissenting in part).
[273] Florida *ex rel.* Atty. Gen. v. U.S. Dept. of Health & Human Services, 648 F.3d 1235, 1296 (11th Cir. 2011).
[274] *Id.,* at 1298.
[275] *See* Koppelman, *supra* note 98, at 6 (arguing that "Lopez constrains Congressional power without relying on the activity/inactivity distinction" thus undermining what in this thesis is called the broccoli objection).
[276] Siegel, *supra* note 268, at 594.
[277] *See e.g*., *id.,* at 599.

the constitutional right to bodily integrity would be implicated, and correspondingly the Fifth Amendment would prevent Congress from mandating such consumption.[279] Hence, there is no reason to fear that permitting Congress to enact the individual mandate is the start of a slippery slope that leads to mandatory broccoli consumption.

Furthermore, *New York v. United States* and *Printz* specify a procedural limitation on Congress legislative authority: Congress cannot commandeer the States to implement federal laws. As we have seen, the individual mandate commandeers individual citizens and not the several States.

In light of the abovementioned limitations, the argument that there would be *no* limits on Congress' power, should the individual mandate be upheld, is unpersuasive. While the limits on federal legislative authority in place today are minor, there *are* certain limits on Congress's power that the individual mandate respects. Arguably, this fact should be enough to refute the broccoli objection because, as Stokes Paulsen reminds us, "[t]he enumeration of powers presupposes something unenumerated. But not very much."[280]

6.2 The Libertarian objection

> [It] is difficult to imagine that a nation which began, at least in part, as the result of opposition to a British mandate giving the East India Company a monopoly and imposing a nominal tax on all tea sold in America would have set out to create a government with the power to force people to buy tea in the first place.[281]

The challenges to the individual mandate are litigated as cases about federalism. However, the intuitive aversion toward the mandate that Judge Sutton suspects is "shared by most Americans"[282] is arguably rooted in a notion that the provision interferes with individual liberty.[283] This idea, that ultimately the constitutionally problematic aspect of the PPACA is infringement of individual liberty, is what Smith calls "the libertarian objection".[284] The libertarian objection, unlike the broccoli objection,

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[278] As opposed to mandating the *purchase* of broccoli.

[279] *See* Siegel, *supra* note 268, at 599-600.

[280] Michael Stokes Paulsen, *A Government of Adequate Powers*, 31 HARV. J.L. & PUB. POL'Y 991, 1004 (2008).

[281] Florida *ex rel*. Bondi v. U.S. Dept. of Health & Human Services, 780 F. Supp. 2d 1256, 1286 (N.D. Fla. 2011).

[282] Thomas More Law Ctr. v. Obama, 651 F.3d 529, 564 (6th Cir. 2011).

[283] *See* Florida *ex rel*. Atty. Gen. v. U.S. Dept. of Health & Human Services, 648 F.3d 1235, 1361 (11th Cir. 2011) (Marcus, J., concurring in part and dissenting in part) ("it is clear that individual liberty concerns lurk just beneath the surface, inflecting the plaintiffs' argument throughout, although largely dressed up in Commerce Clause and Necessary and Proper Clause terms."); *see also* Hall, *supra* note 135, at 1838 ("the desire to protect individual rights is what motivates challenges against the insurance mandate."); *see also* Koppelman, *supra* note 98, at 22 ("What really drives the constitutional claims against the bill is […] an implicit libertarianism").

[284] Smith, *supra* note 170, at 1725.

"arise[s] from the perceived anti-libertarian *substance* of the law, not the federalist *structure* of the law".[285]
The opinion of Judge Hudson supports the conclusion that the opposition towards the individual mandate stems from libertarian concerns: "At its core, this dispute is not simply about regulating the business of insurance–or crafting a system of universal health insurance coverage–it is about an individual's right to choose to participate".[286] Similarly, Judge Graham explains that the mandate

> forces law-abiding individuals to purchase a product – an expensive product, no less – and thereby invades the realm of an individual's financial planning decisions. [...] In the absence of the mandate, individuals have the right to decide how to finance medical expenses. The mandate extinguishes that right.[287]

Judge Sutton, for his part, writes that plaintiffs claim the individual mandate infringes on "that most American of freedoms: to be left alone."[288] Thus, there seems to be disagreement as to exactly what aspect of individual liberty is put into jeopardy by the passing of the individual mandate. Broadly speaking however, most statements seem to suggest that the individual mandate violates the right to *freedom of contract*. The idea, thus, is that it is problematic for the government to make an individual enter into a contract with a private party:

> what Congress cannot do under the Commerce Clause is mandate that individuals enter into contracts with private insurance companies for the purchase of an expensive product from the time they are born until the time they die.[289]

6.2.1 Finding firm footing for a libertarian objection

A difficulty with the libertarian objection to the individual mandate is "finding firm constitutional footing for the objection".[290] The Fifth Amendment to the Constitution was mentioned briefly in the discussion of bodily integrity. Declaring that "[n]o person shall […] be deprived of life, liberty, or property, without due process of law", the Due Process Clause of the Fifth Amendment offers important protection of individual liberty vis-a-

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[285] Abigail R. Moncrieff, *Safeguarding the Safeguards: The ACA Litigation and the Extension of Indirect Protection to Non-Fundamental Liberties* 64 FLA. L. REV. (forthcoming 2012) (manuscript at 2), available at http://ssrn.com/abstract=19192722
[286] Virginia *ex rel*. Cuccinelli v. Sebelius, 728 F. Supp. 2d 768, 788 (E.D. Va. 2010).
[287] Thomas More Law Ctr. v. Obama, 651 F.3d 529, 572 (6th Cir. 2011) (Graham, J., concurring in part and dissenting in part).
[288] *Id.,* at 558 (Sutton, J., concurring in part and delivering the opinion of the court in part). Judge Sutton is alluding to *the right of privacy*, first addressed by Brandeis and Warren, *see* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).
[289] Florida *ex rel*. Atty. Gen. v. U.S. Dept. of Health & Human Services, 648 F.3d 1235, 1311 (11th Cir. 2011).
[290] *Id.,* at 1361 (Marcus, J., concurring in part and dissenting in part).

vi the federal government.[291] During the so called Lochner-era, the Supreme Court engaged in economic substantive due process, that is, it "aggressively protected economic rights" such as the freedom of contract under the banner of due process.[292] Indeed, the Lochner Court found "many laws unconstitutional as interfering with freedom of contract".[293] If, then, the constitutionally problematic aspect of the individual mandate relates to infringement of the right to freedom of contract, a Fifth Amendment economic substantive due process challenge to the PPACA seems to be called for.[294] However, since the Lochner-era "came to a crashing halt"[295] in *West Coast Hotel Co. v. Parrish,* where the Court explained that "[t]he Constitution does not speak of freedom of contract"[296], "not one law has been declared unconstitutional by the Supreme Court as violating economic substantive due process"[297]. Accordingly, today "[t]here is no serious argument that the Fifth Amendment creates an individually protected right to be uninsured".[298] Indeed, the weakness of a straightforward due process claim "might help to explain why the opponents of the individual mandate have, for the most part, urged the courts to invalidate the provision on federalism grounds".[299] Put another way, because the challengers have good reason to suspect that the libertarian objection is unviable as a due process argument, for strategic reasons, they instead ask the courts to import the libertarian objection into federalism doctrine.

Regardless of whether the plaintiffs' decision to argue federalism doctrine is chosen because it has a better chance of success than a due process claim, the "tension between the concerns that motivate the [PP]ACA lawsuits and the doctrines that are central to the [PP]ACA litigation"[300] is interesting and has generated criticism from legal scholars. Smith, for example, argues that, "if the problem with the individual mandate is that it violates a libertarian ideal, then *federalism is an inappropriate constitutional framework in which to consider it*."[301]

One reason to question the incorporation of libertarian norms into federalism doctrine has to do with the underlying values of federalism. This will be discussed in Section 6.2.3. First, however, we shall see that federalism may be an inappropriate framework to consider the libertarian

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[291] U.S. CONST. amend. V.
[292] CHEMERINSKY, *supra* note 66, at 582.
[293] *Id*., at 592.
[294] Indeed, unsuccessful attempts to challenge the PPACA on substantive due process grounds have been made. *See e.g*., Florida *ex rel*. McCollum v. U.S. Dep't of Health & Human Servs., 716 F. Supp. 2d 1120, 1161-62 (N.D. Fla. 2010) (rejecting freedom of contract argument).
[295] Wilson Huhn, J.D., *Constitutionality of the Patient Protection and Affordable Care Act Under the Commerce Clause and the Necessary and Proper Clause*, 32 J. LEGAL MED. 139, 156 (2011).
[296] W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 391 (1937).
[297] CHEMERINSKY, *supra* note 66, at 604; *see also* Hall, *supra* note 135, at 1863 (arguing that the Supreme Court "since the Lochner era have not endorsed or even suggested […] heightened scrutiny of necessity for purely economic regulation").
[298] Hall, *supra* note 135, at 1858-59.
[299] Smith, *supra* note 170, at 1745.
[300] Moncrieff, *supra* note 285, at 2.
[301] Smith, *supra* note 170, at 1726 (emphasis added).

objection because, as a matter of practice, federalism doctrine cannot protect liberty interests in a *coherent* way. Indeed, according to Koppelman, the libertarian objection to the individual mandate is "intellectually incoherent, because it is intended to apply only against the federal government, not the states."[302]

6.2.2 An incoherent objection?

From the standpoint of the libertarian objection, the problematic aspect of the individual mandate is that the provision violates the right to freedom of contract. Assuming, *arguendo*, that the right to freedom of contract deserves constitutional protection, there is no reason why this right should not be safeguarded against *both* federal and State violations.[303] Thus, what is problematic about the mandate is not so much that the *federal* government forces individuals to maintain health insurance. Rather, the libertarian objection is that people are mandated by *government in general*. The activity-inactivity distinction and the commandeering of the people theory are federalism-based arguments against the individual mandate that *resonate* with the libertarian objection. However, even if ultimately successful in court, these arguments will fail to properly address the libertarian objection because they would limit *federal* power only. The case of health care reform in Massachusetts illustrates this inconsistency. As of July 1, 2007, Massachusetts *state law* requires that all residents maintain health insurance.[304] An unsuccessful substantive due process challenge to the Massachusetts mandate was brought in state court.[305] Federalism-based arguments such as the activity-inactivity distinction are, for obvious reasons, unavailable when challenging a State mandate (recall that Massachusetts posses a general police power). Now suppose that the U.S. Supreme Court - finding that the *federal* mandate provision constitutes an improper commandeering of the people or an unconstitutional regulation of inactivity - would strike down the PPACA. The residents of Massachusetts would have to maintain insurance, this hypothetical Supreme Court ruling notwithstanding.[306] Thus, even if the Supreme Court ultimately was to adopt

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[302] Koppelman, *supra* note 98, at 23 (observing that the Supreme Court "has noted that if there were a valid rights-based objection to a federal statute, a state would likewise be prohibited from enacting that statute.").

[303] Thomas More Law Ctr. v. Obama, 651 F.3d 529, 565 (6th Cir. 2011) ("Why construe the Constitution […] to place this limitation—that citizens cannot be forced to buy insurance […] in a grant of power to Congress, as opposed to due process limitations on power with respect to all American legislative bodies?").

[304] Mass. Gen. Laws Ann. ch. 111M, § 2.

[305] Fountas v. Comm'r of Dept. of Revenue, 76 Mass. App. Ct. 1116, 922 N.E.2d 862 *review denied*, 456 Mass. 1107, 925 N.E.2d 865 (2010).

[306] Furthermore, as to the activity/inactivity distinction, Judge Sutton points out the following paradox: Due to the fact that Massachusetts state law already mandates health insurance, the citizens of Massachusetts are no longer inactive with respect to the health insurance market and can, even assuming the activity-inactivity distinction, be mandated by the federal government to continue to maintain insurance. *See* Thomas More Law Ctr. v. Obama, 651 F.3d 529, 562 (6th Cir. 2011) (Sutton, J., concurring in part and delivering the opinion of the court in part) ("How strange that individuals who live in States with mandates would be subject to federal regulation but others would not be with the difference

either principle, the several States would not be prevented from passing identical mandates; "leav[ing] states free to breach the relevant liberties"[307] that, according to the libertarian objection, deserve protection.[308]

6.2.3 The legitimacy of the libertarian objection and the underlying values of federalism

The case of Massachusetts's health care reform illustrates the failure of the proposed principles to achieve the goal of the libertarian objection - to protect the right to freedom of contract for *all* citizens. Indeed, this is one reason to view federalism as an inappropriate framework in which to consider said objection.

In addition, "several scholars have also criticized, *more generally*, the incorporation of libertarian norms into structural doctrines".[309] Smith, for example argues that the libertarian objection to the PPACA, "though couched in federalism terms, have very little to do with federalism at all".[310] In other words, legal scholars are questioning the *legitimacy* of framing a libertarian objection as a question of federalism.

To analyze the legitimacy of the libertarian objection, we must begin with a fundamental question: What *are* the reasons authority is divided between the federal government and the States? In other words, which are the underlying values that justify the judicial enforcement of federalism? Although "many Supreme Court decisions protecting federalism say relatively little about the underlying values that are being served"[311], the Court has stated that "[p]erhaps the principal benefit of the federalist system is a check on abuses of government power. The constitutionally mandated balance of power between the States and the Federal Government was adopted by the Framers to ensure the protection of our fundamental liberties".[312] There are, however, diametrically different opinions as to the strength of this justification for federalism. In Chemerinsky's submission,

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in treatment having little to do with the concerns about federal intrusions on individual autonomy that led to this challenge in the first place").

[307] Moncrieff, *supra* note 285, at 8.

[308] Furthermore, another inconsistency in advancing the libertarian objection through federalism doctrine is that whatever aspect of liberty is perceived to be violated by the individual mandate, surely a single-payer insurance system would be at least as intrusive from the perspective of the individual. Yet, paradoxically, under established precedent, it is likely that Congress would have the authority to enact a single-payer system under the Taxation power. *See* Helvering v. Davis, 301 U.S. 619, 640-41 (1937) (upholding the Social Security Act of 1935 on the basis of the general welfare Clause).

[309] Moncrieff, *supra* note 285, at 8 (emphasis added).

[310] Smith, *supra* note 170, at 1726.

[311] CHEMERINSKY, *supra* note 66, at 305.

[312] Gregory v. Ashcroft, 501 U.S. 452, 458 (1991). *But see* Jenna Bednar & William N. Eskridge, Jr., *Steadying the Court's "Unsteady Path": A Theory of Judicial Enforcement of Federalism*, 68 S. CAL. L. REV. 1447, 1463-64 (1995) (questioning the robustness of this libertarian theory about "why federalism is constitutionally desirable" and concluding that "the Framers' libertarian theory of federalism is not a solid basis for explaining or defending the Court's existing federalism-based doctrines or for urging changes in these doctrines").

federalism, defined as "the limits on federal power imposed by the Supreme Court […] *limit rather than enhance* individual liberties."[313] Indeed, over the course of American history "almost without exception [federalism was used] as a rhetorical tool to argue for results that were clearly 'rights regressive'", Chemerinsky continues.[314] In the early 20th century, for example, "federalism was successfully used as the basis for challenging federal laws […] imposing the minimum wage".[315] *A.L.A. Schechter Poultry Corp. v. United States*, previously discussed in this thesis, illustrates one such challenge. Further, Chemerinsky points to the fact that during the 1950s and 1960s, legal objections to the Civil Rights Act "were phrased primarily in terms of federalism".[316] Indeed, *Katzenbach v. McClung* represents an unsuccessful attempt to use federalism-based arguments against federal civil rights efforts.

Unsurprisingly, the opponents of the individual mandate offer a very different outlook. One assessment is that "the Framers viewed structural limitations on governmental power [as] a far more important source of protection for individual liberty than the nowadays oft-exalted Bill of Rights provisions."[317] Certainly, Judge Sutton has a suggestion for those doubting that federalism relates to individual liberty: "Go to any federal prison in the country to see how a broad conception of the commerce power has affected individual liberty through the passage of federal gun-possession and drug-possession laws and sentencing mandates."[318]

To be sure, while the protection of individual liberty is *one* justification for federalism the Supreme Court has recognized, it is not the *only* one. Justice Brandeis first articulated what is perhaps the best-known justification for federalism. It is the idea of states-as-laboratories: "One of federalism's chief virtues, of course, is that it promotes innovation by allowing for the possibility that 'a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.'"[319]Another important goal of federalism is to enhance democratic rule by providing a government that is closer to the people: "[The] federalist structure [...] increases opportunity for citizen involvement in democratic processes [...]".[320]

Suffice to say, for our purposes, the Supreme Court justifies judicial enforcement of federalism by reference to a variety of underlying values. Thus, the validity of the criticism voiced against the libertarian objection, to some degree, depends on which of these values one emphasizes. If one understands federalism and individual liberty to be essentially unrelated concepts then, unsurprisingly, one will conclude that the libertarian

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[313] Erwin Chemerinsky, *Does Federalism Advance Liberty?,* 47 WAYNE L. REV. 911, 912-13 (2001) (emphasis added) [hereinafter *Does Federalism Advance Liberty*]
[314] *Id.*, at 914.
[315] *Id.*
[316] *Id.*
[317] *A healthy debate, supra* note 63, at 95 (internal citation omitted). The Fifth Amendment is part of the Bill of Rights.
318 Thomas More Law Ctr. v. Obama, 651 F.3d 529, 564 (6th Cir. 2011).
[319] Chandler v. Florida, 449 U.S. 560, 579 (1981) (quoting New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).
[320] Gregory v. Ashcroft, 501 U.S. 452, 458 (1991).

objection lacks a nexus to the reason why authority is divided between the federal government and the States. However, if one accepts that individual liberty is *one* of several values underlying federalism, then it is not necessarily problematic that it is this value that animates the challenges to the PPACA.[321]

6.2.4 Federalism: indirect protection of liberty

In the previous section we established that *one* reason the constitution divides authority between the federal and state governments is to protect individual liberties.[322] Thus, the libertarian objection, *in the abstract*, puts forward concerns that are legitimate in the context of federalism. But, as Smith points out, "that federalism is ultimately *a means* to achieve the end of individual liberty *tells us very little about what rules to apply* in determining the actual allocation of authority between the federal government and the states."[323] Recall that one rule proposed by opponents of the individual mandate was the activity-inactivity dichotomy. In his analysis of the constitutional challenges to the PPACA, Huhn criticizes the plaintiffs' reliance on Rehnquist revolution cases as the foundation for the activity-inactivity distinction because, in his view, "Lopez and Morrison rest upon the principle of federalism, *not* individual liberty".[324] Considering that "[o]ne of the most frequently advanced justifications for federalism is that the division of power between federal and state governments advances liberty"[325], Huhn's comment may appear somewhat surprising, but understood as criticism directed at the activity-inactivity distinction *as a general rule of law* aimed at putting limits on federal power, his point seems valid. Similarly, Koppelman argues that the activity-inactivity distinction is unrelated to "the underlying reasons for wanting to have limited but effective federal power".[326] Indeed, the *specific rules* proposed in the litigation by the plaintiffs seem to have been developed *ad hoc* for the purpose of invalidating the individual mandate, and therefore appear arbitrary if studied as general rules of law.[327] Can putting forward such *ad hoc* arguments nevertheless be considered legitimate? One way to make sense of the strategy chosen by plaintiffs in the PPACA litigation is to view

[321] Judge Graham, for example, does not consider federalism and individual liberty to be mutually exclusive. In his view "[the individual mandate] intrudes on *both* the States and the people". Thomas More Law Ctr. v. Obama, 651 F.3d 529, 571 (6th Cir. 2011) (Graham, J., concurring in part and dissenting in part) (emphasis added).
[322] Even Smith, one of the harshest critics of the legitimacy of the challenges to the PPACA acknowledges that "[n]o one disputes that the Constitution divides authority between the federal and state governments […] for the protection of individual liberties", see Smith, *supra* note 170, at 1747 (internal quotations and citations omitted).
[323] *Id.*
[324] Huhn, *supra* note 295, at 146 (emphasis added).
[325] *Does Federalism Advance Liberty*, *supra* note 313, at 911.
[326] Koppelman, *supra* note 98, at 11.
[327] *See* Koppelman, *supra* note 98, at 11 (offering the following "summary of the constitutional claim against the federal health insurance mandate: '(1) There must be some limit on federal power; (2) I can't think of another one; and therefore, (3) the limit must preclude the individual mandate.'").

the libertarian objection as a plea to the courts to *indirectly* protect the right to freedom of contract by applying the proposed federalism rules. The idea behind *indirect*[328] protection of individual liberty by way of judicial enforcement of federalism, "is simply that limiting federal power means restricting the ability of the federal government to enact laws inimical to individual freedom."[329] While federalism is commonly assumed to be a "substantive value that can *receive* indirect protection rather than as a tool for *providing* indirect protection", the Supreme Court and some scholars have argued that federalism may be used to protect individual liberty rather than an end itself.[330] As a matter of theory, the limiting principles proposed by the plaintiffs in the PPACA litigation would function by "rais[ing] the cost of enacting legislation that implicates substantive constitutional norms". The constitutional norm implicated by the individual mandate, according to the libertarian objection, is the right to freedom of contract. As we have seen, the limiting principles proposed in the litigation would not prevent the States from enacting mandates identical to the PPACA mandate. However, by effectively barring *Congress* from passing the individual mandate, the right to freedom of contract will still get some protection because "getting fifty state statutes passed is harder than getting one federal statute passed".[331]
According to Moncrieff, "indirection in the protection of constitutional liberties is a well-known and well-theorized strategy"[332] and indeed, there are federalism precedents that academic commentators have read as cases where the Supreme Court engaged in indirect protection of individual liberty. To illustrate how the challenges to the PPACA can be understood as a strategy to demand indirect protection of the right to freedom of contract, the PPACA litigation will be compared with two familiar cases. Let us revisit *Lopez* and *Printz*.

6.2.5 Indirect protection of liberty: Lopez and Printz

To be able to follow this section, the Second Amendment to the Constitution must be introduced. It reads: "A well regulated militia being necessary to the security of a free State, *the right of the People to keep and bear arms shall not be infringed*."[333] For our purposes, it is enough to note that the right to keep and bear arms is a constitutionally recognized liberty interest. Keeping this constitutional right in mind, we now turn to *Lopez*.

[328] From this perspective, the Due Process Clause (and the other provisions in the Bill of Rights) is a vehicle through which the Constitution *directly* protects individual liberty whereas the federal structure it establishes offers *indirect* protection. Moncrieff prefers "semisubstantive constitutional review" to "indirect protection", but the basic idea is similar, *supra* note 285.
[329] *Does Federalism Advance Liberty*, *supra* note 313, at 912.
[330] Moncrieff, *supra* note 285, at 17; *but see* Smith, *supra* note 170, at 1743 (arguing that a viable federalism-based argument must "bear some relationship to the very reasons why we divide authority between the federal government and the states in the first place").
[331] Moncrieff, *supra* note 285, at 18.
[332] *Id.*, at 1.
[333] U.S. CONST. amend. II (emphasis added).

As Huhn correctly pointed out, the Supreme Court did not explicitly justify its decision in *Lopez* by reference to individual liberty.[334] Putting aside the reasoning in the opinion, the holding has nonetheless been understood to *indirectly* protect a liberty interest. Indeed, Barnett's reading of *Lopez* offers a good illustration of how indirect protection of individual liberty can function in the context of Commerce Clause jurisprudence:

> Notice that, by striking down the Gun Free School Zone Act in Lopez as beyond the power of Congress to enact, the Court protected the right of the people to keep and bear arms without having to apply the specific prohibition of the Second Amendment.[335]

The Supreme Court found the law under review in *Lopez* to be an unconstitutional regulation of non-economic activity. Thus, understood as a holding indirectly protecting individual liberty, the Lopez Court protected the right of the people to keep and bear arms by adopting a formal commerce power dichotomy.

Recall that opponents of the individual mandate, in addition to making the activity-inactivity distinction, also suggest that the mandate is an improper means of regulating interstate commerce in that it entails a commandeering of the people. To make sense of the commandeering of the people theory as a federalism doctrine safeguarding individual liberty, consider *Printz v. United States*. Recall that in *Printz*, the Supreme Court extended the anti-commandeering doctrine of *New York v. United States*, thereby prohibiting the federal government from using state officials to implement background checks on prospective gun owners. Commenting on the anti-commandeering doctrine, Siegel remarked that "the unavailability of commandeering advanced the values not only of federalists but also of civil libertarians."[336] The civil libertarian value indirectly protected by the extension of the anti-commandeering principle in *Printz* is the same as in *Lopez*: The right to keep and bear arms. Paraphrasing Barnett's comment on the holding in *Lopez*, we can similarly say about *Printz*: Notice that, by holding that Congress could not commandeer State officials to conduct background checks on potential gun owners, the Court protected the right of the people to keep and bear arms without having to apply the specific prohibition of the Second Amendment. Even Chemerinsky who, as we have seen, generally views federalism as detrimental to the protection of individual liberty, suggests that *Lopez* and *Printz* "[a]rguably [...] advance rights by safeguarding the Second Amendment's protections."[337]

On the surface, *Lopez*, a criminal case, and *Printz*, concerning the proper implementation of federal law, may seem unrelated to the challenges to the individual mandate. The relevance of *Lopez*-*Printz* in this context, emerge once one substitutes the right to keep and bear arms for the right to freedom of contract. With regards to *Lopez*, further substitute the economic-noneconomic distinction for the activity-inactivity distinction. As to *Printz*,

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[334] *See, supra* note 320.
[335] Randy E. Barnett, *Three Federalisms*, 39 LOY. U. CHI. L.J. 285, 293 (2008).
[336] Neil S. Siegel, *Commandeering and Its Alternatives: A Federalism Perspective*, 59 VAND. L. REV. 1629, 1645 (2006).
[337] *Does Federalism Advance Liberty*, *supra* note 313, at 924.

substitute the anti-commandeering (of the States) doctrine for the prohibition on commandeering the people, and parallels can be drawn between these two cases and the libertarian objection to the individual mandate. The idea of using federalism doctrine to indirectly protect a substantive liberty interest applies *mutatis mutandis* to the PPACA litigation. Indeed, *Lopez* stands as an example of how dichotomies in Commerce Clause doctrine can function as safeguards against restrictions on individual liberty and *Printz* illustrates how extending the anti-commandeering of *New York* can function in the same way.

However, one important difference between *Lopez–Printz*, understood as holdings indirectly protecting individual liberty, and the libertarian objection to the individual mandate, is that while the former cases involved a right clearly stated in the text of the Constitution (the Second Amendment's right to keep and bear arms), the right to freedom of contract at issue in the PPACA litigation is a right that has not been recognized in constitutional law since the demise of the Lochner-era. Moncrieff acknowledges that "no court has applied the freedom of contract since the death of the Lochner era" but, in her submission, this fact "does not establish that the liberty interests are constitutionally irrelevant".[338] On the contrary, Moncrieff asserts that there is "no doubt […] that the [PP]ACA plaintiffs have evoked constitutionally relevant […] norms."[339] Moreover, it should be noted that it was not until the year 2008, in *D.C. v. Heller*[340], that the Supreme Court first held that the Second Amendment confers an *individual right* to keep and bear arms. Both *Printz* and *Lopez* were handed down in the 1990s. Thus, *Lopez* can be "justif[ied] as a Second-Amendment-lite holding, *issued before* the Supreme Court stated openly protecting individual rights to gun ownership",[341] and so can *Printz*.

The examples of *Lopez* and *Printz* allowed us to situate the PPACA-litigation in a broader context of cases in which federalism doctrine has been understood to serve as indirect protection of substantive liberty interests. The fact that "structural […] methods of the kinds at issue in the [PP]ACA litigation, for protecting substantive constitutional values"[342] has been recognized prior to the health care reform challenges does lend legitimacy to the strategy employed by plaintiffs in the PPACA litigation. However it does not speak to the normative question – whether the right to freedom of contract *deserves* the additional protection the libertarian objection suggests that it does.[343]

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[338] Moncrieff, *supra* note 285, at 19.
[339] *Id.*, at 23; *but see* Siegel, *supra* note 268, at 600 ("the minimum coverage provision [does not] violate economic substantive due process, notwithstanding the emphases of opponents of the ACA on themes of constitutional liberty, freedom from coercion, and individual rights").
[340] 554 U.S. 570 (2008).
[341] Moncrieff, *supra* note 285, at 6 (emphasis added); Moncrieff suggests that while a "direct Second Amendment challenge [to the Gun Free Schools Act] would have been sure to fail at the time, […] it might succeed today.", *id.*, at 16.
[342] Moncrieff, *supra* note 285, at 1.
[343] The author of this thesis is not persuaded that such protection is necessary. However, a Supreme Court decision striking down the individual mandate would perhaps usher in a new *Lochner-esque* era. Or, to paraphrase Moncrieff's reading of Lopez-Printz: a substantive economic due process-lite holding, *issued before* the Supreme Court stated

7 Concluding Summary

In Chapter 5 we saw that the government argues that the individual mandate can be justified as a necessary and proper exercise of the commerce power. Plaintiffs, on the other hand, argue that the individual mandate seeks to reach inactivity and that this fact is of constitutional relevance. They seek support in the Rehnquist revolution cases that confirmed that the Supreme Court was serious about policing federalism. However, the object of regulation is arguably not inactivity but financial risk management or the future activity of purchasing health care. Furthermore, a distinction between activity and inactivity within the realm of commerce jurisprudence has no support in the text of the Constitution, is based on a questionable reading of the Rehnquist revolution cases and is hard to square with Commerce Clause precedents in general. In addition, categorical distinctions have, historically, limited federal power in arbitrary ways and there is no reason to think that an abstract concept such as inactivity would be a helpful tool for courts charged with the difficult task of reviewing the constitutionality of legislation.

Opponents of the individual mandate also argue *de lege ferenda*. The commandeering of the people theory is elegant but flawed. Far from being a plausible extension of the anti-commandeering doctrine, the theory is fundamentally incompatible with the assumptions underlying *New York v. United States*, the case in which the anti-commandeering doctrine was formulated. Thus, while American federalism is a work in progress, much indicates that the individual mandate is lawful.

Chapter 6 identified two core concerns animating the PPACA litigation; the *broccoli* and the *libertarian objections* to the individual mandate. The broccoli objection is based on an anxiety about unlimited federal power. This objection states that upholding the individual mandate would lead to the end of the constitutional scheme of a federal government of limited and enumerated powers and open the doors for mandates to consume broccoli, etc. This thesis argued that these fears are exaggerated. The libertarian objection to the individual mandate is grounded in perceived problems with the substance of the law. One notion is that the individual mandate violates the right to freedom of contract. While the broccoli objection is uncomplicated from a legitimacy standpoint, the legitimacy in framing a libertarian objection as a question of federalism is more questionable. However, the Supreme Court has stated that individual liberty is one of the values advanced by federalism and while federalism has been traditionally viewed as a value that can receive protection, rather than as an instrument providing protection of other values, there are examples of federalism cases that have been understood to *indirectly* protect liberty interests. Against this background, the libertarian objection to the individual mandate arguably can

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openly protecting the right to freedom of contract. Interestingly, in the legal academy a reevaluation of *Lochner* is taking place, *see* DAVID E. BERNSTEIN, REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM (2011).

be viewed as a legitimate appeal for indirect protection of the right to liberty of contract.

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