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Ronald Kahn

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**THE COMMERCE CLAUSE AND EXECUTIVE POWER:
EXPLORING NASCENT INDIVIDUAL RIGHTS IN *NATIONAL
FEDERATION OF INDEPENDENT BUSINESS v. SEBELIUS***

RONALD KAHN*

INTRODUCTION

Does *National Federation of Independent Business v. Sebelius*¹ suggest any means through which the Supreme Court, in the future, might limit executive and legislative authority over social and economic policy in general and health care policy in particular?²

Does the fact that five Justices support the notion that the Commerce Clause only applies to action as opposed to inaction—that is, only applies after an individual has entered the economic system³—mean that this distinction (between action and inaction) will allow the United States Supreme Court to limit congressional and presidential action in support of social and economic policy aimed at meeting the ever-increasing complexity of our nation?

While the Internet colloquy addressing *Sebelius* on the day the Supreme Court announced its decision centered on the political implications of the case, with particular regard to why Chief Justice Roberts viewed Congress’s taxing power as a basis on which the constitutionality of the Af-

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* James Monroe Professor of Politics and Law, Oberlin College.

1. 132 S. Ct. 2566 (2012). In this article, this case will be referred to as *Sebelius*.
2. The Affordable Care Act mandates that most Americans (not prisoners or undocumented aliens) maintain “minimal essential” health insurance coverage or pay a “shared responsibility payment.” 26 U.S.C. § 5000A(a)–(b) (2006). If an individual taxpayer fails to maintain such health care coverage, the IRS will impose a penalty on the taxpayer. *Id.* § 5000A(b)–(c). Does Congress, however, have the constitutional authority to enact the individual mandate? If so, does Congress’s authority stem from its Commerce Clause power to regulate commerce among the states? Five Justices answer this question in the negative (Justices Roberts, Alito, Kennedy, Thomas, Scalia); the remaining four Justices answer this question in the affirmative (Justices Breyer, Ginsburg, Kagan, and Sotomayor). *See generally Sebelius*, 132 S. Ct. 2566 (2012).
3. *See Sebelius*, 132 S. Ct. at 2586 (noting that Congress’s power to regulate commerce “presupposes the existence of commercial *activity* to be regulated” and that “[i]f the power to ‘regulate’ something included the power to create it, many of the provisions in the Constitution would be superfluous” (emphasis added)).

fordable Care Act⁴ (“ACA”) could rest,⁵ this Article will explore the legal implications of five Justices’ support in *Sebelius* of the inaction-action distinction as a basis for constitutional violations under the Commerce Clause.⁶

Is the Supreme Court in *Sebelius* creating a path to an individual right or liberty interest that could trump the power of the President and Congress to make economic and social policy?

Is the inaction-action distinction in *Sebelius* a “loaded weapon” for future courts to use to define a new libertarian individual right, and thus, should this distinction be viewed as another by-product of what Tom Keck has called the conservative “rights revolution” in our nation?⁷

Commerce Clause cases are usually not viewed as cases directly involving individual rights, but are primarily interpreted as cases involving polity principles, such as state compared to national government power under concepts of federalism, or congressional versus presidential power under the separation of powers doctrine.⁸ Nevertheless, debates over polity

4. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of the U.S. Code).

5. See generally Kali Borkoski, *Live Blog of the Health Care Decision (Sponsored by Bloomberg Law)*, SCOTUSBLOG (June 28, 2012, 9:29 AM), <http://www.scotusblog.com/2012/06/live-blog-of-the-health-care-decision-sponsored-by-bloomberg-law/> (presenting the entirety of the live blog on the day the Supreme Court announced its decision in *Sebelius*).

6. As a preliminary matter, I agree with the view that Chief Justice Roberts did not want to overturn the ACA because of long standing polity principles, including the view that the Supreme Court should not overturn congressional legislation if a constitutionally viable reason can be found in support of such legislation. See *Sebelius*, 132 S. Ct. at 2594 (stating that the “question is not whether [the Government’s construction of the Act as imposing a tax] is the most natural interpretation of the mandate, but only whether it is a ‘fairly possible’ one” because “‘every reasonable construction must be resorted to, in order to save a statute from unconstitutionality’” (internal citations omitted)). Secondly, I believe Chief Justice Roberts feared that, politically, overturning the ACA would raise the specter of *his* Court being viewed as a new “*Lochner* Court.” See, e.g., James Raskin, *The Ghost of Lochner Sits on the Supreme Court and Haunts the Land*, HUFFINGTON POST (Apr. 2, 2013), http://www.huffingtonpost.com/jamie-raskin/the-ghost-of-lochner-sits_b_1398073.html (“The ghost of *Lochner* is alive and well on the Roberts Court, which has been busily dismantling laws that stand in the way of total corporate freedom.”). Nevertheless, these institutional concerns do not preclude the fact that also at issue in *Sebelius* are nascent rights principles that conservative justices now, and perhaps liberal justices in the future, might support as they analyze such principles in light of the changing world outside the Court.

7. See THOMAS KECK, *THE MOST ACTIVIST SUPREME COURT IN HISTORY* 282 (2004).

8. But cf. Arthur J.R. Baker, *Fundamental Mismatch: The Improper Integration of Individual Liberty Rights into Commerce Clause Analysis of the Patient Protection and Affordable Care Act*, 66 U. MIAMI L. REV. 259, 298–99 (2011) (noting that “there is a history of liberty-based attacks on congressional exercises of power under the Commerce Clause focusing on the Thirteenth Amendment, which prohibits slavery” and further suggesting that “legal challenges to the individual mandate as coercing individuals into activity amount to a veiled form of the earlier Thirteenth Amendment arguments”).

principles informing the powers of government institutions raise important questions about individual rights. For example, in *Immigration and Naturalization Service v. Chadha*,⁹ Justice Powell, in concurrence, emphasized that the use of the legislative veto by the House to overturn a decision by the Immigration and Nationalization Service to allow Mr. Chadha to remain in the country is a denial of individual rights.¹⁰ When the legislative veto permitted Congress to deport Mr. Chadha, without applying general rules to his individual case or ensuring that the procedural safeguards found in courts and in quasi-judicial bodies in administrative agencies were used, individual rights were compromised.¹¹

My work to date has centered on the process through which individual rights have developed under the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Explored to date is the question of why a conservative/moderate Supreme Court in the conservative political age since the 1990s has expanded implied fundamental rights to sexual intimacy for homosexuals and sustained the fundamental right of women to choose whether to have an abortion.¹² One would expect the Supreme Court in the late twentieth and early twenty-first centuries to be conservative. Since 1969, when President Nixon named Warren Burger as Chief Justice, through 2005, when President George W. Bush appointed Chief Justice John Roberts to and nominated Samuel Alito for the Supreme Court, Republican presidents had made twelve of fourteen appointments to the Supreme Court, thus constituting a clear majority of appointees in any given year.¹³

9. 462 U.S. 919 (1983).

10. *See id.* at 966 (Powell, J., concurring) (“When [Congress] decides rights of specific persons, those rights are subject to ‘the tyranny of a shifting majority.’” (internal citation omitted)).

11. *See id.* (“In deciding whether Chadha deserves to be deported, Congress is not subject to any internal constraints that prevent it from arbitrarily depriving him of the right to remain in this country. . . . Congress is not bound by established substantive rules. Nor is it subject to the procedural safeguards, such as the right to counsel and a hearing before an impartial tribunal, that are present when a court or an agency adjudicates individual rights.”).

12. *See* Ronald Kahn, *Social Constructions, Supreme Court Reversals, and American Political Development: Lochner, Plessy, Bowers, but Not Roe*, in *THE SUPREME COURT AND AMERICAN POLITICAL DEVELOPMENT* 67 (Ronald Kahn & Ken I. Kersch eds., 2006); *see also* Ronald Kahn, *Why Does a Moderate/Conservative Supreme Court in a Conservative Age Expand Gay Rights?: Lawrence v. Texas (2003) in Legal and Political Time*, in 44 *STUDIES IN LAW, POLITICS AND SOCIETY, SPECIAL ISSUE: CONSTITUTIONAL POLITICS IN A CONSERVATIVE ERA* (Austin Sarat ed., 2008).

13. President Nixon appointed Chief Justice Burger (1969), Justice Blackmun (1970), Justice Powell (1972), and Justice Rehnquist (1972). President Ford appointed Justice Stevens (1975). *Members of the Supreme Court of the United States*, SUPREME COURT OF THE UNITED STATES, http://www.supremecourt.gov/about/members_text.aspx (last visited July 28, 2013). Democratic President Carter had no appointees to the Supreme Court. President Reagan appointed Justice O’Connor (1981), reappointed Justice Rehnquist as Chief Justice in 1986, and appointed Justices

The Supreme Court, however, has not overturned any of the major individual rights cases from the progressive Warren Court era (1954–1969). Moreover, during the years under Chief Justice Warren Burger (1969–1986), the Supreme Court expanded individual rights in significant ways, deciding that a woman had a constitutional right to elect abortion in *Roe v. Wade*,¹⁴ that gender classifications under the law would be subject to heightened judicial scrutiny in *Craig v. Boren*,¹⁵ and that race can be one factor among many in the admission of students to colleges and universities in *Regents of the University of California v. Bakke* (1978).¹⁶

During the Rehnquist Court, the Supreme Court reaffirmed the right to abortion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.¹⁷

Scalia (1986) and Kennedy (1988). President George Herbert Walker Bush appointed Justices Souter (1990) and Thomas (1991). Democratic President Bill Clinton appointed Justices Ginsburg (1993) and Breyer (1994). Not until 2005, eleven years later, would any President make additional appointments to the Supreme Court. In 2005, Republican President George W. Bush appointed John Roberts as Chief Justice. One year later, Bush appointed Justice Alito. For a list of all Supreme Court nominations from 1789 to the present, including those listed above, see *U. S. Senate, Supreme Court Nominations 1789—Present*, <http://www.senate.gov/pagelayout/reference/nominations/Nominations.htm> (last visited Oct. 13, 2013).

14. See 410 U.S. 113, 153 (1973) (“This right of privacy, whether it be founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action, as we feel it is, or . . . in the Ninth Amendment’s reservation of rights to the people, is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.” (emphasis added)).

15. See 429 U.S. 190, 218 (1976) (Rehnquist, J., dissenting) (“[T]he plurality rested its invocation of strict scrutiny largely upon the fact that ‘statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members.’” (quoting *Frontiero v. Richardson*, 411 U.S. 677, 686–87 (1973))).

16. See 438 U.S. 265, 317 (1978) (“[R]ace or ethnic background may be deemed a ‘plus’ in a particular applicant’s file, yet it does not insulate the individual from comparison with all other candidates for the available seats.”).

17. 505 U.S. 833, 846 (1992). Nonetheless, some scholars of quite different political persuasions have argued that *Casey* only upheld *Roe* technically. See, e.g., Caitlin E. Borgmann, *Winter Count: Taking Stock of Abortion Rights After Casey and Carhart*, 31 *FORDHAM URB. L.J.* 675, 681 (2004) (suggesting that *Casey*’s modification of *Roe*’s holding and rejection of *Roe*’s trimester framework “were far more than modest adjustments to *Roe*. Rather, they altered the very nature of the abortion right, demoting it from a fundamental right to something more enigmatic and certainly more fragile”). As one scholar noted, the *Casey* Court’s “undue burden test” allowed Pennsylvania to implement a twenty-four hour waiting period before an abortion and further permitted parental consent for a minor’s abortion, record keeping and reporting to the state, and informed consent; a majority of the Court only struck down the spousal notification requirement as imposing an undue burden on a woman’s right to obtain an abortion. *Id.* at 682–89.

To ascertain whether or not *Casey* simply upheld *Roe* technically or was in fact rights expansive, one must do more than an analysis in policy terms of whether the Pennsylvania abortion law has made it more difficult or easier in the short run to obtain an abortion; one would have to explore whether the right itself is more or less fundamental by reviewing the evolution of Supreme Court decisions addressing this issue. In this regard, I would argue that the *Casey* decision upheld the fundamental right to choose an abortion, and in important ways made the right more funda-

In *Lawrence v. Texas*,¹⁸ the Court overturned *Bowers v. Hardwick*¹⁹ and extended the implied fundamental rights of privacy and personhood to homosexuals regarding the right of sexual intimacy.²⁰ Regarding equal protection, in *Grutter v. Bollinger*²¹ the Rehnquist Court also reaffirmed the *Bakke* principle that race may play a role in university admissions²² and even heightened the level of scrutiny of gender classifications in *United States v. Virginia*.²³ Most importantly, in *Romer v. Evans*,²⁴ a six-to-three decision, the Rehnquist Court invalidated a Colorado constitutional amendment that required all laws relating to homosexuals to be valid only through the process of amending its constitution.²⁵ The Court said this initiative by the people was invalid because it was based on pure animus against homosexuals and, thus, was a violation of the Equal Protection Clause.²⁶

Even with the addition to the Court of Chief Justice Roberts in 2005 and Justice Alito in 2006,²⁷ the Supreme Court refused to overrule landmark cases. For example, in *Parents Involved in Community Schools v. Seattle School District No. 1*,²⁸ the Court refused to find that race could not be

mental. The jettisoning of the trimester framework in *Casey* was a significant step in expanding the right of abortion choice because it did away with medical science as the framework within which the right to choose abortion rested. Arguably, *Casey* removed the collision course that would undermine the right to choose, as medical science now allows fetuses to be kept alive closer to conception, albeit with scientific aids, and women likewise have safer abortions closer to term.

Also, in *Gonzales v. Carhart*, the most recent Supreme Court case addressing “partial birth abortions,” the Supreme Court reinforced the fundamentality of the right to choose, but also recognized that certain abortion methods carry greater risks. 550 U.S. 124, 156–57 (2007). Justice Kennedy openly recognized the practice of lethal injections for fetuses. *Id.* at 136. Moreover, as both *Roe* and *Casey* seem to suggest, there remains the possibility that a state could pass a law today that would permit women to choose an abortion up to term so long as the law takes into consideration those standards of humanity espoused in *Gonzales v. Carhart*.

18. 539 U.S. 558 (2003).

19. 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

20. *See Lawrence*, 539 U.S. at 575 (“When homosexual conduct is made criminal by the law of the State, that declaration . . . is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres. The central holding of *Bowers* . . . demeans the lives of homosexual persons.”).

21. 539 U.S. 306 (2003).

22. *Id.* at 336–37.

23. *See* 518 U.S. 515, 573 (1996) (Scalia, J., dissenting) (criticizing the majority opinion’s application of intermediate scrutiny to the facts of the case, noting that “[o]nly the amorphous ‘exceedingly persuasive justification’ phrase, and not the standard elaboration of intermediate scrutiny, can be made to yield this conclusion that VMI’s single-sex composition is unconstitutional because there exist several women . . . willing and able to undertake VMI’s program”).

24. 517 U.S. 620 (1996).

25. *Id.* at 623, 627.

26. *Id.* at 632, 635.

27. *See Members of the Supreme Court of the United States*, *supra* note 13.

28. 551 U.S. 701 (2007).

a factor in attempts by school boards to diversify public schools.²⁹ Similarly, in *Fisher v. University of Texas at Austin*,³⁰ the Court under Chief Justice Roberts reaffirmed the principles of *Bakke* and *Grutter* by allowing the continuation of race to be one “plus factor” among many in the University of Texas’s undergraduate admissions process.³¹

Most significantly, in *United States v. Windsor*,³² Chief Justice Roberts’s Court not only refused to backtrack on the expansion of homosexuals’ rights under the Due Process Clause in *Lawrence*³³ and under the Equal Protection Clause in *Romer*,³⁴ but also *expanded* homosexuals’ rights under the Constitution³⁵ by declaring the nation’s Defense of Marriage Act (“DOMA”) unconstitutional because it violates basic due process and equal protection principles by “impos[ing] a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States.”³⁶ Thus, as the aforementioned discussion suggests, the Supreme Court has reaffirmed and expanded implied fundamental rights and equal protection under the law during a period of political dominance of social conservatives, evangelical Christians, and other groups who otherwise viewed the protection of their definition of family values as a central mission of government.³⁷ As I noted in a previous publication, social conservatives hoped that Republican appointees to the Supreme Court would roll back abortion rights, gay rights, affirmative

29. *Id.* at 735.

30. 133 S. Ct. 2411 (2013).

31. *Id.* at 2415–16 (2013).

32. 133 S. Ct. 2675 (2013).

33. *Id.* at 2694.

34. *Id.* at 2692.

35. *Cf. id.* at 2697 (Roberts, C.J., dissenting) (“The majority emphasizes that DOMA was a ‘systemwide enactment with no identified connection to any particular area of federal law,’ but a State’s definition of marriage ‘is the foundation of the State’s broader authority to regulate the subject of domestic relations with respect to the [p]rotection of offspring, property interests, and the enforcement of marital responsibilities.’ And the federal decision undermined (in the majority’s view) the ‘dignity [already] conferred by the States in the exercise of their sovereign power,’ whereas a State’s decision whether to expand the definition of marriage from its traditional contours involves no similar concern.” (internal citations omitted)).

36. *Id.* at 2693 (majority opinion).

37. *See, e.g.,* Lynn D. Wardle, “Multiply and Replenish”: *Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*, 24 HARV. J.L. & PUB. POL’Y 771, 799 (2001) (“Culturally, the legalization of same-sex marriage would send a message that would undermine the social boundaries relating to marriage and family relations. The confusion and social roles linked with marriage and parenting would be tremendous, and the message of ‘anything goes’ in the way of sexual behavior, procreation, and parenthood would wreak its greatest havoc among groups of vulnerable individuals who most need the encouragement of bright line laws and clear social mores concerning procreative responsibility.”).

action policies, and the constitutional separation of church and state.³⁸ I argued, however, that the Supreme Court has either surprisingly or unsurprisingly sustained doctrine in opposition to the core values comprising the base of the Republican Party or expanded rights in these doctrinal areas.³⁹

During its tenure, the Court under Chief Justice Roberts has had an impact on doctrinal change by primarily opening up new avenues of doctrine. For example, the Chief Justice's Court has generally been pro-business, dramatically reducing access to federal courts by those seeking to use class action suits to limit what many feel are discriminatory corporation policies, as well as reducing the impact of required arbitration agreements for those interacting with businesses.⁴⁰ The Court also established an individual right to bear arms in the *District of Columbia v. Heller* decision.⁴¹

In order to explain why a conservative-moderate Supreme Court has expanded implied fundamental rights for homosexuals and sustained a woman's right to choose, one must explore the nature of Supreme Court decisionmaking, focusing in particular on how Supreme Court decisionmaking either parallels or diverges from the social, economic, and political climate outside the Court. Such a contextual analysis will also help explain why most social scientists and other legal scholars and experts in constitutional law have failed to explain or predict the expansion of privacy rights and other individual liberties.⁴²

This Article will ask similar questions with regard to understanding the possibility of the development of perceived "conservative" rights principles in *Sebelius*.⁴³ Should we expect a different trajectory of rights expansion in

38. Kahn, *Why Does a Moderate/Conservative Supreme Court in a Conservative Age Expand Gay Rights?*, *supra* note 12, at 174.

39. *Id.*

40. See Lee Epstein et al., *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431, 1472 (2013) ("[T]he Roberts Court is much friendlier to business than either the Burger or Rehnquist Courts The Court is taking more cases in which the business litigant lost in the lower court and reversing more of these—giving rise to the paradox that a decision in which certiorari is granted when the lower court decision was anti-business is more likely to be reversed than one in which the lower court decision was pro-business.").

41. 554 U.S. 570, 595 (2008).

42. See, e.g., Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality and Marriage*, 2003 SUP. CT. REV. 27, 27 ("My principal suggestion here is that the Court's remarkable decision in *Lawrence v. Texas* is best seen as a successor to *Griswold v. Connecticut*: judicial invalidation of a law that had become hopelessly out of touch with existing social convictions. So understood, *Lawrence*, like *Griswold*, reflects an American variation of the old English idea of desuetude.").

43. Of course, one could ask similar questions with regard to what are perceived as conservative rights defined in *District of Columbia v. Heller*, 554 U.S. 570 (2008).

what are viewed as conservative rights? If we should expect a different trajectory for conservative rights, how can the difference be explained?

To make sense of *Sebelius* and the possibility of nascent rights creation in this case, I will explore how social scientists and legalists have explained Supreme Court decisionmaking as a process, with particular regard to its relationship to the world outside the Court.⁴⁴ By doing so we can begin to understand how rights are created; we can also explore whether such rights will or will not be sustained by future Courts.

I. BIDIRECTIONAL SUPREME COURT DECISIONMAKING

Two models exist for examining the relationship of the Supreme Court to the world outside. Scholars who rely on Model 1, for example, seek to explain Court decisionmaking in unidirectional terms, either internally from text or precedent, or externally from the social, economic, and political realities of the world outside. Model 2 explains Court decisionmaking and doctrinal change as a bidirectional relationship between legal principles and precedents and the social, economic, and political climate outside the Court.⁴⁵ To clarify, Model 1 explains Supreme Court decisionmaking, either from the historical, political, social facts, and events outside the Court, or from text, statute, or precedent. Model 2 explains Supreme Court decisionmaking in bidirectional terms, as a mutual construction process between text, precedent, and principles coupled with the social, political, and historical realities of the lived lives of persons.⁴⁶

II. THE FORMALIST-REALIST DIVIDE

The differences between the models can be better understood by looking at their impact on the study of courts and constitutional law—what Bri-

44. See *infra* Part I.

45. See, e.g., Ronald Kahn, *Originalism, the Living Constitution, and Supreme Court Decision Making in the Twenty-First Century: Explaining Lawrence v. Texas*, 67 MD. L. REV. 25, 35 (2012) (noting that “bi-directionality between the internal Court and the world outside occurs at several levels, at the level of the lived lives of citizens as the Court makes decisions about rights of privacy and personhood as we see in the SCP [social construction process], and at the level of politics itself”). This Article will center on the use of both models to explain doctrinal change on the Supreme Court. Nevertheless, these models may also be applied to decision making and doctrinal change in lesser federal and state courts.

46. These two models are distinguishable in other respects as well. For example, political scientists applying Model 1 use quantitative methods and those applying Model 2 use interpretive methods to study the Supreme Court and doctrinal change. Further, both models adopt conflicting assumptions about the importance of Court institutional norms and process on the preference formation of Justices.

an Z. Tamanaha calls the “formalist-realist divide.”⁴⁷ That is, to understand why Model 1 dominates the analysis of Supreme Court decisionmaking, especially among most social scientists, and why Model 2 is superior in explaining Court action and doctrinal change, we need to explore the nature of this divide and whether the divide between formalism and realism was valid historically as Justices made decisions—and whether it remained valid when *Sebelius* was decided.⁴⁸ I also note that many other scholars of the Court and common law reject the formalist-realist divide, and thus by rejecting it, also reject the possibility of Model I unidirectional explanations of Court action and doctrinal change.⁴⁹

The divide consists of the view that the 1870s through the 1920s should be viewed as the heyday of legal formalism, a doctrine that asserts “the law is an internally consistent and logical body of rules that is independent from the variable forms of its surrounding social institutions.”⁵⁰ While operating within the legal formalism framework, “[f]ormalist judges . . . assumed that law was objective, unchanging, extrinsic to the social climate, and, above all, different from and superior to politics.”⁵¹ The formalist vision as described by legal realists, however, included the following premises: “(1) law is rationally determinate, and (2) judging is [deductive in a] mechanical [way]. . . (3) legal reasoning is autonomous, since the class of legal reasons suffices to justify a unique outcome [and] no . . . non-legal reasons [are] demanded or required.”⁵² Further, (4) the process is formal in the sense “that right answers could be derived from [an] autonomous, logical working out of the system”; and (5) legal thought is “*conceptually ordered*

47. BRIAN Z. TAMANAHA, *BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING* 1–2 (2009) (noting that the formalist-realist divide has permeated legal circles and political science and has also shaped general historical understandings).

48. Brian Tamanaha, at least, suggests that the divide is a “stranglehold. It consists of a web of interlocking misinterpretations and confusions bundled in a mutually reinforcing package that is now virtually taken for granted. The consequences of this collection of errors are ongoing and pernicious.” *Id.* at 3.

49. *See generally, e.g.*, DOUGLAS E. EDLIN, *JUDGES AND UNJUST LAWS: COMMON LAW CONSTITUTIONALISM AND THE FOUNDATIONS OF JUDICIAL REVIEW* (2008) (discussing how common law tradition gives judges the dual mandate of applying law and developing law); JAMES R. STONER, JR., *COMMON LAW LIBERTY: RETHINKING AMERICAN CONSTITUTIONALISM* (2003) (arguing that common law is key to unlocking fundamental principles of the U.S. Constitution and is a guide for judges deciding contemporary constitutional matters).

50. TAMANAHA, *supra* note 47, at 2 (quoting MATHIEU DEFLEM, *SOCIOLOGY OF LAW: VISIONS OF A SCHOLARLY TRADITION* 98 (2008)) (internal quotation marks omitted).

51. *Id.* (quoting WILLIAM M. WIECEK, *LIBERTY UNDER LAW: THE SUPREME COURT IN AMERICAN LIFE* 187 (1988)) (internal quotation marks omitted).

52. *Id.* at 160 (quoting Richard H. Pildes, *Forms of Formalism*, 66 U. CHI. L. REV. 607, 608–09 (1999)) (internal quotation marks omitted).

in that ground-level rules could all be derived from a few fundamental principles.”⁵³

The other side of the divide narrative places an emphasis on legal realist conceptions of judging and the study of courts, which are viewed as counter to conceptions of judicial formalism.⁵⁴ During the 1920s and 1930s, legal realists were charged with discrediting legal formalism; this is due in part to the insights of Oliver Wendell Holmes, Roscoe Pound, and Benjamin Cardozo.⁵⁵ As Brian Tamanaha writes:

[T]he legal realists discredited legal formalism, demonstrating that the law is filled with gaps and contradictions, that the law is indeterminate, that there are exceptions for almost every legal rule or principle, and that legal principles and precedents can support different results. The realists argued that judges decide according to their personal preferences and then construct the legal analysis to justify the desired outcome.⁵⁶

To this day, the divide dominates scholars’ and our nation’s vision of the relationship between law and politics and whether courts are to be viewed as primarily legal or political bodies.⁵⁷ Moreover, acceptance of the divide and Model 1 assumptions about Supreme Court decisionmaking by most political scientists leads them to employ behavioral, usually quantitative, “normal science” methods when explaining Court action rather than view the impact of Court processes and norms as causative of Court action.⁵⁸ Typically, political scientists will view all explanations of Court action as a product of factors external to the Court, such as the following: (1) the ideology of the Justices; (2) the President who appointed them; (3) the legal advocacy process; or (4) the social, political, and economic world outside the Court.⁵⁹

53. *Id.* (quoting Richard H. Pildes, *Forms of Formalism*, 66 U. CHI. L. REV. 607, 608–09 (1999)) (internal quotation marks omitted).

54. *Id.* at 1.

55. *Id.*

56. *Id.*

57. *Id.* at 1–2 (“Until the twentieth century, most lawyers and scholars believed that judging was a mechanistic enterprise in which judges applied the law and rendered decisions without recourse to their own ideological or policy preferences. . . . In the 1920s, however, a group of jurists and legal philosophers, known collectively as ‘legal realists,’ recognized that judicial discretion was quite broad and that often the law did not mandate a particular result.” (quoting VIRGINIA A. HETTINGER, STEFANIE A. LINDQUIST & WENDY L. MARTINEK, *JUDGING ON A COLLEGE COURT* 30 (2006))).

58. *See id.* at 132–55 (noting that “[q]uantitative studies of judging are burgeoning” and discussing the findings of these studies).

59. Common law judges likewise “accommodated the law to social circumstances[.]” as Brian Tamanaha notes, even further suggesting that “[a] multitude of common law judges and jurists . . . have declared that the consideration, subconsciously and consciously, by judges of social

Scholars who employ Model 2 assumptions of bidirectionality and view the presence of a mutual construction process involving internal institutional and precedential factors, as well as external factors typically reject normal science and quantitative methods for explaining Court action.⁶⁰ Instead, proponents of the Model 2 approach use interpretive methods, which rest on methodological assumptions employed by what has been referred to as the historical institutional or political development approach.⁶¹ Methods used in both models are empirical—thus, one could label Model 1 methods as empirical behavioral and Model 2 methods as empirical interpretive.

Brian Tamanaha demonstrates, however, that the divide has always been a myth because, since the founding of our nation, Justices and judges have rejected such a divide between formalist law and the realist world outside the Court's decisionmaking. Ironically, when analyzing the scholarship of the leading legal realists, it becomes apparent that they too reject the divide.⁶² Because Model 2 assumptions about Supreme Court decisionmaking and methods of analysis reject the divide and bring the realist world outside the Court into its application of principles and precedents,⁶³ they have a better chance of explaining the development of individual rights—whether these be progressive rights or the nascent conservative rights defined by five Justices in *Sebelius*.

In analyzing *Sebelius*, we first must look at what polity and rights principles are raised in each of the opinions and how these principles are constructed. Do both liberal and conservative Justices employ arguments that are based on a bidirectionality between principles and the lived lives of individuals? Are there different levels of polity principles? Additionally, are there different levels of social and economic constructions used to ex-

interests, customs, morals, and purposes is integral to the common law system of judging." *Id.* at 175.

60. See *supra* text accompanying note 56. For a contextual understanding of the underpinnings of the Model 2 approach, see Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 465 (1897) ("[I]n the broadest sense it is true that the law is a logical development, like everything else. The danger of which I speak is not the admission that the principles governing other phenomena also govern the law, but the notion that a given system, ours, for instance, can be worked out like mathematics from some general axioms of conduct.").

61. For a description of the institutional approach, see TAMANAHA, *supra* note 47, at 194–95 ("The institutional context of judging blankets judges in multiple legal layers. Judges make legal decisions surrounded by colleagues, within a stable hierarchical institution, with the participation of and under the gaze of a legally trained audience of participants and observers. Lawyers, law clerks, fellow judges, and legal academics engage with judges in working out legal answers . . .").

62. See *id.* at 3 ("The objective of this book is to free us from the formalist-realist *stranglehold*. . . . Rooting out the formalist-realist story will help us recover a sound understanding of judging." (emphasis added)).

63. See *supra* notes 60–61 and accompanying text.

plain the nature of the principles and whether the mandate is constitutional? Do the polity and rights principles articulated in *Sebelius* make sense at the level of principle and social construction in light of prior cases? Is choosing not to purchase health insurance similar to actions in prior cases for which the Court permitted regulation under the Commerce Clause? What do these findings suggest about the long-term permanence of the inaction-action distinction that is at the core of the decisions by Chief Justice Roberts, Justice Scalia, and Justice Thomas, and that is criticized in the opinion of Justice Ginsburg, joined by Justices Breyer, Kagan, and Sotomayor?⁶⁴

Using Model 2 assumptions and methods, the Court analyzed both polity and rights principles and social and economic constructions to ascertain whether an individual has a constitutional right to refuse to purchase health insurance—and whether the government, in forcing one into the stream of interstate commerce by mandating that he or she purchase health insurance, violates that constitutional right.⁶⁵

As we explore below, the polity principles defined by Chief Justice Roberts exist at multiple levels of abstraction—from a general statement of Court deference to political institutions, where a constitutionally permissible argument can be made, to more complex polity principles of federalism.⁶⁶ Most importantly, as the following discussion will demonstrate, the opinion contains numerous references to the relationship between Com-

64. *Compare* Nat'l Fed'n of Indep. Bus. v. *Sebelius*, 132 S. Ct. 2566, 2587 (2012) (majority opinion) ("Every day individuals do not do an infinite number of things. In some cases they decide not to do something; in others they simply fail to do it. Allowing Congress to justify federal regulation by pointing to the effect of inaction on commerce would bring countless decisions an individual could *potentially* make within the scope of federal regulation . . ."), *with id.* at 2622 (Ginsburg, J., concurring in part and dissenting in part) ("In concluding that the Commerce Clause does not permit Congress to regulate commercial 'inactivity,' and therefore does not allow Congress to adopt the practical solution it devised for the health-care problem, [the Chief Justice] views the Clause as a 'technical legal conception,' precisely what our case law tells us not to do." (quoting *Wickard v. Filburn*, 317 U.S. 111, 122 (1942))).

65. In fact, both the majority *and* dissenting opinions incorporate the substantive and economic rights discussions in their respective analyses. *See, e.g., id.* at 2624 (Ginsburg, J., concurring in part and dissenting in part) ("A mandate to purchase a particular product would be unconstitutional if, for example, the edict impermissibly abridged the freedom of speech, interfered with the free exercise of religion, or infringed on a liberty interest protected by the Due Process Clause."); *see also id.* at 2589 (majority opinion) ("To an economist, perhaps, there is no difference between activity and inactivity; both have measurable economic effects on commerce.").

66. *See id.* at 2594 (noting that, as the Supreme Court has long explained, "every reasonable construction [of a statute] must be resorted to, in order to save a statute from unconstitutionality." (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895))); *see also id.* at 2676–77 (Scalia, J., dissenting) ("Structural protections—notably, the restraints imposed by federalism and separation of powers—are less romantic and have less obvious a connection to personal freedom than the provisions of the Bill of Rights It should be the responsibility of the Court to teach otherwise, to remind our people that the Framers considered structural protections of freedom the most important ones . . .").

merce Clause principles, protection of individual rights, and reduction in the abuse of government power.

At the core of Chief Justice Roberts's opinion, as well as the opinions of those Justices in opposition to the Chief Justice's stance, is the question of whether the inaction-action distinction, as a basis for a denial of rights or a liberty interest of individuals, is valid under the Commerce Clause.⁶⁷ Justices on both sides of the debate articulated the action-inaction dichotomy in conflicting fashions.⁶⁸ Questions on this precise issue abound, and the dual and conflicting interpretations of the inaction-action distinction further sow confusion in this area. Thus, under Commerce Clause principles, when citizens must pay the mandate after choosing not to purchase health insurance, should this be considered action or inaction within the economic market, and thus subject or not subject to regulation by Congress? Is the failure to buy health insurance inaction or action, particularly with respect to whether such action has an *effect* upon commerce? As previously noted, and in sum, the inaction-action distinction speaks directly to the following question—is there a right or liberty interest in refusing to be a participant in the market and interstate commerce?

Justices in *Sebelius*, through the lens of prior Commerce Clause cases, including *Wickard v. Filburn*,⁶⁹ *Perez v. United States*,⁷⁰ *United States v. Lopez*,⁷¹ *Heart of Atlanta Motel, Inc. v. United States*,⁷² and *Katzenbach v. McClung*,⁷³ considered what types of actions would trigger permissible government regulation under the Commerce Clause.⁷⁴ Additionally, could

67. As Chief Justice Roberts articulates with respect to the action-inaction distinction, “[t]he individual mandate’s regulation of the uninsured as a class is, in fact, particularly divorced from any link to existing commercial activity. . . . If the individual mandate is targeted at a class, it is a class whose commercial inactivity rather than activity is its defining feature.” *Id.* at 2590 (majority opinion).

68. As Justice Ginsburg articulates in her opinion, for example, “[i]t is not hard to show the difficulty courts (and Congress) would encounter in distinguishing statutes that regulate ‘activity’ from those that regulate ‘inactivity,’” further relying upon one scholar, who noted that “‘it is possible to restate most actions as corresponding inactions with the same effect.’” *Id.* at 2622 (Ginsburg, J., concurring in part and dissenting in part) (quoting *Archie v. Racine*, 847 F.2d 1211, 1213 (7th Cir. 1988), *cert. denied*, 489 U.S. 1065 (1989)).

69. 317 U.S. 111 (1942).

70. 402 U.S. 146 (1971).

71. 514 U.S. 549 (1995).

72. 379 U.S. 241 (1964).

73. 379 U.S. 294 (1964).

74. *See, e.g.*, *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2585 (2012) (majority opinion) (noting that, while “[t]he path of [the Supreme Court’s] Commerce Clause decisions has not always run smooth, . . . it is now well established that Congress has broad authority under the Clause”). With respect to the individual mandate in particular, Chief Justice Roberts pointed out one important shortcoming—namely, that while Commerce Clause power is quite expansive in

an aggregate of many lesser actions by citizens trigger permissible government regulation under the Commerce Clause?

Also, because issues of social and health policy are involved in *Sebelius*, Justices must explore the nature of the health care market, that is, whether it is national, state, or local in scope; the place of individual persons in that market; and whether the health care market is different from other markets that past Commerce Clause jurisprudence has permitted Congress to regulate. The following question may help better frame this complex issue—is buying health insurance or paying the mandate simply an individual economic action, or do the collective choices of whether to buy health insurance, taken together, affect the market?

Answering all of these questions will not only determine whether the government can ensure health coverage for most persons, as a social policy, but also whether these new Commerce Clause principles—and the new right advocated by the majority on the question of the constitutionality of the mandate—will impact future economic and social policy initiatives by government. Definitions of polity and rights principles, and the constructions of such principles in past cases as compared to the same principles and their construction at issue in *Sebelius*, delineate the contours of legal arguments addressing this issue, the rights as defined or rejected by the Justices, and, ultimately, whether such rights, as defined under the inaction-action distinction, have a long-term staying power.

The central question in this Article, therefore, is *not* whether the ACA was constitutional because five Justices, including Chief Justice Roberts, formally stated as much. Rather, the question is *why* the ACA is constitutional—particularly, whether, in Chief Justice Roberts’s opinion, the mandate was constitutional under the power to tax,⁷⁵ or whether, under the view of four other Justices (Breyer, Kagan, Ginsburg, and Sotomayor), the mandate was a legitimate government regulation under Congress’s power to regulate commerce.⁷⁶ Putting the question more simply, does *any* limitation

scope, “Congress has never attempted to rely on that power to compel individuals not engaged in commerce to purchase an unwanted product.” *Id.* at 2586.

75. *See id.* at 2595 (noting that, while the Affordable Care Act describes the payment as a penalty rather than a tax, the Court has “similarly held that exactions not labeled taxes nonetheless were authorized by Congress’s power to tax”).

76. As Justice Ginsburg stated in her opinion, the Court’s Commerce Clause jurisprudence has traditionally been guided by two principles: (1) “Congress has the power to regulate economic activities ‘that substantially affect interstate commerce’”; and (2) the Court “owe[s] a large measure of respect to Congress when it frames and enacts economic and social legislation.” *Id.* at 2616 (Ginsburg, J., concurring in part and dissenting in part) (quoting *Gonzales v. Raich*, 545 U.S. 1, 17 (2005)). Thus, as Justice Ginsburg further noted, “[s]traightforward application of these principles would require the Court to hold that the minimum coverage provision [of the Act] is proper Commerce Clause legislation.” *Id.* at 2617.

exist under the Commerce Clause whereby the government would lack the power to force an individual into an economic market based on a nascent liberty interest?

To answer this question, it is necessary to analyze how the majority and dissenting opinions in this case constructed such a right and limitation on Congress's power over economic and social policy, and how they analyzed the feared slippery slope concerns.⁷⁷ Several additional questions subsequently surface: Will *Sebelius* be viewed as the harbinger of a right or liberty interest under the Commerce Clause? Will *Sebelius* be the case that harkens much closer scrutiny of Congress's power under the Commerce Clause by redefining the contours of what constitutes a liberty interest? Finally, will *Sebelius* follow *Reed v. Reed*,⁷⁸ the case that triggered higher Court scrutiny of gender classifications under the Equal Protection Clause?⁷⁹

III. CHIEF JUSTICE ROBERTS'S MAJORITY OPINION ADDRESSING THE CONSTITUTIONALITY OF THE ACA

A. *First Look: Court Deference to Congress*

At first glance, Chief Justice Roberts appears to be quite deferential to political branches when they implement policy.⁸⁰ The Chief Justice believes that when a constitutionally permissible basis for government power may be found, the Court should not declare a law unconstitutional.⁸¹ As the Chief Justice writes, "it is well established that if a statute has two possible meanings, one of which violates the Constitution, courts should adopt the meaning that does not do so."⁸²

In his opinion, Chief Justice Roberts emphasizes that the Court must strike down laws that transgress the limits of government powers;⁸³ to base the individual mandate on the Commerce power is such a transgression for

77. *See infra* Parts III–V.

78. 404 U.S. 71 (1971).

79. See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES 772 (4th ed. 2011) (noting *Reed v. Reed*'s role in the "emergence of intermediate scrutiny").

80. *Cf. Sebelius*, 132 S. Ct. at 2579 (majority opinion) ("Our permissive reading of [Congress's power to tax and to regulate commerce] is explained in part by a general reticence to invalidate the acts of the Nation's elected leaders. . . . [N]onetheless, [o]ur deference in matters of policy cannot, however, become abdication in matters of law.").

81. *Id.*

82. *Id.* at 2593.

83. *Id.* at 2579–80.

the Chief Justice.⁸⁴ Nonetheless, when Chief Justice Roberts found a constitutionally permissible basis for the individual mandate under the taxing power, he chose to support the longstanding polity principle of deference to political branches.⁸⁵ As Chief Justice Roberts writes, citing past precedent, “every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.”⁸⁶

Even though Chief Justice Roberts opposes the Commerce Clause as the constitutional basis for the individual mandate, he starts with a view that the Commerce power can be expansive when individual actions “substantially affect interstate commerce.”⁸⁷ Citing *Wickard v. Filburn* as an example, Chief Justice Roberts states that “[t]he power over activities that substantially affect interstate commerce can be expansive. That power has been held to authorize federal regulation of such seemingly local matters as a farmer’s decision to grow wheat”⁸⁸ Further, citing *Perez v. United States*, Chief Justice Roberts likewise accepts the legitimacy of government regulations that seek to stop actions such as extortionate payments by butchers to loan sharks because these actions substantially affect interstate commerce.⁸⁹

Chief Justice Roberts also appears to support major legal principles under the Commerce Clause as applied to the individual mandate and the ACA. He agrees that, by requiring individuals to purchase health insurance, the individual mandate prevents cost shifting from those who purchase health insurance to those who ordinarily would not purchase health insurance.⁹⁰ However, as Chief Justice Roberts recognizes, the individual

84. *See id.* at 2590–91 (“Everyone will likely participate in the markets for food, clothing, transportation, shelter, or energy; that does not authorize Congress to direct them to purchase particular products in those or other markets today. The Commerce Clause is *not* a general license to regulate an individual from cradle to grave” (emphasis added)).

85. *See id.* at 2599 (“Whether the mandate can be upheld under the Commerce Clause is a question about the scope of federal authority. Its answer depends on whether Congress can exercise what all acknowledge to be the novel course of directing individuals to purchase insurance. Congress’s use of the Taxing Clause to encourage buying something is, by contrast, not new. . . . Sustaining the mandate as a tax depends only on whether Congress *has* properly exercised its taxing power to encourage purchasing health insurance, not whether it *can*.”).

86. *Id.* at 2594 (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)).

87. *Id.* at 2578 (internal citation omitted).

88. *Id.*

89. *Id.* at 2579. *But cf. id.* at 2677 (Thomas, J., dissenting) (“I adhere to my view that ‘the very notion of a substantial effects test under the Commerce Clause is inconsistent with the original understanding of Congress’ powers and with this Court’s early Commerce Clause cases.” (second internal quotation marks and citation omitted)).

90. *Id.* at 2585 (majority opinion).

mandate opens up the possibility of a concerning free-rider dilemma.⁹¹ Chief Justice Roberts also agrees that the Commerce power is not limited to individual actions that substantially affect interstate commerce; Congress's power under the Commerce Clause also extends to individual activities that affect commerce in the aggregate.⁹²

Nonetheless, Chief Justice Roberts's proposal that there be an inaction-action dichotomy and a liberty interest under the Commerce Clause demonstrates the revolutionary nature of his decision.

B. *The Inaction-Action Dichotomy*

For the Chief Justice, the problem with ruling the mandate constitutional under Commerce Clause principles is that "Congress has never attempted to rely on that [Commerce] power to compel individuals not engaged in commerce to purchase an unwanted product."⁹³ Congress's "power to *regulate* commerce presupposes the existence of commercial activity to be regulated."⁹⁴ The power to regulate, however, does not amount to the "power to create."⁹⁵ As Chief Justice Roberts states: "The language of the Constitution reflects the natural understanding that the power to regulate assumes there is already something to be regulated."⁹⁶ Furthermore, all Commerce Clause cases "uniformly describe the power as reaching 'activity.' . . . The individual mandate, however, does not regulate existing commercial activity. It instead compels individuals to *become* active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce."⁹⁷ According to Chief Justice Roberts, the decision not to purchase health insurance means that individuals are not immersed in the stream of interstate commerce, but rather are otherwise

91. *See id.* ("[T]he mandate forces into the insurance risk pool more healthy individuals, whose premiums on average will be higher than their health care expenses. This allows insurers to subsidize the costs of covering the unhealthy individuals the reforms require them to accept."). *But see id.* at 2620 (Ginsburg, J., concurring in part and dissenting in part) ("[The Chief Justice] also calls the minimum coverage provision an illegitimate effort to make young, healthy individuals subsidize insurance premiums paid by the less hale and hardy. This complaint, too, is spurious. . . . By requiring the healthy uninsured to obtain insurance . . . the minimum coverage provision ends the free ride these individuals currently enjoy.").

92. *See id.* at 2586 (majority opinion) ("Congress's power, moreover, is not limited to regulation of an activity that by itself substantially affects interstate commerce, but also extends to activities that do so only when aggregated with similar activities of others.").

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at 2587.

brought into the stream of interstate commerce by government requirements under the individual mandate.

In his opinion, Chief Justice Roberts emphasizes that the failure to purchase health insurance is not action, but rather a decision not to enter a market (the economic system);⁹⁸ therefore, this decision cannot be the basis for government regulation (in this case, the individual mandate).⁹⁹ Thus, according to Chief Justice Roberts, the decision not to purchase health insurance should not be a predicate for government regulation because such decision does not constitute an act that government has the capacity or power to regulate in the first place. Chief Justice Roberts's construction of inaction,¹⁰⁰ which Justice Ginsburg opposes in her dissenting opinion,¹⁰¹ assumes that a conscious choice not to purchase health insurance consequently embodies a conscious decision *not* to act in the economic system.

In sum, as discussed throughout this Article, the difference between the majority and dissenting opinions on the individual mandate turns on how that act of choice is constructed. Can the Court ultimately construe that an act, either by an individual or in the aggregate, substantially affects commerce? Moreover, it is important to note that the difference also turns on the conflicting positions taken by both the majority and dissenting opinions on the question of whether a person has a liberty interest in being left alone by the government. One can ask what the difference is between the decision not to buy insurance, which Chief Justice Roberts believes cannot be regulated under the Commerce Clause, and the decision by the farmer in *Wickard* to grow wheat used on his farm rather than follow a government regulation that limited the amount he could grow. It is precisely the comparison of these economic and social constructions that is at the core of Chief Justice Roberts's call in *Sebelius* for a new liberty interest under the Commerce Clause.

98. *See id.* at 2589 (“To an economist, perhaps, there is no difference between activity and inactivity; both have measurable economic effects on commerce. But the distinction between doing something and doing nothing would not have been lost on the Framers, who were ‘practical statesmen,’ not metaphysical philosophers.” (internal citation omitted)).

99. Chief Justice Roberts concludes that this is so, in part, because permitting “Congress to justify federal regulation by pointing to the effect of inaction on commerce would bring countless decisions an individual could *potentially* make within the scope of federal regulation[.]” *Id.* at 2587.

100. Chief Justice Roberts, as an extreme articulation of the inaction-action distinction, noted that “the Government’s logic would justify a mandatory purchase to solve almost any problem.” *Id.* at 2588.

101. *See infra* Part IV.B (providing an overview of Justice Ginsburg’s opinion in greater detail).

C. *To Regulate Rather Than Compel*

Chief Justice Roberts makes what he believes is a clear distinction between the government's power to *regulate* commerce and its power to *compel* it.¹⁰² A look at Justice Ginsburg's dissenting opinion demonstrates what she perceives to be Chief Justice Roberts's refusal to *prospectively* define the health care market, choosing instead to define the health care market with respect to the "here and now."¹⁰³ However, because the provision of health care is now "a concern of national dimension,"¹⁰⁴ Justice Ginsburg notes that Justices should be cognizant of the following facets of this national health care market: (1) the unpredictability of sickness;¹⁰⁵ (2) individuals are constantly operating in the health care marketplace because, at some point, these individuals will become sick and affect the health care market, whether or not these individuals have paid for insurance;¹⁰⁶ and (3) the difference between regulating classes of *activities* that affect the market, such as the growing of marijuana or not buying health insurance, compared to regulating individuals assumed to be at rest.¹⁰⁷ Thus, the uninsured are not simply individuals seeking to be left alone, but are rather individuals who have made the conscious decision not to pay for the social and economic effects of their choices.

IV. CONGRESS MAY NOT REGULATE INDIVIDUALS NOW BECAUSE OF "PROPHESED FUTURE ACTIVITY"

A. *Race Discrimination and Interstate Commerce*

Chief Justice Roberts refuses to accept the long-time precedent under the Commerce Clause that "Congress may dictate the conduct of an individual today because of prophesied future activity[.]"¹⁰⁸ Citing both *Heart of Atlanta Motel, Inc. v. United States* and *Katzenbach v. McClung*, which

102. *Sebelius*, 132 S. Ct. at 2589.

103. *See id.* at 2619 (Ginsburg, J., concurring in part and dissenting in part) (further noting that "it is Congress' role, not the Court's, to delineate the boundaries of the market the Legislature seeks to regulate").

104. *Id.* at 2609.

105. *Id.* at 2610.

106. This facet is clearly demonstrated by the fact that, according to Justice Ginsburg, "[c]ollectively, Americans spent \$2.5 trillion on health care in 2009, accounting for 17.6% of our Nation's economy." *Id.* at 2609.

107. Chief Justice Roberts likewise acknowledges this distinction, pointing out that "[o]ur precedents recognize Congress's power to regulate 'class[es] of activities,' not classes of *individuals*, apart from any activity in which they are engaged." *Id.* at 2590 (majority opinion) (internal citations omitted).

108. *Id.*

prohibited discrimination by hotel operators and restaurant owners due to the effect of such acts on commerce,¹⁰⁹ Chief Justice Roberts admits, however, that “[the Court has] said that Congress can anticipate the *effects* on commerce of an economic activity.”¹¹⁰ Nevertheless, Chief Justice Roberts sees a distinction between the Commerce Clause basis for outlawing race discrimination in public accommodations and in allowing the mandate under the ACA. As the Chief Justice writes: “We have never permitted Congress to anticipate that activity itself in order to regulate individuals not currently engaged in commerce.”¹¹¹ Thus, the Chief Justice emphasizes that all Commerce Clause cases have involved “preexisting economic activity.”¹¹²

Importantly, Chief Justice Roberts implied that one of the ancillary reasons the Court provided in *Heart of Atlanta Motel* and *Katzenbach* in support of its decision to outlaw discrimination in public accommodations was the fact that many African-Americans and others chose not to act—that is, African-Americans chose to refuse to engage in interstate travel because of expected race discrimination, a choice that also affected the economy.¹¹³ How is the choice not to enter the economic system by refusing to travel different from choosing not to purchase health insurance? Arguably, both decisions are “inactions.” How can the decisions by African-Americans not to engage in interstate travel be grounds for regulation of public accommodations, but the choice not to purchase health insurance not be a basis for government regulation of this choice?

109. *Id.* As the Court in *Heart of Atlanta Motel*, noted, on the one hand, “It is said that the operation of the motel here is of a purely local character. But, assuming this to be true, ‘[i]f it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.’” 379 U.S. 241, 258 (1964) (quoting *United States v. Women’s Sportswear Mfrs. Assn.*, 336 U.S. 460, 464 (1949)). Further, in *Katzenbach*,—decided the same day as *Heart of Atlanta Motel*—the Court likewise noted that “Congress has determined for itself that refusals of service to Negroes have imposed burdens both upon the interstate flow of food and upon the movement of products generally. Of course, the mere fact that Congress has said when particular activity shall be deemed to affect commerce does not preclude further examination by this Court. But where we find that the legislators . . . have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end.” 379 U.S. 294, 303–04 (1964).

110. *Id.*

111. *Sebelius*, 132 S. Ct. at 2590.

112. *Id.*

113. See *supra* text accompanying notes 111–112; see also, e.g., *Katzenbach*, 379 U.S. at 300 (noting that “there was an impressive array of testimony that discrimination in restaurants had a direct and highly restrictive effect upon interstate travel by Negroes. This resulted, it was said, because discriminatory practices prevent Negroes from buying prepared food served on the premises while on a trip, except in isolated and unkempt restaurants and under most unsatisfactory and often unpleasant conditions. *This obviously discourages travel and obstructs interstate commerce for one can hardly travel without eating.*” (emphasis added)).

Finally, as previously stated, although Chief Justice Roberts at first appears to support the principle of Court deference to political branches when a constitutionally viable way can be found to support social and economic legislation,¹¹⁴ he further suggests in *Sebelius* that the Court, not Congress, should have the power to choose the economic principles that are to apply in deciding whether the mandate is constitutional under the Commerce Clause. As the Chief Justice writes: “To an economist, perhaps, there is no difference between activity and inactivity; both have measurable economic effects on commerce. But the distinction between doing something and doing nothing would not have been lost on the Framers, who were ‘practical statesmen,’ not metaphysical philosophers.”¹¹⁵ The fact that the Founders did not have such a view of economic relationships is not an effective screen partitioning off inaction and action in light of the long history of Court precedents since the Founding.

B. Chief Justice Roberts’s Slippery Slope

For the Chief Justice, one of the most important aspects of federalism in shaping the power of government is the relationship between the principles of federalism and the liberty of individuals.¹¹⁶ Therefore, when he thinks about national and state power under the Commerce Clause, a rights concept is generally looming large in the background. Quoting directly from *New York v. United States*,¹¹⁷ Chief Justice Roberts writes: “‘State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.’”¹¹⁸ Chief Justice Roberts emphasizes that federalism and divided power between the national and state government limits the arbitrary use of power by the national government.¹¹⁹ Therefore, Congress’s powers under the Commerce Clause must be addressed with an eye toward ascertaining whether a broad, general federal police power will be expanded at the expense of the more localized police power of the states.¹²⁰

114. See *supra* text accompanying notes 80–82.

115. *Sebelius*, 132 S. Ct. at 2589 (internal citation omitted).

116. See *id.* at 2578 (“By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power.” (quoting *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011))).

117. 505 U.S. 144 (1992).

118. *Sebelius*, 132 S. Ct. at 2578 (quoting *New York v. United States*, 505 U.S. 144, 181 (1992)).

119. See *supra* text accompanying notes 116, 118 and accompanying text.

120. See *Sebelius*, 132 S. Ct. at 2578 (“Because the police power is controlled by 50 different States instead of one national sovereign, the facets of governing that touch on citizens’ daily lives are normally administered by smaller governments closer to the governed. The Framers thus en-

Chief Justice Roberts fears that permitting the individual mandate to pass muster under the Commerce Clause based on inaction would create a slippery slope—that is, it would create a “‘great substantive and independent powers’ beyond those specifically enumerated.”¹²¹ For similar reasons, the Chief Justice determined that such power is not permissible under the Necessary and Proper Clause because such powers are derivative of others in the Constitution—in this case, under the Commerce Clause.¹²² As discussed below, the dissenters view the Necessary and Proper Clause in much more expansive terms.¹²³ Most importantly, Chief Justice Roberts identifies a slippery slope that would surface if the Court entertained that such “inaction” could be the basis of national government regulation under the Commerce Clause. Chief Justice Roberts suggests that this slippery slope will lead to a wide abuse of government power:

Construing the Commerce Clause to permit Congress to regulate individuals precisely because they are doing nothing would open a new and potentially vast domain to congressional authority. Every day individuals do not do an infinite number of things. In some cases they decide not to do something; in others they simply fail to do it.¹²⁴

Thus, at the core of the *Sebelius* decision is a slippery slope—that if we allow the government to apply the Commerce Clause to a decision not to act or enter interstate commerce, then any failure of persons to take positive action to meet a social or economic problem could be regulated precisely due to the effects of such failure to act.¹²⁵ As Chief Justice Roberts writes: “Indeed, the Government’s logic would justify a mandatory purchase to solve almost any problem.”¹²⁶ He believes that the Constitution does not “authorize[] Congress to use its commerce power to compel citi-

sured that powers . . . were held by governments more local and more accountable than a distant federal bureaucracy. . . . This case concerns two powers that the Constitution does grant the Federal Government, but which must be read carefully to avoid creating a general federal authority akin to the police power.”)

121. *Id.* at 2591 (quoting *McCulloch v. Maryland*, 4 Wheat 316, 421 (1819)).

122. *Id.* at 2592.

123. *See, e.g., id.* at 2627 (Ginsburg, J., concurring in part and dissenting in part) (criticizing Chief Justice Roberts for failing to explain “*why* the power to direct either the purchase of health insurance or, alternatively, the payment of a penalty collectible as a tax is more far-reaching than other implied powers this Court has found meet under the Necessary and Proper Clause”).

124. *Id.* at 2587 (majority opinion).

125. Chief Justice Roberts uses, as an extreme example, that most Americans have poor diets. *Id.* at 2588. As such, Chief Justice Roberts notes that “[t]he failure of that group to have a healthy diet increases health care costs, to a greater extent than the failure of the uninsured to purchase insurance.” *Id.* Would it make sense, as the Chief Justice suggests, to “address the diet problem by ordering everyone to buy vegetables”? *Id.*

126. *Id.*

zens to act as the Government would have them act.”¹²⁷ The Chief Justice views this principle of regulating the effects of inaction as “fundamentally changing the relation[ship] between the citizen and the Federal Government.”¹²⁸

V. DISTINGUISHING BETWEEN THE COMMERCE AND TAXING POWERS

A. *Getting Rid of the Slippery Slope*

The difference between the suitability of the constitutional justification for the individual mandate under the taxing power rather than the commerce power is related to the way in which the Chief Justice constructs the failure to purchase health insurance. For the reasons outlined below, Chief Justice Roberts views granting the constitutionality of the individual mandate under Congress’s power to tax as not threatening individual liberty.

Foremost, the slippery slope that he fears regarding government regulation of “inaction” under the Commerce Clause is not as ominous under the taxing power.¹²⁹ Chief Justice Roberts does not view the choice not to buy health insurance that “triggers a tax” as constituting “a legal command to buy insurance.”¹³⁰ Arguably, the Chief Justice still has difficulty attempting to justify the mandate as a tax. This is so because he concedes that, operationally, the individual mandate functions as a tax even though it has at times been labeled a penalty.¹³¹ Chief Justice Roberts also concedes that this payment will certainly impact individual behavior, noting that “[n]one of this is to say that the payment is not intended to affect individual conduct.”¹³² Moreover, he notes that the failure to purchase health insurance is enforced through the tax system, not the criminal justice system—an individual is not considered an outlaw for failing to purchase health insurance, regardless of the reasons.¹³³ While taxes concern practical applica-

127. *Id.* at 2589.

128. *Id.*

129. *Id.* at 2599–600. This is so for three primary reasons, as the Chief Justice notes: (1) “it is abundantly clear the Constitution does not guarantee that individuals may avoid taxation through inactivity”; (2) “Congress’s ability to use its taxing power to influence conduct is not without limits”; and (3) “although the breadth of Congress’s power to tax is greater than its power to regulate commerce, the taxing power does not give Congress the same degree of control over individual behavior.” *Id.*

130. *Id.* at 2594.

131. *Id.*

132. *Id.* at 2596.

133. *See id.* at 2597 (“That Congress apparently regards such extensive failure to comply with the mandate as tolerable suggests that Congress did not think it was creating four million outlaws. It suggests instead that the shared responsibility payment merely imposes a tax citizens may lawfully choose to pay in lieu of buying health insurance.”).

tions and should be analyzed in functional terms, Commerce Clause issues involve more complex concerns such as federalism and basic liberty interests.

Even though determining whether the payment passes muster under Congress's taxing power requires a more straightforward, "functional approach,"¹³⁴ one should still ask why a penalty under Congress's taxing power does not similarly raise slippery slope concerns. At a basic level, Chief Justice Roberts views an individual paying a tax for failing to purchase health insurance as fundamentally different from an individual being forced by the government to purchase health insurance.¹³⁵ He notes that taxes primarily involve incentives, and that Congress's use of its taxing power to encourage an individual to purchase something is not a new concept.¹³⁶ Lastly, the Chief Justice also does not view this tax as an outlawed direct tax on individuals because it is not a capitation tax paid by all.¹³⁷

With respect to the individual mandate, Chief Justice Roberts permits the "payment's practical characteristics" to form the constitutional basis for Congress's taxing power in this case.¹³⁸ Practicalities such as the place of the individual in the health care market and the place of the mandate as it affects that same market with respect to Commerce Clause principles are not allowed. As Justice Ginsburg opines: Why is this so, particularly given the trajectory of Commerce Clause jurisprudence?¹³⁹

A key difference exists between basing the constitutionality of the mandate on the commerce versus the taxing power. As Chief Justice Roberts writes: "First, and most importantly, it is abundantly clear the Constitution does not guarantee that individuals may avoid taxation through inactivity."¹⁴⁰ Unlike Congress's power under the Commerce Clause, therefore, there is no promise that one may escape taxation given abstention from reg-

134. *Id.* at 2595.

135. *Cf. id.* at 2596–97 ("While the individual mandate clearly aims to induce the purchase of health insurance, it need not be read to declare that failing to do so is unlawful. Neither the Act nor any other law attaches negative legal consequences to not buying health insurance, beyond requiring a payment to the IRS.").

136. *Id.* at 2596.

137. *Id.* at 2599.

138. *Id.* at 2600.

139. *See id.* at 2600–01 ("Justice G[insburg] questions the necessity of rejecting the Government's commerce power argument, given that § 5000A can be upheld under the taxing power. But the statute reads more naturally as a command to buy insurance than as a tax, and I would uphold it as a command if the Constitution allowed it. It is only because the Commerce Clause does not authorize such a command that it is necessary to reach the taxing power question. And it is only because we have a duty to construe a statute to save it, if fairly possible, that § 5000A can be interpreted as a tax.").

140. *Id.* at 2599.

ulated or taxable activity. Accordingly, the inaction-action distinction, at least for Chief Justice Roberts, is not central to the taxing power. Further, as previously noted, Congress's use of the taxing power "to encourage buying something is . . . not new."¹⁴¹

What this boils down to is that there is no directness of government power over individual choice if the mandate is permitted under the taxing power; there is, however, a directness if the mandate is allowed under the Commerce Clause. This distinction is key to Chief Justice Roberts's fear of the slippery slope. He believes that validating the individual mandate under the Commerce Clause, rather than justifying it under the taxing power, would create a slippery slope because it would provide the government with more direct control over individuals both now and in the future.¹⁴² The economic construction here is that the directness of government action is much greater given the feared slippery slope of government power, and thus requires a liberty interest, or cocoon, to be defined under the Commerce Clause. Articulating his fear of the slippery slope, Chief Justice Roberts states: "Once we recognize that Congress may regulate a particular decision under the Commerce Clause, the Federal Government can bring its full weight to bear. Congress may simply command individuals to do as it directs. An individual who disobeys may be subjected to criminal sanctions."¹⁴³ In fact, one can see a slippery slope of possible sanctions clearly outlined in the majority opinion: (1) "fines and imprisonment"; (2) branding as a criminal; (3) "deprivation of otherwise protected civil rights, such as the right to bear arms or vote in elections"; (4) "loss of employment opportunities"; and (5) "social stigma."¹⁴⁴ Chief Justice Roberts emphasizes that, "[b]y contrast, Congress's authority under the taxing power is limited to requiring an individual to pay money into the Federal Treasury, [and] no more."¹⁴⁵

The Chief Justice's opinion thus demonstrates that at the core of his decision are polity principles such as federalism and separation of powers, including, at a more basic level, the relationship between both the Court and Congress in interpreting the Commerce Clause and whether the individual mandate is constitutional under this clause rather than under Congress's taxing power.¹⁴⁶ Importantly, these principles have no context without

141. *Id.*

142. *Id.* at 2601.

143. *Id.* at 2600.

144. *Id.*

145. *Id.*

146. *See, e.g., id.* at 2608 ("The Framers created a Federal Government of limited powers, and assigned to this Court the duty of enforcing those limits. The Court does so today. But the Court

Chief Justice Roberts engaging in an economic construction process and drawing analogies between the construction processes of the individual mandate as compared to the economic constructions of prior Commerce and Taxing Clause jurisprudence. Moreover, in drawing these analogies, it is simply not possible to sustain a formalist-realist divide; formalist legal principles and realist factors mutually construct each other in determining whether the mandate is constitutional under Congress's commerce or taxing power. Thus, Model 2 bidirectional explanations of Supreme Court decisionmaking are necessary to understand the opinions of all Justices—whether they are liberal, moderate, or conservative.

Notably, this very same process of decisionmaking has an eye to the future, as is evident in Chief Justice Roberts's attempt to establish the difference between inaction and action and a liberty interest under the Commerce Clause.¹⁴⁷ We will see a similar bidirectional process of decisionmaking at work in Justice Ginsburg's dissenting opinion, with quite different definitions of principles and social constructions in light of precedent.¹⁴⁸

To counter the slippery slope, Chief Justice Roberts seeks to establish a new right or principle, a liberty interest under the Commerce Clause, without the need to do so. The Chief Justice could have only spoken to the constitutionality of the individual mandate under the taxing power. He also could have chosen not to brighten the line between action and inaction and to allow the political branches to define such a line using modern concepts of economic causation. Therefore, one must conclude that Chief Justice Roberts (and the four other Justices who supported his analysis) appears to seek a new economic liberty interest under the Commerce Clause.¹⁴⁹ As evidenced by *Sebelius*, this is another example of the fact that conservative Justices, not simply progressives, are non-minimalist or maximalist in their decisionmaking.

B. Justice Ginsburg's Opinion

Justice Ginsburg, who is joined by Justices Sotomayor, Breyer, and Kagan, alternatively opines that the ACA and the mandate are constitutional

does not express any opinion on the wisdom of the Affordable Care Act. Under the Constitution, that judgment is reserved to the people.”).

147. See *supra* Part V.A.

148. See *infra* Part V.B.

149. See Elizabeth Weeks Leonard, *Affordable Care Act Litigation: The Standing Paradox*, 38 AM. J.L. & MED. 410, 415 (2012) (“To be sure, there are plausible individual rights objections to the requirement to purchase health insurance, including interference with autonomous healthcare decisionmaking and freedom of contract. At the core, the objections sound in libertarian rights and economic liberty to be free from government coercion.”).

under the Commerce Clause.¹⁵⁰ However, at the core of Justice Ginsburg's opinion is a point-by-point attack on each of the following: (1) Chief Justice Roberts's articulation of the inaction-action dichotomy; (2) the liberty interest that Chief Justice Roberts and Justices Scalia, Thomas, Alito, and Kennedy seek to establish; and (3) the unfounded fear of a slippery slope leading to wide abuse of congressional powers in the future should the ACA and the individual mandate be declared constitutional under the Commerce Clause.¹⁵¹ The centerpiece of Justice Ginsburg's discussion of the inaction-action dichotomy and the liberty interest, however, is her endeavor to engage in a law-drawing exercise to make sense of this dichotomy.¹⁵² Further, Justice Ginsburg also points to the absurdity of the "chain of inferences" that would result if, for example, the Court were to accept Chief Justice Roberts's economic construction that a "vegetable-purchase mandate" somehow substantially affects interstate commerce.¹⁵³

In addition to addressing the absurdity of the inaction-action dichotomy in light of Commerce Clause jurisprudence, Justice Ginsburg also explores the polity principles at the core of congressional and Court power under the Commerce Clause.¹⁵⁴ She analyzes these constructions in light of their applicability to those at the core of the inaction-action dichotomy, ultimately concluding that "[w]hen contemplated in its extreme, almost any power looks dangerous. The commerce power, hypothetically, would enable Congress to prohibit the purchase and home production of all meat, fish,

150. See *Sebelius*, 132 S. Ct. at 2609 (Ginsburg, J., concurring in part and dissenting in part) ("Unlike [the Chief Justice], however, I would hold, alternatively, that the Commerce Clause authorizes Congress to enact the minimum coverage provision.").

151. *Id.* at 2609–42.

152. See *id.* at 2622 ("It is not hard to show the difficulty courts (and Congress) would encounter in distinguishing statutes that regulate 'activity' from those that regulate 'inactivity.'"). On this point, Justice Ginsburg cites *Wickard v. Filburn* as a prime example, and asks the following question: "Did the statute there at issue [in *Wickard*] target activity (the growing of too much wheat) or inactivity (the farmer's failure to purchase wheat in the marketplace)?" *Id.* at 2622–23. Furthermore, Justice Ginsburg rejects the Chief Justice's analogy between the health care and car markets on the principal basis that at some point, all individuals will be active in the health care market—that is, "[t]he inevitable yet unpredictable need for medical care and the guarantee that emergency care will be provided when required are conditions nonexistent in other markets." *Id.* at 2619. Thus, at its core, the economic construction of the health care market is unique as compared to other markets—for example, as Justice Ginsburg notes, just because "an individual *might* buy a car or a crown of broccoli one day, there is no certainty she will ever do so." *Id.* at 2619–20.

153. *Id.* at 2624.

154. See *id.* at 2619 ("[I]t is Congress' role, not the Court's, to delineate the boundaries of the market the Legislature seeks to regulate."). Justice Ginsburg further noted that, despite Congress's power to define the boundaries of legislative action, "[o]ther provisions of the Constitution also check congressional overreaching. . . . Supplementing these legal restraints is a formidable check on congressional power: the democratic process." *Id.* at 2624.

and dairy goods, effectively compelling Americans to eat only vegetables.”¹⁵⁵

Again, in light of how both Chief Justice Roberts and Justice Ginsburg interpret Commerce Clause jurisprudence, we may gain a better picture of whether the inaction-action dichotomy and the economic liberty interest associated with this dichotomy will revolutionize Court decisionmaking under the Commerce Clause and whether Congress will be able to confront future economic and social problems without interference from the Supreme Court.

We also witness, when analyzing Justice Ginsburg’s critique of the majority opinion, that the formalist-realist divide is absent. Conservative and liberal Justices alike reject this divide, and otherwise engage in a bidirectional Supreme Court decisionmaking process that incorporates the outside economic, social, and political world.

In Justice Ginsburg’s opinion, there are four primary levels of analysis, with each level speaking directly to the arguments in the majority opinion.¹⁵⁶ All four levels discuss why the ACA and individual mandate are constitutional under the Commerce and Necessary and Proper Clauses, as well as under principles of federalism and separation of powers (congressional and court power) as these principles have been applied in connection to the Commerce Clause. More specifically, each of these four levels explains why precedent cannot sustain the inaction-action dichotomy and the liberty interest Chief Justice Roberts believes should cement this dichotomy.

Level I is a discussion of the Commerce Clause in light of what the Framers envisioned in the Constitution, having lived under the Articles of Confederation, and how the Commerce Clause should be interpreted in *Sebelius* in light of this discussion.¹⁵⁷ Level II directly addresses whether the inaction-action dichotomy, as justification for the unconstitutionality of the individual mandate and the ACA, can be sustained through an application of the above principles and the analysis of case law.¹⁵⁸ Level III speaks to Chief Justice Roberts’s fear that allowing the individual mandate to pass under the Commerce Clause will lead to a slippery slope of significant abuses by Congress, a problem that the Chief Justice believes can only be stopped by the introduction of a discrete, economic liberty interest.¹⁵⁹ Lev-

155. *Id.* at 2625.

156. *See infra* Parts V.B.1–B.4.

157. *See infra* Parts V.B.1.a–b.

158. *See infra* Part V.B.2.

159. *See infra* Parts V.B.3.a–d.

el IV refers back to first principles explored under Level I of the opinion, with particular regard to the creation of the liberty interest in light of *Lochner* era Commerce Clause cases and principles that have been rejected by the Court for over seventy years.¹⁶⁰

1. *Level I*

a. *Interpreting the Commerce Clause in Terms of First Principles*

Justice Ginsburg begins her analysis of first principles by emphasizing that the need for a new Constitution incorporating a Commerce Clause embodied the Framers' response to the central problem of the new nation under the Articles of Confederation. She writes:

The Commerce Clause, it is widely acknowledged, "was the Framers' response to the central problem that gave rise to the Constitution itself." Under the Articles of Confederation, the Constitution's precursor, the regulation of commerce was left to the States. This scheme proved unworkable, because the individual States, understandably focused on their own economic interests, often failed to take actions critical to the success of the Nation as a whole.¹⁶¹

Justice Ginsburg continues, "[w]hat was needed was a 'national Government . . . armed with a positive & compleat authority in all cases where uniform measures are necessary'" on matters of general and national concern.¹⁶² Furthermore, she states, "[t]he Framers' solution was the Commerce Clause, which, as they perceived it, granted Congress the authority to enact economic legislation 'in all Cases for the general Interests of the Union, and also in those Cases to which the States are separately incompetent.'" ¹⁶³

Indeed, the national government was charged with the power of meeting the general needs of the nation, although these needs would change in ways the Framers did not have the wherewithal to anticipate. Therefore, the Constitution, in effect, served as a preliminary blueprint. To this effect, Justice Ginsburg states:

160. *See infra* Parts V.B.4.a–b.

161. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct 2566, 2615 (Ginsburg, J., concurring in part and dissenting in part) (quoting *EEOC v. Wyoming*, 460 U.S. 226, 244, 245, n.1 (1983) (Stevens, J., concurring)).

162. *Id.* (quoting Letter from James Madison to Edmund Randolph (Apr. 8, 1787) in *PAPERS OF JAMES MADISON* 368, 370 (R. Rutland ed. 1975)).

163. *Id.* (quoting 2 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 131–32 (Max Farrand ed., rev. 1966)).

The Framers understood that the “general Interests of the Union” would change over time, in ways they could not anticipate. Accordingly, they recognized that the Constitution was of necessity a “great outlin[e],” not a detailed blueprint, and that its provisions included broad concepts, to be “explained by the context or by the facts of the case.”¹⁶⁴

Moreover, “There ought to be a [capacity] to provide for future contingencies[,] as they may happen; and as these are illimitable in their nature, it is impossible safely to limit that capacity.”¹⁶⁵

In this discussion of first principles, Justice Ginsburg emphasized the importance of the nation’s ability to meet its problems, and the responsibility of the Supreme Court to allow the nation to do so. To meet this responsibility, however, the Court must defer to Congress to understand the contexts and facts of specific policies—that is, to understand the “practical considerations” and “actual experience” of individuals in the health care market.¹⁶⁶ Quoting *North American Co. v. Securities and Exchange Commission*,¹⁶⁷ Justice Ginsburg notes that “[c]ommerce itself is an intensely practical matter. To deal with it effectively, Congress must be able to act in terms of economic and financial realities.”¹⁶⁸

Government powers under the Commerce Clause had been viewed as capacious until the *Sebelius* case. To this end, Justice Ginsburg suggests the following:

Until today, this Court’s pragmatic approach to judging whether Congress validly exercised its commerce power was guided by two familiar principles. First, Congress has the power to regulate economic activities “that substantially affect interstate commerce.” This capacious power extends even to local activities that, viewed in the aggregate, have a substantial impact on interstate commerce.¹⁶⁹

b. The Constitutionality of the ACA and the Mandate Under a Rational Basis Test

Justice Ginsburg demonstrates far more deference to congressional power under the Commerce Clause than Justices Roberts, Scalia, and

164. *Id.* at 2615 (internal citations omitted).

165. *Id.* at 2616 (alteration in original) (quoting THE FEDERALIST NO. 34, at 205–06 (Alexander Hamilton) (John Harvard Library ed., 2009)).

166. *Id.*

167. 327 U.S. 686 (1946).

168. *Sebelius*, 132 S. Ct. at 2616 (quoting *North Am. Co.*, 327 U.S. at 705).

169. *Id.* (internal citation omitted).

Thomas. Consistent with the Framers' intent that the Commerce Clause help solve the problem of self-serving economic interests on the part of the individual states in the regulation of commerce,¹⁷⁰ Justice Ginsburg explains that the Supreme Court should show wide deference to Congress when it makes economic and social laws.¹⁷¹ Therefore, such laws should be interpreted under minimal Court scrutiny using a rational basis test.¹⁷² Thus, the Court should only declare a law unconstitutional if there is no connection between the law and interstate commerce. Relying upon prior Supreme Court precedent, Justice Ginsburg quotes the following from *Hodel v. Indiana*¹⁷³ in support of her view that the Court should give deferential treatment to congressional action: ““This [C]ourt will certainly not substitute its judgment for that of Congress unless the relation of the subject to interstate commerce and its effect upon it are clearly non-existent.””¹⁷⁴

When Justice Ginsburg applies the rational basis test to the “minimum coverage provision”—that is, the individual mandate of the ACA—she perceives it as undoubtedly constitutional, particularly in light of the national scope of the health care market and the inability of individual states to successfully regulate it.¹⁷⁵ To further elaborate, Justice Ginsburg states the following:

Straightforward application of these principles would require the Court to hold that the minimum coverage provision is proper Commerce Clause legislation. Beyond dispute, Congress had a rational basis for concluding that the uninsured, as a class, substantially affect interstate commerce. Those without insurance consume billions of dollars of health-care products and services each year. Those goods are produced, sold, and delivered largely by national and regional companies who routinely transact business across state lines. The uninsured also cross state lines to receive care. Some have medical emergencies while away from home. Others, when sick, go to a neighboring State that provides better care for those who have not prepaid for care.¹⁷⁶

170. *Id.* at 2615.

171. *Id.* at 2616.

172. *Id.*

173. 452 U.S. 314 (1981).

174. *Sebelius*, 132 S. Ct. at 2616 (quoting *Hodel*, 452 U.S. at 326).

175. *See, e.g., id.* at 2612 (“States cannot resolve the problem of the uninsured on their own. Like Social Security benefits, a universal health-care system, if adopted by an individual State, would be ‘bait to the needy and dependent elsewhere, encouraging them to migrate and seek a haven of repose.’” (quoting *Helvering v. Davis*, 301 U.S. 619, 644 (1937))).

176. *Id.* at 2617.

Moreover, an individual's decision to forgo health insurance has a significant economic impact both on the insured and on the health care system overall, including on pricing—an area that Congress traditionally has had the power to regulate. As Justice Ginsburg writes:

Not only do those without insurance consume a large amount of health care each year; critically, as earlier explained, their inability to pay for a significant portion of that consumption drives up market prices, foists costs on other consumers, and reduces market efficiency and stability. Given these far-reaching effects on interstate commerce, the decision to forgo insurance is hardly inconsequential or equivalent to “doing nothing”; it is, instead, an economic decision Congress has the authority to address under the Commerce Clause.¹⁷⁷

Finally, under rational basis scrutiny, Justice Ginsburg concluded that there was no doubt a reasonable connection existed between Congress's decision to require the individual mandate and its corresponding power over interstate commerce. As Justice Ginsburg writes:

The minimum coverage provision, furthermore, bears a “reasonable connection” to Congress' goal of protecting the health-care market from the disruption caused by individuals who fail to obtain insurance. By requiring those who do not carry insurance to pay a toll, the minimum coverage provision gives individuals a strong incentive to insure. This incentive, Congress had good reason to believe, would reduce the number of uninsured and, correspondingly, mitigate the adverse impact the uninsured have on the national health-care market.¹⁷⁸

By taking particular care to explain how the uninsured are also active in the health care market, consuming a large portion of it each year as described above, we witness Justice Ginsburg's opening salvo as to why she perceives that the decision not to purchase insurance is not inaction, but rather action, thus supporting the constitutionality of the individual mandate. As we shall explore more deeply below, Justice Ginsburg suggests that Congress also acted reasonably in requiring that both healthy, as well as sick, individuals either purchase health insurance or pay the penalty. She writes:

Congress also acted reasonably in requiring uninsured individuals, whether sick or healthy, either to obtain insurance or to pay the specified penalty. As earlier observed, because every person is at risk of needing care at any moment, all those who lack insurance, regardless of their current health status, adversely affect the

177. *Id.*

178. *Id.*

price of health care and health insurance. Moreover, an insurance-purchase requirement limited to those in need of immediate care simply could not work.¹⁷⁹

As emphasis, Justice Ginsburg continues: “No insurance regime can survive if people can opt out when the risk insured against is only a risk, but opt in when the risk materializes.”¹⁸⁰

Most importantly, concerns about the Court being practical and pragmatic when deciding Commerce Clause cases requires that the Court’s economic constructions respect the principles enunciated in the Court’s Level I analysis of the issues in *Sebelius*. However, the Chief Justice’s inaction-action dichotomy and call for a liberty interest under the Commerce Clause fail to do so.

2. Level II: The Inaction-Action Dichotomy

As discussed in greater detail below, the following principles are at the core of Chief Justice Roberts’s majority opinion and Justice Ginsburg’s dissent: (1) differences between the conservative and liberal Justices over what constitutes inaction and action; (2) whether the individual mandate is unconstitutional because it forces an “inactive” uninsured person to become “active” in interstate commerce; and (3) whether Congress or the Court has the power to define inactivity and activity. Indeed, Justice Ginsburg focuses directly on why the inaction-action distinction cannot be supported by Commerce Clause precedents, and, thus, why it is a “newly minted” conception under the Commerce Clause built on Commerce Clause principles and economic constructions that the Supreme Court has rejected in the past seventy years.¹⁸¹ Justice Ginsburg begins her discussion of the inaction-action dichotomy with the following:

Rather than evaluating the constitutionality of the minimum coverage provision in the manner established by our precedents, [the Chief Justice] relies on a newly minted constitutional doctrine. The commerce power does not, [the Chief Justice] announces, permit Congress to “compe[l] individuals to become active in commerce by purchasing a product.”¹⁸²

Justice Ginsburg’s critique of this doctrine is very detailed and filigreed. Initially, Justice Ginsburg argues that even if one were to assume that the inaction-action distinction could fall under the umbrella of general

179. *Id.* (internal citation omitted).

180. *Id.* (quoting Brief for State of Maryland as Amici Curiae at 28, *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012) (No. 11-398)).

181. *Id.* at 2618.

182. *Id.* (internal citation omitted).

Commerce Clause principles, the distinction would *still* be inapplicable here for the following reason: “Everyone will, at some point, consume health-care products and services. Thus, if [the Chief Justice] is correct that an insurance-purchase requirement can be applied only to those who ‘actively’ consume health care, the minimum coverage provision fits the bill.”¹⁸³ Simply put, it is improper to say that the individual mandate compels individuals to purchase an unwanted product because all individuals will at some point consume health care. Further, regardless of whether or not these same individuals purchase health insurance, interstate commerce will be directly affected both currently and prospectively in the future.¹⁸⁴ Justice Ginsburg speaks directly to the inactivity-activity distinction by arguing that it is similar to past formulations of direct and indirect effects on commerce as a basis through which the Court is to decide whether an activity affects commerce.¹⁸⁵ Justice Ginsburg explains that the distinction Chief Justice Roberts formulates is built on this same direct-indirect test that the Court has rejected for the large part of seventy years.¹⁸⁶ Moreover, even if the indirect-direct dichotomy were valid, the decision not to purchase health insurance *directly* affects interstate commerce. As Justice Ginsburg states:

T[he Chief Justice] does not dispute that all U.S. residents participate in the market for health services over the course of their lives. But, [the Chief Justice] insists, the uninsured cannot be considered active in the market for health care, because “[t]he proximity and degree of connection between the [uninsured today] and [their] subsequent commercial activity is too lacking.”¹⁸⁷

Contrary to the Chief Justice’s assertions, the uninsured do have a proximate and significant effect on the health care market for many reasons. Most of the uninsured in the current health care market will need health care, and many will need health care soon after they choose not to purchase health insurance.¹⁸⁸ Moreover, Justice Ginsburg notes that the individual mandate is a rational congressional response to the problem of a large, uninsured population because, as a practical matter, it is very difficult to sepa-

183. *Id.* (internal citation omitted).

184. *Id.* Indeed, statistics clearly demonstrate this fact. “[M]ore than 60% of those without insurance visit a hospital or doctor’s office each year. Nearly 90% will within five years. An uninsured’s consumption of health care is thus quite proximate: *It is virtually certain to occur in the next five years and more likely than not to occur this year.*” *Id.* (emphasis added) (internal citation omitted).

185. *Id.* at 2622.

186. *See id.* (arguing that the Chief Justice failed to learn from history).

187. *Id.* at 2618 (internal citation omitted).

188. *See supra* note 184 and accompanying text.

rate out who among the uninsured will need medical care and who cannot pay for insurance. As she states:

Equally evident, Congress has no way of separating those uninsured individuals who will need emergency medical care today (surely their consumption of medical care is sufficiently imminent) from those who will not need medical services for years to come. No one knows when an emergency will occur, yet emergencies involving the uninsured arise daily.¹⁸⁹

Most importantly, as Justice Ginsburg further suggests, Congress has broad authority under the Commerce Clause, through its power to define the contours of the market, to cast its net widely to prevent an evil that Congress anticipated would come at an undetermined point in time. As she explains: “To capture individuals who unexpectedly will obtain medical care in the very near future, then, Congress needed to include individuals who will not go to a doctor anytime soon. Congress, our decisions instruct, has authority to cast its net that wide.”¹⁹⁰ Justice Ginsburg further emphasizes her point, noting that ““when it is necessary in order to prevent an evil to make the law embrace more than the precise thing to be prevented it may do so.”¹⁹¹

In an important footnote to the above quotation, Justice Ginsburg criticizes the notion that the individual mandate impermissibly regulates young people who have no intention of purchasing medical care and are allegedly too far removed from the health care market, thereby having no direct effect on the health care market.¹⁹² Indeed, it is this idea that is at the very core of the inaction-action distinction as a modern day direct-indirect effects test. To address this issue, she writes:

Echoing [the Chief Justice], the joint dissenters urge that the minimum coverage provision impermissibly regulates young people who “have no intention of purchasing [medical care]” and are too far “removed from the [health-care] market.” This criticism ignores the reality that a healthy young person may be a day away from needing health care. A victim of an accident or unforeseen illness will consume extensive medical care immediately, though scarcely expecting to do so.¹⁹³

Justice Ginsburg also addresses one important polity principle: the power of Congress, as compared to the Supreme Court, to define markets

189. *Sebelius*, 132 S. Ct. at 2618.

190. *Id.* at 2618.

191. *Id.* at 2618–19 (quoting *Perez v. United States*, 402 U.S. 146, 154 (1971)).

192. *Id.* at 2619 n.5.

193. *Id.* (internal citations omitted).

under the Commerce Clause as well as the time frames under which Congress considers the actions of these individuals, businesses, and groups to be affecting the flow of interstate commerce. As she writes:

[I]t is Congress' role, not the Court's, to delineate the boundaries of the market the Legislature seeks to regulate. T[he Chief Justice] defines the health-care market as including only those transactions that will occur either in the next instant or within some (unspecified) proximity to the next instant. But Congress could reasonably have viewed the market from a long-term perspective, encompassing all transactions virtually certain to occur over the next decade, not just those occurring here and now.¹⁹⁴

To be sure, Congress has the power to make laws today that regulate individuals because of what Congress predicts will be the effect on commerce in the future. In support of this view, Justice Ginsburg states the following: “[C]ontrary to [the Chief Justice]’s contention, our precedent does indeed support ‘[t]he proposition that Congress may dictate the conduct of an individual today because of prophesied future activity.’”¹⁹⁵ As a result, she concludes:

Our decisions thus acknowledge Congress' authority, under the Commerce Clause, to direct the conduct of an individual today (the farmer in *Wickard*, stopped from growing excess wheat; the plaintiff in *Raich*, ordered to cease cultivating marijuana) because of a prophesied future transaction (the eventual sale of that wheat or marijuana in the interstate market). *Congress' actions are even more rational in this case, where the future activity (the consumption of medical care) is certain to occur, the sole uncertainty being the time the activity will take place.*¹⁹⁶

For further clarification, the above argument suggests that, even if one accepts the principle that congressional power over commerce depends upon the directness of the action to be regulated—a principle at the core of the inaction-action dichotomy—Congress nonetheless still retains the authority to regulate individuals because of how their actions today will at some point lead to “prophesized,” albeit direct, impacts on interstate commerce in the future.

Justice Ginsburg next responds to Chief Justice Roberts's view that requiring individuals to either purchase health insurance or pay the tax under the individual mandate will compel a person to purchase an unwanted product. To counter the Chief Justice's view, Justice Ginsburg notes that, with-

194. *Id.* at 2619.

195. *Id.* (internal citation omitted).

196. *Id.* (emphasis added).

out question, everyone either needs, or will at some point need, health care and that “Congress is merely defining the terms on which individuals pay for an interstate good they consume”¹⁹⁷ As she further suggests:

Nor is it accurate to say that the minimum coverage provision “compel[s] individuals . . . to purchase an unwanted product,” or “suite of products.” If unwanted today, medical service secured by insurance may be desperately needed tomorrow. Virtually everyone, I reiterate, consumes health care at some point in his or her life. Health insurance is a means of paying for this care, nothing more. In requiring individuals to obtain insurance, Congress is therefore not mandating the purchase of a discrete, unwanted product. Rather, Congress is merely defining the terms on which individuals pay for an interstate good they consume: Persons subject to the mandate must now pay for medical care in advance (instead of at the point of service) and through insurance (instead of out of pocket). Establishing payment terms for goods in or affecting interstate commerce is quintessential economic regulation well within Congress’ domain.¹⁹⁸

Additionally, the individual mandate would not require that healthy individuals subsidize the unfit or the unhealthy.¹⁹⁹ Rather, the individual mandate imposes an accountability requirement, particularly for the young, healthy uninsured—that is, the individual mandate requires that these particular individuals pay in advance for medical care for which they were previously assured would nonetheless be provided (for example, in the event of a catastrophic emergency) without regard to their ability to pay.²⁰⁰ Because these young, healthy individuals will need health care at some point, whether it be within a day, a week, or a month—that is, at some unpredictable point in the future—the individual mandate requires that the uninsured be held accountable for benefits for which the insured and other institutions, such as hospitals, have already been paying.²⁰¹ As Justice Ginsburg writes:

T[he Chief Justice] also calls the minimum coverage provision an illegitimate effort to make young, healthy individuals subsidize insurance premiums paid by the less hale and hardy. This complaint, too, is spurious. Under the current health-care system, healthy persons who lack insurance receive a benefit for which they do not pay: They are assured that, if they need it, emergency

197. *Id.* at 2620.

198. *Id.* (internal citations omitted).

199. *Id.*

200. *Id.*

201. *Id.*

medical care will be available, although they cannot afford it. Those who have insurance bear the cost of this guarantee. By requiring the healthy uninsured to obtain insurance or pay a penalty structured as a tax, the minimum coverage provision ends the free ride these individuals currently enjoy.²⁰²

Moreover, as previously emphasized, all individuals in their lifetime will need health care; and, as we saw above, Congress can determine the time period under which a class of persons is defined under the Commerce Clause. Thus, Justice Ginsburg concludes by capturing this in the simplest of terms:

In the fullness of time, moreover, today's young and healthy will become society's old and infirm. Viewed over a lifespan, the costs and benefits even out: The young who pay more than their fair share currently will pay less than their fair share when they become senior citizens. And even if, as undoubtedly will be the case, some individuals, over their lifespans, will pay more for health insurance than they receive in health services, they have little to complain about, for that is how insurance works. Every insured person receives protection against a catastrophic loss, even though only a subset of the covered class will ultimately need that protection.²⁰³

Additionally, as previously discussed, because interstate health insurance and health care markets have been in existence long before enactment of the ACA and the individual mandate, both the insured and the uninsured cannot justifiably argue that they are now being forced into the interstate commerce.²⁰⁴ As Justice Ginsburg explains, "Requiring individuals to obtain insurance unquestionably regulates the interstate health-insurance and health-care markets, both of them in existence well before the enactment of the ACA."²⁰⁵ Instead, "[t]he stimulation of commerce is a use of the regulatory function quite as definitely as prohibitions or restrictions thereon."²⁰⁶ To Justice Ginsburg, then, "the 'something to be regulated' was surely there when Congress created the minimum coverage provision."²⁰⁷

Most importantly, Justice Ginsburg speaks directly to the inactivity-activity distinction in Commerce Clause principles by emphasizing that individuals have no power to *stay out of the market*.²⁰⁸ Rather, Congress has

202. *Id.*

203. *Id.*

204. *Id.* at 2621.

205. *Id.*

206. *Id.* (quoting *Wickard v. Filburn*, 317 U.S. 111, 128 (1942)).

207. *Id.*

208. *Id.* at 2622.

the power to define the activities as affecting commerce and to determine whether these activities are subject to government regulation.²⁰⁹ To explain this view, Justice Ginsburg states:

Nor does our case law toe the activity versus inactivity line. In *Wickard*, for example, we upheld the penalty imposed on a farmer who grew too much wheat, even though the regulation had the effect of compelling farmers to purchase wheat in the open market. “[F]orcing some farmers into the market to buy what they could provide for themselves” was, the Court held, a valid means of regulating commerce. . . . [T]his Court similarly upheld Congress’ authority under the commerce power to compel an “inactive” landholder to submit to an unwanted sale.²¹⁰

Continuing her attack on the inactivity-activity dichotomy and the view that the Commerce Clause does not regulate commercial “inactivity,” Justice Ginsburg takes issue with Chief Justice Roberts’s view of the Commerce Clause as a “technical legal conception,” as the following suggests:

In concluding that the Commerce Clause does not permit Congress to regulate commercial “inactivity,” and therefore does not allow Congress to adopt the practical solution it devised for the health-care problem, [the Chief Justice] views the Clause as a “technical legal conception,” precisely what our case law tells us not to do. This Court’s former endeavors to impose categorical limits on the commerce power have not fared well. In several pre-New Deal cases, the Court attempted to cabin Congress’ Commerce Clause authority by distinguishing “commerce” from activity once conceived to be noncommercial, notably, “production,” “mining,” and “manufacturing.” The Court also sought to distinguish activities having a “direct” effect on interstate commerce, and for that reason, subject to federal regulation, from those having only an “indirect” effect, and therefore not amenable to federal control.²¹¹

The Court has soundly rejected categorical limits on the commerce power and the direct-indirect effects tests, which arguably occupy the core of the inactivity–activity distinction Chief Justice Roberts proposes.²¹² In particular, according to Justice Ginsburg:

These line-drawing exercises were untenable, and the Court long ago abandoned them. “[Q]uestions of the power of Congress [under the Commerce Clause],” we held in *Wickard*, “are

209. *Id.* at 2621–22.

210. *Id.* at 2621 (quoting *Wickard*, 317 U.S. at 128–29).

211. *Id.* at 2622 (internal citations omitted).

212. *Id.*

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.”²¹³

Instead, Justice Ginsburg criticizes Chief Justice Roberts for “[f]ailing to learn from this history,” and “plow[ing] ahead with his formalistic distinction between those who are ‘active in commerce[]’ and those who are not.”²¹⁴

As she further suggests, the inactivity-activity dichotomy also carries little weight because it is possible to restate most actions as corresponding inactions with the same effect.²¹⁵ At a basic level, Justice Ginsburg reasons that the decision not to purchase health insurance can be formulated either in inaction or action terms.²¹⁶ This distinction, therefore, cannot serve as a principled basis upon which to limit congressional power under the Commerce Clause.²¹⁷ Further elaborating upon this point, Justice Ginsburg explains: It is not hard to show the difficulty courts (and Congress) would encounter in distinguishing statutes that regulate “activity” from those that regulate “inactivity.” As Judge Easterbrook noted, “it is possible to restate most actions as corresponding inactions with the same effect.”²¹⁸

As Justice Ginsburg further explains, the most prominent example of the impracticality of the distinction is the construction of an individual’s desire not to purchase health insurance—that is, the precise issue before the Supreme Court in *Sebelius*.²¹⁹ Justice Ginsburg continues: “Take this case as an example. An individual who opts not to purchase insurance from a private insurer can be seen as actively selecting another form of insurance: self-insurance.”²²⁰ Similarly, “No one is inactive when deciding how to pay for health care, as self-insurance and private insurance are two forms of action for addressing the same risk.”²²¹ As such, Justice Ginsburg states:

213. *Id.* (quoting *Wickard*, 317 U.S. at 120).

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.* (citing *Archie v. Racine*, 847 F.2d 1211, 1213 (7th Cir. 1988), *cert. denied*, 489 U.S. 1065 (1989)).

219. *Id.*

220. *Id.*

221. *Id.* (quoting *Thomas More Law Center v. Obama*, 651 F.3d 529, 561 (6th Cir. 2011) (Sutton, J., concurring in part), *cert. denied*, 133 S. Ct. 61 (2012), *abrogated by Sebelius*, 132 S. Ct. 2566).

The minimum coverage provision could therefore be described as regulating activists in the self-insurance market. *Wickard* is another example. Did the statute there at issue target activity (the growing of too much wheat) or inactivity (the farmer's failure to purchase wheat in the marketplace)? If anything, the Court's analysis suggested the latter.²²²

This quotation is significant because Justice Ginsburg ventures to argue that if the construction process makes it impossible to clarify the key distinction that is the basis for a major principle, then the principle itself must also be questioned. The confusion surrounding this construction process, as Justice Ginsburg explains, is the most telling evidence of the centrality of the economic or social construction process in Supreme Court decisionmaking and its relationship to the principles advocated in those cases, in addition to the staying power of those principles.

Further, the relationship between this construction process and principles articulated by Supreme Court precedent also impacts the development of constitutional law—in particular, as the majority opinion suggests, when the proposed inaction-action dichotomy forms the basis for establishing a new, substantive liberty interest under the Commerce Clause.

With respect to the new economic liberty interest underpinning Chief Justice Roberts's inaction-action dichotomy, Justice Ginsburg articulates this, in what is perhaps the most important quotation in the opinion:

At bottom, [the Chief Justice]'s and the joint dissenters' "view that an individual cannot be subject to Commerce Clause regulation absent voluntary, affirmative acts that enter him or her into, or affect, the interstate market expresses a concern for individual liberty that [is] more redolent of Due Process Clause arguments."²²³

Thus, at its core, sustaining the inactivity-activity distinction, and solidifying this distinction as Chief Justice Roberts attempts to do, has the operative effect of embedding a newly formulated liberty interest within the Commerce Clause, particularly where one had otherwise never before existed. Furthermore, it is clear that, at the core of Justice Ginsburg's analysis, one must look not only at the principles, but, more importantly, one must also look very closely to see whether the social or, as in this case, economic constructions supporting these principles can be both applied and sustained in the long term. In this particular case, the inaction-action distinction, and

222. *Id.* at 2622–23.

223. *Id.* at 2623 (quoting *Seven-Sky v. Holder*, 661 F.3d 1, 19 (D.C. Cir. 2011), *cert. denied*, 133 S. Ct. 63 (2012), *abrogated by Nat'l Fed'n of Indep. Bus. V. Sebelius*, 132 S. Ct. 2566 (2012)).

the liberty interest Chief Justice Roberts introduces to cement this distinction, cannot be sustained, not only because it does not fit with Commerce Clause precedent, but also because one cannot clearly and precisely construct a principled distinction between inaction and action.²²⁴

To be sure, the development of constitutional law is a process involving both the comparison of principles and the social and economic constructions Justices articulate in support of these principles. These comparisons require that Justices apply the principles they advocate to the lived lives of individuals, as described in precedent and as applied in cases before the Supreme Court. In *Sebelius*, the decision not to purchase health insurance was compared with the actions by wheat farmers in *Wickard*,²²⁵ the marijuana growers in *Raich*,²²⁶ and the gun owner in a school zone in *United States v. Lopez*,²²⁷ all in light of Commerce Clause principles. In light of Supreme Court precedent, even under Chief Justice Roberts's articulation of such precedent, it becomes apparent that the inaction-action dichotomy does not have particularly deep legs. Furthermore, as we explore in greater detail below, it is also questionable whether this Court or future Courts will ever sustain the particularized economic liberty interest the Chief Justice articulates in his majority opinion.

3. Level III

a. Addressing Fears of a Slippery Slope That Require a Liberty Right Under the Commerce Clause

Justices Roberts, Scalia, and Thomas, joined by Justices Kennedy and Alito, not only support a bright-line distinction between inaction and action in the interpretation of the Commerce Clause,²²⁸ but also emphasize that the

224. For a more in depth discussion of Justice Ginsburg's attempt to parse this distinction, see *infra* Part V.B.3.

225. For a discussion of Chief Justice Roberts's contextualization of the individual mandate in light of *Wickard*, see *Sebelius*, 132 S. Ct. at 2587–90 (majority opinion).

226. Chief Justice Roberts primarily relied upon *Raich* to support his proposition that the individual mandate was likewise invalid under the Constitution's Necessary and Proper Clause. *Id.* at 2593.

227. Chief Justice Roberts primarily utilizes *Lopez* to illustrate how, despite the expansive scope of the Supreme Court's Commerce Clause cases, each of these cases "uniformly describe[s] the power as reaching 'activity.'" *Id.* at 2587.

228. See, e.g., *id.* at 2649 (Scalia J., dissenting) ("But it must be *activity* affecting commerce that is regulated, and not merely the failure to engage in commerce. And one is not now purchasing the health care covered by the insurance mandate simply because one is likely to be purchasing it in the future. Our test's premise of regulated activity is not invented out of whole cloth, but rests upon the Constitution's requirement that it be commerce which is regulated. *If all inactivity affecting commerce is commerce, commerce is everything.*" (emphasis added)).

only way to end government abuse of Commerce Clause power is to embed an economic liberty right or interest within the Commerce Clause.²²⁹

At the core of the argument in support of embedding a right or liberty interest within the Commerce Clause, however, is the fear of a slippery slope leading to wide abuse of governmental power if such a right is not established.²³⁰ Justice Ginsburg pointedly addresses and admittedly pokes fun at this fear of a slippery slope when she suggests the following: “[t]he Chief Justice] accepts just such specious logic when he cites the *broccoli horrible* as a reason to deny Congress the power to pass the individual mandate.”²³¹ Justice Ginsburg also spends a large portion of her opinion specifically addressing Justices Scalia, Thomas, Kennedy, and Alito, and their unfounded fears of a slippery slope.²³² She states: “Underlying [the Chief Justice]’s view that the Commerce Clause must be confined to the regulation of active participants in a commercial market is a fear that the commerce power would otherwise know no limits.”²³³ Moreover, Justice Ginsburg critiques the majority’s reasoning on grounds that “[a]llowing Congress to compel an individual not engaged in commerce to purchase a product would ‘permi[t] Congress to reach beyond the natural extent of its authority, everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex.’”²³⁴ In its place, she explains that “[t]he joint dissenters express a similar apprehension,” noting “[i]f the minimum coverage provision is upheld under the commerce power then ‘the Commerce Clause becomes a font of unlimited power, . . . the hideous monster whose devouring jaws . . . spare neither sex nor age,

229. Justice Scalia hints at this economic liberty interest in the following passage of his dissent: “The case is easy and straightforward, however, in another respect. What is absolutely clear, affirmed by the text of the 1789 Constitution, by the Tenth Amendment ratified in 1791, and by innumerable cases of ours in the 220 years since, is that there are structural limits upon federal power—upon what it can prescribe with respect to private conduct, and upon what it can impose upon the sovereign States. Whatever may be the conceptual limits upon the Commerce Clause and upon the power to tax and spend, they cannot be such as will enable the Federal Government to regulate all private conduct and to compel the States to function as administrators of federal programs.” *Id.* at 2643.

230. For the most comprehensive analysis of slippery slope arguments, and how to counter these arguments, see DOUGLAS WALTON, *SLIPPERY SLOPE ARGUMENTS* (1992).

231. *Sebelius*, 132 S. Ct. at 2625 (Ginsburg, J., concurring in part and dissenting in part) (emphasis added).

232. *Id.* at 2623.

233. *Id.*

234. *Id.* (internal citation omitted).

nor high nor low, nor sacred nor profane.”²³⁵ According to Justice Ginsburg, “[t]his concern is unfounded.”²³⁶

Point-by-point, Justice Ginsburg explains why the fear of a slippery slope of abuses as defined by Chief Justice Roberts is not warranted and, thus, why defining a new economic liberty interest is similarly unwarranted. As Justice Ginsburg first suggests, there is simply no need for such a right because the Court could uphold the individual mandate without permitting all congressional mandates to pass muster under the Commerce Clause, particularly where the facts either suggest or clearly demonstrate congressional overreaching.²³⁷ She opines:

T[he Chief Justice] could certainly uphold the individual mandate without giving Congress carte blanche to enact any and all purchase mandates. As several times noted, the unique attributes of the health-care market render everyone active in that market and give rise to a significant free-riding problem that does not occur in other markets.²³⁸

Moreover, relying upon *Lopez*, Justice Ginsburg notes that the Court could still apply the principles from *Lopez* whenever Congress attempted to regulate “noneconomic conduct that has only an attenuated effect on interstate commerce [in an area] traditionally left to state law.”²³⁹ Validating the individual mandate under the Commerce Clause would not strip the Court of this continued power; indeed, as she believes, there is no need to create a new liberty interest that would undermine key Commerce Clause principles and Court deference to the federal government’s social and economic policy decisions.²⁴⁰ As Justice Ginsburg writes:

Nor would the commerce power be unbridled, absent [the Chief Justice]’s “activity” limitation. Congress would remain unable to regulate noneconomic conduct that has only an attenuated effect on interstate commerce and is traditionally left to state law. In *Lopez*, for example, the Court held that the Federal Government lacked power, under the Commerce Clause, to criminalize the possession of a gun in a local school zone. Possessing a gun near a school, the Court reasoned, “is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce.”²⁴¹

235. *Id.* (internal citation omitted).

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.* at 2623–24.

241. *Id.* at 2623–24 (quoting *United States v. Lopez*, 514 U.S. 549, 567 (1995)).

Justice Ginsburg notes that to hold otherwise would require the Court “to pile inference upon inference” to conclude that gun possession has a substantial effect on commerce.²⁴²

b. Analyzing Self-Insurance and the Difference Between Health Insurance, Broccoli, and Cars

Justice Ginsburg further demonstrates that to analyze the validity of a feared slippery slope, one must directly and specifically analyze the feared outcomes. Accordingly, she responds to Chief Justice Roberts’s assertion that upholding the individual mandate under the Commerce Clause would lead the federal government to mandate that persons purchase broccoli or automobiles:²⁴³

An individual’s decision to self-insure, I have explained, is an economic act with the requisite connection to interstate commerce. Other choices individuals make are unlikely to fit the same or similar description. As an example of the type of regulation he fears, [the Chief Justice] cites a Government mandate to purchase green vegetables. One could call this concern “the broccoli horrible.” Congress, [the Chief Justice] posits, might adopt such a mandate, reasoning that an individual’s failure to eat a healthy diet, like the failure to purchase health insurance, imposes costs on others.²⁴⁴

By analyzing the chain of inferences the Court would have to accept to support the broccoli or car analogy as compared to the individual mandate, we can thus explore whether fears of a slippery slope are justified or simply unwarranted. In referring to the “piling of inference upon inference,” Justice Ginsburg explores the economic constructions that would be necessary to make the broccoli and car hypothetical line up with an individual’s decision not to purchase health insurance:

Consider the chain of inferences the Court would have to accept to conclude that a vegetable-purchase mandate was likely to have a substantial effect on the health-care costs borne by lithe Americans. The Court would have to believe that individuals forced to buy vegetables would then eat them (instead of throwing or giving them away), would prepare the vegetables in a healthy way (steamed or raw, not deep-fried), would cut back on unhealthy foods, and would not allow other factors (such as lack of exercise or little sleep) to trump the improved diet. Such “pil[ing of] in-

242. *Id.* at 2624 (quoting *Lopez*, 514 U.S. at 567).

243. *Id.* at 2591 (majority opinion).

244. *Id.* at 2624 (Ginsburg, J., concurring in part and dissenting in part).

ference upon inference” is just what the Court refused to do in *Lopez* and *Morrison*.²⁴⁵

Justice Ginsburg also speaks to proximity differences when addressing both the mandate in health care and another mandate involving the purchase of broccoli. She writes:

The failure to purchase vegetables in [the Chief Justice]’s hypothetical, then, is *not* what leads to higher health-care costs for others; rather, it is the failure of individuals to maintain a healthy diet, and the resulting obesity, that creates the cost-shifting problem. Requiring individuals to purchase vegetables is thus several steps removed from solving the problem. The failure to obtain health insurance, by contrast, is the *immediate cause* of the cost-shifting Congress sought to address through the ACA. Requiring individuals to obtain insurance attacks the source of the problem directly, in a single step.²⁴⁶

Thus, slippery slope arguments carry little credibility if the chain of inferences upon which they are built is not believable when comparisons are made between the government regulation sought by Congress in a particular case and other possible surmised regulations (in this case, the broccoli example). Nevertheless, it remains true that the decision whether to self-insure has an impact on interstate commerce. One does not have to build inference upon inference to see this relationship, and it is a relationship that falls squarely within Congress’s Commerce power. This is not so, however, with regard to a government mandate to purchase broccoli or a car.

c. Individual Rights Built on Slippery Slopes with Unspecified or Questionable Inferences Are Unlikely to Stand

When the definition of a newly established right is founded upon a slippery slope that is similarly built upon unlikely inferences, then acceptance of that right is undoubtedly questionable as precedent in future cases. By analyzing landmark cases that the Supreme Court has overturned, one can see that when inferences are no longer applicable in terms of the lived lives of citizens, then a right once defined or a government action once permitted will likely be questioned and overturned. For example, when the social construction in *Plessy v. Ferguson*²⁴⁷—namely the assertion that “the enforced separation of the two races stamps the colored race with a badge of inferiority is not by reason of anything found in the act, but solely

245. *Id.* (footnote omitted).

246. *Id.* at 2624 n.9.

247. 163 U.S. 537 (1896).

because the colored race chooses to put that construction upon it”²⁴⁸—proved to no longer be valid because education’s role in society had changed, it was subsequently repudiated by *Brown v. Board of Education*.²⁴⁹

To be sure, slippery slope arguments decontextualize case analysis in many ways. In particular, slippery slopes fail to consider the polity and rights principles involved in different hypotheticals and their relationship to the possibility of the horrors built into these arguments.²⁵⁰ In addition, slippery slope arguments tend to be quite general, rather than nuanced, in nature.²⁵¹ Despite their admitted shortcomings, slippery slopes have nonetheless played a significant role in the development of American constitutional law,²⁵² specifically with regard to whether a new right should be defined, or whether prior principles should be applied in any given case before the Court. For example, slippery slopes have been important in the Supreme Court’s failure to view factual situations and contexts as signaling a denial of possible constitutional rights. Indeed, in *McCleskey v. Kemp*,²⁵³ even though an African-American was more than twenty-two times as likely to receive the death penalty in Georgia if he killed a white person rather than if he killed a black person,²⁵⁴ the Court emphasized that the entire criminal justice system would be undermined, including prosecutorial discretion, if the Court effectively acknowledged this fact.²⁵⁵ Further, we also see a slippery slope argument in *San Antonio Independent School District v. Rodriguez*²⁵⁶ where the Court feared that recognizing gross differences in school funding among districts would force the Court, and lower federal

248. *Id.* at 551.

249. 347 U.S. 483, 495 (1954)

250. See, e.g., Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026, 1137 (2003) (“The slippery slope is in some ways a helpful metaphor, but as with many metaphors, it starts by enriching our vision and ends by clouding it. We need to go beyond the metaphor and examine the specific mechanisms that cause the phenomenon that the metaphor describes—mechanisms that connect to the nature of our political institutions, our judicial process, and possibly even human reasoning.”).

251. See, e.g., *id.* at 1029–30 (“The slippery slope argument, opponents suggest, is the [general] claim that ‘we ought not make a sound decision today, for fear of having to draw a sound distinction tomorrow.’ To critics of slippery slope arguments, the arguments themselves sound like a slippery slope: if you accept this slippery slope argument, then you’ll end up accepting the next one and then the next one until you eventually slip down the slope to rejecting all government power.” (internal citation omitted)).

252. Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361, 364 (1985).

253. 481 U.S. 279 (1987).

254. *Id.* at 327.

255. *Id.* at 311–12.

256. 411 U.S. 1 (1973).

courts, to constantly monitor state funding schemes under equal protection principles.²⁵⁷ Therefore, not only have slippery slope arguments been used as a basis for the inclusion of a right (as in *Sebelius*), but they have also been used to deny the expansion of group and individual rights (as in *San Antonio Independent School District*).

In addition to the aforementioned reasons, slippery slopes also fail to contextualize with regard to how specific rights in the Constitution, that is, “legal constraints,” can keep feared slippery slopes from occurring. As Justice Ginsburg writes:

Supplementing these legal restraints is a formidable check on congressional power: the democratic process. As the controversy surrounding the passage of the Affordable Care Act attests, purchase mandates are likely to engender political resistance. This prospect is borne out by the behavior of state legislators. Despite their possession of unquestioned authority to impose mandates, state governments have rarely done so.²⁵⁸

d. Attacking Broccoli, Breathing, and Specious Court Logic

In her opinion, Justice Ginsburg launches a direct attack on the slippery slope argument supported by Chief Justice Roberts, emphasizing that the Chief Justice engages in a “specious logic” of fear, especially by even contemplating that Congress would ever attempt to enforce a “vegetarian state” by mandating the purchase of broccoli in the future.²⁵⁹ To this end, Justice Ginsburg writes:

When contemplated in its extreme, almost any power looks dangerous. The commerce power, hypothetically, would enable Congress to prohibit the purchase and home production of all meat, fish, and dairy goods, effectively compelling Americans to eat only vegetables. Yet no one would offer the “hypothetical and unreal possibilit[y],” of a vegetarian state as a credible reason to deny Congress the authority ever to ban the possession and sale of goods.²⁶⁰

257. *Cf. id.* at 33–34 (“It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. Thus, the key to discovering whether education is ‘fundamental’ is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel. Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution.”).

258. *See Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2624 (2012) (Ginsburg, J., concurring in part and dissenting in part).

259. *Id.* at 2625.

260. *Id.* (quoting *Pullman Co. v. Knott*, 235 U.S. 23, 26 (1914)).

In addressing the joint opinions of Justices Scalia, Kennedy, Thomas, and Alito, however, Justice Ginsburg characterizes their claims as outlandish because they fallaciously claim that “if the minimum coverage provision is sustained, then Congress could make ‘breathing in and out the basis for federal prescription.’”²⁶¹

4. *Level IV*

a. *Back to First Principles and the Creation of a Liberty Interest*

Justice Ginsburg concludes her analysis of the constitutionality of the individual mandate under the Commerce Clause by reintroducing the theme of how the Constitution in general, and the Commerce Clause in particular, should be interpreted if they are to meet the needs of a changing society.²⁶² She considers whether the ACA should be declared unconstitutional merely as a result of its novelty, especially since the structure of providing health care has traditionally been focused on the role of private insurance companies.²⁶³ Novelty, however, is at times required because Congress must adapt to the changing economic and financial realities of today’s world. Indeed, principles and their attendant economic constructions under the Commerce and the Necessary and Proper Clauses permit the federal government to squarely face changing social and economic conditions and execute public policy in response to such conditions. As Justice Ginsburg suggests:

For decades, the Court has declined to override legislation because of its novelty, and for good reason. As our national economy grows and changes, we have recognized, Congress must adapt to the changing “economic and financial realities.” Hindering Congress’ ability to do so is shortsighted; if history is any guide, today’s constriction of the Commerce Clause will not endure.²⁶⁴

Moreover, as Justice Ginsburg suggests, the individual mandate is necessary and proper to the attainment of a legitimate end under Congress’s commerce power;²⁶⁵ this reasoning is analogous to Justice Scalia’s reasoning in *Gonzales v. Raich*.²⁶⁶ She explains:

261. *Id.*

262. *Id.*

263. *Id.*

264. *Id.* (internal citation omitted).

265. *Id.* at 2626.

266. See 545 U.S. 1, 40 (2005) (Scalia, J., concurring) (“That simple possession is a non-economic activity is immaterial to whether it can be prohibited as a necessary part of a larger

The minimum coverage provision is thus an “essential par[t] of a larger regulation of economic activity”; without the provision, “the regulatory scheme [w]ould be undercut.” Put differently, the minimum coverage provision, together with the guaranteed-issue and community-rating requirements, is “‘reasonably adapted’ to the attainment of a legitimate end under the commerce power”: the elimination of pricing and sales practices that take an applicant’s medical history into account.²⁶⁷

Further, directing individuals to purchase health insurance or pay the individual mandate is no more far-reaching than other implied powers that Congress has invoked under the Necessary and Proper Clause.²⁶⁸ To this effect, Justice Ginsburg notes:

Nor does [the Chief Justice] pause to explain why the power to direct either the purchase of health insurance or, alternatively, the payment of a penalty collectible as a tax is more far-reaching than other implied powers this Court has found meet under the Necessary and Proper Clause. These powers include the power to enact criminal laws; the power to imprison, including civil imprisonment; and the power to create a national bank.²⁶⁹

In a particularly important footnote to the above quotation, Justice Ginsburg emphasizes that “Congress regularly and uncontroversially requires individuals who are ‘doing nothing’ to take action.”²⁷⁰ She elaborates further and notes specific examples, including “federal requirements to report for jury duty; to register for selective service; to purchase firearms and gear in anticipation of service in the Militia; . . . and to file a tax return.”²⁷¹

b. Congressional Power: “You Will Know It When You See It”²⁷²

Justice Ginsburg continues by criticizing the Chief Justice for “failing to explain why the individual mandate threatens our constitutional or-

regulation. Rather, Congress’s authority to enact all of these prohibitions of intrastate controlled-substance activities depends only upon whether they are appropriate means of achieving the legitimate end of eradicating Schedule I substances from interstate commerce. By this measure, I think the regulation must be sustained.”).

267. *Sebelius*, 132 S. Ct. at 2626 (quoting *Raich*, 545 U.S. at 25–25 (majority opinion) & *Raich*, 545 U.S. at 37 (Scalia, J., concurring)).

268. *Id.* at 2627.

269. *Id.*

270. *Id.* at 2627 n.10.

271. *Id.* (internal citations omitted).

272. *Id.* at 2628.

der”²⁷³ In particular, Justice Ginsburg takes issue with the fact that Chief Justice Roberts provides no clear guidelines for federal courts when deciding what is and is not a permissible derivative or implied power under the Commerce and Necessary and Proper Clauses.²⁷⁴ Justice Ginsburg harkens back to a famous footnote in a pornography case, without specific attribution.²⁷⁵ To this end, she states the following:

How is a judge to decide, when ruling on the constitutionality of a federal statute, whether Congress employed an “independent power” or merely a “derivative” one. Whether the power used is “substantive,” or just “incidental”? The instruction [the Chief Justice], in effect, provides lower courts: You will know it when you see it.²⁷⁶

Justice Ginsburg concludes her opinion by reemphasizing a major, unspoken theme before the Supreme Court that day:

T[he Chief Justice]’s Commerce Clause opinion, and even more so the joint dissenters’ reasoning, bear a disquieting resemblance to those long overruled decisions [of the *Lochner* era in the early 20th century]. . . . Why should [the Chief Justice] strive so mightily to hem in Congress’ capacity to meet the new problems arising constantly in our ever-developing modern economy? I find no satisfying response to that question in his opinion.²⁷⁷

VI. CONCLUSION

Analyzing *Sebelius* demonstrates that the formalist-realist divide is but a legal fiction. As this Article suggests, all Justices, both those in majority and dissenting opinions on the issue of the constitutionality of the ACA and the individual mandate, either consciously or subconsciously reject this divide. Each of the Justices articulate polity and rights principles either in support of or in opposition to the ACA and the individual mandate—these polity and rights principles only gain meaning through economic and social construction of how individuals act in the real world as members of a wider social and economic system. There are simultaneously formalist and realist aspects of all decisions, which mutually construct each other.

273. *Id.* at 2627.

274. *Id.* at 2627–28.

275. *See* *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (“I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description [of what constitutes pornography]; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.”).

276. *Sebelius*, 132 S. Ct. at 2627–28.

277. *Id.* at 2629.

When Chief Justice Roberts, joined by Justices Scalia, Thomas, Kennedy, and Alito, seeks to establish a bright line distinction between inaction and action in the interpretation of the Commerce Clause, that bright line is defined by his comparison of the failure of citizens to purchase health insurance with the failure of farmers to purchase wheat in *Wickard* and the failure of persons to grow and use marijuana in *Raich*. The rejection of that bright line in *Sebelius* requires a similar comparison, but one that results in quite a different conclusion as to the constitutionality of the ACA and the individual mandate.

Nor can the majority and dissenting opinions in *Sebelius*—each addressing the constitutionality of the individual mandate—be explained by the unidirectional impact of historical events, politics, or economic and social facts outside the Court, or the unidirectional effect of past cases or principles. The majority and dissenting opinions, while reaching conflicting conclusions, engage in a similar mutual construction process that involves the analysis of polity and rights principles and the contemporary construction of these principles in light of prior Commerce Clause cases.

To explain *Sebelius* and doctrinal change, one must engage in Model 2 assumptions and methods because all of the Justices engage in a mutual construction process as they decide the nature of individual rights and whether government power has been abused.²⁷⁸ As in *Casey*, where the Justices addressed a woman's right to terminate her pregnancy, and in *Lawrence*, where the Justices addressed whether homosexuals should have the right to engage in non-procreative sex without being criminally sanctioned,²⁷⁹ there are differences among Justices as to what goes into the mutual construction mix in *Sebelius*. Despite these differences, no Justice can create an individual right or define the powers of Congress under the Commerce Clause without engaging in some kind of mutual construction process, one which brings the outside world into the Court. More importantly, the long-term staying power of a defined right, or a power granted or not granted to government, will depend on whether the social and economic construction makes sense in a changing world.

As we have explored throughout this Article, Justice Ginsburg devotes a large portion of her opinion to addressing Chief Justice Roberts's articulation of the inaction-action dichotomy and its relationship to the question of whether a right or liberty interest for individuals under the Commerce Clause even exists. She also questions whether the slippery slope of future

278. For an overview of Models 1 and 2, see *supra* Part I.

279. See, e.g., Kahn, *Social Constructions, Supreme Court Reversals, and American Political Development: Lochner, Plessy, Bowers, but Not Roe*, *supra* note 12, at 72, 76 (explaining the factual context underlying the Supreme Court decisions).

government abuse is valid if the mandate is allowed under the Commerce Clause and no individual right to liberty is established. She finds, however, that there is no need for such a liberty interest and that having one will hurt the nation's ability to meet future problems, many of which cannot now be defined.

Nevertheless, in light of the increasingly complex economic and social systems that constitute our nation, and compounded with the problems Ginsburg identifies with respect to the nascent individual right proposed in *Sebelius*, it is increasingly unlikely that the nascent individual right to liberty articulated by five Justices in *Sebelius* will ever be expanded by future courts.²⁸⁰ Moreover, expansion of this right is unlikely because the Court will likely continue to engage in a bidirectional mutual construction process.²⁸¹

What is so intriguing, however, about studying the nascent individual right that is proposed in *Sebelius* and the inaction-action dichotomy upon which that right is built, is that *if* the future courts build upon the right, the ability of Congress and future Presidents to meet future social and economic problems will be severely limited.

In *Sebelius*, Chief Justice Roberts seeks to place a cocoon around citizens by making choices that are economic in nature that would mirror, or be similar to, the cocoon that surrounds citizens that prevents government from regulating their personal choice to engage in consensual, private, sexual activities.²⁸² A comparison of the rights articulated under the inaction-action dichotomy with rights that seek to enhance both equality and social and political inclusivity—for example, the rights articulated in *Lawrence*, *Romer*, and *Windsor*—suggests why the likelihood of rights expansion under the Due Process and Equal Protection Clauses is higher than under the Commerce Clause.²⁸³ Individual rights under due process and equal protection, and the social constructions in support of those rights, are personal in a way that the right not to purchase health insurance simply is not. Indeed, eliminating privacy rights would allow government to abuse individuals and minority groups in ways that giving government permission to impact their economic decisions would not.

Therefore, even though the Justices who viewed the individual mandate and the ACA as constitutional under Congress's Commerce Clause

280. See *supra* Part V.B.4. A similar argument can be made with regard to the rights of firearm owners under the Second Amendment as articulated in *District of Columbia v. Heller*, 554 U.S. 570 (2008), but I will reserve this argument for another day.

281. For a discussion of bidirectional decisionmaking, see *supra* Part I.

282. For a detailed discussion of Chief Justice Roberts's majority opinion, see *supra* Part III.

283. For a discussion of rights expansion, see *supra* text accompanying notes 14–39.

powers lost this battle, they will ultimately win the war. The inaction-action dichotomy and the liberty interest Chief Justice Roberts tactfully attempted to embed within the Commerce Clause will not pass the test of time because the economic and social constructions upon which both the dichotomy and the liberty interest rest will fail to survive.