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THE PATIENT PROTECTION AND AFFORDABLE CARE ACT OF 2010: IMPLEMENTATION CHALLENGES IN THE CONTEXT OF FEDERALISM

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I. INTRODUCTION

On June 29, 2012, the United States Supreme Court issued a landmark decision in *National Federation of Independent Businesses v. Sebelius*.¹ The case focused on the constitutional challenges of twenty-six states to the Patient Protection and Affordable Care Act (PPACA) proposed by President Barack Obama and passed by the United States Congress in 2010.² This 5–4 decision is widely viewed as one of the most important in history next to *Bush v. Gore*³ and *Brown v. the Board of Education*.⁴ The decision is also very controversial and

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1. 132 S. Ct. 2566, 2608 (2012).

2. *See id.* at 2572 (noting that twenty-six states, along with the National Federation of Independent Business, brought suit challenging the constitutionality of the individual mandate and Medicaid expansion provisions of the Patient Protection and Affordable Care Act).

3. *See generally* 531 U.S. 98 (2000) (determining the results of the 2000 election for President of the United States).

4. 347 U.S. 483, 495 (1954) (holding that the doctrine of “separate but equal” is unconstitutional in public education); *see, e.g.*, Kate Pickert, *Supreme Court Upholds Health Reform Law in Landmark Decision*, TIME (June 28, 2012), <http://swampland.time.com/2012/06/28/supreme-court-upholds-obamacare-in-landmark-decision/?iid=sl-main-lede?iid=tsmodule> (describing the Court’s 5–4 holding as a “landmark” decision); Bobby Cuza, *Supreme Court Upholds Obama Health Care Law*, NY1.com

ensured that health care reform was one of the most important and contested issues in the 2012 national election.⁵

What the status of health care reform is, and should be, is extraordinarily divisive at the national and state levels in the United States.⁶ The Supreme Court decision recognized that health care reform is centrally related to determining the appropriate breadth and scope of involvement of the federal and state levels of government in health care.⁷ It also raised great uncertainty about the ultimate implementation of PPACA with respect to some of the central provisions of the legislation.⁸ Specifically, despite the Supreme Court decision, there continues to be great controversy over implementation of the individual mandate and Medicaid provisions of the legislation.⁹

The Supreme Court decision focused on several key issues which will be central to this paper: (a) the constitutionality of the individual mandate provision of PPACA pursuant to the Commerce Clause;¹⁰ (b) the constitutionality of the individual mandate pursuant to the Necessary and Proper Clause;¹¹ (c) the “tax” on those who are not covered by health insurance;¹² and (d) the Medicaid expansion provision.¹³

This paper argues that despite a focus on individual liberty by many opposing individual mandates, the major controversies surrounding implementation will focus on the appropriate scope and role of the federal and state governments in

(June 28, 2012), http://www.ny1.com/content/top_stories/163884/supreme-court-upholds-obama-health-care-law (describing the case as a “landmark decision”).

5. See, e.g., Terry Baynes, “*Friends*” line up for *Obamacare Supreme Court challenge*, REUTERS (Mar. 18, 2012), <http://www.reuters.com/article/2012/03/18/us-usa-supremecourt-friends-idUSBRE82H09F20120318> (noting that a record-breaking one hundred and thirty-six amicus briefs were filed for *National Federation of Independent Businesses v. Sebelius*); see also Dan Balz, *Introduction* to WASH. POST, LANDMARK: THE INSIDE STORY OF AMERICA’S NEW HEALTH-CARE LAW AND WHAT IT MEANS FOR US ALL 1, 4–6 (2010) [hereinafter LANDMARK] (tracing the origins of the health care debate to Theodore Roosevelt’s call for nationalized health insurance during his 1912 presidential bid, and noting its omnipresence in public policy discussions ever since).

6. See Sarah Kliff, *Gallup Poll: Health-Care Reform Now America’s Most Divisive Issue*, NEWSWEEK, (Feb. 9, 2010), available at <http://www.thedailybeast.com/newsweek/blogs/the-gaggle/2010/02/09/gallup-poll-health-care-reform-now-america-s-most-divisive-issue.html> (describing the current divide over health care reform).

7. *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2577.

8. See generally *Ten Strategic Considerations of the Supreme Court Upholding PPACA*, MILLIMAN (June 29, 2012), <http://insight.milliman.com/article.php?cntid=8113> (highlighting various uncertainties in PPACA’s implementation and detailing ten strategic considerations that stakeholders should focus on in preparing to implement provisions of the Act).

9. See generally *id.* (suggesting that the effectiveness of the individual mandate provision in lowering costs will depend upon enrollee demographics and that questions still remain as to how Medicaid expansion programs will function because the Court’s ruling allows states to opt out).

10. *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2584–87.

11. *Id.* at 2585.

12. *Id.* at 2580 (likening the Act’s proposed penalty for individuals who do not purchase health insurance to the IRS’ assessment and collection of tax penalties).

13. *Id.* at 2581–82.

providing health insurance and health care (the federalism dimension) along with the questions of unfunded mandates,¹⁴ Medicaid expansion,¹⁵ and the overall financing of PPACA.¹⁶ The Court clearly wished to protect the states from coercion by the federal government and wished to preserve individual autonomy for citizens.¹⁷ To quote one District Court judge reviewing the legislation, the case of PPACA “is not really about our health care system at all. It is principally about our federalist system, and it raises very important issues regarding the Constitutional role of the federal government.”¹⁸

Part II of this paper provides a general history of health care reform. Part III of this paper discusses the various stages of implementing PPACA. Part IV explores the major issues over the individual mandate covered by the Supreme Court; we focus on the arguments put forward by the federal circuit courts and how they were resolved (or not) by the landmark decision. Part V discusses implementation issues surrounding Medicaid Expansion with a focus on federalism. Part VI discusses direct challenges to federalism by the states against the federal government over PPACA. Part VII concludes with an analysis of what can be expected in the future. This paper will discuss the key implementation issues of PPACA in the context of federalism.

II. HISTORY OF HEALTH CARE REFORM

The health care reform debate between 2008 and 2010, which led to the passage of PPACA, was reminiscent of opportunities for reform that have occurred on a cyclical basis throughout American history. These opportunities occurred most notably in the presidential administrations of Franklin Roosevelt, Harry S. Truman, John F. Kennedy, Lyndon B. Johnson, Richard Nixon, and William J. Clinton.¹⁹

14. See *infra* Parts IV.B.4, IV.

15. See *infra* Part V.

16. See *infra* Part VII.

17. See *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2578 (asserting that the Court tried to preserve the individual autonomy preferred by the Framers by delegating specific powers to state governments in certain areas).

18. Fla. v. U.S. Dep't of Health & Human Servs., 780 F.Supp.2d 1256, 1263 (N.D. Fla. 2011).

19. See, e.g., Beatrix Hoffman, *Health Care Reform and Social Movements in the United States*, 93 AM. J. PUB. HEALTH 75, 76–78 (2003) (reciting the various presidential attempts at health care reform, including those by Presidents Theodore Roosevelt, Franklin Roosevelt, Harry Truman, John Kennedy, Lyndon Johnson, and Bill Clinton); see also Jerome Karabel, *Obama, FDR, and the Politics of Health Care Reform*, THE HUFFINGTON POST (July 15, 2009), http://www.huffingtonpost.com/jerome-karabel/obama-fdr-and-the-politic_b_234400.html (comparing the health care reform efforts of Presidents Barack Obama and Franklin Roosevelt); Farah Stockman, *Recalling the Nixon-Kennedy Health Plan*, BOSTON GLOBE, (June 23, 2012), available at http://articles.boston.com/2012-06-23/opinion/32368604_1_health-care-health-insurance-stuart-altman (detailing the health care plans proposed by President Nixon and his presumed Democratic rival Ted Kennedy in 1969).

These debates were intense and controversial, but they did not ultimately lead to legislation enacting health care reform.²⁰

The Clinton Health Security Act, proposed in 1993, quickly became the center of an intense public debate on “reforming” the American health care system.²¹ Both the Republican and Democratic parties proposed reform plans, and a variety of states attempted to adopt more local health care reform efforts.²² None of the over one hundred proposals introduced in Congress between 1991 and 1994 was enacted.²³ The major stakeholders in the American health care system—providers, consumers, and third-party payers—could not agree on what needed to be done.²⁴ At the same time, the success of state reforms was very limited.²⁵ This fact has led many journalists and scholars to conclude that the Clinton initiatives were a “colossal failure” which ultimately led to the Republican victory in the 1994 elections.²⁶

This cycle *seemed* to end in 2010 with the passage of the Patient Protection and Affordable Care Act (Health Care Act).²⁷ President Obama has, to some degree, succeeded where all of his predecessors failed, in that his healthcare legislation passed.²⁸ Nevertheless, there are a set of major implementation

20. See Derek Bok, *The Great Health Care Debate of 1993-94*, PUB. TALK: ONLINE J. DISCOURSE IN LEADERSHIP (1998), <http://www.upenn.edu/pnc/ptbok.html> (discussing the nature of the health care reform debate of 1993-1994 and the debate’s failure to pass health care legislation).

21. See H. Richard Beresford, *The Health Security Act: Coercion and Distrust for the Market*, 79 CORNELL L. REV. 1405, 1405 (1994) (discussing the debate over the health care reforms sparked by Clinton’s Health Security Act).

22. See Bok, *supra* note 20 (highlighting the competing plans for health reform during the 1994 election); see also Maggie Mertens, *The Democrats’ 2010 Health Reform Plan Evokes 1993 Republican Bill*, KAISER HEALTH NEWS (Feb. 23, 2010), <http://www.kaiserhealthnews.org/Checking-In-With/Durenberger-1993-gop-bill-q-and-a.aspx> (comparing a bill proposed by Republicans in 1993 to President Obama’s health reform proposal).

23. See Bok, *supra* note 20 (explaining that during the 1993–94 congressional debates, twenty-seven different legislative plans for health reform were proposed, none of which passed).

24. See Hoffman, *supra* note 19, at 78 (noting that the lack of public input and general support and the difficulty of pleasing both patients and health care providers contributed to the demise of Clinton’s proposal).

25. See Mary Ann Chirba-Martin & Troyen A. Brennan, *The Critical Role of ERISA in State Health Reform*, 12 HEALTH AFFAIRS 142, 143 (1994) (discussing the failure of states’ attempts at health care reform in 1993, due in part to ERISA preemption).

26. David Greenberg, *It Wasn’t Harry and Louise*, N.Y. TIMES (Mar. 22, 1997), <http://www.nytimes.com/books/97/03/23/reviews/970323.23greenbt.html>. See also Charles Ornstein & Sue Fox, *Blazing a Trail for Health Care*, L.A. TIMES (Sept. 15, 2003), <http://articles.latimes.com/2003/sep/15/local/me-health15> (noting that lawmakers have largely avoided proposing health care reforms after the Clinton administration’s failure to pass its reforms).

27. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010) (codified as amended in scattered sections of 42 U.S.C.) [hereinafter PPACA].

28. See Jonathan Oberlander, *Long Time Coming: Why Health Reform Finally Passed*, 29 HEALTH AFFS. 1112, 1112 (2010) (discussing failed attempts made by Presidents Truman, Nixon, Carter, and Clinton to reform health care).

challenges and continued controversies that are associated with this legislation despite the controversial Supreme Court decision.²⁹ It is also worth noting that ongoing controversy, over what to some is labeled “Obamacare,” reflects the fact that closure has not been reached on what constitutes appropriate or reasonable health care reform and what the appropriate role of the federal government in the organization and delivery of health care services should be.³⁰ In this paper, we argue that implementation needs to be viewed in the context of challenges presented by historical and on-going discussions related to the “appropriate role” for the federal and state levels of government in health care financing and delivery (i.e., federalism).

III. STAGES OF IMPLEMENTATION

PPACA was designed to address a series of key health insurance and health care service delivery issues:³¹ (a) the growing number of adults and children who are uninsured;³² (b) the inability of individuals with “pre-existing conditions” to obtain health insurance or affordable health insurance;³³ (c) the loss of health insurance for those who contract a serious health condition;³⁴ (d) the affordability of health insurance in general;³⁵ and (e) the general lack of access to health insurance for critical populations (e.g., children and the poor).³⁶ Implementation of the legislation occurs in four stages: (1) the first six months after the legislation was

29. See generally MILLIMAN, *supra* note 8 (detailing various issues and challenges in implementing PPACA which will need to be determined in the future).

30. See Daniel Fisher, *Supreme Court Upholds Obamacare: What It Means, What Happens Next*, FORBES (June 28, 2012), <http://www.forbes.com/sites/danielfisher/2012/06/28/supreme-court-upholds-healthcare-law-what-it-means/> (suggesting possible future expectations and outcomes as a result of the implementation of Obamacare and noting specifically the controversy surrounding state versus federal funding for the expansion of Medicaid).

31. See HINDA CHAIKIND ET. AL., CONG. RESEARCH SERV., R41664, PPACA: A BRIEF OVERVIEW OF THE LAW, IMPLEMENTATION, AND LEGAL CHALLENGES I (2011) (noting that PPACA was designed to improve access to health insurance and enhance the quality of health care in the United States).

32. See Laxmaiah Manchikanti et al., *Patient Protection and Affordable Care Act of 2010: Reforming the Health Care Reform for the New Decade*, 14 PAIN PHYSICIAN E35, E38 (2011) (stating that in 2011 thirty-four million Americans were uninsured).

33. See *id.* at E39, E41 (illustrating that PPACA would bar insurance companies from denying coverage to children with pre-existing conditions and would entirely eliminate pre-existing condition limitations on insurance).

34. See *id.* at E41–42 (noting that PPACA’s requirement that insurers renew policies “without regard to the health status of the insured” effectively prohibits companies from dropping people who develop serious conditions).

35. See *id.* at E35, E38 (describing the new system of subsidies which will help make the new health care system affordable based on income and family size).

36. See *id.* at E35, E37–38 (mentioning different provisions of PPACA that would provide the thirty-four million Americans who were uninsured in 2011 access to health insurance, in part by providing subsidies for the poor).

enacted into law; (2) the period between 2011 and 2014; (3) 2014 thru 2019, (4) and beyond 2019.³⁷

From the perspective of consumers, some of the most attractive features of the legislation have already been implemented or are currently in the process of implementation:

- Insurance companies are required to provide health insurance for adult dependent children up to age twenty-six on their parents' health insurance policies;³⁸
- Children with "pre-existing conditions" cannot be denied health insurance coverage;³⁹
- Insurance plans are prohibited from rescinding coverage from individuals (except in the case of fraud) and from placing lifetime limits on how much can be paid out to individual policyholders;⁴⁰
- Insurance plans are required to cover preventative services for children, such as immunizations, and women, such as cancer screenings;⁴¹
- A temporary 5 billion dollar high-risk insurance pool will be established to provide health insurance coverage for individuals with pre-existing medical conditions who have been uninsured for at least six months;⁴²
- A 5 billion dollar "reinsurance program" will be established that allows employers to provide insurance coverage for retirees over the age of fifty-five who are not eligible for Medicare;⁴³
- Small businesses with no more than twenty-five employees and average annual wages of \$40,000 will receive tax credits to help provide health insurance to their employees. The tax credit is up to thirty-five percent of the employer's contribution if the employer pays at least fifty percent of the total premium cost (effective 2010 tax year with the credit increasing to fifty percent in the 2014 tax year);⁴⁴
- Medicare patients who face a gap in prescription drug coverage will receive a one-time \$250 rebate to help pay for medication;⁴⁵
- Funding will increase by 11 billion dollars for community health centers which provide access to health care for many disadvantaged individuals (effective January 1, 2011);⁴⁶

37. *See id.* at E39–40 (showing the implementation schedule of PPACA, divided into categories based on when specific provisions take effect).

38. 42 U.S.C. § 300gg-14(a) (2010).

39. 42 U.S.C. § 18001(a) (2010).

40. 42 U.S.C. § 300gg-12 (2010).

41. 42 U.S.C. § 300gg-13 (2011).

42. 42 U.S.C. § 18001 (2011).

43. 42 U.S.C. § 18002 (2011).

44. 26 U.S.C. § 45R (2011).

45. 42 U.S.C. § 1395w-152c (2011).

- A total annual fee of \$2.5 billion will be imposed on pharmaceutical manufacturers; this is designed to help finance the overall federal health care program (effective January 1, 2011). The annual fee on pharmaceutical manufacturers will increase to \$3 billion each year through 2016 (effective January 1, 2012);⁴⁷
- Health insurance companies will be required to provide rebates to enrollees if they spend less than eighty-five percent of premium dollars collected on health care as opposed to administrative costs (effective January 1, 2011);⁴⁸
- Primary care physicians and surgeons practicing in geographic areas that lack primary care doctors will receive a ten percent bonus payment under Medicare (effective January 1, 2011, through January 1, 2015);⁴⁹
- Drug companies will be required to provide a fifty percent discount on brand-name prescription drugs for seniors who face a gap in drug coverage. More discounts would be phased in through 2020 when the gap will be closed (effective January 1, 2011).⁵⁰ The annual fee on pharmaceutical manufacturers will increase to \$3.5 billion in 2017 and \$4.2 billion in 2018;⁵¹
- The federal tax on individuals who spend money from health savings accounts on ineligible medical expenses would be increased by twenty percent (effective January 1, 2011);⁵²
- Contributions to individual flexible savings accounts that set aside tax-free money for health costs will be limited to \$2,500; at the moment employers set the limits (effective January 1, 2013);⁵³
- The threshold for deducting itemized deductions for unreimbursed medical expenses would be increased from 7.5 percent of adjusted gross income to ten percent (effective January 1, 2013); and⁵⁴

46. 42 U.S.C. § 254b-2 (2011).

47. Patient Protection and Affordable Care Act, Pub. L. No. 111-148 § 9008, 124 Stat. 119, 868 (2010) (to be codified in scattered sections of 42 U.S.C.).

48. 42 U.S.C. § 300gg-18 (2011) (requiring that large group plan insurers provide an eighty-five percent rebate and that small group or individual plan insurers provide an 80 percent rebate).

49. 42 U.S.C. § 1395l (2011).

50. 42 U.S.C. § 1395w-153 (2011); *see also Medicare Drug Discounts*, HEALTHCARE.GOV (last updated July 6, 2012), <http://www.healthcare.gov/law/features/65-older/drug-discounts/index.html> (providing a year-by-year breakdown of prescription drug discounts until the coverage gap is closed in 2020).

51. Patient Protection and Affordable Care Act, Pub. L. No. 111-148 § 9008, 124 Stat. 119, 868 (2010) (to be codified at 42 U.S.C. § 1395t).

52. 26 U.S.C. § 223f (2011).

53. 26 U.S.C. § 125i (2011); Manchikanti, *supra* note 32, at E39.

54. Patient Protection and Affordable Care Act, Pub. L. No. 111-148 § 9013, 124 Stat. 119, 868 (2010) (to be codified at 26 U.S.C. § 213).

- The Medicare tax rate will increase by 0.9 percent—from 1.45 percent to 2.35 percent—on earnings over \$200,000 for individuals and \$250,000 for families. (effective January 1, 2013).⁵⁵

After this initial implementation phase, the most controversial aspects of the Health Care Act are scheduled to be implemented in the period between 2014 and 2016.⁵⁶ As of January 1, 2014, most Americans will be required to have health insurance or pay a fine (or “tax”) which increases in amount between 2014 and 2019.⁵⁷ Individuals with pre-existing medical conditions cannot be denied health insurance coverage nor may their insurance be cancelled or not renewed due to illness.⁵⁸ In addition, other key controversial provisions are also scheduled for implementation as of January 1, 2014 including:

- Expanding Medicaid, at the discretion of a state, by increasing income eligibility to 133% percent of federal poverty level, or \$29,327 for a family of four. This is, in essence, an unfunded mandate on the states to increase the number of individuals who qualify for Medicaid;⁵⁹
- Providing federal subsidies, which vary according to household income, to offset the cost of purchasing health insurance for American citizens and legal residents who qualify;⁶⁰
- Imposing an annual fee of \$8 billion on health insurance companies to help finance the overall cost of the new health care program. The annual fee on insurance companies increases to \$13.9 billion in 2017 and \$14.3 billion in 2019;⁶¹
- Creating state health insurance exchanges. These are new “organizations” which are designed to provide affordable health insurance to a wide range of individuals. These new organizations are designed to leverage insurance companies with the result of providing more competitive prices; and⁶²
- Imposing a forty percent excise tax on health care plans that cost more than \$10,200 for individual coverage and \$27,500 for family coverage (effective

55. Patient Protection and Affordable Care Act, Pub. L. No. 111-148 § 9015, 124 Stat. 119, 870-71 (2010), *amended by* Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152 § 1411, 124 Stat. 1029, 1061-63 (2010) (to be codified at 26 U.S.C. § 3101b).

56. See Martin D. Carrigan, *The Patient Protection And Affordable Care Act of 2010: Constitutional?*, 3 AM. J. OF HEALTH SCI. 75, 76 (2012) (noting that the most controversial aspects of the PPACA do not take effect until 2014).

57. 26 U.S.C. § 5000A (2011).

58. 42 U.S.C. § 18001d (2011).

59. 42 U.S.C. § 1396a (2011); Manchikanti, *supra* note 32, at E40.

60. See 26 U.S.C. § 36B (2011) (setting forth the premiums available by household income).

61. Patient Protection and Affordable Care Act, Pub. L. No. 111-148 § 9010, 124 Stat. 119, 865-88 (2010), *amended by* Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152 § 1406, 124 Stat. 1029, 1065-67 (2010); Manchikanti, *supra* note 32, at E40.

62. 42 U.S.C. § 1396w-3 (2011).

January 1, 2018). This is designed to constrain insurance companies from making very large increases in insurance premiums.⁶³

As one can see, many of these implementation strategies postpone the responsibility until further down the road. Those that are assigned to the states carry immense regulatory and financial burdens.⁶⁴ Yet, while not trivial, these implementation challenges were not unforeseen or unavoidable.⁶⁵ Indeed, the core tenets driving PPACA's record pace from passage to the Supreme Court, the individual mandate, were distinctly absent from *candidate* Obama's health care proposals.⁶⁶ As we proceed, the questions at issue are why this legislation in its existing form and why now? Appreciating these answers will help address future challenges to federalism in balancing state and federal power.

IV. IMPLEMENTATION ISSUE: THE INDIVIDUAL MANDATE

As already noted, the two key issues which the Supreme Court examined in reviewing PPACA were the individual mandate and Medicaid expansion.⁶⁷ Throughout the history of the litigation over these issues, the federal courts focused on powers granted to the federal government under the Interstate Commerce Clause, the Necessary and Proper Clause, and the Taxing Power.⁶⁸ The core issue for the Medicaid expansion was whether the federal government could mandate the

63. 26 U.S.C. § 4980I (2011).

64. See, e.g., Lanhee Chen, *How Obamacare Burdens Already Strained State Budgets*, WALL ST. J., Nov. 16, 2010, <http://online.wsj.com/article/SB10001424052748703326204575616824184501464.html> (discussing the financial strains the Patient Protection and Affordable Care Act will place on state budgets); see also CURTIS W. COPELAND, CONG. RESEARCH SERV., R41180, RULEMAKING REQUIREMENTS AND AUTHORITIES IN THE PPACA 16 (2011) (asserting that the provisions of PPACA are burdensome in the regulatory realm).

65. See, e.g., Elizabeth Weeks Leonard, *The Rhetoric Hits the Road: State Challenges to the Affordable Care Act Implementation*, 46 UNIV. OF RICHMOND L. REV. 781, 786–87 (2011) (predicting a variety of state challenges to PPACA implementation).

66. See, e.g., *President-Elect Barack Obama's Health Care Reform Proposal*, KAISER FAMILY FOUND. (Nov. 25, 2008), http://www.kff.org/uninsured/upload/Obama_Health_Care_Reform_Proposal.pdf (listing candidate Obama's health care proposal during the 2008 presidential campaign which did not include an individual mandate provision); Andrew Cline, *How Obama Broke His Promise on Individual Mandates*, ATLANTIC, June 29, 2012, <http://www.theatlantic.com/politics/archive/2012/06/how-obama-broke-his-promise-on-individual-mandates/259183/> (discussing the lack of an individual mandate in Obama's original health care plan proposal in 2008).

67. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2577 (2012).

68. See, e.g., Thomas More Law Ctr. v. Obama, 720 F.Supp.2d 882, 886 (E.D. Mich. 2010) (discussing whether Congress acted Constitutionally in passing the individual mandate provision of the PPACA); Liberty University, Inc. v. Geithner, 753 F.Supp.2d 611, 629–30 (W.D. Va. 2010) (examining whether Congress exceeded its powers by forcing individuals to purchase health insurance); Florida v. U.S. Dep't of Health & Human Servs., 648 F.3d 1235, 1268 (11th Cir. 2011) (analyzing the appropriateness of the individual mandate under the Constitution's Commerce Clause and Necessary and Proper Clause).

Medicaid expansion.⁶⁹ The Supreme Court settled the debate by stating that the individual mandate was constitutional pursuant to Congress's Taxing Power and that the Medicaid expansion was unconstitutional because it violated Congress's taxing and spending power.⁷⁰ The Court noted that it was improper for the federal government to "coerce" the States.⁷¹

Part A will briefly review the Supreme Court's decision in *National Federation of Independent Businesses v. Sebelius*. Part B will discuss the Commerce Clause's application to the individual mandate. Part C will discuss the Necessary and Proper Clause's application to the individual mandate. Part D will discuss the Taxing and Spending Clause's application to the individual mandate. Part E will discuss the implementation issues associated with the Medicaid expansion. Part F will discuss cases where states directly challenged the limits of federalism when they passed their own state laws that protected their citizens from being mandated to purchase insurance. Part G details closing thoughts and remarks.

A. *The Supreme Court's Holding on the Constitutionality of PPACA.*

The Supreme Court ruled that PPACA's "individual mandate" provision is constitutional due to Congress's Taxing Power.⁷² The Supreme Court looked at four major issues pertaining to PPACA: (1) whether the Court's jurisdiction is removed by the Anti-Injunction Act;⁷³ (2) if the Court does have jurisdiction, whether the insurance mandate falls within the Commerce Clause or Taxing Powers of Congress;⁷⁴ (3) if the insurance mandate is deemed unconstitutional, whether it is severable from the rest of PPACA;⁷⁵ and (4) the constitutionality of the mandated Medicaid expansion.⁷⁶

1. *The Anti-Injunction Act*

The Anti-Injunction Act (AIA) provides "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed."⁷⁷ Barring litigation to enjoin or otherwise obstruct the collection of taxes

69. See *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2582 (noting that plaintiffs challenged the Medicaid expansion provision on the basis that Congress exceeded its constitutional powers in expanding Medicaid).

70. *Id.* at 2608.

71. *Id.* at 2602.

72. *Id.* at 2600.

73. *Id.* at 2582–84.

74. *Id.* at 2594–601.

75. *Id.* at 2607.

76. *Id.* at 2603–08.

77. Anti-Injunction Act, 26 U.S.C. § 7421 (2011).

“protects the Government’s ability to collect a consistent stream of revenue.”⁷⁸ The issue was whether the AIA barred litigation on PPACA’s individual mandate.⁷⁹

Prior to the Supreme Court’s decision, a holding that the AIA barred litigation would presumably have required that PPACA’s individual mandate be considered a tax.⁸⁰ However, even though the Supreme Court found the mandate to be constitutional pursuant to Congress’s Taxing Power,⁸¹ the holding concerning the AIA stated that the individual mandate did not preclude litigation on the Individual Mandate Exaction because it was not a tax for the purposes of the AIA.⁸² The seeming inconsistency of the application of the AIA and the Taxing Power will be discussed in detail later.⁸³

2. *The Interstate Commerce Clause*

The Commerce Clause provides that Congress shall have the power “to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”⁸⁴ The issue regarding the constitutionality of the individual mandate was whether the individual mandate was outside the scope of Congress’s Commerce Clause Power.⁸⁵ In a 5–4 vote, the majority of the Supreme Court Justices, including Chief Justice Roberts, Justice Scalia, Justice Kennedy, Justice Thomas, and Justice Alito, found that the individual mandate was outside the scope of Congress’s Commerce Power.⁸⁶ Justice Ginsburg’s partially concurring and partially dissenting opinion, joined by Justice Sotomayor, Justice Breyer, and Justice Kagan, found that the individual mandate was within Congress’s Commerce Clause Power.⁸⁷

The Commerce Clause Power was hotly contested as the main issue prior to the Supreme Court decision.⁸⁸ The proper exertion of Congress’s Power over the

78. *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2582 (discussing the purpose of the Anti-Injunction Act).

79. *Id.*

80. *See, e.g., Liberty Univ., Inc. v. Geithner*, 671 F.3d 391, 415 (4th Cir. 2011) (Wynn, J., concurring) (suggesting that mandates are constitutional taxes because the AIA barred litigation against them), *cert. denied, sub nom. Liberty Univ. v. Geithner*, 2012 WL 2470099 (U.S. June 29, 2012).

81. *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2599.

82. *Id.* at 2584.

83. *See infra* text accompanying notes 381–93.

84. U.S. CONST. art. I, § 8, cl. 3.

85. *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2585 (reiterating the government’s argument that the individual mandate is a valid use of Congress’s Commerce Clause power).

86. *Id.* at 2591.

87. *Id.* at 2609 (Ginsburg, J., concurring in part and dissenting in part).

88. *See infra* Part IV.B.1–B.5.

states and the American Public continues to be a major source of political debate.⁸⁹ A further discussion of these implications will be discussed later in this paper.⁹⁰

3. *The Taxing Power*

The Taxing Power provides that “Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.”⁹¹ The issue facing the Supreme Court was whether the individual mandate is a tax for the purposes of Congress’s Taxing Power.⁹² Interestingly enough, as stated above, the Court’s majority found that it was a tax pursuant to Congress’s Taxing Power, even though it was not considered a tax for the purposes of the AIA.⁹³ This holding allowed the individual mandate to be constitutionally valid under Congress’s Taxing Power.⁹⁴

There was a lot of controversy over this decision.⁹⁵ Prior to the Supreme Court’s decision, only one circuit court considered the individual mandate to be a tax.⁹⁶ Other federal circuit courts or district courts either found that it was not a tax or did not decide on that issue.⁹⁷ Furthermore, even proponents of PPACA did not

89. See generally *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2577–78 (discussing the historical tension of balancing of state power with Congressional power through federalism).

90. See *infra* Part III.B.1–B.5.

91. U.S. CONST. art. I, § 8, cl. 1.

92. *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2584 (reiterating the government’s argument that the individual mandate is a valid use of Congress’s Taxing Power).

93. *Id.*

94. *Id.*

95. See, e.g., Chris Good, *Obama in 2009: The Individual Mandate is Not a Tax*, ABC NEWS (June 28, 2012, 10:32 AM), <http://abcnews.go.com/blogs/politics/2012/06/obama-in-2009-its-not-a-tax/> (noting that the Court’s decision was particularly controversial because President Obama had previously stated that the individual mandate is not a tax, although the Court found otherwise).

96. See *Liberty Univ., Inc. v. Geithner*, 671 F.3d 391, 413–15 (4th Cir. 2011) (holding that the individual mandate was a tax for purposes of the Anti-Injunction Act), *cert. denied, sub nom.* *Liberty Univ. v. Geithner*, No. 11-438 (U.S. June 29, 2012); see also *id.* at 423 (Davis, J., dissenting) (demonstrating that prior to this case no other court has held that the Anti-Injunction Act is applicable to the individual mandate).

97. See, e.g., *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 549 (6th Cir. 2011) (holding that the mandate is valid on other grounds and declining to rule on whether it is a tax), *cert. denied*, 2012 WL 2470097 (U.S. June 29, 2012); *Fla. ex rel. Att’y Gen. v. Dep’t of Health & Human Servs.*, 1235, 1328 (11th Cir. 2011) (holding that the mandate is not a tax), *cert. granted in part sub nom.* *Fla. v. Dep’t of Health and Human Servs.*, 132 S. Ct. 604 (2011), and *aff’d in part, rev’d in part sub nom.* *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. 2566 (2012); *Thomas More Law Ctr. v. Obama*, 720 F.Supp.2d 882, 895 (E.D. Mich. 2010) (holding that the mandate is valid on other grounds and declining to rule on whether it is a tax), *aff’d*, 651 F.3d 529 (6th Cir. 2011), *cert. denied*, 2012 WL 2470097 (U.S. June 29, 2012); *Fla. ex rel. Bondi v. Dep’t of Health & Human Servs.*, 780 F.Supp.2d 1256, 1265 n.4 (N.D. Fla.) (rejecting the Department’s argument that the mandate is a tax), *aff’d in part, rev’d in part sub nom.* *Fla. ex rel. Att’y Gen. v. Dep’t of Health & Human Servs.*, 648 F.3d 1235, 1328 (11th Cir.), *cert. granted in part sub nom.* *Fla. v. Dep’t of Health and Human Servs.*, 132 S. Ct. 604 (2011), and *aff’d in part, rev’d in part sub nom.* *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. 2566 (2012).

consider it a tax, including President Obama himself.⁹⁸ Thus, this decision greatly changes several fundamental dynamics of PPACA and federalism, which are further discussed below.⁹⁹

4. Medicaid Expansion

The Medicaid expansion was created pursuant to Congress's Taxing and Spending Power, which comes from the same clause as the Taxing Power.¹⁰⁰ The issue was whether the Medicaid expansion is so coercive that it is a violation of Congress's Taxing and Spending Power.¹⁰¹ The Supreme Court, in a 7–2 vote, found that it was too coercive and struck down a key component of PPACA's overall attempt to provide universal health care.¹⁰² Three Justices, Chief Justice Roberts, Justice Breyer, and Justice Kagan, found that the Medicaid expansion could survive as long as the federal government could not threaten to remove all of its existing funding if States did not participate.¹⁰³ Four Justices, consisting of Justices Scalia, Kennedy, Thomas, and Alito, would have eliminated the Medicaid expansion altogether.¹⁰⁴ The Supreme Court drew a line on what is deemed "coercive," implying that a limit exists on Congress's future ability to incentivize states with its spending power.¹⁰⁵ This has great implications on the future of federalism, which will be discussed below.¹⁰⁶

5. Prior History

Prior to the Supreme Court's Ruling, the federal district and circuit courts were split, bitterly dividing by party lines.¹⁰⁷ The following chart is a summary of holdings of the Supreme Court cases, the circuit court Cases, and the district court cases that were successfully appealed:

98. Good, *supra* note 95.

99. See *infra* Part IV.D (examining the mandate as a tax and its broad implications on federalism).

100. U.S. CONST. art. 1, § 8, cl. 1; *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2601.

101. *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2601 (explaining the plaintiffs' stance that the Medicaid expansion exceeds Congress's power under the Taxing and Spending Clause of the Constitution).

102. *Id.* at 2606–08; *id.* at 2666–67 (Scalia, J., dissenting) (stating that seven members of the Court agreed that the expansion of Medicaid "as enacted by Congress" was unconstitutional).

103. *Id.* at 2607 (majority opinion).

104. *Id.* at 2667–68 (Scalia, J., dissenting).

105. *Id.* at 2602–03 (majority opinion).

106. See *infra* Part V.

107. See *infra* Tables 1 and 2.

TABLE 1
SUPREME COURT AND CIRCUIT COURT CASES:

Case Name	Court	Constitutionality of Individual Mandate		Constitutionality of the Medicaid Expansion
		<i>Commerce Clause/ Necessary & Proper</i>	<i>Taxing Power</i>	
<i>National Federation of Independent Business v. Sebelius</i>	Supreme Court	No ¹⁰⁸	Yes ¹⁰⁹	No ¹¹⁰
<i>Thomas More Law Center v. Obama</i>	6 th Circuit	Yes ¹¹¹	Not Discussed ¹¹²	Not argued ¹¹³
<i>Florida v. HHS</i>	11 th Circuit	No ¹¹⁴	No ¹¹⁵	Yes ¹¹⁶
<i>Liberty University v. Geithner</i>	4 th Circuit	Not discussed ¹¹⁷	Yes; but noted that AIA precludes adjudication ¹¹⁸	Not Discussed
<i>Virginia v. Sebelius</i>	4 th Circuit	Virginia lacks standing to adjudicate against PPACA since its only injury is based on the VHCFA. ¹¹⁹		

108. *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2591, 2593.

109. *Id.* at 2584.

110. *Id.* at 2606–08.

111. *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 549 (6th Cir. 2011), *cert. denied*, 2012 WL 2470097 (U.S. June 29, 2012).

112. *Id.*

113. *See id.* at 534 (stating that the court will consider only the constitutionality of the individual mandate provision).

114. *Fla. ex rel. Att'y Gen. v. Dep't of Health & Human Servs.*, 648 F.3d 1235, 1328 (11th Cir.), *cert. granted in part sub nom. Fla. v. Dep't of Health and Human Servs.*, 132 S. Ct. 604 (2011), and *aff'd in part, rev'd in part sub nom. Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. 2566 (2012).

115. *Id.*

116. *Id.*

117. *See Liberty Univ., Inc. v. Geithner*, 671 F.3d 391, 397, 399–400 (4th Cir. 2011) (demonstrating that the issue in the case was only whether the individual mandate was an unlawful tax), *cert. denied, sub nom. Liberty Univ. v. Geithner*, 2012 WL 2470099 (U.S. June 29, 2012).

118. *Id.* at 414–15.

119. *Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253, 272 (4th Cir. 2011), *cert. denied*, 2012 WL 2470098 (U.S. June 29, 2012).

TABLE 2
DISTRICT COURT CASES:

Case Name	Court	Constitutionality of Individual Mandate		Constitutionality of the Medicaid Expansion
		Commerce Clause/ Necessary & Proper	Taxing Power	
<i>Thomas More Law Center v. Obama</i>	Eastern District of Michigan	Yes ¹²⁰	Not Discussed ¹²¹	Not Discussed ¹²²
<i>Florida v. HHS</i>	Northern District of Florida	No ¹²³	Not Discussed ¹²⁴	Yes ¹²⁵
<i>Liberty University v. Geithner</i>	Western District of Virginia	Yes ¹²⁶	No; also noted that AIA does not preclude Adjudication ¹²⁷	Not Discussed
<i>Virginia v. Sebelius</i>	Eastern District of Virginia	No ¹²⁸	No ¹²⁹	Not Discussed ¹³⁰

120. *Thomas More Law Ctr. v. Obama*, 720 F.Supp.2d 882, 895–96 (E.D. Mich. 2010), *aff'd*, 651 F.3d 529 (6th Cir. 2011), *cert. denied*, 2012 WL 2470097 (U.S. June 29, 2012).

121. *Id.* at 895.

122. *See id.* at 885–86 (stating that the issues of the case were limited to whether Congress lacks power under the Commerce Clause to pass health care reform, whether the mandate provision is an unconstitutional tax, and whether the Act violates the Free Exercise Clause, Equal Protection Clause, Due Process Clause or states' rights under the Tenth Amendment).

123. Fla. ex rel. Bondi v. U.S. Dep't of Health & Human Servs., 780 F.Supp.2d 1256, 1298–99 (N.D. Fla.), *aff'd in part, rev'd in part sub nom.* Fla. ex rel. Att'y Gen. v. U.S. Dep't of Health & Human Servs., 648 F.3d 1235, 1328 (11th Cir.), *cert. granted in part sub nom.* Fla. v. Dep't of Health and Human Servs., 132 S.Ct. 604 (2011), *and aff'd in part, rev'd in part sub nom. Sebelius*, 132 S.Ct. 2566 (2012).

124. *See id.* at 1306–07 (holding that the individual mandate violates the Commerce Clause but omitting discussion of whether the mandate is a lawful exercise of Congress's taxing power).

125. *Id.* at 1269.

126. *See Liberty Univ., Inc. v. Geithner*, 753 F.Supp.2d 611, 630 (W.D. Va. 2010) (upholding the mandate as a valid exercise of Congress's power under the Commerce Clause, and providing that a Necessary and Proper Clause assessment of the provision was not necessary to the court's analysis), *vacated*, 671 F.3d 391 (4th Cir. 2011), *cert. denied, sub nom.* Liberty Univ. v. Geithner, 2012 WL 2470099 (U.S. June 29, 2012).

127. *Id.* at 627–29.

128. *Virginia ex rel. Cuccinelli v. Sebelius*, 728 F.Supp.2d 768, 788 (E.D. Va. 2010), *rev'd*, 656 F.3d 253 (4th Cir. 2011), *cert. denied*, 2012 WL 2470098 (U.S. June 29, 2012).

129. *Id.* at 787.

130. *See id.* at 770 (noting that the issue was specifically the constitutionality of the individual mandate and omitting any discussion Medicaid expansion).

6. *Implications on Federalism*

The Supreme Court's landmark decision has significant implications for the structure and operations of federalism.¹³¹ The Supreme Court's decision is final as far as the judicial branch of government is concerned.¹³² However, there has already been much discussion on possibly repealing PPACA through the legislative branch.¹³³ The battle over PPACA actually signals a much broader struggle than just that of the financing and delivery of health care across the country; it deals with the best way to define the powers of our dual system of government.¹³⁴ Who should have the regulatory powers over the design and delivery of health care in the United States—the state government or the federal government? What are the policy issues that should be taken into consideration? These questions can be answered by looking into the various issues presented by PPACA debate with a focus on its federalism dimension.¹³⁵

B. *The Individual Mandate: The Interstate Commerce Clause*

The most controversial implementation issue in PPACA is § 1501, “Minimum Essential Coverage Provision,” also known as the individual mandate.¹³⁶ As already noted, this section is effective on January 1, 2014 and requires that each “applicable individual” purchase health insurance or be subject to a “penalty” or tax.¹³⁷ The definition of “applicable individual” is “an individual other than” a religious objector who opposes health insurance in principle, a non-resident or illegal resident, or an incarcerated individual.¹³⁸ Therefore, outside of the few above

131. See *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2577–80 (discussing the importance of federalism and its impact on the Court's decision).

132. U.S. CONST. art III; see *Marbury v. Madison*, 5 U.S. 137, 177–79 (1803) (establishing the principle of judicial review and noting the power of the Supreme Court in the judicial branch).

133. See, e.g., Repealing the Job-Killing Health Care Law Act, H.R. 2, 112th Cong. (2011) (providing for the repeal of the PPACA); Press Release, Rep. Steny Hoyer, Minority Whip, Republicans Try To Repeal Health Care Benefits, Still No Focus On Jobs Or Economy (Jul. 11, 2012), http://hoyer.house.gov/index.php?option=com_content&task=view&id=3003&Itemid=56.

134. *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2577 (examining the power of Congress to enact a law that many States and individuals believe exceed the federal government's authority).

135. See *infra* Part VI.

136. See, e.g., *Florida ex rel. McCollum v. Dep't of Health & Human Servs.*, 716 F.Supp.2d 1120, 1127–28, 1142 (N.D. Fla. 2010) (stating that the individual mandate was “by far the most publicized and controversial part” of the Act); Gayland O. Hethcoat II, *Plaintiff Standing in Florida ex rel. Bondi and the Challenges to the Patient Protection and Affordable Care Act*, 65 U. MIAMI L. REV. 1241, 1243, 1245–48 (2011) (describing the individual mandate as “[t]he Act's most controversial provision” due to the constitutional debate over whether Congress had the power to enact such a mandate); Leslie Meltzer Henry & Maxwell L. Stearns, *Commerce Games and the Individual Mandate*, 100 GEO. L.J. 1117, 1128, 1154 (2012) (stating that there is “sharp disagreement” about the “controversial individual-mandate provision” and whether or not it “regulates economic activity”).

137. 26 U.S.C. § 5000A (2011).

138. § 5000A(d).

mentioned exceptions, the “individual mandate” of PPACA applies to everyone living in the United States.¹³⁹

Ultimately, the Supreme Court found that the individual mandate is Constitutional, pursuant to Congress’s Taxing Power.¹⁴⁰ However, a discussion of the debate over the many and varied issues is important to understand the implications of the Supreme Court’s ruling on federalism.

At the inception of PPACA, in the Congressional findings associated with passage of the law, Congress found that the individual mandate is commercial and economic in nature and substantially affects interstate commerce because (1) the requirement related to (a) an activity (b) which is commercial, the decision to purchase health care and health insurance, (2) health care and health insurance are substantial parts of the national economy, (3) the act will increase the number of people insured and “add millions of new consumers to the health insurance market,” (4) the universal coverage will strengthen the private insurance market, (5) the act will improve financial security of families, (6) under ERISA and the Public Health Service Act the Federal government already has a significant role in regulating the insurance market of interstate commerce, (7) the Act will decrease adverse selection, and (8) the act will increase economies of scale.¹⁴¹

Once an act of Congress falls under the Commerce Clause, it can be executed under the Necessary and Proper Clause; “The Congress shall have Power [t]o make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers.”¹⁴² The main implementation issue at the time was whether Congress acted within its powers granted by the Constitution.¹⁴³

Congress concluded that the individual mandate “is essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold.”¹⁴⁴

All cases discussing the constitutionality of PPACA, to date, have focused on the constitutionality of the law’s “mandate” to purchase individual insurance.¹⁴⁵

139. See *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2580 (“The individual mandate requires most Americans to maintain ‘minimum essential’ health insurance coverage.”).

140. *Id.* at 2600.

141. 42 U.S.C. § 18091 (2011).

142. U.S. CONST. art I, § 8, cl. 18.

143. See, e.g., Robert R. Harrison, *Health Care Reform in the Federal Courts*, 57 FED. LAW. 52, 52 (2010) (noting that several states including Virginia and Florida quickly filed lawsuits challenging the constitutionality of the PPACA); James G. Hodge, Jr. et al., *Nationalizing Health Care Reform in A Federalist System*, 42 ARIZ. ST. L.J. 1245, 1247 (2011) (stating that many of the challenges to health care reform concern federalism issues and whether the federal government exceeded its powers by mandating state participation in the Act’s implementation).

144. 42 U.S.C. § 18091 (2011).

145. See, e.g., *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 540–41, 549 (6th Cir. 2011) (discussing the constitutionality of the individual mandate and holding that Congress acted within its Commerce Clause powers in enacting the provision), *cert. denied*, 2012 WL 2470097 (U.S. June 29,

The main challenge is the authority of Congress to compel everyone (with some exceptions) to purchase health insurance.¹⁴⁶ Several key issues to answer this question deal with (1) the Commerce Clause Power and its precedent; (2) the relevant market the individual mandate is regulating; (3) whether the individual mandate regulates activity or inactivity; (4) the uniqueness of the healthcare market; and (5) possible alternative approaches if the current jurisprudence of the Commerce Clause is unhelpful.¹⁴⁷

1. The Commerce Clause Power and Landmark Precedent

The most controversial issue regarding the individual mandate is whether it is within Congress's Commerce power to require individuals to purchase insurance.¹⁴⁸ The Commerce Clause states that Congress has the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."¹⁴⁹

United States v. Lopez identified three broad categories that Congress could regulate under the Commerce Clause Power: (1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce, or persons or things in interstate commerce; and (3) activities that substantially affect or substantially relate to interstate commerce.¹⁵⁰ The debate is whether the individual mandate falls under the third category of the commerce clause power.¹⁵¹ *Wickard v. Filburn* established the "substantial effects doctrine" which allows Congress to regulate an individual's economic activity if, in the aggregate, that activity done by many

2012); Florida *ex rel.* Att'y Gen. v. Dep't of Health & Human Servs., 648 F.3d 1235, 1268, 1311, 1313–14, 1320 (11th Cir. 2011) (discussing the constitutionality of the individual mandate as a invalid exercise of Congress' power under the Commerce Clause and the Taxing Power), *aff'd in part, rev'd in part, sub nom.* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012); Liberty Univ., Inc. v. Geithner, 753 F.Supp.2d 611, 635 (W.D. Va. 2010) (discussing the constitutionality of the individual mandate under the Commerce Clause and holding that Congress acted within its powers in enacting the provision), *vacated*, 671 F.3d 391 (4th Cir. 2011), *cert. denied, sub nom.* Liberty Univ. v. Geithner, 2012 WL 2470099 (U.S. June 29, 2012).

146. See, e.g., Wilson Huhn, *Constitutionality of the Patient Protection and Affordable Care Act Under the Commerce Clause and the Necessary and Proper Clause*, 32 J. LEGAL MED. 139, 142 (2011) ("The only portion of the Act's constitutionality that seems to be in serious question is the individual mandate.").

147. See *infra* Part IV.B.

148. See *supra* Tables 1 and 2.

149. U.S. CONST. art. I, § 8 cl. 3.

150. U.S. v. Lopez, 514 U.S. 549, 558–59 (1995).

151. See, e.g., *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 1585–86 (noting the Government's argument that the mandate falls under Congress's power to regulate activities that have a substantial effect on commerce). See also Bruce Moyer, *State Actions Against Health Care Law Take Root*, 57 FED. LAW. 8, 8 (2010) (discussing the controversy surrounding the mandate and whether its enactment is a valid exercise of Congress's power to regulate activity that substantially affects interstate commerce); Arthur Nussbaum, *Can Congress Make You Buy Health Insurance? The Affordable Care Act, National Health Care Reform, and the Constitutionality of the Individual Mandate*, 50 DUQ. L. REV. 411, 416 (2012) (noting Congress's finding that that the individual mandate is of a commercial and economic nature and "substantially affects interstate commerce").

individuals would have a substantial economic effect on interstate commerce.¹⁵² How this doctrine applies to the individual mandate has been greatly debated.¹⁵³ There are several issues central to determining how the individual mandates are affected by the Commerce Clause. These issues include: whether not purchasing insurance is considered activity or inactivity, whether the decision not to purchase insurance is an economic decision, and whether the insurance or the healthcare market is being regulated by the mandate.¹⁵⁴

Lopez and *United States v. Morrison* provide a limit to the commerce clause power and the substantial effects doctrine. In *Lopez*, the Gun-Free School Zone Act was considered to be criminal in nature, not economic, and therefore outside the scope of the three broad categories of the commerce clause.¹⁵⁵ In *Morrison*, the Violence Against Women Act was deemed to be outside of Congress's commerce power because the relationship of violence against women to commerce would require a "but-for causal chain" of reasoning and would require inference upon inference to establish.¹⁵⁶ There would be no stopping point as Congress could exercise police powers traditionally reposed to the States.¹⁵⁷ *Lopez* and *Morrison* drive the debate over the mandate toward whether or not it is an economic activity and whether it requires "inference upon inference" to establish the non-purchase of health insurance to constitute "commerce."¹⁵⁸

However, given the limitations afforded in *Lopez* and *Morrison*, *Gonzales v. Raich* expands the commerce powers, allowing Congress to regulate a wholly intrastate activity that is not itself commercial if failure to regulate that class of activity would undercut a broader regulatory scheme.¹⁵⁹ Thus, if the decision to not purchase insurance is deemed to be part of a greater regulatory scheme for PPACA to enforce its other provisions, it will be within Congress's powers.¹⁶⁰

The core tension regarding the law's constitutionality involves *Wickard* and *Raich*'s expansion of the commerce clause and *Lopez* and *Morrison*'s limitation of it.¹⁶¹ Those that find the mandate constitutional emphasize *Wickard* and *Raich*.¹⁶²

152. *Wickard v. Filburn*, 317 U.S. 111, 127–29 (1942).

153. See *supra* note 145 and accompanying text.

154. See *infra* Parts IV.B.2–3.

155. *Lopez*, 514 U.S. at 561, 567.

156. *United States v. Morrison*, 529 U.S. 598, 615 (2000).

157. *Id.* at 615–16.

158. See, e.g., *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. 2566, 2623–24 (2012) (Ginsburg, J., concurring) (applying the Court's reasoning in *Lopez* and *Morrison* in determining whether buying health insurance is an economic act).

159. 545 U.S. 1, 22 (2005).

160. *Id.* (reasoning that Congress was acting within its Commerce Clause and Necessary and Proper Clause powers in enacting regulations banning the use of medicinal marijuana because the ban was part of a larger regulatory scheme). See also *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2591.

161. See *supra* text accompanying notes 151–159.

162. See, e.g., *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2616, 2619, 2621–26 (Ginsburg, J., concurring) (discussing *Wickard* and *Raich* extensively and concluding that the individual mandate

Those that find the mandate unconstitutional seek to apply the limiting jurisprudence of *Lopez* and *Morrison*.¹⁶³ Some Courts have found the current jurisprudence to be unworkable and have fallen back to fundamental principles of federalism for guidance.¹⁶⁴ The varied approaches of the district courts and courts of appeal will be discussed in greater detail in the remainder of this section.

2. Economic: Regulating Health Care Industry or Health Insurance Market?

One important factor to determine if Congress acted within its Commerce Clause Power is whether the regulated activity is an economic one (a commercial activity).¹⁶⁵ For the individual mandate, a key issue in addressing this question is whether the Minimum Essential Coverage Clause is designed to regulate the “insurance” market or the “health care” market.¹⁶⁶ If it regulates insurance, then it would be regulating the decision to not purchase insurance, arguably a non-economic decision.¹⁶⁷ The mandate would be forcing people into a market in which they were previously not a participant.¹⁶⁸ If, on the other hand, the mandate

should be upheld under the substantial effects doctrine of the Commerce Clause); Thomas More Law Ctr. v. Obama, 651 F.3d 529, 542–60 (6th Cir. 2011) (emphasizing the similarities between the laws upheld in *Wickard* and *Raich* and PPACA’s individual mandate), *cert. denied*, 2012 WL 2470097 (U.S. June 29, 2012); Liberty Univ., Inc. v. Geithner, 753 F.Supp.2d 611, 633 (W.D. Va. 2010) (stating that the substantial effects doctrine under *Raich* and *Wickard* apply in determining whether the individual mandate is a constitutional exercise of Congress’s Commerce Clause power), *vacated*, 671 F.3d 391 (4th Cir. 2011), *cert. denied, sub nom.* Liberty Univ. v. Geithner, 2012 WL 2470099 (U.S. June 29, 2012).

163. See, e.g., *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2578, 2646 (Scalia, J., dissenting) (emphasizing that *Lopez* and *Morrison* indicate that there are limits to Congress’ Commerce power and concluding that the individual mandate cannot be upheld under Congress’ Commerce power); Florida *ex rel.* Atty. Gen. v. Dep’t of Health & Human Servs., 648 F.3d 1235, 1273–76, 1312–13 (11th Cir. 2011) (discussing *Lopez* and *Morrison* extensively and ultimately concluding that Congress exceeded its Commerce powers in enacting the individual mandate), *aff’d in part, rev’d in part, sub nom.* Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

164. See, e.g., Florida *ex rel. Att’y Gen.*, 648 F.3d at 1284 (stating that, in order to determine whether an act of Congress has violated the Commerce Clause, the Court must look at the action’s effect on federalism).

165. See, e.g., United States v. Lopez, 514 U.S. 549, 561 (1995) (noting that the challenged statute did not regulate economic activity and therefore was not a valid exercise of Congress’s Commerce Clause powers).

166. See *infra* Part IV.B.2. See also Florida *ex rel. Bondi* v. Dep’t of Health & Human Servs., 780 F.Supp.2d 1256, 1288 n.18 (N.D. Fla. 2011) (acknowledging the plaintiff’s opinion that Congress is attempting to regulate the more narrow *health insurance* market rather than the *health care* market) (emphasis added), *aff’d in part, rev’d in part, sub nom.* Florida *ex rel. Att’y Gen. v. Dep’t of Health & Human Servs.*, 648 F.3d 1235 (11th Cir. 2011), *aff’d in part, rev’d in part, sub nom.* Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

167. See JENNIFER STAMAN & CYNTHIA BROUGH, CONG. RESEARCH SERV., R40725, REQUIRING INDIVIDUALS TO OBTAIN HEALTH INSURANCE: A CONSTITUTIONAL ANALYSIS 6 (2009) (stating that while regulating the health care market could be economic activity, regulating the choice whether to purchase insurance is arguably not economic activity).

168. In fact, this is the contention of the Supreme Court’s majority opinion. *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2591 (“The individual mandate forces individuals into commerce precisely because they elected to refrain from commercial activity.”).

regulates the health care market as a whole, the mandate would be regulating the active participation in the health care market since virtually everyone makes use of this market.¹⁶⁹ This would be economic participation that is within Congress's commerce power.¹⁷⁰

All courts agree that everyone will likely enter the "health care" market at some point, and therefore it is not a question of whether one will participate, but when and under what terms.¹⁷¹ Judge Vinson of the Northern District of Florida, as the first district court to deem the mandate unconstitutional, sided with the plaintiffs in holding that the relevant market "for the purposes of analyzing the individual mandate is the more specific health insurance market" and not the broadly defined "health care" market.¹⁷² The Eleventh Circuit, for the appellate case, frequently framed the mandate as one that regulates the decision of "choosing not to purchase health insurance."¹⁷³

In contrast, the Sixth Circuit framed the relevant market as the health care market, stating that "[t]he Act considered as a whole makes clear that Congress was concerned that individuals maintain minimum coverage not as an end in itself, but because of the economic implications on the broader health care market" and finding the mandate to be constitutional.¹⁷⁴ The 6th Circuit also stated that "[c]onsumption of health care falls squarely within *Raich's* definition of economics, and virtually every individual in this country consumes these services."¹⁷⁵ The term "these services" refers to the "broader health care market."¹⁷⁶

169. *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 544–49 (6th Cir. 2011) (finding that Congress may enact legislation requiring individuals to purchase health insurance even if the legislation is regulating inactivity because participation and lack of participation affect the health care market), *cert. denied*, 2012 WL 2470097 (U.S. June 29, 2012).

170. *See, e.g., id.* at 544 (stating that the decision to buy health insurance as well as the decision not to buy health insurance are both economic activities that substantially affect interstate commerce).

171. *See generally Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. 2566 (demonstrating that the majority, concurring, and dissenting opinions agree with this fact and illustrating that it has not been a point of contention in the debate on health care reform).

172. *Florida ex rel. Bondi v. Dep't of Health & Human Servs.*, 780 F.Supp.2d 1256, 1288 n.18 (N.D. Fla. 2011), *aff'd in part, rev'd in part, sub nom. Florida ex rel. Att'y Gen. v. Dep't of Health & Human Servs.*, 648 F.3d 1235 (11th Cir. 2011), *aff'd in part, rev'd in part, sub nom. Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

173. *Florida ex rel. Att'y Gen.*, 648 F.3d at 1286 (emphasizing that individuals who choose not to purchase insurance are not involved in economic activity and therefore not regulated parties subject to Congress's Commerce Clause powers); *id.* at 1292 (declining to limit its analysis solely to the decision not to purchase health insurance); *id.* at 1297 (discussing the slippery slope that would result in allowing Congress to compel purchases of products or services by individuals who have purposely chosen not to purchase them); *id.* at 1310 (stating that the regulated conduct—the decision whether to purchase health insurance—does not frustrate Congressional efforts to regulate the insurance industry as a whole).

174. *Thomas More Law Ctr.*, 651 F.3d at 543–44.

175. *Id.* at 544.

176. *See id.* at 543 (noting that almost everyone is a participant in the health care market and such individuals must finance "these services" either by buying health insurance or by self-insuring).

Interestingly, the dissenting Fourth Circuit Judge in *Liberty v. Geithner* analyzed whether the Commerce Clause can apply to the decision not to purchase *health insurance* but still found the individual mandate to be constitutional.¹⁷⁷ However, in order to allow the Commerce Clause to apply to the health insurance market, Judge Davis had to make two arguments. The first argument is that the health insurance market has not “always been the province of the states” like “education, family law, and criminal law.”¹⁷⁸ The second argument is that the mandate does not compel action in an unconstitutional way because Congress has compelled purchases in the past.¹⁷⁹ However, Judge Davis found that there would be a problem if Congress compelled consumption.¹⁸⁰ He reasoned that since everyone enters the health care market, they are consuming health care services.¹⁸¹ Congress is only requiring them to pay their fair share for such services.¹⁸² Therefore, even though the analysis was geared toward the *health insurance* market, the critical link to find the mandate constitutional was the finding that people, by virtue of being alive, are participating in the *health care* market as a whole and Congress may mandate purchases of health insurance.¹⁸³

The Supreme Court’s interpretation of the relevant market went one step further from commercial activity when they deemed the individual mandate to be outside of Congress’s Commerce Clause Power.¹⁸⁴ In the majority opinion, Justice Roberts stated that “[t]he individual mandate’s regulation of the uninsured as a class is, in fact, particularly divorced from any link to existing commercial activity.”¹⁸⁵ This single sentence in the entire opinion demonstrates that the majority deemed insurance to be at issue in the individual mandate. The fact that it was the uninsured people as a class instead of the health insurance market as a whole simply bolsters the argument that the individual mandate is far removed

177. *Liberty Univ., Inc. v. Geithner*, 671 F.3d 391, 441 (4th Cir. 2011) (Davis, J., dissenting), *cert. denied, sub nom. Liberty Univ. v. Geithner*, 2012 WL 2470099 (U.S. June 29, 2012).

178. *Id.* at 438 (citing *United States v. Morrison*, 529 U.S. 598, 618 (2000)).

179. *Id.* at 446 (citing examples of two federal laws that have required purchases in the past: the Motor Carrier Act, 49 C.F.R. § 387 (2012), which requires all drivers purchase car insurance, and the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601–75 (2011), which requires owners of property containing hazardous substances to provide remediation measures).

180. *Id.* at 448.

181. *See id.* at 447 (stating that “public goods are enjoyed by all” and that “lower prices for health services” is a public good).

182. *See id.* at 446 (recognizing that the individual mandate requires individuals to purchase health insurance or pay a penalty to the government to offset the government’s costs for providing care to the uninsured).

183. *See id.* (arguing that framing the individual mandate as unlawfully requiring participation in the health care market does not make the provision unconstitutional because such Congressional compulsion has long been held to be a valid exercise of Congress’s power under the Commerce Clause).

184. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2590 (2012).

185. *Id.*

from what is considered commercial activity.¹⁸⁶ Thus, the opinion avoids the problem of trying to distinguish between regulation of the *health insurance market* and regulation of the *health care market*.¹⁸⁷ However, it still demonstrates that the relevant market of regulation is integral to the ultimate decision on whether the individual mandate is within Congress's Commerce Clause Power.¹⁸⁸

The particular issue of the relevant market is not an issue that is directly debated even though it is important in determining whether the individual mandate regulates economic activity.¹⁸⁹ The most likely reason is that the broader *health care* market includes the *health insurance* market and the *health insurance* market is an integral part of how individuals acquire health care services.¹⁹⁰ The two markets are so integrated with each other that it is easy to interchange and confuse one with the other.¹⁹¹

The debate over whether PPACA applies to *health insurance* versus *health care* is not merely semantic. It lies at the heart of our dual system of government.¹⁹² If the bill is meant to affect the *health care* market then, arguably, it is a national

186. *Id.*

187. *Compare id.* (focusing the discussion on whether the individual mandate regulates the uninsured as a class that is wholly inactive in commerce, rather than determining the mandate's relevant market of regulation), with Florida *ex rel.* Bondi v. Dep't of Health & Human Servs., 780 F.Supp.2d 1256, 1288 n.18 (N.D. Fla. 2011) (noting plaintiff's opinion that the individual mandate provision is Congress's attempt to regulate the more narrow *health insurance* market rather than the *health care* market) (emphasis added), *aff'd in part, rev'd in part, sub nom.* Florida *ex rel.* Att'y Gen. v. Dep't of Health & Human Servs., 648 F.3d 1235 (11th Cir. 2011), *aff'd in part, rev'd in part, sub nom.* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

188. *See Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2590 (focusing on the commercial inactivity of the uninsured as a class, which necessarily entails defining the relevant market of regulation by the individual mandate).

189. *See supra* note 187 and accompanying text. Lower court cases that discuss the constitutionality of PPACA do not devote a section to discussing what the relevant market is. *See, e.g.*, Thomas More Law Ctr. v. Obama, 651 F.3d 529, 544 (6th Cir. 2011) (lacking a discussion of the relevant market of regulation and instead focusing on the class of individuals regulated), *cert. denied*, 2012 WL 2470097 (U.S. June 29, 2012); Liberty Univ., Inc. v. Geithner, 671 F.3d 391, 414–15 (4th Cir. 2011) (failing to include any substantive determination of whether the regulated market is health care or health insurance in the context of Congress's commerce power and instead deciding the issue using the taxing and spending power), *cert. denied, sub nom.* Liberty Univ. v. Geithner, 2012 WL 2470099 (U.S. June 29, 2012).

190. *See* Les Christie, *Number of people without health insurance climbs*, CNNMONEY, Sept. 13, 2011, http://money.cnn.com/2011/09/13/news/economy/census_bureau_health_insurance/index.htm (providing that in 2010 approximately sixteen percent of the population was uninsured and illustrating that the majority of Americans were insured).

191. *See, e.g.*, Brief for Petitioners at 41, Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012) (No. 11-398) ("Congress understood the economic reality that health insurance and health care financing are inherently integrated, and it was permitted to regulate on that basis.").

192. *See, e.g.*, *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2589 (finding that if the individual mandate was upheld under the Commerce Clause it would allow Congress to regulate inactivity, which would change the dynamics of the federal government-citizen relationship).

problem that is being solved with a federal solution.¹⁹³ If the bill is meant to affect the *health insurance* market, then the question arises whether it should fall solely under state regulation.¹⁹⁴ There is no doubt that PPACA directly affects health insurance companies through various restrictions.¹⁹⁵ The main method by which PPACA seeks to provide universal health care is through the health insurance market.¹⁹⁶ The question then boils down to whether a regulation on the insurance market can be seen as a regulation on the broader health care market.¹⁹⁷

PPACA was Congress's solution to the rising cost of health care.¹⁹⁸ Even though the approach specifically deals with insurance companies, the goals are much broader than just the health insurance market.¹⁹⁹ The fact that PPACA relies heavily on regulating insurance companies and policy-holders reflects how integral the health insurance market is to the overall health care market.²⁰⁰ However, determination of the specific market PPACA seeks to regulate is not decisive on whether the individual mandate falls within Congress's commerce power because the current debate has not been framed along the lines of *health care* versus *health insurance*.²⁰¹ Instead, the major area of disagreement lies in whether the act of not purchasing health insurance constitutes an economic activity.²⁰² More specifically, framers of the debate have asked the broader question of whether or not purchasing

193. See *id.* at 2612 (Ginsburg, J., concurring) (noting that when a "national solution" is required, Congress may take over an otherwise private market and establish a "tax-and-spend federal program" to address the issue, as it did with the creation of the Social Security program).

194. See *id.* at 2649–50 (Scalia, J., dissenting) (finding that the individual mandate is not within Congress's enumerated constitutional powers). Granting states the exclusive power to regulate health insurance is one of the primary purposes of the McCarran-Ferguson Act, which exempts the insurance industry from most federal regulation. McCarran-Ferguson Act, 15 U.S.C. §§ 1011–15 (2011).

195. See, e.g., 42 U.S.C. § 300gg (2011) (imposing regulations on the portability of, access to, and reliability of health insurance); 42 U.S.C. § 18011 (2011) (preserving the right of insurance customers to maintain existing coverage at the time of PPACA's enactment); 42 U.S.C. § 18022 (2011) (requiring certain minimum levels of coverage for insurance plans); 42 U.S.C. § 18001 (2011) (requiring insurance companies to provide coverage for individuals with preexisting conditions).

196. See 26 U.S.C. § 5000A (2011) (requiring individuals to maintain minimum levels of insurance coverage or pay a penalty tax); 42 U.S.C. § 1396a (2011) (outlining for states certain specific requirements for Medicaid insurance plans); 42 U.S.C. 1396d(y)(1) (2011) (outlining decreasing amounts of federal assistance to state Medicaid plans for newly eligible persons); 42 U.S.C. § 18031 (2011) (providing for the establishment of health benefit exchanges in each state).

197. See *United States v. Lopez*, 514 U.S. 549, 561 (1995) (finding it to be well settled that Congress may regulate an economic activity that is integral and necessary to a larger regulatory scheme).

198. See, e.g., Consolidated Brief for Respondents at 2, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012) (Nos. 11-393 and 11-400).

199. The Act does not simply regulate health insurance; it also regulates other aspects of health care as a whole. See, e.g., 42 U.S.C. § 1396a (2011) (extending Medicaid eligibility); 42 U.S.C. §§ 280j (2011) (improving the quality and efficiency of health care); 42 U.S.C. § 262 (2011) (regulating and improving access to certain biological products).

200. See *supra* note 195 and accompanying text.

201. See *supra* notes 166, 187–189 and accompanying text.

202. See *supra* note 165 and accompanying text.

insurance constitutes “inactivity” and whether “inactivity” automatically falls outside the category of “economic activity.”²⁰³

3. *Activity versus Inactivity as a Limiting Principle*

The major issue that has been debated by the Supreme Court, Courts of Appeal, and District Courts is whether the individual mandate regulates activity or inactivity and whether such a distinction is constitutionally relevant.²⁰⁴ Some plaintiffs argued that forcing them to purchase something they do not want to purchase (or feel that they do not need), whether they can afford to or not, is an unconstitutional overreaching of the authority of the federal government.²⁰⁵ It was the plaintiffs’ position that if PPACA is found constitutional, the Commerce Clause would provide Congress with the authority to regulate every aspect of our lives, including our choice to refrain from acting.²⁰⁶ The federal government, on the other hand, contended that everyone eventually enters the health care market,²⁰⁷ and thus Congress is not infringing on people’s liberty because everyone inevitably uses health services.²⁰⁸ All of the cases have noted that the activity/inactivity issue is unprecedented and represents an important new dimension of constitutional interpretation of the commerce clause.²⁰⁹

203. See *infra* Part IV.B.3.

204. See, e.g., Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2587 (2012) (stating that the individual mandate regulates inactivity by forcing individuals to “become active”); Thomas More Law Ctr. v. Obama, 651 F.3d 529, 543 (6th Cir. 2011) (discussing the plaintiffs’ concession that while the decision not to purchase health insurance may be an activity, this class of activities is beyond Congress’ regulatory powers under the Commerce Clause), *cert. denied*, 2012 WL 2470097 (U.S. June 29, 2012); Liberty Univ., Inc. v. Geithner, 671 F.3d 391, 422 (4th Cir. 2011) (Davis, J., dissenting) (describing the plaintiffs’ position that the decision not to purchase health insurance is inactivity and regulation under Congress’ Commerce Power), *cert. denied, sub nom. Liberty Univ. v. Geithner*, 2012 WL 2470099 (U.S. June 29, 2012); Florida *ex rel. Atty. Gen. v. Dep’t of Health & Human Servs.*, 648 F.3d 1235, 1291–92 (11th Cir. 2011) (finding that the individual mandate forces individuals who choose not to purchase health insurance into active participation in the health insurance market), *aff’d in part, rev’d in part, sub nom. Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

205. See Florida *ex rel. Bondi v. Dep’t of Health & Human Servs.*, 780 F.Supp.2d 1256, 1270 (N.D. Fla. 2011) (addressing plaintiffs’ claim that the federal government’s requiring individuals to purchase health insurance is beyond of the power of the Commerce Clause because it focuses on economic activity rather than inactivity), *aff’d in part, rev’d in part, sub nom. Florida ex rel. Att’y Gen. v. Dep’t of Health & Human Servs.*, 648 F.3d 1235 (11th Cir. 2011), *aff’d in part, rev’d in part, sub nom. Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

206. Thomas More Law Ctr. v. Obama, 720 F. Supp. 2d 882, 891 (E.D. Mich. 2010), *aff’d*, 651 F.3d 529 (6th Cir. 2011), *cert. denied*, 2012 WL 2470097 (U.S. June 29, 2012).

207. Nat’l Fed’n of Indep. Bus., 132 S. Ct. at 2585.

208. Florida *ex rel. Bondi*, 780 F.Supp.2d at 1288 (discussing the government’s argument that every human is vulnerable to sickness or injury at any time and thus cannot choose to remain outside of the health care market).

209. Nat’l Fed’n of Indep. Bus., 132 S. Ct. at 2599; Thomas More Law Ctr., 651 F.3d at 558–59; Liberty Univ., Inc., 671 F.3d at 448 (Davis, J., dissenting); Florida *ex rel. Att’y Gen.*, 648 F.3d at 1286.

At the outset, the first court to challenge the constitutionality of the individual mandate focused heavily on the concept of inactivity versus activity.²¹⁰ In Florida, Judge Vinson defined his belief in the activity requirement as axiomatic of the need for the Commerce Clause analysis.²¹¹ The court went on to insist upon an activity requirement for fear of the inferences one could draw by regulating “inactivity.”²¹²

Afterward, the Fourth Circuit’s dissenting opinion responded to the “parade of horrors” argument by distinguishing between compelling purchases and compelling consumption.²¹³ Firstly, Judge Davis established that Congress has compelled purchases in the past and cited the Motor Carrier Act of 1980 (MCA) and the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA).²¹⁴ Secondly, Judge Davis objected to the argument that allowing the commerce clause to regulate inactivity would allow Congress to compel people to eat broccoli.²¹⁵ He stated: “I note that mandating the purchase (but *not* the consumption, which would raise serious constitutional issues) of broccoli in order to bolster the broccoli market would, in practical effect, be nothing new.”²¹⁶

The argument can be separated into two aspects. The first is that there is a distinction between compelling the purchase of a commodity and compelling its consumption.²¹⁷ Virtually everyone consumes health services within his or her lifetime.²¹⁸ The mandate is a purchase mandate and Congress has compelled purchases in the past.²¹⁹ Therefore, a mandate to purchase insurance to pay for those services is not as horrible as opponents like Judge Vinson proclaim.²²⁰ The second aspect is that compelling the purchase of a product is “nothing new” because “[s]ince the time of the Founding Fathers. . . the federal government has used tax revenues to subsidize various industries. Though centralized subsidies are far more efficient than purchase mandates—which is why a broccoli mandate is

210. *Florida ex rel. Bondi*, 780 F.Supp.2d at 1285 (discussing whether Congress can exercise its Commerce Clause powers to regulate inactivity as well as activity).

211. *Id.* at 1287.

212. *Id.* (noting that if Congress could regulate inactivity, it would be difficult to imagine anything that Congress could not regulate).

213. *Liberty Univ., Inc.*, 671 F.3d at 446 (Davis, J., dissenting).

214. *Id.* (explaining that the MCA requires motor carriers to purchase either liability insurance or a surety bond to guarantee that damage could be paid for and that CERCLA requires property owners to remove hazardous substances from contaminated properties even when the owner did not cause the contamination).

215. *Id.* at 422 (disagreeing with the appellant that the PPACA would create an unconstitutional expansion of the government’s police power through which the government could control nearly every aspect of one’s life, including choice of vegetables).

216. *Id.* at 448.

217. *Id.*

218. *Id.* at 440.

219. *Id.* at 446.

220. *See id.* at 447 (noting that the individual mandate actually attempts to enhance individual freedom by allowing persons to make their own decisions about purchasing health insurance).

purely fantastical—they are, in effect, the same.”²²¹ This aspect of the argument centers around the issues of federalism and the taxation power which will be discussed later in this paper.²²²

Not all courts accepted the activity/inactivity dichotomy as a proper limiting principle for the Commerce Power. In the District Court case for *Thomas More Law Center*, the court found that the law has a substantial effect on interstate commerce stating that “decisions to forego insurance coverage in preference to attempting to pay for health care out of pocket drive up the cost of insurance” and “[t]he decision whether to purchase insurance or attempt to pay for health care out of pocket is plainly economic.”²²³ The Court then sided with the government and said everyone will enter the health care market, stating that “[n]o one can guarantee his or her health, or ensure that he or she will never participate in the health care market.”²²⁴ This demonstrated that although the activity/inactivity debate is a controversial and novel issue, it may not be the critical consideration for our Commerce Clause Jurisprudence.²²⁵

The Sixth Circuit’s opinion demonstrated that it is possible to abandon the activity/inactivity inquiry and find PPACA constitutional.²²⁶ The majority opinion of the Sixth Circuit Court of Appeals of the district court case found that the commerce clause power includes the regulation of inactivity because, “[t]he Supreme Court has never directly addressed whether Congress may use its Commerce Clause power to regulate inactivity, and it has not defined activity or inactivity in this context”²²⁷ and “the constitutionality of the minimum coverage provision cannot be resolved with a myopic focus on a malleable label.”²²⁸ The concurring opinion of Judge Sutton proposed that the action/inaction dichotomy as a limiting principle for the commerce power is unlikely to be useful in practice.²²⁹ This is especially the case for health insurance because it deals with the concept of financial risk and, “[w]hat is more, inaction *is* action, sometimes for better, sometimes for worse, when it comes to financial risk.”²³⁰ Furthermore, the line

221. *Id.* at 448.

222. *See infra* notes 329–40, 375–479 and accompanying text.

223. *Thomas More Law Ctr. v. Obama*, 720 F. Supp. 2d 882, 893 (E.D. Mich. 2010), *aff’d*, 651 F.3d 529 (6th Cir. 2011), *cert. denied*, 2012 WL 2470097 (U.S. June 29, 2012).

224. *Id.* at 894.

225. *Id.* (explaining that the Health Care Reform Act was designed remedy the burden that uninsured users of health care place on the health care system, and therefore the decision to delay payment of services should not be considered inactivity).

226. *See Thomas More Law Ctr.*, 651 F.3d at 547 (reasoning that the Commerce Clause does not distinguish activity and inactivity).

227. *Id.*

228. *Id.* at 548.

229. *Id.* at 560 (Sutton, J., concurring).

230. *Id.* at 561.

between action and inaction is unclear.²³¹ If done responsibly, self-insurance can actually require more action than purchasing insurance.”²³² Instead, Judge Sutton focused on the inquiry of whether the individual mandate is part of one of Congress’s enumerated powers and found that it did.²³³

Similarly, the dissenting opinion in *Liberty* did not find the activity versus inactivity dichotomy to be useful for a limitation on the commerce clause power.²³⁴ However, the issue was not about risk, but about the nature of the health services market.²³⁵ Judge Davis found that the Commerce Clause power simply looked at whether an activity was economic and whether the aggregated impact of an activity had a substantial effect on interstate commerce.²³⁶ *Raich* demonstrated that Congress can regulate purely intrastate activity that is not commercial.²³⁷ Judge Davis argued that virtually everyone will voluntarily enter the interstate health services market in their lifetime.²³⁸ This action constitutes activity in commerce.²³⁹ Similar to the Sixth Circuit’s contention, Judge Davis stated: “[i]t is not clear why ‘sav[ing] for and privately manag[ing] health care,’ a species of what economists call ‘self insurance,’ requires neither ‘effort’ nor ‘resources’—in fact, one would imagine that ‘sav[ing]’ requires ‘resources’ (namely, money) and that ‘manag[ing]’ requires some ‘effort.’”²⁴⁰

The Eleventh Circuit addressed the activity/inactivity issue differently and found that the individual mandate was outside the Commerce Power because it regulated inactivity.²⁴¹ That court found a distinction between activity and

231. *See id.* at 560 (asserting that the establishment of a tangible line that differentiates between action and inaction is unlikely to succeed in practice).

232. *Id.* at 561.

233. *Id.* at 549 (agreeing with the majority in upholding the mandate but specifically framing the issue as whether Congress may use its Commerce Clause powers to force individuals who do not want health insurance to purchase insurance as part of a larger national regulatory scheme).

234. *Liberty Univ., Inc. v. Geithner*, 671 F.3d 391, 441–44 (4th Cir. 2011) (Davis, J., dissenting) (asserting that the Act is constitutional even if it regulates inactivity), *cert. denied, sub nom. Liberty Univ. v. Geithner*, 2012 WL 2470099 (U.S. June 29, 2012).

235. *See id.* at 440 (stating that unlike products in other markets, healthcare is a product that will be provided regardless of the ability to pay, and it is up to the insured to bear the cost).

236. *Id.*

237. *Gonzales v. Raich*, 545 U.S. 1, 17 (2005) (establishing that Congress may regulate local activities that are part of an economic class of activities that have a substantial effect on interstate commerce).

238. *Liberty Univ., Inc.*, 671 F.3d at 441.

239. *Id.*

240. *Id.* at 443; *accord* *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 548–49 (6th Cir. 2011) (stating that whether the individual mandate regulates inactivity is not an issue because all individuals are active in the health care market due to its unique nature), *cert. denied*, 2012 WL 2470097 (U.S. June 29, 2012).

241. *Florida ex rel. Att’y Gen. v. Dep’t of Health & Human Servs.*, 648 F.3d 1235, 1294 (11th Cir. 2011) (stating that the mandate expands traditional notions of Congress’s Commerce Clause power by regulating an activity that has not yet taken place), *aff’d in part, rev’d in part, sub nom. Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

inactivity by recognizing a temporal difference between the decision to purchase or not to purchase health insurance and the eventual use of health services.²⁴² The Eleventh Circuit noted that prior Supreme Court Commerce Clause cases dealt with already-existing activity, not the mere possibility of future economic activity.²⁴³ The Eleventh Circuit stated that:

the individual mandate does not regulate behavior at the point of consumption. Indeed, the language of the individual mandate does not truly regulate “how and when health care is paid for.” [citations omitted]. It does not even require those who consume health care to pay for it with insurance when doing so. Instead, the language of the individual mandate in fact regulates a related, but different, subject matter: “when health insurance is purchased.”²⁴⁴

For this reason, the Eleventh Circuit found the mandate to be over inclusive of both whom it regulates and when it regulates.²⁴⁵

On the contrary, the Eleventh Circuit dissent found this temporal difference to be irrelevant.²⁴⁶ The dissent reasoned that if it is possible for Congress to regulate economic activity when an individual consumes health care services, there should be no reason why Congress cannot make the temporal jump to regulate decisions right now on whether to pay now for health care services rendered in the future.²⁴⁷ Furthermore,

[t]here is no doctrinal basis for requiring Congress to wait until the cost-shifting problem materializes for each uninsured person before it may regulate the uninsured as a class. The majority’s imposition of a strict temporal requirement that congressional regulation only apply to individuals who first engage in specific market transactions in the health care services market is at odds with the idea that Congress may adopt “reasonable preventive measures” to avoid future disruptions of interstate commerce.²⁴⁸

On the individual mandate, the Supreme Court sided with the Eleventh Circuit’s majority opinion and ultimately found that it was a regulation on inactivity outside the scope of the Commerce Clause.²⁴⁹ When looking at the Commerce Clause precedent, the Supreme Court stated that “[a]s expansive as our cases construing the scope of the commerce power have been, they all have one

242. *Id.*

243. *Id.*

244. *Id.* at 1295.

245. *Id.*

246. *Id.* at 1339 (Marcus, J., dissenting).

247. *Id.*

248. *Id.*

249. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2591 (2012) (stating that requiring individuals to purchase health insurance exceeds Congress’s power under the Commerce Clause).

thing in common: They uniformly describe the power as reaching ‘activity.’ It is nearly impossible to avoid the word when quoting them.”²⁵⁰ As a result, the Court found that the individual mandate compels individuals to become active in purchasing a product.²⁵¹

The main concern for individual liberty is that the Commerce Clause can be used to regulate an individual to enter into a commercial activity by doing nothing, “open[ing] a new and potentially vast domain to congressional authority.”²⁵² The majority opinion continued to discuss a practical point that “[e]very 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.”²⁵³ Allowing this type of mandate on inactivity, “would bring countless decisions an individual could *potentially* make within the scope of federal regulation, and. . .empower Congress to make those decisions for him.”²⁵⁴ The majority opinion also highlighted a hypothetical similar to Judge Vinson’s “parade of horrors” that under the government’s interpretation an American’s diet (*i.e.* the decision to eat broccoli) would fall under the Commerce Clause Power.²⁵⁵

The Supreme Court also recognized the difficulty of distinguishing between activity and inactivity but considered it a largely metaphysical discussion.²⁵⁶ Practically speaking, the majority did not find the fact that virtually every individual will require health services to be relevant.²⁵⁷ Instead, they made the simple observation that “[t]he phrase ‘active in the market’ cannot obscure the fact that most of those regulated by the individual mandate are not currently engaged in any commercial activity involving health care.”²⁵⁸ Thus, a limit has been created on the Commerce Clause power—that evidence sufficient to demonstrate a substantial effect on interstate commerce cannot rely on economic theory, risk pooling, or future expectations, no matter how much these relationships are widely accepted as true.²⁵⁹

250. *Id.* at 2587.

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.*

255. *See id.* (referring to Florida *ex rel.* Bondi v. Dep’t of Health & Human Servs., 780 F. Supp. 2d 1256, 1289 (N.D. Fla. 2011)) (discussing the virtually limitless federal power that would result if Congress had the ability to compel individuals to buy health insurance).

256. *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.”).

257. *See id.* at 2590 (commenting that the Court’s prior decisions gave no support to the notion that Congress may compel individuals into activity based on a future expectation regardless of its inevitability).

258. *Id.*

259. *See id.* at 2591 (stating that the Commerce Clause does not grant Congress the power to regulate an individual from birth until death based on his or her propensity to engage in an activity).

The activity/inactivity issue has evolved considerably over PPACA litigation.²⁶⁰ It is the most hotly contested and debated issue concerning the individual mandate.²⁶¹ The “inactivity” dimension, it is argued, potentially extends the powers of the federal government beyond an acceptable level; regulating inactivity is the precedent-changing dimension which some find to be disconcerting.²⁶² The classic example of buying car insurance is similar to the individual mandate but is not a perfect analogy.²⁶³ People can consider the purchase of car insurance as part of the purchase of a car and roll the costs together.²⁶⁴ The same can be said for homeowner’s insurance.²⁶⁵ Mandates for people or entities that are in a business (i.e. a waste management business, a chemical company, or even a hospital) do not evoke the same reaction because the consideration of doing business and complying with government regulation happens simultaneously.²⁶⁶

A health insurance mandate, on the other hand, seems to only require that one be alive.²⁶⁷ This fact seems to force consideration of purchasing health insurance to occur simultaneously with being born or being alive.²⁶⁸ The only larger decision

260. See *supra* notes 204–259 and accompanying text.

261. See, e.g., *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2590 (noting the difference between the plaintiffs’ assertions and government’s view of the activity or inactivity regulated by PPACA).

262. See, e.g., *id.* (noting that there is no precedent for Congress requiring an individual to perform certain conduct because of the individual’s possible future activity).

263. See Mark A. Hall, *The Constitutionality of Mandates to Purchase Health Insurance*, 37 J.L. MED. & ETHICS 38, 40 (2009) (likening insurance mandates and automotive insurance requirements).

264. *Id.* There are, however, several critics of the car insurance analogy. See Judson Berger, *A Health Insurance that Works Like Auto Insurance? Think Again*, FOXNEWS.COM (Sept. 14, 2009), <http://www.foxnews.com/politics/2009/09/14/health-insurance-mandate-works-like-auto-insurance-think/> (distinguishing the individual mandate from state laws requiring auto insurance by noting that purchasing auto insurance is avoidable because individuals can choose not to drive, but purchasing health insurance is not avoidable under the mandate).

265. See Gina Hamilton, *Why Health Care Reform Matters to the Economy*, NEW MAINE TIMES (June 26, 2012), <http://www.newmainetimes.org/articles/2012/06/26/why-health-care-reform-matters-economy/> (explaining that most states already have individual mandates in other contexts, such as requiring car owners to purchase car insurance and requiring homeowners to buy home insurance).

266. There are two fundamental questions: (1) Do I want to go into business?; and (2) Do I want to follow government regulations/mandates? Both must be answered with an affirmative or a negative. You cannot answer “yes” to the first question and answer “no” for the second question without legal consequences. Answering the first question with a “no” and the second question with a “yes” would lead to a preposterous result. This is in contrast to a health care mandate which is discussed in the next paragraph.

267. *Florida ex rel. Bondi v. U.S. Dep’t of Health & Human Servs.*, 780 F.Supp.2d 1256, 1284 (N.D. Fla. 2011) (noting that the health insurance mandate requires all individuals who are alive and who live in the United States to buy health insurance), *aff’d in part, rev’d in part, sub nom. Florida ex rel. Att’y Gen. v. Dep’t of Health & Human Servs.*, 648 F.3d 1235 (11th Cir. 2011), *aff’d in part, rev’d in part, sub nom. Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

268. Homeowner’s insurance, auto insurance, and the decision to run a business have two fundamental questions stated previously. See *supra* notes 263–266. If we were to draw two analogous questions with health care mandates, they would be in the form of: (1) Do I want to live; and (2) Do I want to comply with the health care mandate and purchase health insurance? As stated above, both must be answered either in the affirmative or the negative. *Id.* Answering “yes” to one and “no” to the other

here would be the decision to live.²⁶⁹ That is why, intuitively, there seems to be a distinction between a choice to purchase a good or service and the choice to not enter into that market.

Consider that the characteristics of the health care market that make the activity/inactivity distinction even more difficult are due to the Emergency Medical Treatment and Active Labor Act (EMTALA).²⁷⁰ EMTALA requires that hospitals provide care to anyone needing emergency care regardless of their ability to pay.²⁷¹ It is true that virtually everyone uses medical care in their lifetime.²⁷² However, it is also important to note that not everyone is paying for the medical care due to the mandate established by EMTALA.²⁷³ An individual's decision not to purchase insurance raises the cost of health services only when hospitals provide free health services to those without insurance.²⁷⁴ These unreimbursed costs are shifted to individuals who pay for insurance and to the government when they reimburse hospitals through Medicaid and Medicare.²⁷⁵ It is curious to find that an individual mandate in PPACA was the solution to the funding deficiencies established by EMTALA.²⁷⁶ These are, in effect, two mandates which are interconnected.²⁷⁷

would lead to absurd results. *Id.* However, the answer to (1) must be a “yes”, implying that the answer of (2) must be a “yes” as well. *Id.* This nature of the health care mandate distinguishes it from mandates in the form of homeowner's insurance, automobile insurance, and the decision to run a business. *Id.*

269. *See id.*

270. 42 U.S.C. § 1395dd (2011); *see also infra* notes 271–77 and accompanying text.

271. 42 U.S.C. § 1395dd.

272. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2610 (2012) (noting that every individual will visit some type of health care professional during their lifetime).

273. *See infra* notes 274–75 and accompanying text.

274. *See Avik Roy, Myths of the “Free Rider” Health Care Problem*, FORBES (Feb. 2, 2011), <http://www.forbes.com/sites/aroy/2011/02/02/myths-of-the-free-rider-health-care-problem/> (noting that when hospitals provide medical care to individuals who cannot pay, EMTALA does not remunerate the cost of those services).

275. *See Daniel Anderson, Would Patients Really “Die on the Sidewalk” in the Absence of Government Mandates?*, FREEDOM WORKS (Apr. 5, 2012), <http://www.freedomworks.org/blog/daniel-anderson/would-patients-really-%E2%80%9Cdie-on-the-sidewalk%E2%80%9D-in-the-> (commenting that EMTALA's requirement that hospitals provide emergency medical services to all individuals regardless of individuals' ability to pay shifts the burden of paying for care onto the government and taxpayers).

276. *See Avik Roy, The Tortuous History of Conservatives and the Individual Mandate*, FORBES (Feb. 7, 2012), <http://www.forbes.com/sites/aroy/2012/02/07/the-tortuous-conservative-history-of-the-individual-mandate/> (arguing that the individual mandate resolves the issue of individuals intentionally choosing not to purchase health insurance because such individuals knew that hospitals would have to provide emergency care to them under EMTALA).

277. *Id.*; *see generally*, Emergency Medical Treatment and Active Labor Act (EMTALA), 42 U.S.C. § 1395dd (2011); 26 U.S.C. § 5000A (2010).

4. *Limiting Principle to the Commerce Clause: The Health Care Market is Unique*

Proponents of the constitutionality of PPACA that reject “inactivity” as a proper limiting rule for Congress’s commerce clause offer their own limiting principle.²⁷⁸ This limiting principle argues that since the health care market is unique, there will be no slippery slope problem of a growing and unceasing number of mandates from the federal government.²⁷⁹ The Sixth Circuit characterized the health care market as unique based on two factors: “(1) virtually everyone requires health care services at some unpredictable point; and (2) individuals receive health care services regardless of ability to pay.”²⁸⁰ The court found that Congress had a rational basis to conclude that self-insuring for health care directly affects interstate commerce because it shifts costs to third parties through higher costs in health care.²⁸¹ The court noted that attempts to avoid using health care will not always be successful because the health care market often contains unpredictable and unavoidable needs for care.²⁸² This combined with the fact that EMTALA, state laws, and many charitable institutions cover those who cannot pay for health care makes the health care market unique.²⁸³ The Sixth Circuit reasoned that this uniqueness prevents Congress’s Commerce power from being overly broad.²⁸⁴

At the outset, Judge Vinson, as the first judge to rule on the constitutionality of the individual mandate, objected to the “uniqueness” argument, stating that “[u]niqueness is not an adequate limiting principle as every market problem is, at some level and in some respects, unique.”²⁸⁵ The Eleventh Circuit also rejected “uniqueness” as a limiting factor for two reasons: (1) there is no constitutional basis for uniqueness as a limiting factor for the commerce power; and (2) uniqueness is an intensely fact-based criterion and would not be a “judicially enforceable” limitation to the Commerce Power.²⁸⁶

278. See, e.g., *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 548 (6th Cir. 2011) (acknowledging that the individual mandate could be labeled as regulating inactivity but upholding it on the ground that an individual’s decision to not buy health insurance substantially affects interstate commerce), *cert. denied*, 2012 WL 2470097 (U.S. June 29, 2012).

279. See *id.* at 548–49 (noting that even if the individual mandate seeks to regulate individuals’ inactivity such regulation is still valid because of the unique nature of the health care market).

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.*

285. *Florida ex rel. Bondi v. U.S. Dep’t of Health & Human Servs.*, 780 F.Supp.2d 1256, 1291 (N.D. Fla. 2011), *aff’d in part, rev’d in part, sub nom. Florida ex rel. Att’y Gen. v. Dep’t of Health & Human Servs.*, 648 F.3d 1235 (11th Cir. 2011), *aff’d in part, rev’d in part, sub nom. Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

286. *Florida ex rel. Att’y Gen.*, 648 F.3d at 1295–96.

It is interesting to note that one of two factors that make the health care sector unique requires EMTALA to be in effect.²⁸⁷ If EMTALA did not require hospitals to provide emergency care services regardless of the patient's ability to pay, then, arguably, the health care market would not be unique.²⁸⁸ It is troubling to find that the uniqueness as a limiting factor for the Commerce Clause has a foundation in one of the largest unfunded federal mandates.²⁸⁹

Let us extend the analogy to cell phones. If virtually everyone requires cell phone services at some unpredictable point and the federal government required all cell phone towers to send and receive emergency 911 calls from all cell phone recipients regardless of ability to pay, would it then follow that the government could mandate that everyone purchase a cell phone plan in an effort to lower the cost of cell phone plans? ²⁹⁰ If the answer is yes, then it appears the uniqueness limiting factor allows a government to regulate a market if (1) virtually all people consume the goods or services in the market and (2) the government mandates that the suppliers of this good or service offer these goods or services regardless of ability to pay.²⁹¹

Since the government is in control of the second prong, the uniqueness limiting factor rests solely on the first prong.²⁹² If this is the case, the inquiry is reduced to whether virtually all people consume the good or service in the market at some point in time.²⁹³ The “virtually all” aspect of the first prong may appear to be a good way to separate national issues from purely local issues.²⁹⁴ If everyone in the nation uses a particular good or service, how can it not be a national issue? However, consider the following example. Virtually everyone will encounter vegetables in their lives. Obesity is a national problem. If Congress mandated that

287. See *supra* notes 278–280 and accompanying text.

288. See *supra* notes 270–275 and accompanying text (explaining how EMTALA ties the uninsured to the rising cost of health care).

289. See, e.g., Damon Dietrich, *EMTALA: A Lesson in the Inevitable Futility of Forced Ethics*, COMMON SENSE (Am. Acad. of Emergency Med., Milwaukee, WI), Sept./Oct. 2008, at 26, 28, 29 (arguing that EMTALA was carelessly passed by the government with no form of funding to support the requirement).

290. See Transcript of Record at 6, *Florida ex rel. Att’y Gen.*, 648 F.3d 1235 (No. 11-398) (Chief Justice Roberts asking the Solicitor General whether the government can require individuals to buy a cell phone if it would improve individuals’ access to emergency services); see also *id.* at 7–8 (analogizing the individual mandate to a government requirement that individuals purchase burial insurance because death is inevitable).

291. See e.g., Emergency Medical Treatment and Active Labor Act (EMTALA), 42 U.S.C. § 1395dd (2011) (requiring a supplier, the hospital, to provide services regardless of a patient’s ability to pay.)

292. *Id.*

293. See Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2589–90 (2012) (discussing the government’s argument that the mandate is constitutional because all individuals will enter the health care market because sickness and injury are unavoidable).

294. See *id.* at 2587 (explaining that healthcare may still be regulated by Congress because the healthcare market has a substantial economic effect on interstate commerce).

farmers and supermarkets provide vegetables to people regardless of ability to pay, could they then require that everyone join a super market club to pre-pay for these vegetables regardless of current consumption? Based on the logic provided by “uniqueness” as a limiting factor, the answer would be yes.²⁹⁵ This would be indicative of the “parade of horrors” that could result with the adoption of uniqueness as a limiting factor for the Commerce Power.²⁹⁶

Ultimately, the Supreme Court did not find the uniqueness factor to be compelling.²⁹⁷ The Court recognized that the health insurance market and health financing market are “inherently integrated.”²⁹⁸ However, the Court continued, saying “[b]ut that does not mean the compelled purchase of the [health insurance] first is properly regarded as a regulation of [health financing]. No matter how “inherently integrated” health insurance and health care consumption may be, they are not the same thing.”²⁹⁹ The Supreme Court was not persuaded by the first uniqueness argument that virtually everyone will require health care services at some particular point, stating that the purchase of health care services and health insurance “involve[s] different transactions, entered into at different times, with different providers.”³⁰⁰ The Supreme Court also countered the second uniqueness argument that individuals receive health care services regardless of ability to pay with the fact that “for most of those targeted by the mandate, significant health care needs will be years, or even decades, away.”³⁰¹

Note that the core disagreement between the opposing views over the uniqueness as a proper limiting principle for the Commerce Clause rests on when and how health care is financed in relation to the purchase of health insurance.³⁰² Does this mean that the appropriateness of the federal government’s intervention is a question of timing and method? Is this what should distinguish between federal intervention and state intervention? Some may argue that a better limiting principle should be a focus on the appropriateness of government intervention (either state or federal) in relation to the problem at hand (classically, either state or local).³⁰³ If the

295. See *id.* (explaining that the individual mandate compels citizens to join the health care market because their decision to not buy health insurance impacts interstate commerce).

296. *Florida ex rel. Bondi v. U.S. Dep’t of Health & Human Servs.*, 780 F.Supp.2d 1256, 1288–92 (N.D. Fla. 2011) (discussing the “parade of horrors” that could result in allowing Congress to enact the individual mandate), *aff’d in part, rev’d in part, sub nom. Florida ex rel. Att’y Gen. v. Dep’t of Health & Human Servs.*, 648 F.3d 1235 (11th Cir. 2011), *aff’d in part, rev’d in part, sub nom. Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

297. *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2591.

298. *Id.*

299. *Id.*

300. *Id.*

301. *Id.*

302. See *supra* notes 267–286 and accompanying text.

303. See, e.g., *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2612 (Ginsburg, J., concurring) (stating that Congress needed to take action to address “the problem of the uninsured” because individual states were unlikely to adopt successful reforms on their own).

federal government is more equipped to find a solution to a problem, then the federal government should have the power to do so and vice versa.³⁰⁴ Such an approach is similar to what is called the “nexus approach.”³⁰⁵ Under this approach, one would argue that the rising cost of health care is a national problem and, therefore, there should be a national solution involving the power of a federal government.³⁰⁶ However, the Eleventh Circuit, using this approach, found differently.³⁰⁷

5. Nexus Approach of Eleventh Circuit

The Eleventh Circuit had a different overall approach to the Commerce Clause Power.³⁰⁸ Their constitutional reasoning focused on whether there was a proper nexus between the regulated subject matter and interstate commerce.³⁰⁹ The Eleventh Circuit did not go into a discussion on whether the subject matter was the “health insurance market” or “health care market.”³¹⁰ Instead, the court found that, “[u]nder any framing, the regulated conduct is defined by the *absence* of both commerce or even the “the production, distribution, and consumption of commodities”—the broad definition of economics in *Raich* [citations omitted].”³¹¹ The nexus would require a “‘but-for causal chain’ that the Supreme Court has rejected, as it would allow Congress to regulate anything.”³¹²

The dissent to the Eleventh Circuit’s majority opinion disagreed.³¹³ Judge Marcus stated that “the substantial effect on commerce occurs directly and immediately when the uninsured consume health care services [and] do not pay for them.”³¹⁴ Thus, there is a nexus between people not purchasing insurance and interstate commerce.³¹⁵

304. *See, e.g., id.* at 2628 (arguing that a national solution is appropriate because individual states have an inability to address the health care crisis on their own).

305. *See Florida ex rel. Att’y Gen. v. Dep’t of Health & Human Servs.*, 648 F.3d 1235, 1293 (11th Cir. 2011) (stating that the crucial question is whether a regulated activity is connected, or has a “nexus,” to interstate commerce, rather than whether it substantially affects interstate commerce), *aff’d in part, rev’d in part, sub nom. Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

306. *See id.* at 1246 (commenting that Congress enacted the PPACA in response to the problem of the fifty million uninsured and their effect on the country’s economy).

307. *Id.* at 1293 (reasoning that Congress overstepped its Commerce Clause powers in enacting the individual mandate provision).

308. *See infra* notes 309–12 and accompanying text.

309. *Florida ex rel. Att’y Gen.*, 648 F.3d at 1293.

310. *See infra* note 311 and accompanying text.

311. *Id.* at 1293 (citing *Gonzales v. Raich*, 545 U.S. 1, 25 (2005)).

312. *Id.* (citing *United States v. Morrison*, 529 U.S. 598, 615 (2000)).

313. *Id.* at 1353 (Marcus, J., concurring in part and dissenting in part) (arguing that the connection between the regulated conduct and interstate commerce is clearly direct).

314. *Id.*

315. *Id.*

Justice Ginsburg's concurring opinion adopted many elements of the nexus approach but found that the individual mandate is constitutional under the Commerce Clause, contrary to the Eleventh Circuit majority's opinion.³¹⁶ Justice Ginsburg emphasized that this is a national problem,³¹⁷ and pointed out that States cannot resolve the problem because

[a]n influx of unhealthy individuals into a State with universal health care would result in increased spending on medical services. To cover the increased costs, a State would have to raise taxes, and private health-insurance companies would have to increase premiums. Higher taxes and increased insurance costs would, in turn, encourage businesses and healthy individuals to leave the State. States that undertake health-care reforms on their own thus risk "placing themselves in a position of economic disadvantage as compared with neighbors or competitors."³¹⁸

Therefore, if States are ill equipped to solve the national healthcare problem, the only solution can come from the federal government and the restraint on the Commerce Clause harkens back to America under the Articles of Confederation.³¹⁹

An analysis of the Eleventh Circuit's nexus approach is important because the opinion highlights the difficulty of a limiting principle for Congress's Commerce Power.³²⁰ The nexus approach is promising, since it allows flexibility between state and federal governments to intervene when appropriate.³²¹ Appropriateness would be defined by whether the state or federal government is best equipped to face the problem.³²² In many respects, "appropriateness" is a fundamental consideration to federalism.³²³ However, it also this approach has the possibility of being too vague for lower courts to apply.³²⁴ Consider that the Eleventh Circuit majority argued that the nexus between the rising cost of health care and mandating the purchase of

316. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2617 (2012) (Ginsburg, J., concurring) (upholding the mandate as a valid exercise of Congress's Commerce Clause powers because it relates to Congress's goal to reduce rising health care costs).

317. *Id.* at 2609 ("The provision of health care is today a concern of national dimension, just as the provision of old-age and survivors' benefits was in the 1930's.')

318. *Id.* at 2612.

319. *Id.* at 2615, 2628.

320. *See Florida ex rel. Att'y Gen.*, 648 F.3d at 1293 (noting that Congress must avoid regulating activities with an insufficient nexus to interstate commerce when exercising its Commerce Clause powers).

321. *See infra* notes 322–23 and accompanying text.

322. *See, e.g., Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2612 (Ginsburg, J., concurring) (emphasizing that health care reform is a national problem that individual states are not equipped to handle on their own).

323. *Id.*

324. *Compare* *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 548 (6th Cir. 2011) (finding that the individual mandate bears a sufficient nexus to interstate commerce), *cert. denied*, 2012 WL 2470097 (U.S. June 29, 2012) *with Florida ex rel. Att'y Gen.*, 648 F.3d at 1293 (finding that the individual mandate does not bear a sufficient nexus to interstate commerce).

insurance requires a “but for causal chain” whereas the dissent argues that the nexus is direct and immediate.³²⁵ Justice Ginsburg listed a plethora of Congressional findings to demonstrate this is a national problem that cannot be dealt with by states.³²⁶ Where one falls on the nexus approach is fact intensive in an area that is largely a legal debate on an interpretation of the Constitution.³²⁷ If the nexus approach is to have any future in federalism, the Supreme Court will need to offer more guidance that can be applied consistently.³²⁸

C. *The Necessary and Proper Clause*

The Necessary and Proper Clause gives Congress the power “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”³²⁹ *McCulloch v. Maryland* established that the Necessary and Proper Clause gives Congress the power to enact provisions that are “incidental to the [enumerated] power, and conducive to its beneficial exercise.”³³⁰ The Necessary and Proper Clause does not stand on its own.³³¹ It only expands one of Congress’s powers already enumerated in the Constitution.³³²

In the context of PPACA, the issue is whether the individual mandate is “necessary and proper” for the exercise of PPACA as a whole.³³³ From here, we look to *Gonzales v. Raich* for guidance of how the Necessary and Proper Clause is used pursuant to Congress’s Commerce Clause Power.³³⁴ *Raich* established that if a provision is part of a larger regulatory scheme, then it can be upheld under the

325. *Compare Florida ex rel. Att’y Gen.*, 648 F.3d at 1293 (stating that there was no connection between decisions not to buy insurance and the effect they have on interstate commerce), *with id.* at 1353 (Marcus, J., concurring in part and dissenting in part) (stating that the connection between the decision not to buy health insurance and the effect on interstate commerce is direct and immediate).

326. *See Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2609–15 (Ginsburg, J., concurring) (showing that Congress believed a national response was needed to address the problem of rising health care costs and reduce the number of uninsured).

327. *See supra* note 325.

328. *See supra* notes 320–327 and accompanying text.

329. U.S. CONST. art. I, § 8, cl. 18.

330. 17 U.S. 316, 418 (1819).

331. *See Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2579 (quoting *McCulloch*, 17 U.S. at 421); *see also* Gary Lawson & Patricia B. Granger, *The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 310 (1993) (arguing that the scope of the Necessary and Proper Clause is limited to powers already granted to Congress).

332. *See supra* note 331.

333. *See Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2585.

334. *See Gonzales v. Raich*, 545 U.S. 1, 38 (2005) (explaining that Congress may take all needed and appropriate measures to effectively regulate interstate commerce).

Necessary and Proper Clause pursuant to Congress's Commerce Clause power.³³⁵ The most striking aspect of *Raich* is that it supports the notion that the Commerce Clause affords Congress broad power to regulate even purely local matters that have substantial economic effects.³³⁶ In both *Wickard* and *Raich*, the Supreme Court sustained Congress's power to impose obligations on individuals who claimed not to participate in interstate commerce, because those obligations were components of broad schemes regulating interstate commerce.³³⁷

The Sixth Circuit found that the individual mandates were part of a larger regulatory scheme.³³⁸ The Court focused on the fact that PPACA “bans this practice through a guaranteed issue requirement, which bars insurance companies from denying coverage to individuals with preexisting conditions; and a community rating requirement, which prohibits insurance companies from charging higher rates to individuals based on their medical history.”³³⁹ In order for Congress to make such a rule, there would have to be an individual mandate or people would be incentivized to delay purchase of insurance only until they actually need medical care.³⁴⁰ More specifically, the court found that “seven states that had enacted guaranteed issue reforms without minimum coverage provisions suffered detrimental effects to their insurance markets, such as escalating costs and insurance companies exiting the market. In contrast, Congress found that ‘[i]n Massachusetts, a [minimum coverage] requirement has strengthened private employer-based coverage: despite the economic downturn, the number of workers offered employer-based coverage has actually increased.’”³⁴¹ Thus, not only is the mandate part of a larger regulatory scheme, it is an integral component to the goals of PPACA.³⁴²

In contrast, the Eleventh Circuit did not find the individual mandates to be part of a larger regulatory scheme.³⁴³ First, the Eleventh Circuit stated that the “larger regulatory scheme” doctrine is for as-applied challenges, not facial

335. *Id.* at 22, 26 (concluding that marijuana is a fungible good and that Congress had a rational basis for believing that regulating the intrastate possession and manufacture of marijuana was necessary to regulate interstate commerce).

336. *Id.* at 17.

337. *Wickard v. Filburn*, 317 U.S. 111, 129–30 (1942); *Gonzales*, 545 U.S. at 32–33.

338. *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 547 (6th Cir. 2011) (recognizing that Congress rationally concluded that failing to regulate the self-insured would undermine the larger health regulatory scheme), *cert. denied*, 2012 WL 2470097 (U.S. June 29, 2012).

339. *Id.* at 546–47.

340. *Id.* at 547.

341. *Id.*

342. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2626 (2012) (Ginsburg, J., concurring) (finding that the individual mandate was essential to increase access to insurance and reduce uncompensated health care).

343. *Florida ex rel. Att'y Gen. v. Dep't of Health & Human Servs.*, 648 F.3d 1235, 1307 (11th Cir. 2011), *aff'd in part, rev'd in part, sub nom. Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

challenges currently being brought on the constitutionality of PPACA.³⁴⁴ However, the Eleventh Circuit went further to say that even if the doctrine can be applied to facial challenges, it would still fail.³⁴⁵ The court looked to find whether removal of the mandate would substantially interfere or obstruct the exercise of Congress's powers.³⁴⁶ The Court found that the individual mandate does not interfere with Congress's ability to regulate insurance companies.³⁴⁷ Also, the court held that the mandate is not meant to enable the execution of other provisions in PPACA but only to counteract the regulatory costs on insurance companies from the provisions.³⁴⁸

The dissent in the Eleventh Circuit found that the individual mandate was part of a larger regulatory scheme.³⁴⁹ Contrary to the majority opinion, the dissent noted that the "larger regulatory scheme" doctrine applies to facial challenges because *Lopez* applied it in the context of a facial challenge.³⁵⁰ The dissent found that PPACA is a comprehensive economic statute and that the economic realities of the health insurance business make the mandate essential to properly enforcing the regulations in the Act.³⁵¹

Chief Justice Robert's majority opinion did not discuss whether the individual mandate was part of a larger regulatory scheme but, instead, focused on whether it could be upheld based on the Necessary and Proper Clause pursuant to Congress's Commerce Clause.³⁵² Chief Justice Robert's opinion stated that "[e]ach of our prior cases upholding laws under [the Necessary and Proper Clause] involved exercises of authority derivative of, and in service to, a granted power."³⁵³ The majority's fear is that allowing the individual mandate to be upheld by the Necessary and Proper Clause would give Congress the ability to dictate what it deems necessary in an exercise of its enumerated powers.³⁵⁴ Justice Robert's opinion stated that "[e]ven if the individual mandate is "necessary" to the Act's insurance reforms, such an expansion of federal power is not a "proper" means for making those reforms

344. *Id.*

345. *Id.* at 1308.

346. *Id.* at 1307 (examining whether the individual mandate was a necessary and valid exercise of Congress's Commerce Power to regulate the insurance and health care markets).

347. *Id.* at 1310.

348. *Id.*

349. *Id.* at 1332 (Marcus, J., dissenting).

350. *Id.* at 1354 (explaining that there is no doctrinal basis for using an as-applied challenge to determine whether or not legislation is an essential part of a larger regulatory scheme since the Court applied a facial challenge in *Lopez*).

351. *Id.* at 1360 (reasoning that the individual mandate was an appropriate method to expand health insurance coverage to the uninsured due to the unique interconnectedness of the health care and insurance markets).

352. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2591–93 (2012).

353. *Id.* at 2592.

354. *Id.* (noting that such a result would allow Congress to "reach beyond the natural limit of its authority and draw within its regulatory scope those who otherwise would be outside of it").

effective.”³⁵⁵ In applying *Raich*, the Supreme Court found that in *Raich*, Congress’s attempts to regulate interstate market for marijuana would “be substantially undercut if it could not also regulate intrastate possession and consumption.”³⁵⁶ They did not find the same to be true for the individual mandate.³⁵⁷

Justice Ginsburg’s concurring opinion, on the other hand, found that the individual mandate could survive the Commerce Clause challenge because it was part of a broader regulatory scheme.³⁵⁸ Justice Ginsburg stated that “Congress knew, however, that simply barring insurance companies from relying on an applicant’s medical history would not work in practice. Without the individual mandate, Congress learned, guaranteed-issue and community rating requirements would trigger an adverse-selection death-spiral in the health-insurance market.”³⁵⁹

The Necessary and Proper Clause has always been controversial, even at its inception.³⁶⁰ In the drafting of the Constitution, Anti-Federalists were concerned that it would grant the federal government unlimited power.³⁶¹ Federalists, on the other hand, argued that it would only permit the execution of powers granted by the Constitution.³⁶² Based on the Supreme Court’s opinion on this issue, it seems we have maintained the latter view.³⁶³ Nevertheless, there are still divergent views on *Raich*’s application to the individual mandate.³⁶⁴ There is no argument that the individual mandate is one of many components of PPACA designed to provide universal health coverage for all Americans.³⁶⁵ The individual mandate mechanism

355. *Id.*

356. *Id.* (citing *Gonzales v. Raich*, 545 U.S. 1, 22 (2005)).

357. *Id.* at 2593 (stating that Congress’s attempt to regulate the effects of individuals’ decision not to purchase health insurance through the mandate is not a valid exercise of Congress’s Commerce Clause Power).

358. *Id.* at 2625 (Ginsburg, J., dissenting) (arguing that a complex regulatory program can be a valid exercise of the Congress’s Commerce Clause Power without showing that every component of the program is related to a legitimate congressional goal).

359. *Id.* at 2626.

360. Compare THE ANTIFEDERALIST NO. 17, at 44 (Brutus) (Morton Borden ed., 1965) (arguing that the power granted to the federal government by the Necessary and Proper Clause is so extensive that state legislatures could be abolished), with THE FEDERALIST NO. 44, at 230 (James Madison) (Ian Shapiro ed., 2009) (“Without the *substance* of this [Necessary and Proper Clause] power, the whole Constitution would be a dead letter.”) (emphasis in original).

361. THE ANTIFEDERALIST NO. 17, *supra* note 360, at 44.

362. THE FEDERALIST NO. 44, *supra* note 360, at 231 (arguing that even if the Constitution did not include the Necessary and Proper Clause it was still implied that the government could take all necessary means to execute its other powers).

363. *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2591–92 (reasoning that the Court has historically deferred to Congress on whether a regulation is necessary under the Clause).

364. Compare *id.* at 2593 (arguing that *Raich* does not stand for the notion that Congress may regulate future activity of individuals under the Commerce Clause), with *id.* at 2619 (Ginsburg, J., concurring) (arguing that *Raich* demonstrates that Congress has the authority under the Commerce Clause to regulate future individual activity), with *id.* at 2646 (Kennedy, J., dissenting) (arguing that *Raich* cannot serve as a precedent supporting Congress’s enactment of the individual mandate).

365. See *id.* at 2580 (majority opinion) (“The Act aims to increase the number of Americans covered by health insurance and decrease the cost of health care.”); see also *id.* at 2613 (Ginsburg, J.,

is meant to work with the prohibition on denial of coverage based on preexisting conditions to prevent a moral hazard problem.³⁶⁶ Therefore, in order to reconcile *Raich* and *National Federation* there must be more to the “regulatory scheme” than simply the presence of a regulatory scheme.³⁶⁷ The “more” is the federalism dimension.³⁶⁸

Under *Raich*, the additional regulatory power recognized under the Necessary and Proper Clause was the ability to regulate intrastate possession and consumption of marijuana.³⁶⁹ However, this does not preclude the ability of the State police to enforce their own drug laws.³⁷⁰ The individual mandate, on the other hand, would preclude state regulation on the “inactivity” of their citizen’s insurance choices.³⁷¹ The structure of the individual mandate could be expanded to other types of inactivity, removing state power without the state having any recourse (or even any concurrent power, as with the drug enforcement power noted in *Raich*).³⁷² Therefore, when we say that the Necessary and Proper Clause was never meant to expand federal power, we must be more precise and say that it was never meant to expand federal power at the expense of state power.³⁷³

D. The Taxing Power

The other constitutional issue related to the individual mandate provision is whether Congress can enforce an exaction for failure to purchase insurance under Congress’s Taxing Power.³⁷⁴ The Taxing and Spending Clause states: “Congress shall have the Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.”³⁷⁵ The Taxing Power argument was that PPACA was enacted under the Taxing Power because the individual mandate exaction is a tax meant to provide

concurring) (“A central aim of the ACA is to reduce the number of uninsured U.S. residents.”); *id.* at 2642 (Kennedy, J., dissenting) (“Congress has set out to remedy the problem that the best health care is beyond the reach of many Americans who cannot afford it.”).

366. *See id.* at 2614 (Ginsburg, J., concurring) (contending that requiring insurance companies to provide coverage allows an individual to wait to get sick and purchase insurance at that point, which would be substantially less than the cost of direct medical care).

367. *See supra* notes 334–359 and accompanying text (noting that the decisions in *Raich* and *Nat’l Fed’n of Indep. Bus.* both address a larger regulatory scheme yet reach different conclusions).

368. *See infra* notes 369–373 and accompanying text.

369. *Gonzales v. Raich*, 545 U.S. 1, 5, 9 (2005).

370. *See, e.g.*, MASS. GEN. LAWS ch. 94C (2012) (regulating controlled substances at the state level).

371. The inability of States to regulate against the individual mandate is further explored in Part VI.

372. *See* U.S. CONST. art. VI, cl. 2; *Raich*, 545 U.S. at 5, 9.

373. *See generally* Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. PA. J. CONST. L. 181 (2003) (discussing the origins and meaning of the Necessary and Proper Clause).

374. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2594 (2012).

375. U.S. CONST. art. 1, § 8, cl. 1.

for the general welfare of the United States.³⁷⁶ This was ultimately the position the Supreme Court adopted.³⁷⁷ However, the analysis does not end here. It is important to understand the historical context in which the Supreme Court made its decision because it will directly shape the future of federalism.

The issue here is whether the individual mandate exaction is a tax or a penalty.³⁷⁸ If it is a tax, then Congress has the ability under the Taxing Power to tax people and use those funds for the general welfare.³⁷⁹ If it is not a tax, then the exaction would not fall under the Taxing Power and Congress would need to rely on another power to sustain the individual mandate.³⁸⁰

Originally, the Fourth Circuit was the first court to deem that the individual mandate exaction is a tax.³⁸¹ However, unlike the Supreme Court's decision, the Fourth Circuit found that if the mandate is deemed a tax, then the Court would be precluded by the Anti-Injunction Act (AIA) from ruling on the constitutional issue.³⁸² The AIA provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person."³⁸³ The AIA forbids pre-enforcement actions brought before the IRS.³⁸⁴ The taxpayer would be allowed to pay the assessment and then seek a refund from the IRS.³⁸⁵ If the IRS refuses, then the taxpayer may bring the refund action to federal court.³⁸⁶ Therefore, in order to bring the constitutional issue of whether the individual mandate exaction is a tax for the purposes of Congress's taxing power, the individual would have to have paid the exaction.³⁸⁷ Since the individual mandate does not go into effect until 2014,³⁸⁸ the debate over whether the individual mandate exaction is a tax would be delayed by the AIA until that time.³⁸⁹

376. *Liberty Univ., Inc. v. Geithner*, 671 F.3d 391, 420 (4th Cir. 2011) (Wynn, J., concurring) (explaining that the individual mandate provides for the general welfare because the provision was designed to reduce the number of uninsured, which subsequently reduces health care costs for those who are insured as well), *cert. denied, sub nom. Liberty Univ. v. Geithner*, 2012 WL 2470099 (U.S. June 29, 2012).

377. *See Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2608 (holding that the individual mandate is a valid exercise of Congress's taxing power).

378. *Id.* at 2593–94.

379. *Id.*

380. *Id.*

381. *Liberty Univ., Inc.*, 671 F.3d at 409.

382. *Id.* at 397.

383. Anti-Injunction Act, 26 U.S.C. § 7421 (2011).

384. *Id.*

385. 26 U.S.C. § 7422 (2011).

386. *Id.*

387. *See, e.g., Liberty Univ., Inc.*, 671 F.3d at 403 (denying judicial review of the individual mandate because the Anti-Injunction Act prohibits review of IRS pre-enforcement actions).

388. 26 U.S.C. § 5000A(a) (2011).

389. *See supra* notes 378–388 and accompanying text.

Prior to the Fourth Circuit's opinion, every federal court had unanimously held that the individual mandate exaction was a penalty not a tax.³⁹⁰ There was so much confidence in this unanimity that the Eleventh Circuit commented that

[i]t is not surprising to us that all of the federal courts, which have otherwise reached sharply divergent conclusions on the constitutionality of the individual mandate, have spoken on this issue with clarion uniformity. . . all have found, without exception, that the individual mandate operates as a regulatory penalty, not a tax.³⁹¹

Furthermore, in the Fourth Circuit case, *Liberty v. Geithner*, both the plaintiffs and the defendants also argued that the individual mandate exaction is a penalty and not subject to the AIA's preclusion, and the opposing parties asked the Court to rule on the merits of the case.³⁹² The Fourth Circuit declined and instead opined that it did not have jurisdiction to decide the merits due to the AIA pre-enforcement bar.³⁹³

Thus, the entire country was awaiting a decision by the Supreme Court largely based on the Commerce Clause Power.³⁹⁴ Instead, the Supreme Court found

390. See, e.g., *Florida ex rel. Att'y Gen. v. Dep't of Health & Human Servs.*, 648 F.3d 1235, 1315 (11th Cir. 2011) (reasoning that the individual mandate was a penalty because it imposes a monetary sanction on individuals who violate the law), *aff'd in part, rev'd in part, sub nom.* *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012); *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 539 (6th Cir. 2011) (reasoning that because Congress called the individual mandate exaction a penalty and the Anti-Injunction Act only bars pre-enforcement of taxes, the AIA did not bar the Court from hearing the case), *cert. denied*, 2012 WL 2470097 (U.S. June 29, 2012); *Virginia ex rel. Cuccinelli v. Sebelius*, 728 F.Supp.2d 768, 787–88 (E.D. Va. 2010) (concluding that the individual mandate “is, in form and substance, a penalty as opposed to a tax,” and therefore, Congress must derive alternative authority to enact the provision), *vacated*, 656 F.3d 253, 272 (4th Cir. 2011), *cert. denied*, 2012 WL 2470098 (U.S. June 29, 2012); *Liberty Univ., Inc. v. Geithner*, 753 F.Supp.2d 611, 629 (W.D. Va. 2010) (noting that Congress specifically chose not to label the mandate as a tax despite labeling other exactions in the Act as taxes), *vacated*, 671 F.3d 391 (4th Cir. 2011), *cert. denied, sub nom.* *Liberty Univ. v. Geithner*, 2012 WL 2470099 (U.S. June 29, 2012). Even where there were dissenting opinions, each court was unanimous in concluding that the individual mandate exaction was a penalty. See, e.g., *Florida ex rel. Att'y Gen.*, 648 F.3d at 1330 (Marcus, J., concurring in part and dissenting in part) (implying agreement with the majority as to the characterization of individual mandate by describing it as “requiring non-exempted individuals to pay a penalty,” rather than a tax); *Thomas More Law Ctr.*, 651 F.3d at 567 (Graham, J., concurring in part and dissenting in part) (“Individuals who fail to satisfy the ‘individual responsibility requirement’ must pay a monetary penalty.”).

391. *Florida ex rel. Att'y Gen.*, 648 F.3d at 1314.

392. See Supplemental Brief of Appellants Liberty University, Michele G. Waddell and Joanne V. Merrill at 2, *Liberty Univ., Inc.*, 671 F.3d 391 (No. 10-2347) (arguing that the fines associated with the mandates are penalties under the Commerce Clause, not taxes under the Taxing and Spending Clause); see also Supplemental Brief for Appellees at 2–3, *id.* (No. 10-2347) (distinguishing the minimum coverage penalty from the penalties contained in other portions of the Internal Revenue Code that are deemed taxes for Anti-Injunction Act purposes).

393. See Supplemental Brief of Appellants *supra* note 392, at 2; Supplemental Brief for Appellees, *supra* note 392, at 9.

394. See, e.g., Amy Howe, Anticipating the health-care decision: In Plain English, SCOTUSBLOG (June 27, 2012, 10:45 PM), <http://www.scotusblog.com/2012/06/anticipating-the-health-care-decision->

that the individual mandate was beyond Congress's Commerce Clause power, yet upheld it based on Congress's Taxing Power.³⁹⁵ This decision was surprising to many, including President Obama himself, who still contended that the mandate is not a tax even after the Supreme Court holding.³⁹⁶

The Supreme Court's decision was made in light of the controversy that surrounded the constitutionality of the individual mandate along with a great concern for the principles of federalism.³⁹⁷ Therefore, it is important to understand the arguments both for and against the individual mandate exaction being a tax to understand how far the federal government's power can extend in relation to the powers reserved to the states.³⁹⁸

1. *The Individual Mandate Exaction is a Penalty*

The argument that the individual mandate exaction is a penalty uses rules of statutory interpretation.³⁹⁹ The Eleventh Circuit stated that “[t]he plain language of the statute and the well-settled principles of statutory construction overwhelmingly established that the individual mandate is not a tax, but rather a penalty.”⁴⁰⁰ The Eleventh Circuit then analyzed the plain language of the statute and the legislative history to support the argument that the exaction is a penalty and not a tax.⁴⁰¹

The plain language of the individual mandate frequently uses the word “penalty” to refer to the individual mandate exaction.⁴⁰² The Eleventh Circuit pointed out that this language was not a “careless one-time invocation of the word

in-plain-english (characterizing the issue before the Court as the constitutionality of the Act pursuant to the Commerce Clause).

395. *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2593, 2598.

396. See, e.g., Byron Tau, *Obama campaign: It's a penalty, not a tax*, POLITICO, (June 29, 2012, 10:49 AM), <http://www.politico.com/politico44/2012/06/obama-campaign-its-a-penalty-not-a-tax-127721.html> (reporting that the President and one of his top political allies argued that the individual mandate even after the Supreme Court's decision held that it was).

397. See *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2577–80 (explaining that the constitutionality of the individual mandate must be decided with the deference that the Court must give to notions of federalism).

398. See *supra* notes 378–380 and accompanying text (explaining the implications of whether or not the mandate is a tax). See also discussion *infra* Parts IV.D.1–3.

399. *Florida ex rel. Att'y Gen. v. Dep't of Health & Human Servs.*, 648 F.3d 1235, 1314–17 (11th Cir. 2011) (applying principles of statutory interpretation in concluding that the individual mandate exaction is a penalty), *aff'd in part, rev'd in part, sub nom.* *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

400. *Id.* at 1314.

401. *Id.* at 1314–20 (citing Congress's repetition of the word “penalty” in the mandate and clear designation of other provisions in the Act as taxes, among other factors, as evidence that the exaction is a penalty).

402. See *id.* at 1315 (noting the mandate provision's multiple references to “penalty” including the statement that “[i]f a taxpayer who is an applicable individual . . . fails to meet the requirement of subsection (a) for 1 or more months, then . . . there is hereby imposed on the taxpayer a penalty with respect to such failures”) (emphasis added by Court) (quoting Patient Protection and Affordable Care Act § 1501, 26 U.S.C. § 5000A(b)(1) (2011)).

‘penalty,’ because the remainder of the relevant provisions in § 5000A” use the term “penalty” repeatedly in reference to the mandate without ever describing it as a “tax.”⁴⁰³ Also, there are other provisions in PPACA that use the term “tax” instead of “penalty.”⁴⁰⁴ These provisions, according to the Eleventh Circuit, are “unmistakably taxes” and “Congress knows full well how to enact a tax when it chooses to do so.”⁴⁰⁵ Furthermore, the congressional findings about the individual mandate support the argument that the exaction is designed to be a penalty.⁴⁰⁶ The Supreme Court found that Congress does not need to explicitly label a provision as a “tax,” nor does it need to “expressly invoke the Taxing and Spending Clause, in order to enact a valid tax.”⁴⁰⁷ However, Congress did not use the term “tax,” nor did they invoke the Taxing and Spending Clause, when explaining the constitutional basis of the individual mandate.⁴⁰⁸

In statutory construction, when the plain language is unclear, courts resort to the legislative history to determine the meaning of a provision.⁴⁰⁹ The Eleventh Circuit continued its analysis of the legislative history to bolster its argument that the individual mandate exaction is a penalty not a tax.⁴¹⁰ Preliminary versions of the Act that married an individual mandate and a “tax” were introduced in both the House and Senate prior to PPACA’s ultimate enactment.⁴¹¹ The final version of

403. *Id.*

404. *Id.* at 1316 (pointing to four other provisions of the Act that undoubtedly create taxes, rather than penalties including a tax on medical device manufacturers, a tax on high cost employer-sponsored health coverage, an additional hospital insurance tax for high-income taxpayers, and a tax on indoor tanning services).

405. *Id.*

406. *Id.* The Court pointed out that Congress explicitly relied on its Commerce Clause authority in its legislative findings, stating that, “[t]he individual responsibility requirement provided for in this section . . . is commercial and economic in nature, and substantially affects interstate commerce” *Id.* (quoting 42 U.S.C. § 18091(a)(1)) (2011) (internal quotation marks omitted). The Court surmised that the focus on commerce in the findings indicated “that the goal of the individual mandate is not to raise revenue for the public fisc, but rather to . . . reduce the number of the uninsured.” *Id.*

407. *Id.* at 1317 (citing *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948) (“[T]he constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise.”)).

408. *Id.*

409. *See, e.g.*, *United States v. Davidson*, 246 F.3d 1240, 1246 (9th Cir. 2001) (“Where the plain language of a statute is ambiguous, a court may go beyond the words of the statute to examine . . . the legislative history.”) (quoting *United States v. R.L.C.*, 503 U.S. 291, 298 (1992) (internal quotation marks omitted)); *see also* *United States v. Choice*, 201 F.3d 837, 840 (6th Cir. 2000) (“The language of the statute is the starting point for interpretation we may look to the legislative history of a statute if the statutory language is unclear.”) (citations omitted). *Cf.* *United States v. Cullen*, 499 F.3d 157, 163 (2d Cir. 2007) (“When statutory language is unambiguous . . . we need not look to its title or history to determine its meaning.”).

410. *Florida ex rel. Att’y Gen.*, 648 F.3d at 1317.

411. *Id.* The 11th Circuit cited several such congressional bills that were precursors to PPACA. *Id.* (noting, for instance, the introduction of one bill, America’s Affordable Choices Act of 2009 in the House of Representatives which provided that “there is hereby imposed a tax” on “any individual who

PPACA replaced the term “tax” with “penalty.”⁴¹² The Eleventh Circuit commented that “[t]his is no mere semantic distinction, as ‘[f]ew principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded *in favor of other language*.”⁴¹³

In his dissenting opinion, Justice Scalia agreed with the Eleventh Circuit that the individual mandate was not a tax.⁴¹⁴ However, instead of going into a lengthy analysis of the statutory interpretation of Congress’s intention, Justice Scalia based his disagreement almost entirely on the fact that holding a provision to be both a penalty and a tax is unprecedented in the history of the country.⁴¹⁵ The dissenting opinion considered a penalty and a tax to be mutually exclusive terms.⁴¹⁶ However, the dissenting opinion did indicate that if the dissenting Justices were to do a statutory interpretation, they would still find the individual mandate to be a penalty, stating that “[w]e have no doubt that Congress knew precisely what it was doing when it rejected an earlier version of this legislation that imposed a tax instead of a requirement-with-penalty.”⁴¹⁷

The idea that the individual mandate exaction is a penalty is strong if we look to the rules of statutory interpretation and the historical context of PPACA.⁴¹⁸ The idea that the exaction is a tax for the purposes of the taxing power or the AIA was not prominent until the Fourth Circuit opinion.⁴¹⁹ Thus, when the Supreme Court found the individual mandate to be a tax, it came as great and unexpected surprise, even to the Obama Administration.⁴²⁰

2. *The Individual Mandate Exaction is a Tax*

As noted above, the Fourth Circuit’s majority opinion in *Liberty v. Geithner* was the only opinion that had found that the individual mandate exaction was a tax.⁴²¹ If the individual mandate exaction operates as a tax, then it would fall under Congress’s Taxing and Spending power.⁴²² However, before any ruling on the

does not meet the requirements of [maintaining minimum health insurance coverage] at any time during the taxable year.”)

412. *Id.*

413. *Id.* (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 422–23 (1987)).

414. See *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2651–52 (2012) (Scalia, J., dissenting) (arguing that it would require judicial “rewriting” and contravention of Court precedent to find that Congress intended the individual mandate to be a tax).

415. See *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2651–55 (Scalia, J., dissenting).

416. *Id.* at 2651 (noting that the Court has always held provisions like the individual mandate to be either a penalty or a tax).

417. *Id.* at 2655.

418. See *supra* notes 399–413 and accompanying text.

419. See *supra* notes 382–383, 390–391 and accompanying text.

420. See *supra* notes 395–396 and accompanying text.

421. See *supra* notes 382, 390 and accompanying text.

422. U.S. CONST. art. 1, § 8, cl. 1.

Taxing and Spending power could be made, the Fourth Circuit had to make a determination on whether the AIA precluded a court from deciding the issue.⁴²³ The Fourth Circuit's majority opinion analyzed whether the individual mandate exaction was a tax for the purpose of the AIA and found that they were precluded from ruling on the mandate under the AIA.⁴²⁴ However, Judge Wynn's concurring opinion still admitted that "[he] would uphold the constitutionality of the Affordable Care Act on the basis that Congress had the authority to enact the individual and employer mandates under its plenary taxing power."⁴²⁵

The original argument in the Fourth Circuit that the individual mandate exaction was a tax relied on a very broad definition of the term "tax."⁴²⁶ According to the majority opinion by Judge Motz, "[a] 'tax, in the general understanding of the term,' is simply 'an exaction for the support of the government.'"⁴²⁷ The purpose of the AIA is to ensure prompt collections of lawful revenue by preventing taxpayers from avoiding payment of taxes with pre-enforcement lawsuits.⁴²⁸ The use of the term "tax" in the AIA is meant to include "penalties" as "taxes."⁴²⁹ Furthermore, the Supreme Court has consistently found that labels have little impact in determining whether an exaction is a "tax" or a "penalty".⁴³⁰ In fact, the Fourth Circuit goes even further, saying that "[a]ccordingly, it is simply irrelevant what the 2010 Congress would have thought about the AIA; all that matters is whether the 2010 Congress imposed a tax," implying that any statutory interpretation of legislative intent for the AIA would be irrelevant even though the statute's interpretation is ambiguous.⁴³¹

However, the Supreme Court saw things differently even though it agreed with the Fourth Circuit that the individual mandate was a tax.⁴³² The Supreme Court reasoned that "[t]he Anti-Injunction Act and the Affordable Care Act. . . are creatures of Congress's own creation. How they relate to each other is up to Congress, and the best evidence of Congress's intent is the statutory text."⁴³³ The

423. See Anti-Injunction Act, 26 U.S.C. § 7421(a) (2011); see also *supra* notes 383–389.

424. *Liberty Univ., Inc. v. Geithner*, 671 F.3d 391, 415 (4th Cir. 2011) (barring judicial review under the AIA), *cert. denied, sub nom. Liberty Univ. v. Geithner*, 2012 WL 2470099 (U.S. June 29, 2012); see also *supra* notes 382–389 and accompanying text.

425. *Liberty Univ., Inc.*, 671 F.3d at 415 (Wynn, J., concurring).

426. *Id.* at 402 (majority opinion) (citing *Snyder v. Marks*, 109 U.S. 189, 192 (1883)) ("[A]n exaction constitutes a 'tax' for purposes of the AIA so long as the method prescribed for its assessment conforms to the process of tax enforcement.").

427. *Id.* at 401 (quoting *United States v. Butler*, 297 U.S. 1, 61 (1936)).

428. *Id.* at 402 (citing *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 7–8 (1962)) (noting that the Supreme Court has construed "tax" in its broadest sense because the AIA aims to promote the expedient collection of taxes without undue delays due to disputed amounts).

429. *Id.*

430. *Id.* at 404.

431. *Id.* at 410.

432. See *infra* notes 433–35 and accompanying text.

433. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2583 (2012).

Supreme Court ultimately gave Congress full discretion on whether the AIA applies, stating that “Congress can, of course, describe something as a penalty but direct that it nonetheless be treated as a tax for purposes of the Anti-Injunction Act,”⁴³⁴ thus creating a peculiar legal doctrine which allows the individual mandate to be a tax for the purposes of enforcement but not a tax for the purposes of the AIA.⁴³⁵

In the Fourth Circuit opinion that the individual mandate was a tax, Judge Wynn’s concurring opinion took a practical approach to determine that the individual exaction is a tax.⁴³⁶ The four practical considerations were (1) “[i]ndividuals who are not required to file income tax returns are not required to pay the penalty”;⁴³⁷ (2) “[t]he amount of any penalty owed is generally calculated by reference to household income and reported on an individual’s federal income tax return”;⁴³⁸ (3) “taxpayers filing jointly are jointly liable for the penalty”;⁴³⁹ and (4) “the Secretary of the Treasury is empowered to enforce the provision like a tax, albeit with several procedural exceptions.”⁴⁴⁰ These considerations support the idea that the penalty operates more like a tax than a penalty.⁴⁴¹

Even though the Fourth Circuit and the Supreme Court disagreed on the application of the AIA, they had similar rationales for deeming the individual mandate as a tax.⁴⁴² Chief Justice Robert’s opinion sought to give deference to Congress, stating that “it is well established that if a statute has two possible

434. *Id.*

435. *Id.* at 2594 (explaining that Congress’s description of the mandate as a “penalty” and not a “tax” would be “fatal” under the Anti-Injunction Act, but that Congress also has discretion in applying the Anti-Injunction Act to a specific statute, and that Congress’s choice of a different label does not preclude it from enacting the provision pursuant to congressional taxing power).

436. *Liberty Univ., Inc. v. Geithner*, 671 F.3d 391, 418 (4th Cir. 2011) (Wynn, J., concurring) (noting that the assessment of an exaction’s constitutionality requires examination of its practical operation rather than deference to its choice of label).

437. *Liberty Univ., Inc. v. Geithner*, 671 F.3d 391, 418 (4th Cir. 2011) (Wynn, J., concurring), *cert. denied, sub nom. Liberty Univ. v. Geithner*, 2012 WL 2470099 (U.S. June 29, 2012).

438. *Id.* at 418–19.

439. *Id.* at 419.

440. *Id.*

441. *Id.*

442. *See Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2594 (2012) (reasoning that the individual mandate looks like a tax in many respects because “the shared responsibility payment” is paid into the Treasury by taxpayers when they file their tax returns, it does not apply to individuals who do not pay federal income taxes because their household income is less than the Internal Revenue Code’s filing threshold, the amount that taxpayers who do owe the payment is determined by taxable income, number of dependants, and joint filing status, and the IRS must assess and collect the payment in the same manner as taxes); *Liberty Univ.*, 671 F.3d at 418–19 (Wynn, J., concurring) (reasoning that “the practical operation of the individual mandate provision is as a tax [because] [i]ndividuals who are not required to file income tax returns are not required to pay the penalty[.]... [t]he amount of any penalty owed is generally calculated by reference to household income and reported on an individual’s federal income tax return[.]... [t]axpayers filing jointly are jointly liable for the penalty[.]... [a]nd the Secretary of the Treasury is empowered to enforce the provision like a tax”).

meanings, one of which violates the Constitution, courts should adopt the meaning that does not do so.”⁴⁴³ Given that prior to the Supreme Court’s ruling, the majority of people believed the individual mandate to be a penalty,⁴⁴⁴ the Court was willing to go against the vast majority of previous judicial opinions and adopt a contradictory holding regarding the AIA to maintain the constitutionality of PPACA.⁴⁴⁵ The standard given by the Supreme Court on how to interpret the mandate draws from *Hooper v. California*, which stated that “every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.”⁴⁴⁶ This indicates very high bar needed to invalidate a law passed by Congress on constitutional grounds.⁴⁴⁷

The Supreme Court’s majority opinion set forth several reasons why the individual mandate can be considered a tax similar to the Fourth Circuit rationale by Judge Wynn.⁴⁴⁸ Firstly, there is a “shared responsibility payment” which is paid to the Treasury when taxpayers file their tax returns.⁴⁴⁹ Second, the individual mandate would not apply to individuals whose household income is less than the filing threshold for the Internal Revenue Service.⁴⁵⁰ Third, the amount owed is determined based on factors like taxable income, number of dependents, and joint filing status.⁴⁵¹ Fourth, the requirement to pay is found in the Internal Revenue Code and enforced by the IRS, which must assess and collect the individual mandate “in the same manner as taxes.”⁴⁵² Thus, for the majority, the individual mandate could be construed as a tax since its application is very similar to other taxes.⁴⁵³

443. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2593 (2012).

444. *See supra* notes 396, 420–21 and accompanying text (noting that the majority of courts, as well as President Obama, did not consider the mandate to be a tax).

445. *Compare Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2593 (determining that although the individual mandate is not a “tax” for the purposes of Anti-Injunction Act, the mandate is a valid “tax” under Congress’s taxing powers), *with Liberty Univ., Inc.*, 671 F.3d at 423 (Davis, J., dissenting) (emphasizing that the majority’s application of the Anti-Injunction Act to bar judicial review of the mandate deviated from the judgments of nine other federal judges that the Anti-Injunction Act was not applicable to mandates of PPACA).

446. *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2594 (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)).

447. *Id.* at 2593 (quoting *Hooper*, 155 U.S. at 657) (providing that a reviewing court should consider “every reasonable construction” of a statute before striking it down as unconstitutional).

448. *See id.* at 2594; *see also Liberty Univ., Inc.*, 671 F.3d at 418–19 (Wynn, J., concurring); *see infra* notes 449–53 and accompanying text.

449. *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2594.

450. *Id.*

451. *Id.*

452. *Id.*

453. *Id.* (noting that the individual mandate resembles a tax because the penalty produces revenue for the government and the penalty amount is determined by taxable income, joint filing status, and number of dependents).

The majority opinion also distinguished the individual mandate from a penalty using precedent established in *Drexel Furniture*.⁴⁵⁴ In *Drexel*, (1) the tax imposed was very large (ten percent of a company's net income), (2) it had a scienter requirement typical of punitive statutes, and (3) the tax was enforced by the Department of Labor, a department that typically punishes, not collects revenues.⁴⁵⁵ In contrast, for the individual mandate, (1) the amount due is far less than the price of insurance and, by statute, can never be more, (2) there is no scienter requirement, and (3) payment is collected solely through the IRS using normal means of taxation (and the IRS is not allowed to use other means that are suggestive of punitive sanction).⁴⁵⁶ Ultimately, when determining whether the individual mandate was a penalty, the Supreme Court looked to whether Congress intended "not buying insurance" to be an "unlawful" act.⁴⁵⁷

3. *The Taxing Power and Federalism*

The idea that the individual mandate exaction is a tax has major implications on federalism.⁴⁵⁸ Congress's Taxing Power is broader than its Commerce power since the Taxing Power only looks to whether revenue was raised and whether it was used for the general welfare.⁴⁵⁹ The Commerce Clause, on the other hand, looks at the nature of the regulation and whether it properly fits into the categories established by the Constitution and Supreme Court precedent.⁴⁶⁰ This is why the majority opinion in the Supreme Court placed limitations on when a penalty can be considered a tax.⁴⁶¹ However, before discussing the implications of the Supreme Court's decision on federalism, it is important to compare an individual mandate as a tax to a single payer system where there healthcare is funded by the government via a general tax on the public.⁴⁶²

Consider the alternative of taxing the general public and spending the general welfare for the unreimbursed emergency care that PPACA seeks to address.⁴⁶³

454. *Id.* at 2595–96.

455. *Id.* at 2595.

456. *Id.* at 2595–96.

457. *Id.* at 2597.

458. *See supra* notes 397–98 and accompanying text; *see also infra* Part VI.

459. *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2599–600 (explaining that upholding the mandate under the Commerce Clause would raise questions about the scope of Congressional power but that Congress's broad discretion under the Taxing Clause has long been recognized).

460. *United States v. Lopez*, 514 U.S. 549, 559 (1995) (emphasizing that the Commerce Clause allows Congress to regulate three categories of activity including the use of interstate commerce channels, the persons or things in interstate commerce, and activities that substantially affect interstate commerce).

461. *See Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2594 (discussing the numerous similarities between the penalty and other taxes, which supports the Court's conclusion that the mandate is a tax).

462. *See infra* notes 463–73 and accompanying text.

463. *Cf. Stuart M. Butler, A Tax Reform Strategy to Deal With the Uninsured*, 265 JAMA 2541 (1991) (proposing elimination of the tax exclusion of employer-provided health plans from the tax code).

Proponents of the idea that the individual mandate exaction is a tax would likely assert that there is no distinction.⁴⁶⁴ However, if an exaction was based on people's action, then some people would pay the exaction while others would be free from it.⁴⁶⁵ The amount of taxes paid for each individual would be different not based on income, but based on one's actions.⁴⁶⁶ The current tax structure taxes people based on higher income or higher spending.⁴⁶⁷ The rationale is that the marginal benefit of an extra dollar of someone who makes a lot of money is much less than the marginal benefit of an extra dollar from someone who makes a near poverty wage.⁴⁶⁸ Therefore, taxing someone with a higher income at a higher rate does not greatly burden those taxpayers.⁴⁶⁹ Taxing someone with a lower income at a lower rate alleviates the strain of taxes for those taxpayers.⁴⁷⁰ The same is true for spending.⁴⁷¹ If an exaction from a mandate is considered a tax under Congress's broad Taxing Power, the policy behind the tax is no longer based on whether people can afford the tax but, instead, on whether they are following Congress's idea of what a citizen should do.⁴⁷² This opens the possibility of disproportionately

and the implementation of a new system of refundable tax credits in which workers could include health packages as taxable income to deal with the problem of the uninsured), with Carol K. Kane, Ph.D., *Physician Marketplace Report: The Impact of EMTALA on Physician Practices*, AMA Center for Health Policy Research (February 2003), available at www.ama-assn.org/ama1/pub/upload/mm/363/pmr2003-02.pdf (noting that emergency medicine physicians attributed sixty-one percent of their debt to costs relating to unreimbursed emergency care).

464. See *Liberty Univ., Inc. v. Geithner*, 671 F.3d 391, 416 (4th Cir. 2011) (Wynn, J., concurring) (reasoning that an exaction is a tax not because of its label but because of its purpose, which is to produce revenue), *cert. denied, sub nom. Liberty Univ. v. Geithner*, 2012 WL 2470099 (U.S. June 29, 2012).

465. This, of course, depends on the action an exaction depends on. If it is an action all individuals participate in (i.e. breathing), then everyone will be taxed the same way. However, if the action an exaction depends on is one in which participation is voluntary, some would have to pay while others would not. For example, driving is a voluntary activity, and therefore not everyone pays parking or speeding tickets. See *supra* notes 261–64 and accompanying text.

466. 26 U.S.C. § 5000A (2011) (requiring individuals who fail to purchase minimum essential insurance coverage to pay a certain sum to the IRS).

467. See INTERNAL REVENUE SERV., 2011 TAX TABLE (2011), available at <http://www.irs.gov/pub/irs-pdf/i1040tt.pdf>.

468. See Michael A. Livingston, *Blum and Kalven at 50: Progressive Taxation, "Globalization," and the New Millennium*, 4 FLA. TAX REV. 731, 745 n.30 (2000) ("It is easy to suppose that the utility of an additional dollar will be greater to a serf than to a lord.").

469. *Id.* (arguing that the wealthy have a greater taxpaying capacity and thus a greater responsibility to contribute to those less fortunate).

470. *Id.*

471. *Id.* at 745–46 (explaining that sales tax increases with spending and therefore follows the same payment structure as income tax).

472. *Florida ex rel. Att'y Gen. v. Dep't of Health & Human Servs.*, 648 F.3d 1235, 1351 (11th Cir. 2011) (Marcus, J., concurring in part and dissenting in part) (reasoning that upholding the mandate would allow the federal government to compel citizens to purchase and consume what it thinks its citizens should), *aff'd in part, rev'd in part, sub nom. Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012); see also *Florida ex rel. Bondi v. Dep't of Health & Human Servs.*, 780 F.Supp.2d 1256, 1289 (N.D. Fla. 2011) (noting the constitutional concerns surrounding the mandate because there are

burdening lower income tax payers, compelling them to act when they originally would not.⁴⁷³

The dynamics described above explain why it was important for Congress to create provisions exempting lower income individuals from being subject to the individual mandate exaction.⁴⁷⁴ It also explains why the Supreme Court found it necessary to limit the application of a penalty pursuant to Congress's Taxing Power only to penalties that have the same structure as an income tax (which takes into account the marginal differences between a lower income individual and a higher income individual).⁴⁷⁵ However, if the individual mandate was meant to compel the uninsured to purchase insurance, thus creating universal health coverage, can an individual mandate that has a limited enforcement power be compelling "enough" for the program to work?⁴⁷⁶ If the individual mandate is integral to the overall structure of what PPACA is trying to achieve, what happens to the other provisions that depend on it (i.e. banning denials for preexisting condition⁴⁷⁷) if the individual mandate fails to compel the uninsured to purchase insurance?

Finding the individual mandate is constitutional under the Taxing Power may have been a short-term victory for proponents of PPACA, but the long-term effects are still unknown.⁴⁷⁸ Furthermore, since individual mandates are only allowed under the Taxing Power provided that they have the enforcement power of taxes, they will inevitably be politically unpopular.⁴⁷⁹ In upholding the mandate under the Taxing Power, the Supreme Court may have essentially invalidated individual mandates as a viable tool for regulation by the federal government to regulate its people. In theory, opponents of PPACA might consider this a victory.

several markets that people cannot "opt out" of), *aff'd in part, rev'd in part, sub nom. Florida ex rel. Att'y Gen.*, 648 F.3d 1235.

473. *Florida ex rel. Att'y Gen.*, 648 F.3d at 1351 (Marcus, J., concurring in part and dissenting in part).

474. See *supra* text accompanying notes 448–57.

475. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2593–600 (2012).

476. See, e.g., Stephanie Condon, *Can Obama's Health Care Law Survive Without the Individual Mandate?*, CBSNEWS (Mar. 27, 2012, 2:39 PM), http://www.cbsnews.com/8301-503544_162-57404791-503544/can-obamas-health-care-law-survive-without-the-individual-mandate/ (questioning whether PPACA would have any enforcement power without the mandate).

477. *Id.*; 42 U.S.C. § 18001(d)(3) (2010) (noting that individuals with preexisting conditions would be covered by PPACA).

478. See generally Clark Neily, *Unintended Consequences*, SCOTUSBLOG (June 29, 2012, 9:54 AM), <http://www.scotusblog.com/2012/06/unintended-consequences> (noting that the effect of the Court's decision on the scope of federal power will not be immediately clear).

479. See generally KAISER PUBLIC OPINION, KAISER FAMILY FOUND., PUB. NO. 8296 (Mar. 2012), available at <http://www.kff.org/healthreform/upload/8296.pdf> (showing that the individual mandate is consistently the least popular portion of PPACA and that the mandate is disfavored by the general public two-to-one).

V. IMPLEMENTATION ISSUE: MEDICAID EXPANSION AND THE STATES

The federalism dimension is not only important in an analysis of individual mandates. It also is critical to the Medicaid expansion provisions of PPACA, and it represents one of the issues reviewed by the Supreme Court.⁴⁸⁰ Medicaid represents forty percent of all federal funds awarded to states and seven percent of all federal spending.⁴⁸¹

In this context, the Supreme Court examined a core issue: are the requirements of PPACA, with respect to Medicaid, “coercive” to the states and, therefore, incompatible with federalism, not consistent with the 10th amendment to the U.S. constitution?⁴⁸² In other words, the Court addressed the question of whether state sovereignty is violated by PPACA.⁴⁸³

As already noted, PPACA requires that states expand the Medicaid program by increasing income eligibility to 133% of the federal poverty level as of January 1, 2014.⁴⁸⁴ This greatly expands the program, and causes a significant increase in enrollment and expenditures.⁴⁸⁵ However, the most significant change for Medicaid is the extension of Medicaid eligibility to adults with low income, particularly childless adults.⁴⁸⁶ Currently, only five states offer full Medicaid benefits to childless adults.⁴⁸⁷

In the federalism context, these provisions call the “cooperative” nature of the Medicaid program into question.⁴⁸⁸ Can this program continue to be considered “cooperative” with the new federal requirements for the states?⁴⁸⁹ Under PPACA,

480. *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2601–09 (analyzing whether PPACA’s Medicaid expansion provisions are within Congress’s Spending Clause powers).

481. George Will, *A Supreme Obamacare Test*, WASH. POST (Jan. 20, 2012), http://www.washingtonpost.com/opinions/supreme-court-on-obamacare-something-to-argue-about/2012/01/20/gIQAYdjoEQ_story.html.

482. *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2601–09.

483. *Id.* at 2601–02.

484. 42 U.S.C. § 1396a (2011); *see also* Brian Blase, *Obamacare and Medicaid: Expanding a Broken Entitlement and Busting State Budgets*, HERITAGE FOUND., 1, 2 n.3 (Jan. 19, 2011), http://thf_media.s3.amazonaws.com/2011/pdf/wm3107.pdf (explaining that the reconciliation bill effectively raised the eligibility to one hundred and thirty-eight percent of the federal poverty level).

485. Blase, *supra* note 484.

486. 42 U.S.C. § 1396a (2011); *see generally* LYNDIA FLOWERS, AARP PUB. POL’Y INST., FACT SHEET NO. 185, HEALTH REFORM PROVIDES NEW FEDERAL MONEY TO HELP STATES EXPAND MEDICAID (2010), *available at* <http://assets.aarp.org/rgcenter/ppi/health-care/fs185-health-reform.pdf> (noting that approximately eighty percent of the new enrollees covered by the Medicaid expansion will be childless adults).

487. *See* INST. OF GOV’T & PUB. AFF., STATE SUMMIT REPORT ON MEDICAID 6 (2010), *available at* <http://igpa.uillinois.edu/system/files/state-summit-report-on-medicaid.pdf>.

488. *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2601–09 (analyzing whether the Medicaid expansion provision of PPACA coerces states to implement changes to the Medicaid program by withholding funding).

489. *Id.*

the federal government will pay for the increased costs of Medicaid up to the year 2016; by 2020, states are required to pay ten percent of the expansion.⁴⁹⁰

This expansion is in addition to the growth in Medicaid enrollment by nearly 6 million from December 2007 to December 2009.⁴⁹¹ Medicaid enrollment has lagged behind Medicaid spending, which is consistent with the fact that health insurance premiums have grown at a much quicker rate than inflation and savings.⁴⁹² As part of the American Recovery and Reinvestment Act (ARRA), states received “enhanced” federal Medicaid matching funds and used these funds to Medicaid general fund expenditures in FY 2009 and FY 2010.⁴⁹³ At the same time, ARRA prohibited states from reducing eligibility for Medicaid.⁴⁹⁴ Stimulus dollars though ARRA no longer added revenue to the Medicaid program as of June of 2011.⁴⁹⁵ But the requirements that prohibited states from reducing eligibility are now incorporated into PPACA.⁴⁹⁶

Another key feature of PPACA with respect to Medicaid is the “maintenance of effort” requirement, which stipulates that:

a state shall not have in effect eligibility standards, methodologies, or procedures under the State plan under the title or under any waiver of such plan that is in effect during that period, that are more restrictive than the eligibility standards, methodologies, or procedures, respectively, under the plan or waiver that are in effect on the date of enrollment of the Patient Protection and Affordable Care Act.⁴⁹⁷

In other words, PPACA requires that states continue their current Medicaid and State Children’s Health Insurance Program eligibility levels in order to receive any federal dollars for their programs.⁴⁹⁸ This requirement is designed to prevent states from reducing enrollment in their Medicaid programs and pushing low-income residents into the federally mandated and funded insurance exchanges.⁴⁹⁹ States are also prohibited from imposing new paperwork and other barriers that would make it more difficult for people to enroll in Medicaid or SCHIP.⁵⁰⁰ States that do not meet these requirements will be considered to be “noncompliant” and

490. Will, *supra* note 481.

491. KAISER COMM’N ON MEDICAID AND THE UNINSURED, KAISER FAMILY FOUND., PUB. NO. 8050-04, MEDICAID ENROLLMENT: DECEMBER 2010 DATA SNAPSHOT 1 fig.1 (2011), *available at* <http://www.kff.org/medicaid/upload/8050-04.pdf>.

492. INST. OF GOV’T & PUB. AFF., *supra* note 487, at 5.

493. American Recovery and Reinvestment Act of 2009 §§ 5000–5001, 42 U.S.C. § 1396(a), (d) (2011).

494. 42 U.S.C. § 1396(f).

495. *Id.*

496. Patient Protection and Affordable Care Act § 10201(a)(4)(cc), 42 U.S.C. § 1396a (2011).

497. 42 U.S.C. § 1396a(gg) (2011).

498. 42 U.S.C. § 1396w–3 (2011).

499. *Id.*

500. 42 U.S.C. § 1396w–3(b).

can, therefore, be denied all Medicaid funds.⁵⁰¹ This would cripple states for which Medicaid already represents the largest single expenditure in their state budgets.⁵⁰² For example, twenty-six percent of Florida's budget is devoted to Medicaid.⁵⁰³ If Florida lost federal funds, sixty percent of all state revenue would need to be devoted to Medicaid to maintain pre-PPACA levels of care.⁵⁰⁴

This requirement is particularly problematic for states that have expanded eligibility beyond the federally mandated level.⁵⁰⁵ These "maintenance of effort" requirements will be in effect for adults through January of 2014, when the new insurance exchanges are operational, and for children through September of 2019.⁵⁰⁶

PPACA seems to handcuff the states in terms of what they can do to address budget deficits by reforming Medicaid.⁵⁰⁷ Because of the requirements of PPACA, states have very little freedom in terms of cutting eligibility and benefits.⁵⁰⁸ Many states feel that this is an unfunded mandate designed to decrease the number of uninsured individuals and increase the number of individuals who have their health insurance through Medicaid.⁵⁰⁹ In addition, as outlined in the previous section of this article, some states feel that these Medicaid provisions are additional "proof" that the Act is a violation of the 10th Amendment of the Constitution and that it reduces the historical flexibility of the states with respect to regulation of health insurance programs.⁵¹⁰

The Supreme Court ultimately found that § 1396c, the provision that allows the federal government to withdraw its Medicaid funding if a state does not participate in the Medicaid expansion, is unconstitutional, and invalidated that portion.⁵¹¹ The Supreme Court did not invalidate the whole act due to the unconstitutionality of § 1396c.⁵¹² In order to invalidate the entire act, the Court must

501. 42 U.S.C. § 1396w-3(a).

502. Will, *supra* note 481 (noting that Medicaid costs comprise the majority of state budgets and that states are left with no choice but to participate in because it would leave millions of poor residents without affordable care).

503. Will, *supra* note 481.

504. Will, *supra* note 481.

505. *See supra* text accompanying notes 481-87.

506. 42 U.S.C. § 1396a (2011).

507. Will, *supra* note 481.

508. Will, *supra* note 481.

509. *See* S. FIN. COMM. AND H. ENERGY & COMMERCE COMM., 112TH CONG., REP. ON EXPANSION IN THE NEW HEALTH LAW: COSTS TO THE STATES 2 (Joint Rep. 2011) (prepared by Sen. Orrin Hatch, Ranking Member, S. Fin. Comm. and Rep. Fred Upton, Chairman, H. Energy & Commerce Comm.), available at <http://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/analysis/20110301medicaid.pdf> (noting that several states, including California and Texas, have issued reports finding that PPACA's Medicaid mandates requires unprecedented spending that could bankrupt states).

510. *See supra* text accompanying notes 488-506.

511. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2607 (2012).

512. *Id.* at 2608.

ask whether Congress would have wanted the rest of the Act to stand alone without the unconstitutional provision.⁵¹³ If yes, then the rest of the act must stay.⁵¹⁴ If not, then the entire act must be invalidated.⁵¹⁵ The Supreme Court stated that they “are confident that Congress would have wanted to preserve the rest of the Act. It is fair to say that Congress assumed that every State would participate in the Medicaid expansion, given that States had no real choice but to do so.”⁵¹⁶

The Supreme Court found § 1396c unconstitutional because it interpreted Congress’s Taxing and Spending power to be limited to creating incentives, not exerting some form of inducement (to the point of coercion).⁵¹⁷ The Supreme Court considered § 1396c to be coercive, stating: “[i]n this case, the financial “inducement” Congress has chosen is much more than “relatively mild encouragement”—it is a gun to the head.”⁵¹⁸ It looked to the fact that the *entire* existing Medicaid funding would be at stake if States did not comply with the Medicaid Expansion.⁵¹⁹ The fear in the federalism context was that it would undermine states’ statuses as independent sovereigns over their people.⁵²⁰

Nevertheless, the Supreme Court emphasized that although the withdrawal of existing Medicaid funding to induce participation in the Medicaid Expansion was unconstitutional, incentives in the form of offering funds that states could accept or reject is still within Congress’s Spending power.⁵²¹ This holding relied on the notion that withdrawal of existing funds constitutes a penalty more than an incentive.⁵²²

In the simplest terms, if prior to *National Federation*, Congress was free to use a “Carrot or a Stick approach” with its Taxing and Spending Power, the Supreme Court’s decision limited it to “Carrots only.”⁵²³ After *National*

513. *Id.* at 2607.

514. *Id.* (citing *Champlin Refining Co. v. Corporation Comm'n of Oklahoma*, 286 U.S. 210, 234 (1932)) (“Unless it is ‘evident’ that the answer is no, we must leave the rest of the Act intact.”).

515. *Id.*

516. *Id.* at 2608.

517. *Id.* at 2607 (noting that Congress can promote state participation in the new program by offering additional funds to states who participate, but that Congress does not have the authority to penalize states who chose not to participate by taking away existing Medicaid funding).

518. *Id.* at 2604.

519. *Id.* (citing *South Dakota v. Dole*, 483 U.S. 203, 211 (1987)).

520. *Id.* at 2602.

521. *Id.* at 2607.

522. *Id.*

523. *Id.* (remarking that Congress can offer states funding for new programs to expand access to health care and place conditions on that funding but that Congress cannot take away states’ existing Medicaid funding as a penalty for not participating in the new program). “Carrot or stick approaches” are methods used to induce cooperation either by providing position incentives, a “carrot” approach,” or by threatening harsher outcomes, a “stick” approach. See Kathleen Segerson & Thomas Miceli, *Voluntary Environmental Agreements: Good or Bad News for Environmental Protection?*, J. ENVTL. ECON. & MGMT. 109, 110 (1998) (discussing carrot and stick approaches used in the context of environmental regulation as a way to reduce pollution levels).

Federation, Congress may no longer use withdrawal of existing funding to induce state compliance with federal laws.⁵²⁴ Congress has one less enforcement tool in their effort to effect national change.⁵²⁵ Unanimous state participation in the Medicaid expansion was a critical component of the complex PPACA regime to provide universal health coverage for all Americans.⁵²⁶ If a threat to withdraw all existing funding in a program is considered too “coercive,” and Congress is only allowed to offer financial “incentives,” is there anything Congress can do that will both guarantee unanimous State participation in its program while having it be constitutional? Is Congress therefore, by definition, unable to craft solutions that require unanimous state participation? Or perhaps this is the main source of the Supreme Court’s concern for the integrity of federalism.⁵²⁷ If Congress requires unanimous state participation and enacts a law to guarantee it, is it possible that this act is *the* definition of “coercive”? In the context of federalism, it would imply that all solutions under a dual system of government must allow independent sovereigns to reject that solution even if full unanimity is required for the solution to be effective.⁵²⁸

VI. FEDERALISM ADDRESSED DIRECTLY

Much of the debate has revolved around the Commerce Clause and Taxing Power issues.⁵²⁹ However, there has been a consistent presence of federalism issues throughout the debate over the constitutionality of the mandate.⁵³⁰ This paper argues that differences over federalism are fundamental to the controversy over this legislation and at the heart of the Supreme Court decision.⁵³¹ In fact, the Supreme Court began its opinion with a broad overview of the importance of federalism, addressing who should be in charge of policy for the citizens’ health, as well as whether this a state/local problem or a national problem and if the solution should be state/local in nature or national in nature.⁵³² Although the health care coverage

524. *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2606–07.

525. *Id.*

526. *Id.* at 2665 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (noting that Congress did not contemplate that states would be able to refuse compliance with the Medicaid expansion provisions when it enacted PPACA).

527. *Id.* at 2606 (refusing to establish a specific line after which Congressional “persuasion gives way to coercion”).

528. *See supra* text accompanying notes 507–10.

529. *See supra* text accompanying notes 83–98.

530. *See supra* Part IV.D (examining the mandate’s broad implications for federalism).

531. *See supra* Part V (discussing implementation issues surrounding PPACA’s Medicaid provision with a focus on federalism); *see also infra* notes 532–58 and accompanying text.

532. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. at 2577–80 (2012). (commenting on the federalism concerns surrounding PPACA’s mandate and Medicaid expansion provisions and whether the federal government or individual states should dictate policy for citizen’s healthcare).

debate centers on Congress's Commerce and Taxing and Spending powers, these are ultimately questions that will define the structure of our dual sovereignty.⁵³³

Interestingly, there were some litigated cases where the federalism issue was directly addressed.⁵³⁴ On the same day President Obama signed PPACA into law, the Governor of Virginia filed the case of *Virginia ex rel. Cuccinelli v. Sebelius*; he signed the Virginia Health Care Freedom Act (VHCFA) the following day.⁵³⁵ The VHCFA states that “[n]o resident of this Commonwealth. . . shall be required to obtain or maintain a policy of individual insurance coverage.”⁵³⁶ Traditionally, individual state constitutions may give their citizens more rights than what the federal constitution offers.⁵³⁷ State constitutions may not remove rights given in the federal constitution.⁵³⁸ The VHCFA was phrased in such a way that it appeared to confer its citizen more rights than what the federal constitution offered.⁵³⁹ Therefore, the question was whether such a statute in direct conflict with a federal law could be passed for the purpose of overriding federal law.⁵⁴⁰ The Commonwealth of Virginia brought an action against the Secretary of the Health and Human Services Department (HHS) challenging the constitutionality of the individual mandate based on the presence of VHCFA.⁵⁴¹

The Fourth Circuit found that the Commonwealth of Virginia did not have standing to challenge the constitutionality of the individual mandate because Virginia did not suffer “injury in fact,” which is one of three elements to demonstrate a “case” or “controversy.”⁵⁴² The Fourth Circuit stated:

the mere existence of a state law like the VHCFA does not license a state to mount a judicial challenge to any federal statute with which the state law assertedly conflicts. Rather, only when a federal law interferes with a state's exercise of its sovereign “power to create and enforce a legal code” does it inflict on the state the requisite injury-in-fact.⁵⁴³

533. *Id.*

534. *See, e.g., Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253, 268 (4th Cir. 2011) (discussing Virginia's basis for standing to challenge the mandate on the grounds that the provision violated the state's sovereign rights), *cert. denied*, 2012 WL 2470098 (U.S. June 29, 2012).

535. *Id.* at 267.

536. VA. CODE ANN. § 38.2–3430.1:1 (2010).

537. U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

538. *Id.*

539. *See Virginia ex rel. Cuccinelli*, 656 F.3d at 270 (“[T]he VHCFA reflects no exercise of ‘sovereign power,’ for Virginia lacks the sovereign authority to nullify federal law.”).

540. *Id.* at 269.

541. *Id.* at 267.

542. *Id.* at 268, 272.

543. *Id.* at 269 (citing *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 601 (1982)).

The Fourth Circuit went on to say that the VHCFA does not regulate anything and there is nothing to enforce.⁵⁴⁴ If Virginia is not exerting its sovereign power, then there is no genuine conflict with the individual mandate and, therefore, there is no injury-in-fact.⁵⁴⁵ The Fourth Circuit also pointed out that “[t]he only apparent function of the VHCFA is to declare Virginia’s opposition to a federal insurance mandate.”⁵⁴⁶ Finally, a crucial policy argument against allowing the VHCFA to confer standing to Virginia is that if it were allowed, a state could acquire standing merely by enacting a statute that negated a federal law; it would, “convert the federal judiciary into a ‘forum’ for the vindication of a state’s ‘generalized grievances about the conduct of government.’”⁵⁴⁷

This argument is reasonable to the extent that allowing a law like VHCFA to conflict with PPACA would destroy the federalist structure of our government.⁵⁴⁸ If VHCFA were allowed, states could simply pass a law that directly countered a federal law just to bring a challenge to the court.⁵⁴⁹ The state’s power to challenge the federal government would be limitless.⁵⁵⁰ However, such an argument does not solve the major question of distinguishing what is truly national from what is truly local.⁵⁵¹ This is especially difficult for the health care market.⁵⁵² The health insurance market is under state sovereignty due to the McCarren-Ferguson act, which sequestered insurance regulation to the states.⁵⁵³ However, the health insurance market has become such a critical and integral component of the health care market that the national crisis of the health care market will undoubtedly affect the health insurance market.⁵⁵⁴ The problem is certainly national in nature but the

544. *Id.* at 271.

545. *Id.* at 268 (“Virginia must demonstrate that the individual mandate in the Affordable Care Act ‘inva[des]’ its ‘legally protected interest,’ in a manner that is both ‘concrete and particularized’ and ‘actual or imminent.’”) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

546. *Id.* at 270.

547. *Id.* at 271 (quoting *Flast v. Cohen*, 392 U.S. 83, 106 (1968)).

548. *Id.* at 272 (citation omitted) (reasoning that adopting Virginia’s standing theory would allow states to challenge any issue in federal court regardless of how generalized or political the issue).

549. *Id.*

550. *Id.* at 272.

551. *Id.* at 272–73 (refraining from analyzing the underlying federalism concerns surrounding the mandate because of the standing issue).

552. *See supra* Part III.B.2.

553. *See* McCarren-Ferguson Act, 15 U.S.C. §§ 1011–1015 (2011) (exempting the business of insurance regulation from federal regulation and keeping it solely within the state’s powers to regulate).

554. Most Americans have health insurance, which is their primary means of acquiring their health care services. *See* Les Christie, *Number of People Without Health Insurance Climbs*, CNNMONEY (Sept. 13, 2011, 5:22 PM), http://money.cnn.com/2011/09/13/news/economy/census_bureau_health_insurance/index.htm (implying that 83.7% of Americans are insured). Thus, a discussion of health care services necessarily entails a discussion of health insurance. *Id.*

solution involves the health insurance market, something traditionally within the state's powers.⁵⁵⁵

VII. WHAT TO EXPECT IN THE FUTURE

Beyond the issues of mandates and the expanded role of the states through Medicaid and SCHIP, the other critical implementation issue is the future of an expanded regulatory role for the federal government.⁵⁵⁶ In a move designed to assuage concerns over the expanded role of the federal government, in February of 2011 President Obama told the National Governors Association that he would be willing to allow states to obtain waivers from the controversial elements of the health care legislation, including the individual mandate, as soon as the law went into effect in 2014.⁵⁵⁷ This is an acceleration of previous waiver exemptions which would have started in 2017.⁵⁵⁸ It is also a recognition of the underlying concerns driving the health law legislation.⁵⁵⁹

Despite this olive branch, states will still have to apply for and be granted the waivers, leaving them at the mercy of federal determination for the waiver and the federal government requirements, which creates an expanded role for the federal government.⁵⁶⁰ This expanded role will manifest itself in a number of ways: (a) changes to the Medicare program and how it is financed; the Medicare tax rate will increase by 0.9%—from 1.45% to 2.35%—on earnings over \$200,000 for individuals and \$250,000 for families. In addition, a 3.8% Medicare tax would be imposed on unearned income;⁵⁶¹ (b) state health insurance exchanges will be created;⁵⁶² (c) the rules and procedures for operation will be regulated by the federal government;⁵⁶³ (d) federal subsidies are provided to off-set the high costs of health insurance and to, thereby, provide greater access to health insurance. These subsidies vary according to household income to offset the cost of purchasing health insurance for American citizens and legal residents who qualify;⁵⁶⁴ (e) regulation on the flexibility of private insurance companies to raise premiums and requirements of insurance companies to pay a “tax” to help finance the overall

555. See 15 U.S.C. §§ 1011–15 (exempting the business of insurance regulation from federal regulation and keeping it solely within the state's powers to regulate).

556. See *infra* notes 560–70 and accompanying text.

557. Sheryl Gay Stolberg & Kevin Sack, *Obama Backs Easing State Health Law Mandates*, N.Y. TIMES, Mar. 1, 2011, at A1.

558. *Id.*

559. See *id.* (commenting that President Obama's announcement to allow states to opt out of the mandate under certain conditions came amidst controversy surrounding the mandate in courts and prior to the election).

560. See 42 U.S.C. § 18052 (2011) (detailing the process for obtaining a waiver).

561. See 26 U.S.C. § 1411 (2011) (effective Jan. 1, 2013) (explaining the Medicare tax).

562. 42 U.S.C. § 1396w–3 (2011) (effective Jan. 1, 2014).

563. Patient Protection and Affordable Care Act, Pub. L. No. 111-148 § 9008(f)(1), 10202 (c)(3)–(4), §10322 (a)(4)(E), 124 Stat. 119, 868 (2010) (to be codified in scattered sections of 42 U.S.C.).

564. See 26 U.S.C. § 36B (2011) (detailing the provisions for tax credits under PPACA).

program. Insurance companies will be required to provide rebates to enrollees if they spend less than eighty-five percent of premium dollars collected on health care as opposed to administrative costs.⁵⁶⁵ In addition, an annual fee of eight billion dollars will be imposed on health insurance companies.⁵⁶⁶ The annual fee on insurance companies will increase to \$11.3 billion.⁵⁶⁷ This is designed to help finance the overall program;⁵⁶⁸ (f) strong regulation of pharmaceutical companies to help insure that health care costs are affordable;⁵⁶⁹ and (g) a forty percent excise tax is imposed on health care plans that cost more than \$10,200 for individual coverage and \$27,500 for family coverage.⁵⁷⁰

Taken as a whole, PPACA is a landmark piece of legislation from the perspective of the organization and financing of the American health insurance and the health care delivery system. As outlined in this article, the implementation strategies for this far-reaching legislation are complex and controversial.⁵⁷¹ The legal controversy centers around questions of the appropriate scope and breadth of federal and state governments' roles in the design, delivery, and financing of health care in the United States. The controversy is also focused on questions of appropriate regulation of the insurance and pharmaceutical industries. The legislation establishes health care as a "legal right" for the vast majority of Americans for the first time in United States history.⁵⁷² It also recognizes that if we, as a society, are to increase access to health insurance for an additional 31 million Americans, then this can only be done (from a financial perspective) if everyone is required to obtain health insurance.⁵⁷³ Moreover, the legislation is also a landmark in increasing the role of the federal government in regulating health insurance and thereby displacing the states as the primary regulators.⁵⁷⁴

565. Large group plan insurers must provide an 85 percent rebate; small group or individual plan insurers must provide an 80 percent rebate. 42 U.S.C. § 300gg-18 (2011).

566. *See supra* note 60 and accompanying text.

567. *Id.*

568. *See* 42 U.S.C. § 300gg-18 (2011) (describing the purpose of lowering the cost of health care coverage).

569. *See, e.g.,* Patient Protection and Affordable Care Act, Pub. L. No. 111-148 § 9008 (to be codified in scattered sections of 42 U.S.C.).

570. 26 U.S.C. § 4980I (2011).

571. *See supra* Parts III-V.

572. *See supra* Parts III-V. It is a legal "right" to the extent that all Americans can enforce their rights and PPACA creates a society where all Americans must have health insurance. *See* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), *amended by* Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010) (codified as amended in scattered sections of 26 and 42 U.S.C.).

573. *See* DAVID AUERBACH ET AL., CONG. BUDGET OFF, WORKING PAPER NO. 2010-05, WILL HEALTH INSURANCE MANDATES INCREASE COVERAGE? SYNTHESIZING PERSPECTIVES FROM THE LITERATURE IN HEALTH ECONOMICS, TAX COMPLIANCE, AND BEHAVIORAL ECONOMICS 1 (2010), *available at* http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/116xx/doc11634/working_paper_2010-05-health_insurance_mandate.pdf (estimating that the amount of uninsured will drop by more than 30 million people).

574. *See supra* notes 30-37 and accompanying text.

Following the 2012 election, based upon the political rancor, Congress will likely take up questions related to the future of this legislation.⁵⁷⁵ A House of Representatives vote to repeal the legislation in Congress was symbolic but did not have an operational impact.⁵⁷⁶ However, with an implementation schedule that stretches over at least eight years, PPACA's controversial provisions will be affected by the Supreme Court's decision regarding the individual Mandate and Medicaid expansion, future congressional financing of the Act, federal and state regulatory initiatives, and future national elections.⁵⁷⁷

Inevitably, we may find any attempt by Congress to dispute PPACA to be a pox on both their houses. Republicans have vowed to repeal parts of the legislation deemed unpopular while saving the more popular parts, such as the insurance reforms eliminating pre-existing condition clauses.⁵⁷⁸ Yet, these reforms cannot be executed without the individual mandate.⁵⁷⁹ To validate one provision without the other is to invite the dissolution of the insurance market⁵⁸⁰ and may be political suicide.

Even in light of the Supreme Court decision, major implementation controversies will continue and the ultimate outcome for our health insurance and health care delivery system is uncertain.⁵⁸¹ The implementation challenges associated with this legislation represent an important new chapter in the areas of jurisprudence focused on federalism.

575. See *President Obama Vows to Veto PPACA Repeal*, AM. SOC. OF ANESTHESIOLOGISTS (Jan. 7, 2011), <http://www.asahq.org/For-Members/Advocacy/Washington-Alerts/President-Obama-Vows-to-Veto-PPACA-Repeal.aspx> (noting that President Obama vowed to veto any attempts to repeal PPACA); Kathryn Mayer, *Romney Slams PPACA, Vows to Repeal it*, BENEFITSPRO (June 28, 2012), <http://www.benefitspro.com/2012/06/28/romney-slams-ppaca-vows-to-repeal-it> (explaining former presidential candidate Romney's stance on PPACA and his vow to repeal it if elected).

576. Repealing the Job-Killing Health Care Law Act, H.R. 422, 112th Cong. (as passed by House of Representatives, Jan. 19, 2011).

577. See *supra* Part III.

578. See, e.g., Jonathan Easley, *Romney: Repeal Health Law, Keep Pre-existing Conditions Clause*, THE HILL (June 12, 2012, 10:02 AM), <http://thehill.com/blogs/healthwatch/politics-elections/232225-romney-repeal-health-law-but-keep-some-pre-existing-coverage> (noting Romney's statement that he would repeal the law if elected, but would replace it with a law that included coverage for individuals with pre-existing conditions).

579. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2613–14 (2012) (Ginsburg, J., concurring).

580. Banning insurance companies from denying patients with preexisting conditions will increase the cost of insurance since these patients are more costly to cover. This cost was meant to be offset by the individual mandate. Without the individual mandate, the cost increase will remain yet the mechanism meant to reduce this cost increase would be lost. See Robert Pear & Abby Goodnough, *It Will Be Tricky for Romney to Keep Best of Health Law While Repealing It*, N.Y. TIMES, Sept. 11, 2012, at A11 (detailing Romney's proposal to get rid of the individual mandate while maintaining provisions that would ensure insurance for those with pre-existing conditions).

581. See generally *Ten Strategic Considerations of the Supreme Court Upholding PPACA*, MILLIMAN (June 29, 2012), <http://insight.milliman.com/article.php?cntid=8113> (describing the impact of the Supreme Court's decision to uphold PPACA and the uncertainty surrounding the legislation's implementation).

VIII. CONCLUSION

Healthcare reform has been a source of great disagreement over the past few decades causing a massive political divide between republicans and democrats.⁵⁸² PPACA represents landmark legislation that sought to make universal healthcare a reality.⁵⁸³ Proponents applauded it for its comprehensive and dynamic set up.⁵⁸⁴ Opponents opposed it for its controversial components: the individual mandate and Medicaid expansion.⁵⁸⁵ They brought their contention to federal courts and reached the Supreme Court.⁵⁸⁶ The Supreme Court resolved a set of critical federalism related issues pertaining to PPACA which the district and circuit courts differed on and which we have summarized in this paper.⁵⁸⁷ Although the political divide over healthcare reform centers on what healthcare “should” look like from a policy standpoint, the key implementation issues of PPACA, and consequently, any healthcare reform in the future, will fundamentally have to be discussed in the context of federalism.⁵⁸⁸

582. See *supra* Part II.

583. See *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2580 (noting that Congress's goal in enacting PPACA was to ensure that more Americans have health insurance).

584. See, e.g., Gwendolyn Roberts Majette, *PPACA and Public Health: Creating a Framework to Focus on Prevention and Wellness and Improve the Public's Health*, 39 J.L. MED. & ETHICS 366, 375 (2011) (noting that PPACA fills gaps in current federal health law by focusing on “prevention and wellness”).

585. See *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2577.

586. *Id.*

587. See *supra* Parts IV–VI.

588. See *supra* Parts V–VI.