

## Article

# FOUR CONSTITUTIONAL LIMITS THAT THE MINIMUM COVERAGE PROVISION RESPECTS

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*JUSTICE O’CONNOR: If this is covered, what’s left of enumerated powers? What is there that Congress could not do, under this rubric, if you are correct?*

*GENERAL DAYS: Justice O’Connor, that certainly is a question that one might ask, but this Court has asked that question in a number of other circumstances, and rather than starting from the assumption that something was inherently local, it’s looked at the degree to which Congress had a reasonable basis for extending its authority under the commerce power to regulate that particular activity.<sup>1</sup>*

## INTRODUCTION

The minimum coverage provision in the Patient Protection and Affordable Care Act (ACA)<sup>2</sup> requires most people lawfully living in the United States to obtain a certain level of health insurance coverage or pay a certain amount of money each year.<sup>3</sup> Constitutional critics of this “individual mandate” fall into two

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1. Transcript of Oral Argument at 4, *United States v. Lopez*, 514 U.S. 549 (1995) (No. 93-1260), available at [http://www.oyez.org/cases/1990-1999/1994/1994\\_93\\_1260/argument/](http://www.oyez.org/cases/1990-1999/1994/1994_93_1260/argument/).

2. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010); see also Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029.

3. 26 U.S.C.A. § 5000A (West 2010). The minimum coverage provision goes into effect on January 1, 2014.

categories. Some critics make the sweeping assertion that if Congress can impose a mandate to obtain health insurance coverage, then Congress can impose any mandate—indeed, any Commerce Clause regulation—it wants on Americans, so that there is nothing left of the constitutional principle of a national government of limited, enumerated powers. Less implausibly, other critics insist that even if upholding the minimum coverage provision would not mean Congress could impose any mandate or other regulation it wants on Americans, Congress could at least impose whatever “economic” mandates it wants, including federal requirements to purchase specific kinds and quantities of food, transportation, housing, and insurance.

Supporters of the ACA tend to defend the minimum coverage provision by showing that its constitutionality follows from a correct application of contemporary doctrine concerning the Commerce Clause, the Necessary and Proper Clause, or the tax power.<sup>4</sup> These demonstrations are sufficiently persuasive that a number of prominent conservative jurists or scholars have deemed decisive at least one doctrinal argument in favor of the minimum coverage provision.<sup>5</sup> The Supreme Court of the United States, however, can change the governing doctrine. Accordingly, such demonstrations alone may not suffice to persuade five Justices to uphold the minimum coverage provision. For the provision to survive the Court’s likely review in the wake of its invalidation by the United States Court of Appeals for the Eleventh Circuit,<sup>6</sup> defenders of the ACA’s

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4. See, e.g., Erwin Chemerinsky, *Political Ideology and Constitutional Decision-Making: The Coming Example of the Affordable Care Act*, 75 L. & CONTEMP. PROBS., no. 3 (forthcoming 2012); Mark A. Hall, *Commerce Clause Challenges to Health Care Reform*, 159 U. PENN. L. REV. 1825 (2011); Neil S. Siegel, *Free Riding on Benevolence: Collective Action Federalism and the Minimum Coverage Provision*, 75 L. & CONTEMP. PROBS., no. 3 (forthcoming 2012); Laurence H. Tribe, *The limits of intuition*, SCOTUSBLOG (Aug. 4, 2011, 2:56 PM), <http://www.scotusblog.com/2011/08/the-limits-of-intuition/>.

5. These judges or scholars have concluded that the minimum coverage provision is within the scope of the Commerce Clause or the Necessary and Proper Clause. See, e.g., *Seven-Sky v. Holder*, No. 11-5047 (D.C. Cir. Nov. 8, 2011) (majority opinion of Silberman, J.); *Thomas More Law Ctr. v. Obama*, No. 10-2388, at 27 (6th Cir. June 29, 2011) (Sutton, J., concurring in part and delivering the opinion of the court in part); *Constitutionality of the Affordable Care Act: Before the S. Comm. on the Judiciary*, 112th Cong. at 4 (Feb. 2, 2011) (statement of Charles Fried, Beneficial Professor of Law, Harvard Law School), <http://judiciary.senate.gov/pdf/11-02-02%20Fried%20Testimony.pdf>; Orin Kerr, *Some Tentative Thoughts on the Constitutionality of the Individual Mandate Under Current Supreme Court Doctrine*, THE VOLOKH CONSPIRACY (Oct. 6, 2010, 2:25 AM), <http://volokh.com/2010/10/06/some-tentative-thoughts-on-the-constitutionality-of-the-individual-mandate-under-current-supreme-court-doctrine/>.

6. A grant of certiorari is now likely both because a federal court of appeals has invalidated an important provision of federal law, and because there is a circuit split on

constitutionality may need to identify principled, judicially enforceable limits on the scope of Congress's enumerated powers that the minimum coverage provision respects.<sup>7</sup>

So far, however, the federal government's briefs shy away from endorsing specific limits on the Commerce Clause beyond what the Supreme Court itself has identified.<sup>8</sup> If anxiety about unlimited federal power attracts the attention of five Justices, they will take a hard look at what the government's limiting principles are.

The present situation brings to mind the oral argument in *United States v. Lopez*.<sup>9</sup> The Justices asked Solicitor General Drew Days a series of direct questions about the limits of the Commerce Clause. In response, General Days was unable or unwilling to identify a single hypothetical regulation that was beyond the scope of the commerce power.<sup>10</sup> Folk lore has it that

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an important question of federal law. *See* U.S. SUP. CT. RULE 10. *Compare* Seven-Sky v. Holder, No. 11-5047 (D.C. Cir. Nov. 8, 2011) (upholding minimum coverage provision as within the scope of Congress's enumerated powers), *and* Thomas More Law Ctr. v. Obama, No. 10-2388, at 28 (6th Cir. June 29, 2011) (same), *with* Florida *ex rel.* Att'y Gen. v. U.S. Dep't Health & Human Servs., 648 F.3d 1235, 1282 (11th Cir. 2011) (invalidating the minimum coverage provision as beyond the scope of Congress's enumerated powers).

7. The United States Court of Appeals for the Fourth Circuit ruled for the federal government on jurisdictional grounds. *See* Liberty Univ., Inc. v. Geithner, No. 10-2347, 2011 WL 3962915 (4th Cir. Sept. 8, 2011) (holding that the federal tax Anti-Injunction Act (AIA) bars the action); Virginia *ex rel.* Cuccinelli v. Sebelius, Nos. 11-1057, 11-1058, 2011 WL 3925617 (4th Cir. Sept. 8, 2011) (holding that Virginia lacks Article III standing to bring the action). Other courts have disagreed with the Fourth Circuit's conclusion that the AIA bars pre-enforcement challenges to the minimum coverage provision. The Supreme Court's view of the question will determine whether it reaches the merits.

8. *Accord* Adam Winkler, *Gotcha*, SCOTUSBLOG (Aug. 5, 2011, 9:16 AM), <http://www.scotusblog.com/2011/08/gotcha/> ("One searches in vain for a persuasive answer to the 'gotcha' question in the briefs filed by the government in the ACA cases winding their way through the federal courts. They all argue that the mandate is well within Congress's power, while offering few clues as to what are the practical and theoretical limits to that power.").

9. 514 U.S. 549 (1995).

10. *See* Transcript of Oral Argument, *United States v. Lopez*, *supra* note 1 and accompanying text. For strike two, *see id.* at 4-5:

CHIEF JUSTICE REHNQUIST: Well, what would be—if this case is—Congress can reach under the interstate commerce power, what would be an example of a case which you couldn't reach?

GENERAL DAYS: Well, Your Honor, I'm not prepared to speculate generally, but this Court has found that Congress, for example, . . . could not require New York State to carry out certain responsibilities, because it was commandeering the instrumentalities of the State.

JUSTICE KENNEDY: Well, the objection there was that it was objecting the State governmental machinery to operate in a certain way. The question here, it seems to me, is quite different. The question here is the universe of transactions that the Congress may reach.

his nonresponsive answers contributed to the federal government's 5-4 loss.<sup>11</sup> Whether or not that is true, his exchanges with the Court could not have helped the government's case.<sup>12</sup>

In this essay, I identify four principled and judicially enforceable limits on the scope of the Commerce Clause that counsel upholding the constitutionality of the minimum coverage provision in the ACA. Under the restrictions imposed by these limits, Congress may not use its commerce power: (1) to regulate noneconomic subject matter; (2) to impose a regulation that violates constitutional rights, including the right to bodily integrity; (3) to regulate at all, including by imposing a mandate, unless it reasonably believes that the regulation will ameliorate a significant collective action problem involving multiple states; or (4) to impose an economic mandate unless it reasonably believes that other regulatory means would be less effective or more coercive.

The first two limits are firmly established in the jurisprudence of the Supreme Court. The third limit has been developed by an increasing number of scholars whose work understands the Commerce Clause in light of the collective action problems that the nation faced under the Articles of Confederation, when Congress lacked the power to regulate

GENERAL DAYS: Yes.

11. For strike three, see *id.* at 20:

JUSTICE GINSBURG: What are the limits, then? You said . . . all of violent crime could come within it. You're not making the distinction between concurrent jurisdiction and displacing the State authority, so what is the check? How would you describe the check that the Court has?

GENERAL DAYS: Well, I'm perhaps left to repeat myself in some respects. This Court has never said that there are absolute limits to the exercise of the commerce power. It's looked at individual cases and tried to determine, exercising—

JUSTICE GINSBURG: What would be a case that would fall outside, other than the one that you—the nuclear waste, telling the State, in effect, you serve as Federal official for this purpose?

GENERAL DAYS: I don't have—

JUSTICE SCALIA: Don't give away anything here. (Laughter.) They might want to do it next— . . .

GENERAL DAYS: —the Court has never looked at this in the abstract. It's not an abstract process. It's been viewed by the Court as an empirical process.

12. To be sure, the Solicitor General (SG) is not well positioned institutionally to identify for the Court constitutional limits on the powers of the federal government, the SG's client. But it is in the best interests of the client for the SG to do so when it likely means the difference between winning and losing a momentous case before a Court that insists on such limits.

interstate commerce.<sup>13</sup> The fourth limit—a restrained inquiry into the coerciveness and efficacy of the regulatory alternatives available to Congress—I articulate here. Although I do not endorse such a limit, its imposition would have a sounder constitutional basis than the interpretive mistake of invalidating the minimum coverage provision on the broad ground that Congress may never regulate “inactivity” using its commerce power, either alone or in combination with the Necessary and Proper Clause. From *McCulloch v. Maryland*<sup>14</sup> to *United States v. Comstock*,<sup>15</sup> the Court has understood Congress to possess ample means to pursue its constitutionally enumerated ends. Therefore, any concerns about the coerciveness of regulating “inactivity” should be balanced against the relative efficacy and coerciveness of regulating through other means.

If the proffered distinction between inactivity and activity resonates with the Court, then the outcome of the ACA litigation may turn on whether approving the minimum coverage provision means approving any mandate that Congress might theoretically impose (no matter how politically unlikely). The minimum coverage provision is constitutionally distinguishable from many other potential mandates for at least four reasons. First, the subject matter regulated by the provision is economic in nature. Second, the provision violates no constitutional rights. Third, Congress reasonably concluded that the provision would help to solve a significant problem of collective action among the states caused by cost shifting and adverse selection in the health care and insurance markets. Fourth, Congress reasonably concluded that no alternative to the minimum coverage provision would be as effective and less coercive.

Part I identifies why the minimum coverage provision regulates economic subject matter. Part II discusses why the provision does not violate constitutional rights. Part III explains why the provision is unlikely to be saved by the invocation of political limits on the power of Congress to impose mandates. Part IV clarifies why Congress had a reasonable basis to conclude that the minimum coverage provision would ameliorate a significant problem of collective action among the states. Part V addresses why Congress had a reasonable basis to

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13. For a discussion, see *infra* note 41 and accompanying text.

14. 17 U.S. 316 (1819).

15. 130 S. Ct. 1949 (2010).

conclude that regulatory alternatives to the provision would be less effective or more coercive.

Part VI uses these four limits on the scope of the Commerce Clause to illuminate the constitutional pertinence of five characteristics of the interstate health care market that economists have identified as distinguishing it from other markets: the inevitability of access, the unpredictability of access, the potentially enormous cost of care, the legal entitlement to care in an emergency, and the substantial cost shifting and adverse selection problems that disrespect state borders. The Conclusion summarizes the four judicially enforceable limits on Congress's commerce power that are either presently in place or potentially available, all of which will be maintained if the Court upholds the minimum coverage provision in the ACA.

### I. LIMIT #1: NO NONECONOMIC MANDATES

The most aggressive critics of the ACA insist that if Congress can require people to obtain health insurance coverage or pay a certain amount of money each year, then Congress can impose on individuals whatever requirements it wants by invoking its commerce power.<sup>16</sup> They further insist that if

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16. See, e.g., Editorial, *ObamaCare and the Constitution*, WALL ST. J., Apr. 2, 2010, at A16 ("If the insurance mandate stands, then why can't Congress insist that Americans buy GM cars, or that obese Americans eat their vegetables or pay a fat tax penalty?"); *Is President Obama's Individual Health Care Mandate Constitutional?*, THE HERITAGE FOUNDATION, <http://www.askheritage.org/is-president-obamas-individual-health-care-mandate-constitutional/> (last visited Oct. 5, 2011) ("If Congress can impose a health-insurance mandate, then there is no limit to what Congress can do, and the Constitution's limits on congressional power will have essentially been eliminated."); Lloyd Dunkelberger, *Health Care Fight Opens in Florida*, SARASOTA HERALD-TRIBUNE, Sept. 14, 2010, at A01 ("If Congress can regulate the failure to have health care insurance coverage, it can equally regulate the 'failure' to meet any other requirement it chooses to impose."); Warren Richey, *Attorneys General in 11 States Poised to Challenge Healthcare Bill*, CSMONITOR.COM, (Mar. 22, 2010) (quoting Virginia Attorney General Ken Cuccinelli as arguing that "[j]ust being alive is not interstate commerce . . . [i]f it were, there would be no limit to the U.S. Constitution's commerce clause [sic] and to Congress's authority to regulate everything we do"); Lauren Seifert, *Ken Cuccinelli: Health Care Mandate Like Forcing People to Buy Guns*, CBSNEWS.COM (Dec. 14, 2010, 1:52 PM), [http://www.cbsnews.com/8301-503544\\_162-20025622-503544.html](http://www.cbsnews.com/8301-503544_162-20025622-503544.html) ("Never before in our history has the federal government ordered Americans to buy a product under the guise of regulating commerce. . . . Imagine if this bill were that in order to protect our communities and homeland security, every American had to buy a gun. Can you image the reaction across the country to that?").

The title of an opinion editorial by Randy Barnett falls in the sweeping category, but he likely did not choose the title. See Randy Barnett, *If Obamacare's Mandate Is Approved, Congress Can Require Anything*, THE WASHINGTON EXAMINER (June 6, 2011, 8:05 PM), <http://washingtonexaminer.com/opinion/op-eds/2011/06/if-obamacares-mandate-approved->

Congress can regulate whatever it wants by invoking its commerce power, then there is nothing left of judicial enforcement of constitutional limits on Congress's enumerated powers.

The conclusion follows from the premise, but the premise is incorrect. The decision whether or not to purchase health insurance is an economic decision. Because the need for nearly all people to access health care services is unavoidable, unpredictable, and legally guaranteed in medical emergencies, and because the cost of such access is potentially crushing even for wealthy individuals who lack insurance,<sup>17</sup> the decision whether or not to obtain health insurance coverage is a decision about how to manage substantial financial risk. Financially able individuals who decline to purchase health insurance are making the economic decision to "go bare" with respect to the risk of serious injury or illness.

In insurance law, the phrase "going bare" is used to describe the conduct of a business enterprise that chooses to be uninsured, or severely underinsured, regarding a risk. Such an enterprise is making the economic decision to self-insure, relying either on personal resources or on the protections afforded by federal bankruptcy law in the event the risk materializes.<sup>18</sup> Businesses that persist in going bare are sometimes described as engaging in conduct that entails potentially high economic risk to themselves and others.<sup>19</sup> If bankruptcy results, substantial costs associated with this financial risk will be shifted to creditors.<sup>20</sup>

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congress-can-require-anything. The piece itself focuses on economic mandates and argues for a categorical principle that the commerce power does not authorize Congress to require people to contract with private companies. *Id.* By contrast, Ilya Somin charges without qualification that "there is no way to uphold the mandate without giving Congress unlimited power to mandate anything." Ilya Somin, *Insurance Mandate Has Fatal Flaws*, NEWSDAY (Aug. 16, 2011, 7:24 PM), <http://www.newsday.com/opinion/oped/somin-insurance-mandate-has-fatal-flaws-1.3101602>.

17. For a discussion of the constitutional relevance of these and other characteristics of the interstate health care market, see *infra* Part VI.

18. Rosie Cisneros, *Malpractice Insurance Costs and Going Bare*, LODMELL & LODMELL, <http://www.lodmell.com/malpractice-insurance-cost-going-bare> ("Malpractice costs have become so expensive that more and more physicians are seeking alternatives wherever they can find them. Some are so angry and frustrated by soaring insurance premiums that they are going 'bare,' foregoing costly insurance—relying instead, in some cases, on the threat of bankruptcy to bail them out of any hefty patient claims. This is a risky choice, indeed.")

19. *Id.* ("Going 'bare,' especially when it comes to medical malpractice insurance, has never seemed advisable.")

20. I thank my colleague Jonathan Wiener for alerting me to the business practice of "going bare" with respect to a risk.

The economic nature of the decision whether or not to purchase health insurance means that upholding the minimum coverage provision would not require revisiting the requirement of *United States v. Lopez*, *United States v. Morrison*, and *Gonzales v. Raich* that Congress may regulate only “economic” or “commercial” subject matter when using its commerce power in cases involving allegedly substantial effects on interstate commerce.<sup>21</sup> Accordingly, upholding the minimum coverage provision would not authorize Congress to impose mandates that regulate noneconomic subject matter.<sup>22</sup> The Court articulated the distinction between economic and noneconomic subject matter in *Lopez*, *Morrison*, and *Raich* in order to give Congress the authority to regulate markets, but not to regulate merely social forms of interaction.<sup>23</sup>

A mandate is noneconomic, as opposed to economic, when Congress is attempting to regulate something other than a market through the mandate. For example, if the Court were to uphold the minimum coverage provision, it would remain beyond the scope of the commerce power for Congress to require individuals to possess firearms in their homes (or in school zones) on the ground that such possession, in the aggregate, substantially affects interstate commerce.<sup>24</sup> It would

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21. See, e.g., *Gonzales v. Raich*, 545 U.S. 1 (2005) (stressing the economic/noneconomic distinction); *United States v. Morrison*, 529 U.S. 598 (2000) (same); *United States v. Lopez*, 514 U.S. 549 (1995) (same).

22. Under *Lopez*, *Morrison*, and *Raich*, the “economic” or “noneconomic” characterization attaches to the object of congressional regulation, not to the regulation itself.

23. Accord Orin Kerr, *The “Unlimited Power” Argument and the Commerce Clause*, THE VOLOKH CONSPIRACY (Aug. 17, 2011, 1:02 PM), <http://volokh.com/2011/08/17/the-unlimited-power-argument-and-the-commerce-clause/> (“[A]rguments in support of the mandate do reflect a limitation on the scope of federal power: the line between regulating markets in goods and services and regulating outside of markets in goods and services. . . . But while the economic/non-economic line may not be enough of a limitation to me, I don’t think it’s accurate to say that it makes the federal government one of unlimited power.”).

24. Some critics of the minimum coverage provision include a mandate to purchase firearms in their parade of horrors if the minimum coverage provision is upheld. See, e.g., Seifert, *supra* note 16 (quoting Virginia Attorney General Ken Cuccinelli’s statement that “[n]ever before in our history has the federal government ordered Americans to buy a product under the guise of regulating commerce,” and that “[i]magine if this bill were that . . . every American had to buy a gun”). This hypothetical is not as far-fetched as it may seem. One city in the United States has a law requiring its residents to keep a firearm in the home. See Anna Fifield, *Kennesaw, Where Everyone Is Armed By Law*, FINANCIAL TIMES (Sept. 25, 2010, 9:32 AM), <http://www.ft.com/cms/s/2/5c1b6a72-c5eb-11df-b53e-00144feab49a.html#axzz1Vao6SUE>n (“But this city, half an hour’s drive north of Atlanta, is unique: it is the only place in America where it is compulsory to own a gun. In 1982, Kennesaw City Council unanimously passed an ordinance requiring households to own at least one firearm with ammunition.”); cf. Glenn Reynolds, Op-Ed., *A Rifle in Every Pot*, N.Y. TIMES (Jan. 16, 2007), <http://>



remain beyond the scope of the commerce power for Congress to provide victims of gender-motivated violence with a private civil damages remedy against individuals who do not render assistance when they witness acts of gender-motivated violence being perpetrated in their midst.<sup>25</sup> In both instances, as in *Lopez* and *Morrison* but unlike in *Raich*, Congress would not be attempting to regulate an actual or shadow market.

## II. LIMIT #2: NO MANDATES THAT VIOLATE CONSTITUTIONAL RIGHTS

Upholding the minimum coverage provision would not mean that Congress could impose mandates that violate constitutional rights. Some of the hypotheticals that have been floated include requiring Americans to *eat* broccoli or exercise a certain number of hours per week.<sup>26</sup> These hypotheticals implicate the constitutional right to bodily integrity, for “[t]he integrity of an individual’s person is a cherished value of our society.”<sup>27</sup> This right is protected against interference by both the federal government and the states under the Due Process Clauses of the Fifth and Fourteenth Amendments.<sup>28</sup>

Infringements of the right to bodily integrity must meet heightened scrutiny.<sup>29</sup> This would be difficult for any government

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[www.nytimes.com/2007/01/16/opinion/16reynolds.html](http://www.nytimes.com/2007/01/16/opinion/16reynolds.html) (“Last month, Greenleaf, Idaho, adopted Ordinance 208, calling for its citizens to own guns and keep them ready in their homes in case of emergency. . . . Greenleaf is following in the footsteps of Kennesaw, Ga., which in 1982 passed a mandatory gun ownership law in response to a handgun ban passed in Morton Grove, Ill.”).

25. *Cf. United States v. Morrison*, 529 U.S. 598 (2000).

26. *See, e.g., Florida ex rel. Bondi v. U.S. Dep’t Health & Human Servs.*, No. 3:10-cv-91-RV/EMT at 46 (N.D. Fla. Jan. 31, 2011) (“Congress could require that people buy and consume broccoli at regular intervals, not only because the required purchases will positively impact interstate commerce, but also because people who eat healthier tend to be healthier, and are thus more productive and put less of a strain on the health care system.”).

27. *Schmerber v. California*, 384 U.S. 757, 772 (1966).

28. For a discussion of the right to bodily integrity, see *Cruzan v. Dir., Missouri Dep’t. of Health*, 497 U.S. 261, 287 (1990) (O’Connor, J., concurring). “As the Court notes,” Justice O’Connor observed, “the liberty interest in refusing medical treatment flows from decisions involving the State’s invasions into the body. Because our notions of liberty are inextricably entwined with our idea of physical freedom and self-determination, the Court has often deemed state incursions into the body repugnant to the interests protected by the Due Process Clause.” *Id.* at 287 (citation omitted). Some of the Court’s most important bodily integrity decisions arose in the criminal procedure context. *See id.* at 287–88 (quoting *Rochin v. California*, 342 U.S. 165, 172 (1952), *Schmerber*, 384 U.S. at 772, and *Winston v. Lee*, 470 U.S. 753, 759 (1985)).

29. I am not aware of Supreme Court decisions that have specifically declared the level of scrutiny triggered by infringements of the right to bodily integrity. It is clear, however, that the Court was applying more than rational basis review in the decisions

in America to do. If, say, there were an epidemic spreading around the nation that could be cured or prevented only by eating broccoli, then it likely would not violate the right for Congress to require people to eat broccoli—just as it likely would not violate the right for Congress to require people to get vaccinated in such circumstances. But given the state of the world in which Americans have long lived (that is, a world in which one’s life does not depend on eating broccoli), any attempt by Congress to force people to eat broccoli would violate the right.

The minimum coverage provision does not implicate the right to bodily integrity. No one argues otherwise. Congress has required most lawful residents of the United States to obtain health insurance coverage or pay a certain amount of money.<sup>30</sup> Congress has not required them even to use their coverage, let alone to ingest anything or engage in a certain level of physical activity. Although it might seem unnecessary to mention the distinction between constitutional powers and constitutional rights, this distinction warrants inclusion in a catalogue of constitutional limits because much criticism of the minimum coverage provision ignores it.

Nor does the minimum coverage provision violate substantive due process, notwithstanding the emphases of opponents of the ACA on themes of constitutional liberty, freedom from coercion, and individual rights.<sup>31</sup> The Supreme

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cited in the previous note.

30. 26 U.S.C.A. § 5000A (West 2010). The minimum coverage provision applies to U.S. citizens and legal residents. It does not apply to “individuals not lawfully present,” such as undocumented aliens, to people in prison, or to people with certain religious objections. *Id.* The exaction for noncompliance with the provision is inapplicable to people who need not file a federal income tax return because their household incomes are too low, to people whose premium payments would be greater than eight percent of their annual household income, to individuals who are uninsured for short periods of time, to members of Native American tribes, and to people who show that compliance with the requirement would impose a hardship. 26 U.S.C.A. § 5000A(e) (West 2010). In 2014, the annual exaction for noncompliance will be the greater of \$95 or one percent of income. By 2016, the annual exaction will be the greater of \$695 or 2.5 percent of income. 26 U.S.C.A. § 5000A(c) (West 2010). These provisions require no change in behavior for many people in addition to those listed above, such as those who qualify for Medicaid and those who already have insurance coverage through their employers.

31. See, e.g., *Virginia ex rel. Cuccinelli v. Sebelius*, 728 F.Supp.2d 768, 788 (E.D. Va. 2010) (“At its core, this dispute is not simply about regulating the business of insurance—or crafting a scheme of universal health insurance coverage—it’s about *an individual’s right to choose* to participate.” (emphasis added)). For an analysis of many instances of “rights talk” by citizens, politicians, and judges, see generally Bryan J. Leitch, *Where Law Meets Politics: Freedom of Contract, Federalism, and the Fight Over Health Care*, 27 J.L. & POL. (forthcoming Fall 2011).

Court long ago abandoned freedom from contract as an independent limit on government power.<sup>32</sup> Accordingly, *Lochner*-style substantive due process challenges to the minimum coverage provision have not survived motions to dismiss.<sup>33</sup>

To summarize the analysis so far, upholding the minimum coverage provision would not authorize Congress to regulate noneconomic subject matter using its commerce power, whether through a mandate or some other regulatory means. Nor would upholding the minimum coverage provision allow Congress to impose mandates that violate constitutional rights. Criticism of the minimum coverage provision to the contrary is best viewed as hyperbolic political rhetoric.

### III. AN ASIDE: POLITICAL SAFEGUARDS

Are there any additional constitutional limits on the power of Congress to impose mandates? One possible response to this question, which is preferred by many defenders of robust federal commerce power, is that Congress may use the Commerce Clause to impose any rights-respecting economic mandate as long as Congress rationally could conclude that the object of congressional regulation has substantial effects on interstate commerce in the aggregate.<sup>34</sup> Indeed, many nationalists would go further by rejecting *Lopez* and *Morrison*, arguing that Congress can impose noneconomic mandates as long as Congress rationally could conclude that the object of congressional regulation substantially affects interstate commerce in the aggregate.

Nationalists have a response to “slippery slope” concerns about the numerosity and invasiveness of future economic mandates that Congress would be authorized to impose absent further judicial safeguards.<sup>35</sup> In light of the widespread political

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32. Compare, e.g., *Lochner v. New York*, 198 U.S. 45 (1905), with *West Coast Hotel Co. v. Parish*, 300 U.S. 379, 391 (1937) (“What is this freedom of contract? The Constitution does not speak of freedom of contract.”). See Richard A. Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243, 244 (1998) (“*Lochner* is never cited for its legal authority. Although it has never been formally overruled, it is well understood among constitutional lawyers that relying on *Lochner* would be a pointless, if not a self-destructive, endeavor.”).

33. See, e.g., *Florida ex rel. McCollum v. U.S. Dep’t of Health & Human Servs.*, 716 F. Supp. 2d 1120, 1161–62 (N.D. Fla. 2010).

34. See, e.g., Chemerinsky, *supra* note 4.

35. See Ilya Somin, *A Mandate for Mandates: Is the Individual Health Insurance Case a Slippery Slope?*, 75 L. & CONTEMP. PROBS., no. 3 (forthcoming 2012).

unpopularity of individual mandates in the United States,<sup>36</sup> nationalists can plausibly insist that the political safeguards of federalism will operate to discipline Congress.<sup>37</sup> This observation about public perceptions of federal regulation, rather than the Eleventh Circuit's suggestion about Congress's past confessions of unconstitutionality,<sup>38</sup> likely explains why Congress has not made a habit of imposing purchase mandates throughout American history. Congress seems as likely to impose future purchase mandates as it is to have imposed them in the past. It seems as likely to impose them as it is to set the federal minimum wage at \$100 or \$1000 per hour. The Court has long upheld federal minimum-wage laws notwithstanding this theoretical possibility.<sup>39</sup>

The minimum coverage provision, however, is unlikely to be saved by even a powerful case that the political safeguards of federalism will limit federal imposition of economic mandates. Justices who believe in the judicial safeguards of federalism must be persuaded that upholding the minimum coverage provision would not mean abandoning those safeguards. Specifically, whether or not Justices Ginsburg, Breyer, Sotomayor, and Kagan will be reassured by the invocation of political safeguards, none of the five remaining Justices are likely to view them as

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36. According to a recent Associated Press-National Constitution Center poll, 82 percent of respondents answered "no" to the question of whether "the Federal Government should have the power to require all Americans to buy health insurance, and to pay a fine if they don't." *AP-Constitution Center Poll*, (August 2011), available at [http://surveys.ap.org/data/GfK/AP-GfK%20Poll%20Aug%202011%20FINAL%20Topline\\_NCC\\_1st%20story.pdf](http://surveys.ap.org/data/GfK/AP-GfK%20Poll%20Aug%202011%20FINAL%20Topline_NCC_1st%20story.pdf) (last visited Oct. 5, 2011). This datum is striking, even if the phrasing of the question leaves much to be desired. The ACA does not require all Americans to buy health insurance, and calling the exaction for going without insurance a "fine" is provocative and controversial. It is materially equivalent to a tax. See Robert D. Cooter & Neil S. Siegel, *Taxes, Penalties, and the Minimum Coverage Provision* (2011) (unpublished manuscript) (on file with the authors).

37. There is a longstanding debate over the political safeguards of federalism in U.S. constitutional law. See, e.g., JESSE CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 171–259 (1980); Larry Kramer, *Understanding Federalism*, 47 *VAND. L. REV.* 1485 (1994); Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 *SUP. CT. REV.* 341; Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 *COLUM. L. REV.* 543 (1954).

38. *Florida ex rel. Att'y Gen. v. U.S. Dep't Health & Human Servs.*, 648 F.3d 1235, 1289 (11th Cir. 2011) ("The fact that Congress has never before exercised this supposed authority is telling. As the Supreme Court has noted, 'the utter lack of statutes imposing obligations on the States' executive (notwithstanding the attractiveness of that course to Congress), suggests an assumed *absence* of such power.'" (citation omitted)).

39. See, e.g., *United States v. Darby*, 312 U.S. 100 (1941) (sustaining federal minimum-wage and maximum-hour regulations on manufacturers of goods shipped in interstate commerce).

sufficient. If Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Alito prove unwilling to sign off on federal power to impose any and all economic mandates (that, of course, respect individual rights), then the question becomes whether other judicially enforceable limits are available.

#### IV. LIMIT #3: NO MANDATES ABSENT COLLECTIVE ACTION PROBLEMS

As a matter of professional “logic” and “reason,”<sup>40</sup> would upholding the ACA mandate allow Congress to impose whatever mandates it wishes, as long as the mandate is economic and Congress does not violate individual rights? A key question presented by this litigation is whether there is a principled distinction between the minimum coverage provision and other rights-respecting economic mandates that Congress might, at least as a theoretical matter, impose using its commerce power.

An increasing number of constitutional scholars have argued that the commerce power should be interpreted in light of the collective action problems that the nation faced under the Articles of Confederation, when Congress lacked the power to regulate interstate commerce.<sup>41</sup> During the Critical Period of the 1780s, the states acted individually when they needed to act collectively, discriminating against interstate commerce and free riding on the contributions of other states to the federal treasury and United States military. When states engaged in conduct that spilled over from one state to another, James Madison, James Wilson, Alexander Hamilton, and other nationalist Framers registered that the actions of individually rational states were producing irrational results for the nation.<sup>42</sup> This is a collective action problem. Empowering Congress to regulate commerce

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40. See *Hein v. Freedom from Religion Found., Inc.*, 127 S. Ct. 2553, 2582 (2007) (Scalia, J., concurring) (“[T]he soul of the law . . . is logic and reason.”).

41. See Akhil Amar, *The Lawfulness of Health-Care Reform*, 121 YALE L.J. ONLINE (forthcoming 2011); Siegel, *supra* note 4; Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115 (2010); Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1 (2010); Andrew Koppelman, *Bad News for Mail Robbers: The Obvious Constitutionality of Health Care Reform*, 121 YALE L.J. ONLINE 1, 9 (2011), <http://yalelawjournal.org/2011/04/26/koppelman.html> (last visited Oct. 5, 2011); Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite United States v. Lopez*, 94 MICH. L. REV. 554 (1995); Robert L. Stern, *That Commerce Which Concerns More States Than One*, 47 HARV. L. REV. 1335, 1340 (1934).

42. See Cooter & Siegel, *supra* note 41, at 121–24.

“among the several States” was and remains a pivotal part of the solution.

The states often cannot achieve an end when doing so requires multiple states to cooperate. The commerce power authorizes Congress to solve economic problems of collective action that predictably frustrate the states. Such problems are “among the several States.” Conversely, governmental activities that do not pose collective action problems for the states are internal to a state or local. They are beyond the scope of federal power. All ordinary crime falls in the latter category regardless of whether the victim of the crime is a commercial enterprise, unless the crime involves multistate organizations<sup>43</sup> or crosses state lines.<sup>44</sup>

The distinction between individual and collective action by states gives independent, sensible meaning to the phrase “among the several States” in the Commerce Clause. This phrase references a problem of collective action involving two or more states. This is the key inquiry in determining whether “Commerce,” understood by the Court in terms of its economic/noneconomic categorization, is interstate and thus regulable under Clause 3, or is intrastate and thus beyond the scope of the commerce power.

The distinction between activities that pose collective action problems for the states and those that do not best explains why Congress may not usually use its commerce power to regulate such crimes as assault or gun possession in schools, but may regulate an interstate market for guns, wheat, or drugs. That is, a

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43. Cf. Balkin, *supra* note 41, at 30 (reading the phrase “among the several states” in the Commerce Clause so that “Congress can regulate interactions that extend in their operation beyond the bounds of a particular state”).

44. For example, the federal arson law, 18 U.S.C. § 844(i) (2006), appears problematic as commerce power legislation even as applied to commercial enterprises. A federal ban on arson of buildings actively employed for commercial purposes does not appear to address any collective action problem involving multiple states:

[S]tate control over arson laws—whether they are applied to arson of a commercial enterprise or of a private residence—does not seem to cause a collective action problem. Different rates of arson in different states may have some effect on the price residents pay for mortgages, insurance, or gas. These effects, however, do not allow one state to externalize its costs to another. In controlling arson, one state does not have an incentive to free ride on the laws of a neighboring state. Nor does one state try to extract concessions from another state by threatening to reduce sanctions against arsonists. The federal law apparently did not address a collective action problem, so construing it narrowly (or invalidating it) [appropriately] limits federal power. . . .

Cooter & Siegel, *supra* note 41, at 175–76 (analyzing the Court’s use of constitutional avoidance in *Jones v. United States*, 529 U.S. 848 (2000)).

collective action perspective offers a way to distinguish the “truly national” from the “truly local” in Commerce Clause litigation,<sup>45</sup> justifying the outcomes in such cases as *Wickard v. Filburn*,<sup>46</sup> *United States v. Lopez*,<sup>47</sup> *United States v. Morrison*,<sup>48</sup> and *Gonzales v. Raich*.<sup>49</sup>

According to a collective action approach to the Commerce Clause that reflects the Court’s typical level of scrutiny in federalism cases, Congress may invoke its commerce power if there is a reasonable basis to believe that it is ameliorating a significant problem of collective action involving “more States than one.”<sup>50</sup> If there is no reasonable basis to believe that Congress is addressing such a collective action problem, then Congress may not invoke its commerce power.<sup>51</sup>

A collective action requirement in commerce power cases would counsel upholding the minimum coverage provision. As I have argued elsewhere,<sup>52</sup> the provision aims to solve a collective action problem involving multiple states because it addresses two free rider problems that spill over state boundaries. The first free rider problem arises because a financially able individual who declines to purchase health insurance free rides on benevolence. Pursuant to federal and state law,<sup>53</sup> as well as the longstanding charitable practices of most hospitals in the United States,<sup>54</sup> others will pay a significant share of the cost of medical

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45. For a discussion, see *id.* at 159–66.

46. 317 U.S. 111 (1942).

47. 514 U.S. 549 (1995).

48. 529 U.S. 598 (2000).

49. 545 U.S. 1 (2005).

50. *Gibbons v. Ogden*, 22 U.S. 1, 194 (1824).

51. Reasonableness is the appropriate test. To ask more of Congress is to impose heightened scrutiny in Commerce Clause cases, which is unheard of in the Court’s contemporary federalism jurisprudence. See, e.g., *Thomas More Law Ctr. v. Obama*, No. 10-2388, at 49 (6th Cir. June 29, 2011) (Sutton, J., concurring in part and delivering the opinion of the court in part) (“The courts do not apply strict scrutiny to commerce clause [sic] legislation and require only an ‘appropriate’ or ‘reasonable’ ‘fit’ between means and ends.” (quoting *United States v. Comstock*, 130 S. Ct. 1949, 1956–57 (2010))).

52. See generally Siegel, *supra* note 4.

53. See Emergency Medical Treatment and Active Labor Act of 1986, 42 U.S.C. § 1395dd (“EMTALA”); Brief for Appellant, at \*42, *Virginia ex rel. Cuccinelli v. Sebelius*, Nos. 11-1057 & 11-1058 (4th Cir. Feb. 28, 2011), 2011 WL 686279 (discussing state tort law creating liability for failure to provide emergency care).

54. See, e.g., CHARLES ROSENBERG, *THE CARE OF STRANGERS: THE RISE OF AMERICA’S HOSPITAL SYSTEM* 347 (1995) (observing that “the hospital never assumed the guise of rational and rationalized economic actor during the first three-quarters of the twentieth century”; that it “continued into the twentieth century, as it had begun in the eighteenth, to be clothed with public interest in a way that challenged categorical distinctions between public and private”; and that “[p]rivate hospitals had always been assumed to serve the community at large—treating the needy.”); *id.* at 352 (seeing “little

treatment rather than let an uninsured person go untreated.<sup>55</sup> Moreover, even when the uninsured individual does not receive medical care for the time being, he or she benefits from the existence of the health care infrastructure and can rely on its availability in case of emergency. The minimum coverage provision is designed to overcome risk taking in reliance on benevolence.

In addition, theoretical rationales and empirical evidence suggest that the free rider problem of uncompensated care is interstate in scope. It is interstate in scope primarily because of the operation of many insurance companies in multiple states, the phenomenon of cross-state hospital use, and the interstate migration (or immobility) of insurance companies, providers, and individuals in partial response to the existence of different state health care regimes.<sup>56</sup> Perhaps Massachusetts can manage the federalism problem created by the existence of sister states, at least once Medicare and Medicaid solve the worst of this problem. Massachusetts had a low population of uninsured residents, a health economy, and ample financial resources at the time it acted. But almost every other state is differently situated.<sup>57</sup>

Strikingly, Massachusetts is the only state that has passed health care reform legislation that shares the basic ends and means of the ACA. (Consider, by contrast, the more than forty states that had enacted laws banning guns in schools when Congress passed the Gun Free School Zones Act of 1990.<sup>58</sup>) The reason is probably not lack of support for the ACA everywhere except Massachusetts. The President campaigned on the issue of health care reform, and the nation is divided evenly over the law, “with 46% saying it was a good thing and 44% saying it was a bad thing.”<sup>59</sup> In all likelihood, part of the reason for the current

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prospect of hospitals in general becoming monolithic cost minimizers and profit maximizers,” and predicting that American society “will feel uncomfortable with a medical system that does not provide a plausible (if not exactly equal) level of care to the poor and socially isolated”).

55. Of course, not all participants in the interstate health care market are fairly described as benevolent. They may merely be complying with the law. The benevolence is embodied in federal and state laws and charitable social practices.

56. See generally Siegel, *supra* note 4.

57. See Sara Rosenbaum, *Can States Pick Up the Health Reform Torch?*, THE NEW ENGLAND JOURNAL OF MEDICINE (Feb. 25, 2010), <http://healthpolicyandreform.nejm.org/?p=3088> (“Massachusetts must be understood as the rarity rather than the norm.”).

58. See *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring).

59. See Frank Newport, *One Year Later, Americans Split on Healthcare Law*,



situation at the state level is that the federalism problems associated with state-by-state solutions are significant—and are perceived by state legislators to be significant.<sup>60</sup>

The minimum coverage provision addresses another kind of free rider problem: adverse selection in insurance markets. This adverse selection problem occurs when individuals with higher expected health care costs are more likely to purchase insurance than individuals with lower expected health care costs. Absent a requirement to obtain health insurance coverage, the ACA exacerbates this problem. This is because the law prohibits insurance companies from denying coverage based on preexisting conditions, canceling insurance absent fraud, charging higher premiums based on medical history, and imposing lifetime limits on benefits.<sup>61</sup> Such prohibitions on underwriting permit healthy individuals without insurance to free ride on healthy people with insurance by entering the market only when they expect to require expensive medical care.

Insurance companies may not be financially viable if the law denies them the capacity to control costs in the ways noted above without broadening the risk pool to include healthier people and preventing market timing behavior.<sup>62</sup> As Congress found, “if there were no [coverage] requirement, many individuals would wait to purchase health insurance until they needed care.”<sup>63</sup> The predicted consequence of the adverse

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GALLUP.COM (Mar. 21, 2011), <http://www.gallup.com/poll/146729/One-Year-Later-Americans-Split-Healthcare-Law.aspx>. Although the minimum coverage provision remains unpopular, *see supra* note 36, the ACA provisions that prohibit underwriting are popular, *see, e.g.*, Koppelman, *supra* note 41, at 14–15. This suggests that many Americans may not grasp the relationship between the two parts of the law.

60. *See id.* at 17–18 (arguing that the factual uncertainty about the existence and scope of a race to the bottom is part of the collective action problem).

61. 42 U.S.C.A. §§ 300gg, 300gg-1(a), 300gg-3(a), 300gg-11, 300gg-12 (West 2010).

62. *See, e.g.*, Brief for America’s Health Insurance Plans as *Amicus Curiae* in Support of Neither Party, at \*3, *Virginia ex rel. Cuccinelli v. Sebelius*, Nos. 11-1057 & 11-1058 (4th Cir. Mar. 7, 2011) 2011 WL 795219 (“Without an individual mandate requirement, more individuals will make the rational economic decision to wait to purchase coverage until they expect to need health care services. If imposed without an individual mandate provision, the market reform provisions would reinforce this ‘wait-and-see’ approach by allowing individuals to move in and out of the market as they expect to need coverage, undermining the very purpose of insurance to pool and spread risk.” (footnote omitted)).

63. 42 U.S.C.A. § 18091(a)(2)(I) (West 2010). Congress further found that “[b]y significantly increasing health insurance coverage, the requirement, together with the other provisions of this Act, will minimize this adverse selection and broaden the health insurance risk pool to include healthy individuals, which will lower health insurance premiums,” and that “[t]he requirement is essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of preexisting conditions can be sold.” *Id.* *See* 42 U.S.C.A.

selection problem absent the minimum coverage provision is a substantial rise in insurance rates.<sup>64</sup>

The connection between the minimum coverage provision and the (concededly constitutional) ACA provisions that prohibit underwriting offers a strong constitutional rationale for the minimum coverage provision.<sup>65</sup> This connection justifies the minimum coverage provision under the interpretation of the Necessary and Proper Clause in *McCulloch v. Maryland*<sup>66</sup> and *United States v. Comstock*.<sup>67</sup> This connection also justifies the provision under the interpretation of the Commerce Clause in *United States v. Lopez*<sup>68</sup> and *Gonzales v. Raich*.<sup>69</sup>

While there often will be disagreements about the existence, scope, and significance of collective action problems, as well as the adequacy of Congress's response, collective action reasoning is easier to employ with respect to some problems than others. For example, in light of the aforementioned free rider problems that impede the functioning of the health insurance and health care markets, it is easier to justify the minimum coverage provision on collective action grounds than it would be to justify a federal mandate to buy a General Motors car, a house, broccoli, or a health club membership.

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§ 18091(a)(2)(J) (West 2010) (“The requirement is essential to creating effective health insurance markets that do not require underwriting and eliminate its associated administrative costs.”).

64. See, e.g., Congressional Budget Office, *Effects of Eliminating the Individual Mandate to Obtain Health Insurance 2* (June 16, 2010), available at [http://www.cbo.gov/ftpdocs/113xx/doc11379/Eliminate\\_Individual\\_Mandate\\_06\\_16.pdf](http://www.cbo.gov/ftpdocs/113xx/doc11379/Eliminate_Individual_Mandate_06_16.pdf) (predicting a 15 to 20 percent increase in premiums for new nongroup policies relative to current law absent a minimum coverage provision); Bradley Herring, *An Economic Perspective on the Individual Mandate's Severability from the ACA*, *THE NEW ENGLAND JOURNAL OF MEDICINE* (Mar. 10, 2011), <http://www.nejm.org/doi/full/10.1056/NEJMp1101519> (noting the estimation of MIT economist Jonathan Gruber that only eight million people (instead of 32 million) would join the ranks of the insured if the ACA had no minimum coverage provision).

65. The U.S. Supreme Court has long held that Congress may invoke the Commerce Clause to regulate insurance markets. See *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 540 (1944) (“Perhaps no modern commercial enterprise directly affects so many persons in all walks of life as does the insurance business.”); *id.* at 541 (“This business is not separated into 48 distinct territorial compartments which function in isolation from each other. Interrelationship, interdependence, and integration of activities in all states in which they operate are practical aspects of the insurance companies' methods of doing business.”); see also 42 U.S.C.A. § 18091(a)(3) (West 2010) (citing *South-Eastern Underwriters Association* as authority for the proposition that “insurance is interstate commerce subject to Federal regulation”).

66. 17 U.S. 316, 405–07, 421 (1819).

67. 130 S. Ct. 1949, 1956–58 (2010).

68. 514 U.S. 549 (1995).

69. 545 U.S. 1 (2005).

In order to impose a mandate to purchase (not to eat) broccoli, the mandate would have to be designed to regulate (most likely, to stabilize) agricultural markets, and Congress would have to reasonably conclude that such a mandate would help to solve a collective action problem among the states with respect to those markets. It would not suffice that “the required purchases will positively impact interstate commerce,” or that “people who eat healthier tend to be healthier, and are thus more productive and put less of a strain on the health care system.”<sup>70</sup> If a collective action requirement were imposed in commerce power cases generally, it would limit the authority of Congress to enact economic mandates specifically.

To be clear, the Court did not say it was imposing a collective action limit in *Lopez*, *Morrison*, and *Raich*. As argued above, however, a collective action framework provides the best way of understanding—and justifying—what the Court did in those cases. Moreover, language in the majority and concurring opinions in *Lopez* and *Raich* appears to be animated by collective action concerns.<sup>71</sup> For example, Chief Justice Rehnquist wrote in *Lopez* that the Gun-Free School Zones Act “is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.”<sup>72</sup> This statement suggests that the absence of regulation of guns near schools in one state would not undercut the effectiveness of regulations prohibiting them in other states. Justice Kennedy similarly wrote that if a state or local government “determines that harsh criminal sanctions are necessary and wise to deter students from carrying guns on school premises, the reserved powers of the States are *sufficient* to enact those measures. Indeed, over 40 States already have criminal laws outlawing the possession of firearms on or near school grounds.”<sup>73</sup>

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70. Florida *ex rel.* Bondi v. U.S. Dep’t Health & Human Servs., No. 3:10-cv-91-RV/EMT at 46 (N.D. Fla. Jan. 31, 2011).

71. See, e.g., *Raich*, 545 U.S. at 19 (“[O]ne concern prompting inclusion of wheat grown for home consumption in [*Wickard*] was that rising market prices could draw such wheat into the interstate market, resulting in lower market prices. The parallel concern making it appropriate to include marijuana grown for home consumption in the CSA is the likelihood that the high demand in the interstate market will draw such marijuana into that market.” (citation omitted)).

72. *Lopez*, 514 U.S. at 561.

73. *Id.* at 581 (Kennedy, J., concurring) (emphasis added); see Regan, *supra* note 41, at 566 (attributing a collective action rationale to the part of Justice Kennedy’s opinion quoted in the text).

V. LIMIT #4: NO MANDATES IF ALTERNATIVES ARE  
AS EFFECTIVE AND LESS COERCIVE

I would stop here. From the perspective of constitutional federalism, there is nothing distinctive about economic mandates, as opposed to other concededly constitutional forms of federal regulation that require regulated individuals to comply by engaging in certain conduct. It seems to me constitutional for Congress to impose a rights-respecting economic mandate when it has a reasonable basis to conclude that such a mandate would meaningfully address a significant problem of collective action among the states—a problem in the commercial sphere that the federal government is better situated to address than the states. I do not see how, from a federalism perspective, the distinction between mandates and other forms of federal regulation—between regulations of “inactivity” and “activity”—is relevant. It has no basis in constitutional text, structure, history, precedent, or a consequentialist analysis of the appropriate division of powers in a federal system.<sup>74</sup> It is a distinction sounding in economic substantive due process.<sup>75</sup>

Moreover, the distinction between inactivity and activity is unresponsive to the very concerns about differences in coerciveness that purport to justify it. There is no meaningful difference in coerciveness between many kinds of mandates and many other kinds of regulation. For example, there is little difference in coerciveness between requiring individuals to obtain health insurance coverage (regulation of “inactivity”) and requiring them to obtain coverage if, but only if, they seek health care services (regulation of “activity”), as almost everyone does at some point. There is no meaningful difference in coerciveness between requiring financially able individuals to purchase a certain kind of food (regulation of “inactivity”) and requiring individuals to purchase a certain kind of food if, but only if, they decide to enter the food market by purchasing food (regulation of “activity”), as almost everyone must.

Focusing just on health insurance coverage, there is no difference in coerciveness between the minimum coverage provision and a tax increase for everyone combined with a tax credit for insured individuals that wipes out the increase and equals the amount of the exaction for going without insurance in the ACA. A requirement to obtain health insurance coverage or

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74. See generally Siegel, *supra* note 4.

75. See, e.g., Leitch, *supra* note 31.

pay \$X is materially equivalent to a requirement that only individuals with health insurance do not pay \$X more in taxes. Indeed, the exaction in the ACA for going without insurance is materially equivalent to a tax.<sup>76</sup>

By contrast, there is a meaningful difference in coerciveness between the minimum coverage provision and a federal law establishing a government-run, single-payer system of national health care. But that is because the single-payer is more coercive than the minimum coverage provision. The ACA preserves private health insurance markets and allows individuals to choose among a variety of private health insurance options. Also more coercive than the minimum coverage provision is denying people medical care unless they already have insurance—or unless they agree to purchase it on the spot in the emergency room.

And yet the Court may disagree. Notwithstanding the arguments in support of the three limits set forth above, the Court may be loath to commit to the proposition that Congress may impose an economic mandate that respects individual rights only if it reasonably concludes that the mandate meaningfully addresses an interstate collective action problem. The Court may conceive of the commerce power, at least in part, in libertarian terms. And the Court may be sympathetic to the view that the minimum coverage provision is coercive in a way that is quantitatively or qualitatively different from other kinds of federal regulation.

A Court so disposed is a Court that may be inclined to break new doctrinal ground by announcing the constitutional relevance of a distinction between regulating economic “inactivity” and regulating economic “activity.” Such a Court, however, should exhibit the same caution it exhibits in other areas of constitutional law when it breaks new ground.<sup>77</sup> Such a Court should hesitate before holding broadly that Congress may never impose an economic mandate no matter how grave the interstate economic problem and no matter how much less effective or more coercive other forms of federal regulation may be.

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76. See Cooter & Siegel, *supra* note 36.

77. See, e.g., *District of Columbia v. Heller*, 554 U.S. 570 (2008) (declining to impose a standard of review for the time being and limiting the holding to firearm possession in the home for purposes of self-defense).

Instead, a Court concerned generally about the coerciveness of rights-respecting economic mandates that solve interstate collective action problems should remain faithful to a constitutional understanding that has endured from *McCulloch v. Maryland*<sup>78</sup> to *United States v. Comstock*.<sup>79</sup> According to this understanding, Congress possesses ample means to pursue its constitutionally enumerated ends. The most straightforward way for a Court concerned about the potential coerciveness of economic mandates nonetheless to vindicate this venerable principle would be to compare the likely effectiveness and coerciveness of the economic mandate under review with the regulatory alternatives available to Congress. Specifically, such a Court should ask whether the Congress that enacted the economic mandate had a reasonable basis to conclude that other regulatory means would be less effective or more coercive.<sup>80</sup>

There often will be ways of addressing an interstate economic problem whose effectiveness is roughly equivalent (or superior) to imposing an individual mandate, particularly when mandates are politically unpopular. To recall an earlier suggestion, this observation about public perceptions of federal regulation likely explains why Congress has not imposed purchase mandates in the past using its commerce power.<sup>81</sup> For example, restricting a farmer's wheat production seems politically preferable to requiring him or her to purchase wheat on the interstate market when the restriction on the supply side sufficiently accomplishes the objectives of Congress.<sup>82</sup>

Health care reform is a different kettle of fish. Based on the experience of many states that have attempted to expand access to health care, Congress reasonably concluded that the regulatory alternatives to the minimum coverage provision would be less effective or more coercive. It is well documented that numerous insurers moved to other states when their home state banned coverage denials based on preexisting conditions but did not impose a coverage requirement. For example, almost every insurer left the state when Kentucky passed reform legislation; only one private insurer and one state-run insurer

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78. 17 U.S. 316 (1819).

79. 130 S. Ct. 1949 (2010).

80. This potential limit is built on the assumption that there is something distinctly coercive about economic mandates. *McCulloch* would prohibit such a limit from being imposed on all regulatory authority under the Commerce Clause.

81. See *supra* note 38 and accompanying text.

82. See *Wickard v. Filburn*, 317 U.S. 111 (1942).

remained.<sup>83</sup> Insurers also left Washington,<sup>84</sup> New York,<sup>85</sup> and several other states.<sup>86</sup> By contrast, Congress accurately found that Massachusetts has been substantially more successful in preventing an exodus of insurers by imposing a mandate.<sup>87</sup>

To be sure, Congress could have tried to combat the adverse selection problem in other ways.<sup>88</sup> For example, it could have provided higher subsidies to tempt healthier individuals into the insurance pool.<sup>89</sup> Or Congress could have automatically enrolled individuals in insurance as a default but allowed them to opt out if they did not want coverage.<sup>90</sup> Congress also could have imposed limited open-enrollment periods and penalties for late enrollment.<sup>91</sup> Medicare uses some of these approaches.<sup>92</sup>

But Congress can always elect to spend more money on a problem, including by giving every American free health care.

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83. See Adele M. Kirk, *Riding the Bull: Experience with Individual Market Reform in Washington, Kentucky, and Massachusetts*, 25 J. HEALTH POL., POL'Y & L. 133 (2000).

84. *Id.*

85. Mark A. Hall, *An Evaluation of New York's Reform Law*, 25 J. HEALTH POL., POL'Y & L. 71 (2000).

86. Sara Rosenbaum & Jonathan Gruber, *Buying Health Care, the Individual Mandate, and the Constitution*, 363 NEW ENG. J. MED. 401, 403 (2010) ("Five states have tried to undertake reforms . . . without enacting an individual mandate; those five states are now among the eight states with the most expensive nongroup health insurance."); Brief for America's Health Insurance Plans, *supra* note 62, at 15–26 (surveying the experience of Maine, New Jersey, Kentucky, New Hampshire, Washington, New York, Vermont, and Massachusetts in passing reform legislation without a mandate, and finding a common trend of "destabilization of individual markets, increases in premiums, and declines in enrollment").

87. 42 U.S.C.A. § 18091(a)(2)(D) (West 2010) ("In Massachusetts, a similar requirement has strengthened private employer-based coverage: despite the economic downturn, the number of workers offered employer-based coverage has actually increased."); see Amitabh Chandra, Jonathan Gruber, & Robin McKnight, *The Importance of the Individual Mandate—Evidence from Massachusetts*, 364 NEW ENG. J. MED. 293, 295 (2011) (offering evidence suggesting that the Massachusetts "mandate had a causal role in improving risk selection").

88. Congress also could have tried to address the cost shifting problem in another way: it could have denied uninsured individuals access to stabilizing care in a medical emergency. Congress, however, should not be faulted for rejecting a regulatory alternative that it regards as immoral.

89. See, e.g., Chandra, Gruber, & McKnight, *supra* note 87 (analyzing the approaches of mandates and subsidies and concluding that "the higher the subsidies, the smaller the role for an individual mandate").

90. See Jonathan Gruber, *Health Care Reform Without the Individual Mandate: Replacing the Individual Mandate would Significantly Erode Coverage Gains and Raise Premiums for Health Care Customers*, CENTER FOR AMERICAN PROGRESS at 3–5, available at [http://www.americanprogress.org/issues/2011/02/pdf/gruber\\_mandate.pdf](http://www.americanprogress.org/issues/2011/02/pdf/gruber_mandate.pdf).

91. See *id.* at 5–7.

92. Medicare Part B, which covers outpatient costs for individuals enrolled in Medicare, combines auto-enrollment with a late enrollment penalty of 10 percent of premiums for each year of delay. See *id.* at 5. Moreover, the Medicare Part D prescription drug plan imposes a penalty for late enrollment. See *id.*

So that consideration does not seem an appropriate part of the analysis. Moreover, the context of health insurance is different from Medicare, so it is uncertain whether the other alternative methods noted above would be nearly as effective in achieving high rates of enrollment as the minimum coverage provision.<sup>93</sup> Economist Jonathan Gruber of the Massachusetts Institute of Technology, a defender of the minimum coverage provision in the ACA, examined auto-enrollment and late enrollment penalties, finding that “both alternatives significantly erode the gains in public health and insurance affordability made possible by the Affordable Care Act.”<sup>94</sup>

Many constitutional critics of the ACA will no doubt dismiss an inquiry into the effectiveness and coerciveness of regulatory alternatives either as toothless in light of the deference it shows Congress, or as lacking judicial administrability, or as putting the federal courts in the inappropriate position of second-guessing the policy judgments of Congress. None of these criticisms suggests that the better course is to invalidate the minimum coverage provision.

First, a reasonableness inquiry ought to suffice to satisfy reasonable concerns about coerciveness. The test, properly formulated, is whether Congress could have reasonably concluded that substitutes for an economic mandate would be less effective or more coercive. Ill-considered, gratuitously coercive economic mandates will flunk this test. To ask more of Congress is to impose *Lochner*-like strict scrutiny in Commerce Clause cases,<sup>95</sup> which is foreign to the Court’s federalism jurisprudence.<sup>96</sup> Under a restrained analysis of regulatory alternatives, the Court could uphold the minimum coverage provision while leaving itself principled room to invalidate future economic mandates where it is evident that there were equally effective, less coercive alternatives available to Congress.

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93. See *id.* at 3–4 (discussing the differences between the two settings, including the incentive of employers to encourage participation and the likelihood that young employees have already considered participation).

94. *Id.* at 1. Specifically, Gruber found that “no alternative to the individual mandate can cover more than two-thirds as many uninsured as the Affordable Care Act does;” that “no alternative to the mandate saves much money;” and that “any alternative imposes much higher costs on those buying insurance in the new health insurance exchanges as the healthiest opt out and the less healthy face increased premiums.” *Id.* at 7.

95. See *Lochner v. New York*, 198 U.S. 45 (1905).

96. See *supra* note 51 (quoting Judge Sutton).



Second, the doctrinal test sketched above is no less administrable than the balancing inquiries that courts apply in other areas of constitutional law.<sup>97</sup> Indeed, it likely is more administrable than many such inquiries because of the measure of deference built into the test. The courts would be tasked with assessing the relative efficacy and coerciveness of different regulatory alternatives at one step removed: they would ask whether there is a reasonable basis for Congress's judgment. If such a test is not administrable, then neither is much of modern constitutional law.

Third, concerns about putting the federal courts in the position of second-guessing the policy judgments of Congress counsel in favor of upholding an economic mandate without inquiring about the regulatory alternatives. Such a concern does not counsel in favor of invalidating all economic mandates in one judicial decision regardless of the policy importance of imposing any of them. It is far more respectful of Congress's policy expertise and political responsibility to impose a restrained inquiry into regulatory alternatives than it is to declare all economic mandates constitutionally out of bounds.<sup>98</sup>

Critics and defenders of the ACA alike may nonetheless agree that I am running a fool's errand. On this view, a Court that registers the policy justification for the minimum coverage provision will uphold it without conducting an inquiry into relative efficacy and coerciveness, and a Court that is uninterested in the policy justification will balk at making the kinds of judgments that such an inquiry entails. They may be right. But then again they may be wrong, particularly given the methodological disagreements among members of the Court. An inquiry into relative efficacy and coerciveness is well suited to jurists who are comfortable articulating standards and applying balancing tests; who are inclined to decide momentous cases relatively narrowly; and who want to construct doctrinal space in

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97. Consider, for example, the analysis of less restrictive or less discriminatory alternatives that is central to constitutional review of many free speech, equal protection, and dormant commerce cases. Consider as well the balancing test required by *Mathews v. Eldridge*, 424 U.S. 319 (1976), in many procedural due process cases.

98. *But cf.* Florida *ex rel.* Att'y Gen. v. U.S. Dep't Health & Human Servs., 648 F.3d 1235, 1296 (11th Cir. 2011) ("We are loath to invalidate an act of Congress, and do so only after extensive circumspection. But the role that the Court would take were we to adopt the position of the government is far more troublesome. Were we to adopt the 'limiting principles' proffered by the government, courts would sit in judgment over every economic mandate issued by Congress, determining whether the level of participation in the underlying market, the amount of cost-shifting, the unpredictability of need, or the strength of the moral imperative were enough to justify the mandate.").

which to make constitutional distinctions among different kinds of economic mandates.<sup>99</sup>

## VI. THE DISTINCTIVENESS OF HEALTH CARE

With the four aforementioned constitutional limits on the commerce power in mind, one is better situated to apprehend the constitutional relevance of the five factors that economists have identified as distinguishing the interstate health care market from all or nearly all other markets. These factors include: (1) the near certainty of use; (2) the unpredictability of use; (3) the potentially ruinous cost of use; (4) the legal restrictions on denying access to treatment in medical emergencies; and, as a partial consequence of these four factors; (5) the significant cost shifting and adverse selection problems that cause market failure.<sup>100</sup> In the interstate health care market, these five conditions exist, in combination, to a great extent.<sup>101</sup> In present litigation in the federal courts, the federal government has been emphasizing these characteristics with mixed success, possibly because some reviewing courts misunderstand their pertinence.

These five distinguishing characteristics of the interstate health care market are not best thought of (only to be dismissed) as freestanding criteria of constitutional judgment.<sup>102</sup> Instead,

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99. The Court may be reluctant to conduct an analysis of regulatory alternatives in an enumerated powers case because such an inquiry would create tension with *McCulloch* and would “feel” like part of a substantive due process analysis. Such reluctance may suggest that the activity/inactivity distinction is better suited to a substantive due process claim than to a Commerce Clause objection to a federal law.

100. See, e.g., Brief of *Amici Curiae* of Economics Scholars in Support of Appellant, at \*3, *Virginia ex rel. Cuccinelli v. Sebelius*, Nos. 11-1057 & 11-1058 (4th Cir. Mar. 7, 2011), 2011 WL 792209 (“[T]he health care market is characterized by five unique factors—the unavoidable need for medical care; the unpredictability of such need; the high cost of care; the inability of providers to refuse to provide care in emergency situations; and the very significant cost-shifting that underlies the way medical care is paid for in this country—which do not obtain in other markets.”).

101. See generally *id.*; cf. Mark A. Hall, *The History and Future of Health Care Law: An Essentialist View*, 41 WAKE FOREST L. REV. 347, 358 (2006) (considering “the essential features of health care delivery that distinguish its legal issues from those of other related fields,” and identifying as one of them “the *high cost* of care and *wide variability* of need, which necessitate public or private insurance that fundamentally alters medical economics”).

102. See *Florida ex rel. Att’y Gen.*, 648 F.3d 1235, 1295–96 (“These five factual criteria comprising the government’s ‘uniqueness’ argument are not limiting principles rooted in any constitutional understanding of the commerce power. Rather, they are *ad hoc* factors that—fortuitously—happen to apply to the health insurance and health care industries. They speak more to the complexity of the problem being regulated than the regulated decision’s relation to interstate commerce. They are not limiting principles, but

they are relevant to most of the present or potential constitutional limits on the power of Congress to issue individual mandates.

First, these factors speak to whether the minimum coverage provision is economic in nature. In view of the inevitability of consumption of health care services, the significant cost shifting that occurs from the uninsured to other participants in the health care market, and the substantial adverse selection problems that undermine insurance markets, the subject matter addressed by the minimum coverage provision is properly characterized as economic. The provision is a key part of Congress's effort to regulate the health insurance and health care markets.

Second, these factors inform whether the minimum coverage provision addresses a significant problem of collective action among the states. Not only do cost shifting and adverse selection occur to a great (and extensively documented) extent, but their effects also spill over state borders. With mobile participants in the health insurance and health care markets, and with state health care regimes of differing quality and generosity, states end up imposing significant costs on one another without paying for them.

Third, these five factors would be pertinent to a judicial assessment of whether Congress reasonably concluded that alternatives to a mandate would be less effective or more coercive. Because everyone requires access to health care; because no healthy person can know when she will require such access; because the costs of such care can bankrupt even wealthy Americans who lack insurance; because no one can lawfully be denied emergency care; and because uninsured Americans shift substantial costs to other participants in the health care market, one is hard pressed to identify regulatory alternatives to the minimum coverage provision that likely would prove about as effective and less coercive. To my knowledge, no one has identified such an alternative. Constitutional critics of the ACA who stress the coerciveness of the minimum coverage provision ought to be obliged to produce one.

## CONCLUSION

The Supreme Court's review of the constitutionality of the minimum coverage provision in the Affordable Care Act will

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limiting circumstances.”).

likely turn on whether there are principled, judicially enforceable limits on the scope of Congress's enumerated powers that the provision respects. No amount of properly applying contemporary doctrine under the Commerce Clause, the Necessary and Proper Clause, and the tax power may save the minimum coverage provision unless the Court is persuaded that a vote to uphold it is a vote to maintain judicially enforceable limits on Congress's powers.

I have identified several present or potential limits on the scope of the Commerce Clause that the minimum coverage provision honors. A principled jurist can conclude that the provision is within the scope of the commerce power while also embracing—or leaving for another day—some or all of the following principles regarding Congress's use of the Commerce Clause:

- (1) Congress may not regulate noneconomic subject matter, whether the regulation is a mandate or not, and whether the subject matter is deemed “inactivity” or “activity.” For example, Congress may not ban or require the possession of firearms in schools or in the home, nor may Congress force people to render aid to stop the commission of ordinary crimes like assault.
- (2) Congress may not impose any regulation (including a mandate) that violates constitutional rights. For example, Congress may not force people to eat certain foods or exercise a certain amount.
- (3) In order to regulate at all, Congress must have a reasonable basis to believe that the regulation will ameliorate a significant problem of collective action among the states. For example, all ordinary crime falls in this category regardless of whether the victim of the crime is a commercial enterprise.
- (4) Congress may not impose an economic mandate unless it has a reasonable basis to believe that the regulatory alternatives would be less effective or more coercive. For example, Congress may not require individuals to purchase a product if Congress can accomplish its regulatory objectives in a less coercive way, such as by restricting production of the product or by using tax incentives to encourage purchases.

In light of these present or potential limits, it would be difficult for the Court convincingly to invalidate the minimum coverage

provision on the ground that no judicially enforceable limits on individual mandates are available.

To be sure, some of these limits will not be satisfactory to those who believe that only categorical rules can meaningfully limit federal power.<sup>103</sup> But *Gonzales v. Raich*,<sup>104</sup> in which Justices Scalia and Kennedy voted with the majority to uphold federal power without reasoning categorically, makes clear that such a view of Congress's enumerated powers is rejected by at least six Justices (probably more), and for good reason.<sup>105</sup> A vote to uphold the minimum coverage provision is not a vote to authorize Congress to impose whatever economic mandates it wishes, let alone a vote to authorize Congress to impose whatever mandates it wishes, let alone a vote to abandon judicial enforcement of any constitutional limits on a national government of enumerated powers.

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103. See, e.g., Barnett, *supra* note 16 (“Today, only a categorical principle will preserve the protection of liberty afforded by the scheme of limited and enumerated federal power: Congress may not use its ‘power to regulate commerce . . . among the several states’ to conscript the American people to do business with private companies.”). For a demonstration of why a distinction between inactivity and activity would not be clear or categorical in practice, see generally Thomas More Law Ctr. v. Obama, No. 10-2388, at 27 (6th Cir. June 29, 2011) (Sutton, J., concurring in part and delivering the opinion of the court in part).

104. 545 U.S. 1 (2005).

105. See, e.g., *supra* note 71 (quoting the majority opinion written by Justice Stevens in *Raich*, which Justice Kennedy joined); *Raich*, 545 U.S. at 37 (Scalia, J., concurring in judgment) (“Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce. See *Lopez*, [514 U.S.] at 561. The relevant question is simply whether the means chosen are ‘reasonably adapted’ to the attainment of a legitimate end under the commerce power.”).