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Constitutionality of the Patient Protection and Affordable Care Act Under the Commerce Clause and the Necessary and Proper Clause

Wilson Huhn*

INTRODUCTION

On March 23, 2010, President Barack Obama signed into law the Patient Protection and Affordable Care Act (PPACA).¹ The PPACA is a comprehensive statute reforming how health care is paid for in the United States. One of the principal purposes of the Act is to extend access to health care by vastly reducing the number of persons who are uninsured. According to the Congressional Budget Office and the Centers for Medicare and Medicaid Services, the new law will extend health insurance coverage to an additional 32 to 34 million American citizens.² In addition, the new law will regulate the health insurance industry in a number of ways in order to guarantee certain minimum levels of insurance coverage. According to HealthCare.gov, under the law medical loss ratios will be increased so that 80 to 85% of policyholders' premium dollars will be spent on health care instead of administrative expenses.³ Health insurance policies will no longer be permitted to exclude preexisting conditions from coverage.⁴ Preventive care must be fully covered.⁵ Annual and lifetime limits on insurance coverage will be abolished.⁶ Furthermore, the law utilizes the taxation system to effect a massive redistribution of resources

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¹ Public Law 111-148 (2010). See The White House, Office of the Press Secretary, *Remarks of the President and Vice-President at the Signing of the Health Insurance Reform Bill* (March 23, 2010), at <http://www.whitehouse.gov/the-press-office/remarks-president-and-vice-president-signing-health-insurance-reform-bill>.

² See Congressional Budget Office, *Letter to Honorable Nancy Pelosi* (March 18, 2010), Table 2, Preliminary Estimate of the Effects of the Insurance Coverage Provisions of the Reconciliation Legislation Combined with H.R. 3590 as Passed by the Senate, at <http://www.cbo.gov/ftpdocs/113xx/doc11355/hr4872.pdf> (showing a reduction of 32 million persons in the number of uninsured Americans by the year 2019); Department of Health and Human Services, Centers for Medicare and Medicaid Services, Office of the Actuary, *Estimated Financial Effects of the "Patient Protection and Affordable Care Act," as passed by the Senate on December 24, 2009* (January 8, 2010), at <http://www.modernhealthcare.com/assets/pdf/CH68197110.PDF> (showing an "additional 34 million people who would become insured by 2019").

³ See HealthCare.gov, Medical Loss Ratio: Getting Your Money's Worth on Health Insurance, at http://www.healthcare.gov/news/factsheets/medical_loss_ratio.html:

Today, many insurance companies spend a substantial portion of consumers' premium dollars on administrative costs and profits, including executive salaries, overhead, and marketing. Thanks to the Affordable Care Act, consumers will receive more value for their premium dollar because insurance companies will be required to spend 80 to 85 percent of premium dollars on medical care and health care quality improvement, rather than on administrative costs, starting in 2011. If they don't, the insurance companies will be required to provide a rebate to their customers starting in 2012.

⁴ Act, Sec. 2704

⁵ *Id.*, Sec. 2713.

⁶ *Id.*, Sec. 2711.

to help low-income individuals and families purchase health insurance.⁷ Under the law individuals and families earning less than 400% of the Federal Poverty Level (currently \$88,200 per year for a family of four)⁸ will receive refundable tax credits to help purchase health insurance and to pay for out-of-pocket expenses.⁹

To make these reforms work the Act contains a provision (Section 1501) that is unpopular in itself but necessary to the achievement of the goals of the Act. Section 1501 of the Act, entitled “Requirement to Maintain Minimum Essential Coverage,” commonly referred to as the “individual mandate” or Minimum Essential Coverage Provision (MELP), requires nearly all American citizens to maintain health insurance coverage.¹⁰ The provision is enforced not through the criminal law but rather administratively by means of the Internal Revenue Code.¹¹ The law provides that, with certain exceptions,¹² all persons must either acquire health insurance or incur a tax penalty measured by income level.¹³ The individual mandate and most of the associated insurance industry regulations go into effect on January 1, 2014.¹⁴

As part of the bill, Congress adopted detailed findings justifying Congress’ authority to enact the individual mandate. Congress reached this conclusion: “The individual responsibility requirement provided for in this section ... is commercial and economic in nature, and substantially affects interstate commerce.”¹⁵ Congress made extensive specific findings in support of this conclusion.¹⁶

⁷ See HealthCare.gov, *Provisions of the Affordable Care Act, by Year, 2014*, at <http://www.healthcare.gov/law/about/order/byyear.html#2014>, stating:

Tax credits to make it easier for the middle class to afford insurance will become available for people with income between 100 percent and 400 percent of the poverty line who are not eligible for other affordable coverage. (In 2010, 400 percent of the poverty line comes out to about \$43,000 for an individual or \$88,000 for a family of four.) The tax credit is advanceable, so it can lower your premium payments each month, rather than making you wait for tax time. It’s also refundable, so even moderate-income families can receive the full benefit of the credit. These individuals may also qualify for reduced cost-sharing (copayments, co-insurance, and deductibles).

⁸ See CMS.gov, *2010 Federal Poverty Guidelines*, at

<https://www.cms.gov/MedicaidEligibility/downloads/POV10Combo.pdf>.

⁹ See note 7 *supra*.

¹⁰ See Act, Sec. 1501, including 26 U.S.C. 5000A (amendment to the Internal Revenue Code entitled “Requirement to Maintain Minimum Essential Coverage”).

¹¹ See *Commonwealth ex rel. Cuccinelli v. Sebelius*, 728 F.Supp.2d 768, 770 (E.D. Va. 2010) (summarizing the MELP):

The Minimum Essential Coverage Provision requires that every United States citizen, other than those falling within specified exceptions, maintain a minimum level of health insurance coverage for each month beginning in 2014. Failure to comply will result in a penalty included with the taxpayer’s annual return. As enacted, Section 1501 is administered and enforced as a part of the Internal Revenue Code.

Id. at 770.

¹² See 26 U.S.C. 5000A(d)(2) (religious exemptions from individual mandate); 5000A(e) (exemptions for persons who cannot afford coverage, members of Indian Tribes, and persons whose coverage was temporarily interrupted).

¹³ See notes 10-11 *supra*.

¹⁴ See HealthCare.gov, *Provisions of the Affordable Care Act, by Year, 2014*, at <http://www.healthcare.gov/law/about/order/byyear.html#2014>.

¹⁵ § 1501(a)(1).

¹⁶ See § 1501(a)(2). Congress stated:

(2) EFFECTS ON THE NATIONAL ECONOMY AND INTERSTATE

Soon after the adoption of the Act, a number of lawsuits were launched challenging its constitutionality, many of which have been dismissed on standing or other grounds.¹⁷ The only portion of the Act whose constitutionality seems to be in serious question is the individual

COMMERCE.—The effects described in this paragraph are the following:

(A) The requirement regulates activity that is commercial and economic in nature: economic and financial decisions about how and when health care is paid for, and when health insurance is purchased.

(B) Health insurance and health care services are a significant part of the national economy. National health spending is projected to increase from \$2,500,000,000,000, or 17.6 percent of the economy, in 2009 to \$4,700,000,000,000 in 2019. Private health insurance spending is projected to be \$854,000,000,000 in 2009, and pays for medical supplies, drugs, and equipment that are shipped in interstate commerce. Since most health insurance is sold by national or regional health insurance companies, health insurance is sold in interstate commerce and claims payments flow through interstate commerce.

(C) The requirement, together with the other provisions of this Act, will add millions of new consumers to the health insurance market, increasing the supply of, and demand for, health care services. According to the Congressional Budget Office, the requirement will increase the number and share of Americans who are insured.

(D) The requirement achieves near-universal coverage by building upon and strengthening the private employerbased health insurance system, which covers 176,000,000 Americans nationwide. 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.

(E) Half of all personal bankruptcies are caused in part by medical expenses. By significantly increasing health insurance coverage, the requirement, together with the other provisions of this Act, will improve financial security for families.

(F) Under the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1001 et seq.), the Public Health Service Act (42 U.S.C. 201 et seq.), and this Act, the Federal Government has a significant role in regulating health insurance which is in interstate commerce.

(G) Under sections 2704 and 2705 of the Public Health Service Act (as added by section 1201 of this Act), if there were no requirement, many individuals would wait to purchase health insurance until they needed care. By 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. The 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.

(H) Administrative costs for private health insurance, which were \$90,000,000,000 in 2006, are 26 to 30 percent of premiums in the current individual and small group markets. By significantly increasing health insurance coverage and the size of purchasing pools, which will increase economies of scale, the requirement, together with the other provisions of this Act, will significantly reduce administrative costs and lower health insurance premiums. The requirement is essential to creating effective health insurance markets that do not require underwriting and eliminate its associated administrative costs.

¹⁷ See, e.g., *New Jersey Physicians, Inc. v. Obama*, ___ F.Supp.2d ___, (D. N.J. 2010) 2010 WL 5060597 (decided Dec. 8, 2010, ruling that patient and physician group lack standing to challenge constitutionality of Act); *Shreeve v. Obama*, ___ F.Supp. 2d ___, (E.D. Tenn. 2010) 2010 WL 4628177 (decided Nov. 4, 2010, and holding that plaintiffs lack standing to challenge constitutionality of Act and defendants are immune from suit under the Speech and Debate Clause and doctrine of Presidential Immunity); *Baldwin v. Sebelius*, ___ F.Supp.2d ___, (S.D. Cal. 2010) 2010 WL 3418436 (decided Aug. 27, 2010, dismissing challenge to Act for lack of standing); *Taitz v. Obama*, 707 F.Supp. 1 (D. D.C. 2010) (decided April 14, 2010, dismissing challenge to Act for lack of standing).

mandate.¹⁸ As of this date, three federal District Courts have rendered final decisions concerning the constitutionality of the individual mandate.¹⁹ In two of these cases the district courts upheld the law,²⁰ and in the remaining case the district court declared the individual mandate unconstitutional.²¹

The federal government has argued that Congress has authority to enact the PPACA under the Commerce Clause (Article I, Section 8, Clause 3), and the Necessary and Proper Clause (Article I, Section 8, Clause 18).²² These portions of the Constitution state that “Congress shall have power:”

Clause 3. To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

...

Clause 18. To 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.²³

Part I of this essay discusses Congress’ power to enact the individual mandate under the Affection Doctrine. Part II discusses Congress’ power to enact the individual mandate pursuant to the Necessary and Proper Clause.

¹⁸ See, e.g., *U.S. Citizens Ass’n v. Sebelius*, ___ F.Supp.2d ___ (N.D. Ohio 2010) 2010 WL 4947043 (decided Nov. 22, 2010, dismissing challenge to individual mandate based upon First Amendment, Due Process, or Right to Privacy, but refusing to dismiss challenge to individual mandate based upon Commerce Clause); *but see Florida ex rel. McCollum v. U.S. Department of Health and Human Services*, 716 F.Supp.2d 1120 (N.D. Fla. 2010) (dismissing challenges to employer mandate and health exchange option, but refusing to dismiss challenge to Medicaid expansion and individual mandate). In my opinion, since the states have the option to refuse federal funding for Medicaid, and because the conditions upon receipt of funding contained in the PPACA are intimately related to the purpose of the funding, it is unlikely that the Medicaid option will be ruled “coercive” under *South Dakota v. Dole*, 483 U.S. 203 (1987).

¹⁹ See *Commonwealth ex rel. Cuccinelli v. Sebelius*, 728 F.Supp.2d 768 (E.D.Va. 2010), 2010 WL 5059718 (decided Dec. 13, 2010, striking down Minimum Essential Coverage Provision of PPACA); *Liberty University, Inc., v. Geithner*, ___ F.Supp.2d ___ (W.D. Va. 2010), 2010 WL 4860299 W.D.Va. (decided Nov. 30, 2010, upholding constitutionality of individual mandate, employer mandate, abortion funding, and religious conscience provisions of PPACA); *Thomas More Law Center v. Obama*, 720 F.Supp.2d 882 (E.D. Mich. 2010) (decided Oct. 7, 2010, upholding constitutionality of the individual mandate provision of PPACA).

²⁰ See *Liberty University*, note 19 *supra*; *Thomas More Law Center*, *id.*

²¹ See *Cuccinelli*, note 19 *supra*.

²² The government has also argued, in the alternative, that the individual mandate is a constitutional exercise of Congress’ power under the General Welfare Clause, U.S. Const., art. I, sec. 8, cl. 1. Having found the individual mandate constitutional under the Commerce Clause and Necessary and Proper Clause, the district courts in *Thomas More Institute* and *Liberty University* did not rule on the government’s contention that this law was authorized under the General Welfare Clause. See *Liberty University*, at 11 (finding it unnecessary to consider constitutionality of individual mandate under General Welfare Clause); 720 F.Supp.2d, at 895 (same). The district court in *Cuccinelli* did reach this issue, and ruled that the provision in the statute imposing an additional tax on income for failure to maintain minimum effective coverage constituted a “penalty” and not a “tax,” and therefore was not enacted pursuant to the General Welfare Clause. See 728 F.Supp.2d, 782-788 (finding penalty provision of individual mandate was not a valid enactment under the General Welfare Clause).

²³ U.S. CONST., art. I, sec. 8, cl. 1, 3, 18.

I. CONGRESS' POWER TO ENACT THE INDIVIDUAL MANDATE UNDER THE AFFECTATION DOCTRINE

The central question that has arisen in this litigation is whether Congress' power under the Commerce Clause is limited by the principle of individual freedom. More specifically, does the Commerce Clause withhold from Congress the power to require individuals to purchase a commodity that they would prefer not to purchase? I suggest that the answer to this question is "No" – that this matter was definitively settled in 1937 when the Supreme Court abandoned the doctrine of economic substantive due process.

A. Congress' Power under the Affectation Doctrine

The standard governing the power of Congress to enact legislation under the Commerce Clause is quite broad. Not only does Congress have the power to regulate the flow of interstate commerce; the Supreme Court has held that under the Affectation Doctrine Congress also has authority to regulate any and all economic activity that, in the aggregate, has a substantial economic effect on interstate commerce.²⁴ Under the Affectation Doctrine, the courts are not supposed to exercise independent judgment as to whether or not an activity affects interstate commerce; instead they are to defer to Congress' view of the matter.²⁵ So long as there exists a "rational basis" for believing that the activity in question substantially affects interstate commerce, the courts must uphold the legislation.²⁶

The furthest reach of Congress' power under the Affectation Doctrine is illustrated by the Supreme Court's rulings in *Wickard v. Filburn* (1942)²⁷ and *Gonzales v. Raich* (2005).²⁸ In *Wickard*, the Court upheld the constitutionality of a provision of the Agricultural Adjustment Act

²⁴ See *Perez v. United States*, 402 U.S. 146, 150 (1971) (describing Congress' power under the Commerce Clause). The Court stated:

The Commerce Clause reaches, in the main, three categories of problems. First, the use of channels of interstate or foreign commerce which Congress deems are being misused, as, for example, the shipment of stolen goods or of persons who have been kidnaped. Second, protection of the instrumentalities of interstate commerce, as for example, the destruction of an aircraft, or persons or things in commerce, as, for example, thefts from interstate shipments. Third, those activities affecting commerce.

Id. (citations omitted). See also *United States v. Lopez*, 514 U.S. 549 (1995) (setting forth elements of Affectation Doctrine) (stating, "Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce. ... We conclude ... that the proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce."); *Gonzales v. Raich*, 545 U.S. 1, 17 (2005) ("Our case law firmly establishes Congress' power to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce." (citation omitted)).

²⁵ See *Gonzales v. Raich*, 545 U.S. 1, 22 (2005) ("In assessing the scope of Congress' authority under the Commerce Clause, we stress that the task before us is a modest one. We need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a "rational basis" exists for so concluding.").

²⁶ *Id.* See also Greg Sergent, *Legal expert: Ruling on health reform is "very defective" and "will be overturned"* (Washington Post, Dec. 13, 2010) (quoting Professor Timothy Jost in his criticism of the District Court's reasoning about the Commerce Clause) at http://voices.washingtonpost.com/plum-line/2010/12/legal_expert_ruling_on_obamaca.html.

²⁷ 317 U.S. 111 (1948) (upholding provision of Agricultural Adjustment Act against Commerce Clause challenge).

²⁸ 545 U.S. 1 (2005) (upholding provision of Controlled Substances Act against Commerce Clause challenge).

imposing a penalty on farmers for producing more wheat than permitted under the law.²⁹ The Court reasoned that by producing and consuming home-grown wheat instead of purchasing wheat from the market, Filburn (and all other farmers like him) contributed to the overproduction of wheat, thus depressing the market price.³⁰ Although the effect of Filburn's action on the price of wheat was trivial by itself, the effect of all other farmers similarly situated was far from trivial.³¹ Similarly, in *Gonzales v. Raich*, the Court ruled that Congress has the authority under the Commerce Clause to punish the individual cultivation and consumption of marijuana for medicinal purposes under the Controlled Substances Act, even though this activity had been made lawful by the California Compassionate Use Act.³² The Court in *Raich* found *Wickard* to be analogous, in that the aggregate effect of all persons growing marijuana for personal use substantially affects interstate commerce in marijuana.³³

In two cases in recent decades the Supreme Court has struck down important pieces of federal legislation on the ground that Congress lacked authority under the Affection Doctrine to regulate the activity in question. In *United States v. Lopez* (1995)³⁴ the Court invalidated the Guns Free School Zone Act which prohibited the possession of firearms within 1000 feet of a school,³⁵ and in *United States v. Morrison* (2000)³⁶ the Court struck down the Violence Against Women Act which provided federal remedies in cases of gender-based violence.³⁷ In both cases the Court ruled that Congress lacked authority under the Commerce Clause to enact the laws in question because the activity being regulated was not "economic" in nature.³⁸ In *Lopez* the Court based its decision upon the additional ground that there was insufficient evidence to support the proposition that the activities in question substantially effect interstate commerce.³⁹

²⁹ See 317 U.S., at 128-129 ("This record leaves us in no doubt that Congress may properly have considered that wheat consumed on the farm where grown if wholly outside the scheme of regulation would have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices.").

³⁰ See *id.*

³¹ See *id.* at 127-128. The Court stated:

The effect of the statute before us is to restrict the amount which may be produced for market and the extent as well to which one may forestall resort to the market by producing to meet his own needs. That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.

³² See 545 U.S., at 32-33 (upholding Controlled Substances Act and stating that the challenge to the law "comes down to the claim that a locally cultivated product that is used domestically rather than sold on the open market is not subject to federal regulation. Given the findings in the CSA and the undisputed magnitude of the commercial market for marijuana, our decisions in *Wickard v. Filburn* and the later cases endorsing its reasoning foreclose that claim.").

³³ See *id.* at 17-21 (discussing *Wickard*); *id.* at 18 ("The similarities between this case and *Wickard* are striking.").

³⁴ 514 U.S. 549 (1995) (striking down Guns Free School Zones Act as beyond Congress' authority under the Commerce Clause).

³⁵ *Id.* at 567-568 (same).

³⁶ 529 U.S. 598 (2000) (striking down Violence Against Women Act as beyond Congress' authority under the Commerce Clause).

³⁷ *Id.* at 617-619 (same).

³⁸ 514 U.S., at 567 ("The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce. "); 529 U.S., at 613 ("Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity. ").

³⁹ 514 U.S., at 567 ("To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police

The dominant reason cited by the Court for its rulings in *Lopez* and *Morrison* is the principle of federalism. In *Lopez* the Court warned:

Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory.⁴⁰

In *Morrison*, the Court echoed this rationale:

The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States.⁴¹

The Court made clear that it was defending the power of the states against federal action under the Commerce Clause:

We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce.⁴²

In both *Lopez* and *Morrison*, the primary reason that the Supreme Court struck down the federal laws was to preserve the traditional powers of the states against federal encroachment. In both cases, the Court stated that the Constitution recognizes “a distinction between what is truly national and what is truly local.”⁴³ *Lopez* and *Morrison* rest upon the principle of federalism, not individual liberty.

B. The Plaintiffs’ Challenge to Congress’ Power to Enact the PPACA Under the Affectation Doctrine

According to the plaintiffs, it is significant that, in describing the power of Congress to enact legislation under the Affectation Doctrine, the Supreme Court has repeatedly used the specific term “economic activity” or “economic activities” rather than the more general term “economic conduct” or “economic decisions.”⁴⁴ The plaintiffs contend that an individual’s decision not to purchase health insurance is “inactivity” rather than “activity.”⁴⁵ Of even greater

power of the sort retained by the States.”); 529 U.S., at 615 (rejecting the government’s argument that gender-based violence substantially affects interstate commerce.”).

⁴⁰ 514 U.S., at 577.

⁴¹ 529 U.S., at 618.

⁴² *Id.* at 617.

⁴³ 514 U.S., at 567-568; 529 U.S., at 617-618.

⁴⁴ See *Cuccinelli*, Plaintiff’s Memorandum in Opposition to the Secretary’s Motion for Summary Judgment, 2010 WL 3740668 (E.D.Va.) (distinguishing the term “activities” from “decisions” or “conduct” and stating, “It is only the third prong [the Affectation Doctrine] that is at issue in this case and under that prong the operative word is ‘activities.’ And, of course, the status of being uninsured is inactivity; the opposite of activity.”)

⁴⁵ See *id.*

significance is that fact that in every previous instance in which the Court upheld enactments of Congress under the Commerce Clause, the activity being regulated consisted of an affirmative act.⁴⁶ Even the conduct that Congress regulated in *Wickard* and *Raich* constituted production of a commodity (wheat or marijuana).⁴⁷ Accordingly, argue the plaintiffs, there is no precedent for Congress to force persons to enter a market and purchase a product,⁴⁸ and the Affectation Doctrine should not be expanded to include such a power.⁴⁹

The following portion of this article describes the response of the district courts in *Thomas More Law Center*⁵⁰ and *Liberty University*⁵¹ to these arguments .

C. The Decisions of the District Courts in *Thomas More Law Center* and *Liberty University* Regarding the Affectation Doctrine

The district courts in *Thomas More Law Center v. Obama* and *Liberty University v. Geithner* upheld the constitutionality of the PPACA. Both courts rejected the distinction between “economic activity” and “inactivity.” Semantically, the courts characterized the subject of congressional regulation as “decisions” or “conduct.”⁵² The courts found that the conduct resulting from individuals’ decisions not to purchase health insurance is economic in nature.⁵³ Furthermore, those two courts found that individuals’ decisions not to purchase health insurance, in the aggregate, bear a close and substantial relation to interstate commerce.⁵⁴ Accordingly, those courts upheld the individual mandate as an appropriate exercise of Congress’ power under the Affectation Doctrine.

⁴⁶ *See id.* (stating that the Congress’ power under the Commerce Clause and Necessary and Proper Clause “has never won judicial consent in the context of commandeering a citizen into commerce in order to regulate him.”).

⁴⁷ *See id.* (stating, “Nor is it true that this is anything like the activities in *Wickard* and *Raich*, the cases that establish the existing affirmative outer limits of the Commerce Clause. The explanation for the holdings in both of those cases is that when one engages in the voluntary activity of producing a commodity, which in the aggregate affects the price of the whole, one is not entitled to an atomized, as applied defense to such regulation.”).

⁴⁸ *See Cuccinelli*, Plaintiff’s Memorandum in Support of Motion for Summary Judgment, 2010 WL 3536788 (stating, “Mandate and Penalty are Outside the Existing Outer Limits of the Commerce Clause and Associated Necessary and Proper Clause as Measured by Supreme Court Precedent.”).

⁴⁹ *See* Plaintiff’s Memorandum in Opposition to the Secretary’s Motion for Summary Judgment, note 45 *supra* (stating, “This negative outer limit of the Commerce Clause is why the Secretary’s claim of power must fail. Her theory that activities substantially affecting interstate commerce include the failure to purchase goods or services from another citizen, giving rise to a federal power to require such purchases, would create a particularly strong form of federal police power lacking principled limits. Because no limits on the claimed power have been or can be identified, the Secretary is not entitled to summary judgment.”).

⁵⁰ 720 F.Supp.2d 882 (2010) (upholding individual mandate of PPACA).

⁵¹ ___ F.Supp.2d ___ (2010) 2010 WL 4860299 (same).

⁵² 720 F.Supp.2d, at 893 (“The decision whether to purchase insurance or to attempt to pay for health care out of pocket, is plainly economic.”); *Liberty University*, at 12 (“The conduct regulated by the individual coverage provision-individuals’ decisions to forego purchasing health insurance coverage-is economic in nature, and so the provision is not susceptible to the shortcomings of the statutes struck down by the Court in *Lopez* and *Morrison*.”).

⁵³ *See id.*

⁵⁴ *See* 720 F.Supp.2d, at 893 (“These decisions, viewed in the aggregate, have clear and direct impacts on health care providers, taxpayers, and the insured population who ultimately pay for the care provided to those who go without insurance.”); *Liberty University*, at 14 (“I hold that there is a rational basis for Congress to conclude that individuals’ decisions about how and when to pay for health care are activities that in the aggregate substantially affect the interstate health care market.”).

The district courts in *Thomas More Law Center* and *Liberty University* found *Wickard* and *Raich* to be analogous to the case at hand.⁵⁵ The court in *Thomas More Law Center* noted that the persons challenging the laws in *Wickard* and *Raich* had similarly claimed that they were not engaging in commerce – they claimed that they were being punished for *refusing* to enter the market that Congress was regulating – but the Supreme Court had rejected that argument in both *Wickard* and *Raich*.⁵⁶

A critical finding of the district courts in *Thomas More Law Center* and *Liberty University* is that *no-one* is outside the market that is regulated by the PPACA. In reaching this conclusion, the two district courts characterized the relevant market governed by the PPACA to be not the purchase of health insurance but rather the purchase of medical care.⁵⁷ Those courts found that the decision to purchase health insurance is simply a decision about *how* to pay for medical care – not *whether* to pay for it.⁵⁸ Health insurance is not purchased as a commodity in and of itself – it is a method of paying for medical costs that are, in this day and age, inevitable.⁵⁹ The plaintiffs are in the market for health care, whether they want to be or not.⁶⁰ It is this fact that converts the refusal to purchase health insurance from “inactivity” to “activity.” The court in *Thomas More Law Center* stated:

The health care market is unlike other markets. No one can guarantee his or her health, or ensure that he or she will never participate in the health care market. Indeed, the opposite is nearly always true. The question is how participants in the health care market pay for medical expenses—through insurance, or through an attempt to pay out of pocket with a backstop of uncompensated care funded by third parties. This phenomenon of cost-shifting is what makes the health care market unique. Far from “inactivity,” by choosing to forgo insurance plaintiffs are making an economic decision to try to pay for health care services later, out of pocket, rather than now through the purchase of insurance, collectively shifting billions of dollars, \$43 billion in 2008, onto other market participants.⁶¹

The court in *Liberty University* came to the same conclusion:

Nearly everyone will require health care services at some point in their lifetimes, and it is not always possible to predict when one will be afflicted by illness or injury and require care. The “fundamental need for health care and the necessity of paying for such services received” creates the market in health care services, of which nearly everyone is a participant. *Thomas More Law Ctr.*, 720 F.Supp.2d at 894. Regardless of whether one relies on an insurance policy, one's savings, or the backstop of free or reduced-cost emergency room services, one has made a

⁵⁵ See 720 F.Supp.2d, at 892 (finding *Wickard* and *Raich* analogous); *Liberty University* at 15 (same).

⁵⁶ See 720 F.Supp.2d, at 894 (citing *Wickard* and *Raich*, and stating, “The Supreme Court has consistently rejected claims that individuals who choose not to engage in commerce thereby place themselves beyond the reach of the Commerce Clause.”).

⁵⁷ See notes 61-62 *infra* and accompanying text.

⁵⁸ See *id.*

⁵⁹ See *id.*

⁶⁰ See *id.*

⁶¹ 720 F.Supp.2d, at 894.

choice regarding the method of payment for the health care services one expects to receive.⁶²

The district court in *Cuccinelli* came to a different conclusion, finding that Congress did not have the power under the Affectation Doctrine to enact the individual mandate of the PPACA.

D. The Decision of the District Court in *Cuccinelli v. Sebelius* regarding Congress' Power under the Affectation Doctrine

The decision of the district court in *Cuccinelli v. Sebelius* interpreting Congress' power under the Affectation Doctrine generally adopts the plaintiffs' arguments. However, in so doing the district court revives two approaches to constitutional decisionmaking that were abandoned by the Supreme Court more than seven decades ago. First, the *Cuccinelli* court recognizes a categorical distinction between "economic activity" and "inactivity." Second, the court implicitly revives the concept of Economic Substantive Due Process.

1. *The Categorical Distinction Between Activity and Inactivity*

The District Court in *Cuccinelli* adopted the distinction drawn by the plaintiffs between "economic activity" and "inactivity." The court framed the issue as follows:

In surveying the legal landscape, several operative elements are commonly encountered in Commerce Clause decisions. First, to survive a constitutional challenge the subject matter must be economic in nature and affect interstate commerce, and second, it must involve activity. Every application of Commerce Clause power found to be constitutionally sound by the Supreme Court involved some form of action, transaction, or deed placed in motion by an individual or legal entity. The constitutional viability of the Minimum Essential Coverage Provision in this case turns on whether or not a person's decision to refuse to purchase health care insurance is such an activity.⁶³

The *Cuccinelli* court distinguished *Wickard* and *Raich* on the ground that in those cases the persons being regulated had voluntarily entered the market by producing a product for personal consumption:

In both cases, the activity under review was the product of a self-directed affirmative move to cultivate and consume wheat or marijuana. This self-initiated change of position voluntarily placed the subject within the stream of commerce. Absent that step, governmental regulation could have been avoided.⁶⁴

The *Cuccinelli* court concludes that the PPACA exceeds the historical reach of the Commerce Clause:

⁶² *Liberty University*, at 15.

⁶³ 728 F.Supp.2d, at 781.

⁶⁴ *Id.* at 780.

The power of Congress to regulate a class of activities that in the aggregate has a substantial and direct effect on interstate commerce is well settled. This even extends to noneconomic activity closely connected to the intended market. But these regulatory powers are triggered by some type of self-initiated action. Neither the Supreme Court nor any federal circuit court of appeals has extended Commerce Clause powers to compel an individual to involuntarily enter the stream of commerce by purchasing a commodity in the private market. In doing so, enactment of the Minimum Essential Coverage Provision exceeds the Commerce Clause powers vested in Congress under Article I.⁶⁵

The foregoing passage of the court’s opinion in *Cuccinelli* contains a significant and telling phrase: “direct effect.”⁶⁶ The district court appears to revive the distinction between “direct” and “indirect” effects on interstate commerce. Before 1937, it was common for the Supreme Court to distinguish “direct” from “indirect” effects upon interstate commerce.⁶⁷ The pre-1937 Court followed the principle that the Commerce Clause vests power in Congress to regulate activities that directly affect interstate commerce (such as the rates charged by railroads on intrastate lines),⁶⁸ but that the Commerce Clause does not authorize Congress to regulate activities that indirectly affect interstate commerce (such as the employment of child labor).⁶⁹

Even more significantly, by drawing a categorical distinction between the production of commodities and the refusal to purchase a commodity – between “activity” and “inactivity” – the *Cuccinelli* court imitates the categorical approach to constitutional interpretation that had been used prior to 1937 to limit Congress’ power under the Commerce Clause. The categorical approach (including the distinction between “direct” and “indirect” effects on commerce) was rejected by the Supreme Court in *NLRB v. Jones & Laughlin Steel*⁷⁰ and subsequent cases, where the Court found that it is not the *nature* of the conduct being regulated but the *degree* of its effect on interstate commerce that determines whether Congress had the power to regulate it.⁷¹

⁶⁵ *Id.* at 781-782 (footnote and citations omitted).

⁶⁶ *Id.*

⁶⁷ See *U.S. v. E.C. Knight Co.*, 156 U.S. 1 (1895) (application of Sherman Antitrust Act to manufacturing has only an indirect effect on interstate commerce and is therefore beyond Congress’ power under the Commerce Clause); *A.L.A. Schechter Poultry Co. v. U.S.*, 295 U.S. 495 (1935) (striking down provision of the Federal Trade Commission Act as beyond Congress’ power under the Commerce Clause); *id.* at 546 (stating, “In determining how far the federal government may go in controlling intrastate transactions upon the ground that they ‘affect’ interstate commerce, there is a necessary and well-established distinction between direct and indirect effects.”).

⁶⁸ See *Shreveport Rate Cases*, 234 U.S. 432 (1914) (upholding power of Interstate Commerce Commission to regulate intrastate railroad rates).

⁶⁹ See *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (striking down federal law prohibiting child labor on ground that law exceeds Congress’ power under the Commerce Clause).

⁷⁰ 301 U.S. 1 (1937) (upholding National Labor Relations Act as proper exercise of Congress’ power under the Commerce Clause); *id.* at 36-37 (rejecting “direct/indirect” test of Congress’ power under the Commerce Clause).

⁷¹ See *Lopez*, at 555-556, where the Court stated:

[I]n the watershed case of *NLRB v. Jones & Laughlin Steel Corp.*, the Court upheld the National Labor Relations Act against a Commerce Clause challenge, and in the process, departed from the distinction between “direct” and “indirect” effects on interstate commerce. (“The question [of the scope of Congress’ power] is necessarily one of degree”). The Court held that intrastate activities that “have such a close and substantial relation to interstate commerce that their control is essential

Legal historian Morton J. Horwitz describes “categorical thinking” and distinguishes it from modern legal reasoning:

Nineteenth-century legal thought was overwhelmingly dominated by categorical thinking – by clear, distinct, bright-line classifications of legal phenomena. Late-nineteenth-century legal reasoning brought categorical modes of thought to their highest fulfillment.

By contrast, in the twentieth century, the dominant conception of the arrangement of legal phenomena has been that of a continuum between contradictory policies or doctrines. Contemporary thinkers typically have been engaged in balancing conflicting policies and “drawing lines” somewhere between them. Nineteenth-century categorizing typically sought to demonstrate “differences of kind” among legal classifications; twentieth-century balancing tests deal only with “differences of degree.”

There were a number of familiar categories that late-nineteenth-century judges used to decide cases: “direct-indirect” tests in a number of legal areas, especially under the commerce clause⁷²

In *Wickard v. Filburn* the Supreme Court explained why it had rejected the categorical approach to Commerce Clause analysis:

The Court’s recognition of the relevance of the economic effects in the application of the Commerce Clause exemplified by this statement has made the mechanical application of legal formulas no longer feasible. Once an economic measure of the reach of the power granted to Congress in the Commerce Clause is accepted, questions of federal power cannot be decided simply by finding the activity in question to be “production” nor can consideration of its economic effects be foreclosed by calling them “indirect.”⁷³

or appropriate to protect that commerce from burdens and obstructions” are within Congress’ power to regulate.

In *Wickard v. Filburn*, the Court upheld the application of amendments to the Agricultural Adjustment Act of 1938 to the production and consumption of homegrown wheat. The *Wickard* Court explicitly rejected earlier distinctions between direct and indirect effects on interstate commerce, stating:

“[E]ven if appellee’s activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as ‘direct’ or ‘indirect.’ ”

Id. (citations omitted).

⁷² MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* (1992). See also GRANT GILMORE, *THE AGES OF AMERICAN LAW* 41 (1977) (referring to the same period as “the age of faith,” (i.e., faith in legal principles) in contrast to “the age of anxiety” which followed it).

⁷³ 317 U.S., at 123-124.

The *Cuccinelli* court's return to categorical analysis in drawing a distinction between "activity" and "inactivity" is not its only retrograde step. In addition, the *Cuccinelli* court engrafted a limitation on the power of Congress that reflects the thinking of the *Lochner* era.

2. A Return to Economic Substantive Due Process

Unlike the Supreme Court in *Lopez* and *Morrison*, the district court in *Cuccinelli* did not base its decision limiting Congress' power under the Commerce Clause to the principle of federalism.⁷⁴ The court did not contend that the individual mandate of the PPACA invades an area traditionally regulated by the states. Instead, it justified its narrow interpretation of the Commerce Clause upon the principle of individual freedom. The court stated:

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 not to participate.⁷⁵

In my opinion, the foregoing language represents an attempt to resurrect a doctrine that the Supreme Court abandoned more than seven decades ago – the discredited notion of "economic substantive due process."

Prior to 1937, the Supreme Court routinely struck down progressive legislation protecting workers from abusive employment practices on that ground that such laws infringe the substantive liberty protected by the Due Process Clause.⁷⁶ The first case to invoke this principle was *Dred Scott v. Sandford* (1857),⁷⁷ in which the Supreme Court ruled that it was a violation of the Due Process Clause – an unconstitutional invasion of property rights – for Congress to have prohibited slaveholders from bringing their human property into the northern territories of the United States.⁷⁸ The prototypical case from this era is *Lochner v. New York*,⁷⁹ a 1905 case in

⁷⁴ See notes ___-___ and accompanying text *supra* (discussing the federalism concerns that supported the decisions of the Supreme Court in *Lopez* and *Morrison*).

⁷⁵ 728 F.Supp.2d, at 788.

⁷⁶ See, e.g., *Adair v. United States*, 208 U.S. 161 (1908) (striking down a federal law that prohibited employers from terminating employees if they joined a labor union, on the ground that the law violated the Due Process Clause of the 5th Amendment); *Coppage v. Kansas*, 263 U.S. 1 (1915) (striking down a similar State law under the Due Process Clause of the 14th Amendment); *Adkins v. Children's Hospital*, 261 U.S. 525 (1923) (striking down federal minimum wage law); Martin A. Schwartz, *The Supreme Court and Local Gov't Law: The 1999-2000 Term: Due Process and Fundamental Rights* 17 *TOURO L. REV.* 237 (2000). Professor Schwartz states:

Substantive due process has always been a very contentious doctrine in the history of constitutional law. The first case that dealt with substantive due process was the *Dred Scott* case, in which the Supreme Court said that slave owners had a substantive due process right to possess slaves. Then, after *Dred Scott*, the Supreme Court, during the discredited *Lochner* era, created economic substantive due process rights.

⁷⁷ 60 U.S. 393 (1857) (striking down Missouri Compromise on the ground that prohibiting slavery from the northern territories violates the property rights of slaveholders).

⁷⁸ *Id.* at 450 ("[A]n act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law."); *id.* at 451-452. Chief Justice Taney stated:

which the Court struck down a law prohibiting bakers from working more than 60 hours per week.⁸⁰ The *Lochner* Court reasoned that the law was not a health measure but rather a labor law, and as such it constituted an invasion of the freedom of the employers and employees to set the terms and conditions of employment.⁸¹ The *Lochner* case is representative of many other decisions of the Supreme Court of the 19th and early 20th centuries striking down legislation protecting workers, including minimum wage and maximum hours laws as well as laws protecting the rights of workers to organize unions.⁸²

Oliver Wendell Holmes dissented in *Lochner*, stating:

The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics. ... [A] Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of laissez faire. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.⁸³

The era of “economic substantive due process” came to a crashing halt in 1937 in the case of *West Coast Hotel v. Parrish*,⁸⁴ when the Court overruled *Adkins v. Children’s Hospital*

[T]he right of property in a slave is distinctly and expressly affirmed in the Constitution. The right to traffic in it, like an ordinary article of merchandise and property, was guaranteed to the citizens of the United States, in every State that might desire it, for twenty years. And the Government in express terms is pledged to protect it in all future time, if the slave escapes from his owner. This is done in plain words too plain to be misunderstood. And no word can be found in the Constitution which gives Congress a greater power over slave property, or which entitles property of that kind to less protection than property of any other description. The only power conferred is the power coupled with the duty of guarding and protecting the owner in his rights.

⁷⁹ 198 U.S. 45 (1905) (striking down state law limiting hours of work for bakers on the ground that the law interfered with liberty of contract under the Due Process Clause).

⁸⁰ See *id.* at 53 (“The statute necessarily interferes with the right of contract between the employer and employees, concerning the number of hours in which the latter may labor in the bakery of the employer. The general right to make a contract in relation to his business is part of the liberty of the individual protected by the 14th Amendment of the Federal Constitution.”) (citation omitted).

⁸¹ See *id.* at 57-58. The Court stated:

The question whether this act is valid as a labor law, pure and simple, may be dismissed in a few words. There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker. ...

...
There is, in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public health, or the health of the individuals who are following the trade of a baker.

⁸² See *Adair v. United States*, 208 U.S. 161 (1908) (striking down federal law making it a crime for any employer to discharge an employee if he or she became a member of a labor organization); *id.* at ___ (stating, “In our opinion that [provision of federal law] is an invasion of the personal liberty, as well as of the right of property, guaranteed by [the 5th] Amendment”); *Coppage v. Kansas*, 236 U.S. 1 (1915) (striking down state law making it a crime for employers to “coerce, demand, require or influence” any person not to become a member of any labor organization); *Adkins v. Children’s Hospital*, 261 U.S. 525 (1923) (striking down federal minimum wage law under “freedom of contract”).

⁸³ 198 U.S., at 75-76.

⁸⁴ 300 U.S. 379 (1937) (upholding minimum wage law against a challenge under the Due Process Clause).

and upheld a minimum wage law.⁸⁵ Speaking for the majority, Chief Justice Charles Evans Hughes declared:

In each case the violation alleged by those attacking minimum wage regulation for women is deprivation of freedom of contract. What is this freedom? The Constitution does not speak of freedom of contract.⁸⁶

Ever since, the Supreme Court has maintained that state and federal lawmakers have the power to enact economic legislation free of considerations such as “freedom of contract.”⁸⁷ Individuals do not have a constitutional right to be free of economic regulations. As Holmes concluded in his dissenting opinion in *Lochner*, the philosophy of “laissez faire” is not an individual right protected by the Constitution; it is instead merely one of many economic theories that the government is free to embrace.⁸⁸ It is now well-established that the courts do not set economic policy in the guise of constitutional interpretation; it is rather for the people, acting through their representatives, to determine economic policy.⁸⁹ The district court in *Cuccinelli* had no justification for resurrecting this obsolete limitation on the power of Congress to regulate the economy.

The *Cuccinelli* court suggested that if Congress has the power to regulate individual decisions to purchase health insurance, then Congress also has the power to regulate other aspects of private life. The court stated: “Of course, the same reasoning could apply to transportation, housing, or nutritional decisions.”⁹⁰ In other words, the *Cuccinelli* court reasons, if Congress can force individuals to purchase health insurance, then it can also force them to buy a house or a car or certain foods.

I do not find this “slippery slope” argument to be persuasive. It is disingenuous to equate the requirement to maintain health insurance (which is a part of a comprehensive regulation of the health insurance industry) with laws that tell people where to live and what to eat. The constitutionality of such invasive and apparently arbitrary laws can be dealt with when and if our legislatures ever deign to enact them.

A separate and alternative aspect of Congress’ power under the Commerce Clause as supplemented by the Necessary and Proper Clause is discussed below.

II. CONGRESS’ POWER TO ENACT LAWS THAT ARE NECESSARY TO MAKE A SCHEME OF REGULATION OF INTERSTATE COMMERCE EFFECTIVE

⁸⁵ See *id.* at 400 (overruling *Adkins*).

⁸⁶ *Id.* at 391.

⁸⁷ See, e.g., *Ferguson v. Skrupa*, 372 U.S. 726 (1963) (upholding debt-adjusting law); *id.* at 730. The Court stated: The doctrine that prevailed in *Lochner*, *Coppage*, *Adkins*, *Burns*, and like cases - that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely - has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.

⁸⁸ See note ___ *supra* and accompanying text.

⁸⁹ See *id.*

⁹⁰ 728 F.Supp.2d, at 781.

A. Congress' Power under the Necessary and Proper Clause

Under the Necessary and Proper Clause, Congress has the power:

To 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.⁹¹

In *McCulloch v. Maryland*,⁹² Chief Justice John Marshall interpreted the word “necessary” to mean “needful,” “requisite,” “essential,” or “conducive to,”⁹³ and he concluded that under the Necessary and Proper Clause Congress

might employ those [means] which, in its judgment, would most advantageously effect the object to be accomplished. That any means adapted to the end, any means which tended directly to the execution of the constitutional powers of the government, were in themselves constitutional.⁹⁴

The Supreme Court has ruled that Congress has the power to enact laws that are necessary to make a regulation of interstate commerce effective, even if the activities being regulated do not in and of themselves affect interstate commerce. In *Wickard v. Filburn* the Supreme Court stated:

Congress may properly have considered that wheat consumed on the farm where grown, if wholly outside the scheme of regulation, would have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices.⁹⁵

In *Lopez* the Court struck down the Guns Free School Zone Act in part because the law

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. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.⁹⁶

In *Gonzales v. Raich*, the Court stated:

Wickard thus establishes that Congress can regulate purely intrastate activity that is not itself “commercial,” in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the

⁹¹ U.S. CONST., art. I, sec. 8, cl. 18.

⁹² 17 U.S. 316 (1819) (upholding the power of Congress under the Necessary and Proper Clause to create the Second Bank of the United States).

⁹³ *Id.* at 418.

⁹⁴ *Id.* at 419.

⁹⁵ At 128-129.

⁹⁶ 514 U.S., at 561.

interstate market in that commodity.⁹⁷

The Court in *Raich* distinguished *Lopez* on the ground that the Guns Free School Zone Act was a “brief, single-subject statute” while the Controlled Substances Act is a “lengthy, complicated statute creating a comprehensive framework for regulating ... controlled substances.”⁹⁸ Quoting *Lopez*, the Court upheld the application of the Controlled Substances Act to individual production of marijuana for medicinal purposes on the ground that this aspect of the law was simply one part of a larger regulatory framework:

While the [Controlled Substances Act] provided for the periodic updating of the five schedules, Congress itself made the initial classifications. It identified 42 opiates, 22 opium derivatives, and 17 hallucinogenic substances as Schedule I drugs. Marijuana was listed as the 10th item in the 3d subcategory. That classification, unlike the discrete prohibition established by the Gun-Free School Zones Act of 1990, was merely one of many “essential part[s] of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.”⁹⁹

In his separate concurring opinion in *Gonzales v. Raich* Justice Scalia distinguished the power to regulate “economic activity” from the power to enact laws that are necessary to make a broader regulation of interstate commerce effective.¹⁰⁰ Justice Scalia described this separate aspect of Congress’ power in these words:

Where necessary to make a regulation of interstate commerce effective, Congress may regulate even those intrastate activities that do not themselves substantially affect interstate commerce.¹⁰¹

The district courts’ application of this principle to the individual mandate of the PPACA is described below.

B. The Decisions of the District Courts in *Thomas More Law Center* and *Liberty University* Regarding Congress’ Power under the Necessary and Proper Clause

⁹⁷ At 18.

⁹⁸ At 23-24. The Court stated:

At issue in *Lopez* was the validity of the Gun-Free School Zones Act of 1990, which was a brief, single-subject statute making it a crime for an individual to possess a gun in a school zone. ...

...

The statutory scheme that the Government is defending in this litigation is at the opposite end of the regulatory spectrum. As explained above, the CSA, enacted in 1970 as part of the Comprehensive Drug Abuse Prevention and Control Act, 84 Stat. 1242-1284, was a lengthy and detailed statute creating a comprehensive framework for regulating the production, distribution, and possession of five classes of “controlled substances.”

⁹⁹ *Id.* at 24-25 (citation omitted).

¹⁰⁰ See 545 U.S., at 34-35 (Scalia, J., concurring in the judgment) (“[T]he category of “activities that substantially affect interstate commerce,” is *incomplete* because the authority to enact laws necessary and proper for the regulation of interstate commerce is not limited to laws governing intrastate activities that substantially affect interstate commerce.”) (citation omitted) (emphasis in original).

¹⁰¹ *Id.* at 35.

The district courts in both *Thomas More Law Center* and *Liberty University* decided to uphold the individual mandate of the PPACA upon this independent, alternative ground. Both courts found that the individual mandate is intimately connected to and necessary for the other regulations of health insurance found within the Act – particularly the Act’s prohibition on exclusions for preexisting conditions. Congress specifically found (and common sense tells us) that if people are not required to purchase health insurance, than people will simply go without health insurance until they become sick.¹⁰² The court in *Thomas More Law Center* ruled:

The Act regulates a broader interstate market in health care services. This is not a market created by Congress, it is one created by the fundamental need for health care and the necessity of paying for such services received. The provision at issue addresses cost-shifting in those markets and operates as an essential part of a comprehensive regulatory scheme. The uninsured, like plaintiffs, benefit from the “guaranteed issue” provision in the Act, which enables them to become insured even when they are already sick. This benefit makes imposing the minimum coverage provision appropriate.

The Supreme Court recognized Congress's power to regulate wholly intrastate, wholly non-economic matters that form ““an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.”” In 2014, the Act will bar insurers from refusing to cover individuals with pre-existing conditions and from setting eligibility rules based on health status or claims experience. At that time, all Americans will be insurable. Without the minimum coverage provision, there would be an incentive for some individuals to wait to purchase health insurance until they needed care, knowing that insurance would be available at all times. As a result, the most costly individuals would be in the insurance system and the least costly would be outside it. In turn, this would aggravate current problems with cost-shifting and lead to even higher premiums. The prospect of driving the insurance market into extinction led Congress to find that the minimum coverage provision was essential to the larger regulatory scheme of the Act.

The minimum coverage provision, which addresses economic decisions regarding health care services that everyone eventually, and inevitably, will need, is a reasonable means of effectuating Congress's goal.¹⁰³

The district court in *Liberty University* held:

¹⁰² See Act, §1502(a)(2)(G), stating:

[I]f there were no requirement, many individuals would wait to purchase health insurance until they needed care. By 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. The 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.

¹⁰³ 720 F.Supp.2d, at 894-895 (*quoting Raich, quoting Lopez*) (citations omitted).

The conduct regulated by the individual coverage provision is also within the scope of Congress' powers under the Commerce Clause because it is rational to believe the failure to regulate the uninsured would undercut the Act's larger regulatory scheme for the interstate health care market. The Act institutes a number of reforms of the interstate insurance market to increase the availability and affordability of health insurance, including the requirement that insurers guarantee coverage for all individuals, even those with preexisting medical conditions. As Congress stated in its findings, the individual coverage provision is “essential” to this larger regulatory scheme because without it, individuals would postpone health insurance until they need substantial care, at which point the Act would obligate insurers to cover them at the same cost as everyone else. This would increase the cost of health insurance and decrease the number of insured individuals—precisely the harms that Congress sought to address with the Act's regulatory measures.¹⁰⁴

C. The Decision of the *Cuccinelli* Court under the Necessary and Proper Clause

The *Cuccinelli* court barely addresses this prong of Commerce Clause jurisprudence. The court does not cite the language of Supreme Court opinions setting forth the rule that Congress has the power to adopt regulations that are necessary to a broader scheme of federal regulation, nor does the court acknowledge the previous rulings of the district courts in *Thomas More Law Center* and *Liberty University* on this question. The entire portion of the opinion of the *Cuccinelli* court on this matter was as follows:

Because an individual's personal decision to purchase – or decline to purchase – health insurance from a private provider is beyond the historical reach of the Commerce Clause, the Necessary and Proper Clause does not provide a safe sanctuary. This clause grants Congress broad authority to pass laws in furtherance of its constitutionally-enumerated powers. This authority may only be constitutionally deployed when tethered to a lawful exercise of an enumerated power. As Chief Justice Marshall noted in *McCulloch*, it must be within “the letter and spirit of the constitution.” The Minimum Essential Coverage Provision is neither within the letter nor the spirit of the Constitution. Therefore, the Necessary and Proper Clause may not be employed to implement this affirmative duty to engage in private commerce.¹⁰⁵

Essentially, the *Cuccinelli* court's summary analysis of Congress' power under the Necessary and Proper Clause rests upon its previous finding that “inactivity” is not economic in nature, and that to allow Congress to regulate this conduct constitutes an interference with individual freedom and is therefore contrary to the “letter and spirit of the constitution.”

The district court utterly neglects to acknowledge that under well-established law, Congress may enact legislation that is necessary to a comprehensive scheme of federal regulation

¹⁰⁴ *Liberty University*, at 16 (citations omitted).

¹⁰⁵ 728 F.Supp.2d, at 782 (citations omitted).

even if that legislation does not directly regulate economic activity. The brief, conclusory disposition of the government’s argument under the Necessary and Proper Clause in *Cuccinelli* is not commensurate to the task that the district court faced – determining the constitutionality of what may be the most significant legislation since the enactment of Medicare forty-five years ago.¹⁰⁶

The failure of the *Cuccinelli* court to adequately address this issue is aggravated by its refusal later in the opinion to decide whether the individual mandate is severable from the rest of the Act.¹⁰⁷ Having declared the individual mandate unconstitutional, it became necessary for the district court to determine whether other portions of the Act or the Act as a whole was also unconstitutional. The district court discussed and articulated the standard for determining severability,¹⁰⁸ but inexplicably failed to apply the standard! Instead the court observed that

[W]ithout the benefit of extensive expert testimony and significant supplementation of the record, this Court cannot determine what, if any, portion of the bill would not be able to survive independently.¹⁰⁹

The district court did not explain why it did not schedule a further hearing on the question; it simply decided to honor the “time-honored rule to sever with circumspection,”¹¹⁰ leaving the rest of the Act intact.

The individual mandate is not severable from the prohibition on exclusions for preexisting conditions and other regulations of the health insurance industry. The individual mandate is an unpopular measure that was adopted for no reason other than the fact that it was necessary; it is a bitter pill that must be swallowed so that exclusions for preexisting conditions can be eliminated. Had the district court acknowledged that fact, it could not have failed to rule that the individual mandate falls within Congress’ power to enact laws necessary to a broader scheme of federal regulation. The district court in *Cuccinelli* should have followed the example of the Supreme Court in *Raich* when it upheld a provision of the Controlled Substances Act against a similar challenge, stating:

[W]e have no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA. Thus, as in *Wickard*, when it enacted comprehensive legislation to regulate the interstate market in a fungible commodity, Congress was acting well within its authority to “make all Laws which shall be necessary and proper” to “regulate Commerce ... among the

¹⁰⁶ See Orin Kerr, *The Significant Error in Judge Hudson’s Opinion*, The Volokh Conspiracy (Dec. 13, 2010) (criticizing the District Court’s analysis of the Necessary and Proper Clause), at <http://volokh.com/2010/12/13/the-significant-error-in-judge-hudsons-opinion/>.

¹⁰⁷ See 728 F.Supp.2d, at 789-790 (discussing the issue of severability).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 789.

¹¹⁰ See *id.* at 790 (stating, “Therefore this Court will hew closely to the time-honored rule to sever with circumspection, severing any ‘problematic portions while leaving the remainder intact.’ Accordingly, the Court will sever only Section 1501 and directly-dependent decisions which make specific reference to Section 1501.” (citation omitted)).

several States.” U.S. Const., Art. I, § 8. That the regulation ensnares some purely intrastate activity is of no moment. As we have done many times before, we refuse to excise individual components of that larger scheme.¹¹¹

CONCLUSION

The Patient Protection and Affordable Care Act is a comprehensive federal statute that attempts to assure the delivery of health care to tens of millions of Americans. The power of Congress to enact this law may be questioned only by returning to a pre-1937 approach to constitutional interpretation. Two federal district courts have upheld the PPACA, but one court – the court in *Cuccinelli v. Sebelius* – struck down the law.

The *Cuccinelli* court returned to a pre-1937 understanding of the Constitution in three fundamental respects. First, the court utilizes “categorical analysis” reminiscent of the distinction that used be drawn between “direct” and “indirect” effects on interstate commerce. Instead of considering the degree of the effect of the regulated conduct on interstate commerce, the district court bases its decision on a novel categorical distinction between “economic activity” and “inactivity” Second, the *Cucinnelli* court implicitly revives the discredited concept of “economic substantive due process” – the notion that individuals have a constitutional right not to submit to laws governing economic decisions. The Court’s recognition that “[a]t its core, this dispute is ... about an individual’s right to choose not to participate” cogently expresses the now-repudiated *Lochner* doctrine about the limits of legislative authority. Third, the district court ignores the longstanding rule developed after 1937 that Congress has the authority under the Necessary and Proper Clause to enact laws that are essential to make a comprehensive scheme of federal regulation of interstate commerce effective, even if those laws govern conduct that is not economic in nature. This error was facilitated by the district court’s refusal to decide whether the individual mandate was “severable” from the remainder of the law. A thorough and candid analysis would have revealed that the individual mandate is necessary to the Act’s comprehensive scheme of health insurance regulation.

The district court in *Cuccinelli* should have followed the example of the district courts in *Thomas More Law Center* and *Liberty University* and deferred to Congress’ judgment that the failure of individuals to maintain health insurance is economic activity that bears a substantial relation to interstate commerce, or in the alternative that the individual mandate is necessary to a comprehensive scheme of federal regulation. The refusal of the *Cucinnelli* court to analyze the severability of the individual mandate from the remainder of the PPACA – and instead arbitrarily strike down one unpopular feature of the law while leaving intact other popular but inextricably intertwined features – is inexplicable.

¹¹¹ 545 U.S., at 22.