

HEALTHCARE, ENVIRONMENTAL LAW,  
AND THE SUPREME COURT: AN ANALYSIS UNDER  
THE COMMERCE, NECESSARY AND PROPER,  
AND TAX AND SPENDING CLAUSES

BY  
JAMES R. MAY\*

*The nation's healthcare and environmental laws share some common features. Both require individuals to participate in certain markets, are steeped in the principles of cooperative federalism, and attach federal dollars to compliance. Thus, the Supreme Court's decision in National Federation of Independent Business v. Sebelius has the potential to influence the nation's federal environmental laws in new ways. First, the logical, if attenuated, extension of the Court's conclusion that the Commerce Clause does not permit Congress to compel individuals to purchase health insurance suggests some limits on the extent to which Congress may compel participation in certain pollution-control and abatement markets. Second, the Court's decision that Congress cannot "compel" states to adopt the Medicaid extension under the threat of losing all Medicaid funding suggests further limits on the extent to which Congress may withhold funding from states that do not or cannot implement federal environmental laws. Lastly, the basis for upholding the individual mandate as a tax actually has the potential to provide additional constitutional justification for federal environmental laws should the Court ever reconsider their Commerce Clause foundations. Nonetheless, the Sebelius opinion is unlikely to have a significant impact on federal environmental laws because they can be effectively distinguished from the Court's healthcare ruling.*

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\* Professor of Law and Graduate Engineering (adjunct) at Widener University, where he teaches constitutional and environmental law and co-directs the Environmental Law Center. Professor May can be reached at: jrmay@widener.edu.

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## I. INTRODUCTION

Construing the Commerce Clause to permit Congress to regulate individuals precisely *because* they are doing nothing would open a new and potentially vast domain to congressional authority. Every day individuals do not do an infinite number of things.<sup>1</sup>

On June 28, 2012, in *National Federation of Independent Business v. Sebelius*, the U.S. Supreme Court issued a wildly mixed and lengthy decision concerning the constitutionality of the 900-page Patient Protection and Affordable Care Act (PPACA).<sup>2</sup> *Sebelius* is a finite decision with infinite implications for the Commerce, Necessary and Proper, Tax, and Spending Clauses of the U.S. Constitution. The opinion's implications for federal environmental laws are the subject of this Essay.

While unlikely, *Sebelius* has the potential to reshape modern environmental law in three ways. First, the logical, if attenuated, extension of the Court's conclusion that the Commerce Clause does not permit Congress to compel individuals to purchase health insurance suggests some limits on the extent to which Congress may compel participation in certain pollution-control and abatement markets. Second, the basis for upholding the individual mandate—the threat of federal tax penalty—has the potential to provide additional constitutional justification for federal environmental laws. Lastly, the Court's decision that Congress cannot “compel” states to adopt the PPACA under threat of losing all Medicaid funding would seem to suggest further limits on the extent to which Congress may withhold funding from states that do not or cannot implement federal environmental laws. As this Essay explains, despite the potential for *Sebelius* to alter federal environmental law, the case is likely to have a limited impact.

Part II of this Essay provides a brief background to the PPACA. Part III contextualizes the Court's Commerce Clause discussion in *Sebelius*, stating that the Court's decision that inactivity does not fall within the reach of the Commerce Clause should have little if any effect on federal environmental laws. Part IV then considers the Court's determination that the Tax Clause provides independent constitutional authority to require that individuals procure health insurance. This component of *Sebelius* provides Congress with a minor degree of additional means to advance federal environmental laws. Part V explores the Court's constricted reading of the Spending Clause,

<sup>1</sup> Nat'l Fed'n of Indep. Bus. v. Sebelius, 132B S. Ct. 2566, 2587 (2012) (Roberts, C.J., writing for the majority).

<sup>2</sup> Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified in sections of 26 U.S.C. and 42 U.S.C.); *Sebelius*, 132B S. Ct. at 2580.

noting that it has the most potential among the various holdings in *Sebelius* to adversely affect federal environmental laws that are implemented by means of cooperative federalism. Part VI concludes that although *Sebelius* may appear to present a threat to the constitutional underpinnings of federal environmental laws, the decision will likely leave this framework intact.

## II. BACKGROUND TO THE PPACA

About 50 million Americans are uninsured due to choice or circumstance, consuming in excess of \$100 billion in healthcare services.<sup>3</sup> About 60% of the uninsured visit a physician or emergency room annually.<sup>4</sup> About one-third of these services derive no payment from the patient.<sup>5</sup>

Enacted in 2010, the PPACA contains two key provisions at issue in *Sebelius*. The first—known as the “individual mandate”—requires about 40 million uninsured Americans to purchase health insurance from a private company, subject to a penalty paid to the federal treasury in an amount ranging between about \$700 and \$1,500 for noncompliance.<sup>6</sup> Insurance companies, in turn, are required to tether the cost of coverage to community rates and must not deny coverage for most preexisting conditions.<sup>7</sup> The second—known as “Medicaid expansion”—requires states that accept federal funding to administer the Medicaid program to expand eligibility to cover approximately 16 million additional Americans who previously did not qualify, including those earning up to 133% of the federal poverty level.<sup>8</sup>

The rationale behind this two-part approach is relatively simple: “shared responsibility.”<sup>9</sup> Millions of Americans who do not have health insurance tend to or need to seek medical care in emergency care

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<sup>3</sup> *Sebelius*, 132B S. Ct. at 2610 (Ginsburg, J., dissenting).

<sup>4</sup> *Id.* at 2610–11.

<sup>5</sup> *See id.* at 2611 (“In 2008, for example, hospitals, physicians, and other health-care professionals received no compensation for \$43 billion worth of the \$116 billion in care they administered to those without insurance.”).

<sup>6</sup> 26 U.S.C. § 5000A(c) (Supp. V 2012). Justice Roberts explained the penalty this way: “In 2016, for example, the penalty will be 2.5[%] of an individual’s household income, but no less than \$695 and no more than the average yearly premium for insurance that covers 60[%] of the cost of 10 specified services (e.g., prescription drugs and hospitalization).” *Sebelius*, 132B S. Ct. at 2580.

<sup>7</sup> *See* 42 U.S.C. §§ 300gg to 300gg-4 (Supp. V 2012).

<sup>8</sup> *Id.* §§ 1396a(a)(10)(A)(i)(VIII), 1396c, 1396d(y)(1); *see also Sebelius*, 132B S. Ct. at 2577; Letter from Douglas Elmendorf, Dir., Cong. Budget Office, to Hon. Nancy Pelosi, Speaker, U.S. H.R. 9 (Mar. 20, 2010), *available at* <http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/113xx/doc11379/amendreconprop.pdf>; U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-12-821, MEDICAID EXPANSION: STATES’ IMPLEMENTATION OF THE PATIENT PROTECTION AND AFFORDABLE CARE ACT 2 (2012), *available at* <http://www.gao.gov/assets/600/593210.pdf>.

<sup>9</sup> *See also* 26 U.S.C. § 5000A(b) (Supp. V 2012) (describing the “[s]hared responsibility payment”). *See generally* U.S. SENATE DEMOCRATIC POLICY & COMM’NS CTR., THE PATIENT PROTECTION AND AFFORDABLE CARE ACT: SHARED RESPONSIBILITY FOR HEALTH CARE, *available at* <http://dpc.senate.gov/healthreformbill/healthbill69.pdf> (providing a brief description of how the Act affects different people).

facilities—i.e., hospital emergency rooms—as a last resort.<sup>10</sup> Many of these care seekers cannot afford or do not pay for these services.<sup>11</sup> These healthcare costs are then passed along to taxpayers, hospitals, physicians, and insurance companies.<sup>12</sup> This spreads the cost of uncompensated care to others, raising taxes and insurance premiums accordingly.<sup>13</sup>

The individual mandate requires many previously uninsured Americans, whether they need care or not, to purchase insurance from a private insurance carrier.<sup>14</sup> Those who choose to refrain must pay a surcharge, called a “penalty,” to the Internal Revenue Service annually.<sup>15</sup> The individual mandate does not apply, however, to select groups, including those who cannot afford coverage and Native Americans.<sup>16</sup>

Medicaid is a federal program designed to serve the most needy members of society. It has elements of cooperative federalism in that it is state-administered and federally funded.<sup>17</sup> Currently, all fifty states accept federal funding to administer Medicaid.<sup>18</sup> Medicaid covers more than 55 million Americans,<sup>19</sup> and the Act is estimated to add roughly 15 million more eligible enrollees by 2014.<sup>20</sup>

Medicaid subsidizes between 50% and 85% of healthcare costs for those who are eligible, depending on the state.<sup>21</sup> In contrast, the federal government will pick up 100% of the Medicaid expansion when the PPACA program goes into effect in 2014, transitioning to 90% by 2020.<sup>22</sup>

As with Medicaid, states have the option of declining to administer the Medicaid expansion. The rub is that the PPACA permits the federal government to withhold *all* Medicaid funding from any state that declines to

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<sup>10</sup> See, e.g., Am. Coll. of Emergency Physicians, *The Uninsured: Access to Medical Care*, <http://www.acep.org/Membership/Become-an-Advocate/ACEP-Spokesperson-Network/The-Uninsured-Access-to-Medical-Care/> (last visited Apr. 11, 2013); CTRS. FOR DISEASE CONTROL AND PREVENTION, NATIONAL HOSPITAL AMBULATORY MEDICAL CARE SURVEY: 2009 EMERGENCY DEPARTMENT SUMMARY TABLES 8 tbl.6 (2009), available at [http://www.cdc.gov/nchs/data/ahcd/nhamcs\\_emergency/2009\\_ed\\_web\\_tables.pdf](http://www.cdc.gov/nchs/data/ahcd/nhamcs_emergency/2009_ed_web_tables.pdf).

<sup>11</sup> See OFFICE OF HEALTH POLICY, U.S. DEP'T OF HEALTH AND HUMAN SERVS., THE VALUE OF HEALTH INSURANCE: FEW OF THE UNINSURED HAVE ADEQUATE RESOURCES TO PAY POTENTIAL HOSPITAL BILLS 6–7 (2011), available at <http://aspe.hhs.gov/health/reports/2011/ValueofInsurance/rb.pdf>.

<sup>12</sup> See *Sebelius*, 132B S. Ct. at 2611 (Ginsburg, J., dissenting) (describing the “free rider” problem).

<sup>13</sup> See *id.*

<sup>14</sup> See *id.* at 2580 (citing 26 U.S.C. § 5000A).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* (citing 26 U.S.C. § 5000A(e)).

<sup>17</sup> See *id.* at 2581.

<sup>18</sup> *Id.*

<sup>19</sup> Nat'l Conference of State Legislatures, *Medicaid*, <http://www.ncsl.org/issues-research/health/medicaid-homepage.aspx> (last visited Apr. 11, 2013).

<sup>20</sup> See Letter from Douglas Elmendorf, *supra* note 8; see also U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 8.

<sup>21</sup> The Federal Medical Assistance Percentage (FMAP) determines the share that the federal government will contribute toward Medicaid costs. Typically, this contribution ranges from 50% to 75%, depending on such factors as the state's per capita income. EVELYNE P. BAUMRUCKER, CONG. RESEARCH SERV., RL32950, MEDICAID: THE FEDERAL MEDICAL ASSISTANCE PERCENTAGE (FMAP) 1, (2010), available at <http://www.aging.senate.gov/crs/medicaid6.pdf>.

<sup>22</sup> 42 U.S.C. § 1396d(y)(1) (Supp. V 2012); see also BAUMRUCKER, *supra* note 21, at 11–12.

administer the Medicaid expansion, even those that continue to administer the pre-PPACA Medicaid program.<sup>23</sup>

Numerous states and other parties challenged the law in litigation across the country.<sup>24</sup> The Supreme Court consolidated two of these cases to address the following questions: 1) whether the individual mandate fell within Congress's enactment authority under either the Commerce or Tax Clauses of the U.S. Constitution, and 2) whether the authority to withhold all Medicaid funding from those states that decline to administer the PPACA expansion violated the Spending Clause.<sup>25</sup>

In a wildly mixed and close decision written by Chief Justice John Roberts, the Court essentially issued three separate but related opinions. First, it ruled 5–4 (Chief Justice Roberts, joined by Justices Alito, Kennedy, Scalia, and Thomas) that the individual mandate violates the Commerce Clause by unconstitutionally regulating *inactivity*—that is, an individual's decision to refrain from participating in the insurance marketplace.<sup>26</sup> Second, the Court nonetheless upheld the individual mandate by a 5–4 margin (Chief Justice Roberts, joined by Justices Breyer, Kagan, Ginsburg, and Sotomayor) as a constitutional exercise of congressional taxing authority.<sup>27</sup> Last, in a portion of the decision that garnered the most support, the Court held 7–2 (Justices Ginsburg and Sotomayor, dissenting) that the federal government's authority to withhold all Medicaid funds from those states that opt out of the Medicaid expansion did not offer the states a “genuine choice” and was therefore unconstitutional coercion under the Spending Clause.<sup>28</sup> Some commentators consider the decision to be a bellwether for states' rights,<sup>29</sup> one that “reaffirm[ed] that the Constitution creates a federal government of limited and enumerated powers.”<sup>30</sup>

The question for present purposes is how this holding will affect environmental law as applied under the Constitution's Commerce Clause, Necessary and Proper Clause, Tax Clause, and Spending Clause. The following Parts discuss each of these core constitutional provisions, along with the opinion's implications for U.S. environmental laws.

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<sup>23</sup> 42 U.S.C. § 1396c (Supp.V 2012).

<sup>24</sup> See, e.g., *Virginia ex rel. Cuccinelli v. Sebelius*, 728 F. Supp. 2d 768 (E.D. Va. 2010); *Liberty Univ., Inc. v. Geithner*, 753 F. Supp. 2d 611 (W.D. Va. 2010); *Florida ex rel. Bondi v. U.S. Dep't. of Health & Human Servs.*, 780 F. Supp. 2d 1256 (N.D. Fla. 2011).

<sup>25</sup> *Sebelius*, 132 S. Ct. at 2576.

<sup>26</sup> *Id.* at 2593.

<sup>27</sup> *Id.* at 2601.

<sup>28</sup> *Id.* at 2608.

<sup>29</sup> See, e.g., Bert Atkinson Jr., *Why Chief Justice Roberts Made the Right Long-Term Decision With ObamaCare*, INDEP. J. REV., June 28, 2012, <http://www.ijreview.com/2012/06/9398-why-chief-justice-roberts-made-the-right-long-term-decision-with-obamacare/> (last visited on Apr. 11, 2013) (“Ultimately, Roberts supported states rights by limiting the federal government's coercive abilities.”).

<sup>30</sup> Jonathan Adler, *Lose the Battle, Win the War?*, SCOTUSBLOG, June 28, 2012, <http://www.scotusblog.com/2012/06/lose-the-battle-win-the-war/> (last visited Feb. 27, 2013).

III. THE COMMERCE CLAUSE, *SEBELIUS*, AND ENVIRONMENTAL LAW

The Court's Commerce Clause analysis in *Sebelius* could, by logical extension, have a substantial effect on environmental law. However, such effect is not likely to occur. This Part lays out the primary principles of Commerce Clause case law, and then considers how the Commerce Clause analysis in *Sebelius* might affect federal environmental laws.

## A. A Brief Background of Commerce Clause Jurisprudence

The Commerce Clause provides, in part, that "Congress shall have the power to . . . regulate Commerce . . . among the several states."<sup>31</sup> The Court's Commerce Clause jurisprudence has waxed and waned through the years, evolving from agnostic to skeptical to permissive, and most recently, to what can fairly be characterized as schizophrenic.<sup>32</sup>

Until recently, the Court had little trouble upholding congressional authority to enact federal environmental laws under the Commerce Clause.<sup>33</sup> In *Hodel v. Virginia Surface Mining & Reclamation Ass'n*,<sup>34</sup> the Court upheld Congress's authority to require private mining companies to restore adversely affected lands under the Surface Mining Control and Reclamation Act. The Court found that Congress had a "rational basis" for determining that surface coal mining could substantially affect interstate commerce.<sup>35</sup>

Although he concurred, Justice Rehnquist remarked in *Hodel* that the Commerce Clause does not grant Congress the power to regulate "to the 'nth degree.'"<sup>36</sup> This proved a harbinger of the Court's heightened review of Commerce Clause authority over the last two decades, as exhibited in two groundbreaking cases. In *United States v. Lopez*,<sup>37</sup> the Court concluded that portions of the Guns Free School Zone Act<sup>38</sup> ran afoul of the Commerce Clause by regulating what the Court considered to be a local activity that did not substantially affect interstate commerce.<sup>39</sup> And then in *Morrison v. United States*,<sup>40</sup> the Court struck portions of the Violence Against Women Act<sup>41</sup> on Commerce Clause grounds because the regulated conduct was

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<sup>31</sup> U.S. CONST. art. I, § 8.

<sup>32</sup> See generally James R. May, *Introduction: The Intersection of Constitutional and Environmental Law*, in PRINCIPLES OF CONSTITUTIONAL ENVIRONMENTAL LAW (James R. May ed., 2011) (providing an overview of "the various ways that constitutional law shapes environmental law").

<sup>33</sup> See *id.* at 7.

<sup>34</sup> 452 U.S. 264 (1981).

<sup>35</sup> *Hodel*, 452 U.S. at 280–83 (citing Surface Mining Control and Reclamation Act of 1977, Pub. L. No. 95-87, 91 Stat. 447 (1977) (codified as amended at 30 U.S.C. §§ 1201–1328 (2006))).

<sup>36</sup> *Id.* at 311 (Rehnquist, J., concurring).

<sup>37</sup> 514 U.S. 549 (1995).

<sup>38</sup> Gun-Free School Zones Act of 1990, Pub. L. No. 101-647, § 1702, 104 Stat. 4844 (1990) (codified at 18 U.S.C. § 921 (2006)).

<sup>39</sup> *Lopez*, 514 U.S. at 567.

<sup>40</sup> 529 U.S. 598 (2000).

<sup>41</sup> Violence Against Women Act of 1994, tit. IV, Pub. L. No. 103-322, 108 Stat. 1902 (1994) (codified at 42 U.S.C. §§ 13925–14045d (2006)).

neither inherently economic, nor had a substantial effect on interstate commerce.<sup>42</sup> In addition, the Court found that the Act lacked the necessary federal “jurisdictional element,” and strayed too far into the states’ traditional control over criminal law.<sup>43</sup> More recently, the Court embraced something of a return to pre-*Lopez* and pre-*Morrison* form. In *Gonzales v. Raich*,<sup>44</sup> the Court upheld a federal law that criminalized the sale and distribution of medical marijuana, notwithstanding that these activities were permitted under California law at the time.<sup>45</sup> There, echoing *Hodel*, the Court held that it was not necessary to decide “whether respondents’ activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a rational basis exists for so concluding.”<sup>46</sup>

### B. Sebelius and the Commerce Clause

The majority’s Commerce Clause analysis in *Sebelius* demonstrates little, if any, fealty to this precedent. It is instead based upon perceived breaches of the Constitution’s structural dynamics that constrain federal power and delegate unenumerated powers to the states. Chief Justice Robert’s reading is that virtually any activity beyond certain types of interstate commercial activity is beyond Congress’s Commerce Clause power. Compelling individual commercial participation is, if at all, left to the states’ inherent police power. “The Commerce Clause is not a general license to regulate an individual from cradle to grave, simply because he will predictably engage in particular transactions,” the Chief Justice wrote.<sup>47</sup> “Any police power to regulate individuals as such, as opposed to their activities, remains vested in the States.”<sup>48</sup>

Finding that the individual mandate reaches economic *inactivity*, rather than economic *activity*, the Court concluded that Congress had gone too far by compelling the uninsured to purchase health insurance:

The individual mandate, however, does not regulate existing commercial activity. It instead compels individuals to *become* active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce. Construing the Commerce Clause to permit Congress to regulate individuals precisely *because* they are doing nothing would open a new and potentially vast domain to congressional authority. Every day individuals do not do an infinite number of things.<sup>49</sup>

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<sup>42</sup> See *Morrison*, 529 U.S. at 610–11.

<sup>43</sup> *Id.* at 613 (noting that “Congress elected to cast [the Act’s] remedy over a wider, and more purely intrastate, body of violent crime”).

<sup>44</sup> 545 U.S. 1 (2005).

<sup>45</sup> *Id.* at 2.

<sup>46</sup> *Id.* at 22 (internal quotation omitted).

<sup>47</sup> *Sebelius*, 132B S. Ct. 2566, 2591 (2012).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 2587.

The Chief Justice drew a formal line: the Commerce Clause permits Congress to *regulate* interstate commerce; it does not permit Congress to *compel* it. The individual mandate, therefore, presupposes power that Congress does not have—that is, to tell people what to do:

Congress already enjoys vast power to regulate much of what we do. Accepting the Government's theory would give Congress the same license to regulate what we do not do, fundamentally changing the relation between the citizen and the Federal Government.

....

The Framers gave Congress the power to regulate commerce, not to compel it, and for over 200 years both our decisions and Congress's actions have reflected this understanding. There is no reason to depart from that understanding now.<sup>50</sup>

In other words, while Congress can regulate economic *activity*, it cannot regulate economic *inactivity*. Justice Scalia's concurring opinion describes the sentiment this way: "[f]ailure to act does result in an effect on commerce, and hence might be said to come under this Court's 'affecting commerce' criterion of Commerce Clause jurisprudence. But in none of its decisions has this Court extended the Clause that far."<sup>51</sup> According to Justice Scalia, "the decision to forgo participation in an interstate market is not itself commercial activity (or indeed any activity at all) within Congress' power to regulate."<sup>52</sup>

Chief Justice Roberts envisaged a slippery slope that ends with the federal government having the authority to control the most picayune decisions an individual can make, such as whether to eat vegetables.<sup>53</sup> In his view, "the Government's logic would justify a mandatory purchase to solve almost any problem[,] thereby "drawing all power into its impetuous vortex."<sup>54</sup> Justice Scalia's concurring opinion claimed that the individual mandate is tantamount to congressional authority to regulate "breathing in and out."<sup>55</sup> In her dissent, Justice Ginsburg took her colleagues to task for such hyperventilation, calling such hypotheticals "outlandish."<sup>56</sup>

The Chief Justice did little to square his Commerce Clause analysis with precedent. It engages neither rational basis nor heightened scrutiny

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<sup>50</sup> *Id.* at 2589.

<sup>51</sup> *Id.* at 2642 (Scalia, J., dissenting).

<sup>52</sup> *Id.* at 2648 (Scalia, J., dissenting).

<sup>53</sup> *See id.* at 2588–89 ("Congress addressed the insurance problem by ordering everyone to buy insurance. Under the Government's theory, Congress could address the diet problem by ordering everyone to buy vegetables. . . . People, for reasons of their own, often fail to do things that would be good for them or good for society. Those failures—joined with the similar failures of others—can readily have a substantial effect on interstate commerce. Under the Government's logic, that authorizes Congress to use its commerce power to compel citizens to act as the Government would have them act.").

<sup>54</sup> *Id.* (quoting THE FEDERALIST NO. 48, at 325 (James Madison) (Harvard Univ. Press 2009)).

<sup>55</sup> *Id.* at 2643.

<sup>56</sup> *Id.* at 2625. Citing the late Robert Bork, Justice Ginsberg observes: "Judges and lawyers live on the slippery slope of analogies; they are not supposed to ski it to the bottom." ROBERT BORK, THE TEMPTING OF AMERICA 169 (1990).

style review. Under the former deferential approach adopted in *Raich*, the Court would ask whether Congress *could* have a rational basis for deciding that the regulated activity *could* have a substantial effect on interstate commerce. In this regard, Justice Ginsburg's dissent would seem to provide the more doctrinally sound approach: "When appraising such legislation, we ask only 1) whether Congress had a rational basis for concluding that the regulated activity substantially affects interstate commerce, and 2) whether there is a reasonable connection between the regulatory means selected and the asserted ends."<sup>57</sup> Under this traditional approach, constitutionality is presumed, absent a clearly irrational aggrandizement of congressional power.<sup>58</sup>

In Ginsburg's view, Congress is acting rationally in regulating what is inevitable, instead of compelling that inevitability. There comes a point in every life when medical care of some sort is necessary—care that comes with costs that ought to be borne by the individual, not society:

If unwanted today, medical service secured by insurance may be desperately needed tomorrow. Virtually everyone, I reiterate, consumes health care at some point in his or her life. Health insurance is a means of paying for this care, nothing more. In requiring individuals to obtain insurance, Congress is therefore not mandating the purchase of a discrete, unwanted product. Rather, Congress is merely defining the terms on which individuals pay for an interstate good they consume: Persons subject to the mandate must now pay for medical care in advance (instead of at the point of service) and through insurance (instead of out of pocket). Establishing payment terms for goods in or affecting interstate commerce is quintessential economic regulation well within Congress' domain.<sup>59</sup>

Thus, Justice Ginsburg concludes, the PPACA should have been upheld under *Raich*'s rational basis review, with due regard to the 10th Amendment:

First, the Chief Justice could certainly uphold the individual mandate without giving Congress *carte blanche* to enact any and all purchase mandates. As several times noted, the unique attributes of the healthcare market render everyone active in that market and give rise to a significant free-riding problem that does not occur in other markets. . . . Congress would remain unable to regulate noneconomic conduct that has only an attenuated effect on interstate commerce and is traditionally left to state law.<sup>60</sup>

Perhaps the most surprising aspect of the Chief Justice's Commerce Clause analysis is that it ignored the Rehnquistian heightened scrutiny-type Commerce Clause doctrine adopted by the Court in *Morrison* only a decade

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<sup>57</sup> *Sebelius*, 132B S. Ct. at 2616 (Ginsberg, J., dissenting) (internal quotations omitted).

<sup>58</sup> *See id.* at 2617. ("In answering these questions, we presume the statute under review is constitutional and may strike it down only on a plain showing that Congress acted irrationally." (internal quotations omitted)).

<sup>59</sup> *Id.* at 2620 (internal citation omitted).

<sup>60</sup> *Id.* at 2623.

ago. As described above,<sup>61</sup> this entails an analysis of four factors: 1) whether the underlying activity is “inherently economic,” 2) whether Congress has made specific findings as to the law’s effect,<sup>62</sup> 3) whether the law contains a “jurisdictional element” wherein Congress expresses its intent to regulate at the national level (rather than local), and 4) whether the overall effects of the activity are actually substantial. Curiously, however, the majority opinion discussed none of these factors, and neither did the dissent.

The PPACA certainly passes the broad standard of rational basis review. It probably passes heightened scrutiny review as well. Receiving health care is an inherently economic activity. Congress made these specific findings prior to passing the PPACA.<sup>63</sup> Thus, Congress embedded the PPACA with the “jurisdictional element” required by *Morrison*.<sup>64</sup> And there is no doubt that the economic effects of healthcare are substantial and national.<sup>65</sup>

Chief Justice Roberts also seemed to dispense with modern rational basis Commerce Clause analysis by distinguishing *Wickard v. Filburn*.<sup>66</sup> In differentiating between *Sebelius* and *Wickard*, for example, Chief Justice Roberts wrote:

The farmer in *Wickard* was at least actively engaged in the production of wheat, and the Government could regulate that activity because of its effect on commerce. The Government’s theory here would effectively override that limitation, by establishing that individuals may be regulated under the Commerce Clause whenever enough of them are not doing something the Government would have them do.<sup>67</sup>

Justice Ginsburg found Chief Justice Roberts’ line drawing between activity and inactivity “redolent” of an earlier time when a laissez-faire driven Supreme Court was busy striking down economic reforms shaped at both the state and federal levels:

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<sup>61</sup> See *supra* text accompanying notes 40–46.

<sup>62</sup> *Morrison*, 529 U.S. 598, 612 (2000) (citing *United States v. Lopez*, 514 U.S. 549, 562–63 (1995)); but see *id.* at 614 (2000) (“But the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation.”).

<sup>63</sup> Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1501, 124 Stat. 119, 243 (2010) (codified at 42 U.S.C. § 18091 (Supp. IV 2011)) (stating that, *inter alia*, health insurance is sold in interstate commerce and that medical expenses play a significant role in many personal bankruptcies).

<sup>64</sup> See *Morrison*, 529 U.S. at 613 (requiring that the law at issue contain a sufficient “jurisdictional element to establ[ish] that the federal cause of action is in pursuance of Congress’ power to regulate interstate commerce”).

<sup>65</sup> See generally NEERAJ SOOD ET AL., U.S. DEP’T OF HEALTH AND HUMAN SERVS., THE EFFECT OF HEALTH CARE COST GROWTH ON THE U.S. ECONOMY (2007), available at <http://aspe.dhhs.gov/health/reports/08/healthcarecost/Report.html> (discussing the considerable economic effects of health care on the national economy).

<sup>66</sup> 317 U.S. 111 (1942) (holding that Congress’s commerce power “extends to those intrastate activities which in a substantial way interfere with or obstruct” interstate commerce (citation omitted)).

<sup>67</sup> *Sebelius*, 132B S. Ct. 2566, 2588 (2012).

Failing to learn from this history, the Chief Justice plows ahead with his formalistic distinction between those who are “active in commerce,” and those who are not. It is not hard to show the difficulty courts (and Congress) would encounter in distinguishing statutes that regulate “activity” from those that regulate “inactivity.”<sup>68</sup>

Indeed, Justice Ginsburg accused the Chief Justice of substituting century-old and oft-criticized *Lochner*-era substantive due process analysis for modern Commerce Clause analysis.<sup>69</sup> She wrote that the “view that an individual cannot be subject to Commerce Clause regulation absent voluntary, affirmative acts that enter him or her into, or affect, the interstate market expresses a concern for individual liberty that [is] more redolent of Due Process Clause arguments.”<sup>70</sup>

This is a fair point. Whenever the Supreme Court substitutes its judgment for Congress’s in a matter involving regulation of commerce, it potentially raises nettlesome structural issues within the Constitution. As Chief Justice Marshall noted 200 years ago, in a representation reinforcing the separation of powers: the unelected judicial branch is the least equipped to make federal policy.<sup>71</sup> This is especially true concerning one of Congress’s greatest powers, the Commerce Clause. Moreover, the willingness of the majority of the Court to find that a major piece of economic regulation runs afoul of the Commerce Clause because it forces individuals to engage in a commercial transaction smacks of judicial hostility toward congressional efforts to address national issues involving economic liberties. The Court abandoned this type of heightened scrutiny review of economic regulation long ago. Justice Ginsburg in particular found this to be quite troubling, especially given that two Justices (Scalia and Thomas) question the existence of substantive due process—including economic liberties—in the first place.<sup>72</sup> What makes this all the more peculiar is that the Chief Justice did not bother to apply heightened scrutiny review to the merits of the

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<sup>68</sup> *Id.* at 2622 (Ginsburg, J., dissenting) (citation omitted).

<sup>69</sup> *See id.* at 2629 (Ginsburg, J., dissenting) (stating that the “Chief Justice’s Commerce Clause opinion . . . bear[s] a disquieting resemblance to those long-overruled decisions” such as *Lochner v. New York* (citation omitted)). *But see* David Driesen, *Health Care’s New Commerce Clause: Implications for Environmental Law*, CPR BLOG, June 29, 2012, <http://www.progressiveregulation.org/CPRBlog.cfm?idBlog=38387E13-FBA5-918D-9C7E50D3AD CFF23C> (last visited Apr. 11, 2013) (“The objection to the ‘individual mandate’ at bottom involved an effort by conservatives to defend individual liberty of the type protected by the Court during the *Lochner* era, when it created ‘substantive due process’ doctrines to ward off progressive legislation.”).

<sup>70</sup> *Sebelius*, 132 S. Ct. at 2623 (quoting *Seven-Sky v. Holder*, 661 F.3d 1, 19 (D.C. Cir. 2011)).

<sup>71</sup> *See, e.g.*, *M’Culloch v. State of Md.*, 17 U.S. 316, 423 (1819) (“But where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a Power.”).

<sup>72</sup> *See Sebelius*, 123 S. Ct. at 2623 n.8 (“Some adherents to the joint dissent have questioned the existence of substantive due process rights. Given these Justices’ reluctance to interpret the Due Process Clause as guaranteeing liberty interests, their willingness to plant such protections in the Commerce Clause is striking.”).

PPACA under the Commerce Clause as suggested in *Morrison*.<sup>73</sup> His chief concern seemed to be grounded in the idea that Congress is infringing on individual liberty interests by regulating the personal decision to freely participate (or not) in commercial markets, including whether to purchase health insurance or be self-insured.<sup>74</sup>

Incidentally, the Chief Justice also rejected the government's argument that the individual mandate can be upheld independently under the Necessary and Proper Clause.<sup>75</sup> In reaching this decision, he reminded the reader that the Necessary and Proper Clause is not an independent grant of congressional authority; instead it provides Congress with the means to achieve already enumerated ends, including regulating interstate commerce.<sup>76</sup>

Having determined that the Commerce Clause provides no home for the individual mandate, the Court's Necessary and Proper Clause analysis was likely superfluous. Yet for good measure the Chief Justice explained that: "Even if the individual mandate is 'necessary' to the Act's insurance reforms, such an expansion of federal power is not a 'proper' means for making those reforms effective."<sup>77</sup>

Justice Ginsburg also seemed to wonder whether the entirety of the majority's Commerce and Necessary Proper Clause analysis was, after all, necessary and proper, or rather was dicta. The Court could have taken a more direct approach and found the individual mandate to be constitutional without the need to reach a contrary conclusion under the Commerce Clause. Acts of Congress, after all, are presumed to be constitutional.<sup>78</sup> Others believe the Chief Justice had to put one foot in front of the other—that is, that the Tax Clause analysis was only possible because the Court had to foreclose these other constitutional avenues first.<sup>79</sup>

Given this backdrop, Justice Ginsburg's dissenting opinion forecasted that the doctrinal impacts of the decision will be negligible and short-lived:

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<sup>73</sup> See *id.* at 2589–91.

<sup>74</sup> See *id.*

<sup>75</sup> *Id.* at 2591–92.

<sup>76</sup> See *id.* at 2592. ("Each of our prior cases upholding laws under that Clause involved exercises of authority derivative of, and in service to, a granted power."). The Chief Justice went on to write that "such a conception of the Necessary and Proper Clause would work a substantial expansion of federal authority. No longer would Congress be limited to regulating under the Commerce Clause those who by some preexisting activity bring themselves within the sphere of federal regulation. Instead, Congress could reach beyond the natural limit of its authority and draw within its regulatory scope those who otherwise would be outside of it." *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 2617 (Ginsburg, J., concurring).

<sup>79</sup> See, e.g., Adler, *supra* note 30 ("It would be tempting to read the Chief Justice's discussions of the Commerce and Necessary and Proper Clauses as mere dicta. It would also be wrong, as these analyses form an essential predicate to his ultimate conclusion that the mandate could be upheld as a tax. As the entire Court accepts, the most natural reading of the minimum coverage provision is as an economic mandate adopted pursuant to the Commerce Clause. It is only after rejecting the possibility that the mandate could be justified in this manner that the Chief returns to the text to see if it is susceptible to an alternative construction. Thus, the only reason the Chief Justice even considers whether the mandate could be considered a tax, the statutory text notwithstanding, is because of his prior conclusion on the Commerce and Necessary and Proper Clauses.").

For decades, the Court has declined to override legislation because of its novelty, and for good reason. As our national economy grows and changes, we have recognized, Congress must adapt to the changing economic and financial realities. Hindering Congress's ability to do so is shortsighted; if history is any guide, today's constriction of the Commerce Clause will not endure.<sup>80</sup>

### *C. Sebelius, the Commerce Clause, and Environmental Law*

A majority of the nation's core environmental laws are founded on Congress's authority under the Commerce Clause, including the Clean Air Act (CAA),<sup>81</sup> the Clean Water Act (CWA),<sup>82</sup> the Endangered Species Act (ESA),<sup>83</sup> the Resource Conservation and Recovery Act (RCRA),<sup>84</sup> the Safe Drinking Water Act (SDWA),<sup>85</sup> and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).<sup>86</sup> However, the Court's decision that Congress cannot compel the uninsured to enter the market and purchase insurance should have little application in these environmental laws. Unlike with the PPACA, federal environmental laws do not *compel* individuals to participate in any markets under fear of a penalty. They do not compel individuals to enter a stream of commerce; rather, they regulate the effects *of* commerce.<sup>87</sup>

On the one hand, federal pollution-control laws require compliance, which can have the adjunct effect of compelling the purchase of pollution-control equipment. For example, some federal pollution-control statutes require compliance with particular "technology-based standards," which are set to achieve pollution-reduction ends.<sup>88</sup> This inevitably forces individuals to

<sup>80</sup> *Sebelius*, 132B S. Ct. at 2625 (internal quotations and citations omitted).

<sup>81</sup> 42 U.S.C. §§ 7401-7671(q) (2006); *Hodel*, 452 U.S. 264, 282 (1981) (finding that congressional authority under the Commerce Clause is broad enough to permit regulation of activities causing air or water pollution).

<sup>82</sup> Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (2006); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985) (stating that, in passing the CWA, Congress intended to exercise its powers under the Commerce Clause to regulate navigable waters and non-navigable wetlands).

<sup>83</sup> Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (2006 & Supp. IV 2011); *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1057 (D.C. Cir. 1997).

<sup>84</sup> Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901-6992k (2006) (amending Solid Waste Disposal Act, Pub. L. No. 89-272, 79 Stat. 992 (1965)); *Rowlands v. Pointe Mouillee Shooting Club*, 959 F. Supp. 422, 426 (E.D. Mich. 1997) ("Congress enacted RCRA, like CERCLA, pursuant to the Commerce Clause and not the Fourteenth Amendment.").

<sup>85</sup> Safe Drinking Water Act of 1974, 42 U.S.C. §§ 300f-300j (2006); *State of Neb. v. Envtl. Protection Agency*, 331 F.3d 995, 998 (D.C. Cir. 2003).

<sup>86</sup> Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601-9675 (2006); *Rowlands*, 959 F. Supp. 422 at 426.

<sup>87</sup> See Ann Carlson, *Another (Mostly) Uninformed Post About the Health Care Cases and Environmental Law*, LEGAL PLANET: THE ENVTL. LAW AND POLICY BLOG (June 28, 2012), <https://legalplanet.wordpress.com/2012/06/28/another-mostly-uninformed-post-about-the-health-care-cases-and-environmental-law/> (last visited Apr. 11, 2013) ("Environmental laws don't force people into commerce; instead they attempt to regulate the negative consequences of commerce (pollution from driving, say, or from manufacturing goods).").

<sup>88</sup> See Federal Water Pollution Control Act, 33 U.S.C. § 1311 (2006) (setting effluent limitations, compliance timetables, and technology standards).

participate in certain commercial pollution-control or abating markets in order to stay in business, potentially running afoul of “Congress’s newly circumscribed power to regulate interstate commerce,” as articulated by the majority in *Sebelius*.<sup>89</sup> These pollution-control mechanisms may include, for example, the purchase of “scrubbers” to control sulfur dioxide emissions,<sup>90</sup> low-NO<sub>x</sub> burners for nitrogen emissions,<sup>91</sup> wastewater treatment systems to control effluent discharge into surface waters,<sup>92</sup> and vapor recovery systems to contain and clean up dense non-aqueous phase liquids releases into groundwater,<sup>93</sup> among others.

On the other hand, pollution-control requirements are a *response to* activity, not a nudge *against* inactivity. *Sebelius* suggests that as long as there is a connection between the requirement to participate in an economic market and an ongoing activity, then that requirement is constitutional under the Commerce Clause. Thus, the requirement to install pollution-control equipment, to purchase emission credits, or to purchase compensatory wetlands, for example, would seem to fall within the doctrinal boundaries set by the majority.<sup>94</sup>

While it seems to bend credulity to think that compelling an individual to purchase health insurance and requiring a company to comply with environmental standards (which in turn leads to the purchase of pollution-control equipment) are congruent, this is an arguable proposition. One need only recall the certainty in which legal experts confidently predicted that the Commerce Clause was no barrier to the PPACA.<sup>95</sup> The logical extension of

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<sup>89</sup> Driesen, *supra* note 69, at 2 (“In order to install the device the owner would, after all, have to purchase it. The Court at one point articulated a principle that the federal government may not compel ‘citizens to act as the Government would have them act.’ But that is exactly what a lot of regulation does, including regulations demanding private inspection of food, filing of reports, and disclosure of information about securities.”).

<sup>90</sup> See Byron Swift, *How Environmental Laws Work: An Analysis of the Utility Sector’s Response to Regulation of Nitrogen Oxides and Sulfur Dioxide Under the Clean Air Act*, 14 TUL. ENVTL. L.J. 309, 317–18 (2001) (“In the Clean Air Act Amendments of 1977, Congress created the New Source Review process and a stricter new source performance standard. . . . This standard required utilities to install scrubbers at all new generating units” (citing Clean Air Act, 42 U.S.C. § 7411 (2000); 40 C.F.R. § 60.43a (2000))).

<sup>91</sup> See, e.g., 40 C.F.R. § 76.10 (2012).

<sup>92</sup> Under the Clean Water Act, point-source discharges of pollutants into the navigable waters of United States are allowed only after obtaining a national pollutant discharge elimination system (NPDES) permit. See Federal Water Pollution Control Act, 33 U.S.C. §§ 1251(a), 1252(a)–(b) (2006).

<sup>93</sup> See generally U.S. Env’tl. Prot. Agency, *Dense Nonaqueous Phase Liquids (DNAPLs): Policy and Guidance*, [http://clu.in.org/contaminantfocus/default.focus/sec/Dense\\_Nonaqueous\\_Phase\\_Liquids\\_%28DNAPLs%29/cat/Policy\\_and\\_Guidance/](http://clu.in.org/contaminantfocus/default.focus/sec/Dense_Nonaqueous_Phase_Liquids_%28DNAPLs%29/cat/Policy_and_Guidance/) (last visited Apr. 11, 2013) (explaining how DNAPLs are regulated under federal environmental laws).

<sup>94</sup> See Driesen, *supra* note 69 (“[T]here are many signs that the ruling will not invalidate all of the many regulations that compel action. The opinion contains significant doctrinal limits. The Court said Congress may regulate what individuals do, not what they do not do. The pollution control requirement does regulate an ongoing activity, pollution producing production, not inactivity, even if it does so by ordering a product purchase.”).

<sup>95</sup> See, e.g., Robert Barnes, *How the Roberts Court Could Save Obama’s Health-Care Reform*, WASH. POST., Mar. 16, 2012, [http://www.washingtonpost.com/opinions/how-the-roberts-court-could-save-healthcare/2012/03/07/gIQALjXGS\\_print.html](http://www.washingtonpost.com/opinions/how-the-roberts-court-could-save-healthcare/2012/03/07/gIQALjXGS_print.html) (last visited Apr. 11, 2013).

Chief Justice Roberts' reasoning would seem to be that *any* compelled participation in *any* market is potentially unconstitutional.

Of course, federal environmental laws still face potential Commerce Clause challenges under the traditional analysis, even if Chief Justice Roberts' *Sebelius* Commerce Clause analysis subsides. If the Commerce Clause reasoning in *Sebelius* is to be exported to federal environmental statutes, two of Congress's most impressive environmental policy achievements—the ESA and CWA—seem particularly vulnerable.

First, application of the Commerce Clause to the ESA has been criticized because the survival of endangered species is often not inherently economic, and because even in the aggregate, endangered species do not necessarily have a substantial effect on interstate commerce.<sup>96</sup> It was of course Chief Justice Roberts who, while serving in the federal appellate ranks, complained in a dissenting opinion that the Commerce Clause does not provide Congress with authority to protect a “hapless toad that, for reasons of its own, lives its entire life in California.”<sup>97</sup> Such skepticism about the reach of the Commerce Clause does not portend positively for broad congressional public health and welfare programs.<sup>98</sup>

Second, it is unclear whether the Commerce Clause authorizes the Clean Water Act to regulate waters that are not traditionally navigable in fact. Indeed, the Court has suggested on several occasions that the scope of the CWA may exceed constitutional authority under the Commerce Clause. For example, in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*,<sup>99</sup> while the Court struck down EPA's “migratory bird rule” as inconsistent with the CWA, Chief Justice Rehnquist—the one who engineered the heightened scrutiny applied in

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(“Walter Dellinger, a former acting solicitor general and one of the health-care law's most ardent constitutional cheerleaders, has long predicted that the vote upholding the legislation will be lopsided . . .”); Richard A. Bonnie & Andrew J. Peach, *Why Obamacare Will Survive in the Supreme Court*, RICHMOND TIMES-DISPATCH, Mar. 6, 2011, [http://www.timesdispatch.com/news/why-obamacare-will-survive-in-the-supreme-court/article\\_6d662aee-150f-5599-846c-4ef78a89bca9.html](http://www.timesdispatch.com/news/why-obamacare-will-survive-in-the-supreme-court/article_6d662aee-150f-5599-846c-4ef78a89bca9.html) (last visited Apr. 11, 2013) (stating that “most constitutional experts do not expect this to be a close case”); Renée M. Landers, “*Tomorrow*” *May Finally Have Arrived—The Patient Protection and Affordable Care Act: A Necessary First Step Toward Health Care Equity in the United States*, 6 J. HEALTH & BIOMEDICAL L. 65, 77 (2010) (“Unless the Supreme Court decides to impose new limitations on congressional authority, the PPACA is likely to survive constitutional challenges on [Commerce Clause] grounds.”).

<sup>96</sup> *But see* GDF Realty Invs., Ltd. v. Norton, 326 F.3d 622, 640 (5th Cir. 2003) (“[I]nterdependence of species compels the conclusion that regulated takes under ESA do affect interstate commerce.”).

<sup>97</sup> *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C. Cir.), *petition for reh'g en banc denied*, 334 F.3d 1158, 1160 (D.C. Cir. 2003) (Roberts, C.J., dissenting).

<sup>98</sup> *See* Brigham Daniels, *Fortuitous Spleens and Hapless Toads*, ENVTL. LAW PROF. BLOG, June 28, 2012, [http://lawprofessors.typepad.com/environmental\\_law/2012/06/hapless-spleens-and-hapless-toads.html](http://lawprofessors.typepad.com/environmental_law/2012/06/hapless-spleens-and-hapless-toads.html) (last visited Apr. 11, 2013) (“While today's news is that Roberts voted to uphold the Affordable Care Act, his opinion also might serve as a warning shot of things to come. If that shot hits, toads and a wide range of other things in our natural environment might sit haplessly by as the Court employs some of the logic in today's opinion to strip away the reach of federal environmental laws.”).

<sup>99</sup> 531 U.S. 159 (2001).

*Lopez* and *Morrison*—wryly observed that a contrary interpretation would raise “significant constitutional questions” under the Commerce Clause.<sup>100</sup> On the other hand, in casting his concurring swing vote in *Rapanos v. United States*<sup>101</sup>—another case questioning the reach of the CWA—Justice Kennedy applied *Raich* for the proposition that “when a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under that statute is of no consequence.”<sup>102</sup>

In conclusion, while the Commerce Clause analysis in *Sebelius* is unlikely to have a profound effect on federal environmental laws, those laws are by no means immune from future challenges under the Court’s evolving heightened-scrutiny Commerce Clause jurisprudence.

#### IV. THE TAX CLAUSE, *SEBELIUS*, AND ENVIRONMENTAL LAW

Finding that the individual mandate contravenes the Commerce Clause, the Court in *Sebelius* looked elsewhere for constitutional support,<sup>103</sup> and turned to the Tax Clause.<sup>104</sup> As explained below, instead of weakening the foundations of federal environmental laws, the Court’s Tax Clause analysis may actually help shore them up, in the event of a Commerce Clause challenge.

Congress’s enumerated powers include those to “lay and collect Taxes.”<sup>105</sup> The government argued that, rather than being an order, the mandate constitutionally imposes a tax on those who do not buy health insurance.<sup>106</sup> Indeed, under the PPACA, the only consequence for those who do not maintain health insurance is to pay a penalty to the IRS at federal tax time.<sup>107</sup>

The majority determined that the Tax Clause saves the individual mandate. It reasoned that it is within Congress’s taxing authority to impose a tax on those individuals who remain uninsured, even when Congress has styled the tax as a “penalty.”<sup>108</sup> In Chief Justice Roberts’ view, even when Congress may not command compliance, it may still impose a tax: “The Federal Government does not have the power to order people to buy health insurance. [The PPACA] would therefore be unconstitutional if read as a command. The Federal Government does have the power to impose a tax on those without health insurance.”<sup>109</sup>

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<sup>100</sup> *Id.* at 173.

<sup>101</sup> 547 U.S. 715 (2006).

<sup>102</sup> *Id.* at 783 (Kennedy, J., concurring) (quoting *Raich*, 545 U.S. 1, 17 (2005)).

<sup>103</sup> *Sebelius*, 132B S. Ct. 2566, 2593 (2012) (“That is not the end of the matter. Because the Commerce Clause does not support the individual mandate, it is necessary to turn to the Government’s second argument: that the mandate may be upheld as within Congress’s enumerated power to lay and collect Taxes.” (internal quotation omitted)).

<sup>104</sup> U.S. CONST. art. I, § 8, cl. 1.

<sup>105</sup> *Id.*

<sup>106</sup> *Sebelius*, 132B S. Ct. at 2593.

<sup>107</sup> *See id.* at 2597.

<sup>108</sup> *Id.* at 2600, 2583.

<sup>109</sup> *Id.* at 2601.

Notably, in order to reach the merits of the individual mandate, the Court held, incongruously, that the “penalty” was not a “tax” for purposes of applying the Anti-Injunction Act.<sup>110</sup> The Court did not find the Anti-Injunction Act dispositive in this case, but placed the onus on Congress to affirmatively apply the statute to prevent taxpayer lawsuits.<sup>111</sup> Thus, the Court decided that the tag Congress imparts is irrelevant—in a sense, a tax by any other name would be just as constitutional.

Interpreting the Tax Clause just so, the Chief Justice had little difficulty holding that the individual mandate falls within its parameters: “Our precedent demonstrates that Congress had the power to impose the exaction in §5000A under the taxing power, and that [the PPACA] need not be read to do more than impose a tax. That is sufficient to sustain it.”<sup>112</sup> Nonetheless, the Chief Justice intimated that he does not much care for the mandate as a matter of policy:

Sustaining the mandate as a tax depends only on whether Congress *has* properly exercised its taxing power to encourage purchasing health insurance, not whether it *can*. Upholding the individual mandate under the Taxing Clause thus does not recognize any new federal power. It determines that Congress has used an existing one.

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Because the Constitution permits such a tax, it is not our role to forbid it, or to pass upon its wisdom or fairness.<sup>113</sup>

While central to the holding in *Sebelius*, the Court’s Tax Clause analysis is unlikely to have any negative effect on federal environmental laws as they currently stand because the individual mandate did not “recognize any new federal power.”<sup>114</sup> The Tax Clause could, however, provide environmental laws with an independent basis for congressional authority in the unlikely event that the Court upends those laws under the Commerce Clause. In that case, Congress could amend federal environmental laws to impose “taxes” against individuals to be paid to the IRS for the failure to, for instance, protect species or purchase and install certain pollution-control equipment.

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<sup>110</sup> Anti-Injunction Act, 68A Stat. 876 (codified at 26 U.S.C. §§ 7421, 7422 (2006)) (forbidding challenges to tax policy until it is actually imposed on an individual).

<sup>111</sup> See *Sebelius*, 132B S. Ct. at 2594 (“It is up to Congress whether to apply the Anti-Injunction Act to any particular statute, so it makes sense to be guided by Congress’s choice of label on that question. That choice does not, however, control whether an exaction is within Congress’s constitutional power to tax.”).

<sup>112</sup> *Id.* at 2598. The Court reached this decision based on three factors: 1) the penalty due for most Americans is far less than the price of insurance “and, by statute, it can never be more”; 2) “the individual mandate contains no scienter requirement”; and 3) “the payment is collected solely by the IRS through the normal means of taxation.” *Id.* at 2595–96.

<sup>113</sup> *Id.* at 2599, 2600.

<sup>114</sup> *Id.* at 2599.

V. THE SPENDING CLAUSE, *SEBELIUS*, AND ENVIRONMENTAL LAW

The General Welfare Clause, a component of the Spending Clause, permits Congress to tax and spend so as to “provide for the common defense and General Welfare of the United States”<sup>115</sup> by attaching conditions to the receipt of federal funds, provided the conditions are not coercive.<sup>116</sup> *Sebelius* held that the PPACA violates the Spending Clause because it threatened to “penalize” states by withdrawing funding for their existing Medicaid programs.<sup>117</sup> Accordingly, *Sebelius* is likely to raise issues for the cooperative federalism-rich aspects of our national environmental laws.

Beginning with first principles, states’ cooperation is essential to achieving the objectives of federal environmental laws. Under a system of cooperative federalism, states receive federal funding to implement federal programs.<sup>118</sup> Many federal environmental laws delegate one or more permitting and enforcement programs to state and local partners.<sup>119</sup> The Clean Air Act is most prominent among these cooperative federal programs, delegating three major stationary source permitting programs: Prevention of Significant Deterioration/New Source Review permits,<sup>120</sup> Title V operating permits,<sup>121</sup> and air-pollution-control permits for outer continental shelf activities.<sup>122</sup>

Many other federal environmental laws deploy the Spending Clause to implement federal programs.<sup>123</sup> For example, states may accept federal funding to administer the National Pollution Discharge Elimination System (NPDES) permitting program under the CWA,<sup>124</sup> the SDWA’s Underground Injection Control program,<sup>125</sup> hazardous waste permitting under RCRA,<sup>126</sup> and both the abandoned mine reclamation program and the surface mining regulatory program<sup>127</sup> of the Surface Mining Control and Reclamation Act (SMCRA).<sup>128</sup> Under most cooperative federalism programs, permit

<sup>115</sup> U.S. CONST. art. I, § 8; *United States v. Butler*, 297 U.S. 1, 65 (1936).

<sup>116</sup> *South Dakota v. Dole*, 483 U.S. 203, 210–11 (1987).

<sup>117</sup> *Sebelius*, 132B S. Ct. at 2606–07.

<sup>118</sup> See generally CRAIG N. JOHNSTON ET AL., *LEGAL PROTECTION OF THE ENVIRONMENT* 187 (3rd ed. 2010) (discussing Congress’s choice in the early 1970s of whether to give pollution-control authority solely to the EPA, to the states themselves, or to set up a cooperative “federal/state model”).

<sup>119</sup> See, e.g., *id.* (describing such programs in the context of the Clean Water Act and the implementation of the National Pollution Discharge Elimination System).

<sup>120</sup> Clean Air Act, 42 U.S.C. § 7471 (2006).

<sup>121</sup> *Id.* § 7661a.

<sup>122</sup> *Id.* § 7627(a)(3).

<sup>123</sup> See generally Denis Binder, *The Spending Clause As a Positive Source of Environmental Protection: A Primer*, 4 CHAP. L. REV. 147, 149 (2001) (referring to Commerce Clause-based environmental laws to argue that “Congress may be able to accomplish many of the same legislative goals by expressly basing jurisdiction on the Spending Clause”).

<sup>124</sup> Federal Water Pollution Control Act, 33 U.S.C. § 1342 (2006).

<sup>125</sup> Safe Drinking Water Act of 1974, 42 U.S.C. § 300h (2006).

<sup>126</sup> Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6926 (2006).

<sup>127</sup> *Id.* § 1253.

<sup>128</sup> 30 U.S.C. § 1235 (2006).

applications are submitted to the state, local, or tribal agency, which apply EPA-governed requirements.<sup>129</sup>

The Spending Clause can also promote resources management. The Land and Water Conservation Fund (LWCF),<sup>130</sup> for example, “has provided hundreds of millions of dollars in grants to federal, state, and local governments to acquire land, water, and related resources for recreational, wildlife, and aesthetic purposes that benefit the public.”<sup>131</sup>

Accordingly, the *Sebelius* decision’s Spending Clause analysis could arguably have a profound effect on federal environmental laws. But there are four reasons why it should not.

First, the *Sebelius* Court departed from established Spending Clause jurisprudence, and it got the rest wrong. The Court has long used a series of factors to determine whether Congress exceeds its authority under the Spending Clause. The factors, outlined in *Dole v. South Dakota*,<sup>132</sup> provide a balancing test that presumes Congress has nearly unlimited authority to condition federal dollars.<sup>133</sup> But the majority did not apply these factors. Instead, it enlisted the Court’s 10th Amendment jurisprudence, derived from *New York v. United States*,<sup>134</sup> to ask whether the condition “coerces” states into compliance.<sup>135</sup> But *New York* is inapposite. There, the Court held that a federal law that required states to take title of low-level radioactive wastes unduly impugned the dignity of the states by skewing political accountability.<sup>136</sup> In short, *New York* should not have applied in *Sebelius* because it stands for the proposition that Congress cannot deny the dignity states hold as sovereigns by commandeering state legislative prerogatives about when and how to regulate. In contrast, the PPACA does the opposite thing by giving the states the full dignity of choice of non-participation.

Second, even if *New York* does apply, the Court was wrong to find that the Medicaid expansion is coercive. In the PPACA, Congress offered to nearly double the funding to states that implement expanded Medicaid.<sup>137</sup> Medicaid and its expansion under the PPACA are closely intertwined, and it does not make sense to implement one part without the other. That is why funding the entire Medicaid program is conditioned on implementing the entire program.<sup>138</sup> As the federal government argued, states do not have to

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<sup>129</sup> See, e.g., 33 U.S.C. § 1342(d)(2)–(4) (2006) (allowing the EPA administrator to object to state-issued NPDES permits and require the state to revise such permits to satisfy the objection); 42 U.S.C. § 7661a(b) (2006) (mandating the same process for Title V permits under the CAA).

<sup>130</sup> Land and Water Conservation Fund Act of 1965, 16 U.S.C. § 4601–4 to 4601–11 (2006).

<sup>131</sup> May, *supra* note 32, at 9.

<sup>132</sup> 483 U.S. 203, 207–08 (1987).

<sup>133</sup> See, e.g., James V. Corbelli, *Tower of Power: South Dakota v. Dole and the Strength of the Spending Power*, 49 U. PITT. L. REV. 1097, 1116–17 (1988) (noting that *Dole* “leaves congressional power under the Spending Clause virtually unchecked”).

<sup>134</sup> 505 U.S. 144 (1992).

<sup>135</sup> *Sebelius*, 132B S. Ct. 2566, 2601 (2012) (citing *New York*, 505 U.S. at 188).

<sup>136</sup> *New York*, 505 U.S. at 169.

<sup>137</sup> Patient Protection and Affordable Care Act, 42 U.S.C. § 1396(c) (Supp. V. 2012), *invalidated* by *Sebelius*, 132B S. Ct. at 2607.

<sup>138</sup> *Sebelius*, 132B S. Ct. at 2604.

listen. States are free to demur; they can say no.<sup>139</sup> Justice Roberts initially agreed with this idea, suggesting that states can “act like” sovereigns, walk away from the federal program and raise funds to cover healthcare costs from their own citizens instead of holding out their hands to federal taxpayers,<sup>140</sup> however raising taxes is politically unpopular, so states are reluctant to do so. Ultimately, the Court called the PPACA coercive. But what about forcing taxpayers from some states to subsidize substandard healthcare programs in other states, forever? Now that’s *coercive*.

Third, the *Sebelius* decision potentially leads to absurd results. The Court has always given the federal government very wide latitude in attaching conditions to the federal tax monies it gives away.<sup>141</sup> Conditional funding to states has been around for 200 years.<sup>142</sup> Examples include statehood,<sup>143</sup> westward expansion,<sup>144</sup> great and small wars,<sup>145</sup> public roads and bridges,<sup>146</sup> public education,<sup>147</sup> public voting,<sup>148</sup> environmental protection,<sup>149</sup> and yes, Medicaid. All involve state participation conditioned on federal tax dollars. Only now, *Sebelius* makes it seem as though attaching a condition to participate in a federal program is coercive when the government decides later on not to provide the funding. As such, if a state decides to run a program poorly, or only part of it, or only on Tuesdays between noon and 1:30 p.m., then it’s unconstitutional for Congress to withhold funding. That stands cooperative federalism on its head, and makes a mockery of the federal fisc. The decision potentially inverts the structure of the Constitution, conscripting federal taxpayers into service for the recalcitrant states, thereby substituting the Articles of Confederation in its stead.

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<sup>139</sup> *Id.* at 2603.

<sup>140</sup> *See id.* (“The states are separate and independent sovereigns. Sometimes they have to act like it.”).

<sup>141</sup> *Id.* at 2601 (“We have long recognized that Congress may use this power to grant federal funds to the States, and may condition such a grant upon the States’ ‘taking certain actions that Congress could not require them to take.’” (quoting *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686 (1999))).

<sup>142</sup> *See* BEN CANADA, CONG. RESEARCH SERV., RL30705, FEDERAL GRANTS TO STATE AND LOCAL GOVERNMENTS: A BRIEF HISTORY 1, 5 (2003), *available at* <http://infousa.state.gov/government/statelocal/docs/fedgrants.pdf> (noting that the grants-in-aid system predates the Constitution, and that early grants took the form of land as well as money); *see also* *South Dakota v. Dole*, 483 U.S. 203, 204 (1987).

<sup>143</sup> *See, e.g.*, Eric Biber, *The Price of Admission: Causes, Effects, and Patterns of Conditions Imposed on States Entering the Union*, 46 AM. J. LEGAL HIST. 119, 206 (2004) (noting that as a condition of Oklahoma’s admission into the union, money granted to the state by the federal government for education purposes was to be used only for the state school system).

<sup>144</sup> *See* CANADA, *supra* note 142, at 2–3.

<sup>145</sup> *See, e.g.*, Patrick Todd Mullins, *The Militia Clauses, the National Guard, and Federalism: A Constitutional Tug of War*, 57 GEO. WASH. L. REV. 328, 334–35 (1988) (discussing federal conditional spending and state national guard units).

<sup>146</sup> *See Dole*, 483 U.S. at 205 (federal highway funds conditioned on state enacting minimum drinking age); *Petty v. Tennessee-Missouri Bridge Comm’n*, 359 U.S. 275, 277 (1959) (funding for bridge construction conditioned on waiver of sovereign immunity).

<sup>147</sup> *See* CANADA, *supra* note 142, at 3.

<sup>148</sup> *See, e.g.*, Help America Vote Act of 2002, Pub. L. No. 107-252, § 101(b), 116 Stat. 1666, 1669 (describing how states may and may not use federal payments under the Act).

<sup>149</sup> CANADA, *supra* note 142, at 8.

Fourth, the reasoning in *Sebelius*, even if correct, does not apply to environmental laws, which are easily distinguishable from Medicaid. For example, while Medicaid makes up a significant portion of state budgets, in some states as much as 20%,<sup>150</sup> federal highway funds tied to environmental laws make up less than 1% nationally.<sup>151</sup> And unlike Medicaid, there can be no claim that states are somehow not aware that highway funds might be withheld for not complying with federal environmental laws like the Clean Air Act. Those provisions have existed in those laws from the outset, and they were never thought to be frozen in time.<sup>152</sup>

## VI. CONCLUSION

Although it is unlikely, *Sebelius* could have an impact on federal environmental law. Admittedly, the nation's environmental and healthcare laws share some of the same features. For instance, both require individuals to participate in certain markets. With healthcare, the individual mandate requires the purchase of insurance under threat of penalty. Many federal environmental laws require individuals to participate in certain markets, including those for purchasing pollution-control equipment, emission credits, or wetlands mitigation. In addition, both healthcare and environmental laws are steeped in the principles of cooperative federalism. With healthcare, states receive federal funding to administer a federal program, Medicaid. States may elect to opt out of the Medicaid program and surrender the corresponding federal funding. States also receive funding to administer the nation's environmental laws. States may opt out of some of these, too, but they have no choice under some environmental programs, since noncompliance invites further reductions in federal funding.<sup>153</sup>

Despite these similarities, it is unlikely that *Sebelius* will be used to challenge national environmental laws. First, the nation's environmental laws are arguably already vulnerable to further Commerce Clause challenges, even apart from *Sebelius*. Second, although the cooperative federalism praxis of most federal environmental laws would seem to suggest

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<sup>150</sup> See, e.g., Heritage Found., *How Much Will Obamacare Cost Your State?*, <http://www.askheritage.org/how-much-will-obamacare-cost-your-state/> (last visited Feb. 23, 2013) (noting that more than 20% of Texas' state budget is spent on Medicaid).

<sup>151</sup> For example, the Federal Highway Administration's requested 2013 budget is \$42.6 billion. See U.S. DEP'T OF TRANSP., FEDERAL HIGHWAY ADMINISTRATION: BUDGET ESTIMATES FISCAL YEAR 2013, at I-1 (2013). Approximately \$405 million is tied to environmental programs. *Id.* at I-3, II-5, III-61.

<sup>152</sup> See, e.g., Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685, 749 (codified at 42 U.S.C. § 7506(c)(1) (2006)) (limiting federal assistance to states for federal highway projects for failure to comply with requirements of CAA); see also *Commonwealth of Va. v. Browner*, 80 F.3d 869, 882 (4th Cir. 1996) (holding that the CAA's "highway sanction" was a valid exercise of Congress's power under the Spending Clause).

<sup>153</sup> For example, states must develop State Implementation Plans (SIPs) to implement the national ambient air quality standards under the Clean Air Act. States that fail to do so run the risk of being denied federal highway funding. See Arnold W. Reitze, Jr., *Air Quality Protection Using State Implementation Plans — Thirty-Seven Years of Increasing Complexity*, 15 VILL. ENVTL. L.J. 209, 211 (2004).

some vulnerability to a *Sebelius* Spending Clause attack where draconian spending withholdings are theoretically allowed, *Sebelius's* Spending Clause component appears to be limited to the PPACA. And finally, while Tax Clause challenges to environmental laws under *Sebelius* are likely to be nil or nearly so, *Sebelius* has some potential to turn Congress toward that clause as a more enduring source of authority for environmental regulation.