

Sec. 8—Powers of Congress

Cl. 3—Power to Regulate Commerce

basis” to believe that diversion of medicinal marijuana into the illegal market would depress the price on the latter market.⁷⁹⁷ The Court also had little trouble finding that, even in application to medicinal marijuana, the CSA was an economic regulation. Noting that the definition of “economics” includes “the production, distribution, and consumption of commodities,”⁷⁹⁸ the Court found that prohibiting the intrastate possession or manufacture of an article of commerce is a rational and commonly used means of regulating commerce in that product.

The Court’s decision also contained an intertwined but potentially separate argument that Congress had ample authority under the Necessary and Proper Clause to regulate the intrastate manufacture and possession of controlled substances, because failure to regulate these activities would undercut the ability of the government to enforce the CSA generally.⁷⁹⁹ The Court quoted language from *Lopez* that appears to authorize the regulation of such activities on the basis that they are an essential part of a regulatory scheme.⁸⁰⁰ Justice Scalia, in concurrence, suggested that this latter category of activities could be regulated under the Necessary and Proper Clause regardless of whether the activity in question was economic or substantially affected interstate commerce.⁸⁰¹

Activity Versus Inactivity.—In a case with overtones of substantive due process, the Court in *National Federation of Independent Business (NFIB) v. Sebelius*⁸⁰² held that Congress did not have the authority under the Commerce Clause to compel individuals to maintain a minimum level of health insurance (although, as discussed previously, the Court found such power to exist under the taxing power).⁸⁰³ Under this “individual mandate,” failure to purchase health insurance may subject a person to a monetary penalty, administered through the tax code.⁸⁰⁴ By requiring that individuals purchase health insurance, the mandate prevents cost-

⁷⁹⁷ 545 U.S. at 19.

⁷⁹⁸ 545 U.S. at 25, quoting Webster’s Third New International Dictionary 720 (1966).

⁷⁹⁹ 545 U.S. at 18, 22.

⁸⁰⁰ 545 U.S. at 23–25.

⁸⁰¹ 545 U.S. at 34–35 (Scalia, J., concurring).

⁸⁰² 567 U.S. ___, No. 11–393, slip op. (2012).

⁸⁰³ See Power to Tax, Regulation by Taxation, *supra*.

⁸⁰⁴ Patient Protection and Affordable Care Act (ACA), Pub. L. 111–148, as amended. This mandate was necessitated by the act’s “guaranteed-issue” and “community-rating” provisions, under which insurance companies are prohibited from denying coverage to those with such conditions or charging unhealthy individuals higher premiums than healthy individuals. *Id.* at §§ 300gg, 300gg–1, 300gg–3, 300gg–4. As these requirements provide an incentive for individuals to delay purchasing health insurance until they become sick, this would impose new costs on insurers, leading them to significantly increase premiums on everyone.