2011 HOUSE INDUSTRY, BUSINESS AND LABOR

HB 1165

# 2011 HOUSE STANDING COMMITTEE MINUTES

**House Industry, Business and Labor Committee**
Peace Garden Room, State Capitol

HB 1165
January 17, 2011
12975

☐ Conference Committee

Committee Clerk Signature

**Explanation or reason for introduction of bill/resolution:** Individual accident and health insurance coverage.

**Minutes:**

**Chairman Keiser:** We will open the hearing on HB 1165.

**Rep. Gary Kriedt:** I'm here to speak in favor of HB 1165. This is in regards to the new health care reform bill. Right now there are 20 states that are involved in a lawsuit with the federal government and recently four more states will be joining them in this particular act. North Dakota is part of that law suit. This bill doesn't have an effect on that lawsuit but it is designed after the bill passed by the state of Virginia. What the bill does is it doesn't force North Dakota to be mandated by the federal government to have to purchase health insurance from the state of North Dakota. My personal feeling is that the government is over reaching their constitutional rights. If the Supreme Court would deem this act is unconstitutional this bill would have no meaning. If the decision were to go in opposite direction, we in North Dakota would have this in statute.

**Chairman Keiser:** Questions?

**Representative Amerman:** On lines 20-22, where the section doesn't apply to a student who is required by institute of high education to obtain health care. Are they required now?

**Representative Kriedt:** I do think that there are some institutions that require them to have insurance. I didn't investigate that part of the bill.

**Chairman Keiser:** Did Virginia pass their bill like this prior to the passage of the federal legislation?

**Representative Kriedt:** They were in session. If we would have been in session during the interim that would have probably been time. The lawsuit going on with the 24 states is still going on.

**Chairman Keiser:** Any other questions, anyone else here in support, opposition, or neutral? We will close the hearing on HB 1165.

# 2011 HOUSE STANDING COMMITTEE MINUTES

**House Industry, Business and Labor Committee**
Peace Garden Room, State Capitol

HB 1165
January 19, 2011
13112

☐ Conference Committee

Committee Clerk Signature

**Explanation or reason for introduction of bill/resolution:**

**Minutes:**

**Chairman Keiser:** We will open on HB 1165. This gives the attorney general the authority to go forward with the lawsuit if this bills passes. Maybe I'm reading too much into that or correct me if I'm wrong but that is my understanding of this bill.

**Christopher Dodson:** The bill does prohibit requiring someone to have health insurance. It is a broad bill and doesn't just deal with state but individual insurance as well. There are some exceptions written into the bill but there are some unique situations in which a religious institution would require someone to have health insurance. The relationship between for example an abbot and the monks or and bishop or priest is not one of employment but when they enter community or relationship they often are required to have health insurance. In other types of arrangements they may have to have some type of insurance before they take their vows to enter that community. The amendment I prepared may look like a rewrite but it is really just one sentence, the rest is already in the bill. (see attachment).

**Chairman Keiser:** That is just C on part three?

**Christopher Dodson:** Yes.

**Representative Kreun:** To be clear on line 22 if you just Insert C after enrolment, for the fourth part of that amendment you insert in between there the amendment that the individual that is required by a religious institution to obtain and maintain health insurance. That's basically the change.

**Christopher Dodson:** That is a correct explanation. We are just adding one sentence in there.

**Chairman Keiser:** What are the wishes of the committee?

**Representative Kreun:** I would make a recommendation to propose the amendment to HB 1165.

**Representative Ruby:** Second.

**Chairman Keiser:** Further discussion of the amendment? Seeing none we will take a voice vote on the amendment. The amendment passes. What are the wishes of the committee?

*Voice vote*: motion carries.

**Representative Kreun:** I would make a motion for a do pass as amended.

**Representative Nathe:** Second.

**Chairman Keiser:** Further discussion?

**Representative Ruby:** With the other bill, I guess I don't know, depending on the working of each one, if they are similar or different. I'd like to see which one is better.

**Chairman Keiser:** Can we withdraw the motion?

**Representative Kreun:** Withdraw the motion.

**Representative Nathe:** I'll withdraw my second.

**Chairman Keiser:** The intent of this for discussion purpose is apparently 24 states are now engage in lawsuit relative to the constitutionality of it. Because we meet only every two years we need to preposition ourselves as a state should Virginia's lawsuit be upheld along with those states on this issue. We will close on HB 1165.

# 2011 HOUSE STANDING COMMITTEE MINUTES

**House Industry, Business and Labor Committee**
Peace Garden Room, State Capitol

HB 1165
February 7, 2011
No Recording

☐ Conference Committee

Committee Clerk Signature Ellen LeBeau

**Explanation or reason for introduction of bill/resolution:**

Individual accident & health insurance coverage.

**Committee Work Session Minutes:**

**Chairman Keiser:** Opens the work session on HB 1165. Goes over the bill.

**Vice Chairman Kasper:** Motions for a Do Pass as Amended.

**Representative Nathe:** Second.

**Chairman Keiser:** Further questions?

**Roll call for a Do Pass as Amended on HB 1165 with 10 yeas, 4 nays, 0 absent and Representative Kreun is the carrier.**

VR
2/7/11

11.0029.01001
Title.02000

Adopted by the Industry, Business and Labor Committee

February 7, 2011

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1165

Page 1, replace lines 16 through 23 with:

"3. This section does not apply to:

a. An individual who voluntarily applies for coverage under a state-administered program pursuant to the medical assistance program under title XIX of the federal Social Security Act [42 U.S.C. 1396 et seq.] or the state's children's health insurance program under title XXI of the federal Social Security Act [42 U.S.C. 1397aa et seq.].

b. A student who is required by an institution of higher education to obtain and maintain health insurance as a condition of enrollment.

c. An individual who is required by a religious institution to obtain and maintain health insurance.

4. This section does not impair the rights of an individual to contract privately for health insurance coverage for family members or former family members."

Renumber accordingly

Date: Feb 7, 2011

Roll Call Vote # 1

## 2011 HOUSE STANDING COMMITTEE ROLL CALL VOTES

## BILL/RESOLUTION NO. 1165

House **House Industry, Business and Labor** Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number 11.0029.01001

Action Taken: ☒ Do Pass ☐ Do Not Pass ☒ Amended ☐ Adopt Amendment

Motion Made By Rep Kasper Seconded By Rep Nathe

| Representatives | Yes | No | Representatives | Yes | No |
|---|---|---|---|---|---|
| Chairman Keiser | ✓ | | Representative Amerman | | ✓ |
| Vice Chairman Kasper | ✓ | | Representative Boe | | ✓ |
| Representative Clark | ✓ | | Representative Gruchalla | | ✓ |
| Representative Frantsvog | ✓ | | Representative M Nelson | | ✓ |
| Representative N Johnson | ✓ | | | | |
| Representative Kreun | ✓ | | | | |
| Representative Nathe | ✓ | | | | |
| Representative Ruby | ✓ | | | | |
| Representative Sukut | ✓ | | | | |
| Representative Vigesaa | ✓ | | | | |
| | | | | | |

Total Yes 10 No 4

Absent 0

Floor Assignment Rep. Kreun

If the vote is on an amendment, briefly indicate intent:

25.0004

## REPORT OF STANDING COMMITTEE

**HB 1165: Industry, Business and Labor Committee (Rep. Keiser, Chairman)** recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (10 YEAS, 4 NAYS, 0 ABSENT AND NOT VOTING). HB 1165 was placed on the Sixth order on the calendar.

Page 1, replace lines 16 through 23 with:

"3. This section does not apply to:

a. An individual who voluntarily applies for coverage under a state-administered program pursuant to the medical assistance program under title XIX of the federal Social Security Act [42 U.S.C. 1396 et seq.] or the state's children's health insurance program under title XXI of the federal Social Security Act [42 U.S.C. 1397aa et seq.].

b. A student who is required by an institution of higher education to obtain and maintain health insurance as a condition of enrollment.

c. An individual who is required by a religious institution to obtain and maintain health insurance.

4. This section does not impair the rights of an individual to contract privately for health insurance coverage for family members or former family members."

Renumber accordingly

2011 SENATE INDUSTRY, BUSINESS AND LABOR

HB 1165

# 2011 SENATE STANDING COMMITTEE MINUTES

**Senate Industry, Business and Labor Committee**
Roosevelt Park Room, State Capitol

HB 1165
March 16, 2011
15426

☐ Conference Committee

Committee Clerk Signature Eva Luetell

**Explanation or reason for introduction of bill/resolution:**

Relating to individual accident and health insurance coverage

**Minutes:** Attachments

**Chairman Klein** opened the committee hearing on HB 1165 relating to individual accident and health insurance coverage.

**Representative Kreidt**: District 33. Introduce HB 1165 in regards to Patient Protection and Affordable Care Act. During the interim this legislation was passed on the national level. I looked at the constitutionality of having individuals mandated to purchase health insurance. My conclusion along with probably a lot of other individuals is that I don't really believe that is constitutional. The Constitution isn't here for the federal government to provide for citizens but it is here to protect citizens. The bill before you and has passed in the House is designed after a bill that was also passed in the legislature in Virginia. It is quite simple and plain bill, again the result of being that we can't force individuals in the state of North Dakota to purchase health insurance and I feel the federal government is going beyond to control the citizens of the US. I am sure many of you are aware that we 26 states or over half of the states that are in a federal lawsuit in regards to the Patient Protection Affordable Health Care Act. There have been lawsuits where some are pro and con and the last suit that was settled in Florida where a judge there claimed that the particular federal legislation is unconstitutional. It didn't halt the continuation of the bill. In regards to this particular act, there are a lot of waivers being issued, this includes 700 waivers and my understanding now it's' well over 1000. The conclusion I draw from that is it is such a great bill, why are the feds granting all these waivers. A lot of them are unions that are getting the waivers to opt out of this particular act along with some individuals or corporations that, do also not want to participate in this and the federal government is granting these waivers at a steady pace. It makes me wonder if as we were told before they passed it, this was such a great piece of legislation why are all these waivers happening, so I guess that is the conclusion or food for thought for you as a committee. I guess I will just sum it up. I just feel that what's happening on the federal level is not fair to our citizens not only nationally but here in the state of North Dakota. I would hope you consider this bill. In regards to the lawsuits that are going on the national level, if those are determined to be unsuccessful, and I am assuming this will be heard by the Supreme Court, which the results are in favor of the Patient Protection Affordable Care Act, this particular bill in statute here in the state of North

Dakota then would give our Attorney General a beginning to start a lawsuit on the state level with this bill enact. I feel that makes this a rather important piece of legislation for the state of North Dakota.

**Chairman Klein**: Does this provide standing for the Attorney General?
**Representative Kreidt:** That would be correct. I would hope the committee would act favorably upon this bill, that you would pass it out and get the process going. I know there maybe some amendments that will come forward. I think Representative Kasper is here, you can consider those, I at this point have not opinion.

**Senator Andrist**: This is a provision that is mandates that people buy health insurance? You say, I don't understand this waivers part. You said a number of the unions were granted waivers? I am wondering why that would be because they practically every union contract requires or includes health protection. So, what are the types of waivers that are being given? **Representative Kreidt**: The waivers are being given under the health care affordable act. They would be required to participate in that particular legislation that has been passed on the national level. What the waivers would consist of is allowing them to opt out and continue to provide the same type of health care in the past. They are not happy with the product that they would be getting out of this particular federal legislation. So, I am happy with B/CB/S but I wouldn't want this. I could go and ask for a federal waiver that I don't want to participate in what's been passed on the national level. I want to keep my local provider here in North Dakota (BCBS). Well that's not going to happen for us here, we're going to have different products and we're going to be mandated to purchase one of those products. **Senator Andrist**: So the federal legislation gets a choice of products and it might not include BC/BS or the union insurer or whoever. And that's why they want to be waivered out. **Representative Kreidt**: They know the product they have right now and they want to continue to have that product. Not participate on the federal level.

**Senator Schneider**: You mentioned the suit that North Dakota is party too trying to overturn the federal health care reform law. But you're saying that this bill would allow us to sue again, is that your intention? **Representative Kreidt**: Let me try to clarify that. Right now we're in federal litigation participating with 26 other states, its more than half of the states, right now are in this lawsuit. If, and we're assuming that is going to proceed to the Supreme Court and we don't know what the decision is. If the Supreme court would rule in favor of the federal legislation, then by having this piece of legislation in place in the state of North Dakota, this is where our Attorney General, then would proceed on the state level with this bill that we already have passed stating that we do not want to be forced to purchase insurance so that would be the step that they would then go forward with. Senator Schneider: Don't you think the individual mandate and its constitutionality would've been fully litigated at that point and therefore any claim that could be potentially brought by the Attorney General would be barred by *res judicata*. What we clearly have standing now, as evidence by the fact that the Attorney General has joined the lawsuit, and do we want to start the whole process over and re-litigate the constitutionality of the health care reform law after the Supreme Court has said that it is constitutional? Is that the intention? Representative Kreidt: If it's ruled that the Supreme Court says its constitutional and they can move forward, as they are now, instituting all of the provisions we still as a state then could still challenge it. I guess we could probably look at Alaska right now. They just at this point said we don't anything to do with this, we're not going to implement anything and we

could take that direction too, but his would give the door again to re-challenge it and maybe each state then individually would do it.

**Senator Klein**: So what this would do is to if this should be declared, that we could move on with it, it would still say that North Dakota isn't going to participate. **Representative Kreidt:** That's correct.

**Senator Murphy**: I am wondering about if you're concerned about constitutionality, why isn't this a resolution? Obviously the federal government holds sway over state government. Wouldn't this be better voiced as a resolution? **Representative Kreidt:** I guess my belief and personal opinion wouldn't be, I feel more comfortable as having a bill in statute in the state of North Dakota and not coming forward with a resolution. That's why I am moving forward with this bill and having this bill passed in the Senate with a large majority I feel most comfortable for the state of North Dakota and the people in North Dakota by having this on statute.

**Representative Kasper**: District 46. See written handouts and an amendment to discuss with the committee at the end of my testimony. What is House Bill 1165 all about? House bill 1165 is about 1) states rights: whether or not there is a separation of powers in the United Stated Constitution 2) it is about this constitution and its' about amendment #10 which reads 'the powers not delegated to the United States by the Constitution nor prohibited by it to the states, or reserved to the states respectively or to the people'. The issue surrounding the Obama Care or the PPACA bill that the Congress passed is whether or not it's constitutional, and whether or not the United State Congress overstepped their bounds under the US Constitution. As Rep. Kreidt said this bill is extremely important because it would provide the citizens of North Dakota with a standing. Currently Attorney General Stenehjem has joined the law suit in Florida, however, whether or not, if the lawsuit wins, and if Obama Care is declared unconstitutional, then we don't need to have standing in North Dakota. But that lawsuit in Florida has not yet been decided and it could be decided partially according to the lawsuit, or whole Obama care could be thrown out or part of it could be retained. When that lawsuit is settled if the PPAC is not judged to be totally unconstitutional, North Dakota citizens do not have standing simply because our Attorney General has joined the lawsuit. Each state in and of itself, in order to have standing must pass a bill like this to protect the citizens of a various states, that is where 1165 does. Now the IBL committee and during the interim and of which I was a part of, heard for about a year and a half, testimony about the impact of the state of North Dakota on the passage of the Federal Health Reform Act. We had testimony from state agencies, insurance companies such as Blue Cross, the hospitals and we had a number of hearings. Representative Kaiser chaired that committee and asked the state agencies and the other areas that were there testifying to come up with an estimate that they thought would be a cost to the state of North Dakota, to implement the Federal Health Reform Act. The numbers that we compiled a lot through Medicaid and some other entities, was over the next 10 years, we project about $1.1 billion dollars of increase cost to the state of North Dakota to implement the Federal Health Reform Act. The key again to protecting the citizens of our state from my perspective that we pass 1165 and I have some amendments that I think will strengthen the bill which I will share with the committee.

The Virginia lawsuit, if I can refer you to the first page of the handout I just gave you, talks about the federal judge rules against the feds motion to dismiss the Virginia health care lawsuit. (Read part to committee 18:07-23:00)

**Chairman Klein**: That is the issue that brings us to this bill, correct? **Representative Kasper**: Exactly, what I am trying to provide for this committee is the legal background that is going on in the United States right now, because there has been a lot of misconception and a lot of misunderstanding about the rulings of the judges throughout the US and the fact that the judges have rules that it is unconstitutional. But we need standing in North Dakota because we don't know the ultimate disposition of those rulings in front of the Supreme Court. Representative Kreidt said under 1165, regardless of the ruling by the Supreme Court it will give North Dakota citizens standing to have our Attorney General protect our citizens as he would deem advisable.

**Senator Schneider**: Is your belief that without this bill North Dakota does not have standing to challenge out the uniform law? **Representative Kasper**: Exactly. Without this bill we do not have standing. The fact that our Attorney General has joined the Florida lawsuit does not give the citizens of North Dakota standing. **Senator Schneider**: How are we a part of that suit if we don't have standing? **Representative Kasper**: We have joined in the lawsuit with the other twenty five attorney generals, so whatever that terminology is; we are part of the lawsuit. But I have other information which I didn't distribute to the committee today that clearly spells out that simply because the state is part of the Florida lawsuit, does not give that state standing in and of itself. **Senator Schneider**: Would you say that an unconstitutional state law gives the state standing to challenge the federal health care reform law again after, initially challenging it? **Representative Kasper**: That is the big assumption. You're assuming that this is unconstitutional, and the Supreme Court has not ruled on that. It's constitutional if we pass it. **Senator Schneider**: My understanding is that we need this in case the Supreme Court says the law is constitutional, correct? So under the supremacy clause, Article 4, Paragraph 2, this state statute would be invalided by that decision. **Representative Kasper**: Regardless of what happens in Virginia or Florida, this bill gives North Dakota standing to protect our citizens' rights under the United States Constitution. So it would in fact open the door for our state and our Attorney General to challenge again the federal bill if we so chose to do that. Our bill is somewhat different than Virginia's bill and Florida's statute, so because of the fact that we have now passed a statute in the state of North Dakota we have standing. Now what we do with that standing it will be determined of what the Supreme Court does.

**Senator Murphy**: Rep. Kasper, I am going to ask for a favor from you. I am going to ask for some civility in terms of referencing this health care act. I did not appreciate when we got into the Iraq war but I didn't walk around calling it Bush's War, and this health care act has a name. And I just ask for that amount of civility in this public place. **Representative Kasper:** Certainly. I apologize for if I offended you.

**Chairman Klein**: Certainly everyone will know if you call it PPAC or whatever it is, or the Affordability Act.

**Senator Andrist**: I am trying to understand what the difference is between participation and having standing for participation. **Representative Kasper**: When an attorney or any

entity such as in Florida, joins in a lawsuit that another state initiates, it is sort of like saying we're coming on board because we agree and we want to add the status of the state of North Dakota to this lawsuit. And so we are joining in the Florida lawsuit and the Florida law that the lawsuit precipitated, similar to 1165 which gave their citizens standing to bring the lawsuit. So the various 26 states join that lawsuit as sort of a friend of the court or part of the proceedings. But that in and of itself, does not carry back to any of the home states of any other states that are participating. Because those attorney generals have joined in the lawsuit that gives their state citizen standing, it does not. **Senator Andrist:** What the bill does it sort of legitimizes the attorney generals participation by saying yes, the people of North Dakota have spoken and they want you to pursue this, is that right? **Representative Kasper:** That would be the result of the message being sent. The legislature agrees with the action that the attorney general took but under the Attorney Generals powers he has the right to do what he did without the legislative consent. What this bill does is it goes beyond that and it says that in the statute of the state of North Dakota, the people of North Dakota cannot be required to purchase health insurance and in amendments it goes a step further because there are several areas that other states have added in their amendments which says 'the people of North Dakota are going to be able to go to a health care provider that they chose and cannot be kept away from a health care provider, and the health care providers themselves are free to practice medicine in the state of ND' and not be prohibited from practicing medicine in ND. Expands the premium protection, that's what the amendments do.

**Chairman Klein**: We are not asking for a waiver we are asking for this standing? Representative Kasper: Yes. HB 1165 does not ask for a waiver, it just asks for a standing. Amendments handed to the committee 1-4 with full explanation. He also gave handouts on Georgetown; handouts of information on the Constitution.

Chairman Klein Closed hearing on 1165

# 2011 SENATE STANDING COMMITTEE MINUTES

**Senate Industry, Business and Labor Committee**
Roosevelt Park Room, State Capitol

HB 1165
March 22, 2011
Job Number 15818

☐ Conference Committee

Committee Clerk Signature Eva Luetkl

**Explanation or reason for introduction of bill/resolution:**

Relating to individual accident and health insurance coverage

**Minutes:** Discussion and Vote

**Chairman Klein**: Called the meeting to order.

**Senator Schneider**: Said the notion of standing as conceived by some of the proponents of the bill, is not grounded in reality, to explain it, the requirement for standing is if I got hit by a bus the chairman couldn't sue because his friend got hit by a bus, he didn't suffer the injury, you would have no standing to sue me. We have standing to sue over federal health care, we joined the suit. He explained that in some cases you could gain standing from statute but in this case it is worthless. He said vote how you will if it is a political vote but don't fall into the trap about standing.

**Chairman Klein**: Said it's easier to call it standing then to vote on it because it is a political vote. He said his thoughts are to say; the Attorney General joined the law suit and the legislature is saying thumbs up to him.

**Senator Schneider**: Said if we want amend this into something that is benign like we support the Attorney General. We will be voting on something that may someday be an unconstitutional statute. If you feel the AG has done the right thing there a better way to do that than passing this into law. Potentially this could be challenged in court and I don't know if the state wants to do that. We are already in Federal District Court, we don't have to do something that maybe unconstitutional just to express our displeasure.

**Senator Andrist**: Said he talked to someone in the AG office and they said they believe they have standing but believe this will make it crystal clear and will be a stronger directive. He said he thinks everything is constitutional until somebody decides it is not.

**Senator Schneider**: Said we are capable of understanding whether this is unconstitutional or not. We have attorneys that work for us. As part of our oath it is important for us to make that determination.

**Chairman Klein**: Asked if they wanted to move on this.

**Senator Nodland**: Moved a do pass on engrossed House Bill 1165.

**Senator Larsen**: Seconded the motion.

Roll Call Vote: Yes-5 No-0

**Senator Larsen** to carry the bill

Date: 3/22/11
Roll Call Vote # 1

**2011 SENATE STANDING COMMITTEE ROLL CALL VOTES**
**BILL/RESOLUTION NO.** Eng. HB 1165

Senate Industry, Business and Labor Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken: ☑ Do Pass ☐ Do Not Pass ☐ Amended ☐ Adopt Amendment

☐ Rerefer to Appropriations ☐ Reconsider

Motion Made By Senator Andrist Seconded By Senator Larsen

| Senators | Yes | No | Senators | Yes | No |
|---|---|---|---|---|---|
| Chairman Jerry Klein | ✓ | | Senator Mac Schneider | | ✓ |
| VC George L. Nodland | ✓ | | Senator Philip Murphy | | ✓ |
| Senator John Andrist | ✓ | | | | |
| Senator Lonnie J. Laffen | ✓ | | | | |
| Senator Oley Larsen | ✓ | | | | |
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Total (Yes) 5 No 2

Absent 0

Floor Assignment Senator Andrist

If the vote is on an amendment, briefly indicate intent:

**REPORT OF STANDING COMMITTEE**

**HB 1165, as engrossed: Industry, Business and Labor Committee (Sen. Klein, Chairman)** recommends **DO PASS** (5 YEAS, 2 NAYS, 0 ABSENT AND NOT VOTING). Engrossed HB 1165 was placed on the Fourteenth order on the calendar.

2011 TESTIMONY

HB 1165

PROPOSED AMENDMENTS TO HOUSE BILL 1165

Page 1, replace lines 16 through 23 with:

3. This section does not apply to:

a. An individual who voluntarily applies for coverage under a state-administered program pursuant to the medical assistance program under title XIX of the federal Social Security Act [42 U.S.C. 1396 et seq.] or the state's children's health insurance program under title XXI of the federal Social Security Act [42 U.S.C. 1397aa et seq.].

b. A student who is required by an institution of higher education to obtain and maintain health insurance as a condition of enrollment.

c. An individual who is required by a religious institution to obtain and maintain health insurance.

4. This section does not impair the rights of an individual to contract privately for health insurance coverage for family members or former family members.

Renumber accordingly

Prepared by the Legislative Council staff for
Representative Kasper
March 14, 2011

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1165

Page 1, line 2, after "coverage" insert "; to provide a penalty; and to declare an emergency"

Page 1, line 6, after "**required**" insert "**- Freedom to choose and provide medical services - Penalty**"

Page 1, line 10, after the underscored comma insert "a person may not require"

Page 1, line 10, remove "is not required"

Page 1, line 11, replace "except as may be" with "if that prohibited act is based on a federal law, rule, or regulation that has not received specific statutory approval by the North Dakota legislative assembly. This subsection does not apply to coverage that is"

Page 1, line 13, after "2." insert "Regardless of whether a resident of this state has or is eligible for health insurance coverage, a person may not take any action or inaction that would have the effect of:

a. Preventing, attempting to prevent, interfering with, or withholding medical treatment from that resident if the prohibited act is based on a federal law, rule, or regulation that has not received specific statutory approval by the North Dakota legislative assembly; or

b. Preventing, attempting to prevent, or interfering with that resident's choice or selection of medical treatment provider if the prohibited act is based on a federal law, rule, or regulation that has not received specific statutory approval by the North Dakota legislative assembly.

3."

Page 1, line 16, replace "3." with "4."

Page 2, line 3, replace "4." with "5."

Page 2, after line 4, insert:

"6. Violation of this section is a class B misdemeanor.

**SECTION 2. EMERGENCY.** This Act is declared to be an emergency measure."

Renumber accordingly

**For Release: August 2, 2010**
**Contact**: Brian J. Gottstein
**Email**: bgottstein@oag.state.va.us (best contact method)
**Phone**: 804-786-5874

# Federal judge rules against feds' Motion to Dismiss Virginia health care lawsuit; suit will move forward

**Richmond (August 2, 2010)** – A federal judge ruled today that Virginia does indeed have standing to bring its lawsuit seeking to invalidate the federal Patient Protection and Affordable Care Act. The judge also ruled that Virginia had stated a legally sufficient claim in its complaint. In doing so, federal district court judge Henry E. Hudson denied the federal government's motion to dismiss the commonwealth's suit.

"We are pleased that Judge Hudson agreed that Virginia has the standing to move forward with our suit and that our complaint alleged a valid claim," said Attorney General Ken Cuccinelli. Cuccinelli and his legal team had their first opportunity in court on July 1, arguing that Virginia's lawsuit was a valid challenge of the federal health care act and that the court should not dismiss the case as the federal government had requested.

The U.S. Department of Justice argued that Virginia lacked the standing to bring a suit, that the suit is premature, and that the federal government had the power under the U.S. Constitution to mandate that citizens must be covered by government-approved health insurance or pay a monetary penalty.

In denying the motion to dismiss, Judge Hudson found that Virginia had alleged a legally recognized injury to its sovereignty, given the government's assertion that the federal law invalidates a Virginia law, the Health Care Freedom Act. In addressing the issue of Virginia's statute, the Court recognized that the "mere existence of the lawfully-enacted [Virginia] statute is sufficient to trigger the duty of the Attorney General of Virginia to defend the law and the associated sovereign power to enact it." He also found that even though the federal insurance mandate doesn't take effect until 2014, the case is "ripe" because a conflict of the laws is certain to occur.

"This lawsuit is not about health care, it's about our freedom and about standing up and calling on the federal government to follow the ultimate law of the land – the Constitution," Cuccinelli said. "The government cannot draft an unwilling citizen into commerce just so it can regulate him under the Commerce Clause."

The Court recognized that the federal health care law and its associated penalty were literally unprecedented. Specifically, the Court wrote that "[n]o reported case from any federal appellate court has extended the Commerce Clause or Tax Clause to include the regulation of a person's decision not to purchase a product, notwithstanding its effect on interstate commerce."

A summary judgment hearing is scheduled for October 18, 2010, at 9:00 a.m. to decide if the federal health care law is unconstitutional.

The case is *Commonwealth of Virginia v. Kathleen Sebelius* in the U.S. District Court for the Eastern District of Virginia, in Richmond.

**Link to ruling:**

http://www.vaag.com/PRESS_RELEASES/index.html

**Link to the attorney general's previous health care lawsuit news releases and briefs:**

http://www.vaag.com/PRESS_RELEASES/index.html

# The Volokh Conspiracy





## Thoughts on the Federal District Court Ruling Refusing to Dismiss the Virginia Health Care Lawsuit

Ilya Somin • August 2, 2010 1:09 pm

Federal District Judge Henry Hudson's opinion refusing to dismiss Virginia's lawsuit challenging the constitutionality of the Obama health care plan has several interesting aspects. The suit focuses primarily on a challenge to the "individual mandate" element of the plan, which requires most American citizens and legal residents to purchase a government-approved health insurance plan by 2014 or pay a fine for nocompliance. Here are a few of the most important points covered in the opinion.

First, Hudson rejected the federal government's claim that Virginia did not have standing to challenge the mandate. Although states are generally not allowed standing to litigate the interests of their citizens, Hudson argues that Virginia has standing because the federal health care bill conflicts with a recently enacted Virginia state law, the Health Care Freedom Act. This, he argues, is enough to give Virginia standing, overcoming the sorts of federal government standing arguments that I discussed in this post. This argument may have negative implications for the other major lawsuit against Obamacare, filed by 20 states and the National Federation of Independent Business. Most of those states do not have state laws comparable to the Health Care Freedom Act. NFIB, however, has individual members who are subject to it, such as self-employed businessmen. In addition, the other states could try to establish standing by relying on the broad theories of state standing endorsed by the Supreme Court in *Massachusetts v. EPA*. Hudson also rejects the federal government's argument that the lawsuit isn't "ripe" for adjudication because the individual mandate will not come into effect until 2014. He

points out that the new federal law will force both individuals and the state government to make adjustments to their health insurance plans even before that.

Second, Hudson agrees with co-blogger Randy Barnett that the individual mandate isn't clearly covered by existing Supreme Court precedent under either the Commerce Clause or federal government's power to tax. He argues that this provision "literally forges new ground and extends Commerce Clause powers beyond its current high watermark." He takes the same view of the government's Tax Clause argument:

> While this case raises a host of complex constitutional issues, all seem to distill to the single question of whether or not Congress has the power to regulate — and tax — an individual's decision not to participate in interstate commerce. Neither the US Supreme Court nor and federal circuit court of appeals has squarely addressed this issue. No reported case from any federal appellate court has extended the Commerce Clause or Tax Clause to include the regulation of a person's decision not to purchase a product...

I previously criticized the Commerce Clause and Tax Clause rationales for the individual mandate here.

Judge Hudson's decision does not decide the case in Virginia's favor. It merely denies the federal government's motion to dismiss the suit on the grounds that the state's arguments are too weak to justify a full-scale consideration of the merits. It is also possible that Hudson will ultimately decide the case in the federal government's favor. Moreover, any decision made by the district court will surely be appealed to the Fourth Circuit Court of Appeals and ultimately the Supreme Court.

Nonetheless, Hudson's ruling is a victory for Virginia and others who contend that the individual mandate is unconstitutional. It also makes it more difficult to argue that the state lawsuits against the mandate are merely political grandstanding with no basis in serious legal argument.

Categories: Federalism, Health Care

## 397 Comments

1. ***Mark Field* says:**

   Henry Hudson? Really?

   Quote

   August 2, 2010, 1:30 pm

2. ***Hans* says:**

   Well put.

   But I have one minor quibble. How could the Fourth Circuit overturn it? Denials of motions to dismiss aren't appealable.

   (You wrote, "Even this ruling could potentially be overruled by the Fourth Circuit Court of Appeals (though I consider that unlikely").

   As I've noted earlier, I think the individual mandate is unconstitutional.

# Federal Judge In Virginia Rules Parts Of Obamacare Are Unconstitutional

Rob Port • **December 13, 2010**
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That per breaking news from CNN. No links yet. I'll update with more information as it becomes available.

This is the first ruling against the health care law, coming from Judge Henry Hudson, appointed by George W. Bush in 2002.

**Update:** The full text of the ruling is below. A key excerpt pertaining to the insurance mandate:

> Article I Section 8 of the Constitution confers upon Congress only discreet enumerated governmental powers. The powers not delegated to the United States by the Constitution, no prohibited by it to the States, are reserved to the states respectively, or to the people.
>
> On careful review, this Court must conclude that Section 1501 of the Patient Protection and Affordable Care Act – specifically the Minimum Essential Coverage provision – exceeds the constitutional boundaries of congressional power.

In other words, it is illegal for Congress to order you to buy health insurance. Note, though, that the ruling does not invalidate the entire Obamacare law. Rather, it only invalidates the portions it finds unconstitutional leaving the rest in place.

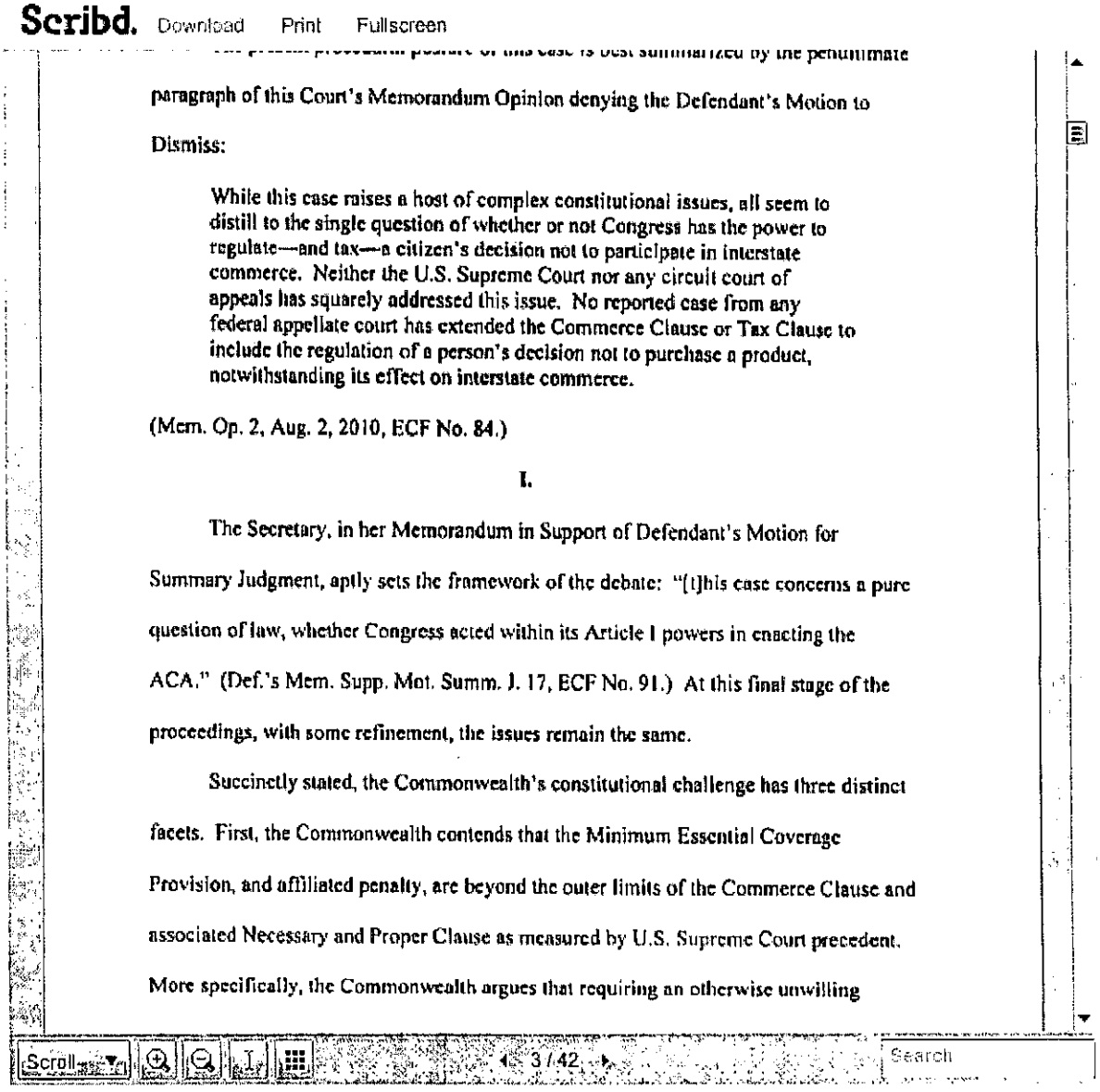
**Update:** "Without the individual mandate, the entire structure of reform would fail," said Obama healthcare guru Jonathan Gruber. Given that, the entire bill should be undone by

Congress given that the mandate is unconstitutional…though I expect the Obama administration will appeal this all the way to the Supreme Court.

**Update:** Per the ruling below, the Court will allow the "problematic portions" to be severed away from the law "while leaving the remainder intact." This means that Obamacare is not being overturned, just parts of it most notably the insurance mandate.

**Update:** Remember that two other federal judges have upheld the Obamacare law as constitutional. This will undoubtedly have to be settled by the Supreme Court.

Commonwealth of Virginia v. Sibelius et al




Tags: obamacare

**(5) Injunction**

The last issue to be resolved is the plaintiffs' request for injunctive relief enjoining implementation of the Act, which can be disposed of very quickly.

Injunctive relief is an "extraordinary" [Weinberger v. Romero-Barcelo, 456 U.S. 305, 312, 102 S. Ct. 1798, 72 L. Ed. 2d 91 (1982)], and "drastic" remedy [Aaron v. S.E.C., 446 U.S. 680, 703, 100 S. Ct. 1945, 64 L. Ed. 2d 611 (1980) (Burger, J., concurring)]. It is even more so when the party to be enjoined is the federal government, for there is a long-standing presumption "that officials of the Executive Branch will adhere to the law as declared by the court. As a result, the declaratory judgment is the functional equivalent of an injunction." See Comm. on Judiciary of U.S. House of Representatives v. Miers, 542 F.3d 909, 911 (D.C. Cir. 2008); accord Sanchez-Espinoza v. Reagan, 770 F.2d 202, 208 n.8 (D.C. Cir. 1985) ("declaratory judgment is, in a context such as this where federal officers are defendants, the practical equivalent of specific relief such as an injunction . . . since it must be presumed that federal officers will adhere to the law as declared by the court") (Scalia, J.) (emphasis added).

There is no reason to conclude that this presumption should not apply here. Thus, the award of declaratory relief is adequate and separate injunctive relief is not necessary.

## CONCLUSION

The existing problems in our national health care system are recognized by everyone in this case. There is widespread sentiment for positive improvements that will reduce costs, improve the quality of care, and expand availability in a way that the nation can afford. This is obviously a very difficult task. Regardless of how laudable its attempts may have been to accomplish these goals in passing the Act, Congress must operate within the bounds established by the Constitution. Again, this case is not about whether the Act is wise or unwise legislation. It is about the

Constitutional role of the federal government.

For the reasons stated, I must reluctantly conclude that Congress exceeded the bounds of its authority in passing the Act with the individual mandate. That is not to say, of course, that Congress is without power to address the problems and inequities in our health care system. The health care market is more than one sixth of the national economy, and without doubt Congress has the power to reform and regulate this market. That has not been disputed in this case. The principal dispute has been about how Congress chose to exercise that power here.[30]

Because the individual mandate is unconstitutional and not severable, the entire Act must be declared void. This has been a difficult decision to reach, and I am aware that it will have indeterminable implications. At a time when there is virtually unanimous agreement that health care reform is needed in this country, it is hard to invalidate and strike down a statute titled "The Patient Protection and Affordable Care Act." As Judge Luttig wrote for an en banc Fourth Circuit in

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[30] On this point, it should be emphasized that while the individual mandate was clearly "necessary and essential" to the Act as drafted, it is not "necessary and essential" to health care reform in general. It is undisputed that there are various other (Constitutional) ways to accomplish what Congress wanted to do. Indeed, I note that in 2008, then-Senator Obama supported a health care reform proposal that did not include an individual mandate because he was at that time strongly opposed to the idea, stating that "if a mandate was the solution, we can try that to solve homelessness by mandating everybody to buy a house." See Interview on CNN's American Morning, Feb. 5, 2008, transcript available at: http://transcripts.cnn.com/TRANSCRIPTS/0802/05/ltm.02.html. In fact, he pointed to the similar individual mandate in Massachusetts --- which was imposed under the state's police power, a power the federal government does not have --- and opined that the mandate there left some residents "worse off" than they had been before. See Christopher Lee, Simple Question Defines Complex Health Debate, Washington Post, Feb. 24, 2008, at A10 (quoting Senator Obama as saying: "In some cases, there are people [in Massachusetts] who are paying fines and still can't afford [health insurance], so now they're worse off than they were . . . They don't have health insurance, and they're paying a fine . . .").

striking down the "Violence Against Women Act" (before the case was appealed and the Supreme Court did the same):

> No less for judges than for politicians is the temptation to affirm any statute so decorously titled. We live in a time when the lines between law and politics have been purposefully blurred to serve the ends of the latter. And, when we, as courts, have not participated in this most perniciously machiavellian of enterprises ourselves, we have acquiesced in it by others, allowing opinions of law to be dismissed as but pronouncements of personal agreement or disagreement. The judicial decision making contemplated by the Constitution, however, unlike at least the politics of the moment, emphatically is not a function of labels. If it were, the Supreme Court assuredly would not have struck down the "Gun-Free School Zones Act," the "Religious Freedom Restoration Act," the "Civil Rights Act of 1871," or the "Civil Rights Act of 1875." And if it ever becomes such, we will have ceased to be a society of law, and all the codification of freedom in the world will be to little avail.

Brzonkala, supra, 169 F.3d at 889.

In closing, I will simply observe, once again, that my conclusion in this case is based on an application of the Commerce Clause law as it exists pursuant to the Supreme Court's current interpretation and definition. Only the Supreme Court (or a Constitutional amendment) can expand that.

For all the reasons stated above and pursuant to Rule 56 of the Federal Rules of Civil Procedure, the plaintiffs' motion for summary judgment (doc. 80) is hereby GRANTED as to its request for declaratory relief on Count I of the Second Amended Complaint, and DENIED as to its request for injunctive relief; and the defendants' motion for summary judgment (doc. 82) is hereby GRANTED on Count IV of the Second Amended Complaint. The respective cross-motions are each DENIED.

In accordance with Rule 57 of the Federal Rules of Civil Procedure and Title

28, United States Code, Section 2201(a), a Declaratory Judgment shall be entered separately, declaring "The Patient Protection and Affordable Care Act" unconstitutional.

DONE and ORDERED this 31st day of January, 2011.

/s/ *Roger Vinson*
ROGER VINSON
Senior United States District Judge

## Kasper, Jim M.

**From:** Jim Kasper [jmkasper@amg-nd.com]
**Sent:** Thursday, January 13, 2011 11:51 PM
**To:** Kasper, Jim M.
**Subject:** FW: ALEC: Health Care Freedom Act Wins Big in OK, AZ

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**From:** Kasper, Jim M. [mailto:jkasper@nd.gov]
**Sent:** Wednesday, November 10, 2010 6:20 PM
**To:** jmkasper@amg-nd.com
**Subject:** FW: ALEC: Health Care Freedom Act Wins Big in OK, AZ

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**From:** Monica Mastracco [mmastracco@alec.org]
**Sent:** Wednesday, November 03, 2010 12:34 PM
**Subject:** ALEC: Health Care Freedom Act Wins Big in OK, AZ

Dear Sponsors and Friends of ALEC's *Freedom of Choice in Health Care Act*:

**Among the many historic election results from last night, it's important to note that two of three *Freedom of Choice in Health Care Act* ballot measures were resoundingly approved by the voters.**

Congratulations go to the great ALEC legislators in Oklahoma who brought ALEC's *Freedom of Choice in Health Care Act* (State Question 756) to a decisive 65-35 victory last night.

Congratulations are also in order for ALEC Senator-Elect Nancy Barto, Eric Novack, the Goldwater Institute, and other ALEC friends for bringing Proposition 106 to an amazing 55-45 win.

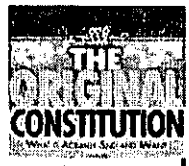
And of course, big thanks go to Colorado's Independence Institute for their hard-fought efforts with Amendment 63. Currently, with 88% of precincts reporting, the vote for Amendment 63 is 53% No; 47% Yes. This outcome is even more impressive considering Colorado's current political landscape, and the fact that the "Yes on 63" campaign was vastly outspent by labor unions and other left-leaning groups.

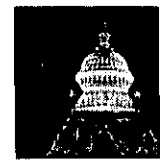
It's been a great year for health care freedom. 42 states have either introduced or announced ALEC's *Freedom of Choice in Health Care Act*. Six states (Virginia, Idaho, Arizona, Georgia, Louisiana, Missouri) passed the ALEC model as a statute, and two states (Arizona and Oklahoma) passed the model as a constitutional amendment. An active citizen initiative is also underway in Mississippi.

**Because the federal individual mandate doesn't take effect until 2014, I urge you to continue the fight by filing ALEC's *Freedom of Choice in Health Care Act* in the 2011 session.**

ALEC's *Freedom of Choice in Health Care Act* will continue to be an essential state legislative tool in fighting the federal requirement to purchase health insurance as prescribed in the *Patient Protection and Affordable Care Act*. If enacted as a statute, ALEC's *Freedom of Choice in Health Care Act* can provide standing to a state in current litigation against the federal individual mandate; will allow a state to launch additional, 10th Amendment-based litigation if the current lawsuits fail; and can empower an attorney general to litigate on behalf of individuals harmed by the mandate when it takes effect in 2014.

Most importantly, if passed as a constitutional amendment, ALEC's *Freedom of Choice in Health Care Act* will ensure—even if the federal individual mandate is found to be unconstitutional—that Massachusetts-style, state-level requirements to purchase health insurance are prohibited.






# Tennessee Passes Health Care Freedom Act

SHARE Written by: Lesley Swann

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On Monday, the Tennessee Health Care Freedom Act cleared its last hurdle in the Tennessee General Assembly. The House voted 70 to 27 to pass the legislation, following on the heels of the Senate passage of SB0079 on February 23. This bill provides vital protections to Tennesseans who choose not to comply with the Patient Protection and Affordable Care Act passed by Congress last year. The Tennessee Health Care Freedom Act states:

> *It is declared that the public policy of this state, consistent with our constitutionally recognized and inalienable right of liberty, is that every person within this state is and shall be free to choose or to decline to choose any mode of securing health care services without penalty or threat of penalty.*
>
> *It is declared that the public policy of this state, consistent with our constitutionally recognized and inalienable right of liberty, is that every person within this state has the right to purchase health insurance or to refuse to purchase health insurance. The government may not interfere with a citizen's right to purchase health insurance or with a citizen's right to refuse to purchase health insurance. The government may not enact a law that would restrict these rights or that would impose a form of punishment for exercising either of these rights. Any law to the contrary shall be void ab initio.*

The bill will be heading to Governor Bill Haslam's desk shortly.

It is crucial that we contact the governor's office to express our support for this bill. We are about to cross the finish line for the Tennessee Health Care Freedom Act, but we still need one last push to bring this victory to fruition here in Tennessee.

Gov. Bill Haslam
Phone: (615) 741-2001
E-Mail: bill.haslam@tn.gov

*********

**CLICK HERE** to view the Tenth Amendment Center's Health Care Freedom Act legislative tracking page

The Tenth Amendment Center has released the **Federal Health Care Nullification Act**, which directly nullifies the "Patient Protection and Affordable Care Act" on a state level. **Click here** to learn more about the bill. **CLICK HERE** to track the Nullification Act in states around the country.

*Lesley Swann is the state coordinator for the **Tennessee Tenth Amendment Center** and founder of the East Tennessee 10th Amendment Group. She is a native of Anderson County, Tennessee.*

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THE TENTHER GRAPEVINE: THE

THE HILL

# Maine gets first state waiver from healthcare law provision

By Julian Pecquet - 03/08/11 04:26 PM ET

Maine health insurers are getting a temporary waiver from the health reform law's requirement that they spend at least 80 percent of premiums on care, federal regulators decided Tuesday.

Maine is the first state to get a waiver. Three other states — New Hampshire, Nevada and Kentucky — have pending waiver applications.

The law requires plans in the individual market to meet an 80 percent medical loss ratio threshold or offer rebates to enrollees for the difference. The Maine Bureau of Insurance in December asked to retain its existing 65 percent ratio, arguing that a higher ratio would disrupt its market.

The Department of Health and Human Services agreed with those arguments in a **letter** sent Tuesday to Superintendent of Insurance Mila Kofman, a supporter of the law. The waiver is good for three years, but the last year is conditional on getting 2012 data that shows a continued need for the waiver.

The decision is "rooted in the particular circumstances of the Maine insurance market," the letter reads.

Specifically, HHS points out that three insurers make up the bulk of Maine's individual insurance market: Anthem Blue Cross Blue Shield of Maine (49 percent), MEGA Life and Health Insurance Company (37 percent) and HPHC Insurance Company (13 percent). MEGA had told Maine during preliminary discussions that it "would probably need to withdraw from this market if the minimum loss ratio requirement were increased."


# Reclaiming the Constitution: Towards An Agenda for State Action

November 2010

by Ted Cruz &
Mario Loyola

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November 2010

by Ted Cruz & Mario Loyola

Center for Tenth Amendment Studies
Texas Public Policy Foundation

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# Reclaiming the Constitution: Towards An Agenda for State Action

by Ted Cruz & Mario Loyola

## Executive Summary

The steady expansion of the federal government since the early 20th century has arrived at a crisis point. The federal government is pushing further and further into areas of traditional state governance—and intruding deeper into our lives. This threat to liberty—one that James Madison thought the several States would be strong enough to resist—is now apparent to millions of Americans.

This first publication of the Texas Public Policy Foundation's Center for Tenth Amendment Studies shows that waves of assault on the constitutional constraints meant to limit federal power, combined with the relentless expansion of the federal bureaucracy, has led to a steady erosion of the constitutional constraints on federal power—raising the very dangers to self-government and individual liberty that the Framers feared might lead to tyranny. Though the Federalists—advocates of a strong national government—expected that the States would retain more than enough power and scope to enforce the constitutional limitations on the federal government, the dawn of the industrial age, and America's rise to Great Power status abroad by the start of the 20th century opened the door to an era of steadily expanding federal power.

In recent years, the federal government has been particularly aggressive in its intrusions into Tenth Amendment rights, pushing the scope of federal regulation to the limits of what courts are likely to uphold in areas such as health care, environmental regulation, and control of the purse strings.

In coming months, the Center for Tenth Amendment Studies will work with partners across the country to develop an Agenda for State Action. The Agenda for State Action will explore tools that States can use to stop federal overreach and restore the Constitution's limits on government power.

- Interstate Compact for Health care Reform
- Constitutional Amendment to Balance the Budget and Limit the Taxing Power
- Opting out of Federal Programs and Federal Funds
- State Lawsuits against the Federal Government
- Federal Legislation

## Introduction: Why the Tenth Amendment Matters

For more than a hundred years, the federal government has been expanding its power and reach. The steady concentration of power in Washington has been accompanied by a steady intrusion into areas of state authority that the Framers assumed the federal government would never be involved in. In the Framers' conception of democracy, state-based self-government and individual liberty went hand in hand. It was for this reason that they insisted on a federal government of strictly limited powers. They enshrined this ideal in the Tenth Amendment of the Constitution: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Today the expansion of the federal government proceeds at an unprecedented pace. The current administration has launched what many Americans see as an inevitable federal takeover of health care. It has undertaken environmental regulatory actions of historic sweep, seeking to regulate manifold areas of traditional state jurisdiction, and smothering less-favored industries in regulatory uncertainty. It has unleashed the greatest explosion in federal spending and borrowing in our history.

These policies not only endanger our economic future—they also erode the constitutional constraints that were meant to shield local self-government and individual liberty from the dangerous accumulation of power in Washington. That is why the balance between state and federal powers matters. That is why the Tenth Amendment matters.

The Tenth Amendment is more than a legal construct. It is an expression of the American tradition of self-governance. The propensity to self-organize spontaneously at the local level to solve problems that had been observed by Alexis de Toqueville—and felt so painfully by the British Army—was essential to American democracy. The Constitution had been designed to protect it, not supplant it. And while a respect and deference to state authority both predated and was implied in the Constitution itself, in the end the Tenth Amendment was deemed necessary to assure that self-governance would never give way to tyranny. In this sense, the Tenth Amendment, coming at the end of the Bill of Rights, was something of a summation of the Framers' whole notion of American democracy—and a salutary warning that those powers granted to the federal government needed to be kept strictly limited within the Constitution's constraints, or else the States and individuals who formed the Union, and the Union itself, would be imperiled. That is also why the Tenth Amendment matters.

This paper will (I) survey the Constitution's vanishing constraints on federal power, (II) examine the main areas of the federal assault, and (III) suggest possible ways of stopping and rolling back the federal government's overreach, and reclaiming our Constitution of limited government by a free people.

## Part I: The Constitution's Vanishing Constraints

Our Constitution has withstood the test of time. But the Framer's original design, in which States would protect and nurture the American tradition of self-governance, and federal power would be used only for limited ends, has been undermined. Waves of assault on the constitutional constraints meant to limit federal power, combined with the steady expansion of the federal bureaucracy, have led to a progressive consolidation of power at the federal level. A brief survey of key issues in current constitutional law reveals that the original framework of federalism has grown fragile, and in some ways has substantially collapsed.

## The Framers' Vision: Active State Sovereignty and Limited Federal Government

After the Constitutional Convention in Philadelphia in 1787, the Framers returned to their homes to engage in debates centered on the state ratification conventions that would now decide the fate of the proposed Constitution. Three prominent Federalists—John Jay, Alexander Hamilton, and the proposed Constitution's principal author, James Madison—published a series of essays in defense of the proposed Union, which came to be known as the Federalist Papers. Motivated by a deep concern for internal order and public safety, the Federalists argued that the proposed Constitution would pose no danger to individual liberty or to self-government in the States.

As James Madison wrote in Federalist No. 45, "the States will retain, under the proposed Constitution, a very extensive portion of active sovereignty," chiefly through the specific enumeration of limited powers for the federal government:

> The powers delegated by the proposed Constitution to the federal government, are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

For this reason, and a host of others that Federalist No. 45 was meant to catalogue, "[t]he State government will have the advantage [over] the Federal government." Hence the Federalists—advocates of a strong national government—expected that the States would retain more than enough power and scope to enforce the constitutional limitations on the federal government.

This conception lasted well into the 19th century. In 1824, the Supreme Court held in the famous case of *Gibbons v. Ogden* that navigation and commerce across state lines fall within the federal government's power to regulate commerce "among the several States, with foreign nations, and with the Indian tribes." *Gibbons* stands for the principle that "the sovereignty of Congress, though limited to specific objects, is plenary as to those objects." But Chief Justice John Marshall shared James Madison's vision of the federal system: their view of a federal government of plenary authority within its enumerated powers was predicated entirely on their foundational assumption that those powers would be few and limited, and that States would remain the major agents of regulation and self-government. "It is not intended to say," wrote Marshall for the Court, "that [the Commerce Clause] comprehended that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does extend to or affect other States. Such a power would be inconvenient and is certainly unnecessary."

Focusing on the word "among," the Court explained, "[t]he phrase is not one which would probably have been selected to indicate the completely interior traffic of a State." In other words, if Congress was supposed to be able to regulate all commerce, there was no reason for the Constitution's drafters to qualify the word "commerce" with the phrase "among the several States." The Court continued:

> The genius and character of the whole government seem to be that its action is to be applied to all the external concerns of the Nation and to those internal concerns which affect the States generally; but not to those which are completely within a particular state, which do not affect other States, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the government. The completely internal commerce of a state, then, may be considered as reserved for the state itself.

In *Gibbons* the Supreme Court observed that "inspection laws, quarantine laws, health laws of every description, as well as law for regulating the internal commerce of a State" were but a few examples "of that immense mass of legislation" not surrendered to the federal government. "No direct power over these objects is granted to Congress," Marshall observed, "and, consequently, they remain subject to State legislation." It was only because they were so sure of the stringent limitations on the *scope* of federal power, and the preeminence of States with respect to most areas of legislation, that Marshall, and the Federalists generally, felt so confident asserting the *supremacy* of federal law within its domain.

## The Modern Expansion of the Federal Government

In Virginia's ratification debates, Patrick Henry, a leader of the anti-Federalist movement, railed against the proposed Constitution: "To all common purposes of Legislation it is a great consolidation of Government."[1] The Federalists agreed that a general consolidation of power would be dangerous and potentially tyrannical. But they saw little risk that would happen, given the power of the States and the many "advantages" Madison thought they would have over the federal government.

For most of the early history of the Republic, the Federalists proved right—the States were able to frustrate the concentration of power in federal hands. During the rest of the 19th century, the commerce power was relied on not to justify the exercise of federal power, but rather to strike down state laws that *discriminated* against interstate commerce. The idea was that States were "preempted" from regulating within areas of exclusive federal regulatory power, such as interstate commerce.

But the cataclysm of the Civil War, the dawn of the industrial age, and America's rise to Great Power status abroad by the start of the 20th century, greatly increased the scope and power of the federal government. The reconstruction amendments (amendments 13, 14, and 15, ratified between 1865 and 1870); along with Progressive Movement amendments to permit a federal income tax and direct election of U.S. senators (amendments 16 and 17, respectively, both ratified in 1913) all set the stage for a dramatic expansion of federal power in the 20th century.

At the dawning of the 20th century, the Supreme Court was still a major obstacle to federal overreach. But then came the ambitious legislative initiatives of the Progressive Era and the New Deal, which President Roosevelt bolstered at the start of his second term in 1937 with a threat to increase the size of the court by adding pro-New Deal justices. Intimidated, the Supreme Court acquiesced in the New Deal legislation, and began to steadily demolish almost all meaningful limits on the federal government's power to regulate commerce. The doctrine that anything with a "direct effect" on interstate commerce could be regulated under the federal commerce power was replaced by a rule allowing regulation of anything with a "substantial effect" on commerce (even if indirect). Then came the doctrine that anything which, if "aggregated" across the Nation, had a "substantial effect" on interstate commerce, was properly within the federal commerce power.

Almost any human activity can be said to have a substantial effect on interstate commerce, if you aggregate every instance of it across the country into a whole class of activity. The post-New Deal Supreme Court cases all but erased the limits on the Commerce Clause. Now there was virtually nothing the federal government couldn't regulate. The fear of the Anti-Federalists now appeared justified: If the power to regulate virtually all human activity had been granted to the federal government in the simple phrase "commerce among the several States," what was left for the States or for the people? And the federal government has been expanding relentlessly ever since, growing from a 19th century average of 4 percent of GDP to a peacetime peak of 27 percent in 2010.

## Constitutional Constraints Today

The battle against unconstrained federal supremacy continues in federal courts, and recent years have given at least some ground to hope for a more originalist approach to the Constitution and a government of limited powers. The following survey of these "constitutional law" issues is useful to lay the groundwork for the rest of this paper.

### *Commerce Clause*

Perhaps the most important power granted to Congress (though the Framers did not intend this to be the case) has turned out to be the power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes." As has been widely noted, the principal motivation for granting this power to the federal government was the concern that individual States might erect tariff barriers, and thereby discriminate against interstate commerce. During the 19th century, the Commerce Clause was invoked chiefly to overturn state laws that discriminated against interstate commerce. But as late as the early 20th century, the Supreme Court was unwilling to allow this power to reach commercial activity that was purely intrastate.

But starting in 1914, the Supreme Court began to embrace an ever-widening interpretation of the Commerce Clause. In the Shreveport Rate cases, the Court articulated a novel basis for intruding on purely intrastate commerce: Where interstate and intrastate commerce were so mingled that regulation of interstate commerce required incidental regulation of intrastate commerce, the activity fell within the commerce power, because of their "close and substantial relation." As it happened, the victim of this first expansion of federal commerce power was Texas: the Court had ruled that the federal government could regulate the fees charged by a railway between Dallas and Marshall, Texas. The law protected those purely intrastate carriers who faced penalties for disobeying the regulations of the Texas Railroad Commission in order to comply with federal mandates.

In the 1935 case of *Schechter Poultry v. U.S.*, the Court once again asserted its role as a powerful guardian of constitutional constraints, striking down federal regulation of labor conditions in a purely intrastate business because the activity in question bore only an "indirect" relation to interstate commerce. The Court reasoned that otherwise "there would be virtually no limit to the federal power and for all practical purposes we should have a completely centralized government."

The Court was no doubt correct about the looming danger of unlimited federal power and "a completely centralized government," but the political winds were blowing against it. FDR won a landslide reelection in 1936, and in an address to Congress in early 1937 threatened to pack the Supreme Court with additional justices, implicitly warning that if the Court did not acquiesce in his New Deal legislation, he and the Congress would break its power. The Supreme Court reacted that very year, in the case of *NLRB v. Jones & Laughlin Steel Corp.*, by casting aside the categories of direct and indirect effects, and holding instead that Congress could regulate activities that "have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions" in state law.

With that, the Court opened the door to all but eliminating the Constitution's constraints on federal power exercised under the Commerce Clause. The stage was now set for the 1942 decision of *Wickard v. Filburn*, in which the Supreme Court held that a farmer's private cultivation of wheat for purely personal use on his own farm could nevertheless be regulated pursuant to the Commerce Clause, because any activity which, in the aggregate across the Nation, could have a substantial effect on interstate commerce, was properly within the power to regulate commerce "among the several States." If this purely personal activity affected interstate commerce, then every activity falls within the power of the federal government. *Wickard* expanded the Commerce Clause to

its outermost limits—so much so, indeed, that it arguably made the other enumerated powers of the Article I, Section 8 superfluous. If the Framers had intended to grant the federal government a power to regulate commerce as expansive as that defined in *Wickard*, there was no need to enumerate so many other powers in addition to the Commerce Clause. Why specifically authorize Congress to create a Post Office (Art. I, Section 8, cl. 7), or regulate bankruptcies (Art. I, Section 8, cl. 4), or protect patents and copyrights (Art. I, Section 8, cl. 8) if anything that in the national aggregate might have an effect on commerce—as all of those surely do—could be regulated already under the Commerce Clause?

It was not until nearly 60 years later that the Supreme Court once again struck down a law of Congress as an impermissible exercise of the commerce power. In *U.S. v. Lopez* (1995) the Court took up the Gun-Free School Zones Act, which made it a federal offense to carry a firearm in a school zone. The majority opinion, by Chief Justice William Rehnquist, rests on previous Commerce Clause cases to demonstrate that there were indeed some limits to what the federal government could regulate pursuant to the commerce power. The impact of the opinion was limited, however, by the majority's desire to stay within existing precedents, which after *Wickard* left very little room for defining meaningful limits to the commerce power. Some commentators have noted that the opinion stands for the simple proposition that there must be *something* Congress cannot regulate under the commerce power, and that the possession of handguns in a school zone must be in that category.

The concurring opinion by Justice Clarence Thomas has received considerable attention because it urges returning to the original understanding of the Framers, and of the *Gibbons* Court in 1824. Justice Thomas relied on contemporary texts such as the Federalist Papers to show that "agriculture, commerce, manufactures," etc., were considered to be separate endeavors. He pointed out that "if Congress had been given authority over matters that *substantially affect* interstate commerce" (as the controlling precedents have ruled) then most of the other enumerated powers in the Constitution were superfluous, because almost everything "substantially affects" interstate commerce, especially in the aggregate. "An interpretation of [the Commerce Clause] that makes the rest of [the Constitution's enumerated federal powers] superfluous simply cannot be correct." Under *Wickard*, wrote Justice Thomas, "Congress can regulate whole categories of activities that are not themselves either 'interstate' or 'commerce' .... The aggregation principle is clever, but it has no stopping point."

Some commentators have gone even further. Michael Greve, of the American Enterprise Institute, writes, "there is no way to squeeze *Wickard* or any Commerce Clause case after it into the intellectual framework of enumerated powers. If Congress may aggregate trivial activities into 'substantial effects,' it may regulate virtually anything; if it may not do so, it is prohibited from regulating most of the things it now regulates."

In *U.S. v. Morrison* (2000) the Supreme Court again struck down a federal law, this time a provision of the Violence Against Women Act. Chief Justice Rehnquist, writing for the same majority that had decided *Lopez*, wrote "[gender]-motivated crimes of violence are not [economic] activity. While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." He went on to say that the "concern we expressed in *Lopez* that Congress might use the Commerce Clause to completely obliterate the Constitution's distinction between national and local authority seems well-founded." He concluded, "the Constitution requires a distinction between what is truly national and what is truly local. In recognizing this fact we preserve one of the few principles that have been consistent since the Clause was adopted."

Five years later, however, in *Gonzalez v. Raich* (2005), the Supreme Court seemed to retreat from its reinvigoration of the Commerce Clause, and it has not revisited the issue since then.

As the crisis of 1937 shows it is difficult for the Supreme Court to uphold constitutional constraints against federal power when the President, Congress, and popular opinion are all against it. The Supreme Court is not supposed to be a political branch, but its perceived legitimacy is vital to the rule of law, and that legitimacy depends on political consensus. In other words, in our democratic republic, even the Supreme Court ultimately derives its power from the people. The other side of the coin is that the better Americans understand the vital importance of a federalist framework in the Constitution, the more strongly they yearn for a return to the Constitution's founding principles, and the easier it will be for the Supreme Court to reassert its role as guardian of enumerated powers constraints.

Disentangling nearly 100 years of Commerce Clause precedent is a tall order, but *Gibbons v. Ogden* might offer a way forward. Chief Justice Marshall's opinion in *Gibbons* has been often quoted for the proposition that the federal government's power is supreme and complete within its enumerated powers. This observation was entirely predicated on Marshall's basic understanding of federalism, in particular the stringent constraints on federal power, which restricted its scope to just a few areas of regulation, and left the "great mass" of legislation to the States. A more complete reading of *Gibbons* could help guide the Supreme Court back to the original understanding of the commerce power. Defining the Commerce Clause should not be just a matter of defining the scope of "interstate commerce" from the point of view of federal power; equally important is the other side, the great mass of regulation that is not interstate commerce and was meant to be left to the States. The Supreme Court has had trouble devising a precise definition of what interstate commerce is partly because it stopped focusing on what it *isn't*—namely those things that were meant to be left to the States.

As Michael Greve argues, the Court must reclaim its role as guardian of constitutional constraints on federal power. It can take its cue from the people, and their desire to return to a more decentralized and responsive system. This desire underpins the promise of a constitutional renaissance now sweeping the Nation.

### *Federal Funds for States and the Spending Clause*

In the years following the Great Depression, agricultural production boomed worldwide, leading to a crash in agricultural commodities prices. Congress passed the Agricultural Adjustment Act of 1933—another unfortunate pillar of New Deal legislation—to "stabilize" agricultural production through price controls. The Act imposed a tax on the production of certain agricultural commodities, the proceeds of which were to subsidize farmers who agreed to restrict their production. In the 1936 cases of *U.S. v. Butler*, the Supreme Court struck down the law, noting, "At best it is a scheme for purchasing with federal funds submission to federal regulation of a subject reserved to the States."

But, signaled the Court, "the power of Congress to authorize expenditure of public moneys for public purposes is not limited the direct grants of legislative power found in the Constitution." Thus was laid to a rest a dispute that had existed since Alexander Hamilton and James Madison clashed over the issue during ratification. The first clause of Article I, Section 8 of the Constitution provides that "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts, and Excises shall be uniform throughout the United States." Madison thought that this taxing power could only be used for a purpose that fell within one of the other enumerated powers of the federal government, but Hamilton disagreed. Hamilton thought that the taxing clause was an independent grant of power, and that it could be used for any public purpose. In *Butler*, the Supreme Court adopted Hamilton's view.

Perhaps the purest Tenth Amendment cases in constitutional law have to do with congressional enactments that "commandeer" instrumentalities of state government.

The power to appropriate for the "general Welfare" was thus given the widest possible interpretation, another example of the New Deal Supreme Court's deference to the expansion of federal power.

The practice of providing federal funds to the States with conditions and mandates attached has been challenged because of the potential for subverting state government and policies to federal ends—an obvious danger to state and local authority. Two years after *Butler*, the Supreme Court ruled in *Steward Machine Co. v. Davis* that the Social Security Act could impose a tax on certain employers and provide a 90 percent credit if they contributed to their state's unemployment fund. The Court reasoned that while economic coercion was impermissible, "encouraging" state compliance with federal policy goals did not run afoul of the Constitution.

In *South Dakota v. Dole* (1987) the state of South Dakota challenged a federal law that empowered the Secretary of Transportation to withhold five percent of federal highway funds allocated to a state that refused to raise its drinking age to 21. South Dakota argued that the statute violated both 21st Amendment (repeal of prohibition) and the Spending clause.

Chief Justice Rehnquist's majority opinion upheld the statute, but did set out several markers for proper uses of the spending power. The funds must be appropriated for the "general Welfare;" conditions must be unambiguously stated in the law; conditions must be related to the federal interest sought to be advanced in the appropriation; the purpose must not be barred by the Constitution; and the condition must not rise to the level of economic coercion such that refusing to comply with the congressional mandate would result in a prohibitive fiscal penalty. This last marker appears to offer the most promise of an effective protection of state authority and citizen sovereignty, and suggests that if the funds to be withheld had been significantly higher than five percent of the state's allocation of federal highway funds, the condition may have been impermissible.

Justice Sandra Day O'Connor's dissent argued that the law was an unconstitutional attempt to regulate the sale of liquor, and that there was not a "reasonable relation" to a permissible federal interest. She warned that if Congress can regulate activity within States with such an attenuated relation to a federal interest, it can regulate in almost any area of a state's social, political, and economic policies.

Subsequent lower-court rulings have shed further light on the import of *South Dakota v. Dole*. For example, the Fourth Circuit ruled against West Virginia in a challenge to a provision of the federal Medicaid program that requires States to recoup Medicaid expenditures from the estates of deceased beneficiaries. But the court nevertheless warned that a coercive law could theoretically violate the Tenth Amendment if it deprived States of any reasonable ability to regulate an area of traditional state authority that falls outside the federal government's enumerated powers.

Two situations are generally thought to constitute violations of the Tenth Amendment through conditions attached to federal spending: First, where the federal government forces States to impose substantial burdens on citizens, and second, where it specifically requires some specific form of political or institutional structure for state or local government. Thus, conditions and mandates attached to federal funds could run afoul of the "commandeering" doctrine of the Supreme Court's federalism jurisprudence.

### *Commandeering*

Perhaps the purest Tenth Amendment cases in constitutional law have to do with congressional enactments that "commandeer" instrumentalities of state government. The "commandeering" doctrine offers

additional grounds for hoping that the Supreme Court will vindicate local authority and roll back federal overreach. In *New York v. U.S.* (1992) the Court struck down a federal law that required States to take title to nuclear waste. In *Printz v. U.S.* five years later, the Court struck down a part of the Brady Act that required States to conduct background checks on prospective gun purchasers.

These cases do not rely on enumerated powers constraints as a basis for decision. Thus, they did not address general federal authority to regulate either nuclear waste or gun purchases. What the federal government cannot do, under *New York* and *Printz*, is to order instrumentalities of state and local government to serve as instrumentalities of the federal government.

As Michael Greve notes in *Real Federalism: Why It Matters, How It Could Happen* (1999), "what the Supreme Court *has* done is to elevate the Tenth Amendment into an extratextual, judge-made principle of intergovernmental immunity." Greve argues that the "genius" of Justice Scalia's majority opinion in *Printz* is to locate that intergovernmental immunity in the "structure" of the Constitution:

> First Justice Scalia explains that the Constitution establishes a system of "dual sovereignty," wherein the States and the national government occupy separate "spheres." The Tenth Amendment is only one of the indicia of federalism so understood. Second, Justice Scalia maintains that the congressional commandeering of state and local officers would undermine the federal executive: by dragooning state and local officers into federal law enforcement, Congress could subvert and circumvent the President's constitutional authority to ensure the faithful execution of the law. Third, Justice Scalia argues that Congress lacked the constitutional authority to enact the background check requirements under, of all things, the Necessary and Proper Clause of the Constitution, which empowers Congress to "make all laws which be necessary and proper" to the enforcement of its delegated powers. A law that presses state and local officers into federal service, Justice Scalia maintains, cannot be "proper." Each of these three claims points beyond the seemingly limited holding in *Printz*. Each implies a notion of federalism, not as a mere protection of state immunity but as a direct constraint on the federal government.

Justice Scalia's opinion takes aim at the danger of requiring States to enforce federal laws, particularly the danger of diminishing political accountability:

> By forcing state government to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for "solving" problems without having to ask their constituents to pay for the solutions with higher federal taxes. And even when the States are not forced to absorb the costs of implementing a federal program, they are still put in the position of taking the blame for its burdensomeness and for its defects.

One promising area of Tenth Amendment jurisprudence is therefore what meaning can be attached to the word "proper" within the final clause of Article I, Section 8 of the Constitution, which grants Congress the power "To make all Laws which shall be *necessary and proper* for carrying into Execution the foregoing Powers." To follow Justice Scalia's opinion in *Printz*, a law that upsets the federalist structure of the Constitution by infringing on the "quasi-sovereign" status of States might not be "proper."

## Part II: Major Areas of Federal Infringement on Tenth Amendment Rights

The federal government has taken advantage of Supreme Court rulings to dramatically expand the scope of its intrusions into Tenth Amendment

rights. In recent years, the federal government has been particularly aggressive in this regard, pushing the scope of federal regulation to the limits of what courts are likely to uphold, apparently accepting the risk of judicial invalidation in some cases on the logic that some or most federal actions will survive judicial scrutiny. These actions tend to set precedents, and the precedents become the basis for future expansions, thereby continuing the steady erosion of the Constitution's constraints on federal power.

## Health Care

The Patient Protection and Affordable Care Act of 2010 ("Obamacare") is a dramatic expansion of the federal government's reach into our daily lives, on an unprecedented scale. It has already begun to unleash a cascade of unintended consequences, including the fact that employers will be increasingly incentivized to stop providing health insurance for their employees. The legislation fixes few of the problems we face in health care, and in fact makes several of them markedly worse. It takes us further away from what should be the goal of health care reform, namely patient-driven, market-based, affordable and accessible health care in which health insurance is primarily a means of spreading the risk of catastrophic illness, rather than the cost of routine care.

Obamacare is an unconstitutional federal overreach and violation of Tenth Amendment rights, in at least two ways:

- **Individual Mandate.** The mandate that individuals purchase health insurance would be the first time that the federal government has required citizens to purchase a good or service as an exercise of the commerce power. Under *Lopez*, health insurance is neither a channel nor an instrumentality of interstate commerce, so the mandate would have to rest on the argument that health insurance is an activity that substantially affects interstate commerce. The mandate, tied to a penalty, may also violate the Due Process Clause of the Constitution.
- **Mandatory State Medicaid Expansion/Health Insurance Exchange.** Obamacare requires that States dramatically expand their Medicaid programs, and establish new health insurance markets to be regulated as utilities for the socialization of health care costs. As such, under *Printz*, Obamacare may well constitute a "commandeering" of state agencies and budgets because it turns them into instrumentalities of the federal government.

## Environmental Regulations

Since their rise in the 1960s and 1970s, environmental standards adopted by the federal government and implemented chiefly by States have achieved enormous improvements in environmental quality. But over time, the main federal regulatory agencies in the environmental field have grown increasingly heavy-handed. With today's clean energy and environmental agenda, the field of environmental regulations has become a central front in the battle to preserve the Constitution's balance of federalism. Today, the Environmental Protection Agency and Department of Interior are using regulatory power to invalidate highly successful state programs that are entirely within the law; to accomplish climate-change policies that have been rejected by Congress; to create stifling regulatory uncertainty in those sectors of industry that compete with the goals of radical environmentalists; and to punish States that pursue a free-market, limited-government regulatory model. By expanding the scope of environmental regulation to the very limits of what courts will allow, and often overstepping the boundary, the federal government's energy and environmental agenda threatens the very foundations of our federal system.

Here in Texas, it is also increasingly viewed as a threat to the state's economic future. The new regulations target state programs that have been highly successful in improving air quality. From 2000 to 2008, Texas lowered ozone emissions by 22 percent while the Nation as a whole achieved only an eight percent reduction. This progress in air quality occurred while

the Texas economy was growing a third faster than the Nation as a whole.

The Environmental Protection Agency's decision to regulate $CO_2$ as a pollutant under the Clean Air Act is another attempt to accomplish through regulation the very climate change bills that Congress has repeatedly rejected. By fiat, EPA declared that States must now regulate greenhouse gases as pollutants beginning January 2, 2010 or EPA will do it for them. Announcing their intention to sue the government in federal court, Texas Attorney General Greg Abbott and chief environmental regulator Bryan Shaw wrote, in a letter to EPA, "we write to inform you that Texas has neither the authority nor the intention of violating, ignoring, or amending its laws to require the regulation of greenhouse gases."

Yet another example is EPA's invalidation in July 2010 of a state permit program that had been operating for 16 years under EPA oversight. The Texas "Flexible Permitting Program" is one of the most innovative and successful air-quality programs in the country. The program sets strict emission caps for facilities as a whole and allows some operational flexibility under the caps. Yet because it deemed that the permits were not detailed enough, EPA invalidated the state permitting rules.

Overnight, legal authorization for most of the refineries, large manufacturers, and some power plants in Texas were thrown into legal limbo. Although EPA has yet to conclude how the state rules should be changed, EPA decreed the individual facilities holding Texas flexible permits to be in violation of the Clean Air Act. Although the flex permit holders comply with the state issued permits, EPA elects to use coercion under the guise of a "voluntary" audit ending with an enforcement decree.

EPA's actions jeopardize major commercial projects on which thousands of new jobs depend. Across Texas, planned expansions in capacity and employment now face a potentially prohibitive degree of regulatory risk. The dispute over permits has struck at the heart of the state's industrial base, one of the vital engines of the U.S. economy, which produces more than 25 percent of the country's transport fuel and more than 60 percent of its industrial chemicals.

EPA also announced that it plans to adopt a new ozone standard this fall. As Dr. Roger McClellan, former chairman of EPA's own scientific advisory committee recently testified, the new standard "is a policy judgment based on flawed science and inaccurate presentation of the science that should inform policy decisions." Moreover, of 3,000 counties in America, only 85 fail to attain the current standard, but according to the Congressional Research Service, the number could increase to 650 counties. Non-attainment of the ozone standard will shackle state authority and economic growth.

The federal government has shown itself increasingly inimical to the domestic production of fossil fuels. Indeed the intended effect of the Department of Interior's moratorium on new deepwater offshore drilling was to halt virtually all new exploration—and the result has been crippling harm and job losses throughout the Gulf Coast economies, already struggling in difficult times. Tellingly, many of the scientists whose names were cited as having recommended a blanket ban have since loudly protested that they did no such thing, and Under Secretary of Commerce Rebecca Blank recently testified that the administration didn't bother to assess what the economic impact might be before it issued the ban. The administration now admits that the ban will result in more than 8,000 job losses on the Gulf Coast. The ban had no basis in the Oil Pollution Act, which permits the federal government to halt drilling on a case-by-case basis but not for the industry as a whole. Three federal courts struck down the moratorium as an illegal "arbitrary and capricious" exercise of regulatory power, but the administration simply ignored them and reissued the moratorium in a slightly different form.

The States and the people will be forced into a "one size fits all" approach to public policy ... at odds with both the American tradition of self-government and the Constitution that codifies that tradition.

By the time Secretary of the Interior Ken Salazar declared an end to the offshore drilling moratorium on October 12, 2010, the regulatory uncertainty had already driven five major drilling rigs to other countries, with millions of dollars in disrupted contracts. The new head of the Bureau of Ocean and Minerals Management assures environmentalists that he won't be in any hurry to approve new permits, and industry leaders have taken that as further evidence of a hostile regulatory environment. For example, the processing of permit applications for shallow water drilling (in less than 500 feet of water) has slowed to a tiny fraction of what it was before the BP spill—putting at risk perhaps 40,000 jobs on the Gulf Coast. This is in addition to the tens of thousands of jobs at risk because of the moratorium on offshore drilling and its long-term effects.

Thus, the current administration has devised a sophisticated and highly effective way of using regulatory uncertainty to shut down economic activity that it sees as incompatible with its agenda. Not even federal court judgments against its policies have impeded their effectiveness in stifling economic activity. This is an example of the federal government exercising powers illegally—according to explicit judgments of federal courts—in an effort to impose radical federal policies on States and the economic freedom of individuals.

If these unilateral environmental actions are allowed to stand, the consequences will be simple and devastating: States will lose control of their economic policies, and the Nation's economic policies will be increasingly driven by whatever ideology, environmental or otherwise, happens to prevail in Washington. The "laboratory of democracies" that has allowed States to innovate and compete in order to develop the most successful models, will be increasingly impaired, replaced by the virtual nationalization of a big-government approach that consistently leaves unemployment and lost opportunity in its wake. The States and the people will be forced into a "one size fits all" approach to public policy, a top-down mode that is at odds with both the American tradition of self-government and the Constitution that codifies that tradition.

## Impact of Conditional Federal Funds on State Budgets and State Autonomy

The practice of conditioning federal grants to the States on state compliance with federal policy priorities is among the most insidious and dangerous practices to have developed over the past sixty years. The federal stimulus bill dramatically increased the federal share of state budgets, and imposed a myriad of requirements on the disbursement of funds. The practice of taxing citizens and returning the money to their States only on condition of state compliance with federal wishes subverts the structure of federalism by coercing States to give up their autonomy, and ignore the will of their citizens, under threat of an increasingly unbearable fiscal and economic penalty. Whether by interstate compact or federal legislation or constitutional amendment, the practice of conditional federal subsidies to state budgets has to be reined in if the States' sovereign status within our Constitution's framework is to be restored.

In the current Texas budget, federal funds make up 36 percent of all the funds in the budget, a dramatic increase over the 30 percent federal share in the previous state budget. More than half of this sum is devoted to health and human services, subject to a host of restrictions and regulations. Another 24 percent is devoted to education, again with a host of onerous restrictions and mandates, many of them unfunded

mandates. Another 16 percent is devoted to business and economic development, again with strings attached. In all of these areas, the federal conditions and mandates are incrementally approaching a nationalization of state policy in the areas affected—health & human services, education, and economic development—areas that the Framers expressly intended to leave to the States.

## Part III: Towards an Agenda for State Action

This paper has tried to highlight major issues and problem areas at the vanishing boundary between the federal government's domain and that of the States and individuals.

In coming months, the Foundation's Center for Tenth Amendment Studies will work with partners across the country to develop an Agenda for State Action. We will identify and share those tools that States can use to stop federal overreach and restore the Constitution's limits on government power. In collaboration with partners such as the Goldwater Institute in Arizona, we are developing tools such as the following:

- **Interstate Compact for Health Care Reform.** Interstate compacts are an effective way to regulate areas of mutual concern among two or more States. In areas of overlapping state and federal jurisdiction, or where state legislation is preempted by an enumerated federal power, the Constitution requires congressional consent (Art. I, sec. 10). The Supreme Court has held that such congressional consent trumps prior federal law and may even subordinate federal agencies to agencies created by the interstate compact. Although Congress has generally consented to interstate compacts through regular legislation signed by the President, congressional consent does not necessarily require presidential signature; the Supreme Court has suggested that congressional consent may even be inferred from acquiescence. Interstate compacts have enormous unexplored potential as a way of shielding areas of traditional state authority from the concentration of power in Washington.

  We propose an interstate compact to create an alternative state-based regulation of health care. The compact would provide that member States are free to choose their preferred model for health care policy; that they may opt out of Obamacare entirely; that they may choose to receive federal Medicaid funds as block grants without strings attached; and would otherwise accommodate maximum state flexibility. The compact could create a regional commission to allow the sharing of certain risks that require a larger pool than a single State to reach efficient scale. The compact would contain a "notwithstanding" clause providing that the operation of any federal law contrary to the provisions of the compact is suspended as to the signatory States. Congressional consent would be sought, and once obtained, would transform the compact into federal law.

- **Constitutional Amendment to Balance the Budget.** Constitutional amendments aimed at controlling taxing and spending would respond to one of the issues that Americans today worry about most: runaway federal spending. Congress itself can propose the amendment, or States can petition Congress to call a constitutional convention under Article V. The call of the States could be limited to proposing amendments that will rein in the spending and taxing powers of the federal government. Amendments could include: a balanced-budget amendment, a line-item veto, and the requirement of a super-majority to raise taxes.

- **Opting out of Federal Programs and Federal Funds.** The problem of federal funding with conditions and mandates attached is an increasingly serious threat to the constitutional balance of federalism. It is a problem that States

must address in a concerted manner. We propose that States consider reciprocal legislation or an interstate compact, providing that in state budgets none of them will accept federal funds with mandates and conditions attached (but accommodating federal funds in the form of block grants for a specified purpose). The laws could be triggered to go into effect once a certain number of States—for example 38 (3/4ths of the States, enough to compel Congress to call a constitutional convention)—have adopted them. This would alter the politics of federal appropriations significantly, and focus more attention on the way in which taxes paid into general federal revenue are diverted to States other than their States of origin, creating enormous economic penalties for those States that refuse to comply with federal policies that they are under no legal obligation to obey.

- **Federal Lawsuits.** States have been fighting back against the federal government by suing in federal court. More than 20 States have sued the federal government to escape the impositions of Obamacare. Texas has filed at least eight separate federal actions seeking relief from various Obama administration environmental actions. More States should join in existing lawsuits, and state legislatures can adopt laws requiring their attorney general to file suit in defense of specific rights.

  State legislation can help strengthen the state's ability to use the federal courts. One way is to pass a law that requires the state attorney general to file suits when an independent commission determines that, e.g., state constitutional provisions are being violated by some federal action. Another is to pass a law providing, e.g., that individuals don't have to comply with the individual mandate in Obamacare. On its face, such a law is null and void under the Supremacy Clause of the Constitution—unless Obamacare is itself unconstitutional. In this way, the state's attorney general will be able to establish standing to challenge the constitutionality of the federal statute in federal court.

- **Federal Legislation.** Our representatives in Congress can have an important role in stopping federal overreach. A simple amendment to the Administrative Procedures Act could establish that the Supremacy Clause of the Constitution (Article VI) shall not apply to regulatory action, and that in cases of conflict between an administrative agency rulemaking and state law, state law prevails. Federal laws could modify entitlement programs to allow States to opt into "block grant" arrangements, either singly, or through interstate compacts. Other federal laws could modify canons of construction and rules of decision for federal courts, instructing them to construe statutory ambiguities in favor of Tenth Amendment rights, thereby establishing a legal presumption against federal power.

## Conclusion

The steady expansion of the federal government since the early 20th century has arrived at a crisis point. The federal government is pushing further and further into areas of traditional state governance—and intruding deeper into our lives. The threat to liberty that Madison thought States would be strong enough to resist has now become apparent to millions of Americans.

The federal courts are a necessary instrument of the solution, but the vital solution lies in self-governance itself, what John Locke might have called a "government properly so-called." We the People have a responsibility to engage and understand the issues that affect the fate of our democracy. By elevating our understanding of the need to preserve the authority of the States, and ultimately the sovereignty of the people—the most contentious and important agreement reached at the Constitutional Convention in Philadelphia more than two centuries ago—we can continue to forge a more perfect Union. ★

## About the Authors

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Mario has written extensively for national and international publications, including features for *National Review* and *The Weekly Standard*, and op-eds in *The Wall Street Journal*. He has appeared on The Glenn Beck Show, CNN International, BBC Television, Radio America, and more.

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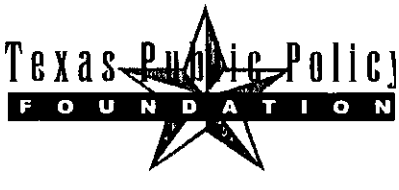


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**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF FLORIDA**
**PENSACOLA DIVISION**

STATE OF FLORIDA, by and through
Attorney General Pam Bondi, et al.;

Plaintiffs,

v. Case No.: 3:10-cv-91-RV/EMT

UNITED STATES DEPARTMENT OF
HEALTH AND HUMAN SERVICES, et al.,

Defendants.
_____/

**ORDER**

My order of January 31, 2011 ("Order"), granted summary judgment for the plaintiffs (in part); held the "individual mandate" provision of The Patient Protection and Affordable Care Act (the "Act") unconstitutional; and declared the remainder of the Act void because it was not severable. The defendants have now filed a motion to "clarify" this ruling (doc. 156) ("Def. Mot."). During the four-plus weeks since entry of my order, the defendants have seemingly continued to move forward and implement the Act. In their response in opposition to the defendants' motion, the plaintiffs have asserted that "[i]f the Government was not prepared to comply with the Court's judgment, the proper and respectful course would have been to seek an immediate stay, not an untimely and unorthodox motion to clarify" (doc. 158 at 2) ("Pl. Resp.").

While I believe that my order was as clear and unambiguous as it could be, it is possible that the defendants may have perhaps been confused or misunderstood its import. Accordingly, I will attempt to synopsize the 78-page order and clarify its intended effect. To that extent, the defendants' motion to clarify is GRANTED.

**I. Clarification**

Let me begin the clarification by emphasizing, once again, what this case is

all about. The plaintiffs filed this case to challenge the Constitutionality of the Act. The complaint raised several causes of action, but the crux of the case centered on the Constitutionality of the individual mandate, which, beginning in 2014, will require everyone (with certain stated exceptions) to buy federally-approved health insurance or pay a monetary "penalty." Like every single district court to consider this issue so far --- including those that have ruled for the federal government --- I rejected the defendants' argument that the penalty should be construed as a tax barred by the Anti-Injunction Act. Instead, I concluded that it was a civil regulatory penalty which could not be based on the federal government's broad taxing power. The issue was thus narrowed to whether the individual mandate fell within, or went beyond, Congress's Constitutional authority "To regulate Commerce . . . among the several States." U.S. Const. art I, § 8, cl. 3.

In granting summary judgment in favor of the plaintiffs on that question, I traced the historical roots of the Commerce Clause and the evolution of its judicial interpretation. I noted that the word "commerce" had a well-understood meaning when the Founding Fathers drafted our Constitution and when "We the People" later adopted it. I analyzed and discussed (in detail) every significant and pertinent Commerce Clause case decided by the Supreme Court, including the primary cases relied on by the defendants: Wickard v. Filburn, 317 U.S. 111, 63 S. Ct. 82, 87 L. Ed. 122 (1942); and Gonzales v. Raich, 545 U.S. 1, 125 S. Ct. 2195, 162 L. Ed. 2d 1 (2005). I concluded, however, that those (and other) cases neither supported the defendants' position nor directly resolved the Constitutional question at issue. Indeed, as Congress's own attorneys (in the Congressional Research Service) have explained:

> While in Wickard and Raich, the individuals were participating in their own home activities (i.e., producing wheat for home consumption and cultivating marijuana for personal use), they were acting of their own volition, and this activity was determined to be economic in nature

> and affected interstate commerce. However, [the individual mandate] could be imposed on some individuals who engage in virtually no economic activity whatsoever. This is a novel issue: whether Congress can use its Commerce Clause authority to require a person to buy a good or a service and whether this type of required participation can be considered economic activity.

Congressional Research Service, Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis, July 24, 2009, at 6 ("CRS Analysis") (emphasis added).[1]

I recognized in my order that "novel" and unprecedented did not, by itself, mean "unconstitutional," so I then proceeded to address the defendants' several arguments in support of the individual mandate. Following the Supreme Court's precedent in United States v. Lopez, 514 U.S. 549, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995), I "pause[d] to consider the implications of the Government's arguments" by discussing possible hypothetical extensions of the logic underlying them. See id. at 564-65. For example, in Lopez, the Court also used hypothetical examples to illustrate other areas that "Congress could regulate" and activities that "Congress could mandate" in the future under the federal government's logic, and concluded that, under such reasoning, it would be hard "to posit any activity by an individual that Congress is without power to regulate." See id. I similarly concluded that the government's arguments in this case --- including the "economic decisions"

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[1] Even the district courts that have upheld the individual mandate seem to agree that "activity" is indeed required before Congress can exercise its authority under the Commerce Clause. They have simply determined that an individual's decision not to buy health insurance qualifies as activity. For example, in the most recent case, Mead v. Holder, --- F. Supp. 2d ---, 2011 WL 611139 (D.C.C. Feb. 22, 2011), the District Court for the District of Columbia concluded that "[m]aking a choice is an affirmative action, whether one decides to do something or not do something," and, therefore, Congress can regulate "mental activity" under the commerce power. See id. at *18 (emphasis added). As that court acknowledged, however, there is "little judicial guidance" from the Supreme Court with respect to this issue as "previous Commerce Clause cases have all involved physical activity." Id.

argument --- could authorize Congress to regulate almost any activity (or inactivity). This could not be reconciled with a federal government of limited and enumerated powers. I thus concluded that the meaning of the term "commerce" as understood by the Founding Fathers would not have encompassed the individual mandate, not because of some vague "original intent," but because it would have violated the fundamental and foundational principles upon which the Constitution was based: a federal government with limited enumerated powers which can only exercise those specific powers granted to it.

Similarly, I determined (consistent with the Lopez majority's rejection of the dissent's arguments) that "market uniqueness" is not an adequate limiting principle as the same basic arguments in support of the individual mandate could be applied in other contexts outside the "unique" health care market, and could be used to require that individuals buy (under threat of penalty) virtually any good or service that Congress has a "rational basis" to conclude would help the national economy, from cars to broccoli.[2] I thus held that the individual mandate exceeded Congress's

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[2] Although some have suggested that the possibility of Congress being able to claim such a power is Constitutionally implausible, subsequent events have only reinforced the legitimacy of this concern. On February 2, 2011, two days after my order was entered, the Senate Judiciary Committee held a hearing to explore the Constitutionality of the individual mandate. The possibility of a "broccoli mandate" was discussed at this hearing. Former Solicitor General and Harvard law professor Charles Fried testified (during the course of defending the Constitutionality of the individual mandate) that under this view of the commerce power Congress could, indeed, mandate that everyone buy broccoli. See Transcript of Senate Judiciary Committee Hearing: Constitutionality of the Affordable Care Act (Feb. 2, 2011); see also Written Testimony of Charles Fried, Beneficial Professor of Law, Harvard Law School, Before the Senate Judiciary Committee on "The Constitutionality of the Affordable Care Act" (Feb. 2, 2011), at 4. This testimony only highlights my concern because it directly undercuts the defendants' principal argument for why an economic mandate is justified here; to wit, that it is justified in this case (and only this case) because the broad health care market is "unique" and because the failure to buy health insurance constitutes an "economic financing decision" about how to pay for an unavoidable service that hospital emergency rooms (unlike sellers

authority under the Commerce Clause (at least as understood, defined, and applied in existing case law). Such an unprecedented and potentially radical expansion of Congress's commerce power could only be authorized in the first instance by the Supreme Court, or possibly by a Constitutional amendment. It is not for a lower court to expand upon Supreme Court jurisprudence, and in the process authorize the exercise of a "highly attractive power" that Congress has never before claimed in the history of the country [see generally Printz v. United States, 521 U.S. 898, 905-18, 117 S. Ct. 2365, 138 L. Ed. 2d 914 (1997)], and which Congress's very own attorneys have warned "could be perceived as virtually unlimited in scope." See CRS Analysis, supra, at 7. After concluding that the individual mandate could not be supported by existing Commerce Clause precedent --- nor under Necessary and Proper Clause case law, including the recent doctrinal analysis articulated in United States v. Comstock, --- U.S. ---, 130 S. Ct. 1949, 176 L. Ed. 2d 878 (2010) --- I then considered the question of severability.

In deciding the severability issue, I began by recognizing and acknowledging that, if at all possible, courts will usually only strike down the unconstitutional part of a statute and leave the rest intact. However, I noted that this was not the usual

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of produce and other commodities) are required under law to provide regardless of ability to pay. As noted, to the extent that one may respond to this hypothetical concern by suggesting that "political accountability" would prevent Congress from ever imposing a "broccoli mandate" (even though it could), the Supreme Court has specifically rejected that as the appropriate test for "the limitation of congressional authority is not solely a matter of legislative grace." See United States v. Morrison, 529 U.S. 598, 616, 120 S. Ct. 1740, 146 L. Ed. 2d 658 (2000); see also id. at 616 n.7 (explaining that Congress's authority under the Commerce Clause is not "limited only by public opinion and the Legislature's self-restraint," and thereby rejecting the claim that "political accountability is . . . the only limit on Congress' exercise of the commerce power"); cf. United States v. Stevens, --- U.S. ---, 130 S. Ct. 1577, 1591, 176 L. Ed. 2d 435 (2010) ("[T]he [Constitution] protects against the Government; it does not leave us at the mercy of noblesse oblige. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.").

case, and that its unique facts required a finding of non-severability. In particular, I noted that:

(i) At the time the Act was passed, Congress knew for certain that legal challenges to the individual mandate were coming;

(ii) Congress's own Research Service had essentially advised that the legal challenges would have merit (and therefore might result in the individual mandate being struck down) as it could not be said that the individual mandate had "solid constitutional foundation" [CRS Analysis, supra, at 3];

(iii) And yet, Congress specifically (and presumably intentionally) deleted the "severability clause" that had been included in the earlier version of the Act.

I concluded that, in light of the foregoing facts, the conspicuous absence of a severability clause --- which is ordinarily included in complex legislation as a matter of routine --- could be viewed as strong evidence that Congress recognized that the Act could not operate as intended if the individual mandate was eventually struck down by the courts.

I also found that the defendants' own arguments in defense of the individual mandate on Necessary and Proper grounds necessarily undermined its argument for severability. I noted, for example, that during this case the defendants consistently and repeatedly highlighted the "essential" role that the individual mandate played in the regulatory reform of the interstate health care and health insurance markets, which was the entire point of the Act. As the defendants themselves made clear:

> [The individual mandate] is essential to the Act's comprehensive scheme to ensure that health insurance coverage is available and affordable [and it "works in tandem" with the health benefit exchanges, employer incentives, tax credits, and the Medicaid expansion].
>
> * * *
>
> [The absence of an individual mandate] would undermine the "comprehensive regulatory regime" in the Act.

* * *

> [The individual mandate] is essential to Congress's overall regulatory reform of the interstate health care and health insurance markets . . . [it] is "essential" to achieving key reforms of the interstate health insurance market . . . [and it is] necessary to make the other regulations in the Act effective.

Memorandum in Support of Defendants' Motion to Dismiss (doc. 56-1), at 46-48 (emphasis added). Therefore, according to the defendants' own arguments, the individual mandate and the insurance reform provisions must rise or fall together.[3]

In the course of applying the two-part severability analysis, I noted that the Supreme Court has stressed that the "relevant inquiry in evaluating severability is whether the statute [with the unconstitutional provision removed] will function in a manner consistent with the intent of Congress." See Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 685, 107 S. Ct. 1476, 94 L. Ed. 2d 661 (1987). In light of the defendants' own arguments as quoted above and dozens of similar representations that they made throughout this case, I had no choice but to find that the individual mandate was essential to, and thus could not be severed from, the rest of the Act.

I further noted that, because the Act was extremely lengthy and many of its provisions were dependent (directly or indirectly) on the individual mandate, it was improper for me (a judge) to engage in the quasi-legislative undertaking of deciding which of the Act's several hundred provisions could theoretically survive without the individual mandate (as a technical or practical matter) and which could not --- or which provisions Congress could have arguably wanted to survive. To demonstrate

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[3] As explained in my order, the mere fact that the individual mandate was "necessary" to the Act as drafted does not mean it was Constitutionally "proper." See, e.g., Printz v. United States, 521 U.S. 898, 923-24, 117 S. Ct. 2365, 138 L. Ed. 2d 914 (1997) ("When a 'Law for carrying into Execution' the Commerce Clause violates [other Constitutional principles], it is not a 'Law proper for carrying into Execution the Commerce Clause'") (emphasis in original) (ellipses omitted).

this problem, I discussed the Act's much-maligned Internal Revenue Service Form 1099 reporting requirement, which was an apparent revenue-generating provision with no connection to health care:

> How could I possibly determine if Congress intended the 1099 reporting provision to stand independently of the insurance reform provisions? Should the fact that it has been widely criticized by both Congressional supporters and opponents of the Act and the fact that there have been bipartisan efforts to repeal it factor at all into my determination?

Order at 73. In fact, on February 2, 2011, two days after entry of my order, the Senate voted (with bipartisan support) to repeal the Form 1099 provision (and the House is expected to follow with a similar vote in upcoming weeks). This is exactly how the process should be, as it highlights that it is Congress --- and not courts --- that should consider and decide the quintessentially legislative questions of which, if any, of the statute's hundreds of provisions should stay and which should go.

Because of these atypical and unusual circumstances (e.g., the deletion of a severability clause in the face of inevitable and well-founded legal challenges; the defendants' repeated acknowledgment in this case that the individual mandate was the keystone or lynchpin of the statute's overall purpose; and the obvious difficulty (if not impropriety) of reconfiguring an extremely lengthy and comprehensive statute with so many interconnected provisions), I concluded that these facts were not likely to be present in future litigation, and that the "normal rule" of severability --- which would still apply in the vast majority of cases --- was not applicable here.

Compare, for example, the unusual facts of this case with a case where the "normal rule" has been applied. In New York v. United States, 505 U.S. 144, 157, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992), the Supreme Court was called upon to consider the Constitutionality of the Low-Level Radioactive Waste Policy Act, which, in an effort to address a looming shortage of disposal sites of low level radioactive waste, set forth three "incentives" to states that provided for disposal

of waste generated within their borders. The Supreme Court held that the first two incentives were Constitutional, but the third --- the take title provision --- was not. In holding that provision could be severed from the statute, the Court explained:

> Common sense suggests that where Congress has enacted a statutory scheme for an obvious purpose, and where Congress has included a series of provisions operating as incentives to achieve that purpose, the invalidation of one of the incentives should not ordinarily cause Congress' overall intent to be frustrated. . . . [The one incentive] may fail, and still the great body of the statute have operative force, and the force contemplated by the legislature in its enactment . . . .
>
> [T]he take title provision may be severed without doing violence to the rest of the Act. The Act is still operative and it still serves Congress' objective of encouraging the States to attain local or regional self-sufficiency in the disposal of low level radioactive waste. It still includes two incentives that coax the States along this road. . . . The purpose of the Act is not defeated by the invalidation of the take title provision, so we may leave the remainder of the Act in force.

Id. at 186-67 (emphasis added). Plainly, the "normal case" is very different from the one presented here, where the federal government has repeatedly made clear that the primary and overall purpose (albeit not necessarily every single provision) of the Act would be directly and irretrievably compromised by the removal of the central feature that Congress described as "essential" in the words of the Act itself. See Act § 1501(a)(2)(I).[4]

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[4] For example, during the summary judgment hearing and oral argument, the defendants' attorney stressed that the individual mandate is absolutely necessary to the health insurance reforms as those reforms "literally can't work without" the individual mandate [see Tr. 83]. As noted, this was very significant because the insurance reform provisions were not a small or inconsequential part of the Act. In fact, they were its primary purpose and main objective --- as clearly demonstrated, inter alia, by the title of the Act itself and the fact that its proponents frequently

After determining that the individual mandate was unconstitutional and that it could not be severed from the remainder of the Act --- and thus "the entire Act must be declared void" --- I finally considered the plaintiffs' request for injunctive relief. I explained that the "extraordinary" and "drastic" remedy of an injunction is not typically required against the federal government because:

> . . . there is a long-standing presumption "that officials of the Executive Branch will adhere to the law as declared by the court. As a result, the declaratory judgment is the functional equivalent of an injunction." See Comm. on Judiciary of U.S. House of Representatives v. Miers, 542 F.3d 909, 911 (D.C. Cir. 2008); accord Sanchez-Espinoza v. Reagan, 770 F.2d 202, 208 n.8 (D.C. Cir. 1985) ("declaratory judgment is, in a context such as this where federal officers are defendants, the practical equivalent of specific relief such as an injunction . . . since it must be presumed that federal officers will adhere to the law as declared by the court") (Scalia, J.) (emphasis added).
>
> There is no reason to conclude that this presumption should not apply here. Thus, the award of declaratory relief is adequate and separate injunctive relief is not necessary.

Order at 75. The above language seems to be plain and unambiguous. Even though I expressly declared that the entire Act was "void," and even though I emphasized that "separate injunctive relief is not necessary" only because it must be presumed that "the Executive Branch will adhere to the law as declared by the court," which means that "declaratory judgment is the functional equivalent of an injunction," the defendants have indicated that they "do not interpret the Court's order as requiring

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referred to the legislative efforts as "health insurance reform." It is, quite frankly, difficult to comprehend how severing and removing the "health insurance reform provisions" from "health insurance reform legislation" could even arguably leave a statute that would "function in a manner consistent with the intent of Congress." See Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 685, 107 S. Ct. 1476, 94 L. Ed. 2d 661 (1987)

them to immediately cease [implementing and enforcing the Act]." See Def. Mot. at 4; see also id. at 6 ("we do not understand the Court's declaratory judgment of its own force to relieve the parties to this case of any obligations or deny them any rights under the Act"). They have reportedly continued with full implementation of the Act. They claim that they have done so based on certain language in (and legal analyses left out of) my order, which they believe suggests that the ruling "does not in itself automatically and in self-executing manner relieve the parties of their obligations or rights under the [Act] while appellate review is pending." See id.

The defendants have suggested, for example, that my order and judgment could not have been intended to have the full force of an injunction because, if I had so intended, I would have been "required to apply the familiar four-factor test" to determine if injunctive relief was appropriate. See Def. Mot. at 14. That well-settled four-factor test requires the party seeking an injunction to demonstrate:

> (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

eBay, Inc. v. MercExchange, LLC, 547 U.S. 388, 391, 126 S. Ct. 1837, 164 L. Ed. 2d 641 (2006). I did not undertake this four-factor analysis for a simple reason: it was not necessary. Even though the defendants had technically disputed that the plaintiffs could satisfy those four factors, the defendants had acknowledged in their summary judgment opposition brief that, if I were to find for the plaintiffs, separate injunctive relief would be superfluous and unnecessary. The defendants expressly assured the court that, in light of the "long-standing presumption that a declaratory judgment provides adequate relief as against an executive officer, as it will not be presumed that that officer will ignore the judgment of the Court," any declaratory judgment in the plaintiffs' favor "would [ ] be adequate to vindicate [the plaintiffs']

claims." Defendants' Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment (doc. 137), at 43. Consequently, there was no need to discuss and apply the four-factor test to determine if injunctive relief was appropriate because the defendants had confirmed that they would "not . . . ignore the judgment of the Court" and that my "declaratory judgment would [ ] be adequate." In other words, the defendants are now claiming that it is somehow confusing that I bypassed the four-factor test and applied the "long-standing presumption" that they themselves had identified and specifically insisted that they would honor.

I am aware that in their opposition brief the defendants attempted to qualify and limit the "long-standing presumption" --- and avoid the declaratory judgment's immediate injunction-like effect --- by intimating that it should apply "after appellate review is exhausted." See id. There were several problems with this claim (which is why I rejected it sub silentio). First of all, the case the defendants cited in making their qualifying statement [Miers, supra, 542 F.3d at 911] does not at all support the position that a district court's declaratory judgment will only be presumed to have injunctive effect against federal officials "after appellate review is exhausted." Quite to the contrary, in that case the Court of Appeals for the District of Columbia determined that the presumption attached immediately and thus the district court's declaratory judgment had immediate injunction-like effect (which is why the order under review was "immediately appealable" in the first instance). See id. at 910-11. Accordingly, while the defendants may have tried to qualify the long-standing presumption and limit it to post-appeal, I was (and still am) unpersuaded that the presumption can (or should) be limited in such fashion. Indeed, I note that the federal government previously advanced the exact same "after appellate review is exhausted" argument (almost word-for-word) in one of the Virginia cases [see doc. 96, in 3:10-cv-188, at 34-35], where it appears to have been rejected sub silentio as well. See Virginia v. Sebelius, 728 F. Supp. 2d 768, 790 (E.D. Va. 2010) (declaring individual mandate unconstitutional, but declining to issue injunction

because, in light of the long-standing presumption against enjoining federal officers, "the award of declaratory judgment is sufficient to stay the hand of the Executive branch pending appellate review") (emphasis added).

Furthermore, as the plaintiffs have correctly pointed out [see Pl. Resp. at 3-6], to suggest that a declaratory judgment will only be effective and binding on the parties after the appeals process has fully run its course is manifestly incorrect and inconsistent with well established statutory and case law. A declaratory judgment establishes and declares "the rights and other legal relations" between the parties before the court and has "the force and effect of a final judgment." See 28 U.S.C. § 2201(a). "A declaratory judgment cannot be enforced by contempt proceedings, but it has the same effect as an injunction in fixing the parties' legal entitlements . . . . A litigant who tries to evade a federal court's judgment --- and a declaratory judgment is a real judgment, not just a bit of friendly advice --- will come to regret it." Badger Catholic, Inc. v. Walsh, 620 F.3d 775, 782 (7th Cir. 2010). If it were otherwise, a federal court's declaratory judgment would serve "no useful purpose as a final determination of rights." See Public Service Comm'n of Utah, v. Wycoff Co., Inc., 344 U.S. 237, 247, 73 S. Ct. 236, 97 L. Ed. 2d 291 (1952). For the defendants to suggest that they were entitled (or that in the weeks after my order was issued they thought they might be entitled) to basically ignore my declaratory judgment until "after appellate review is exhausted" is unsupported in the law.[5]

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[5] The defendants have claimed that "[i]n other declaratory judgment cases, pending appellate review, 'the Government has been free to continue to apply [a] statute' following entry of a declaratory judgment." See Def. Mot. at 4-5 (citing Kennedy v. Mendoza-Martinez, 372 U.S. 144, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963); Carreno v. Johnson, 899 F. Supp. 624 (S. D. Fla. 1995)). Quoting from Mendoza-Martinez, the defendants further claim that "'a single federal judge'" is not authorized to "'paralyze totally the operation of an entire regulatory scheme, either state or federal, by issuance of a broad injunctive order' prior to appellate review." See id. at 5. The two cited cases are plainly inapposite for the reasons identified by the plaintiffs. See Pl. Resp. at 4-5. Mendoza-Martinez, for example,

So to "clarify" my order and judgment: The individual mandate was declared unconstitutional. Because that "essential" provision was unseverable from the rest of the Act, the entire legislation was void. This declaratory judgment was expected to be treated as the "practical" and "functional equivalent of an injunction" with respect to the parties to the litigation. This expectation was based on the "long-standing presumption" that the defendants themselves identified and agreed to be bound by, which provides that a declaratory judgment against federal officials is a de facto injunction. To the extent that the defendants were unable (or believed that they were unable) to comply, it was expected that they would immediately seek a stay of the ruling, and at that point in time present their arguments for why such a stay is necessary, which is the usual and standard procedure. It was not expected that they would effectively ignore the order and declaratory judgment for two and one-half weeks, continue to implement the Act, and only then file a belated motion to "clarify."[6]

The plaintiffs have contended that the defendants did not actually need any of the above clarification as they were not really confused by, or unsure of, the effect of my order and judgment. They have suggested that if the defendants had

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applied a statute that precluded single-judge district courts from enjoining an Act of Congress; but that statute was repealed by Congress thirty-five years ago, in 1976. The defendants' selective quoting from those cases --- to suggest that the federal government may simply ignore a declaratory judgment by a district court until the appeals process has fully run its course --- borders on misrepresentation.

[6] The defendants have suggested in reply to the plaintiffs' response that the reason for the delay was due to the fact that my order "required careful analysis," and it was only after this "careful review" that the defendants could determine its "potential impact" with respect to implementation of the Act (see doc. 164 at 11). This seems contrary to media reports that the White House declared within hours after entry of my order that "implementation will proceed apace" regardless of the ruling. See, e.g., N.C. Aizenman and Amy Goldstein, U.S. Judge in Florida Rejects Health Law, Washington Post, Feb. 1, 2011, at A01 (quoting a senior White House official).

truly believed there was any uncertainty or ambiguity, they would have immediately sought clarification rather than continuing to move forward with implementing the Act as if nothing had happened. The plaintiffs have asserted that the defendants' motion to clarify is, "in fact, a transparent attempt, through the guise of seeking clarification, to obtain a stay pending appeal." See Pl. Resp. at 2. At certain parts in the pleading, the defendants' motion does seem to be more of a motion to stay than a motion to clarify. Because the defendants have stated that they intend to file a subsequent motion to stay [Def. Mot. at 15] if I were to "clarify" that I had intended my declaratory judgment to have immediate injunction-like effect (which I just did), I will save time in this time-is-of-the-essence case by treating the motion to clarify as one requesting a stay as well.

**II. Motion to Stay**

In deciding whether to grant a stay pending appeal, courts should generally examine four factors: (1) whether the applicants have made a strong showing that they are likely to prevail; (2) whether the applicants will be irreparably injured if a stay is not granted; (3) whether granting the stay will substantially injure the other parties interested in the proceeding; and (4) "where the public interest lies." Hilton v. Braunskill, 481 U.S. 770, 776, 107 S. Ct. 2113, 95 L. Ed. 2d 724 (1987).

For the first factor, I cannot say that the defendants do not have a likelihood of success on appeal. They do. And so do the plaintiffs. Although I strongly believe that expanding the commerce power to permit Congress to regulate and mandate mental decisions not to purchase health insurance (or any other product or service) would emasculate much of the rest of the Constitution and effectively remove all limitations on the power of the federal government, I recognize that others believe otherwise. The individual mandate has raised some novel issues regarding the Constitutional role of the federal government about which reasonable and intelligent people (and reasonable and intelligent jurists) can disagree. To be sure, members of Congress, law professors, and several federal district courts have already reached

varying conclusions on whether the individual mandate is Constitutional. It is likely that the Courts of Appeal will also reach divergent results and that, as most court-watchers predict, the Supreme Court may eventually be split on this issue as well. Despite what partisans for or against the individual mandate might suggest, this litigation presents a question with some strong and compelling arguments on both sides. Ultimately, I ruled the way I did, not only because I believe it was the right overall result, but because I believe that is the appropriate course for a lower court to take when presented with a (literally) unprecedented argument whose success depends on stretching existing Supreme Court precedent well beyond its current high water mark and further away from the "first principles" that underlie our entire federalist system. Under these circumstances, I must conclude that the defendants do have some (sufficient for this test only) likelihood of success on appeal.

I must next consider the injury to the defendants if the stay is not entered, and the injury to the plaintiffs if it is. The Act, as previously noted, is obviously very complicated and expansive. It contains about 450 separate provisions with different time schedules for implementation. Some are currently in effect, while others, including the individual mandate, are not scheduled to go into effect for several years. In their motion, the defendants have identified and described the "significant disruption" and "wide-ranging and indeterminate consequences" that could result if implementation of the entire Act must stop immediately [see Def. Mot. at 4, 7-11], and, upon review and consideration of these arguments, I agree that it would indeed be difficult to enjoin and halt the Act's implementation while the case is pending appeal. It would be extremely disruptive and cause significant uncertainty.

Against this, however, I must balance the potential injury to the plaintiffs if a stay is entered. Relying on their previous summary judgment filings, the plaintiffs have argued that the Act is causing them substantial harm now because the state plaintiffs are being required to expend significant funds and resources in order to

comply with the Act's numerous provisions. In this respect, it is apparent that the plaintiffs will be injured by a stay of my ruling.[7] Similarly, businesses, families, and individuals are having to expend time, money, and effort in order to comply with all of the Act's requirements. Further, I do not doubt that --- assuming that my ruling is eventually affirmed --- the plaintiffs will sustain injury if the Act continues to be implemented. Reversing what is presently in effect (and what will be put into effect in the future) may prove enormously difficult. Indeed, one could argue that was the entire point in front-loading certain of the Act's provisions in the first place. It could also be argued that the Executive Branch seeks to continue the implementation, in part, for the very reason that the implemented provisions will be hard to undo once they are fully in place. However, after balancing the potential harm to the plaintiffs against the potential harm to the defendants, I find that, on balance, these two factors weigh in favor of granting a stay --- particularly in light of several unusual facts present in this case.

For example, my declaratory judgment, of course, only applies to the parties to this litigation. The State of Michigan is one of those parties. However, a federal district court in Michigan has already upheld the Act and the individual mandate. See Thomas More Law Center v. Obama, 720 F. Supp. 2d 882 (E.D. Mich. 2010). Can (or should) I enjoin and halt implementation of the Act in a state where one of its federal courts has held it to be Constitutional? In addition, many of the plaintiff states have publicly represented that they will immediately halt implementation of the Act in light of my declaratory judgment, while at least eight plaintiff states (as identified by the defendants in their motion and reply) have suggested that, in an abundance of caution, they will not stop implementing the Act pending appeal. In

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[7] Although the severity of that injury is undercut by the fact that at least eight of the plaintiff states (noted further infra) have represented that they will continue to implement and fully comply with the Act's requirements --- in an abundance of caution while this case is on appeal --- irrespective of my ruling.

addition to these apparent disagreements among the plaintiff states, there is even disagreement within the plaintiff states as to whether the implementation should continue pending appeal. For example, while the plaintiffs (a group that includes the Attorney General of Washington) have requested that I enjoin the defendants from implementing the Act, the Governor of Washington has just filed an amicus brief specifically opposing that request (doc. 163). At this point in time, and in light of all this uncertainty, it would be difficult to deny the defendants a stay pending appeal. Nonetheless, in light of the potential for ongoing injury to the plaintiffs, the stay should be in place for as short of time as possible (months, and not years), as discussed immediately below.

Finally, for the last factor, I must consider "where the public interest lies." Although the defendants' pleadings present a reasonably persuasive argument for why the "public interest lies" in having my declaratory judgment and de facto injunction stayed pending appeal, almost every argument that the defendants have advanced speaks much more persuasively to why the case should be immediately appealed and pursued in the most expeditious and accelerated manner allowable. As both sides have repeatedly emphasized throughout this case, the Act seeks to comprehensively reform and regulate more than one-sixth of the national economy. It does so via several hundred statutory provisions and thousands of regulations that put myriad obligations and responsibilities on individuals, employers, and the states. It has generated considerable uncertainty while the Constitutionality of the Act is being litigated in the courts. The sooner this issue is finally decided by the Supreme Court, the better off the entire nation will be. And yet, it has been more than one month from the entry of my order and judgment and still the defendants have not filed their notice of appeal.

It should not be at all difficult or challenging to "fast-track" this case.[8] The briefing with respect to the general issues involved are mostly already done, as the federal government is currently defending several other similar challenges to the Act that are making their way through the appellate courts. Furthermore, the legal issues specific to this case have already been fully and very competently briefed. With a few additional modifications and edits (to comply with the appellate rules), the parties could probably just change the caption of the case, add colored covers, and be done with their briefing.

After careful consideration of the factors noted above, and all the arguments set forth in the defendants' motion to clarify, I find that the motion, construed as a motion for stay, should be GRANTED. However, the stay will be conditioned upon the defendants filing their anticipated appeal within seven (7) calendar days of this order and seeking an expedited appellate review, either in the Court of Appeals or with the Supreme Court under Rule 11 of that Court. See, e.g., NML Capital Ltd. v. Republic of Argentina, 2005 WL 743086, at *5 (S.D.N.Y. Mar. 31, 2005) (district court granted motion to stay its own ruling, "conditioned on as prompt as possible appeal and a motion for an expedited appeal").

**III. Conclusion**

As I wrote about two weeks after this litigation was filed: "the citizens of this country have an interest in having this case resolved as soon as practically possible" (doc. 18 at 4). That was nearly eleven months ago. In the time since, the battle lines have been drawn, the relevant case law marshaled, and the legal arguments refined. Almost everyone agrees that the Constitutionality of the Act is an issue that will ultimately have to be decided by the Supreme Court of the United States. It is very important to everyone in this country that this case move forward

[8] I note that two of the pending appeals (in the Fourth and Sixth Circuits) are apparently proceeding on an expedited basis.

as soon as practically possible.

Therefore, the defendants' motion to clarify (doc. 156) is GRANTED, as set forth above. To the extent that motion is construed as a motion to stay, it is also GRANTED, and the summary declaratory judgment entered in this case is STAYED pending appeal, conditioned upon the defendants filing their notice of appeal within seven (7) calendar days of this order and seeking an expedited appellate review.

DONE and ORDERED this 3rd day of March, 2011.

/s/ *Roger Vinson*
ROGER VINSON
Senior United States District Judge

# Commandeering the People: Why the Individual Health Insurance Mandate is Unconstitutional


N.Y.U. J.L. & Liberty (forthcoming, 2010)



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*that the Supreme Court has held to be an improper exercise of the commerce power. The very few mandates that are imposed on the people pertain to their fundamental duties as citizens of the United States, such as the duty to defend the country or to pay for its operation. A newfound congressional power to impose economic mandates to facilitate the regulation of interstate commerce would fundamentally alter the relationship of citizen and state by unconstitutionally commandeering the people.*

*In Part V, I conclude with a "realist" assessment of likelihood that the Supreme Court will actually find the mandate to be unconstitutional.*

## I. INTRODUCTION: WHAT THE CONSTITUTION SAYS

The "Patient Protection and Affordable Care Act" includes what is called an "individual responsibility requirement" that all persons buy health insurance from a private company.[1] Is this requirement constitutional? There are three ways to analyze whether a law is constitutional or not. Does it conflict with what the Constitution says? Does it conflict with what the Supreme Court has said? Are there five votes for a particular result? Unless we are clear about which sense of "unconstitutional" we are using, we are likely to talk past each other.

In my book *Restoring the Lost Constitution*,[2] I defend interpreting the text of the Constitution according to its original public meaning. And I also contend that the evidence is overwhelming that the core original public meaning of "commerce" was trade or exchange of goods, including their transportation. Commerce means "with merchandise" and shares the same root as "merchants." Even broadened to include all "intercourse" between states, commerce is still confined to the communication of something—whether goods, people, or messages—from one state to another. Commerce constitutes a subset of economic activity that is distinct from the activities of manufacturing or agriculture, both of which involve the production of the things to be transported or communicated from one state to another.

Not only was this the original meaning of "commerce," but the Supreme Court has never expressly updated or broadened its meaning of the Commerce Clause, which says that Congress has the power "to regulate commerce . . . among

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[1]Patient Protection and Affordable Care Act, Pub. L. 111-148, §1501, 124 Stat. 119 (2010).

[2]RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: The Presumption of Liberty, (Princeton University Press 2005).

manufacturing or agriculture, is to be regulated exclusively by the states.

And so matters stood for 75 years—or more accurately for 150 years since the Founding—until the New Deal Supreme Court revisited the issue in 1944. In *United States v. South-Eastern Underwriters*,[7] the Court for the first time allowed Congress to regulate the interstate insurance business. In his opinion, Justice Black purported to adhere to original meaning. "Ordinarily courts do not construe words used in the Constitution so as to give them a meaning more narrow than one which they had in the common parlance of the times in which the Constitution was written."[8] He then concluded that, "[t]o hold that the word 'commerce,' as used in the Commerce Clause, does not include a business such as insurance would do just that."[9] Based only on a solitary passing observation by Alexander Hamilton concerning insurance, and the fact that "the dictionaries, encyclopedias, and other books of the period show that it included trade,"[10] Justice Black contended that

> a heavy burden is on him who asserts that the plenary power which the Commerce Clause grants to Congress to regulate 'Commerce among the several States' does not include the power to regulate trading in insurance to the same extent that it includes power to regulate other trades or businesses conducted across state lines.[11]

But what of *Paul* and the seventy-five years' worth of cases that relied on it as precedent? Justice Black made short work of the now-hallowed doctrine of *stare decisis*. He contended that all of these cases involved upholding state insurance regulations, which were essential in the absence of congressional regulation. That states may regulate insurance when Congress abstained did not deprive Congress of its power to enter the field now that it finally had. And so was born the authority for Congress to regulate health insurance companies today that have, until now, been exclusively regulated by the states. This is thanks to the McCarran-Ferguson Act[12] passed by Congress in the wake of *South-Eastern Underwriters* to preserve the existing state regulatory schemes.

It is not my purpose here to demonstrate that the New Deal Court was wrong and even disingenuous when it claimed that the power to regulate the

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[7]United States v. South-Eastern Underwriters, 322 U.S. 533 (1944).
[8]*Id.* at 539 (Black, J.).
[9]*Id.*
[10]*Id.*
[11]*Id.* (footnote omitted).
[12]McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (1945).

*United States v. Lopez*[16] that the Gun Free School Zone Act unconstitutionally exceeded the commerce power of Congress. They interpreted this case as an aberration. By 1995, Congress had become so complacent about the scope of its powers that it did not even bother to make findings about why the act was within its commerce power. Most law professors were confident that, in the future, the Court would uphold any law if Congress made adequate findings that the activity it sought to regulate had a substantial effect on interstate commerce.

So law professors were, once again, surprised when the Supreme Court in 2000 held in *United States v. Morrison*[17] that the Violence Against Women Act was unconstitutional—notwithstanding extensive hearings and findings about the substantial effects of violence against women on interstate commerce. In the wake of *Morrison*, law professors started to believe that the Court just might be serious about drawing a line between what is national and what is local, and lower courts started to be more receptive to Commerce Clause challenges.

In one such case I helped bring on behalf of Angel Raich and Diane Monson, the Ninth Circuit held that the Controlled Substances Act was unconstitutional as applied to marijuana grown at home for medical use as authorized by state law.[18] When the Supreme Court in *Gonzales v. Raich*[19] turned away this challenge, however, law professors breathed a sigh of relief that they had been right all along. They reverted to their pre-*Lopez* understanding that Congress can do pretty much whatever it wants under its commerce power.

Indeed, the new conventional wisdom is that, so long as Congress establishes a sweeping and ambitious regulatory scheme, it can reach any activity—whether economic or not—that it deems to be essential to that scheme. In other words, the more grandiose the claim of power by Congress, the stronger is its claim of constitutionality.

Hence some law professors have breezily asserted that Congress may, for the first time in American history, use its commerce power to mandate that all individuals in the United States engage in economic activity. After all, this mandate is essential to Congress's grandiose new scheme regulating private insurance companies. So under *Raich*, it must be constitutional.

Of course, when evaluating the individual mandate, five Justices are always free to disregard what the Court has previously said, just as Justice Black

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[16]United States v. Lopez, 514 U.S. 549 (1995).
[17]United States v. Morrison, 529 U.S. 598 (2000).
[18]Raich v. Ashcroft, 352 F.3d 1222 (9th Cir. 2003).
[19]Gonzalez v. Raich, 545 U.S. 1 (2005).

Then in 1941, in *United States v. Darby*[26] the Court further expanded the power of Congress. Exactly how it did so will prove important in assessing the constitutionality of the individual mandate. In *Darby*, the Court separately considered two distinct powers asserted by Congress in the Fair Labor Standards Act. First was the "power to prohibit the shipment in interstate commerce of lumber manufactured by employees whose wages are less than a prescribed minimum or whose weekly hours of labor at that wage are greater than a prescribed maximum."[27] In assessing this claim of power, as in *Jones & Laughlin Steel*, the Court in *Darby* did not reject the original meaning of "commerce." Instead, it said that, "[w]hile manufacture *is not of itself interstate commerce* the shipment of manufactured goods interstate *is such commerce* and the prohibition of such shipment by Congress is indubitably a regulation of the commerce."[28] As authority for this proposition the Court relied heavily on Chief Justice Marshall's evaluation of the Commerce Clause in *Gibbons v. Ogden.*[29] In sum, the prohibition on shipping specified goods in interstate commerce was a direct exercise of Congress's power over interstate commerce.

But while *Darby* did not expand the meaning of "commerce" to uphold this part of the statute, it did importantly expand the power of Congress by refusing to examine whether the Congressional assertion of its commerce power was a *pretext* for reaching activity that fell within the police power of states: "The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control,"[30] wrote Justice Stone. "Whatever their motive and purpose, regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause."[31]

The Court then turned its attention to a different claim of power, the power "to prohibit the employment of workmen in the production of goods 'for interstate commerce' at other than prescribed wages and hours."[32] In assessing "whether such restriction on the production of goods for commerce is a permissible exercise of the commerce power," the Court held that the "power of Congress over

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[26]United States v. Darby, 312 U.S. 100 (1941).
[27]*Id.* at 105.
[28]*Id.* at 113 (Stone, J.) (emphases added).
[29]*See id.* at 113-14.
[30]*Id.* at 115.
[31]*Id.*
[32]*Id.* at 105.

commerce or the ability of Congress to regulate interstate commerce, therefore, defines the scope of Congress's power under the Necessary and Proper Clause. So all future cases applying this doctrine are not, strictly speaking, "Commerce Clause cases." Instead, they are "Necessary and Proper Clause cases" in the context of the regulation of interstate commerce.[38]

Then came *Wickard v. Filburn*,[39] in which the Court upheld the provisions of the Agricultural Adjustment Act that limited the quantity of wheat that an individual farmer could grow not to sell on the interstate market, but to consume on the farm by feeding his livestock and his family. As historian Barry Cushman has chronicled,[40] the implications of upholding this claim of power were so disturbing to the New Deal Justices that they held the matter over for reargument. Yet, in his opinion, Justice Jackson made the case seem like a natural application of the Necessary and Proper Clause. "The question would merit little consideration since our decision in *United States v. Darby*, sustaining the federal power to regulate production of goods for commerce," he wrote, "except for the fact that this Act extends federal regulation to production not intended in any part for commerce but wholly for consumption on the farm."[41]

In *Wickard*, the government contended that "the statute regulates neither production nor consumption, but only marketing, and, in the alternative, that, if the Act does go beyond the regulation of marketing, it is sustainable as a 'necessary and proper' implementation of the power of Congress over interstate commerce."[42] Once again, the Court in *Wickard* neither questioned nor expanded the word "commerce" beyond its original meaning but opted instead to rely on the Necessary and Proper Clause: "[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. . . ."[43] It then adopted the principle that the fact that Roscoe Filburn'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

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[38] *See* J. Randy Beck, *The New Jurisprudence of the Necessary and Proper Clause*, 2002 U. Ill. L. Rev. 581, 619 (2002) ("the 'affecting commerce' cases derive from the Necessary and Proper Clause. . . ."); and *id.* at 618-18 (discussing *Darby*).

[39] Wickard v. Filburn, 317 U.S. 111 (1942).

[40] BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: The Structure of a Constitutional Revolution 212-19 (Oxford University Press 1998).

[41] *Wickard*, 317 U.S. at 118.

[42] *Id.* at 119 (citing Art. I, §8, cl. 18).

[43] *Id.* at 125 (emphasis added).

He then identified "three broad categories of activity that Congress may regulate under its commerce power."[53] First, "Congress may regulate the use of the channels of interstate commerce."[54] Second, "Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities."[55] Finally, "Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, those activities that substantially affect interstate commerce."[56]

Turning to the third of these categories, he offered the following summary of the "substantial effects" cases decided since the New Deal: "[W]e have upheld a wide variety of congressional Acts regulating intrastate economic activity where we have concluded that the activity substantially affected interstate commerce."[57] He then provided the following examples: "the regulation of intrastate coal mining, intrastate extortionate credit transactions, restaurants utilizing substantial interstate supplies, inns and hotels catering to interstate guests, and production and consumption of home-grown wheat."[58] From these, he concluded that "the pattern is clear. Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained."[59] Because the Gun Free School Zone Act regulated a "class of activity" that lay outside the scope of this doctrine—the noneconomic activity of possessing a gun within 1000 feet of a school—it was held to be unconstitutional.

The above analysis of *N.L.R.B.*, *Darby*, *Wickard*, *Heart of Atlanta*, and *McClung* reveals that the power of Congress to reach intrastate economic activity that substantially affects interstate commerce rests on a combination of the Commerce and Necessary and Proper Clauses. In *Lopez*, the Court restricted this combined power to the regulation of economic activity. Excluded from the reach of the Commerce and Necessary and Proper Clauses, therefore, was wholly intrastate noneconomic activity. "Even *Wickard*," wrote Chief Justice Rehnquist, "which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that the possession of

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[53] *Id.* at 558.
[54] *Id.*
[55] *Id.*
[56] *Id.* at 558-59.
[57] *Id.* at 559.
[58] *Id.* at 559-60.
[59] *Id.* at 560 (Rehnquist, C.J.).

and which were conducive to the end."[66] He then considers a number of examples where a particular measure is "conducive to" the execution of an enumerated power.[67]

In response to stinging criticisms of the decision, Marshall defended his opinion in a series of newspaper essays writing pseudonymously as "A Friend to the Constitution."[68] While granting Congress has discretion as to means, Marshall denied that the Court ever said "that the word 'necessary' means whatever may be 'convenient,' or 'useful.' And when it uses 'conducive to,' that word is associated with others plainly showing that *no remote, no distant conduciveness to the object*, is in the mind of the court."[69] He then denied that a federal law prohibiting state legislatures from levying a land tax would be an "'appropriate' means, or any means whatever, to be employed in the collecting the tax of the United States. It is not an instrument to be so employed. It is not a means 'plainly adapted,' or 'conducive to' the end."[70] Indeed, the "passage of such an act would be an attempt on the part of congress, 'under pretext of executing its powers, to pass laws for the accomplishment of objects not intrusted to the government.'"[71]

In a later letter, Marshall reaffirmed that "the choice of . . . means devolve on the legislature, whose right, and whose duty it is, to adopt those which are most advantageous to the people, provided they be within the limits of the constitution."[72] Nevertheless, "[t]heir constitutionality depends on their being the natural, direct, and appropriate means, or the known and usual means, for the execution of a given power."[73]

Marshall claimed the authority of the "masterly argument" made by, then-Secretary of the Treasury, Alexander Hamilton in his opinion provided to President Washington on behalf of the constitutionality of the first national bank. Marshall quotes this passage: "That every power vested in a government, is, in its nature, *sovereign*, and includes, by *force* of the *term* a right to employ all the

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[66] *Id.* at 415.
[67] *Id.* at 416-17.
[68] *See* JOHN MARSHALL'S DEFENSE OF MCCULLOCH V. MARYLAND 187 (Gerald Gunther ed., Stanford University Press 1969) (from essay of July 5, 1819).
[69] *Id.* at 100 (from essay of April 28, 1819) (emphasis added).
[70] *Id.* (quoting *McCulloch*). Marshall here uses the same example as Hamilton does in the Federalist Papers. *See* The Federalist, No. 33, at 201 (Alexander Hamilton) (Modern Library 1937).
[71] *Id.* (quoting *McCulloch*).
[72] *Id.* at 186 (from essay of July 5, 1819).
[73] *Id.*

interstate commerce as to make it appropriate for Congress to reach. The distinction is useful because the regulation of intrastate economic activity is far more likely to be closely related to interstate commerce than is the vast array of intrastate noneconomic activity. As Randy Beck has explained, "Given the close relationship between intrastate and interstate economic activity, a statute regulating local economic conduct will usually be calculated to accomplish an end legitimately encompassed within the plenary congressional authority over interstate commerce."[81]

By adopting the distinction between economic and noneconomic activity, the Court provided a workable doctrine by which the necessity of a particular regulation of intrastate activity could be assessed without need for a court to evaluate 'the more or less necessity or utility' of the measure.[82] By limiting the substantial effects doctrine to economic intrastate activity, the Supreme Court provided the modern legal 'test' or 'criterion of constitutionality'—to adopt Hamilton's terminology—for whether a regulation of intrastate activity is what 'may truly be said' to be *necessary* under the Necessary and Proper Clause. By this doctrine Congress is held within its enumerated powers and denied the 'right to do merely what it pleases.'

Five years later, in *United States v. Morrison*, the Court reaffirmed the economic-noneconomic distinction within its substantial affects doctrine: "While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature."[83] And it rejected "petitioners' reasoning [that] would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption."[84]

Once again, Justice Breyer questioned the economic-noneconomic

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[81]Beck, *supra* note 38, at 625. Beck considers this test to be effectuating the requirement that a law be "proper," rather than the requirement it be "necessary." *See id.* at 648. Assessing whether this claim is correct on originalist grounds would require the examination of a mass of evidence and is beyond the scope of this article. What matters for present purposes is that Beck does not dispute, but instead insists, that the economic-noneconomic distinction in existing "Commerce Clause" doctrine is actually effectuating and limiting the scope of the Necessary and Proper Clause.

[82]*See id.* at 626 (in *Lopez* the Court sought to address the degree question "on a more categorical basis, rather than through open-ended, case-by-case consideration.").

[83]United States v. Morrison, 529 U.S. 598, 613 (2000).

[84]*Id.* at 615.

Justice Stevens explained that *Wickard* "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 interstate market in that commodity."[90] He then rejected Angel Raich's claim that the production of her marijuana was not "economic," by relying on the definition of "economic" found in a 1966 Webster's Dictionary. "Unlike those at issue in *Lopez* and *Morrison*, the activities regulated by the CSA are quintessentially economic. 'Economics' refers to 'the production, distribution, and consumption of commodities.'"[91] So nothing in Justice Stevens' opinion in *Raich* remotely challenges the framework of *Lopez* or *Morrison*—not even its dictionary definition of "economic."

Moreover, invoking Webster's Dictionary allowed the majority to avoid adopting the government's theory that any activity that substituted for a market activity was economic.[92] The government's theory was founded on law professors' longstanding misinterpretation of *Wickard*: that, because Roscoe Filburn's consumption of wheat on his farm substituted for his buying wheat in interstate commerce, his intrastate activities affected interstate commerce and could be regulated. But, in *Wickard*, it was not the effect on interstate commerce that was used to justify regulating home grown wheat, but the fact that home consumption interfered with Congress's price control scheme for interstate wheat.

In a crucial passage, Justice Jackson explained that "[t]his 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.*"[93] In other words, Congress's power to maintain the price of interstate wheat would be defeated if it could not reach the intrastate wheat consumed on the farm, which the record showed exceeded 20% of the national supply of wheat. In *Wickard*, therefore, it was not the effect of intrastate activity on interstate commerce that mattered, but the effect of substituting intrastate wheat for interstate wheat on Congress's ability to regulate interstate trade in wheat—in particular to control the supply of wheat so as to raise interstate prices. If one assumes that *this* is within the power of Congress, then it becomes necessary to reach intrastate wheat to accomplish this end.

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[90] *Id.* at 18.
[91] *Id.* at 25.
[92] Reply Brief for Petitioners, Gonzales v. Raich, 545 U.S. 1 (2005) (No. 03-1454).
[93] *Id.* at 128-129 (emphasis added).

of how to implement that power.

### *B. Applying Existing Doctrine to the Individual Insurance Mandate*

How does the individual mandate fare under existing Commerce Clause and Necessary and Proper Clause doctrine? First we have to ascertain under which theory Congress purported to act. Does the mandate purport to regulate or protect the instrumentalities of interstate commerce? Does it purport to regulate or protect persons or things in interstate commerce, even though the threat may come only from intrastate activities? Or does it purport to regulate those activities having a substantial relation to interstate commerce, those activities that substantially affect interstate commerce?

In the Act, Congress asserts that "[t]he individual responsibility requirement provided for in this section . . . is commercial and economic in nature, and substantially affects interstate commerce, as a result of the effects described in paragraph (2)."[96] Here Congress is clearly invoking the third category identified in *Lopez* and *Morrison*—and preserved in *Raich*: the substantial effects doctrine. As we have seen, the substantial effects doctrine is not a pure application of the Commerce Clause, but is actually an assertion of the Necessary and Proper Clause to reach activity that is neither interstate nor commerce.

Therefore, under the existing law assessing whether a law reaching intrastate activity is "necessary" to the regulation of interstate commerce, we must ask, (a) what is the "class of activity" reached by the statute, and (b) is it economic or noneconomic? In answering this question, the first thing to notice about all of the substantial effects cases—including *N.L.R.B.*, *Darby*, *Wickard*, *Heart of Atlanta*, *McClung*, *Lopez*, *Morrison*, and *Raich*—is that each concerns the regulation of a class of activities in which persons have freely chosen to engage: manufacturing steel or lumber, operating a hotel or restaurant, possessing a gun, perpetrating gender-motivated violence, or growing marijuana. In sum, all these cases involve activity, not inactivity.

None of these cases concerns mandating that citizens engage in economic activity by entering into a contract with a private company. Indeed, Congress recognizes that existing doctrine requires economic activity in its first "finding," when it states: "The requirement regulates *activity* that is commercial and

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[96]Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1501(a)(1), 124 Stat. 119 (2010).

Such a doctrine would run afoul of what the *Constitution* says about the powers of Congress, what the *Supreme Court* has consistently said about the scope of those powers, and even what Chief Justice Marshall and Alexander Hamilton said about the scope of the Necessary and Proper Clause. Of course, unlike district and circuit courts that are bound to follow existing Supreme Court doctrines, the Supreme Court itself may move beyond what it has previously said about the scope of congressional powers. But, for reasons I shall discuss in the Part V, I sincerely doubt there are five votes today to take the power of Congress where it has never gone before.

## III. THE INDIVIDUAL MANDATE AND EXISTING TAX POWER DOCTRINE

Unable to produce a single example of Congress having used its Commerce and Necessary and Proper Clause powers in this way, defenders of the personal mandate began to shift grounds. On March 21st, the same day the House approved the Senate version of the legislation, the staff of the Joint Committee on Taxation released a 157-page "technical explanation" of the bill.[98] The word "commerce" appeared nowhere therein. Instead, the personal mandate is dubbed an "Excise Tax on Individuals Without Essential Health Benefits Coverage."[99] But while the enacted bill does impose excise taxes on "high cost," employer-sponsored insurance plans and "indoor tanning services,"[100] the statute never describes the regulatory "penalty" it imposes for violating the mandate as an "excise tax." It is expressly called a "penalty."[101] This shift will not work.

### *A. Existing Tax Power Doctrine*

In the 1920s, when Congress wanted to prohibit activity that was then deemed to be solely within the police power of states, it tried to penalize the activity using its tax power. In *Bailey v. Drexel Furniture*,[102] the Supreme Court struck down such a penalty saying, "there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and

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[98] JOINT COMM. ON TAXATION, TECHNICAL EXPLANATION OF THE REVENUE PROVISIONS OF THE "RECONCILIATION ACT OF 2010," AS AMENDED, IN COMBINATION WITH THE "PATIENT PROTECTION AND AFFORDABLE CARE ACT", JCX-18-10 (2010).
[99] JCX-18-10 at 31.
[100] I.R.C. §5000(B) (2010).
[101] I.R.C. §5000(A) (2010).
[102] Bailey v. Drexel Furniture, 259 U.S. 20 (1922).

As the New Deal Court said in *Sonzinsky v. United States* (1937): "Inquiry into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it is beyond the competency of courts."[110] But this principle cuts both ways. Neither has the Court ever looked behind Congress's inadequate assertion of its commerce power to speculate as to whether a measure could be justified as a tax.

### *B. Applying Existing Doctrine to the Individual Insurance Mandate*

Congress simply did not enact the personal insurance mandate pursuant to its tax powers. To the contrary, the statute expressly says the mandate "regulates activity that is commercial and economic in nature."[111] It never mentions the tax power. The penalty is simply there to enforce the health insurance requirement, which cannot possibly be construed as a tax.

The Court in *Sonzinisky* also offered this observation: "The case is not one where the statute contains *regulatory provisions related to a purported tax* in such a way as has enabled this Court to say in other cases that the latter is a penalty resorted to as a means of enforcing the regulations."[112] But this exactly describes the relationship between the individual requirement and the so-called tax. The penalty is clearly being "resorted to as a means of enforcing"[113] a regulation of commerce. The reasoning of *Sonzinisky*, therefore, strongly undercuts the claim that the penalty in the Act is a tax.

The constitutionality of the mandate must rise or fall as a regulation. Its constitutionality is not affected or enhanced by its conjunction with a penalty in the Internal Revenue Code. And if the health insurance requirement is unconstitutional because it exceeds the powers of Congress, then there is nothing for the penalty to enforce.

Moreover, unlike *Sonzinisky*, the penalty does not even "purport" to be a tax. It is called a "penalty." But, although the penalty was inserted into the Internal Revenue Code, Congress then expressly severed the penalty from the normal enforcement mechanisms of the tax code. The failure to pay the penalty "shall not be subject to any criminal prosecution or penalty with respect to such

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[110]Sonzinsky v. United States, 300 U.S. 506, 513-14 (1937).
[111]Patient Protection and Affordable Care Act, Pub. L. 111-148 §1501(a)(2)(A), 124 Stat. 119 (2010).
[112]*Sonzinsky*, 300 U.S. at 513.
[113]*Id.*

regulation of commerce. Nowhere was the purpose of the penalty separately identified as revenue raising.

To the contrary, in Section 9000 et seq of Title IX of the Act, entitled, "Revenue Provisions,"[121] Congress expressly identified all the revenue raising provisions therein including, for example, the "Excise Tax on High Cost Employer-Sponsored Health Coverage."[122] We know this list was exhaustive because its purpose was to score the cost of the Act when Congress was laboring to bring its price tag below one trillion dollars. The more revenue it could list in Section 9000 et seq, the lower the cost. Yet, the penalty enforcing the mandate is nowhere listed as a source of revenue.

In short, the "penalty" is explicitly justified as a penalty to coerce compliance with a regulation of economic activity and not as a tax. None of the purposes for the penalty involve raising revenue and the section of the Act identifying revenue provisions overlooks the penalty. So while Congress need not specify expressly what power it may be exercising, there is simply no authority for the Court to recharacterize a regulation as a tax when doing so is contrary to the express and actual regulatory purpose of Congress.

We can summarize this analysis as follows. Under existing tax power doctrine: (1) the health insurance mandate does not fit the definition of a tax; (2) when considering whether the penalty is a tax, courts will not look behind the fact that the statute described it as a "penalty" to enforce a regulation of commerce to see if the "penalty" was really a tax; (3) if a court did look behind the labels of "penalty" and "requirement"—as the government would need for it to do—it would then have to decide whether the purpose of the exaction was to raise revenues, or whether it genuinely operates instead as a penalty for failing to adhere to the requirement.

So whether we stick with form, or move behind the form to inquire about the substance of the measure, under existing doctrine neither the mandate to buy health insurance, nor the penalty enforcing it, is a tax.[123] Once again, defenders

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[121]Pub. L. No. 111-148, § 9000 et seq, 124 Stat. 119 (2010).

[122]I.R.C. §4980I

[123]Of course, if it is a tax, then it may be neither an income nor an excise tax but instead a direct tax on individuals. If so, then because it is not equally apportioned among the several states, it would be an unconstitutional tax. *See* Steven J. Willis & Nakku Chung, *Constitutional Decapitation and Healthcare*, 128 Tax Notes 169 (2010). But I seriously doubt the Court will ever reach this question given (a) the text of the statute, (b) what it has previously said about examining the true motives of Congress and the difference between and tax and a penalty, and (c) the radical implications of accepting the government's argument.

*Eastern Underwriters*[126] – and (b) it can use this power to impose regulations banning pre-existing conditions, then (c) it becomes necessary to mandate that everyone buy insurance. Hence, although not itself a regulation of commerce, the mandate is a necessary and proper means to exercise Congress's power over interstate commerce.

The government's argument is based on *dicta* in *United States v. Lopez*. In his opinion, Chief Justice Rehnquist noted that the Gun Free School Zone Act was 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."[127] This principle was mentioned again by Justice Stevens writing for the majority in *Raich*.[128] As we already saw, because the activity in *Raich* was deemed by the Court to be "economic" in nature, Justice Stevens' assertion of this principle did not entail it would apply to noneconomic activity.

That Congress could reach intrastate noneconomic activity under this theory was propounded by Justice Scalia in his concurring opinion in *Raich*: "Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce."[129] And he then grounded this principle in the Necessary and Proper Clause. "As we implicitly acknowledged in *Lopez*, . . . Congress's authority to enact laws necessary and proper for the regulation of interstate commerce is not limited to laws directed against economic activities that have a substantial effect on interstate commerce."[130] In this way, Justice Scalia affirmed the understanding that the line of cases upholding the power of Congress to reach wholly intrastate activity are based on the Necessary and Proper Clause.

Of course, a majority of the Supreme Court has yet to adopt Justice Scalia's theory as a way of reaching intrastate economic and noneconomic activity. But to justify the health insurance mandate, the Supreme Court would have to go beyond anything previously written by Justice Scalia, much less by

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[126]United States v. South-Eastern Underwriters, 322 U.S. 533 (1944).

[127]United States v. Lopez, 514 U.S. 549, 561 (1995).

[128]*See* Gonzales v. Raich, 545 U.S. 1, 24-25 (2005) (Stevens, J.) (The "classification [of marijuana as a Schedule I substance], 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.'").

[129]*Id.* at 37.

[130]*Id.* at 36; *see also, id.* at 35 (Scalia, J., concurring) ("Our cases show that the regulation of intrastate activities may be necessary to and proper for the regulation of interstate commerce. . . .").

This is a serious conceptual problem with as-applied Commerce Clause challenges. I believe this was the problem that Justice Scalia was trying to address in his concurring opinion when he invoked the Necessary and Proper Clause to explain why Congress could sometimes reach even noneconomic activity as a means of regulating commerce that was indeed interstate. Justice Scalia would defer to Congress's judgment that, as in *Wickard*, it needed to draw a circle around a class of activity that includes some intrastate noneconomic activity.

In this regard, *Raich* truly does represent the same type of problem dealt with in *Wickard*. Once it is conceded that Congress has power under the Commerce Clause over a class of interstate activities—whether regulating the interstate price of wheat or prohibiting the interstate commerce in marijuana—then, according to Justice Scalia, under the Necessary and Proper Clause, it can reach even intrastate activity of the same kind if, in its judgment, the failure to reach this activity will undercut its ability to regulate interstate commerce. The need to address the problem of defining the relevant class of activity also explains why Justice Stevens' opinion stressed the fungible nature of marijuana, and even included the production of a "fungible commodity" in his definition of commerce.[133]

Properly understood, then, both *Wickard* and *Raich* deal with an exceedingly narrow problem that arises with as-applied Commerce Clause challenges: defining the relevant class of activities for purposes of the challenge. Had either court fully appreciated the problem it faced, it would not have had to strain so mightily to reach its results.[134] In his concurrence, Justice Scalia came the closest to the mark, but his analysis would have been tighter and more constrained had he confined himself to as-applied challenges to the regulation of the intrastate subset of a class of activities that are largely interstate in nature.

In contrast with *Raich* (and *Wickard*), the lawsuits against the individual mandate are all facial challenges to the "class of activity" defined in the statute.

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[133] *Id.* at 22 (Stevens, J.) ("[A]s 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 Several States.").

[134] Nor would this difficulty arise if Nick Rosenkranz is right that there should be no "as-applied" Commerce Clause challenges given that the subject of the Commerce Clause is Congress and thus the proper constitutional question is whether Congress exceeds its authority when it enacts a statute, not when the statute is applied. *See* Nicholas Quinn Rosenkranz, The Subjects of the Constitution, 62 Stan. L. Rev. 1209, 1273-79 (2010).

means-ends fit, discussed above, when assessing a measure's necessity. The italicized portions concern the requirement that a means that may be conducive to an enumerated end and, therefore, necessary must also be appropriate or proper. First, such a means must not be prohibited, and second it must be consistent with the letter and spirit of the constitution.

Of course, because mandating economic activity on the grounds that it is essential to the regulation of commerce is unprecedented, there are no judicial opinions directly addressing whether such a mandate is a means for carrying into execution a regulation of interstate commerce that is "within the letter and spirit of the Constitution." But neither has the Supreme Court been entirely silent on the issue of the propriety of means when Congress is seeking to exercise its commerce power. As it happens, the means it held to be improper was a mandate on state governments.

In 1992, Congress used its commerce power to mandate that any state that refused to enter into interstate compacts to dispose of nuclear waste must take title to the nuclear waste itself. In *New York v. United States*,[137] the Court held that this mandate constituted unconstitutional commandeering of state legislatures. In her opinion for the Court, Justice O'Connor explained that "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions."[138] She characterized this as unconstitutional "commandeering," a term she took from the 1981 case of Hodel v. Virginia Surface Mining & Reclamation Ass'n.:[139] "Congress may not simply 'commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'"[140] In *New York*, the Court held that "'the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program,' an outcome that has never been understood to lie within the authority conferred upon Congress by the Constitution."[141]

Then, in 1997, Congress used its commerce power to mandate that local sheriffs run background checks on gun buyers. In *Printz v. United States*,[142] the Supreme Court held that this too constituted improper "commandeering" of state executive branch officials. In his opinion for the Court, Justice Scalia identified a

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[137]New York v. United States, 505 U.S. 144 (1992).
[138]*Id.* at 162 (O'Connor, J.).
[139]Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981).
[140]*New York*, 505 U.S. at 161 (quoting *Hodel*).
[141]*Id.* at 176 (quoting *Hodel*, 452 at 288).
[142]Printz v. United States, 521 U.S. 898 (1997).

Scalia made clear that, however necessary Congress might deem it to be, imposing mandates on state legislatures and executive officers was an improper means to the end of regulating commerce among the several states.

Nor has Justice Scalia backed away from this position. In his concurring opinion in *Raich*, referring to the portions of Chief Justice Marshall's opinion in *McCulloch* emphasized above, he wrote: "These phrases are not merely hortatory. For example, cases such as [*Printz* and *New York*] affirm that a law is not '*proper* for carrying into Execution the Commerce Clause' '[w]hen [it] violates [a constitutional] principle of state sovereignty.'"[150] But this principle did not apply in *Raich*, he said, because "neither respondents nor the dissenters suggest any violation of state sovereignty of the sort that would render this regulation 'inappropriate' . . ."[151]

The Supreme Court's most recent consideration of the meaning of the Necessary and Proper Clause is *United States v. Comstock*,[152] which upheld the constitutionality of a federal statute allowing the civil commitment of sexually dangerous criminals after the expiration of their sentence for the commission of a federal crime. While it gives the Necessary and Proper Clause an expansive reading, *Comstock* offers little, if any, support for the individual mandate. Justice Breyer's opinion purported to be narrow, identifying five factors that led the Court to its conclusion.[153]

Justice Breyer's opinion may well have been so written to attract the vote of Chief Justice Roberts. Even so, Justices Kennedy and Alito joined only in the result. In his concurring opinion, Justice Kennedy advocated enhanced scrutiny of the connection between means and ends when considering claims of power under the Commerce Clause,[154] strongly signaling that his joining the majority in

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*Sweeping Clause*, 43 Duke L.J. 267 (1993). Randy Beck disputes both Justice Scalia's and Lawson & Granger's reading of "proper" on originalist grounds, but this issue is beyond the scope of this article's focus on existing doctrine. *See* Beck, *supra* note 38, at 626-48. *Cf.* Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. Pa. J. Const. L. 185, 188-215 (2003) (discussing original meaning of "necessary"). As suggested in Part I, both the regulations imposed on insurance companies and the insurance mandate imposed on individuals most likely exceed the original scope of the enumerated powers of Congress.

[150]Gonzales v. Raich, 545 U.S. 1, 39 (Scalia, J., concurring) (emphasis in original).

[151]*Id.* at 41.

[152]United States v. Comstock, 130 S.Ct. 1949 (2010).

[153]*See id.* at 1956-64.

[154]*See id.* at 1967 (Kennedy, J., concurring):

> *Raich*, *Lopez*, and *Hodel* were all Commerce Clause cases [that] require a tangible link to commerce, not a mere conceivable rational relation, as in *Lee*

### C. *Why the Individual Mandate is an Improper Means to the Regulation of Interstate Commerce*

Because an individual mandate is an unprecedented means of executing the commerce power, the Supreme Court has never opined on whether it is "proper." When the Supreme Court has been silent on a question, it is time to turn to the Constitution itself to see if it provides any guidance on the propriety of the government's novel claim of Congressional power.

As we have seen, the anti-commandeering cases that limit the commerce power of Congress were ultimately grounded by the Supreme Court in the text of the Tenth Amendment. Yet the letter of the Tenth Amendment is not limited to states. It says that the "powers not delegated by the Constitution to the United States . . . are reserved to the states respectively, *or to the people*".[160] As Justice Thomas wrote in his dissenting opinion in *U.S Term Limits v. Thornton*, the Tenth Amendment "avoids taking any position on the division of power between the state governments and the people of the States"[161]—a position he reasserted just last term in his dissenting opinion in *Comstock* in which Justice Scalia joined.[162] In this way, the text of the Tenth Amendment recognizes popular sovereignty as it does state sovereignty.

The Supreme Court has not been silent on the sovereignty of the people. In *Chisholm v. Georgia,*[163] its first great constitutional case, the Supreme Court examined the question of whether states were immune from being sued by individual citizens in federal court. By a vote of four to one, the Supreme Court rejected Georgia's claim of sovereign immunity and affirmed the power of an individual to sue a state for breach of contract in federal court.

To evaluate Georgia's claim of sovereign immunity, the Justices were compelled to examine the concept of sovereignty and its relationship with the power of individuals to sue a state to enforce his individual rights. As Justice Cushing observed: "The rights of individuals and the justice due to them, are as

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[160]U.S. CONST. amend. X. (emphasis added) (The Commonwealth of Virginia initially refused to ratify the Tenth Amendment because it thought the addition of these words to the proposal that its ratification convention had recommended to Congress vitiated the protection of state sovereignty. *See* Randy E. Barnett, *Kurt Lash's Majoritarian Difficulty*, 60 Stan. L. Rev. 937, 952-53 (2008) (describing Virginia's objection to this language and that of its U.S. Senators)).

[161]U.S. Term Limits v. Thornton, 514 U.S. 779, 848 (1995).

[162]United States v. Comstock, 130 S.Ct 1949, 1971 (2010) (Thomas, J., dissenting).

[163]Chisolm v. Georgia, 2 U.S. 419 (2 Dall.) (1793).

*Tribe of Florida v. Florida*, this presupposition was that, "each State is a sovereign entity in our federal system."[172]

But in affirming the underlying principle of state sovereignty within the federal system, the Supreme Court has never repudiated its early affirmation of popular sovereignty in *Chisholm*. In *Yick Wo v. Hopkins*,[173] the Supreme court reaffirmed that "in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts."

If commandeering the states is an improper means of executing a federal power under the "letter" of the Tenth Amendment "and spirit of the Constitution," might not commandeering the people be improper as well? Put another way, if imposing mandates on state legislatures and executives intrudes improperly into state sovereignty, might mandating the people improperly infringe on popular sovereignty?

Recall that, in *Printz*, Justice Scalia identified several sections of the constitution that presupposed the principle expressed in the Tenth Amendment.[174] As it happens, the text of the Constitution also contains several express prohibitions on commandeering the people. Persons may not be mandated to quarter soldiers in their homes in time of peace,[175] to testify against themselves,[176] or to labor for another.[177] Although private property may be taken "for public use" if just compensation is made, it may not be commandeered for private use.[178]

These express prohibitions on commandeering the people signal that mandates are different than *regulations* that tell persons who choose to engage in economic activity *how* they must do so — or that prohibit certain activities altogether. To see why, consider the duties the federal government does impose on the people: register for the draft and serve if called, sit on a jury, fill out a census form, and file a tax return. None of these duties are imposed via Congress's power to regulate economic behavior. Instead, all have traditionally been considered fundamental duties that each person owes to the government by virtue of American citizenship or residency. Each of these duties can be

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[172]Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 54 (1996) (Rehnquist, C.J.).
[173]Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) (Matthews, J.).
[174]*See, supra* notes 143-45.
[175]*See* U.S. CONST. Amend. III.
[176]*See* U.S. CONST. Amend. V.
[177]*See* U.S. CONST. Amend. XIII.
[178]*See* U.S. CONST. Amend. V.

the several states? The propriety of the mandate turns on this question.

What separates the United States from other countries is the minimal and fundamental nature of the duties its citizens owe the state. During World War II, the people were not commandeered to work in defense plants or buy war bonds. Even voting is not mandated in the United States. This is why so many Americans instinctively sense that empowering Congress to commandeer the people to engage in economic activities would fundamentally change the relationship between themselves and their government. Conversely, those who are not bothered by the individual mandate likely hold a very capacious notion of the duties owed by the citizen to the state—so capacious that they include 'the supreme and noble duty' to engage in any activity that Congress deems to be convenient to its regulation of interstate commerce.

In both *New York* and *Printz*, Justices O'Connor and Scalia supplemented their analysis with pragmatic reasons why state sovereignty is important in a federal system. For example, Justice O'Connor stressed the reduction in accountability "when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not preempted by federal regulation."[182] Mandates on states are improper because, "where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision."[183]

Likewise, the proposition that commandeering the people as a means of regulating commerce violates popular sovereignty is also supported by pragmatic considerations. Like mandates on states, the individual insurance mandate undermines political accountability, though in a different way. The public is acutely aware of tax increases. Rather than incur the political cost of imposing a general tax on the public using its tax powers, the mandate allowed Congress and the President to escape accountability for tax increases by compelling citizens to make payments directly to private companies.

That this was designed to obviate political accountability is evidenced by President Obama's high profile denial—while the Act was still pending in the Senate—that the mandate constituted a tax increase. The President needed to avoid accountability for breaking his repeated pledge not to raise taxes on persons making below a certain amount of money, so he vehemently denied that the

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[182]New York v. United States, 505 U.S. 144, 169 (1992) (O'Connor, J.).
[183]*Id.*

duties that have traditionally been recognized, the duty to purchase health insurance is entirely of Congress's creation. Because imposing such a duty upon the American people is improper, the American people retain their sovereign power to refrain from entering into contracts with private parties, even when commandeering them to do so may be convenient to the regulation of commerce among the several states.

## V. CONCLUSION: COUNTING TO FIVE

The third way of assessing constitutionality is to try to predict whether the Supreme Court will uphold or strike down the individual mandate. As everyone knows, the Supreme Court is loath to strike down any acts of Congress, but particularly legislation that enjoys popular approval and acceptance. If the "Patient Protection and Affordable Care Act" fits this description, I would predict that the Supreme Court would strive mightily to uphold it. I would also predict that, as in *Raich*, it would avoid appearing to adopt a virtually open-ended interpretation of the commerce power as the government had urged. Nor would it adopt the even more radical theory that Congress can use its tax power to penalize any activity or inactivity so long as the penalty is a fine collected by the IRS. Instead, it will invoke its already latitudinarian interpretation of the Necessary and Proper Clause to find that the mandate is an essential part of a broader regulatory scheme that would be undercut if this "economic decision" to "self-insure" cannot be regulated.

But suppose that when the "Patient Protection and Affordable Care Act" reaches the Court, it is perceived by the Justices to be unpopular. Suppose it is also widely perceived to have been adopted by a bare partisan majority employing unusual and suspect parliamentary maneuvers to avoid the consequences of the loss of the "Ted Kennedy's" seat in the Senate—an election that turned on opposition in Massachusetts (of all places) to this particular measure. Then suppose Democrats lose control of one or both houses of Congress after an election in which their members run away from the Act.

Now, I am not suggesting that the Supreme Court would strike down the individual mandate simply because a majority perceived it to be unpopular. But I do think that if the Court views the Act as manifestly unpopular, there may well be five Justices who are open to valid constitutional objections they might otherwise resist. This then returns us to the dubious justifications of the mandate based on the Commerce and Necessary and Proper Clauses or the tax power.

If the Act continues to be perceived as unpopular, I doubt that a majority

Indeed, the government faces a conundrum when it comes to the issue of severability. To justify the mandate under the Necessary and Proper Clause, it must contend that Congress deemed the mandate "essential" to its broader regulation of the insurance industry. But the harder it presses this point, the stronger grows the implication that Congress would not have intended to sever the mandate from the regulations imposing a costly burden on insurance companies. So the more plausible the government's claim of necessity, the less plausible becomes its assertion of severability. If the individual mandate is either held to be outside existing Commerce and Necessary and Proper Clause doctrine, or found to be "improper," there is therefore a compelling reason to invalidate the insurance regulations as well.

The ultimate appeal of the anti-commandeering principle, however, is that it so precisely identifies why the individual mandate has so riled the American people. In the United States, the people are supposed to commandeer the government, not the reverse. So, with Judge Hudson's ruling that the Virginia lawsuit may proceed, legal observers are beginning to realize that the mandate is of questionable constitutionality based not only on what the Constitution says, but also on what the Supreme Court has said. And awareness is also growing that finding five votes for so radical a change in the American political system may be harder than some may have thought.