Can Congress Make You Buy Health Insurance - The Affordable Care Act, National Health Care Reform, and the Constitutionality of the Individual Mandate

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Can Congress Make You Buy Health Insurance?
The Affordable Care Act, National Health Care Reform, and the Constitutionality of the Individual Mandate

I. THE AFFORDABLE CARE ACT OF 2010:
INTRODUCTION AND OVERVIEW ................................... 412

II. THE APPLICABLE LAW: MODERN SUPREME COURT COMMERCE CLAUSE PRECEDENT .................... 422

III. THE INDIVIDUAL MANDATE OF THE ACA WAS A PROPER EXERCISE OF CONGRESS' POWER UNDER LONG-STANDING TENETS OF COMMERCE CLAUSE AND NECESSARY AND PROPER CLAUSE PRECEDENT ................................................................. 433

A. The Individual Mandate Regulates Economic Activity Subject to the Commerce Power.................................................................................................................. 433

B. The Regulated Activity, When Aggregated Together, Substantially Impacts the National Health Insurance Market ......................... 437

C. The Individual Mandate is Essential for the Success of the Larger Regulatory Scheme of the ACA—Reforming the National Health Care Market and Reducing the Cost of Health Care for All................................. 441

IV. THE ARGUMENTS AGAINST THE INDIVIDUAL MANDATE ARE AT BEST UNPERSUASIVE AND AT WORST REPRESENT BARE PARTISAN POLITICS ...... 445

A. The Individual Mandate is Unconstitutional Because the Commerce Clause Regulates Activity, and Forgoing Health Insurance Is Inactivity, Not Activity ................................................................. 446

B. If Congress Can Make You Buy Health Insurance, Congress Can Make You Eat Broccoli: The Slippery Slope Argument ... 453

V. POLITICS: THE CONCEPT OF THE INDIVIDUAL MANDATE ORIGINATED FROM REPUBLICAN POLICYMAKERS ................................................................. 457

411
I. THE AFFORDABLE CARE ACT OF 2010: INTRODUCTION AND OVERVIEW

President Obama signed the Patient Protection and Affordable Care Act and the Health Care and Education Reconciliation Act into law in March 2010 (together, the “Affordable Care Act,” the “ACA,” the “Act,” or pejoratively—as referred to by its Republican opponents—“Obamacare”). The objective was comprehensive health care reform—“to make health insurance affordable for millions of Americans and to protect them from potentially catastrophic medical expenses.” Toward that end, the Act aimed to curb rising health care costs and to provide greater coverage to the more than forty-five million Americans who were uninsured in 2009. Currently health care costs and health insurance premiums are spiraling out of control and the number of Americans without health insurance continues to rise. As an approximate number, fifty million people are uninsured. The Center for Disease Control reported that an estimated 59.1 million persons had no health insurance for at least part of the first quarter of 2010, up from 56.4 million in the year 2008 and 58.7 million in 2009. Congress found that sixty-two percent of all personal bankruptcies...
in this country were caused in part by medical expenses. Regardless of which statistics one remembers, the need for health care reform in American public policy cannot be disputed. The Act has been described as “the largest social reform effort undertaken since Medicare,” and “a massive incremental reform—but not an uprooting—of the nation’s health care system.”

The ACA is a comprehensive statute designed to increase access to the United States’ health care market for every citizen, reduce health care costs, and enable and increase health insurance protection for those currently uninsured or underinsured. It is 975 pages in length as published in the Public Laws and comprises nine titles (plus a tenth title consisting of amendments to the preceding titles I-IX). Among its numerous reforms, the Act requires insurers to enroll every person or employer who applies for individual or group coverage. It creates state-operated health benefit exchanges that will enable individuals and small businesses to leverage their collective buying power to make health insurance available at competitive prices. Eligibility for Medicaid coverage is expanded for the lowest income populations—individuals at or below 133% of the poverty level. There is a guaranteed issue requirement that prohibits insurance companies from denying coverage to applicants with pre-existing medical conditions, and a community-rating requirement that prevents insurers from charging increased premiums to individuals with pre-existing illnesses. Insurers can no longer limit the amount of coverage

13. Id. at 1251 (citing 42 U.S.C. § 300gg-1(a) (2010)). This is the guaranteed issue requirement, which is effective on January 1, 2014. Id.
15. Id. (citing Patient Protection and Affordable Care Act § 2001); 42 U.S.C. § 1396(a).
16. Thomas More Law Ctr. v. Obama, 651 F.3d 529, 534 (6th Cir. 2011) (citing 42 U.S.C. §§ 300gg, 300gg-1(a), 300gg-3(a)).
available, and insurers are prohibited from cancelling coverage when the insured individual gets sick. Additionally, children covered as dependents under their parents’ policies are eligible to continue that coverage until age twenty-six. The ACA requires large employers to offer health insurance to their employees and offers tax incentives to small businesses that buy health coverage for their workers.

The Act also expands federal programs that help the poor obtain health coverage. For eligible individuals who buy their health coverage through exchanges, the Act offers tax credits for payment of premiums and provides federal subsidies to help alleviate their out-of-pocket costs. All Medicare co-payments and co-insurance fees are cancelled for multiple preventive services, including screening tests for colon, breast, and cervical cancer.

The linchpin of the Act (and the core of the controversy) is the individual mandate. ACA section 1501(b) requires that all applicable individuals and their dependents maintain minimum essential coverage starting in 2014. Those who fail to obtain the minimum coverage must include a “shared responsibility” payment along with their annual federal income tax return. The shared responsibility payment is a fixed dollar amount penalty, and for individuals who cannot afford the coverage, the amount is reduced based on household income. That payment is specifically labeled as a penalty under the statute and not a tax. An applicable individual is a person who does not fit under one of several enumerated statutory exclusions, among which are those who qualify for certain religious exemptions, non-U.S. citizens or illegal aliens,

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21. Id. (citing 26 U.S.C. § 36B); Patient Protection and Affordable Care Act § 1401(a).
22. Id. (citing 42 U.S.C. § 18071); Patient Protection and Affordable Care Act § 1402.
23. Mead, 766 F. Supp. 2d at 19 (citing Patient Protection and Affordable Care Act § 4104); 42 U.S.C. § 1395(b).
24. Thomas More Law Ctr., 651 F.3d at 534 (citing Patient Protection and Affordable Care Act § 1501(b)); 26 U.S.C. § 5000A.
25. Id. at 535 (citing Patient Protection and Affordable Care Act § 1501(b)); 26 U.S.C. § 5000A(b), (c).
26. 26 U.S.C. § 5000A(c), (e)(1)-(5).
27. Thomas More Law Ctr., 651 F.3d at 535 (citing 26 U.S.C. § 5000A(b), (c)); Patient Protection and Affordable Care Act § 1501(b).
incarcerated individuals, members of Indian tribes, and those who cannot afford to pay the required contributions for the minimum essential coverage. In summary, beginning in 2014, ACA § 1501(b) mandates that every individual obtain health insurance or pay a penalty, and further, that every individual must purchase his coverage in the private market. The ACA was designed to preserve and build upon the existing free market.

The individual mandate is the foundation of Congress' comprehensive effort to reduce health care costs. Congress found that the individual mandate, together with the other provisions of the Act, would add millions of new consumers to the health insurance market and thereby increase the supply and demand for health care services. This would, in turn, increase the numbers and percentages of Americans with health insurance. This is important, because Congress found that the cost of providing uncompensated care to the uninsured was forty-three billion dollars in 2008. To make up for this loss, health care providers pass these costs on to private insurers, and private insurers, in turn, pass these costs on to America's families in the form of increased premiums, averaging over $1000 per year. If there were no individual mandate, many individuals would not buy health insurance until they needed care (akin to individuals shopping for fire insurance after the blaze ignites). By significantly increasing the insured population, the individual mandate and the other provisions of the act would minimize this "adverse selection" and enlarge the health insurance market.

28. Patient Protection and Affordable Care Act § 1501(b); 26 U.S.C. § 5000A(d)-(e).
29. 26 U.S.C. § 5000A.
30. Patient Protection and Affordable Care Act § 1501(a); 42 U.S.C. § 18091(2)(D) (2010). A government option had been considered to compete with the private market, but the public option was dropped. Andrew Koppelman, Bad News for Mail Robbers: The Obvious Constitutionality of Health Care Reform, 121 YALE L.J. ONLINE 1, *4 (2011), http://yalelawjournal.org/2011/04/26/koppelman.html. Congress decided that health insurance would be best provided by the private sector. Id.
32. Id. § 18091(a)(2)(F).
33. Id.
34. Adverse selection refers to: [The tendency of people to avoid the purchase of insurance unless they expect to need it, and the tendency of those with greater need to buy more insurance. A health insurance market could never survive or even form if people could wait to buy insurance until they are on the way to the hospital.]


[Which consists of evaluating the health risks specific to each subscriber in order to decide the terms of coverage and assign an actuarially fair price . . . .]
insurance risk pool to include healthy individuals. Congress found that this would lower health insurance premiums for all eligible Americans. The individual mandate is thus essential to creating effective health insurance markets where improved, guaranteed-issue insurance products would be sold without exclusions for pre-existing conditions.

Finally, Congress found that administrative costs for private health insurance amounted to ninety billion dollars in 2006 and accounted for between 26% and 30% of premiums in the individual and small group markets. By significantly increasing health insurance coverage and the size of the purchasing pools, the individual mandate and the other provisions would result in significantly reduced administrative costs and enable further reductions in premiums. The individual mandate, then, is the keystone or foundation provision on which the total reform package rests. Without the mandate and the resulting reduction in health insurance premiums, the other reforms would not be financially viable, and the comprehensive plan for the federal regulation of the health insurance market would be undercut.

Congress framed the main thrust of the ensuing constitutional battles when it found that the individual mandate is commercial and economic in nature and substantially affects interstate commerce. Congress cited several facts in support of that premise. First of all, Congress found that the individual mandate regulates activity that is commercial and economic in nature; specifically, "economic . . . decisions about how and when health care is paid for, and when health care is purchased." Secondly, Congress found that "[h]ealth insurance and health care are a significant part of the national economy," and that health insurance "pays for medical equipment, medical supplies, and drugs that are

\[\text{derwriting rewards people who purchase while they are still young and healthy, and excludes pre-existing conditions or charges higher rates for those who are not.}\]

\textit{Id.}

37. \textit{Id.}
38. \textit{Id.} § 18091(a)(2)(H). "[T]he Federal government has a significant role in regulating health insurance. The [minimum essential coverage] requirement is an essential part of this larger regulation of economic activity, and the absence of the requirement would undercut Federal regulation of the health insurance market." \textit{Id.}
41. \textit{Id.} § 18091(a)(2)(B).
shipped in interstate commerce.\footnote{Id.} Furthermore, because “[m]ost health insurance products are sold by national or regional insurers,\footnote{Id.} health insurance is sold in interstate commerce, and insurance payouts travel through interstate commerce.\footnote{Id.} Predictably, then, the primary focus of the subsequent court challenges would be the Commerce Clause\footnote{U.S. CONST. art. I, § 8, cl. 3. “The Congress shall have Power... to regulate commerce with foreign nations, and among the states, and with the Indian Tribes.”} and the Necessary and Proper Clause,\footnote{U.S. CONST. art. I, § 8, cl. 18. “The Congress shall have power... to make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” Id.} and whether the ACA exceeds Congress’ powers under these cornerstone doctrines.

Within minutes after the signing of the ACA the first constitutional challenge was filed in Florida ex rel. Bondi v. U.S. Department of Health & Human Services.\footnote{780 F. Supp. 2d 1256 (N.D. Fla. 2011), aff’d in part and rev’d in part sub nom. Florida ex rel. Attorney Gen. v. U.S. Dept’ of Health & Human Servs., 648 F.3d 1235 (11th Cir. 2011), cert. granted in part sub nom. Florida v. Dep’t of Health & Human Servs., 132 S. Ct. 604 (2011).} This case was brought by—among others—the Attorney Generals and/or Governors of twenty-six states.\footnote{Florida ex rel. Bondi, 780 F. Supp. 2d at 1263. The states are Alabama, Alaska, Arizona, Colorado, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Louisiana, Maine, Michigan, Mississippi, Nebraska, Nevada, North Dakota, Ohio, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Washington, Wisconsin, and Wyoming. Id. at 1263 n.1.} Since that time (March 2011), no less than twenty-seven cases have been filed challenging the constitutionality of the ACA, primarily targeting the individual mandate.\footnote{Elisabeth L. Bondurant & Steven D. Henry, Constitutional Challenges to the Patient Protection and Affordable Care Act, 78 DEF. COUNS. J. 249, 250 (2011).} A number of these cases were dismissed on procedural grounds such as standing and ripeness.\footnote{Wilson Huhn, Constitutionality of the Patient Protection and Affordable Care Act Under the Commerce Clause and the Necessary and Proper Clause, 32 J. LEGAL MED. 139, 142 n.17 (2011) (citing, inter alia, New Jersey Physicians Inc. v. Obama, 757 F. Supp. 2d 502 (D.N.J. 2010), aff’d, 653 F.3d 234 (3d Cir. 2011); Baldwin v. Sibelius, No. 1033, 2010 WL 3418436 (S.D. Cal. Aug. 27, 2010), aff’d, 654 F.3d 877 (9th Cir. 2011); Taitz v. Obama, 707 F. Supp. 2d 1 (D.D.C. 2010).} At the time of this writing, six cases have been decided at the federal district court level. Three decisions have held that the ACA and the individual mandate are constitutional: Mead v. Holder,\footnote{766 F. Supp. 2d 16, 43 (D.D.C. 2011), aff’d sub nom. Seven-Sky v. Holder, 661 F.3d 1 (D.C. Cir. 2011).} Liberty University, Inc. v. Geithner,\footnote{Id. at 1263 n. 1.} and Tho-
Three decisions have struck down the individual mandate as unconstitutional: *Florida ex rel. Bondi*, *Virginia ex rel. Cuccinelli v. Sibelius*, and *Goudy-Bachman v. U.S. Department of Health & Human Services*. *Liberty University* and *Cuccinelli* were appealed to the Fourth Circuit Court of Appeals, but both of these cases were vacated and dismissed on procedural grounds in September 2011. *Thomas More Law Center* was appealed to the Sixth Circuit Court of Appeals, and the constitutionality of the ACA—including the individual mandate—was affirmed on June 29, 2011. *Florida ex rel. Bondi* was appealed to the Eleventh Circuit Court of Appeals and was affirmed on August 12, 2011, upholding the decision below and ruling the individual mandate unconstitutional. *Mead v. Holder* was appealed to the D.C. Circuit Court of Appeals under the changed name, *Seven Sky v. Holder*, and the court upheld the ACA on November 8, 2011. In summary, at the time of this writing, two circuit courts have upheld the individual mandate and one has struck it down. On Nov 14, 2011, the Supreme Court granted certiorari to hear the Eleventh Circuit Court of Appeals.

In many of these cases, several causes of action were pleaded in addition to the Commerce Clause challenges. 63 In all of these cases, however, the primary target was § 1501 (26 U.S.C. § 5000A): the individual mandate. The question presented has been crystal clear: [i]s the minimum coverage provision of the ACA constitutional and consistent with the Commerce Clause? This comment will focus on whether Congress—consistent with its Commerce Clause power—can require all applicable Americans to buy health insurance in the private market. The relevant and modern Supreme Court precedent will be reviewed, along with the constitutional arguments for and against the mandate.

Pointedly, however, the entirety of research findings and discussion to follow may soon be moot, because the controversy has now reached the Supreme Court. 64 As noted above, the Court granted the petition for a writ of certiorari on November 14, 2011 to hear the government’s appeal from the decision of the Eleventh Circuit Court of Appeals, *Florida ex rel. Attorney General v. U.S. Department of Health & Human Services*. 65 Oral arguments are expected to take place in March 2012, and the Court is expected to rule by the end of the current term. 66 If the Court adheres to precedent rather than “naked politics,” and if the Court interprets the Commerce Clause 67 and the Necessary and Proper Clause 68 as

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63. An incomplete list of some of the other counts pleaded in these cases include:
65. Id.
67. U.S. CONST. art. I, § 8, cl. 3.
68. U.S. CONST. art. I, § 8, cl. 18.
it has in the past, the Affordable Care Act should be upheld as a valid exercise of Congressional power. 69

Unfortunately, politics may play a decisive role in the ultimate outcome. The passage of the ACA was not a bipartisan effort; the votes of the House and Senate went almost entirely along party lines. 70 The three federal district judges who upheld the individual mandate in their decisions were Democratic appointees, and the three federal district judges who ruled against the mandate were appointed by Republicans. 71 Notably, however, the recent ruling of the Sixth Circuit Court of Appeals in Thomas More Law Center v.

69. E-mail from Martin H. Redish, Louis and Harriet Ansel Professor of Law and Pub. Policy, Northwestern Univ. Sch. of Law to author (June 5, 2011, 9:43 PM EDT) (on file with author).

70. Bondurant & Henry, supra note 49, at 249. The passage of the ACA into law was almost a totally partisan event. Id. The ACA “passed the Senate on December 24, 2009 by a vote of 60-39 with all Democrats and Independents voting for it and all Republicans voting against it.” Id. The Act “passed the House of Representatives on March 21, 2010, by a vote of 219-212, with all 178 Republicans and 32 Democrats voting against it.” Id. at 249-50.

Obama, affirming the ACA, was a 2-1 split decision. A Democratic-appointed judge wrote the opinion, and for the first time, a Republican-appointed judge joined and concurred in judgment, upholding the constitutionality of the ACA. The third judge, also a Republican appointee, predictably dissented. The Eleventh Circuit decision in Florida ex rel. Attorney General v. U.S. Department of Health & Human Services, striking down the individual mandate, was also a 2-1 split decision. The majority opinion in that case, however, was written by both a Republican and, surprisingly, a Democratic-appointed judge, while the third judge who concurred in part and dissented in part was a Democratic appointee. Finally, the D.C. Circuit decision in Seven-Sky v. Holder, upholding the Act, was a 2-1 split decision, with a Republican appointee judge writing the majority opinion and a Democratic judge concurring. The third judge in Seven-Sky v. Holder, a Republican appointee, disagreed and opined that the ACA was unconstitutional and exceeded Congress' authority under the Commerce Clause.

74. Id. (Graham, J., concurring in part and dissenting in part).
77. Seven-Sky v. Holder, 661 F.3d 1, 4 (D.C. Cir. 2011). The opinion was written by Judge Silberman, appointed by President Reagan, id., and the concurrence was written by Judge Harry Edwards, appointed by President Carter. Id. at 21 (Edwards, J., concurring); Silberman, Laurence Hirsch, Biographical Directory of Federal Judges, FED. JUD. CENTER, http://www.fjc.gov/servlet/nGetInfo?jid=2189&cid=999&ctype=na&instate=na (last visited Dec. 22, 2011); Edwards, Harry Thomas, Biographical Directory of Federal Judges, FED.
publican appointee, dissented as to jurisdiction, but not as to the merits. 78 Hopefully, these circuit court rulings herald continuing objective and apolitical adjudication and decision making that will remain consistent with and faithful to prior Supreme Court precedent.

II. THE APPLICABLE LAW: MODERN SUPREME COURT COMMERCE CLAUSE PRECEDENT

Our Constitution provides for a dual system of government; the federal government is limited to its enumerated powers, 79 and “[t]he 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.” 80 Under the general police power, states may enact laws similar to the ACA that require their citizens to have minimum health insurance coverage. 81 The federal government, however, has no such police power, and Congress can enact a law like the ACA only if authorized by one of its enumerated powers, such as the Commerce Clause in Article I, Section 8 of the Constitution. 82

The Commerce Clause states that “[t]he Congress shall have power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” 83 The Necessary and Proper Clause follows, stating that “[t]he Congress shall have power . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States . . . .” 84 Key to the arguments on both sides is


79. Thomas More Law Ctr., 651 F.3d at 541.

80. U.S. CONST. amend. X.

81. Thomas More Law Ctr., 651 F.3d at 541 (citing MASS. GEN. LAWS ANN. ch. 111M, § 2 (West 2011)).

82. U.S. CONST. art. I, § 8, cl. 3; Thomas More Law Ctr., 651 F.3d at 541.

83. U.S. CONST. art. I, § 8, cl. 1, 3.

84. U.S. CONST. art. I, § 8, cl. 1, 18.
the interrelationship between these two constitutional commands. Under the Necessary and Proper Clause, however, and with specific reference to the individual mandate, opponents of the Act in *Seven Sky v. Holder* argued that Congress “can effectuate only those powers that it actually possesses under the Commerce Clause, not create new ones.” At the same time, “[t]he right to be free from federal regulation is not absolute, and yields to the imperative that Congress be free to forge national solutions to national problems, no matter how local—or seemingly passive—their individual origins.

At the outset, the Supreme Court held in *United States v. South-Eastern Underwriters Ass’n* that Congress has the power under the Commerce Clause to regulate the insurance market.

The modern insurance business holds a commanding position in the trade and commerce of our Nation. Perhaps no modern commercial enterprise directly affects so many persons in all walks of life. Insurance touches the home, the family, and the occupation or the business of almost every person in the United States.

Insurance policies are commodities in the flow of interstate commerce. Congress can regulate the price of health insurance, because “[i]t is well established . . . that the power to regulate commerce includes the power to regulate the prices at which commodities in that commerce are dealt in and practices affecting such prices.” To ensure that most Americans are covered by insurance—in this case health insurance—Congress has the power to enact the laws necessary to enable that goal.

85. 661 F.3d 1, 14 (D.C. Cir. 2011).
86. *Seven-Sky*, 661 F.3d at 14 (citing Heart of Atlanta Motel v. United States, 369 U.S. 241, 258-59 (1964)).
89. Id. at 546-47, 552-53.
Congress could have established a government-run system of universal health care—under the General Welfare Clause—but politically, there was no hope that a single payer system could be enacted because powerful interest groups were allied against it. Congress decided that a government-run monopoly of health insurance would be not be workable and that coverage would be best provided by the private sector. Under this approach, then, the only way to guarantee health insurance for all would be to require everyone to purchase health coverage from private insurers, including those who are healthy.

Under the Necessary and Proper Clause, Congress can decide how best to exercise its powers. As Chief Justice Marshall wrote almost 200 years ago in *McCulloch v Maryland*:

> [T]he sound construction of the [C]onstitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution. . . . Let the end be legitimate, let it be within the scope of the [C]onstitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the [C]onstitution, are constitutional.

The modern reading of *McCulloch* was articulated in *United States v. Comstock*, decided in 2010. In *Comstock*, the Court stated that "the Necessary and Proper Clause makes clear that the United States Constitution's grants of specific federal legislative authority are accompanied by broad power to enact laws that are 'convenient, or useful', or 'conducive' to the authority's 'beneficial exercise.' The test for whether Congress has acted within its constitutional bounds is a rational basis test. Congress has acted appropriately in passing a particular law if a court finds

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92. U.S. Const. art. I, § 8, cl. 1. "The Congress shall have Power To lay and collect Taxes . . . to pay the Debts and provide for the . . . general Welfare of the United States . . ." Id.
94. Id.
95. Id.
100. *Id.* at 1956 (citing Sabri v. United States, 541 U.S. 600, 605 (2004)).
that "the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power."101

The choice of means is left to the judgment of Congress, and it is for Congress to decide whether the "means adopted are really calculated to attain the end, the degree of their necessity, the extent to which they conduce to the end, the closeness of the relationship between the means adopted and the end to be attained ..."102

Acts of Congress carry with them a presumption of constitutionality, and "due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds."103 Acts of Congress are presumed valid, not as a matter of interdepartmental etiquette, but as a matter of due deference to the "deliberate judgment by constitutional majorities of the two Houses of Congress that an Act is within their delegated power."104

The modern reach of the Commerce Clause was set forth in Perez v. United States,105 decided in 1971, and United States v. Lopez, decided in 1995.106 The Supreme Court has held that Congress may regulate three broad categories of activity under its commerce power: (1) "the use of the channels of interstate commerce,"107 (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities,"108 and (3) "those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce."109

The case for and against the individual mandate of the ACA turns

101. Id.
102. Id. at 1957 (citing Burroughs v. United States, 209 U.S. 534, 547-48 (1934)).
104. Thomas More Law Ctr., 651 F.3d at 541 (quoting United States v. Five Gambling Devices, 346 U.S. 441, 449 (1953)).
107. Lopez, 514 U.S. at 559 (citations omitted).
108. Id. (citations omitted).
109. Id. at 558-59 (citation omitted). See also Thomas More Law Ctr., 651 F.3d at 554 (Sutton, J., concurring). Congress may regulate: "(1) the channels of interstate commerce (e.g., rivers and roads), (2) the instrumentalities of interstate commerce (e.g., ships and cars) as well as persons or things in it, and (3) those other economic activities, even wholly intrastate activities, that substantially affect interstate commerce." Id. (citations omitted) (internal quotation marks omitted).
on whether or not Congress exceeded its commerce clause power under the third category.\textsuperscript{110}

The existence of the third category was established in the 1937 decision of \textit{NLRB v. Jones \& Laughlin Steel Corp.}\textsuperscript{111} and in the 1941 decision of \textit{United States v. Darby.}\textsuperscript{112} In \textit{Darby}, the Supreme Court held that the power of Congress over interstate commerce was not limited to the regulation of commerce among the states.\textsuperscript{113} "It extends to those activities intrastate which so affect interstate commerce . . . as to make regulation of them [an] appropriate means to the attainment of a legitimate end . . . ."\textsuperscript{114} The Supreme Court has long held, then, that under this prong of the commerce power, Congress can regulate two types of conduct: (1) economic activity, even intrastate economic activity, if it substantially affects interstate commerce,\textsuperscript{115} and (2) non-economic, non-commercial activity, if control of that activity is essential to effect a larger economic regulatory scheme.\textsuperscript{116} The controlling case law was set forth in the landmark decisions of \textit{Wickard v. Filburn,}\textsuperscript{117} \textit{Gonzales v Raich,}\textsuperscript{118} \textit{United States v. Lopez,}\textsuperscript{119} and \textit{United States v. Morrison.}\textsuperscript{120}

In \textit{Wickard v. Filburn}, the Supreme Court held that Congress could regulate the intrastate, seemingly inconsequential, non-commercial activity of single individuals, if that activity, added up with the identical activity of numerous others, would have a substantial impact on interstate commerce.\textsuperscript{121} The Court upheld pro-


\textsuperscript{111} 301 U.S. 1, 37 (1937).

\textsuperscript{112} 312 U.S. 100 (1941).

\textsuperscript{113} \textit{Darby}, 312 U.S. at 118.

\textsuperscript{114} \textit{Id.}


\textsuperscript{116} Thomas More Law Ctr., 651 F.3d at 541-42 (citing Wickard v. Filburn, 317 U.S. 111, 127-28 (1942)).

\textsuperscript{117} 317 U.S. 111 (1942).

\textsuperscript{118} 545 U.S. 1 (2005).

\textsuperscript{119} 514 U.S. 549 (1995).

\textsuperscript{120} 529 U.S. 598 (2000).

\textsuperscript{121} \textit{Wickard}, 317 U.S. at 125, 127-28.
visions of the Agricultural Adjustment Act of 1938\textsuperscript{122} that restricted the amount of wheat that an individual farmer could grow, even for his own home use.\textsuperscript{123} The statute was designed to stabilize wheat prices on the interstate market.\textsuperscript{124} By regulating the volume of wheat moving in interstate and foreign commerce, Congress could avert shortages and surpluses and corresponding fluctuations in the price of wheat.\textsuperscript{125} A farmer challenged a penalty that was imposed on him for exceeding his quota. The farmer (Roscoe Filburn) claimed that he used the excess wheat for his own personal consumption, not for the commercial market, and that Congress had no power to penalize him under the Commerce Clause because his activity was local and not commercial in nature.\textsuperscript{126}

The Supreme Court disagreed, holding that the wheat “supplies a need of the man who grew it which would otherwise be reflected by purchases on the open market.”\textsuperscript{127} By growing his own wheat for his own use, the farmer was able to avoid buying it on the open market.\textsuperscript{128} Even though the farmer’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 effect on interstate commerce . . . .”\textsuperscript{129} Further, though the farmer’s detrimental impact on the total demand for wheat may have been insignificant by itself, the Court ruled that “it is not enough to remove him from the scope of federal regulation, whereas here, his contribution, taken together with that of many others similarly situated, is far from trivial.”\textsuperscript{130} Thus, without the power to regulate this class of individual activity, the government’s ability to achieve its overarching objective—the regulation of the interstate wheat market and the stabilization of wheat prices—would be undercut.

\textit{Gonzales v. Raich}\textsuperscript{131} was decided sixty-three years later, in 2005. California had enacted a statute—the Compassionate Use Act of

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\item \textsuperscript{122} \textit{Id.} at 113 nn.1-2 (citing 7 U.S.C. § 1340 (Supp. No. 1 1941); 7 U.S.C. § 1281-1310 (1938)).
\item \textsuperscript{123} \textit{Id.} at 118.
\item \textsuperscript{124} \textit{Id.} at 115 (citations omitted).
\item \textsuperscript{125} \textit{Id.}
\item \textsuperscript{127} \textit{Mead,} 766 F. Supp. 2d at 29 (quoting \textit{Wickard,} 317 U.S. at 128).
\item \textsuperscript{128} \textit{Id.}
\item \textsuperscript{129} \textit{Id.} at 120 (quoting \textit{Wickard,} 317 U.S. at 125).
\item \textsuperscript{130} \textit{Id.} (citing \textit{Wickard,} 317 U.S. at 128).
\item \textsuperscript{131} 545 U.S. 1 (2005).
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1996—that allowed qualified patients to obtain, possess, or grow marijuana for their personal medicinal use. The statute permitted the intrastate, non-commercial possession or cultivation of marijuana for therapeutic purposes upon a physician’s recommendation. Pursuant to its national war on drugs, Congress enacted the Comprehensive Drug Abuse Prevention and Control Act to combat the international and interstate trade in illicit drugs. Under title II of that act, the Controlled Substances Act (“CSA”), the production and possession of marijuana were categorically prohibited. Two California plaintiffs—medical patients who had been growing and using marijuana for their own medical treatment pursuant to the California law—challenged the CSA. The Supreme Court upheld the CSA, using a rationale very similar to that used in Wickard. The Court ruled that the production and consumption of marijuana for medical treatment was a “quintessentially economic” activity, and similar to the fact pattern in Wickard, the plaintiffs were “cultivating, for home consumption, a fungible commodity for which there is an established, albeit illegal, interstate market.” The Court agreed with Congress’ findings that the high demand for marijuana would likely draw the homegrown product into the interstate market. In deciding whether Congress acted within the bounds of its commerce power, the Court stated that the task before it was straightforward. The Court emphasized that “[w]e need not determine whether respondents’ activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a ‘rational basis exists for so concluding.’” The Court held that Congress had a rational basis for concluding that failure to regulate the intrastate cultivation and possession of marijuana would substantially undercut the larger regulatory scheme and that failure

132. Gonzales, 545 U.S. at 5-6 (citations omitted).
133. Id. at 6.
134. Id. at 12-13 (citation omitted).
135. Id. at 15.
136. Id. at 6.
138. Id. The non-commercial production and consumption of marijuana for personal medicinal use was economic because “[e]conomics refers to the production, distribution, and consumption of commodities.” Id. at 25 (quotations omitted).
139. Gonzales, 545 U.S. 1, 18 (2005).
140. Id. at 19.
141. Id. at 22.
142. Id. (citations omitted).
to do so “would leave a gaping hole in the CSA.”\textsuperscript{143} Congress has never been required to legislate with mathematical precision.\textsuperscript{144} As a result, “[w]hen Congress decides that the ‘total incidence’ of a practice poses a threat to a national market, it may regulate the entire class.”\textsuperscript{145} Congress acted within its authority in \textit{Wickard} when it enacted comprehensive legislation to control the price of wheat on the national market, and that congressional action was a necessary and proper exercise of its commerce power.\textsuperscript{146} The fact that the CSA “ensnares some purely intrastate activity is of no moment. As we have done many times before, we refuse to excise individual components of that larger scheme.”\textsuperscript{147} Finally, in order to effectively assert its commerce power and secure its objectives, Congress can reach even those purely intrastate and local activities that may be inconsequential in isolation and without substantial effect nationwide.\textsuperscript{148}

Though the Supreme Court has interpreted the Commerce Clause power very broadly, that power has not been without limits. The Court stated in \textit{NLRB v. Jones \& Laughlin Steel Corp.} that the commerce power:

\begin{quote}
[M]ust be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.\textsuperscript{149}
\end{quote}

In \textit{United States v. Lopez}\textsuperscript{150} and \textit{United States v. Morrison},\textsuperscript{151} the Court struck down single subject criminal statutes that were held to exceed Congress’ power under the Commerce Clause.\textsuperscript{152} In \textit{Lopez}, the Supreme Court struck down the Gun Free School Zones

\begin{itemize}
\item \textsuperscript{143} Id. \\
\item \textsuperscript{144} \textit{Gonzales}, 545 U.S at 17. \\
\item \textsuperscript{145} Id. \\
\item \textsuperscript{146} Id. at 22 (citations omitted). \\
\item \textsuperscript{147} Id. \\
\item \textsuperscript{148} Id. at 35 (Scalia J., concurring). \\
\item \textsuperscript{149} 301 U.S. 1, 37 (1937) (citations omitted). \\
\item \textsuperscript{150} 514 U.S. 549 (1995). \\
\item \textsuperscript{151} 529 U.S. 598 (2000). \\
\item \textsuperscript{152} Thomas More Law Ctr. v. Obama, 651 F.3d 529, 542 (6th Cir. 2011).
\end{itemize}
Act of 1990 ("GFSZA"), and, in *Morrison*, the Court invalidated the Violence Against Women Act of 1994 ("VAWA").

The GFSZA (in *Lopez*) made it a federal offense for any individual to possess a firearm in a school zone. The Government argued that possession of a firearm in a school zone substantially affected interstate commerce in three ways. First, guns in school zones could result in violent crime, and violent crime affects the national economy through insurance costs, which are spread throughout the population. Second, violent crime makes people afraid to travel to parts of the country that they believe are unsafe. Third, guns in schools threaten the educational process and impair the learning environment. A damaged educational process leads to a less productive citizenry, and a less productive citizenry may ultimately have a deleterious effect on the national economy.

The Supreme Court ultimately held that Congress had exceeded its authority under the Commerce Clause and ruled the GFSZA unconstitutional for several reasons. The Court held that possession of a firearm in a school was not an economic activity that might, by replication elsewhere and aggregation, have a substantial effect on interstate commerce. In fact, the GFSZA was a criminal statute that had nothing to do with commercial or economic activity, and there was no overarching regulatory scheme that would be undercut if gun possession in intrastate local school zones were not prohibited. Furthermore, the GFSZA contained no requirement that the gun possession had to be connected in any way with interstate commerce. The law contained no jurisdictional nexus to tie it concretely to interstate as opposed to purely intrastate activity.

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155. 514 U.S. at 551. A school zone was defined as on or within 1000 feet of the grounds of a school. *Id.* at 551 n1 (citing 18 U.S.C. § 921(a)(25)).
156. *Lopez*, 514 U.S. at 563-64 (citations omitted).
157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.*
162. *Id.* at 551, 561.
163. *Id.* at 561.
164. *Id.* at 567.
165. *Id.* at 551, 561.
Notwithstanding the deference owed to the legislature's findings regarding the cause and effect relationship between guns in school zones and interstate commerce—"no . . . substantial effect [on interstate commerce] was visible to the naked eye," and Congressional findings substantially linking gun violence to interstate commerce were lacking. In order to uphold the Government's contentions, the Court "would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." The Court recognized that many of its prior decisions gave a great deal of deference to Congress, and the language in those opinions allowed for additional expansion of the commerce power. Here, however, the Supreme Court declined to go any further, fearing that "there never will be a distinction between what is truly national and what is truly local."

In United States v. Morrison, the Supreme Court considered the constitutionality of the Violence Against Women Act of 1994 ("VAWA"), which created a federal remedy for victims of gender-motivated violence. Applying the reasoning in Lopez, the Court again held that Congress' regulatory power under the Commerce Clause was not unlimited. The Court invalidated the VAWA, because gender-based crimes of violence are not economic activities. The Supreme Court held that "[w]hile 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." Furthermore, the VAWA contained no jurisdictional element connecting the federal cause of action to interstate commerce. Though there were plenty of congressional findings regarding the serious impact of gender-motivated violence on victims and their families, Congress' findings alone were not sufficient to make the

166. Lopez, 514 U.S at 562-63.
167. Id. at 567.
168. Id.
169. Id. at 567-68 (citation omitted).
171. Morrison, 529 U.S. at 613 (citation omitted).
172. Id.
173. Id.
174. Id.
Act constitutional under the Commerce Clause. Again, notwithstanding the deference owed to the lawmakers' findings, it is ultimately up to the Supreme Court, rather than Congress, to decide whether particular activities affect interstate commerce to a sufficient degree as to come under the reach of the commerce power.

Finally, the Court held that the rational basis connection offered by Congress, between gender-motivated violent crime and interstate commerce, was too much of a logical stretch; the link was too attenuated. Here, the Court held that the government's reasoning "seeks to follow the but-for causal chain from the initial occurrence of violent crime (the suppression of which has always been the prime object of the States' police power) to every attenuated effect upon interstate commerce." If laws were upheld on this basis, Congress could apply the Commerce Clause without restraint and completely obliterate the Constitutional demarcation between the legitimate ambit of national government and the broad range of local powers properly reserved to the states.

In summary, as applied to the ACA, Wickard, Lopez, Morrison, and Gonzales establish a three-pronged inquiry to determine whether the individual mandate to purchase health insurance can pass constitutional muster under the Commerce Clause. The applicable analytical framework was set forth by United States District Court Judge Gladys Kessler in Mead v. Holder. First, does the purchase or non-purchase of health insurance, or does the decision whether or not to buy health insurance, comprise economic activity as in Wickard and Gonzales or non-economic activity as in Lopez and Morrison? Second, if the activity is found to be economic, did Congress have a rational basis to conclude that these activities substantially affect the health care market—when replicated by the entire applicable population and taken in the aggregate? Third, is the regulation of this target activity an es-

175. Id. at 614. "Simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." Id. (quoting United States v. Lopez, 514 U.S. 549, 557 n.2 (1995)).
176. Morrison, 529 U.S. at 614 (citation omitted).
177. Id.
178. Id. at 615.
179. Id.
181. Id.
182. Id. at 32.
183. Id.
sential part of a larger regulatory regime, and would that regulatory scheme be undercut if that key regulation were eliminated? 184

III. THE INDIVIDUAL MANDATE OF THE ACA WAS A PROPER EXERCISE OF CONGRESS’ POWER UNDER LONG-STANDING TENETS OF COMMERCE CLAUSE AND NECESSARY AND PROPER CLAUSE PRECEDENT

A. The Individual Mandate Regulates Economic Activity Subject to the Commerce Power

In applying the relevant constitutional law, a court must first determine exactly what class of activities is regulated under the minimum coverage requirement. 185 Proponents of the narrow view hold that the mandate regulates conduct in the national health insurance market by forcing individual, private citizens to buy a minimum level of coverage. 186 They argue that by so doing, the government is impermissibly infringing the rights of private citizens to choose whether or not to buy health insurance, and they believe that their personal choices have nothing to do with interstate commerce. 187 By contrast, proponents of the broader view contend that the mandate regulates activity in the comprehensive arena of the national health care market, 188 because the overarching purpose of the ACA is to improve access to quality health care for all Americans. 189 In Thomas More Law Center, the court espoused this broad view in holding that in enacting the ACA, Congress is requiring every applicable citizen to buy health insurance, not as an end in itself, but because of the economic effect of that aggregated activity on the total national health care market, which Congress can regulate in this context. 190 The court stated that “[n]o matter how you slice the relevant market—as obtaining health care, as paying for health care, as insuring for health

184. Id. (citation omitted).
187. Thomas More Law Ctr., 651 F.3d at 566-68 (citations omitted). See infra Part IV.
188. Id. at 543 (citations omitted).
189. Farley, supra note 8, at 43.
190. Thomas More Law Ctr., 651 F.3d at 543-44, 546, 549 (citations omitted).
care—all of these activities affect interstate commerce, in a substantial way.”

Virtually every American will require health care services at some time during his or her lifetime. In essence, virtually every American will have to participate in the health care market—electively or emergently, voluntarily or involuntarily. In the United States, health care is not free. The only variable is how people pay for these inevitable services. They can either purchase health insurance or pay the total cost out of pocket. If people choose not to buy health insurance, they in effect self-insure. The self-insured assume calculated risks. In theory, these individuals would set aside funds or arrange their finances to provide for their future medical needs. The individual mandate, in its narrowest construction, would regulate the conduct of these non-participants in the insurance market by forcing them to buy a minimum level of coverage. In actuality, however, the mandate regulates the comprehensive activity of near-universal participation in the interstate health care delivery market, and specifically regulates the activity of self-insuring to pay for health care services consumed.

Self-insuring, in this context, is economic activity. The Supreme Court in Gonzales v. Raich defined the term “economics” as referring to “the production, distribution, and consumption of commodities.” Consumption of health care fits neatly within this definition. Virtually no one can opt out of this market, because everyone will ultimately need and receive medical care, and they will necessarily have to pay for the services they receive. Again, to finance that cost, people can either purchase insurance or self-pay, and those that decline to buy health insurance, in fact, self-insure. The individual mandate will eliminate the option of self-insuring when it becomes effective beginning in January 2014.

191. Id. at 556 (Sutton, J., concurring).
192. Id. at 548.
193. Id. at 543.
194. Id.
195. Thomas More Law Ctr., 651 F.3d at 543.
196. Id. at 543, 557, 564-66 (Sutton, J., concurring).
197. Id. at 543-44.
198. Id. at 544.
199. Id. (citing Gonzales, 545 U.S. 1, 25 (2005)).
200. Id.
201. Thomas More Law Ctr., 651 F.3d at 543.
The interstate market for health care services derives from the universal need for medical care and the requirement that patients pay for the virtually inevitable services received. Note, however, that the Emergency Medical Treatment and Active Labor Act of 1986 ("EMTALA") is unique to the United States' health care market. EMTALA affects all hospitals that participate in Medicare and have active emergency departments. EMTALA requires that when any patient arrives in need of care, that hospitals must appropriately screen that patient for an emergency medical condition and stabilize that patient appropriately—without regard to whether the patient has insurance and without regard to whether or not the patient can pay. Persons who self-insure may have saved sufficient funds to pay for the care they received. Others will have to rely on the free care that providers render, either through charity or as required by law.

There is virtually no other market that commands its purveyors to serve a designated class of consumers for free. Thus, those who self-insure in the health care market enjoy the safety net of free services required by law, and that cost $80 billion in 2008, according to Congress' findings. According to a recent report from the Department of Health and Human Services, approximately two-thirds of the unpaid medical costs in 2008 were attributable to hospital care, and United States hospitals reported more than 2.1 million hospitalizations for the uninsured that year. The study found that most uninsured individuals have virtually no savings and few have resources sufficient to pay in full any hospital bills they might potentially incur. The average cost of a single hospitalization in 2008 was $22,200. As will be shown subsequently,

205. Id.
206. Id.
207. Id.
209. Id. at 1-2.
210. Id. at 8.
the cost of that free care to the uninsured—or more broadly, the cost of their access to the national health care market—results in a significant financial impact on the insured population, in the form of increased premiums for individuals and families.\textsuperscript{211} The individual mandate was enacted to significantly reduce the amount of uncompensated care, which should in turn result in the economic effect of reduced insurance premiums and more affordable health care for all Americans.\textsuperscript{212}

The individual mandate, then, does regulate economic activity.\textsuperscript{213} As the court stated in \textit{Thomas More Law Ctr.}, “[b]y requiring individuals to maintain a certain level of coverage, the individual mandate regulates the financing of health care services, and specifically, the practice of self-insuring for the cost of care.”\textsuperscript{214} The activity of purchasing a health insurance policy is thus economic activity.\textsuperscript{215} The act of not buying health insurance is ipso facto the activity of self-insuring, and the choice to pay for health care by self-insuring is economic activity of no less weight and moment—and that holds true whether it be a voluntary choice or involuntary self-denial due to unaffordable costs. Contrary to popular belief, a 2009 study by the director of the Congressional Budget Office found that not all of the uninsured had to forgo medical care because they could not afford the insurance premiums.\textsuperscript{216} Forty-three per cent of the nearly 50 million uninsured Americans were “voluntarily uninsured,” in other words, forty-three percent of the uninsured had disposable income sufficient to purchase health insurance.\textsuperscript{217} Thus, as the Sixth Circuit Court of Appeals noted, “[t]he financing of health care services, and specifically the practice of self-insuring, is economic activity.”\textsuperscript{218}

The courts in \textit{Mead}\textsuperscript{219} and \textit{Liberty University}\textsuperscript{220} applied similar analyses, but characterized the purchase or rejection of health

\begin{itemize}
\item \textsuperscript{211} \textit{See infra} Parts III.B, C.
\item \textsuperscript{212} 42 U.S.C. §§ 18091(a)(2)(F)-(J).
\item \textsuperscript{213} \textit{Thomas More Law Ctr.} v. Obama, 651 F.3d 529, 544 (6th Cir. 2011).
\item \textsuperscript{214} \textit{Thomas More Law Ctr.}, 651 F.3d at 544.
\item \textsuperscript{215} \textit{Id.}
\item \textsuperscript{216} \textit{Hall, supra} note 34, at 474 (citing \textsc{JUNE O’NEILL & DAVE O’NEILL, WHO ARE THE UNINSURED, AN ANALYSIS OF AMERICA’S UNINSURED POPULATION, THEIR CHARACTERISTICS AND THEIR HEALTH} (2009), \textit{available} at http://epionline.org/studies/oneill_06-2009.pdf).
\item \textsuperscript{217} \textit{Id.} (internal citations omitted).
\item \textsuperscript{218} \textit{Thomas More Law Ctr.}, 651 F.3d at 544.
\item \textsuperscript{219} \textit{Mead} v. Holder, 766 F. Supp. 2d 16, 33 (D.D.C. 2011), \textit{aff’d sub nom.} Seven-Sky v. Holder, 661 F.3d 1, (D.C. Cir. 2011).
\end{itemize}
insurance as decisions, rather than activities.221 These decisions about health coverage—whether to buy or not to buy—were economic in nature, and therefore, represented economic activity.222 Both the Mead and Liberty opinions cited South-Eastern Underwriters223 and reiterated the rule that Congress can regulate the national insurance market, because insurance contracts are commodities moving in interstate commerce.224 In Mead, the court stated that "the power to regulate commerce includes the power to regulate the prices at which commodities in that commerce are dealt with and practices affecting such prices."225 Congress is thus empowered under the Commerce Clause to regulate the price of health insurance, and Congress can ban the medical underwriting practices that have made health coverage unaffordable for millions of individuals.226 In summary, the underlying fact is that:

Both the decision to purchase health insurance and its flip side—the decision not to purchase health insurance—therefore relate to the consumption of a commodity: a health insurance policy. . . . It therefore follows that both decisions, whether positive or negative, are clearly economic ones . . . . This case involves an economic activity: deciding whether or not to purchase health insurance.227

B. The Regulated Activity, When Aggregated Together, Substantially Impacts the National Health Insurance Market

Deciding whether or not to buy health insurance is an economic activity or, alternatively, an economic decision about how health care services will be paid for when needed.228 People who forgo

221. Id.; Mead, 766 F. Supp. 2d at 33.
222. Mead, 766 F. Supp. 2d at 33; Liberty Univ., Inc., 753 F. Supp. 2d at 633-34.
225. Mead, 766 F. Supp. 2d at 33 (citing Wickard v. Filburn, 317 U.S. 111, 128 (1942)).
226. Examples of these practices include assessments of higher premium rates or denials of coverage based on past medical history, pre-existing conditions, and/or current state of health. See Hall, supra note 34.
228. Id. See also Thomas More Law Center v. Obama, 651 F.3d 529, 543-44 (6th Cir. 2011) (internal citations omitted).
health insurance self-insure.Δ Because this is an economic activity or decision, Congress had a rational basis to find that when replicated and aggregated nationwide, the practice of self-insuring against the cost of health care substantially affects interstate commerce—specifically the national health insurance market and more generally the entire United States’ health care delivery system.ι In addition to the findings summarized earlier,ιι Congress found that health insurance and health care spending is projected to increase from $2.5 trillion or 17.6% of the economy in 2009 to $4.7 trillion in 2019.ιιι Private health insurance spending was projected to be $854 billion in 2009, which paid for medical supplies, drugs, and equipment—all shipped in interstate commerce.ιιιι Because most health insurance is sold by national or regional companies, it is sold and claims are paid through interstate commerce.ιιιιι

Regarding the uninsured, the economy loses $207 billion per year due to their poorer health and shorter life spans.ιιιιι The aggregated cost of uncompensated care in 2008 amounted to forty-three billion dollars.ιιιιιι Additionally, sixty-two percent of all personal bankruptcies were caused in part by medical expenses.ιιιιιιι Congress found that forty-seven million Americans were uninsured in 2008,ιιιιιιι and more recently, it was estimated that about fifty million non-elderly Americans were uninsured in 2009—18.8% of the non-elderly United States population.ιιιιιιι

The cost of uncompensated care is borne by all. Providers recover their unpaid dollars by increasing their charges for private

229. Thomas More Law Ctr., 651 F.3d at 543-44 (internal citation omitted).
230. Mead, 766 F. Supp. 2d at 34.
233. Id.
234. Id.
235. Id. § (a)(2)(E).
236. Id. § (a)(2)(F).
insurance. Those charges are billed to private insurers, which in turn pass their costs on to American families in the form of inflated health insurance premiums. The rising premiums from this cost shifting process make health insurance unaffordable for increasing numbers of Americans. As a result, more and more individuals are forced out of the market. This results in a smaller total insured population, which in turn exacerbates and perpetuates the cycle. As indicated earlier, most uninsured individuals cannot pay the medical costs they incur, and, as frankly expressed in Mead, the uninsured “will ultimately get a ‘free ride’ on the backs of those Americans who have made responsible choices to provide for the illness we must all face at some point in our lives.”

According to the courts’ reasoning in Thomas More Law Center, Liberty University, and Mead, those who forgo insurance self-insure, and thereby, engage in economic activity. Congress, therefore, could rationally determine that this represents economic activity, that in the aggregate substantially impacts interstate commerce because of the cost-shifting phenomenon and its measurable effects nationwide. Because of the uncompensated care provided to the uninsured, the insured population pays ever-increasing premiums that in turn force-increasing numbers of individuals out of the market. There is hardly a logical stretch in this context between cause and effect. This is the immutable calculus of the insurance industry—far different from the non-persuasive and highly attenuated chain of effects that the Supreme Court rejected in Lopez and Morrison. The congressional findings that justify the ACA are not the products of “inference upon inference” or dubious “but-for causal chain[s]” that would

240. Thomas More Law Ctr., 651 F.3d at 545.
242. Thomas More Law Ctr., 651 F.3d at 545.
243. Id.
244. Id.
245. Id.
246. Mead v. Holder, 766 F. Supp. 2d 16, 34 n.10 (D.D.C. 2011), aff’d sub nom. Seven-Sky v. Holder, 661 F.3d 1 (D.C. Cir. 2011). This footnote was directed at the particular plaintiffs in Judge Kessler’s courtroom who had made a deliberate, voluntary choice to decline health insurance because of constitutional and religious objections and because the individual mandate would have forced them to adjust their financial affairs. Id.
247. Thomas More Law Ctr., 651 F.3d at 544.
248. Id. at 545.
249. Id.
result in a breach of the boundaries between the federal government and the states' police powers if legislation were upheld on those insufficient grounds.

Viewed from a different perspective, the rationale for the individual mandate can be readily analogized to the fact pattern in *Wickard v. Filburn.* Like the farmer who grew wheat for his own home consumption, those who self-insure provide for their health care costs by relying on and consuming their own financial resources. By so doing, they supply their own needs for a given commodity, avoid having to buy it on the open market, and frustrate the government's objective, which was stabilizing wheat prices at the time of *Wickard* and providing affordable health care today. Whether it be growing wheat for home consumption as in *Wickard,* growing marijuana for one's own medical use as in *Raich,* or forgoing health insurance and self-insuring in the context of the national health care market, Congress could rationally conclude that these seemingly de minimis, non-commercial activities of individuals, when multiplied by the identical conduct of others similarly situated across the United States, substantially affects interstate commerce. Absent regulation of that targeted activity, the success of the legislation sub judice would be substantially impaired.

As in *Morrison,* the findings and acts of the legislature are presumed constitutional through the mutual deference due between coordinate branches of government. As in *Lopez* and *Raich,* the role of the courts is not to second-guess the findings of the legislature; rather, the courts need only determine whether a rational basis exists for Congress' conclusion that the regulated activity substantially affects interstate commerce. Here, there is a rational basis for the lawmakers' findings. There is an undisputable causal link between the growing population of citizens who lack health insurance, the cost shifting effect of the unpaid health services they consume, the declining numbers in the healthy insured population pool, the climbing health insurance premiums for those

253. Liberty Univ., Inc., 753 F. Supp. 2d at 634 (citation omitted).
254. Id. at 634-35 (citations omitted).
255. Id.
256. Morrison, 529 U.S. at 607 (citations omitted).
with insurance, and the present day crisis in the national health insurance and general health care markets.258

C. The Individual Mandate is Essential for the Success of the Larger Regulatory Scheme of the ACA—Reforming the National Health Care Market and Reducing the Cost of Health Care for All

The minimum coverage requirement is not a standalone provision, but instead represents the critical foundation upon which rests the success of the overarching regulatory goal in the ACA. Put another way, the individual mandate is an essential part of the total economic regulatory regime for comprehensive health care reform in this country, and affordable medical care for all. In its strictest context, the mandate forbids individuals from self-insuring against the risks of unpredictable and potentially limitless health care costs.259 Nonetheless, when Congress rationally finds that an aggregate practice threatens a nationwide market, it may regulate the entire class of activity,260 and “[w]here necessary to make a regulation of interstate commerce effective, Congress may regulate even those intrastate activities that do not themselves substantially affect interstate commerce.”261 Congress is authorized under the Constitution to make all laws necessary and proper to carry out its Commerce Clause powers.262

The mandate commands that all applicable individuals acquire a minimum level of health insurance coverage. The court opinions upholding the individual mandate have all held that a citizen’s choice to buy health insurance is unequivocally an economic activity, as is an individual’s choice to forego health insurance and self-insure.263 Therefore, the health insurance business and the national market for health care services are fair game for regulation under the Commerce Clause. Even if, however, the activity of self-insuring was found to be non-economical, non-commercial intrastate activity, Congress could still regulate the conduct if its larger

258. Liberty Univ., 753 F. Supp. 2d at 634-35.
260. Gonzales, 545 U.S. at 17 (citations omitted).
261. Id. at 35 (Scalia J., concurring).
The incremental effect of any person's individual acts intrastate is of no moment. "[T]he only thing that matters is whether the national problem Congress has identified is one that substantially affects interstate commerce," and it matters not whether the affected individual himself is actively participating: "Whether any particular person is, or is not, also engaged in interstate commerce... is a mere fortuitous circumstance that has no bearing on Congress's power to regulate an injury to interstate commerce." When replicated and aggregated across the nation, individual choices about providing for health care are economic activities that substantially affect interstate commerce.

The importance of the individual mandate is crystal clear when viewed from the perspective of the fundamental economics of the insurance business. Professor Mark Hall illustrated how insurance markets operate in the absence of the ACA reforms. A 2005 study of the breakdown of total health care spending according to percentages of the population showed that 25% of total health care dollars were spent on behalf of 1% of the population and that 80% of total dollars were attributable to 20% of the population. By contrast, the majority of people, 80% of the population, account for only 20% of the total costs. Professor Hall termed this the "80/20 rule." In summary, there is a disproportionately high concentration of health care dollars spent on behalf of a relatively small number of people who incur very high medical costs.

To preserve their profits against this high risk segment, insurance companies either deny coverage, charge increased premiums

264. Gonzales, 545 U.S. at 18. See also id., 545 U.S. at 34-35 (Scalia, J., concurring) ("Congress' regulatory authority over intrastate activities that are not themselves part of interstate commerce (including activities that have a substantial effect on interstate commerce) derives from the Necessary and Proper Clause... Where necessary to make a regulation of interstate commerce effective, Congress may regulate even those intrastate activities that do not themselves substantially affect interstate commerce." (citations omitted)).
265. Seven-Sky, 661 F.3d at 19.
266. Id. (quoting United States v. Wrightwood Dairy Co., 315 U.S 110, 121 (1942) (internal quotation marks omitted)).
268. Hall, supra note 34, at 459-60.
269. Id. at 460.
270. Id.
271. Id. at 461 (internal citation omitted).
272. Id. at 460 (internal citation omitted).
based on past and current medical history, exclude coverage of pre-existing conditions, or limit the amounts of coverage afforded. This is the practice of medical underwriting that was alluded to earlier. Insurance companies also spread the charges among the entire population pool, in order to keep premiums affordable for everyone, but the extreme costs at the high end—i.e., the 20% of the population who account for 80% of spending—explain the high cost of health insurance, and why these costs may be particularly distasteful for those who are presently healthy. Insurance companies gain by avoiding high-risk populations, or by charging discriminatory, elevated premiums to this group. They also gain by enrolling the large pools of healthy customers, and the health insurers compete to attract these profitable, low risk groups.

The ACA commands health insurers to sell coverage to all comers, and forbids recourse to medical underwriting and the other customary risk-mitigating practices that defined the industry pre-ACA. Health insurance companies are profit-making businesses that seek to enroll healthy, low risk customers—populations that actuarially would not be predicted to generate costly payouts in the near future. Insurers profit by avoiding applicants with higher risks or charging these customers higher prices; at the same time they face major losses if they fail to enroll substantial numbers of lower risk applicants. The ACA imposes forced “adverse selection” on these companies, and commands them to enroll people with pre-existing conditions who are sick ab initio—applicants they could formerly reject, deny, cancel, or surcharge.

273. Approximately 36% of applicants for individual health insurance are denied coverage, charged a higher premium, or are offered only limited coverage that excludes pre-existing conditions. Thomas More Law Ctr. v. Obama, 651 F.3d 529, 546 (6th Cir. 2011) (citing U.S. DEP’T OF HEALTH AND HUMAN SERVS., COVERAGE DENIED: HOW THE CURRENT HEALTH INSURANCE SYSTEM LEAVES MILLIONS BEHIND 1 (2009), available at http://healthreform.gov/reports/deniedcoverage/coveragedenied.pdf).
274. See supra note 227. See also Hall, supra note 34, at 462-63 (discussing medical underwriting).
275. Hall, supra note 34, at 462 (internal citations omitted).
277. 47 Million and Counting: Why the Health Care Marketplace is Broken: Hearing before the S. Comm. on Fin., supra note 238, at 13 (statement of Professor Mark A. Hall).
278. See Hall supra note 34, at 463 (describing adverse selection) (internal citations omitted).
pre-ACA—and whose payout costs beget a loss for the company. Absent the individual mandate, few might be inclined to buy health insurance before they get sick. Post-ACA, if enrollments were purely voluntary, the only individuals who might buy health insurance would be those who are older, in poorer than average health, and who might imminently require costly medical services. The rest—without the minimum coverage requirement and knowing that insurance companies cannot reject them—might predictably purchase their health insurance en route to the hospital (much like, as alluded to earlier, the home owner applying for fire insurance as the house burns down, when the law prohibits the insurer from denying him). This would amount to compulsory “adverse selection” on the part of the insurance companies—forcing them to cover a high risk applicant at the time the risk materializes. Without the right to mitigate losses through discriminatory medical underwriting, mandatory “adverse selection” would bankrupt the industry.

The ACA builds upon and preserves the private health insurance market. The loss of insurance carriers would frustrate not only the immediate objective of the ACA—near universal health coverage at affordable prices—but also the overarching comprehensive reform package that affordable premiums would have enabled. The individual mandate forces all applicable citizens into the nationwide insurance pool, regardless of their state of health. By increasing the size of the healthy insurance pool and spreading the costs over a much larger paying population, health insurance premiums would drop to affordable levels. This would enable near universal health care coverage and substantially mitigate the massive problem of uncompensated care. Congress, therefore, had a rational basis to conclude that the individual mandate is essential to the success of the ACA, that the purpose would be frustrated absent the mandate, and that the mandate represents an

281. Id. at 1-2. See also Hall, supra note 34, at 463 (internal citations omitted).
282. Hall, supra note 34, at 463 (internal citations omitted). This was born out in actual fact. Early ACA regulations required insurers to accept all children under age 19, without regard to pre-existing conditions, starting three years before the individual mandate came into effect. Most of the major insurers discontinued selling child-only coverage. Id. at 470-71 (internal citations omitted).
appropriate means toward the achievement of the larger goal of 
reforming the national health insurance system; in other words, a 
necessary and proper exercise of Congress’ powers under the 
Commerce Clause. Here, consistent with Chief Justice Mar-
shall’s words from almost two hundred years ago, the end is “legi-
timate” and “within the scope of the [C]onstitution. The means 
are “appropriate, [and] plainly adapted to that end . . . [and] not 
prohibited, but consist[ent] with the letter and spirit of the 
[C]onstitution . . . .”

IV. THE ARGUMENTS AGAINST THE INDIVIDUAL MANDATE ARE AT 
BEST UNPERSUASIVE AND AT WORST REPRESENT BARE PARTISAN 
POLITICS

The gravamen of the opponents’ case against the ACA is the 
constitutionality of the individual mandate or minimum coverage 
requirement, and whether the individual mandate falls within 
or beyond Congress’ authority under the Commerce Clause. Judge Vinson, writing for the Northern District of Florida, elo-
quently embraced and ennobled the conservative and libertarian 
positions:

[T]his case is not about whether the Act is wise or unwise leg-
islation, or whether it will solve or exacerbate the myriad 
problems in our health care system. In fact it is not really 
about our health care system at all. It is principally about our 
federalist system, and it raises very important issues regard-
ing the Constitutional role of the federal government.

Holder, 661 F.3d 1 (D.C. Cir. 2011) (citations omitted).
286. Starting in 2014, every citizen (except those who qualify for one of the enumerated 
statutory exceptions) must buy health insurance or pay a penalty. 26 U.S.C. § 5000(A)(a), 
(b)(1), (d), (e) (2011).
v. U.S. Dep’t of Health & Human Servs., 648 F.3d 1235 (11th Cir. 2011), cert. granted in 
2d 1256, 1263 (N.D. Fla. 2011), aff’d in part and rev’d in part sub nom. Florida ex rel. At-
torney Gen. v. U.S. Dep’t of Health & Human Servs., 648 F.3d 1235 (11th Cir. 2011), cert. 
This was the case that was filed minutes after the ACA was signed into law. The challenge was filed by Florida’s attorney general and was joined by the governors and/or attorneys general of twenty-six states.289 This was the first decision that found the individual mandate unconstitutional.290

A. The Individual Mandate is Unconstitutional Because the Commerce Clause Regulates Activity, and Forgoing Health Insurance Is Inactivity, Not Activity

In Florida ex rel. Bondi v. U.S. Department of Health and Human Services, the court pointed out that every Commerce Clause challenge in this nation’s history involved an unequivocal activity—a voluntary, active choice to enter into an affirmative type of economic (or even non-economic) activity, which in the aggregate substantially affected interstate commerce.291 In every application of the commerce power affirmed by the Supreme Court, there was “some form of action, transaction, or deed placed in motion by an individual or legal entity.”292 Roscoe Filburn was in the farming business and voluntarily chose to grow wheat.293 Angel Raich voluntarily consumed locally grown marijuana provided for her own medical use, and her co-challenger and co-user of medical marijuana, Diane Monson, grew her own product.294 All of these plaintiffs had been pre-existing players in their respective markets when they were prosecuted under the contested regulations.295

In Heart of Atlanta Motel v. United States,296 the Court invoked the Commerce Clause to forbid Atlanta innkeepers from discriminating against African Americans.297 Owners and managers of places of public accommodation were compelled to accept guests and travelers without regard to race, religion, or nationality.298 Similarly, in Katzenbach v. McClung,299 the owners of Ollie’s Bar-

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290. Id. at 1263, 1305-07.
291. Id. at 1286-87.
294. Gonzales v. Raich, 545 US 1, 7-8 (2005).
298. Heart of Atlanta Motel, 379 U.S. at 247 (citation omitted).
becue in Birmingham, Alabama were compelled to serve African Americans, and racial discrimination against customers was prohibited. These regulations were upheld under the commerce power, because in the aggregate, racial discrimination by inns or restaurants substantially impedes interstate travel by people of color, and thereby, substantially impairs interstate commerce. In both of these cases, the plaintiff business owners in Georgia and Alabama were compelled to act against their will, much like the complainants in the ACA challenges who oppose the individual mandate. Unlike the opponents of the ACA, however, the Atlanta motel keeper and the Birmingham restaurateur were actively in business when the contested regulations were enforced against them. Neither of these appellants claimed that they had been inactive, nonparticipants in their respective marketplaces. Neither of these businessmen had been compelled to open inns or restaurants in the first instance.

The ACA challenge, then, presents a unique issue, because the complainants before the courts—the medically uninsured—believe themselves to be passive subjects who never entered the relevant stream of commerce. By deliberate choice, these individuals eschewed the health insurance market. Never before, under the commerce power, had Congress ordered nonparticipant individuals to involuntarily enter a market, and never before has Congress forced unwilling individuals to buy an unwanted commodity from a private seller. The opponents of the individual mandate fervently assert that the status of being uninsured is passive economic inactivity. To them, the regulation of inactivity is unprece-
dent in Commerce Clause jurisprudence, and represents a line that has never been crossed before.\textsuperscript{308}

The absence of judicial precedent, however, does not make a law unconstitutional, but the traditional presumption of constitutionality accorded to all federal legislation is "arguably weakened, and an 'absence of power' might reasonably be inferred where—as here—'earlier Congresses avoided use of this highly attractive power."\textsuperscript{309} The court in \textit{Florida ex rel. Bondi} held that by our forefathers' design and past Supreme Court precedent, the Commerce Clause regulates activity only.\textsuperscript{310} The court stated that "[i]t would be a radical departure from existing case law to hold that the government could regulate inactivity under the Commerce Clause."\textsuperscript{311} To hold that Congress could force a passive market nonparticipant to buy a product from a private vendor would presuppose that the bare act of compelling an individual to buy health insurance is itself economic activity that substantially affects interstate commerce.\textsuperscript{312} Put another way, by requiring that all individuals obtain health insurance, the government is actually creating the commerce it intends to regulate.\textsuperscript{313} If this regime is held to be constitutionally permissible, the government could do virtually anything it wanted. The court in \textit{Florida ex rel. Bondi} stated that:

It is difficult to imagine that a nation which began, at least in part, as the result of opposition to a British mandate . . . imposing a nominal tax on all tea sold in America would have set out to create a government with the power to force people to buy tea in the first place. If Congress can penalize a passive individual for failing to engage in commerce, the enumeration of powers in the Constitution would have been in vain for it would be difficult to perceive any limitation on federal

\begin{footnotes}
\textsuperscript{308} Thomas More Law Ctr., 651 F.3d at 559 (Sutton, J., concurring).
\textsuperscript{309} Florida ex rel. Bondi, 780 F. Supp. 2d at 1284-85 (quoting Printz v. United States, 521 U.S. 898, 905, 908 (1997)).
\textsuperscript{310} Id. at 1286-87 (citations omitted).
\textsuperscript{311} Id.
\textsuperscript{312} Id. at 1286.
\end{footnotes}
power and we would have a Constitution in name only. Surely this is not what the Founding Fathers could have intended.\footnote{Florida ex rel. Bondi, 780 F. Supp. 2d at 1286 (citations omitted) (internal quotation marks omitted).}

From this opposing point of view, an individual’s choice not to buy health insurance is inactivity; thus, the individual mandate regulates inactivity—the opposite of activity.\footnote{Id. at 1287.} But for the individual mandate, these individuals are not part of the national health insurance market. Since the Commerce Clause has, to date, applied only to voluntary, self-initiated activity, court held that the individual mandate is beyond its limits, and a person’s own decision not to buy health insurance is not the type of economic activity properly subject to the commerce power.

Opponents state that Congress’ authority has limits. The tools at its disposal are restricted to those assigned by the Constitution, and those methodologies cannot infringe on the Tenth Amendment police powers traditionally reserved to the states or the people.\footnote{Id. at 571 (citing U.S. CONST. amend. X).} To opponents, “Congress’ exercise of power intrudes on both the States and the people.”\footnote{Id. at 559 ("[T]he Supreme Court has considerable discretion in resolving this dispute.").}

As expressed by Professor Randy Barnett, one of the most prominent and published proponents of the conservative position, the individual mandate turns citizens into subjects and represents an impermissible commandeering of the people.\footnote{Randy E. Barnett, Commandeering the People: Why the Individual Health Insurance Mandate is Unconstitutional, 5 N.Y.U. J.L. & LIBERTY 581, 637 (2010).} Note that the Eleventh Circuit Court of Appeals upheld all of the above arguments in its August 2011 decision affirming the Northern District of Florida’s ruling that the individual mandate is unconstitutional.\footnote{Florida ex rel. Attorney Gen. v. U.S. Dep’t of Health & Human Servs., 648 F.3d 1235 (11th Cir. 2011), cert. granted in part sub nom. Florida v. Dep’t of Health & Human Servs., 132 S. Ct. 604 (2011).}

Even if the individual mandate is an unprecedented exercise of the commerce power, the novelty of the issue does not make it a “bridge too far.”\footnote{Thomas More Law Ctr. v. Obama, 651 F.3d 529, 560 (6th Cir. 2011) (Sutton, J., concurring).} The Sixth Circuit majority opined that this only means that the Supreme Court will have considerable latitude in deciding the controversy.\footnote{Id. at 559 ("[T]he Supreme Court has considerable discretion in resolving this dispute.").} New public policy imperatives can
give rise to novel and creative, but nonetheless constitutional remedies under the aggregation principle and substantial effects doctrine.\textsuperscript{322}

The opposition remonstrates vociferously that the individual mandate presents a mortal threat to our hallowed traditions of federalism.\textsuperscript{323} Conservative opponents have penned learned disquisitions relying on history, tradition, and the hallowed pages of the Federalist Papers. The text of the Commerce Clause, however, makes no distinction between action and inaction and neither has the Supreme Court to date.\textsuperscript{324} There is, in fact, no Constitutional bar to passing legislation that could be said to regulate inactivity.\textsuperscript{325} In its Commerce Clause cases, the Supreme Court has declined to apply "flexible labels" to define the scope of the commerce power.\textsuperscript{326} Congress' authority under the Commerce Clause has been defined by "broad principles of economic practicality"\textsuperscript{327} and that authority cannot be confined by any decision making formula based on labels such as direct, indirect, or in this case, activity or inactivity.\textsuperscript{328} Furthermore, as pointed out in \textit{Mead}:

It is pure semantics to argue that an individual who makes a choice to forego health insurance is not "acting," especially given the serious economic and health-related consequences to every individual of that choice. Making a choice is an affirmative action, whether one decides to do something or not

\textsuperscript{322} \textit{Id.} at 559.
\textsuperscript{323} \textit{Id.} at 571-73 (Graham, J., dissenting) (citations omitted).
\textsuperscript{324} \textit{Id.} at 547 (majority opinion).
\textsuperscript{325} \textit{Thomas More Law Ctr.}, 651 F.3d at 547.
\textsuperscript{326} \textit{Id.} at 548 (citing United States v. Faasse, 265 F.3d 475, 490-91 (6th Cir. 2001)). In \textit{Faasse}, the court rejected a constitutional challenge to the Child Support Recovery Act of 1982, 18 U.S.C. § 228 (1994). \textit{Id}. The opponents of the Act argued that the legislation was unconstitutional because it regulated the failure of a parent to make court ordered, out-of-state child support payments—in other words, the legislation regulated the failure of a person to place a thing in interstate commerce. \textit{Id}. The \textit{Faasse} court held that Congress had a rational basis to conclude that a non-custodial parent's failure to send court ordered payments across state lines substantially affected interstate commerce. \textit{Id}. Referring to \textit{Faasse} in \textit{Thomas More Law Center}, the court noted that "[f]ocusing on the broader economic landscape of the legislation revealed the unworkability of relying on inexact labels . . ." 651 F.3d at 548. The \textit{Thomas More Law Center} court similarly declined to rely on problematic labels in analyzing the constitutionality of the individual mandate and held the provision "constitutional notwithstanding the fact that it could be labeled as regulating inactivity." \textit{Id}.
\textsuperscript{327} \textit{Id.} at 547 (quoting United States v. Lopez, 514 U.S. 549, 571 (1995) (Kennedy, J., concurring)).
\textsuperscript{328} \textit{Id.} at 547-48 (citing Wickard v. Filburn, 317 U.S. 111, 120 (1942)).
do something. They are two sides of the same coin. To pretend otherwise is to ignore reality.\textsuperscript{329}

A choice to buy or not to buy health insurance is not a question of activity versus inactivity or passivity.\textsuperscript{330} The issue is not whether one buys or abstains from buying certain goods and services. The real issue is about how a person will pay or who, in fact, will pay for the health care services that people will inevitably consume.\textsuperscript{331} The focus should be on the actual effects of the contested conduct on interstate commerce. A “myopic focus on a malleable label”—in this case action or inaction, uninsured or self-insured—cannot resolve the constitutionality of the individual mandate.\textsuperscript{332}

Notwithstanding the opposing arguments, the Constitutional limits of the commerce power have been clearly set forth in \textit{Lopez} and \textit{Morrison}, and the controlling test is the substantial effects test.\textsuperscript{333} Congress can regulate economic activity that substantially affects interstate commerce, based on the rational basis conclusions of its elected members. The individual mandate “regulates activity that is commercial and economic in nature: economic and financial decisions about how and when health care is paid for, and when health insurance is purchased.”\textsuperscript{334} The fact that virtually no one can escape the need for health care explains why total health-related spending in the United States added up to $2.5 trillion in 2009, equivalent to 17.6\% of the Gross Domestic Product, and amounting to an average expenditure of $8086 per person.\textsuperscript{335} Health care delivery is clearly a national market substantially affecting interstate commerce.\textsuperscript{336} Consumers of health care have to pay, and the costs can be staggering. The acts of paying for health care, obtaining health care, and insuring for health care all ad-

\begin{footnotesize}
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\item \textsuperscript{329} Mead v. Holder, 766 F. Supp. 2d 16, 36 (D.D.C. 2011), \textit{aff’d sub nom.} Seven-Sky v. Holder, 661 F.3d 1 (D.C. Cir. 2011).
\item \textsuperscript{330} Mead, 766 F. Supp. 2d at 37.
\item \textsuperscript{331} Id.
\item \textsuperscript{332} \textit{Thomas More Law Ctr.}, 651 F.3d at 548.
\item \textsuperscript{333} Mead, 766 F. Supp. 2d at 30 (citations omitted). \textit{See also} \textit{Thomas More}, 651 F.3d at 554-55, 567 (citation omitted).
\item \textsuperscript{336} 42 U.S.C § 18091(a)(2)(B). Drugs, medical supplies, and medical equipment all flow through interstate commerce. \textit{Id.} Most health insurers are multistate or large regional corporations and thus premiums and claim payments travel across state lines. \textit{Id.}
\end{itemize}
\end{footnotesize}
dress the financial risk of insufficient funds in the face of sickness or accident, and all these acts affect interstate commerce.

A person could reasonably anticipate the costs of routine medical expenses, but no one can predict the costs of catastrophic illness or accidental injury. To protect against and provide for medical costs, many Americans purchase health insurance. As discussed earlier, the other method of payment is self-insurance. People can save money and conserve assets so that funds will be available to cover their needs. For example, the plaintiffs in Thomas More Law Center and Mead complained that the individual mandate required them to alter their spending and saving habits. It also forced some complainants to cut down on discretionary spending for entertainment, recreation, and dining out. Unfortunately, however, many citizens who self-insure will reserve nothing and rely on public charity, private gifts, and/or EMTALA. The point to be made is that paying for health insurance and self-insuring are two ways to address the same risk. Each involves purposeful positive choices. Both choices comprise action rather than inaction, and both affect the interstate markets in health insurance and health care. A person can keep sufficient funds in his bank account to write periodic premium checks. Alternatively, one can prudently manage assets over time so that adequate funds will be available to cover any and all health-care contingencies. Either way, Congress reasonably concluded that the decisions and actions of the self-insured were “quintessentially economic” and substantially affected interstate commerce.

Roscoe Filburn chose to “self-insure” by growing his own wheat on his own farm to cover his own personal needs. By so doing, he could avoid buying wheat on the open market. Similarly, the ACA opponents, by reserving or “growing” their own funds, plan to pay their medical costs out of pocket to avoid buying health insurance from the commercial marketplace. The ACA opponents pointed out that Filburn had already been in the agricultural

337. Thomas More Law Ctr., 651 F.3d at 536; Mead, 766 F. Supp. 2d at 23.
338. Thomas More Law Ctr., 651 F.3d at 561.
340. Thomas More Law Ctr., 651 F.3d at 544-45 (citation omitted).
343. Id.
business at the time his case was decided, but everyone is by
definition in the health care market—knowingly or unknowingly,
willingly or unwillingly, by choice or due to exigency. No one can
avoid it. The uninsured that consider themselves non-participants
have in reality self-insured, and all members of that class are sub-
ject to regulation, even those who have sufficient assets to cover
all their medical needs. Congress can regulate all who self-insure,
whether or not they can pay for medical care. Put another way,
even if there are individuals among the class of the uninsured
with sufficient means to cover any or all the health care they may
require, “[w]here the class of activities is regulated and that class
is within the reach of federal power, the courts have no power to
excise, as trivial, individual instances of that class.”

B. If Congress Can Make You Buy Health Insurance, Congress
Can Make You Eat Broccoli: The Slippery Slope Argument

The district court in Florida ex rel. Bondi attacked the govern-
ment’s rationale that the health care market is unique and asked
why the purported factors that make it unique are constitutionally
significant. The government argued that the health care deli-
very market is unique, because several factors cause everyone to
be active market participants, and no individual is really inac-
tive. First, everyone is susceptible to sudden and unanticipated
illness. Everyone will require health care at some point during
their lives, and no one can predict the costs. Second, no one can
opt out of the health care market. Third, EMTALA requires
hospitals to provide care to all in need, regardless of ability to

344. See, e.g., Virginia ex rel. Cuccinelli v. Sebelius, 728 F. Supp. 2d 768, 778-79, 780
(E.D. Va. 2010), vacated and remanded for dismissal, 656 F.3d 253 (4th Cir. 2011); Thomas
More Law Ctr., 651 F.3d at 558 (Sutton, J., concurring); Florida ex rel. Attorney Gen. v.
U.S. Dep’t of Health & Human Servs., 648 F.3d 1235, 1291-92 (11th Cir. 2011), cert.
granted in part sub nom. Florida ex rel. Attorney Gen. v. U.S. Dep’t of Health & Human Servs.,

345. Gonzales v. Raich, 545 U.S. 1, 23 (2005) (citations omitted) (internal quotation
marks omitted).

346. Mark A. Hall, Commerce Clause Challenges to Health Care Reform, 159 U. Pa. L.
Rev. 1825, 1839 (2011) (internal citations omitted). See also Florida ex rel. Bondi v. U.S.
Dep’t of Health & Human Servs., 780 F. Supp. 2d 1256, 1289 (N.D. Fla. 2011), aff’d in part
and rev’d in part sub nom. Florida ex rel. Attorney Gen. v. U.S. Dep’t of Health & Human
Servs., 648 F.3d 1235 (11th Cir. 2011), cert. granted in part sub nom. Florida v. Dep’t of

347. Id. at 1288-89.

348. Id. at 1288.

349. Id.

350. Id.

351. Florida ex rel. Bondi, 780 F. Supp. 2d at 1288.
Finally, the massive aggregated costs of unpaid medical care are passed on to everyone through the cost-shifting phenomenon discussed earlier.\footnote{352}

In \textit{Florida ex rel. Bondi}, the district court opined that none of the above features are constitutionally relevant.\footnote{353} None of these uniqueness factors establish that the uninsured are active participants in the national health care market, and thereby, subject to the Commerce power.\footnote{354} None of these factors make the individual mandate constitutional.\footnote{355} The Eleventh Circuit, in affirming the district court, emphasized that the commerce power is not unlimited and that the Supreme Court set boundaries to that enumerated power in \textit{United States v. Lopez} and \textit{United States v. Morrison}.\footnote{356} The uniqueness factors that the government proposed describe the complexity of the health insurance and health care markets, but those elements have nothing to do with any limiting principles grounded in settled Commerce Clause precedent.\footnote{357} If Congress enacts a law that “exceeds its enumerated powers, then [that law] is unconstitutional, regardless of the purported uniqueness of the context in which it is being asserted.”\footnote{358} Every market problem could be viewed as unique in some particular aspects.\footnote{359}

Besides health care, the court noted that there are other markets that people cannot opt out of.\footnote{360} Using the food market as an example, the court stated that “Congress could require that people buy and consume broccoli at regular intervals, not only because the required purchases will positively impact interstate commerce, but also because people who eat healthier tend to be healthier and are thus more productive and put less of a strain on the health care system.”\footnote{361} Similarly, because no one can avoid the transportation market, Congress could require people above a specified
income level to buy General Motors ("GM") cars. This could be done under the rationale that those who refuse to buy GM cars or those who buy foreign cars are adversely impacting the U.S. auto industry, and thereby, interstate commerce, and that conduct adversely affects a company that was bailed out by the government, and ultimately, by taxpayers. Additionally, no one can opt out of the housing market and most people at some time will buy a home. Widespread defaults on home mortgages result in aggregate cost-shifting with significant and demonstrated effects on the housing, lending, and securities markets nationwide. Could Congress, therefore, require people to buy homes and mandate that they finance their purchases with mortgages, and could Congress compel these homebuyers to buy mortgage cancellation insurance to backstop their debt? Could Congress enact a statute of this magnitude to stabilize the housing market? Unlike the national health care market, however, no produce purveyors are compelled to supply broccoli for free, no GM manufacturers or retailers are required to give away cars, and no mortgage lender is required by law to issue mortgages to applicants with no credit. This is true notwithstanding the fact that suppliants may come through the doors of the supermarket in need of green vegetables, others may arrive at the showroom doors in need of cars for transportation, and still others may enter the bank in need of money for housing. Furthermore, people can clearly choose to live without broccoli, cars, and even tea (to go back to Judge Vinson’s Boston tea party metaphor). Also, people can rent rather than own homes. Health care is not broccoli. As noted by William Huhn, “it is disingenuous to equate the requirement to maintain health insurance (which is part of a comprehensive regulation of the health insurance industry) with laws that tell people specifically where to live and what to eat.” These differences establish discernible limits on Congressional

363. Id.
365. Id. at 1290.
366. Id.
367. Id.
368. Id. at 1289.
power. There are due process limitations on the power of every American legislative body, \footnote{372} and there are political restraints and consequences that would present a decided disincentive for lawmakers to pass absurd or abusive legislation. \footnote{373} Nevertheless, the district court in \textit{Florida ex rel. Bondi} feared that under Congress' reasoning in this case there would be no logical limit on the commerce power, \footnote{374} and the Eleventh Circuit agreed. \footnote{375} The Eleventh Circuit stated that "the [Constitution] protects against the Government . . . . We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly."\footnote{376} Furthermore, a concurring judge in \textit{Thomas More Law Center} stated that "[t]he uniqueness that justifies one exercise of power becomes precedent for the next . . . . Congress cannot exceed its constitutional authority, notwithstanding the uniqueness or exigency of the problem it seeks to remedy, and "no matter how powerful the federal interest involved."\footnote{377}

Not every Supreme Court decision, however, necessarily establishes precedent for others. The effects of decisions can be limited to the context of the case at bar. \textit{Bush v. Gore} \footnote{379} has not been cited to support the proposition that the Supreme Court can decide disputed elections and pick the President of the United States. \footnote{380} Chief Justice Roberts, in \textit{United States v. Stevens}, \footnote{381} referred to the First Amendment case \textit{New York v. Ferber}, \footnote{382} and held that the decision in \textit{Ferber} "was a special case"—limited to the context of live child pornography. \footnote{383} The point was that the

\footnote{372} Thomas More Law Ctr. v. Obama, 651 F.3d 529, 564-65 (6th Cir. 2011) (Sutton, J., concurring).
\footnote{373} Hall, supra note 346, at 1825, 1864-66, 1867-71 (internal citation omitted). \textit{Florida ex rel. Bondi}, 780 F. Supp. 2d at 1289 n.20.
\footnote{374} \textit{Florida ex rel. Bondi}, 780 F. Supp. 2d at 1286, 1290-91, 1293-94.
\footnote{376} \textit{Florida ex rel. Bondi}, 780 F. Supp. 2d at 1289 n.20 (alteration in original) (citing, inter alia, \textit{United States v. Stevens}, 130 S. Ct. 1577 (2010) (refusing to recognize commercial videos and other depictions of extreme animal cruelty as a newly minted category of constitutionally unprotected speech outside the umbrella of the First Amendment)).
\footnote{377} Thomas More Law Ctr. v. Obama, 651 F.3d 529, 572 (6th Cir. 2011) (Graham, J., concurring).
\footnote{378} \textit{Florida ex rel. Attorney Gen.}, 648 F.3d at 1312 (citation omitted).
\footnote{379} 531 U.S. 98 (2000).
\footnote{380} Mariner et al., supra note 270, at 202.
\footnote{381} 130 S. Ct. 1577, 1577 (2010).
\footnote{382} 458 U.S. 747 (1982) (upholding a New York statute that declared live child pornography to be a new category of banned speech, unprotected by the First Amendment).
\footnote{383} \textit{Stevens}, 130 S. Ct. at 1586 (citations omitted).
reasoning behind one decision did not necessarily open the door for Congress to invent new and future categories of forbidden speech. The holding in one special case did not amount to carte blanche for Congress to infringe the First Amendment free speech rights of the American people.\textsuperscript{384} Similarly, the unique circumstances that justify the ACA need not invariably become precedent for unlimited Congressional authority. As Judge Marcus wrote for the Eleventh Circuit in his dissent in \textit{Florida ex rel. Attorney General v. U.S. Department of Health and Human Services}: 

\begin{quote}
[T]his case does not open the floodgates to an unbounded Commerce Clause power because the particular factual circumstances are truly unique and not susceptible to replication elsewhere. The factual uniqueness would render any holding in this case limited. I add the unremarkable observation that the holding of every case is bounded by the particular fact patterns arising therein.\textsuperscript{385}
\end{quote}

In this case, the distinctive attributes of the national health care delivery market are constitutionally significant, because those features do in fact bring every American into the national health care market, and thereby, provide the jurisdictional nexus with interstate commerce and the limits on the commerce power that were lacking in the acts struck down in \textit{Lopez} and \textit{Morrison}.\textsuperscript{386}

\section*{V. Politics: The Concept of the Individual Mandate Originated from Republican Policymakers}

Congress has the power to enact a single-payer, socialized health insurance system under its tax and welfare power.\textsuperscript{387} Through that power and by means of payroll deductions, all working Americans purchase government mandated retirement and disability insurance in the form of social security\textsuperscript{388}, and they

\textsuperscript{384} \textit{Id}. \\
\textsuperscript{385} \textit{Florida ex rel. Attorney Gen. v. U.S. Dep't of Health & Human Servs.}, 648 F.3d 1235, 1356 (11th Cir. 2011) (Marcus, J., concurring in part and dissenting in part) (citation omitted), cert. granted in part sub nom. \textit{Florida v. Dep't of Health & Human Servs.}, 132 S. Ct. 604 (2011). \\
\textsuperscript{386} \textit{See supra} Parts II and III.A. \\
\textsuperscript{387} \textit{Id}. note 347, at 1826 (internal citations omitted). \\
\textsuperscript{388} \textit{Id}. n.3 (citing Helvering v. Davis, 301 U.S. 619, 640-41 (1937) (upholding the constitutionality of the Social Security Act of 1935)). \textit{See also} Koppelman, \textit{supra} note 30, at *3-4.
finance health insurance for seniors by means of Medicare taxes.\footnote{389} Congress could have raised income tax rates or enacted a payroll tax to pay for health benefits. Congress could have enacted Medicare for all, but instead passed the ACA, which is far more protective of insurance markets and individual freedoms than any centralized government monopoly.\footnote{390}

As Republican appointee Judge Hudson, in striking down the individual mandate, wrote in \textit{Cuccinelli}, "[this] case has a distinctive political undercurrent."\footnote{391} Actually, Republican policymakers first proposed the idea of an individual mandate in 1993, as part of a health reform bill they introduced during the Clinton Administration.\footnote{392} At that time, conservatives supported the mandate, because it called for individual responsibility to counter the "free rider effect" of those who consumed medical care without paying.\footnote{393} The goal, with bipartisan support, was to preserve the health insurance market and at the same time achieve universal coverage, and the provisions were very similar to the ACA today.\footnote{394} Before the advent of the ACA or "Obamacare," Republican lawmakers never questioned the constitutionality of an individual mandate.\footnote{395}

In 2006, former Republican governor Mitt Romney signed into law the landmark Massachusetts health care reform bill—\textit{An Act Providing Access to Affordable, Quality, and Accountable Health Care}.\footnote{396} The Massachusetts Act was the product of a remarkable collaboration of multiple public and private interest groups, a Democratic state legislature, and a Republican governor.\footnote{397} Like

\footnote{389. \textit{See Florida ex rel. Attorney Gen.}, 648 F.3d at 1302-03. \textit{See also} Mariner et al., \textit{supra} note 370, at 202.}
\footnote{390. Hall, \textit{supra} note 347, at 1826 (internal citation omitted). \textit{See also} Koppelman, \textit{supra} note 30, at *4.}
\footnote{393. Rovner, \textit{supra} note 392.}
\footnote{394. \textit{Id.}}
\footnote{395. Hall, \textit{supra} note 347, at 1826 (internal citations omitted).}
\footnote{397. \textit{Id.}}
the ACA, the law expanded Medicaid coverage, created state subsidized health insurance for low income persons not eligible for Medicaid, merged the individual and small group health insurance markets, instituted a "fair share" assessment against employers, instituted an individual mandate, and created an insurance exchange that was empowered to set standards for coverage and affordability. The bill provided state subsidies for those who could not afford the costs.

Prior to signing the bill, then Governor Romney made this comment, focusing particularly on the requirement that every citizen of Massachusetts have health insurance:

> Around the country, people are watching because they know this is big. Some on the far left don't like it because it's not a single-payer universal coverage program. Some on the far right don't like it because they don't like government telling people that they need to get insurance. But the great majority of people, both on the left and the right, believe that this is a step forward.

The Governor explicitly acknowledged the cost-shifting effect of uncompensated medical care, pointing out that with everyone covered, the burden of the uninsured would no longer be passed on to the community. Governor Romney characterized the Massachusetts plan as "something that's much closer to Republican ideals: reform the market to make the health-insurance marketplace work better. Insist on personal responsibility instead of government responsibility."

The Massachusetts plan was a success and showed that health reform could work. Massachusetts achieved its goal of near universal coverage with 98% of its citizens insured in 2010. The reforms cost the state slightly over 1% of the total state budget for

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399. Amitabh Chandra et al., The Importance of the Individual Mandate-Evidence from Massachusetts, 364 NEW ENG. J. MED. 293, 294-95 (2011).
401. Id.
402. Id. (comparing the Massachusetts plan with the unsuccessful health care campaign of the Clinton administration).
404. Id.
The average premiums for citizens who purchased unsubsidized care dropped 20-40%, mostly because the plan brought younger and healthier people into the pool to offset the costs of the older and sicker population. Most polls have shown that the Massachusetts reforms are strongly supported by the general citizenry, business leaders, and physicians.

The Massachusetts plan, however, has not been perfect and has not curbed the relentless rise in health care costs. Massachusetts did not address the cost problem until universal health insurance coverage had been accomplished. The challenge is considerable and cannot be minimized. Serious remedial efforts are currently under consideration: increasing the state’s power to reject premium increases, limiting reimbursements to hospitals and providers, and promoting new, innovative alternatives to traditional, costly fee-for-service medicine. The ACA will probably evolve in a similar way, but the current ACA does contain provisions to rein in Medicare and Medicaid spending, and by example, the rest of the health care system.

Today, 2012 Republican presidential candidate Mitt Romney has had to change course by distancing himself from “Romney-care,” the Massachusetts reform act he formerly touted and proudly signed into law. Earlier this year Governor Romney told ABC anchor George Stephanopoulos, that Obamacare was “a very bad piece of legislation.” Governor Romney was applauding the district court’s decision in Florida ex rel. Bondi v. U.S. Department of Health & Human Services (ruling the ACA to be unconstitutional) and quoted the court’s memorable tea party remark—that the Boston tea party patriots would never have countenanced a government that could force people to buy tea in the first instance.

405. Id.
406. Id.
407. Id.
408. Editorial, supra note 408.
409. Id.
410. Id.
413. Florida ex rel. Bondi, 780 F. Supp. 2d at 1286 (citation omitted).
However, Governor Romney evidently had no problem with Massachusetts imposing an individual mandate.

States’ rights activists and other opponents of the ACA argue that by our founding fathers’ design, the power to regulate health care and health insurance belongs primarily and exclusively to the states. Under basic principles of federalism, the states have the constitutional prerogative to enact and experiment with their own solutions for their citizens’ health care, and states can exercise that power through an individual mandate. But a state enacted individual mandate necessarily draws those affected into the health care market, and once in that market under state regulation, the federal government can regulate further under the commerce power—e.g., “by increasing the minimum coverage already required by state law or by requiring them to comply with other components of the Affordable Care Act.” Nevertheless, Governor Romney made clear that the bipartisanship in Massachusetts was obviously an aberration, because “[a]mong Republicans in Washington, pro-mandate arguments ... gave way to concerns over individual liberty and the political priority of handing the Obama administration a defeat.”

As expressed by Professor Mark Hall, the constitutional challenges to the ACA have been primarily motivated by libertarian outrage against the constitutional reality that the federal government can force private individuals to buy health insurance—purely as a civic obligation or “as a condition of lawful residence in the United States.” Similarly, as expressed by Judge Hudson for the Eastern District of Virginia, “[a]t its core, this dispute is

415. Basic to the tenets of Federalism are the words of James Madison: 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 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. THE FEDERALIST NO. 45, at 333 (James Madison) (Johnson ed., 2004).
416. Thomas More Law Ctr., 651 F.3d at 562.
417. Id.
420. Thomas More Law Ctr., 651 F.3d at 558-59 (Sutton, J., concurring) (citing, inter alia, CONG. BUDGET OFFICE, MEMORANDUM: THE BUDGETARY TREATMENT OF AN INDIVIDUAL MANDATE TO BUY HEALTH INSURANCE 1 (1994)).
not simply about regulating the business of insurance—or crafting a scheme of universal health insurance coverage—it's about an individual's right to choose to participate, or put differently, "an individual's right to choose to be uninsured." The Supreme Court prescribed explicit limits on the commerce power in *Lopez* and *Morrison,* and those boundaries were enacted to protect the states' police powers against unconstitutional usurpation by the federal government. The constitutional attacks on the individual mandate, however, have generally been driven by the libertarian premise that the mandate infringes the personal rights of "[w]e the People." Nevertheless, there is, in fact, no constitutional basis for an individual to claim a personal liberty interest in refusing to buy health insurance. Though no person can be forced to accept medical care against his will, (because people have that fundamental right), "there is no constitutionally protected individual right to be left entirely alone by the government," and people have no protected individual right to save or spend money entirely as they please. Although the ACA is about health care, "all that is at stake is money. No one is forced to receive medical care, only to pay insurance premiums." In terms of Tenth Amendment infringements on states' rights, Judge Moon in *Liberty University* summarized the current state of Tenth Amendment jurisprudence:

The amendment is violated if (1) Congress does not have authority under the Constitution to pass the regulation, or (2)

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422. Hall, *supra* note 347, at 1838 (internal citation omitted) (quoting Virginia *ex rel.* Cuccinelli, 728 F. Supp. 2d at 788) (internal quotation marks omitted).
425. Hall, *supra* note 419, at 1236 (internal citation omitted).
426. Hall, *supra* note 347, at 1838 (internal citation omitted).
429. U.S. CONST. amend. X. "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." *Id.*
the means of regulation employed impermissibly infringe on state sovereignty by undercutting and displacing state authority and by commandeering state legislative functions. 430

The ACA is a valid exercise of the Commerce Clause power, and, where Congress legitimately exercises its Constitutional authority, there is no reservation of that power to the states. Further, South-Eastern Underwriters 431 established that Congress has the constitutional power to regulate the insurance industry, and the government already regulates health insurance and health care under long established dual sovereignty federal programs, such as Medicare, 432 the Employee Retirement and Income Security Act of 1974 ("ERISA"), 433 the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA"), 434 and the Health Insurance Portability and Accountability Act of 1996 ("HIPPA"). 435

The ACA neither infringes state sovereignty nor commandeers state governments. Although the ACA directs states to create health benefit exchanges, 436 the states actually have options; States may adopt the federal standard for health benefit exchanges or pass their own legislation to create exchanges that satisfy the federal standards. 437 If state lawmakers elect not to comply, then the federal government will set up and operate the in-state exchanges as a default measure. 438 This can be done according to Congress’ "power to offer states the choice of regulating private activity according to federal standards or having state law pre-empted by federal regulation." 439 The ACA does not compel state officials to carry out the federal regulatory regime, because

430. Liberty Univ., Inc., 753 F. Supp. 2d at 636 (citations omitted).
431. Id. (citing United States v. Se. Underwriters Ass’n, 322 U.S. 533, 552-53 (1944)).
434. Id. (citing Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, 100 Stat. 82, (codified at 42 U.S.C. §§ 300bb to 300bb-8 (2003)) (enabling workers who lose their employer sponsored health insurance to continue their coverage for a specified time period)).
436. Id. at 637.
437. Id.
438. Id.
439. Id.
the individual mandate and its operative compliance mechanism—the shared responsibility payment penalty—acts directly upon every American.440

States’ rights arguments have also been raised against the Medicaid expansion provisions.441 Medicaid is a federal program that provides health care for the medically indigent.442 The program is funded jointly by the federal government and the state.443 The ACA requires states to increase Medicaid spending, but the federal government will pay the increased costs for the first three years and then reduce its payments to 90% by 2020.444 No states, however, are compelled to participate in Medicaid, and states are free to withdraw from the program.445 Therefore, the Medicaid expansion does not commandeer the states. The program does not “make states mere agents of federal authority rather than sovereign governments.”446 Note, however, that these comments are, at best, a sketch of the federalist or statist attacks on the ACA and the government’s rebuttals. Professor Hall provided a full analysis in the article cited above.447

Nevertheless, it needs to be re-emphasized that the gravamen of all of the attacks on the ACA has been the constitutionality of the individual mandate, and whether the mandate exceeds the authority of Congress under the Commerce Clause. Regarding states’ rights and individual rights under the commerce power:

The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail. It is beyond peradventure that federal power over commerce is superior to that of the States to provide for the welfare or necessities of their inhabitants . . . Just as state acquiescence to federal regulation cannot expand the bounds

441. Hall, supra note 419, at 1237-42.
443. Id.
444. Id.
445. Id. at 1240-41.
446. Id.
447. Id. at 1233 (internal citation omitted). See also Hall, supra note 34, at 481-85.
of the Commerce Clause, so too state action cannot circumscribe Congress' plenary commerce power.\textsuperscript{448}

Further, as the D.C. Circuit Court of Appeals noted in its November decision in \textit{Seven-Sky v. Holder}: "[t]he right to be free from federal regulation is not absolute, and yields to the imperative that Congress be free to forge national solutions to national problems, no matter how local--or seemingly passive—their individual origins."\textsuperscript{449} The national health insurance and health care market is not a local problem. Health security is a national problem, and a national problem requires a national solution.\textsuperscript{450}

VI. CONCLUSION

The ACA is the product of a Democratic Congress and a Democratic president, and the Act represents the defining domestic program of the Obama administration.\textsuperscript{451} Seldom has a law of this magnitude passed with zero bipartisan support, and seldom has an act of Congress faced the intensity of the all-out war of attrition launched by a determined libertarian and federalist opposition.\textsuperscript{452} Rarely has a piece of legislation been as widely misrepresented, misunderstood, and vilified as the ACA.\textsuperscript{453} Ex-Governor of Alaska, Sarah Palin, claimed that the cost containment provisions would result in the creation of government death panels.\textsuperscript{454} Claims have been made that the ACA funds abortions. Others assert that the ACA is a government takeover of health care and represents the advent of socialized medicine in this country.\textsuperscript{455}

\begin{itemize}
  \item Gonzales v. Raich, 545 U.S. 1, 29 (2005) (citations omitted) (internal quotation marks omitted) (referring to U.S. CONST. art. VI, cl. 2).
  \item 661 F.3d 1 (D.C. Cir. 2011) (citing Heart of Atlanta Motel v. United States, 379 U.S. 241, 258-59 (1964)).
  \item Koppelman, \textit{supra} note 30, at *14, 16, 23. \textit{See also} President Barack Obama & Vice President Joseph Biden, \textit{supra} note 276.
  \item Bondurant, \textit{supra} note 49, at 249-50; Hall, \textit{supra} note 34, at 457-58 (internal citations omitted).
  \item Bacon, \textit{supra} note 9, at 1-2.
  \item Hall, \textit{supra} note 34, at 457-58 (internal citation omitted).
  \item \textit{Id.} (internal citation omitted).
  \item \textit{Id.} (internal citation omitted).
\end{itemize}
The arguments against the ACA have been summarized in Part III, supra, all of which are primarily focused on the individual mandate. The chief complaint is that the minimum essential coverage requirement exceeds the authority of congress under its commerce power and is, therefore, unconstitutional and legally dead ab initio. The mandate regulates passive citizens who are uninsured and requires them to purchase health insurance on the private market—a commodity they do not want. The opponents argue passionately that citizens have the right to be uninsured and that the status of being uninsured does not comprise economic or noneconomic activity that in the aggregate affects interstate commerce. The opponents insist that the status of being uninsured does not comprise activity properly subject to the commerce power, and they reject the government's argument that the uninsured, in fact, have taken affirmative economic steps by self-insuring.

The modern day constitutional requirements for congressional action under the Commerce Clause were set forth earlier under the three-part analysis in Mead v. Holder. The ACA passes all three prongs of the test: (1) not buying health insurance is in fact the economic act of self-insuring; (2) Congress had a rational basis to conclude that the aggregated economic conduct of foregoing health insurance or self-insuring substantially affects the national health care delivery market; (3) the individual mandate is critical to the success of the ACA, and absent the minimum essential coverage requirement, the goal of near universal health insurance coverage and affordable health care for all Americans would be unattainable. Expressed differently, the individual mandate is a

456. See supra Part III.
necessary and proper “means for carrying into execution . . . the Powers vested by the Constitution in the Government of the United States.”

Finally, “[n]ot every intrusive law is an unconstitutionally intrusive law. And even the most powerful intuition about the meaning of the Constitution must be matched with a textual and enforceable theory of constitutional limits, and the activity/inactivity dichotomy does not work with respect to health insurance . . . .” The Constitution is a document “intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs.” Though the individual mandate is an unforeseen application of the commerce power, “[i]t would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur.” If the Supreme Court adheres to modern day Commerce Clause jurisprudence and decides the case based on precedent rather than partisan politics, the ACA should be upheld. Were the Court to decide otherwise, it would represent an atavistic return to the libertarian and statist Commerce Clause jurisprudence of the times of the Founding Fathers that pre-dated Jones & Laughlin Steel in 1937 and Wickard v. Filburn in 1942. Nevertheless, the right wing political movements that idealize those years gone by are formidable and their “Astroturf” effects, grass roots appeal, and potential judicial impact cannot be underestimated.

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466. Id.
467. Redish, supra note 69.
468. Hall, supra note 419, at 1242-43.
470. Hall, supra note 419, at 1242-43 (internal citations omitted).

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