

S. HRG. 112-904

**THE CONSTITUTIONALITY OF THE AFFORDABLE
CARE ACT**

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

ONE HUNDRED TWELFTH CONGRESS

FIRST SESSION

—————
FEBRUARY 2, 2011

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Serial No. J-112-3

Printed for the use of the Committee on the Judiciary



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THE CONSTITUTIONALITY OF THE AFFORDABLE CARE ACT

WEDNESDAY, FEBRUARY 2, 2011

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:02 a.m., in Room SH-216, Hart Senate Office Building, Hon. Richard J. Durbin, presiding.

Present: Senators Durbin, Leahy, Klobuchar, Franken, Blumenthal, Grassley, Sessions, Hatch, Cornyn, and Lee.

OPENING STATEMENT OF HON. RICHARD J. DURBIN, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Senator DURBIN. This hearing of the Senate Judiciary Committee will come to order. I want to thank Chairman Leahy for allowing me to convene this hearing. I expect him to be here and join us shortly.

The title of today's hearing is the Constitutionality of the Affordable Care Act. This is the first-ever Congressional hearing on whether the landmark health care law complies with the Constitution. I would like to thank the Chairman, as I mentioned, and also thank my friend and the Ranking Member of the Senate Judiciary Committee, Senator Chuck Grassley of Iowa, who will make an opening statement after I have completed my own. And then we will turn to the witnesses and seven-minute rounds so that the Senators present will have a chance to question this distinguished panel.

When Judge Vinson of the Northern District of Florida issued a ruling on Monday striking down the Affordable Care Act, I know it must have caused some concern across America. Many Americans who are counting on the provisions of that health care law are in doubt now about its future. I am certain that many parents of children with pre-existing conditions wonder if they will be able to buy insurance now if this law is stricken and the pre-existing conditions become an exclusion for insurance coverage.

Senior citizens who were hoping that we would close the doughnut hole, that gap in Medicare prescription drug coverage, will wonder what it means, whether they have to return the checks that were sent to them or the next check that will be sent in the future.

Millions of Americans will be in doubt. Those who are 25 years old and now eligible to be covered by their parents' family health care plan may have some questions about that. Cancer patients

who had joined the Act's new high-risk pools may have doubts as well. And small businesses who thought tax credits were coming their way may be asking Members of Congress, "What does this all mean?"

I want those millions of Americans to know that they should not despair.

First, they ought to reflect on the simple history of major legislation in America. This is not the first major law that has been challenged in the courts, even challenged successfully in the lower courts, as to its constitutionality. Let me mention two or three others: the Social Security Act, the Civil Rights Act of 1964, and the federal minimum wage law—all of those successfully challenged in lower courts, but ultimately upheld by the Supreme Court. I think the same is going to happen with the Affordable Care Act.

And for those who are keeping score as to the challenges in federal courts to this law, make certain that you know the numbers. Twelve federal district court judges have dismissed challenges to this law, two have found the law to be constitutional, and two have reached the opposite conclusion. How is it possible that these federal judges, 16 different federal judges, who not only study the Constitution but swear to uphold it, have drawn such different conclusions? Well, I think those of us on the Judiciary Committee and serving in the Senate understand that many people can read that Constitution and come to different conclusions.

It is unlikely that we are going to produce a national consensus in this room, maybe not even an agreement with the people in attendance. But if we serve the Congress and the Nation by fairly laying out the case on both sides, I think this is a worthy undertaking by the Senate Judiciary Committee.

At the heart of the issue is Article I, Section 8, which enumerates the only powers delegated to Congress. Now, one side argues that with the passage of the Affordable Care Act, Congress went beyond that constitutional authority. The other, which includes those of us who voted for the law, disagrees.

Within those enumerated powers is one described by one constitutional scholar as "the plainest in the Constitution": the power to regulate commerce. So the threshold question is: Is the health care market in America commerce?

I think the answer is obvious, but ultimately the Supreme Court will decide. Over the course of history, the Court has interpreted this "plainest of powers" through its application of the Founders' vision to current times. Whether it was Roscoe Filburn, growing wheat to feed his chickens in 1941, or Angel Raich, using home-grown marijuana to treat her chronic illnesses in 2002, Justices from Robert Jackson to Antonin Scalia have made it clear that Congress has broad power to regulate private behavior where there is any rational basis to conclude it substantially affects interstate commerce.

The role of the lower courts is to apply those precedents to the facts. But sometimes lower court judges—many might be characterized as "activists" by their critics—try to make new law. And this has happened in Florida and Virginia as judges, I believe, have ignored the precedents and created a new legal test distinguishing

“activity” from “inactivity,” a distinction that cannot be found anywhere in the Constitution or Supreme Court precedent.

This is an historic room. I have had four opportunities—Senator Grassley has probably had more—to meet in this room and to interview prospective nominees to serve on the United States Supreme Court. They all stand with the photographers and the cameras rolling, hold up their hands and take the oath, and then sit and answer questions many times for days. Time and again, the questions that are asked of them is whether or not they are going to follow the Constitution and precedents or whether they are going to be judicial activists. That is the standard that should be applied as we consider the future of the Affordable Care Act. I believe, if the Justices of the Supreme Court apply the precedents, look at the clear meaning of the Constitution, that they are going to find this law constitutional.

When the Affordable Care Act comes before the Supreme Court, I am confident that they will recognize that Congress can regulate the market for health care that we all participate in and that it can regulate insurance, which is the primary means of payment for health care services.

The political question which has enervated this debate focuses primarily on one section. Even if Congress has the enumerated power under Section 8 to tax and to pass laws affecting the health care market, did it go too far in requiring that individuals who do not buy health insurance coverage face a tax penalty, the individual responsibility section of the law?

Returning to Article I, Section 8, which allows Congress “to make all laws which shall be necessary and proper for carrying into execution the foregoing powers,” the Supreme Court just last year in *Comstock* case said “the Necessary and Proper Clause makes clear that the Constitution’s grants of specific Federal legislative authority are accompanied by broad power to enact laws that are convenient, or useful or conducive to that authority’s beneficial exercise.” The test is whether the means is rationally related to the implementation of a constitutionally enumerated power. Is an individual mandate “rationally related” to Congress’ goals of making health care more affordable and prohibiting health insurance companies from denying coverage for those with pre-existing conditions? It is clear to me that private health insurance companies could not function if people only bought coverage when they faced a serious illness.

It is also worth noting that many who argue the Affordable Care Act is unconstitutional are the same people who are critics of judicial activism. They are pushing the Supreme Court to strike down this law because they could not defeat it in Congress and they are losing the argument in the court of public opinion where four out of five Americans oppose repeal.

Why is public sentiment not lining up behind the repeal effort? Because a strong majority of Americans do not believe that their children should be denied health insurance because of pre-existing conditions. They want to cover their young adult children under their family plans. They believe small businesses should be given tax credits to cover health insurance for their employees. They op-

pose caps on coverage and the health industry's cancellation of coverage when people need it the most.

With many parts of our world in turmoil today over questions of freedom, we should never forget that the strength of our Constitution lies in our fellow citizens who put their faith in its values and trust the President, Congress, and the courts to set aside the politics of the moment and to fairly apply 18th century rhetoric to 21st century reality.

Now I want to recognize Senator Grassley, the Ranking Member of the Committee, for his opening statement.

**STATEMENT OF HON. CHUCK GRASSLEY, A U.S. SENATOR
FROM THE STATE OF IOWA**

Senator GRASSLEY. Thank you, and I appreciate my colleague's discussion of the constitutional issues that are here. I also appreciated his discussion of some of the policy issues within this legislation. Whether you agree parts of this bill are very good, parts of it are very bad, things that ought to be thrown out, things that ought to be put into it that maybe are not in it, are all legitimate issues. But the real issue for us today is on the constitutionality of it, and I think we are very fortunate in this country to be under the rule of law, under that Constitution. I think we are very fortunate to be probably the only country out of 190 on the globe that agree in the principle of limited government, and that is something that we not only appreciate; it is something that we ought to worship, and it is something that ought to be considered the American people are very special people for that reason. So I look forward to those constitutional issues.

We agree on the issue of it is constitutional, we move forward; and if it is not constitutional, we start over again. And, of course, all of the policies that are in dispute that my colleague mentioned would be continued if this is constitutional. And if it is not constitutional, then we will debate those issues once again.

The Florida judge who ruled on the constitutionality of the new health law this Monday compared the Government's arguments to Alice in Wonderland. That same reference applies equally to today's hearing. Things are getting "curioser and curioser."

Under our system of limited and enumerated powers, the sensible process would have been to have held a hearing on the law's constitutionality before the bill passed, not after. Instead, the Congress is examining the constitutionality of the health care law after the ship has sailed.

Like Alice in Wonderland, "Sentence first, verdict afterward."

So what has gotten us to this point?

Early in the debate, Republicans and Democrats agreed that the health care system had problems that needed to be fixed.

I was part of the bipartisan group of Senators on the Finance Committee who were trying to reach an agreement on comprehensive health reform.

However, before we could address some of the key issues, some Democratic Senators and the administration ended these negotiations, and the majority took their discussions behind closed doors.

What emerged was a bill that I feel has major problems beyond even constitutionality. Republicans argued that instead of forcing it

through the Senate, Republicans and Democrats should return to the negotiating table to find common-sense solutions that both parties could support.

Of course, the plea went unanswered, and the majority passed their health care law without a single Republican vote.

In fact, when Republicans identified specific concerns, such as the constitutionality of the individual mandate, we were told our arguments were pure messaging and obstructionism.

Throughout the debate, the majority argued that the individual mandate was essential for health reform to work.

There are many constitutional questions about the individual mandate. Is it a valid regulation of interstate commerce? Is it a tax?

The reality is that no one can say for certain. The nonpartisan Congressional Research Service notes that it is unprecedented for Congress to require all Americans to purchase a particular service or good.

The Supreme Court has stated that the Commerce Clause allows regulation of a host of economic activities that substantially affect interstate commerce. No dispute about those decisions. But it has never before allowed Congress to regulate inactivity by forcing people to act.

What is clear is that if this law is constitutional, Congress can make Americans buy anything that Congress wants to force you to buy.

The individual mandate is the heart of the bill. My friend, Senator Baucus, Chairman of the Finance Committee, said at the mark-up back in September 2009, the absence of a requirement of "a shared responsibility for individuals to buy health insurance" guts the health care reform bill.

If the Supreme Court should strike down the individual mandate, it is not clear that the rest of the law can survive. The individual mandate is the reason that the new law bars insurance companies from denying coverage based on pre-existing conditions, and the sponsors made the mandate the basis for nearly every provision of the law.

Judge Vinson's ruling that the whole law must be stricken reflects the importance of the mandate to that overall outcome.

Then there is the Medicaid issue before us. Does the new law amount to impermissible coercion of the States? States do have the choice to drop out of the Medicaid program. No dispute about that.

But some of my colleagues on the other side of the aisle may even make that case today even though I do not think they are really promoting that as a viable option for the States. If a State drops out of Medicaid, the new health law states clearly that none of that State's citizens would be eligible for tax credits because people with incomes at Medicaid eligibility levels can never be eligible for tax credits.

The idea that the Federal Government could, through Medicaid, drive the single largest share of every State budget seems very inconsistent with the objective of our federal system of Government.

At this point, Mr. Chairman, Senator Durbin, I ask that a statement from Virginia Attorney General be placed in the record. I am interested in hearing from the witnesses today, but ultimately, we

all know that the subject of this hearing is finally going to be determined by the Supreme Court.

Thank you very much.

Senator DURBIN. Thanks, Senator Grassley, and without objection, that statement will be made part of the hearing.

[The prepared statement of Senator Grassley appears as a submission for the record.]

Senator DURBIN. I want to invite my colleagues on the Democratic side, if they would like to move and fill these seats, they would be certainly welcome to come closer.

I would ask now if this panel of witnesses would please stand and take the oath. Please raise your right hand. Do you swear or affirm the testimony you are about to give before the Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. KROGER. I do.

Mr. FRIED. I do.

Mr. CARVIN. I do.

Mr. BARNETT. I do.

Mr. DELLINGER. I do.

Senator DURBIN. Thank you.

Let the record reflect that all of the witnesses have answered in the affirmative. Each of the witnesses will be given five minutes for an opening statement, and then we have seven-minute rounds where Senators will ask questions.

Our first witness is Attorney General John Kroger of the State of Oregon. Attorney General Kroger was elected in 2008 and I think has a national distinction in the fact that he was nominated by both the Democratic and Republican Parties. So he truly is a bipartisan Attorney General from the State of Oregon. He and eight other States Attorneys General recently filed an amicus brief before the Sixth Circuit in support of the Affordable Care Act's constitutionality.

Prior to his election in 2008, Attorney General Kroger served as a United States Marine, a law professor, a federal prosecutor, and a member of the Justice Department's Enron Task Force. While a federal prosecutor, he served on the multi-agency Emergency Response Team that investigated the 9/11 attacks on the World Trade Center.

Attorney General Kroger received his bachelor's and master's degrees from Yale University and his law degree from Harvard law School.

General Kroger, thank you for being here today and the floor is yours.

**STATEMENT OF HON. JOHN KROGER, OREGON ATTORNEY
GENERAL, SALEM, OREGON**

Mr. KROGER. Thank you very much. My name is John Kroger, and I am the Attorney General of Oregon.

Over the course of my career, I have taken an oath to defend the Constitution as a United States Marine, as a federal prosecutor, and as the Attorney General of my State, and I take that obligation extraordinarily seriously. I am confident that the Affordable Care Act is constitutional and will ultimately be judged constitutional.

The reason for that confidence is quite simple. There have been four primary arguments raised in litigation challenging the bill, and I believe all four arguments are, as a legal matter, meritless. I would like to briefly review the four arguments and explain why I believe they have no merit.

The first argument is that the Commerce Clause by its own terms only regulates commerce. The argument is that declining to get health insurance is not commerce but refusing to engage in commerce, and thus falls outside the power of Congress to regulate. This argument is extraordinarily weak because it was explicitly rejected in *Gonzalez v. Raich*. In that case, the Court held, and I quote: “Congress can regulate purely intrastate activity that is not in itself commercial.” That belief was stated not just in the majority opinion, which was joined by Justice Kennedy, but in the concurrence from Justice Scalia as well.

This argument is also dangerous. The *Gonzalez* opinion provides the constitutional foundation for federal criminalization of all laws banning the home production and home use of child pornography and dangerous drugs like methamphetamine. As a prosecutor, I think overturning *Gonzalez* would be a disaster.

The second argument that has been raised is based on the so-called activity/inactivity distinction. In *Perez v. United States* and subsequent cases, the Supreme Court spoke of the Commerce Clause regulating commercial activities. Opponents have used this language to raise a novel argument that the Constitution prohibits the regulation of inactivity. The litigants also claimed that declining to buy insurance is not an activity but inactivity, and thus constitutionally protected. There are three serious flaws with this argument.

The first is that the inactivity/activity distinction has absolutely no basis in the text of the Constitution.

Second, the Court recognized in both the *Wickard* decision and in *Carter v. Carter Coal* that Congress can regulate not only activities but conditions, and I believe that that would also apply then to the condition of being without health care.

Third, people lack insurance because businesses do not offer it to their employees, insurance companies decline to extend it for pre-existing conditions, or individuals fail to select it and pay for it—some out of choice, some because they cannot. All of these are actions with real-world and often very tragic consequences. The constitutional fate of a great Nation cannot be decided by semantics and word games that label real-world actions as inactivity.

The third argument which is cited by some litigants and also by some courts is that the Supreme Court has never interpreted the Constitution to allow Congress to force individuals to buy a product. This argument is simply inaccurate because this precise claim was raised and rejected by the Court in *Wickard v. Filburn*. In that case, the plaintiff argued that, as a result of the Agricultural Adjustment Act, he would be forced to buy a product—food—on the open market. As Mr. Justice Jackson wrote, the claim was that Congress was “forcing some farmers into the market to buy what they could provide for themselves.” This claim, then, is identical to the one that has been raised in the litigation, that individuals should not be and cannot be forced to buy a health insurance prod-

uct when they would rather self-insure or pay for the product of health care themselves.

Writing for a unanimous Court, Justice Jackson rejected the claim, holding that these kinds of questions are “wisely left under our system for the resolution by the Congress.” Again, existing precedents strongly support the constitutionality of the Affordable Care Act.

Finally, critics claim that the personal responsibility mandate impermissibly interferes with constitutionally protected liberty. I find this argument odd because the Constitution does not create or protect the freedom to freeload. Right now we have 40 million Americans who do not have health care coverage. Those 40 million people have the right to go to a hospital emergency room, and hospitals are legally required to provide that care. As a result of that, they rack up approximately \$40 billion of health care fees every year. The opponents of the bill claim that this cost shifting is constitutionally protected. I would simply suggest that there is no constitutional right to force other people to pay for your own health care when you decline to take responsibility for yourself.

Thank you very much for your time.

[The prepared statement of Mr. Kroger appears as a submission for the record.]

Senator DURBIN. Thank you very much, General Kroger.

Our next witness is Charles Fried. Professor Fried has served on the Harvard Law School faculty since 1961 as a renowned scholar of constitutional law. He served as Solicitor General under President Ronald Reagan from 1985 until 1989. He worked in the Reagan administration Justice Department as a Special Assistant to the Attorney General. From 1995 until 1999, Professor Fried served as Associate Justice of the Supreme Judicial Court of the State of Massachusetts. He received his B.A. from Princeton, a bachelor’s and master’s degree from Oxford University, and a J.D. from Columbia University School of Law.

Professor, thanks for joining us today, and please proceed with your statement.

STATEMENT OF CHARLES FRIED, BENEFICIAL PROFESSOR OF LAW, HARVARD LAW SCHOOL, CAMBRIDGE, MASSACHUSETTS

Mr. FRIED. Thank you. I should just add to that statement in my C.V. that I have two of my former students here: Professor Barnett, to whom I taught torts, and Attorney General Kroger, to whom I taught constitutional law.

[Laughter.]

Mr. FRIED. I come here not as a partisan for this Act. I think there are lots of problems with it. I am not sure it is good policy. I am not sure it is going to make the country any better. But I am quite sure that the health care mandate is constitutional.

I have my doubts about the part that Senator Grassley mentioned with the Medicaid compulsion on the States. That is something I worry about, but the health care mandate I think really is—I would have said a no-brainer, but I must not with such powerful brains going the other way.

Clearly, insurance is commerce. That was held by the Supreme Court in 1944. There was a time when the Supreme Court did not

think it was commerce. But it has been ever since, and if you look at the mountain of legislation, most noticeably the ERISA legislation, you see that the Congress and the courts obviously think insurance is commerce. And in health care, surely health care insurance surely is commerce, insuring, as it does, something like 18 percent of the gross national product.

Now, if that is so, if health care insurance is commerce, then does Congress have the right to regulate health care insurance? Of course it does. And my authorities are not recent. They go back to John Marshall, who sat in the Virginia Legislature at the time they ratified the Constitution and who in 1824, in *Gibbons v. Ogden*, said regarding Congress' commerce power, "What is this power? It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed." To my mind, that is the end of the story. The constitutional basis for the mandate is that, the mandate is a rule—more accurately part of a system of rules—"by which commerce is to be governed," to quote Chief Justice Marshall.

And if that were not enough for you, though it is enough for me, you go back to Marshall in 1819 in the *McCulloch v. Maryland*, where he said, [T]he powers given to the government imply the ordinary means of execution. . . . The government which has a right to do an act—surely to regulate health insurance—"and has imposed on it, the duty of performing that act, must, according to the dictates of reason, be allowed to select the means. . . ." And that is the Necessary and Proper Clause, and he ends by saying, "Let the end be legitimate"—that is to say, the regulation of health insurance—"let it be within the scope of the Constitution"—ERISA—"and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional."

Well, that to me again is the end of the story, and I think that one thing is noteworthy about Judge Vinson's opinion where he said, "If we strike down the mandate, everything else goes," shows as well as anything could that the mandate is necessary to the accomplishment of the regulation of health insurance. But is it proper?

Well, there is, I think, an intellectual confusion here. This is clearly necessary to the success of Congress's scheme. It is improper only if it bumps up against some specific prohibition in the Constitution. And the only prohibitions I can think of that this bumps up against are the Liberty Clauses of the Fifth and 14th Amendment. And if that is so, then not only is ObamaCare unconstitutional, but so is RomneyCare in Massachusetts. And I think that is an example of an argument that proves too much.

Thank you.

[The prepared statement of Mr. Fried appears as a submission for the record.]

Senator DURBIN. Thank you very much, Professor.

Our next witness is Michael Carvin. Mr. Carvin is a partner in the D.C. office of Jones Day law firm, where he specializes in constitutional, appellate, civil rights, and civil litigation against the Federal Government. During the Reagan administration, Mr. Carvin was a Deputy Assistant Attorney General in the Justice De-

partment's Civil Rights Division and the Office of Legal Counsel. He was one of the lead lawyers that argued before the Florida Supreme Court on behalf of President George W. Bush in the 2000 Florida election recount controversy, received his B.A. from Tulane University, and his J.D. from George Washington Law School.

Mr. Carvin, thanks for being here today and please proceed.

**STATEMENT OF MICHAEL A. CARVIN, PARTNER, JONES DAY,
WASHINGTON, D.C.**

Mr. CARVIN. Thank you for the opportunity, Senator.

The individual mandate obviously compels citizens to engage in a contract with a wealthy corporation even though often, and perhaps usually, it is to the citizen's economic disadvantage to engage in that contract for health insurance when he is healthy and does not need the insurance. And I think it is agreed that this is unprecedented. Congress has never before required a citizen to engage in contractual commercial activity pursuant to the Commerce Clause. And we have heard today and obviously the debate has been that this difference is immaterial. There is no difference between regulating inactivity, compelling someone to contract, and regulating activity, regulating someone who has decided to contract and has entered the commercial marketplace.

Under this reasoning, of course, that means that because we can tell GM how to contract with its customers when they decide to buy a car or how to contract with its employees in terms of its workplace conditions, since there is no difference that means we could compel somebody to contract with General Motors to buy a car or to enter into an employment contract. And the gist of my remarks is that this is not some semantic lawyer's trick, something we came up with in response to the health care act. It is a core principle that goes to the most basic constitutional freedoms and limits on federal enumerated powers.

In the first place, insurance is obviously commerce. That is not the issue. The issue is whether inactivity is commerce. Sitting at home and staying out of the commercial marketplace is not commerce. It only becomes commerce if you leave your house and decide to buy or sell goods or services. Then you have got commerce which you can regulate.

Moreover, the decision of the citizen not to buy health insurance does not even affect commerce. Unlike the examples we have heard in terms of the plaintiffs in *Wickard* and *Raich*, those people were engaging in commerce. They were providing goods that were going to enter the commercial mainstream. Indeed, they were providing goods that were precisely of the sort that Congress was free to regulate if in interstate commerce.

Now, the decision to sit at home does not affect Insurance Company A's ability to contract with Citizen B. It has no effect on it. If there was no pre-existing condition mandate in the bill, this would have no effect. So the rationale for the individual mandate is not that you are eliminating a barrier to commerce. The rationale for the individual mandate is you are ameliorating a Congressional distortion of commerce. Congress told insurance companies that they had to take people with pre-existing conditions. That is obviously good for the patients, but it is obviously costly for the in-

insurance companies. So what we are doing is conscripting American citizens to ameliorate the economic harm that Congress has visited on those insurance companies, and this is not in any way within the traditional commerce power.

Congress can tell Mr. Filburn not to grow his wheat, but what it cannot do is tell Mr. Filburn's neighbor that he has got to buy some other crop of Mr. Filburn's to ameliorate the harm that Congress just visited on him by banning his wheat. This is different in degree and kind, and it is literally without a limiting principle.

As the court noted in the Florida case, the more Congress can distort in the first place the commercial marketplace, it can then bootstrap that original distortion into regulating all sorts of things, all sorts of contracts, from credit cards to cards to mortgages, that it could never get at in the first instance. And it is also not proper.

Mr. Fried suggests that it is certainly fine to compel people to contract, but just recently, the Court in the *Eastern Enterprises* case said you could not force coal companies to, in essence, provide health insurance contracts to former miners. Well, what does this Act do? It forces a citizen to contract with a wealthy corporation to ameliorate the corporation's loss of profits. If that is proper, then, again, there is literally nothing that Congress cannot do.

And what is the limiting principle that has been suggested here and elsewhere? The Liberty Clause, which I used to call the Due Process Clause, which suggests that that will limit Congress' power. But, of course, that is a restriction on the States. That is a restriction on the States' powers. So they are conceding that the only limitation on Congress' limited enumerated powers is the same as the limits on the States' plenary police power. And if the Supreme Court has been clear about anything, it is that you cannot obliterate the distinction between the limited Federal Government and the State government. And if you do that, if you advance a Commerce Clause analogy which entirely eliminates that distinction, then that alone shows you that it is an abuse of the commerce power.

Thank you.

[The prepared statement of Mr. Carvin appears as a submission for the record.]

Senator DURBIN. Thank you very much, Mr. Carvin.

Our next witness is Randy Barnett, the Carmack Waterhouse Professor of Legal Theory at the highly regarded Georgetown University Law Center, where he teaches constitutional law and contracts. Professor Barnett previously served as a prosecutor in Cook County—he is from Calumet City—and he has been a visiting professor at Northwestern and Harvard Law School. Of particular relevance for today's hearing, Professor Barnett argued the Commerce Clause case *Gonzalez v. Raich*, which we have heard referred to several times, before the Supreme Court in 2004. He is a graduate of Northwestern University and Harvard Law School.

Thanks for coming today and please proceed with your statement.

**STATEMENT OF RANDY E. BARNETT, CARMACK WATERHOUSE
PROFESSOR OF LEGAL THEORY, GEORGETOWN UNIVERSITY
LAW CENTER, WASHINGTON, DC**

Mr. BARNETT. Thank you, Senator.

In 2010, something happened in this country that has never happened before: Congress required that every person enter into a contractual relationship with a private company. Now, it is not as though the Federal Government never requires you to do anything. You must register for the military and serve if called, you must submit a tax form, fill out a census form, and serve on a jury. But the existence and nature of these very few duties illuminates the truly extraordinary and objectionable nature of the individual insurance mandate. Each of these duties is inherent in being a citizen of the United States; each is necessary for the operation of the government itself, and each has traditionally been recognized.

In the United States, sovereignty rests with the people, with the citizenry. And if Congress can mandate that you do anything that is “convenient” to its regulation of the national economy, then that relationship is now reversed. Congress would have all the discretionary power of a king, and the American people would be reduced to its subjects.

In essence, the mandate’s defenders claims that because Congress has the power to draft you into the military, it has the power to make you do anything less than that, including mandating that you to send your money to a private company and do business with it for the rest of your life. This simply does not follow. The greater power does not include the lesser.

No one claims that the individual mandate is justified by the original meaning of the Commerce Clause or the Necessary and Proper Clause. Instead, the Government and those law professors who support the mandate rest their arguments exclusively on Supreme Court decisions. But given that economic mandates have never before been imposed on the American people by Congress, there cannot possibly be any Supreme Court case expressly upholding such a power.

In my written testimony and a forthcoming article, I explain why nothing in current Supreme Court doctrine on the tax power, the Commerce Clause, or the Necessary and Proper Clause justifies the individual insurance mandate. To summarize that, rather than impose a tax on the American people, Congress decided instead to invoke its regulatory powers under the Commerce Clause. But because the commerce power has never been construed to include the power to mandate that persons must engage in economic activity, in litigation the government has been forced to rely heavily on the Necessary and Proper Clause.

But the individual mandate is neither necessary nor proper. First, it exceeds the limits currently placed on the exercise of the Necessary and Proper Clause provided by the Supreme Court in the *Lopez*, *Morrison*, and *Raich* decisions. Second, the individual mandate is not necessary to “carry into execution” the regulations being imposed on the insurance companies. Instead, it is being imposed to ameliorate the free rider effects created by the Act itself. Congress cannot bootstrap its powers this way.

In my written testimony, I also explain why the individual mandate is improper because it commandeers the people in violation of the 10th Amendment that reserves all powers not delegated to Congress by the Constitution “to the States respectively, or to the people.” The 10th Amendment protects popular sovereignty as well as the States.

But wholly apart from what the Supreme Court has said about Congress’ power, each Senator and Representative takes his or her own oath to uphold the Constitution, and each must reach his or her own judgment about the scope of Congressional powers. After the Supreme Court relied on the Necessary and Proper Clause to uphold the constitutionality of the Second National Bank in *McCulloch v. Maryland*, a case you are going to hear a lot about today, President Andrew Jackson vetoed the renewal of the bank because he viewed the bank as both unnecessary and improper. And, therefore, he found it to be unconstitutional. He wrote, “If our power over means is so absolute that the Supreme Court will not call in question the constitutionality of an act of Congress the subject of which”—and then he quotes *McCulloch*—“is not prohibited, and is really calculated to effect any of the objects intrusted to the Government,’ . . . it becomes us to proceed in our legislation with the utmost caution.”

Therefore, regardless of how the Supreme Court may eventually rule, each of you must decide for yourself whether the mandate is truly necessary to provide, for example, for the portability of insurance if one changes jobs or moves to another State. Each of you must decide if commandeering that Americans enter into contractual relations with a private company for the rest of their lives is a proper exercise of the commerce power. If you conclude that the mandate is either unnecessary or improper, then, like President Jackson, you are obligated to conclude that it is unconstitutional and to support its repeal.

But even if you do not find that the mandate is unconstitutional, this week’s ruling in Florida suggests that there is a good chance that the Supreme Court will. So you might want to consider constitutional alternatives to the individual mandate sooner rather than later.

Thank you.

[The prepared statement of Mr. Barnett appears as a submission for the record.]

Senator DURBIN. Thank you very much, Professor Barnett.

And now our final witness is Walter Dellinger. Professor Dellinger is the Douglas B. Maggs Professor Emeritus of Law at Duke University Law School. He is a partner and chair of the appellate practice at the law firm of O’Melveny Myers. He served as Acting Solicitor General under President Clinton from 1996 to 1997. He also was Assistant Attorney General and head of the Justice Department’s Office of Legal Counsel from 1993 to 1997. He is a graduate of the University of North Carolina at Chapel Hill and Yale Law School.

Professor Dellinger, we are glad you are here today. Please proceed.

**STATEMENT OF WALTER DELLINGER, DOUGLAS B. MAGGS
PROFESSOR EMERITUS OF LAW, DUKE UNIVERSITY SCHOOL
OF LAW, DURHAM, NORTH CAROLINA**

Mr. DELLINGER. Thank you very much, Senator.

The coming together of the American colonies into a single Nation was more difficult than we can easily now imagine. But come together they did in the summer of 1787, and they created the greatest common market, continental in scope, that the world had ever seen.

John Marshall characterized the power to regulate the commerce of that Nation as the power to regulate that commerce which concerns more States than one. The notion put forward by those who have brought these lawsuits that it is beyond the power of Congress to regulate the markets and to make efficient the markets in health care and health insurance that comprise one-sixth of the national economy is a truly extraordinary, astonishing proposition.

The arguments that are made are essentially that it is novel and has not been done before, and that crazy things will be done if it is accepted. Neither of those arguments pass muster. Each of them are exactly the arguments that were made when the challenge was brought to the Social Security Act of 1935, first accepted by the lower courts and then rejected by the Supreme Court.

First of all, this is a regulation unlike those in the cases of *Morrison* and *Lopez* of local non-economic matters. This is a regulation of economic matters, as Solicitor General Fried has put it so well. Moreover, it is a regulation that is critical to the provision that prohibits insurance companies from denying coverage to Americans because of pre-existing conditions or because a child is born with a birth defect.

Now, a lawyer is said to be someone who can think about one thing that is inextricably related to another thing without thinking about the other thing. And the excellent challengers to this legislation want to do that. There is no dispute over the proposition that Congress can regulate insurance contracts to say you cannot turn down people who have pre-existing conditions, you cannot turn down people because their children are born with a birth defect.

That being the case and the fact that Judge Vinson himself agrees that it is necessary and essential for the Act to operate to also provide a financial incentive for people to maintain coverage generally, those two provisions are inextricably interlinked. My good friend Mr. Carvin says that the provision that prohibits insurance companies from denying coverage for people who have pre-existing conditions, he calls that a "Congressional distortion." I think most Americans that are now assured that when they change jobs they will not lose their insurance, who are now assured that if they have a child born with a defect they will not lose their insurance, do not think of that as a distortion. They think of it as a regulation of the market, which Congress has ample authority to make sure works effectively.

Now, the fact that something is within the commerce power does not mean that it is permissible. Is this so intrusive that it should be carved out of the commerce power? And the answer is it is really rather unremarkable. It is no more intrusive than Social Security and Medicare. Only if you go to work and earn taxable income do

the penalty provisions apply to you that require coverage. So if you go to work and earn taxable income, one of the things you find out is that the Government takes 7.5 percent from you and your employer for Social Security, 15 percent if you are self-employed. They take additional lesser taxes for Medicare. And then for coverage after you are 65, for coverage before you are 65, and for your family they provide a 2.5-percent financial penalty if you do not maintain coverage. It is extraordinary to think that something that gives you more choice, that allows you access to the market, is somehow so intrusive of liberty that it has to be carved out from the scope of the Commerce Clause.

Of course, it has not been done before. As Justice Story noted, every new act of Congress is something that has not been done before, and that mode of reasoning he said is found by all persons to be indefensible.

Will it lead to some extraordinary, expansive Congressional power? It will not. The limiting principle is clear. The Liberty Clauses prevent anyone from forcing Americans to eat certain vegetables or go to the gym. Whether it is State governments or the Federal Government, those are precluded.

And what about the fact that this is something that provides an incentive to buy products in the private market? I never thought I would hear conservatives say that there is something more intrusive about buying products in the private market than there is about having a single governmental provider. But that is essentially their argument. And is it a precedent for doing that for any product? Not at all, because this product is, if not unique, it has characteristics which would limit the application simply because, one, it is a market which no one can be assured that they will not enter. You never know when you are going to get hit by a truck and impose countless thousands of dollars of expenses in medical care which you are guaranteed to be provided by the Emergency Medical Treatment Act. That is not true of flat screen televisions. If my team makes the Super Bowl and I have not thought that they would and have not provided for a flat screen television, I cannot show up and have someone provide it to me. But with health care, no one can be assured that they will not need it, and when they do need it, it is often the case that the cost is transferred to other people. Ninety-four percent of the long-term uninsured have used medical care.

So at the end of the day, it is absolutely unremarkable that this market is one where Congress is using a market mechanism to encourage participation. The attacks against it are fully reminiscent of the attacks made against Social Security. In the Supreme Court, it was argued that if Congress could set a retirement age at 65, they could set it at 30 and, therefore, it must be unconstitutional to have Social Security at all. The Supreme Court rejected that. It was said that if Congress can set a minimum wage of \$10, they could set a minimum wage of \$5,000. That did not stop the Court from sustaining the minimum wage law.

So at the end of the day, I think this challenge to the legitimacy of judicial review is one that we have seen before. And even a more conservative court than we have ever seen in 1937 stepped back from that precipice and said, "We are not going to stand in the way

of Social Security.” And I think at the end of the day the Supreme Court will not stand in the way of something which is less intrusive, which respects the autonomy of Americans, and corrects the functioning of a national market.

Thank you.

[The prepared statement of Mr. Dellinger appears as a submission for the record.]

Senator DURBIN. Thanks very much, Professor Dellinger.

We have been joined by the Chairman of the Committee, Senator Patrick Leahy. I would like to give him an opportunity if he would like to make an opening statement or submit it for the record.

Chairman LEAHY. Thank you very much.

One, I thank Senator Durbin for holding this hearing. When he first asked about that, I thought it was an extremely important one and obviously very timely. I must say that I have no doubt Congress acted within the bounds of its constitutional authority.

Professor Barnett from the law school that both Senator Durbin and I attended says we should look at our oath of office. We do. I have been sworn into the Senate seven times, and I can remember vividly each time taking that oath. And I repeat it to myself all the time. I think most of us do.

But we had arguments on the constitutional issue. In fact, during the Senate debate, I talked about those arguments. I responded to them. And the Senate voted on the constitutional issue. The Senate formally rejected a constitutional point of order claiming that the individual responsibility requirement was unconstitutional. It is not as though it was not considered. We voted on it. We voted that the Act was constitutional.

Now, two courts have ruled it is not. Two courts have ruled that it is. We all know that ultimately it is going to go to the Supreme Court to be decided. As I was coming in here, I heard Professor Fried, who has testified before this Committee—as Professor Dellinger has, and we have all profited by such testimony—saying that it was not going to go into questions about the policy but about the constitutionality. And I appreciate that. The Act was neither novel nor unprecedented. I believe it rested on what has been a century’s work of building on our safety net in this country.

The opponents sought to continue their political battle by challenging the law minutes after—it seemed almost minutes after President Obama signed it into law. It was actually within a few days. They want to achieve in courts what they were unable to achieve in Congress. This was debated for over a year or most of the year, countless hearings, countless debates, on and off the floor. And many Americans now have access to health care today because of the Affordable Care Act. Parents who have children in school, in college, will be able to keep them on their policy until they are 26 years old. If you have a child with juvenile diabetes, they cannot be refused; if you have got a pre-existing condition, you cannot.

There are a whole lot of things. It eliminates discriminatory practices by health insurers, making sure that a patient’s gender was no longer a pre-existing condition. Just think about that. In the 21st century, some were talking about gender being a pre-existing condition. We have added important tools to help law enforcement recover taxpayer dollars lost to fraud and abuse in the health

care system. While Senator Grassley and I may have disagreed about the health care bill itself, we agreed on going after fraud and abuse in the system. A lot of our Nation's senior citizens will now pay less for their prescription drugs.

I realize that some want the courts to deliver a victory that they could not secure in the Congress. Over the course of this country, that has happened many, many times, people from both sides on issues. But I would hope that the independent judiciary will act as an independent judiciary and will be as mindful as Justice Cardozo was when he upheld 75 years ago the constitutionality of Social Security. He wrote: "[W]hether wisdom or unwisdom resides in the scheme of benefits set forth. . . it is not for us to say. The answer to such inquiries must come from Congress, not the courts." I agree with that. I hope the Court will follow his wise example.

Mr. Chairman, I will have some questions for the record. I have another hearing, but I compliment you for doing this. I think this is as important a hearing as being held in the Congress at this time.

[The questions of Chairman Leahy appears under questions and answer.]

Senator DURBIN. Thanks a lot, Chairman Leahy. We appreciate that very much.

As I would not invite my former law school professors to stand in judgment of my performance as a Senator, I will not ask Professor Fried to issue another grade to Professor Barnett. He had that chance once before. But I would like to ask you to comment, Professor Fried, if you would, about one of the statements made by Professor Barnett, and it relates to the question of whether this is a unique situation where we are, in fact, imposing a duty on citizens to either purchase something in the private sector or face a tax penalty. And I would like to ask you to comment on that generally, but specifically, if you can, I am trying to go back to the case involving this famous man, Roscoe Filburn. Mr. Filburn objected to a federal law which imposed a penalty on him if he grew too much wheat, and he argued before the Court that this wheat was being consumed by him and by his chickens, and that as a result, the law went too far. I think the net result of the law is that he either faced a penalty or complied with the allotment requirement and then had to make a purchase in the open market to feed his chickens.

Is there an analogy here? Would you like to comment on this general notion that this is unique in that the law requires a purchase in the private market?

Mr. FRIED. I taught Professor Barnett torts, not constitutional law.

[Laughter.]

Chairman LEAHY. Maybe he thinks it is a tort.

Mr. FRIED. The *Filburn* case can be distinguished only if you say, "After all, Mr. Filburn did not have to eat, and his chickens did not have to eat." And that is an absurd argument, and I think Mr. Dellinger pointed that out. That is like saying that if you could make a commitment that you will never use health care, that you will never visit an emergency room, that you will never seek the ministrations of a doctor, then you should be free not to enter this

system. That is silly. That is the first point of non-distinction in *Wickard*.

There is another point which is made, and I get a little hot under the collar when I hear it, and that is that this turns us from citizens into being subjects. And Judge Vinson also said that those who threw the tea into Boston harbor would be horrified at this.

Let me remind you that the citizens of the earlier United States were well acquainted with many taxes. Remember the Whiskey Rebellion. The reason they threw that tea in the harbor was taxation without representation. A parliament which they had not elected did this to them.

Well, the people elected the Congress, and in 2010, they changed the Congress, and that is why we are not subjects, why we are citizens.

Senator DURBIN. Professor Barnett, you and Mr. Carvin have alluded to this activity and inactivity distinction. Tell me what case you look to for precedent or what part of the Constitution you refer to to come up with this approach.

Mr. BARNETT. Thank you, Senator. Well, there is nothing in the Constitution that says that Congress has the power to regulate economic matters, which is what Professor Dellinger referred to; and there is nothing in the Constitution that even says that Congress has the power to regulate activity that has a substantial effect on interstate commerce. That latter doctrine—there is no former doctrine. There is no economic matters doctrine in the Constitution. As for the substantial effects doctrine, that is given to us by the Supreme Court, not the Constitution itself.

So I have been operating—my testimony is based entirely on what the Supreme Court has said, and the Supreme Court has time and time again referred to the Congress' power and authorized Congress to exercise its power to regulate activity, economic activity. That is what it says. In fact, in Justice Scalia's concurring opinion in *Raich*, which the plaintiffs—the government in this case—relies heavily on—Justice Scalia uses the word “activity” or “activities” 42 times. That is a lot.

So that is what we are looking to, and what we notice is that the Court has never said that Congress has the power to regulate economic matters, economic decisions, nor economic inactivity. It has simply said the Congress can go this far, economic activity, and has never said the Congress can go farther.

Now, it could say that, Senator. It is free, next time it hears a case like this one, to say it can go farther. Of course, we know that. It just has not done so up until now.

Senator DURBIN. For the record, I think the other four witnesses have acknowledged explicitly that the health care industry is part of commerce. Do you accept that?

Mr. BARNETT. Yes, I do, absolutely.

Senator DURBIN. All right. General Kroger, how would you respond to this comment: We are talking about the inactivity of a citizen, not the overt act of a citizen?

Mr. KROGER. I would say two things, Senator. First of all, most of the case law does speak repeatedly of activities because most bills are regulating activities. But the Supreme Court has certainly

never limited the Commerce Clause to a formal category of activities and prohibited Congress from acting otherwise.

The *Wickard* case itself specifically cites the language in *Carter v. Carter Coal*, which says that the proper test is not just whether there is an activity but whether there is a condition that can be regulated. And so I think this somewhat artificial attempt to restrict the Congress to only regulating activities as opposed to conditions falls short. It simply does not make sense under the case law.

Senator DURBIN. And I would like to ask Professor Dellinger—I just have a minute left here. Judge Vinson basically said, “Since I found this one section to be unconstitutional, I am going to basically say that the entire Act is unconstitutional, virtually unconstitutional.” And then there is a question as to what the operative effect of his decision is on that particular district, that State, and the Nation.

Would you comment on those two aspects of his decision?

Mr. DELLINGER. Well, I think that Judge Vinson’s decision sweeps far beyond where it was necessary to go and takes down completely unrelated provisions. And I think that the fact that two other federal district courts have upheld the constitutionality of the law will indicate that his opinion will not have a necessary effect at this moment.

The Department of Justice, I think, is considering whether to seek an appeal, even though he issued no order, to nonetheless clarify that only the individual mandate is at stake. And, of course, everyone agrees that what is also at stake is the provision that prohibits insurance companies from denying coverage for pre-existing conditions. Those two are linked, and I think that aspect of it is indisputable.

Senator DURBIN. Thank you very much.

Senator Grassley.

Senator GRASSLEY. Professor Fried, you have made very clear that you are convinced that there is no doubt that the mandate in the health law is constitutional. So would you see any need for Congress to make any changes to the mandate in order to increase the chances that it would be found to be constitutional, make more certain it was constitutional?

Mr. FRIED. I see no need for it because it seems so clearly constitutional. You are wearing a belt. Maybe you want to put on some suspenders as well. I do not know. But I think it is not necessary. I suppose it would be proper.

Senator GRASSLEY. Okay. Then to any of the witnesses, some of you have discussed the Supreme Court’s decision that has given Congress broad authority under the Commerce Clause. That is the whole point here. But Congress has never before passed a law that requires people who are not already engaged in an activity, commercial or otherwise, to affirmatively purchase a product or service. Could the Supreme Court strike down such a novel provision as the individual mandate without overturning a single one of its precedents?

Mr. CARVIN. Yes, Senator, that is clearly true. It is the defenders of the Act who are seeking to extend the Court’s Commerce Clause jurisprudence past what it currently is. Again, as Professor Barnett has pointed out, they have only suggested that activities that affect

interstate commerce can be regulated under the Commerce Clause. They have never suggested that Congress can compel people to engage in certain activities to offset the economic effects of another part of the law.

To get back to Senator Durbin's question, they have never suggested that they could compel Mr. Filburn to grow wheat. They have never suggested, again, as I pointed out in my testimony, that they could require Mr. Filburn's neighbors to buy some other of his crops to counteract the negative economic effects on limiting the amount of wheat that he could grow. Contrary to my good friend Charles Fried, I think those distinctions are hardly lawyerly semantics. I would think they are relatively obvious to most people.

Senator GRASSLEY. If you want to add, Professor Dellinger.

Mr. DELLINGER. Yes, Senator Grassley. I think the very notion that what is involved here is "inactivity" can be called into question. If you are sitting alone in the woods doing nothing, the tax penalty does not apply to you. You have to go out and enter the national economy, earn \$18,000 for a couple in order to be required to file an income tax return. Only then do you have to pay a 2.5-percent penalty if you do not maintain insurance coverage. And since no one can be assured they are not going to need health care, they are going to be active participants in the health care markets. So in both of those ways, this is in that sense by no means a pure regulation of inactivity. And I believe there is no case ever that has come close to holding that Congress cannot impose affirmative obligations when doing so carries out its regulatory authority over an important part of the national economy.

Mr. BARNETT. If I can just add, the penalty might not apply to everyone, but the mandate does apply to everyone. It is the penalty that is enforcing the mandate that might not apply to everyone, but the mandate that says every American has to have health insurance, has to obtain or procure health insurance, that does, I believe, apply to everyone.

Mr. FRIED. If I might just add, the Supreme Court precedent which I have always thought was very relevant is the 1905 decision in *Jacobson v. Commonwealth of Massachusetts*. Massachusetts said every citizen had to obtain a smallpox vaccination. Jacobson thought this was an attack on his liberty. He was fined \$5, and the Supreme Court said, "Pay the fine."

Mr. CARVIN. That illustrates the distinction that I am talking about. Massachusetts acted to stop the spread of an infectious disease pursuant to its power to protect the health and welfare of the State's citizens. Congress does not have that plenary power. Under Mr. Fried's analysis, Congress could tomorrow require everyone to buy vitamins or vaccinations because in another part of the law they have required doctors, for perfectly charitable reasons, to provide free vitamins and vaccinations to others. And this would be an offsetting effect just like the individual mandate is an offsetting effect. If Congress can do that—than I think we all agree Congress can do everything that State governments can do today, subject to the restrictions of the Liberty Clause. And if that is true, then there is no distinction between the commerce power and the police power. And, again, I think we would all agree that the Court has

made clear that if there is no such distinction, that means the commerce power has been exceeded.

Senator GRASSLEY. I want to go on to ask for a comment on a quote from the Center for American Progress critical of Judge Vinson: "If Judge Vinson were to have his way, insurance companies will yet again be able to deny you coverage because you have a pre-existing condition, drop your coverage when you get sick, limit the amount of care you receive, take more of your premium dollars from their profits."

I think that this group shares the same thoughts that many of the supporters of this legislation have used as a basis for the law as well as a basis for this hearing, that there seems to be no difference between law and politics. And, of course, I think the supporters of that view think that the judge who rules that a law is unconstitutional must oppose the policies as contained in the law.

Obviously, I take a different view. I believe that a judge is obligated to make sure that the laws that Congress passes comply with the Constitution. If Congress passes a law that is beyond the constitutional power to enact no matter how popular or desirable the provisions of that law are for some people, the courts have an obligation to strike it down.

Number one—and, by the way, I wanted to direct this to the three people on the left.

[Laughter.]

Senator GRASSLEY. I am sorry. General Kroger, Professor Fried, and Professor Dellinger. Do you think it is appropriate to personally attack a judge's ruling striking down a law by saying that the judge must prefer particular policy results that the critic opposes?

Mr. FRIED. No, it is not proper.

Senator GRASSLEY. Okay. And anybody can add if they want to, but let me go on to the next one. Is it fair to say that Judge Vinson's decision aims to take away benefits that millions of Americans are already seeing and putting insurance companies back in charge of your health care?

Mr. FRIED. It will have that effect. Quite possibly he greatly regrets it.

Senator GRASSLEY. And do you think that judges should decide cases based on their best understanding of the meaning of the Constitution or on whether they think their rulings would have good or bad policy consequences?

Mr. FRIED. The former.

Senator GRASSLEY. Obviously, it is good to have that understanding, that we are a society based upon law and not upon what judges just happen to think it might be.

You are right. My time is up.

Senator DURBIN. Senator Leahy.

Chairman LEAHY. I always have to watch out for these tough chairmen. Actually, on that last question, Professor Fried, do you know anybody who disagrees with that, whether the left or the right?

Mr. FRIED. Yes, I am afraid I do.

[Laughter.]

Chairman LEAHY. But do you know anybody who should disagree with it?

Mr. FRIED. Not a soul.

Chairman LEAHY. I thought you might go that way.

Mr. Kroger, it is good to have you here. We always like having Attorneys General here. We are fortunate to have two former Attorneys General on this Committee—Senator Blumenthal and Senator Whitehouse. You represent the State of Oregon, and you said that Oregon is a sovereign State—I am trying to summarize your testimony—and is charged with protecting and promoting the health and welfare of its citizens. Do you have any concern about the constitutionality of the requirement that individuals purchase health insurance?

Mr. KROGER. None whatsoever.

Chairman LEAHY. Thank you.

Now, as Attorney General, were you asked to or did you on your own review the legal basis for the Affordable Care Act?

Mr. KROGER. Yes, I have, Senator.

Chairman LEAHY. Do you think it intrudes on Oregon's responsibility to protect the health and welfare of its citizens?

Mr. KROGER. Senator, I think it greatly assists the ability of the State of Oregon to protect its citizens.

Chairman LEAHY. Thank you.

Professor Fried, you know, having been here actually from the time of President Ford, when you were Solicitor General for President Reagan, I still almost feel like I—that is when I think I first met you. I almost feel I should call you "Solicitor General." But do you believe that the requirement in the Affordable Care Act that individuals purchase health insurance represents an unprecedented extension of Congress' authority to regulate insurance under the Commerce Clause?

Mr. FRIED. It is a new requirement. I do not think it is unprecedented. I think the language which I quoted to you from Chief Justice Marshall at the beginning of our Nation amply covers it.

Chairman LEAHY. You say that it is a different one. Let me just explore that a little bit further. Do you believe that there have been new limitations on the Commerce Clause by the current Court or other courts that give you concern that the Affordable Care Act is not a constitutional—

Mr. FRIED. There have been—excuse me, Senator.

Chairman LEAHY. No. Go ahead.

Mr. FRIED. There have been limitations. I sat at counsel table with the prevailing argument in *United States v. Morrison* because I believed that the relevant provisions of the *Violence Against Women Act* were unconstitutional, and the Court so held. But that was because the Court found, correctly, that, as despicable and criminal as it is for a man to beat up his girlfriend, it is not commerce. Well, there is no doubt health insurance is commerce.

Chairman LEAHY. And on the *Violence Against Women Act*, did not the Congress go back and redraft it based on the ruling in *Morrison*?

Mr. FRIED. I believe they did, but—

Chairman LEAHY. Or a version of it.

Mr. FRIED. I believe they did, but I cannot swear to that, and I have sworn to my testimony.

Chairman LEAHY. Thank you. Again, one of the reasons why I enjoyed your tenure as Solicitor General with President Reagan.

Does anybody want to add to this? Mr. Carvin, here is your chance to disagree with Professor Fried.

Mr. CARVIN. I never pass up a chance to disagree with Charles. [Laughter.]

Mr. CARVIN. It rarely happens. Again, Senator, I do think there is a fundamental difference in two respects. You are compelling people to engage in commerce, and what is the rationale? Is it that by not contracting with insurance companies that somehow acts as an impediment to commerce? No. What it does do is prevent this free rider problem that Congress created by imposing the pre-existing condition. Now, I call that a distortion of commerce. I did not suggest that in a normative sense. Congress interferes in the private market all the time, and what they have done is impose certain restrictions on insurance companies and they are, therefore, compelling people to ameliorate that problem. So the individual mandate does not carry into execution the regulation of commerce. It corrects a distorting effect of the regulation of commerce. And it seems to me that that distinction is critical because, otherwise, again, if Congress decides to limit what banks can do with mortgages or credit cards or car companies, then obviously they could conscript the citizenry to offset that.

Chairman LEAHY. Which is a repeating of your earlier argument, and I am only cutting you off because my time is running out.

Mr. CARVIN. I was about finished. Thank you.

Chairman LEAHY. Plus your time is running out.

Professor Barnett and Professor Dellinger, if you can very briefly—

Mr. BARNETT. All I would say, Senator, is—I wanted to talk about the two quotes that Professor Fried mentioned, one from *McCulloch*, which refers to Congress' power to use any ordinary means of execution. A mandate is not an ordinary means of execution. It is extraordinary.

Second, in *Gibbons v. Ogden*, Justice Marshall said that Congress may prescribe the rule by which commerce is to be governed. Nobody up here thinks that the failure to buy health insurance is itself commerce. That is not what anybody here thinks. So that does not fall under this language either.

So neither one of those quotations directly apply to the situation we currently face.

Chairman LEAHY. Professor Dellinger.

Mr. DELLINGER. Yes, I would like to respond, I think, to what is one of Michael Carvin's best points. I disagree that this matter would stand for the proposition that, where Congress imposes costs on companies, it could then make up for that, fix that by going out and making people buy that company's products. That is not true because in this instance, Congress is dealing with a dysfunction and an important national market caused by the fact that companies have an incentive to deny coverage to people with pre-existing conditions; as a result of that, they are not covered. In order to make that market work efficiently, you need to encourage people to join the market so that they do not wait and order up their health insurance on their cell phone in the ambulance on the way

to the hospital. That is a market problem that Congress can address and fix.

It is unprecedented, quote-unquote, but only in the sense that the Affordable Care Act uses a market-based system giving people more choices than has been our previous custom of providing a single governmental payer, as we did under Social Security and largely do under Medicare. So the idea that this is unprecedented is only one that it is a new use of a market-based approach, less intrusive, providing more choice.

Chairman LEAHY. Thank you.

Thank you, Mr. Chairman.

Senator DURBIN. Thanks a lot, Mr. Chairman.

Senator CORNYN.

Senator CORNYN. Thank you, Senator Durbin, and thanks to all the witnesses for being here. I feel like I am back in law school, but we appreciate the fact that each of you are giving us the benefit of your expertise and your opinions on a very important issue, no doubt.

I was tempted to say, Mr. Chairman, that I wish we had done this before the law was passed, which we did not, as opposed to now. But I think, Professor Barnett, you make a very important point, that Congress' duty with regard to a law like this does not end when it passes a law. Indeed, if, in fact, we are of the opinion that it exceeds either the prudential or constitutional bounds of Congressional power under the Commerce Clause, we can repeal it. And I would just say to my friend who is chairing the Committee, Senator Durbin, I know it was suggested earlier that it is either this or nothing. I think they call that the fallacy of a false dichotomy. There are not just two choices. There are many other choices that are available to Congress if this were to be repealed and replaced, and I am sure we will talk about that a lot more.

But let me just say—I went back to look at the Federalist Papers where in Federalist 45 James Madison talked about the powers of the Federal Government being enumerated and specific and the power of the State being broad. And, indeed, the heading for the Federalist 45 is “Alleged Danger From the Powers of the Union to the State Governments Considered.” It was exactly this sort of relationship between the State government and State power and individual citizens and the Federal Government that I think is causing the most concern here, because my own view is that the individual mandate is an unprecedented overreach of the Federal Government's limited and enumerated powers. And I know lawyers can disagree, and we do disagree, and we usually do so in a civil and dignified way, and that is great.

By the way, Mr. Chairman, I would ask unanimous consent to introduce a letter from the Attorney General of Texas, Greg Abbott. He was one of the 26 Attorneys General who were successful in the litigation recently concluded in the district court in Florida.

Senator DURBIN. Without objection.

Senator CORNYN. I thank the Chair.

[The letter appears as a submission for the record.]

Senator CORNYN. So really I think what worries people more than anything else, whether they articulate it quite this way or not, is that I think a lot of people feel like the fundamental rela-

tionship between the Federal Government and the American people has somehow been altered in a basic and sweeping way. And whether they can say, well, that is a violation of the 10th Amendment or it is a violation of the Commerce Clause or the Necessary and Proper Clause or whatever, I think it depends on the individual and their background and expertise.

But I just want to ask whether you agree—let me ask Professor Fried this question. Jonathan Turley, a law professor who testifies occasionally here before us, said that if the Supreme Court upholds the individual mandate, it is hard to see what is left of federalism. Do you agree or disagree with that?

Mr. FRIED. I disagree with that. I recall in the *Violence Against Women Act* there must have been Attorneys General from 52 States arguing that that Act was constitutional, and it was thrown out anyway because it was not commerce, and that was a correct decision. I supported it. I helped procure it, indeed. But that was because what the act covered was not commerce. This is as I recall, the great debate in the Senate was between this device and something called the government option. And the government option was described as being something akin to socialism. And I think there is a bit of a point to that. But what is striking, Senator, is that I do not think anybody in the world could argue that the government option or, indeed, a single-payer federal alternative would have been unconstitutional. It would have been deplorable. It would have been regrettable. It would have been Western if not Eastern European.

[Laughter.]

Mr. FRIED. But it would not have been unconstitutional. And it is odd that this, which is an attempt to keep health coverage in the private market, is now being attacked that way.

Senator CORNYN. You made a very good case that Congress can pass some very bad laws that are still constitutional.

Mr. FRIED. Yes, sir.

Senator CORNYN. Because time is running short—and I hope we will have a chance for a second round because seven minutes does not give us enough time. But I did want to explore. Professor Fried, you did say that while you are not troubled by the individual mandate, you are troubled by this huge unfunded mandate imposed on the States by the Medicaid expansion. Indeed, there is a whole body of law that you are no doubt expert in that talks about the Federal Government's coercing the States and commandeering the States to pursue a federal policy that is beyond the Federal Government's authority to do. And I will have to tell you that one of the consequences of this in my State is a \$27 billion unfunded mandate over the next 10 years for the Medicaid expansion, which is crowding out spending at the State level for education and transportation and other important priorities.

I just want to ask you to expand briefly on your concerns in this area.

Mr. FRIED. The case that comes to mind is *South Dakota v. Dole* which required the States—and that was not even a funding mandate—to alter the drinking age and threatened them with the withdrawal of five percent of highway funds if they did not comply. And the Supreme Court said, Well, five percent is so little that it is not

that much of a threat. Implicit in that is, Would you believe 10 percent? How about 50 percent? And the unfunded mandate here is huge, and that is why I said to Senator Grassley that I think there really is a constitutional worry about that.

Senator CORNYN. If I could just conclude by saying that was one of the bases for the Texas challenge, and I believe the other Attorneys General in the Florida case—I do not believe that the judge got to that issue because—I may stand corrected here, but although we are focusing on the individual mandate, I am interested in your testimony with regard to the coercion or commandeering of State authorities and State budgets.

Thank you. My time is up for now. I hope to come back.

Senator DURBIN. Thanks, Senator Cornyn.

Senator FRANKEN.

Senator FRANKEN. Well, I feel like I am back in law school.

I did not go to law school.

[Laughter.]

Senator FRANKEN. Attorney General Kroger, Mr. Carvin said and then repeated essentially this in his testimony: A decision not to buy health insurance does not affect commerce. Is that an accurate quote?

Mr. CARVIN. Absent the pre-existing condition ban, true. In other words, if you took the pre-existing condition ban out of the law, the insurance company would be able to contract with its patients, and the fact that some stranger to that transaction sat at home would not affect that contractual relationship. The argument I am making is that the pre-existing condition ban is what enables Congress to reach out and bring that stranger to the transaction in.

Senator FRANKEN. Well, without the mandate, you could not have the pre-existing condition; it would not work in the law. But this is a question for Attorney General Kroger. A decision not to buy health insurance does not affect commerce. Mr. Kroger, when the uninsured in your State go to emergency rooms and cannot pay their bills, how much does that cost Oregon hospitals every year?

Mr. KROGER. You know, Senator, I have spoken to the CEOs of various hospitals around the State. The amount of charitable care, care of persons who do not have insurance, varies from hospital, between three and in some cases as high as 12 percent of the amount of care that they are providing. The idea that being uninsured does not affect commerce is just factually incorrect. Every American pays higher insurance premiums to cover those costs.

Senator FRANKEN. I understand it costs about \$1.1 billion every year for Oregon hospitals. Do you know how much that costs insured Oregonians in terms of higher premiums?

Mr. KROGER. Senator, the different studies show somewhere between \$450 in higher insurance premiums for individuals, up to about \$1,500 for families who are required to help carry that cost of the uninsured.

Senator FRANKEN. So this basically sounds to me like insured Oregonians are subsidizing uninsured Oregonians.

Mr. KROGER. That is correct, Senator.

Senator FRANKEN. So would you agree with the statement that a decision not to buy health insurance does not affect commerce?

Mr. KROGER. It clearly does affect commerce, Senator.

Senator FRANKEN. OK. Thank you.

Professor Dellinger, my understanding is that when the Supreme Court decides cases, they are interpreting the Constitution, or if they are ruling based on precedent, they are ruling based on previous Supreme Court interpretations of the Constitution. Is that correct?

Mr. DELLINGER. Yes, sir.

Senator FRANKEN. Okay. I have to say that I am confused—and maybe it is because I did not go to law school—by Mr. Barnett’s testimony when he says, “No one claims that the individual mandate is justified by the original meaning of either the Commerce Clause or Necessary and Proper Clause. Instead, the Government and those law professors who support the mandate have rested their arguments exclusively on the . . . Supreme Court.”

First of all, I am confused because I know of at least two scholars, Jack Balkin and Akhil Amar, who do think the original intent of the Commerce Clause supports the constitutionality. Are Akhil Amar and Jack Balkin no one? They are pretty esteemed, are they not?

Mr. DELLINGER. They are, and so is—

Senator FRANKEN. So the statement is not actually accurate.

Mr. DELLINGER. And so is Professor Barnett, but you—

Senator FRANKEN. Okay. Well, but I am sure Akhil Amar and Jack Balkin have made ridiculous statements, too. I am sorry. I did not mean that.

Mr. DELLINGER. Okay.

Senator FRANKEN. I did. I did.

[Laughter.]

Senator FRANKEN. Anyway, sorry. See, but to me on this—and I did not go to law school, but it seems to me that there is a transitive property. If A equals B, B equals C, and C equals D, A equals D. And since the courts are relying on precedent, they are relying on a Supreme Court that was interpreting the Constitution. Right? So is it not true that by relying on precedent you are really interpreting the intent of the Founders?

Mr. DELLINGER. That is true, Senator Franken, but I would also be perfectly willing to go back to the original understanding and find that this is fully consistent with it in the following sense: The Framers did assume in 1787 that there would be substantial areas that were matters for local regulation only and the national government would be limited to regulating only that commerce which concerns more States than one.

What happened over the ensuing two centuries is that the category of what affects more States than one has increased dramatically because of developments in telecommunications and markets, et cetera. We now have a single national market so that Congress’ authority to regulate that commerce which concerns more States than one is greatly vaster than the Framers would have imagined, not because of any difference in constitutional principle that they adopted, but because of the extraordinary developments in technology, communications, and other matters which make us a single—

Senator FRANKEN. Like airplanes.

Mr. DELLINGER. Which have made us a single national economy, yes.

Senator FRANKEN. Senator Cornyn made this 10th Amendment point. As I understand it, the way the 10th amendment was written, and if you go to the Federalist Papers, it was written specifically to exclude the word “expressly.” This is the 10th Amendment: “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.”

Now, I remember that when they were writing this some South Carolina representative wanted to put in “expressly,” which had been in the Articles of Confederation, and Madison said no. And Madison writes in the Federalist Papers that if you put “expressly” in, then every possible power of the Federal Government would have to be written in an encyclopedic way into the Constitution and that that would be absurd. Is that your understanding, is that everybody’s understanding of the 10th Amendment? Is that history right? Is my history right?

Mr. DELLINGER. It is mine.

Senator FRANKEN. Thank you.

Senator DURBIN. I would like to welcome to the Judiciary Committee Senator Lee of Utah and recognize him at this point.

Senator LEE. Thank you, Mr. Chairman. I want to thank each of our witnesses for coming today. For a law geek like me, it is an honor to be here and be able to interact with each of you.

I want to echo something that has been mentioned once or twice this morning but emphasize it again. I think it is important that we do this as Senators because I believe that among the founding generation, the Founding Fathers, there was no understanding that was more ubiquitous than the idea that what we were creating at the national level was not an all-purpose national government possessing general police powers but a limited-purpose Federal Government. And I think one of our jobs as Senators is to make sure that, regardless of what the courts say that we can get away with in court, regardless of how broadly we may exercise our power without judicial interference, we take a second look and say, separate and apart from what the court says we can do, should we be doing this? Is this consistent with our role as legislators operating within a government with decidedly limited powers?

I also like the quote from Justice Jackson that was pulled out a few minutes ago, I think by Mr. Kroger, to the effect that certain decisions are wisely left for Congress. The courts lack the authority to be a sort of roving commission on all things constitutional. We have to make a number of these decisions on our own regardless of whether the courts are going to do them for us.

I wanted to ask a few questions of Mr. Dellinger, if that is okay, Professor. Do you agree, first of all, with James Madison’s assessment that Mr. Cornyn quoted a few minutes ago that while the powers of the Federal Government are few and defined, those that are left to the States are numerous and indefinite?

Mr. DELLINGER. I do agree, and I think Senator Cornyn correctly cites Federalist 45 for that proposition. And as I said, Senator Lee, within the area of Congress’ authority to regulate national com-

merce, what has grown is the interdependency of national commerce, not our understanding of the Constitution.

Senator LEE. Sure. Sure, it has grown. But they had interstate commerce then. They were interconnected. In fact, that was the whole reason why we need to be a union in the first place, right?

Mr. DELLINGER. Correct.

Senator LEE. We could not survive. So they understood this interconnectedness. This is not new. It has been facilitated by jet airplanes and by the Internet, but—

Mr. DELLINGER. That is right. But if you get sick in North Carolina in 1787, it had no effect in Utah.

Senator LEE. Well, Utah then was part of Mexico.

[Laughter.]

Senator LEE. Still a lovely place, but—

Mr. DELLINGER. It had no effect in Pennsylvania, if I may clarify my remarks.

Senator LEE. Okay, okay. But they were interconnected, so perhaps the changes that we have had have been changes of degree. Perhaps we were more interdependent then than we are now, but you would still agree that it is still accurate to say the powers of the Federal Government are few and defined, whereas those reserved to the States are numerous and indefinite.

Mr. DELLINGER. Yes.

Senator LEE. And yet if this law is upheld, if this law is within Congress' limited power to regulate commerce among the States—notice it did not say “commerce.” It says “commerce among the several States and with foreign nations.” If this is within Congress' power, wouldn't it also be within Congress' power to tell every American, including you and me and everything in this room, that we must eat four servings of green leafy vegetables each day?

Mr. DELLINGER. No.

Senator LEE. Why is that? What is the distinction?

Mr. DELLINGER. The distinction is that a regulation of commerce to be constitutional has to be a permissible regulation of commerce, and something which intrudes into the area of personal autonomy does not meet that standard.

Senator LEE. Like, say, deciding where to go to the doctor and how to pay for it. I am trying to understand the difference between the personal autonomy at issue there and that presented by this law.

Mr. DELLINGER. Well, the case about broccoli is a case that is covered both by *Lopez* and *Morrison*; that is, you are regulating a local non-economic matter, what you eat and whether you exercise. And it is also governed as well—it is doubly unconstitutional because it is governed as well by the principle in cases like *Luxburg* and *Vacco* and *Cruzan* that say that an individual has the right to refuse unwanted medical treatment. You have a constitutional right to refuse it, and I—

Senator LEE. Please understand, Professor, I am talking about the Commerce Clause here. I am not talking about—

Mr. DELLINGER. I understand that, but I—

Senator LEE. Let us keep our discussion limited to the Commerce Clause.

Mr. DELLINGER [continuing]. Think if you talk about whether Congress could require people to buy other products—what would be Congress' legitimate reason for doing so? I think there would be many constitutional objections?

Senator LEE. Oh, I can come up with one right now. I mean, look, if we are going to make sure that everybody has got health insurance and that the Government is going to pick up the slack behind, then Congress could assemble a panel of experts—let us say your functional equivalence from the dietary council industry who would come and tell us that if you eat four servings of green leafy vegetables every single day, you are 50 percent less likely to suffer from heart disease, cancer, stroke, or a whole host of other ailments. That is going to cost the government less money. So there is a pretty tight nexus there.

Mr. DELLINGER. Yes, but as the Court said in *Gonzalez v. Raich*, that is a *Morrison* and *Lopez* problem of dealing with non-economic matters, and the Court said in *Gonzalez* where the act under review is “a statute that directly regulates economic, commercial activity, our opinion in *Morrison* casts no doubt on its constitutionality.” This is a direct regulation of a commercial activity, not something that merely affects a commercial activity.

Senator LEE. Okay. Let us change the hypothetical just slightly then. Instead of saying you must eat them, it would say you must take the first \$200 out of each month's earnings and purchase the equivalent of four servings of green leafy vegetables to eat per day. This all of a sudden is economic activity. This is not *Lopez*, where we are talking about bare, non-commercial, intrastate possession of a firearm within a school zone, or about *Morrison*, where you are talking about non-economic intrastate acts of violence.

Mr. DELLINGER. Okay. It seems to me that there are two responses to the argument that upholding this would stand for the proposition that Congress can force people to buy anything.

The first is that this is a requirement that you make provision to buy something which you cannot ever be assured you will not use and cannot be assured you will not transfer the cost to others. So I think it is distinguishable.

But, second, the very form of that argument was used to attack the minimum wage and Social Security.

Senator LEE. Social Security was—

Mr. DELLINGER [continuing]. Minimum wage, your question to be—if the issue were the constitutionality of the minimum wage law and it were 1937, you would be asking me, is it a regulation of commerce for Congress to have a minimum wage of \$5,000 an hour? And that has never been a legitimate—is it a regulation of commerce to say that if you buy one car, you have to buy three cars? That form of argument, I think, was used against Social Security and used against Medicare, and Congress has, in fact, never abused that. It has never set the retirement age at 25 as the opponents of the Social Security Act said would be possible if you upheld a retirement plan for people over 65. So the very form of the argument, I think, deflects attention from what is basically a completely unremarkable regulation of an important national market.

Senator LEE. Mr. Chairman, I see my time has expired. I have got one very brief follow-up question. Could I just ask that? Then I will be finished.

I was pleased to see in your written testimony that you have become such a huge fan of Justice Scalia's jurisprudence. He is also one of my favorite Justices on the Court. You quote him repeatedly as a source for the Court's post-*Wickard v. Filburn* jurisprudence under the Commerce Clause. Is it the case that that necessarily reflects his view as an original matter, as a matter of first principles? Or are those views made in recognition of the fact that he is bound by stare decisis?

Mr. DELLINGER. That is a good question, Senator, and I do not know the answer to that. It could well be that he is reflecting stare decisis, and I do admire him, because I believe that in the case that you and I are arguing against each other, he cast the critical vote for the position that sustained my argument and not yours.

[Laughter.]

Senator LEE. And he could not have been more wrong, could he? Thank you.

Senator DURBIN. Thank you, Senator Lee.

Senator KLOBUCHAR.

Senator KLOBUCHAR. Thank you very much, Mr. Chairman.

I am going to take a little different tack than Mr. Lee in terms of the practicality of these decisions as you look at people who—I think Mr. Kroger is well aware of this—already small business is taking advantage of the discounts that they are getting and the fact that you have got people who are—kids who are getting to keep their insurance that have pre-existing conditions and States who are now struggling to figure out what they are going to do in light of these decisions. And so my question—I know Senator Durbin asked this of Professor Dellinger, but maybe a few of the other witnesses want to chime in. What is the practical, immediate outcome of the decision in Florida on Monday? And I understand that some State Attorneys General are telling people they do not need to do the work to comply with the law since Judge Vinson did not stay his ruling pending the government's appeal. Other States think it would be irresponsible not to continue making preparations for implementation of the Act in case Judge Vinson's opinion is overruled at higher levels.

I guess I would start quickly with you, Mr. Kroger. Just from the practical level, what are you telling your State what they should do in light of the Florida ruling?

Mr. KROGER. Well, Senator, I hate to sound like a lawyer as a practical matter, if I—

Senator KLOBUCHAR. Aren't you a lawyer?

Mr. KROGER. Yes. If I was giving advice to State government, it would be covered by attorney-client privilege—

Senator KLOBUCHAR. Oh, okay.

Mr. KROGER.—and I would not be prepared to share it with you here.

Senator KLOBUCHAR. OK.

Mr. KROGER. I can say, generally, that I think it would be a huge mistake for a State to pretend that this is the final word. Obviously, we have decisions on both sides that have come out. They

are only district court opinions. And so, you know, my sense is that it would be an enormous mistake for a State not to continue on with implementation of the Act.

Senator KLOBUCHAR. Professor Fried.

Mr. FRIED. I do not have a judgment on that. It seems to me odd that one judge in Florida could govern the Nation. So——

Senator KLOBUCHAR. If they were in Minnesota, that might be different.

Mr. FRIED. Not to me, it would not.

[Laughter.]

Mr. FRIED. But I cannot really speculate. I had not thought that one through.

Senator KLOBUCHAR. The next two, Mr. Carvin, Professor Barnett.

Mr. CARVIN. I will join Professor Fried's agnostic response. I am not really sure.

Mr. BARNETT. I have been asked this, too, Senator, and I do not think I know the answer. But I can say without violating attorney-client privilege that I saw Attorney General Abbott from Texas on the news last night, and he said himself that he was counseling the Texas legislature that they should continue to act pursuant to the law until it is ruled upon by above. So I do not know if he is right, but I do know that he is someone whose opinion I respect, and that is the advice he is giving his own State legislature.

Senator KLOBUCHAR. Okay. Along these same lines, Judge Vinson struck the entire Affordable Care Act down because he found that the individual mandate was unconstitutional. That is a step that an earlier decision, which also found problems with the Act from the Eastern District of Virginia, did not take. Do you think the constitutionality of the whole law is contingent on the individual mandate? And then I guess a secondary question was how important it is to you that there was not a severability clause included in the bill. We will start with you, Professor Dellinger. Do you want to——

Mr. DELLINGER. I think it strikes me as far too sweeping, and I will pass that question on to my colleagues.

Senator KLOBUCHAR. Professor Fried, and then we will go——

Mr. FRIED. I do not believe that Judge Vinson said that the other parts of the statute were unconstitutional. What he said was because there is no severability clause and because the rest of the Act becomes unworkable without the mandate, which is something, of course, that many of us have been arguing, therefore, in striking the mandate, he is really in effect striking the rest of the statute because the rest of the statute becomes unworkable. But he is not saying that it is unconstitutional.

Senator KLOBUCHAR. Right.

Mr. FRIED. If I read him correctly.

Senator KLOBUCHAR. Okay. I just meant it more broadly. So do you think it matters that there is not a severability clause?

Mr. BARNETT. A severability clause, Senator, would not be dispositive. It would help the Court in discerning what the intent of Congress was. So in the absence of a severability clause, the judge must try to figure out what the intent of Congress was, and the government, even in its brief, said that the insurance regulations

imposed on the insurance companies were not severable from the mandate. Then the only question was for the judge—and that seemed pretty obvious—whether he could go into the bill, the 2,700-page bill, and look at all the provisions that were not regulations of insurance companies, sort of like the 1099 requirement, let us say, and say, Well, those could stand independently of these. And he said that is just not something he thinks the judge ought to be able to do, to go inside a bill and just find the ones that he thinks can work and not work. So he just said, “It is outside my purview, and I am just going to have to go with the whole thing.”

Senator KLOBUCHAR. All right. Professor Dellinger stated that the minimum coverage requirement in the Affordable Care Act is no more intrusive than Social Security or Medicare. What do you think about that statement, Professor Fried?

Mr. FRIED. It is distinguishable because, after all, the argument is being made you do not have to buy insurance, you can pretend that you will never get sick and so on and so forth. But with Social Security, you only get into that system if you earn money, if you have a job, if you make a living. Well, for goodness sake.

Senator KLOBUCHAR. Professor Dellinger.

Mr. DELLINGER. Although the mandate applies to everyone who is not exempted because they already have Medicare, their income is too low, et cetera, like Social Security, the penalty provision only applies if you enter the market and earn money. And so what strikes me as so remarkable about the attack on this law is that it seems to me to be in two ways everything conservatives should abhor.

First of all, it seeks to establish the principle that Congress can address a major national economic problem only by providing a monolithic government solution and is precluded from using a more choice-friendly—

Senator KLOBUCHAR. You are saying the argument would lead you to believe that under their argument that would be constitutional.

Mr. DELLINGER. Yes. And I know Professor Barnett, I believe, acknowledges that. I think Mr. Carvin does, too. You could have—and so if the only way Congress can address a market problem is by having the government step in and be the exclusive provider, that strikes me as an odd position for conservatives to take, which is why the idea of using the market and creating a financial incentive has always been more or less a conservative idea, a Republican idea. It is very akin to what the previous President Bush wanted to do with parts of Social Security: give people a financial incentive to go into the private market. That private market approach was adopted here, so it seems odd to attack that and say you can only use a government approach. And it also seems odd to say that five Justices sitting in Washington should decide a matter of economic regulation for the whole country. Both of those seem to me approaches that ought to be anathema to anyone who marches under the banner of conservatism.

Senator KLOBUCHAR. Thank you very much.

Senator DURBIN. Senator Hatch.

Senator HATCH. Well, thank you, Mr. Chairman. I first want to ask consent to place a few items in the record. I have a statement

for myself and one submitted by our Attorney General of our great State, Mark Shurtleff.

Senator DURBIN. Without objection.

[The prepared statement of Senator Hatch appears as a submission for the record.]

[The prepared statement of Mr. Shurtleff appears as a submission for the record.]

Senator HATCH. Now, Utah is an original plaintiff in this multi-State lawsuit, and of course, Judge Vinson singled out Utah as having standing as well. Attorney General Shurtleff has been at the head of the pack in finding for individual liberty and State sovereignty, and I am very proud of Utah's role in this. So I ask consent for Judge Vinson's opinion to be part of the record as well as the friend-of-the-court brief filed in that case by 32 Senators, including several members of this Committee.

[The information referred to appears as a submission for the record.]

Senator HATCH. And, finally, I ask consent that a few of the articles that I published on this subject in newspapers such as the *Wall Street Journal* and *Chicago Tribune* and the *Regent Journal of Law and Public Policy*, if I could have those in the record as well, Mr. Chairman.

Senator DURBIN. Without objection.

[The information referred to appears as a submission for the record.]

Senator HATCH. Now, it has already been said that the distinction between activity and inactivity is not in the text of the Constitution. I think most all of you have said that. Ah, a textualist is born. But neither are words such as "substantial effects" or "broader regulatory scheme" or anything else the Supreme Court has come up with that defenders of ObamaCare rely on. And there is no "intrusiveness" standard in the Constitution either. Would you agree with that, Professor Barnett?

Mr. BARNETT. Of course. That is not a constitutional standard or doctrine that I am aware of.

Senator HATCH. Well, none of them are.

Mr. Carvin.

Mr. CARVIN. Right, no. Obviously, things that substantially affect commerce is something that the Court says is within the Commerce Clause, but as has been pointed out, there are a number of things that affect commerce—violence against women, possessing guns—which the Court has said, no, no, those do not come within the ambit. And I would argue that economic inactivity is far more afield from the commerce power than things like buying and possessing guns.

Senator HATCH. I am very grateful to have Professor Fried here—he is a grand old friend—and Professor Dellinger is an old friend, both of whom I admire greatly. I do not know you, Mr. Kroger, but I am sure you are just fine.

[Laughter.]

Senator HATCH. Now, the Congressional Budget Office, in the past, has said that requiring individuals to purchase a particular good or service was "unprecedented." Now, that is the Congressional Budget Office. The Congressional Research Service recently

concluded that, "It is a novel issue whether Congress may use the Commerce Clause to require an individual to purchase a good or a service." I think it is a novel issue, I submit, because Congress has never done it before.

Now, I will throw this question to each of our witnesses and hope I get straight answers. Can you give me an actual example other than ObamaCare of Congress requiring individuals to purchase a particular good or service?

Mr. KROGER. Senator, if I may, my parents own a small business. They are constituents of Senator Cornyn's. And if you told them that the government had never required them to buy a good or service, they would be astounded. The federal OSHA law and regulations require all kinds of sole proprietors and small business people to go out and buy equipment, whether it is orange cones or hard hats or a fire disposal system in a restaurant. The environmental laws require a huge range of small business owners to buy air filters up to, you know, sulfur oxide scrubbers.

The reason small business people tend not to like government regulation, and particularly federal regulation, is because it does require them to spend money on goods and services. And so I think those are——

Senator HATCH. Only as a condition of being in business.

Mr. KROGER. You know, Senator, the——

Senator HATCH. I mean, these people are not trying to get into business.

Mr. KROGER. It is true that my parents could close down their business. All people could close down their business.

Senator HATCH. Well, they do not have to because they can go into business. But as a condition of going into it, they have to meet certain laws, right?

Mr. KROGER. Yes, I——

Senator HATCH. In this particular case, we have an inactivity of people—if you want to use that word. I do not find it the greatest word in the world. But we have an inactivity here that they do not want to do. And they would make their choice not to do it.

Let me go to you, Professor Fried.

Mr. FRIED. I think the idea that one can make a choice not to seek health care throughout one's life is simply not realistic and cannot be the basis for an attack on the constitutionality.

Senator HATCH. It is not right. I have to concede that point. But that still begs the question of whether it should be mandated.

Mr. FRIED. Well, I think once you have taken the first step and you have made that first concession, the rest follows.

Senator HATCH. Okay.

Mr. FRIED. And it has brought to mind the various things that were considered in the Senate and which the previous President, I think, very wisely suggested as an alternative to Social Security. And as an alternative, it was suggested that you could buy mutual funds from Vanguard, from Fidelity, and you would not have to buy it from the Government. And maybe one would say that, well, you do not have to work. You can simply, you know, sit on a corner and say, "Spare change," and then you would not have to pay Social Security. But I think that is unrealistic as well.

Senator HATCH. Let me go to Mr. Carvin. I only have a few seconds left.

Mr. CARVIN. No, they have never done it before, and if you buy any of the analogies that have been just agreed to, then there is no limit on Congress. The notion that health care is unique because you have to buy the goods is factually incorrect. You have to buy transportation, clothes, housing, shelter, food. The notion that health insurance is somehow a core requirement is kind of silly. And, of course, if you started drawing these distinctions between transportation and health care, you get back into the sort of unprincipled distinctions that bedeviled Commerce Clause jurisprudence prior to at least the 1930s.

Senator HATCH. Mr. Barnett.

Mr. BARNETT. It has never been done before, Senator, and the fact is that even though everyone might be said to one day need health care, the bill itself exempts people from buying health—health insurance is not the same thing as health care. Everyone does not go into the insurance market, and the bill exempts people for religious reasons from having to obtain health insurance. So, clearly, even Congress recognized that not everyone has to obtain health insurance just because they may or may not one day seek medical care. So the fact that medical care is an inevitability—which it is not for everyone. But to the extent that it is likely, it does not mean insurance. A completely different product is an inevitability.

Senator HATCH. Walter.

Mr. DELLINGER. Senator, my understanding is that the very first Congress required every adult free male to purchase and equip themselves with muskets, with ammunition, even certain forms of dress to carry the weapons and equipage with them. It is true that—

Senator HATCH. But you have got to admit that the—

Mr. DELLINGER. That has been a long—

Senator HATCH [continuing]. Provides guidance for that.

Mr. DELLINGER. It has been a long time since then. Yes, you can say when something has not been done before that it is novel or unprecedented, but no matter how much one italicizes those words, it does not amount to a constitutional argument. This is novel in the sense that Congress has decided to use a market approach, and it has used it with regard to the purchase of a commodity that truly is unlike others. There is nothing else in our economy where an individual who has made no preparation for the expense could go in and get a million dollars' worth of goods and services provided to them, the cost of which is passed on to others. There is nothing like that. So in that truly unique market, an incentive for people to make provision through insurance seems unremarkable.

Senator HATCH. One reason I raised it is for the purpose of showing that it has never been done before, and I think there are good reasons why it has never been done before. But I have asked the distinguished Chairman if he would just let me make a couple more remarks. I have a lot of other things I would like to ask, but my time is up. If you will indulge me, I would appreciate that.

You know, because no Commerce Clause cases involve Congress regulating decisions rather than an activities, that renders this

case as a case of first impression, which is my point. ObamaCare backers cite mandates that derive from different enumerated powers. They argue, for example, as some of you have argued here—I have been very interested in these arguments—that Congress has imposed mandates on individuals before such as jury service and military draft or Social Security. Professor Fried has made this argument. And simply because one provision of the Constitution allows Congress to require that someone do something cannot mean that the Commerce Clause allows the Congress to impose an individual insurance mandate.

Jury duty, for example, as been mentioned, has multiple layers of exceptions that make it far less compulsory for most people. It is also “necessary and proper” in order to exercise Congress’ power to establish lower courts and to implement the Sixth Amendment right to trial by an impartial jury.

Congress may impose a military draft, which, again, has layers of exceptions, pursuant to enumerated powers to raise and support armies, and they can clothe them and ask them to have guns as well and maintain a navy.

And the Social Security system, which has been raised here, is, unlike this insurance mandate, unequivocally an exercise of Congress’ power to tax and spend for the general welfare. It is a completely different issue, as far as I am concerned.

Now, each of these examples stands clearly within enumerated power. The insurance mandate does not. And I think, great scholars that you are, I think you have to admit that. If Congress could impose—now, that does not say that I am right and you are wrong, but it does make it more clear. If Congress could impose any mandate on an individual because it may impose a particular mandate on certain individuals, there would be no limits to federal power at all. And that is where I have a lot of difficulty here and have had a lot of difficulty as I have studied this matter.

Now, I have got to say, I respect all of you, and I respect the differences in points of view. But for the life of me—Professor Fried, I have a great regard for you, but I am really amazed at some of your arguments here today. Great man that you are. Now, I expected them from Walter Dellinger.

[Laughter.]

Mr. DELLINGER. Thank goodness I have General Fried with me.

Mr. FRIED. It is wonderful not to lose one’s power to surprise.

[Laughter.]

Senator HATCH. Well, you have never lost that power. I have to say that I probably agree with you much more on many other issues than I do here, but I have really enjoyed this. I really appreciate it. You have taken the time here. This is a very, very important issue.

And, Walter, Professor Dellinger, I want you to at least realize that the liberal part of you should be protecting our rights, not necessarily broadening them in the sense of making us have to buy health insurance.

Mr. DELLINGER. Senator, just a brief comment. I think you make obviously a very good point that most legislation, State—

Senator HATCH. I thought they were points.

Mr. DELLINGER. Well, you made one that I thought was—

Senator HATCH. Okay, one.
[Laughter.]

Mr. DELLINGER. And that is that most legislation, State and federal, prohibits individuals from doing things. But there has always been some legislation, State and federal, that imposes affirmative obligations.

Senator HATCH. No question.

Mr. DELLINGER. That does not mean that—in that sense, it is unremarkable to impose affirmative obligations, though I think our—

Senator HATCH. You can find those in the Constitution, is my point.

Mr. DELLINGER. I think I—well, but it is also true under—it is the commerce power that Congress uses to build interstate highways and tells people that they have to move and take a check from the government. It is the commerce power that does that. So there are lots of affirmative obligations.

Now, I think we should be very attentive. Affirmative obligations can be more intrusive, and, therefore, we have to take a careful look to make sure that they do not transcend any limits. This to me it seems easily does not.

Senator HATCH. Well, I have transcended my limits, and I apologize to the distinguished Chairman, but I appreciate him giving me this little leeway because I have to leave, and I just want to thank each one of you for coming.

Senator DURBIN. Thanks very much, Senator Hatch.

If any members of the panel would like us to take a break for a few minutes here before we proceed, just kind of give a high sign. Should we just keep—

Mr. FRIED. I need to get back to Boston if I possibly can, but that is a two o'clock train.

Senator DURBIN. Well, I swear that we will get you to the station on time.

We are honored to have as a new Member of the Senate Judiciary Committee Senator Blumenthal of Connecticut, who is a former Attorney General of that State. Welcome, Senator Blumenthal. Please proceed.

Senator BLUMENTHAL. Thank you, Mr. Chairman, and thank you to the panel.

I have to make clear at the very beginning I do not feel like I am back in law school. If law school had been this interesting and enlightening, I would have gone to more classes.

[Laughter.]

Senator BLUMENTHAL. I just want to join Senator Hatch and other Members of the Committee in thanking you for spending the time with us today and giving us the benefit of some very important testimony.

I want to say particularly to General Kroger that I appreciate your being here and your having the courage to do what you have done in declining to join what may be a popular stance in some quarters in challenging the lawsuit. I declined as Attorney General to join in that challenge, partly because this new Act actually saves money for many, many States, including Connecticut. It saves Connecticut some \$53 million through September 2011 and perhaps

does the same for Oregon and other States, but also because I believe that the lawsuit is without merit. And I think that the two opinions we have to the contrary from Judge Hudson and Judge Vinson show clearly that it is without merit, and partly because of this distinction made out of non-cloth, non-constitutional cloth, between inactivity and activity, which is nowhere present in any previous case of the United States Supreme Court, but also because I think they give very, very inadequate attention and weight to the doctrine that laws should be presumed constitutional.

Judge Hudson, in effect, rejects the idea because of a footnote in *City of Chicago v. Morales*. Judge Vinson considers it almost not at all. In fact, he says that, as I recall, “I can consider”—“I assume that I can consider the constitutionality instead of I presume that it is constitutional.”

So I want to direct this question to you, General Kroger, and also perhaps to the other members of the panel. Aren’t you troubled by the lack of weight given to this presumption, which is so fundamental to the work that you and other Attorneys General and the Attorney General of the United States does day in and day out in defending statutes against constitutional attack?

Mr. KROGER. Senator, I would simply agree with you that the presumption of constitutionality is extraordinarily important, and that deference is shown to the democratically elected officials in the State to craft the right policy that will govern the country. And I think probably both of those could use greater emphasis in the decisions that go forward.

Senator BLUMENTHAL. And would you agree that one of the reasons that this presumption should have stronger and special weight in this case is that, in fact, the U.S. Congress, as Senator Leahy pointed out earlier, considered these constitutional issues in deliberating and debating this law? So it is not as if the courts have discovered this issue or the plaintiffs have discovered it. Congress considered it, and a co-equal branch of government is entitled to that respect.

Mr. KROGER. Senator, I think ultimately, of course, it is the Court’s province to declare whether the law is constitutional or unconstitutional, and as someone who appears in front of courts all the time, I would hate to in any way imply that they do not have that responsibility. But I do think closer attention to precedent would make a big difference in these cases going forward.

Senator BLUMENTHAL. Let me ask Mr. Carvin, and Professor Barnett perhaps, your views on this issue and whether you are not troubled by the overreaching—and I do not use that word lightly—the judicial overreaching that very plausibly could be seen in this disregard for the presumption of constitutionality.

Mr. CARVIN. I certainly think the presumption of constitutionality is important, and I think the Congress has very broad discretion in its Commerce Clause regulation. But I think the key thing to focus on both under the Necessary and Proper Clause and the Commerce Clause is Congress was given broad discretion in terms, broad means to achieve a legitimate end. This comes from *McCulloch v. Maryland*. And for reasons that I will not repeat, I think Congress is seeking to achieve an illegitimate end in this context.

I would also caution that it is unfair to label activities which strike down laws as unfair judicial activism. Judicial activism to me is striking down a law that is constitutional because you think it is bad policy. I think it would be equally wrong to uphold a law that you believe is unconstitutional because you think it is good policy. In both instances, the judge is not doing what I think we all agree judges should do, is look at the law and not be influenced by the desirability of the policy.

Mr. BARNETT. Senator, I am confident that you are not impugning Judge Vinson's integrity in ruling the way he did, but I know people—

Senator BLUMENTHAL. Not at all.

Mr. BARNETT. I know you are not, but some people outside this room are. And in light of your question, I just want to point out that this very same Judge Vinson who held that the individual mandate was unconstitutional turned away the State AG's challenge to the Medicaid requirements under their interpretation of *South Dakota v. Dole*. That is the very same judge in the very same case upholding an act of Congress, although it, too, is being challenged by 26 Attorneys General while he—as he turns away their challenge. He upholds the law while he finds another part of the law unsatisfactory. I think that should be added to the record in defense of Judge Vinson's integrity in respecting a co-equal branch of government.

Senator BLUMENTHAL. Thank you very much.

Thank you, Mr. Chairman.

Senator DURBIN. Thanks a lot. I am going to recognize Senator Sessions for the last Senator to ask in the first round. We will have a second round, but I have asked my colleagues if they have questions; let us do it in a shorter period of time and try our best to accommodate the schedules of our kind panel.

Senator Sessions.

Senator SESSIONS. Thank you.

I would like to offer for the record the written testimony of Florida Attorney General Pam Bondi for this, and I also will be offering for the record a statement from Alabama's Attorney General Luther Strange, who would be also of the belief that—both of them are of the belief that the Act is unconstitutional.

[The statements appears as a submission for the record.]

Senator SESSIONS. The U.S. Government is a government of limited powers. I mean, this is how it was created, and there are explicit grants of power to the Federal Government, and there are certain powers that were not given to the Federal Government. In recent years, there has been a feeling about in our country that the Federal Government can do anything it desires to do on any subject, and I think the rulings attacking this statute are refreshing to me in that it causes our Nation to once again enter into a discussion about what it means to be a government of limited powers.

I would just suggest how far we have gotten from these issues when there are explicit constitutional provisions, the right to keep and bear arms, whereas we have four members of the Court who want to read that out of the Constitution. It has a specific provision that provides individuals the right to not have their property taken except for public use. It has specific provisions that allow free and

robust debate and the ability to speak out in public forums. Those things are individual rights that our courts somehow have gotten to the point that they are not very important anymore. I think in those cases the State either won or almost won that would diminish individual rights as opposed to the State. So I just think this is a fundamental point that we ought to know.

We did not have hearings in this Committee on the health care bill, the constitutionality of it. When people raised it on the floor of the Senate, as quite a number did, they were ignored for the most part, and it was dismissed out of hand. We also had a Congressman I saw on television basically saying, What has the Constitution got to do with this? You know, it was a disrespectful approach to the Constitution entirely. So Congress did not do such a good job, frankly. We did not seriously engage in a debate about whether this power was legitimately granted to the Federal Government.

And, of course, the comment was made about States and the money. I would just note that my Governor, Governor Riley, has told me he is stunned by the economic impact that this health care bill would have on State budgets. It is a stunning thing. Senator Cornyn tells me that Texas expects a \$27 billion hit on Medicaid requirements for the State under this. So it is huge.

Mr. Carvin, if the courts were to allow the individual mandate to stand and thereby grant the Federal Government authority to compel private citizens to purchase goods or services to promote some broader government policy, can you identify any limiting principle that would prevent the government from mandating the purchase of anything or everything?

Mr. CARVIN. I cannot, and there have been a few efforts to try and identify them today. If Congress can require you to subsidize a corporation because of burdens the Federal Government has imposed on that corporation, I do not see any limit in terms of requiring you to purchase—I think everyone agrees—commercial goods, credit card contracts, cars, things like that.

Mr. Dellinger, whom I greatly respect, has suggested that maybe there is some restriction in terms of requiring you to purchase health care because that involves personal autonomy. But I would think that most people would think that purchasing health insurance and deciding how you pay for it and what doctor you go to would implicate personal autonomy.

I would also point out there is disagreement between my brother Dellinger and my brother Fried on this point. Professor Fried thinks that it is perfectly okay to require you to purchase a vaccination citing the *Jacobson* case, and Professor Dellinger apparently would think that would implicate the Liberty Clause.

At the end of the day, all that can be agreed on in terms of a limiting principle is, well, Congress cannot do anything under the Commerce Clause that is unconstitutional. Well, Congress can never do anything that is unconstitutional, so it makes the limitations in the Commerce Clause utterly irrelevant, because all it means is they cannot violate the Bill of Rights. Well, that would be true if you gave to Congress absolute plenary power. They still could not violate the Bill of Rights.

So I would argue that all of these so-called limiting principles are, A, very difficult to understand and, B, meaningless, particularly the one that suggests that, gee, health insurance is something you have got to buy and it is different than every other product. Well, I have got to buy food and transportation and housing and clothing every day, and I think people feel much more of a compulsion to buy those products than health insurance, particularly a healthy 27-year-old who may well honestly, and quite rationally, think, I am not going to go to the doctor except rarely for the next 20 years, and I can maybe make a much better deal for myself than being compelled into this, what everyone agrees is an extraordinarily overpriced health insurance market.

Senator SESSIONS. Thank you. I believe that is a very important point. It basically says that at some level, if we eviscerate the logic of Commerce Clause, which, as I understand it, was designed to regulate commerce between States and fundamentally it has been broadened and broadened, but I do believe there is a limit to it.

Mr. Carvin, I hear you make a reference to the judicial activism question. I believe the President said, or one of his spokespersons, that this judicial ruling was judicial activism. I strongly believe and have stated repeatedly that a decision that invalidates an act of Congress, if that act of Congress is unconstitutional, is not activism. Is that what you would agree?

Mr. CARVIN. I think everyone agrees that activism is striking down acts of Congress even though there is nothing in the Constitution that prevents it. If there is something in the Constitution that prevents it, then obviously you need to strike it down. No one on this panel is going to tell you it would be judicial activism that strikes down a law that denies women the vote, because we can all look at the Constitution and realize that that is blatantly unconstitutional. I think these labels are sometimes thrown around in a very pejorative manner that is unfair to judges that are trying to grapple with what at least I think everyone on the panel would agree is a very nuanced and difficult constitutional question.

Mr. FRIED. I agree with that.

Senator SESSIONS. Thank you, Mr. Fried. Good to see you again.

Thank you, Mr. Chairman. I am sorry to have been late. I have the Budget Committee and will have to return. Thank you.

Senator DURBIN. Thank you, Senator Sessions.

I would like, if I could, to enter into the record the *Congressional Record* for December 23, 2009. In this section which I am entering, Senator Hutchison of Texas raised a constitutional point of order concerning the Affordable Care Act, and in stating her constitutional point of order, she said that she objected to it, believing it was unconstitutional because it violated the 10th Amendment, and she specifically referred to the mandate that it was impose on Texas to buy health insurance for teachers and employees. And it was then considered and voted on by the Senate on December 23, 2009, and the roll call vote was yes sustaining the point of order and 60 votes against the point of order. So there was a constitutional question raised specifically on the floor during the course of the debate.

[The information referred to appears as a submission for the record.]

Senator DURBIN. I would like to ask Professor Fried—the point raised by Senator Lee, the “buy your vegetables, eat your vegetables” point—I would like to ask you to comment on that, because that is the one I am hearing most often by people who are saying, Well, if the government can require me to buy health insurance, can it require me to have a membership at a gym or eat vegetables? We have heard from Professor Dellinger on that point. Would you like to comment?

Mr. FRIED. Yes. We hear that point quite a lot. It was put by Judge Vinson, and I think it was put by Professor Barnett in terms of eating your vegetables. And for reasons I set out in my testimony, it would be a violation of the Fifth and the 14th Amendment to force you to eat something. But to force you to pay for something—I do not see why not. It may not be a good idea. I do not see why it is unconstitutional.

I suppose that under the food stamp program there are all kinds of regulations which distinguish between healthy and unhealthy foods, and if there are not, perhaps there ought to be. And in any case, if there were, it would not be unconstitutional. And that is a situation where you are going to get your money only to buy your broccoli. That is all we are going to give you money for.

Now, you can say, well, you do not need food stamps. A lot of people do not need food stamps. But some people do. And those kinds of mandates, I think, are all over the law. The mandate that you eat your vegetables, that you go to the gym, I would be willing to—I would love to argue that case, the unconstitutionality of that, before any court in the country and up to the Supreme Court, but on liberty grounds.

Senator DURBIN. Professor Barnett, my last question relates to a section of your testimony which may be taken out of context or misconstrued, and I want to give you an opportunity to clarify it.

When you close your testimony, you make reference to *McCulloch v. Maryland* and the national bank and the decision by President Jackson that he viewed the bank as unnecessary, improper, unconstitutional. And you say in your concluding second-to-last paragraph, “In short, just because the Supreme Court defers to you does not mean the Constitution lets you do anything you like.”

I want to make sure I understand and give you an opportunity to state. If the law of the land is a Supreme Court decision, whether I agree with it or not, whether I think it is constitutional or not, it is, in fact, the law of the land and I have to follow it, correct?

Mr. BARNETT. Absolutely. May I expand just a bit?

Senator DURBIN. Sure, of course.

Mr. BARNETT. The point I am trying to make and that I think is really important is that much of Supreme Court doctrine, getting back to Senator Blumenthal’s question, involves a presumption of constitutionality in which they defer to the Congress’ judgment upon the scope of its own powers. And President Jackson is saying, if the Court is going to defer to us, if that is what *McCulloch v. Maryland* stands for—which he is commenting on that specific case—then it is incumbent upon us to independently assess whether we think something is unnecessary, improper, and also unconstitutional. So he thought he was respecting the Supreme Court decision in *McCulloch v. Maryland* by holding the act unconstitutional,

the bank, which the Supreme Court had itself found to be constitutional.

Senator DURBIN. But the law of the land until the President acted was clear. The decision of the Court was controlling. Whether I happen to agree with it as an individual citizen—

Mr. BARNETT. You are absolutely right, Senator, and nothing in that statement was meant to imply anything to the contrary. I appreciate the opportunity to clarify that.

Mr. FRIED. May I add to that, Senator?

Senator DURBIN. Of course.

Mr. FRIED. I think there is a great difference between the Congress deliberately passing a statute which the Court said violates the Constitution and refusing to pass a statute which the Congress thinks is unconstitutional even though the Court has said it is not unconstitutional. I think there is a big difference between those two things, and I think that is what President Jackson was talking about. And I think that the renowned citizen of Illinois, Abraham Lincoln, made much the same point in his debates in respect to *Dred Scott*.

So there is a difference, and I think Professor Barnett is dead right about that. You have an independent judgment. You have no leeway to violate what the Court has said violates the Constitution. But you are not bound to say that if they say it is constitutional, I guess it must be. No, I think he is right about that.

Mr. DELLINGER. Can I add, Senator, that I also agree that he is clearly right that Members of Congress have an independent obligation to make constitutional decisions. I would just like to clarify a point where I think Charles Fried and I may differ.

We both agree that one can easily dismiss hypotheticals about laws requiring you to go to the gym or eat broccoli because they implicate liberty interests that are invalid.

With respect to incentives to buy commercial products, I think I disagree or may disagree that I think the Court need not go anywhere near having to hold that it would be acceptable to require people to buy commercial products outside the well-defined context that presents itself here where virtually everyone has no choice but to participate in the health care market, where \$45 billion is transferred from people who are underinsured to others, where 94 percent of the long-term uninsured have actually accessed that health care market, and where Congress is curing a dysfunction. Those elements are unlikely ever to be presented again, and, therefore, I think that this unremarkable financial incentive to have insurance is not going to be a predicate for a parade of horrors marching through the city of Washington.

Senator DURBIN. Thank you.

Senator Cornyn.

Senator CORNYN. Thank you, Mr. Chairman.

I had a chance to ask Professor Fried and Professor Dellinger about this, but I would like to give Mr. Carvin and Professor Barnett a shot at it. I asked about Professor Turley's comment that if the Supreme Court upholds the individual mandate, it is hard to see what is left of federalism. And let me ask you to consider this in your answers as well.

It sounds to me like Professor Fried is arguing there are no limits on Congress' power to require an individual to buy insurance. And the argument, it sounds like, the distinction—and I may be missing something—with regard to broccoli and other leafy vegetables is you cannot require them to eat it. But you might be able to require them to buy it under the Commerce Clause.

So I would just like to ask Professor Barnett and Mr. Carvin to consider this: The health care costs imposed by diabetes, which is really a ticking time bomb in terms of our health care costs and especially children who are obese and because they get seriously ill and have a premature end to their lives, some of them, as a result, I do not really understand how if you concede that requiring the purchase of health insurance because of the costs on taxpayers of uncompensated care, how that is different if you look at the costs of diabetes and what that imposes on taxpayers, and why, if you say, well, you can require them to buy insurance, you cannot say, well, you are required to buy a gym membership, you are required to buy fruits and vegetables. It sounds to me like they are saying you cannot make them eat them, but you can require them to buy them. That sounds very strange to me. Would you care to respond, please?

Mr. CARVIN. I think everyone agrees that the skyrocketing health care costs are more attributable to the rising costs of health care than these distortions in the insurance market that have been talked about. So if you want to reduce health care costs, not only would it be appropriate if the Court upholds this; it would attack the problem much more directly. Your diabetes example is an excellent one. I assume even Walter would agree that they could require you to attend smoking cessation programs if you are a smoker and all these other kinds of unhealthy habits. I cannot imagine why they could not go at it.

And then to respond to Walter's larger point that this is some unique system—and to Senator Franken's point that, look, we have so regulated and subsidized this market, these people who decide to live their own lives are really becoming these sorts of free riders, means that you will always have an excuse to force people to engage in purchasing insurance the more that the government has regulated the particular area. That was the point that Judge Vinson made yesterday. It has this very perverse bootstrapping effect that the more the Federal Government encroaches on markets in local areas, then it gives them a greater power under the Commerce Clause to get at all these people who are so-called free riders because of this subsidy issue. So it literally builds on itself such that the distinction between local and national is quite literally obliterated.

Senator CORNYN. Professor Barnett.

Mr. BARNETT. First, as to Professor Turley's point about it would be the end of federalism, whether or not it would be the end of federalism, it would be the functional end of the enumerated powers scheme that is one of the central features of federalism. Federalism is based not only on States having independent rights or powers, but it is based on Congress having limited and enumerated powers. And if, after this, there is not justiciable limit on Congress' power, then that part of the constitutional scheme is gone, and the Su-

preme Court has said repeatedly that that is an essential part—that any ruling that would lead to that outcome cannot be a correct ruling. That is a *reductio ad absurdum* of any argument that would lead to that outcome.

And the only other point I would make is that, you know, I think Professor Fried in his testimony and again today, he has basically conceded the basic claim that if Congress can make you buy this, then they can make you buy anything. Now, he has not conceded the claim that they can make you eat anything that you buy. But in his testimony, he says—and he affirmed it again today—that they can make you buy a gym membership. They cannot make you go to the gym.

Well, that may not be everything because they cannot make you go to the gym, but it is a whole heck of a lot, and I think that people would really be surprised that Congress—that there is nothing improper under the Commerce Clause—that the—let me get back to first principles here: that the power of Congress to regulate commerce among the several States that takes place between one State and another goes all the way down to make you, the individual person, buy a gym membership at your gym, that that includes that power. That is a stretch, and that is a stretch that would end the doctrine of enumerated powers.

Senator CORNYN. If I may ask one more question, then I would be glad to have other witnesses who want to respond subject to the Chairman's time limits here. I just want to ask one specific question, Mr. Carvin, because you have talked about the police power and the power of the States relative to the Federal Government. I think some people are confused by the fact that States like my State require an individual who drives to buy liability insurance and why there is a different argument when it comes to the power of the Federal Government. Would you care to respond to that?

Mr. CARVIN. Right. Obviously, the States can play a relatively paternalistic role in protecting the health and welfare of others. I am not an expert on the car insurance laws, but I think even there they are not requiring you to insure yourself. They are requiring you to have insurance if you run into somebody else. But presumably the States, unlike the Federal Government, might require you insure yourselves like they can require you to wear a motorcycle helmet. But I do not think anyone would think that that is part of the commerce power, but I may be wrong even on that.

And the other two obvious points are that it is a condition of access to the highways as well. Again, it does not get at somebody sitting in their home, which distinguishes it from this, and Randy—

Mr. BARNETT. Yes. No State requires you to buy a car and operate a car. Only if you choose to buy and operate a car do you have to buy insurance. And, in fact, I do not think there are any States that require you to buy insurance if you only operate a car on private property and do not go out into the public highways.

So this gets back to an earlier line of questioning. It is absolutely garden variety regulation to tell you, to tell a citizen that if you are going to do something, here is how you have to do it. That is just something that the government does. And that is a fundamentally different proposition than telling the citizen they must do this

thing—not if they are going to do it, here is how you do it, but they must do the thing itself. And that is the line that this bill crosses that Congress under the commerce power has never crossed before.

Senator CORNYN. Professor Dellinger, I know you want to respond.

Mr. DELLINGER. I do. I want to say two things.

One, it is similar to automobile liability insurance in the following sense: If you are going to drive, the States say you have to have liability insurance. And here it says if you are going to use health care, you need to have health care insurance. And since this is a product which everyone will use or at least no one can be assured that they will not wind up at the hospital, in that sense it seems quite similar. I may say I am never going to use a flat screen TV, and you hold it to me, you do not have to buy me one.

Now, I do not agree with Michael Carvin's suggestion that, in my view, upholding this legislation would mean that it would be constitutional for Congress to require anything that would reduce the national health bill like exercise or smoking cessation. What is different about this is that it is a regulation, as Charles Fried noted, that since 1944 the Court has clearly held the regulation itself is of the commercial transaction of purchasing health insurance. And I think that distinguishes it from all other of the hypotheticals.

Senator CORNYN. Mr. Dellinger, Professor Dellinger, the only point I was trying to make—and perhaps I did not make it very well—is that the power of the State to legislate is quite broad under the police powers because of anything having to do with health, safety, and welfare. But that is not to say, just because a State can legislate on an issue, that the Federal Government cannot because of the doctrine of federalism that we have talked about, the 10th Amendment, and the power of the Federal Government is different than the power of the State government.

Mr. DELLINGER. I wholly agree, and I think there is nothing in the defense of the Constitution under this bill that calls into question decisions like *United States v. Morrison* and *United States v. Lopez* where the Supreme Court held that when Congress tries to regulate crime, local crime, because of its supposed effects on commerce, that the Court will draw a line there because it is a regulation of matters that are local and non-economic. Here is a regulation that is part and parcel of national economic regulation and, therefore, does, I think, call into question those limits.

Senator DURBIN. Thank you, Senator.

Senator Blumenthal, you have the last question.

Senator BLUMENTHAL. Yes, thank you again. I will resolve to ask this question very simply, and it may be sort of a follow-up to Senator Cornyn's excellent line of questioning. Tax or penalty. A lot of discussion outside this room, almost none here that I can recall. Is it a tax or a penalty? Does it make a difference? And maybe it makes no difference, and, therefore, we do not—

Mr. FRIED. Well, if the Congress had frankly enacted a tax on everybody which they would then remit to those people who bought private health insurance, it is hard for me to imagine that we would be having this discussion. But Congress did not so enact. It did not do so for political reasons. It did not want to have this

viewed as a tax. And I think they are now paying the price in the fact that they have got to confront this discussion.

But it was not, for better or worse, put as a tax, although the penalty is something that is collected by the Internal Revenue Service, I believe. But it is not viewed—it was not enacted as a tax, because if it had been, as Senator Cornyn pointed out, the power to tax for the general welfare and spend for the general welfare is pretty plenary. But that is not how Congress chose to enact this, so it has left us with this debate that we are having.

Senator DURBIN. Professor Barnett, last word.

Mr. BARNETT. I do want to agree with the other thing that Professor Fried just said about that. That is my assessment as well.

The only thing I would add to it is that if you actually try to justify what was done as a tax, then essentially it does—here is the sense in which, Senator, it does not matter because, again, it would be an unprecedented proposition that Congress can require American citizens to do whatever it chooses to require, and then enact a monetary penalty under its tax power to penalize them for not doing that. That is really no different than the debate we just had two hours about whether this exceeds Congress' power or not. In other words, whether you call a fine a tax or a fine, it would still give Congress the unlimited power to order and command that citizens do anything, and that has never been done before. The tax power has never been used for that before. So that is the only thing I would add to what Professor Fried has said.

Mr. DELLINGER. Senator Blumenthal, it is relevant in the following sense: There is a misimpression out there that under this law, I think. Federal agents arrive in black helicopters, dressed in fully equipped armed Ninja costumes, kick down your bedroom door, and drag you off at the point of bayonets to an insurance agency. In fact, all that happens is that for those who are not otherwise exempted and when they are filling out their federal income tax return, if you are not maintaining minimum coverage, you have to pay an additional 2.5 percent, much less than Social Security. That is all that happens. So in that sense, this great intrusion on liberty does not approach any slippery slope or exceed any understood limits in our legal culture.

Senator DURBIN. Thank you very much to the panel that has joined us. I think this has been an excellent hearing. Professor Dellinger, Professor Barnett, Mr. Carvin, Professor Fried, and Attorney General Kroger, it is an honor that you all joined us for this important consideration of this major legislation. Many organizations have submitted testimony, and it will be added to the record: the California Attorney General Kamala Harris, AARP, a hundred legal scholars who happen to agree with the constitutionality of the Act, the Small Business Majority, Constitution Action Center, the National Senior Citizens Law Center, and the Center for American Progress Action Fund, and without objection, they will be placed in the record.

[The statements appears as a submission for the record.]

Senator DURBIN. I would just say that it is possible that written questions may come your way in the next week or two, which I hope you would respond to in a timely fashion. It would be greatly appreciated.

Again, thank you all very much. This hearing stands adjourned—

Mr. FRIED. Senator, as a citizen, not a subject, may I say that what the Senate has shown and this Committee has shown is our government at its best. And it was a privilege to participate in it.

Senator DURBIN. And you can make your train.

[Laughter.]

Senator DURBIN. Thank you.

[Whereupon, at 12:41 p.m., the Committee was adjourned.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

Witness List

Hearing before the
Senate Committee on the Judiciary

On

“The Constitutionality of the Affordable Care Act”

Wednesday, February 2, 2011
Hart Senate Office Building, Room 216
10:00 a.m.

The Honorable John Kroger
Attorney General for the State of Oregon
Salem, OR

Randy E. Barnett
Carmack Waterhouse Professor of Legal Theory
Georgetown University Law Center
Washington, DC

Michael A. Carvin
Partner
Jones Day
Washington, DC

Walter Dellinger
Douglas B. Maggs Professor Emeritus of Law
Duke University School of Law
Durham, NC

Charles Fried
Beneficial Professor of Law
Harvard Law School
Cambridge, MA

PREPARED STATEMENT OF SENATOR DICK DURBIN

Statement of

The Honorable Richard J. Durbin

United States Senator
Illinois
February 2, 2011

Assistant Senate Majority Leader Dick Durbin

Hearing on "The Constitutionality of the Affordable Care Act"
Opening Statement

As Prepared for Delivery

When Judge Vinson of the Northern District of Florida issued a ruling on Monday striking down the Affordable Care Act in its entirety, many parents of children with preexisting conditions likely spent a sleepless night.

Senior citizens probably started checking their savings accounts see if they could afford to pay back the prescription drug money the law gave them.

Millions of Americans no doubt felt betrayed by this ruling – college students who just rejoined their parents' insurance plans, cancer patients who had joined the Act's new high risk pools, small businesses who thought tax credits were coming their way.

I want those millions of Americans to know that they should not despair.

Many of America's landmark governing achievements – Social Security, the Civil Rights Act of 1964, the federal minimum wage – ran into trouble in lower courts before they were ultimately upheld by the Supreme Court. I believe the same will happen with the Affordable Care Act.

For those keeping score, twelve federal district court judges have dismissed challenges to the law, two have found the law to be constitutional and two have found the opposite. How is it possible that federal judges who not only study the Constitution but swear to uphold it can read its words and draw such different conclusions?

It is unlikely that this hearing will produce a national consensus or even agreement in this room. But if it serves the Congress and the Nation by fairly laying out the case on both sides, then it will be a worthy undertaking.

At the heart of the issue is Article I, Section 8 which enumerates the only powers delegated to Congress. One side argues that with the passage of the Affordable Care Act, Congress went

beyond its constitutional authority. The other side, which includes those of us who voted for the Act, disagrees.

Within those enumerated powers is one described as "the plainest in the Constitution": the power to regulate commerce. So the threshold question is whether the health care market is commerce. I think the answer to that question is obvious, but ultimately the Supreme Court will decide. Over the course of its history, the Supreme Court has interpreted this "plainest of powers" through its application of the Founders' vision to current times. Whether it was Roscoe Filburn, growing wheat to feed his chickens in 1941, or Angel Raich, using homegrown marijuana to treat her chronic illnesses in 2002, Justices from Robert Jackson to Antonin Scalia have made it clear that Congress has broad power to regulate private behavior where there is any rational basis to conclude it substantially affects interstate commerce.

The role of the lower courts is to apply those precedents to the facts. But sometimes lower court judges, whom some might call "activists", try to make new law. And this has happened in Florida and Virginia, as judges ignored precedent and created a new legal test distinguishing "activity" from "inactivity" – a distinction that cannot be found anywhere in the Constitution or Supreme Court precedent.

When the Affordable Care Act comes before the Supreme Court, I am confident the Court will recognize that Congress can regulate the market for health care that we all participate in, and that it can regulate insurance, which is the primary means of payment for health care services.

The political question which has enervated this debate focuses primarily on one issue. Even if Congress has the enumerated power under Section 8 to tax and to pass laws affecting the health care market, did it go too far in requiring that individuals who do not buy health insurance coverage face a tax penalty, the individual responsibility section of the law?

Returning to Article I, Section 8 which allows Congress "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers", the Supreme Court just last year in the *Comstock* case said "the Necessary and Proper Clause makes clear that the Constitution's grants of specific federal legislative authority are accompanied by broad power to enact laws that are convenient, or useful or conducive to that authority's beneficial exercise." The test is whether the means is rationally related to the implementation of a constitutionally enumerated power. Is an individual mandate "rationally related" to Congress' goals of making health care more affordable and prohibiting health insurance companies from denying coverage for those with preexisting conditions? It is clear to me that private health insurance companies could not function if people only bought coverage when they faced a serious illness.

It is also worth noting that many who argue the Affordable Care Act is unconstitutional are the same people who condemn judicial activism. They are pushing the Supreme Court to strike down this law because they could not defeat it in Congress and they are losing the argument in the court of public opinion where 4 out of 5 Americans oppose repeal.

Why is public sentiment not lining up behind repeal? Because a strong majority of Americans do not believe their children should be denied health insurance because of pre-existing conditions. They want to cover their young adult children under their family plans. They believe small

businesses should be given tax credits to cover the health insurance of their employees. They oppose caps on coverage and the health industry's cancellation of coverage when people need it the most.

With many parts of our world in turmoil today over questions of freedom, we should never forget that the strength of our Constitution lies in our fellow citizens who put their faith in its values and trust the President, Congress and the courts to set aside the politics of the moment and to fairly apply eighteenth century rhetoric to twenty-first century reality.

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PREPARED STATEMENT OF SENATOR CHUCK GRASSLEY

Statement of

The Honorable Charles Grassley

United States Senator
Iowa
February 2, 2011

Prepared Statement of Senator Chuck Grassley
Senate Committee on the Judiciary
"The Constitutionality of the Affordable Care Act"

Wednesday, February 2, 2011

Mr. Chairman, the Florida judge who ruled on the constitutionality of the new health law this Monday compared the government's arguments to Alice in Wonderland. That same reference applies equally to today's hearing. Things are getting "curioser and curioser."

Under our system of limited and enumerated powers, the sensible process would have been to have held a hearing on the law's constitutionality before the bill passed, not after. Instead, the Congress is examining the constitutionality of the health care law after the ship has already sailed.

Like Alice in Wonderland, "Sentence first, verdict afterward."

So what got us to this point?

Early in the debate, Republicans and Democrats agreed that the health care system had problems that needed to be fixed.

I was part of a bipartisan group of senators on the Finance Committee who were trying to reach an agreement on comprehensive health reform.

However, before we could address some of the key issues, some Democratic senators and the administration ended those negotiations and the majority took their discussions behind closed doors.

What emerged was a bill with major problems. Republicans argued that instead of forcing it through the Senate, Republicans and Democrats should return to the negotiating table to find common-sense solutions that both parties could support.

Of course, that plea went unanswered, and the majority passed their health care law without a single Republican vote.

In fact, when Republicans identified specific concerns, such as the constitutionality of the individual mandate, we were told our arguments were pure messaging and obstructionism. Throughout the debate, the majority argued that the individual mandate was essential for health reform to work.

There are many constitutional questions about the individual mandate.

Is it a valid regulation of interstate commerce? Is it a tax?

The reality is that no one can say for certain. The nonpartisan Congressional Research Service notes that it is unprecedented for Congress to require all Americans to purchase a particular service or good.

The Supreme Court has stated that the Commerce Clause allows regulation of a host of economic activities that substantially affect interstate commerce. But it has never before allowed Congress to regulate inactivity by forcing people to act.

What is clear is that if this law is constitutional, Congress can make Americans buy anything that Congress wants.

The individual mandate is the heart of the bill. As my friend, Senator Baucus, said at the markup: the absence of a requirement of "a shared responsibility for individuals to buy health insurance" "guts health care reform."

If the Supreme Court should strike down the individual mandate, it is not clear that the rest of the law can survive. The individual mandate is the reason that the new law bars insurance companies from denying coverage based on pre-existing conditions and the sponsors made the mandate the basis for nearly every provision of the law.

Judge Vinson's ruling that the whole law must be stricken reflects the importance of the mandate to the overall scheme.

Then there is the Medicaid issue. Does the new law amount to impermissible coercion of the states? States do have the choice to drop out of the Medicaid program.

Some of my colleagues on the other side of the aisle may even make that case today even though I don't think they are really promoting that as a viable option for the states. If a state drops out of Medicaid, the new health law states clearly that none of that state's citizens would be eligible for tax credits because people with incomes at Medicaid eligibility levels can NEVER be eligible for tax credits.

The idea that the federal government could, through Medicaid, drive the single largest share of every state budget is not consistent with the objective of our federal system.

At this point, Mr. Chairman, I ask that a statement from Virginia Attorney General Kenneth

Cucinnelli be placed in the record.

Mr. Chairman, I am interested in hearing from our witnesses today. But ultimately, we all know that it will be up to the Supreme Court to resolve the question that this hearing poses.

PREPARED STATEMENT OF SENATOR ORRIN G. HATCH

Statement of Senator Orrin G. Hatch
Before the Senate Committee on the Judiciary
At the hearing titled "The Constitutionality of the Affordable Care Act"
February 2, 2011

The debate over the constitutionality of Obamacare's individual insurance mandate is a debate over what the Constitution really is. Is it the supreme law of the land that Congress must obey, or is it a tool that lets Congress do whatever it wants? In only the second paragraph of his opinion striking down the mandate on January 31, Judge Roger Vinson wrote that the case "is not really about our health care system at all. It is principally about our federalist system, and it raises very important issues regarding the Constitutional role of the federal government." Indeed it does. This fight is between those who start with what the Constitution allows Congress to do and those who start with what Congress wants to do.

Liberty requires limits on government. Those limits come from a written Constitution that divides government power between the states and the federal government, separates federal power into three branches, and enumerates the powers of Congress. Every piece of legislation Congress passes must stand on one of those enumerated powers. The question is whether any enumerated powers justify Obamacare's requirement that individuals purchase health insurance or pay a fine.

It should take more than a political agenda and an active imagination properly to interpret the Constitution. Those enumerated powers do not mean whatever Congress wants them to mean. If they did, then Congress could define its own powers. That would be the death of liberty. The only enumerated power seriously suggested as the foundation of the individual insurance mandate is the power to regulate interstate commerce. As broad as this power has become, it does not allow Congress to require individuals to purchase a particular good or service.

Judge Vinson concluded that the interstate “commerce” the Constitution allows Congress to regulate is, at its core, activity. That’s what it meant to America’s founders, the ones who put the commerce clause in the Constitution. That’s even what it meant to the Supreme Court when, in the wake of the Depression, it dramatically expanded Congress’ power to cover activity that substantially affects commerce. The choice to engage in that activity triggers Congress’ regulation of that activity. No activity, no regulation.

The individual insurance mandate regulates decisions, not activities. Rather than regulate activity in which individuals choose to engage, Obamacare requires individual to engage in that activity. When defending the mandate in court, the Obama administration argues that the decisions actually are activities, that even the decision not to buy something is the same as literally buying it. In their Constitution, Congress apparently has the power to regulate anything that could possibly affect commerce or the economy. Guess what, that would allow Congress to regulate – that is, to control – absolutely everything.

That is not what the real Constitution says, or even what it has ever been interpreted to mean. In 1995, the Supreme Court refused to interpret the commerce clause so broadly that it would be difficult “to posit any activity by an individual that Congress is without power to regulate.” The Court was saying that there must be at least some activities that Congress may not regulate in the name of interstate commerce. How, then, can the Constitution be stretched so far to allow Congress to make economic decisions for all of us? As Judge Vinson put it, each of us makes thousands of what could be called economic decisions. “There will be no stopping point if that should be deemed the equivalent of activity for Commerce Clause purposes.”

The Constitution is the stopping point. Our liberty depends on it.

PREPARED STATEMENT OF CHAIRMAN PATRICK LEAHY

Statement of

The Honorable Patrick Leahy

United States Senator
Vermont
February 2, 2011

Statement Of Senator Patrick Leahy (D-Vt.),
Chairman, Senate Judiciary Committee,
Hearing On The Constitutionality Of The Affordable Care Act

February 2, 2011

I thank Senator Durbin for chairing today's hearing on Congress' authority under the Constitution to enact the Affordable Care Act. I have no doubt that Congress acted well within the bounds of its constitutional authority in working to secure affordable health care for all Americans. As I said when the Affordable Care Act was debated in the Senate, the authority of Congress to act is well-established by the specific powers vested in Congress by Article I, Section 8 of the Constitution, by prior acts of Congress like Social Security and Medicare, by longstanding precedent established by the courts, and by the history of American democracy. This Act was neither novel nor unprecedented, but rested on the foundation used over the last century to build and secure the social safety net.

Opponents of the Affordable Care Act have sought to continue their political battle by challenging the landmark legislation in the courts the moment President Obama signed it into law. These political opponents seek to achieve in the courts what they could not in Congress. They want judges to override legislative decisions properly assigned by the Constitution to Congress, the elected representatives of the American people.

Every member of Congress takes an oath of office to "support and defend the Constitution of the United States." We take this oath seriously. Arguments about the law's constitutionality, including about the requirement that individuals purchase health insurance or pay a tax penalty, were considered and rejected in congressional committees. During the Senate debate, as Chairman of the Senate Judiciary Committee, I responded, publicly and on the record, to arguments about the constitutionality of this requirement. During that debate, the Senate formally rejected a constitutional point of order claiming that the individual responsibility requirement was unconstitutional. The Senate's judgment was that the Act is constitutional.

Millions of Americans have access to health care today because of the Affordable Care Act. With this law, Congress acted to further secure the Nation's social safety net, protecting some of our most vulnerable citizens. The Affordable Care Act eliminated discriminatory practices by health insurers, ensuring that a patient's gender was no longer a pre-existing condition. The

historic law provided important tools to help law enforcement recover taxpayer dollars lost to fraud and abuse in the health care system. Now many of our Nation's senior citizens pay less for their prescription drugs.

Challenges to the Affordable Care Act have been making their way through the Federal courts since the enactment of the historic health care reform law. Two Federal courts have upheld Congress' authority to enact the Affordable Care Act and two have not. These decisions are being appealed, and there is little doubt the Supreme Court will be the final arbiter of this constitutional question.

I recently joined congressional leaders in filing an amicus brief in one of those lawsuits, now pending before the Sixth Circuit Court of Appeals. I did so not only because I have fought for decades to secure affordable health care for all Americans, but because I am convinced that Congress acted well within the limits of Article I of the Constitution in doing so. I believe we must defend the enumerated powers given to Congress by the Constitution so that our ability to help protect hardworking American workers, families and consumers is not unduly curtailed. Before passing the law, we debated whether to control costs by having all Americans be covered by health insurance. We considered untold numbers of amendments in Committees and before the Senate. That is what Congress is supposed to do. We consider legislation, debate it, vote on it, and act in our best collective judgment to promote the general welfare. Some Senators agreed and some disagreed, but this was a matter decided by a super-majority of the full Senate.

Ironically, the so-called individual mandate now under partisan attack in the courts has long been a Republican proposal. The individual mandate was supported by the senior Senator from Arizona, Senator McCain, when Republicans opposed health care reform efforts during the Clinton administration. It was a part of the health care reform effort in Massachusetts supported by former Governor Mitt Romney and by Scott Brown, now a Republican Senator from Massachusetts. Hundreds of Republican health care reform ideas were included in the Affordable Care Act as it was drafted, developed, debated and passed. In fact, Republican health care reform proposals offered in previous Congresses included similar requirements that individuals obtain health insurance.

Three clauses in Article I, Section 8 of the Constitution -- the "General Welfare Clause," the "Commerce Clause" and the "Necessary and Proper Clause" -- each provide an independent source of authority for Congress to reform health care by containing spiraling costs and ensuring its availability for all Americans. During the debate on the Affordable Care Act, I noted that using a tax penalty to enforce the requirement that individuals buy health insurance is far from unprecedented, despite the claims of critics. Individuals are required to pay for Social Security and Medicare, for example, by payroll taxes collected under the Federal Insurance Contributions Act (FICA), which are typically collected as deductions and noted on Americans' paychecks every month. Those who seek to undermine this source of congressional authority would turn back the clock to the hardships of the Great Depression, striking down principles that have been settled for nearly three quarters of a century and standing the Constitution on its head.

There is also no doubt that Congress has the power under the Commerce Clause to regulate the massive national health care market. The question is whether courts should create and impose

new limitations on the means by which Congress regulates this core commercial market.

When the Senate considered the Affordable Care Act, I pointed to the set of findings adopted by Congress in the law itself related to the significant cumulative economic effects of the rising costs of health care. These findings bear directly on the Supreme Court's test for constitutionality under the Commerce Clause. Among Congress' findings were that "health insurance and health care services are a significant part of the national economy," comprising more than 17 percent of the Nation's gross domestic product, and that the individual "requirement regulates activity that is commercial and economic in nature: economic and financial decisions about how and when health care is paid for, and when health insurance is purchased."

Moreover, Congress specifically determined that the requirement for Americans to buy health insurance or pay a tax penalty was necessary to control the massive costs caused by free riders, millions of Americans who cannot afford to buy health insurance or who refuse to buy health insurance and then must rely on expensive emergency health care when inevitably faced with medical problems. Recent studies show that the vast majority of uninsured Americans are forced to seek emergency care in hospitals and clinics across the country. Because this is America, doctors and hospitals do not turn them away, and they should not. But in opting out of paying for health insurance, these free riders do not opt out of the health care market. Rather, they shift the cost of their decision on to people who do have health insurance. Those costs are profound. The Congressional Budget Office in 2008 found that this cost-shifting caused by individuals who chose not to purchase health insurance amounted to \$43 billion nationwide. This results in higher insurance premiums for Americans who do buy health insurance and has a significant effect on the economy as a whole.

I understand that some partisans are hoping that the courts will deliver a victory they could not secure in the Congress. I hope that the independent judiciary will be as mindful as Justice Cardozo was nearly 75 years ago in upholding the constitutionality of Social Security. In *Helvering v. Davis*, Justice Cardozo wrote: "[W]hether wisdom or unwisdom resides in the scheme of benefits set forth . . . it is not for us to say. The answer to such inquiries must come from Congress, not the courts." I agree. Justice Cardozo understood the separation of powers enshrined in the Constitution and the Supreme Court's precedent. I hope that courts today follow this wise example and do not seek to cast aside this landmark legislation or Congress' ability to act to protect the American people.

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PREPARED STATEMENT OF JOHN KROGER, OREGON ATTORNEY GENERAL, SALEM,
OREGON



STATEMENT OF
JOHN KROGER
OREGON ATTORNEY GENERAL

BEFORE THE
UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

HEARING ENTITLED
"THE CONSTITUTIONALITY OF THE AFFORDABLE CARE ACT"

PRESENTED
FEBRUARY 2, 2011

Mr. Chairman, Senator Grassley, and distinguished Members of the Committee – thank you for your invitation to address the Committee and for giving me the opportunity to discuss my views as Oregon Attorney General on the importance and constitutionality of the Affordable Care Act.

I. INTRODUCTION

As a sovereign state, Oregon is charged with protecting and promoting the health and welfare of its citizens. Citizen access to affordable medical care is necessary for our state to promote health, prevent disease, and heal the sick. In our modern system of advanced yet costly medical care, comprehensive health insurance coverage is critical to achieving that end. It is well documented that a lack of health insurance coverage leads to increased morbidity, mortality, and individual financial burdens.¹

In connection with our duties to protect and promote the health and welfare of our citizens, Oregon and many other states have engaged in varied, creative, and determined efforts to expand and improve health insurance coverage and to contain health care costs. Despite some successes, these state-by-state efforts have fallen short. As a consequence, we believe that a national solution is necessary.

Oregon's predicament illustrates the problem that states now face. Despite a variety of legislative efforts to increase access to insurance coverage, 21.8% of Oregonians lack health insurance. Absent health care reform, Oregon expects that figure to rise to approximately 27.4% in the next ten

¹ See, e.g., Stan Dorn, *Uninsured and Dying Because of It: Updating the Institute of Medicine Analysis on the Impact of Uninsurance on Mortality* (Urban Institute Jan. 2008), available at http://www.urban.org/UploadedPDF/411588_uninsured_dying.pdf (last visited Jan. 11, 2011).

years.² In 2009, Oregon spent approximately \$2.6 billion on Medicaid and CHIP. Absent health care reform, that figure is expected to grow to approximately \$5.5 billion by 2019.³

The situation that states now face is unsustainable. And without national reform, state-level health care costs will rise dramatically over the next ten years. Even as states are forced to spend more to keep up with skyrocketing health care costs, the number of individuals without insurance will continue to rise if we do not implement national health care reform.⁴

The Patient Protection and Affordable Care Act (ACA) is a national solution that will help us fulfill our duty to protect and promote the health and welfare of our citizens. The law strikes an appropriate balance between national requirements that promote the goal of expanding access to health care in a cost-effective manner and state flexibility in designing programs to achieve that goal. As at least two different U.S. District Courts have concluded, the ACA achieves these goals without running afoul of any constitutional limits on federal government authority.⁵

II. BACKGROUND

As Congress recognized, the nation's health care system is in a state of crisis. As of 2008, 43.8 million people in the United States had no health insurance coverage and thus no or little access to health care.⁶ Indeed, Congress found that "62 percent of all personal bankruptcies are caused in part by medical expenses." ACA § 1501(a)(2)(G).⁷ And state-level health care costs will only continue to rise.

² Bowen Garrett et al., *The Cost of Failure to Enact Health Reform: Implications for States*, 51 (Robert Wood Johnson Foundation and the Urban Institute Oct. 1, 2009), available at http://www.urban.org/uploadedpdf/411965_failure_to_enact.pdf (last visited Jan. 11, 2011).

³ *Id.*

⁴ Bowen Garrett et al., *supra* note 3, at 51.

⁵ *Thomas More Law Center v. Obama*, 720 F.Supp.2d 882 (E.D. Mich. 2010); *Liberty University, Inc. v. Geithner*, 2010 WL 4860299 (W.D. Va. 2010).

⁶ The Centers for Disease Control and Prevention, Early Release of Selected Estimates Based on Data From the 2008 National Health Interview Survey Table 1.1a (2009), available at http://www.cdc.gov/nchs/data/nhis/earlyrelease/200906_01.pdf (last visited Jan. 11, 2011).

⁷ All references to ACA § 1501(A)(2) are to §1501 as amended by § 10106 of the ACA.

These increases threaten to overwhelm already overburdened state budgets. Without a national solution to the health care crisis, states would be forced for the foreseeable future to spend more and more on health care and yet still slide further and further away from their goal of protecting the health and well-being of their citizens.

The ACA will allow states to expand and improve health insurance coverage. The ACA achieves coverage increases through a variety of mechanisms, including the implementation of a minimum coverage provision that requires most residents of the United States, starting in 2014, to obtain health insurance or pay a tax. Among other exceptions, the minimum coverage provision does not apply to those whose income falls below a specified level or to those who can demonstrate that purchasing insurance would pose a hardship.⁸ In other words, the minimum coverage provision targets those who, while they can afford it, choose not to purchase insurance and choose instead to “self insure,” relying on luck, their own financial reserves, and the health care social safety net of emergency rooms and public insurance programs to catch them when they fall ill.

Some of the opponents of the ACA claim that the individual coverage provision exceeds Congress’s Commerce Clause power. As they frame their argument, the Commerce Clause empowers Congress to regulate only activity and not, as they characterize it, the “inactivity” of refusing to purchase health insurance. But these arguments ignore the effect on interstate commerce of refusing to comply with the minimum coverage provision and thus mischaracterize the conduct as “inactivity.” Moreover, they lose sight of the principal concern that animates the Supreme Court’s Commerce Clause jurisprudence, namely, ensuring a meaningful distinction between what is truly national and what is

⁸ Individuals who will not be subject to the individual mandate include those with incomes low enough that they are not required to file an income tax return (in 2009 the threshold for taxpayers under age 65 was \$9,350 for singles and \$18,700 for couples), those who would have to pay more than a certain percentage of their income (8% in 2014) to obtain health insurance, and those who can demonstrate that purchasing insurance would pose a hardship. ACA § 1501(e).

truly local. For the reasons explained below, the minimum coverage provision fits easily within Congress's Commerce Clause authority.

III. THE ACA'S MINIMUM COVERAGE PROVISION IS CONSTITUTIONAL.

A. The minimum coverage provision is necessary for the success of health care reform and the overall stability of the nation's health insurance markets.

Any fair review of Congress's authority under the Commerce Clause to enact the minimum coverage provision must be conducted in the context of examining why the minimum coverage provision is crucial to national health care reform. One of the primary goals of the ACA is to increase the number of Americans who have access to health insurance coverage. Insurance is a system of shared risk. But in a system where purchasing insurance is purely voluntary, people with higher than average health risks will disproportionately enroll in insurance plans, as those individuals are more likely to purchase insurance when they expect to require health care services. This phenomenon is commonly referred to as "adverse selection."

Adverse selection raises the cost of insurance premiums for two reasons: first, because adverse selection tends to create insurance pools with higher than average risks and premiums that reflect the average cost of providing care for the members of the pool, the overall cost is higher. Second, because insurers fear the potentially substantial costs associated with individuals with non-obvious high health risks disproportionately enrolling in their insurance plans, insurers will often add an extra loading fee to their premiums, particularly in the small group and individual markets. An individual mandate addresses both of these problems. First, the law moves low-risk people into the risk pool and thus drives down average costs. Second, by lessening the probability that a given individual is purchasing insurance solely because he or she knows something the insurer does not know about his or her health status, the law reduces insurer hedging and the fees associated with adverse selection.

Another consequence of adverse selection is that insurers enact a variety of policies designed to keep high-cost individuals out of their plans and limit the financial cost to the plan if those individuals enroll—such as limiting coverage for preexisting conditions, denying coverage, charging higher premiums for those with actual or anticipated health problems, and imposing benefit caps. The ACA seeks to eliminate many of these adverse selection avoidant practices by outlawing preexisting condition exclusions and requiring insurers to issue policies to anyone who applies.

These reforms are, of course, designed to increase access to insurance. However, the reality is that “[i]nsurance pools cannot be stable over time, nor can insurers remain financially viable, if people enroll only when their costs are expected to be high. . . [a]nd research leaves no doubt that without an individual mandate, many people will remain uninsured” until they get sick.⁹ Young Americans are especially inclined to forgo purchasing health insurance in favor of other purchases. If pre-existing conditions are eliminated with no requirement that one purchase insurance, these people would have an incentive to forgo coverage until they get sick—and the high-risk pool would collapse from inadequate funding.¹⁰ A minimum coverage requirement that requires everyone to pay into the risk pool will dramatically reduce adverse selection, and make it financially practical to insist upon coverage for individuals with pre-existing conditions.

B. The minimum coverage provision fits within Congress’s authority under the Commerce Clause and the Necessary and Proper Clause.

1. Congress has broad authority to regulate activities that substantially affect interstate commerce.

The United States Constitution empowers Congress to “make all Laws which shall be necessary and proper” to “regulate Commerce . . . among the several States.” U.S. Const. art. I § 8, cl. 3. The

⁹ Linda J. Blumberg & John Holahan, *The Individual Mandate—An Affordable and Fair Approach to Achieving Universal Coverage*, 361 *New Eng. J. Med.* 6, 6–7 (2009).

¹⁰ See Michael C. Dorf, *The Constitutionality of Health Insurance Reform, Part II: Congressional Power* (Nov. 2, 2009), available at <http://writ.news.findlaw.com/dorf/20091102.html> (last visited Jan. 11, 2011).

Commerce Clause power includes the authority to “regulate those activities having a substantial relation to interstate commerce, . . . *i.e.*, those activities that substantially affect interstate commerce.” *United States v. Lopez*, 514 U.S. 549, 558–59 (1995) (internal citations omitted).

The Supreme Court has long understood the Commerce Clause to be an exceptionally wide grant of authority. In that regard, three important principles have emerged from the Court’s cases that are relevant here. First, an activity will be deemed to have a “substantial effect” on interstate commerce if the activity, when aggregated with the similar activity of many others similarly situated, will substantially affect interstate commerce. *Wickard v. Filburn*, 317 U.S. 111, 128 (1942). Second, local, non-economic activities will be held to affect interstate commerce substantially if regulation of the activity is an integral or essential part of a comprehensive regulation of interstate economic activity, and if failure to regulate that activity would undercut the general regulatory scheme. *Gonzalez v. Raich*, 545 U.S. 1, 18 (2005). Third, in determining whether a regulated activity substantially affects interstate commerce within the meaning of the Commerce Clause, the Court “need not determine whether . . . [the regulated activities] taken in the aggregate, substantially affect interstate commerce in fact, *but only whether a ‘rational basis’ exists for so concluding.*” *Id.* at 22 (emphasis added). Congress’s judgment that an activity would undermine the statutory scheme “is entitled to a strong presumption of validity.” *Id.* at 28.

Although the Commerce Clause authority to regulate interstate commerce is thus broad, it is not without limits. Courts will not “pile inference upon inference” to find that a local, noncommercial activity that is not part of a comprehensive regulatory scheme nonetheless substantially affects interstate commerce. *Lopez*, 514 U.S. at 567. In *Lopez*, the Court struck down the federal Gun-Free School Zones Act which prohibited carrying a gun within 1,000 feet of a school. In finding the statute outside of the authority of the Commerce Clause, the Court observed that the act at issue was a criminal statute that

had “nothing to do with ‘commerce’ or any sort of economic enterprise” and was “not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.” *Id.* at 561. *See also United States v. Morrison*, 529 U.S. 598, 615 (2000) (sustaining Commerce Clause challenge to statutory provision creating federal civil remedy for victims of gender-motivated violence).

Lopez and *Morrison* notwithstanding, the Supreme Court’s more recent cases have reaffirmed the broad reach of Congress’s commerce clause authority. In *Raich*, for example, the Court upheld federal power to prohibit the wholly intrastate cultivation and possession of small amounts of marijuana for medical purposes, despite express state policy to the contrary. 545 U.S. at 31–32. Expressly reaffirming its holding in *Wickard*, the *Raich* Court concluded that Congress had a rational basis for concluding that marijuana cultivation is an “economic activity” that, in the aggregate, has a substantial effect on interstate commerce. *Raich* also makes clear that Congress may “regulate activities that form part of a larger regulation of economic activity.” *Id.* at 24. In other words, Congress can regulate wholly intrastate activity to make effective a comprehensive regulation of an interstate market. *Id.* at 36 (Scalia, J., concurring). Even if an activity is “local and though it may not be regarded as commerce, it may still, *whatever its nature*, be reached by Congress if it exerts a substantial economic effect on interstate commerce.” *Id.* at 17 (quoting *Wickard*, 317 U.S. at 128) (emphasis added).

Congress’s broad commerce power is also rooted in the Necessary and Proper Clause. That clause authorizes the federal government to enact regulations that, while not within the specifically enumerated powers of the federal government, are nonetheless “‘necessary and proper for carrying into Execution’ the powers ‘vested by’ the ‘Constitution in the Government of the United States.’” *United States v. Comstock*, 130 S.Ct. 1949, 1954 (2010) (quoting U.S. Const. Art. I, § 8, cl. 18). In other words, the Necessary and Proper clause permits Congress to enact regulations that are necessary or convenient

to the regulation of commerce. In *Comstock*, the Supreme Court recently explained that the Necessary and Proper clause provides federal regulatory authority where “the means chosen are reasonably adapted to the attainment of a legitimate end under the commerce power or under other powers that the Constitution grants Congress the authority to implement.” *Comstock*, 130 S.Ct. at 1957.

2. **The minimum coverage provision is constitutional because it regulates activity that substantially affects interstate commerce and because it is an essential part of comprehensive regulation of interstate economic activity.**
 - a. **The minimum coverage provision regulates activity that substantially affects interstate commerce.**

In the ACA, Congress specifically found that the minimum coverage requirement is “commercial and economic in nature, and substantially affects interstate commerce.” ACA § 1501(a)(1).¹¹ Congress certainly had a rational basis for reaching that conclusion. An individual’s decision to not purchase health insurance, when aggregated with the purchasing decisions of thousands of other individuals who choose not to maintain health insurance—because they cannot afford it or for some other reason—has a powerful and generally adverse impact on the health insurance and health care markets. In the aggregate, these economic decisions regarding how to pay for health care services—including, in particular, decisions to forgo coverage, pay later, and if need be, to depend on free care—have a substantial effect on the interstate health care market. As the Supreme Court recognized in *Raich* and in *Wickard*, the Commerce Clause empowers Congress to regulate these direct and aggregate effects. *See Raich*, 545 U.S. at 16–17; *Wickard*, 317 U.S. at 127–28.

When individuals choose not to purchase health insurance, they are still participants in the interstate health care marketplace. When the uninsured get sick, they seek medical attention within the health care system. The medical care provided to the uninsured costs a substantial amount of money.

¹¹ *See also* ACA § 1501(a)(2) (describing the effects of the minimum coverage requirement on the national economy).

Approximately one third of the cost of that care is covered by the uninsured themselves. The remaining two thirds of the cost are passed on to other public and private actors in the interstate health care and health insurance system, including the state and federal governments, multi-state private insurance companies, and large multi-state employers. Although researchers disagree as to the price tag for uncompensated care, it is generally agreed that the cost is substantial—billions of dollars each year.¹²

Oregon's experience illustrates the financial impact of the uninsured on the health care market. Because the uninsured are often unable to pay their medical bills, providers shift those costs onto the insured. Experts have estimated that this so-called "hidden tax" amounts to \$225 per privately insured Oregonian, accounting for approximately 9% of a commercial premium.¹³ Hospitals foot this bill as well. In 2009, Oregon hospitals spent a combined \$1.1 billion—an average 7.8% of gross patient revenue—on uncompensated care.¹⁴ To put this number in perspective, Oregon hospitals had a combined net income of \$255 million in 2009.¹⁵

The cost of the uncompensated care provided to the uninsured is magnified by the fact that the uninsured frequently delay seeking care. By the time they are treated, their medical problems are often more costly to treat than they would have been had they sought care earlier.¹⁶ Furthermore, because

¹² See, e.g., Dianne Miller Wolman & Wilhelmine Miller, *The Consequences of Uninsurance for Individuals, Families, Communities, and the Nation*, 32 J.L. Med. & Ethics 397, 402 (2004); Susan A. Channick, *Can State Health Reform Initiatives Achieve Universal Coverage? California's Recent Failed Experiment*, 18 S. Cal. Interdisc. L.J. 485, 499 (2009).

¹³ K. John McConnell & Neal Wallace, *Oregon's Cost-Shift: The Effect of Public Insurance Coverage on Uncompensated Care* 3-4, available at http://www.oregon.gov/OHPPR/docs/OR_Uncom_Care-McConnell.pdf?ga=t (last accessed Jan. 25, 2011).

¹⁴ Oregon Health Policy and Research, *Financial Data, 2009* (Dec. 7, 2010) available at http://www.oregon.gov/OHPPR/RSCH/docs/Hospital_Financials/2009_Margins_FINAL_12071_0.xls (last accessed Jan. 25, 2011).

¹⁵ *Id.*

¹⁶ *Hearings to Examine Health Care Access and Affordability and Its Impact on the Economy: Before the Subcomm. on Labor, Health and Human Services, Education, and Related Agencies of the S. Comm. on Appropriations*, 108th Cong. (2003) (testimony of Jack Hadley,

emergency rooms are required by federal law to screen everybody who walks through their doors and to provide stabilizing treatment to those with an emergency medical condition, much of the care for the uninsured is delivered in this costly and inefficient setting. Indeed, treatment in an emergency room costs approximately three times as much as a visit to a primary care physician, at a cost of approximately \$4.4 billion across the United States.¹⁷

In addition to the direct impact on the health care and health insurance systems, individuals who choose to forgo insurance affect the national economy in other ways, including lost productivity due to poor health and personal bankruptcies due to health care costs, and some of the limited health care resources are shifted to emergency departments, rather than to preventative care.¹⁸ In the aggregate, economic decisions regarding how to pay for health care services, particularly decisions to forgo coverage, have a substantial effect on the interstate health care market, because the costs of providing care to the uninsured are passed on to everyone else through higher premiums, on average, over \$1,000 a year, and higher health care costs. ACA § 1501(a)(2)(F).

Urban Institute), available at <http://ftp.resource.org/gpo.gov/hearings/108s/89058.txt> (last visited Jan. 19, 2011).

¹⁷ California Association of Health Plans, *10 Factors Driving Costs for California's Hospitals* at 3 (Nov. 2010), available at <http://www.calhealthplans.org/documents/IssueBriefHospitalCostDriversNovember2010.pdf> (last accessed Jan. 13, 2011); see also USC Center for Health Financing, Policy, and Management, *Marginal Costs of Emergency Department Outpatient Visits: An update using California data* (Nov. 2005) available at www.usc.edu/schools/sppd/research/healthresearch/images/pdf_reportspapers/multivariate_cost_paper_v5.pdf (last accessed Jan. 13, 2011).

¹⁸ Kaiser Family Foundation, *Hospital Emergency Room Visits per 1,000 Population, 1999*, available at <http://www.statehealthfacts.kff.org/comparetrend.jsp?yr=6&sub=94&cat=8&ind=388&typ=1&sort=a&srn=1> (last visited Jan. 12, 2011). From 1999 to 2008, emergency room visits rose from 365 to 404 per 1,000 population as uninsured rates increased.

b. The minimum coverage provision is an essential part of comprehensive regulation of interstate economic activity.

The Commerce Clause challenge to the minimum coverage provision also fails because it is an essential part of comprehensive regulation of the health care and health insurance industries. Health insurance and health care are both economic activities in interstate commerce that are indisputably within Congress's Commerce Clause power to regulate. Seventeen percent of the United States economy is devoted to health care. ACA § 1501(a)(2)(B). More than 11 million people work in the US health care industry.¹⁹ The federal government has for decades been deeply involved in healthcare regulation, including, among other programs Medicare, Medicaid, and CHIP. As the Supreme Court recently recognized, such a longstanding history helps to illustrate "the reasonableness of the relation between the new statute and pre-existing federal interests." *Comstock*, 130 S. Ct. at 1958.

The minimum coverage provision is an essential component of creating an affordable, accessible, and robust insurance market that all Americans can rely on — the central goal of the ACA. As explained above, Congress's purpose in including the minimum coverage provision was to combat the problem of adverse selection. It does that by incorporating healthy people into the risk pool, thus driving down average costs. Moreover, without a minimum coverage provision, it would be impossible to prohibit insurers from excluding from coverage individuals with pre-existing conditions. In short, the minimum coverage provision is an integral part of the ACA's comprehensive framework for regulating healthcare, the absence of which would severely undercut Congress's regulatory scheme. It is therefore constitutional under *Raich*. ("Congress can . . . regulate purely intrastate activity that is not itself "commercial," . . . if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity." *Raich*, 545 U.S. at 3.

¹⁹ Kaiser Family Foundation, *Total Health Care Employment, 2009*, available at <http://www.statehealthfacts.org/comparemaptable.jsp?ind=445&cat=8> (last visited Jan. 11, 2011).

For the same reasons, the minimum coverage provision is a means “reasonably adapted” to achieving “a legitimate end under the commerce power.” *Comstock*, 130 S. Ct. at 1957. There can be no dispute that creating an affordable and accessible health insurance market is a legitimate Congressional goal, and one well within the scope of its Commerce Clause authority. The minimum coverage provision is a reasonably adapted means to that end. The provision is therefore a “necessary and proper” regulation that Congress is empowered to enact. *Id.*

CONCLUSION

Thank you for the opportunity to address you this morning.

DM#2498200.2

PREPARED STATEMENT OF CHARLES FRIED, BENEFICIAL PROFESSOR OF LAW,
HARVARD LAW SCHOOL, CAMBRIDGE, MASSACHUSETTS

Testimony of
Charles Fried
Beneficial Professor of Law
Harvard Law School

Before the Senate Committee on the Judiciary
Hearing on "The Constitutionality of the Affordable Care Act"

February 2, 2011



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TESTIMONY OF CHARLES FRIED

I come here today not as a partisan supporter of the Obama Administration's health care legislation. I am not an expert in health care economics or policy, and I am sure there are many arguments for and against the wisdom and feasibility of this legislation. I do not enter into that debate. I am an expert on constitutional law, which I have been teaching and practicing for many years and on which I have written books and articles, most to the point my 2004 book, SAYING WHAT THE LAW IS: THE CONSTITUTION IN THE SUPREME COURT. I also am not one who believes that Article I, Section 8 of the Constitution is in effect a grant of power to Congress to regulate anything it wishes in any way it pleases. There are limits to what may plausibly be called commerce. I agree entirely with the decision in *United States v. Morrison*¹ that section 13981 of the Violence Against Women Act cannot be brought within Congress's power to regulate commerce. Indeed I sat at counsel table with Michael Rosman when he successfully argued that case. Though gender-motivated violence is despicable, cowardly, and in every state in the union criminal, a man beating up his wife or girlfriend is not commerce. Neither is carrying a gun in or near a school, as the Court correctly held in *United States v. Lopez*.² The arguments to the contrary required torturing not only constitutional law but the English language. But the business of insurance is commerce. That's what the Supreme Court decided in 1944 in *United States v. South-Eastern Underwriters Ass'n*,³ and the law has not departed from that conclusion for a moment since then. One need only think of the massive regulation of insurance that is represented by ERISA to see how deep and unquestioned is that conclusion.

If insurance is commerce, then of course the business of health insurance is commerce. It insures an activity that represents nearly 18% of the United States economy.⁴ (In this connection recall *Perez v. United States*,⁵ which held that a very local loan sharking operation was within Congress's power to regulate commerce.) And if health insurance is commerce, then the health

¹ 529 U.S. 598 (2000) (Rehnquist, C.J.).

² 514 U.S. 549 (1995) (Rehnquist, C.J.).

³ 322 U.S. 533 (1944) (Black, J.).

⁴ Anne Martin et al., *Recession Contributes to Slowest Annual Rate of Increase in Health Spending in Five Decades*, 20 HEALTH AFF. 11, 11 (2011) (reporting that 17.6% of U.S. GDP in 2009 was devoted to health care).

⁵ 402 U.S. 146 (1971) (Douglas, J.).

care mandate is a regulation of commerce, explicitly authorized by Article I, Section 8 of the Constitution.

There is the argument, which I believe is entirely wrong and even worse quite confused, that the health care mandate is not a regulation of commerce because it requires an economic act—entering the health insurance market—rather than prohibiting or limiting an economic activity. This is what Chief Justice Marshall, who had been an active member of the Virginia legislature at the time the Constitution was adopted, wrote in 1824 in *Gibbons v. Ogden*⁶ regarding Congress’s commerce power:

What is this power?

It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. . . . If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States. The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse.⁷

To my mind that is sufficient to provide the constitutional basis for the mandate. The mandate is a rule (more accurately, part of a system of rules) “by which commerce is to be governed.” Neither the Constitution nor the great Chief Justice said anything about limiting such rules to those that prohibit or limit commerce. But to those who may argue that, for some reason not disclosed in any constitutional text or known constitutional doctrine, this is not sufficient, there are these words of Marshall in 1819 in *M’Culloch v. Maryland*,⁸ often invoked, most recently in *United States v. Comstock*,⁹ in an opinion joined by Chief Justice Roberts, and in *Gonzales v. Raich*,¹⁰ in an opinion by Justice Scalia:

[T]he powers given to the government imply the ordinary means of execution. . . . The government which has a right to do an act, and has

⁶ 22 U.S. (9 Wheat.) 1 (1824).

⁷ *Id.* at 196–97.

⁸ 17 U.S. 316 (1819).

⁹ 130 S. Ct. 1949, 1956, 1965 (2010) (Breyer, J.).

¹⁰ 545 U.S. 1, 39 (2005) (Scalia, J., concurring in the judgment).

imposed on it, the duty of performing that act, must, according to the dictates of reason, be allowed to select the means

But the Constitution of the United States has not left the right of congress to employ the necessary means, for the execution of the powers conferred on the government, to general reasoning. To its enumeration of powers is added, that of making

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 thereof.

...

. . . The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers, to insure, so far as human prudence could insure, their beneficial execution. This could not be done, by confiding the choice of means to such narrow limits as not to leave it in the power of congress to adopt any which might be appropriate, and which were conducive to the end. This provision is made in a constitution, intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It 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. . . .

We admit [as do I—see *United States v. Morrison*], as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution 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, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. *Let the end be legitimate, let it be within the scope of the constitution, 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 constitution, are constitutional.*¹¹

¹¹ *M'Culloch*, 17 U.S. at 409–10, 411–12, 415, 421 (emphasis added).

Mandatory enrollment by all in the health insurance system seems close to absolutely necessary—though, as Marshall wrote, the necessity need not be absolute—to a scheme that requires private health insurers to accept virtually all applicants regardless of preexisting conditions and to retain them no matter how large the cost they impose on the system. To allow the young and well to wait until they are older and sicker to enroll is to design a system of private insurance that cannot work. Everyone knows that.

In a debate last November before the Federalist Society (of which I have been a member since its beginning), my good friend and former student Professor Randy Barnett, by way of peroration, said that it was not the America he knew if a person could be compelled to enter a market and purchase a product there he did not want. (As has been repeatedly asked, may Congress by way of regulating commerce force you to eat your veggies or visit the gym regularly? Surely not.) But the objection, while serious, is not at all about the scope of Congress's power under the Commerce Clause. It is about an imposition on our personal liberty, a liberty guaranteed by the 5th and 14th Amendments, and guaranteed against invasion not only against federal but also against state power.

Is the health care mandate an invasion of constitutionally protected liberty? That question was answered in 1905 by a unanimous Court in *Jacobson v. Commonwealth of Massachusetts*,¹² upholding against a liberty argument the imposition of a fine for refusing to submit to a state-mandated smallpox vaccination. By refusing vaccination, Jacobson was endangering not only himself but others whom he might infect. By refusing the much less intrusive and less intimate imposition of a requirement that one purchase health insurance if one can afford it, a person threatens to unravel—in the view of Congress and the health insurance industry, but Congress is enough—the whole scheme designed to protect by health insurance the largest part of the population.

As for the veggies, I suppose such forced feeding would indeed be an invasion of personal liberty, but making you pay for them would not, just as making you pay for a gym membership which you can afford but do not use would not.

To sum up:

Insurance is commerce.

Health insurance is undoubtedly commerce.

Congress has the power to regulate commerce, and that means that Congress may prescribe, in Chief Justice Marshall's words, a rule for commerce.

¹² 197 U.S. 11 (1905) (Harlan, J.).

The health care mandate is a rule for commerce. And in any event it is a necessary and proper part of the particular regulation of health insurance that Congress chose to enact.

That the rule speaks to inactivity as much as activity—which may or may not be true—is in any event irrelevant. Nothing in constitutional text or doctrine limits Congress to the regulation of an activity, although many—maybe all—examples of past regulations may in fact be characterized as regulations of activity.

Even if the regulation of inactivity—if that is what it is—is a novelty, its novelty does not count against it. Many—maybe most—regulations of commerce have some aspect of novelty about them. The question is whether that novelty is in some sense fatal to the regulation being a regulation of commerce or necessary and proper to such a regulation.

The objection that the mandate is an imposition on the individual is an objection not to Congress's exceeding its power to lay down a rule for commerce, but to Congress's violating individual liberty as guaranteed by the 5th Amendment. But the *Jacobson* case, which has been settled precedent for more than one hundred years, shows conclusively that the mandate is not an unconstitutional imposition on individual liberty.

A different route to the same conclusion would conceptualize the healthcare mandate as a part of a scheme regulating not just the market for health insurance but also the market for health care itself, how it is obtained and how it is paid for. Though an individual may claim—though not very plausibly—that he would never voluntarily enter the health *insurance* market, no one can plausibly claim he will never get sick or suffer injury and so will never need health care and never need to pay for health care. This healthcare mandate is part of the regulation of the market everyone must at some time enter—whether that person will need care tomorrow or ten years from now, whether it will be to seek help for himself or for some dependent.

PREPARED STATEMENT OF MICHAEL A. CARVIN, PARTNER, JONES DAY, WASHINGTON,
DC

Senate Judiciary Committee
Testimony of Mr. Michael A. Carvin
Jones Day
February 2, 2011

I appreciate this opportunity to testify concerning the unconstitutionality of the individual mandate for health insurance imposed by the Patient Protection and Affordable Care Act (“the Act”).

Despite the vast expanse of federal regulation that exists today, and the array of cases upholding such regulations, the individual mandate is unprecedented. The mandate expands the federal government’s reach beyond its traditional regulation of voluntary activities by instead punishing *inactivity* – the mere *failure* to purchase health insurance. Specifically, subject to a few exceptions, the mandate forces individual Americans to enter into a private commercial transaction for health insurance that they are unwilling to purchase, primarily in order to mitigate the costs that Congress has separately imposed on insurers by prohibiting them from denying coverage for pre-existing health conditions. In thus commandeering the people to reduce the burdensome effect of Congress’s regulation of third parties, the mandate far exceeds Congress’s limited and enumerated powers.

When it enacted the individual mandate, Congress opined that, particularly in light of the Act’s new requirement that health insurers provide coverage to customers with pre-existing health conditions, the mandate was needed to “add millions of new consumers to the health insurance market” and “minimize . . . adverse selection and broaden the health insurance risk pool to include healthy individuals”; thereby reducing the costs to insurers and their customers. Pub. L. No. 111-148, § 10106, 124 Stat. 119, 907 (2010). Thus, the mandate was justified by the “adverse selection” options created by the Act’s pre-existing condition ban and the need to make

the “health insurance risk pools” less costly by forcing the inclusion of more “healthy individuals” not currently in need of expensive health care. This effort to mitigate the burdens imposed on insurers by the Act is not supported by Congress’s power to “regulate Commerce ... among the several States,” or by its power to “make all Laws which shall be necessary and proper for carrying into Execution” its regulation of interstate commerce. U.S. CONST., art. I, § 8, cls. 3, 18. Nor can the mandate be saved by recharacterizing it, *post hoc*, as a mere revenue measure.

1. At the outset, we should all be able to agree that the individual mandate is not a direct regulation of interstate commerce pursuant to the Commerce Clause. Under the controlling formulation used by the Supreme Court, the Commerce Clause authorizes the federal government to “regulate the channels of interstate commerce,” as well as to “regulate and protect the instrumentalities of interstate commerce.” *United States v. Lopez*, 514 U.S. 549, 558 (1995). But the individual mandate clearly does not regulate either the “channels” or “instrumentalities” of interstate commerce; indeed, in defending the individual mandate in court, the Justice Department has not even attempted to argue otherwise, nor has any court so held. This is not surprising, since no amount of lawyerly argument can convert a regulation that punishes the *absence* of commerce into a regulation of commerce. At the risk of belaboring the obvious, inactivity cannot be commerce or anything resembling commerce because it does not involve the transmission of goods or currency between people, or any activity which is in any way antecedent to such interactions.

The question, then, is whether Congress can regulate something that is plainly not commerce under the Commerce Clause. The Justice Department argues that they can do so under the Necessary and Proper Clause because the Court has upheld the regulation of activities that do not constitute interstate commerce on the grounds that, in the aggregate, the activities

“substantially affect interstate commerce.” *Lopez*, 514 U.S. at 560. In particular, the “substantial effects” doctrine applies “[w]here [a] class of activities is regulated and that class is within the reach of federal power” under the Commerce Clause, because “the courts have no power to excise, as trivial, individual instances of the class” that do not affect interstate commerce. *Gonzales v. Raich*, 545 U.S. 1, 23 (2005) (quoting *Perez v. United States*, 402 U.S. 146, 154 (1971) (emphasis in *Perez*)). For example, in *Wickard v. Filburn*, 317 U.S. 111 (1942), the Supreme Court upheld a federal restriction on the amount of wheat a farmer could produce, even though some of the wheat was never placed in interstate commerce, because Congress had sought to support the price of wheat in interstate commerce by imposing quotas on supply, and that regulation could not be accomplished if farmers were allowed to grow wheat for personal consumption outside the quotas. *See id.* at 125-29. Likewise, in *Raich*, the Court upheld Congress’s ban on the production of marijuana as applied to marijuana grown for home use, because “the production of [a] commodity meant for home consumption ... has a substantial effect on supply and demand in the national market for that commodity.” 545 U.S. at 19.

This line of cases, however, plainly does not justify Congressional regulation of economic inactivity under the Necessary and Proper Clause (or the Commerce Clause). *First*, only “economic activities” that affect interstate commerce may be regulated under the Necessary and Proper Clause. The Court has squarely held that “noneconomic activity,” such as possessing a gun or committing violence against women, cannot be regulated by Congress even if that activity has “substantial effects” on interstate commerce. *Lopez*, 514 U.S. at 560; *United States v. Morrison*, 529 U.S. 598 (2000). Imposing such a limit on Congress’s power to regulate commerce was essential, the Court held, because an alternative rule would be “unworkable if we are to maintain the Constitution’s enumeration of powers.” *Morrison*, 529 U.S. at 615.

Since Congress is without power to reach activity if it is noneconomic, it necessarily follows that Congress cannot reach inactivity. Noneconomic activity, such as possessing guns, is far more analogous to commerce than refraining from any activity related to commerce. Moreover, authorizing this dramatic expansion of Congress's power would do far more to "create a completely centralized government" and "effectually obliterate the distinction between what is national and what is local" than would regulation of noneconomic activity. *Lopez*, 514 U.S. at 557. Virtually every decision not to engage in economic activity, in the aggregate, will have a substantial effect on interstate commerce. Decisions by citizens not to buy cars (but instead use public transportation), not to use credit cards (but instead pay for purchases out of savings), and not to take out mortgage loans (but instead rent their homes) would obviously have a substantial effect on the interstate markets in cars, consumer credit, and mortgage loans. But the notion that Congress could thus force citizens to buy cars, to make purchases with credit cards, or to take out a home mortgage is precisely the sort of unbounded interpretation of the Necessary and Proper Clause that the Supreme Court rejected in *Lopez* and *Morrison*.

Second, the individual mandate also cannot be defended on the theory that it is an "essential part" of a "larger regulation of economic activity." The Justice Department has argued that, because the Act prohibits health insurers from denying coverage on the basis of pre-existing health conditions, it is necessary to force individuals to buy insurance now in order to prevent them from taking advantage of insurance companies by waiting to purchase insurance until they get sick. But this doctrine provides no support for the individual mandate.

In the first place, the notion that Congress can regulate *anything* that is an "essential part" of "larger regulation" is not the law. Rather, this notion is based solely on one sentence of *dicta* in *Lopez* (541 U.S. at 561) and a concurring opinion in *Raich* (547 U.S. at 371 (Scalia, J.,

concurring in the judgment)), which seem irreconcilable with the Court's actual precedent. More important, assuming *arguendo* that this doctrine were the law, it would in no way justify regulating inactivity that poses no impediment to regulating interstate commerce. Even under this expansive view, the Necessary and Proper Clause allows regulation of purely intrastate activity because exempting such activity from the regulatory scheme would make it more difficult to "carry into Execution" the permissible regulation of interstate commerce. Mr. Filburn in *Wickard* and Ms. Raich in *Gonzales* were engaged in the same activity on the local level that Congress sought to regulate in the interstate market—raising wheat and marijuana. Obviously, such intrastate activity can impede the effective regulation of interstate commerce because it acts as a "potential obstacle" to regulating commerce or a "potential stimulant" to the commercial activity Congress seeks to suppress. *Raich*, 545 U.S. at 35 (Scalia, J., concurring). Since intrastate commerce resembles and affects interstate commerce, Congress may sweep such intrastate activity within its regulatory ambit, because that makes the regulation more effective than if Congress were forced to "excise, as trivial, individual instances of the class" of activities being regulated. *Raich*, 541 U.S. at 23 (majority opinion) (internal quotation marks omitted). Accordingly, under this doctrine, Congress need not make exemptions for intrastate commerce or for anything else that impedes the regulation of interstate commerce.

Those who choose not to purchase health insurance, however, are not in any way deterring or complicating Congress's permissible effort to "carry into Execution" its regulation of interstate commerce—*i.e.*, its requirement that insurance companies issue policies to those with pre-existing conditions. In stark contrast to Mr. Filburn and Ms. Raich, the persons Congress seek to regulate are not engaged in activity analogous to interstate commerce or, indeed, any activity or even inactivity that acts as an impediment to regulating interstate

commerce. Rather, the rationale for regulating those subject to the individual mandate is that compelling them to buy insurance offsets and mitigates the negative economic effects created by Congress's imposition of, *inter alia*, the pre-existing condition ban.

There is a fundamental, dispositive difference between regulating individuals because it "carr[ies] into Execution" desirable regulation of interstate commerce and regulating individuals to offset the negative consequences of an interstate commerce regulation already carried into execution. While *Wickard* and *Raich* upheld regulating citizens whose activities impeded the regulation of commerce, they certainly never suggested that Congress could regulate citizens in order to subsidize those harmed by Congress's regulation of commerce. While Congress may require Filburn to stop harvesting wheat, it may not require others to buy Filburn's non-wheat crops in order to offset the harm caused by the wheat ban.

Here, Congress has compelled insurance companies to enter into economically disadvantageous contracts with persons who are already suffering from the diseases to be "insured against," and seeks to mitigate the economic harm caused by this "guaranteed issue" requirement by forcing healthy individuals to contract before they become sick. Congress did not and could not suggest that the individual decision to refrain from purchasing insurance somehow affects the government's ability to force insurance companies to provide the "guaranteed issue." That requirement is "carried into Execution" simply by requiring that insurance contracts not penalize the consumer for pre-existing conditions.

Congress's ability to mandate such contractual terms is not impaired by the refusal to purchase insurance by *other*, non-contracting individuals, and so the individual mandate is not necessary to "carry into Execution" the guaranteed issue requirement. Indeed, the mandate *assumes* that the pre-existing condition ban has been successfully executed, which is why it is

necessary to mitigate the ban's harmful effects through the mandate. In short, the individual mandate does not remove an obstacle preventing Congress from "carrying into Execution" its desired regulation of insurance contracts, but merely forces Americans *to subsidize* the costs that Congress's executed regulation imposes on insurance companies.

Once again, allowing Congress to impose an "individual mandate" on Americans in order to offset the costs created by Congressional regulation would mean that the Necessary and Proper Clause eviscerates all limits on Congress's enumerated powers. Congressional regulation will often have costly effects on the regulated parties, and those effects could always be offset by conscripting third parties to bear some of the burden. For example, if Congress prohibits credit card companies from imposing high penalties on late-paying consumers, then those companies will lose money, but surely Congress could not offset that loss by requiring consumers with healthy savings accounts to purchase goods using credit cards rather than debit cards. Likewise, if Congress prohibits mortgage companies from turning away poor credit risks, then those companies might lose money, but surely Congress could not offset that loss by requiring affluent homebuyers to take out a mortgage.

2. Even if the individual mandate could somehow be deemed "necessary," it certainly is not "proper." As the Supreme Court made clear in *Printz v. United States*, 521 U.S. 898 (1997), Congress may not engage in regulation, no matter how "necessary," if the regulation is inconsistent with the Tenth Amendment and the basic premises underlying our federal system. In *Printz*, although Congress was directly carrying into execution certain provisions of the Brady Bill by forcing state officials to enforce them, the Court nevertheless held that such commandeering of state officials was inconsistent with the historical understanding of our federal system and the structure of the Constitution. *See id.* at 905-23. And, having so

concluded, it rejected the Government's reliance on "the Necessary and Proper Clause," which it characterized as "the last, best hope of those who defend ultra vires congressional action." *Id.* at 923. That Clause did not save congressional commandeering of state officials, because "[w]hen a 'La[w] ... for carrying into Execution' the Commerce Clause violates [an implicit] principle ... reflected in ... constitutional provisions ... [and historical understanding], it is not a 'La[w] ... proper for carrying into Execution the Commerce Clause,' and is thus, in the words of *The Federalist*, 'merely [an] ac[t] of usurpation' which 'deserve[s] to be treated as such.'" *Id.* at 923-24; see also *McCulloch v. Maryland*, 4 Wheat. (17 U.S.) 316, 421 (1819) (Necessary and Proper Clause legislation must be "consist[ent] with the letter and spirit of the Constitution"). *Printz's* anti-commandeering principle applies at least as forcefully to citizens who exercise ultimate sovereignty over their government, particularly since the Tenth Amendment reserves non-delegated powers "to the states respectively, or to the *people*." U.S. CONST., amend. X.

Indeed, forcing citizens to enter into contracts they eschew, and which harm them, in order to subsidize others, is a particularly suspect and "improper" sort of government compulsion, devoid of historical precedent. As even the CBO acknowledged, "[t]he government has never [before] required people to buy any good or service as a condition of lawful residence in the United States." See Cong. Budget Office, *The Budgetary Treatment of an Individual Mandate to Buy Health Insurance* 1 (1994); see also *Virginia v. Sebelius*, No. 10 Civ. 188, at *24 (E.D. Va. Dec. 13, 2010) (noting that "[n]either the Supreme Court nor any federal circuit court of appeals has extended Commerce Clause powers to [allow the government to] compel an individual to involuntarily enter the stream of commerce by purchasing a commodity in the private market"). And for good reason. Anglo-American law reflects an ancient distinction between prohibitions of and conditions on conduct (on the one hand), which are considered normal incidents of

government, and affirmative requirements to act (on the other), which require special justification. As Blackstone put it in the famous first chapter of his *Commentaries*: “Let a man, therefore, be ever so abandoned in his principles, or vitious in his practice[;] provided he keeps his wickedness to himself, and does not offend against the rules of public decency, he is out of the reach of human laws.” St. George Tucker, 2 *Blackstone's Commentaries* *124 (photo. reprint 1996) (1803); see also, e.g., *Bailey v. Alabama*, 219 U.S. 219 (1911) (the Thirteenth Amendment proscribes criminalizing breach of a contract to work). To be sure, certain affirmative obligations *to the Government* are inherent in the constitutional scheme and the duties of citizenship. See, e.g., *Selective Draft Law Cases*, 245 U.S. 366, 386-88 (1918) (military draft); *Blair v. United States*, 250 U.S. 273, 281 (1919) (jury duty). But supporters of the individual mandate have not been able to identify a *single* historical example of an affirmative duty of citizens to enter into private contracts for the benefit of other private parties.

To the contrary, the Supreme Court has emphasized the serious constitutional concerns raised by governmental attempts to force citizens to convey their wealth for the benefit of third parties to whom they have no reasonable obligation. As far back as *Calder v. Bull*, 3 Dall. (3 U.S.) 386 (1798), it has been recognized that “[i]t is against all reason and justice’ to presume that the legislature has been entrusted with the power to enact ‘a law that takes property from A. and gives it to B.’” *Id.* at 388 (opinion of Chase, J.). More recently, the Court relied in part upon the *Calder* principle when invalidating a Congressional mandate that a former coal company had to pay for certain health benefits of former coal miners. See *Eastern Enter. v. Apfel*, 524 U.S. 498, 522-23, 529-37 (1998) (plurality opinion). There, Congress required wealthy coal companies to pay healthcare benefits to retired coal workers who had worked for the company, although the companies had never contracted to provide such benefits. The Court found that

requiring the companies to provide healthcare costs “unrelated to any commitment the employers made or to any injury they caused . . . implicates the fundamental principles of fairness underlying the Takings Clause,” and therefore invalidated the law. *Id.* at 537; *see also id.* at 549-50 (Kennedy, J., concurring in the judgment) (similar, under Due Process Clause). Here, the Government seeks to force relatively under-funded individuals to provide money to wealthy insurance companies to compensate for rising healthcare costs “unrelated to any injury that [those subjected to the individual mandate] caused.” Regardless of whether this mandate affirmatively violates the citizen’s constitutional rights, *Eastern Enterprises* vividly demonstrates that it is the sort of compelled action that is plainly not “proper” because it is at odds with the “fundamental principles of fairness” and personal autonomy underlying the Takings, Due Process and Contract Clauses.

While the Government has broad authority to rewrite contracts voluntarily entered into, it would be wholly unprecedented to allow the federal government to force individuals into contracts against their will, particularly when the only reason to do so is to ensure the continued profitability of wealthy corporations in the face of a government mandate that harms those profits. Although it is permissible for the federal government to regulate the terms and conditions of contracts between employers and employees, by establishing minimum wages and maximum hours, it would be entirely different if the federal government sought to compel an individual to contract with an employer.

In short, because this drastic encroachment on the rights of Americans is both unprecedented under, and inconsistent with, the premises of our federal system, *Printz* forecloses any attempt to defend the individual mandate as “proper” under the Necessary and Proper clause.

3. As constitutional criticism of the individual mandate has mounted, lawyers in the Justice Department have come up with a new defense: because the mandate is enforced by a monetary penalty, the argument goes, it is not a mandate at all, but rather a “tax.” This argument attempts to exploit the fact that, while Congress may regulate only within its enumerated powers, it can impose taxes on activities outside the reach of those other powers. *See United States v. Sanchez*, 340 U.S. 42, 44 (1950). The individual mandate is plainly not a tax, however, and allowing the government to relabel it as one would mean that there is literally no limit on Congress’s regulatory powers.

The individual mandate is classic regulation; it requires an individual to do something upon pain of penalty. Specifically, every covered individual “shall for each month beginning after 2013 ensure that the individual . . . is covered under minimum essential coverage for such month,” and “[i]f an applicable individual fails to meet th[is] requirement . . . there is hereby imposed a penalty.” *See* Pub. L. No. 111-148, § 1501(b) (emphasis added). If Congress had enforced the mandate through a non-monetary penalty (imprisonment, for example), the mandate would of course not be a tax; imposing a monetary penalty does nothing to change the character of the law. For these reasons, Judge Vinson correctly held in the Florida litigation that “it is manifestly clear that Congress intended [the mandate] to be a penalty and not a tax.” *See Florida v. Dept. of Health and Human Svcs.*, No. 10 Civ. 00091, at *16 (N.D. Fla. Oct. 14, 2010).

The regulatory character of the mandate is particularly obvious because using the requirement to generate revenue would be utterly inconsistent with the logic of the health care law. As the Justice Department has vigorously argued when defending the mandate in court, Congress thought that compelling individuals to purchase insurance was essential to the success of the health care law. That is, Congress thought it was critical that everyone purchase health

coverage and that the government *not* collect revenue from the mandate's penalty provision. It is difficult to come up with a clearer example of a regulation being enforced by a monetary penalty, as opposed to a tax to secure revenue. Perhaps that is why the President has previously argued that the mandate is "absolutely not a tax" and that "[n]obody considers [it] a tax increase." *See, e.g., Obama: Requiring Health Insurance is Not a Tax Increase*, CNN, Sept. 29, 2009, *available at*: <http://www.cnn.com/2009/POLITICS/09/20/obama.health.care/index.html>.

Nor can the mandate be saved by reliance on cases that take a deferential posture to excise taxes on disfavored transactions. *E.g., Sanchez*, 340 U.S. at 44 (deferring to Congress's characterization of a tax on the transfer of marijuana). In such cases, the Court usually accepts Congress's word that, when it requires the payment of money to the government as an incident to some other transaction, the government is engaged in taxation. Here, however, there is simply no underlying transaction to be taxed. Instead, the monetary penalty at issue is triggered solely by the violation of a regulatory command ("buy insurance"). No case has ever upheld a tax on the absence of activity. The mandate is therefore nothing like a cigarette tax, which is triggered by a voluntary commercial transaction; instead, it is the equivalent of the government requiring every smoker to attend a smoking cessation program, subject to a monetary penalty. If such "taxes" are permissible, then the limits on Congress's enumerated powers mean nothing—Congress could require people to do anything, no matter how divorced from enumerated powers or how central to the State's police powers, simply by enforcing it through a monetary fine called a "tax." Congress could reenact the prohibitions at issue in *Lopez* and *Morrison*, or require anyone to purchase a car, take out a loan, or buy a home, so long as it enforced those mandates with a hefty "tax" rather than a "penalty."

The Founders surely did not contemplate such claims of federal power, and our Constitution requires that they be rejected.

PREPARED STATEMENT OF RANDY E. BARNETT, CARMACK WATERHOUSE PROFESSOR
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**TURNING CITIZENS INTO SUBJECTS:
WHY THE HEALTH INSURANCE MANDATE IS
UNCONSTITUTIONAL**

Randy E. Barnett*

In 2010 something happened in this country that has never happened before: Congress required that every person enter into a contractual relationship with a private company. Now, it is not as though the federal government never requires you to do anything. You must register for the military and serve if called, you must submit a tax form, fill out a census form, and serve on a jury. And you must join a posse organized by a U.S. Marshall. But the existence and nature of these very few duties illuminates the truly extraordinary and objectionable nature of the individual insurance mandate. Each of these duties is necessary for the operation of government itself; and each has traditionally been widely recognized as inherent in being a citizen of the United States.

Consider why, in 1918, the Supreme Court rejected the claim that the military draft violated the Thirteenth Amendment, which bars “involuntary servitude.” At first glance, conscription surely looks like a form of involuntary servitude. But the Court said that it could not see how “the exaction by government from the citizen of the performance of *his supreme and noble duty* of contributing to the defense of the rights and honor of the nation . . . can be said to be the imposition of involuntary servitude. . . .”¹

Keep that phrase, “supreme and noble duty” of citizenship, in mind. For this, and nothing less than this, is what is at stake in the fight

*Carmack Waterhouse Professor of Legal Theory, Georgetown University Law Center. These remarks were prepared as testimony before the Senate Judiciary Committee hearings held on February 2, 2011. This testimony is based on Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate is Unconstitutional*, 5 NYU J. L. & LIBERTY 581 (2011). Together with the Cato Institute, I have submitted amicus briefs in support of the challenges to the Affordable Care Act in *Virginia v. Sebelius* in the U.S. District Court for the Eastern District of Virginia, and in *Thomas More Law Center v. Obama* in both the U.S. District Court for the Eastern District of Michigan and the U.S. Circuit Court of Appeals for the Sixth Circuit. I have also discussed, without remuneration, the constitutional issues raised by the Affordable Care Act with attorneys representing challengers in Virginia, Michigan, and Florida.

¹Selective Draft Law Cases, 245 U.S. 366, 390 (1918)

over the constitutionality of the individual insurance mandate. Is it part of the “supreme and noble duty” of citizenship to do whatever the Congress deems in its own discretion to be convenient to its regulation of interstate commerce? If this proposition is upheld, I submit, the relationship of the people to the federal government would fundamentally change: no longer would they fairly be called “citizens;” instead they would more accurately be described as “subjects.”

In fact, in Article III, the Constitution distinguishes between citizens of the United States and “subjects” of foreign states.² What is the difference? In the United States, sovereignty rests with the citizenry. The government, including the Congress, is not sovereign over the people, but is the servant of the people. In the 1886 case of *Yick Wo v. Hopkins*, the Supreme Court reaffirmed that “in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts.”³ But if Congress can mandate you do anything that is “convenient” to its regulation of the national economy, then that relationship is now reversed, and Congress has the prerogative powers of King George III.

In essence, the defenders of this bill are making the following claim: because Congress has the power to draft you into the military — a power tantamount to enslaving you to fight and die — it has the power to make you do anything less than this, including mandating that you to send your money to a private company and do business with it for the rest of your life. This simply does not follow. The greater power does not include the lesser.

One way to justify so exceptional a power would be to find it in

²Compare U.S. CONST. art. III, sec. 2 (“The judicial power shall extend . . . to controversies . . . between a state, or the citizens thereof, and foreign states, citizens or subjects.”) and U.S. CONST. amend XI (“The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.”), with U.S. CONST. amend. XIV, §1 (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.”).

³*Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (Matthews, J.). See also *Chisolm v. Georgia*, 2 U.S. 419, 479 (2 Dall.) (1793) (affirming “this great and glorious principle, that the people are the sovereign of this country,” and “the people” consists of “fellow citizens and joint sovereigns.”) (opinion of Jay, C.J.); *id.* at 356 (referring to the people as “a collection of original sovereigns.”) (opinion of Wilson, J.).

the Constitution itself. Does the Constitution expressly give Congress a power to compel citizens to enter into contractual relations with private companies — or can it be fairly implied? Quite obviously, the answer is no.

True, the Constitution does give Congress the power to impose taxes on the people to compel them to give their money *to the government* for its support. And it has long been assumed that Congress can then appropriate funds to provide for the common defense and general welfare by making disbursements to private companies and individuals. Social Security and Medicare are examples of the exercise of such tax and spending powers.

Because the Supreme Court is highly deferential to Congress's use of its tax power, the primary constraint on the exercise of this power is political. That is, like the power to declare war or impose a military draft, legislators will be held politically accountable for their exercise of the great and dangerous power to tax. But for this constraint to operate, at a minimum Congress must expressly invoke this power so it can be held politically accountable for exercising its power to tax.

This is why it is of utmost significance that, when it enacted the Affordable Care Act, Congress did not refer to the penalty imposed on those who fail to buy insurance as a tax. Instead it called it a “penalty” to enforce the insurance mandate. Although the penalty was inserted into the Internal Revenue Code, Congress then expressly severed the penalty from the normal enforcement mechanisms of the tax code. The failure to pay the penalty “shall not be subject to any criminal prosecution or penalty with respect to such failure.”⁴ Nor shall the IRS “file notice of lien with respect to any property of a taxpayer by reason of any failure to pay the penalty imposed by this section,”⁵ or impose a “levy on any such property with respect to such failure.”⁶ All of these restrictions undermine the claim that, because the penalty is inserted into the Internal Revenue Code, it is a garden-variety tax.

Nor is this merely a matter of form. As Justice Souter explained

⁴I.R.C. §5000A(g)(2)(A) (West 2010).

⁵I.R.C. §5000A(g)(2)(B)(i) (West 2010).

⁶I.R.C. §5000A(g)(2)(B)(ii) (West 2010).

in a 1996 case, “if the concept of penalty means anything, it means *punishment for an unlawful act or omission. . .*”⁷ By contrast, he described a tax as “a pecuniary burden laid upon individuals or property *for the purpose of supporting the Government.*”⁸ But when Congress identified all the revenue raising provisions of the Affordable Care Act for the vital purpose of scoring its costs, it failed to include *any* revenues to be collected under the penalty.⁹

Rather than tax everyone to provide a direct subsidy to private insurance companies to compensate them for the cost of the new regulations being imposed upon them, Congress decided to compel the people to pay insurance companies directly. And it expressly justified the mandate as an exercise of its regulatory powers under the Commerce Clause. But if the mandate to buy insurance is unconstitutional because it exceeds the commerce power, then there is nothing for the penalty to enforce, regardless of whether it is deemed to be a tax.

So the unprecedented assertion of a power to impose economic mandates on the citizenry must rise and fall on whether the mandate is within the power of Congress under the Commerce Clause “to regulate . . . commerce among the several states,”¹⁰ or whether, under the Necessary and Proper Clause, the mandate is both “necessary and proper for carrying into Execution”¹¹ its commerce power.

No one claims that the individual mandate is justified by the original meaning of either the Commerce Clause or Necessary and Proper Clause. Instead, the government and those law professors who support the mandate have rested their arguments exclusively on the decisions of the Supreme Court. So what does existing Supreme Court doctrine say about the scope of the Commerce and Necessary and Proper clauses?

Of course, given that economic mandates have never before been

⁷United States v. Reorganized CF&I Fabricators of Utah, Inc., 518 U.S. 213, 224 (1996) (emphases added).

⁸*Id.* (quoting New Jersey v. Anderson, 203 U. S. 483, 492 [1906]) (emphasis added).

⁹See Pub. L. No. 111-148, §§ 9000 et seq., 124 Stat. 119 (2010).

¹⁰U.S. CONST. art I., § 8, cl. 3.

¹¹U.S. CONST. art I., § 8, cl. 18.

imposed on the American people by Congress, there cannot possibly be any Supreme Court case expressly upholding such a power. But during the New Deal, the Supreme Court used the Necessary and Proper Clause to allow Congress to go beyond the regulation of interstate commerce itself to reach wholly intrastate activities that substantially affect interstate commerce.¹² Then in 1995, in the case of *United States v. Lopez*, it limited the reach of this power to the regulation of economic, rather than noneconomic activity.¹³

Barring Congress from regulating noneconomic intrastate activity keeps it from reaching activity that has only a remote connection to interstate commerce, without requiring courts to assess what Alexander Hamilton referred to as the “more or less necessity or utility”¹⁴ of a measure. Existing Commerce Clause and Necessary and Proper Clause doctrine, therefore, allows Congress to go this far, *and no farther*.

But the individual mandate is not regulating any economic activity. It is quite literally regulating *inactivity*. Rather than regulating or prohibiting economic activity in which a citizen voluntarily *chooses* to engage — such as growing wheat, operating a hotel or restaurant, or growing marijuana — it is commanding that a citizen *must* engage in economic activity. It is as though the federal government had mandated Roscoe Filburn (of *Wickard v. Filburn*¹⁵) to grow wheat, or mandated Angel Raich (of *Gonzales v. Raich*¹⁶) to grow marijuana.

The distinction between acting and not acting is pervasive in all areas of law. We are liable for our actions but, absent some preexisting duty, we cannot be penalized for inaction. So in defending the mandate, the government has been forced to offer a number of shifting arguments

¹²See e.g. *United States v. Darby*, 312 U.S. 100, 118 (1941) (relying on the Necessary and Proper case of *McCulloch v. Maryland* to justify reaching intrastate activities that affect interstate commerce).

¹³See *United States v. Lopez*, 514 U.S. 549 (1995). See also *United States v. Morrison*, 529 U.S. 598 (2000).

¹⁴Alexander Hamilton, *Opinion on the Constitutionality of a National Bank* (Feb. 23, 1791), in *LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES* 95, 98 (M. St. Clair Clarke & D. A. Hall eds., Augustus M. Kelley Publishers 1967) (1832).

¹⁵See *Wickard v. Filburn*, 317 U.S. 111 (1942)

¹⁶See *Gonzales v. Raich*, 545 U.S. 1 (2005)

for why, despite the appearances, insurance mandates are actually regulations of activity.

The statute itself speaks of regulating “decisions”¹⁷ as though a decision is an action. But expanding the meaning of “activity” to include “decisions” not to act erases the distinction between acting and not acting. It would convert all of your “decisions” not to sell your houses or cars into economic activity that could be “regulated” or mandated if Congress deems it convenient to its regulation of interstate commerce.

The government also claims that it is regulating the activity of obtaining health care, which it says everyone eventually will seek. While the government could try to condition the activity of delivering health care on patients having previously purchased insurance, in the Affordable Care Act it did not do this. The fact that most Americans will seek health care at some point or another does not convert their failure to obtain insurance from inactivity to activity and so does not convert the mandate to buy insurance into a regulation of activity.

For this reason, the government primarily relies, not on the claim that “decisions” are activities or that Congress is regulating the activity of seeking health care, but on a proposition that has yet to be accepted by a majority of the Supreme Court: that Congress may do anything that it deems to be “necessary to a broader scheme” regulating interstate commerce — in this case the regulation of the insurance companies under the commerce power.

But there is no such existing doctrine. The government’s theory is based on a concurring opinion by Justice Antonin Scalia in the 2005 medical marijuana case of *Gonzales v. Raich* — a lawsuit I brought on behalf of Angel Raich and argued in the Supreme Court.¹⁸ Justice

¹⁷See PATIENT PROTECTION AND AFFORDABLE CARE ACT, Pub. L. No. 111-148, § 1501(a)(2)(A), 124 STAT. 119 (2010) (“The requirement regulates activity that is commercial and economic in nature: economic and financial decisions about how and when health care is paid for, and when health insurance is purchased.”).

¹⁸See *Raich*, 545 U.S. at 37 (Scalia, J. concurring) (“Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce.”)

Scalia's theory, in turn, rests on a single sentence of dictum in *Lopez*.¹⁹

Whenever a majority of the Supreme Court eventually decides to allow Congress to regulate noneconomic activity because doing so is essential to a broader regulatory scheme, it will need to limit this doctrine, lest it lead to an unlimited power in Congress. If that day comes, the Court need only look back to see that every exercise of the Commerce and Necessary and Proper clauses has involved the regulation of voluntary activity. Barring Congress from reaching inactivity prevents it from exercising powers that are even more remote to the regulation of interstate commerce than is the regulation of noneconomic activity.

Look at what is happening here. Congress exercises its commerce power to impose mandates on insurance companies, and then claims these insurance mandates will not have their desired effects unless it can impose mandates on the people — which would be unconstitutional if imposed on their own. By this reasoning, the Congress would now have the general police power the Supreme Court has always denied it possessed. All Congress need do is adopt a broad regulatory scheme that won't work the way Congress likes unless it can mandate any form of private conduct it wishes.

But the individual mandate not only exceeds existing Supreme Court doctrine governing what is "necessary" under the Necessary and Proper Clause. That clause also requires that a law be "proper." Economic mandates, however, are an improper means to the regulation of interstate commerce. In 1997, the Supreme Court struck down a mandate that local sheriffs run background checks on purchasers of firearms as part of a broader scheme regulating the sale of guns that Congress enacted using its commerce power. In *Printz v. United States*,²⁰ the Court held that this mandate on state executives unconstitutionality violated the sovereignty of state governments and the Tenth Amendment.

Writing for the Court, Justice Scalia rejected the government's

¹⁹See *Lopez*, 514 U.S. at 561 (noting that the Gun Free School Zone Act was not "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.").

²⁰*Printz v. United States*, 521 U.S. 898 (1996).

contention that, because the background checks were “necessary” to the operation of the regulatory scheme, they were justified under the Necessary and Proper Clause. After memorably calling the Necessary and Proper Clause “the last, best hope of those who defend ultra vires congressional action,”²¹ Justice Scalia concluded that “When a ‘Law . . . for carrying into Execution’ the Commerce Clause violates the principle of state sovereignty reflected in” the Tenth Amendment and other constitutional provisions, “it is not a ‘Law . . . proper for carrying into Execution the Commerce Clause,’ and is thus, in the words of The Federalist, ‘merely [an] act of usurpation’ which ‘deserves to be treated as such.’”²²

Just as commandeering state governments is an unconstitutional infringement of state sovereignty, commandeering the people violates the even more fundamental principle of *popular* sovereignty. After all, the Tenth Amendment reads: “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.*”²³

Should the Supreme Court decide that Congress may not commandeer the people in this way, such a doctrine would only affect one law: the Affordable Care Act of 2010. Because Congress has never done anything like this before, the Court need strike down no previous mandate. This makes a challenge to the insurance mandate more likely to succeed. But if it strikes down the individual insurance mandate, the Court may also have to strike down the mandates imposed on insurance companies. For the Affordable Care Act does not include the normal severability clause that would let the remainder stand if any part is invalidated. And the very reasons why the government argues that the individual mandate is “essential” to implement the insurance regulations, are why it is not severable.

Although the bulk of my remarks today concerned decisions of the Supreme Court, many of the Court’s doctrines concerning the regulatory and taxing powers are not actually opinions about what the

²¹*Id.* at 923.

²²*Id.* at 923–24. (citations omitted).

²³U.S. CONST. Amend X.

Constitution requires, but when the Court will defer to Congress's judgment of the scope of its own powers and when it will intervene. Each Senator and Representative takes his or her own oath to uphold the Constitution, and each must reach his or her own judgment about the scope of Congressional powers.

After the Supreme Court upheld the constitutionality of the second national bank in *McCulloch v. Maryland* by invoking the Necessary and Proper Clause, President Andrew Jackson vetoed its renewal. Jackson interpreted *McCulloch* as deferring to the judgment of the legislature as to the bank's necessity and propriety. Because he viewed the veto power as legislative in nature, and because he viewed the bank as both unnecessary and improper, he concluded that the bank was unconstitutional. "If our power over means is so absolute that the Supreme Court will not call in question the constitutionality of an act of Congress the subject of which "is not prohibited, and is really calculated to effect any of the objects intrusted to the Government," . . . it becomes us to proceed in our legislation with the utmost caution."²⁴

In short, just because *the Supreme Court* defers to you, does not mean *the Constitution* lets you do anything you like. Regardless of how the Supreme Court may eventually rule, each of you must decide for yourself whether the mandate is truly necessary to provide, for example, for portability of insurance if one changes jobs or moves to another state. If not, then restricting the liberties of the American people in this way is unnecessary. Each of you must also decide if allowing Congress to regulate inactivity by mandating that Americans enter into contractual relations with a private company for the rest of their lives would be to treat them as subjects, rather than citizens. If so, then commandeering the people in this manner is improper.

If you conclude that the mandate is either unnecessary or improper then, like President Jackson, you are obligated to conclude that it is unconstitutional, and to support its repeal.

²⁴Andrew Jackson, *Veto Message* (July 10, 1832), as it appears in RANDY E. BARNETT, *CONSTITUTIONAL LAW: CASES IN CONTEXT* 141 (2008)

PREPARED STATEMENT OF WALTER DELLINGER, DOUGLAS B. MAGGS PROFESSOR
EMERITUS OF LAW, DUKE UNIVERSITY SCHOOL OF LAW, DURHAM, NORTH CAROLINA

**Committee on the Judiciary
United States Senate**

Hearing

“The Constitutionality of the Affordable Care Act”

Prepared Statement of
Walter Dellinger

February 2, 2011
Washington, DC

Senator Durbin and Members of the Committee -

As part of the comprehensive health care legislation enacted in 2010, Congress prohibited insurance companies from denying health insurance coverage to those with pre-existing conditions. Congress made this important step feasible by adopting a companion provision requiring individuals to have adequate health insurance. The assertion that the national Congress lacks the constitutional authority to adopt these regulations of the national commercial markets in health care and health insurance is a truly astonishing proposition. When these lawsuits reach their final conclusion, that novel claim will be rejected.

The lawsuits that have been brought in federal courts around the country do not simply challenge the new law's minimum coverage requirement. They necessarily call in question as well the provisions prohibiting insurance companies from denying coverage to those with pre-existing conditions. Because the two provisions are linked, both are at stake. The outcome of this litigation will thus determine whether Americans must continue to fear being denied health insurance because of their prior or current medical condition; will continue to be concerned about losing health insurance if they change jobs; and will once again be subject to having coverage denied to a child born with a serious medical condition. Those provisions are absolutely at risk in this litigation.

Fortunately, there are so many ways that the minimum coverage requirement is an appropriate exercise of Congress's power to regulate the national economy that it is difficult to know where to begin. Let me start with the undoubted proposition that Congress can regulate the terms and conditions upon which health insurance is bought and sold, making it indisputable that Congress can prohibit insurance companies from denying coverage to those with pre-existing conditions. To make this obviously valid regulation of the national insurance market

workable, Congress found it necessary to include as well a financial incentive for individuals to maintain minimum insurance coverage. That is the so-called individual mandate. Without this mandate -- this minimum coverage provision -- there would an incentive for people who are now guaranteed coverage to postpone purchasing health insurance until they already sick. That critical fact about the interstate market in health insurance provides a full and sufficient basis for Congress to provide a financial incentive for individuals to maintain adequate health insurance coverage.

As Justice Scalia observed in his concurring opinion in *Gonzales v. Raich*, “where Congress has the authority to enact a regulation of interstate commerce, ‘it possesses every power needed to make that regulation effective.’” 545 U.S. 1 at 36 (quoting *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 118-19 (1942)). “[T]he relevant inquiry is simply ‘whether the means chosen are “reasonably adapted” to the attainment of a legitimate end under the commerce power’” *United States v. Comstock*, 130 S. Ct. 1949, 1957 (2010) (quoting *Raich*, 545 U.S. at 37 (Scalia, J., concurring in the judgment)).

That foundational principle, so aptly stated by Justice Scalia, should be dispositive of this constitutional issue. The minimum

coverage requirement requires certain taxpayers to pay a penalty of not more than 2.5% of adjusted gross income if they fail to maintain adequate insurance coverage. (The requirement does not apply, among other exceptions, to those who are eligible for Medicare or Medicaid, to those who have employment based health insurance, to those for whom purchase of insurance would be a financial hardship and those who have certain religious objections.) Because the minimum coverage provision is reasonably adapted to the attainment of a legitimate end under the Commerce Power it is plainly constitutional.

The truly novel contention put forth in this litigation, however, is that even matters vital to the national economy may not be regulated if they fall within an artificial category that the challengers label as “inactivity.” This is descriptively inaccurate, because (1) the penalty for failing to maintain minimum coverage applies only to those who participate in the economy by earning sufficient taxable income that they are otherwise required to file federal income tax returns and (2) virtually everyone subject to the penalty participates in some way in the health care market.

There is nothing unprecedented about Congress imposing affirmative requirements on citizens who would prefer to be left alone,

when those regulations are necessary to accomplish an objective wholly within the powers assigned to Congress. So why carve out this proposed new judicial exception to Congress's power to regulate commerce?

There is nothing so surprising or severe about the provision in question to justify the suggestion that it must be judicially excised from what is otherwise a valid exercise of an enumerated power. The minimum coverage requirement is no more intrusive than Social Security or Medicare.

The Social Security Act requires individuals to make payments to provide for old age retirement. Medicare requires individuals to make payments to provide for health coverage after they are 65 years of age. The Affordable Care Act requires individuals to make payments to provide for health coverage before they are 65.

Under Social Security and Medicare, there is one predominant payer, the government. Under the Affordable Care Act, individuals are given an option to choose among a larger number of insurers in the private market. Neither Social Security nor Medicare nor the Affordable Care Act is such a novel intrusion into liberty that judges would be justified in overriding the considered judgment of the elected branches that adopted those laws.

Litigants who are urging the courts to carve out a novel exception from Congress's authority to regulate interstate commerce have no precedent upon which to rely. To be sure, they cite to the Supreme Court's decisions in *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000). Those decisions, however, offer no support to these challenges. Those cases involved an attempt to regulate local crime (guns near schools and violence against women) because of a presumed ultimate effect on interstate commerce. The minimum coverage requirement, in contrast, is itself a regulation of interstate commerce; it regulates the provision of health insurance that is itself critical to the national health care market in which virtually every American participates. As the Supreme Court said in *Gonzales v. Raich*, 545 U.S. 1, 16 (2005), "where [the act under review] is a statute that directly regulates economic, commercial activity, our opinion in *Morrison* casts no doubt on its constitutionality."

The minimum coverage provision of the Affordable Care Act tests no limits and approaches no slippery slope.¹ Notwithstanding the

¹ Slippery slope arguments are themselves often slippery. Where the issue is simply whether something falls within the scope of a subject matter over which Congress is given jurisdiction to legislate, the parade of horrors marches all too easily. If it is within the scope of regulating commerce to set a minimum wage, one might argue, then Congress could set the minimum wage at \$5000 an hour. Would that force us

improbable hypotheticals put forth by those bringing these lawsuits, Congress never has and never would require Americans to exercise or eat certain foods. Were Congress ever to consider laws of that kind infringing on personal autonomy, the judiciary would have ample tools under the liberty clause of the Fifth Amendment to identify and enforce constitutional limits. See *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261 (1990). What the Affordable Care Act regulates is not personal autonomy, but commercial transactions.

Suggestions that sustaining the minimum coverage provision would mean that Congress could mandate the purchase of cars or comparable items are also disingenuous. The provision requiring minimum health insurance cannot be viewed in isolation. It is an integral part of regulating a health care market in which virtually everyone participates. No one can be certain he or she will never receive medical treatment. Health care can involve very expensive medical treatments that are often provided without regard to one's ability to pay and whose cost for treating the uninsured is often

to conclude that Congress therefore cannot set any minimum wage at all? Were Congress to legislate the extreme hypotheticals envisioned by those bringing these challenges, there will be ample constitutional doctrines available for the judiciary to use for the imposition of limits..

transferred to other Americans. These qualities are found in no other markets.

For an extended period of time, Congress debated how best to regulate the two vitally important, inextricably intertwined national markets in health care and health insurance. Many different proposals were put forth, criticized and defended. But what seems most clear is that in our constitutional tradition these sharply contested questions of national economic regulation are the kinds of issues that are more appropriately resolved by political debate than by judicial decree.

QUESTIONS

QUESTIONS SUBMITTED BY SENATOR DICK DURBIN FOR JOHN KROGER

Senate Judiciary Committee
Hearing on the Constitutionality of the Affordable Care Act
February 2, 2011
Questions from Senator Dick Durbin

Questions for John Kroger

1. **Do you agree that health care services are a form of interstate commerce that can be regulated by Congress?**
2. **Does paying for health care services constitute activity?**
3. **In the Affordable Care Act Congress pursued the goal of making health care more affordable and more accessible to Americans, and did so by reforming the way that people pay for the health care that every American uses. Congress incentivized people to pay for their health care in the way that works best for the overall system - through the purchase of insurance that spreads risk - instead of paying in ways that strain the system or relying on others to bear their costs. Did Congress have a rational basis to conclude that the way individuals pay for their health care has an enormous aggregate effect on Congress' efforts to make health care services affordable and accessible?**

QUESTIONS SUBMITTED BY SENATOR DICK DURBIN FOR CHARLES FRIED

Senate Judiciary Committee
Hearing on the Constitutionality of the Affordable Care Act
February 2, 2011
Questions from Senator Dick Durbin

Questions for Charles Fried

1. **Do you agree that health care services are a form of interstate commerce that can be regulated by Congress?**
2. **Does paying for health care services constitute activity?**
3. In the Affordable Care Act Congress pursued the goal of making health care more affordable and more accessible to Americans, and did so by reforming the way that people pay for the health care that every American uses. Congress incentivized people to pay for their health care in the way that works best for the overall system - through the purchase of insurance that spreads risk - instead of paying in ways that strain the system or relying on others to bear their costs. **Did Congress have a rational basis to conclude that the way individuals pay for their health care has an enormous aggregate effect on Congress' efforts to make health care services affordable and accessible?**
4. In his opinion striking down the minimum coverage requirement provision, Judge Hudson of Virginia said the following:

“The unchecked expansion of congressional power to the limits suggested by the Minimum Essential Coverage Provision would invite unbridled exercise of federal police power. At its core, this dispute is not simply about regulating the business of insurance – or crafting a scheme of universal health insurance coverage – it’s about an individual’s right to choose to participate.”

This statement seems to misread what the Affordable Care Act does. The Act broadly regulates the massive market for health care services, and every individual is already and unavoidably a participant in that market. What the Act specifically regulates is how they choose to pay for participation in that market- through insurance or through other means- not whether they choose to participate.

- a. **In your view, is “an individual’s right to choose to participate” really at the “core” of this dispute?**
- b. **Does the Commerce Clause authority yield to an individual’s supposed right to choose the way they pay for health care services they use?**

QUESTIONS SUBMITTED BY SENATOR DICK DURBIN FOR MICHAEL CARVIN

Senate Judiciary Committee
Hearing on the Constitutionality of the Affordable Care Act
February 2, 2011
Questions from Senator Dick Durbin

Questions for Michael Carvin

1. **Do you agree that health care services are a form of interstate commerce that can be regulated by Congress?**
2. **Does paying for health care services constitute activity?**
3. The Supreme Court in U.S. v. Lopez laid out “three broad categories of activity that Congress may regulate under its commerce power.” In your testimony you argue that the individual mandate is not a regulation of commerce, but when you describe the Supreme Court’s “controlling formulation” you only list two of the three Lopez categories. Chief Justice Rehnquist’s majority opinion in Lopez describes that third category as follows: “Congress’s commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce.” But you say on page 2 and 3 of your testimony that this “substantial effects” doctrine is a Necessary and Proper clause doctrine, not a Commerce Clause doctrine. **How do you reconcile your testimony with the clear precedent of Lopez?**

QUESTIONS SUBMITTED BY SENATOR DICK DURBIN FOR RANDY BARNETT

Senate Judiciary Committee
Hearing on the Constitutionality of the Affordable Care Act
February 2, 2011
Questions from Senator Dick Durbin

Questions for Randy Barnett

1. Do you agree that health care services are a form of interstate commerce that can be regulated by Congress?
2. Does paying for health care services constitute activity?
3. Orin Kerr is a professor at the George Washington University Law School and a former Republican staff member of this committee. Professor Kerr wrote that Judge Vinson in his decision "is reasoning that existing law *must be* a particular way because he thinks it should be that way as a matter of first principles, not because the relevant Supreme Court doctrine actually points that way." Do you believe it is preferable for a district court judge to base decisions on the way the judge thinks existing law should be as a matter of first principles, or for a judge to base decisions on relevant Supreme Court doctrine?

QUESTIONS SUBMITTED BY SENATOR DICK DURBIN FOR WALTER DELLINGER

Senate Judiciary Committee
 Hearing on the Constitutionality of the Affordable Care Act
 February 2, 2011
 Questions from Senator Dick Durbin

Questions for Walter Dellinger

1. **Do you agree that health care services are a form of interstate commerce that can be regulated by Congress?**
2. **Does paying for health care services constitute activity?**
3. In his opinion striking down the minimum coverage requirement provision, Judge Hudson of Virginia said the following:

“The unchecked expansion of congressional power to the limits suggested by the Minimum Essential Coverage Provision would invite unbridled exercise of federal police power. At its core, this dispute is not simply about regulating the business of insurance – or crafting a scheme of universal health insurance coverage – it’s about an individual’s right to choose to participate.”

This statement seems to misread what the Affordable Care Act does. The Act broadly regulates the massive market for health care services, and every individual is already and unavoidably a participant in that market. What the Act specifically regulates is how they choose to pay for participation in that market- through insurance or through other means- not whether they choose to participate.

- a. **In your view, is “an individual’s right to choose to participate” really at the “core” of this dispute?**
 - b. **Does the Commerce Clause authority yield to an individual’s supposed right to choose the way they pay for health care services they use?**
4. Federal district court judges in the Western District of Virginia and Eastern District of Michigan have demonstrated how the Affordable Care Act is clearly supported by the Constitution. Here is a summary of their analysis:
 - The Affordable Care Act deals with the interstate market for health care goods and services, a gigantic market in which everybody participates.
 - People currently choose whether to pay for their health care either with insurance, out-of-pocket, or by free-riding off uncompensated care programs.
 - There is a rational basis to conclude that individual decisions about how to pay for health care have an enormous aggregate effect on Congress’s ability to make the health care market accessible and affordable.
 - This means that Congress has Commerce Clause authority to regulate the means of payment in the health care market, because a rational basis is all the Supreme Court requires.

- For those who do not pay for their health care prudently through insurance, Congress is within its power to require them to pay a tax penalty. Congress has acted within its Necessary and Proper Clause authority in using this means to achieve the goal of affordable and accessible care.

Do you agree with this analysis?

QUESTIONS SUBMITTED BY SENATOR JEFF SESSIONS FOR MICHAEL CARVIN

Senator Jeff Sessions
Hearing: "Constitutionality of the Affordable Care Act"
Written Questions for Mr. Michael A. Carvin

1. At the hearing, Senator Lee and several other Senators discussed the issue of whether Congress could create a regulation requiring every citizen to eat a certain number of servings of fruits and vegetables each day. In this discussion, it was assumed that Congress would do so based on the theory that people who do not eat enough fruits and vegetables are unhealthy. Congress might conclude that the aggregate effect of such individuals' poor health has a substantial impact on the interstate market in healthcare and health insurance. Although all witnesses expressed some doubt about whether Congress could mandate people *eat* a certain number of vegetables per day, Professor Fried testified that Congress could mandate almost anything be *purchased* if the good or service in issue is sold in an interstate market.
 - a. Is there any relevant text or tradition of the *Commerce Clause itself* that would draw a distinction between requiring a person to *purchase* vegetables and requiring a person to *eat* vegetables?
 - b. Assume Congress passed such a regulation out of concern that the FDA's regulations were harming the interstate market for fruits and vegetables, instead of concern for the interstate markets in healthcare and health insurance. Could Congress require that every American *purchase* vegetables in order to assure the steady operation of that market?
2. Professor Dellinger also testified that the healthcare market was unique, and the unique characteristics of that market justified the broad exercise of federal government authority over healthcare. According to Professor Dellinger's argument, it is inevitable that every American will participate in the healthcare market at some time or another.
 - a. Could this same logic apply to fruits and vegetables, given that every American must eat at least one fruit or a vegetable at some time in their life?
 - b. Professor Dellinger also argued that the market in healthcare services requires special treatment under the Commerce Clause because federal statutes require some types of care be provided regardless of the patient's ability to pay. Professor Dellinger argued that Congress should have broader authority to force people to purchase health insurance because people can, and inevitably will, force healthcare costs onto the rest of society. Attorney General Kroger also spoke on that point, claiming that Americans "do not have a constitutional right to freeload."
 - i. Absent state or federal laws providing otherwise, would doctors and hospitals be free to turn people away for lack of insurance or ability to pay?

- ii. If Professor Dellinger's argument were to be accepted by the Supreme Court, would there be any principle in the Constitution to keep Congress from granting itself more power simply by passing laws that give citizens the ability to impose their costs on the rest of society?

- 3. In *Florida v. U.S. Department of Health and Human Services*, U.S. District Judge Roger Vinson determined that the individual mandate is unconstitutional based, in part, on his conclusion that the type of power authorized under the Affordable Care Act, if sustained, would allow Congress almost limitless authority to compel any kind of economic activity Congress deems proper.
 - a. Do you agree with that conclusion?
 - b. Under the reasoning offered by the Obama Administration in this case, is it possible that Congress could, for example, attempt to solve the health problems associated with obesity by mandating that people buy a certain number of fruits and vegetables weekly? Or purchase multivitamins and other dietary supplements?
 - c. President Obama seems to have recognized this problem himself when, during his 2008 presidential campaign, he criticized then-Senator Clinton's proposal of an individual mandate by arguing, "I mean, if a mandate was the solution, we can try to solve homelessness by mandating everybody to buy a house." Under the constitutional reasoning the Obama Administration has now offered to justify the individual mandate, wouldn't Congress also be able to justify the type of housing mandate President Obama mocked as absurd in 2008?

- 4. At the hearing, Professor Dellinger testified that the individual mandate is not a broader exercise of Congress' power than the requirement to make payments into Social Security or Medicare.
 - a. When funds are withheld from a worker's paycheck pursuant to the Social Security Act of 1965, are those funds transferred to the government or to a private individual?
 - b. When funds are withheld from a worker's paycheck pursuant to the Medicare provisions of the Social Security Act of 1965, are those funds turned over to the government or a private company?
 - c. Will payments under the individual mandate always be made to the government, or will some of those payments be made directly to private companies?
 - d. In terms of its effect on the Constitutional principles of checks and balances and enumerated powers, does any importance attach to the distinction between a dedicated tax and a regulation forcing all Americans into a contractual agreement with a private party?

5. Throughout the debate on this issue, we have heard the argument, based on Justice Scalia's concurrence in *Gonzales v. Raich*, 541 U.S. 1 (2005), that "where Congress has authority to enact a regulation of interstate Commerce, 'it possesses every power needed to make that regulation effective.'"
 - a. Do you think that Justice Scalia made that statement in his concurrence based on the text and original public meaning of the Constitution, or because it had been so held in earlier precedents of the Court?
 - b. Do you agree that Congress has the power under the Necessary and Proper Clause to take whatever actions necessary to make a permissible exercise of its power effective? For example the power to establishing federal law enforcement agencies or the power to impose a fine for violating the laws of interstate shipping?
 - c. Do you think that "making a regulation effective" is the same as "avoiding the negative economic impacts of a regulation"?
 - d. Can Congress, by choosing one policy option over another in dealing with an exercise of its enumerated powers, obtain the power to regulate people and actions that it would otherwise lack? If so, are there any limits to Congress' ability to do so?
6. The Constitution grants to Congress the power to regulate "commerce . . . among the several states." The word "commerce" normally implies some action already in existence. For instance, Webster's dictionary defines "commerce" as "the buying and selling of goods, esp. when done on a large scale between cities, states, or countries." As Justice Marshall put it, the Commerce Clause represents "the power is to regulate; that is, to prescribe the rule by which commerce is to be governed." Do you think the language of the Commerce Clause indicates Congress has the power to regulate whatever interstate commerce is occurring on its own, rather than the power to create commerce by mandate?

QUESTIONS SUBMITTED BY SENATOR JEFF SESSIONS FOR RANDY BARNETT

Senator Jeff Sessions
Hearing: "Constitutionality of the Affordable Care Act"
Written Questions for Professor Randy Barnett

1. During his opening statement at the hearing, Senator Durbin claimed that, in holding the individual mandate unconstitutional, Judge Vinson ignored relevant precedents and created a new test distinguishing "activity" and "inactivity" in determining whether Congress has power to regulate under the Commerce Clause.
 - a. Are you aware of any relevant Supreme Court precedent that directly contradicts Judge Vinson's holding?
 - b. You testified at the hearing that "[i]n 2010 something happened in this country that has never happened before: Congress required that every person enter into a contractual relationship with a private company." If a law of this type has never before been passed by Congress, do you agree that there were no Supreme Court precedents directly addressing the question before Judge Vinson?
 - c. Do you believe that a judge is a judicial activist when he decides a question of first impression in light of the text and original public meaning of a provision of the Constitution, rather than further extending the Supreme Court's expansive reading of a provision?
2. Senator Durbin alluded to your testimony during a question for Professor Fried, in which he argued that the regulation addressed in *Wickard v. Filburn*, 317 U.S. 111 (1942) had the effect of forcing Roscoe Filburn into the market to buy wheat, since Mr. Filburn made clear that the wheat he wanted to grow was for the consumption of himself and his chickens. Professor Fried testified that *Wickard* could be distinguished from the present question only if we assume that Mr. Filburn and his chickens did not have to eat.
 - a. As a factual matter, could Mr. Filburn and his chickens have grown and eaten some suitable crop that was not subject to the regulation, rather than purchasing wheat on the open market?
 - b. Does that same ability to avoid the regulation's effect exist for the individual health insurance mandate?
3. At the hearing, Professor Fried testified that Congress could mandate all Americans purchase almost any product, so long as there is a national market involved and doing so does not violate some other specific prohibition in the Constitution. In today's highly mobile society, people often move from state to state to find or retain work. Therefore, there is arguably a national market in labor. Today, we have roughly nine percent unemployment. As a result, Congress might reasonably conclude that market is not functioning properly and efficiently. Under Professor Fried's reading of the Commerce

Clause, would it be constitutional for Congress to pass a law that required every employer in America to hire at least one new worker?

4. At the hearing, Attorney General Kroger testified
 - The Constitution does not create or protect the freedom to freeload. Right now, we have 40 million Americans who don't have healthcare coverage, but those 40 million people have the right to go to a hospital emergency room and hospitals are legally required to provide that care. As a result of that, they rack up approximately forty billion dollars of healthcare fees every year. The opponents suggest that this cost-shifting is constitutionally protected. I would simply suggest that there is no constitutional right to force other people to pay for your own healthcare when you decline to take responsibility for yourself.
 - a. Attorney General Kroger mentioned a legal requirement to provide healthcare to patients in hospital emergency rooms, regardless of their ability to pay. Has the United States Congress ever passed such a law, or are these solely state laws?
 - b. If the requirement to provide care is imposed by law, is it accurate to say that the patient is engaged in cost-shifting? Would it be more accurate to say that the government has imposed cost-shifting as a matter of law?
5. At the hearing, Professor Dellinger mentioned that Congress had once passed a law requiring individual male citizens to provide themselves with muskets, gear and uniforms of a certain specification. I believe Professor Dellinger was referring to the Militia Act of 1792, which required all able-bodied male citizens, 18 years of age or older, to be enrolled in a militia and provide themselves with certain supplies for that service.
 - a. Do you believe Congress most likely relied on its Commerce Clause powers in passing that statute?
 - b. Do you believe the Militia Act of 1792 would have been a permissible exercise of Congress' authority if it were based solely on Congress' Commerce Clause powers?
 - c. In your testimony, you alluded to jury duty, selective service registration and several other actions the federal government requires of each individual citizen. You described these as traditionally-recognized requirements that were necessary for the continued function of the government itself. In 1792, the United States did not have a permanent standing army. Do you think service in the militia was among those traditionally-recognized requirements necessary for the continued function of government?

ANSWERS

RESPONSES OF JOHN KROGER TO QUESTIONS SUBMITTED BY SENATOR DURBIN

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March 8, 2011

Senator Patrick Leahy
Chairman, U.S. Senate Committee on the Judiciary
433 Russell Senate Bldg
United States Senate
Washington, DC 20510

Re: "The Constitutionality of the Affordable Care Act"

Dear Senator Leahy:

This letter is in response to questions from Senator Durbin.

1. **Do you agree that health care services are a form of interstate commerce that can be regulated by Congress?**

Yes.

The United States Constitution empowers Congress to "make all Laws which shall be necessary and proper" to "regulate Commerce . . . among the several States." U.S. Const. art. I § 8, cl. 3. The Commerce Clause power includes the authority to "regulate those activities having a substantial relation to interstate commerce, . . . i.e., those activities that substantially affect interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558-59 (1995) (internal citations

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omitted). Congress's broad commerce power is also rooted in the Necessary and Proper Clause. That clause authorizes the federal government to enact regulations that, while not within the specifically enumerated powers of the federal government, are nonetheless "necessary and proper for carrying into Execution" the powers 'vested by' the 'Constitution in the Government of the United States.'" *United States v. Comstock*, 130 S.Ct. 1949, 1954 (2010) (quoting U.S. Const. art. I, § 8, cl. 18). In other words, the Necessary and Proper Clause permits Congress to enact regulations that are necessary or convenient to the regulation of commerce. In *Comstock*, the U.S. Supreme Court recently explained that the Necessary and Proper Clause provides federal regulatory authority where "the means chosen are reasonably adapted to the attainment of a legitimate end under the commerce power or under other powers that the Constitution grants Congress the authority to implement." *Id.* at 1957.

Health insurance and health care are both economic activities in interstate commerce that are indisputably within Congress's Commerce Clause power to regulate. Seventeen percent of the United States economy is devoted to health care. The Patient Protection and Affordable Care Act (ACA) § 1501(a)(2)(B). More than 11 million people work in the U.S. health care industry.¹ The federal government has for decades been deeply involved in healthcare regulation, including, among other programs Medicare, Medicaid, and CHIP. As the Supreme Court recently recognized, such a longstanding history helps to illustrate "the reasonableness of the relation between the new statute and pre-existing federal interests." *Comstock*, 130 S. Ct. at 1958. There

¹ Kaiser Family Foundation, *Total Health Care Employment, 2009*, available at <http://www.statehealthfacts.org/comparemappable.jsp?ind=445&cat=8> (last visited Jan. 11, 2011).

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can be no dispute that creating an affordable and accessible health insurance market is a legitimate Congressional goal, and one well within the scope of its Commerce Clause authority.

2. Does paying for health care services constitute activity?

Yes.

Congress may regulate three broad categories of activity under its commerce power:

First, Congress may regulate the use of the channels of interstate commerce.

Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Third, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce.

Lopez, 514 U.S. at 558-559 (citations omitted).

The Supreme Court has long recognized that *de minimis* individual activities can be regulated under the third category—those that substantially affect interstate commerce.

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For example, in *Wickard v. Filburn*, the Court upheld the federal power to regulate small amounts of wheat grown for home consumption. 317 U.S. 111, 128 (1942). The Court concluded that an activity will be deemed to have a “substantial effect” on interstate commerce if the activity, when aggregated with the similar activity of many others similarly situated, will substantially affect interstate commerce. *Id.*

Likewise, in *Gonzales v. Raich*, the Court upheld the federal power to prohibit the wholly intrastate cultivation and possession of small amounts of marijuana for medical purposes, despite express state policy to the contrary. 545 U.S. 1, 31-32 (2005). The *Raich* Court considered marijuana cultivation to be “economic activity” that could be aggregated to evaluate whether Congress had a rational basis to find a substantial effect on interstate commerce. *Raich* also makes clear that Congress may “regulate activities that form part of a larger regulation of economic activity.” *Id.* at 24. Even if an activity is “[l]ocal and though it may not be regarded as commerce, it may still, *whatever its nature*, be reached by Congress if it exerts a substantial economic effect on interstate commerce.” *Id.* at 17 (quoting *Wickard*, 317 U.S. at 128) (emphasis added).

Under *Wickard* and *Raich*, paying for health care is certainly an activity. It did not matter that the farmer in *Wickard* and the marijuana grower in *Raich* did not want to participate in the market; their actions were still deemed as activities that were part of the broader regulatory scheme. Similar to those *de minimus* individual activities, decisions regarding how to pay for health care services—including, in particular, decisions to forgo coverage and to pay later or, if

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need be, to depend on free care—are activities, which have a substantial effect on the interstate health care market, as explained below.

3. In the Affordable Care Act Congress pursued the goal of making health care more affordable and more accessible to Americans, and did so by reforming the way that people pay for the health care that every American uses. Congress incentivized people to pay for their health care in the way that works best for the overall system - through the purchase of insurance that spreads risk - instead of paying in ways that strain the system or relying on others to bear their costs. **Did Congress have a rational basis to conclude that the way individuals pay for their health care has an enormous aggregate effect on Congress' efforts to make health care services affordable and accessible?**

Yes.

The Commerce Clause empowers Congress to regulate direct and aggregate effects of interstate commerce, as the Supreme Court recognized in *Raich* and in *Wickard*. See *Raich*, 545 U.S. at 16–17; *Wickard*, 317 U.S. at 127–28. Applying this principle, Congress certainly had a rational basis for reaching the conclusion that the way individuals pay for their health care has an enormous aggregate effect on Congress's efforts to make health care services affordable and accessible. In the aggregate, the decisions regarding how to pay for health care services have a powerful impact on the interstate health insurance and health care markets. Providing care to the uninsured has an especially adverse impact as those costs are passed on to everyone else through

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higher premiums—on average, over \$1,000 a year—and higher health care costs. ACA § 1501(a)(2)(F).

Uninsured individuals are not outside the interstate health care marketplace. They still participate in the marketplace because they seek medical attention within the health care system once they get sick. Two thirds of that medical care cost are passed on to other public and private actors in the interstate health care and health insurance system, including the state and federal governments, multi-state private insurance companies, and large multi-state employers. It is generally agreed that the cost for uncompensated care is substantial—billions of dollars each year.²

To illustrate how this impacts a single state, experts estimate that privately insured Oregonians pay a so-called \$225 “hidden tax”—accounting for approximately 9% of a commercial premium—to cover the costs of the nearly 22% of the state who are uninsured and who are often unable to pay their medical bills.³ Likewise, Oregon hospitals spent a combined \$1.1 billion—an average 7.8% of gross patient revenue—on uncompensated care in 2009.⁴ To

² See, e.g., Dianne Miller Wolman & Wilhelmine Miller, *The Consequences of Uninsurance for Individuals, Families, Communities, and the Nation*, 32 J.L. Med. & Ethics 397, 402 (2004); Susan A. Channick, *Can State Health Reform Initiatives Achieve Universal Coverage? California's Recent Failed Experiment*, 18 S. Cal. Interdisc. L.J. 485, 499 (2009).

³ K. John McConnell & Neal Wallace, *Oregon's Cost-Shift: The Effect of Public Insurance Coverage on Uncompensated Care* 3-4, available at http://www.oregon.gov/OHPPR/docs/OR_Uncom_Care-McConnell.pdf?ga=t (last accessed Jan. 25, 2011).

⁴ Oregon Health Policy and Research, *Financial Data, 2009* (Dec. 7, 2010) available at http://www.oregon.gov/OHPPR/RSCH/docs/Hospital_Financials/2009_Margins_FINAL_120710.xls (last accessed Jan. 25, 2011).

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put this number in perspective, Oregon hospitals had a combined net income of \$255 million in 2009.⁵

The cost of the uncompensated care provided to the uninsured is magnified by the fact that the uninsured frequently delay seeking care. By the time they are treated, their medical problems are often more costly to treat than they would have been had they sought care earlier.⁶ Furthermore, because emergency rooms are required by federal law to screen everybody who walks through their doors and to provide stabilizing treatment to those with an emergency medical condition, much of the care for the uninsured is delivered in this costly and inefficient setting. Indeed, treatment in an emergency room costs approximately three times as much as a visit to a primary care physician, at a cost of approximately \$4.4 billion across the United States.⁷

In addition to the direct impact on the health care and health insurance systems, individuals who choose to forgo insurance affect the national economy in other ways, including

⁵ *Id.*

⁶ *Hearings to Examine Health Care Access and Affordability and Its Impact on the Economy: Before the Subcomm. on Labor, Health and Human Services, Education, and Related Agencies of the S. Comm. on Appropriations, 108th Cong. (2003)* (testimony of Jack Hadley, Urban Institute), available at <http://ftp.resource.org/gpo.gov/hearings/108s/89058.txt> (last visited Jan. 19, 2011).

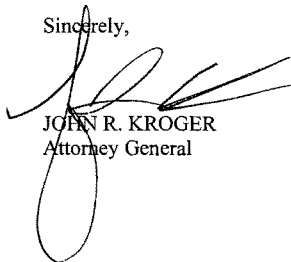
⁷ California Association of Health Plans, *10 Factors Driving Costs for California's Hospitals* at 3 (Nov. 2010), available at <http://www.calhealthplans.org/documents/IssueBriefHospitalCostDriversNovember2010.pdf> (last accessed Jan. 13, 2011); see also USC Center for Health Financing, Policy, and Management, *Marginal Costs of Emergency Department Outpatient Visits: An update using California data* (Nov. 2005) available at www.usc.edu/schools/sppd/research/healthresearch/images/pdf_reportspapers/multivariate_cost_paper_v5.pdf (last accessed Jan. 13, 2011).

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lost productivity due to poor health and personal bankruptcies due to health care costs, and some of the limited health care resources are shifted to emergency departments, rather than to preventative care.⁸ Congress found that the national economy “loses up to \$207,000,000,000 a year because of the poorer health and shorter lifespan of the uninsured.” ACA § 1501(a)(2)(E)

With these wide-ranging effects stemming from the way individuals pay for their health care, Congress had a rational basis to conclude that those actions have an enormous aggregate effect on efforts to make health care services affordable and accessible.

Sincerely,



JOHN R. KROGER
Attorney General

⁸Kaiser Family Foundation, *Hospital Emergency Room Visits per 1,000 Population, 1999*, available at <http://www.statehealthfacts.kff.org/comparetrend.jsp?yr=6&sub=94&cat=8&ind=388&typ=1&sort=a&srngn=1> (last visited Jan. 12, 2011). From 1999 to 2008, emergency room visits rose from 365 to 404 per 1,000 population as uninsured rates increased.

RESPONSES OF CHARLES FRIED TO QUESTIONS SUBMITTED BY SENATOR DURBIN

Senate Judiciary Committee
Hearing on the Constitutionality of the Affordable Care Act
February 2, 2011
Questions from Senator Dick Durbin

Questions for Charles Fried

1. **Do you agree that health care services are a form of interstate commerce that can be regulated by Congress?**

There can be no serious doubt of that. The Supreme Court held in 1944, in *United States v. Southeastern Underwriters* (322 U.S. 533), that insurance is commerce. It has never departed from that conclusion and a vast array of laws and programs are built on that premise. Think just of ERISA.

And if insurance is commerce, so surely is health insurance, which applies to something like 18% of our national economy.

2. **Does paying for health care services constitute activity?**

Paying for health insurance is certainly an activity, and an economic activity. In *Perez v. United States*, 402 U.S. 146 (1971), the Supreme Court held that a very local loan sharking operation came under the coverage of a federal law enacted under the Commerce Clause. If Congress had chosen to make illegal paying the loan shark as well as the loan shark's being paid that would certainly be constitutional as well.

3. In the Affordable Care Act Congress pursued the goal of making health care more affordable and more accessible to Americans, and did so by reforming the way that people pay for the health care that every American uses. Congress incentivized people to pay for their health care in the way that works best for the overall system - through the purchase of insurance that spreads risk - instead of paying in ways that strain the system or relying on others to bear their costs. **Did Congress have a rational basis to conclude that the way individuals pay for their health care has an enormous aggregate effect on Congress' efforts to make health care services affordable and accessible?**

It did. Indeed Judge Vinson's opinion assumed that, because he held that without the insurance mandate the rest of the Act becomes unworkable.

4. In his opinion striking down the minimum coverage requirement provision, Judge Hudson of Virginia said the following:

“The unchecked expansion of congressional power to the limits suggested by the Minimum Essential Coverage Provision would invite unbridled exercise of federal police power. At its core, this dispute is not simply about regulating the business of insurance – or crafting a scheme of universal health insurance coverage – it’s about an individual’s right to choose to participate.”

This statement seems to misread what the Affordable Care Act does. The Act broadly regulates the massive market for health care services, and every individual is already and unavoidably a participant in that market. What the Act specifically regulates is how they choose to pay for participation in that market- through insurance or through other means- not whether they choose to participate.

- a. **In your view, is “an individual’s right to choose to participate” really at the “core” of this dispute?**
- b. **Does the Commerce Clause authority yield to an individual’s supposed right to choose the way they pay for health care services they use?**

a and b. I think Judge Vinson is correct that the individual’s right to choose to participate is at the core of this dispute. But he draws the wrong conclusion from that premise. To quote Chief Justice Marshall in *Gibbons v. Ogden*:

What is this power?

It is the power to regulate, that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its Constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States. The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. . . .¹

¹ 22 U.S. (9 Wheat) 1 (1824) at 196-97.

And in *McCulloch v. Maryland*:

But the Constitution of the United States has not left the right of Congress to employ the necessary means for the execution of the powers conferred on the Government to general reasoning. To its enumeration of powers is added that of making

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 thereof.

.....

We admit, as all must admit, that the powers of the Government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution 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 which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. *Let the end be legitimate, let it be within the scope of the Constitution, 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 Constitution, are Constitutional. . . .*

McCulloch 17 U.S. at 409, 415-421 (emphasis added)

And Justice Jackson in *Wickard v. Filburn*:

“The stimulation of commerce is a use of the regulatory function quite as definitely as prohibition or restriction...” 317 U.S. 111 128 (1942)

Thus the health insurance mandate is clearly within commerce power, and as Judge Vinson pointed out, necessary to the scheme by which Congress chose to exercise that power.

The only remaining question is not the extent of the Commerce power—it clearly goes this far—but whether this “right to choose to participate” is for some reason improper, and that asks whether though within a power of Congress does this exercise of that power violate some provision of the Constitution. The only plausible candidate is the liberty interest of the due process clause of the Fifth and Fourteenth Amendments. And although the opponents of the mandate have got rhetorical mileage from raising in a vague liberty concern, no one has quite had the brass to argue that the mandate takes constitutional liberty without due process of law.

In 1905 the Supreme Court in *Jacobson v. Commonwealth*, 197 U.S. 11 (Harlan, J.), ruled unanimously that Massachusetts could without infringing a due process liberty right attach a five dollar fine to an obligation to undergo small pox vaccination. That settles the question. In that case the citizen actually had to undergo the vaccination—a needle stick—while here all he has to do is pay for something he may not want to pay for. The vaccination not only protected the vaccinee but others as well. The health care mandate not only gives the individual the benefit of health insurance but makes possible a scheme that would give many other people health insurance. In one case the infection threatened by declining the mandate is viral, in the other it is economic—and much more certain. The citizen, after all, does not have to use the insurance he has paid for; with the mandatory vaccination there was no such option.

RESPONSES OF MICHAEL CARVIN TO QUESTIONS SUBMITTED BY SENATOR DURBIN

Senate Judiciary Committee
 Hearing on the Constitutionality of the Affordable Care Act
 February 2, 2011
 Questions from Senator Dick Durbin

Questions for Michael Carvin

1. Do you agree that health care services are a form of interstate commerce that can be regulated by Congress?

Contracting with insurance companies for health care services is commerce. Intrastate commerce can be regulated if it has a substantial economic effect on interstate commerce.

2. Does paying for health care services constitute activity?

Yes.

3. The Supreme Court in U.S. v. Lopez laid out “three broad categories of activity that Congress may regulate under its commerce power.” In your testimony you argue that the individual mandate is not a regulation of commerce, but when you describe the Supreme Court’s “controlling formulation” you only list two of the three Lopez categories. Chief Justice Rehnquist’s majority opinion in Lopez describes that third category as follows: “Congress’s commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce.” But you say on page 2 and 3 of your testimony that this “substantial effects” doctrine is a Necessary and Proper clause doctrine, not a Commerce Clause doctrine. **How do you reconcile your testimony with the clear precedent of Lopez?**

To be precise, my testimony was that the “substantial effects” doctrine “does not justify congressional regulation of economic activity under the Necessary and Proper Clause (or the Commerce Clause).” P. 3. I do think that Congress can reach activities substantially affecting commerce more readily under the Necessary and Proper Clause than under the Commerce Clause, for basically the reasons stated by Justice Scalia in his *Gonzales v. Raich* concurrence. See 545 U.S. 1, 34-36 (2005) (Scalia, J., concurring). The case law is, however, ambiguous. I note that the Justice Department defends the individual mandate on both Commerce Clause and Necessary and Proper Clause grounds, illustrating that the Necessary and Proper Clause gives the Act’s defenders an additional potential ground for justification.

RESPONSES OF MICHAEL CARVIN TO QUESTIONS SUBMITTED BY SENATOR SESSIONS

Senator Jeff Sessions
Hearing: "Constitutionality of the Affordable Care Act"
Written Questions for Mr. Michael A. Carvin

1. At the hearing, Senator Lee and several other Senators discussed the issue of whether Congress could create a regulation requiring every citizen to eat a certain number of servings of fruits and vegetables each day. In this discussion, it was assumed that Congress would do so based on the theory that people who do not eat enough fruits and vegetables are unhealthy. Congress might conclude that the aggregate effect of such individuals' poor health has a substantial impact on the interstate market in healthcare and health insurance. Although all witnesses expressed some doubt about whether Congress could mandate people *eat* a certain number of vegetables per day, Professor Fried testified that Congress could mandate almost anything be *purchased* if the good or service in issue is sold in an interstate market.
 - a. Is there any relevant text or tradition *of the Commerce Clause itself* that would draw a distinction between requiring a person to *purchase* vegetables and requiring a person to *eat* vegetables?

No, the power to do one includes the other. Any differences would arise under the Due Process Claus.
 - b. Assume Congress passed such a regulation out of concern that the FDA's regulations were harming the interstate market for fruits and vegetables, instead of concern for the interstate markets in healthcare and health insurance. Could Congress require that every American *purchase* vegetables in order to assure the steady operation of that market?

The answer is "no" under existing precedent but would become "yes" if the individual mandate is upheld.
2. Professor Dellinger also testified that the healthcare market was unique, and the unique characteristics of that market justified the broad exercise of federal government authority over healthcare. According to Professor Dellinger's argument, it is inevitable that every American will participate in the healthcare market at some time or another.
 - a. Could this same logic apply to fruits and vegetables, given that every American must eat at least one fruit or vegetable at some time in their life?

Yes.
 - b. Professor Dellinger also argued that the market in healthcare services requires special treatment under the Commerce Clause because federal statutes require some types of care be provided regardless of the patient's ability to pay. Professor Dellinger argued that Congress should have broader authority to force people to purchase health insurance because people can, and inevitably will, force healthcare costs onto the rest of society. Attorney General Kroger also spoke on

that point, claiming that Americans “do not have a constitutional right to freeload.”

- i. Absent state or federal laws providing otherwise, would doctors and hospitals be free to turn people away for lack of insurance or ability to pay?

Yes.

- ii. If Professor Dellinger’s argument were to be accepted by the Supreme Court, would there be any principle in the Constitution to keep Congress from granting itself more power simply by passing laws that give citizens the ability to impose their costs on the rest of society?

No. Under this analysis, the more Congress imposes burdensome regulations on corporations to favor some customers, the more power it has to require others to subsidize those corporations to offset those burdens.

- 3. In *Florida v. U.S. Department of Health and Human Services*, U.S. District Judge Roger Vinson determined that the individual mandate is unconstitutional based, in part, on his conclusion that the type of power authorized under the Affordable Care Act, if sustained, would allow Congress almost limitless authority to compel any kind of economic activity Congress deems proper.

- a. Do you agree with that conclusion?

Yes.

- b. Under the reasoning offered by the Obama Administration in this case, is it possible that Congress could, for example, attempt to solve the health problems associated with obesity by mandating that people buy a certain number of fruits and vegetables weekly? Or purchase multivitamins and other dietary supplements?

It certainly could.

- c. President Obama seems to have recognized this problem himself when, during his 2008 presidential campaign, he criticized then-Senator Clinton’s proposal of an individual mandate by arguing, “I mean, if a mandate was the solution, we can try to solve homelessness by mandating everybody to buy a house.” Under the constitutional reasoning the Obama Administration has now offered to justify the individual mandate, wouldn’t Congress also be able to justify the type of housing mandate President Obama mocked as absurd in 2008?

Yes.

4. At the hearing, Professor Dellinger testified that the individual mandate is not a broader exercise of Congress' power than the requirement to make payments into Social Security or Medicare.

a. When funds are withheld from a worker's paycheck pursuant to the Social Security Act of 1965, are those funds transferred to the government or to a private individual?

The government.

b. When funds are withheld from a worker's paycheck pursuant to the Medicare provisions of the Social Security Act of 1965, are those funds turned over to the government or a private company?

The government.

c. Will payments under the individual mandate always be made to the government, or will some of those payments be made directly to private companies?

At least some will be made to private companies.

d. In terms of its effect on the Constitutional principles of checks and balances and enumerated powers, does any importance attach to the distinction between a dedicated tax and a regulation forcing all Americans into a contractual agreement with a private party?

Congress has broad taxing power, but little, if any, power to force selected citizens to contract with others. The basic purpose of the Takings Clause was to preclude forcing a subset of citizens to bear costs of regulation that should be borne by the citizenry as a whole, through, for example, tax subsidies. Finally, forcing contracts is not "Proper" legislation under the Necessary and Proper Clause.

5. Throughout the debate on this issue, we have heard the argument, based on Justice Scalia's concurrence in *Gonzales v. Raich*, 541 U.S. 1 (2005), that "where Congress has authority to enact a regulation of interstate Commerce, 'it possesses every power needed to make that regulation effective.'"

a. Do you think that Justice Scalia made that statement in his concurrence based on the text and original public meaning of the Constitution, or because it had been so held in earlier precedents of the Court?

Justice Scalia cited the precedents, not the Constitution, in support of that position.

- b. Do you agree that Congress has the power under the Necessary and Proper Clause to take whatever actions necessary to make a permissible exercise of its power effective? For example the power to establishing federal law enforcement agencies or the power to impose a fine for violating the laws of interstate shipping?

Yes.

- c. Do you think that “making a regulation effective” is the same as “avoiding the negative economic impacts of a regulation”?

No, entirely different.

- d. Can Congress, by choosing one policy option over another in dealing with an exercise of its enumerated powers, obtain the power to regulate people and actions that it would otherwise lack? If so, are there any limits to Congress’ ability to do so?

It cannot and, if it could, there would be no limit to Congress’ power.

6. The Constitution grants to Congress the power to regulate “commerce . . . among the several states.” The word “commerce” normally implies some action already in existence. For instance, Webster’s dictionary defines “commerce” as “the buying and selling of goods, esp. when done on a large scale between cities, states, or countries.” As Justice Marshall put it, the Commerce Clause represents “the power is to regulate; that is, to prescribe the rule by which commerce is to be governed.” Do you think the language of the Commerce Clause indicates Congress has the power to regulate whatever interstate commerce is occurring on its own, rather than the power to create commerce by mandate?

I think the plain language shows that Congress has the power only to regulate commerce, not to create it.

RESPONSES OF RANDY BARNETT TO QUESTIONS SUBMITTED BY SENATOR DURBIN

Hearing: "Constitutionality of the Affordable Care Act"
February 2, 2011
Responses of Professor Randy Barnett

Questions from Senator Dick Durbin

1. Do you agree that health care services are a form of interstate commerce that can be regulated by Congress?

Under existing doctrine, health care services provided across state lines would likely be considered a form of interstate commerce. Under existing doctrine, health care services -- like other "economic activity" -- that does not cross state lines may still be regulated by Congress under the Necessary & Proper Clause if such activity, in the aggregate, has a "substantial affect" on interstate commerce.

2. Does paying for health care services constitute activity?

Paying for anything, including health care services, is a form of activity; conversely, not paying for anything, including health insurance or health care services, is inactivity.

3. Orin Kerr is a professor at the George Washington University Law School and a former Republican staff member of this committee. Professor Kerr wrote that Judge Vinson in his decision "is reasoning that existing law must be a particular way because he thinks it should be that way as a matter of first principles, not because the relevant Supreme Court doctrine actually points that way." Do you believe it is preferable for a district court judge to base decisions on the way the judge thinks existing law should be as a matter of first principles, or for a judge to base decisions on relevant Supreme Court doctrine?

To the extent I understand Professor Kerr's statement, I do not agree it accurately characterizes Judge Vinson's opinion. In his opinion, Judge Vinson is attempting to apply, in good faith, existing Supreme Court doctrine. As the health insurance mandate is unprecedented in American history, there can be no Supreme Court case directly authorizing such a means of regulating interstate commerce. Therefore every *defender* of the mandate is extrapolating from what the Supreme Court has said in cases not involving economic mandates to what they either hope or expect the Supreme Court says in a future case unlike those of the past. The Supreme Court has said that Congress may go so far -- to regulate intrastate economic activity -- and no farther. Judge Vinson is merely following these cases, and then refusing to expand them beyond the line they currently draw. In contrast, two district court judges upholding the individual mandate have admitted the lack of any directly applicable precedent and yet extended current doctrine to allow Congress to regulate economic "decisions" rather than activity. Perhaps these judges are doing what Professor Kerr is describing but, as I said, I do not fully understand his position on how judges are supposed to address novel claims of Congressional power.

Written Questions from Senator Jeff Sessions

1. During his opening statement at the hearing, Senator Durbin claimed that, in holding the individual mandate unconstitutional, Judge Vinson ignored relevant precedents and created a new test distinguishing “activity” and “inactivity” in determining whether Congress has power to regulate under the Commerce Clause.

a. Are you aware of any relevant Supreme Court precedent that directly contradicts Judge Vinson’s holding?

There are no Supreme Court cases, of which I am aware, that contradict Judge Vinson’s holding.

b. You testified at the hearing that “[i]n 2010 something happened in this country that has never happened before: Congress required that every person enter into a contractual relationship with a private company.” If a law of this type has never before been passed by Congress, do you agree that there were no Supreme Court precedents directly addressing the question before Judge Vinson?

The Supreme Court has used the Necessary and Proper Clause to extend the power of Congress beyond the regulation of interstate commerce, to reach wholly intrastate “economic activity” when that activity in the aggregate substantially affects interstate commerce. These Supreme court precedents authorized the Congress to go this far and, to date, no farther. There is no precedent upholding the imposition of economic mandates on the people as a means of exercising Congress’s commerce power.

c. Do you believe that a judge is a judicial activist when he decides a question of first impression in light of the text and original public meaning of a provision of the Constitution, rather than further extending the Supreme Court’s expansive reading of a provision?

As the Supreme Court demonstrated in DC v. Heller, in a case of first impression, it will examine the original meaning of the Constitution. Where the Supreme Court has developed doctrines governing the scope of the Commerce and Necessary and Proper clauses, it is not the responsibility of an inferior federal judge to extend Congress’s power beyond that already authorized by the Supreme Court. This criticism would more justly be leveled at the district court judges who have upheld the mandate by extending the power of Congress to regulate “economic decisions” -- something the Supreme Court has never mentioned, much less held. But whether or not it is proper for an inferior federal judge to uphold new and unprecedented Congressional powers, federal district court judges are under no obligation to do so.

2. Senator Durbin alluded to your testimony during a question for Professor Fried, in which he argued that the regulation addressed in Wickard v. Filburn, 317 U.S. 111 (1942) had the effect of forcing Roscoe Filburn into the market to buy wheat, since Mr. Filburn made clear that the wheat he wanted to grow was for the consumption of himself and his chickens. Professor Fried testified that Wickard could be distinguished from the present question only if we assume that

Mr. Filburn and his chickens did not have to eat.

a. As a factual matter, could Mr. Filburn and his chickens have grown and eaten some suitable crop that was not subject to the regulation, rather than purchasing wheat on the open market?

Wickard v. Filburn involved imposing limits in the amount of wheat that could be grown by a commercial farmer as a means of raising the interstate price of wheat. Whatever may have been the secondary effects of this marketing order -- and there were bound to be many secondary effects throughout the economy --- Congress did not mandate that Mr. Filburn raise wheat, and did not mandate what he fed his livestock -- or that he must continue to raise livestock. Whether or not it was a good policy to restrict the supply of wheat available to consumers so as to increase the prices received by wheat farmers as a group, this scheme bore no resemblance to mandating that all Americans engage in a particular form of economic activity by entering into a contract with a private company. According to Professor Fried's logic, if Congress had the power to place a prohibitive tax or duty on all imported automobiles and exercised this power, it would have the "effect" of Americans buying American-made cars. Therefore, Congress can simply mandate all Americans to buy an American made car -- even those who do not wish to purchase any car. Professor Fried admitted as much in his testimony when he said that Congress had the power to make every American buy a membership in a gym.

b. Does that same ability to avoid the regulation's effect exist for the individual health insurance mandate?

The mandate reads: "An applicable individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage for such month." So far as I know, only those with religious objections or incarcerated prisoners can avoid the mandate, which by its terms applies to everyone else.

3. At the hearing, Professor Fried testified that Congress could mandate all Americans purchase almost any product, so long as there is a national market involved and doing so does not violate some other specific prohibition in the Constitution. In today's highly mobile society, people often move from state to state to find or retain work. Therefore, there is arguably a national market in labor. Today, we have roughly nine percent unemployment. As a result, Congress might reasonably conclude that market is not functioning properly and efficiently. Under Professor Fried's reading of the Commerce Clause, would it be constitutional for Congress to pass a law that required every employer in America to hire at least one new worker?

Without a doubt he would find this within the commerce power of Congress (subject perhaps to other express constraints), and I predict he will answer this question in the affirmative.

4. At the hearing, Attorney General Kroger testified

The Constitution does not create or protect the freedom to freeload. Right now, we have 40 million Americans who don't have healthcare coverage, but those 40 million people have the

right to go to a hospital emergency room and hospitals are legally required to provide that care. As a result of that, they rack up approximately forty billion dollars of healthcare fees every year. The opponents suggest that this cost-shifting is constitutionally protected. I would simply suggest that there is no constitutional right to force other people to pay for your own healthcare when you decline to take responsibility for yourself.

a. Attorney General Kroger mentioned a legal requirement to provide healthcare to patients in hospital emergency rooms, regardless of their ability to pay. Has there United States Congress ever passed such a law, or are these solely state laws?

From what I understand, Congress has made it a condition of the receipt of Medicare or Medicaid funding that hospitals operating emergency rooms treat all comers regardless of their ability to pay or having insurance. The Emergency Medical Treatment and Active Labor Act (EMTALA), enacted in 1986, requires hospitals and ambulance services to provide care to anyone needing emergency healthcare treatment regardless of citizenship, legal status or ability to pay. EMTALA applies to "participating hospitals" that accept payment under the Medicare program. There are no reimbursement provisions. This was an exercise of the Taxing and Spending power of Congress -- not its Commerce Clause power.

b. If the requirement to provide care is imposed by law, is it accurate to say that the patient is engaged in cost-shifting? Would it be more accurate to say that the government has imposed cost-shifting as a matter of law?

Yes, and if Congress has imposed cost shifting thereby creating an economic burden on hospitals, the constitutional means of addressing this burden is for the tax payer to provide a subsidy to the providers. But a far more expensive form of cost-shifting are price caps on Medicare disbursement leading health care providers to increase the prices they charge third-party insurance companies. This cost shifting greatly increases the price of health insurance and leads millions of Americans to refrain from insuring themselves at rates far beyond those presented by their own actuarial risk. If true insurance is a "bet" between the insurer and the insured, this cost-shifting is forcing many younger and healthier consumers either to make a bad bet or refrain from betting. So they opt to refrain.

5. At the hearing, Professor Dellinger mentioned that Congress had once passed a law requiring individual male citizens to provide themselves with muskets, gear and uniforms of a certain specification. I believe Professor Dellinger was referring to the Militia Act of 1792, which required all able-bodied male citizens, 18 years of age or older, to be enrolled in a militia and provide themselves with certain supplies for that service.

a. Do you believe Congress most likely relied on its Commerce Clause powers in passing that statute?

Congress was relying on its Article I, section 8 power "To provide for organizing, arming, and disciplining, the militia, and for governing such part of them as may be employed in the service of the United States . . . " The militia power, and the duty of a citizen to serve,

pre-existed the formation of national government.

b. Do you believe the Militia Act of 1792 would have been a permissible exercise of Congress' authority if it were based solely on Congress' Commerce Clause powers?

It would not.

c. In your testimony, you alluded to jury duty, selective service registration and several other actions the federal government requires of each individual citizen. You described these as traditionally-recognized requirements that were necessary for the continued function of the government itself. In 1792, the United States did not have a permanent standing army. Do you think service in the militia was among those traditionally-recognized requirements necessary for the continued function of government?

Without question, it was considered a fundamental duty of citizenship. Congress is now seeking to add an new and unprecedented duty of citizenship to those which have traditionally been recognized: the duty to engage in economic activity when Congress deems it convenient to its regulation of interstate commerce. And the *rationales* offered to date for such a duty would extend as well to the performance of *any* action, whether economic or not, when Congress deems it convenient to the exercise of its power over interstate commerce. The recognition of so sweeping a duty would fundamentally alter the relationship of American citizens to the government of the United States.

NOTE: At the time of printing, after several attempts to obtain responses to the written questions, the Committee had not received any communication from Walter Dellinger.

MISCELLANEOUS SUBMISSIONS FOR THE RECORD

CONGRESSIONAL RECORD—SENATE, DECEMBER 23, 2009

S13832

CONGRESSIONAL RECORD—SENATE

December 23, 2009

The result was announced—yeas 57, nays 42, as follows: [Rollcall Vote No. 391 Leg.]

- YEAS—57 Akaka Gillibrand Murray Baucus Hagans Nebraska (NE) Bennett Hawkins Nelson (NE) Blumenthal Inhofe Pryor Brown Johnson Reid Burr Kerry Rockefeller Byrd Loefer Schaben Cantwell Klobuchar Schumer Casey Landrum Specter Conrad Leach Stabenow Dodd Levin Udall (CO) Durbin Lieberman Udall (NM) Feinstein Menendez Webb Peltola Mikulski Whitehouse Franken Nelson Wyden

- NAYS—42 Alexander Crapo Lugar Baucus DeMint McCain Durbin Ensign McChesnut Bayh Kyl McCotter Bennett Graham Markowski Bond Grassley Hatch Roberts Brownback Hatch Roberts Campbell Hatch Shelby Cochran Inhofe Snow Collins Johnson Thune Corker Kyl Vitter Cornyn Lubiano Wicker

NOT VOTING—1 Senator

The motion was agreed to. Mr. REID. I move to reconsider the vote.

Mr. DURBIN. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

THE PRESIDING OFFICER. There is now 2 minutes, equally divided, prior to a vote on the constitutional point of order made by the Senator from Texas, Mrs. HUTCHISON.

The Senator from Texas, Mrs. HUTCHISON. Mr. President, the 10th amendment says:

The powers not delegated to the United States by the Constitution . . . are reserved to the States. . .

In this bill, a State such as Texas and many other States that have taken full responsibility for insurance plans for their employees and teachers will have to justify any change in those terms to the Federal Government.

The majority claims the commerce clause gives them the power to do what is in this bill. But what they fail to mention is the power to regulate interstate commerce has not been the basis for a robust role in insurance regulation.

This is an encroachment of the Federal Government into a role left to the States in the Constitution. The 10th amendment is being eroded by an activist Congress, and it is time to stop it now.

I urge a vote to uphold this point of order.

THE PRESIDING OFFICER. The Senator from Montana.

Mr. BAUCUS. Mr. President, the bill before us is clearly an appropriate ex-

ercise of the commerce clause. We further believe Congress has power to enact this legislation pursuant to the taxing and spending powers. This bill does not violate the 10th amendment because it is an appropriate exercise of powers delegated to the United States, and because our bill fundamentally gives States the choice to participate in the exchanges themselves or, if they do not choose to do so, to allow the Federal Government to set up the exchanges fully within the provisions as interpreted by the Supreme Court of the 10th amendment.

I urge my colleagues to vote against the point of order.

THE PRESIDING OFFICER. The question is on the constitutional point of order made by the Senator from Texas, Mrs. HUTCHISON, that the amendment violates the 10th amendment.

The yeas and nays have been ordered. The clerk will call the roll.

The legislative clerk called the roll. Mr. KYL. The following Senator is necessarily absent: the Senator from Kentucky (Mr. BUNNING).

Further, if present and voting, the Senator from Kentucky (Mr. BUNNING) would have voted "yea."

THE PRESIDING OFFICER. Are there any other Senators in the Chamber desiring to vote?

The result was announced—yeas 59, nays 40, as follows: [Rollcall Vote No. 392 Leg.]

- YEAS—59 Alexander Daines Lugar Baucus Durbin McCain Markey Bennett Ensign McChesnut Bond Graham Markowski Brownback Grassley Hatch Roberts Campbell Hatch Shelby Cochran Inhofe Snow Collins Johnson Thune Corker Kyl Vitter Cornyn Lubiano Wicker

- NAYS—40 Akaka Baucus Gillibrand Blumenthal Inhofe Pryor Burr Kerry Rockefeller Byrd Loefer Schaben Casey Landrum Specter Conrad Leach Stabenow Dodd Levin Udall (CO) Durbin Lieberman Udall (NM) Feinstein Menendez Webb Peltola Mikulski Whitehouse Franken Nelson Wyden

NOT VOTING—1 Senator

The PRESIDING OFFICER. The point of order is not agreed to.

The Senator from South Carolina.

Mr. DEMINT. Mr. President, since I have not used or yielded 10 minutes, I ask to be recognized for up to 10 minutes under rule XXII, paragraph 2.

THE PRESIDING OFFICER. The Senator has that right.

The Senator from South Carolina, please proceed.

Mr. DEMINT. Mr. President, in just a moment I will move to suspend the rules for the purpose of offering an amendment that would ban the practice of trading earmarks for votes.

While I want to be careful not to suggest wrongdoing by any Member, there has been growing public concern that earmarks were used to buy votes for this legislation. It has been argued by some that this practice is acceptable because it is necessary to get things done in the Senate. I reject that argument, and I urge my colleagues to put an end to business as usual here in the Senate.

The House of Representatives has a rule prohibiting the use of earmarks to buy votes for legislation. If we were in the House considering this bill, vote trading would be a direct violation of the ethics rule. Unfortunately, a vote-trading rule does not exist in the Senate.

During the debate on the lobbying and ethics reform bill in the 110th Congress, the senior Senator from Illinois, Mr. DURBIN, and I offered an earmark reform amendment which contained the following language:

A Member may not condition the inclusion of language to provide funding for a congressional earmark . . . on any vote cast by another Member.

The Durbin-DeMint amendment was written to mirror Speaker PELLONI's earmark reforms in the House. The Durbin-DeMint amendment passed the Senate by a vote of 98 to 0 and was included in S. 1, the Honest Leadership and Open Government Act, which passed the Senate by a vote of 95 to 2.

The rule against trading votes for earmarks was in the bill when it left the Senate, but then the bill moved to a closed-door negotiation. Somehow, at some point in those closed-door negotiations, someone dropped the earmark-for-vote language. I have no idea who it was, and we may never know. Remember, this bill was called the Honest Leadership and Open Government Act. In any case, the vote-trading rule was dropped from the bill, which then passed the Senate and was signed by the President.

Just to confirm all of this, I wish to make a parliamentary inquiry to the Chair. Is the Chair aware of any prohibition in the Standing Rules of the Senate such as the previously referenced rule contained in the Durbin-DeMint amendment or in the Rules of the House of Representatives?

THE PRESIDING OFFICER. No such rule exists in the Senate.

Mr. DEMINT. No such rule exists.

I have an amendment which would correct this error. It mirrors the Durbin-DeMint language which passed the Senate 98 to 0, and I will read the relevant parts. I quote:

It shall not be in order in the Senate to consider a congressionally directed spending

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would the new rules be implemented? What happens to the health care bill? Who decides the answers to these questions?

Moreover, if we overrule the Chair, we would be setting a dangerous precedent that points of order lie even if not provided for in Senate rules, standing orders, or procedures.

It is clear the purpose of this is to obstruct and delay. I urge my colleagues to vote to table the Cornyn appeal of the ruling of the Chair when that comes.

Mr. CORNYN. Will the Senator yield for a question?

Mr. REID. No, I will not. The health care votes we have held this week have been procedural in nature. Each has been a party-line vote and much of this debate is focused on politics. But health reform is not about procedure or partisanship or politics. It is about people—people like the thousands who write us every day.

At my desk, we have a few of the letters we have picked up in the last day or so. Sorry, staff has had to lift that and I didn't. This is a few we have gotten. Look at this. They are all basically the same. Each of these letters right here represents a story, a tragedy, a life, a death, but most of all, a person—a person, people who wake up every morning and struggle to get health care or struggle to hold on to what they have, people who lie awake every night second-guessing the agonizing decisions they have to make about what to sacrifice just to stay healthy.

Here is a letter that was written to Senator Bob CASEY of Pennsylvania. Listen to what this woman said:

Dear Senator CASEY. In a country like the United States, we shouldn't need a tip jar in an ice cream shop to raise money for a kid with leukemia. Jennifer Wood.

Here is another one of those letters. This one is from a father in North Las Vegas, NV:

Can you imagine what it is like to have a doctor look you in your eye when you hold your 1-year-old child and be told that you will likely outlive your son?

He goes on to say:
I am certain my story is not unique, but it is real. Stop forcing Americans to use the most expensive point of service, the emergency room, to get what the system won't give them. Let's make all Americans equal in the eyes of health care, please.

This legislation is not about the number of pages of this bill. It is about the number of people—people such as the man whose letter I just read who was told by a doctor that he would likely outlive his son. It is about the number of people whom this bill will help. That is what this is all about. It is about fairness. So when people are hurt or sick, they can go see somebody who can help them and not lie awake at night wondering if they will outlive their 1-year-old son.

Mr. President, how much time remains?

The ACTING PRESIDENT pro tempore. There is 1½ minutes remaining.

Mr. REID. I yield back that time and ask the vote start earlier.

I withdraw that request.

I ask unanimous consent that prior to each vote today there be 2 minutes of debate equally divided and controlled in the usual form.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

There is now 2 minutes equally divided.

The majority leader.

Mr. REID. Mr. President, stop the 2 minutes from running. I do want to explain. We will shortly have a series of up to seven votes. As we noted in the last few days, if Members remain at their desks, the votes can be concluded much earlier.

ENSIGN POINT OF ORDER

The ACTING PRESIDENT pro tempore. There is now 2 minutes of debate equally divided prior to a vote on the constitutional point of order offered by the Senator from Nevada, Mr. ENSIGN.

Who yields time?

The majority leader.
Mr. REID. Mr. President, the vote sequence will be as follows: Ensign constitutional point of order; Corker unfunded mandates point of order; Baucus motion to table the Cornyn appeal ruling of the Chair; Hutchinson constitutional point of order. I have been advised that a Republican Member will move to suspend the rules so he can offer his amendment under rule XXII. He is going to be allowed 10 minutes. This will require 67 votes because it is an effort to change the rules. Following that we will have adoption of the substitute amendment and cloture on H.R. 3590. So there is a series of seven votes.

The ACTING PRESIDENT pro tempore. Who yields time?
The Senator from Nevada is recognized.

Mr. ENSIGN. Mr. President, I raise a constitutional point of order because I am concerned that the health reform bill violate's Congress's enumerated powers under article I, section 8 and the fifth amendment takings clause of the Constitution.
Each one of us takes an oath to defend the Constitution of the United States. We do not take an oath to reform health care. We do not take an oath to do anything else here but to defend the Constitution of these United States.

Health care reform needs to fit within the Constitution. The Constitution limits the powers we have. The Congress, the U.S. Government has never enacted anything that would regulate someone's inactivity in the way the individual mandate in this health care bill would. Anything we have ever done, somebody actually had to have an action before we could tax or regulate it. In this case, if you choose to not do something—in other words, if you do not choose health insurance—this bill will actually tax you. It will act as an onerous tax. So for the first

time in the history of the United States this bill will do something the Federal Government has never done before. This bill would do something that is beyond Congress's powers to authorize. This bill is unconstitutional and I urge all Members to vote in support of the constitutional point of order.

The ACTING PRESIDENT pro tempore. The Senator's time has expired. The Senator from Montana.

Mr. BAUCUS. Mr. President, our committee and the HELP Committee have given a lot of thought to the provisions in this legislation. We also gave a lot of thought to the constitutionality of the provisions—how they work and the interrelationship between the power of Congress and the States and what States will be doing, particularly under the commerce clause and the tax-and-spending powers of the Constitution.

It is very strongly our considered judgment, and that of many constitutional scholars who have looked at these provisions—and many articles have been put in the Record—that clearly these provisions are constitutional. The commerce clause is constitutional, the tax-and-spending clause, and the provisions clearly are constitutional.

I yield back my time.
The ACTING PRESIDENT pro tempore. The question is on agreeing to the constitutional point of order made by the Senator from Nevada, Mr. ENSIGN, that the amendment violates article I, section 8 of the Constitution, and the fifth amendment.

The question is, is the point of order well taken?

The yeas and nays have been ordered.

The clerk will call the roll.

The bill clerk called the roll.
Mr. KYL. The following Senator is necessarily absent: the Senator from Kentucky (Mr. BUNNING).

Further, if present and voting, the Senator from Kentucky (Mr. BUNNING) would have voted "yea."

The ACTING PRESIDENT pro tempore. Are there any other Senators in the Chamber desiring to vote?

The yeas and nays resulted—yeas 39, nays 60, as follows:

[Rollcall Vote No. 389 Leg.]

YEAS—39

Alexander	DeMint	Lugar
Barraso	Ensign	McCain
Bennett	Ernst	McConnell
Bond	Graham	Murkowski
Brownback	Grassley	Risch
Burr	Gregg	Roberts
Chambliss	Hatch	Sessions
Coburn	Hutchinson	Shelby
Cochran	Inhofe	Snowe
Collins	Isakson	Thune
Cortez	Johannes	Vitter
Cornyn	Kyl	Voivovich
Crapo	LeMieux	Wicker

NAYS—60

Akaka	Burr	Dorgan
Baucus	Byrd	Darbin
Bayh	Cardwell	Feingold
Beahm	Cardin	Feinstein
Bennet	Casper	Franken
Bingaman	Casey	Gillibrand
Boner	Cornak	Hagan
Brown	Dodd	Harkin

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Inouye	Lincoln	Sanders
Johnson	McCaskill	Schumer
Kaufman	Morano	Stabenow
Kerry	Merkeley	Speier
Kirk	Mikulski	Stabenow
Klobuchar	Murray	Tester
Kohl	Nelson (NE)	Udall (CO)
Landrieu	Nelson (FL)	Udall (NM)
Lautenberg	Pryor	Warner
Leahy	Reid	Webb
Levin	Reid	Whitehouse
Lieberman	Rocketteller	Wyden

NOT VOTING—1
Bunning

The ACTING PRESIDENT pro tempore. The point of order is not well-taken.

CORKER POINT OF ORDER

The ACTING PRESIDENT pro tempore. There is now 2 minutes equally divided prior to the vote on the motion to waive the point of order raised by the Senator from Tennessee, Mr. CORKER.

Who yields time?

The Senator from Tennessee is recognized.

Mr. CORKER. Mr. President, thank you so much.

There is almost nothing held in lower esteem than for the Senate to pass laws in this body that cause mayors and Governors to have budgetary problems because we create unfunded mandates.

Many of you have been mayors and Governors, and for that reason, in 1995, in a bipartisan way, a law was created—15 Senators on the other side of the aisle who are now serving supported this law—to keep us from passing unfunded mandates. CBO has stated without a doubt that this bill violates that.

I urge Members to vote against this motion to waive that. It is important. It says everything about the way we do business here in Washington. Please, let's not pass another huge unfunded mandate to the States at a time when they all are having budgetary problems. This speaks to the essence of who we are and the arrogance many people perceive us to have here in Washington.

The ACTING PRESIDENT pro tempore. The Senator from Montana is recognized.

Mr. BAUCUS. This point of order calls for legislation to impose an obligation on States to extend their coverage on Medicaid. Under existing law, on average, the Federal Government pays about 57 cents on the dollar for every dollar spent under Medicaid. Under this legislation, the Federal Government will pay 100 percent of that obligation for newly enrolled beneficiaries up through the year 2016. Afterward, the Federal Government will pay on average 80 percent of the cost of new enrollees. Therefore, I think this is a very fair deal for States, and I urge my colleagues to waive the point of order.

Mr. President, I also ask consent that this vote and all subsequent votes in this sequence be 10-minute votes.

The PRESIDING OFFICER (Mr. SANDERS). The question is on agreeing

to the motion to waive the Budget Act point of order raised under section 425(a)(2).

The yeas and nays were previously ordered.

The clerk will call the roll.

Mr. KYL. The following Senator is necessarily absent: the Senator from Kentucky (Mr. BUNNING).

Further, if present and voting, the Senator from Kentucky (Mr. BUNNING) would have voted "nay."

The PRESIDING OFFICER. Are there any other Senators in the Chamber desiring to vote?

The result was announced—yeas 55, nays 44, as follows:

[Rollcall Vote No. 390 Leg.]

YEAS—55

Alaska	Franken	Merkeley
Baucus	Graham	Mikulski
Beahm	Hagel	Murray
Bennet	Harkin	Nelson (FL)
Bingaman	Leahy	Pryor
Borah	Johnson	Reid
Brown	Kaufman	Reid
Burr	Kerry	Rocketteller
Byrd	Kirk	Sanders
Cantwell	Klobuchar	Schumer
Cardin	Kohl	Speier
Carper	Landrieu	Stabenow
Casper	Lautenberg	Tester
Casey	Leahy	Udall (CO)
Conrad	Levin	Udall (NM)
Dodd	Lieberman	Udall (NM)
Dorgan	Lincoln	Whitehouse
Dornis	McCaskill	Wyden
Feingold	Menendez	
Feinstein		

NAYS—44

Alexander	Kushnir	Murkowski
Barrasso	Enzi	Nelson (NE)
Bayh	Graham	Risch
Bennett	Grassley	Roberts
Bond	Grigg	Sessions
Brownback	Hatch	Stabenow
Burr	Hutchison	Shelby
Chambliss	Inhofe	Snowe
Coburn	Ishakson	Thune
Cobrar	Johanns	Vitter
Collins	Kyl	Voitovich
Corker	LeMieux	Warner
Cornyn	Lujan	Webb
Crapo	McCain	Wicker
DeMint	McConnell	

NOT VOTING—1

Bunuing

The PRESIDING OFFICER. The motion to waive section 425(a)(2) requiring a simple majority is agreed to.

The point of order fails.

The majority leader is recognized.

Mr. REID. Mr. President, I have spoken to the Republican leader. Senators on both sides feel that it would be to their advantage if we had the vote on Christmas Eve at 7 a.m. rather than 8 a.m. That being the case, I ask unanimous consent that the vote start at 7 a.m. on Christmas Eve.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. LEAHY. May I address a question to the distinguished majority leader.

The PRESIDING OFFICER. The Senator from Vermont.

Mr. LEAHY. Mr. President, it will not affect my travel plans because I long ago decided—

Mr. REID. If I could interrupt my friend, quit while you are ahead.

Mr. LEAHY. You have your agreement on this. But is there any possibility that our friends on the other side, knowing that those who are trav-

eling to the Midwest are going to face horrendous problems, that we could have that vote this evening? It will not affect the Senator from Vermont one way or the other, but it will affect a lot of Senators, Republicans and Democrats alike, who have to fly through the Midwest to get where they are going.

Mr. MCCONNELL. Regular order.

CORNBYN APPEAL OF THE RULING OF THE CHAIR
The PRESIDING OFFICER. Regular order has been called for.

There is now 2 minutes equally divided prior to a vote on the motion to table the appeal of the ruling of the Chair.

The Senator from Texas.

Mr. CORNYN. Mr. President, upon passage of the Honest Leadership and Open Government Act, the majority leader said:

I believe last November Americans . . . asked us to make Government honest. We have done that . . . This is the toughest reform bill in the history of this body as it relates to ethics and lawmaking.

This is an appeal to the ruling of the Chair that that provision of rule XLIV is unenforceable. Why would anybody who voted overwhelmingly to make this the toughest reform bill in the history of the body render this rule toothless by agreeing with the attempt to set this aside and to waive its effect?

I ask my colleagues to make sure we vote for transparency, for honesty, for open government. Vote no on this motion to waive.

The PRESIDING OFFICER. The Senator from Montana.

Mr. BAUCUS. Mr. President, the plain text of the language in rule XLIV provides that no point of order lies against amendments. That is the way the drafters intended it. That is the way they wrote rule XLIV. That is why the Presiding Officer ruled that way on the advice of the Parliamentarian. We should support the Chair and the Parliamentarian and vote for the motion to table the appeal of the ruling of the Chair.

I yield back the remainder of my time.

Mr. CORNYN. Do I have time remaining?

The PRESIDING OFFICER. One second.

Mr. CORNYN. I ask my colleagues to vote no on the motion to waive.

The PRESIDING OFFICER. The question is on agreeing to the motion to table the appeal of the ruling of the Chair that there is no point of order under rule XLIV, paragraph 4(a).

The yeas and nays were previously ordered.

The clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. KYL. The following Senator is necessarily absent: the Senator from Kentucky (Mr. BUNNING).

Further, if present and voting, the Senator from Kentucky (Mr. BUNNING) would have voted "nay."

The PRESIDING OFFICER. Are there any other Senators in the Chamber desiring to vote?

TESTIMONY OF THE HON. KAMALA D. HARRIS, ATTORNEY GENERAL OF CALIFORNIA,
FEBRUARY 2, 2011KAMALA D. HARRIS
Attorney GeneralState of California
DEPARTMENT OF JUSTICEOffice of the Attorney General
Telephone: (916) 345-8555
Facsimile: (916) 322-7622**TESTIMONY OF THE HONORABLE KAMALA D. HARRIS,
ATTORNEY GENERAL OF CALIFORNIA****United States Senate Committee on the Judiciary
Dirksen Senate Office Building, Room 226
Washington, DC 20510****The Constitutionality of the Affordable Care Act**

Wednesday, February 2, 2011, 10:00 am

Dear Chairman Leahy, Ranking Member Grassley, and distinguished members of the Senate Committee on the Judiciary:

Thank you for the opportunity to submit testimony on an issue that I deeply care about: ensuring that Californians, and all Americans, have access to affordable health care. I firmly believe that the Affordable Care Act goes a long way toward achieving that goal, and that its enactment is squarely within Congress's constitutional authority. That is why I have joined a growing number of states in defending the Affordable Care Act in federal court and before Congress.

As Attorney General of California, one of my most important duties is protecting the health and welfare of the citizens of California. While serving as a career prosecutor, I have seen the devastation that crime can wreak on society. But the harm and hardship to individuals, families, and our state from a lack of adequate access to health care, while not as visible, is also devastating.

Each year, millions of Californians who lack health insurance go without basic medical care, in many cases turning what could be an easily treatable illness into a costly, life threatening emergency. Thousands more are forced to declare bankruptcy under the weight of a mountain of hospital bills because their health insurer refused to cover them for a preexisting condition, or placed limits on how much they would pay. Sadly, during the economic recession of the last two years, the health care crisis has worsened and has profoundly impacted our most vulnerable populations. Last year, 1.5 million children went without health insurance in California, a 33 percent increase from just two years ago. During the economic downturn of the last two years, many California families have lost jobs, which has also meant losing healthcare coverage for them and, in many cases, their families.

The skyrocketing cost of health care, coupled with the rising number of uninsured, has come at a tremendous cost to California. This crisis has occurred while our state has grappled with recurring budget deficits, this year estimated to be approximately \$25 billion of the state's

close its budget gap through reducing its payments to Medi-Cal providers have now reached the United States Supreme Court.¹

Acknowledging the crisis confronting the state, California has focused on, among other things, providing health insurance to “high risk individuals” which account for approximately one-eighth of California’s uninsured. To that end, California has established the Major Risk Medical Insurance Program, which covers individuals who have been unable to obtain adequate coverage for the previous twelve months. Individuals in this program are required to pay a monthly contribution, a \$500 deductible and co-payments. Because the individuals in this program are, by definition, a high risk to insurers, the monthly contributions are quite high: California only pays one-third of the cost of the plan, while the subscriber pays the remainder. Even with the state subsidy, many individuals who could benefit from this program are unable to afford it.

Nevertheless, California’s story remains similar to that of many other states. While it strives to provide for its most vulnerable populations, the high cost of medical care, combined with increased demand for services and devastating budget cuts, make it more and more difficult for California to meet its moral obligations to those who are unable to afford adequate medical care. As a result, federal intervention was necessary to ensure that all individuals have access to affordable health insurance and to bring down the costs of providing health care.

THE BENEFITS OF THE AFFORDABLE CARE ACT TO CALIFORNIA

The Affordable Care Act is in many ways similar to California’s attempts at health care reform. It relies in large part on an expansion of the current market for health insurance, while instituting reforms to ensure that all Americans have access to affordable and reliable health insurance. Many of those reforms are already benefitting California and its citizens. For instance, the Affordable Care Act seeks to expand the number of employers who offer insurance to their workers, which is the largest source of insurance coverage in California. While it requires businesses with more than fifty employees to begin providing health insurance in 2014, the significant tax breaks to small businesses that provide health insurance have already gone into effect. As a result, smaller businesses can be more competitive with larger corporations that routinely offer health insurance: according to the IRS, over 500,000 businesses will benefit from these tax breaks in California alone. Given the numerous start-up companies that begin in California in the tech and green industries, the ability of these small businesses to offer health insurance to their employees is critical to their ability to attract the talent that makes them thrive. Many businesses in California are already taking advantage of these tax incentives, and their employees are now benefitting from having access to affordable health insurance.

While allowing a greater number of employers to provide health insurance to their employees, the Affordable Care Act expands access to Medicaid so that many of those who lack

¹ Petitions for a writ of certiorari in *Maxwell-Jolly v. Independent Living Center of Southern California* (09-958), *Maxwell-Jolly v. S.R.M. Hospital* (10-283), and *Maxwell-Jolly v. California Pharmacists Association* (09-1158) were granted on January 18, 2011, and the cases consolidated for argument.

insurance companies to offer certain preventive services, and authorizes \$15 billion for a new Prevention and Public Health Fund, which will support initiatives from smoking cessation to fighting obesity.

Finally, the Act contains important consumer protections that I intend to vigorously enforce as Attorney General. In addition to barring the practice of insurance companies rescinding coverage, the Act provides consumers with a way to appeal coverage determinations or the denial of claims, and establishes an external review process to examine those decisions. In addition, California has already taken advantage of a provision that provides for grants to states to expand consumer assistance programs. California has received \$3.4 million to enhance the capacity of existing consumer assistance networks, to develop and promote a centralized consumer-friendly website and toll-free number that consumers can call with questions about health care coverage, and to receive assistance with filing complaints/and or appeal. The state has also been given a \$1 million grant to implement a provision of the Affordable Care Act that grants states the authority to review premium increases. Each of these provisions is vitally important to ensuring that insurance companies honor their commitments to consumers.

THE CONSTITUTIONALITY OF THE MINIMUM COVERAGE PROVISION

A key component of the Affordable Care Act is the minimum coverage provision. Under the Act, individuals not otherwise exempt must purchase a qualified insurance plan, or pay a penalty to the IRS. This provision is essential for two reasons. First, it ensures that individuals take responsibility for their own care rather than shifting those costs to society. In so doing, the minimum coverage provision lowers the cost of care generally. Second, it is necessary to include all segments of the population in the health insurance market so that insurance companies can eliminate caps on benefits and insure individuals with preexisting conditions. Because the minimum coverage provision clearly implements Congress's ability to regulate the sector of our economy that accounts for one-sixth of the nation's gross domestic product, it is squarely within Congress's power to regulate interstate commerce under Article I, section 8.

Under the U.S. Constitution, Congress has the power to "make all Laws which shall be necessary and proper" to "regulate Commerce . . . among the several States." Art. I, § 8. This authority includes the ability to "regulate those activities having a substantial relation to interstate commerce. . . i.e., those activities that substantially affect interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558–59 (1995). The Supreme Court has concluded that if "a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence." *Gonzalez v. Raich*, 545 U.S. 1, 17 (2005). Thus, even if individual conduct, in isolation, would be insufficiently related to interstate commerce for Congress to regulate it, if the regulation of that conduct is part of a larger regularly scheme, Congress can nevertheless regulate the individual conduct.

Every individual, at some point in their lives, needs medical care. It is an unavoidable fact, yet one that individuals who refuse to obtain health care routinely ignore, at great cost to society. Individuals who do not have health insurance often delay seeking care, such that it is more expensive to obtain treatment. For instance, providing antibiotics at an early stage of an infection may cost a few dollars, but hospitalization with pneumonia could cost thousands. Moreover, emergency rooms are required by federal law to treat patients without regard to their

most costly individuals would be in the insurance system and the least costly would be outside it. In turn, this would aggravate current problems with cost-shifting and lead to even higher premiums.” *Thomas More Law Center v. Obama*, Order Denying Plaintiff’s Motion for Injunction at p. 18. Without the minimum coverage provision, then, Congress’s other reforms of the health care market would be substantially hindered.

The minimum coverage provision is thus an essential part of Congress’s reform of the health care system and the goal of providing citizens with affordable health insurance. Just as the regulation of health care generally is undoubtedly within Congress’s commerce clause powers, so too is the minimum coverage provision within those powers. Without it, Congress’s goal of reducing health care costs will be unrealized. The uninsured will continue to pass on hidden costs to those who are insured, making it more difficult for individuals to obtain insurance who want to do so, despite Congress’s establishment of health insurance exchanges and its provision of subsidies to individuals and businesses. Invalidation of the minimum coverage provision will also render Congress’s attempts to provide insurance for those with preexisting conditions ineffectual, since individuals will be free to purchase coverage just as they fall ill without paying into it when they are healthy.

CONCLUSION

Thank you for allowing me the opportunity to express my views on the importance of the Affordable Care Act to California. I truly believe that this Act represents a smart and fiscally responsible means of providing affordable health coverage to all Californians. I look forward to the resolution of the various legal challenges to the minimum coverage provision so that we can get to the work of ensuring that all Americans have access to affordable, reliable, and effective health coverage.

Respectfully Submitted,

KAMALA D. HARRIS
Attorney General of California

STATEMENT BY AMERICAN ASSOCIATION OF RETIRED PEOPLE (AARP), WASHINGTON,
DC, FEBRUARY 2, 2011



STATEMENT FOR THE RECORD

SUBMITTED TO THE

Judiciary Committee

United States Senate

on

Constitutionality of the Affordable Care Act

February 2

AARP

601 E Street, N.W.

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Government Relations & Advocacy

Senator Durbin and Members of the Judiciary Committee:

Thank you for the opportunity to provide comments on the Affordable Care Act (ACA), a law which includes many vital provisions important to older Americans and their children and grandchildren.

Through outreach and conversations with AARP members and other Americans, as well as information reflected in public polling, we have learned that older Americans and their families - while still unclear on many aspects of the new law - support key provisions of the ACA. These include:

- Strengthening Medicare, such as by lowering drug costs for seniors in the Medicare Part D coverage gap or "doughnut hole" and adding free preventive services;
- Improving insurance coverage, such as stopping insurance companies from canceling or pricing someone out of coverage if they get sick, denying coverage based on a pre-existing condition and cracking down on discriminatory practices that allow insurers to charge exorbitant premiums simply based on a person's age;
- Making insurance more affordable, such as by providing tax breaks and establishing "exchanges" to provide greater choice and transparency for individuals and small businesses, as well as capping out-of-pocket costs for individuals and families and allowing young adults to stay on their parents' insurance policies until they are 26 years old; and
- Helping Americans better plan for their long-term services needs, including by giving them new options for receiving more cost-effective care at home.

AARP is deeply disappointed by the recent ruling by the U.S. District Court for the Northern District of Florida on the ACA and the individual requirement, which allows for important insurance market reforms that will make access to coverage a possibility for Americans who are today shut out due to their age, gender or pre-existing conditions.

In that particular court case, AARP joined with other consumer advocates in support of the law's Medicaid provisions because of our long history of working to strengthen this lifeline for millions of older Americans in need of health and long-term care, including home and community-based services. We are pleased that the court found no legal basis for the plaintiffs' Medicaid claim.

AARP appreciates that many have strongly held views on the new law. However, the ACA would provide many important protections for older Americans. As health care will continue to present many challenges, we look forward to working constructively with the 112th Congress to strengthen Medicare and improve our entire health care system.

Over 100 Legal Scholars Agree on Affordable Care Act's Constitutionality

"...there can be no serious doubt about the constitutionality of the minimum coverage provision."

"We, the undersigned, write to explain why the "minimum coverage provision" of the Affordable Care Act (ACA), which requires most Americans who can afford it to have health insurance or pay a tax, rests on sound, long-established constitutional footing. The current challenges to the constitutionality of this legislation seek to jettison nearly two centuries of settled constitutional law.

Congress's power to regulate the national healthcare market is unambiguous. Article I of the U.S. Constitution authorizes Congress to regulate interstate commerce. The national market in healthcare insurance and services, which Congress found amounts to over \$2 trillion annually and consumes more than 17% of the annual gross domestic product, is unquestionably an important component of interstate commerce. One of the Framers' primary goals was to give Congress the power to regulate matters of national economic significance because states individually could not effectively manage them on their own. The problems facing the modern healthcare system today are precisely the sort of problems beyond the reach of individual states that led the Framers to give Congress authority to regulate interstate commerce.

Opponents of healthcare reform argue that a person who does not buy health insurance is not engaging in any commercial "activity" and thus is beyond Congress's power to regulate. But this argument misapprehends the unique state of the national healthcare market. Every individual participates in the healthcare market at some point in his or her life, and individuals who self-insure rather than purchase insurance pursue a course of conduct that inevitably imposes significant costs on healthcare providers and taxpayers.

Given that the minimum coverage provision bears a close and substantial relationship to the regulation of the interstate healthcare market, Congress can require minimum coverage pursuant to the Constitution's Necessary and Proper Clause. In a landmark decision studied by every law student, the Supreme Court in 1819 explained that the Necessary and Proper clause confirmed Congress's broad authority to enact laws beyond the strict confines of its other enumerated powers: "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end" are lawful, the Court wrote. Since then, the Supreme Court has repeatedly held that Congress, in regulating the national marketplace, can reach matters that when viewed in isolation may not seem to affect interstate commerce.

In 2005, Justice Antonin Scalia explained that the necessary and proper clause gives Congress broad authority to ensure that its economic regulations work. In Justice Scalia's words, "where Congress has authority to enact a regulation of interstate commerce, it possesses every power needed to make that regulation effective." Just last term, a majority of the Supreme Court, in an opinion joined by Chief Justice John Roberts, wrote that in "determining whether the Necessary and Proper Clause grants Congress the legislative authority to enact a particular federal statute, we look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power."

The ACA's minimum coverage provision fits easily within this framework. The ACA eliminates one of the insurance industry's worst practices—denying coverage to people with preexisting conditions—but this goal cannot be achieved if potential patients refuse to pay into a plan during their healthy years and, when they eventually fall ill, drain the insurance funds contributed by others. Those who choose to forgo insurance altogether end up relying on costly emergency room care funded by the public, undermining Congress's effort to combat the spiraling costs of healthcare.

The direct relationship between the minimum coverage provision and the ACA's broad and comprehensive regulation of a multitude of economic transactions involving insurance companies, hospitals, doctors, and patients sets this apart from hypothetical laws requiring individuals, for example, to eat broccoli. To draw a

connection between a person's decision to eat broccoli and the financial stability of the national healthcare market requires one to pile inference upon inference. In contrast, the connection between individuals' method of insurance is obvious and depends upon no such attenuated reasoning.

Nothing in the Constitution's text, history, or structure suggests that, in exercising its enumerated powers, Congress is barred from imposing reasonable duties on citizens on the theory that such requirements amount to regulating "inactivity." Indeed, the Framers would be surprised by this view of Congress's powers; they enacted an individual mandate in the Second Militia Act of 1792, which required all men eligible for militia service to outfit themselves with a military style firearm, ammunition, and other equipment, even if such items had to be purchased in the marketplace. Today, individuals are still obligated by federal law to perform other actions, like serve on juries, file tax returns, and register for selective service, among other duties.

Finally, we note that Congress also has the authority to enact the minimum coverage provision under the power to levy taxes to promote the general welfare. Opponents say the provision is not a tax because the final version of the law used the descriptive term "penalty" rather than the term "tax." Yet the Supreme Court has expressly held that a law amounts to a tax for constitutional purposes if it raises revenue. As the Court explained, the only concern is a law's "practical application, not its definition or the precise form of descriptive words which may be applied to it." Moreover, Congress imposed the minimum coverage requirement only upon taxpayers, made the tax payable through individual tax returns, and charged the Internal Revenue Service with collection of the tax. For the Court to reverse the democratic judgment of Congress on the arbitrary and insubstantial basis that certain "magic words" were not used would undermine the careful separation of powers established by the Constitution.

People can disagree about the wisdom of the Affordable Care Act, but there can be no serious doubt about the constitutionality of the minimum coverage provision."

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STATEMENT BY SMALL BUSINESS MAJORITY, BRIEF AMICUS CURIAE IN SUPPORT OF
 DEFENDANT IN *State of Florida v. U.S. Department of Health and Human Services*



Executive Summary

**Brief amicus curiae of Small Business Majority, in support of defendant in
*State of Florida v. U.S. Dept. of Health and Human Services***

Small Business Majority has been and continues to be focused on one of the biggest problems facing small businesses: the skyrocketing cost of healthcare. The enactment and implementation of the Patient Protection and Affordable Care Act (ACA) is of paramount importance to Small Business Majority and the millions of small business owners for whom we advocate. Economic research released by Small Business Majority based on modeling by MIT economist Jonathan Gruber shows that without reform, \$52.1 billion in small business profits, \$834 million in wages and 178,000 small business jobs would be lost by 2018 as a direct result of skyrocketing healthcare costs.

A lawsuit that could send us back to the status quo is not in the best interest of small business owners. Small Business Majority filed an *amicus curiae* brief on Nov. 19, 2010 in the case, "State of Florida v. the U.S. Department of Health and Human Services" in Florida's Northern District Court, showing the court how the new law will help lower small businesses' healthcare costs and help boost our struggling economy. The following points summarize the arguments outlined in the brief:

- **The ACA lowers small businesses' healthcare costs.** Small businesses pay on average 18% more than large firms for the same health coverage, yet receive fewer benefits. As a result, small businesses are less likely to offer insurance to their employees, and therefore are less able to compete for the most talented workers. By reducing the cost of health insurance, the ACA will reduce small business expenses and improve productivity, thereby enhancing their ability to compete with large businesses. The ACA's requirement that all individuals must be insured increases small businesses' productivity by reducing the amount of employee time lost to serious illness or injury. Small businesses represent 99.7% of all employer firms, pay 44% of the total U.S. private payroll and have generated 64% of all new net jobs over the past 15 years. Increased small business productivity will reverberate throughout the entire U.S. economy, and the minimum coverage provision is essential to lower costs for small businesses. It is well within Congress' power under the Commerce Clause.
- **Small businesses in particular will benefit from the ACA's minimum coverage provision and its positive effect on interstate commerce.** By reducing the cost of insurance, the minimum coverage requirement will enable more small businesses to offer health benefits, increasing their competitiveness. The problem of "job lock" that occurs when employees of large companies are reluctant to leave jobs that offer coverage for jobs that don't will be decreased due to this provision. And the amount of worker downtime attributable to illness or injury will be reduced because every worker is required to carry insurance, and

small businesses will be less likely to suffer from this disproportionate lost productivity. This will close the competitiveness gap between large firms and those less able to compensate for a sick worker, and it will reduce job lock and enhance small business job creation. All of these changes will have a significant impact on interstate commerce and the economy.

- **The minimum coverage provision will substantially reduce healthcare premiums.** This requirement will reduce premiums and ensure nearly all individuals are insured, helping drastically reduce the \$43 billion in uncompensated care hospitals currently provide to uninsured patients; fewer costs will be passed on to consumers such as small businesses. Premiums for small businesses will also be lowered because insurance pools will include younger and healthier members, many of whom currently are uninsured. They will also not be able to draw benefits from a pool into which they had not paid, minimizing the “adverse selection” problem. This provision is fundamentally essential to ensuring that all of the provisions of the ACA function as intended; without it, other measures won’t be able to achieve the cost reductions necessary to bring down healthcare premiums.

The Affordable Care Act will expand choice and competition for small business owners who want to purchase insurance, and will help them do so without breaking the bank. With less money ending up in the hands of insurance companies and more of it in the pockets of small business owners and entrepreneurs, new opportunities for business growth and expanded commerce throughout the United States will emerge.

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

STATE OF FLORIDA, by and)	
through Bill McCollum, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
v.)	Case No. 3:10-cv-91-RV/EMT
)	
UNITED STATES DEPARTMENT OF)	
HEALTH AND HUMAN SERVICES,)	
<i>et al.</i> ,)	
_____)	

**BRIEF *AMICUS CURIAE* OF
SMALL BUSINESS MAJORITY FOUNDATION, INC.
IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

CORPORATE DISCLOSURE STATEMENT

Small Business Majority Foundation, Inc. ("SBMF") is a District of Columbia non-profit corporation exempt from tax as an educational organization under section 501(c)(3) of the Internal Revenue Code. SBMF does not have any parent company or any subsidiary or affiliate that has issued shares to the public.

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I. IDENTITY AND INTEREST OF AMICUS

Amicus curiae Small Business Majority Foundation, Inc. ("SBMF") is a national, nonpartisan organization, founded and run by small business owners across the United States. SBMF is a District of Columbia non-profit organization exempt from tax as an educational organization under section 501(c)(3) of the Internal Revenue Code. SBMF advocates the interests of small business owners and researches and disseminates policy proposals addressing the special interests and needs of small businesses.

Over the past few years, SBMF has been focused on the biggest single problem facing small businesses: the skyrocketing cost of health care. The enactment and successful implementation of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 199 (the "ACA"), the law that is the subject of this lawsuit, is of paramount importance to SBMF and the small business owners whose interests SBMF promotes.

This brief *amicus curiae* is filed pursuant to the Court's Order of November 12, 2010 (Doc. 101) granting SBMF's Motion for Leave to File Brief *Amicus Curiae* in Support of Defendants' Motion for Summary Judgment (Doc. 89).

II. ARGUMENT

Congress' Commerce Power is at its apex when Congress regulates "economic activity." *Gonzales v. Raich*, 545 U.S. 1; 25-26 (2005). Few laws will have a more substantial impact on interstate commerce than the Patient Protection and Affordable Care Act, Pub L. No. 111-148, 124 Stat. 119 (the "PPACA"). Congress determined that the PPACA would reverse a longstanding trend of rapidly increasing health insurance

premiums, *see* PPACA §§ 1501(a)(2)(B), 10106(a), and ensure that nearly every American is insured. *Id.* § 10106(a).

Small businesses will especially benefit from these reforms. Small businesses must pay 10–18 percent more than large firms for the same health policy, Jon Gabel, et al., *Generosity And Adjusted Premiums In Job-Based Insurance: Hawaii Is Up, Wyoming Is Down*, 25 *Health Affairs* 832, 840 (2006). In part for this reason, small businesses are far less likely to offer health benefits to their workers, and thus are less able to compete for the most talented employees. By reducing the cost of health insurance, the PPACA will not only enable small employers that currently offer health benefits to reduce this rapidly-growing expense, it will also enable more such companies to provide health benefits in the first place—thus enhancing their power to compete with larger companies. Additionally, by ensuring that nearly every worker will carry insurance, the PPACA increases small business productivity by reducing the amount of employee time lost to serious illness or injury.

The beneficial effects of the PPACA on small business will have an enormously positive effect on the U.S. economy as a whole. Small businesses represent 99.7 percent of all employer firms; pay 44 percent of the total U.S. private payroll; and have generated 64 percent of all net new jobs over the past fifteen years. U.S. Small Business Administration, *FAQ's: Frequently Asked Questions: Advocacy Small Business Statistics and Research*, available at: <http://web.sba.gov/faqs/faqindex.cfm?areaID=24>

The provisions of the PPACA requiring all individuals to carry a minimum level of insurance or pay a penalty, PPACA §1501(a)(2)(G), are an essential element of the PPACA's scheme to lower premiums and ensure near-universal coverage, benefiting

small businesses. As explained below, this minimum coverage provision is well within Congress' power under the Commerce Clause. Accordingly, this Court should uphold the minimum coverage provision.

For those reasons, Defendants' Motion for Summary Judgment, as to Count I of the Complaint, should be granted,

A. SMALL BUSINESSES WILL PARTICULARLY BENEFIT FROM THE MINIMUM COVERAGE PROVISION'S SUBSTANTIAL POSITIVE EFFECT ON INTERSTATE COMMERCE

Congress determined that administrative costs for private health insurance were \$90 billion in 2006. PPACA § 10106(a). These administrative costs are particularly difficult to bear for small businesses which lack the economies of scale that benefit larger employers. Similarly, by virtue of their small size, small employers lack the bargaining power that major employers enjoy when negotiating health insurance premiums. As a result, small employers pay an average of 10 to 18 percent more to provide the same level of health benefits as a large employer. Gabel, *supra*, at 840.

The minimum coverage provision will mitigate small business' competitive disadvantage in two ways. First, by reducing the cost of insurance, the minimum coverage provision will enable more small businesses to offer health benefits, thus increasing their ability to compete in the job market with large employers. Between 2000 and 2009, the number of firms with less than 200 employees that offer health benefits declined from 57 percent to 46 percent. Kaiser Family Foundation, *Employer Health Benefits: 2009 Annual Survey* 50 (2009) available at <http://ehbs.kff.org/>. Those small employers that do offer coverage often cannot afford to provide the same level of coverage to their employees. Forty-eight percent of small business employees have

insurance that caps the total amount of care they may receive, as compared with 37 percent of large firm employees. Michelle M. Doty, et al., *Out of Options: Why So Many Workers in Small Businesses Lack Affordable Health Insurance, and How Health Care Reform Can Help*, 67 The Commonwealth Fund, available at:

<http://www.commonwealthfund.org/Content/Publications/Issue-Briefs/2009/Sep/Out-of-Options.aspx> (Sep. 9, 2007). Similarly, small business employees are three times as

likely to have a plan with no prescription drug coverage, as compared to large firms. *Id.*

This gap between the coverage offered by large employers and the coverage offered by small firms leads to a phenomenon known as “job lock.” Employees of companies that offer insurance are reluctant to leave jobs that provide health care for jobs that do not, even if the new job could better harness that employee’s particular skills. See Brigitte C. Madrian, *Health Insurance and Job Mobility: Is There Evidence of Job-Lock?*, 109 Q. J. of Econ. 27, 43 (1994) (determining that job lock “accounts for a 25–30 percent reduction in [job] mobility”); see also Kevin T. Stroupe, et al., *Chronic Illness and Health Insurance Related-Job Lock*, 20 J. of Pol’y Analysis & Mgmt. 525, 525 (2001) (finding that workers with chronic illnesses or a family member with chronic illness are 40 percent less likely to voluntarily leave a job which provides health benefits than a similarly-situated healthy worker with a healthy family):

“Job lock” causes harm beyond trapping workers in jobs they may not want. It also keeps small employers who cannot afford to offer good health benefits to their workers from hiring the most hard working and talented staff. By reducing premiums, the minimum coverage provision will enable more small businesses to offer health

insurance to their employees, thus empowering them better to compete with large businesses for top talent.

Additionally, by requiring nearly every worker to carry insurance, the minimum coverage provision will increase small business productivity by reducing the amount of worker downtime attributable to illness or injury. As explained in Part B, *infra*, uninsured workers are far more likely to delay coverage until their condition has deteriorated significantly, not only resulting in higher medical bills, but in more days of lost work. In 2009, the U.S. economy suffered "between \$124 billion and \$248 billion in lost productivity . . . due to the almost 52 million uninsured Americans who live shorter lives and have poorer health." Peter Harbage & Ben Furnas, *The Cost of Doing Nothing on Health Care*, Center for American Progress (May 29, 2009), available at http://www.americanprogress.org/issues/2009/05/pdf/cost_doing_nothing.pdf

Indeed, according to the Institute of Medicine, "the estimated benefits across society in healthy years of life gained by providing health insurance coverage are likely greater than the additional social costs of providing coverage to those who now lack it." *Id.*

Small businesses suffer disproportionately from this lost productivity. Because of their small size, such employers lack a "reserve pool" of employees who can fill in for an absent worker while that worker is out sick or in the hospital. Mark V. Paul, et al., *A General Model of the Impact of Absenteeism on Employers and Employees*, 11 *Health Econ.* 221, 227 (2002). By achieving near-universal coverage, the minimum coverage provision will drastically reduce the tens of billions of dollars in lost productivity costs the U.S. economy suffers every year due to uninsured workers. Additionally, this provision will help to close the competitiveness gap between large employers and those

who are less able to compensate for a sick worker, reduce job lock and enhance small business job creation. It is beyond dispute that the reduction of the competitiveness gap between large and small businesses has a "substantial effect on interstate commerce." *Raich*, 545 U.S. at 17.

B. THE MINIMUM COVERAGE PROVISION SUBSTANTIALLY AFFECTS INTERSTATE COMMERCE BY REDUCING PREMIUMS AND ENSURING THAT NEARLY ALL INDIVIDUALS WILL CARRY INSURANCE

Congress determined that, absent the PPACA, national health spending would increase from \$2.5 trillion per year to \$4.7 trillion by 2019. PPACA § 1501(a)(2)(B). The PPACA, however, will eventually reduce this rate of growth by 15% to 20%. Business Roundtable, *Health Care Reform: Creating a Sustainable Health Care Marketplace 23* (Nov. 2009) available at http://www.businessroundtable.org/sites/default/files/Hewitt_BRT_Sustainable%20Health%20Care%20Marketplace_Final.pdf. In this way the PPACA will save consumers and businesses hundreds of billions of dollars in the process. The minimum coverage provision will contribute to these savings in three ways.

First, by requiring almost all individuals to carry insurance, Congress determined that the provision will drastically reduce the \$43 billion in uncompensated care hospitals currently provide to uninsured patients. PPACA § 10106(a). Under the Emergency Medical Treatment and Labor Act, 42 U.S.C. § 1395dd, most hospitals must stabilize any person who presents themselves to an emergency room, even if that person is unable to pay. Moreover, because uninsured individuals often delay care until their condition has deteriorated significantly, the costs of treating uninsured patients often exceed the costs

of treating the same condition in insured individuals. Families USA, *Health Reform: Help for Americans with Pre-Existing Conditions* 9 (2010), available at <http://www.familiesusa.org/assets/pdfs/health-reform/pre-existing-conditions.pdf>. These costs are then passed on to other consumers, burdening the average family with \$1000 a year in increased premiums. PPACA § 10106(a).

Even if the minimum coverage provision had been enacted as a standalone provision, rather than as part of a comprehensive regulatory scheme, it would reduce the number of uninsured Americans by 41%, or 21.5 million individuals. RAND Corp., *Analysis of the Patient Protection and Affordable Care Act (H.R. 3590)* 9 (2010), available at http://www.rand.org/pubs/research_briefs/2010/RAND_RB9514.pdf. “By significantly reducing the number of the uninsured, the [minimum coverage] provision, together with the other provisions of the Act, will lower health insurance premiums.” PPACA § 10106(a)

Second, the minimum coverage provision will reduce premiums by expanding insurance pools to include younger and healthier members. The purpose of health insurance is to dilute the impact of an unexpected and expensive illness by spreading the risk of the cost of such illness across a large number of individuals. *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 211 (1979). Because insurance plan participants place their premiums into a pool that any participant can draw upon if they are ill, pools made up of younger, healthier individuals tend to have lower costs than pools with older, less-healthy individuals—the healthier the average member of the pool, the lower premiums will be.

Young adults, however, “are disproportionately represented among people who lack health insurance, accounting for 30 percent of the 46 million uninsured people under age 65, even though they comprise just 17 percent of the population.” Sara R. Collins & Jennifer L. Nicholson, *Rite of Passage: Young Adults and the Affordable Care Act of 2010*, 87 *The Commonwealth Fund* (May 2010) at http://www.commonwealthfund.org/~media/Files/Publications/Issue%20Brief/2010/May/1404_Collins_rite_of_passage_2010_v3.pdf. Likewise, over 60 percent of the uninsured are in “excellent” or “very good” health. Lisa Dubay & Allison Cook, *How Will the Uninsured be Affected by Health Reform?*, (Urban Institute August 2009) available at http://www.urban.org/uploadedpdf/411950_uninsured.pdf. Accordingly, those individuals who are the most likely to contribute more in premiums to an insurance pool than they take out in benefits are also the least likely to join that pool in the first place. By requiring the overwhelming majority of these young, healthy individuals to carry insurance, the minimum coverage provision will reduce premiums by encouraging those individuals who are least likely to require expensive care to join insurance pools.

Finally, the minimum coverage provision is essential to ensuring that other provisions of the PPACA function as they are intended to function. Historically, insurance companies have prevented uninsured individuals from intentionally delaying the purchase of insurance until they become ill or injured by denying coverage to individuals with preexisting conditions. Section 1101 of the PPACA, however, forbids insurers from continuing this practice.

Congress determined that, absent a minimum coverage provision, “many individuals would wait to purchase health insurance until they needed care,” thus

allowing them to draw benefits from an insurance pool into which they had not paid. PPACA § 10106(a). Because of this “adverse selection” problem, in every single state which has required insurers to guarantee issue to all individuals—without also requiring all individuals to carry insurance—premiums have increased, in some cases to the point of unsustainability. See Jonathan Gruber, *Why We Need the Individual Mandate*, Center for American Progress, April 8, 2010, at 2, at http://www.americanprogress.org/issues/2010/04/pdf/individual_mandate.pdf; Len M. Nichols, *State Regulation: What Have We Learned So Far?*, 25 *J. of Health Politics, Pol’y & L.* 175, 189 (2000). By contrast, the Massachusetts health insurance program has been successful—lowering costs of a nongroup insurance policy by 40 percent from 2006-2009, the period during which such costs rose nationally by 14 percent—precisely because the Massachusetts system *does* include a minimum coverage provision. Jonathan Gruber, *Why we need the individual mandate*, Center for American Progress, available at: http://www.americanprogress.org/issues/2010/04/pdf/individual_mandate.pdf.

The minimum coverage provision will reduce premiums, increase insurance coverage and strengthen the viability of risk pools. All of these actions directly address significant threats to and problems with the national market for health care. Additionally, the minimum coverage provision is necessary to ensure that PPACA's ban on discrimination against individuals with preexisting conditions does not undermine the viability of the national health insurance market.

“When Congress decides that the ‘total incidence’ of a practice poses a threat to a national market, it may regulate the entire class.” *Raich*, 545 U.S. at 15 (internal citation omitted). Congress has the authority under the Commerce Clause to regulate

individual decisions and activities that form “part of an ‘economic class of activities that have a substantial effect on interstate commerce.’” *United States v. Forrest*, 429 F.3d 73, 78 (4th Cir. 2005)(quoting *Raich*, 545 U.S. at 16). The purchase of health insurance clearly meets that test. For these reasons, the minimum coverage provision of the PPACA is well within Congress’ power under the Commerce Clause.

III. CONCLUSION

For the reasons set forth above, Defendants’ Motion for Summary Judgment, as to Count I of the Complaint, should be granted.

Respectfully submitted,

Dated: November 19, 2010

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of November, 2010, the foregoing document was filed with the Clerk of court via the CM/ECF system, causing it to be served on counsel of record for all parties.

/s/ Joseph E. Sandler

Joseph E. Sandler
Counsel for *Amicus Curiae*
Small Business Majority Foundation

LETTER TO SENATORS LEAHY, SESSIONS, AND DURBIN FROM ELIZABETH WYDRA,
CHIEF COUNSEL, AND DOUGLAS KENDALL, PRESIDENT, CONSTITUTIONAL ACCOUNT-
ABILITY CENTER, FEBRUARY 1, 2011



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February 1, 2011

Senator Patrick Leahy
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

Senator Jeff Sessions
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

Senator Richard Durbin
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Leahy, Ranking Member Sessions, and Senator Durbin:

To assist the Committee in its consideration of the issues presented in its hearing on "The Constitutionality of the Affordable Care Act," we write to express our view that the Constitution's text and history clearly support the constitutionality of the Affordable Care Act. In recent legal rulings and other public statements, there have been many misuses and misinterpretations of the Constitution, most notably regarding the Constitution's grant of power to Congress to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."¹ Constitutional Accountability Center has written extensively on the constitutional basis for the Act² and also represents a bipartisan group of state legislators from across the country in *Florida, et al. v. U.S. Dep't of Health & Human Services et al.*³

¹ U.S. CONST. art. I, § 8.

² See, e.g., Elizabeth B. Wydra, "The States, Health Care Reform and the Constitution," available at http://www.theconstitution.org/upload/fck/file/File_storage/The%20States%20Health%20Care%20Reform%20and%20the%20Constitution%281%29.pdf?phpMyAdmin=TzXZ9IzqiNsbGaj5tqLH06F5Bxe; Elizabeth B. Wydra, "Strange Brew: The Tea Party's Errant Constitutional Attacks on Health Care Reform," available at <http://theconstitution.org/blog/history/?p=1829>; Iowa Sen. Jack Hatch & Elizabeth B. Wydra, "Dismiss the Florida Lawsuit: Health Care Reform Law Preserves Constitutional Federalism," available at http://www.huffingtonpost.com/elizabeth-b-wydra/dismiss-the-florida-lawsu_b_614846.html.

³ The brief CAC filed on behalf of this group of legislators may be found at <http://www.theconstitution.org/blog/history/wp-content/uploads/2010/11/State-Legislators-Amicus-Brief.pdf>.

I. Federal Power Under the Constitution's Text and History

Our Constitution creates a vibrant system of federalism that gives broad power to the federal government to act in circumstances in which a national approach is necessary or preferable, while reserving a significant role for the States to craft innovative policy solutions reflecting the diversity of America's people, places, and ideas.

While some have portrayed the Constitution as a document that is all about limiting government, the historical context shows that the Founders were just as, if not more, concerned with creating an empowered, effective national government. By the time our Founders took up the task of drafting the Constitution in 1787, they had lived for a decade under the dysfunctional Articles of Confederation—which created such an ineffectual central government that, according to George Washington,⁴ it nearly cost the Americans victory in the Revolutionary War—and were focused on creating a new, better form of government with a sufficiently strong federal power.⁵

Specifically, the delegates to the Constitutional Convention instructed the Committee of Detail, which drafted the enumerated powers of Congress in Article I, that Congress should have authority to “legislate in all Cases for the general Interests of the Union, and also in those Cases to which the States are separately incompetent, or in which the harmony of the United States may be interrupted by the Exercise of individual Legislation.”⁶ Article I thus expressly grants Congress the power to, among other things, regulate interstate commerce and tax and spend to “provide for the general Welfare of the United States.”

The Commerce Clause

Some of the challenges to the Affordable Care Act have proffered an overly narrow view of what the Framers of our Constitution meant when they gave Congress power to regulate “Commerce.” While it is certainly true that this power relates to economic interactions and trade, “commerce” also had in 1787, and retains even now, a broader meaning referring to all

⁴ Letter from George Washington to John Hancock, June 11, 1783, available at <http://gwpapers.virginia.edu/documents/constitution/1784/hancock.html>. The Articles of Confederation, adopted by the Second Continental Congress in 1777 and ratified in 1781, established a confederacy built merely on a “firm league of friendship” between thirteen independent states. There was only a single branch of national government, the Congress, which was made up of state delegations. Congress under the Articles of Confederation had some powers, but was given no means to execute those powers. Congress could not directly tax individuals or legislate upon them; it had no express power to make law that would be binding in the states’ courts and no general power to establish national courts, and it could raise money only by making requests to the states.

⁵ Indeed, it is indicative of the shift from revolution to statecraft that the Constitution’s first Article gives Congress the power to impose a broad range of “Taxes, Duties, Imposts and Excises.” U.S. CONST. ART. I, § 8, cl. 1. “Thus, only a decade after they revolted against imperial taxes, Americans were being asked to authorize a sweeping regime of continental taxes, with the decisive difference that these new taxes would be decided on by public servants chosen by the American people themselves—taxation *with* representation.” AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 107 (2005). Suggestions that the legitimate complaints of the “Boston Tea Party” in 1775 animated the Founders during the Constitutional Convention in 1787 are thus deeply flawed. *E.g.*, *Florida et al. v. U.S. Dep’t of Health & Human Servs., et al.*, No. 3:10-cv-00091-RV, Order Granting Summary Judgment, Jan. 31, 2011.

⁶ AMAR, *supra* note 5, at 108 (citing 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand, ed., rev. ed. 1966)). See Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 8-12 (2010).

forms of intercourse in the affairs of life, whether or not narrowly economic or mediated by explicit markets.⁷ This broader meaning of commerce is clear when reading the full text of the Clause: “Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”⁸ Only if “commerce” is given a broad meaning does the Commerce Clause effectuate the Framers’ direction that Congress should have authority to “legislate in all Cases for the general Interests of the Union, and also in those Cases to which the States are separately incompetent, or in which the harmony of the United States may be interrupted by the Exercise of individual Legislation.”⁹ If commerce were limited merely to active trade of goods, Congress would not be able to, for example, regulate navigation to and from foreign nations, as Chief Justice John Marshall noted in *Gibbons v. Ogden*.¹⁰ As Chief Justice Marshall explained, “Commerce, undoubtedly is traffic, but it is something more: it is intercourse.”¹¹

While the meaning of commerce in the Constitution was intended to be broad, the text of the Commerce Clause places significant limits on federal regulation: Congress can only act if a given problem genuinely spills across state or national lines. As Chief Justice Marshall explained in *Gibbons*, the Commerce Clause uses the word “among” to mean “intermingled with” and that “commerce among the several states” means “commerce which concerns more States than one.”¹² If commerce within a single state has external effects on other states or on the Nation as a whole then it falls under Congress’s constitutional regulatory authority; if commerce is “completely internal” to a state, then Congress has no power to regulate.¹³

The Necessary and Proper Clause

The congressional powers written into the Constitution by the Founders are even stronger when coupled with Article I, section 8’s sweeping grant of authority to Congress to make laws that are “necessary and proper” for carrying out the other powers granted by the Constitution. As conservative scholar Orin Kerr phrased it, “[t]he point of the Necessary and Proper Clause is that it grants Congress the power to use *means* outside the enumerated list of Article I powers to achieve the *ends* listed in Article I.”¹⁴

Chief Justice John Marshall explained in *McCulloch v. Maryland*¹⁵ that Congress should be shown significant deference regarding what laws it considers to be appropriate in carrying out its constitutional duties. Just last Term, the Supreme Court affirmed that so long as Congress does not run afoul of any other constitutional provision, the Necessary and Proper Clause affords Congress the power to use any “means that is rationally related to the implementation of a constitutionally enumerated power.”¹⁶ “[T]he Necessary and Proper Clause makes clear that the

⁷ AMAR, *supra* note 5, at 107.

⁸ U.S. CONST. art. I, § 8.

⁹ See AMAR, *supra* note 5, at 108 (citing FARRAND’S RECORDS 2:131-32); Balkin, *supra* note 6, at 8-9.

¹⁰ 22 U.S. (9 Wheat.) 1, 194 (1824).

¹¹ *Id.*

¹² *Id.* at 194-95.

¹³ Balkin, *supra* note 6, at 30 (quoting *Gibbons*, 22 U.S. at 195).

¹⁴ Orin Kerr, “The Significant Error in Judge Hudson’s Opinion” (emphasis in original), available at <http://volokh.com/2010/12/13/the-significant-error-in-judge-hudsons-opinion/>.

¹⁵ 17 U.S. 316 (1819).

¹⁶ *United States v. Comstock*, 130 S. Ct. 1949, 1956-57 (2010).

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.'¹⁷

To be sure, the powers of the federal government under our Constitution are not unlimited—as the Tenth Amendment affirms, the Constitution establishes a central government of enumerated powers, and the States play a vital role in our federalist system—but the powers our charter *does* grant to the federal government are broad and substantial. And, since the Founding, the American people have amended the Constitution to ensure that Congress has all the tools it needs to address national problems and protect the constitutional rights of all Americans. Critics of the Affordable Care Act who begin with the premise that the Constitution establishes a weak, severely limited federal government are thus wrong from the start.

II. Congress's Power to Enact the Affordable Care Act Pursuant to Its Authority to Regulate Commerce and Enact Laws "Necessary and Proper" to Executing That Power

Congress's authority to pass legislation to fix problems in the health care industry is firmly rooted in the Constitution, in particular through the provisions in Article I, section 8 authorizing Congress to regulate interstate commerce and to enact laws that are necessary and proper to exercise its other powers.¹⁸

Since the health care industry comprises nearly 20 percent of the U.S. economy, no one can seriously dispute that Congress has the authority to regulate health care and the health insurance industries under its Commerce Clause power. Most critics therefore aim more narrowly at whether Congress has the power to require individuals who can afford it to purchase health insurance or pay a tax penalty if they refuse to do so.

As a threshold matter, those critics who claim that not doing anything—that is, choosing to remain uninsured—cannot be considered an economic act are incorrect. The decision not to buy health insurance is a profoundly economic act; the people who make it are making an economic choice to self-insure. That economic choice has significant financial consequences for everyone else. Because our country has decided that no one will be refused emergency care who needs it, regardless of ability to pay,¹⁹ the uninsured can rely on receiving health care when they truly need it. When the uninsured fall seriously ill or get into an accident, they go to the emergency room, where they run up medical bills they often cannot afford to pay without insurance. But someone pays: the American people, who not only foot those bills as taxpayers but also end up paying higher premiums of their own because the uninsured have opted out of the national risk pool. In short, the national economic consequences of individuals deciding to go without insurance are substantial.

The Act contains an individual responsibility provision for a very basic reason: if you don't require people who can afford it to get insurance, they impose costs on taxpayers,

¹⁷ *Id.* at 1956 (quoting *McCulloch v. Maryland*, 17 U.S. at 316, 413, 418).

¹⁸ This letter focuses on the Commerce Clause and the Necessary and Proper Clause; it does not address other potential sources of constitutional power to enact the Affordable Care Act.

¹⁹ Emergency Medical Treatment and Active Labor Act, 42 U.S.C. § 1395dd.

hospitals, and local, state and federal governments. According to statistics compiled by Families USA, in 2005, 48 million Americans were uninsured and they incurred \$43 billion in medical costs that they could not pay, an average of nearly \$900 per uninsured individual.²⁰ Such a cost figure makes clear that the individual responsibility provision falls squarely within Congress's authority under the Constitution to regulate commerce, including actions—such as the decision not to buy health insurance—that substantially affect interstate commerce.

Even if the choice not to buy insurance could be seen as a non-economic activity, Congress still has the power under the Commerce Clause to require the individual responsibility provision. As the Supreme Court has held, Congress can regulate non-economic activity that has a substantial effect on interstate commerce. For example, in the 2005 case of *Gonzales v. Raich*,²¹ the Supreme Court ruled that Congress, as part of its regulation of interstate commerce in illegal drugs, could prohibit a person from growing marijuana in her own backyard for personal, medicinal use (in a State where doing so was legal under local law). Certainly if backyard, medicinal marijuana cultivation for personal use falls under Congress's Commerce Clause power, Congress can regulate the decision to be uninsured.

In addition, the individual responsibility provision is a quintessential example of a law that is "necessary and proper for carrying into execution"²² Congress's other constitutional powers, such as the power to regulate commerce among the several States. The Affordable Care Act is designed to make health care coverage affordable to all Americans and to prohibit certain insurance practices, such as denying coverage to individuals with pre-existing conditions. Among many other reasons, if Americans can go uninsured until they get sick and then impose these costs on those who already have health insurance policies, the ban on pre-existing conditions will be prohibitively expensive and the cost of insurance will increase across the board.

Finally, requiring individuals to obtain or purchase particular items is not as unprecedented as some critics claim. As Professor Adam Winkler has explained,²³ just five years after the Constitution was drafted, in the second 1792 Militia Act,²⁴ Congress required male citizens to obtain certain weapons and other items, such as a "knapsack," ammunition, and, in some cases, "a serviceable horse." This was a necessary and proper regulation to effectuate Congress's power to raise armies.²⁵ In the case of health care, the individual responsibility provision's requirement to obtain health insurance if one can afford it is a necessary and proper regulation effectuating Congress's power to regulate interstate commerce in health care.

In sum, Congress determined that the individual responsibility provision was the appropriate means of regulating the health care and insurance markets. Since the Act does not run afoul of any other constitutional provision—there is no constitutional right to inflict uninsured health care costs on the American taxpayers—health care reform falls squarely within

²⁰ See generally Pub. L. No. 111-148, §§ 1501(a)(2)(F), 10106(a).

²¹ 545 U.S. 1 (2005).

²² U.S. CONST. art. I, § 8.

²³ Adam Winkler, "The Founders' 'Individual Mandate,'" available at http://www.huffingtonpost.com/adam-winkler/the-founding-fathers-indi_b_523001.html.

²⁴ Text available at http://www.constitution.org/mil/mil_act_1792.htm.

²⁵ U.S. CONST. art. I, § 8 (granting Congress power to "raise and support armies").

Congress's power to regulate commerce and enact necessary and proper legislation to carry out this power.

III. Principles of Federalism and the Affordable Care Act

States historically have been leaders in policy innovations that better protect their citizens, resources, and environment.²⁶ The States have a long history of leadership on health care reform—indeed, the Affordable Care Act incorporated the valuable lessons learned from the experience of health care reform practices by our State and local governments, and preserves the role of the States as laboratories of democracy by giving States considerable policy flexibility.

For example, States have the discretion to form their own insurance exchange or join with other States to form a regional exchange.²⁷ A State may also choose not to operate an exchange at all, in which case the federal government will administer a statewide insurance exchange for the benefit of the State's citizens.²⁸ While States must provide the opportunity to buy four levels of health care plans on the exchange—platinum, gold, silver, and bronze plans, at declining expense—they have significant discretion with respect to other aspects of the plans.²⁹ States can also set up their own programs—with or without an individual responsibility provision, or with a public option—under what has been called the Empowering States to Be Innovative provision.³⁰ States can obtain a waiver from the federal government if they set up a system that meets the coverage and cost containment requirements in the Act.³¹ This allows for the diversity and innovation that is the hallmark of the States.³²

Nonetheless, some critics of health care reform, such as the plaintiffs who have initiated a legal challenge to the Act in Florida, have claimed that the Act infringes on the sovereignty of the states because it expands the Medicaid program to include all non-elderly individuals with incomes up to 133 percent of the poverty line, or about \$29,000 for a family of four. This is legally frivolous for the simple reason that States are entirely free to rid themselves of any burdens imposed by the Act by withdrawing from the federal Medicaid program. States cannot be “coerced” into doing anything with respect to Medicaid—Medicaid is a wholly voluntary federal-State partnership, which the States could opt out of if their leaders and citizens so desired, avoiding the Act's new requirements for expanded Medicaid coverage.

The Supreme Court has made clear that the Constitution allows the federal government to structure or condition federal funds and programs in a certain way, allowing States to choose whether to participate and accept those conditions, or not.³³ It is well-established that “Congress

²⁶ See Exec. Order on Federalism No. 13132, 64 Fed. Reg. 43255, § 2(c) (Aug. 4, 1999) (“States possess unique authorities, qualities, and abilities to meet the needs of the people and should function as laboratories of democracy.”)

²⁷ See ACA § 1321, 42 U.S.C. 18041.

²⁸ *Id.* at § 1321(c).

²⁹ See ACA § 1331, 42 U.S.C. 18051.

³⁰ ACA § 1332, 42 U.S.C. 18052.

³¹ *Id.*

³² See generally *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (observing that, under our federalism, “a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country”).

³³ *South Dakota v. Dole*, 483 U.S. 203, 206 (1987).

may attach conditions on the receipt of federal funds."³⁴ If the State finds the conditions too onerous, it may simply refuse the federal funds.³⁵

Similarly, the wholly voluntary nature of Medicaid for the States dooms any federalism-based arguments that the Medicaid expansion in the Affordable Care Act somehow "compel[s] the States to enact or administer a federal regulatory program."³⁶ Because the States can opt out of Medicaid altogether, it is impossible for them to be unconstitutionally compelled to enact or administer the Medicaid expansion required by the Act. The Supreme Court has expressly held that Congress may constitutionally "hold out incentives to the states as a method of influencing a state's policy choices."³⁷

Congress established Medicaid in Title XIX of the Social Security Act of 1965; the States then had the option whether to jointly fund the program with the federal government, or not. With the Affordable Care Act, Congress expanded Medicaid to help reduce the number of uninsured people by 32 million in the next ten years; States can again determine whether to continue working with the federal government in the Medicaid partnership, or not.

The Affordable Care Act is appropriately respectful of constitutional principles of vibrant federalism.

* * *

Despite claims by certain critics of the Affordable Care Act that the federal government is sharply limited by the Constitution and too weak to act in crucial areas of policy, such as health care reform, the text and history of the Constitution show otherwise. From the broad and substantial powers granted to Congress in the 1787 Constitution, to the sweeping enforcement powers added to the Constitution through the amendment process in the last two centuries, our Constitution establishes a federal government that is strong enough to act when the national interest requires a national solution.

Congress has the power to regulate the nearly 20 percent of the U.S. economy that is the health care industry, and, when faced with a national health care crisis where millions are uninsured and can't afford decent health care, is empowered to act to reform the health care industry. The Affordable Care Act's individual responsibility provision fits within Congress's Commerce Clause power and is also a necessary and proper means of effectuating Congress's commercial regulation of the health care industry. Far from offending constitutional principles of federalism, the Act reflects how the federal and state governments can work together to protect their citizens and resources.

³⁴ *Id.*

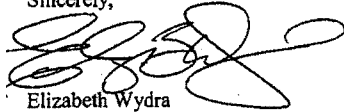
³⁵ See *Oklahoma v. United States Civil Service Comm'n*, 330 U.S. 127 (1947) (upholding the Hatch Act, which required that any employee of a state highway commission [financed in whole or part with federal funds] must be removed from office if he/she was found to be engaging in political activities, because the federal government may attach conditions to disbursement of funds, and because the employee and the State have the right to refuse funds).

³⁶ *Printz v. United States*, 521 U.S. 898, 926 (1997); *New York v. United States*, 505 U.S. 144, 188 (1992).

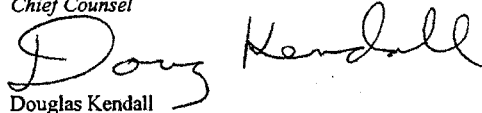
³⁷ *Id.* at 166; see also *id.* at 167 ("Where the recipient of federal funds is a State, as is not unusual today, the conditions attached to the funds by Congress may influence a State's legislative choices.")

We thank the Committee for providing a forum to discuss these significant issues, which are of great consequence to every American and particularly to those of us who work to secure the promise and premise of the Constitution.

Sincerely,



Elizabeth Wydra
Chief Counsel



Douglas Kendall
President
CONSTITUTIONAL ACCOUNTABILITY CENTER

cc: Members of the Senate Judiciary Committee

NATIONAL SENIOR CITIZENS LAW CENTER, WASHINGTON, DC, FEBRUARY 2, 2011
LETTER



PROTECTING THE RIGHTS OF LOW-INCOME OLDER ADULTS

Written Statement of the National Senior Citizens Law Center
Submitted to the United States Senate

For February 2, 2011 Hearing on
"The Constitutionality of the Affordable Care Act"

Chairman Durbin, Ranking Member Sessions, and Members of the Committee:

Below please find an excerpt from the amicus brief submitted in the Court of Appeals for the Sixth Circuit in the case of Thomas More Law Center, et al. v. Obama, et al., on behalf of the American Association of People with Disabilities, the ARC of the United States, Breast Cancer Action, Families USA, Friends of Cancer Research, March of Dimes Foundation, Mental Health America, National Breast Cancer Coalition, National Organization for Rare Disorders, National Partnership for Women and Families, National Senior Citizens Law Center, National Women's Health Network, National Women's Law Center, and the Ovarian Cancer National Alliance.

Empirical evidence and analysis demonstrate that Congress correctly concluded that a minimum coverage provision "is essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold." Patient Protection and Affordable Care Act ("ACA"), Pub L. No. 111-148, 124 Stat. 119 § 1501(a)(2)(G) (2010). In particular, the evidence presented here shows that every single state that required insurers to cover pre-existing conditions without also enacting a minimum coverage provision had disastrous results.

Recent experience with the early implementation of ACA indicates similar results in the national market when a pre-existing conditions provision is not accompanied by a minimum coverage provision. In September 2010, a nationwide pre-existing conditions provision for children went into effect under the ACA. Pub L. No. 111-148 § 10103(e). Immediately thereafter, several large insurance companies stopped offering new child-only insurance policies. A.C. Aizenman, *Major Health Insurers to Stop Offering New Child-Only Policies*, Washington Post, (Sept. 20, 2010). A health insurance industry



spokesperson explained that “[w]ith no ... mandate currently in place, ... the result over the next several years [until 2014, when the minimum coverage provisions takes effect] could be that the pool of children insured by child-only plans would rapidly skew toward those with expensive medical bills, either bankrupting the plans or forcing insurers to make up their losses by substantially increasing premiums for all customers.” *Id.*

Based on this experience of the states as well as the early implementation of ACA, it is totally foreseeable that the pre-existing conditions exclusion will not succeed without the minimum coverage provision. Thus, it is predicted that premiums in 2019 are likely to rise 27% without the minimum coverage provision. Jonathan Gruber, “Health Care Reform is a ‘Three-Legged Stool,’” (2010).¹

An unbroken pattern shows that pre-existing conditions provisions, absent a minimum coverage provision, are a failed experiment. At best, they result in premium increases. At worst, they cause the total collapse of a state’s individual insurance market.

Where seven states failed, the state of Massachusetts succeeded by implementing reforms similar to the ACA. *See* Jonathan Gruber, Massachusetts Institute of Technology, The Senate Bill Lowers Non-Group Premiums: Updated for New CBO Estimates 1 (2009) (“Senate Bill Lowers”). Indeed, Congress cited Massachusetts’ health reform as a model for the ACA. Pub L. No. 111-148 § 10106(a).

In mid-2006, Massachusetts Governor Mitt Romney signed a health reform bill which included a minimum coverage provision. Mass. Gen. Laws ch. 111M, § 1-5. Massachusetts law already had a pre-existing conditions provision. Mass. Gen. Laws ch. 176M, § 3(a). The results were both striking and immediate. Although nationwide individual premiums increased an average of 14 percent over the next few years, —the average individual premium in [Massachusetts] fell from \$8537 at the end of 2006 to \$5143 in mid-2009, a 40% reduction while the rest of the nation was seeing a 14% increase. Jonathan Gruber, Massachusetts Institute of Technology, The Senate Bill

¹ http://www.americanprogress.org/issues/2010/08/pdf/repealing_reform.pdf.



Lowers Non-Group Premiums: Updated for New CBO Estimates 1 (2009) (emphasis in original).

The lesson of Massachusetts and the other seven states is clear. A preexisting conditions provision must have an accompanying minimum coverage provision to be successful. Because a minimum coverage provision is essential to enacting the ACA's pre-existing conditions provision, it falls squarely within Congress' authority under the Commerce and Necessary and Proper Clauses. Congress does not simply have the power to regulate interstate commerce, "it possesses every power needed to make that regulation effective." *Gonzales v. Raich*, 545 U.S. 1, 36 (2005) (Scalia, J., concurring in the judgment) (quoting *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 118-19 (1942)).

Individuals who do not carry insurance are nonetheless participants in the health care market and, collectively, shift billions of dollars of costs onto third parties. Cong. Budget Office, *Key Issues in Analyzing Major Health Proposals* 114 (2008).² The minimum coverage provision addresses this cost-shifting and forms an essential part of the ACA's broader reforms. In particular, one of the most problematic of the insurance industry practices targeted by the ACA – the exclusion from coverage of persons with pre-existing medical conditions – depends upon a minimum coverage provision.

Rochelle Bobroff
Simon Lazarus
Federal Rights Project
National Senior Citizens Law Center

² http://www.cbo.gov/ftpdocs/99xx/doc9924/12-18-Key_Issues.pdf.

Center for American Progress Action Fund



Statement of the Center for American Progress Action Fund
For the Senate Committee on the Judiciary hearing
“The Constitutionality of the Affordable Care Act”

February 2, 2011

Nearly three dozen judges have now considered challenges to the landmark Affordable Care Act and the overwhelming majority of these cases have been dismissed. Nevertheless, two outlier judges have embraced meritless arguments against the new health care law.

With only a few exceptions, these lawsuits principally challenge the Affordable Care Act’s minimum coverage provision—the provision requiring most Americans to either carry health insurance or pay slightly more income taxes—falsely arguing that Congress lacks the constitutional authority to enact such a provision. It is true that Congress’s authority is limited to an itemized list of powers contained in the text of the Constitution itself, but while Congress’s powers are not unlimited, they are still quite broad. There is no doubt that the Affordable Care Act fits within these enumerated powers.

.....
Congress has broad power to regulate the national economy

A provision of the Constitution known as the “commerce clause” gives Congress power to “regulate commerce...among the several states.” And there is a long line of Supreme Court decisions holding that Congress has broad power to enact laws that substantially affect prices, marketplaces, or other economic transactions. Because health care comprises approximately 17 percent of the national economy, it is impossible to argue that a bill regulating the national health care market does not fit within Congress’s power to regulate commerce.

Nevertheless, opponents of the Affordable Care Act claim that a person who does not buy health insurance is not engaged in any economic “activity” and therefore cannot be compelled to perform an undesired act. Even if these opponents were correct that the uninsured are not active participants in the health care market—and they are active, of course, every time they become ill and seek medical care—nothing in the Constitution supports this novel theory. Indeed, this theory appears to have been invented solely for the purpose of this litigation.

Congress has enacted countless laws that would be forbidden under this extra-constitutional theory, including a 1792 law that required much of the country to purchase a firearm, ammunition, and other equipment; a landmark Civil Rights Act compelling business owners to engage in transactions they considered undesirable—hiring and otherwise doing business with African Americans; and other mandates requiring individuals to perform jury service, file tax returns, and register for selective service.

The minimum coverage provision is the keystone that holds the Affordable Care Act together

The Constitution also gives Congress the power “[t]o make all laws which shall be necessary and proper for carrying into execution” its power to regulate interstate commerce. As Supreme Court Justice Antonin Scalia explains, this means that “where Congress has the authority to enact a regulation of interstate commerce, it possesses every power needed to make that regulation effective.”

The act eliminates one of the insurance industry’s most abusive practices—denying coverage to patients with pre-existing conditions. This ban cannot function if patients are free to enter and exit the insurance market at will. If patients can wait until they get sick to buy insurance, they will drain all the money out of an insurance plan that they have not previously paid into, leaving nothing left for the rest of the plan’s consumers.

Seven states enacted a pre-existing conditions law without also passing an insurance coverage requirement, and all seven states saw health insurance premiums spiral out of control. In some of these states, the individual insurance market collapsed. There is a way out of this trap, however. Massachusetts enacted a minimum coverage provision in 2006 to go along with its pre-existing conditions provision and the results were both striking and immediate. Massachusetts’ premiums rapidly dropped by 40 percent.

Because the only way to make the pre-existing conditions law effective is to also require individuals to carry insurance, that requirement easily passes Scalia’s test.

The link between the minimum coverage provision and the Affordable Care Act’s insurance regulations also sets this law aside from other hypothetical laws requiring individuals to purchase other goods or services. The national market for vegetables will not collapse if Congress does not require people to purchase broccoli, nor will Americans cease to be able to obtain automobiles absent a law requiring the purchase of cars from General Motors. Accordingly, a court decision upholding the Affordable Care Act would not provide a precedent enabling Congress to compel all Americans to purchase broccoli or cars, despite the law’s opponents’ claims to the contrary.

Congress has broad leeway in how it raises money

Congress also has the authority to “lay and collect taxes” under the Constitution. This power to tax also supports the minimum coverage provision, which works by requiring individuals who do not carry health insurance to pay slightly more income taxes. Taxpayers who refuse insurance must pay more in taxes while those who do carry insurance are exempt from this new tax. For this reason, the law is no different than dozens of longstanding tax exemptions, including the mortgage interest tax deduction, which allows people who take out home mortgages to pay lower taxes than people who do not.

Opponents of the Affordable Care Act respond that the minimum coverage provision somehow ceases to be a tax because the new law does not use the word “tax” to describe it, but this distinction is utterly meaningless. Nothing in the Constitution requires Congress to use certain magic words to invoke its enumerated powers. And no precedent exists suggesting that a fully valid law somehow ceases to be constitutional because Congress gave it the wrong name.

“THE HEALTH CARE LAWSUITS: UNRAVELING A CENTURY OF CONSTITUTIONAL LAW AND THE FABRIC OF MODERN AMERICAN GOVERNMENT,” BY SIMON LAZARUS, FEBRUARY 8, 2011, ISSUE BRIEF



**The Health Care Lawsuits:
Unraveling A Century of Constitutional Law
and The Fabric of Modern American Government**

Simon Lazarus

February 8, 2011

All expressions of opinion are those of the author or authors.
The American Constitution Society (ACS) takes no position on specific legal or policy initiatives.

**The Health Care Lawsuits:
Unraveling A Century of Constitutional Law
and The Fabric of Modern American Government**

Simon Lazarus*

Introduction and Summary

Nearly a year after President Obama signed the Affordable Care Act (ACA) into law, battles over its constitutionality flare in over twenty separate lawsuits and countless media and political arenas. As Congress was drafting the law, when opponents first broached the prospect of constitutional challenges, experts across a broad ideological spectrum derided the constitutional case against the legislation as, in the words of Harvard's Charles Fried, Solicitor General to President Ronald Reagan, "preposterous." Thus far, most of the cases have indeed been dismissed, and two of the federal district courts that have reached the merits have upheld the principal target of the challenges – the requirement that most Americans who can afford it carry health insurance, the so-called "individual mandate" or "individual responsibility provision." However, two district courts have struck the mandate down. In addition to the widespread attack on the individual responsibility provision, 26 Republican state officials have made a claim in the Western District of Florida challenging the ACA's expansion of Medicaid. The district judge hearing that case ruled the claim inconsistent with applicable precedents, but suggested that those precedents might merit reconsideration. Ultimately, these issues will be resolved, perhaps two years or so hence, by the Supreme Court. Key members of the Court's conservative bloc have written or joined opinions that would be hard to square with disapproval of the mandate or other ACA provisions under challenge. But this is a Court with a track record in politically or ideologically charged cases of giving precedent short shrift and splitting 5-4 along partisan lines, so precedent may not be prologue in this case.

This issue brief will consider what, beyond the specifically targeted ACA provisions, is at stake in these cases. The brief will not focus on detailing the by now familiar standard arguments for and against the validity of the challenged provisions. Instead, the brief assesses the broader potential impact of the claims at issue in the suits. What are the implications of the theories behind them? If a Supreme Court majority were to embrace those claims, what would the new constitutional landscape look like? Will basic underpinnings of established constitutional law and governmental practice shift? If so, how, and how much? Apart from the ACA, what other important statutes and areas of policy could expect potential collateral damage from follow-on challenges?

In summary, the brief concludes:

- The pending health care reform challenges constitute a bold bid for historic, sweeping constitutional change. If successful, the challenges would be a major step toward resuscitating a web of tight constitutional constraints on congressional

* Public Policy Counsel, National Senior Citizens Law Center. An earlier issue brief, *Mandatory Health Insurance: Is it Constitutional?*, was published by the American Constitution Society in December 2009 and can be found at <http://www.acslaw.org/files/Lazarus%20Issue%20Brief%20Final.pdf>.

authority that conservative Supreme Court majorities repeatedly invoked during the first third of the 20th century to strike down economic regulatory laws. In the late 1930s and thereafter, the Supreme Court jettisoned this conservative activist jurisprudence, replacing it with constitutional interpretations supporting Progressive Era, New Deal, Great Society, and kindred reforms.

- The legal theories behind the health care lawsuits take dead aim at three bedrock understandings that inform the vision of a democratically governed, economically robust nation first reflected in Chief Justice John Marshall's early nineteenth century seminal interpretations of federal economic policy-making authority, and reaffirmed in all Supreme Court decisions since the New Deal era. These understandings are:
 1. The federal government exists and is empowered to address objectives that states acting individually lack, in the words of the Framers, the "competence" to handle on their own.¹ In very recent times, the same understanding has been articulated by the late Chief Justice William H. Rehnquist as the difference between matters that are "truly national" and those that are "truly local."² As Justice Anthony Kennedy expressed the principle: "Congress can regulate on the assumption that we have a single market and a unified purpose to build a stable national economy."³
 2. To tackle those "truly national" problems, the federal government has the flexibility to pick solutions that are the most "competent" in practice. In the words of Justice Antonin Scalia, the national government "possesses every power needed to make [its solution] effective."⁴
 3. The democratic branches, not the judiciary, have the principal constitutional writ to shape economic policy, and, accordingly, the courts are to defer to Congress and give it the running room necessary to target objectives and craft effective solutions. In other words, economic

¹ The Framers repeatedly used "competence," and its antonym "incompetence," to distinguish federal from state constitutional authority, not to mean "ability" or "ineptness," but rather jurisdictional "capacity" or "scope." See Jack Balkin, *Commerce*, 109 MICH. L. REV. 1, 8-13 (2010).; Akhil Amar, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 107-08 (2005). The principles driving the drafting of Congress' legislative authority were a widely shared consensus among the delegates to the Constitutional Convention that the "National Legislature ought to be impowered . . . to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted [by state legislation], . . . or in all cases for the general interests of the union." Jack N. Rakove, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 177-78* (1997). These and original sources on which they draw are concisely marshaled in written testimony of Elizabeth Wydra and Douglas Kendall of the Constitutional Accountability Center submitted to the Senate Judiciary Committee on February 1, 2011, and by Elizabeth Wydra and David Gans, in *Setting The Record Straight: The Tea Party and the Constitutional Powers of the Federal Government* (July 16, 2010). Both the latter two documents are available on the site of the Constitutional Accountability Center, <http://theconstitution.org/>.

² *United States v. Lopez*, 514 U.S. 549, 567-68.

³ *Id.* at 574 (Kennedy J., concurring) (1995).

⁴ *Gonzales v. Raich*, 545 U.S. 1, 36 (2005) (Scalia, J. concurring) (quoting *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 118-19 (1942)).

“regulatory legislation . . . is not to be pronounced unconstitutional unless . . . it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators,” or where the legislation violates individual rights that are “fundamental” or expressly protected by particular constitutional provisions.⁵

The individual responsibility provision, as well as other targeted ACA features, cannot be overturned without violating these basic understandings and the specific doctrinal rules and principles implementing them. In turn, such a decision will call into question the constitutional bases for, and hence could trigger copycat challenges to, provisions of other landmark laws and programs, including safety net programs such as Medicare, Medicaid, Social Security, and CHIP (the Children’s Health Insurance Program); civil rights law guarantees against private discrimination by places of public accommodation or in the workplace; federal grant programs in education, transportation, and other large-scale cooperative federalism initiatives; and environmental protection. As the judiciary disposes of these ensuing suits, it will jostle against and upstage Congress and the President as a direction-setter and micro-manager of national economic policy.

In place of a constitutional jurisprudence that prioritizes effective and responsive national governance, the pending health care reform challengers would substitute a radically different regime. As stated by 38 leading Republican members of the House of Representatives in an amicus curiae brief filed in one of the cases: “*Congress cannot pass just any law that seems to most efficiently address a national problem.*”⁶ This self-styled “precept,” which in similar form recurs in briefs, argument transcripts, and even judicial opinions impugning the ACA, is a recipe for circumscribing the capacity of the federal government to meet national needs. Barring Congress from enacting the ACA exemplifies this impact, since doing so would deny Congress the ability to effectively reform a dysfunctional national health care market comprising over 17% of the national economy, that causes 62% of personal bankruptcies, leaves 50 million citizens uninsured, and deprives individuals with pre-existing medical conditions of access to affordable health insurance and, thus, needed health care. If nine, or more realistically, five life-tenured justices can block an undisputed rational solution for an economic problem so big and so urgent, what limit is there on the Court’s capacity to hamstring federal stewardship of the national economy?

⁵ *United States v. Carolene Products Co.*, 304 U.S. 144, 152 & n.4 (1938). The Court at footnote 4 of this opinion famously prescribed “rational basis” deference to Congress’ legislative judgment, except in cases involving alleged violations of “fundamental” individual or minority rights, incapable of protection through democratic political processes. *Id.*

⁶ Brief for American Center for Law & Justice et al. as Amici Curiae Supporting Plaintiff, *Virginia v. Sebelius*, No. 3:10-cv-00188-HEH at 2-3 (E.D. Va. June 7, 2010) (emphasis added), available at http://www.aclj.org/media/PDF/Virginia_Amicus_Brief_20100607.pdf.

I. The Constitution as a Charter for National Governance

A. A Historical Overview: Restoration of the Framers' Vision

Contrary to misimpressions spread by some supporters of the health care reform lawsuits, the constitutional doctrines on which Congress relied in drafting the ACA did not spring to life only in 1937 when the Supreme Court definitively rejected the so-called *Lochner* era doctrinal apparatus that a conservative Supreme Court had deployed to abort numerous Progressive and New Deal era reforms.⁷ If anything, it would be more accurate to view what libertarian critics call the New Deal Supreme Court's "revolution of 1937" as a restoration of the vision of the original Framers, who sought to supplant the feckless Articles of Confederation with a charter for effective and responsive national governance.⁸ That vision was given doctrinal form by the Framers' contemporary Chief Justice John Marshall and his fellow Supreme Court justices in the first third of the 19th century. In the century between Marshall's iconic decisions and the New Deal Court's reactivation of effective governance as a lodestar for constitutional interpretation, the textual basis for robust federal authority was materially enhanced by the Reconstruction and Progressive Era amendments.

The Senate's 1987 rejection of Robert Bork's Supreme Court nomination squelched what some observers viewed as a movement to overturn the post-New Deal constitutional consensus.⁹ But while Bork and the generation of conservative constitutionalists for whom he spoke condemned the "activism" of the Warren Court in expanding Bill of Rights protections for individuals and minorities, they also called the "activist Court of the *Lochner* era . . . as illegitimate as the Warren Court," and endorsed the post-New Deal postulate of judicial deference to Congress on economic regulatory matters. A cadre of libertarian academics and advocates continued to champion *Lochneresque* constraints on federal economic regulatory authority, but they were very few in number and stood self-consciously outside the mainstream of conservative constitutional jurisprudence.¹⁰

⁷ *Lochner v. New York*, 198 U.S. 45 (1905), launched and has come to symbolize the notoriously activist anti-regulatory regime of the first third of the 20th century. The case held that maximum hours regulation violated employers' and employees' "freedom of contract," a "right" that the five justice majority divined in the Fifth and Fourteenth Amendments' ban on deprivation of liberty without due process of law. *Id.*

⁸ Justice Clarence Thomas, the Supreme Court's sole libertarian-leaning member, has called the New Deal Court's jurisprudential shift a "wrong turn." *United States v. Lopez*, 514 U.S. 549, 594 (1995); D.C. Circuit Judge Janice Rogers Brown used more florid language: "A Whiter Shade of Pale," Speech to the Federalist Society, University of Chicago Law School, (April 20, 1000), at 12; Justice Anthony Kennedy concisely reviews the evolution of Commerce Clause jurisprudence in his *Lopez* concurrence, 514 U.S. at 570-74. For the Framers' vision, see sources cited in note 1, *supra*. For the principles prescribed by Chief Justice Marshall for construing the Necessary and Proper and Commerce Clauses, see *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (Commerce Clause authorizes establishment of a National Bank); *Gibbons v. Ogden* 22 U.S. (9 Wheat) 1 (1824) (Ferry monopoly under state law preempted by Congress exercising Commerce Clause powers), discussed at notes 15 and 19-20 below.

⁹ Bruce Ackerman, *WE THE PEOPLE: FOUNDATIONS* 51-52 (1991). During the same period, in 1987-88, a Reagan nominee for the Ninth Circuit Court of Appeals, Bernard Siegan, was rejected expressly because of his professed aversion to post-1937 expansionary interpretations of Federal economic regulatory authority.

¹⁰ See, e.g., Stephen Macedo, *THE NEW RIGHT V. THE CONSTITUTION* (The CATO Institute, 1986), which contains chapters entitled "The Framers v. Judge Bork," "The Majoritarian Myth," and "Principled Judicial Activism." The history of conflict between libertarian and mainstream conservative legal thought-leaders is elaborated in Damon Root, *Conservatives v. Libertarians: The Debate over Judicial Activism Divides Former Allies* (July 2010), <http://www.freerepublic.com/focus/f-news/2530504/posts>. See also Doug Kendall and Glenn Sugameli, *Janice*

During the late 1990s, a five-justice bloc coalesced to introduce novel doctrines constraining federal legislative authority to implement the Commerce Clause and enforce the Fourteenth Amendment. This “federalism revolution” was widely feared as an effort to open the door to a major assault on the post-New Deal constitutional regime. But from 2003 to 2005, the “federalism” bloc dissolved, and the revolution, such as it was, fizzled; a retreat substantially endorsed by Chief Justice John Roberts during his 2005 confirmation hearing.¹¹ Again, however, it bears emphasis that the justices who engineered the 1990s federalism boomlet, especially in decisions applying the constitutional provisions at issue in the ACA litigations, offered no challenge to, and indeed reinforced, the basic constitutional doctrines enabling post-New Deal active national government.¹²

B. Doctrinal Ground Rules Established by the Marshall and New Deal Supreme Courts

As discussed, the modern post-New Deal constitutional regime, based squarely on the Framers’ design as implemented by the Marshall Court two centuries ago, prioritizes effective governance of the national economy. On the level of doctrine, this regime comprises rules generously construing three of Congress’ Article I powers: (1) the power to regulate commerce among the states, (2) the power to collect and spend revenue for the general welfare, and (3) the power to enact measures necessary and proper to implement the foregoing two (and other enumerated) powers. An additional, critical component of the current regime is a “strict constructionist” approach to the Fifth Amendment prohibition of federal deprivation of property or liberty without due process of law, thus rigorously constraining the ability of the judiciary to invalidate economic regulatory legislation. Finally, the Court has developed various doctrines obligating the judiciary to defer to congressional judgments and to respect congressional procedures necessary to enable Congress to function effectively.

1. The Commerce Clause as a Platform for National Economic Policy

No objective was more critical to the Framers of the original Constitution than enabling the new central government to ensure a robust national economy by countering balkanizing protectionist propensities on the part of the states and mercantilist policies of foreign governments. A principle vehicle for achieving that objective was what we refer to as “the Commerce Clause” – the third clause of Section 8 of Article I, authorizing Congress to “regulate

Rogers Brown and the Environment: A Dangerous Choice for a Critical Court, A Report by Community Rights Counsel and Earthjustice at 2, 8 (October 23, 2003), available at <http://www.communityrights.org/PDFs/BrownReport.pdf>.

¹¹ This history is traced in a previous ACS issue brief, subsequently published as Simon Lazarus, *Federalism R.I.P.? Did the Roberts Hearings Junk the Rehnquist Court’s Federalism Revolution?*, 56 DEPAUL L. REV. 1, 14-21, 45-50 (2006).

¹² *Id.* at 30-31. See *infra* notes 15-17, 22-25 and accompanying text.

commerce with foreign nations, and among the several states” In construing that broad and general provision, three interpretive rules would be essential to its purpose:

- a. Congress’ commerce power covers economic matters that are “national” in scope, as distinguished from “local.”
- b. Matters subject to federal Commerce Clause jurisdiction must be determined on the basis of flexible and practical criteria, i.e., their “operation and effects” on the interstate economy, not rigid and economically arbitrary categorical criteria.
- c. Application of the clause must facilitate Congress’ practical ability “to regulate.”

The Framers’ commitment to this conception of the Commerce Clause¹³ was implemented in detail by the foundational Commerce Clause decisions of Chief Justice Marshall. Thus, Marshall gave “interstate commerce” a concise, emphatically practical and flexible definition: “that commerce which *concerns* more states than one, which “*extend[s] to or affect[s]* other States.” Accordingly, he said, “the power of Congress” could not be bounded in rigid categorical or geographical terms. That “power . . . does not stop at the jurisdictional lines of the several States.” Marshall rejected the claim that application of the clause should be constrained by a canon of “narrow” or “strict construction.” On the contrary, he said, the purpose of the clause should govern, explaining that in resolving any “serious doubts respecting the extent of any given power, it is a well settled rule, that the objectives for which it was given . . . should have great influence in the construction.” A “narrow construction,” he stressed, would undermine the Framers’ enabling priority and “would cripple the government, and render it unequal to [its intended] object . . . for which the powers given, as fairly understood, render it competent. . . .” Hence, the clause confers on Congress the flexibility and freedom to deploy that capability: “[T]he power to regulate . . . is to prescribe the rule by which commerce is governed. This power . . . is complete in itself, may be exercised to its utmost extent and acknowledges no limitations, other than those prescribed in the Constitution.”¹⁴

Marshall’s broad definition has not been fundamentally challenged by conservative justices appointed by 20th and 21st century Republican presidents, up to this point at least, with the exception of Justice Clarence Thomas. In writing the first of only two post-New Deal decisions invalidating federal statutes as exceeding Congress’ Commerce Clause authority, Chief Justice Rehnquist reaffirmed Marshall’s touchstone “distinction between what is truly national and what is truly local.”¹⁵ Further, Chief Justice Rehnquist restated and reaffirmed the entire doctrinal litany of post-New Deal jurisprudence – that the commerce power encompasses “intrastate” matters which “substantially affect” interstate commerce, and that Congress may

¹³ See note 1, *supra*.

¹⁴ *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 187-89, 194-95, 196-98 (1824) (emphasis added).

¹⁵ *United States v. Lopez*, 514 U.S. 549, 567-68 (2005).

regulate matters neither interstate nor “economic” in nature where necessary to effectuate a larger regulatory scheme legitimate under the Commerce Clause.¹⁶

Moreover, in the same case, Justice Anthony Kennedy wrote a concurring opinion that endorsed Chief Justice Marshall’s “early and authoritative recognition” of Congress’ “extensive power and ample discretion” to regulate interstate commerce. Kennedy traced, and emphatically disavowed, the early 20th century Court’s turn away from Marshall’s “flexible,” “practical conception of commercial regulation,” and its deployment of categorical “content-based” boundaries on the commerce power. “Congress,” Kennedy summed up, “can regulate [under the Commerce Clause] on the assumption that we have a single market and a unified purpose to build a stable national economy.”¹⁷

2. Congress’ “Necessary and Proper” Authority to Make Regulation Work

A critical adjunct to the Commerce Clause is the “Necessary and Proper” Clause, which provides that Congress may enact “all laws which shall be necessary and proper, for carrying into execution the foregoing [enumerated powers, including the Commerce Clause]”¹⁸ Two interpretive rules shape modern Necessary and Proper Clause jurisprudence, both of which were laid down two centuries ago by Chief Justice Marshall. The first rule is that the term “necessary” should be read broadly to cover any means that is “convenient” or “appropriate.”¹⁹ The second rule is that, while the ends or statutory goals that Congress chooses must be authorized by an enumerated power, the means it fashions to achieve such ends need not themselves fall within the ambit of an enumerated power. “Let the end be legitimate, let it be within the scope of the constitution,” Marshall wrote in terms familiar to every first year law student. “[A]ll means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”²⁰ Even more pointedly, Marshall explained:

The power being given, it is the interest of the nation to facilitate its execution. *It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution by withholding the most appropriate means.*²¹

Modern post-New Deal decisions have repeatedly and without exception confirmed, and even extended, Marshall’s two rules. Chief Justice Rehnquist, in his *Lopez* decision invalidating

¹⁶ *Id.* at 558-61. The actual holding in *Lopez* was limited to the proposition that the Commerce Clause does not extend to “noneconomic” activities with such attenuated relationship to interstate commerce that the Court “would have to pile inference upon inference” to make the necessary connection. The limited scope of the *Lopez* ruling was further demonstrated when Congress re-passed the stricken statutory prohibition on possession of a gun within 1000 yards of a school and added what Rehnquist had termed a “jurisdictional element” – a prerequisite for conviction that any gun involved in an offense have traveled in interstate commerce. See *Guns Free School Zone Act of 1995*, 18 U.S.C. § 922(q) (1995).

¹⁷ *Lopez*, 514 U.S. at 568-74 (Kennedy, J., concurring).

¹⁸ U.S. CONST. art. I § 8, cl. 18.

¹⁹ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 366-67 (1819).

²⁰ *Id.* at 421.

²¹ *Id.* at 408. (emphasis added).

the gun-free school zones statute, reaffirmed that the Necessary and Proper Clause authorized requirements outside Congress' enumerated powers that are "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut" without the otherwise *ultra vires* requirement.²² In 2005, Justice Scalia elaborately described the necessary and proper power, specifying that the clause "empowers Congress to enact laws in effectuation of its enumerated powers that are not within its authority to enact in isolation," and that "where Congress has the authority to enact a regulation of interstate commerce, 'it possesses every power needed to make that regulation effective.'"²³ Less than a year ago, a 6-3 majority, including Chief Justice John Roberts and Justice Kennedy, confirmed that the clause authorizes Congress to legislate wherever "the means chosen are reasonably adapted to the attainment of a legitimate end."²⁴

3. Congress' Tax-and-Spend Power as a Lever to Promote the "General Welfare"

While media attention regarding the health care reform suits has been focused on the Commerce Clause, the case for the individual mandate provision, as well as other challenged provisions of the ACA, alternatively rests on Congress' Article I authority to raise and spend revenue for the nation's "general welfare."²⁵ To overturn the mandate, as well as to approve challengers' claims against the ACA's expansion of Medicaid (discussed below), courts will have to confront the modern interpretation of that provision.

Two rules give the General Welfare Clause robust leverage for prescribing and implementing national policies. First, the objectives of a measure that imposes taxes or spends funds pursuant to the clause are not confined by the enumerated powers assigned Congress in Article I, but only by the broad direction in the text of the clause itself that the measure serve the "general welfare of the United States."²⁶ Hence, the scope of the tax-and-spend power is even broader than the scope of the Commerce Clause augmented by the Necessary and Proper Clause. This is particularly important because Congress has broad leeway to attach conditions to the acceptance of funds provided pursuant to its broad spending authority by states or other grant recipients, as the modern Court has emphatically reaffirmed.²⁷ Second, as long as a measure raises some revenue, it is valid as a tax authorized by the General Welfare Clause, whether or not its purpose is primarily to promote a policy goal, rather than simply to raise revenue. As the

²² *Lopez*, 514 U.S. at 561.

²³ *Gonzales v. Raich*, 545 U.S. 1, 39 (2005).

²⁴ *United States v. Comstock*, 130 S. Ct. 1949, 1957 (2010).

²⁵ The general welfare clause reads: "The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States." U.S. CONST. art. I § 8, cl. 1.

²⁶ *United States v. Butler*, 297 U.S. 1, 67 (1936). As noted in my December 2009 issue brief, *United States v. Butler*, decided even before the Court altered its perspective on other constitutional issues to accommodate the New Deal, famously resolved the then-century and a half old debate between Alexander Hamilton and James Madison in favor of Hamilton's view that the scope of the tax-and-spend power was not limited by the other, specifically enumerated Article I powers. *Helvering v. Davis*, 301 U.S. 619, 640 (1937).

²⁷ *South Dakota v. Dole*, 483, U.S. 203, 207-10 (1987).

Court has pronounced: “It is beyond serious question that a tax does not cease to be valid merely because it regulates, discourages, or even definitely deters the activities taxed.”²⁸

4. Legislation Rationally Related to Lawful Goals Must Ordinarily be Upheld Unless It Violates a “Fundamental” Individual Right

Common to both modern commerce, necessary and proper, and general welfare clause jurisprudence is the requirement that, ordinarily, such “legislation . . . is not to be pronounced unconstitutional unless . . . it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.”²⁹ In effect, this rule of “rational basis” deference amounted to an act of partial judicial unilateral disarmament and a repudiation of the aggressive manner in which the *Lochner* era Court had exploited various constitutional provisions, especially the Fifth Amendment’s due process clause, to strike down progressive economic regulatory reforms.

Importantly, while the Court retreated, it did not abdicate. “Substantive” due process protection for individual rights and liberties remains a critical judicial province. But, ordinarily, due process-based assertions of constitutionally protected liberty interests can trump rational exercises of the commerce or general welfare powers only where the interests alleged to have been violated are “fundamental.” Over the past three quarters of a century, the Court has identified certain rights as fundamental and struck down otherwise valid (i.e., rational) laws that infringed those rights, such as an individual’s right to bodily integrity. But the Court has required rigorous analysis before bestowing the label “fundamental” on an asserted liberty interest, and has done so only rarely.³⁰

²⁸ *United States v. Sanchez*, 340 U.S. 42, 44 (1950). In the same vein: “[A] tax is not any the less a tax because it has a regulatory effect, and . . . an act of Congress which on its face purports to be an exercise of the taxing power is not any the less so because the tax . . . tends to restrict or suppress the thing taxed.” *Sonzinsky v. United States*, 300 U.S. 506, 513 (1937).

²⁹ *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938).

³⁰ *See, e.g., Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261 (1990). As Walter Dellinger recently testified to before Congress, this line of substantive due process cases would provide ample basis for judicial rejection on constitutional grounds of hypothetical extreme laws conjured by health reform opponents as analogous to the ACA mandate, such as requirements to consume specific vegetables or enroll in a health club. *The Constitutionality of the Affordable Care Act: Hearing Before the S. Comm. On the Judiciary*, 112th Cong. 6-7 (2011) [hereinafter *ACA Hearings*]. Although fundamental, this personal liberty interest in bodily integrity is not absolute. *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905) (upholding a state mandatory smallpox vaccination law, on the ground that an individual’s refusal to comply endangered others as well as himself). *See ACA Hearings* at 4 (testimony of Charles Fried, analogizing mandatory vaccination to the ACA individual responsibility provision).

II. The Health Reform Lawsuits Would Dismantle the Constitutional Regime Established by Chief Justice Marshall and the Modern Supreme Court to Enable Central Oversight of the National Economy

To recap: as sketched in the preceding section, the established constitutional regime for federal economic regulation rests on eight doctrinal building blocks:

- Congress' power to regulate interstate commerce...
 1. covers matters that have an economic impact national in scope that “*concern* more states than one,” and is not limited to matters physically present in more state than one.
 2. is bounded by criteria that are flexible, practical, and focused on impact (“substantial effects” on interstate commerce), and are not rigid or categorical.
 3. is interpreted in accord with the Framers’ purpose to empower Congress to manage effectively a robust national economy.
- Congress' authority to enact measures “necessary and proper” to “carry into execution” its specifically enumerated powers...
 4. does not limit Congress to measures that are “absolutely” necessary to achieve lawful goals, but authorizes (and requires judicial approval of) any optional approach that is “plainly adapted” to attain such goals.
 5. is not circumscribed by the Commerce Clause (nor by other enumerated powers), but encompasses “all means” appropriate for achieving Commerce Clause-authorized goals or to ensure the effective operation of a broader statutory program duly authorized by the Commerce Clause (or other enumerated power).
- The General Welfare, or Tax-and-Spend power...
 6. is not circumscribed by Congress’ enumerated powers, but may be exercised to achieve any Congressional goal that serves the “general welfare of the United States,” and includes the ability to impose conditions in exchange for the acceptance of federal funds.
 7. authorizes legislation that raises revenue, regardless of whether the legislation has a regulatory purpose or a purpose to deter, or even eliminate, types of conduct.
- 8. Neither the Commerce nor the General Welfare Clause justifies measures that violate the Fifth Amendment guarantee against deprivation of liberty without

due process of law, but such measures must ordinarily be upheld if rationally related to a lawful goal, unless they violate personal liberty interests which are “fundamental.”

The constitutional theories advanced by the pending health care reform challenges contravene, and in some cases, repudiate outright each of these eight basic rules.

Substantially all the cases brought by health care reform opponents target the individual responsibility provision, or individual mandate, deploying essentially identical arguments. This brief will review solely the opponents’ case against the mandate and one other claim: that mounted by 26 Republican state attorneys general and governors in the Western District of Florida in Pensacola contending that the ACA’s expansion of Medicaid amounts to “coercion” of states in violation of the 10th Amendment’s protections for state “sovereignty.”

A. Opponents’ Claim that the Individual Mandate Is Unlawful Because it Regulates “Inactivity” Contravenes Established Commerce Clause Doctrine and Nullifies the Necessary and Proper Clause

Opponents do not contend that the ACA’s individual responsibility provision runs afoul of any of the established criteria noted above for grounding legislation in the Commerce Clause. They do not contest the statutory findings that detail Congress’ determination that decisions to forego health insurance “substantially affect” interstate commerce (and/or are themselves integral components of interstate commerce in health insurance and health care delivery). They do not dispute that achieving universal coverage and reforming abusive insurance practices are statutory goals authorized by Congress’ Commerce Clause authority. Nor do they challenge Congress’ judgment inscribed in the statutory findings that mandatory insurance is necessary to achieve these lawful goals. Indeed, Virginia Attorney General Kenneth Cuccinelli, plaintiff in one of the most publicized challenges, acknowledged in his complaint that the individual mandate provision is “an essential element of the [ACA] without which . . . the statutory scheme cannot function.” He thus concedes it is “an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut” without it.³¹

³¹ In short, the case of the ACA individual mandate is entirely different from *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), the two late 1990s decisions in which the Court’s conservative five justice majority held a federal law to exceed the reach of Congress’ commerce power. In those cases – involving a federal ban on possession of a gun within 1000 yards of a school and a federal remedy for violence against women – the question was whether the outlawed practice had a sufficient connection to interstate commerce, and the majority concluded that no meaningful connection existed. In neither case was a contention offered by the federal government that the challenged requirement was integral to a broader valid regulatory scheme, hence supported by the Necessary and Proper clause. *Lopez* and *Morrison* were situations at the periphery of established definitions of the reach of Congress’ commerce power, as augmented by its necessary and proper power. In contrast, the ACA individual mandate – addressing decisions that substantially affect an economic sector comprising 17% of GDP and concededly “essential” to effectuating Congress’ approach to regulating this sector – is at the core of the circle traced by those established definitions. In the same vein, the ACA’s mandatory insurance provision has a far clearer fit with established Commerce Clause criteria than do *Wickard v. Filburn*, 317 U.S. 111 (1942), and *Gonzales v. Raich*, 545 U.S. 1 (2005), the two decisions generally considered to have upheld applications of the commerce power to its outermost boundaries. Both cases involved crops, home-grown for home-use, but banned by federal authorities pursuant to a facially applicable federal regulatory statute. Admittedly, the connection of home-made and consumed crops to, or their impact on, interstate commerce was attenuated, as was

Opponents' argument contends that *even though* the subject-matter of the individual responsibility provision substantially affects commerce, and *even though* the provision is essential to a broader regulatory scheme targeted at objectives sanctioned by the Commerce Clause, it should nevertheless be struck down. The reason they give is that decisions to forego health insurance do not constitute "activity," but rather "inactivity." The interstate commerce covered by the Commerce Clause, they add, encompasses "economic activity," and decisions not to insure, though economic, are not activity. Hence, such decisions are not included in the interstate commerce that Congress may regulate.

Plainly, opponents' activity/ inactivity theory shoves aside the above-noted essential ground rules of Commerce Clause jurisprudence first laid down by Chief Justice Marshall and reinstated and refined by the modern Supreme Court. With respect to the definition of interstate commerce, what Justice Kennedy spotlighted as Marshall's "flexible," "practical," real-world, impact-based concept, would, as it was a century ago, be replaced by a categorical "content-based" boundary that walls Congress off from remedying major problems with massive detrimental economic effects that manifestly "concern more states than one." With respect to the necessary and proper leg of Congress' justification for the individual mandate, the opponents' argument simply scuttles the most fundamental rule underpinning that clause since the Marshall Era: that the clause, in Justice Scalia's words, "empowers Congress to enact laws in effectuation of its enumerated powers that are not within its authority to enact in isolation."

This *de facto* erasure of the Necessary and Proper Clause from the Constitution appears with special clarity in the December 13, 2010 decision of Judge Henry Hudson of the Eastern District of Virginia, in which he struck the mandate down, embracing and elaborating on the opponents' arguments. First, Judge Hudson reasoned that all prior decisions upholding statutes exercising Congress' commerce power had involved "some type of self-initiated action."³² Converting this asserted factual distinction between the mandate and other, previously upheld regulatory requirements, into a new rule of law (without citing any legal authority or offering any argument as to why established rules should be displaced by this new one),³³ Hudson then went on to make a further leap:

If a person's decision not to purchase health insurance at a particular point in time does not constitute the type of economic activity subject to regulation under the Commerce Clause, then logically an attempt to enforce such provision under the Necessary and Proper Clause is equally offensive to the Constitution.³⁴

their importance in the overall regulatory scheme. The ACA mandate's indisputably strong connection to the statute's plan for regulating one of the largest markets of the national economy stands in sharp contrast.

³² *Virginia v. Sebelius*, No. 3:10-cv-00188-HEH, slip op. at 24 (E.D. Va. Dec. 13, 2010) (granting plaintiff's motion for summary judgment and denying defendant's motion for summary judgment).

³³ Rochelle Broboff, *Examining the Latest Decision on the Affordable Care Act: When Precedent Proves Elusive*, ACSBLOG, Dec. 15, 2010, <http://www.acslaw.org/acsblog/node/17881>.

³⁴ *Sebelius*, slip op. at 19.

Immediately after its release, George Washington University Law Professor Orin Kerr (among others) noted this “significant error in Judge Hudson’s opinion:”

The point of the Necessary and Proper clause is that it grants Congress the power to use *means* outside the enumerated list of Article I powers to achieve the *ends* listed in Article I. (emphasis in original). If you say, as a matter of “logic” or otherwise, that the Necessary and Proper Clause only permits Congress to regulate using means that are themselves covered by the Commerce Clause, then *the Necessary and Proper Clause is rendered a nullity. But that’s not how the Supreme Court has interpreted the Clause, from Chief Justice Marshall onwards.*³⁵ (emphasis supplied).

Three days after the release of Judge Hudson’s decision, his excision of the Necessary and Proper Clause was reinforced by Judge Roger Vinson, presiding at oral argument in Pensacola, Florida, in the ACA challenge brought by Republican state attorneys general and other elected officials (the “AGs”). Like Hudson, Vinson did not dispute that the individual mandate is directed at attaining constitutional regulatory goals. Nevertheless, Vinson, a Reagan appointee, stressed: “There are lots of *alternative ways* to provide health care to the needy without imposing on individual liberties and freedom of choice.” Vinson’s brushing aside of Congress’ choice of means overlooks the fact that, under the Necessary and Proper Clause, identifying and selecting among “alternative” means is up to Congress. Courts are bound, as Chief Justice Marshall put it in 1819, to approve *all* means “which are plainly adapted to [a lawful] end.”

Judge Vinson’s suggestion that Congress could and should have chosen another means, apart from being unsupported, constitutes activist second-guessing and micro-managing of congressional policy choices of precisely the sort that the Necessary and Proper Clause, has been understood to preclude. Together with Judge Hudson’s assertion that the Necessary and Proper Clause does not authorize legislation that, standing alone, would not fall within an enumerated power, Vinson’s alternative means tack repudiates the two essential touchstones of modern – as well as “original” – construction and in effect reads the Necessary and Proper Clause out of the Constitution.

Judge Vinson’s final January 31, 2011 decision granting the AGs’ motion for summary judgment and striking down the individual mandate repeats his views expressed at oral argument regarding the Necessary and Proper Clause and further asserts that “‘Economic’ cannot be equated with ‘Commerce’” – a direct repudiation of the established recognition of the purpose and scope of the Commerce Clause to empower Congress to “build a stable national economy.”³⁶ Most remarkably, Vinson, purporting to review the history of Commerce Clause interpretation, attempts to trivialize the status of Chief Justice Marshall’s foundational interpretation of the commerce power in *Gibbons v. Ogden*. In the same revisionist vein, he airbrushes out of his account of the

³⁵ Orin Kerr, *The Significant Error in Judge Hudson’s Opinion*, THE VOLOKH CONSPIRACY, Dec. 13, 2010, <http://volokh.com/2010/12/13/the-significant-error-in-judge-hudsons-opinion/>.

³⁶ *United States v. Lopez*, 514 U.S. 549, 574 (1995) (Kennedy, J., concurring).

Supreme Court's most recent decision, *Gonzales v. Raich*, the powerful and unambiguous statements in Justice John Paul Stevens' majority opinion and Justice Scalia's concurring opinion that reaffirm and, if anything, strengthen Marshall's broad interpretation of both the Commerce and Necessary and Proper Clauses.³⁷

B. Opponents' Back-door Reinstatement of Activist Substantive Due Process

1. Judges Hudson and Vinson: "Liberty Interests" Trump Rational Legislation

In his October 14, 2010 preliminary decision denying the Justice Department's motion to dismiss the claims against the individual mandate provision, Judge Vinson set out a plausible rationale for his displacement of Supreme Court precedent construing the Commerce and Necessary and Proper Clauses. But that rationale, echoed in a fragmentary manner in Judge Hudson's preliminary (July 1, 2010) and final (December 13, 2010) decisions, only serves to underscore the inherently radical character of the case against the ACA.³⁸

Judge Vinson's moment of candor appears, not in his abbreviated argument endorsing opponents' inactivity Commerce Clause theory, but in an adjacent section of his October 14, 2010 preliminary opinion. In this section, he addresses the AGs' claim that the mandate violates individuals' Fifth Amendment due process rights, brusquely dismissing this theory. He brushes aside, as "long since discarded," *Lochner* and kindred decisions that interpreted "the Due Process Clause...to reach economic rights and liberties." Since the New Deal, he notes, due process-based claims can only set aside economic laws that are not "rationally related to a legitimate end." In the ACA, he continues: "Congress made factual findings . . . that the individual mandate was 'essential' to the insurance market reforms contained in the statute." Judge Vinson agrees with the AGs that an individual "liberty interest" is at stake in the case, but, he goes on, under contemporary, post-*Lochner* doctrine, courts may set aside rationally based statutory requirements only if the liberty interests they impinge constitute "fundamental rights." These, he notes, the Supreme Court has limited to a "narrow class" of interests. The liberty interest in foregoing health insurance, he concluded, has not been so recognized by the Court, and hence, the mandate is impervious to due process challenge because it is rationally related to the ACA's insurance reforms. Remarkably, one page later, Judge Vinson endorses the legal theory behind the AGs' Commerce Clause attack, neglecting to mention, much less reconcile, his

³⁷ Florida v. U.S. Dep't of Health and Human Services, No. 3:10-cv-91-RV/EMT, slip op. at 13, 28, 55, 60, 61 (N.D. Fla. Jan. 31, 2011) (order granting summary judgment). The points noted here concerning this opinion's evasion and scuttling of Commerce and Necessary and Proper Clause precedent from both the Marshall and post-New Deal eras echoes numerous commentators, notably Andrew Koppelman, *Non-Sequiturs in the Florida Health Care Decision*, BALKINIZATION, Feb. 2, 2011, <http://balkin.blogspot.com/2011/02/non-sequiturs-in-florida-health-care.html>, and Orin Kerr, *The Weak Link in Judge Vinson's Opinion Striking Down the Mandate*, THE VOLOKH CONSPIRACY, Jan. 31, 2010, <http://volokh.com/2011/01/31/the-weak-link-in-judge-vinsons-opinion-striking-down-the-mandate/>.

³⁸ The following section of this issue brief draws on and expands upon my opinion column *Jurisdictional Shell Game: Health Reform Lawsuits Sneak "Lochnerism" back from Constitutional Exile*, NATIONAL LAW JOURNAL Dec. 20, 2010, at 29, available at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202476355698&slreturn=1&hblogin=1>.

statement when dismissing their due process claim that Congress had established a "rational basis justifying the individual mandate" as a matter of law.

This was no mere rhetorical slip on Judge Vinson's part. On the contrary, balancing the individual liberty interest in foregoing health insurance against Congress' reasons for mandating insurance coverage is precisely what drives Judge Vinson's rejection of the individual mandate provision. "At its core," he concluded in his final decision granting Virginia's motion for summary judgment, "this dispute is not simply about regulating the business of insurance – or crafting a scheme of universal health insurance coverage – it's about an individual's right to choose to participate."³⁹ Otherwise said, an individual liberty interest in foregoing health insurance trumps an otherwise valid regulation of commerce.

After an intense exchange with counsel for the Department of Justice, Vinson repeated the conclusion he shares with Judge Hudson:

I'm just saying that as far as an integrated national plan of trying to deal with the problems you've identified [preventing cost-shifting and implementing the insurance reforms in the law], there are lots of optional ways of doing it that are less intrusive, less drastic and *certainly don't go to the extreme of mandating someone to buy insurance if they don't want to.*"

In effect, Vinson was condemning the individual mandate provision on the theory that it is not the least restrictive alternative for achieving Congress' goal. This least-restrictive-alternative test would be appropriate IF the mandate were being analyzed as an asserted substantive due process violation, and IF the liberty interest at stake amounted to a "fundamental right," as Judge Vinson himself had correctly explained in his earlier opinion. In any event, least restrictive alternative balancing has no part in determining the scope of the Commerce Clause, as the Government's counsel queried the Court: "[T]he question that actually is before the Court is whether Congress had a rational basis for it, right?"⁴⁰

2. Opponents' "Necessary but Improper" Argument Amounts to Substantive Due Process with No Limiting Principle

To get around the dead end of "rational basis" deference prescribed by Commerce and Necessary and Proper Clause precedent, libertarian academics have proposed an alternative route. Their theory is that while the individual mandate provision is concededly "necessary" for achieving a constitutionally legitimate end, that is not sufficient to approve the legislation because the Constitution requires that it be "necessary AND proper." "Proper," this argument goes, is an independent criterion and a limitation on "necessary." In particular, an otherwise necessary measure may be "improper" if it violates constitutionally derived norms of federalism, i.e., state sovereignty as prescribed by the Tenth Amendment, separation of powers, or individual

³⁹ Virginia v. Sebelius, No. 3:10-cv-00188-HEH, slip op. at 37 (E.D. Va. Dec. 13, 2010).

⁴⁰ Transcript of Oral Argument at 81, Florida v. U.S. Dep't of Health and Human Services, No. 3:10-cv-91-RV/EMT (N.D. Fla. Dec. 16, 2010).

rights.⁴¹ In his January 31, 2011 final decision, Judge Vinson's entire case for rejecting the mandate came down to reliance upon this argument:

“The defendants [the Department of Justice] have asserted again and again that the individual mandate is absolutely ‘necessary and ‘essential’ for the Act to operate as it was intended by Congress. *I accept that it is.* Nevertheless, the individual mandate falls outside the boundary of Congress’ Commerce Clause authority and cannot be reconciled with a limited government of enumerated powers. *By definition, it cannot be ‘proper.’*”⁴²

Though ingenious, this theory transparently flouts Chief Justice Marshall's prescription that the Necessary and Proper Clause “cannot be construed to restrain the powers of Congress, or to impair the right of the legislature to exercise its best judgement. . . .”⁴³ Moreover, it has never been considered, let alone adopted, by the Supreme Court.

The result of accepting opponents' case against the mandate, with the necessary but improper component either explicit or implicit, would be to import, into determinations of the scope of the Commerce and Necessary and Proper Clauses, protections for individual liberty interests hereto assigned to the Fifth Amendment due process clause. This would not constitute simply a change of textual venue, but a major expansion of judicial power at the expense of Congress. As Judge Vinson explained, substantive due process-based “liberty interests” can trump rationally based statutes only if the claims concern a “narrow” class of “fundamental rights.” Not so, it appears, from his – and other reform opponents’ – treatment of identical claims in the context of a Commerce Clause attack. In contrast to the rigorous analysis prescribed by substantive due process precedents, there appears to be no limiting principle to the capacity of judges to carve out asserted “liberty interests” from Congress’ authority to regulate interstate commerce.

The tremors from thus rewriting the Commerce and Necessary and Proper Clauses would hardly be minor. When opponents' objection to the individual mandate is subjected to the rigorous scrutiny prescribed by post-New Deal substantive due process precedent, its stature as a liberty interest shrinks. To be sure, the Supreme Court has held that an individual's right to refuse medical *treatment* is “fundamental,” and can prevail over an otherwise valid federal requirement,⁴⁴ but that does not exempt individuals from paying Medicare taxes and thereby contributing to the Medicare insurance pool. If the right to avoid payment for treatment were constitutionally “fundamental,” then Medicare taxation would be vulnerable to due process attack, as would state mandatory insurance requirements like those enacted by Massachusetts in 2006. Indeed, refusing to carry health insurance may not constitute a genuine liberty interest at

⁴¹ Randy Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate is Unconstitutional*, 6 N.Y.U. J.L. & LIBERTY (forthcoming 2011); Gary Lawson and Patricia Granger, *The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 297 (1993).

⁴² *Florida v. U.S. Dep’t of Health and Human Services*, No. 3:10-cv-91-RV/EMT, slip op. at 63 (N.D. Fla. Jan. 31, 2011) (emphasis added).

⁴³ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 420 (1819).

⁴⁴ *See supra* note 30.

all. Treating uninsured patients, as most hospitals are required by federal statute to do, shifts tens of billions of dollars in costs annually to providers, insured consumers, and taxpayers. As former Massachusetts Governor Mitt Romney noted when signing the Massachusetts individual mandate:

"[S]omeone has to pay for the health care that must, by law, be provided: Either the individual pays or the taxpayers pay. A free ride on the government is not libertarian."⁴⁵

In sum, opponents' case against the minimum coverage provision reinstates the precise logic of *Lochner*, along with the baggage that induced conservatives like Bork, Meese, and Roberts to brand that era of jurisprudence as "illegitimate" activism. Federal judges, as with Judges Hudson and Vinson, could be free to stymie even indisputably "essential" legislation, on the basis of asserted "liberty interests" that would have not the remotest chance of qualifying as "fundamental" under long-established rules mediating conflicts between due process rights and Congress' authority to regulate the economy. In effect, a long step will have been taken toward the libertarian goal of a regime in which the longstanding presumption of constitutionality no longer applies to federal laws challenged in court. Instead, any asserted interference with a liberty interest would impose on the federal government the burden of overcoming a "presumption of liberty."⁴⁶

C. Reform Opponents' Arguments against the Individual Responsibility Provision Repudiate Established Rules Governing Congress' Authority to Tax and Spend for the General Welfare

To keep the ACA individual mandate from being evaluated under the broad "general welfare" and "rationally related" criteria of Congress' tax-and-spend authority, opponents rely on two arguments. First, they contend, the individual mandate is not a tax at all because it is too regulatory in its nature. For this conclusion, which conflicts directly with the above-noted post-New Deal precedents, opponents rely on a 1922 decision, *Bailey v. Drexel Furniture*, often styled the *Child Labor Tax Case*. *Bailey* ruled unconstitutional a federal tax on products moving in interstate commerce that had been produced by child labor. Four years prior to this decision, the Court had ruled that a flat ban on child labor exceeded Congress' power under the Commerce Clause.⁴⁷ Since 1937, when *Sonzinsky v. U.S.* ruled that regulatory purpose or effect does not cause a law to lose its status as a tax, *Bailey*, along with kindred *Lochner* era decisions, has been ignored.

Judge Hudson's answer to charges that the Child Labor Tax Case belongs to a discredited era in constitutional interpretation is that, "[n]otwithstanding criticism by the pen of some constitutional scholars, the constraining principle articulated in [this and similar cases], while

⁴⁵ Mitt Romney, *Health Care for Everyone? We Found a Way*, WALL ST. J., Apr. 11, 2006, at A16, available at http://online.wsj.com/article/SB114472206077422547.html?mod=opinion_main_commentaries.

⁴⁶ Randy Barnett elaborates this vision in his book, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2004).

⁴⁷ *Hammer v. Dagenhart*, 247 U.S. 251, 276-77 (1918).

perhaps dormant, remains viable and applicable [to the status of the ACA mandate].”⁴⁸ Were a Supreme Court majority to follow Judge Hudson in resuscitating the case, and the radical “constraint” on the tax-and-spend power that it stands for, this would effectively remove an indispensable foundation for legislative authority on which Congress has relied to enact protections and benefits long taken for granted by the public.

Perhaps skittish about relying on a century-old ruling that Congress lacks the power to ban discourage child labor, opponents offer a second, complementary argument. They contend that, while the individual mandate provision imposes federal income tax liability, and has other objective, structural characteristics of a tax, the weight of (concededly ambiguous) evidence from the statute itself and its legislative history (including, prominently, one statement in a television interview by President Obama) demonstrates that Congress *intended* the provision to be *perceived* as a “penalty,” not a “tax.”⁴⁹

There is no justification for judges to rule legislation unconstitutional where Congress was concededly acting well within authority conferred by the Constitution, but (on the basis of a highly debatable construct of the congressional and extra-congressional record) somehow did not desire that the legislation be linked to a particular, applicable constitutional provision.⁵⁰ As several scholars have noted, the validity of a federal law cannot turn on “magic words” or labels: “The question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise.”⁵¹ This “gotcha” approach, if followed by higher courts, may portend more far-reaching judicial interference with Congress’ ability to legislate than even the reversals of long-established substantive constitutional doctrine outlined in earlier sections of this issue brief.

D. Opponents’ Claim that the ACA’s Expansion of Medicaid Coverage Unconstitutionally “Coerces” State Governments in Violation of the Tenth Amendment Would Overturn a Basic Component of Spending Clause Jurisprudence and Undermine Many “Cooperative Federalism” Programs

Opponents’ attack on the individual responsibility provision figures in virtually all the suits challenging the ACA and dominates media accounts, but at least one other claim could, if upheld by the Supreme Court, trigger seismic changes in constitutional law and in laws and programs affecting all Americans. This claim, set out in the AGs’ complaint targets the ACA’s expansion of Medicaid to require, starting in 2014, coverage of all adults below 133% of the Federal Poverty Line.

⁴⁸ *Virginia v. Sebelius*, No. 3:10-cv-00188-HEH, slip op. at 36 (E.D. Va. Dec. 13, 2010).

⁴⁹ Judge Vinson’s decision on the motion to dismiss tracks Florida’s argument on this issue. *Florida v. U.S. Dep’t of Health and Human Services*, No. 3:10-cv-91-RV/EMT, slip op. at 22 (N.D. Fla. Oct. 14, 2010).

⁵⁰ Bear in mind that the question here is not how to interpret and apply a constitutional provision, or to determine whether Congress has authority to enact a particular law. In such cases, Congress’ subjective intent, expressed through statutory provisions and legislative history, is certainly pertinent and important. But this is a completely different type of inquiry. Here there is no question that the Constitution authorizes Congress to enact the mandate under its authority to tax and spend for the general welfare. That should be the end of the inquiry.

⁵¹ *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948). See Gillian Metzger and Trevor Morrison, *Health Care Reform, the Tax Power, and the Presumption of Constitutionality*, BALKINIZATION, Oct. 19, 2010, <http://balkin.blogspot.com/2010/10/health-care-reform-tax-power-and.html>.

The AGs acknowledge that state participation in Medicaid has been, since the program was first enacted in 1965, and remains formally voluntary, in that states can opt out. They assert that the expansion prescribed in the ACA is not only greater in magnitude but different in kind than previous expansions which grew Medicaid from costing \$4.5 billion in 1970 to \$338 billion and covering over 55 million Americans in 2009.⁵² Further and most important, they contend that Medicaid has become so central to states' ability to ensure access to medical care for the variety of less well-off sectors of their citizenry, that state governments have no realistic option to withdraw from the program. Hence, their argument runs, the ACA effectively "coerces" states into accepting broadened coverage and with it, crippling new costs. Such *de facto* coercion, the AGs claim, exceeds Congress' power under the General Welfare Clause and undermines state sovereignty in violation of the Tenth Amendment.

The AGs' "coercion" attack on the Medicaid expansion provisions proposes a radical upheaval in applicable constitutional law. Judge Vinson, in his preliminary October 14 ruling on the Department of Justice's motion to dismiss the AGs' complaint, and in both oral arguments before him, emphatically acknowledged that "the current status of the law provides very little support for the plaintiffs' coercion theory argument. Indeed . . . its entire underpinning is shaky."⁵³ He noted that "the courts of appeal that have considered the theory have been almost uniformly hostile to it." Vinson specifically rejected the AGs' claim that none of these negative rulings had addressed claims where the degree of financial pressure on state litigants was as intense as in the current case. In so doing, he cited a 1997 case brought by California challenging a Medicaid requirement that it extend emergency medical services to undocumented immigrants – a requirement with a \$400 million price-tag for the state. The state claimed that it had no choice because withdrawing from Medicaid altogether would mean "a collapse of its medical system." Vinson noted that the Ninth Circuit in that case "concluded that the state was merely presented with a 'hard political choice.'"⁵⁴

Since there are literally no cases upholding a claim of coercion, and since the AGs' basis for their claim has been both murky and variable through the various phases of the litigation in the District Court so far, it is not possible to predict with confidence what the grounds for and scope of a holding in their favor would be. They have appeared to emphasize several points: (1) an alleged qualitative change in the conceptual basis and financial magnitude of the Medicaid program; (2) the magnitude of federal funding of Medicaid (\$251 billion nationally in 2010); (3) the proportion of the states' Medicaid budgets attributable to the federal funds they would lose if they withdrew from the program; (4) the proportion of the states' budgets attributable to the

⁵² Center for Medicare and Medicaid Services, U.S. Department of Health and Human Services, Office of the Actuary, 2008 ACTUARIAL REPORT ON THE FINANCIAL OUTLOOK FOR MEDICAID, page 16, Table 3 (2008); Kaiser Family Foundation, Commission on Medicaid and the Uninsured, *A Timeline of Key Developments*, http://www.kff.org/medicaid/medicaid_timeline.cfm

⁵³ Florida v. U.S. Dep't of Health and Human Services, No. 3:10-cv-91-RV/EMT, slip op. at 55 (N.D. Fla. Oct. 14, 2010). Judge Vinson noted that the source of the so-called "coercion theory," and one of the only two cases mentioning the concept, rejected a challenge to the Federal-state partnership arrangements of the first Federal unemployment compensation law, stating that "Nothing in the case suggests the exertion of a power akin to undue influence, if we assume that such a concept can ever be applied with the fitness to the relations between state and nation." *Id.* (emphasis in original) (citing *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937)).

⁵⁴ *Id.* at 54 (citing *California v. United States*, 104 F.3d 1086 (9th Cir. 1997)).

federal Medicaid contribution; and (5) the importance of the program, and the federal funds allocated to it, to states and their citizens. Each of these grounds for finding “coercion,” has been specifically rejected by one or more of the courts of appeal that had heard coercion claims.⁵⁵

Despite thus acknowledging the chasm separating the AGs’ coercion claim from current case-law, Judge Vinson nevertheless declined to dismiss the claim because, he said, he was sympathetic to the states’ description of their plight, and because, in principle, there must be “a line somewhere between mere pressure and impermissible coercion.”⁵⁶ In his final decision, Judge Vinson reiterated his understanding that established law precludes granting the AGs’ claim, though he invited the Supreme Court to “revisit and reconsider its Spending Clause cases,” quoting libertarian scholar Lynn Baker’s suggestion that “the greatest threat to state autonomy is, and has long been, Congress’s spending power.”⁵⁷ In any event, it is clear from the account of current law provided by this judge, hardly sympathetic to the ACA, that upholding the AGs’ coercion claim would deliver a “jolt to the system,” as Chief Justice Roberts called reversals of precedent in his confirmation hearing, that would match or, more likely, surpass any such departures from precedent yet authored by the Roberts Court.

III. Health Reform Opponents’ Claims Against the ACA Individual Mandate and Medicaid Expansion Provisions Potentially Threaten a Broad Array of Landmark Laws and Programs

Some health reform challengers downplay the significance of their claims, arguing that they necessitate no overturning of existing “post-New Deal constitutional cases and doctrine” and no damage to laws other than the ACA.⁵⁸ To be sure, most of these advocates have long histories of fervent and articulate opposition to the modern post-New Deal state, and to the constitutional regime that supports it.⁵⁹ The question is, how far would invalidation of the challenged provisions of the ACA move constitutional interpretation in the direction of that broad libertarian agenda? In the interest of provoking awareness and consideration of these prospects, this Part of the brief will specify the key doctrinal changes that reform opponents’ claims entail, and briefly identify examples of areas potentially vulnerable to collateral damage from those changes.

A. The New Doctrines Embedded in the Legal Theories Behind the ACA Challenges

The theories advanced by the health care reform challenges contravene, and in some cases, repudiate outright the above-sketched basic rules of the established constitutional regime. Based

⁵⁵ Florida v. U.S. Dep’t of Health and Human Services, supra note 53, *Reply in Support of Defendants’ Motion for Summary Judgment*, at page 22 (filed 12/06/2010).

⁵⁶ The Department of Justice responded to the AGs’ complaint that the Medicaid expansion provisions will “drive them off a cliff” financially, with multiple studies and statistics purporting to show that the overall financial impact of the ACA on the states would be very small at worst and, for some states at least, significantly positive.

⁵⁷ Florida, slip op. at 12.

⁵⁸ Randy Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate is Unconstitutional*, 6 N.Y.U. J.L. & LIBERTY (forthcoming 2011).

⁵⁹ See, e.g., Randy Barnett, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2004); Richard A. Epstein, *HOW PROGRESSIVES REWROTE THE CONSTITUTION* (CATO Institute, 2006).

on the arguments they assert in the litigations, in their place, the ACA challengers would introduce the following new rules:

- A categorical rule that a prerequisite to the imposition of Commerce Clause-based regulation is some form of “self-initiated activity.” Whatever scope subsequent decisions might give this vague and unprecedented concept, it cannot include foregoing or not carrying health insurance. Hence, personal decisions or conduct equivalent to foregoing health insurance must similarly be beyond the reach of Congress’ commerce power.
- A rule that regulatory measures that, standing alone, are not authorized by the Commerce Clause or other enumerated power cannot be authorized by the Necessary and Proper Clause on the ground that they are essential to achieving a valid statutory goal or to ensure the effectiveness of a broader, valid statutory program.
- A rule that, where a levy or exaction carries a “regulatory purpose,” it must be authorized by the Commerce Clause or another enumerated power, not by the broad term “general welfare” in the text of the tax-and-spend clause itself.
- A rule that laws sanctioned by the Commerce Clause or the General Welfare Clause (or, presumably, any other constitutional provision) must fail if they impinge on an individual liberty interest of comparable dimension to the interest in foregoing health insurance. This would replace the existing rule that legislation must be upheld if rationally related to a lawful objective except when conflict is asserted between the law and a “fundamental right.” In effect, this would reinstate the precise legal logic used by the pre-New Deal “Lochner” judiciary to strike down economic regulatory laws, but under the rubric of the Commerce Clause instead of the Due Process Clause of the Fifth Amendment.
- A rule that conditional funding programs (funding programs with strings attached) for state governments are unconstitutionally coercive under one or more of the following circumstances: if, *as a practical or political matter*, a state (or states generally) cannot exercise their legal right to reject funding and withdraw from a federal program because of: the absolute level of federal funding, the proportion of the federal funds in question to a state’s program to which they contribute, the proportion of the federal contribution to the state’s overall budget, or the political or other importance of the federal program to the state.
- A rule that neither Congress nor, presumably, administrative agencies can require states to accept changes in conditional spending programs that significantly increase costs or other burdens for participating states as a

condition of remaining in and continuing to receive funds from the program.

B. Areas of Law Vulnerable to Challenges Based on Reform Opponents' Claims

Given the broad sweep of the doctrines that invalidation of the ACA mandate would repudiate or call into question, and the entrenchment of those doctrines in constitutional jurisprudence and legal and governmental practice, it is difficult to predict the precise impact of such an outcome. At this juncture, some of the most far-reaching consequences may be the most hidden from view. For example, the status of the Necessary and Proper Clause as a facilitator of Congress' ability to choose efficacious ways, independent of its enumerated powers, to "carry [those powers] into execution," has been established since the earliest days of the Republic. For all that time, Congress has crafted legislation with the understanding that individual components of a regulatory scheme need not themselves be in or have a substantial connection to interstate commerce. Only rarely have the courts addressed challenges to such non-interstate commerce-connected pieces of broader programs, and thereby been compelled to reaffirm Chief Justice Marshall's rule. So it is difficult to find cases that could go the other way if that rule is overturned. But such challenges could proliferate, if the Supreme Court endorses Judge Hudson's new rule that "[b]ecause an individual's personal decision to purchase – or decline to purchase – health insurance from a private provider is beyond the historical reach of the Commerce Clause, the Necessary and Proper Clause does not provide a safe sanctuary."

Nevertheless, it is possible to identify at least some policy areas and statutes susceptible to being targeted or affected by the theories pressed by ACA challengers.

1. Benefit Programs – Medicare, Social Security, and Medicaid

Two elements of a decision to strike down the individual mandate provision could pose major threats to the nation's safety net. The first threat arises from the fact that the decision would effectively provide that a personal liberty interest can overcome a statute that is, indisputably, rationally related to and, apart from its conflict with the asserted liberty interest, justified under Congress' Commerce Clause authority. To be sure, opponents argue that the mandate regulates "inactivity," which, they assert, the Commerce Clause does not cover. But, as noted above, the inactivity/ activity distinction at best states a purely factual difference between the individual mandate provision and all other cases applying the Commerce Clause. The only basis for turning that factual difference into a legal standard is precisely the reason given by both Judge Hudson and Judge Vinson: namely, that the ACA mandate impairs a personal liberty interest, an individual's interest in freedom to choose not to purchase health insurance. Similarly, proponents have advanced the necessary but improper theory to strike the mandate, even though it is concededly "necessary" as prescribed by the Necessary and Proper Clause. But, again, the reason why they brand the mandate "improper," is because it violates the same asserted personal liberty interest.

So the question will arise, what is the nature of this liberty interest robust enough to invalidate a rationally based exercise of Congress' commerce power? ACA opponents generalize the principle at stake as the interest in not being compelled to purchase a privately

marketed product. ACA supporters see the issue differently and would characterize the interest at stake as an individual's interest in determining whether and how to pay for health care services, or whether to contribute to an insurance pool available to finance the individual's and others' purchases of health care services at affordable prices. Viewed through the latter lens, in terms of its impact on individual liberty, the ACA mandate is indistinguishable from Medicare or Social Security taxes. To libertarian theorists and advocates, forced contributions to public health and/or retirement programs are, in principle, not necessarily less objectionable than mandatory private insurance. Certainly, cases will be brought alleging that the principle on which a decision adverse to the ACA rests necessarily implicates Medicare and Social Security taxes as well, whether as a substantive due process claim or as a carve-out from the tax power. In the short term, it may seem extreme and untenable, at least politically, to apply the principle underlying a decision to strike down the ACA mandate to require Medicare and Social Security contributions to become voluntary. But just a year ago, most legal experts regarded the claims put forward in the health care reform cases as improbable, if not frivolous. Once such a principle has been embraced by the Supreme Court, political acceptance, not legal logic, will determine how far it will carry in the courts, and how fast it might travel.

In addition to this threat to Medicare and Social Security taxes, the AGs' attack on the ACA's Medicaid expansion provisions would cripple Medicaid – the entire, existing program financing health care for over 50 million Americans, not just Medicaid as it would be revised by the ACA – as well as other state-administered programs that are federally funded and supervised. Any of the criteria suggested by the AGs' counsel for branding the Medicaid expansion as coercion could effectively immunize the states from complying with federal requirements in exchange for accepting federal funds and convert Medicaid into a *de facto* block grant. The AGs' claims, if embraced by the Supreme Court, could effectively prevent Congress or the Department of Health and Human Services from modifying the program in ways to which states would object as adding financial or other burdens unforeseen when they first decided to participate in the program. The federal government could be significantly drained of its ability to ensure that the billions of tax dollars turned over to the states to administer are spent in accord with statutory purposes and requirements.

2. Civil Rights Protections

If ACA opponents' inactivity/ activity distinction is embraced and the individual mandate provision struck down, an obvious target area for copycat claims could be safeguards against discriminatory refusals to serve, sell or rent, or hire. Health care reform opponents distinguish these antidiscrimination laws on the ground that, prior to subjecting themselves to requirements to serve or employ or sell or rent to all, regardless of race or other protected status, hospitality providers, housing sellers or renters, or employers have "initiated" commercial activity. Once individuals have taken such a voluntary step, they say, the government may regulate them under the Commerce Clause (or, presumably, other applicable power).

At first blush, opponents' distinction may seem viable. But, especially when the complex realities of the health insurance and health care markets are considered, the line of demarcation becomes murky. To be sure, someone declining to enter into a commercial transaction with a prospective homebuyer or worker or restaurant customer may plausibly be characterized as

already having voluntarily entered the stream of commerce. But the same can just as plausibly be said for many uninsured persons. A substantial majority of those without insurance coverage at some point during any given year move in or out of coverage and have coverage at some other point within the same year, and 62.6% of the uninsured at a given point in time made at least one visit to a doctor or emergency room within the year.⁶⁰ The two models could be characterized as not all that categorically different, a point that will surely be made in court. Depending on the facts in particular cases, challengers can be expected to claim that it would be difficult to distinguish the ACA mandate from antidiscrimination laws that, arguably, require persons to enter into transactions or otherwise “engage in commerce.”⁶¹

A second set of vulnerable civil rights protections are antidiscrimination guarantees prescribed by conditional funding programs such as Title VI of the Civil Rights Act and Title IX of the Education Amendments of 1972, the Age Discrimination Act, the Rehabilitation Act, and the Individuals With Disabilities Education Act (IDEA). These requirements are responsible for such diverse and revolutionary changes as women’s sports facilities and teams nationwide and accommodation for people with disabilities by public universities and facilities. Among the most effective engines of equal opportunity on the nation’s lawbooks, these conditional funding safeguards could be threatened or obstructed by the Supreme Court’s embrace of the “coercion” theory the AGs have leveled at the ACA’s Medicaid expansion provisions. In any of its variations, the coercion theory means that the requirements of a conditional funding program could become unenforceable, precisely as funding levels reach a threshold sufficient to constitute an effective inducement. Otherwise stated, the more politically difficult it is for a state to turn away funding, the less power Congress has to impose conditions on that funding. In the case of antidiscrimination conditions, the reason that compliance has been so widespread over the decades since these laws were enacted is precisely that noncompliance could lead to the loss of federal funding for an entire institution (such as a state university), not just the individual program or facility where noncompliance occurs.⁶²

⁶⁰ Florida v. U.S. Dep’t of Health and Human Services, *supra* note 53, *Memorandum in Support of Defendants’ Motion for Summary Judgment* 28 (citing Congressional Budget Office, *How Many Lack health Insurance and For How Long* at 4,9 (2003); Thomas More Law Center et al. v. Barack Hussein Obama et al., Civil Case No. 10-11156, Amicus Curiae Brief of Majority leader Harry Reid et al, 13 (filed January 21, 2011) (citing Center for Health Statistics, *Health, United States, 2009*, at 318..

⁶¹ Probably not coincidentally, supporters of the health care reform suits include opponents of government bans on private discrimination. They will presumably not be displeased if, following a decision adverse to the ACA mandate, the constitutional status of longstanding prohibitions on private discrimination comes under attack. New U.S. Senator Rand Paul created a stir during the 2010 campaign when he acknowledged this view. See <http://www.washingtonpost.com/wp-dyn/content/article/2010/05/20/AR2010052003500.html>.

⁶² The institution-wide bite of Title VI and Title IX guarantees was secured by congressional override of a 1984 Supreme Court decision construing Title VI to restrict funding cut-offs for non-compliance narrowly to affected activities or programs only. *Grove City College v. Bell*, 465 U.S. 555 (1984). *Grove City* was overridden by the Civil Rights Restoration Act of 1988. http://www.now.org/issues/title_ix/history.html The Rehabilitation Act covers “all of the operations” of a “federally funded program or activity, such that if one part of a department or agency receives federal financial assistance, the whole entity is considered to receive federal assistance. 28 U.S.C.A. §794(b); *Schroeder v. City of Chicago*, 927 F.2d 957, 962 (7th Cir. 1991). Conservative members of the Court have shown hostility to conditional spending antidiscrimination protections on other occasions, *see Alexander v. Sandoval*, 532 U.S. 275 (2001), and, more generally, to enforcement of conditional spending protections. *Phirma v. Walsh*, 538 U.S. 644, 674-83 (dissenting opinions of Justices Scalia and Thomas) (2003); R. Bobroff, *Section 1983 and Preemption: Alternative Means of Court Access For Safety Net Statutes*, 10 LOYOLA JOURNAL OF PUBLIC INTEREST LAW 27, 75-80 (2009) *Arlington Central School District Board of Education v. Murphy*, 126 S. Ct. 2455,

3. Environmental Programs

Four aspects of the ACA opponents' case could pose threats to major environmental laws and programs. First, a new activity/ inactivity barrier to Commerce Clause-based regulation could spell trouble for the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), also known as the Superfund hazardous waste law, and, possibly, the Endangered Species Act and the Clean Water Act. CERCLA prescribes a strict liability regime for exacting contributions from property owners to pay for clean-up of underground toxic contaminants. Property owners, residential as well as commercial, are liable for clean-up of contamination far removed from the borders of their own land, as long as run-off or seepage from sources under their land could have contributed to targeted contamination, under quite loose standards of proof.⁶³ Judge Hudson dismissed an asserted analogy between the individual mandate provision and CERCLA on the ground that property owners at some point would have purchased the land before incurring liability, thereby engaging in a "self-initiated activity." But in reality, some cases of home or other real property ownership triggering CERCLA liability could show more tenuous and problematic connections to commercial activity than the case of many, uninsured individuals subject to the ACA individual mandate provision. Judge Hudson's dismissal of such a threat to Superfund requirements is unlikely to deter copycat litigants from challenging, nor excuse judges from determining, whether a new rule would require limits on CERCLA strict liability. Insofar as the Endangered Species Act, and/or the Clean Water Act impose restrictions without a prerequisite of "self-initiated activity" on the part of affected property owners, such measures would likewise face court scrutiny under a new rule.

Second, provisions of environmental laws and regulations could be put in play by a new rule that individual components of valid Commerce Clause regulatory programs must themselves be independently subject to Commerce Clause jurisdiction. To take one possible example, Commerce Clause challenges to the detailed mandates in the Surface Mining Control and Reclamation Act, summarily dismissed by a unanimous Supreme Court in 1981, could suddenly become viable 30 years later, by affirmance of Judge Hudson's December 13 ruling that the Necessary and Proper Clause provides no "sanctuary" for individual instrumental pieces of broader regulatory schemes.

Third, if opponents' claims, as embraced by Judges Hudson and Vinson, are embraced by the Supreme Court, resistance and challenges to applications of environmental laws could mushroom, simply because the Court has broken with decades of precedent and erected a categorical barrier to Congress' ability to regulate a major economic sector. This seems especially likely, given the level of hostility conservative justices have already shown to application of the Clean Water Act, for example, to allegedly intrastate targets.⁶⁴

2457-64 (2006), discussed in Simon Lazarus, *Federalism R.I.P.? Did the Roberts hearings Junk the Rehnquist Court's Federalism Revolution?* 56 DEPAUL L. REV. 1, 6-7 (2006).

⁶³ "One of the most troubling aspects of CERCLA liability is the burden placed upon landowners who did not contribute to the presence of hazardous substances on their property." Paul D. Taylor, *Comment: Liability of Past owners: Does CERCLA Incorporate a Causation-Based Standard?*, 35 S. TEX. L. REV. 535 (1994)..

⁶⁴ See SWANCC v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001) and Rapanos v. United States, 547 U.S. 715 (2006). In SWANCC, a 5-4 majority narrowly construed the Clean Water Act to overturn an Army Corps of Engineers rule extending the statutory jurisdictional term "navigable waters of the United States" to include any

A fourth threat to environmental programs posed by a decision adverse to the individual mandate provision would flow from a determination that interference with a loosely defined personal liberty interest can be the basis for invalidating rationally related and otherwise lawful Commerce Clause (or General Welfare Clause) regulatory requirements. This *Lochnerian* logic could spawn challenges to provisions of environmental statutes and regulations, or to particular applications of them.

IV. Conclusion: Power to the Courts?

Perhaps more significant than specific changes to substantive law are procedural and other below-the-radar ways in which endorsement of the health care reform challenges will accelerate the Supreme Court majority's penchant for empowering itself and weakening Congress, as policy makers and political players. To begin with, that trend will be furthered by the hole such a decision will blow through doctrines of "rational basis" deference to Congressional policy and factual determinations. This particular display of judicial willingness to buck legislators' judgments will loom particularly portentous because of the political importance of the clash and centrality of the subject matter to Congress' constitutional authority to regulate the national economy.

In addition, a decision adverse to the ACA mandate, in particular, will scorn an elaborately conscientious effort by Congress to ensure, and to demonstrate with carefully drafted statutory findings, that the legislation squares with governing Supreme Court precedent. Rejecting the case for the legislation made in the statutory findings is not merely an affront to the drafters, nor cavalier disregard for the Court's own precedents. More importantly, shoving aside the findings will demonstrate indifference to Congressional *reliance upon* those precedents in crafting this historic legislation. This sort of "moving the goal posts" makes it hard or impossible for Congress to shape legislation with confidence that it will be sustained. Combined with the difficulties of re-mobilizing the support necessary to enact complex legislation like the ACA, such decisions, however remediable in theory, in practice can and do kill major legislative initiatives permanently.

The complexities and challenges inherent in the legislative process are the reasons why the New Deal Court adopted practices and doctrines essential to give Congress the running room it needs to discharge its constitutional role. Granting the claims of ACA opponents could severely undermine Congress' capacity to perform that role. That possibility should set off alarm bells, and not just for supporters of health care reform.

habitat adopted by migratory birds. In *Rapanos*, four justices voted to erect a categorical rule that would, if adopted by a Court majority, significantly hamper Federal wetlands protection efforts, as discussed in Lazarus, *supra* note 65, 56 DEPAUL L. REV. at 6.

“THE HEALTH CARE LAWSUITS: UNRAVELING A CENTURY OF CONSTITUTIONAL LAW AND THE FABRIC OF MODERN AMERICAN GOVERNMENT: EXECUTIVE SUMMARY,” BY SIMON LAZARUS, FEBRUARY 8, 2011, ISSUE BRIEF



**The Health Care Lawsuits:
Unraveling A Century of Constitutional Law
and The Fabric of Modern American Government**

EXECUTIVE SUMMARY

Simon Lazarus

February 8, 2011

All expressions of opinion are those of the author or authors.
The American Constitution Society (ACS) takes no position on specific legal or policy initiatives.

**The Health Care Lawsuits:
Unraveling A Century of Constitutional Law
and The Fabric of Modern American Government**

EXECUTIVE SUMMARY

Simon Lazarus*

Nearly a year after President Obama signed the Affordable Care Act (ACA) into law, battles over its constitutionality flare in at least 20 separate lawsuits and countless media and political arenas. As Congress was drafting the law, when opponents first broached the prospect of constitutional challenges, experts across a broad ideological spectrum derided the constitutional case against the legislation as, in the words of Harvard's Charles Fried, Solicitor General to President Ronald Reagan, "preposterous." Thus far, most of the cases have indeed been dismissed, and two of the federal district courts that have reached the merits have upheld the principal target of the challenges – the requirement that most Americans who can afford it carry health insurance, the so-called "individual mandate" or "individual responsibility provision." However, two district courts have struck the mandate down. In addition to the widespread attack on the individual responsibility provision, 26 Republican state officials have made a claim in the Western District of Florida challenging the ACA's expansion of Medicaid. The district judge hearing that case ruled the claim inconsistent with applicable precedents, but suggested that those precedents might merit reconsideration. Ultimately, these issues will be resolved by the Supreme Court. Key members of the Court's conservative bloc have written or joined opinions that would be hard to square with disapproval of the mandate or other ACA provisions under challenge. But this is a Court with a track record in politically or ideologically charged cases of giving precedent short shrift and splitting 5-4 along partisan lines, so precedent may not be prologue in this case.

This issue brief will consider what, beyond the specifically targeted ACA provisions, is at stake in these cases. The brief will not focus on detailing the by now familiar standard arguments for and against the validity of the challenged provisions. Instead, the brief attempts a first cut at assessing the broader potential impact of the claims at issue in the suits. What are the implications of the theories behind them? If a Supreme Court majority were to embrace those claims, what would the new constitutional landscape look like? Will basic underpinnings of established constitutional law and governmental practice shift? If so, how, and how much? Apart from the ACA, what other important statutes and areas of policy could expect potential collateral damage from follow-on challenges?

* Public Policy Counsel, National Senior Citizens Law Center. An earlier issue brief, *Mandatory Health Insurance: Is it Constitutional?*, was published by the American Constitution Society in December 2009 and can be found at <http://www.acslaw.org/files/Lazarus%20Issue%20Brief%20Final.pdf>.

The Constitution: A Charter to Enable – Or Stymie – Effective National Governance?

In summary, the brief concludes:

- The pending health care reform challenges constitute a bold bid for historic, sweeping constitutional change. If successful, the challenges would be a major step toward reinstating a web of tight constitutional constraints on congressional authority that conservative Supreme Court majorities repeatedly invoked during the first third of the 20th century to strike down economic regulatory laws. In the late 1930s and thereafter, the Supreme Court jettisoned this conservative activist jurisprudence, replacing it with constitutional interpretations supporting Progressive Era, New Deal, Great Society, and kindred reforms.
- The legal theories behind the health care lawsuits take dead aim at three bedrock understandings that inform the vision of a democratically governed, economically robust nation-state first reflected in Chief Justice John Marshall’s foundational decisions interpreting the constitutional provisions prescribing federal economic policy authority, and reaffirmed in all Supreme Court decisions since the New Deal era. These understandings are:
 1. The federal government exists and is empowered to address objectives that states acting individually lack, in the words of the Framers, the “competence” to handle on their own.¹ In very recent times, the same understanding has been articulated by the late Chief Justice William H. Rehnquist as the difference between matters that are “truly national” from those that are “truly local.”² As Justice Anthony Kennedy expressed the principle: “Congress can regulate on the assumption that we have a single market and a unified purpose to build a stable national economy.”³
 2. To tackle those “truly national” problems, the federal government has the flexibility to pick solutions that are the most “competent” in practice. In

¹ The Framers repeatedly used “competence,” and its antonym “incompetence,” to distinguish federal from state constitutional authority, not to mean “ability” or “ineptness,” but rather jurisdictional “capacity” or “scope.” See Jack Balkin, *Commerce*, 109 MICH. L. REV. 1, 8-13 (2010).); Akhil Amar, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 107-08 (2005). The principles driving the drafting of Congress’ legislative authority were a widely shared consensus among the delegates to the Constitutional Convention that the “National Legislature ought to be impowered . . . to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted [by state legislation], . . . or in all cases for the general interests of the union.” Jack N. Rakove, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 177-78* (1997). These and original sources on which they draw are concisely marshaled in written testimony of Elizabeth Wydra and Douglas Kendall of the Constitutional Accountability Center submitted to the Senate Judiciary Committee on February 1, 2011, and by Elizabeth Wydra and David Gans, in *Setting The Record Straight: The Tea Party and the Constitutional Powers of the Federal Government* (July 16, 2010). Both the latter two documents are available on the site of the Constitutional Accountability Center, <http://theconstitution.org/>.

² *United States v. Lopez*, 514 U.S. 549, 567-68.

³ *Id.* at 574 (Kennedy J., concurring) (1995).

the words of Justice Antonin Scalia, the national government “possesses every power needed to make [its solution] effective.”⁴

3. The democratic branches, not the judiciary, have the principal constitutional writ to shape economic policy, and, accordingly, the courts are to defer to Congress and give it the running room necessary to target objectives and craft effective solutions. In other words, economic “regulatory legislation . . . is not to be pronounced unconstitutional unless . . . it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators,” or where the legislation violates individual rights that are “fundamental” or expressly protected by particular constitutional provisions.⁵

The individual responsibility provision, as well as other targeted ACA features, cannot be overturned without violating these basic understandings and the specific doctrinal rules and principles implementing them. In turn, such a decision will call into question the constitutional bases for, and hence could trigger copycat challenges to, provisions of other landmark laws and programs, including safety net programs such as Medicare, Medicaid, Social Security, and CHIP (the Children’s Health Insurance Program); civil rights law guarantees against private discrimination by places of public accommodation or in the workplace; federal grant programs in education, transportation, and other large-scale cooperative federalism initiatives; and environmental protection. As the judiciary disposes of these ensuing suits, it will jostle against and upstage Congress and the President as a direction-setter and micro-manager of national economic policy.

In place of a constitutional jurisprudence that prioritizes effective and responsive national governance, the pending health care reform challengers would substitute a radically different regime. As stated by 38 leading Republican members of the House of Representatives in an amicus curiae brief filed in one of the cases: *Congress cannot pass just any law that seems to most efficiently address a national problem.*⁶ This self-styled “precept,” which in similar form recurs in briefs, argument transcripts, and even judicial opinions impugning the ACA, is a recipe for circumscribing the capacity of the federal government to meet national needs. Barring Congress from enacting the ACA exemplifies this impact, since doing so would deny Congress the ability to effectively reform a dysfunctional national health care market comprising over 17% of the national economy, that causes 62% of personal bankruptcies, leaves 50 million citizens uninsured, and deprives individuals with pre-existing medical conditions of access to affordable health insurance and, thus, needed health care. If nine, or more realistically, five life-tenured

⁴ *Gonzales v. Raich*, 545 U.S. 1, 36 (2005) (Scalia, J. concurring) (quoting *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 118-19 (1942)).

⁵ *United States v. Carolene Products Co.*, 304 U.S. 144, 152 & n.4 (1938). The Court at footnote 4 of this opinion famously prescribed “rational basis” deference to Congress’ legislative judgment, except in cases involving alleged violations of “fundamental” individual or minority rights, incapable of protection through democratic political processes. *Id.*

⁶ Brief for American Center for Law & Justice et al. as Amici Curiae Supporting Plaintiff, *Virginia v. Sebelius*, No. 3:10-cv-00188-HEH at 2-3 (E.D. Va. June 7, 2010) (emphasis added), available at http://www.aclj.org/media/PDF/Virginia_Amicus_Brief_20100607.pdf.

justices can block an undisputed rational solution for an economic problem so big and so urgent, what limit is there on the Court's capacity to hamstring federal stewardship of the national economy?

Legal Bases for Effective Federal Economic Governance

The established constitutional regime for federal economic regulation implements the broad understandings noted above and rests on eight doctrinal building blocks:

- Congress' power to regulate interstate commerce...
 1. covers matters that have an economic impact national in scope that "*concern* more states than one," and is not limited to matters physically present in more than one state.
 2. is bounded by criteria that are flexible, practical, and focused on impact ("substantial effects" on interstate commerce), and is not rigid or categorical.
 3. is interpreted in accord with the Framers' purpose to empower Congress to manage effectively a robust national economy.
- Congress' authority to enact measures "necessary and proper" to "carry into execution" its specifically enumerated powers...
 4. does not limit Congress to measures that are "absolutely" necessary to achieve lawful goals, but authorizes (and requires judicial approval of) any optional approach that is "plainly adapted" to attain such goals.
 5. is not circumscribed by the Commerce Clause (nor by other enumerated powers), but encompasses "all means" appropriate for achieving Commerce Clause-authorized goals or to ensure the effective operation of a broader statutory program duly authorized by the Commerce Clause (or other enumerated power).
- The General Welfare, or Tax-and-Spend power...
 6. is not circumscribed by Congress' enumerated powers, but may be exercised to achieve any Congressional goal that serves the "general welfare of the United States," and includes the ability to impose conditions in exchange for the acceptance of federal funds.
 7. authorizes legislation that raises revenue, regardless of whether the legislation has a regulatory purpose or a purpose to deter, or even eliminate, types of conduct.

- 8. Neither the Commerce nor the General Welfare Clause justifies measures that violate the Fifth Amendment guarantee against deprivation of liberty without due process of law, but such measures must ordinarily be upheld if rationally related to a lawful goal, unless they violate personal liberty interests which are “fundamental.”

The ACA Challengers' Proposed New Rules and Their Impact

The theories advanced by the pending health reform challenges contravene, and in some cases, repudiate outright each of the above-sketched eight basic rules of the established constitutional regime. Based on the arguments they assert in the litigations, in their place, the ACA challengers would introduce the following new rules:

- A categorical rule that a prerequisite to the exercise of Commerce Clause authority is some form of “self-initiated activity.” Whatever scope subsequent decisions might give this vague and unprecedented concept, under this new rule, Congress cannot regulate the foregoing of health insurance. Hence, personal decisions or conduct equivalent to foregoing health insurance must be similarly beyond the reach of Congress’ Commerce power.
- A rule that regulatory measures which, standing alone, are not authorized by the Commerce Clause or other enumerated power, cannot be authorized by the Necessary and Proper Clause on the ground that they are essential to achieving a valid statutory goal or to ensure the effectiveness of a broader, valid statutory program.
- A rule that, where a levy or exaction carries a “regulatory purpose,” it must be authorized by the Commerce Clause or another enumerated power, not by the broad term “general welfare” in the text of the tax-and-spend clause itself.
- A rule that laws sanctioned by the Commerce Clause or the General Welfare Clause (or, presumably, any other constitutional provision) must fail if they impinge on an individual liberty interest of comparable dimension to the interest in foregoing health insurance. This would replace the existing rule that legislation must be upheld if rationally related to a lawful objective except when conflict is asserted between the law and a “fundamental right.” In effect, this would reinstate the precise legal logic used by the pre-New Deal “Lochner” judiciary to strike down economic regulatory laws, but under the rubric of the Commerce Clause instead of the Due Process Clause of the Fifth Amendment.⁷

⁷ *Lochner v. New York*, 198 U.S. 45 (1905), launched and has come to symbolize the notoriously activist anti-regulatory regime of the first third of the 20th century. The case held that maximum hours regulation violated employers’ and employees’ “freedom of contract,” a “right” that the five justice majority divined in the Fifth and Fourteenth Amendments’ ban on deprivation of liberty without due process of law. *Id.*

- A rule that federal conditional funding programs (i.e. funding programs with strings attached) are unconstitutionally coercive under one or more of the following circumstances: if, as a practical or political matter, a state (or states generally) cannot exercise its legal right to reject funding and withdraw from a federal program because of the absolute level of federal funding, the proportion of the federal funds in question to the state program to which it contributes, the proportion of the federal contribution to the state's overall budget, or the political or other importance of the federal program to the state.
- A rule that neither Congress nor, presumably, administrative agencies can require states to accept changes in conditional spending programs that significantly increase costs or other burdens for participating states, as a condition of remaining in and continuing to receive funds from the program.

Of course, it is impossible to predict how fast the logic of such revolutionary – or counter-revolutionary – doctrinal principles might be fleshed out by the federal courts, nor how far they would cut. But conservative, business, and other advocates would surely move, quickly and persistently if strategically, to test the limits and try to push them faster and farther. Possible targets could include:

- Benefit programs: Medicare, Social Security, Medicaid, and CHIP (Children's Health Insurance Program). Medicare and Social Security could be affected by claims that Medicare and Social Security taxes amount to forced contributions to insurance coverage that particular individuals may not want, analogous to the ACA individual responsibility provision. Medicaid (pre-ACA Medicaid, not just the new ACA addition) and CHIP could be affected if a Supreme Court majority embraces reform opponents' proposed constraints on Congress' authority to attach conditions to state funding grants.
- Civil Rights. If reform opponents' inactivity/ activity distinction is embraced and the individual responsibility provision struck down, an obvious target area for copycat claims would be safeguards against discriminatory refusals to serve, sell, rent, or hire. If opponents' attack on the ACA's Medicaid expansion provisions as "coercive" is sustained, guarantees imposed on federal grantees, such as Title VI of the Civil Rights Act, Title IX of the Education Amendments Act of 1972, the Age Discrimination Act, the Rehabilitation Act, and the Individuals With Disabilities Education Act would be targets.
- Environmental programs. A new activity/inactivity barrier to Commerce Clause-based regulation could create defenses for landowners subject to the Superfund Law (the Comprehensive Environmental Response, Compensation, and Liability Act known by its acronym CERCLA) and, possibly, the Endangered Species Act as well. Some landowners could be expected to assert they have been subjected to onerous federal liability without "self-initiated activity" on their part, and more so than many persons who lack health insurance coverage.

Conclusion: Power to the Courts?

Perhaps more significant than specific radical changes to substantive law are procedural and other below-the-radar ways in which endorsement of the health care reform challenges will accelerate the Supreme Court majority's penchant for empowering itself and weakening Congress, as policy makers and political players. To begin with, that trend will be furthered by the hole such a decision will blow through doctrines of "rational basis" deference to congressional policy and factual determinations. This particular display of judicial willingness to buck legislators' judgments will loom particularly portentous because of the political importance of the clash and the centrality of the subject matter of health care to Congress' constitutional authority to regulate the national economy.

In addition, a decision adverse to the ACA mandate, in particular, will scorn an elaborately conscientious effort by Congress to ensure, and to demonstrate with carefully drafted statutory findings, that the legislation squares with governing Supreme Court precedent. Rejecting the case for the legislation made in the statutory findings is not merely an affront to the drafters, nor cavalier disregard for the Court's own precedents. More importantly, such a rejection will demonstrate indifference to Congress' reliance upon those precedents in crafting this historic legislation. This sort of "moving the goal posts" makes it hard or impossible to shape legislation with confidence that it will be sustained. Combined with the difficulties of re-mobilizing the support necessary to enact complex legislation like the ACA, such decisions, however remediable in theory, in practice can and do kill major legislative initiatives permanently.

The complexities and challenges inherent in the legislative process are the reasons why the New Deal Court adopted practices and doctrines essential to give Congress the running room it needs to discharge its constitutional role. Granting the claims of ACA opponents could truncate Congress' capacity to perform that role. That possibility should set off alarm bells, and not just for supporters of health reform.

LETTER TO SENATOR CORNYN FROM HON. GREG ABBOTT, ATTORNEY GENERAL OF
TEXAS, FEBRUARY 2, 2011ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 2, 2011

The Honorable John Cornyn
United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Senator Cornyn:

I write to inform you about the State's legal challenge to the so-called "Patient Protection and Affordable Care Act of 2010." As you know from the discussions we have had since I first raised questions about the bill's constitutionality on January 5 of last year, this law is constitutionally flawed. Specifically, the unprecedented requirement that virtually every American purchase federally-approved health insurance exceeds Congress' constitutional authority. Earlier this week, U. S. District Judge Roger Vinson agreed with our legal analysis and found that the law is unconstitutional, writing "[n]ever before has Congress required that everyone buy a product from a private company (essentially for life) just for being alive in the United States." And this is for good reason—neither the commerce clause nor any of Congress' other constitutionally enumerated powers provides the authority for this unprecedented federal overreach and interference with individual liberties.

Significantly, I was not the first to warn Congress about the unprecedented and constitutionally problematic nature of the individual mandate. Congress' own independent, non-partisan research agency, the Congressional Research Service, acknowledged doubts about the individual mandate's constitutionality in a July, 2009 report: "[T]he imposition of an individual mandate...would be unprecedented. The government has never required people to buy any good or service as a condition of lawful residence in the United States...Despite the breadth of powers that have been exercised under the Commerce Clause, it is unclear whether the clause would provide a solid constitutional foundation for legislation containing a requirement to have health insurance...It may be argued that the mandate goes beyond the bounds of the Commerce Clause."

Judge Vinson's learned and well-researched ruling confirms the Congressional Research Service's warnings—which Congress should have heeded when it first debated this legislation.

The individual mandate indeed exceeds Congress' commerce clause authority because it attempts to regulate *inactive* people who have chosen *not* to engage in commerce. As you know, the Supreme Court has sorted Congress' power to "regulate Commerce...among the several States" into three categories. Importantly, the high court has clearly admonished Congress not to go beyond these three categories: (1) regulation of channels of commerce, (2) regulation of instrumentalities of commerce, and (3) regulation of economic activities that affect commerce. See *United States v. Lopez*, 514 U.S. 549, 559 (1995). Under the third category, when Americans choose to engage in economic activities that substantially affect interstate commerce, their actions are properly subject to congressional regulation. But Congress' power is only triggered by the individual's decision to engage in economic activity. Congress lacks the authority to force those who choose to remain inactive to participate in the stream of commerce.

Not only does the individual mandate improperly regulate inactivity, it does so in a way that—if upheld—would eliminate any meaningful limits on Congress' commerce power. The Supreme Court has clearly stated that meaningful limits on the commerce power must be recognized and has warned that legislation that eviscerates those limits will be struck down. See *Lopez*, 514 U.S. at 563-65; *United States v. Morrison*, 529, U.S. 598, 607-08 (2000). The individual mandate fails this test as well. If Congress can enact the individual mandate, it is difficult to imagine anything it cannot do. As Judge Vinson explained, if the federal government can force everyone to buy health insurance based on the alleged benefits to the health care market, then Congress could also require that all Americans buy a GM car to prop up the auto industry, take out a mortgage to benefit the housing market, or eat broccoli because a healthier population is an economically more productive one.

These may appear to be fanciful hypotheticals, but surely the idea that Congress would someday require every American to purchase government-approved health insurance would have appeared equally fanciful to the generation that founded this nation and framed our Constitution. That generation's immediate concerns were with matters that today sound outdated, such as abolishing interstate tariffs and establishing a national currency. The Constitution drafted by our founding fathers, however, was carefully designed to protect Americans of *every* generation from undue intrusion by the federal government. We cannot imagine today what issues will face a future Congress, decades or centuries from now. But we have a sacred duty to future generations to preserve our system of constitutionally *limited* government. No matter how wise or necessary a particular piece of legislation may appear at the time, a law must be rejected if it exceeds Congress' authority under the Constitution. If we acquiesce to a law that recognizes no limits on Congress' power—even if our intentions are pure and our cause is just—we abandon unknown future generations to the whims of unknown future governments, and we pave the way for those whose intentions may not be pure and whose cause may not be just.

It is regrettable that Congress passed the Act without heeding early warnings about the individual mandate's constitutional infirmities. I am encouraged, however, by the House of Representatives' recent vote to repeal the Act, and I am hopeful that the Senate will soon vote to send the repeal bill to President Obama. Together with elected leaders in 27 other states, I stand ready to vigorously pursue our constitutional challenge to the individual mandate, and I am optimistic that the Supreme Court will ultimately affirm Judge Vinson's ruling. But protracted litigation would be unnecessary if a legislative solution is reached. I join you in urging the Senate leadership to allow an immediate vote on the repeal legislation approved by the House.

Sincerely,

A handwritten signature in black ink, appearing to read "Greg Abbott", written in a cursive style.

Greg Abbott
Attorney General of Texas

PAM BONDI, ATTORNEY, STATE OF FLORIDA, STATEMENT

**Written Testimony of Florida Attorney Pam Bondi before
the Senate Committee on the Judiciary
February 2, 2011**

In relation to the subject of today's hearing, I am pleased on behalf of the State of Florida, along with 25 States, the National Federation of Independent Business and several individuals, to commend the scholarly 78-page summary judgment order in *Florida v. U.S. Health and Human Services*. On Monday, Federal District Court Judge Roger Vinson in Pensacola, Florida ruled that the individual mandate is unconstitutional and that it is non-severable from the Patient Protection and Affordable Care Act. As a result, the entire federal health care law was appropriately struck.

All along the Attorneys General, Governors and other plaintiffs in this litigation have sought to vindicate the Founding principles of limited government and individual liberty. Under our federalist form of government, states retain their sovereignty protected both by enumerated powers and by rights, such as the 10th Amendment, under the U.S. Constitution. When the Congress acts in its enumerated powers, including the Commerce Clause enhanced by the Necessary and Proper Clause, it must do so bound by some limiting principle – some end of the reach of federal power where state sovereignty and individual freedom remains. This lawsuit is about how the individual mandate has crossed that constitutional line.

Individual Mandate – Commerce Clause

The Patient Protection and Affordable Care Act (“ACA” or “the Act”) constitutes an unprecedented intrusion on the sovereignty of the States and the freedom of their citizens. In enacting it, Congress exceeded the limited enumerated powers conferred upon it by Article I of the Constitution.

The Act's “Individual Mandate” – a requirement that virtually all Americans obtain and maintain congressionally-approved healthcare insurance coverage for themselves and their families – is unconstitutional. Congress's power under the Commerce Clause is not infinite. At its furthest reach, the commerce power permits federal regulation of *activities* having a substantial relation to interstate commerce. The commerce power does not allow Congress to compel inactive individuals to engage in economic activity against their will. Nor is there any basis in law to treat an internal decision to abstain from activity as a form of “activity” subject to regulation under the Commerce Clause, or to deem all Americans “active” participants within a regulable market merely by dint of their existence. To uphold the Individual Mandate would give future Congresses unbridled power to compel Americans to engage in a variety of economic activities. Authority so novel and sweeping would be indistinguishable from a general federal “police power,” which is irreconcilable with the well-established constitutional principle that Congress has only limited and enumerated powers.

The object of congressional regulation under the commerce power must be some form of commercial or “economic activity.” Indeed, the term “commerce” inherently encompasses some form of an activity. The Supreme Court's Commerce Clause jurisprudence is permeated with recognition of this most fundamental requirement, and it applies both in cases where the Court

has upheld federal statutes under the commerce power, *see Gonzales v. Raich*, 545 U.S. 1, 17 (2005) (“... the power to regulate *activities* that substantially affect interstate commerce”) (emphasis added), and in cases where the Court has struck down laws as exceeding that authority. *See, e.g., United States v. Morrison*, 529 U.S. 598, 608-09 (2000) (Congress has “the power to regulate those *activities* having a substantial relation to interstate commerce”) (emphasis added); *United States v. Lopez*, 514 U.S. 549 (1995) (commerce power allows Congress to “regulate those *activities* having a substantial relation to interstate commerce.”) (emphasis added).

No decision assessing any enactment other than the ACA under the Commerce Clause *ever* has gone beyond the three categories of permissible regulation identified in *Lopez* and *Morrison*, and none *ever* has found inactivity to be a proper subject of regulation under the commerce power. In particular, neither *Gonzales v. Raich*, nor *Wickard v. Filburn* – the Supreme Court’s most sweeping Commerce Clause rulings and on which the Department of Justice principally relies – suggests that Congress through its commerce power can regulate anything other than economic activity. Indeed, in both cases Congress reached the plaintiffs’ activities only based upon its overall regulation of commodities that were indisputably part of the interstate market.

Commerce Clause jurisprudence could not be clearer. Congress may not order Americans to buy, sell, manufacture, grow, distribute, use, obtain, or maintain any product or service against their will unless and until they *choose* to engage in some type of *activity* properly subject to its authority to regulate interstate commerce.

Individual Mandate – Necessary and Proper Clause

The Necessary and Proper Clause is not itself an enumerated power, capable of operating on its own, but is meant to aid in the exercise of Congress’s enumerated powers. Accordingly, Necessary and Proper Clause analysis “look[s] to see whether the [Necessary and Proper-based] statute constitutes a means that is rationally related to the *implementation of a constitutionally enumerated power.*” *Comstock*, 130 S. Ct. at 1956 (emphasis added); *see also United States v. Darby*, 312 U.S. 100, 121 (1941) (“Congress ... may choose *the means* reasonably adapted to the *attainment* of the permitted end”) (emphasis added). Yet, although the Individual Mandate is the ACA’s keystone, it is not related to the *implementation* of Congress’s insurance industry regulations and is not “essential” to them, as that term is used in *Raich* and similar cases. *See e.g., Raich*, 545 U.S. at 36 (Scalia, J. concurring). As those cases indicate, Congress can reach commercial *activity*, including intrastate *activity*, where necessary to implement its regulation of interstate commerce – e.g., where “the regulatory scheme could be undercut unless the intrastate *activity* were regulated.” *Id.* (quoting *Lopez*, 514 U.S. at 561).

Unlike the statute recently upheld by the Supreme Court under the Necessary and Proper Clause in *Comstock*, the mandate is neither “modest” nor a “narrow” addition to a longstanding and indisputably legitimate federal program. Never before has a Congress even attempted to impose on Americans an affirmative obligation to buy a particular good or service simply because they live in the United States. While the long “history of involvement” in the mental healthcare of federal inmates and their civil commitment supported the challenged law as a legitimate exercise of the Necessary and Proper Clause in *Comstock*, the unprecedented and

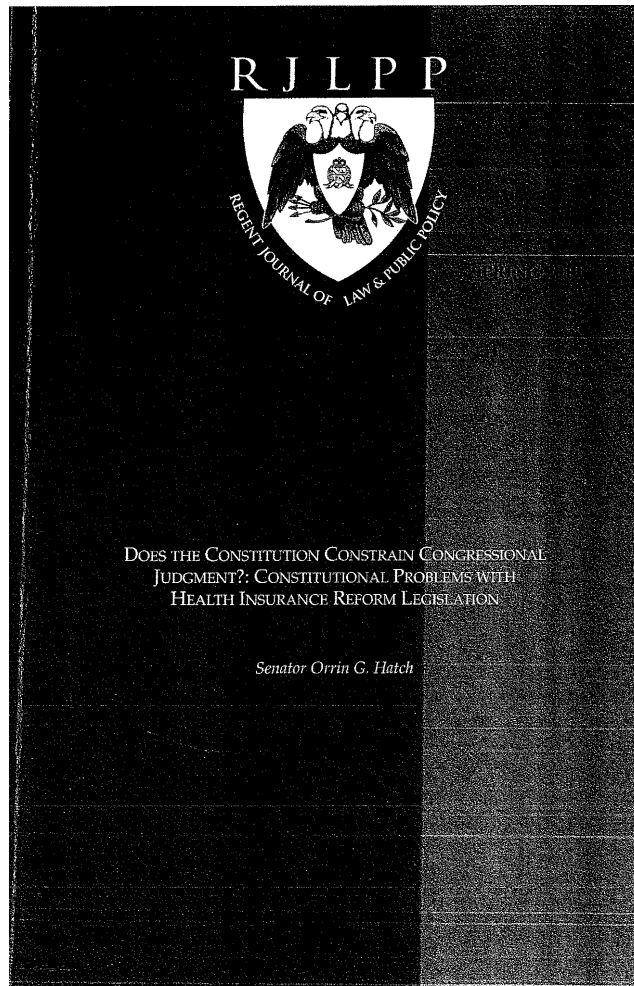
extraordinary nature of the Individual Mandate, and the sheer magnitude of its scope, must lead to the opposite conclusion. Directly or indirectly, the mandate will affect nearly every man, woman, and child lawfully living in this country – and this is its purpose.

Severability

Moreover, because the mandate is concededly indispensable to the ACA, it cannot be severed: the Act must fall along with the mandate. Plaintiffs have established that the Act's Individual Mandate and Medicaid provisions are unconstitutional. Because each is essential to the ACA as a whole, neither can be severed, as a matter of law. The Department of Justice offers no sound reason for avoiding this result. That numerous relatively trivial aspects – e.g., indoor tanning salon provisions – are hung from the structure of the ACA affords no basis for allowing any part of the Act to stand. There is no support for any argument that Congress would have passed any portion of the ACA in the absence of its main components. Turning to the ACA, it is highly instructive that Congress did not include a severability clause. While a prior version contained a severability provision, it was omitted in the final bill, which passed the House of Representatives by a vote of 219 to 212. Although not dispositive, the absence of a severability clause speaks volumes as to Congress's intent and the functional interdependency of the ACA's central provisions, including the Individual Mandate and Medicaid alterations.

I appreciate the opportunity to submit testimony based on the arguments put forward in the litigation on the issues in which the States prevailed in the Florida-based lawsuit.

“DOES THE CONSTITUTION CONSTRAIN CONGRESSIONAL JUDGMENT?: CONSTITUTIONAL PROBLEMS WITH HEALTH INSURANCE REFORM LEGISLATION,” BY SENATOR ORRIN G. HATCH, *Regent Journal of Law and Public Policy (RJLPP)*



**DOES THE CONSTITUTION CONSTRAIN
CONGRESSIONAL JUDGMENT?:
CONSTITUTIONAL PROBLEMS WITH
HEALTH INSURANCE
REFORM LEGISLATION**

ORRIN G. HATCH*

INTRODUCTION

“We do not take an oath to balance the budget, and we do not take an oath to bring about universal peace, but we do take an oath to protect and defend the Constitution of the United States.”¹

—Senator Daniel Patrick Moynihan

In April 1992, Senator Alfonse D’Amato (R-NY) offered an amendment to the congressional budget resolution.² His Democratic colleague from New York, Senator Daniel Patrick Moynihan, made the statement quoted above while making a point of order³ that the D’Amato amendment was unconstitutional.⁴ He “appeal[ed] to the Constitution” and asked

* United States Senator (R-Utah); J.D., University of Pittsburgh School of Law, 1962; B.A., Brigham Young University, 1959. Senator Hatch has chaired both the Senate Judiciary Committee and its Subcommittee on the Constitution and serves on the two committees with primary jurisdiction over health insurance reform legislation, the Finance Committee and the Health, Education, Labor and Pensions Committee.

1. 138 CONG. REC. 9313 (1992) (statement of Sen. Moynihan)

2. Amend. 1784 S. Con. Res. 106, 102d Cong. (1992). The Senate voted 43-47 against the amendment. S. Amdt. 1784 Status, Libr. of Cong., <http://thomas.loc.gov/cgi-bin/bdquery/z?d102:SP01784>: (last visited Mar. 3, 2010).

3. Rule XX of the Standing Rules of the Senate allows a Senator to raise a question of order which “unless submitted to the Senate, shall be decided by the Presiding Officer without debate, subject to an appeal to the Senate.” Comm. on Rules & Admin., Rules of the Senate, <http://rules.senate.gov/public/index.cfm?p=rule-xx> (last visited Feb. 2, 2010) [hereinafter Rules of the Senate]. Tabling such an appeal “shall be held as affirming the decision of the Presiding Officer.” *Id.*

4. 138 CONG. REC. 9313 (1992). “Under Senate precedents, the presiding officer may not rule on a constitutional point of order and instead must submit the point of order to the full Senate for a vote.” BETSY PALMER, CHANGING SENATE RULES OR PROCEDURES: THE ‘CONSTITUTIONAL’ OR ‘NUCLEAR’ OPTION 6 (Cong. Research Serv., CRS Report for Congress Order Code RL32684, Apr. 5, 2005), available at <http://www.thecapitol.net/Research/images/CRS-RL32684.pdf>. The Senate’s 45-45

“Senators to remember their oaths” because “our first responsibility lies . . . with the Constitution that created us and which we are sworn to uphold and protect.”⁵ In other words, Senator Moynihan argued, the Constitution comes first. It empowers Congress to do many things for the American people, but it also sets limits on the exercise of that power. No matter what a Senator thinks of the policy behind a bill or the politics surrounding it, the Constitution comes first.

Senator Moynihan not only made this argument rhetorically, but his point of order also demonstrated that individual Senators, the Senate, and Congress as a whole must ensure that proposed legislation is consistent with the Constitution. Applying that axiom, this article examines the health insurance reform bill passed by the United States Senate⁶ and

vote on Senator Moynihan’s point of order meant that it was not well taken. 138 CONG. REC. 9314 (1992). According to the Congressional Research Service, the Senate voted on sixteen constitutional points of order between 1989 and December 2009. VALERIE HEITSHUSEN, CONSTITUTIONAL POINTS OF ORDER IN THE SENATE 4 (Cong. Research Serv., CRS Report for Congress Order Code R40948, Jan. 6, 2010). One was tabled, six were sustained, and the remaining seven were not well taken *Id.*

5. 138 CONG. REC. 9313 (1992) (statement of Sen. Moynihan). As prescribed, Senators take the following oath: “I do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.” 5 U.S.C. § 3331 (2006). Rule III of the Standing Rules of the Senate also requires Senators to subscribe to this oath by signing a printed copy Rules of the Senate, *supra* note 3.

6. On November 7, 2009, the House voted 220-215 to pass H.R. 3962, the Affordable Health Care for America Act. H.R. 3962 Status, Libr. of Cong., <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HR03962:@@R> (last visited Mar. 3, 2010). On December 24, 2009, the Senate voted 60-39 to pass H.R. 3590, the Patient Protection and Affordable Care Act. H.R. 3590 Status, Libr. of Cong., <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HR03590:@@R> (last visited Mar. 3, 2010). This Article was submitted for publication in January 2010 while the process of reconciling these two bills was underway. The election of Senator Scott Brown (R-MA) on January 19, 2010 may have complicated the passage of health insurance reform legislation because it deprived Democrats of the 60-vote margin they used to invoke cloture on the bill they passed. See Shailagh Murray & Lori Montgomery, *Democrats ponder health-care reform plans in wake of Massachusetts Senate race*, WASH. POST, Jan. 20, 2010, at A1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/01/19/AR2010011904426.html>. The day after that election, the Wall Street Journal said that the message was to “shelve ObamaCare” while the Boston Globe said that “the results need not—must not—stop the fundamental reform of the nation’s health insurance system.” Editorial, *Boston Tea Party*, WALL ST. J., Jan. 20, 2010, <http://online.wsj.com/article/SB1000142405274870383700457>

outlines some of its provisions that raise real constitutional concerns.⁷

I. "RECURRING TO PRINCIPLES"

In *The Federalist* No. 39, James Madison explained the nature of the republican form of government by "recurring to principles."⁸ Ending in the right place requires starting in the right place, with some of the basic principles shaping the system of government within which Congress is considering health insurance reform legislation. Abandoning any or all of these principles along the way will virtually guarantee coming up with the wrong answer.

The first principle is that liberty requires limits on government power; it always has and it always will. The nature of human beings is such that liberty cannot exist without at least some order provided by government. As James Madison put it in *The Federalist* No. 51: "If men were angels, no government would be necessary."⁹ But the nature of government is such that liberty cannot exist without limits on government. James Madison went on to observe: "If angels were to

5013120573610774.html; Editorial, *But Health Reform Still Crucial*, BOSTON GLOBE, Jan. 20, 2010, at 12, available at http://www.boston.com/bostonglobe/editorial_opinion/editorials/articles/2010/01/20/but_health_reform_still_crucial/. On March 21, 2010, the House of Representatives passed H.R. 3590, the Patient Protection and Affordable Care Act, which was signed by President Barack Obama on March 23, 2010. Pub. L. No. 111-148, 124 Stat. 119 (2010).

7 Senator John Ensign (R-NV) made a point of order that H.R. 3590, the Patient Protection and Affordable Care Act, was unconstitutional because it exceeded Congress's enumerated powers and violated the Fifth Amendment. 155 CONG. REC. S13830-31 (daily ed. Dec. 23, 2009) (statement of Sen. Ensign). The Senate voted 39-60 against his point of order. 155 CONG. REC. S13830-31 (daily ed. Dec. 23, 2009) (roll call vote). Senator Kay Bailey Hutchison (R-TX) also made a point of order that the bill was unconstitutional because it violated the Tenth Amendment. 155 CONG. REC. S13832 (daily ed. Dec. 23, 2009) (statement of Sen. Hutchison). The Senate similarly voted 39-60 against her point of order. 155 CONG. REC. S13832 (daily ed. Dec. 23, 2009) (roll call vote). Prior to the "summit" on healthcare reform held on February 24, 2010, President Obama unveiled an eleven-page proposal which uses the Senate bill as its "basic framework." Alec MacGillis & Amy Goldstein, *Obama Offers New Health-Care Reform Proposal*, WASH. POST, Feb. 23, 2010, at A01. The analysis in this Article focuses primarily on the bill passed by the Senate on December 24, 2009, but where appropriate will also make reference to this proposal, which is available at <http://www.whitehouse.gov/health-care-meeting/proposal> [hereinafter President's Proposal].

8 THE FEDERALIST No. 39, at 20 (James Madison) (J. & A. McLean 1788).

9 THE FEDERALIST No. 51, at 118 (James Madison) (J. & A. McLean 1788).

govern men, neither external nor internal controls on government would be necessary.”¹⁰

These controls include a written Constitution that delegates certain powers to the federal government and enumerates the powers delegated to Congress. The second principle is that Congress must establish, rather than assume, that the Constitution allows passage of particular legislation.¹¹ The Tenth Amendment lays out the formula: “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.”¹² In other words, the federal government needs constitutional permission to act while the states need constitutional prohibition to be kept from acting.

“The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.”¹³ In *McCulloch v. Maryland*, Chief Justice John Marshall wrote that the federal government “is acknowledged by all, to be one of enumerated powers. The principle that it can exercise only the powers granted to it . . . is now universally admitted.”¹⁴ Nearly two centuries later, the Supreme Court reaffirmed that among the “first principles” of our form of government is that “[t]he Constitution created a Federal Government of enumerated powers.”¹⁵ As

10 *Id*

11. I am a cosponsor of S. 1319, the Enumerated Powers Act, which would require that every bill “shall contain a concise explanation of the specific constitutional authority relied upon for the enactment of each portion of that Act. The failure to comply with this section shall give rise to a point of order in either House of Congress.” S. 1319, 111th Cong. § 102a (2009). For further description and analysis of this bill, see Andrew M. Grossman, *The Enumerated Powers Act: A First Step Toward Constitutional Government*, THE HERITAGE FOUNDATION LEGAL MEMORANDUM, June 23, 2009, available at <http://www.heritage.org/research/legal/issues/lm0041.cfm>

12. U.S. CONST. amend. X.

13. *Marbury v. Madison*, 5 U.S. 137, 176 (1803).

14. *McCulloch v. Maryland*, 17 U.S. 316, 405 (1819).

15. *United States v. Lopez*, 514 U.S. 549, 552 (1995). This principle is fundamental to the nature of the American system of constitutional government and has been recognized from the founding of the Republic. See *Martin v. Hunter's Lessee*, 14 U.S. 304, 326 (1816) (“The government . . . of the United States, can claim no powers which are not granted to it by the constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication”); see also *Alden v. Maine*, 527 U.S. 706, 739 (1999) (quoting principle stated in *Martin*);

such, “[e]very law enacted by Congress must be based on one or more of its powers enumerated in the Constitution.”¹⁶

The third principle follows necessarily from the first two. For the Constitution to be able to limit the power of the federal government generally and of Congress specifically, the Constitution cannot mean whatever the federal government wants it to mean. The Constitution, after all, created Congress,¹⁷ not the other way around. If Congress could determine the meaning of the Constitution, Congress could define its own power.¹⁸ The Constitution could not be a con-

City of Boerne v. Flores, 521 U.S. 507, 516 (1997) (“Under our Constitution, the Federal Government is one of enumerated powers.”); *Carter v. Carter Coal Co.*, 298 U.S. 238, 291 (1936) (“The ruling and firmly established principle is that the powers which the general government may exercise are only those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers.”); *Newberry v. United States*, 256 U.S. 232, 249 (1921) (quoting principle stated in *Martin*); *Kansas v. Colorado*, 206 U.S. 46, 87 (1907) (“[T]he constant declaration of this court from the beginning is that this [Federal] government is one of enumerated powers.”); *Hepburn v. Griswold*, 75 U.S. 603, 611 (1870) (“But the Constitution is the fundamental law of the United States. By it the people have created a government, defined its powers, prescribed their limits, distributed them among the different departments, and directed, in general, the manner of their exercise. No department of the government has any other powers than those thus delegated to it by the people.”).

16. *United States v. Morrison*, 529 U.S. 598, 607 (2000); see also *Dorr v. United States*, 195 U.S. 138, 140 (1904) (“It may be regarded as settled that the Constitution of the United States is the only source of power authorizing action by any branch of the Federal government.”); *United States v. Harris*, 106 U.S. 629, 635 (1883) (“[T]he government of the United States is one of delegated, limited, and enumerated powers. Therefore, every valid act of Congress must find in the Constitution some warrant for its passage.”) (citations omitted).

17. See *O’Donoghue v. United States*, 289 U.S. 516, 530 (1933) (“The Constitution, in distributing the powers of government, creates three distinct and separate departments—the legislative, the executive, and the judicial. This separation is not merely a matter of convenience or of governmental mechanism. Its object is basic and vital, namely, to preclude a commingling of these essentially different powers of government in the same hands.”) (citations omitted).

18. I have addressed the proper approach to interpreting and applying the Constitution in the context of the judicial selection process. See, e.g., Orrin G. Hatch, *The Constitution as the Playbook for Judicial Selection*, 32 HARV. J.L. & PUB. POL’Y 1035 (2009); Orrin G. Hatch, *Judicial Nomination Filibuster Cause and Cure*, 2005 UTAH L. REV. 803; see also RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (Liberty Fund 1997) (1977); ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1991); *Speech in ORIGINALISM: A QUARTER-CENTURY OF DEBATE* (Steven G. Calabresi ed., 2007); ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997); CHRISTOPHER WOLFE, *THE RISE OF MODERN JUDICIAL REVIEW: FROM CONSTITUTIONAL INTERPRETATION TO JUDGE-MADE LAW* (Rowman & Littlefield 1994) (1986).

trol on government, as Madison argued,¹⁹ or provide limits that cannot be mistaken or forgotten, as Chief Justice Marshall wrote,²⁰ if it means whatever Congress wants it to mean. In that case, Alexander Hamilton would have made no sense to argue that legislation “contrary to the manifest tenor of the Constitution [is] void.”²¹

Since the “manifest tenor” of any document comes from the meaning of its words, the Constitution cannot be simply the form of its words. The Constitution, which declares itself to be the “supreme Law of the Land,”²² is the substance of its meaning. As Judge Robert Bork has explained: “What does it mean to say that the words in a document are law? One of the things it means is that the words constrain judgment. They control judges every bit as much as they control legislators, executives, and citizens.”²³ It is the manifest tenor, or the substantive meaning, of the Constitution that must constrain Congress’s judgment and to do that, the Constitution’s meaning must come from the same authority that supplied the words themselves, namely, the people of the United States. They “ordain[ed] and establish[ed]”²⁴ the Constitution which, Hamilton wrote, represents “the intention of the people.”²⁵ Quoting George Washington, the Rhode Island Constitution declares that “the constitution which at any time exists, till changed by an explicit and authentic act of the whole people, is sacredly obligatory upon all.”²⁶ Words without meaning can oblige no one. To be the Constitution, it must not only say what the people wanted it to say, but it must mean what the people wanted it to mean. Only in this way can the Constitution actually represent the people’s in-

19 THE FEDERALIST NO 51, *supra* note 9, at 118.

20 *Marbury v. Madison*, 5 U.S. 137, 176 (1803).

21 THE FEDERALIST NO 78, at 293 (Alexander Hamilton) (J. & A. McLean 1788).

22 U.S. CONST. art. VI.

23 Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823, 824–25 (1986) (article derived from the Hon. Robert H. Bork, United States Court of Appeals for the District of Columbia, Address at the University of San Diego Law School (Nov. 18, 1985) (transcript available at http://www.fed-soc.org/resources/id_53/default.asp)).

24 U.S. CONST. pmbl.

25 THE FEDERALIST NO 78, *supra* note 21, at 294.

26 R.I. CONST. art. I, § 1.

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tention and actually protect liberty by limiting government power.

Senator Moynihan's call to place the Constitution first echoed the earlier wisdom of Justice Hugo Black directed at his branch of government:

I realize that it is far easier to substitute individual judges' ideas of 'fairness' for the fairness prescribed by the Constitution, but I shall not at any time surrender my belief that that document itself should be our guide, not our own concept of what is fair, decent, and right I prefer to put my faith in the words of the written Constitution itself rather than to rely on the shifting, day-to-day standards of fairness of individual judges.²⁷

Members of Congress must also put the Constitution first

II. APPLYING THE PRINCIPLES

The three principles informing this examination of the health insurance reform legislation are that liberty requires limits on government power, that Congress must identify at least one of its powers enumerated in the Constitution as the basis for legislation, and that the Constitution does not mean whatever Congress wants it to mean. These principles counsel resistance to two temptations. Congress must resist the temptation to assume that the Constitution allows Congress to do whatever it wants and the temptation to ignore the question entirely by leaving it to the courts. The first temptation takes Congress's constitutional responsibility too lightly; the second abdicates it altogether.

The courts may be called upon to exercise judicial review, or "the power . . . to invalidate the acts of government officials as disallowed by the Constitution."²⁸ They may well be called upon to do so with regard to health insurance reform legislation.²⁹ The judicial branch, however, may exercise its power

²⁷ *In re Winship*, 397 U.S. 358, 377–78 (1970) (Black, J., dissenting)

²⁸ Lino A. Graglia, "Interpreting" the Constitution: *Posner on Bork*, 44 STAN L. REV. 1019, 1020 (1992)

²⁹ See Matt Canham, *If Congress Passes Bill, Court Fight Not Far Behind*, SALT LAKE TRIB., Jan. 19, 2010, http://www.sltrib.com/health/ci_14217433; Ben Pershing, *Some Foes of Health-Care Bill Hope Courts Will Stop Legislation*, WASH. POST, Jan. 3, 2010, at A3, available at http://www.washingtonpost.com/wp-dyn/content/article/2010/01/02/AR2010010200620_pf.html.

only in the context of actual “Cases” or “Controversies”³⁰ brought to it by litigants. Because judges may not render advisory opinions in the absence of concrete cases,³¹ there will be no judicial ruling on the constitutionality of a statute unless a case is brought properly raising that issue and meeting relevant procedural and jurisdictional requirements. Even then, judges may address a statute’s constitutionality by considering different factors, using different standards, and for a different purpose than members of Congress would.³² In this way, the judicial branch is reactive, rendering its judgments after the fact; the legislative branch must be proactive, rendering its judgments before legislation becomes law. That judgment cannot be made unless the matter is deliberately considered.

The possibility that a court may someday evaluate a statute’s constitutionality is no substitute for Senators’ duty today to evaluate whether a bill actually before them is constitutional. Senators take an oath to support and defend the Constitution, not to defer to the courts, and that duty is an

30. U.S. CONST. art. III, § 2

31. The Supreme Court’s opposition to rendering advisory opinions began with expressing “some doubts” in *Hayburn’s Case*, 2 U.S. 409, 412 (1792), and has become a virtually categorical rule especially on constitutional questions. See *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 101 (1998) (stating that advisory opinions have been “disapproved by this Court from the beginning”); *Clinton v. Jones*, 520 U.S. 681, 700 (1997) (“[T]he judicial power to decide cases and controversies does not include the provision of purely advisory opinions”); *Church of Scientology v. United States*, 506 U.S. 9, 13 n.6 (1992) (stating that advisory opinions are “impermissible”); *Mistretta v. United States*, 488 U.S. 361, 385 (1989) (“In implementing this limited grant of [judicial] power, we have refused to issue advisory opinions”); *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975) (“The exercise of judicial power under Art. III of the Constitution depends on the existence of a case or controversy [A] federal court has [no] power to render advisory opinions”); *North Carolina v. Rice*, 404 U.S. 244, 246 (1971) (“Early in its history, this Court held that it had no power to issue advisory opinions”); *Hall v. Beals*, 396 U.S. 45, 48 (1969) (declaring that the Court must “avoid advisory opinions on abstract propositions of law”); *Liverpool, N.Y. & Phila. S.S. Co. v. Comm’rs of Emigration*, 113 U.S. 33, 39 (1885) (dealing with an issue “purely as an hypothesis” or “pass[ing] upon the constitutionality of an act of Congress as an abstract question . . . [t]hat is not the mode in which this court is accustomed or willing to consider such questions”)

32. Commentator Jacob Sullum writes that a decision by the Supreme Court that a statute is constitutional “does not mean that such a [statute] would be constitutional – i.e., that it *should* be upheld.” Jacob Sullum, *Would a Federal Requirement to Buy Insurance Be Constitutional?*, REASON, Sept. 23, 2009, <http://reason.com/blog/2009/09/23/would-a-federal-requirement-to>

ongoing, present one. As constitutional historian Charles Warren has written: “However the Court may interpret the provisions of the Constitution, it is still the Constitution which is the law and not the decision of the Court.”³³ Senator Moynihan’s point of order and his appeal to Senators’ own oath of office emphasized that they have an independent, current responsibility to ensure that legislation they consider is consistent with the Constitution.

A. *Constitutional Issues Affecting Individuals and Businesses*

1. *The Individual Insurance Mandate*

The provision in the Senate health insurance reform bill that has received the most constitutional attention and debate is the requirement that, beginning in 2014, individuals³⁴ must obtain a specific level of health insurance for themselves and their dependents.³⁵ Failure to do so would result in a penalty of up to \$750 per year per individual.³⁶ While the penalty would be assessed and collected through the Internal Revenue Code,³⁷ failure to pay it would not result in any “criminal prosecution or penalty” or any lien or levy on property.³⁸ This mandate is the core of the legislation’s plan for expanding health insurance coverage.³⁹

³³ 3 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 470–71 (1922)

³⁴ Under the Senate bill, an “applicable individual” includes citizens and legal residents who are not incarcerated or who have not been granted a religious exemption. H.R. 3590, 111th Cong. § 1501(b) (as passed by Senate, Dec. 24, 2009).

³⁵ *Id.* Section 1501 of the Senate bill would add a section to the Internal Revenue Code requiring that an “applicable individual . . . ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage.” *Id.*

³⁶ *Id.* The penalty would start at \$95 per individual in 2014, \$350 per individual in 2015, and \$750 per individual thereafter. *Id.* The penalty for minors would be one half this amount. *Id.* The bill would cap the total amount of an individual’s penalty at 300 percent of the applicable dollar amount. *Id.* President Obama’s latest proposal would lower the penalty in 2015 to \$325, and in 2016 to \$695. President’s Proposal, *supra* note 7.

³⁷ H.R. 3590, 111th Cong. § 1501(b) (as passed by Senate, Dec. 24, 2009).

³⁸ *Id.*

³⁹ Professor Michael Dorf explains that today “substantial numbers of healthy, mostly young Americans choose to forego health insurance entirely.” The mandate is necessary to address the problem that such individuals would “avoid[] paying premiums when they were healthy, only to collect benefits when they got sick.” He

Properly evaluating the individual insurance mandate requires clarifying just what it is. The Senate bill would require that individuals spend their own money to purchase a particular good or service. This kind of mandate has never been enacted into law. In 1994, the Congressional Budget Office examined the individual insurance mandate in legislation introduced during the 103rd Congress and concluded that it would be “an unprecedented form of federal action. The government has never required people to buy any good or service as a condition of lawful residence in the United States Federal mandates typically apply to people as parties to economic transactions, rather than as members of society.”⁴⁰

No one has offered a single example to the contrary.⁴¹ In a memo dated October 29, 1993 to Attorney General Janet Reno, Assistant Attorney General Walter Dellinger defended

continues, “[t]he solution . . . is the individual mandate: Everyone is required to have health insurance at all times. That way, everyone—including healthy people—pays premiums that end up covering the health care costs of those who ultimately need care.” Michael C. Dorf, *The Constitutionality of Health Insurance Reform, Part I: The Misguided Libertarian Objection*, FINDLAW WRIT, Oct. 21, 2009, <http://writ.news.findlaw.com/dorf/20091021.html>; see also Ruth Marcus, *An ‘Illegal’ Mandate? No*, WASH. POST, Nov. 26, 2009, at A27, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/11/24/AR2009112402815.html> (stating that “the individual mandate is central to the larger effort to reform the insurance market”).

40. CONG. BUDGET OFFICE, MEMORANDUM: THE BUDGETARY TREATMENT OF AN INDIVIDUAL MANDATE TO BUY HEALTH INSURANCE 1–2 (1994), available at <http://www.cbo.gov/ftpdocs/48xx/doc4816/doc38.pdf> [hereinafter CONG. BUDGET OFFICE].

41. See, e.g., Erwin Chemerinsky, *The Constitutionality of Healthcare*, L.A. TIMES, Oct. 6, 2009, <http://articles.latimes.com/2009/oct/06/opinion/oe-chemerinsky6> (“The Supreme Court has held that . . . Congress has the ability to regulate activities that have a substantial effect on interstate commerce.”); MARK A. HALL, THE CONSTITUTIONALITY OF MANDATES TO PURCHASE HEALTH INSURANCE, O’NEILL INSTITUTE FOR NATIONAL AND GLOBAL HEALTH LAW 8, available at http://www.law.georgetown.edu/oneillinstitute/national-health-law/legal-solutions-in-health-reform/Papers/Individual_Mandates.pdf (stating that “matters relating to insurance substantially affect interstate commerce”). The authors of an excellent analysis published by The Heritage Foundation are correct when they observe: “Mandating that all private citizens enter into a contract with a private company to purchase a good or service, or be punished by a fine labeled a ‘tax,’ is unprecedented in American history.” Randy Barnett et al., *Why the Personal Mandate to Buy Health Insurance Is Unprecedented and Unconstitutional*, THE HERITAGE FOUNDATION LEGAL MEMORANDUM No. 49-14, Dec. 9, 2009, available at <http://www.heritage.org/research/legalissues/lm0049.cfm>

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the constitutionality of the proposed Health Security Act.⁴² He claimed that the United States Supreme Court had upheld “regulation of the economic *choices* [of] individuals,”⁴³ but offered as support only decisions upholding “the prerogative to regulate the *conduct* of the citizen”⁴⁴ or “*activity*” that substantially affects interstate commerce.⁴⁵

Some advocates have tried to find something comparable by describing the individual insurance mandate much more generally. Professor Michael Dorf, for example, describes it as merely imposing “an affirmative obligation on persons.”⁴⁶ General descriptions can cover more examples than specific ones, and this level of generality allows Professor Dorf to compare the individual insurance mandate with a federal statute requiring that “all citizens . . . shall have an obligation to serve as jurors when summoned for that purpose.”⁴⁷ He would, in other words, characterize the individual insurance mandate simply as requiring that someone somewhere do something.⁴⁸

42 Memorandum from Assistant Att’y Gen. Walter Dellinger to Att’y Gen. Janet Reno and Assoc. Att’y Gen. Webster L. Hubbell, *Constitutionality of Health Care Reform* (Oct. 29, 1993), available at <http://www.justice.gov/oic/1stlady.htm>.

43 *Id.* at 3 (emphasis added).

44 *Id.* at 3–4 (emphasis added) (quoting *Nebbia v. New York*, 291 U.S. 502, 525 (1934)).

45 *Id.* at 2 (emphasis added) (quoting *Wickard v. Filburn*, 317 U.S. 111, 125 (1942)).

46 Dorf, *supra* note 39.

47 28 U.S.C. § 1861 (2006).

48 Professor Akhil Amar uses a similar tactic: “True, the plan imposes mandates on individuals. So do jury service laws, draft registration laws and automobile insurance laws.” Akhil Reed Amar, *Constitutional Objections to Obamacare Don’t Hold Up*, *L.A. TIMES*, Jan. 20, 2010, at 21, available at <http://articles.latimes.com/2010/jan/20/opinion/la-oe-amar20-2010jan20>. In its 1994 analysis, the Congressional Budget Office cited the requirement that draft-age men register with the Selective Service System as the only other example of a mandate that applies to individuals “as members of society.” CONG. BUDGET OFFICE, *supra* note 40, at 2. The Supreme Court held nearly a century ago that Congress’s authority to require military service comes from its power “To raise and support Armies,” “To provide and maintain a Navy,” and “To make rules for the Government and Regulation of the land and naval Forces.” U.S. CONST. art. I, § 8, cls. 12–14; see *Rostker v. Goldberg*, 453 U.S. 57, 59 (1981); *United States v. O’Brien*, 391 U.S. 367, 377 (1968) (“The constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping . . . The power of Congress to classify and conscript manpower for military service is ‘beyond question.’”) (citations omitted). As such, Congress has the very enumerated constitutional authority for requiring military service that it lacks for requiring the purchase of health insurance.

The federal statute Professor Dorf cites states that “it is . . . the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States, and shall have an obligation to serve as jurors when summoned for that purpose.”⁴⁹ Many who are considered and summoned for jury service, however, do not actually serve. The website of the United States District Court for the District of South Carolina, for example, states that individuals may be excused from jury service who are over seventy years of age; have served on a federal court jury within the previous two years; care for a child under ten years of age or for aged or infirm persons; whose business or agricultural enterprise would have to close while they served; or who volunteer as firefighters or members of a rescue squad.⁵⁰ There are no such exclusions from the individual insurance mandate. In addition, many persons who will be considered for jury service do not eventually serve because they are excused, again for a host of reasons, during the actual jury selection process. The two “mandates” are not at all comparable.⁵¹

More importantly, the principles discussed earlier counsel for a more specific focus. The limits on government that liberty requires and the necessity for identifying an enumerated power to justify federal legislation cannot be so easily avoided. The federal government’s powers, James Madison wrote, are “few and defined” while the states’ powers are “numerous and indefinite.”⁵² This counsels a more concrete, rather than a selectively general, focus when evaluating the constitutionality of federal legislation such as the individual insurance mandate.

49. 28 U.S.C. § 1861 (2006).

50. Juror Excuses from Service, U.S. Dist. Court, Dist. of S.C., <http://www.scd.uscourts.gov/Jury/excuses.asp> (last visited Feb. 3, 2010).

51. The Congressional Research Service also examined statutes and regulations that “require a person to take action, and penalize that person for failure to take that action.” JENNIFER SIAMAN & CYNTHIA BROUGH, *REQUIRING INDIVIDUALS TO OBTAIN HEALTH INSURANCE: A CONSTITUTIONAL ANALYSIS* 7 (Cong. Research Serv., CRS Report for Congress Order Code R40725, July 24, 2009), available at http://assets.opencrs.com/rpts/R40725_20090724.pdf. The CRS analysis concluded “these cases are not entirely instructive.” *Id.*

52. *THE FEDERALIST* NO. 45, at 82 (James Madison) (J. & A. McLean 1788).

The question, then, is whether the Constitution gives Congress authority to impose a specific kind of requirement, namely, that individuals purchase a particular good or service, not whether it gives Congress the authority to impose any kind of requirement. As the earlier discussion established, a particular enumerated power must provide authority for Congress to enact a particular piece of legislation. Senator Max Baucus (D-MT), who chairs the Finance Committee, has said that Congress's power to regulate interstate commerce⁵³ and its power to tax and spend⁵⁴ form the foundation for the individual insurance mandate.⁵⁵ Other analysts and advocates have cited the same two provisions.⁵⁶

In an example of judicial understatement, the Supreme Court recently said that its "understanding of the reach of the Commerce Clause, as well as Congress' assertion of authority thereunder, has evolved over time"⁵⁷ This evolution has steadily expanded "the subject to be regulated," which has been the central element of the clause's meaning since *Gibbons v. Ogden*, the Court's first commerce clause case.⁵⁸ In *Gibbons*, the Court said that commerce includes "traffic" and "commercial intercourse" which "concerns more States than

53 U.S. CONST. art. I, § 8, cls. 1, 3 ("The Congress shall have power to . . . regulate commerce . . . among the several states . . .")

54 U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States . . .")

55 155 CONG. REC. S13830 (daily ed. Dec. 23, 2009) (statement of Sen. Baucus)

56 See SIMON LAZARUS, AM. CONST. Soc'y ISSUE BRIEF, MANDATORY HEALTH INSURANCE: IS IT CONSTITUTIONAL? 1 (Dec. 2009), http://www.nslc.org/areas/federal-rights/mandatory-health-insurance-is-it-constitutional/at_download/attachment; Chemerinsky, *supra* note 41; HALL, *supra* note 41, at 1; Marcus, *supra* note 39. Yale law professor Jack Balkin argues that the power to tax alone provides authority for the mandate and that "the Commerce Clause issue is irrelevant." Pershing, *supra* note 29

57 *Gonzales v. Raich*, 545 U.S. 1, 15-16 (2005).

58 *Gibbons v. Ogden*, 22 U.S. 1, 189-90 (1824).

one.”⁵⁹ Congress’s power to regulate involves “prescribing rules for carrying on that intercourse.”⁶⁰

Since the mid-1930s, the Supreme Court has included as a permissible subject of regulation under the commerce clause not only interstate commerce itself but also an expanding category of activities with some degree of impact on interstate commerce. In *A.L.A. Schechter Poultry Corp. v. United States*, the Court utilized the “necessary and well-established distinction between direct and indirect effects” and held that Congress could regulate activities that directly affect interstate commerce.⁶¹ In *NLRB v. Jones & Laughlin Steel Corp.*, the Court further expanded the subject of regulation under the commerce clause to include activities that “have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions.”⁶² In *United States v. Darby*, the Court included as a subject of regulation “activities intrastate which so affect interstate commerce . . . as to make regulation of them appropriate means to the attainment of . . . the exercise of the granted power of Congress to regulate interstate commerce.”⁶³ In *Wickard v. Filburn*, the

59 *Gibbons*, 22 U.S. at 194; see also *Veazie & Young v. Moor*, 55 U.S. 568, 573–74 (1853) (stating that commerce in its “broadest” meaning includes “not merely traffic, but the means and vehicles by which it is prosecuted” and Congress’s power to regulate “was not designed to operate upon matters . . . which are essentially local in their nature and extent”); see also *Wickard v. Filburn*, 317 U.S. 111, 125 (1942) (stating that even local activity may “be reached by Congress if it exerts a substantial economic effect on interstate commerce and this irrespective of whether such effect is what might at some earlier time have been defined as ‘direct’ or ‘indirect.’”); *County of Mobile v. Kimball*, 102 U.S. 691, 702 (1881) (“Commerce . . . consists in intercourse and traffic, including . . . navigation, and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities.”).

60 *Gibbons*, 22 U.S. at 190; see also *United States v. Lopez*, 514 U.S. 549, 553 (1995) (quoting principle stated in *Gibbons*); *The Employers’ Liability Cases*, 207 U.S. 463, 493 (1908) (“It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed.”); *Lottery Case*, 188 U.S. 321, 347 (1903) (stating that regulating commerce “amounts to nothing more than a power to limit and restrain it at pleasure”). For an analysis of the original meaning of the commerce clause, see Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001); Robert H. Bork & Daniel E. Troy, *Locating the Boundaries: The Scope of Congress’s Power to Regulate Commerce*, 25 HARV. J.L. & PUB. POL’Y 849 (2002).

61 295 U.S. 495, 546 (1935).

62 301 U.S. 1, 37 (1937).

63 312 U.S. 100, 118 (1941).

Court went a step further to include activity that “exerts a substantial economic effect on interstate commerce”⁶⁴ In *Lopez*, describing *Wickard* as “the most far reaching example of Commerce Clause authority over intrastate activity,”⁶⁵ the Court held that “the proper test requires an analysis of whether the regulated activity ‘substantially affects’ interstate commerce.”⁶⁶

This evolutionary expansion of Congress’s power to regulate interstate commerce offers one fact and one caveat that help evaluate the individual insurance mandate today. The fact from these cases is that, whether striking down or upholding an exercise of federal power, they have always involved regulation of activity in which individuals choose to engage. The Court has expanded the category of activities that Congress may regulate by relaxing the required nexus between the activity and commerce but has never abandoned that nexus altogether or crossed the line from regulating activities to requiring them.

In *Carter v. Carter Coal Co.*, for example, the Court struck down the Bituminous Coal Conservation Act, which imposed a tax on the production of coal.⁶⁷ In *NLRB*, the Court upheld the National Labor Relations Act, under which the National Labor Relations Board ordered a steel company to re-hire fired workers.⁶⁸ In *Darby*, the Court upheld the Fair Labor Standards Act, which a lumber company had been charged with violating.⁶⁹ In *United States v. Wrightwood Dairy Co.*, the Court upheld the Agricultural Marketing Agreement Act that authorized the Secretary of Agriculture to set minimum prices for milk produced and sold within one state.⁷⁰ In *Wickard*, the Court upheld the Agricultural Adjustment Act, which imposed a tax for growing more than a prescribed amount of wheat.⁷¹ In *Lopez*, the Court struck down the

64. 317 U.S. 111, 125 (1942).

65. *Lopez*, 514 U.S. at 560.

66. *Id.* at 559; see also *Gonzales v. Raich*, 545 U.S. 1, 17 (2005) (“Congress has the power to regulate activities that substantially affect interstate commerce”).

67. 298 U.S. 238 (1936).

68. 301 U.S. 1, 37 (1937).

69. 312 U.S. 100, 124–25 (1941).

70. 315 U.S. 110, 124–26 (1942).

71. 317 U.S. 111, 128–29 (1942).

Gun-Free School Zones Act, which prohibited possession of a firearm within 1000 feet of a school.⁷² And in *Gonzales v. Raich*, the Court upheld application of the Controlled Substances Act to prohibit the growing of marijuana that was permissible under state law.⁷³

These and all other cases brought under the commerce clause involved attempts by Congress to regulate an activity in which companies or individuals chose to engage. Congress did not require companies to produce coal, re-hire workers, or produce milk. Congress imposed the tax on growing wheat to encourage the purchase of wheat in the national market, but it did not require anyone to do so. There would have been no *United States v. Lopez* if Alfonso Lopez had not chosen to carry a firearm to school. Likewise, there would have been no *Gonzales v. Raich* if Angel Raich had not chosen to grow and use marijuana. The issue before the Supreme Court in each of these cases was whether Congress's power to regulate interstate commerce allowed it to regulate an activity in which companies or individuals had chosen to engage.

Once again, clarity about the nature of the individual insurance mandate is critical to its proper evaluation. If the mandate regulates anything, it regulates decisions rather than activities. This is a constitutionally significant distinction. Regulating what someone has chosen to do includes their freedom of choice in the equation. Regulating someone's decision whether to do something eliminates their freedom of choice. If the principles noted earlier mean anything and if liberty requires that the Constitution impose concrete limits on federal power through adherence to enumerated powers, then this difference between respecting and eliminating individual choice makes all the difference. It is a difference in kind rather than a difference in degree.

The fact from the Supreme Court's commerce clause cases is that they involve activities in which people choose to engage rather than requiring people to engage in those

72. 514 U.S. at 551. Even critics of *Lopez* stay within the limits described here. See, e.g., Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues*, 85 IOWA L. REV. 1, 13-20 (1999) (arguing that the commerce clause allows Congress to regulate all "gainful activity").

73. 545 U.S. 1, 30-32 (2005).

activities. The caveat from the Supreme Court's commerce clause cases is that the Court will reject a version of Congress's power to regulate interstate commerce that would effectively eliminate any limits on federal government power. In *Kidd v. Pearson*, for example, the Court distinguished manufacturing and the buying and selling of manufactured goods.⁷⁴ Without this distinction, the Court said, "[C]ongress would be invested . . . with the power to regulate . . . every branch of human industry."⁷⁵ In *Schechter Poultry*, the Court said that without its line between activities that directly and indirectly affect interstate commerce, "there would be virtually no limit to the federal power, and for all practical purposes we should have a completely centralized government."⁷⁶ In *Jones & Laughlin*, the Court similarly warned that Congress's power "may not be extended so as to . . . effectually obliterate the distinction between what is national and what is local and create a completely centralized government."⁷⁷ And in *Lopez*, the Court refused to interpret the commerce clause so broadly that it would be difficult "to posit any activity by an individual that Congress is without power to regulate."⁷⁸

Our system of government requires limits on federal government power, limits that flow from a written Constitution that delegates enumerated powers to Congress. The Constitution could not serve its limiting function if its words had infinitely malleable meaning or if the government could determine the meaning of those words. It is certainly a challenge to determine what the proper standard and application of constitutional provisions such as the commerce clause should be, but it is easier to determine what they should not be. They cannot result in effectively eliminating real limits on government power altogether. This would turn the division of powers between the federal and state governments on its head by making the only condition for the

74. 128 U.S. 1 (1888).

75. *Id.* at 21.

76. 295 U.S. 495, 548 (1935).

77. 301 U.S. 1, 37 (1937).

78. 514 U.S. 549, 564 (1995).

exercise of federal power the lack of a negative prohibition rather than the grant of an affirmative power.

Significantly, the Court's warnings about and its rejection of an unlimited version of the power to regulate interstate commerce came in the context of the cases discussed above, cases that involve activities in which individuals had chosen to engage. Its cases between 1935 and 1942 expanded the category of activities that Congress could regulate from those with a "direct"⁷⁹ effect to those with a "substantial"⁸⁰ effect on interstate commerce. That is a difference of degree. Even within that context, in *Lopez*⁸¹ and again in *United States v. Morrison*,⁸² the Court found that Congress had exceeded its constitutional authority. There are activities in which people choose to engage that Congress cannot regulate in the name of regulating interstate commerce. The individual insurance mandate goes beyond that category altogether and represents the difference between activity and non-activity—between regulating activity and requiring it.

The fact and the caveat from the Supreme Court's commerce clause cases demonstrate that requiring individuals to purchase health insurance is of a different nature altogether from what in the past Congress has ever attempted and the courts have ever approved. For this reason, the Congressional Research Service concluded in July 2009:

Despite the breadth of powers that have been exercised under the Commerce Clause, it is unclear whether the clause would provide a solid constitutional foundation for legislation containing a requirement to have health insurance. Whether such a requirement would be constitutional under the Commerce Clause is perhaps the most challenging question posed by such a proposal, as it is a novel issue whether Congress may use this clause to require an individual to purchase a good or a service.⁸³

If there are activities that Congress does not have constitutional authority to regulate under the commerce clause, then

79. *Schechter*, 295 U.S. at 546

80. *Wickard v. Filburn*, 317 U.S. 110, 125.

81. 514 U.S. at 551

82. *United States v. Morrison*, 529 U.S. 598, 617-18 (2000)

83. STAMAN & BROUGHER, *supra* note 51, at 3.

it is hard to explain how Congress would have authority under the commerce clause after leaving the realm of activities altogether. At a high enough level of generality or by connecting enough conceptual dots, virtually every decision by an individual, including the decision not to engage in a particular activity, has some conceivable impact on the economy or interstate commerce. The decision not to purchase an automobile, not to save for retirement, not to invest in a particular company, or not to engage in interstate commerce can have a negative effect on interstate commerce. By giving Congress the power to require individual activity, that power eliminates the individual's freedom of choice and the distinction between incentives and mandates. There would be virtually nothing that Congress could not do.

The Senate-passed bill contains three categories of "findings" that attempt to connect the individual insurance mandate with the regulation of interstate commerce. The first finding asserts that the mandate itself "is commercial and economic in nature, and substantially affects interstate commerce, as a result of the effects" described in the findings.⁸⁴ The second category of findings lists the mandate's purported "effects on the national economy and interstate commerce."⁸⁵ The third category of findings is a citation to the Supreme Court's decision in *United States v. South-Eastern Underwriters Association*, in which the Court held that "fire insurance transactions which stretch across state lines constitute 'Commerce among the several States.'"⁸⁶

The first category makes three errors. It mistakenly focuses on the regulation, rather than the subject of regulation, as that which must affect interstate commerce. The Supreme Court's cases have not evaluated whether a statute substantially affects interstate commerce but whether the activity regulated by the statute does so. The findings also improperly include "economic and financial *decisions*" within the category of "activity that is commercial and economic in na-

84 H.R. 3590, 111th Cong. § 1501(a)(1) (as passed by Senate, Dec 24, 2009)

85 *Id.* § 1501(a)(2).

86 322 U.S. 533, 538, 562 (1944).

ture.”⁸⁷ As discussed above, the Supreme Court has never gone beyond the category of activities in which people have chosen to engage to include the decision whether to engage in that activity. And in addition to improperly equating decisions with activities, this first category of findings misidentifies the decision in question. The mandate concerns the decision to purchase health insurance, not “decisions about how and when health care is paid for.”⁸⁸ Under this legislation, individuals will be required to purchase health insurance whether they ever obtain health care services.

The second category of findings similarly has the wrong focus. “[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.”⁸⁹ Needless to say, if Congress believes such a conclusion would make legislation more likely to become law or more likely to be upheld in the courts, Congress is more likely to at least state that conclusion. The essential inquiry, however, is about the constitutional authority for, not the economic effects of, a legislative provision. And while the findings assert that uninsured individuals who seek medical care impose an economic cost on everyone else, the individual insurance mandate is not limited to those who seek medical care. It requires individuals to obtain a minimum level of health insurance coverage whether they ever see a doctor, ever buy a prescription, or ever undergo a medical test or surgical procedure.

Finally, merely stating the holding in *South-Eastern Underwriters* shows its irrelevance to the individual insurance mandate.⁹⁰ This case involved commercial activities such as

87. H.R. 3590, 111th Cong. § 1501(a)(2)(A) (as passed by Senate, Dec. 24, 2009) (emphasis added).

88. *Id.*

89. *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 311 (1981) (Rehnquist, J., concurring).

90. In his paper published by the American Constitution Society, Simon Lazarus relies heavily on the *South-Eastern Underwriters* decision. LAZARUS, *supra* note 56, at 4–5; see also *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944). He also argues that since “health insurance is itself an ‘ingredient’ of interstate commerce,” Congress may do anything that will make health insurance coverage “broader[], more efficient and less costly, or otherwise improve[ed].” LAZARUS, *supra* note 56, at 6. Not surprisingly, he offers no support for that broad proposition. See *id.* It would extend the reach of Congress’s power to regulate

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the “execution of insurance contracts” and “innumerable transactions necessary to performance of the contracts.”⁹¹ These are activities in which people choose to engage. The constitutionality of the individual insurance mandate, however, depends upon whether Congress may require that individuals engage in such transactions and require that individuals participate in executing such insurance contracts. The individual insurance mandate does not regulate the sale of health insurance or the provision of healthcare services. It mandates the purchase of health insurance.

Congress has certainly sought to influence individuals’ spending decisions. So-called “sin” taxes, such as the excise tax on cigarettes, seek to discourage purchase of certain products. Tax deductions encourage contributions to charitable or educational organizations. The recent “Cash for Clunkers” program used a tax credit to encourage the purchase of new, fuel-efficient cars. But none of these is a mandate that requires individuals to spend their own money to purchase a particular good or service. That is what the individual insurance mandate does, and it remains unprecedented and unjustified by Congress’s power to regulate interstate commerce.

2. *Individual Insurance Mandate Enforcement Penalty*

Under the bill passed by the Senate, failure to obtain the specific level of health insurance coverage would result in a “penalty” to be collected through the Internal Revenue Code.⁹² Advocates collapse the mandate into the penalty that

interstate commerce, and the category of permissible subject of that regulation, far beyond anything that the Supreme Court has approved.

91. *South-Eastern Underwriters*, 322 U.S. at 537.

92. Under the Senate bill, a penalty imposed for failure to obtain health insurance would “be included with a taxpayer’s return” by being added to the tax owed for that taxable year. H.R. 3590, 111th Cong. § 1501(b) (as passed by Senate, Dec. 24, 2009). Failure to pay the additional tax represented by this penalty would not result in “any criminal prosecution or penalty” or any lien or levy on a taxpayer’s property. *Id.* Under federal law, however, failing to pay taxes can result in a range of civil and criminal penalties. 26 U.S.C. §§ 6662–63, 6651, 6702, 7201, 7203. It is unclear how the Internal Revenue Service will distinguish between the failure to pay taxes that are owed because of the penalty and taxes that would otherwise be owed. It is similarly unclear how the enforcement penalty would be applied and collected in the case of individuals who do not file an income tax return. This number was more than 18 million Americans in 2003. PETER R. ORSZAG & MATIEW G. HALL, *TAX POL’Y*

enforces it and, by characterizing the penalty as a tax, argue that Congress's authority to tax and spend authorizes the package. This argument can potentially succeed only by accepting that the enforcement penalty is a tax. On September 20, 2009, President Obama was interviewed by ABC News's George Stephanopoulos, who asked: "Under this mandate, the government is forcing people to spend money, fining you if you don't. How is that not a tax?" President Obama responded: "No. That's not true." The host asked again: "But you reject that it's a tax increase?" President Obama was unequivocal: "I absolutely reject that notion."⁹³

The Congressional Research Service examined this provision in the Senate bill and distinguished between taxes and penalties. While true taxes fall under Congress's broad authority to tax, penalties require that Congress separately have constitutional authority to impose the underlying requirement. The Congressional Research Service concluded:

But where a tax is imposed conditionally, and may be avoided by compliance with regulations set out in the statute, its character may also be accurately described as a penalty. In these cases, the Supreme Court has asked whether Congress has the authority to regulate the underlying subject matter. If such regulation is authorized under a provision of the Constitution other than the Taxing power, the exaction has been sustained as an

CENTER, NONFILERS AND FILERS WITH MODEST TAX LIABILITIES 723 (Aug. 4, 2003), http://www.urban.org/UploadedPDF/1000548_TaxFacts_080403.pdf; see also Michael Tanner, *Individual Mandates for Health Insurance: Slippery Slope to National Health Care*, POL'Y ANALYSIS, Apr. 5, 2006, at 3, available at <http://www.cato.org/pubs/pas/pa565.pdf>. "Another 9 million Americans who are required to file tax returns nonetheless fail to do so." *Id.*

93. Interview by George Stephanopoulos with Barack Obama, President of the United States of America (Sept. 20, 2009), available at <http://blogs.abcnews.com/george/2009/09/obama-mandate-is-not-a-tax.html>. Stephanopoulos also noted that President Obama had opposed the individual insurance mandate during the presidential campaign. *Id.* During the debate between then-Senators Hillary Clinton and Barack Obama on January 31, 2008, CNN's Wolf Blitzer asked about "the most significant policy differences between the two of you." Obama highlighted as a "genuine difference" the fact that "Senator Clinton has a different approach. She believes that we have to force people who don't have health insurance to buy it." Hillary Clinton and Barack Obama, 2008 Democratic Presidential Debate (Jan. 31, 2008) (transcript available at <http://www.cnn.com/2008/POLITICS/01/31/dem.debate.transcript/>).

appropriate enforcement mechanism. Absent such authority, such taxes have been found to be invalid.⁹⁴

The penalty enforcing the individual insurance mandate fits squarely within this analysis. It “appears to have a purpose besides the traditional revenue raising purpose of taxation since it is effectively the enforcement mechanism for the insurance coverage mandate.”⁹⁵ In other words, if it works as intended, the penalty would not generate any revenue at all. It is, in operation, what it is called in the Senate bill, namely, a penalty for failure to obtain health insurance.⁹⁶ As such, its legitimacy depends upon whether Congress has separate constitutional authority to impose the mandate that the penalty enforces.⁹⁷ As analyzed earlier, that authority can come only from Congress’s authority to regulate interstate commerce and that authority does not include requiring individuals to purchase a particular good or service.

Even if the enforcement penalty is considered a tax, it runs afoul of a different constitutional requirement. Article I imposes specific requirements on direct and indirect taxes. “Congress . . . must impose direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity.”⁹⁸ Direct taxes are imposed upon “the owner [of property] merely because he is owner, regardless of his use or disposition of the property.”⁹⁹ Examples include taxes on real or personal property or a capitation tax,¹⁰⁰ which is “a tax of a

94 EDWARD C. LIU ET AL., CONSTITUTIONALITY OF PROVISIONS OF THE CHAIRMAN’S MARK OF THE AMERICA’S HEALTHY FUTURE ACT OF 2008, AS AMENDED ON OCTOBER 2, 2009 8 (Cong. Research Serv., Memorandum, Oct. 9, 2009), at 8 (citations omitted)

95 *Id.* at 21

96 The Senate calls this enforcement mechanism a penalty in at least a dozen places H.R. 3590, 111th Cong. § 1501 (as passed by the Senate, Dec. 24, 2009). President Obama’s latest proposal does not change the nature or function of this penalty, and the media continue to call it a “fine.” MacGillis & Goldstein, *supra* note 7

97 See also David B. Rivkin & Lee A. Casey, *Illegal Health Reform*, WASH. POST, Aug. 22, 2009, at A15, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/08/21/AR2009082103033.html>. “Congress cannot use its power to tax solely as a means of controlling conduct that it could not otherwise reach through the commerce clause or any other constitutional provision.” *Id.*

98 License Tax Cases, 72 U.S. 462, 471 (1867).

99 *Fernandez v. Wiener*, 326 U.S. 340, 362 (1945).

100 *Murphy v. I.R.S.*, 493 F.3d 170, 181 (D.C. Cir. 2007)

specific sum levied upon each person within the jurisdiction of the taxing power and within a certain class . . . without reference to his property or lack of it.”¹⁰¹ Under Article I, Section 9, “[N]o capitation, or other direct, Tax shall be laid, unless in Proportion to the Census.”¹⁰² This apportionment rule requires that “a state with twice the population of another state would have to pay twice the tax.”¹⁰³

Indirect taxes, by contrast, are often called excise taxes and are imposed upon the production or sale of goods and services,¹⁰⁴ the transfer of gifts or estates, or “a particular use or enjoyment of property or the shifting from one to another of any power or privilege incidental to the ownership or enjoyment of property.”¹⁰⁵ Excise taxes are akin to event taxes.¹⁰⁶ Under Article I, Section 8, “all Duties, Imposts and Excises shall be uniform throughout the United States.”¹⁰⁷

The penalty for failing to purchase health insurance is clearly not an excise tax. It is imposed not at the occurrence, but in the absence, of a transaction or sale. This penalty is instead a lump sum imposed directly on the individuals who fail to comply with the mandate.¹⁰⁸ Tax law expert George Clarke analyzed the penalty and concluded: “A tax on a person who chooses not to act is precariously close to a tax on everyone with an exemption from the tax for those that act.”¹⁰⁹ If the enforcement penalty is a tax at all, then it is

101 BLACK’S LAW DICTIONARY 1498 (8th ed. 2004).

102 U.S. CONST. art. I, § 9, cl. 4.

103 Erik M. Jensen, *Direct Taxes*, in THE HERITAGE GUIDE TO THE CONSTITUTION 159, 159 (Edwin Meese III et al. eds., 2005).

104 *Murphy*, 493 F.3d at 181.

105 *Fernandez v. Wiener*, 326 U.S. 340, 352 (1945).

106 See generally IRS.gov, Excise Tax, <http://www.irs.gov/businesses/small/article/0,,id=99517,00.html> (last visited Mar. 15, 2010).

107 U.S. CONST. art. I, § 8, cl. 1.

108 See Erik M. Jensen, *The Apportionment of ‘Direct Taxes’: Are Consumption Taxes Constitutional?*, 97 COLUM. L. REV. 2334, 2390 (1997) (stating that “there can be no doubt . . . that a capitation tax is direct” and that it includes “a lump-sum charge on each taxed person”); Robert A. Levy & Michael F. Cannon, *Bill ‘reforms’ Constitution*, PHILA. INQUIRER, Dec. 11, 2009, <http://www.philly.com/inquirer/opinion/79034917.html> (stating that the penalty is “levied per person and [is] therefore a ‘direct tax’ under the Constitution, which requires that such taxes be apportioned among the states according to their population, as determined by the census”).

109. George Clarke, *Baucus ‘Excise’ on Those Who Fail to Buy Insurance Raises Constitutional Issue*, BNA DAILY REP. FOR EXECUTIVES, Sept. 29, 2009.

much more like a direct tax than an excise tax. Even the Senate bill's reference to the enforcement mechanism calls it a "penalty with respect to the individual."¹¹⁰ The penalty enforcing the individual insurance mandate, if a tax at all, is a direct tax on individuals and, therefore, fails to comply with the apportionment requirement of Article I, Section 9.

3. *Excise Tax on High-Cost Insurance Plans*

The Senate bill would impose, starting in 2013, an "excise tax on high cost employer-sponsored health coverage."¹¹¹ The insurance provider must pay a "tax equal to 40 percent of the excess benefit," defined as an annual premium of more than \$8,500 for "an employee with self-only coverage" or \$23,000 for "an employee with coverage other than self-only coverage."¹¹² This tax on so-called "Cadillac" health insurance plans has become controversial and labor union members whose collective bargaining agreements include such plans have lobbied the White House and congressional leaders to modify this provision of the legislation.¹¹³

For present purposes, however, the portion of this provision that raises constitutional questions is the "transition rule for states with highest coverage costs."¹¹⁴ This provision would, for three years, raise the "excess benefit" threshold that triggers this excise tax in "each of the 17 States which the Secretary of Health and Human Services, in consultation with the Secretary [of the Treasury], estimates had the highest average cost during 2012 for employer-sponsored coverage under health plans."¹¹⁵ As a result, sale of identical insurance policies charging identical premiums would be taxed in some states but not in others. The constitutional question is

110. H.R. 3590, 111th Cong. § 1501(b)(1) (as passed by Senate, Dec. 24, 2009).

111. *Id.* § 9001

112. *Id.*

113. See Lori Montgomery & Michael D. Shear, *White House Nears Deal on Health Care*, WASH. POST, Jan. 15, 2010, at A1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/01/14/AR2010011404837.html>. The President's Proposal raises the threshold triggering the excise tax and delays its implementation until 2018. MacGillis & Goldstein, *supra* note 7.

114. H.R. 3590, 111th Cong. § 9001 (as passed by Senate, Dec. 24, 2009).

115. *Id.*

whether this differential application of the excise tax is nonetheless “uniform throughout the United States.”¹¹⁶

This tax on the sale of certain insurance plans is clearly an excise tax. The kind of goods, activities, and transactions that are the subject of excise taxes “are distributed unequally through the country” so that “virtually all such taxes have non-uniform effects.”¹¹⁷ Professor Nelson Lund explains that the “challenge in interpreting the Uniformity Clause is to distinguish between the kind of non-uniformity that is forbidden by the Constitution and the inevitable non-uniform effects that accompany legitimate duties, imposts, and excises.”¹¹⁸ Neither the framers of the Constitution nor the Supreme Court have provided much guidance on this question. In *Edye v. Robertson*, the Court stated that a tax is uniform if it “operates with the same force and effect in every place where the subject of it is found.”¹¹⁹ And in *United States v. Ptasynski*, the Court said that “where Congress does choose to frame a tax in geographic terms, we will examine the classification closely to see if there is actual geographic discrimination.”¹²⁰ Congress has wide latitude in determining what to tax and may tailor a regional solution to a geographically isolated problem, but laws drawn explicitly in terms of state lines will receive heightened scrutiny.¹²¹

The Congressional Research Service examined this provision of the Senate bill and concluded that “the legislative history of the provision is incomplete, and it does not appear that Congress has yet fully articulated its justification for creating the special rule for the 17 highest cost states.”¹²²

116 U.S. CONST. art. I, § 8.

117. Nelson Lund, Comment, *The Uniformity Clause*, 51 U. CHI. L. REV. 1193, 1194-95 (1984).

118. Nelson Lund, *Uniformity Clause*, in THE HERITAGE GUIDE TO THE CONSTITUTION, *supra* note 103, at 97. For a thorough analysis of the uniformity clause, see Thomas B. Colby, *Revitalizing the Forgotten Uniformity Constraint on the Commerce Power*, 91 VA. L. REV. 249 (2005).

119. 112 U.S. 580, 594 (1884).

120. 462 U.S. 74, 85 (1983).

121. See Jensen, *supra* note 108, at 2340 (“The uniformity rule has been held to require only geographical uniformity: the standards that apply in one state must apply in all other states as well. For example, Congress may not tax a particular transaction in New York at a ten percent rate and an otherwise identical transaction in Delaware at a fifteen percent rate.”)

122. EDWARD C. LIU ET AL., *supra* note 94, at 27.

Because the classification is framed explicitly along state lines, courts must “examine the classification closely to see if there is actual geographic discrimination.”¹²³ On the current record, there is very little available for that examination. Research has not uncovered anything explaining the choice of seventeen states, as opposed to ten or twenty or any other number, for this category of “highest average cost” states. In fact, the Senate bill does not even identify those states but leaves their choice to the Secretaries of Health and Human Services and the Treasury.¹²⁴

These are some of the constitutional issues that affect individuals and businesses arising from provisions of the health insurance reform bill passed by the Senate on December 24, 2009.¹²⁵ Congress’s authority to regulate interstate commerce does not extend to requiring that individuals purchase a particular good or service such as health insurance. The mechanism enforcing this individual insurance mandate is properly seen as a penalty rather than a tax and, therefore, is unconstitutional because Congress lacks authority for the underlying mandate. If the penalty is instead considered a tax, it is properly seen as a direct tax and, therefore, is unconstitutional because it is not apportioned. Finally, the excise tax on high cost health insurance plans is unconstitutional because, since it applies differently in some states than in others, it is not uniform throughout the United States.

B. *Constitutional Issues Affecting States*

Philosopher George Santayana wrote that “those who cannot remember the past are condemned to repeat it.”¹²⁶ That

¹²³ *Ptasynski*, 462 U.S. at 85.

¹²⁴ H.R. 3590, 111th Cong. § 9001 (as passed by Senate, Dec. 24, 2009).

¹²⁵ Professor Richard Epstein argues that the bill’s restrictions on the ability of insurance companies to make their own risk-adjusted decisions about coverage and premiums amount to a regulatory taking in violation of the Fifth Amendment. Richard A. Epstein, *Impermissible Ratemaking in Health-Insurance Reform: Why the Reid Bill is Unconstitutional*, MANHATTAN INST. CTR. FOR LEGAL POL’Y, Dec. 18, 2009, available at http://www.medicalprogressstoday.com/pdfs/MI_Health_Care_act.pdf. For other constitutional concerns affecting individuals, see Peter Urbanowicz & Dennis G. Smith, *Constitutional Implications of an ‘Individual Mandate’ in Health Care Reform*, FEDERALIST SOC’Y FOR L. & PUB. POL’Y STUD., July 10, 2009, available at http://www.fed-soc.org/doclib/20090710_Individual_Mandates.pdf.

¹²⁶ GEORGE SANTAYANA, *THE LIFE OF REASON OR THE PHASES OF HUMAN PROGRESS* 82 (1954).

advice would serve Congress well in developing health insurance reform legislation. Frances Perkins served as Secretary of Labor during the entire presidency of Franklin D. Roosevelt.¹²⁷ In an October 1962 speech about the history of the Social Security system,¹²⁸ she told of discussing legislative initiatives with Roosevelt including “old-age insurance, and health insurance.”¹²⁹ Roosevelt himself doubted whether the federal government could achieve such objectives because, as he and Perkins agreed, there were “very severe constitutional problems.”¹³⁰ These problems included interference with “state-federal relationships.”¹³¹ In fact, they “took it for granted that anything in the way of social legislation had to be done state by state.”¹³² Rather than “rig up any curious constitutional relationships,”¹³³ the Roosevelt administration and Congress established the Social Security system squarely on the taxing power through direct imposition of a payroll tax.¹³⁴

As the review of the Supreme Court’s commerce clause cases revealed, the Roosevelt administration coincided with the most significant expansion of federal power in American history. Even at that time, however, when leaders sought to assert a stronger federal role in the economy and society, they agreed that Congress could not achieve social legislative goals such as health insurance through federal mandates and regulations. It appears, then, that even President Roosevelt would believe that the individual insurance mandate exceeds Congress’s power to impose. In addition, the Senate health insurance reform bill seeks to establish and use the very “curious constitutional relationships” that change the balance

127. SocialSecurity.gov, Social Security Pioneers: Frances Perkins, <http://www.socialsecurity.gov/history/fperkins.html> (last visited Feb. 6, 2010) (reciting the biography of the first female to be appointed to a Cabinet position).

128. Frances Perkins, Address at the Social Security Administration Headquarters (Oct. 23, 1962) (transcript available at <http://www.socialsecurity.gov/history/perkins5.html>).

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

between the federal and state governments that President Roosevelt avoided

1. *Commandeering States to Implement a Federal Program*

The Senate bill would require each state to “establish an American Health Benefit Exchange” by January 1, 2014.¹³⁵ “An Exchange shall be a governmental agency or nonprofit entity that is established by a State” and must meet an extensive list of criteria established by the Secretary of Health and Human Services.¹³⁶ States must establish and operate these exchanges without federal funds¹³⁷ but if the Secretary of Health and Human Services determines that a state has not met this requirement, she “shall . . . establish and operate such Exchange within the State and the Secretary shall take such actions as are necessary to implement such other requirements.”¹³⁸

“The constitutional question is as old as the Constitution: It consists of discerning the proper division of authority between the Federal Government and the States.”¹³⁹ Justice Sandra Day O’Connor was writing here for the Supreme Court in a case about Congress’s mandate that states take title to and possession of nuclear waste generated within their borders and be liable for damages for failure to do so. The case “concerns the circumstances under which Congress may use the States as implements of regulation; that is, whether Congress may direct or otherwise motivate the States to regulate in a particular field or a particular way.”¹⁴⁰ The Court held that while the scope of federal authority has changed over time, “the constitutional structure underlying and limiting that authority has not.”¹⁴¹ This means that while Congress may induce states to take certain actions by conditioning federal funds upon their compliance,¹⁴² Congress may not “cross[] the line distinguishing encouragement

135 H.R. 3590, 111th Cong. § 1311(b) (as passed by Senate, Dec. 24, 2009)

136 *Id.* § 1311(d)(1)

137 *Id.* § 1311(d)(5)

138 *Id.* § 1321(c)(1)

139 *New York v. United States*, 505 U.S. 144, 149 (1992)

140 *Id.* at 161

141 *Id.* at 159.

142 *Id.* at 167

from coercion.”¹⁴³ Congress may not “commandeer[] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.”¹⁴⁴

Several years later, the Supreme Court reviewed a provision of the Brady Handgun Violence Prevention Act which required local law enforcement officials to conduct a background check when an individual had purchased a firearm. Reaffirming the principle that “state legislatures are *not* subject to federal direction,”¹⁴⁵ the Court held that Congress may regulate individuals, but not states,¹⁴⁶ and concluded that “the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs.”¹⁴⁷ As if this were not clear enough, the Court said: “We . . . conclude categorically, as we concluded categorically in *New York [v. United States]*: ‘The Federal Government may not compel the States to enact or administer a federal regulatory program.’”¹⁴⁸

The Senate bill euphemistically calls this threat of federal intervention “state flexibility in operation and enforcement of exchanges and related requirements.”¹⁴⁹ It is important to note that this is not a threat to pre-empt the state exchanges by the establishment of a national exchange created by Congress. Under the Senate bill, the exchanges will remain state entities, established and operated with state funds, but may be established and operated by the Secretary of Health and Human Services

This seems even more in the nature of actively commandeering the states than a simple directive that state officials take certain actions to implement a federal program. This arrangement would require states to pass state legislation and issue state regulations, and may well see their state operations taken over and directed by a federal official. Congress

143 *Id.* at 175

144 *Id.* at 176 (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass’n, Inc.*, 452 U.S. 264, 288 (1981))

145 *Printz v. United States*, 521 U.S. 898, 912 (1997) (emphasis in original).

146 *Id.* at 920 (quoting *New York v. United States*, 505 U.S. 144, 166 (1992))

147 *Id.* at 925.

148 *Id.* at 933 (quoting *New York*, 505 U.S. at 188.)

149 H.R. 3590, 111th Cong. § 1321 (as passed by Senate, Dec. 24, 2009)

would require, rather than encourage,¹⁵⁰ states to pass their own legislation to implement this federal health insurance program. In describing this provision on the Senate floor, Finance Committee Chairman Baucus said that it “gives States the choice to participate in the exchanges themselves or, if they do not choose to do so, to *allow* the Federal Government to set up the exchanges.”¹⁵¹

America’s founders implemented the principle that liberty requires limits on government power in various ways, including the separation of powers into branches and the division between spheres of federal and state power.¹⁵² This structural framework cannot be compromised without the liberty it protects being compromised. One of the most common arguments for doing so is that the particular crisis of the moment requires it, which is to say that the ends justify the means. But that is the difference between principles and politics and between constitutional imperatives and policy objectives. As Justice O’Connor wrote: “But the Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day.”¹⁵³

There exists an important parallel between the individual and state mandates in the Senate bill. In both cases, Congress could have pursued its policy objective through incentives but chose to impose mandates. The result is an

150. In *South Dakota v. Dole*, the Supreme Court held that even if Congress could not directly impose a national minimum age for alcohol consumption, encouraging the states to establish that policy by threatening to withhold federal highway funds would be a valid exercise of Congress’s spending power. 483 U.S. 203 (1987)

151. 155 CONG REC S18832 (daily ed. Dec. 23, 2009) (statement of Sen. Baucus) (emphasis added)

152. See *Gregory v. Ashcroft*, 501 U.S. 452, 458–59 (1991) (“Perhaps the principal benefit of the federalist system is a check on abuses of government power. The “constitutionally mandated balance of power” between the States and the Federal Government was adopted by the Framers to ensure the protection of “our fundamental liberties.” . . . Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.” (citations omitted)).

153. *New York*, 505 U.S. at 187

expansion of federal government power beyond what the Constitution authorizes. "The question is not what power the Federal Government ought to have but what powers in fact have been given by the people."¹⁵⁴ The people have not given Congress power to require that individuals purchase particular goods or services or the power to compel the states to implement and administer a federal regulatory program.

2. *Relief from Medicaid Costs for Nebraska*

Another provision of the Senate bill raising constitutional issues affecting states would exempt Nebraska for its share of the increased cost of the Medicaid program created by the bill.¹⁵⁵ The news media have reported that this provision was added so that Senator Ben Nelson (D-NE) would support the bill.¹⁵⁶ As controversy about this provision has grown, there has been increased pressure to either eliminate it altogether or to give the same exemption to all states, and it has been reported that Senator Nelson himself supports such elimination or modification.¹⁵⁷

The constitutional concern over this special treatment of one state was expressed in letters sent to congressional leaders. In one letter dated December 30, 2009, a group of thirteen state attorneys general argued that "this provision is constitutionally flawed. As chief legal officers of our states we are contemplating a legal challenge to this provision and we ask you to take action to render this challenge unneces-

154. *United States v. Butler*, 297 U.S. 1, 63 (1936)

155. H.R. 3590, 111th Cong. § 10201 (as passed by Senate, Dec. 24, 2009).

156. See Amy Goldstein, *Medicaid Provision for Nebraska Raises Ire*, WASH. POST, Jan. 17, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/20100116/AR2010011602884.html>

157. See Lori Montgomery, *Democrats Seek Quick Deal on Health-Care Bill*, WASH. POST, Jan. 16, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/01/15/AR2010011504061.html> Under President Obama's recent proposal, the legislation would eliminate the assistance targeted at Nebraska and provide "significant additional Federal financing to all States for the expansion of Medicaid." President's Proposal, *supra* note 7. Even though this single-state benefit may be eliminated, it is troubling that it was considered at all. The Constitution before the fact, rather than political backlash or negative publicity after the fact, should have prevented that consideration.

sary by striking that provision”¹⁵⁸ They argued this separate treatment for Nebraska would be inconsistent with the constitutional requirement that congressional spending “provide for the . . . general welfare of the United States.”¹⁵⁹ Giving one state relief from its share of increased Medicaid program costs, they said, would “be not only unrelated, but also antithetical to the legitimate federal interests in the bill.”¹⁶⁰

In a separate letter to Senators Kay Bailey Hutchison (R-TX) and John Cornyn (R-TX), Texas Attorney General Greg Abbott, who had also signed the group letter, explained this argument further and offered others.¹⁶¹ He cited the Supreme Court decision in *Ptasynski*,¹⁶² discussed above in connection with the differential taxation of high cost insurance plans, for the proposition that Congress may treat some states differently than others only when addressing “geographically isolated problems.”¹⁶³ Spreading the cost of the Medicaid program is a national objective which selective state exemptions makes more difficult.¹⁶⁴

CONCLUSION

Liberty requires limits on government power. Those limits come primarily from a written Constitution which delegates enumerated powers to Congress. There must be at least one of those enumerated powers to justify legislation and those powers do not mean whatever Congress wants them to mean.

158. Letter from Thirteen State Att’ys Gen. to the Hon. Nancy Pelosi and the Hon. Harry Reid (Dec. 30, 2009), available at <http://www.scattorneygeneral.org/newsroom/pdf/2009/healthCareLetter.pdf>.

159. U.S. CONST. art. I, § 8, cl. 1

160. Letter from Thirteen State Att’ys Gen., *supra* note 158

161. Letter from Greg Abbott, Att’y Gen. of Tex. to the Hon. Kay Bailey Hutchison and the Hon. John Cornyn (Jan. 5, 2010), available at <http://www.oag.state.tx.us/newspubs/releases/2010/010610healthcare.pdf>

162. 462 U.S. 74 (1983)

163. *Id.* at 84; Letter from Greg Abbott, *supra* note 161.

164. Attorney General Abbott also argued that the individual insurance mandate is unconstitutional: “For the first time Congress is attempting to regulate and tax Americans for doing absolutely nothing. H.R. 3590 attempts to tax and regulate each American’s mere existence. This unprecedented congressional mandate threatens individual liberty and raises serious constitutional questions.” Letter from Greg Abbott, *supra* note 161

Members of Congress have their own, independent responsibility to ensure that proposed legislation is consistent with the Constitution. Fulfilling this responsibility requires more than a self-serving assumption that the Constitution necessarily allows whatever they want to do or general speculation about how the courts might answer the question.

Instead, fulfilling this responsibility requires clarity about the purported exercise of federal power and analysis at a level concrete enough to allow meaningful application of these principles. This application leads this author to conclude that Congress does not have authority to require that individuals purchase health insurance or to enforce that mandate with a financial penalty. In addition, Congress may neither use as its mandate enforcement mechanism a penalty that amounts to an unapportioned direct tax nor apply an excise tax on high cost insurance plans differently in some states than in others. Commandeering states to implement this federal regulatory program or selectively giving financial advantages to some states but not others similarly violates the Constitution. These are only some of the constitutional concerns raised by the Senate health insurance reform bill.¹⁶⁵

Senator Moynihan said that the Senators' oath is to the Constitution, not to political objectives. This author agrees with the authors of the Heritage Foundation's analysis of the individual insurance mandate, that "political considerations aside, each legislator owes a duty to uphold the Constitution."¹⁶⁶

165. In a letter dated December 11, 2009, the United States Commission on Civil Rights wrote to congressional leaders expressing "deep reservations about racially discriminatory provisions included in" the Senate health insurance reform bill. Letter from U.S. Comm. on Civil Rights to President Barack Obama and Eight United States Senators (Dec. 11, 2010), available at <http://www.usccr.gov/corresp/LetterPresidentSenatorsHealthCare12-11-09.pdf>. These reservations include authorizing the Secretary of Health and Human Services to enter into contracts and award grants to entities operating professional training programs for health care professionals with a "demonstrated record" of training individuals from certain minority groups. *Id.* These provisions are constitutionally suspect, the Commission argued, to the extent that these entities use racially preferential admissions policies. *Id.* For other arguments that the health insurance reform legislation raises constitutional problems, see David B. Rivkin, Jr. & Lee A. Casey, *Is Government Health Care Constitutional?*, WALL ST. J., June 22, 2009, <http://online.wsj.com/article/SB124562948992235831.html> (focusing on the "right to privacy").

166. Barnett et al., *supra* note 41, at 16.

“FORCING AMERICANS TO BUY WHAT THEY DON’T WANT,” BY SENATOR ORRIN G.
HATCH, *Chicago Tribune*, April 4, 2010

Forcing Americans To Buy What They Don't Want

Sunday, April 04, 2010

Senator Orrin G. Hatch

The following originally appeared as an op-ed with Ed Meese and Steven Calabresi in the Chicago Tribune.

Parents across America tell their kids that what matters is how you play the game, not whether you win or lose. Ordinary Americans know that the ends do not justify the means, that playing by the rules is more important than simply getting your way. We would be much better off if America's political leaders were more like America's parents.

Most Americans reject the "by-any-means-necessary" tactics by which the controversial health care bill was pushed through Congress. President Barack Obama once promised transparency and accountability, but in the end he didn't worry about procedural rules.

Not caring how the legislative game is played means ignoring the rules imposed by the Constitution, the document that the president and every member of Congress swore an oath to support and defend. There had to be a public outcry before House Democrats obeyed the Constitution and allowed the House to vote on the Senate bill before sending it to the president. The Constitution sets limits on government, which is to say that the Constitution is not about picking winners and losers but about the very procedural rules that Washington liberals are telling us to stop worrying about.

The Constitution delegates only certain powers to the federal government and lists the ones given to Congress. Every bill that Congress passes must be justified not by the result it would reach but by whether Congress has authority to pass it. The health care bill that liberals rammed through Congress fails this test. It would, for example, require that people purchase a certain level of health insurance or face a financial penalty. Liberals assume Congress' authority to regulate interstate commerce justifies this unprecedented mandate.

The question is not whether the commerce clause is in the Constitution, but what it means and whether it authorizes Congress to require people to purchase health insurance. In the beginning, the Supreme Court said commerce involves such things as trade and other economic transactions. Since the 1930s, the court has allowed Congress to regulate activities that substantially affect interstate commerce. Regulating activities in which people choose to engage is one thing, requiring them to engage in those activities is something else entirely.

Americans know the difference between the government letting them choose whether to do something and ordering them to do it. They know the difference between engaging in an activity and deciding whether to do so. They know the difference between choosing to do something and choosing not to do it. The Constitution knows the difference too, and allows the federal

government to regulate activities in which individuals choose to engage, but not to take away that choice by requiring them to do it.

In 220 years, Congress has never required Americans to purchase a particular good or service. Every decision whether to purchase something affects the economy, and many other decisions can affect our health. If Congress makes us buy health insurance, it may tell us to buy gym memberships or vegetables to attack the obesity problem. If mandates are no different than incentives, there was no need for the "cash for clunkers" program because Congress could simply tell Americans what cars they must buy.

Liberals then pivot and claim that this is no different than states requiring individuals to purchase auto insurance or even health insurance. The answer is once again right there in the Constitution. While the federal government may exercise only the powers listed in the Constitution, states may exercise all the others. States may do many things that the feds may not. And besides, no one need purchase auto insurance if they choose not to drive.

Federal law will now tell Americans they must buy health insurance whether they want it or not. Many of them do not like how this new game is being played.

“WHY THE HEALTH CARE BILLS ARE UNCONSTITUTIONAL,” BY SENATOR ORRIN G. HATCH, KENNETH BLACKWELL, AND KENNETH A. KLUKOWSKI, *Wall Street Journal*, January 2, 2010

Wall Street Journal – January 2, 2010

Why the Health-Care Bills Are Unconstitutional

If the government can mandate the purchase of insurance, it can do anything.

By ORRIN G. HATCH, J. KENNETH BLACKWELL AND KENNETH A. KLUKOWSKI

President Obama's health-care bill is now moving toward final passage. The policy issues may be coming to an end, but the legal issues are certain to continue because key provisions of this dangerous legislation are unconstitutional. Legally speaking, this legislation creates a target-rich environment. We will focus on three of its more glaring constitutional defects.

First, the Constitution does not give Congress the power to require that Americans purchase health insurance. Congress must be able to point to at least one of its powers listed in the Constitution as the basis of any legislation it passes. None of those powers justifies the individual insurance mandate. Congress's powers to tax and spend do not apply because the mandate neither taxes nor spends. The only other option is Congress's power to regulate interstate commerce.

Congress has many times stretched this power to the breaking point, exceeding even the expanded version of the commerce power established by the Supreme Court since the Great Depression. It is one thing, however, for Congress to regulate economic activity in which individuals choose to engage; it is another to require that individuals engage in such activity. That is not a difference in degree, but instead a difference in kind. It is a line that Congress has never crossed and the courts have never sanctioned.

In fact, the Supreme Court in *United States v. Lopez* (1995) rejected a version of the commerce power so expansive that it would leave virtually no activities by individuals that Congress could not regulate. By requiring Americans to use their own money to purchase a particular good or service, Congress would be doing exactly what the court said it could not do.

Some have argued that Congress may pass any legislation that it believes will serve the "general welfare." Those words appear in Article I of the Constitution, but they do not create a free-floating power for Congress simply to go forth and legislate well. Rather, the general welfare clause identifies the purpose for which Congress may spend money. The individual mandate tells Americans how they must spend the money Congress has not taken from them and has nothing to do with congressional spending.

A second constitutional defect of the Reid bill passed in the Senate involves the deals he cut to secure the votes of individual senators. Some of those deals do involve spending programs because they waive certain states' obligation to contribute to the Medicaid program. This selective spending targeted at certain states runs afoul of the general welfare clause. The welfare it serves is instead very specific and has been dubbed "cash for cloture" because it secured the 60 votes the majority needed to end debate and pass this legislation.

A third constitutional defect in this ObamaCare legislation is its command that states establish such things as benefit exchanges, which will require state legislation and regulations. This is not a condition for receiving federal funds, which would still leave some kind of choice to the states. No, this legislation requires states to establish these exchanges or says that the Secretary of Health and Human Services will step in and do it for them. It renders states little more than subdivisions of the federal government.

This violates the letter, the spirit, and the interpretation of our federal-state form of government. Some may have come to consider federalism an archaic annoyance, perhaps an amusing topic for law-school seminars but certainly not a substantive rule for structuring government. But in *New York v. United States* (1992) and *Printz v. United States* (1997), the Supreme Court struck down two laws on the grounds that the Constitution forbids the federal government from commandeering any branch of state government to administer a federal program. That is, by drafting and by deliberate design, exactly what this legislation would do.

The federal government may exercise only the powers granted to it or denied to the states. The states may do everything else. This is why, for example, states may have authority to require individuals to purchase health insurance but the federal government does not. It is also the reason states may require that individuals purchase car insurance before choosing to drive a car, but the federal government may not require all individuals to purchase health insurance.

This hardly exhausts the list of constitutional problems with this legislation, which would take the federal government into uncharted political and legal territory. Analysts, scholars and litigators are just beginning to examine the issues we have raised and other issues that may well lead to future litigation.

America's founders intended the federal government to have limited powers and that the states have an independent sovereign place in our system of government. The Obama/Reid/Pelosi legislation to take control of the American health-care system is the most sweeping and intrusive federal program ever devised. If the federal government can do this, then it can do anything, and the limits on government power that our liberty requires will be more myth than reality.

Mr. Hatch, a Republican senator from Utah, is a former chairman of the Senate Judiciary Committee. Mr. Blackwell is a senior fellow with the Family Research Council and a professor at Liberty University School of Law. Mr. Klukowski is a fellow and senior legal analyst with the American Civil Rights Union.

BRIEF FOR THE MEMBERS OF THE UNITED STATES SENATE, AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT, FILED NOVEMBER 18, 2010 IN U.S. DISTRICT COURT, FLORIDA

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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
Pensacola Division

STATE OF FLORIDA, by and through)	
BILL McCOLLUM, <i>et al.</i>)	
)	
Plaintiffs,)	
)	
v.)	Case No.: 3:10-cv-91-RV/EMT
)	
)	
UNITED STATES DEPARTMENT OF)	
HEALTH AND HUMAN SERVICES, <i>et al.</i> ,)	
)	
Defendants.)	
_____)	

BRIEF FOR MEMBERS OF THE UNITED STATES SENATE AS AMICI
CURIAE IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY
JUDGMENT

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INTEREST OF AMICI

Amici Curiae United States Senate Republican Leader Mitch McConnell, and Senators Orrin Hatch, John Barrasso, Kit Bond, Sam Brownback, Jim Bunning, Richard Burr, Saxby Chambliss, Tom Coburn, Thad Cochran, Susan Collins, Bob Corker, John Cornyn, Mike Crapo, Jim DeMint, John Ensign, Mike Enzi, Chuck Grassley, Kay Bailey Hutchison, James Inhofe, Johnny Isakson, Mike Johanns, Jon Kyl, George LeMieux, John McCain, James Risch, Pat Roberts, Richard Shelby, Olympia Snowe, John Thune, David Vitter, and Roger Wicker are all United States Senators of the One Hundred Eleventh Congress.

As United States Senators, *amici* have a keen interest in the constitutional issues at stake in this litigation that transcends any opposition they may have voiced to the Patient Protection and Affordable Care Act, Pub. L. No. 111-148 (2010) (hereinafter “PPACA” or “Act”) on policy grounds. All Members of Congress have taken oaths to uphold the Constitution of the United States. While our constitutional system is built on both vertical and horizontal checks and balances, Members of Congress are, by virtue of their oath, under a responsibility of their own to uphold the Constitution of the United States and to ensure that the Legislative Branch stays within the bounds of the powers afforded it by the Constitution.

Amici are cognizant of their responsibility to uphold the Constitution, and as a result they raised two constitutional points of order during consideration of the health care bill. On December 23, 2009, Senator Ensign raised a point of order that the bill would violate the Constitution because Congress’ enumerated powers in Article I, section

8 do not give it the authority to mandate that people engage in activity (i.e., buy insurance meeting federal requirements) or be fined. The same day, Senator Hutchison raised a point of order that the bill would violate the Tenth Amendment, which states that “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.” U.S. CONST. amend. X. Each point of order received the support of all senators who voted against the legislation (with the exception of one senator who was absent from the votes on these two points of order).

Where, as in this case with respect to the PPACA’s Individual Mandate, Congress legislates without authority, it damages its institutional legitimacy and precipitates divisive federalism conflicts like the instant litigation. The long term harms that the PPACA may do to our governmental institutions and constitutional architecture are at least as important as are the specific consequences of the PPACA.

ARGUMENT

I. The Individual Mandate Exceeds The Commerce Power.

This nation was founded on and continues to be characterized by its unique system of dual sovereignty, in which the federal government is limited to exercising the enumerated powers granted it by the Constitution, while states retain the general police power. *See generally* THE FEDERALIST No. 45 (Madison) (“The powers delegated by the proposed Constitution to the Federal Government, are few and defined” while “[t]hose which are to remain in the State Governments are numerous and indefinite.”). This balance of power was conceived by the Framers of the Constitution to “ensure protection

of our fundamental liberties” by “prevent[ing] the accumulation of excessive power,” thus “reduc[ing] the risk of tyranny and abuse from either” state or federal government. *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). As Chief Justice Marshall observed:

Th[e] [federal] government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it ... is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist.”

McCulloch v. Maryland, 4 Wheat. 316, 405 (1819) (quoted in *United States v. Lopez*, 514 U.S. 549, 566 (1995)). In modern times, debate has arisen particularly over the scope of the power granted to the federal government “[t]o regulate Commerce ... among the several States....” U.S. CONST. art. I, § 8, cl. 3.

While the past century has seen a general expansion of the subject matter committed to the federal government under the Commerce Clause, in recent years the Supreme Court has rejected the notion of an infinitely elastic clause, recognizing the potential for it to be stretched to eliminate any meaningful limits on the federal government’s power. See *United States v. Lopez*, 514 U.S. 549, 556-57 (1995); *United States v. Morrison*, 29 U.S. 598, 607-08 (2000). Defendants’ arguments in this case threaten to undermine the remaining limits on Commerce Clause power, harming the Constitution’s framework by allowing the federal government to overreach its enumerated powers and invade the legitimate province of the States.

A. The Commerce Clause Power Does Not Authorize Congress To Mandate The Purchase Of A Particular Product, Only To Regulate Commercial Activity In Which People Are Engaged.

The Individual Mandate provides that, subject to certain very narrow exceptions, “an . . . individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual . . . is covered under minimum essential coverage for such month.” See PPACA § 1501(b). Noncompliance results in the assessment of a monetary penalty. See PPACA § 1501(b)(1). The Mandate therefore compels otherwise passive individuals to engage in economic activity against their will, by requiring them to obtain health insurance regardless of whether or not they wish to purchase a policy. As such, the Mandate dramatically oversteps the bounds of the Commerce Power which has always been understood as a power to regulate, and not to compel, economic activity.¹

The Supreme Court noted in *United States v. Lopez* that Congress’ power to “regulate Commerce . . . among the several States” has three permissible applications:

First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate commerce. Finally, Congress’ commerce authority includes the power to regulate *those activities* having a substantial relation to interstate commerce.

¹ Indeed, this is the only meaning compatible with the plain meaning of the Constitutional text. In the Eighteenth Century, as today, to “regulate” was defined in terms that presuppose action upon some object or activity that already is already extant. See 2 Samuel Johnson, *A Dictionary of the English Language* (1755) (defining “regulate” as “(1) to adjust by rule or method. (2) to direct.”). See also *Merriam Webster’s Collegiate Dictionary* 985 (10th ed. 1996) (defining “regulate” variously as “to govern or direct according to rule,” “to bring under the control of law or constituted authority,” “to make regulations for or concerning,” “to bring order, method, or uniformity to,” “to fix or adjust the time, amount, degree, or rate of”). A regulator comes to an existing phenomenon and orders it.

Lopez, 514 U.S. at 558-59 (emphasis added, internal citations omitted). Commercial *activity* that is local and intrastate may be regulated if, in the aggregate, such “activity” exerts a “substantial economic effect” on the interstate economy. See *Wickard v. Filburn*, 317 U.S. 111, 125 (1942). Furthermore, under the third prong of *Lopez*, the test is not whether *the regulation itself* would substantially affect interstate commerce, but whether *the activity regulated* so affects commerce.

Congress’ findings explicitly and exclusively invoke its power under the Commerce Clause as the constitutional authority for the Individual Mandate, and they make clear that it is the third *Lopez* prong upon which the Mandate is supposedly based. See PPACA §1501(a). However, these findings misstate the *Lopez* test and strongly suggest that Congress misunderstood the nature of its authority. Compare PPACA §1501(a) (emphasis added) (finding that “*The individual responsibility requirement* provided for in this section . . . is commercial and economic in nature, and *substantially affects* interstate commerce”) with *Lopez* 514 U.S. at 558-59 (emphasis added) (“Congress’ commerce authority includes the power to regulate *those activities* having a substantial relation to interstate commerce”). In short, Congress did not find that the “activity” (really, the “inactivity” or lack of activity) substantially affects commerce. Rather, Congress found that the regulation – the Mandate itself – affects commerce. This puts the constitutional cart before the horse, and the Supreme Court has never embraced such reasoning.

Indeed, in more than 200 years of debate as to the proper scope of the Commerce Power, the Supreme Court has never suggested that the Commerce Power allows Congress to impose affirmative obligations on passive individuals, or to punish individuals for failing to purchase a particular product. To the contrary, every landmark Commerce Clause case has dealt with congressional efforts to regulate different kinds of activity under the Commerce power. In every significant Commerce Clause case the Supreme Court has always had to decide whether Congress may regulate a given form of activity. See, e.g., *Gibbons v. Ogden*, 22 U.S. 1 (1824) (considering whether interstate navigation was “commerce”); *Kidd v. Pearson*, 128 U.S. 1 (1888) (whether manufacturing was “commerce”); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), 301 U.S. 1 (whether labor relations could be regulated as “commerce”); *Wickard*, 317 U.S. 111 (whether economic activity was too “local” to be regulated under the Commerce Power); *Lopez*, 514 U.S. 549 (whether carrying a weapon in a “school zone” could be regulated on the basis of supposed effects on commerce); *Morrison*, 29 U.S. 598 (whether gender-motivated violence could be regulated under the Commerce Clause). Though the Court’s decisions in these cases reflect different and evolving views of the Commerce Power, not one can be read to even hint at a power to impose affirmative obligations. All are concerned with the regulation of activity that is already ongoing, not with the antecedent, and frankly unprecedented, question of whether it is constitutional for the federal government to force someone to engage in commercial activity to begin with.

Inasmuch, then, as the Individual Mandate regulates (and punishes) a decision not to engage in an activity, it falls beyond the settled scope of the Commerce Clause. There is simply no precedent for Congress using the Commerce Power to compel economic activity by inactive persons. Indeed, Congress' own analyses have repeatedly recognized this.

For example, Congress has charged the Congressional Budget Office with providing it with objective and nonpartisan analyses of federal programs. *See* <http://www.cbo.gov/aboutcbo/factsheet.cfm>. The CBO has noted that in 200 years, Congress has "never required people to buy any good or service as a condition of lawful residence in the United States." *See* Cong. Budget Office, *The Budgetary Treatment of an Individual Mandate to Buy Health Insurance*, at 1 (Aug. 1994).

More recently, and as this Court has noted, another non-partisan office within Congress has reached much the same conclusion. The Congressional Research Service has been called Congress' "think tank." *See State of Florida v. United States Department of Health and Human Services*, Order and Memorandum Opinion on motion to dismiss, October 14, 2010 at 61 [hereinafter "10/14/2010 Mem. Op."]. Among its responsibilities, the CRS provides Congress with non-partisan analyses of the constitutionality of proposed federal laws. It has questioned whether the Commerce Clause "would provide a solid constitutional foundation for legislation containing a requirement to have health insurance." Congressional Research Service, *Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis*, July 24, 2009 at 3 (cited in 10/14/2010 Mem. Op.,

at 61-62). In fact, the CRS has called the constitutionality of the individual mandate “the most challenging question” and moreover has noted that “it is a novel issue whether Congress may use the clause to require an individual to purchase a good or service.” *Id.*

Since the enactment of PPACA, the CRS has reiterated its questions about the constitutionality of the Individual Mandate under the Commerce Clause. In fact, the day after this Court issued its Memorandum Opinion on Defendants’ Motion to Dismiss, the CRS updated its analysis of the PPACA, again noting the novelty of what Congress was doing by way of the Individual Mandate. *See* Congressional Research Service, *Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis*, October 15, 2010, at 8-9. It then noted that, in ‘general, Congress has used its authority under the Commerce Clause to regulate individuals, employers, and others who *voluntarily* take part in some type of economic activity.’ *Id.* at 11 (emphasis added). And it questioned whether, like in the PPACA, “regulating a *choice* to purchase health insurance is” such an activity at all. *Id.* (emphasis added). In short, the CRS observed that the Individual Mandate in PPACA is a difference in kind, not just in degree, from the type of power that Congress in the past has relied upon the Commerce Clause to exert:

While in *Wickard* and *Raich*, the individuals were participating in their own home activities . . . , they were acting on their own volition, and this activity was determined to be economic in nature and affected interstate commerce. However, [under the Individual Mandate] a requirement could be imposed on some individuals *who do not engage in any economic activity* relating to the health insurance market. This is a novel issue: whether Congress can use its Commerce Clause authority to require a person to buy a good or a service and whether this type of *required participation* can be considered economic activity.

Id. (emphasis added) (citing *Wickard*, 317 U.S. 111, and *Gonzales v. Raich*, 545 U.S. 1 (2005)). The CRS opined that, quite simply, “it may seem like too much of a bootstrap to force individuals into the health insurance market and then use their participation in that market to say they are engaging in commerce.” *Id.* at 11-12.

This Court has already found that “the power that the individual mandate seeks to harness is simply without prior precedent,” and “the Commerce Clause and Necessary and Proper Clause have never been applied in such a manner before.” 10/14/2010 Mem. Op., at 61. Likewise, the federal court hearing a similar challenge brought by the Commonwealth of Virginia has ruled that the individual mandate exceeds the “high watermark” of the Commerce Power. *See Virginia v. Sebelius*, No. 3:10-cv-188, Mem. Op. at 18 (E.D. Va. Aug. 2, 2010).

Indeed, every court to consider this issue has found it to be novel and unprecedented. Even the only court to uphold the constitutionality of the individual mandate thus far has noted the case as one of “first impression” since “[t]he [Supreme] Court has never needed to address the activity/inactivity distinction advanced by plaintiffs because in every Commerce Clause case presented thus far, there has been *some sort of activity*.” *Thomas More Law Center v. Obama*, No. 10-CV-11156, Mem. Op. at 15 (E.D. Mich. Oct. 7, 2010) (emphasis added).

As the Supreme Court has stated several times, the “utter lack” of such statutes for more than 200 years strongly suggests the “*absence* of such power.” *Printz v. United States*, 521 U.S. 898, 908 (1997) (emphasis in original); *id.* at 905 (if “earlier Congresses

avoided use of this highly attractive power, we would have reason to believe that the power was thought not to exist”); *id.* at 907-908 (“the utter lack of statutes imposing obligations [like the one in *Printz*] (notwithstanding the attractiveness of that course to Congress), suggests an assumed *absence* of such power”) (emphasis in original); *id.* at 918 (“almost two centuries of apparent congressional avoidance of the practice [at issue in *Printz*] tends to negate the existence of the congressional power asserted here”).

B. Defendants’ Efforts To Characterize The Individual Mandate As Regulating “Activity” Fail Because They Destroy All Limits On the Commerce Power.

In defending the Mandate, the Defendants have shied away from arguing that Congress may regulate inactivity under the Commerce Clause. Instead, Defendants have tried to advance several overlapping theories as to why the decision not to buy insurance is in fact a form of regulable economic activity. They have variously suggested that the choice not to obtain health insurance is activity subject to federal regulation because it is a “volitional economic decision,” Def. Mem. in Support of Mot. to Dismiss at 43, *see also* Def. Mem. In Support of Mot. For Sum. Judgment at 16, 27-28; or because individuals will “almost certainly” need health care in the future, Def. Mem. In Support of Mot. To Dismiss at 35; or because the failure to obtain insurance is some form of supposedly active “self-insurance,” *see* Def. Reply Mem. in Support of Mot. to Dismiss at 18, *see also* Def. Mem. In Support of Mot. For Sum. Judgment at 41.

These semantically clever arguments must fail because they “prove” far too much. To uphold the Individual Mandate on any of these bases would represent the boldest

expansion of the Commerce Power in history. It would also defy the Supreme Court's clear signal, in cases like *Lopez* and *Morrison*, that it will once again police the limits of the Commerce Power. If Congress can use the Commerce Power to punish a decision not to engage in a private activity, on the basis that the future consequences of this choice, in the aggregate, would substantially affect interstate commerce, there is seemingly *no* private decision Congress could *not* regulate or *no* activity it could not force private citizens to undertake (subject, presumably to the protections of the Bill of Rights) when, in the aggregate, it concludes that doing so would benefit the economy. For example, this same rationale would allow Congress to punish individuals for not purchasing health-related products, like vitamin supplements, on the ground that their failure to do so would increase health care costs by not ameliorating or preventing health conditions, like osteoporosis.

This is precisely the type of reasoning criticized by the Supreme Court in *Lopez*, where it warned that, under the Government's theories,

it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.

514 U.S. at 564; *accord Morrison*, 529 U.S. at 613 (to allow regulation of non-economic activity at issue would enable the federal government to regulate almost any activity, including "family law and other areas of traditional state regulation.").

Such a result would yield Commerce Clause jurisprudence both unrecognizable and incompatible with the Founder's vision of Congress' powers being limited and enumerated. *See generally* THE FEDERALIST No. 45 (Madison) ("The powers delegated by the proposed Constitution to the Federal Government, are few and defined" while "[t]hose which are to remain in the State Governments are numerous and indefinite."). The Court has warned of the risks that such an expanded Commerce Clause would pose to our system of dual sovereignty:

the scope of the interstate commerce power 'must 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.'

Jones & Laughlin Steel, 301 U.S. 1 at 37 (quoted in *Lopez*, 514 U.S. at 557).²

II. **Defendants Would Turn The Commerce Power Into An Impermissible Federal Police Power.**

A. **The Mandate Is A Classic Exercise Of The Police Power.**

Almost every affirmative legal obligation binding on citizens arises under a state's police powers. For example, compulsory vaccination, *Jacobson v. Massachusetts*, 197 U.S. 11, 12, 24-25 (1905); drug rehabilitation, *Robinson v. California*, 370 U.S. 660, 665 (1962); and the education of children, *cf. Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972), have all been upheld on the basis of state police powers.

² Similar consequences would attend acceptance of Defendants' apparent theory that Congress may regulate *anticipated commerce* rather than incidents of actual commerce. *See* Def. Mem. in Support of Mot. to Dismiss at 35. Such an understanding would permit Congress to manufacture its own potentially limitless jurisdiction.

A state's police power is also the basis for the only other "Individual Mandate" that requires individuals to obtain health insurance. Massachusetts law requires most adult residents to obtain health insurance amounting to "creditable coverage" and, analogously to the PPACA, imposes a penalty for failure to do so. *See* Mass. Gen. Laws ch. 111M, §2 (2008) (upheld pursuant to state "police power" in *Fountas v. Comm'r of Dep't of Revenue*, 2009 WL 3792468 (Mass. Super. Ct. Feb. 6, 2009) (dismissing suit), *aff'd*, 922 N.E.2d 862 (Mass App. Ct. 2009), *review denied*, 925 N.E.2d 865 (Mass. 2010)). Congress' findings in support of the Individual Mandate note the existence of a "similar requirement" in Massachusetts and make clear that Congress' intent in enacting the Mandate was to emulate this state measure. *See* PPACA § 1501(a)(2)(D) (finding that "[i]n Massachusetts, a similar requirement has strengthened private employer-based coverage: despite the economic downturn, the number of workers offered employer-based coverage has actually increased.").

By contrast, in the rare instances where Congress imposes affirmative obligations on passive individuals, it does so pursuant to enumerated powers other than the power to regulate interstate commerce. A classic example is the draft, authorized by Congress' power "to raise and support Armies." *See* U.S. CONST. art. I, § 8, cl. 12; *Selective Service Cases*, 245 U.S. 366, 383, 390 (1918). Congress has never before attempted to impose an affirmative obligation to purchase a product or service, or participate in any kind of activity through the Commerce Clause.

B. The Supreme Court Has Foreclosed Conversion of the Commerce Power Into A Federal Police Power.

The fundamental problem with Defendants' theories, therefore, is that they would result in the conversion of the Commerce Power into a federal "police power" – a result which the Supreme Court has repeatedly held constitutionally impermissible.

The Supreme Court has been vitally concerned with policing – and preserving – the boundary between the federal commerce power and the state's police powers. This boundary, the Court has explained, is an important bulwark for liberty and an integral feature of our non-unitary constitutional order which, the Supreme Court has explained, favors liberty. *See Lopez*, 514 U.S. at 576 (Kennedy, J. and O'Connor, J. concurring) (explaining that limits on commerce power essential to fulfilling the "theory that two governments accord more liberty than one" which "requires for its realization two distinct and discernable lines of political accountability: one between the citizens and the Federal Government; the second between the citizens and the States"). Accordingly, the *Lopez* Court warned of extending the Commerce Clause so far as to "effectually obliterate the distinction between what is national and what is local and create a completely centralized government." *See id.* at 557. *See also Morrison*, 529 U.S. at 617-19 (explaining that "[t]he Constitution . . . withholds from Congress a plenary police power") (internal citations omitted).

If, however, a decision *not* to engage in an activity which substantially affects interstate commerce renders individuals subject to coercive regulation under the Commerce Clause, there will not only cease to be a limit on Congress' own power under

the Commerce Clause, there will also cease to be a workable distinction between Congress' broad but bounded Commerce Power and the states' general police powers, hemmed in only by the Bill of Rights and the supremacy of federal legislation. Such a ruling would, as the Supreme Court warned in *Lopez*, "obliterate the distinction between what is national and what is local." 514 U.S. at 557. This result would be incompatible with the federal design of our Constitution and should be rejected by the Court.

CONCLUSION

For all the foregoing reasons, *amici curiae* Members of the United States Senate respectfully request that the Court grant Plaintiffs' Motion for Summary Judgment.

Dated November 18, 2010

Respectfully submitted,

/s/ Carrie L. Severino
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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of November, 2010, a copy of the foregoing Brief of Members of the United States Senate as *Amici Curiae* in Support of Plaintiffs' Motion for Summary Judgment was served on counsel of record for all counsel of record in this case through the Court's Notice of Electronic Filing system.

/s/ Carrie L. Severino

Carrie L. Severino

Chief Counsel

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Counsel for *Amici Curiae*

HON. LUTHER STRANGE, ALABAMA ATTORNEY GENERAL, STATEMENT

**WRITTEN TESTIMONY OF ALABAMA ATTORNEY GENERAL LUTHER STRANGE
BEFORE THE SENATE COMMITTEE ON THE JUDICIARY
February 9, 2011**

I would like to thank Chairman Durbin, Senator Grassley, and members of the Committee for allowing me to offer my testimony on the Patient Protection and Affordable Care Act ("PPACA"). I also want to thank Senator Sessions of my State, Alabama, for his leadership on this issue.

I am testifying in my capacity as Attorney General, but it goes without saying that attorneys are not the only ones paying attention to this important question about the scope of our Constitution. Throughout my State, lawyers and non-lawyers alike are acutely aware, and deeply concerned, that the PPACA contains provisions that are inconsistent with basic notions of the Constitution that the citizens of this country first learned about in their civics classes, and have held throughout their lives. If there is one benefit to the PPACA, it is that it has reawakened in the popular consciousness a deep respect for the limits the Constitution places on the federal government's power. The benefit of that reawakening, of course, does not outweigh the harm that our system of limited government will suffer if the PPACA is allowed to stand.

Alabama is one of 26 states that joined as plaintiffs in the challenge to the PPACA filed in Florida. As others have testified, Judge Vinson, the presiding judge in that case, recently issued a decision finding the PPACA's individual mandate unconstitutional and striking down the entire statute. If the PPACA remains in place, I believe that the Supreme Court will uphold Judge Vinson's decision. But I am particularly heartened by the Committee's decision to call hearings on whether Congress itself should take the step of repealing the individual mandate at this point before the Supreme Court considers the issue. As the Committee is aware, the sworn duty to uphold the Constitution is not limited to the courts. It is admirable that you, as representatives of the people, have accepted the responsibility of considering whether that duty requires you to repeal this statute now. Our democracy flourishes when Congress decides not to exercise power that it believes would violate our Constitution's fundamental principles. The people's faith in our system is strengthened when elected representatives exercise this type of self-restraint and do not simply delegate the matter to the courts.

A proper analysis of the Constitution requires Congress to repeal not only the individual mandate, but the entire PPACA. Judge Vinson's scholarly opinion explains why. And others who have testified in these hearings—

including Attorney General Abbott of Texas, Attorney General Cuccinelli of Virginia, and Attorney General Bondi of Florida—have provided thorough legal analyses of these issues with which I fully agree. I do not wish to belabor these points here. Suffice it to say that in my respectful view, the Commerce Clause does not allow Congress to take the unprecedented step of forcing private citizens to enter an economic market. As Judge Vinson wrote, “[t]o uphold that provision via application of the Necessary and Proper Clause would authorize Congress to reach and regulate far beyond the currently established ‘outer limits’ of the Commerce Clause and effectively remove all limits on federal power.” *Florida ex rel. Bondi v. U.S. Dept. of Health & Human Servs.*, 2011 WL 285683, at *33 (N.D. Fla. 2011). Likewise, Congress’s power to tax does not authorize it to compel Americans to buy specific insurance products. The Founders of our country sought freedom, not federal regulation. This unprecedented expansion of the federal government’s control over citizens cannot be what the Founders envisioned when they drafted the Constitution.

These legal principles, standing alone, counsel in favor of repealing the PPACA. But there are two additional, practical reasons that warrant taking that action immediately and not simply waiting for the Supreme Court to decide the issue.

First, if Congress does not repeal the PPACA now, the statute will impose substantial costs on the States even before the Supreme Court has an opportunity to rule. According to Alabama’s Medicaid Agency, the initial implementation costs in my State alone will total over \$76 million by the conclusion of state Fiscal Year 2015. To put that sum into perspective, \$76 million amounts to approximately 5% of one annual budget for the State of Alabama, at a time when Alabama, like other states, is already facing massive cuts that may come from education, infrastructure, and other essential government budgets. And these are just projections. No one knows, for sure, how much more the State will be forced to spend once the total costs of the PPACA are added up. I am told that by 2014, the individual mandate and PPACA-required expansion of Medicaid eligibility could cause Alabama’s Medicaid rolls to swell by more than 588,000 people. The State would also incur costs amounting to as-of-yet-untold millions of dollars in creating and operating PPACA-mandated insurance exchanges, and in the increased insurance costs for current state employees. The taxpayers of Alabama would have to foot that bill, and Alabama simply cannot afford to go down that road.

Second, unless Congress repeals the PPACA now, the 26 states that are parties to the action before Judge Vinson will face much uncertainty about how to move forward. Under the ruling, the PPACA is no longer effective against

the plaintiff States, and these States are not required to take any actions to implement it. But if a court stays Judge Vinson's order during the appeals that will follow, States such as Alabama may be forced to take steps to implement the PPACA immediately. Those steps would be extremely costly to my State, and all the other plaintiff States, for the reasons I just discussed. To give you but one example, it is my understanding that the Alabama Department of Insurance has been engaged in a PPACA planning process that is funded at least in part by a federal grant. Neither that grant money nor any other money should be spent on that process, particularly since in the end, the Supreme Court would likely agree with Judge Vinson that the PPACA is unconstitutional. Congress can and should eliminate this uncertainty by repealing the PPACA now.

Thank you again for considering this important issue, and for giving me the opportunity to share my views.

HON. E. SCOTT PRUITT, ATTORNEY GENERAL OF OKLAHOMA, STATEMENT



**Statement of the Honorable E. Scott Pruitt
Attorney General of Oklahoma
Before the U.S. Senate Committee on the Judiciary for the Hearing
Titled "The Constitutionality of the Affordable Care Act"**

Chairman Leahy, Senator Grassley, and Members of the Committee.

A few days prior to assuming my duties as Attorney General last month, I announced that I would, on behalf of the State of Oklahoma, be filing a separate lawsuit against the federal government, challenging the constitutionality of the Obama Administration's Federal Health Care Law. Shortly after taking office, I filed the lawsuit. Oklahoma's lawsuit challenges a single provision of the Patient Protection and Affordable Care Act — the "minimum essential coverage provision," commonly referred to as the individual mandate provision. That federally imposed mandate requires every United States citizen, other than those falling within certain specified exceptions, to maintain a minimum level of health care insurance coverage for them and their dependents each month after 2013 or pay a penalty, which will be included in the annual tax return of taxpayers who do not purchase the required health care insurance coverage.

The individual mandate is in direct conflict with Oklahoma law. After the Oklahoma Constitutional Convention decided on the language of an initial draft of the proposed State Constitution, one and ultimately, two people were hired to transcribe the Constitution onto parchment. Subsequently, the President of the Constitutional Convention, William H. (Alfalfa Bill) Murray, discharged one of the transcribers believing that he was not being faithful to the language

adopted and was instead inserting what Murray called “jokers” into the Constitution to water down its provisions. When Oklahomans recently learned of the individual mandate provision in the Obama Administration’s Health Care Bill, they viewed the mandate as undesirable — as undesirable as Alfalfa Bill Murray’s view of the “jokers” that the particular scrivener had attempted to place in the original Oklahoma Constitution. On November 2, 2010 the citizens of Oklahoma responded to the individual mandate by overwhelming approving State Question No. 756, which added Section 37 to Art. II of the Oklahoma Constitution (Oklahoma’s Bill of Rights). In pertinent part the new Section of the Bill of Rights provided:

[t]o preserve the freedom of Oklahomans to provide for their health care . . . [a] law or rule shall not compel, directly or indirectly, any person, employer or health care provider to participate in any health care system[.]

In enacting this provision, the people of Oklahoma established an irreconcilable conflict between the newly adopted Oklahoma constitutional provision and Section 1501 of the Patient Protection and Affordable Care Act (26 U.S.C. § 5000A), which contains the individual mandate provision.

The peoples’ adoption of Oklahoma’s Bill of Rights provision placed Oklahoma law in direct contravention of Congress’ individual mandate, as Oklahoma’s Bill of Rights provision preserves the freedom of Oklahomans to provide for their own health care and prohibits them from being compelled, directly or indirectly, to participate in a health care system. The federal Health Care Act, on the other hand, requires them to purchase health insurance.

It was because of this irreconcilable conflict between Oklahoma’s Bill of Rights provision and the individual mandate that I, on behalf of the State of Oklahoma, challenged the individual

mandate's constitutionality in federal court. While Oklahoma's constitutional challenge is to the individual mandate provision in the Health Care Act, the issues raised are far more important than the fate of that provision, for the issues raised concern the proper role of Congress in our federal system, and the scope of Congress' power under the Commerce Clause.

Congress made efforts throughout the Act to emphasize that its power to require the purchase of individual health insurance was derived from the Commerce Clause. In defending the Act, the United States has attempted to characterize its action as a well-recognized power of Congress. To the contrary, Congress has never enacted legislation requiring individuals to engage in the act of purchasing a commodity. The farthest the Commerce Clause has been extended has been to permit regulation of a commodity, when individual actions dealing with the commodity (such as the growing of wheat for personal consumption) taken in the aggregate, substantially affects the interstate commerce of that commodity. The individual mandate is far removed from this, because the mandate requires those who would not otherwise engage in activity to do so. By requiring Oklahomans to purchase health care insurance, Congress is attempting to extend its power to regulate inactivity. To permit such unprecedented intrusion by the federal government would deprive the Commerce Clause of any effective limits and would create powers indistinguishable from a general police power in derogation of our constitutional scheme of enumerated powers.

The individual mandate exceeds the powers given to Congress, accordingly, the provision is unconstitutional. Further, because attorneys for the government have acknowledged that the individual mandate as the key part of the overall health care plan, the Act as a whole should also fail. Attorneys for the United States have described the individual mandate as the critical element of the national health care scheme and have stated that if there were no minimum coverage type provision,

the market would be driven into extinction. The attorneys have acknowledged that without the individual mandate, the market will implode. As the individual mandate is essential to the Health Care Act, a finding that the individual mandate is unconstitutional, must result in the entire Act being held unconstitutional.

On January 31, 2011, Judge Roger Vinson, Senior United States District Judge for the United States District Court for the Northern District of Florida, Pensacola Division, entered his Order Granting Summary Judgment in the Plaintiff States' favor, holding that Congress exceeded the bounds of its authority in passing the Health Care Act's individual mandate. I believe Judge Vinson's careful historical analysis and well reasoned decision — which has already been provided to the Committee — is correct, and I refer it to you, and in doing so, I call your attention to the following from Judge Vinson's conclusion:

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

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

I urge the Committee to conclude, as Judge Vinson did, that the Health Care Act's individual mandate provision is unconstitutional, and to take action with your colleagues to remove it from the Act and to draft a bill consistent with your enumerated powers.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "E. Scott Pruitt", written over a horizontal line.

E. SCOTT PRUITT
OKLAHOMA ATTORNEY GENERAL

HON. MARK L. SHURTLEFF, ATTORNEY GENERAL OF UTAH, STATEMENT



**Statement of Hon. Mark L. Shurtleff
Attorney General of Utah
Before the U.S. Senate Committee on the Judiciary For the hearing
titled "The Constitutionality of the Affordable Care Act"
February 2, 2011**

Introduction

Chairman Leahy, Senator Grassley, and members of the Judiciary Committee.

On March 23, 2010, President Obama signed into law a massive new universal healthcare overhaul titled the "Patient Protection and Affordable Care Act," H.R. 3590 (the "Affordable Care Act.") On Monday, January 31, 2011, Senior United States District Court Judge Roger Vinson, declared the entire Affordable Care Act to be unconstitutional and granted a Motion for Summary Judgment brought by me and twenty-six state attorneys general and governors. As Utah Attorney General, it is my legal opinion that, absent a stay of Judge Vinson's order, Utah and the other plaintiff States need not comply with any other mandate contained within the Affordable Care Act. Of course, the federal government is expected to appeal the decision to the Eleventh Circuit, and ultimately the United States Supreme Court will have the final say. In the meantime, I believe it is well and proper for the 112th Congress to reconsider and reevaluate the constitutionality of provisions of the Affordable Care Act, and I appreciate the opportunity to be heard by this committee in that regard.

Judge Vinson's opinion, attached hereto as Exhibit A and incorporated herein by reference (the "Opinion"), is a powerful legal treatise on the history and modern application of the Commerce Clause and the extent of federal power under the Constitution *vis-à-vis* the states. As he pointed out in the opening paragraph of the Opinion, Judge Vinson declared that the case is not about "*our health care system at all. It is principally about our federalist system, and it raises very important issues regarding the Constitutional role of the federal government.*" In so ruling, the judge agreed with the Constitutional arguments advanced by state attorneys general.

For several months prior to passage of the Affordable Care Act, I and a dozen other state attorneys general formed a working group that held regular meetings and conference calls to discuss constitutional and legal concerns raised during the debate in Congress. We jointly wrote to members of Congress to share those concerns and to urge them in crafting federal legislation to consider the impact on state and individual rights and to respect federalism and the Tenth and Fourteenth Amendments to the Constitution. For example, in December 2009, we wrote to House and Senate Conference Committee

negotiators and warned them that a controversial provision (called by some the “Nebraska Compromise,” and others the “Cornhusker Kickback”), which was designed to benefit Nebraska's Medicaid program to the detriment of other states, was unconstitutional, and states would sue if it was included in the final version of the law. Gratefully, the negotiators withdrew that provision.

The attorneys general working group continued to discuss and express major concerns regarding other provisions of the House and Senate versions of the proposed healthcare overhaul, most notably the unprecedented encroachment on the liberty of individuals living in our respective states, by mandating that all citizens and legal residents of the United States have qualifying healthcare coverage or pay a tax penalty. We could find nowhere in the Constitution the authority for the United States to enact an “individual mandate,” either directly or under threat of penalty, that all citizens and legal residents have qualifying healthcare coverage. By imposing such a mandate, we were convinced that Congress would exceed its powers enumerated in Article I of the Constitution and violate the Tenth Amendment to the Constitution.

While Congress was debating universal healthcare in February and March of 2010, the Utah State Legislature was meeting in its annual forty-five day session, where Utah's elected officials acted boldly to fulfill their responsibility to protect the constitutional rights of the State of Utah and its citizens. On March 8, 2010, the Utah legislature passed H.B. 67, Health System Amendments, sponsored by Representative Carl Wimmer. It states that the then-pending federal government proposals for health care reform “infringe on state powers” and “infringe on the rights of citizens of this state to provide for their own health care” by “requiring a person to enroll in a third party payment system” and “imposing fines on a person who chooses to pay directly for health care rather than use a third party payer.” On March 22, 2010, before the Affordable Care Act became law, Utah Governor Gary Herbert signed H.B. 67 into Utah law.

On Sunday night, March 21st, as the United States House of Representatives was taking its final vote on the Affordable Care Act, I and other attorneys general in the state working group were holding a conference call to finalize our complaint challenging its constitutionality. On March 23rd, just a few minutes after President Obama signed it into law, I on behalf of Utah, and twelve other state attorneys general on behalf of their respective states, filed that lawsuit in the United States District Court for the Northern District of Florida. Amended complaints were later filed bringing the current number of plaintiff states to twenty-six.

Notwithstanding the fact that one of the original thirteen attorneys general is a Democrat, my colleagues and I were immediately attacked nationally with allegations that our lawsuit lacked any merit and was simply a partisan political move by “disgruntled Republicans.” I gave numerous local and national press interviews strongly rejecting that claim, stating that many provisions of the law were admirable, then arguing that our challenge wasn't about the public policy specifics of needed healthcare reform, but about the legality of the process employed and the authority of Congress to so legislate.

In a nation founded on the rule of law grounded in a constitutional framework, process and authority matter most. Judge Vinson so found. In the Conclusion of the Opinion (OP. 75,) he declared,

The existing problems in our national health care system are recognized by everyone in this case. There is widespread sentiment for positive improvements that will reduce costs, improve the quality of care, and expand availability in a way that the nation can afford. This is obviously a very difficult task. Regardless of how laudable its attempts may have been to accomplish these goals in passing the Act, Congress must operate within the bounds established by the Constitution.

Constitutional Concerns

The lynchpin of our legal challenge was that the “individual mandate” of the Affordable Care Act violated Article 1 of the Constitution and the Tenth Amendment, and was not otherwise authorized by either the Commerce Clause nor the Necessary and Proper Clause. Ultimately Judge Vinson’s ruling came down to this single argument. However, we asserted several additional constitutional deficiencies and would ask that Congress consider the following in any future actions relating to the Affordable Care Act or other universal healthcare reform.

We claimed that the tax penalty required under the Affordable Care Act, which must be paid by uninsured citizens and residents, constitutes an unlawful capitation or direct tax, in violation of Article I, sections 2 and 9 of the Constitution of the United States.

The Act also represents an unprecedented encroachment on the sovereignty of the states. For example, it requires that states vastly broaden their Medicaid eligibility standards to accommodate upwards of fifty percent more enrollees, and imposes burdensome new operating rules that states must follow. States are required to spend billions of additional dollars to cover the expansion, and bear additional administrative costs for hiring and training new employees, as well as requiring that new and existing employees devote a considerable portion of their time to implementing the law. This onerous encroachment on state sovereignty occurs at a time when individual states are facing severe budget cuts to offset shortfalls in already-strained budgets, which Utah and other states’ constitutions require to be balanced each fiscal year (unlike the federal budget), and at a time when state Medicaid programs already consume a substantial percent of state financial outlays. We argued, and Judge Vinson agreed in *dictum*, that the plaintiff states cannot effectively withdraw from participating in Medicaid, because Medicaid has, over the more than four decades of its existence, become customary and necessary for citizens throughout the United States and because individual enrollment in Plaintiffs’ respective Medicaid programs, which presently cover tens of millions of residents, can only be accomplished by their continued participation in Medicaid.

State attorneys general further argue the Affordable Care Act violates the Tenth Amendment in converting what had been a voluntary federal-state partnership into a

compulsory top-down federal program in which the discretion of individual citizens, and elected state policy makers, is removed in violation of the core constitutional principle of federalism.

The Affordable Care Act contains several significant unfunded mandates that will financially burden state and local governments. For example, in most states, there is no government entity or infrastructure that currently exists to sufficiently fulfill all of the responsibilities required to meet requirements related to increases in Medicaid enrollment under the Act, and to operate healthcare insurance exchanges required by the Act. In the case of Utah, our elected policy makers have crafted a model health insurance exchange system that has been recognized and lauded nationally (including by President Obama himself.) However, it is arguable that federal elected officials have required that Utah citizens accept their vision of a cost-effective and workable exchange in place of what state elected officials have already crafted, thereby violating principles of federalism and state sovereignty.

The Affordable Care Act clearly places an immediate burden on states to invest and implement the Act, but by making federal funds available at the discretion of federal agencies, it provides no guarantee that the states will receive such funds or that implementation costs will be met.

In granting our Motion for Summary Judgment last Monday, Judge Vinson closely followed the briefing by plaintiff states and to a large extent adopted our constitutional and analysis and arguments with regard to the individual mandate. Therefore the remainder of my testimony to this committee will refer to and cite to the Opinion and incorporate said findings, conclusions and analysis as representing my own personal legal opinion and testimony as to the constitutionality of the Affordable Care Act as it relates to the individual mandate, and by extension, to the entire Act.

Standing

I would like to point out to the committee that before Judge Vinson could get to the substance of the states' constitutional argument, he had to respond to the federal government's claim that the states lacked standing. Citing Utah's H.B. 67, passed before the Affordable Care Act became federal law, the judge ruled that Utah and Idaho "*through plaintiff Attorneys General Lawrence G. Wasden and Mark L. Shurtleff, have standing to prosecute this case based on statutes duly passed by their legislatures, and signed into law by their Governors.*" He therefore did not have to consider the standing of the other twenty-four plaintiff states.

The Commerce Clause

The Commerce Clause section of Judge Vinson's Opinion (OP.20) closely tracks attorneys general briefing and arguments. Commencing with an 1824 quotation from Chief Justice John Marshall in the first ever Supreme Court analysis of the Commerce Clause, the judge continues with a lengthy discussion of the history of the clause

including the original intent of the Founders, its language and purpose, and the evolution of the Supreme Court's interpretation and application.

The opinion carefully delineates the ebb and flow of the clause's reach, and agrees with plaintiff attorneys general that the Supreme Court in its most recent significant Commerce Clause rulings, *United States v. Lopez* (1995) and *United States v. Morrison* (2000), which began the return the limitation of federal power to its proper historical and constitutional context; and thereby restore the balance between dual sovereigns that had been upset by prior decisions that implied limitless federal authority. This historical discussion is necessary due to the Court's finding that, as I have argued many times, the individual mandate is an unprecedented application of the Commerce Clause.

Beginning on page 38 of the opinion, Judge Vinson explains the individual mandate "differs from the regulations in *Wickard* and *Raich*, [prior Supreme Court Commerce Clause opinions] for example, in that the individuals being regulated in those cases were engaged in an activity (regardless of whether it could readily be deemed interstate commerce in itself) and each had the choice to discontinue that activity and avoid penalty." He further explains,

The mere fact that the defendants have tried to analogize the individual mandate to things like jury service, participation in the census, eminent domain proceedings, forced exchange of gold bullion for paper currency under the Gold Clause Cases, and required service in a "posse" under the Judiciary Act of 1789 (all of which are obviously distinguishable) only underscores and highlights its unprecedented nature.

Because the individual mandate is unprecedented, the judge was required to confront an issue of first impression: "whether activity is required before Congress can exercise its power under the Commerce Clause." (Op.39.) We argued, and the Court agreed, that regulation in the absence of activity would afford Congress the authority to "do almost anything it wanted." (Op. 42.) This would be inconsistent with the history and purpose of the Constitution: "[i]t is difficult to imagine that a nation which began, at least in part, as the result of opposition to a British mandate giving the East India Company a monopoly and 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." (Op. 42.) It would also upset the balance of sovereign powers articulated in *Lopez*: with the power to regulate inactivity, "we would go beyond the concern articulated in *Lopez* for it would be virtually impossible to posit anything that Congress would be without power to regulate." (Op. 43.) The Judge observed that this unreasonable interpretation would empower the government to compel the purchase of any number of goods, from wheat and broccoli to General Motors cars. (Op. 46.)

The Supreme Court has "uniformly and consistently declared that [the Commerce Clause] applies to 'three broad categories of activity.'" (Op. 43.) The health care market is not "unique" as argued by the federal government so that inactivity would somehow be considered activity for purposes of the Commerce Clause. To the contrary, Judge Vinson

ruled pursuant to our argument that because “the mere status of being without health insurance, in and of itself, has absolutely no impact whatsoever on interstate commerce,” the causal chain to allow the federal government to regulate is too long and attenuated to provide the necessary limiting principle. (Op. 50.)

The provisions of the Affordable Care Act that allows the federal government to fine and penalize individuals for the inactivity of NOT purchasing health insurance pursuant to the individual mandate is therefore outside the reach of its Commerce Clause authority.

The Necessary And Proper Clause

The federal government argued that the individual mandate is “necessary and proper” to render effective Congress’s regulation of the health insurance market and therefore is constitutionally sound. Judge Vinson articulated the history of the Necessary and Proper Clause, recounting the clause’s great controversy and the debate on its necessity and breadth among the Framers.

In our opinion, the individual mandate exemplifies the Framers’ very worst fears about how the clause could be abused. Judge Vinson agreed, “[I]f these advocates for ratification had any inkling that, in the early twenty-first century, government proponents of the individual health insurance mandate would attempt to justify such an assertion of power on the basis of this Clause, they probably would have been the strongest opponents of ratification.” (Op. 59.) In passing the Affordable Care Act, Congress relied on the clause to solve a problem of its own making, and under this approach Judge Vinson stated, “the more harm the statute does, the more power Congress could assume for itself.” (Op. 60.) “Surely this is not what the Founders anticipated, nor how the Clause should operate.” (Op. 60.) Further, “To uphold that provision via application of the Necessary and Proper Clause would authorize Congress to reach and regulate far beyond the currently established ‘outer limits’ of the Commerce Clause and effectively remove all limits on federal power.” (Op. 62.)

Therefore, although the individual mandate is arguably “essential” to the Affordable Care Act to produce the policy results its proponents might have intended, it “falls outside the boundary of Congress’ Commerce Clause authority and cannot be reconciled with a limited government of enumerated powers.” (Op. 63.)

Accordingly, Congress did not have the Constitutional authority to enact the individual mandate and therefore it violates the Tenth Amendment.

Judge Vinson further found because the individual mandate is, as the federal government argued fourteen times in its Motion to Dismiss, the “essential” part of the Affordable Care Act, in cannot be severed. In this regard, the Court explained:

In the final analysis, this Act has been analogized to a finely crafted watch, and that seems to fit. It has approximately 450 separate pieces, but one essential piece (the individual mandate) is defective and must be

removed. It cannot function as originally designed. There are simply too many moving parts in the Act and too many provisions dependent (directly and indirectly) on the individual mandate and other health insurance provisions --- which, as noted, were the chief engines that drove the entire legislative effort --- for me to try and dissect out the proper from the improper, and the able-to-stand-alone from the unable-to-stand-alone. . . . The Act, like a defectively designed watch, needs to be redesigned and reconstructed by the watchmaker. (Op. 73-74.)

Conclusion

It is my opinion that Judge Vinson's ruling is an injunction against further implementation of the Affordable Care Act. It is likely that the DOJ will file a notice of appeal and ask the United States Court of Appeals for the Eleventh Circuit to stay that injunction pending its decision. As Utah Attorney General, I will continue with my colleagues in the other twenty-five plaintiff states to litigate all the way to the United States Supreme Court. Hopefully, the parties will agree to, and the court will order, an expedited appeal.

While this critical constitutional issue makes its way through the legal system, I applaud Congress for taking the initiative to conduct a constitutional analysis for itself, and I stand ready to assist or advise in that process in whatever manner requested. Thank you again for the opportunity to present my thoughts, opinion and analysis of the law, and in particular Judge Vinson's recent ruling.

