Much Ado About Nothing: Why the War over the Affordable Care Act’s Individual Mandate Will End with a Whimper and Not a Bang

“Whether or not such a law is wise, the people’s representatives have the constitutional authority to enact it. What was said during the constitutional struggle over the New Deal is still true today: for objectionable social and economic legislation, however ill-considered, ‘appeal lies not to the courts but to the ballot and to the processes of democratic government.’”

I. INTRODUCTION

Since the emergence of “modern” medicine in America at the turn of the twentieth century, political debate has raged over reforming and expanding access to the healthcare system. While the movement enjoyed limited victories over the years, the Patient Protection and Affordable Care Act of 2010 (PPACA or the Act) represents the first successful attempt at comprehensive healthcare reform. On March 23, 2010, the day President Obama signed the bill into law, the attorneys general of thirteen states filed suit in United States District Court challenging the constitutionality of various provisions of the

1. This Note was principally written in Winter 2011 and discusses litigation occurring through March 2011. By the time of publication, several of the lawsuits discussed herein have reached decisions in various United States Circuit Courts of Appeal. Although the bulk of this Note cites to and analyzes the cases at the district court level, the analysis remains relevant. The positions maintained by parties on both sides have not changed, nor has the reasoning employed by the courts in deciding the cases.


While many prior failed attempts at healthcare reform have included some version of an “individual mandate,” the PPACA represents the first time Congress enacted a general requirement that all Americans obtain health insurance or pay a penalty. It is this provision—which one author called “health care reform’s most controversial element”—that lies at the heart of the constitutional challenges.

Specifically, the Act’s critics contend that the individual mandate, among other provisions, unconstitutionally exceeds the scope of Congress’s power to regulate interstate commerce. Although it would likely come as surprise to many Americans, it is this power that Congress turns to most frequently to find the authority for its broad-ranging enactments. While commentators on both sides of the debate argue fervently for their respective positions—that the mandate either falls far outside or well within Congress’s regulatory power—both sides believe the showdown carries significant implications for the future of Commerce Clause jurisprudence. If the history of Commerce Clause

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6. See A Healthy Debate, supra note 2, at 94 (opening statement of Rivkin & Casey) (noting individual mandate has been “hardy perennial of proposed health care reforms”). President Clinton’s unenacted healthcare reform proposal also included an individual mandate. See id.


8. See Complaint at 4, Florida ex rel. Bondi v. U.S. Dep’t of Health & Human Servs., 768 F. Supp. 2d 1256 (N.D. Fla. 2010) (No. 3:10-cv-91) (“The Constitution nowhere authorizes the United States to mandate . . . that all citizens and legal residents have qualifying healthcare coverage.”); see also Sack, supra note 5 (noting objections center around constitutionality of individual mandate under Commerce Clause).

9. See A Healthy Debate, supra note 2, at 97 (opening statement of Rivkin & Casey) (describing significance of power to regulate interstate commerce). Rivkin and Casey write, “Over the years, it is [the power to regulate interstate commerce] that has been used—in one way or another—to support most features of the elaborate federal regulatory system.” Id. Rivkin and Casey further argue that if the federal government has the ability to overhaul the national healthcare system, authority to do so could likely only be found under the Commerce Clause. See id. (emphasizing importance of Commerce Clause in justifying constitutionality of national healthcare system); see also Stephen M. McJohn, The Impact of United States v. Lopez: The New Hybrid Commerce Clause, 34 DUQ. L. REV. 1, 1 (1995) (“The Commerce Clause has long been a constitutional powerhouse underlying federal legislation”). Congress has used its Commerce Clause authority to justify legislation regarding civil rights, loan-sharking, and environmental damage, among other things. See McJohn, supra (discussing breadth of legislation passed pursuant to Commerce Clause).

10. See generally Is the Health Care Law Unconstitutional?, ROOM FOR DEBATE (Mar. 28, 2010, 7:00 PM), http://roomfordebate.blogs.nytimes.com/2010/03/28/is-the-health-care-law-unconstitutional [hereinafter Room for Debate: Is the Health Care Law Unconstitutional?] (presenting various commentators’ views on individual mandate’s potential impact on future Commerce Clause jurisprudence). As one might expect, defenders of the mandate’s constitutionality generally regard the challenge as less significant than do the challengers. See id.
litigation tells us anything, however, it is that regardless of outcome, the present challenge will do relatively little to define the limits of Congress’s regulatory authority.\textsuperscript{11} Put simply, this particular challenge will not “upset the apple cart” of Commerce Clause jurisprudence.\textsuperscript{12}

This Note will first provide a brief history of healthcare reform efforts in the twentieth century.\textsuperscript{13} Next, the Note will discuss Congress’s power to enact legislation, focusing on its power to regulate interstate commerce.\textsuperscript{14} It will then analyze the evolution of Commerce Clause jurisprudence and the century expansion of Congress’s authority to regulate interstate commerce in the late twentieth century.\textsuperscript{15} This Note will then turn to a discussion of the enactment of the PPACA and the nature of the ensuing legal challenges.\textsuperscript{16} In the following section, this Note will analyze the challenge and where it fits in the scheme of modern Commerce Clause jurisprudence.\textsuperscript{17} In doing so, this Note will argue that the individual mandate falls well within Commerce Clause power and does not represent an expansion of that power.\textsuperscript{18}

\section*{II. History}

\subsection*{A. Healthcare Reform in the Twentieth Century}

Healthcare reform has undoubtedly been one of the greatest political causes of the twentieth century, and continues to feature prominently in twenty-first century political debate.\textsuperscript{19} Most reform efforts over the past century have focused on the best way to finance medical care.\textsuperscript{20} While federally administered health insurance was first seriously considered as a component of...
Social Security under Franklin D. Roosevelt’s New Deal, the shift towards advocating for a “genuinely national” plan came with the 1943 Wagner-Murray-Dingell Bill and President Truman’s proposed health program of 1945, both of which called for compulsory national health insurance funded by a payroll tax. After these early attempts failed, due in large part to vehement opposition from the American Medical Association (AMA) and general fears of “socialized medicine,” the movement first met limited success with the passage of Medicare and Medicaid under President Johnson in 1965. After another failed attempt at complete overhaul by President Clinton in 1992, the movement finally succeeded in 2010 with the passage of the PPACA, which President Obama signed into law on March 23 of that year.

The Act, dubbed “Obamacare” by its critics, immediately faced legal challenges that had been developing even before the bill became law. These numerous legal challenges contend that the Act, and in particular the requirement that Americans purchase health insurance or pay a penalty, exceeds the scope of Congress’s power to regulate interstate commerce—the power pursuant to which Congress enacted the legislation.

B. Congressional Power and Its Limits

The federal government was established as a government of “limited [and] enumerated” powers. And while the federal government is undoubtedly an

21. See id. at 81 (summarizing early attempts at healthcare reform). Proposals to include some form of compulsory health insurance in the New Deal generally called for federal sponsorship of state-administered health insurance, as distinguished from President Truman’s national insurance plan. See id.; see also Karen S. Palmer, A Brief History: Universal Health Care Efforts in the US, Address at Physicians for a National Health Program Meeting (Spring 1999), available at http://www.pnhp.org/facts/a_brief_history_universal_health_care_efforts_in_the_us.php?page=all (noting compulsory aspect of Wagner-Murray-Dingell and Truman plans).

22. See Starr, supra note 3, at 81 (noting Medicare and Medicaid’s limited application to elderly and poor); see also Palmer, supra note 20 (citing AMA’s extensive lobbying effort against national health insurance amid concerns it would “make doctors slaves”). Widespread anti-communist and anti-socialist sentiment also contributed to the various plans’ failures. Palmer, supra note 21.


26. THE FEDERALIST NO. 14, at 102 (James Madison) (Clinton Rossiter ed., 1961). Madison writes, “In the first place it is to be remembered that the general government is not to be charged with the whole power of making and administering laws. Its jurisdiction is limited to certain enumerated objects . . . .” Id.
omnipresent fixture in modern American life, at the turn of the twentieth century, the extent of most Americans’ interaction with the federal government constituted a weekly trip to the post office. Following the Great Depression, courts began to define the scope of Congress’s Commerce Clause authority in a series of landmark cases that tested the permissible reach of the federal government into the daily activities of ordinary citizens.

The text of the Commerce Clause itself reads, “[The Congress shall have the Power] . . . to regulate Commerce . . . among the several states.” Of course, like most things in constitutional law, the meaning of this clause has been the subject of great legal and political debate for the better part of the last century. Now, in the early twenty-first century, the law in this area is fairly well settled, particularly in comparison to other areas of constitutional law. Yet, as the debate over the Act highlights, the Commerce Clause has become a political lightning rod for conservatives fighting for smaller government and an originalist interpretation of the Constitution.

1. The Power to Regulate Interstate Commerce and the pre-1937 Commerce Clause

Prior to the implementation of the New Deal in the 1930s, Congress’s power to regulate “commerce . . . between the several states” was largely limited to exactly the kind of thing most lay people associate with interstate commerce—“buying and selling across state lines.” Regulations of this type—the purest form under the Commerce Clause—cover the interstate exchange itself or the

27. Allen Koop, Visiting Professor of History at Dartmouth College, Class Lecture in Health Care in American Society at Dartmouth College (Winter 2009).
28. See, e.g., Heart of Atlanta Motel v. United States, 379 U.S. 241, 256 (1964) (Congress had authority to regulate local businesses ability to discriminate between customers based on race); Katzenbach v. McClung, 379 U.S. 294, 302 (1964) (same); United States v. Darby, 312 U.S. 100, 122 (1941) (overruling Hammer v. Dagenhart, Court held Congress had authority to regulate minimum wage and maximum hours for workers); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 38-39 (1937) (Congress had authority to regulate relations between labor and management); Hammer v. Dagenhart, 247 U.S. 251, 273-74 (1918) (holding Congress had no power under Commerce Clause to pass regulations pertaining to children in workplace); see also Robert G. Natelson, The Legal Meaning of “Commerce” in the Commerce Clause, 80 ST. JOHN’S L. REV. 789, 790-92 (2006) (discussing evolving definition of interstate commerce vis-à-vis Commerce Clause).
29. U.S. Const. art. I, § 8, cl. 3.
30. See supra note 28 and accompanying text (reviewing expansion of Commerce Clause over course of twentieth century).
32. See Steven G. Calabresi, “A Government of Limited and Enumerated Powers”: In Defense of United States v. Lopez, 94 MICH. L. REV. 752, 752 (1995) (contending Supreme Court “asleep at the constitutional switch” for fifty years preceding Lopez and its progeny); see also Regan, supra note 31, at 554 (arguing modern Commerce Clause doctrine “pay[s] lip service to the idea that Congress’s power is limited”).
33. See U.S. Const. art. I, § 8, cl. 3 (setting forth Congress’s regulatory power over interstate commerce); Natelson, supra note 28, at 791 (noting pre-1937 Commerce Clause reached “economic exchange, economic intercourse, [and] mercantile trade”).
instrumentalities used to facilitate the exchange. As President Franklin D. Roosevelt sought to implement programs designed to help the country emerge from the depths of the Great Depression, however, he turned to the Commerce Clause for the necessary legislative authority.

Legislation passed pursuant to an expanded vision of the Commerce power was first challenged in *Wickard v. Filburn* and *United States v. Darby* in the early 1940s. In *United States v. Darby*, the Supreme Court considered whether the Fair Labor Standards Act of 1938 could constitutionally regulate labor conditions in the workplace when the enterprise shipped its products across state lines. Specifically, the Court asked whether Congress has the “constitutional power to prohibit the shipment in interstate commerce” of goods produced in violation of the standards prescribed by the act, and, in addition, whether Congress could prohibit altogether the manufacture of goods in a manner not conforming to the act. In answering the first question in the affirmative, the Court explicitly overruled its 1918 decision in *Hammer v. Dagenhart*, which stood for the exact opposite proposition, but had not been followed in the twenty-two years since it was decided. In answering the second question, the Court held:

The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce.

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34. See Natelson, * supra* note 28, at 808-11 (discussing historical interpretation of “exchange” and “instrumentality” doctrines).
35. See id. at 791-93. In 1937, Roosevelt advisor Walton Hale Hamilton authored a political pamphlet entitled “The Power to Govern: The Constitution—Then and Now,” in which he argued that the Commerce Clause “should be reinterpreted to grant Congress authority to regulate the entire national economy.” See id. Hamilton argued that the Court’s initial narrow interpretation of commerce was incorrect and inconsistent with the original intent of the founders. Id.
37. 312 U.S. 100 (1941).
38. See Regan, * supra* note 31, at 554 (acknowledging Commerce Clause “revolution” began with New Deal cases); see also Natelson, * supra* note 28, at 790-91 (citing 1937 as turning point in Commerce Clause jurisprudence).
39. See 312 U.S. at 105.
40. See id. The Fair Labor Standards Act of 1938, among other things, prescribed minimum wage and maximum hour requirements. See id. at 109. Appellee challenged the applicability of the law to his company’s manufacture of lumber in the state of Georgia. Id. at 111. The record indicates that appellee knew a portion, but not all, of the lumber produced would be shipped out of state. See id.
41. 247 U.S. 251 (1918).
42. See Darby, 312 U.S. at 115-17 (noting *Hammer v. Dagenhart* not followed and characterizing it as irreconcilable with present decision).
43. *United States v. Darby*, 312 U.S. 100, 118 (1941). Applied to the facts of the case, the Court held that
While not explicitly discussed in the opinion itself, the “appropriate means to the attainment of a legitimate end” language represents the Court’s acknowledgement that the Necessary and Proper Clause of the Constitution allows the Commerce Clause to reach activities that affect interstate commerce only indirectly.\(^\text{44}\) The Court also held that Congress may regulate intrastate activities that have a “substantial effect on the commerce or the exercise of the Congressional power over it,” a doctrine that the Court continued to develop in the next major New Deal case, *Wickard v. Filburn*.\(^\text{45}\) The Court further held that it was not in the business of examining the motivations behind particular acts of Congress, and that similarities between the Fair Labor Standards Act and “the exercise of the police power of the states” was irrelevant, provided that the nature of the regulations accomplishing that end fell within Congress’s commerce power.\(^\text{46}\)

*Darby* represented the beginning of a fundamental change in the way the Court viewed the Commerce Clause.\(^\text{47}\) Luckily for President Roosevelt and the New Dealers, the Court was willing to look to the Commerce Clause to find Congressional authority that had not existed prior to 1937.\(^\text{48}\) For instance, in *Wickard v. Filburn*, the court evaluated the constitutionality of the Agricultural because it was “practically impossible” to differentiate between pieces of lumber produced for in-state customers and those destined for interstate shipment, it was appropriate for Congress to apply the Fair Labor Standards Act to all employees at the plant. See id. at 117-18.

\(^44\) See id. at 118; see also Natelson, supra note 28, at 799 (noting New Deal Court’s evolving view of the Necessary and Proper Clause); infra notes 73-78 and accompanying text (discussing modern application of Necessary and Proper Clause in *Gonzales v. Raich*, 545 U.S. 1 (2005)). The Necessary and Proper Clause gives Congress the power “[t]o make all Laws which shall be necessary and proper for carrying into Execution the [plenary] Powers, and all other Powers vested by this Constitution in the Government of the United States . . . .” U.S. CONST. art. I, § 8, cl. 18.

\(^45\) See 317 U.S. 111, 124-29 (1942) (expounding upon *Darby* “substantial effect” doctrine); *Darby*, 312 U.S. at 119-20 (introducing “substantial effect” doctrine).

\(^46\) See *Darby*, 312 U.S. at 114-15.

It is no objection to the assertion of the power to regulate interstate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the states.

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... The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the Courts are given no control.

Id.


\(^48\) See id. at 1386 (discussing political motivations of “New Deal Court”). “The immediate agenda of the New Deal Court was to interpret the Commerce Clause broadly enough to embrace regulatory legislation with incidental (but demonstrable) effects on interstate commerce, and with this the coalition consolidated the new Commerce Clause jurisprudence with unanimous majorities by 1942.” Id.; see also infra note 72 and accompanying text (discussing significance of “demonstrable” effects as shown by legislative findings).
Adjustment Act of 1938, which limited the amount of wheat that a farmer could grow per acre of land. Unlike in *Darby*, where the lumber produced was destined, at least in part, for interstate commerce, the good regulated in *Wickard*, wheat, was never destined to enter the stream of commerce, but was instead only intended for personal consumption on the appellee’s farm. The Court, however, was ultimately unconcerned with this distinction, holding that even if the appellee’s activity “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 . . . .” Further, the Court held that the fact that appellee, by himself, may have had a trivial effect on the wheat surplus was immaterial, provided that his action, when aggregated with others “similarly situated,” substantially affected interstate commerce. Particularly interesting in the context of this Note, the Court deemed similarly unpersuasive the argument that wheat production caps forced individuals to purchase wheat in the market that they otherwise would have provided for themselves.

2. The “Modern” Civil Rights Cases

The next major development in Commerce Clause jurisprudence came in the form of the Civil Rights Cases of 1964. *Katzenbach v. McClung* and *Heart of Atlanta Motel, Inc. v. United States* both dealt with the constitutionality of

49. See 317 U.S. at 114 (detailing wheat allotment provision for appellee’s crop as 11.1 acres and 20.1 bushels per acre). Any wheat grown in excess of these limits was subject to a penalty of 49 cents per bushel. Id. at 114-15.
50. See id. at 118 (distinguishing *Darby* on grounds that “this Act extends federal regulation to production not intended in any part for commerce”).
51. See *Wickard v. Filburn*, 317 U.S. 111, 125 (1942). The Court elaborated that it is immaterial whether “such effect is what might at some earlier time have been defined as ‘direct’ or ‘indirect.’” Id. But see NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937) (stating commerce power “may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them . . . would effectually obliterate the distinction between what is national and what is local”).
53. See id. at 129 (rejecting “forced into the market” argument).

It is of the essence of regulation that it lays a restraining hand on the self-interest of the regulated and that advantages from the regulation commonly fall to others. The conflicts of economic interest between the regulated and those who advantage by it are wisely left under our system to resolution by Congress . . . . Such conflicts rarely lend themselves to judicial determination. And with the wisdom, workability, or fairness, of the plan of regulation we have nothing to do.

Id.

54. I refer to the cases discussed in this section as the “Modern” Civil Rights Cases in order to distinguish from the Civil Rights Cases, 109 U.S. 3 (1883).
55. See McJohn, supra note 9, at 2 (acknowledging sustaining federal regulation of civil rights as important moment in Commerce Clause jurisprudence); see also Eskridge & John Ferejohn, supra note 47, at 1388-89 (noting importance of Civil Rights Cases following long period of Supreme Court unanimity on commerce powers).
Title II of the Civil Rights Act of 1964, which prohibited race-based discrimination in places of public accommodation. In *Heart of Atlanta*, the Court readily held Title II constitutional as applied to a motel that refused to provide lodging to African-American patrons because common sense and the congressional record provided “overwhelming evidence of the disruptive effect that racial discrimination has had on commercial intercourse.”

The second of the modern Civil Rights Cases, *Katzenbach v. McClung*, differed only in that it addressed the application of Title II to a restaurant where there was no claim that interstate travelers frequented the restaurant. Nevertheless, the Court held Title II constitutionally applicable to appellants’ restaurant on the grounds that a substantial portion of the food served in the restaurant traveled in interstate commerce, and refusal of service to African Americans “imposed burdens both upon the interstate flow of food and upon the movement of products generally.” As such, application of Title II to appellants’ restaurant as part of a larger regulatory scheme aimed at mitigating the adverse effects of racial discrimination on interstate commerce survived rational basis review. As in *Heart of Atlanta*, the Court held a rational basis for the regulation existed—based on a legitimate purpose and reasonably adapted means—despite the absence of formal congressional findings, because widespread refusals of service severely restricted travel by African Americans and therefore substantially affected interstate commerce.

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58. See id. at 245-49 (reviewing history of Title II of Civil Rights Act). Each case involved a challenge to the Civil Rights Act’s constitutionality, characterizing the legislation as an impermissible extension of Congress’s power. See id. at 243-44 (arguing no Commerce Clause authority to regulate local Georgia hotel); *Katzenbach*, 379 U.S. at 295 (summarizing appellants’ complaint as attacking Title II’s constitutionality).

59. See *Heart of Atlanta*, 379 U.S. at 257. The Court further held that despite the absence of specific congressional findings regarding the effect of racial discrimination on interstate commerce (similar to the findings included in the Fair Labor Standards and Agricultural Adjustment Acts addressed in *Darby* and *Filburn*, respectively) the legislative history more than adequately supported a rational basis for the regulation in question. See id. at 261-62. It should also be noted that appellant conceded that his business reached out to states other than Georgia and frequently served interstate travelers. See id. at 243.

60. See *Katzenbach*, 379 U.S. at 298.

61. See id. at 303; see also id. at 300-01 (applying *Wickard v. Filburn* principle of aggregation to meet substantial effect standard). The opinion stated:

> Of course, the mere fact that Congress has said when particular activity shall be deemed to affect commerce does not preclude further examination by the Court. But where we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end.

Id. at 303-04.


63. See id. at 303-05 (stating “absence [of formal congressional findings] is not fatal to the validity of the statute”).
3. Lopez and the Modern Commerce Clause

As Professor Randy Barnett writes, “The smart money is always on the Supreme Court upholding an act of Congress. . . . And the smart money is right until the day it is wrong.”\(^{64}\) The Supreme Court invalidated an act of Congress for the first time in nearly sixty years in 1995 when it ruled 5-4, in United States v. Lopez\(^ {65}\) that the Gun-Free School Zones Act of 1990 exceeded the scope of Congress’s Commerce Clause authority.\(^ {66}\) In considering the constitutionality of the law in question, which prohibited possession of a firearm in a school zone, the Court held that the law is a criminal statute that by its terms has nothing to do with “commerce” or any sort of economic enterprise, however broadly one might define those terms. . . . [It] is 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.\(^ {67}\)

The Court was also concerned with the lack of a “jurisdictional element” in the statute requiring some “additional nexus” connecting the firearm to interstate commerce, and found troubling the lack of congressional findings on the effect on interstate commerce of guns in school zones.\(^ {68}\) Ultimately, the Court concluded that possessing a gun in a school zone, a noneconomic criminal activity, was beyond the ability of Congress to regulate pursuant to the Commerce Clause, as the link between the intrastate activity and interstate commerce was simply too attenuated.\(^ {69}\)

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66. See id. at 551; McJohn, supra note 9, at 1 (summarizing result in Lopez); see also Calabresi, supra note 32, at 752 (“After being asleep at the constitutional switch for more than fifty years, [Lopez] must be recognized as an extraordinary event.”). Still, Richard Epstein recognizes that just as Lopez may “usher in a new age of constitutional restraint” it could just as easily “turn out to be a flash in the pan.” Richard A. Epstein, Constitutional Faith and the Commerce Clause, 71 NOTRE DAME L. REV. 167, 167 (1996).
67. Lopez, 514 U.S. at 561. The Court continued, reasoning, “It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.” Id. In addition to the “activities substantially affecting interstate commerce” justification for exercise of the commerce power, the Court identified two other categories of regulation that are historically permissible under the Commerce Clause: regulation of the channels of interstate commerce, in light of Darby, and regulation designed to protect the instrumentalities of interstate commerce, such as regulations on railroads, trucks, etc. See id. at 558.
68. See id. at 561-63.
69. See id. at 564 (rejecting Government’s argument that “costs of crime” substantially affect interstate commerce). Further, the Court stated, “To uphold the Government’s contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.” Id. at 567. In addition to the tenuous effects of gun possession on interstate commerce, the Court also rejected the notion that gun possession can be considered “economic activity” in any way. See id. at 561. Thus, the Court was able to distinguish Lopez from Wickard, which it characterized as “perhaps the most far reaching example of Commerce Clause
In 2000, the Supreme Court again struck down an act of Congress on the premise that it exceeded Congress’s commerce power.\textsuperscript{70} In another 5-4 decision, the Court held that the Violence Against Women Act (VAWA), which created a civil remedy for victims of gender-motivated violence, like the Gun-Free School Zones Act, attempted to regulate noneconomic criminal conduct that had only an attenuated effect on interstate commerce.\textsuperscript{71} Although, unlike in Lopez, the VAWA included congressional findings tying gender-motivated violence to an effect on interstate commerce, the Court made it clear that such findings do not automatically guarantee victory, and rejected Congress’s conclusion that gender-motivated violence substantially affected interstate commerce.\textsuperscript{72}

In the most recent of the major Commerce Clause cases, Gonzales v. Raich,\textsuperscript{73} the Court upheld the constitutionality of the Controlled Substances Act (CSA), which criminalized the possession, manufacture, and distribution of marijuana, against a challenge that it unconstitutionally interfered with the legalization of medical marijuana under California’s Compassionate Use Act.\textsuperscript{74} Respondents, two women who cultivated marijuana in their homes for personal medicinal use, claimed that the CSA’s categorical prohibition of the possession and manufacture of marijuana exceeded Congress’s Commerce Clause authority.\textsuperscript{75} The Court rejected this challenge, and while acknowledging the trivial nature of respondents’ marijuana use, the majority nevertheless held that Congress had a rational basis for outlawing all marijuana use as part of a larger regulatory scheme, a principle first articulated in Wickard.\textsuperscript{76} While concededly a criminal statute—unlike gun possession and violence against women—the Court was satisfied that drug manufacture and distribution was genuinely commercial in nature, and thus well within Congress’s authority to regulate.\textsuperscript{77}


\textsuperscript{71} Id. at 617-18 (“The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States.”) The Court, in effect, says that sustaining a regulation under the “substantial effect” category requires the regulation not to be aimed at criminal or other plainly noneconomic activity. Id.

\textsuperscript{72} See id. at 614-615 (acknowledging but rejecting congressional findings). The Court wrote, “The reasoning that [the Government] advance[s] seeks to follow the but-for causal chain from the initial occurrence of violent crime . . . to every attenuated effect upon interstate commerce.” Id. at 615. The Court further expressed concern that allowing such reasoning to rule the day would lead to a slippery slope that would erode the distinction between federal and State powers. See id. at 615-16.

\textsuperscript{73} 545 U.S. 1 (2005).

\textsuperscript{74} See id. at 5-9.

\textsuperscript{75} See id. at 7-8. Respondents did not contend that the CSA as a whole exceeded Congress’s power. Id.

\textsuperscript{76} See id. at 22. The Court reasoned, “When a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under that statute is of no consequence.” Id. at 17 (quoting Maryland v. Wirtz, 392 U.S. 183, 196 n.27 (1968)).

\textsuperscript{77} See Raich, 545 U.S. at 13 n.20 (describing congressional findings regarding nature of market for illicit
Although undoubtedly there are distinctions to be drawn between *Raich* and *Lopez* and *Morrison*, the Court’s ruling in *Raich* signaled that the New Deal Commerce Clause jurisprudence was still alive and well—a fact that many observers recognized all along.\(^{78}\)

4. “Obamacare” and Its Challengers

As previously mentioned, The PPACA includes a Minimum Essential Coverage Provision, or “individual mandate,” which, subject to certain exceptions, requires all Americans to obtain health insurance or pay a penalty.\(^{79}\) Although not required to do so, Congress very carefully included a jurisdictional hook and provided its findings under the heading “Effect on the National Economy and Interstate Commerce.”\(^{80}\) The findings discuss in detail the effect health insurance has on the national economy, as well as the impact of medical expenses on personal bankruptcy, and the success of similar requirements in states like Massachusetts.\(^{81}\) Key among these findings is that the mandate “is essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of preexisting conditions can be sold.”\(^{82}\) The Act goes on to...
cite *United States v. South-Eastern Underwriters Ass’n*, in which the Supreme Court held that insurance is interstate commerce subject to federal regulation, notwithstanding the fact that Congress’s general authority to regulate the insurance industry is not being challenged by the Act’s critics.84

Generally speaking, the Act’s challengers object that the mandate forces individuals to enter into a contract with a private party—an insurance company—or pay a penalty, claiming that such a requirement plainly exceeds Congress’s power to regulate interstate commerce.85 Specifically, the challengers regard such a mandate as regulation of obviously noneconomic activity based on speculation about the activity’s effect on interstate commerce.86 Along those same lines, the challengers have sought to characterize the mandate as applying to individuals simply because they are citizens of the United States and nothing more:

> The status of being a citizen or resident of the Commonwealth of Virginia is not a channel of interstate commerce; nor a person or thing in interstate commerce.87

the requirement, together with the other provision of this Act, will significantly reduce administrative costs and lower health insurance premiums. The requirement is essential to creating effective health insurance markets that do not require underwriting and eliminate its associated administrative costs.

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Id.; see also *A Healthy Debate*, supra note 2, at 107 (rebuilt of Jack Balkin) (“Indeed, without an individual mandate that pushes uninsured persons into the risk pool, health insurance reform may not succeed”). Without reducing overall risk by including healthier individuals in the risk pool, guaranteed issue and coverage for pre-existing conditions would be impossible. See *A Healthy Debate*, supra note 2, at 107 (rebuilt of Jack Balkin).


85. See Complaint at 19, *Florida ex rel. Bondi v. U.S. Dep’t of Health & Human Servs.*, 768 F. Supp. 2d 1256 (N.D. Fla. 2010) (No. 3:10-cv-91) (criticizing Act as overextension of Congress’s Commerce Clause power). “The Act thus compels persons to perform an affirmative act or incur a penalty, simply on the basis that they exist and reside in the United States. . . . Such inactivity by its nature cannot be deemed to be in commerce or to have any substantial effect on commerce, whether interstate or otherwise.” Id.; see also *A Healthy Debate*, supra note 2, at 99 (opening statement of Rivkin & Casey) (characterizing mandate as “an affirmative federal command that parties engage in a particular commercial activity”); *Room for Debate: Is the Health Care Law Unconstitutional?*, supra note 10 (“Congress has never before mandated that a citizen enter into an economic transaction with a private company, so there can be no judicial precedent for such a law.”). The legal challenges also allege violations of the Tenth Amendment and an overextension of Congress’s power to tax; however, these allegations pertain to other sections of the Act that are beyond the scope of this Note. See Complaint at 15-18, *Florida ex rel. Bondi v. U.S. Dep’t of Health & Human Servs.*, 768 F. Supp. 2d 1256 (N.D. Fla. 2010) (No. 3:10-cv-91) (arguing sections of Act unconstitutionally coercive towards state governments and impose unapportioned capitation tax).

commerce; nor is it an activity arising out of or connected with a commercial transaction. Instead, the status arises from an absence of commerce, not from some sort of economic endeavor, and is not even a non-economic activity affecting interstate commerce. It is entirely passive.87

The Obama Administration counters with two main arguments: first, that “the economic decisions that the Act regulates as to how to pay for health care services have direct and substantial impact on the interstate health care market”; and second, that “the minimum coverage provision is essential to the Act’s larger regulation of the interstate business of health insurance.”88 This “substantial effect” is derived in part from emergency room visits by the uninsured that contribute to the approximately $43 billion in unpaid medical bills that are absorbed each year into the national healthcare market.89 And while the Obama Administration has won two challenges to the individual mandate and fourteen challenges to other sections of the Act, it is the administration’s two defeats at the district court level that have generated the most attention.90

a. A Substantial Effect on Interstate Commerce

The first lawsuit challenging the mandate to reach a decision was *Thomas More Law Center v. Obama* in the Eastern District of Michigan.91 Addressing the plaintiffs’ attempt to distinguish between economic activity and inactivity, District Judge George Caram Steeh rejected the notion that the decision not to
purchase health insurance should be classified as inactivity.92  “Far from ‘inactivity,’ by choosing to forgo insurance plaintiffs are making an economic decision to try to pay for healthcare services later, out of pocket, rather than now through the purchase of insurance, collectively shifting billions of dollars . . . onto other market participants.”93  Judge Norman Moon of the Western District of Virginia was similarly unimpressed with the distinction between activity and inactivity, and, drawing heavily upon Judge Steeh’s earlier decision, wrote that because the affirmative decision not to purchase health insurance is economic in nature, “the provision is not susceptible to the shortcomings of the statues struck down by the Court in *Lopez* and *Morrison*.”94  Judge Steeh went one step further, rejecting any notion that individuals can truly refrain from participating in the health services market, and reasoning, “While plaintiffs describe Commerce Clause power as reaching economic activity, the government’s characterization of the Commerce Clause reaching economic decisions is more accurate.”95  And, answering the “slippery slope” argument advanced by the challengers that if the mandate is held constitutional, the Commerce Clause “would provide Congress with the authority to regulate every aspect of our lives, including our choice to refrain from acting,” Judge Steeh stated, “The health care market is unlike other markets. No one can guarantee his or her health, or ensure that he or she will never participate in the health care market.”96

b. Essential to a Broader Regulatory Scheme

Because Judge Steeh held that congressional authority existed to impose the individual mandate under the Commerce Clause by characterizing the decision not to purchase health insurance as economic activity, it was unnecessary for the court to determine whether similar authority might exist under the Necessary and Proper Clause.97  Nevertheless, Judge Steeh noted that the individual mandate is essential to a broader regulatory scheme, and thus, similarly permissible.98  Judge Steeh cited both *Wickard* and *Raich* as examples where the Supreme Court sustained legislation that imposed “obligations on

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92. See [*Thomas More Law Ctr.*, 720 F. Supp. 2d at 894]. Judge Steeh continued, “As this cost-shifting is exactly what [the Act] was enacted to address, there is no need for metaphysical gymnastics of the sort proscribed by *Lopez*.” Id. In [*Liberty University*, Judge Moon similarly acknowledged that the “unique nature of the market for health care” presents a “novel set of facts for consideration,” but nevertheless concluded that “the well-settled principles expounded in *Raich* and *Wickard* control the disposition of this claim.” 753 F. Supp. 2d at 633.

93. [*Thomas More Law Ctr.*, 720 F. Supp. 2d at 894].


96. See id. at 891, 894.

97. See id. at 894-95 (noting regulation of insurance market necessary as part of longer regulatory scheme).

98. See id.
individuals who claimed not to participate in interstate commerce, because those obligations were components of broad schemes regulating interstate commerce.”

Similarly, Judge Moon also relied on the Supreme Court’s “essential . . . to a larger regulatory scheme” language to find support for the mandate even if, *arguendo*, decisions about how to pay for healthcare are not economic activity in the purest sense. Lastly, lest anyone need reminding, both Judges Steeh and Moon made clear that Congress needs only a “rational basis”—a decidedly low standard—to conclude that individuals’ decisions about how and when to pay for healthcare substantially affects the interstate healthcare market.

c. Mandate Ruled Unconstitutional

Despite the numerous victories, it is the challengers’ two successes that have sparked the most discussion. In *Virginia ex rel. Cuccinelli v. Sebelius*, the first loss for the Obama Administration, Judge Henry Hudson of the Eastern District of Virginia held the individual mandate unconstitutional on two main grounds: first, because the decision not to purchase health insurance is not economic activity, Congress cannot look to the aggregation and substantial effect doctrine for support; and, secondly, because the decision not to purchase health insurance is not activity at all, nor can it derive authority from the Necessary and Proper clause. In the challengers’ second and more important victory, Judge Roger Vinson of the Northern District of Florida held the individual mandate unconstitutional, and additionally, because he believed the mandate was “inextricably bound together in purpose” with the Act as a whole,

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99. See *Thomas More Law Ctr.*, 720 F. Supp. 2d at 892. Judge Steeh further noted that the “[t]wo cases, decided sixty years apart, demonstrate the breadth of the Commerce power and the deference accorded Congress’s judgments.” *Id.* Further bolstering this position, Judge Steeh also touched on the fact that the Supreme Court has “recognized Congress’s power to regulate wholly intrastate, wholly non-economic matters that form ‘an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.’” *See id.* at 894-95 (quoting *Gonzales v. Raich*, 545 U.S. 1, 24-25 (2005)).

100. See *Liberty Univ., Inc. v. Geithner*, 753 F. Supp. 2d 611, 634-35 (W.D. Va. 2010) (acknowledging rational to believe failure to regulate uninsured would undercut Act’s larger regulatory scheme). Although acknowledging that they are not dispositive, Judge Moon looked to the congressional findings included in the Act on the effect of the uninsured on the market for healthcare to support the court’s conclusion. *See id.* at 633.

101. *See id.* at 630; *id.* at 634-35 (finding rational basis for regulation exists); *see also Thomas More Law Ctr. v. Obama*, 720 F. Supp. 2d 882, 891-92, 894-95 (2010) (invoking rational basis review and holding rational basis exists). “‘In assessing the scope of Congress’ authority under the Commerce Clause,’ the court’s task ‘is a modest one.’ . . . The court need not itself 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.’” *Thomas More Law Ctr.*, 720 F. Supp. 2d at 891-92 (quoting *Gonzales v. Raich*, 545 U.S. 1, 22 (2005)).

102. See supra note 90 and accompanying text (noting discussion and debate over significance of victory).

103. 728 F. Supp. 2d 768 (E.D. Va. 2010).

104. *See id.* at 781-82.
Addressing the *Wickard* and *Raich* substantial effect argument first, Judge Hudson stated bluntly and briefly, “[The Obama Administration’s] broad definition of the economic activity subject to congressional regulation lacks logical limitation and is unsupported by Commerce Clause jurisprudence.” Judge Hudson reasoned that in all prior Commerce Clause cases, Congress’s regulatory powers “are triggered by some type of self-initiated action,” and “[n]either the Supreme Court nor any federal circuit court of appeals has extended Commerce Clause powers to compel an individual to involuntarily enter the stream of commerce by purchasing a commodity in the private market.” In a much lengthier and meticulously analyzed opinion, Judge Vinson deliberately tackles each of the Obama Administration’s arguments piece by piece. Using *Wickard* as an example, Judge Vinson argues that utilizing the Obama Administration’s logic, Congress could accomplish the goal of raising wheat prices by “increasing demand through mandating that every adult purchase and consume wheat bread daily, rationalized on the grounds that because everyone must participate in the market for food, non-consumers of wheat bread adversely affect prices in the wheat market.”

Second among Judge Vinson’s more forceful arguments is that to establish a

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105. See *Florida ex rel. Bondi v. U.S. Dep’t of Health & Human Servs.*, 780 F. Supp. 2d 1256 (N.D. Fla. 2011) (striking down individual mandate and invalidating entire Act). Twenty-six state governors and attorneys general joined in the action, the greatest number of plaintiffs of any of the challenges by far. See *Sack, Federal Judge Rules Health Law Violates Constitution*, supra note 90 (noting prominence of decision due to number of plaintiffs and nature of ruling). Id. Sack also notes that Vinson’s ruling “solidified the divide in the health litigation” among Republican- and Democrat-appointed judges. Id. Many of the Act’s supporters criticized Judge Vinson’s ruling as judicial activism. Id.

106. *Cuccinelli*, 728 F. Supp. 2d at 781 (rejecting characterization of decision not to purchase insurance as “activity”).

107. *See id. at 782.* When articulating the issue before the court, Judge Hudson stated, Every application of Commerce Clause power found to be constitutionally sound by the Supreme Court involved some form of action, transaction, or deed placed in motion by an individual or legal entity. The constitutional viability of the Minimum Essential Coverage Provision in this case turns on whether or not a person’s decision to refuse to purchase health care is such an activity.

108. See generally *Bondi*, 780 F. Supp. 2d 1256 (reviewing history of Commerce Clause and analyzing constitutionally of individual mandate throughout seventy-eight page opinion). A close reading of Judge Vinson’s detailed history of the Commerce Clause suggests that he believes the present doctrine to be over-expansive of federal power. *See id.*

109. *See id.* (providing additional examples). To his credit, while Judge Vinson clearly disagrees politically with the notion that the federal government could issue such a mandate, he acknowledges that Congress plausibly could require people to buy wheat, or cars from General Motors. *Id.* Judge Vinson also tacitly acknowledges that requiring people to buy wheat and requiring them to consume it are two different things, the latter being a matter of personal liberty outside Congress’s purview. *See id.*
causal link between the decision not to purchase healthcare and a Wickard-type substantial effect on interstate commerce would require a court “to pile inference upon inference” in a manner that is impermissible under Lopez. Judge Vinson concedes that these inferences are logical and reasonable, but that many such inferences could support regulation of what he considers to be otherwise unregulable activity. In summary, Judge Vinson states, “To now hold that Congress may regulate the so-called ‘economic decision’ not to purchase a product or service in anticipation of future consumption is a ‘bridge too far.’ It is without logical limitation and far exceeds the existing legal boundaries established by Supreme Court precedent.”

Having refused to accept the government’s contention that the decision not to purchase insurance is the logical equivalent of the decision to pay for medical expenses out of pocket, or to simply receive emergency care with no intention of ever paying, both opinions turned to the Necessary and Proper Clause. Judge Hudson ruled that because the decision not to purchase insurance is, in his view, beyond the reach of the Commerce Clause, the fact that the mandate may be essential to the broader regulatory scheme is of no avail because “[t]his authority may only be constitutionally deployed when tethered to a lawful exercise of an enumerated power.” Judge Vinson goes a

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110. See Bondi, 780 F. Supp. 2d at 1291. Unlike individuals who grow and consume small amounts of wheat or marijuana, Judge Vinson does not accept that individuals who do not purchase health insurance have any effect on interstate commerce whatsoever. Id. Because zero multiplied by anything equals zero, Judge Vinson believes there is no Wickard-type aggregate effect of these individuals on interstate commerce. Id. Judge Vinson describes the necessary—and impermissibly attenuated—inferential chain as follows:

The uninsured can only be said to have a substantial effect on interstate commerce . . . (i) if they get sick or injured; (ii) if they are still uninsured at that specific point in time; (iii) if they seek medical care for that sickness or injury; (iv) if they are unable to pay for the medical care received; and (v) if they are unable or unwilling to make payment . . . and the costs are thereafter shifted to others.

Id.

111. See Florida ex rel. Bondi v. U.S. Dep’t of Health & Human Servs., 780 F. Supp. 2d 1256, 1292 (N.D. Fla. 2011) (“The problem with this legal rationale . . . is it would essentially have unlimited application.”). Judge Vinson suggests this rationale could be used to require Americans to purchase any or all types of insurance, based on the cost-shifting effects of their decision to remain uninsured. See id.

112. See id.

113. See Virginia ex rel. Cuccinelli v. Sebelius, 728 F. Supp. 2d 768, 782 (E.D. Va. 2010) (rejecting Necessary and Proper Clause as providing adequate authority). It is interesting to note that despite being handed down months and weeks earlier, respectively, Judge Hudson does not reference Thomas More Law Center or Liberty University in his discussion of the individual mandate. See id.; see also Bondi, 780 F. Supp. 2d 1256.

114. See Cuccinelli, 728 F. Supp. 2d at 782. On this point, Judge Hudson apparently ignores authority that suggests that the “lawful exercise of an enumerated power” refers not to the specific individual mandate provision, but to regulation of the interstate markets for healthcare in the broader sense, for which Congress undoubtedly holds authority. See, e.g., Gonzales v. Raich, 545 U.S. 1, 37 (2005) (Scalia, J., concurring in the judgment) (acknowledging Congress may use Necessary and Proper Clause to support specific regulations, that, if not part of “comprehensive” regulatory scheme, would be unconstitutional). Justice Scalia reminds the Court that a specific provision may be essential to a comprehensive regulation of interstate commerce even
step further, and posits that because the problems the individual mandate seeks to address (i.e. skyrocketing insurance costs) are created by provisions of the Act itself calling for guaranteed issue and coverage for pre-existing conditions, the Necessary and Proper Clause cannot be used to justify the mandate.115

III. ANALYSIS

A. Failure to Purchase Health Insurance Is Economic Activity That Substantially Affects Interstate Commerce

It seems most likely that when one of these challenges finally makes it to the Supreme Court, the issue of the individual mandate’s validity under the Commerce Clause will hinge on the distinction between activity and inactivity, given that this matter is arguably one of first impression.116 Short of overruling the New Deal cases and discarding half a century of precedent in the process, it is unlikely that the Court will side with the challengers.117 And while the challengers seem to rely heavily on the activity versus inactivity argument, these “metaphysical gymnastics” are unlikely to prevail because they lack even the support of the two modern examples of the Court limiting Congress’s commerce power, Lopez and Morrison.118

Key to the Court’s decisions in Lopez and Morrison was the fact that both of the challenged statutes dealt with violent crimes having only tangential effects on interstate commerce, a fact that is largely brushed aside by Judges Vinson...
and Hudson.\(^{119}\) While the government in both cases sought to draw a link between the regulated activity and interstate commerce, the connections in Lopez and Morrison were simply too weak to sustain the regulations.\(^{120}\) In the case of the Minimum Essential Coverage provision, this is simply not true.\(^{121}\)

Given the near inevitability of the need for healthcare, those who choose not to purchase insurance are engaged in economic activity perhaps even to a greater degree than the person who grows wheat or marijuana for personal consumption.\(^{122}\) While the home-grower may choose not to enter the market at all, the person who fails to purchase insurance cannot truly choose not to eventually enter the market for healthcare.\(^{123}\) Additionally, the decision not to purchase healthcare is an “activity” that, in the aggregate, has a direct, measurable, and substantial impact on the healthcare and insurance industries.\(^{124}\) The butterfly effect of which Judge Vinson speaks may be an apt metaphor for the causal chain in Lopez and Morrison, but does not ring true when applied to the PPACA.\(^{125}\)

\(^{119}\) Compare supra notes 67, 71 (discussing Court’s emphasis on criminal, noneconomic nature of regulations in Lopez and Morrison), with Virginia ex rel. Cuccinelli v. Sebelius, 728 F. Supp. 2d 768, 781 (E.D. Va. 2010), and Florida ex rel. Bondi v. U.S. Dep’t of Health & Human Servs., 780 F. Supp. 2d 1256, 1292 (N.D. Fla 2011) (lacking similar emphasis when discussing Lopez and Morrison).

\(^{120}\) See supra notes 68, 71 and accompanying text (discussing attenuated link between regulated activity and interstate commerce). Critical to the Court’s holding in Lopez was the fact that the Gun-Free School Zones Act was a standalone criminal statute, having “nothing to do with ‘commerce’ or any sort of economic enterprise . . . [and is] 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.” United States v. Lopez, 514 U.S. 549, 561 (1995). In contrast, when the Court decided Raich ten years later, it evaluated a provision of the Controlled Substances Act—a comprehensive regulatory scheme designed to regulate the vast interstate market for illicit drugs—and thus was “quintessentially economic” in nature. See Gonzales v. Raich, 545 U.S. 1, 18-19, 25 (2005).

\(^{121}\) See supra notes 79-82 and accompanying text (discussing congressional findings regarding effect on interstate commerce on national market for healthcare); note 88 (examining government’s arguments about effect of cost-shifting on healthcare).

\(^{122}\) Compare supra note 88 (discussing effects of decision not to purchase health insurance), and A Healthy Debate, supra note 2, at 108 (Jack Balkin rebuttal) (arguing decision not to purchase health insurance has substantial effects on interstate commerce), with Wickard v. Filburn, 317 U.S. 111, 127-28 (1942) (discussing effects of personal wheat cultivation on price of wheat), and Raich, 545 U.S. at 28-29 (describing theoretical effects of homegrown marijuana on national market).


\(^{124}\) See Thomas More Law Ctr., 720 F. Supp. 2d at 894 (characterizing Heart of Atlanta as controlling “decisions” on which patrons to serve). Judge Steeh states, “While plaintiffs describe the Commerce Clause power as reaching economic activity, the government’s characterization of the Commerce Clause reaching economic decisions is more accurate.” Id. Judge Steeh also characterizes Wickard and Raich as regulating decisions not to enter the market for a good. Id.

\(^{125}\) See Florida ex rel. Bondi v. U.S. Dep’t of Health & Human Servs., 780 F. Supp. 2d 1256, 1292 (N.D.
CONSTITUTIONAL CHALLENGES TO THE INDIVIDUAL MANDATE

In reality, the Act is much more similar to the statutes upheld in *Wickard* and *Raich* than it is to the ones struck down in *Lopez* and *Morrison*. Like the statutes in *Wickard* and *Raich* that were intended to regulate the national market for a commodity, The PPACA is intended to regulate the national market for health insurance. While there has been much discussion about how the Supreme Court has never upheld a statute that forced individuals into the market for goods or services, that is exactly what happened in *Wickard*: individuals over their wheat quota were forced to either pay a penalty or purchase additional wheat from the market.

**B. The Individual Mandate Is Essential to a Larger Regulatory Scheme**

As the decision not to purchase health insurance should be considered an activity that substantially affects interstate commerce, it is unnecessary to turn to the Necessary and Proper Clause to find authority for the regulation. However, the individual mandate, if not held to fall within commerce power on its own right, is likely constitutional pursuant to Congress’s power under the Necessary and Proper Clause. The mandate is inarguably essential to the

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189. See supra note 110 and accompanying text (noting Judge Vinson’s five-step causal chain between decision and ultimate effect). Judge Vinson seemingly ignores the fact that the triviality or “de minimis” character of individual instances arising under that statute is of no consequence.” See *Raich*, 545 U.S. at 17.

126. See *Liberty Univ., Inc.*, 753 F. Supp. 2d at 633-34 (drawing factual comparison to *Wickard*).


128. Compare supra note 85 (citing arguments that no law forcing individuals into market has been upheld), with *Wickard*, 317 U.S. at 129 (rejecting notion statute invalid because it forced individuals into market for wheat). The Court explained:

“It is of the essence of regulation that it lays a restraining hand on the self-interest of the regulated and that advantages from the regulation commonly fall to others. The conflicts of economic interest between the regulated and those who advantage by it are wisely left under our system to resolution by the Congress . . . .”

*Wickard*, 317 U.S. at 129.

129. See supra note 99 and accompanying text (discussing substantial effect as grounds for constitutionality independent of Necessary and Proper Clause).

130. See supra notes 113, 114 and accompanying text (discussing distinction between authority from Necessary and Proper Clause and authority under substantial effect doctrine). Justice Scalia, concurring in the judgment in *Raich*, explains that the Necessary and Proper Clause gives authority to Congress to regulate activities that, while not falling under the commerce power in their own right, are nonetheless “necessary . . . ‘to make [] effective’ . . . a more general regulation of interstate commerce.” See *Raich*, 545 U.S. at 36 (Scalia, J., concurring in the judgment).
larger regulatory scheme that is the Affordable Care Act, and given the mandate’s political unpopularity, it seems unlikely that it would have been included if it were not essential. 131 Both Judge Hudson’s and Judge Vinson’s conclusion that the Necessary and Proper Clause cannot be used because its use is not “tethered to a lawful exercise of an enumerated power,” misses the mark. 132 The “lawful exercise” that the specific regulation must be tethered to—in this case, the general regulation of the interstate markets for healthcare—is regulation that is decidedly within Congress’s Commerce Clause power. 133

IV. CONCLUSION

As Professor Natelson so eloquently states:

[P]olicy preference should not affect the search for historical truth—or for any other kind of truth. My explorations frequently lead to constitutional results I find distasteful, but that is no reason to suppress the results. The reputation of legal history is already bad enough without my compromising it further. 134

Despite extensive criticism of Wickard and Raich, and despite the Supreme Court’s characterization of Wickard as “perhaps the most far reaching example of Commerce Clause authority over intrastate activity,” the Court has continued to reaffirm the precedential value of both Wickard and Raich. 135 The Patient Protection and Affordable Care Act may be an ill-conceived, unpopular law, but that fact does not make it any less constitutionally permissible. Accordingly, when the challenges finally come before the Supreme Court, as they almost undoubtedly will, the result should be a predictable one. The individual coverage requirement is a permissible regulation of an activity that

131. See supra note 82 and accompanying text (discussing critical nature of individual mandate to Act’s underlying goal of providing health insurance for all Americans); supra note 7 and accompanying text (discussing historical political unpopularity of individual mandate); supra Part II.B.4 (discussing controversy surrounding Act’s inclusion of individual mandate).

132. See supra note 130 (explaining nuance involved in applying Necessary and Proper Clause). Indeed, if the specific regulation sought to be upheld always fell within the applicable plenary power when standing on its own, there would never be a need to rely on the Necessary and Proper Clause. See Raich, 545 U.S. at 36-37 (Scalia, J., concurring in the judgment). Additionally, Scalia makes clear that this question of necessity is subject only to rational basis review. Id. at 37.

133. See Gonzales v. Raich, 545 U.S. 1, 37 (2005) (stating certain legislation lawful if “reasonably adapted” to attainment of enumerated power); see also United States v. Se. Underwriters Ass’n, 322 U.S. 533, 553 (1944) (holding regulation of insurance industry falls within Congress’s commerce power).

134. Natelson, supra note 28, at 847 (arguing modern interpretation of Commerce Clause more consistent with original intent than many believe).

substantially affects interstate commerce. If the Patient Protection and Affordable Care Act is an ill-conceived law, the opposition should seek resolution through the political process and not the courts.

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