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LEGALLY ILL: IS THE FEDERAL HEALTH INSURANCE MANDATE CONSTITUTIONAL?

Josh Bolus*

I. INTRODUCTION

Much of the political landscape in the last half of 2009 was dominated by the debate in Congress over the proposed reforms to America's health care system. On November 7, 2009, H.R. 3962, the House of Representative's proposal for health care reform, was passed in the late Saturday night hours with a narrow vote of 220-215.¹ Almost a month and a half later, on December 24th, H.R. 3590, the Senate's version, passed with a 60-39 vote divided completely along party lines.² Before either bill could be enacted into law, the House or Senate version had to be approved by the other respective chamber then presented to President Barack Obama for his signature.³ The proposals constituted the biggest federal expansion of health care benefits since Medicaid and Medicare were introduced in the 1960's.⁴ After the Senate version of health care reform (known as the Patient Protection and Affordable Care Act) was passed,⁵ President Obama stated, that if enacted, it would be "the most important piece of social legislation passed since the Social Security Act passed in the 1930's."⁶

Popular support for the reforms, at the time, was mixed at best.⁷ A Washington Post-ABC News poll taken in early 2010 placed public support for the proposed changes at forty-four percent and opposition at fifty-one percent.⁸ The special election of Senator Scott Brown in Massachusetts to replace the deceased Ted Kennedy, who had long advocated for universal coverage, created a roadblock for any attempt to enact the House version of the bill in the Senate.⁹ Brown gave Senate Republicans the 41st vote needed to prevent any votes to end a potential

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1. *House Passes Health Care Reform Bill*, CNN, Nov. 8, 2009, available at <http://www.cnn.com/2009/POLITICS/11/07/health.care/index.html>.

2. Alan Silverleib, *Senate Approves Health Care Reform Bill*, CNN, Dec. 24, 2009, available at <http://www.cnn.com/2009/POLITICS/12/24/health.care/index.html> [hereinafter Silverleib].

3. *Id.*

4. *Id.*

5. Patient Protection and Affordable Care Act, Pub. L. No. 111-148(2010), available at <http://www.govtrack.us/congress/bill.xpd?bill=h111-3590>. [hereinafter H.R. 3590]

6. Silverleib, *supra* note 2.

7. Dave Balz & Chris Cillizza, *Senate Election in Massachusetts Could Be a Harbinger for Health-Care Reform*, WASH. POST, Jan. 19, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/01/18/AR2010011803450.html>.

8. *Id.*

9. Karen Tumulty, *Does Brown's Senate Win Mean the End of Health Reform?* TIME, Jan. 20, 2010, available at <http://www.time.com/time/politics/article/0,8599,1954980,00.html>.

filibuster against an effort to pass the House version.¹⁰ Some media commentators went so far as to declare Congress' efforts at reform "dead" after the election.¹¹

However, in March 2010, history was made when the House narrowly passed the Senate version with a 219-212 vote, with unanimous Republican opposition as well as thirty-four Democrats voting against it.¹² Democrats hailed the bill's passage as a major victory and a great advancement in expanding coverage for uninsured Americans, while Republicans bemoaned it as a government take-over and an economic burden.¹³

The debate has been highly charged on both sides of the issue, and critics and lawmakers have questioned the constitutionality of the reforms since before the law was finally enacted.¹⁴ Since the Republican Party's efforts in the legislative realm have failed, conservative opponents have decided to utilize the courts to prevent federal expansion of health care regulation.¹⁵

One particular provision of the law that is criticized as an unconstitutional expansion of Federal power is the "individual mandate," which stipulates that all Americans, with certain exceptions, are required to obtain some form of health coverage.¹⁶ It is the purpose of this article to explore the constitutionality of the individual mandate of the health care reform bill as well as the economic penalty that is assessed to those who do not meet the mandate. A brief history of prior health reform initiatives in the United States will be examined to provide a historical context for the current political debate regarding the currently instituted reforms. The legal justifications of the proponents for the mandate will be analyzed regarding their constitutionality, and the legal fate of the mandate will be examined. Lastly, this article will explore other potential health care reform alternatives that are constitutionally sound.

II. CONSTITUTIONALITY OF THE INDIVIDUAL MANDATE

As early as the Presidential Election of 1912, when former President Theodore Roosevelt was running as a third party candidate, an organized push for some type

10. *Id.*

11. *Flashback: Media Repeatedly Declared Health Care Reform "Dead" After Brown's Senate Victory*, MEDIA MATTERS FOR AMERICA, Mar. 22, 2010, available at <http://mediamatters.org/research/201003220039>.

12. *Health Care Bill Passes in House*, CBS NEWS, Mar. 22, 2010, available at <http://www.cbsnews.com/stories/2010/03/21/politics/main6321210.shtml>.

13. *Id.*

14. *See 13 Republican Attorneys General Threaten Lawsuit over Health Care*, FOX NEWS, Dec. 30, 2009, available at <http://www.foxnews.com/politics/2009/12/30/republican-attorney-generals-threaten-lawsuit-health-care> [hereinafter *Threaten Lawsuit*].

15. *See 13 Attorneys General Sue over Health Care Overhaul*, USA TODAY, Mar. 23, 2010, available at http://www.usatoday.com/news/nation/2010-03-23-attorneys-general-health-suit_N.htm [hereinafter *Attorneys General Sue*].

16. RANDY BARNETT, NATHANIEL STEWART & TODD F. GAZIANO, WHY THE PERSONAL MANDATE TO BUY HEALTH INSURANCE IS UNPRECEDENTED AND UNCONSTITUTIONAL The Heritage Foundation, Legal Memorandum No. 49 (2009), available at <http://www.heritage.org/Research/LegalIssues/lm0049.cfm> [hereinafter BARNETT].

of national health reform has existed in the United States.¹⁷ Proponents of health reform supported Roosevelt as their best hope of the three candidates to institute changes once elected.¹⁸ However, it was not until President Harry S. Truman's Administration that a comprehensive health reform plan was actually proposed by the government.¹⁹ Among some of the proposals listed was a plan to institute national health insurance under the Social Security System; participation would have been voluntary and paid for by income taxes.²⁰ The bill did not garner much congressional support and was eventually abandoned.²¹ In 1994, the Clinton Administration made health reform a top priority upon assuming office only to fall short due to successful efforts among congressional Republicans to prevent passage of any proposals.²²

A proposal present in the enacted Senate bill is the provision requiring all individuals, with certain exceptions, to obtain some form of health coverage.²³ This is often referred to as the "individual mandate."²⁴ Today's law is modeled in part on the reform plan enacted in Massachusetts, which requires all state citizens to obtain some form of coverage.²⁵ The law imposes a requirement for individuals and their dependents to maintain what it deems "minimum essential coverage," which would take effect after 2013.²⁶ With this requirement, Congress seeks to ensure that those who do not purchase health insurance, mostly newly employed young adults, be required to partake in the system in order to help subsidize others.²⁷ Without these subsidies, it would be difficult for the government to establish a stable system for national health care.²⁸

Individuals, excluding those meeting certain exceptions (i.e. religious objections),²⁹ who fail to maintain some form of coverage deemed acceptable under the requirements of the bill for at least a month will be subject to monetary penalties.³⁰ It has been estimated that these penalties will generate as much as \$167 billion in government revenue.³¹ Those that fail to pay could be subject to criminal prosecution and imprisonment.³²

17. Lee Igel, *The History of Health Care as a Campaign Issue*, THE PHYSICIAN EXECUTIVE, May1, 2008, at 12, available at <http://net.acpe.org/MembersOnly/pejournal/2008/MayJun/Igel.pdf>. [hereinafter Igel].

18. *Id.*

19. *Id.* at 13.

20. *Id.*

21. *Id.* at 14.

22. Igel, *supra* note 17, at 14-15.

23. H.R. 3590, *supra* note 5, at 124-32; Affordable Health Care for America Act, H.R. 3962, 111th Cong. 296-304, (2009), available at <http://www.gpo.gov/fdsys/pkg/BILLS-111hr3962ih/pdf/BILLS-111hr3962ih.pdf>.

24. See Ezra Klein, *How Does the Individual Mandate Work?* WASH. POST, Mar. 25, 2010, available at http://voices.washingtonpost.com/ezra-klein/2010/03/how_does_the_individual_mandat.html.

25. Michael Cannon, MASSACHUSETTS' OBAMA-LIKE REFORMS INCREASE HEALTH COSTS, WAIT TIMES, CATO INSTITUTE, (2009), available at http://www.cato.org/pub_display.php?pub_id=10488.

26. H.R. 3590, *supra* note 5, at 324-25.

27. David B. Rivkin, Jr. & Lee A. Casey, *Illegal Health Reform*, WASH. POST, Aug. 22, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/08/21/AR2009082103033.html> [hereinafter Rivkin].

28. *Id.*

29. H.R. 3590, *supra* note 5, at 329-30.

30. *Id.* at 325.

31. Brian W. Walsh & Hans. A. von Spakovsky, *Criminalizing Health-Care Freedom*, NATIONAL REVIEW ONLINE, Nov. 19, 2009, available at

Proponents of the individual mandate argue that a mandate is constitutionally sound or are quick to dismiss the talk altogether.³³ Upon questioning by a reporter over the constitutionality of a federally imposed mandate, then-House Speaker Nancy Pelosi, one of the mandate's staunchest supporters, quipped with annoyance, "[a]re you serious?" before moving on to the next question.³⁴ Later, Speaker Pelosi's spokeswoman, Nadeam Elshami, was quoted as saying that such a notion was not a "serious question."³⁵ In some cases, proponents in Congress themselves are unsure about the constitutionality of a federal mandate,³⁶ or in the case of Representative James Clyburn of South Carolina, ambivalent.³⁷ When asked where the Constitution specifically provides Congress the power to require individuals to purchase insurance, Senator Bob Casey of Pennsylvania remarked, "[w]ell, I don't know if there's a specific constitutional provision."³⁸ He later stated, "I think it's constitutional, and I think it's been subjected to scrutiny before, and I think if this bill is subjected to scrutiny on that constitutional question, I think it will prevail."³⁹ Congressman Clyburn stated, when faced with similar questioning, "[t]here's nothing in the Constitution that says that the federal government has anything to do with most of the stuff we do."⁴⁰ He followed up, "[h]ow about [you] show me where in the Constitution it prohibits the federal government from doing this?"⁴¹

What individuals like Congressman Clyburn forget is that the United States Constitution establishes a federal government with limited enumerated powers.⁴² The Father of the Constitution, James Madison, wrote in Federalist No. 45 that, "the powers delegated by the proposed Constitution to the federal government are few and defined."⁴³ Those which are to remain in the State governments are numerous and indefinite."⁴⁴ The framers' intent in the formation of a federal government was:

<http://article.nationalreview.com/?q=MjVjY2FmYmE3MTQwNmNlYWRlMzE4YTc5NGQ4OGJkMmM>
[hereinafter von Spakovsky].

32. *Id.*

33. See generally Matt Cover, *When Asked Where the Constitution Authorizes Congress to Order Americans to Buy Health Insurance, Pelosi says: "Are You Serious?"*, CNS NEWS, Oct. 23, 2009, available at <http://www.cnsnews.com/news/article/55971> [hereinafter Cover]; Andrew Napolitano, *Health-Care Reform and the Constitution*, WALL ST. J., Sept. 15, 2009, available at <http://online.wsj.com/article/SB10001424052970203917304574412793406386548.html> [hereinafter Napolitano]; Matt Cover, *Sen. Bob Casey: Health Care Mandate Constitutional But Not Sure If There's 'Specific Constitutional Provision'*, CNS NEWS, Dec. 24, 2009, available at <http://www.cnsnews.com/news/article/59011> [hereinafter Casey].

34. Cover, *supra* note 33.

35. *Id.*

36. Casey, *supra* note 33.

37. See Napolitano, *supra* note 33.

38. Casey, *supra* note 33.

39. Napolitano, *supra* note 33.

40. *Id.*

41. *Id.*

42. *United States v. Lopez*, 514 U.S. 549, 552 (1995).

43. *Id.* (quoting *The Federalist* No. 45, at 292-293 (James Madison) (Clinton Rossiter ed., 1961)).

44. *Id.*

[T]o ensure 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.⁴⁵

Despite what some congressional leaders may have believed, there appear to be serious constitutional issues surrounding a federal mandate to purchase insurance, and a legal battle has been ongoing since the legislative battle reached a final resolution.⁴⁶ Before the law was enacted, thirteen state attorneys general initiated the beginnings of the legal fight when they signed a letter and sent it to Democratic Senate Majority Leader Harry Reid and House Speaker Pelosi indicating their intention to mount a legal challenge if certain provisions of the Senate bill were enacted into law.⁴⁷ Then-Florida Attorney General Bill McCollum, one of the letter's cosigners, later cited the mandate in particular as an objectionable provision of the bill that would be addressed in any suit initiated by his office.⁴⁸

Minnesota Governor Tim Pawlenty, a potential Republican candidate for President in 2012, has also suggested that individual state governments invoke the nullification doctrine and assert their sovereignty in this respect.⁴⁹ It appears that this is a sentiment shared by lawmakers in certain state legislatures across the nation as some are considering amending their state constitutions to prohibit employers or individuals from participating in a national health care system.⁵⁰ These state lawmakers and officials believe that the proposed national health system exceeds the federal government's power under the Constitution in an area that should be regulated on a state-by-state level via the Tenth Amendment.⁵¹ However, the legality of these measures is doubtful since the courts have routinely held that Federal law supersedes conflicting laws of the states under the Constitution's Supremacy Clause.⁵² Michael Dorf, a constitutional law professor at Cornell University, deemed these efforts as merely "symbolic gestures."⁵³ Others have derided it as "political theater."⁵⁴

45. *Id.* (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (internal quotation marks omitted)).

46. *See generally* *Attorneys General Sue*, *supra* note 15.

47. *Threaten Lawsuit*, *supra* note 14.

48. Michael Kirkland, *U.S. Supreme Court: Is Healthcare Reform Constitutional?*, UNITED PRESS INT'L, Jan. 3, 2010, available at http://www.upi.com/Top_News/US/2010/01/03/US-Supreme-Court-Is-healthcare-reform-constitutional/UPI-66781262506740 [hereinafter Kirkland].

49. Bob Von Sternberg, *Pawlenty: 10th Amendment Might let States Sidestep Healthcare Changes*, MINNEAPOLIS STAR TRIBUNE, Sept. 11, 2009, available at <http://www.startribune.com/politics/state/59009217.html>.

50. Karen Pierog & Lisa Lambert, *U.S. States Girding for Battle over Healthcare Reform*, REUTERS, Sept. 16, 2009, available at <http://www.reuters.com/article/idUSTRE58F4D720090916>.

51. *Id.* The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states. U.S. CONST. amend. X.

52. *States Seeking to Ban Mandatory Health Insurance*, FOX NEWS, Feb. 1, 2010, available at <http://www.foxnews.com/politics/2010/02/01/states-seeking-ban-mandatory-health-insurance/>.

53. *Id.*

54. *Id.*

After the bill was signed into law by President Obama, the attorneys general of Florida and Virginia made good on their promises and filed lawsuits within minutes of the law's enactment.⁵⁵ Currently, over half the states are involved in legal challenges against the health care law.⁵⁶

Despite all the political rhetoric, would there be a substantive constitutional case that could be argued against the insurance mandate or are its critics merely playing politics? A report released in July 2009 by the Congressional Research Service, Congress' non-partisan legal research department, stated that there were legitimate legal questions surrounding a federally imposed health insurance mandate.⁵⁷ In particular, the proposed mandate raises two legitimate issues concerning the scope of the federal government's power under the United States Constitution. First, can the government require individual citizens to purchase health insurance, and second, can it impose a tax penalty on those who fail to make such a purchase?

A. Can the Federal Government Mandate Health Insurance in the Same Respect that the States can Mandate Automotive Insurance?

One justification for a federal mandate that is espoused by proponents, such as Senator Claire McCaskill of Missouri, is that state governments require citizens to obtain automobile insurance and that a federal requirement for one to purchase health insurance is of a similar nature.⁵⁸ Nebraska Senator Ben Nelson believes that the Constitution provides Congress the power to mandate health insurance in the "same place" that the states have the power to mandate auto insurance.⁵⁹ Peter Urbanowicz, former general counsel for the Department of Health and Human Services during President George W. Bush's Administration, deemed the comparison to car insurance an "appealing argument."⁶⁰ However, David B. Rivkin, a constitutional lawyer practicing at Baker Hostetler in Washington, D.C.,⁶¹ argues that the comparison between auto and health insurance mandates is like

55. William McQuillen, *Florida Health-Care Lawsuit Can Proceed, Judge Says*, BLOOMBERG NEWS, Oct. 14, 2010, available at <http://www.bloomberg.com/news/2010-10-14/florida-challenge-to-obama-health-care-overhaul-can-proceed-judge-rules.html>.

56. Melissa Nelson, *26 States Join Obama Health Care Lawsuit in Florida*, ASSOCIATED PRESS, Jan. 18, 2010, available at http://news.yahoo.com/s/ap/20110118/ap_on_re_us/health_overhaul_lawsuit.

57. Matt Canham, *Can Congress Force You to Buy Health Insurance?*, SALT LAKE TRIBUNE, Nov. 23, 2009 [hereinafter Canham].

58. Edwin Mora, *Sen. McCaskill Doesn't Say Where Congress Gets Power to Mandate Health Insurance, But Cites Auto Insurance at State Level*, CNS NEWS, Dec. 27, 2009, available at <http://www.cnsnews.com/news/article/59036>.

59. Chris Neefus, *Sen. Nelson: Constitutionally, Congress Can 'Probably' Mandate Health Insurance in 'Same Place' States Can Mandate Car Insurance*, CNS NEWS, Dec. 23, 2009, available at <http://www.cnsnews.com/news/article/59008> [hereinafter Neefus].

60. Kristen Wyatt, *Auto Insurance May Parallel Healthcare*, FOX NEWS PROVIDENCE, Nov. 26, 2009, available at http://www.foxprovidence.com/dpp/news/us_news/west/Auto-insurance-may-parallel-healthcare1259272111776 [hereinafter Wyatt].

61. Rivkin, *supra* note 27. Rivkin was the lead counsel in the legal challenge made to the mandate in the U.S. District Court for the Northern District of Florida. http://www.pbs.org/newshour/bb/health/july-dec10/healthcare_12-13.html

“apples and oranges.”⁶² With respect to auto insurance, Rivkin reasons that people have a choice to forgo obtaining a driver’s license in all states that require the carrying of some form of liability insurance upon obtainment of a license, while one will have no option to abstain from buying health insurance without breaking the law.⁶³ Indeed, these state mandates are conditioned on discretionary behavior.⁶⁴ One does not have to drive an automobile nor does one have a constitutional right to do so, and the Supreme Court has made a distinction between government requirements that are strictly imposed and those that are imposed as a condition for a voluntary benefit.⁶⁵

However, it remains to be seen that just because the states have the power to impose mandates on their citizens, the federal government does as well. Placing the legal justification on this premise is faulty; Urbanowicz warns that any national overhaul of the health care system could collapse if a court is not persuaded that the federal government can mandate health insurance on the basis that the states are empowered to mandate.⁶⁶ As already elaborated, the Constitution provides a set of specific enumerated powers to the federal government and delegates all others to the states via the Tenth Amendment.⁶⁷ The states’ power to mandate is presumed to be permissible under the Tenth Amendment, provided their own state constitutions do not prohibit it.

B. Is there a Commerce Clause Justification for a Federal Mandate?

Many supporters, among them former House Speaker Pelosi⁶⁸ and California Senator Diane Feinstein, have pointed to the Commerce Clause laid forth in Article I, section 8 of the Constitution as a source of federal power to impose such a requirement.⁶⁹ The Commerce Clause states that Congress is provided the power to “regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes.”⁷⁰ The clause grants the federal government some of its most dominant power over the states in its ability to regulate economic activity in and among them.⁷¹ The enacted Senate bill itself, among its 2,000 pages, contains five pages defending the constitutionality of its proposals and cites the Commerce Clause as a legitimate source of authority.⁷² The aforementioned July 2009 report issued by the Congressional Research Service states that the Commerce Clause could be a possible source of power to institute a federal mandate, but that it was

62. Wyatt, *supra* note 60.

63. *Id.*

64. Karl Manheim & Jamie Court, *Must You Buy Health Insurance?*, CHRISTIAN SCI. MONITOR, March 26, 2008, available at <http://www.csmonitor.com/Commentary/Opinion/2008/0326/p09s01-coop.html>.

65. *Id.*

66. Wyatt, *supra* note 60.

67. *See Lopez*, 514 U.S. at 552.

68. BARNETT, *supra* note 16.

69. Fred Lucas, *Sen. Feinstein ‘Assumes’ Commerce Clause Gives Congress Unlimited Authority to Mandate Health Insurance*, CNS NEWS, Dec. 22, 2009, available at <http://www.cnsnews.com/news/article/58937>.

70. U.S. CONST. art. 1, § 8, cl. 3.

71. *See Wickard v. Filburn*, 317 U.S. 111, 121 (1942).

72. Canham, *supra* note 57; *See generally* H.R. 3590, *supra* note 5, at 320-24.

not certain.⁷³ The report deemed the Commerce Clause justification the most “challenging question posed by such a proposal,” and called it “a novel issue” whether the clause could be construed to provide Congress power to require citizens to buy a good or service.⁷⁴

There is plenty of evidence that the purchase of health care insurance has an effect on the nation’s markets.⁷⁵ In today’s economy, health care comprises a substantial portion of the nation’s gross domestic product (GDP).⁷⁶ It is estimated that spending on health care makes up as much as 17.6 percent of the national economy (approximately \$2.5 trillion) and is projected to expand to \$4.5 trillion by 2019.⁷⁷ Private health insurance spending is presently estimated at \$850 billion.⁷⁸

While most patients visit doctors to obtain medical services within an intrastate context, Congress is provided significant leeway in regulating activity that occurs solely within a state’s borders under today’s Commerce Clause jurisprudence.⁷⁹ By the precedent set forth in *Wickard v. Filburn*, the United States Supreme Court has ruled that purely intrastate activity can be subject to federal regulation if it has an aggregate effect on interstate commerce.⁸⁰ In *Wickard*, a farmer that cultivated wheat solely for his own domestic use was still subject to federal regulations limiting the amount he could grow.⁸¹ The Court reasoned that the growing of wheat in the aggregate, regardless of intended use, affected supply and demand ratios among the states and, subsequently, the movement of wheat through interstate commerce.⁸² As a result, it was a legitimate use of federal power to set quotas on the amount of wheat that could be grown in order to achieve stability in wheat prices.⁸³

Gonzales v. Raich, decided over sixty years later, reaffirmed the *Wickard* standard when it upheld the Federal Controlled Substances Act, outlawing the possession of marijuana, as applied to an individual that grew marijuana for home personal use, despite no connection with interstate commerce, on the grounds that it was a class of activity that substantially affected interstate commerce.⁸⁴ The Court further justified its decision on the grounds that the activity was “quintessentially economic.”⁸⁵ As a result of the precedents set forth in *Wickard*

73. Canham, *supra* note 57.

74. *Id.*

75. See generally JENNIFER STAMAN AND CYNTHIA BROUGH, CONGRESSIONAL RESEARCH SERVICE, REQUIRING INDIVIDUALS TO OBTAIN HEALTH INSURANCE: A CONSTITUTIONAL ANALYSIS 1-18 (2009), available at http://assets.opencrs.com/rpts/R40725_20090724.pdf [hereinafter Staman].

76. See generally John Tammy, *Health Care: 16% of GDP?*, FORBES.COM, Feb. 1, 2010, available at http://www.forbes.com/2010/01/31/health-care-gdp-reform-opinions-columnists-john-tammy.html?feed=rss_home

77. H.R. 3590, *supra* note 5, at 321.

78. *Id.*

79. Napolitano, *supra* note 33.

80. See *Wickard*, 317 U.S. at 124.

81. *Id.* at 133-36.

82. *Id.* at 125-28.

83. *Id.* at 128.

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

85. *Id.* at 25.

and *Gonzales*, federal courts would certainly factor in whether a citizen's failure to obtain health insurance has a substantial aggregate effect on interstate commerce.⁸⁶

However, in recent years the Court has demonstrated a willingness to strike down certain federal laws predicated on commerce power for being excessive in scope.⁸⁷ In *United States v. Lopez*, the Court refined the holding in *Wickard* stating that Congress' commerce power is limited to purely commercial intrastate activity that has a nexus with interstate commerce.⁸⁸ The Court was clear to iterate that the Commerce Clause has limitations.⁸⁹

The *Lopez* decision struck down the Gun-Free School Zones Act of 1990, which made it a federal offense "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone."⁹⁰ The Court identified three broad categories of activity that fell within Congress' power to regulate commerce: the channels (e.g. highways and rivers), instrumentalities (e.g. automobiles and trains), and activities having a substantial relation to commerce.⁹¹ The Court reasoned that the law was effectively a federal criminal statute that had no economic or commercial purpose,⁹² and the activity it outlawed did not substantially affect interstate commerce.⁹³ The Court believed that upholding the law would present a problem whereby Congress would effectively be granted the ability to regulate any activity it wished, under Commerce Clause power.⁹⁴ Five years later, *United States v. Morrison* reaffirmed the limitations on commerce power laid forth in *Lopez* when it struck down a provision of the Violence Against Women Act of 1994, which provided federal civil remedies for female victims of violent crime, on similar reasoning.⁹⁵

Supporters of the bill are likely to stress the economic consequences that a mandate would have on the national market to justify the use of commerce power. The *Washington Post*'s Ruth Marcus states that the uninsured have a "ripple effect" on the national health care market.⁹⁶ When the uninsured are treated at the emergency room, it drives up costs and premiums for everybody because it limits the size of the insurance pool.⁹⁷ The Congressional Research Service's July 2009 report laid forth a possible argument that the mandate could "benefit the orderly flow of health care services in interstate commerce."⁹⁸ Wayne McCormack, a law professor at the University of Utah, predicts that supporters of the mandate can make a strong case citing examples of massive subsidies provided by taxpayers and

86. Canham, *supra* note 57.

87. *See generally Lopez*, 514 U.S. 549. *See generally United States v. Morrison*, 529 U.S. 598 (2000).

88. *See generally Lopez*, 514 U.S. 549.

89. *Id.* at 557.

90. *Id.* at 551 (citing 18 U.S.C. § 922 (q)(1)(A) (1988 ed., Supp. V)).

91. *Id.* at 558-59.

92. *Id.* at 561.

93. *See id.* at 558-59.

94. *Id.* at 564.

95. *See generally Morrison*, 529 U.S. 598.

96. Ruth Marcus, *An Illegal Mandate? No.*, WASH. POST, Nov. 26, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/11/24/AR2009112402815.html>.

97. *Id.*

98. Canham, *supra* note 57.

the insured toward emergency room care for the uninsured.⁹⁹ Professor Mark Hall of Wake Forrest Law School argues that the federal government already regulates health care and that a mandate would just be another regulation.¹⁰⁰

However, the mere fact that a particular behavior may influence interstate commerce, either directly or indirectly, does not automatically subject it to federal regulation.¹⁰¹ Any examination of a mandate would have to also involve an evaluation of the class of activity that is affecting interstate commerce.¹⁰² Of the three criteria that the government can regulate in interstate commerce (i.e. channels, instrumentalities, and activities substantially affecting interstate commerce), the lack of insurance should obviously be analyzed as an activity substantially affecting interstate commerce.¹⁰³

It is in this context where the proponents' arguments are flawed. All of these arguments fail to address the central issue at the heart of the matter, which is whether Congress can regulate non-activity on the grounds that it influences the interstate markets in certain contexts.¹⁰⁴ It appears unlikely that individuals that refrain from purchasing a good or service are engaging in a form of commercial activity as *United States v. Lopez* construes the Commerce Clause to require.¹⁰⁵ In the context of a mandate, the government would be regulating uninsured individuals for no reason other than that they merely exist and have the potential to partake in the health care system.¹⁰⁶ Essentially, by penalizing the failure to buy insurance, Congress would be attempting to designate inactivity as a form of activity.¹⁰⁷

The decision to refrain from affirmative behavior is distinguishable from the intrastate activity found to be regulable in *Wickard* and *Gonzales*.¹⁰⁸ In *Wickard*, the behavior deemed permissible for the federal government to regulate consisted of an activity that had a connection to commerce: the growing of wheat.¹⁰⁹ In *Gonzales*, the activity consisted of the growing of marijuana plants for personal use.¹¹⁰ This is what could separate the holdings in those cases from the current cases involving a mandate because all those decisions were addressing some form of activity, as opposed to non-activity. Furthermore, the farmer in *Wickard* and the

99. *Id.*

100. *Id.*

101. *See, e.g. Lopez*, 514 U.S. 549. *See e.g. Morrison*, 529 U.S. 598.

102. BARNETT, *supra* note 16.

103. *Id.*

104. *See generally* AMERICAN CENTER FOR LAW & JUSTICE, INDIVIDUAL MANDATE: IS IT CONSTITUTIONAL? 1-12 (2009), available at http://www.aclj.org/media/pdf/Constitutionality_of_Individual_Mandate_Memo.pdf [hereinafter ACLJ].

105. Ken Klukowski, *Individual Mandate Insurance is Unconstitutional*, POLITICO, Oct. 20, 2009, available at <http://www.politico.com/news/stories/1009/28463.html> [hereinafter Klukowski]; ACLJ, *supra* note 104, at 7.

106. Rivkin, *supra* note 27.

107. Brian Darling, *Obama's Individual Healthcare Mandate is Unconstitutional*, THE HERITAGE FOUND., Dec. 11, 2009, available at <http://newresearchfindingstwo.blogspot.com/2009/12/obamas-individual-health-care-mandate.html> [hereinafter Darling].

108. ACLJ, *supra* note 104, at 7.

109. John Carney, *Why the Supreme Court Should Strike Down Health Care Reform's Individual Mandate*, THE BUS. INSIDER, Dec. 21, 2009, <http://www.businessinsider.com/why-the-supreme-court-should-strike-down-health-care-reforms-individual-mandate-2009-12>.

110. *See generally Gonzales*, 545 U.S. 1.

grower in *Gonzales* could have escaped regulation by not engaging in the activity at all, which, short of death, would not be an option available to the uninsured. The decision to refrain from buying insurance may be an economic one, but the Court has construed the Commerce Clause to only apply to quintessential economic activity and not economic choices.¹¹¹

In 1994, during the Clinton Administration's attempts to institute an individual mandate in its own version of health care reform, the non-partisan Congressional Budget Office (CBO) issued a report that called the proposal an "unprecedented form of federal action."¹¹² The report went on to state:

[t]he government has never required people to buy any good or service as a condition of lawful residence in the United States. An individual mandate would have two features that, in combination, would make it unique. First, it would impose a duty on individuals as members of society. Second, it would require people to purchase a specific service that would be heavily regulated by the federal government.¹¹³

Proponents counter-argue that, "[t]here is no such thing as 'inactivity' or non-participation in the health care market."¹¹⁴ They argue that everyone inevitably ends up as a participant in the health care market, whether or not one chooses to, due to illnesses and injuries.¹¹⁵ As a result, the proper question is whether one participates responsibly by paying for his or her own costs or having society pay for it.¹¹⁶

However, this broad reasoning could be applied to any market to argue that individuals cannot opt out, such as the food, transportation, and housing markets.¹¹⁷ Furthermore, under this logic, instead of attempting to control wheat supplies through federal quotas as in *Wickard*, Congress could have raised wheat prices by increasing demand through a mandate that everyone buy and eat wheat bread on a daily basis because everyone participates in the food market and non-consumers of wheat products adversely affect the wheat market.¹¹⁸ The same could be said of those who do not buy General Motors cars and trucks, which is a partially government-owned and taxpayer-subsidized business, because they have a negative effect on the company's profitability.¹¹⁹ Also, would Congress now have the power to require individuals above a certain income to purchase a mortgage

111. *Id.*

112. CONGRESSIONAL BUDGET OFFICE, THE BUDGETARY TREATMENT OF AN INDIVIDUAL MANDATE TO BUY HEALTH INSURANCE 1-13, 11 (1994) available at <http://www.cbo.gov/doc.cfm?index=4816&type=0>.

113. *Id.*

114. Ezra Klein, *The Justice Will See You Now*, NEWSWEEK, Feb. 6, 2011, available at <http://www.newsweek.com/2011/02/06/the-justice-will-see-you-now.html> [hereinafter Klein].

115. *Id.*

116. *Id.*

117. See *Florida v. U. S. Dep't of Health Human Serv.*, No. 3:10-cv-91-RV/EMT, 2011 WL 285683, at *24 (N.D. Fla. 2011).

118. *Id.*

119. *Id.*

financed home protected by guaranty insurance to add stability to the housing market and to guard against future cost-shifting due to defaults on the theory that most everyone participates or will participate in the housing market?¹²⁰

An individual mandate for health insurance could open Pandora's Box, whereby Congress could impose regulations requiring citizens to spend their money in any manner it wishes.¹²¹ Senator Orrin Hatch, a vocal critic of the individual mandate,¹²² highlighted this reasoning, arguing that the federal government simply has no constitutional authority to make laws requiring citizens to spend their money in a certain way.¹²³ If a decision not to purchase insurance classifies as an economic activity, then practically every behavior imaginable could theoretically be open to regulation on Commerce Clause grounds.¹²⁴

C. Can the Federal Government Assess a Tax Penalty on Individuals that Disobey the Mandate?

The power of Congress to tax and spend is found in Article I, section 8 of the Constitution.¹²⁵ The power to tax and spend is one of the federal government's broadest powers and has provided the basis for the nation's biggest social welfare programs such as Social Security, Medicare, Medicaid, and the State Children's Health Insurance Program.¹²⁶ The Court has given Congress deference, allowing it much discretion, if it creates a program it believes is for the general welfare.¹²⁷ Congress can also place conditions on the receipt of federal funds and benefits.¹²⁸ Furthermore, it is settled law that Congress can impose a tax for regulatory rather than solely revenue-raising purposes.¹²⁹ However, as David Rivkin and Lee A. Casey point out in their column, *Illegal Health Reform*, the Court ruled in *Bailey v. Drexel* that Congress could not tax to penalize conduct it could not otherwise regulate under the Commerce Clause (in this case it was child labor).¹³⁰ Despite the fact that commerce power has expanded since the *Bailey* holding and labor conditions now fall within the regulatory reach of the federal government,¹³¹ the Court has not overturned the principal that the government cannot tax to penalize conduct outside the realm of commerce power.¹³² Since the individual mandate is a regulatory scheme by Congress to regulate commercial activity (non-activity in this

120. *Id.*

121. Canham, *supra* note 57.

122. Interestingly, Senator Hatch at one time supported insurance mandates as a viable reform. Klein, *supra* note 114.

123. Canham, *supra* note 57.

124. BARNETT, *supra* note 16.

125. U.S. CONST. art. I, § 8, cl. 1. "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. . ." *Id.*

126. Staman, *supra* note 75, at 1-2.

127. *Id.* (citing *Helvering v. Davis*, 301 U.S. 619, 640 (1937)).

128. *Id.* (citing *South Dakota v. Dole*, 483 U.S. 203, 206 (1987)).

129. Rivkin, *supra* note 27.

130. *Id.* See also *Bailey v. Drexel Furniture*, 259 U.S. 20 (1922).

131. See *United States v. Darby Lumber Co.*, 312 U.S. 100 (1941).

132. Rivkin, *supra* note 27.

case) out of its reach, these tax penalties would constitute an unconstitutional method of taxation.¹³³

Lastly, it does not appear that a potential tax penalty can be classified as another constitutional form of taxation. Uninsured individuals are not receiving federal money or benefits that can condition the paying of any kind of tax.¹³⁴ Congress is also limited in the types of taxes it can impose such as income and excise taxes.¹³⁵ For it to be a valid excise tax, it has to constitute a charge on a purchase of some form.¹³⁶ As a result, an excise tax cannot be charged against the uninsured because they have not purchased anything.¹³⁷

This would leave Congress with the option of instead calling the penalty a direct tax, such as a capitation tax or an income tax.¹³⁸ It is not a capitation tax because such taxes are assessed against all citizens of each state equally, and this tax would discriminate against particular persons.¹³⁹ It cannot be classified as an income tax, because such taxes are imposed based upon income and not purchases.¹⁴⁰

V. CONCLUSION

A. Federal District Court Decisions

Following two decisions rendered in federal district courts in Michigan and Virginia upholding the mandate's constitutionality, the first judicial blow to the individual mandate was delivered on December 13, 2010 by U.S. District Judge Henry Hudson when he ruled that the health care law "exceeded the constitutional boundaries of congressional power" and would "invite unbridled exercise of the federal police powers."¹⁴¹ He also stated in his decision that the core of the dispute did not revolve around regulating insurance or creating a universal system of medical coverage but around "an individual's right to choose to participate."¹⁴² The American Center for Law and Justice issued a statement declaring the decision a "momentum changer."¹⁴³

The second legal blow was delivered on January 31, 2011 by Judge Roger Vinson's ruling in the U.S. District Court for the Northern District of Florida in *Florida v. United States Dep't of Health & Human Serv.*¹⁴⁴ In Judge Vinson's

133. ACLJ, *supra* note 104, at 11.

134. Klukowski, *supra* note 105.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. Ariane DeVogue, *Virginia Judge Strikes Down Key Part of Obama Health Care Law*, ABC NEWS, Dec. 13, 2010, available at <http://abcnews.go.com/Politics/health-care-law-virginia-judge-rule-constitutionality-individual-mandate/story?id=12377565&page=1> [hereinafter DeVogue].

142. *Id.*

143. *Id.*

144. See generally *Florida*, 2011 WL 285683.

decision, he stated, in regard to federal commerce power, “it is difficult to imagine that a nation which began . . . as the result of opposition to a British mandate giving the East Indian 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.”¹⁴⁵

Both decisions addressed the issue of whether some form of activity was required for regulation under commerce power and held that it was.¹⁴⁶ Subsequently, they both held that an individual who abstains from purchasing health insurance falls under a class of inactivity outside the reach of Congress’ commerce power.¹⁴⁷ Judge Vinson’s decision went so far as to state that uninsured individuals have no impact on interstate commerce at all:

[I]f impact on interstate commerce were to be expressed and calculated mathematically, the status of being uninsured would necessarily be represented by zero. Of course, any other figure multiplied by zero is also zero. Consequently, the impact must be zero, and of no effect on interstate commerce.¹⁴⁸

He later conceded that uninsured individuals would have an effect on interstate commerce if they sought medical care and were unable to pay, and thus they would fall under the reach of congressional power to be regulated.¹⁴⁹ However, he stated that it would be casting a “wide net” to impose a mandate on everyone on a certain condition under the expectation that they will or could take such steps in the future.¹⁵⁰ This would run afoul of the precedent set by the Court in *Lopez*, which rejected Commerce Clause analysis that would consider attenuated connections between certain activities and their effect on interstate commerce and require a court “to pile inference upon inference.”¹⁵¹

Regarding the tax imposed on the uninsured, Judge Hudson ruled that, as a matter of law, the fee imposed on those who remain uninsured operated as a regulatory penalty rather than a revenue raising tax and was thus unconstitutional since the penalty was not linked to the exercise of any enumerated power.¹⁵² The judge emphasized that a tax and a penalty were not legally synonymous, and the contention by the federal government that the word “penalty” was meant to be used interchangeably in describing a tax for revenue raising purposes rather than penalization was unconvincing.¹⁵³

145. *Id.* at *22.

146. *See* Commonwealth v. Sebelius, 728 F. Supp. 2d 768, 781 (E.D. Va. 2010); *See Florida*, 2011 WL 285683, at *23.

147. *Sebelius*, 728 F. Supp. 2d at 782; *Florida*, 2011 WL 285683, at *26.

148. *Florida*, 2011 WL 285683, at *26.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Sebelius*, 728 F. Supp. 2d at 782.

153. *Id.* at 782-88.

Judge Hudson did not grant any injunctions against enforcement of the law nor did he invalidate it in its entirety.¹⁵⁴ However, Judge Vinson went much further and ruled that since the provisions requiring the insurance mandate were not severable from the law and were essential for the regulatory scheme to work, that the entire law should be overruled.¹⁵⁵ These lower court decisions are currently heading to the appellate courts and are ultimately expected to be resolved by the United States Supreme Court.¹⁵⁶

B. How Would the Supreme Court Decide?

When the mandate finally makes its way to the nation's highest court, its chances may prove dubious with the current make-up of the sitting justices. As illustrated, there are no clear precedents supporting an exercise of federal power of this scope.¹⁵⁷ It is likely the Court would have to devise a new constitutional doctrine in order to justify any kind of federal mandate.¹⁵⁸

The Court is generally viewed as having a conservative edge. Three of the five justices who voted in the majority of the commerce power constricting *Lopez* and *Morrison* decisions are still serving.¹⁵⁹ Those justices include Clarence Thomas, Antonin Scalia, and Anthony Kennedy. The replacements of Sandra Day O'Connor and William Rehnquist, the two other justices that rounded out those majorities, are Samuel Alito and Chief Justice John Roberts.¹⁶⁰ Both are widely considered to be reliable members of the Court's conservative bloc.¹⁶¹

Chief Justice Roberts was a former clerk for Rehnquist and is not expected to depart from his mentor's legal philosophy.¹⁶² As an appellate judge in the United States Third Circuit Court of Appeals, Justice Alito was skeptical of the government's arguments to invoke the Commerce Clause as a justification for federal regulation of machine guns and various environmental initiatives.¹⁶³ Justice Thomas's wife, Virginia Thomas, is the founder of a conservative organization that she left after controversy over a memo was released under her name that called for a repeal of the health care law.¹⁶⁴

154. Rosalind S. Haldeman & Amy Goldstein, *Federal Judge in Virginia Strikes Down Part of Health Care Law*, WASH. POST, Dec. 14, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/13/AR2010121302420.html?hpid=topnews&sid=ST2010123103352>.

155. See *Florida*, 2011 WL 285683, at *33-39.

156. Andrew M. Harris & Margaret Cronin Fisk, *Health-Care Law Goes to Appeals Courts, States Weigh Enforcement*, BLOOMBERG BUS. WK., Feb. 2, 2011, available at <http://www.businessweek.com/news/2011-02-02/health-care-law-goes-to-appeals-courts-states-weigh-enforcement.html>. It should be noted that the two judges upholding the individual mandate were appointed by a Democratic President while the two judges overruling it were appointed by Republicans. *Id.*

157. BARNETT, *supra* note 16.

158. *Id.*

159. Kirkland, *supra* note 48.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. Huma Kahn, *Should Supreme Court Justice Clarence Thomas, Elena Kagan Sit Out Health Care Case?* ABC NEWS, Feb. 10, 2011, available at <http://abcnews.go.com/Politics/supreme-court-justice-clarence-thomas-sit-health-care/story?id=12878346&page=1>.

Some legal prognosticators predict the decision will come down to a 5-4 split with Justice Anthony Kennedy, who is the Court's moderate swing vote, being the ultimate decider of the individual mandate's fate.¹⁶⁵ However, the Court isn't expected to decide the matter for as long as two years.¹⁶⁶ Survival of the mandate may hinge on vacancies on the conservative side of the Court that could be filled with justices that would be more receptive to a mandate, as the more liberal members of the Court might be.

In the past, the Court has been willing to defer to Congress on certain laws it has passed that were designed to rectify or avoid economic emergencies or address matters of national security.¹⁶⁷ It does not appear that the passage of a mandate is of dire necessity to rectify the problems present in the nation's health care system, and the Court would likely factor this into any decision.¹⁶⁸

C. Are There Constitutional Alternatives to a Mandate?

Rivkin and Casey point out that the simplest choice, albeit unlikely due to its political unpopularity, is to raise the federal corporate and income taxes in an effort to fund a national health care system.¹⁶⁹ In turn, Medicare could simply be expanded to extend eligibility to all Americans, but this would likely be politically unfeasible.¹⁷⁰ The government could set up a tax credit for those that purchase insurance as an incentive to compel those who would otherwise forgo it.¹⁷¹ However, Congress is likely trying to avoid this approach in an attempt to keep the subsidies off the budgetary records through the use of unconventional penalizing taxes.¹⁷²

Judge Andrew Napolitano, a former judge on the Superior Court of New Jersey and a legal analyst on Fox News, argues that Congress could exercise its Commerce Clause authority to override various state laws that create barriers preventing individual state citizens from purchasing health insurance across state lines.¹⁷³ Health insurance companies are commonly prohibited by state laws from selling policies to citizens in their borders if the insurer is not licensed to sell within that state.¹⁷⁴ By tearing down these state barriers, it could create a much larger national health insurance market that would create more insurance options for individuals as well as create more competition among providers that could drive

165. See Klein, *supra* note 118; See Ben Adler, *Will the Supreme Court Overturn Health-Care Reform?* NEWSWEEK, Dec. 15, 2010, available at <http://www.newsweek.com/2010/12/15/will-the-supreme-court-overturn-health-care-reform.html> [hereinafter Adler].

166. Adler, *supra* note 165.

167. BARNETT, *supra* note 16.

168. *Id.*

169. Rivkin, *supra* note 27.

170. Adler, *supra* note 165.

171. BARNETT, *supra* note 16.

172. *Id.*

173. Napolitano, *supra* note 33.

174. STEPHANIE KANWIT, GEORGETOWN UNIVERSITY SCHOOL OF LAW, O'NEILL INSTITUTE FOR NATIONAL AND GLOBAL HEALTH LAW, THE PURCHASE OF INSURANCE ACROSS STATE LINES IN THE INDIVIDUAL INSURANCE MARKET 1-16, 12, available at <http://www.rwjf.org/pr/product.jsp?id=39416>.

costs down.¹⁷⁵ However, this method has many critics that argue this would allow out-of-state insurers to circumvent state consumer protection laws that set certain standards for what insurance benefits can be offered and what cannot be denied.¹⁷⁶

It could be left to each individual state to enact some form of universal coverage, as was done in Massachusetts. The states could mandate that individuals purchase health insurance much like automobile insurance. In 2007, California's then-Governor Arnold Schwarzenegger proposed a plan to the state legislature that would impose a health insurance mandate on individuals.¹⁷⁷ The plan proposed by Schwarzenegger was modeled after the aforementioned Massachusetts plan.¹⁷⁸

D. Closing Thoughts

“This is not liberty. It is tyranny of good intentions by elites in Washington who think they can plan our lives better than we can.”¹⁷⁹ These statements were made by South Carolina Senator Jim Demint on the Senate Floor last year, criticizing the scope of the proposed government plan.¹⁸⁰ Indeed, as Rivkin and Casey point out:

[T]he federal government is a government of limited, enumerated powers, with the states retaining broad regulatory authority. . . . Congress, in other words, cannot regulate simply because it sees a problem to be fixed. Federal law must be grounded in one of the specific grants of authority found in the Constitution.¹⁸¹

On its face, the mandate is nothing more than a forced contract by the government.¹⁸² Broadening the Commerce Clause to grant the federal government power to dictate what individual citizens can buy would certainly set a dangerous precedent. If Congress can mandate to the nation's citizens what to purchase with their own money, where do the limits to federal power end?¹⁸³ Constitutional checks on congressional power will have essentially been eliminated.¹⁸⁴ It would appear that a mandate would not even achieve its primary objective as the CBO estimates that as many as 18 million Americans would still be uninsured in 2016.¹⁸⁵

175. *Id.*

176. *See id.* at 13.

177. *News Hour with Jim Lehr, Schwarzenegger Proposes Universal Health Care in California* (PBS television broadcast Jan. 9, 2007) (transcript available at http://www.pbs.org/newshour/bb/health/jan-june07/arnold_01-09.html).

178. *Id.*

179. Neefus, *supra* note 59.

180. *Id.*

181. David B. Rivkin & Lee A. Casey, *Mandatory Insurance is Unconstitutional*, WALL ST. J., Sept. 18, 2009, available at <http://online.wsj.com/article/SB10001424052970204518504574416623109362480.html>.

182. Karl Manheim & Jamie Court, *Not So Fast on the Mandates*, L.A. TIMES, March 24, 2008, available at <http://articles.latimes.com/2008/mar/24/opinion/oe-court24>.

183. Darling, *supra* note 107 (quoting Walsh & von Spakovsky, *Criminalizing Health-Care Freedom*, NATIONAL REVIEW ONLINE, Nov. 19, 2009).

184. *Id.*

185. von Spakovsky, *supra* note 31.

Is such a dangerous expansion of government power worth this? It appears to be as Judge Napolitano writes in *Health-Care Reform and the Constitution*:

[W]hat we have here is raw abuse of power by the federal government for political purposes. . . . Their only restraint on their exercise of Commerce Clause power is whatever they can get away with. They aren't upholding the Constitution—they are evading it.¹⁸⁶

186. Napolitano, *supra* note 33.