Is the Individual Mandate constitutional under the Commerce Clause?

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Introduction

The Patient Protection and Affordable Care Act (Act)[1] of 2010 requires most adults residing in the United States to either purchase a minimum level of health insurance[2] (also called an individual mandate), or pay a fee or penalty[3].

This Act has many facets besides the individual mandate that are beyond the scope of this paper. The act of self-insurance, or choosing not to buy health insurance, is what the individual mandate seeks to regulate. In other words, most adults have to purchase a minimum level of health insurance. The individual mandate, which goes into effect in 2014, increases the number of healthy individuals in the insurance pool. In return insurance companies can no longer deny insurance coverage to any person based on preexisting conditions[4], such as cancer or stroke; and a community rating section prohibits them from charging higher premiums based on medical history[5].

The Act's constitutionally is mainly challenged because of the individual mandate as being beyond the reach of Congress's power under the Commerce Clause. Opponents of the individual mandate are not challenging the mandate on due process or liberty grounds. They concede that states under their police powers can require individuals to buy health insurance. In fact, the State of Massachusetts[6] already has an individual mandate. The individual mandate is essential for prohibiting preexisting conditions and discriminating premiums based on medical history from operating in insurance contracts. Without the individual mandate violence would be done to the Act itself, or to its core purpose; which is to promote universal health insurance coverage at affordable prices to all Americans.

Thesis

The thesis of this paper is that the individual mandate is within the scope of the commerce clause (including the necessary and proper clause).

Background History of litigation in lower courts

There are four appellate[7] decisions pending to be resolved by the U.S. Supreme Court (Court) in the near future. They include the constitutionality of the individual mandate, and other subjects covered by the Act, including the constitutionality of the Act itself.

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1 The Patient Protection and Affordable Care Act (H.R. 3590) and the Health Care and Education Reconciliation Act of 2010 (H.R. 4872), became Public Law 111-148 (the Patient Protection and Affordable Care Act) and Public Law 111-152 (the Health Care and Education Reconciliation Act of 2010) in 2010. Together they are known as the Affordable Care Act (ACA).
2 26 U.S.C. § 5000A
3 26 U.S.C. § 5000A(b), (c)
4 42 U.S.C. § 18071§§ 300gg-1(a), 300gg-3(a)
5 42 U.S.C. § 18071 § 300gg
6 Mass. Gen. Laws 111M § 2
7 Health Care Lawsuits - All lawsuit case files

The Broad Scope of the Commerce Power

In *United States v. Lopez*[8], the U.S. Supreme Court set out the vast reach of Congress acting through the Commerce Clause:

(i) "First, … the use of channels of interstate commerce."
(ii) "Second, … the instrumentalities of interstate commerce, or persons or things in interstate commerce…"
(iii) "Finally, … those activities that substantially affect interstate commerce."

This paper is arguing that self-insurance, which the individual mandate seeks to regulate is a valid exercise of Commerce Clause under the third prong of *Lopez*, namely, that the individual mandate "substantially affects interstate commerce".

The Rational Basis Test

There are various levels of scrutiny that the Court uses to examine the validity of a federal or a state law. In the economic sphere, that we are delving here; the Court uses the rational basis test. In this test the court generally defers to the political branches of the government, especially when it involves giving effect to economic legislation under the commerce clause. The Court examines the reasons given by Congress in passing the legislation and upholds such legislation if it rationally supports it. Such evidence usually comes from the Congressional record. But even if the court may come to different conclusion, it still considers the law constitutional under the rational basis test. From 1937[9] until 1995, not a single federal legislation using the Commerce power has been invalidated on constitutional grounds.

New Limits on the Rational Basis Test

In *Thomas More Law Center v. Obama*[10], the sixth circuit articulated the new limits imposed by Court,

> "…the Gun Free Zones Act and the Violence Against Women Act, exceeded Congress's Commerce Clause power based on four main factors: (1) the statutes regulated non-economic, criminal activity and were not part of a larger regulation of economic activity; (2) the statutes contained no jurisdictional hook limiting their application to interstate commerce; (3) any Congressional findings regarding the effects of the regulated activity on interstate commerce were not sufficient to sustain constitutionality of the legislation; (4) the link between the regulated activity and interstate commerce was too attenuated. *See, Morrison*, 529 U.S. at 601-15, 120 S.Ct. 1740; *Lopez*, 514 U.S. at 561-67, 115 S.Ct. 1624."

8 514 U.S. at 558-59, 566, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995)
9 *NLRB v. Jones & Laughlin Steel Corp*., 301 US 1, 57 S. Ct. 615, 81 L. Ed. 893
10 651 F. 3d 529 (2011)

Congressional findings regarding the effects of the regulated activity on interstate commerce under *Lopez/Morrison*

Congress found that:

The requirement regulates activity that is commercial and economic in nature: economic and financial decisions about how and when health care is paid for, and when health insurance is purchased. In the absence of the requirement, some individuals would make an economic and financial decision to forego health insurance coverage and attempt to self-insure, which increases financial risks to households and medical providers[11].

The requirement achieves near-universal coverage by building upon and strengthening the private employer-based health insurance system, which covers 176,000,000 Americans nationwide. In Massachusetts, a similar requirement has strengthened private employer-based coverage: despite the economic downturn, the number of workers offered employer-based coverage has actually increased[12].

The economy loses up to $207,000,000,000 a year because of the poorer health and shorter lifespan of the uninsured[13].

The cost of providing uncompensated care to the uninsured was $43,000,000,000 in 2008. To pay for this cost, health care providers pass on the cost to private insurers, which pass on the cost to families. This cost shifting increases family premiums by on average over $1,000 a year. By significantly reducing the number of the uninsured, the requirement, together with the other provisions of this Act, will lower health insurance premiums[14].

62 percent of all personal bankruptcies are caused in part by medical expenses. By significantly increasing health insurance coverage, the requirement, together with the other provisions of this Act, will improve financial security for families[15].

Administrative costs for private health insurance, which were $90,000,000,000 in 2006, are 26 to 30 percent of premiums in the current individual and small group markets. By significantly increasing health insurance coverage and the size of purchasing pools, which will increase economies of scale, the requirement, together with the other provisions 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[16].

Supreme Court ruling
The Supreme Court of the United States ruled that insurance is interstate commerce subject to Federal regulation[17].

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11 The "requirement" refers to the individual mandate. *See*, 42 USC § 18091(2)(A)
12 42 USC § 18091(2)(D)
13 42 USC § 18091(2)(E)
14 42 USC § 18091(2)(F)
15 42 USC § 18091(2)(G)
16 42 USC § 18091(2)(J)
17 *United States v. South-Eastern Underwriters Association,* 322 U.S. 533 (1944)

Is Self-Insurance which the mandate seeks to regulate an Economic Activity under *Lopez/Morrison*?

No one is arguing that health care and health insurance are a major part of the economy. Congress already has authority to regulate the insurance industry[18]. The sixth circuit[19], made a strong and convincing argument that justified the mandate on economic grounds:

> "the minimum coverage provision regulates activity that is decidedly economic. In Raich, the Supreme Court explained that "Economics refers to 'the production, distribution, and consumption of commodities.'" Id. at 25, 125 S.Ct. 2195 (quoting Webster's Third New International Dictionary 720 (1966)) Consumption of health care falls squarely within Raich's definition of economics, and virtually every individual in this country consumes these services. Individuals must finance the cost of health care by purchasing an insurance policy or by self-insuring, cognizant of the backstop of free services required by law. By requiring individuals to maintain a certain level of coverage, the minimum coverage provision regulates the financing of health care services, and specifically the practice of self-insuring for the cost of care. The activity of foregoing health insurance and attempting to cover the cost of health care needs by self-insuring is no less economic activity than the activity of purchasing an insurance plan. Thus, the financing of health care services, and specifically the practice of self-insuring, is economic activity[20]."

The individual mandate is a necessary component for the viability of this Act; as without the individual mandate, insurance companies would not be able to give affordable coverage to people, without excluding them on pre-existing health conditions, unless the size of the uninsured needing insurance coverage increases significantly.

Activities Having a Substantial relationship to interstate Commerce

Congress can regulate intrastate economic activity that has a substantial effect on interstate Commerce

In *Wickard v. Filburn*[21], the U.S. Supreme Court held that Congress could regulate the excess wheat production that Filburn produced for his own home consumption, because in the aggregate such home consumption of wheat could have an impact on the market price of wheat and impact the regulatory scheme – thus having a substantial impact on interstate commerce.

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18 *Id*. *See*, ERISA's foundation comes from the commerce clause, 29 U.S.C. §1001(b); regulation of health care prices *United States v. Whiteside*, 285 F.3d 1345, 1346 (11th Cir. 2002)
19 *Thomas More Law Center v. Obama*, 651 F. 3d 529 (2011)
20 *Id*. at 544
21 317 U.S. 111, 63 S. Ct. 82, 87 L.Ed. 122 (1942)

As a part of a larger regulatory scheme Congress can also regulate non-economic intra-state activity that has a substantial effect on interstate Commerce

In *Gonzales v. Raich*[22], the Court held that Congress could regulate non-economic intra-state activity if it is part of a larger regulatory scheme that affects interstate commerce. Raich lawfully consumed marijuana for medical purposes under California law. The Court held that her consumption would have an impact on the federal Controlled Substances Act (CSA) that sought to prevent the sale of illegal drugs in interstate commerce.

> "In assessing the scope of Congress' authority under the Commerce Clause, we stress that the task before us is a modest one. We need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a "rational basis" exists for so concluding. Given the enforcement difficulties that attend distinguishing between marijuana cultivated locally and marijuana grown elsewhere, 21 U.S.C. § 801(5), and concerns about diversion into illicit channels, we have no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA."[23]

We have discussed before that self-insurance is an economic activity. But does this self-insurance activity have a substantial impact on interstate commerce? Here are some facts to consider whether such activity, or some would call inactivity, would have an impact on interstate commerce.

The economy loses up to $207,000,000,000 a year because of the poorer health and shorter lifespan of the uninsured[24]. Sixty-two percent of personal bankruptcies were caused in part by medical expenses[25]. An estimated 18.8% of the non-elderly United States population (about 50 million people) had no form of health insurance in 2009[26], the uninsured consume over $100 billion in health care services annually[27], and the cost of providing uncompensated care to the uninsured was $43,000,000,000 in 2008[28]. When the uninsured get sick they seek medical assistance in the emergency wards of hospitals, which are obligated to provide these services[29]. But the cost of these services are passed by hospitals to insurance companies which in turn inflate the premiums that families must pay for health insurance, by an average of over $1,000[30].

Thus, the self-insured by their inactivity, in the aggregate, have a substantial effect on interstate commerce, and thus can be regulated under *Wickard*, and *Raich*.

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22 545 US 1, 125 S. Ct. 2195, 162 L. Ed. 2d 1 (2005)
23 *Id*. at 15
24 42 USC § 18091(2)(E)
25 42 USC § 18091(2)(G)
26 *Thomas More Law Center v. Obama*, 651 F. 3d 544
27 *Id*. at 545
28 42 USC § 18091(2)(F)
29 *See, for example*, Emergency Treatment and Active Labor Act (EMTALA), 42 U.S.C. § 1395dd; *Roberts v. Galen of Va., Inc.*, 525 U.S. 249, 250-51, 119 S.Ct. 685, 142 L.Ed.2d 648 (1999) (per curiam)
30 651 F. 3d at 545

Is the link between the regulated activity and interstate commerce too attenuated under *Lopez/Morrison*?

Raich was decided after *Lopez* and *Morrison*. In *Raich*, Angel Raich who consumed homegrown marihuana for medical purposes in California, which permitted this activity, could be prohibited under the federal Controlled Substances Act (CSA), from doing so. The Court held in this case that Congress under the Commerce Clause could regulate this non-commercial, intrastate activity, as this activity in the aggregate could affect interstate commerce of illegal drugs that the CSA was designed to regulate. Moreover, the Court also held that Congress could rationally conclude that such activity in the aggregate affected interstate commerce[31].

What distinguishes *Raich* from *Lopez* and *Morrison* is that the latter two were single subject criminal statutes that were not part of an overall statute that regulated interstate commerce. The links to interstate commerce if any were far too attenuated.

Lopez, involved a federal statute that prohibited the possession of a handgun in a school zone. *Morrison,* on the other hand dealt with a federal statute about violence against women. Both of these statutes were single subject criminal statutes. None of them had an overlaying statute that regulated interstate commerce. These statutes were therefore declared unconstitutional as beyond the reach of Congress under the Commerce Clause.

This Act on the other hand is a multi-subject statute where one of the subjects, the individual mandate, is an essential component for the viability of the Act.

Without the individual mandate, the limited pool of the insured would not be able to sustain other portions of the Act that call for a ban on preexisting health conditions, and the community rating portions, which prohibit higher insurance rates, based on adverse medical history.

As the 6th Circuit explained in *Thomas More Law Center*:

> "The Act uses this power to regulate prices and protect purchasers by banning certain practices in the insurance industry that have prevented individuals from obtaining and maintaining insurance coverage. Under the process of "medical underwriting," insurance companies review each applicant's medical history and health status to determine eligibility and premium levels. As a result of this practice, approximately thirty-six percent of applicants in the market for individual health insurance are denied coverage, charged a substantially higher premium, or offered only limited coverage that excludes pre-existing conditions. Department of Health and Human Services, Coverage Denied: How the Current Health Insurance System Leaves Millions Behind, at 1 (2009)[32].

Seven States that tried to have health insurance for all its citizens without the individual mandate found that the cost of insurance soared and scores of insurance companies exited

31 545 U.S. at 18, 125 S.Ct. 2195
32 *Supra*, at 546

the health insurance market[33]. Only Massachusetts was successful in health care reform because it had an individual mandate[34].

Further, without the individual mandate, people would postpone getting insured until they were in very bad health, aware that they would be still guaranteed coverage at discounted prices. Such actions undoubtedly in the aggregate would raise the health insurance premium costs of all adults and would thus thwart the main purpose of the Act, which was to guarantee low-level insurance costs to all adults irrespective of pre-existing conditions.

Thus, the mandate being a part of a multi-subject, intrastate, non-commercial activity that in the aggregate affects interstate commerce, and is part of a larger regulatory scheme, is valid under *Raich*.

Does the Activity/Inactivity Label Matter?

One of the leading reasons for striking the entire Act by plaintiffs is that Congress is attempting to regulate *inactivity*. That is, forcing some who want to be left alone, by the act of self-insuring, to enter into an economic activity by purchasing health insurance. These plaintiffs acknowledge that Congress has the power to regulate economic activity. But by the mere fact of being idle, Congress is now turning them into economic actors, so that it can regulate them. This they contend is beyond the reach of the Commerce Clause.

First, there is nothing in the Commerce Clause that makes a distinction about activity and inactivity. The Commerce Clause states:

> The Congress shall have the power "To regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes[35]."

Further, the U.S. Constitution in pursuant of the commerce clause enables Congress,

> "To make all Laws which shall be necessary and proper for carrying into Execution" this Clause[36].

The interpretation to the Commerce Clause was given in *Lopez*[37], which held that Congress's power applies to the use of the channels of interstate commerce, the instrumentalities of interstate commerce, or persons or things in interstate commerce, and to those activities that substantially affect interstate commerce.

Lopez[38] and *Morrison*[39] laid the boundaries if any to the power of Congress to regulate interstate Commerce. But *Raich*, which was decided after these two cases has given

33 *Id*. at 547
34 *Id*. at 547
35 U.S. Const. Article 1, § 8, cl. 3.
36 U.S. Const. Article 1, § 8, cl. 18.
37 514 U.S. at 558-59, 566, 115 S.Ct. (1995)
38 514 U.S. at 561-67, 115 S.Ct. 1624
39 529 U.S. at 601-15, 120 S.Ct. 1740

almost unlimited authority to Congress to pursue economic legislation under the Commerce Clause, just like *Wickard* did from 1941 until 1995, just before *Lopez* was decided.

Judge Sutton, a republican nominee, who concurred in *Thomas More Law Center v. Obama*[40], made an observation that was unfortunately not argued by Solicitor General Donald Verrilli at the oral argument before the Court in March 2012 (*See*, n. 42), about the activity/inactivity argument of the plaintiffs:

> "How would the action/inaction line have applied to Roscoe Filburn? Might he have responded to the Agricultural Adjustment Act of 1938 by claiming that the prohibition on planting more than 11.1 acres of wheat on his farm compelled him to action – to buy wheat in the interstate market so that he could feed *all* of his animals? And is it any more offensive to individual autonomy to prevent a farmer from being self-sufficient when it comes to supplying feed to his animals than an individual when it comes to paying for health care? It seems doubtful that the *Wickard* court would have thought so. See Wickard, 317 U.S. at 129, 63 S.Ct. 82 (acknowledging that the law "forc[ed] some farmers into the market to buy wheat they could provide for themselves"). How would the action/inaction line apply if someone like Angel Raich sold her house, marijuana plants and all? The Controlled Substances Act would obligate the new owner to act (by removing the plants), see 21 U.S.C. § 844, but it seems doubtful that he could sidestep this obligation on the ground that the law forced him to act rather than leaving him alone to enjoy the fruits of his inaction.[41]"

Judge Sutton further raised an interesting argument that should have made to the Chief Justice Roberts, about the Court's precedent and other existing federal law on action/inaction controversy in the oral arguments in March 2012 (*See,* n. 42):

> "There is another linguistic problem with the action/inaction line. The power to regulate includes the power to prescribe and proscribe. *See* <u>*Lottery Case*, 188 U.S. 321, 359-60, 23 S.Ct. 321, 47 L.Ed. 492 (1903).</u> Legislative prescriptions set forth rules of conduct, some of which require action. See, e.g., 18 U.S.C. § 2250 (sex-offender registration); id. § 228 (child-support payments); *see also United States v. Faasse*, 265 F.3d 475, 486-87 (6th Cir. 2001) (en banc). The same is true for legislative proscriptions. Take the drug laws at issue in *Raich*, where Congress regulated by prohibiting individuals from possessing certain drugs. A drug-possession law amounts to forced inaction in some settings (those who do not have drugs must not get them), and forced action in other settings (those who have drugs must get rid of them)[42]."

Further, consider this argument by Judge Sutton about the mandate in Massachusetts:

> "How strange that individuals who live in States with mandates would be subject to federal regulation but others would not be — with the difference in treatment having little to do with the concerns about federal intrusions on individual autonomy that led to this challenge in the first place. How strange, too, that, if other States opted to enact individual mandates in the future, the federal commerce power would spring into existence as to individuals living there[43]."

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40 651 F.3d 529 (2011)
41 *Id*. at 562
42 *Id*. at 561
43 *Id. at 562*

Or, this one by those already having token health insurance:

> "What of individuals who voluntarily purchased bare-bones insurance before the mandate's effective date — *e.g.,* catastrophic-care insurance or high-deductible insurance — but are required by the minimum-essential-coverage provision to obtain more insurance? The action/inaction line means nothing to them, establishing another class of individuals against whom Congress could apply the law …[44]"

Judge Sutton also questioned the assumption as to whether the self-insured are really inactive; and the micro-managing of Congress's power:

> "… the notion that self-insuring amounts to inaction and buying insurance amounts to action is not self-evident. If done responsibly, the former requires more action (affirmatively saving money on a regular basis and managing the assets over time) than the latter (writing a check once or twice a year or never writing one at all if the employer withholds the premiums)[45]."

> "If Congress has the power to regulate the national healthcare market, as all seem to agree, it is difficult to see why it lacks authority to regulate a unique feature of that market by requiring all to pay now in affordable premiums for what virtually none can pay later in the form of, say, $100,000 (or more) of medical bills prompted by a medical emergency[46]."

The Broccoli Controversy

An argument has been made repeatedly in the lower federal courts[47] and the appellate courts and even sensationalized by several Justices of the Court[48] that if the individual mandate were made constitutional, then what would be next? Can Congress require people to buy broccoli, new cars, cell phones, prepaid funeral services, and gym memberships?

The response to this line of reasoning is that health care is a special exception. In other words buying health care insurance is not the same as buying broccoli or a car. The health care insurance market is distinguishable from the market for other commodities. The price of broccoli and cars do not keep on fluctuating steeply and widely from year to year[49]. In fact we could budget for broccolis and cars with a fair degree of accuracy.

But the same could not be said of health care costs. In some years one may not incur any or sizable health care costs. This is especially true of the younger generation. But what if a serious accident was to occur (accidents can happen to anyone), or one has a sudden heart attack, or stroke, or are diagnosed with cancer[50]? Who can foresee or budget the prohibitive costs that can occur in such situations? It is easy to sensationalize in the media that the government can next make us buy broccoli or cars. But there is an

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44 *Id*. at 563
45 *Id. at 561*
46 *Id*. at 563
47 *See*, Florida v. U.S. Dep't of Health and Human Servs., No. 3:10-cv-91-RV/EMT, slip op. (N.D. Fla. Jan. 31, 2010).
48 *See*, oral arguments, March 27, 2012, in *Dept of Health and Human Services v. Florida, et. al. v. Florida, et. al.* , No. 11-398. http://www.c-span.org/uploadedFiles/Content/The_Courts/11-398-Tuesday_IndMandate.pdf
49 *Supra*, n. 10 at 557
50 *Id*, at 557

important distinction to be made here. Even if the government could mandate one to buy broccoli, no one can be forced to eat broccoli or drive a car.

But with health care the same logic does not apply. If one is in involved in a serious car accident, health care providers will take us to the nearest hospital for treating our injuries. So we can willingly, or without our consent, be taken to emergency wards of private and public hospitals. Further, here is the irony; these health care providers are required by law to treat the sick or injured free of charge. On the other hand, a broccoli vendor at a shopping mall is not obliged to give us free broccoli, even if we were starving to death.

Further, the critics, like the medieval monks who used to contemplate about the number of angels that could stand on the head of the needle; in other words how far is the expanse of the Commerce Clause, should instead examine the Bill of Rights of the Constitution, which can prohibit the government from requiring people to buy and eat broccoli should the government mandate the purchase and consumption of broccoli in the future. Further, why have such arguments about due process failed, with respect to the individual mandate, in States like Massachusetts[51]? Also, has Massachusetts, now required its citizens to buy broccoli or cars?

As Judge Sutton in *Thomas More v. Obama*, aptly put it:

> "Life is filled with risks, and one of them is not having the money to pay for food, shelter, transportation and health care when you need it. Unlike most of these expenses, however, the costs of health care can vary substantially from year to year. The individual can count on incurring some healthcare costs each year (*e.g.,* an annual check-up, insulin for a diabetic) but cannot predict others (*e.g.,* a cancer diagnosis, a serious accident). That is why most Americans manage the risk of not having the assets to pay for health care by purchasing medical insurance[52]."

As a default – The Necessary and Proper Clause Applies

In *Florida ex rel. Attorney General v. US Dept. of Health and Human Services*[53], the 11th Circuit elaborated on Congress's power under the necessary and proper clause:

> "In *Comstock,* the Supreme Court held that Congress acted pursuant to its Article I powers in enacting a federal civil-commitment statute, 18 U.S.C. § 4248, that authorized the Department of Justice to detain mentally ill, sexually dangerous prisoners beyond the term of their sentences. The majority opinion enumerated five "considerations" that supported the statute's constitutional validity: "(1) the breadth of the Necessary and Proper Clause, (2) the long history of federal involvement in this arena, (3) the sound reasons for the statute's enactment in light of the Government's custodial interest in safeguarding the public from dangers posed by those in federal custody, (4) the statute's accommodation of state interests, and (5) the statute's narrow scope." *Comstock,* 560 U.S. at ___, 130 S.Ct. at 1965 [54]."

51 *Id*. at 565
52 *Id.* at 557
53 648 F.3d 1235 (2011)
54 *Id*. at 1280

"On the breadth of the Necessary and Proper Clause, the *Comstock* Court noted that (1) the federal government is a government of enumerated powers, but (2) is also vested "`with ample means'" for the execution of those powers. *Id.* (quoting *McCulloch,* 17 U.S. at 408). The Supreme Court must determine whether a federal statute "constitutes a means that is rationally related to the implementation of a constitutionally enumerated power." *Id.* "[T]he relevant inquiry is simply `whether the means chosen are reasonably adapted to the attainment of a legitimate end under the commerce power' or under other powers that the Constitution grants Congress the authority to implement." *Id.* at ___, 130 S.Ct. at 1957 (quotation marks omitted) (quoting *Raich,* 545 U.S. at 37, 125 S.Ct. at 2217 (Scalia, J., concurring))[55]."

It has already been shown above that the ends of the Act are legitimate; Congress can regulate the insurance industry. The individual mandate is the means necessary to give effect to the Act. Under the rational basis test that is used in analyzing the necessary and proper clause, the Court should defer to the Act under *Comstock*[56].

Conclusion

The irony of this whole debate is that while Congress has the power to socialize medicine with a single payer system such as Medicare and Social Security[57], it does not according to the opponents of health care reform have the power to require individuals to buy health insurance under the individual mandate.

The Commerce Clause under Article 2 of the Constitution was meant to solve interstate problems like the rising health care costs and rising ranks of people without health care insurance, that States on their own are unable or incompetent to address effectively. Such problems need national solutions that the Act attempts to solve. Congress is regulating an economic activity, and the individual mandate, whether labeled as active or passive, is a necessary component that sustains the Act. If Congress could regulate Roscoe Filburn so that he was forced to buy wheat for his home consumption, and could stop Angel Raich from consuming marijuana for medical necessity, surely it has the power to compel individuals to purchase health insurance. As the Court in *Gibbons v. Ogden* said:

"The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections [] … are the sole restraints on which they have relied, to secure them from abuse [58]."

55 *Id*. at 1280
56 *US v. Comstock*, 130 S. Ct. 1949, 560 US __, 176 L. Ed. 2d 878 (2010)
57 *Steward Machine Co. v. Davis*, 301 US 548, 57 S. Ct. 883, 81 L. Ed. 1279 (1937)
58 22 U.S. (9 Wheat.) 1, 197, 6 L.Ed. 23 (1824)

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