Return Economic Substantive Due Process Rights: A Challenge to the Individual Mandate Using the Commerce Clause

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I. Introduction

The Constitutional challenges to the Patient Protection and Affordable Care Act (PPACA)[1] are about more than just medicine and health insurance. The challenges reach into a political debate as old as our country, how much individual liberty is each citizen guaranteed? Those who support this act had admirable intentions, however the scales of justice should favor individual liberty and outweigh the government regulation mandating the purchase of minimum health insurance.

The United States Supreme Court has a daunting task as the justices heard oral arguments to the PPACA two years after the act was signed into law. The Court's decision will surely be one of the most anticipated decisions in its illustrious history. On Tuesday, March 27th, individual liberty's time to shine was upon the Supreme Court as it heard arguments on the minimum coverage provision (individual mandate) of the Affordable Care Act.[2] In order to understand why individual liberty should outweigh the Commerce Clause, one must first understand the PPACA and the basic elements of the legislation. Next the paper will focus on how the Commerce Clause is being used by both positions. This will include an analysis of how case law supports the individual mandate, as well as case law used by those who want the law

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[1] Patient Protection and Affordable Care Act (PPACA), Pub. L. 111-148, 124 Stat. 119 (2010)

[2] The Supreme Court scheduled review of a consolidation of decisions from the Fourth, Sixth, and Eleventh Circuits. The three issues the Supreme Court heard arguments on were: Anti-Injunction Act, Minimum Coverage Provision, and Severability.

found unconstitutional. Due to the great opportunity for returning economic substantive due process, there will be a call to the Supreme Court to find the law unconstitutional. Finally, a reflection on oral arguments will conclude the thoughts of this paper and foreshadow the decision.

A. Patient Protection and Affordable Care Act

The PPACA has been the result of several failed attempts and countless years of debate between politicians. As late Senator Edward Kennedy wrote, "sixty years ago, President Harry Truman sought to establish basic health insurance as a right for all Americans. His efforts fell short, as have so many others since then."[3] Senator Kennedy and President Obama were two of the driving forces behind the passage of the PPACA. President Obama addressed a joint session of Congress on September 9, 2009, to urge both chambers to reach a common ground, saying: "the plan I'm announcing tonight would meet three basic goals. It will provide more security and stability to those who have health insurance. It will provide insurance for those who don't. And it will slow the growth of health care costs for our families, our businesses, and our government."[4]

The Senate and House of Representatives passed the PPACA on December 24, 2009, and March 21, 2010, respectively.[5] As reiterated by President Obama, the PPACA's main objective is to provide all citizens reliable access to health insurance.[6] In order to achieve this objective,

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[3] Senator Edward M. Kennedy, *Kennedy: Now is the time for health care reform*, Politico (May 3, 2009 10:31 PM), http://www.politico.com/news/stories/0409/21955.html

[4] President Barack Obama, Remarks By The President to a Joint Session of Congress on Health Care (Sept. 9, 2009) (available at http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-to-a-Joint-Session-of-Congress-on-Health-Care)

[5] H.R. 3590, 111th Cong. (1st Sess. 2010)

[6] *See* Obama, *supra* note 4.

Congress included four main provisions: "prohibiting discrimination against preexisting conditions, mandating the purchase of insurance, providing subsidies for premium assistance, and raising revenue and reducing government expenditures."[7] President Barack Obama signed the PPACA into law on March 23, 2010, saying the legislation "enshrines the core principle that everybody should have some basic security when it comes to their health care."[8]

One of the provisions added to the PPACA was requested directly by President Obama during his September 9th speech to Congress, "under my plan, individuals will be required to carry basic health insurance, just as most states require you to carry auto insurance."[9] Through his request, Congress included the "minimum essential coverage" provision also know as the individual mandate.[10] One of the theories behind the individual mandate is that by increasing the number of individuals who pay for insurance, insurance companies will subsequently lower premiums across the board making it more affordable, increasing the number of individuals who have access to health insurance, and lowering the government burden of providing health care.[11]

B. Individual Mandate

At the center of the debate on the constitutionality of the PPACA is the individual mandate. This section of the PPACA requires all citizens to purchase an insurance policy or pay

[7] Michael Lee, Jr., Note, *Adverse Reactions: Structure, Philosophy, and Outcomes of the Affordable Care Act*, 29 YALE L. & POL'Y REV. 559, 562 (2011)
[8] Sheryl Gay Stolberg & Robert Pear, *Obama Signs Health Care Overhaul Bill, with Flourish*, N.Y. Times, March 23, 2010, http://www.nytimes.com/2010/03/24/health/policy/24health.html?pagewanted=all
[9] *See* Obama, *supra* note 4.
[10] Requirement to maintain minimum essential coverage, 26 U.S.C.A. § 5000A(a) (West 2010)
[11] *Critical Issues in Health Reform: Individual Mandate*, American Academy of Actuaries (May 2009), http://www.actuary.org/pdf/health/individual_mandate_may09.pdf

a fine.[12] The PPACA does not define 'minimum essential coverage,' but Congress has delegated that authority to the Department of Health & Human Services.[13] However, the PPACA does specifically mention certain services that shall be included.[14] Furthermore, the PPACA considers government-sponsored programs, eligible employer-sponsored health plans, individual market health plans, grandfathered health plans, and health plans qualified in a state-run exchange as 'minimum essential coverage.'[15]

If an individual does not maintain the minimum essential coverage during any given month, a fine will be imposed. The individual mandate takes effect in 2014, and the fine will increase over time, eventually peaking in 2015.[16] When the fine peaks those who chose not to purchase health insurance will be required to pay $695 or 2.5% of the taxpayer's income, whichever is less.[17] Even considering that premiums might be lower due to an increase in consumers, the individuate mandate also includes a hardship exemption for the penalty. The exemption applies if the required contribution exceeds 8% of the individual's household income.[18] Finally, there are exemptions for religious reasons, aliens not legally present in the United States, and for incarcerated persons exist as well that relate to having to purchase minimum coverage.[19]

C. Constitutional Authority

[12] *See* §5000A, *supra* note 10.
[13] *See* §5000A, *supra* note 10.
[14] Essential health benefits requirements, 42 U.S.C.A. § 18022 (West 2010). The minimum essential coverage must include ambulatory services, emergency services, hospitalization, maternity care, mental health and substance use disorder services, prescription drugs, rehabilitation, laboratory services, preventive and wellness care, and pediatric services.
[15] *See* §5000A(a), (f)(1), *supra* note 10
[16] *Id.* at §5000A(c)
[17] *Id*.
[18] *Id*. at §5000A(e)(1)(A)
[19] *Id.* at §5000A(f)(1)(E)

The reason why the individual mandate receives criticism is due to the explicit language Congress used in the legislation, "the individual responsibility requirement […] is commercial and economic in nature, and substantially affects interstate commerce."[20] Congress effectively cites to its authority under Article I, Section 8, Clause 3, the Commerce Clause, and not the Taxing and Spending Clause. The Commerce Clause plainly states that Congress shall have the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[21] It is easy to see why there are varying viewpoints on the constitutionality of the individual mandate when Congress' authority here is defined by sixteen words. Congress does include language in §18091(a)(1) of the PPACA that reaches both requirements: commercial in nature and among several states. Furthermore, in §18091(a)(3) Congress cites *United States v. South-Eastern Underwriters Association*,[22] a Supreme Court decision holding that insurance falls under interstate commerce for federal regulation purposes. A discussion about *South-Eastern Underwriters* will be included in the constitutional arguments section of this paper. Finally, aside from the constitutional and jurisprudence authority for Congress to enact the PPACA, Congress lists ten effects on the economy and interstate commerce, to further justify the act.[23]

Supporters of the PPACA often cite to cases such as *South-Eastern Underwriters Association*,[24] *Wickard v. Filburn*,[25] and *Gonzales v. Raich*[26] to support the Supreme Courts deference to Congress' Commerce Clause powers. Opponents of the PPACA utilize three major

[20] Requirement to maintain minimum essential coverage, 42 U.S.C.A. §18091(a)(1) (West 2010)
[21] U.S. Const. art. I, §8, cl. 3.
[22] 322 U.S. 533 (1944)
[23] *See* §18091(2)(a)-(j), *supra* note 20
[24] 322 U.S. 533 (1944)
[25] 317 U.S. 111 (1942)
[26] 545 U.S. 1 (2005)

cases in their argument, *Lockner v. New York*,[27] *United States v. Lopez*,[28] and *United States v. Morrison*,[29] decisions where the Supreme Court had deferential review of congressional authority of the Commerce Clause. Seemingly, the heart of the Commerce Clause debate hinges on whether Congress can regulate 'inactivity,' in this instance the voluntary choice to not purchase health insurance.[30] Perhaps the most important case to the position of bringing back a right to chose how individuals spend their money and what contracts to enter into (economic substantive due process) is *Lockner*.[31]

D. Economic Substantive Due Process

The main objective of this paper, aside from analyzing the Commerce Clause arguments for and against the PPACA, is to call for a return of the economic substantive due process right individuals once had. The Supreme Court's use of the due process clause to protect liberty rights is best illustrated in *Lochner*, a case in which the Supreme Court held that a New York statute mandating a maximum of sixty-hours of work for bakers violated the Due Process Clause of the Fourteenth Amendment.[32] Justice Peckham wrote, "there is no reasonable ground for interfering with the liberty of person or right of free contract, by determining the hours of labor, in the occupation of a baker."[33]

[27] 198 U.S. 45 (1905)
[28] 514 U.S. 549 (1995)
[29] 529 U.S. 598 (2000)
[30] *See* Florida ex rel. Bondi v. United States Department of Health and Human Services, 780 F.Supp.2d 1256 (N.D. Florida 2011) (The individual mandate seeks to regulate economic inactivity, which is the opposite of economic activity. The Commerce Clause requires activity as applied by existing Supreme Court case law.)
[31] 198 U.S. 45 (1905)
[32] *Lochner,* 198 U.S. 45 (1905)
[33] *Id*. at 57

Economic substantive due process was well established in American jurisprudence for roughly thirty years, until President Herbert Hoover's appointments to the Supreme Court started chipping away at *Lochner* in the 1930s.[34] In 1937, the Supreme Court put the proverbial nail in the coffin of economic substantive due process in *West Coast Hotel v. Parrish*.[35] The Supreme Court acknowledged that the Constitution did not guarantee any right to freedom of contract, and upheld a Washington minimum wage law.[36] Today, the Supreme Court has the perfect opportunity to invoke the ruling of *Lochner* when it hands down a decision on the individual mandate. One of the rationales behind the individual mandate is unless Congress requires individuals to maintain minimum essential coverage, the regulation would not achieve its objectives. Specifically the PPACA says:

> "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."[37]

This language conjures memories of the New York statute prohibiting more than a maximum 60-hour week for bakers, which the *Lochner* Court ruled was unconstitutional.[38] In *Lochner*, the Court recognized that the right to contract could not be limited by the State, even for the worthy purpose of the health, safety, and welfare of workers. Soon thereafter, the Court reversed course, however the PPACA individual mandate provision gives the Court an opportunity to resurrect the importance *Lochner* placed on the freedom to contract. Essentially, with the PPACA, Congress is dictating that individuals do not have a right to choose whether they want to enter

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[34] Brandon S. Swider, *Judical Activism v. Judicial Adbication: A Plea for a Return to the Lochner Era Substantive Due Process Methodology*, 84 CHI.-KENT L. REV. 315 (2009)
[35] 300 U.S. 379 (1937)
[36] *Id*.
[37] *See* §18091(2)(A), *supra* note 20
[38] 198 U.S. 45 (1905)

into a contractual relationship with insurance companies. When the Supreme Court rules on the constitutionality of the individual mandate, economic substantive due process rights should be considered along with the Commerce Clause arguments.

II. Using the Commerce Clause to Analyze the Constitutionality of the Individual Mandate

Various courts of appeals had the opportunity to hear oral arguments from non-profit organizations, state attorney generals, and the federal government over the constitutionality of the PPACA. On March 27th, when the Supreme Court heard oral arguments on the individual mandate, there were two main court of appeals decisions that will be taking center stage. Decisions from the Sixth and Eleventh Circuits will be most present in the discussion.[39] Due to the splits in various circuits, supports and opponents of the individual mandate each have strong, compelling case law in their favor. Furthermore, over the course of American jurisprudence there are a variety of Supreme Court cases and interpretations that can be used to the advantage of either side. Below will include the legal arguments for and against the constitutionality of the individual mandate solely on Commerce Clause grounds. One of the most important distinctions is whether not purchasing health insurance is activity or inactivity,[40] and whether that matters when Congress wants to regulate commerce.

A. The Individual Mandate is a Valid Use of the Commerce Clause

[39] Thomas More Law Center v. Barack H. Obama, 651 F.3d 529 (6th Cir. 2011); Florida v. Dep't of Health and Human Services, 648 F.3d 1235 (11th Cir. 2011)

[40] The origins of the argument on whether the Commerce Clause applies to activity or inactivity was developed in United States v. Lopez, 514 U.S. 549 (1995).

Supporters of the individual mandate can look back to 1942 for the first case supporting their position, *Wickard*.[41] Roscoe Filburn filed suit against the federal government because the Agricultural Adjustment Act of 1938 penalized him for producing more wheat than the Act allowed.[42] Mr. Filburn wanted to use the excess wheat for personal consumption, instead of going to the open market.[43] Congress enacted the Agricultural Adjustment Act of 1938 as a way to control surplus of wheat, which could affect interstate commerce.[44] The Court ultimately held that Congress gave Mr. Filburn the option to either cooperate with the wheat allotment or face a monetary penalty, and because he had a choice, the Act did not violate his due process rights.[45]

How does wheat production in the 1930s and 1940s have any connection to the individual mandate? The question in *Wickard* goes to the heart of the argument opponents of the individual mandate make – the distinction between regulating inactivity and activity. In Mr. Filburn's case, he actively chose to be in the wheat business and if he did not want to subject himself to the regulations he could chose another profession. Furthermore, the Act restricting how much wheat Mr. Filburn could grow directly related to the regulation of the interstate wheat market.[46] Contrasting the individual insurance mandate and the wheat production mandate in *Wickard,* in his article, Professor Mark Hall makes the following analogy: "In *Wickard*, Congress regulated commerce in wheat by limiting consumption of home-grown wheat. By the same token,

[41] 317 U.S. 111 (1942)
[42] *Id.* at 114-15
[43] *Id.* at 111
[44] *Id*. at 115
[45] *Id*. at 131
[46] Peter J. Smith, *Federalism, Lochner, and the* Individual *Mandate*, 91 B.U. L. REV. 1723, 1735 (October 2011)

Congress might have considered simply barring people from seeking care if they lacked insurance."[47]

Another analogy can be made when considering that in *Wickard*, the congressional act forced Mr. Filburn into the wheat market, prohibiting the private consumption of wheat. As proponents argue, similarly the PPACA forces consumers in the insurance market prohibiting private action, i.e. uninsured coverage. Consumption and growth of wheat was not the end of the Supreme Court ruling in favor of Commerce Clause effectively controlling private individuals ability to 'do something.'

Sixty-seven years later, *Gonzales v. Raich*[48] became the modern day *Wickard*. California law created an exemption from criminal prosecution for doctors who proscribe medicinal marijuana and those who cultivate marijuana for medicinal purposes.[49] The Drug Enforcement Administration seized and destroyed one of the respondent's crops of medicinal marijuana after a raid pursuant to an investigation for violating the federal Controlled Substances Act.[50] One of the arguments made by the respondents was that the Controlled Substances Act was not a valid exercise of the Commerce Clause.[51]

First the Supreme Court explained that, "*Wickard* thus establishes that Congress can regulate purely intrastate activity that is not itself 'commercial,' in that it is not produced for sale,

[47] Mark A. Hall, *Commerce Clause Challenges to Health Care Reform*, 159 U. PA. L. REV. 1825, 1834 (June 2011)
[48] 545 U.S. 1 (2005)
[49] *Id*. at 7
[50] *Id*.
[51] *Id*.

if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity."[52]

In *Raich*, the cultivation of medicinal marijuana for home purposes does create or effect an "albeit illegal, interstate market."[53] The primary purpose then of the Controlled Substance Act was to regulate the supply and demand of illegal substances, and failure to regulate these substances would undercut the purpose of curbing illegal drug use.[54] Thus, the collective growing of medicinal marijuana in California had a substantial effect on interstate commerce, and the Controlled Substances Act was found to be a valid exercise of the Commerce Clause.[55] Both *Wickard* and *Raich* set the scene for the decision in the Sixth Circuit Court of Appeals decision upholding the individual mandate as constitutional.

The Sixth Circuit Court of Appeals decision in *Thomas More Law Center v. Barack Hussein Obama*,[56] is the leading authority upholding the constitutionality of the individual mandate. In *Thomas More*, the Court ruled that the minimum essential coverage provision of the PPACA was a valid exercise of Congress' authority under the Commerce Clause.[57] The Sixth Circuit at first seemed to pass on the issue entirely by saying, "it is not this Court's role to pass on the wisdom of Congress' choice."[58] However, the Sixth Circuit did eventually go into detail on why the individual mandate passes constitutional muster. First, it explained the three instances in which the Commerce Clause can regulate: (1) the use of channels of interstate

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[52] *Raich,* 545 U.S. at 18 (2005)
[53] *Id*.
[54] *Id*. at 19
[55] 545 U.S. 1 (2005) (giving deference to Congress because the standard of review for Commerce Clause challenges is rational basis)
[56] 651 F.3d 529 (6th Cir. 2011)
[57] *Id*.
[58] *Id*. at 541

commerce; (2) the instrumentalities of interstate commerce or persons or things; and (3) activities that substantially affect interstate commerce.[59] The individual mandate only falls into the third prong, "substantial effect." The issue presented for the court to consider was whether regulating participation in health insurance markets substantially affected interstate commerce.

The Sixth Circuit explains, "consumption of health care falls squarely within *Raich*'s definition of economics, and virtually every individual in this country consumes these services."[60] Answering directly to the opponents of the individual mandate, the Circuit Court takes its decision one step further saying that, "the activity of foregoing health insurance […] is no less economic than the activity of purchasing an insurance plan."[61] The Sixth Circuit Court of Appeals effectively said that there is no distinction between activity and inactivity for Commerce Clause purposes. The rationale for this is that "virtually everyone requires health care services at some point."[62] To a certain extent, the fact that at some point in an individual's future he or she may need to enter the market allows Congress to regulate participation in the present.

As mentioned previously, the Supreme Court in *United States v. South-Eastern Underwriters Association* already concluded that regulation of insurance does affect interstate commerce.[63] Expanding on *South-Eastern Underwriters Association*, the Sixth Circuit wrote in *Thomas More Law Center,* "Congress had a rational basis for concluding that the minimum coverage requirement is essential to its broader reforms to the national markets in health care

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[59] Douglas A. Bass, *Validity of the Minimum Essential Medical Insurance Coverage, or "Individual Mandate," Provision of § 1501 of the Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, 124 Stat. 119*, 60 A.L.R. FED. 2D 1, 11 (2011)
[60] 651 F.3d 529, 543 (6th Cir. 2011)
[61] *Thomas More Law Center*, 651 F.3d at 543 (6th Cir. 2011)
[62] *Id*.
[63] 322 U.S. 533 (1944)

delivery and health insurance."[64] The Sixth Circuit found the Act was rationally related to an important state interest, satisfying the requirements of the Commerce Clause, and ruled the individual mandate was a valid exercise of Congress' authority.[65]

Another argument raised regarding congressional authority on economic activity comes from Professor Andrew Koppelman, who questions whether free riding on healthcare without paying for insurance is an economic activity.[66] Professor Koppelman explains that choosing not to enter the insurance market is an economic decision with economic consequences.[67] The argument Professor Koppelman refers back to *Wickard*, in that if Mr. Filburn chose not to enter the wheat market it would be an economic decision which would affect the wheat market, albeit in a small way, but it would have an effect. Professor Koppelman makes one final observation about the individual mandate:

> "But when Congress chartered the Bank of the United States, it had never done that before either. The underlying principle behind the individual mandate is not novel at all. The Court declared in *McCulloch*: a government that has the right to do an act – here, to regulate health care – "must, according to the dictates of reason, be allowed to select the means."[68]

The argument made here is that even though Congress has never before passed a law to this extent, it has the authority to regulate insurance markets and thus should be allowed to choose the method of doing so.

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[64] 651 F.3d 529, 547 (6th Cir. 2011)
[65] *South-Eastern Underwriters Association,* 651 F.3d at 547
[66] Andrew Koppelman, *Bad News for Mail Robbers: The Obvious Constitutionality of Health Care Reform*, 121 YALE L.J. ONLINE 1, 6 (April 26, 2011)
[67] *Id*. at 7
[68] *Id.* (citing McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 409-10 (1819)) (discussing the Necessary and Proper Clause)

Finally, perhaps the strongest argument is that the Constitution already permits Congress to mandate certain activity in a variety of instances. The Supreme Court has upheld congressional authority to compel citizens to register for the draft, pay taxes, report for jury duty, and respond to the census.[69] With the precedent in favor of regulating 'inactivity,' the substantial effects of health insurance on the economy, and the underlying fact that Congress currently does mandate certain behavior, those who argue in support of the individual mandate have plenty of resources to make their case.

B. The Individual Mandate is Not a Valid Use of the Commerce Clause

Starting with the last point made regarding constitutional authority to mandate certain behavior, each of those scenarios is enumerated in the Constitution. Congress' authority to raise armies,[70] lay taxes,[71] compel jury duty,[72] and compel responses to the census[73] are enumerated in Article I. The proponents of the individual mandate cannot cite to a clear enumerated power in the Constitution that gives Congress the authority to enact the individual mandate. The fall back is to combine the Necessary and Proper Clause[74] with another enumerated power. The argument being, in order to provide meet the objectives of the PPACA, it was necessary and proper for Congress to pass the individual mandate. The line is too attenuated for this argument to work, because it is the strength of the chain between the authorities that allows the Necessary and Proper Clause to be invoked.[75] As Justice Kennedy wrote in *United States v. Comstock*, "the inferences must be controlled by some limitations lest […] congressional powers become

[69] *See* Smith at 1731, *supra* note 46.
[70] U.S. Const. art. I, §8, cl. 12.
[71] U.S. Const. art. I, §8, cl. 1.
[72] U.S. Const. art. I, §8, cl. 9.
[73] U.S. Const. art. I, §2, cl. 3.
[74] U.S. Const. art. I, §8, cl. 18.
[75] United States v. Comstock*,* 139 S. Ct. 1949, 1966 (2010) (Kennedy, J., concurring).

completely unbounded by linking one power to another *ad infinitum* in a veritable games of 'this is the house that Jack built.'"[76] The individual mandate should be held to this limitation of linking powers, or as it will be discussed latter, the parade of horribles will be exactly as Justice Kennedy and Thomas Jefferson warned.

Opponents of the constitutionality of the individual mandate have strong precedent in their favor as well, most notably the 1995 Supreme Court case *United States v. Lopez*.[77] The Gun-Free School Zones Act of 1990 made it a federal offense to knowingly possess a firearm in a school zone.[78] Mr. Lopez, carried a .38-caliber handgun to school, and he was arrested and charged under the Gun-Free School Zones Act.[79] At issue was whether the Gun-Free School Zones Act was a valid exercise of the Commerce Clause.[80]

The Supreme Court found that the Gun-Free School Zones Act was not an essential part of a larger regulation of economic activity and therefore could not be sustained.[81] Ultimately, the Court found that under the third prong of the Commerce Clause test, regulating guns in school zones does not, "substantially effect" interstate commerce.[82] Chief Justice Rehnquist recognized the scope of the Commerce Clause had been broadened over time, however he concluded that "even *Wickard*, which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that the possession of a gun in a

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[76] *Comstock*, 130 S. Ct. at 1966 (2010) (Kennedy, J., concurring) (citing Letter from Thomas Jefferson to Edward Livingston (Apr. 30, 1800), 31 THE PAPERS OF THOMAS JEFFERSON 547 (B. Oberg ed. 2004)
[77] 514 U.S. 549 (1995)
[78] 18 U.S.C. § 922(q)(1)(A) (1988 Ed.)
[79] *Lopez*, 514 U.S. at 551 (1995)
[80] *Id*.
[81] *Id.* at 561
[82] *Id.*

school zone does not."[83] This created a limitation on Congress' use of the Necessary and Proper Clause, limiting its reach to economic activity, and not noneconomic activity.[84] Professor Barnett further expands this notion to say:

> "by expanding the substantial effects doctrine to economic intrastate activity, the Supreme Court provided the modern legal 'test' or 'criterion of constitutionality' for whether a regulation of intrastate activity is what 'may truly be said' to be necessary under the Necessary and Proper Clause. By this doctrine Congress is held within its enumerated powers and denied the 'right to do merely what it pleases.'"[85]

Professor Barnett reaches to the heart of the issue explained above by using examples of the draft, laying taxes, and others.[86] That Congress should be limited to its enumerated powers, and only if the activity is economic could the Necessary and Proper Clause be invoked.

In *Lopez*, the Supreme Court recognized that Congress' authority should be limited to the enumerated powers, and those powers should have "judicially enforceable outer limits."[87] The Court went on to say:

> "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 States. Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action."[88]

This explains why Chief Justice Rehnquist wanted to see the Commerce Clause authority limited, perhaps a more formalist approach. Ten years after the opinion in *Lopez*, Chief Justice Rehnquist

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[83] *Lopez*, 514 U.S. at 560 (1995)
[84] Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate is Unconstitutional*, 5 N.Y.U. J.L. & LIBERTY 581, 596 (2010)
[85] *Id.* at 600
[86] *Id.*
[87] *Lopez*, 514 U.S. at 567 (1995)
[88] *See* Barnett at 567, *supra* note 84

had another opportunity to further restrict Congress' use of the Commerce Clause in *United States v. Morrison*.[89]

Petitioner in *Morrison*, filed suit after three students at Virginia Polytechnic Institute raped her in violation of the Violence Against Women Act.[90] The Violence Against Women Act provided a federal civil remedy for victims of gender-motivated violence.[91] The issue in *Morrison* is whether Congress had authority under the Commerce Clause to enact the Violence Against Women Act.[92] The Supreme Court explained, "gender-motivated crimes of violence are not, in any sense of the phrase, economic activity."[93] Taking the decision in *Lopez* one step further, Chief Justice Rehnquist directed the Court to rely on more than just congressional findings of violence and its effects on intrastate commerce when determining constitutionality.[94] More precisely, Chief Justice Rehnquist wrote, "whether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court."[95] This threshold requirement is important for the opponents of the individual mandate because the law now requires more than just congressional findings and data to support enacting the law. Even if the Court were to find that the congressional findings support the effects of having the individual mandate, the constitutionality of the individual mandate would still remain at issue and only the Supreme Court can settle that.[96] Finally, Chief Justice Rehnquist again

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[89] 529 U.S. 598 (2000)
[90] *Morrison,* 529 U.S. at 598 (2000)
[91] *Id.*
[92] *Id.*
[93] *Id.* at 613
[94] *Id.*
[95] *Id.* at 614 (quoting Heart of Atlanta Motel v. United States, 379 U.S. 241, 273 (1964))
[96] *Individual Mandate: Is it Constitutional?*, American Center for Law & Justice (Dec. 8, 2009), http://www.aclj.org

foreshadows the current debate by writing that if the Court were to uphold the Violence Against Women Act, Congress may extend that authority to regulate family law and other areas of traditional state regulation.[97]

Together *Lopez* and *Morrison* provide adequate precedent for the decision in *Florida v. United States Department of Health and Human Services*.[98] Similar to *Thomas More Law Center*, the Eleventh Circuit addressed the constitutionality of the individual mandate under a Commerce Clause challenge. Before analyzing the Eleventh Circuit decision, a discussion of important legal analysis from United States District Court for the Northern District of Florida and Judge Vinson's opinion is addressed.[99] Judge Vinson begins his analysis of the individual mandate with an exhaustive review of the history of the Commerce Clause from the Constitutional Convention and the Federalist Papers to current precedent.

Setting the stage for the Supreme Court, Judge Vinson summarizes the controlling precedent on both sides, "the plaintiffs [opponents of the individual mandate] rely heavily on *Lopez* and *Morrison* in framing their arguments, while the defendants [proponents of the individual mandate] look principally to *Wickard* and *Raich*."[100] When answering whether activity is required for Congress to exercise authority under the Commerce Clause, Judge Vinson responds emphatically saying, "activity is an indispensable part."[101] By saying activity is an indispensable requirement, the question turns to whether the choice to not buy insurance is

[97] *Morrison*, 529 U.S. at. 615-16 (2000)
[98] 648 F.3d 1235 (11th Cir. 2011)
[99] Florida v. United States Department of Health and Human Services, 780 F. Supp. 2d 1256 (N.D. Fla. 2011)
[100] *Florida,* 780 F. Supp. 2d at 1284 (N.D. Fla. 2011)
[101] *Id.* at 1287

considered an activity. Judge Vinson uses the words of §1501 to its detriment in explaining this point:

> "I must agree with the plaintiffs' contention that the individual mandate regulates inactivity. Section 1501 states in relevant part: 'If an applicable individual fails to [buy health insurance], there is hereby imposed a penalty.' By its very own terms, therefore, the statute applies to a person who does not buy the government-approved insurance; that is, a person who "fails" to act pursuant to the congressional dictate."[102]

In essence, the statute itself acknowledges the penalty only applies to individuals who fail to act and participate in the insurance market. Judge Vinson's point highlights the issues with activity and inactivity. Unlike growing wheat or medicinal marijuana, which requires individual action, there is no choice or action in the individual mandate to be free from government regulation. In furthering this point, Judge Vinson explains that it is not difficult to identify an economic decision people make that in the aggregate will have a substantial effect on interstate commerce.[103] Judge Vinson concludes his thought by saying, "to now hold that Congress may regulate the so-called 'economic decision' to *not* purchase a product […] in anticipation of *future* consumption is a 'bridge too far.'"[104]

The "bridge too far" conclusion is hidden amongst the other legal conclusions raised by Judge Vinson – a colorful prediction into the future, if the individual mandate is found to be a valid exercise of the Commerce Clause – broccoli.[105] One of the arguments for the individual mandate is that health care is a market that individuals will at some point have to participate in. However, Judge Vinson explains, "after all, there are lots of markets – especially if defined

[102] *Florida,* 780 F. Supp. 2d at 1287 (N.D. Fla. 2011)
[103] *Id.* at 1293
[104] *Id.* at 1294
[105] *Id.* at 1289

broadly enough – that people cannot 'opt out' of."[106] In particular, Judge Vinson points to the food and transportation markets. First, Judge Vinson writes, "congress could require people to buy and consume broccoli" because the buying and selling of broccoli effects interstate commerce and because healthier eaters would lower the strain on the health care system.[107] Next, Judge Vinson says that since people need transportation, Congress could require individuals above a certain income level to buy only General Motors cars.[108] The "parade of horribles" as Judge Vinson calls them, is not too far fetched considering this is the first time in history Congress is mandating the purchase of some good or service. Admittedly so, the Supreme Court could make a very narrow ruling on the individual mandate. If the mandate is upheld, however, one can imagine other dooers opened by Congress' future attempts to regulate.

Judge Vinson's holding in *Florida v. United States Department of Health and Human Services* was appealed to the Eleventh Circuit Court of Appeals, where the issue of the individual mandate was again addressed.[109] Interestingly, the Eleventh Circuit contrasts the PPACA with the National Flood Insurance Act of 1968.[110] Congress did not include an individual mandate to purchase flood insurance in the National Flood Insurance Act of 1968, but rather provided incentives to those who did.[111] Evidence shows that the National Flood Insurance Act of 1968 has not had a large impact; less than 10% of residents within flood plains have purchased that insurance.[112] Why is there no individual mandate included in the National Flood Insurance Act

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[106] *Florida,* 780 F. Supp. 2d at 1289 (2011)
[107] *Id*.
[108] *Id.*
[109] 648 F.3d 1235 (11th Cir. 2011)
[110] *Id.* at 1289
[111] 42 U.S.C. § 4001(a)(1)
[112] *Florida*, 648 F.3d at 1290 (citing Bryant J. Spann, Note, *Going Down for the Third Time: Senator Kerry's Reform Bill Could Save the Drowning National Flood Insurance Program*, 28 GA. L. REV. 593, 597 (1994))

of 1968? That question has not been answered. The Eleventh Circuit acknowledged that of all the instances in which individuals have been subject to a mandate, it has been citizens interacting with the government, not private companies like the individual mandate requires.[113]

In ruling on the constitutionality of the individual mandate, the Eleventh Circuit concludes,

> "The power that Congress has wielded via the Commerce Clause for the life of this country remains undiminished. Congress may regulate commercial actors. It may forbid certain commercial activity. It may enact hundreds of new laws and federally-funded programs, as it has elected to do in this massive 975 page Act (PPACA). But what Congress cannot do under the Commerce Clause is mandate that individuals enter into contracts with private insurance companies for the purchase of an expensive product from the time they are born until the time they die."[114]

The heart of this decision is exactly what the Supreme Court should focus on when it decides the constitutionality of the individual mandate. This is the first time in the history of the United States that just by the mere fact of being a United States citizen (or legal alien) and individual is mandated to purchase something and enter into a contract with a private company. This provides a very compelling reason for bringing back economic substantive due process rights. The right to choose with whom individuals want to enter into contracts, when individuals want to enter contracts, and how individuals want to spend their money.

III. Return Economic Substantive Due Process Rights

Both sides of the argument agree on one issue regarding the individual mandate, this is a novel concept and the first time Congress has attempted to require individuals to enter into a contract with a private company. There are three reasons for the Supreme Court to invalidate the

[113] *Florida*, 648 F.3d at 1290 (2011)
[114] *Id.* at 1311

individual mandate and to bring back economic substantive due process rights: (1) the mandate is not enumerated in the Constitution, (2) Congress should not regulate inactivity, and (3) individuals have a fundamental liberty interest in their economic situation.

First, as mentioned earlier, there are instances in which Congress does have enumerated authority to mandate certain behavior. Congress can without debate require individuals to register for the draft, file taxes, report for jury duty, and respond to the census.[115] The individual mandate falls short of this because Congress had to pile inference upon inference to generate some constitutional authority. The first inference is that to promote the general welfare of the citizens, Congress must regulate the insurance industry.[116] Since the Supreme Court has already held that insurance falls under the definition of commerce,[117] this part probably passes muster. Second, Congress is making the inference that in order to achieve its objective of increasing the availability of health care, everyone who can afford health insurance must purchase at least a minimum essential coverage plan. This inference fails because there is no empirical data to support these claims and the Supreme Court has already ruled that congressional findings alone do not overcome Constitutional objections.[118] The third inference is that the individual mandate is "necessary and proper" for carrying into execution the objectives of readily available healthcare by regulating economic activity.[119] Unlike the enumerated mandates above; the stretch Congress is attempting to make is too attenuated to pass constitutional muster. Combined with the fact that it is the Supreme Court's role to determine whether a particular action falls under interstate commerce and under Congress' authority to regulate. This taken in light with the fact

[115] *See* Smith at 1731, *supra* note 43.
[116] U.S. Const. art. I, §8, cl. 1. (Congress shall have the authority to provide for the general Welfare of the United States)
[117] *South-Eastern Underwriters Association*, 322 U.S. 533 (1944)
[118] *Morrison,* 529 U.S. 598 (2000)
[119] *See* Barnett, *supra* note 84

that the Necessary and Proper Clause, when used, has regulated 'activity' and not 'inactivity' provides further rationale for invalidating the individual mandate.

Constitutional scholars differ on whether the individual mandate regulates activity or inactivity. The language of the individual mandate is the key to what Congress believed it was regulating, "'if an applicable individual fails to [buy health insurance], there is hereby imposed a penalty."[120] Those individuals who do not purchase health insurance are inactive and not participating. President Obama sees it differently using the analogy that States require individuals to have automobile insurance, and this would be no different.[121] This analogy fails though because individuals who do not wish to drive on the roads, who do not have a car – do not have to buy automobile insurance. There are numerous decisions individuals make on a daily basis that voluntarily exposes them to government regulation, while at the same time individuals make decisions so that they do not have to be exposed to government regulation. Stated further as the idea of choice versus compulsion by threat of penalty. Much like Judge Vinson's opinion, the benefit of being in a free republican democracy is that, for the most part, we as citizens are free to make choices and decisions. There is an inherent right to be inactive. The individual mandate is eliminating that choice to be free from government regulation in certain arenas.

The last point; individuals should have a fundamental liberty interest in their economic decisions. In *Meyer v. Nebraska*, the Supreme Court described liberty as:

> "Freedom from bodily restraint [,] but also the *right of the individual to contract*, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally

[120] 26 U.S.C.A. § 5000A(b)(1)
[121] *See* Obama, *supra* note 4

> to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free man."[122]

Notably, the right to contract is included within the definition of liberty, a right that was recognized by *Lochner.* Unfortunately, due to the ebb and flow of judicial philosophies, that right was stripped from the hands of individuals in the 1930s and never restored. The individual mandate is the perfect opportunity for the Supreme Court to restore the right to contract. Furthermore, it would not be unprecedented for the Court to reverse seventy years of jurisprudence. In fact, *Washington v. Glucksburg* established a two-prong test that may be useful to the Supreme Court for returning economic substantive due process rights. The two-prong test is (1) whether the right is "objectively, deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty"; and (2) whether the asserted right is stated with sufficient specificity – to determine whether the right is sufficiently fundamental to receive constitutional protection.[123]

Both prongs can be met by looking at the past definitions of liberty and previous Supreme Court decisions. In order to be objectively, deeply rooted, one has to look no further than pre-1930s case law for example, *Meyer* and *Lochner*. Although the Court's protection of the freedom of contract has waned since the 1930s, the Amicus Brief of the Institute for Justice sheds light on how contract formation was viewed during the founding of the United States, "after ratification of the Constitution, American courts continued to follow [the common-law doctrine of mutual assent]."[124] Mutual assent requires that individuals must agree to enter into the contract. The Founding Fathers and earlier courts understood these principles. Unfortunately,

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[122] *See* Swider at 323, *supra* note 34 (citing Meyer v. Nebraska, 262 U.S. 390, 399 (1923))
[123] *Id.* (citing Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997))
[124] Brief for Institute for Justice as Amici Curiae Supporting Respondents, United States Department of Health and Human Services v. Florida, (No. 11-398) (citing Utley v. Donaldson, 94 U.S. 29, 47 (1876) ("There can be no contract without the mutual assent of the parties."))

the individual mandate undermines these principles. Furthermore, as a fundamental principle, individuals must be free to decide which contracts they want to enter into. As the Institute of Justice's Brief explains, "by enacting the individual mandate, Congress has crossed the line, using its commerce power to coerce contractual relations."[125] Using the two-prong test from *Glucksburg*, it becomes more apparent that the individual right of freedom to contract is deeply rooted in our Nation's history and traditions.

The objection to Congress mandating that individuals must enter a contract with a private insurance company to be in compliance with the PPACA is deeply rooted in the jurisprudence of the *Lochner* era. As Professor Smith mentions,

> "during that era, the Court viewed 'the right to contract about one's affairs [as] a part of the liberty of the individual protected' by the Due Process Clauses, and it accordingly viewed with skepticism any regulation that interfered with that form of individual liberty."[126]

The possibility that Congress could pass any number of laws, somewhat connected to a broad overarching economic interest is scary. Professor Barnett explains that the individual mandate, which is disguised as an economic mandate, is "so much more onerous than either economic regulations or prohibitions, and why so dangerous an unwritten congressional power should not be implied."[127]

To a broader issue, the individual mandate blurs the boundaries of a limited and unlimited federal power. Subjecting individuals to private contracts, based solely on the fact that they are alive is not what the Framers intended. The Supreme Court should not allow such

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[125] *See* Institute for Justice, *supra* note 124
[126] *See* Smith at 1743, *supra* note 46
[127] Randy E. Barnett, *Obamacare's Individual Mandate is a Dangerous New Federal Power,* WASHINGTON EXAMINER (Feb. 15, 2011), http://washingtonexaminer.com/opinion/op-eds/2011/02/obamacares-individual-mandate-dangerous-new-federal-power

commandeering of individuals if our founding principles should survive. In *Printz v. United States*, Justice Scalia wrote that Congress commanding the states to act was "fundamentally incompatible with our constitutional system of dual sovereignty."[128] Justice Thomas furthered this point in his dissent in *United States v. Comstock*, writing that the Court is coming "perilously close to transforming the Necessary and Proper Clause into a basis for the federal police power that we always have rejected."[129] Collectively, the opinions of Justices Scalia and Thomas reflect a view that recent jurisprudence does not favor the path Congress took in enacting the individual mandate. Hopefully, Professor Barnett accurately predicts the future by writing, "Justice Scalia could write in his sleep the opinion holding that economic mandates in general, and the individual insurance mandate in particular, constitute an improper commandeering of the people."[130]

In order for the Supreme Court to keep Congress' powers consistent with the language of the Constitution, it should reinstate the economic substantive due process rights Americans enjoyed prior to the 1930s. These rights are not only fundamentally sound and consistent with contract principles, but also a previously recognized liberty interest. Perhaps the Supreme Court will reverse its holding in *West Coast Hotel* and return to the Lochner era's protection of the freedom to contract. Individuals in America deserve the right to pick and choose which private individuals/companies they want to do business with, regardless of Congress' claim that regulating choice is within its purview. A holding in favor of the individual mandate sets dangerous precedent for the future of individual liberty rights in America.

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[128] *See* Barnett at 623, *supra* note 84 (citing 521 U.S. 898, 935 (1997))
[129] *Id.* at 626 (citing 130 S. Ct. 1949, 1983 (2010) (Thomas, J., dissenting))
[130] *Id.* at 636

IV. Conclusion

The legal arguments on both sides of the individual mandate are strong and supported by existing case law. However, this is a novel question facing the Supreme Court. Even more novel is the idea of bringing back economic substantive due process rights. Supporters of the individual mandate can cite to three sources of support for the valid exercise of the Commerce Clause – *South-Eastern Underwriters Association*, *Wickard*, and *Raich*. The overarching argument is that the insurance market falls within the definition of commerce and that the individual mandate is a necessary and proper law to achieve Congress' goals of regulating the insurance market. Opponents of the individual mandate should utilize four sources of support – *Lochner*, *Lopez*, *Morrison*, and Judge Vinson's opinion in *Florida*. The argument opponents make is that mandating individuals to enter private contracts (a) does not substantially affect commerce and (b) violates a fundamental liberty interest.

During oral arguments on Tuesday, March 27th, 2011, Justice Kennedy asked a very important question, "can you create commerce in order to regulate it."[131] Justice Kennedy continued to say:

> "[in the individual mandate] the government is saying that Federal government has a duty to tell the individual citizen that it must act, and that is different from what we have in previous cases, and that changes the relationship of the Federal government to the individual in a very fundamental way."[132]

It appears that Justice Kennedy is concerned with the issue about inactivity and activity. His questions seem to focus on can Congress force people into the market through the individual

[131] Transcript of Oral Argument at 4, 5, Department of Health and Human Services v. Florida, No.11-398.
[132] *Id.* at 30

mandate. It should be noted further that Justice Kennedy was in the majority in both *Lopez* and *Morrison*, and it appears he could be leaning towards invalidating the individual mandate as well.

Mr. Paul Clement, arguing on behalf of the states made a great argument regarding the ability to not be in the market saying that in Manhattan a lot of people do not own cars, so they effectively opt-out of the auto-insurance market.[133] So similarly, people can choose to opt-out of the health care market for any given number of years and when they need health care and opt-in to the market then they would fall under government regulation.[134] While *Lochner* was brought up a handful of times during oral arguments, the rhetoric seems to hint that choice and inactivity were common themes throughout. The time is ripe, as the Court has not faced the question of economic due process in a long time. Here is the perfect opportunity for the Court to take one step closer to the fundamental liberty interest right of freedom to contract, once recognized by the Court.

Whichever way the Court decides, it will truly be a historic landmark decision. On one hand, if the Court upholds the individual mandate, it could, as Justice Vinson explains, open the door to a "parade of horribles." On the other hand, the Supreme Court by invalidating the individual mandate, could send Congress a clear message – dictating the private, economic decisions of American citizens is a violation of the Constitution. We are at a point in history that the Framers could not foresee. It will be up to nine justices to make a determination on how far the Commerce Clause and Necessary and Proper Clause extend in support of congressional power to interfere in the lives of Americans.

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[133] *See* Oral Argument at 67, *supra* not 131
[134] *Id.* at 68

The words of Federalist No. 78 should help guide the Supreme Court, when faced with upholding liberty or rubber-stamping congressional action:

> "the courts were designed to be an intermediate body between the people and the legislature, in order, among other things to keep the latter within the limits assigned to their authority. […] The power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decision by the fundamental laws, rather than by those which are not fundamental."[135]

The fundamental laws confirm the notion that individual economic decisions should not be dictated by acts of Congress that violate the right to freedom of contract. The Supreme Court is charged with the task of making sure the fundamental laws are upheld, to control Congress' blatant abuse of a power it does not have. Finding the individual mandate unconstitutional restores the ideals of the Federalists, the Framers, and our Constitution. More important it protects the rights of the citizens.

[135] THE FEDERALIST No. 78 (Alexander Hamilton)