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THE INDIVIDUAL MANDATE, COMMERCE CLAUSE, AND SUPREME COURT: PREDICTING THE COURT'S RULING IN *HHS v. FLORIDA*

SUBMITTED TO

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FOR

SENIOR THESIS

SPRING 2012

APRIL 23, 2012

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Chapter 1: Introduction

The healthcare system of the United States of America has been in a contentious position for decades. It has been the center of numerous political, ethical, and legal battles.[1] The enactment of the Patient Protection and Affordable Care Act ("the Act") on March 23, 2010 represents the most recent development in this ongoing struggle to balance opposing viewpoints on the best role the federal government should play in the healthcare market. The Act has already had and will continue to have enormous effects on this country's healthcare system and the policies through which it interacts with individual American citizens. However, the Act will have implications reaching far beyond the healthcare sector.

Due to the legal challenges initiated by those who oppose various provisions of this new legislation, the Supreme Court will not only have the final say on which aspects of the Act are constitutional and thus remain in effect, but it will also have the task of defining limits to the Congress' power under the commerce clause in an area where the Court has never before set foot. The Court bundled the majority of these challenges into *Department of Health and Human Services v. Florida*, and one of the most significant questions being raised is whether or not individual mandate provision of the Act is a valid exercise of the Congress' commerce power. Its forthcoming decision has the potential to

[1] Atlas, Scott W. *Reforming America's Health Care System: The Flawed Vision of ObamaCare* (Stanford: Hoover Institution, 2010), 83.

either grant unprecedentedly unchecked powers or begin the return to a Congress with a limited and specifically enumerated commerce power.

In the past, the Court has not been shy about showing great deference to the Congress' commerce power. Two periods in history represent the greatest expansions of the interpretation of the commerce clause. In 1824, the Marshall Court heard the first challenge to an act passed by the Congress under the auspices of authorization from the commerce clause in *Gibbons v. Ogden*. In this case, Chief Justice Marshall interpreted the commerce clause to the advantage of the Congress. Marshall allowed for the broad use of the words "commerce" and "among." Combining these new definitions with his plenary view of the commerce power as "complete in itself" and acknowledging "no limitations other than are prescribed in the constitution," Marshall set the precedent for an expansive interpretation of the commerce clause.[2] For over a hundred years following the Court's *Gibbons* decision, subsequent Courts have implemented unique tests and theories to limit the applicability of Marshall's precedent and prevent additional growth.

Another cycle of expansion of the commerce power started in 1936 with President Franklin D. Roosevelt's New Deal legislation. The Court initially rejected the vast majority of FDR's programs that he thought would help the American people following the Great Depression, in keeping with the Court's contractionary response to *Gibbons*. However, following FDR's attempted court-packing plan, the Court abruptly changed its tune. Beginning with *West Hotel Company v. Parrish* and *National Labor Relations Board v. Jones & Laughlin Steel Company* in 1936, the Court started to uphold congressional actions under the commerce power that were more egregious than those it

[2] *Gibbons v. Ogden*, 22 U.S. 17 (1824).

had overturned less than a year earlier. This newly advanced view of the commerce power continued for nearly sixty years during which time there was not a single significant judicial check on the Congress' regulatory authority under the commerce clause. The response to this second expansion only began with the Rehnquist Court's *United States v. Lopez* decision in 1995. The line in the sand that the Court drew in *Lopez* has been faithfully maintained since then, although the Court has made no effort to overturn the expansive precedent set throughout the first half of this cycle.

The Court is faced with a decision in *HHS v. Florida* that will have monumental effects on future jurisprudence regarding the commerce clause. If it rules that the individual mandate is an overreach on the behalf of the Congress and that the commerce clause does not authorize the Congress to require individuals to purchase health insurance, it will represent a continuation of the limiting approach it has taken since 1995 that was established in *Lopez*, reinforced in *U.S. v. Morrison* (2000), and supported – when looked at through a historical perspective – even by *Gonzales v. Raich* (2005). However, if it gives the nod to the constitutionality of the mandate, it will represent the first such expansion of the commerce power in over a decade. Furthermore, it would mark the beginning of an entirely new cycle of Court decisions. The Court would spend the next several decades delineating the boundaries to which this new interpretation of the commerce clause is subject. In essence, the Court can either remain in the contractionary portion of the second cycle of commerce clause jurisprudence, or it can initiate the third cycle by expanding the meaning of the commerce clause well beyond its original intentions.

The briefs filed in this case contain clear signals to individual justices attempting to sway them one way or another. The three most clearly targeted are Justice Scalia, Justice Kennedy, and Chief Justice Roberts. The four "liberal" justices are considered to surely vote in support of the individual mandate, and the remaining two "conservative" justices are those least likely to break ranks and be the one vote that the government needs to make its case. An article on *Politico.com* coyly claims that the Court's decision on this issue "could hinge on wheat, pot and broccoli," and this quip is not too far from the truth.[3] Two major Court precedents about the commerce clause involve the growth of wheat and the possession of marijuana (pot). The Act's opponents frequently cite the argument that if the Congress can make people buy healthcare, it could make them enter into almost any commercial action, including buying broccoli.

While both parties crafted their arguments to win over these three key jurists, only one of the parties appears to be successful. Based on the relative weaknesses in the briefs, there were several main issues that each side had to address during oral arguments. Unfortunately for the Obama Administration, the respondents were more persuasive in convincing these three key players. The Court will likely vote 5-4 to overturn the minimum coverage provision of the Act. Although the decision will be along ideological lines, each of the three justices whose vote has been identified as potentially up for grabs will weigh arguments specific to their own constitutional beliefs. The Court will determine that the petitioners have failed to make their case that the commerce clause authorizes the Congress to require individuals to purchase healthcare insurance. In doing

[3] Gerstein, Josh. "Health law could hinge on wheat, pot and broccoli." *Politico*. Accessed 22 March 2012. http://www.politico.com/news/stories/0312/74324.html.

so, the Court will maintain the line in the sand that it drew over a decade ago and prevent another cycle of expansion for the Congress' commerce power.

Chapter 2: Overview of the Act

I. Political History

When Barack Obama was sworn in as the 44th President of the United States, he made it clear that healthcare was going to be one of his priorities. During his inaugural address, Obama twice mentioned problems with the health care system's excessive costs and inability to provide high quality, technological-advanced healthcare to everyone.[1] Less than a year and a half later, on March 23, 2010, President Obama signed the Patient Protection and Affordable Care Act (PPACA, "the Act") into law. PPACA has become one of the biggest domestic issues for contention between Democrats and Republicans. During the election cycle, throughout congressional debates, and even after it became law, the Act has drawn sharp criticism from opponents and laurels from its supporters.

Obama's pressure for health care reform was one of his major campaign promises. Early in his campaign for the presidency, Obama pushed universal healthcare reform as one of the cornerstones for his potential administration. In January 2007, he said, "the time has come for universal health care in America." He was determined that by the end of his first term, this country would have universal health care.[2] Obama campaigned on the promise that his plan would ensure that all Americans would have

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[1] "Barack Obama's Inaugural Address," *New York Times*. January 20, 2010. Accessed on 13 March 2012. http://www.nytimes.com/2009/01/20/us/politics/20text-obama.html?pagewanted=all.

[2] Pickler, Nedra "Obama Calls for Healthcare Reform" *USA Today*. January 25, 2007. Accessed on March 6, 2012. http://www.usatoday.com/news/washington/2007-01-25-obama-health_x.htm.

health care coverage through employers, private health plans, the federal government, or the individual states.[3]

These healthcare promises did not necessarily differentiate him from the rest of the Democratic field of contenders. In August 2008, the Democratic Party's national platform called for the provision of access to affordable healthcare for every American citizen and pushed to make it a national priority. Hilary Clinton, Obama's primary rival in the Democratic primaries, was the first of the candidates to push for a health insurance mandate that would require everyone to carry health insurance.[4] In fact, all of the major Democratic candidates for nominee for president in 2008 supported some form of major health care reform on the federal level that purported to provide higher quality healthcare to more Americans.

It was not just the party elite who was in favor of substantial health care reform to expand access to millions of Americans, but rather it was the Democratic base across the country that strongly supported such a reform. A poll released in February 2008 by the Harvard School of Public Health revealed that 71% of voting Democrats believed that a socialized medical system was in the country's best interest and was preferable to the system that was in place at the time.[5] Polls in 2008 indicated that health care reform was either the third or fourth most important issue to voters in determining the next president.

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[3] "Barack Obama's Campaign Positions" *Washington Post.* Accessed on March 6, 2012. washingtonpost.com/2008-presidential-candidates/issues/candidates/Obama.
[4] "Democratic Platform on Healthcare" *New York Daily News*. Accessed on March 6, 2012. http://www.nydailynews.com/2008-08-21/news/17904315_1_democratic-party-platform-health-care.
[5] "Poll Finds Americans Split by Political Party Over Whether Socialized Medicine Better or Worse Than Current System" February 14, 2008. Accessed on March 6, 2012. http://www.hsph .harvard.edu/news/press-releases/2008-releases/poll-americans.

Healthcare was surpassed only by the economy following the 2008 economic crisis, the Iraq War, and possibly the price of gasoline – although many fold this into the underlying condition of the economy.[6]

Discontent with Republican Party and President Bush's handling of the economy and Iraq War led to a staggering democratic victory in the 2008 federal elections. In addition to winning the Presidency, the Democratic Party also increased their stronghold on both the House of Representatives and the Senate. While the Republicans were only the minority in the Senate prior to 2008 because the two Independents joined the Democrats, Republicans failed to pick up a single Democratic seat and lost eight of their own, giving the Democrats a 59-41 majority – inclusive of the two independents who caucused with the Democratic majority. The House saw a less drastic increase in Democratic power as they picked up 21 formerly Republican districts to give themselves a 257-178 majority over John Boehner's Republican minority. With near filibuster-proof levels of control of the Congress, President Obama and his Democratic Party were poised to follow-up on the promises they made to gain this control.

With the structural advantages of controlling two branches of the federal government, a health care reform pursuant to their desires was entirely possible.[7] March 2010 represented a close to over a year of active political debate over health reform. However, even with such strong institutional factors on their side, the Democrats were unable to push the legislation through without it being bogged down by Republicans who attempted to neuter it at every turn. On nearly every vote of significance, all Republicans

[6] "March Health Care Tracking Poll" *Kaiser Family Foundation*, 2010.
[7] Rigby, Elizabeth, Jennifer Hayes Clark, and Stacey Pelika. 2011. "Party Politics & Enactment of 'ObamaCare': Another Look at Minority Party Influence."

lined up to oppose the motion while nearly every Democrat voted in support.[8] As a result, the Senate Majority Leader, Harry Reid, had to ensure the support of all 58 of his Democrats and both Independents to pass any legislation and break the quasi-filibuster informally attached to every motion by the Republican opposition. Republicans used various other procedural quirks to stall the bill's passing.[9]

Ostensibly, Republicans were not attempting to defeat the bill or delay its implementation out of spite. Instead, their actions were rooted in their conservative political ideals that value a laissez-faire market and a small federal government. To them, PPACA represented an encroachment of states' rights and a violation of the basic free market economy that has made America prosper. Republicans support an approach that empowers individuals to make the choices necessary to have access to the highest quality healthcare, but without such high governmental intervention. They further object to requiring individuals to purchase health insurance if they do not feel that the costs justify such a purchase. As a result, Republicans range in their opposition of the Act from simply disliking several of the more intrusive provisions to finding the whole notion of a federal regulation of the healthcare market "un-American."

President Obama and the Democratic Party are motivated by ideals of social justice and equity. They view access to quality healthcare as a fundamental right on par with "life, liberty, and the pursuit of happiness." In 2009, a large portion of the American population was uninsured and this left over 50 million American citizens without access

[8] Jacobs, Lawrence R. 2010. "What Health Reform Teaches us About American Politics." *PS: Political Science & Politics*, 43(4):619-623.
[9] Jacobs, Lawrence R., and Theda Skocpol. *Health Care Reform and American Politics: What Everyone Needs to Know*. (New York: Oxford University Press, 2010).

to the high quality healthcare – the same healthcare services that the majority of Americans take for granted and rely on without a second thought. Healthcare spending represents roughly 16% of the United States' GDP, and its portion is only expected to increase as time goes on.[10] In 2000, it only represented 13% of GDP. This nearly 25% increase in spending over a decade is largely attributable to the rapid increase in prices as a result of technological innovations. With these rising costs, the uninsured are often unable to afford necessary medical procedures, such as preventative care or life-saving treatments. Thus, Democrats felt that it was the federal government's fiduciary duty to reform the healthcare system to make high quality healthcare services affordable and available to every American citizen.[11]

II. The Act

The Act seeks to accomplish this goal through a number of key provisions. It requires each state to establish health insurance exchanges that will offer a marketplace for the comparison and purchasing of healthcare insurance policies. States must set up a marketplace where individuals or small businesses can enter to receive as much information as possible about their options with respect to health plan benefits, premiums, and other statistics that they might find useful in making their healthcare insurance decisions. In addition, all of the policies that are on display at these exchanges have to meet a number of criteria that the Congress has established as the baseline for "qualified health plans" that they feel all Americans need in order to have access to

[10] Lee, Christie. "Number of people without health insurance climbs." *CNN*. September 13, 2011. Accessed March 6, 2012. http://www.money.cnn.com /2011/09/13/news/economy/census_bureau_health_insurance/index.htm.
[11] Peterson, Mark. "It Was a Different Time: Obama and the Unique Opportunity for Health Care Reform." *Journal of Health Politics, Policy and Law.* 36.3 (2011): 429-436.

dependable, high-quality healthcare.[12] In several years, states may begin to petition the Congress for permission to establish their own framework for a healthcare exchange system, and the Congress may approve such independence if the proposed system meets the basic requirements as described by the Congress.

To counter recent negative trends in the utilization of preventative care across low-income households, the Act also contains a provision that requires insurance companies to cover preventative care without requiring a co-payment. This has been implemented as a result of the recent emphasis healthcare professionals have placed on preventive care in saving lives and maintaining good standards of living. Studies have shown that individuals often fail to adequately respond to symptoms by visiting a health care professional because they are unable to part with the co-pay that insurance companies have grown accustomed to allowing physicians to charge based on simply visiting the doctor.[13] Research has also shown that co-payments originated in order to reduce the frequency of patient visits from the point of view of the insurance company, and the Act's framers wanted to allow patients to visit doctors to seek preventative care free of deterrents. In a move that further upset Republican voters and leaders, the PPACA includes a tax on so-called "Cadillac" insurance plans, which are defined based on the cost of coverage of the insurance plan.[14] The Act places enormous limitations on health

[12] "Patient Protection and Affordable Care Act: Health Insurance Exchanges" *National Association of Insurance Commissioners*. April 20, 2010. Accessed on March 6, 2012. http://www.naic.org/documents/committees_b_Exchanges.pdf
[13] "New Guidance Regarding PPACA Preventive Health Care Requirements" *Day Pitney, LLP*. July 27, 2010. Accessed March 6, 2012. http://www.daypitney.com/news/docs/dp_3262.pdf
[14] Patient Protection and Affordable Care Act, 111, 2. (2010).

insurance company's ability to price risk and to simply choose not to insure certain individuals.

It establishes a number of regulations governing healthcare policies that prevents insurance companies from denying applicants based on pre-existing conditions. Thus, insurance companies are prevented from denying coverage – in either group or individual plan settings – to applicants because they have a particular illness that increases the likelihood of future health problems that would likely lead to substantially higher healthcare costs. Historically, insurance companies have required extensive personal background information and healthcare histories in order to adequately price the risk associated with each particular client. While the Act marginally allows for this practice to continue, it sets a limit to how wide the premium disparity based on individual facts may be. It further prevents insurance companies from denying coverage when they feel that the financial risk that insuring that applicant exposes them to exceeds the maximum premium that they are allowed to charge them.

As a result, insurance companies have to shift the cost of insuring these individuals whose anticipated expenditures cannot be offset by their own premiums to others. They do this by raising the rates of other policyholders. From the rational actor economic theory's perspective, this would lead to the adverse selection problem, which would cripple the healthcare insurance industry. This is based on the premise that individuals shopping for healthcare insurance generally know more about their own health than the insurance companies that insure them. If the premium charged were around the average cost to the entire group of applicants, people will use only accept plans that charge them less than or equal to their expected costs. For all those who feel

that the premium exceeds the value that they will need to get from healthcare services, they will reject the offer. This only leaves people whose anticipated costs exceed their premiums because the relatively healthy people – who forecast low future medical costs – drop out of the market. Thus, insurance companies have to raise premiums, which creates another group of relatively healthy individuals whose anticipated future costs are lower than their premiums. This cycle repeats until nearly everyone has quit the market and the only available plans are too costly to afford.

III. The Individual Mandate and the Constitution

Obama and other Democratic leaders knew that the adverse selection problem combined with the potential free-riding problem – where the uninsured would show up at emergency rooms and rely on taxpayers to foot their bill – would require a solution. They deduced that a requirement for all citizens to purchase health insurance or face a fine was necessary to make the remainder of the Act effective.[15] This individual mandate, or minimum-coverage provision, prevents healthy individuals who anticipate their healthcare needs to be lower than the cost of an insurance premium from exiting the market without paying a penalty to subsidize others' premiums. Thus, high-risk individuals can be charged a lower premium – a premium that is lower than a free capitalist market would charge given the financial risks that their pre-existing conditions or other distinguishing characteristics expose the insurance company to. The individual mandate imposes a penalty or fee to be administered through the Internal Revenue Service on any individual who has not attained a healthcare insurance plan through their

[15] Wulsin, Lucien. *Individual Mandate: A Background Report*. California Research Bureau

employer or through the newly formed state-run health insurance marketplace. The Act however takes into account families and individuals for whom the purchase of healthcare would be too expensive. If it would cost more than 8% of their gross earnings, they would not be on the hook for this fee.

It is this individual mandate that has garnered the most negative publicity and drawn the sharpest attacks from critics. The majority of the American population supported the healthcare reform proposals until the addition of this minimum coverage provision. When President Obama announced this change in 2009, public opinion sharply fell off. The Act had held a longstanding positive majority since the campaign for the 2008 elections, but this majority quickly turned negative. Although polls have varied, they have consistently hovered around indicating that 60% of the population disapproves of this mandate.[16] Before this, the Obama Administration and the Democratic party had been able to cite public support as a primary motivation for being able to "ram through" the partisan legislation However, the addition of this unpopular provision shifted the public's perception of these actions from the thought that the Congress was enforcing the desires the American people at the polling booths to the ardent belief that it was ignoring their natural right to make their own decisions.[17]

While the individual mandate drew the most negative attention from the American public, there was still a large minority that felt that other provisions of the law were not in the country's best interest. As a result, the Act has faced a plethora of

[16] "Obama and Democrat's Health Care Plan Polls" *Real Clear Politics*. Accessed March 6, 2012. www.realclearpolitics.com/epolls/other/obama_and_democrats_health_care-1130.html

[17] Rigby, Elizabeth, Jennifer Hayes Clark, and Stacey Pelika. 2011.

constitutional challenges in the court system – mostly with the support of the Republican Party. Some political commentators have noted that Republicans were not at the bill's signing with President Obama and other Democratic leaders because they were getting in line at the courthouse to file motions to challenge the Act's constitutionality.[18] This flurry of judicial activity has focused on four main constitutional issues: the commerce clause basis for individual mandate, the expansion of Medicare, the Anti-Injunction Act, and the severability of the individual mandate from the remainder of the Act. While the issue about Medicare expansion revolves around states' rights and federalism, the other three constitutional challenges center on the individual mandate.

The Anti-Injunction Act is relevant because the Constitution grants the Congress the power to tax.[19] If the Supreme Court determines that the individual mandate is a tax per the definitions provided in the Anti-Injunction Act, and that the Congress is therefore simply exercising its power to tax, then there is a good chance that they would find Act's individual mandate constitutional.[20] However, the Anti-Injunction Act provides for another area of judicial decision: whether or not the plaintiffs have standing in the case. If the court rules that it is a tax, then it is likely that the Court will rule that they do not have standing to file the lawsuit because in cases of taxation, the Anti-Injunction Act dictates the tax has to be paid before it can be challenged in the court system. If the Court agrees with this interpretation, as the Fourth Circuit Court of Appeals did in its ruling in *Liberty v. Geithner*, then the earliest that they would be able to rule on the constitutionality of any of the two other bases upon which the minimum coverage provision is being challenged

[18] Jacobs and Skocpol, 132.
[19] U.S. Const. art. I, sec. 8, cl. 1.
[20] 26 U.S.C. § 7421(a)

would be 2015, a year after when the provision kicks in and the tax is levied. Even if the Anti-Injunction Act results in the Court dismissing the lawsuit, the question of the constitutionality of the individual mandate and the implied expansion of the commerce clause will still need to be decided.

The debate over the constitutionality of the individual mandate in *HHS v. Florida* rests of the Commerce Clause and, by extension, the Necessary and Proper Clause. Article I, Section 8, Clause 3 reads, "[The Congress shall have Power] To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes."[21] Therefore, if it can be determined that the individual mandate is merely a regulation of commerce "among the several states," and that the mandate is "necessary and proper for carrying into Execution the foregoing," then the Supreme Court should uphold the Act.[22] However, if the opposite is true and it is decided that the individual mandate either falls outside of the confines of the regulation of interstate commerce or is not necessary for such regulation, then the Supreme Court will strike down the individual mandate provision of the Act.

[21] U.S. Const. art. I, sec. 8, cl. 3.
[22] U.S. Const. art. I, sec. 8, cl. 18.

Chapter 3: Development of the Commerce Clause, 1824-1936

Today, it is widely accepted that the commerce clause is nearly plenary and "the single most important source of national power."[1] By the late 1930s, the commerce clause was being used to justify a myriad of Franklin D. Roosevelt's progressive programs. In 1959, constitutional scholars were arguing that the Court's interpretation of the commerce clause had led to the "virtual abandonment of limits to the federal commerce clause." This expansion of power was hardly anticipated by the Founders, who would not have agreed with the expansion of the meaning of commerce that has taken place to justify these actions.[2] How then, has the Congress' authority under the commerce clause raised to such great heights given the limited intent with which it was written? Although its powers were initially expanded in the early 19th century, the commerce clause was fairly well guarded by the Court until 1936. The Court implemented a number of restrictions during this hundred-plus year period and temporarily prevented the the commerce clause from growing to one of the federal government's most important bases of power over the states and citizens that it has become today.

I. The Marshall Court (1801-1835)

Gibbons v. Ogden (1824), also commonly known as the Steamboat Case, marked the beginning of the rapid expansion of the powers of the commerce clause. Nearly 200

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[1] Johnson, Calvin H. "The Panda's Thumb: The Modest and Mercantilist Original Meaning of the Commerce Clause," *Williams & Mary Bill of Rights Journal* 13, no 1 (2004) 3.

[2] Berger, Raoul. *Federalism: The Founders' Design* (Norman: University of Oklahoma, 1987) 122.

years later, many consider it a "masterpiece of bold assertion, coupled with discrete sidestepping."[3] The State of New York granted Robert Livingston and Robert Fulton the exclusive right to navigate steamboats between New York City and Albany. Aaron Ogden was licensed by this Livingston-Fulton syndicate to operate a steamboat between Elizabeth, New Jersey and New York City. When Thomas Gibbons began carrying passengers by steamboat between the same two cities, Ogden sued him in the New York chancery court.[4] Gibbons argued that the Livingston-Fulton monopoly, under which Ogden brought him to court, violated the commerce clause and the license that the Congress gave him under the Coastal Licensing Act. The highest court in the New York judicial system rejected this viewpoint, but Chief Justice John Marshall's opinion overturned its decision and thus started the evolution of the commerce clause into its current, nearly unfettered, form.

A question at the heart of this case was the definition of commerce. Must there be an exchange of goods for commerce to have occurred, and thus for the Congress to be able to regulate it? Aaron Ogden argued in the affirmative. He contended that the federal statute by which Gibbons was licensed was unconstitutional because it did not regulate the trading of commodities in any way. Since it did not regulate the buying or selling of goods, it could not be regulating commerce, and thus was not one of the Congress' enumerated powers.[5] Marshall however, easily dismissed this by declaring that commercial activity covered a wide range of actions and was not to be construed

[3] Johnson, Herbert A. *Gibbons v. Ogden: John Marshall, Steamboats, and the Commerce Clause* (Lawrence: University Press of Kansas, 2010) 104.
[4] ibid, 1.
[5] Coenen, Dan T. *Constitutional Law: The Commerce Clause* (New York: Foundation Press, 2004) 25.

narrowly.[6] He purported that all Americans understood this to be the case.[7] This is contrary to the fact that many legal scholars both now and then have not agreed that this wide definition of commerce is what the founders had in mind. He held that commerce is more than the mere trafficking of commodities, and that it is also intercourse, a definition under which navigation falls. *Gibbons v. Ogden* marked the beginning of the extension of the meaning of commerce beyond its traditional definition. The court decided that navigation was commerce as well, and therefore the Congress had the authority, superseding the states, to regulate it.[8] This plenary power could not be infringed upon by the states. Marshall wrote that "this power […] is complete in itself, may be exercised to its utmost extend, and acknowledges no limitations, other than are prescribed in the constitution."[9] Marshall ruled that the Congress' commerce power was plenary, and as such could control whatever moved in interstate commerce however it saw fit; this ruling has fueled the expansion of the commerce power for time to come.

The meaning of "among the several states" was also decided in this case to increase the Congress' power. To construe this phrase strictly would have meant that the Congress could only regulate commerce when the parties involved were states. However, the opinion makes note of the founders' usage of the word "among" rather than "between." Thus, Marshall contended that any commercial activity – defined using the expanded meaning he reasoned earlier in the opinion – that occurred between state lines

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[6] Benson, Paul R. *The Supreme Court and the Commerce, 1937-1970* (Cambridge: Dunellen Publishing Company, 1970) 21.
[7] Johnson, *Gibbons v. Ogden: John Marshall, Steamboats, and the Commerce Clause*, 115.
[8] Gavit, Bernard C. *The Commerce Clause of the United States Constitution* (Bloomington: Principia Press, 1932) 10.
[9] *Gibbons v. Ogden*, 22 U.S. 1 (1824), at 8.

in any fashion other than manufacturing constituted commerce "among the states."[10] Marshall provided meaning to the previously undefined and un-litigated phrase "among the states," and in doing so set a fairly broad precedent for its interpretation.[11]

Even with this ruling that sided with the Congress' power under the commerce clause and expanded the meaning of commerce, *Gibbons v. Ogden* put definite limits on the Congress' power. Marshall wrote that his definition of commerce and interpretation of the phrase "among the states" were not without reasonable boundaries. Commerce which was "completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States" could not be regulated by the Congress. He concluded, "such a power would be inconvenient and is certainly unnecessary." [12] Regardless of how broadly he was willing to define the term "among," Marshall could not fathom a reasonable definition of the word that would include commerce entirely conducted within a single state. The framers would surely have used a more suitable phrase had they intended the commerce clause to give the Congress the power to regulate commerce that occurs entirely within one state. Even with the monumental increase in the power of the commerce clause provided by *Gibbons v. Ogden*, it placed limits. *Gibbons* sets the precedent that a commercial activity must extend to or affect other states; if not, it was only intrastate commerce, and as such

[10] Brown, David W. *Commercial Power of Congress: Considered In Light of its Origin* (New York: Knickernocker Press, 1910) 217.
[11] Frankfurter, Felix. *The Commerce Clause: Under Marshall, Taney, and White*. (Chapel Hill: University of North Carolina Press, 1937) 41.
[12] *Gibbons v Ogden*, 22 U.S. 1 (1824), at 24.

not subject to the Congress' regulatory powers.[13] However, as time has gone on, these limits have been strained or broken.

The Marshall Court heard two more cases on the commerce clause. In *Brown v. Maryland* (1827), Marshall struck down a state tax on businesses that were importing or selling foreign goods. He based this partially on the commerce clause and its support of the supremacy of the Congress's Federal Tariff Act, which barred states from imposing any tariffs on imports and ensured that wholesalers could sell their goods free of state interference.[14] Marshall added that this would also prohibit the same action between states. The Court's opinion in *Willson v. The Black-Bird Creek Marsh Company* (1829) showed a slight hesitance to giving the commerce clause complete power.[15] Similar to *Gibbon v Ogden*, it was a federal coasting license dispute that brought the issue to court. The state condoned the building of a dam that limited the creek's navigability, and thus prevented a licensed steamboat operator from using it. However, Marshall did not strike down the authorization of the dam because it was not an act "repugnant to the power to regulate commerce in its dormant state," but rather a valid exercise of the state's police power and for the improvement of the general health of its citizens. Marshall reiterated the distinction between interstate and intrastate commerce, which he had introduced in *Gibbons*.[16]

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[13] O'Brien, David M. *Constitutional Law and Politics: Volume I* (New York: W. W. Norton & Company, 2003) 523.
[14] Benson, *The Supreme Court and the Commerce, 1937-1970*, 25.
[15] Bork, Robert H. and Daniel E. Troy. *Locating the Boundaries: The Scope of Congress's Power to Regulate Commerce*. Accessed 2 March 2011. http://www.constitution.org/lrev/ bork-troy.htm#111.
[16] O'Brien, *Constitutional Law and Politics: Volume I*, 501.

II. Limitations on the Commerce Power

Following Marshall's death in 1835, there was a period of comparative silence for the issue of the congressional power under the commerce clause until 1888. The only cases the Court legislated on during this period revolved around the so-called dormant commerce clause – the question over whether states could pass legislation in areas that the Congress had the enumerated authority to act, but had not yet done so. *Cooley v. Board of Wardens* (1852) marked one notable exception to this period of calm. This decision shifted the Supreme Court's focus from the nature and extent of the power under the commerce clause to the actual subjects it regulated.[17] *Cooley* made it clear that when the subject in question was national in nature, it was under the exclusive control of the Congress and its commerce clause powers. When the subject was local in nature, it could be left to the states.[18] When the subjects were "local" in their nature, the state's police power provided exclusion to the Congress' commerce power. The activity changes from local to national, and is thus governable by the federal government, when "a commodity has begun to move as an article of trade from one State to another."[19] This marked an important change in the Court's focus as the nature of the commerce power was more readily accepted and they now shifted to the cases in which the decision revolved around whether or not the activities governed by this power were local or national in nature.

A differentiation between manufacturing and commerce was made clear in *Kidd v. Pearson* (1888). While the Congress had the ability to regulate commerce on a national level, the *Kidd* decision limited the meaning of commerce. In this case, Iowa had banned

[17] Benson, *The Supreme Court and the Commerce, 1937-1970*, 35.
[18] Brown, *Commercial Power of Congress*, 227.
[19] *Cooley v. Board of Wardens*, 53 U.S. 299 (1852), at 311.

the manufacture of alcohol within their state lines. The law further noted that it was not limiting the importation of intoxicating liquors, so long as they remained in the original cases in which they were imported and obeyed all laws of the United States. The Court ruled that such an act does not conflict with the commerce power by attempting to regulate commerce among the states, even if the manufactures of the spirits intended to ship them across state lines after they were produced.

Justice Lamar's majority opinion acknowledges the difficulty in determining where the intersection between national and local activity occurs. He cites *Daniel Ball* (1870), which states that, "Whenever a commodity has begun to move as an article of trade from one state to another, commerce in that commodity between the states has commenced."[20] Therefore, Lamar decided that a good does not become national – and thus subject to the commerce power – at the point of manufacturing. It only stops being local in nature when it has been shipped or enters a common carrier for transport. Similarly to how Marshall explain the relation between commerce and intercourse, Lamar claimed that "no distinction is more popular to the common mind" that that between manufacturing and commerce.

This importance of the distinction between manufacturing and commerce in general was reiterated in a *Hammer v. Dagenhart* (1918). The Court again ruled that manufacturing in and of itself does not constitute commerce, and as such cannot be regulated. Furthermore, because manufacturing cannot be regulated, the process by which goods are manufactured cannot be regulated. Therefore, the Child Labor Act of 1915 and the Keating-Owen Act of 1918, which worked in tandem to prohibit the interstate sale of

[20] *Kidd v. Pearson*, 128 U.S. 1 (1888), at 2.

commerce produced by child labor, were unconstitutional because they attempted to regulate the manufacturing process of certain goods under the commerce clause. Since the commerce clause was construed as unable to regulate manufacturing, the Supreme Court ruled that if the manufacturing process was entirely internal to a state, the Congress could not later ban the sale of the good because of the process by which it was manufactured.[21]

Justice Day cited *Gibbons* and interpreted Marshall's wording to be equivalent to, "the [commerce] power is one to control the means by which commerce is carried on, which is directly contrary of the assumed right to forbid commerce from moving and thus destroy it as to particular commodities."[22] In essence, the *Hammer* opinion decided that the Congress could not completely outlaw products, but could only regulate the commercial transactions that they took part in, and the means by which they were shipped.[23] Because the statutes in question would result in the complete prohibition of these goods as a result of their manufacturing process, which occurred entirely inside of a single state, the commerce clause could not support their constitutionality.

However, Day had to differentiate *Hammer* from the precedent set by *Champion v. Ames* (1903), also known as the Lottery Case, several years earlier. In *Champion*, the Supreme Court ruled that the commerce power included the ability to entirely prohibit the commerce of any item across state lines. In this case, it was lottery tickets. Day distinguished between the two cases, and thus did not feel he was overturning the Lottery Case. He wrote that *Champion* (and several sister cases decided around the same time

[21] Coenen, *Constitutional Law: The Commerce,* 40.
[22] *Hammer v. Dagenhart*, 247 U.S. 251 (1918), at 270.
[23] O'Brien, *Constitutional Law and Politics: Volume I*, 524.

focusing on the same issue) involved goods that were innately harmful, and therefore the Congress had more leeway in prohibiting them.[24] Without acknowledging whether or not child labor was intrinsically harmful, he wrote than "the goods shipped are of themselves harmless." [25] Allowing these laws to stand would have effectively brought all manufacturing of any goods possibly destined for interstate commerce under federal control. This would have overturned the *Kidd* decision, as well as the numerous other decisions that differentiated the power the Congress had over commerce and the lack of authority they have over manufacturing.[26] Thus, *Hammer* provided some limitation on the extension of the commerce power given by *Champion*.

III. Stream-of-Commerce Doctrine and Affecting-Commerce Theory

The ruling from *Swift & Company v. United States* (1905) provided some hope for those who wanted the commerce power to extend beyond the limitations *Hammer* put on it. This hope was based on the stream-of-commerce doctrine arising from Justice Holmes' opinion in *Swift*.[27] Using the Sherman Antitrust Act, an injunction was issued to stop meatpacking firms from holding cattle in Midwestern stockyards to drive up prices. Holmes held the Congress' act constitutional using the commerce power, arguing that they could regulate the monopolies because their actions were a part of the stream of commerce. Even though the holding up of the cattle by delaying the transfer of title occurred entirely within a single state, the sale was a part of the stream of commerce whereby they were part of a constant and recurring course through which the cattle

[24] Coenen, *Constitutional Law: The Commerce,* 40.
[25] *Hammer v Dagenhart*, 247 U.S. 251 (1918), at 272
[26] Coenen, *Constitutional Law: The Commerce,* 41.
[27] Benson, *The Supreme Court and the Commerce, 1937-1970*, 53.

always travelled into interstate commerce. Because the transfer of title was merely a stop along the way between the beginning and ending, the Sherman Antitrust Act could enjoin such action.

Holmes wrote than, "commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business."[28] Although their actions were technically entirely local, the fact that they were a part of this current of commerce allowed for them to be construed as national, and as such subject to the commerce power. This stream-of-commerce doctrine sought to further enlarge federal power under the commerce clause in *Stafford v. Wallace* (1922). Chief Justice Taft agreed, and allowed for the regulation of meatpackers based entirely in Chicago to be regulated because the "stockyards [were] but a throat through which the current" flowed.[29]

These decisions left many questions unanswered, not the least of which asked how far into the business process would this stream-of-commerce doctrine would allow the Congress to extend its hand. *A.L.A. Schechter Poultry Corporation v. United States* (1935) and *Carter v. Carter Coal Company* (1936) answered this question. Both of these cases severely limited the substantive impact the steam-of-commerce doctrine could have. They made it clear that *Swift* did not decide, "that the interstate commerce power extended to the growth or production of the things which, after production, entered the flow."[30] Thus, they re-reaffirmed the barrier between commerce and manufacturing that had been set up by the likes of *Hammer* and *Kidd*, but had been recently overturned. In

[28] *Swift & Company v. United States,* 196 U.S. 375 (1905), at 398.
[29] Coenen, *Constitutional Law: The Commerce,* 43.
[30] *Carter v. Carter Coal Company*, 298 U.S. 238 (1936), at 305.

Schechter Poultry, the Court ruled that the steam-of-commerce had stopped because the company only traded with intrastate buyers and suppliers. Therefore, any affect the company had on interstate commerce would be entirely indirect, not the direct effects that could be governed by the Congress. This distinction between an indirect and direct effect on interstate commerce was key.

This affecting-commerce theory is based on the notion that an action that affects interstate commerce can affect it either directly or indirectly, and this ultimately expanded the Congress' commercial power. The commerce clause gives the Congress the power to regulate actions that directly affect interstate commerce. But, when the effect is indirect, the Congress does not have the ability to regulate it via the commerce clause. One of the most decisive cases that started using the affecting-commerce theory was *Houston E. & W. T. Ry. Co. v. United States* (1914), also referred to as the Shreveport Rate Case. The Court held that because the Congress would not have been able to regulate interstate commerce effectively, it could regulate intrastate commerce to that end.[31] Thus, because these intrastate actions directly affected interstate commerce, they could be regulated under the commerce clause.[32]

IV. Conclusion

By the end of 1936, the Supreme Court had used a number of conditions that had to be met in order for the Congress to have the power under the commerce clause to regulate an activity. Most of these conditions focused on the difference between interstate and intrastate commerce, the pure latter of which the Congress had no authority to

[31] *Houston E. & W. T. Ry. Co. v. United States*, 234 U.S. 342 (1914), at 344.
[32] Coenen, *Constitutional Law: The Commerce,* 50.

regulate. *Hammer, Kidd,* and *E.C. Knight Company* showed the importance of the distinction between manufacturing and commerce – or production and distribution. This rule enabled the Court to simultaneously extend to states the ability to regulate or tax activities that were only production and limit the reach of the congressional commerce power.[33] The stream-of-commerce doctrine and affecting-commerce theory were other tests provided by *Swift* and *Shreveport*; *Schechter Poultry* and *Carter Coal* limited the Congress' ability to use these tests to extend of power. Between *Gibbons* and *Carter Coal*, the Court established the basic meaning of the commerce clause and implemented a number of rules that placed limitations on the Congress' commerce power. This was merely the calm before the storm. Franklin D. Roosevelt's 2nd New Deal legislation required the Court to have a different view of the commerce power than it had developed for over a hundred years, and he was determined to change the Court's perspective.

[33] O'Brien, *Constitutional Law and Politics: Volume I*, 523.

Chapter 4: Development of the Commerce Clause, 1936-2012

Gibbons resulted in an expansion of congressional power under the commerce clause, and decades later it was countered by cases like *Cooley, Hammer, Schechter Poultry,* and *Carter Coal* that worked to implement various tests and constraints to limit and restrict this power. This cycle repeated itself with the unprecedented expansion of the Court's interpretation of commerce clause arising from Franklin D. Roosevelt's 2nd New Deal and the subsequent attempt to mitigate that expansion which began under the Rehnquist Court. Although FDR's "court-packing plan" failed to gain momentum in the Congress, many historians consider it as having successfully served its purpose by acting as the catalyst for the Court's sudden shift in policy regarding the commerce clause between 1936 and 1937 to a position more favorable to FDR's progressive programs.[1] The Court again dramatically expanded the reach and meaning of the commerce power in 1937, and it only moved to curtail this power extension after the Rehnquist Court's initiation in 1986.

I. Roosevelt's New Deal

FDR saw a plethora of his New Deal and Hundred Days legislation invalidated by the Court. The Court explained that these programs, even if they were objectively beneficial for the country, exceeded the Congress' enumerated powers and were a far cry from the regulation of interstate commerce. The Court struck down nearly every

[1] Coenen, Dan T. *Constitutional Law: The Commerce Clause* (New York: Foundation Press, 2004) 60.

important provision of FDR's New Deal legislation – save for the devaluation of the dollar and removal of the gold standard – in cases revolving around anything from railroad retirement accounts (*Railroad Retirement Board v. Alton R.R. Co*., 1935) and subsidies under the Agricultural Adjustment Act (*United States v. Butler*, 1935) to women's minimum wage laws (*Morehead v. New York ex rel. Tipaldo*, 1937).[2] The Court based these rulings on the affecting-commerce theory and other precedents they had established, which had curtailed the Congress' commerce power. This judicial interference in programs was very unpopular with the American public.[3]

FDR's 2nd New Deal involved a series of more progressive legislation. The Wagner Act, Public Utility Holding Company Act, and Social Security Act were about to be invalidated by the Court, if it followed precedent. To keep these programs in place, FDR resorted to proposing that the Congress increase the number of Supreme Court justices from nine to fifteen. Since he would choose justices sympathetic to his progressive programs, this would nearly ensure the Court's acknowledgement of the constitutionality of key legislation. Although the Congress and the public reacted poorly to this plan, the Court issued several rulings that indicated it had changed its views on any perceived limits to the commerce power.[4] This judicial revolution is referred to as a "change in time that saved nine." Had the court not changed their perception of the scope of the commerce clause, it is likely that their invalidation of these new programs would

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[2] O'Brien, David M. *Constitutional Law and Politics: Volume I* (New York: W. W. Norton & Company, 2003) 536.
[3] Bork, Robert H. and Daniel E. Troy *Locating the Boundaries: The Scope of Congress's Power to Regulate Commerce*. Accessed 2 March 2011. http://www.constitution.org/lrev/bork-troy.htm#111.
[4] Coenen, *Constitutional Law: The Commerce Clause*, 62.

have given FDR enough support to pack the Court.[5] It is important to note that the changes in the Court's philosophies were not limited to its interpretation of the commerce clause.

This "switch in time" began with the Court's upholding of a minimum wage law in *West Coast Hotel Company v. Parrish* (1937) and of the National Labor Relations Act in *National Labor Relations Board v. Jones & Laughlin Steel Corporation* (1937) two weeks later.[6] As mentioned earlier, the court revolutionized more than just its view of the commerce clause. *Parrish* overturned *Adkins v. Children's Hospital* (1923) and ruled that freedom of contract could be violated if the state law protected the community as whole or small portions of it.[7] The *National Labor Relations Board* decision, however, directly involved the commerce clause.

Jones & Laughlin Steel involved a steel company that was alleged to have discriminated against workers who wanted to join a labor union. This violated the Wagner Act, which ensured equal treatment for union members and organizers. The NLRB, under the authorization of the Wagner Act and the National Labor Relations Act, required the steel company to rehire the workers and pay them for lost wages. However, district and appellate courts – using precedent established by the Supreme Court – ruled that the NLRB did not have the power under the commerce clause to take such an action. They ruled that, like in *Hammer* and *Carter Coal*, because the manufacturing process was entirely local in nature, and thus does not significantly affect interstate commerce, that the Congress could not impose those rules.

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[5] Coenen, *Constitutional Law: The Commerce Clause*, 61.
[6] O'Brien, *Constitutional Law and Politics: Volume I,* 538.
[7] *West Coast Hotel Company v. Parrish*, 300 U.S. 379 (1937), at 399.

However, the Supreme Court overturned the lower courts' decisions. The Court ruled that the NLRB had jurisdiction over any person involved in unfair labor practices that affected commerce, even if it were only in manufacturing processes. Chief Justice Hughes ruled that if activities were entirely intrastate in nature but had "such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions," the commerce power could reach it.[8] Even though the employees were solely engaged in manufacturing, Hughes did not view this as determinative. Thus, the *E.C. Knight* and *Carter Coal* – the latter of which had only been decided the year before – were effectively dismissed. However, Hughes did not explicitly state this, but rather he only alluded to other grounds being the basis for which *Carter Coal* was decided. Even though the Court was unwilling to overturn the production-transportation distinction emphasized by *Carter Coal* based on judicial reasoning in this case, they used this case as the basis for their decision in *Labor Board v. Friedman-Harry Marks* (1937).[9] Regardless of the fact that the company in the later case rarely entered into interstate commerce of any kind, the Court used *Jones & Laughlin Steel* to declare any doubt about the constitutionality of the labor boards' action as "without merit."[10] Thus, it gave the Congress a new power. It allowed the Congress to regulate labor-management relations in private industry and business.[11]

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[8] *National Labor Relations Board v. Jones & Laughlin Steel Corporation,* 301 U.S. 1 (1937), at 37.
[9] Coenen, *Constitutional Law: The Commerce Clause*, 83.
[10] *Labor Board v. Friedman-Harry Marks Clothing Co.,* 301 U.S. 58 (1937), at 75.
[11] Benson, Paul R. *The Supreme Court and the Commerce, 1937-1970* (Cambridge: Dunellen Publishing Company, 1970) 82.

Three years later, the Court overruled *Hammer v. Dagenhart* and further limited the application of *Carter Coal* in its decision in *United States v. Darby* (1941). This case completely eliminated the distinction between manufacturing and transportation. The Fair Labor Standards Act prohibited the interstate shipping of any goods that were produced under conditions that failed to meet its standards. The Court unanimously ruled that even though goods made in unfair labor conditions failed to be inherently bad in and of themselves, they still could be regulated because the Congress now had the authority to prohibit the interstate sale of any good it so deemed necessary.[12] The court was able to rationalize the effect these labor practices had on interstate commerce by pointing out that unfair labor conditions could lead to strikes, which would in turn affect interstate commerce, and because poor labor conditions could drive down labor conditions in other states. Citing Marshall's plenary view of the commerce clause, *Darby* essentially eliminated the prevailing distinction between direct and indirect effects on interstate commerce. Any activity that affected interstate commerce in any fashion was subject to the Congress' authority via the commerce clause.[13] The Congress had the authority to control entirely internal concerns of the state if control of these concerns were necessary to achieve the plenary authority granted to it by the Constitution.[14]

One of the most remarkable examples of the expansion of the commerce clause resulting from New Deal legislation is *Wickard v. Filburn* (1942).[15] In this well-known case, a farmer, Roscoe Filburn, was growing wheat on his own farm for personal

[12] Coenen, *Constitutional Law: The Commerce Clause*, 66.
[13] Benson, *The Supreme Court and the Commerce, 1937-1970*, 91.
[14] *United States v. Darby* 312 U.S. 100 (1941), at 113
[15] O'Brien, *Constitutional Law and Politics: Volume I*, 539.

consumption in excess of the maximum amount of wheat allowed per acre established by Agricultural Adjustment Act of 1938. Filburn argued that since the wheat he grew never became interstate commerce – or commerce of any kind for that matter – because he grew it for his own use, the Congress lacked the authority to regulate it under the commerce clause.

However, the Court disagreed. They ruled that because the purpose of the act was to regulate national wheat prices, and by not buying wheat on the national market Filburn affected the national price of wheat, Filburn had an effect on interstate commerce. Even if his actions did not have a substantial effect on interstate commerce, the combination of numerous farmers doing the same would have a substantial effect. Furthermore, the distinction between direct and indirect effects on interstate commerce that was declared a part of a "fundamental … maintenance of our constitutional system," had been tossed aside.[16] An activity that is not inherently commercial in nature could now be regulated under the commerce clause. Thus, the precedent was set for the Congress to regulate any activity – local or national in nature – if a rational basis existed for its effect on interstate commerce.[17]

II. The Rehnquist Court

The Court's enlarged view of the scope of the commerce clause went essentially unchecked from 1942, when *Wickard* was decided, until 1995, when the Rehnquist Court addressed the commerce power for the first time. The basis that an activity had any effect on interstate commerce was used to justify a myriad of congressional regulations.

[16] *A.L.A. Schechter Poultry v. United States,* 295 U.S. 495 (1935), at 547.
[17] Benson, *The Supreme Court and the Commerce, 1937-1970*, 100.

Following Chief Justice Warren Burgers' retirement in 1986, the Rehnquist Court began issuing a number of decisions that limited federal power in favor of states' rights. One major area around which the Court differed from historical decisions was the commerce clause. The Court issued meaningful decisions in *U.S. v Lopez* (1995), *U.S. v. Morrison* (2000), and *Gonzales v. Raich* (2005). In both *Lopez* and *Morrison,* the Court put a limit on the Court's increasingly expansive interpretation of the commerce power for the first time since *Jones & Laughlin Steel* and *Wickard v. Filburn*.[18] While these two cases seemed to be part of the cycle of responding to broad decisions, as seen earlier, *Gonzales v. Raich* once again set the Court back in the direction of an expansive commerce power.

A. *United States v. Lopez* (1995)

U.S. v. Lopez was the first Supreme Court decision to rule against the government's use of the commerce power in over sixty years. Alfonso Lopez was a high school student who was convicted of violating a federal law, the Gun Free School Zones Act of 1990, after carrying a revolver on school premises. Lopez challenged his conviction on the basis that the regulation of Texas' public schools went beyond the constitutional powers of the Congress. The district judge rejected this viewpoint, arguing that the regulation was a valid exercise of the commerce power because the "business of elementary, middle, and high school" affects interstate commerce. The Fifth Circuit Court of Appeals overturned this ruling, but did so in a fashion very favorable for the government. It ruled that the government had not established a strong enough link between the act and an effect on interstate commerce. If the Congress were able to give

[18] Collins, Julie K. "Scalia's Raich Concurrence: A Significant Departure from Originalist Interpretation?" *Marquette Law Review* (90.4) 1043-1068.

more evidence to support the existence of such an effect on interstate commerce, the Appeals Court indicated it would have no problem accepting it as a valid exercise of the commerce power.

The Supreme Court affirmed the Appeals Court's decision, but did so on grounds much less reminiscent of *Wickard v. Filburn* than the Appeal Court's opinion. In a 5-4 decision, the Court ruled that the Act exceeded congressional authority over the commerce clause. Chief Justice Rehnquist chose to write the opinion of the Court himself, as this was a major departure from decades of precedents. Rehnquist acknowledges the three categories of authority that the Court has recognized for activities that the Congress may regulate under the commerce clause: (1) the use of the channels of interstate commerce (2) regulate and protect the instrumentalities of interstate commerce, and (3) activities that have a substantial relation to and affect on interstate commerce.

The Court altered the third category. It argued that case law has never declared that the Congress "may use a relatively trivial impact on commerce as an excuse for the broad regulation of state or private activities." Thus, the affect on interstate commerce cannot be a mere insignificant one upon which the only constitutional basis of the act relies. Thus, it was decided that the proper test of the constitutionality of an act requires an analysis of whether or not the regulated activity "substantially affects" interstate commerce. The first two categories were quickly discarded as not being applicable to the case in any way. The Court concluded that it did not fall under the third category's protection because it was not an activity that substantially affected interstate commerce.

In making this determination, the court further analyzed precedent with respect to economic versus non-economic activity. The Court looked at numerous cases where the

Court perceived the effect on interstate commerce to warrant the invocation of the commerce clause, and came to the conclusion that these were all economic activities. Regulations on coal mining, wages, and labor disputes are some examples of the economic activities that the Court had said affected interstate commerce. The Court explained that even *Wickard*, considered one of the most far reaching expansions of the commerce power, involved an economic activity in a way that *Lopez* did not. *Wickard* was about the growth of wheat, an item a short step away from entering the realm of commerce. Filburn was ruled against because his intrastate activity had to be regulated in order to ensure the Congress' effective regulation of interstate commerce. However, the Court was unable to find such a connection between carrying a gun in a school zone and commerce, let alone interstate commerce. It was a non-economic activity that could not be shown to have a substantial effect on interstate commerce. The Act regulated a non-economic activity the failed to pass the substantive effect test.

The government tried to argue the possession of a firearm in a school zone substantially affects interstate commerce because it could lead to a violent crime. Violent crime can affect interstate commerce in two ways: the cost of – and insurance against – violent crimes are substantial throughout the whole population and the unsafe perception created by violent crimes would reduce the willingness of people to travel throughout the country. Furthermore, violent crimes on school premises would handicap the educational process, which would in turn affect interstate commerce when the pupil's turned out less productive economically. Because guns in school could limit national productivity, they could be regulated under the auspices of interstate commerce.

The Court was unmoved by the argument because it felt that it would essentially authorize a general federal police power. Analyzing the cost of crime would lead the Congress to having the authority to not just regulate violent crime, but also to regulate any activity that could lead to violent crime, and then in turn affect interstate commerce – without care for how related the economic activity the crime-affecting action was. Furthermore, the court saw virtually no limits to congressional power under the commerce clause if it accepted the "national productivity" theory. Using this theory, the Congress could regulate anything from family law to dietary requirements if it found a connection to the economic productivity of its population. They conclude that accepting the government's argument would posit a scenario in which the Court would be hard pressed to find any activity that the Congress could not tie back to interstate commerce and thus not be able to regulate.

Lopez held that the "possession of a gun in a local school zone is in no sense an economic activity that might through repetition elsewhere, substantially affect any sort of interstate commerce." Lopez was a local student at a local high school who was in no way recently involved in interstate commerce. It was similarly not proven that the firearm had any ties to interstate commerce. It would require the piling of "inference upon inference" to uphold the constitutionality of the statute.[19] While Rehnquist recognizes that earlier cases had made steps down this road "giving great deference to congressional action," such suppositions would eliminate any remaining distinction between national and local. Unwilling to do this, the Court used *Lopez* to rein in the runaway power that the commerce clause had become since *Wickard*. Thus, the court held, "where economic

[19] *United States v. Lopez*, 514 U.S. 549 (1995)

activity substantially affects interstate commerce, legislation regulating the activity with be sustained." The addition of the words "economic" and "substantially" are what served to break the chain of Court decisions increasingly strengthening the Congress' commerce power.

B. *United States v. Morrison* (2000)

The Violence Against Women Act of 1994 created a means through which victims of gender-motivated violence could seek remedies in civil court. Christy Brzonkala sued Antonio Morrison and James Crawford after alleging that they had assaulted and raped her. When Morrison moved to dismiss the complaint on the basis that the Act's civil remedy provision was unconstitutional, the United States intervened to defend the Act's constitutional basis. An en banc panel of the Fourth Circuit Court of Appeals held that the Congress lacked the authority to implement such a civil remedy provision under either the enforcement powers drawn from section five of Fourteenth amendment or the commerce clause in *Brzonkala v. Virginia Polytechnic and State University*, which were the two sources of power that the Congress explicitly stated they had relied upon in the act. The equal protection clause's relevance to this case is beyond the scope of this paper and will not be discussed beyond to say that it was found insufficient to justify the act by the Supreme Court.

Chief Justice Rehnquist used *United States v. Lopez* (1995) as one of the major precedents in his majority opinion for the court that ultimately concluded that the federal civil remedy provided by the act exceeds the congress' authority under the commerce clause. The Court mentions, just as it had done in *Lopez*, that the Congress had been given significant latitude under the commerce clause since *Jones & Laughlin Steel* –

much more than previous case law would have allowed. *Morrison* reiterated the fact that even with the modern interpretation of the commerce clause, the Congress' regulatory authority was not without effective boundaries. The government attempted to use the third category of activity for which the Congress may regulate under its commerce power. Drawing from *Lopez* and *Jones & Laughlin Steel*, the commerce power gave the Congress the ability to regulate activities that have a substantial relation to or affect on interstate commerce.

The distinction between an activities being of an economic nature versus a non-economic nature was an important factor in the Court's opinion. This fact, along with the many other holdings in the case, mirrors *Lopez*. The court cites *Lopez's* holding regarding the review of historical commerce clause case law. In the cases where the Court used the third category, of substantially affecting interstate commerce, to uphold the regulation of the activity in question, the activity had always been economic in nature. In one way or another, there was a reasonable link that could be drawn between the action that was being regulated and commerce. However, there was no such link for the activities regulated in *Lopez* or *Morrison*.

The Court found that by no stretch of the imagination could it be found that gender-motivated crimes of violence were economic activity.[20] Furthermore, the court found no jurisdictional element in *Morrison* that established a link between the act and interstate commerce. The fact that the Congress claimed that such a substantial link existed, was not sufficient for making it so. Instead, the decision as to the extent of the link's effect on interstate commerce was a judicial rather than legislative question, and as

[20] *United States v. Morrison*, 529 U.S. 598 (2000)

such could only be determined by the Supreme Court, as mentioned in *Lopez*. Thus, the congressional findings that attempted to add the jurisdictional element were not sufficient in the Court's eyes. The Court emphasized the requirement for the distinction between what is truly national and what is truly local. As such, the Court solidified the *Lopez* decision's limitation on the expansion of the Congress' power to regulate activity under the commerce clause.

C. *Gonzales v. Raich* (2005)

Unlike the previous two decisions that worked to contain the expansion of the Congress' powers under the commerce clause, *Gonzales v. Raich* (2005) upheld the federal law in question. A number of Angel Raich's marijuana plants were seized or destroyed by Drug Enforcement Agency agents working under the authority of the Controlled Substances Act. Raich sued for injunctive and declarative relief based on the fact that the CSA outlawed her possessing, obtaining, or manufacturing of cannabis for their personal, medical use. She argued that the act violated the commerce clause, the due process clause of the Fifth Amendment, the Ninth and Tenth amendments, and the doctrine of medical necessity. Again, for purposes of this paper, only the challenge to the authority granted by the commerce clause shall be discussed.

The majority opinion, written by Justice Breyer, concluded that the CSA was a valid exercise of the Congress' power to regulate interstate markets for medicinal substances, even if those substances were produced and consumed locally. Raich argued that the CSA's categorical prohibition of the manufacture and possession of marijuana for

medical purposes […] exceeds Congress' authority under the commerce clause."[21] The Court rejected the "separate class of activities" based on the medical nature of the marijuana. Thus, the claim can be boiled down to the belief that entirely locally cultivated products sold locally rather than on the open market, are not subject to federal regulation. However, the Court cites *Wickard v. Filburn* to refute that claim. The large magnitude of the commercial market for marijuana was undisputed, and as such the Court used precedent to rule it a valid application of the Congress' commerce power.

The Court found that the test of the third category allowed the Congress to regulate purely local activities if they have a substantial affect on interstate commerce. This allowance of federal regulation of entirely local, intrastate activities began with *Wickard*. Similarly to how the existence of wheat on Gibbon's farm might have prompted him to sell it at some point when wheat prices rose and thus inhibit the Congress' ability to stabilize wheat prices, the Congress' ability to eliminate the commercial transaction of marijuana altogether is inhibited by the existence of the locally grown marijuana. Thus, it was not difficult for the Court to determine that a rational basis existed for believing that the concerns that the local cultivation and use of marijuana hindered the ability of the Congress to regulate the interstate commerce of marijuana.

The court differentiated *Raich* from its earlier two commerce clause cases. Unlike those two cases, the cultivation and usage of medical marijuana constituted economic activity. Furthermore, the CSA was designed to regulate that interstate commerce.[22] Unlike the Gun Free School Zones Act of 1990, the CSA's prohibition of marijuana was

[21] *Gonzales v. Raich*, 545 U.S. 14 (2005)
[22] *Gonzales v. Raich*, 545 U.S. 9 (2005)

considered an essential part of a larger regulation of economic activity, and that regulation would be undercut without the regulation of intrastate activity. The previous two cases were noneconomic in nature, and this fact contributed to their decisions. The Court cited *Morrison*, in declaring that "where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained." The Court found that the intrastate, noncommercial growth, possession, and use of marijuana was within the realm of activities that the Congress could regulate under the commerce clause. Because it was an economic activity and the exemptions for which can be clearly seen to significantly impact the interstate supply and demand sides of the market, the Court ruled that it substantially affected interstate commerce.

III. Conclusion

The New Deal and seventy years afterwards saw a rapid expansion of the Court's perception of the Congress' commerce power. *Lopez* and *Morrison* ended that expansion. Their holdings only partially rolled back Congress' power as they focused on whether or not the affect an activity had on interstate commerce was "substantial" and required that for any activity to be regulated under the commerce clause, it, in and of itself, had to be economic in nature. Many view *Raich* as a turn away from *Lopez* and *Morrison* and an indication that the court is leaning more towards a New Deal-style perception of the commerce clause. However, it is important to note than neither *Lopez* nor *Morrison* overturned *Wickard v. Filburn*; rather, they differentiated themselves from it because they were non-economic activities. *Raich* did not breach this distinction between economic and non-economic activities. In fact, *Raich* used this distinction to explain its ruling. Although some might argue with the extent to which the growth and use of

marijuana is an economic activity, they are certainly more of an economic activity than the possession of guns on school premises or a gender-motivated hate crime. *Lopez*, *Morrison*, and *Raich* supported a contractive response to the New Deal's expansion of the commerce power, by focusing the court on the bearing the distinction between economic and non-economic activities has on the activities' ability to substantially affect interstate commerce.

Chapter 5: Briefs in *Health and Human Services v. Florida*

The minimum coverage provision, or individual mandate provision, of the Patient Protection and Affordable Care Act (Pub. L. No. 111-148, 124 Stat. 119) is the focus of myriad lawsuits challenging its constitutionality. This issue reached its pinnacle in *HHS v. Florida* (No. 11-398). In this case, the petitioner is the Department of Health and Human Services. The respondents filed two briefs as they are broken down into two groups: state respondents and private respondents. The question for which the writ of certiorari was granted is, "whether the congress had the power under Article I of the Constitution to enact the minimum coverage provision." The commerce clause and the necessary and proper clause are the two aspects of Article I that are at the center of this debate. The petitioners seek to overturn the Court of Appeals for the Eleventh Circuit's decision that the individual mandate exceeded the constitutional authority given to it by Article I, while the respondents argue that the appellate court's decision should be upheld. The briefs enter into discussions regarding the Congress' taxing power as another basis for the constitutionality of the minimum coverage provision, but this paper only focuses on whether or not the commerce clause authorizes the Congress to maintain such a provision.

I. Fundamental Differences between the Parties

The major disagreements between the petitioners and the respondents can be boiled down to several differences in interpretation. They both acknowledge that the Congress is a legislative body of enumerated and limited powers, but they disagree about

whether or not the enforcement of the individual mandate is a part of the affirmative grant of power given by the commerce clause and the necessary and proper clause. First, while the respondents view the individual mandate under the commerce clause as an unprecedented expansion of power, the petitioners see it as an anticipated evolution due to the new type of federal government that has developed since the New Deal. Second, the respondents claim that if it is deemed constitutional, it would be very difficult to imagine the boundaries that could be placed on the Congress, but the petitioners dismiss this argument by characterizing the healthcare market as a unique market unlike any other and do not feel that a threat exists as a result of these unique circumstances. The third major difference is their perception of the minimum coverage provision as a regulation of inactivity or activity, and whether or not this distinction matters. Another major different is their views on both the answer to and the premise of the question about whether or not the necessary and proper clause lets the Congress fix problems it created by its exercise of other powers. While these are not all of the disagreements gleaned from the briefs of *HHS v Florida* on the individual mandate, they are the key differences that are likely to have the most bearing on the Supreme Court's upcoming ruling.

II. Brief for Petitioners

The federal government purports that the minimum coverage provision is a constitutional act of the Congress for two reasons. First, it is a necessary component of a large scheme of the regulation of interstate commerce that is within the Congress' enumerated powers; without the provision, this broader scheme would be ineffective. The second basis for the government's argument is independent of this broader scheme. The minimum coverage provision in and of itself regulates economic conduct that has a

substantial effect on interstate commerce, and is therefore constitutional even without being part of a larger scheme of interstate ecommerce regulation.[1] The petitioners conclude their argument for the constitutionality of the provision under the commerce clause by claiming that the clause does not prohibit the regulation of inactivity, but even if it did, the minimum coverage provision is a regulation of activity rather than inactivity.[2] Therefore, the Congress has the constitutional authority to enforce the provision.

The United States' brief for the petitioners begins by explaining the current state of the healthcare in this country. It reminds the Justices of the importance of healthcare, as it states that the market accounts for 17.6% of our national economy. The primary means of payment in this market is insurance, but many cannot afford it or are denied coverage due to pre-existing conditions. The brief cites Congressional Budget Office statistics of 2009 that claim that payments by health insurance companies and government programs accounted for 84% of national spending on healthcare. However, the uninsured still consume healthcare without being able to pay for it at the time of service. The government argues that the participation of the uninsured in the healthcare market shifts risks and costs to the other market participants. Because state and federal laws require emergency rooms to treat patients regardless of their insurance status, the uninsured are still able to participate in the healthcare market. However, some research indicates that the uninsured are unable to pay up to 63% of their medical bills. Because healthcare providers are unable to collect the fees from these uninsured individuals, they

[1] *Department of Health and Human Services v. State of Florida*, No. 11-398. Brief for Petitioners (Minimum Coverage Provision), 33.
[2] *HHS v. Florida,* Brief for Petitioners, 50.

are forced to pass the costs onto other market participants. The Congress has estimated that these costs are passed on to insured families to the tune of $1,000 a year.[3] The brief also summarizes the Act and the history of attempted reforms on American healthcare.[4]

The brief argues for the broad power that the Congress is given by the commerce and necessary and proper clauses. It cites *Gonzales v. Raich* in concluding that the Congress may regulate activities that substantially affect interstate commerce even if they are purely local activities, so long as they are economic in nature.[5] Furthermore, the Congress need not prove that the activity substantially affects interstate commerce, only that a rational basis exists for the belief that in aggregate the activities could affect interstate commerce.[6] The necessary and proper clause makes it clear that the federal government has the power to enact any laws that are useful to this end.[7] The minimum coverage provision is necessary to effectuate the Congress' otherwise legitimate ends, and as such the Court should show the Congress great deference to its decisions as to how to meet its goal. It is an integral part of the Act's end to discriminatory practices in the individual healthcare insurance market because, without this provision, many individuals would wait to purchase health insurance until they believed that they needed care. And, as a result of the guaranteed-issue and community-rating provisions, they would be able to get this insurance. Because the Court has historically shown great deference to the Congress in determining how to accomplish its regulation of interstate commerce, the minimum coverage provision should be upheld.

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[3] ibid, 8.
[4] ibid, 14.
[5] ibid, 22.
[6] *Gonzales v. Raich*, 545 U.S. 17 (2005)
[7] *McCulloch v. Maryland*, 17 U.S. 316 (1819)

The activities that the minimum coverage provision regulates are the "economic and financial decisions about how and when health care is paid for and when health insurance is purchased"[8] Under the assumptions of the various other provisions of the Act, some individuals would choose not to purchase healthcare insurance until they needed it, which would push financial risks to insurance companies and healthcare providers, quite possibly across interstate lines. Therefore, the activity that the Congress is allowed to regulate is the foregoing of purchasing health insurance. Based on the size of the healthcare industry in dollar terms, the brief does not find it difficult to consider this decision an economy activity. Therefore, citing *United States v. Morrison*, it argues that the provision should be sustained because it regulates an economic activity that substantially affects interstate commerce.[9]

The federal government directly challenges the basis upon which the court of appeals based their decision to overturn the minimum coverage provision. The court of appeals acknowledged that the Congress could require individuals who "consume health care to pay for it with insurance when doing so."[10] It found that requiring people to maintain health insurance is proper in regulating the method of payment in the market for healthcare. The appeals court justices, as well as the respondents, make a distinction between requiring individuals to have healthcare insurance when they file their taxes and when they receive medical care. The petitioners interpret this requirement for the regulation of behavior at the point of consumption to infringe upon the Congress'

[8] *HHS v. Florida,* Brief for Petitioners, 33.
[9] ibid, 34.
[10] Ibid, 118a-119a.

aforementioned ability to decide how best to achieve its objectives.[11] They argue that focusing on the point of consumption is illogical for an issue regarding healthcare insurance because the healthcare insurance market would never survive financially if people were allowed to get insurance on their way to the hospital, and therefore the congress was reasonable in requiring insurance before consumption.[12] Furthermore, given the societal view the denial of emergency medical care is immoral, requiring people to have healthcare insurance when they need emergency medical care would be inappropriate.

The petitioners also had to differentiate this case from *Lopez* and *Morrison*, both of which the appeals court partially based their decision on to overturn the minimum coverage provision. They read *Lopez* as overturning the federal prohibition of guns on school premises because it was not an essential part of a larger regulation of economic activity. Furthermore, the prohibition itself is, in no way, an economic activity nor could it possibly affect interstate commerce in a substantial way.[13] Any connection to interstate commerce was too contrived to make it a valid execution of the commerce power. Similarly, gender-motivated crime, which was the issue in *Morrison*, was in no way an economic activity; the Court rejected the same attenuated effects they might have on interstate commerce.[14] However, the minimum coverage provision, which regulates how people pay for their healthcare, is quintessentially economic in nature. They argue that this economic activity directly affects interstate economic and commercial activity,

[11] ibid, 38.
[12] ibid, 39.
[13] *United States v. Lopez*, 514 U.S. 549 (1995)
[14] *United States v. Morrison*, 529 U.S. 598 (2000)

unlike the activities of *Lopez* or *Morrison*. Furthermore, neither of those two cases reasonably purported that the regulation of either respective activity was a part of a larger regulatory scheme aimed at regulating interstate commerce.

The final hurdle that petitioners attempt to jump is the notion that the Congress cannot regulate "inactivity." They argue that there is no textual support in the commerce clause or in case law to indicate that there is any limitation on the regulation of inactivity. They argue that at the time the constitution was written, the meaning of regulate meant "to direct," which in turn meant "to order; to command."[15] Thus, they conclude that when it was written, the commerce clause had intended for the Congress to be able to require individual to take action under the auspices of regulation. They further saw, at the time of the founding, no limitation on the term "commerce" to "existing commerce." The Court disregarded content-based or subject-matter distinctions between production/manufacturing and transportation as well as direct and indirect effects in *Lopez* as not being appropriate for the "new ear of federal regulation under the commerce power."[16] Therefore, petitioners contend that the distinction between activity and inactivity is based on mere "semantic or formalistic categories" which attempt to distinguish between activities that are considered commerce and those that are not so considered. They use *Wickard* to emphasize that the Court should use a practical approach and not give controlling influence to nomenclature.

Yet, they also contend that their regulation of people's decisions about whether or not to buy healthcare insurance is still a regulation of activity, not inactivity. This is

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[15] *HHS v. Florida,* Brief for Petitioners, 48.
[16] *United States v. Lopez*, 514 U.S. 569 (1995)

because the uninsured, as a class, are active in the market because they regularly look for and receive healthcare services. Therefore, they are regulating this activity of getting healthcare by requiring them to do so through and pay for by insurance. Choosing self-insurance is as much an activity as choosing private-insurance. Based on the assumption that the uninsured will still have to use healthcare, the minimum coverage provision only regulates the way in which they finance what they consume.[17] They construe *Wickard*'s holding that the Congress could restrict the extent "to which one may forestall resort to the market" as allowing the Congress to similarly requiring individuals to "resort to the market" for insurance rather than self-insure.[18] In addition, since uninsured individuals shift risk from themselves to the rest of the market, it is an activity. The fact that they choose to externalize their risk to other market participants makes their choice not to get insurance a commercial activity.

III. Brief for Respondents

It is clear from the beginning of their briefs that the respondents' focus will be on the difference between regulating commerce and compelling individuals to enter into commerce. They argue that the individual mandates imposes an unprecedented requirement on American citizens that abolishes the principle of enumerated powers that are defined and limited.[19] They challenge the government's characterization of the individual mandate as regulating "the timing and method of financing the purchase of

[17] *HHS v. Florida,* Brief for Petitioners, 50.
[18] ibid, 50 and *Wickard v. Filburn*, 317 U.S. 127 (1814)
[19] *Department of Health and Human Services v. State of Florida*, No. 11-398. Brief for Private Respondents on the Individual Mandate, 7.

health care services."[20] Instead, they contend that this euphemistic description does not adequately describe what the provision does. They argue that upholding the minimum coverage provision would remove the last shred of a federal government with limited and enumerated powers.

The commerce power allows for the regulation of extant commerce, not for the introduction of new commerce by compelling individuals to enter into it. *Lopez* and *Gonzales* point out the three categories of activities that the Congress may regulate under the commerce power: (1) channels of interstate commerce (2) instrumentalities of interstate commerce and (3) economic activities that substantially affect interstate commerce.[21] The regulation of inactivity is covered by none of these three categories. They point out that *Gibbons* defined the commerce power as the power "to prescribe the rule by which commerce is to be governed," and to prescribe the means why which commerce shall be conducted. They argue that it is axiomatic that the phrase to "regulate commerce" implies that there must be commerce in existence to regulate. The power was not written by the founders to "compel individuals into commerce so that the Congress has something to regulate."[22] The framers intended on giving the Congress the ability to regulate ongoing interstate commerce, not create commerce and impose rules on this new commerce to burden individuals.

The respondents analyze this distinction further via the surrounding text of Article 1, Section 8 of the Constitution. They point out that in the only two other clauses that

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[20] *Department of Health and Human Services v. State of Florida*, No. 11-398. Brief for State Respondents on the Individual Mandate, 12.
[21] *HHS v. Florida,* Brief for Private Respondents, 18.
[22] *HHS v. Florida,* Brief for State Respondents, 16.

give the Congress the power to regulate something, they first and separately give the Congress to ability to bring it into existence. The two examples provided are the ability to "coin money" being given before the ability to "regulate the value thereof" and the power to "raise and support Armies" and "provide and maintain a Navy" being conferred upon the Congress before the power to "make Rules for the Government and Regulation of the land and Naval Forces."[23] Had the framers intended, or had it been generally understood, that the power to bring into existence was a part of the power to regulate, they would not have needed to add these extra clauses. However, since this was not the case, they had no reason to think that the power to regulate interstate commerce could ever be construed to give the Congress the power to compel individuals to participate in market transactions.

They further point to the assumed absence of such a power, evident in the entire history of congressional legislation. There have been numerous times in the recent and distant past when the ability to compel people into commerce would have been viewed as a highly attractive option, if the Congress had thought that their commerce clause powers could extend that far. They point out how much easier it would have been for the Congress to simply compel individuals to buy wheat to stabilize prices than to enforce such a complicated system with subsidies and quotas that came up in *Wickard* with the hopes that indirectly it would maintain the desirable price level.[24] As the Congress had to come up with intricate and creative means by which to stimulate the economy during the

[23] U.S. Constitution art. I., Section 8, clauses 5, 12-14 and *HHS v. Florida,* Brief for State Respondents, 19.
[24] *HHS v. Florida,* Brief for Private Respondents, 30.

Great Depression, the world wars, or the 2008 financial crisis, it never thought that it achieve this stimulation simply by forcing individuals to enter the market. [25]

The respondents attack the characterization of the individual mandate purported by the government, which claims it is a regulation of "the way in which individuals finance their participation in the health care market."[26] However, the Act never prescribes that individuals have to use their insurance that the mandate requires them to pay for to cover their healthcare costs. Instead, there is no connection between the required insurance and the method by which individuals have to pay. The Congress furthers this fact by making it clear that they actually hope that these healthy individuals who now have to purchase healthcare insurance will not use the insurance, so that their premiums will instead subsidizes the costs of other participants.

The briefs then turn to challenging the idea that the minimum coverage provision is an integral part of the remainder of the Act's permissible regulations of the Congress. They do not agree with the government that the mandate is not an end in itself. The necessary and proper clause only allows for the Congress to employ means by which otherwise constitutional objectives can be met; it does not give the Congress any large power to be "used for its own sake."[27] However, the power to create commerce rivals the power to raise and support the army and navy, which required their own explicit clauses. As such, it cannot simply be accepted as being an incidental byproduct of the power to regulate commerce. Of even more interest is the fact that the Congress, as well as the petitioner's brief, accept that they need the individual mandate not to let the rest of the

[25] *HHS v. Florida,* Brief for State Respondents, 23.
[26] *HHS v. Florida,* Brief for Petitioners, 18.
[27] *McCulloch v. Maryland*, 17 U.S. 416 (1812)

legislation be effective, but instead to counteract how effective the rest of the legislation would be without it because people would take advantage of the clauses.[28] It is unlikely that the founders intended the commerce power's combination with the necessary and proper clause to allow the Congress to create problems that require extraconstitutional solutions to fix.

The respondents do not limit their questioning of the use of the necessary and proper clause at this. They contend that even if the mandate is accepted as a means of executing their enumerated power under the commerce clause, it is still not "law … proper for the carrying into execution" of that power.[29] It is not proper for carrying into execution such a power because it violates the letter and spirit of the constitution, in direct contraction to *McCulloch*.[30] Several statutes regulating interstate commerce have been held unconstitutional by the Court because they were "inconsistent with the federal structure of our government," as stated in *New York v. United States.*[31] They argue that one of the most basic principles guarding the federal structure of our government is the concept of the federal government having only limited, enumerated powers. The power to compel individuals to enter into commerce is such a plenary power that it could allow the Congress to control nearly every decision that could be construed to have a substantial affect on interstate commerce.[32]

The notion that health and policing powers should and have always been left to the states rather than the federal government is also brought up. Even *Gibbons* recognized

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[28] *HHS v. Florida,* Brief for State Respondents, 34.
[29] *HHS v. Florida,* Brief for Private Respondents, 25.
[30] *HHS v. Florida,* Brief for State Respondents, 34.
[31] *New York v. United States*, 505 U.S. 144 (1992)
[32] *HHS v. Florida,* Brief for State Respondents, 37.

that "health laws of every description" are among the plethora of legislation that should, and must, be exercised most advantageously by the states themselves. It points out that many states have passed legislation expressly preventing their residents from being burdened by the individual mandate. If the Court were to rule that the Congress' commerce power, as amplified under the necessary and proper clause, overrules these laws, it would take the general policing power away from the states in favor of an even stronger federal police power.[33]

IV. Reply Brief for Petitioners

The reply brief for the United States focuses on their two main arguments for the minimum coverage provision's constitutionality from their initial brief. The provision regulates an economic activity that substantially affects interstate commerce, and it is necessary and proper to carry out the rest of the Act's reforms. In response to the respondent's brief that emphasized the fact that the Congress was attempting to create commerce out of thin air, the government argued that they were simply regulating an activity that already existed: uninsured people's routine use of healthcare they cannot afford. They point out that as such, they are not creating new commerce to regulate, but are merely dictating "the timing and method of financing health-care services that members of the regulated class consume."[34] It is a pre-existing economic activity that has the substantial economic effect of risk-shifting and cost-shifting. They argue that no one can be inactive in their choice of how to insure against future healthcare costs. Choosing

[33] ibid, 38.
[34] *Department of Health and Human Services v. State of Florida*, No. 11-398. Reply Brief for Petitioners (Minimum Coverage Provision), 5

self-insurance is as much of an action and choice as choosing private insurance.[35] Therefore, the arguments regarding the expansion of commerce is irrelevant because no other market has the same substantial economic effects resulting from a choice of perceived inactivity.

They attack the argument regarding the timing of the requirement. The fact that the regulation is imposed well before consumption is mere difference in degree, not in the substance of the regulation. There is no constitutional or case law basis for deciding between these two choices of timing. Since the respondents would accept it at the point of consumption, it would also be constitutional at an earlier point because the Court should not dictate to the Congress the means by which it attains its constitutionally sound objectives.

The respondents' claims regarding the lack of authority under the necessary and proper clause is also countered. They argue that the necessary part of the clause is met solely by the fact that it is "'convenient, or useful, or essential' to the execution of an enumerated power," citing *McCulloch*. Since, in their minds, that standard is met, no further inquiry into whether or not the law is necessary it needed. They disregard the argument around the proper part of the clause by analyzing the two cases the respondents used as examples, *New York v. United States* (1992) and *Printz v. United States* (1997).[36] In both cases, it was the Congress' attempt to command the states that was improper, but they left open the ability to command individual citizens. Therefore, no precedent exists in their minds for overturning the congressional commerce legislation on the basis that it

[35] ibid, 6.
[36] ibid, 9.

was either not necessary or improper. Therefore, the minimum coverage provision is argued to be necessary and proper to carry out the rest of the act's health insurance reforms. While the respondents characterize the act's guaranteed-issue and community-rating provisions as the cause of the need for the minimum coverage provision, the petitioners argue that it is simply necessary in order to make them effective.[37]

[37] ibid, 13.

Chapter 6: The Supreme Court's Upcoming Decision

The Supreme Court's decision on the constitutionality of the minimum coverage provision in *HHS v. Florida* will have immense consequences on the futures of the country, Obama administration, and healthcare market. While several of the Justice's decisions have been predicted with high degrees of confidence, a few justices are not so easy to read. As a result, there is little consensus among legal experts as to which way the court is going to rule on the constitutionality of the individual mandate. Based on the effectiveness of the parties' briefs, oral arguments will be the deciding factor in the Court's decision. The written arguments, in conjunction with their constitutional philosophies, likely left several justices with questions that would have to be resolved in order for the particular justice to vote with that side.

The "liberal justices" Ginsberg, Breyer, Sotomayor, and Kagan are widely thought to vote in favor of the mandate, but only two of the "conservative justices" are believed to be as locked-in on the other side of the argument. Justices Alito and Thomas are assumed to vote against the mandate, but the two remaining conservatives, Justice Scalia and Chief Justice Roberts, are faced with decisions that could lead them to vote against ideological lines. The swing vote, Justice Kennedy, is also difficult to envisage. If any of these three justices break ideological ranks and the join the four liberals, the individual mandate will be upheld and the commerce power will again be expanded. Roberts, Scalia, and Kennedy are each presented with unique circumstances that lead to

different degrees of uncertainty with which their decisions can be predicted months before the opinion of the Court is to be issued.

I. Justice Antonin Scalia

Justice Scalia's decision would have been a foregone conclusion, had it not been for *Raich v. Gonzales* (2005). With the regulation of congressional power he promoted in *U.S. v. Lopez* and *U.S. v. Morrison*, a similar check on the commerce power appears likely. However, in *Raich*, Scalia issued a concurring opinion that allowed the Congress to exercise its commerce powers over noneconomic activities, moving away from his limitation on the congressional commerce power. Thus, he could easily offer the four liberal justices the fifth vote that they need in order to form a majority. The importance of his vote can be seen in the parties' briefs as they frequently cite his opinions and argue extensively on the issues that he based his decision on in *Raich*.

In *Raich*, Scalia based his support of the Congress' legislation on the necessary and proper clause of the Constitution. If the Congress needs to ban the simple possession of marijuana as part of a larger regulation of interstate commerce, it can do it so long as they are "appropriate means of achieving the legitimate end of eradicating marijuana from interstate commerce."[1] Scalia wrote that the Congress could regulate noneconomic, entirely intrastate activity so long as it is a necessary part of a broader scheme of regulation of interstate commerce. He does, however, consider the fact that as in *Lopez*, the Congress may not "pile inference upon inference in order to establish that noneconomic activity has a substantial effect on interstate commerce."[2] It is not difficult

[1] *Gonzales v. Raich,* 545 U.S. 1, Scalia, J. concurring in judgment, 32-42 (2005).
[2] *United States v. Lopez*, 514 U.S. 549 (1995), at 571.

to consider that the uninsured's choice not to purchase health care has a substantial effect on interstate commerce, and as such Scalia might agree that the Congress has the ability to regulate it. Scalia would not have to decide whether or not the minimum coverage provision was a regulation of economic activity. The only issue Scalia would have to decide would be whether or not the provision was an appropriate way to effectuate the regulation of the national health insurance market.

However, there are still important distinctions between *Raich* and *HHS v. Florida* that might let Scalia keep his intellectual integrity and dedication to federalism. In *Raich*, the Californians made the choice to enter into the realm of commerce by possessing marijuana. Even though the possession of marijuana in and of itself is not economic in nature, it was just one stop away from entering into interstate commerce by the choice of the person possessing it. There is no choice that American citizens make that subjects them to the individual mandate, just as there is nothing that they can choose to do or not to do in the hopes of remaining outside of the realm of interstate commerce and the reach of the mandate. Whereas marijuana is one step away from the interstate market because someone chose to possess marijuana, a person is one step away from the international healthcare market simply because of his or her American citizenship. Furthermore, Scalia can point to the fact that the individual mandate is not required for the Congress to effectively regulate insurance companies. The rest of the act provides for the regulation of the market that the Congress desires, but it merely has unintended consequences – in that it almost works too well. Scalia is unlikely to believe that unintended consequences give the Congress free license to correct them however it sees fit.

Perhaps most different of all is the fact that healthcare insurance mandate is an entirely new issue. As a strict originalist and federalist, Scalia cares about the Constitution's limits on congressional power.[3] Scalia was a member of the "federalist five" that constituted the majority on *Lopez* and *Morrison*. In that former instance, they issued the first court decision to stop the expansion of the commerce power by not allowing "attenuated links" to interstate commerce pass the substantial effects test.[4] Although they did not overturn precedent, they drew the line. Since the individual mandate would provide for the new regulation of inactivity – from which individuals cannot escape – Scalia might use this distinction to separate himself from *Raich* and vote to overturn the minimum coverage provision. In *Printz v. United States*, Scalia affirmed the notion that the fact that the Congress has historically not exercised an attractive power gives strong evidence that such a power does not, in fact, exist.[5] *Raich* regulated an activity, and Scalia could take the position that choosing not to get private insurance is not an activity to preserve his intellectual honesty while maintaining his well-known view that the commerce clause needs limits.

In 2011, Scalia joined Justice Thomas' dissent of the Court's decision to deny issuing a writ of certiorari in *Alderman v. United States.* This demonstrated his commitment to federalism and limits on the commerce power.[6] In this case, the Ninth Court of Appeals ruled that the Congress had the power under the commerce clause to

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[3] Ralph A. Rossum, *Antonin Scalia's Jurisprudence: Text and Tradition* (Lawrence: University of Kansas, 2006) 28.
[4] *United States v. Lopez*, 514 U.S. 549 (1995), at 550.
[5] *Printz v. United States*, 521 U.S. 898 (1997).
[6] Elwood, John, "Supreme Court Relist Watch" *The Volokh Conspiracy*. 10 January 2011. Accessed 24 March 2012. http://volokh.com/2011/01/10/supreme-court-relist-watch-7/.

prevent felons from possessing or transporting body armor. The Court failed to grant certiorari, meaning that at least six justices decided not to hear the case, and allowed this ruling to stand. Thomas wrote that the Court "tacitly accept[ed] the nullification of our recent commerce clause jurisprudence" of *Lopez* and *Morrison* by allowing the appeals court to base its decision on a case from 1977, *Scarborough v. United States*.[7] By joining Thomas on this dissent, Scalia signaled that his concurrence in *Raich* did not indicate a monumental swing in his perception of the interpretation of the commerce clause. The dissent argued that the appeals court's logic threatened the "proper limits on Congress' commerce power" and concluded that the Court should have granted certiorari, and thus hinted that Scalia's vote on the individual mandate would be more along the lines of *Lopez* and *Morrison* than *Raich*.[8]

Scalia is a brilliant justice and could likely find many other distinguishing features that render his concurrence in *Raich* insignificant in the healthcare litigation, and he is likely to do so in order to limit the commerce power. While Scalia has been hesitant to overturn precedent in the past, he would not pass up the opportunity to prevent another leap forward in the expansive nature of the interpretation of the commerce power. Scalia reinforced his dedication to the limited nature of the Congress' enumerated commerce power by joining Thomas' dissent in *Alderman*. Scalia will be more persuaded by the respondents' arguments and vote to strike down the minimum coverage provision of the Act.

[7] *Alderman v. United* States, 562 U.S. (2011), Thomas, J. dissenting, 1.
[8] ibid, 3.

II. Justice Anthony Kennedy

As the Court's infamous swing vote since the departure of Justice O'Connor, Kennedy is likely to fall on the winning side of this debate. However, his vote is far from certain. Justice Kennedy believes in two ideas, which would each result in a different decision for the determination of the constitutionality of the minimum coverage provision. First, he believes in the judicial – rather than political – duty to enforce limits on the federal government's power. This belief would have him leaning towards overturning the minimum coverage provision. Second, he promotes the acceptance of the modern view of the expanded congressional regulation of the national economy.[9] This belief has him leaning towards accepting the provision as a required part of the regulation of the new national economy that has arisen following industrialization and the New Deal. Thus, the question as to which side Kennedy is likely to push the Court's decision has its answer in how effectively each side demonstrated the ability, or inability, of the mandate to represent judicially enforceable limits on future federal power.[10] If the petitioners are unable to make their case for a practical and enforceable stopping point for federal power under the commerce clause, Kennedy's recent trend for conservative rulings might very well break the tie in favor of overturning the mandate.

Kennedy voted against upholding the Gun Free School Zones Act in *Lopez* because he ruled that the law regulated "an activity beyond the realm of commerce in the

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[9] Frank J. Colluci, *Justice Kennedy's Jurisprudence: the Full and Necessary Meaning of Liberty* (Lawrence: University Press of Kansas, 2009) 243.
[10] "Inside the Mind of Justice Kennedy on the Mandates' Constitutionality." *BasmanRoseLaw.* 30 March 2011. Accessed 28 March 2012. http://basmanroselaw.blogspot.com/2011/03/inside-mind-of-justice-kennedy-on.html.

ordinary and usual sense of the term."[11] In that regard, even though he refused to join the majority and only gave his own concurrence, there is an indication that this distinction between action and inaction could lead Kennedy to overturn the mandate. Kennedy stresses the "ordinary and usual" meaning of commerce in his concurrence, and it is hardly within the average American's understanding that choosing not do anything is an action. Congress had held since *Wickard* that any action that substantially affects interstate commerce could be regulated, even if it is entirely intrastate and non-economic in nature. Even though the choice not to purchase healthcare is non-economic and local, Kennedy might construe *Wickard* as not covering it because it is outside of the realm of the ordinary and understood meaning of commerce, both today and at the time of the founding.

The petitioners' briefs do a good job at targeting Kennedy by emphasizing that the individual mandate is a part of the broader scheme of regulatory powers that the Congress has assumed since the New Deal. They cite the importance that the healthcare market plays in the individual and national level, and they also bring to bear the substantial effect that the uninsured have on the nation's healthcare market. He has a practical "post-New Deal conception of the federal power to regulate a national economy," and the briefs play to the importance the individual mandate has in the Congress' regulation of this new national economy.[12] By intricately connecting the individual mandate's necessity in regulating interstate commerce to *Wickard* and

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[11] *United States v. Lopez*, 514 U.S. 549, Kennedy, J. concurring in judgment 568-584 (1995)

[12] Colluci, *Justice Kennedy's Jurisprudence: the Full and Necessary Meaning of Liberty*, 87.

demonstrating the large impact individuals' decision have in aggregate to the workings of the national economy as a whole, the petitioners have strongly pushed Kennedy towards accepting the mandate as a forum of new regulation required after the New Deal.

However, the petitioners' attempt to convince Kennedy that allowing the individual mandate to stand would still allow for practical limitations on federal power was not as convincing. They first try to dispel this argument from the respondents by citing Scalia's opinion in *Harmelin v. Michigan* (1992), claiming that the argument is weak because there is little "probability that the parade will in fact materialize."[13] Since the Congress is accountable to the people, they contend that the Congress would never pass laws requiring the people to purchase products like broccoli or cars – examples that have been brought up by the opposition in both the media and elsewhere as items that the Congress could legislate if the Court allowed the individual mandate. At first, they are unable to distinguish the medical insurance market from any other commercial market. Their response failed to adequately draw a line where "federal authority must be subject to some limitations." The simple fact that the Congress might not use this authority would not placate Kennedy.[14]

Sliding away from this argument, they try to sooth Kennedy's fears with a "healthcare insurance is different" argument.[15] They argue that because insurance is inherently different from regular market transactions. The receipt of an insurance card

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[13] *Department of Health and Human Services v. State of Florida*, No. 11-398. Reply Brief for Petitioners (Minimum Coverage Provision), 18.
[14] Frank J. Colluci, "Inside the Mind of Justice Kennedy," *The New Republic.* Accessed 28 March 2012. http://www.tnr.com/article/politics/85813/anthony-kennedy-health-care-supreme-court?page=0,0.
[15] *HHS v. Florida*, Reply Brief for Petitioners, 19.

and insurance coverage is not the ends to which a payment for healthcare insurance is made, but rather the end good is the receipt of healthcare services. In most transactions, such as car purchases or broccoli, the good that is paid for and immediately received is the end desired. However, as respondents have pointed out, the Congress in no way has required people to use the insurance that they purchase, but instead they can finance their transaction however they see fit.[16] Thus, the receipt of insurance is the end to which the Congress has declared the transaction must seek – not the use of the insurance for health services as the petitioners contend. Therefore, their conclusion that "upholding the minimum coverage provision thus would not authorize Congress to compel purchases of an end-product by a stranger to that end-product's market" is false, because the end product in the case of the individual mandate is the insurance, and as such there is no distinction.[17]

The government fails to provide any doctrine that would lead to a meaningful limit on the federal powers that would exist if the Court upheld the individual mandate. They first try to sidestep the argument by claiming that the Congress would never compel the people to buy anything, even though they do in fact have that power. However, Kennedy has expressed that political limits are not enough to curb exorbitant federal powers, but instead there must be judicial limits that can be readily enforced.[18] Their attempt to characterize the healthcare insurance market as different failed as well. This removed another method by which the Court could have easily distinguished this ruling

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[16] *Department of Health and Human Services v. State of Florida*, No. 11-398. Brief for State Respondents on the Individual Mandate, 37.
[17] *HHS v. Florida*, Reply Brief for Petitioners, 19.
[18] Colluci, *Justice Kennedy's Jurisprudence: the Full and Necessary Meaning of Liberty*, 155.

from others in the future. Given the petitioners' inability to persuade the Court of the existence of a rationale by which they could limit federal power, their success in unlikely. Kennedy will most likely vote against the minimum coverage provision, even though it was well portrayed as an extension of the New Deal type of federal government's regulation of the single national economy, because the petitioners' briefs failed to placate his commitment to judicially enforceable limits on the federal government.

III. Chief Justice John Roberts

Chief Justice Roberts' vote is also difficult to predict. There are two main arenas from which Roberts is going to be heavily influenced. The first is his view of the Constitution, the commerce clause, and their relevance to the individual mandate – in essence, the same debate every Justice on the Court will undergo. The second arena, however, is one in which none of the other Justices could enter: being the Chief Justice. The fact that Roberts is the Chief Justice could play an incredibly important role in his decision making process. Beyond his own constitutional rationales, Chief Justice Roberts will also be affected by the importance he places on the Roberts' Court's legacy, the public's perception of the Court, and the ability to decide who writes the opinion of the Court if he votes with the majority.

With respect to Roberts' constitutionally grounded basis – as opposed to the basis resulting from his position as Chief Justice – for determining which way to vote, he has given signals that could lend his vote to either side in this debate. In Roberts' first judicial opinion in 2003, while on the Court of Appeals for the District of Columbia Circuit, he expressed a position limiting the Congress' commerce power in *Rancho Viejo v. Norton*. In dissenting from the majority opinion, he argued for an en banc review because the

Congress did not have the power under the commerce clause to enforce the Endangered Species' Act and prevent a construction company from building houses due to the presence of a species of frog. He argued that the emphasis has to be placed on "whether the *activity* being regulated" substantially affects interstate commerce, rather than "whether the challenged *regulation*" does so.[19] He disagreed with the appellate court's rationalization to sustain the application of the Act, which was that the construction was interstate commerce and the regulation governs that commerce, not whether or not removing the frog was interstate commerce. He thought that the court should have looked at the regulated activity, as looking beyond the regulated activity "would effectively obliterate the limiting purpose of the commerce clause."[20]

This distinction can be brought to bear on how he will rule on the individual mandate. He emphasized that the commerce clause was, in fact, a limited power and that the Court had the responsibility to keep it as such. Applying his rationale to the discussion at hand, one of the questions that the petitioners would need to answer to Roberts' satisfaction is whether the activity being regulated by the individual mandate substantially affects interstate commerce. In the strictest terms, the activity being regulated by the mandate is the activity that it prevents. Since it prevents the practice of self-insurance, or not getting health insurance, Roberts would view the choice to not purchase health insurance as the activity being regulated. Following this, would the simple fact that someone does not purchase health insurance substantially affect interstate commerce? The answer is clearly that it does not and that an effect on interstate

[19] *Rancho Viejo v. Norton*, No. 01-5373, Roberts, J. dissenting, 1.
[20] ibid, 1.

commerce would only exist once an uninsured individual seeks healthcare services and fails to make the payment. Roberts has to be convinced that, without "looking primarily beyond," the act of not purchasing health insurance, there is a substantial effect on interstate commerce. A whole series of actions – the uninsured getting ill, seeking medical treatment, getting this treatment, and failing to pay for these services – necessarily constitutes "looking primarily beyond." As such, if he follows the arguments from his dissent in *Rancho Viejo v. Norton*, Roberts will vote against the individual mandate and rule it unconstitutional.

Some scholars cite *United States v. Comstock* (2010) in predicting that Roberts will vote to uphold the individual mandate.[21] In this case, Roberts joined Breyer's opinion of the Court that promoted an expansive view of the necessary and proper clause. Rather than concurring in judgment and writing a separate opinion like the other two non-liberal justices Kennedy and Alito, Roberts chose to be a member of the majority and subscribe to this view of the necessary and proper clause. *Comstock* ruled that the Court should show significant deference to the methods by which the Congress chooses to implement its enumerated powers. In this case, the majority voted to uphold an act of the Congress that authorized the civil commitment of sex offenders following their release from prison at the end of their sentence. In essence, the *Comstock* majority opinion said that so long as a law's goal is to further an enumerated power and the Congress has a rational basis for believing it so, it is probably acceptable.

[21] Eric R. Clayes, "Obamacare and the Limits of Judicial Conservatism," *National Affairs*, ed. 8. Summer 2011, 58.

While Roberts' support in *Comstock* should definitely give pause, it is hardly indicative of his vote in the upcoming case. There are several reasons why Roberts – and the court in general – will likely pass over the *Comstock* decision as an important precedent for his decision-making process in *HHS v. Florida*. Breyer bases the Court's aforementioned broad interpretation of the necessary and proper clause on "five considerations, taken together."[22] Immediately, it is clear that this decision will not have far-reaching consequences as it will only serve as a precedent for other situations in which all five of these factors are also present. Therefore, to determine if *Comstock* will sway the Court, or indicate Roberts' position, in the minimum coverage debate to favor the constitutionality of the individual mandate under the commerce clause, it must be determined that these same five considerations exist.

The first factor is irrelevant, as it is a necessary condition for the second so it will be ignored.[23] The second consideration is that the law was "an addition to a set of […] statutes that have existed for many decades."[24] While the government has clearly regulated the insurance market for decades, it is hard to substantiate the claim that the individual mandate can be considered an extension of that legislation. However, the scope Breyer defined in the opinion is fairly broad and as such the second consideration could help or hurt either side, but it at least provides for some doubt and debate. The third consideration is that the regulation "reasonably extended long standing policy."[25]

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[22] *United States v. Comstock,* 560 U.S. ___ (2010), 5.
[23] Ilya Shapiro and Trevor Burrus, "Not Necessarily Proper: *Comstock's* Errors and Limitations," *The Cato Institute*. 28 February 2011. Accessed 25 March 2012. http://www.cato.org/pubs/articles/Shapiro-ComstockArticle.pdf, 422.
[24] *United States v. Comstock,* 9.
[25] *United States v. Comstock,* 14.

While some might be able to make strained arguments to support the existence of this consideration for the individual mandate, they could not be as conclusive as those that were used by Breyer to support the claim in *Comstock*.[26] The fourth consideration taken into account by Breyer was that the statute "properly accounts for state interests."[27] In this instance, the states were allowed to remove federal interference if they could show that they were able to sustain a program that accomplished the same ends. Given that the only leeway given to the states in the Act is the ability to run the health insurance exchange in their own fashion, the individual mandate entirely fails to satisfy this requirement. Furthermore, as evidenced by the composition of the respondents, the states are at the lead charging against the Act because it does not leave them any choice.

The fifth premise upon which *Comstock* is based is slightly strained as the individual mandate could be construed as "too sweeping in its scope."[28] In *Comstock*, the scope of the act was substantially limited. It only affected convicted sex offenders and only until such a time that their re-introduction into society was deemed safe. The minimum coverage provision is a sweeping new legislative item that affects everyone in the United States. In fact, it has no limitation whatsoever. Because the individual mandate provision fails to meet at least three of the five factors upon which Breyer and Roberts based their interpretation of the necessary and proper clause, its applicability to *HHS v. Florida* is weak, at best. Roberts' decision is not leaning towards allowing the individual mandate based on this decision. In fact, it could be argued that as the most conservative member of the majority, these five considerations were required for Roberts to join in and

[26] Shapiro, "Not Necessarily Proper: *Comstock's* Errors and Limitations," 424.
[27] *United States v. Comstock,* 16.
[28] *United States v. Comstock,* 18.

that without them, he would have wholly rejected this view of the necessary and proper clause.

Now that Roberts' credentials and vote – based solely on his perception of the constitutionality of the mandate – have been re-established as more conservative than liberal, the impact of his role as Chief Justice has to be analyzed. Roberts knows that the American public has an increasingly partisan view of the Court. Another 5-4 decision split along the same conservative-liberal ideological lines striking down Democratic President Obama's keystone legislation would only reinforce this idea. The Chief Justice is aware of the legacy that he will leave behind, and even though this case is early in his career, it will have long-lasting implications.[29] Roberts feels some pressure to promote a more decisive ruling than a 5-4 ideological split. Thus the question becomes whether or not Roberts would be willing make a decision contrary to the one he believes to be constitutional for the sake of the Court's legacy. This is doubtful.[30]

However, the fact that Roberts has the task of assigning who writes the Court's opinion if he is on the majority might push him to vote to uphold the individual mandate if the four liberal justices had already gotten another justice to side with them. This would allow Roberts to assign the case to either himself or the conservative justice who flipped sides in order to limit the decision as a precedent for the future, if he felt so inclined. Furthermore, if the Court was split 5-3 when it was his turn to cast a vote, he might be

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[29] Liptak, Adam. "Health Care Act Offers Roberts a Signature Case," *The New York Times*. 11. March 2012. Accessed 18 March 2012. http://www.nytimes.com/2012/03/12/us/health-care-act-offers-roberts-a-signature-case.html?pagewanted=1&_r=1&ref=affordablecareact.

[30] Haberkorn, Jennifer. "Obama Makes a Play for Scalia," *Politico*. 28 February 2012. Accessed 26 March 2012. http://www.politico.com/news/stories/0212/73412.html.

willing to set his judicial integrity aside and vote with the majority in order to dispel the notion of the politicized Supreme Court and give the American public a firm ruling on the matter. The likelihood of Roberts also joining the majority would increase if the fifth justice were Kennedy. Because Kennedy is well-known as the swing voter, a 5-4 decision upholding the mandate with the four liberal justices and Kennedy on the majority would represent another case of the Court being divided along ideological lines. It would not have been a "real" conservative justice that had joined the liberals, but rather the typical swing voter. However, if Roberts also joined the majority, it would be both a decisive ruling and one that clearly broke ideological lines. Given the landmark case that *HHS v. Florida* will become, it is doubtful that Roberts has not or will not take these factors into consideration. However, it is still more likely that Roberts will follow his conservative beliefs – *Comstock* notwithstanding – and strike down the individual mandate if the decision falls to him.

IV. Oral Arguments

Thus, it was into this situation that both parties were set to argue orally before the Court to convince these three justices to rule in support of their position. Solicitor General Donald Verrilli, Former Solicitor General Paul Clement, and Michael Carvin argued the individual mandate portion of *HHS v. Florida* in front of the Supreme Court on March 27, 2012. While a certain level of uncertainty must be afforded to deductions drawn from justices' questions during oral arguments, their questions as well as the lifelines that they threw to the litigators at various points in the arguments provide keen insight into how they are likely to vote in the coming months. The first ten minutes of oral arguments made it clear that the liberal justices are going to vote to uphold the

individual mandate. Scalia's stance is also clear from the beginning, although Chief Justice Roberts and Justice Kennedy take a little longer to show their hand. However, by the end it is fairly clear that they both see significant problems with the mandate and that they will likely join Scalia in opposing the Act. In total, oral arguments reaffirm the aforementioned predictions for each of the justices, although to varying degrees.

A. Liberal Justices

Oral arguments essentially solidified the rock-solid base that the Act has from the four liberal justices, regardless of how poorly many commentators feel that Verrilli presented his case. Justice Ginsburg's first interjection seemed designed to dig Verrilli out of a hole that he had dug in attempting to respond to Justice Alito. She commented, "if you're going to have insurance, that's how insurance works," and Verrilli used this as the launching pad for the rest of his response to Alito.[31] Ginsburg again had to throw Verrilli a lifeline when he got stuck answering Scalia's question regarding the "principled basis for distinguishing" the individual mandate from other situations like broccoli.[32] Ginsburg essentially told Verrilli what his main point was, and Verrilli graciously accepted that what she said was "definitely the difference that distinguishes this market and justices this as a regulation."[33]

Justice Breyer also tilted his hand by piggybacking on the help that Ginsburg offered. He essentially answered one of Justice Kennedy's questions for Verrilli. He also showed his own viewpoint in this instance when he said that, yes the Congress could

[31] *HHS v. Florida*, Oral Arguments. No. 11-398. 27 March 2012. Accessed 27 March 2012. http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-398-Tuesday.pdf, 10.
[32] Ibid, 13.
[33] Ibid, 13.

"create commerce that did not previously exist."[34] Sotomayor similarly had to step in to aid Verrilli in his defense from Scalia by summarizing the "three strands of arguments" in his briefs, and giving him a roadmap for his answer to Scalia's questioning.[35] Kagan aided Verrilli by essentially explaining why the Congress chose the individual mandate as opposed to several alternatives.[36] In sum, the liberal justices of the Court left little doubt that they would vote to uphold the individual mandate.

B. Targeted Justices

Justice Scalia was the most vocal opponent of the individual mandate during Solicitor General Verrilli's oral argument. Scalia's comments indicate that he is vehemently skeptical of the individual mandate, and any limits that its constitutionality would put on the federal government. The comment that best illustrates Scalia's view on the matter is, "If the government can do this, what else can it not do?"[37] Scalia constantly barrages Verrilli with questions regarding the limitations to the Congress' power, which he is not able to answer to Scalia's satisfaction. He agrees with the respondents' arguments that the Congress cannot impose the individual mandate to counter the effectiveness of the guaranteed-issue and pre-existing condition provisions of the Act as he declares, "it's a self-created problem."[38] In sum, there is no doubt in most legal scholars' minds at this point that Scalia is going to vote against the minimum coverage provision given his comments in oral arguments.

[34] Ibid, 15.
[35] Ibid, 22.
[36] Ibid, 24.
[37] Ibid, 28.
[38] Ibid, 38.

Justice Kennedy mirrored Scalia's skepticism when he asked Verrilli, "can you create commerce in order to regulate it," while Verrilli was trying to answer Scalia's first question.[39] In this regard, Kennedy seems to have accepted the petitioners' contention that the individual mandate was not merely regulating how people finance their healthcare. Instead, Kennedy at least appears to entertain the belief that the mandate creates commerce out of thin air, and as such he doubts the Congress' ability to do this. Kennedy supplemented this doubt with what appears to be a glimpse into his own rationalization, that the Congress must have "a heavy burden of justification" in order to condone such an action that "is a step beyond what our cases have allowed."[40] Kennedy asked, "Can you identify for us some limits on the Commerce Clause," and he did some seem thrilled with the response.[41] Kennedy further makes it clear that he has qualms about the new fundamentally new relationship that this mandate creates between the individual and the federal government and mentions his concerns "requiring the individual to do an affirmative act."[42] Kennedy equally rejects the "healthcare is unique market" when he says "And in the next case, it'll say the next market is unique."[43] Oral arguments indicate that Justice Kennedy does not seem to have accepted the petitioner's explanation of limits on the commerce clause, and as such he is unlikely to support it.

Chief Justice Roberts illustrated the doubts that he has with the mandate, and with the respondents' inability to provide a valid limit to the Congress' powers if they are allowed to impose the minimum coverage provision. Roberts joined in on the initial

[39] Ibid, 4.
[40] Ibid, 11.
[41] Ibid, 16.
[42] Ibid, 31.
[43] Ibid, 103.

assault led by Scalia and Kennedy but drawing comparisons between the healthcare market and "police, fire, ambulance, roadside assistance, whatever."[44] Roberts contends that the situations are nearly identical in that "you don't know when you're going to need" them and "the government will make sure you get it."[45] Roberts also argues "you cannot say that everybody is going to participate in" certain markets, and yet "you require people to purchase insurance coverage for that."[46] Roberts is not satisfied with Verrilli's arguments and shows how he is likely to vote when he says that "but next year, they can decide everybody's in this market; we're going to look at a differently problem now, and this is how we're going to regulate it."[47]

V. The Decision

The three justices that were most heavily targeted by the petitioners have varying levels of inclination for upholding the minimum coverage provision. But, it is still more likely that they will hold their ground and rule that the individual mandate is not authorized by the commerce clause in another 5-4 ideologically split ruling. Scalia is a staunch believer in limiting the commerce power and federal government in general, and his concurrence in *Raich* was a unique decision that is easily separable from the situation provided by the individual mandate. Kennedy, even as the swing voter, is unlikely to join a majority upholding the mandate because the petitioners have failed to show that an adequate check on the commerce power could still be maintained by the Court if it started down that road. Roberts believes that the commerce power is too large and needs limits,

[44] Ibid, 6.
[45] Ibid, 7.
[46] Ibid, 33.
[47] Ibid, 40.

and neither his decision in *Comstock* nor his role as Chief Justice are likely to sway him from that position. Each of the justices mirrored these beliefs during oral arguments, and it does not appear that the government has persuaded them to the contrary. The conservative justices will likely hold strong and prevent another rampant bout of commercial power expansion.

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