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REGULATING A DECISION: AN EXAMINATION OF THE CONSTITUTIONALITY OF THE INDIVIDUAL MANDATE IN HEALTH CARE REFORM

*by Ryan Wiscombe**

I. INTRODUCTION

On March 23, 2010, President Barack Obama signed the Patient Protection and Affordable Care Act into law. The purpose of this law is to create a more universal health care system that will provide coverage to most, if not all, of the forty-six million Americans who currently do not have health insurance.¹ This law also includes expanding Medicaid eligibility, and prohibiting denial of coverage based on pre-existing conditions. This is the largest reform of health care in the United States, even surpassing the creation of Medicare and Medicaid. Although many Americans feel that the health care industry is in dire need of reform, there is still strong opposition to the current reforms enacted by Congress. Opposition is strong enough that twenty-six states, including Florida, Texas, Pennsylvania, Washington, Colorado, Michigan, Louisiana, and Virginia, have filed lawsuits against the federal government on the grounds that the Patient Protection and Affordable Care Act is unconstitutional.

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¹ HINDA CHAIKIND ET AL., CONG. RESEARCH SERV., R40885, PRIVATE HEALTH INSURANCE PROVISIONS OF H.R. 3962, 4 (2009).

One of the states' main arguments against the bill's constitutionality is the individual mandate, termed the Minimum Essential Coverage Provision. This individual mandate requires that every independent person in the United States purchase health insurance or face tax penalties. In a recent report, the Congressional Research Service not only asserts that the Commerce Clause fails to grant Congress specific powers to enforce such a mandate, but also claims that a mandate requiring the purchase of a product is a novel issue.² These observations open the debate as to whether the individual mandate is constitutional. Opponents' main constitutional complaint against the Minimum Essential Coverage Provision is that it attempts to regulate noneconomic activity, which, they claim, Congress cannot legitimately regulate.³ The tax penalizes the individual's *decision* not to purchase insurance rather than the *act* of purchasing. Economic activity should only be defined as the voluntary production, buying, and selling of a good or service. Non-economic activity should then be defined as any activity that does not include the voluntary production, buying, or selling of a good or service.⁴ Under this definition, an individual's decision should not be considered economic activity because a decision is distinctly different from the actual production, buying, or selling process, which essentially defines commerce. Inasmuch as Congress is not granted the power to regulate noneconomic activity, the individual mandate under the recent health care reform is unconstitutional.

In this analysis, I will first briefly examine the history of the individual mandate and how it has previously been implemented. I will analyze how prior precedents of the individual mandate can be applied to the Patient Protection and Affordable Care Act. I will further examine whether, according to past Supreme Court cases,

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- 2 JENNIFER STAMAN & CYNTHIA BROUGHER, CONG. RESEARCH SERV., R40725, *REQUIRING INDIVIDUALS TO OBTAIN HEALTH INSURANCE: A CONSTITUTIONAL ANALYSIS* 3 (2009).
 - 3 *Virginia v. Sebelius*, 702 F. Supp. 2d 598, 609, 612 U.S. Dist. (2010) (the mem. opinion given by J. Henry E. Hudson).
 - 4 Gregory W. Watts, *Gonzales v. Raich: How to Fix a Mess of "Economic" Proportions*, 40 AKRON L. REV. 545, 578 (2007).

the Minimum Essential Coverage Provision has constitutional merit in the Patient Protection and Affordable Care Act. From these cases, I will propose that the decision to purchase a product or service is noneconomic activity. Finally, I will explore and evaluate the possible effects of the individual mandate on the national political scale.

II. HISTORY OF THE INDIVIDUAL MANDATE

Although common belief that the individual mandate is a relatively new political concept, its history can be traced to the early days of American history. The Militia Acts of 1792, passed under President George Washington, required every white male between the ages of eighteen and forty-five to purchase a weapon and ammunition. Since the government enforced a legal provision that compelled individuals to purchase goods that they would not otherwise purchase voluntarily, that provision can be deemed an individual mandate. The individual mandate of the health reform bill is similar to the Militia Acts because it compels individuals to purchase goods. However, more recent precedents have called into question the government's ability to require its citizens to purchase goods.

While the individual mandate's history traces as far back as the early colonial era, the mandate's current implications originate from the Great Depression. In 1938, Congress enacted the Agriculture Adjustment Act (AAA) to control wheat prices during the Great Depression. This act called for farmers to limit the amount of wheat per acre they were allowed to grow. In 1942, Roscoe Filburn was convicted of growing excess wheat on his land. While he claimed that the extra wheat was not for commercial use, the Supreme Court ruled in *Wickard v. Filburn* that Congress has "the federal power to regulate production of goods for commerce, except for the fact that this Act extends federal regulation to production not intended in any part for commerce but wholly for consumption on the farm."⁵ In its decision, the Supreme Court not only affirmed Congress' ability to regulate interstate commerce but also broadened Congress' authority to regulate individual activity of any economic nature. Applied

to the recent health care reform proposals, Congress does have the power to enforce mandates that regulate economic activity. Yet, the question of what clearly defines economic and noneconomic activity is not specifically answered in *Wickard v. Filburn*, nor does it give Congress power to regulate noneconomic activity.

More recently, in 1993, economist Mark V. Pauly suggested that an individual mandate to purchase health insurance be enacted as a counterproposal to President Clinton's Health Security Act. Clinton's reform called for an employer mandate that would require employers to provide health coverage for their employees.⁶ Pauly argued that an individual mandate would more efficiently reduce the free-rider problem and decrease the amount of confusion among the general public.⁷ Even though it was never adopted, the individual mandate proposed by Pauly is similar to the Minimum Essential Coverage Provision of President Obama's reforms, in that both require each independent person to purchase health insurance or pay a tax penalty. The Minimum Essential Coverage Provision states:

In the case of any individual who does not meet the requirements of subsection (d) at any time during the taxable year, there is hereby imposed a tax equal to 2.5 percent of the excess of (1) the taxpayer's modified adjusted gross income for the taxable year, over (2) the amount of gross income specified in section 6012(a)(1) with respect to the taxpayer.⁸

Americans will be subject to this tax if they do not meet the requirements as noted in subsection (d), which include the purchase of the government insurance option, employer based coverage, Medicare

6 Health Security Act, H.R. 3600, 103d Cong. § 6121 (1993).

7 Mark V. Pauly, *Making a Case for Employer-enforced Individual Mandates*, HEALTH AFF., Spring 1994, at 21, 32.

8 America's Affordable Health Choices Act of 2009, H.R. 3200 U.S.C. § 401 (59B.a) (2009); *See also* Patient Protection and Affordable Care Act, 3590 U.S.C. §§ 2711-10909 (2010). (H.R. 3590 actually implemented the health care reforms that had been proposed in H.R. 3200, but it also included amendments to the Public Health Service Act of 1944).

or Medicaid. The mandate does assure that the tax will not exceed more than the average national premium for health insurance.⁹

Although this is not the first time the federal government has enacted a tax to regulate behavior, it is the first occurrence that an individual's decision, rather than a product, is taxed. In the past the government has enacted taxes on goods such as cigarettes, making them more expensive in order to discourage people from purchasing such products. Never, however, has a tax been enacted to compel people to purchase a product or a service. Thus, the debate is whether or not an individual's decision is economic activity.

III. ECONOMIC VS. NONECONOMIC ACTIVITY

Congress claims that it has the constitutional authority to enact the individual mandate under the Commerce and General Welfare Clauses, which give Congress the authority to raise taxes and to regulate interstate commerce.¹⁰ Some experts believe that the implementation of the individual mandate is stretching the limits of the Commerce Clause too far because it forces citizens to participate in economic activity by purchasing health insurance. In dealing with the limitations of the Commerce Clause, the Supreme Court made several significant decisions in the cases of *United States v. Lopez* (1995), *United States v. Morrison* (2000), and *Gonzales v. Raich* (2005). Although each of these cases dealt with different issues, the principles are applicable to determining a definition of economic and noneconomic activity, which further strengthens the argument that the mandate is unconstitutional.

United States v. Lopez

In 1995, the Supreme Court case *United States v. Lopez* dealt with determining if the possession of a gun in a school zone was economic activity or not. When twelfth grade student Alfonso Lopez, Jr. carried a loaded .038 caliber revolver to school, he was charged

9 America's Affordable Health Choices Act of 2009, H.R. 3200 U.S.C. § 59(b)(1) (2009).

10 U.S. CONST. art. I, § 8, cl. 1, 3.

with violations of the federal Gun-Free School Zones Act of 1990, which made it illegal for an individual to knowingly possess a firearm in a school zone. The Supreme Court deemed the GFSZA unconstitutional on the grounds that it exceeded congressional limits to regulate interstate commerce. The court ruled that the possession of a firearm did not affect economic activity. Justice Breyer, however, dissented, claiming that violence on school grounds adversely affects the learning process, which then interrupts a child's ability to earn an education, hold a job, earn money, and then participate in economic and commercial activity in the future.¹¹ In response to this argument, Justice Rehnquist said that Breyer's rationale was flawed on the grounds that any activity could be seen as economic activity because it could potentially affect commerce, however indirectly it may seem. Justice Rehnquist further reiterates his point in response to Justice Breyer, saying, "Congress could just as easily look at child rearing as 'falling on the commercial side of the line' because it provides a 'valuable service—namely, to equip [children] with the skills they need to survive in life and, more specifically, in the work place.'"¹²

Had the Supreme Court ruled according to Justice Breyer's logic, Congress could potentially claim legislative authority over many activities because they indirectly influence economic activity. Justice Rehnquist asserts that even though an activity may indirectly affect commerce, it is still noneconomic activity, which is not regulated by Congress.

The ruling in *United States v. Lopez* can also be applied to the individual mandate of the health care reform bill. If Congress cannot regulate noneconomic activity, then the Supreme Court must decide if an individual's decision to purchase a product or service can be deemed economic activity. If an individual's decision is not considered economic activity, then, based on the ruling in *Lopez*, Congress does not have the constitutional authority to require citizens to purchase health insurance.

11 U.S. v. *Lopez*, 514 U.S. 549, 619-21 (1995) (Breyer, J., dissenting).

12 *Id.* at 565.

U.S. v. Morrison

In 1994, Virginia Tech student Christy Brzonkala, accused two other students, Antonio Morrison and James Crawford, of rape. After Morrison and Crawford were more or less exonerated by the university, Brzonkala filed suit against her alleged rapists and Virginia Tech in federal court.¹³ The plaintiff argued that the attack violated 42 USC section 13981, part of the Violence Against Women Act of 1994 (VAWA), which provides a civil remedy for victims of gender-motivated violence. The Supreme Court ruled, in a 5–4 decision, that Congress could not enact section 13981 of the VAWA under the Commerce Clause or the Fourteenth Amendment. Delivering the majority opinion, Chief Justice Rehnquist cited *U.S. v. Lopez* as the basis for the Court’s reasoning. First, as in *Lopez*, gender-motivated violence does not constitute economic activity. Second, Congress did not include any jurisdictional element in section 13981 that showed the cause of legislative action was pursuant of the Commerce Clause. Third, and unlike *Lopez*, congressional research and findings that show gender-motivated violence heavily affects interstate commerce rest on logic renounced by the court, namely the “but for causal chain.”¹⁴ This means that the aggregate, or attenuated effect of an action is not a reason for regulation. Referring back to Justice Rehnquist’s opinion in *Lopez*, the causal chain refers to how directly an activity affects commerce. The Supreme Court, citing *NLRB v. Jones & Laughlin Steel Corp.* (1937) further stated that the commerce power should be evaluated in the dual system of government used by the United States, and that it should “not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them . . . would effectually . . . create a completely centralized government.”¹⁵ Similar to the ruling in *Lopez*, the Supreme Court determined that allowing a broad scope of what constitutes commerce and economic activity allows Congress to control noneconomic activities. This ruling again presents a need to clearly

13 *U.S. v. Morrison*, 529 U.S. 598, 601-19 (2000).

14 *Id.* at 615.

15 *NLRB v. Jones & Laughlin Steel Corp.* 301 U.S. 1, 37 (1937).

define what should be seen as economic activity and what should be considered noneconomic activity.

Under the precedents of both *Lopez* and *Morrison*, Congress does not have the authority to regulate noneconomic activity. Thus, the individual mandate of the health care reform bill should be seen as unconstitutional if an individual's decision is seen as noneconomic activity. However, a more recent case supports the argument that Congress could potentially have power to regulate noneconomic activity.

Gonzales v. Raich

The opinions from the 2005 U.S. Supreme Court case *Gonzales v. Raich*, which dealt with the use of medical homegrown marijuana in California, offer a possible justification of the individual mandate in the health care reform bill. Justice Scalia authored the following opinion:

Unlike the power to regulate activities that have a substantial effect on interstate commerce, the power to enact laws enabling effective regulation of interstate commerce can only be exercised in conjunction with congressional regulation of an interstate market, and it extends only to those measures necessary to make the interstate regulation effective . . . Congress may regulate noneconomic activities only where the failure to do so "could . . . undercut" its regulation of interstate commerce.¹⁶

If the individual mandate were deemed necessary as part of the federal government's attempt to effectively regulate the interstate healthcare market, its enforcement could be legal under the *Gonzales* ruling. Though not economic activity, refraining from buying insurance could undermine the interstate health care market. This possible distortion becomes subject to regulation, falling under what Justice Scalia calls noneconomic activity.

Besides granting the federal government the right to regulate activity that pertains to interstate commerce, the *Gonzales* ruling

16 *Gonzales v. Raich*, 545 U.S. 5, 38 (2005).

also gives the federal government power to override state regulations if they interfere with interstate commerce. As states attempt to ignore individual mandate legislation, the Court could find such laws unconstitutional, based on the rulings of *Gonzales*.

While this argues in favor of the individual mandate, it does not completely justify its use in the health care reform bill. While refraining from purchasing health insurance may affect the health care market, the government is trying to mandate activity to make a purchase without allowing such activity to be voluntary. Similar to *Wickard v. Filburn*, in *Gonzalez v. Raich*, there was already voluntary activity—in the voluntary growing of wheat and marijuana. Under the individual mandate, Congress “would compel nearly every American to enter the market by purchasing insurance and then using this forced economic transaction as a basis for regulating behavior under the guise of interstate commerce.”¹⁷ Congress is trying to force people into a market and then regulate that activity, which it does not have the power to do.

The rulings in *Lopez* and *Morrison*, when applied to the individual mandate, say that Congress does not have the authority to regulate noneconomic activity, and *Gonzales v. Raich* says that it may only regulate that activity under certain conditions. Therefore, the question of whether or not an individual’s decision constitutes economic activity may certainly help to determine whether the individual mandate is constitutional. I propose that the Supreme Court must decide on a clear definition of what economic and noneconomic activity is. If clear definitions are assigned to each, then it will be much easier for courts to determine if the mandate is constitutional or not. I submit that economic activity should only be defined as the voluntary participation in the production process, buying, or selling of a good, service, or property.¹⁸ Noneconomic activity should then be defined as any activity that does not fall under the voluntary production, buying or, selling of a good or service. Under these defini-

17 AM. CENT. FOR LAW & JUSTICE, *INDIVIDUAL MANDATE: IS IT CONSTITUTIONAL?* 1, 8 (2009), http://www.aclj.org/media/pdf/Constitutionality_of_Individual_Mandate_Memo.pdf.

18 See Watts, *supra* note 4 at 578.

tions, a person's decisions, child rearing, the learning process, etc., would then be considered noneconomic activity and be outside the jurisdiction of Congress' authority to regulate under the Commerce Clause. This would make the individual mandate unconstitutional because Congress could not regulate an individual's decision to purchase health insurance.

Under these conditions, the individual mandate of the Patient Protection and Affordable Care Act is unconstitutional because it attempts to regulate noneconomic activity. The current state lawsuits against the federal government will most likely reach the Supreme Court in the coming years.¹⁹ These cases will give the Supreme Court an opportunity to define economic and noneconomic activity and rule whether or not the individual mandate has constitutional merit.

IV. EFFECTS OF THE INDIVIDUAL MANDATE

While the debate over the constitutionality of the individual mandate will continue for some time to come, the Supreme Court will ultimately determine if it is constitutional or not. If the individual mandate is deemed constitutional, it will have large, lasting consequences—both positive and negative—on U.S. political institutions. While this article does not intend to resolve the dispute of whether the individual mandate will cause more good than harm, this section will shed light on the core question at hand: should the government be able to regulate noneconomic activity in the case of health care reform?

The individual mandate could potentially result in several positive outcomes in regard to the health reform bill. First, and most obviously, the mandate would ensure that up to forty-six million more Americans obtain health insurance.²⁰ In the *American Journal of Law & Medicine*, Allison K. Hoffman declares that without this mandate, it is extremely unlikely that uninsured individuals would

19 See Janet Adamy, *Judge Rejects Health Law*, WALL ST. J., Feb. 15, 2011, at A1.

20 Patient Protection and Affordable Care Act, H.R. 3590 § 1501 (c) (2010).

obtain health insurance of their own accord. Thus, the mandate is necessary to ensure universal coverage, which of itself she argues, would be a great success for the United States in its attempt to assure that its citizens are taken care of medically. This would also satisfy the moral consciences of those who feel that too many Americans are uninsured. Hoffman further claims the mandate would satisfy those who “want to ensure that we create a system that enables all members of their community . . . to have equitable access to good medical care when in need.”²¹

The individual mandate could also effectively reduce the free-rider problem in the health care system. The free-rider problem occurs when people who do not have health insurance still rely on emergency care and other services in times of need. This forces insurance providers to shift the cost of the free-riders onto people who do have insurance in an attempt to cover the medical costs of the free-riders. Insurance premiums rise, and those who have insurance have to pay more than their share of the health care cost burden.²² The individual mandate will require everybody to pay for a share of the medical costs, rather than relying on a smaller group to cover the costs of everybody’s health care needs. With more people paying their share of the health care cost burden, premiums will decrease, which will also lower the individual contribution. For this reason, Yale professor Jack M. Balkin claims that the individual mandate should not be seen as a punishment, but rather an incentive for more people to purchase health insurance.²³ If the individual cost burden for each person will be reduced by an individual mandate, then people may be more willing to purchase health insurance.

21 Allison K. Hoffman, *Oil and Water: Mixing Individual Mandates, Fragmented Markets, and Health Reform*, 36 AM. J.L. & MED. 7, 9-10 (2010) (discussing the possible accomplishments of the individual mandate).

22 See Mark A. Hall, *Legal Solutions in Health Reform: The Constitutionality of Mandates to Purchase Health Insurance*, 37 J.L. MED. & ETHICS 40, 42 (2009) (discussing the application to compulsory health insurance).

23 See David B. Rivkin, Jr., Lee A. Casey & Jack M. Balkin, *A Healthy Debate: The Constitutionality of an Individual Mandate*, 158 U. PA. L. REV. 93, 105 (2009) (discussing the constitutionality of the individual mandate).

Proponents of the individual mandate argue that Congress can enact such a mandate under the General Welfare and Commerce Clauses of the Constitution. Under the General Welfare Clause, Congress has “power to lay and collect [t]axes . . . and provide for the . . . general welfare of the United States.”²⁴ Given both the large number of Americans for which the mandate provides coverage, and the historical benefits of health insurance, it is clear how expanding health coverage in the United States serves to increase the general welfare of citizens. Furthermore, under the Commerce Clause, Congress has the power to regulate commerce “among the several States.”²⁵ Health insurance falls under this category because it is an enterprise not limited by state borders.

While health insurance may fall under the commerce power of Congress and while the General Welfare Clause gives Congress the power to tax, neither clause gives Congress the ability to regulate what may be termed noneconomic activity. The question is not whether Congress can impose an individual mandate, but whether it can impose a mandate on noneconomic activity. As Allison K. Hoffman points out, “[w]e have seen individual mandates that require drivers to hold motor vehicle insurance, parents vaccinate children against contagious diseases, motorists wear seatbelts and 18-year old men register for the draft.”²⁶ While the federal government can, and has, enacted mandates requiring citizens to perform some type of action, in the case of the individual mandate, the government attempts to regulate a person’s decision, a noneconomic activity, which may not have a substantial effect on commerce or the general welfare of the nation. Each of the noted mandates was held valid, because they either provided for the common defense of the nation, such as the draft, or ensured the general welfare of citizens against potential harm or disease. A person’s decision to purchase health insurance does not provide for the common defense of the nation, and it is questionable as to whether it really promotes the general welfare of

24 U.S. CONST. art. I, § 8, cl. 1.

25 *Id.* at cl. 3.

26 Hoffman, *supra* note 21, at 16 (discussing models of universal coverage and the individual mandate).

the United States as a whole. Furthermore, the individual mandate tries to regulate involuntary activity. The mandate forces people into the market where the government is then able to regulate their economic activity. In the Supreme Court cases of *Wickard v. Filburn* and *Gonzales v. Raich*, the individuals involved were already participating in voluntary activity that could affect commerce, be it wheat or marijuana. This voluntary activity allowed Congress to regulate the effects the activity could have on interstate commerce. There is no voluntary activity in the case of individual mandate of the health care reform bills.²⁷ Forcing people into a market is not regulating economic activity; it is expanding the market that is already under regulation.

Opponents of the individual mandate further argue that if Congress is allowed to force people into involuntary action, under the Commerce Clause, Congress will then be able to expand the interpretation of the clause to alarming heights. Former Justice Department officials David B. Rivkin and Lee A. Casey argue against the individual mandate, stating, “[i]t features an affirmative federal command that parties engage in a particular activity—i.e., a purchase of health insurance . . . This regulation would apply to every American simply because they exist.”²⁸ In other words, American citizenship is grounds for the federal government to force us into an action that we may or may not want to participate in. Rivkin and Casey further state that if the mandate is implemented, Congress could also potentially regulate an “infinite array of other mandates,” from requiring citizens to purchase health club memberships to requiring them to eat a certain amount of fruits and vegetables a day.²⁹

Another argument against the individual mandate of the health care reform bills is that the mandate would greatly shift the balance of authoritative power away from the states toward the federal government. The mandate has already generated a large amount of

27 American Ctr. for Law & Justice, *supra* note 17 at 8 (2009).

28 Rivkin, *supra*, note 23, at 99 (discussing the constitutionality of the individual mandate).

29 Rivkin, *supra* note 23, at 101 (discussing possible effects of the individual mandate).

controversy from the states to the point that there have been two lawsuits filed against the federal government: one in Florida, which is backed by several other states, and another in Virginia. Judge Henry Hudson of Virginia cites *Alfred L. Snapp & Son, Inc., v. Puerto Rico* in his opinion of the *Commonwealth v. Sebelius* case saying, “[t]he states have a legally protected sovereign interest in the exercise of sovereign power over individuals and entities within the relevant jurisdiction, [which] involves the power to create and enforce a legal code.”³⁰ Bill McCollum, Attorney General of Florida, complains in his lawsuit that the health care reform bill will force states into a “top-down federal program” that eliminates the states’ sovereignty over the health care markets in their respective states.³¹ States will continue to resist the individual mandate and the health reform bills because they feel that they will lose authority to regulate activity in their own respective states. To reiterate this point, Rivkin and Casey claim that the individual mandate would rob the states of their explicit, independent authority as sovereign powers.³² While the debate over federalism’s nature has largely defined the nation since its independence, the individual mandate of the health care reform bill may spur the debate on to even greater heights.

V. CONCLUSION

While the evidence of the possible outcomes of the individual mandate will not be seen for several years, its impact is already felt around the nation. Whether the positive effects outweigh the negative or vice versa, constitutional debates will continue until the Supreme Court eventually has the final say regarding the constitutionality of the individual mandate. As current state lawsuits demon-

30 Virginia, 702 F. Supp. 2d 598, 609, 612 U.S. Dist. (2010) *See also*, *Alfred L. Snapp & Son, Inc.*, 458 U.S. 592, 601, (1982).

31 Florida v. DHHS, Fla. So. 2d, No. 3:10-W-91 at 5 (Pensacola, Mar. 23, 2010).

32 Rivkin, *supra* note 23, at 101 (discussing effects of the individual mandate on the federalist system).

strate, it is all but assured that the cases over the health care reform bill will, in time, reach the Supreme Court for a final verdict.³³

Should the Supreme Court choose to define economic activity as the voluntary production, buying, and selling of a good or service, and noneconomic activity as anything outside that scope, the Supreme Court will be able to more precisely determine whether the individual mandate is constitutional.³⁴ While these definitions may not fully explain what constitutes economic activity in every case, they would effectively separate activities that fall under interstate commerce from those that do not.

The precedents set by *Lopez* and *Morrison* strongly support the argument that Congress cannot require citizens to purchase health insurance. Based on the *Gonzales* case, Congress cannot regulate noneconomic activity unless it is entered into voluntarily. An individual's decision would fall under the noneconomic category and thus outside Congress' authority to regulate.

Regardless of how the Supreme Court determines the constitutionality of the mandate, the ruling will have far-reaching legal and political consequences that will be evident for many years. If the mandate is ruled constitutional, it will have a significant impact on the interpretation and application of the Commerce Clause. Congress will be able to expand its regulatory power to many noneconomic activities. Furthermore, the mandate will likely disrupt the balance of power within the U.S. federal system. However, if the Supreme Court rules the mandate unconstitutional, it will prevent Congress from overstepping its bounds and thus affirm the autonomy of U.S. citizens.

33 Adamy, *supra* note 19.

34 See U.S. v. *Lopez* 514 at 585. (In his concurring opinion of *U.S. v. Lopez*, Justice Thomas suggested that in time, the Supreme Court reconsider the substantial effects test, which tries to determine whether an economic activity has a substantial effect on commerce. If it is unclear as to whether an activity is economic or noneconomic in nature, then additional testing should be devised to determine under which category the activity falls).