**MEMORANDUM**

To: Chief Justice
U.S. Supreme Court

From: Rachel Ezzell

Date: August 1, 2010

Re: Constitutionality of Individual Mandate Provision

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## Issue Presented

(1) Is the Individual Mandate provision of the Patient Protection and Affordable Care Act a constitutional exercise of Congress' authority under the Commerce Clause?

## Answer

(1) The individual mandate provision regulates a class of persons whose activities, when viewed in the aggregate, substantially affect the interstate market for healthcare services. Therefore, it is most likely a constitutional exercise of Congress' authority under the Commerce Clause.

## Statement of Facts

On March 23, 2010, the Patient Protection and Affordable Care Act (PPACA) became law. In designing the PPACA, Congress aimed to provide nearly universal health care coverage to American citizens.[1] Congress relied upon findings that significant barriers existing in the insurance industry were preventing millions from obtaining health insurance.[2] As a result, several PPACA provisions modify health insurance industry practices that made obtaining and

[1] Mead v. Holder, No. 10-950 (GK), 2011 WL 611139, at *1, *23 (D.D.C. Feb. 22, 2011)
[2] Virginia v. Sebelius, 728 F. Supp. 2d 768, 772 (E.D. Va. 2010).

maintaining coverage difficult for sick individuals.[3] Others, including the politically controversial individual mandate provision, target the behavior of individuals.[4]

The Requirement to Maintain Minimum Essential Coverage, described in multiple news outlets as the individual mandate provision, is codified in § 1501 of the PPACA.[5] Under § 1501(a)(1), Congress indicates its findings that the provision substantially affects interstate commerce.[6] The individual mandate provision requires that most individuals must provide proof of health insurance coverage.[7] With limited exceptions, individuals who cannot provide proof of qualifying coverage will be forced to pay a penalty on their income tax return.[8] Section 5000A details the penalty faced by uncovered individuals, being the greater of $695 ($2,085 per family maximum) or 2.5% of household income.[9]

The legislative goals in enacting the provision include lowering the price of health insurance premiums by significantly reducing the number of uninsured Americans.[10] According to the PPACA, this objective would be achieved in two ways.[11] First, increased subscriber pools would result in economies of scale and thus reduce administrative costs.[12] Second, by limiting the overall cost of uncompensated care, the PPACA will limit the degree of cost-shifting increases to insurance premiums.[13]

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[3] Elenora E. Connors & Lawrence O. Gostin, Commentary, *Health Care Reform – A Historic Moment in US Social Policy,* 303 JAMA 2521, 2521 (2010), *available at* http://jama.ama-assn.org
[4] *Id.* at 2522.
[5] 42 U.S.C. § 18091.
[6] *Id.*
[7] *Id.*
[8] 26 U.S.C. § 5000A.
[9] *Id.*
[10] 42 U.S.C. § 18091
[11] *Id.*
[12] *Id.*
[13] *Id.*

Irrespective of Congress' goals, since the PPACA's enactment, the constitutionality of the individual mandate provision has been challenged in multiple federal courts.[14] Claimants reason that the individual mandate provision is tantamount to an affirmative obligation to purchase health insurance, thus regulating an individual's inactivity.[15] As a result, these claimants have alleged that enactment of the individual mandate provision in the PPACA is beyond the limits of Congress' authority under the Commerce Clause power.[16]

## <u>Discussion</u>

Whether the individual mandate provision is constitutional under Congress' Commerce Clause power depends on existing jurisprudence. This issue has split the courts which have ruled on the issue. Part I reviews Commerce Clause jurisprudence and identifies the relevant tests against which the individual mandate must be tested. Part II describes how courts have handled the issue and notes the areas where their legal reasoning diverged. Part III explains why the individual mandate provision satisfies the existing Commerce Clause framework. Part IV argues that federalism concerns do not render the individual mandate provision unconstitutional.

### *1. Review of Commerce Clause Jurisprudence*

[14] *E.g.,* Mead v. Holder, No. 10-950 (GK), 2011 WL 611139, at *1, *1 (D.D.C. Feb. 22, 2011).
[15] *E.g.,* Florida v. United States Dep't of HHS, No. 3:10-cv-91-RV/EMT, 2011 WL 285683, at *1, *1 (N.D. Fla. Jan. 31, 2011).
[16] *Id.*

The Constitution provides in relevant part that "Congress shall regulate commerce… among the States."[17] The first judicial ruling on the role of the Commerce Clause relative to other provisions of the Constitution was in *Gibbons v. Ogden*, where Chief Justice Marshall reasoned that the Necessary and Proper Clause pertained to Congress' existing powers but did not extend them.[18] He concluded that when Congress relies upon the Necessary and Proper Clause in conjunction with the Commerce Clause power that the end need be legitimate and the means used plainly adapted to that end.[19]

In 1937, the Supreme Court expanded the reach of Congress' Commerce Clause powers.[20] In *Wickard v. Filburn*, the Court held that Congress could regulate a farmer who grew and consumed wheat wholly intrastate and locally.[21] Relying upon an aggregation principle, the Court reasoned that since his activity, when aggregated, had an economic effect on interstate industry, it was within Congress' commerce power.[22] This approach was reiterated in *Perez v. U.S.*, where the Court summarized the three areas that the commerce power can reach.[23] First, Congress could regulate the channels of interstate commerce.[24] Second, Congress could regulate the instrumentalities of and persons and things in interstate commerce.[25] Third, Congress could regulate activities that affected interstate commerce.[26]

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[17] U.S. CONST., art. I, § 8, cl. 3.
[18] Gibbons v. Ogden, 22 U.S. 1 (1824).
[19] *Id.* at 37-46.
[20] Ryan C. Patterson, Note, *"Are You Serious?": Examining the Constitutionality of an Individual Mandate for Health Insurance*, 85 NOTRE DAME L. REV. 2003, 2019-20 (2010).
[21] Wickard v. Filburn, 317 U.S. 111, 125-28 (1942).
[22] *Id.* at 125.
[23] Perez v. United States, 402 U.S. 146, 150 (1971).
[24] *Id.*
[25] *Id.*
[26] *Id.*

The Supreme Court reined in the Commerce Clause in the 1990s and reestablished a focus on federalism concerns with its rulings in *U.S. v. Lopez* and *U.S. v. Morrison*.[27] In *Lopez*, the Court held that enforcement of the Gun Free School Zones Act fell outside of Congress' commerce authority, reasoning that wholly intrastate activities need have not just an effect, but a substantial effect on interstate commerce in order for Congress to have authority to regulate it.[28] In *Morrison*, the Court held that Congress' passage of the Violence Against Women Act exceeded its Commerce Clause power because the causal link between violence and commerce was too attenuated.[29] The Court relied on its reasoning in *Lopez* and warned against piling inference upon inference in establishing a link between activity and commerce.[30]

In its 2005 decision *Gonzalez v. Raich*, however, the Court ruled that the Controlled Substances Act (CSA), which prohibited the completely local growth and consumption of marijuana, was within the third prong of the commerce power: Congress' power to regulate intrastate activities which substantially effect interstate commerce.[31] The Court analogized to *Wickard*; in consideration of the aggregation principle, the local growth and consumption of a fungible good affected supply and demand in the national market.[32] The majority reasoned that a specific finding of why it would affect interstate commerce was helpful but not necessary, as all that was needed was a rational basis upon which for Congress to rely.[33] It distinguished from *Lopez* and *Morrison* in that the activities regulated by the CSA were quintessentially economic: the production, distribution, and consumption of commodities.[34] In an opinion concurring in the

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[27] Patterson, *supra* note 20 at 2019-20.
[28] U.S. v. Lopez, 514 U.S. 549, 561 (1995).
[29]U.S. v. Morrison, 529 U.S. 598, 610-13 (2000).
[30] *Id.* at 614-15*; Lopez,* 514 U.S. at 563-65.
[31] Gonzalez v. Raich, 545 U.S. 1, 17-18 (2005).
[32] *Id.* at 19.
[33] *Id.* at 23-24.
[34] *Id.*

judgment, Justice Scalia concluded that Congress' authority over intrastate activities that are not necessarily a part of interstate commerce derives from the Necessary and Proper Clause.[35] In language echoing that of Chief Justice Marshall, he noted that the appropriate inquiry is whether the means chosen by Congress are reasonably adapted to the attainment of a legitimate end under the commerce power.[36] Instead of obliterating the distinction between what was national and what was local, in this case Congress acted within its power because it regulated an activity that was part of a nationally regulated activity.[37]

The constitutionality of the individual mandate, which forces individuals to provide proof of health insurance or otherwise face financial penalty, depends on whether it fits within the third prong of the commerce power: Congress' power to regulate intrastate activities which substantially effect interstate commerce.[38] Here, an individual's activity, the failure to purchase health insurance, must be quintessentially economic, its relationship to the interstate market for healthcare services must not be overly attenuated, and it should be part of a nationally regulated activity.

*2. How Courts Have Handled the Individual Mandate Provision*

As of this writing, five district courts and one appellate court have ruled on the constitutionality of the individual mandate with respect to the Commerce Clause. Each court has acknowledged that there is limited judicial guidance whether or not the decision to forgo health insurance falls within the definition of activity relevant to the commerce power.[39] Some courts

[35] *Id.* at 34- 36 (Scalia, J., concurring in the judgment).
[36] *Id.*
[37] *Id.* at 36-37.
[38] *Id.* at 17-18.
[39] *E.g.*, Thomas More Law Ctr. v. Obama, No. 10-2388, 2011 WL 2556039, at *1, *16 (6th Cir. Jun. 29, 2011) (Sutton, J., concurring in part).

have described the issue as unprecedented.[40] Three district courts and one appellate court have ruled the provision constitutional, relying primarily on the line of reasoning stemming from *Wickard* and *Raich*. Two have ruled it unconstitutional relying primarily on the line of reasoning stemming from *Lopez* and *Morrison*.

The first court to rule on the issue was *Thomas More Law Center v. Obama.*[41] In *Thomas More*, the district court focused its Commerce Clause authority inquiry on the third prong, whether a rational basis existed for Congress to conclude that the regulated economic activities, when aggregated, had a substantial effect on interstate commerce.[42] The district court held that it did.[43] It relied in part on the uniqueness of the health insurance market; since uninsured plaintiffs could not guarantee their future health, they therefore could not opt out of the health care services market.[44] The Sixth Circuit reaffirmed this holding, concluding that the "minimum coverage provision regulates economic activity with a substantial effect on interstate commerce."[45] This analysis of the individual mandate under the substantial effects test was repeated in *Liberty University v. Geithner,* which also held that the decision of an individual to forgo health insurance is one that is economic in nature and, in the aggregate, substantially affects the interstate healthcare services markets.[46] The *Liberty Univ.* court reasoned that receiving medical care at some future point is inevitable, and thus an individual who elects not to purchase insurance merely chooses to "try to pay for health care services later, out of pocket,

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[40] *E.g.,* Florida v. United States Dep't of HHS, No. 3:10-cv-91-RV/EMT, 2011 WL 285683, at *1, *20 (N.D. Fla. Jan. 31, 2011).
[41] 720 F.Supp.2d at 882.
[42] *Id.* at 891-95.
[43] *Id.*
[44] *Id.*
[45] Thomas More Law Ctr. v. Obama, No. 10-2388, 2011 WL 2556039, at *1, *11 (6th Cir. Jun. 29, 2011).
[46] Liberty Univ., Inc. v. Geithner, 753 F. Supp. 2d 611, 629-35 (W.D. Va. 2010).

rather than now, through the purchase of insurance."[47] A third district court ruled that the provision was constitutional in *Mead v. Holder*.[48] In finding that the decision to forgo health insurance substantially affects the national health insurance market, the *Mead* court restated the PPACA's findings that "uncompensated costs of $43 billion dollars were transferred onto other health care market participants, as well as federal and state governments and American taxpayers."[49]

Moreover, the Sixth Circuit held that even if the individual mandate was not regulating economic activity, that it was an essential part of a broader regulatory scheme and therefore a constitutional exercise of the Commerce Clause power.[50] Since the Supreme Court ruled that insurance is interstate commerce subject to federal regulation in *U.S. v. Southeastern Underwriters*, the general ability of Congress to regulate the health insurance market is well established.[51] Indeed, if Congress may regulate the national healthcare market, "it is difficult to see why it lacks the authority to regulate a unique feature of that market by requiring all" individuals to obtain health insurance.[52] The Sixth Circuit invoked reasoning in *Raich,* noting that Congress "may regulate non-economic intrastate activity if it rationally believes that, in the aggregate, the failure to do so would undermine the effectiveness of the overlying regulatory scheme."[53] Since the cost-shifting that results from decisions to forgo health insurance in the aggregate significantly impacts many health care services market stakeholders by driving up the

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[47] *Id.* at 633.
[48] Mead v. Holder, No. 10-950 (GK), 2011 WL 611139, at *1, *25 (D.D.C. Feb. 22, 2011).
[49] 42 U.S.C. § 18091; *Mead*, 2011 WL 611139 at *15.
[50] Thomas More Law Ctr. v. Obama, No. 10-2388, 2011 WL 2556039, at *1, *12 (6th Cir. Jun. 29, 2011).
[51] US v. South-Eastern Underwriters, 322 U.S. 533 (1944); *How Private Health Coverage Works: A Primer*, 2008 Update (Henry J. Kaiser Fam. Found., Menlo Park, Ca.) at 13-20, *available at* www.kff.org.
[52] Thomas More Law Ctr. v. Obama, No. 10-2388, 2011 WL 2556039, at *1, *30 (6th Cir. Jun. 29, 2011) (Sutton, J., concurring in part).
[53] *Id.* at *12.

cost of insurance premiums, the individual mandate provision was essential to the national regulatory scheme.[54]

Two courts, however, have held the individual mandate provision unconstitutional. The first was *Virginia v. Sebelius*, where the district court described the central issue was whether the individual mandate provision could be enforced through Congress's commerce clause power by relying upon the Necessary and Proper Clause.[55] The court reasoned that if a person's decision not to purchase health insurance was an activity not subject to regulation under the Commerce Clause, then an attempt to enforce such a provision by relying upon the Necessary and Proper Clause was unconstitutional.[56] The issue turned on whether "a person's decision to refuse to purchase health insurance is such an activity."[57]

The court reached a different conclusion largely due to its assertion that Congress's "regulatory powers are [only] triggered by some type of self-initiated action" and that the choice, or non-decision, not to purchase health insurance was not a self-initiated action.[58] The court distinguished the case on the facts from *Wickard* and *Gonzalez* by noting that in those cases, individuals made a "conscious decision to grow wheat or cultivate marijuana" and thus "voluntarily placed themselves within the stream of interstate commerce."[59] The court rejected the argument that at some point every individual uses health care services.[60] Therefore, the court held that Congress's power under the Commerce Clause and Necessary and Proper Clause did not reach "noneconomic activity closely connected to the intended market."[61]

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[54] *Id.*
[55] Virginia v. Sebelius, 728 F. Supp. 2d 768, 779-82 (E.D. Va. 2010).
[56] *Id.* at 779.
[57] *Id.* at 781.
[58] *Id.* at 782.
[59] *Id.* at 779.
[60] *Id.* at 779-81.
[61] *Id.* at 782.

The second court to hold that the provision was unconstitutional was *Florida v. United States Dep't HHS*.[62] Despite noting that courts should presume federal legislation is constitutional, the court also held that an element of affirmative activity was an "indispensable part of the Commerce Clause analysis."[63] The court observed that to date, Congress had never required an individual to buy a private company's product "just for being alive and residing in the United States."[64] The court concluded that a decision to forgo health insurance could not be sustained by *Wickard's* aggregation principle because such a finding would be over-inclusive.[65] In particular, the court distinguished *Raich* and its discussion of the Necessary and Proper Clause by noting that it relied upon a definition of economics "as 'the production, distribution, and consumption of commodities.'"[66] The court dismissed the argument that the health insurance market is unique.[67] In an oft-cited concern, the court opined that a ruling finding the individual mandate within the scope of Congress's powers could result in a requirement that "people buy and consume broccoli at regular intervals" because the purchases affect interstate commerce and because broccoli is healthy.[68]

*3. The Individual Mandate Satisfies the Substantial Effects Test*

Notably, precisely what the provision requires and the way it is discussed in court rulings often differs.[69] Nevertheless, the individual mandate is probably a constitutional exercise of

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[62] Florida v. United States Dep't of HHS, No. 3:10-cv-91-RV/EMT, 2011 WL 285683, at *1, (N.D. Fla. Jan. 31, 2011).
[63] *Id.* at *20-21, *23.
[64] *Id.*
[65] *Id.* at *28-29.
[66] *Id.* at *20 (quoting Gonzalez v. Raich, 545 U.S. 1, 25-26 (2005)).
[67] *See id.* at *24.
[68] *Id.*
[69] *See* Thomas More Law Ctr. v. Obama, No. 10-2388, 2011 WL 2556039, at *1, *30 (6th Cir. Jun. 29, 2011) (Sutton, J., concurring in part) (noting that the individual mandate provision "does not compel individuals to buy

Congress's Commerce Clause power because of the impact an individual's choice to forgo health insurance has on the market for healthcare services. The decision not to insure oneself against health risks is both economic in nature and an affirmative activity. A proper examination of this impact in the aggregate demonstrates that it substantially affects the interstate market for health insurance.

First, the decision to self-insure as opposed to purchase health insurance is one that is economic in nature, and the characterization made by the *Sebelius* and *Florida* courts that a decision not to purchase health insurance is non-economic is dubious.[70] The economic effect is well-documented: the uninsured, in part due to the uniqueness of the health insurance market,consume more than $50 billion in uncompensated care.[71] These costs pass through health care providers onto health insurers and eventually fall upon insured Americans in the form of increased premiums or increased costs of health care services.[72] These costs directly influence the price of health insurance premiums, which dictates the consumption rate of that commodity.[73] Indeed, the effect of this uncompensated care on health insurance premiums is "not at all attenuated."[74] The decision not to purchase health insurance is thus one that is "fundamentally economic" and within the bounds of *Raich*.[75]

Moreover, labeling the choice not to purchase health insurance as a non-activity is inaccurate. Individuals who choose not to purchase health insurance instead self-insure and thus

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insurance or even use insurance"); Jack M. Balkin, *The Constitutionality of the Individual Mandate for Health Insurance*, 362 NEW ENG. J. MED. 482, 482 (2010), *available at* http://www.nejm.org.

[70] *See* Thomas More Law Ctr. v. Obama, No. 10-2388, 2011 WL 2556039, at *1, *16 (6th Cir. Jun. 29, 2011); Thomas More Law Ctr. v. Obama, No. 10-2388, 2011 WL 2556039, at *1, *14 (6th Cir. Jun. 29, 2011) .

[71] Sara Roseumbaum & Jonathan Gruber, *Buying Health Care, the Individual Mandate, and the Constitution*, 363 NEW ENG. J. MED. 401, 402 (2010), *available at* http://www.nejm.org.

[72] *See id.*

[73] *See id.*

[74] Mead v. Holder, No. 10-950 (GK), 2011 WL 611139, at *1, *16 (D.D.C. Feb. 22, 2011).

[75] *See* Roseumbaum & Gruber, *supra* note 73 at 403.

engage in substitute activities.[76] When individuals who are uninsured become sick, they turn to family or friends for financial support, they visit emergency rooms, or they "purchase over-the-counter remedies" such as painkillers or vitamins.[77] These substitute activities are analogous to those regulated in *Wickard* and *Raich:* the substitution of homegrown wheat or marijuana for that purchased in the interstate market.[78]

A proper application of the *Wickard* aggregation principle to the substantial effects test demonstrates that the individual mandate regulates activity within the commerce power. The *Mead* court correctly held that Congress had a rational basis for believing that the decisions of individuals not to purchase health insurance substantially affect the interstate health care market when viewed in the aggregate.[79] The *Mead* court reasoned that an individual's decision to forgo the purchase of health insurance, in the aggregate, is "market-distorting behavior" that "justif[ies] Congress's efforts to stabilize the price" of health insurance premiums.[80]

In contrast, the court in *Florida* misapplied the *Wickard* aggregation principle.[81] The *Florida* court erroneously found that because, theoretically, the decision of one individual to forgo health insurance coverage and any sort of treatment had no effect on the interstate market for health insurance, Congress's targeting of such activity resulted from the "sort of piling 'inference upon inference' rejected in *Lopez.*'"[82] Instead of adding together the effect of each individual's choice to forgo insurance to view as a collective whole,[83] the court in error relied

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[76] *See* Balkin, *supra* note 71 at 483.
[77] *Id.*
[78] *Id.*
[79] Mead v. Holder, No. 10-950 (GK), 2011 WL 611139, at *1, *15 (D.D.C. Feb. 22, 2011).
[80] *Mead*, 2011 WL 611139 at *15.
[81] *See* Florida v. United States Dep't of HHS., No. 3:10-cv-91-RV/EMT, 2011 WL 285683, at *1, *26 (N.D. Fla. Jan. 31, 2011).
[82] *See id.*
[83] *Aggregate Definition,* Merriam-Webster.com, http://www.merriam-webster.com/dictionary/aggregate (last visited May 19, 2011).

upon the mathematical operation of multiplication: "If impact on interstate commerce were to be expressed and calculated mathematically, the status of being uninsured would necessarily be represented by zero. Of course, any other figure *multiplied* by zero is also zero. Consequently, the impact must be zero, and of no effect on the interstate market."[84] Properly applying *Wickard's* aggregation principle would have required analysis using addition, not multiplication.[85] As a result, the reasoning in *Thomas More* and *Mead* better exemplifies the *Wickard* principle.

*4. Why Federalism Concerns are Insufficient*

One potential objection to finding that the decision to forgo the purchase of health insurance is within Congress's Commerce Clause powers is that it impermissibly undermines the distinction between what is national and what is local.[86] The tension between the Tenth Amendment and Congress' power is, as always, a legitimate concern in Commerce Clause jurisprudence.[87] In his dissent in *Thomas More*, Judge Graham argues that the individual mandate provision intrudes on the personal liberty of "both the States and the people," bringing "an end to state experimentation."[88] Indeed, the PPACA has the effect of "wip[ing] out any contrary state laws on the subject."[89] Moreover, it affects individual financial planning decisions in way that could be described as invasive.[90]

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[84] *See Florida*, 2011 WL 285683 at *26 *(emphasis added).*
[85] *See* 2011 WL 611139 at *19-20 (reasoning that plaintiffs could use health care services in the future and instead considering the average expenditure for each hospital stay.)
[86] *See Florida*, 2011 WL 285683 at *22 (reasoning that Congress could do almost anything it wanted to do.)
[87] *E.g.*, Gonzalez v. Raich, 545 U.S. 1 (2005).
[88] Thomas More Law Ctr. v. Obama, No. 10-2388, 2011 WL 2556039, at *1, *39 (6th Cir. Jun. 29, 2011) (Graham, J., dissenting).
[89] *Id.* at *22 (Sutton, J., concurring in part).
[90] *Id.* at *39 (Graham, J., dissenting).

These concerns, while reasonable, are insufficient to alter the substantial effects test. As noted in Part III, the individual mandate satisfies that test. The Court reaffirmed that test in *Raich;* as Justice O'Connor observed in her dissent, the *Raich* ruling "stifle[d] an express choice by some states, concerned for the lives and liberties of their people, to regulate medical marijuana differently."[91] While a ruling that the individual mandate is constitutional would stifle an express choice by some states to regulate insurance differently, it would do so in a manner that is consistent with this Court's precedent.[92] To the extent that reaching those actions described as nonactivity is invasive, as observed by the Sixth Circuit, "the text of the commerce clause does not acknowledge a constitutional distinction between activity and inactivity, and neither does the Supreme Court."[93]

## Conclusion

The individual mandate provision requires that individuals provide proof of health insurance or otherwise face financial penalty. In so doing, it regulates a class of persons whose activities, when viewed in the aggregate, substantially affect the interstate market for healthcare services. The choice not to purchase medical insurance is one that is economic in nature and requires affirmative activity. Finally, the extent to which the legislation is invasive or undermines federalism principles does not invalidate the substantial effects test. Therefore, it is most likely a constitutional exercise of Congress' authority under the Commerce Clause.

[91] Gonzalez v. Raich, 545 U.S. 1, 47 (2005) (O'Connor, J., dissenting).
[92] *See id.*
[93] Thomas More Law Ctr. v. Obama, No. 10-2388, 2011 WL 2556039, at *1, *14 (6th Cir. Jun. 29, 2011).