Within the pages of the Health-Care Reform Bill lies mandatory health insurance, a current topic of Constitutional debate. The specific part of the bill itself, referred to as the "individual mandate," states that beginning in 2014 those persons not meeting certain exceptions will be required to purchase qualifying health insurance. Those meeting the exceptions would typically do so by claiming financial hardship. Individuals mandated to comply with the requirement would, for failure to do so, face a penalty of $695 per person, or up to $2,085 per family or 2.5% of household income, whichever is greater. This penalty would be processed as a tax, and while no criminal penalties would be pursued for noncompliance, the IRS will be responsible for withholding any necessary portions of a tax refund to recoup the penalty. In turn, the producer-side of the equation requires that insurance policies be created that would essentially guarantee coverage to all applicants, restricting the use of traditional barriers of acceptance to a health insurance policy.

The aforementioned is in effect a summary of the individual mandate. While there are many avenues to choose from in debating the subject, the win or loss of record will lie in the following question: does the government have the Constitutional authority to mandate health insurance? The US Congress, by means of the Commerce Clause, has the authority to "regulate commerce among the several states." It is upon this clause that Congress has acted to vote the Health-Care Reform Bill into law, and so it is also within this clause that the matter of the Constitutionality of the law will be debated.

Congress voted the bill into law on March 21, 2010, and as a result, opponents are now waiting their turn before the Supreme Court. In the meantime, though, the basis for their argument will be heard here. In a September 2009 article posted on investors.com, the question is asked, "Where in the Constitution does it say the government can force people to buy health insurance?" ("Is Health Care Reform Constitutional?" 2009). Though the question stated is simplistic in nature it does speak to the opposition's primary concern. Their issue is with regard to the interpretation of the Commerce Clause and whether or not the individual mandate is covered therein. In their view the Commerce Clause is only that, a clause by which to regulate

commerce. As quoted in the investors.com article, former New Jersey Superior Court Judge Andrew Napolitano argued James Madison's intentions on the use of the word "regulate," in that he was attempting to "make regular," his point being that the government is there to referee the field but not to "call plays." Adding to his argument, he points out that the government is choosing to force individuals to purchase health insurance, but at the same time prohibiting those purchases across state lines: "Congress refuses to keep commerce regular when the commercial activity is the sale of insurance, but claims it can regulate the removal of a person's appendix because that regulates interstate commerce."

David B. Rivkin, Jr. and Lee A. Casey of the *Washington Post* present another argument against. They discuss an "aggressive" Commerce Clause case, in which the Supreme Court in 1942 upheld the regulation of local wheat farms, stating that "the court reasoned that the consumption of homegrown wheat by individual farms would, in the aggregate, have a substantial effect on interstate commerce, and so was within Congress's reach" (Rivkin, Casey 2009). They continue, juxtaposing this decision with the uninsured's requirement to purchase coverage, "not because they were even tangentially engaged in the 'production, distribution or consumption of commodities,' but for no other reason than that the people without health insurance exist." In contrast, they note that the Supreme Court has in the past (in 1995 and 2000) denied Congress the ability to regulate noneconomic activities on the basis that they might, in certain circumstances, have an economic effect. "These decisions reflect judicial recognition that the commerce clause is not infinitely elastic and that, by enumerating its powers, the framers denied the type of general police power that is freely exercised by the states" (Rivkin, Casey 2009). Ultimately they, like many of those they share views with, find that the Constitution does not afford Congress the ability to require the individual to purchase insurance, as "the Constitution assigns only limited, enumerated powers to Congress," and that none of these powers "would support a federal mandate requiring anyone who is without health insurance to buy it."

Those who stand by the law, rather, believe that even though its powers are limited, Congress still holds the authority to approve the individual mandate. In an issue brief by the

American Constitution Society, the Constitutionality of the individual mandate is documented in detail. Compiled by Simon Lazarus, "Mandatory Health Insurance: Is It Constitutional?" asserts that opponents to the mandate have no basis in law. Instead, the work points to incidents such as eliminating adverse selection to insurance acceptance, creating broad-scale pooling for individuals not covered by group health plans, and reducing the number of uninsured patient visits to emergency rooms all as contributing to reasons enabling Congress to have acted upon the bill. This last part regarding uninsured patient visits to emergency rooms speaks volumes in the role the Commerce Clause is to play in proponent's arguments in the months to follow.

The case of Mead V. Holder is referenced in a February 23rd, 2011 post to pajamamedia.com by author Dan Miller, entitled "ObamaCare Held Constitutional." In brief, the plaintiff, Margaret Peggy Lee Mead, brought action against Eric Holder, US Attorney General, US Dept. of Health and Human Services, seeking the declaration that an individual insurance mandate is unconstitutional. Judge Gladys Kessler of the US District Court for the District of Washington, DC granted the motion to dismiss the case on February 22nd. Quoting Miller, "Kessler held that a decision not to purchase insurance is 'activity' no less than the actual purchase of something," adding, "a decision not to purchase health insurance 'is not simply a decision whether to consume a particular good or service, but ultimately a decision as to how health care services are to be paid and who pays for them…in view of ObamaCare's prohibition against exluding preexisting conditions from coverage, people might wait until they are really sick to obtain coverage, thereby increasing coverage costs for us all'" (Miller 2011). Miller points out Judge Kessler's acknowledgement that "*all* previous Commerce Clause cases involved physical rather than mental activity (decision-making) so there is *little* judicial guidance on whether controlling mental activity falls within Congress's power."

That the law should be unprecedented does not necessarily make it prohibited, as is pointed out in "Is Mandatory Health Insurance Constitutional?" a 2009 article posted to cbsnews.com. Quoting Mark Hall, a law professor at Wake Forest University, author Declan McCullagh writes, "'transfer to a private party for health or economic purposes seems to be unprecedented because laws tend to *prohibit* such purposes rather than mandating them"

(McCullagh 2009). But as a theory is not wrong – or right – because it is new, a fundamental Constitutional basis must still be relied upon for proponents to see this law become realized in 2014.

It is the view here that, in light of the fact that Congress has exercised its powers in a way not familiar with the past, it has not done so in a way outside of its own boundaries. Aside from all posturing by both sides on interpretations of the Commerce Clause, the cost of health care simply is not an intrinsic one, but instead one that is made up of real dollars and cents. At the end of every day there is someone left responsible for this cost.

That the responsible parties may be public or private or both makes this a concern for commerce amongst the states, and on this basis alone Congress has seemed to act within its scope in voting the individual mandate into law. Left to its own devices the private market for health care has seen its own system fail in terms of efficiently allocating scarce resources amongst the greatest number of individuals in the effort to benefit society as a whole. Should Congress's act allow the government a greater standing to further regulate the industry, by the means of the individual mandate, their action should be warranted. This is not to say that the individual mandate is necessarily an answer that will solve any problem, only that the government has acted in accord to the powers granted it by the US Constitution.

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