IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

COMMONWEALTH OF VIRGINIA EX REL. KENNETH T. CUCCINELLI, II, in his official capacity as Attorney General of Virginia,	)	
Plaintiff,	)	
v.	)	Civil Action No. 3:10CV188–HEH
KATHLEEN SEBELIUS, SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES, in her official capacity,	)	
Defendant.	)	

MEMORANDUM OPINION
(Cross Motions for Summary Judgment)

In this case, the Commonwealth of Virginia (the "Commonwealth"), through its Attorney General, challenges the constitutionality of the pivotal enforcement mechanism of the health care scheme adopted by Congress in the Patient Protection and Affordable Care Act ("ACA" or "the Act"), Pub. L. No. 111-148, 124 Stat. 119 (2010). At issue is Section 1501 of the Act, commonly known as the Minimum Essential Coverage Provision ("the Provision"). The Minimum Essential Coverage Provision requires that every United States citizen, other than those falling within specified exceptions, maintain a minimum level of health insurance coverage for each month beginning in 2014. Failure to comply will result in a penalty included with the taxpayer's annual return. As enacted, Section 1501 is administered and enforced as a part of the Internal Revenue Code.

In its Complaint, the Commonwealth seeks both declaratory and injunctive relief. Specifically, the Commonwealth urges the Court to find that the enactment of Section 1501 exceeds the power of Congress under the Commerce Clause and General Welfare Clause of the United States Constitution. Alternatively, the Commonwealth contends that the Minimum Essential Coverage Provision is in direct conflict with Virginia Code Section 38.2-3430.1:1 (2010), commonly referred to as the Virginia Health Care Freedom Act, thus implicating the Tenth Amendment.

As part of the relief sought, the Commonwealth also requests prohibitory injunctive relief barring the United States government from enforcing the Minimum Essential Coverage Provision within its territorial boundaries.

The case is presently before the Court on Motions for Summary Judgment filed by both parties pursuant to Federal Rule of Civil Procedure 56. Both sides have again filed well-researched memoranda supplying the Court with a thorough analysis of the controlling issues and pertinent jurisprudence. The Court heard oral argument on October 18, 2010. As this Court previously cautioned, this case does not turn on the wisdom of Congress or the public policy implications of the ACA. The Court's attention is focused solely on the constitutionality of the enactment.

A review of the supporting memoranda filed by each party yields no material facts genuinely in issue and neither party suggests to the contrary. The dispute at hand is driven entirely by issues of law.[1]

[1] The Secretary takes issue with the Commonwealth's characterization of aspects of the ACA, its economic impact, and the legislative intent underlying Va. Code Section 38.2-3430.1:1. These

The present procedural posture of this case is best summarized by the penultimate paragraph of this Court's Memorandum Opinion denying the Defendant's Motion to Dismiss:

> While this case raises a host of complex constitutional issues, all seem to distill to the single question of whether or not Congress has the power to regulate—and tax—a citizen's decision not to participate in interstate commerce. Neither the U.S. Supreme Court nor any circuit court of appeals has squarely addressed this issue. No reported case from any federal appellate court has extended the Commerce Clause or Tax Clause to include the regulation of a person's decision not to purchase a product, notwithstanding its effect on interstate commerce.

(Mem. Op. 2, Aug. 2, 2010, ECF No. 84.)

I.

The Secretary, in her Memorandum in Support of Defendant's Motion for Summary Judgment, aptly sets the framework of the debate: "[t]his case concerns a pure question of law, whether Congress acted within its Article I powers in enacting the ACA." (Def.'s Mem. Supp. Mot. Summ. J. 17, ECF No. 91.) At this final stage of the proceedings, with some refinement, the issues remain the same.

Succinctly stated, the Commonwealth's constitutional challenge has three distinct facets. First, the Commonwealth contends that the Minimum Essential Coverage Provision, and affiliated penalty, are beyond the outer limits of the Commerce Clause and associated Necessary and Proper Clause as measured by U.S. Supreme Court precedent. More specifically, the Commonwealth argues that requiring an otherwise unwilling

---

disputed facts are neither substantive nor essential to issue resolution, and consequently do not preclude summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48, 106 S. Ct. 2505, 2510 (1986).

individual to purchase a good or service from a private vendor is beyond the boundaries of congressional Commerce Clause power. The Commonwealth maintains that the failure, or refusal, of its citizens to elect to purchase health insurance is not economic activity historically subject to federal regulation under the Commerce Clause.

Alternatively, the Commonwealth contends that the Minimum Essential Coverage Provision cannot be sustained as a legitimate exercise of the congressional power of taxation under the General Welfare Clause. It argues that the Provision is mischaracterized as a tax and is, in actuality, a penalty untethered to an enumerated power. Congress may not, in the Commonwealth's view, exercise such power to impose a penalty for what amounts to passive inactivity.

Lastly, the Commonwealth asserts that Section 1501 is in direct conflict with the Virginia Health Care Freedom Act. Its Attorney General argues that the enactment of the Minimum Essential Coverage Provision is an unlawful exercise of police power, encroaches on the sovereignty of the Commonwealth, and offends the Tenth Amendment to the U.S. Constitution.

The Secretary prefaces her response with an acknowledgement that the debate over the constitutionality of the ACA has evolved into a polemic mix of political controversy and legal analysis. When viewed from a purely legal perspective, the Secretary maintains that the requirement that most Americans obtain a minimum level of health insurance coverage or pay a tax penalty "is well within the traditional bounds of Congress's Article I powers." (Def.'s Mem. Supp. 1.) Her argument begins with an explanation of the reformative impact of the health care regime created by the Act.

"[T]he Act is an important, but incremental, advance that builds on prior reforms of the interstate health insurance market over the last 35 years." (Def.'s Mem. Supp. 1.) The Secretary points to congressional findings that the insurance industry has failed to take corrective action to eliminate barriers which prevent millions of Americans from obtaining affordable insurance. To correct this systemic failure in the interstate health insurance market, Congress adopted a carefully crafted scheme which bars insurers from denying coverage to those with preexisting conditions, and from charging discriminatory premiums on the basis of medical history.

In order to guarantee the success of these reforms, the Secretary maintains that Congress properly exercised its powers under the Commerce Clause, or alternatively the Necessary and Proper Clause, to adopt a regulatory mechanism to effectuate these health care market reform measures, namely the Minimum Essential Coverage Provision. "[B]ecause the Act regulates health care financing [it] is quintessential economic activity." (Def.'s Reply Mem. 3, ECF No. 132.)

Moreover, the Secretary rejects the Commonwealth's contention that the implementation of the Minimum Essential Coverage Provision through the Necessary and Proper Clause violates state sovereignty. Since the penalty mechanism does not compel state officials to carry out a federal regulatory scheme, she maintains that it does not implicate the Tenth Amendment.

The Secretary also disputes the logic behind the Commonwealth's contention that the Provision compels health care market participation by individuals who do not wish to

purchase insurance. She dismisses the notion that uninsured people can sit passively on the market sidelines. Her reasoning flows from the observation that

> the large majority of the uninsured regularly migrate in and out of insurance coverage. That is, the uninsured, as a class, often make, revisit, and revise economic decisions as to how to finance their health care needs. Congress may regulate these economic actions when they substantially affect interstate commerce. . . . Insurance-purchase requirements have long been fixtures in the United States Code.

(Def.'s Mem. Supp. 2.)

Both the Secretary's argument in defense of the Provision and the apparent underlying rationale of Congress are premised on the facially logical assumption that every individual at some point in life will need some form of health care. "No person can guarantee that he will divorce himself entirely from the market for heath care services." (Def.'s Mem. Opp. Mot. Summ. J. 1, ECF No. 96.) "[N]o person can guarantee that he will never incur a sudden, unanticipated need for expensive care; and very few persons, absent insurance, can guarantee that they will not shift the cost of that care to the rest of society." (Def.'s Reply Mem. 2.) In the Secretary's view, failure to appreciate this logic is the fatal flaw in the Commonwealth's position.[2]

On a third front, the Secretary defends the Minimum Essential Coverage Provision as a valid exercise of Congress's independent authority to lay taxes and make expenditures for the general welfare. Contrary to earlier representations by the

[2] In *Florida ex rel. McCollum v. U.S. Dep't of Health & Human Servs.*, Judge Vinson aptly captures the theoretic underpinning of the Secretary's argument. "Their argument on this point can be broken down to the following syllogism: (1) because the majority of people will at some point in their lives need and consume healthcare services, and (2) because some of the people are unwilling or unable to pay for those services, (3) Congress may regulate everyone and require that everyone have specific, federally-approved insurance." 716 F. Supp. 2d 1120, 1162 (N.D. Fla. 2010).

Legislative and Executive branches, the Secretary now states unequivocally that the Provision is a tax, published in the Internal Revenue Code, and enforced by the Internal Revenue Service. The Secretary notes that "[i]ts penalty operates as an addition to an individual's income tax liability on his annual tax return, which is calculated by reference to income." (Def.'s Mem. Supp. 2.) The Secretary also cites projections that it will raise $4 billion annually in general revenue. She takes issue with the Commonwealth's position that there is a legal distinction between penalties that serve regulatory purposes and other forms of revenue raising taxation. In her opinion, any such legal distinction has long been abandoned by the Supreme Court.[3]

Finally, the Secretary highlights several precepts of legal analysis which she suggests should guide the Court in reviewing the issues raised. First, she cautions the Court to remember that the standard for facial challenges establishes a high hurdle. It requires the Commonwealth to demonstrate that there are no possible circumstances in which the Provision could be constitutionally applied. *United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 2100 (1987). In other words, they "must show that the [statute] cannot operate constitutionally under any circumstance." *West Virginia v. U.S. Dep't of Health & Human Servs.*, 289 F.3d 281, 292 (4th Cir. 2002). Proof of a single constitutional application is all that is necessary in her view. In summary, she explains

[3] Because the Minimum Essential Coverage Provision is incorporated into the Internal Revenue Code, and technically under the purview of the Secretary of the Treasury, Secretary Sebelius, at this late stage, maintains that the Secretary of the Treasury is a necessary party, whose absence as such warrants dismissal. This aspect of her motion was rejected by a separate Memorandum Order (Dk. No. 152) dated October 13, 2010.

> for Virginia's facial challenge to succeed under its theory, this Court would have to conclude that no uninsured individual would ever use or be charged for medical services, and that no uninsured individual would ever make an active decision whether to purchase insurance. Because such a showing cannot be made, Virginia's facial challenge must fail.

(Def.'s Mem. Opp. 19.)

On this issue, the Secretary holds the weaker hand. The cases she relies upon, *Salerno* and *West Virginia*, which are styled as facial challenges, focus on the impact or effect of the enactment at issue. The immediate lawsuit questions the authority of Congress—at the bill's inception—to enact the legislation. The distinction is somewhat analogous to subject matter jurisdiction, the power to act ab initio. By their very nature, almost all constitutional challenges to specific exercises of enumerated powers, particularly the Commerce Clause, are facial. "When . . . a federal statute is challenged as going beyond Congress's enumerated powers, under our precedents the court first asks whether the statute is unconstitutional *on its face*." *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 743, 123 S. Ct. 1972, 1986 (2003) (Scalia, J., dissenting); *see also City of Boerne v. Flores*, 521 U.S. 507, 516, 117 S. Ct. 2157, 2162 (1997). A careful examination of the Court's analysis in *Lopez* and *Morrison* does not suggest the standard articulated in *Salerno*. In both *Lopez* and *Morrison*, the Court declared the statute under review to be legally stillborn without consideration of its effect downstream.

In fact, the viability of the *Salerno* dictum cited by the Secretary has been questioned by the Court in *City of Chicago v. Morales*, 527 U.S. 41, 119 S. Ct. 1849 (1999). "To the extent we have consistently articulated a clear standard for facial challenges, it is not the *Salerno* formulation, which has never been the decisive factor in

any decision of this Court, including *Salerno* itself." *Id.* at 55 n.22, 119 S. Ct. at 1858 n.22. *See also Fargo Women's Health Org. v. Schafer*, 507 U.S. 1013, 1013, 113 S. Ct. 1668, 1669 (1993) (O'Connor, J., concurring in denial of stay and injunction); *Planned Parenthood v. Miller*, 63 F.3d 1452, 1458 (8th Cir. 1995).

Even if the Commonwealth is held to the higher standard of proof, unconstitutionality in all applications, it could be met if the enforcement mechanism is itself unconstitutional. Importantly, it is not the effect on individuals that is presently at issue—it is the authority of Congress to compel *anyone* to purchase health insurance. An enactment that exceeds the power of Congress to adopt adversely affects everyone in every application. Indeed, the Minimum Essential Coverage Provision touches every American citizen required to file an annual IRS Form 1040 or 1040A.[4]

Second, the Secretary correctly asks the Court to be mindful that it must presume the constitutionality of federal legislation. *Gibbs v. Babbitt*, 214 F.3d 483, 490 (4th Cir. 2000). Third, she reminds the Court that the task at hand is not to independently review the facts underlying the decision of Congress to exercise its Article I authority to enact legislation. Reviewing courts are confined to a determination of whether a rational basis exists for such congressional action. *See Gonzales v. Raich*, 545 U.S. 1, 22, 125 S. Ct. 2195, 2208 (2005).

[4] The Commonwealth also contends that the only application at issue is the conflict with the Virginia Health Care Freedom Act. The Court, however, need not specifically reach this issue.

II.

In this Court's Memorandum Opinion denying the Defendant's Motion to Dismiss, the Court recognized that the Secretary's application of the Commerce Clause and General Welfare Clause appeared to extend beyond existing constitutional precedent. It was also noted that each side had advanced some authority arguably supporting the theory underlying their position. Accordingly, the Court was unable to conclude at that stage that the Complaint failed to state a cause of action. At this point, the analysis proceeds to the next level. To prevail, the Commonwealth, as Plaintiff, must make "a plain showing that Congress has exceeded its constitutional bounds." *Gibbs*, 214 F.3d at 490 (internal citation omitted). To win summary judgment, the Secretary must convince the Court to the contrary.

Under Federal Rule of Civil Procedure 56(c)(2), summary judgment should be granted "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *News & Observer Publ'g Co. v. Raleigh-Durham Airport Auth.*, 597 F.3d 570, 576 (4th Cir. 2010) (quoting Fed. R. Civ. P. 56(c)(2)). "The moving party is 'entitled to judgment as a matter of law' when the nonmoving party fails to make an adequate showing on an essential element for which it has the burden of proof at trial." *News & Observer Publ'g Co.*, 597 F.3d at 576; *see Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 805–06, 119 S. Ct. 1597, 1603 (1999). Aside from sparring over representations of marginal consequence, there do not

appear to be any material facts genuinely at issue. This case turns solely on issues of law. Both parties acknowledge that resolution by summary judgment is appropriate.

III.

Turning to the merits, this Court previously noted that the Minimum Essential Coverage Provision appears to forge new ground and extends the Commerce Clause powers beyond its current high water mark. The Court also acknowledged the finite well of jurisprudential guidance in surveying the boundaries of such power. The historically-accepted contours of Article I Commerce Clause power were restated by the Supreme Court in *Perez v. United States*, 402 U.S. 146, 150, 91 S. Ct. 1357, 1359 (1971). The *Perez* Court divided traditional Commerce Clause powers into three distinct strands. First, Congress can regulate the channels of interstate commerce. *Id.* Second, Congress has the authority to regulate and protect the instrumentalities of interstate commerce and persons or things in interstate commerce. *Id.* Third, Congress has the power to regulate activities that substantially affect interstate commerce. *Id.* It appears from the tenor of the debate in this case that only the third category of Commerce Clause power is presently at issue.

Critical to the Secretary's argument is the notion that an individual's decision not to purchase health insurance is in effect "economic activity." (Def.'s Mem. Supp. 35.) The Secretary rejects the Commonwealth's implied premise that a person can simply elect to avoid participation in the health care market. It is inevitable, in her view, that every individual—today or in the future—healthy or otherwise—will require medical care. She adds that a large segment of the population is uninsured and "consume[s] tens

of billions of dollars in uncompensated care each year." (Def.'s Mem. Opp. 14.) The Secretary maintains that the irrefutable facts demonstrate that "[t]he conduct of the uninsured—their economic decision as to how to finance their health care needs, their actual use of the health care system, their migration in and out of coverage, and their shifting of costs on to the rest of the system when they cannot pay—plainly is economic activity." (Def.'s Mem. Opp. 16–17.)

The Secretary relies on what is commonly referred to as an aggregation theory, which is conceptually based on the hypothesis that the sum of individual decisions to participate or not in the health insurance market has a critical collective effect on interstate commerce. Congress may regulate even intrastate activities if they are within a class of activities that, in the aggregate, substantially affect interstate commerce. In support of this argument, the Secretary relies on the teachings of the Supreme Court in *Gonzales*, wherein the Court noted that "[w]hen Congress decides that the 'total incidence' of a practice poses a threat to a national market, it may regulate the entire class." *Gonzales*, 545 U.S. at 17, 125 S. Ct. at 2205–06 (citing *Perez*, 402 U.S. at 154, 91 S. Ct. at 1361). In other words, her argument is premised on the theoretical effect of an aggregation or critical mass of indecision on interstate commerce.

The core of the Secretary's primary argument under the Commerce Clause is that the Minimum Essential Coverage Provision is a necessary measure to ensure the success of its larger reforms of the interstate health insurance market.[5] The Secretary emphasizes

[5] The Secretary seems to sidestep the independent freestanding constitutional basis for the Provision.

that the ACA is a vital step in transforming a currently dysfunctional interstate health insurance market. In the Secretary's view, the key elements of health care reform are coverage of those with preexisting conditions and prevention of discriminatory premiums on the basis of medical history. These features, the Secretary maintains, will have a material effect on the health insurance underwriting process, and inevitably, the cost of insurance coverage. Therefore, without full market participation, the financial foundation supporting the health care system will fail, in effect causing the entire health care regime to "implode." Unless everyone is required by law to purchase health insurance, or pay a penalty, the revenue base will be insufficient to underwrite the costs of insuring individuals presently considered as high risk or uninsurable. Therefore, under the Secretary's reasoning, since Congress has the power under the Commerce Clause to reform the interstate health insurance market, it also possesses, under the Necessary and Proper Clause, the power to make the regulation effective by enacting the Minimum Essential Coverage Provision. *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 118–19, 62 S. Ct. 523, 525–26 (1942).

The Secretary seeks legal support for her aggregation theory in the Supreme Court's holding in *Wickard v. Filburn*, 317 U.S. 111, 63 S. Ct. 82 (1942) and *Gonzales*. She maintains that the central question is whether there is a rational basis for concluding that the class of activities at issue, when "taken in the aggregate," substantially affects interstate commerce. *Gonzales*, 545 U.S. at 22, 125 S. Ct. at 2208; *Wickard*, 317 U.S. at 127–28. In other words, "[w]here the class of activities is regulated and that class is within reach of federal power, the courts have no power 'to excise, as trivial, individual

instances' of the class." *Gonzales*, 545 U.S. at 23, 125 S. Ct. at 2209 (quoting *Perez*, 402 U.S. at 154, 91 S. Ct. at 1361); *United States v. Malloy*, 568 F.3d 166, 180 (4th Cir. 2009), *cert. denied*, 130 S. Ct. 1736 (2010).

In *Wickard*, the Supreme Court upheld the power of Congress to regulate the personal cultivation and consumption of wheat on a private farm. The Court reasoned that the consumption of such non-commercially produced wheat reduced the amount of commercially produced wheat purchased and consumed nationally, thereby affecting interstate commerce. *Wickard* is generally acknowledged to be the most expansive application of the Commerce Clause by the Supreme Court, followed by *Gonzales*.

At issue in *Gonzales* was whether the aggregate effect of personal growth and consumption of marijuana for medicinal purposes under California law had a sufficient impact on interstate commerce to warrant regulation under the Commerce Clause. The Supreme Court concluded that "[l]ike the farmer in *Wickard*, respondents are cultivating, for home consumption, a fungible commodity for which there is an established, albeit illegal, interstate market. . . . Here too, Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would similarly affect price and market conditions." *Gonzales*, 545 U.S. at 18–19, 125 S. Ct. at 2206–07.

The Secretary emphasizes that the Commonwealth's challenge fails to appreciate the significance of the overall regulatory scheme and program at issue. Quoting from *Gonzales*, the Secretary notes that when "a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under the statute is of no consequence." (Def.'s Mem. Supp. 19 (quoting *Gonzales*, 545 U.S. at 17,

125 S. Ct. at 2206).) Furthermore, the Secretary adds that "[f]or the provisions of '[a] complex regulatory program' to fall within [Congress's] commerce power, '[i]t is enough that the challenged provisions are an integral part of the regulatory program and that the regulatory scheme when considered as a whole satisfies this test.'" (Def.'s Mem. Opp. 9 (quoting *Gibbs*, 214 F.3d at 497).)

When reviewing congressional exercise of the Commerce Clause powers, the Secretary cautions that a court "need not itself measure the impact on interstate commerce of the activities Congress sought to regulate, nor need the court calculate how integral a particular provision is to a larger regulatory program. The court's task instead is limited to determining 'whether a rational basis exists' for Congress's conclusions."[6] (Def.'s Mem. Supp. 19 (quoting *Gonzales*, 545 U.S. at 22, 125 S. Ct. at 2208).)

Because the Minimum Essential Coverage Provision is the linchpin which provides financial viability to the other critical elements of the overall regulatory scheme, the Secretary concludes that its adoption is within congressional Commerce Clause powers. She emphasizes that Congress "rationally found that a failure to regulate the

[6] In response to footnote 1 in the Court's Memorandum Opinion denying Defendant's Motion to Dismiss, the Secretary addresses the effect of the McCarran-Ferguson Act on the power of Congress to regulate the business of insurance under the Commerce Clause. The Act expressly declared that the regulation and taxation of the business of insurance, and all who engage in it, should be subject to the laws of the several states unless Congress specifically states the contrary. 15 U.S.C. § 1012. *Life Partners, Inc. v. Morrison*, 484 F.3d 284, 292 (4th Cir. 2007) *cert. denied*, 552 U.S. 1062 (2007).

The Secretary points out that where Congress exercises that power, its enactment controls over any contrary state law. *Humana, Inc. v. Forsyth*, 525 U.S. 299, 306, 119 S. Ct. 710, 716 (1999). Specifically, the Secretary maintains that the ACA reforms the insurance industry by preventing insurers from denying or revoking coverage for those with preexisting conditions and by protecting individuals with such conditions from being charged discriminatory rates. These provisions, which are effectuated by the Minimum Essential Coverage Provision, in the Secretary's view, regulate the business of insurance.

The Commonwealth counters, however, that an individual's decision not to purchase insurance is not within the logical ambit of the business of insurance.

decision to delay or forego insurance—*i.e.*, the decision to shift one's costs on to the larger health care system—would undermine the 'comprehensive regulatory regime.'" (Def.'s Mem. Supp. 27 (quoting *Gonzales*, 545 U.S. at 27, 125 S. Ct. at 2211).) Therefore, the Secretary posits that because the guaranteed coverage and rate discrimination issues are unquestionably within the Commerce Clause powers, the mechanism chosen by Congress to effectuate those reforms, the Minimum Essential Coverage Provision, is also a proper exercise of that power—either under the Commerce Clause or the associated Necessary and Proper Clause.

IV.

The Secretary characterizes the Minimum Essential Coverage Provision as the vital kinetic link that animates Congress's overall regulatory reform of interstate health care and insurance markets. "[T]he Necessary and Proper Clause makes clear that the Constitution's grants of specific federal legislative authority are accompanied by broad power to enact laws that are 'convenient, or useful' or 'conducive' to the authority's 'beneficial exercise.'" *United States v. Comstock*, 130 S. Ct. 1949, 1956 (2010) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 408 (1819). The Secretary maintains that because Congress has rationally concluded "that the minimum coverage provision is necessary to make the other regulations in the Act effective," it is an appropriate exercise of the Necessary and Proper Clause. (Def.'s Mem. Supp. 29.) Again, the Secretary contends that the determination of whether the means adopted to attain its legislative goals are rationally related is reserved for Congress alone. *Burroughs v. United States*, 290 U.S. 534, 547–48, 54 S. Ct. 287, 291 (1934).

Although the Necessary and Proper Clause vests Congress with broad authority to exercise means, which are not themselves an enumerated power, to implement legislation, it is not without limitation. As the Secretary concedes, the means adopted must not only be rationally related to the implementation of a constitutionally-enumerated power, but it must not violate an independent constitutional prohibition. *Comstock*, 130 S. Ct. at 1956–57. Whether the Minimum Essential Coverage Provision, which requires an individual to purchase health insurance or pay a penalty, is borne of a constitutionally-enumerated power, is the core issue in this case. As the Supreme Court noted in *Buckley v. Valeo*, "Congress has plenary authority in all areas in which it has substantive legislative jurisdiction, . . . so long as the exercise of that authority does not offend some other constitutional restriction." 424 U.S. 1, 132, 96 S. Ct. 612, 688 (1976) (internal citation omitted). The Commonwealth argues that the Provision offends a fundamental restriction on Commerce Clause powers.

In their opposition, the Commonwealth focuses on what it perceives to be the central element of Commerce Clause jurisdiction—economic activity. The Commonwealth distinguishes what was deemed to be "economic activity" in *Wickard* and *Gonzales*, namely a voluntary decision to grow wheat or cultivate marijuana, from the involuntary act of purchasing health insurance as required by the Provision. In *Wickard* and *Gonzales*, individuals made a conscious decision to grow wheat or cultivate marijuana, and consequently, voluntarily placed themselves within the stream of interstate commerce. Conversely, the Commonwealth maintains that the Minimum

Essential Coverage Provision compels an unwilling person to perform an involuntary act and, as a result, submit to Commerce Clause regulation.

Drawing on the logic articulated in *United States v. Lopez*, 514 U.S. 549, 115 S. Ct. 1624 (1995) and *United States v. Morrison*, 529 U.S. 598, 120 S. Ct. 1740 (2000), which limited the boundaries of Commerce Clause jurisdiction to activities truly economic in nature and that actually affect interstate commerce, the Commonwealth contends that a decision not to purchase a product, such as health insurance, is not an economic *activity*. In *Morrison*, the Court noted that "[e]ven [our] modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits." *Morrison*, 529 U.S. at 608, 120 S. Ct. at 1748–49. The Court in *Morrison* also pointed out that "the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation." *Id.* at 614, 120 S. Ct. at 1752. Finally, in *Morrison*, the Court rejected "the argument that Congress may regulate noneconomic, violent criminal conduct based solely on the conduct's aggregate effect on interstate commerce." *Id.* at 617, 120 S. Ct. at 1754. The Commonwealth urges a similar analysis in this case.

The Commonwealth does not appear to challenge the aggregate effect of the many moving parts of the ACA on interstate commerce. Its lens is narrowly focused on the enforcement mechanism to which it is hinged, the Minimum Essential Coverage Provision.

The Commonwealth argues that the Necessary and Proper Clause cannot be employed as a vehicle to enforce an unconstitutional exercise of Commerce Clause

power, no matter how well intended. Although the Necessary and Proper Clause grants Congress broad authority to pass laws in furtherance of its constitutionally-enumerated powers, its authority is not unbridled. As Chief Justice John Marshall observed in *McCulloch*, "[l]et the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional." *McCulloch*, 17 U.S. (4 Wheat.) at 421.

More recently, in restating the limitations on the scope of the Necessary and Proper Clause, the Supreme Court defined the relevant inquiry, "we look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power." *Comstock*, 130 S. Ct. at 1956. If a person's decision not to purchase health insurance at a particular point in time does not constitute the type of economic activity subject to regulation under the Commerce Clause, then logically an attempt to enforce such provision under the Necessary and Proper Clause is equally offensive to the Constitution.

The Secretary, in rebuttal, faults the Commonwealth's reasoning as overly simplistic. She argues that the Commonwealth's theory is dependent on which method a person chooses to finance their inevitable health care expenditures. If the costs are underwritten by an insurance carrier, it is activity; if the general public pays by default, it is passivity. She maintains that under the Commonwealth's reasoning, the former is subject to Commerce Clause powers, while the latter is not. The Secretary also points out that under the Commonwealth's approach, "it [is] unclear whether an individual became

'passive,' and therefore supposedly beyond the reach of the commerce power, if he dropped his policy yesterday, a week ago, or a year ago." (Def.'s Mem. Opp. 18.) She characterizes the Commonwealth's logic as untenable.

The Secretary also rejects the notion that the imposition of a monetary penalty for failing to perform an act is outside the spirit of the Constitution. She offers two examples to highlight the point. In the context of Superfund regulation, a property owner cannot avoid liability for allowing contamination on his property by claiming that he was only "passive." Mere ownership of contaminated property under the Superfund Act triggers an obligation to undertake remedial measures. *Nurad, Inc. v. Wm. E. Hooper & Sons Co.*, 966 F.2d 837, 845 (4th Cir. 1992). Moreover, a property owner cannot defeat an action to take a parcel of his land under the power of eminent domain, simply by passively taking no action. *Berman v. Parker*, 348 U.S. 26, 33, 75 S. Ct. 98, 103 (1954).

In addition, the Secretary points out that sanctions have historically been imposed for failure to timely file tax returns or truthfully report or pay taxes due, as well as failure to register for the selective service or report for military duty. The Commonwealth, however, counters that most of the examples presented are directly related to a specific constitutional provision—empowering Congress to assess taxes and to provide and maintain an Army and Navy, U.S. Const. art. I, § 8, or requiring compensation for exercising the power of eminent domain. U.S. Const. amend. V. In the case of the landowner sanctioned for contamination of his property, liability largely stemmed from an active transaction of purchase. In contrast, no specifically articulated constitutional authority exists to mandate the purchase of health insurance.

V.

Despite the laudable intentions of Congress in enacting a comprehensive and transformative health care regime, the legislative process must still operate within constitutional bounds. Salutatory goals and creative drafting have never been sufficient to offset an absence of enumerated powers. As the Supreme Court noted in *Morrison*, "[e]ven [our] modern-era of precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits." *Morrison*, 529 U.S. at 608, 120 S. Ct. at 1748–49 (quoting *Lopez*, 514 U.S. at 556–57, 115 S. Ct. at 1628). Congressional findings, no matter how extensive, are insufficient to enlarge the Commerce Clause powers of Congress. *Morrison*, 529 U.S. at 614, 120 S. Ct. at 1752.

In *Wickard* and *Gonzales*, the Supreme Court staked out the outer boundaries of Commerce Clause power. In both cases, the activity under review was the product of a self-directed affirmative move to cultivate and consume wheat or marijuana. This self-initialed change of position voluntarily placed the subject within the stream of commerce. Absent that step, governmental regulation could have been avoided.

In *Morrison* and *Lopez*, however, the Supreme Court tightened the reins and insisted that the perimeters of legislation enacted under Commerce Clause powers square with the historically-accepted contours of Article I authority delineated by the Supreme Court in *Perez v. United States*, 402 U.S. 146, 91 S. Ct. 1357 (1971). Pertinent to the immediate case, the Court in *Perez* stated that Congress has the power to regulate *activities* that substantially affect interstate commerce. *Id.* at 150, 91 S. Ct. at 1359. In