MEMORANDUM STATE OF ALASKA

DEPARTMENT OF LAW

TO: Mike Nizich
Chief of Staff
Office of the Governor

DATE: April 19, 2010

FROM: Daniel S. Sullivan
Attorney General

SUBJECT: Constitutional Analysis of the Patient Protection Affordable Care Act and Health Care and Education Affordability Reconciliation Act of 2010

The Governor has requested that the Department of Law analyze the constitutionality of the recently enacted Patient Protection and Affordable Care Act and the Health Care and Education Affordability Reconciliation Act of 2010 (hereinafter "the Act"). Our analysis and recommendation on whether Alaska should join the 20 other states challenging the constitutionality of the Act are detailed in the following memorandum.

Executive Summary

The Patient Protection and Affordable Care Act was passed by the U.S. Congress on March 21, 2010, and signed by the President on March 23, 2010. The Health Care and Education Affordability Reconciliation Act of 2010 was passed by the U.S. Congress on March 25, 2010, and signed by the President on March 30, 2010. Combined, these two bills constitute an enormous and complex piece of federal legislation that is over 2,200 pages and imposes hundreds of new requirements on states, businesses, health care providers, non-profit entities, and individuals. The following provisions are the most relevant with regard to an analysis of the constitutionality of this federal legislation.

The Act contains an "individual mandate" that requires uninsured Americans to purchase health insurance if they do not fall within one of the individual mandate's exceptions. This mandate expressly requires U.S. citizens and legal residents to have federal government-approved "qualifying" health insurance coverage beginning in 2014. Those who refuse to purchase a government-approved health insurance plan will have to pay a tax penalty of $695 per year or 2.5% of their annual income, whichever is higher. The Act imposes numerous new requirements on the terms of health insurance policies and plans under which American citizens will be covered. Most of these requirements

involve expanding the terms and conditions of health insurance plans. The Act also significantly expands Medicaid eligibility for low-income individuals.

Finally, the Act requires each state to establish an "American Health Benefit Exchange" to facilitate the purchase of federal qualifying health plans, provide for the establishment of a "Small Business Health Options Program," and meet other requirements described in the Act. To qualify to be listed on the exchange, a health benefit plan must abide by numerous federal regulations, which will be promulgated at a future date. If a state fails to establish a health benefit exchange, the Act requires the Secretary of Health and Human Services to establish and operate an exchange within that state.

In analyzing the constitutionality of the Act, it is critical to keep in mind as a legal touchstone the fundamental structural principles of the U.S. Constitution as they relate to the American system of government. More specifically, to ensure that no single government entity wields too much power, the Framers of the U.S. Constitution created vertical and horizontal separations of power. The vertical separation is between the federal and state governments and their respective powers. The horizontal separation consists of the division of authority and limited powers among the three branches of the federal government. These structural principles, which are fundamental components of the U.S. Constitution, were adopted by the Framers to ensure the protection of the liberty interests of the American people.

The Act's individual mandate is the most troubling and constitutionally suspect component of this expansive legislation. Such a federal dictate is clearly unprecedented. Congress' own budget arm, the Congressional Budget Office, has stated that a "mandate requiring all individuals to purchase health insurance *would be an unprecedented form of federal action; [t]he government has never required people to buy any good or service as a condition of lawful residence in the United States*." Nevertheless, in the "findings" section of the Act, Congress attempts to make the case that it has the authority to require an individual mandate pursuant to its powers under the Commerce Clause of the U.S. Constitution.

While it is certainly correct that modern Supreme Court jurisprudence has greatly expanded the scope of congressional power under the Commerce Clause, it is also true that no court – and certainly not the Supreme Court – has ever authorized federal action similar to the individual mandate based on Congress' Commerce Clause authority or any other enumerated power in the Constitution. Moreover, while acknowledging Congress' expansive Commerce Clause powers, recent Supreme Court cases have also emphasized the need for limits to such powers. Without such discernable limits, Congress' Commerce Clause powers could end up nullifying and making irrelevant other fundamental components of

the U.S. constitutional structure, particularly states' rights, federalism, and the individual liberty interests of the American people.

Given the unprecedented scope of the Act's individual mandate and Supreme Court jurisprudence recently emphasizing limits to Congress' Commerce Clause powers, we believe that the Supreme Court could find that the individual mandate is beyond the scope of Congress' Commerce Clause powers.

We also believe that it is not in Alaska's interest to acquiesce to the significant expansion of the federal government's power as embodied in the Act's individual mandate. History has shown that our state's interests, perhaps uniquely among states in the Union, are negatively affected by growing federal power that often disregards, or is inimical to, what is in the public interest of Alaska and our citizens. Whether one agrees with the need for comprehensive health care reform or not, such reform is not in Alaska's public interest if it is accomplished in a manner that allows for a constitutional shortcut that dramatically expands the reach of the federal government's powers at the expense of states' rights, constitutional limits on Congress, and the liberty interests of our citizens. We therefore recommend that Alaska join 20 other states in challenging the constitutionality of the Act on the grounds that the Commerce Clause and Tenth Amendment of the U.S. Constitution do not authorize the Act's unprecedented individual mandate requirement.

In defending its authority to enact the Act's individual mandate, the federal government will likely claim that even if Congress does not have the authority for such a mandate under its Commerce Clause powers, it nevertheless has the authority pursuant to the Constitution's Tax and Spending Clause because the individual mandate entails a tax penalty. Supreme Court jurisprudence on this issue has shifted over the years with two somewhat conflicting lines of precedent. The first is an extremely broad reading of Congress' tax and spending powers that generally has upheld most congressional tax enactments as constitutional if they raise revenue. But another line of Supreme Court cases has held that Congress cannot resort to its taxing power to effectuate an end which otherwise is not within the scope of its other enumerated powers under Article I of the U.S. Constitution. These differing lines of Supreme Court precedent have never been reconciled. Thus, it is not clear how the Supreme Court would rule on the issue of whether Congress has the authority under its taxing power to enact the individual mandate even if it lacks such authority under the Commerce Clause.

Our analysis with regard to certain other claims challenging the constitutionality of the Act has resulted in similar uncertain conclusions. For example, there is a colorable claim that the individual mandate's tax penalty is a "direct tax." Under Article I, § 9, direct taxes must be apportioned, and because

the individual mandate's tax penalty is not apportioned, it may be an invalid exercise of Congress' taxing authority. A claim can also be made that the Medicaid mandate exceeds Congress' power under Article I and violates the Tenth Amendment of the U.S. Constitution. However, Supreme Court jurisprudence on such issues is sparse, as is detailed factual information regarding such claims, which makes it very difficult to have definitive conclusions about the merits of such claims.

On the other hand, there have been a number of other claims challenging the constitutionality of the Act, such that various provisions violate Due Process, Privileges and Immunities, Equal Protection, and the First Amendment. We have examined many of these claims and find that in general they would be unlikely to succeed.

I. OVERVIEW OF THE HEALTH CARE BILL

The Patient Protection and Affordable Care Act was passed by the U.S. Congress on March 21, 2010, and signed by the President on March 23, 2010, and the Health Care and Education Affordability Reconciliation Act of 2010 was passed by the U.S. Congress on March 25, 2010, and signed by the President on March 30, 2010.[1] This legislation, referred to as "the Act" in this memorandum, is an enormous and complex piece of federal legislation that consists of over 2,200 pages and imposes hundreds of new requirements on states, businesses, health care providers, non-profit entities, and individuals. The following provisions are the most relevant with regard to an analysis of the constitutionality of this federal legislation.[2]

A. The Individual and Employer Mandates

The Act contains an "individual mandate" that requires uninsured Americans to purchase health insurance if they do not fall within one of the individual mandate's exceptions. The Act expressly requires U.S. citizens and

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[1] The Patient Protection and Affordable Care Act (H.R. 3590, as amended in the Senate (Dec. 24, 2009)) ("H.R. 3590") and the Health Care and Education Affordability Reconciliation Act of 2010 (amendment in the nature of a substitute to H.R. 4872).

[2] Other agencies within Alaska's state government are reviewing how to implement the Act, as well as the numerous implications that the Act will have on the state.

legal residents to have "qualifying" health coverage beginning in 2014.[3] Individuals without qualifying coverage, i.e., those who refuse to purchase a government-approved health insurance plan, will have to pay a tax penalty of $695 per year or 2.5% of income, whichever is higher, beginning in 2016.[4] The penalty will be a lower amount in 2014 and 2015 because Congress has phased-in the penalty provisions.[5]

Exemptions to the mandate will be granted: (1) for financial hardship, religious objections, American Indians, those without coverage for less than three months, undocumented immigrants, and incarcerated individuals; (2) if the lowest cost government-approved plan option available exceeds eight percent of an individual's income; and (3) if an individual's income is below the Commerce Department's poverty level.[6] The Act expressly provides that failure to pay the penalty cannot result in criminal liability.[7]

Similarly, the Act contains a mandate for employers, which is titled "Shared Responsibility for Employers."[8] This provision takes effect on January 1, 2014. Under the Act, employers with over 200 full-time employees must automatically enroll new employees in a government approved plan.[9] Additionally, companies with 50 or more employees, at least one of whom is entitled to the federal subsidy for health insurance premium payments, must offer

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[3] H.R. 3590, §§ 5000A(a)(c)-(e) (2009). The Act provides for subsidies that attempt to make mandatory coverage affordable for all eligible persons. H.R. 3590 § 5000A(e).

[4] H.R. 3590, § 5000A(c). Individuals who fail to maintain minimum essential coverage will be subject to a penalty equal to the greater of: (1) 2.5% of household income in excess of the taxpayer's household income (with a maximum of $2,085 for a family); or (2) $695 per uninsured adult in the household.

[5] H.R. 3590, § 5000A(c)(3)(B). In 2014, the penalty will be the greater of 1% of household income over the filing threshold or $95. In 2015, it will be the greater 2% of household income over the filing threshold or $325. Beginning in 2016, it will be the greater of 2.5% or $695.

[6] H.R. 3590, § 5000A(e).

[7] H.R. 3590, § 5000A(g)(2)(A) ("WAIVER OF CRIMINAL PENALTIES – In the case of any failure by a taxpayer to timely pay any penalty imposed by this section, such taxpayer shall not be subject to any criminal prosecution or penalty with respect to such failure.").

[8] H.R. 3590, § 1513.

[9] H.R. 3590, § 1511.

health insurance benefits or face a financial penalty of $2000 per employee.[10] Companies with fewer than 50 workers would be exempt from the per-employee penalty. These employers could be eligible to receive tax incentives and credits for offering health care coverage.[11]

This mandate will also apply to state and local governments.

B. Required Health Benefit Policy Terms

The Act also imposes new requirements on the terms of health insurance policies under which U.S. citizens and businesses will be covered. Under the Act, insurers may not, among other things: (1) establish lifetime limits on the dollar value of benefits or annual limits on the dollar value of benefits (effective 2014);[12] (2) rescind a policy, except in the event of fraud or misrepresentation by the insured;[13] or (3) exclude an individual from coverage due to that individual's pre-existing condition.[14]

Additionally, insurers must: (1) provide coverage for childhood immunizations, breast cancer screenings, and other preventative health care practices;[15] (2) allow a parent to carry an adult child on his or her policy until the child reaches the age of 26;[16] and (3) allow the insured to renew his or her policy, if the insurer continues to offer that type of policy.[17]

All insurers must provide individuals a standardized summary of benefits and coverage explanation that complies with regulations to be developed by the Secretary of Health and Human Services.[18] All insurers must also provide a

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10 H.R. 4872, § 1003(a).

11 H.R. 3590, § 1513. The Reconciliation Act lessened the amount of this penalty by subtracting 30 from the number of employees for the purpose of calculating the per-employee penalty. H.R. 4872, § 1003(a).

12 H.R. 3590, § 2711.

13 H.R. 3590, § 2712.

14 H.R. 3590, § 2704.

15 H.R. 3590, § 2713.

16 H.R. 3590, § 2714.

17 H.R. 3590, § 2703.

18 H.R. 3590, § 2715.

standardized process for coverage determinations and claims that provides certain procedural protections for the insured.[19]

C. Expansion of Coverage for Lower-Income Individuals and Families

The Act expands Medicaid eligibility for low-income individuals. Beginning in January 2014, all children, parents, and childless adults who are not presently entitled to Medicaid and whose family incomes are at or below 133% of the federal poverty line will become eligible for Medicaid.[20] The federal government will fund 100% of the additional cost of providing care for newly-covered individuals between January 1, 2014, and December 31, 2016, and it will pay a decreasing percentage of the additional cost in subsequent years.[21] As these federal Medicaid payments decline, states will likely have to pick up these additional expenses.

The Act also provides for a tax credit to those lower-income individuals and families who do not qualify for Medicaid to assist in paying the cost of health insurance premiums. This "premium assistance credit" is calculated on a sliding scale – the lower a person or family's income, the higher the tax credit.[22] Additionally, the Act reduces the maximum out-of-pocket costs that may be paid by lower-income individuals, as compared to the standard ceiling for out-of-pocket costs.[23]

D. The Health Benefit Exchange Provision

The Act's exchange provision requires each state to establish an "American Health Benefit Exchange" no later than January 1, 2014.[24] The health benefit exchanges are designed to allow individuals and small businesses to access and compare health insurance policies through a centralized clearinghouse. The exchanges must facilitate the purchase of federal qualifying health plans, provide for the establishment of a "Small Business Health Options Program," and meet

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19 H.R. 3590, § 2719.

20 H.R. 3590, § 2001(a)(1).

21 H.R. 3590, § 2001(a)(3).

22 H.R. 3590, § 1401.

23 H.R. 3590, § 1402.

24 H.R. 3590, § 1311(b)(1).

other requirements described in the Act.[25] To qualify for listing on the exchange, a health benefit plan must abide by regulations, to be established by the Secretary of Health and Human Services, governing marketing, enrollment, presentation of benefits in a standard format, and other matters.[26] The Act authorizes grants of money to the states for activities related to the establishment of the health benefit exchange.[27]

If a state fails to establish a health benefit exchange, the Act requires the Secretary of Health and Human Services to establish and operate an exchange within that state. The Secretary will do so if: (1) the state does not elect to apply standards that the Secretary adopts by regulation for establishing and operating exchanges, or (2) the Secretary determines by January 1, 2013, that the state will not have an operational exchange by January 1, 2014, or that the state has not taken actions necessary to implement related requirements.[28]

E. The Disaster Provision

The Act's disaster provision adjusts the federal medical assistance percentage for Medicaid funding to states suffering major, statewide disasters. The provision applies only if, at any time during the preceding seven fiscal years, the President declared a major disaster in that state and determined that, because of the disaster, every county or parish in the state qualified for public assistance from the federal government.[29] Other conditions also apply.[30]

II. FOUNDATIONAL PRINCIPLES OF THE U.S. CONSTITUTION

A. Horizontal and Vertical Separation of Powers

In analyzing the constitutionality of the Act, it is critical to keep in mind as a legal touchstone the fundamental structural principles of the U.S. Constitution as they relate to the American system of government. More specifically, to ensure that no single government entity wields too much power, the Framers of the U.S. Constitution created vertical and horizontal separations of power. The vertical separation is between the federal and state governments and their respective

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25 H.R. 3590, § 1311(b)(1).

26 H.R. 3590, § 1311(c).

27 H.R. 3590, § 1311(a)(1)-(3).

28 H.R. 3590, § 1321(c).

29 H.R. 3590, § 2006.

30 H.R. 3590, § 2006.

powers. The horizontal separation consists of the division of authority and limited powers among the three branches of the federal government. These structural principles, which are fundamental components of the U.S. Constitution, were adopted by the Framers to ensure the protection of the liberty interests of the American people.[31]

As James Madison wrote: "In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivide among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself."[32] And more recently the Supreme Court stated, "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."[33]

B. Congress' Limited Enumerated Powers

One critical mechanism that the Framers devised to keep the federal government in check was to provide Congress with enumerated powers. Article I, § 1, of the U.S. Constitution provides Congress only with the "legislative powers herein granted[.]" Article I, § 8, lists Congress' legislative powers. To effectuate this limited grant of authority, this section of the Constitution states that Congress may "make all laws which shall be necessary and proper for carrying into execution the *foregoing powers*[.]"[34] Put simply: "The powers delegated by the proposed Constitution to the federal government are few and defined."[35]

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31 *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) ("This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry. . . . The constitutionally mandated balance of power between the States and the Federal Government was adopted by the Framers to ensure the protection of our fundamental liberties.").

32 The Federalist No. 51.

33 *Gregory*, 501 U.S. at 458.

34 Art. I, § 8, cl. 18 (emphasis added) (the "Necessary and Proper Clause").

35 The Federalist No. 45 (J. Madison).

In one of our country's most important Supreme Court decisions, *Marbury v. Madison*, Chief Justice Marshall enshrined this bedrock principle: "The powers of the legislature are defined and limited; and those limits may not be mistaken or forgotten."[36] More recently, the Supreme Court succinctly observed that "[e]very law enacted by Congress must be based in one or more of its powers enumerated in the Constitution."[37]

The foundational principle that Congress has limited power is supplemented, and in some ways held in tension with another well-accepted principle: Congress has broad implied powers.[38] Indeed, "[a] government ought to contain in itself every power requisite to the full accomplishment of the objects committed to its care, and to the complete execution of the trusts for which it is responsible; free from every other control, but a regard to the public good and to the sense of the people."[39] This proposition was endorsed by the Supreme Court nearly 200 years ago and has been accepted ever since.[40]

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[36] *Marbury v. Madison*, 5 U.S (1 Cranch) 137, 176 (1803).

[37] *United States v. Morrison*, 529 U.S. 598, 607 (2000).

[38] The tension between Congress' "enumerated powers" and "implied powers" has led to disputes since President Washington's first administration, when some leaders wanted Congress to charter a bank. Critics countered that nothing in the Constitution authorizes Congress to form a bank. To resolve this debate, President Washington asked his cabinet whether the authority to form a bank could be inferred from the powers that are enumerated in the Constitution. Thomas Jefferson said "no." Alexander Hamilton disagreed; he explained that in order to carry out the powers it was expressly granted, Congress must have implied powers. President Washington sided with Hamilton. And the Supreme Court, when it eventually heard this dispute many years later, vindicated President Washington's decision. *See* Laurence H. Tribe, *American Constitutional Law* § 5-3 at 799 (3d ed. 2000) (citing *McCulloch v. Maryland*, 17 U.S. 317 (1819)).

[39] The Federalist No. 31 (A. Hamilton).

[40] *See McCulloch v. Maryland*, 17 U.S. 316, 421 (1819) ("We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let 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 consist with the letter and spirit of the constitution, are

Throughout our nation's history the Supreme Court has balanced these competing principles, and, as will be discussed in more detail below, has struck down laws when Congress' actions exceed its enumerated and implied powers. Any analysis of the constitutionality of the more-than 2,200 page Patient Protection and Affordable Care Act and the Health Care and Education Affordability Reconciliation Act must keep in mind, and use as a touchstone, these fundamental principles of our Constitution.

III. OVERVIEW OF THE INDIVIDUAL MANDATE

A. "An Unprecedented Form of Federal Action"

The individual mandate, or the "individual responsibility requirement" as it is referred to in the Act, requires uninsured individuals to obtain a government-approved minimal level of health insurance or face a tax penalty.[41] It is undisputed that Congress has never before imposed anything like the individual mandate on American citizens.

Indeed, Congress' own budget and research arms acknowledged just how unprecedented this mandate is. In evaluating the individual mandate, the Congressional Budget Office stated:

> A mandate requiring all individuals to purchase health insurance *would be an unprecedented form of federal action*. *The government has never required people to buy any good or service as a condition of lawful residence in the United States*. An individual mandate would have two features that, in combination, would make it unique. First, it would impose a duty on individuals as members of society. Second, it would require people to purchase a specific service that would be heavily regulated by the federal government.[42]

More recently, the Congressional Research Service stated that "[w]hether such a requirement would be constitutional under the Commerce Clause is perhaps the most challenging question posed by such a proposal, as it is a novel issue whether

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constitutional."); *see generally* Laurence H. Tribe, *American Constitutional Law* § 5-3 at 799 (3d ed. 2000).

41 H.R. 3590, § 5000A.

42 Congressional Budget Office, *The Budgetary Treatment of an Individual Mandate to Buy Health Insurance* (1994) (emphasis added); available at http://www.cbo.gov/ftpdocs/48xx/doc4816/doc38.pdf.

Congress may use this clause to require an individual to purchase a good or a service."[43]

B. Congress Relies on Its Commerce Clause and Tax and Spending Clause Authority to Impose the Individual Mandate

To justify the constitutionality of imposing an individual mandate on qualifying American citizens who lack health insurance, the federal government will argue that the mandate is authorized by the U.S. Constitution's Commerce Clause. Indeed, in the Act's "findings" section, Congress expressly attempts to make the case that it has the authority to enact the individual mandate pursuant to its Commerce Clause powers. This section states that the individual mandate "is commercial and economic in nature, and substantially affects interstate commerce[.]"[44] As explained in more detail below, this is the criteria that Congress must satisfy to justify acting under the Commerce Clause.

The findings section then goes into significant detail about how health care and health insurance affect the nation's economy.[45] To bolster this finding that the

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[43] Congressional Research Service, *Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis* 3 (2009), available at http://assets.opencrs.com/rpts/R40725_20090724.pdf.

[44] H.R. 3590 § 5000A.

[45] *See* H.R. 3590 § 1501(a)(2), which provides: (A) The requirement regulates activity that is commercial and economic in nature: economic and financial decisions about how and when health care is paid for, and when health insurance is purchased.
(B) Health insurance and health care services are a significant part of the national economy. National health spending is projected to increase from $2,500,000,000,000, or 17.6 percent of the economy, in 2009 to $4,700,000,000,000 in 2019. Private health insurance spending is projected to be $854,000,000,000 in 2009, and pays for medical supplies, drugs, and equipment that are shipped in interstate commerce. Since most health insurance is sold by national or regional health insurance companies, health insurance is sold in interstate commerce and claims payments flow through interstate commerce.
(C) The requirement, together with the other provisions of this Act, will add millions of new consumers to the health insurance market, increasing the supply of, and demand for, health care services. According to the Congressional Budget Office, the requirement will increase the number and share of Americans who are insured.
(D) The requirement achieves near-universal coverage by building upon and strengthening the private employer-based health insurance system, which covers

individual mandate affects commerce, Congress also cites *United States v. South-Eastern Underwriters Association*, 322 U.S. 533 (1944), where the Supreme Court "ruled that insurance is interstate commerce subject to Federal regulation."[46]

The federal government will also likely argue that the individual mandate is authorized by Congress' taxing power under the U.S. Constitution's Tax and Spending Clause. The individual mandate provision is codified in section 5000A of the Internal Revenue Code. The provision will be enforced by the IRS and imposes a tax penalty on qualifying individuals who decide not to purchase federally approved health insurance.

176,000,000 Americans nationwide. In Massachusetts, a similar requirement has strengthened private employer-based coverage: despite the economic downturn, the number of workers offered employer-based coverage has actually increased.
(E) Half of all personal bankruptcies are caused in part by medical expenses. By significantly increasing health insurance coverage, the requirement, together with the other provisions of this Act, will improve financial security for families.
(F) Under the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1001 et seq.), the Public Health Service Act (42 U.S.C. 201 et seq.), and this Act, the Federal Government has a significant role in regulating health insurance which is in interstate commerce.
(G) Under sections 2704 and 2705 of the Public Health Service Act (as added by section 1201 of this Act), if there were no requirement, many individuals would wait to purchase health insurance until they needed care. By significantly increasing health insurance coverage, the requirement, together with the other provisions of this Act, will minimize this adverse selection and broaden the health insurance risk pool to include healthy individuals, which will lower health insurance premiums. The requirement is essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold.
(H) Administrative costs for private health insurance, which were $90,000,000,000 in 2006, are 26 to 30 percent of premiums in the current individual and small group STAT.244markets. By significantly increasing health insurance coverage and the size of purchasing pools, which will increase economies of scale, the requirement, together with the other provisions of this Act, will significantly reduce administrative costs and lower health insurance premiums. The requirement is essential to creating effective health insurance markets that do not require underwriting and eliminate its associated administrative costs.

[46] H.R. 3590 § 1501(a)(3).

This memorandum will principally focus on whether Congress possesses the power to impose the individual mandate under the Commerce Clause and the Tax and Spending Clause of the U.S. Constitution.

IV. DOES THE INDIVIDUAL MANDATE VIOLATE THE COMMERCE CLAUSE?

A. An Overview of the Supreme Court's Early Commerce Clause Jurisprudence

Under the U.S. Constitution's Commerce Clause, Congress has the power "[t]o regulate Commerce with foreign Nations, and among the several States."[47] Congress has corresponding authority under the Necessary and Proper Clause to pass legislation that constitutes a reasonable means to effectuate the regulation of interstate commerce.[48]

The Supreme Court's "understanding of the reach of the Commerce Clause, as well as Congress' assertion of authority thereunder, has evolved over time."[49] For this reason, any analysis of the Commerce Clause will benefit from a review of the Supreme Court's landmark 1995 *United States v. Lopez* decision where the Court discusses in detail the development of its Commerce Clause jurisprudence.

The *Lopez* Court begins by explaining that the Supreme Court first defined the nature of Congress' commerce power in *Gibbons v. Ogden,* 22 U.S. (9 Wheat) 1, 189-190 (1824):

> Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse.[50]

Chief Justice Marshall elaborated that the commerce power "is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in congress, is complete in itself, may be exercised to

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47 Art. I, § 8, cl. 3.

48 Art. I, § 8, cl. 18; *see McCulloch v. Maryland*, 17 U.S. at 421-422.

49 *Gonzales v. Raich*, 545 U.S. 1, 15-16 (2005).

50 *United States v. Lopez,* 514 U.S. 549, 553 (1995) (quoting *Gibbons,* 9 Wheat at 189-190).

its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution."[51]

The *Gibbons* Court went on to acknowledge at least one important limitation on Congress' Commerce Clause power: "It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient, and is certainly unnecessary. . . . The enumeration presupposes something not enumerated; and that something, if we regard the language, or the subject of the sentence, must be the exclusively internal commerce of a State."[52]

As *Lopez* notes, for over sixty years thereafter, "the Court's Commerce Clause decisions dealt but rarely with the extent of Congress' power, and almost entirely with the Commerce Clause as a limit on state legislation that discriminated against interstate commerce."[53]

Beginning in the late 19th century, because of a significant increase in industrialization, Congress began to rely on the Commerce Clause to regulate national economic activities. For example, in 1887, Congress enacted the Interstate Commerce Act, and, in 1890, Congress enacted the Sherman Antitrust Act.[54] "These laws ushered in a new era of federal regulation under the commerce power. When cases involving these laws first reached this Court, we imported from our negative Commerce Clause cases the approach that Congress could not regulate activities such as 'production,' 'manufacturing,' and 'mining.'"[55] Under this more restrained theory of the Commerce Clause, the Supreme Court was active and struck down federal legislation.[56]

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51 *Lopez*, 514 U.S. at 553.

52 *Id.* at 553 (*quoting Gibbons*, 9 Wheat at 194-195).

53 *Id.* at 553-554 (collecting cases).

54 *Id.* at 554.

55 *Id*. (citing *United States v. E.C. Knight Co.*, 156 U.S. 1, 12 (1895) ("Commerce succeeds to manufacture, and is not part of it") and *Carter v. Carter Coal Co.*, 298 U.S. 238, 304 (1936) ("Mining brings the subject matter of commerce into existence. Commerce disposes of it")).

56 *Id.* at 554 (citing *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 851-852 (1935) (striking down regulations that fixed the hours and wages of individuals employed by an intrastate business because the activity being regulated related to interstate commerce only indirectly)).

During the New Deal, however, a sea change in the Supreme Court's jurisprudence occurred. "In *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 57 (1937), the Court upheld the National Labor Relations Act against a Commerce Clause challenge, and in the process, departed from the distinction between 'direct' and 'indirect' effects on interstate commerce."[57] The Court specifically held that intrastate activities that "have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions" are within Congress' power to regulate.[58]

B. The Expansion of Congressional Authority Under Modern Commerce Clause Jurisprudence

Thus, in 1937, the Supreme Court departed from its restrained 19th century precedents and significantly expanded Congress' authority under the Commerce Clause. The Supreme Court announced: "The power to regulate commerce is the power to enact 'all appropriate legislation' for 'its protection and advancement.'"[59] The Supreme Court added, "[t]he power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over [commerce] as to make regulation of [these activities] appropriate[.]"[60]

In one of its most expansive readings of the Commerce Clause to date, the Supreme Court, in *Wickard v. Filburn*, upheld the application of regulations promulgated under the Agricultural Adjustment Act, which were designed to control the volume of wheat moving in interstate and foreign commerce in order to avoid surpluses and abnormally low wheat prices.[61] In challenging the Act, Filburn, a farmer, argued that Congress' power to regulate commerce did not authorize it to regulate wheat production that was "wholly for consumption on the farm."[62] The Supreme Court, in a unanimous opinion, rejected this argument.[63]

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57 *Lopez*, 514 U.S. at 555.

58 *Id.* (quoting *Jones & Laughlin Steel Corp.* 301 U.S. at 37).

59 *Jones & Laughlin Steel Corp.*, 301 U.S. at 36-37 (quoting *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 564 (1870)).

60 *United States v. Darby*, 312 U.S. 100, 118 (1941) (holding that Congress has the authority to establish a federal minimum wage).

61 317 U.S. 111 (1942).

62 *Wickard*, 317 U.S. at 118.

The *Lopez* Court explains why these decisions expanded Congress' authority over commerce:

> *Jones & Laughlin Steel* and *Wickard* ushered in an era of Commerce Clause jurisprudence that greatly expanded the previously defined authority of Congress under that Clause. In part, this was a recognition of the great changes that had occurred in the way business was carried on in this country. Enterprises that had once been local or at most regional in nature had become national in scope. But the doctrinal change also reflected a view that earlier Commerce Clause cases artificially had constrained the authority of Congress to regulate interstate commerce.[64]

With this framework, Congress used its expanded Commerce Clause power to regulate many matters that were previously considered far outside the scope of the Commerce Clause.[65] For example, in the Civil Rights cases, motel and restaurant owners argued that the Civil Rights Act cannot be constitutional because it impairs their right to contract and infringes on their liberty interests to deny service to whomever they please.[66] The Supreme Court forcefully rejected

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[63] *Wickard*, 317 U.S. at 127-28 ("The effect of the statute before us is to restrict the amount which may be produced for market and the extent as well to which one may forestall resort to the market by producing to meet his own needs. That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.").

[64] *Lopez*, 514 U.S. at 556.

[65] *See, e.g., Darby*, 312 U.S. at 118 (holding that Congress has the authority to establish a federal minimum wage and require employers to maintain records in order to ensure compliance with the new law); *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942) (holding that the commerce power extends to the regulation of intrastate milk pricing); *Perez v. United States*, 402 U.S. 146 (1971) (holding that Congress has authority under the Commerce Clause to impose criminal penalties on intrastate extortionate credit transactions); *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 288 (1981) (holding that Congress could regulate intrastate surface coal mining).

[66] *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 254-55 (1964), and *Katzenbach v. McClung*, 379 U.S. 294, 298 (1964) (holding that the Commerce Clause authorizes Congress to pass the Civil Rights Act, which banned

these claims because racial discrimination at motels and restaurants does impact commercial activity.[67]

More recently, in *Gonzales v. Raich*, the Supreme Court found that in the course of regulating the national illegal market in marijuana, Congress could forbid the local, noncommercial, production and consumption of medical marijuana. The *Raich* court explained that as part of a scheme to regulate narcotics it was "necessary and proper" for Congress to also regulate local non-economic behavior even when it did not cross state lines.[68] As Justice Scalia observed in his concurring opinion: "Where necessary to make a regulation of interstate commerce effective, Congress may regulate even those intrastate activities that do not themselves substantially affect interstate commerce."[69]

C. Modern Limits On Congress' Commerce Clause Power

But this expansive interpretation of Congress' Commerce Clause powers has not been without limits. In the landmark 1995 decision of *United States v. Lopez*, the Supreme Court, driven by renewed federalism concerns and a fear that Congress had virtually unlimited powers under the Commerce Clause, ruled, for the first time in decades, that Congress had exceeded its Commerce Clause power. More specifically, the *Lopez* Court struck down a federal law mandating a gun-free zone around public school campuses because it was "a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms."[70] The Supreme Court added that "[t]o uphold the Government's contentions [that the Act was authorized by the Commerce Clause], we would have to pile inference upon inference in a manner that would . . . convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States."[71]

Lopez was not a rogue decision. Five years later, in *United States v. Morrison*, the Supreme Court invalidated as beyond Congress' Commerce Clause powers the portion of the Violence Against Women Act that created civil liability

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motel and restaurant owners from discriminating against African-Americans, because discrimination in interstate travel affects interstate commerce).

67 *Id.*

68 545 U.S. 1, 24 (2005) (quotations omitted).

69 *Raich*, 545 U.S. at 34.

70 *Lopez*, 514 U.S. at 561.

71 *Id.* at 567.

for gender-based violent crimes.[72] The *Morrison* Court held: "We . . . reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local. In recognizing this fact we preserve one of the few principles that has been consistent since the Clause was adopted. The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States."[73]

But perhaps most importantly, *Lopez* and *Morrison* emphasized the need for tangible and meaningful limits to Congress' Commerce Clause powers.[74] The Supreme Court underscored "that even under our modern, expansive interpretation of the Commerce Clause, Congress' regulatory authority is *not without effective bounds*."[75] The Supreme Court also stated that the "scope of the interstate commerce power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government."[76]

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72 529 U.S. 598 (2000).

73 *Morrison*, 529 U.S. at 617-618 (citations omitted).

74 *Id.* at 615-616 ("Petitioners' reasoning, moreover, will not limit Congress to regulating violence but may, as we suggested in *Lopez*, be applied equally as well to family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant.").

75 *Id.* at 608 (emphasis added).

76 *Id.* (quotations omitted). The Supreme Court went on to explain that if an Act of Congress does not regulate commercial activity, Congress has no authority under the Commerce Clause. *Id.* at 610 (citing *Lopez*, 514 U.S. at 567) ("The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce"). Thus, for an Act of Congress to withstand judicial scrutiny the persons being regulated, or their conduct, "must have a commercial character, and the purposes or the design of the statute must have an evident commercial nexus." *Id.* at 611.

D. Does Congress Have Authority Under the Commerce Clause to Impose the Individual Mandate?

Based on the foregoing, the Supreme Court has identified three broad categories of activity that Congress may regulate under its commerce power. First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce. And third, Congress' commerce authority includes the power to regulate activities that "substantially affect" interstate commerce.[77]

The focus here will be on the third category, the "substantially affects" test, because health insurance reform and the individual mandate have nothing to do with the channels or instrumentalities of interstate commerce.

To evaluate whether an activity that is not in interstate commerce is authorized under the "substantially affects" test, the relevant questions are: (1) whether Congress had a rational basis for finding that activity being regulated affects interstate commerce, and (2) if it had such a basis, whether the means it selected to regulate the activity are reasonable and appropriate.[78]

We therefore need to examine whether health insurance substantially affects interstate commerce and, if it does, whether the individual mandate is a reasonable and appropriate means to regulate this market. As Justice Scalia explained, when an Act of Congress regulates interstate commerce, Congress also has the authority under the Necessary and Proper Clause to regulate local non-economic activities if the regulation of the local non-economic activity "is a necessary part of a more general regulation of interstate commerce. [In this

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77 *Raich*, 545 U.S. at 16-17.

78 *Heart of Atlanta Motel, Inc.*, 379 U.S. at 258; *see also Raich*, 545 U.S. at 18, 24 (explaining if an Act or comprehensive statutory scheme regulates interstate commerce then Congress can also regulate non-economic activities if the specific provision is necessary to effectively regulate the interstate market); *Lopez*, 514 U.S. at 561 (noting that Congress can regulate non-economic conduct if it is an "essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated."); *Darby*, 312 U.S. at 121 (explaining legislation regulating local conduct will be sustained "when the means chosen, although not themselves within the granted power, [are] nevertheless deemed appropriate aids to the accomplishment of some purpose within an admitted power of the national government.").

context] the relevant question is simply whether the means chosen are 'reasonably adapted to the attainment of a legitimate end under the commerce power."[79]

(1) "Substantially Affect" Analysis

The first prong of this test requires an examination of whether the Act or, alternatively, the individual mandate, substantially affects interstate commerce. It is generally well accepted that health insurance is a financial product that is purchased by millions of businesses and individuals throughout the nation and thus deals with economic transactions and substantially affects interstate commerce.[80] Thus, as a preliminary matter, the Act falls within Congress' power under the Commerce Clause.

In arguing that the individual mandate is constitutional, the federal government will also likely assert that Congress found that the existence of millions of uninsured Americans and the decision to not have insurance substantially affects the national health insurance market.[81] This finding is

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[79] *Raich*, 545 U.S. at 37 (Scalia, J., concurring); *accord Darby,* 312 U.S. at 122-125 (holding that Congress could require employers to maintain records in order to demonstrate compliance with a regulatory scheme because this non-commercial intrastate activity was "an appropriate means to a legitimate end" of regulating interstate commercial conduct).

[80] *See United States v. South-Eastern Underwriters Ass'n,* 322 U.S. 533, 540 (1944) ("Perhaps no modern commercial enterprise directly affects so many persons in all walks of life as does the insurance business. Insurance touches the home, the family, and the occupation or the business of almost every person in the United States.").

[81] *See* H.R. 3590, § 1501(a)(2). The findings section first explains that the mandate requirement "regulates" commercial "activity," i.e.: "economic and financial decisions about how and when health care is paid for, and when health insurance is purchased." The findings section then links the mandate to the achievement of specific statutory goals. Paragraph 2(A), for example, specifies that without the mandate, "some individuals would make an economic and financial decision to forego health insurance coverage and attempt to self-insure, which increases risk to households and medical providers." Paragraph 2(F) puts the cost of providing uncompensated care to the uninsured at $43,000,000,000, which raises family premiums by $1,000 per year. Paragraph 2(G) also notes that 62 percent of all personal bankruptcies are caused by medical expenses, and states that the requirement, by increasing health insurance coverage, will strengthen financial security for families. Paragraph 2(I) explains why and how the mandate

entitled to substantial deference.[82] Thus, based on Congress' findings, the federal government will contend that uninsured individuals affect interstate commerce.

(2) Did Congress Select "Reasonable and Appropriate" Means?

The second prong of the analysis requires us to examine whether the imposition of the individual mandate is reasonable and appropriate – i.e., whether the individual mandate is needed to effectuate health insurance reform and whether the means chosen by Congress are reasonably adapted to the end permitted by the Constitution: the regulation of interstate commerce.[83]

Under this theory, the federal government will likely assert that the mandate is "reasonable and appropriate" because it furthers Congress' goal of health care reform. More specifically, Congress found that covering more people is expected to reduce health care costs by addressing the free-rider and adverse selection problems.[84] The federal government will also contend that the individual mandate is "reasonable and appropriate" because without it keeping premium costs down would be difficult or impossible health insurance reform would likely unravel. Indeed, Congress essentially makes this claim in the Act's findings section.[85]

Thus, the federal government will very likely argue that Congress may regulate the decision to not purchase insurance, even if it is viewed as a

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will minimize "adverse selection" and "broaden the risk pool" to "lower health insurance premiums."

[82] *See Raich*, 545 U.S. at 22.

[83] *Raich*, 545 U.S. at 34-35 (Scalia, J., concurring) (collecting cases discussing the relationship between the Necessary and Proper Clause and the "substantially affects" analysis). Justice Scalia explains that "the category of activities that substantially affect interstate commerce is *incomplete* because the authority to enact laws necessary and proper for the regulation of interstate commerce is not limited to laws governing intrastate activities that substantially affect interstate commerce. Where necessary to make a regulation of interstate commerce effective, Congress may [also] regulate even those intrastate activities that do not themselves substantially affect interstate commerce." *Id.* at 35 (citations and quotations omitted).

[84] *See* H.R. 3590, § 1501(a)(2).

[85] *See* H.R. 3590, § 1501(a)(2) (finding that to defray the increased costs caused by expanding health benefits, Congress needed to expand the pool of people insured).

noneconomic local activity, because increasing the number of insured is a necessary part of a more general regulation of an interstate commercial activity: the health insurance market. And as the Supreme Court has stated, Congress may regulate local non-economic activity if it is "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated."[86]

(3) Problems with the Federal Government's Likely Arguments

There are, however, potential weaknesses with the foregoing arguments.

First, the Supreme Court has never authorized Congress to regulate the "inactivity" of American citizens. A critical distinction exists between the individual mandate and past efforts to regulate noncommercial activities: unlike the farmer in *Wickard*, a person without health insurance, or one who declines to purchase it, is not engaged in *any* activity. Indeed, all of the Supreme Court's Commerce Clause cases are predicated on an individual or business engaged in some type of activity or conduct that impacts the economy – e.g., racial discrimination at restaurants and motels[87] or the consumption of home-grown wheat[88]or marijuana.[89] Congress' individual mandate, on the other hand,

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[86] *Lopez*, 514 U.S. at 561; *see also Heart of Atlanta Motel, Inc.*, 379 U.S. at 272 (Black, J., concurring) ("since the *Shreveport Case* this Court has steadfastly followed, and indeed has emphasized time and time again, that Congress has ample power to protect interstate commerce from activities adversely and injuriously affecting it, which but for this adverse effect on interstate commerce would be beyond the power of Congress to regulate."); *Wrightwood Dairy Co.*, 315 U.S. at 118-119 ("Congress plainly has power to regulate the price of milk distributed through the medium of interstate commerce, and it possesses every power needed to make that regulation effective. The commerce power is not confined in its exercise to the regulation of commerce among the states. . . . It is no answer to suggest, as does respondent, that the federal power to regulate intrastate transactions is limited to those who are engaged also in interstate commerce. The injury, and hence the power, does not depend upon the fortuitous circumstance that the particular person conducting the intrastate activities is, or is not, also engaged in interstate commerce."). *But see Morrison*, 529 U.S. at 611 ("in those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor.").

[87] *Heart of Atlanta Motel, Inc.*, 379 U.S. at 254-55.

[88] *Wickard*, 317 U.S. at 125.

presupposes power over Americans for literally doing nothing. The Congressional Budget Office also recognized this essential point when it expressed its own concerns about the individual mandate. "Federal mandates typically apply to people as parties to economic transactions, rather than as members of society."[90]

Second, the Supreme Court has never held that Congress can require individuals who are not engaged in any activity to purchase something in the private market or face a penalty. Even the Congressional Research Service cautioned that it is a "challenging" and "novel" question whether Congress may use the Commerce Clause "to require an individual to purchase a good or service."[91] The Commerce Clause provides Congress with the power to "regulate commerce . . . among the several states," but this power does not extend to *requiring citizens* to engage in commerce.[92]

To allow this to happen would create powers in the federal government that are indistinguishable from general police powers,[93] which are reserved to the states, in derogation of our Constitution's important limitations on federal legislative authority. The Supreme Court has specifically warned against such an expansive reading of the Commerce Clause. "The scope of the interstate commerce power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex

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89 *Raich*, 545 U.S. at 22-24.

90 Congressional Budget Office, *The Budgetary Treatment of an Individual Mandate to Buy Health Insurance* (1994) at 2, available at http://www.cbo.gov/ftpdocs/48xx/doc4816/doc38.pdf.

91 Congressional Research Service, *Requiring Individuals to Obtain Health Insurance*: *A Constitutional Analysis* at 3 (2009), available at http://assets.opencrs.com/rpts/R40725_20090724.pdf.

92 U.S. Const. Art. I, § 8.

93 Broadly speaking, the phrase "police power" describes "the residual prerogatives of sovereignty which the states had not surrendered to the federal government." Laurence H. Tribe, *American Constitutional Law* § 6-4 at 1046 (3d ed. 2000); *see also The License Cases*, 46 U.S. 504, 584 (1847) ("the police powers of a state . . . are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions"); *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 424 (1952) ("the police power is not confined to a narrow category; it extends . . . to all the great public needs."). It is generally understood that Congress does not have broad "police powers" because its authority to act is limited by Article I's enumerated powers.

society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." [94]

Third, to uphold the individual mandate a court would have to ignore the Supreme Court's recent admonition in *Lopez* and *Morrison* that Congress does not have unlimited Commerce Clause power. As one leading commentator has written, the "focus of the [*Lopez*] Court's analysis, and the basis for its holding, was a search for judicially cognizable limits to the increasingly amorphous and seemingly unbundled 'substantive effects' test that has developed [since 1937]."[95]

But if the individual mandate is upheld as constitutional, the concept of Commerce Clause limits would be rendered illusory, providing Congress with potential authority to regulate practically any sphere of American life.[96] For example, Congress can certainly regulate the car industry. Indeed, the federal government now owns a substantial stake in General Motors (GM). However, if the individual mandate is upheld under the Commerce Clause, could it then follow that Congress can require consumers shopping for vehicles to purchase a GM vehicle under threat of a tax surcharge in order for the federal government to more effectively manage GM? More on point, under the threat of a tax penalty, could Congress amend the Patient Protection and Affordable Care Act to require all Americans to purchase a federally-approved gym membership in order to lower obesity and blood pressure rates to reduce overall health care costs? If the Act's individual mandate is held to be a viable exercise of Congress' powers, the answer to these hypotheticals might well be yes.

(4) The Individual Mandate Should Be Beyond the Scope of Congress' Commerce Clause Powers

In conclusion, while it is certainly correct that modern Supreme Court jurisprudence has greatly expanded the scope of congressional power under the Commerce Clause, it is also true that no court – and certainly not the Supreme Court – has ever authorized federal action similar to the individual mandate based on Congress' Commerce Clause authority or any other enumerated power in the

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94 *Lopez*, 514 U.S. at 557 (quotations omitted).

95 *See* Laurence H. Tribe, *American Constitutional Law* § 5-4 at 817-18 (3d ed. 2000).

96 *Cf. Morrison*, 529 U.S. at 615-616 ("Petitioners' reasoning, moreover, will not limit Congress to regulating violence but may, as we suggested in *Lopez*, be applied equally as well to family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant.").

Constitution. Moreover, while acknowledging Congress' expansive Commerce Clause powers, recent Supreme Court cases have also emphasized the need for limits to such powers. Without such discernable limits, Congress' Commerce Clause powers could end up nullifying and making irrelevant other fundamental components of the U.S. constitutional structure, particularly states' rights, federalism, and the individual liberty interests of the American people.

Given the unprecedented scope of the Act's individual mandate and Supreme Court jurisprudence recently emphasizing limits to Congress' Commerce Clause powers, we believe that the Supreme Court could find that the individual mandate is beyond the scope of Congress' Commerce Clause powers.

E. The Individual Mandate and Alaska's Public Interest

With regard to the individual mandate, it is not in Alaska's interest to acquiesce to such a significant expansion of the federal government's power. History has shown that our state's interests, perhaps uniquely among states in the Union, are negatively affected by growing federal power that often disregards, or is inimical to, the interest in the public interest of Alaska and our citizens.[97]

Whether one agrees with the need for comprehensive health care reform or not, such reform is not in Alaska's public interest if it is accomplished in a manner that allows for a constitutional shortcut that dramatically expands the reach of the federal government's powers at the expense of states' rights, constitutional limits on Congress, and the liberty interests of our citizens.[98]

Moreover, if the individual mandate is deemed a legitimate exercise of Congress' Commerce Clause powers then the critically important separation of powers and federalism framework of the U.S. Constitution, which is designed to "ensure liberty,"[99] will be further eroded at the expense of Alaska's and Alaskans' interests. Therefore, we recommend that this exercise of unprecedented congressional power be challenged in court on the grounds that the Commerce

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[97] For instance, over the last several decades the federal government has consistently hindered or stopped responsible resource development within our state's borders. The examples are too numerous to list, but they range from closing off ANWR to the recent denial of permits in the National Petroleum Reserve.

[98] Commentators have noted that there are many ways to undertake comprehensive health care reform that falls comfortably within Congress' enumerated powers.

[99] *See Gregory*, 501 U.S. at 458.

Clause of the U.S. Constitution does not authorize the Act's individual mandate requirement.

V. DOES THE ACT VIOLATE CONGRESS' TAX POWER?

Although Congress is clearly basing its authority to institute an individual mandate on its Commerce Clause power, in defending the mandate from constitutional challenges, the federal government will also likely argue that Congress has the authority to require an individual mandate based on its taxing power. We therefore turn to the question of whether the taxing power under the U.S. Constitution authorizes Congress to enact the individual mandate.

A. Overview of the Act's Tax Penalty Provision

The Act requires U.S. citizens and legal residents to purchase or maintain a minimum level of government-approved health insurance coverage.[100] Minimum essential coverage includes various government-sponsored programs, eligible employer-sponsored plans, plans available for purchase in the individual market, grandfathered group health plans, and other coverage as approved by the Secretary of Health and Human Services in coordination with the Secretary of the Treasury.[101]

As noted above, qualifying individuals who fail to maintain minimum essential coverage will be subject to a penalty equal to the greater of: (1) 2.5% of household income in excess of the taxpayer's household income (with a maximum of $2,085 for a family); or (2) $695 per uninsured adult in the household. The fee for an uninsured individual under age 18 is one-half of the adult fee.[102] The total household tax may not exceed 300 percent of the per-adult tax.[103] This provision is effective for tax years beginning after December 31, 2013, although the tax amount will be phased in beginning in 2014–2016 and will be indexed for inflation after 2016.[104] The use of liens and seizures as a means of enforcing this

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100 H.R. 3590, §§ 5000A(b), (f).

101 H.R. 3590, § 5000A(a). This requirement would not apply to everyone – e.g., it does not apply to individuals who cannot afford coverage, American Indians, Alaska Natives, or those who maintain religious objections. H.R. 3590 §§ 5000A(d), (e).

102 H.R. 3590, § 5000A(c)(3)(C).

103 H.R. 3590, § 5000A(c)(2).

104 H.R. 3590, § 5000A(c)(3)(B).

tax is not authorized to enforce this tax, and noncompliance will not trigger criminal penalties.[105]

B. Congress' Taxation Power

Under Article I, § 8, of the U.S. Constitution, Congress has the power "to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States." Congress' taxing power is broad. However, Supreme Court jurisprudence on this issue has shifted over the years. Relevant to the individual mandate analysis, there are two lines of precedent that the Supreme Court has followed with regard to "regulatory taxes."

As an initial matter, there is no disputing that Congress has "especially broad latitude in creating classifications and distinctions in tax statutes."[106] As Justice Rehnquist explained: "The passage of time has only served to underscore the wisdom of that recognition of the large area of discretion which is needed by a legislature in formulating sound tax policies. . . . It has, because of this, been pointed out that in taxation, even more than in other fields, legislatures possess the greatest freedom in classification. . . . . the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes."[107]

Along these lines, the Supreme Court has generally held that if an enactment raises revenue (assuming the tax does not implicate the double jeopardy or excessive fines clauses[108]) then it is constitutional.[109] And since 1937, the

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105 H.R. 3590, § 5000A(g)(2)(A).

106 *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 547 (1983).

107 *Id.* at 547.

108 *See Dep't of Revenue, Mont. v. Kurth Ranch*, 511 U.S. 767 (1994) and *United States v. Bajakajian*, 524 U.S. 321 (1998); *see also Marchetti v. United States*, 390 U.S. 39, 44 (1968) (holding that a tax cannot violate the constitutional prohibition against self-incrimination).

109 *See, e.g., Sonzinsky v. United States*, 300 U.S. 506, 513-14 (1937) (holding that a tax does not cease to be valid because it discourages or regulates conduct or even deters the activities being taxed); *United States v. Sanchez*, 340 U.S. 42, 44-45 (1952) (same); *see also Helvering v. Davis*, 301 U.S. 619, 640 (1937) (holding that Congress acts within its constitutional powers when it raises revenue through taxation and redistributes it to serve the general welfare).

Supreme Court has never invalidated a penalty as an unconstitutional regulatory tax.[110]

Indeed, under these broad readings of Congress' tax power, the Supreme Court has generally held that Congress can often do through the Tax and Spending Clause what it cannot do directly under other enumerated powers.[111] "From the beginning of our government, the courts have sustained taxes although imposed with the collateral intent of effecting ulterior ends which, considered apart, were beyond the constitutional power of the lawmakers to realize by legislation directly addressed to their accomplishment."[112] It is therefore well accepted that a tax statute does not "necessarily fall because it touches on activities which Congress might not otherwise regulate."[113]

Federal appellate courts have not shown any willingness to depart from these general principles that underscore Congress' broad taxing authority.[114]

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110 Laurence H. Tribe, *American Constitutional Law* § 5-7 at 845-46 (3d ed. 2000).

111 *See, e.g., United States v. Butler*, 297 U.S. 1, 65-66 (1936) (noting that power to tax is not limited by the direct grants of legislative power found in Art. I, § 8); *New York v. United States,* 505 U.S. 144, 156-57, 167-78 (1992) (upholding regulation of states through conditional spending while striking down regulations purportedly passed under the commerce power); *see also Kansas v. United States*, 214 F.3d at 1198-202 (noting that the Tenth Amendment and the Tax and Spending Clause "are essentially mirror images of each other: if the authority to act has been delegated by the Constitution to Congress, then it may act pursuant to Article I; if not, the power has been reserved to the states by the Tenth Amendment."); *Litman v. George Mason University,* 186 F.3d 544, 556-57 & n.1 (4th Cir. 1999) (noting that Congress' tax authority is not dependent on the other grants of power in Art. I, § 8).

112 *Magnano Co. v. Hamilton*, 292 U.S. 40, 47 (1934).

113 *Sanchez,* 340 U.S. at 44.

114 *See, e.g., United States v. Grier,* 354 F.3d 210, 215 (3d Cir. 2003); *United States v. Thomson,* 361 F.3d 918, 921 (6th Cir. 2004) (rejecting argument that Congress unconstitutionally exercised its taxing power; "[h]aving required payment of a transfer tax and having required registration as an aid in collection of that tax, Congress under the taxing power may reasonably impose a penalty on possession of unregistered weapons . . . to discourage the transferor . . . from transferring the firearm without paying the tax"); *United States v. Lim,* 444 F.3d 910, 913 (7th Cir. 2006) (noting that courts will tolerate "overtly regulatory statutes so long as they have a plausible nexus to taxation"); *United States v. Hall,*

Nonetheless, such power is not without limits. In a second and related line of cases, the Supreme Court has ruled that Congress cannot impose a "tax" in order to penalize conduct that it could not regulate under another provision of the Constitution.[115]

For example, in *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922), the Supreme Court addressed the constitutionality of the Child Labor Tax Law. Drexel was engaged in the manufacture of furniture. It was assessed a tax penalty for having employed and permitted to work in its factory a boy under 14 years of age, which resulted in a ten percent tax on the company's net profits for that year. The company sued, attacking the Child Labor Tax Law on the ground that it is a regulation of the employment of child labor, which is a state, and not federal, function. The federal government defended the Act on the ground that it is a mere excise tax levied by Congress under its broad power of taxation conferred by Article I, § 8 of the U.S. Constitution.

The Supreme Court rejected the government's arguments. It tartly observed that "a court must be blind not to see that the so-called tax is imposed to stop the employment of children within the age limits prescribed. Its prohibitory

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171 F.3d 1133, 1142 (8th Cir. 1999) (holding "that Congress had the authority under the taxing clause to define as a crime the possession of an unregistered silencer" because the enactment, while regulatory in nature, was also designed to raise revenue); *Marigold v. Comeux*, 945 F.2d 409 (9th Cir. 1991) (upholding Tax Injunction Act under Congress' taxation power because it imposes a tax); *United States v. Dalton*, 960 F.2d 121, 125-26 (10th Cir. 1992) (noting that Congress has power to impose registration requirements for machine gun ownership under its tax power even though the main purpose of the tax was regulatory); *Mobile Republican Assembly v. United States*, 353 F.3d 1357, 1360-62 (11th Cir. 2003) (upholding federal campaign finance law designed to regulate local political organizations that imposed an additional tax on organizations that fail to make required disclosures).

[115] *United States v. Kahriger*, 345 U.S. 22, 31 (1953) ("Penalty provisions in tax statutes added for breach of a regulation concerning activities in themselves subject only to state regulation have caused this Court to declare the enactments invalid.") *overruled on other grounds by Marchetti v. United States*, 390 U.S. 39 (1968). *See generally A Healthy Debate*, 158 U. Pa. L. Rev. PENNUMBRA 93, 100 ("the problem with basing the [Act's individual] mandate on Congress's taxing power is not that such power cannot be used in a regulatory fashion; indeed, the Court has specifically authorized taxing schemes with regulatory effects. The problem is that this particular regulatory scheme (the health insurance-purchase mandate) exceeds Congress's regulatory power.").

and regulatory effect and purpose are palpable."[116] The Court then held that it will not enforce "laws of Congress dealing with subjects not entrusted to Congress, but left or committed by the supreme law of the land to the control of the states."[117] Significantly, the Court added that it would not let Congress attempt to regulate conduct by imposing penalties through its taxation power.[118]

Similarly, in *United States v. Butler*, 297 U.S. 1 (1937), the Supreme Court held that the Agricultural Adjustment Act was unconstitutional because it imposed a tax on processors of farm products that was coupled with payments to induce farmers not to produce. The Supreme Court explained that the design of the Act was *not* to raise revenue for the government, "but by its operation shows the exaction laid upon processors to be the necessary means for the intended control of agricultural production."[119] The Court held that the tax imposed was a pretext "for bringing about a desired end. . . . It is a statutory plan to regulate and control agricultural production, a matter beyond the powers delegated to the federal government. The tax, the appropriation of the funds raised, and the direction for their disbursement, are but parts of the plan. They are but means to an unconstitutional end."[120]

The Supreme Court concluded: "The power of taxation, which is expressly granted, may, of course, be adopted as a means to carry into operation another power also expressly granted. But resort to the taxing power to effectuate an end which is not legitimate, not within the scope of the Constitution, is obviously inadmissible."[121] Accordingly, the Supreme Court struck down the tax as unconstitutional.

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116 259 U.S. at 22.

117 *Bailey*, 259 U.S. at 22. *But see* John G. Nowak *Constitutional Law* § 5.5 at 231 (8th ed. 2010) ("The Tenth Amendment, however, is not a specific limitation on the federal taxing power. Although *Bailey* held that the federal government had violated the Tenth Amendment by infringing on the power reserved to the state, in modern times the Court does not apply the Tenth Amendment in this manner. The court treats the Tenth Amendment as a redundancy.").

118 *Id.*

119 *Butler*, 297 U.S. at 59

120 *Id.* at 61, 68. *But see* Erwin Chemerinsky, *Constitutional Law, Principles and Policies* § 3.4 at 198 (1997) ("This aspect of *Butler* has never been followed.").

121 *Id.* at 69.

C. Can Congress Impose an Individual Mandate Under its Taxing Power?

The first step in evaluating the constitutionality of the individual mandate tax requires us to consider whether Congress could reasonably conclude that the tax provision in the Act promotes the general welfare of the country.

"In considering whether a particular [tax] is intended to serve general public purposes, courts should defer substantially to the judgment of Congress."[122] In fact, the level of deference to the congressional decision is such that the Court "has more recently questioned whether 'general welfare' is a judicially enforceable restriction at all."[123] "No more essential or important power has been conferred upon the Congress and the presumption that an Act of Congress is valid applies with added force and weight to a levy of public revenue."[124]

Here, the tax penalty appears to meet this first test because Congress has found that it is necessary for "promoting a healthy populace, expanding access to health insurance, and preventing members of the public from being driven into poverty by medical costs surely count as contributions to the general welfare."[125] Congress has also found that taxing uninsured people helps to pay for the costs of the reform.[126]

The second, and more difficult issue, is whether Congress has the authority to impose the individual mandate under threat of a tax to secure compliance with the regulatory scheme. As explained above, there appear to be two conflicting lines of precedent that have never been fully reconciled by the Supreme Court.

On the one hand, a tax that is explicitly used as a penalty to enforce a mandate is unconstitutional if the mandate is not authorized by the Constitution. In other words, Congress cannot circumvent its limited powers by using its taxing authority as a backdoor way to regulate conduct.[127] Based on these cases, if the individual mandate is unconstitutional under the Commerce Clause then the tax

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122 *South Dakota v. Dole*, 483 U.S. 203, 207 (1987).

123 *Id.* at 207 n.2 (citing *Buckley v. Valeo*, 424 U.S. 1, 90-91 (1976) (per curiam)).

124 *United States v. Jacobs*, 306 U.S. 363, 370 (1937).

125 *A Healthy Debate*, 158 U. Pa. L. Rev. PENNUMBRA 93, 102.

126 H.R. 3590, § 1501(a)(2).

127 *See, e.g.*, *Bailey*, 259 U.S. at 20.

penalty is unconstitutional because Congress is misusing its taxation power to regulate in an area reserved exclusively for the states.

In defending the individual mandate, the federal government will likely counter, based on the other line of cases discussed above, that the court should reject the argument that the mandate is an impermissible "regulatory" tax for the simple reason that the enactment, on its face, is designed to raise revenue to pay for expanded health care.[128] The federal government might also argue that the *Bailey* and *Butler* line of cases is no longer followed by the Supreme Court.[129]

One problem with this argument is that the Supreme Court has never directly repudiated the principle that when Congress has no other independent regulatory authority, a regulatory tax raises constitutional issues.[130] "Penalty provisions in tax statutes added for breach of a regulation concerning activities in themselves subject only to state regulation have caused this Court to declare the enactments invalid."[131] And while the Supreme Court has not used this principle to invalidate an act of Congress since the 1930s, this may have more to do with the fact that Congress has not, apparently, enacted mandates that were outside of Congress' authority to act and that were enforced with penalty provisions.

Indeed, one explanation for why the Supreme Court has ignored *Bailey* and *Butler* for most of the last seventy years is that the Supreme Court's jurisprudence has allowed for virtually unlimited Congressional power under the Commerce Clause.[132] As a consequence, the limitations imposed by the pre-1937 tax cases,

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128 *See, e.g., Sonzinsky*, 300 U.S. at 513-14.

129 *Bob Jones Univ. v. Simon*, 416 U.S. 725, 741 n.12 (1974) ("It is true that the Court in those [pre-1937] cases drew what it saw at the time as distinctions between regulatory and revenue-raising taxes. But the Court has subsequently abandoned such distinctions."); *United States v. Lipscomb*, 299 F.3d 303, 319 (5th Cir. 2002) ("Although the *Butler* Court did hold that the Tenth Amendment cabined Congress's spending power, the Court quickly abandoned this view."); *Cf. Kansas v. United States*, 214 F.3d 1196, 1201 n.6 (10th Cir. 2000) (discussing how the Court has abandoned analogous limitations on Congress' spending authority; the *Lochner* era Court "relied on an overly narrow view of Congress' enumerated powers").

130 *See, e.g., Bailey*, 259 U.S. at 20.

131 *Kahriger*, 345 U.S. at 31 (citations and quotations omitted).

132 *See* Laurence H. Tribe, *American Constitutional Law* § 5-7 at 845-46 (3d ed. 2000) ("The breadth of the commerce clause, as construed by the Court starting in 1937, rendered moot any consideration of whether a tax was

such as *Bailey* and *Butler*, became moot because of Congress' sweeping power over all commerce – i.e., it simply did not matter whether the tax provision was a penalty imposed to enforce a regulation because the regulatory act was authorized by the Supreme Court's broad interpretation of Congress' power under the Commerce Clause. Accordingly, while the Supreme Court has not used the pre-1937 tax cases to strike down an act of Congress in decades, the Supreme Court may re-examine the scope of Congress' tax authority because it has recalibrated and limited its Commerce Clause jurisprudence in *United States v. Lopez* and *United States v. Morrison*.

Additionally, it simply should not be the case under our constitutional system that Congress has unfettered power to force individuals to purchase government approved goods in the private marketplace under threat of a tax penalty. "If any regulatory measure with a monetary penalty for refusal to comply is considered a tax, then many of Congress' powers would be superfluous, since Congress could essentially regulate anything that fell within the subject matter of [the Tax and Spending] clause simply by imposing monetary penalties on those who fail to comply."[133]

In sum, it is unclear how a court will respond to this issue given the competing lines of cases, which have never been reconciled. Nevertheless, this is by no means a reason why the state should not challenge the constitutionality of the individual mandate. To the contrary, it is worth challenging Supreme Court precedents which ostensibly provide Congress with unlimited taxing authority. Indeed, the notion of unlimited taxing authority directly conflicts with Supreme Court case law that a regulatory tax is invalid if its very application presupposes a taxpayer violation of a series of specified conditions promulgated along with the tax. It is also worth challenging this regulatory tax because the tax conflicts with our constitutional framework; i.e., allowing Congress to force individuals to do something under threat of a tax penalty would mean that Congress has limitless power under its taxing authority.

'regulatory'; because there also seemed to be an independent source of federal regulatory authority . . . nothing would turn on the revenue/regulation distinction. Accordingly, if *United States v. Lopez* marks the beginning of a new era, it may also render salient, for the first time in more than half a century, the distinction between 'regulatory' and 'revenue' taxes for purposes of Congress' powers.").

[133] Ilya Somin, *Does Congress Have the Authority to Enact a Health Insurance Mandate Using Its Power to Tax?*, THE VOLOKH CONSPIRACY, Dec. 24, 2009, http://volokh.com/2009/12/24/does-congress-have-the-power-to-enact-a-health-insurance-mandate-using-its-power-to-tax/

VI. DOES THE ACT UNCONSTITUTIONALLY IMPAIR STATES' RIGHTS?

The following examines whether key aspects of the Act violate the rights of states under the U.S. Constitution.

A. The Tenth Amendment

Analysis of whether federal legislation violates states' rights commonly involves the Tenth Amendment, which provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." In certain lines of cases, the Supreme Court has interpreted this amendment and the extent of its reach in close conjunction with the Congress' Article I powers. "If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress."[134] Thus, as discussed above, if Congress exceeded the scope of its Commerce Clause power by enacting the Act's individual mandate, then it also violated the Tenth Amendment.[135]

The remainder of this section will examine other provisions of the Act that may violate Alaska's Tenth Amendment rights because Congress has arguably "invad[ed] the province of state sovereignty reserved by the Tenth Amendment."[136]

B. The Health Benefit Exchange Requirement

The Act's exchange provision requires each state to establish an "American Health Benefit Exchange" no later than January 1, 2014.[137] The exchanges must facilitate the purchase of qualifying health plans, provide for the establishment of a "Small Business Health Options Program," and meet other requirements described in the legislation.[138] This mandate will likely impose significant costs on states. But if a state fails to comply, the Act requires the Secretary of Health and Human Services to establish and operate an exchange within that state. The

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134 *New York v. United States*, 505 U.S. 144, 156 (1992).

135 *Id.* at 156-57.

136 *Id.* at 156.

137 H.R. 3590, § 1311(b)(1).

138 H.R. 3590, § 1311(b)(1).

Secretary will do so if: (1) the state does not elect to apply standards that the Secretary adopts by regulation for establishing and operating exchanges; (2) the Secretary determines by January 1, 2013, that the state will not have an operational exchange by January 1, 2014; or (3) that the state has not taken actions necessary to implement related requirements.[139]

Without this second provision allowing the federal government to establish a state's required health benefit exchange, the exchange requirement would be constitutionally suspect. "Congress may not simply 'commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'"[140] "[T]he Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions."[141] "We have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts."[142] "The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. . . . [S]uch commands are fundamentally incompatible with our constitutional system of dual sovereignty."[143]

But Congress may, through less direct methods, encourage states to regulate in particular ways. For example, Congress may attach conditions on states' receipt of federal funds or, "where Congress has the authority to regulate private activity under the Commerce Clause,[144] . . . [it may] offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation."[145] The Supreme Court concluded that these less direct methods of influencing states' actions are consistent with the federalism principles of the Tenth Amendment because of the discretion they leave with the states' citizens:

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139 H.R. 3590, § 1321(c).

140 *New York v. United States*, 505 U.S. at 161 (quoting *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 288 (1981)).

141 *New York v. United States*, 505 U.S. at 162 (citing *Coyle v. Smith*, 221 U.S. 559, 565 (1911)).

142 *New York v. United States*, 505 U.S. at 166 (citations omitted).

143 *Printz v. United States*, 521 U.S. 898, 935 (1997).

144 Congress' Commerce Clause authority is addressed above.

145 *New York v. United States*, 505 U.S. at 167 (citations omitted).

> By either of these methods, as by any other permissible method of encouraging a State to conform to federal policy choices, the residents of the State retain the ultimate decision as to whether or not the State will comply. If a State's citizens view federal policy as sufficiently contrary to local interests, they may elect to decline a federal grant. If state residents would prefer their government to devote its attention and resources to problems other than those deemed important by Congress, they may choose to have the Federal Government rather than the State bear the expense of a federally mandated regulatory program, and they may continue to supplement that program to the extent state law is not pre-empted.[146]

In the Act, Congress took the second approach with regard to the health benefits exchange. Although the Act requires states to establish exchanges, the consequence of failing to satisfy the requirement is that the federal government will establish the exchange. It remains to be seen how that would be done. If the federal government's involvement still imposed significant costs on states, or "commandeered" state resources, then there still could be a claim under the Tenth Amendment. But in terms of a facial challenge to this requirement under the Act, because the statute offers states a choice, it is premature to file a suit on this claim at this time because the Supreme Court's jurisprudence in this area suggests that the Act's exchange requirement does not violate the Constitution.

C. The Medicaid Expansion Requirement

The Act expands Medicaid eligibility for low-income individuals. Beginning in January 2014, all children, parents, and childless adults who are not presently entitled to Medicaid and whose family incomes are at or below 133% of the federal poverty line will become eligible for Medicaid.[147] The federal government will fund 100% of the additional cost of providing care for newly-covered individuals between January 1, 2014, and December 31, 2016, and it will pay a decreasing percentage of the additional cost in subsequent years, which will then be born by states.[148]

An argument can be made that the legislation creates an unfunded mandate because it requires states to considerably expand their Medicaid programs without the necessary federal support. As noted above, however, the Medicaid expansion

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146 *New York v. United States*, 505 U.S. at 168.

147 H.R. 3590, § 2001(a)(1).

148 H.R. 3590, § 2001(a)(3).

is arguably not unconstitutional because states are given an option. That is, to avoid these onerous requirements states could simply withdraw from the Medicaid program.

It is, however, highly unlikely that a state could or would pursue this option because by doing so the state would leave many persons uninsured. One can therefore argue that Medicaid expansion is unconstitutional because it imposes conditions on the receipt of federal funds in a manner that constitutes unconstitutional "coercion."

In addressing this "coercion" legal theory, the Supreme Court has held that Congress' Spending Clause authority allows it to impose conditions on the receipt of federal funds.[149] The Supreme Court concluded in *New York v. United States* that this method of influencing states' actions is consistent with the federalism principles of the Tenth Amendment because "[i]f a State's citizens view federal policy as sufficiently contrary to local interests, they may elect to decline a federal grant."[150] Yet the Supreme Court also acknowledged in *South Dakota v. Dole* that it has "recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'"[151]

The Supreme Court has never discussed this principle in detail. Thus, we turn to lower federal courts examination of this limit on Congress' federal spending power.

The Ninth Circuit characterized the *Dole* decision as concluding that the Supreme Court "would only find Congress' use of its spending power impermissibly coercive, if ever, in the most extraordinary circumstances."[152] Applying that standard, the Ninth Circuit rejected California's "coercion theory" challenge to the federal government's requirement that, to receive Medicaid funds, states must agree to provide emergency medical services to illegal aliens.[153] Observing that it previously noted that "no party challenging the conditioning of

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149 *New York v. United States*, 505 U.S. at 167; *South Dakota v. Dole*, 483 U.S. 203, 206 (1987).

150 *Id.* at 168.

151 *South Dakota v. Dole*, 483 U.S. at 211 (citing *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937)).

152 *California v. United States*, 104 F.3d 1086, 1092 (9th Cir. 1997).

153 *Id.* at 1092.

federal funds has ever succeeded under the coercion theory,"[154] the Ninth Circuit concluded that "to the extent that there is any viability left in the coercion theory, it is not reflected in the facts of this record."[155]

Other circuits have likewise rejected claims based on the coercion theory.[156] But when the Fourth Circuit rejected a coercion theory claim, it suggested that the theory has more viability in that circuit than elsewhere.[157] Still, the Fourth Circuit more recently observed that, "[a]lthough there might be a

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154 *California v. United States*, 104 F.3d at 1092 (citing *Nevada v. Skinner*, 884 F.2d 445, 448 (9th Cir. 1989)); *see also Nevada*, 884 F.2d at 448 ("[C]an a sovereign state which is always free to increase its tax revenues ever be coerced by the withholding of federal funds – or is the state merely presented with hard political choices? The difficulty if not the impropriety of making judicial judgments regarding a state's financial capabilities renders the coercion theory highly suspect" (footnotes omitted)).

155 *California v. United States*, 104 F.3d at 1092.

156 *N.H. Dep't of Empl. Sec. v. Marshall*, 616 F.2d 240, 246 (1st Cir. 1980) (rejecting claim that requirements of Federal Unemployment Tax Act were coercive; "We do not agree that the carrot has become a club because rewards for conforming have increased."); *Padavan v. United States*, 82 F.3d 23, 29 (2d Cir. 1996) (rejecting claim that potential loss of federal Medicaid funds coerced New York to provide emergency medical services to illegal immigrants); *West Virginia v. U.S. Dep't of Health & Human Servs.*, 289 F.3d 281, 291-93 (4th Cir. 2002) (rejecting claim that threatened loss of all or part of federal Medicaid reimbursements if state failed to adopt program to recover funds from estates of deceased Medicaid recipients constituted coercion violating Tenth Amendment); *Texas v. United States*, 106 F.3d 661, 666 (5th Cir. 1997) (rejecting claim that potential loss of federal Medicaid funds coerced Texas to provide emergency medical care to undocumented aliens); *Kansas v. United States*, 214 F.3d 1196, 1202 (10th Cir. 2000) (rejecting challenge to conditions imposed under Personal Responsibility and Work Opportunity Reconciliation Act on state's receipt of federal welfare funds; [T]he coercion theory is unclear, suspect, and has little precedent to support its application.").

157 *West Virginia v. U.S. Dep't of Health & Human Servs.*, 289 F.3d at 288, 290 (noting that, while other circuits "have expressed strong doubts about the viability of the coercion theory," "the coercion theory is not viewed with such suspicion" in the Fourth Circuit).

federal funding condition that is unconstitutionally coercive, neither the Supreme Court nor any federal court of appeals has yet identified one."[158]

In short, a court might conclude that withdrawing from the Medicaid program would be so burdensome on states that new and extremely costly conditions imposed on the states for participation constituted unconstitutional coercion. However, because this doctrine is not well developed, and because projections for Alaska's specific costs estimates are not yet finalized, it is unclear how a court would respond to such claims.

VII. MISCELLANEOUS ARGUMENTS

A. Equal Protection Claims

Some have suggested that requiring individuals to buy health insurance violates the equal protection clause because Congress has exempted certain categories of persons, such as those with incomes under the poverty line. Others have indicated that it violates equal protection to exempt individuals in certain trades or who are members of a union from additional taxation.

These arguments need not detain us long. "Legislatures have especially broad latitude in creating classifications and distinctions in tax statutes."[159] "Congressional selection of particular entities or persons for entitlement to this sort of largesse is obviously a matter of policy and discretion not open to judicial review."[160] Indeed, with "taxation, even more than in other fields, legislatures possess the greatest freedom in classification."[161] Thus, to withstand an equal protection challenge to a tax classification, the federal government merely needs to show that "any reasonably conceivable state of facts … could provide a rational basis for the classification." [162] This test is so low that Congress' classification

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158 *Constantine v. Rectors and Visitors of George Mason Univ.*, 411 F.3d 474, 493 (4th Cir. 2005).

159 *Regan*, 461 U.S. at 546.

160 *Id.* (quotations omitted). For example, in *Maher v. Roe*, 432 U.S. 464 (1977), the Supreme Court considered legislative decisions not to subsidize abortions, even though other medical procedures were subsidized. The Supreme Court rejected equal protection challenges to the statutes.

161 *Id.* at 547.

162 *Gilmore v. County of Douglas*, 406 F.3d 935, 940 (8th Cir. 2005).

"may be based on rational speculation unsupported by evidence or empirical data."[163]

Moreover, "[t]he presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes."[164]

Based on the above, the Act will very likely withstand an equal protection challenge. First, there is no evidence that the Act's classifications are a "hostile and oppressive discrimination against particular person or classes." Second, while some may see certain exemptions or deductions as unfair, tax exemptions and deductions are "a matter of grace [that] Congress can, of course, disallow . . . as it chooses."[165]

B. Due Process Claims

Some have alleged that by mandating that all private citizens purchase health care coverage under penalty of law, the Act violates the Due Process Clause of the Fifth Amendment.

The Supreme Court routinely rejects due process challenges to tax laws. "The claim that a particular tax is so unreasonably high and unduly burdensome as to deny due process is both familiar and recurring, but the Court has consistently refused either to undertake the task of passing on the 'reasonableness' of a tax that otherwise is within the power of Congress or of state legislative authorities, or to hold that a tax is unconstitutional because it renders a business unprofitable."[166] Simply put, it is highly unlikely that due process is violated by the imposition of a tax for the failure to purchase health insurance.

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163 *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993).

164 *Regan*, 461 U.S. at 547 (quoting *Madden v. Kentucky*, 309 U.S. 83, 87-88 (1940)).

165 *Id.* at 549.

166 *City of Pittsburgh v. Alco Parking Corp.*, 417 U.S. 369, 373-74 (1971); *see also Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 588-90 (1937) (observing that it is unlikely that the Court would ever find a tax unduly coercive); *Alaska Fish Salting & By-Products Co. v. Smith*, 255 U.S. 44, 48-49 (1921) ("Even if the tax should destroy a business it would not be made invalid or require compensation upon that ground alone. Those who enter upon a business take that risk. . . . We know of no objection to exacting a discouraging rate as the alternative to giving up a business, when the legislature has the full power of taxation.").

C. The Direct Tax Claim

Some have argued that the tax penalty violates Article 1, § 9, of the U.S. Constitution, which provides that while Congress has "[t]he general power to 'lay and collect taxes . . . . [that power] is limited by section 2 of the same article, which requires 'direct' taxes to be apportioned, and section 9, which provides that 'no capitation, or other direct, tax shall be laid, unless in proportion to the census' directed by the Constitution to be taken."[167]

More specifically, some contend that the individual mandate's tax penalty applies without regard to property, profession, or any other circumstance, and is unrelated to any taxable event or activity. It is to be levied upon persons for their failure to do something. Because it applies without regard to property, profession, or any other circumstance, it is a direct tax that must be apportioned by the population of each state. And since the tax penalty is a direct tax and is not apportioned, it violates Article I, § 9, of the U.S. Constitution.

To analyze the merits of this claim, we must examine the difference between a direct and indirect tax. Direct taxes are a general tax on the entire population.[168] Indirect taxes are excise taxes.[169] Generally speaking, an excise tax is a tax that the state imposes on a taxpayer after the occurrence of an event or when a taxpayer exercises a certain right or privilege.[170]

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167 *Bromley v. McGaughn*, 280 U.S. 124 (1929). The Constitution recognizes four types of taxes: (1) "Duties, Imposts and Excises," generally called indirect taxes, which must be uniform throughout the United States (Art. I, § 8); (2) capitation, or other direct taxes, which may only be imposed "in Proportion to the Census" among the states (Art. 1, § 2; Art. 1, § 9); (3) export taxes, which are prohibited (Art. 1, § 9); and (4) the income tax, permitted by the 16th Amendment, which can be imposed without apportionment among the states.

168 *Murphy v. I.R.S.*, 493 F.3d 170, 181 (D.C. Cir. 2007) ("Only three taxes are definitely known to be direct: (1) a capitation, U.S. CONST. art. I, § 9, (2) a tax upon real property, and (3) a tax upon personal property.").

169 *New Neighborhoods, Inc. v. W. Va. Workers' Comp. Fund*, 886 F.2d 714, 719 (4th Cir. 1989).

170 *United States v. 4,432 Mastercases of Cigarettes, More or Less*, 448 F.3d 1168, 1185 (9th Cir. 2006) (explaining that an excise tax is "imposed on the performance of an act . . . or the enjoyment of a privilege. The quintessential excise tax in our country is the sales tax.") (citing Black's Law Dictionary 563 (6th ed.1990)); *see also* 9E Am.Jur.2d Bankruptcy § 3099 ("For priority purposes, an 'excise tax' covers practically any tax which is not an ad valorem tax and

The Supreme Court has long struggled to explain where the legal dividing line is between direct and indirect taxes.[171] Indeed, "there are almost as many classifications of direct and indirect taxes are there are authors."[172] This can be explained, in part, by the fact that "[n]either the record of the constitutional convention nor the state ratification debates defines with any clarity the meaning of the term 'direct tax'[.]"[173]

To determine whether a tax is direct or indirect, lower courts have examined whether "the tax is more akin, on the one hand, to a capitation or a tax upon one's ownership of property, or, on the other hand, more like a tax upon a use of property, a privilege, an activity, or a transaction."[174] Federal courts have also used a range of definitions to define what constitutes an indirect tax. For example, some courts have stated that "an excise tax is a pecuniary obligation imposed by a government to defray expenses of an authorized undertaking."[175] Sometimes federal courts have stated that "[a] tax laid upon the happening of an

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which is imposed on the performance of an act, the engaging in an occupation, or the enjoyment of a privilege.").

171 *Spreckels Sugar Ref. Co. v. McClain*, 192 U.S. 397, 413 (1902) (observing that "taxes that are direct and those which are to be regarded simply as excises" is "often very difficult to be expressed in words").

172 *Murphy*, 493 F.3d at 182 (quotations omitted).

173 *Union Elec. Co. v. United States*, 363 F.3d 1292, 1297 (Fed. Cir. 2004) (citing 2 *The Records of the Federal Convention of 1787*, at 350 (Max Farrand ed., Yale Univ. Press, 1966) (Aug. 20, 1787) ("Mr. King [a delegate to the constitutional convention] asked what was the precise meaning of direct taxation? No one answer[ere]d."). Part of the confusion may be explained by how the direct tax clauses were included in the U.S. Constitution. "They do not represent an independent judgment about the proper system for direct taxation, but were part and parcel of a larger compromise over slavery at the Philadelphia Convention. Quite simply, the South would get three-fifths of its slaves counted for purposes of representation in the House and the Electoral College, if it was willing to pay an extra three-fifths of taxes that could be reasonably linked to overall population. The origins of the clauses in a larger political compromise explain an otherwise embarrassing fact – the Founders didn't have a very clear sense of what they were doing in carving out a distinct category of "direct" taxes for special treatment." Bruce Ackerman, *Taxation and the Constitution*, 99 Colum. L. Rev. 1, 4 (1999).

174 *Murphy*, 493 F.3d at 183.

175 *New Neighborhoods, Inc.*, 886 F.2d at 719.

event, as distinguished from its tangible fruits, is an indirect tax which Congress . . . undoubtedly may impose."[176]

The federal government will likely argue that the tax penalty provision does not have to be apportioned because it is an income tax or an indirect tax. The tax is designed as an income tax with a floor: a person who must purchase insurance, but does not, must either pay 2.5% of their household income or $695, whichever is greater. Income taxes do not have to be apportioned.[177]

If a court rejects the contention that the tax penalty is an income tax, the federal government will argue that the tax penalty more closely resembles an indirect tax because it is not a general tax levied on *all* individuals. Instead it is only imposed on those who must purchase health insurance but refuse to do so. The federal government will likely add that the tax penalty cannot be construed to be a general tax because the amount of the tax is based on a percentage of an individual's income, which means that not everyone will pay the same amount. The conclusion that the mandate is an indirect tax is also bolstered by other considerations: (1) in an analogous situation, courts have held that a tax penalty imposed on employers who fail to carry required insurance constitutes an excise tax[178] and (2) courts have historically construed the "direct tax" clause narrowly.[179]

Nevertheless, given that the lack of clarity in this area of the law, it is difficult to predict how a court would rule on whether the individual mandate tax penalty is a direct tax.

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176 *Tyler v. United States,* 281 U.S. 497, 502 (1930).

177 The Sixteenth Amendment eliminated any requirement that income taxes imposed by Congress be apportioned among the states. *See Eisner v. Macomber,* 252 U.S. 189, 205 (1920).

178 *See, e.g., In re DeRoche,* 287 F.3d 751, 753 (9th Cir. 2002) (citing *Bliemeister v. Indus. Comm'n of Ariz.*, 251 B.R. 383, 394-96 (Bankr. Ariz. 2000)); *New Neighborhoods, Inc.,* 886 F.2d at 718-20 (holding that premiums owed by employers – who fail to purchase worker compensation insurance – to West Virginia Workers' Compensation Fund constituted excise taxes).

179 *See* Bruce Ackerman, *Taxation and the Constitution*, 99 Colum. L. Rev. 1, 4-5 (1999) (collecting cases).

D. Legislative Process Infirmities

Many observers have alleged that the legislative process in enacting the Act was corrupt and unfair. Some specifically complain that certain Senators were bribed with specific provisions.

For example, the health care legislation's disaster provision adjusts the federal medical assistance percentage for Medicaid funding to states suffering major, statewide disasters. The provision applies only if, at any time during the preceding seven fiscal years, the President declared a major disaster in that state and determined that, because of the disaster, every county or parish in the state qualified for public assistance from the federal government.[180] Other conditions also apply.[181] In support of the provision, some contend that infusions of federal disaster assistance funds and the departure of poorer residents in the wake of a disaster artificially inflate the per capita income of a disaster-struck state, leading to reduced federal Medicaid funding for that state.[182] Apparently only Louisiana currently qualifies for the benefits of the disaster provision, although the provision could apply to other states.[183]

Regardless of the specific claims that one might bring against the legislative process, the State of Alaska and private parties likely lack standing to file a suit.

"Whether styled as a constitutional or prudential limit on standing, the [Supreme] Court has sometimes determined that where large numbers of Americans suffer alike, the political process, rather than the judicial process, may

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180 H.R. 3590, § 2006.

181 H.R. 3590, § 2006.

182 Peter Overby, *With Health Care Bill, One Day You're In . . .* (Mar. 19, 2010), www.npr.org/templates/story/story.php?storyId=124933273; Jonathan Tilove, *Louisiana Medicaid provision survives health bill changes* (Mar. 7, 2010), www.nola.com/politics/index.ssf/2010/03/post_323.html.

183 Peter Overby, *With Health Care Bill, One Day You're In . . .* (Mar. 19, 2010), www.npr.org/templates/story/story.php?storyId=124933273; Jonathan Tilove, *Louisiana Medicaid provision survives health bill changes* (Mar. 7, 2010), www.nola.com/politics/index.ssf/2010/03/post_323.html; Pablo Martinez Monsivais, *Chart: Highlights of health care bill* (Mar. 19, 2010), www.usatoday.com/news/washington/2010-03-18-health-bill-table_n.htm.

provide the more appropriate remedy for a widely shared grievance."[184] Based upon this reasoning, the Supreme Court has repeatedly stated, "We will not . . . entertain citizen suits to vindicate the public's nonconcrete interest in the proper administration of the laws."[185]

Such claims amount to little more than attempts "to employ a federal court as a forum in which to air . . . generalized grievances about the conduct of government."[186] Therefore, "assertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of Art. III without draining those requirements of meaning."[187]

This principle applies with particular force to "cases where the harm at issue is not only widely shared, but is also of an abstract and indefinite nature-for example, harm to the common concern for obedience to law."[188] "The abstract nature of the harm (for example, injury to the interest in seeing that the law is obeyed) deprives the case of the concrete specificity . . . which . . . prevents a plaintiff from obtaining what would, in effect, amount to an advisory opinion."[189]

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184 *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 23 (1998) (citing cases).

185 *Massachusetts v. E.P.A.*, 549 U.S. at 516-17; *see also Lance v. Coffman*, 549 U.S. 437, 442 (2007) (per curiam) (noting that the "[t]he only injury plaintiffs allege is that the law . . . has not been followed. This injury is precisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past."); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-74 (1992) ("We have consistently held that a plaintiff raising only a generally available grievance about government-claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large-does not state an Article III case or controversy."); *Pa. Prison Soc'y v. Cortes*, 508 F.3d 156, 161 (3d Cir. 2007) (holding voters and taxpayers lacked standing to assert a "generalized grievance[ ] of concerned citizens");

186 *Valley Forge Christian Coll. v. Am. United For Separation of Church and State*, 454 U.S. 464, 479 (1982) (quotation, alteration omitted).

187 *Id.* at 483.

188 *Akins*, 524 U.S. at 23.

189 *Id.* at 24.

Moreover, "standing in no way depends on the merits of plaintiffs' contention that particular conduct is illegal."[190]

For example, in *Schlesinger v. Reservists Committee To Stop the War*, 418 U.S. 208 (1974), the Supreme Court addressed standing to bring a challenge under the Constitution's Incompatibility Clause, which provides that "no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office."[191] Citizen-taxpayers brought a lawsuit contending that Members of Congress who were also members of the military Reserves violated the Incompatibility Clause. The Supreme Court dismissed for lack of standing, holding "that standing to sue may not be predicated upon an interest of the kind alleged here which is held in common by all members of the public, because of the necessarily abstract nature of the injury all citizens share."[192]

Similarly, in refusing to accept as judicially cognizable a taxpayer organization's complaint that the conveyance of government-owned property to an educational institution supervised by a religious order violated the Establishment Clause of the First Amendment, the Supreme Court stated:

> Although [plaintiffs] claim that the Constitution has been violated, they claim nothing else. They fail to identify any personal injury suffered by the plaintiffs as a consequence of the alleged constitutional error, other than the psychological consequences presumably produced by observation of conduct with which one disagrees. This is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms.[193]

Applying these principles to the legislative process that produced the Act will likely bar a lawsuit that sought to challenge this process because such an action would: (1) amount to a generalized grievance related to the conduct of government and (2) amount to no more than an abstract and widely shared harm related to a common concern that Congress has abused its power.

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190 *Warth v. Seldin*, 422 U.S. 490, 500 (1975).

191 Art. I, § 6, cl. 2.

192 *Schlesinger*, 418 U.S. at 220.

193 *Valley Forge Christian Coll.*, 454 U.S. at 479. *Cf. Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432-433 (1982) ("the legislative determination provides all the process that is due.").

But even assuming the state has standing, we do not have any viable claims to challenge the legislative process. We considered whether certain provisions, like the disaster funding, violated the Constitution's Spending Clause, which authorizes Congress to "pay the debts and provide for the common defense and general welfare of the United States."[194] A provision that financially benefits only one state arguably does not serve the "general welfare of the United States." But, as explained above, the Supreme Court defers substantially to Congress' judgment in determining what serves the general welfare.[195] "The level of deference to the congressional decision is such that the Court has more recently questioned whether 'general welfare' is a judicially enforceable restriction at all."[196] So a court is unlikely to conclude that the disaster provision violates the Spending Clause.

We also considered whether other constitutional claims might provide grounds for a state to challenge the disaster provision, but we could find none. The Privileges and Immunities and Equal Protection Clauses of the Fourteenth Amendment[197] do not seem applicable because they "protect people, not States."[198] Similarly, the privileges and immunities provision of Article IV, § 2 of the Constitution[199] protects "citizens," not states.[200] And states are not "persons" for purposes of the Fifth Amendment's Due Process Clause.[201] Because these

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194 Art. I, § 8, cl. 1 of the U.S. Constitution.

195 *Helvering v. Davis*, 301 U.S. 619, 640-41 (1937) (quoting *United States v. Butler*, 297 U.S. 1, 67 (1936)).

196 *South Dakota v. Dole*, 483 U.S. at 207 n.2 (citing *Buckley v. Valeo*, 424 U.S. 1, 90-91 (1976) (per curiam)).

197 U.S. Const. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

198 *Pennsylvania v. New Jersey*, 426 U.S. 660, 665 (1976).

199 U.S. Const. art. IV, § 2, cl. 1 ("The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.").

200 *Cf. Hemphill v. Orloff*, 277 U.S. 537, 548-50 (1928) (corporation cannot claim benefits that article IV, section 2 assures corporation's members).

201 *Conn. Dep't of Soc. Servs. v. Leavitt*, 428 F.3d 138, 147 (2d Cir. 2005); *Okla. ex rel. Okla. Tax Comm'n v. Int'l Registration Plan, Inc.*, 455 F.3d 1107,

clauses' protections do not extend to states, as states, they do not seem to provide a basis for a state to challenge the constitutionality of the disaster provision.

1113-14 (10th Cir. 2006) (both citing *South Carolina v. Katzenbach*, 383 U.S. 301, 323-24 (1966)).