IN THE UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

Case Number: 3:10-CV-91- RV/EMT

STATE OF FLORIDA, by and through
BILL MCCOLLUM, Attorney General
of the State of Florida, et al,

Plaintiffs
__________________________________/

V.

UNITED STATES Department of
Health and Human Services, et al,

Defendants
__________________________________/

MEMORANDUM OF LAW: IN SUPPORT OF A RETURN TO A MORE TEXTUAL, LITERAL UNDERSTANDING OF THE CONSTITUTION, AND A RECOGNITION THAT THE LAWS OF CONGRESS MUST BE NECESSARY AND PROPER

COMES NOW Counselor Curtis M. Elmore of The Jimmy Doane Show, and Jimmy Doane, a.k.a. George Sutherland Elmore, files this MEMORANDUM OF LAW: IN SUPPORT OF A RETURN TO A MORE TEXTUAL, LITERAL UNDERSTANDING OF THE CONSTITUTION, AND A RECOGNITION THAT THE LAWS OF CONGRESS MUST BE NECESSARY AND PROPER Offered in Support of AMICI REPLY IN SUPPORT OF PLAINTIFF TO: DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND BRIEF IN SUPPORT, and **in support of Plaintiffs' Amended Complaint of May 13th, 2010.**

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MEMORANDUM OF LAW

IN SUPPORT OF A RETURN TO A MORE TEXTUAL, LITERAL UNDERSTANDING OF THE CONSTITUTION, AND A RECOGNITION THAT THE LAWS OF CONGRESS MUST BE NECESSARY AND PROPER

Offered in Support of Plaintiffs' Amended Complaint, and in support of AMICI REPLY ON BEHALF OF PLAINTIFF TO: DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND BRIEF IN SUPPORT

For: Case Number: 3:10-CV-91- RV/EMT

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BRIEF SUMMARY

This analysis will trace the application of the Commerce Clause and the Necessary and Proper Clause through several historical lines, incorporating various legal areas of conflict, and identifying rulings consistent with the original text of the Constitution, in order to offer an argument as to the proper standard that this Court should apply in the case at bar.

The Court's interpretation of these clauses has seemingly changed from McCulloch, requiring a "Rational Basis", plus "Appropriate means Reasonably Adapted" to "Legitimate Ends," and "Directly"; To a line requiring "Directly": see Railroad cases, Schechter, ending with Carter Coal; To a line requiring a "Substantial Effect": Wickard, Darby - but these derive from Shreveport and have lost the N&P language inadvertently, plus Rock Royal, which articulates an untenable standard in regards to Federalism; To a line requiring any "Rational Relationship" to any power of Congress in Raich.

This final line, that of any "rational relation" of Raich and Lopez, [F6] comes directly from the original source too: McCulloch, but again, like the line of cases that uphold the substantial effect doctrine seemingly ignores the other language in the McCulloch case of "Direct", and Necessary and Proper.

The correct standard is obviously the one articulated by the Constitution itself: the law must be necessary and proper for regulating interstate commerce.

__ARGUMENT:__ **To the extent that the government relies on The Commerce Clause and/or The Necessary and Proper Clause to support the Obama health care act, its cause should fail.**

A REVIEW OF THE COMMERCE CLAUSE AND THE NECESSARY AND PROPER CLAUSE JURISPRUDENCE

The people granted Congress the power to regulate commerce... among the several States..." in Article 1, section 8 of the US Constitution.

The powers and spheres of power within the Constitution are stable; however, the reach of The Commerce Clause has seemingly vacillated and extended over the years as this court has interpreted it. [see Footnote 7 in Thomas's concurrence in Lopez.] Reviews of this history are offered by Justices Stevens and Scalia in the Raich; Justices Rehnquist, Kennedy, and Thomas in Lopez; and Justice O'Connor's opinion in New York to name a few.

Potentially the broadest interpretation of the Commerce Clause was reiterated recently in the Raich case. The Raich case was of course slightly different from the case at bar, because, among other differences, that case involved a state statute being measured against an act of Congress. In this case so far, no state statute has been invoked to conflict with Obama Care. However, even given the differences, we can begin our analysis with Raich as that case is both a recent example of The Commerce Clause and Necessary and Proper Clause interpretations, as well as potentially the broadest reading of both of those clauses, such that it will potentially control the outcome of this case.

Gonzales v. Raich, 545 U.S. 1. (2005)

The facts of the Raich case for our purposes here are irrelevant, except in so far as they concern matters of purely intrastate activity which is sought to be regulated by the act of Congress in question.

Section III of the opinion begins the recitation of law concerning The Commerce Clause. "Our understanding of the reach of the Commerce Clause, as well as Congress' assertion of authority thereunder, has evolved over time. The Commerce Clause emerged as the Framers' response to the central problem giving rise to the Constitution itself: the absence of any federal commerce power under the Articles of Confederation." (Raich opinion section III, paragraph 2)

For now, this argument will pursue The Commerce Cause as it has evolved and later return to the issues raised in the second sentence of this statement.

Justice Stevens continues:
"Cases decided during that new era, which now spans more than a century have identified three general categories of regulation in which Congress is authorized to engage under its

commerce power. First, Congress can regulate the channels of interstate commerce. Perez v United States 402 U.S. 146, 150 (1971). Second, Congress has the authority to regulate and protect the instrumentalities of interstate commerce and persons or things in interstate commerce, third, Congress has the power to regulate activities that substantially affect interstate commerce *ibid*.; NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1., 37 (1937). Only the third category is advocated in the case at hand" (underlines added).

As it seems unlikely that the government will argue that health insurance is either a channel or an instrumentality of interstate commerce, it seems logical to conclude that it will rely upon this third category in the case at bar as well.

The Stevens Opinion in Raich, as to the issue of the length of the reach of Congress into the states, goes into detail about the effects upon interstate commerce of the acts Congress seeks to regulate and refers continually to Wickard and ultimately relies upon Wickard: "Our decision in Wickard, 317 U.S. 111, is of particular relevance." (Raich at III, paragraph 5)

At one point Stevens articulates a "rational basis" test too, but he ties it to a substantial effect of interstate commerce, saying "we need not determine whether respondents activities taken in the aggregate, substantially affect interstate commerce in fact, but only whether a "rational basis" exists for so concluding. Lopez, 514 U.S. at 557; see also Hodell v. Virginia Surface Mining and Reclamation Assn., Inc., 452 U.S. 264, 276 – 80 (1981.) Perez, 402 U.S. at 155-156; Katzenbach v. McClung 379 U.S. 294, 299-301- (1964); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241. 252-253. (1964)" (Raich at) (underlines added).

Justice Stevens distinguishes Lopez and Morrison as noneconomic. It seems likely that the government and Justice Stevens would conclude similarly that the purchase of health insurance is an economic activity. Because the broader rule would be one which encompasses non-economic activity as well, we will focus on that for now and later return to the likely argument that such a purchase is an economic act within the meaning of Perez and Darby.

Justice Stevens returns to the substantial impact test and further states, "the congressional judgment that an exemption for such a significant segment of the total market would undermine the orderly enforcement of the entire regulatory scheme is entitled to a strong presumption of validity.", and then asks whether that judgment is rational finding "Congress could have rationally concluded that the aggregate impact on the national market of all the transactions exempted from federal supervision is unquestionably substantial.", which language seems derived directly from Wickard (underline added).

In his final comment on the issue, Justice Stevens says "given the findings in the CSA and the undisputed magnitude of the commercial market for marijuana, our decisions in Wickard v. Filburn and the latter cases endorsing its reasoning foreclose that claim" (section IV, last sentence).

So the Stevens opinion in Raich rests firmly upon Wickard. We will come back to the Scalia concurrence in Raich.

Wickard v. Filburn, 317 U.S. 111 (1942)

Turning now to Wickard.

Wickard is notable for having articulated the standard which could be characterized as the "substantial effect in the aggregate" test.

This "substantial effect" language is in some ways compiled from previous case law, however in the Wickard case, some of the previous language utilized by the Court in interpreting the Commerce Clause and Necessary and Proper Clause - in particular the direct/indirect language, and also the manufacturing/sale language - was denounced by Justice Jackson, and seemingly once and for all the question was put to rest as to whether Congress could affect a purely intrastate activity, because of its effect, even indirect, on interstate commerce.

The Wickard case requires some detailed review.

The Wickard case involved activity that was asserted by appellee to be entirely local. By the time the case reached the Supreme Court level, the facts below had been stipulated to such that none of the product that Mr. Filburn produced in violation of the amendment of May 26, 1941, to the Agriculture Adjustment Act of 1938 left the farm, much less the state, such that the question arose as to whether these acts were in fact so local as to be beyond the reach of Congress's powers associated with the Commerce Clause.

The facts are well known and will not be repeated here.

Again, the question will likely arise in the case at bar as to whether or not the acts intended to fall under the Obamacare regulatory scheme are intended in any part for commerce. If it were so found, then the Darby case would control. That is, United States v. Darby 312 U.S. 100. However, if the acts are held to be noncommercial in nature then the Wickard case should apply. Because the latter argument is broader, we begin with it.

First, the Justice identifies previous language used by previous courts such as "production", "manufacturing", "mining", "local" and "indirect", "direct", and calls all of these terms dicta *101.

Then the court, with all due respect, goes through its own reconstruction of dicta.

He acknowledges this Court's first century annunciated only the nugatory power of the Commerce Clause saying "the influence of the clause on American life and law was a negative one resulting almost wholly from its operation is a restraint upon the powers of the states."

Then Justice Jackson says a new era of federal legislation started and the Court at first resisted, but then "it was soon demonstrated that the effects of many kinds of intrastate activity upon interstate commerce were such as to make them a proper subject of federal regulation" (Wickard at p.122) (underline added).

Next Justice Jackson equates the terms “substantial”, “material” and “direct.” [Footnote: this had been done in an earlier RR case too]

Continuing on, the Wickard opinion notes the Shreveport Rate Cases 234 US 342, where the opinion of Mr. Justice Hughes found federal intervention constitutionally authorized because of "matters having such a close and substantial relation to the interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of the conditions under which interstate commerce may be conducted upon fair terms and without molestation and hindrance." Id. at 351. (underlines added).

And here is where Justice Jackson sews Wickard’s undoing where he says, "The Court's recognition of the relevance of the economic affect in the application of the commerce clause, *exemplified by this statement*, has made the mechanical application of legal formulas no longer feasible." In other words, he derives his authority for Wickard to abandon the previous dicta of "production”, “manufacturing”, ”sale", "direct/indirect" and “local” and the like, based upon *this* statement from the Shreveport Rate Cases.

Notice of course that this statement has both the language of “substantial relation to interstate traffic”, but also language, which exactly parallels "necessary and proper" in the terms "essential or appropriate." In other words, the Wickard opinion fails to recognize these qualifying terms articulated in the Shreveport opinion it claims to rely upon.

The Shreveport Rate Cases, everywhere cited as support for the substantial interference doctrine, not only obviously involved instrumentalities and channels of interstate commerce, but also utilizes the accurate qualifying terms analogous to necessary and proper, and should henceforth be recognized as doing so.

Next the Wickard Court goes on to quote, U.S. v. Wrightwood Dairy Co. 315 U.S. 110, 119. "The reach of that power extends to those intrastate activities, which "in a substantial way" interfere with or instruct the exercise of the granted power."

Wrightwood, upon this issue, in turn relies on United States v. Rock Royal Cooperative, Inc. where it states, “We think it clear that Congress, by the provisions of section 8c(1), conferred upon the Secretary authority to regulate the handling of intrastate products, which by reason of its competition with the handling of interstate milk so affects the commerce as substantially to interfere with its regulation by Congress, and that the statute, so read, is a constitutional exercise of the commerce power. Such was the view expressed in United States v. Rock Royal Cooperative, Inc., supra, 307 U.S. 533, at 307

U.S. 568. We adhere to that opinion now." U.S. V. Wrightwood Dairy Co. 315 U.S. 110, 119 (underline added).

United States v. Rock Royal Cooperative, Inc., 307 U.S. 533. (1939)

Rock Royal 1939 is a case about milk pricing.

Rock Royal puts forth a description of the law which at first seems to support "substantial interference" type language; however, everywhere Rock Royal defines the effect upon interstate commerce, the adverb "directly" tempers the language.

The address of the Constitutionality of the Act in question begins on page 307, section II.

"A. *Minimum Prices.* The act authorizes and the order undertakes the fixing of minimum prices for the purchase of milk "in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce" in milk [Footnote 36] there is no challenge to the fact that the milk of all four defendants reaches the marketing area through the channels of interstate commerce. Nor is there any question raised as to the power of Congress to regulate the distribution in the area of the wholly intrastate milk. It is recognized that the federal authority covers the sales of this milk, as its marketing is inextricably intermingled with and directly affects the marketing in the area of the milk, which moves across state lines.[Footnote 37]" (underline added).

This "directly" language is more akin to that articulated in Schechter and Carter Coal, and McCulloch, than to that language which Justice Jackson is promulgating.

How is it then that the Wickard Court comes up with the "substantial effect in the aggregate" test? How were they so easy to ignore Carter Coal, and the myriad precedents which supported the "directly" language if not the N&P language? Perhaps it is derived from a concept articulated here in Rock Royal which seems to bear on the entire argument about the "substantial effect in the aggregate test" as it relates to Congressional authority under the Commerce Clause.

Here in Rock Royal, in assessing the length of the reach of Congress' power, the Court says that the ability of Congress to regulate interstate commerce is not unlike the ability of states to regulate intrastate commerce, and uses examples of state powers upheld as support for upholding the exercise of similar powers by Congress stating "The authority of the federal government over interstate commerce does not differ in extent or character from that retained by the states over intrastate commerce."

However, I must argue that this is inaccurate. There is one huge difference, which must temper the power of Congress and keep it in its proper place, and that is that the states do not have states within them, which have their non-delegateable sovereign core powers protected by the 10th amendment and the United States does have such autonomous pieces within it.

Furthermore, the plain meaning of the 9th and 10th Amendments seems clearly to be that the great mass of unassigned rights and powers belongs to the states and the people and not to the federal government (Am 9, Am.10 U.S. Constitution).

"The powers delegated by the proposed constitution to the federal government are few and defined. Those which are to remain in the state governments are numerous and indefinite" Justice O'Connor in Raich quoting James Madison, in Federalist number 45, pages 292 to 293. (C. Rossiter edition 1961).

The Rock Royal Court interpreted the powers as equals in reach. But I would argue that whereas the federal sphere is more powerful, it is smaller in size. A state's power is plenary. Congress's power is granted. Congress's power, therefore, in regards to regulation of an area of commerce, is not as broad as a State's power, and although Congress's power is superior to that of the State's, it is so only in its sphere of influence, and that sphere is defined by the enumerated powers including the qualification that the laws "shall be necessary and proper." (Also, Rock Royal can be distinguished from the case at bar in that it was believed in that case that the (milk) objects of purchase were "bought for use beyond state lines").

But the Wickard court doesn't look past Wrightwood to the language of Rock Royal, and instead continues on with its articulation of the "substantial effect in the aggregate" test.

In conclusion, the court of course holds that Mr. Filburn's activities do fall under the commerce clause, because if other people followed the same course of action, which he pursued that in the aggregate such activities would have a substantial impact upon Congress's ability to regulate interstate commerce. Thus we are left with a new articulation the "substantial effect in the aggregate" test, which is an impracticable test.

As has been pointed out by Justices Thomas and O'Connor in their dissents in the Raich case, it doesn't take a vivid imagination to come up with a scenario whereby independent people's activities clearly beyond the scope of congressional authority, when taken together in the aggregate, could rationally be seen to have a substantial affect on interstate commerce.

Justice Thomas used the examples of "quilting bees, clothes drives, and potluck suppers" (Raich at II, A, P5). Justice O'Connor uses the examples of "Charades games", and "backyard or windowsill gardening" and their potentially aggregate substantial affect on "movie tickets", and "going to the supermarket" respectively.

Truthfully, <u>any</u> act, if a sufficiently large enough group of people decided to do it, could substantially interfere with interstate commerce. Anything done in a large coordinated fashion, people going anywhere, or buying anything; such a group could certainly have a "substantial affect" upon interstate commerce, or at the very least there is a "rational basis" to believe they could, yet still such things are supposed to be beyond the reach of Congress unless the court finds the specific Act of Congress "necessary and proper" upon challenge.

For example, if a large group of people decided to abstain from work on Sunday, that would have a huge impact on interstate commerce; however, no one would argue that Congress has the ability to order those people to work on Sunday. However, if said group conspired to disrupt trade, such activities might fall within the power of congress to regulate in order to thwart the disruption of trade, again if found to be exercised in a necessary and proper way.

I would argue that the power grant to regulate commerce among the several states normally does not include the power to regulate business among individuals, because such can, and is properly regulated by the states, thus there is no need, unless there be a conflict or bias among the states, in which case then Congress could act to resolve the conflict to normalize trade. [See Footnote 2 from Thomas's concurrence in Lopez. “Congress did not have authority to regulate all commerce; Congress can only "regulate commerce with foreign Nations, and among the several states, and with the Indian tribes." U.S. Constitution, Article 1 section 8, clause 3.”]

As for superflousness, Justice Thomas detailed comments in Lopez are worth repeating here in part. "The Commerce Clause [n.2] does not state that Congress may “regulate matters that substantially affect commerce with foreign Nations, and among the several states, and with the Indian tribes"”

"[I]f Congress may regulate all matters that substantially affect commerce, there is no need for the Constitution to specify that Congress may act bankruptcy laws, cl. 4, or coin money and fix the standard of weights and measures cl. 5, or punish counterfeiters of United States coin and securities, cl. 6. Likewise, Congress would not need a separate authority to establish Post offices and post roads, cl. 7, or to grant patents and copyrights, cl. 8, or to “punish Piracies and Felonies committed on the high Seas," cl. 10. It might not even need the power to raise and support armies, cl.12 and 13, for fewer people would engage in commercial shipping if they thought that a foreign nation would expropriate their property with ease. Indeed, if Congress can regulate matters that substantially affect interstate commerce, there would have been no need to specify that Congress can regulate international trade and commerce with the Indians. As the framers surely understood, these other branches of trade substantially affect interstate commerce.”

“Put simply, much if not all of Art I, § 8 (including portions of the commerce clause itself), would be surplusage if Congress had been given authority over matters that substantially affect interstate commerce. An interpretation of clause 3 that makes the rest of § 8 superfluous simply cannot be correct.”

This power was interpreted by this Court in Gibbons v. Ogden by Justice Marshall, who, in upholding the nation's power to supersede the state's power in regards to the nation's waterways nevertheless recognized, “it does not extend to a commerce, which is completely internal” and “laws for regulating the internal commerce of a state,...are not within the power granted to Congress.”

Surely Justice Marshall knew that such intrastate regulation has a “substantial effect” on interstate commerce, yet he doesn’t say the 10th Amendment prevents the exercise of such powers, he says “are not within the power granted”, which proves that at least according to Ogden, the substantial effect doctrine cannot be the law.

The logic of the Wickard test necessarily fails. It is almost impossible to imagine a scenario wherein any act of any individual if taken in the aggregate and performed by every other individual would *not* have an impact on interstate commerce. Certainly a group of kids playing marbles on the side of the road and eating ham sandwiches, were every child to do the same, the price of marbles, and ham, and soap would certainly increase interstate; However, I doubt even Justice Holmes would allow Congress to regulate children playing marbles. Justice Thomas in his concurrence in Lopez, or his dissent in Raich correctly pointed out that the decisions in Wickard and Raich under the broadly worded substantial effect test articulated by Holmes and Jackson would allow the regulation of local bake sale, and many other things obviously far beyond the reach of Congress. Scalia would probably point out that there is no rational relationship between the regulation of say, the length of a game of marbles, or the types of food permitted to be served at a marble game, and commerce, and perhaps he is right. However, the marble game satisfies the “substantial effect in the aggregate” test. And the bake sale would probably pass both tests. Surely the Constitutional Convention participants could not have intended for Congress to have the ability to control the local bake sale, nor the hours of operation of the bake sale, nor the contents of the baked goods. Surely these things were contemplated as being under the control of the state or the people.

Were Congress to pass an act tomorrow, even pursuant to some broad regulatory scheme, say, for example, to reduce the “difficulties of the surplus and cutthroat competitions, which burdens this [labor market]” (language from Rock Royal), compelling every American citizen into civil service, under the auspices that to resist such service in the aggregate would have a substantial impact upon interstate commerce, or rather that there was a rational basis for Congress to conclude that Congress’s not being able to compel people into civil service, could have a substantial impact upon Congress's ability to regulate interstate commerce in the area of labor, then the appeal to this Court would be the last remaining civil defense to such an obviously unconstitutional intrusion into the everyday lives of American citizens.

In the Lopez concurrence Justice Thomas makes such an ominous comment. "Under our jurisprudence, if Congress passes an omnibus "substantially affects interstate commerce" Statute, purporting to regulate every aspect of human existence, the act apparently would be constitutional. Even though particular sections may govern only trivial activities, the statute in the aggregate regulates matters that substantially affect commerce."

The Wickard standard is not only unworkable as described in detail in the many places and ways cited above, now it can also be seen to be unsupported in the law, and is rightly discredited. As Justice Thomas in Raich quoting his concurrence in Morrison points out, “the ‘substantial effects’ test is a ‘rootless and malleable standard’ at odds with the constitutional design. Morrison, supra, at 627 (Thomas, J., concurring).” It has been shown over and over again to be overbroad, and producing preposterous results. The "substantial effects" test has become so unsupportable it appears now as a fault line destined to eventually give way to the pressures underneath. The problem is, the more law that is built upon such unstable ground, the more catastrophic the shift will be when it finally does give way.

The Wickard case can also be distinguished from the case at bar, because as Justice O'Connor points out in her dissent in Raich, as for the amended agricultural adjustment act of 1938 at issue in that case, "Congress provided an exemption within the AAA for small producers." Nothing can be a smaller producer than an individual act of no purchase of insurance for that individual. Fewer than one person can't make a purchase, and one can't make fewer than zero purchases.

However, it seems apparent the government will assert that the personal mandate is an economic act within the meaning of Darby, such that Darby would control, and not Wickard.

U. S. v. Darby, 312 U.S. 100 (1941)

As for Darby, the Darby case held on page 118 "the power of Congress over interstate commerce... extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of legitimate end" (Darby at 118.) (underline added).

The Court here seems to have applied half of the standard of necessary and proper in that it asks whether the regulation is "appropriate", and this language comes again directly from McCulloch. Of course the word "appropriate" is a synonym of the word "proper." The Darby court fails to apply the second prong of the Necessary and Proper test and assess whether or not the act is really necessary. The opinion simply ignores that language in the Constitution and only uses the more limited language found in McCulloch of "appropriate means to the attainment of a legitimate end" which really just means "proper."

Then Justice Stone makes a relevant observation to the case at hand. He states, "While this Court has many times found state regulation of interstate commerce, when uniformly of its regulation is of national concern, to be incompatible with the Commerce Clause even though Congress has not legislated on the subject, the Court has never implied such restraint on state control over matters intrastate not deemed to be regulations of interstate commerce or its instrumentalities, even though they affect the commerce. Minnesota rate cases 230 U.S. 352, 398, 410 S. et seq., 33 S. Ct. 729, 739, 744, 48 L.R.A., N. S., 1151, Ann.Cas.1916A, 18, and cases cited."

In the next paragraph he clarifies. "But it does not follow that Congress may not by appropriate legislation, regulate intrastate activities where they have a substantial effect on interstate commerce. See Santa Cruz Fruit Packing Co. v. National Labor Relations Board, 303 U.S. 453, 466, 58 S. Ct. 656, 660. A recent example is the National Labor

Relations Act, 29 U.S.C.A.151 et seq…[upheld in] National Labor Relations Board v. Jones and Laughlin Steel Corp., 301 U.S. 1, 38, 40 S., 57 S. Ct. 615, 625, 108 A.L.R. 1352; National Labor Relations Board v. Fainblatt, 306 U.S. 601, 604, 59 S. Ct. 668, 670 and cases cited" (underline added).

A look at the Santa Cruz Fruit case reveals the use of the "direct" language. Page 466, 467. "To express this essential distinction "direct" has been contrasted with "indirect," and what is "remote" or "distant" with what is "close and substantial""; "it would be difficult to find a case in which unfair labor practices had a more direct effect upon interstate and foreign commerce."

Turning to National Labor Relations Board, one finds that though this case is cited for "substantiality" language, it also contains the "direct" language and even contains half of the Necessary and Proper Clause language. "It is a familiar principle that acts which directly burden or obstruct interstate or foreign commerce or its free flow, are within the reach of the congressional power." This case, then seems to apply half of the "necessary and proper" test. "Discrimination and coercion to prevent the free exercise of the right of employees to self organization and representation is a proper subject for combination by competent legislative authority" (underline added). What it doesn't directly say is that the legislative authority, out of necessity, has to be national in character.

But the Darby court doesn't stop at NLRB.

Justice Stone continues. "But long before the adoption of the national Labor Relations act, this Court had many times held at the power of Congress to regulate interstate commerce extends to the regulation through legislative action of activities intrastate which have a substantial effect on the commerce or the exercise of the commerce power over it. Footnote 3."

Turning to footnote 3, we find many cases which obviously concerned channels and instrumentalities of interstate commerce, such as railways, which can be distinguished from the case at bar on those grounds: Houston East and West Texas R. Co. v. United States, 234 U.S. 342, 34 Supreme Court 833 (this is the Shreveport rate cases dealt with elsewhere in this argument) Baltimore and Ohio R. Co. v. Interstate Commerce Commission 221 U.S. 612, 619, 31 S.Ct. 621, 625; Southern R. Co. v. United States 222 U.S. 20, 32 S. Ct. 2; Railroad Commission of Wisconsin v. Chicago, Burlington and Quincy R. Co., 257 US 563, 42 S. Ct. 232, 22 A.L.R. 1086; United States v. Louisiana, 290 U.S. 70, 74, 54 S. Ct. 28, 31; Florida v. United States, 292 U.S. 1, 54 S. Ct. 603.

As for the remaining three opinions cited - Coronado Coal, Local 167, and Chicago Board of Trade v. Olson - Coronado Coal never reaches the constitutional question of the reach of the acts. But instead simply addresses the reach of the statute. However the "direct" language is implied in this comment. "The mere reduction in the supply of an article to be shipped in interstate commerce by the torturous prevention of its production is ordinarily an indirect and remote obstruction to that commerce; but when the intent of those unlawfully preventing the production is to restrain or control the supply entering and moving in interstate commerce or the price of it in interstate commerce, their action is a direct violation of the Anti-Trust Act. P. 268 U.S. 310." This comment seems to suggest that the acts in violation of the antitrust act are also a direct obstruction to interstate commerce. Chicago Board of Trade v. Olson uses the "direct" language, and the word "imperative", which is a synonym for "necessary", although it allows Congress to make these findings, so long as they're "reasonable." "Congress having reasonably found that sales of grain for future delivery (most of which transactions do not result in actual deliberate, but are settled off-setting with like contracts), are susceptible to speculation, manipulation, and control, affecting cash prices and consignments of grain in such ways as to cause a direct <u>burden</u> on an interference with interstate commerce therein rendering the regulation <u>imperative</u> for the protection of such commerce and the national public interest therein - had power…" Local 167 uses both the "direct" and "necessary and proper" language. "The control of the handling, sales, and the prices at the place of origin before the interstate journey begins or in the state of destination where the interstate movement ends may operate <u>directly</u> to restrain and monopolize interstate commerce" (underline added), and here in support of this proposition cites Coronado Coal.

So the cases in footnote 3 hardly support the contention that this Court has sanctioned the regulation of intrastate activities simply due to a "substantial effect upon interstate commerce", but rather that the Court requires a determination that the acts Congress seeks to control at least have a "direct" effect upon interstate commerce.

As for the instrumentalities cases: **Houston E.&W.** uses the "direct" language. "[Congress] its authority, extending to these interstate carriers as instrumentalities of interstate commerce, necessarily embraces the right to control their operations in all matters having such a close and <u>essential</u> relation to the interstate traffic that the control is <u>essential</u> or <u>appropriate</u> to the security of that traffic, to the efficiency of the interstate servers, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance." And "it is for Congress to supply the needed correction where the relation between intrastate and interstate rates present the evil to be corrected, and this it may do completely, by reason of its control over the interstate carrier in all matters having such a close and substantial relation to interstate commerce that it is <u>necessary</u> or <u>appropriate</u> to exercise the control for the effective governments of that commerce." See Shreveport 234 U.S. 342 at 355. **Baltimore and Ohio R Co**. uses this language. "The argument undoubtedly involves the consideration that the interstate and intrastate operations of interstate carriers are so <u>interwoven</u> that it is utterly <u>impracticable</u> for them to divide their employees in such a manner that the duties of those who are engaged in connection with interstate commerce shall be confined to that commerce exclusively and thus, many employees who had to do with the movement of trains and interstate transportation are, by virtue of practical <u>necessity</u>, also implored and intrastate transportation" This could be read as a "Necessary and Proper" type ruling. It continues "By virtue of its power to regulate interstate and foreign commerce, Congress may enact laws for the safeguarding of the persons and property that it transported in that commerce, and of those who are employed in transporting them. Johnson v. Southern Pacific Co. 196 U.S. 1; Adair of the United

States, 208 U.S. 177, 208 U.S. 178; St. Louis, I. M. & S. Railway Co. v. Taylor 210 U.S. 281; Chicago, Burlington and Quincy Railway Co. v United States decided May 15, 1911. 220 U.S 559." **Southern R. Co v. United States 222 U.S. 20. 1911. – has "direct" -** this case equates "real or substantial" to "close and direct". "We come, then, to the question whether these acts are within the power of Congress under the commerce clause of the Constitution, considering that they are not confined to vehicles used in moving interstate traffic, but embrace vehicles used in moving intrastate traffic. The answer to this question depends upon another, which is, is there a real or substantial relation or connection between what is required by these acts in respect of vehicles used in moving intrastate traffic in the object which the acts obviously are designed to attain -- namely, the safety of interstate commerce and of those who are employed in its movement? Or, stating it another way, is there such a close or direct relation to or connection between the two classes of traffic, when moving over the same railroad, as to make it certain that the safety of the interstate traffic and of those who are employed in its movement will be promoted in a real and substantial sense by applying the requirements of these acts to vehicles moving used in moving the traffic which is intrastate as well those as to those used in moving that which is interstate? If the answer to this question as doubly stated, be in the affirmative, then the principal question must be answered in the same way."
Railroad Commission of Wisconsin v. Chicago, B. & Q. R. Co., 257 U.S. 563 – This case reaches the question and then immediately relies upon Shreveport, M.N., Illinois, Baltimore, Southern, and Second. "It is objected here... that the commission is not to regulate traffic wholly within the state. To this the same answer must be made as was made in the Shreveport case." Page 588. "Counsel for the appellants have not contested the constitutional validity of the statute construed as we have construed it, although the counsel for the state commissions, whom we permitted to file briefs as amici curiae. have done so. The principles laid down by this Court in the Minnesota cases 230 U.S. 352, 230 U.S. 432, 433; the Shreveport case 234 U.S. 342, 234 U.S 351; and the Illinois Central case 245 U.S. 493, 245 U.S. 506, which are rate cases, and in the analogous cases of Baltimore and Ohio R. Co. v. Interstate Commerce Commission 221 U.S. 612, 221 U.S. 618; Southern Ry Co. v United States, 222 U.S. 20, 222 U.S. 26-27; Second Employers liability case 223 U.S. 1, 223 U.S. 48, 223 U.S. 51. We think leave no room for the discussion on this point." Shreveport is revealed above. For Minnesota, Illinois, Baltimore, and Southern see above. Second says "4. This power over commerce among the states, so conferred upon Congress, is complete in itself, extends incidentally to every instrument and agent by which such commerce is carried on, may be exerted to its utmost extent over every part of such commerce, and is subject to no limitations save such as are prescribed in the Constitution. But, of course, it does not extend to any matter or thing which does not have <u>a real or substantial relation</u> to some part of such commerce" (underline added).
United States v. Louisiana, 290 U.S. 70 –this case never reaches the constitutional question of the commerce clause; however it does refer to the previous authority granted by the Shreveport rate cases. And finally, FL v U.S. perhaps the only one which arguably supports this argument, still has some "necessary-esq" language.

Turning back to the Darby opinion., Justice Stone continues, "Congress having by the present act adopted a policy of excluding from interstate commerce all goods produced for the commerce, which do not conform to the specified labor standards, it may choose the means reasonably adapted to the attainment of the permitted end, even though they involve control of intrastate activities. Such legislation has often been sustained with respect to powers, other than the commerce power granted to the national government, when the means chosen, although not themselves within the granted power, were nevertheless deemed to be appropriate aids to the accomplishment of some purpose within an admitted power of the national government (underlines added). See Rupert, Inc., v Caffey, 251 U.S. 264, 40 S. Ct. 141; Everard's Breweries v Day, 265 U.S. 545, 560, 44 S. Ct. 628 631; Westfall v United States, 274 U.S. 256, 259, 47 S. Ct. 629."

Checking the cited sources, Rupert uses qualified "necessary and proper" language, as well as war-time powers at 282 "as a measure reasonably necessary to make the prohibition of intoxicating liquors effectual, Congress, in the exercise of the war power, may prohibit those containing as much as one half of one percent by volume of alcohol, even though they be not in fact, intoxicating. *Id.*" Everard directly invokes the Necessary and Proper clause: The Constitution confers upon Congress the power to make all laws necessary and proper for carrying into execution all powers that are vested in it. Article 1, § 8, cl. 18. In the exercise of such nonenumerated or "implied" powers, it has long been settled that Congress is [265 U. S. 559] not limited to such measures as are indispensably necessary to give effect to its express powers, but in the exercise of its discretion as to the means of carrying them into execution may adopt any means, appearing to it most eligible and appropriate, which are adapted to the end to be accomplished and consistent with the letter and spirit of the Constitution. *6 U. S. 395;* 14 U. S. 326; *McCulloch v. Maryland, supra,* pp. 17 U. S. 421-422; *Ex parte Curtis,* 106 U. S. 371, 106 U. S. 372; *Legal Tender Case,* 110 U. S. 421, 110 U. S. 440; *In re Rapier,* 143 U. S. 110, 143 U. S. 134; *Logan v. United States,* 144 U. S. 263, 144 U. S. 283; *Fong Yue Ting v. United States,* 149 U. S. 698, 149 U. S. 712; *Lottery Case, supra,* p. 188 U. S. 355; *Hoke v. United States,* 227 U. S. 308, 227 U. S. 323." "It is likewise well settled that, where the means adopted by Congress are not prohibited and are calculated to effect the object entrusted to it, this Court may not inquire into the degree of their necessity; as this would be to pass the line which circumscribes the judicial department and to tread upon legislative ground. *McCulloch v. Maryland, supra,* p. 17 U. S. 423; *Legal Tender Case, supra,* p. 110 U. S. 450; *Fong Yue Ting v. United States, supra,* p. 149 U. S. 713. Nor may it enquire as to the wisdom of the legislation. *Legal Tender case, supra,* p. 110 U. S. 450; *McCray v. United States,* 195 U. S. 27, 195 U. S. 54; *Hamilton v. Kentucky Distilleries,* 251 U. S. 146, 251 U. S. 161. What it may consider is whether that which has been done by Congress has gone beyond the constitutional limits upon its legislative discretion. *Ex Parte Curtis, supra,* p. 106 U. S. 373." This language in Everard seems to suggest that "necessity" is a requirement, but not "indispensable necessity"; and Westfall uses the "necessary" language too: "when it is necessary in order to prevent an evil to make the law embrace more than the precise thing to be prevented, it may do so" (underline added).

Again, *arguably none* of these cases support the contention made that the Court supports congressional action merely where such acts are "reasonably adapted to the attainment of the permitted end", or otherwise appropriate, without there being a judicial assessment of the need for congressional action. See Ex Parte Curtis for the only case with an assertion that the level of necessity cannot be judged by the judiciary.

The Darby Court seemingly secure at this point in its assertion of the legal standard of "appropriate", then makes this qualifying statement. "A familiar like exercise of power is the regulation of intrastate transactions which are so commingled with or related to interstate commerce that all must be regulated if the interstate commerce is to be effectively controlled. Shreveport case, 234 U.S. 342, 34 S. Ct. 833; Wisconsin Railroad Comm. v. Chicago, B.&Q. R. Co., 257 U.S. 563, 42 S. Ct. 232, 22 A.L.R. 1086; United States v. New York Central Railroad Co. supra, 272 U.S. 464, 47 S. Ct. 132; Currin v. Wallace, 306 U.S. 1, 59 S. Ct. 379; Mulford v. Smith supra." This language, of course, contains both the "commingled" language and also a "must" qualifier, which sounds like the equivalent of a "necessary" provision.

Checking the Court's sources, Currin v. Wallace has "commingling" and also "necessary" language, though it doesn't hold the Act itself is necessary. But cites Shreveport for support, which does, and Stafford, which does, and M.N. which does too. (M.N. Rate Cases, 230 U.S. 352; and Stafford v. Wallace, 258 U.S. 522). Mulford v. Smith uses "must" language, which could equate to "necessary": "Regulation, to be effective, must, and therefore may, constitutionally applied to all state sales [footnote 16]" (underline added). Footnote 16 cites "The Minnesota Rate Cases, 230 U.S 352; the Shreveport case 234 U.S. 342; and Currin v. Wallace, supra"; however, the dissent is clearer, but too verbose to include here. U.S. v. N.Y. Central never reaches the question of the reach of the Commerce Clause, and instead deals only with the application of the statute.

Then the Justice addresses Carter Coal. "So far as Carter v. Carter Coal Co., 298 U.S. 238, 56 S. Ct. 855 is inconsistent with this conclusion, its doctrine is limited in principle by the additions under the Sherman act and the National Labor Relations Act, which we have cited and which we follow. See Sunshine Anthracite Coal Co. v Adkins 310 U.S. 381. 60 S. Ct. 907. Currin v. Wallace, supra. Mulford v. Smith supra. United States v. Rock Royal Co-op supra; Clover Fork Coal Co. v. National Labor Relations Board, 6 Cir., 97 F.2d 331; National Labor Relations Board v. Crowe Coal Co., 8 Cir., 104 F.2d 633; National Labor Relations Board v. Good Coal Co., 6 Cir., 110 F.2d 501."

Addressing these sources:

Sunshine Anthracite Coal uses the "direct" language."The regulatory provisions are clearly within the power of Congress under the commerce clause of the Constitution. These provisions are applicable only to sales or transactions in, or directly or intimately affecting, interstate commerce." (Id. at 393.) **Rock Royal** uses "directly" and is dealt with at length above. All three NLRB cases - Clover Fork Coal Co. v. NLRB 97 F.2d 331; NLRB v. Crowe Coal Co 104 F.2d 633.; NLRB v. Good Coal Co 110 F.2d 501 are presumably supported by the **NLRB v. Jones and Laughlin steel Co. case (301 US 1) (1937),** which again is dealt with above. **Van Camp and Sons v. American Can Co. 278 U.S. 245** - The opinion in this case never reaches a consideration of the commerce clause, and instead addresses only questions relating to whether the statute encompasses the acts of the Appelees. **Fed. Trade Comm. v. R.F. Keppel and Bro 291 U.S. 304. 1934.** – Similarly, the opinion in this case never reaches a consideration of the commerce clause, and instead only addresses to questions relating to whether the acts controlled are within the statute. **Swift & Co. v. United States 196 U.S. 375.**,1905, uses the "direct" language. "[T]he effect of such a combination upon interstate commerce in direct, and not accidental, secondary, or remote, as in United States v. E. C. Knight Co., 156 U.S. 1". **U.S. v. Patten 226 U.S. 525. 1913**. – Utilizes both the "direct" language, and the "necessary and proper" language. "The antitrust act does not apply to a combination affecting trade or commerce that is purely intrastate, or where the effect on interstate commerce is merely incidental or not <u>direct</u>; but, although carried on with only wholly within a state, if the <u>necessary</u> operation of a combination used to <u>directly</u> impede or burdened the due course of interstate commerce, it is within the prohibition of the statute, and so held as to a corner in cotton to be run in New York City. Persons purposely engaged in a conspiracy which <u>necessarily</u> <u>and</u> <u>directly</u> produces the result which a prohibitory statute is designed to prevent, are in legal contemplation, chargeable with intending to produce that result, and so held that, if the details of the conspiracy or alleged in the indictment, an allegation of specific intent to produce the natural result is not essential". **United Mine Workers v Coronado Coal 259 U.S. 344**. - This case was superseded by Coronado Coal Co., the United Mine Workers, 268 U.S. 295. 1925, which uses the "direct" lanugage. **Local 167** utilizes the N&P standard too. **C. E. Stephens Co. et. al. v. Foster & Kleiser Co., 311 U.S. 255**. Similarly, the opinion in this case never reaches a consideration of the commerce clause, and instead only addresses to questions relating to whether the acts controlled are within the statute.

Remarkably, it appears that arguably *none* of the cases cited support an overruling of Carter Coal, nor do any of them support the concept that the Court will sanction Congressional action where the Act is merely "appropriate means" reasonably adapted without at least "direct" language, if not the "necessary and proper" language.

Darby, as to this issue, is obviously a deeply flawed case offering a shallow perspective of previous case law, and should be discredited.

Raich revisited

So we continue with Raich.

Even though Justice Kennedy in his concurrence in Lopez calls Wickard. "Probably the most far-reaching case under the commerce clause", we find that is no longer the case, because the Raich case goes even further than Wickard. We apparently needn't concern ourselves with Wickard anymore because Raich has seemingly subsumed it.

In the Raich concurrence, Justice Scalia revives an articulation made by Justice Marshall in McCulloch v Maryland, where he reiterates what could be called the "rational basis" test.

Turning now to the Scalia concurrence in Raich, this Court upheld the “rational basis” standard first articulated near the beginning of such interpretations by Chief Justice Marshall in McCulloch v. Maryland (See Raich 2005 and McCulloch 1819.)

In Justice Scalia's concurrence, he articulates the broad standard:

“Since Perez, the United States 402 U.S. 146 (1971), our cases have mechanically recited that the Commerce Clause permits Congressional regulation on three categories: (1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce, and persons or things in interstate commerce; and (3) activities that "substantially affect" interstate commerce Id., at 150; see United States v. Morrison 529 U.S. 598, 608 -609 2000; United States v Lopez, 514 U.S. 549, 558-559, 1995; Hodell v. Virginia Surface Mining and Reclamation Association, 452 U.S. 264, 276-277 (1981). The first two categories are self-evident, since they are the ingredients of interstate commerce itself. See Gibbons v. Ogden, 9 Wheat. 1, 189-190,(1824). The third category, however, is different in kind, and its recitation without explanation is misleading and incomplete.”

It is likely that this third category is the one that the government will depend upon. It would seem difficult to argue that health insurance was somehow an instrumentality or a channel of interstate commerce. See Perez v United States 402 U.S. 146, 150. 1971. Further, the government uses in its brief the “substantial effect” language consistent with the third test.

Justice Scalia continues:

“It is *misleading* because, unlike channels, instrumentalities, and agents of interstate commerce, activities that substantially affect interstate commerce are not themselves part of interstate commerce, and thus the power to regulate them cannot come from the commerce clause alone. Rather, as this Court has recognized since a least United States v. Combs 12 Pet. 72 (1838), Congress’s regulatory authority over intrastate activities that are not themselves part of interstate commerce (including activities that have substantial effect on interstate commerce) derives from the Necessary and Proper Clause. Id., at 78; Katzenbach v. McClung, 379 U.S. 294, 301- 302 (1964); United States v. Wrightwood Dairy Co., 315 U.S. 110, 119 (1942); Shreveport Rate Cases, 234 U.S. 342, 353 (1914), United States v. E.C. Knight Co., 156 U.S. 1, 39-40 (1895) (Harlan J. dissenting).1 And the category of "activities that substantially affect interstate commerce," Lopez, supra at 559, is incomplete because the authority to enact laws necessary and proper for the regulation of interstate commerce is not limited to laws governing interstate commerce that substantially affect interstate commerce. 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.”

This is in clear contradiction to the assertion that the Necessary and Proper clause is for “carrying into execution the forgoing powers.” If there need not even be a substantial affect on interstate commerce, then the Act is pursuant to no power at all, or simply pursuant to any claimed necessity. See Carter Coal. "Replying directly to the suggestion advanced by counsel in Kansas City v. Colorado, 206 U.S. 46, 89-90, to the effect that necessary powers national in their scope must be found vested in Congress, though not expressly granted or essentially implied, this Court said:

“But the proposition that there are legislative powers affecting the nation as a whole, which belong to, although not expressed in the grant of powers, is in direct conflict with the doctrine that this is a government of enumerated powers. Kansas v. Colorado, 206 U.S. 46, 89-90.” in Carter Coal.

Then Justice Scalia touches on the Lopez case, which also bears on the case at bar. "Though the conduct in Lopez was not economic, the court nevertheless recognized that it could be regulated as "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity was regulated." 514 U.S. 549., 561. This statement referred to those cases, permitting the regulation of intrastate activities "which in a substantial way interfere with or obstruct the exercise of the granted power." Wrightwood Dairy Co., 315 U.S., at 119; see also United States v. Darby, 312 U.S. 100, 118 -119 (1941); Shreveport Rate Cases 234 U.S. at 353.

We have already seen how Wrightwood, Darby, and the Shreveport Rate Cases do not support the so-called substantial effect test.

In the next paragraph the Justice continues: "Moreover, as the passage from Lopez quoted above suggests, Congress may regulate even noneconomic local activity if that regulation is a necessary (underline added) part of the more general regulation of interstate commerce. See Lopez, super at 561.” And then he concludes, “The relevant question is simply whether the means chosen are “reasonably adapted” to the attainment of a legitimate end under the commerce power. See Darby supra at 121.”

This language is, as Justice Scalia points out, derived directly from McCulloch page 421, where Justice Marshall says "..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 Constitutional”(underlines added).

Notice Justice Scalia uses the word “necessary” when characterizing the part of the more general regulation of interstate commerce. In other words, the Justice recognizes that this part of the plan is necessary to the whole plan. There is still a question as to whether the whole plan is necessary and proper, however, according to the Justice’s judgment, this part, at least, is necessary. One must ask the question “Why would this Justice care if it were “necessary””? Why would the Justice not simply ask if the part is rationally related to the plan? Surely it cannot be that the part of the plan needs to be “necessary” but that the plan need only to be “rationally related.”

Mr. Justice Scalia concludes his concurrence with the articulation that "Congress could reasonably conclude that its objective..."could be undercut" if those activities were excepted from its general scheme of regulation. See Lopez, 514 U.S. at 561. That is sufficient to authorize [the act of Congress], drawing support from Lopez which is relevant for the case at bar today."

If the analysis were to stop here, the application of these principles in the case before us seems to be straightforward. With the Obama Health Care Act, Congress has undertaken to regulate prices, among other aspects, of the healthcare industry according to a "comprehensive scheme of regulation". See Government's Response.

It seems likely that Justice Scalia would rule that Congress could reasonably conclude that its objective "could be undercut" if any of the parts of the sites were excepted from its general scheme of regulation relying on Lopez. Or perhaps he would hold that Congress's authority to enact every aspect of this act depends only upon whether it is an appropriate means of achieving legitimate ends of regulating the healthcare industry, which conclusion seems supported by McCulloch.

As one of the legitimate sources of constitutional law, stare decisis is compelling, and a brief analysis might end here; however, as Justice Rehnquist reminds us in his dissent in Fry v. United States 421 U.S. 542. 1975, the principle of starre decisis is lesser in its capacity as legitimate constitutional support then when this Court is measuring an act of Congress against the Constitution where he says. "We have the authority of Mr. Chief Justice Taney, dissenting, in The Passenger Cases, 7 How. 283, 470 (1849); of Mr. Justice Brandeis, dissenting, in Burnett v. Coronado Oil & Gas Co., 285 U.S. 393, 405-411, (1932); and of Mr. Justice Douglas, dissenting, in New York v. United States, 326 U.S., at 590-591, for the proposition that important decisions of constitutional law are not subject to the same command of starre decisis as are decisions of statutory questions."

Mr. Justice Rehnquist also reminds us here that "the overruling of a case such as Maryland v Wirtz quite obviously should not be lightly undertaken." Prudence indeed, should guide this Court when it comes to a place where broad decisions with potentially sweeping consequences are made concerning historic line of cases. However, this Court is bound to review even its prior decisions were those decisions conflict with the Constitution, and with vigor, because This Court is well aware that the more law that gets built upon a shaky foundation, the harder the correction will ultimately be.

In order to be thorough, the careful student of American jurisprudence goes to the source.

MCCULLOCH V. MARYLAND, 17 U.S. 316 (1819)

Turning to McCulloch v. Maryland, the underpinning for many of the cases cited above.

A thorough review of the McCulloch case reveals an opinion which does not at all times strictly adhere to the principle of judicial restraint. [Footnote 5] In particular in regards to the standards of review articulated in relation to the commerce clause, the opinion actually articulates *several* standards, and that is where the confusion about the commerce clause seemingly begins, and, it is from these articulations, in McCulloch, that the opinions found in the various rulings in the separate case lines of interpretation about the commerce clause promulgate.

During the opinion the Justice makes the following statements as to the means available to Congress: "…the most appropriate means…" Page 408; "…essential, to the beneficial exercise of those powers." P. 409; "…calculated to subserve legitimate objects of that government." Page 411; "…convenient and useful or essential…" p. 413; "…any means calculated to produce the end" p. 414; "…to adopt any which might be appropriate, and which were conducive to the end" p.415; "... a means for carrying into execution all sovereign powers, and may be used although not indispensably necessary." p. 418; "…all means which are appropriate, which are plainly adapted,…"; "…consist with the letter and spirit of the Constitution" p. 421.

These words have appeared in cases in support of Congressional power since then. The last two are the sources Justice Scalia cites in support of his Raich concurrence. However, it must be noted that that was not all Justice Marshall said, and the rest of his opinion bears on these words and tempers them, and qualifies the powers of Congress.

First, it should be noted that the Marshall opinion articulates language indicative of the "direct" effect test later discarded in Darby. On p419 the Justice states: "That [Congress] might employ those which, in its judgment, would most advantageously effect the object to be accomplished. That any means adapted to the end, <u>any means which tended *directly* to the execution of the Constitutional powers of the Government</u>, were in themselves Constitutional" (underline and italics added). Any reliance upon the McCulloch case must acknowledge this qualification.

However, much more interesting is Justice Marshall's use of the Necessary and Proper Clause, and his account of its power and lack of power.

Justice Marshall begins by circumscribing the power of Congress. "This government is acknowledged by all to be one of enumerated powers." "…but the question respecting the extent of the powers actually granted is perpetually arising, and will probably continue to arise so long as our system shall exist.", "Government of the Union, though limited in its powers, is supreme <u>within its sphere of action</u>" (underline added). He continues this idea, on page 410 "In America, the powers of sovereignty are divided between the Government of the Union and those of the States. They are each sovereign with respect to the objects committed to it, and <u>neither sovereign with respect to the objects committed to the other</u>" (underline added).

Then Justice Marshall admits that the bank is not mentioned in the Constitution, but claims that the Necessary and Proper clause allows it. On 408 he says "that instrument does not profess to enumerate the means by which the powers it confers may be executed;" but then at end of page 411 he says. "But the Constitution of the United States has not left to the right of Congress to employ the necessary means for the execution of the powers conferred on the government to general reasoning. To its enumeration of powers is added that of making laws which shall be necessary and proper for carrying into execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of United States or in any Department thereof" So it's enumerated, but only to some degree, that of necessity and propriety, I would argue.

Then he invokes the Necessary and Proper Clause.

Justice Marshall and the Necessary and Proper Clause

The specific language used by Justice Marshall in the McCulloch opinion in regards to the Necessary and Proper clause is worth reviewing.

First, his legal argument:

Specifically, Justice Marshall goes on about how the necessary and proper clause cannot be one which limits the power of Congress. His most compelling argument is that the Necessary and Proper clause appears in Section 8 of Article 1, the power grants, and not in Section 9, Article 1, powers denied to Congress. That is to say, if the Necessary and Proper clause were specifically meant to limit Congress's action to those laws which are necessary and proper, would not the framers have simply put that language in section 9? For example, the framers could have made the Constitution read, "Congress shall make no laws which are not necessary and proper."

However, this placement can be understood in a number of ways. First, we will not argue that the framers made a mistake, because even if they did, it's the law now. However, the clause can be read as a power grant, *and* as a restrictive clause, and that is the plain meaning of the clause.

The state of Maryland argues that the Necessary and Proper clause is a grant to Congress of the ability to make laws. Justice Marshall denies this argument stating that the power to make laws was obviously inherent in the legislature. However, if Justice Marshall is right, that means the only possible reason for the inclusion of the words "necessary and proper" were to effect *their* meaning. Even if the state of Maryland is correct, and the clause is one which is meant to grant to Congress the ability to pass laws, still, it must be assumed that the words that follow were included for some purpose and we would be remiss not to attempt to effect meaning to the words necessary and proper. Of course, the Justice was to interpret the words "necessary and proper" to mean simply "convenient or useful", but it should be acknowledged that some interpretation is being made of those particular words.

My reading of the clause is both. That is to say, it is a grant of Congress to make laws in case there was any doubt, but not all laws, only laws which are necessary and proper and that is the limit of the clause. That is to say, the clause grants Congress power from no power up through laws that are necessary and proper, but not beyond that.

Justice Marshall would deny this reading of his language as he says on page 420, "No reason has been or can be assigned for thus concealing an intention to narrow the discretion of the national legislature under words with purport to enlarge it." However, it should be noted that such English construction is common in section 8. Clause 1 itself begins with such an undeniably restricting clause: "Section 8. The Congress shall have 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; <u>but all Duties, Imposts and Excises shall be uniform throughout the United States</u>;" (underline added) Clause 12 too has such a restriction: "To raise and support Armies, <u>but no Appropriation of Money to that use shall be for a longer term than two years</u>;"(underline added). Clause 16 has such a restriction: "To provide for organizing, arming, and disciplining, the Militia, and for governing such part of them as may be employed in the Service of the United States, <u>reserving to the states respectively</u>, the Apportionment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;"(underline added). Clause 17 has such a restriction: "To exercise exclusive Legislation in all cases whatsoever, over such District <u>(not exceeding 10 Miles square)</u>… as may... become the seat of the Government of the United States" (underline added). Each of these clauses stands in direct contravention of the argument put forth by Mr. Justice Marshall that the Necessary and Proper clause does not require of all Congressional laws some measure of necessity and propriety.

And finally, the Necessary and Proper clause itself:

"To make all laws <u>which shall be necessary and proper </u>for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof" (underline added).

Notice the clause itself uses the "shall" language. This language of course connotes a legal directive to perform some act. The verb following shall in this case is "be." The question must be asked, "What shall be?"

The plain meaning seems to be that what "shall be" are the laws and what they "shall be" seems to be directed toward a requirement, of necessity and propriety, which words directly follow "shall be". It seems clear there is a direct relationship between "shall be" and "necessary and proper". F6

The "shall" directs members of the U.S. Government to make the laws "be necessary and proper".

Second, and much more interesting and potentially revealing is Justice Marshall's continual use of language synonymous with "necessary" and "proper" in his examples of laws he would uphold.

The relevant phraseology for this perspective begins on page 408. At the end of page 408 the sentence carrying over into page 409 reads in relevant part. The Constitution does not "prohibit the creation of corporation, if the existence of such a being be <u>essential</u>, to the <u>beneficial</u> exercise of those powers" (underlines added). Here the words "essential" and “beneficial” could be read to satisfy the constitutional requirement of “necessary and proper”.

On page 412, the Justice starts to analyze the state's objection to Congress's action based upon the necessary and proper clause. Here the Justice frames Maryland’s argument: "Congress is not empowered by [the Constitution] to make all laws which may have relation to the powers conferred on the government, only such as may be "necessary and proper" for carrying them into execution.” and denies that the word “necessary” controls the clause overall, and denies such limits the powers of Congress.

At this point, in the middle of page 413, the Justice begins to question the definition of the word "necessary". Apparently, the attorney for the state of Maryland in his or her brief made the case that the word “necessary” connotes “indispensable.”

Justice Marshall takes great pains to traverse and define the boundaries of the word “necessary”. He seems intent on making sure that no one interprets “necessary” as “cannot exist without”, which is one possible colloquial interpretation of “necessary”; however, that interpretation belies the obvious, which is that the nation existed from the moment it began, which means that under the “cannot exist without” definition, no laws are “necessary”, because the country already exists. The only other necessity possible, in that case, would be a Nation-saving Act. That is an act, which but for its passage, the nation would perish. Such a narrow are reading of the word “necessary” is unwarranted, as is the broad reading of “convenient”, but <u>some</u> reading of the word “necessary” <u>is</u> necessary.

Justice Marshall asks “is it true that this is the sense in which the word “necessary “ is always used?“ “Does it always import of absolute physical necessity so strong that one thing to which another may be termed necessary cannot exist without the other? We think it does not.”

I say the Justice is correct here, and I urge him not to interpret the word “necessary” that way, but simply to interpret the word necessary the way that he would interpret it, but to interpret it in some way, and not to offer other words in its place which future justices may interpret differently from the word "necessary."

The Justice goes on to say “if reference be had to its use in the common affairs of the world or in approved authors, we find that it frequently imports no more than one scene is “convenient”, or “useful”, or “essential” to another. To employ the means necessary to and is generally understood as employing any means calculated to produce that end and not as being confined to those single means without which the end would be entirely unattainable.” Then finally explaining on 414: “It is essential to just construction that many words which import something excessive should be understood in a more mitigated sense.”

On 415, The Justice is tempering the definition of the word “necessary”, when he should be simply applying his definition. The Constitution says “necessary”. If his definition of necessary includes such less restrictive words such as “convenient” or “useful”, then the Justice can just find that the government has met its burden under the necessary and proper clause whenever he finds the Act in question is simply convenient. Instead, the Justice goes on and on offering us all sorts of language as to what necessary and proper might mean, and offers language which has been seized upon by later justices as being the legal interpretation of the Constitution.

The Justice uses the word “necessary” several times in his description of acts of Congress, which would be authorized to be inappropriately challenged if Congress was held to the standard of only being able to pass necessary laws. At one point, he also uses the word “proper” in the same context.

The Justice modifies the word “necessary” with the word “indispensably” twice in his attempt to characterize an act of Congress, which would fail to meet this standard, thereby creating an untenable situation, and thus the act should fail as one which will create a ridiculous result. However, it's instructive that the Justice adds the word “indispensably” in order to modify his example to fit his argument.

The Justice then argues that were the narrowest interpretation of “necessary” to be applied to the other Powers of Congress an absurd consequence would result, and thus the narrowest interpretation must be invalid.

The Justice offers the example that nowhere does it say in the Constitution that the government may require an oath of office, but that certainly this power is implied by the Constitution. I would argue that Justice Marshall could simply find that this law would be necessary and proper because it is “certainly implied”.

On p. 417 the Justice offers examples about post offices. The Justice points out that even though it's not enumerated in the Constitution, that certainly, Congress has “the right to punish those who steal letters from the post office, or rob the mail. It may be said with some plausibility that the right to carry the mail, and to punish those who rob it, is not <u>indispensably</u> necessary to the establishment of a post office and post roads” (underline added). I would argue that these things are necessary and proper to the establishment of a post office. In Justice Marshall's effort to argue that they are not necessary and proper, notice he finds it necessary to add the word “indispensably” before the word “necessary” in order to make his example valid. He admits on page 417 “this right is indeed <u>essential</u> to the beneficial exercise of the power but not “indispensably necessary” to its exercise.” So whereas earlier in the opinion (p.417) Justice Marshall equates the word “necessary” with the word “essential”, here he distinguishes “essential” from “indispensably necessary”, and then claims that since those obviously valid acts of Congress creating the various postal powers are not “indispensably necessary” to the establishment of post office and post roads, that they would somehow fail to meet the threshold that would be established by reading The Necessary and Proper Clause as a literal limitation. One can see in such a review how the Justice has inadvertently adapted his own example to fit with his logic. Also, by using the word “essential”, he again suggests such means are necessary.

The Justice then concludes: “the baneful influence of this narrow construction on all the operations of the government and the absolute in the practicability of maintaining it without rendering the government incompetent to its great objects might be illustrated by numerous examples drawn from the Constitution and from our laws.” But if that's true, it implies that such laws are necessary and proper to the effective, competent, practicable, maintaining of the government and thus, they too, meet the “Necessary and Proper” standard.

In 419 the Justice continues “That [Congress] might employ those [means] which in its judgment, would most advantageously effects the object to be accomplished that any means adapted to the end, any means which tended directly to the execution of the constitutional powers of the government were in themselves constitutional”. Then in the next sentence, the Justice says “this clause as construed by the state of Maryland, would abridge and almost annihilate this useful and <u>necessary</u> right of the legislature to select its means.” (underline added). What the Justice seemingly fails to recognize in this statement is that he is stating that these rights of the legislature - that of selecting its means - are “necessary” and therefore they would satisfy his interpretation of the word necessary under the Necessary and Proper clause.

The “direct/indirect” test might be thought of as a the “proper” prong of the “Necessary and Proper” test in that , if an effect on interstate commerce is direct, that seems to be the proper place for Congress to act.

On page 421, the Justice states, “we admit as all must admit that the powers of government are limited and that its limits are not to be transcended”. Then he goes on to say, “Let that end be “legitimate”,…”within the scope of the Constitution” which is just another way of saying pursuant to the conferred powers…“appropriate” which is just another way of saying “proper”, and “plainly adapted” to that end, which sounds like a standard equivalent to “direct”.

The Justice then ironically makes reference to the “letter and spirit” of the Constitution, which language which is attached to the “appropriate” and “plainly adapted” language. The validity of one cannot be detached from the validity of the other. If this Court intends to continue to give a fact to the dicta, which is “appropriate” and “plainly adapted” - rather than judge the act against the constitution’s actual words "necessary" and "proper" - then the words "letter and spirit" should be given effect as well and to the same degree.

"Letter" brings us back to the words “necessary” and “proper”.

Turning to the issue of the Spirit of the law, we turn to its history. Justice Thomas covers some of the relevant history in his concurrence in Lopez.

In order to assess the spirit of the power to regulate commerce among the several states it is necessary (but not indispensably necessary) to review its emergence. This brings us back to the statement made by Justice Stevens in the Raich case “The Commerce Clause emerged as the framers responds to the central problem giving rise to the Constitution itself: the absence of any federal commerce power under the Articles of Confederation." This seems to me to be a law which was intended to resolve conflict among the states.

It is instructive in this case, to revisit the problems associated with the previous government, which gave rise to the commerce clause.

It has been related in the Federalist papers, that the issue arose where states began to compete with one another. The framers envisioned that this conflict would grow as the space between the states shrank and their number was increased. In order to alleviate conflict and to provide a harmonious legal union, the framers knew the states would have to delegate to the federal government the power to regulate - here I believe used in its sense as in “to make regular”. The genuine idea seems to be more one that keeps a constant flow going without interruption, without conflict, then one allowing the federal government to control every aspect of a particular industry, especially one of a local and personal nature.

The single biggest objection to the inclusion of the Commerce Clause was the idea that federalism would not survive it. That is to say power of the states would eventually succumb completely to the singular federal government, and all possibility to experiment at the local level would be lost.

Turning back to the opinion, the Justice then on p.422 takes pains to articulate further, the definition of the power of Congress within the necessary and proper clause by comparing the necessary and proper clause to another clause in the Constitution, which confers the power “to make all <u>needful</u> rules and regulations respecting the territory or other property belonging to the United States” (underline added). The Justice finds these two powers indistinguishable. I think that could be agreed because the word “needful” is a synonym for the word “necessary”. Thus again, the Justice fails to show where an act of Congress would be in danger for not rising to the level of necessary, even as he defines it.

On page 423 Justice Marshall makes his now famous proclamation that “to undertake here to inquire into the degree of [its] necessity would be to pass the line which circumscribes the judicial department and to tread on legislative ground.” But it's not a degree of necessity that needs to be evaluated, but simply the existence of necessity. “Necessary” and “proper” are common words commonly understood with, common meaning. The accurate analysis is whether the act is necessary and proper for Congress to regulate commerce among the several states, whatever that means to the individual Justice. Justice Marshall should have simply said that the bank was *necessary enough* according to him.

On 424, the Justice again addresses the quandary he is in, and again claims that to hold Congress to the standard of necessary “might disappoint its <u>most important designs</u> and is incompatible with the <u>language</u> of the Constitution”. However, again, if the design is one of Congress's “most important”, I would expect a majority of justices to find it necessary and proper.

And finally on 424 and 425, in the last two sentences of the opinion dealing with the Commerce Clause the Justice once again uses the words "necessary" and "proper" in describing the bank, stating: "<u>the great duties of the bank</u> are prescribed; those duties <u>require branches</u>; and the bank itself may, we think, be safely trusted with the selection of places where those branches shall be fixed, reserving always to the Government the right to require that a branch shall be located where it may be deemed <u>necessary</u>. It being the opinion of the Court that the act incorporating the bank is constitutional, and that the power of establishing a branch in the state of Maryland might be <u>properly</u> exercised by the bank itself" (underlines added).

In his final words on the subject, Justice Marshall speaks of "required" branches, "properly" established, in locations deemed "necessary", and then upholds The Necessary and Proper Clause as the basis for his ruling, but only insofar as it is a grant of power, and not as a restriction - except insofar as the other variegated, nebulous articulations he offered throughout the opinion, which should be discarded as obiter dictum, but are today being invoked as law instead of "necessary and proper" by the government.

Justice Marshall, in example after example in this case, refers to acts of Congress which he considers to be indispensable, and then claims that they would fail under The Necessary and Proper clause, if held to a literal interpretation of the words "necessary and proper." Clearly they would not if he were the Justice.

Justice Marshall articulates several standards, all of which are helpful, but none of which are exactly what the Constitution expressly says. The framers could have said Congress shall have the power "to make all laws which will be convenient useful or essential to the foregoing Powers", or it could have said Congress shall have the power "to make all laws which bear a rational relationship to the forgoing powers" or "to adopt any laws which might be appropriate in which were conducive to a power of Congress." The framers could have said, the Congress shall have the power "to pass all laws which have a substantial effect upon the foregoing Powers". But the framers didn't say any of that. The framers said the law "shall be necessary and proper" and that's the law that should be followed.

Marshall in McCulloch asks us to recognize the power of the Necessary and Proper clause, and to give the clause itself effect, but not to give effect to the words "necessary" nor "proper" within the clause. This particular parsing of words and clauses slices too thin. That is, it attempts to draw a distinction, where there is none. If the clause itself has effect than the words within the clause have effect. Marshall's opinion here is revealed to be stretched, and there must be a snapping back into place of the underpinnings of the Constitution in the form of the enforcement of the Necessary and Proper Clause to its natural extent.

After McCulloch

Since McCulloch, this Court has nevertheless applied standards other than the rational relationship test. A soonthereafter application of the Commerce Caused came in the Cooley case of 1852, wherein this Court upheld a state's power over the congressional power of the Commerce Clause. However, I find more persuasive line of reasoning illuminated by Justice Daniels in his concurrence that, "the true question here is whether the power to enact pilot laws is appropriate and necessary."

Then Kidd 1888 highlighted the Manufacture/Sale distinction with a further recognition that activity completely internal to a state was beyond Congressional regulatory power. This line continued for decades up through Schechter and Carter Coal until the Darby/Wickard turn.

Leisy talked about traditional powers of the states in 1890 quoting Beer Co. v Massachusetts 97 U.S. 32, 33., "whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, <u>health</u>, and property of citizens, and to the preservation of good order and public morals. The Legislature cannot by any contract divest itself of the power to provide for these objects. They belong and emphatically to that class of objects which demand the application of the maximum salus Populi suprema lex, and they are to be attained and provided for by such appropriate means as the Legislative discretion may devise. That discretion can be no more bargained away than the power itself."

Then E C. Knight in 1895 stated, "It cannot be denied that the power of a state to protect the lives, health, and property of its citizens, and to preserve good order and the public morals, "the power to govern men and things within the limits of its dominion," is a power originally and always belonging to the states, not surrendered by them to the general government nor directly restrained by the Constitution of the United States and essentially exclusive," (p.11) "It is vital that the independence of the commercial power and of the police power, and the delimitation between them, however sometimes perplexing, should always be recognized and observed, for while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the states as required by our dual form of government, and <u>acknowledged evils, however grave and urgent they may appear to be, had better be borne, than the risk be run, in the effort to suppress them, of more serious consequences by resort to expedients of even doubtful constitutionality</u>" (Id at 13.) (underline added.)

Hammer v. Dagenhart (overruled by Darby) recognized both: "the act in a two-fold sense is repugnant to the Constitution. It not only transcends the authority delegated to Congress over commerce, but also exerts a power as to a purely local matter to which the federal authority does not extend. The far-reaching result of upholding the act cannot be more plainly indicated than by pointing out that, if Congress can thus regulate matters entrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the States over local matters may be eliminated, and, thus, our system of government be practically destroyed. Page 247 U. S. 277 For these reasons, we hold that this law exceeds the constitutional authority of Congress" 1918.

The direct/indirect standard articulated in McCulloch continued through many cases. See RR cases: Shreveport, MN, CA, etc; Schechter Poultry, Carter Coal, and the previously illuminated lists which Wickard erroneously used as support for its dicta.

So, where are we now?

Raich is the latest articulated standard, but it relies upon Wickard and Darby - which are unsupported - and McCulloch, which says more than Raich says it does.

The purpose of this Memorandum is to urge This Honorable Court to restore a more literal interpretation of the Constitution and in particular the Necessary and Proper clause.

First, the "substantial effect in the aggregate" test should be thrown out as unsupported, or unworkable, or redundant. Unsupported as can be confirmed by a check of the case law, unworkable as is demonstrated in myriad examples, and redundant because if the true test followed by this Court is the rational relationship test, then the "substantial effect in the aggregate" test, being a narrower interpretation of congressional power, should be subsumed in the latter. It should be recognized that a mere rational relationship need not be one of any substantiality. The Wickard test is unnecessary in light of the holding in Raich.

Justice Thomas: "even a Court interested more in the modern than the original understanding of the Constitution ought to resolve cases based on the meaning of the words that are actually in the document" (Raich) "if stability is possible, it is only by discarding the standalone substantial effects test and revisiting our definition of "commerce among the several states"

Second, the "rational basis" standard must be seen for what it is - an almost complete abdication of the judicial function - with only acts of irrationality being overruled. Holding Congress to a rational basis test is the same as holding the challengers of the constitutionality of law to the Beyond the Reasonable Doubt standard such that they must prove that there is no reasonable (or rational) hypothesis consistent with the Government's position. That is the wrong standard. The Court should be ruling that "by a preponderance of the evidence, the law measures up to the constitution" because how could it be argued, as it must under the rational basis standard, that "the Court does not need to believe the individual provisions to be constitutional, but only that Congress could rationally conclude that the Act as a whole is constitutional, and therefore the Act and all its provisions are constitutional." That standard denies the judge's judgment.

This "rational basis" standard now threatens to wipe out Federalism itself, and as Justice Marshall pointed out on page 403 of McCulloch, "no political dreamer was ever wild enough to think of breaking down the lines which separate the states, and of compounding the American people into one common mass."

I would ask that if the Court intends to rely upon the McCulloch decision that it rely upon the entire decision, including the “direct” and “essential” language.

Third and finally, the best standard is really the one articulated by Justice Marshall, offhandedly, over and over again in McCulloch v. Maryland where he talks about necessary and proper. That is the also the actual text of the Constitution, and it should be given its plain meaning. This standard can be measured using the direct/indirect tool – present in most cases up until Darby/Wickard - at least in one way in that is to say that if the act Congress seeks to regulate has an indirect effect upon interstate commerce, then the regulation of that act is certainly not necessary and proper to carry into execution Congress's power to regulate commerce among the several states.

This line of reasoning is recognized throughout the history of rulings on the Commerce Clause, where Congress is empowered to control those things which have a direct impact upon interstate commerce, and not an indirect impact, and certainly not just a substantial effect in the aggregate. “Congress may regulate interstate commerce, not things that affect it, even where sums together, unless truly ‘necessary and proper’ to regulating interstate commerce.” Justice Thomas in Raich perfectly put. Also see Carter Coal.

Mr. Justice Daniel, in his concurrence in Cooley v. Board of Wardens reiterates this standard when he says, "The true question here is whether the power to enact pilot laws is appropriate and necessary, or rather most appropriate and necessary, to the state or the federal governments.”

One quasi-legitimate source of constitutional rulings is, of course, the potential for upheaval following the enactment of a ruling. However, the consequences of returning to righteous behavior should never dissuade the righteous from doing so. It would seem the flexibility in the implementation of the court's orders could be made to follow a path which would not lead to devastation, but still allow the correct order. Such source is usually not held up as the primary constitutional source for a ruling, and it should not be here one which holds back an overturning of a statute which has yet to be fully implemented in the Obamacare Act. Nor should it be one here which hold back this court from taking the painful but ultimately unavoidable steps to reign in the standards associated with Wickard/Darby and Raich rulings, no matter how broadly the consequences of those rulings have permeated and entangled the legal culture of the United States.

The Stare Decisis associated with the “substantial effect” and “rational basis” tests is a house of cards built upon quicksand. It should not be reinforced, and moreover, the sooner the removal of it from the nation’s jurisprudence the better.

By far the most legitimate source of constitutional law is the Constitution itself. Regardless of the potential upheaval, the supposed intentions of the framers, the few rulings which do support said standards, the Constitution uses words which still have plain meaning to us today and that is the supreme law of the land.

In Summation

The Wickard, Darby, and Raich standards are unsupported in the law and unworkable as standards, and thus should be overruled. Each Act of Congress, upon proper constitutional challenge, should be judged by this Court, as to whether it is both necessary and proper for carrying into execution one of Congress's enumerated powers.