ROBERT G. NATELSON
CONSULTANT IN CONSTITUTIONAL LAW
1793 QUAIL STREET
LAKEWOOD, COLORADO 80215
(406) 240-7568
rgnatelson@gmail.com

April 5, 2011

The Honorable Lamar Smith
Chairman
Committee on the Judiciary
U.S. House of Representatives
2138 Rayburn House Building
Washington, DC 20510

The Honorable Fred Upton
Chairman
Committee on Energy and Commerce
U.S. House of Representatives
2125 Rayburn House Building
Washington, DC 20510

The Honorable John Conyers
Ranking Member
Committee on the Judiciary
U.S. House of Representatives
B-351 Rayburn House Building
Washington, DC 20510

The Honorable Henry Waxman
Ranking Member
Committee on Energy and Commerce
U.S. House of Representatives
2322A Rayburn House Building
Washington, DC 20510

RE: Constitutional objections to HR 5

Gentlemen:

My name is Robert G. Natelson, and I am Senior Fellow in Constitutional Jurisprudence at the Independence Institute, a free-market-oriented policy center in Golden, Colorado. I hold similar positions with the Montana Policy Institute and the Goldwater Institute, in Phoenix, Arizona. Until last spring, I was Professor of Law at the University of Montana, and served in that position for 23 years. I taught, among other subjects, Constitutional Law, Advanced Constitutional Law, and Constitutional History. However, I write on my own behalf, not on behalf of any organization.

As a scholar, I have published extensively, for both academic and general audiences, on constitutional issues, particularly but not limited to, the Founding Era. Last year, for example, I co-authored a scholarly book on the Necessary and Proper Clause published by Cambridge University Press, and also authored a book

explaining for laypersons the Constitution's original meaning. My publications can be found at http://constitution.i2i.org/about.

Unlike many in the professorate, I came to academia after a decade of experience in the private sector, where I owned and operated two small businesses. Moreover, I have been a conservative Republican political activist, and in 1996 and in 2000 was a Republican candidate for Governor of Montana. However, I take particular care to ensure that my political views do not influence my deductions of constitutional meaning.

Over the past few years, I have been gravely concerned by the seeming assumption among some politicians that the powers of the federal government are nearly unlimited. I was encouraged when, last year, many Members of Congress were elected who promised to honor the Constitution's rule that the federal government enjoys only circumscribed and enumerated powers. Therefore, I was particularly distressed to learn that many of those Members—including self-described conservatives—are now supporting H.R. 5, the so-called "HEALTH Act of 2011,"a measure based on a grossly overly-expansive view of the authority of Congress.

To be blunt: H.R. 5 flagrantly contravenes the limitations the Constitution places upon Congress, and therefore violates both the Ninth and Tenth Amendments. H.R. 5 is purportedly an exercise of the Constitution's Commerce Power. Yet as I shall explain, its subject-matter—civil actions in federal and state courts—is not within the Constitution's meaning of "Commerce." Nor can H.R. 5 be justified under the Necessary and Proper Clause as incidental to the regulation of interstate commerce. On the contrary, during the debates over ratification of the Constitution, leading Founders specifically represented that the subject-matter of H.R. 5 was outside federal enumerated powers and reserved to the states.

The Constitution's Grants of Enumerated Powers Do Not Confer Authority Over All Matters Conceivably "National"

A key argument behind H.R. 5 is that the Constitution authorizes congressional action because health lawsuits have interstate, or national, implications: that we are "one country," and there must be a "common system" dealing with such issues. This position represents an alarming disregard of the nature of American federalism and of how the Constitution—which all Members of Congress have taken an oath to support—distributes authority between the central government and the states.

During the Constitutional Convention of 1787, the delegates consciously

rejected proposals, such those contained in James Madison's initial Virginia Plan and in Alexander Hamilton's plan, that would have given Congress authority over all matters with interstate or national effects. Instead, they adopted the formula of the Committee of Detail, which substituted for such open-ended authority a list of circumscribed, enumerated powers. The delegates did so because they recognized that a central government that could regulate any activity with interstate "effects" was functionally not federal, but unitary. Because the Framers believed limits on central power were critical to both good government and the preservation of liberty, they restricted federal authority to certain principal (not all) issues of national concern, and left the remainder with the states and people. As it turned out, even with these limits the Constitution was too centralizing to be accepted by the general public. In order to obtain ratification, the Constitution's advocates had to agree to further restrictions on federal authority, later encapsulated in the Bill of Rights.

Civil Justice is not "Commerce"

Supporters of H.R. 5 have quoted Madison and Hamilton on the need for Congress to regulate, and thereby facilitate, "Commerce among the States."[1] As an initial matter, it is not clear that this bill really is designed to facilitate interstate commerce, since the Report of the Committee on the Judiciary speaks of *stemming* the flow of physicians from state to state.[2] But this is constitutionally irrelevant, because neither civil justice nor health care is "Commerce" as the Constitution uses the term.

The Constitution's definition of "Commerce" has been the subject of several recent studies cumulatively relying on thousands of legal and lay uses of the word during the Founding Era. (I conducted one of those studies using English and American sources at Oxford University.)[3] In the Constitution, the word "Commerce" encompasses trade in goods among merchants and certain related activities, such as commercial paper, transportation, and cargo insurance. It does not include other economic activities, and it certainly does not include health care or the states' administration of civil justice.

If there were any doubt on this score, it would be settled by the fact that during the ratification debates the Constitution's supporters repeatedly represented that, outside federal territories and enclaves, the Constitution left such matters to

---

[1] *E.g.*, Report of the House Committee on the Judiciary, page 38.

[2] *Id.*

[3] *See The Legal Meaning of "Commerce" In the Commerce Clause*, 80 St. John's L. Rev. 789 (2006) (which cites earlier studies). *See also Commerce in the Commerce Clause: A Response to Jack Balkin*, 109 Mich. L. Rev. First Impressions 55 (2010) (with David Kopel).

the exclusive jurisdiction of the states. Even before the Ninth and Tenth Amendments reinforced the limits, Founders such as Madison, Hamilton, and James Wilson, among others, represented that tort law and civil justice specifically were to be state concerns.[4] True, Congress could erect and regulate *federal* courts with diversity jurisdiction, but only because of separate constitutional grants,[5] not as a result of the Commerce Power. Indeed, I have never seen any evidence that the power to erect and regulate federal courts included authority to alter prevailing tort law even in those courts, and certainly not in state courts.

To the extent that H.R. 5 regulates health care in addition to civil justice, it is also outside the Commerce Clause. No less an authority than Chief Justice John Marshall said so in *Gibbons v. Ogden,*[6] a decision celebrated as an *expansive* interpretation of the Commerce Power. In that case, Marshall (himself formerly a leading Ratifier) stated that "health laws of every description"—presumably including laws governing health care litigation—were reserved exclusively to the states.[7]

H.R. 5 is Outside the Scope of Congress's Power Under the Necessary and Proper Clause

The Necessary and Proper Clause[8] recites that Congress has authority to adopt "Laws necessary and proper" to executing its other powers. However, as several leading Founders (including Marshall) explained, this provision does not grant additional authority; it merely clarifies that the listed powers include those inherently subordinate ("incidental") to those listed powers.[9] The Necessary and Proper Clause does not authorize Congress to control issues of health care or civil justice, because such matters are important issues in their own right, and not merely incidental to mercantile interstate trade in goods ("Commerce").

In recent years, both Congress and the Supreme Court have assumed that the Necessary and Proper Clause permits Congress to regulate economic activity substantially affecting Commerce, but this is clearly erroneous because it contradicts specific statements at the Founding and because it undermines the Constitution's federal scheme. Moreover, H.R. 5 seems to exceed even that

---

[4]Robert G. Natelson, *The Enumerated Powers of States*, 3 Nev. L. J. 469 (2003).
[5]U.S. Constitution, art. I, § 8, cl. 9 & art. III, § 2, cl. 2; *see also* art. III, § 1.
[6]22 U.S. 1 (1824).
[7]22 U.S. at 203. *See also* Natelson, *Enumerated*, note 4 above.
[8]U.S. Const., art. I, § 8, cl. 18.
[9]*See generally* Gary Lawson, Geoffrey P. Miller, Robert G. Natelson & Guy I. Seidman, The Origins of the Necessary and Proper Clause (2010).

expansive definition of the Necessary and Proper Clause: Not only does it purport to govern civil justice matters that "affect" (rather than being limited to those that "substantially affect") interstate commerce, but because civil justice is not an "economic activity" as the modern Supreme Court uses the term.[10]

Indeed, it is clear from H.R. 5's Statement of Purpose (§ 2(b)) that the measure is not targeted at regulating commerce at all, but only at issues of health care, civil justice, and damages. Such a purpose is not saved by pretextual recitals that those matters "affect" commerce. John Marshall stated in his celebrated Necessary and Proper Clause case, *McCulloch v. Maryland:*[11]

> Should congress. . . under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say, that such an act was not the law of the land.[12]

As noted earlier, health laws were among those Marshall listed as outside the objects entrusted to Congress.

H.R. 5's "State Flexibility" Section Does Nothing To Alleviate Constitutional Concerns

Section 10 of H.R. 5 provides that certain state laws are not to be pre-empted by the measure. The section is objectionable if only because it seems to preserve those laws as a matter of congressional grace rather than as a recognition of the constitutional limits on Congress. Moreover, the section grants protection only when the state undertakes policy choices preferred by Congress. Thus, state laws that offer "greater . . . protections for health care providers" are preserved, while those that provide less are overridden. States that enact statutory caps on damages receive protection, while those that make the traditional common law choice—leaving the amount to jury and judge—receive no protection. The section is, in other words, more in the nature of an insult to the states than a protection of federalism.

---

[10]*See* Gonzales v. Raich, 545 U.S. 1, 13 (2005) (describing economic activity as the "production, distribution, and consumption of commodities").

[11]17 U.S. 316 (1819).

[12]17 U.S. at 423.

Conclusion

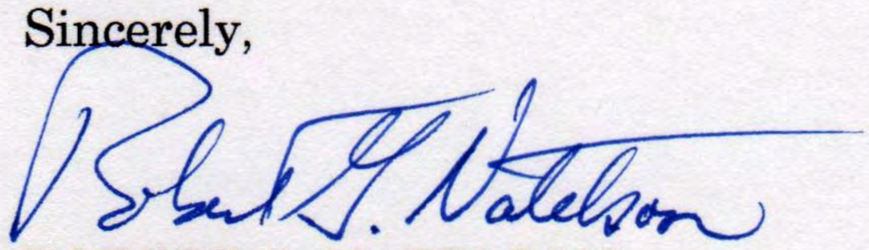
All Members of Congress take an oath to follow the Constitution. Moreover, many Members of the present Congress owe their election partly to promises to honor the Constitution as adopted by the people through their state ratifying conventions, except, of course, where the people have duly amended it. Such a commitment is unconditional. It is not contingent on whether an issue is "liberal" or "conservative" or whether it appeals to Interest Group A or Interest Group B.

There is a practical political aspect to this as well. It is no secret that Congress is deeply unpopular with the American people, in part because Members are seen as giving lip-service to law and principle, and then disregarding both when law and principle become even slightly inconvenient. It also is no secret that Congress as an institution is in difficulties over its collective head, due largely to its attempts to address all issues, in contravention of constitutional limits, rather than restricting itself to the issues the Constitution entrusts to it.

I believe there is a health liability problem in many states, but that is an issue constitutionally to be addressed by the states themselves. States that adopt poor policies will suffer accordingly, as some have—but correcting the problem is the prerogative and responsibility of those states, not of an overreaching federal government.

I urge you to reject H.R. 5 as exceeding congressional authority, and thereby send the message that this Congress will focus only on issues the Constitution authorizes it to address—many of which desperately call for your attention.

Sincerely,



ROBERT G. NATELSON