Published in final edited form as:

Policy Polit Nurs Pract. 2011 November ; 12(4): 236–244. doi:10.1177/1527154411432645.

Health Reform and the Constitutionality of the Individual Mandate

Jeffrey J. Lee¹, Deena Kelly, MS, RN¹, and Matthew D. McHugh, PhD, JD, MPH, RN¹

¹University of Pennsylvania School of Nursing, Philadelphia, PA, USA

Abstract

The Patient Protection and Affordable Care Act (ACA) of 2010 is landmark legislation designed to expand access to health care for virtually all legal U.S. residents. A vital but controversial provision of the ACA requires individuals to maintain health insurance coverage or face a tax penalty—the individual mandate. We examine the constitutionality of the individual mandate by analyzing relevant court decisions. A critical issue has been defining the “activities” Congress is authorized to regulate. Some judges determined that the mandate was constitutional because the decision to go without health insurance, that is, to self-insure, is an activity with substantial economic effects within the overall scheme of the ACA. Opponents suggest that Congress overstepped its authority by regulating “inactivity,” that is, compelling people to purchase insurance when they otherwise would not. The U.S. Supreme Court is set to review the issues and the final ruling will shape the effectiveness of health reform.

Keywords

health reform; Affordable Care Act; Constitution; individual mandate; Commerce Clause; nursing

The Patient Protection and Affordable Care Act of 2010 (ACA) is landmark legislation that will transform the health care system in which nurses practice. The expansion of insurance coverage for an additional 32 million previously uninsured Americans will increase the demand for high-quality nursing care. The ACA, however, faces challenges in the courtroom as the constitutionality of the law has been debated. The most controversial provision of the ACA is §1501—the requirement to maintain minimum health insurance coverage, otherwise known as the *individual mandate*. The provision requires all U.S. citizens and legal residents, with few exceptions (e.g., incarcerated persons, Indian Tribe members, those with financial hardships), to maintain health insurance or face a penalty enforced through the Internal Revenue Code.

© The Author(s) 2011

Corresponding Author: Matthew D. McHugh, Center for Health Outcomes and Policy Research, University of Pennsylvania School of Nursing, 418 Curie Blvd, Philadelphia, PA 19104-4217, USA, mchughm@nursing.upenn.edu.

On November 20, 2011, Jeffrey Lee, the first author of our paper entitled, “Health Reform and the Constitutionality of the Individual Mandate”, died suddenly after collapsing upon completion of the Philadelphia half marathon. Jeffrey was a senior in the University of Pennsylvania’s coordinated dual degree program in nursing and healthcare management. He was also accepted into the Master’s in Nursing and Healthcare Administration program at the University of Pennsylvania. Among many notable accomplishments, Jeffrey earned the 2009 TYLENOL Health Care Scholarship, one of only 40 recipients in the U.S., and was active in multiple research projects. Jeffrey dedicated himself to mentoring fellow students and he was a leader in both the School of Nursing and the Wharton School at the University of Pennsylvania, as well as in the local community and his church. Strengthened by his faith and a loving family, Jeffrey excelled in all his endeavors—his loss is a great one for nursing. We mourn the passing of this bright and caring young man, and we extend our deepest sympathy to Jeffrey’s family, friends, and fellow students.

Declaration of Conflicting Interests

The author(s) declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

The individual mandate provision is not a new idea (Pauly, Danzon, Feldstein, & Hoff, 1991). It was designed to work in concert with other provisions of the ACA to pool risk and ensure a stable insurance market with affordable premiums and a reasonable range of offerings within the ACA's guide-lines. Since the law prohibits insurers from denying coverage based on pre-existing conditions (guaranteed issue) and charging higher premiums to sicker Americans (community-rated premiums), insurers would be required to cover a disproportionately costlier and less healthy population without a mandate. In a system with community-rating and guaranteed issue but no individual mandate, healthy individuals could forego buying insurance until they became ill, driving up premium costs and threatening the stability of the insurance market (Oberlander, 2011). This would undermine the foundation of the ACA.

Even before the ACA became law, opponents argued that Congress did not have the constitutional authority to require Americans to purchase health insurance and there was no federal precedent for requiring the purchase of a product in the private market. To some, a federal requirement to purchase health insurance infringes on personal liberty; to others, it is an affront to federalism and state powers. The moment the ACA was signed into law, a number of lawsuits were filed. First, the federal district courts and now various Circuit Courts of Appeals have reached different conclusions regarding the constitutionality of the individual mandate. The Supreme Court of the United States (hereinafter Supreme Court) has now decided that it will hear the case, focusing in large part on the constitutionality of the individual mandate. We will provide an overview of the constitutional issues and arguments related to the individual mandate by analyzing the federal district court and courts of appeals rulings that have led up to the Supreme Court agreeing to rule on the question in 2012.

Historical Background

The cases involving a challenge to the constitutionality of the minimum coverage provision largely differ in their interpretation of the ACA's mandate with respect to the Commerce Clause (Article I, §8, Cl. 3), the Necessary and Proper Clause (Article I, §8, Cl. 18), and the case law and doctrine related to these portions of the U.S. Constitution. In the next section, we will discuss these aspects of the Constitution and the corresponding case law that puts the decisions regarding the constitutionality of the individual mandate in the proper context.

Commerce Clause

Article I, §8, Cl. 3 of the Constitution provides that "Congress shall have the power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." Under the Commerce Clause, Congress can regulate economic activity if there is a rational basis for determining that the activity has a substantial effect on interstate commerce, and the regulation is part of a broader scheme regulating interstate commerce. Key elements at issue for challenging the individual mandate include the interpretation of "activity," the broad regulatory scheme principle, and rational basis review.

Interpretation of "Activity"

The Supreme Court has identified three broad categories of interstate commerce that Congress may regulate under the Commerce Clause: (a) the use of the channels of interstate commerce; (b) the instrumentalities, persons, or things in interstate commerce; and (c) activities that have a substantial effect on interstate commerce (*Heart of Atlanta Motel v. United States*, 1964; *Perez v. United States*, 1971). This third area, often referred to as the "affectation doctrine," is primarily at issue with the individual mandate. Challengers of the individual mandate contend that a decision not to purchase health insurance is not "activity"

but “inactivity” and is thus out of Congress’s scope of constitutional regulation under the Commerce Clause. For example, in their original complaint, plaintiffs in the case of *Florida v. U.S. Department of Health and Human Services* stated that the ACA is “directed to a lack of or failure to engage in activity that is driven by the choices of individual Americans” (Complaint at 19, *State of Florida v. U.S. Department of Health and Human Services*, 2011). According to this argument, the individual mandate exceeds Congress’s power under the Commerce Clause, rendering the mandate unconstitutional.

In the first major Commerce Clause case, *Gibbons v. Ogden* (1824), Chief Justice John Marshall, finding that the Commerce Clause encompassed the power to regulate interstate navigation, ruled that Congress’s power to regulate interstate commerce is broad and only limited by the Constitution. This set the stage for a broad view of federal authority under the Commerce Clause. The position was reinforced in *Wickard v. Filburn* (1942); Justice Robert Jackson recognized the power of the federal government to regulate economic activity by upholding the Agricultural Adjustment Act’s quota on agricultural production. In this case, the government had placed limits on private individuals’ wheat production during the Great Depression, but Filburn (a farmer) was producing wheat for his own use. By producing his own wheat, the farmer did not need to purchase wheat on the open market. Filburn’s wheat production activity, though trivial by itself, taken together with others similarly situated constituted significant economic activity affecting interstate commerce.

Although the court has not distinguished between “inactivity” and “activity,” the argument might be considered in the context of *Wickard v. Filburn* (1942), which highlighted the tension between government action and the private interests of individuals who may not want to participate in the market under the constraints outlined by the regulation.

It is said, however, that this Act, forcing some farmers into the market to buy what they could provide for themselves, is an unfair promotion of the markets and prices of specializing wheat growers. It is of the essence of regulation that it lays a restraining hand on the self-interest of the regulated, and that advantages from the regulation commonly fall to others. The conflicts of economic interest between the regulated and those who advantage by it are wisely left under our system to resolution by the Congress under its more flexible and responsible legislative process. Such conflicts rarely lend themselves to judicial determination. And with the wisdom, workability, or fairness, of the plan of regulation, we have nothing to do. (*Wickard v. Filburn*, 1942, p. 129)

In this passage, Justice Jackson outlines Congress’s authority to establish the regulatory scheme of the market, including constraints on individual behavior, and such decisions are best left to Congress as opposed to judges. Parallels might ultimately be drawn to the individual mandate, which constrains the behavior of those who would otherwise not purchase insurance: They must either choose to maintain health insurance or pay a tax penalty.

Broad Regulatory Scheme

The history of Supreme Court decisions interpreting the Commerce Clause suggests that even if the regulated activities themselves do not have a substantial effect on interstate commerce they may 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 were regulated” (*United States v. Lopez*, 1995, p. 561).

Two important cases, *United States v. Lopez* (1995) and *United States v. Morrison* (2000) marked a shift in Commerce Clause interpretation following the *Wickard* case. In 1992, Alfonso Lopez, a 12th-grade student, was arrested for carrying a concealed handgun onto

school grounds. Federal agents charged him with violating the federal Gun-Free School Zones Act of 1990. Lopez challenged Congress's authority to regulate local gun safety.

The United States argued that Congress had the authority to regulate in this area under the Commerce Clause because guns in an educational setting may lead to violent crime which could impact the national economy in two ways: First, by the increased costs of violent crime spread throughout the population and, second, by reducing the willingness of people to travel to areas perceived to be unsafe. In a 5-4 decision, the Supreme Court held that Congress exceeded its authority under the Commerce Clause. The court found that there was no evidence that regulation of carrying a firearm, in and of itself, affected the economy and that the Gun-Free School Zones Act was not tied to a larger regulatory scheme.

This interpretation was largely followed in *United States v. Morrison* (2000). In this case, Virginia Tech freshman Christy Brzonkala was allegedly assaulted and raped by two members of the football team, but a state grand jury failed to find sufficient evidence to charge either man with a crime. Brzonkala then filed a lawsuit under the Violence Against Women Act of 1994, which allowed for a federal civil remedy to victims of gender-based violence even when no criminal charges were filed. Paralleling the reasoning offered in *Lopez*, the government argued that gender-motivated violence substantially affected the national economy because potential victims were deterred from interstate travel and commerce, had diminished productivity, and had increased medical and other costs among other effects. In contrast to the Gun-Free School Zones Act at issue in *Lopez* (1995), the Violence Against Women Act of 1994 included detailed congressional findings outlining these economic effects. In a 5-4 decision, the Supreme Court invalidated this section of the Violence Against Women Act, holding that the section exceeded Congress's power under the Commerce Clause. In formulating this opinion, the court relied on the ruling in *Lopez* and noted that congressional findings are not themselves sufficient to uphold the constitutionality of legislation under the Commerce Clause, particularly where the link between the activity and interstate commerce is far removed.

A significant factor distinguishing *Lopez* (1995) and *Morrison* (2000) from the decisions that preceded and followed them was that the challenges applied to particular statutes (or provisions) that were, as a whole, outside congressional authority. Although violence against women and gun violence arguably have an impact on interstate commerce, neither did the laws at issue in *Lopez* and *Morrison* regulate economic activity nor were they essential to a broader regulatory scheme. The Gun-Free School Zones Act was a criminal statute and the section of the Violence Against Women Act created a civil remedy enforceable given proof of violation of state law. Neither were these laws regulation of economic activity nor could they be considered essential parts of a larger regulatory scheme related to economic activity.

The most recent case giving in-depth treatment to the Commerce Clause, *Gonzales v. Raich* (2005), also highlights this broader regulatory scheme principle. In *Raich*, the court upheld Congress's authority to punish individual marijuana cultivation and consumption for medicinal purposes under the Controlled Substances Act despite this being legal under California state law. In his concurring opinion, Justice Scalia emphasized that "Congress may regulate even noneconomic local activity [i.e., local cultivation of marijuana] if that regulation is a necessary part of a more general regulation [i.e., Controlled Substances Act regulating use, distribution, and manufacture of medications and illicit substances] of interstate commerce" (*Gonzales v. Raich*, 2005, p. 35). Courts hearing challenges to the individual mandate must determine whether the requirement to purchase insurance sufficiently meets the test of being an essential part of a broader statutory scheme aimed at regulating economic activity as *Raich* distinguishes from *Lopez* (1995) and *Morrison* (2000).

Necessary and Proper Clause

The Necessary and Proper Clause is frequently reviewed together with the Commerce Clause. The Necessary and Proper Clause allows Congress to “make all 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 the United States, or in any department or officer thereof.” The Necessary and Proper Clause is broadly interpreted to enable Congress to seek an objective as long as it is rationally related to its enumerated powers and is not forbidden by the Constitution (*McCulloch v. Maryland*, 1819; *United States v. Comstock*, 2010).

The Commerce Clause, and particularly the affectation doctrine, is highly interrelated with the Necessary and Proper Clause. The court distinguishes between Congress’s power to regulate economic activity and the power to enact laws necessary to make *broader regulation* of interstate commerce effective (Huhn, 2011). In his concurring opinion in *Gonzales v. Raich* (2005), for example, Justice Scalia noted that Congressional power to regulate activities that substantially affect interstate commerce but are not themselves part of interstate commerce and does not come from the Commerce Clause alone but derives from the Necessary and Proper Clause.

Rational Basis Review

A final issue is the level of scrutiny the court applies. Commerce Clause cases are generally considered on a “rational review” basis: the court will uphold a law if a rational basis exists for concluding that the regulated activities, in aggregate, substantially affect interstate commerce (*Gonzales v. Raich*, 2005; *Heart of Atlanta Motel v. United States*, 1964). Under this standard, the individual mandate would likely be upheld if there was reasonable support for Congress’s judgment that failure to establish the individual mandate would substantially affect the interstate health care insurance market. If a court finds that a law meets this standard, it would be hesitant to substitute its judgment for Congress’s even if the Justices themselves would have come to different conclusions about the specific design of the policy to achieve the aims.

Courts Finding the Individual Mandate Constitutional

In 2010, federal district courts in Detroit, Michigan and Lynchburg, Virginia, upheld the mandate in cases brought by special interest groups and individual litigants. In February 2011, the Washington, D.C. District Court also held that the provision was constitutional. These cases will be presented to illustrate the reasoning behind the decisions.

Thomas More Law Center v. Barack Hussein Obama (2010)

The Thomas More Law Center, a Christian legal group, and four individuals filed suit challenging Congress’s authority to enact the individual mandate under the Commerce Clause. District Court Judge George Steeh was not persuaded by the plaintiff’s claim that the act of not purchasing health insurance is considered “inactivity” and thus beyond the reach of Congress’s authority to regulate under the Commerce Clause. Instead, Steeh ruled that the *choice* not to obtain health coverage is an active decision to pay for medical care out of pocket. This decision, he determined, qualifies as economic activity that substantially affects interstate commerce.

Judge Steeh’s ruling relied on the precedent outlining the broader regulatory scheme principle allowing Congress to regulate individual activity that amounts to an “integral part of a broader regulatory statutory scheme that permissibly regulates interstate commerce” (*Thomas More Law Center v. Obama*, 2010, p. 12). Steeh’s findings centered around two

main conclusions. First, “economic decisions that the Act regulates as to how to pay for health care services have direct and substantial impact on the interstate health care market” (Thomas More Law Center v. Obama, 2010, p. 16). Second, he reasoned that the individual mandate provision was an essential component to the ACA’s larger regulation of the interstate business of health insurance. If this activity did not affect the broader regulatory scheme that regulated interstate commerce, then the law would fail the constitutionality test.

The individual mandate is central to the legislative scheme because without a large pool of healthy Americans participating in the insurance market, it would be infeasible to create the proper market conditions for stable health insurance. Without the minimum coverage requirement, insurers would be susceptible to adverse selection and the broad regulatory scheme envisioned by the ACA would collapse (Rosenbaum, 2010).

Steeh noted that the health care market is unique in that everyone requires health care at some point—all Americans can be considered market purchasers. As a result, how individuals purchase health care fundamentally affects the health care system nationwide. Accordingly, when considered in the aggregate like the decision to grow wheat for one’s own consumption as in *Wickard v. Filburn* (1942), decisions to self-insure or go without insurance, have a substantial effect on tax payers, insurance providers, and the health care system as a whole.

Liberty University v. Geithner (2010)

Liberty University, a Christian college, and five individuals challenged the ACA claiming that the individual mandate violated the Commerce Clause. District Court Judge Norman Moon dismissed the challenges to the individual mandate finding, like in the Thomas More Law Center (2010) case, that the decision to forego purchasing health insurance coverage “is economic in nature,” as it constitutes a decision about how individuals will finance health care that they will inevitably consume. Judge Moon reasoned that failure to regulate uninsured Americans would “undercut the [ACA’s] larger regulatory scheme for the interstate health care market” (Liberty University v. Geithner, 2010, p. 23). As a result, even if the purchasing of health insurance does not directly constitute an economic activity, Congress can regulate this act because it is integral to the effectiveness of the ACA’s broader regulatory scheme, a scheme regulating the interstate health insurance markets. Judge Moon determined that it was unnecessary to consider whether the mandate was appropriate under the Necessary and Proper Clause because of his determination that it was squarely within Congress’s Commerce Clause authority.

Mead v. Holder (2011)

This case was brought by five plaintiffs in the District Court for the District of Columbia. Judge Gladys Kessler held that the decision to not purchase insurance is economic in nature and that Congress had a rational basis for determining that the mandate would affect interstate commerce. The mandate, she reasoned, was a necessary and proper part of a broader scheme to regulate interstate commerce. Therefore, Kessler ruled that the individual mandate was constitutional under both the Commerce Clause and Necessary and Proper Clause.

Similar to other rulings upholding the individual mandate, Kessler’s decision stemmed from two Supreme Court rulings interpreting the Commerce Clause, *Wickard v. Filburn* (1942) and *Gonzales v. Raich* (2005), in which Congressional authority had been broadly interpreted. Kessler concluded that the decision to remain uninsured, like the decisions to grow wheat (*Wickard v. Filburn*, 1942) or marijuana (*Gonzales v. Raich*, 2005), respectively, for personal use, is fundamentally economic conduct that has an indirect but

substantial effect on interstate commerce. She cited congressional findings in the ACA (Section 1501(a) (2)(G)) that “62 percent of all personal bankruptcies are [at least partially] caused by medical expenses” (Mead v. Holder, 2011, p. 39) and noted that the cost of uncompensated care is shifted to Americans with health insurance, leading to significantly higher premiums. Congress had a rational basis for determining that the decision not to buy health insurance would significantly affect the national health insurance market, and, therefore, a law that makes the purchase of insurance a requirement was constitutional.

Interpreting the Necessary and Proper Clause, Judge Kessler stated that courts look to see if the legislation is rationally related to the exercise of a congressionally enumerated power. After finding that the individual mandate was an appropriate tool for facilitating Congress’s Commerce Clause powers to regulate the interstate health care market, Kessler concluded that the mandate was a necessary and proper part of a broader, lawful, regulatory scheme designed to control insurance (which is essentially interstate commerce). Thus, the Commerce Clause combined with the Necessary and Proper Clause could empower Congress to enact the mandate.

Synthesis of the Constitutional Rulings

Judges Steeh, Moon, and Kessler relied on similar reasoning to formulate their rulings in favor of the constitutionality of the individual mandate. They held that the decision to not purchase insurance is considered “activity” and has a significant impact on interstate commerce. They focused on Supreme Court precedent, that is, *Wickard v. Filburn* (1942) and *Gonzales v. Raich* (2005), that many believe supports a broad interpretation of the Commerce Clause.

While the judges offered well-reasoned opinions, there are potential counterarguments that can be made. Judge Steeh, for instance, reasoned that all Americans are market purchasers because “the health care market is unlike other markets [and] no one can guarantee his or her health or ensure that he or she will never participate in the health care market” (Thomas More Law Center v. Obama, 2010, p. 16). Intuitively, this makes sense and Congress presented extensive findings in the language of the ACA regarding the effects of uninsurance on interstate commerce. However, *United States v. Morrison* (2000) tells us that “the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation ... [the issue of constitutionality] is ultimately judicial ... [and] can be settled only by this Court” (*United States v. Morrison*, 2000, p. 614). In *Morrison*, the court found that gender-based violence could only be linked to interstate commerce through a causal chain too long to be plausible and doing so would open the door to congressional regulation of nearly any activity. Courts must determine whether the link between the decision to self-insure itself affects interstate commerce or if it is necessary to effectuate a broader regulatory scheme.

There was some difference among the judges related to the interpretation of the Necessary and Proper Clause. Kessler’s ruling seems most in keeping with *Gonzalez v. Raich* in terms of identifying the interplay between the affectation doctrine and the Necessary and Proper Clause. Judge Steeh’s ruling does not cite the Necessary and Proper Clause but seems to be consistent with the spirit in saying “The minimum coverage provision ... is a reasonable means of effectuating Congress’s goal” (Thomas More Law Center v. Obama, 2010, p. 19). Judge Moon felt the Necessary and Proper Clause analysis was unnecessary once he found the mandate within Congress’s Commerce Clause power.

Arguments could also be made that the individual mandate runs afoul of the Tenth Amendment, which states that “powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to

the people.” Some scholars argue that the Tenth Amendment, generally considered a defense of state sovereignty from federal intrusion, also protects individuals from federal intrusion by its inclusion of the phrase “to the people” (Barnett, 2010). This interpretation, however, has not been supported in the case law of the Tenth Amendment.

A libertarian argument that an individual mandate interferes with an individual’s substantive due process could also be made. This would be contrary, however, to a long history of the court declining to reject regulations based on individual economic liberty arguments. Following what was called the *Lochner*-era, the court has been hesitant to substitute its judgment for the legislature in individual economic matters. This line of argument would equally have to oppose individual mandates at the state level, such as the one in Massachusetts, along with other compulsory state laws such as auto insurance requirements for the same reason they oppose the ACA’s mandate. While possibly consistent with a libertarian view, this approach is not necessarily consistent with federalism (Smith, 2011).

Courts Finding the Individual Mandate Unconstitutional

On December 13, 2010, in the case of *Commonwealth of Virginia v. Sebelius*, District Court Judge Henry Hudson in Richmond, Virginia, ruled that Congress lacked the necessary constitutional authority to enact the mandate and held that the State of Virginia may exempt its residents from the individual mandate. About two months later, Florida District Court Judge Roger Vinson ruled in *State of Florida v. United States Department of Health and Human Services* that the individual mandate was unconstitutional and could not be separated or “severed” from the remainder of the ACA. Thus, he ruled the entire health reform law unconstitutional.

Commonwealth of Virginia v. Sebelius (2010)

The Commonwealth of Virginia, through its Attorney General, sought injunctive relief barring the U.S. government from enforcing the individual mandate within state boundaries. Part of Virginia’s argument was based on the contention that the individual mandate conflicted with a newly enacted statute (passed in response to the mandate) that declared that no Virginia resident was required to obtain or maintain individual health insurance coverage (Va. Code Ann. § 38.2–3430.1:1). Judge Henry Hudson reasoned that not purchasing health insurance was inactivity, and by regulating inactivity, Congress had exceeded its constitutional authority (*Virginia v. Sebelius*, 2010). This differs from the rulings which concurred with the government’s argument that not purchasing insurance is considered activity because it is an active decision and choice to pay for health care out of pocket.

Judge Hudson was not persuaded by the argument that similar sanctions have been imposed for inactivity such as failure to register for the selective service, to file tax returns, or to report for military duty. The difference, he reasoned, was that these examples were directly related to a specific constitutional provision (i.e., Congress’s power to tax, or provide and maintain an army); no such constitutional provision authorizes a mandate to purchase health insurance.

Judge Hudson rejected a corollary Necessary and Proper Clause argument. He reasoned that as an individual’s decision not to purchase health insurance does not constitute the type of economic activity subject to regulation under the Commerce Clause, any attempt to enforce this provision under the Necessary and Proper Clause was also unconstitutional.

A final issue to be determined was severability. “Severability” means that a portion of a law can be invalidated while the remainder can be enforced if it is constitutional and can function as Congress intended. Statutes often include severability clauses specifying that if

one provision is invalidated, the remainder of the law will stand. The ACA has no such clause. Nonetheless, Judge Hudson concluded that it would be impossible to determine whether Congress would have passed the ACA without the individual mandate and, accordingly, severed §1501 referring to the Minimum Essential Coverage Provision only, leaving the remainder of the ACA intact.

State of Florida v. U.S. Department of Health and Human Services (2011)

This case was brought by 26 state governors or attorneys general, led by Florida, along with the National Federation of Independent Business and other private parties, minutes after President Obama signed the ACA into law. District court judge Roger Vinson ruled that the individual mandate was unconstitutional.

Vinson's primary contention was consistent with that voiced by many opponents of the provision; the Commerce Clause solely permits regulation of activity, but the decision to not purchase health insurance is inactivity. The Department of Health and Human Services, supported by 35 leading economists, asserted that the decision to not purchase health insurance is an economic decision to impose the costs of one's care on others. Vinson, however, focused on the historical interpretations of the Commerce Clause that would limit its scope to that relevant at the time when the Constitution was originally drafted. This "original intent" focus would restrict congressional action under Commerce Clause to the elimination of trade restrictions and barriers imposed by the states to permit unimpeded trade in commodities. While acknowledging that the law interpreting the Commerce Clause has broadened beyond this scope, he distinguished "decisions" from "activities" and raised a concern that if decisions (as in the decision to forego insurance) are considered activity, the floodgates would be opened for federal regulation. Judge Vinson found that, as in *Lopez*, it would require the court to "pile inference upon inference" (*United States v. Lopez*, 1995, p. 567) to connect being without insurance to a substantial effect on interstate commerce. He concluded that "the mere status of being without health insurance ... has absolutely no impact whatsoever on interstate commerce" (*State of Florida v. U.S. Department of Health and Human Services*, 2011a, p. 50).

Judge Vinson went on to note that the Necessary and Proper Clause adds nothing to the powers otherwise delegated to Congress by the Constitution. Thus, if the mandate was not constitutional vis-à-vis the enumerated Commerce Clause power, the mandate could not be deemed proper. Unlike Judge Hudson, Judge Vinson found that the mandate was nonseverable. Judge Vinson found that although there were provisions of the law that were not dependent on the individual mandate, the overall intent of Congress could not be achieved without the individual mandate. Thus, he ruled that the entire ACA was unconstitutional.

Synthesis of Rulings Finding the Individual Mandate Was Unconstitutional

Both Judges Hudson and Vinson used similar reasoning in their opinions. They concluded that the decision to not buy health insurance constituted inactivity and the Commerce Clause only gives Congress the power to regulate "activity." Thus, their reasoning goes, the individual mandate must exceed congressional authority.

Commerce Clause matters have historically turned on issues being defined as "economic" or not, not being defined as "activities" (Jost, 2011). The semantic trap of the "activity" versus "inactivity" argument is that doing nothing is still doing something. The constitutional question is whether there is a substantial effect on interstate commerce. Activity, for Commerce Clause purposes, has never been defined in contrast to inactivity, and there is no evidence that Congress expressly avoided regulating inactivity. Having now had the

occasion to regulate in an area, there is no apparent reason that Congress's constitutional authority should be any less (Hall, 2011).

Judge Vinson began his opinion by noting that the individual mandate was "novel" and "unprecedented." While conceding that legislation is not unconstitutional simply because it is novel, he asserted that the presumption of constitutionality that courts give to congressional enactments should be weaker when a law takes an unprecedented approach. It is unclear that the authority that Judge Vinson relied on for this interpretation fits (*Printz v. United States*, 1997).

Judge Vinson's original intent arguments may seem logical but it is difficult to discern the intentions of the Founding Fathers. Others would argue they drafted the Commerce Clause to be dynamic and interpreted under contemporary standards. Judge Vinson's statement that health insurance status has *no* effect on interstate commerce is also hard to justify; most opponents of the legislation concede that health insurance status has some impact on interstate commerce.

United States Circuit Courts of Appeals

Each of the decisions reviewed have been appealed to and heard in their respective Circuit Court of Appeals—the level of judicial review after the federal district court level but before the Supreme Court. The Sixth Circuit Court of Appeals, the first appellate court to rule on the constitutionality of the ACA, upheld the lower court's decision in *Thomas More Law Center v. Obama* (2010) that the individual mandate was constitutional. The court provided two reasons for this decision. First, Congress had a rational basis to believe that the individual mandate regulated economic activity, the decision to self-insure, that had a substantial effect on interstate commerce. The court noted that even if the decision to self-insure were deemed "inactivity," there was nothing constitutionally precluding Congress from regulating inactivity. The second reason was that the provision was essential to the broad regulatory scheme of reforming the interstate health care and insurance markets.

The Fourth Circuit Court of Appeals heard the cases of *Virginia v. Sebelius* (2011) and *Liberty University v. Geithner* (2011). Both of these cases were dismissed on jurisdictional grounds—the court's authority to hear a case. According to the Fourth Circuit, the Commonwealth of Virginia lacked "standing" to challenge the federal law because the individual mandate applies to individual citizens and not states. Judge Motz, writing for a unanimous court, also determined that the law that Virginia passed, which would give immunity to Virginia citizens who defied the individual mandate, was unenforceable and did not give the State grounds to sue the federal government. Virginia's case, therefore, was dismissed.

In *Liberty University v. Geithner* (2011), the court ruled that the individual mandate could appropriately be enforced as a tax. However, the case was dismissed because, under the Anti-Injunction Act, the plaintiffs could not challenge the individual mandate until the "tax" penalty is assessed after the mandate goes into effect in 2014. Decisions from the Third and Ninth Circuit Courts of Appeals have also dismissed cases on similar jurisdictional or other grounds (*Baldwin v. Sebelius*, 2011; *New Jersey Physicians v. Obama*, 2011; *Purpura v. Sebelius*, 2011).

A divided panel of Eleventh Circuit Court of Appeals judges affirmed Judge Vinson's lower court ruling in *State of Florida v. U.S. Department of Health and Human Services* (2011b) that the individual mandate was unconstitutional. The judges, however, held that the individual mandate was severable from the rest of the ACA, upholding the remainder of the health reform law without the individual mandate. One of the principles the court used to

guide the decision was that a fundamental goal in limiting congressional action is the protection of individual liberty. The court noted that if it were to rule that the individual mandate was constitutional, it could find no meaningful limiting principles to halt federal intrusion on individual freedom. The dissenting opinion countered by noting that the limiting principles are found in the Supreme Court's Commerce Clause cases and the individual mandate meets these criteria: regulation of activity with a substantial effect on interstate commerce as part of a broad regulatory scheme. A similar view can be found in *Gibbons v. Ogden* (1824), one of the first Commerce Clause cases, which outlined that Congress's power to regulate commerce is general and only limited by the Constitution itself (*Gibbons v. Ogden*, 1824, p. 196).

The most recent appellate decision, *Seven-Sky v. Holder* (2011; Mead is no longer a party), came from the Court of Appeals for the District of Columbia, which upheld the constitutionality of the individual mandate. Judge Laurence Silberman, a conservative judge appointed by President Reagan, drafted the opinion. The opinion outlines, in contrast to the Fourth Circuit's *Liberty University* decision, that the Anti-Injunction Act does not prevent the court from hearing the case before penalties are assessed. The opinion addressed the Commerce Clause issues finding that the mandate was within Congress's discretion. In upholding the mandate, Judge Silberman closed by addressing the balance of federal intervention and individual freedom: "The right to be free from federal regulation is not absolute, and yields to the imperative that Congress be free to forge national solutions to national problems" (*Seven-Sky v. Holder*, 2011, p. 37).

Petitions for Writ of Certiorari

The Supreme Court has discretion over the cases it hears. Before the Supreme Court reviews a lower court's (e.g., a U.S. Circuit Court of Appeals) decision, a certiorari petition must be filed and granted (Cordray & Cordray, 2004). The vast majority of certiorari petitions are denied.

The Supreme Court often grants certiorari where the lower courts are split or in conflict as with the individual mandate cases. Although the Sixth Circuit and Circuit Court for the District of Columbia held that the mandate was constitutional, the Eleventh Circuit struck down the provision and the Fourth Circuit dismissed both its cases. This lack of national uniformity coupled with the importance of resolving the current constitutional uncertainty of such sweeping legislation raised the likelihood that the Supreme Court would review the case.

A number of certiorari petitions were filed. From the Sixth Circuit, the Thomas More Law Center petitioned for certiorari, asking the Supreme Court to declare the individual mandate an unlawful overreach of congressional power. Their justification rested on the argument that individual mandate would regulate "inactivity"—an unprecedented interpretation of the Commerce Clause that would expand congressional power to regulate without limitation. The response filed by the United States asked the Supreme Court to hold the certiorari petition in the *Thomas More Law Center* case pending resolution of their certiorari petition for the review of the Eleventh Circuit decision in which the individual mandate was found unconstitutional (*State of Florida v. U.S. Department of Health and Human Services*, 2011b).

In their Eleventh Circuit petition, the United States asked the Supreme Court to consider whether Congress had the constitutional authority to enact the mandate. A second question was whether the challenges to the individual mandate should be barred by the Anti-Injunction Act—a federal law that would block any cases challenging the individual mandate until after 2014, when the penalties are actually assessed. Florida and the other 25

states, and the National Federation of Independent Business also filed petitions requesting review of the Eleventh Circuit decision.

Conclusion

On November 14, 2011, the Supreme Court issued an order granting the petitions for a writ of certiorari from the parties in *State of Florida v. U.S. Department of Health and Human Services* (2011b). The court will likely hear arguments on the issues in early spring of 2012 with a ruling coming in early summer. The Supreme Court will not address all of the issues raised but instead will focus on three main questions related to the individual mandate.

First, the court will determine whether a case challenging the individual mandate can be heard at this time at all or must wait until the penalties are assessed; specifically, whether a suit challenging the minimum coverage provision is barred by the Anti-Injunction Act. If the court determines that it has the jurisdiction to hear the case, it will then determine whether Congress has the power under Article I of the Constitution to enact the minimum coverage provision. If the court determines that the individual mandate is unconstitutional, the justices will determine whether and to what extent the individual mandate can be severed from the ACA or whether the health reform law should be invalidated in its entirety. A fourth, no less important question not directly related to the individual mandate concerns changes to Medicaid and how authority is divided between federal and state governments. The court will address whether the expansion of Medicaid as part of the ACA unconstitutionally “coerces” states by “attaching strings” to federal Medicaid funding; that is, conditioning grants of federal dollars on states’ participation in and taking on an increased burden of Medicaid costs and administration. No district or appellate court has found this to be a reason for ruling that the ACA was unconstitutional.

Whatever the final decision of the high court, the ruling will address some of the United States’ most core and ongoing constitutional issues: the interrelationship of national economic interests and individual freedom from government intervention, and the balance of state and federal power. The repercussions of the determination of the individual mandate’s constitutionality extend beyond the mandate itself; the result will chart the course for health reform as well as set new precedent on the authority of Congress to regulate under both the Commerce Clause and the Necessary and Proper Clause.

Acknowledgments

The authors gratefully acknowledge Benjamin Hardy, Annemarie Marrou, and Julie Berez for their assistance with manuscript preparation.

Funding

The authors disclosed receipt of the following financial support for the research, authorship, and/or publication of this article: Dr. McHugh is funded as a Robert Wood Johnson Foundation Nurse Faculty Scholar. Deena Kelly is funded as a predoctoral fellow at the Center for Health Outcomes and Policy Research at the University of Pennsylvania School of Nursing by the National Institute of Nursing Research (L. Aiken, PI - T32-NR-007104-11; Advanced Training in Nursing Outcomes Research).

References

- Baldwin v. Sebelius*, 3:10-cv-01033 (CA9 2011).
- Barnett RE. Commandeering the people: Why the individual health insurance mandate is unconstitutional. *NYU Journal of Law & Liberty*. 2010; 5:581–637.
- Complaint, *State of Florida v. U.S. Department of Health and Human Services*, 780 F. Supp. 2d 1256 (N.D. Fla. 2011).

- Cordray MM, Cordray R. Philosophy of certiorari: the jurisprudential considerations in Supreme Court case selection. *Washington University Law Quarterly*. 2004; 82:389–452.
- Gibbons v. Ogden*, 22 U.S. 1 (1824).
- Gonzales v. Raich*, 545 U.S. 1 (2005).
- Hall MA. Commerce Clause challenges to health care reform. *University of Pennsylvania Law Review*. 2011; 159:1825–1872.
- Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964).
- Huhn W. Constitutionality of the Patient Protection and Affordable Care Act under the Commerce Clause and the Necessary and Proper Clause. *Journal of Legal Medicine*. 2011; 32(2):139–165. [PubMed: 21623525]
- Jost TS. Can Congress regulate “inactivity” (and make Americans buy health insurance)? *New England Journal of Medicine*. 2011; 364:e17. [PubMed: 21323534]
- Liberty University v. Geithner*, 753 F. Supp. 2d 611 (W.D. Va. 2010).
- Liberty University v. Geithner*, WL 3962915 (CA4 2011).
- McCulloch v. Maryland*, 17 U.S. 316 (1819).
- Mead v. Holder*, 766 F. Supp. 2d 16 (DC 2011).
- New Jersey Physicians v. Obama*, 2:10-cv-01489 (CA3 2011).
- Oberlander J. Under siege—The individual mandate for health insurance and its alternatives. *New England Journal of Medicine*. 2011; 364:1085–1087. [PubMed: 21323536]
- Pauly MV, Danzon P, Feldstein P, Hoff J. A plan for “responsible national health insurance”. *Health Affairs*. 1991; 10(1):5–25. [PubMed: 2045055]
- Perez v. United States*, 402 U.S. 146 (1971).
- Printz v. United States*, 521 U.S. 898 (1997).
- Purpura v. Sebelius*, 3:10-cv-04814 (CA3 2011).
- Rosenbaum S. A “broader regulatory scheme”—The constitutionality of health care reform. *New England Journal of Medicine*. 2010; 363:1881–1883. [PubMed: 20979465]
- Seven-Sky v. Holder*, 1:10-cv-00950 (CADC 2011).
- Smith PJ. Federalism, Lochner, and the individual mandate. *Boston University Law Review*. 2011; 91:1723–1747.
- State of Florida v. U.S. Department of Health and Human Services*, 780 F. Supp. 2d 1256 (N.D. Fla. 2011a).
- State of Florida v. U.S. Department of Health and Human Services*, 648 F. 3d 1235 (CA11 2011b).
- Thomas More Law Center v. Obama*, 720 F. Supp. 2d 822 (E.D. Mich. 2010).
- United States v. Comstock*, 551 U.S. 274 (2010).
- United States v. Lopez*, 514 U.S. 549 (1995).
- United States v. Morrison*, 529 U.S. 598 (2000).
- Virginia v. Sebelius*, 728 F. Supp. 2d 768 (E.D. Va. 2010).
- Virginia v. Sebelius*, 656 F. 3d 253 (CA4 2011).
- Wickard v. Filburn*, 317 U.S. 111 (1942).

Biographies

Jeffrey J. Lee was a student in the dual degree program in Nursing and Health Care Management in the School of Nursing and Wharton School at the University of Pennsylvania.

Deena Kelly, MS, RN, is a doctoral fellow at the Center for Health Outcomes and Policy Research at the University of Pennsylvania.

Matthew D. McHugh, PhD, JD, MPH, RN, is a nursing and health policy researcher and assistant professor at the University of Pennsylvania School of Nursing in the Center for

Health Outcomes and Policy Research. He directs the dual degree program in nursing and health care management at the University of Pennsylvania. He is a Robert Wood Johnson Foundation Nurse Faculty Scholar.