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Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis

Abstract
[Excerpt] This report analyzes certain constitutional issues raised by requiring individuals to purchase health insurance under Congress's authority under its taxing power or its power to regulate interstate commerce. It also addresses whether the exceptions to the minimum coverage provision to purchase health insurance satisfy First Amendment freedom of religion protections. Finally, this report discusses some of the more publicized legal challenges to ACA, as well additional issues that are currently before the Court.

Keywords
health care, insurance, Patient Protection and Affordable Care Act, ACA, Congress, insterstate commerce

Comments

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Congressional Research Service

Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis

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Summary

As part of the Patient Protection and Affordable Care Act (ACA), P.L. 111-148, as amended, Congress enacted a "minimum coverage provision," which compels certain individuals to have a minimum level of health insurance (i.e., an "individual mandate"). Individuals who fail to do so may be subject to a monetary penalty, administered through the tax code. Congress has never compelled individuals to buy health insurance, and there has been significant controversy and debate over whether the requirement is within the scope of Congress's legislative powers.

Shortly after ACA was enacted, several lawsuits were filed that challenge the individual mandate on constitutional grounds. While some of these cases have been dismissed for procedural reasons, others have moved forward. These challenges have now reached the Supreme Court. During the last week of March, the Court heard arguments in *HHS v. Florida*, a case in which attorneys general and governors in 26 states as well as others brought an action against the Administration, seeking to invalidate the individual mandate and other provisions of ACA. Besides evaluating the constitutionality of the individual mandate, the Court is examining the question of whether the Anti-Injunction Act currently prevents the Court from ruling on the merits of the case. It also is considering the extent to which the minimum coverage provision can be severed from the remainder of ACA, if it is found to be unconstitutional. Finally, the Court is analyzing ACA's expansion of the Medicaid program and whether it unconstitutionally "coerces" states into compliance with federal requirements. This last issue will be addressed in CRS Report R42367, *Federalism Challenge to Medicaid Expansion Under the Affordable Care Act: Florida v. Department of Health and Human Services*, by Kenneth R. Thomas.

While there is no specific enumerated constitutional power to regulate health care or establish a minimum coverage provision, Congress's taxing power or its power to regulate interstate commerce may be pertinent. With regard to the taxing power, the requirement to purchase health insurance might be construed as a tax and upheld so long as it was found to comply with the constitutional restrictions imposed on direct and indirect taxes. On the other hand, opponents of the minimum coverage provision may argue that since it is imposed conditionally and may be avoided by compliance with regulations set out in the statute, that the requirement may be more accurately described as a penalty. If so, the taxing power alone might not provide Congress the constitutional authority to support this provision.

In evaluating the minimum coverage provision under the Commerce Clause, one of several issues that may be examined is whether the individual mandate is a regulation of economic activity. Some argue that the requirement to purchase health insurance is economic in nature because it regulates how an individual participates in the health care market, through insurance or otherwise. Conversely, others argue that forcing individuals to participate in commerce in order to regulate them goes beyond the bounds of the clause.

This report analyzes certain constitutional issues raised by requiring individuals to purchase health insurance under Congress's authority under its taxing power or its power to regulate interstate commerce. It also addresses whether the exceptions to the minimum coverage provision to purchase health insurance satisfy First Amendment freedom of religion protections. Finally, this report discusses some of the more publicized legal challenges to ACA, as well additional issues that are currently before the Court.

Contents

Background 1
Constitutional Authority to Require an Individual to Have Health Insurance 2
Taxing Power 3
Limits on the Taxing Power 5
Supreme Court Review 8
Power to Regulate Commerce 9
Supreme Court Review 15
Religious Exemptions to the Requirement to Have Health Insurance 16
Constitutional and Statutory Rules Regarding Religious Exercise 16
Legal Analysis of Religious Exemptions for the Minimum Coverage Provision 17
Is a Religious Exemption Constitutionally or Statutorily Required? 17
Is a Religious Exemption Constitutionally Permissible? 19
Legal Challenges to the Minimum Coverage Provision 21
Eleventh Circuit: Florida v. HHS 22
Sixth Circuit: Thomas More Law Center v. Obama 25
Fourth Circuit: Virginia ex rel. Cuccinelli v. Sebelius and Liberty v. Geithner 27
Additional Issues Before the Supreme Court 28
Anti-Injunction Act 29
Individual Mandate and Severability 31
Background 31
The *Florida* Case 34
Supreme Court Arguments 35

Contacts

Author Contact Information 39

Although the federal government provides health coverage for many individuals through federal programs such as Medicare, it has never required individuals to purchase health insurance until the enactment of the Patient Protection and Affordable Care Act[1] (ACA) in March of 2010.[2] While a requirement to transfer money to a private party may arise in other contexts (e.g., automobile insurance), it has been noted that these provisions are based on exercising a privilege, like driving a car.[3] Thus, due at least in part to the novelty of this requirement, there have been questions debated over its constitutionality, and several lawsuits have challenged the minimum coverage provision on constitutional grounds. These challenges have reached the Supreme Court, where oral arguments in the cases took place during the last week of March, 2012.

This report first analyzes the authority of Congress to enact the minimum coverage provision contained in ACA and discusses whether there must be exceptions to a requirement to purchase health insurance based on First Amendment freedom of religion. It finally examines some of the legal challenges to this federal requirement as well as other questions (relating to the Anti-Injunction Act and severability) that the Supreme Court is considering in conjunction with the minimum coverage provision. For a discussion of the constitutional challenge to ACA's expansion of the Medicaid program, see CRS Report R42367, *Federalism Challenge to Medicaid Expansion Under the Affordable Care Act: Florida v. Department of Health and Human Services*, by Kenneth R. Thomas.

Background

Under Section 1501 of ACA, beginning in tax year 2014, some taxpayers will be assessed a monetary penalty for any months during which they or their dependents lack "minimum essential" health coverage.[4] "Minimum essential coverage" includes coverage under a government-sponsored health care program (e.g., Medicaid, Part A of Medicare); an "eligible" employer-sponsored plan; coverage under a plan offered in the individual market; a grandfathered health plan; and other health coverage as recognized by the Secretary of Health and Human Services.

The amount of the assessment for failing to meet the individual mandate, which can be prorated for partial compliance during the year, is determined by taking the greater of a flat dollar amount

[1] Patient Protection and Affordable Care Act, P.L. 111-148, §1501(b) (2010), as amended by the Health Care and Education Reconciliation Act of 2010 P.L. 111-152 §1002 (2010). The requirement to purchase health insurance will be referred to interchangeably, as either the minimum coverage provision or the individual mandate.

[2] *See* Congressional Budget Office Memorandum, The Budgetary Treatment of an Individual Mandate to Buy Health Insurance (August 1994) ("A mandate requiring all individuals to purchase health insurance would be an unprecedented form of federal action.").

[3] *See* Mark A. Hall, *The Constitutionality of Mandates to Purchase Health Insurance, Legal Solutions in Health Care Reform*, available at http://www.rwjf.org/files/research/38108.3693.constitutionality.mandates.pdf. *See also* Ex Parte Poresky, 290 U.S. 30 (1933) (Court agreed that a district court's dismissal of a complaint alleging that Massachusetts' compulsory automobile liability insurance law violated the 14th Amendment was proper "in view of the decisions of this Court bearing upon the constitutional authority of the State, acting in the interest of public safety, to enact the statute assailed."). It should be noted that while laws related to military service (e.g., the draft) could be considered an example of a federal mandate pertaining to individuals, the authority for these laws likely relies on Congress's authority to raise and support armies. *See generally* Rostker v. Goldberg, 453 U.S. 57, 65 (1981); Selective Draft Law Cases, 245 U.S. 366 (1918).

[4] P.L. 111-148, §1501(b), as amended by P.L. 111-152, §1002.

and a calculation based on a percentage of the taxpayer's household income. The annual flat dollar amount is assessed per individual or dependent without coverage and will be phased in over three years. The amount is set at $95 for 2014; $325 for 2015; and $695 in 2016 and thereafter.[5] This amount will also be adjusted for inflation beyond 2016. Although this is a fixed per-person amount, a taxpayer's liability will not exceed three times this amount per year, regardless of the number of individuals who actually lack adequate coverage during the year. For example, a married couple filing jointly with two dependent children and no health insurance will have the same flat dollar assessment as a similarly situated married couple with three dependent children.

This flat dollar amount will be compared to a percentage of the extent to which the taxpayer's household income exceeds the income tax filing threshold.[6] Like the flat dollar amount, the applicable percentage to be used is phased in over three years, set at 1% for 2014, 2% for 2015, and 2.5% thereafter. The amount assessed on a taxpayer who lacks minimum essential coverage will be equal to the greater of the flat dollar amount or the calculated percentage of household income. However, this amount shall not exceed the national average of the annual premiums of a bronze level health insurance plan offered through an exchange created under ACA.

Exemptions would apply to individuals with qualified religious exemptions, members of health care sharing ministries, unauthorized aliens, incarcerated individuals, qualified U.S. citizens and residents living abroad, and bona fide residents of the U.S. possessions. Additionally, no amounts would be assessed on individuals who could not afford coverage;[7] taxpayers with income less than the filing threshold; members of Indian tribes; and individuals granted hardship exceptions. Finally, no amounts would be assessed for periods without coverage that last less than three months. This three-month exception could apply to only one continuous period without coverage during a calendar year.

Constitutional Authority to Require an Individual to Have Health Insurance

While there is no specific enumerated constitutional power to regulate health care or establish a minimum coverage provision, one can look to Congress's other broad enumerated powers which have been used to justify health care regulation in the past. In the instant case, Congress's taxing power or its power to regulate interstate commerce may be pertinent. It should be noted that while there are numerous congressional findings under Section 1501 of ACA that address the correlation of the minimum coverage provision to interstate commerce, there are no similar statements in the Act relating to the individual mandate and Congress's taxing power.

[5] The tax would be one half the applicable dollar amount if the taxpayer was younger than 18 years old.

[6] The filing threshold for individuals is defined in I.R.C. §6012(a)(1) and is roughly equal to the taxpayer's personal exemption (or exemptions in the case of a joint filer) and standard deduction.

[7] In general, an individual will be deemed unable to afford coverage if the required contribution for employer-sponsored coverage or a bronze-level plan on an Exchange exceeds 8% of the individual's household income for the taxable year. *See* 26 U.S.C. §5000A(e)(1)(A), as created by ACA. For information on Exchanges as provided for in ACA, see CRS Report R40942, *Private Health Insurance Provisions in the Patient Protection and Affordable Care Act (PPACA)*, by Hinda Chaikind and Bernadette Fernandez.

Taxing Power

Article I, Section 8 of the Constitution states that "Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.... " The power to tax and spend for the general welfare is one of the broadest powers in the Constitution and affords the basis of government health programs in the Social Security Act, including Medicare, Medicaid, and the State Children's Health Insurance Program.

Because Congress's power to tax is extremely broad,[8] it has been argued that this power is a legitimate source of power for Congress to impose the minimum coverage provision. If so, the provision might be upheld as constitutional so long as it was found to comply with the constitutional restrictions imposed on direct and indirect taxes discussed below. In defense of the individual mandate, the Solicitor General has favorably compared the requirement to other instances in which Congress has used its taxing authority to create financial incentives for individuals to purchase health insurance.[9] Similarly, if Congress were to require individuals to purchase health insurance, and then encourage compliance with this requirement by conditioning receipt of a tax benefit (e.g., a tax credit) on the purchase of health insurance, this incentive also could be seen as a legitimate exercise of Congress's taxing authority.[10]

On the other hand, opponents of the minimum coverage provision have argued that the enacted requirement differs in that it creates a financial disincentive for failing to obtain health insurance. As the tax is imposed conditionally and may be avoided by compliance with regulations set out in the statute, some might argue that it may also be accurately described as a penalty and, therefore, the taxing power alone might not provide Congress the constitutional authority to impose the requirement.[11] A court analyzing this argument might look to cases where the Supreme Court has examined whether Congress has the authority, independent of its taxing authority, to regulate the underlying subject matter. If such regulation is authorized under a provision of the Constitution other than the taxing power, the exaction may be sustained as an appropriate enforcement mechanism.[12] But, in the absence of such independent authority, a tax triggered by the failure to comply with federal standards has been held to be invalid.[13]

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[8] *See*, e.g., United States v. Doremus, 249 U.S. 86, 93 (1919) ("If the legislation enacted has some reasonable relation to the exercise of the taxing authority conferred by the Constitution, it cannot be invalidated because of the supposed motives which induced it.").

[9] *See* Brief for Petitioner at 4-5, 55 HHS v. Florida (2012) (No. 11-398) (citing I.R.C. §106 which excludes compensation received by employees in the form of health care benefits from gross income).

[10] *See*, *e.g.*, Thomas More Law Ctr. v. Obama, 651 F.3d 529, 550 (6th Cir. 2011) (Sutton, J., concurring) (If Congress clearly intended to enact a tax, it would simplify the court's role "as it is easy to envision a system of national health care, including one with a minimum-essential-coverage provision, permissibly premised on the taxing power.").

[11] *But see* Brian D. Galle, Conditional Taxation and the Constitutionality of Health Care Reform (April 3, 2010). Yale Law Journal Online, Forthcoming; FSU College of Law, Public Law Research Paper; GWU Law School Public Law Research Paper. Available at SSRN: http://ssrn.com/abstract=1584044 (arguing "'conditional' taxes—taxes used to achieve some regulatory end—are not limited only to those purposes covered by Congress's other enumerated powers. Instead, Congress may condition exemptions from a tax on any criteria it chooses—other than those expressly prohibited by the Constitution, such as restrictions on free speech—so long as it is willing to pay the political price for carving out that exception.").

[12] Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 383 (1940) (a tax on coal producers who did not meet certain federal requirements was upheld because the imposition of federal requirements was a valid exercise of Congress' power to regulate interstate commerce).

[13] *Child Labor Tax Case*, 259 U.S. 20 (1922) (striking tax on the employment of children because regulation of child (continued...)

A court that found it necessary to determine whether the character of the minimum coverage payment is that of a tax or penalty would likely examine congressional intent. The Supreme Court has noted that:

> the difference between a tax and a penalty is sometimes difficult to define and yet the consequences of the distinction in the required method of their collection often are important.... Taxes are occasionally imposed in the discretion of the legislature on proper subjects with the *primary* motive of obtaining revenue from them and with the *incidental* motive of discouraging them by making their continuance onerous. They do not lose their character as taxes because of the incidental motive. But there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment.[14]

Here, enforcement of this provision would likely result in revenue for the federal government, and a court might find this to be a sufficient purpose to be a valid exercise of the taxing power. But, it may be difficult for a court to ignore the larger context of health insurance reform in which the provision has arisen. To the extent that this context indicates that a primary motive of the provision is to encourage compliance with a federal requirement that individuals maintain some form of health insurance, a court may characterize it as a penalty rather than a tax.

For example, a court might look to any legislative findings accompanying the minimum coverage provision. Notably, Congress found that:

> [t]he [minimum coverage] requirement regulates activity that is commercial and economic in nature: economic and financial decisions about how and when health care is paid for, and when health insurance is purchased.[15]

The language Congress itself uses to refer to the provision may also influence its characterization. On one hand, simply because Congress has labeled a provision as a tax, a court is not bound by that label.[16] However, neither would a court be prohibited from using Congress's description of the provision as a penalty as evidence of Congress's intent.

Other factors can be gleaned from the Court's jurisprudence distinguishing taxes and penalties. Factors which suggest that a provision might actually be a penalty include (1) the absence of a correlation between the amount of tax and the magnitude by which an individual's conduct deviates from the conduct which is exempt from taxation; (2) a limitation that the tax only falls on individuals who knowingly deviate from the exempt conduct; and (3) the possibility of enforcement by government entities not traditionally charged with the enforcement of taxes.[17]

(...continued)

labor was not within Congress' authority under the Commerce Clause at the time; Congress' authority under the Commerce Clause has since been recognized by the Supreme Court to be much broader).

[14] *Id.* at 38 (emphasis added).

[15] *See* P.L. 111-148, §1501(a)(2)(A).

[16] *Child Labor Tax Case*, 259 U.S. at 38 ("To give such magic to the word "tax" would be to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the States.").

[17] *Id*. at 36-37 ("In the light of these features of the act, a court must be blind not to see that the so-called tax is imposed to stop the employment of children within the age limits prescribed. Its prohibitory and regulatory effect and purpose are palpable. All others can see and understand this. How can we properly shut our minds to it?").

Application of these three factors to the instant provision would appear to support its characterization as a tax. First, the amount of the penalty is roughly proportional to the length of time during the year that the taxpayer and his or her dependents lacked coverage. Second, knowledge is not a necessary element to assess the penalty. Third, it appears that the provision will be enforced by the Internal Revenue Service, an entity traditionally charged with the enforcement of taxes. However, this list comprises only those factors the Court found present in the case before it, and may not represent an exhaustive list of what a court might consider as indicia of taxes.

If a court were to classify the provision as a penalty, this would not be determinative of its constitutional validity, but would merely establish that Congress's authority to enact such a provision must be found in something other than its power to levy taxes. In other words, the constitutionality of the minimum coverage provision, if determined to be a penalty, would depend upon whether Congress has the authority under a power other than the taxing power to impose a financial burden on individuals who lack health insurance. As discussed below, one potential source of such authority may be the Commerce Clause.

Limits on the Taxing Power

Even where Congress has the general authority to levy a tax, the Constitution may impose additional requirements on the form of such taxes. For constitutional purposes,[18] taxes are understood to be either:

- direct taxes, subject to apportionment among the states based on population,[19] or
- indirect taxes (i.e., duties, imposts, and excises), subject to the Uniformity Clause.[20]

Additionally, under the Sixteenth Amendment, taxes on income, from whatever source, are not required to be apportioned,[21] even if such taxes are direct. The amendment itself does not classify income taxes as direct or indirect.

Here, it appears the minimum coverage provision would raise constitutional concerns under these provisions only if it were found to be a direct tax that was not a tax on income. This is because it would then be subject to the requirement of apportionment, and there is no indication it will be apportioned among the states based on population. If, however, the requirement were found to be a tax on income, it would fall under the protection of the Sixteenth Amendment and its lack of apportionment would raise no constitutional concerns. Similarly, it appears no constitutional issues would arise if the requirement were found to be an indirect tax since it would appear to satisfy the requirement of uniformity since it is geographically neutral on its face.[22]

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[18] *See* Thomas v. United States, 192 U.S. 363, 370 (1904) ("And these two classes, [direct taxes], and 'duties, imposts and excises," apparently embrace all forms of taxation contemplated by the Constitution.").

[19] U.S. CONST. Art. 1, §9, cl. 4 ("No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration…."); Art. 1, §2, cl. 3 ("direct Taxes shall be apportioned among the several States….").

[20] U.S. CONST. Art. I, §8, cl. 1 ("[A]ll duties, Imposts and Excises shall be uniform throughout the United States.").

[21] U.S. CONST. Amend. XVI ("The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.").

[22] *See* United States v. Ptasynski, 461 U.S. 74 (1983) (stating the Uniformity Clause bars geographic discrimination).

Some have argued that the minimum coverage provision is in fact a direct tax, and, consequently, must be apportioned. The exact scope of the term "direct taxes" is undetermined, but the Court has construed it to be relatively narrow. The Constitution does not define the term other than specifying that it includes capitations (a capitation, or head tax, is a fixed tax imposed on each person in a jurisdiction). The Framers' debates provide little clarity.[23] From its earliest days, the Supreme Court has indicated that direct taxes include capitations and real property taxes at a minimum.[24] The Court has also suggested that other types of taxes might be considered direct,[25] although the Court did not find any such examples[26] until the *Pollock* case in 1895. In *Pollock*, the Court struck down the unapportioned Income Tax Act of 1894[27] after finding parts of it—the taxes on income from real and personal property—were direct taxes.[28] The *Pollock* decision was subject to substantial criticism and led to the adoption of the Sixteenth Amendment in 1913. *Pollock* has not been expressly overruled,[29] although the Court moved away from its analysis in

[23] *See, e.g.,* 2 Farrand's Records 350 ("Mr. King asked what was the precise meaning of direct taxation? No one answd."). Primary sources from the time period have supported multiple interpretations, from narrow definitions limiting direct taxes to only those that can realistically be apportioned, perhaps just capitation and real property taxes, to broader interpretations that would, for example, include all taxes other than consumption taxes. *See, e.g.,* Bruce Ackerman*, Taxation and the Constitution*, 99 COLUM. L. REV. 1, 14-19 (1999) (arguing that "direct tax" was primarily a political, and not economic, term intended to be interpreted narrowly); Erik M. Jensen, *The Taxing Power, the Sixteenth Amendment, and the Meaning of "Incomes,"* 33 ARIZ. ST. L.J. 1057 (2001) (arguing that the Framers distinguished the two types on the basis that indirect taxes—which he thinks means taxes on consumption—have inherent protection from government abuse because taxpayers can choose whether to consume if the tax gets too high).

[24] Congress has in the past levied taxes on property. In 1813, Congress levied a direct tax on property totaling $3 million, which the statute apportioned among the 18 states and then among the counties (parishes) of each state. Act of August 2, 1813, 2 Stat. 53. Thus, for example, $369,018.44 was apportioned to Virginia and $6,354.50 of that amount apportioned to Fairfax County. Provisions for assessing and collecting the tax were contained in the Act of July 22, 1813. 3 Stat. 22 (1813). A direct tax on property totaling $20 million was levied in 1861, apportioned among the states, territories, and the District of Columbia. Act of August 5, 1861, §8, 12 Stat. 295. We have found no examples of head taxes enacted by Congress.

[25] *See* Hylton v. United States, 3 U.S. 171 (1796). *But, see id. at* 175 (Chase, J., concurring, "I am inclined to think, but of this I do not give a judicial opinion, that the direct taxes contemplated by the Constitution, are only two, to wit, a capitation, or poll tax, simply, *without regard to property, profession, or any other circumstances*; and a tax on land") (emphasis added).

[26] *See* Hylton, 3 U.S. at 175 (upholding unapportioned tax on carriages); Pacific Insurance Co. v. Soule, 74 U.S. 433 (1869) (upholding tax on the business of insurance); Veazie Bank v. Fenno, 75 U.S. 533 (1869) (upholding tax on bank notes); Scholey v. Rew, 90 U.S. 331 (1875) (upholding inheritance tax); Springer v. United States, 102 U.S. 586 (1881) (upholding income tax).

[27] 28 Stat. 509 (1894) (imposing a tax on "the gains, profits, and income received in the preceding calendar year by every citizen of the United States ... whether said gains, profits, or income be derived from any kind of property, rents, interest, dividends, or salaries, or from any profession, trade, employment, or vocation carried on in the United States or elsewhere.... ").

[28] The Court reasoned that income taxes on the gains derived from investments in real or personal property had a substantial impact on the underlying assets and should be treated as direct taxes falling on the property. *See* Pollock, 157 U.S. at 583.

[29] Some commentators would argue the decision has essentially been erased by the Court's subsequent jurisprudence and passage of the Sixteenth Amendment. *See, e.g.*, Calvin H. Johnson, *Fixing the Constitutional Absurdity of the Apportionment of Direct Tax*, 21 CONST. COMMENT. 295, 298-99 (2004) ("Pollock is dead on its holding as to the income tax. Indeed, courts have a duty to distinguish Pollock in every case."). On the other hand, some have argued that "the reports of Pollock's demise are exaggerated" and that "[a]n income tax is nothing like the classic forms of indirect taxation, and the Supreme Court therefore got the result right in [Pollock]: an income tax is a direct tax as that term was originally understood." Erik M. Jensen, *The Apportionment of "Direct Taxes": Are Consumption Taxes Constitutional?,* 97 COLUM. L. REV. 2334, 2345 (1997); Jensen, *supra* note 23 at 1079.

subsequent cases that upheld a variety of unapportioned taxes on the basis they were excise taxes.[30]

The minimum coverage provision is codified in the Internal Revenue Code as an excise tax. For constitutional purposes, the Supreme Court has found excise taxes to be a broad category of indirect taxes.[31] It might be argued, for example, that the tax is properly characterized as an excise tax imposed on earning income without maintaining health insurance for oneself and one's dependents.[32] Excise taxes imposed on inaction are not unprecedented,[33] although it does not appear that any have been challenged on the grounds that it is unconstitutional to impose an excise tax on a failure to act.

On the other hand, some have argued that the individual mandate is a tax based on inaction and is effectively a capitation.[34] Under this argument, "[a] tax on a person who chooses not to act is precariously close to a tax on everyone with an exemption from the tax for those that act."[35] In other words, a tax on the failure to act (i.e., buy health insurance) is essentially a tax on "the state of mere existence."[36] However, others might point to the fact that the tax would not be imposed on individuals with insufficient income as evidence that it should not be characterized as a capitation. Additionally, some might compare it to existing tax deductions and credits that are intended to encourage certain types of behaviors, such as the tax benefits provided to homeowners.[37] It might be argued that the minimum coverage provision is analogous to these types of provisions, and the fact that it takes a different form (i.e., is not a deduction or credit) should not be constitutionally significant.

Resolving this point may require determining whether a generally applicable tax that is avoidable if an individual takes some action constitutes a capitation. The federal courts have yet to explore in detail the precise definition of capitations, also known as poll taxes, for purposes of the federal Constitution. However, some insight into their meanings may be gleaned from the states' attitudes regarding poll taxes which were held contemporaneously with the ratification of the federal

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[30] *See* Nicol v. Ames, 173 U.S. 509 (1899) (tax on certain sales and exchanges of property); Knowlton v. Moore, 178 U.S. 41 (1900) (estate tax); Patton v. Brady, 184 U.S. 609 (1902) (tax on manufactured tobacco); Flint v. Stone Tracy Co., 220 U.S. 107 (1911) (corporate franchise tax); *but see* Eisner v. Macomber, 252 U.S. 189 (1920) (striking an unapportioned tax on a stock dividend that did not change the taxpayer's proportionate ownership of the company, relying on the *Pollock* holding that taxes on rents and income from real and personal property were direct taxes).

[31] *See* Nicol v. Ames, 173 U.S. 509 (1899) (tax on certain sales and exchanges of property); Knowlton v. Moore, 178 U.S. 41 (1900) (estate tax); Patton v. Brady, 184 U.S. 609 (1902) (tax on manufactured tobacco); Flint v. Stone Tracy Co., 220 U.S. 108 (1911) (tax on corporate franchise).

[32] *See also* Galle, *supra* note 11 (arguing the tax could be characterized as imposed on "the use of personal wealth for purposes other than the purchase of health insurance" or "on a particular form of arranging one's economic affairs: the choice to shift the risk of future medical needs from oneself to the social safety net—in effect, a tax on the use of the existing system of free care, Medicaid, and debtor-protection and bankruptcy law").

[33] Other provisions include the excise taxes on the failure of tax-exempt private foundations to distribute income (26 U.S.C. §4942); failures of certain group health plans to provide continuation coverage or to meet certain requirements (26 U.S.C. §§4980B, 4980D) and failures of certain investment vehicles to distribute income (26 U.S.C. §§4981, 4982).

[34] *See* George Clark, *Baucus "Excise" on Those Who Fail to Buy Insurance Raises Constitutional Issues*, DAILY TAX REPORT, September 29, 2009.

[35] *Id*.

[36] *Id*.

[37] *See, e.g.,* 26 U.S.C. §163(h) (permitting individuals to deduct qualifying home mortgage interest payments); 26 U.S.C. §36 (providing a tax credit to qualifying "first-time" homebuyers).

Constitution. For example, in *Short v. State* the Maryland Court of Appeals was confronted with the meaning of poll taxes for purposes of the state constitution. At the time of the case in 1895, every Maryland state constitution since 1776 had prohibited poll taxes.[38] Maryland had also required, at least since 1795, that all able-bodied state male residents either spend two days a year improving the road system or pay seventy-five cents for road maintenance. Based upon approximately one hundred years of coexistence between these two provisions, the Maryland Court of Appeals determined that the meaning of poll taxes, as used in the state constitution in 1776, did not encompass the financial penalty imposed on those who failed to perform road maintenance.[39] A potential inference from this holding is that, at the time the Constitution was drafted, the common understanding of poll taxes did not encompass a financial penalty imposed on the failure to satisfy a lawful obligation to take some action. Therefore, while Congress's authority to impose the underlying mandate may be challenged, it is far from certain that a tax on individuals who fail to comply with that mandate would be a capitation necessitating apportionment.

If the minimum coverage provision is classified as a tax on income, whether the tax is direct or not becomes irrelevant as it would no longer be subject to apportionment by virtue of the Sixteenth Amendment. Certain aspects of the tax might support its classification as a tax on income since, for taxpayers with sufficient income, the amount of taxation would be directly proportional to their excess household income above the filing threshold and only those taxpayers with household income above the filing threshold would be subject to the tax at all. However, it is not clear that a court would classify the minimum coverage provision as a tax on income since a significant component of the tax appears to have no relationship to a taxpayer's income, but is instead related to the lack of coverage under a health plan for themselves and their dependents.

Supreme Court Review

Before the Supreme Court, the Administration argues that the minimum coverage provision could be independently justified under the taxing power.[40] In support of the provision's characterization as a tax, the Administration notes that the mandate is expected to raise substantial revenue, is placed in the IRC, and is to be assessed and collected by the IRS.[41] Although the Administration acknowledges that the minimum essential coverage requirement is intended to affect individual behavior with respect to purchasing insurance, it argues that the Court's precedent has established that "[e]very tax is in some measure regulatory" and that the critical inquiry is whether the measure is "productive of some revenue."[42] Additionally, the Administration argues that the individual mandate's designation as a "penalty" should not be determinative of the provision's characterization as a tax, particularly given its function as a revenue raising provision.

In opposition, the respondents before the Supreme Court principally argue that the minimum coverage provision should not be evaluated under the taxing power principally because the minimum essential coverage requirement contains a stand-alone provision directing individuals to

[38] Md. December of R. art. 15.

[39] 31 A. 322 (Md. 1895). Examples of poll taxes recited in the opinion were a specific sum levied on all persons, male or female, free or slave, above the age of 16 for general support of the government and a tax of 40 pounds of tobacco "per poll" to support clergy of the Church of England.

[40] *See* Brief for Petitioner at 52-62, HHS v. Florida (2012) (No. 11-398).

[41] *Id.*

[42] United States v. Sonzinsky, 300 U.S. 506, 513 (1937) (upholding license tax on firearms dealers).

maintain health insurance, and that this mandate cannot be justified under the taxing power even if the penalty imposed on individuals that do not satisfy that mandate could be.[43] Additionally, the respondents rely on the fact that Congress chose to explicitly refer to the provision as a penalty rather than as a tax.[44] Finally, the respondents alternatively argue that, even if the provision is appropriately characterized as a tax, it may be an unconstitutionally un-apportioned capitation.

Power to Regulate Commerce

The Commerce Clause of the U.S. Constitution empowers Congress "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[45] The Supreme Court developed an expansive view of the Commerce Clause relatively early in the history of judicial review.[46] This power has been cited as the constitutional basis for a significant portion of the laws passed by the Congress over the last 50 years, and it currently represents one of the broadest bases for the exercise of congressional powers.[47] While the Supreme Court held in *United States v. South-Eastern Underwriters Association*[48] that Congress could regulate the competitive practices of insurers under the Commerce Clause, it is unclear whether the minimum coverage provision could be considered regulation of insurance per se. Despite the breadth of powers that have been exercised under the Commerce Clause, whether the minimum coverage provision would be constitutional under the clause is a challenging question, as it is a novel issue whether Congress may use the clause to require an individual to purchase a good or a service.

Under modern Commerce Clause jurisprudence, the Supreme Court has found that the Commerce Clause allows for three categories of congressional regulation: the channels of interstate commerce; the instrumentalities of interstate commerce; and "those activities having a substantial relation to interstate commerce ... i.e., those activities that substantially affect interstate commerce."[49] It is likely that a court would evaluate Congress's authority for enacting the minimum coverage provision under this third "substantially affects" category.

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[43] Brief for Respondents at 52-54, HHS v. Florida (2012) (No. 11-398).

[44] *Id.* at 57-62.

[45] U.S. Const., Art. I, §8, cl. 3. It should be noted that the Commerce Clause is augmented by the Necessary and Proper Clause, which allows Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers ... " U.S. Const., Art. I, §8, cl. 18.

[46] For instance, Chief Justice Marshall wrote in 1824 that "the power over commerce ... is vested in Congress as absolutely as it would be in a single government ..." and that "the influence which their constituents possess at elections, are ... the sole restraints" on this power. Gibbons v. Odgen, 22 U.S. (9 Wheat.) 1, 197-98 (1824).

[47] *See* CRS Report RL32844, *The Power to Regulate Commerce: Limits on Congressional Power*, by Kenneth R. Thomas.

[48] 322 U.S. 533 (1944). In response to the Court's ruling in *South-Eastern Underwriters,* Congress explicitly recognized the role of the states in the regulation of insurance with the passage of the McCarran-Ferguson Act of 1945. The intent of the McCarran-Ferguson Act was to grant states the explicit authority to regulate insurance in light of the *South-Eastern Underwriters* decision. Section 2(a) of the Act states: The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business. 15 U.S.C. §1012(a). However, under the Act, Congress also reserved to itself the right to enact federal statutes that "specifically" relate to "the business of insurance." 15 U.S.C. §1012(b).

[49] *See* United States v. Lopez, 514 U.S. 549, 558-59 (1995) (internal citations omitted).

Three recent cases, *United States v. Lopez, United States v. Morrison,*[50] *and Gonzales v. Raich*,[51] as well as several historical decisions such as *Wickard v. Filburn*,[52] govern much of the current Commerce Clause analysis under the "substantially affects" category. These cases indicate that, while the modern interpretation of the Commerce Clause is broad, congressional authority is not without bounds.[53] In a case that has been perceived as one of the Supreme Court's most expansive Commerce Clause rulings, *Wickard v. Filburn*, the Court was asked to determine whether the clause permitted amendments to the Agricultural Adjustment Act of 1938 affecting the production and consumption of homegrown wheat.[54] In upholding the statute as constitutional, the Court held that economic activities, regardless of their nature, could be regulated by Congress if the activity exerts a substantial effect on interstate commerce.[55] Although the Court admitted that one family's production alone would likely have a negligible impact on the overall price of wheat, if combined with other personal producers, the effect would be substantial enough to make the activity subject to congressional regulation.[56] The Court concluded that Congress had a rational basis for its action and its belief that, in the aggregate, keeping homegrown wheat outside of federal regulation would have a substantial influence on interstate commerce.

From 1937 to 1995, after cases like *Wickard* and others, the Supreme Court did not hold a federal statute to be beyond the scope of the authority vested in Congress by the Commerce Clause. However, in 1995, in *United States v. Lopez*, the Court struck down a statute that made it a federal crime to knowingly possess a firearm in a school zone because it exceeded Congress's Commerce Clause authority. In analyzing the statute under the "substantially affects" category, the Court identified four major problems. First, it determined that the criminal statute at issue had no connection with commerce or any sort of economic enterprise, and did not play an essential role in a larger regulatory scheme. Secondly, the Supreme Court found it significant that there was no jurisdictional element in the statute, which would ensure that firearm possession affected interstate commerce in a particular instance. Third, the Court stated that the lack of congressional findings regarding the impact of the offense on the national economy detracted from any substantial relation it might have to interstate commerce. Finally, the Court rejected the government's argument that the statute was valid because possession of a firearm near a school could result in violent crime, and this crime could affect the national economy. The Court explained that if it were to accept the government's arguments, it would be hard "to posit any activity by an individual that Congress is without power to regulate."[57]

The Supreme Court used the logic of *Lopez* in *United States v. Morrison*, where the Court evaluated whether a federal statute that provided for a private right of action for victims of gender-motivated violence fell within Congress's power under the Commerce Clause. In finding that this statute was beyond Congress's authority under the Commerce Clause, the Court followed the analysis in *Lopez*. First, the Court explained that "gender-motivated crimes are not, in any sense of the phrase, economic activity." Turning to the second prong of the *Lopez* analysis, the

[50] 529 U.S. 598 (2000).

[51] 545 U.S. 1 (2005).

[52] 317 U.S. 111 (1942).

[53] *See Lopez*, 514 U.S. at 557; *Morrison*, 529 U.S. at 608.

[54] In 1941, Mr. Filburn harvested an excess amount of 239 bushels for which he was fined pursuant to amendments to the Agricultural Adjustment Act of 1938. 317 U.S. at 114.

[55] *Id*. at 125.

[56] *Id.*

[57] *Lopez*, 514 U.S. at 564.

Court noted that, like the Gun-Free School Zones Act, the statute lacked a "jurisdictional element establishing that the federal cause of action is in pursuance of Congress' power to regulate interstate commerce."[58]

The Court then discussed the existence of congressional findings regarding the effects of gender-motivated violence on the national economy and interstate commerce. While noting that the statute was supported by "numerous findings,"[59] the Court stressed its declaration in *Lopez* that "[s]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." Finally, the Court considered the level of attenuation between the federal statute and its effect on interstate commerce. In explaining why the statute exceeded the boundaries of the Commerce Clause, the Court explained that the statute would impermissibly provide Congress with the power "to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption."[60] Expanding upon this observation, the Court noted that to allow such regulation of a non-economic activity would enable federal regulation of almost any activity, including "family law and other areas of traditional state regulation.... "[61]

In *Gonzales v. Raich*, the Supreme Court evaluated whether, under the Commerce Clause, Congress had the power to apply the federal Controlled Substances Act's (CSA's) prohibition of the manufacture and possession of marijuana to the local cultivation and use of marijuana that was in compliance with California law. In holding that the CSA's prohibition was within Congress's authority under the Commerce Clause, the Court relied on *Wickard v. Filburn* and the idea that Congress can regulate purely intrastate activity that is not "commercial" if it concludes that failure to regulate the activity would undercut federal regulation of the interstate market.[62] However, the Court found that the standard for assessing the scope of Congress's power under the Commerce Clause is not whether the activity at issue, when aggregated, substantially affects interstate commerce; but rather, whether there exists a "rational basis" for Congress to have reached that conclusion. Further, the Court distinguished *Raich* from *Lopez* and *Morrison* based on the idea that in *Raich*, the regulated activity was "quintessentially economic."[63] The Court also concluded that Congress had acted rationally in determining that the CSA's prohibition of the class of activities at issue was an "an essential part of the larger regulation of economic activity."[64]

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[58] *Morrison*, 529 U.S at 613.

[59] The Court pointed to various legislative findings including findings that gender-motivated violence affected interstate commerce by deterring potential victims from traveling interstate, from engaging in interstate business, by diminishing national productivity, and increasing medical and other costs. *Id.* at 615 (quoting H.Rept. 103-711, at 385).

[60] *Id.*

[61] *Id.* It should be noted that after the decision in *Lopez* and *Morrison*, the question arose as to whether these cases were an indicator of future restrictions on Congress's power to regulate interstate commerce. However, it is arguable that the Court intended *Lopez* and *Morrison* to have a limited effect, as the Court specifically reaffirmed much of its previous Commerce Clause case law, including *Wickard*.

[62] *Raich*, 545 U.S. at 18.

[63] *Id.* at 25. The Court explained that "the CSA regulates the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market. Prohibiting the intrastate possession or manufacture of an article of commerce is a rational ... means of regulating commerce in that product." Id. at 26.

[64] *Id.* at 26-27. *See also Lopez*, 514 U.S., at 561.

In applying the 4-factor analysis used in *Lopez* and *Morrison* to the minimum coverage provision of ACA,[65] the first and fourth factors of these cases warrant the closest analysis. Under the first factor of the test, it must be determined whether requiring individuals to purchase health insurance is commercial or economic in nature. In *Lopez*, the gun control law at issue was struck down by the Supreme Court, as was a cause of action based on gender-motivated crime in *Morrison*, because the statutes did not have anything to do with an economic activity or enterprise. While the regulation of the health insurance industry or the health care system would likely be considered economic in nature, a requirement to purchase health insurance is more of an open question. On one hand, for example, it is argued that the individual mandate regulates economic conduct, as the provision dictates the way in which individuals pay for their participation in the health care market.[66] It is claimed that virtually all individuals participate in this market, since they will utilize health care services at some point. And, because uninsured individuals may seek and receive medical care, which they may not be able to pay for, the costs for this care are passed on to other market participants, i.e., health care providers, insurers, and the insured.[67] Accordingly, the minimum coverage provision prevents this cost shifting and regulates how this health care is purchased.[68]

On the other hand, it is argued that the minimum coverage provision goes beyond the bounds of the Commerce Clause, as regulation of the health insurance industry or the health care system could be considered economic activity, but regulating a choice to purchase health insurance is not.[69] It is questioned whether a requirement to purchase health insurance is really a regulation of an economic activity or enterprise, if individuals who would be required to purchase health insurance are not, but for this regulation, a part of the health insurance market.[70] In general, Congress has used its authority under the Commerce Clause to regulate individuals, employers, and others who voluntarily take part in some type of economic activity. While in *Wickard* and *Raich*, the individuals were participating in their own home activities (i.e., producing wheat for home consumption and cultivating marijuana for personal use), they were acting of their own volition, and this activity was determined to be economic in nature and affected interstate commerce. However, a requirement could be imposed on some individuals who do not engage in any economic activity relating to the health insurance market. This is a novel issue: whether Congress can use its Commerce Clause authority to require a person to buy a good or a service and whether this type of required participation can be considered economic activity. Still, while it may seem to many like too much of a bootstrap to force individuals into the health insurance market and then use their participation in that market to say they are engaging in commerce, there is plenty of evidence that the purchase of health insurance has an effect on the commerce of the

[65] As discussed above, after *Lopez* and *Morrison*, whether a regulation has a substantial effect on interstate commerce requires reviewing courts to consider the following four factors: (1) whether the regulated activity is commercial or economic in nature; (2) whether an express jurisdictional element is provided in the statute to limit its reach; (3) whether Congress made express findings about the effects of the activity on interstate commerce; and (4) whether the link between the activity and the effect on interstate commerce is attenuated. United States v. Stewart, 348 F.3d 1132, 1136-37 (9th Cir. 2003) (citing *Morrison*, 529 U.S. at 610-12).

[66] *See* Brief for Appellant-Petitioner at 18-19, HHS v. Florida (2012) (No. 11-398).

[67] *See id.*

[68] *Id*.

[69] *See e.g.,* Brief for Appellee-Respondent at 15 *et seq*, HHS v. Florida (2012) (No. 11-398).

[70] *See, e.g.*, *id*.

nation. For example, in 2009, health care expenditures in the United States grew 4% to $2.5 trillion, or $8,086 per person, and accounted for 17.6% of gross domestic product.[71]

In evaluating whether the individual mandate and the effect on interstate commerce is attenuated, one may point to evidence of the effect that the requirement to purchase health insurance would have on the insurance industry and the health care system as a whole. One could argue that because most individuals do, at some point, become ill and require health care, a requirement that all persons purchase health insurance coverage would benefit the orderly flow of health care services in interstate commerce. As pointed out in the findings accompanying the minimum coverage provision, the requirement regulates activity such as "the economic and financial decisions about how and when health care is paid for, and when health insurance is purchased. In the absence of the requirement, some individuals would make an economic and financial decision to forego health insurance coverage and attempt to self-insure, which increases financial risks to households and medical providers."[72] Also, because one of the motivating factors for a requirement to obtain health insurance is arguably to get healthy individuals who do not have health insurance to purchase it (so as to offset the cost of the individuals who need greater, more expensive care), this also would contribute to the proper functioning of the health care system. Still, it is argued that if the commerce power can be used to mandate the purchases of a private individual, it could be perceived as virtually unlimited in scope.[73] Based on similar arguments made in *Lopez* and *Morrison*, a court may examine whether Congress can require the purchase of any good or service based on the effect such purchases could have on an industry or the economy as a whole.

Also, while perhaps not as important to the instant inquiry as the other *Lopez/Morrison* factors, the presence of congressional findings for purposes of commerce clause analysis may be examined. ACA includes detailed findings regarding the effect that the minimum coverage provision would have on interstate commerce.[74] However, as mentioned above, it appears that the presence of congressional findings may be helpful, but not determinative, of Congress's authority to legislate under the Commerce Clause. In addition, as discussed in *Lopez* and *Morrison*, a court could also examine the fact that ACA does not contain an explicit jurisdictional element that insures that the statute affects interstate commerce. This element could have been satisfied by a statement, such as one providing that any person using medical care in or affecting interstate commerce must have health insurance. It is possible that a court may overlook the need for a jurisdictional element, especially in light of Congress's findings that indicate the effects that the minimum coverage provision has on interstate commerce.[75] However, should a reviewing court find that absence of a jurisdictional element as essential for Congress's ability to enact the minimum coverage provision, it seems possible that Congress may be able to amend ACA to include this element.[76]

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[71] Centers for Medicare and Medicaid Services, National Health Expenditure Data Fact Sheet, *available at* http://www.cms.gov/NationalHealthExpendData/25_NHE_Fact_Sheet.asp.

[72] P.L. 111-148, §1501(a)(2).

[73] *See e.g.,* Brief for Appellee-Respondent, HHS v. Florida at 24 *et seq*.

[74] P.L. 111-148, §1501(a)(2).

[75] Further, if a court finds the minimum coverage provision to be, similar to the provisions in *Wickard* and *Raich*, an essential component of a larger economic regulatory scheme, then the need for a jurisdictional element may be alleviated. *See* discussion of *Raich infra*.

[76] It may be noted that Congress replaced the provision struck down in *Lopez* with an amended version that makes it unlawful for an individual "knowingly to possess a firearm *that has moved in or that otherwise affects interstate or* (continued...)

Following the reasoning of *Raich*, a court may evaluate whether Congress rationally concluded that persons failing to have health insurance have a substantial effect on interstate commerce. One arguing in favor of the constitutionality of the minimum coverage provision may point to the fact that a health insurance mandate would presumably lower the uninsured population. Many suggest that Americans without health coverage burdens our health care system and adds strain on the economy. As indicated in the congressional findings accompanying the minimum coverage provision, the economy loses up to $207 billion a year because of the poorer health and shorter lifespan of the uninsured.[77] Further, according to these findings, in 2008, cost of providing uncompensated care to the uninsured was $43 billion and these amounts are paid for when health care providers pass on the cost to private insurers, which in turn then transfer the cost to those who are insured.[78] Evidence like this could be relied on by a court in demonstrating a rational basis for Congress's enactment of a requirement to purchase health insurance.

In addition, based on *Raich*, if a requirement to purchase health insurance is not considered economic or commercial in nature, it should be determined whether the requirement is "an essential part of a larger regulation of economic activity." One may argue that a minimum coverage provision is an essential part of Congress's current regulation of the health care system or industry. A reviewing court could consider whether the absence of a requirement to purchase health care would undercut the regulation of the health care as a whole. In making this determination, a court may look to the involvement of the federal government in the regulation of health care generally to decide whether a requirement to purchase health insurance could be seen as an essential component of this regulation. Given the federal government's fairly significant role in health care regulation (e.g., ERISA, the Public Health Service Act), the argument that the requirement to purchase insurance is an "essential part" of the regulation may become more viable. In addition, since the minimum coverage provision is part of a comprehensive act dealing with many aspects of health care, this may reinforce the idea that it is acceptable under the Commerce Clause as part of a larger health care reform effort.[79]

Further, because certain new insurance provisions in ACA require health insurers to accept every individual who applies for coverage, prevent them from imposing exclusions from coverage based on preexisting conditions, and restrict insurers from charging higher premiums based on an individual's health status, some argue that the minimum coverage provision plays an integral role within ACA itself.[80] Without an individual mandate, individuals might wait to purchase health

(...continued)

foreign commerce at a place that the individual knows, or has reasonable cause to believe, is a school zone." *See* 18 U.S.C. §922(q)(2)(A) (emphasis added). This amendment demonstrates that the required nexus to interstate commerce can, at least in some cases, may be fixed.

[77] P.L. 111-148, §1501(a)(2)(E).

[78] P.L. 111-148, §1501(a)(2)(F).

[79] The Court has also suggested that challenges to non-commercial aspects of a larger economic regulatory scheme may be evaluated under the Necessary and Proper Clause. *Raich*, 545 U.S at 36 (Scalia, J., concurring) ("Congress' authority to enact laws necessary and proper for the regulation of interstate commerce is not limited to laws directed against economic activities that have a substantial effect on interstate commerce."). Using this rationale, it could be argued that a requirement that individuals obtain health insurance is necessary for the proper functioning of the broader health care regulation established under ACA, so that such a mandate would pass constitutional muster. *Id*. at 22. The kinds of factors likely to be considered are (1) the historic breadth of the Necessary and Proper Clause; (2) the history of federal involvement in this area; (3) the reason for the statute's enactment; (4) the statute's accommodation of state interests; and (5) whether the scope of the statute is too attenuated from Article I powers. United States v. Comstock, 130 S. Ct. 1949 (May 17, 2010).

[80] *See, e.g.,* Brief for Appellant-Petitioner, HHS v. Florida at 17-18, 24-25.

insurance until they need care. As congressional findings point out, "[t]he [minimum coverage] requirement is essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold."[81] On the other hand, one could note that under Section 1501 of ACA, an individual could decide to pay the penalty associated with the minimum coverage provision and avoid purchasing health insurance. If a large number of individuals refused to purchase health insurance, this may weaken the idea that the minimum coverage provision is an essential part of this health care regulation.

Supreme Court Review

Arguments like the ones discussed above have been presented to the Supreme Court. In arguing their position to the Court, the challengers to the individual mandate contend that "[t]he Constitution grants Congress the power to *regulate* commerce, not the power to compel individuals to enter into commerce" or "the power to bring commerce into existence."[82] Accordingly, it is argued that if the Court finds that the Commerce Clause allows Congress to enact such a requirement, this would be a vast expansion of legislative powers.[83] And while the challengers concede that the decision to purchase health insurance could have economic consequences, they reason that "[i]f the "economic" nature of a decision were enough to allow Congress to displace the decision-making power of individuals and compel them to make whatever decisions Congress deems useful for the more efficient regulation of commerce, it would be 'difficult to perceive any limitation on federal power,' or any 'residuum of power' reserved to the States."[84] Following this logic, the challengers claim, every decision not to purchase a good or a service could have a substantial effect on interstate commerce if they are aggregated with similar decisions made by other individuals, and thus Congress would be in a position to require the purchase of any product.[85]

Conversely, the Administration primarily argues that the minimum coverage provision addresses the existing economic effects of the cost of care for the uninsured on the health care market.[86] Because the minimum coverage provision addresses "the timing and method of financing health care services," and because health care regulation is an area of "pervasive federal involvement," the Administration reasons that the requirement to purchase health insurance is well within the boundaries of the commerce power.[87] The Administration also distinguishes the requirement to purchase health insurance from the requirement to purchase other products, due to the health insurance market's unique characteristics, and the fact that "in markets for those [other] goods, there is no pre-existing economic activity analogous to the uncompensated consumption of health care, and thus no substantial economic effect like the massive risk-shifting and cost-shifting that

[81] P.L. 111-148, §1501(a)(2).

[82] Brief for Appellee-Respondent, HHS v. Florida at 11, 15. (emphasis in original) ("If Congress not only can regulate individuals once they decide to enter into commerce, but can compel them to enter commerce in the first place, then there is nothing left of the principle that Congress' powers "are defined, and limited," Marbury v. Madison, 5 U.S. 137, 176 (1803), as Congress could simply force within its regulatory reach all those who would remain outside it.") *Id.* at 11.

[83] *See, e.g., id*. at 24.

[84] *Id*. at 27 (*quoting* Lopez, 514 U.S. at 564; U.S. v. Comstock, 130 S. Ct. 1949, 1967 (Kennedy, J., concurring)).

[85] *Id*. at 12-13.

[86] Reply Brief for Petitioners at 2, HHS v. Florida (2012) (No. 11-398).

[87] *Id*. at 3.

occurs in the health-care and health-insurance markets."[88] The Administration also emphasizes that the constitutionality of the minimum coverage provision is further established by the fact that it is "integral" to ACA's insurance reforms, namely the guaranteed issue and community rating provisions, as the mandate is necessary to make these reforms effective.[89]

Religious Exemptions to the Requirement to Have Health Insurance

Requiring individuals to obtain health insurance may conflict with some individuals' religious beliefs.[90] Accordingly, legislation that would require individuals to obtain health insurance might raise constitutional issues of religious freedom.[91] These issues may be addressed with a religious exemption to the minimum coverage provision, which must comport with the First Amendment's religion clauses. Those clauses serve as guarantees that individuals will neither be required to act under a prescribed religious belief (the Establishment Clause) nor be prohibited from acting under their chosen religious beliefs (the Free Exercise Clause).

Constitutional and Statutory Rules Regarding Religious Exercise

Constitutional and statutory rules regarding free exercise of religion would determine whether a religious exemption would be required for legislation requiring individuals to have health insurance. The First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.... "[92] Although the Supreme Court historically had applied a heightened standard of review to government actions that allegedly interfered with a person's free exercise of religion,[93] the Court reinterpreted that standard in 1990. Since then, the Court has held that the Free Exercise Clause never "relieve[s] an individual of the obligation to comply with a valid and neutral law of general applicability."[94] Under this interpretation, the constitutional baseline of protection was lowered, meaning that laws that do not specifically target religion or do not allow for individualized assessments are not subject to heightened review under the Constitution.

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[88] *Id*. at 6.

[89] *Id*. at 3-4. *See* the severability section of this report, *infra*, for an additional discussion of the relationship of the individual mandate to the guaranteed issue and community rating provisions of ACA.

[90] Some religions teach that the religious community must be responsible for social services that otherwise might be included in health insurance coverage. The Amish, for example, believe that the community has an obligation to provide the assistance that would be provided by Medicare programs to community members in need of such assistance, and have challenged laws requiring their participation in such programs as unconstitutional. *See* United States v. Lee, 455 U.S. 252 (1982). Other religions teach that spiritual treatment through prayer, rather than medical treatment, is the appropriate method to treat ailments. *See* Christian Science, 1 Encyclopedia of Politics and Religion 141 (Robert Wuthnow, ed., 2nd ed.) (2006).

[91] For background and legal analysis of religious exemptions in mandatory healthcare programs generally, *see* CRS Report RL34708, *Religious Exemptions for Mandatory Health Care Programs: A Legal Analysis*, by Cynthia Brougher.

[92] U.S. Const. Amend. I. For a discussion of constitutional and statutory standards of review used in relation to the First Amendment, *see* CRS Report RS22833, *The Law of Church and State: General Principles and Current Interpretations*, by Cynthia Brougher.

[93] *See* Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963).

[94] Employment Div., Dep't of Human Resources of Oregon v. Smith, 494 U.S. 872, 879 (1990).

In 1993, Congress enacted the Religious Freedom Restoration Act (RFRA), which statutorily reinstated the heightened standard of review for government actions interfering with a person's free exercise of religion. Although the Court later struck down as unconstitutional portions of RFRA that applied to state and local governments, the heightened standard provided by RFRA still applies to federal government actions.[95] RFRA provides that a statute or regulation of general applicability may lawfully burden a person's exercise of religion only if it (1) furthers a compelling governmental interest, and (2) uses the least restrictive means to further that interest.[96] This two-part standard is sometimes referred to as strict scrutiny analysis. The Supreme Court has held that in order for the government to prohibit exemptions to generally applicable laws, the government must "demonstrate a compelling interest in uniform application of a particular program by offering evidence that granting the requested religious accommodations would seriously compromise its ability to administer the program."[97]

Legal Analysis of Religious Exemptions for the Minimum Coverage Provision

Analysis of the issues raised by religious exemptions for the minimum coverage provision must address two questions: (1) whether the U.S. Constitution requires a religious exemption to ensure the free exercise rights of individuals who may have religious objections to health insurance; and (2) if a religious exemption is not constitutionally required, but included nonetheless, whether it would be constitutional under the First Amendment.

Is a Religious Exemption Constitutionally or Statutorily Required?

As a neutral law of general applicability that potentially burdens religious exercise, the minimum coverage provision would be subject to analysis under RFRA. Generally, it does not appear that a religious exemption is required for legislation mandating health coverage. The Supreme Court and other lower courts generally have allowed federal mandates that relate to public health, but nonetheless interfere with religious beliefs, to continue without exemptions.[98] Under the strict scrutiny analysis, an exemption would be required only if the government does not have a compelling state interest that is achieved by the least restrictive means possible.

One important goal for enacting the minimum coverage provision appears to be aimed at protecting public health. The government's interest in protecting public health has been held to outweigh individuals' religious interests. According to the Supreme Court, "the right to practice religion freely does not include liberty to expose the community or the child to communicable

[95] *See* City of Boerne, Texas v. Flores, 521 U.S. 407 (1997). Although RFRA currently applies as a general limitation on federal actions, Congress may amend its scope or may exempt future statutes from complying with RFRA. Under the long-standing legal principle of entrenchment, a legislative enactment cannot bind a future Congress. That is, Congress cannot entrench a legislative action by providing that it may not be repealed or altered. *See* Fletcher v. Peck, 10 U.S. 87, 135 (1810) (Chief Justice Marshall). Thus, when considering proposed legislation that may conflict with requirements imposed by RFRA, Congress may avoid the conflict by exempting the legislation from RFRA.

[96] 42 U.S.C. §2000bb-1(b). In some instances, RFRA may be preempted by another federal law. *See* S.Rept. 103-111, at 12-13 (1993).

[97] Gonzales v. O Centro Espirita Beneficente Unaio Do Vegetal, 546 U.S. 418, 435-437 (2006).

[98] *See, e.g.,* Prince v. Massachusetts, 321 U.S. 158 (1944); Cude v. State, 237 Ark. 927 (1964).

disease or the latter to ill health or death."[99] The Court delivered this decision before the Court applied a heightened standard of review to religious exercise cases, so it was not required to address whether the government's interest was compelling. Nonetheless, the relative balance struck by the Court between the interests is significant, particularly if a healthcare proposal includes a requirement for children, but not adults. Health care legislation that requires coverage for children may face fewer obstacles in strict scrutiny analysis than legislation requiring coverage for all individuals in part because of the Court's specific recognition that parents' religious liberty does not trump the welfare of children and in part because of the general recognition that children's interests are given heightened protection. In a decision that did apply heightened constitutional review, the Court held that the government's interest in tax programs used to fund health insurance programs for low-income and aging portions of American society outweighs individuals' interests in exercising their religion freely.[100] The Court held that the government had a compelling interest in a uniform tax system that provided revenue for such governmental programs.[101] The Court's treatment of public health as an interest paramount to individual religious practice could indicate a compelling interest under RFRA.

Although protecting public health through insurance programs appears to be a compelling governmental interest, the nature of the program that promotes public health may be significant to the analysis. The nature of the burden on religion may be significant when analyzing the constitutionality of a particular measure (e.g., the burden of a medical program that requires affirmative participation in medical procedures like vaccinations differs from that imposed by a financial program that requires payments to fund an insurance program like Medicaid). In the case of ACA, the minimum coverage provision is enforced through financial programs, meaning that the enacted legislation is more likely to avoid constitutional problems than a mandate for affirmative participation in medical programs. Depending on what is deemed to constitute public health, a court may find that requiring individuals to obtain health insurance does not rise to the same level of governmental interest as requirements that directly prevent the spread of disease. On one hand, it may be argued that health insurance coverage promotes productivity in society. Insurance coverage may encourage some individuals to seek medical treatment that they otherwise might forgo if they had to pay the full cost. By seeking treatment, these individuals may have prevented the spread of disease or may have improved their personal health to be more productive members of society. On the other hand, it may be argued that insurance coverage does not promote health because individuals are not guaranteed treatment. The minimum coverage provision does not require individuals to seek or accept treatment, and thus the effectiveness in promoting public health may be questioned.

Even if the government has a compelling interest in requiring individual health insurance, it must use the least restrictive means to achieve that interest in order for the requirement to be upheld as constitutional. That is, the government must make the burden on religious exercise as narrow as possible. This test may be met by providing alternative means of compliance with the legislation, such as the exemption provided in ACA. Allowing individuals who object to the program on religious grounds and would not receive benefits from the program to opt out of coverage would likely satisfy both the individual's free exercise of religion and the government's interest in protecting public health at large.

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[99] *Prince*, 321 U.S. at 166-67.

[100] *Lee*, 455 U.S. at 260-61.

[101] *Id.*

Is a Religious Exemption Constitutionally Permissible?

Even though an exemption may not be required by the Constitution, ACA's exemption for those with religious objections provides an alternative for certain people based on their religious beliefs that is not available to other people who do not share the same religious beliefs. Thus, some individuals may claim that the religious exemption would violate the Establishment Clause by providing a benefit to groups based on religion.

The Establishment Clause prohibits preferential treatment of one religion over another or preferential treatment of religion generally over nonreligion.[102] Providing an exemption based on religion may be construed as favoring a particular religion or religion generally because only individuals with a religious affiliation would be eligible for the exemption. However, the mere fact that a law addresses religion does not automatically make that law unconstitutional. Traditionally, to be constitutional under Establishment Clause analysis, a government action must meet a three-part test known as the *Lemon* test. To meet the *Lemon* test, a law must (1) have a secular purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) not lead to excessive entanglement with religion.[103] The Supreme Court has upheld religious exemptions for government programs where the exemptions were enacted to prevent government interference with religious exercise.[104]

Exemptions that are specifically available only to certain religions have been construed in some cases as a violation of the Establishment Clause.[105] The religious conscience exemption in ACA does not state specific religious groups that would qualify for exemption. Rather, ACA exempts any individual who has been certified to be "a member of a recognized religious sect or division thereof described in section 1402(g)(1) [of the Internal Revenue Code of 1986] and an adherent of established tenets or teaching of such sect or division as described in such section."[106] Section 1402(g)(1) provides an exemption from self-employment income tax if the individual seeking exemption:

> is a member of a recognized religious sect or division thereof and is an adherent of established tenets or teachings of such sect or division by reason of which he is conscientiously opposed to acceptance of the benefits of any private or public insurance which makes payments in the event of death, disability, old-age, or retirement or makes payments toward the cost of, or provides services for, medical care....[107]

Thus, the exemption is general, such that any member of any religious organization with the beliefs described in the provision would qualify. This construction of the exemption appears to

[102] Epperson v. Arkansas, 393 U.S. 97, 103-04 (1968).

[103] Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971). While the first two prongs of the test are self-explanatory, the third prong prohibits "an intimate and continuing relationship" between government and religion as the result of the law. Id. at 621-22. The continuing viability of *Lemon* has been unclear as the Court has raised questions regarding its adequacy in analyzing these issues. *See, e.g.,* County of Allegheny v. American Civil Liberties Union, 492 U.S. 573 (1989).

[104] In *Locke v. Davey*, the Court recognized that some government actions that allow free exercise consequently raise questions of establishment, noting that there was room for "play in the joints" in this intersection of the religion clauses. 540 U.S. 712 (2004).

[105] *See, e.g.,* Sherr v. Northport-East Northport Union Free School District, 672 F. Supp. 81, 89-90 (E.D.N.Y. 1987).

[106] 26 U.S.C. 5000A(d)(2)(A).

[107] 26 U.S.C. §1402(g)(1).

conform with the constitutional requirements of the First Amendment. The Supreme Court has held that legislation that provides protection or exemption for a specific religious group violates the Establishment Clause.[108] The Court has held on numerous occasions that the government cannot provide special treatment to one religion over another, or religion generally over non-religion.[109] However, challenges have been made even to generally available religious exemptions under the Establishment Clause because such exemptions would provide preferential treatment to individuals with religious beliefs, but not to individuals who might object on nonreligious philosophical grounds to claim the exemption.[110]

Although First Amendment issues are not at issue in the cases being reviewed by the Supreme Court, some legal challenges have included religious freedom claims, with at least one court addressing the merits of those claims.[111] In that case, taxpayers claimed that the requirement violated RFRA by imposing a substantial burden on their religious exercise because obtaining health insurance would indicate a lack of trust as Christians that God would provide for their needs.[112] The U.S. District Court for the District of Columbia noted that, according to the Supreme Court, a substantial burden would indicate that the government has substantially pressured an individual to modify his or her behavior in violation of his or her religious beliefs.[113] The court held that the burden imposed by the coverage requirement did not rise to the level of a substantial burden because there was insufficient evidence that the individuals would be pressured to modify their behavior and violate their beliefs. The court reasoned that the individuals could opt out of the coverage requirement by paying a shared responsibility requirement instead.[114] Further, the court found the individuals "routinely contribute to other forms of insurance, such as Medicare, Social Security, and unemployment taxes, which present the same conflict with their belief that God will provide for their medical and financial needs."[115] The court concluded that even if it had found a substantial burden on religious exercise, the coverage requirement nonetheless complied with RFRA. According to the court, the requirement served a compelling governmental interest in lowering health insurance premiums and improving access to health care through the least restrictive means, which provided individuals with a choice

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[108] U.S. CONST. amend I. *See* Board of Education of Kiryas Joel v. Grumet, 512 U.S. 687 (1994) (invalidating the creation of a school district for one particular religious group). The Court has looked at whether the religious group alleged to be favored by the act in violation of the Establishment Clause is one of many religious groups eligible for similar treatment or if the special treatment is made through a series of benefits offered separately to multiple groups. *Id.* at 703-704.

[109] *See* Wallace v. Jaffree, 472 U.S. 38, 52-54 (1985); Epperson v. Arkansas, 393 U.S. 97, 104 (1968); School Dist. of Abington Township v. Schempp, 374 U.S. 203, 216-217 (1963).

[110] *See* McCarthy v. Boozman, 212 F.Supp. 2d 945 (W.D. Ark. 2002).

[111] *See* Mead v. Holder, 766 F. Supp. 2d 16 (D.D.C. 2011), *aff'd sub nom. Seven-Sky*, 661 F.3d 1. *See also* Liberty University v. Geithner, 753 F. Supp. 2d 611 (W.D. Va. 2010), *vacated*, 2011 U.S. App. LEXIS 18618 (4th Cir. 2011).

[112] *Mead*, 766 F. Supp. 2d 16, *aff'd sub nom. Seven-Sky*, 661 F.3d 1.

[113] *Id.* at 42 (citing Thomas v. Review Bd., 450 U.S. 707, 718 (1981)).

[114] *Id*.

[115] *Id*. As a general rule, without comparing the individual's beliefs to those of other members of the same religious sect or considering the objective veracity of the beliefs, courts examine the individual's beliefs to determine whether the belief is sincerely held or is being used as a false claim to avoid compliance with governmental regulation. If the individual does not consistently apply the belief in relevant life experiences (e.g., objecting to insurance coverage under ACA, but not under Medicare), a court may be less likely to recognize that a sincerely held belief is burdened. *See, e.g.*, Quaring v. Peterson, 728 F.2d 1121, 1123-25 (8th Cir. 1984) (finding a sincerely held objection to photo identification requirements after noting that the individual kept no photographs, television, paintings, or floral-designed furnishings in her home and even removed pictures from food containers).

between the minimum coverage provision or the shared responsibility requirement.[116] On appeal, the U.S. Court of Appeals for the D.C. Circuit affirmed the district court's opinion, agreeing "that appellants failed to allege facts showing that the mandate will substantially burden their religious exercise."[117]

Legal Challenges to the Minimum Coverage Provision

In addition to the litigation mentioned in the previous section, several lawsuits have been filed challenging the constitutionality of the minimum coverage provision. While these lawsuits are not identical in their complaints, they typically assert that the federal government does not have the authority to impose on individuals a requirement to purchase health insurance, and therefore seek declarative and injunctive relief. The Administration has filed motions to dismiss in these cases, arguing that the lawsuits are barred for procedural reasons because, among other things, the plaintiffs lack standing to challenge the minimum coverage provision, and that the issues asserted are not ripe for adjudication because the requirement does not take effect until 2014, and thus no injury to individuals could occur before then. The Administration has also contended that the requirement is well within Congress's power under the Commerce Clause, General Welfare Clause, and the Necessary and Proper Clause. Plaintiffs' success in challenging the minimum coverage provision has been mixed.[118] So far, nine federal courts, including three appellate courts and six district courts, have rendered a decision on the constitutionality of the requirement. The three appellate courts evaluating the issue have reached contrasting conclusions.[119] While three district courts have upheld the minimum coverage provision,[120] three have struck it down.[121] Other courts have dismissed plaintiffs' claims for procedural reasons, such as lack of standing to bring the action.[122] Six petitions for Supreme Court review were filed in response to appellate decisions in the Eleventh, Sixth, and Fourth Circuits.[123] On November 14, 2011, the Court agreed

[116] *Id*. at 43.

[117] *Seven-Sky*, 661 F.3d at 5 fn. 4.

[118] Certain websites have been tracking the status of legal challenges to ACA. *See, e.g*., U.S. Department of Justice, Defending the Affordable Care Act, available at http://www.justice.gov/healthcare/. *See also* Bara Vaida and Karl Eisenhower, Kaiser Health News, Scoreboard: Tracking Health Law Court Challenges, available at http://www.kaiserhealthnews.org/Stories/2011/March/02/health-reform-law-court-case-status.aspx.

[119] Florida v. Department of Health and Human Services, 2011 U.S. App. LEXIS 16806 (11th Cir. 2011); Thomas More Law Ctr. v. Obama, 2011 U.S. App. LEXIS 13265 (6th Cir. 2011); Seven-Sky v. Holder, 2011 U.S. App. LEXIS 22566 (D.C. Cir. 2011).

[120] Thomas More Law Ctr. v. Obama, 2010 U.S. Dist. LEXIS 107416 (October 7, 2010); Liberty Univ., Inc. v. Geithner, 2010 U.S. Dist. LEXIS 125922 (November 30, 2010); Mead v. Holder, 2011 U.S. Dist. LEXIS 18592 (Dist. D.C. 2011).

[121] Goudy-Bachman v. HHS, 2011 U.S. Dist. LEXIS 102897 (September 13, 2011); Florida v. Department of Health and Human Services, Case No.: 3:10-cv-91-RV/EMT (N.D. Fla., January 31, 2011); Virginia ex rel. Cuccinelli v. Sebelius, No. 3:10cv188-HEH (E.D. Va., filed December 13, 2010).

[122] *See, e.g.,* Virginia ex rel. Cuccinelli v. Sebelius, 2011 U.S. App. LEXIS 18632 (4th Cir. 2011); Liberty Univ., Inc. v. Geithner, 2011 U.S. App. LEXIS 18618 (4th Cir. 2011); New Jersey Physicians, Inc. v. Obama, No. 10-4600 (3rd Cir. 2011); Baldwin v. Sebelius, No. 10-56374 (9th Cir. 2011).

[123] Petitions for Supreme Court review of the minimum coverage provision and related briefs can be accessed on the Supreme Court's website: http://www.supremecourt.gov/docket/PPAACA.aspx.

to hear the appeals in the *Florida* case.[124] Oral arguments in this case took place during the last week of March.

Eleventh Circuit: Florida v. HHS

One of the most publicized of these lawsuits was filed on the same day that ACA was signed. Attorneys general in 13 states brought an action in the District Court of the Northern District of Florida against the Secretaries of Health and Human Services, Treasury, and Labor, seeking declaratory and injunctive relief from its various requirements, including the minimum coverage provision.[125] Certain individuals, the National Federation of Independent Business, and several other states later joined this lawsuit, and there are currently 26 state plaintiffs. The district court in *Florida v. HHS* held that the minimum coverage provision exceeds the powers of Congress under the Commerce Clause and the Necessary and Proper Clause, and struck down the law in its entirety.[126] On August 12, 2011, in a 2-1 ruling, the Court of Appeals for the Eleventh Circuit affirmed the district court's decision that the minimum coverage provision exceeds Congress's enumerated powers.[127] However, unlike the lower court, the appellate court allowed the remaining provisions of ACA to stand.

In assessing the constitutionality of the requirement to have health insurance under the Commerce Clause, the appeals court took a somewhat different approach in its reasoning than the district court. One of the district court's primary reasons for invalidating the minimum coverage provision was that it was a regulation of inactivity, which the court found was not permitted under the Clause.[128] However, the court of appeals concluded that the question to explore in this case is not whether the requirement was or was not "activity" that can be regulated under the Commerce Clause, but whether "the federal government can issue a mandate that Americans purchase and maintain health insurance from a private company for the entirety of their lives."[129] In order to answer this question, the court discussed certain characteristics of the minimum coverage provision that it found to be relevant. Among other things, it addressed the "unprecedented nature of the individual mandate."[130] The court indicated, for example, that Congress traditionally has used its Commerce Clause authority to promote commercial activity, rather than require it.[131] The court also noted that the requirement to have health insurance is quite different from other types of personal mandates (e.g., registering for the draft, filing a tax return) in that it does not have a

[124] The Court granted three petitions arising from this single case for review: National Federation of Independent Business v. Sebelius, No. 11-393 (September 27, 2011); Florida v Department of Human Services, No. 11-400 (September 27, 2011); and Department of Health and Human Services v. Florida, No. 11-398 (September 28, 2011).

[125] Florida v. Department of Health and Human Services, Case No.: 3:10-cv-91-RV/EMT (N.D. Fla., amended complaint filed May 14, 2010), available at http://healthreformgps.org/wp-content/uploads/Fla-v.-Sebelius.pdf.

[126] Florida v. Department of Health and Human Services, Case No.: 3:10-cv-91-RV/EMT (N.D. Fla., January 31, 2011).

[127] Florida v. Department of Health and Human Services, 2011 U.S. App. LEXIS 16806 (11th Cir. 2011).

[128] Florida v. Department of Health and Human Services, Case No.: 3:10-cv-91-RV/EMT at 42 (The court opined that based on existing Commerce Clause precedent, it would be "a radical departure from existing case law to hold that Congress can regulate inactivity under the Commerce Clause.")

[129] Florida v. Department of Health and Human Services, 2011 U.S. App. LEXIS 16806 at 161.

[130] *Id*. at 161-171.

[131] The appeals court provided the example of the Flood Insurance Act of 1968 (42 U.S.C. §4001 et seq.) as an illustration of this idea. Under as the court indicated, the act did not require the purchase of flood insurance, but rather created incentives to encourage the purchase of it. *Id*. at 165-66.

clear constitutional foundation, and does not require a citizen to interact with the government, but instead a private company.[132]

Additionally, the court found that the individual mandate "lacks cognizable limits."[133] If an individual's decision not to purchase health insurance could be regulated under the Commerce Clause, the court opined that this reasoning could apply to the purchase of any product, rendering the Clause unlimited in scope. The federal government had asserted that limits exist in applying the Commerce Clause to an economic mandate on individuals, and that a minimum coverage provision is within the acceptable limits because the health insurance and health care markets are unique (e.g., virtually everyone needs health care services at some point, and individuals receive services even if they cannot pay).[134] In rejecting this argument, the court indicated that using uniqueness as a limiting factor is not constitutionally relevant, and not judicially enforceable. As the court stated, accepting this principle "would lead to expansive involvement by the courts in congressional legislation, requiring us to sit in judgment over when the situation is serious enough to justify an economic mandate."[135]

The court explained that the requirement is also impermissibly over inclusive, as the requirement is not linked to health care consumption. The court pointed out that the requirement impermissibly regulates individuals beyond those who have not paid for their health care (e.g., those who have not entered the health care market), as well as those who will not consume health care until years later. In addition, the court determined that the minimum coverage provision "imperils our federalist structure." The court discussed the role of the states with respect to health insurance and health care regulation, and noted that to allow Congress to enact this requirement in an area of traditional state concern "is a factor that strengthens the inference of a constitutional violation."[136]

The Eleventh Circuit also unanimously held that the individual mandate in ACA cannot be supported by Congress's authority to levy taxes under the General Welfare Clause.[137] In contrast with the court's discussion of the Commerce Clause challenge, which largely examined the scope of Congress's authority over interstate commerce in the abstract, the court's analysis of the taxing power argument focused only on whether the text and history of ACA sufficiently evidence Congress's intent to invoke its power to tax in this particular case.

In order to reach the conclusion that Congress did not intend to enact a tax in the minimum coverage provision, the Eleventh Circuit placed heavy emphasis upon ACA's form and, in particular, the words Congress itself used to describe the minimum coverage provision. Throughout Section 5000A of the IRC, the amount due under the minimum coverage provision is referred to as a "penalty" rather than as a "tax."[138] The court also relied on the text of the legislative findings accompanying Section 5000A, which cites Congress's authority over

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[132] *Id*. at 169.

[133] *Id*. at 240.

[134] *Id*. at 185.

[135] *Id*. at 236.

[136] *Id*. at 221.

[137] Florida v. Department of Health and Human Services, 2011 U.S. App. LEXIS 16806, slip op. 172-189 (11th Cir. August 12, 2011) (tax holding joined by all judges).

[138] 26 U.S.C. §5000A.

interstate commerce as a source of constitutional authority, and which describes the goal of the provision as achieving near universal health insurance coverage, rather than raising revenue.[139]

The organizational structure of ACA was also found to be relevant; the court noted that ACA contained a number of other revenue raising provisions that were set off in a separate revenue title of the act. These revenue provisions were also explicitly described as taxes. In the court's view this was further evidence that Congress did not intend to use its taxing power to enact the minimum coverage provision, reasoning that "Congress knows full well how to enact a tax when it chooses to do so."[140]

In addition to examining ACA's form and structure, the Eleventh Circuit also used the substantive mechanics of the minimum coverage provision as evidence of Congress's intent. ACA does not give the minimum coverage provision means of enforcement that are as strong as the panoply of enforcement provisions available to enforce the other provisions of the IRC. The court viewed this difference as bolstering the argument that the uniqueness of the minimum coverage provision indicated that Congress did not intend to exercise its taxing power.[141]

Because the holding only went so far as to ascertain what Congress intended to do in ACA, it does not appear that the opinion says anything about the reach of a properly invoked exercise of Congress's power to tax. Consequently, a close reading of the opinion would not likely pose an obstacle to a future effort by Congress to affect individuals' behavior by imposing tax-based incentives or disincentives in order to encourage the purchase of private goods, so long as Congress explicitly invoked its power to tax.[142] Instead questions about the scope of the taxing power remain largely unresolved, with only the limited guidance provided by pre-existing jurisprudence described *supra*.

In evaluating whether the rest of ACA remained valid, the district court found the record to indicate that Congress would not have passed ACA without the minimum coverage provision, and that it was "indisputably essential" to the health reform effort.[143] Evidence of this, the lower court explained, was a lack of a severability clause providing that the rest of the statute should remain intact if any particular provision is found to be unconstitutional. As the lower court noted, earlier versions of health reform legislation contained such a clause, but it was not included in the final

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[139] P.L. 111-148, §1501(a)(2)(D) and (a)(3).

[140] Florida v. HHS, slip op. 177-178. *See also* Thomas More Law Ctr. v. Obama, 2011 U.S. App. LEXIS 13265 at 55 ("Congress showed throughout the Act that it understood the difference between these terms and concepts, using 'tax' in some places and 'penalty' in others.")

[141] Although one might argue that a weaker enforcement regime has the effect of making the minimum essential coverage provision less penal, neither court reached the question of whether the minimum coverage provision is functionally a penalty because they both ended their inquiry under the taxing power with the initial conclusion that Congress intended it to be a penalty.

[142] *See* Thomas More Law Ctr. v. Obama, 2011 U.S. App. LEXIS 13265 at 53 (6th Cir. 2011) (If Congress clearly intended to enact a tax, it would simplify court's role "as it is easy to envision a system of national health care, including one with a minimum-essential-coverage provision, permissibly premised on the taxing power.").

[143] Florida v. HHS, Case No.: 3:10-cv-91-RV/EMT, slip op at 66-67. When one section of a law is held unconstitutional, courts are faced with determining whether the remainder of the statute remains valid, or whether the whole statute or act is nullified. As noted by the Supreme Court, "Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684 (1987) (quoting Buckley v. Valeo, 424 U.S. 1, 108 (1976)). For a discussion of the issue of severability, see CRS Report 97-589, *Statutory Interpretation: General Principles and Recent Trends*, by Larry M. Eig.

version of ACA.[144] The appeals court disagreed with this reasoning and reversed this part of the district court's decision, noting that the district court put too much emphasis on ACA's lack of a severability clause. The appeals court relied on Supreme Court precedent favoring a strong presumption of severing unconstitutional provisions from the remainder of valid acts. It found that the without the requirement to have health insurance, the rest of the ACA's provisions remain legally operative, and that the evidence needed to rebut this presumption had not been met.

Following this decision, the Administration petitioned the Supreme Court for review of the Eleventh Circuit's decision to invalidate the minimum coverage provision on constitutional grounds.[145] In addition, both the states and the private plaintiffs in the *Florida* case filed separate petitions with the Court for review of the appellate court's holding that the mandate is severable from the rest of ACA.[146] On November 14, 2011, the Supreme Court agreed to examine these issues.[147] While not addressed in the *Florida* case, the Court also chose to examine whether a challenge to the minimum coverage provision is barred by the federal tax Anti-Injunction Act (AIA),[148] which prohibits lawsuits seeking to restrain the assessment or collection of a tax.[149] Additionally, it agreed to evaluate whether the requirement may be severed from the rest of ACA. Aside from the requirement to have health insurance, the Court also granted the states' petition for review of a question related to ACA's expansion of the Medicaid program.[150]

Sixth Circuit: Thomas More Law Center v. Obama

In a 2-1 ruling, the Sixth Circuit Court of Appeals in *Thomas More Law Center v. Obama*[151] upheld the constitutionality of the minimum coverage provision. The judges in the majority evaluated the requirement under the Commerce Clause and reached a conclusion based on somewhat different reasoning. Judge Martin, writing the opinion of the court, relied heavily on the *Raich, Lopez,* and *Morrison* decisions and found that the minimum coverage provision regulates economic activity. He also found that because of certain factors, such as the cost of providing care to uninsured individuals, Congress had a rational basis to conclude that allowing individuals to "self-insure" substantially affects interstate commerce.[152] Additionally, the judge determined that the provision is essential to a larger economic scheme of reforming the health insurance and health care market.[153] While the court ultimately upheld the constitutionality of the minimum coverage provision, the court did agree with the Eleventh Circuit that that the

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[144] *Id*. at 67.

[145] Petition for Writ of Certiorari, HHS v. Florida, No. 11-398 (September 28, 2011).

[146] Unlike the petition of the private plaintiffs in the *Florida* case, the states are seeking review of other provisions of ACA, including the Medicaid expansion requirements. Petition for Writ of Certiorari, Florida v. HHS, No. 11-400 (September 27, 2011).

[147] Florida v. HHS, 648 F.3d 1235 (11th Cir. 2011), *cert. granted*, (U.S. November 14, 2011)(Nos. 11-393, 11-398, 11-400).

[148] 26 U.S.C. §7421.

[149] *See generally* discussion of *Liberty v. Geithner*, 2011 U.S. App. LEXIS 18618 (4th Cir. 2011), *infra*.

[150] For more information on this Medicaid issue, *see* CRS Report R42367, *Federalism Challenge to Medicaid Expansion Under the Affordable Care Act: Florida v. Department of Health and Human Services*, by Kenneth R. Thomas, and CRS Report R40846, *Health Care: Constitutional Rights and Legislative Powers*, by Kathleen S. Swendiman.

[151] Thomas More Law Ctr. v. Obama, 2011 U.S. App. LEXIS 13265 (6th Cir. 2011).

[152] *Id*. at 35-37.

[153] *Id*. at 38-39.

Commerce Clause does not support a distinction between activity and inactivity, and neither does existing Supreme Court jurisprudence. However, unlike the Eleventh Circuit, Judge Martin still noted that the minimum coverage provision regulates individuals who are active in the health care market because of the market's unique characteristics (e.g., the inevitability of an individual's need for health care services).[154]

In a concurring opinion, Judge Sutton indicated that the answer to whether the individual mandate is a valid exercise of Congress's Commerce Clause power turns on two questions: first, whether it passes the "substantial effects test," and second, whether there is something about the novelty of the requirement that warrants striking it down.[155] With regard to the first question, and similar to Judge Martin, Judge Sutton found that Congress could reasonably conclude that self-insuring substantially affects interstate commerce, and that the requirement to have health insurance is economic in nature. With respect to the second question, Judge Sutton found nothing with respect to the minimum coverage provision that, under current Commerce Clause doctrine, established a constitutional defect.[156] Also, unlike other courts that have evaluated the constitutionality of the requirement to have health insurance, Judge Sutton focused on the fact that the challenge mounted against the minimum coverage provision was deemed a "facial," versus an "as-applied" challenge. Unlike as-applied challenges, which consider the validity of a statute as applied to a particular plaintiff, a plaintiff bringing a facial challenge must demonstrate that a particular requirement is unconstitutional in all of its applications. Judge Sutton explained that because there were certain settings in which Congress could apply the minimum coverage provision (e.g., for individuals who voluntarily purchased health coverage, but do not want to be forced to maintain it), this was sufficient to uphold a facial challenge to the minimum coverage provision's constitutionality.[157]

Two judges in the Sixth Circuit also found that the minimum coverage provision could not be supported under Congress's power to tax, for largely the same reasons as the Eleventh Circuit, discussed *supra*.[158] Specifically, the court held that the form and structure of ACA indicate that Congress intended this provision to be a penalty, even though the Sixth Circuit acknowledged that Congress likely has the power to use the tax code to create a financial disincentive to remain uninsured.[159] Following the decision, the law center petitioned the Supreme Court for review of the case, and the petition is currently pending.[160] One may assume that the Court may address this petition once it issues its decision in the *Florida* case.

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[154] *Id*. at 47.

[155] Thomas More Law Ctr. v. Obama, 2011 U.S. App. LEXIS 13265 at 71 (Sutton, J. concurring).

[156] *Id*. at 93.

[157] *Id*. at 99.

[158] Thomas More Law Ctr. v. Obama, 2011 U.S. App. LEXIS 13265 (6th Cir. 2011) (concurring opinion by Sutton, J., joined by Graham, D. J.; opinion by Martin, J., avoided any holding on the taxing power).

[159] Thomas More Law Ctr. v. Obama, 2011 U.S. App. LEXIS 13265 at 53 (If Congress clearly intended to enact a tax, it would simplify the court's role "as it is easy to envision a system of national health care, including one with a minimum-essential-coverage provision, permissibly premised on the taxing power.").

[160] Petition for Writ of Certiorari, Thomas More Law Ctr. v. Obama, No. 10-2388 (July 26, 2011).

Fourth Circuit: Virginia ex rel. Cuccinelli v. Sebelius and Liberty v. Geithner

Unlike the Eleventh and Sixth Circuits, the Fourth Circuit in *Virginia ex rel. Cuccinelli v. Sebelius*[161] and *Liberty v. Geithner*[162] determined that it did not have jurisdiction to decide whether Congress is authorized under the Constitution to require the purchase of health insurance. Instead, the court in the *Virginia* case found that the Commonwealth did not have standing to bring an action. In *Liberty University*, the appeals court held that the university's claim was barred by the federal tax Anti-Injunction Act (AIA), which prohibits lawsuits seeking to restrain the assessment or collection of a tax. Petitions for Supreme Court review of both cases are currently pending and may be held by the Court until after it issues a decision in the *Florida* case.[163]

In *Virginia,* the commonwealth challenged the minimum coverage provision on the basis that Congress lacks authority to require individuals to purchase insurance.[164] The case was brought in conjunction with the Virginia Health Care Freedom Act (VHCFA), a law stating that Virginia residents cannot be required to obtain or maintain a policy of health insurance coverage, except as required by a court or a state agency.[165] Virginia also alleged that Congress did not have the authority to enact the minimum coverage provision under, among other things, its power to regulate interstate commerce and its taxing power.

The district court found that the Commonwealth could bring the action and ruled that the minimum coverage provision is unconstitutional because it exceeds the boundaries of Congress's authority under the Commerce Clause.[166] The court also held that the General Welfare Clause does not provide authority for Congress to enact the minimum coverage provision, as it most closely resembles a penalty as opposed to a tax. Although it found the minimum coverage provision unconstitutional, the court did not strike down the entire act. Instead, it severed the minimum coverage provision and "directly-dependent provisions which make reference" to the section from the rest of ACA.[167]

On appeal, the Fourth Circuit found that it could not evaluate the merits of the case because the Commonwealth did not have standing to challenge the minimum coverage provision. The court noted, among other things, that the requirement imposes no obligation on the Commonwealth, and therefore it suffered no injury to warrant bringing the claim.[168] The court also rejected

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[161] 2011 U.S. App. LEXIS 18632 (4th Cir. 2011).

[162] 2011 U.S. App. LEXIS 18618 (4th Cir. 2011).

[163] Petition for Writ of Certiorari, Virginia ex rel. Cuccinelli v. Sebelius, No. 11-420 (September 30, 2011); Petition for Writ of Certiorari, Liberty Univ. v. Geithner, No. 11-438 (October 7, 2011).

[164] Virginia ex rel. Cuccinelli v. Sebelius, No. 3:10cv188-HEH (E.D. Va., filed December 13, 2010).

[165] *See* Va. Code Ann. §38.2-3430.1:1 (2010), available at http://leg1.state.va.us/cgi-bin/legp504.exe?101+ful+HB10ER2+pdf.

[166] The court mentioned in a footnote that it did not need to address the argument advanced by the Commonwealth that the minimum coverage provision conflicts with the application of the Virginia Health Care Freedom Act. *See* Virginia ex rel. Cuccinelli v. Sebelius, No. 3:10cv188-HEH, slip op. at 9, fn. 4.

[167] *Id*. at 40. While the federal government appealed the case to the Fourth Circuit, Virginia petitioned the Supreme Court for immediate review, arguing that fast tracking the case was warranted, "[g]iven the importance of the issues at stake to the States and to the economy as a whole…." Brief for Petitioner, Virginia ex rel. Cuccinelli v. Sebelius, 2010 U.S. Briefs 1014 at 3. On April 25, 2011, the Supreme Court rejected Virginia's request to expedite the case. No. 10-1014, 2011 U.S. LEXIS 3247 (April 25, 2011).

[168] *See Virginia*, 2011 U.S. App. LEXIS 18632 at 17.

Virginia's argument that the federal requirement to purchase health insurance impermissibly conflicts with the VHCFA, explaining that because the only apparent function of the Commonwealth's act is to immunize its citizens from compliance with federal law, there is no "concrete interest in the 'continued enforceability'" of the act.[169] As the court further explained, that "the mere existence of a state law like the VHCFA does not license a state to mount a judicial challenge to any federal statute with which the state law assertedly conflicts," and that "only when a federal law interferes with a state's exercise of its sovereign 'power to create and enforce a legal code'" does the law cause the state to have the requisite injury needed for standing.[170]

Conversely, in *Liberty University v. Geithner,* the District Court for the Western District of Virginia rejected the plaintiffs' challenge to the minimum coverage provision on the basis that the requirement was constitutional.[171] In evaluating the requirement under the Commerce Clause, the court relied on the *Wickard* and *Raich* cases, among others, and found that an individual's decision about whether or not to purchase health insurance is economic in nature. The district court also found that Congress had a rational basis to conclude that regulating this decision, in the aggregate, substantially affects the health care market.

On September 8, 2011, the Fourth Circuit Court of Appeals held that the AIA prevented the court from considering the constitutionality of the minimum coverage provision. In contrast with other federal courts that have ruled on this issue, the Fourth Circuit reasoned that because the amount imposed for failure to comply with the requirement to purchase health insurance constitutes an exaction imposed by the Internal Revenue Code, and because the plaintiffs brought a pre-enforcement challenge to the requirement, the AIA barred the action.[172] While the university argued that the AIA did not apply to the case at hand because the consequence for failure to purchase health insurance is a "penalty," rather than a "tax," the appellate court relied on Supreme Court precedent and concluded that the AIA "reaches any exaction assessed by the Secretary pursuant to his authority under the Internal Revenue Code—even one that constitutes a 'penalty' for constitutional purposes."[173] The court explained the broad nature of the AIA, and opined that the act bars challenges to exactions that are authorized to be assessed under the Tax Code, even though they may not be considered taxes under the General Welfare Clause.[174] The appeals court vacated the district court's decision, and remanded the case to the district court for dismissal.[175]

Additional Issues Before the Supreme Court

As mentioned above, in November 2011, the Supreme Court agreed to hear arguments in *HHS v. Florida*. Regardless of the outcome of the case, many view this challenge to ACA as historic—not just because of the implications it may have for the regulation of health care, but also for how

[169] *Id*. at 23.

[170] *Id*. at 19-20.

[171] Liberty Univ., Inc. v. Geithner, 2010 U.S. Dist. LEXIS 125922 (November 30, 2010).

[172] Liberty Univ., Inc. v. Geithner, 2011 U.S. App. LEXIS 18618 at 17-21.

[173] *Id*. at 28 (discussing Bailey v. George, 259 U.S. 16 (1922); Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922)).

[174] *Id.* at 19.

[175] One judge disagreed with the AIA holding, but would have upheld the minimum coverage provision as a valid exercise of the Commerce Clause. *Id*. at 77-168 (Davis, J. dissenting).

it could generally affect the scope of Congress's legislative powers. Oral arguments took place in this case during the last week of March 2012, and many expect the Court to reach a decision in June.

Aside from evaluating the constitutional issues surrounding the requirement to have health insurance, the Court agreed to separately examine whether the Court is barred from evaluating the individual mandate at this time because of the Anti-Injunction Act, which prohibits lawsuits seeking to restrain the assessment or collection of a tax. The Court also agreed to review the question of whether the individual mandate may be severed from the rest of ACA, assuming the individual mandate is found to be unconstitutional.[176]

Anti-Injunction Act

A federal law known as the Anti-Injunction Act (AIA) generally provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed."[177] In response to lawsuits filed challenging the constitutionality of the minimum coverage provision, the government initially argued that the suits were barred by the AIA, but withdrew that argument as the litigation progressed.[178] However, the question of whether the AIA bars this litigation has been raised by three United States courts of appeals, on their own initiative, notwithstanding the fact that all the litigants before these courts agree that the AIA should not preclude a decision about the merits of the minimum coverage provision. Two of the three courts of appeals have held that the AIA does not apply to suits challenging the individual mandate,[179] while one has held the opposite.[180] In light of this circuit-split, the Supreme Court included this question in its *writ of certiorari* granted in response to petitions seeking review of the constitutional questions surrounding the individual mandate and other provisions of ACA. Oral arguments on this question were heard before the Supreme Court on March 26, 2012.

Because the federal government is no longer raising the AIA as a defense to the challenges to the minimum coverage provision, the first question that must be answered in the context of the AIA is whether the applicability of the AIA must be addressed by the Court at all. Generally, litigants are permitted to waive potential defenses in federal court.[181] However, this is not the case where the

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[176] As mentioned above, the Court is also examining ACA's expansion of the Medicaid program and whether it "coerces" states into compliance with the program, in violation of federalism principles. For a discussion of this issue, *see* CRS Report R42367, *Federalism Challenge to Medicaid Expansion Under the Affordable Care Act: Florida v. Department of Health and Human Services*, by Kenneth R. Thomas and CRS Report R40846, *Health Care: Constitutional Rights and Legislative Powers*, by Kathleen S. Swendiman.

[177] I.R.C. §7421(a).

[178] Thomas More Law Center v. Obama, 631 F.3d 529, 539 (6th Cir. 2011) ("The United States and the plaintiffs now agree that the Anti–Injunction Act does not bar this action."); Florida v. HHS, 648 F.3d 1235 (11th Cir. 2011) (district court's ruling that AIA is inapplicable not appealed); Liberty v. Geithner, 2011 WL 3962915 at 4 (4th Cir. September 8, 2011) ("[B]oth the Secretary and plaintiffs contend that the AIA does not bar this action."); Seven-Sky v. Holder 2011 WL 5378319 at n.25 (D.C. Cir. November 8, 2011) (noting that government has abandoned argument that AIA bars this litigation).

[179] Thomas More Law Ctr. v. Obama, 651 F.3d at 539-540 (6th Cir. 2011); Seven-Sky v. Holder, 2011 WL 5378319 at 2-9 (D.C. Cir. November 8, 2011).

[180] Liberty v. Geithner, 2011 U.S. App. LEXIS 18618 (4th Cir. September 8, 2011).

[181] FED. R. CIV. P. 12(h).

defense is based on the court's lack of jurisdiction over the subject matter of a case.[182] Therefore, if the AIA is a jurisdictional statute, it cannot be waived by the federal government. The Supreme Court has made statements in prior cases indicating that the AIA is a jurisdictional bar. For example, in *Bob Jones University v. Simon*, the Court held that the AIA "deprived the [federal] District Court of jurisdiction" to hear a case in which the plaintiff sought to enjoin the IRS from issuing a ruling denying the plaintiff's tax-exempt status.[183] Similarly, in *Enochs v. Williams Packing and Navigation Company*, the Court stated that "[t]he object of [the AIA] is to withdraw jurisdiction from the state and federal courts to entertain suits seeking injunctions prohibiting the collection of federal taxes."[184] On the other hand, the federal government had not sought to waive the AIA in either of these cases, so the Court may not have been directly addressing the issue of waiver when describing the AIA as jurisdictional.

The second question presented by the AIA is whether these suits would fall within the class of suits that Congress has prohibited by enacting the AIA. The text of the AIA provides that no "suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed."[185] Based on this language, the AIA would likely be an obstacle to these suits if they are suits to restrain the assessment or collection of any tax. In order to determine whether this is the case, one must first identify which tax would be at issue in the suit. The most obvious possibility here is that the penalty imposed on the failure to obtain health insurance as required by the minimum coverage provision is a tax for purposes of the AIA. The suits challenging the minimum coverage provision seek a declaration that Congress does not have the power to require individuals to purchase health insurance. If they are successful, the penalties imposed on individuals that fail to purchase health insurance could no longer be assessed or collected. Therefore, if the penalty is a tax for purposes of the AIA, then these suits would be barred.

The AIA provides no definition of the term "tax." However, federal courts have generally interpreted the term to refer to "an exaction for the support of the government."[186] Despite this broad interpretation, the Supreme Court has held that even where an exaction has been labeled as a tax, "when by its very nature the imposition is a penalty, it must be so regarded."[187] A number of commentators and lower courts have relied on the fact that the minimum coverage provision is described as a "penalty" in the text of the ACA. Other textual arguments may be made to support inclusion of the minimum coverage provision within the meaning of taxes for purposes of the AIA. For example, the provision specifically states that it should be "assessed and collected" in the same manner as assessable penalties that are subject to the AIA.[188] Other explicit penalties in the Internal Revenue Code have been held to be subject to the AIA, but only where there were explicit statutory directives to treat such penalties as taxes or where the penalties were part of an

[182] FED. R. CIV. P. 12(h)(3).

[183] Bob Jones Univ. v. Simon, 416 U.S. 725, 749 (1974).

[184] Enochs v. Williams Packing & Navigation Co., 370 U.S. 1, 5 (1962).

[185] I.R.C. §7421(a).

[186] Liberty Univ., Inc. v. Geithner, 2011 U.S. App. LEXIS 18618 (4th Cir. 2011) (quoting United States v. Butler, 297 U.S. 1 (1936)).

[187] Lipke v. Lederer, 259 U.S. 557, 561 (1922).

[188] I.R.C. §5000A(g)(1).

overall tax scheme.[189] Neither of these characteristics appears to be present with respect to the minimum coverage provision.

Finally, it should be noted that the use of the term "tax" in the context of the AIA is not identical to how that term is used for purposes of Congress' power to levy taxes. In *Bailey v. George*, the Court applied the AIA to bar a suit challenging a tax on employers who used child labor on the same day that the Court struck down the same tax in a separate suit.[190] Therefore, it is not necessarily true that if the Court were to determine that the minimum coverage provision is a tax for purposes of the AIA that it would be bound by that decision when determining whether the minimum coverage provision could be justified solely under the Taxing Power.

Individual Mandate and Severability

When a court finds a portion of a law to be unconstitutional, it may then confront the issue of whether to strike what is unconstitutional and uphold the remainder, or whether to declare the rest a law invalid, either partially or in its entirety.[191] The Supreme Court agreed to review the question of whether the individual mandate can be severed from the remainder of ACA. This section provides an overview of severability precedent, discusses severability arguments in the *Florida* case, and addresses some of the considerations that the Supreme Court could take into account in evaluating the severability of the individual mandate.

Background

Current severability doctrine is based on the premise that courts "should refrain from invalidating more of a statute than is necessary…."[192] Courts also express reluctance to rewrite or restructure a statute in order to preserve the remaining portions of a law.[193] The Supreme Court has, on multiple occasions, recited a "well-established" standard for determining the severability of an unconstitutional provision, under which severability is presumed: "'[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.'" [194]

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[189] *See* I.R.C. §6671(a) (providing that any reference to "tax" in the IRC also applies to certain assessable penalties); and Mobile Republican Assembly v. U.S., 353 F.3d 1357 (11th Cir. 2003) (holding that penalties imposed on failure of tax exempt organizations under I.R.C. §527 organization to disclose certain donors were covered by AIA because those penalties were part of the overall tax scheme created by I.R.C. §527).

[190] *Compare* Bailey v. George, 259 U.S. 16 (1922) (holding that a pre-enforcement challenge to a tax on child labor was barred by the AIA) *with* Bailey v. Drexel Furniture, 259 U.S. 20 (1922) (striking tax on the employment of children in the context of a suit seeking a refund of taxes paid).

[191] It should be noted that severability doctrine can be applied beyond the realm of legislative enactments. *See, e.g.,* Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999)(severability of executive orders).

[192] Regan v Time, Inc. 468 U.S. 641, 652 (1984). *See also*, El Paso & Northeastern R. Co. v. Gutierrez, 215 U.S. 87, 96 (1909)("[W]henever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to so declare, and to maintain the act in so far as it is valid."); Ayotte v. Planned Parenthood of Northern New Eng., 546 U.S. 320, 328-329 (2006) ("Generally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem," severing any "problematic portions while leaving the remainder intact.").

[193] *See generally,* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138 (2010).

[194] Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684 (U.S. 1987), *quoting* Buckley v. Valeo, 424 U.S. 1, 108 (1976); *quoting* Champlin Refining Co. v. Corporation Comm'n of Oklahoma, 286 U.S. 210, 234 (1932); *accord* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3161-62 (2010); Regan v. Time, Inc., 468 U.S. 641, 653 (continued...)

Notwithstanding this standard, it is generally recognized that the "touchstone" of a court's severability analysis is congressional intent.[195]

In one of the modern and more frequently cited Supreme Court cases exploring severability, *Alaska Airlines v. Brock*, the Court evaluated whether an unconstitutional legislative veto provision allowing Congress to nullify Department of Labor regulations could be removed from employee protection provisions in the Airline Deregulation Act of 1978.[196] In examining the remaining employee protection provisions of the Act, the Court noted that because the legislative veto was, by its nature, separate from the operation of the substantive provisions of the Act, there was little guidance as to Congress's intent regarding severability of the veto. The Court therefore noted that "the more relevant inquiry" was whether the severed statute "will function in a *manner* consistent with the intent of Congress."[197]

The Court went on to find "abundant indication[s]" of congressional intent for severability in the language, structure, and legislative history of the Airline Deregulation Act.[198] The Court pointed out, for example, that with respect to the number of duties that the Act placed on air carriers with respect to employees, there was not much of substance subject to a veto.[199] There were also, according to the Court, several indications that Congress regarded the labor protections as an important part of the Airline Deregulation Act, but paid "scant attention" to the legislative veto provision.[200] The Court found no conclusive evidence that Congress would have refused to pass the Act with its employee protections, but without the legislative veto. Accordingly, it found the legislative veto provision severable.

In one of the Court's most recent cases to address severability, *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, the Court reaffirmed use of this severability standard, as well as its deference to Congress in matters of legislative restructuring.[201] In that case, the Court looked at the constitutionality of a provision in Sarbanes-Oxley Act that created a public board with members that were subject to removal by an agency for violation of specified federal laws, and not directly by the President. After finding that the board's tenure provisions violated separation of powers principles, the Court briefly addressed the severability question. The Court found the remainder of the large Act "'fully operative as a law'" with these tenure restrictions excised, and that "nothing in the statute's text or historical context made it "evident" that Congress, faced with the limitations imposed by the Constitution, would have preferred no Board at all to a Board whose members are removable at will."[202] The Court noted that theoretically, it could "blue-pencil" a number of fixes to the Sarbanes-Oxley Act, but it found such "editorial freedom" more appropriate for the Congress, rather than the Court.[203]

(...continued)

(1984); INS v. Chadha, 462 U.S. 919, 931-932 (1983); U.S. v. Jackson, 390 U.S. 570, 585 (1968).

[195] *See* Ayotte v. Planned Parenthood, 546 U.S. 320 (2006).

[196] Alaska Airlines, Inc. v. Brock, 480 U.S. 678 (1987).

[197] *Id*. at 685 (emphasis in original).

[198] *Id*. at 687.

[199] *Id.*

[200] *Id*. at 691.

[201] 130 S. Ct. 3138 (2010).

[202] *Id*. at 3161-62.

[203] *Id.* at 3162.

In assessing whether a provision is severable from the rest of a statute, the Court has also considered the purpose of the congressional act and how the provision interacts with that purpose. For example, in *New York v. U.S.*, the Court evaluated a challenge to the Low-Level Radioactive Waste Policy Amendments Act of 1985, which addressed disposal of this waste.[204] The Court struck down on constitutional grounds a provision requiring states or a regional compact to take title to and possession of low level radioactive waste under certain circumstances, but left other incentives for dealing with the waste in place. The Court explained that "[c]ommon sense suggests that where Congress has enacted a statutory scheme for an obvious purpose, and where Congress has included a series of provisions operating as incentives to achieve that purpose, the invalidation of one of the incentives should not ordinarily cause Congress' overall intent to be frustrated."[205]

Other recent cases such as *U.S. v. Booker* seem to demonstrate some willingness of the Court to amend a statutory scheme in order to preserve congressional intent.[206] After holding that the mandatory nature of the U.S. Sentencing Guidelines for criminal offenses was unconstitutional, the Court conducted a severability analysis, and, in a 5-4 decision, severed two sections of the Sentencing Reform Act of 1984, which had the effect of replacing the mandatory guidelines with those operating in a discretionary manner.[207] The Court indicated that it sought to determine "what 'Congress would have intended' in light of the Court's constitutional holding."[208] The Court acknowledged that the remedy chosen by the majority of the Court, i.e., discretionary sentencing guidelines, as well as the different remedy proposed by the minority, would "significantly alter the system that Congress designed."[209] However, it explained that because of the constitutional holding, Congress's desire to have mandatory sentencing guidelines was no longer possible. Accordingly, the Court stated its role was to decide which remedy "would deviate less radically from Congress's system…."[210] The Court also noted its responsibility to retain those portions of the Act that were "(1) constitutionally valid, (2) capable of 'functioning independently,' and (3) consistent with Congress' objectives in enacting the statute."[211] By severing the two provisions the Court concluded that the remainder of the Act met the three constitutional requirements.[212]

Additionally, the Court has noted that while the answer to a severability inquiry can sometimes be "elusive,"[213] the inquiry may be clarified by the presence of a severability clause.[214] The inclusion

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[204] New York v. U.S., 505 U.S. 144 (1992).

[205] *Id*. at 186. *See also* U.S. v. Jackson, 390 U.S. 570, 591 (1968) ("Thus the infirmity of the death penalty clause does not require the total frustration of Congress' basic purpose—that of making interstate kidnapping a federal crime."). *Cf.* Mille Lacs Band, 526 U.S. at 191-92 (in finding that President Taylor intended a 1850 executive order "to stand or fall as a whole," Court notes that the order "embodied a single, coherent policy, the predominant purpose").

[206] 543 U.S. 220 (2005).

[207] *Id*. at 245-46.

[208] *Id*. at 246 (*citing* Denver Area Ed. Telecommunications Consortium, Inc. v. FCC, 518 U.S. 727, 767 (1996)("Would Congress still have passed" the valid sections "had it known" about the constitutional invalidity of the other portions of the statute? (internal quotation marks omitted)).

[209] *Id*.

[210] *Id*. at 247.

[211] *Id*. at 258-59. (internal citations omitted).

[212] *Id*. at 259.

[213] *Chadha*, 462 U.S. 919 at 932.

[214] *See, e.g., Alaska Airlines*, 480 U.S. at 686.

of a severability clause reinforces the presumption that Congress preferred for the valid portion of a statute in question to remain standing.[215] However, the Court has expressed multiple times that the lack of a severability clause does not create a presumption against severability.[216]

The *Florida* Case

Both the state and private petitioners in the *Florida* case argue that ACA should be struck down in its entirety. However, the Administration advocates for partial severability, arguing that certain health insurance provisions, i.e., the "community rating" and "guaranteed issue" provisions, are inseverable from the individual mandate, but that the rest of the Act should remain valid. In general, the guaranteed issue requirements compel health insurers to accept everyone that applies and prevent an insurer from denying health insurance coverage based factors such as health status.[217] The community rating provisions prohibit health insurers from charging higher premiums based on health factors.[218] The Administration submits that Congress intended that these insurance provisions work together, because without the individual mandate, individuals would simply wait to purchase health insurance until they needed care, which would make the market dysfunctional.[219] In light of the fact that the Administration and the state and private petitioners in *Florida* agree to at least partial severability, the Court appointed an amicus to argue in support of the judgment of the Eleventh Circuit: that the individual mandate alone should be severed from the remainder of the ACA.

In *Florida*, the district court reached the opposite conclusion, striking down the ACA, and generally finding that while many provisions in ACA could function independently of the individual mandate, they could not function "in a manner consistent with the intent of Congress."[220] This was because, as the district court explained, the individual mandate, was "indisputably essential" to the health reform effort.[221] The lack of a severability clause, the district court found, was evidence of this idea that the rest of the statute should not remain intact. It noted that earlier versions of health reform legislation contained such a clause, but it was not included in the final version of ACA.[222] The district court distinguished the instant case from cases like *Alaska Airlines*, where the provision at issue was "uncontroversial," and where legislative history demonstrated its "relative unimportance," compared to ACA, where the individual mandate is "at

[215] *See, e.g.*, *id*. ("The [severability] inquiry is eased when Congress has explicitly provided for severance by including a severability clause in the statute. This Court has held that the inclusion of such a clause creates a presumption that Congress did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provision. In such a case, unless there is strong evidence that Congress intended otherwise, the objectionable provision can be excised from the remainder of the statute.") (citations omitted).

[216] *See, e.g., id.* ("In the absence of a severability clause, however, Congress' silence is just that—silence—and does not raise a presumption against severability."). United States v. Jackson, 390 U.S. 570, 585 n.27 (1968) (the "ultimate determination of severability will rarely turn on the presence or absence of such a clause.").

[217] *See* 42 U.S.C. §§300gg-1 300gg-2, 300gg-3, and 300gg-4(a).

[218] ACA's community rating provisions restrict premium variation to the following factors: self-only or family enrollment; rating area, as specified by the state; age (by no more than a 3 to 1 ratio across age rating bands established by the Secretary, in consultation with the NAIC); and tobacco use (by no more than 1.5 to 1 ratio). *See* 42 U.S.C. §§300gg(a)(1), 300gg-4(b).

[219] *See* Brief for the Respondents at 44-51, NFIB v. Sebelius; Florida v. HHS, (2012) (Nos. 11-393 and 11-400).

[220] Florida v. HHS, 780 F. Supp. 2d 1256, 1300-01 (N.D. FL 2011) (*quoting* Alaska Airlines, Inc. v. Brock, 480 U.S. at 685).

[221] *Id*. at 1301.

[222] *Id*.

the heart of the Act." [223] The court also explained that it was impossible for the court to go through the lengthy, complex statute to ascertain which provisions would or would not have to be severed along with the individual mandate, and accordingly nullified the Act.[224]

The appeals court disagreed with the district court's holding of "wholesale invalidation" of ACA and reversed this part of the district court's decision. In deciding to only excise the individual mandate, the court opined that "the lion's share of the Act has nothing to do with private insurance, much less the mandate to buy insurance."[225] The Eleventh Circuit noted that "in light of the stand-alone nature of hundreds of the Act's provisions and their manifest lack of connection to the individual mandate, the plaintiffs have not met the heavy burden needed to rebut the presumption of severability."[226] The appellate court also disagreed with the district court's emphasis on the lack of a severability clause in ACA.[227] In deciding to sever the individual mandate alone, while leaving the insurance reforms intact, the court found that certain factors relevant in determining congressional intent. For example, relying on the *Booker* and *New York* cases, the court explained that ACA contains many other provisions besides the individual mandate that could help to accomplish the goals of ACA (i.e., accessibility of health insurance coverage and a reduction of the number of uninsured individuals).[228] Cutting against the idea that ACA would fail to function without the individual mandate but with the other health insurance reforms preserved, the court observed that the individual mandate is, similar to the legislative veto in *Alaska Airlines*, limited in its operation, because, e.g., there are individuals who are excepted from having to buy health insurance or pay a penalty.[229] For these reasons and others, the court was not persuaded that it was "evident" that Congress would not have enacted the guaranteed issue and community rating reforms without the individual mandate.[230]

Supreme Court Arguments

If the Court determines that the individual mandate is unconstitutional and undertakes a severability analysis of ACA, the Court will likely evaluate legislative intent to determine the extent to which ACA should remain intact. In conjunction with that evaluation, the Court may explore whether ACA could function without the individual mandate. Other factors may also come into play in ascertaining whether other provisions of ACA remain valid. It should be noted that while the Court could address severability if it were to find the expansion of the Medicaid

[223] *Id*. at 1301-03.

[224] *Id*. at 1304.

[225] Florida v. HHS, 648 F.3d 1235, 1322 (11th Cir. 2011). The court said that the examples of these stand alone provisions were "too numerous to bear repeating," but mentioned that "representative examples include provisions establishing reasonable break time for nursing mothers, 29 U.S.C. §207(r); epidemiology-laboratory capacity grants, 42 U.S.C. §300hh-31; an HHS study on urban Medicare-dependent hospitals, *id.* §1395ww note; restoration of funding for abstinence education, *id*. §710; and an excise tax on indoor tanning salons, 26 U.S.C. §5000B." *Id*.

[226] Florida, 648 F.3d 1235 at 1323.

[227] *Id*. at 1322.

[228] *Id*. at 1325. Provisions mentioned by the court include creation of health insurance exchanges to provide individuals and small employers with access to insurance, federal premium tax credits and cost sharing subsidies to help individuals pay for health coverage, and taxes imposed on large employers under certain circumstances if the employer fails to provide, or provides health coverage that is unaffordable, as specified under ACA. For more information on these provisions, see CRS Report R41664, *ACA: A Brief Overview of the Law, Implementation, and Legal Challenges*, coordinated by C. Stephen Redhead.

[229] *Id*. at 1325-26.

[230] *Id*. at 1327.

program under ACA unconstitutional, the question explicitly granted review by the Court, and thus the focus of this overview, addressed the severability of the individual mandate.

In determining congressional intent, the Court may, as it has in previous cases, frame its inquiry as whether it is evident that Congress would have passed ACA without the individual mandate. The parties to the litigation disagree about what to evaluate in answering this fundamental question. Private and state petitioners, for example, claim that this part of the severability inquiry should largely be focused on, as noted in *Alaska Airlines*, whether the "balance of the Act can function in the *manner* that Congress intended."[231] Applying this standard to ACA, state and private petitioners generally contend that the requirement to have health insurance is the centerpiece of ACA, which is essential to achieving universal health coverage, and to remove it would fundamentally alter what Congress intended.[232] They explain that this conclusion is reinforced by legislative history addressing the importance of the individual mandate.[233] Petitioners further point to the contentious legislative process through which ACA was created, e.g., the narrow margin under which the Act was passed, as an indication that the Act would have failed had there been any changes to it (e.g., removing the minimum coverage provision).[234]

The Administration, on the other hand, relies on the idea that the Court generally tries not to invalidate more of a statute than is necessary. One of the Administration's central arguments is that the majority of ACA should remain valid because the Act contains a number of tools for improving the health care market that "operate independently of the [individual mandate] and would advance Congress's goal of expanding affordable coverage if that provision were invalidated."[235] It contends further that "there is no basis for invalidating as inseverable provisions of the Act that have no apparent connection at all, let alone an inextricably close

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[231] *See, e.g.,* Reply Brief for the Private Petitioners on Severability at 2, NFIB v. Sebelius; Florida v. HHS, (2012) (Nos. 11-393 and 11-400) (emphasis in original).

[232] *See, e.g*., Reply Brief for the State Petitioners on Severability at 23-24, NFIB v. Sebelius; Florida v. HHS, (2012) (Nos. 11-393 and 11-400). *See also* Reply Brief for the Private Petitioners at 18 ("When a bill's *hallmark* is stripped therefrom, it is hardly reasonable to presume that Congress nevertheless would have pressed ahead to enact the remainder.") (emphasis in original).

[233] Amici cite, among other things, a report accompanying H.R. 4872, the Health Care and Education Reconciliation Act of 2010 addresses the individual mandate and states:

> Individual responsibility is a key component of health reform. In order to control rising health care costs, it is vital that everyone be part of the health care system. The only way to ensure that almost everyone is participating is to require such participation by law. To that end, the bill institutes a tax on individuals who choose not to purchase qualified health insurance as the mechanism to enforce participation.

H.Rept. 111-443, The Reconciliation Act of 2010, 111th Congress (March 17, 2010) at 260.

See also, e.g., statements of Senator Baucus, Chairman of the Finance Committee, 156 Cong. Rec. S4729 (daily ed. June 9, 2010):

> [The Congressional Budget Office], again, states this requirement is one of the most critical pieces of reform. Without it, we lose coverage for millions of Americans. Without it – without that reform – premiums could spike by up to 15 to 20 percent in the nongroup market. . . . That is the analysis of the nonpartisan Congressional Budget Office. So, clearly, we must resist efforts to weaken the individual responsibility policy in the health care reform bill.

[234] *See* Brief for the State Petitioners, at 2-4, 39-40, NFIB v. Sebelius; Florida v. HHS, (2012) (Nos. 11-393 and 11-400).

[235] Brief for the Respondents (Severability) at 12, NFIB v. Sebelius; Florida v. HHS, (Nos. 11-393 and 11-400). The tools that incentivize broader health insurance coverage include the expansion of eligibility for the Medicaid program, tax credits for small businesses seeking to buy health insurance for the employees, and insurance market reforms beyond guaranteed issue and community rating. *Id*.

connection, to the [individual mandate]."[236] The Administration notes that evidence of this idea includes the fact that while the individual mandate does not take effect until 2014, there are many provisions of ACA that are effective before then.[237] Similar to the 11th Circuit, the Administration claims that the intent of many of ACA's provisions, not just the individual mandate alone, is to broaden access to affordable health care.[238] They argue that this situation is similar to cases like *New York*, where there was a "common purpose," and where the Court found it appropriate to sever an unconstitutional provision from the rest of a valid act, even where the provision related to one of the primary objectives of the congressional enactment.

However, unlike the 11th Circuit, the Administration claims that Congress intended for the guaranteed issue and community rating provisions to be integral to the individual mandate. Without the mandate, it argues, individuals would not purchase health insurance until they needed care, which would leave more unhealthy people with insurance. As a result, premiums would increase, which is precisely what Congress did not want.[239] Accordingly, the Administration argues that because the individual mandate is needed to make those insurance reforms effective, the guaranteed issue and community rating provisions are inseverable from the individual mandate, while the rest of the Act should stand.[240]

The Court-appointed amicus defends the 11th Circuit position, stating that the focus should be on the question of whether Congress would have preferred an ACA with no individual mandate, to no ACA at all.[241] Similar to the Administration, the amicus argues, among other things, that besides the guaranteed issue and community rating requirements, many provisions of ACA have little, if any connection to the individual mandate. Relying on cases like *Booker*, the amicus disputes the petitioner's claim that severability turns on the question of whether the statute functions in the manner that Congress intended.[242] Additionally, the amicus reasons that the guaranteed issue and community rating should also stand, as it is improbable that Congress would have wanted for health insurance consumers to be in the position they were in before the act: potentially subject to things like denials of coverage because of their health conditions.[243] The

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[236] Reply Brief for the Respondents (Severability) at 7, NFIB v. Sebelius; Florida v. HHS, (2012) (Nos. 11-393 and 11-400) (quotations omitted).

[237] *See, e.g.,* Brief for Respondents (Severability) at 29.

[238] *See* Reply Brief for the Respondents (Severability) at 6.

[239] *Id*. at 8-9.

[240] *See generally* Brief for the Respondents (Severability) at 44-47, Brief for the State Petitioners (Severability) at 12, 47; Brief for the Private Petitioners (Severability) at 36-40.

[241] Brief For the Court-Appointed amicus Curiae Supporting Complete Severability, NFIB v. Sebelius; Florida v. HHS, (2012) (Nos. 11-393 and 11-400). It should be noted, however, that private petitioners argue that this description of the severability inquiry is consonant with the petitioner's focus on "whether the statute will function in a manner consistent with the intent of Congress." *See* Reply Brief for the Private Petitioners (Severability) at 7-8.

[242] As the amicus notes:

> The Court's decisions since *Alaska Airlines* demonstrate that the "manner consistent with the intent of Congress" language was not meant to rewrite basic severability analysis. In *Booker*, for example, the Court replaced a system of mandatory criminal sentencing with a discretionary sentencing system, even though it was readily apparent that Congress had intended the system to work in a mandatory "manner." … Severability analysis thus must begin with a recognition that the statute as enacted by Congress cannot stand. And, once it is acknowledged that the law inevitably will be altered, a preference for preserving the valid portions of the statute is the best of the possible options.

Id. at 17-18.

[243] *Id*. at 5.

amicus argues that while Congress expected these health insurance requirements to work together with the individual mandate, it is not evident that Congress would have wanted to remove those benefits from individuals, which can still be effective without the individual mandate.

One factor that the Court may consider in evaluating congressional intent is the congressional findings accompanying the individual mandate. As discussed above, the findings state, among other things, that the individual mandate is "an essential part of this larger regulation of economic activity, and the absence of the requirement would undercut Federal regulation of the health insurance market."[244] The findings further provide that it is "essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold."[245] It is not clear whether the Court might regard these findings as an indicator that Congress regarded the individual mandate as an indispensable part of ACA, as the petitioners argue;[246] as an expression of Congress's view that the individual mandate is inseparable from the guaranteed issue and community rating provisions, as the Administration claims;[247] or conversely, unrelated to the severability question, as a demonstration of Congress's view that the individual mandate plays an essential role in a broader regulatory scheme for purposes of the Commerce Clause, as the amicus contends.[248] Phrasing this latter position differently, the findings arguably address Congress's position on its power to enact the provision, not its preference as to what should happen to the rest of ACA without it.

Other arguments that could influence the decision of the Court include the lack of a severability clause in ACA. While recent Supreme Court jurisprudence does not place great emphasis on the existence of the clause in legislation, petitioners argue that this case is distinguishable, as there was a severability clause in earlier versions of the health reform bill that was removed in the health reform bill that passed and became ACA.[249] The Administration contends that the lack of such a clause in ACA is insignificant and disputes the idea that a clause was removed from the bill that was enacted by Congress, as a severability clause was only included in a House bill that was never considered in the Senate.[250] The Administration also contends that severability clauses in the acts that ACA amends (e.g., the Internal Revenue Code) could apply to ACA's provisions.[251] In addition, the Administration claims that the Court should not address inseverability of provisions that do not affect the plaintiffs. The Administration asserts that the petitioners "may not challenge the myriad provisions of the Act that do not apply to them," and that "[p]arties must demonstrate standing for each form of relief they seek and, in doing so, cannot rely on the rights of third parties."[252] The Administration relies on *Printz v. United*

[244] 42 U.S.C. §18091(a)(2)(H).

[245] 42 U.S.C. §18091(a)(2)(I).

[246] *See, e.g.*, Reply Brief for the State Petitioners (Severability) at 19-20.

[247] *See, e.g.,* Reply Brief for the Respondents (Severability) at 9-10.

[248] Brief for the Court-Appointed amicus Curiae Supporting Complete Severability at 31-33.

[249] *See, e.g.*, Brief for the Private Petitioners (Severability) at 58.

[250] *See*, Brief for Respondents (Severability) at 43 ("Private petitioners rely on what they incorrectly describe as 'the *deletion* of a severability clause from an earlier version of the bill' to support their assertion that 'Congress intended this unique legislative deal to rise or fall as a whole.' There was no such 'deletion.' Private petitioners presumably refer to H.R. 3962, a health care reform bill passed by the house in November 2009. The Senate never considered that measure, much less made 'deletions' from it, instead using a different house bill, H.R. 3590, as the vehicle for the Senate's own health care reform legislation."). (internal citations omitted).

155

[251] Brief for the Respondents (Severability) at 42-43.

[252] Brief for Respondents (Severability) at 10.

States,[253] a case in which the Court declined to address certain provisions of a statute that "burden[ed] only" parties outside the litigation.[254] However, the petitioners and amicus disagree with this position, contending, among other things, that the Court is not constrained to considering remedies only affecting the interests of the parties to the instant case.[255]

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[253] 521 U.S. 898, 935 (1997) ("We decline to speculate regarding the rights and obligations of parties not before the Court.")

[254] *See, e.g.,* Reply Brief for Respondents (Severability) at 2 *et seq*.

[255] *See, e.g.,* Brief for State Petitioners (Severability) at 46.