FEDERALISM AND HEALTH CARE IN THE UNITED STATES

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On March 23, 2010, President Obama signed into law the Patient Protection and Affordable Care Act (PPACA).[1] Among other things, this complex 2700-page statute prohibits private health insurers from denying coverage based on pre-existing medical conditions, expands eligibility for Medicaid (which provides health care for indigents), provides incentives for employers to provide health care benefits, and supports medical research. It also imposes a financial penalty on those who do not obtain health insurance by 2014 –the so-called "individual mandate"– unless they are exempt because of low income. Its proponents claim that PPACA will significantly expand access to health care while simultaneously helping to curtail health-care costs by cuts in reimbursements to hospitals for medical services and by establishing "health insurance exchanges" that would enable individuals and small businesses to compare the costs and coverage of various insurance plans. But its opponents charge that PPACA will

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1. On Truman's effort, see Monte M. Poen, *Harry Truman versus the Medical Lobby* (Columbia: University of Missouri Press, 1979). More generally, see James Morone and David Blumenthal, *The Heart of Power: Health and Politics in the Oval Office* (Berkeley: University of California Press, 2009).

promote greater governmental control over health care, raising costs without enhancing the quality of care.

Beginning with President Harry Truman in the late 1940s, several previous Democratic presidents had unsuccessfully championed health-care reform, so PPACA was a landmark enactment.[2]The Act sparked bitter partisan divisions in Congress and eventually was adopted on virtually a party-line vote. In the Senate, the legislation passed by a vote of 56-43, with no Republican voting in favor of it, and in the House of Representatives the margin was 219-212, again without a single Republican vote in favor. The Act remains politically controversial. During the 2010 congressional elections, Republican candidates made opposition to "ObamaCare" a centerpiece of their campaigns, and after the Republicans won control of the House of Representatives in that election, one of their first actions (on January 19, 2011) was to pass a bill repealing PPACA. This action was largely symbolic, as the bill stood no chance of passing in the Democratically-controlled Senate or of surviving a presidential veto. Nonetheless, the House's action underscored the continuing Republican opposition to PPACA, and the Republicans plan to revise various features of the Act and to limit funding for its implementation.

The Act has raised constitutional as well as political controversy. Under Section 1501 of the Act, most Americans who do not have health insurance are obliged to obtain coverage by 2014 or they will be subject to what the Act's supporters call "a tax" but what its opponents call "a fine." Supporters view this "individual mandate" provision as crucial to the Act's goals of ensuring universal health coverage and reducing the costs of medical care. They insist that private insurers could not afford to provide coverage to persons with pre-existing medical problems, unless they could be guaranteed that all persons, including healthy ones, purchased insurance, thereby increasing the pool of funds available to them. Opponents not only doubt the efficacy of the individual mandate but also –and more importantly for present purposes– challenge

2. P.L. 111-148 (2010). For an overview of the politics of its enactment, see Lawrence R. Jacobs and Theda Skcopol, "Hard Fought Legacy: Obama, Congressional Democrats, and Struggle for Comprehensive Health Reform," available at: http://www.russellsage.org/sites/all/files/u4/Obama_Chapter%202_Health%20Reform.pdf.

its constitutionality, insisting that it represents an unprecedented expansion of federal authority.[3]

Even before President Obama signed PPACA into law, the attorneys general of 12 states had filed suit in federal court, challenging the constitutionality of the individual mandate provision. Perhaps unsurprisingly, all these attorneys general were Republicans and thus political opponents of the president. By early 2011, with the replacement of Democratic by Republican attorneys general in several states, the number of states filing suit against the individual mandate had risen to 26.[4] Other suits challenging the individual mandate were also commenced in federal courts, and by early 2011 two district court judges had ruled the mandate constitutional, while another three had invalidated it.[5] This study examines the arguments for and against the constitutionality of the individual mandate, relates this litigation to United States Supreme Court rulings analyzing the scope of federal power, and speculates on the likely outcome when the Supreme Court considers constitutional challenges to the individual mandate. Before

3. Opponents of the law have challenged the constitutionality of the law on a variety of other grounds, ranging from complaints that it violated the religion clause of the Bill of Rights to arguments that it exceeded the spending power of the federal government. Most of these claims were patently frivolous, and they were summarily rejected by the district courts. Hence, we shall focus exclusively on the constitutional challenge to the individual mandate.

4. Not all state officials have opposed the Act or questioned its constitutionality. See John Gramlich, "State legislative group lends backing to health care law," *Stateline,* November 17, 2010, at: http://stateline.org/live/details/story?contentId=529645.

5. Rulings upholding the individual mandate include *Liberty University v. Geithner*, 2010 WL 4860299 (W.D. Va. 2010); *Thomas More Law Center v. Obama*, 720 F. Supp. 2d 882 (E.D. Mich. 2010); and *Wisconsin Right to Life Political Action Committee* v. *Brennan*, Case No. 09-cv-764-wmc (D.C. 2011), available at http://media.journalinteractive.com/documents/WRTL_Decision_033111.pdf. The rulings striking down the individual mandate are *Cuccinelli v. Sibelius*, 728 F. Supp. 2d 768 (E.D. Va. 2010), and *Florida v. U.S. Department of Health and Human Services*, Case No.: 3-10-cv-91-RV/EMT (N.D. Fla. 2011). In *Cuccinelli* the district judge declined the plaintiff's request to suspend implementation of the Act pending appeal, so the ruling had no immediate practical effect. In *Florida* the district judge declined to issue an injunction suspending implementation of the Act but opined that it was expected that federal authorities would act in line with his judgment. The rulings in all these cases have been appealed, and it is expected that the United States Supreme Court will ultimately resolve the constitutional issue.
Interestingly, the rulings upholding the individual mandate were issued by judges appointed by Democratic presidents, while those striking it down were issued by judges appointed by Republican presidents. With this in mind, it is worth noting that as of early 2011, the U.S. Supreme Court has 5 justices appointed by Republican presidents.

doing so, however, it is useful to place the current dispute in historical and constitutional context.

1. The Historical and Constitutional Context

1.1. Health Care in the United States

For most of the nation's history, the American health care system relied on the private provision of services, with patients paying physicians for their care directly. Throughout the nineteenth century and into the twentieth century, government initiatives were limited primarily to public health, the construction of hospitals, and the provision of medical care for the indigent. State governments encouraged hospital construction by giving money to institutions that providing charitable care. For example, by 1898, Pennsylvania had 113 benevolent or not-for-profit hospitals, of which 69 were aided by the state."[6] State governments also played the primary role in attempting to prevent the spread of communicable diseases, particularly in major cities where population density and inadequate sanitation aggravated health problems. Local governments provided services for those unable to afford medical care, although "early arrangements were made on an ad hoc, decentralized, local, and often erratic basis," and most care was provided by private charity rather than by government.[7] Congress in 1878 passed a National Quarantine Act in order to prevent entry into the country of persons with communicable diseases, but generally the federal government played little role in health care until the twentieth century.

This began to change after the ratification of the Sixteenth Amendment, which authorized the imposition of a federal income tax, in 1913. The imposition of an income tax increased the revenues available to the federal government, and this enabled it to provide grants to state governments to fund activities of interest to the federal government, including the provision of medical care. For example, the federal Maternity Act of 1921 provided for grants to states that

6. Rosemary Stevens, *The Public-Private Health Care State: Essays on the History of American Health Care Policy* (New Brunswick, NJ: Transaction Publishers, 2007), p. 10.

7. *Ibid*., p. 188.

agreed to establish programs designed to reduce maternal and infant mortality and protect the health of mothers and infants.[8] Spurred partially by federal grants-in-aid but also by increasing needs, state governments also expanded their involvement in health care during the first half of the twentieth century. Another important development during the twentieth century was the replacement of direct payment for services with a system of health insurance provided in part or in total by the employer. The federal government encouraged the development of these private, voluntary insurance plans, and a ruling by the Internal Revenue Service in 1951 that employers'costs for premiums were a tax-deductible expense made large-scale development of private health insurance viable.[9]

Federal involvement in health care increased dramatically in the latter half of the twentieth century.[10] In 1965, Congress enacted Medicaid, a cooperative program under which the federal and state governments jointly provide health insurance for low-income persons. This program, which is administered by the states, has expanded so that even though the federal government provides more than half the

8. A federal taxpayer sought to challenge the constitutionality of this program in *Frothingham v. Mellon*, 262 U.S. 447 (1923. However, the U.S. Supreme Court rejected the suit, arguing that a federal taxpayer lacks standing to sue to challenge its constitutionality of appropriations, because the taxpayer cannot demonstrate "that he has sustained or is immediately in danger of sustaining some direct injury as a result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally." Although the Supreme Court has expanded slightly its understanding of "standing to sue" in ways that facilitate challenges to federal appropriations or spending –see e.g., *Flast v. Cohen*, 392 U.S. 83 (1968)– the Court continues to look askance at taxpayer challenges, even when it is asserted that the federal government has exceeded its authority. See, e.g., *Hein v. Freedom from Religion Foundation*, 551 U.S. 587 (2001).

9. "By mid-1958 nearly two-thirds of the population had some coverage for hospital costs, the most common type of insurance… [and] when the main earner was fully employed, the probability of having some insurance was 78 percent." Paul Starr, *The Social Transformation of American Medicine* (NY: Basic Books, 1982), p. 334.

10. To illustrate this: from 1965, when Medicaid was enacted, to 2000, the percentage of all federal grants going to health policy rose from 6% to 43%. See Frank J. Thompson, "Federalism and Health Care Policy: Toward Redefinition?" in Robert B. Hackey and David A. Rochefort, eds., *The New Politics of State Health Policy* (Lawrence: University Press of Kansas, 2001), p. 43. For overviews of federal initiatives and the history of health care in the United States more generally, see Kant Patel and Mark Rushefsky, *Health Care Politics and Policy in America*, 3rd ed. (Armonk, NY: M. E. Sharpe, 2006), Chapter 2; Starr, *Social Transformation of American Medicine*; Theda Skocpol, *Protecting Mothers and Soldiers: The Political Origins of Social Policy in the United States* (Cambridge, MA: Belknap Press, 1992); and Stevens, *The Public-Private Health Care State*.

funding, Medicaid payments currently account for 22 percent of state budgets.[11] Congress in 1965 also enacted Medicare, which established a program of compulsory health insurance for the elderly, financed through payroll taxes (Medicare A) and a voluntary insurance program for physicians' services subsidized through general revenues (Medicare B). In addition, Congress enacted a number of other health programs during the 1960s, such as Maternal and Infant Care, the Children Supplemental Feeding Program, and community health centers as part of President Lyndon Johnson's "War on Poverty." In 2003 Congress enacted the Medicare Modernization Act, which established a new voluntary outpatient prescription drug benefit. Although these programs were controversial when they were enacted, the controversy focused on the wisdom and financial viability of the initiatives, not on their constitutionality. These federal programs now enjoy broad public support, and so although there may be efforts to reduce program costs, there is little likelihood of their elimination. Indeed, recent poll data reveal strong popular support for the federal government taking the lead in health-care policy.[12] Nonetheless, it would be a mistake to describe this array of programs as a fully integrated health-care system.

11. This figure is drawn from "In State Budgets, Medicaid Goes under the Knife," *Kaiser Health News*, December 22, 2010, available at: http://www.kaiserhealthnews.org/Daily-Reports/2010/December/22/states.aspx. Other commentators dispute the figure, arguing that it is misleading because it includes federal funds given to the states as well as state funds. According to the Center for Children and Families at Georgetown University: "On average, federal funds account for 56.2 percent of all Medicaid spending. Average *state* spending on Medicaid as a share of *state general fund budgets* is actually 16.8 percent, and just 13.4 percent as a share of spending from *all state funds*." See "Medicaid and State Budgets: Looking at the Facts," at: http://ccf.georgetown.edu/index/cms-filesystem-action?file=ccf%20publications/about%20medicaid/nasbo%20final%205-1-08.pdf.
Medicaid provides funds to private health-care providers in reimbursement for the medical care that they provide for indigents. Although Medicaid is jointly funded by the federal government and state governments, state governments bear primary responsibility for its implementation. The federal government establishes general guidelines that states must adhere to qualify for federal matching funds and grants. However, within those guidelines, states have considerable leeway in determining eligibility requirements, what services to provide, the level of reimbursements to hospitals and nursing homes, and many other matters. For overviews of how states have exercised the discretion available to them, see Robert F. Rich and William D. White, eds., *Health Policy, Federalism, and the American States* (Washington, DC: Urban Institute Press, 1996); Hackey and Rochefort, *New Politics of State Health Policy*; and John Holahan, Alan Weil, and Joshua M. Wiener, eds., *Federalism and Health Policy* (Washington, DC: Urban Institute Press, 2003).

12. See Saundra K. Schneider, William G. Jacoby, and Daniel C. Lewis, "Public Opinion Toward Intergovernmental Policy Responsibilities," *Publius: The Journal of Federalism* 41 (Winter 2011): 13-15.

In closing this historical overview, it should be noted that the increased federal involvement in health care has not displaced the states. In part, this is because Medicaid was a joint federal-state program, with states responsible for its administration and for a substantial portion of the funding. In part, too, federal grants have encouraged state initiatives. Finally, the increasing cost of Medicaid, as well as federal budget gaps that curtailed federal policy innovation, has led states to assume a leadership role in the health care field in the late twentieth century.[13] For example, both California and North Carolina introduced programs for increasing access to prenatal care for low-income women in order to reduce infant mortality; South Carolina adopted a program to identify and provide services to women with high-risk pregnancies; and 20 states adopted "presumptive eligibility" programs so that pregnant women could receive care without going through the normal, but cumbersome and time-consuming process of proving Medicaid eligibility.[14]

1.2. Constitutional Fundamentals

The U.S. Constitution grants a limited legislative authority to the federal government. Article I, Section 1 grants Congress all "legislative powers herein granted," thereby implying that there are legislative powers beyond those "herein granted." James Madison stated his expectations on this in *The Federalist* No. 45:

> The powers delegated by the proposed constitution to the federal government are few and defined. Those which to remain in the State governments are numerous and indefinite. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the live, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

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13. For an overview of state innovations, see Howard M. Leichter, "State Governments and Their Capacity for Health Care Reform," and Michael S. Sparer and Lawrence D. Brown, "States and the Health Care Crisis: The Limits and Lessons of Laboratory Federalism," both in Robert F. Rich and William D. White, eds., *Health Policy, Federalism, and the American States* (Washington, DC: Urban Institute Press, 1996).

14. These innovations are described in Saundra K. Schneider, "Improving the Quality of Maternal and Child Health Care in the United States: State-Level Initiatives and Leadership," in Howard M. Leichter, ed., *Health Policy Reform in America: Innovations from the States* (Armonk, NY: M. E. Sharpe, 1992).

That the legislative powers of the federal government are limited is also confirmed by the drafters' decision to enumerate those powers (Article 1, Section 8) rather than to grant Congress a plenary legislative authority. The Tenth Amendment to the Constitution affirms the limited grant of authority to the federal government, declaring that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Thus all residual powers rest with the states or with the people. Although it does not limit federal powers directly, the Tenth Amendment is relevant to the interpretation of those powers, making clear that any interpretation that leads to a plenary federal authority is erroneous. This is true because, as James Madison noted in *The Federalist*, No. 39, the Constitution "leaves to the several States a residuary and inviolable sovereignty." Nevertheless, within its sphere, federal law is supreme, superseding all state enactments including state statutes and state constitutional provisions. This is confirmed by the federal Supremacy Clause (Article VI, Section 2) which states that "this Constitution, and the Laws of the United States which shall be made in Pursuance thereof… shall be the supreme Law of the Land."

Perhaps unsurprisingly, given its eighteenth century origins, the U.S. Constitution does not expressly address what level of government has authority over health matters or whether such authority is shared between the federal and state governments. The federal government has justified its involvement in health care based on three constitutional grants of power: the Taxing and Spending Clause, the Commerce Clause, and the Necessary and Proper Clause. Article I, section 8, paragraph 1 grants Congress the power "to lay and collect Taxes, Duties, Imposts, and Excises [and] to pay the Debts and provide for the common Defense and general Welfare of the United States." Thus, Congress can establish grant programs dealing with public health because of its power to spend for the general welfare, and it can impose taxes to raise revenues to underwrite such programs because of its power to lay and collect taxes for the public welfare. Article I, section 8, paragraph 3grants Congress the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Thus Congress can regulate the provision of health care and the operation of medical institutions, at least insofar as these involve commerce among the several states, and the provision of health care involves the sale of products and services, so it does have a commercial

character. Finally, Article I, section 8, paragraph 18 grants Congress the power "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers," namely, those powers listed in the previous enumeration of powers. And so Congress can exercise whatever other powers are necessary and proper to make effectual the power over public health granted to it by the preceding provisions.

Yet the question remains: what are those federal powers over health care, and how far do they extend? More specifically, do they encompass a power to require persons to purchase health insurance and penalize them should they fail to do so? Or to put it in more analytic terms, do the commerce clause and necessary and proper clause grant Congress a power to require persons to purchase a product from a private company? And does the taxing clause authorize the imposition of a penalty on a person who fails to purchase a product from a private company? To answer these questions, one must turn to the Supreme Court's rulings interpreting these constitutional provisions.

2. The Supreme Court's Interpretation of Federal Powers

2.1. The Commerce Clause

Chief Justice John Marshall's opinion in *Gibbons v. Ogden* (1824) provides the starting point for all subsequent interpretations of the Commerce Clause.[15] Although the case was eventually decided on the basis of a conflict between federal and state law, Marshall used *Gibbons* to elaborate a broad interpretation of federal power, emphasizing the founders' desire to remove state barriers to economic activity and create a national common market. He expansively defined commerce to include "the commercial intercourse between nations, and parts of nations, in all its branches." Furthermore, insisting that Congress can deal with all obstacles to the free flow of goods among the states, Marshall concluded that congressional power necessarily extends to "that commerce which concerns more states than one"–a

15. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

formulation that encompasses but is not limited to interstate commerce. Insofar as intrastate activities affect commerce "among the several states," they too are subject to congressional regulation.

This broad interpretation had little immediate effect, because for almost a century after the American Founding, Congress enacted little commercial legislation. However, the passage of the Interstate Commerce Act (1887) heralded a more active national role, and conflict over the scope of congressional power soon reached the Supreme Court. In the late nineteenth and early twentieth centuries, the Court developed a more restrictive conception of the commerce power and periodically invalidated congressional legislation.[16] Following the advent of the Great Depression in1929 and the election of President Franklin Roosevelt in 1932, this narrower understanding of the commerce power collided with innovative federal efforts (Roosevelt's "New Deal") to stimulate an economic recovery. From 1934 to 1936, the Court struck down 13 federal laws, including key elements of the New Deal, and the reasons given by the Court in its opinions presaged the invalidation of future New Deal measures. In response, after his landslide reelection in 1936, President Roosevelt proposed a plan to increase the membership of the Supreme Court from 9 to 15 justices. Although the measure was promoted as necessary to help the Court with its workload, in fact it was intended to give the president a chance to change the balance on the Court by appointing justices more sympathetic to his New Deal legislation. Although this "court-packing" plan was never adopted by Congress, the Supreme Court capitulated, upholding the National Labor Relations Act in 1937 and thereby signaling a new approach in its interpretation of the Commerce Clause. The retirement of justices unsympathetic to his agenda gave Roosevelt the opportunity to appoint justices who shared his constitutional views, solidifying support for an expansive interpretation of the national commerce power.[17]

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16. See, for example, *Hammer v. Dagenhart*, 247 U.S. 251 (1918); *Schecter Poultry Corp. v. United States*, 295 U.S. 495 (1935); and *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936). For overviews of the Court's jurisprudence during this era from diverse perspectives, see Barry Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* (New York: Oxford University Press, 1998), and Edward S. Corwin, *Court over Constitution* (Princeton, NJ: Princeton University Press, 1938).

17. *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, 301 U.S. 1 (1937). By 1943 all nine justices of the Supreme Court were Roosevelt appointees.

After 1937 the Supreme Court overruled several recent decisions and upheld major New Deal legislation.[18] Equally important, it made clear that it would defer to congressional judgments as to whether economic activities "affected more states than one" and were therefore subject to congressional regulation under the Commerce Clause. The scope of congressional power under the Commerce Clause under this new understanding is illustrated by the Court's decision in *Wickard v. Filburn* (1942), which has become an important precedent in the litigation over the individual mandate.[19] *Wickard* involved the constitutionality of the Agricultural Adjustment Act of 1938, which imposed limitations on the acreage that individual farmers could devote to wheat production. Congress sought by this legislation to control the volume of wheat moving in interstate and foreign commerce, in order to avoid surpluses and shortages that might lead to abnormally low or high wheat prices. Filburn exceeded his allotment under the Act by 12 acres, but he kept the excess wheat for use on his own farm rather than selling it. Hence the question in the case was whether the federal power to regulate goods for production for interstate commerce extended to a power to regulate production intended wholly for personal consumption that would not enter into commerce at all.

A unanimous Supreme Court answered that question in the affirmative. Speaking for the Court, Justice Robert Jackson noted that consumption of home-grown wheat would reduce the demand for wheat in the marketplace. Therefore, although Filburn did not market his excess production, it still had an effect on the demand for wheat. Moreover, even if the effect of Filburn's action on the demand for wheat was by itself only "trivial", that was "not enough to remove him from the scope of the federal regulation where, as here, his contribution, taken together with that of many others similarly situated, was far from trivial."[20] Thus, *Wickard* apparently stands for two propositions: (1) Congress's power to regulate commerce among the several states extends to activities, themselves not commercial, if they nonetheless have substantial effects on economic activity; and (2) Con-

18. See, for example, *Mulford v. Smith*, 307 U.S. 38 (1939) and *United States v. Darby*, 312 U.S. 100 (1941).

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

20. 317 U.S. 111, 128 (1942).

gress may regulate an activity that has only a trivial effect on commerce among the several states if it is part of a class of activities that falls within the reach of federal power. This latter point was reaffirmed in *Perez v. United States* (1971), a case that involved federal regulation of purely local loan-sharking.[21]

Both of the propositions established in *Wickard* also figured prominently in the Supreme Court's most recent important ruling under the Commerce Clause, *Gonzales v. Raich* (2005), which is likewise pertinent to the constitutionality of the individual mandate. This case involved the constitutionality of a federal statute that forbade the possession, obtaining, or cultivating of marijuana for personal use, despite a California law that authorized physicians to prescribe marijuana for seriously ill residents of the state and allowed those persons to grow or purchase marijuana. Speaking for a six-member Court majority, Justice John Paul Stevens upheld the federal law, concluding that "'the power to make all Laws which shall be necessary and proper for carrying into Execution' its authority to 'regulate commerce with foreign nations, and among the several States' includes the power to prohibit the local cultivation and use of marijuana in compliance with California law."[22] Relying on *Wickard* and *Perez*, the Court argued that Congress has authority to regulate local matters that are part of a class of activities that have substantial effects on interstate commerce. As in *Wickard*, the fact that a product was grown for personal use was not decisive, as there was "an established, albeit illegal, interstate market" for marijuana. Likewise as in *Wickard*, Congress could reasonably conclude that "leaving home-grown marijuana outside federal control would similarly affect price and market conditions."[23] Finally, again as in *Wickard*, the fact that Raich's production of marijuana was trivial was irrelevant, as long as the class of production regulated was not. And ultimately, the Court reasoned, this determination was Congress's to make: the Court observed that "we need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a 'rational basis' exists for so concluding."[24] If a rational basis existed

21. *Perez v. United States*, 402 U.S. 146 (1971).

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

23. 545 U.S. 1, 19.

24. 545 U.S. 1, 22.

for concluding that the aggregate effect of personal growth and consumption of marijuana for medicinal purposes under California law had a sufficient impact on interstate commerce to warrant regulation under the Commerce Clause, then the Court should defer to the judgment of Congress on the matter and uphold the legislation.

The Supreme Court's expansive interpretation of the national commerce power after 1937 meant that from that year until 1995 only once, in *National League of Cities v. Usery* (1976) did the Supreme Court rule that an enactment exceeded Congress's power under the Commerce Clause; and it expressly overruled that decision 9 years later in *Garcia v. San Antonio Metropolitan Transit Authority* (1985).[25] However, in two recent cases, *United States v. Lopez* (1995) and *United States v. Morrison* (2000), the justices have acknowledged limits on Congress's commerce power and struck down congressional enactments.[26] In *Lopez* a five-member Court majority struck down the Gun-Free School Zones Act of 1990, which made it a federal offense to possess a firearm in a local school zone. Speaking for the Court, Chief Justice William Rehnquist noted that "even [our] modern-day precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits."[27] Distinguishing *Wickard*, the Court noted that the law in *Lopez* did not deal with economic activity and that weapons possession was only tenuously related to commerce among the several states. To accept such a connection as justifying congressional regulation, the majority noted, would in effect leave the Court "hard pressed to posit any activity by an individual that Congress is without power to regulate."[28] This would undermine the constitutional architecture of the American federal system by converting the Commerce Clause into an unlimited grant of power.

The same five-justice majority applied similar reasoning in *United States v. Morrison*, concluding that neither the Commerce

25. *National League of Cities v. Usery*, 426 U.S. 833 (1976), and *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

26. *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000).

27. 514 U.S. 549, 556-557.

28. 514 U.S. 549, 564.

Clause nor the Fourteenth Amendment gave Congress the power to enact a provision of the Violence Against Women Act that gave victims a right to sue perpetrators of gender-based violence in federal court. Noting that gender-based violence is not economic activity, the Court observed that its past decisions had sustained congressional regulation of intrastate activity based on its effects on interstate commerce only when the activity in question itself had some sort of economic character. Maintaining this distinction was essential, the Court argued, because otherwise there would in practice be no limits to the federal commerce power. And this would be inconsistent with the constitutional division of power between nation and state.

Thus, the Court sought to interpret the Commerce Clause in light of its understanding of the overall character of the constitutional system.

2.2. The Taxing Clause

The Constitution grants the federal government broad taxing authority, subject to only three express limitations: Congress may not tax exports, it must apportion direct taxes among the states in relation to their population, and it must impose taxes uniformly throughout the country.[29] None of these currently pose any problems, although it was necessary to amend the Constitution to overrule a Supreme Court decision that used the limitation on direct taxes to strike down a federal income tax.[30] What has proved controversial are the uses to which Congress has put its taxing power. All taxes, in addition to raising revenue, make goods more expensive and thereby discourage their purchase, so taxes serve regulatory purposes as well. Thus the question becomes whether Congress, by using its taxing power for regulatory purposes, can legitimately reach activities that it could not regulate directly under its other enumerated powers.

During the early twentieth century, the Supreme Court held that if Congress could not regulate an activity directly, then it could not regulate it indirectly through the subterfuge of a "so-called tax."

29. These restrictions on the federal taxing power are found in Article I, section 8, paragraph 1, and in Article I, section 9, paragraphs 4 and 5.

30. The Supreme Court's ruling in *Pollock v. Farmer's Loan & Trust Company*, 157 U.S. 429 (1895), was overturned with the ratification of the Sixteenth Amendment in 1913.

However, since 1937 the Court has taken the position that the power to tax, like the power to regulate commerce among the several states, is plenary.[31] Hence it has refused to monitor the motives underlying congressional tax laws. As long as taxes produce some revenue, their regulatory purposes are irrelevant to their constitutionality. Because the assessment for failing to purchase health insurance does raise revenue, proponents have sought to characterize it as a tax, which would ensure its constitutionality, while opponents have disputed that characterization.

2.3. The Necessary and Proper Clause

Chief Justice John Marshall provided the authoritative interpretation of the Necessary and Proper Clause in *McCulloch v. Maryland* (1819), in which the Supreme Court recognized Congress's power to charter the Bank of the United States and invalidated a Maryland tax on that bank.[32] According to Marshall, the Constitution grants powers so that the federal government can achieve certain broad objectives. How best to achieve those objectives depends on circumstances, and so the Constitution's framers did not specify in detail the means for accomplishing its aims. Instead, they included the Necessary and Proper Clause to ensure Congress discretion in its choice of means. Marshall thus concluded: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."[33] This understanding continues to inform the Court's jurisprudence. As the Court explained in *United States v. Comstock* (2010), "the Necessary and Proper Clause makes clear that the Constitution's grants of specific federal legislative authority are accompanied by broad power to enact laws that are 'convenient or useful' or 'conducive' to the authority's 'beneficial exercise.'"[34]

31. See, for example, *Mulford v. Smith*, 307 U.S. 38 (1939), and *United States v. Kahriger*, 345 U.S. 22 (1953).

32. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

33. 17 U.S. 316, 421.

34. *United States v. Comstock*, 130 S.Ct. 1949, 1956 (2010). See also *Gonzales v. Raich*, 545 U.S. 1, 22 (2005), and *Sabri v. United States*, 541 U.S. 600, 605 (2004).

This broad discretion in the choice of means might threaten to convert the federal government from a limited to an unlimited government. However, the Supreme Court in recent years has sought to avoid this by emphasizing that the constitutional principle of state sovereignty operates as a check. Thus, as Justice Antonin Scalia noted in *Printz v. United States* (1997), a law may serve the purpose of carrying into execution the Commerce Clause, but if it "violates the principle of state sovereignty reflected in the various constitutional provisions we mentioned earlier, it is not a 'Law… *proper* for carrying into Execution the Commerce Clause'" and so is unconstitutional.[35] In other words, when the federal government claims that an exercise of power is authorized by the Necessary and Proper Clause, the Court must inquire not only whether the exercise of power serves to effectuate an enumerated congressional power but also whether it properly respects the division of authority under the American federal system.

3. Litigating the Constitutionality of the Individual Mandate

3.1. Congressional Power under the Commerce Clause and the Necessary and Proper Clause

Three district courts have upheld the individual mandate as a valid exercise of congressional power under the Commerce and Necessary and Proper Clauses, but two others have concluded that the individual mandate exceeds congressional authority under those clauses. These conflicting outcomes reflect differing characterizations of the individual mandate, as well as differing readings of the Supreme Court's recent rulings on the Commerce Power.

The district courts that struck down the individual mandate described it as an unprecedented exercise of congressional power. According to these courts, PPACA was the first law in which Congress had mandated that someone buy a product from a private vendor. The courts further maintained that Congress had never before penal-

35. *Printz v. United States*, 521 U.S. 898, 923-24 (1997). See also *New York v. United States*, 505 U.S. 144 (1992).

ized mere inactivity, a failure to take action, under the Commerce Clause. The courts read the Supreme Court's rulings in *United States v. Lopez* and *United States v. Morrison* as establishing the proposition that Congress did not have the power to regulate all local non-commercial activities that bore some attenuated relationship to commerce among the several states. Yet if this is true for non-commercial activity, it necessarily follows that it is true as well for non-activity, for the failure to participate in commerce among the states. In order to be subject to congressional regulation under the Commerce Clause, the courts asserted, a person had to engage in some "self-initiated action." But persons who do not purchase health insurance engage in no action at all; they simply choose not to participate in the health care market. And if their "decision not to purchase health insurance at a particular point in time does not constitute the type of economic activity subject to regulation under the Commerce Clause," the *Cuccinelli* court noted, "then logically an attempt to enforce such a provision under the Necessary and Proper Clause is equally offensive to the Constitution." In addition, if Congress cannot coerce a person into engaging in an involuntary commercial action, then it cannot penalize that person's failure to do so.

In making this argument, the courts distinguished the current case from the Supreme Court's earlier rulings in *Wickard v. Filburn*, *Perez v. United States*, and *Gonzales v. Raich*, in which the justices had upheld congressional statutes under the Commerce Clause. In *Perez,* the courts noted, the Supreme Court had stressed that although loan sharking was illegal, it was nonetheless an "activity" with substantial economic effects on commerce among the states. Indeed, Justice Douglas's opinion for the Court in *Perez* stated that loan sharking was the second largest source for revenue for organized crime.[36] In *Wickard* and *Gonzales*, the courts continued, the litigants had made conscious decisions to engage in activities –growing wheat or cultivating marijuana– and that these activities affected markets for those products, so the litigants had voluntarily placed themselves within the stream of interstate commerce. According to the courts, however, these cases staked out the outer boundaries of the Commerce Clause. But those who fail to purchase health insurance engage in no action, and they do not place themselves within the stream of interstate commerce.

36. *Perez v. United States*, 402 U.S. 146, 155 (1971).

As a result, the individual mandate represents a congressional exercise of power unsupported by earlier precedents and "beyond the historical reach of the Commerce Clause." Moreover, as the *Florida* court argued, upholding the individual mandate would convert the federal commerce power into an unlimited grant of authority:

> The problem with this legal rationale, however, is that it would essentially have unlimited application. There is quite literally no decision that, in the natural course of events, does not have an economic impact of some sort. The decisions of whether and when (or not) to buy a house, a car, a television, a dinner, or even a morning cup of coffee also have a financial impact that –when aggregated with similar economic decisions– affect the price of that particular product or service and have a substantial effect on interstate commerce. To be sure, it is not difficult to identify an economic decision that has a cumulatively substantial effect on interstate commerce; rather, the difficult task is to find an economic decision that does not.[37]

Thus, in order to limit federal power and safeguard both state power and individual liberty, the two courts concluded that that "the law's requirement that most Americans obtain insurance exceeded the regulatory authority granted to Congress under the Commerce Clause."

The other three district courts that addressed the constitutionality of the individual mandate viewed the situation quite differently. First of all, they rejected the notion that the individual-mandate provision regulates "inactivity." Those who choose not to purchase insurance may be making an economic decision to try to pay for health care services later, out of pocket, rather than now through the purchase of insurance. Alternatively, they may be making a decision to participate at some later point in time or they may expect that their health-care needs will be met by government or health-care providers, if they are unable to shoulder the costs. Whatever the economic calculus, those who purchase health insurance and those who fail to do so are both making choices among alternatives; and because these economic decisions have practical consequences, just like economic

37. *Florida v. U.S. Department of Health and Human Services*, at 53.

activities, they can be regulated by Congress if they have a substantial effect on interstate commerce. Thus, the Commerce Clause covers "economic decisions" as well as "economic activity."

In determining whether individual decisions to purchase or not purchase health insurance have a sufficient effect on interstate commerce to justify congressional regulation, the two district courts have relied on *Wickard* and *Raich,* which recognized congressional authority to regulate local matters that have substantial economic effects, even when the regulated individuals claim not to be participating in interstate commerce. Moreover, the fact that a single decision or action has a trivial effect on interstate commerce is irrelevant, as long as the class of which it is an instance has a non-trivial effect. The courts therefore concluded that the sum of individual decisions to participate or not participate in the health insurance market has a critical collective effect on interstate commerce. They also noted that the individual mandate was necessary to guarantee success of larger health care scheme, because without full market participation, the financial foundation supporting the health care system would fail. Thus, even if the individual mandate did not address "commerce" directly, it was necessary for implementing health-care reform and thus constitutional under the Necessary and Proper Clause.

What, then, are the legal bases for the disagreement among the courts? Those judges who have upheld the constitutionality of the individual mandate have emphasized that it is consistent with recent Supreme Court precedent and that it is necessary for the success of the health-care reform. In so doing, they have assumed that if the Constitution authorizes the federal government to pursue an objective, it must also grant the federal government the means necessary to achieve that objective. In contrast, those judges who have struck down the individual mandate have emphasized a structural concern, namely, that the Constitution was designed to create a federal balance. Therefore, any interpretation of congressional power that destroys that federal balance must be erroneous.

3.2. The Taxing Power

The key taxing-power issue raised by PPACA is whether the assessment it imposes on those who fail to purchase insurance coverage

is a "tax" or a "penalty" or "fine." If the assessment is a tax, then the Constitution merely requires that it be for the "general welfare," and hence the assessment would be constitutional. For Congress may use its power under the tax clause even for purposes that would exceed its power under other provisions of Article I.[38] But if the assessment is a penalty or fine, then it must be justified as necessary and proper to the execution of an enumerated power. Under this understanding, the Tax Clause does not come into play at all. If Congress lacks the authority to require an individual to participate in the health-care market, it also lacks the authority to impose a penalty for failure to do so. Conversely, if Congress has the power under the Commerce Clause to require participation in the health-care market, then it has the power under the Necessary and Proper Clause to impose a fine for failure to do so.[39]

Having concluded that Congress had the power under the Commerce Clause to impose the individual mandate, the District Court for the Eastern District of Michigan did not address whether the assessment was a tax or a penalty. However, the other two district courts did address the issue, and both concluded that it was a penalty. Both courts acknowledged that the fact that that the assessment served a regulatory purpose was irrelevant to its constitutionality, observing that all taxes have regulatory effects and that the Supreme Court had abandoned the distinction between revenue-raising and regulatory taxes. But looking closely at the text of the statute, they noted that PPACA itself called the exaction imposed for violation of the individual coverage provision a "penalty," whereas it described other provisions in PPACA as "taxes." Although the penalty provision was subsequently placed in the section of the tax code entitled "Miscellaneous Excise Taxes," the courts pointed out that the tax code itself instructed that no inferences for statutory interpretation should be drawn from such placement. Finally, the very nature of the exaction, the fact that it encourages compliance with the Act by imposing a

38. *United States v. Sanchez*, 340 U.S. 42, 44 (1950).

39. There is a related statutory issue as well. The Anti-Injunction Act states 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." (26 U.S.C.sec. 7421(a)). Thus the conclusion that the assessment was a tax would deprive the court of jurisdiction to hear the constitutional challenge to PPACA. Since this is not pertinent to federalism concerns, we do not analyze this issue in depth.

punitive expense on conduct that offends the Act, supported the conclusion that it is a penalty, not a tax. Thus, the penalty had to be justified as necessary and proper to the exercise of congressional power under the Commerce Clause.

3.3. Severability

When a provision in a statute is declared unconstitutional, this raises questions about the continuing validity of the surviving parts of the statute. Should these continue to operate, or should the entire statute be invalidated because the legislature intended to pass all of the law or none of it? This is the issue of the "severability" or "non-severability" of statutory provisions. If the legislature includes in the statute itself language indicating that one or more provisions are severable, that is, that their invalidation should not prevent the enforcement of the rest of the statute, that determination is usually binding on the court.[40] This makes sense if the key concern in deciding on severability is whether the aims of the legislature can be achieved absent a particular provision, because the legislature is typically the best judge of that. But if the legislature does not specify in a statute what provisions (if any) are severable, then a court must use its best judgment in resolving the matter. It can look to the legislative history of the statute, statements of key supporters, or the reports of congressional committees. It may also consider whether Congress considered but rejected proposals to make provisions severable. Or courts may consider "whether, when the invalid provision is stricken, the remainder is complete in itself and capable of standing alone or being enforced consistent with the apparent legislative intent."[41]

40. This is not always the case. Courts tend to view legislative statements as to severability as rules of construction rather than as inexorable commands. See John Copeland Nagle, "Severability," *North Carolina Law Review* 72 (1993): 212-13. For an example of a court refusing to honor a legislative statement of non-severability, see *Stilp v. Commonwealth*, 905 A.2d 918 (Pa. 2006).

41. Otto J. Hetzel, Michael E. Libonati, and Robert F. Williams, *Legislative Law and Statutory Interpretation: Cases and Materials*, 4th ed. (Newqrk, NJ: LexisNexis, 2008), p. 692. See, for example, *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983), in which the U.S. Supreme Court struck down a single provision of an enactment but upheld the rest of the statute, noting that what remained was "fully operative as law."

The health care law enacted by Congress did not include language as to the severability of the individual mandate. The Obama administration has suggested that were the individual mandate to be invalidated, the Act's provisions preventing insurance companies from discriminating against persons with pre-existing conditions would also be invalidated because they are inseparably linked. However, it has insisted that this would not necessitate the invalidation of the entire Act, noting that courts have a constitutional obligation to preserve as much of a statute as possible.[42] Some commentators unsympathetic to PPACA have challenged this latter conclusion, arguing that judges should not assume that provisions are severable in the absence of an expression of clear congressional intent on the matter.[43] Those district courts that upheld the individual mandate of course did not need to address the issue of severability. The district court in *Cuccinelli* that struck down the individual mandate nonetheless upheld the constitutionality of the overall law. But the district court in *Florida* reached the opposite conclusion. Although acknowledging that certain elements of PPACA could function independently, the court argued that "the individual mandate is indisputably necessary to the Act's insurance market reforms, which are, in turn, indisputably necessary to the purpose of the Act."[44] However, because there might be other ways to incentivize a healthy insurance pool through the tax code that could pass constitutional muster, one may doubt that appellate courts would strike down PPACA in its totality rather than affording Congress a chance to remedy any constitutional defects.

4. Conclusion

The rulings of the district courts are not, of course, the last word on the constitutionality of the individual mandate. Their rul-

42. The White House's position is discussed in Randy Barnett, "White House Concedes Individual Mandate Is Not Severable," at: http://volokh.com/2010/12/09/white-house-concedes-individual-mandate-is-not-severable/.

43. See Joshua Gordon, "From a Budgetary Perspective, the Health Care Individual Mandate Is Not Severable," at; http://www.concordcoalition.org/tabulation/budgetary-perspective-health-care-individual-mandate-not-severable, and Maureen Martin, "Why Judge Hudson Was Wrong on Severability of the Individual Mandate," at: http://www.heartland.org/healthpolicy-news.org/article/29048/Why_Judge_Hudson_Was_Wrong_on_Severability_of_the_Individual_Mandate.html.

44. *Florida v. U.S. Department of Health and Human Services*, at 73.

ings have been appealed to the pertinent federal courts of appeals, which will also rule on the constitutionality of the individual mandate and on severability, and it is a foregone conclusion that the dispute will wind up before the U.S. Supreme Court. Prediction is always dangerous, but it would be highly unusual for the Supreme Court to strike down the centerpiece of the political agenda of a president and his party, so I would expect that a divided Court will uphold the constitutionality of the individual mandate. However, should the Supreme Court strike down the individual mandate, there might be constitutionally unexceptionable substitutes available.

Among these possibilities is replacing the individual mandate with a system that permits consumers to buy insurance with no limits on preexisting conditions, but only when they first start a job or first become eligible to buy coverage. Those who fail to purchase at these points would be able to obtain coverage later on, but they would not be covered for any pre-existing condition for two years. Alternatively, it has been suggested that higher premiums to those who wait to enroll, much as Medicare does today. A third suggestion is to create a very limited "open season" each year during which people could enroll. If they failed to sign up in that narrow window, they would have no coverage until the next enrollment period.[45]

Yet even if these substitutes do not raise constitutional issues, that does not mean that they are politically feasible. In the 2010 congressional elections, the Republicans gained control of the House of Representatives and reduced considerably the Democratic majority in the Senate. Republican candidates ran in opposition to President Obama's health care plan, with many pledging to seek its repeal. Although repeal is impossible, given Democratic control of the Senate and the presidency, Republicans will not support new legislation designed to effectuate the Democratic health care plan. Indeed, they can be expected to use their control over appropriations to

45. Several alternatives are identified in Howard Gleckman, "Are There Alternatives to the Individual Mandate in the Health Reform Law?" at: http://taxvox.taxpolicycenter.org/2011/01/18/are-there-alternatives-to-the-individual-mandate-in-the-health-reform-law/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+taxpolicycenter%2Fblogfeed+%28TaxVox%3A+the+Tax+Policy+Center+blog%29&utm_content=Google+Reader. This article also identifies sources where alternatives to the individual mandate are discussed at length.

undermine the program by starving implementation efforts. Indeed, one can expect such efforts to undermine the program regardless of how the Supreme Court rules. And should the Supreme Court strike down the individual mandate and rule that it is not severable, the Republicans will certainly not support reenactment of a slightly modified PPACA.

It is important to recognize that this Republican opposition rests not on federalism concerns but on disagreements with expanded governmental involvement in the health care field, sometimes denounced as "socialism." In addition, opponents of Obamacare share a concern about how the individual mandate affects individual liberty. If the federal government can tell citizens that they must spend their money on health insurance, it is argued, then the government can in principle tell them how they shall spend the rest of their money as well. Thus, while constitutional objections in the United States may be framed in terms of federalism, principled political support for federalism is no longer a feature of American policies –if it ever was. There is a principled concern about the threat posed by concentrated political power, but the solution is sought in reducing the size and reach of government, not in dividing political power between federal and state governments.

ABSTRACT

President Barack Obama proposed a major overhaul of the American health system, and in 2010 the U.S. Congress enacted his proposal, the Patient Protection and Affordable Care Act. Opponents of the Act challenged its constitutionality in federal court, claiming that it exceeds the powers granted to the federal government under the Commerce Clause and the Necessary Proper Clause of the federal Constitution. Some courts have upheld the law, but others have agreed with the critics, in particular ruling that the provision requiring citizens to buy health insurance is unconstitutional. Eventually the U.S. Supreme Court will rule on the issue. This article traces the controversy, surveys the interpretation of pertinent constitutional provisions in past cases, analyzes the constitutional arguments presented by proponents and opponents of the Act, and concludes that the Act is constitutional.

Key words: Health care; commerce clause; U.S. Constitution; judicial review; individual mandate.

RESUM

L'any 2010 el Congrès dels EUA va promulgar la Llei de protecció del pacient i d'assistència sanitària assequible, d'acord amb la proposta presentada pel president Barack Obama per tal de revisar, a gran escala, el sistema de salut americà. Els contraris a la Llei n'han qüestionat la constitucionalitat davant el Tribunal Federal al·legant que excedeix les competències que la Clàusula de comerç i la Cláusula necessària i justa de la Constitució federal atorguen al Govern federal. Alguns tribunals han defensat la Llei, però d'altres han donat suport a les opinions dels crítics i han determinat que la disposició que exigeix que els ciutadans han de subscriure una assegurança mèdica és inconstitucional. Per tant, en última instància, serà el Tribunal Suprem dels EUA qui decidirà sobre el tema. Aquest article fa un seguiment de la controvèrsia, examina la interpretació de les disposicions constitucionals pertinents en casos anteriors, analitza els arguments constitucionals que presenten defensors i detractors de la Llei, i conclou considerant que aquesta és constitucional.

Paraules clau: assistència sanitària; clàusula de comerç; Constitució dels EUA; revisió judicial; mandat individual.

RESUMEN

En el año 2010 el Congreso de los EE.UU. promulgó la Ley de protección del paciente y de asistencia sanitaria asequible, de acuerdo con la propuesta presentada por el presidente Barack Obama a fin de revisar, a gran escala, el sistema de salud americano. Los contrarios a la Ley cuestionaron su constitucionalidad ante el Tribunal federal alegando que excedía las competencias que la Cláusula de comercio y la Cláusula necesaria y justa de la Constitución federal otorgan al Gobierno federal. Algunos tribunales han defendido la Ley, pero otros han apoyado las opiniones de los críticos y han determinado que la disposición que exige que los ciudadanos han de suscribir un seguro médico es anticonstitucional. Por lo tanto, en última instancia, será el Tribunal Supremo de los EE.UU. quien decidirá sobre el asunto. Este artículo hace un seguimiento de la controversia, examina la interpretación de las disposiciones constitucionales pertinentes en casos anteriores, analiza los argumentos constitucionales presentados por defensores y detractores de la Ley, y concluye considerando que ésta es constitucional.

Palabras clave: asistencia sanitaria; cláusula de comercio; Constitución de los EE.UU.; revisión judicial; mandato individual.