The Constitutionality of the Patient Protection and Affordable Care Act in the Courts of Appeals

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Having undergone an extensive process of political discussion and debate, the ACA (properly the Patient Protection and Affordable Care Act) is now under intensive legal challenge with over 20 different cases from both states and organizations and individuals having been initiated.\(^1\) The challengers argue that the Act lacks a constitutional basis and/or infringes on their constitutional rights. These cases involve a fascinating intersection of legal, political and policy issues and, regardless of the outcome, will have important implications for the future direction of US health care policy. There have now been four decisions of the courts of appeal on the substantive issues involved with the courts involved coming to different conclusions as to the constitutionality of the legislation (Thomas More Law Ctr. v. Obama, 651 F.3d 529, (6th Cir. 2011); Florida v. U.S. Dep’t of Health and Human Servs., 648 F.3d 1235, (11th Cir. 2011); Liberty Univ., Inc. v. Geithner, No. 10-2347, (4th Cir. Sept. 8, 2011) and Seven Sky v Holder, No 11-5047, (DC Cir. Nov 8, 2011)). This article discusses the issues involved, in particular whether the individual mandate is constitutional under the Commerce Clause of the US Constitution and analyzes how the courts of appeal have addressed this issue in the cases to date. It considers how the case may be addressed by the US Supreme Court.

The US health care system

As the OECD (2008) has pointed out, Americans consumed $7,290 of health services per person in 2007, almost two-and-a-half times more than the OECD average of just under $3,000 (adjusted for the differences in prices levels in different countries). This represents 16% of the US Gross Domestic Product which was by far the highest share in the OECD and almost double the average of 8.9% in OECD countries overall. Despite this level of spending (and notwithstanding that in some areas the US has extremely high quality health care), the US has lower life expectancy than most OECD countries (78.1; average is 79.1), and is below average on a wide range of other measures, including infant mortality, potential years of life lost, and ‘amenable mortality’ (i.e. mortality that can be averted by good health care) (see also Carey et al. 2009).

One of the reasons for the rather unsatisfactory situation is perceived to be the structure of the US health care system. Health care reform has, of course, been on the US policy agenda for some time. Although common in European countries and advocated by some experts, a move to a single-payer system for most citizens would not seem to have significant political support (Blake and Adolino 2001; Gordon 2003, Gottschalk 2008). Therefore, reform centers on changes to the existing mix of publicly supported care for those on low incomes and private care (supported by health insurance) for the rest of the population. One of the

\(^1\) For legal materials on these cases and links to academic commentary see the excellent [http://acalitigationblog.blogspot.com/](http://acalitigationblog.blogspot.com/)
difficulties in this area is that research shows that about 17 per cent of the population (about 50 million people) had no health insurance in 2009. As one might expect, non-insurance is related to income with over one-quarter of those with an income of below 25,000 having no insurance. However, non-insurance is by no means confined to the low income and even amongst those earning over $75,000 per annum, almost one-in-ten (9 per cent) or 10 million people had no health insurance. The lack of comprehensive cover means that persons may have difficulty in paying for the own health needs. Given the unpredictability of health needs and the very high cost of health care in the US, many persons may find that health care costs can lead to bankruptcy (Himmelstein et al. 2005; 2009; Dranove and Millenson, 2006). This situation is also impacted by the fact that emergency medical treatment must be provided regardless of ability to pay. Research for Congress has estimated that $43 billion in unpaid medical care was provided in 2008. These costs were of course shifted to other parties (cost-shifting) with consequent increases in the costs of health insurance. However, earlier proposals for major reform of the health system have, of course, been unsuccessful (see, for example, Steinmo and Watts 1995; Brady and Kesler 2010).

The OECD has argued that policies were required to expand coverage substantially and that this could be facilitated by requiring community rated and guaranteed issue policies, thus disconnecting the individual cost of insurance from individual health risks (OECD 2008). In addition, the OECD pointed out that this approach would have a greater impact on coverage if accompanied by a requirement to be insured, as otherwise healthy people may choose to be uninsured rather than to pay community rated premiums, which would be higher than experience rated premiums for healthy people. After extensive political debate the Obama administration finally succeeded in having legislation adopted by Congress which included health insurance reforms along these lines (Jacobs and Skocpol, 2011). The battleground for health care reform has now turned to implementation.

The Health Care Reform Act

The Act is a massive piece of legislation running to 2,700 pages. However, it contains five key measures designed to improve access to the health care and health insurance markets, and to reduce the escalating costs of health care. First, the Act builds upon the existing system of employer-based health insurance by establishing tax incentives for small businesses to purchase health insurance for their employees and requiring certain large employers to offer health insurance to their employees (referred to as the ‘employer mandate’). Second, it provides for the creation of state-operated ‘health benefit exchanges’. These exchanges will allow individuals and small businesses to use their collective buying power to obtain competitive health insurance. Third, it expands federal programs to assist the poor with obtaining health insurance. For eligible individuals who purchase insurance through an exchange, the Act offers federal tax credits for payment of health insurance premiums, and authorizes federal payments to help cover out-of-pocket expenses. The Act also expands eligibility for Medicaid (as discussed in more detail below). Fourth, the Act bars certain practices in the insurance industry that have prevented individuals from obtaining and maintaining health insurance. The ‘guaranteed issue’ requirement bars insurance companies from denying coverage to individuals with preexisting conditions, and the ‘community rating’ requirement prohibits insurance companies from charging higher rates to individuals based on their medical history. Finally,
and arguably as a necessary complement to the guaranteed issue and community rating reforms, the Act imposes an ‘individual mandate’ to maintain ‘minimum essential coverage’ or, in default, to pay a ‘shared responsibility payment’ which will be collected by the IRS. The individual mandate will take effect in 2014 and requires every ‘applicable individual’ to obtain ‘minimum essential coverage’ on an ongoing basis.

The challenged provisions of the Health Care Reform Act

Only a small number of specific provisions of the Act are currently under challenge. These are:

- The ‘individual mandate’ i.e. the minimum coverage provision of the Act which requires that all private citizens maintain minimum essential coverage under penalty of federal law.

- The ‘shared responsibility payment’ provision provides that, beginning in 2014, taxpayers subject to the minimum coverage provision who fail to obtain qualifying coverage will be assessed a penalty, reportable with their tax returns.

- The Medicaid amendments which expand and alter the Medicaid program by extending the program to include all individuals under the age of 65 with incomes up to 133% of the federal poverty line. This would require additional funding from the states (insofar as they chose to remain part of the Medicaid program).

It is argued that

- the individual mandate and the related ‘penalty’ exceed Congress’s authority under the Commerce Clause;

- the individual mandate and the related ‘penalty’ exceed Congress’s authority under the taxing power;

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2 A much wider range of issues were raised initially before the District Courts but these were all dismissed and none appear to pose a live issue. In addition, the employer mandate (whereby ‘large employers’ are required to provide their employees with a prescribed minimum level of health insurance coverage) was challenged in Florida but was dismissed by the court of appeals on the basis of Supreme Court precedent, see also Judge Davis (dissenting) in Liberty University. The Supreme Court has now refused to grant a petition of certiorari in relation to this issue and, while such a refusal does not – in legal terms – indicate that the Court approves the decision below, in practice this issue would now also appear to be longer live in relation to the ACA. The constitutionality of the religious exemptions to the Act were also in issue in Liberty University but were not reached by the majority (on the basis of their views as to the AIA). Judge Davis (dissenting) would have ruled that they were valid as did the courts below. A small number of additional issues have been raised in pending District Court cases but it seems somewhat unlikely that these will survive to a higher judicial level.

3 Section 1501(b) of the Act adds section 5000A(a) to the Internal Revenue Code (IRC), Title 26 U.S.C. (IRC), which provides: An applicable individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage for such month.

4 Section 1501(b) of the Act inserts section 5000A(b) of the IRC which provides: If a taxpayer who is an applicable individual, or an applicable individual for whom the taxpayer is liable under paragraph (b), fails to meet the requirement of subsection (a) for 1 or more months, then, except as provided in subsection (e), there is hereby imposed on the taxpayer a penalty with respect to such failures in the amount determined under subsection (c). . . .
• the Act coerces and commandeers the states with respect to Medicaid by altering
and expanding the program in violation of Article I and the Ninth and Tenth
Amendments (raised only in Florida).

There have now been four decisions by Courts of Appeals which have considered the
substantive aspects of these challenges: two have upheld the constitutionality of the
mandate under the Commerce Clause, one has declared the mandate to be
unconstitutional, while one has ruled that the Anti-Injunction Act (AIA) deprives the courts
of jurisdiction at this time. In Thomas More Law Centre, the court of appeals for the Sixth
Circuit (CA6) by a 2-1 majority upheld the constitutionality of the mandate under the
Commerce Clause and in Seven Sky the court of appeals for the DC circuit (CADC) – again by
a 2-1 majority – came to the same conclusion. However, in Florida the court of appeals for
the Eleventh Circuit (CA11) ruled that the mandate did not have a constitutional basis in
either the Commerce Clause (read in the light of the Necessary and Proper Clause) or the
Tax Clause. The Florida court rejected the argument that the Medicaid expansion was
unconstitutional. Finally, in Liberty University, the court of appeals for the Fourth Circuit
(CA4) – again by a 2-1 majority – ruled that the case was currently barred by the Anti-
Injunction Act. Of the 10 judges who expressed a view on the substance of the individual
mandate, six would have upheld it under the Commerce Clause, three would have rejected
it as unconstitutional, and only one (Judge Wynn in Liberty University) would have upheld it
under the Tax Clause. As discussed below, the Supreme Court has now granted petitions of
certiorari in relation to a number of aspects of this case and will consider the issues
(probably) in March 2012 with a judgment expected around July 2012. In the next section of
this article we discuss the key points raised in these decisions.

The Commerce Clause

5 In addition, CA4 (the same court that gave the Liberty University ruling) held in Virginia that the State did not
have standing to challenge the individual mandate on the basis that it was in conflict with the Virginia Health Care Freedom Act (VHCFA); Virginia v. Sebelius, 656 F.3d 253 (4th Cir. 2011). The individual mandate did not
impose any obligation on Virginia and the CA4 ruled that declaratory legislation such as the VHCFA – which
regulated nothing and provided for no state program – could not provide standing as to allow this would be to
convert the federal jurisdiction into a forum for the vindication of a State’s generalized grievances against the
conduct of the Federal Government. In addition, in two cases, courts of appeal have rejected claims on the
basis that the plaintiffs lacked standing on the facts (or on the facts as pleaded): Baldwin v Sebelius, No. 10-
56374 (9th Cir., August 12, 2011) and New Jersey Physicians v President, No. 10-4600 (3rd. Cir., August 3,
2011).

6 A majority of that court held that the mandate was not justified under the Tax Clause.

7 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 a person is the person against whom such tax was assessed.’ Both CA6 (Thomas More) and CADC (Seven Sky, Judge Kananuagh dissenting on this point) rejected
the view that the AIA barred the suit arguing that the mandate was not covered by the AIA. CA11 did not
explicitly discuss the issue.

8 And these comments were purely obiter as Judge Wynn agreed with the opinion of the court that the
challenge was barred by the AIA. Chief Judge Motz in Liberty expressed no views on the substance while Judge
Kavanaugh (dissenting in Seven Sky on the basis that he felt the challenge was barred by the AIA) expressed
lengthy views on the substance but these related mainly to the type of legislation he would have preferred to
have been considering and do not give clear guidance as to his views on that which was, in fact, before him.
As Judge Martin pointed out (*Thomas More* at 14)

States have authority under their general police powers to enact minimum coverage provisions similar to the one in the Affordable Care Act. However, the federal government has no police power and may enact such a law only if it is authorized by one of its enumerated powers.

The main argument against the Act is that it lacks a constitutional basis. Both Congress and the federal government have relied primarily on the argument that it is grounded in the Commerce Clause. The Commerce Clause (U.S. Const. art I, § 8, cl. 3) provides that Congress shall have Power

> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

Obviously, only inter-state commerce is relevant to this case. In interpreting the Commerce Clause, the Supreme Court has set out a three-prong inquiry to determine if a federal law falls within this grant of authority to regulate commerce amongst the states (*Perez v. United States*, 402 U.S. 146, (1971); *United States v. Lopez*, 514 U.S. 549, 558-59 (1995)). This inquiry allows that Congress may regulate:

1. The use of the channels of interstate commerce,
2. To protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, and
3. Those activities that substantially affect interstate commerce.

In this case, only the third prong is relevant and the argument turns on whether or not the individual mandate can be seen as a regulation of activities that substantially affect inter-state commerce. It is clear that the provision of health care insurance involves interstate commerce and that Congress may regulate such insurance under the Commerce Clause (*United States v South-Eastern Underwriters Ass’n*, 322 U.S. 533 (1944)). The key question is whether the individual mandate is a legitimate exercise of Congressional powers under that Clause. The Supreme Court has ruled that in assessing the scope of Congress’ authority under the Commerce Clause, the court’s task ‘is a modest one’ (*Gonzalez v. Raich*, 545 U.S. 1, 22 (2005)). The court should not itself determine whether the regulated activities ‘substantially affect interstate commerce in fact, but only whether a ‘rational basis’ exists for so concluding.’

The argument against, on first sight, looks appealing. Those opposed to the Act basically argue that a decision *not* to engage in a contractual relationship (concerning health insurance) has nothing to do with inter-state commerce and that government is trying to regulate *inactivity*. They argue that the federal government had never attempted to regulate inactivity, or a person’s mere existence within the national boundaries, under the auspices of the Commerce Clause and that if the Act is found constitutional, the Commerce Clause would provide Congress with the a general police power which would give it the authority to regulate every aspect of citizens’ lives, including the choice to refrain from acting.

All the cases have discussed a small number of key Supreme Court decisions. The first key case is *Wickard v. Filburn* (317 U.S. 111 (1942)) in which the Supreme Court upheld a penalty on wheat grown for home consumption despite the farmer’s evidence that he did not
intend to put the commodity on the market. The Court held it was sufficient that the existence of home-grown wheat could ‘supply a need of the man who grew it which would otherwise be reflected by purchases in the open market,’ thereby undermining the efficacy of the federal price stabilization scheme (at 128). Between 1937 and 1994 no law was struck down on the grounds that it was not authorized under the Commerce Clause. However, more recently, the Supreme Court has placed limits on the reach of that Clause. In United States v. Lopez, the Court did not uphold the constitutionality of the Gun-Free School Zone Act of 1990 which criminalized possession of a gun within a statutorily defined school zone. The government argued that possession of a firearm in a school zone may result in violent crime, which can be expected to affect the national economy in several ways including the costs associated with violent crime, the unwillingness of individuals to travel to areas that are perceived to be unsafe, and the threat to the educational process, which will result in a less productive citizenry. However, the Supreme Court held that Congress could not ‘pile inference upon inference’ to find a link between the regulated activity and interstate commerce and that possessing a gun in a school zone was not an economic activity. Nor was the prohibition against possessing a gun ‘an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.’ For similar reasons, in United States v. Morrison (529 U.S. 598, (2000)), the Court did not uphold the cause of action created in the Violence Against Women Act, ruling that any link between gender-motivated violence and economic activity could be established only through a chain of speculative assumptions.

But the direction of the Court’s decision has not all been one way. Sixty years after Wickard, in Gonzales v. Raich, the Supreme Court upheld Congress’s authority to prohibit the possession of home-grown marijuana intended solely for personal use. The Controlled Substances Act ‘regulate[d] the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market.’ The restriction on home-grown marijuana for personal use was essential to the Act’s broader regulatory scheme. Therefore, although the case law gives clear guidance as to how far the courts may (and may not) go in interpreting the Commerce Clause, the cases considered address quite different factual situations and the Courts have come to quite different interpretations of how to apply the principles they establish to the facts here.

**Framing the issue**

In the lower courts, and in much of the early academic debate, there was much emphasis on the distinction between activity and inactivity. It was argued by the plaintiffs that the Government was attempting to regulate inactivity and that that this was unprecedented and exceeded the powers of federal government under the Commerce Clause. As Judge Sutton in Thomas More (at 40) described it, this appeared to be the ‘most compelling’ argument against the mandate. However, this distinction has largely been rejected by the courts of appeal as unworkable. The wording of the Commerce Clause and the jurisprudence of the Supreme Court do not support such a distinction. Indeed, the courts have pointed out that the Supreme Court has rejected similar categorical distinctions, such as that between the direct and indirect effects on interstate commerce. Judge Sutton considered the issue in some detail and pointed out the difficulties in relying on such an approach pointing to the practical difficulties on distinguishing between activity and inactivity (at 43 et seq). Fundamentally, he argues, ‘No one is inactive when deciding how to
pay for health care, as self-insurance and private insurance are two forms of action for addressing the same risk’ (at 45).

However, the activity/inactivity dichotomy has largely been reconceptualized, in a somewhat more sophisticated form, in the manner in which courts have framed the key question. Courts which have identified the issue as being about access to health care have upheld the mandate while courts which have framed the issue as about non-participation in health insurance have found it to be unconstitutional. Thus CA4 and CADC have identified the issue as being about health care while CA11 has focused more narrowly on health insurance. For the latter, non-participation in health insurance is seen as being ‘outside the stream of commerce’ (as in Lopez and Morrison) rather than as inactivity (Florida at 124). To the contrary, it has been argued that

The Act considered as a whole makes clear that Congress was concerned that individuals maintain minimum coverage not as an end in itself, but because of the economic implications on the broader health care market. Virtually everyone participates in the market for health care delivery, and they finance these services by either purchasing an insurance policy or by self-insuring (Thomas More at 17).

**Standard of review**

The courts have differed as to the standard of review to be applied. In principle, this issue is quite clear (as quoted above). However, the Florida court applied a higher standard of review and argued that the mandate was ‘woefully overinclusive’ in that it was not confined to persons do not pay for a portion of their health care (i.e., the cost-shifters) or even to those who consume health care. With respect, this is a judgment for Congress to make as long as it has a rational basis for doing so (which it clearly does). As the Supreme Court stated in *Raich* (at 17)

[w]hen Congress decides that the total incidence of a practice poses a threat to a national market, it may regulate the entire class.

**Necessary and Proper Clause**

One interesting question is the role of the ‘Necessary and Proper Clause’. As the Florida court argued (at 93)

As it relates to the commerce power, the Supreme Court has essentially bound up the Necessary and Proper Clause with its substantial effects analysis. In other words, the interpretation of the Commerce Clause set out above and, in particular, the third leg of the Commerce Clause (‘those activities that substantially affect interstate commerce’) is derived from the Commerce Clause read in conjunction with the Necessary and Proper Clause.

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9 Art. 1 § 8, cl. 18 provides that Congress shall have Power ‘To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.’
In addition, Justice Scalia (Raich, 545 U.S. at 37) has stated that under the Necessary and Proper Clause

Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce.

However, whether this represents the law as it stands (or may become) remains a matter of debate. Judge Martin (who gave the opinion of the court in Thomas More)10 appeared to rely on this dictum (albeit without attribution) for his view that Congress may ‘regulate even non-economic intrastate activity if doing so is essential to a larger scheme that regulates economic activity’ (at 15). He held that the mandate was justified under the Commerce Clause and, in the alternative, under the Necessary and Proper Clause.11

The CA11 did not agree that the Necessary and Proper Clause justified the mandate for a number of reasons. First, both rather technically and rather questionably, it argued that the Supreme Court has implied that the ‘larger regulatory scheme’ doctrine primarily implicates as-applied challenges as opposed to the facial challenge at issue in this case (at 158 et seq.). Second, it argued that an individual’s decision not to purchase health insurance in no way burdened or obstructed Congress’s ability to enforce its regulation of the insurance industry (at 164)

Congress’s statutory reforms of health insurance products—such as guaranteed issue and community rating—do not reference or make their implementation in any way dependent on the individual mandate.12

Now besides being factually incorrect, it is simply not the role of the courts to make this assessment. As long as Congress has a rational basis to take the view that the mandate is essential, the courts must accept this.13

The CA11 went on to argue that the government’s assertion that the individual mandate is ‘essential’ to the broader regulation was further undermined by the facts that Congress had exempted certain groups from the mandate and had ‘hamstrung its own efforts to ensure compliance with the mandate by opting for toothless enforcement mechanisms.’ Again, leaving aside issues as to the accuracy of these statements, these assessments are simply not the role of the court.

The unprecedented nature of the mandate

It is undeniable that the mandate (in its particular form) is unprecedented. Government attempts to counter this point have tended rather to emphasize how unprecedented it is. And, as Judge Sutton pointed out, ‘[l]egislative novelty typically is not a constitutional virtue’

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10 However, Judge Sutton who concurred took a more narrow approach which, in effect, is the majority decision of CA6 and did not consider, in detail, the Necessary and Proper Clause.

11 Judge Graham (dissenting) did not agree as to the Necessary and Proper Clause (at 59 fn. 2).

12 On the factual accuracy, see the discussion by Judge Marcus (dissenting) at 256-57.

13 See, e.g., Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 197 (1824): ‘The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections are . . . the sole restraints on which they have relied, to secure them from its abuse.’
(Thomas More at 42). However, the presumption of constitutionality still applies and the courts have previously upheld ‘unprecedented’ legislation.

Several of the courts involved have expressed their concerns at the lack of any constitutional limiting factors which could delimit the government’s power to impose a mandate. The appalling vista of a mandate to purchase broccoli or (perhaps even worse) General Motors cars has been canvassed. The government has pointed to the ‘unique’ nature of the health care issue given the facts that (almost) everyone will require health care at some time; that the need for care is unpredictable; and that providers are legally required to provide care free (at least in emergency cases). Such factors do not apply, the government argues, in the case of the motor industry. As the CA11 has pointed out these are ‘circumstances’ rather than ‘principles’ and leave open the question as when a Congress can impose a mandate in future cases. Nonetheless, the Supreme Court – in cases such as Lopez and Morrison - has already laid down clear limits to the scope of the Commerce Clause and, arguably, future courts will be able to decide whether any proposed mandates are within those limits.

**Federalism and liberty concerns**

The plaintiffs have articulated federalism and liberty concerns and these have been acknowledged by the courts – most notably in Florida. Judge Sutton (in Thomas More at 51) referred to the ‘the lingering intuition—shared by most Americans, I suspect—that Congress should not be able to compel citizens to buy products they do not want’. However, the constitutional basis for these concerns is rather unclear. As regards liberty, the primary redress here might be expected to be the Due Process Clause of the Fifth Amendment. The plaintiffs’ arguments would have found support in the Supreme Court’s decisions in the years prior to the New Deal legislation of the mid-1930’s, when the Due Process Clause was interpreted to reach economic rights and liberties (Lochner v. New York, 198 U.S. 45, (1905)). However, this approach to due process has long been abandoned. Therefore, unless the law impinges on a fundamental right, the court need only review whether the legislature could reasonably conclude that the measure at issue is ‘rationally related’ to a legitimate end. No matter now conceived, it is clear that the issues involved in the mandate do not concern fundamental rights and that there is a rational basis for the mandate. All the lower courts have rejected due process challenges. Given that there ought to be some degree of comity to constitutional interpretation, there is no argument for smuggling a stricter approach to liberty into the interpretation of the Commerce Clause.

As regards federalism, this case is sometimes seen as being ‘not really about our health care system at all’ but ‘principally about our federalist system’ and raising ‘very important issues regarding the Constitutional role of the federal government’ (Florida v United States Dept of Health and Human Services 716 F.Supp.2d 1120, 1144-50 (N.D.Fla. 2010)). It is argued that health and insurance are both ‘traditional state concerns’ and that an expansive interpretation of the Commerce Clause should be avoided particularly where it would result in an invasion of these concerns by the federal government. Indeed the Supreme Court has indicated that this is a relevant issue in considering the scope of the Clause (United States v. Morrison, 529 U.S. at 615). The courts have generally accepted that health and insurance

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14 This provides that ‘[n]o person shall . . . be deprived of life, liberty, or property, without due process of law.’
have been traditional areas of state concern (*Florida* at 147). However, other courts have emphasized the expansive role which the federal government already plays in this area (including Medicaid, Medicare and the Employee Retirement Income Security Act (ERISA)). However, if the mandate falls within the scope of the Commerce Clause then federalism concerns are not, in themselves, sufficient to warrant a different outcome. Nor does the Tenth Amendment assist the plaintiffs. In *New York v United States* (505 US 144, 156 (1992)) the Supreme Court confirmed that specific Congressional constitutional authority trumps state authority:

>If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress.

This view is supported by looking at the history of the constitution and, as Professor Steven Schwinn points out, ‘a more robust alternative’ to the current wording of the Tenth Amendment was rejected by the Framers (Schwinn 2011). When looked at in depth, as Judge Sutton (*Thomas More* at 52) concluded, ‘[s]ometimes an intuition is just an intuition’.

### The Tax Clause

An alternative argument in support of the constitutionality of the individual mandate is that the minimum coverage provisions are justified by Congress’s expansive power to tax for the general welfare. The Constitution (Art I, § 8, cl. 1) provides that

> The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the . . . general Welfare.

Although a number of academic commentators have forcefully advanced this argument, it is noticeable that the government’s main reliance has been on the Commerce Clause and that it has relied on the taxation power only in the alternative. This is understandable given that there is an obvious threshold issue in invoking the taxation power in that the individual mandate (i.e. obliging an uninsured person to enter into a contract for health insurance) is simply not a tax. Most (if not all) of the arguments for the taxation power have glossed over this fundamental issue focusing on the argument that the penalty for not complying with the individual mandate is a tax. But even if one were to accept this argument, the taxation power cannot justify the individual mandate because the latter is simply not an exercise of the taxation power by any definition (any more than a law outlawing carrying firearms on school premises would be justified under the taxation power if Congress chose to impose a tax liability on persons in breach of the law). And all the District Courts which have, to date, considered the issue have rejected the argument that the mandate is supported by the Taxation Clause.

The question of whether the penalty for non-compliance with the individual mandate is a tax has been considered in some detail in *Florida* which held that the mandate was not within the scope of the Taxation Clause. This was for the simple reasons that (at 174)

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15 This says that ‘[t]he 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’. See Judge Marcus (dissenting in *Florida*) at 287-91.
The plain language of the statute and well-settled principles of statutory construction overwhelmingly establish that the individual mandate is not a tax, but rather a penalty.

The Act refers repeatedly to the penalty as a penalty although other sections of the ACA refer to taxes and previous versions of the Bill had referred to the shared responsibility payment as a tax.\(^{16}\)

**Severability**

The *Florida* court, having found the mandate to be unconstitutional, had to consider whether it could be severed from the rest of the Act or whether the entire ACA must fall. The Act does not contain a severability clause. In general, the Supreme Court has advised judicial restraint and has ruled that courts should sever any ‘problematic portions while leaving the remainder intact.’ However, the court must also determine whether the other provisions can function independently and remain ‘fully operative as a law.’ Two lower courts which had found the mandate unconstitutional had differed on the issue of severability. In *Virginia* the court decided that the best option was to sever only section 1501 and its directly-dependent provisions. However, while not differing as to the legal principles involved, Judge Vinson in *Florida* pointed out that the court must also decide if Congress, had it been presented with a statute that did not contain the struck part, would have preferred to have no statute at all. He concluded that it would as the mandate was ‘indisputably essential to what Congress was ultimately seeking to accomplish’ and accordingly he declared the entire Act unconstitutional.’ The CA11 (at 194) reversed this ruling holding 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.

It, therefore, struck down only the individual mandate.

**Medicaid**

In *Florida* the state plaintiffs argued that the Act’s expansion of the Medicaid program, under the Spending Clause, was unduly coercive under *South Dakota v. Dole*, 483 U.S. 203, 211, (1987). The Spending Clause (as interpreted by the Court) requires that (1) the exercise of spending power must be for the general welfare; (2) the conditions must be stated clearly and unambiguously; (3) the conditions must bear a relationship to the purpose of the program; and (4) the conditions imposed may, of course, not require states to engage in activities that would themselves be unconstitutional. The states relied on an additional

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\(^{16}\) Judge Wynn (concurring) in *Liberty University* stated that – if he had not ruled that the case was barred by the AIA – he would have upheld the mandate under the Tax Power (the only judge so far to take this position). He points out that the designation by Congress (as a tax or penalty) is not determinative [at 52]) but does not satisfactorily address the points made by CA11 (and many of the lower courts) as to the very clear designation in this case.
requirement, which has been described as the *Dole* coercion theory. This is based on a brief comment by the *Supreme Court* (*in Dole*) that

in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which ‘pressure turns into compulsion’.  

The coercion theory has been often discussed in case law and scholarship, but never actually applied. Indeed, the courts of appeal that have considered the theory have been almost uniformly hostile to it. The courts have rejected similar arguments specifically in relation to Medicaid as in *California v. United States* (104 F.3d 1086 (9th Cir. 1997)). However, CA11 took a rather expansive view of the coercion doctrine criticizing other courts for their refusal to apply it (at 63). The court of appeals found (at 64)

that *Dole* instructs that the Tenth Amendment places certain limitations on congressional spending; namely, that Congress cannot place restrictions so burdensome and threaten the loss of funds so great and important to the state’s integral function as a state—funds that the state has come to rely on heavily as part of its everyday service to its citizens—as to compel the state to participate in the ‘optional’ legislation.

However, it concluded, on the facts, that the Medicaid expansion was not unduly coercive relying on a number of factors. First, the Medicaid-participating states were warned from the beginning of the program that Congress reserved the right to make changes to it. Second, the federal government will bear most of the costs associated with the expansion. Third, states had adequate notice of the change to allow them to decide whether to continue participation in Medicaid or not. Fourth, states have the power to create alternative programs if they do not like Congress’ terms. Fifth, it was not a foregone conclusion that non-participating states would lose all their Medicaid funding (which was at the discretion of the HHS) (at 64-66).

**On to the Supreme Court**

Rather than seeking *en banc* review of any of these decisions, the parties applied to the Supreme Court for certiorari and on 14 November 2011, the Court granted the petitions of certiorari in relation to a number of issues raised in the *Florida* decision (and indeed added one issue of its own motion).  

These issues will now be heard by the Court in 2012 (probably in late March) and a decision will be given later in that year (probably by July 2012). The issues which the Court will hear are:

1) Whether the challenge to the minimum coverage provisions is barred by the Anti-Injunction Act?

2) If not, whether Congress has the power under Article I of the Constitution to enact the minimum coverage provision?

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17 See also *Steward Machine Co. v. Davis*, 301 U.S. 548, (1937)

18 The issue added concerned the AIA which had not been considered by CA11 in that case. Petitions in relation to *Thomas More* and *Liberty University* have been held by the Court and will presumably be disposed of on the basis of the outcome of the *Florida* litigation.
3) If the mandate is found to be unconstitutional, to what extent (if any) can the mandate be severed from the remainder of the Act or whether the ACA must be invalidated in its entirety? and finally

4) Does Congress exceed its enumerated powers and violate basic principles of federalism when it coerces States into accepting onerous conditions that it could not impose directly by threatening to withhold all federal funding under the single largest grant-in-aid program, or does the limitation on Congress’s spending power that the Supreme Court recognized in *South Dakota v. Dole* no longer apply?

Thus, the Court will first have to consider whether it can hear this case at all or whether the parties must wait till the Act comes into force and ‘tax collection’ commences before it can be heard. At this stage, both parties argue that the AIA does not apply but the Court must itself decide whether or not the AIA deprives it of jurisdiction. If the challenge gets over that hurdle, the Court must then consider whether the mandate is constitutional. The focus will be on the Commerce Clause (and Necessary and Proper Clause) but the Court can also consider whether the Tax Clause provides a basis (although, as we have seen, the weight of authority below is very definitely against this argument). If the Court finds that there is no constitutional basis, if must then consider whether to strike down only the mandate itself (as CA 11 did) or whether the entire ACA must be struck down (as the District Court decided in *Florida*). Finally, it must also consider whether the Medicaid provisions of the Act are unconstitutional. This was perhaps the most surprising aspect of the Court’s November order with most commentators having expected the Court to refuse to hear this aspect of the case. There had, after all, been no split in the courts below as to the interpretation of this concept. One must assume that the Court accepted this in order to clarify the status of the *Dole* ‘coercion doctrine’. But given the factors outlined in the CA11 decision, there will be considerable surprise if the Court actually strikes down part of the Act on these grounds.\(^{19}\)

On the mandate itself, predicting an outcome is more or less impossible. Recent informed predictions range from a clear majority upholding the Act to a majority against.\(^{20}\) And much commentary is so polarized that one might doubt the objectivity of some predictions. However, while the District Court decisions may have been less favorable than the Government expected, it may perhaps have gained some quiet satisfaction from the courts of appeals. Not only have a majority of courts upheld the ACA but two influential conservative judges (Judges Sutton and Silberman) have written opinions so that effect. Based on the Court’s recent Commerce Clause jurisprudence and the record of the courts below, one can perhaps safely predict that a unanimous decision is unlikely.

**Discussion**

From a legal perspective, one might expect that if the Court focuses on the Commerce Clause, as it has been interpreted to date, it should uphold the mandate as did the majority

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\(^{19}\) It has been suggested that the Court may have taken the issue for tactical purposes so that it can split its decisions – upholding the Act in part and striking it down in part. This is perhaps a rather cynical view of the Court’s approach but, in any case, one might suspect that if the Court strikes the individual mandate, the media and general public will not be paying too much attention to the other aspects of its ruling.

\(^{20}\) See [http://www.scotusblog.com/category/special-features/aca/](http://www.scotusblog.com/category/special-features/aca/)
of judges who have considered it to date. However, if a majority of the Court is influenced by the lack of constitutional limitations on the mandate and by liberty and federalist concerns about a mandate, the ACA case may become a major landmark in the federalism debate. Even if the Court does reject the facial challenge to the Act, it is likely that further challenges may be advanced to the ACA ‘as-applied’. If the Court were to go further and uphold the coercion argument (in relation to Medicaid) this would represent a real shift in the Court’s approach to the balance between state and federal powers.

From the perspective of political science the current saga might tend to re-establish a view of the United States as ‘a nation of courts and parties’ (Skocpol, 1992). It again emphasizes the role of institutions in US social policy and the importance of veto-points in the US system of governance (Blake and Adolino 2001). But, as Steinmo and Watts (1995) have highlighted, institutional barriers are not somehow accident or neutral in their distributional effect. Rather, as they emphasize, the ‘fragmented and federated national political system’ in the United States ‘yields enormous power to intransigent interest groups’, which in turn makes large-scale policy changes such as health reform difficult, if not impossible.

From a more political perspective, the timing of the litigation means that the Supreme Court will unfortunately end up in the middle of both the Presidential and Congressional election campaigns and in a no-win situation in that any substantive decision is likely to leave a significant body of voters (and politicians) dissatisfied. While the outcome of the ruling may have little impact on the Congressional elections, it could have a more important impact on the Obama campaign given that the ACA has been on the President’s main achievements,
References


