

# Congress, Courts, and Commerce: Upholding the Individual Mandate to Protect the Public's Health

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## I. Introduction

Despite historic efforts to enact the Patient Protection and Affordable Care Act (PPACA)<sup>1</sup> in 2010, national health reform is threatened by multiple legal challenges grounded in constitutional law. Premier among these claims is the premise that PPACA's "individual mandate" (requiring all individuals to obtain health insurance by 2014 or face civil penalties<sup>2</sup>) is constitutionally infirm.<sup>3</sup> Attorneys General in Virginia and Florida (joined by 25 other states) allege that Congress' interstate commerce powers do not authorize federal imposition of the individual mandate because Congress lacks the power to regulate commercial "inactivity."<sup>4</sup> Stated simply, Congress cannot regulate individuals who choose not to obtain health insurance because they are not engaged in a commercial venture. Several courts initially considering this argument have rejected it, but two federal district courts in Virginia and Florida have concurred, leading to numerous appeals<sup>5</sup> and the near promise of United States Supreme Court review.<sup>6</sup>

What is lost in this purported view of interstate commerce powers is that Congress is not merely attempting to regulate individual health care consumers via the individual mandate because PPACA is not merely a health insurance reform initiative. At its core, PPACA is a public health act. As such, the individual mandate provision is designed not so much to regulate health care consumers' purchasing choices as it is to remedy a lack of universal access to basic health services, one of the leading causes of morbidity and mortality in the United States.<sup>7</sup> From this perspective, the dispositive constitutional question is not whether Congress' interstate commerce power extends to commercial inactivity, but rather whether it authorizes Congress to regulate individual decisions with significant economic ramifications in the interests of protecting and

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promoting the public's health. Although Congress could use its broad powers to tax and spend to expand Americans' access to health care coverage, politics<sup>8</sup> and judicial complications have focused arguments on whether Congress can encourage individuals to obtain health insurance alternatively via its commerce power. This article explores the constitutional conundrum underlying the individual mandate and offers a refined interpretation of the scope of Congress' commerce power to regulate in furtherance of the public's health in our federal system of government.

## II. Purported Limits of Congress' Interstate Commerce Powers to Impose the Individual Mandate

To date, five federal courts have ruled on the constitutionality of PPACA's individual health insurance mandate under Congress' commerce power. Three of these courts have upheld the mandate,<sup>9</sup> noting Congress' extensive regulatory reach over "economic decisions,"<sup>10</sup> including decisions whether or not to obtain health insurance.<sup>11</sup> As the court in *Mead v. Holder* suggests, "Making a choice is an affirmative action, whether one decides to do something or not do something."<sup>12</sup> Consistent with these decisions, an individual's participation in health care systems is not tied solely to his or her choice to be insured. One's current or prospective need for health services, particularly in health emergencies,<sup>13</sup> undergirds Congress' ability to regulate these choices. As discussed later and observed by the court in *Thomas More Law Center v. Obama*, the Supreme Court has previously approved federal regulations governing persons not actively engaged in interstate commerce.<sup>14</sup>

Other courts assessing the scope of federal commerce powers related to the individual mandate disagree. Federal district court Judges Hudson (in Virginia) and Vinson (in Florida) held that Congress exceeded its interstate commerce authority in passing PPACA's individual mandate provisions.<sup>15</sup> Striking down the mandate in *Virginia v. Sebelius*, Judge Hudson emphasized that existing Supreme Court Commerce Clause jurisprudence addresses actors voluntarily engaging in commerce.<sup>16</sup> Some sort of commercial "activity," concluded the court, is required before Congress may regulate individual actions under the Commerce Clause.<sup>17</sup> Even in cases like *Wickard v. Filburn*<sup>18</sup> and *Gonzalez v. Raich*,<sup>19</sup> in which the Supreme Court is widely regarded as offering its most expansive interpretation of federal commerce powers,<sup>20</sup> individuals were engaged in "self-directed affirmative move[s]" in growing wheat and marijuana, respectively.<sup>21</sup> Judge Hudson characterized uninsured Americans as making a "personal decision to...decline

to purchase," which does not amount to "activity."<sup>22</sup> Contrary to the federal government's position, future entry of the uninsured into the health care market does not mean that their collective refusal to become insured uniquely affects interstate commerce. Defining commercial "activity" to encompass economic decisions in this way, concluded the court, "lacks logical limitation."<sup>23</sup>

In *Florida v. HHS*, Judge Vinson held similarly that the constitutionality of the individual mandate turned on whether refusal to purchase health insurance is an activity.<sup>24</sup> Rejecting arguments that health care is distinctive and deserving of special considerations, Judge Vinson disallowed Congress' use of its commerce power to regulate "economic decisions," as opposed to commercial activities. Noting that any decisions in the aggregate may have some economic impact, Judge Vinson refused the idea that an economic decision is equivalent to an activity.<sup>25</sup> Viewed otherwise, Congress would have potentially limitless powers to compel citizens to purchase any product, like broccoli or cars.<sup>26</sup> Judge Vinson questioned further the strength of the relationship between uninsured status and its effect on interstate commerce, drawing comparison to the attenuated link between mere gun possession and commerce criticized in *United States v. Lopez*.<sup>27</sup> The court reasoned that being uninsured has no impact on interstate commerce unless an individual (1) becomes ill while uninsured, (2) seeks care, (3) is unable to pay for it, and (4) is unable or unwilling to make alternative arrangements with health care providers or obtain other assistance.<sup>28</sup> This chain of events may be logical and predictable for many Americans currently lacking health insurance but does not authorize Congress to regulate individuals at the inception of the chain. There are other alternatives for commercial regulation that may comport with Congress' commerce power. For example, suggested the court, Congress could choose to regulate an uninsured person when she first seeks care, cannot pay, or attempts to make alternative arrangements with health care providers, all of which are unequivocally commercial activities.<sup>29</sup>

## III. PPACA's Public Health Objectives

The federal constitutional debate over the breadth of Congress' commerce power is meaningful but misdirected. What Judges Hudson and Vinson fail to acknowledge is that PPACA does not address the health care consumed by individuals solely to regulate the health insurance market. PPACA is also quintessentially a public health statute. Multiple provisions of the Act directly promote the public's health, including requirements to (1) develop a national strategy to improve health care services, patient health outcomes,

and population health;<sup>30</sup> (2) improve preventive care through Medicare/Medicaid coverage<sup>31</sup> and through grants to states and other entities;<sup>32</sup> (3) fund public health awareness campaigns, educational programs, training,<sup>33</sup> and research;<sup>34</sup> (4) support community and school-based health centers, community-based health teams, and nurse-managed health clinics;<sup>35</sup> (5) improve monitoring of infectious and congenital health diseases;<sup>36</sup> (6) assist states with immunizations for high-risk populations;<sup>37</sup> and (7) require nutritional labeling of standard menu items at chain restaurants.<sup>38</sup>

try or individual actors, but rather seek to advance a core public health objective of improving access to health care services. Congress explicitly acknowledges this premise. Explaining the need for PPACA, the Senate Report notes: “In 2008, over 46 million Americans were uninsured and millions more have lost their health coverage as a result of the recent economic downturn. Another 25 million people are underinsured, with coverage that is insufficient to protect against the cost of a major illness.”<sup>43</sup> The Senate Report further commented on the public health

**For most Americans, the cost of health care services over a lifespan is so prohibitive that meaningful access is available only if one has health insurance. Health insurance, essentially, is one’s ticket to accessing even basic health services. Correspondingly, Americans’ lack of health insurance, cumulatively, is a substantial public health problem because insufficient access to care is a significant cause of preventable individual morbidity and mortality across the population.**

Yet premier among the public health objectives in PPACA is Congress’ attempt to expand access to health care to millions of uninsured and underinsured nationwide. For most Americans, the cost of health care services over a lifespan is so prohibitive that meaningful access is available only if one has health insurance. Health insurance, essentially, is one’s ticket to accessing even basic health services. Correspondingly, Americans’ lack of health insurance, cumulatively, is a substantial public health problem because insufficient access to care is a significant cause of preventable individual morbidity and mortality across the population. Uninsured adults are more likely to be diagnosed with late-stage cancer; die from heart attacks, strokes, or trauma; forego needed medications and treatment; and generally suffer worse health outcomes than their insured counterparts.<sup>39</sup> Children who have health insurance experience more timely diagnosis of serious health conditions, have fewer avoidable hospitalizations, and miss fewer days of school.<sup>40</sup> Uninsured children, by contrast, have a 60% higher risk of death in the hospital than those with health insurance.<sup>41</sup> Moreover, higher rates of uninsured in a community diminish the ability of the insured population to access needed care, demonstrating that pervasive lack of health insurance within a community has population-wide effects on health status.<sup>42</sup>

PPACA’s provisions to expand access to health services for millions of America’s uninsured are not simply aimed at regulating the health insurance indus-

try or individual actors, but rather seek to advance a core public health objective of improving access to health care services. Congress explicitly acknowledges this premise. Explaining the need for PPACA, the Senate Report notes: “In 2008, over 46 million Americans were uninsured and millions more have lost their health coverage as a result of the recent economic downturn. Another 25 million people are underinsured, with coverage that is insufficient to protect against the cost of a major illness.”<sup>43</sup> The Senate Report further commented on the public health

impact of lack of health insurance, recounting how health outcomes are worse among the uninsured and the fact that 22,000 uninsured adults die prematurely each year due to lack of access to care.<sup>44</sup> In addition to containing costs and improving health care quality, the public health need to expand access was a predominant goal of Congress in passing PPACA. Pivotal to achieving this public health goal is the individual mandate requirement. By expanding the pool of insured individuals, the mandate broadens access and makes comprehensive coverage more affordable. “In order to control costs and expand access to quality affordable health care,” notes the House of Representatives in its Report, “everyone must be covered and employers, individuals and the government must share in this responsibility.”<sup>45</sup> Members of Congress compared cost control and universality of health care as being two sides of a coin: one cannot be achieved without the other.<sup>46</sup> Even Judge Vinson recognized the mandate as a keystone provision, noting that the individual mandate is so integral to the functioning of PPACA that it cannot be severed from the remainder of Act.<sup>47</sup> In Congress’ view, however, universal access to health insurance was a central objective of PPACA’s individual mandate provision, designed to stem the significant public health burden of preventable morbidity and mortality caused by lack of health care coverage. Cast this way, the individual mandate provision is driven by a public health objective, which, as discussed below, falls

squarely within Congress' historical and modern uses of its commerce power.

#### IV. Protecting the Public's Health through Federal Commerce Powers

Not only has Congress traditionally used its commerce power to regulate in the interests of public health, but courts also have routinely upheld these exercises. Congress' power to regulate to promote or protect the public's health derives from its power to (1) regulate objects that have a substantial effect on interstate commerce<sup>48</sup> and (2) exclude articles of commerce the use of which may be injurious to the public health, morals, or welfare.<sup>49</sup> The Supreme Court has expressly recognized the governmental interest in protecting the public health, safety, and environment from known or imminent harms under the Commerce Clause.<sup>50</sup> Among many examples, federal public health statutes supported by Congress' expansive commerce powers include the following:

- **Food, Drug, and Cosmetic Act of 1938 (FDCA)**,<sup>51</sup> designed to keep interstate channels free from deleterious, adulterated, and misbranded food and drugs in furtherance of public health and safety;<sup>52</sup>
- **Cigarette Labeling and Advertising Act of 1965 (CLAA)**,<sup>53</sup> which seeks to inform the public of the health risks of cigarettes while protecting commerce and the economy from the downsides of non-uniform requirements;
- **Clean Air Act of 1970 (CAA)**,<sup>54</sup> intended to protect and enhance the quality of U.S. air resources so as to promote the public health and welfare and the productive capacity of its population;
- **Occupational Safety and Health Act of 1970 (OSHA)**,<sup>55</sup> which helps assure safe and healthful conditions for working persons and long-term preservation of human resources;
- **Controlled Substances Act of 1970 (CSA)**,<sup>56</sup> prohibiting the illegal importation, manufacture, distribution, and possession and improper use of controlled substances that have a substantial and detrimental effect on the health and general welfare;
- **Surface Mining Control and Reclamation Act of 1977 (SMCRA)**,<sup>57</sup> promoting the reclamation of mined areas which otherwise may substantially degrade the quality of the environment, prevent or damage the beneficial use of land or water resources, and endanger the health or safety of the public; and
- **Freedom of Access to Clinic Entrances Act of 1994 (FACE)**,<sup>58</sup> which protects and promotes

the public health and safety concerning access to entities offering reproductive services.

Courts have upheld these and other statutes as valid exercises of Congress' commerce powers while acknowledging their public health purposes. In 1947, for example, the Supreme Court upheld the constitutionality of the FDCA pursuant to the Commerce Clause, noting the public health aims of the Act.<sup>59</sup> Modern decisions continue to advance this theme. Rejecting a constitutional challenge to the SMCRA, the Supreme Court acknowledged in 1981 that a core purpose of the Act was to prevent danger to public health while protecting commerce.<sup>60</sup> In the 1990s, the FACE Act, which sets forth federal criminal penalties for persons who interfere with access to reproductive services, was upheld by two federal courts of appeal as a constitutional exercise of Congress' commerce power because of the significant governmental interest in ensuring the availability of reproductive health services and protecting women who seek them.<sup>61</sup>

The Supreme Court has consistently upheld federal statutory provisions intended primarily to protect the public's health so long as there was a commerce "hook," principally that the object of regulation has a substantial effect upon interstate commerce. However, there are limits to Congress' commerce power to protect public health. In *United States v. Lopez*<sup>62</sup> (1995) and *United States v. Morrison*<sup>63</sup> (2000), the Court articulated that certain subjects of federal regulation (gun possession near schools in *Lopez* and violence against women in *Morrison*) are of such a noneconomic nature that they do not have a substantial effect on interstate commerce. Consistent with its New Federalism jurisprudence,<sup>64</sup> the Court concluded that Congress cannot regulate these activities under its commerce powers despite laudable public health objectives.

*Lopez* and *Morrison* do not diminish Congress' ability to regulate to protect the public's health through its commerce power. It was not the public health purpose that sank the federal statutes under *Lopez* and *Morrison*, but rather the noneconomic nature of the activities Congress sought to proscribe.<sup>65</sup> Since *Lopez* and *Morrison*, courts have continued to recognize, uphold, and enforce federal public health statutes passed pursuant to the Commerce Clause.<sup>66</sup> In *Gonzalez v. Raich*, the Supreme Court held that the CSA is a valid exercise of Congress' commerce powers, even when applied to purely private cultivation of medical marijuana under California law.<sup>67</sup> The Court noted Congress' purposes for passing the CSA, including addressing the substantial, detrimental effect on the health and general welfare of the American public exacted by the manufacture, distribution, and use of

controlled substances.<sup>68</sup> The Court held that the CSA's larger regulatory scheme is quintessentially economic given the lucrative interstate market for controlled substances.<sup>69</sup>

In *Raich*, the Court cautioned against myopically focusing on *Lopez* and *Morrison* against the "larger context of modern-era Commerce Clause jurisprudence preserved by those cases."<sup>70</sup> Under this Commerce Clause jurisprudence, an individual component of a broader economic regulatory scheme may be valid even if such component is purely local or non-economic in nature.<sup>71</sup> *Raich* upheld the notion that Congress may properly regulate the entire class of a practice (e.g., local growth and consumption of medical marijuana), although the impact on interstate commerce may be *de minimis* at the individual level, if the total incidence of that practice poses a threat to *any* national market (e.g., the black market for illicit marijuana).<sup>72</sup> In this light, Congress may use its commerce power to regulate individual practices of a largely non-commercial nature that affect a national market in the interest of protecting or promoting the public's health.

## V. Reconceptualizing Commerce Powers in a Public Health Marketplace

To the extent that lower courts in Virginia and Florida frame PPACA's individual mandate as beyond Congress' commerce power, they (1) misstate the "market" that Congress seeks to regulate, (2) fail to recognize the broader public health purposes underlying the Act, and (3) discredit Congress' ability to act in the interest of public health. The overriding purpose of PPACA's ill-named individual mandate is not to force Americans into buying health insurance products that they may not need in the health care marketplace. (For purposes of clarification, the Act does not actually require anyone to purchase health insurance in the same way that Congress requires citizens to obtain a Social Security number. PPACA sets forth a fairly minimal penalty for those who can afford but choose not to purchase health insurance, thus reserving to individuals the choice whether to be insured or pay the penalty.) Rather, the goal of the individual mandate provision is to alleviate the negative public health and economic consequences of a systemic lack of access to essential health services. In this sense, the individual mandate provision might be aptly recast as PPACA's "universal access incentive."

Consistent with the Court's reasoning in *Raich*, the national "market" at stake in PPACA is not simply the health insurance or health care markets (as perceived by the Florida and Virginia district courts), but also the larger economy that is inextricably tied to the health of the public. As noted earlier in Part III, unin-

sured persons' lack of access is directly tied to negative health outcomes across the population. And poor public health outcomes tied to lack of access have a staggering economic toll. Annually, the uninsured receive over \$40 billion in uncompensated care,<sup>73</sup> another \$30 billion in taxpayer-funded care,<sup>74</sup> and suffer a 15 to 20% decrease in earnings associated with reduced labor and productivity from poor health (based on 2003 data).<sup>75</sup> Similar to the effects of poor air quality on the public's health and productivity (which justified Congress' passage of the CAA under its commerce powers), the market at stake concerning PPACA is nothing less than the national economy affected by the public health crisis stemming from widespread lack of access to health services. Under historical and modern Commerce Clause jurisprudence, Congress may address those types of economic and public health effects without having to justify its actions as regulating purely commercial activity. Even if one were to accept Judge Hudson's and Vinson's conclusions that persons who avoid purchasing health insurance are not engaged in commercial activity, the individual mandate is still constitutionally acceptable. Consistent with *Raich*, the individual mandate is a component of PPACA's larger economic regulatory scheme by which the total incidence of uninsured persons choosing not to obtain health care coverage threatens the viability of improving access to affordable health care for all. Uninsured persons who avoid purchasing health insurance are, in the aggregate, pivotal actors in the larger economy and significant contributors to the vast public health and economic costs of lack of access to health care services.

Congress' strategic approach for addressing the public health and economic consequences of lack of access through PPACA is multi-faceted. By 2014, expansions of the Medicaid program are designed to cover more people.<sup>76</sup> Infusion of new resources to create and operate health clinics provides more outlets for affordable primary care.<sup>77</sup> A mandate for large employers to offer health insurance to full-time employees or pay a penalty expands the pool of insured.<sup>78</sup> Optional tax incentives for small businesses to cover their employees<sup>79</sup> are designed to increase offerings of employer-based health insurance. Subsidies for low-income Americans to purchase health insurance and the creation of health insurance exchanges provides consumers greater choices of individual health insurance products.<sup>80</sup> Anti-discrimination measures targeted toward the insurance industry open doors for unhealthy or high-risk adults and children to secure health insurance where previously they could not.<sup>81</sup>

The lynchpin of PPACA's aim to improve access to promote the public's health, however, is to substan-

tially increase the pool of insured persons by including individuals previously eschewing health insurance (despite the potential for catastrophic health and financial consequences). Some estimate that if PPACA's individual mandate were eliminated, the number of newly insured would be cut by half or more, the number of people with employer-sponsored health insurance would decline, and premiums in the individual health insurance market would increase by 15% or more.<sup>82</sup> Congress acted well within its commerce authority when it passed the individual mandate to encourage participation of those who would otherwise decline health insurance. Their choices to avoid participation in the insurance market affect the prices and availability of health coverage for others, directly impact population health outcomes, and substantially affect the national economy.

## VI. Conclusion

Courts that have struck down PPACA's individual mandate provision narrowly focus on the concept that the government is attempting to regulate an individual's commercial inactivity. In this way, they miss the fact that the individual mandate is a critical component in a larger economic scheme to improve access to health care and that the cumulative impact of individuals' decisions not to purchase health insurance has widespread economic and public health ramifications. Under this broader view, PPACA's individual mandate is squarely within Congress' historical and modern interstate commerce powers to regulate in the interest of public health where such regulations have a substantial effect on the American economy. The activity/inactivity distinction makes no sense for choices, like declining health insurance, that have direct and significant economic and health-related costs for the entire population.

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