

## **One Last Hurdle: The Constitutionality of the Health Care Mandate**

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*The Individual Responsibility Policy, more commonly known as the “health care mandate,” is an integral part of the Patient Protection and Affordable Care Act (PPACA), the long-debated health care reform bill that was passed in early 2010. After an examination of the policy behind the mandate, along with an analysis of the intended effects of the legislation, this paper evaluates the constitutional arguments brought forth by lawsuits challenging the policy. Contrary to lawsuits filed by fourteen Attorneys General, this paper finds the Individual Responsibility Policy is constitutional. The ability of Congress to enact a health care mandate is derived from previous uses of the General Welfare and Commerce Clauses of Article 1, Section 8, as well as Supreme Court precedent regarding both federalism and individual rights.*

Following the signing of The Patient Protection and Affordable Care Act (PPACA), fourteen Attorneys General from across the United States filed lawsuits against the Departments of Labor, the Treasury, and Health and Human Services. The lawsuits claim the individual mandate to purchase health insurance, known as the “Individual Responsibility Policy,” within the text of the 1,200-page bill, is unconstitutional. This paper evaluates the constitutional arguments brought forth by the lawsuits challenging the policy. After providing the political context of the passing of the bill, an examination of the policy behind the mandate, and an analysis of the intended effects of the legislation, this paper assesses the claims of unconstitutionality. In assessing the lawsuits’ argument, this paper examines Congress’ use of the Commerce Clause, the General Welfare Clause, the principles of federalism, and individual rights to enact the health care mandate.

I find through this analysis of the legislation and the lawsuits that the Individual Responsibility Policy is constitutional. Although there seems to be a dearth of direct Supreme Court precedent, as well as no direct mention of health care in the Constitution, Congress and President Obama are well within the limits of the federal government’s powers. The ability of Congress to enact a health care mandate is derived from previous uses of the General Welfare and

Commerce Clauses of Article 1, Section 8, as well as Supreme Court precedent regarding both federalism and individual rights.

### **The Political Landscape of PPACA**

On March 23, 2010, President Barack Obama signed The Patient Protection and Affordable Care Act into law, capping off, as the *New York Times* said later that day, “the most expansive social legislation enacted in decades” (Stolberg and Pear 2010). The signing of the bill accomplished the President’s (in conjunction with the rest of the Democratic Party’s) top priority, as dictated at the beginning of his term (Schaeffer 2010).

The signing of this bill signaled the end of a legislative debate regarding health care, but a judicial debate remains. Controversy surrounded the PPACA long before there was any semblance of a written bill; and, now that such a bill passed, protests abound. The debate helped spark the creation of the Tea Party Movement, and Congressional Republicans quickly adopted a “repeal and replace” campaign. Leaders of the opposition, from Speaker of the House John Boehner to commentator Glenn Beck, continue to call for protests. But amidst the cries of ‘Don’t tread on me’ or ‘Keep government out of my Medicare’ there are legitimate constitutional questions concerning PPACA.

### **The Policy Behind the Mandate**

The Individual Responsibility Policy, or the requirement (as stated in the bill), is presented in Sec. 5000A of the PPACA. The ‘Requirement to Maintain Minimal Essential Coverage’ is defined as “An applicable individual shall for each month beginning after 2013 ensure that the individual ... is covered under minimum essential coverage for such month” (Patient Protection and Affordable Care Act, 2009, 111-148; Hereafter PPACA). In the most basic terms, the mandate is a requirement, enforced through the Internal Revenue Service, which gives an individual two basic options. First, the individual can buy health insurance (not necessarily through the Exchange set up later in the bill) for oneself and any dependants or, second, the individual can receive a tax penalty on their next tax return. This is the essence of the mandate. The “Minimum Essential Coverage” that Sec. 5000A refers to is laid out in Sec. 1302. It can be either a government-sponsored program (Medicare, Medicaid, and

CHIP are all mentioned along with other government programs), an employee-sponsored plan, an individual plan (offered in the individual market within a state or in the exchange), or ‘grandfathered’ health plans (which are defined, along with the other types of plans, in Sec. 2791 of the Public Health Service act, which the PPACA amends).

The penalty, or the “applicable dollar amount,” starts at \$750 or 2.5% of income (whichever is greater) in 2016, and is then multiplied by a cost-of-living adjustment. This would seem unfair to those who cannot pay \$750 a year, but exemptions are incorporated in the bill. The four main exemptions are specific religious groups, members of a health care sharing ministry, Indians, and individuals who qualify for hardship exemptions. Along with methods for exemption, PPACA includes other economic devices and reforms to further lower the cost of now-required health insurance. Because the bill is a budget and tax bill, the main methods of providing assistance to afford and purchase insurance are tax breaks and credits. There are small business tax credits that relieve the burden that the bill would have otherwise created on already financially strained businesses. It also aims to increase the likelihood that more citizens will become covered and follow the mandate without needing to apply for exemptions. In addition to the tax credits and exemptions for small businesses, individuals will also qualify for various tax credits depending on the cost of their plan, their income level, the number of dependents provided for, and many other qualifications. This goes along with the general ‘cost-sharing’ reductions throughout the bill. All of these requirements, penalties, exemptions, and reforms related to the creation of The Individual Responsibility Policy are intended to be economic in nature. The PPACA also states that these economic reforms are legitimate, claiming, in Sec.1501 (a) (1), “The individual responsibility requirement provided for in this section... is commercial and economic in nature, and substantially affects interstate commerce.” (PPACA, 2009) The mandate is an economic tool, created and sustained through government regulation, taxation, and participation.

### **The Intended Effects of the Mandate**

The Individual Responsibility Policy was created first and foremost as a cost saving measure. The effect of the mandate is not to establish a “nanny state” as said by the conservative pundit Bill

O'Reilly. The intended effects and benefits are laid out in Sec. 1501 of PPACA; they are explicitly economic in nature and focused on saving costs in many facets of the healthcare industry. The mandate is designed to regulate commercial activity, specifically, "financial decisions about how and when health care is paid for, and when health insurance is purchased" (PPACA, 2009, 111-148).

The rationale underlying Congressional justification to regulate health insurance is twofold. First, most health insurance that is provided in the United States is from companies that are either national or semi-national. This means that any insurance company that conducts business beyond one state is subject to regulation by Congress via the interstate commerce clause. Second, the cost of national, interstate, health care commerce is \$2.5 trillion. That amounts to 17.6 percent of the national economy. This is one of the largest industries in the current economy of the United States and is projected to increase to an approximate value of \$5 trillion by 2019.

Congress expresses a need to regulate an industry that deals between states. This regulation will seek to prevent economic instability in one of the largest industries and seeks to protect Americans who would be subject to significantly increased prices if no action were taken. This is not to be misinterpreted as a punishment for the private insurance companies. The mandate, as stated in Sec. 1501 (a)(2)(C), "will add millions of new consumers to the health insurance market, increasing the supply of, and demand for, healthcare services," which will benefit the insurance companies by increasing the number of premiums being paid each month. This increase of customers is a substantive rights achievement for a healthier populace because the mandatory purchase of insurance "achieves near-universal coverage" again by building upon national private insurers (PPACA, 2009).

The PPACA was created, in part, to reign in the health insurance industry before costs became so high that they negatively affected the customer: the American public. The mandate is also designed to increase financial stability for families and individuals. The bill asserts that half of all bankruptcies in the United States are caused in part by medical expenses. The mandate adds millions of customers to insurance rolls, which will reduce the cost of medical emergencies on families, further promoting financial security. Most of these intended outcomes from the mandate derive from what the bill showcases as the preeminent economic reasons why a mandate is necessary:

If there were no requirement, many individuals would wait to purchase health insurance until they needed care. By significantly increasing health insurance coverage, the requirement, ... will minimize this adverse selection and broaden the health insurance risk pool... which will lower health insurance premiums. The requirement is essential to creating effective health insurance markets in which improved health insurance products [are] guaranteed..." (PPACA, 2009, Sec.1501 (a) (2) (G)).

Although there are sections of the PPACA which were created to eliminate the social disparity that a lack of health insurance creates, the reasoning behind the Individual Responsibility Policy is not to create the substantive right to access to health insurance. It is an economic tool developed by Congress through a revision in the tax code to regulate interstate commerce in the health care industry. The intended effects of the mandate are to cut down on soaring costs and to provide economic stability for the numerous parties affected by the health care industry.

### **Oppositional Opinion**

The PPACA, as well as most forms of major health care reform in America's history, have garnered vociferous opposition from the days of its early conception (Lepore 2009). The bill, although passed by a majority, split the Democratic Party and was decried by an relentless protest campaign. Within all the concerns voiced, there were legitimate questions of the validity and constitutionality of the actions Congress was taking. On March 23, 2010, minutes after PPACA was signed into law, 13 states (Florida, South Carolina, Nebraska, Texas, Utah, Louisiana, Alabama, Colorado, Michigan, Pennsylvania, Washington, Idaho, and South Dakota) filed a lawsuit challenging the constitutionality of the mandate. This lawsuit, filed by Bill McCollum, Attorney General of Florida, against Secretary of Health and Human Services, Kathleen Sebelius, succinctly states the legal argument that will be used by those challenging the bill.

The twelve Republican Attorneys General and Louisiana's James Caldwell, claim that the PPACA "represents an unprecedented encroachment on the liberty of individuals..." and attempt to prove this by presenting a three-tiered argument (McCollum et al. 2010). First, they maintain that Congress is not explicitly given any power

to mandate the purchase of health insurance to citizens in the Constitution. Thus, the Individual Responsibility Policy enacted through the PPACA would be a violation of the 10th Amendment, which states “The powers not delegated to the United States by the Constitution... are reserved to the States respectively...” (McCollum et al. 2010, 15). The lawsuit then goes on to claim an issue of taxation, citing Article 1, Sections 2 and 9, which prohibit direct taxes (McCollum et al. 2010, 16). This charge states that Congress is not only overreaching their authority, but is in conflict with the limits set forth in the Constitution on taxation. Thirdly, Florida and the cosigning 12 states bring up multiple policies that will violate the lines of federalism. The PPACA is exhibited as not only an “unprecedented encroachment on the liberty of individuals” but also “represents an unprecedented encroachment of the sovereignty of the states,” in the lawsuit (McCollum et al. 2010, 3).

Similar charges have been made by Kenneth Cuccinelli, Attorney General of Virginia. In his lawsuit, also filed against Secretary Sebelius, the overwhelming burden that the Individual Responsibility Policy places on the state is used as the basis for a violation of federalism (Cuccinelli 2010). Along with the accusation of misplaced federal oversight, Attorney General Cuccinelli challenges the commercial nature of the PPACA’s reforms, therefore challenging the use of the Commerce Clause (which is used as a main argument for Congressional jurisdiction in the bill) (Cuccinelli 2010).

The Attorneys General Tom Miller, from Iowa, and Richard Cordray, from Ohio, have come out in adamant support of the mandate and against the lawsuits filed by their 14 counterparts. Both Miller and Cordray claim in a co-authored Op-Ed, “For Congress to have the power to pass this legislation... the health care problem need only [to] affect interstate commerce. It clearly does” (Cordray and Miller 2010). Along with Iowa’s and Ohio’s attorneys general, Oregon’s Governor Ted Kulongoski and Attorney General John Kroger have come out in support of the Congressional mandate to purchase insurance. The Oregon Justice Department, under Kroger, will pursue the formation of a coalition of states that are in support of the mandate in order to compose a joint amicus brief (Ross 2010).

## Commerce Clause Controversy

Under Article 1, Section 8, Congress has the enumerated power to regulate interstate commerce. The ability of Congress to regulate interstate commerce is not being challenged by the opposition. Rather, the opposition questions whether health insurance falls under the realm of interstate commerce; and, even if it does, whether Congress can regulate individuals on such a basis. If one of the cases is brought to the Supreme Court, the Justices could look at both statistical evidence and nearly seventy years of precedent to justify Congress' place in regulating insurance. The Individual Responsibility Policy, which on the surface looks to primarily affect an individual's finance, is explained in the PPACA as a large-scoped cost saving method. It hopes to prevent a cumulative "Cost-Shift" burden on to other aspects of the health care industry, which lands this act of regulation into regulating actions that affect interstate exchange (ElBoghdady 2005). This most recent regulatory role that Congress has taken in the PPACA is backed by numerous Supreme Court cases.

Justice Black asserts Congress' power to regulate insurance in *United States v. Southeastern Underwriters Association*, 322 U.S. 533 (1944). Justice Black first states the interstate nature of insurance companies. Black's rationale is very similar to Congressional justification in the health care reform bill. According to Black, "The decisions which that [insurance] company makes... concern not just the people of the state where the home office happens to be located. They concern people living far beyond the boundaries of that state" (*Southeastern Underwriters Ass'n.* at 541). Justice Black's decision will be very crucial to the interpretation of the new case because it concerned "an Act of Congress ... [and] whether the Commerce Clause grants to Congress the power to regulate insurance transactions stretching across state lines" (*United States v. Southeastern Underwriters Ass'n.* at 534). The Court ruled in favor of Congress, reinforcing its right to regulate insurance.

The current Supreme Court might be hesitant to rule on Congress' regulatory power with the backing of just one case without additional precedent regarding the ability of Congress to regulate seemingly private affairs. However, the Court that will rule on the challenges to the PPACA will find relevant precedent to maintain the recently passed Act in *Wickard v. Filburn*, 317 U.S. 111(1942) and its more recent counterpart, *Gonzalez v. Raich*, 545

U.S. 1 (2005). *Wickard*, 317 U.S. 111, although pertaining to wheat production in the 1940s, provides a relevant interpretation of Congressional regulatory powers. In the case, Justice Jackson maintained "even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce" (*Wickard*, 317 U.S. at 125).

Professor Jim Chen, from University of Louisville's Law School, highlights *Wickard's* modern importance. He states "in the wake of New Deal-era Supreme Court jurisprudence, it has become clear that Congress has acquired the authority to regulate private economic activity..." (Chen 2003). A similar case was brought up in 2005, which will have a large impact on the potential ruling that can come from the PPACA. *Gonzales v. Raich*, 545 U.S. 1 serves two important roles in determining the ability for Congress to regulate health insurance on such an individual level. First, the decision reiterates *Wickard's* relevance in the current case. The majority opinion delivered by Justice Stevens asserts that "*Wickard* thus establishes that Congress can regulate purely intrastate activity that is not itself 'commercial,' in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity" (*Gonzalez v. Raich*, 545 U.S. at 18). Second, Stevens proceeds to rule "Where necessary to make a regulation of interstate commerce effective, Congress may regulate even those intrastate activities that do not themselves substantially affect interstate commerce" (*Gonzalez*, 545 U.S. at 35). This is easily applied to the newly developed role Congress has taken to regulate the individual purchase of health insurance nationwide. The Patient Protection and Affordable Care Act is a law that regulates intrastate activities in order to effectively regulate insurance, an industry that the Court maintained as one affecting interstate commerce. Therefore, Congress is able, within the bounds of the Commerce Clause, to mandate the purchase of health care to individuals.

### **The Promotion of General Welfare?**

Beyond the fundamental issue of whether Congress has the power to regulate health insurance or not, is the question asked by both lawsuits, Florida, et al. and Virginia's, as to whether the action used to enforce the regulation, taxation, is constitutional. That is, does the

individual mandate to purchase insurance enforced through a tax penalty fall within the scope of the Congress' ability to tax found in the General Welfare Clause of Article 1, Section 8, Clause 1? The Individual Responsibility Policy is enforced through an income tax (as outlined earlier) and the very nature of the PPACA is a tax code amendment. In fact, the long title of the PPACA as passed through the House of Representatives is "An Act to amend the Internal Revenue Code of 1986..." The PPACA is a tax bill that is intended to regulate the insurance industry through the IRS tax code.

The Congress is able to use taxation as a method to regulate insurance because, as Justice Stone writes in the majority opinion of *Sonzinky v. United States*, 300 U.S. 506 (1937), "Every tax is in some measure regulatory." Justice Stone goes beyond this statement to defend taxes similar to the penalty tax in PPACA: "a tax is not any the less a tax because it has a regulatory effect... and it has long been established that an Act of Congress which on its face purports to be an exercise of the taxing power is not any the less so because the tax is burdensome or tends to restrict or suppress the thing taxed" (*Sonzinky*, 300 U.S. at 513).

From this it seems that the mandate to purchase, in which Congress is using the tax to regulate health insurance, has been upheld; there is also no issue in the use of taxes to promote the general welfare of Americans. The latter position is supported by Justice Cardozo's opinion in *Helvering v. Davis*, 301 U.S. 619 (1937), another 1937 case that has relevance to the debate on health care reform. Cardozo states "When money is spent to promote the general welfare, the concept of welfare or the opposite is shaped by Congress, not the states. So the concept be not arbitrary, the locality must yield. U.S. Constitution, art. 6, par. 2" (*Helvering*, 301 U.S. at 645). This gives Congress the ability to tax for the welfare of Americans, an area under which healthcare clearly falls.

There is also the issue of whether the tax itself is a direct tax, and therefore unconstitutional. This has absolutely no standing since the tax is laid out in proportion to income, a power Congress has held since the 16th Amendment was ratified in 1913. In 1796, Justice Paterson set up a three-pronged way of understanding taxes in the United States, which continues to be the foundation of how taxes are viewed. In his opinion from *Hylton v. United States*, 3 U.S. 171 (1796), Justice Paterson laid out three types of Congressional taxation: direct taxes, indirect taxes, and excise taxes. Paterson goes further in affirming that if there ever is a question as to whether a tax

is indirect or direct, a tax should be considered indirect because of the interpretative room given by the framers of the Constitution (Hall 2009, 42-43). The Patient Protection and Affordable Care Act is a revision of the IRS tax code, and it lays out the Individual Responsibility Policy as an income tax: a constitutional measure to lay and collect taxes to promote the general welfare.

### **Cooperative Federalism**

The Individual Responsibility Policy is not only constitutional by the terms of Congress' regulatory reach under the Commerce Clause and by Congress' ability to lay and collect the tax from the General Welfare Clause. It will also follow in the modern lines of federalism. When assessing the viability of Congress to mandate insurance to citizens of all states, the Court will look at recent applicable court cases. The Supreme Court will look for how the mandate could cross over the constitutional lines of federalism and what the PPACA does to prevent Congressional overreach.

When the Virginia Senate passed a bill stating "No resident of this Commonwealth . . . shall be required to obtain or maintain a policy of individual insurance coverage," it was a direct challenge to PPACA (Jost 2010). The Senate of Virginia is attempting to block the mandate by following the precedent set by the Supreme Court in *Printz v. United States*, 521 U.S. 898 (1997). In this 1997 case, the Court ruled that the Brady Bill, a bill that raised protests from states similar to those occurring now against the PPACA, was in violation of the principle of federalism because it violated the 10th Amendment, which states "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." Contrary to what is posited by those opposed to the PPACA, *Printz* does not justify a nullification of the mandate to purchase health insurance. Justice Scalia, in the majority opinion for the case, pointed out, "the precise issue before us here... is the forced participation of the States' executive in the actual administration of a federal program" (*Printz*, 521 U.S. at 918) The Court in *Printz* ruled that Congress could not force state and local law enforcement to conduct the specific duties that the Brady Bill enumerated. It did not, however, rule the Brady Bill unconstitutional.

In *Reno v. Condon*, 528 U.S. 141 (2000), the Court found itself in a similar situation to that in *Printz*. In *Reno*, the state of South

Carolina argued that a congressionally-enacted law went beyond the boundaries of federalism. In a unanimous decision, delivered by Justice Rehnquist, the Court upheld *Printz* and ruled in favor of Congress because there was no forced participation in administering the federal program, as in *Printz (Reno)*, 528 U.S. 141).

Mark A. Hall summarizes the Court's rationale in simple terms, "When Congress 'does not require the States in their sovereign capacity to . . . enact any laws or regulations, and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals,' the Court has ruled that there is no federalism constraint on Congressional power" (Hall 2009, 43). The current case of the mandate in the PPACA demonstrates that Congress is abiding by the federalism boundaries drawn by *Printz* and *Reno*. The PPACA sets up the mandate to purchase under federal execution; the state has no role in enforcing the mandate.

The one part of the bill that might violate federalism principles is the establishment of exchanges proposed in Section 1321 in the PPACA. Nonetheless, if states do not create the exchanges, Secretary Sebelius will create and maintain one for the state. This route of action is backed by *New York v. United States*, 505 U.S. 144 (1992), where Justice O'Connor delivered the opinion of the court. O'Connor's ruling serves as a good summary of how the PPACA might be viewed: "where Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress' power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation" (*New York*, 505 U.S. at 167). The Court will most likely find that Congress has created an Act that "establishes a program of cooperative federalism that allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs" (*Hodel v. Virginia Surface Mining and Reclamation Association*, 452 U.S. 264, 289 (1981)). This is lauded by Justice Marshall as a constitutional approach to enacting federal programs at a state level (*Hodel* 452 U.S. 264).

While states' rights activists join the fray of PPACA protests and attorneys general from around the nation file lawsuits claiming to defend the sovereignty of their respective states, it is very unlikely that claims relating to federalism will undermine their legislation. Section 1321 of the Patient Protection and Affordable Care Act, entitled "State Flexibility in Operation and Enforcement of

Exchanges and Related Requirements,” establishes a system of cooperative federalism to execute the statutes in a constitutional manner.

### **The Impact and Possible Future**

The Individual Responsibility Policy, as presented in Section 5000A of The Patient Protection and Affordable Care Act (Pub. L. No. 111-148) is in the end a constitutional measure. It is within the breadth of power that Congress is given in the Commerce Clause. This is an integral argument for the opponents of the bill, but even the Supreme Court’s more conservative Justice, Antonin Scalia, who many liberals fear will oppose the PPACA, explained, “Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce” (*Gonzales v. Raich*, 545 U.S. 1, 37 (1992), Scalia, A., concurring). The claim that the mandate to purchase insurance is unconstitutional in the way it delivers its penalty is also baseless. The Act itself is an amendment to the IRS tax code and the penalty is assessed in a clearly constitutional income tax. Furthermore, President Obama and Congress are not overstepping the modern lines of federalism. The PPACA sets up a system of cooperative federalism that has previously been proven as constitutional by the Court.

The Patient Protection and Affordable Care Act and its Individual Responsibility Policy will stand the test of a Supreme Court case. However, as President Obama said in an e-mail sent out the day of the bill’s passage in the House of Representatives, “This day is not the end of this journey. Much hard work remains” (Obama 2010). The mandate is just a part of the massive bill presented by Obama and Congress. There are many other facets besides the mandate and the PPACA that could perhaps violate the Constitution. Along with that, if the Supreme Court does not overrule the mandate, then it could usher in a new era of radical reforms that push the limit of the Commerce Clause and the central government’s role in the federal system.

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