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**Constitutional Aspects of the Patient Protection
and Affordable Care Act**

Case Author

Karly Burke
MD Candidate (2014), Harvard Medical School

Case Mentor

Charles Fried, JD
Beneficial Professor of Law
Harvard Law School

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Background

In March 2010, the Patient Protection and Affordable Care Act (PPACA) was signed into law. The legislation includes increases to Medicaid, cost containment measures, and reform of the private insurance market¹. Individuals are required to maintain a specified minimum level of health insurance, beginning in 2014. Those individuals without health insurance will be penalized through their federal income tax returns². This “individual mandate” is the target of lawsuits in federal district court. Lawsuits argue that the individual mandate portion of PPACA violates the Commerce Clause of the Constitution and infringes upon personal liberties¹.

Relevant portions of the Constitution

The Constitution directly grants Congress the power to regulate commerce, thereby making it an enumerated power. The Commerce Power is often coupled with the Necessary and Proper Clause to provide more expansive powers to Congress.

- Article 1, Section 8, Clause 3 (Commerce Clause):
 - *Congress shall have the Power - To regulate Commerce with foreign Nations and among the several States, and with the Indian Tribes.*
- Article 1, Section 8, Clause 18 (Necessary and Proper Clause):
 - *The 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 the Constitution in the Government of the United States, or in any Department or Officer thereof.*

United States Supreme Court Cases of Interest

- *Wickard v Filburn* (1942)
- *United States v Alfredo Lopez, Jr.* (1995)
- *United States v Morrison* (2000)
- *Gonzales v Raich* (2005)

Arguments Supporting the Constitutionality of PPACA

Insurance is commerce

Congress uses power, from the Commerce Clause, to regulate the health insurance market because insurance is considered interstate commerce. Specifically, health insurance payments flow from enrollees across state lines. Health care services, as paid for by insurance, comprise 17.5% of the gross domestic product¹.

Supreme Court precedents in *Wickard* and *Raich* support expanded federal government regulation under the Commerce Clause. In *Wickard*, the Supreme Court said that Congress could regulate individuals from overproducing wheat crops if it had an “accumulated effect” on national markets². In *Raich*, the Court again reasoned that individuals growing marijuana, even for intra-state consumption, would disrupt the greater federal regulation of an inter-state market (in this case, prohibition of such a market). Congress can regulate intra-state activities if they affect inter-state commerce². In the case of PPACA, lack of purchasing of health insurance at

the individual level will affect the national health insurance market and consequently, inter-state commerce².

When the Supreme Court ruled on the *Morrison* and *Lopez* cases, they ruled Congress had gone too far in its scope of regulation under the Commerce Clause. The law in question for *Lopez* made it a crime to carry a gun within the vicinity of a school. The law involved in *Morrison* made gender-based violence a federal offense. In each case, the Court ruled that Congress had overstepped its boundaries granted to it by the Commerce Clause³. With PPACA, Congress is within its scope of regulation under the Commerce Clause. It is necessary to regulate the individual insurance purchasing in order for PPACA to function³.

Congress can regulate and mandate conduct

In order for PPACA to regulate the health insurance market, it needed to protect the health insurance market from adverse selection³. Health care is a service that every individual will require in their lives. Congress included the individual mandate to avoid cost, to pool risk, and to decrease adverse selection. Young and healthy individuals, many of whom are uninsured, must be part of the health insurance pool in order to decrease premiums and to spread out insurance risk^{2,3}.

Previously, Congress has used the Commerce Clause to regulate conduct³. In 1790, Congress penalized ship owners for failing to provide medicine on their ships. In 1792, Congress ordered every eligible militia man to provide his own bayonet, musket, and flint. Since 1890, economic boycotts have been forbidden by federal antitrust laws. This suggests that failure not to buy goods is also subject to federal regulation³. Mandates, themselves, were upheld by the Supreme Court in *Heart of Atlanta Motel Inc. vs. United States* (1964). There, the Supreme Court ruled that Congress could use the Commerce Clause to uphold the federal Civil Rights Act and to force businesses to serve people whom they might not otherwise prefer to serve³.

Individual liberty is not violated

PPACA is not a precedent for government to make decisions for individuals. Individuals have an economic incentive to maintain “minimal essential coverage” and avoid a \$750 per year federal tax increase. It is in the financial sense that an individual mandate compels individuals to act or to not act³. It is estimated that the provision of uncompensated care costs \$43 billion per year, of which is passed on to insured individuals through higher premiums⁴. The decision for an individual remain uninsured is a decision to engage in cost-shifting to others. As Laurence Tribe argues, “Individuals who don’t purchase insurance they can afford have made a choice to take a free ride on the health care system. They know that if they need emergency-room care that they can’t pay for, the public will pick up the tab. This conscious choice carries serious economic consequences for the national health care market, which makes it a proper subject for federal regulation”^{3,4}.

Arguments Against the Constitutionality of PPACA

Invades individual liberty by regulating inaction/behavior

Congress does not have the authority to mandate individuals purchase health insurance, as laid out in the Constitution’s Commerce Clause and enumerated powers to collect taxes to “provide

for the general welfare” (Article 1, Section 8)³. The mandate focuses on uninsured individuals who do not engage in commercial health insurance transactions, and thereby do not affect interstate commerce². Randy Barnett argues, “The individual mandate provision regulates no action. To the contrary, it purports to ‘regulate’ inactivity by converting the inactivity of not buying insurance into commercial activity”³.

State plenary power versus federal enumerated powers

The limited, enumerated powers of the national government are distinct from the plenary police powers given to the states by the Constitution⁵. States may enact laws for the safety of their citizens that extend beyond the enumerated power of Congress. The Supreme Court highlighted this distinction when it struck down a federal gun law in *Lopez* and acknowledged the existence of similar state gun laws. No federal plenary power has been acknowledged by the Supreme Court⁵. Likewise, the State has a plenary police power to regulate motor vehicle drivers and to determine the conditions under which drivers may use public roads⁵. States can require drivers to carry automobile insurance as driving itself is a voluntary act. A requirement to carry health insurance is a restriction placed on every living person⁵. The Supreme Court, during the New Deal, wrote, “that distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system”⁵.

Limitations to enumerated power over taxation and commerce clause

Congress has the power to tax. However, the uninsured individual faces a penalty, not a tax. The financial burden is placed on the individual rather than the tax powers of Congress. It is a “social policy regulation” masked as a tax², but cannot be justified under taxation powers given to Congress⁵. The individual mandate surpasses the boundaries of the Commerce Clause⁵. It is unprecedented for Congress to require an individual to purchase a specific good or service⁵. While a “supreme and noble duty of citizenship,” such as participating in the census, filling out tax forms, registering for the military, and serving on a jury, exists, these efforts are necessary and essential for a functioning country³. However no precedent exists where the national government is enacting a mandate on individuals to purchase goods or services with private businesses³.

Beyond Powers of Commerce Clause

The *Lopez* and *Morrison* cases give precedent to the Supreme Court to strike down federal laws that regulate interstate commerce only via remote connections. When the Supreme Court ruled on *Lopez*, they ruled that a prohibited activity that did not substantially affect interstate commerce could not be regulated by the Commerce Clause^{2,3}. Likewise in *Morrison*, the Congress exceeded its powers because the regulated activity was non-economic with non-substantial impact on interstate commerce.

Similar to what was overturned in *Lopez* and *Morrison*, PPACA exceeds the boundaries of the Commerce Clause. Congress is attempting to regulate non-economic behavior, the failure to purchase health insurance³. The legislation itself did not regulate the activity of obtaining health care. Even if there are economic consequences of not buying health insurance, failure to act is not economic activity. Non-economic activity will not convert to activity that can be regulated³. The individual mandate is not necessary for the execution of Congressional power to regulate interstate commerce.

Questions

1. Is not buying health insurance considered inactivity, which consequently would not be regulated under the Commerce Clause?
2. Would acceptance of PPACA be equivalent to an expanded version of federal power? Is this a constitutional battle or a political battle?
3. “If the federal government can require people to buy insurance in order to keep premiums affordable, could it also require people to buy baby aspirin or a gym membership to keep those premiums affordable, on the theory that using these products reduces the use of health care services and thus insurance costs? Or, as Judge Vinson asked at the December 16 oral arguments in Florida, “If they decide that everyone needs to eat broccoli,” can Congress require everyone to buy broccoli?”⁶ Can the federal government make you buy broccoli? Why or why not?
4. How would you rule on the individual mandate? Why?

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