Constitutional Challenges to the Patient Protection and Affordable Care Act:
Four Questions for the Supreme Court

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December 2011

The Patient Protection and Affordable Care Act (ACA) was signed into law by President Obama on March 23, 2010 and will expand coverage and access for millions of Americans through its numerous provisions reforming the healthcare system. The ACA has been challenged in a number of courts, and on November 10, 2011 the Supreme Court decided to hear arguments on four constitutional issues in the spring of 2012.¹ This paper summarizes the four major questions before the Court and delves into the constitutional arguments that surround them.

Before the Supreme Court: Florida v. HHS²

The ACA is a long and complex piece of legislation, but constitutional challenges levied against it have focused on just a few provisions. The individual mandate, which requires non-exempt individuals to obtain health insurance, has been challenged as exceeding Congress’ power to regulate interstate commerce. The expansion of Medicaid has also come under vigorous attack, with claims by plaintiffs that the federal government infringes on states’ rights by coercing states to comply in return for federal funding. Of the four circuit court cases in which petitions for certiorari have been filed, one court has upheld the ACA as constitutional, two have refused to hear challenges based on standing issues, and one court has held that the individual mandate is unconstitutional but allowed the ACA to stand. In agreeing to hear the case, the Supreme Court specifically agreed to hear argument on four questions related to the constitutionality of the ACA:³

1. Can the individual mandate be justified as an exercise of Congress’ power to regulate commerce?
2. If the individual mandate is found unconstitutional, is that provision severable from the remainder of the ACA?
3. Is the ACA’s requirement that states expand Medicaid eligibility or risk losing federal funds unduly coercive in violation of the Tenth Amendment?
4. Is the individual mandate a tax for the purposes of the Anti-Injunction Act, meaning that plaintiffs seeking to challenge the mandate cannot do so until it goes into effect in 2014?

This paper will expand on the constitutional issues involved in the questions before the Court, analyzing the background and precedents that will likely be involved in the Court’s deliberations.

The Issues

1. Can the individual mandate be justified as an exercise of Congress’ power to regulate commerce?

In general, Congress cannot make any laws unless they have been given the authority to do so through an enumerated power in the Constitution. One of the most common powers relied upon by Congress is the ability to “regulate Commerce… among the several states.” This is known as the Commerce Clause. Commerce Clause challenges to the ACA’s individual mandate appear in several cases but figure most prominently in two circuit court cases: Florida v. U.S. Dept. of Health and Human Services (Florida v. HHS) and Thomas More Law Center v. Obama (Thomas More), where the Sixth and Eleventh Circuits diverge on a number of key questions regarding the extent of congressional commerce power. The following table provides a snapshot of the courts’ conflicting views.

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<th>Commerce Clause Issue</th>
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<th>Thomas More Law Center</th>
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<td>Whether Congress may regulate activity but not “inactivity” as a limit on the Commerce Clause</td>
<td>The Commerce Clause has never been used by Congress to regulate individuals who are inactive in an economic market, and to use it so now</td>
<td>Self-insuring is an activity just as much as purchasing private insurance is, and regulating such activity is wholly within the purview of the Commerce</td>
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<td>Temporal problem with the individual mandate</td>
<td>The individual mandate attempts to regulate the individual before healthcare services are consumed, and is thus an unconstitutional attempt to regulate a mere potential eventuality.</td>
<td>Self-insuring is a present activity that involves planning for the future, and the cost shifting Congress seeks to address through the individual mandate is a current problem affecting our national economy.</td>
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<tr>
<td>Overinclusivity of individual mandate</td>
<td>The individual mandate regulates even those people who are in no way a part of the healthcare market, and is therefore overinclusive.</td>
<td>The individual mandate covers a large portion of the U.S. population, which is acceptable because as a class uninsured individuals have a negative effect on interstate commerce.</td>
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<tr>
<td>Substantial effects/aggregation theory</td>
<td>Substantial effects and aggregation theory is not relevant to the analysis, because what is important is the connection of the regulation to interstate commerce, a nexus absent here.</td>
<td>In the aggregate, all individuals will eventually need healthcare and the way in which that care is paid for has a substantial affect on interstate commerce.</td>
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<tr>
<td>Applicability of broader regulatory scheme doctrine</td>
<td>Because the Court is dealing with a facial challenge, the larger regulatory scheme doctrine does not apply as it</td>
<td>There is a rational basis for Congress to conclude that without an individual mandate the remainder of its regulatory</td>
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The following issues regarding Congress’ power under the Commerce Clause and its relation to the individual mandate have arisen in a number of cases, and the Supreme Court is likely to grapple with them in the spring:

**Inactivity in the Healthcare Market**

Plaintiffs in *Florida v. HHS* argue that the individual mandate, by requiring individuals to purchase health insurance, is an attempt by Congress to regulate inactivity (the decision not to purchase insurance and “self-insure”), and is thus outside the purview of the Commerce Clause. This focus on inactivity as a limit to congressional Commerce power stems from a concern in many courts that some limits to the Commerce Clause must be articulated. Though the Commerce power has expanded significantly since the 1930s, limits do exist and the imposition of a new distinction between activity and inactivity does not seem necessary. The Eleventh Circuit, in finding the individual mandate unconstitutional, only refers to this distinction to indicate that Congress has not regulated “inactivity” through the Commerce Clause in the past. Even this claim is untrue, however, since civil rights statutes did just this by requiring business owners to stop discriminating against African-Americans (thus regulating the “inactivity” of not selling products to specific groups of people). Thus, the argument that the Commerce Clause does not allow regulation of inactivity is without precedent and is unlikely to survive Supreme Court scrutiny. There has never been a line drawn at inactivity, and such a limit would provide no meaningful distinction for Commerce Clause jurisprudence. Even if the Supreme Court decided that the activity/inactivity line had value, it can and has been argued that self-insurance is itself an activity.

Related to whether the Commerce Clause permits regulation of “inactivity” is the claim that the individual mandate is overinclusive. Challengers argue that the individual mandate covers individuals who do not cause the cost shifting problems Congress identified as the reason...
for the individual mandate. They argue that the mandate covers a great number of individuals, without separating those who self-insure but do not contribute to cost shifting from those who have never used the healthcare system.

Overinclusivity has not posed a problem in past Commerce Clause cases, and is unlikely to concern the Court when dealing with the individual mandate here. In *Gonzales v. Raich*, the Court held that the important consideration is Congress’s estimation of the “total incidence” of the regulated behavior; thus, Congress can regulate an entire class of people despite individual instances that deviate from the norm. Given the complexity of the healthcare system, the many ways in which individuals might contribute to cost shifting, and the possibility that people may enter and leave the class being regulated (for instance, if they gain or lose employment), the comprehensive nature of the individual mandate is likely to survive any claims that it is overinclusive. By encouraging people to obtain health insurance, the individual mandate seeks to ensure that all of the individuals who fall into these classes remain insured and do not contribute to cost shifting.

**Timing and the Individual Mandate**

The forward-looking nature of the individual mandate reflects realities about healthcare and the healthcare market that make it a unique subject for regulation. The individual mandate regulates the purchase of health insurance, which assumes a future need for healthcare services. Thus, critics of the ACA argue that Congress seeks to regulate an eventuality that may never come to pass. The Sixth Circuit in *Thomas More* concludes, however, that “virtually every American” will use the healthcare system, and that waiting until they are ill to require the purchase of health insurance will undermine Congress’s purpose of stabilizing the healthcare industry. By contrast, the Eleventh Circuit found it problematic that the individual mandate requires individuals to purchase a product that anticipates future need. Since it is not certain that any particular person will need healthcare services or that they will contribute to the cost shifting problem associated with self-insurance, the Eleventh Circuit concluded that requiring the purchase of health insurance is not sufficiently related to interstate commerce. In dissent from this part of the Eleventh Circuit’s decision, Judge Marcus asserted that Congress has the power
to prepare for future disruptions in the economy, such as the cost shifting that uninsured
individuals are likely to cause when they enter the healthcare market.\textsuperscript{31}

As the Sixth Circuit articulated, the individual mandate is simply a way for Congress to
regulate \textit{when} the vast majority of individuals pay for healthcare. Without an individual mandate, Congress will not be able to ensure affordable healthcare because healthy individuals will not enter the system until they are ill. This problem of “adverse selection” means that the insurance industry will not be able to create meaningful insurance pools, posing a disruption to the economy as Judge Marcus predicts.\textsuperscript{32} Since the ACA also bans underwriting and requires insurance companies to accept people with pre-existing conditions, the individual mandate is a key part of making sure that the insurance industry can continue to provide services. Thus, the Supreme Court is unlikely to see the timing of the individual mandate as a viable constitutional challenge.

\textbf{Applicability of the Substantial Effects and Aggregation Theories}

The connections between the health insurance market and interstate commerce are well-
documented,\textsuperscript{33} and in passing the individual mandate portion of the ACA Congress concluded that individual decisions to self-insure have a substantial effect on the healthcare market.\textsuperscript{34} While the Eleventh Circuit held that using aggregation principles to uphold the individual mandate would lead to an “unlimited scope” for aggregation doctrine,\textsuperscript{35} the Sixth Circuit held that Congress had a “rational basis” for believing that the uninsured, in aggregate, have substantial effects on the interstate health insurance market.

In \textit{Wickard v. Filburn}\textsuperscript{36} and \textit{Gonzales v. Raich},\textsuperscript{37} the Court used aggregation principles to justify congressional regulation of individuals whose actions only affected interstate commerce when combined with the actions of others similarly situated.\textsuperscript{38} It would substantially undermine the well-established precedents created by the \textit{Wickard} and \textit{Gonzales} cases if the Court were now to find that aggregating the effects of uninsured Americans on the interstate market for healthcare was inappropriate. Much like the situation presented in \textit{Filburn} and \textit{Raich}, the individual who self-insures contributes to the cost-shifting problem identified by Congress, and therefore self-insuring individuals as a class have a substantial effect on interstate commerce. In general, the Eleventh Circuit’s concern with aggregation theory appears to be an extension of its
general concern that the Commerce power needs limiting principles, but the reality of the healthcare market’s operation and the effects self-insurance have on the market make it unlikely that the Supreme Court will refuse to use aggregation theory to uphold the individual mandate.  

Another challenge to the individual mandate has been whether or not the decision not to purchase healthcare is in fact “economic” in nature, an important limitation on congressional power within the substantial effects doctrine. In U.S. v. Lopez, the Supreme Court held that the Gun Free School Zones Act of 1990 went too far afield of congressional Commerce power because gun possession is not economic activity and attenuated effects that require the Court to “pile inference upon inference” to find a connection to interstate commerce could not serve to support congressional power in enacting the law. Similarly, the Eleventh Circuit’s decision regarding the individual mandate refers to the economic/non-economic distinction from Lopez in finding the mandate unconstitutional. According to the Eleventh Circuit, refusal to purchase health insurance is not necessarily economic activity. Because an individual could self-insure without ever needing care, the argument goes, self-insurance is not “economic” for Commerce Clause purposes. For the Eleventh Circuit, an individual’s decision to self-insure is not “economic” until he needs healthcare he cannot pay for, and it is at that point that Congress may regulate. 

The Sixth Circuit’s analysis of the relation of Lopez to the individual mandate differs markedly from the Eleventh Circuit. In its analysis, the Sixth Circuit court found that Congress rationally concluded that self-insuring was an economic activity that had a substantial effect on interstate commerce. Unlike the situation in Lopez, the Sixth Circuit found that individuals directly affect the interstate market for health insurance when they self-insure because they make health insurance more costly for those who do purchase it. By doing so, these individuals make an economic decision well within the purview of congressional Commerce power.

The Individual Mandate’s Role in the Broader Regulatory Scheme

Congress may also pass laws on matters whose regulation is essential to a broader regulatory scheme within the scope of the Commerce Clause. The “broader regulatory scheme” justification for congressional legislation is closely related to Congress’ ability to pass laws that are “necessary and proper” to the exercise of its enumerated powers. Self-insuring individuals
make it nearly impossible for Congress to regulate the healthcare industry, and thus even if the Individual Mandate is found by the Supreme Court to exceed congressional Commerce power it is likely to survive based on its importance to the broader regulatory scheme of the ACA.\textsuperscript{43} While the Eleventh Circuit and the Pennsylvania District Court in \textit{Goudy-Bachman}\textsuperscript{44} conclude that the individual mandate cannot be justified by its importance to the larger regulatory scheme because it is not “essential” to the ACA,\textsuperscript{45} the Sixth Circuit concludes that the entire regulatory purpose of the ACA would be undermined without the presence of the individual mandate.\textsuperscript{46} The importance of the individual mandate to the ACA is analogous to the importance of the regulation in \textit{Raich}: though it may seem that Raich was simply acting as a private individual outside of the market, his actions served to undermine congressional regulation of an entire industry. Similarly, though individuals who choose to self-insure seem to act as private individuals, their decision undermines Congress’ regulation of the healthcare industry in the ACA. Of note when considering the “broader regulatory scheme” justification for the individual mandate is that it is a theory of last resort. More than likely, the Court will not have to reach this question because it will find the individual mandate a valid exercise of congressional Commerce Power due to the substantial effects of self-insurance.

\textbf{The Necessary and Proper Clause}

Closely related to Commerce Clause challenges are arguments by plaintiffs in several cases that Congress overstepped the bounds of the Necessary and Proper Clause\textsuperscript{47} by requiring most individuals to purchase health insurance. The Necessary and Proper Clause provides Congress with the ability to make laws that are necessary and proper to the exercise of other enumerated congressional powers. In the context of the ACA, supporters argue that even if the individual mandate is not supported by the Commerce power, the mandate is necessary to Congress’ exercise of that power in regulating the healthcare industry. Both the necessity and propriety of the individual mandate have been challenged in the lawsuits.

“Necessity” in the context of the Necessary and Proper clause does not mean strict necessity. The Court in \textit{U.S. v. Comstock} held that the means through which Congress exercises its power must only be “reasonably adapted to the attainment of a legitimate end under the Commerce Power” in order to be considered necessary.\textsuperscript{48}
In the context of the ACA, the legitimate end is the regulation of the health insurance market, and the question becomes whether an individual mandate is necessary to assist in that regulation. While the Eleventh Circuit held that being self-insured does not “interfere with Congress’s ability to regulate insurance companies,” congressional findings and economic analyses of the U.S. healthcare system have shown that without the individual mandate the insurance industry would likely fail under the other insurance expansions of the ACA. The bar for necessity under the Necessary and Proper Clause is not very high, because the purpose of the clause is to allow Congress to effectively use its other enumerated powers. Thus, the regulation at issue here should have little trouble meeting the necessity standard.

Challengers also claim that the individual mandate is not a “proper” use of congressional powers. Economic mandates are exceedingly rare, and this one is unprecedented, the argument goes, and therefore the individual mandate is improper. The bar for propriety is low, and the novelty of the Individual Mandate on its own is unlikely to cause the Court to strike the individual mandate as unconstitutional. While mandates from Congress are rare, they are not unheard of. The Militia Act of 1792 required men to purchase goods that would prepare them should the need to raise militias arise, and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) requires landowners, whether or not they are responsible for particular environmental problems, to rectify them. The individual mandate’s requirement that individuals purchase health insurance, intimately connected to the overall goals of the ACA, is therefore unlikely to pose a problem based on propriety.

2. If the Individual Mandate is found unconstitutional, is that provision severable from the remainder of the Affordable Care Act?

Severability is the test used by a court to determine whether, once a portion of an act has been found unconstitutional, the entire act must fail as a result. In determining whether a provision is severable, a court inquires whether the statute is merely a “bundle of separate legislative enactment[s]” or a “carefully-balanced and clockwork-like statutory arrangement comprised of pieces that all work toward one primary legislative goal.” The test employed to make this determination consists of two parts with a presumption in favor of severability. First, a court inquires whether, once the unconstitutional provisions have been cast aside, the
remainder of the statute could be “fully operative as a law.” Judge Vinson, writing for the Northern District of Florida before Florida v. HHS reached the Eleventh Circuit, identified several provisions that could continue to function absent the individual mandate, namely those not relating to the healthcare industry. However, he found that the provisions would not continue to “function ‘in a manner consistent with the intent of Congress.’”

The second step in severability analysis requires a court to determine Congress’ intent regarding severability, asking whether it is “evident that the Legislature would not have enacted those provisions which are within its power.” Judge Vinson found that Congress did not intend the individual mandate to be severable for two reasons. First, an earlier version of the ACA included a severability clause, while the final version does not. Second, as the defendants concede, the insurance reforms cannot survive without the individual mandate, and these reforms constitute the core of the Act. Judge Vinson also balked at having the judiciary rewrite a lengthy act of Congress in order to salvage the permissible portions.

The Eleventh Circuit disagreed with Judge’s Vinson’s severability analysis, noting that according to legislative drafting manuals and Supreme Court precedent, the lack of a severability clause should not carry any weight. However, it should be noted that the Eleventh Circuit did not address Judge Vinson’s other severability concerns. The Supreme Court, in the unlikely event that it finds the Individual Mandate unconstitutional, will have to decide whether the rest of the ACA can stand without it. Given the importance of the Individual Mandate to healthcare reform, strategic questions remain as to whether or not the Government should argue for severability (see “Strategic Considerations” below).

3. Is the Medicaid Expansion’s requirement that states expand Medicaid eligibility or risk losing federal funds unduly coercive in violation of the Tenth Amendment?  

Coercion Doctrine

One of the main provisions of the ACA is the expansion of Medicaid. The ACA increases eligibility for Medicaid to include people earning up to 133% of the Federal Poverty Level, creating millions of new beneficiaries. Additionally, the ACA provides that for the first two years, the Federal government will pay 100% of the cost of this expansion (with the
percentage of Federal contribution reduced to 90% for several years after). Under the Medicaid Act, the States must implement the expansion or lose some or all of their federal Medicaid funding, as decided by HHS. Several states claim that the Medicaid expansion violates a limitation on the use of the spending power to encourage state regulation and constitutes unconstitutional coercion and thus commandeering, in violation of the Tenth Amendment.

In Florida v. HHS, the Eleventh Circuit applied the coercion doctrine to the ACA Medicaid expansion and found that it does not constitute unlawful coercion of the States. The Eleventh Circuit considered many factors in determining that the Medicaid expansion was not coercive: (1) Medicaid-participating states were warned from the beginning that Congress reserved the right to make changes to Medicaid, (2) Congress has already made numerous amendments to the program since its inception, and in each of these amendments, the States were given the option to comply with the changes or lose all or part of their funding, (3) the federal government will bear nearly all of the costs of the expansion, (4) the States have almost four years of notice to decide whether they will continue to participate in Medicaid, (5) the States have the power to tax and raise revenue, and can therefore create and fund programs of their own if they prefer, (6) nothing in the Medicaid Act requires that the states who choose not to participate in the expansion lose all of their Medicaid funding, but rather gives HHS the discretion to determine what penalty will arise.

The Eleventh Circuit’s decision is consistent with earlier jurisprudence. Prior changes to Medicaid have survived constitutional challenges on similar grounds. An important part of the defense is that since no state has actually refused to implement the changes and had its federal funding cut, this is a facial challenge only, so plaintiffs bear the heavy burden of proving that the ACA cannot be applied in a constitutionally valid manner. Since HHS has discretion as to the effect of a refusal to comply, it is impossible to prove beforehand that this discretion will be wielded in an unconstitutional manner. A state would have to refuse to implement the Medicaid expansion before it could successfully claim that the federal response was unduly coercive, and it is unlikely that any state will take the risk of losing a substantial portion of their federal Medicaid funding. Both because of the difficulty of succeeding on a coercion claim and because of the strategic difficulties of bringing such a claim, the ACA Medicaid expansion should survive attacks based on the coercion doctrine.
4. Is the Individual Mandate a tax for the purposes of the Anti-Injunction Act, meaning that plaintiffs seeking to challenge the Mandate cannot do so until it goes into effect in 2014?

The Anti-Injunction Act

The Anti-Injunction Act (AIA) specifies that federal courts do not have subject matter jurisdiction over suits seeking a pre-enforcement permanent injunction of a federal tax.\textsuperscript{75} This prohibition applies to challenges to the individual mandate if it is a tax for the purposes of the AIA. In other words, if the Supreme Court determines that the individual mandate is a tax for AIA purposes, challengers would not have standing to challenge that provision until 2014 when it goes into effect. If the AIA does apply to the individual mandate, challengers will still have standing to dispute the constitutionality of other parts of the ACA before 2014.

Supporters of the ACA must consider whether to argue that the individual mandate is a tax under the AIA. A finding that the mandate is a tax would not necessarily mean that the mandate is a tax for Article 1 purposes, and may thus be of limited strategic advantage. Moreover, if the Court finds that the mandate is not a tax under the AIA, it will be able to decide its constitutional validity in the spring of 2012, relieving uncertainty and confusion as many states gear up to implement the ACA’s various provisions. A finding that the individual mandate is a tax under the AIA would perpetuate uncertainty about the ACA, which is not in the government’s interest. So far, the government has chosen to argue that the individual mandate is not a tax under the AIA.\textsuperscript{76}

Two circuit courts have addressed this issue, with different results. The Sixth Circuit held that the AIA does not apply to the individual mandate,\textsuperscript{77} while the Fourth Circuit held that it does apply and strips the court of jurisdiction to hear pre-enforcement challenges.\textsuperscript{78} The main reason for the Fourth Circuit’s decision was that the label of “penalty” does not affect the analysis in any way and Congress did not clearly state that the AIA does not apply to the individual mandate. The mandate was found to be a tax for AIA purposes because it is assessed and enforced in the same way as a tax.\textsuperscript{79} There are a few arguments that give significant support the Sixth Circuit’s decision that the individual mandate is not a tax.\textsuperscript{80} First, Congress explicitly used the word “penalty” to describe the mandate. This argument is made stronger by the fact that Congress originally used the word “tax,” but changed it to “penalty.”\textsuperscript{81} Second, the purpose of the AIA is
not implicated by these pre-enforcement actions. The AIA is meant to further the expeditious collection of taxes.\textsuperscript{82} An enforcement action that will be decided years before the first individual mandate penalty is collected does not implicate this interest. The Supreme Court’s decision to consider whether this Act applies to challenges regarding the individual mandate will have important consequences for legal strategy and argument before the court this spring.

\textbf{The Taxing and Spending Clause}

Whether or not the individual mandate constitutes a tax or a penalty is important both for plaintiffs’ standing under the Anti-Injunction Act and for the analysis of whether Congress acted within its Taxing and Spending powers in enacting the individual mandate. The Taxing and Spending power allows Congress to raise revenue and spend governmental funds to support the general welfare. Congressional power is very broad when it comes to the Taxing and Spending Clause, and if the Court finds that the individual mandate is a tax in this context, the mandate is very likely to be upheld as a valid exercise of congressional power.\textsuperscript{83}

To date, all courts have held that the Individual Mandate constitutes a penalty and not a tax.\textsuperscript{84} Even the Fourth Circuit, in deciding that the Individual Mandate constitutes a tax for Anti-Injunction Act purposes, fell short of finding that the mandate is a tax for Article 1 purposes. From a strategic point of view, it may be that plaintiffs and the government alike wish to steer clear of the tax issue because doing otherwise may complicate standing under the Anti-Injunction Act, but if the Court decides that the mandate \textit{is} a tax, it is likely to decide in favor of its constitutionality.

\textbf{Strategic Considerations}

The Anti-Injunction Act and severability analysis present strategic issues for defenders of the ACA. If the individual mandate is found to be a tax, then plaintiffs cannot challenge its constitutionality until after the mandate becomes effective in 2014. While in the short run this may provide more time for implementation, in the long run waiting until 2014 leaves the legal status of the ACA uncertain. Given the elections in 2012 and the need to implement important
provisions of the ACA as soon as possible, waiting to determine the constitutionality of the ACA until 2014 is unfavorable for challengers and advocates alike.

The severability of the Individual Mandate is an additional strategic hurdle for defenders of the ACA. If the mandate is severable, then even if it is held unconstitutional by the Court, the rest of the ACA may remain law. If the mandate is not severable, then a finding of unconstitutionality would mean an end to the entire ACA. While defenders of the ACA cannot desire to see the Act fail completely under Supreme Court review, realities of the health insurance market make it unlikely that the ACA can be successful without the presence of an individual mandate. If healthy people do not purchase insurance, the insurance industry will likely be unable to abide by other rules set out in the ACA, such as the bans on discrimination against people with preexisting conditions and underwriting.

These strategic issues must be discussed and considered in depth as the Supreme Court prepares to decide the fate of the Affordable Care Act, and advocates must decide on the approach most likely to yield the promises of healthcare reform.

**Conclusions**

Many challenges have been brought against the Affordable Care Act, some stronger than others. The Supreme Court’s decision, however, is likely to come down to its interpretation of how Commerce Clause jurisprudence applies to the Affordable Care Act. Severability questions pose additional logistical challenges, as even the government believes that the ACA will fail in its ultimate goal of reforming America’s healthcare system unless the individual mandate is found constitutional. The most important Tenth Amendment claim brought in the cases thus far is that the Medicaid expansion constitutes unlawful coercion of the states. The ACA will almost certainly survive this claim, as no court has ever held a conditional grant of federal funds to be unduly coercive. With healthcare reform on the line, the Supreme Court’s decisions regarding the issues discussed here will have far-reaching effects for access to healthcare as well as for jurisprudence in these areas of law for years to come.
A Role for the Advocacy Community

The health advocacy community has an important role to play in defending the ACA against attack. Through education, the advocacy community can work to inform various stakeholders about what’s at stake for healthcare reform and how the ACA can benefit states, businesses, and individuals. Advocacy groups can and should form coalitions to write amicus briefs supporting the various provisions of the ACA that are under attack. Advocates should contact legislators, and urge continued funding and implementation of the healthcare reforms promised in the ACA. Supporters of the ACA must convince politicians who may be skeptical of the constitutionality of the ACA that it is likely to survive legal challenge and that we lose valuable time if we delay implementation. Finally, implementation itself must be a key goal for the advocacy community. The more of the ACA that is implemented when the cases come before the Supreme Court, the more persuasive supporters of the ACA can be at the Supreme Court level when defending its various provisions.
## Appendix 1: Challenges to the Affordable Care Act

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1 For links to major Supreme Court filings related to the ACA, see http://www.supremecourt.gov/docket/PPAACA.aspx


4 The Commerce Clause gives Congress the power “to regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes.” U.S. CONST. art. 1, § 8, cl. 3.

5 26 U.S.C. §5000A


Id. at 130.


Florida v. U.S. Dep’t of Health & Human Servs., Nos. 11-11021, 11-11067, slip. op. at 130 (11th Cir. Aug. 12, 2011).

Id. at 146.

Thomas More Law Center v. Obama, No. 10-2388, slip. op. at 17 (6th Cir. June 29, 2011).

Id. at 20.


Id. at 126


A facial challenge is a challenge to a law based on the law as written, as opposed to an “as-applied” challenge, which disputes the validity of a law as it is applied to particular individuals or circumstances.


Thomas More Law Center v. Obama, No. 10-2388, slip. op. at 23 (6th Cir. June 29, 2011).

For instance, the court in U.S. v. Lopez, 514 U.S. 549 (1995) found that for congressional regulation to be valid under the Commerce Clause, it must be “economic” in nature.


“...It is simply untrue, however, that congress cannot wield its commerce power to require an individual to ‘engage in activity.’ The owners of whites-only lunch counters wanted nothing more than to refrain from engaging in activity with African-American patrons, yet the Supreme Court unanimously determined that the commerce power authorized Congress to force them to conduct business against their will.” Ian Millhiser, Worse Than Lochner, 29 Yale L. & Pol’y Rev Inter Alia (2011) available at http://yalelawandpolicy.org/29-2/worse-than-lochner.

Mark A. Hall, Commerce Clause Challenges to Health Care Reform, 159 U. Pa. L. Rev. 1825, 1834 (June 2011)
24 Mark Hall argues that the activity/inactivity line has little to offer Commerce Clause jurisprudence. According to Hall, a desire to place “some” limits on congressional commerce power should not lead our courts down the dangerous path of settling on an unworkable distinction such as this one. Whether or not something is an “activity” within this proposed distinction is a contentious question and may simply complicate constitutional analysis. See Id. at 1828.

25 See Jack M. Balkin, Commerce, 109 Mich. L. Rev. 1, 47 (Oct. 2010). Since virtually every individual will at some point have need for medical care, self-insurance can be seen as the equivalent of choosing to put off paying for a service that one will eventually need. Balkin also argues that self-insurance could also be considered an activity because self-insuring individuals “also go to emergency rooms where they cannot be turned away, increasing costs for everyone in their community.” As the court in Thomas More Law Center v. Obama, No. 10-2388 (6th Cir. June 29, 2011) made clear, “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.” Id. at 45.

26 In Florida v. HHS, the Eleventh Circuit explains that part of the congressional rationale for enacting the individual mandate relates to the argument that those who use the healthcare without being able to pay for it cause costs to shift to hospitals and those who do buy insurance. Because emergency rooms are required to treat patients who present with an emergency regardless of ability to pay, the uninsured are identified as a significant part of the increasing costs of healthcare in the United States.

27 Gonzales v. Raich, 545 U.S. 1, 17 (2005). In Gonzales v. Raich, the Supreme Court considered whether Congress had the power under the Commerce Clause to regulate marijuana grown for personal consumption and never sold in commerce. The Court held in the affirmative, concluding that Congress may regulate the home-grown marijuana because allowing individuals to grow the drug would have a “substantial effect” on the market for marijuana nationally.

28 Similarly, in United States v. Lopez, the Court said that unique individual cases are “of no consequence” when considering the validity of congressional regulation through the Commerce Clause. U.S. v. Lopez, 514 U.S. 549, 558 (1995).

29 Everyone will experience illness and death eventually, and thus it is a virtual guarantee that all individuals will need healthcare services. It is true that some may choose not to obtain medical care even when faced with illness, and that others may have ways to fund their needs for healthcare; nevertheless, the vast majority of Americans will need assistance paying for healthcare when they require it and the present decision to purchase health insurance ensures that when they enter the market they will be able to secure the services they need.

30 Thomas More Law Center v. Obama, No. 10-2388, slip. op. at 59 (6th Cir. June 29, 2011).


Wickard v. Filburn, 317 U.S. 111, 124-126 (1942). In Wickard v. Filburn, the Supreme Court held that the Commerce Power allows Congress to regulate local activity if it has a “substantial effect,” in the aggregate, on the national market for a product. The home production of wheat for personal use in Wickard was found to decrease demand for wheat on the market, and thus the Court decided that in the aggregate home production had a substantial effect on interstate commerce.

Gonzales v. Raich, 545 U.S. 1, 2 (2005).

Id.

Another argument set forth in academic literature is that the existing limits to congressional commerce power are based in Congress’s need to address “collective action problems,” wherein the states individually are unable to deal effectively with economic issues that span the country. Reform through the ACA’s individual mandate can be justified as an attempt by Congress to create a rule for the country that avoids potential negative repercussions of individual states reforming the health insurance industry. For instance, if one state enacts stricter health insurance laws, insurance companies or providers might move to other states or raise their rates in states with less restrictive rules to compensate. Robert Cooter and Neil Seigel argue that the Court’s decision in U.S. v. Lopez, 514 U.S. 549 (1995) could be read as dealing with this issue: if one state enacts stricter gun laws, these laws are unlikely to have collective action repercussions in other states. Thus, the court could not justify the regulation at issue in Lopez under the Commerce Clause. See Robert D. Cooter & Neil S. Seigel, Collective Action Federalism: A General Theory of Article I, Section 8, 63 Stan. L. Rev. 115, 162-163 (Dec. 2010) available at http://www.stanfordlawreview.org/content/article/collective-action-federalism-general-theory-article-i-section-8.


Thomas More Law Center v. Obama, No. 10-2388, slip. op. at 60 (6th Cir. June 29, 2011).


Id. at 43.

Thomas More Law Center v. Obama, No. 10-2388, slip. op. at 23 (6th Cir. June 29, 2011).

U.S. CONST. art. I, § 8 states that Congress may “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.”


Mark A. Hall, The Factual Bases for Constitutional Challenges to Federal Health Insurance Reform, Wake Forest Univ. Legal Studies Paper No. 1717781 (2010) at 11-22. Hall also explains that states that have tried to reform the health insurance market without an individual mandate have failed due to adverse selection problems.

Mark Hall points out that Justice Scalia’s concurrence in Raich indicates his belief that the Necessary and Proper Clause’s function is to allow Congress to do what it would otherwise be unable to do through its enumerated powers, in order to fulfill the tasks it sets using those powers. Mark A. Hall, Commerce Clause Challenges to Health Care Reform, 159 U. PA. L. REV. 1825, 1849 (June 2011)

Mark Hall argues that an act of congress must violate a “distinct constitutional norm” to be considered improper under this clause. Mark Hall, “Commerce Clause Challenges to Health Care Reform,” pages 1852-1853.

Militia Act, ch. 33, 1 Stat. 271 (1792).


Severability is a judicial doctrine, whereby, after determining that a statutory provision is unconstitutional, a court will decide whether the provision at issue can be severed from the rest of the statute, or if the whole statute will have to be struck down with the provision. The overarching idea is that courts should “try to limit the solution to the problem,’ severing ‘any problematic portions while leaving the remainder intact.” Free Enterprise Fund v. Public Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3161 (2010) (citation omitted).


Id. (quoting Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 685 (1987) (emphasis in original)). Here however, the court seems to be conflating the two elements of the test, as the second specifically probes congressional intent, while the first, by the literal words of the Supreme Court is supposed to be concerned with the practical effects. However, in the end, this would not affect Judge Vinsons’ analysis.


Florida ex rel. Bondi v. U.S. Dep’t of Health & Human Servs., 780 F. Supp. 2d, 1256, 1301 (N.D. Fla. 2011). (”strong evidence that Congress recognized the Act could not operate as intended without the individual mandate”) (emphasis in original).

Id. at 1301-03. Various evidence used in this determination include remarks by President Obama, id. at 1302 n.28, the arguments of the defense, id. at 1301-03, and language in the Act itself, such as Section 1501(a)(2)(I), id. at 1303.

Id. at 1303-05.


The Tenth Amendment to the United States Constitution specifies that “the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” (U.S. CONST. amend. X.) The Tenth Amendment is primarily a residual provision specifying that Congress only has the powers enumerated in Article I of the Constitution. The Supreme Court has interpreted the Tenth Amendment to independently prohibit commandeering. Therefore, even when Congress has the power to directly regulate an activity, it cannot order the states to regulate that activity. If commandeering is found, the statute is necessarily unconstitutional. (New York v. United States, 505 U.S. 144 (1992)).

For an act of Congress to violate the Tenth Amendment, three elements must be present. The first is that the challenged statute regulates the States as States, rather than as part of a generally applicable regime. The second element is that the federal regulation must address matters that are indisputable attributes of state sovereignty. The final element is that the States’ compliance with the federal law would directly impair their ability to structure integral operations in areas of traditional governmental functions. Hodel v. Va. Surface Mining & Reclamation Ass’n, Inc., 452 U.S. 264, 287-88 (1981).

There appear to be only two cases in which the Supreme Court found an Act of Congress to be unconstitutional commandeering in violation of the Tenth Amendment. In New York v. United States, 505 U.S. 144 (1992), states that refused to comply with federal requirements for the regulation of radioactive waste were forced to take title of that waste and assume liability for any damages caused by it. This provision offered state governments a choice between accepting ownership of the waste or regulating according to the instructions of Congress. The Supreme Court held that this was not a valid choice because Congress could not viably mandate either option and “a choice between two unconstitutionally coercive regulatory techniques is no choice at all.” In
Printz v. United States, 521 U.S. 898 (1997) the Brady Act amendments to the Gun Control Act required Chief Law Enforcement Officers to make reasonable inquiries every time a resident of their region sought to purchase a handgun. The Supreme Court held that Congress cannot require these state officials to assist in enforcing federal regulatory requirements.


The coercion doctrine was established in Steward Machine Co. v. Davis, 301 U.S. 548 (1937) when the Supreme Court recognized that a financial inducement to the States may constitute unlawful coercion in certain factual circumstances. In this case, the Supreme Court held that the combination of an excise tax and federal grants for state unemployment insurance programs was not coercive. The concept was fleshed out in South Dakota v. Dole, 483 U.S. 203 (1987) when the Supreme Court confirmed that a financial inducement offered by Congress could be coercive. The Supreme Court held that the federal government’s decision to withhold a portion of federal highway funds from states that had a minimum drinking age under 21 was not coercive. Despite wide recognition of the coercion doctrine, no court has ever found a conditional grant to be impermissibly coercive. West Virginia v. U.S. Dep’t of Health & Human Servs., 289 F. 3d 281, 288 (4th Cir. 2002).


70 Florida v. U.S. Dep’t of Health & Human Servs., Nos. 11-11021, 11-11067, slip. op. at 67 (11th Cir. Aug. 12, 2011).

71 Id. at 64-66.

72 West Virginia v. U.S. Dep’t of Health & Human Servs., 289 F. 3d 281, 288 (4th Cir. 2002). In that case West Virginia argued that the program was unduly coercive because the states did not know up-front the cost of failing to comply, and thus had to take a big risk to avoid the federal requirements. The 4th Circuit rejected this argument, concluding that “...the Medicaid Act is not coercive simply because it fails to reach this idealized standard of specificity.”

73 Id. at 292. In a facial challenge the plaintiff must prove that the Act could not be imposed in a constitutional manner.

74 Id.

76 Liberty Univ. v. Geithner, No. 10-2347, slip. op. at 19 (4th Cir. Sept. 8, 2011); Thomas More Law Center v. Obama, No. 10-2388, slip. op. at 11 (6th Cir. June 29, 2011).
79 Id.
80 Other arguments include: (1) refusing to make a decision on the merits undermines the core purpose the ACA, (2) it is not appropriate to require Congress to include a clear statement that the AIA does not apply, (3) the Secretary of the Treasury’s opinion that the mandate is not a tax is relevant, (4) many of the mechanisms used to collect a tax are specifically forbidden when collecting the mandate, and (5) the purpose of the individual mandate is regulation, not revenue creation. Liberty Univ. v. Geithner, No. 10-2347 (4th Cir. Sept. 8, 2011) (Davis J. dissenting); see Thomas More Law Center v. Obama, No. 10-2388, slip. op. at 13 (6th Cir. June 29, 2011).
81 Liberty Univ. v. Geithner, No. 10-2347, slip. op. at 59-60 (4th Cir. Sept. 8, 2011) (Davis J. dissenting).
82 Id. at 61; Thomas More Law Center v. Obama, No. 10-2388, slip. op. at 13 (6th Cir. June 29, 2011).
85 The table presented here borrows heavily from the table at ACA Litigation Blog’s ACA Litigation Spreadsheet (10/27/11), available at http://acalitigationblog.blogspot.com/.
86 By “sovereign injury,” the plaintiffs in this case (the state of Virginia) mean to defend their standing to sue based on what they see as a defense of the state’s sovereign right to defend its own laws. Here, Virginia has enacted a law meant to protect its citizens from the individual mandate and sues because it claims the ACA conflicts with that law. The 4th Circuit denied this claim to standing.