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Constitutional Challenges to the Patient Protection and Affordable Care Act—A Snapshot

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Debates about the Patient Protection and Affordable Care Act of 2010 (ACA) and its measures continue to play out in both the court of public opinion and our federal and state courts. Various federal courts, called circuit courts, have reached different decisions on whether the act is constitutional. Recently, the Department of Justice petitioned the U.S. Supreme Court for review of the conflicting decisions, making it very likely that the Supreme Court will make a final decision by June 2012 [1].

The question of constitutionality has mainly focused on the act's "minimum essential coverage provision," which requires that individuals maintain a minimum level of health insurance coverage starting in 2013 [2]. Central to this debate is whether Congress has the constitutional authority to require all American citizens to maintain minimum insurance coverage.

What is the Minimum Essential Coverage Provision?

The provision requires that every citizen of the United States, except those falling within specified exceptions, acquire and maintain a minimum level of health care coverage [2]. Exceptions include those exercising religious conscience, those who cannot afford coverage, and those who, by reason of low income, do not file taxes [2, 3]. Failure to obtain minimum coverage by anyone else will result in a tax penalty [3].

ACA proponents stress that this provision is important to the overall legislation, mainly for financial reasons. One section of the ACA requires insurers to provide coverage for people with preexisting conditions [4]. This mandate will likely increase costs to health care insurers because they will be providing coverage to more sick people, thus driving up costs for everyone. Mandating that everyone take part in health insurance will widen the pool; more healthy people will be paying premiums while needing little medical care, thus counterbalancing the cost to insurers of covering sick people [5]. Moreover, requiring everyone to purchase health insurance might reduce the total costs of treatment for patients with preexisting conditions by providing them access to care earlier in the development of those conditions, as well as preventing "free riders," those who join up last-minute and receive care but have paid little or nothing into the health plan [6]. For reasons such as these, ACA proponents insist that the minimum essential coverage provision is not only appropriate but also crucial to fulfilling the greater purposes of the act.

What is the Commerce Clause?
Broadly speaking, Congress's powers must be granted to it by the Constitution. All other authority is reserved for the states. One of the powers granted to Congress by the Constitution is the ability to pass legislation regulating "Commerce with foreign Nations, and among the several States, and with the Indian Tribes" [7]. The commerce clause has been interpreted to give Congress the power to regulate (a) any item that travels in interstate commerce (such as goods transported across state lines), and (b) any action that, when taken in the aggregate, can substantially affect interstate commerce [8]. The "substantial effects" test has, in the past, given the federal government a wide reach in regulating the national economy.

For example, in *Wickard v. Filburn* Congress attempted to regulate the price of wheat by limiting how much wheat farmers could grow and sell [9]. The plaintiff in that case grew wheat in excess of the limit and used it to feed his livestock [10]. He argued that Congress could not prohibit him from doing so because the wheat never moved into the stream of interstate commerce [11]. The Supreme Court ruled that, even though some of his wheat was purely for personal use, the regulation was constitutional because, if all farmers acted as the plaintiff did, those actions would, in aggregate, have a substantial effect on interstate commerce [12]. More farmers would not need to purchase wheat on the market, thus decreasing demand and lowering the market price of wheat. And, in turn, it would undermine Congress's ability to effectively regulate wheat prices, which is a reasonable goal for Congress.

The question addressed by the federal courts when looking at ACA is: can Congress require someone who might not otherwise do so to purchase health insurance, or is that power outside the reach of the Constitution? To date, four of the thirteen circuit courts have heard the case and come to different decisions. The Third and Fourth Circuit courts have failed to reach a verdict regarding constitutionality because they believed the parties had no standing (or right) to bring the lawsuit before the courts [13, 14]. The other two courts have diverged in their rulings, with the Sixth Circuit finding the essential coverage provision constitutional, and the Eleventh Circuit finding the opposite [15, 16].

The Sixth Circuit
The Sixth Circuit—which has jurisdiction over Michigan, Ohio, Kentucky, and Tennessee—ruled that the minimum essential coverage provision falls within the powers of Congress and the commerce clause and is constitutional [15]. This decision relies on the theory, developed in the *Wickard* case, that Congress may regulate acts that, in the aggregate, substantially affect interstate commerce [17]. The Sixth Circuit sees all citizens as being actively involved in the health care market: they participate in the health care market either by purchasing insurance, by paying for medical costs out of pocket, or by incurring costs they do not cover [18]. Like the wheat farmer in *Wickard* who grew his own wheat and thus potentially affected the overall market for wheat, uninsured individuals also affect the market price of a good or service they choose not to purchase [18]. In this way, the Sixth Circuit sees those

who are not currently purchasing health insurance not as being removed from the market, but as still participating in the market, albeit in a different manner.

The Sixth Circuit distinguishes the health care market from other markets that Congress might be tempted to regulate in the same manner by pointing out its uniqueness. Hospitals are required to provide certain health care to patients whether or not an individual is capable of paying for it. This distinguishes it from the markets for food and clothing, which seem just as essential, and yet no store is required to provide them for free [19]. This unique aspect of health care delivery causes the cost of health care for the insured to rise to meet the burden of providing care to the uninsured, thus making this a more appropriate issue for Congress to regulate than some other forms of commerce [19].

The Eleventh Circuit

The Eleventh Circuit—which has jurisdiction over Alabama, Florida, and Georgia—ruled that the individual mandate was unconstitutional and distinguished the case from *Wickard* in two ways [16]. First, the court elaborates that, in *Wickard*, Congress foreclosed only one of many options for wheat growers, unlike ACA, with which Congress mandates a certain action from consumers and eliminates other choices [20]. In *Wickard*, the wheat grower "could have decided to make do with the amount of wheat he was allowed to grow. He could have redirected his efforts to agricultural endeavors that required less wheat….[Congress] left [the farmer] with a choice. [ACA]'s economic mandate to purchase insurance, on the contrary, leaves no choice and is more far-reaching" [21]. The court has refused to make what it perceived would be a fundamental expansion of congressional power—Congress being allowed to dictate where and when Americans spend their money by forcing them to purchase health insurance. The court might fear this expansion would allow Congress to legislate that Americans must purchase other goods or services in order to regulate markets.

Second, the Eleventh Circuit argued that the minimum essential coverage provision attempts to regulate theoretical future economic activity (future receipt of health care) rather than ongoing activity such as growing and using wheat [22]. Congress assumes that everyone eventually will receive health care. The Eleventh Circuit responds that it is entirely possible for someone to never enter the health care market by never using medical services—but that this provision still attempts to regulate such people and force them into the health care market [22]. The court adds that receipt of health care is far less inevitable than participation in markets for basic necessities such as food and clothing [23].

The Eleventh Circuit further distinguished ACA by noting that the government has traditionally only been able to compel activities that concern citizens' relationships with the state itself. Historically, Americans have had few requirements of citizenship: serving on juries, registering for the draft, filing taxes, and responding to the census among them [24]. While these requirements involve the relationship

between citizens and the government, the minimum essential coverage provision regulates a relationship between citizens and private insurers.

The Third and Fourth Circuits

Both the Third (Pennsylvania, New Jersey, and Delaware) and Fourth (Maryland, Virginia, North Carolina, and South Carolina) Circuit Courts have ruled that, in some way, the plaintiffs bringing the case did not have a right to do so and, thus, the court need not reach a decision on the constitutionality of the law [13, 14]. The Third Circuit refused to rule on constitutionality because the persons challenging the law (a group of patients and physicians) could not prove how they had actually yet been harmed by the law [13]. Most recently, the Fourth Circuit argued that a state cannot bring a suit because the mandate affects individuals, not governments [14]. Moreover, this court believed that the individual mandate is a tax and thus cannot be litigated until the measure actually goes into force, under certain federal laws [14]. The issue of whether the constitutionality of the individual mandate is a matter of tax law or commerce clause law could be another key issue the Supreme Court will have to wrestle with in the near future.

Conclusion: The Road Ahead for ACA

If and when the Supreme Court decides on the ACA's constitutionality, the outcome may turn on a number of questions: Is Congress's right to require the individual mandate regulated by tax or commerce laws, or is it not permitted at all? Are all citizens inherently participating in the health care market? Would this legislation set a new precedent for congressional power over consumers, and, if so, what kind? And how does health care compare to other types of goods and services that the federal government regulates? The Supreme Court, if it grants *certiorari*—meaning that it has determined the subject is worthy of its review—would then also face the question of whether the minimum essential coverage provision could be severed from the rest of the ACA and struck down on its own [24]. If it cannot be severed, the whole of the ACA would be declared unconstitutional.

In the end, the present issue will only be resolved by a ruling from the Supreme Court—but even that, depending on the outcome, might be only a temporary resolution of the broader national debate.

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