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U.S. Supreme Court to Consider Constitutionality of Health Care Act

2321 N. Loop Drive, Ste 200 • Ames, Iowa 50010 www.calt.iastate.edu

Originally Posted on February 1, 2011
Updated March 7, 2011 and November 26, 2011
- by Roger A. McEowen*

Overview

"The Patient Protection and Affordable Care Act"[1] ("Act") was enacted in early 2010 on straight-party line votes in both the House and Senate, and remains largely unpopular according to many polls.[2] Perhaps because of those facts, the constitutionality of the Act is now before the U.S. Supreme Court. But, a significant question remains as to whether the Court will decide the constitutional issue, or simply vacate the lower court opinions for lack of jurisdiction. That's an important point because, among other things, there are numerous tax provisions in the Act that have either taken effect or are set to take effect in the coming years.[3]

Constitutional Analysis

There are various approaches to addressing the constitutionality of a statute. One approach is to consider what the Constitution actually says. Under this approach, the Act is obviously unconstitutional. But, no one litigating the present case argued their position based on the original meaning of the language of the Constitution. Another approach is simply to base constitutionality of the Act solely on a prediction of whether there are a majority of votes on the U.S. Supreme Court to either uphold or strike down the Act. A third approach is based on constitutional law doctrine – what the Supreme Court has said in prior cases that may have application to the present case. But, it is difficult to apply constitutional law doctrine to this case. That is because the Act's mandate provision punishes inactivity. The Act's mandate provision requires every person to engage in economic activity – indeed, to engage in a particular type of economic activity by entering into a private contract with a private insurance company for the purchase of health insurance or be fined for not doing so. Prior to the enactment of the Act, the Congress has never done this. So, there is no prior caselaw or constitutional law doctrine to apply to the Act's mandate provision.

The Commerce Clause.[4] Article I, Section 8 of the Constitution says that, "The Congress shall have Power…To regulate Commerce with foreign Nations and among the several States, and with the Indian tribes…". In Federalist No. 22, Alexander Hamilton provided insight into the purpose and meaning of the Commerce Clause when he stated, "…we may reasonably expect, from the gradual conflicts of State regulations, that the citizens of each would at length come to be considered and treated by others in no better light than that of foreigners and aliens." Hamilton, based on his observations of the Germans, went on to explain that the nation would face economic chaos if there wasn't some sort of "a superintending authority over the reciprocal trade of confederated States" to make sure that the "states shall not lay tolls or customs on bridges, rivers, or passages." Thus, the Commerce Clause gave the Congress the power "to regulate commerce among the several states."

There is no doubt that the Congress has the authority under the Commerce Clause to regulate economic *activity*. Indeed, in Federalist No. 22, Hamilton explicitly noted that the clause was to be limited to *actual commerce* among the states. Indeed, in every Commerce Clause case that the U.S. Supreme Court has considered, economic activity has been involved.

Is Inactivity Regulable Conduct?

The government's primary argument is that economic activity is *not* required to trigger the power of Congress to regulate under the Commerce Clause. That argument is based heavily on a 1942 case involving an Ohio farmer that had voluntarily agreed to subject himself to a wheat allotment established by the United States Department of Agriculture.

The ag program at issue arose out of the political and economic theories occasioned by the Great Depression which, as applied to agriculture, resulted in the enactment of the Agricultural Adjustment Act of 1933. That Act provided the framework for various agricultural programs that were enacted in the 1930s. The production control aspects of the Act were deemed unconstitutional in 1936.[5] Later in 1936, however, the Soil Conservation and Domestic Allotment Act of 1936 became law. The law resurrected the acreage allotment concept of the Agricultural Adjustment Act and combined it with natural resource conservation programs. The 1936 law was to avoid the constitutional problems of the 1933 law and lead to further legislation that could withstand a constitutional challenge as determined by a reconstituted court. That legislation came in 1938 in the form of the Organic Act.

The constitutionality of the 1938 law was upheld in *Wickard v. Filburn*.[6] The case involved an Ohio farmer, Roscoe Filburn, who operated a small farm in Montgomery County, Ohio. He raised chickens, had dairy cows and sold milk and eggs. He also raised winter wheat on a few acres for the purpose of feeding his poultry and livestock. He also made flour for consumption by his family and occasional sales. He voluntarily participated in the newly-established farm program. That program set quotas on wheat growers with the purpose of controlling the market price of wheat, and gave the Secretary of Agriculture the power to establish acreage allotments for each farm.

Instead of planting his allotted 11.1 acres to wheat, he planted 23 acres for his own on-farm use. As a result, the Secretary charged Filburn of having committed a "marketing excess" and ordered him to destroy his excess crops and pay a fine. However, Filburn pointed out that his crop never entered the stream of commerce (not even intrastate commerce) and, as such, did not constitute interstate commerce that the federal government could regulate.

The U.S. Supreme Court upheld the constitutionality of the 1938 law under the "aggregation" theory. As applied to Filburn, that theory meant that Filburn's wheat planting for entirely personal consumption, if extended to the hypothetical aggregate, could have a "cumulative effect" on wheat demand on the interstate commodity market and, therefore, rose to the level of interstate commerce.

The *Wickard* case (along with some others in the late 1930s and early 1940s) opened the floodgates for the Congress to regulate all types of economic activity. It wasn't until the mid1990s that the Court paired back the excesses of the Congress under the Commerce Clause. But, there has never been an attempt by the Congress to compel private citizens to engage in commercial activity under the guise of the Commerce Clause – until the enactment in 2010 of the "health care" legislation.

> **Note:** In defense of the health care legislation, the government commonly cites *Wickard* as the constitutional justification for the law. The *Wickard* case is critically important to the pro-mandate position.

Caselaw Developments

The Florida case. On January 31, 2011, the United States District Court for the Northern District of Florida found that "The Patient

Protection and Affordable Care Act"[7] ("Act") was unconstitutional.[8] The court not only found the provision of the Act mandating that every person buy health insurance to be unconstitutional, but *all* provisions of the Act. The court noted that the individual mandate provision of the Act represented and unprecedented and radical expansion of Congress's exercise of its commerce power. As such, only the U.S. Supreme Court or a constitutional amendment could authorize such an expansion.

> **Note:** Before the Florida court issued its opinion, the Federal District Court for the Eastern District of Virginia ruled on a summary judgment motion involving the Act.[9] The court determined that mandate provision was unconstitutional as not being within the power of the Congress under the Commerce Clause. The court specifically rejected the government's argument that the mandate was a tax and, as such, the power of the Congress to enact the mandate provision was not within the Constitution's Taxation Clause. Instead, the court reasoned that the mandate provision constituted a regulatory penalty for inactivity.

The Commerce Clause argument. The court rejected the government's argument that the Commerce Clause permitted the regulation of inactivity. Indeed, the court pointed out that the government's position ran counter to statements of the Congressional Budget Office (CBO) made during the health care reform efforts of 1994 and warnings the CBO issued concerning the constitutionality of the Act before it was enacted. In addition, the court stated that "It is difficult to imagine that a nation which began, at least in part, as the result of opposition to a British mandate giving the East India Company a monopoly and imposing a nominal tax on all tea sold in America would have set out to create a government with the power to force people to buy tea in the first place. If Congress can penalize a passive individual for failing to engage in commerce, the enumeration of powers in the Constitution would have been in vain…".

So, the court determined that "activity" is an indispensable part of the Commerce Clause.[10] The question then became whether the failure to buy health insurance constituted economic activity. The court determined that it did not. The government claimed that all persons will, at some point, utilize the health care market – they cannot opt out. Thus, the government's argument was that the uninsured are not inactive. But, the court noted that the same argument could be made for the food market, the transportation market and the housing market. So, under the government's logic, the court noted, the government would claim it is constitutional for the Congress to require persons to eat broccoli, buy a certain type of automobile or buy a house. As such, the court noted that the government's argument "lacks logical limitation and is unsupported by Commerce Clause jurisprudence." Similarly, consistent with a 1995 U.S. Supreme Court opinion,[11] the court noted that the causal link between what is being regulated and its effect on interstate commerce cannot be attenuated and require a court "to pile inference upon inference." That, the court stated, is exactly what would be required to find the individual mandate constitutional.

The Necessary and Proper Clause argument. The government made another argument in an attempt to salvage the Act's mandate provision. The government claimed that the Act's mandate provision was a valid exercise of Congressional power under the Necessary and Proper Clause.[12] In essence, the government argued that the Act bans insurance companies from denying health coverage or charging higher premiums to persons with pre-existing medical conditions and, as a result of the bans, persons will be given an incentive to delay obtaining insurance because they are guaranteed coverage if they get sick or injured. Thus, there will be fewer healthy persons in the insured pool and premiums and insurance costs for everyone will rise. Consequently, the government argued, since the Act imposes such a negative impact on the health insurance market, the market will collapse unless the Act mandates that everyone buy health insurance. So, the government argued, the Act's mandate provision was

"necessary and proper" as an essential means to avoid the adverse consequences of the Act on the health insurance industry. But, the court didn't buy the argument. The court noted that the government's reasoning would allow the Congress to pass "ill-conceived, or economically disruptive statutes, secure in the knowledge that the more dysfunctional the results of the statute are, the more essential or "necessary" the statutory fix would be. Under such a rationale, the more harm the statute does, the more power Congress could assume for itself under the Necessary and Proper Clause." That, the court noted, did not comport with the meaning, intent and interpretation of the Necessary and Proper Clause.[13]

The severability issue. The Congress specifically deleted a severability clause from the version of the Act that became law. Such a clause had been in prior versions of the act, and would have provided that in the event any provision of the Act were found to be unconstitutional, the remaining provisions would not be impacted. While the lack of such a provision does not necessarily mean that all provisions of the Act would be deemed unconstitutional, the court agreed with the government's position that the mandate provision was the critical linchpin to the entire Act, and noted that the Congress knew that the Act was controversial, politically partisan, and would be challenged. Indeed, Congress' own attorneys advised that the Act may indeed be unconstitutional. So, the lack of a severability clause was of particular importance. Because the mandate provision was critical to the entire Act, it was not severable and the entire Act was declared void.

Further development. Later, on March 3, 2011, the court filed an opinion in response to the government's motion for "clarification" of the court's order of January 31.[14] The court treated the motion as one for a stay. The court granted the stay with specific instruction to the Department of Justice (DOJ) that they must file an appeal by March 10 and then must request an expedited appeal in the U.S. Circuit Court of Appeals for the Eleventh Circuit. In the opinion, the court, at least indirectly, noted its displeasure with the bad-faith conduct of the DOJ by stating that DOJ's legal citation "borders on misrepresentation." The court expressed its dismay that the government (including the IRS) was continuing with full implementation of the Act even though the court had enjoined the Act in its entirety.[15]

Subsequent Court Opinions

During 2011, several other courts ruled on the Act, with their analysis focusing on different legal points that had been raised by the parties. The courts have reached some inconsistent conclusions on the various points. Additionally, in late 2011, the U.S. Supreme Court agreed to consider the issue. An opinion is expected by the end of June 2012. Whether the Court's opinion will settle the constitutional issue remains to be seen.

Here's a rundown, in chronological order, of the decisions:

- On February 22, the Federal District Court for the District of Columbia, in granting the government's motion to dismiss, held that the mandate provision was a legitimate exercise of congressional power under the Commerce Clause.[16] The court reasoned the choice to not buy health insurance constituted "economic activity." Interestingly, the court stated that "health care is special" by defining the relevant market as health care rather than health insurance.[17] The court also upheld the mandate provision under the Necessary and Proper Clause.[18] In addition, the court held that the mandate constituted a penalty rather than a tax, and could not be upheld under the taxing power.

- On June 29, the United States Court of Appeals for the Sixth Circuit, upheld the mandate provision against a facial challenge, reasoning that the provision was within the power of the Congress to legislate under the Commerce Clause.[19] The court noted that the nature of the

challenge as a pre-enforcement facial challenge favored the government and is not the preferred route for litigation, and that the court's opinion would not preclude future "as-applied" challenges to the mandate provision and that the Act may, indeed, be eliminated by the Congress. The court also rejected the government's position that the mandate provision constituted a tax that could be upheld under the taxing power.[20]

- On August 12, the United States Court of Appeals for the Eleventh Circuit, affirmed the Federal District Court for the Northern District of Florida on the point that the mandate provision was unconstitutional.[21] The remainder of the Act was upheld because the appellate court reversed the trial court on the severability issue.

- On September 8, the United States Court of Appeals for the Fourth Circuit ruled that challenges to the Act were barred due to the plaintiffs' lack of standing.[22] The court determined that the plaintiffs could not challenge the mandate provision before it became effective in 2014. By so ruling, the court became the first appellate court to dismiss a challenge to the mandate provision after the trial court below had ruled on the merits (the trial court had ruled the mandate provision constitutional).[23]

  Note: Many legal observers had expected the three-judge panel in the case to uphold the constitutionality of the mandate provision. All of panel members were Democratic appointees, with two of them appointed by President Obama. Instead, the court vacated the trial court's decision and remanded the case with instructions to dismiss the case for lack of subject matter jurisdiction.

- On September 13, the Federal District Court for the Middle District of Pennsylvania, on the government's motion to dismiss, held that the mandate provision was unconstitutional.[24] The court stated that, "the power of the Congress to regulate interstate commerce does not subsume the power to dictate a lifetime financial commitment to health insurance coverage" and that the Congress has no police-power authority under the Commerce Clause. As a result, the court struck the mandate provision along with the guaranteed issue provision and the pre-existing conditions health insurance reform provisions from the Act.

- On September 30, the Federal District Court for the Eastern District of New York granted the government's motion to dismiss the plaintiff's challenge to the mandate provision.[25] The court found that the plaintiffs lacked standing because only potential future injury was involved insomuch as the mandate to buy insurance or be penalized didn't start until 2014. While the court noted that the Act had already caused health insurance premiums to rise, the court determined that the increase, absent a showing of any present financial impact on the plaintiffs, was not sufficient to confer standing.[26]

- On November 8, the United State Circuit Court of Appeals for the District of Columbia affirmed the trial court and held that the mandate provision was constitutional under the Commerce Clause.[27]

  Note: The court's 2-1 opinion was authored by Laurence Silberman, a Reagan appointee. Judge Silberman noted that his opinion was merely a "sparing" opinion given that the U.S. Supreme Court would have the final word on the issue.[28]

- On November 14, the U.S. Supreme Court granted certiorari in the Eleventh Circuit case.[29]

The Anti-Injunction Act

It is possible that the U.S. Supreme Court will not decide whether the mandate provision is constitutional. Several of the lower courts, most prominently the U.S. Court of Appeals for the Fourth Circuit,[30] ruled that a constitutional challenge to the mandate provision could not be brought until the mandate provision became effective in 2014. The basis for such a ruling is found in the Anti-Injunction Act (AIA). The AIA provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person."[31] Thus, by its express terms, the AIA bars suits seeking to restrain the assessment or collection of a tax. Likewise, the Declaratory Judgment Act authorizes a federal court to issue a declaratory judgment "except with respect to Federal taxes."[32] In 1974, the U.S. Supreme Court held that the DJA's exception for federal taxes was "at least as broad as the Anti Injunction Act."[33] Thus, when it applies, the AIA divests the federal courts of subject-matter jurisdiction.[34]

What all of this means is that the AIA prevents federal courts from hearing pre-enforcement actions brought before the Secretary of the Treasury (or the Secretary's delegate) until the IRS has assessed or collected tax.[35] Importantly, the mandate provision is contained in the Internal Revenue Code. While the lower courts have repeatedly rejected the government's argument and have held that the mandate is not a tax and, therefore, cannot be upheld under the Taxation Clause of Article II, Section 8 of the Constitution, the Fourth Circuit did hold that the penalty was subject to the AIA as being sufficiently close enough to a tax and that an exception from the AIA did not apply.

> **Note:** In other words, even if the mandate's penalty is not a tax for constitutional purposes (a point on which the lower courts have largely agreed), it could still be found to function as a tax for purposes of the AIA. If that is found to be the case, the Supreme Court lacks jurisdiction to hear the case until the mandate goes into effect in 2014.

If the U.S. Supreme Court adopts this line of reasoning (and it is entirely possible given the reticence of Chief Justice Roberts and Justice Kennedy to decide cases involving major constitutional precedents),[36] it would effectively vacate both the decision of the Eleventh Circuit (mandate unconstitutional) and the Sixth Circuit (mandate constitutional) without reaching the merits of the constitutional issue. That could spur the Congress to amend the AIA to permit jurisdiction, but that would mean that any decision on the merits of the Act would not occur until after the 2012 election.[37]

What Will The Court Do?

As noted above, constitutional jurisprudence has devolved largely into simply counting up votes from a political standpoint in any particular case. From that perspective it is reasonable to anticipate that four of the Justices (Ginsburg, Breyer, Sotomayor and Kagan) will vote to uphold the constitutionality of the mandate provision. How the remaining Justices will vote is less clear.

Clearly, the U.S. Supreme Court has, over the past 70 years, shown a reluctance to invalidate federal laws that govern economic activity on Commerce Clause grounds.[38] But, the Court has never construed the Commerce Clause to permit regulation of inactivity (e.g., to allow the Congress to enact legislation requiring the participation in economic activity under threat of fine or similar penalty).

The *Wickard*[39] decision, while tremendously expanding the scope of congressional power under the Commerce Clause, is not directly on point on the question of the constitutionality of the mandate provision. *Wickard* did not involve a federal law forcing farmers (Filburn in particular) to buy wheat on the open market. Instead, the issue involved in the case was a penalty for voluntarily exceeding a wheat

harvesting limit after a farmer agreed to participate in a federal farm program. The penalty in *Wickard* was fully avoidable had Filburn chose to not exceed the limit, not grow wheat, not farm, or not participate in the program.

Thus, *Wickard* does not stand for the proposition that the government can force every private citizen to engage in commerce. It simply asserts the proposition that voluntary activity that is purely local in nature can be aggregated to amount to a finding of "interstate commerce."

In a more recent case, the Court also interpreted the Commerce Clause in an expansive manner. *Gonzalez v. Raich*[40] involved an "as applied" Commerce Clause challenge via the Controlled Substances Act to the federal regulation of home-grown marijuana for medicinal purposes which was permitted under state law. The Court compared the facts to those presented in *Wickard* in that the regulated class of activity involved a fungible commodity, and noted that the activity being regulated was "quintessentially economic." As such, the aggregation theory of *Wickard* applied such that the Court determined that there could be an impact on the interstate market for marijuana - the production of marijuana was an economic activity like the production of wheat in *Wickard*. Thus, the Congress had the power under the Commerce Clause to regulate such activity.

Importantly, while the *Raich* decision affirmed the "aggregation theory" of *Wickard*, that has little application to the health care legislation's mandate that every person buy health insurance. The decision *not* to enter into a contract to buy a good or service is an entirely different proposition than the decision *to* participate in an economic activity that, in the aggregate, could substantially impact interstate commerce. Thus, the Court, if it rules on the constitutionality of the mandate, can find it unconstitutional without disturbing *Wickard*.

In recent years, the Court has had the opportunity to expand the reach of the *Wickard* "aggregation theory" to non-economic activity or inactivity, but has declined to do so. For example, in *United States v. Lopez*,[41] the Court invalidated a federal statute that prohibited the possession of a firearm in a school zone since such activity did not "substantially affect" interstate commerce. The Court noted that the law did not involve commerce or economic activity, and declined to apply the *Wickard* "aggregation theory" to find an interstate commerce connection. Likewise, in 2002, the Court held that the federal Violence Against Women Act did not apply to the gang rape of a college student by members of a university football team.[42] The Court held instead that the issue was a matter of state law due to a lack of connection with interstate commerce.

> **Note:** Importantly, the *Raich* decision shows that *Wickard* still has application to Commerce Clause cases where an "as-applied" challenge to a federal law is brought rather than the facial challenges present in *Lopez* and *Morrison* as well as the current challenge to the mandate provision. *Raich* did not invalidate the reasoning or holdings of either the *Lopez* or *Morrison* decisions.

As noted above, the unpopularity of the Act with the public, and the partisan nature of its passage in the Congress could influence the Court to rule that the lower courts improperly exercised jurisdiction with the result that the lower court opinions are vacated and the merits of the constitutional issue are not reached. That would put the matter back in the lap of the Congress to address the issue.[43]

Summary

If the Act were widely popular and had been enacted with any degree of bipartisan support, there may not have been any legal challenge to the Act's constitutionality. However, the Act represents the nation's first piece of social redistributive legislation impacting everyone that was passed on a straight party-line vote with no bipartisan support, a slim majority and under questionable circumstances. In addition, the Congress was provided many warnings that the

Act's enactment would not be welcome. This is all part of the "predicting" approach of constitutional law, and can provide the necessary "cover" for the U.S. Supreme Court to ultimately find the law unconstitutional, or vacate the lower court opinions for lack of jurisdiction.

Of course, for tax practitioners and their clients, all of this means that it is possible that the numerous tax provisions in the law that are already in effect could remain in effect, and those taking effect in the near future will have to be complied with.

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*Leonard Dolezal Professor in Agricultural Law, Iowa State University, Ames, Iowa. Director of the Center for Agricultural Law and Taxation. Member of the Iowa and Kansas Bar Associations and licensed to practice in Nebraska.

[1] Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010).

[2] See, e.g., CBS News/New York Times October 2011 poll showing 45 percent disapproval of the Act and 40 percent approval located at http://www.cbsnews.com/8301-503544_162-57324430-503544/americans-split-on-obama-health-care-law/; in the Kaiser Family Foundation Monthly Health Tracking Poll, the late October poll found only a 35 percent favorability rating for the Act and a 51 percent unfavorability rating. See, http://www.politico.com/news/stories/1011/67048.html. In mid-November, a Gallup survey showed that 47 percent of those surveyed favored repeal and 42 percent wanted the Act to remain in place.

[3] For a detailed discussion of the tax provisions of the Act, see McEowen and Kristan, "Summary of Tax Provisions in Recently Enacted Health Care Legislation," located at http://www.calt.iastate.edu/briefs/CALT%20Legal%20Brief%20-%20Tax%20Health%20Care%20Legislation.pdf

[4] U.S. Constitution, Art. I, §8, Clause 3.

[5] United States v. Butler, 297 U.S. 1 (1936).

[6] 317 U.S. 111 (1942).

[7] Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010).

[8] State of Florida, *et al*. v. United States Department of Health and Human Services, et al., 780 F. Supp. 2d 1256 (N.D. Fla. 2011)(the court also determined that the mandate provision was not severable and, thus, the entire Act was invalidated). The case had been brought by 26 states, two private citizens and the National Federation of Independent Business.

[9] Commonwealth v. Sebelius, 728 F. Supp. 2d 768 (E.D. Va. 2010).

[10] One of the cases the government relied upon for the purported ability to regulate inactivity was *Wickard v. Filburn, 317 U.S. 111 (1942).* However, *Wickard* was an obvious case of activity – farming activity.

[11] United States v. Lopez, 514 U.S. 549 (1995).

[12] U.S. Constitution, Art. I, §8, Clause 18.

[13] The Necessary and Proper Clause is not normally viewed as source of federal power in and of itself. It is typically held to be a clause that makes effective (i.e., necessary and proper) the powers that are vested in the Congress by the Constitution. *See, e.g.,* Gonzales v. Raich, 545 U.S. 1 (2005).

[14] State of Florida, *et al*. v. United States Department of Health and Human Services, *et al*., 780 F. Supp. 2d 1307 (N.D. Fla. 2011).

[15] The DOJ's conduct is comparable to that of the Interior Department that has continued to block offshore drilling in the Gulf of Mexico even though the federal government had been ordered by a federal court to lift the ban because it was arbitrary and capricious. On February 2, 2011, the Interior Department was held in contempt of the federal court order of 2010 and was ordered to pay attorneys' fees for oil companies that were challenging the drilling ban. Hornbeck Offshore Drilling Services, LLC, *et al*. v. Salazar, No. 10-1663 (E.D. La. Feb. 2, 2011).

[16] Mead v. Holder, *et al.* 766 F. Supp. 2d 16 (D. D.C. 2011).

[17] But, the court made no mention of the constitutional relevance of health care providers being required to provide emergency health care.

[18] Unfortunately, the court gave no explanation of why the arguments against the mandate were wrong.

[19] Thomas More Law Center, *et al*. v. Obama, *et al*., 651 F.3d 529 (6th Cir. 2011).

[20] The dissent noted that the mandate did not regulate commercial activity, but rather the status of being uninsured. Thus, since no market activity was involved, the Congress had no ability under the Commerce Clause to regulate such inaction. The dissent also pointed out that a finding that the mandate provision was constitutional would remove all limits on the authority of the Congress under the Commerce Clause.

[21] State of Florida v. United States Department of Health and Human Services, 648 F.3d 1235 (11th Cir. 2011), *aff'g in part and rev'g in part,* 780 F. Supp. 2d 1256 (N.D. Fla. 2011).

[22] Liberty University v. Geithner, *et al*., No. 10-2347, 2011 U.S. App. LEXIS 18618 (4th Cir. Sept. 9, 2011).
[23] Liberty University, Inc. v. Geithner, 753 F. Supp. 2d 611 (W.D. Va. 2010).
[24] Goudy-Bachmann v. United States Department of Health and Human Services, *et al*., No. 1:10-CV-763, 2011 U.S. Dist. LEXIS 102897 (M.D. Pa. Sept. 13, 2011). The court's prior decision on standing and jurisdiction can be found at 764 F. Supp. 2d 684 (M.D. Pa. 2011).
[25] Butler v. Obama, No. 2:10-cv-05025, 2011 U.S. Dist. LEXIS 112814 (E.D. N.Y. Sept. 30, 2011).
[26] The plaintiffs complaint focused on the individual mandate provision, and an increase in premiums, the court noted was caused by the Act's other provisions which the plaintiff had not challenged. As such, the plaintiff failed to satisfy the particularized injury requirement of the Article III of the Constitution.
[27] Seven-Sky, *et al.* v. Holder, No. 11-5047, 2011 U.S. App. LEXIS 22566 (D.C. Cir. Nov. 8, 2011), *aff'g, sub. nom.,* Mead v. Holder, *et al*., 766 F. Supp.2d 16 (D. D.C. 2011). One justice (a conservative jurist) dissented on the basis that the court did not have jurisdiction to hear the case under the Anti-Injunction Act.
[28] Judge Silberman stated that "the right to be free from federal regulation is not absolute...". The statement is strange insomuch as the plaintiffs were not claiming an "absolute" right to be free from federal regulation. Judge Silberman also pointed out that the federal government, via the Act, was claiming an unprecedented level of power, and that the governmental lawyers could not provide any "doctrinal limiting principles" on that power. But, Judge Silberman then proceeded to state that, "We are obliged - and this might well be our most important consideration - to presume that acts of Congress are constitutional." Presuming constitutionality of an act that has no "doctrinal limiting principles" would appear to render the Commerce Clause a nullity.
[29] United States Department of Health and Human Services v. Florida, 2011 U.S. LEXIS 8094 (U.S. Sup. Ct. Nov. 14, 2011). The court granted certiorari on the issue of "severability" of the mandate provision, the constitutionality of the mandate provision, and directed the parties to brief and argue the issue of whether the AIA bars the lawsuit. The court also granted certiorari on the issue of whether the expansion of Medicaid under the Act was constitutional.
[30] Liberty University v. Geithner, *et al*., No. 10-2347, 2011 U.S. App. LEXIS 18618 (4th Cir. Sept. 9, 2011).
[31] I.R.C. §7421(a).
[32] 28 U.S.C. §2201(a).
[33] Bob Jones Univ. v. Simon, 416 U.S. 725 (1974).
[34] Enochs v. Williams Packing & Navigation Co., 370 U.S. 1, 5 (1962)
[35] Procedurally, taxpayer has the option to pay an assessment, seek a refund directly from the IRS and, upon being denied, sue for a refund in the appropriate federal district court. Alternatively, the taxpayer can directly challenge the assessment in the United States Tax Court. Appeals from either the district court or the Tax Court are to the applicable U.S. Circuit Court of Appeals.
[36] See Northwest Austin Municipal Utility District No. One v. Holder, 557 U.S. 193 (2009).
[37] The matter is even more confused given that a conservative Justice, Justice Scalia, indicated a willingness to expansively construe the Commerce Clause in *Gonzalez v. Raich, 545 U.S. 1 (2005)*. In *Raich*, the court endorsed *Wickard* in holding that the federal government could bar an individual from consuming home-grown medical marijuana, despite the fact that medical marijuana is legal in the individual's state – California).
[38] For example, in United States v. South-Eastern Underwriters Association, 322 U.S. 533 (1944), the Court held that the Congress has the power to regulate the insurance industry and individuals that *voluntarily* purchase insurance. In a more recent opinion, *Gonzales v. Raich, 545 U.S. 1 (2005)*, the Court held that, in line with *Wickard*, the aggregate impact of personal growth and consumption of marijuana grown for personal medical purposes in a state where such growth was legal sufficiently impacted interstate commerce such that the Congress could regulate the activity.
[39] 317 U.S. 111 (1942).
[40] 545 U.S. 1 (2005).
[41] 514 U.S. 549 (1995).
[42] United States v. Morrison, 529 U.S. 598 (2000)(the Court noted that the Congress lacks constitutional authority to impose penalties under the law even though the non-economic activity at issue could theoretically be aggregated to find an effect on interstate commerce).
[43] On January 19, 2011, the U.S. House passed H.R. 2, the "Repealing the Job-Killing Health Care Law Act" by a 245-189 vote. The bill was not taken up by the Senate.