Cleveland-Marshall
College of Law Library

Cleveland State University
EngagedScholarship@CSU

Journal of Law and Health | Law Journals

2013

The Commerce Clause Implications of the Individual Mandate Under the Patient Protection and Affordable Care Act

L. Darnell Weeden
Thurgood Marshall School of Law, Texas Southern University

Follow this and additional works at: http://engagedscholarship.csuohio.edu/jlh

Part of the Constitutional Law Commons, and the Health Law Commons

Recommended Citation
L. Darnell Weeden, *The Commerce Clause Implications of the Individual Mandate Under the Patient Protection and Affordable Care Act* , 26 J.L. & Health 29 (2013)
available at http://engagedscholarship.csuohio.edu/jlh/vol26/iss1/4

This Article is brought to you for free and open access by the Law Journals at EngagedScholarship@CSU. It has been accepted for inclusion in Journal of Law and Health by an authorized administrator of EngagedScholarship@CSU. For more information, please contact library.es@csuohio.edu.

THE COMMERCE CLAUSE IMPLICATIONS OF THE INDIVIDUAL MANDATE UNDER THE PATIENT PROTECTION AND AFFORDABLE CARE ACT

L. DARNELL WEEDEN*

I. INTRODUCTION 29
II. THE ARGUMENT THAT THE DECISION NOT TO PURCHASE HEALTH INSURANCE IS NOT TO BE TREATED AS AN ECONOMIC ACTIVITY BECAUSE IT IS NOT CONNECTED TO ECONOMIC RISK-TAKING SHOULD BE REJECTED AS A DENIAL OF ECONOMIC REALITY AT THE PRACTICAL INTERACTIVE MARKETPLACE LEVEL 36
III. ON NOVEMBER 14, 2011, THE SUPREME COURT DECIDED TO HEAR A CASE FROM FLORIDA OBJECTING TO THE INDIVIDUAL MANDATE AS AN UNCONSTITUTIONAL VIOLATION OF THE COMMERCE CLAUSE: WHY THE SUPREME COURT SHOULD REVERSE THAT CONCLUSION 43
IV. CONCLUSION 49

I. INTRODUCTION

In an effort to protect the national economy from the economic burden created by the expanding cost of healthcare, Congress enacted legislation under the Commerce Clause[1] to compel or mandate specific people to engage in the economic activity of purchasing health insurance.[2] On June 28, 2012, four months after the primary focus of my Article was written, the Supreme Court held in *National Federation of Independent Business v. Sebelius*[3] that the federal mandate to buy private health insurance in the Patient Protection and Affordable Care Act (PPACA) is an unconstitutional exercise of the power of Congress to regulate Commerce. The individual mandate violates the Commerce Clause because it does not regulate existing commercial activity.[4] The mandate compels individuals to *become* active in commerce by buying a product, on the basis that their failure to do so affects

* Associate Dean, Thurgood Marshall School of Law, Texas Southern University; B.A., J.D., University of Mississippi. I would like to thank my Research Assistant, Brenda Dang, J.D. Candidate 2012, Thurgood Marshall School of Law, for her helpful comments on an earlier draft of this article. I am grateful to my wife and my children for their moral support while I worked on this article.

[1] U.S. CONST. art. I, § 8, cl. 3.

[2] Patient Protection and Affordable Care Act, Pub. L. No 111-148, 124 Stat. 119 (2010).

[3] Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2586 (2012).

[4] *Id.* at 2587.

interstate commerce.[5] Interpreting the Commerce Clause to allow Congress to regulate individuals specifically because they are doing nothing would release a new and potentially unlimited domain to congressional authority.[6]

PPACA's compulsion that particular individuals pay a financial penalty for not acquiring health insurance may reasonably be described as a tax.[7] Since the Constitution authorizes such a tax, it is not the role of the Supreme Court to forbid it, or to decide its wisdom or fairness.[8] Because the Federal Government does not have the power to command people to buy health insurance under the Commerce Clause, Section 5000A's individual mandate is not a valid exercise of the Commerce Power by Congress. However, Congress does have the power to impose a tax on those without health insurance and, therefore, the individual mandate is a valid and constitutional exercise of the power of Congress under the Taxing Clause.[9]

The Obama administration contends the individual mandate is "absolutely intertwined" with PPACA provisions prohibiting insurers from rejecting applicants as well as prohibiting insurers from taking into account an applicant's pre-existing conditions.[10] The fundamental focus of this Article is whether the decision not to buy individual health insurance as required by Congress also qualifies as valid economic activity under the Commerce Clause. This question before the Court continues the modern battle regarding the scope of Congress's power under the Commerce Clause, and the battle regarding the regulation of economic activity continues, irrespective of the Supreme Court decision regarding PPACA, because of the continuing impact of the Supreme Court's holding in *United States v. Lopez*.[11]

In *Lopez*, the Court held that because a Gun Free School Zone Law went beyond the scope of Congress's power under the Commerce Clause, it was unconstitutional.[12] In a dissenting opinion in *Lopez*, Justice Souter correctly warned that it would be a serious mistake to think of the Supreme Court's holding as an insignificant event in Commerce Clause law.[13] Justice Souter appropriately articulated a position saying that the holding in *Lopez* could be the foundation for a substantial rollback of the commerce power that could endanger a world of federal commerce power, which his generation had continuously experienced.[14] However, Professor Richard Primus argues that the day of the big commerce clause rollback has not come.[15] From both a doctrinal and political perspective, all the drama

---

[5] *Id*.

[6] *Id*.

[7] *Id*. at 2600.

[8] *Id*.

[9] *Id*. at 2601.

[10] *Id.*

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

[12] *See id.*

[13] Richard Primus, *How the Gun-Free School Zones Act Saved the Individual Mandate*, 110 MICH. L. Rev. 44, 50-51 (2012).

[14] *Id.* at 51.

[15] *Id.*

regarding the Supreme Court's applicability of the Commerce Clause to PPACA is about whether now is the right time for the federal judiciary to rollback the commerce clause power of Congress.[16]

The fact that the Supreme Court initially scheduled five and a half hours of oral arguments in place of the standard one-hour is evidence of the significance of PPACA case, and the Court's judgment, only a few months afterwards, offered many insights and challenges to the presidential contenders and candidates in the fight for power in Congress.[17] The Obama White House, which requested the Supreme Court to review the case immediately as opposed to later, contended that the challenges to the PPACA and its individual mandates are similar to those that confronted Social Security, the Civil Rights Act, and other very important parts of progressive social legislation.[18] The Supreme Court then announced on December 19, 2011 that it scheduled three days in March of 2012 to consider arguments that challenged the constitutionality of PPACA.[19]

On March 26, 2012, the Court proceeded by listening to arguments involving the issue of whether the federal Anti-Injunction Act creates a situation where a court dispute regarding the individual mandate, like the one within PPACA, is an untimely challenge if brought prior to 2015.[20] The court scheduled two hours on March 27, 2012 to hear arguments on the most important issue in the litigation –whether Congress went beyond its constitutional authority by compelling most Americans under PPACA's individual mandate to buy health insurance or opt out of buying health insurance and be assessed a fee.[21] The Court scheduled arguments involving two issues for March 28, 2012.[22] Initially, the Court contemplated for ninety minutes whether PPACA's individual mandate can be segregated from the rest of PPACA.[23] Next, the Court scheduled an hour of argument on March 28, 2012 to determine whether Congress may enlarge the size and range of Medicaid.[24] The dominant and most plausible explanation for the Supreme Court granting five and one-half hours for three consecutive days in March 2012 for oral arguments regarding the constitutionality of the PPACA is because the Court is seriously considering how to justify a rollback of enumerated commerce power of Congress on an issue of market place social justice.

---

[16] *Id.* at 44.

[17] *See* Adam Liptak, *Justices to Hear Health Care Case as Race Heats Up*, N.Y. TIMES, Nov. 14, 2011, http://www.nytimes.com/2011/11/15/us/supreme-court-to-hear-case-challenging-health-law.html?pagewanted=all.

[18] Robert Barnes, *Supreme Court to Hear Challenge to Obama's Health-Care Overhaul*, WASH. POST, Nov. 14, 2011, http://www.washingtonpost.com/politics/supreme-court-to-hear-challenge-to-obamas-health-care-overhaul/2011/11/11/gIQALTvrKN_story.html.

[19] Adam Liptak, *Supreme Court to Hear Health Care Case in Late March*, N.Y. TIMES, Dec. 19, 2011, http://thecaucus.blogs.nytimes.com/2011/12/19/supreme-court-to-hear-health-care-case-in-late-march/?nl=us&emc=politicsemailema4.

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.*

PPACA requires an individual, under specific circumstances, to either purchase health insurance or make a payment for a failure to acquire health insurance.[25] Professor Mark Hall contends the more convincing arguments in the individual mandate battle support the conclusion that a congressional directive that encourages individuals to obtain healthcare insurance is a permissible regulation of Congress's commerce power under the Commerce Clause.[26] The Commerce Clause allows Congress to regulate the economic marketplace involving the commercial enterprise of healthcare insurance coverage or healthcare services.[27] In *U.S. v. South-Eastern Underwriters Association*, the Supreme Court articulated that "[n]o commercial enterprise of any kind which conducts its activities across state lines has been held to be wholly beyond the regulatory power of Congress under the Commerce Clause. We cannot make an exception of the business of insurance."[28] The interstate market for individual healthcare coverage without an individual mandate, and regulated under state and local laws, creates an undue burden on the national economy.[29] Therefore, an individual's decision not to purchase healthcare coverage through an insurance policy should be treated as a commercial enterprise.[30]

Congress may utilize its historical regulatory power under the Commerce Clause to eradicate the undue burden on the national economy created by requiring all American's to purchase healthcare insurance that contains an individual mandate.[31] The requirement to purchase healthcare insurance coverage or to pay a fee to the government helps to control costs of healthcare in the interstate market by increasing the pool of healthy, insured individuals.[32] The Supreme Court's duty when it applied the Commerce Clause to PPACA was to keep the power to regulate interstate commercial risks among the states in the hands of Congress, because the power to regulate interstate commercial risks "is vested in the Congress, available to be exercised for the national welfare as Congress shall deem necessary."[33] For one to refuse to purchase healthcare insurance is in reality a commercial venture because that individual's decision cannot be separated from an aggregate burden on the national healthcare service market.[34] Under the rationale of *United States v. South-Eastern Underwriters Association*, Congress may use its Commerce Clause power to

---

[25] Patient Protection and Affordable Care Act, Pub. L. No 111-148, 124 Stat. 119, 242 (2010).

[26] *See* Mark A. Hall, *Commerce Clause Challenges to Health Care Reform*, 159 U. PA. L. REV. 1825, 1828 (2011).

[27] *See generally*, United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 553 (1944) (holding Congress may utilize its power under the commerce clause to regulate the insurance industry).

[28] *Id.* at 553.

[29] Patient Protection and Affordable Care Act, Pub. L. No 111-148, 124 Stat. 119, 242 (2010).

[30] *Id.* at 242-43.

[31] *See id.* at 244.

[32] *See id.* at 243.

[33] *Underwriters Ass'n*, 322 U.S. at 552-53.

[34] *See id.* at 552.

regulate the healthcare insurance market, and therefore promoting national welfare in healthcare services by making healthcare more affordable under PPACA.[35]

The collective impact of the refusal to purchase health insurance in the healthcare market creates an undue burden on the national economy.[36] Since 1824, the Supreme Court in *Gibbons v. Ogden* understood the regulatory nature of the Commerce Clause power vested by the Constitution to Congress, giving Congress the power to prescribe the rule by which commerce is to be governed for the purpose of protecting our national economy.[37] Because the individual health insurance mandate requirement is a plausible means of protecting our national economy, the regulatory power of the Commerce Clause allows Congress to prescribe the rules by which healthcare service is to be paid for by individuals.[38] A reasonable interpretation of the United States Supreme Court's analysis in *United States v. Darby*[39] strongly suggests that the individual healthcare mandate issue presented under PPACA is neither original nor fresh.[40] In *Darby*, the Supreme Court again articulated its historically correct view that the Commerce Clause granted Congress complete power to regulate conditions involving interstate transportation and other situations that place an unnecessary burden on the national economy.[41] Under this power, Congress has the authority to protect items involved in interstate commerce from unfair economic competition by expressly regulating the wages and hours paid to employees.[42]

The power of Congress over interstate commerce is so extensive that it is only limited by the Constitution itself.[43] One group of commentators challenges the lower courts' conclusion in both Virginia and Florida that PPACA's individual mandate requirement exceeds Congress's powers under the Commerce Clause.[44] The Virginia and Florida lower courts (1) failed to adequately identify the "market" that Congress intended to impact, (2) did not understand the expansive public health policy objectives generated by PPACA, and (3) created unnecessary uncertainty regarding Congress's authority to act in the best interest of an individual involving public health issues.[45] Additionally, Professor Randy E. Barnett contends PPACA's individual responsibility requirement is unconstitutional because Congress cannot

---

[35] *See id.* at 552-53.

[36] Patient Protection and Affordable Care Act, Pub. L. No 111-148, 124 Stat. 119, 242-44 (2010).

[37] Gibbons v. Ogden, 22 U.S. 1, 96 (1824).

[38] *Id.*

[39] *See* United States v. Darby, 312 U.S. 100 (1941).

[40] *See* Patient Protection and Affordable Care Act, Pub. L. No 111-148, 124 Stat. 119 (2010).

[41] *Darby*, 312 U.S. at 114.

[42] *Id.*

[43] *Gibbons*, 22 U.S. at 75.

[44] James G. Hodge, Jr. et al., *Congress, Courts, and Commerce: Upholding the Individual Mandate to Protect the Public's Health*, 39 J.L. MED & ETHICS 394, 398 (2011).

[45] *Id.*

exercise its power over interstate commerce, even when attached to the Necessary and Proper Clause requiring people to undertake the economic activity of buying health insurance from a private business or paying a fee for failure to do so.[46] A decision to buy health insurance or not to buy health insurance is by its very nature an intellectual economic activity. However, under the individual mandate provision of PPACA,[47] Congress makes available a forum for economic activity by presenting a person with an opportunity to make an economic decision about whether to purchase healthcare insurance.[48]

In one case challenging the individual mandate provision of PPACA, a federal court in Michigan accepted the government's argument that the provision "regulates economic decisions regarding the way in which healthcare services are paid for."[49] Since an economic decision to buy or not to buy healthcare insurance requires intellectual activity regarding the healthcare market, the argument that no activity has taken place when an individual does not buy healthcare insurance should be rejected.[50] The assertion that a court is required to engage in a highly abstract line of reasoning to support the conclusion that the economic decision not to purchase insurance is a definite intellectual economic activity is not valid.[51] Intellectual activity involving the decision to buy or not to buy healthcare insurance is an example of an economic decision, which the Commerce Clause allows Congress to regulate under PPACA.[52]

The major goal of PPACA is to decrease the number of Americans without healthcare insurance and the growing economic price tag they inflict on the healthcare system when not covered.[53] Since the prevailing purpose of PPACA's individual mandate[54] is to decrease the burden on the national healthcare marketplace and national economy from the millions of uninsured Americans, PPACA is a valid exercise of Congress's Commerce Clause power.[55] Under the Commerce Clause, Congress has the ability to regulate those activities of the uninsured that substantially affect the interstate healthcare marketplace.[56] Congress's legislative intent to bring down the cost of health insurance, increase coverage, and trim down uncompensated care will be unworkable if the minimum coverage prerequisite, which commands all

---

[46] Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate Is Unconstitutional,* 5 N.Y.U. J. L. & LIBERTY 581, 606 (2010).

[47] *See* Patient Protection and Affordable Care Act, Pub. L. No 111-148, 124 Stat. 119 (2010).

[48] *Id.*

[49] Thomas More Law Ctr. v. Obama, 720 F. Supp. 2d 882, 893 (E.D.Mich. 2010).

[50] *Id.*

[51] *Id.*

[52] *Id.* at 894.

[53] *Id.* at 893.

[54] *Id.*

[55] *Id.*

[56] United States v. Lopez, 514 U.S. 549, 558-59 (1995).

United States citizens, not specifically exempt to keep "minimum essential coverage" healthcare, is not permitted to commence in 2014.[57]

Congress established that the individual mandate is a necessary component of a much larger regulation of economic activity and that its nonexistence would chip away at federal regulation of the health insurance market.[58] The rationale of *Gonzalez v. Raich*[59] establishes that the individual mandate requirement is a valid exercise of the Commerce Clause power by Congress. There are many good reasons for Congress to exercise its Commerce Clause power to reduce the economic burdens created in the healthcare marketplace; particularly, the millions of uninsured Americans who increase the cost of healthcare services for all.[60] PPACA's individual mandate requirement should be regarded as a constitutionally permissible attempt to eliminate the undue burden on interstate healthcare created by uninsured Americans.[61] Although a person's activity may only consists of one's economic decision not to purchase healthcare insurance, it still may be regulated by Congress if such a decision exerts a substantial economic impact on the interstate health insurance market.[62]

Part II of this Article contends that the decision not to purchase health insurance is not to be treated as an economic activity because it is not connected to economic risk-taking should be rejected outright as nothing more than a denial of the economic reality at a practical interactive marketplace level.[63] Part III of this Article provides an analysis of the individual mandate as a Commerce Clause issue, with a focus particularly on a case from Florida, objecting to the 2010 healthcare overhaul law as unconstitutional, which on November 14, 2011, the Supreme Court agreed to hear.[64] Three different courts had urged the Supreme Court to review the essential issue concerning the power of Congress to invoke PPACA's individual mandate.[65] Since the 11th Circuit was the only court to hold the individual mandate unconstitutional, the Supreme Court may have been persuaded to hear the cases from that circuit.[66] Part III discusses why the Supreme Court should have reversed the conclusion from the District Court in Florida that the individual health insurance mandate is unconstitutional under the Commerce Clause.

---

[57] *Thomas More Ctr.*, 720 F.Supp.2d at 886.

[58] Gonzalez v. Raich, 545 U.S. 1, 22 (2005).

[59] *Id.* at 32-33.

[60] *Thomas More Ctr.*, 720 F.Supp.2d at 893.

[61] *See* Patient Protection and Affordable Care Act, Pub. L. No 111-148, 124 Stat. 119 (2010).

[62] Wickard v. Filburn, 317 U.S. 111, 125 (1942).

[63] *Thomas More Ctr*., 720 F.Supp.2d at 893.

[64] Liptak, *supra* note 17.

[65] Liptak, *supra* note 17.

[66] Liptak, *supra* note 17.

II. THE ARGUMENT THAT THE DECISION NOT TO PURCHASE HEALTH INSURANCE IS NOT TO BE TREATED AS AN ECONOMIC ACTIVITY BECAUSE IT IS NOT CONNECTED TO ECONOMIC RISK-TAKING SHOULD BE REJECTED AS A DENIAL OF ECONOMIC REALITY AT THE PRACTICAL INTERACTIVE MARKETPLACE LEVEL

The thrust of the argument against the constitutional validity of PPACA is that Congress lacks the authority under the Commerce Clause to require individuals to purchase health insurance or subject them to a tax.[67] Twenty-seven state Attorneys General argued that Congress could not, under the Commerce Clause, command people to purchase health insurance because it is not connected or linked to economic risk-taking.[68] This argument should be rejected as a denial of economic reality at the practical interactive marketplace level.[69] The decision to pay for medical expenses either through health insurance or at the occurrence of an event requiring medical care is, in fact, economic activity.[70] Congress appropriately concluded that the individual mandate was a necessary and essential component of regulating economic activity for health insurance. Without PPACA's individual mandate, a person could destabilize the federal supervision of the health insurance market by delaying the decision to pay for health insurance until she considered care necessary.[71] If an individual can delay her decision to purchase health insurance without the economic burden of an increased premium expense when she is sick, this will defeat PPACA's goal of lowering the cost of health insurance premiums.[72] But with the individual mandate, insurance companies can maintain lower premiums with an increased pool of insureds, therefore, accomplishing PPACA's goal.[73]

Robert Peck correctly asserts that PPACA's individual mandate is a practical means of making insurance coverage economically feasible, as insurance companies can no longer deny coverage based on an individual's pre-existing health situation.[74] PPACA requires health insurers to offer coverage without increased rates for individuals with pre-existing health conditions.[75] Because of this, Congress rationally concluded that insurance companies would only remain economically profitable if PPACA commanded virtually every American to pay for some form of health insurance coverage.[76] Only Americans unable to obtain insurance due to their

---

[67] Hodge et al., *supra* note 44, at 394.

[68] Hodge et al., *supra* note 44, at 394.

[69] *Thomas More Ctr*., 720 F.Supp.2d at 893.

[70] *Id*.

[71] 42 U.S.C. § 18091(2)(A)(LexisNexis 2012).

[72] § 18091(2)(I).

[73] Wilson Huhn, *Constitutionality of the Patient Protection and Affordable Care Act Under the Commerce Clause and the Necessary and Proper Clause*, 32 J. LEGAL MED. 139, 154 (2011).

[74] Robert S. Peck, *Understanding the Constitutional Challenges to Federal Health Care Reform*, THE BRIEF, Summer 2011, at 28.

[75] *Id*.

[76] *Id*.

financial situation are free from this obligation.[77] Starting in 2014, Americans who do not acquire the minimum health insurance will be charged a fee equivalent to the larger of $95 or 1 percent of their income equal to the price of an essential health insurance plan. This fee is to be subtracted from any tax refund owed to that individual.[78] By 2016, the involuntary coverage price of the insurance will rise to $695 for each adult, or a total of 2.5 percent of income.[79]

Allison K. Hoffman argues that PPACA's individual mandate is designed to allow the government to achieve universal coverage while avoiding any basic reformation of the present payment and delivery systems.[80] Basically, PPACA will not alter or transform the mainly private distribution of healthcare due to some combination of public and private financing.[81] The government's primary function under PPACA is to serve as a vehicle for promoting universal coverage.[82] PPACA establishes a structure that is similar to Germany, Switzerland, and the Netherlands. In those countries, each individual's involvement in the country's healthcare insurance coverage is required and insurance is managed by private organizations and financed from a combination of public and private funds.[83]

However, because PPACA's goal of achieving universal coverage is based on actuarially-rated commercial insurance, to which its purpose is profit and not a universal right to have access to health care, the universal healthcare goal will more than likely be sacrificed in favor of profits.[84] This contradiction presents enough problems to keep the individual mandate requirement of PPACA from being utilized as an effective tool for reaching a goal of universal coverage.[85] The basis of considerable disagreement concerning the individual mandate under PPACA is whether it will fail to achieve universal coverage.[86] The requirement under PPACA to purchase health insurance has produced energetic discussions about the regulatory reach of the Commerce Clause.[87]

PPACA's passage created an array of political emotions.[88] When PPACA was enacted into law it was a very partisan event.[89] The Senate passed PPACA on

---

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] Allison K. Hoffman, *Oil and Water: Mixing Individual Mandates, Fragmented Markets, and Health Reform*, 36 AM. J.L. & MED. 7, 15 (2010).

[81] *Id.* at 15-16.

[82] *Id.* at 16.

[83] *Id.*

[84] *Id.*

[85] *Id.*

[86] Scott Lindstrom, Comment, *Health Care Reform and Rural America: The Effect of the Patient Protection and Affordable Care Act On the Rural Economy and Rural Health*, 47 IDAHO L. REV. 639, 644 (2011).

[87] Elizabeth J. Bondurant & Steven D. Henry, *Constitutional Challenges to the Patient Protection and Affordable Care Act*, 78 DEF. COUNS. J. 249 (2011).

[88] *Id.*

December 24, 2009, by a vote of 60-39, all Democrats and Independents voting to support it and all Republicans voting to oppose it.[90] It was approved in the House of Representatives on March 21, 2010, by a vote of 219-212, although 178 Republicans and 34 Democrats did not support it.[91] Almost immediately following PPACA's approval, extensive ligation was filed, testing PPACA's constitutionality under the Commerce Clause.[92] Professor Wilson Huhn argued that PPACA's individual mandate might present a significant problem regarding the constitutionality of the entire law.[93] The goal of PPACA's drafter's was to expand access to healthcare by greatly decreasing the total number of uninsured persons.[94] The Congressional Budget Office and the Centers for Medicare and Medicaid Services report the PPACA will effectively make available health insurance coverage not previously had to between 32 to 34 million additional American citizens.[95] PPACA is designed to manage the health insurance market in a manner to ensure specific minimum insurance protection to individuals.[96] By expanding the number of insureds, the constitutional validity of PPACA's "individual mandate," or Minimum Essential Coverage Provision (MECP), is absolutely necessary if PPACA is to achieve the Congressional goal of expanding access to healthcare insurance.[97]

Despite the fact that PPACA's individual mandate was responsible for a great deal of the opposition in the Senate and House of Representatives to the legislation, the section's endorsers were determined to keep the individual mandate in the law because it was viewed as the heart of the legislation, as a tool to regulate a dysfunctional healthcare insurance market.[98] Professor Nan Hunter correctly asserts it would be economically infeasible in the healthcare insurance marketplace to increase individuals' access to healthcare coverage without using the individual mandate as a tool to offset preexisting health condition discrimination.[99] The practical effect of outlawing medical underwriting and discrimination because of pre-existing health conditions is to make the insurance market more available to individuals, regardless of each individual's current health condition and increasing coverage to those with the greatest need.[100] However, commanding insurers to accept high-risk beneficiaries at a reduced cost while not including a mandate that healthy

---

[89] *Id.*

[90] *Id.*

[91] *Id.* at 249-50.

[92] Huhn, *supra* note 73, at 142.

[93] *Id.*

[94] *Id.* at 139.

[95] *Id.*

[96] *Id.*

[97] *Id.*

[98] Nan D. Hunter, *Health Insurance Reform and Intimations of Citizenship*, 159 U. PA. L. REV. 1955, 1973 (2011).

[99] *Id.*

[100] *Id.* at 1975.

persons enroll in insurance pools would destroy the private marketplace by concurrently dropping premium income while raising payments.[101]

Harold Pollack and Greg Anrig contend that President Obama could have announced PPACA as his single most significant domestic accomplishment in his 2012 State of the Union address.[102] PPACA without a doubt remains an extremely contentious and divisive law with results and expenditures pending for many years after its passage. The prevailing early evidence reveals that PPACA is currently enhancing the lives of millions of Americans just a few years after its enactment.[103] PPACA is encouraging as long-overdue basic changes in our dysfunctional healthcare structure was necessary.[104] Even though PPACA does not take full effect until 2014, Harold Pollack and Greg Anrig have identified five tangible areas where PPACA is already having an impact: (1) approximately 2.5 million additional young adults are now insured as a result of the new law; (2) senior Americans have greater prescription drug and preventive care coverage;(3) coverage is more accessible for those individuals with pre-existing conditions; (4) structural transformations are already building a more efficient healthcare procedure; and (5) the law encourages fairness, transparency, and integrity in the private healthcare insurance marketplace.[105] Since PPACA transforms the essential business model of private healthcare insurance, the insurance industry will be unable to profit by cherry-picking healthy customers or denying coverage to those individuals with preexisting conditions.[106] Because the federal government under PPACA teams up with states in investigating insurance rate increases, some insurers have already amended or reversed big rate increases.[107]

Although PPACA benefits millions of Americans, it is not an accident or coincidence that the requirement that all individuals purchase qualifying health coverage is the most controversial and contested aspect of the law by those opposed to any health insurance reform.[108] The individual mandate is the primary focus of constitutional dispute regarding PPACA because it is the instrument by which the law accomplishes its goal of comprehensive and subsidized healthcare coverage.[109] The motivation for the individual mandate is easy to understand: it is the only method to make young, healthy persons, who habitually and voluntarily forego health insurance coverage, pay into the healthcare insurance structure in this manner,

---

[101] *Id*.

[102] Harold Pollack & Greg Anrig, *The Quiet Triumph of Obama Care*, WASH. MONTHLY BLOG (Jan. 30, 2012, 8:45 AM), http://www.washingtonmonthly.com/ten-miles-square/2012/01/a_quiet_triumph_of_obama_care035079.php.

[103] *Id*.

[104] *Id*.

[105] *Id*.

[106] *Id*.

[107] *Id*.

[108] Matthew R. Farley, *Challenging Supremacy: Virginia's Response to the Patient Protection and Affordable Care Act*, 45 U. RICH. L. REV. 37, 50 (2010).

[109] *Id*. at 50-51.

cross-subsidizing seniors and unhealthy individuals.[110] If the Supreme Court opined that the individual mandate was unconstitutional and could not be upheld as a tax, PPACA would have financially crippled. The individual mandate is absolutely necessary for PPACA to effectively produce the results intended by Congress and the drafters of the legislation.[111]

Even though the Supreme Court has held the individual mandate in PPACA as imposing a permissible tax, the federal government may find it difficult to collect the penalties it imposes on violators.[112] This difficulty exists because PPACA prohibits the placing of liens or levies on a taxpayer's property if the individual does not pay the fee.[113] The IRS may withhold an individuals tax refund if the individual fails to produce evidence that she is insured; however, this measure is not effective for those individuals not entitled to an adequate refund or any refund at all.[114] For people not entitled to either an adequate tax refund or any tax refund, one commentator asserts that submission to PPACA's individual mandate is effectively voluntary.[115]

A private health insurance company's level of profit is directly linked to how the insurance company is able to manage and redistribute its risks.[116] PPACA significantly modifies how insurance companies may redistribute covered individuals' risks by regulating how those risks are distributed.[117] A risk class is created as an economic tool for sharing risks or risk pooling.[118] Risk pooling is expanded when the insurance coverage and prices are comparable for the insured in a pool[119] (e.g., in those situations where costs and coverage are not personalized because of a person's risk).[120] In the past, private health insurance was presented in three markets: big group (over 50 or 100 employees, varied by state), little group, and individual.[121] All three markets made the redistribution of risks possible.[122] The big group market traditionally distributed risks more comprehensively than the little group or the individual market.[123] PPACA's plain meaning and subject matter

---

[110] *Id.* at 51.

[111] *Id.*

[112] *Id.* at 77.

[113] *Id.*

[114] *Id.*

[115] Farley, *supra* note 108, at 77.

[116] Allison K. Hoffman, *Three Models of Health Insurance: The Conceptual Pluralism of the Patient Protection and Affordable Care Act*, 159 U. PA. L. Rev. 1873, 1883 (2011).

[117] *Id.* at 1884.

[118] *Id.*

[119] *Id.*

[120] *Id.*

[121] *Id.*

[122] *Id.*

[123] *Id.*

promptly champions the argument that the individual mandate's goal clearly includes regulation of insurers in the healthcare market.[124]

Because PPACA views health insurance as a vehicle to redistribute risks in the insurance market, it wipes away the risk differences in the three insurance markets by commanding individuals to purchase private health insurance.[125] As a result, each individual will become a member of a risk pool under the requirements of the individual mandate.[126] One commentator believes that the primary purpose of PPACA's individual mandate is to establish private-market healthcare reform that reflects more solidarity in the health insurance system.[127] Professor Hoffman remarked, "[a] solidaristic [health insurance] system is one in which risks are pooled equally and broadly among healthy and sick insureds, resulting in 'health redistribution,' where the healthy help to shoulder the burden of medical care costs for the sick."[128] Americans committed to furthering social justice in the United States should welcome PPACA's individual mandate as a useful instrument to promote solidarity in the healthcare system where each of us can share the blessings of liberty by equally and broadly dividing our risks as our brothers' keepers.[129] Our perception of America's national character influences whether we view PPACA's individual mandate as doing the right thing[130] because it helps to secure the advantages of liberty for millions of Americans who would otherwise be unable have access to healthcare.[131] President Barack Obama urged Congress to enact healthcare reform for the reason that it is the right thing to do for the sake of our national conscience.[132] While discussing the controversy surrounding PPACA, Professor Gina Rosoff appropriately said, "[t]he American national character influences what we attempt, how we go about it, and how likely we are to succeed."[133]

The plan for an individual mandate within healthcare reform in America began with Republican politicians, who had no problem with its constitutionality before President Barack Obama, a Democrat, campaigned on the issue when he was seeking election.[134] Under the Commerce Clause, Congress has expansive authority to

---

[124] *See* Hall, *supra* note 26, at 1851.

[125] Hoffman, *supra* note 116, at 1886.

[126] *Id.*

[127] *Id.* at 1887.

[128] *Id.*

[129] Gina Koalta, *The ABC's of the Health Care Law and It's Future*, N.Y. TIMES, Apr. 2, 2012, http://www.nytimes.com/2012/04/03/health/policy/the-abcs-of-the-health-care-law-and-its-future.html?_r=1&adxnnlx=1346342814-sKcx2UILP3mBwemMsc0R+g.

[130] Arnold J. Rosoff, *Of Stars and Proper Alignment: Scanning the Heavens for the Future of Health Care Reform*, 159 U. PA. L. REV. 2083, 2112 (2011).

[131] CONG. BUDGET OFFICE, UPDATED ESTIMATES FOR THE INSURANCE COVERAGE PROVISIONS OF THE AFFORDABLE CARE ACT (Mar. 2012), *available at* http://www.cbo.gov/sites/default/files/cbofiles/attachments/43472-07-24-2012-CoverageEstimates.pdf.

[132] Rosoff, *supra* note 130, at 2114.

[133] Rosoff, *supra* note 130, at 2112.

[134] Hall, *supra* note 26, at 1826.

regulate products affecting interstate commerce, as individual health insurance coverage or the lack thereof was thought to effect commerce adequately enough to justify regulation. [135] The established economics of health insurance reveals that an individual mandate to acquire insurance is an essential part of regulating how health insurers price and offer their products on the market.[136]

However, federal district courts in Virginia and Florida avoided the economic marketplace rationale for Commerce Clause regulatory scrutiny and held that Congress did not have the constitutional authority to force individuals to buy health insurance or pay a fee.[137] Minutes after President Obama signed PPACA into law on March 23, 2010, a legal crusade against the law began with thirteen states, led by Florida Attorney General Bill McCollum, asking federal courts across the country to declare that Congress lacked the authority under the under the Commerce Clause when it enacted PPACA.[138] For example, Virginia Attorney General Kenneth Cuccinelli took independent legal action in Virginia, with the state of Virginia as the only plaintiff, on grounds comparable to those states in the Florida litigation.[139] At the heart of the Republican-led Florida lawsuit challenging PPACA was the constitutionality of the individual mandate.[140] It appeared that Republicans had quickly forgotten that they were the creators of the individual mandate as a tool for healthcare reform.[141]

Much of the commentary and litigation involving PPACA placed the individual mandate as the center of attention because of the intense belief by many that the individual mandate goes beyond the federal government's enumerated power under the Commerce Clause.[142] Those objecting to the individual mandate maintain that commanding all Americans to pay for privately-offered healthcare insurance is not only unconstitutional but extraordinary and wrong.[143] Most observers predicted the constitutional validity of PPACA's individual mandate would eventually be decided by the U.S. Supreme Court.[144] The prediction became a reality on November 14, 2011 when the petition for writ of certiorari to the United States Court of Appeals

---

[135] Hall, *supra* note 26, at 1826.

[136] Hall, *supra* note 26, at 1827.

[137] Hall, *supra* note 26, at 1827 (*citing* Virginia ex rel. Cuccinelli v. Sevelius, 728 F. Supp. 2d 768, 788 (E.D. Va. 2010); Florida ex rel. Bondi v. U.S. Dep't of Health & Human Servs., No. 10-0091, 2011 WL 285683, at *27 (N.D. Fla. Jan. 31, 2011)).

[138] Gayland O. Hethcoat II, *Plaintiff Standing in Florida Ex Rel. Bondi and the Challenges to the Patient Protection and Affordable Care Act*, 65 U. MIAMI L. REV. 1241, 1241 (2011).

[139] *Id.* at 1241-42.

[140] *Id.* at 1241-43.

[141] Hall, *supra* note 26, at 1826.

[142] Jonathan H. Adler, *Cooperation, Commandeering, or Crowding Out?: Federal Intervention and State Choices in Health Care Policy*, 20 KAN. J.L. & PUB. POL'Y 199, 200 (2011).

[143] *Id.*

[144] *Id.*

for the Eleventh Circuit was granted in *Florida v. Department of Health and Human Services.*[145]

III. ON NOVEMBER 14, 2011, THE SUPREME COURT DECIDED TO HEAR A CASE FROM FLORIDA OBJECTING TO THE INDIVIDUAL MANDATE AS AN UNCONSTITUTIONAL VIOLATION OF THE COMMERCE CLAUSE: WHY THE SUPREME COURT SHOULD REVERSE THE CONCLUSION

The conclusion reached by the Supreme Court in *Florida v. Department of Health and Human Services* has been considered a political and constitutional blockbuster.[146] The Court's decision to become involved in the constitutional debate over PPACA was anticipated, as any federal court striking down an Act of Congress is almost certainly to be reviewed by the Supreme Court. One commentator believed that any ruling in the Supreme Court case will be of great assistance in identifying the constitutional standards of the Roberts court.[147] Pam Bondi, Florida's attorney general, said she appreciated the court's quick decision to review the 11th Circuit's opinion, in which Florida was the lead plaintiff.[148] Ms. Bondi said, "we have urged swift judicial resolution because of the unprecedented threat that the individual mandate poses to the liberty of Americans simply because they live in this country."[149] Representative Nancy Pelosi of California, the House Democratic leader, said an opinion from the Supreme Court approving PPACA and its individual mandate means that, consistent with the intent of Congress, "Americans will benefit from lower health care costs and greater access to high-quality medical care."[150]

The Supreme Court's decision to review PPACA presents an interesting public policy question that is generating a great deal of attention in American politics.[151] Those opposed to PPACA, despite the Supreme Court eventually upholding the law, have successfully improperly framed the debate in the context of the constitutional limits of the government's power under the Commerce Clause.[152] But, Congress has expansive power to regulate economic activity under the Commerce Clause as a matter of judgment.[153]

---

[145] Fla. v. Dep't of Health & Human Serv., 648 F.3d 1235 (11th Cir. 2011), *cert. granted*, 132 S.Ct. 604 (U.S. Nov. 14, 2011) (No. 11-400) (Consolidated with, Nat'l Fed'n of Indep. Bus. *v.* Sebelius, No. 11–393, 132 S.Ct. 603, petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit in No. 11–393, granted. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit in No. 11–400 granted).

[146] Liptak, *supra* note 17.

[147] Liptak, *supra* note 17.

[148] Liptak, *supra* note 17.

[149] Liptak, *supra* note 17.

[150] Liptak, *supra* note 17.

[151] Barnes, *supra* note 18.

[152] Barnes, *supra* note 18.

[153] Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 537 (1985); Barnes, *supra* note 18.

PPACA is valid under the Constitution because both the Commerce Clause and the political process authorize Congress to regulate both the cost of and access to healthcare.[154] The political process is available to both the states and individuals as a check on congressional power to regulate the purchase of healthcare insurance as economic activity.[155] PPACA inflames president Obama's conservative opponents, beyond the scope of the Commerce Clause reality because the law highlights one part of President Obama's progressive domestic agenda.[156] During the 2012 presidential election, the Republican candidates made an energetic vow to take a part PPACA, which is now commonly coined: "Obamacare." The Supreme Court's opinion also sent a clearly identifiable message to the electorate when upholding PPACA during the 2012 presidential elections.[157]

After President Obama signed PPACA, those individuals that antagonized by the Act rushed to dispute its constitutional validity in court.[158] The initial court opinions demonstrated an obvious pattern, with federal district court judges chosen by Democratic presidents supporting the law and Republican appointees finding the Act unconstitutional.[159] In an Eleventh Circuit judgment, Judge Frank Hull, who was appointed to his federal judgeship by Bill Clinton, united with a Republican judge in holding PPACA unconstitutional, arguing that the Act was too invasive.[160] However, in the U.S. Court of Appeals for the Sixth Circuit and D.C. Circuit, two well-known Republican-selected judges agreed that, although the PPACA is invasive, the Act is within the bounds of the powers granted to Congress under the constitution.[161]

Although PPACA may appear invasive, the issue regarding the individual mandate of the Act is more of a political issue than a serious issue regarding the constitutional limitations on the Commerce Clause.[162] PPACA's individual mandate places a federal regulatory requirement on individuals to purchase health insurance in order to promote social justice for all. Comparable regulatory requirements were placed on privately owned restaurants to prevent them from practicing racial discrimination by denying people the right to eat.[163] Federal regulations under the Commerce Clause may also prohibit access to medical marijuana necessary to relieve unbearable pain.[164] As a practical matter, it is absolutely crucial that Congress be granted the freedom and discretion to create a national solution to alleviate a national problem, like healthcare reform, by utilizing the individual mandate.[165]

---

[154] *Garcia*, 469 U.S. at 546-57.

[155] *Id.* at 551, 556.

[156] Barnes, *supra* note 18.

[157] Barnes, *supra* note 18.

[158] Barnes, *supra* note 18.

[159] Barnes, *supra* note 18.

[160] Barnes, *supra* note 18.

[161] Barnes, *supra* note 18.

[162] Seven-Sky v. Holder, 661 F.3d 1, 20 (D.C. Cir. 2011).

[163] *Id.* (citing Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258 (1964)).

[164] *Seven-Sky*, 661 F.3d at 20.

[165] *Id.*

The Eleventh Circuit's treatment of PPACA's individual mandate put forward a thinly veiled goal to rollback the enumerated Commerce Clause power of Congress.[166] To roll back this power, the Eleventh Circuit virtually ignored Supreme Court precedent standing for the notion that federal laws enacted by Congress are entitled to a presumption of constitutional validity.[167] Therefore, the Eleventh Circuit exceeded its judicial authority when it failed to follow the Supreme Court's instruction to "invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds."[168] The Eleventh Circuit's rationale for rolling back the federal commerce power of Congress without adequate justification, effectively concluding that Congress exceeded its enumerated authority under the Commerce Clause demonstrates a lack of judicial restraint and respect for the institutional role of Congress.[169]

When Congress exercised its enumerated power under the Commerce Clause, its legislative judgments, which were rationally supported and not otherwise prohibited by the Constitution, were entitled to judicial deference.[170] By subjecting Congress's exercise of its enumerated commerce power to the rational basis standard of judicial review in the current public policy debate over healthcare policy, a court demonstrates respect for the traditional expertise of Congress involving a commercial enterprise under a power expressly delegated to Congress by the Constitution.[171] When Congress affirmatively acts via its enumerated commerce powers, the rational basis standard of judicial review is both necessary and proper. Such a high level of deference is required because Congress, unlike the judicial branch, is accountable to the people when addressing controversial subjects, like accessibility to healthcare coverage.[172]

By rejecting the individual mandate, the Eleventh Circuit effectively ignored over 75 years of precedent that granted Congress authority, under the Commerce Clause, to regulate areas of the national economy that require a Congressional solution.[173] It is undisputable that it is an issue that an estimated 5 million people lacked healthcare insurance coverage.[174] More troubling is that only 63% of uninsured individuals' healthcare costs are paid for, leaving the remaining, $43

---

[166] Fla. v. Dep't of Health & Human Serv., 648 F.3d 1235, 1328 (11th Cir. 2011).

[167] United States v. Morrison, 529 U.S. 598, 607 (2000).

[168] *Id.*

[169] United States v. Lopez, 514 U.S. 549, 604 (1995) (Souter, J., dissenting) (citing FCC v. Beach Commc'n, Inc., 508 U.S. 307, 314-15 (1993)).

[170] *Id.* at 603-04.

[171] *Id.*

[172] *Id.* at 603-04, 607.

[173] *Florida*, 648 F.3d at 1330 (Marcus, J., dissenting).

[174] *Number of Uninsured Climbs to Highest Figure Since Passage of Medicare, Medicaid*, PHYSICIANS FOR A NAT'L HEALTH PROGRAM (Sept. 13, 2011), http://www.pnhp.org/news/2011/september/number-of-uninsured-climbs-to-highest-figure-since-passage-of-medicare-medicaid.

billion in 2008, unpaid.[175] The unpaid amount is then indirectly paid for by insured individuals through increased premiums which are invoked by health insurance providers – an average of over $1,000 a year per family.[176] The individual mandate sought to provide a solution to this issue in the national economy, and as granted under the Commerce Clause, Congress acted within its right to regulate.[177]

In *Gibbons*, the Court noted that Congress held unlimited power under the Commerce Clause, except for those expressed in the Constitution.[178] With this strong presumption of Commerce Clause precedent giving Congress wide latitude to regulate the national economy, Congress has already regulated the insurance industry, as observed in *United States v. South-Eastern Underwriters*, as well as private health insurance policies, healthcare providers, and other provisions concerning the consumption of healthcare services.[179] Regulation of healthcare services includes the regulation of prices or price-fixing for healthcare service expenditures in order to stimulate commerce.[180] Therefore, it has been previously established that Congress has the authority to regulate the healthcare industry generally and health insurance specifically.[181]

Eventually, everyone is certain to participate in the healthcare market as a consumer.[182] Without PPACA's individual mandate, an individual may easily opt out of purchasing health insurance; however, a person may never opt out of the healthcare services market.[183] No individual can simply "opt out" of contracting an unavoidable illnesses or having a health emergency in the future, although in rare instances such may be the case for an individual.[184] Consequently, it is "a question of when and how individuals will consume and pay for such services, not whether they will consume them."[185] The Eleventh Circuit described PPACA's individual mandate as a constitutional grant of general police power to Congress.[186] Those who avidly oppose PPACA, however, claim that by allowing the individual mandate, Congress would have unlimited power under the Commerce Clause to impose far-

---

[175] *Florida*, 648 F.3d at 1331 (Marcus, J., dissenting) (citing *Hidden Health Tax: Americans Pay a Premium*, FAMILIES USA (2009), *available at* http://familiesusa2.org/assets/pdfs/hidden-health-tax.pdf).

[176] *Id.* at 1360.

[177] *Id.* at 1332.

[178] *Gibbons*, 22 U.S. at 196.

[179] United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 551 (1944); *see* Patient Protection & Affordable Care Act, 42 U.S.C. § 18091(a)(2) (2010).

[180] Patient Protection and Affordable Care Act, § 18091(a)(3) (2010).

[181] *Underwriters Ass'n*, 322 U.S. at 541.

[182] *Florida*, 648 F.3d at 1357.

[183] *Id.* at 1356 (Marcus, J., dissenting).

[184] *Id.*

[185] *Id.* at 1356-57.

[186] Frederick Thide, *In Search of Limiting Principles: The Eleventh Circuit Invalidates Mandate in Florida v. U.S. Department of Health and Human Services*, 53 B.C. L. REV. 359, 367 (2012).

reaching requirements on individuals.[187] However noble and legitimate these concerns on individual liberties may be, for the purposes of American constitutional law, those arguments are untenable because PPACA's individual mandate regulates an activity that is inherently economic in nature and does not seek to regulate outside of that narrow scope.[188]

Relying on *Lopez* and *Morrison*, The Eleventh Circuit held that Congress exceeded its regulation authority under the Commerce Clause with PPACA's individual mandate. Both *Lopez* and *Morrison* held that Congress exceeded its Commerce Clause regulating authority;[189] however, the Eleventh Circuit majority could not have been more incorrect in its analysis. *Lopez* and *Morrison* tackled issues that were non-economic in nature.[190] *Lopez* invalidated the Gun-Free School Zones Act, which criminalized possessing a firearm in public school zones.[191] The Act contemplated by the Supreme Court in *Lopez* was unrelated to commerce and economic activity due to the lack of any legitimate connection between the action (possessing a firearm in public schools) and the economic activity Congress sought to control.[192] Similarly, the Supreme Court in *Morrison* invalidated criminal sanctions for gender-motivated felonious acts of violence, another non-economic regulation passed by Congress.[193]

Contrary to the issues addressed by the Supreme Court in *Lopez* and *Morrison*, regulating the cost-shifting of $43 billion by uninsured individuals in our healthcare marketplace is economic in nature.[194] The Supreme Court, if it was to rely on *Lopez* and *Morrison*, would have to rely on an unacceptable chain of reasoning to find a nexus between regulating criminal conduct having a substantial effect on interstate commerce.[195] But, PPACA's individual mandate has a substantial economic connection to regulation of the healthcare marketplace and interstate commerce. There is direct link between the individual mandate's requirement to purchase healthcare insurance or pay a tax penalty and the regulatory scheme of healthcare services.[196]

An individual's failure to purchase health insurance coverage and that individual's subsequent inability to pay for healthcare services incurred affects commerce because those participating in the health insurance market unavoidably will pay for those unpaid services through increased premiums.[197] Unlike *Lopez* and

---

[187] Neil S. Siegel, *Four Constitutional Limits that the Minimum Coverage Provision Respects*, 27 CONST. COMMENT. 591, 596 (2011).

[188] *Florida*, 648 F.3d at 1352 (Marcus, J., dissenting).

[189] *Id.* at 1285.

[190] *Id.* at 1352 (Marcus, J., dissenting).

[191] United States v. Lopez, 514 U.S. 549, 551 (1995).

[192] *Florida*, 648 F.3d at 1352 (Marcus, J., dissenting).

[193] United States v. Morrison, 529 U.S. 598, 603 (2000).

[194] *Florida*, 648 F.3d at 1352 (Marcus, J., dissenting).

[195] *Id.*

[196] *Id.*

[197] Siegel, *supra* note 187, at 607.

Morrison, PPACA's individual mandate is a comprehensive statute essential to regulating the economic issues underlying healthcare services and is not a regulatory scheme invoking social interaction or criminal prohibitions. [198]

Supreme Court Commerce Clause jurisprudence is unharmed, despite PPACA's individual mandate being upheld.[199] *Lopez* and *Morrison* lack any facts concerning economic activity within Congress's constitutional reach to regulate.[200] The Supreme Court in those two cases recognized this, and both statutes were invalidated as impermissible actions of Congress. The limitations applied in those cases do not apply to PPACA's individual mandate, which is inherently economic in nature.[201] When Congress regulates inherently economic activity that substantially impacts the interstate healthcare market or interstate healthcare insurance, that regulation is entitled to a presumption of constitutional validity under a rational basis standard.[202] Therefore, Congress's conclusion that PPACA's individual mandate is an essential component to effectively and efficiently regulate the healthcare market or health insurance industry is permissible under the Commerce Clause.[203]

The Eleventh Circuit decision invalidating PPACA disregards Congress's Commerce Clause authority by attempting to heighten the level of judicial scrutiny required when reviewing the constitutionality of acts of Congress.[204] The evidence regarding unpaid healthcare services directly attributed to the amount of uninsured Americans reveals the need for PPACA's individual mandate. PPACA's regulatory scheme concerning America's health insurance industry meets the rational basis scrutiny required of Congress when it acts to regulate interstate commerce.[205] Inevitably, uninsured individuals will consume healthcare services or products, and the subsequent unpaid healthcare costs will be shifted to those individuals who participate in the health insurance market.[206] Years of judicial precedent demonstrate Congress has broad authority to regulate the interstate marketplace,[207] and rejection of PPACA's individual mandate limits Congress's presumptive rational basis Commerce Clause authority to regulate the health insurance and healthcare markets.[208]

Unlike Chief Justice Roberts, Justice Ginsburg's conclusion in *National Federation of Independent Business v. Sebelius* argues that the Commerce Clause

---

[198] Siegel, *supra* note 187, at 598.

[199] *Florida*, 648 F.3d at 1355 (Marcus, J., dissenting).

[200] *See* United States v. Lopez, 514 U.S. 549 (1995); *see* United States v. Morrison, 529 U.S. 598 (2000).

[201] *Florida*, 648 F.3d at 1355 (Marcus, J., dissenting).

[202] *Id.*

[203] Primus, *supra* note 13, at 45.

[204] *Florida*, 648 F.3d at 1355 (Marcus, J., dissenting).

[205] *Id.*

[206] Siegel, *supra* note 187, at 607.

[207] Thide, *supra* note 186, at 365.

[208] *Florida*, 648 F.3d at 1301.

authorizes Congress to enact the individual mandate. [209] Similar to offering elderly and survivorship benefits in the 1930's, offering heightened accessibility to the healthcare marketplace in 2012 is permissible under the Commerce Clause. Plainly, it is untenable to conclude that the PPACA violates the Commerce Clause.[210] When enacting the Social Security Act, Congress exercised its Commerce Clause authority to establish a federal system making available monthly benefits to previous wage earners now retired, and to their survivors.[211] Unquestionably, the Commerce Clause grants Congress the ability to approve a similar scheme in healthcare. Congress decided, as an alternative, to preserve a pivotal role for private insurers as well as state governments.[212] "According to The Chief Justice, the Commerce Clause does not permit that preservation. This rigid reading of the Clause makes scant sense and is stunningly retrogressive. Since 1937, our precedent has recognized Congress' large authority to set the Nation's course in the economic and social welfare realm."[213]

IV. CONCLUSION

An analysis of the rationale of the majority opinion in *Florida v. Department of Health and Human Services* unquestionably reveals the *Lopez* Commerce Clause enumerated powers analysis was not utilized as a rubric to protect the presumptive validity of PPACA's individual mandate under the rational basis standard.[214] The *Lopez* rationale of rolling back Congress's expansive Commerce Clause power was misused by the majority opinion in the Eleventh Circuit.[215] The misuse of *Lopez* occurred when the Eleventh Circuit incorrectly interpreted *Lopez* to represent the unfounded proposition that Congress must meet a standard higher than rational basis in order to enact PPACA's individual mandate under the Commerce Clause.[216] The Eleventh Circuit's rationale for concluding that the individual mandate in PPACA is an example of Congress exceeding its enumerated authority under the Commerce Clause demonstrates a lack of judicial restraint and respect for the institutional role of Congress.[217] When the Eleventh Circuit attempts to roll back federal Commerce

---

[209] Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2609 (2012) (Ginsburg, J. dissenting). Justice Ginsburg, with whom Justice Sotomayor joins, and with whom Justice Breyer and Justice Kagan join as to Parts I, II, III, and IV, concurring in part, concurring in the judgment in part, and dissenting in part. Justice Ginsburg, agreed with The Chief Justice that the Anti–Injunction Act does not bar the Court's consideration of this case, and that the individual mandate is a proper exercise of Congress' taxing power. Justice Ginsburg therefore join Parts I, II, and III–C of The Chief Justice's Opinion. Unlike The Chief Justice, however, Justice Ginsburg would hold, alternatively, that the Commerce Clause allows Congress to approve the individual mandate provision. Justice Ginsburg would also hold that the Spending Clause allows the Medicaid expansion precisely as Congress authorized it. *Id*.

[210] *Id*.

[211] *Id*.

[212] *Id*.

[213] *Id*.

[214] *Id*.

[215] *Id*.

[216] *Id*.

[217] *Id.* at 1321.

Clause power, without demonstrating that the individual mandate is not a rational attempt to regulate activity with a substantial impact on interstate commerce, it demonstrates judicial disrespect for Congress's plenary power under the Commerce Clause.[218] The Supreme Court's rigid reading of the Commerce Clause in *Florida v. Department of Health and Human Services* is retrogressive and should only make scant sense to those who wish to roll back Supreme Court precedent acknowledging that Congress' extensive authority to regulate the Nation's agenda in the area addressing economic and social welfare policy since 1937.[219]

---

[218] *Id.*

[219] *Sebelius*, 132 S. Ct. at 2586, 2609 (Ginsburg, J. dissenting).