

To: Chief Justice
From: Jordan Jones
Re: 2011 HCLS Writing Competition
Date: July 31, 2011

Statement of Facts

The Patient Protection and Affordable Care Act (PPACA) officially became law on March 23, 2010. The PPACA is meant to reform health care so that people with preexisting conditions can get better coverage, and to reduce health care premiums, among other things. Millions of Americans do not have health insurance, and when those uninsured people require medical treatment they generally are not denied said treatment. *Florida ex rel. McCollum v. U.S. Dept. of Health & Human Services*, 716 F. Supp. 2d 1120, 1128 (N.D. Fla. 2010). Often these medical expenses go unpaid, and in turn the cost is shifted onto those who have purchased medical insurance in the form of higher premiums. *Id.* Congress created the PPACA with this in mind. A controversial part of the legislation is the Minimum Essential Coverage Provision, § 1501(a). The “individual mandate,” as it is sometimes called, requires all Americans (with limited exceptions) to purchase health insurance beginning in 2014. This would add more people to the insurance pool creating a larger base resulting in lower premiums.

In addition, after 2014 insurers can no longer exclude people with preexisting conditions from obtaining coverage, nor can they charge them outlandish premiums. *Id.* In order for this to properly function without bankrupting the health insurance sector, the minimum essential coverage provision is absolutely necessary. Although this is the case, and there are undoubtedly valid economic reasons for Congress to regulate the health insurance sector, it is unclear whether the individual mandate is constitutional under existing commerce clause jurisprudence.

To date there have been four decisions on the issue in federal district courts. Elizabeth J. Bondurant & Steven D. Henry, *Constitutional Challenges to the Patient Protection and Affordable Care Act*, 78 Def. Couns. J. 249, 250 (2011). Both *Florida ex rel. Bondi v. U.S. Dept. of Health & Human*

Services, 2011 WL 285683 (N.D. Fla. Jan. 31, 2011) and *Virginia ex rel. Cuccinelli v. Sebelius*, 728 F. Supp. 2d 768 (E.D. Va. 2010) ruled that the individual mandate was unconstitutional. Both held that commerce clause jurisprudence did not afford Congress the power to regulate inactivity.

Conversely, in *Liberty Univ., Inc. v. Geithner*, 753 F. Supp. 2d 611 (W.D. Va. 2010) and *Thomas More Law Center v. Obama*, 720 F. Supp. 2d 882 (E.D. Mich. 2010) (which was later affirmed in the 6th circuit Court of Appeals), the provision was held constitutional because of its substantial relation to a larger regulatory scheme. There are valid arguments that can be made on both sides of the debate, but the question will inevitably make its way to the Supreme Court.

Brief Questions

- A. Whether Congress can only regulate “activity” pursuant to *U.S. Const. art. I, § 8, cl. 3* where (1) the court has never made a distinction between activity and inactivity in commerce clause jurisprudence, (2) failure to purchase health insurance substantially affects interstate commerce, and (3) the individual mandate is absolutely essential to the broader regulatory scheme.
- B. Whether choosing to forego health insurance constitutes “activity” that can be properly regulated using the commerce clause

Brief Answers

- A. Pursuant to *U.S. Const. art. I, § 8, cl. 3* Congress can only regulate “activity;” that is, voluntary acts that substantially affect interstate commerce, or taken in the aggregate could substantially affect interstate commerce. Congress can only regulate “activity” because all commerce clause jurisprudence involves some affirmative act to engage in, or circumvent the market, or the production of some tangible good, and because case precedent has established that there are outer limits on the commerce clause power which would cease to exist if Congress were able to regulate “inactivity.”

- B. Failure to purchase health insurance is not “activity” that can be regulated under the commerce clause because there is no voluntary act to engage in, or circumvent the market, and because there is no voluntary change of position.

Discussion

§ 1501(a) of the Patient Protection and Affordable Care Act (the “individual mandate”) is probably unconstitutional and should be struck down. Congress has the power to “regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes.” *U.S. Const. art. I, § 8, cl.*

3. The court has always stated that some “activity” is required for congress to act pursuant to the commerce clause, and choosing not to purchase medical insurance is not activity for the purposes of commerce clause regulation. Here, Congress seeks to regulate an economic decision that substantially affects interstate commerce. However, just because this decision affects interstate commerce does not mean Congress has a free pass to invoke the commerce clause to regulate economic choices. The regulatory measure must still operate within the confines of the Constitution. The individual mandate seeks to regulate inactivity as opposed to activity; contrary to all commerce clause jurisprudence where Congressional power was said to extend to those “activities” that substantially affect commerce. Furthermore, expanding the commerce clause power in this fashion would offend the American system of checks and balances, and create a general Congressional police power.

Case precedent has outlined a “three-prong analysis” in determining whether congressional action is properly exercised using the commerce clause. *Thomas More Law Center v. Obama*, 720 F.Supp.2d 882, 891 (E.D. Mich 2010). Congress can regulate “(1) the use of channels of interstate commerce...(2) the instrumentalities of interstate commerce...[and] (3) those activities that substantially affect interstate commerce.” *Id.* at 891 (citing *United States v. Lopez*, 514 U.S. 549, 558-59 (1995)). The third category also encompasses purely local noneconomic activity which could substantially affect interstate commerce. *Wickard v. Filburn*, 317 U.S. 111, 124-25 (1942). *See also United States v. Patton*,

451 F.3d 615, 622–23 (10th Cir. 2006); *Florida ex rel. Bondi v. U.S. Dept. of Health & Human Services*, 2011 WL 285683 (N.D. Fla. Jan. 31, 2011) (citations omitted).

The court has also extended the commerce clause power to encompass local noneconomic activity where regulating that act “is an integral part of a broader statutory scheme.” *Thomas More Law Center*, 720 F.Supp.2d at 892. However, there must be a “rational basis” between the regulated activity and its potential effect on interstate commerce. *Gonzales v. Raich*, 545 U.S. 1, 22 (2005). It is well settled that the insurance industry itself is subject to regulation under the commerce clause. *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 553 (1944).

The individual mandate is likely unconstitutional. Although Congress has a rational basis for concluding that foregoing health insurance substantially affects commerce, Congress can only regulate activity. An economic choice regarding health insurance does not constitute activity. Expanding the commerce clause power in this fashion would destroy any restraint that exists on Congressional power under the commerce clause and would effectively give Congress the ability to police every aspect of American life so long as it could substantially affect interstate commerce.

A. Whether Congress can only regulate “activity” pursuant to U.S. Const. art. I, § 8, cl. 3.

The court has never had to decide whether activity is required in order for Congress to have the authority to exercise its commerce clause power. *Thomas More Law Center*, 720 F.Supp.2d 882 at 893. All courts that have decided upon the constitutionality of the minimum coverage provision have agreed upon this. *Florida ex rel., supra*, 2011 WL 285683 at 21. However, “the fact that legislation is unprecedented does not by itself render it unconstitutional.” *Id.* at 20. Congress has the authority to regulate activities that “substantially affect” interstate commerce. *United States v. Lopez*, 514 U.S. 549, 559 (1995). This includes the power to regulate intrastate or local activities that could substantially affect interstate commerce. *Gonzales v. Raich*, 545 U.S. 1, 17 (2005) (citing *Wickard v. Filburn*, 317 U.S. 111, 128-129 (1942)). Precedent has also established that where a “general regulatory statute bears a

substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence,” and can be regulated. *Lopez*, 514 U.S. 549 at 588 (emphasis original). However, Congress must have a “rational basis” for concluding that the activity could substantially affect commerce. *Gonzales v. Raich*, 545 U.S. 1, 22 (2005).

In *Wickard v. Filburn*, 317 U.S. 111 (1942) the court upheld a provision in the Agricultural Adjustment Act of 1938 that limited the amount of wheat an individual could grow. The purpose of the act was to avoid excess wheat production that would cause the market price to plummet. *Wickard*, 317 U.S. at 116. The plaintiff, Filburn, exceeded the production cap, but the excess wheat he grew was for personal use rather than commercial sale. The plaintiff argued that Congress could not regulate his activity because he was not participating in the interstate market. The court held that Congress could regulate his wheat production even if it was for personal, noncommercial use. *Id.* at 128-29. The *Wickard* court held that Congress can regulate practices that would “have a substantial affect in defeating or obstructing” the legislative purpose. *Id.*

In *Gonzales v. Raich*, 545 U.S. 1 (2005), the court held that Congress could regulate the growth of medical marijuana for personal consumption using the commerce clause. In *Gonzales*, marijuana growers challenged the constitutionality of the Controlled Substances Act (CSA) to the extent that it prohibited them from producing medical marijuana for personal consumption. The plaintiff’s contended that their cannabis was intrastate and noncommercial, and therefore, Congress had exceeded its power in regulating their ability to grow marijuana. The court held that Congress had rightfully exercised its regulatory power under the commerce clause. *Id.* at 19. In holding that this was within Congress’ power, the court noted that “a primary purpose of the CSA is to control the supply and demand of controlled substances” in the market; legal or otherwise. *Id.* The court found a “rational basis” between the purpose of the legislation and the regulation of cultivating medical marijuana for personal use. *Id.*

Both *Wickard* and *Gonzales* are distinguishable from the current facts. In *Gonzales*, the court stated that

Wickard thus establishes that Congress can regulate purely intrastate *activity* that is not itself “commercial,” in that it is not *produced* for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity.

Gonzales, 545 U.S. 1 at 18 (emphasis added). The *Wickard* holding as articulated in *Gonzales* encompasses “activity,” not economic choices. Here, like *Wickard*, Congress is trying to regulate a broader interstate market. However, unlike *Wickard* where wheat was produced, in the case of the individual mandate nothing has been produced. Congress seeks to regulate an individual’s choice to participate in the insurance market rather than the production of some tangible good. In *Wickard*, the plaintiff actively grew wheat for personal use to circumvent the market unlike the current fact set where people who have not purchased health insurance have taken no action whatsoever. Furthermore, *Wickard* does not apply because the statute itself was intended to regulate the *production* of wheat, among other commodities. 7 U.S.C.A. § 1331 (1938). Here, the provision is meant to regulate a decision to purchase insurance rather than the production of a good.

Similarly, the current facts are also distinguishable from *Gonzales*. Unlike the individual mandate, *Gonzales* regulated an activity. In *Gonzales* the plaintiffs actively grew marijuana for their own consumption to circumvent the market, but here there has been no such activity. Here, people have chosen not to participate in the market rather than take action to circumvent it. Furthermore, *Gonzales* also dealt with the *production* of a tangible good unlike the individual mandate where Congress is trying to regulate people who have produced nothing at all. In addition, the statutes themselves are distinguishable. The Controlled Substances Act regulated “quintessentially economic” activities. *Gonzales*, 545 U.S. 1 at 26. The CSA “is a statute meant to regulate the *production*, distribution, and consumption” of a commodity. *Id.* (emphasis added). In the CSA Congress declared that “manufacture, local distribution, and possession [of controlled substances]...have a substantial and direct effect upon

interstate commerce.” 21 U.S.C.A. § 801 §§(2) (1970). This is distinguishable from the individual mandate because it does not seek to regulate production, manufacture or distribution of anything. Congress posits only that the requirement regulates “activity [that]...substantially affects interstate commerce.” 42 U.S.C.A. § 18091 §§(2) (2010).

Although both *Wickard* and *Gonzales*, like the minimum essential coverage provision, deal with legislation aimed at furthering a Congressional regulatory initiative, both cases are distinguishable from the current situation. Both dealt with fact patterns where challenges arose after an individual had taken affirmative steps to circumvent the market and had actually produced some tangible good for personal consumption. Here, people who have forgone health insurance have not taken any affirmative steps to circumvent the market, but rather have simply chosen not to buy insurance. Furthermore, the individual mandate provision seeks to regulate an economic choice unlike the statutes in *Wickard* and *Gonzales* where the Agricultural Adjustment Act and the Controlled Substances Act respectively dealt with production and distribution of a tangible commodity.

The court has also reiterated that although Congress’ power under the commerce clause is quite broad, it is still subject to limitations. *United States v. Lopez*, 514 U.S. 549, pp. 556-57. In *Lopez*, a student carried a concealed weapon into his school. *Lopez*, 514 U.S. 549 at 549. He was subsequently charged with violating the Gun-Free School Zone Act which forbade possession of a firearm in a school zone. *Id.* (citing 18 U.S.C. § 922(q)(1)(A)). The *Lopez* court held that Congress could not regulate any activity that simply affects interstate commerce, but only those activities which “substantially affect” interstate commerce. *Id.* at 559. The court declined to extend the commerce clause to the extent that it could be used to regulate activity that affected commerce only after relying upon a series of inferences. *Id.* at 549. The commerce clause was not extended because doing so would have given Congress limitless power, making it hard to imagine “any activity by an individual” that Congress was not able to regulate. *Id.* at 564.

Similarly, in *United States v. Morrison*, 529 U.S. 598 (2000), the court declined to allow Congress to regulate violent crimes against women using the commerce clause. *Morrison*, 529 U.S. at 615. In *Morrison*, the female victim brought suit under 42 U.S.C. § 13981, which provided civil relief for gender motivated crimes using the commerce clause. She alleged that while she and the defendants were attending Virginia Polytechnic Institute, they assaulted and raped her. *Id.* at 602. Relying heavily on *Lopez*, the *Morrison* court held that the commerce clause power cannot be exercised in this way because it would allow “Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial” economic ramifications. *Id.* at 615. In *Morrison*, the court again declined to validate the use of the commerce clause in this fashion for fears of making Congress’ regulatory power too expansive.

Although there are clearly some differences, the overarching principle in *Lopez* and *Morrison* is applicable here. If Congress could regulate inactivity it would be difficult to imagine any limit on the commerce clause power. Just as validating the legislation in *Lopez* and *Morrison* would make Congressional power too broad, validating the individual mandate would leave Congressional power uncapped. As one commentator has written, extending the commerce clause in this fashion would effectively give Congress the power to regulate “every American simply because they exist.” David B. Rivkin, Jr., Lee A. Casey & Jack M. Balkin, *A Healthy Debate: The Constitutionality of an Individual Mandate*, 158 U. Pa. L. Rev. PENnumbra 93, 99 (2009). Although *Lopez* and *Morrison* both dealt with criminal activities that had weak connections to economic activity, the importance of the cases is that they articulate a necessity to place limitations on Congress’ commerce clause power. Validating the minimum essential coverage provision would remove all restraint on commerce clause power.

Furthermore, commerce clause jurisprudence has clearly stated that Congress can regulate activities. See *Florida ex rel. Bondi, Supra*, 2011 WL 285683 at 22 (citing *Lopez, supra*, 514 U.S. at 558; *Morrison, supra*, 529 U.S. at 608; *Lopez, supra*, 514 U.S. at 558–59, (saying Congress can regulate

activities that substantially affect interstate commerce); *Morrison, supra*, 529 U.S. at 609; *Gonzales, supra*, 545 U.S. at 17; *Wickard, supra*, 317 U.S. at 124). Even though, as previously discussed, the court has never had to consider whether activity was actually required, precedent has always included the word “activity,” and some voluntary activity was present. No case precedent exists to justify reading “inactivity” into commerce clause jurisprudence.

Commerce clause jurisprudence has always established that Congress can regulate those “activities” that substantially affect commerce. Although the commerce clause can be used to regulate those activities that would undercut a broader regulatory scheme, such regulation has always applied where some tangible good was produced and where the offenders had taken active steps to circumvent the market. Despite the fact that in the current situation there are clearly substantial economic affects, there is simply no precedent that would allow Congress to regulate inactivity and compel Americans to purchase insurance. Rather, case precedent invalidates the minimum essential coverage provision because like in *Morrison* and *Lopez*, allowing the commerce clause to be used in this way would destroy any restraint on Congress’ regulatory powers.

B. Whether choosing to forego health insurance constitutes “activity” subject to Congressional regulation under the commerce clause.

The decision not to purchase health insurance cannot be considered economic activity. As discussed, Congress can only regulate *activity* that substantially affects interstate commerce. The common understanding of activity entails some state of being “active.” In the context of the minimum essential coverage provision Congress is trying to regulate the exact opposite of activity.

The *Geithner* court held that “decisions about how and when to pay for health care” constituted activity. *Geithner, supra*, 753 F.Supp.2d at 633. In *Geithner*, the court relied on *Wickard* and *Gonzales* to establish that activities which substantially affect commerce can be regulated, but the court then goes on to say that a “preference for paying for health care needs out of pocket rather

than purchasing insurance on the market” is like the plaintiff in *Wickard* growing his own wheat to satisfy his demand rather than purchasing it from the market. *Geithner*, 753 F. Supp. 2d at 634 (W.D. Va. 2010).

The court fails to recognize the distinguishing factors between the case at hand and *Wickard*. First, as previously discussed, the plaintiff in *Wickard* actively produced a tangible good in order to circumvent the market, unlike here where individuals have not produced anything or taken any steps to otherwise satisfy their demand. Second, the court applies *Wickard* because individual “choices” affect insurance premiums. *Id.* But a “choice” is still distinguishable from an “activity.” Again, in *Wickard* the plaintiff voluntarily produced excess wheat as distinguished here, where people have only made a choice not to participate in the health insurance market.

A similar analysis is used in *Geithner* when the court applies *Gonzales*. Supply and demand is discussed again, and the opinion likens the decision to forego insurance to the cultivation of marijuana for personal consumption. *Id.* at 634. However, this analysis too has the same flaws as the court’s *Wickard* analysis. There is no production aspect in the case at hand, unlike *Gonzales* where the plaintiffs actively grew marijuana. There is also no voluntary action to circumvent the market.

The applications of both *Gonzales* and *Wickard* as used in *Geithner* seems to posit that because the decision to forego insurance substantially affects commerce, that choice somehow drifts into the realm of activity for the purpose of the commerce clause. However, that simply is not the case. There is no precedent, nor is there any justification for classifying this economic decision as “activity” subject to the commerce clause. In fact, precedent actually pushes the health insurance decision away from the realm of activity because in all commerce clause jurisprudence there has been some voluntary change in position. The farmer in *Wickard* voluntarily changed his position from buying in the market, to producing his own wheat removing himself from the market. Here,

individuals were not market participants in the first place and have simply chosen to remain as such. The same can be said of *Gonzales*. There, the plaintiffs were not producing marijuana but they actively changed their position to become marijuana producers. Again, in the current debate, people who were not in the insurance market have taken no action whatsoever, and have not changed their position at all.

Concededly, foregoing medical insurance does substantially affect interstate commerce. There are compelling economic reasons for health care reform, and the individual mandate would certainly be very effective in achieving that reform. However, as previously shown, Congress can only regulate activity, and there is no precedent or any other justification for classifying the decision to refrain from purchasing health insurance as activity.

Conclusion

The current state of the medical insurance market and the current state of medical care in America more generally are in need of reform. There is no doubt that the individual mandate as stated in § 1501(A) of the Patient Protection and Affordable Care Act would be very effective in achieving reform. However, despite the admirable intentions behind the act, the legislation must operate within the confines of the Constitution. Commerce clause jurisprudence regarding Congressional power pursuant to *U.S. Const. art. I, § 8, cl. 3* suggests that some “activity” that could substantially affect interstate commerce is required in order for Congress properly exercise its regulatory power. There must be a rational basis for so concluding. This being the case, Congress cannot regulate in the absence of any activity. Furthermore, it cannot be said that choosing to forego health insurance constitutes “activity” because there is no voluntary act to circumvent the market. Therefore, despite economic justifications, there is no constitutional justification for validating the minimum essential coverage provision of the PPACA. The provision is unconstitutional under the commerce clause power.