



# Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis

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May 7, 2010

Congressional Research Service

7-5700

[www.crs.gov](http://www.crs.gov)

R40725

**CRS Report for Congress**

*Prepared for Members and Committees of Congress*

011173008

## Summary

As part of the Patient Protection and Affordable Care Act, P.L. 111-148, Congress enacted a provision that requires certain individuals to have a minimum level of health insurance. Covered individuals who fail to maintain sufficient coverage will be subject to a financial penalty beginning in 2014. Although the federal government provides health coverage for many individuals through federal programs such as Medicare, it had never before required individuals to purchase health insurance. There are various constitutional considerations relevant to the enactment of this provision. This report provides an analysis of constitutional issues raised by compelling individuals to purchase health insurance.

This report first analyzes the authority of Congress to pass a law of this nature, as well as how a court could analyze this provision in light of a constitutional challenge based on various provisions of the Fifth and Tenth Amendments. Finally, this report discusses whether the exceptions to the individual responsibility requirement to purchase health insurance satisfy First Amendment freedom of religion protections.

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Although the federal government provides health coverage for many individuals through federal programs such as Medicare, it has never required individuals to purchase health insurance until the enactment of the Patient Protection and Affordable Care Act<sup>1</sup> (PPACA) in March of 2010.<sup>2</sup> While a requirement to transfer money to a private party may arise in other contexts (e.g., automobile insurance), it has been noted that these provisions are based on exercising a privilege, like driving a car.<sup>3</sup> Thus, due at least in part to the novelty of this requirement, questions over its constitutionality have been raised.

This report first analyzes the authority of Congress to enact the individual responsibility requirement contained in PPACA, as well as how a court might analyze this provision if challenged based on various provisions of the Fifth and Tenth Amendments. Finally, this report discusses whether there must be exceptions to a requirement to purchase health insurance based on First Amendment freedom of religion.<sup>4</sup> It should be noted that at least three lawsuits have been filed that challenge the individual responsibility requirement on constitutional grounds.<sup>5</sup>

## Background

Under Section 1501 of PPACA, beginning in tax year 2014, some taxpayers will be assessed a monetary penalty for any months during which they or their dependents lack “minimum essential” health coverage.<sup>6</sup> “Minimum essential coverage” includes coverage under a government-sponsored health care program (e.g., Medicaid, Part A of Medicare); an “eligible” employer-sponsored plan; coverage under a plan offered in the individual market; a grandfathered health plan; and other health coverage as recognized by the Secretary of Health and Human Services.

The amount of the assessment for failing to meet the individual responsibility requirement, which can be prorated for partial compliance during the year, is determined by taking the greater of a

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<sup>1</sup> Patient Protection and Affordable Care Act, P.L. 111-148, § 1501(b) (2010), as amended by the Health Care and Education Reconciliation Act of 2010 P.L. 111-152 § 1002 (2010). The requirement to purchase health insurance will be referred to, as in section 1501(b), as the individual responsibility requirement.

<sup>2</sup> See Congressional Budget Office Memorandum, *The Budgetary Treatment of an Individual Mandate to Buy Health Insurance* (Aug. 1994) (“A mandate requiring all individuals to purchase health insurance would be an unprecedented form of federal action.”).

<sup>3</sup> See Mark A. Hall, *The Constitutionality of Mandates to Purchase Health Insurance, Legal Solutions in Health Care Reform*, available at <http://www.rwjf.org/files/research/38108.3693.constitutionality.mandates.pdf>. See also *In Ex Parte Poresky*, 290 U.S. 30 (1933) (Court agreed that a district court’s dismissal of a complaint alleging that Massachusetts’ compulsory automobile liability insurance law violated the 14<sup>th</sup> Amendment was proper “in view of the decisions of this Court bearing upon the constitutional authority of the State, acting in the interest of public safety, to enact the statute assailed.”). It should be noted that while laws related to military service (e.g., the draft) could be considered an example of a federal mandate pertaining to individuals, the authority for these laws likely relies on Congress’s authority to raise and support armies. See generally *Rostker v. Goldberg*, 453 U.S. 57, 65 (1981); *Selective Draft Law Cases*, 245 U.S. 366 (1918).

<sup>4</sup> It should be noted that the State of Massachusetts enacted a health insurance mandate that requires residents to obtain and maintain health care coverage or be subject to adverse tax consequences, subject to certain exceptions. Mass. Gen. Laws ch. 111M, § 2 (2008). While a constitutional analysis of Massachusetts’s law would differ from the analysis presented in this memorandum, certain features of the Massachusetts law are referenced for informational purposes.

<sup>5</sup> For a discussion of these lawsuits, see CRS Report R40846, *Health Care: Constitutional Rights and Legislative Powers*, by Kathleen S. Swendiman.

<sup>6</sup> P.L. 111-148, § 1501(b), as amended by P.L. 111-152, § 1002.

flat dollar amount and a calculation based on a percentage of the taxpayer's household income. The annual flat dollar amount is assessed per individual or dependent without coverage and will be phased in over three years. The amount is set at \$95 for 2014; \$325 for 2015; and \$695 in 2016 and thereafter.<sup>7</sup> This amount will also be adjusted for inflation beyond 2016. Although this is a fixed per-person amount, a taxpayer's liability will not exceed three times this amount per year, regardless of the number of individuals who actually lack adequate coverage during the year. For example, a married couple filing jointly with two dependent children and no health insurance will have the same flat dollar assessment as a similarly situated married couple with three dependent children.

This flat dollar amount will be compared to a percentage of the extent to which the taxpayer's household income exceeds the income tax filing threshold.<sup>8</sup> Like the flat dollar amount, the applicable percentage to be used is phased in over three years, set at 1% for 2014, 2% for 2015, and 2.5% thereafter. The amount assessed on a taxpayer who lacks minimum essential coverage will be equal to the greater of the flat dollar amount or the calculated percentage of household income. However, this amount shall not exceed the national average of the annual premiums of a bronze level health insurance plan offered through an exchange created under PPACA.

Exemptions would apply to individuals with qualified religious exemptions, members of health care sharing ministries, unauthorized aliens, incarcerated individuals, qualified U.S. citizens and residents living abroad, and bona fide residents of the U.S. possessions. Additionally, no amounts would be assessed on individuals who could not afford coverage;<sup>9</sup> taxpayers with income less than the filing threshold; members of Indian tribes; and individuals granted hardship exceptions. Finally, no amounts would be assessed for periods without coverage that last less than three months. This three-month exception could apply to only one continuous period without coverage during a calendar year.

## **Constitutional Authority to Require an Individual to Have Health Insurance**

In analyzing the constitutionality of PPACA's requirement to obtain health insurance, the first question is the congressional authority for this requirement based on Congress's enumerated powers. While there is no specific enumerated power to regulate health care or establish an individual responsibility requirement, one can look to Congress's other broad enumerated powers which have been used to justify social programs in the past. In the instant case, Congress's taxing power could be applicable. In addition, Congress's power to regulate interstate commerce may also be pertinent, especially given that Section 1501 of PPACA, as amended, provides numerous findings about the correlation or the individual responsibility requirement to interstate commerce.

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<sup>7</sup> The tax would be one half the applicable dollar amount if the taxpayer was younger than 18 years old.

<sup>8</sup> The filing threshold for individuals is defined in I.R.C. § 6012(a)(1) and is roughly equal to the taxpayer's personal exemption (or exemptions in the case of a joint filer) and standard deduction.

<sup>9</sup> In general, an individual will be deemed not to afford coverage if the required contribution for employer-sponsored coverage or a bronze-level plan on an Exchange exceeds 8% of the individual's household income for the taxable year. See 26 U.S.C. § 5000A(e)(1)(A), as created by PPACA. For information on Exchanges as provided for in PPACA, see CRS Report R40942, *Private Health Insurance Provisions in the Patient Protection and Affordable Care Act (PPACA)*, by Hinda Chaikind et al.

## Taxing Power

Article I, Section 8 of the Constitution states that “Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States....” The power to tax and spend for the general welfare is one of the broadest powers in the Constitution and affords the basis of government health programs in the Social Security Act, including Medicare, Medicaid, and the State Children’s Health Insurance Program.

Because Congress’s power to tax is extremely broad,<sup>10</sup> a court might look to it as a legitimate source of power for Congress to impose the individual responsibility requirement. If so, the provision might be upheld as constitutional so long as it was found to comply with the constitutional restrictions imposed on direct and indirect taxes discussed below. In such case, a court might favorably compare the requirement to other examples of where Congress has used its taxing authority to create financial incentives for individuals to purchase health insurance.<sup>11</sup> Similarly, if Congress were to require individuals to purchase health insurance, and then encourage compliance with this requirement by conditioning receipt of a tax benefit (e.g., a tax credit) on the purchase of health insurance, this incentive also could be seen as a legitimate exercise of Congress’s taxing authority.

On the other hand, opponents of the individual responsibility requirement may note that the enacted individual responsibility requirement differs in that it creates a financial disincentive for failing to obtain health insurance. As the tax is imposed conditionally and may be avoided by compliance with regulations set out in the statute, some might argue that it may also be accurately described as a penalty and, therefore, the taxing power alone might not provide Congress the constitutional authority to impose the requirement.<sup>12</sup> A court analyzing this argument might look to cases where the Supreme Court has examined whether Congress has the authority, independent of its taxing authority, to regulate the underlying subject matter. If such regulation is authorized under a provision of the Constitution other than the taxing power, the exaction may be sustained as an appropriate enforcement mechanism.<sup>13</sup> But, in the absence of such independent authority, a tax triggered by the failure to comply with federal standards has been held to be invalid.<sup>14</sup>

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<sup>10</sup> See, e.g., *United States v. Doremus*, 249 U.S. 86, 93 (1919) (“If the legislation enacted has some reasonable relation to the exercise of the taxing authority conferred by the Constitution, it cannot be invalidated because of the supposed motives which induced it.”).

<sup>11</sup> See I.R.C. § 106 (excluding from gross income compensation received by employees in the form of health care benefits).

<sup>12</sup> *But see* Brian D. Galle, *Conditional Taxation and the Constitutionality of Health Care Reform* (April 3, 2010). Yale Law Journal Online, Forthcoming; FSU College of Law, Public Law Research Paper; GWU Law School Public Law Research Paper. Available at SSRN: <http://ssrn.com/abstract=1584044> (arguing “‘conditional’ taxes—taxes used to achieve some regulatory end—are not limited only to those purposes covered by Congress’s other enumerated powers. Instead, Congress may condition exemptions from a tax on any criteria it chooses—other than those expressly prohibited by the Constitution, such as restrictions on free speech—so long as it is willing to pay the political price for carving out that exception.”).

<sup>13</sup> *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 383 (1940) (a tax on coal producers who did not meet certain federal requirements was upheld because the imposition of federal requirements was a valid exercise of Congress’ power to regulate interstate commerce).

<sup>14</sup> *Child Labor Tax Case*, 259 U.S. 20 (1922) (striking tax on the employment of children because regulation of child labor was not within Congress’ authority under the Commerce Clause at the time; Congress’ authority under the Commerce Clause has since been recognized by the Supreme Court to be much broader).

A court that found it necessary to determine whether the character of the individual responsibility payment is that of a tax or penalty would likely examine congressional intent. The Court has noted that

the difference between a tax and a penalty is sometimes difficult to define and yet the consequences of the distinction in the required method of their collection often are important.... Taxes are occasionally imposed in the discretion of the legislature on proper subjects with the *primary* motive of obtaining revenue from them and with the *incidental* motive of discouraging them by making their continuance onerous. They do not lose their character as taxes because of the incidental motive. But there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment.<sup>15</sup>

Here, enforcement of this provision would likely result in revenue for the federal government, and a court might find this to be a sufficient purpose to be a valid exercise of the taxing power. But, it may be difficult for a court to ignore the larger context of health insurance reform in which the provision has arisen. To the extent that this context indicates that a primary motive of the provision is to encourage compliance with a federal requirement that individuals maintain some form of health insurance, a court may characterize it as a penalty rather than a tax.

For example, a court might look to any legislative findings accompanying the individual responsibility requirement. Notably, Congress found that

[t]he [individual responsibility] requirement regulates activity that is commercial and economic in nature: economic and financial decisions about how and when health care is paid for, and when health insurance is purchased.<sup>16</sup>

The language Congress itself uses to refer to the provision may also influence its characterization. On one hand, simply because Congress has labeled a provision as a tax, a court is not bound by that label.<sup>17</sup> However, neither would a court be prohibited from using Congress's description of the provision as a penalty as evidence of Congress's intent.

Other factors can be gleaned from the Court's jurisprudence distinguishing taxes and penalties. Factors which suggest that a provision might actually be a penalty include (1) the absence of a correlation between the amount of tax and the magnitude by which an individual's conduct deviates from the conduct which is exempt from taxation; (2) a limitation that the tax only fall on individuals that knowingly deviate from the exempt conduct; and (3) the possibility of enforcement by government entities not traditionally charged with the enforcement of taxes.<sup>18</sup>

Application of these three factors to the instant provision would appear to support its characterization as a tax. First, the amount of the penalty is roughly proportional to the length of time during the year that the taxpayer and his or her dependents lacked coverage. Second, knowledge is not a necessary element to assess the penalty. Third, it appears that the provision

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<sup>15</sup> *Id.* at 38 (emphasis added).

<sup>16</sup> See P.L. 111-148, § 1501(a)(2)(A).

<sup>17</sup> *Child Labor Cases*, 259 U.S. at 38 ("To give such magic to the word "tax" would be to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the States.").

<sup>18</sup> *Id.* at 36-37 ("In the light of these features of the act, a court must be blind not to see that the so-called tax is imposed to stop the employment of children within the age limits prescribed. Its prohibitory and regulatory effect and purpose are palpable. All others can see and understand this. How can we properly shut our minds to it?").

will be enforced by the Internal Revenue Service, an entity traditionally charged with the enforcement of taxes. However, this list comprises only those factors the Court found present in the case before it, and may not represent an exhaustive list of what a court might consider as indicia of taxes.

If a court were to classify the provision as a penalty, this would not be determinative of its constitutional validity, but would merely establish that Congress's authority to enact such a provision must be found in something other than its power to levy taxes. In other words, the constitutionality of the individual responsibility requirement, if determined to be a penalty, would depend upon whether Congress has the authority under a power other than the taxing power to impose a financial burden on individuals that lack health insurance. As discussed below, one potential source of such authority may be the Commerce Clause.

### **Limits on the Taxing Power**

Even where Congress has the general authority to levy a tax, the Constitution may impose additional requirements on the form of such taxes. For constitutional purposes,<sup>19</sup> taxes are understood to be either

- direct taxes, subject to apportionment among the states based on population,<sup>20</sup> or
- indirect taxes (i.e., duties, imposts, and excises), subject to the Uniformity Clause.<sup>21</sup>

Additionally, under the Sixteenth Amendment, taxes on income, from whatever source, are not required to be apportioned,<sup>22</sup> even if such taxes are direct. The amendment itself does not classify income taxes as direct or indirect.

Here, it appears the individual responsibility requirement would raise constitutional concerns under these provisions only if it was found to be a direct tax that was not a tax on income. This is because it would then be subject to the requirement of apportionment, and there is no indication it will be apportioned among the states based on population. If, however, the requirement was found to be a tax on income, it would fall under the protection of the Sixteenth Amendment and its lack of apportionment would raise no constitutional concerns. Similarly, it appears no constitutional issues would arise if the requirement was found to be an indirect tax since it would appear to satisfy the requirement of uniformity since it is geographically neutral on its face.<sup>23</sup>

Some have argued that the individual responsibility requirement is in fact a direct tax, and, consequently, must be apportioned. The exact scope of the term "direct taxes" is undetermined, but the Court has construed it to be relatively narrow. The Constitution does not define the term other than specifying that it includes capitations (a capitation, or head tax, is a fixed tax imposed

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<sup>19</sup> See *Thomas v. United States*, 192 U.S. 363, 370 (1904) ("And these two classes, [direct taxes], and 'duties, imposts and excises,' apparently embrace all forms of taxation contemplated by the Constitution.")

<sup>20</sup> U.S. CONST. Art. 1, § 9, cl. 4 ("No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration..."); Art. 1, § 2, cl. 3 ("direct Taxes shall be apportioned among the several States...").

<sup>21</sup> U.S. CONST. Art. I, § 8, cl. 1 ("[A]ll duties, Imposts and Excises shall be uniform throughout the United States.")

<sup>22</sup> U.S. CONST. Amend. XVI ("The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.")

<sup>23</sup> See *United States v. Ptasynski*, 461 U.S. 74 (1983) (stating the Uniformity Clause bars geographic discrimination).

on each person in a jurisdiction). The Framers' debates provide little clarity.<sup>24</sup> From its earliest days, the Supreme Court has indicated that direct taxes include capitations and real property taxes at a minimum.<sup>25</sup> The Court has also suggested that other types of taxes might be considered direct,<sup>26</sup> although the Court did not find any such examples<sup>27</sup> until the *Pollock* case in 1895. In *Pollock*, the Court struck down the unapportioned Income Tax Act of 1894<sup>28</sup> after finding parts of it—the taxes on income from real and personal property—were direct taxes.<sup>29</sup> The *Pollock* decision was subject to substantial criticism and led to the adoption of the Sixteenth Amendment in 1913. *Pollock* has not been expressly overruled,<sup>30</sup> although the Court moved away from its analysis in subsequent cases that upheld a variety of unapportioned taxes on the basis they were excise taxes.<sup>31</sup>

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<sup>24</sup> See, e.g., 2 Farrand's Records 350 ("Mr King asked what was the precise meaning of direct taxation? No one answd."). Primary sources from the time period have supported multiple interpretations, from narrow definitions limiting direct taxes to only those that can realistically be apportioned, perhaps just capitation and real property taxes, to broader interpretations that would, for example, include all taxes other than consumption taxes. See, e.g., Bruce Ackerman, *Taxation and the Constitution*, 99 COLUM. L. REV. 1, 14-19 (1999) (arguing that "direct tax" was primarily a political, and not economic, term intended to be interpreted narrowly); Eric M. Jensen, *The Taxing Power, the Sixteenth Amendment, and the Meaning of "Incomes,"* 33 ARIZ. ST. L.J. 1057 (2001) (arguing that the Framers distinguished the two types on the basis that indirect taxes—which he thinks means taxes on consumption—have inherent protection from government abuse because taxpayers can choose whether to consume if the tax gets too high).

<sup>25</sup> Congress has in the past levied taxes on property. In 1813, Congress levied a direct tax on property totaling three million dollars, which the statute apportioned among the 18 states and then among the counties (parishes) of each state. Act of August 2, 1813, 2 Stat. 53. Thus, for example, \$369,018.44 was apportioned to Virginia and \$6,354.50 of that amount apportioned to Fairfax County. Provisions for assessing and collecting the tax were contained in the Act of July 22, 1813. 3 Stat. 22 (1813). A direct tax on property totaling \$20 million was levied in 1861, apportioned among the states, territories, and the District of Columbia. Act of August 5, 1861, § 8, 12 Stat. 295. We have found no examples of head taxes enacted by Congress.

<sup>26</sup> See *Hylton v. United States*, 3 U.S. 171 (1796). *But, see id.* at 175 (Chase, J., concurring, "I am inclined to think, but of this I do not give a judicial opinion, that the direct taxes contemplated by the Constitution, are only two, to wit, a capitation, or poll tax, simply, *without regard to property, profession, or any other circumstances*; and a tax on land") (emphasis added).

<sup>27</sup> See *Hylton*, 3 U.S. at 175 (upholding unapportioned tax on carriages); *Pacific Insurance Co. v. Soule*, 74 U.S. 433 (1869) (upholding tax on the business of insurance); *Veazie Bank v. Fenno*, 75 U.S. 533 (1869) (upholding tax on bank notes); *Scholey v. Rew*, 90 U.S. 331 (1875) (upholding inheritance tax); *Springer v. United States*, 102 U.S. 586 (1881) (upholding income tax).

<sup>28</sup> 28 Stat. 509 (1894) (imposing a tax on "the gains, profits, and income received in the preceding calendar year by every citizen of the United States ... whether said gains, profits, or income be derived from any kind of property, rents, interest, dividends, or salaries, or from any profession, trade, employment, or vocation carried on in the United States or elsewhere....").

<sup>29</sup> The Court reasoned that income taxes on the gains derived from investments in real or personal property had a substantial impact on the underlying assets and should be treated as direct taxes falling on the property. See *Pollock*, 157 U.S. at 583.

<sup>30</sup> Some commentators would argue the decision has essentially been erased by the Court's subsequent jurisprudence and passage of the Sixteenth Amendment. See, e.g., Calvin H. Johnson, *Fixing the Constitutional Absurdity of the Apportionment of Direct Tax*, 21 CONST. COMMENT. 295, 298-99 (2004) ("Pollock is dead on its holding as to the income tax. Indeed, courts have a duty to distinguish Pollock in every case."). On the other hand, some have argued that "the reports of Pollock's demise are exaggerated" and that "[a]n income tax is nothing like the classic forms of indirect taxation, and the Supreme Court therefore got the result right in [Pollock]: an income tax is a direct tax as that term was originally understood." See Erik M. Jensen, *The Apportionment of "Direct Taxes": Are Consumption Taxes Constitutional?*, 97 COLUM. L. REV. 2334 (1997); Jensen, *supra* note 104 at 1079.

<sup>31</sup> See *Nicol v. Ames*, 173 U.S. 509 (1899) (tax on certain sales and exchanges of property); *Knowlton v. Moore*, 178 U.S. 41 (1900) (estate tax); *Patton v. Brady*, 184 U.S. 609 (1902) (tax on manufactured tobacco); *Flint v. Stone Tracy Co.*, 220 U.S. 107 (1911) (corporate franchise tax); *but see Eisner v. Macomber*, 252 U.S. 189 (1920) (striking an unapportioned tax on a stock dividend that did not change the taxpayer's proportionate ownership of the company, relying on the *Pollock* holding that taxes on rents and income from real and personal property were direct taxes).

The individual responsibility requirement is codified in the Internal Revenue Code as an excise tax. For constitutional purposes, the Supreme Court has found excise taxes to be a broad category of indirect taxes.<sup>32</sup> It might be argued, for example, that the tax is properly characterized as an excise tax imposed on earning income without maintaining health insurance for oneself and one's dependents.<sup>33</sup> Excise taxes imposed on inaction are not unprecedented,<sup>34</sup> although it does not appear that any have been challenged on the grounds that it is unconstitutional to impose an excise tax on a failure to act.

On the other hand, some have argued that the individual responsibility requirement is a tax based on inaction and is effectively a capitation.<sup>35</sup> Under this argument, “[a] tax on a person who chooses not to act is precariously close to a tax on everyone with an exemption from the tax for those that act.”<sup>36</sup> In other words, a tax on the failure to act (i.e., buy health insurance) is essentially a tax on “the state of mere existence.”<sup>37</sup> However, others might point to the fact that the tax would not be imposed on individuals with insufficient income as evidence that it should not be characterized as a capitation. Additionally, some might compare it to existing tax deductions and credits that are intended to encourage certain types of behaviors, such as the tax benefits provided to homeowners.<sup>38</sup> It might be argued that the individual responsibility requirement is analogous to these types of provisions, and the fact that it takes a different form (i.e., is not a deduction or credit) should not be constitutionally significant.

Resolving this point may require determining whether a generally applicable tax that is avoidable if an individual takes some action constitutes a capitation. The federal courts have yet to explore in detail the precise definition of capitations, also known as poll taxes, for purposes of the federal Constitution. However, some insight into their meanings may be gleaned from the states' attitudes regarding poll taxes which were held contemporaneously with the ratification of the federal constitution. For example, in *Short v. State* the Maryland Court of Appeals was confronted with the meaning of poll taxes for purposes of the state constitution. At the time of the case in 1895, every Maryland state constitution since 1776 had prohibited poll taxes.<sup>39</sup> Maryland had also required, at least since 1795, that all able-bodied state male residents either spend two days a year improving the road system or pay seventy-five cents for road maintenance. Based upon approximately one hundred years of coexistence between these two provisions, the Maryland

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<sup>32</sup> See *Nicol v. Ames*, 173 U.S. 509 (1899) (tax on certain sales and exchanges of property); *Knowlton v. Moore*, 178 U.S. 41 (1900) (estate tax); *Patton v. Brady*, 184 U.S. 609 (1902) (tax on manufactured tobacco); *Flint v. Stone Tracy Co.*, 220 U.S. 108 (1911) (tax on corporate franchise).

<sup>33</sup> See also Galle, *supra* note 12 (arguing the tax could be characterized as imposed on “the use of personal wealth for purposes other than the purchase of health insurance” or “on a particular form of arranging one’s economic affairs: the choice to shift the risk of future medical needs from oneself to the social safety net—in effect, a tax on the use of the existing system of free care, medicaid, and debtor-protection and bankruptcy law”).

<sup>34</sup> Other provisions include the excise taxes on the failure of tax-exempt private foundations to distribute income (26 U.S.C. § 4942); failures of certain group health plans to provide continuation coverage or to meet certain requirements (26 U.S.C. §§ 4980B, 4980D) and failures of certain investment vehicles to distribute income (26 U.S.C. §§ 4981, 4982).

<sup>35</sup> See George Clark, *Baucus “Excise” on Those Who Fail to Buy Insurance Raises Constitutional Issues*, DAILY TAX REPORT, Sept. 29, 2009.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> See, e.g., 26 U.S.C. § 163(h) (permitting individuals to deduct qualifying home mortgage interest payments); 26 U.S.C. § 36 (providing a tax credit to qualifying “first-time” homebuyers).

<sup>39</sup> Md. Dec. of R. art. 15.

Court of Appeals determined that the meaning of poll taxes, as used in the state constitution in 1776, did not encompass the financial penalty imposed on those who failed to perform road maintenance.<sup>40</sup> A potential inference from this holding is that, at the time the Constitution was drafted, the common understanding of poll taxes did not encompass a financial penalty imposed on the failure to satisfy a lawful obligation to take some action. Therefore, while Congress's authority to impose the underlying mandate may be challenged, it is far from certain that a tax on individuals who fail to comply with that mandate would be a capitation necessitating apportionment.

If the individual responsibility requirement is classified as a tax on income, whether it is direct or not becomes irrelevant as it would no longer be subject to apportionment by virtue of the Sixteenth Amendment. Certain aspects of the tax might support its classification as a tax on income since, for taxpayers with sufficient income, the amount of taxation would be directly proportional to their excess household income above the filing threshold and only those taxpayers with household income above the filing threshold would be subject to the tax at all. However, it is not clear that a court would classify the individual responsibility requirement as a tax on income since a significant component of the tax appears to have no relationship to a taxpayer's income, but is instead related to the lack of coverage under a health plan for themselves and their dependents.

## Power to Regulate Commerce

The Commerce Clause of the U.S. Constitution empowers Congress “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”<sup>41</sup> The Supreme Court developed an expansive view of the Commerce Clause relatively early in the history of judicial review.<sup>42</sup> This power has been cited as the constitutional basis for a significant portion of the laws passed by the Congress over the last 50 years, and it currently represents one of the broadest bases for the exercise of congressional powers.<sup>43</sup> While the Supreme Court held in *United States v. South-Eastern Underwriters Association*<sup>44</sup> that Congress could regulate the competitive practices of insurers under the Commerce Clause, it is unclear whether the individual responsibility requirement could be considered regulation of insurance per se. Despite the breadth

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<sup>40</sup> 31 A. 322 (Md. 1895). Examples of poll taxes recited in the opinion were a specific sum levied on all persons, male or female, free or slave, above the age of 16 for general support of the government and a tax of 40 pounds of tobacco “per poll” to support clergy of the Church of England.

<sup>41</sup> U.S. Const., Art. I, §8, cl. 3. It should be noted that the Commerce Clause is augmented by the Necessary and Proper Clause, which allows Congress “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers ...” U.S. Const., Art. I, §8, cl. 18.

<sup>42</sup> For instance, Chief Justice Marshall wrote in 1824 that “the power over commerce ... is vested in Congress as absolutely as it would be in a single government ...” and that “the influence which their constituents possess at elections, are ... the sole restraints” on this power. *Gibbons v. Odgen*, 22 U.S. (9 Wheat.) 1, 197-98 (1824).

<sup>43</sup> See CRS Report RL32844, *The Power to Regulate Commerce: Limits on Congressional Power*, by Kenneth R. Thomas and Todd B. Tatelman.

<sup>44</sup> 322 U.S. 533 (1944). In response to the Court's ruling in *South-Eastern Underwriters*, Congress explicitly recognized the role of the states in the regulation of insurance with the passage of the McCarran-Ferguson Act of 1945. The intent of the McCarran-Ferguson Act was to grant states the explicit authority to regulate insurance in light of the *South-Eastern Underwriters* decision. Section 2(a) of the Act states: The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business. 15 U.S.C. § 1012(a). However, under the Act, Congress also reserved to itself the right to enact federal statutes that “specifically” relate to “the business of insurance.” 15 U.S.C. § 1012(b).

of powers that have been exercised under the Commerce Clause, whether the individual responsibility requirement would be constitutional under the clause is a challenging question, as it is a novel issue whether Congress may use the clause to require an individual to purchase a good or a service.

Under modern Commerce Clause jurisprudence, the Supreme Court has found that the Commerce Clause allows for three categories of congressional regulation: the channels of interstate commerce; the instrumentalities of interstate commerce; and “those activities having a substantial relation to interstate commerce ... i.e., those activities that substantially affect interstate commerce.”<sup>45</sup> It is likely that a court would evaluate Congress’s authority for enacting the individual responsibility requirement under this third “substantially affects” category.

Three recent cases, *United States v. Lopez*,<sup>46</sup> *United States v. Morrison*,<sup>47</sup> and *Gonzales v. Raich*,<sup>48</sup> as well as several historical decisions such as *Wickard v. Filburn*,<sup>49</sup> govern much of the current Commerce Clause analysis under the “substantially affects” category. These cases indicate that, while the modern interpretation of the Commerce Clause is broad, congressional authority is not without bounds.<sup>50</sup> In a case that has been perceived as one of the Supreme Court’s most expansive Commerce Clause rulings, *Wickard v. Filburn*, the Court was asked to determine whether the clause permitted amendments to the Agricultural Adjustment Act of 1938 affecting the production and consumption of homegrown wheat.<sup>51</sup> In upholding the statute as constitutional, the Court held that economic activities, regardless of their nature, could be regulated by Congress if the activity exerts a substantial effect on interstate commerce.<sup>52</sup> Although the Court admitted that one family’s production alone would likely have a negligible impact on the overall price of wheat, if combined with other personal producers, the effect would be substantial enough to make the activity subject to congressional regulation.<sup>53</sup> The Court concluded that Congress had a rational basis for its action and its belief that, in the aggregate, keeping homegrown wheat outside of federal regulation would have a substantial influence on interstate commerce.

From 1937 to 1995, after cases like *Wickard* and others, the Supreme Court did not hold a federal statute to be beyond the scope of the authority vested in Congress by the Commerce Clause. However, in 1995, in *United States v. Lopez*, the Court struck down a statute that made it a federal crime to knowingly possess a firearm in a school zone because it exceeded Congress’s Commerce Clause authority. In analyzing the statute under the “substantially affects” category, the Court identified four major problems. First, it determined that the criminal statute at issue had no connection with commerce or any sort of economic enterprise, and did not play an essential role in a larger regulatory scheme. Secondly, the Supreme Court found it significant that there was no jurisdictional element in the statute, which would ensure that firearm possession affected interstate commerce in a particular instance. Third, the Court stated that the lack of congressional

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<sup>45</sup> See *United States v. Lopez*, 514 U.S. 549, 558-59 (internal citations omitted).

<sup>46</sup> 514 U.S. 549 (1995).

<sup>47</sup> 529 U.S. 598 (2000).

<sup>48</sup> 545 U.S. 1 (2005).

<sup>49</sup> 317 U.S. 111 (1942).

<sup>50</sup> See *Lopez*, 514 U.S. at 557; *Morrison*, 529 U.S. at 608.

<sup>51</sup> In 1941, Mr. Filburn harvested an excess amount of 239 bushels for which he was fined pursuant to amendments to the Agricultural Adjustment Act of 1938. 317 U.S. at 114.

<sup>52</sup> *Id.* at 125.

<sup>53</sup> *Id.*

findings regarding the impact of the offense on the national economy detracted from any substantial relation it might have to interstate commerce. Finally, the Court rejected the government's argument that the statute was valid because possession of a firearm near a school could result in violent crime, and this crime could affect the national economy. The Court explained that if it were to accept the government's arguments, it would be hard "to posit any activity by an individual that Congress is without power to regulate."<sup>54</sup>

The Supreme Court used the logic of *Lopez* in *United States v. Morrison*, where the Court evaluated whether a federal statute that provided for a private right of action for victims of gender-motivated violence fell within Congress's power under the Commerce Clause. In finding that this statute was beyond Congress's authority under the Commerce Clause, the Court followed the analysis in *Lopez*. First, the Court explained that "gender-motivated crimes are not, in any sense of the phrase, economic activity." Turning to the second prong of the *Lopez* analysis, the Court noted that, like the Gun-Free School Zones Act, the statute lacked a "jurisdictional element establishing that the federal cause of action is in pursuance of Congress' power to regulate interstate commerce."<sup>55</sup>

The Court then discussed the existence of congressional findings regarding the effects of gender-motivated violence on the national economy and interstate commerce. While noting that the statute was supported by "numerous findings,"<sup>56</sup> the Court stressed its declaration in *Lopez* that "[s]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." Finally, the Court considered the level of attenuation between the federal statute and its effect on interstate commerce. In explaining why the statute exceeded the boundaries of the Commerce Clause, the Court explained that the statute would impermissibly provide Congress with the power "to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption."<sup>57</sup> Expanding upon this observation, the Court noted that to allow such regulation of a non-economic activity would enable federal regulation of almost any activity, including "family law and other areas of traditional state regulation...."<sup>58</sup>

In *Gonzales v. Raich*, the Supreme Court evaluated whether, under the Commerce Clause, Congress had the power to apply the federal Controlled Substances Act's (CSA's) prohibition of the manufacture and possession of marijuana to the local cultivation and use of marijuana that was in compliance with California law. In holding that the CSA's prohibition was within Congress's authority under the Commerce Clause, the Court relied on *Wickard v. Filburn* and the idea that Congress can regulate purely intrastate activity that is not "commercial" if it concludes that failure to regulate the activity would undercut federal regulation of the interstate market.<sup>59</sup> However, the Court found that the standard for assessing the scope of Congress's power under the

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<sup>54</sup> *Lopez*, 514 U.S. at 564.

<sup>55</sup> *Morrison*, 529 U.S. at 613.

<sup>56</sup> The Court pointed to various legislative findings including findings that gender-motivated violence affected interstate commerce by deterring potential victims from traveling interstate, from engaging in interstate business, by diminishing national productivity, and increasing medical and other costs. *Id.* at 615 (quoting H.Rept. 103-711, at 385).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* It should be noted that after the decision in *Lopez* and *Morrison*, the question arose as to whether these cases were an indicator of future restrictions on Congress's power to regulate interstate commerce. However, it is arguable that the Court intended *Lopez* and *Morrison* to have a limited effect, as the Court specifically reaffirmed much of its previous Commerce Clause case law, including *Wickard*.

<sup>59</sup> *Raich*, 545 U.S. at 18.

Commerce Clause is not whether the activity at issue, when aggregated, substantially affects interstate commerce; but rather, whether there exists a “rational basis” for Congress to have reached that conclusion. Further, the Court distinguished *Raich* from *Lopez* and *Morrison* based on the idea that in *Raich*, the regulated activity was “quintessentially economic.”<sup>60</sup> The Court also concluded that Congress had acted rationally in determining that the CSA’s prohibition of the class of activities at issue was an “an essential part of the larger regulation of economic activity.”<sup>61</sup>

In applying the 4-factor analysis used in *Lopez* and *Morrison* to the individual responsibility requirement of PPACA,<sup>62</sup> the first and fourth factors of these cases warrant the closest analysis. Under the first factor of the test, it must be determined whether requiring individuals to purchase health insurance is commercial or economic in nature. In *Lopez*, the gun control law at issue was struck down by the Supreme Court, as was a cause of action based on gender-motivated crime in *Morrison*, because the statutes did not have anything to do with an economic activity or enterprise. While the regulation of the health insurance industry or the health care system would likely be considered economic in nature, a requirement to purchase health insurance is more of an open question. One could make the argument that the requirement to purchase health insurance is economic in nature because it essentially requires an individual to be a consumer in the health insurance market. In *Lopez*, the Court pointed out that the gun control law was not a regulation of activity that “arises out of or is connected with a commercial transaction” which viewed in the aggregate, substantially affects interstate commerce. A requirement to purchase health insurance could be seen as a commercial transaction, especially since the individual responsibility requirement can be fulfilled by purchasing insurance from a private insurance company.

On the other hand, it may be argued that the individual responsibility requirement goes beyond the bounds of the Commerce Clause. One could argue that while regulation of the health insurance industry or the health care system could be considered economic activity, regulating a choice to purchase health insurance is not. It may also be questioned whether a requirement to purchase health insurance is really a regulation of an economic activity or enterprise, if individuals who would be required to purchase health insurance are not, but for this regulation, a part of the health insurance market. In general, Congress has used its authority under the Commerce Clause to regulate individuals, employers, and others who voluntarily take part in some type of economic activity. While in *Wickard* and *Raich*, the individuals were participating in their own home activities (i.e., producing wheat for home consumption and cultivating marijuana for personal use), they were acting of their own volition, and this activity was determined to be economic in nature and affected interstate commerce. However, a requirement could be imposed on some individuals who do not engage in any economic activity relating to the health insurance market. This is a novel issue: whether Congress can use its Commerce Clause authority to require a person to buy a good or a service and whether this type of required participation can be

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<sup>60</sup> *Id.* at 25. The Court explained that “the CSA regulates the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market. Prohibiting the intrastate possession or manufacture of an article of commerce is a rational ... means of regulating commerce in that product.” *Id.* at 26.

<sup>61</sup> *Id.* at 26-27. *See also Lopez*, 514 U.S., at 561.

<sup>62</sup> As discussed above, after *Lopez* and *Morrison*, whether a regulation has a substantial effect on interstate commerce requires reviewing courts to consider the following four factors: (1) whether the regulated activity is commercial or economic in nature; (2) whether an express jurisdictional element is provided in the statute to limit its reach; (3) whether Congress made express findings about the effects of the activity on interstate commerce; and (4) whether the link between the activity and the effect on interstate commerce is attenuated. *United States v. Stewart*, 348 F.3d 1132, 1136-37 (9<sup>th</sup> Cir. 2003) (citing *Morrison*, 529 U.S. at 610-12).

considered economic activity. Still, while it may seem like too much of a bootstrap to force individuals into the health insurance market and then use their participation in that market to say they are engaging in commerce, there is plenty of evidence that the purchase of health insurance has an effect on the commerce of the nation. For example, in 2008, health care expenditures in the United States grew 4.4% to \$2.3 trillion, or \$7,681 per person, and accounted for 16.2% of gross domestic product.<sup>63</sup>

Perhaps one example of the regulation of voluntary individual behavior is the use of the Commerce Clause to prohibit criminal activity. While in *Lopez* and *Morrison* the Supreme Court found that the criminal statute exceeded Congress's Commerce Clause authority, courts have upheld other federal criminal statutes as acceptable under the Commerce Clause.<sup>64</sup> One notable case, *U.S. v. Bishop*, upheld congressional authority to enact a carjacking statute. In *Bishop*, the court, in *dicta*, briefly addressed the voluntariness factor, finding that commerce does not have to be a "voluntary economic exchange."<sup>65</sup> In addition, certain federal criminal statutes require a person to take action, and penalize that person for failure to take that action. For example, an individual who willfully fails to pay a child support obligation with respect to a child who resides in another state may be subject to criminal penalties, subject to certain requirements.<sup>66</sup> However, while criminal statutes evaluated under the Commerce Clause may provide some insight as to how a court would evaluate a requirement to purchase health insurance, these cases are not entirely instructive.

In evaluating whether the individual responsibility requirement and the effect on interstate commerce is attenuated, one may point to evidence of the effect that the requirement to purchase health insurance would have on the insurance industry and the health care system as a whole. One could argue that because most individuals do, at some point, become ill and require health care, a requirement that all persons purchase health insurance coverage would benefit the orderly flow of health care services in interstate commerce. As pointed out in the findings accompanying the individual responsibility requirement, the requirement regulates activity such as "the economic and financial decisions about how and when health care is paid for, and when health insurance is purchased. In the absence of the requirement, some individuals would make an economic and financial decision to forego health insurance coverage and attempt to self-insure, which increases financial risks to households and medical providers."<sup>67</sup> Also, because one of the motivating factors for a requirement to obtain health insurance may be to get healthy individuals who do not have health insurance to purchase it (so as to offset the cost of the individuals who need greater, more expensive care), this also would contribute to the proper functioning of the health care system. Still, one could argue that if the commerce power can be used to mandate the purchases of a private individual, it could be perceived as virtually unlimited in scope.<sup>68</sup> Based on similar

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<sup>63</sup> Centers for Medicare and Medicaid Services, National Health Expenditure Data Fact Sheet, available at [http://www.cms.gov/NationalHealthExpendData/25\\_NHE\\_Fact\\_Sheet.asp](http://www.cms.gov/NationalHealthExpendData/25_NHE_Fact_Sheet.asp).

<sup>64</sup> See, e.g., *Perez v. U.S.*, 402 U.S. 146 (1971) (conviction for loan sharking affirmed because Consumer Credit Protection Act held to be a valid exercise of the Commerce Clause); *United States v. Ogba*, 526 F.3d 214 (5<sup>th</sup> Cir. 2008) (health care fraud statute acceptable under Commerce Clause); *United States v. Bishop*, 66 F.3d 569(3<sup>rd</sup> Cir. 1995), *cert. denied* 516 U.S. 1032 (1995) (Congress had not exceeded its power under the Commerce Clause in enacting a carjacking statute).

<sup>65</sup> *Id.* But see the dissent in *Bishop*, 66 F.3d at 592 (Becker, J., dissenting) (arguing that Congress's Commerce Clause power under the substantially affects category is limited to regulation of "a voluntary economic exchange.").

<sup>66</sup> 18 U.S.C. § 228.

<sup>67</sup> P.L. 111-148, § 1501(a)(2).

<sup>68</sup> See generally David B. Rivkin Jr. and Lee A. Casey, Mandatory Insurance Is Unconstitutional, *Wall Street Journal*, (continued...)

arguments made in *Lopez* and *Morrison*, there may be questions raised about whether Congress can require the purchase of any good or service based on the effect such purchases could have on an industry or the economy as a whole.

Also, while perhaps not as important to the instant inquiry as the other *Lopez/Morrison* factors, a reviewing court may examine the presence of congressional findings for purposes of commerce clause analysis. PPACA includes detailed findings regarding the effect that the individual responsibility requirement would have on interstate commerce.<sup>69</sup> However, as mentioned above, it appears that the presence of congressional findings may be helpful, but not determinative, of Congress's authority to legislate under the Commerce Clause. In addition, as discussed in *Lopez* and *Morrison*, a reviewing court may also examine the fact that PPACA does not contain an explicit jurisdictional element that insures that the statute affects interstate commerce. This element could have been satisfied by a statement, such as one providing that any person using medical care in or affecting interstate commerce must have health insurance. It is possible that a court may overlook the need for a jurisdictional element, especially in light of Congress's findings that indicate the effects that the individual responsibility requirement has on interstate commerce.<sup>70</sup> However, should a reviewing court find that absence of a jurisdictional element as essential for Congress's ability to enact the individual responsibility requirement, it seems possible that Congress may be able to amend PPACA to include this element.<sup>71</sup>

Following the reasoning of *Raich*, a court may examine whether Congress rationally concluded that persons failing to have health insurance have a substantial effect on interstate commerce. One arguing in favor of the constitutionality of the individual responsibility requirement may point to the fact that a health insurance mandate would presumably lower the uninsured population. It has been suggested that Americans without health coverage burdens our health care system and adds strain on the economy.<sup>72</sup> As indicated in the congressional findings accompanying the individual responsibility requirement, the economy loses up to \$207 billion a year because of the poorer health and shorter lifespan of the uninsured.<sup>73</sup> Further, according to these findings, in 2008, cost of providing uncompensated care to the uninsured was \$43 billion and these amounts are paid for when health care providers pass on the cost to private insurers, which pass on the cost to those who are insured. Evidence like this could demonstrate a rational basis for Congress's enactment of a requirement to purchase health insurance.

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Sept. 18, 2009 (arguing that "Congress could evade all constitutional limits by "taxing" anyone who doesn't follow an order of any kind—whether to obtain health-care insurance, or to join a health club, or exercise regularly, or even eat your vegetables.")

<sup>69</sup> P.L. 111-148, §1501(a)(2).

<sup>70</sup> Further, if a court finds the individual responsibility requirement to be, similar to the provisions in *Wickard* and *Raich*, an essential component of a larger economic regulatory scheme, then the need for a jurisdictional element may be alleviated. See discussion of *Raich* *infra*.

<sup>71</sup> It may be noted that Congress replaced the provision struck down in *Lopez* with an amended version that makes it unlawful for an individual "knowingly to possess a firearm *that has moved in or that otherwise affects interstate or foreign commerce* at a place that the individual knows, or has reasonable cause to believe, is a school zone." See 18 U.S.C. § 922(q)(2)(A) (emphasis added). This amendment demonstrates that the required nexus to interstate commerce can, at least in some cases, may be fixed.

<sup>72</sup> See, e.g., Health Care Affordability and the Uninsured, Testimony of Diane Rowland to the House of Representatives, Committee on Ways and Means, Health Subcommittee, available at <http://www.kff.org/uninsured/upload/7767.pdf>.

<sup>73</sup> P.L. 111-148, § 1501(a)(2).

In addition, based on *Raich*, if a requirement to purchase health insurance is not considered economic or commercial in nature, it should be determined whether the requirement is “an essential part of a larger regulation of economic activity.” One may argue that an individual responsibility requirement, while not commercial in nature, is an essential part of Congress’s current regulation of the health care system or industry. A reviewing court could consider whether the absence of a requirement to purchase health care would undercut the regulation of the health care as a whole. In making this determination, a court may look to the involvement of the federal government in the regulation of health care generally to decide whether a requirement to purchase health insurance could be seen as an essential component of this regulation. Given the federal government’s fairly significant role in health care regulation (e.g., ERISA, the Public Health Service Act), the argument that the requirement to purchase insurance is an “essential part” of the regulation may become more viable. In addition, since the individual responsibility requirement is part of comprehensive act dealing with many aspects of health care, this may reinforce the idea that it is acceptable under the Commerce Clause as part of a larger health care reform effort.<sup>74</sup>

Further, it may be argued that the individual responsibility requirement plays an integral role within PPACA itself, because of certain new insurance requirements that require health insurers to accept every individual that applies for coverage, and prevent insurers from imposing exclusions from coverage based on preexisting conditions. One may argue that without an individual responsibility requirement, individuals could wait to purchase health insurance until they needed care. As congressional findings point out, “[t]he [individual responsibility] requirement is essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold.”<sup>75</sup> On the other hand, one could point out that under Section 1501 of PPACA, an individual could decide to pay the penalty associated with the individual responsibility requirement and avoid purchasing health insurance. If there were to be large scale non-compliance with the requirement to purchase health insurance, this may weaken the idea that individual responsibility requirement is an essential part of this health care regulation.

## Health Insurance Coverage Requirements and the Fifth and Tenth Amendments

Some commentators have questioned whether a requirement to have health insurance might violate certain protections found under the U.S. Constitution.<sup>76</sup> This section provides a general

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<sup>74</sup> Another consideration with respect to *Raich* is that both Justice Scalia’s concurring opinion and Justice Thomas’s dissenting opinion focused on the scope and import of the “Necessary and Proper” clause and its interaction with the Commerce Clause. In finding the federal regulation acceptable under the Commerce Clause, Justice Scalia explained that “Congress’ authority to enact laws necessary and proper for the regulation of interstate commerce is not limited to laws directed against economic activities that have a substantial effect on interstate commerce.” *Raich*, 545 U.S. at 36 (Scalia, J., concurring). Using this rationale, if it could be argued that a requirement that individuals obtain health insurance is necessary for a properly functioning health care system, a mandate could pass Constitutional muster. On the other hand, Justice Thomas’s dissent argues that the “Necessary and Proper Clause,” as originally understood, cannot be used to expand the scope of Congress’s enumerated powers. *Id.* at 2232 (Thomas, J., dissenting). While these arguments are instructive, it is important to note that a court would more likely rely on the line of reasoning used by the majority in the *Lopez*, *Morrison*, and *Raich* decisions.

<sup>75</sup> P.L. 111-148, § 1501(a)(2).

<sup>76</sup> See e.g., Peter Urbanowicz and Dennis G. Smith, *Constitutional Implications of an “Individual Mandate” in Health Care Reform*, The Federalist Society for Law and Public Policy Studies, available at <http://www.fed-soc.org/doclib/> (continued...)

discussion of how a court might evaluate a health insurance requirement that is challenged on Fifth Amendment due process, takings clause, or equal protection grounds, as well as under the Tenth Amendment. In general, it seems unlikely that a challenge to the individual responsibility requirement would be successful under these provisions.

## **Substantive Due Process**

The Fifth Amendment states, in relevant part, that “[n]o person shall be ... deprived of life, liberty, or property, without due process of law....”<sup>77</sup> The Supreme Court has understood due process to protect both procedural and substantive rights. Under the doctrine of substantive due process, the Court has held that certain fundamental rights, while not expressly recognized in the text of the Constitution, are subsumed within the notion of liberty in the Due Process Clause. If the Court determines that a right is fundamental, any government infringement of that right will be subject to strict scrutiny. Strict scrutiny is the most rigorous form of judicial review applied by a reviewing court, and government action will survive strict scrutiny only if such action is narrowly tailored to achieving a compelling government interest.<sup>78</sup> Where there is no fundamental right involved, the government must demonstrate that there is a rational basis for its action.<sup>79</sup> This level of judicial review, referred to as rational basis review, is characterized by its deference to legislative judgment. Because of the distinction between strict scrutiny and rational basis review, a determination of whether there is a fundamental right is central to a substantive due process analysis.

To date, the Supreme Court has not articulated a fundamental right to health care.<sup>80</sup> Indeed, the words “health” or “medical care” do not appear anywhere in the text of the Constitution. Thus, rights of individuals to health care services derive from statutory rights (with a few such rights also set forth in state constitutions) and have most often concerned the provision of medical care to poor persons. In challenging a health insurance mandate on due process grounds, it is possible that one could allege a fundamental right to be uninsured, or to not purchase health insurance.

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20090710\_Individual\_Mandates.pdf. *But see generally* Simon Lazarus, Mandatory Health Insurance, Is It Constitutional? American Constitutional Society Issue for Law and Policy Issue Brief, available at <http://www.acslaw.org/pdf/Lazarus%20Issue%20Brief%20Final.pdf>.

<sup>77</sup> U.S. Const. Amend. V. See also U.S. Const. Amend. XIV, §1, which contains a similar clause that applies to states.

<sup>78</sup> *Roe v. Wade*, 410 U.S. 113, 155 (1973). See also *Carey v. Population Services Int'l*, 431 U.S. 678, 686 (1977). Fundamental rights found by the Court include the right to use contraception, marry, procreate, have family relationships, and control the education of one’s children.

<sup>79</sup> Among its substantive due process cases, the Court has held that welfare benefits, housing, federal employment, a funded education, pregnancy-related medical care, and medically necessary abortions are not fundamental rights, and it evaluated the statutes under a rational basis review. William P. Gunnar, *Article: The Fundamental Law That Shapes the United States Health Care System: Is Universal Health Care Realistic Within the Established Paradigm?* 15 Ann. Health L. 151 (2006).

<sup>80</sup> While the U.S. Constitution does not explicitly set forth a right to health care, the Supreme Court’s decisions in the areas of the right to privacy and bodily integrity suggest the Constitution implicitly provides an individual the right to access or deny health care services at one’s own expense from willing medical providers. See *Roe v. Wade*, 410 U.S. 113 (1973) (constitutionally protected right to choose whether or not to terminate a pregnancy) and *Cruzan v. Missouri Department of Health*, 497 U.S. 261 (1990) (constitutional right to refuse medical treatment that sustains life), both of which involve a right to bodily integrity that may be extended to a person seeking health care services at his or her own expense. For a general discussion of constitutional rights related to health care, see CRS Report R40846, *Health Care: Constitutional Rights and Legislative Powers*, by Kathleen S. Swendiman.

However, this is not a fundamental right that has been recognized by the Supreme Court.<sup>81</sup> While the Supreme Court has recognized a constitutional right to privacy, and, arguably within that right, a right to be left alone (i.e., protection against “invasion of [one’s] infeasible right of personal security, personal liberty and private property”),<sup>82</sup> it does not seem that a requirement to make a purchase of health insurance would rise to the level of interference with this fundamental right. Thus, because there does not appear to be an imposition on any fundamental right that would trigger heightened scrutiny, the individual responsibility requirement would likely be evaluated under a rational basis review and upheld.

It is possible that a reviewing court would evaluate the requirement to purchase health insurance as economic legislation. In evaluating claims that economic regulations violate a person’s rights under the Due Process clause, the Court has pronounced a strict “hands-off” standard of judicial review and implements a rational basis test.<sup>83</sup> As a “legislative Act[] adjusting the burdens and benefits of economic life,” such a law enjoys a strong “presumption of constitutionality,” and the “burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way.”<sup>84</sup> If the economic legislation “is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches.”<sup>85</sup> The Court has suggested that the accommodation among interests which the legislative branch has “struck may have profound and far-reaching consequences ... [and] provides all the more reason for this Court to defer to the congressional judgment unless it is demonstrably arbitrary or irrational.”<sup>86</sup>

If the Supreme Court were to view the individual responsibility requirement as economic legislation (i.e., a legislative act “adjusting the burdens and benefits of economic life”), it is likely that a Court would implement rational basis review and uphold the statute.<sup>87</sup> The analysis of economic regulation mandated by the present jurisprudence of substantive due process requires only that Congress act rationally and reasonably, that its decisions need only be within the

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<sup>81</sup> In challenging the individual responsibility requirement on due process grounds, it is possible that one could allege a fundamental right to not purchase health insurance. However, this is not a fundamental right that has been recognized by the Supreme Court. *But see* Roy G. Spece, Jr., *Article: A Fundamental Constitutional Right of the Monied to “Buy Out Of” Universal Health Care Program Restrictions Versus the Moral Claim of Everyone Else to Decent Health Care: An Unremitting Paradox of Health Care Reform?* 3 J. Health & Biomed. L. 1 (2007) (alleging that “many would argue that persons surely have a fundamental right to purchase standard [health] care and insurance necessary to obtain that care”).

<sup>82</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965) (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)).

<sup>83</sup> Arguably, this approach to economic legislation began with *Nebbia v. New York*, 291 U.S. 502 (1934), in which the Court upheld a state statute establishing a commission to fix milk prices as a reasonable health and welfare measure. The Court asked only that state regulation not be unreasonable or arbitrary and that the regulation have a real relation to the object of the legislation. A divided Court in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), upheld a state minimum-wage law. “The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law.... [R]egulation which is reasonable in relation to its subject and adopted in the interests of the community is due process.” *Id.* at 391. For additional background on the history and jurisprudence of economic substantive due process, see *Constitution of the United States of America, Analysis and Interpretation*, Congressional Research Service, p. 1682 et seq.

<sup>84</sup> *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). See also *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Fund*, 508 U.S. 602, 637-39 (1993).

<sup>85</sup> *PBGC v. R. A. Gray & Co.*, 467 U.S. 717, 729 (1984).

<sup>86</sup> *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 83-4 (1978).

<sup>87</sup> It should be noted that even if a court were not to consider a requirement to purchase health insurance as “economic regulation,” it is still likely that a court would evaluate a requirement to purchase health insurance under a rational basis review, given the absence of a fundamental right.

parameters of the possible approaches that Congress may take. Thus, as indicated by the congressional findings accompanying the individual responsibility requirement, given that Congress enacted the requirement in an effort, for example, to increase the number and share of Americans who are insured” and “improve financial security for families,” the requirement could be seen as rationally related to these goals, even if other legislative means might be presumed more effective in achieving them.<sup>88</sup> Someone seeking to challenge the individual responsibility requirement would likely have to demonstrate to a court that Congress’s decision to enact the requirement was arbitrary or irrational. However, it seems unlikely that a reviewing court would see Congress’s decision to enact the mandate as irrational, given the deference given to Congress for economic regulation and the importance placed on having health insurance in the U.S. health care system.

## Equal Protection

Constitutional challenges that allege discrimination against certain persons are premised either on the equal protection guarantees of the Fourteenth Amendment<sup>89</sup> or the equal protection component of the Fifth Amendment.<sup>90</sup> While the Fourteenth Amendment prohibits discriminatory conduct by the states, the Fifth Amendment forbids such action by the federal government.

It has been said that “[Equal protection] does not reject the government’s ability to classify persons or ‘draw lines’ in the creation and application of laws, but it does guarantee that those classifications will not be based upon impermissible criteria or arbitrarily used to burden a group of individuals.”<sup>91</sup> A classification will not offend the Constitution unless it is characterized by invidious discrimination,<sup>92</sup> and the Court has adopted certain levels of review to establish the presence of this discrimination. When a law’s classification burdens a fundamental interest (e.g., privacy, marriage, or voting) or there is a suspect classification (e.g., race or country of origin), strict scrutiny is applied. A classification will survive strict scrutiny if the government can show that it is necessary to achieving a compelling state interest.<sup>93</sup> By contrast, when the challenged law does not involve a fundamental right or a suspect classification, a court may undertake rational basis review. This least restrictive form of judicial review allows a classification to survive an equal protection challenge if the classification is rationally related to a legitimate

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<sup>88</sup> §1501(a) of P.L. 111-148.

<sup>89</sup> U.S. Const. Amend. XIV, § 1. The Fourteenth Amendment provides, in relevant part,

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

<sup>90</sup> The Equal Protection Clause of the Fourteenth Amendment, which by its terms applies only to the states, has been held applicable to the federal government as well through the Due Process Clause of the Fifth Amendment. A 1995 Supreme Court decision notes that the Court has for decades “treat[ed] the equal protection obligations imposed by the Fifth and Fourteenth Amendments as indistinguishable.” *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 217 (1995). See also *Buckley v. Valeo*, 424 U.S. 1, 93 (1976) (“Equal protection analysis in the Fifth Amendment area,” the Court has said, “is the same as that under the Fourteenth Amendment.”).

<sup>91</sup> Ronald D. Rotunda and John E. Nowak, *Treatise on Constitutional Law: Substance and Procedure* § 18.2 (3d ed. 1999).

<sup>92</sup> See *Ferguson v. Skrupa*, 372 U.S. 726, 732 (1963).

<sup>93</sup> See *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973).

government interest.<sup>94</sup> This level of review is characterized by its deference to legislative judgment. Most economic regulations are subject to rational basis review.<sup>95</sup>

In addition, similar to other economic regulation, classifications made for federal tax purposes are generally constitutionally permissible so long as “they bear a rational relation to a legitimate governmental purpose.”<sup>96</sup> Courts typically show great deference to the tax classifications made by legislatures in recognition of “the large area of discretion which is needed by a legislature in formulating sound tax policies.”<sup>97</sup> The Supreme Court has noted that, “[i]t has ... been pointed out that in taxation, even more than in other fields, legislatures possess the greatest freedom in classification.”<sup>98</sup> Because legislatures have “especially broad latitude” in creating tax classifications,<sup>99</sup> the bar is low for Congress to adequately justify its rationale for making the classifications used.<sup>100</sup> Nevertheless, some tax classifications based on a suspect classification, or that interfere with a fundamental right are subject to higher levels of scrutiny.<sup>101</sup>

Under the individual responsibility requirement of PPACA, questions regarding equal protection may arise due to the fact that the requirement to enroll in health coverage and the corresponding tax only apply to certain individuals. For example, as mentioned above, individuals who have coverage through a federal health care program such as Medicare would be deemed to have met the individual responsibility requirements. Under PPACA, exemptions from the tax would be made for various individuals, including nonresident aliens, qualified U.S. citizens and residents living abroad, and bona fide residents of the U.S. possessions. Additionally, no penalty would be imposed on individuals who could not afford coverage, taxpayers with income less than 100% of the poverty line, and individuals granted hardship exceptions. While a person subject to the individual responsibility requirement could allege discrimination based on the fact that certain other groups would not have to obtain health insurance or pay a tax, the classifications made by these provisions and the corresponding tax seem unlikely to rise to the level of an equal protection violation. Because there does not seem to be a fundamental right that is burdened by the individual responsibility requirement,<sup>102</sup> and it appears that no suspect class would be subject to discriminatory treatment, it seems that rational basis scrutiny would be applied by a reviewing court. Also, given that one could envision a legitimate government interest in making the

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<sup>94</sup> It should be noted that the Court has also recognized an intermediate level of scrutiny. See *Craig v. Boren*, 429 U.S. 190, 197 (1976). A classification will survive intermediate scrutiny if it is substantially related to achieving an important government objective. Sex classifications are subject to intermediate scrutiny.

<sup>95</sup> The Supreme Court has opined that “In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.... Where there are ‘plausible reasons’ for Congress’ action, ‘our inquiry is at an end.’” *FCC v. Beach Communications*, 508 U.S. 307, 313-314 (1993) (quoting *United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980)).

<sup>96</sup> *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 547 (1983).

<sup>97</sup> *Taxation with Representation*, 461 U.S. at 547 (quoting *Madden v. Kentucky*, 309 U.S. 83, 88 (1940)).

<sup>98</sup> *Id.* (quoting *Madden*, 309 U.S. at 88).

<sup>99</sup> *Id.*

<sup>100</sup> *See id.* at 547-48 (“[T]he presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. The burden is on the one attacking the legislative arrangement to negate every conceivable basis which might support it.” *Madden v. Kentucky*, 309 U.S. 83, 87-88 (1940)).

<sup>101</sup> *See Taxation with Representation of Washington*, 461 U.S. at 547.

<sup>102</sup> As previously discussed, neither the Constitution nor the Supreme Court’s jurisprudence suggests a fundamental right to health care. *See* discussion of Substantive Due Process *supra*.

distinction between individuals who, for example, have higher incomes and those who have lower incomes and may have difficulty finding affordable health insurance coverage, an equal protection challenge to the individual responsibility requirements or the corresponding taxes would likely be unsuccessful.

## Takings Clause

Under the Takings Clause of the Fifth Amendment, no property shall be taken for public use without just compensation.<sup>103</sup> As the Supreme Court has explained, the language of the Takings Clause “requires the payment of compensation whenever the government acquires private property for a public purpose.”<sup>104</sup> The clause, extensively explicated by the courts in recent decades, seeks to strike a balance between societal goals and the burdens imposed on property owners to achieve those goals. “Property” under the Takings Clause includes land and personal property, both tangible and intangible. Money is also generally held to be property under the clause.<sup>105</sup>

In a few situations, government actions that appear to be obvious appropriations of property are deemed outside the scope of takings law.<sup>106</sup> While the Supreme Court has found that a taking claim may arise when government appropriates money from a specifically identified fund of money,<sup>107</sup> a statute imposing generalized monetary liability has not been considered by courts to be a taking.<sup>108</sup> Thus, with regard to the individual responsibility requirement, it is unlikely that a court would find the amounts required as part of the mandate to be paid for insurance to be a taking. This outcome is further emphasized by the fact that there is a benefit obtained with purchase of the insurance that could offset the economic impact of the regulation.<sup>109</sup> Further, it would be unlikely for a court to find the imposition of an excise tax a taking, as the general rule that money paid in taxes is not deemed to be taken, unless the tax is so arbitrary as to be “confiscatory.”<sup>110</sup>

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<sup>103</sup> For a general discussion of takings law, see CRS Report RS20741, *The Constitutional Law of Property Rights ‘Takings’: An Introduction*, by Robert Meltz, *The Constitutional Law of Property Rights ‘Takings’: An Introduction*, by Robert Meltz.

<sup>104</sup> *Brown v. Legal Found.*, 538 U.S. 216, 232 (2003).

<sup>105</sup> *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 160 (1998); *Webb’s Fabulous Pharms., Inc. v. Beckwith*, 449 U.S. 155, 164-65 (1980). See generally *Eastern Enterprises v. Apfel*, 524 U.S. 498, 540, 554 (1998) (in a plurality opinion, five justices opine that regulatory actions requiring the payment of money are not takings).

<sup>106</sup> Robert Meltz, *Takings Law Today: A Primer for the Perplexed*, 34 *ECOLOGY L.Q.* 307, 327 (2007).

<sup>107</sup> *Brown v. Legal Found.*, 538 U.S. 216, 232 (2003); *Webb’s Fabulous Pharms., Inc. v. Beckwith*, 449 U.S. 155 (1980).

<sup>108</sup> See, e.g., *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1338-40 (Fed. Cir. 2001) (en banc); *Swisher International, Inc. v. Shafer*, 550 F.3d 1046 (11<sup>th</sup> Cir. 2008). See generally *Eastern Enterprises v. Apfel*, 524 U.S. 498, 540, 554 (1998) (in a plurality opinion, five justices opined that regulatory actions requiring the payment of money were not takings).

<sup>109</sup> See *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 137 (1978), where the Supreme Court made clear that certain land development rights conferred on the landowner who claimed to be subject to a taking “mitigate whatever financial burdens the law has imposed ... and ... are to be taken into account in considering the impact of regulation.”

<sup>110</sup> See, e.g., *County of Mobile v. Kimball*, 102 U.S. 691, 703 (1880); *Branch v. United States*, 69 F.3d 1571, 1576-77 (Fed. Cir. 1995) (collecting cases).

## **Tenth Amendment**

The Tenth Amendment provides that the “powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” While this language would appear to represent one of the most clear examples of a federalist principle in the Constitution, it does not appear likely to have a significant impact in relationship to the instant act. While the Tenth Amendment is often cited by the Supreme Court in Commerce Clause cases as a guiding principle of the concept of limited government, the Tenth Amendment by itself appears to only address the process by which the federal government regulates the states.

In *New York v. United States*,<sup>111</sup> Congress had attempted to regulate in the area of low-level radioactive waste. In a 1985 statute, Congress provided that states must either develop legislation on how to dispose of all low-level radioactive waste generated within the state, or the state would be forced to take title to such waste, which would mean that it became the state’s responsibility. The Court found that Congress had attempted to require the states to perform the regulation, and decreed that the failure to do so would require the state to deal with the financial consequences of owning large quantities of radioactive waste. In effect, Congress sought to “commandeer” the legislative process of the states.

In the *New York* case, the Court found that this power was not found in the text or structure of the Constitution, and it was thus a violation of the Tenth Amendment. A later case presented the question of the extent to which Congress could regulate through a state’s executive branch officers. This case, *Printz v. United States*,<sup>112</sup> involved the Brady Handgun Act. The Brady Handgun Act required state and local law-enforcement officers to conduct background checks on prospective handgun purchasers within five business days of an attempted purchase. After a historical study of federal commandeering of state officials, the Court concluded that commandeering of state executive branch officials was, like commandeering of the legislature, outside of Congress’s power, and consequently a violation of the Tenth Amendment.

There does not appear to be a significant argument that the individual responsibility requirement would “commandeer” a state legislature or executive branch officials, as the obligations imposed by the individual mandate would be upon individuals. Consequently, under existing case law, it would not appear that there would be a significant argument that the act would violate the Tenth Amendment.

## **Religious Exemptions to Individual Responsibility Requirements**

Requiring individuals to obtain health insurance may conflict with some individuals’ religious beliefs.<sup>113</sup> Accordingly, legislation that would require individuals to obtain health insurance might

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<sup>111</sup> 505 U.S. 144 (1992).

<sup>112</sup> 521 U.S. 898 (1997).

<sup>113</sup> Some religions teach that the religious community must be responsible for social services that otherwise might be included in health insurance coverage. The Amish, for example, believe that the community has an obligation to provide the assistance that would be provided by Medicare programs to community members in need of such (continued...)

raise constitutional issues of religious freedom and equal protection.<sup>114</sup> These issues may be addressed with a religious exemption to the individual responsibility requirement. Potential religious exemptions must meet the requirements of the First Amendment's religion clauses, which serve as guarantees that individuals will neither be required to act under a prescribed religious belief (the Establishment Clause) nor be prohibited from acting under their chosen religious beliefs (the Free Exercise Clause). Religious exemptions also may raise equal protection issues under the Fifth Amendment. It is important to note that the outcome of the legal analysis under the First Amendment may differ based on the form of the requirement proposed.

## **Constitutional and Statutory Rules Regarding Religious Exercise**

Constitutional and statutory rules regarding free exercise of religion would determine whether a religious exemption would be required for legislation requiring individuals to have health insurance. The First Amendment of the U.S. Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..."<sup>115</sup> These clauses are known respectively as the Establishment Clause and the Free Exercise Clause. Although the U.S. Supreme Court historically had applied a heightened standard of review to government actions that allegedly interfered with a person's free exercise of religion,<sup>116</sup> the Court reinterpreted that standard in 1990. Since then, the Court has held that the Free Exercise Clause never "relieve[s] an individual of the obligation to comply with a valid and neutral law of general applicability."<sup>117</sup> Under this interpretation, the constitutional baseline of protection was lowered, meaning that laws that do not specifically target religion or do not allow for individualized assessments are not subject to heightened review under the Constitution.

In 1993, Congress enacted the Religious Freedom Restoration Act (RFRA), which statutorily reinstated the heightened standard of review for government actions interfering with a person's free exercise of religion. Although the Court later struck down as unconstitutional portions of RFRA that applied to state and local governments, the heightened standard provided by RFRA still applies to federal government actions.<sup>118</sup> RFRA provides that a statute or regulation of general applicability may lawfully burden a person's exercise of religion only if it (1) furthers a compelling governmental interest, and (2) uses the least restrictive means to further that interest.<sup>119</sup> This two-part standard is sometimes referred to as strict scrutiny analysis. The

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(...continued)

assistance, and have challenged laws requiring their participation in such programs as unconstitutional. *See* *United States v. Lee*, 455 U.S. 252 (1982). Other religions teach that spiritual treatment through prayer, rather than medical treatment, is the appropriate method to treat ailments. *See* *Christian Science*, 1 *Encyclopedia of Politics and Religion* 141 (Robert Wuthnow, ed., 2<sup>nd</sup> ed.) (2006).

<sup>114</sup> For background and legal analysis of religious exemptions in mandatory healthcare programs generally, *see* CRS Report RL34708, *Religious Exemptions for Mandatory Health Care Programs: A Legal Analysis*, by Cynthia Brougher.

<sup>115</sup> U.S. Const. Amend. I. For a discussion of constitutional and statutory standards of review used in relation to the First Amendment, *see* CRS Report RS22833, *The Law of Church and State: General Principles and Current Interpretations*, by Cynthia Brougher.

<sup>116</sup> *See* *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963).

<sup>117</sup> *Employment Div., Oregon Dep't of Human Resources v. Smith*, 494 U.S. 872, 879 (1990).

<sup>118</sup> *See* *City of Boerne, Texas v. Flores*, 521 U.S. 407 (1997).

<sup>119</sup> 42 U.S.C. § 2000bb-1(b). In some instances, RFRA may be preempted by another federal law. *See* S.Rept. 103-111, at 12-13 (1993).

Supreme Court has held that in order for the government to prohibit exemptions to generally applicable laws, the government must “demonstrate a compelling interest in uniform application of a particular program by offering evidence that granting the requested religious accommodations would seriously compromise its ability to administer the program.”<sup>120</sup> Although RFRA currently applies as a general limitation on federal actions, Congress may amend its scope or may exempt future statutes from complying with RFRA.<sup>121</sup> Thus, when considering proposed legislation that may conflict with requirements imposed by RFRA, Congress may avoid the conflict by exempting the legislation from RFRA.

## **Legal Analysis of Religious Exemptions for the Individual Responsibility Requirement**

Analysis of the issues raised by religious exemptions for the individual responsibility requirement must address two questions: (1) whether the U.S. Constitution requires a religious exemption to ensure the free exercise rights of individuals who may have religious objections to health insurance; and (2) if a religious exemption is not constitutionally required, but included nonetheless, whether it would be constitutional under the First and Fifth Amendments. The issues addressed in this section stem from religious exemptions offered in other contexts, and some issues that may be raised by future proposals may not be discussed.

### **Is a Religious Exemption Constitutionally or Statutorily Required for an Individual Responsibility Requirement?**

As a neutral law of general applicability that potentially burdens religious exercise, the individual responsibility requirement would be subject to analysis under RFRA. Generally, it does not appear that a religious exemption is required for legislation mandating health coverage. The Supreme Court and other lower courts generally have allowed federal mandates that relate to public health, but nonetheless interfere with religious beliefs, to continue without exemptions.<sup>122</sup> Under the strict scrutiny analysis, an exemption would be required only if the government does not have a compelling state interest that is achieved by the least restrictive means possible.

One important goal for enacting the individual responsibility requirement appears to be aimed at protecting public health. The government’s interest in protecting public health has been held to outweigh individuals’ religious interests. According to the Supreme Court, “the right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death.”<sup>123</sup> The Court delivered this decision before the Court applied a heightened standard of review to religious exercise cases, so it was not required to address whether the government’s interest was compelling. Nonetheless, the relative balance struck by the Court between the interests is significant, particularly if a healthcare proposal includes a requirement for children, but not adults. Health care legislation that requires coverage

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<sup>120</sup> *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 435-437 (2006).

<sup>121</sup> Under the longstanding legal principle of entrenchment, a legislative enactment cannot bind a future Congress. That is, Congress cannot entrench a legislative action by providing that it may not be repealed or altered. *See Fletcher v. Peck*, 10 U.S. 87, 135 (1810) (Chief Justice Marshall).

<sup>122</sup> *See, e.g., Prince v. Massachusetts*, 321 U.S. 158 (1944); *Cude v. State*, 237 Ark. 927 (1964).

<sup>123</sup> *Prince*, 321 U.S. at 166-67.

for children may face fewer obstacles in strict scrutiny analysis than legislation requiring coverage for all individuals in part because of the Court's specific recognition that parents' religious liberty does not trump the welfare of children and in part because of the general recognition that children's interests are given heightened protection. In a decision that did apply heightened constitutional review, the Court held that the government's interest in tax programs used to fund health insurance programs for low-income and aging portions of American society outweighs individuals' interests in exercising their religion freely.<sup>124</sup> The Court held that the government had a compelling interest in a uniform tax system that provided revenue for such governmental programs.<sup>125</sup> The Court's treatment of public health as an interest paramount to individual religious practice could be taken to indicate there would be a compelling interest under RFRA.

Although protecting public health through insurance programs appears to be a compelling governmental interest, the nature of the program that promotes public health may be significant to the analysis. For example, medical programs such as laws that require affirmative participation in medical procedures (e.g., vaccinations) differ from financial programs such as laws that require indirect funding of programs aimed at promoting health (e.g., funding for health insurance programs). Because of the varied nature of the burden on religion under these two types of programs, the specific requirements of the legislation impact the determination of constitutionality. In the case of PPACA, the individual responsibility requirement is enforced through financial programs and penalties, meaning that the enacted legislation is more likely to avoid constitutional problems than a mandate for affirmative participation in medical programs. Depending on what is deemed to constitute public health, a court may find that requiring individuals to obtain health insurance does not rise to the same level of governmental interest as requirements that directly prevent the spread of disease. On one hand, it may be argued that health insurance coverage promotes productivity in society. Insurance coverage may encourage some individuals to seek medical treatment that they otherwise might forgo if they had to pay the full cost. By seeking treatment, these individuals may have prevented the spread of disease or may have improved their personal health to be more productive members of society. On the other hand, it may be argued that insurance coverage does not promote health because individuals are not guaranteed treatment. The individual responsibility requirement does not require individuals to seek or accept treatment, and thus the effectiveness in promoting public health may be questioned.

Even if the government has a compelling interest in requiring individual health insurance, it must use the least restrictive means to achieve that interest in order for the requirement to be upheld as constitutional. That is, the government must make the burden on religious exercise as narrow as possible. This test may be met by providing alternative means of compliance with the legislation, such as the exemption provided in PPACA. Allowing individuals who object to the program on religious grounds and would not receive benefits from the program to opt out of coverage would satisfy both the individual's free exercise of religion and the government's interest in protecting public health at large.

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<sup>124</sup> Lee, 455 U.S. at 260-61.

<sup>125</sup> *Id.*

## Does the Constitution Allow a Religious Exemption for the Individual Responsibility Requirement?

Even though an exemption may not be required by the Constitution, PPACA's exemption for those with religious objections provides an alternative for certain people based on their religious beliefs that is not available to other people who do not share the same religious beliefs. Thus, some individuals may claim that the religious exemption would violate the Establishment Clause (by providing a benefit to groups based on religion) and the equal protection portion of the Fifth Amendment (by providing for disparate treatment of separate groups).

The Establishment Clause prohibits preferential treatment of one religion over another or preferential treatment of religion generally over nonreligion.<sup>126</sup> Providing an exemption based on religion may be construed as favoring a particular religion or religion generally because only individuals with a religious affiliation would be eligible for the exemption. However, the mere fact that a law addresses religion does not automatically make that law unconstitutional. Traditionally, to be constitutional under Establishment Clause analysis, a government action must meet a three-part test known as the *Lemon* test. To meet the *Lemon* test, a law must (1) have a secular purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) not lead to excessive entanglement with religion.<sup>127</sup> The Supreme Court has upheld religious exemptions for government programs where the exemptions were enacted to prevent government interference with religious exercise.<sup>128</sup>

Exemptions that are specifically available only to certain religions have been construed in some cases as a violation of the Establishment Clause.<sup>129</sup> The religious conscience exemption in PPACA does not state specific religious groups that would qualify for exemption. Rather PPACA exempts any individual who has been certified to be "a member of a recognized religious sect or division thereof described in section 1402(g)(1) [of the Internal Revenue Code of 1986] and an adherent of established tenets or teaching of such sect or division as described in such section." Section 1402(g)(1) provides an exemption from self-employment income tax if the individual seeking exemption

is a member of a recognized religious sect or division thereof and is an adherent of established tenets or teachings of such sect or division by reason of which he is conscientiously opposed to acceptance of the benefits of any private or public insurance which makes payments in the event of death, disability, old-age, or retirement or makes payments toward the cost of, or provides services for, medical care....<sup>130</sup>

<sup>126</sup> *Epperson v. Arkansas*, 393 U.S. 97, 103-04 (1968).

<sup>127</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). While the first two prongs of the test are self-explanatory, the third prong prohibits "an intimate and continuing relationship" between government and religion as the result of the law. *Id.* at 621-22. The continuing viability of *Lemon* has been unclear as the Court has raised questions regarding its adequacy in analyzing these issues. *See, e.g., County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989).

<sup>128</sup> In *Locke v. Davey*, the Court recognized that some government actions that allow free exercise consequently raise questions of establishment, noting that there was room for "play in the joints" in this intersection of the religion clauses. 540 U.S. 712 (2004).

<sup>129</sup> *See Sherr v. Northport-East Northport Union Free School District*, 672 F. Supp. 81, 89-90 (E.D.N.Y. 1987).

<sup>130</sup> 26 U.S.C. § 1402(g)(1).

Thus, the exemption is general, such that any member of any religious organization with the beliefs described in the provision would qualify. This construction of the exemption appears to conform with the constitutional requirements of the First Amendment. The Supreme Court has held that legislation that provides protection or exemption for a specific religious group violates the Establishment Clause of the First Amendment, which forbids preferential treatment based on religion.<sup>131</sup> The Court has held on numerous occasions that the government cannot provide special treatment to one religion over another, or religion generally over non-religion.<sup>132</sup> However, challenges have been made even to generally available religious exemptions under the Establishment Clause because such exemptions would provide preferential treatment to individuals with religious beliefs, but not to individuals who might object on nonreligious philosophical grounds to claim the exemption.<sup>133</sup> Thus, the question of the constitutionality of exemptions based on religion appears not to be settled as of yet.

The concerns of preferential treatment for certain groups of individuals that lead to Establishment Clause questions also raise questions under the equal protection principles of the Fifth Amendment. Equal protection prevents the government from treating some groups of individuals differently from other groups of individuals. If the disparate treatment results from a “suspect classification,” equal protection principles may be violated. Typically, courts have recognized groups identified by race, national origin, or alienage as suspect classifications. In the context of religious exemptions, the group being treated differently is a group that might be based on religious affiliation or might be based on nonreligion. Courts often decide cases alleging disparate treatment involving religion under the First Amendment, rather than equal protection. Thus, equal protection jurisprudence does not appear to have addressed religious discrimination to a significant extent. Courts have generally held that laws that treat groups of individuals differently because of some animus would be suspect classifications that would be subject to strict scrutiny. Thus, it appears that the analysis under the equal protection principles likely would not produce a different outcome from the analysis that would be used under the First Amendment.

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<sup>131</sup> U.S. CONST. amend I. *See* Board of Education of Kiryas Joel v. Grumet, 512 U.S. 687 (1994) (invalidating the creation of a school district for one particular religious group). The Court has looked at whether the religious group alleged to be favored by the act in violation of the Establishment Clause is one of many religious groups eligible for similar treatment or if the special treatment is made through a series of benefits offered separately to multiple groups. *Id.* at 703-704.

<sup>132</sup> *See* Wallace v. Jaffree, 472 U.S. 38, 52-54 (1985); Epperson v. Arkansas, 393 U.S. 97, 104 (1968); School Dist. of Abington Township v. Schempp, 374 U.S. 203, 216-217 (1963).

<sup>133</sup> *See* McCarthy v. Boozman, 212 F.Supp. 2d 945 (W.D. Ark. 2002).

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