



# Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis

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## Summary

As part of Congress's health care reform effort, there has been interest in requiring individuals to have some type of health insurance. 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. While it seems possible that Congress could enact an individual coverage requirement that would pass constitutional muster, there are various constitutional considerations relevant to the enactment of such a proposal. This report provides an analysis of constitutional issues raised by a federal proposal compelling individuals to purchase health insurance (i.e., an "individual health insurance mandate"). This report first analyzes the authority of Congress to pass a proposal of this nature, as well as how a court could analyze this type of proposal if there were to be a constitutional challenge based on various provisions of the Fifth Amendment. Finally, this report discusses whether there must be exceptions to a requirement to purchase health insurance based on First Amendment freedom of religion. It should be noted that the structure of a proposal may affect the constitutional provisions implicated.

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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.<sup>1</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>2</sup> As part of Congress's health care reform effort, there has been interest in requiring individuals to have some type of health insurance. This report first analyzes the authority of Congress to pass a proposal of this nature, as well as how a court might analyze this type of proposal if there were to be a constitutional challenge based on various provisions of the Fifth Amendment. Finally, this report discusses whether there must be exceptions to a requirement to purchase health insurance based on First Amendment freedom of religion. While it seems possible that Congress could enact an individual coverage requirement that would pass constitutional muster, questions may arise in evaluating this type of proposal. It is important to note that this analysis is merely a general overview of how constitutional principles might apply to a requirement to have health insurance. Any specific proposal requiring individuals to obtain health insurance would require further analysis.<sup>3</sup>

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

In attempting to analyze the constitutionality of a requirement to obtain health insurance, it is important to determine the congressional authority for any proposal based on Congress's enumerated powers. While there is no specific enumerated power to regulate health care or establish an individual coverage 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, both Congress's taxing and spending power, as well as its power to regulate interstate commerce, could be applicable.

### Taxing/Spending 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 Defense 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

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<sup>1</sup> For purposes of this report, it is assumed that individuals and families could satisfy a requirement to obtain health coverage from a group health plan, a health insurer, or by participating in a public program such as Medicare or Medicaid. Those who fail to comply with a requirement would be subject to a tax or some other type of penalty. In addition, for purposes of this general analysis, it is assumed that other federal laws and programs remain unchanged.

<sup>2</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.").

<sup>3</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.

programs in the Social Security Act, including Medicare, Medicaid, and the State Children's Health Insurance Program.

The Supreme Court accords great deference to a legislative decision by Congress that a particular spending program provides for the general welfare. Indeed, the Court has suggested that the question of whether a spending program provides for the general welfare is one that is squarely within the discretion of the legislative branch.<sup>4</sup> Further, under the Spending Clause authority, courts have found that Congress has broad authority to condition the conferral of federal benefits.<sup>5</sup> According to the Supreme Court, Congress has used its spending power "to further broad policy objectives by conditioning receipt of federal mon[ies] upon compliance by the recipient with federal statutory and administrative directives."<sup>6</sup> While there may be limits to this authority, this conditioning based on the spending power is one of the more powerful means by which Congress can regulate certain recipients of federal funds.<sup>7</sup> The Supreme Court has also recognized that Congress's power to tax is extremely broad.<sup>8</sup> While the Constitution places some restrictions upon Congress's ability to tax, it seems that a requirement to purchase health insurance could be structured so as to avoid these restrictions.<sup>9</sup>

Certain health insurance mandate proposals could rely on Congress's spending and taxing authority. For example, if Congress chose to require individuals to have health insurance by levying a tax, then using the revenue for funding health benefits, this could be viewed as an appropriate use of Congress's taxing and spending power. Or, if Congress were to require individuals to purchase health insurance, and then enforce this requirement by conditioning receipt of a tax benefit (e.g., a tax credit) on compliance, this also could be seen as a legitimate exercise of Congress's taxing authority. Similarly, if Congress were to enact a proposal under which individuals who did not purchase health insurance were subject to a tax penalty (e.g., a loss of a tax deduction), this also could be seen as valid under this clause of the Constitution.

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<sup>4</sup> See, e.g., *Helvering v. Davis*, 301 U.S. 619, 640 (1937), where the Court explained that "[t]he discretion [to decide whether spending aids the general welfare] belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power [or] not an exercise of judgment...."

<sup>5</sup> See, e.g., *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) ("Incident to [the spending clause] power, Congress may attach conditions on the receipt of federal funds.").

<sup>6</sup> *Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980).

<sup>7</sup> The Supreme Court has noted that Congress's spending power is not unlimited. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 n.13 (1981). As articulated in *South Dakota v. Dole*, 483 U.S. 203 (1987), the Court has found four general restrictions on the spending power:

The first of these limitations is derived from the language of the Constitution itself: the exercise of the spending power must be in pursuit of "the general welfare." In considering whether a particular expenditure is intended to serve general public purposes, courts should defer substantially to the judgment of Congress. Second, we have required that if Congress desires to condition the States' receipt of federal funds, it "must do so unambiguously ... , enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation." Third, our cases have suggested (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated "to the federal interest in particular national projects or programs." Finally, we have noted that other constitutional provisions may provide an independent bar to the conditional grant of federal funds.

*Id.* at 207-208 (citations omitted).

<sup>8</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>9</sup> For a discussion of certain limitations on Congress's power to tax, see generally *Constitution of the United States of America, Analysis and Interpretation*, Congressional Research Service, p. 152 *et seq.*

In addition, Congress's Spending Clause authority could be invoked if a proposal to require individuals to purchase health insurance involves state participation. Congress has frequently promoted its policy goals by conditioning the receipt of federal funds on state compliance with certain requirements. Accordingly, if Congress were to condition payment of certain funds to states based on whether that state requires its residents to have health insurance, this could also be seen as acceptable under the Spending Clause.<sup>10</sup> While the Court has recognized that Congress cannot force states to take certain courses of action because of state sovereignty protected under the Tenth Amendment,<sup>11</sup> the conditioning of funds can be a legitimate inducement to get states to follow the will of Congress.<sup>12</sup> Thus, if Congress were to grant federal funds to states that enacted laws which required individuals to purchase health insurance, this type of law would likely be considered a legitimate use of Congress's spending clause authority.

## **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>13</sup> The Supreme Court developed an expansive view of the Commerce Clause relatively early in the history of judicial review.<sup>14</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. Despite the breadth of powers that have been exercised under the Commerce Clause, it is unclear whether the clause would provide a solid constitutional foundation for legislation containing a requirement to have health insurance. Whether such a requirement would be constitutional under the Commerce Clause is perhaps the most challenging question posed by such a proposal, as it is a novel issue whether Congress may use this clause to require an individual to purchase a good or a service.<sup>15</sup>

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

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<sup>10</sup> See, e.g., *South Dakota v. Dole*, 483 U.S. 203, 211 (1987), where the Supreme Court rejected a challenge to a federal law providing for the withholding of a percentage of federal highway funds if the state's drinking age was below 21.

<sup>11</sup> The Tenth Amendment provides that "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." For a discussion of Tenth Amendment principles, see CRS Report RL30315, *Federalism, State Sovereignty, and the Constitution: Basis and Limits of Congressional Power*, by Kenneth R. Thomas.

<sup>12</sup> *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937); see also *Dole*, 483 U.S. at 211.

<sup>13</sup> U.S. Const., Art. I, §8, cl. 3. For a general discussion of the Commerce Clause, see CRS Report RL32844, *The Power to Regulate Commerce: Limits on Congressional Power*, by Kenneth R. Thomas and Todd B. Tatelman. 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>14</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>15</sup> However, it should be noted that individual health insurance mandates have been proposed in the past. See, e.g., S. 1770, 103<sup>rd</sup> Cong. (1993).

commerce.”<sup>16</sup> It is likely that a court would evaluate Congress’s authority for enacting an individual health insurance coverage requirement under this third “substantially affects” category.

Three recent cases, *United States v. Lopez*,<sup>17</sup> *United States v. Morrison*,<sup>18</sup> and *Gonzales v. Raich*,<sup>19</sup> as well as several historical decisions such as *Wickard v. Filburn*,<sup>20</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>21</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>22</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 “asserts a substantial impact on interstate commerce....”<sup>23</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>24</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 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>25</sup>

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<sup>16</sup> See *United States v. Lopez*, 514 U.S. 549, 558-59 (internal citations omitted).

<sup>17</sup> 514 U.S. 549 (1995).

<sup>18</sup> 529 U.S. 598 (2000).

<sup>19</sup> 545 U.S. 1 (2005).

<sup>20</sup> 317 U.S. 111 (1942).

<sup>21</sup> See *Lopez*, 514 U.S. at 557; *Morrison*, 529 U.S. at 608.

<sup>22</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>23</sup> *Id.* at 125.

<sup>24</sup> *Id.*

<sup>25</sup> *Lopez*, 514 U.S. at 564. 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 (continued...) ”

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>26</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>27</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>28</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>29</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>30</sup> However, the Court found that the standard for assessing the scope of Congress's power under the 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>31</sup> The Court also

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(...continued)

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, be relatively easy to fix.

<sup>26</sup> *Morrison*, 529 U.S. at 613.

<sup>27</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>28</sup> *Id.*

<sup>29</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 legislate. 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>30</sup> *Raich*, 545 U.S. at 18.

<sup>31</sup> *Id.* at 25. The Court explained that "the CSA regulates the production, distribution, and consumption of commodities (continued...)"



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>32</sup>

In applying the reasoning of *Lopez*, *Morrison*, and *Raich* to a federal proposal to require individuals to purchase health care, it is important to evaluate the proposal under the four factors articulated in *Lopez* and *Morrison*.<sup>33</sup> In particular, the first and fourth factors of these cases warrant the closest analysis. In regard to 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 a 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 under a proposal which would require or offer an option to an individual to purchase health insurance from a private insurance company.

On the other hand, it may be argued that the mandate 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 engage in virtually no economic activity whatsoever. 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 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

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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>32</sup> *Id.* at 26-27. *See also* *Lopez*, 514 U.S., at 561.

<sup>33</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).

the purchase of health insurance has an effect on the commerce of the nation. For example in 2007, health care expenditures in the United States grew 6.1% to \$2.2 trillion, or \$7,421 per person, and accounted for 16.2% of gross domestic product.<sup>34</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>35</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>36</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>37</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 requirement to purchase health insurance 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 some type of health insurance coverage would benefit the orderly flow of health care services in interstate commerce. Also, because one of the motivating factors for a requirement to obtain health insurance is 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. Based on similar arguments made in *Lopez* and *Morrison*, there may be questions about whether Congress could 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 look to whether an enacted statute possesses a jurisdictional element that insures that the statute affects interstate commerce. It seems possible that Congress could satisfy this factor. For example, if Congress provided that any person using or wanting to have access to medical care in or affecting interstate commerce must have health insurance, this factor may be fulfilled. In addition, the presence of congressional findings may also be satisfied for purposes of commerce clause analysis. For instance, Congress could produce findings regarding the effect of

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<sup>34</sup> Centers for Medicare and Medicaid Services, National Health Expenditure Data Fact Sheet, *available at* [http://www.cms.hhs.gov/NationalHealthExpendData/25\\_NHE\\_Fact\\_Sheet.asp#TopOfPage](http://www.cms.hhs.gov/NationalHealthExpendData/25_NHE_Fact_Sheet.asp#TopOfPage).

<sup>35</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) (Congress had not exceeded its power under the Commerce Clause in enacting a carjacking statute).

<sup>36</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>37</sup> 18 U.S.C. § 228.

the uninsured on the health care industry and the national economy. However, given the discussion of these findings in *Lopez* and *Morrison*, it appears that the presence or absence of congressional findings may be helpful, but not determinative, of Congress's authority to legislate under the Commerce Clause.

Following the reasoning of *Raich*, one may examine whether Congress can rationally conclude that requiring individuals to purchase health insurance would have a substantial effect on interstate commerce. One arguing in favor of the constitutionality of a health insurance mandate 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 additional strain on the economy.<sup>38</sup> For example, it has been estimated that lost productivity due to the diminished health and shorter life span of the uninsured had an annualized economic cost of \$102-\$204 billion.<sup>39</sup> Evidence like this could demonstrate a rational basis for Congress enacting a requirement to purchase health insurance.

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 coverage requirement, while not commercial in nature, is an essential part of Congress's current regulation of the health care industry.<sup>40</sup> A reviewing court could consider whether the absence of a requirement to purchase health care would undercut the regulation of the health care industry 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 a requirement to purchase insurance is an "essential part" of the regulation may become more viable. In addition, if a requirement to have health insurance were passed as part of a comprehensive health care reform package, this may reinforce the idea that it is acceptable under the Commerce Clause as part of a larger health care reform effort.<sup>41</sup>

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<sup>38</sup> 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>39</sup> *Id.*

<sup>40</sup> It should be noted that although insurance matters are primarily regulated at the state level, the McCarran-Ferguson Act reserves to Congress the ability to enact federal statutes that "specifically" relate to "the business of insurance." 15 U.S.C. § 1012(b). A federal requirement to have health insurance may be seen as regulation of insurance under this act.

<sup>41</sup> Another consideration with respect to *Raich* is 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.

## Health Insurance Coverage Requirements and the Fifth Amendment

Commentators have asked whether a requirement to have health insurance might violate certain protections found under the Fifth Amendment of the U.S. Constitution.<sup>42</sup> This section provides a general discussion of how a court might evaluate a health insurance requirement that is challenged on due process, takings clause, or equal protection grounds. In general, it seems unlikely that a challenge to a health insurance mandate would be successful under these provisions. However, as mentioned above, any specific proposal to require individuals to purchase health insurance could contain provisions that may alter the analysis.

### 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>43</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>44</sup> Where there is no fundamental right involved, the government must demonstrate that there is a rational basis for its action.<sup>45</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>46</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

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<sup>42</sup> See Karl Manheim and Jamie Court, *Must You Buy Health Insurance?* Christian Science Monitor (Mar. 26, 2008), available at <http://www.csmonitor.com/2008/0326/p09s01-coop.html>.

<sup>43</sup> U.S. Const. Amend. V. See also U.S. Const. Amend. XIV, §1, which contains a similar clause that applies to states.

<sup>44</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>45</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>46</sup> It should be noted that if health care were to be considered a fundamental right, it is not clear that an individual health insurance mandate would interfere with this right. However, one could argue that the requirement to purchase health insurance could interfere with this right for those who prefer to self-insure, use alternative medicine, or obtain treatment outside the traditional health care system. See Manheim and Court, note 42 *supra*.

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. However, this is not a fundamental right that has been recognized by the Supreme Court.<sup>47</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] indefeasible right of personal security, personal liberty and private property”),<sup>48</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, a requirement to purchase health insurance would likely be evaluated under a rational basis review and upheld.

It is possible that a reviewing court would evaluate a 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>49</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>50</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>51</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>52</sup>

If the Supreme Court were to view a requirement to have health insurance 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>53</sup> The analysis of economic

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<sup>47</sup> In challenging a health insurance mandate 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, (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>48</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965) (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)).

<sup>49</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>50</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>51</sup> *PBGC v. R. A. Gray & Co.*, 467 U.S. 717, 729 (1984).

<sup>52</sup> *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 83-4 (1978).

<sup>53</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.

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 parameters of the possible approaches that Congress may take. Thus, if Congress enacted an individual coverage requirement in an effort, for example, to protect public health, to lower the number of uninsured individuals, or to improve access to the health care system, the requirement could be seen as rationally related to these goals, even if other legislative efforts might be found more effective in achieving them. Someone seeking to challenge an individual health coverage requirement would likely have to demonstrate to a court that Congress's decision to enact a requirement was arbitrary or irrational. However, it seems hard to imagine that a reviewing court would not see Congress's decision to enact a mandate as a rational one, 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>54</sup> or the equal protection component of the Fifth Amendment.<sup>55</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>56</sup> A classification will not offend the Constitution unless it is characterized by invidious discrimination,<sup>57</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>58</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>54</sup> The Fourteenth Amendment provides, in relevant part,

No state shall make or enforce any law which shall abridge the privileges or immunities of the 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.

U.S. Const. Amend. XIV, § 1 (emphasis added).

<sup>55</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., 93 (“Equal protection analysis in the Fifth Amendment area,” the Court has said, “is the same as that under the Fourteenth Amendment.”).

<sup>56</sup> Ronald D. Rotunda and John E. Nowak, *Treatise on Constitutional Law: Substance and Procedure* § 18.2 (3d ed. 1999).

<sup>57</sup> See *Ferguson v. Skrupa*, 372 U.S. 726, 732 (1963).

<sup>58</sup> See *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973).

government interest.<sup>59</sup> This level of review is characterized by its deference to legislative judgment. Most economic regulations are subject to rational basis review.<sup>60</sup>

It appears that Congress could structure a requirement to purchase health insurance so as to withstand an equal protection challenge. It seems unlikely that a requirement to purchase health insurance would burden a fundamental right. As previously discussed, the Supreme Court has not found health care to be a fundamental right. As to whether a requirement to purchase health insurance “operates to the detriment of a suspect class,”<sup>61</sup> unless the requirement to purchase insurance is directed at a suspect class, or operates differently for a suspect class, the mandate seems unlikely to raise equal protection concerns. If it were to be asserted that a requirement to purchase health insurance discriminates against individuals who may find it more difficult than others, based on their economic status, to purchase health insurance, this is likely to be a losing argument.<sup>62</sup> The Court has never found that financial need itself identifies a suspect class for purposes of equal protection analysis.<sup>63</sup> If a health insurance mandate were to apply only to children, again, there appears to be no suspect classification that would trigger heightened judicial scrutiny. The Supreme Court has found that classifications on the basis of age do not violate equal protection, so long as the classification in question is rationally related to a legitimate state interest.<sup>64</sup> Further, it seems that a legitimate government interest for this distinction could exist (e.g., a finding that children are in greater need of medical care than adults).

## Takings Clause

Under the Takings Clause of the Fifth Amendment, no property shall be taken for public use without just compensation.<sup>65</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>66</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

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<sup>59</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>60</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>61</sup> *Harris v. McRae*, 448 U.S. 297, 326 (1980).

<sup>62</sup> It may be noted that in the Massachusetts individual mandate, Massachusetts residents are only required to purchase coverage that is deemed affordable. Thus, Massachusetts residents may be exempted from the individual mandate if they can demonstrate that, based on their income and other factors, they do not meet certain affordability standards. See 956 C.M.R. 600 et seq. (regulations addressing the affordability standards).

<sup>63</sup> *Maher v. Roe*, 432 U.S. 464, 471 (1977)(citing *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1, 29 (1973)); *Dandridge v. Williams*, 397 U.S. 471 (1970).

<sup>64</sup> See, e.g., *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 83 (2000).

<sup>65</sup> For a general discussion of takings law, see CRS Report RS20741, *The Constitutional Law of Property Rights “Takings”: An Introduction*, by Robert Meltz.

<sup>66</sup> *Brown v. Legal Found.*, 538 U.S. 216, 232 (2003).

property, both tangible and intangible. Money is also generally held to be property under the clause.<sup>67</sup>

In a few situations, government actions that appear to be obvious appropriations of property are deemed outside the scope of takings law.<sup>68</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>69</sup> a statute imposing generalized monetary liability has not been considered by courts to be a taking.<sup>70</sup> Thus, if Congress were to enact a requirement to purchase health insurance, it is unlikely that a court would find the amounts required to be paid for the 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>71</sup>

## Religious Exemptions to Individual Coverage Requirements

Requiring individuals to obtain health insurance may conflict with some individuals' religious beliefs.<sup>72</sup> Accordingly, legislation that would require individuals to obtain health insurance might raise constitutional issues of religious freedom and equal protection.<sup>73</sup> These issues may be addressed with a religious exemption to the individual coverage 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

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<sup>67</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 opined that regulatory actions requiring the payment of money are not takings).

<sup>68</sup> Robert Meltz, *Takings Law Today: A Primer for the Perplexed*, 34 *Ecology L.Q.* 307, 327 (2007).

<sup>69</sup> *Brown v. Legal Found.*, 538 U.S. 216, 232 (2003); *Webb's Fabulous Pharms., Inc. v. Beckwith*, 449 U.S. 155 (1980).

<sup>70</sup> See, e.g., *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1338-40 (Fed. Cir. 2001) (en banc); *Smith v. Cortes*, 879 A.2d 382 (Pa. Commw. Ct. 2005), *aff'd*, 901 A.2d 980 (Pa. 2006). Also money paid in taxes is not generally considered a taking, unless the tax is so arbitrary as to be "confiscatory." 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). Thus, if a requirement to purchase health insurance were to be structured as a tax, it is highly improbable that a court would consider the requirement to be a taking.

<sup>71</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>72</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 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>73</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.



Amendment may differ based on the form of the requirement proposed (e.g., a requirement to purchase health insurance has been considered less burdensome than a requirement to receive healthcare).

## **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>74</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>75</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>76</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>77</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>78</sup> This two-part standard is sometimes referred to as strict scrutiny analysis. The 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>79</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>80</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.

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<sup>74</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>75</sup> See *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963).

<sup>76</sup> *Employment Div., Oregon Dep’t of Human Resources v. Smith*, 494 U.S. 872, 879 (1990).

<sup>77</sup> See *City of Boerne, Texas v. Flores*, 521 U.S. 407 (1997).

<sup>78</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).

<sup>79</sup> *Gonzales v. O Centro Espirita Beneficente Unaio Do Vegetal*, 546 U.S. 418, 435-437 (2006).

<sup>80</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).

## **Legal Analysis of Religious Exemptions for Individual Coverage Requirements**

Analysis of the issues raised by religious exemptions for individual coverage requirements 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. The structure of a proposed individual mandate may affect the analysis significantly.

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

As a neutral law of general applicability that potentially burdens religious exercise, an individual coverage requirement would be subject to analysis under RFRA. Generally, it does not appear that a religious exemption is required for legislation mandating health coverage, but the details of the proposal may impact the analysis. The U.S. 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>81</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 an individual coverage 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>82</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 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 has 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>83</sup> The Court held that the government had a compelling interest in a uniform tax system that provided revenue for such governmental programs.<sup>84</sup> The Court's treatment of public health as an interest paramount to

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<sup>81</sup> See, e.g., *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Cude v. State*, 237 Ark. 927 (1964).

<sup>82</sup> *Prince*, 321 U.S. at 166-67.

<sup>83</sup> *Lee*, 455 U.S. at 260-61.

<sup>84</sup> *Id.*

individual religious practice appears 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 imposed by the legislation likely will have an impact on the outcome of the constitutionality. 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. Individual coverage requirements do 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, one of which might be a religious exemption. For example, when Massachusetts enacted a statewide insurance mandate, it included several options for individuals who objected to insurance coverage, including a religious exemption.<sup>85</sup> The Massachusetts individual coverage requirement allowed individuals who declared an objection based on their religion to effectively opt out of the requirement to acquire insurance coverage.<sup>86</sup> If an individual receives medical care during the year in which the exemption was claimed, the individual is responsible for paying for the care and is subject to penalty assessed by the commissioner of revenue.<sup>87</sup> Such an exemption would satisfy both the individual's free exercise of religion and the government's interest in protecting public health. There may be other accommodations that would satisfy the requirement of tailoring the legislation narrowly to meet strict scrutiny requirements.

### **Does the Constitution Allow a Religious Exemption for an Individual Coverage Requirement?**

Congress may choose to include an exemption for religious objections even if it is not required by the Constitution. An exemption based on religious belief would provide an alternative for certain

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<sup>85</sup> See *An Act Providing Access to Affordable, Quality, Accountable Health Care*, Mass. Gen. Laws ch. 58, § 12.

<sup>86</sup> To qualify for Massachusetts's religious exemption, an individual must file documentation with tax returns, declaring "that his sincerely held religious beliefs are the basis of his refusal to obtain and maintain creditable coverage during the 12 months of the taxable year for which the return was filed." Mass. Gen. Laws ch. 111M, § 3.

<sup>87</sup> *Id.*

people based on their religious beliefs that would not be available to other people who do not share the same religious beliefs. Thus, some individuals may claim that a 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>88</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. 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>89</sup> The Supreme Court has upheld religious exemptions for government programs where the exemptions were enacted to prevent government interference with religious exercise.<sup>90</sup>

Like the analysis under the Free Exercise Clause, the constitutionality of a religious exemption under the *Lemon* test would depend on the language of the exemption. Exemptions that are specifically available only to certain religions have been construed in some cases as a violation of the Establishment Clause.<sup>91</sup> However, providing an exemption that does not specify certain religions as eligible may not pass the *Lemon* test either. A generally available religious exemption may be construed as a violation of the Establishment Clause because it provides preferential treatment to individuals with religious beliefs, but does not provide individuals who might object on nonreligious philosophical grounds to claim the exemption.<sup>92</sup> Thus, there does not appear to be a clear consensus regarding the constitutionality of religious exemptions under the Establishment Clause.

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

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<sup>88</sup> *Epperson v. Arkansas*, 393 U.S. 97, 103-04 (1968).

<sup>89</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>90</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>91</sup> *See Sherr v. Northport-East Northport Union Free School District*, 672 F. Supp. 81, 89-90 (E.D.N.Y. 1987).

<sup>92</sup> *See McCarthy v. Boozman*, 212 F.Supp. 2d 945 (W.D. Ark. 2002).

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.

In sum, although the federal government provides health coverage for many individuals, it has never required individuals to purchase health insurance. While it seems possible that Congress could enact an individual coverage requirement that would pass constitutional muster, there are various constitutional considerations relevant to the enactment of such a proposal. It appears Congress may have the ability to enact a requirement to obtain health insurance as part of its taxing and spending power, or its power to regulate interstate commerce. In addition, while a challenge to a requirement to purchase health insurance may be brought under the Fifth Amendment, it seems unlikely that a challenge would be successful under these provisions. However, any specific proposal to require individuals to purchase health insurance should be evaluated, as the specifics may alter the analysis. Generally, although some individuals may have religious objections to a requirement for insurance coverage, a religious exemption does not appear to be required under the Free Exercise Clause or RFRA. Congress may choose to include an exemption nonetheless, but the constitutionality of the exemption under the Establishment Clause likely would depend on the language of the exemption.

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