



**THE CASE AGAINST
PRESIDENT OBAMA'S
HEALTH CARE REFORM
A PRIMER FOR NONLAWYERS**

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Executive Summary

Multiple challenges to President Obama's health care reform are percolating through the federal courts. Soon the Supreme Court will be asked to weigh in on perhaps the most important question of the post-New Deal era: Are there any remaining limits on the breadth and scope of federal power?

Reinforced by decades of Court decisions that have gutted the Framers' original conception of limited government, the Obama administration has embraced an unprecedented expansion of centralized control. This paper addresses the Patient Protection and Affordable Care Act, which includes a mandate that individuals either purchase a government-prescribed health insurance policy or pay a penalty.

The Department of Health and Human Services has asserted three constitutional provisions as sources of authority for the mandate—the Taxing Power, the Commerce Clause, and

the Necessary and Proper Clause. Each of those purported sources is deficient.

First, the penalty for not buying health insurance is not a tax. Even if the penalty were a tax, it would fail the constitutional requirements for income, excise, or direct taxes. Second, the power to regulate interstate commerce extends only to economic activities; it does not permit Congress to compel such activities in order to regulate them. Third, the mandate is not necessary; indeed, it is merely a means to circumvent problems that would not exist if not for PPACA itself. Nor is the mandate proper; it cannot be reconciled with the Framers' original design for a limited federal government of enumerated powers.

An essential aspect of liberty is the freedom not to participate. PPACA's directive that Americans buy an unwanted product from a private company debases individual liberty. And it's unconstitutional.

Introduction

The Supreme Court will soon get a crack at President Obama's most important piece of domestic legislation. Three lower courts—in Virginia, Michigan, and Washington, D.C.¹—have ruled that the Patient Protection and Affordable Care Act (PPACA)² is constitutional. Two other courts—in Florida and a second district in Virginia³—disagreed. Appeals are pending. Oral argument in the Virginia cases is scheduled for May 10 before the U.S. Court of Appeals for the Fourth Circuit. The Michigan case will be heard on June 1 before the Sixth Circuit, and the Florida case will be heard on June 8 before the Eleventh Circuit. A momentous Supreme Court decision on the limits of congressional power is likely by June 2012, or earlier if the Court unexpectedly grants Virginia's motion for expedited review, which would skip the intermediate appeals process.

The central issue is whether there is constitutional authorization for Congress to have enacted PPACA—more specifically, the mandate in PPACA that individuals must acquire prescribed health insurance or pay a penalty for not doing so. Proponents of PPACA have cited the Taxing Power, the Commerce Clause, and the Necessary and Proper Clause as their constitutional pedigrees. Opponents dispute each of those arguments. For a better understanding of the constitutional complexities, here is a primer on the case against President Obama's health care reform.

The Individual Mandate

The health insurance mandate is the centerpiece of PPACA. It's an unprecedented legal requirement that Americans purchase an approved policy, under penalty of law. Without the mandate, said President Obama to a joint session of Congress, the rest of the legislation falls apart. That's because PPACA bars insurers from denying coverage for pre-

existing conditions—a step meant principally to address loss of coverage when a sick employee changes jobs. Predictably, there are unintended consequences. Consumers are not ignorant. If they know an insurer cannot deny coverage for preexisting conditions, rational consumers will wait until they are sick or injured before buying a policy. The waiting game means insurers won't collect premiums from healthy people to cover the claims of unhealthy people. PPACA's solution: Don't let consumers wait until they're sick; require everyone to buy insurance now, and impose a penalty on anyone who declines.

Prior to 2010, a federal mandate to purchase a product from a private company had never been tested in the courts. When one was last proposed in the context of Hillary-care in 1994, the Congressional Budget Office wrote: "A mandate requiring all individuals to purchase health insurance would be an unprecedented form of federal action. The government has never required people to buy any good or service as a condition of lawful residence in the United States."⁴ Yet that is precisely what PPACA will do—unless and until the Supreme Court says otherwise.

The Taxing Power

Art. I, sec. 8, cl. 1: "The Congress shall have Power To lay and collect Taxes . . . [to] provide for the . . . general Welfare of the United States."

The federal government's first line of argument is that the mandate is authorized under Congress's Taxing Power. Contrary to modern readings, that clause does not grant Congress an independent power to tax for the general welfare. If it did, there would be no need to enumerate any other powers. Rather, the clause authorizes Congress to raise revenue in support of the specifically enumerated powers that follow it. And the *general* welfare restriction precludes Congress from taxing to provide for *special* interests.

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All the same, the Supreme Court in *Helvering v. Davis* (1937)⁵ established that taxes can be levied for just about any purpose that allegedly serves the general welfare. According to the Obama administration, that would include subsidizing insurers so they can afford to cover preexisting conditions. To their credit, none of the five federal courts that have ruled on PPACA has embraced the Taxing Power logic.

Backdoor Regulation

Challengers offered three responses to the administration's Taxing-Power justification. First, Congress cannot use the Taxing Power as a backdoor means of regulating, unless the regulation is authorized elsewhere in the Constitution (see *Bailey v. Drexel Furniture* [1922])⁶. The purpose of a tax is to generate revenue. By contrast, the insurance mandate exists solely to coerce people into obtaining healthcare coverage. If the mandate worked perfectly, it would raise no revenue.

But U.S. district judge Roger Vinson rejected that claim of "backdoor regulation."⁷ Although he denied the federal government's motion to dismiss a lawsuit by Florida—joined by 25 other states, the National Federation of Independent Businesses, and two individual plaintiffs—Vinson noted that courts no longer draw a sharp distinction between regulatory and revenue-raising purposes. In some sense, he declared, every tax has a regulatory component; the mandate is not unconstitutional merely because it regulates.

A Penalty, Not a Tax

The challengers fared considerably better in their second response to the government's invocation of the Taxing Power. The assessment is not a tax, they asserted, but a penalty. Judge Vinson agreed. He pointed out that Congress had written "tax" in an earlier version of PPACA, but changed the word to "penalty" in the final version. Moreover, the word "tax" is used elsewhere in the bill to describe other sources of revenue; so the drafters of the legislation knew how to

specify a tax when that's what they meant. In addition, PPACA cited not the Taxing Power but the Commerce Clause as its constitutional authority. The bill even barred the IRS from using its ordinary enforcement methods to collect the penalty, and the dollars supposedly to be collected were not counted in revenue estimates from the Congressional Budget Office. Apparently, Congress did not want the scrutiny that attaches to multibillion-dollar tax increases—especially after President Obama had repeatedly called the assessment a penalty and reminded voters of his promise not to impose any new taxes on the middle class.

On the basis of that record, Judge Vinson was justifiably reluctant to override clear congressional intent. He concluded that "penalty" was not just a label, but was indicative of a nontax legislative purpose. In December, a month before the Vinson opinion, a second federal judge, Henry Hudson, reached the same conclusion, upholding Virginia's challenge to PPACA. He characterized revenue generation as "a transparent afterthought" and "extraneous to any tax need."⁸ Plainly, the mandate imposes a penalty, not a tax.

Income, Excise, and Direct Taxes

Assume, however, the Supreme Court ultimately disagrees and finds that the penalty for not purchasing health insurance is indeed a tax. Nevertheless, say opponents of PPACA, the tax would be unconstitutional. They underscore that taxes are of three types—income, excise, or direct. Each type must meet specified constitutional constraints. Because the mandate penalty under PPACA does not satisfy any of the constraints, it is not a valid tax.

Income taxes, authorized by the Sixteenth Amendment, must (by definition) be triggered by income. Yet the mandate penalty is triggered by the nonpurchase of insurance. Except for an exemption available to low-income families, the amount of the penalty depends on age, family size, geographic location, and smoking status. So the penalty is not an income tax.

Excise taxes are assessed on selected transactions. Because the penalty arises from a nontransaction, perhaps it qualifies as a reverse excise tax. If so, it has to be uniform across the country (U.S. Const., Art. I, sec. 8). But the penalty varies by location, so it cannot be a constitutional excise tax.

Direct taxes are assessed on persons or their property. Because the penalty is imposed on nonownership of property, perhaps it could be classified as a reverse direct tax. But direct taxes must be apportioned among the states by population (U.S. Const., Art. I, sec. 2). The mandate penalty is assessed on individuals without regard to any state's population. Hence, it is not a lawful direct tax.

Of Credits and Debits

Despite that, the administration notes that PPACA would have raised no eyebrows if the mandate had been structured as a tax credit for those who purchase health insurance rather than a debit for those who do not. After all, the Internal Revenue Code is replete with credits that incentivize various behaviors. Why not a credit for buying health insurance? Any person obtaining a policy would pay less tax than a person who did not—precisely the effect of PPACA's penalty.

The reality, however, is that Congress decided on a debit, not a credit. If Congress had enacted a credit, it would have lessened the impact of a preexisting, (presumably) legitimate tax—thus implicating the Constitution only to ensure that favored parties would not have to relinquish key rights as quid pro quo, and disfavored parties would not be subject to invidious or otherwise unreasonable discrimination. Furthermore, because tax credits reduce government revenue, some budget analysts characterize them as “tax expenditures.” If one subscribes to the notion that credits are equivalent to expenditures, then they would be authorized under Congress's power to spend money.

Conversely, instead of reducing revenue, tax debits raise money and must therefore

be authorized under the Taxing Power. As noted, the Taxing Power is subject to constraints not applicable to spending—that is, taxes must be income, excise, or direct; and each tax, depending on its type, must respectively be triggered by income, be geographically uniform, or be apportioned by population. The penalty for non-purchase of health insurance does not qualify as any of the three types of tax.

Plainly put, the mandate cannot be justified under Congress's “Power To lay and collect Taxes . . . [to] provide for the . . . general Welfare of the United States.” And that leads to the president's second asserted source of constitutional authority: the power “To regulate Commerce . . . among the several States.”

The Commerce Clause

Art. I, sec. 8, cl. 3: “Congress shall have Power . . . To regulate Commerce . . . among the several States.”

The Commerce Power was not designed to provide Congress open-ended authority to regulate anything and everything that affects commerce. Instead, the Framers aimed at creating a national “free-trade zone,” putting an end to the interstate protectionism allowed under the Articles of Confederation. To ensure free trade among the states, Congress was given the power to regulate, or “make regular,” such commerce. If the clause had been understood to grant Congress the limitless regulatory power it now exercises, the Constitution would never have been ratified. Yet, in recent decades, the courts have allowed Congress to drift far from the original meaning of the Commerce Clause, regulating behaviors that are neither interstate nor commerce. That regrettable development was rooted in the New Deal.

Wickard v. Filburn

The infamous 1942 case of *Wickard v. Filburn* laid the groundwork for a vastly

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expanded regulatory state.⁹ Filburn grew wheat primarily for consumption by his family and farm animals. During the 1930s, to boost depressed prices of agricultural products, the Roosevelt administration decided to cut wheat production. Accordingly, the federal government ordered Filburn to grow fewer bushels. When Filburn asked officials for their constitutional authority, the government cited the power to regulate interstate commerce.

Filburn responded that his farm was entirely within a single state and he neither bought nor sold crops across state lines. No matter, held the Supreme Court. By growing his own wheat, Filburn avoided buying. And, if he had not eaten what he grew, he would have been able to sell what was left over. Thus, by not buying and not selling, Filburn had an effect on the supply and demand for wheat—which, when considered in the aggregate, along with the crops of other farmers who did the same, undoubtedly impacted interstate commerce. That opened the floodgates through which the regulatory state was ready to pour—regulating anything and everything under the Commerce Clause.

The Modern Framework

Still, could the power to regulate commerce—properly defined as the exchange of goods—conceivably cover a *non-economic* event; that is, an event that does not involve growing, mining, manufacturing, buying, selling, distributing, or consuming? It took the Supreme Court more than a half-century to clarify the answer to that question. In *United States v. Lopez* (1995), the Court held that the Commerce Clause does not empower the federal government to criminalize possession of a gun near a school.¹⁰ Five years later, in *United States v. Morrison*, the Court overturned a statute that invoked the Commerce Clause to grant victims of gender-motivated violence a right to sue in federal court.¹¹

Those two cases, together with *Wickard*, yielded this modern framework for inter-

preting the Commerce Clause: Congress may regulate the exchange of products—that is, commerce—across state lines, and transportation linked to such exchanges. Congress can also regulate *noncommercial, economic* acts having a substantial aggregate effect on interstate commerce, such as growing and consuming wheat in *Wickard*. But Congress may not regulate *non-economic* acts, such as the mere possession of a gun in *Lopez* or a gender-based crime in *Morrison*.

Constitutional originalists insist that the rules derived from *Wickard* and *Lopez* are far more expansive than the Framers intended. Today, instead of serving as a shield against state interference with free trade, the Commerce Power has become a sword wielded by the federal government in pursuit of a boundless array of regulations. Indeed, if the Framers intended the Commerce Clause to cover any economic act that had a substantial effect on interstate commerce, why did they separately enumerate powers for Congress to coin money, establish post offices, and issue patents? Surely, those powers would be redundant and add nothing to the text. Yet, as Chief Justice John Marshall admonished in *Marbury v. Madison* (1803), “It cannot be presumed that any clause in the constitution is intended to be without effect.”¹²

Compelled Activity

Nonetheless, that’s where we now stand. The federal Commerce Power is indeed expansive. But the individual mandate in PPACA stretches still further—beyond dictating how, when, and under what conditions a product may be produced, distributed, exchanged, or consumed. The mandate actually compels that a transaction occur. Rather than merely regulating an economic act that affects interstate commerce, PPACA commands the purchase of a product—health insurance—that cannot legally be purchased across state lines. Under PPACA, neither an act nor an interstate market exists to be regulated.

Essentially, the insurance mandate is regulatory bootstrapping of the worst sort.

Congress forces someone to engage in commerce, then proclaims that the activity may be regulated under the Commerce Clause. If Congress can do that, it can prescribe all manner of human conduct.

We know, however, that liberty and pervasive government cannot coexist. Even if Congress can regulate Filburn's wheat production, that does not mean Congress can require consumers to purchase bread from their local grocer in order to subsidize wheat growers. At least for now, the Supreme Court's tortured Commerce Clause jurisprudence does not reach that far. In Judge Hudson's words: Courts have "never extended Commerce Clause powers to compel an individual to involuntarily enter the stream of commerce by purchasing a commodity in the private market."¹³

The litmus test is economic activity. A mental decision not to buy insurance is *not* a physical economic act. In that respect, it is no different than a decision not to work. Neither decision can be regulated simply because the non-act, if converted into an act, might have an effect on interstate commerce. As Judge Hudson put it, "the subject matter must be economic in nature and affect interstate commerce, and . . . *must involve activity*."¹⁴ (Emphasis added.) Thought processes are not subject to regulation.

Other Mandates

Defenders of PPACA respond that courts have upheld other federal mandates such as jury duty, the military draft, and obtaining guns for militia service. Perhaps so; but those mandates are encompassed within specific constitutional provisions. The Sixth and Seventh Amendments guarantee jury trials, which imply a power to select jurors. Article I, section 8 expressly empowers Congress "To raise and support Armies" and "provide for . . . arming . . . the Militia." When necessary, the Framers knew how to provide an express power, independent of the Commerce Clause.

What about state mandates such as involuntary community service, compulsory

schooling, and car insurance? First, states exercise police power and are not subject to constraints on federal authority in the U.S. Constitution. Second, community service does not require purchasing a good or service, and is not imposed by all schools—especially private and home schools. Third, compulsory schooling and mandatory car insurance are designed to protect the rights of innocent third parties—children, other drivers, and pedestrians. No car owner is compelled to buy casualty or comprehensive insurance that reimburses for injury to himself or his property. By contrast, PPACA directs individuals to acquire insurance on their own health. Fourth, cars are driven on public roads, so the government has some authority to dictate conditions for use of those roads. Fifth, nondrivers are not required to purchase car insurance. Driving is a voluntary activity, which has associated responsibilities. The insurance mandate is not voluntary and is imposed on everyone.

Timing Decisions

Finally, even if the mandate, considered in isolation, doesn't regulate economic activity, PPACA supporters contend that requiring health insurance is no different than requiring advance purchase of health care. Nearly everyone ultimately consumes health care; and consumption is clearly an economic act. Why then, so the argument goes, wouldn't the Commerce Clause allow the federal government to direct that health care be purchased now, by obtaining insurance, rather than later when the medical bill comes due? In other words, buying health insurance is just a timing decision about when, not whether, to incur medical costs. And if failure to purchase insurance were to trigger a penalty, it too would be mere timing—no different than assessing a penalty later, on someone who obtains future services from a hospital or doctor and does not pay the bill.

Judge Vinson was not convinced. Nor should he have been. Virtually all forms of insurance represent timing decisions—pay-

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ing up front for burial costs, loss of life, disability, supplemental income, credit default, business interruption, and more. Only a federal government of unbounded powers could mandate that every American insure against such risks. And while it might be permissible to penalize an uninsured person who shows up at a hospital or doctor’s office demanding that his expenses be borne by the taxpayers, that is not what PPACA does. Instead, PPACA penalizes *all* uninsured persons, not just those who seek to be reimbursed by government for costs they should have borne themselves. And PPACA does more than mandate coverage; it also prescribes certain provisions that each policy must include. Many Americans who prefer to insure using, for example, Health Savings Accounts with high deductible coverage, will be told by their federal overseers that such coverage isn’t adequate.

Never has the Commerce Clause been stretched to such lengths. Never could the Framers have envisioned such overweening federal power. That’s why proponents of PPACA had to fashion a fallback position.

The Necessary and Proper Clause

Art. I, sec. 8, cl. 18: “Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers.”

The Necessary and Proper Clause grants Congress the means to execute its enumerated powers or ends. It adds no new ends. And the chosen means must be both “necessary and proper”: They must respect the Constitution’s structure and spirit of limited government, the dual sovereignty of state and federal governments, and the rights retained by the people.

The Obama administration attempts, unsuccessfully, to shoehorn the insurance mandate into that framework. Suppose the mandate to buy health insurance does not qualify

as a direct regulation of interstate commerce. Even so, the administration argues, the Constitution authorizes implicit powers under the Necessary and Proper Clause. If government can show that (a) it has Commerce Clause authority to regulate interstate health care, (b) the insurance mandate is necessary for Congress to regulate interstate health care, and (c) the mandate is a proper means of doing so, then the courts are unlikely to intervene.

Note that the government’s argument is still premised on its underlying Commerce Clause authority—but over health *care*, not health insurance. Forcing Americans to purchase an insurance product they do not want is ostensibly permissible, but only because the mandate is a necessary and proper means of regulating the national health care system. That assertion is the corollary of two underlying contentions, both of which are flawed.

Cost Shifting and the Uninsured

First, the mandate is said to be necessary because its elimination would perpetuate the problem of the uninsured—that is, taxpayers would continue to bear the burden of uncompensated emergency care. Without the mandate, responsible, insured consumers would have to pay the health costs of irresponsible, uninsured consumers.

To put that in perspective, the Census Bureau reports that roughly 46 million Americans did not have health insurance at some point during 2007. But 10 million were non-citizens, mostly illegal; 14 million either did not report their Medicaid enrollment to the Census, or qualified but did not enroll; 10 million earned more than \$75,000 annually and might have preferred to self-insure.¹⁵ Even allowing for overlap, there were far fewer than 46 million uninsured citizens with income below \$75,000 who were not receiving or eligible to receive Medicaid. And many of the uninsured were temporarily without coverage because they were starting or switching jobs. Yes, there’s a residual problem, but it’s much less severe than trumpeted by backers of PPACA.

Furthermore, as Judge Vinson observed, cost shifting by the uninsured is not inevitable. It arises only if a person gets sick, seeks medical care, cannot pay, and has no access to funds from family, friends, or private charities.¹⁶ That cost can be more efficiently addressed if and when it arises.

Uncompensated care in the United States accounts for \$56 billion yearly—about 2.2 percent of our annual \$2.5 trillion in national health expenditures.¹⁷ That’s meaningful, but scarcely a crisis. Besides, many of the uninsured—those who are financially able and choose to self-insure—pay their bills without imposing costs on anyone. And because they self-insure, they typically pay higher prices for medical care—significantly more than is ordinarily reimbursed by public or private insurance. Those higher prices subsidize unhealthy insured individuals and offset the tax burden of uncompensated care.

Moreover, an insurance mandate does not eliminate the cost of uncompensated care. It simply transfers the cost to insurance companies, which recoup their outlays by selling PPACA-mandated policies to individuals who prefer not to own them. In fact, total healthcare costs will increase as more persons become insured. That’s the moral hazard predicament. Insured persons demand more medical services than persons who pay their own way. Higher demand means higher prices. It’s no accident that the costs of lasik and cosmetic surgery, which are not covered by insurance, have declined while the cost of MRIs, which is covered by insurance, has skyrocketed. PPACA’s insurance mandate will make matters worse. It is not only unnecessary; it is undesirable.

Admittedly, nonpurchasers of health insurance sometimes impose costs on others; but so do nonpurchasers of many other products that could potentially reduce health costs—such as nutritional foods, exercise gear, and preventive medicine. Does the government also claim authority under the Necessary and Proper Clause to coerce purchase of those products? If so, why stop with health care? Defaults on credit cards and

mortgages surely impose substantial costs on nondefaulters. Can government compel credit card and mortgage insurance?

Preexisting Conditions

The administration’s second rationale for invoking the Necessary and Proper Clause is no more convincing: Namely, it is essential that everyone be covered for preexisting conditions, and the insurance mandate is key to accomplishing that goal.

Interestingly, PPACA allotted \$5 billion for the Department of Health and Human Services to provide stopgap insurance to persons with preexisting conditions until the mandate is effective in 2014. Taxpayers subsidize 65 percent of the costs; coverage is extended to anyone turned down by a single insurance company; and premiums vary only by age, not health status. From the program’s inception in July 2010 through January 2011, combined federal and state enrollees numbered just over 12,000. Compare that to HHS estimates of 375,000 enrollees in the first four months and 400,000 more each year. That prompted the *Wall Street Journal* to editorialize that claims about a nation of sick indigents who are denied insurance may well be bogus. The country likely does not need a multitrillion-dollar entitlement to help 12,000 people.¹⁸

The Meaning of “Necessary”

Ironically, HHS has defended both sides of this argument. On one hand, the mandate is presumably necessary for purposes of the Necessary and Proper Clause. On the other hand, in its legal briefs, HHS advised the courts that the mandate is “severable”—meaning that PPACA need not be overturned in its entirety even if the mandate is declared unconstitutional. Put somewhat differently, HHS maintains that the mandate can be stripped from the legislation without affecting the bulk of its other provisions.

To explain that apparent contradiction, the administration relies on an 1819 Supreme Court opinion, *McCulloch v. Maryland*.¹⁹ There, Chief Justice John Marshall rejected the commonplace meaning of “necessary”—that is,

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required, needed, essential—and broadened it to include all means that are “plainly adapted” to achieving a designated objective. Applying that expansive standard, Congress decided that compulsory health insurance is a reasonable measure to facilitate coverage of preexisting conditions. Thus, pronounces HHS, the mandate may not be indispensable, but it is “plainly adapted.”

Once again, Judge Vinson saw through the sophistry: The mandate is artificially necessary—required only because Congress went down a particular path that left few if any alternatives. Vinson wrote: “[T]he individual mandate is actually being used as the means to avoid the adverse consequences of the Act itself [i.e., compulsory coverage of preexisting conditions]. . . . [T]he more dysfunctional the results of the statute are, the more essential or ‘necessary’ the statutory fix would be. Under such a rationale, the more harm the statute does, the more power Congress could assume for itself under the Necessary and Proper Clause.”²⁰

The Supreme Court is unlikely to endorse that rationale. But there is one other, more technical legal argument that the Court should also consider when it interprets “necessary” as it relates to the Commerce Clause. Prior cases established two bounds in deciding what means could be employed in regulating interstate commerce. First, if an activity is not commerce and not interstate, its regulation qualifies as “necessary” only if the activity has a “substantial effect” on interstate commerce. Second, if an activity is “non-economic,” its regulation falls outside the limits of “necessary.” PPACA’s challengers now ask the Court to establish a third restraint: The regulation of *inactivity* is never necessary in executing Congress’s Commerce Clause authority. That principle is easily administered by the courts, vital to constrain all-embracing federal power, and crucial to the Framers’ original design for limited government.

The Meaning of “Proper”

Lastly, consider the remaining term in the

Necessary and Proper Clause: the requirement that a regulation be “proper.” Here too, Chief Justice Marshall set the standard in *McCulloch*. A regulation is “proper” if it does not violate established rights and is consistent “with the letter and spirit of the constitution.”²¹ Only a handful of scholarly articles have addressed the legal meaning of “proper”; but Judge Vinson had no trouble applying Marshall’s guidepost: “The individual mandate . . . cannot be reconciled with a limited government of enumerated powers. By definition, it cannot be ‘proper.’”²²

Joseph Story, the renowned constitutional expert, expressed the same sentiment in his 1833 *Commentaries*: “The constitution of the United States is to receive a reasonable interpretation of its language, and its powers, keeping in view the objects and purposes, for which those powers were conferred. . . . [I]n case the words are susceptible of two different senses, the one strict, the other more enlarged, that should be adopted, which is most consonant with the apparent objects and intent of the Constitution.”²³ Extending that test to PPACA, no one could plausibly argue that the Commerce Power is so elastic as to compel the purchase by every American of an unwanted, government-designed product from a private company.

For a slightly different perspective on the meaning of “proper,” recall the Tenth Amendment, which provides that all powers not enumerated and delegated to the national government “are reserved to the States . . . or to the people.” That provision protects both state sovereignty and personal sovereignty against federal encroachment. One aspect of such protection is to bar the federal government from commandeering state legislatures (see *New York v. United States* [1992])²⁴ and state enforcement authorities (see *Printz v. United States* [1997])²⁵ to carry out federal programs. Because the Tenth Amendment is neutral as between reserving powers to the states or to the people, it follows that neither individuals nor states may be commandeered. Accordingly, a mandate that coerces individual acts is no more

“proper” than a mandate that coerces state acts.

What Should Congress Have Done?

What then should Congress have done about uninsured consumers and coverage of preexisting conditions, without running afoul of the Commerce Clause and the Necessary and Proper Clause? A number of options were suggested to Congress, but rejected. First, expedite competition by allowing interstate sales of health insurance. Second, encourage the states to reform their medical malpractice laws. Third, eliminate restrictions on Health Savings Accounts with high-deductible coverage. Fourth, and most important, change the income tax treatment of health insurance premiums that discriminates against individual policies in favor of corporate policies.

Medical insurance premiums are mainly paid by employers, not patients. Because patients do not bargain directly with providers of corporate health insurance, guaranteed renewable coverage, which would largely alleviate the problem of preexisting conditions, is not available in the corporate market. By comparison, individual consumers of term life insurance have no problem obtaining guaranteed renewable policies.

Our tax code is the culprit. Employees do not have to include the cost of employer-provided medical insurance as part of their taxable income, and businesses can deduct that cost as an ordinary expense. No equivalent deduction is available to individuals who buy their own health insurance. So it's more economical for each person to obtain standardized coverage through his employer, rather than tailored coverage from an insurer. In that manner, federal tax policy drives another wedge between the patient and his care provider. Not only is there an insurance company that pays the doctor or hospital, but also an employer that pays the insurance company. The net result is that

patients seldom monitor the cost of their medical care or their insurance. One solution: Allow patients to deduct the cost of medical insurance against their personal income taxes. That would eliminate the incentive for employers to pay for health insurance and remove the employer from the doctor-patient relationship. It would encourage consumers to do what they do in other markets—shop around for adequate and fairly priced service.

Those market-based solutions, grounded on individual responsibility, would raise no constitutional concerns. In contrast, PPACA is grounded on subsidies, dependency, and compulsion. Most significant, PPACA's key provision—the individual insurance mandate—is unconstitutional. It is not a tax; it is not interstate commerce; and it is neither necessary nor proper to fix our ailing healthcare system.

“At its core,” wrote Judge Hudson in the Virginia case, “this dispute is . . . about an individual's right to choose to participate.”²⁶ In Florida, Judge Vinson put it this way: “If Congress can penalize a passive individual for failing to engage in commerce, the enumeration of powers in the Constitution would have been in vain.”²⁷ That sums it up.

Notes

1. *Liberty Univ., Inc. v. Geithner*, 2010 U.S. Dist. LEXIS 125922 (W.D. Va. 2010); *Thomas More Law Ctr. v. Obama*, 720 F. Supp. 2d 882 (D. Mich. 2010); *Mead v. Holder*, 2011 U.S. Dist. LEXIS 18592 (D.D.C. 2011).
2. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).
3. *Florida v. United States HHS*, 2011 U.S. Dist. LEXIS 8822 (D. Fla. 2011); *Commonwealth ex rel. Cuccinelli v. Sebelius*, 728 F. Supp. 2d 768 (D. Va. 2010).
4. Congressional Budget Office, “The Budgetary Treatment of an Individual Mandate to Buy Health Insurance,” August 1994, p. 1, <http://www.cbo.gov/ftpdocs/48xx/doc4816/doc38.pdf>.
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PPACA's key provision—the individual insurance mandate—is unconstitutional.

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9. *Wickard v. Filburn*, 317 U.S. 111 (1942).
10. *United States v. Lopez*, 514 U.S. 549 (1995).
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14. *Commonwealth ex rel. Cuccinelli v. Sebelius*, 728 F. Supp. 2d 768, 781 (D. Va. 2010).
15. Sally C. Pipes, "The Top Ten Myths of American Health Care," Pacific Research Institute, October 2008, pp. 31-40, http://www.pacificresearch.org/docLib/20081020_Top_Ten_Myths.pdf.
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18. Editorial, "The 8,011-Person Crisis: Obamacare's Pre-existing Condition Program Is a Bust," *Wall Street Journal*, November 12, 2010. Note: Through October 31, 2010, 8,011 persons had enrolled for the preexisting condition program. Three months later, as noted in the text above, the number of enrollees had risen to 12,000—a trivial increase of 1,330 per month.
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26. *Commonwealth ex rel. Cuccinelli v. Sebelius*, 728 F. Supp. 2d 768, 788 (D. Va. 2010).
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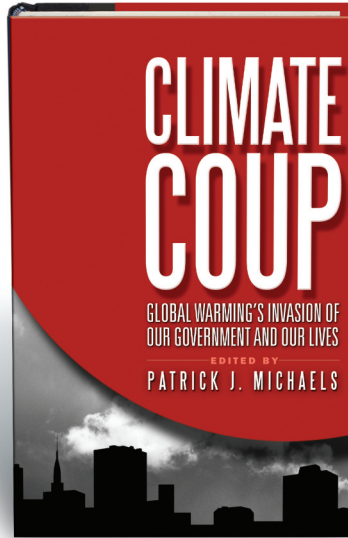
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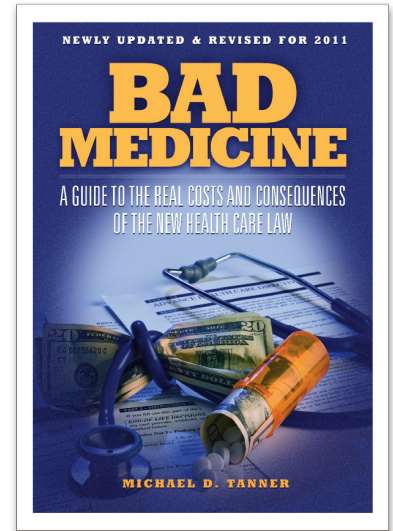
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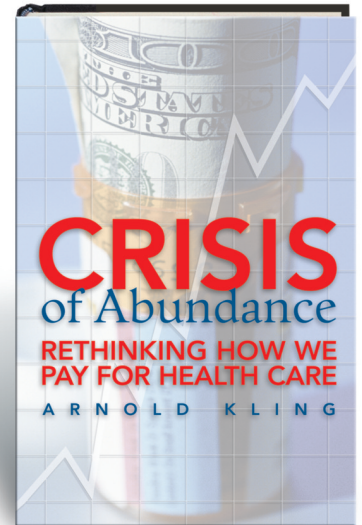
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