

Over 100 Law Professors Agree on Affordable Care Act's Constitutionality

"...there can be no serious doubt about the constitutionality of the minimum coverage provision."

We, the undersigned, write to explain why the "minimum coverage provision" of the Affordable Care Act (ACA), which requires most Americans who can afford it to have health insurance or pay a tax, rests on sound, long-established constitutional footing. The current challenges to the constitutionality of this legislation seek to jettison nearly two centuries of settled constitutional law.

Congress's power to regulate the national healthcare market is unambiguous. Article I of the U.S. Constitution authorizes Congress to regulate interstate commerce. The national market in healthcare insurance and services, which Congress found amounts to over \$2 trillion annually and consumes more than 17% of the annual gross domestic product, is unquestionably an important component of interstate commerce. One of the Framers' primary goals was to give Congress the power to regulate matters of national economic significance because states individually could not effectively manage them on their own. The problems facing the modern healthcare system today are precisely the sort of problems beyond the reach of individual states that led the Framers to give Congress authority to regulate interstate commerce.

Opponents of healthcare reform argue that a person who does not buy health insurance is not engaging in any commercial "activity" and thus is beyond Congress's power to regulate. But this argument misapprehends the unique state of the national healthcare market. Every individual participates in the healthcare market at some point in his or her life, and individuals who self-insure rather than purchase insurance pursue a course of conduct that inevitably imposes significant costs on healthcare providers and taxpayers.

Given that the minimum coverage provision bears a close and substantial relationship to the regulation of the interstate healthcare market, Congress can require minimum coverage pursuant to the Constitution's Necessary and Proper Clause. In a landmark decision studied by every law student, the Supreme Court in 1819 explained that the Necessary and Proper clause confirmed Congress's broad authority to enact laws beyond the strict confines of its other enumerated powers: "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end" are lawful, the Court wrote. Since then, the Supreme Court has repeatedly held that Congress, in regulating the national marketplace, can reach matters that when viewed in isolation may not seem to affect interstate commerce.

In 2005, Justice Antonin Scalia explained that the necessary and proper clause gives Congress broad authority to ensure that its economic regulations work. In Justice Scalia's words, "where Congress has authority to enact a regulation of interstate commerce, it possesses every power needed to make that regulation effective." Just last term, a majority of the Supreme Court, in an opinion joined by Chief Justice John Roberts, wrote that in "determining whether the Necessary and Proper Clause grants Congress the legislative authority to enact a particular federal statute, we look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power."

The ACA's minimum coverage provision fits easily within this framework. The ACA eliminates one of the insurance industry's worst practices—denying coverage to people with preexisting conditions—but this goal cannot be achieved if potential patients refuse to pay into a plan during their healthy years and, when they eventually fall ill, drain the insurance funds contributed by others. Those who choose to forgo insurance altogether end up relying on costly emergency room care funded by the public, undermining Congress's effort to combat the spiraling costs of healthcare.

The direct relationship between the minimum coverage provision and the ACA's broad and comprehensive regulation of a multitude of economic transactions involving insurance companies, hospitals, doctors, and patients sets this apart from hypothetical laws requiring individuals, for example, to eat broccoli. To draw a

connection between a person's decision to eat broccoli and the financial stability of the national healthcare market requires one to pile inference upon inference. In contrast, the connection between individuals' method of insurance is obvious and depends upon no such attenuated reasoning.

Nothing in the Constitution's text, history, or structure suggests that, in exercising its enumerated powers, Congress is barred from imposing reasonable duties on citizens on the theory that such requirements amount to regulating "inactivity." Indeed, the Framers would be surprised by this view of Congress's powers; they enacted an individual mandate in the Second Militia Act of 1792, which required all men eligible for militia service to outfit themselves with a military style firearm, ammunition, and other equipment, even if such items had to be purchased in the marketplace. Today, individuals are still obligated by federal law to perform other actions, like serve on juries, file tax returns, and register for selective service, among other duties.

Finally, we note that Congress also has the authority to enact the minimum coverage provision under the power to levy taxes to promote the general welfare. Opponents say the provision is not a tax because the final version of the law used the descriptive term "penalty" rather than the term "tax." Yet the Supreme Court has expressly held that a law amounts to a tax for constitutional purposes if it raises revenue. As the Court explained, the only concern is a law's "practical application, not its definition or the precise form of descriptive words which may be applied to it." Moreover, Congress imposed the minimum coverage requirement only upon taxpayers, made the tax payable through individual tax returns, and charged the Internal Revenue Service with collection of the tax. For the Court to reverse the democratic judgment of Congress on the arbitrary and insubstantial basis that certain "magic words" were not used would undermine the careful separation of powers established by the Constitution.

People can disagree about the wisdom of the Affordable Care Act, but there can be no serious doubt about the constitutionality of the minimum coverage provision.

Libby S. Adler

Professor of Law

Northeastern University School of Law

Vikram Amar

Associate Dean for Academic Affairs and Professor of Law

UC Davis School of Law

Frank Askin

Distinguished Professor of Law and Director of the Constitutional Litigation Clinic

Rutgers School of Law-Newark

Reuven Avi-Yonah

Irwin I. Cohn Professor of Law

University of Michigan Law School

Jack Balkin

Knight Professor of Constitutional Law and the First Amendment

Yale Law School

Ian Bartrum

Assistant Professor of Law

Drake University Law School

Joseph Bauer

Professor of Law
University of Notre Dame Law School

Theresa M. Beiner

Nadine Baum Distinguished Professor of Law
University of Arkansas Little Rock William H. Bowen School of Law

Eric Berger

Assistant Professor of Law
University of Nebraska College of Law

Micah Berman

Assistant Professor of Law and Director, Center for Public Health and Tobacco Policy
New England Law

Ashutosh Baghwat

Professor of Law
UC Hastings College of Law

Vincent Blasi

Corliss Lamont Professor of Civil Liberties
Columbia Law School

Eric Blumenson

Professor of Law
Suffolk University Law School

Alfred W. Blumrosen

Professor of Law Emeritus
Rutgers University School of Law - Newark

Linda Bosniak

Distinguished Professor
Rutgers University School of Law-Camden

John C. Britain

Professor of Law
University of the District of Columbia School of Law

Karen Brown

Donald Phillip Rothchild Research Professor of Law
George Washington University Law School

Rebecca Brown

University of Southern California Gould School of Law
Newton Professor of Constitutional Law

Mark Brown

Newton D. Baker/Baker & Hostetler Professor of Law

Capitol University Law School

Harold Bruff

Charles Inglis Thomson Professor of Law
University of Colorado Law School

Neil Buchanan

Associate Professor of Law
George Washington University Law School

Kim Buchanon

Associate Professor of Law
University of Southern California Gould School of Law

Patricia Cain

Aliber Family Chair Emeritus
The University of Iowa College of Law

Emily Calhoun

Professor of Law
University of Colorado Law School

Alexander M. Capron

University Professor, Scott H. Bice Chair in Healthcare Law, Policy and Ethics, and Professor of Law
and Medicine
University of Southern California Gould School of Law

Guy-Uriel Charles

Professor of Law
Duke University School of Law

Erwin Chemerinsky

Founding Dean
UC Irvine School of Law

Steven Cohen

Professor of Law
Georgetown Law

Michael Curtis

Judge Donald L. Smith Professor in Constitutional and Public Law
Wake Forest University School of Law

Richard Daynard

Professor of Law
Northeastern

Walter Dellinger III

Douglas B. Maggs Professor Emeritus of Law

Duke University School of Law

John DiPippa

Dean and Distinguished Professor of Law and Public Policy
University of Arkansas Little Rock William H. Bowen School of Law

Michael Dorf

Robert S. Stevens Professor of Law
Cornell University Law School

Erica Eisinger

Visiting Professor of Law
Rutgers School of Law-Newark

Peter Enrich

Professor of Law
Northeastern University School of Law

Susan Estrich

Robert Kingsley Professor of Law and Political Science
University of Southern California Gould School of Law

Dan Faber

Sho Sato Professor of Law and Director, Environmental Law Program
UC Berkeley School of Law

Barbara J. Fick

Associate Professor of Law
University of Notre Dame Law School

Howard M. Friedman

Distinguished University Professor Emeritus
University of Toledo

Lawrence Friedman

Professor of Law
New England School of Law

Brian Galle

Assistant Professor of Law
Boston College Law

Lee Goldman

Professor of Law
University of Detroit Mercy School of Law

Robert Goldstein

Professor of Law and Special Assistant to the Vice Chancellor for Academic Personnel
UCLA School of Law

Risa Goluboff

Caddell & Chapman Professor of Law and Professor of History
University of Virginia School of Law

Laura Gomez

Professor of Law
University of New Mexico School of Law

Craig Green

Associate Professor of Law
Temple University Beasley School of Law

Edwin H. Greenebaum

Professor Emeritus of Law
Maurer School of Law, Indiana University

Abner Greene

Leonard F. Manning Professor of Law
Fordham University School of Law

Jamal Greene

Associate Professor of Law
Columbia Law School

Kent Greenfield

Professor of Law
Boston College Law

Dan Greenwood

Professor of Law
Hofstra Law School

Ariela Gross

John B. & Alice R. Sharp Professor of Law & History
University of Southern California Gould School of Law

Paul Hardin

Chancellor Emeritus and Professor of Law Emeritus
University of North Carolina School of Law

Melissa Hart

Associate Professor of Law and Director of the Byron R. White Center
University of Colorado Law School

Rick Hills

William T. Comfort, III Professor of Law
New York University School of Law

Michael Hoffheimer

Professor of Law and Mississippi Defense Lawyers Association Distinguished Lecturer
The University of Mississippi School of Law

Barbara Hoffman

Legal Research and Writing Instructor
Rutgers School of Law-Newark

Nicole Huberfeld

Gallion & Baker Associate Professor of Law
University of Kentucky College of Law

Jonathan M. Hyman

Professor of Law and Alfred C. Clapp Public Interest Scholar
Rutgers School of Law – Newark

Calvin Johnson

Andrews & Kurth Centennial Professor
The University of Texas at Austin School of Law

Dawn Johnson

Walter W. Foskett Professor of Law
Indiana University

Vincent Johnson

Professor of Law
St. Mary's School of Law

Tim Jost

Robert L. Willett Family Professor of Law
Washington & Lee University School of Law

David Kairys

Professor of Law
Temple University Beasley School of Law

Kenneth L. Karst

David G. Price and Dallas P. Price Professor of Law Emeritus
UCLA School of Law

Kenneth Katkin

Professor of Law
Northern Kentucky University Salmon P. Chase College of Law

Mark Kaufman

Professor of Law
Concord Law School

Gregory Keating

William T. Dalessi Professor of Law and Philosophy
University of Southern California Gould School of Law

Dr. Fazal Khan
Assistant Professor of Law
University of Georgia Law

Neil Kinkopf
Professor of Law
Georgia State University

Heidi Kitrosser
Associate Professor of Law and Vance K. Opperman Research Scholar
U of Minnesota

Edward Kleinbard
Professor of Law
University of Southern California Gould School of Law

Carlton Larson
Professor of Law
UC Davis School of Law

Laurie Levenson
Professor of Law, David W. Burcham Chair of Ethical Advocacy
Loyola Law School

Hope Lewis
Professor of Law
Northeastern

Ethan Lieb
Professor of Law
UC Hastings College of the Law

Rory Little
Professor of Law
UC Hastings College of the Law

Christine Littleton
Vice Provost, Diversity & Faculty Development and Professor of Law
UCLA School of Law

Gregory Magarian
Professor of Law
Washington University in St. Louis School of Law

William Marshall
William Rand Kenan, Jr. Distinguished Professor of Law

University of North Carolina School of Law

Jerry Marshaw

Sterling Professor of Law
Yale Law School

Stephen McJohn

Professor of Law
Suffolk University Law School

Mark P. McKenna

Associate Professor of Law
University of Notre Dame Law School

Ajay Mehrotra

Professor of Law
Maurer School of Law, Indiana University

Michael Meltsner

Matthews Distinguished University Professor of Law
Northeastern

Saul Mendlovitz

Dag Hammarskjöld Professor of Law
Rutgers School of Law-Newark

Frances Miller

Professor of Law Emerita
Boston University School of Law

Alan B. Morrison

Lerner Famil Associate Dean for Public Interest and Public Service
The George Washington University Law School

Scott Moss

Associate Professor of Law
University of Colorado Law School

Eric Muller

Dan K. Moore Distinguished Professor in Jurisprudence and Ethics and Associate Dean for Faculty
Development
University of North Carolina School of Law

Gene Nichol

Professor of Law and Director of the Center on Poverty, Work & Opportunity
University of North Carolina School of Law

Christiana Ochoa

Professor of Law and Charles L. Whistler Faculty Fellow

Maurer School of Law, Indiana University

Aviva Orenstein

Professor of Law and Val Nolan Faculty Fellow
Maurer School of Law, Indiana University

Kevin Outterson

Associate Professor of Law and Associate Professor of Health Law, Bioethics and Human Rights
Boston University School of Law

Wendy E. Parmet

Matthews Distinguished University Professor of Law
Northeastern

Richard Primus

Professor of Law
University of Michigan Law School

David T. Ritchie

Associate Professor of Law
Mercer University School of Law

Daria Roithmayr

Professor of Law
University of Southern California Gould School of Law

Kermit Roosevelt

Professor of Law
University of Pennsylvania Law School

Mark Rosen

Professor of Law and Freehling Scholar
Chicago-Kent

Sara Rosenbaum

Professor of Health Services Management and Policy and Chair, Department of Health Policy, School
of Public Health and Health Services
The George Washington University Law School

James V. Rowen

Professor of Law
Northeastern University School of Law

Thomas D. Rowe, Jr.

Elvin R. Latty Professor of Law Emeritus
Duke University School of Law

Theodore Ruger

Professor of Law

University of Pennsylvania Law School

Richard Schragger

Professor of Law
University of Virginia

Steve Schwinn

Associate Professor of Law
The John Marshall Law School

Paul Secunda

Associate Professor of Law
Marquette

Ilene Seidman

Assistant Dean, Clinical Professor of Law and Associate Director of Clinical Programs
Suffolk University Law School

Ted Seto

Professor of Law and William Rains Fellow
Loyola-L.A. Law School

Jeffrey Shaman

Vincent dePaul Professor of Law
DePaul College of Law

Darien Shanske

Associate Professor of Law
UC Hastings School of Law

Neil Siegel

Professor of Law and Political Science
Duke University School of Law

Jessica Silbey

Associate Professor of Law
Suffolk University Law School

Joshua M. Silverstein

Associate Professor of Law
University of Arkansas Little Rock William H. Bowen School of Law

Joseph Slater

Eugene N. Balk Professor of Law and Values
Toledo

Jessica Slavin

Associate Professor of Legal Writing
Marquette University Law School

Carla Spivak

Associate Professor of Law
Oklahoma City University School of Law

Ralph Michael Stein

Professor of Law
Pace Law School Pace University

Geoffrey Stone

Edward H. Levi Distinguished Service Professor of Law
The University of Chicago Law School

Jay Tidmarsh

Professor of Law
University of Notre Dame Law School

Daniel Tokaji

Professor of Law and Associate Director of Election Law @ Moritz
The Ohio State University Michael E. Moritz College of Law

Franita Tolson

Assistant Professor of Law
Florida State University College of Law

Paul Tractenberg

Board of Governors Distinguished Service Professor and Alfred C. Clapp Distinguished Public Service
Professor of Law
Rutgers School of Law-Newark

Laurence Tribe

Carl M. Loeb University Professor and Professor of Constitutional Law
Harvard

Jonathan Varat

Professor of Law
UCLA School of Law

Judith Welch Wegner

Burton Craige Professor of Law
University of North Carolina School of Law

Deborah Weissman

Reef C. Ivey II Distinguished Professor of Law
University of North Carolina School of Law

Norman Williams

Professor of Law and Director of the Center for Law and Government
Willamette University College of Law

Lauren E. Willis
Professor of Law
Loyola Law School

Adam Winkler
Professor of Law
UCLA School of Law