

# HEALTH CARE AND CONSTITUTIONAL CHAOS: WHY THE SUPREME COURT SHOULD UPHOLD THE AFFORDABLE CARE ACT

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The Supreme Court's decision on the constitutionality of the Affordable Care Act (ACA) will likely be handed down on the last day of this year's term. If the Court finds that the ACA—either in whole or in part—violates the Constitution, the health care industry will be shaken to its core. And, no matter what legal justification the Court uses to invalidate the ACA, the structure of constitutional law will be severely undercut. The resulting medical and legal chaos will be expensive, divisive, and completely unnecessary. Nothing in the text, history or structure of the Constitution warrants the Court overturning Congress's effort to address our national health care problems.

For the health care industry, a decision striking down the entire ACA would be an absolute disaster. Physicians, hospitals, and private companies have been shifting how they practice medicine in anticipation of the ACA's implementation. They've been creating accountable care organizations,<sup>1</sup> envisioning a significant reduction in uncompensated care, and enjoying increased Medicare and Medicaid reimbursement in primary care settings.<sup>2</sup> That will all vanish if the ACA is struck down. Moreover, seniors will pay more for prescription drugs and young adults will be taken off their parents' insurance. The private insurance industry, which has seen its market shrink significantly over

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1. Jenny Gold, *FAQ on ACOs: Accountable Care Organizations, Explained*, KAISER HEALTH NEWS (Oct. 21, 2011), <http://www.kaiserhealthnews.org/stories/2011/january/13/aco-accountable-care-organization-faq.aspx>.

2. Fatima Najiy, *Primary Care Physicians Receive Increased Medicare Payments Under ACA*, THINKPROGRESS HEALTH (May 9, 2012, 2:07 PM), <http://thinkprogress.org/health/2012/05/09/481050/primary-medicare/?mobile=nc>.

the last decade,<sup>3</sup> will see a real chance to reverse that trend disappear. According to one estimate, if the ACA is overturned, insurers may lose over \$1 trillion in revenues between 2013 and 2020.<sup>4</sup>

A more likely scenario is that the Court will invalidate only the individual mandate. The problem is that the mandate serves a limited, necessary, and often misunderstood role in health care reform. The major purpose of the ACA is to improve issue and affordability. Here's how it works: If you don't get your insurance through your job today, you most likely have to purchase an individually rated policy on the open market. Such insurance can be difficult to obtain because it is hard for insurers to calculate and pool risk when they are taking bets on individuals. The situation becomes even more complicated if you have a chronic disease. If an insurance company knows you are already ill, it likely will refuse to cover you at all. Since more than 130 million of us have some form of chronic disease, large numbers of Americans can't get an insurance policy even if they want it.<sup>5</sup> And, if you are lucky enough to be able to get it, it's unlikely you can afford it.

One way to fix this problem would be to enact universal coverage through a single-payer system, like Medicare. But that's not politically feasible. Therefore, there is only one other option: finding a way to make private insurance more available and affordable for everyone. Doing nothing is simply not an option, as millions of Americans don't have any coverage at all, and a major cause of bankruptcy in America is expensive health care.<sup>6</sup>

The first step to the solution is to mandate that private insurance companies can't refuse to cover people who wish to purchase insurance. That's called "guaranteed issue," which is already the law in several states.<sup>7</sup> The next problem is one of affordability. The law can require insurance companies to issue policies, but insurers will compensate by charging exorbitant premiums to those they'd rather not cover.

To avoid that problem, lawmakers need to prohibit insurance companies from individually rating applicants. This is akin to how you get insurance from

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3. CARMEN DENAVAS-WALT, BERNADETTE D. PROCTOR, & JESSICA C. SMITH, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2010 82 (U.S. Census Bureau Ser. No. P60-239, 2011), available at <http://www.census.gov/prod/2011pubs/p60-239.pdf>.

4. Sarah Kliff, *Obamacare Repeal Would Cost Insurers \$1 Trillion*, WASH. POST WONKBLOG (May 15, 2012, 3:53 PM), [http://www.washingtonpost.com/blogs/ezra-klein/post/obamacare-repeal-would-cost-insurers-1-trillion/2012/05/15/gIQADGbrRU\\_blog.html](http://www.washingtonpost.com/blogs/ezra-klein/post/obamacare-repeal-would-cost-insurers-1-trillion/2012/05/15/gIQADGbrRU_blog.html).

5. *Chronic Diseases and Health Promotion*, CENTERS FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/chronicdisease/overview/index.htm> (last updated July 7, 2010).

6. Catherine Arnst, *Study Links Medical Costs and Personal Bankruptcy*, BLOOMBERG BUSINESSWEEK (June 4, 2009, 8:45 AM), [http://www.businessweek.com/bwdaily/dnflash/content/jun2009/db2009064\\_666715.htm](http://www.businessweek.com/bwdaily/dnflash/content/jun2009/db2009064_666715.htm).

7. See George Lauer, *Where Would Consumers, Insurers, Land if ACA Is Struck Down?*, CAL. HEALTHLINE (Apr. 5, 2012), <http://www.californiahealthline.org/features/2012/where-would-consumers-insurers-land-if-aca-is-struck-down.aspx>.

a large employer. Companies and the government don't take medical histories of their employees when offering insurance. Just by being part of a large group, you get to buy insurance at the same price as everyone else. This is called "community rating," and it's also the law in a number of states already.<sup>8</sup>

So far, so good. But there's another problem. If insurers have to grant a policy to anyone who wants one, but also can't charge people more if they are ill, many young and healthy people will forego buying insurance. They know they can purchase the insurance when they do get sick. This opt-out will lead to insurance becoming more expensive for those insured, which will, in turn, lead to more healthy people exiting the market. Soon, what is known as a "death spiral" occurs, and insurance becomes too expensive for everyone.<sup>9</sup>

To prevent this spiral, healthy people need to enter the insurance market along with sick people. One way to do that is to create short open-enrollment periods or charge those who delay entering the insurance market a significant penalty when they finally do choose to join. But the most efficient way of avoiding adverse selection is to *mandate* that everyone buy insurance. Short of a single-payer system, a mandate leads to the fewest people being uninsured and the lowest overall cost of premiums for everybody.

If the government requires people to buy insurance, it also has to make sure everyone can afford it. That's where the subsidies come into play. Those who make less than 400% of the poverty line will receive money to help offset the cost of premiums they wouldn't otherwise be able to pay for.

Add it all together, and you wind up with the ACA. This is why people refer to the guaranteed issue/community ratings, the individual mandate, and the subsidies as the "three-legged stool" of the ACA. Make no mistake about it—striking down the individual mandate leg of that stool could make guaranteed issue almost impossible to achieve, because then only sick people would buy insurance, and the insurance companies would either have to charge higher premiums or go out of business. The stool then becomes unstable, along with the private insurance market and our entire health care system.

Not only would a Court decision striking down the mandate cause significant uncertainty for the health care markets, possibly precipitating another grave economic crisis; it would also generate legal uncertainty, as it would cast into doubt fundamental constitutional law principles governing national power that have been widely accepted for generations.

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8. *Individual Market Rate Restrictions (Not Applicable to HIPAA Eligible Individuals)*, 2011, STATEHEALTHFACTS.ORG, <http://www.statehealthfacts.org/comparetable.jsp?typ=5&ind=354&cat=7&sub=87&sortc=2&o=a> (last visited May 28, 2012).

9. See Avik Roy, *Want to See a Health Insurance Death Spiral? Visit Washington State*, FORBES (Mar. 30, 2012, 11:17 AM), <http://www.forbes.com/sites/aroy/2012/03/30/want-to-see-a-health-insurance-death-spiral-visit-washington-state>.

In *M'Culloch v. Maryland*,<sup>10</sup> decided in 1819, the Supreme Court upheld the constitutionality of a congressionally created National Bank even though the power to create a bank (or any corporation) is not listed in the Constitution. The Court held that, under the Necessary and Proper Clause, as long as the “end be legitimate,” Congress can use any “appropriate” (or rational) means to further that end.<sup>11</sup> That principle forms the doctrinal basis for much of constitutional law. For example, in 2010, the Court held that Congress could order the civil detention of dangerous sexual predators after their federal sentences had run their course—again in the absence of any specific constitutional provision giving Congress that power.<sup>12</sup> The vote in that case, which strongly affirmed the breadth of Congress’s powers under the Necessary and Proper Clause, was 7-2, with only Justices Scalia and Thomas dissenting.

Applying these constitutional principles to the Affordable Care Act (absent political and partisan considerations) should be easy and uncontroversial. Congress has the enumerated authority to regulate commerce among the states. The health care and health insurance industries are multibillion-dollar enterprises that affect our national economy. Under the rationale of *M'Culloch*, requiring people to buy health insurance is an appropriate or reasonable way for Congress to regulate commerce among the states, and thus fully constitutional.

So, what is all the fuss about? Opponents of the individual mandate make two legal arguments concerning the constitutional invalidity of the law. First, they argue there is a constitutional difference between regulating “activity” and regulating “inactivity.” Second, they posit that the federal mandate to buy health insurance gives such unlimited power to the federal government that it violates the Tenth Amendment and would allow Congress to make people buy any commercial product: today health insurance, tomorrow broccoli.

The answer to the first concern is that there is no provision in our Constitution that prohibits Congress from regulating inactivity when exercising its enumerated powers. Because the mandate is a reasonable part of Congress’s regulation of health care as a whole, it is a valid exercise of the commerce power and the Necessary and Proper Clause. It is therefore constitutional unless there is a separate limitation in the Constitution implicated by the mandate. There isn’t.

The best way to illustrate the clear constitutionality of the ACA is to think about Congress’s power to fund the Air Force or charter the American Red Cross. While the Constitution talks about an army and navy, it says nothing about an air force, and of course does not mention any organization like the Red Cross. So where does Congress get the power to spend money on military jets and ensure a safe supply of blood? It is because they are reasonably related to other enumerated powers, and there is no “anti-air force,” or “anti-Red

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10. 17 U.S. (4 Wheat.) 316 (1819).

11. *Id.* at 421.

12. *United States v. Comstock*, 130 S. Ct. 1949 (2010).

Cross,” language in the Federal Constitution, just like there is no “anti-mandate” language.

Not only is the mandate justified under legal principles going back to 1819, it also is clearly supported by cases decided as recently as 2005. In *Gonzales v. Raich*,<sup>13</sup> the issue was whether Congress could criminalize possessing marijuana in the privacy of one’s home when the marijuana was never bought or sold, never moved across state lines, and was legal under state law. Five Justices—the four liberals/moderates plus Justice Kennedy—held that Congress has the Commerce Clause authority to regulate noncommercial local activity, as long as Congress could rationally believe doing so was necessary to avoid undercutting regulation of a national market.<sup>14</sup> That rationale, of course, fully supports the ACA. As the first part of this Essay demonstrates, Congress could rationally have thought that requiring people to buy health insurance or pay a penalty (or tax) was necessary for Congress’s overall scheme of regulating health care.

But even if you don’t accept the majority’s rationale in *Raich*, Justice Scalia filed a concurrence that fully justifies the mandate. He supported Congress’s authority to criminalize homegrown and privately used marijuana on the basis of the Necessary and Proper Clause. He argued:

Congress’s 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. . . . The relevant question is simply whether the means chosen are “reasonably adapted” to the attainment of a legitimate end under the commerce power.<sup>15</sup>

Is the requirement that people buy health insurance “reasonably adapted” to “a legitimate end under the commerce power?” The only possible answer is yes.

Despite his *Raich* concurrence, Justice Scalia hinted during the oral arguments on the ACA that the individual mandate might be constitutionally “necessary” under the Necessary and Proper Clause, but not constitutionally “proper.” But he mentioned no basis, nor made any argument, to show that may be the case.

There are many regulations of economic activity that might not be “proper” because they would violate other specific constitutional limitations on Congress’s enumerated powers. For example, even though Congress has the Commerce Clause authority to regulate the interstate shipment of newspapers, the First Amendment would prohibit Congress from doing so in a way that unconstitutionally restricts speech or violates the freedom of religion. But there simply is no analogous constitutional anti-mandate or anti-regulating-inactivity language in the constitutional text.

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13. 545 U.S. 1 (2005).

14. *Id.* at 18.

15. *Id.* at 36-37 (Scalia, J., concurring).

The usual response to this argument is to point to the Tenth Amendment as a limitation on Congress's power to require Americans to buy health insurance. But it is undisputed that the text of the Tenth Amendment says nothing about mandates, inactivity, or any other aspect of Congress's power to regulate commerce among the states (including health care); it simply says that all powers not delegated to the national government are reserved to the states or to the people. The commerce power, of course, is explicitly delegated to Congress.

The last resort argument of anti-mandate advocates is that the Tenth Amendment stands for the *principle* that the federal government has limited powers, and the ACA (or any other law that gives Congress unlimited powers) violates that principle. But allowing Congress to use mandates or regulate inactivity when it regulates commerce does not give it unlimited powers. All laws passed under the Commerce Clause, including laws that use mandates or regulate inactivity, must be rationally related to a legitimate constitutional end. On today's facts, requiring Americans to buy broccoli would fail the rationality test. If Congress had a reasonable or rational commercial justification (or end) for a broccoli mandate, however, then the Commerce Clause and the Necessary and Proper Clause would permit the mandate. We rely on this reasonableness test in most areas of constitutional law to act as the limiting principle on governmental power, and there is no reason not to do so here.

The leading academic proponent of a decision overturning the ACA has conceded that the law is an attempt to "transform a sixth of the national economy."<sup>16</sup> Whatever can be said about that economic plan as a policy matter, there can be no question that (1) it is a regulation of commerce among the states; and (2) there is no textual or precedential constitutional principle that suggests Congress can't use all reasonable tools to regulate that commerce, including the use of an individual mandate.

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16. Randy Barnett, *Judicial Minimalism and the Individual Mandate*, VOLOKH CONSPIRACY (May 20, 2012, 5:05 PM), <http://volokh.com/2012/05/20/judicial-minimalism-and-the-individual-mandate>.