

# CONSTITUTIONALITY OF THE INDIVIDUAL MANDATE

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## HEARING BEFORE THE COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES ONE HUNDRED TWELFTH CONGRESS FIRST SESSION

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FEBRUARY 16, 2011  
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WEDNESDAY, FEBRUARY 16, 2011

HOUSE OF REPRESENTATIVES,  
COMMITTEE ON THE JUDICIARY,  
*Washington, DC.*

The Committee met, pursuant to call, at 9:35 a.m., in room 2141, Rayburn House Office Building, the Honorable Lamar Smith (Chairman of the Committee) presiding.

Present: Representatives Smith, Sensenbrenner, Coble, Gallegly, Goodlatte, Lungren, Chabot, Issa, Pence, Forbes, King, Franks, Gohmert, Poe, Chaffetz, Reed, Griffin, Marino, Gowdy, Ross, Adams, Quayle, Conyers, Nadler, Scott, Watt, Lofgren, Jackson Lee, Waters, Cohen, Johnson, Quigley, Chu, Deutch, and Wasserman Schultz.

Staff Present: (Majority) Allison Halataei, Deputy Chief of Staff/Parliamentarian; Zachary Somers, Counsel; and Heather Sawyer, Minority Counsel.

Mr. SMITH. The Judiciary Committee will come to order. Without objection, the Chair is authorized to declare recesses of the Committee at any time. We welcome our panelists today as well as all Members who are present in the room. I am going to recognize myself for an opening statement, and then recognize the Ranking Member for his opening statement.

As the Framers of the Constitution understood, Congress has an independent duty to examine the constitutionality of the legislation it considers. Ideally, we should assess the constitutionality of legislation before it becomes law. However, given the unprecedented nature of the health care law's individual mandate, it is important that we examine its constitutionality then though it has already been enacted.

The individual mandate, which requires all Americans to purchase health insurance, is the foundation of the new health care law. It is also, in my judgment, unprecedented. Twenty-seven States are now challenging the constitutionality of the new law. Two Federal district court judges have ruled that the individual mandate is unconstitutional, two have determined that it is not. Ultimately, it will, of course, be decided by the Supreme Court.

The individual mandate requires Americans to purchase health insurance from a private company. It does not matter whether they want health insurance or can even afford it. Under this law, Americans must either obtain insurance or pay a penalty. But the Constitution, which creates a Federal Government of limited, enumer-

ated powers, does not necessarily allow Congress to require individuals to purchase any good or service including health insurance.

As Judge Vinson observed in his opinion in the Florida case declaring the health care law unconstitutional, “it is difficult to imagine that a Nation which began, at least in part, as a result of opposition to a British mandate imposing a nominal tax on all tea sold in America, would have set out to create a government with the power to force people to buy tea in the first place.”

The Obama administration argues that the individual mandate is either a law that is necessary and proper for the regulation of interstate commerce or, alternatively, that the mandate is constitutional because it is a tax.

The Administration’s arguments are supported by neither the original meaning of the Constitution nor Supreme Court precedent.

The Constitution gives Congress the authority to regulate economic activity, which includes everything from growing wheat to managing a restaurant to running a Fortune 500 company. But the current health care law wrongly assumes that Congress can also regulate economic inactivity. Neither the Constitution nor the Supreme Court has ever given Congress that authority.

There is a difference between regulating economic activity that is ongoing and forcing Americans to engage in an economic activity, in this case, purchasing health insurance. Part of a free society means the freedom to choose not to do something. Never before in America’s history has Congress required people to purchase a good or service simply because they live in the United States, at least not until now.

If the commerce clause allowed Congress to regulate inactivity, Congress could force Americans to buy anything that might conceivably affect commerce in some way. If the housing sector were struggling, Congress could force renters to purchase a house. If the auto industry is on the verge of collapse, Congress could force individuals who take public transportation to purchase a car, or if falling citrus prices were driving farmers into bankruptcy, Congress could force consumers to purchase oranges.

The Administration asserts that the decision not to purchase health insurance is unique because if Americans don’t purchase health insurance, the cost of their health care shifted to the government. But the same can be said of every other type of insurance that people choose not to purchase. There is no end to the number of commercial transactions Americans could be forced into if the commerce clause were as broad as the Obama administration argues.

Because the Administration’s commerce clause argument is without legal precedent the Administration has argued that the individual mandate is authorized by Congress’ power to tax. This argument, however, is an unpersuasive revisionist justification for the mandate that was not raised until the mandate was challenged in court.

The health care law explicitly calls the penalty imposed on those who fail to purchase insurance a penalty not a tax. As President Obama stated, the mandate is “absolutely not a tax” and “nobody considers it a tax increase.” Additionally the mandate’s penalty is not listed with the provisions of the health care law intended to

raise revenue for the government. And the IRS is prohibited from seeking the same types of punishment for failure to pay the penalty as it does for failure to pay taxes.

The arguments in favor of the constitutionality of the individual mandate are unconvincing and, if accepted, would give the Federal Government almost unlimited power over Americans' lives. In my opinion, the individual mandate is both unprecedented and unconstitutional. We should question any law that appears to violate the Constitution and common sense.

[The prepared statement of Mr. Smith follows:]



**Statement of Judiciary Committee Ranking Member Lamar Smith  
Hearing on the “Constitutionality of the Individual Mandate”**

**Chairman Smith:** As the Framers of the Constitution understood, Congress has an independent duty to examine the constitutionality of the legislation it considers.

Ideally, we should assess the constitutionality of legislation before it becomes law. However, given the unprecedented nature of the health care law’s individual mandate, it is important that we examine its constitutionality even though it has already been enacted.

The individual mandate—which requires all Americans to purchase health insurance—is the foundation of the new health care law. It is also unprecedented.

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The Obama administration argues that the individual mandate is either a law that is necessary and proper for the regulation of interstate commerce or, alternatively, that the mandate is constitutional because it is a tax. The Administration’s arguments are supported by neither the original meaning of the Constitution nor Supreme Court precedent.

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Additionally, the mandate's penalty is not listed with the provisions of the health care law intended to raise revenue for the government. And the IRS is prohibited from seeking the same types of punishment for failure to pay the penalty as it does for failure to pay taxes.

The arguments in favor of the constitutionality of the individual mandate are unconvincing and, if accepted, would give the federal government almost unlimited power over Americans' lives.

In my opinion, the individual mandate is both unprecedented and unconstitutional. We should question any law that appears to violate the Constitution and common sense.

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Mr. SMITH. That concludes my opening statement. I am very pleased to recognize the Ranking Member the gentleman from Michigan, Mr. Conyers, for his opening statement.

Mr. CONYERS. Thank you very much, Chairman Smith. Good morning, Members of the Committee and distinguished witnesses present. We are here today to have a hearing on the constitutionality of the individual mandate. You will note that the term individual mandate does not appear anywhere in the bill that is being claimed to have an unconstitutional provision.

The Affordable Care Act includes the term minimum coverage requirement in the bill. There is nothing—the term “individual mandate” does not appear.

Now, I enjoyed our first reading of the Constitution on the floor in the Congress in all of my career here. I hope somebody got more out of it than I did, because reading the Constitution and understanding the Constitution are two different things. I think you could be in about the sixth or seventh grade and you can read clearly enough to read the Constitution. It does not comport with your understanding of the Constitution. And that is why Chairman Smith and I have talked about evening classes, informal sessions with our colleagues here to talk with experts about certain provisions of the law of the Supreme Court decisions and the Constitution itself, and I encourage our reading and negotiations on that.

Now, as a universal single-payer health care advocate, I was not enthusiastic about all of the benefits that accrued to the insurance industry under the Affordable Care Act. I supported it nevertheless. And I assume because of that support the insurance industry itself supports this so-called individual mandate. I wonder how they feel about this assault on that portion of the law.

Fortunately, the Chairman and his Committee did not say that consequently that voids the whole Act itself. I hope he didn't say that. I didn't interpret him to say that and he doesn't say that.

And so I am struck by the partisan nature of the discussion that is going on this morning here about constitutionality because you see many years ago, my colleagues in the other body, Senators Orrin Hatch and Senator Charles Grassley, along with 18 other Republican colleagues, included the notion of an individual mandate in their health care bill of 1993. And I hope someone asks me to prove that because my staff has researched this.

Now, in addition to that, we have other supporters on the constitutional question who are not Democrats. Former Massachusetts Governor Mitt Romney featured an individual mandate as part of his successful health care reform law in Massachusetts where it helped reduce insurance premiums by 40 percent while the national average has increased 14 percent.

Given this demonstrated success and the need to solve our national health care crisis, one would hope that my friends on the other side of the aisle would continue to embrace the idea that has been brought forth by Republicans at a earlier period of time. But unfortunately, they have taken a different course and are now suggesting that the individual mandate is unconstitutional.

Now I would like to cite the Constitution. Congress has the clear power under article 1, section 8, clause 3 of the Constitution, which gives us the authority to regulate commerce between the States. And further, that power is augmented by article 1, section 8, clause 18, which grants us discretion to choose the “necessary and proper” means of achieving our legitimate regulatory goals. And if I could

just begin my conclusion by explaining briefly why our authority here is really beyond question. And I suppose that this hearing today may conclusively determine that.

First, the core argument that is put forward by my friends is that this regulates inactivity. Now what in the world does that mean, to regulate inactivity? It requires us to accept what really amounts to a complete fiction because we all participate in the health care market. That is one statement I can make. Everybody from the time they are born until the time we leave this planet will participate in the health care market one way or the other. No one can claim that they will never get ill or get injured or get sick. We even promise emergency care for all who need it. As a matter of fact, we passed a law to say that emergency rooms must take in people who are ill and don't have any insurance and don't have any visible means to pay for the health care that they seek at a hospital.

The cost of uncompensated care in this country last year was \$43 billion. And those costs, of course, are shifted to other Americans who pay higher taxes and increased fees for medical care and insurance premiums. The individual mandate recognizes the reality that we are all active in the health care market and regulates how and when we pay for our health care. Doing so is uncontroversially within the scope of congressional power.

Now while some of my colleagues may think talking about inactivity is an argument, I would counter with the statement of former solicitor general Charles Fried, a Reagan appointee, who said that in any event, it is irrelevant as a matter of law. Solicitor General Fried is not a partisan supporter of the Affordable Care Act. But he is a staunch defender of the Constitution, and in his view, the individual mandate is fully constitutional because Congress unquestionably has the power to regulate the interstate health and insurance markets and the discretion to choose the necessary and proper means of doing so.

Solicitor General Fried has testified in the other body, and I would ask unanimous consent to enter his statement into the record.

Mr. SMITH. Without objection.

Mr. CONYERS. In conclusion, Chairman Smith and I thank you for your generosity with the time. We have been hearing a lot about individual liberty, the right to be let alone. But is it really? For example, States can and do require citizens to purchase car insurance. You have to have insurance to drive a car. In Massachusetts, legislation signed by former Governor Romney obligates that States' residents to purchase health insurance.

There are many, many other laws that impose affirmative obligations on our citizenry. We must pay taxes. We must send our children to school and vaccinate them, we must contribute to Medicare, and to Social Security, just to name a few in the long list. So I am pleased to be here today to join in this discussion with the Members of the Committee.

And I thank the Chairman for his generous allowance of time.

Mr. SMITH. Thank you, Mr. Conyers.

Without objection, other Members' statements will be made a part of the record. We welcome our panelists today, and our first

witness is going to be introduced by the gentleman from Virginia, Mr. Goodlatte.

Mr. GOODLATTE. Thank you, Mr. Chairman, for holding this hearing and affording me the opportunity to introduce our attorney general, Congressman Forbes and Congressman Scott join me in welcoming Ken Cuccinelli who was elected attorney general of Virginia on November 3, 2009, and was sworn into office on January 16, 2010.

In this position, he is responsible for overseeing the Office of the Attorney General and its more than 300 attorneys and support staff.

Prior to this, Attorney General Cuccinelli served in the Senate of Virginia from August 2002 to January 2010.

As a State senator and private attorney, Attorney General Cuccinelli worked to improve all levels of the Commonwealth mental health system, first serving as a court-appointed attorney for individuals in Virginia's involuntary civil commitment process. After joining the Senate in 2002, he passed legislation that has provided for more humane treatment of the mentally ill and helped family members better cope with treating their loved ones.

Best known nationally, however, for having brought the first lawsuit challenging the constitutionality of the individual mandate, a challenge which was successful at the district level before Judge Henry Hudson in the Eastern District of Virginia. That case is now on appeal.

Mr. Chairman, it is my pleasure to welcome a great leader of the Commonwealth of Virginia.

Mr. SMITH. Thank you, Mr. Goodlatte.

Our second witness is Walter Dellinger. Mr. Dellinger is the head of appellate practice at O'Melveny & Myers and the Douglas Maggs professor emeritus of law at Duke University Law School. Mr. Dellinger served as assistant attorney general for the Office of Legal Counsel from 1993 to 1996 and as acting solicitor general from the 1996 1997 term of the U.S. Supreme Court.

By our joint reckoning, he is making perhaps his 30th appearance before Congress as a witness today, 30th or 31st, something like that.

Our final witness is Randy Barnett. Mr. Barnett is the Carmack Waterhouse professor of legal theory at the Georgetown University Law Center. He has served as a visiting professor at Northwestern and Harvard Law School and was awarded a Guggenheim Fellowship in Constitutional Studies and has authored over nine books and over 100 articles and reviews.

Each of the witness' statement will be made a part of the record. We welcome you all and look forward to your 5 minutes' worth of a statement after which we will need to move on to the next witness.

We appreciate your presence and look forward to the testimony, first of Attorney General of Virginia, Mr. Cuccinelli.

**TESTIMONY OF THE HONORABLE KENNETH T. CUCCINELLI, II,  
ATTORNEY GENERAL, VIRGINIA**

Mr. CUCCINELLI. Thank you, Mr. Chairman and Members of the Committee. I will not repeat my written testimony. In my oral tes-

timony, I would like to make three points to you all. The first is that what the States are doing, and I will refer to the States generically, there are dozens of cases running challenging the individual mandate. My focus obviously being an Attorney General is on the States' cases. What the States are doing in challenging the individual mandate and which ultimately will result in a request to the Supreme Court to find that individual mandate unconstitutional, is very modest from a legal perspective. We are not asking the Supreme Court to change any law, to expand or contract any of its precedent, simply to apply the existing law to deny the opportunity to the Federal Government to massively expand its power to compel American citizens to act.

The other side, the Federal Government, requires to prevail an expansion, as noted by the judges that have even rules in their favor, an expansion of the commerce clause power which is already vast, as it stands under Supreme Court precedent right now, the Federal Government requires that to be expanded yet again, and further, in order to prevail in this case.

It is the Federal Government that is asking for a dramatic change to the law, not the States that are challenging the individual mandate. That is the first point I would like to leave you with.

The second point is that this case, while it, of course, deals with the legislation passed last year that the President signed March 23 last year relating to health insurance, health care and a variety of other things, the litigation is not so much about health care as it is about liberty. And the reason for that is that if the power that the Federal Government, for the first time, is exercising in the legislation passed last year is allowed to stand, then it can be applied across the economy and across the lives of our citizens in ways that are not part of the discussion now because they don't have anything to do with health care.

The Chairman referenced ordering people to buy a car, to eat asparagus or broccoli, the vegetable of discussion changes day to day, those compulsions were addressed by judges in these cases, they are very legitimate concerns, and until the United States can articulate a constitutional boundary to the power that it proposes the Federal Government has, it should lose in the Supreme Court because of the vast expansion of Federal power.

To give you one example, Professor Turley, here at George Washington University, I am sure some of you are familiar with him, in his first op-ed after this case was filed, he noted that if the States lose this case, it is the end of federalism as we have known it for over 220 years, the end of federalism.

Federalism, of course, is intended, in part, to protect the liberty of citizens ultimately by the tension established by the Federal and State governments.

And I would submit to you that the States that are assaulting the individual mandate in court are doing exactly what the Founders expected us to do, and that is, to check Federal power when they overstep the boundaries of the Constitution. That is exactly what we are doing in this case.

My third point is more historical. Whenever we deal with a novel question of constitutional law, and this is an unprecedented exer-

cise of Federal power, and so the question that the court is dealing with is novel, I would reference Mr. Conyers' remarks about the inactivity, activity distinction, that has never arisen before because no case the Supreme Court has ever dealt with before has ever had to consider it because Congress has never presumed to have the power to compel Americans in the way done with the individual mandate.

In that sort of a circumstance, we do look back to the founding period. We look back to the writing of the commerce clause, and we look back to the context in which it was written. What was the problem they were trying to solve? And if you recall the colonial period, during that time, the colonists engaged in boycotts of British goods. This began in the 1760's with the Stamp Act and the follow-on Acts of taxation primarily, but it also included the Intolerable Acts. And a Massachusetts convention in 1768 determined to boycott British goods until the Stamp Act was lifted and the duties imposed by it were lifted.

Cross the water to Britain, King George III is furious about this. In a mercantilist economic system, this hurts. Merchants are hurting, his shippers are hurting, and at that time, the solicitor general and attorney general by tradition sat in the Parliament and the solicitor general was asked in Parliament if what the colonists were doing was treason to boycott British goods. And the solicitor general responded by saying that while the colonists have come up to the line, they have come to within a hair's breadth, they are within the law to boycott British goods.

Now that didn't sit well with a lot of the powers that be in Britain at the time. But the corollary of that is that they could not compel colonists, subjects of the crown and parliament, to purchase the goods of their choice. But we now have a President and had a Congress that thinks that they can. Thank you, Mr. Chairman.

Mr. SMITH. Thank you Mr. Cuccinelli.

[The prepared statement of Mr. Cuccinelli follows:]

**TESTIMONY OF KENNETH T. CUCCINELLI, II,  
ATTORNEY GENERAL OF VIRGINIA  
House Judiciary Committee  
February 16, 2011**

Chairman Smith, Ranking Member Conyers, and distinguished members of the Committee: Thank you for inviting me to testify today. I am Kenneth T. Cuccinelli, II, and I currently serve as the Attorney General of the Commonwealth of Virginia. As you know, the Commonwealth is engaged in litigation with the federal government over the constitutionality of the Patient Protection and Affordable Care Act of 2010. I appreciate this opportunity to discuss the arguments and ideas that underpin Virginia's suit.

Despite all of the attention it has received, it should be noted that Virginia's challenge to the Patient Protection and Affordable Care Act is modest. We do not seek to overturn any prior decisions of the United States Supreme Court or develop any new doctrine. Rather, within the boundaries of constitutional text and precedent, we simply seek a determination that, in passing the individual mandate and penalty as part of the Patient Protection and Affordable Care Act, Congress exceeded the powers granted it by the Constitution.

Resolving such a suit is and has been one of the primary functions of the federal courts since the inception of the nation. As Justice O'Connor noted in *New York v. United States*, 505 U.S. 144, 155 (1992), a State which seeks the aid of the federal courts in resolving competing claims of state and federal power acts in accordance with the foundational and traditional function of those courts:

In 1788, in the course of explaining to the citizens of New York why the recently drafted Constitution provided for federal courts, Alexander Hamilton observed: "The erection of a new government, whatever care or wisdom may distinguish the work, cannot fail to originate questions of intricacy and nicety; and these may, in a particular manner, be expected to flow from the establishment of a constitution founded upon the total or partial incorporation of a number of distinct sovereignties." The Federalist No. 82, p. 491 (C. Rossiter ed. 1961). Hamilton's prediction has proved quite accurate. While no one disputes the proposition that "the Constitution created a Federal Government of limited powers," *Gregory v. Ashcroft*, 501 U.S. 452, 457, 115 L. Ed. 2d 410, 111 S. Ct. 2395 (1991); and while the Tenth Amendment makes explicit that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people"; the task of ascertaining the constitutional line between federal and state power has given rise to many of the Court's most difficult and celebrated cases. At least as far back as *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 324, 4 L. Ed. 97 (1816), the Court has resolved

questions “of great importance and delicacy” in determining whether particular sovereign powers have been granted by the Constitution to the Federal Government or have been retained by the States.

Turning to the merits of Virginia’s suit, the central issue is tied to the Commerce Clause. As you know, in the act itself, Congress asserted that the Commerce Clause empowered it to order private citizens, who were not presently engaged in commercial activity, to purchase insurance from private vendors or pay a penalty to the government. Such a use of the Commerce Clause is literally unprecedented. As the Congressional Research service noted when the Senate Finance Committee inquired as to the constitutionality of the mandate:

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.

Cong. Research Serv. *Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis* 3 (2009).

While not dispositive, the mere fact that no Congress had ever attempted to use the Commerce Clause in this way casts grave doubt at to whether Congress has such a power. As the Supreme Court noted in *Printz v. United States*, 521 U.S. 898, 918 (1997), the fact that Congress has not asserted a particular power or practice for 200 years “tends to negate the existence of the congressional power . . .” claimed.

The gravamen of Virginia’s suit is that the claimed power exceeds Congress’s enumerated powers because it lacks any principled limit and is tantamount to a national police power-- that is, the power to legislate on matters of health, safety and welfare that was considered part of the reserve powers retained by the States at the time of the Founding.

Since *Wickard v. Filburn*, 317 U.S. 111 (1942), the United States Supreme Court has reached no further than to hold that Congress can regulate (1) the “use of the channels of interstate commerce,” (2) “the instrumentalities of interstate commerce, or persons and things in interstate commerce,” and (3) “**activities** that substantially affect interstate commerce.” *United States v. Lopez*, 514 U.S. 549, 558-59 (1995) (emphasis added). Section § 1501 of Patient Protection and Affordable Care Act seeks to regulate **inactivity** affecting interstate commerce, a claimed power well in excess of the affirmative outer limits of the Commerce Clause, even as executed by the Necessary and Proper Clause. See *Gonzales v. Raich*, 545 U.S. 1 (2005). This claimed power also violates the negative outer limits of the Commerce Clause identified in *Lopez* and in *United States v. Morrison*, 529 U.S. 598 (2000). As was so clearly stated by the Court in *Morrison*: “We **always** have rejected readings of the Commerce Clause and the scope of federal power



that would permit Congress to exercise a police power.” *Morrison*, 529 U.S. at 618-19 (emphasis in original).

In the face of these problems with the Commerce Clause argument, the federal government has adopted a fall-back position in the various cases challenging the Patient Protection and Affordable Care Act. Despite no indication from Congress that it thought it was doing anything other than attempting to use its Commerce Clause powers, and despite the protests of the President that the individual mandate and penalty were most definitely not taxes, the federal government now claims that the mandate and penalty are merely an exercise of Congress’s taxing power.

While the Commerce Clause argument advanced by the federal government is unprecedented, the taxing power argument is simply radical.

At the outset, it is important to note that the taxing power argument is inconsistent with the very words chosen by Congress. What lawyers from the Justice Department now call a “tax” was not called a tax by Congress; it is identified in the Patient Protection and Affordable Care Act as a “penalty.” Accordingly, the first flaw in the taxing power argument is that it, by necessity, ignores the words that Congress chose to use.

Even if the Justice Department could overcome the fact that Congress chose to explicitly impose a penalty as opposed to levying a tax, the taxing power argument would still fail. The United States Supreme Court has long recognized that “taxes” and “penalties” are separate and distinct, stating that “[a] tax is an enforced contribution to provide for the support of government; a penalty, as the word is here used, is an exaction imposed by statute as punishment for an unlawful act.” *United States v. Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213, 224 (1996) (quoting *United States v. La Franca*, 282 U.S. 568, 572 (1931)). As the *La Franca* court held, the word “tax” and the word “penalty”

are not interchangeable, one for the other. No mere exercise of the art of lexicography can alter the essential nature of an act or a thing; and if an exaction be clearly a penalty it cannot be converted into a tax by the simple expedient of calling it such. That the exaction here in question is not a true tax, but a penalty involving the idea of punishment for infraction of the law is settled . . . .

*La Franca*, 282 U.S. at 572. To prevail, the federal government’s taxing power argument requires that courts ignore Congress’s express decision to denominate the penalty a “penalty” and it has to “alter the essential nature” of the penalty by ignoring its function so that it can be called a tax.

The Justice Department has tried to avoid the Supreme Court’s consistent view, that, substantively, a penalty is an imposition for failing to obey a command of government, by resorting to idiosyncratic definitions. It has staked out the position that unlawful acts are limited to criminal violations, so that penalties for violating non-criminal statutes are not penalties at all. This is simply not the law.

The idea that it is only unlawful to violate criminal statutes as opposed to civil statutes is incorrect as a simple matter of definition. *Black's Law Dictionary*, 6<sup>th</sup> Edition, defines "unlawful" as:

That which is contrary to, prohibited, or unauthorized by law. That which is not lawful. The acting contrary to, or in defiance of the law; disobeying or disregarding the law. Term is equivalent to without excuse or justification. While necessarily not implying the element of criminality, it is broad enough to include it.

*Black's* at 1536. Clearly, "unlawful" comprehends the violation of any law, whether civil or criminal.

This plain-meaning, common-sense definition finds firm support in precedents of the Supreme Court. For instance, in *Dep't. of Rev. of Mont. v. Kurth Ranch*, 511 U.S. 767, 784 (1994), the Court explicitly recognizes "civil penalties" as being distinct from "taxes", noting that "tax statutes serve a purpose quite different from civil penalties . . ."

Additionally, the Justice Department has argued that the penalty must be a tax because it "is codified in the Internal Revenue Code in a subtitle labeled 'Miscellaneous Excise Taxes.'" This formalistic argument is not likely to prevail because it is foreclosed by both statutory and Supreme Court authority. A provision of the Internal Revenue Code, 26 U.S.C. § 7806(b), provides that "[n]o inference, implication, or presumption of legislative construction shall be drawn or made by reason of the location or grouping of any particular section or provision of this title . . . ." Furthermore, the United States Supreme Court, in finding that an exaction that Congress had denominated a "tax", located in a section of the Internal Revenue Code titled "Miscellaneous Excise Taxes", was actually a penalty and not a tax, stated that "[n]o inference of legislative construction should be drawn from the placement of a provision in the Internal Revenue Code." *Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. at 223.

Even if it could be assumed that the penalty was a tax, it would still need to pass muster under an enumerated power other than the taxing power so long as it is being used for regulation. See *Child Labor Tax Case*, 259 U.S. 20 (1922); *United States v. Butler*, 297 U.S. 1, 68 (1936); *Linder v. United States*, 268 U.S. 5, 17-18 (1925). While some have suggested that courts can ignore these decisions, the Supreme Court has not overruled them. In fact, the relevant rationale of the *Child Labor Tax Case* was cited with approval by the Supreme Court in 1994, when the Court wrote:

Yet we have also recognized that "there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment." *Id.*, at 46 (citing *Child Labor Tax Case*, 259 U.S. 20, 38 (1922)).

*Kurth Ranch*, 511 U.S. at 779.

Given that the Supreme Court as recently as 1994 cited the *Child Labor Tax Case* for the very proposition for which the Commonwealth offers it, it cannot be demonstrated that it is no longer good law. Furthermore, the holdings of these cases are perfectly consistent with the overarching principle found in *Morrison*, that the Court has “always . . . rejected readings of . . . the scope of federal power that would permit Congress to exercise a police power.” *Morrison*, 529 U.S. at 618-19 (emphasis in original).

Comparisons to Social Security taxes and the inheritance tax do not aid the Justice Department’s case, but rather, underscore why it fails. It is true that the Court upheld the Social Security tax, but it did so because it was a valid excise on a voluntary activity/transaction-- the employment relationship. *Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 548 , 580-81 (1937). Nothing in that opinion suggests that Congress has the power to impose an employment excise tax on workers who are not working or on businesses that do not currently exist. Similarly, the Court upheld the estate tax in *Knowlton v. Moore*, 178 U.S. 41 (1900), as an excise tax or duty; it was upheld not as a tax on a person or even a person’s death, but rather, as a tax on a commercial event-- the transfer of property. *Knowlton*, 178 U.S. at 78 (estate taxes “concern the passing of property by death, for if there was no property to transmit, there would be nothing upon which the tax [could be] levied . . .”).

Like the Commerce Clause argument, the taxing power argument ultimately fails because it is not bounded by any principled limits, and therefore, arrogates to the federal government a national police power denied to it by the Constitution. As the Justice Department has summarized its position, anything that “imposes involuntary pecuniary burdens for a public purpose . . . is an exercise of the taxing power. . . .” and therefore, is constitutional. This radical position has already been rejected by the Supreme Court in *Morrison* as quoted above.

Faced with these legal obstacles, supporters of the Patient Protection and Affordable Care Act often make arguments that are not based on the Constitution or on decisions of the Supreme Court, but rather, are nothing more than appeals to address a pressing national problem. The argument is that there is a serious problem that must be fixed, and thus, the Patient Protection and Affordable Care Act must be constitutional because it is an attempt to solve that problem.

In a society based on the rule of law, such an argument cannot be credited. As the Supreme Court held in *New York v. United States*, 505 U.S. 144, 187-88 (1992):

Some truths are so basic that, like the air around us, they are easily overlooked. Much of the Constitution is concerned with setting forth the form of our government, and the courts have traditionally invalidated measures deviating from that form. The result may appear “formalistic” in a given case to partisans of the measure at issue, because such measures are typically the product of the era’s perceived necessity. But the Constitution protects us from our own best intentions: It divides power

among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day. . . . [Something may be a] pressing national problem, but a judiciary that licensed extraconstitutional government with each issue of comparable gravity would, in the long run, be far worse.

Chairman Smith, Ranking Member Conyers, and members of the Committee, this concludes my remarks. Thank you again for the opportunity to share my views.

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Mr. SMITH. And Mr. Dellinger.

**TESTIMONY OF WALTER DELLINGER, PROFESSOR,  
DUKE UNIVERSITY SCHOOL OF LAW**

Mr. DELLINGER. Thank you, Chairman Smith.

The provisions of the Affordable Care Act that are at issue in this case are so clearly within the commerce power that there are multiple ways that it is a perfectly unremarkable application of Federal power. Yes, it does impose an affirmative obligation, an affirmative obligation as an alternative to paying a 2½ percent tax penalty, in order to encourage Americans to have a minimum health coverage. It is as Solicitor General Fried who served under Ronald Reagan, as Mr. Conyers noted, so eloquently put it, this is a perfectly routine application of Congress' power to regulate the insurance market.

Now what is absolutely at stake in this litigation is the provision of the health care law that for the first time prohibits insurance companies from denying coverage to Americans because of pre-existing conditions, the provision that for the first time prohibits insurance companies from denying coverage to individuals because they have a child who is born with a birth defect. This was a very important reform, to ensure that Americans could obtain the health care coverage they needed.

Of course, when you do that, you create the possibility that people can say, well, I am going to wait to buy my insurance when I am in the ambulance on the way to the hospital because they can't turn me down. And therefore, it was clearly reasonably adapted, reasonably related to use Justice Scalia's language justifying the use of the necessary and proper clause, it is reasonably adapted to the law that prohibits insurance companies from denying coverage to individual Americans to provide this financial incentive for Americans to maintain minimum coverage.

That is all. It is perfectly unremarkable. It is clearly a regulation of commerce as no one would doubt that Congress has the authority to regulate the terms and conditions upon which insurance is bought and sold and that this is a very essential facilitation of the requirement that insurance companies not be allowed to deny coverage.

What is striking about it is that is there something so remarkable about this affirmative obligation that would mean that it has to be accepted from what would otherwise be Congress' power to regulate these commercial transactions. It is actually no more intrusive than Medicare or Social Security. All three of them, Medicare, Social Security and the minimum coverage requirements that are called the individual mandate, those three only apply to individuals that go into the economy, the penalty provisions only apply if you go into the economy and earn a sufficient amount, \$18,000 for a couple, earn a sufficient amount, that you have to file Federal income taxes. If you go into the economy and do that, you are required to pay 7½ percent of your earnings into Social Security, 15 percent if you are self-employed. You are required to pay a certain—to take care of your old age benefits, you are required to pay a few percentage points for Medicare to provide for health coverage after you are 65, and now you are required to pay up to 2½ percent and an additional tax penalty to provide for health care before you are 65, unless you are maintaining minimum coverage.

The difference between this approach and what is done with Social Security and Medicare, and the reason it was supported for so long by so many conservatives, is it that offers more choice. Instead of having a single monolithic governmental provider, it allows people a choice among private providers of insurance. That surely is a choice that Congress can make to favor a market approach over a government bureaucracy approach.

Is this unprecedented? Has Congress ever “regulated inactivity”?

Congress of course has no free standing power to regulate inactivity. It has a variety of powers which it can sometimes use to impose affirmative obligations. That is what we are talking about.

In 1792, months after the Bill of Rights was adopted, Congress passed a law requiring every adult free male to purchase a weapon, to purchase ammunition, to purchase a knapsack. No one said, oh my goodness, this is a regulation of inactivity, and if Congress could regulate that they could regulate anything. The reason they didn’t is that what it was was the imposition of an affirmative obligation where Congress has the authority to impose an affirmative obligation.

Now, let me go just right to the question of limits, first of all, this doesn’t implicate the Supreme Court’s decision limiting Congresses’ power to regulate noneconomic local matters, like street violence, or guns within schools—near schools. *Morrison* and *Lopez* deal with different issues because this regulates a matter that is entirely economic, entirely commercial.

Secondly, does it allow Congress to require the eating of asparagus or broccoli? I wanted to decide that with General Cuccinelli about how many times the word “broccoli” would be mentioned this morning. Of course it doesn’t. The liberty clause of the Constitution stands in the way of that kind of imposition of activity on individuals.

Does it require the purchase of any other products? Can I tell you if Congress can regulate this, anything that Congress cannot regulate? I can tell you thousands of things Congress cannot regulate after this is upheld. I brought the Yellow Pages because if you want me to spend the next 3 days, I can read every product that Congress would not have the power to require you to purchase—

Mr. ISSA. Mr. Chairman, has the opening statement concluded?

Mr. SMITH. Conclude your testimony.

Mr. DELLINGER. I will. I will by saying that the justification will be that Congress can require the purchase of the unique product, which is one that no one can be assured they will not use and which we have complete and total evidence that when people are not insured, they transfer that cost to other Americans, other people who are sick, or to taxpayers and that is a unique situation where Congress can encourage people to maintain minimum coverage. It would not be a precedent for any of the parade of horrors that come marching through this Committee room.

Thank you, Mr. Chairman.

Mr. SMITH. Thank you, Mr. Dellinger.

[The prepared statement of Mr. Dellinger follows:]

**Committee on the Judiciary  
United States House of Representatives**

Hearing

**“The Constitutionality of the Affordable Care Act”**

Prepared Statement of  
Walter Dellinger

February 16, 2011  
Washington, DC

Chairman Smith and Members of the Committee –

As part of the comprehensive health care legislation enacted in 2010, Congress prohibited insurance companies from denying health insurance coverage to those with pre-existing conditions. Congress made this important step feasible by adopting a companion provision requiring individuals to have adequate health insurance. The assertion that the national Congress lacks the constitutional authority to adopt these regulations of the national commercial markets in health care and health insurance is a truly astonishing proposition. When these lawsuits reach their final conclusion, that novel claim will be rejected.

The lawsuits that have been brought in federal courts around the country do not simply challenge the new law's minimum coverage requirement. They necessarily call in question as well the provisions prohibiting insurance companies from denying coverage to those with pre-existing conditions. Because the two provisions are linked, both are at stake. The outcome of this litigation will thus determine whether Americans must continue to fear being denied health insurance because of their prior or current medical condition; will continue to be concerned about losing health insurance if they change jobs; and will once again be subject to having coverage denied to a child born with a serious medical condition. Those provisions are absolutely at risk in this litigation.

Fortunately, there are so many ways that the minimum coverage requirement is an appropriate exercise of Congress's power to regulate the national economy that it is difficult to know where to begin. Let me start with the undoubted proposition that Congress can regulate the terms and conditions upon which health insurance is bought and sold, making it indisputable that Congress can prohibit insurance companies from denying coverage to those with pre-existing conditions. To make this obviously valid regulation of the national insurance market



workable, Congress found it necessary to include as well a financial incentive for individuals to maintain minimum insurance coverage. That is the so-called individual mandate. Without this mandate -- this minimum coverage provision -- there would an incentive for people who are now guaranteed coverage to postpone purchasing health insurance until they already sick. That critical fact about the interstate market in health insurance provides a full and sufficient basis for Congress to provide a financial incentive for individuals to maintain adequate health insurance coverage.

As Justice Scalia observed in his concurring opinion in *Gonzales v. Raich*, “where Congress has the authority to enact a regulation of interstate commerce, ‘it possesses every power needed to make that regulation effective.’” 545 U.S. 1 at 36 (quoting *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 118-19 (1942)). “[T]he relevant inquiry is simply ‘whether the means chosen are “reasonably adapted” to the attainment of a legitimate end under the commerce power’ ... .” *United States v. Comstock*, 130 S. Ct. 1949, 1957 (2010) (quoting *Raich*, 545 U.S. at 37 (Scalia, J., concurring in the judgment)).

That foundational principle, so aptly stated by Justice Scalia, should be dispositive of this constitutional issue. The minimum

coverage requirement requires certain taxpayers to pay a penalty of not more than 2.5% of adjusted gross income if they fail to maintain adequate insurance coverage. (The requirement does not apply, among other exceptions, to those who are eligible for Medicare or Medicaid, to those who have employment based health insurance, to those for whom purchase of insurance would be a financial hardship and those who have certain religious objections.) Because the minimum coverage provision is reasonably adapted to the attainment of a legitimate end under the Commerce Power it is plainly constitutional.

The truly novel contention put forth in this litigation, however, is that even matters vital to the national economy may not be regulated if they fall within an artificial category that the challengers label as “inactivity.” This is descriptively inaccurate, because (1) the penalty for failing to maintain minimum coverage applies only to those who participate in the economy by earning sufficient taxable income that they are otherwise required to file federal income tax returns and (2) virtually everyone subject to the penalty participates in some way in the health care market.

There is nothing unprecedented about Congress imposing affirmative requirements on citizens who would prefer to be left alone,

when those regulations are necessary to accomplish an objective wholly within the powers assigned to Congress. So why carve out this proposed new judicial exception to Congress's power to regulate commerce?

There is there nothing so surprising or severe about the provision in question to justify the suggestion that it must be judicially excised from what is otherwise a valid exercise of an enumerated power. The minimum coverage requirement is no more intrusive than Social Security or Medicare.

The Social Security Act requires individuals to make payments to provide for old age retirement. Medicare requires individuals to make payments to provide for health coverage after they are 65 years of age. The Affordable Care Act requires individuals to make payments to provide for health coverage before they are 65.

Under Social Security and Medicare, there is one predominant payer, the government. Under the Affordable Care Act, individuals are given an option to choose among a larger number of insurers in the private market. Neither Social Security nor Medicare nor the Affordable Care Act is such a novel intrusion into liberty that judges would be justified in overriding the considered judgment of the elected branches that adopted those laws.

Litigants who are urging the courts to carve out a novel exception from Congress's authority to regulate interstate commerce have no precedent upon which to rely. To be sure, they cite to the Supreme Court's decisions in *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000). Those decisions, however, offer no support to these challenges. Those cases involved an attempt to regulate local crime (guns near schools and violence against women) because of a presumed ultimate effect on interstate commerce. The minimum coverage requirement, in contrast, is itself a regulation of interstate commerce; it regulates the provision of health insurance that is itself critical to the national health care market in which virtually every American participates. As the Supreme Court said in *Gonzales v. Raich*, 545 U.S. 1, 16 (2005), "where [the act under review] is a statute that directly regulates economic, commercial activity, our opinion in *Morrison* casts no doubt on its constitutionality."

The minimum coverage provision of the Affordable Care Act tests no limits and approaches no slippery slope.<sup>1</sup> Notwithstanding the

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<sup>1</sup> Slippery slope arguments are themselves often slippery. Where the issue is simply whether something falls within the scope of a subject matter over which Congress is given jurisdiction to legislate, the parade of horrors marches all too easily. If it is within the scope of regulating commerce to set a minimum wage, one might argue, then Congress could set the minimum wage at \$5000 an hour. Would that force us

improbable hypotheticals put forth by those bringing these lawsuits, Congress never has and never would required Americans to exercise or eat certain foods. Were Congress ever to consider laws of that kind infringing on personal autonomy, the judiciary would have ample tools under the liberty clause of the Fifth Amendment to identify and enforce constitutional limits. See *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261 (1990). What the Affordable Care Act regulates is not personal autonomy, but commercial transactions.

Suggestions that sustaining the minimum coverage provision would mean that Congress could mandate the purchase of cars or comparable items are also disingenuous. The provision requiring minimum health insurance cannot be viewed in isolation. It is an integral part of regulating a health care market in which virtually everyone participates. No one can be certain he or she will never receive medical treatment. Health care can involve very expensive medical treatments that are often provided without regard to one's ability to pay and whose cost for treating the uninsured is often

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to conclude that Congress therefore cannot set any minimum wage at all? Were Congress to legislate the extreme hypotheticals envisioned by those bringing these challenges, there will be ample constitutional doctrines available for the judiciary to use for the imposition of limits..

transferred to other Americans. These qualities are found in no other markets.

For an extended period of time, Congress debated how best to regulate the two vitally important, inextricably intertwined national markets in health care and health insurance. Many different proposals were put forth, criticized and defended. But what seems most clear is that in our constitutional tradition these sharply contested questions of national economic regulation are the kinds of issues that are more appropriately resolved by political debate than by judicial decree.

Mr. SMITH. Mr. Barnett.

**TESTIMONY OF RANDY E. BARNETT, PROFESSOR,  
GEORGETOWN UNIVERSITY LAW CENTER**

Mr. BARNETT. Thank you, Mr. Chairman, and thank you to the Members of the Committee.

Let me begin today with a thought experiment. Imagine that I tell you 100 things that you may not do tomorrow. For example, you may not run on a treadmill, you may not eat broccoli, you may not buy a car, and 97 other specific things that you can't do tomorrow. Now while your liberty would certainly be restricted, there would still be an infinite number of things that you may still do.

All right. Now suppose I tell you 100 things that you must do tomorrow. You must run on a treadmill, you must eat broccoli, you must buy a car and 97 other things. These 100 mandates could potentially occupy all your time and consume all your money.

I offer this illustration to help you see why economic mandates are so much more onerous than either economic regulations or prohibitions, and why so dangerous an unwritten constitutional power should not be implied. Now of course, we all know that Congress may mandate the citizens register for the military and serve if called, submit a tax form, fill out a Census form and serve on a jury.

But each of these duties is necessary for the operation of government itself, and each has traditionally been recognized as duties that are inherent in being a citizen of the United States. They are inherent in United States citizenship. In essence, the mandate's defenders are claiming that because Congress has the power to draft you into the military, it has the power to make you do anything less than this, including mandating that you send your money to a private company and do business with it for the rest of your life.

To justify this claim of power, implied power, supporters of the mandate say that health care is different or unique. But a factual description of health care is not a constitutional principle. It does not provide any principled line identifying when economic mandates are constitutional and when they are not. Once a power to conscript Americans to enter into contracts with private companies is accepted here, the Supreme Court will never limit it to any particular factual circumstance in the future.

From now on, Congress would simply have the power to impose economic mandates whenever it deems it convenient to its regulation of the national economy. So when a defender of the insurance mandate says health care is unique, you need to ask, okay, but what is the constitutional limit on the power to impose economic mandates?

Now some have responded that the commerce power is limited by the protection of liberty in the due process clause. But law professors know, even if the American people do not, that the Supreme Court now limits the scope of the due process clause to protecting only a very few specifically defined fundamental rights, none of which would include a right to refrain from doing business with private companies.

As important, claiming that commerce is limited only by the due process clause or some other expressed prohibition in the Constitu-

tion is really to claim that Congress' enumerated powers in article 1 are unlimited except as they are qualified by the Bill of Rights. Such a proposition has always been rejected by the Supreme Court. As Chief Justice Rehnquist wrote in *Lopez v. United States*, "We start with first principles, the Constitution creates a Federal Government of enumerated powers." And then he went on to quote James Madison's Federalist 45 and here is what Madison said, "The powers delegated by the proposed Constitution to the Federal Government are few and defined. Those which are to remain in State governments are numerous and indefinite."

As I explained in my written testimony, existing Supreme Court doctrine limits Congress to the regulation of economic activity, and to date, has never sanctioned implied congressional power to regulate inactivity. In other words, the Supreme Court has said that Congress may go this far and no farther. But even if it did, even if the Supreme Court were to uphold this, each Member of Congress must still decide for him or herself whether conscripting Americans to enter into contractual relations with a private company is a proper exercise of the commerce power.

In 2010, Congress claimed a power that had never before been claimed, the power to mandate that every citizen enter into a contractual relationship with a private company and do business with it or another business like it for the rest of their life. Had this ever been done before? Each of you would know all the economic mandates that you must obey upon pain of penalty to the IRS, you don't know of any such mandates because this claim of power is literally unprecedented.

For this reason, if you conclude that economic mandates are either unnecessary or improper and are therefore unconstitutional and beyond your power to impose, this conclusion would affect only one law ever enacted by this Congress, the Affordable Care Act of 2010.

And this fact makes it much more likely that it will be held unconstitutional by the Supreme Court.

Nothing in Judge Vinson's opinion in Florida imposes any new limits on congressional power. For over 200 years, Congress has gotten along without a power to mandate that every citizen enter into a contractual relationship with a private company. Congress has ample means to solve free rider problems by regulating economic activity and devising tax and spending schemes and does not need this new and dangerous power.

Because economic mandates are both an unnecessary and improper means for regulating interstate commerce, the individual insurance mandate is unconstitutional, and I believe Congress should repeal it. Thank you.

Chairman SMITH. Thank you, Mr. Barnett.

[The prepared statement of Mr. Barnett follows:]



**UNITED STATES HOUSE OF REPRESENTATIVES  
COMMITTEE ON THE JUDICIARY**

**HEARING**

**“THE CONSTITUTIONALITY OF  
THE PATIENT PROTECTION AND AFFORDABLE CARE ACT’S  
INDIVIDUAL INSURANCE MANDATE”**

**February 16, 2011**

Prepared Statement of  
Professor Randy E. Barnett\*

In 2010 something happened in this country that has never happened before: Congress required that every person enter into a contractual relationship with a private company. Now, it is not as though the federal government never requires American citizens to do anything. They must register for the military and serve if called, they must submit a tax form, fill out a census form, and serve on a jury. And they must join a posse organized by a U.S. Marshall. But the existence and nature of these very few duties illuminates the truly extraordinary and objectionable nature of the individual insurance mandate. Each of these duties is necessary for the operation of government itself; and each has traditionally been widely recognized as inherent in being a citizen of the United States.

Consider why, in 1918, the Supreme Court rejected the claim that the military draft violated the Thirteenth Amendment, which bars

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\*Carmack Waterhouse Professor of Legal Theory, Georgetown University Law Center. This testimony is based on Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate is Unconstitutional*, 5 NYU J.L. & LIBERTY 581 (2011). Together with the Cato Institute, I have submitted amicus briefs in support of the challenges to the Affordable Care Act in *Virginia v. Sebelius* in the U.S. District Court for the Eastern District of Virginia, and in *Thomas More Law Center v. Obama* in both the U.S. District Court for the Eastern District of Michigan and the U.S. Circuit Court of Appeals for the Sixth Circuit. I have also discussed, without remuneration, the constitutional issues raised by the Affordable Care Act with attorneys representing challengers in Virginia, Michigan, and Florida.

“involuntary servitude.” At first glance, conscription surely looks like a form of involuntary servitude. But the Court said that it could not see how “the exaction by government from the citizen of the performance of *his supreme and noble duty* of contributing to the defense of the rights and honor of the nation . . . can be said to be the imposition of involuntary servitude. . . .”<sup>1</sup>

Keep that phrase, “supreme and noble duty” of citizenship, in mind. For this, and nothing less than this, is what is at stake in the fight over the constitutionality of the individual insurance mandate. Is it part of the “supreme and noble duty” of citizenship to do whatever the Congress deems in its own discretion to be convenient to its regulation of interstate commerce? If this proposition is upheld, I submit, the relationship of the people to the federal government would fundamentally change: no longer would they fairly be called “citizens;” instead they would more accurately be described as “subjects.”

In fact, in Article III, the Constitution distinguishes between citizens of the United States and “subjects” of foreign states.<sup>2</sup> What is the difference? In the United States, sovereignty rests with the citizenry. The government, including the Congress, is not sovereign over the people, but is the servant of the people. In the 1886 case of *Yick Wo v. Hopkins*, the Supreme Court reaffirmed that “in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts.”<sup>3</sup> But if Congress can mandate you do anything that is “convenient” to its regulation of the national economy,

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<sup>1</sup>Selective Draft Law Cases, 245 U.S. 366, 390 (1918)

<sup>2</sup>*Compare* U.S. CONST. art. III, sec. 2 (“The judicial power shall extend . . . to controversies . . . between a state, or the citizens thereof, and foreign states, citizens or subjects.”) *and* U.S. CONST. amend XI (“The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.”), *with* U.S. CONST. amend. XIV, §1 (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.”).

<sup>3</sup>*Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (Matthews, J.). *See also* *Chisolm v. Georgia*, 2 U.S. 419, 479 (2 Dall.) (1793) (affirming “this great and glorious principle, that the people are the sovereign of this country,” and “the people” consists of “fellow citizens and joint sovereigns.”) (opinion of Jay, C.J.); *id.* at 356 (referring to the people as “a collection of original sovereigns.”) (opinion of Wilson, J.).

then that relationship is now reversed, and Congress has the prerogative powers of King George III.

In essence, the defenders of this bill are making the following claim: because Congress has the power to draft citizens into the military — a power tantamount to enslaving one to fight and die — it has the power to make citizens do *anything less than this*, including mandating that them to send their money to a private company and do business with it for the rest of their lives. This simply does not follow. The greater power does not include the lesser.

One way to justify so exceptional a power would be to find it in the Constitution itself. Does the Constitution expressly give Congress a power to compel citizens to enter into contractual relations with private companies — or can it be fairly implied? Quite obviously, the answer is no.

True, the Constitution does give Congress the power to impose taxes on the people to compel them to give their money *to the government* for its support. And it has long been assumed that Congress can then appropriate funds to provide for the common defense and general welfare by making disbursements to private companies and individuals. Social Security and Medicare are examples of the exercise of such tax and spending powers.

Because the Supreme Court is highly deferential to Congress's use of its tax power, the primary constraint on the exercise of this power is political. That is, like the power to declare war or impose a military draft, legislators will be held politically accountable for their exercise of the great and dangerous power to tax. But for this constraint to operate, at a minimum Congress must expressly invoke its tax power so it can be held politically accountable.

This is why it is of utmost significance that, when it enacted the Affordable Care Act, Congress did not refer to the penalty imposed on those who fail to buy insurance as a tax. Instead it called it a “penalty” to enforce the insurance mandate. Although the penalty was inserted into the Internal Revenue Code, Congress then expressly severed the penalty from the normal enforcement mechanisms of the tax code. The failure to pay the penalty “shall not be subject to any criminal

prosecution or penalty with respect to such failure.”<sup>4</sup> Nor shall the IRS “file notice of lien with respect to any property of a taxpayer by reason of any failure to pay the penalty imposed by this section,”<sup>5</sup> or impose a “levy on any such property with respect to such failure.”<sup>6</sup> All of these restrictions undermine the claim that, because the penalty is inserted into the Internal Revenue Code, it is a garden-variety tax.

Nor is this merely a matter of form. As Justice Souter explained in a 1996 case, “if the concept of penalty means anything, it means *punishment for an unlawful act or omission*. . . .”<sup>7</sup> By contrast, he described a tax as “a pecuniary burden laid upon individuals or property *for the purpose of supporting the Government*.”<sup>8</sup> But when Congress identified all the revenue raising provisions of the Affordable Care Act for the vital purpose of scoring its costs, it failed to include *any* revenues to be collected under the penalty.<sup>9</sup>

Rather than tax everyone to provide a direct subsidy to private insurance companies to compensate them for the cost of the new regulations being imposed upon them, Congress decided to compel the people to pay insurance companies directly. And it expressly justified the mandate as an exercise of its regulatory powers under the Commerce Clause. But if the mandate to buy insurance is unconstitutional because it exceeds the commerce power, then there is nothing for the penalty to enforce, regardless of whether it is deemed to be a tax.

So the unprecedented assertion of a power to impose economic mandates on the citizenry must rise and fall on whether the mandate is within the power of Congress under the Commerce Clause “to regulate . . . commerce among the several states,”<sup>10</sup> or whether, under the

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<sup>4</sup>I.R.C. § 5000A(g)(2)(A) (West 2010).

<sup>5</sup>I.R.C. § 5000A(g)(2)(B)(i) (West 2010).

<sup>6</sup>I.R.C. § 5000A(g)(2)(B)(ii) (West 2010).

<sup>7</sup>*United States v. Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213, 224 (1996) (emphases added).

<sup>8</sup>*Id.* (quoting *New Jersey v. Anderson*, 203 U. S. 483, 492 [1906]) (emphasis added).

<sup>9</sup>*See* Pub. L. No. 111-148, §§ 9000 et seq., 124 Stat. 119 (2010).

<sup>10</sup>U.S. CONST. art I, § 8, cl. 3.

Necessary and Proper Clause, the mandate is both “necessary and proper for carrying into Execution”<sup>11</sup> its commerce power.

The government is not claiming that the individual mandate is justified by the original meaning of either the Commerce Clause or Necessary and Proper Clause. Instead, the government and most law professors who support the mandate have rested their arguments exclusively on the decisions of the Supreme Court. So what does existing Supreme Court doctrine say about the scope of the Commerce and Necessary and Proper clauses?

Of course, given that economic mandates have never before been imposed on the American people by Congress, there cannot possibly be any Supreme Court case expressly upholding such a power. But during the New Deal, the Supreme Court used the Necessary and Proper Clause to allow Congress to go beyond the regulation of interstate commerce itself to reach wholly intrastate activities that substantially affect interstate commerce.<sup>12</sup> Then in 1995, in the case of *United States v. Lopez*, it limited the reach of this power to the regulation of economic, rather than noneconomic activity.<sup>13</sup>

Barring Congress from regulating noneconomic intrastate activity keeps it from reaching activity that has only a remote connection to interstate commerce, without requiring courts to assess what Alexander Hamilton referred to as the “more or less necessity or utility”<sup>14</sup> of a measure. Existing Commerce Clause and Necessary and Proper Clause doctrine, therefore, allows Congress to go this far, *and no farther*.

But the individual mandate is not regulating any economic activity. It is quite literally regulating *inactivity*. Rather than regulating or prohibiting economic activity in which a citizen voluntarily *chooses*

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<sup>11</sup>U.S. CONST. art I, § 8, cl. 18.

<sup>12</sup>*See e.g.* *United States v. Darby*, 312 U.S. 100, 118 (1941) (relying on the Necessary and Proper case of *McCulloch v. Maryland* to justify reaching intrastate activities that affect interstate commerce).

<sup>13</sup>*See* *United States v. Lopez*, 514 U.S. 549 (1995). *See also* *United States v. Morrison*, 529 U.S. 598 (2000).

<sup>14</sup>Alexander Hamilton, *Opinion on the Constitutionality of a National Bank* (Feb. 23, 1791), in *LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES* 95, 98 (M. St. Clair Clarke & D. A. Hall eds., Augustus M. Kelley Publishers 1967) (1832).

to engage — such as growing wheat, operating a hotel or restaurant, or growing marijuana — it is commanding that a citizen *must* engage in economic activity. It is as though the federal government had mandated Roscoe Filburn (of *Wickard v. Filburn*<sup>15</sup>) to grow wheat, or mandated Angel Raich (of *Gonzales v. Raich*<sup>16</sup>) to grow marijuana.

The distinction between acting and not acting is pervasive in all areas of law. We are liable for our actions but, absent some preexisting duty, we cannot be penalized for inaction. So in defending the mandate, the government has been forced to offer a number of shifting arguments for why, despite the appearances, insurance mandates are actually regulations of activity.

The statute itself speaks of regulating “decisions”<sup>17</sup> as though a decision is an action. But expanding the meaning of “activity” to include “decisions” not to act erases the distinction between acting and not acting. It would convert all “decisions” not to sell one’s house or car into economic activity that could be “regulated” or mandated if Congress deems it convenient to its regulation of interstate commerce.

The government also claims that it is regulating the activity of obtaining health care, which it says everyone eventually will seek. While the government could try to condition the activity of delivering health care on patients having previously purchased insurance, in the Affordable Care Act it did not do this. The fact that most Americans will seek health care at some point or another does not convert their failure to obtain insurance from inactivity to activity and so does not convert the mandate to buy insurance into a regulation of activity.

For this reason, the government primarily relies, not on the claim that “decisions” are activities or that Congress is regulating the activity of seeking health care, but on a proposition that has yet to be accepted by a majority of the Supreme Court: that Congress may do anything that it deems to be “necessary to a broader scheme” regulating interstate

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<sup>15</sup>See *Wickard v. Filburn*, 317 U.S. 111 (1942)

<sup>16</sup>See *Gonzales v. Raich*, 545 U.S. 1 (2005)

<sup>17</sup>See PATIENT PROTECTION AND AFFORDABLE CARE ACT, Pub. L. No. 111-148, § 1501(a)(2)(A), 124 STAT. 119 (2010) (“The requirement regulates activity that is commercial and economic in nature: economic and financial decisions about how and when health care is paid for, and when health insurance is purchased.”).

commerce — in this case the regulation of the insurance companies under the commerce power.

But there is no such existing doctrine. The government's theory is based on a concurring opinion by Justice Antonin Scalia in the 2005 medical marijuana case of *Gonzales v. Raich* — a lawsuit I brought on behalf of Angel Raich and argued in the Supreme Court.<sup>18</sup> Justice Scalia's theory, in turn, rests on a single sentence of dictum in *Lopez*.<sup>19</sup>

Whenever a majority of the Supreme Court eventually decides to allow Congress to regulate noneconomic activity because doing so is essential to a broader regulatory scheme, it will need to limit this doctrine, lest it lead to an unlimited power in Congress. If that day comes, the Court need only look back to see that every exercise of the Commerce and Necessary and Proper clauses has involved the regulation of voluntary activity. Barring Congress from reaching inactivity prevents it from exercising powers that are even more remote to the regulation of interstate commerce than is the regulation of noneconomic activity.

Look at what is happening here. Congress exercises its commerce power to impose mandates on insurance companies, and then claims these insurance mandates will not have their desired effects unless it can impose mandates on the people — which would be unconstitutional if imposed on their own. By this reasoning, the Congress would now have the general police power the Supreme Court has always denied it possessed. All Congress need do is adopt a broad regulatory scheme that won't work the way Congress likes unless it can mandate any form of private conduct it wishes.

What limiting principle is offered by the government to this new claim of federal power under the Necessary and Proper Clause? Its only response, to date, is that health care is somehow different than other types of goods and services. This argument takes a number of different forms, but most commonly it is claimed that because everyone will one

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<sup>18</sup>See *Raich*, 545 U.S. at 37 (Scalia, J. concurring) (“Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce.”)

<sup>19</sup>See *Lopez*, 514 U.S. at 561 (noting that the Gun Free School Zone Act was not “an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.”).

day need health care and may not be able to afford it when that day arrives, and because emergency rooms are obligated by law to provide care regardless of ability to pay, then it is necessary to require that all persons purchase health insurance today to avoid shifting costs to others.

There are many serious factual problems with this analysis, but, even if we assume it is entirely accurate, the government has not identified any *constitutional* principle to differentiate health care – or more relevantly health insurance – from any other activity that Congress may in the future want to mandate or conscript the American people to perform. Without more, *a factual distinction is not a constitutional principle*. If the Supreme Court upholds the power to impose insurance mandates on the people, in the future it will never evaluate the next use of economic mandates to see if that circumstance is similar to or different from health care.

For nearly two hundred years the Court has avoided making any such factual distinctions in favor of deferring to Congress's assessment of the facts. So, lacking any limiting *constitutional* principle, once the power to conscript Americans to enter into contractual relations with private companies is accepted here, it will be accepted for any circumstances that Congress deems it convenient to its regulation of the national economy. And this would be to fundamentally reverse the relationship of American citizen to the federal government. No longer would they be citizens in the fullest sense of the world, they would be subjects.

So whenever defenders of the insurance mandate say “health care is different,” one needs to ask them: “Yes, but what *constitutional* limitation are you proposing for this power?” If their only reply is the protection of “liberty” in the Due Process Clause, then they have now avoided the question by changing the subject. They are actually claiming that the commerce power is limited only by rights guarantees — the very same rights guarantees that limit the state's plenary police power. This answer is like saying, “Well, the First Amendment is a limit on the commerce power.”

Any answer based on Due Process or liberty is actually a refusal to provide any limit to Congress's enumerated powers. Since a state's police power is also limited by the Due Process Clause of the Fourteenth Amendment, in reality, defenders of the mandate are claiming that the



powers of Congress *are just as broad as the police power of the states*. That is, if the only limit on Congress's power is the same as the limit on state power, then the two powers have the same scope. But this is a proposition that has always been rejected by the Supreme Court. As Chief Justice Rehnquist wrote in *Lopez v. United States*: "We start with first principles. The Constitution creates a Federal Government of enumerated powers."<sup>20</sup> He then quoted James Madison's Federalist No. 45: "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."<sup>21</sup>

If the only limitation on the scope of enumerated powers is the Due Process Clause or the Bill of Rights, however, then this would no longer be the case, and our system of government would be fundamentally altered. In addition, law professors know, even if the American people do not, that under current constitutional doctrine, the Due Process Clause is not construed to be an open-ended protection of liberty. Instead the Supreme court now construes it to protect only a very few specifically defined rights, none of which would apply to the right to refrain from doing business with private companies.<sup>22</sup>

Therefore, when defenders of the mandate give this answer, what they are really saying is that the enumerated powers scheme in Article I of the Constitution provides no constraint whatsoever on the powers of Congress. Because this theory of Congress's implied power would lead to a general federal police power. In the words of Chief Justice Marshall in *McCulloch v. Maryland*, it would not "consist with the letter and spirit of the constitution," and would therefore be "improper."<sup>23</sup>

In his decision, Judge Vinson held that "the individual mandate falls outside the boundary of Congress' Commerce Clause authority and cannot be reconciled with a limited government of enumerated powers.

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<sup>20</sup>*Lopez*, 514 U.S. at 552.

<sup>21</sup>*Id.*

<sup>22</sup>*See generally*, Randy E. Barnett, *Scrutiny Land*, 106 MICH. L. REV. 1479 (2008) (explaining how the Supreme Court avoids recognizing rights as "fundamental" so as to avoid protecting liberty under the Due Process Clauses).

<sup>23</sup>*McCulloch v. Maryland*, 17 U.S. 316, 423 (1819).

By definition, it cannot be ‘proper.’”<sup>24</sup> In other words, because the rationale offered to justify the mandate would lead to a general federal police power, such a law cannot be a proper exercise of Congressional power.

This is but one reason why the insurance mandate, however “necessary” it might be, is an “improper” means to the regulation of interstate commerce. In 1997, the Supreme Court struck down a mandate that local sheriffs run background checks on purchasers of firearms as part of a broader scheme regulating the sale of guns that Congress enacted using its commerce power. In *Printz v. United States*,<sup>25</sup> the Court held that this mandate on state executives unconstitutionality violated the sovereignty of state governments and the Tenth Amendment.

Writing for the Court, Justice Scalia rejected the government’s contention that, because the background checks were “necessary” to the operation of the regulatory scheme, they were justified under the Necessary and Proper Clause. After memorably calling the Necessary and Proper Clause “the last, best hope of those who defend ultra vires congressional action,”<sup>26</sup> Justice Scalia concluded that “When a ‘Law . . . for carrying into Execution’ the Commerce Clause violates the principle of state sovereignty reflected in” the Tenth Amendment and other constitutional provisions, “it is not a ‘Law . . . proper for carrying into Execution the Commerce Clause,’ and is thus, in the words of The Federalist, ‘merely [an] act of usurpation’ which ‘deserves to be treated as such.’”<sup>27</sup>

Just as commandeering state governments is an unconstitutional infringement of state sovereignty, commandeering the people violates the even more fundamental principle of *popular* sovereignty. After all, the Tenth Amendment reads: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved

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<sup>24</sup>Florida v. U.S. Dep’t of Health and Human Servs., No. 3:10-cv-91-RV/EMT, slip op. at 63 (N.D. Fla. Jan. 31, 2010).

<sup>25</sup>*Printz v. United States*, 521 U.S. 898 (1996).

<sup>26</sup>*Id.* at 923.

<sup>27</sup>*Id.* at 923–24. (citations omitted).

to the states respectively, *or to the people.*<sup>28</sup>

Should the Supreme Court decide that Congress may not commandeer the people in this way, such a doctrine would only affect one law: the Affordable Care Act of 2010. Because Congress has never done anything like this before, the Court need strike down no previous mandate. This makes a challenge to the insurance mandate more likely to succeed. But if it strikes down the individual insurance mandate, the Court may also have to strike down the mandates imposed on insurance companies. For the Affordable Care Act does not include the normal severability clause that would let the remainder stand if any part is invalidated. And the very reasons why the government argues that the individual mandate is “essential” to implement the insurance regulations, are why it is not severable.

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Although the bulk of my remarks today concerned decisions of the Supreme Court, many of the Court’s doctrines concerning the regulatory and taxing powers are not actually opinions about what the Constitution requires, but when the Court will defer to Congress’s judgment of the scope of its own powers and when it will intervene. Each Senator and Representative takes his or her own oath to uphold the Constitution, and each must reach his or her own judgment about the scope of Congressional powers.

After the Supreme Court upheld the constitutionality of the second national bank in *McCulloch v. Maryland* by invoking the Necessary and Proper Clause, President Andrew Jackson vetoed its renewal. Jackson interpreted *McCulloch* as deferring to the judgment of the legislature as to the bank’s necessity and propriety. Because he viewed the veto power as legislative in nature, and because he viewed the bank as both unnecessary and improper, he concluded that the bank was unconstitutional. “If our power over means is so absolute that the Supreme Court will not call in question the constitutionality of an act of Congress the subject of which “is not prohibited, and is really calculated to effect any of the objects intrusted to the Government,” . . . it becomes

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<sup>28</sup>U.S. CONST. Amend X.

us to proceed in our legislation with the utmost caution.”<sup>29</sup>

In short, just because *the Supreme Court* defers to you, does not mean *the Constitution* lets you do anything you like. Regardless of how the Supreme Court may eventually rule, each of you must decide for yourself whether the mandate is truly necessary to provide, for example, for portability of insurance if one changes jobs or moves to another state. If not, then restricting the liberties of the American people in this way is unnecessary. Each of you must also decide if allowing Congress to regulate inactivity by mandating that Americans enter into contractual relations with a private company for the rest of their lives would be to treat them as subjects, rather than citizens. If so, then commandeering the people in this manner is improper.

If you conclude that the mandate is either unnecessary or improper then, like President Jackson, you are obligated to conclude that it is unconstitutional, and to support its repeal.

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<sup>29</sup> Andrew Jackson, *Veto Message* (July 10, 1832), as it appears in RANDY E. BARNETT, *CONSTITUTIONAL LAW: CASES IN CONTEXT* 141 (2008)

Mr. SMITH. I will recognize myself for questions and Mr. Cuccinelli, I would like to address my first question to you. You mentioned that if the individual mandate is upheld, you feel that it would be the end of federalism. I gather then that you also feel that if Congress can require everyone to purchase health insurance, that there is really no limit to Congress' ability to regulate under the commerce clause. Is that the case?

Mr. CUCCINELLI. That is correct, Mr. Chairman. Once you have allowed, sort of kicked open that door, there is no articulable limit to that power. I am sure I could come up, as Mr. Dellinger mentioned, with examples what I would call crumbs off the table that might remain exclusively within the power of the States, but we would have dramatically, dramatically reduced that sphere.

Mr. Conyers, in his opening remarks, referenced auto insurance and the Massachusetts insurance example, both legitimate examples, I hear questions about them all the time. Massachusetts is a State. The Constitution as originally written did not limit States. It limited the Federal Government, and it is the Federal Government that has stepped outside those boundaries. Massachusetts can do exactly what the Federal Government attempted to do last year perfectly well within its constitutional prerogative as a sovereign entity in our constitutional system.

That is why federalism is so threatened by this legislation is you completely gut that differential, the distinctive authority and responsibility that was left to the States when the Federal Government was limited by the enumerated powers. And that is why the language of the 10th Amendment reads the way it does, is that residual power which we typically refer to as the police power is still left with States, and it would be gutted if the individual mandate is allowed to stand.

Mr. SMITH. Thank you, Mr. Cuccinelli.

Mr. Barnett, supporters of the individual mandate say we don't need to worry because the due process clause puts a limit on Congress' power. Do you buy that argument?

Mr. BARNETT. Well, the due process clause does put a limit on Congress' power and it puts a limit on the States power as well. And if that is the only limit that is on the State and Federal power, that means that Congress' power is the same as the States' power, it is just as broad, if that is the only limit, since it is the same limit on both entities. But we know that that is not right that Congress has limited and enumerated powers and the States' powers are broad and diverse. So that can't be the only limit.

Essentially what argument says, Mr. Chairman, is that the enumerated powers in article 1, section 8 are unlimited in and of themselves, they are unlimited and they are only to be qualified by the Bill of Rights or the due process clause. It is like saying Congress' powers are unlimited unless they violate free speech. It is the same kind of argument.

Mr. SMITH. Mr. Barnett, one other question. Supporters of the individual mandate also say that somehow health care is unique and therefore we also don't need to worry about excessive power residing in the hands of Congress.

Do you think that health care is so unique that that should alleviate our concerns?

Mr. BARNETT. Whether or not health care is unique, the factual uniqueness of any particular market is not a constitutional principle. And for 200 years, the Supreme Court has declined to examine the factual reach of any particular congressional law.

What they need is a firm line that they can judicially administer, and they don't get into the factual details of this circumstance versus that circumstance. So the problem with that objection is it is not a constitutional limitation, it will never be held as a constitutional limitation, so it don't solve the basic problem.

Mr. SMITH. Thank you, Mr. Barnett.

And the gentleman from Michigan, Mr. Conyers is recognized for his questions.

Mr. CONYERS. Thank you, Chairman Smith. First of all, I want to thank the Attorney General Of Virginia for his instructions. I will not debate this now because we are short of time, but I wanted to just ask you this question: What is it that two solicitor generals, Fried and Dellinger, don't understand about the constitutionality of the issue that brings us here this morning? What is it that they don't understand and that you do understand? Could you explain that for me?

Mr. CUCCINELLI. Mr. Conyers, they, along with many others, we could pile the list of supporters of each position on a scale and it would be a mile high, but the position they have taken is accepting that there are not no limits but virtually no limits on the commerce clause power of Congress.

And you commented earlier on the inactivity focus of us on our attack on the individual mandate, if one can treat a decision to do nothing as activity for purposes of Supreme Court precedent, which even judges ruling in favor of the Federal Government have had to make that logical leap, that is the leap they have to make, they have to redefine words and they have to have leaps of language and logic to prevail, and they are willing to do that.

Mr. CONYERS. I want to assure you that the sky is not falling. I want to give you the assurance today that federalism is probably alive and well before, during and after the Supreme Court decision on this matter.

Now, Mr. Dellinger, do you have a response for Professor Barnett in this discussion that we are having this morning?

Mr. DELLINGER. Mr. Conyers, I believe that the fundamental flaw in the critique of this legislation, the no-limits critique, is it assumes that a decision by the Supreme Court upholding this law would say that we are upholding this law because in our opinion Congress can regulate anything it wants or Congress can require the purchase of any product it wants, but why in the world would you think that would be what the Supreme Court would hold?

Whether a Supreme Court decision sustaining this minimum coverage incentive or requirement would allow Congress to do lots of other things when would entirely depend upon what the Supreme Court gave as the reason. And I think, I can't, I am sure there are ethical rules and criminal rules that prevent Members of Congress and witnesses from wagering, but if there weren't, I would wager that not only would this be upheld if it gets to the Supreme Court, that is, if any of the courts of appeal strike it down, which they may not, and I would wager that—and I have sampled a lot of

other Supreme Court experts, I would wager that Chief Justice Roberts writes an opinion upholding the law. And he is not going to write an opinion that says, we are upholding this law because Congress can require people to buy any product that Congress chooses or engage in any exercise. They are going to uphold it by saying in this case it is imminently intertwined with a fundamental part of the interstate markets in health insurance and health care.

And here is what the opinion I expect by the chief justice will cite. It will say that 94 percent of the long term uninsured have actually utilized health services. It will say that only one-third of the cost of health service is obtained by the uninsured are paid for by the uninsured. Of hospital costs, only 10 percent of the hospital costs obtained by the uninsured are paid for by the uninsured. Ninety percent of those costs are transferred to other Americans, other patients who are sick, and to taxpayers.

And in those circumstances, when Congress is regulating a market by prohibiting insurance companies from denying coverage, it can surely create an incentive more, modest more respecting of liberty than the way Medicare and Social Security operate in order to encourage people to maintain minimum coverage.

That is what the Supreme Court will say, and it won't be a precedent for requiring any other obligation to purchase anything whatsoever.

Mr. CONYERS. Well, I want to assure you that as long as you stay away from Internet gambling, wagers are probably permitted in the Rayburn building. Thank you, Mr. Chairman.

Mr. SMITH. Thank you, Mr. Conyers.

The gentleman from Virginia, Mr. Goodlatte, is recognized for his questions.

Mr. GOODLATTE. Thank you, Mr. Chairman.

Gentlemen, welcome. This is a very interesting discussion. But Mr. Dellinger, I have to tell you that while the Supreme Court can write anything they want to in their opinion, they have historically done so from the perspective of what parameters they are going to impose upon what Congress can do based upon that decision and based upon the precedents that have stood before them.

And quite frankly, I find it astonishing that you would compare Social Security or Medicare or any other government program which is funded through taxation, and then provided to people who can choose to avail themselves of it or not as the equivalent of mandating that individuals buy a private product from a private company which the government is also going to then mandate to that private company what has to be provided in the product.

And I would yield first to the Attorney General and see if he would like to address that point.

Mr. CUCCINELLI. Thank you, Congressman.

I would note that every example that I have heard listed by either Mr. Dellinger or Mr. Conyers, car insurance, Medicare, Social Security the 1792 Militia Act that Mr. Dellinger was referring to, all stand on their own constitutional footing and it is not the commerce clause, or none of them. None of them. They all have an independent power provided to Congress. The Militia Act, if you read your article 1 section 8, you will see it worded affirmatively

that you may raise an army, that there is vast authority over the militia and how it is to be governed and utilized. That doesn't exist in commerce. You must regulate something that already exists. They may not compel it into being.

Car insurance we already talked about. That is within the realm States. Medicare and Social Security as you note are implemented using the taxing power, a broad though not unlimited power of Congress.

The other example cited so far is for schooling which is within the realm of the power of States, not the Federal Government.

So none of the other examples are applicable. And I am one of these—I was an engineer before I went to the dark side and went to law school. So I had this logical training that forces me to argue in certain ways, I would say. And all of the discussion of the importance of the subject, I take for granted. I agree this is important. The Supreme Court has repeatedly noted that that doesn't matter, it doesn't matter. What matters is are you within the boundaries of the Constitution? And this isn't even close.

Mr. GOODLATTE. Let me ask you about another argument that has been made by the Justice Department in supporting their case. They have argued that the individual mandate penalty is constitutional as a tax.

And could you explain the problem with the argument that the mandate's penalty is a tax.

Mr. CUCCINELLI. First of all, let's note that this argument really didn't exist until they began to worry we might actually beat them.

Mr. GOODLATTE. We were told here that it wasn't a tax.

Mr. CUCCINELLI. Of course, and rather famously and emphatically the President in the George Stephanopoulos interview said the same thing. And that was cited by Judge Vinson in his October 14 order in the Florida case. But it is called a penalty. It had been called a tax in an earlier version of the bill. That was changed to a penalty.

The Supreme Court has noted *La Franca*. There is a distinction that matters between taxes and penalties. The taxing power, as I already mentioned, is broad for you all, for Congress. However, it is not unlimited either.

And the money you must pay if you fail to obey the government dictate and buy their chosen health insurance is a penalty. It is a punishment for failure to comply. That is a penalty. It was called a penalty. It acts as a penalty. In form and substance it is a penalty. To rename it after the fact in court attacks doesn't change its form or its substance. And it does not generally raise revenue as the money raised for Medicare and Social Security do. That is why those stand just fine. And it is an argument that not even the two judges who have found the individual mandate constitutional have bought.

I would suggest to you that if all you have to do, and you here as Congress, if all you have to do is penalize me some amount of money if I don't obey whatever you put in the legislation whatever the legislation can be and that can survive under the taxing power, that is a truly radical argument in terms of Federal power. That is radical. And it is not being upheld by any judge anywhere. And playing along with Mr. Dellinger's wagers, I bet you that not a sin-



gle judge in America upholds that argument. They may uphold the individual mandate. It is going to be a close call. But they will not uphold that taxing argument.

Mr. GOODLATTE. Thank you, Mr. Chairman.

Mr. SMITH. Thank you, Mr. Goodlatte.

The gentleman from New York, Mr. Nadler, is recognized for his questions.

Mr. NADLER. Thank you. I agree with Mr. Cuccinelli. I don't think anybody will uphold that argument because they will never get to it because they will decide the case is valid, the law is valid as an expression of Congress' power under the commerce clause.

Before I begin my questioning, let me ask the Chairman for unanimous consent to enter into the record the testimony submitted for today's hearing by the attorneys general of California and Oregon, Kamala Harris and John Kroger.

Like Attorney General Cuccinelli, they are involved in legal challenges to the Affordable Care Act. But they defend the constitutionality of the law and herald it as a much-needed solution to their States' and our Nation's health care crisis.

Having their perspectives will be useful to our consideration of this issue.

Mr. SMITH. Without objection.

[The information referred to follows:]

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**TESTIMONY OF THE HONORABLE KAMALA D. HARRIS,  
 ATTORNEY GENERAL OF CALIFORNIA**

**Committee on the Judiciary, U.S. House of Representatives  
 Room 2141, Rayburn House Office Building  
 Washington, DC 20510**

**Wednesday, February 16, 2011, 9:30 a.m.**

**Hearing on: "Constitutionality of the Individual Mandate"**

Dear Chairman Smith, Ranking Member Conyers, and distinguished members of the House Committee on the Judiciary:

Thank you for the opportunity to submit testimony on an issue that I deeply care about: ensuring that Californians, and all Americans, have access to affordable health care. I firmly believe that the Affordable Care Act goes a long way toward achieving that goal, and that its enactment is squarely within Congress's constitutional authority. That is why I have joined a growing number of states in defending the Affordable Care Act in federal court and before Congress.

As Attorney General of California, one of my most important duties is protecting the health and welfare of the citizens of California. While serving as a career prosecutor, I have seen the devastation that crime can wreak on society. But the harm and hardship to individuals, families, and our state from a lack of adequate access to health care, while not as visible, is also devastating.

Each year, millions of Californians who lack health insurance go without basic medical care, in many cases turning what could be an easily treatable illness into a costly, life threatening emergency. Thousands more are forced to declare bankruptcy under the weight of a mountain of hospital bills because their health insurer refused to cover them for a preexisting condition, or placed limits on how much they would pay. Sadly, during the economic recession of the last two years, the health care crisis has worsened and has profoundly impacted our most vulnerable populations. Last year, 1.5 million children went without health insurance in California, a 33 percent increase from just two years ago. During the economic downturn of the last two years, many California families have lost jobs, which has also meant losing healthcare coverage for them and, in many cases, their families.

The skyrocketing cost of health care, coupled with the rising number of uninsured, has come at a tremendous cost to California. This crisis has occurred while our state has grappled

with recurring budget deficits, this year estimated to be approximately \$25 billion of the state's General Fund. At the same time, California is expected to spend \$25 billion on health care in the 2010-2011 Fiscal Year, even as it cuts benefits to those on Medi-Cal and other forms of government assistance. In short, the situation facing states like California is unsustainable.

The Affordable Care Act, and its requirement that applicable individuals obtain health insurance, is a reasonable — and constitutional — means of addressing the health care crisis in this country. It simultaneously reduces health care costs (and our country's deficit) while ensuring that individuals have access to affordable health insurance. The Act expands the existing insurance market, and provides important protections for those who already have health insurance, while giving Californians without insurance access to affordable care through expanding Medicaid.

The minimum coverage provision that is the subject of various legal challenges is an important part of the Affordable Care Act. When individuals have the means to purchase health insurance, but refrain from doing so, this choice raises the cost of insurance and the cost of medical care for everyone. The Act's requirement that individuals with sufficient means must carry health insurance, included as part of a law that seeks to ensure that health insurance is affordable and available for all, is well within Congress's constitutional powers.

#### **CALIFORNIA'S EXPERIENCE WITH THE HEALTH CARE CRISIS**

As the largest state in the union, California's experience with providing health care to its residents is particularly relevant to the debate over the Affordable Care Act. As a result of the economic downturn, more Californians than ever are uninsured. In 2009, one in four Californians — over 8 million individuals — lacked health insurance for all or part of the year. This represents a 28 percent increase in the number of uninsured Californians in just the last two years. A large part of this increase is the result of fewer Californians obtaining health insurance through their employer. In 2000, 60.8 percent of Californians were insured through their employer; in 2009, due to the downturn in the economy, that figure dropped to 52.3 percent.

As the number of Californians who obtain health insurance through their employer has decreased, the number of Californians who are in the state's Medicaid programs, Medi-Cal and Healthy Families, has increased from 13.8 percent of California Residents in 2000 to 19.4 percent in 2009. And while the number of individuals entitled to government health care has increased, the resources available to support such care have decreased. As is the case with many states, California has faced a series of budget deficits that have forced it to reduce spending even as the demand for social services such as Medi-Cal has increased. Governor Jerry Brown's proposed budget for the 2011-2012 fiscal year includes \$127.4 billion in spending on health and human services, the vast majority of which funds government health care programs. This is \$17.5 billion less than was budgeted three years ago. As a result, California has already been forced to eliminate routine teeth cleanings, optometric exams, and some mental health services from Medi-Cal; further reductions in services are expected this year. California's attempts to

close its budget gap through reducing its payments to Medi-Cal providers have now reached the United States Supreme Court.<sup>1</sup>

Acknowledging the crisis confronting the state, California has focused on, among other things, providing health insurance to “high risk individuals” which account for approximately one-eighth of California’s uninsured. To that end, California has established the Major Risk Medical Insurance Program, which covers individuals who have been unable to obtain adequate coverage for the previous twelve months. Individuals in this program are required to pay a monthly contribution, a \$500 deductible and co-payments. Because the individuals in this program are, by definition, a high risk to insurers, the monthly contributions are quite high: California only pays one-third of the cost of the plan, while the subscriber pays the remainder. Even with the state subsidy, many individuals who could benefit from this program are unable to afford it.

Nevertheless, California’s story remains similar to that of many other states. While it strives to provide for its most vulnerable populations, the high cost of medical care, combined with increased demand for services and devastating budget cuts, make it more and more difficult for California to meet its moral obligations to those who are unable to afford adequate medical care. As a result, federal intervention was necessary to ensure that all individuals have access to affordable health insurance and to bring down the costs of providing health care.

#### **THE BENEFITS OF THE AFFORDABLE CARE ACT TO CALIFORNIA**

The Affordable Care Act is in many ways similar to California’s attempts at health care reform. It relies in large part on an expansion of the current market for health insurance, while instituting reforms to ensure that all Americans have access to affordable and reliable health insurance. Many of those reforms are already benefitting California and its citizens. For instance, the Affordable Care Act seeks to expand the number of employers who offer insurance to their workers, which is the largest source of insurance coverage in California. While it requires businesses with more than fifty employees to begin providing health insurance in 2014, the significant tax breaks to small businesses that provide health insurance have already gone into effect. As a result, smaller businesses can be more competitive with larger corporations that routinely offer health insurance: according to the IRS, over 500,000 businesses will benefit from these tax breaks in California alone. Given the numerous start-up companies that begin in California in the tech and green industries, the ability of these small businesses to offer health insurance to their employees is critical to their ability to attract the talent that makes them thrive. Many businesses in California are already taking advantage of these tax incentives, and their employees are now benefitting from having access to affordable health insurance.

While allowing a greater number of employers to provide health insurance to their employees, the Affordable Care Act expands access to Medicaid so that many of those who lack

<sup>1</sup> Petitions for a writ of certiorari in *Maxwell-Jolly v. Independent Living Center of Southern California* (09-958), *Maxwell-Jolly v. S.R.M. Hospital* (10-283), and *Maxwell-Jolly v. California Pharmacists Association* (09-1158) were granted on January 18, 2011, and the cases consolidated for argument.

access to employer-based health insurance will nonetheless be covered. The Act allows individuals who earn less than 133 percent of the federal poverty level to be covered by Medicaid. California is one of the first states to take advantage of a provision that permits states to obtain a waiver from the federal government so that they can offer this expanded coverage in advance of 2014. Pursuant to this waiver and other provisions of the Affordable Care Act, California will receive approximately \$10 billion in federal funds to cover the costs of expanding health coverage for low-income individuals as well as the costs of providing uncompensated care for uninsured individuals. These funds will also allow California to invest in its public hospitals and health care infrastructure, adding critical jobs in a state with one of the highest rates of unemployment. These funds are direly needed by California as it faces a current deficit of \$7 billion in addition to a projected \$19 billion deficit next fiscal year, even while greater numbers of uninsured seek state assistance in gaining access to basic medical care.

For those individuals who are ineligible for Medi-Cal and who are not offered health insurance by an employer, the Affordable Care Act authorizes the creation of health insurance exchanges where individuals (and small businesses) can purchase affordable health insurance plans. By pooling together individuals and businesses, the health insurance exchanges will lower costs, ensuring that everyone has access to quality health coverage. California was the first state to pass legislation establishing an exchange, so that Californians will be able to take advantage of this provision of the Affordable Care Act when it goes into effect in 2014.

In addition to expanding health coverage, the Affordable Care Act also makes reforms to health insurance plans to ensure that individuals do not lose their coverage. California has enacted legislation<sup>2</sup> implementing the Act's ban on denying coverage of children based on preexisting conditions, as well as its requirement that insurance plans cover dependent children who are 25 or under. California has also passed legislation that prohibits a person's health care insurance policyholder from canceling insurance once the enrollee is covered unless there is a demonstration of fraud or intentional misrepresentation of material fact by the enrollee. In addition, until denying coverage of adults who have a pre-existing condition becomes barred in 2014, California has established a pre-existing condition insurance plan for adults who are unable to obtain insurance. Coupled with a federal prohibition on lifetime caps on insurance benefits that is already in place, these provisions will ensure that Californians keep the health insurance coverage they already have.

In addition to expanding the market for health insurance, the Affordable Care Act contains numerous provisions that will improve the quality of health care for Californians. With regard to senior citizens, the Act closes the "doughnut hole" in prescription coverage. Currently, there is a gap in prescription coverage between the yearly limit on prescription medications and the provision for "catastrophic coverage" such that in 2009, there was no coverage by Medicare of drug costs between \$2700 and \$6154 per year for seniors. The Affordable Care Act closes the doughnut hole by 2020. The Act also provides new incentives to expand the number of primary care doctors, nurses, and physician assistants through scholarships and loan repayment programs. The Act also contains provisions aimed at preventing illness in the first instance. It requires

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<sup>2</sup> California maintains a website detailing its implementation of the Affordable Care Act. See <http://www.healthcare.ca.gov/>.

insurance companies to offer certain preventive services, and authorizes \$15 billion for a new Prevention and Public Health Fund, which will support initiatives from smoking cessation to fighting obesity.

Finally, the Act contains important consumer protections that I intend to vigorously enforce as Attorney General. In addition to barring the practice of insurance companies rescinding coverage, the Act provides consumers with a way to appeal coverage determinations or the denial of claims, and establishes an external review process to examine those decisions. In addition, California has already taken advantage of a provision that provides for grants to states to expand consumer assistance programs. California has received \$3.4 million to enhance the capacity of existing consumer assistance networks, to develop and promote a centralized consumer-friendly website and toll-free number that consumers can call with questions about health care coverage, and to receive assistance with filing complaints/and or appeal. The state has also been given a \$1 million grant to implement a provision of the Affordable Care Act that grants states the authority to review premium increases. Each of these provisions is vitally important to ensuring that insurance companies honor their commitments to consumers.

#### THE CONSTITUTIONALITY OF THE MINIMUM COVERAGE PROVISION

A key component of the Affordable Care Act is the minimum coverage provision. Under the Act, individuals not otherwise exempt must purchase a qualified insurance plan, or pay a penalty to the IRS. This provision is essential for two reasons. First, it ensures that individuals take responsibility for their own care rather than shifting those costs to society. In so doing, the minimum coverage provision lowers the cost of care generally. Second, it is necessary to include all segments of the population in the health insurance market so that insurance companies can eliminate caps on benefits and insure individuals with preexisting conditions. Because the minimum coverage provision clearly implements Congress's ability to regulate the sector of our economy that accounts for one-sixth of the nation's gross domestic product, it is squarely within Congress's power to regulate interstate commerce under Article I, section 8.

Under the U.S. Constitution, Congress has the power to "make all Laws which shall be necessary and proper" to "regulate Commerce . . . among the several States." Art. I, § 8. This authority includes the ability to "regulate those activities having a substantial relation to interstate commerce. . . i.e., those activities that substantially affect interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558–59 (1995). The Supreme Court has concluded that if "a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence." *Gonzalez v. Raich*, 545 U.S. 1, 17 (2005). Thus, even if individual conduct, in isolation, would be insufficiently related to interstate commerce for Congress to regulate it, if the regulation of that conduct is part of a larger regularly scheme, Congress can nevertheless regulate the individual conduct.

Every individual, at some point in their lives, needs medical care. It is an unavoidable fact, yet one that individuals who refuse to obtain health care routinely ignore, at great cost to society. Individuals who do not have health insurance often delay seeking care, such that it is more expensive to obtain treatment. For instance, providing antibiotics at an early stage of an infection may cost a few dollars, but hospitalization with pneumonia could cost thousands. Moreover, emergency rooms are required by federal law to treat patients without regard to their

ability to pay, and so many uninsured end up using emergency rooms for their primary health care. The cost of care at an emergency room, however, is three times higher than care by a primary care physician.

More often than not, these costs are passed on to other consumers who do have health insurance, since the uninsured often cannot pay for medical bills, particularly when faced with a catastrophic illness. Hospitals must make up for this uncompensated care, and often do so by passing those costs on to those who have health insurance. Californians on average pay an extra 10 percent on their insurance premiums to cover the costs of providing care for the uninsured. By requiring individuals to purchase health insurance, those individuals will bear the costs (which will be on average much lower) rather than passing them on to others, thus lowering the cost of insurance for everyone. As the district court found in the first ruling on a challenge to the minimum coverage provision:

There is a rational basis to conclude that, in the aggregate, decisions to forego insurance coverage in preference to attempting to pay for health care out of pocket drive up the costs of insurance. The costs of caring for the uninsured who prove unable to pay are shifted to health care providers, to the insured population in the form of higher premiums, to governments, and to taxpayers.

Order Denying Plaintiff's Motion for Injunction and Dismissing Plaintiff's First and Second Claims for Relief, *Thomas More Law Center et al. v. Obama et al.* (E.D. Mich. Case No. 10-CV-11156) at p. 16 (October 7, 2010).<sup>3</sup> And while it may not be true that every uninsured person will pass on costs to others, "[w]hen Congress decides that the 'total incidence' of a practice poses a threat to a national market, it may regulate the entire class." *Raich*, 545 U.S. at 16.

The minimum coverage provision is also essential to Congress's efforts to insure those who have preexisting conditions and those who suffer a catastrophic illness. The Affordable Care Act prohibits insurers from declining to cover an individual for a preexisting condition (starting in 2014) and eliminates an insurer's ability to place annual or lifetime caps on benefits. The effect of these restrictions will be to increase the amount of money paid out to claimants. This would be unsustainable if individuals were permitted to wait until they became ill to purchase insurance, knowing that insurance companies would be forced to accept them. Allowing an individual to access the market whenever they chose presents a moral hazard: individuals with the means to do so can simply refrain from carrying health insurance, since they know that if they fall seriously ill, society will cover their costs.

If only the sick were part of the health insurance pool, there would be insufficient premiums flowing into the insurance companies from healthy people to support payments for those who are ill. As the district court found, without the minimum coverage provision, "the

<sup>3</sup> This ruling is currently on appeal in the United States Court of Appeals for the Sixth Circuit, Case No. 10-2388. On behalf of California, I joined eight other states, including Oregon, Iowa, New York, Vermont, Hawaii, Connecticut, Delaware, and Maryland in filing an amicus brief in that case supporting the federal government.

most costly individuals would be in the insurance system and the least costly would be outside it. In turn, this would aggravate current problems with cost-shifting and lead to even higher premiums.” *Thomas More Law Center v. Obama*, Order Denying Plaintiff’s Motion for Injunction at p. 18. Without the minimum coverage provision, then, Congress’s other reforms of the health care market would be substantially hindered.

The minimum coverage provision is thus an essential part of Congress’s reform of the health care system and the goal of providing citizens with affordable health insurance. Just as the regulation of health care generally is undoubtedly within Congress’s commerce clause powers, so too is the minimum coverage provision within those powers. Without it, Congress’s goal of reducing health care costs will be unrealized. The uninsured will continue to pass on hidden costs to those who are insured, making it more difficult for individuals to obtain insurance who want to do so, despite Congress’s establishment of health insurance exchanges and its provision of subsidies to individuals and businesses. Invalidation of the minimum coverage provision will also render Congress’s attempts to provide insurance for those with preexisting conditions ineffectual, since individuals will be free to purchase coverage just as they fall ill without paying into it when they are healthy.

#### CONCLUSION

Thank you for allowing me the opportunity to express my views on the importance of the Affordable Care Act to California. I truly believe that this Act represents a smart and fiscally responsible means of providing affordable health coverage to all Californians. I look forward to the resolution of the various legal challenges to the minimum coverage provision so that we can get to the work of ensuring that all Americans have access to affordable, reliable, and effective health coverage.

Respectfully Submitted,

KAMALA D. HARRIS  
Attorney General of California





**STATEMENT OF  
JOHN KROGER  
OREGON ATTORNEY GENERAL**

**BEFORE THE  
UNITED STATES HOUSE  
COMMITTEE ON THE JUDICIARY**

**HEARING ENTITLED  
"CONSTITUTIONALITY OF THE INDIVIDUAL MANDATE"**

**PRESENTED  
FEBRUARY 16, 2011**

Mr. Chairman, Ranking Member Conyers, and distinguished Members of the Committee – thank you for the opportunity to discuss my views as Oregon Attorney General on the importance and constitutionality of the Affordable Care Act and in specific the individual mandate.

#### **I. INTRODUCTION**

As a sovereign state, Oregon is charged with protecting and promoting the health and welfare of its citizens. Citizen access to affordable medical care is necessary for our state to promote health, prevent disease, and heal the sick. In our modern system of advanced yet costly medical care, comprehensive health insurance coverage is critical to achieving that end. It is well documented that a lack of health insurance coverage leads to increased morbidity, mortality, and individual financial burdens.<sup>1</sup>

In connection with our duties to protect and promote the health and welfare of our citizens, Oregon and many other states have engaged in varied, creative, and determined efforts to expand and improve health insurance coverage and to contain health care costs. Despite some successes, these state-by-state efforts have fallen short. As a consequence, we believe that a national solution is necessary.

Oregon's predicament illustrates the problem that states now face. Despite a variety of legislative efforts to increase access to insurance coverage, 21.8% of Oregonians lack health insurance. Absent health care reform, Oregon expects that figure to rise to approximately 27.4% in the next ten

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<sup>1</sup> See, e.g., Stan Dorn, *Uninsured and Dying Because of It: Updating the Institute of Medicine Analysis on the Impact of Uninsurance on Mortality* (Urban Institute Jan. 2008), available at [http://www.urban.org/UploadedPDF/411588\\_uninsured\\_dying.pdf](http://www.urban.org/UploadedPDF/411588_uninsured_dying.pdf) (last visited Jan. 11, 2011).

years.<sup>2</sup> In 2009, Oregon spent approximately \$2.6 billion on Medicaid and CHIP. Absent health care reform, that figure is expected to grow to approximately \$5.5 billion by 2019.<sup>3</sup>

The situation that states now face is unsustainable. And without national reform, state-level health care costs will rise dramatically over the next ten years. Even as states are forced to spend more to keep up with skyrocketing health care costs, the number of individuals without insurance will continue to rise if we do not implement national health care reform.<sup>4</sup>

The Patient Protection and Affordable Care Act (ACA) is a national solution that will help us fulfill our duty to protect and promote the health and welfare of our citizens. The law strikes an appropriate balance between national requirements that promote the goal of expanding access to health care in a cost-effective manner and state flexibility in designing programs to achieve that goal. As at least two different U.S. District Courts have concluded, the ACA achieves these goals without running afoul of any constitutional limits on federal government authority.<sup>5</sup>

## II. BACKGROUND

As Congress recognized, the nation's health care system is in a state of crisis. As of 2008, 43.8 million people in the United States had no health insurance coverage and thus no or little access to health care.<sup>6</sup> Indeed, Congress found that "62 percent of all personal bankruptcies are caused in part by medical expenses." ACA § 1501(a)(2)(G).<sup>7</sup> And state-level health care costs will only continue to rise.

<sup>2</sup> Bowen Garrett et al., *The Cost of Failure to Enact Health Reform: Implications for States*, 51 (Robert Wood Johnson Foundation and the Urban Institute Oct. 1, 2009), available at [http://www.urban.org/uploadedpdf/411965\\_failure\\_to\\_enact.pdf](http://www.urban.org/uploadedpdf/411965_failure_to_enact.pdf) (last visited Jan. 11, 2011).

<sup>3</sup> *Id.*

<sup>4</sup> Bowen Garrett et al., *supra* note 3, at 51.

<sup>5</sup> *Thomas More Law Center v. Obama*, 720 F.Supp.2d 882 (E.D. Mich. 2010); *Liberty University, Inc. v. Geithner*, 2010 WL 4860299 (W.D. Va. 2010).

<sup>6</sup> The Centers for Disease Control and Prevention, Early Release of Selected Estimates Based on Data From the 2008 National Health Interview Survey Table 1.1a (2009), available at [http://www.cdc.gov/nchs/data/nhis/earlyrelease/200906\\_01.pdf](http://www.cdc.gov/nchs/data/nhis/earlyrelease/200906_01.pdf) (last visited Jan. 11, 2011).

<sup>7</sup> All references to ACA § 1501(A)(2) are to §1501 as amended by § 10106 of the ACA.

These increases threaten to overwhelm already overburdened state budgets. Without a national solution to the health care crisis, states would be forced for the foreseeable future to spend more and more on health care and yet still slide further and further away from their goal of protecting the health and well-being of their citizens.

The ACA will allow states to expand and improve health insurance coverage. The ACA achieves coverage increases through a variety of mechanisms, including the implementation of a minimum coverage provision that requires most residents of the United States, starting in 2014, to obtain health insurance or pay a tax. Among other exceptions, the minimum coverage provision does not apply to those whose income falls below a specified level or to those who can demonstrate that purchasing insurance would pose a hardship.<sup>8</sup> In other words, the minimum coverage provision targets those who, while they can afford it, choose not to purchase insurance and choose instead to “self insure,” relying on luck, their own financial reserves, and the health care social safety net of emergency rooms and public insurance programs to catch them when they fall ill.

Some of the opponents of the ACA claim that the individual coverage provision exceeds Congress’s Commerce Clause power. As they frame their argument, the Commerce Clause empowers Congress to regulate only activity and not, as they characterize it, the “inactivity” of refusing to purchase health insurance. But these arguments ignore the effect on interstate commerce of refusing to comply with the minimum coverage provision and thus mischaracterize the conduct as “inactivity.” Moreover, they lose sight of the principal concern that animates the Supreme Court’s Commerce Clause jurisprudence, namely, ensuring a meaningful distinction between what is truly national and what is

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<sup>8</sup> Individuals who will not be subject to the individual mandate include those with incomes low enough that they are not required to file an income tax return (in 2009 the threshold for taxpayers under age 65 was \$9,350 for singles and \$18,700 for couples), those who would have to pay more than a certain percentage of their income (8% in 2014) to obtain health insurance, and those who can demonstrate that purchasing insurance would pose a hardship. ACA § 1501(e).

truly local. For the reasons explained below, the minimum coverage provision fits easily within Congress's Commerce Clause authority.

### **III. THE ACA'S MINIMUM COVERAGE PROVISION IS CONSTITUTIONAL.**

#### **A. The minimum coverage provision is necessary for the success of health care reform and the overall stability of the nation's health insurance markets.**

Any fair review of Congress's authority under the Commerce Clause to enact the minimum coverage provision must be conducted in the context of examining why the minimum coverage provision is crucial to national health care reform. One of the primary goals of the ACA is to increase the number of Americans who have access to health insurance coverage. Insurance is a system of shared risk. But in a system where purchasing insurance is purely voluntary, people with higher than average health risks will disproportionately enroll in insurance plans, as those individuals are more likely to purchase insurance when they expect to require health care services. This phenomenon is commonly referred to as "adverse selection."

Adverse selection raises the cost of insurance premiums for two reasons: first, because adverse selection tends to create insurance pools with higher than average risks and premiums that reflect the average cost of providing care for the members of the pool, the overall cost is higher. Second, because insurers fear the potentially substantial costs associated with individuals with non-obvious high health risks disproportionately enrolling in their insurance plans, insurers will often add an extra loading fee to their premiums, particularly in the small group and individual markets. An individual mandate addresses both of these problems. First, the law moves low-risk people into the risk pool and thus drives down average costs. Second, by lessening the probability that a given individual is purchasing insurance solely because he or she knows something the insurer does not know about his or her health status, the law reduces insurer hedging and the fees associated with adverse selection.

Another consequence of adverse selection is that insurers enact a variety of policies designed to keep high-cost individuals out of their plans and limit the financial cost to the plan if those individuals enroll—such as limiting coverage for preexisting conditions, denying coverage, charging higher premiums for those with actual or anticipated health problems, and imposing benefit caps. The ACA seeks to eliminate many of these adverse selection avoidant practices by outlawing preexisting condition exclusions and requiring insurers to issue policies to anyone who applies.

These reforms are, of course, designed to increase access to insurance. However, the reality is that “[i]nsurance pools cannot be stable over time, nor can insurers remain financially viable, if people enroll only when their costs are expected to be high. . . . [a]nd research leaves no doubt that without an individual mandate, many people will remain uninsured” until they get sick.<sup>9</sup> Young Americans are especially inclined to forgo purchasing health insurance in favor of other purchases. If pre-existing conditions are eliminated with no requirement that one purchase insurance, these people would have an incentive to forgo coverage until they get sick—and the high-risk pool would collapse from inadequate funding.<sup>10</sup> A minimum coverage requirement that requires everyone to pay into the risk pool will dramatically reduce adverse selection, and make it financially practical to insist upon coverage for individuals with pre-existing conditions.

**B. The minimum coverage provision fits within Congress’s authority under the Commerce Clause and the Necessary and Proper Clause.**

**1. Congress has broad authority to regulate activities that substantially affect interstate commerce.**

The United States Constitution empowers Congress to “make all Laws which shall be necessary and proper” to “regulate Commerce . . . among the several States.” U.S. Const. art. I § 8, cl. 3. The

<sup>9</sup> Linda J. Blumberg & John Holahan, *The Individual Mandate—An Affordable and Fair Approach to Achieving Universal Coverage*, 361 *New Eng. J. Med.* 6–7 (2009).

<sup>10</sup> See Michael C. Dorf, *The Constitutionality of Health Insurance Reform, Part II: Congressional Power* (Nov. 2, 2009), available at <http://writ.news.findlaw.com/dorf/20091102.html> (last visited Jan. 11, 2011).

Commerce Clause power includes the authority to “regulate those activities having a substantial relation to interstate commerce. . . . *i.e.*, those activities that substantially affect interstate commerce.” *United States v. Lopez*, 514 U.S. 549, 558–59 (1995) (internal citations omitted).

The Supreme Court has long understood the Commerce Clause to be an exceptionally wide grant of authority. In that regard, three important principles have emerged from the Court’s cases that are relevant here. First, an activity will be deemed to have a “substantial effect” on interstate commerce if the activity, when aggregated with the similar activity of many others similarly situated, will substantially affect interstate commerce. *Wickard v. Filburn*, 317 U.S. 111, 128 (1942). Second, local, non-economic activities will be held to affect interstate commerce substantially if regulation of the activity is an integral or essential part of a comprehensive regulation of interstate economic activity, and if failure to regulate that activity would undercut the general regulatory scheme. *Gonzalez v. Raich*, 545 U.S. 1, 18 (2005). Third, in determining whether a regulated activity substantially affects interstate commerce within the meaning of the Commerce Clause, the Court “need not determine whether . . . [the regulated activities] taken in the aggregate, substantially affect interstate commerce in fact, *but only whether a ‘rational basis’ exists for so concluding.*” *Id.* at 22 (emphasis added). Congress’s judgment that an activity would undermine the statutory scheme “is entitled to a strong presumption of validity.” *Id.* at 28.

Although the Commerce Clause authority to regulate interstate commerce is thus broad, it is not without limits. Courts will not “pile inference upon inference” to find that a local, noncommercial activity that is not part of a comprehensive regulatory scheme nonetheless substantially affects interstate commerce. *Lopez*, 514 U.S. at 567. In *Lopez*, the Court struck down the federal Gun-Free School Zones Act which prohibited carrying a gun within 1,000 feet of a school. In finding the statute outside of the authority of the Commerce Clause, the Court observed that the act at issue was a criminal statute that

had “nothing to do with ‘commerce’ or any sort of economic enterprise” and was “not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.” *Id.* at 561. *See also United States v. Morrison*, 529 U.S. 598, 615 (2000) (sustaining Commerce Clause challenge to statutory provision creating federal civil remedy for victims of gender-motivated violence).

*Lopez* and *Morrison* notwithstanding, the Supreme Court’s more recent cases have reaffirmed the broad reach of Congress’s commerce clause authority. In *Raich*, for example, the Court upheld federal power to prohibit the wholly intrastate cultivation and possession of small amounts of marijuana for medical purposes, despite express state policy to the contrary. 545 U.S. at 31–32. Expressly reaffirming its holding in *Wickard*, the *Raich* Court concluded that Congress had a rational basis for concluding that marijuana cultivation is an “economic activity” that, in the aggregate, has a substantial effect on interstate commerce. *Raich* also makes clear that Congress may “regulate activities that form part of a larger regulation of economic activity.” *Id.* at 24. In other words, Congress can regulate wholly intrastate activity to make effective a comprehensive regulation of an interstate market. *Id.* at 36 (Scalia, J., concurring). Even if an activity is “local and though it may not be regarded as commerce, it may still, *whatever its nature*, be reached by Congress if it exerts a substantial economic effect on interstate commerce.” *Id.* at 17 (quoting *Wickard*, 317 U.S. at 128) (emphasis added).

Congress’s broad commerce power is also rooted in the Necessary and Proper Clause. That clause authorizes the federal government to enact regulations that, while not within the specifically enumerated powers of the federal government, are nonetheless “‘necessary and proper for carrying into Execution’ the powers ‘vested by’ the ‘Constitution in the Government of the United States.’” *United States v. Comstock*, 130 S.Ct. 1949, 1954 (2010) (quoting U.S. Const. Art. I, § 8, cl. 18). In other words, the Necessary and Proper clause permits Congress to enact regulations that are necessary or convenient



to the regulation of commerce. In *Comstock*, the Supreme Court recently explained that the Necessary and Proper clause provides federal regulatory authority where “the means chosen are reasonably adapted to the attainment of a legitimate end under the commerce power or under other powers that the Constitution grants Congress the authority to implement.” *Comstock*, 130 S.Ct. at 1957.

2. **The minimum coverage provision is constitutional because it regulates activity that substantially affects interstate commerce and because it is an essential part of comprehensive regulation of interstate economic activity.**
  - a. **The minimum coverage provision regulates activity that substantially affects interstate commerce.**

In the ACA, Congress specifically found that the minimum coverage requirement is “commercial and economic in nature, and substantially affects interstate commerce.” ACA § 1501(a)(1).<sup>11</sup> Congress certainly had a rational basis for reaching that conclusion. An individual’s decision to not purchase health insurance, when aggregated with the purchasing decisions of thousands of other individuals who choose not to maintain health insurance—because they cannot afford it or for some other reason—has a powerful and generally adverse impact on the health insurance and health care markets. In the aggregate, these economic decisions regarding how to pay for health care services—including, in particular, decisions to forgo coverage, pay later, and if need be, to depend on free care—have a substantial effect on the interstate health care market. As the Supreme Court recognized in *Raich* and in *Wickard*, the Commerce Clause empowers Congress to regulate these direct and aggregate effects. *See Raich*, 545 U.S. at 16–17; *Wickard*, 317 U.S. at 127–28.

When individuals choose not to purchase health insurance, they are still participants in the interstate health care marketplace. When the uninsured get sick, they seek medical attention within the health care system. The medical care provided to the uninsured costs a substantial amount of money.

<sup>11</sup> See also ACA § 1501(a)(2) (describing the effects of the minimum coverage requirement on the national economy).

Approximately one third of the cost of that care is covered by the uninsured themselves. The remaining two thirds of the cost are passed on to other public and private actors in the interstate health care and health insurance system, including the state and federal governments, multi-state private insurance companies, and large multi-state employers. Although researchers disagree as to the price tag for uncompensated care, it is generally agreed that the cost is substantial—billions of dollars each year.<sup>12</sup>

Oregon's experience illustrates the financial impact of the uninsured on the health care market. Because the uninsured are often unable to pay their medical bills, providers shift those costs onto the insured. Experts have estimated that this so-called "hidden tax" amounts to \$225 per privately insured Oregonian, accounting for approximately 9% of a commercial premium.<sup>13</sup> Hospitals foot this bill as well. In 2009, Oregon hospitals spent a combined \$1.1 billion—an average 7.8% of gross patient revenue—on uncompensated care.<sup>14</sup> To put this number in perspective, Oregon hospitals had a combined net income of \$255 million in 2009.<sup>15</sup>

The cost of the uncompensated care provided to the uninsured is magnified by the fact that the uninsured frequently delay seeking care. By the time they are treated, their medical problems are often more costly to treat than they would have been had they sought care earlier.<sup>16</sup> Furthermore, because

<sup>12</sup> See, e.g., Dianne Miller Wolman & Wilhelmine Miller, *The Consequences of Uninsurance for Individuals, Families, Communities, and the Nation*, 32 J.L. Med. & Ethics 397, 402 (2004); Susan A. Channick, *Can State Health Reform Initiatives Achieve Universal Coverage? California's Recent Failed Experiment*, 18 S. Cal. Interdisc. L.J. 485, 499 (2009).

<sup>13</sup> K. John McConnell & Neal Wallace, *Oregon's Cost-Shift: The Effect of Public Insurance Coverage on Uncompensated Care* 3-4, available at [http://www.oregon.gov/OHPPR/docs/OR\\_Uncom\\_Care-McConnell.pdf?ga=t](http://www.oregon.gov/OHPPR/docs/OR_Uncom_Care-McConnell.pdf?ga=t) (last accessed Jan. 25, 2011).

<sup>14</sup> Oregon Health Policy and Research, *Financial Data, 2009* (Dec. 7, 2010) available at [http://www.oregon.gov/OHPPR/RSCH/docs/Hospital\\_Financials/2009\\_Margins\\_FINAL\\_120710.xls](http://www.oregon.gov/OHPPR/RSCH/docs/Hospital_Financials/2009_Margins_FINAL_120710.xls) (last accessed Jan. 25, 2011).

<sup>15</sup> *Id.*

<sup>16</sup> *Hearings to Examine Health Care Access and Affordability and Its Impact on the Economy: Before the Subcomm. on Labor, Health and Human Services, Education, and Related Agencies of the S. Comm. on Appropriations*, 108th Cong. (2003) (testimony of Jack Hadley,

emergency rooms are required by federal law to screen everybody who walks through their doors and to provide stabilizing treatment to those with an emergency medical condition, much of the care for the uninsured is delivered in this costly and inefficient setting. Indeed, treatment in an emergency room costs approximately three times as much as a visit to a primary care physician, at a cost of approximately \$4.4 billion across the United States.<sup>17</sup>

In addition to the direct impact on the health care and health insurance systems, individuals who choose to forgo insurance affect the national economy in other ways, including lost productivity due to poor health and personal bankruptcies due to health care costs, and some of the limited health care resources are shifted to emergency departments, rather than to preventative care.<sup>18</sup> In the aggregate, economic decisions regarding how to pay for health care services, particularly decisions to forgo coverage, have a substantial effect on the interstate health care market, because the costs of providing care to the uninsured are passed on to everyone else through higher premiums, on average, over \$1,000 a year, and higher health care costs. ACA § 1501(a)(2)(F).

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Urban Institute), available at <http://ftp.resource.org/gpo.gov/hearings/108s/89058.txt> (last visited Jan. 19, 2011).

<sup>17</sup> California Association of Health Plans, *10 Factors Driving Costs for California's Hospitals* at 3 (Nov. 2010), available at <http://www.calhealthplans.org/documents/IssueBriefHospitalCostDriversNovember2010.pdf> (last accessed Jan. 13, 2011); see also USC Center for Health Financing, Policy, and Management, *Marginal Costs of Emergency Department Outpatient Visits: An update using California data* (Nov. 2005) available at [www.usc.edu/schools/sppd/research/healthresearch/images/pdf\\_reportspapers/multivariate\\_cost\\_paper\\_v5.pdf](http://www.usc.edu/schools/sppd/research/healthresearch/images/pdf_reportspapers/multivariate_cost_paper_v5.pdf) (last accessed Jan. 13, 2011).

<sup>18</sup> Kaiser Family Foundation, *Hospital Emergency Room Visits per 1,000 Population, 1999*, available at <http://www.statchealthfacts.kff.org/comparctrend.jsp?yr=6&sub=94&cat=8&ind=388&typ=1&sort=a&srqn=1> (last visited Jan. 12, 2011). From 1999 to 2008, emergency room visits rose from 365 to 404 per 1,000 population as uninsured rates increased.

**b. The minimum coverage provision is an essential part of comprehensive regulation of interstate economic activity.**

The Commerce Clause challenge to the minimum coverage provision also fails because it is an essential part of comprehensive regulation of the health care and health insurance industries. Health insurance and health care are both economic activities in interstate commerce that are indisputably within Congress's Commerce Clause power to regulate. Seventeen percent of the United States economy is devoted to health care. ACA § 1501(a)(2)(B). More than 11 million people work in the US health care industry.<sup>19</sup> The federal government has for decades been deeply involved in healthcare regulation, including, among other programs Medicare, Medicaid, and CHIP. As the Supreme Court recently recognized, such a longstanding history helps to illustrate "the reasonableness of the relation between the new statute and pre-existing federal interests." *Comstock*, 130 S. Ct. at 1958.

The minimum coverage provision is an essential component of creating an affordable, accessible, and robust insurance market that all Americans can rely on — the central goal of the ACA. As explained above, Congress's purpose in including the minimum coverage provision was to combat the problem of adverse selection. It does that by incorporating healthy people into the risk pool, thus driving down average costs. Moreover, without a minimum coverage provision, it would be impossible to prohibit insurers from excluding from coverage individuals with pre-existing conditions. In short, the minimum coverage provision is an integral part of the ACA's comprehensive framework for regulating healthcare, the absence of which would severely undercut Congress's regulatory scheme. It is therefore constitutional under *Raich*. ("Congress can . . . regulate purely intrastate activity that is not itself "commercial," . . . if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity." *Raich*, 545 U.S. at 3.

<sup>19</sup> Kaiser Family Foundation, *Total Health Care Employment, 2009*, available at <http://www.statehealthfacts.org/comparcmaptable.jsp?ind=445&cat=8> (last visited Jan. 11, 2011).

For the same reasons, the minimum coverage provision is a means “reasonably adapted” to achieving “a legitimate end under the commerce power.” *Comstock*, 130 S. Ct. at 1957. There can be no dispute that creating an affordable and accessible health insurance market is a legitimate Congressional goal, and one well within the scope of its Commerce Clause authority. The minimum coverage provision is a reasonably adapted means to that end. The provision is therefore a “necessary and proper” regulation that Congress is empowered to enact. *Id.*

#### CONCLUSION

Thank you for the opportunity to present my written testimony.

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Mr. NADLER. Thank you. I now would like to start the questioning.

Let me ask Mr. Cuccinelli, a number of our laws impose affirmative obligations on citizens. We must all pay taxes, buy car insurance, send our children to school and vaccinate them.

Yet critics of the Affordable Care Act proclaim that this law, not any of these other existing affirmative obligations, signals the end of liberty as we know it. And they posit various hypotheticals rais-

ing questions about government forcing citizens to eat leafy greens or to exercise, both from my perspective perhaps objectionable.

Can the States require residents to eat broccoli or require them to exercise, Mr. Cuccinelli?

Mr. CUCCINELLI. I am sorry, eat broccoli or——

Mr. NADLER. Can the States require, can the States, can Virginia require someone to eat 2 ounces of broccoli a day?

Mr. CUCCINELLI. I think they could certainly order people to buy broccoli.

Mr. NADLER. Can they require them to eat broccoli?

Mr. CUCCINELLI. I think that is a more difficult question.

Mr. NADLER. But they could require them to buy them?

Mr. CUCCINELLI. And the Federal Government cannot.

Mr. NADLER. Now, presumably what you are saying is under the police power, the State can order that?

Mr. CUCCINELLI. That is correct.

Mr. NADLER. And the Federal Government doesn't have the police power?

Mr. CUCCINELLI. That is correct. Well——

Mr. NADLER. But if that is correct, if the State under the, if the State can exercise its authority to order someone to buy broccoli or to exercise, then the quarrel here is not about individual liberty such as you talked about. It is not a question of the liberty interests under the Fifth Amendment, but it is a question of who gets to exercise that authority. If the State can order it, then that is not protected by the Fifth Amendment, or the 14th for that matter.

And the question then is, since somebody can order it, the question is who can exercise the authority which concededly is not limited by the liberty interest of the Fifth Amendment. And so long as we act within an enumerated power, which I would contend we do here, doesn't the supremacy clause answer that question as well in favor of Congress?

Mr. CUCCINELLI. Mr. Nadler, I would acknowledge that if you take the broccoli example and say the State government can order but the Federal Government cannot, that there is the potential within each of the 50 States for the citizens there to be burdened with that obligation.

Mr. NADLER. My question is not that. My question is: Isn't your argument that the Congress is limited by a liberty interest here negated, and that the question has nothing to do with the liberty interest of the Fifth Amendment? The question is simply one of how far the commerce clause power extends, which is not a liberty question, but is an enumerated powers question, and the liberty question is, therefore, really a red herring?

Mr. CUCCINELLI. Yes, this case is about liberty and not health care. And the reason that the distinction you are making does not address that problem is that the Federal system of sovereignty, States and Federal being separate and having separate spheres of authority, is intended to be a structural protection for liberty.

So the fact that the States still have this reservoir of power and authority does not change the fact that the division of that power and authority is a protection.

Mr. NADLER. Of course, that argument you have just made has been specifically rejected numerous times under the supremacy clause jurisprudence of the Supreme Court.

Mr. CUCCINELLI. That is not correct, Congressman.

Mr. NADLER. I ask Mr. Dellinger briefly to comment on what Mr. Cuccinelli just said, and on my contention, that if a State can force you to eat broccoli, then it is not a question of liberty, it is simply a question of whether Congress can do something under the commerce clause or not, there is no liberty interest question here.

Mr. DELLINGER. That is correct. I think there is no issue of liberty in anything that the States can do and the Federal Government can do. Let me give credit to the other side by saying that there is the following question: What I think they misnamed "the regulation of inactivity" is actually the imposition of an affirmative obligation in an area where Congress has power, jurisdictional authority to legislate.

Now, I think as Professor Barnett, who has been one of the great advocates of—

Mr. NADLER. Let me interrupt you for a second because my time is about to run out. This whole question of the inactivity and the liberty interest of inactivity, et cetera, wasn't that disposed of really by *Wickard v. Filburn* when the courts specifically said, in 1942, I think it was, that the Federal Government, under the commerce clause, could regulate the private production of wheat for the farmer's own use, that that affected interstate commerce, because if he didn't grow it, he would buy it from someone else. And the court there is saying, in effect, that Congress has the right to prevent an inactivity, namely that he wouldn't buy it from someone else?

Mr. DELLINGER. I think, yes, that essentially *Wickard* is a case in which the court recognized that Congress is encouraging people to make a purchase in interstate commerce who would have preferred not to make such a purchase.

Mr. SMITH. The gentleman's time has expired.

The gentleman from California, Mr. Lungren, is recognized.

Mr. LUNGREN. Thank you very much. And I hope my friend from New York will pay as much attention to the opinion of this attorney general from California as he does to the new one, but I may be asking for too much.

You know, I am sorry, even though I went to law school at Georgetown and practiced law and was attorney general and argued a case before the Supreme Court, sometimes we seem to make these things so esoteric that the average person is left out. That is, only those of us with coats and ties on or judges who are attorneys with robes on can really make sense of this.

I always thought that the intent of the Founding Fathers was to have a limited government. And I always thought that one of the defining issues of limited government was the power to compel; that is compulsion. And what I don't understand, and with due respect to you, Mr. Dellinger, because I respect you and I have liked your opinions many other times, I don't understand why you so easily find that the power of the Federal Government in this instance is closer to the power to compel one to defend the country, including compel performance in the Armed Forces by way of a draft, as opposed to the liberty interest that is explicitly expressed

in the Fifth Amendment, you can't be compelled to testify against yourself.

Now, I know we don't have a specific amendment that says Congress cannot compel an individual to buy a product, but I thought if there is any essence of the sense of liberty, it would be that. And I am, well, put off a little bit by your argument. It almost seems to me that you are saying because there is a constitutional end, you can use a constitutional means to get there. That the commerce clause is so elastic that if there is any way we can shoehorn anything in, then Congress can use the power of compulsion to do that. And your opening statement was emotional about what we want to do about those who have preexisting condition, but it didn't go to the constitutional question of whether, therefore, we can do that.

I mean, as I have told my friends on this panel many times, the Constitution is the truly inconvenient truth. You may want to do it, but we don't have the right to do it. And I am really surprised at this, and also your argument, and even Mr. Cuccinelli's argument about the difference between the State and the Federal Government. If you think about a liberty interest and you read the 10th Amendment, the 10th Amendment seems to say, at least to me, that there is a whole area of activity that is left to the States and the sovereignty of the people.

So if there is a liberty interest with respect to an individual, the 10th Amendment says that is to be expressed and protected by the sovereignty of the people within the States, which would say that there is still a liberty interest, but the concept of protecting it on the State level is left to popular sovereignty. Now, I know that may not be the current thinking with some, but can you help me with that? How do you so easily find that we have the right to compel someone to act in this way, to purchase a product, particularly when you say no one can escape being part of the system and therefore everything I do affects everybody else. Well, you know, there are people who don't believe in doctors and don't go to doctors, and there are people who are hermits who will never utilize these services.

And there are other ways to do this, by the way. One of the ways you could do it, I am not saying it is the most practical way, but you could say that we understand, for instance, young people, we want to get young people in and they don't do it because they make a bet that on average they are not going to be sick like the rest of us, and that is a pretty good bet. But when they lose it, they have to pay. One of the ways you could do to incentivize young people to be part of it is say if, in fact, you have an illness, if, in fact, you have an accident and you are taken care of and there are bills that are incurred, you will never be allowed to discharge that in bankruptcy. That will follow you the rest of your life.

Now, that is one incentive, one way of doing it that doesn't get into the question of the liberty interest.

And so, are you saying that ultimately as long as you can shoehorn something within the commerce clause, we have no protection against the government's compulsion? We have no protection against the government's compulsion as long as Congress decides that we are going to compel you in a certain way?



Mr. DELLINGER. Well, first of all, I want to correct one statement you made. I have never taken a position that this is in any way like the solemn responsibility Congress compels sometimes for people to engage in military service. That is not——

Mr. LUNGREN. That was my metaphor to say within those parameters, on the one side we all recognize that in order to have a government work, a society work, we can compel people. On the other hand——

Mr. CONYERS. Mr. Chairman, I ask unanimous consent that the gentleman be given an additional minute.

Mr. SMITH. Without objection.

Mr. LUNGREN. I am not saying you were, but I am trying to say it seems to me those are the two edges of the question. I think you easily go to the one side, and I would say I find it very difficult to get that way.

Mr. DELLINGER. Look, you said we ought to put this simply so the people can understand it, and I agree. I think Ronald Reagan's solicitor general was chosen by President Reagan because he had a very good capacity to put things simply.

What Charles Fried said was this is a regulation of an interstate commercial transaction. It is a requirement rather than a prohibition, but it is still a regulation of commerce, and Congress has the power. Now, the question is: Is it so intrusive because it is an affirmative obligation? And I think that is a serious question because affirmative obligations, as Randy Barnett has noted, affirmative obligations are more intrusive than negative prohibitions. So I think you could well argue that just because something has some influence on commerce, if it is an affirmative obligation, Congress needs to have a better reason than that.

But unlike any of the thousand products mentioned here, this is in the Yellow Pages or in the Sears catalog, this is a product where Congress can simply say 94 percent of the people have used health care for the long term uninsured, and we can, therefore, create a financial incentive, that is all it is, a financial incentive to participate.

Is that intrusive in liberty. Mr. Goodlatte said it was astonishing that I would compare it to the use of the tax power for Medicaid and Social Security.

What I find surprising is the notion that there is a constitutional rule that the only way Congress could deal with a situation like this would be to provide a monolithic government provided, taxpayer-supported system, rather than having the same kind of or even lesser incentive to purchase a product in a private market. That seems unremarkable to me.

Mr. SMITH. The gentleman's time has expired.

The gentleman from Virginia, Mr. Scott, is recognized.

Mr. SCOTT. Thank you, Mr. Chairman.

Welcome, Attorney General.

Mr. Dellinger, one of the things your testimony kind of talked around it is about what do we call this thing? And it has always intrigued me that the label is so important. People pretty well accept the idea if you go to a gas station with a credit card, it should be prohibited to charge you extra for using the credit card. However, people think it ought to be permissible to have a cash dis-

count. So if there are two prices, one a credit card price and then a lower cash price, if you call it a penalty for using a credit card, that is bad. But if you call it, the same differential, if you call it a cash discount, then that should be permissible.

It seems to me that we are in the same situation on what we call this thing. There is no mandate. If you don't have insurance, you pay the tax. If everybody is paying the tax, if we called this thing a tax credit for having insurance, would that have made a difference because there is no mandate? It is calling it a tax credit for having insurance, and that would mean Mr. Cuccinelli couldn't label it a mandate and couldn't label it a penalty. If you called it a tax credit, would that have made a constitutional difference?

Mr. DELLINGER. I don't think it should because even when you consider it as a commerce clause matter, the fact that it is clearly within commerce and would be unremarkable if it were done unmistakably as a tax credit for having coverage rather than an additional tax penalty for not having coverage, it seems that is very deeply nonintrusive. Your notion about what to call—

Mr. SCOTT. That is what we hear about. We hear about the penalty, the mandate. If we called it a tax credit, would it have made a difference?

Mr. DELLINGER. It shouldn't. It just would have changed the rhetoric.

Mr. SCOTT. Mr. Cuccinelli, would have made a difference if we called it a tax credit?

Mr. CUCCINELLI. As I mentioned earlier, if the structure is as it is now in the bill and you changed the word "penalty" to "negative tax credit" or something, the substance is still the same. It is the substance that the Supreme Court has looked to historically. It does not operate as a tax; therefore, it is not a tax. Therefore, it does not fall under the taxing and spending power for the general welfare. It will have to survive on some other basis.

Mr. SCOTT. You can get a tax credit for solar panels. You don't have to buy a solar panel; but if you do, you get a tax credit for it.

Mr. CUCCINELLI. Well, the critical distinction in your point, and it goes to the earlier sort of shift of Mr. Nadler over to *Wickard v. Filburn* is yes, but if you compelled the purchase of solar panels, we would be in a totally different category. Much like the *Wickard* case—

Mr. SCOTT. We don't compel the insurance. If you don't have insurance, you pay the extra tax. You don't have the tax credit for insurance.

Mr. CUCCINELLI. You do, in fact, compel it, and you provide a punishment for those who don't obey the compulsion. The *Wickard* case, the wheat case, I am sure you all are familiar with, would have been like this legislation if *Wickard* was compelled to grow wheat. He was not, but he chose to do so and, therefore, was governed because his activities, voluntarily engaged in, were subject to regulation under the commerce clause.

Mr. SCOTT. You have labeled it a mandate when there is no mandate. You don't have to buy insurance.

Mr. CUCCINELLI. Well, if you don't, you are not obeying the law.

Mr. SCOTT. You pay the extra penalty. If you don't have insurance, you don't get the tax credit. And if we labeled this a tax credit for having insurance, we wouldn't be here.

Mr. CUCCINELLI. You still have the structural problem of the legislation as it is. The words on it, if I could ask you to set aside—

Mr. SCOTT. If it had a different differential, those without insurance will pay a tax, and those with insurance get a tax credit and will not have to pay that extra tax, would that make a difference?

Mr. CUCCINELLI. Well, you give tax credits for various forms of insurance that are purchased, and at least that tax credit standing on its own has never been challenged, so far as I know.

Mr. SCOTT. So, Mr. Dellinger, if we labeled it different, would we have a different conclusion?

Mr. DELLINGER. I think your question very effectively points out the fact that this simply isn't very intrusive. If it is just the flip side of providing a tax credit, a modest tax credit for maintaining insurance by having a set of modest tax penalties for not maintaining insurance, how is this the end of liberty as we know it?

Mr. SCOTT. Well, is it true there is not a mandate to have insurance?

Mr. DELLINGER. There is a freestanding requirement in the bill, a requirement that everyone should have coverage unless they already have Medicare or Medicaid or they are below the poverty level. The penalty provision only applies to people who engage in certain activities, which I will describe.

You can search the bill for the word "individual mandate." It nowhere appears.

Mr. SCOTT. So you have the difference, if we labeled it "tax credit," we would have avoided a lot of this controversy?

Mr. DELLINGER. Absolutely. And it can't be that a mere labeling like that is something on which turns some great issue of liberty.

If you ask an ordinary person to say look, if you are sitting out in the woods, you don't have to buy insurance because there is no penalty that attaches to it. If you go to work in the economy, they are going to deduct money for Social Security for your old age. They are going to deduct money for your Medicare for health care after you are 65, and they are going to add a 2½ percent tax penalty to pay for coverage before you are 65 unless you are maintaining minimum coverage.

No one is going to say well, gosh, one of those is the end of liberty as we know it; and the other two are all right. In fact, this argument sounds exactly like the arguments over the challenge to Social Security. And those attacking Social Security said, if Congress can mandate a requirement age of 65, financial support for those over 65, they can set the retirement age at 30, or 25. The Supreme Court said Congress is never going to do that. That doesn't mean it is unconstitutional.

People said when the minimum wage law was passed, that if you could have a minimum wage of \$10 an hour, why couldn't Congress have a minimum wage of \$5,000 an hour. Once again the Court said Congress is never going to do that. That, I think, hardly counts as an argument. No one would think of this as unremarkable. No one is going with bayonets and force you, force

march you to some insurance agency. It is just a financial incentive to maintain minimum coverage, as your question points out.

Mr. SMITH. The gentleman's time has expired.

The gentleman from Iowa, Mr. King, is recognized for his questions.

Mr. KING. Thank you, Mr. Chairman. I appreciate this hearing today, and I think there has been a tremendous amount of instructive testimony that has come out from each of you. I look at the bookends, Mr. Cuccinelli and Mr. Barnett, have made, I think, the arguments that I would be making. And so rather than turn directly to either one of the gentlemen, I would go to Mr. Dellinger who probably hasn't had quite enough time to air his position.

I would first take it to this point as I listened to the discussion about *Wickard v. Filburn*. I have a couple of follow-up questions for you, Mr. Dellinger.

Do you believe that *Wickard v. Filburn* was justly and rightly held?

Mr. DELLINGER. I do.

Mr. KING. Rather than go into my disagreement with that, I think that expanded the commerce clause beyond the intentions of the Founding Fathers or the concepts that we basically hold today, then would you describe what you think, if ObamaCare is upheld as constitutional and the provisions of the commerce clause are, you might argue not expanded, I would argue they would be expanded if that were the case, then what could be constrained by the commerce clause? What type of activity would be constrained and where would the boundaries be?

Mr. DELLINGER. That is a very good question. It would depend, of course, on the kind of opinion that the Supreme Court wrote upholding the law.

In my view, the Supreme Court, in upholding it, will say first of all, nothing we uphold today gives Congress any power to regulate local noneconomic matters unless they have some special showing of relation to interstate commerce. So nothing we hold today undercuts *United States v. Morrison*, *United States v. Lopez*, regulating local, noneconomic matters is something Congress cannot generally do.

Secondly, they would say we think when Congress imposes affirmative obligations, it has to show that is really tightly related to—I expect them to say Congress has to show that there is a substantial relationship to a regulation of commerce. And a substantial relationship here would be that this is part and parcel of a regulation of insurance contracts that prohibits denial of coverage for pre-existing conditions to provide a financial incentive for people to participate. It does not provide—our opinion today, they will say, does not mean that Congress can simply require anyone to purchase anything in order to stimulate the economy.

Mr. KING. And then quickly, before I go to Mr. Barnett, can you tell me, the distinction I just heard, the language used “health care” and “health insurance” and the distinction between the two was blurred in your opening testimony. Can you draw a distinction between the two?

Mr. DELLINGER. I think both of those markets are markets obviously which Congress can regulate under its commerce power. They

account for one-sixth of the national economy. Health care is unique in that no one can decide not to utilize it. Health insurance is how you pay—

Mr. KING. Would you agree that it has been a practice to conflate the two terms, and it makes it difficult sometimes for us to sort the two when we use the term “health care” interchangeable with “health insurance,” and we should do a better job of being careful how we use that terminology?

Mr. DELLINGER. Yes.

Mr. KING. Let me just make that a statement because the clock is ticking, and I turn to Mr. Barnett.

Mr. Barnett, would you care to respond to the response that you heard from Professor Dellinger?

Mr. BARNETT. Yes. It is what I said in my opening statement, Mr. King, and that is that we have heard no constitutional principle.

The Supreme Court, if they uphold this bill, they will write an opinion. They will talk a lot about how health care is different. But then they will say we must defer to Congress’s assessment that this was necessary in order to impose insurance requirements. So they will defer to you is basically how the opinion will be written. They will not identify a limiting principle, if they uphold this bill.

At least we have not heard from any of the proponents of the bill a constitutional principle that the Supreme Court could enunciate. If they say health care is different, what I am saying to you is that never in the history of this country has the Supreme Court gotten into a factual determination saying well, okay, health care is different. That is okay. But this other market for cars, let us say, that is different. There is a constitutional difference between the two. They haven’t ever said that, and they are not going to say that.

Mr. KING. And likely then, if the Supreme Court upholds, then they would leave the discretion to Congress to define because they would be reluctant to?

Mr. BARNETT. I would just say that I bet you, Professor Dellinger would take that bet, that he would not want to take the bet that if the Supreme Court upholds the mandate, that they won’t say that in the future it is up to Congress to decide whether to impose mandates.

Mr. KING. General Cuccinelli.

Mr. CUCCINELLI. Well, actually, Mr. Dellinger and I were on a panel in October at the Washington Legal Foundation, and when he was asked the principle at that time, he said the limits would be political. And I agree with him. I think that is the absolutely dead on, accurate, honest answer. And that means majority rules. If that is the case, why have a constitution in the first place?

Mr. KING. I will accept that as a closing remark, and I yield back the balance of my time.

Mr. SMITH. Thank you, Mr. King.

The gentleman from Georgia, Mr. Johnson, is recognized for his questions.

Mr. JOHNSON. Thank you, Mr. Chairman. I was in the process of formulating my thoughts here.

Let me ask, or let me note the fact that Mr. Cuccinelli, you have opined that States have the power to mandate that an individual

purchase insurance. That is what you said as far as Massachusetts is concerned; is that correct?

Mr. CUCCINELLI. Yes, sir, that is correct.

Mr. JOHNSON. And you have also stated that your State, the State of Virginia, has the power to compel or mandate that its citizens purchase broccoli?

Mr. CUCCINELLI. I think that is probably correct, yes.

Mr. JOHNSON. And it can compel them to actually eat the broccoli?

Mr. CUCCINELLI. No, I didn't go there. I don't think so.

Mr. JOHNSON. Okay, just to purchase the broccoli. What provision of the Virginia constitution would authorize the State of Virginia to compel its citizens to purchase broccoli?

Mr. CUCCINELLI. Congressman, you wouldn't find it in the constitution of Virginia. The power resides with the States best articulated in the 10th Amendment. It is a power not given to the Federal Government; and, therefore, it is left to the States and the people through the 10th Amendment.

Mr. JOHNSON. No, if the State has the power to compel its citizens to purchase broccoli, where does it get that power from? Is it an express power or is it an implied power in the Virginia constitution?

Mr. CUCCINELLI. It is not in the Virginia constitution. It is a residual power remaining in the States because it was not given from the States to the Federal Government when the Constitution was written. So it stays with Virginia.

Mr. JOHNSON. Well, you realize that probably some individuals in the State of Virginia would argue that since the power to compel a citizen to purchase broccoli is not stated in the constitution expressly, then it has been left to the people themselves, that power? You realize that, correct?

Mr. CUCCINELLI. I would agree with that statement with respect to the Federal Constitution. But the State constitutions, and Virginia in particular, lays out not only what the governmental structure would be, but it is not formulated like the Federal Constitution to be a specific list of enumerated powers.

Mr. JOHNSON. And the Federal Government, I would argue to you, because times have changed since the enactment of the Constitution and its amendments, times have changed, things have grown, the concerns and affairs of the government have grown and expanded, both State and Federal, and they are much more complicated now than they were back in the 18th century; is that correct?

Mr. CUCCINELLI. Absolutely undeniable, Congressman.

Mr. JOHNSON. And so, therefore, we have to have an ability to interpret the Constitution with an understanding of how it applies under current conditions; isn't that a reasonable proposition? Or should we just stick with a strict authority or strict interpretation of the Framers of the Constitution, what they intended at the time? Because even the Supreme Court didn't do that in its Citizens United case, did they?

Mr. CUCCINELLI. Congressman, you are looking to change interpretations with changing times, and I would suggest to you that the proper course is to amend the Constitution if some alternative

power is believed to be more necessary or appropriate to our time that was not originally granted to the Federal Government when they enumerated powers in the Constitution.

Mr. JOHNSON. If one of Virginia's citizens said that the State of Virginia does not have the power to force me to purchase broccoli unless it goes and gets a constitutional amendment which would authorize it to do so, would that be reasonable?

Mr. CUCCINELLI. As a policy matter, perhaps not. But as a constitutional matter, they could pursue that through the general assembly. And if they got a bill, I suspect it would stand up under the Virginia constitution.

Mr. JOHNSON. I believe what we are doing is we are arguing for States rights when it is politically expedient to do so, and then when the Federal Government wants to regulate something like the ability of States to determine whether or not damages in medical malpractice injuries should be capped or not, then it is okay for the Federal Government to come into that kind of a situation and legislate. And so it is politics. And that is what we have here with this health care argument in the courts.

And, unfortunately, due to the activities of a couple of our Supreme Court Justices and how close they are to the Koch brothers, I am disappointed at the specter of politics coming into a decision by the U.S. Supreme Court on this very issue. And with that, I will yield back the balance of my time.

Mr. SMITH. The gentleman's time has expired.

Let me say to Members that one of our witnesses, Mr. Cuccinelli, is going to have to leave in 15 minutes for a prior engagement. We ought to have at least three more rounds of questions.

Mr. LUNGREN. Parliamentary inquiry, Mr. Chairman.

Mr. SMITH. The gentleman from California is recognized.

Mr. LUNGREN. I know under the rules of the House, one is not allowed to call into question the motivation of a Member of Congress in the House or the Senate or the President of the United States. Does that rule of the House also refer to members of the Supreme Court?

Mr. SMITH. I think the gentleman may have referred to politics, and I am not sure that accusing someone of politics is impugning their character. So I would say it does not apply in this case.

Mr. LUNGREN. Mr. Chairman, there was a particular reference to particular individuals and decisions made by members of the Supreme Court, and one would believe that was a question of motivation. And I know my objection is not timely, but I believe that the gentleman's words could have been taken down under the ruling of the parliamentarian in past decisions.

Mr. SMITH. As the gentleman stated, his objection is not timely. In any case, I am sure that the gentleman from Georgia did not intend to impugn the integrity of members of the Supreme Court, either individually or in the whole.

If the gentleman from Georgia would want to comment on that, he is welcome to. If not, we will move on to questions.

Mr. JOHNSON. I appreciate that, Mr. Chairman. Just to clear it up, I did not comment about what the Supreme Court has already ruled. It is what I fear that they may rule. But this matter may not even get to the U.S. Supreme Court. We will have to see.

Mr. SMITH. We will now recognize the gentleman from Indiana, Mr. Pence, for his questions.

Mr. PENCE. Thank you, Mr. Chairman. I want to thank you for calling this hearing on what I think is perhaps the most important constitutional question since I arrived on the Judiciary Committee in 2001. That is this question of whether or not the Federal Government has the power under the Constitution of the United States to order Americans to purchase goods or services, whether they want them or need them or not.

And I want to thank this panel: General Cuccinelli, who I greatly admire for his thoughtful testimony; and Professor Dellinger and Professor Barnett. This has been an important discussion.

We have now added the Judiciary Committee to a chorus of kitchen tables around America, small tables in diners over coffee. This is an argument the American people are fully engaged in, and I think it is an enormously important debate. And the disposition of this debate I think will bear greatly on the liberties of our people for generations to come.

Professor Dellinger held up the phone book and compared, frighteningly, and began to recite various goods and services that could never be compelled by the Federal Government. And while that list may be long and I assume good faith by the witness, I fear that list, what would be included is longer than any American today would ever imagine. Meaning those things that could be regulated.

I want to associate myself strongly with something that you said, General Cuccinelli. You quoted Professor Jonathan Turley who said if the States lose this case, it is the end of federalism. Let me say that I think the effort by States like yours, like my own beloved Indiana, 27 States in all, challenging this unprecedented exercise of Federal power represents potentially the rebirth of federalism in America. I leave that maybe for another hearing, Mr. Chairman, but I think something very special is happening in America today, and I believe it is something that our Founders would have, as you said, General Cuccinelli, I think they would have greatly identified with the notion that States ought to, by definition, they should feel obligated to defend the liberties of the people and defend their own prerogatives as a means of ensuring the ongoing vitality of the limited government enshrined in the Constitution of the United States, and most especially, defined in the 10th Amendment.

I want to say specifically on this issue of regulating the market, and Professor Dellinger, I think you and I vigorously disagree on this, but I have great respect for your career and for your intellect. Let me just stipulate, you will never convince me that the Constitution of the United States gives this government the power to order Americans to buy health insurance. You just will never convince me of that. So I don't want you to spend a lot of energy on that. You don't even have to come over here.

Mr. DELLINGER. I was going to leave.

Mr. PENCE. That is not going to happen. But it is important to me to understand your thinking on this. You actually said this fell, in your judgment, this individual mandate in this legislation, fell within, I think you used the phrase "routine power to regulate the insurance market." This is a very sincere question, and sometimes we do more posturing here, but I would love to know your answer



to this question, and that is: How does regulating a market include compelling people to participate in that market? It does seem to me that you make a point that the commerce clause contemplates an orderly regulation of the Federal Government and commerce between the States. But is it your view that if the government has the power to regulate the insurance market in this country, that by definition that also includes the power to compel Americans to participate in that market?

Mr. DELLINGER. That is closer to General Charles Fried's view from the Reagan administration that purely and simply, just as the Supreme Court held in 1905, that prohibiting interstate commerce was a regulation of commerce, prohibiting the shipment of lottery tickets in that case, so you can either prohibit a commerce or require commerce, either way you are setting the rules for commerce, I don't think you need to, and I don't think the Supreme Court would actually reach that question because I think they would simply say regulating existing insurance contracts by forbidding pre-existing condition denials, for example, is clearly a regulation of commerce.

And the only question is this, to use the court's phrase, Justice Scalia's phrase, reasonably related to that regulation. And, secondly, that this is a market in which Americans will already participate, cannot choose not to participate, and the facts show very substantially transfer the costs to other people.

Now, let me acknowledge that when I say this is a routine application, I think you are right to raise a question about that. Let me acknowledge that in the following sense. While it is well within the commerce power, imposing affirmative obligations may very well demand a stronger level of justification. I think what the Supreme Court would say is there are three limits on Congress's power. First is political. That is, it is the only thing that prevents you from adopting a minimum wage of \$5,000 an hour.

Second, there are liberty clause objections and Bill of Rights objections. And thirdly, where I think Congress is imposing affirmative obligations, you might need a special justification. You can't simply say making people buy something will help that company, it would help the economy, therefore they can willy-nilly buy something.

As Randy Barnett said, a Supreme Court decision upholding this would talk a lot about the uniqueness of health care. It is the one market where Federal law requires people to provide you with a service whether you are going to pay for it or not and transfer the costs to other people. Therefore, it is uniquely one where you could justify requiring people to maintain coverage.

Mr. SMITH. The gentleman's time has expired.

The gentleman from North Carolina, Mr. Watt, is recognized.

Mr. WATT. Thank you, Mr. Chairman.

I actually wasn't intending to ask questions. I came back to thank my good friend, Mr. Dellinger, and the other two witnesses, of course, but my relationship with Mr. Dellinger goes back a long, long ways to North Carolina.

But I can't resist the rare opportunity that I have to agree with Mr. Pence on a couple of issues, the first of which is this is important for the Judiciary to have the hearing about, even though in

no sense will we be the final word on this. It is working its way up through the courts. There is substantial division of opinion about it. And ultimately, it will be decided by the United States Supreme Court. So I think it is important for me to agree with Mr. Pence that this is an important hearing for the Judiciary Committee to have. It is important for me to agree with him that Mr. Dellinger has had a long and very bright legal career, and we thank him for that.

And I hope we have some agreement on one other thing because Mr. Pence and I, over the years, have had pretty strong feelings about one thing, and one comment he made, the comment that says you will never convince me that this is constitutional, I have kind of been in that position one time myself on the short end of a 434-1 vote on an issue that I thought was unconstitutional and that the Supreme Court ultimately disagreed with my view on. I hope that once the Supreme Court, if it does say this is constitutional, maybe that will convince him because I had to have an attitude adjustment on that issue once the Supreme Court ruled. I had to come back and vote for some things I had to implement, to vote for funding for something that I had previously thought was unconstitutional.

And I hope we have the agreement that his never, ever, ever, Walter Dellinger won't convince me, also doesn't apply to the Supreme Court because he is going to be out there possibly in a very difficult position. Having been there myself, I can attest to that.

With that, this has been a great hearing. I am glad I got to hear the witnesses before I had to go off and hear witnesses in another Committee. I am glad I got a chance to come back and at least express my appreciation to the Chairman for having the hearing and to position myself in a similar position at the opposite end of a spectrum from Mr. Pence, but nevertheless, the dilemma is the same. We try to do what we believe is constitutional. There is no way we would have been able to convince Mr. Pence, or others, that this was a constitutional undertaking.

But at some point, the Supreme Court is going to resolve this question, and we are all going to have to live with it one way or another. And I hope that the American people and the Congress will get on with it and hopefully provide health care to all of the American citizens if that is the ultimate outcome.

So with that, Mr. Chairman, I yield back the balance of my time.

Mr. SMITH. Thank you, Mr. Watt.

Mr. Cuccinelli, thank you for your testimony today. We understand you have to leave.

Mr. CUCCINELLI. May I just thank Congressman Watt for something that in my own legislature in Richmond I don't always see, and that is a commitment to upholding your oath. If you think it is not constitutional, to voting against it. I do not see that enough. I don't have—I am not here with you all, I am in Richmond, but my friends don't always abide by that. They kick it to the court. They say it is a decision for the court. Read your oath, and I really appreciate, Mr. Watt, you fulfilling that oath in the way.

Ms. LOFGREN. Mr. Chairman?

Mr. SMITH. The gentlewoman from California is recognized out of order.

Ms. LOFGREN. I appreciate that and I understand that the attorney general has to leave. I did have questions for him, and I am wondering if I may submit those questions to him in writing and get his agreement to answer them.

Mr. CUCCINELLI. Ma'am, absolutely. And if we can help any of you all, even if you may not agree, we are happy to help talk through subject matter with anyone of you all to try to be as helpful as we can as you try to do your job as you see fit.

Ms. LOFGREN. Thank you.

Ms. WASSERMAN SCHULTZ. Mr. Chairman?

Mr. SMITH. Let me say to all Members that it is a part of our regular order of business that all Members have 5 legislative days to submit questions to the Chair, and we will submit the questions to the witnesses and get their responses in time to make them a part of the record.

Ms. WASSERMAN SCHULTZ. Mr. Chairman.

Mr. SMITH. The gentlewoman from Florida is recognized.

Ms. WASSERMAN SCHULTZ. Mr. Chairman, Attorney General Cuccinelli, I am the next Democrat to ask questions, and my questions are of you. Do you have an extra couple of minutes?

Mr. CUCCINELLI. I brought my running boots, so I can.

Ms. WASSERMAN SCHULTZ. Thank you very much.

Mr. SMITH. Actually the gentlewoman from Florida is not the next Member to ask questions.

Ms. WASSERMAN SCHULTZ. I said I am the next Democrat.

Mr. SMITH. The gentleman from Arizona, Mr. Franks, is recognized.

Mr. FRANKS. Mr. Chairman, because General Cuccinelli has been so kind to stay a little longer, let me first start out, thank you for reminding us of our oath. We take an oath, we swear to uphold and defend the Constitution, not to adding the words unless the Supreme Court thinks otherwise. I am grateful to you because that is indeed one of the great geniuses of this country is that when we with trifurcated this government, all of us would have to have some tension between us, if necessary, to maintain the great principles of the country, and I am grateful to you, sir.

This debate over the individual mandate, I believe, is a big one, Mr. Chairman. I know that Professor Dellinger has expressed sort of the general thought here, and I will paraphrase, that no one can escape being part of the system when it comes to health care. I guess I am concerned because if, indeed, the commerce clause in the Constitution can compel us to buy a certain product, then I wonder what cannot be reached within the framework of economy? Any inactivity or activity, I wonder what could not be reached by the commerce clause?

I just think that the Chairman put it so well in his opening statement, those who threw the Boston Tea Party for excessive taxation of tea, I wonder how they would respond if their government told them they had to buy tea. I think that it might have been an even more lively party.

Every exercise of Congress's power to regulate interstate commerce has involved some form of action or transaction engaged in by an individual or legal entity. The government's theory that the decision not to buy insurance is an economic one, would, for the

first time ever, permit laws commanding people, coercing citizens, to engage in economic activity.

According to Ilya Shapiro, he is senior fellow of constitutional studies at the CATO Institute, under such a reading which two judges have upheld, Congress would be the sole arbiter of its own powers. The only check would be political. The Federal Government would have plenary power, plenary authority to compel activities, as we have heard, ranging from eating spinach to joining gyms to lessen the burden on the health care system, to coercing citizens to buy GM cars as, perhaps, an auto bailout.

So, Mr. Barnett, how would you describe the breadth of what I suggest is a power grab under the ObamaCare rubric?

Mr. BARNETT. Well, as I said, Congress has never before tried to impose an economic mandate on the people. So it is a new power. It is a new claim of power. And they have been able to get along without that power for over 200 years. So they are not claiming the power to do other things, but they are claiming the power to do this. And being able to make you do something, being able to make you enter the marketplace rather than regulate you after you voluntarily choose to enter the marketplace is a vast expansion of congressional power, especially when it claims the power to do so as long as it sees a rational connection between this mandate and its regulation of interstate commerce, or sometimes more broadly put, the regulation of the national economy.

It is a vast claim of new power that will, after it is recognized by the Supreme Court, if it ever is, will be solely within Congress's discretionary power to exercise.

Mr. FRANKS. Mr. Chairman, I would just express a sense of gratitude to the American people because the former Congress seemed to be headed in a pretty dangerous direction. The precedent that they were willing to set, if you look at the original version of ObamaCare introduced by the former House leadership, it would require families to purchase insurance that the CBO estimated would be \$15,000 a year annually. It would require families to do that for the average family of four.

First of all, I am wondering if that is what is considered free insurance, \$15,000 a year requirement.

Under the original version, the even worse potential precedent that they were attempting to set, and it didn't pass, I am grateful for that, but it is an indication of the, I guess arrogance, is the word. The failure to purchase the insurance would have resulted in not only civil penalties, but criminal penalties. If the head of household chose a pay medical expenses out of pocket rather than purchase health insurance, the citizen could have been fined a quarter of a million dollars or sentenced up to 5 years in prison.

I am wondering if that kind of provision could be in a health care bill introduced in the Congress. If ObamaCare is upheld, is there anything standing in the way of such a legal scheme to be instituted in the future? And Mr. Barnett, I will give you a shot at it.

Mr. BARNETT. Congressman, that is a very good point. As Mr. Dellinger has noted, there are two provisions of the current Act. One is the requirement that every person have health insurance, and the other is a monetary penalty for the failure to. Those are two different provisions.

The issue is the constitutionality of the requirement. And if that requirement is upheld, the Supreme Court will certainly say that Congress has powers to enforce this requirement however it wishes to. It has chosen in its first iteration to enforce it as a monetary fine or penalty. In the words of the statute, a penalty. That is what it chose to do so now. Only applicable to people who pay taxes.

But there is no reason, there is no constitutional limit on Congress's power to enforce the requirement, once the requirement is upheld as a valid regulation of commerce. So you are absolutely right. That parade of horrors, that parade of severe penalties could easily be upheld once the precedent of the requirement is set.

Mr. SMITH. The gentleman's time has expired.

The gentlewoman from Florida, Ms. Wasserman Schultz, is recognized for her questions.

Ms. WASSERMAN SCHULTZ. Mr. Chairman, thank you.

Attorney General Cuccinelli, I appreciate your indulgence. I will try to ask my questions rapid fire to get you on your way.

You mentioned in your written testimony that you see no constitutional problem with Congress taxing Americans to pay for government-provided health care; is that right?

Mr. CUCCINELLI. Yes, ma'am.

Ms. WASSERMAN SCHULTZ. And you believe that Medicare is constitutional?

Mr. CUCCINELLI. Yes, ma'am.

Ms. WASSERMAN SCHULTZ. And you believe that Social Security is constitutional?

Mr. CUCCINELLI. Yes, ma'am.

Ms. WASSERMAN SCHULTZ. And that is because in your view Congress is taxing the activity of working?

Mr. CUCCINELLI. In the transaction, yes. Voluntarily engaged in.

Ms. WASSERMAN SCHULTZ. Right. So in your view, Congress can tax labor in the present to pay for social welfare legislation down the road, and you are fine with that?

Mr. CUCCINELLI. The tax, what it goes for is irrelevant. They have the taxing power.

Ms. WASSERMAN SCHULTZ. But something that we can—the concept of taxing labor in the present to pay for social welfare down the road is something that you are fine with? You think it is constitutional?

Mr. CUCCINELLI. As a constitutional matter, yes.

Ms. WASSERMAN SCHULTZ. Okay. Do you also believe that Congress can regulate activities that substantially affect interstate commerce as was decided in *United States v. Lopez*?

Mr. CUCCINELLI. Yes.

Ms. WASSERMAN SCHULTZ. Were you aware that in 2008 alone, the uninsured, those who got sick or had an accident and couldn't pay racked up \$43 billion in health care costs?

Mr. CUCCINELLI. I read that in briefs for well on a year.

Ms. WASSERMAN SCHULTZ. Is \$43 billion a lot of money to you?

Mr. CUCCINELLI. It is heck of a lot of money. It is more than my State's budget.

Ms. WASSERMAN SCHULTZ. It is not more than mine, but it is certainly a lot of money. Do you conceive that \$43 billion worth of uninsured medical costs substantially affects interstate commerce?

Mr. CUCCINELLI. Yes, but it does not give you the ability to compel people against their own desire to enter into a market to address the problem.

Ms. WASSERMAN SCHULTZ. No, no, no. Because in *United States v. Lopez*, which you support, commerce that is substantially affected, Congress has the ability to regulate. That is what you stated.

Mr. CUCCINELLI. Ma'am, if your assertion in that question is that then they can do anything, then you have reduced the necessary and proper clause to the necessary clause. Anything necessary to regulate is therefore within Congress's power; that is simply not the case.

Ms. WASSERMAN SCHULTZ. No, the Supreme Court decided that activities that substantially affect interstate commerce, which you just acknowledged that \$43 billion is substantially affecting commerce, then by connecting those dots, then you would agree that that kind of impact affects interstate commerce significantly?

Mr. CUCCINELLI. Not as you have phrased it.

Ms. WASSERMAN SCHULTZ. Well, did you know that the average family paid an extra \$1,000 last year in their medical premiums due to the cost of the uninsured?

Mr. CUCCINELLI. Again, I read it in briefs over the last year.

Ms. WASSERMAN SCHULTZ. Do you pay for your own health care?

Mr. CUCCINELLI. Yes.

Ms. WASSERMAN SCHULTZ. Okay, wouldn't you like to have an extra thousand dollars in your pocket?

Mr. CUCCINELLI. I would like to have an extra thousand dollars whether I paid for my health care or not.

Ms. WASSERMAN SCHULTZ. So would we all. Do you think American families would like to have that extra thousand dollars in your budget each year?

Mr. CUCCINELLI. Obviously.

Ms. WASSERMAN SCHULTZ. You would do what with an extra thousand dollars, invest in a bank, invest in stocks, make sure that you could send your kids to college?

Mr. CUCCINELLI. Or donate to a Republican in Florida. Who knows.

Ms. WASSERMAN SCHULTZ. You may have to look at a different district than mine. You might be throwing money away if you do that.

Mr. CUCCINELLI. Freely and with no compulsion, you are right.

Ms. WASSERMAN SCHULTZ. I think we have established pretty clearly that you acknowledge that \$43 billion is a significant amount of money, that it significantly affects interstate commerce, and I think your arguments that somehow we are regulate inactivity by your testimony and your answers to my questions makes it pretty clear that the individual mandate is constitutional.

Mr. CUCCINELLI. No, actually your questions used the words "activity" in your presumption, and that is where you fail.

Ms. WASSERMAN SCHULTZ. Well, \$43 billion in expenditures is activity.

Mr. CUCCINELLI. People deciding not to do something is inactivity. It is the state of doing nothing.

Ms. WASSERMAN SCHULTZ. If they go to the emergency room—

Mr. SMITH. Let the witness answer one question.

Ms. WASSERMAN SCHULTZ. Oh, he answered a bunch. Thank you.

Mr. CUCCINELLI. If you look at the argument that you are talking about there, there are two, call them "boxes." One is the action of a transaction undertaken. The other is the decision not to undertake a transaction. To do nothing. Now, if doing nothing is regulatable under the commerce clause, it literally has infinite reach. If something can be regulated, that is everything.

Ms. WASSERMAN SCHULTZ. Mr. Attorney General, individuals who have to go to the emergency room to get their health care which is part of that \$43 billion is not inactivity. That is activity that we all pay for.

Mr. CUCCINELLI. You can regulate at that point.

Ms. WASSERMAN SCHULTZ. So it substantially affects interstate commerce.

Mr. CUCCINELLI. And you can regulate at that point. And the Federal Government, by its own law, has sold the treatment that causes in part the costs you are identifying. So the Federal Government has trapped itself into a financial corner and then says hey, we are trapped into a financial corner, give us new constitutional powers so we can get out. That doesn't hold water.

Mr. SMITH. The gentlewoman's time has expired.

Ms. WASSERMAN SCHULTZ. And I do appreciate the Attorney General's Indulgence. It was a pleasure bantering with you.

Mr. CUCCINELLI. Yes, ma'am, for me as well.

Mr. SMITH. Mr. Cuccinelli, we appreciate your being here.

The gentleman from Texas, Mr. Gohmert is recognized.

Mr. GOHMERT. Thank you, Mr. Chairman.

I think most of us would agree, including General Cuccinelli, that the right to regulate is far different from the right to mandate. And, in fact, if this Congress did a better job of regulating rather than trying to run people's lives, this country would be a whole lot better off. And in fact, if the Federal Government, for example, did a better job of regulating fraud and illegal activity with regard to stocks, than perhaps we wouldn't have the Madoffs out there taking advantage of people. But this government has gotten so interested in mandating and running people's lives, that we have lost sight of the job that is really important and that is, regulating, making sure there is a fair, level playing field for people to play on. We have been so busy being players on the field and referees that we have really skewed what the original intent was of the Constitution.

And so we hear all this talk about car insurance. Let me ask the witnesses, are you aware of any State in the Union in the United States that mandates the purchase of car insurance in order to reside in that State? Either.

Mr. DELLINGER. No.

Mr. GOHMERT. Because I keep hearing that brought up, car insurance. States can mandate car insurance. But I know, as smart as both of you are, you know that no State mandates the purchase of car insurance unless a resident decides to take advantage of the privilege of driving on the State's roadways, correct?

Mr. DELLINGER. That is correct. What is similar about that, that particular mandate, is that the reason that it is one of the rare

items that people are compelled to purchase to operate a motor vehicle is that no one can be assured that they are just not going to have an accident and impose costs on other people.

Mr. GOHMERT. Well, there—

Mr. DELLINGER. And so here as well no one can be ensured that they are not going to use health care and put the cost on other people.

Mr. GOHMERT. Let's go back. I haven't asked about health care yet, because I am wanting to go after this metaphor of car insurance purchase.

The fact is there is not a State in this country that requires anybody to purchase car insurance on themselves in order to have the privilege of driving on the roads. Every State that I am aware of requires the purchase of insurance to protect against damaging someone else, but you don't have to buy insurance to drive on a road to cover your own damages. So that is another difference from car insurance. This is the Federal Government going in and saying, for the first time ever, we are requiring not only the purchase of a private product, but we are requiring you to purchase a private product that must be used on yourself.

That seems pretty significant.

Mr. DELLINGER. What is similar is that, in both cases, the cost is imposed on other people. When you have a car accident, it imposes costs on other individuals. Liability insurance means that there is going to be a way to pay those individuals.

When the uninsured use hospitalizations, they wind up paying only 10 percent of—

Mr. GOHMERT. Who is "they", sir?

Mr. DELLINGER. The uninsured—the uninsured pay only 10 percent of the hospitalization costs that they use.

Mr. GOHMERT. Do you know how much insurance companies pay on the cash value of services that are rendered? I know from some lawsuits in which I was involved you have got insurance companies that pay about 10 percent of what someone who doesn't have insurance has to pay. So there are all kinds of problems with the system the way it is set up.

We could regulate that system. We could require free market competition, which we don't have and can't have as long as nobody really knows what insurance companies are paying, what pharmaceuticals get paid, what somebody really could get away with paying if they work out a deal with cash. Those are the kind of things we ought to regulate, and then people don't have to be paying for everybody else's.

But again I see I am running out of time.

But let me just say, with regard to my friend from Georgia who brought up Supreme Court justices, I wish I had heard from my friends across the aisle the sense of outrage and also from Common Cause the kind of outrage they are expressing, and the racial hatred they are stirring up by doing so, if they had raised that kind of issue over an ACLU leader sitting in judgment on cases involving the ACLU or a Supreme Court judge who has been a solicitor general sitting on cases in which the solicitor general was involved. I think it would have a lot more credibility to raise it at this point.

And with that I yield back.



Mr. SMITH. Thank you, Mr. Gohmert.

The gentleman from Florida, Mr. Deutch, is recognized.

Mr. DEUTCH. I thank you, Mr. Chairman.

First of all, Mr. Chairman, I would, as a Member of the other side of the aisle, take offense to the suggestion that those in my caucus are somehow stirring up racial hatred. I think it is an inappropriate comment.

Mr. GOHMERT. Would the gentleman yield?

Mr. DEUTCH. I will.

Mr. GOHMERT. I didn't say that. I was redressing Common Cause that stirred up demonstrations that created racial epithets and threats to Supreme Court justices and their family. I am not aware of anybody on the other side of the aisle stirring up that kind of issue; and if I indicated that, I did not intend to. I was referring to Common Cause. So thank you.

I ask unanimous consent that he have additional time to make up for what I said.

Mr. SMITH. Without objection, the gentleman from Florida is yielded 1 additional minute.

Mr. DEUTCH. Thank you, Mr. Chairman.

We have been able to do the one thing that all of us believe in. With the General's departure, we have leveled the playing field.

I have some questions for both of you.

Professor Dellinger, you spoke earlier about the fact that—and we have now confirmed with the General—that it is constitutional to require the purchase of old age survivors and disability insurance, that being Social Security; it is constitutional to make payments, health insurance payments, throughout one's working life with those benefits to then be paid out upon retirement, that is Medicare; so I would like to understand then why this is different, but I would like to play it in a different direction.

Professor Barnett, if the Federal Government enforced an individual mandate by deducting premiums from Americans' paychecks and providing individuals with a coupon to buy private insurance that they would have to be required—mandated to buy from a private insurance company, would that be constitutional, in your opinion?

Mr. BARNETT. Mr. Congressman, this actually gets back to Mr. Scott's earlier question about labels making a difference. I agree with you that labels make a big difference. And Congress does have a tax power. It is the label given one of your powers, the tax power. And when you exercise that power, you can collect revenues, and then you can then spend those revenues for the general welfare, to provide for the general welfare and the common defense.

And the programs that you have just mentioned are an exercise of that tax power, and the constraint on the tax power that is provided for up till now is political. And that is the reason why Congress doesn't like to exercise it so much. Because when they do exercise the tax power they have to pay a political price for doing so. So they might rather call it something else. So labels actually do make a difference.

Mr. DEUTCH. So collecting taxes then and handing out coupons and requiring that those coupons be spent in the private market, that is acceptable. That is constitutional.

Mr. BARNETT. That would be an exercise of your tax and spending power, Congressman.

Mr. DEUTCH. And what if individuals have the option to purchase publicly run health insurance in the exchange? I guess the question is, would public ownership of a health plan affect the interpretation of the constitutionality of the mandate?

Mr. BARNETT. I think the simplest way to put this is, if Medicare is constitutional, then Medicare for everyone is constitutional.

Mr. DEUTCH. So single-payer clearly would be constitutional?

Mr. BARNETT. Yes.

Mr. DEUTCH. And would an even greater exercise then of a single-payer financed through new taxes and automatically provided to all Americans, that would clearly be constitutional? If, instead of this, we had an additional tax that was used to finance a publicly created entity to provide health insurance, that is clearly constitutional?

Mr. BARNETT. Yeah.

Mr. DEUTCH. So how much more government intervention is required to make the Affordable Care Act constitutional?

Mr. BARNETT. There is no principle of constitutional law that measures the degree of intrusiveness of constitutional power. You have a list of powers in article 1, section 8, and some of them are very intrusive, and some of them are not. One of the most intrusive powers you have is power of taxation. That is the reason why the general public is very sensitive to when you invoke that power. And candidates run for public office pledging they won't invoke that power. So the label makes a big difference in terms of the constraint on that power, but you do have that power.

Mr. DEUTCH. Professor Dellinger, would you flesh out that distinction between the Affordable Care Act provisions and the proposed privatization of Medicare which would provide coupons that would then be—would then mandate individuals to use those coupons in the private market?

Mr. DELLINGER. I think what is important about that example is that, functionally, it would be the same and yet there would be no doubt about one being valid. The rhetorical arguments wouldn't even be available to challenge it. So you have to ask whether it could possibly be some great incursion in liberty if you are merely talking about the way in which you label matters.

But I think your question leads to a more—an even more profound point, which is much of the argument against the purchase requirement or the requirement that you maintain insurance is that it is novel.

Now, all new laws are novel. But this is novel for a particular reason. This is really the first time for a major social program that Congress has chosen a market approach, giving American citizens greater choice and giving them the choice among private providers, rather than doing it through an imposition and a monolithic government bureaucracy. And that is what is novel.

Mr. DEUTCH. Professor Dellinger, I am sorry. I am running out of time.

Professor Barnett, the last question is, why shouldn't Congress be able to require individuals to assume responsibility for their

own health care when their inaction on the issue has a direct and negative impact on society?

You spoke earlier about the things that we politicians run on. Well, a lot of us are run on individual responsibility. Why shouldn't we be expected to impose some responsibility on American citizens to take responsibility for themselves?

Mr. BARNETT. You certainly may, Congressman, as long as it is within one of the powers that is given to you by the Constitution.

Mr. DEUTCH. Thank you.

Mr. Chairman, I yield back.

Mr. SMITH. Thank you, Mr. Deutch.

The gentleman from Pennsylvania, Mr. Marino, is recognized.

Mr. MARINO. Thank you, Mr. Chairman.

Gentlemen, I have to admit that my constitutional appetite has been fully satisfied today with your discussions. I really appreciate that.

Professor Dellinger, I am not a betting man, but I think I am forced to take you up on your bet, not with who may write the opinion but the outcome of it. We shall see.

Mr. DELLINGER. We shall see. And I will send a note to your constituents saying what a fine and outstanding person you are if you prevail. And you can hold me up to ridicule if—

Mr. MARINO. I would never do that. I respect your intellect and your arguments here today.

This question is to both of you, but, please, Mr. Barnett, would you start with this?

My question is, there was discussion about if the Supreme Court does rule this is not unconstitutional and then sending back to the Congress for further legislation as to how the health care program would be implemented, the limitations, does that not move the line, the scrimmage line down the field for further issues concerning constitutionality of what Congress can do as far as implementing any particular program or any particular thought that a Congressman or woman has in mind promoting their cause? Do you understand my question?

Mr. BARNETT. Really, all that is at issue here, Congressman, I believe, is whether the Constitution gives Congress the power to impose economic mandates on the general public. So that is what the Supreme Court is going to have to decide one way or the other. And your guess is as good as mine perhaps how they are going to rule.

If they should uphold the power for the first time to impose economic mandates on the general public, then at that point when Congress now has this new power that it has never needed to exercise before, there is going to be an awful lot of future litigation or at least future issues about when that power can and should be employed and when it cannot be. But, generally speaking, the Court will defer to Congress' judgment about when it may exercise one of the powers that Court thinks the Congress has. So once they have acknowledged this power, chances are at that point it is just going to be a matter of Congress to employ this new power that it has.

Mr. MARINO. Professor Dellinger.

Mr. DELLINGER. I think a lot of your colleagues have asked questions in the following form: If this is upheld, then can't Congress do anything? And the answer to that is, if the Supreme Court were to uphold this requirement on the grounds that Congress can do anything, then indeed Congress can do anything. But they won't.

The reason Chief Justice Roberts will write the opinion is because I think he will want to write a narrow opinion. He won't want to say that the market alternatives are ruled out and you can only use monolithic government alternatives. He will write an opinion to say that this is upheld not because Congress can use its commerce power to impose affirmative obligations willy-nilly to purchase, but it is upheld because of all the reasons we have said about the central role it plays in avoiding the displacement of costs on to other citizens.

And if that is the opinion the Supreme Court writes, then only things that fit within that parameter will be regulatable by Congress, and I think that will be a very small set.

Mr. BARNETT. Congressman, you have yet to hear from my friend, Mr. Dellinger—and he truly is my friend, actually. It is not just one of these things we just say to each other. We have known each other for a long time—and you have yet to hear from former Solicitor General Fried, who was my torts professor in law school, any constitutional limitation, any constitutional limitation on this new claim of a power to impose economic mandates.

Yes, health care is unique. It is different. It is free rider problems. It is this. It is that. Those are not constitutional principles. I agree if the mandate is upheld, the opinion will be written like that. But it will not impose any future constraint on the use of this new power once it is acknowledged. And that is why you are having this hearing, because there is a lot at stake as to what is going to happen going forward.

Mr. MARINO. Gentlemen, thank you. I have no further questions. I yield back my time.

Mr. DELLINGER. Chairman Smith, I have my own individual mandate that I may need a couple of minutes to take care of, if that is possible. I trust Mr. Barnett not to say anything completely dishonest while I am down the hall.

Mr. SMITH. We have had a request for a 7th inning stretch, and we will take 5 minutes to recess and then resume our hearing.

[recess.]

Mr. SMITH. The Judiciary Committee will resume our hearing; and the gentlewoman from Texas, Ms. Jackson Lee, is recognized for her questions.

Ms. JACKSON LEE. Thank you very much, Mr. Chairman; and I appreciate this hearing. It has been fascinating. And I am disappointed not because I don't have two remaining stellar witnesses but that the Attorney General would not allow me to banter with him. But I hope as we go forward with our witnesses we will be able to give all Members a chance to question all witnesses and that their time will be accordingly.

This is an important issue, and I just want to start with sort of a given constitutional premise from the Wickard-Filburn case that indicates that even when a farmer grew his own wheat for personal consumption it was discerned that it was interstate commerce.

So I want to raise questions of policy and law, Mr. Dellinger, because you have argued before the Supreme Court and because we have two distinct positions, four courts, two decisions, one, the Affordable Care Act is constitutional, and then the second with two courts unconstitutional.

And I might make the point that there is certainly some question as to the persuasion of the two courts that rendered the decision that it was unconstitutional, so the Supreme Court becomes even more important, and I think that is what the Founding Fathers intended for us to do.

Let me just give you these numbers: 5.8 million Texans without coverage, includes 1.5 million children. My State has the highest rate of residents without health insurance, 26.8 percent. According to a Gallup poll, 16 percent of American adults are without health insurance. Census numbers say that 46 million Americans in total are uninsured, 41.5 percent Hispanic Americans, and 19.9 percent of African Americans. Those are policy questions.

And let me just ask this. As I reflect on Supreme Court decisions through the ages or say in the last—since 1950, 1954 decision on *Brown v. Board of Education*, have lawyers made policy arguments before the Supreme Court?

Mr. DELLINGER. Well, I think the answer to that question is yes. In many instances, lawyers in our system do argue what the practical outcome would be of one decision or another. It is—

Ms. JACKSON LEE. Along with the law. I understand.

Mr. DELLINGER. Throughout, yes.

Ms. JACKSON LEE. But, in fact, you can raise sort of the irreparable harm potential from a policy perspective as you make your arguments.

Mr. DELLINGER. That is one kind of argument that people can and have made. Yes.

Ms. JACKSON LEE. Well, I would venture to say a State that has some 26 percent or large numbers of unemployed, 5.8 million and 26.8 percent, a Nation that has 41 percent Hispanic uninsured and then a sizable number of African Americans, I think we have a question of whether there has been irreparable harm.

So let me just proceed with some of the questions.

I will ask you, Mr. Dellinger, if instead of the word “penalty” someone said you will get a ticket if you don’t have health insurance, would that have answered some of the opponents’ concern? Tickets, you got a parking ticket, you got a lack of health insurance ticket. Are we in the business of semantics? Do we need to say that you have a ticket, you get a ticket when you don’t have insurance?

Would that have answered this whole question of the mandate? Are we playing semantics here?

Mr. DELLINGER. I think that is a question better asked to those who believe it is unconstitutional. I think it is—since it is no more intrusive than Medicare or Medicaid as a practical matter, I don’t think the label matters, that it is not constitutional in any respect.

Professor Barnett, if they impose a ticket on you, would it be unconstitutional?

Ms. JACKSON LEE. And before he answers the question, let me also raise this question, and I am not being facetious. But could I not be engaged in economic activity by actively not getting insur-

ance? Isn't it a fine line of semantics? And might I just—let me just put this on the record so you both can answer this.

Just a few years ago, a Republican, Senator Orrin Hatch, supported the idea of mandates in the Republican proposal for health insurance. In fact, as I understand it, he said, “to tell you what you have to buy even if you don't want to buy it” is a quote. And then their particular plan would have required everyone to buy coverage, and it would have helped them do so by giving them a health care credit, which was a point made earlier.

So couldn't I actively not be insured, and isn't that economic activity? Professor.

Mr. BARNETT. I thought maybe I would add to our conversation a definition of penalty and the definition of tax that has been adopted by the Supreme Court in a 1996 case, and here is how justice Souder defined those two terms: He said, if the concept of penalty means anything, it means punishment for an unlawful act or omission. So that is what a penalty is, the substance, not the label, just the thing.

By contrast, he then described a tax as, quote, a pecuniary burden laid upon individuals or property for the purpose of supporting the government. That is a tax.

So it isn't just a matter of labels. It is a matter of substance. And you have to ask yourself, is the penalty that is called a penalty in the bill, is it a punishment for an unlawful act or omission defined as failure to have health insurance, or is it an enactment, a burden laid upon individuals for the purpose of supporting the government?

Ms. JACKSON LEE. I ask the gentleman for 15 additional seconds.

Mr. SMITH. The gentlelady is recognized for an additional 30 seconds.

Ms. JACKSON LEE. I thank the gentleman.

And I would make the argument, one, that, instead, it is an incentive to do right, that it is not penalizing you. Because penalty is punishment. You are not punished if you have health insurance, in fact. And so you are, in fact, incentivized to have health insurance, rather than take the negative, which is to suggest that because you have the penalty you are being punished.

I am helping you. I am helping you not have 26 percent uninsurance in the State of Texas. I am helping children be insured. I am helping diverse minorities be insured.

And I know during the civil rights arguments, even though we were arguing on the Constitution, there were many policy statements being made. Do we want to live in a Nation that discriminates against a person for the color of their skin?

In addition to the amendment constitutional argument, do we want to live in a Nation where there are people who are uninsured, causing catastrophic costs to the Nation and others have to pay? I think that is a question that should be considered by the courts.

And I also need to—I understand the Souder language, but I also need to say whether or not it is more an incentive than it is a punishment. I am more inspired by incentive, and I welcome it being a parking ticket. We give parking tickets all the time, and no one complains about being required to do the right thing.

I yield back.

Mr. SMITH. The gentlelady's time has expired.  
The gentleman from South Carolina, Mr. Gowdy.  
Mr. GOWDY. Thank you, Mr. Chairman.

I want to start by commending all three of the witnesses, the two that are remaining and the Attorney General, for the civility and the professionalism with which you disagree with each other, which really is an example for all of us.

Professor Dellinger, was *Morrison* correctly decided?

Mr. DELLINGER. Yes.

Mr. GOWDY. So Congress can mandate that the victim of domestic violence purchase health insurance but cannot set a forum in which she seeks justice for her injuries?

Mr. DELLINGER. That is correct.

Mr. GOWDY. Help a guy that made a C in con law understand.

Mr. DELLINGER. Well, the reason is that the Supreme Court held in *Morrison* that local crime had only an attenuating connection to national commerce.

Mr. GOWDY. But she has got injuries which will be treated for at a hospital. So we can make her have health insurance for her injuries, but we can't set the forum for the adjudication of the underlying crime.

Mr. DELLINGER. Correct.

Mr. GOWDY. What about *Lopez*?

Mr. DELLINGER. That is because there is something different about the health care market that you can't avoid participating in it and transferring the costs to others.

And also what the Court was concerned about in *Morrison* and in *Lopez* regulating guns near schools was that fact that, once you got into the area of local crime, because all local crime affects commerce in the sense that people who are crime victims are less productive, there is no limit to what—

Mr. GOWDY. However, in Title XVIII you specifically have to prove that the gun traveled in interstate commerce. In the Hobbs Act, you have to prove that the good that was stolen from the store in a Hobbs Act case traveled in interstate commerce.

Mr. DELLINGER. Correct.

Mr. GOWDY. So you concede there are—that this language “Congress shall have the power to regulate commerce among the several States” still means something.

Mr. DELLINGER. Yes.

Mr. GOWDY. Can Congress mandate the purchase of dental insurance if we show that overall dental health is tantamount to overall dental health? Can we mandate the purchase of dental insurance.

Mr. DELLINGER. It would depend on what the Supreme Court said in upholding the health care mandate.

Mr. GOWDY. Well, I am asking you. If you were on the Supreme Court, you are advocating on behalf of the constitutionality of this particular mandate.

Mr. DELLINGER. If I were on the Supreme Court and asked to pass on a mandate to purchase dental insurance, I would want to know whether Congress had the same basis for showing that people had no choice but to get dental care. And maybe that showing could be made and that the cost of that care, when obtained, was transferred to other taxpayers.

Mr. GOWDY. What about life insurance? Because we are all going to die, and generational debt is a bad thing. Can Congress mandate the purchase of life insurance?

Mr. DELLINGER. I would assume that that is distinguishable. Because there is no showing that if you don't buy life insurance that the cost is going to be imposed on other Americans.

Mr. GOWDY. Can you give me three examples where you would find that Congress has exceeded its—that the commerce clause is not as elastic as some of my colleagues believe it to be?

Mr. DELLINGER. Yes.

Mr. GOWDY. I will just take three.

Mr. DELLINGER. Congress cannot regulate that you eat broccoli, that you go to a gym, or, in my view, that you purchase a flat-screen television.

Mr. GOWDY. So you do not see much of a stretch between mandating the purchase of health insurance and mandating other things that contribute to good overall health like vision insurance and dental insurance?

Mr. DELLINGER. Contributing to overall health is a fine and salutary objective, but it may be one that the Court would think is a matter for local governments. This is a regulation of an economic activity itself, and let me just give you one example.

If the—

Mr. GOWDY. I will give you 10 seconds, because I have one more chance to ask another law professor a question, and I have never had this chance in my life.

Mr. DELLINGER. Ask Professor Barnett again; and if I have a moment, I will come back.

Mr. GOWDY. Some would argue that you gave the road map to the opposition, so to speak, by your wonderful advocacy in Raich. Am I correct pronouncing it?

Mr. BARNETT. Raich. Angel Raich was my client.

Mr. GOWDY. And that is marijuana being sold, grown purely within a State, and you convinced the Supreme Court that that impacts—that Congress can regulate that. How is that not a road map for the opposition?

Mr. BARNETT. When you say I convinced the Supreme Court, you mean I argued strenuously against that, and I only got three votes, and I lost that case.

Mr. GOWDY. You lost it. Well then good. That makes me feel better.

Mr. BARNETT. It was Solicitor General Paul Clement who won that case, and I failed to convince the Court.

Mr. GOWDY. In 10 seconds, if the Chairman will give me 10 seconds, how does Raich not carry the day on this issue?

Mr. BARNETT. Because it would be as though Congress had required that my client grow marijuana for medical purposes. What they said is she couldn't grow it, and the majority of the Court said she couldn't grow it. Because growing marijuana, like growing any other good, is an economic activity and therefore is something within Congress' power to reach, economic activity. But they never said or intimated that somehow Congress had the power to make her grow marijuana. That would be a step that no one even imagined until last year was something Congress would ever claim.



Mr. SMITH. The gentleman's time has expired. Good question. Thank you.

Mr. Issa, the gentleman from California, is recognized.

Mr. ISSA. Thank you, Mr. Chairman.

The line of questioning has been interesting, and I apologize I have been going in and out with another Committee. But I am trying to understand something.

Mr. Barnett, you are a professor. Maybe you can help me. There is a long history of States requiring insurance if you want to drive an automobile, right? But even when they require you to do that—I am a native of Ohio—they have held in those States that, constitutionally, they can't make you buy the insurance, but they can make you provide the equivalent of insurance. So, in the case of Ohio, they can't make you buy insurance. They can make you post a bond, show financial ability to pay if you are in an accident, or buy insurance.

Is there anything in the Health Care Reform Act that is the equivalent of that for people who say I can take care of my own health care?

Mr. BARNETT. Well there is an exemption in the Act for people who have religious objections. So it is somehow not necessary that they—

Mr. ISSA. But being wealthy enough to pay for your own health care is not a religion.

Mr. BARNETT. No. No.

Mr. ISSA. So we don't—in this Act, if there were no other problem, we fail to observe people's right to pay out of their pocket. In other words, we force them to enter into a commercial relationship with a for-profit entity, an insurance company.

Mr. BARNETT. That is the mandate. Yes.

Mr. ISSA. Is that enough to be unconstitutional, just because we didn't leave them their individual liberty to simply pay the doctor themselves?

Mr. BARNETT. I think the way to simplify this, just for purpose of understanding, whichever side of this you are on, is that when you choose to engage in voluntary activity government at the State and Federal level may regulate that activity that you choose to engage in in a variety of ways. And the Federal Government has some powers to regulate, State governments have other powers to regulate. But there is just no dispute that if you voluntarily decide to engage in activity the government can tell you how to do it, like if you are going to drive a car, you have to do it this way. You have to get a driver's license, too, in addition to insurance. That is something else you have to get.

Mr. ISSA. So you agree that the Federal Government could simply nationalize all insurance and take away from all States the right to regulate insurance companies, eliminate 50 States' insurance commissioners?

Mr. BARNETT. The Supreme Court in 1944 said that insurance was commerce, an interstate commerce, and that is the precedent that we are living with. For 100 years before that, it denied that is true. But now that is established law, and no one is contesting that. So Congress can do, in regulating that industry, whatever they can do in regulating any other industry.

Mr. ISSA. Here is a question I find amazing, and it is not on the same topic as others.

So those who voted for ObamaCare—we will call those the other side of the aisle and nobody on this side of the aisle—they could have simply created 50 State complete over-the-border selling, and they could have even taken it on to a 50 State common federalized system if they had wanted to. They could have usurped all of the States and had anyone who is licensed anywhere be licensed to the Federal Government and therefore sell insurance in all 50 States and created incredible competition on a national basis by having a single standard, couldn't they?

Mr. BARNETT. The reason why States still regulate insurance is because Congress passed the McCarran-Ferguson Act in 1944. After the Supreme Court said it was in your hands, then Congress turned around and said we are going to preserve the State system that had been up and running—

Mr. ISSA. Right. But ObamaCare has partially preempted it. It could have preempted that.

So I understand that when my colleagues on the other side said they wanted to bend the health curve down, they wanted to save money, and they wanted to find ways to have more competition so that you wouldn't have just one choice in Alabama or South Carolina, they could have done that very easily because one law trumps the one before it. They would simply amend that.

Mr. BARNETT. Yes, Congressman.

Mr. ISSA. So we didn't do the constitutional common 50 State insurance. We didn't put in any kind of a personal responsibility alternative where you simply post a bond or provide the proof that you can pay for it. We didn't do a lot of things we could do. But we chose to mandate that you pay if you don't pay. Is that right?

Mr. BARNETT. Yes, Congressman.

Mr. ISSA. Mr. Dellinger, you have done a wonderful job of telling me how, you know, there are all these things that are okay constitutionally. But what about that mandate that I pay a private entity rather than, if you will, the personal responsibility that was envisioned by our Founders? They certainly did expect that George Washington could have a doctor come in on his own, that he wouldn't have to buy something that wasn't even available at the time, insurance, right?

Mr. DELLINGER. Right.

Mr. ISSA. Mr. Chairman, I thank you for this hearing.

Being the last on my side, I would assume that all that could be said had already been said, but I found one little piece that I thought hadn't, and I yield back.

Mr. SMITH. Thank you, Mr. Issa, for your contribution. Actually, you are next to last, because the gentlewoman from Florida, Mrs. Adams, is recognized.

Mr. ISSA. Sorry, only on my side.

Mrs. ADAMS. Thank you, Mr. Chairman.

And I will preface this by saying I come from Florida, also; and I stood with our Attorney General then, Attorney General McCollum, when he challenged this law when it was signed into law. I agree with him. I believe that it is unconstitutional, and I will go ahead and tell you up front.

I am trying to reconcile how you believe, Mr. Dellinger, that if someone is sitting in their home and they are not engaged in any activity how the Federal Government could then force them to engage in this activity?

Mr. DELLINGER. Well, the Federal Government, like the State and local governments, has for more than 200 years sometimes imposed affirmative obligations on individuals where they have had power. Sometimes it is an important power like the militia power where everyone was required sitting at home to go out and buy a knapsack for their ammunition, the Congress in 1792. Congress is never considered, quote, regulating an activity when they impose an affirmative obligation and then they can only impose an affirmative obligation where they already have the power to do so.

Now, the penalty in this law does not apply to someone who is just sitting at home. It is only when that person goes into the national economy and earns \$18,000 for a couple that they are required to file a Federal income tax and make a 2½ percent additional penalty payment if they haven't maintained minimum insurance coverage. Like you have to pay a couple percentage points for Medicare coverage for when they are over 65, they have to pay 7½ percent for Social Security for old-age assistance after they are 65.

Those are impositions that the government makes, the latter two under the taxing power, but none of them seem particularly extraordinary in terms of an incursion of liberty. And, in fact, what is so—

Mrs. ADAMS. Let me stop you there. Because the knapsack and the gun—I also am a staunch supporter of the Second Amendment, and I understand that that was done so that we would have some kind of protection to our country, and that is a constitutional requirement that government provide for our safety and well-being.

On that same inference that you are saying, so this person who works, may not have a car, and so, therefore, under that same analogy, there are car accidents, there are a lot of tort actions, there is a lot of costs associated with those accidents. Would you then say that we should maybe say that everyone, no matter if they own a car or not, because you are going to buy car insurance, so are you now saying that everyone who owns a car, whether they own a car or not, should have to pay car insurance so that everyone would be covered if something were to happen in an accident?

Mr. DELLINGER. No, I would not.

Mrs. ADAMS. Okay. You made a comment that kind of concerned me. You said that no one can decide not to use health care. Do you believe that everyone has to use health care?

Mr. DELLINGER. No. What I mean by that—and that is a good question. What I mean by that is, except for those who have religious objections to health care—

Mrs. ADAMS. You didn't say that, though. You said—and you said it right here in this hearing, and I wrote it down verbatim because I thought that was unusual. You said, no one can decide not to use it.

Mr. DELLINGER. Yes, that is correct.

Mrs. ADAMS. So that concerns me also because—

Mr. DELLINGER. May I—

Mrs. ADAMS. When I hear about the Federal Government taking more and more liberty away from the American people or imposing their will on the American people, when I heard that statement, it made me concerned that you believe that no one can decide not to use health care in America.

Mr. DELLINGER. That is a statement of fact, Mrs. Adams, not a statement of preference. That is to say, no one can be assured if you are riding a bicycle, as I do, that you are not going to be hit by a truck and wind up in the emergency room. And when you do, under the Emergency Medical Treatment Act, they are going to have to provide with you with treatment, whether or not you are going to pay for it—

Mrs. ADAMS. If you get hit by the truck, hopefully they have insurance. Because if you are driving that vehicle on a city roadway or a city roadway or a county roadway or a Federal roadway then in order to have the privilege of driving that truck, you have to have insurance. So let's move on.

Mr. DELLINGER. I was on a bicycle.

Mrs. ADAMS. I really am concerned about that statement, but I am going to move on. Because there has been conversation about choice, choice, here; and I would like to know from you and Mr. Barnett how do you equate choice with mandate? How do you bring those two together?

Mr. DELLINGER. I bring them together in the following sense, that one proposal for dealing with health care for the last 40 years, one that Congress did not adopt, is simply to extend Medicare from age 65 all the way down so that people would be taxed out of their income to pay for Medicare. This alternative adopted instead, Mrs. Adams, gave people more choice among private providers, rather than having them limited to a government provider.

Mrs. ADAMS. Mr. Barnett, quickly.

Mr. BARNETT. This bill does give people the choice between a congressionally mandated—between providers of congressionally mandated health insurance policies. You no longer have a choice—insurance companies no longer have a choice on what terms to offer you and you no longer have a choice on whether to do business with them. The only choice you have is which insurance company you do business with. And that is not really—that is a choice, but it is not the choices that we started with.

Mrs. ADAMS. Thank you.

Mr. SMITH. I thank the gentlewoman.

The gentleman from Arkansas, Mr. Griffin, is recognized for his questions.

Mr. GRIFFIN. I don't have any at this time.

Mr. SMITH. That makes it easy.

We have concluded our hearing, and let me thank the witnesses again for their testimony.

Without objection, all Members will have 5 legislative days to submit additional questions for the witnesses, and we will make their responses part of the record.

Also without objection, Members will have 5 legislative days to submit additional materials for the record.

With that, again, thanks to the witnesses. We are adjourned.

[Whereupon, at 12:23 p.m., the Committee was adjourned.]

## A P P E N D I X

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### MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE HENRY C. "HANK" JOHNSON, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF GEORGIA, AND MEMBER, COMMITTEE ON THE JUDICIARY

*Congressman Henry C. "Hank" Johnson, Jr.*  
**Statement for the Hearing on the  
"Constitutionality of the Individual Mandate"**

**February 16, 2011**

Mr. Chairman, I would like to thank our witnesses for being here today. The individual mandate is constitutional and I will do what I can to defend it.

This is imperative because at some point in time, each and every one of us will get sick.

On March 23, 2010, President Obama signed into law the first comprehensive health care reform law in our nation's history, the Affordable Care Act.

I am a proud supporter of this law, voted with a majority of my colleagues to pass the bill, and firmly believe that it is constitutional.

This historic law is a once in a lifetime opportunity to ensure that all Americans get quality, affordable health care. This legislation will reduce costs, prohibit discrimination against patients with pre-existing conditions and extend coverage to the uninsured.

It will extend coverage to 32 million Americans.

The new health care law bars insurance companies from discriminating based on pre-existing conditions, health status and gender. It provides small businesses and working families with tax credits to help purchase insurance. And it strengthens Medicare and closes the prescription drug donut hole.

Under the Act's individual mandate provision, individuals who can afford health insurance must purchase it or pay a penalty for failing to do so.

Four district courts have ruled on the merits of the constitutionality claim.

Two courts have upheld the health care reform law, two have found that the individual mandate violates the Constitution. Ultimately, the Supreme Court will need to resolve this issue.

These cases also call into question the provisions prohibiting insurance companies from denying coverage to Americans with pre-existing conditions.

The individual mandate is key to ensuring that millions of Americans will not have to worry about being denied health care coverage because of a current medical condition or fear that their coverage will be capped if they get sick.

Congress has several sources of power to support the individual mandate.

First, Congress has power under the Commerce Clause to enact the individual mandate. The United States Constitution grants Congress the power to regulate commerce among the several states.

Health care constitutes more than 17 percent of the gross domestic national product and thus it is well within Congress' power to regulate the interstate health care market under the Commerce Clause.

Second, the Necessary and Proper Clause supplements Congress' Commerce Clause power with respect to enacting the individual mandate. Under the Necessary and Proper Clause, the analysis is simply whether the means chosen are reasonably adapted to the

attainment of a legitimate end under the Commerce Clause or under other powers the Constitution grants Congress.

Congress' legitimate end here is increasing the affordability and availability of health care through regulation of the interstate health care and insurance markets. This is definitely within the scope of the Commerce Clause.

Because Congress has the power to regulate these markets, it also has the supplemental power under the necessary and proper clause to choose any means appropriate to effectively regulate those markets and the individual mandate is an appropriate method.

Further, Congress has power under the General Welfare Clause to enact the individual mandate. Congress has authority to impose taxes for the general welfare. The individual mandate collects revenue from individuals who are able, but fail to purchase insurance as part of their income tax. This is expected to generate \$4 billion annually, which will help offset the health care costs that the uninsured fail to pay.

With an unemployment rate of 9 percent, my top priority is job creation and supporting policies and programs that help my constituents.

I am not in favor of taking health care benefits and security away from hard working Americans.

Now is not the time to strip away valuable health care protections from millions of Americans.

Thank you, Mr. Chairman, and I yield back the balance of my time.

PREPARED STATEMENT OF CHARLES FRIED, BENEFICIAL PROFESSOR OF LAW,  
HARVARD LAW SCHOOL

Testimony of  
Charles Fried  
Beneficial Professor of Law  
Harvard Law School

Before the Senate Committee on the Judiciary  
Hearing on "The Constitutionality of the Affordable Care Act"

February 2, 2011





HARVARD LAW SCHOOL  
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Charles Fried  
Beneficial Professor of Law

TESTIMONY OF CHARLES FRIED

I come here today not as a partisan supporter of the Obama Administration's health care legislation. I am not an expert in health care economics or policy, and I am sure there are many arguments for and against the wisdom and feasibility of this legislation. I do not enter into that debate. I am an expert on constitutional law, which I have been teaching and practicing for many years and on which I have written books and articles, most to the point my 2004 book, SAYING WHAT THE LAW IS: THE CONSTITUTION IN THE SUPREME COURT. I also am not one who believes that Article I, Section 8 of the Constitution is in effect a grant of power to Congress to regulate anything it wishes in any way it pleases. There are limits to what may plausibly be called commerce. I agree entirely with the decision in *United States v. Morrison*<sup>1</sup> that section 13981 of the Violence Against Women Act cannot be brought within Congress's power to regulate commerce. Indeed I sat at counsel table with Michael Rosman when he successfully argued that case. Though gender-motivated violence is despicable, cowardly, and in every state in the union criminal, a man beating up his wife or girlfriend is not commerce. Neither is carrying a gun in or near a school, as the Court correctly held in *United States v. Lopez*.<sup>2</sup> The arguments to the contrary required torturing not only constitutional law but the English language. But the business of insurance is commerce. That's what the Supreme Court decided in 1944 in *United States v. South-Eastern Underwriters Ass'n*,<sup>3</sup> and the law has not departed from that conclusion for a moment since then. One need only think of the massive regulation of insurance that is represented by ERISA to see how deep and unquestioned is that conclusion.

If insurance is commerce, then of course the business of health insurance is commerce. It insures an activity that represents nearly 18% of the United States economy.<sup>4</sup> (In this connection recall *Perez v. United States*,<sup>5</sup> which held that a very local loan sharking operation was within Congress's power to regulate commerce.) And if health insurance is commerce, then the health

<sup>1</sup> 529 U.S. 598 (2000) (Rehnquist, C.J.).

<sup>2</sup> 514 U.S. 549 (1995) (Rehnquist, C.J.).

<sup>3</sup> 322 U.S. 533 (1944) (Black, J.).

<sup>4</sup> Anne Martin et al., *Recession Contributes to Slowest Annual Rate of Increase in Health Spending in Five Decades*, 20 HEALTH AFF. 11, 11 (2011) (reporting that 17.6% of U.S. GDP in 2009 was devoted to health care).

<sup>5</sup> 402 U.S. 146 (1971) (Douglas, J.).

care mandate is a regulation of commerce, explicitly authorized by Article I, Section 8 of the Constitution.

There is the argument, which I believe is entirely wrong and even worse quite confused, that the health care mandate is not a regulation of commerce because it requires an economic act—entering the health insurance market—rather than prohibiting or limiting an economic activity. This is what Chief Justice Marshall, who had been an active member of the Virginia legislature at the time the Constitution was adopted, wrote in 1824 in *Gibbons v. Ogden*<sup>6</sup> regarding Congress’s commerce power:

What is this power?

It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. . . . If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States. The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse.<sup>7</sup>

To my mind that is sufficient to provide the constitutional basis for the mandate. The mandate is a rule (more accurately, part of a system of rules) “by which commerce is to be governed.” Neither the Constitution nor the great Chief Justice said anything about limiting such rules to those that prohibit or limit commerce. But to those who may argue that, for some reason not disclosed in any constitutional text or known constitutional doctrine, this is not sufficient, there are these words of Marshall in 1819 in *M’Culloch v. Maryland*,<sup>8</sup> often invoked, most recently in *United States v. Comstock*,<sup>9</sup> in an opinion joined by Chief Justice Roberts, and in *Gonzales v. Raich*,<sup>10</sup> in an opinion by Justice Scalia:

[T]he powers given to the government imply the ordinary means of execution. . . . The government which has a right to do an act, and has

<sup>6</sup> 22 U.S. (9 Wheat.) 1 (1824).

<sup>7</sup> *Id.* at 196–97.

<sup>8</sup> 17 U.S. 316 (1819).

<sup>9</sup> 130 S. Ct. 1949, 1956, 1965 (2010) (Breyer, J.).

<sup>10</sup> 545 U.S. 1, 39 (2005) (Scalia, J., concurring in the judgment).

imposed on it, the duty of performing that act, must, according to the dictates of reason, be allowed to select the means . . . .

But the Constitution of the United States has not left the right of congress to employ the necessary means, for the execution of the powers conferred on the government, to general reasoning. To its enumeration of powers is added, that of making

all laws which shall be necessary and proper, for carrying into execution the foregoing powers, and all other powers vested by this constitution, in the government of the United States, or in any department thereof.

. . . .

. . . The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers, to insure, so far as human prudence could insure, their beneficial execution. This could not be done, by confiding the choice of means to such narrow limits as not to leave it in the power of congress to adopt any which might be appropriate, and which were conducive to the end. This provision is made in a constitution, intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. . . .

We admit [as do I—see *United States v. Morrison*], as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. *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, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.*<sup>11</sup>

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<sup>11</sup> *M'Culloch*, 17 U.S. at 409–10, 411–12, 415, 421 (emphasis added).

Mandatory enrollment by all in the health insurance system seems close to absolutely necessary—though, as Marshall wrote, the necessity need not be absolute—to a scheme that requires private health insurers to accept virtually all applicants regardless of preexisting conditions and to retain them no matter how large the cost they impose on the system. To allow the young and well to wait until they are older and sicker to enroll is to design a system of private insurance that cannot work. Everyone knows that.

In a debate last November before the Federalist Society (of which I have been a member since its beginning), my good friend and former student Professor Randy Barnett, by way of peroration, said that it was not the America he knew if a person could be compelled to enter a market and purchase a product there he did not want. (As has been repeatedly asked, may Congress by way of regulating commerce force you to eat your veggies or visit the gym regularly? Surely not.) But the objection, while serious, is not at all about the scope of Congress's power under the Commerce Clause. It is about an imposition on our personal liberty, a liberty guaranteed by the 5th and 14th Amendments, and guaranteed against invasion not only against federal but also against state power.

Is the health care mandate an invasion of constitutionally protected liberty? That question was answered in 1905 by a unanimous Court in *Jacobson v. Commonwealth of Massachusetts*,<sup>12</sup> upholding against a liberty argument the imposition of a fine for refusing to submit to a state-mandated smallpox vaccination. By refusing vaccination, Jacobson was endangering not only himself but others whom he might infect. By refusing the much less intrusive and less intimate imposition of a requirement that one purchase health insurance if one can afford it, a person threatens to unravel—in the view of Congress and the health insurance industry, but Congress is enough—the whole scheme designed to protect by health insurance the largest part of the population.

As for the veggies, I suppose such forced feeding would indeed be an invasion of personal liberty, but making you pay for them would not, just as making you pay for a gym membership which you can afford but do not use would not.

To sum up:

Insurance is commerce.

Health insurance is undoubtedly commerce.

Congress has the power to regulate commerce, and that means that Congress may prescribe, in Chief Justice Marshall's words, a rule for commerce.

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<sup>12</sup> 197 U.S. 11 (1905) (Harlan, J.).

The health care mandate is a rule for commerce. And in any event it is a necessary and proper part of the particular regulation of health insurance that Congress chose to enact.

That the rule speaks to inactivity as much as activity—which may or may not be true—is in any event irrelevant. Nothing in constitutional text or doctrine limits Congress to the regulation of an activity, although many—maybe all—examples of past regulations may in fact be characterized as regulations of activity.

Even if the regulation of inactivity—if that is what it is—is a novelty, its novelty does not count against it. Many—maybe most—regulations of commerce have some aspect of novelty about them. The question is whether that novelty is in some sense fatal to the regulation being a regulation of commerce or necessary and proper to such a regulation.

The objection that the mandate is an imposition on the individual is an objection not to Congress's exceeding its power to lay down a rule for commerce, but to Congress's violating individual liberty as guaranteed by the 5<sup>th</sup> Amendment. But the *Jacobson* case, which has been settled precedent for more than one hundred years, shows conclusively that the mandate is not an unconstitutional imposition on individual liberty.

A different route to the same conclusion would conceptualize the healthcare mandate as a part of a scheme regulating not just the market for health insurance but also the market for health care itself, how it is obtained and how it is paid for. Though an individual may claim—though not very plausibly—that he would never voluntarily enter the health *insurance* market, no one can plausibly claim he will never get sick or suffer injury and so will never need health care and never need to pay for health care. This healthcare mandate is part of the regulation of the market everyone must at some time enter—whether that person will need care tomorrow or ten years from now, whether it will be to seek help for himself or for some dependent.

AMERICAN CONSTITUTION SOCIETY (ACS) FOR LAW AND POLICY, ISSUE BRIEF, THE HEALTH CARE LAWSUITS: UNRAVELING A CENTURY OF CONSTITUTIONAL LAW AND THE FABRIC OF MODERN AMERICAN GOVERNMENT, SIMON LAZARUS, FEBRUARY 8, 2011



The Health Care Lawsuits:  
Unraveling A Century of Constitutional Law  
and The Fabric of Modern American Government

Simon Lazarus

February 8, 2011

All expressions of opinion are those of the author or authors.  
The American Constitution Society (ACS) takes no position on specific legal or policy initiatives.

**The Health Care Lawsuits:  
Unraveling A Century of Constitutional Law  
and The Fabric of Modern American Government**

Simon Lazarus\*

Introduction and Summary

Nearly a year after President Obama signed the Affordable Care Act (ACA) into law, battles over its constitutionality flare in over twenty separate lawsuits and countless media and political arenas. As Congress was drafting the law, when opponents first broached the prospect of constitutional challenges, experts across a broad ideological spectrum derided the constitutional case against the legislation as, in the words of Harvard's Charles Fried, Solicitor General to President Ronald Reagan, "preposterous." Thus far, most of the cases have indeed been dismissed, and two of the federal district courts that have reached the merits have upheld the principal target of the challenges – the requirement that most Americans who can afford it carry health insurance, the so-called "individual mandate" or "individual responsibility provision." However, two district courts have struck the mandate down. In addition to the widespread attack on the individual responsibility provision, 26 Republican state officials have made a claim in the Western District of Florida challenging the ACA's expansion of Medicaid. The district judge hearing that case ruled the claim inconsistent with applicable precedents, but suggested that those precedents might merit reconsideration. Ultimately, these issues will be resolved, perhaps two years or so hence, by the Supreme Court. Key members of the Court's conservative bloc have written or joined opinions that would be hard to square with disapproval of the mandate or other ACA provisions under challenge. But this is a Court with a track record in politically or ideologically charged cases of giving precedent short shrift and splitting 5-4 along partisan lines, so precedent may not be prologue in this case.

This issue brief will consider what, beyond the specifically targeted ACA provisions, is at stake in these cases. The brief will not focus on detailing the by now familiar standard arguments for and against the validity of the challenged provisions. Instead, the brief assesses the broader potential impact of the claims at issue in the suits. What are the implications of the theories behind them? If a Supreme Court majority were to embrace those claims, what would the new constitutional landscape look like? Will basic underpinnings of established constitutional law and governmental practice shift? If so, how, and how much? Apart from the ACA, what other important statutes and areas of policy could expect potential collateral damage from follow-on challenges?

In summary, the brief concludes:

- The pending health care reform challenges constitute a bold bid for historic, sweeping constitutional change. If successful, the challenges would be a major step toward resuscitating a web of tight constitutional constraints on congressional

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\* Public Policy Counsel, National Senior Citizens Law Center. An earlier issue brief, *Mandatory Health Insurance: Is it Constitutional?*, was published by the American Constitution Society in December 2009 and can be found at <http://www.acslaw.org/files/Lazarus%20Issue%20Brief%20Final.pdf>.

authority that conservative Supreme Court majorities repeatedly invoked during the first third of the 20<sup>th</sup> century to strike down economic regulatory laws. In the late 1930s and thereafter, the Supreme Court jettisoned this conservative activist jurisprudence, replacing it with constitutional interpretations supporting Progressive Era, New Deal, Great Society, and kindred reforms.

- The legal theories behind the health care lawsuits take dead aim at three bedrock understandings that inform the vision of a democratically governed, economically robust nation first reflected in Chief Justice John Marshall’s early nineteenth century seminal interpretations of federal economic policy-making authority, and reaffirmed in all Supreme Court decisions since the New Deal era. These understandings are:
  1. The federal government exists and is empowered to address objectives that states acting individually lack, in the words of the Framers, the “competence” to handle on their own.<sup>1</sup> In very recent times, the same understanding has been articulated by the late Chief Justice William H. Rehnquist as the difference between matters that are “truly national” and those that are “truly local.”<sup>2</sup> As Justice Anthony Kennedy expressed the principle: “Congress can regulate on the assumption that we have a single market and a unified purpose to build a stable national economy.”<sup>3</sup>
  2. To tackle those “truly national” problems, the federal government has the flexibility to pick solutions that are the most “competent” in practice. In the words of Justice Antonin Scalia, the national government “possesses every power needed to make [its solution] effective.”<sup>4</sup>
  3. The democratic branches, not the judiciary, have the principal constitutional writ to shape economic policy, and, accordingly, the courts are to defer to Congress and give it the running room necessary to target objectives and craft effective solutions. In other words, economic

<sup>1</sup> The Framers repeatedly used “competence,” and its antonym “incompetence,” to distinguish federal from state constitutional authority, not to mean “ability” or “ineptness,” but rather jurisdictional “capacity” or “scope.” See Jack Balkin, *Commerce*, 109 MICH. L. REV. 1, 8-13 (2010). ; Akhil Amar, AMERICA’S CONSTITUTION: A BIOGRAPHY 107-08 (2005). The principles driving the drafting of Congress’ legislative authority were a widely shared consensus among the delegates to the Constitutional Convention that the “National Legislature ought to be empowered . . . to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted [by state legislation], . . . or in all cases for the general interests of the union.” Jack N. Rakove, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 177-78 (1997). These and original sources on which they draw are concisely marshaled in written testimony of Elizabeth Wydra and Douglas Kendall of the Constitutional Accountability Center submitted to the Senate Judiciary Committee on February 1, 2011, and by Elizabeth Wydra and David Gans, in *Setting The Record Straight: The Tea Party and the Constitutional Powers of the Federal Government* (July 16, 2010). Both the latter two documents are available on the site of the Constitutional Accountability Center, <http://theconstitution.org/>.

<sup>2</sup> *United States v. Lopez*, 514 U.S. 549, 567-68.

<sup>3</sup> *Id.* at 574 (Kennedy J., concurring) (1995).

<sup>4</sup> *Gonzales v. Raich*, 545 U.S. 1, 36 (2005) (Scalia, J. concurring) (quoting *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 118-19 (1942)).



“regulatory legislation . . . is not to be pronounced unconstitutional unless . . . it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators,” or where the legislation violates individual rights that are “fundamental” or expressly protected by particular constitutional provisions.<sup>5</sup>

The individual responsibility provision, as well as other targeted ACA features, cannot be overturned without violating these basic understandings and the specific doctrinal rules and principles implementing them. In turn, such a decision will call into question the constitutional bases for, and hence could trigger copycat challenges to, provisions of other landmark laws and programs, including safety net programs such as Medicare, Medicaid, Social Security, and CHIP (the Children’s Health Insurance Program); civil rights law guarantees against private discrimination by places of public accommodation or in the workplace; federal grant programs in education, transportation, and other large-scale cooperative federalism initiatives; and environmental protection. As the judiciary disposes of these ensuing suits, it will jostle against and upstage Congress and the President as a direction-setter and micro-manager of national economic policy.

In place of a constitutional jurisprudence that prioritizes effective and responsive national governance, the pending health care reform challengers would substitute a radically different regime. As stated by 38 leading Republican members of the House of Representatives in an amicus curiae brief filed in one of the cases: “*Congress cannot pass just any law that seems to most efficiently address a national problem.*”<sup>6</sup> This self-styled “precept,” which in similar form recurs in briefs, argument transcripts, and even judicial opinions impugning the ACA, is a recipe for circumscribing the capacity of the federal government to meet national needs. Barring Congress from enacting the ACA exemplifies this impact, since doing so would deny Congress the ability to effectively reform a dysfunctional national health care market comprising over 17% of the national economy, that causes 62% of personal bankruptcies, leaves 50 million citizens uninsured, and deprives individuals with pre-existing medical conditions of access to affordable health insurance and, thus, needed health care. If nine, or more realistically, five life-tenured justices can block an undisputed rational solution for an economic problem so big and so urgent, what limit is there on the Court’s capacity to hamstring federal stewardship of the national economy?

<sup>5</sup> United States v. Carolene Products Co., 304 U.S. 144, 152 & n.4 (1938). The Court at footnote 4 of this opinion famously prescribed “rational basis” deference to Congress’ legislative judgment, except in cases involving alleged violations of “fundamental” individual or minority rights, incapable of protection through democratic political processes. *Id.*

<sup>6</sup> Brief for American Center for Law & Justice et al. as Amici Curiae Supporting Plaintiff, Virginia v. Sebelius, No. 3:10-cv-00188-HEH at 2-3 (E.D. Va. June 7, 2010) (emphasis added), available at [http://www.aclj.org/media/PDF/Virginia\\_Amicus\\_Brief\\_20100607.pdf](http://www.aclj.org/media/PDF/Virginia_Amicus_Brief_20100607.pdf).

## I. The Constitution as a Charter for National Governance

### A. A Historical Overview: Restoration of the Framers' Vision

Contrary to misimpressions spread by some supporters of the health care reform lawsuits, the constitutional doctrines on which Congress relied in drafting the ACA did not spring to life only in 1937 when the Supreme Court definitively rejected the so-called *Lochner* era doctrinal apparatus that a conservative Supreme Court had deployed to abort numerous Progressive and New Deal era reforms.<sup>7</sup> If anything, it would be more accurate to view what libertarian critics call the New Deal Supreme Court's "revolution of 1937" as a restoration of the vision of the original Framers, who sought to supplant the feckless Articles of Confederation with a charter for effective and responsive national governance.<sup>8</sup> That vision was given doctrinal form by the Framers' contemporary Chief Justice John Marshall and his fellow Supreme Court justices in the first third of the 19<sup>th</sup> century. In the century between Marshall's iconic decisions and the New Deal Court's reactivation of effective governance as a lodestar for constitutional interpretation, the textual basis for robust federal authority was materially enhanced by the Reconstruction and Progressive Era amendments.

The Senate's 1987 rejection of Robert Bork's Supreme Court nomination squelched what some observers viewed as a movement to overturn the post-New Deal constitutional consensus.<sup>9</sup> But while Bork and the generation of conservative constitutionalists for whom he spoke condemned the "activism" of the Warren Court in expanding Bill of Rights protections for individuals and minorities, they also called the "activist Court of the *Lochner* era . . . as illegitimate as the Warren Court," and endorsed the post-New Deal postulate of judicial deference to Congress on economic regulatory matters. A cadre of libertarian academics and advocates continued to champion Lochneresque constraints on federal economic regulatory authority, but they were very few in number and stood self-consciously outside the mainstream of conservative constitutional jurisprudence.<sup>10</sup>

<sup>7</sup> *Lochner v. New York*, 198 U.S. 45 (1905), launched and has come to symbolize the notoriously activist anti-regulatory regime of the first third of the 20<sup>th</sup> century. The case held that maximum hours regulation violated employers' and employees' "freedom of contract," a "right" that the five justice majority divined in the Fifth and Fourteenth Amendments' ban on deprivation of liberty without due process of law. *Id.*

<sup>8</sup> Justice Clarence Thomas, the Supreme Court's sole libertarian-leaning member, has called the New Deal Court's jurisprudential shift a "wrong turn." *United States v. Lopez*, 514 U.S. 549, 594 (1995); D.C. Circuit Judge Janice Rogers Brown used more florid language: "A Whiter Shade of Pale," Speech to the Federalist Society, University of Chicago Law School, (April 20, 1000), at 12; Justice Anthony Kennedy concisely reviews the evolution of Commerce Clause jurisprudence in his *Lopez* concurrence, 514 U.S. at 570-74. For the Framers' vision, see sources cited in note 1, *supra*. For the principles prescribed by Chief Justice Marshall for construing the Necessary and Proper and Commerce Clauses, see *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (Commerce Clause authorizes establishment of a National Bank); *Gibbons v. Ogden* 22 U.S. (9 Wheat) 1 (1824) (Ferry monopoly under state law preempted by Congress exercising Commerce Clause powers), discussed at notes 15 and 19-20 below.

<sup>9</sup> Bruce Ackerman, *WE THE PEOPLE: FOUNDATIONS* 51-52 (1991). During the same period, in 1987-88, a Reagan nominee for the Ninth Circuit Court of Appeals, Bernard Siegan, was rejected expressly because of his professed aversion to post-1937 expansionary interpretations of Federal economic regulatory authority.

<sup>10</sup> See, e.g., Stephen Macedo, *THE NEW RIGHT V. THE CONSTITUTION* (The CATO Institute, 1986), which contains chapters entitled "The Framers v. Judge Bork," "The Majoritarian Myth," and "Principled Judicial Activism." The history of conflict between libertarian and mainstream conservative legal thought-leaders is elaborated in Damon Root, *Conservatives v. Libertarians: The Debate over Judicial Activism Divides Former Allies* (July 2010), <http://www.freerepublic.com/focus/f-news/2530504/posts>. See also Doug Kendall and Glenn Sugameli, *Janice*

During the late 1990s, a five-justice bloc coalesced to introduce novel doctrines constraining federal legislative authority to implement the Commerce Clause and enforce the Fourteenth Amendment. This “federalism revolution” was widely feared as an effort to open the door to a major assault on the post-New Deal constitutional regime. But from 2003 to 2005, the “federalism” bloc dissolved, and the revolution, such as it was, fizzled; a retreat substantially endorsed by Chief Justice John Roberts during his 2005 confirmation hearing.<sup>11</sup> Again, however, it bears emphasis that the justices who engineered the 1990s federalism boomlet, especially in decisions applying the constitutional provisions at issue in the ACA litigations, offered no challenge to, and indeed reinforced, the basic constitutional doctrines enabling post-New Deal active national government.<sup>12</sup>

#### B. Doctrinal Ground Rules Established by the Marshall and New Deal Supreme Courts

As discussed, the modern post-New Deal constitutional regime, based squarely on the Framers’ design as implemented by the Marshall Court two centuries ago, prioritizes effective governance of the national economy. On the level of doctrine, this regime comprises rules generously construing three of Congress’ Article I powers: (1) the power to regulate commerce among the states, (2) the power to collect and spend revenue for the general welfare, and (3) the power to enact measures necessary and proper to implement the foregoing two (and other enumerated) powers. An additional, critical component of the current regime is a “strict constructionist” approach to the Fifth Amendment prohibition of federal deprivation of property or liberty without due process of law, thus rigorously constraining the ability of the judiciary to invalidate economic regulatory legislation. Finally, the Court has developed various doctrines obligating the judiciary to defer to congressional judgments and to respect congressional procedures necessary to enable Congress to function effectively.

##### 1. The Commerce Clause as a Platform for National Economic Policy

No objective was more critical to the Framers of the original Constitution than enabling the new central government to ensure a robust national economy by countering balkanizing protectionist propensities on the part of the states and mercantilist policies of foreign governments. A principle vehicle for achieving that objective was what we refer to as “the Commerce Clause” – the third clause of Section 8 of Article I, authorizing Congress to “regulate

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*Rogers Brown and the Environment: A Dangerous Choice for a Critical Court, A Report by Community Rights Counsel and Earthjustice at 2, 8* (October 23, 2003), available at <http://www.communityrights.org/PDFs/BrownReport.pdf>.

<sup>11</sup> This history is traced in a previous ACS issue brief, subsequently published as Simon Lazarus, *Federalism R.I.P.? Did the Roberts Hearings Junk the Rehnquist Court’s Federalism Revolution?*, 56 DEPAUL L. REV. 1, 14-21, 45-50 (2006).

<sup>12</sup> *Id.* at 30-31. See *infra* notes 15-17, 22-25 and accompanying text.

commerce with foreign nations, and among the several states . . . .” In construing that broad and general provision, three interpretive rules would be essential to its purpose:

- a. Congress’ commerce power covers economic matters that are “national” in scope, as distinguished from “local.”
- b. Matters subject to federal Commerce Clause jurisdiction must be determined on the basis of flexible and practical criteria, i.e., their “operation and effects” on the interstate economy, not rigid and economically arbitrary categorical criteria.
- c. Application of the clause must facilitate Congress’ practical ability “to regulate.”

The Framers’ commitment to this conception of the Commerce Clause<sup>13</sup> was implemented in detail by the foundational Commerce Clause decisions of Chief Justice Marshall. Thus, Marshall gave “interstate commerce” a concise, emphatically practical and flexible definition: “that commerce which *concerns* more states than one, which *extend[s] to or affect[s]* other States.” Accordingly, he said, “the power of Congress” could not be bounded in rigid categorical or geographical terms. That “power . . . does not stop at the jurisdictional lines of the several States.” Marshall rejected the claim that application of the clause should be constrained by a canon of “narrow” or “strict construction.” On the contrary, he said, the purpose of the clause should govern, explaining that in resolving any “serious doubts respecting the extent of any given power, it is a well settled rule, that the objectives for which it was given . . . should have great influence in the construction.” A “narrow construction,” he stressed, would undermine the Framers’ enabling priority and “would cripple the government, and render it unequal to [its intended] object . . . for which the powers given, as fairly understood, render it competent. . . .” Hence, the clause confers on Congress the flexibility and freedom to deploy that capability: “[T]he power to regulate . . . is to prescribe the rule by which commerce is governed. This power . . . is complete in itself, may be exercised to its utmost extent and acknowledges no limitations, other than those prescribed in the Constitution.”<sup>14</sup>

Marshall’s broad definition has not been fundamentally challenged by conservative justices appointed by 20<sup>th</sup> and 21<sup>st</sup> century Republican presidents, up to this point at least, with the exception of Justice Clarence Thomas. In writing the first of only two post-New Deal decisions invalidating federal statutes as exceeding Congress’ Commerce Clause authority, Chief Justice Rehnquist reaffirmed Marshall’s touchstone “distinction between what is truly national and what is truly local.”<sup>15</sup> Further, Chief Justice Rehnquist restated and reaffirmed the entire doctrinal litany of post-New Deal jurisprudence – that the commerce power encompasses “intrastate” matters which “substantially affect” interstate commerce, and that Congress may

<sup>13</sup> See note 1, *supra*.

<sup>14</sup> *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 187-89, 194-95, 196-98 (1824) (emphasis added).

<sup>15</sup> *United States v. Lopez*, 514 U.S. 549, 567-68 (2005).

regulate matters neither interstate nor “economic” in nature where necessary to effectuate a larger regulatory scheme legitimate under the Commerce Clause.<sup>16</sup>

Moreover, in the same case, Justice Anthony Kennedy wrote a concurring opinion that endorsed Chief Justice Marshall’s “early and authoritative recognition” of Congress’ “extensive power and ample discretion” to regulate interstate commerce. Kennedy traced, and emphatically disavowed, the early 20<sup>th</sup> century Court’s turn away from Marshall’s “flexible,” “practical conception of commercial regulation,” and its deployment of categorical “content-based” boundaries on the commerce power. “Congress,” Kennedy summed up, “can regulate [under the Commerce Clause] on the assumption that we have a single market and a unified purpose to build a stable national economy.”<sup>17</sup>

## 2. Congress’ “Necessary and Proper” Authority to Make Regulation Work

A critical adjunct to the Commerce Clause is the “Necessary and Proper” Clause, which provides that Congress may enact “all laws which shall be necessary and proper, for carrying into execution the foregoing [enumerated powers, including the Commerce Clause] . . . .”<sup>18</sup> Two interpretive rules shape modern Necessary and Proper Clause jurisprudence, both of which were laid down two centuries ago by Chief Justice Marshall. The first rule is that the term “necessary” should be read broadly to cover any means that is “convenient” or “appropriate.”<sup>19</sup> The second rule is that, while the ends or statutory goals that Congress chooses must be authorized by an enumerated power, the means it fashions to achieve such ends need not themselves fall within the ambit of an enumerated power. “Let the end be legitimate, let it be within the scope of the constitution,” Marshall wrote in terms familiar to every first year law student. “[A]ll means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”<sup>20</sup> Even more pointedly, Marshall explained:

The power being given, it is the interest of the nation to facilitate its execution. *It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution by withholding the most appropriate means.*<sup>21</sup>

Modern post-New Deal decisions have repeatedly and without exception confirmed, and even extended, Marshall’s two rules. Chief Justice Rehnquist, in his *Lopez* decision invalidating

<sup>16</sup> *Id.* at 558-61. The actual holding in *Lopez* was limited to the proposition that the Commerce Clause does not extend to “non-economic” activities with such attenuated relationship to interstate commerce that the Court “would have to pile inference upon inference” to make the necessary connection. The limited scope of the *Lopez* ruling was further demonstrated when Congress re-passed the stricken statutory prohibition on possession of a gun within 1000 yards of a school and added what Rehnquist had termed a “jurisdictional element” – a prerequisite for conviction that any gun involved in an offense have traveled in interstate commerce. See *Guns Free School Zone Act of 1995*, 18 U.S.C. § 922(q) (1995).

<sup>17</sup> *Lopez*, 514 U.S. at 568-74 (Kennedy, J., concurring).

<sup>18</sup> U.S. CONST. art. I § 8, cl. 18.

<sup>19</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 366-67 (1819).

<sup>20</sup> *Id.* at 421.

<sup>21</sup> *Id.* at 408. (emphasis added).

the gun-free school zones statute, reaffirmed that the Necessary and Proper Clause authorized requirements outside Congress' enumerated powers that are "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut" without the otherwise *ultra vires* requirement.<sup>22</sup> In 2005, Justice Scalia elaborately described the necessary and proper power, specifying that the clause "empowers Congress to enact laws in effectuation of its enumerated powers that are not within its authority to enact in isolation," and that "where Congress has the authority to enact a regulation of interstate commerce, 'it possesses every power needed to make that regulation effective.'"<sup>23</sup> Less than a year ago, a 7-2 majority, including Chief Justice John Roberts and Justice Kennedy, confirmed that the clause authorizes Congress to legislate wherever "the means chosen are reasonably adapted to the attainment of a legitimate end."<sup>24</sup>

### 3. Congress' Tax-and-Spend Power as a Lever to Promote the "General Welfare"

While media attention regarding the health care reform suits has been focused on the Commerce Clause, the case for the individual mandate provision, as well as other challenged provisions of the ACA, alternatively rests on Congress' Article I authority to raise and spend revenue for the nation's "general welfare."<sup>25</sup> To overturn the mandate, as well as to approve challengers' claims against the ACA's expansion of Medicaid (discussed below), courts will have to confront the modern interpretation of that provision.

Two rules give the General Welfare Clause robust leverage for prescribing and implementing national policies. First, the objectives of a measure that imposes taxes or spends funds pursuant to the clause are not confined by the enumerated powers assigned Congress in Article I, but only by the broad direction in the text of the clause itself that the measure serve the "general welfare of the United States."<sup>26</sup> Hence, the scope of the tax-and-spend power is even broader than the scope of the Commerce Clause augmented by the Necessary and Proper Clause. This is particularly important because Congress has broad leeway to attach conditions to the acceptance of funds provided pursuant to its broad spending authority by states or other grant recipients, as the modern Court has emphatically reaffirmed.<sup>27</sup> Second, as long as a measure raises some revenue, it is valid as a tax authorized by the General Welfare Clause, whether or not its purpose is primarily to promote a policy goal, rather than simply to raise revenue. As the

<sup>22</sup> *Lopez*, 514 U.S. at 561.

<sup>23</sup> *Gonzales v. Raich*, 545 U.S. 1, 39 (2005).

<sup>24</sup> *United States v. Comstock*, 130 S. Ct. 1949, 1957 (2010).

<sup>25</sup> The general welfare clause reads: "The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States." U.S. CONST. art. I § 8, cl. 1.

<sup>26</sup> *United States v. Butler*, 297 U.S. 1, 67 (1936). As noted in my December 2009 issue brief, *United States v. Butler*, decided even before the Court altered its perspective on other constitutional issues to accommodate the New Deal, famously resolved the then-century and a half old debate between Alexander Hamilton and James Madison in favor of Hamilton's view that the scope of the tax-and-spend power was not limited by the other, specifically enumerated Article I powers. *Helvering v. Davis*, 301 U.S. 619, 640 (1937).

<sup>27</sup> *South Dakota v. Dole*, 483 U.S. 203, 207-10 (1987).

Court has pronounced: “It is beyond serious question that a tax does not cease to be valid merely because it regulates, discourages, or even definitely deters the activities taxed.”<sup>28</sup>

4. Legislation Rationally Related to Lawful Goals Must Ordinarily be Upheld Unless It Violates a “Fundamental” Individual Right

Common to both modern commerce, necessary and proper, and general welfare clause jurisprudence is the requirement that, ordinarily, such “legislation . . . is not to be pronounced unconstitutional unless . . . it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.”<sup>29</sup> In effect, this rule of “rational basis” deference amounted to an act of partial judicial unilateral disarmament and a repudiation of the aggressive manner in which the *Lochner* era Court had exploited various constitutional provisions, especially the Fifth Amendment’s due process clause, to strike down progressive economic regulatory reforms.

Importantly, while the Court retreated, it did not abdicate. “Substantive” due process protection for individual rights and liberties remains a critical judicial province. But, ordinarily, due process-based assertions of constitutionally protected liberty interests can trump rational exercises of the commerce or general welfare powers only where the interests alleged to have been violated are “fundamental.” Over the past three quarters of a century, the Court has identified certain rights as fundamental and struck down otherwise valid (i.e., rational) laws that infringed those rights, such as an individual’s right to bodily integrity. But the Court has required rigorous analysis before bestowing the label “fundamental” on an asserted liberty interest, and has done so only rarely.<sup>30</sup>

<sup>28</sup> *United States v. Sanchez*, 340 U.S. 42, 44 (1950). In the same vein: “[A] tax is not any the less a tax because it has a regulatory effect, and . . . an act of Congress which on its face purports to be an exercise of the taxing power is not any the less so because the tax . . . tends to restrict or suppress the thing taxed.” *Sonzinsky v. United States*, 300 U.S. 506, 513 (1937).

<sup>29</sup> *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938).

<sup>30</sup> See, e.g., *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261 (1990). As Walter Dellinger recently testified to before Congress, this line of substantive due process cases would provide ample basis for judicial rejection on constitutional grounds of hypothetical extreme laws conjured by health reform opponents as analogous to the ACA mandate, such as requirements to consume specific vegetables or enroll in a health club. *The Constitutionality of the Affordable Care Act: Hearing Before the S. Comm. On the Judiciary*, 112<sup>th</sup> Cong. 6-7 (2011) [hereinafter *ACA Hearings*]. Although fundamental, this personal liberty interest in bodily integrity is not absolute. *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905) (upholding a state mandatory smallpox vaccination law, on the ground that an individual’s refusal to comply endangered others as well as himself). See *ACA Hearings* at 4 (testimony of Charles Fried, analogizing mandatory vaccination to the ACA individual responsibility provision).

II. The Health Reform Lawsuits Would Dismantle the Constitutional Regime Established by Chief Justice Marshall and the Modern Supreme Court to Enable Central Oversight of the National Economy

To recap: as sketched in the preceding section, the established constitutional regime for federal economic regulation rests on eight doctrinal building blocks:

- Congress' power to regulate interstate commerce...
  1. covers matters that have an economic impact national in scope that "*concern* more states than one," and is not limited to matters physically present in more state than one.
  2. is bounded by criteria that are flexible, practical, and focused on impact ("substantial effects" on interstate commerce), and are not rigid or categorical.
  3. is interpreted in accord with the Framers' purpose to empower Congress to manage effectively a robust national economy.
- Congress' authority to enact measures "necessary and proper" to "carry into execution" its specifically enumerated powers...
  4. does not limit Congress to measures that are "absolutely" necessary to achieve lawful goals, but authorizes (and requires judicial approval of) any optional approach that is "plainly adapted" to attain such goals.
  5. is not circumscribed by the Commerce Clause (nor by other enumerated powers), but encompasses "all means" appropriate for achieving Commerce Clause-authorized goals or to ensure the effective operation of a broader statutory program duly authorized by the Commerce Clause (or other enumerated power).
- The General Welfare, or Tax-and-Spend power...
  6. is not circumscribed by Congress' enumerated powers, but may be exercised to achieve any Congressional goal that serves the "general welfare of the United States," and includes the ability to impose conditions in exchange for the acceptance of federal funds.
  7. authorizes legislation that raises revenue, regardless of whether the legislation has a regulatory purpose or a purpose to deter, or even eliminate, types of conduct.
- 8. Neither the Commerce nor the General Welfare Clause justifies measures that violate the Fifth Amendment guarantee against deprivation of liberty without



due process of law, but such measures must ordinarily be upheld if rationally related to a lawful goal, unless they violate personal liberty interests which are “fundamental.”

The constitutional theories advanced by the pending health care reform challenges contravene, and in some cases, repudiate outright each of these eight basic rules.

Substantially all the cases brought by health care reform opponents target the individual responsibility provision, or individual mandate, deploying essentially identical arguments. This brief will review solely the opponents’ case against the mandate and one other claim: that mounted by 26 Republican state attorneys general and governors in the Western District of Florida in Pensacola contending that the ACA’s expansion of Medicaid amounts to “coercion” of states in violation of the 10<sup>th</sup> Amendment’s protections for state “sovereignty.”

A. Opponents’ Claim that the Individual Mandate Is Unlawful Because it Regulates “Inactivity” Contravenes Established Commerce Clause Doctrine and Nullifies the Necessary and Proper Clause

Opponents do not contend that the ACA’s individual responsibility provision runs afoul of any of the established criteria noted above for grounding legislation in the Commerce Clause. They do not contest the statutory findings that detail Congress’ determination that decisions to forego health insurance “substantially affect” interstate commerce (and/or are themselves integral components of interstate commerce in health insurance and health care delivery). They do not dispute that achieving universal coverage and reforming abusive insurance practices are statutory goals authorized by Congress’ Commerce Clause authority. Nor do they challenge Congress’ judgment inscribed in the statutory findings that mandatory insurance is necessary to achieve these lawful goals. Indeed, Virginia Attorney General Kenneth Cuccinelli, plaintiff in one of the most publicized challenges, acknowledged in his complaint that the individual mandate provision is “an essential element of the [ACA] without which . . . the statutory scheme cannot function.” He thus concedes it is “an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut” without it.<sup>31</sup>

<sup>31</sup> In short, the case of the ACA individual mandate is entirely different from *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), the two late 1990s decisions in which the Court’s conservative five justice majority held a federal law to exceed the reach of Congress’ commerce power. In those cases – involving a federal ban on possession of a gun within 1000 yards of a school and a federal remedy for violence against women – the question was whether the outlawed practice had a sufficient connection to interstate commerce, and the majority concluded that no meaningful connection existed. In neither case was a contention offered by the federal government that the challenged requirement was integral to a broader valid regulatory scheme, hence supported by the Necessary and Proper clause. *Lopez* and *Morrison* were situations at the periphery of established definitions of the reach of Congress’ commerce power, as augmented by its necessary and proper power. In contrast, the ACA individual mandate – addressing decisions that substantially affect an economic sector comprising 17% of GDP and concededly “essential” to effectuating Congress’ approach to regulating this sector – is at the core of the circle traced by those established definitions. In the same vein, the ACA’s mandatory insurance provision has a far clearer fit with established Commerce Clause criteria than do *Wickard v. Filburn*, 317 U.S. 111 (1942), and *Gonzales v. Raich*, 545 U.S. 1 (2005), the two decisions generally considered to have upheld applications of the commerce power to its outermost boundaries. Both cases involved crops, home-grown for home-use, but banned by federal authorities pursuant to a facially applicable federal regulatory statute. Admittedly, the connection of home-made and consumed crops to, or their impact on, interstate commerce was attenuated, as was

Opponents' argument contends that *even though* the subject-matter of the individual responsibility provision substantially affects commerce, and *even though* the provision is essential to a broader regulatory scheme targeted at objectives sanctioned by the Commerce Clause, it should nevertheless be struck down. The reason they give is that decisions to forego health insurance do not constitute "activity," but rather "inactivity." The interstate commerce covered by the Commerce Clause, they add, encompasses "economic activity," and decisions not to insure, though economic, are not activity. Hence, such decisions are not included in the interstate commerce that Congress may regulate.

Plainly, opponents' activity/ inactivity theory shoves aside the above-noted essential ground rules of Commerce Clause jurisprudence first laid down by Chief Justice Marshall and reinstated and refined by the modern Supreme Court. With respect to the definition of interstate commerce, what Justice Kennedy spotlighted as Marshall's "flexible," "practical," real-world, impact-based concept, would, as it was a century ago, be replaced by a categorical "content-based" boundary that walls Congress off from remedying major problems with massive detrimental economic effects that manifestly "concern more states than one." With respect to the necessary and proper leg of Congress' justification for the individual mandate, the opponents' argument simply scuttles the most fundamental rule underpinning that clause since the Marshall Era: that the clause, in Justice Scalia's words, "empowers Congress to enact laws in effectuation of its enumerated powers that are not within its authority to enact in isolation."

This *de facto* erasure of the Necessary and Proper Clause from the Constitution appears with special clarity in the December 13, 2010 decision of Judge Henry Hudson of the Eastern District of Virginia, in which he struck the mandate down, embracing and elaborating on the opponents' arguments. First, Judge Hudson reasoned that all prior decisions upholding statutes exercising Congress' commerce power had involved "some type of self-initiated action."<sup>32</sup> Converting this asserted factual distinction between the mandate and other, previously upheld regulatory requirements, into a new rule of law (without citing any legal authority or offering any argument as to why established rules should be displaced by this new one),<sup>33</sup> Hudson then went on to make a further leap:

If a person's decision not to purchase health insurance at a particular point in time does not constitute the type of economic activity subject to regulation under the Commerce Clause, then logically an attempt to enforce such provision under the Necessary and Proper Clause is equally offensive to the Constitution.<sup>34</sup>

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their importance in the overall regulatory scheme. The ACA mandate's indisputably strong connection to the statute's plan for regulating one of the largest markets of the national economy stands in sharp contrast.

<sup>32</sup> *Virginia v. Sebelius*, No. 3:10-cv-00188-HEH, slip op. at 24 (E.D. Va. Dec. 13, 2010) (granting plaintiff's motion for summary judgment and denying defendant's motion for summary judgment).

<sup>33</sup> Rochelle Broboff, *Examining the Latest Decision on the Affordable Care Act: When Precedent Proves Elusive*, ACSNI.ORG, Dec. 15, 2010, <http://www.acslaw.org/acsblog/node/17881>.

<sup>34</sup> *Sebelius*, slip op. at 19.

Immediately after its release, George Washington University Law Professor Orin Kerr (among others) noted this “significant error in Judge Hudson’s opinion.”

The point of the Necessary and Proper clause is that it grants Congress the power to use *means* outside the enumerated list of Article I powers to achieve the *ends* listed in Article I. (emphasis in original). If you say, as a matter of “logic” or otherwise, that the Necessary and Proper Clause only permits Congress to regulate using means that are themselves covered by the Commerce Clause, then *the Necessary and Proper Clause is rendered a nullity. But that’s not how the Supreme Court has interpreted the Clause, from Chief Justice Marshall onwards.*<sup>35</sup> (emphasis supplied).

Three days after the release of Judge Hudson’s decision, his excision of the Necessary and Proper Clause was reinforced by Judge Roger Vinson, presiding at oral argument in Pensacola, Florida, in the ACA challenge brought by Republican state attorneys general and other elected officials (the “AGs”). Like Hudson, Vinson did not dispute that the individual mandate is directed at attaining constitutional regulatory goals. Nevertheless, Vinson, a Reagan appointee, stressed: “There are lots of *alternative ways* to provide health care to the needy without imposing on individual liberties and freedom of choice.” Vinson’s brushing aside of Congress’ choice of means overlooks the fact that, under the Necessary and Proper Clause, identifying and selecting among “alternative” means is up to Congress. Courts are bound, as Chief Justice Marshall put it in 1819, to approve *all* means “which are plainly adapted to [a lawful] end.”

Judge Vinson’s suggestion that Congress could and should have chosen another means, apart from being unsupported, constitutes activist second-guessing and micro-managing of congressional policy choices of precisely the sort that the Necessary and Proper Clause, has been understood to preclude. Together with Judge Hudson’s assertion that the Necessary and Proper Clause does not authorize legislation that, standing alone, would not fall within an enumerated power, Vinson’s alternative means tack repudiates the two essential touchstones of modern – as well as “original” – construction and in effect reads the Necessary and Proper Clause out of the Constitution.

Judge Vinson’s final January 31, 2011 decision granting the AGs’ motion for summary judgment and striking down the individual mandate repeats his views expressed at oral argument regarding the Necessary and Proper Clause and further asserts that “‘Economic’ cannot be equated with ‘Commerce’” – a direct repudiation of the established recognition of the purpose and scope of the Commerce Clause to empower Congress to “build a stable national economy.”<sup>36</sup> Most remarkably, Vinson, purporting to review the history of Commerce Clause interpretation, attempts to trivialize the status of Chief Justice Marshall’s foundational interpretation of the commerce power in *Gibbons v. Ogden*. In the same revisionist vein, he airbrushes out of his account of the

<sup>35</sup> Orin Kerr, *The Significant Error in Judge Hudson’s Opinion*, THE VOLOKH CONSPIRACY, Dec. 13, 2010, <http://volokh.com/2010/12/13/the-significant-error-in-judge-hudsons-opinion/>.

<sup>36</sup> *United States v. Lopez*, 514 U.S. 549, 574 (1995) (Kennedy, J., concurring).

Supreme Court's most recent decision, *Gonzales v. Raich*, the powerful and unambiguous statements in Justice John Paul Stevens' majority opinion and Justice Scalia's concurring opinion that reaffirm and, if anything, strengthen Marshall's broad interpretation of both the Commerce and Necessary and Proper Clauses.<sup>37</sup>

B. Opponents' Back-door Reinstatement of Activist Substantive Due Process

1. Judges Hudson and Vinson: "Liberty Interests" Trump Rational Legislation

In his October 14, 2010 preliminary decision denying the Justice Department's motion to dismiss the claims against the individual mandate provision, Judge Vinson set out a plausible rationale for his displacement of Supreme Court precedent construing the Commerce and Necessary and Proper Clauses. But that rationale, echoed in a fragmentary manner in Judge Hudson's preliminary (July 1, 2010) and final (December 13, 2010) decisions, only serves to underscore the inherently radical character of the case against the ACA.<sup>38</sup>

Judge Vinson's moment of candor appears, not in his abbreviated argument endorsing opponents' inactivity Commerce Clause theory, but in an adjacent section of his October 14, 2010 preliminary opinion. In this section, he addresses the AGs' claim that the mandate violates individuals' Fifth Amendment due process rights, brusquely dismissing this theory. He brushes aside, as "long since discarded," *Lochner* and kindred decisions that interpreted "the Due Process Clause . . . to reach economic rights and liberties." Since the New Deal, he notes, due process-based claims can only set aside economic laws that are not "rationally related to a legitimate end." In the ACA, he continues: "Congress made factual findings . . . that the individual mandate was 'essential' to the insurance market reforms contained in the statute." Judge Vinson agrees with the AGs that an individual "liberty interest" is at stake in the case, but, he goes on, under contemporary, post-*Lochner* doctrine, courts may set aside rationally based statutory requirements only if the liberty interests they impinge constitute "fundamental rights." These, he notes, the Supreme Court has limited to a "narrow class" of interests. The liberty interest in foregoing health insurance, he concluded, has not been so recognized by the Court, and hence, the mandate is impervious to due process challenge because it is rationally related to the ACA's insurance reforms. Remarkably, one page later, Judge Vinson endorses the legal theory behind the AGs' Commerce Clause attack, neglecting to mention, much less reconcile, his

<sup>37</sup> Florida v. U.S. Dep't of Health and Human Services, No. 3:10-cv-91-RV/EMT, slip op. at 13, 28, 55, 60, 61 (N.D. Fla. Jan. 31, 2011) (order granting summary judgment). The points noted here concerning this opinion's evasion and scuttling of Commerce and Necessary and Proper Clause precedent from both the Marshall and post-New Deal eras echoes numerous commentators, notably Andrew Koppelman, *Non-Sequiturs in the Florida Health Care Decision*, BALKINIZATION, Feb. 2, 2011, <http://balkin.blogspot.com/2011/02/non-sequiturs-in-florida-health-care.html>, and Orin Kerr, *The Weak Link in Judge Vinson's Opinion Striking Down the Mandate*, THE VOLOKH CONSPIRACY, Jan. 31, 2010, <http://volokh.com/2011/01/31/the-weak-link-in-judge-vinsons-opinion-striking-down-the-mandate/>.

<sup>38</sup> The following section of this issue brief draws on and expands upon my opinion column *Jurisdictional Shell Game: Health Reform Lawsuits Sneak "Lochnerism" back from Constitutional Exile*, NATIONAL LAW JOURNAL Dec. 20, 2010, at 29, available at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202476355698&slreturn=1&hbxtlogin=1>.

statement when dismissing their due process claim that Congress had established a "rational basis justifying the individual mandate" as a matter of law.

This was no mere rhetorical slip on Judge Vinson's part. On the contrary, balancing the individual liberty interest in foregoing health insurance against Congress' reasons for mandating insurance coverage is precisely what drives Judge Vinson's rejection of the individual mandate provision. "At its core," he concluded in his final decision granting the AGs' motion for summary judgment, "this dispute is not simply about regulating the business of insurance – or crafting a scheme of universal health insurance coverage – it's about an individual's right to choose to participate."<sup>39</sup> Otherwise said, an individual liberty interest in foregoing health insurance trumps an otherwise valid regulation of commerce.

After an intense exchange with counsel for the Department of Justice, Vinson repeated the conclusion he shares with Judge Hudson:

I'm just saying that as far as an integrated national plan of trying to deal with the problems you've identified [preventing cost-shifting and implementing the insurance reforms in the law], there are lots of optional ways of doing it that are less intrusive, less drastic and *certainly don't go to the extreme of mandating someone to buy insurance if they don't want to.*"

In effect, Vinson was condemning the individual mandate provision on the theory that it is not the least restrictive alternative for achieving Congress' goal. This least-restrictive-alternative test would be appropriate IF the mandate were being analyzed as an asserted substantive due process violation, and IF the liberty interest at stake amounted to a "fundamental right," as Judge Vinson himself had correctly explained in his earlier opinion. In any event, least restrictive alternative balancing has no part in determining the scope of the Commerce Clause, as the Government's counsel queried the Court: "[T]he question that actually is before the Court is whether Congress had a rational basis for it, right?"<sup>40</sup>

## 2. Opponents' "Necessary but Improper" Argument Amounts to Substantive Due Process with No Limiting Principle

To get around the dead end of "rational basis" deference prescribed by Commerce and Necessary and Proper Clause precedent, libertarian academics have proposed an alternative route. Their theory is that while the individual mandate provision is concededly "necessary" for achieving a constitutionally legitimate end, that is not sufficient to approve the legislation because the Constitution requires that it be "necessary AND proper." "Proper," this argument goes, is an independent criterion and a limitation on "necessary." In particular, an otherwise necessary measure may be "improper" if it violates constitutionally derived norms of federalism, i.e., state sovereignty as prescribed by the Tenth Amendment, separation of powers, or individual

<sup>39</sup> Virginia v. Sebelius, No. 3:10-cv-00188-HEH, slip op. at 37 (E.D. Va. Dec. 13, 2010).

<sup>40</sup> Transcript of Oral Argument at 81, Florida v. U.S. Dep't of Health and Human Services, No. 3:10-cv-91-RV/EMT (N.D. Fla. Dec. 16, 2010).

rights.<sup>41</sup> In his January 31, 2011 final decision, Judge Vinson's entire case for rejecting the mandate came down to reliance upon this argument:

“The defendants [the Department of Justice] have asserted again and again that the individual mandate is absolutely ‘necessary and ‘essential’ for the Act to operate as it was intended by Congress. *I accept that it is.* Nevertheless, the individual mandate falls outside the boundary of Congress’ Commerce Clause authority and cannot be reconciled with a limited government of enumerated powers. *By definition, it cannot be ‘proper.’*”<sup>42</sup>

Though ingenious, this theory transparently flouts Chief Justice Marshall's prescription that the Necessary and Proper Clause “cannot be construed to restrain the powers of Congress, or to impair the right of the legislature to exercise its best judgement. . . .”<sup>43</sup> Moreover, it has never been considered, let alone adopted, by the Supreme Court.

The result of accepting opponents' case against the mandate, with the necessary but improper component either explicit or implicit, would be to import, into determinations of the scope of the Commerce and Necessary and Proper Clauses, protections for individual liberty interests hereto assigned to the Fifth Amendment due process clause. This would not constitute simply a change of textual venue, but a major expansion of judicial power at the expense of Congress. As Judge Vinson explained, substantive due process-based “liberty interests” can trump rationally based statutes only if the claims concern a “narrow” class of “fundamental rights.” Not so, it appears, from his – and other reform opponents' – treatment of identical claims in the context of a Commerce Clause attack. In contrast to the rigorous analysis prescribed by substantive due process precedents, there appears to be no limiting principle to the capacity of judges to carve out asserted “liberty interests” from Congress' authority to regulate interstate commerce.

The tremors from thus rewriting the Commerce and Necessary and Proper Clauses would hardly be minor. When opponents' objection to the individual mandate is subjected to the rigorous scrutiny prescribed by post-New Deal substantive due process precedent, its stature as a liberty interest shrinks. To be sure, the Supreme Court has held that an individual's right to refuse medical *treatment* is “fundamental,” and can prevail over an otherwise valid federal requirement,<sup>44</sup> but that does not exempt individuals from paying Medicare taxes and thereby contributing to the Medicare insurance pool. If the right to avoid payment for treatment were constitutionally “fundamental,” then Medicare taxation would be vulnerable to due process attack, as would state mandatory insurance requirements like those enacted by Massachusetts in 2006. Indeed, refusing to carry health insurance may not constitute a genuine liberty interest at

<sup>41</sup> Randy Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate is Unconstitutional*, 6 N.Y.U. J.L. & LIBERTY (forthcoming 2011); Gary Lawson and Patricia Granger, *The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 297 (1993).

<sup>42</sup> Florida v. U.S. Dep't of Health and Human Services, No. 3:10-cv-91-RV/EMT, slip op. at 63 (N.D. Fla. Jan. 31, 2011) (emphasis added).

<sup>43</sup> McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 420 (1819).

<sup>44</sup> See *supra* note 30.

all. Treating uninsured patients, as most hospitals are required by federal statute to do, shifts tens of billions of dollars in costs annually to providers, insured consumers, and taxpayers. As former Massachusetts Governor Mitt Romney noted when signing the Massachusetts individual mandate:

"[S]omeone has to pay for the health care that must, by law, be provided: Either the individual pays or the taxpayers pay. A free ride on the government is not libertarian."<sup>45</sup>

In sum, opponents' case against the minimum coverage provision reinstates the precise logic of *Lochner*, along with the baggage that induced conservatives like Bork, Meese, and Roberts to brand that era of jurisprudence as "illegitimate" activism. Federal judges, as with Judges Hudson and Vinson, could be free to stymie even indisputably "essential" legislation, on the basis of asserted "liberty interests" that would have not the remotest chance of qualifying as "fundamental" under long-established rules mediating conflicts between due process rights and Congress' authority to regulate the economy. In effect, a long step will have been taken toward the libertarian goal of a regime in which the longstanding presumption of constitutionality no longer applies to federal laws challenged in court. Instead, any asserted interference with a liberty interest would impose on the federal government the burden of overcoming a "presumption of liberty."<sup>46</sup>

C. Reform Opponents' Arguments against the Individual Responsibility Provision Repudiate Established Rules Governing Congress' Authority to Tax and Spend for the General Welfare

To keep the ACA individual mandate from being evaluated under the broad "general welfare" and "rationally related" criteria of Congress' tax-and-spend authority, opponents rely on two arguments. First, they contend, the individual mandate is not a tax at all because it is too regulatory in its nature. For this conclusion, which conflicts directly with the above-noted post-New Deal precedents, opponents rely on a 1922 decision, *Bailey v. Drexel Furniture*, often styled the *Child Labor Tax Case*. *Bailey* ruled unconstitutional a federal tax on products moving in interstate commerce that had been produced by child labor. Four years prior to this decision, the Court had ruled that a flat ban on child labor exceeded Congress' power under the Commerce Clause.<sup>47</sup> Since 1937, when *Sonzinsky v. U.S.* ruled that regulatory purpose or effect does not cause a law to lose its status as a tax, *Bailey*, along with kindred *Lochner* era decisions, has been ignored.

Judge Hudson's answer to charges that the Child Labor Tax Case belongs to a discredited era in constitutional interpretation is that, "[n]otwithstanding criticism by the pen of some constitutional scholars, the constraining principle articulated in [this and similar cases], while

<sup>45</sup> Mitt Romney, *Health Care for Everyone? We Found a Way*, WALL ST. J., Apr. 11, 2006, at A16, available at [http://online.wsj.com/article/SB114472206077422547.html?mod=opinion\\_main\\_commentaries](http://online.wsj.com/article/SB114472206077422547.html?mod=opinion_main_commentaries).

<sup>46</sup> Randy Barnett elaborates this vision in his book, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2004).

<sup>47</sup> *Hammer v. Dagenhart*, 247 U.S. 251, 276-77 (1918).

perhaps dormant, remains viable and applicable [to the status of the ACA mandate].”<sup>48</sup> Were a Supreme Court majority to follow Judge Hudson in resuscitating the case, and the radical “constraint” on the tax-and-spend power that it stands for, this would effectively remove an indispensable foundation for legislative authority on which Congress has relied to enact protections and benefits long taken for granted by the public.

Perhaps skittish about relying on a century-old ruling that Congress lacks the power to ban discourage child labor, opponents offer a second, complementary argument. They contend that, while the individual mandate provision imposes federal income tax liability, and has other objective, structural characteristics of a tax, the weight of (concededly ambiguous) evidence from the statute itself and its legislative history (including, prominently, one statement in a television interview by President Obama) demonstrates that Congress *intended* the provision to be *perceived* as a “penalty,” not a “tax.”<sup>49</sup>

There is no justification for judges to rule legislation unconstitutional where Congress was concededly acting well within authority conferred by the Constitution, but (on the basis of a highly debatable construct of the congressional and extra-congressional record) somehow did not desire that the legislation be linked to a particular, applicable constitutional provision.<sup>50</sup> As several scholars have noted, the validity of a federal law cannot turn on “magic words” or labels: “The question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise.”<sup>51</sup> This “gotcha” approach,” if followed by higher courts, may portend more far-reaching judicial interference with Congress’ ability to legislate than even the reversals of long-established substantive constitutional doctrine outlined in earlier sections of this issue brief.

D. Opponents’ Claim that the ACA’s Expansion of Medicaid Coverage Unconstitutionally “Coerces” State Governments in Violation of the Tenth Amendment Would Overturn a Basic Component of Spending Clause Jurisprudence and Undermine Many “Cooperative Federalism” Programs

Opponents’ attack on the individual responsibility provision figures in virtually all the suits challenging the ACA and dominates media accounts, but at least one other claim could, if upheld by the Supreme Court, trigger seismic changes in constitutional law and in laws and programs affecting all Americans. This claim, set out in the AGs’ complaint targets the ACA’s expansion of Medicaid to require, starting in 2014, coverage of all adults below 133% of the Federal Poverty Line.

<sup>48</sup> *Virginia v. Sebelius*, No. 3:10-cv-00188-HEH, slip op. at 36 (E.D. Va. Dec. 13, 2010).

<sup>49</sup> Judge Vinson’s decision on the motion to dismiss tracks Florida’s argument on this issue. *Florida v. U.S. Dep’t of Health and Human Services*, No. 3:10-cv-91-RV/EMT, slip op. at 22 (N.D. Fla. Oct. 14, 2010).

<sup>50</sup> Bear in mind that the question here is not how to interpret and apply a constitutional provision, or to determine whether Congress has authority to enact a particular law. In such cases, Congress’ subjective intent, expressed through statutory provisions and legislative history, is certainly pertinent and important. But this is a completely different type of inquiry. Here there is no question that the Constitution authorizes Congress to enact the mandate under its authority to tax and spend for the general welfare. That should be the end of the inquiry.

<sup>51</sup> *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948). See Gillian Metzger and Trevor Morrison, *Health Care Reform, the Tax Power, and the Presumption of Constitutionality*, BALKINIZATION, Oct. 19, 2010, <http://balkin.blogspot.com/2010/10/health-care-reform-tax-power-and.html>.



The AGs acknowledge that state participation in Medicaid has been, since the program was first enacted in 1965, and remains formally voluntary, in that states can opt out. . They assert that the expansion prescribed in the ACA is not only greater in magnitude but different in kind than previous expansions which grew Medicaid from costing \$4.5 billion in 1970 to \$338 billion and covering over 55 million Americans in 2009.<sup>52</sup> Further and most important, they contend that Medicaid has become so central to states' ability to ensure access to medical care for the variety of less well-off sectors of their citizenry, that state governments have no realistic option to withdraw from the program. Hence, their argument runs, the ACA effectively "coerces" states into accepting broadened coverage and with it, crippling new costs. Such *de facto* coercion, the AGs claim, exceeds Congress' power under the General Welfare Clause and undermines state sovereignty in violation of the Tenth Amendment.

The AGs' "coercion" attack on the Medicaid expansion provisions proposes a radical upheaval in applicable constitutional law. Judge Vinson, in his preliminary October 14 ruling on the Department of Justice's motion to dismiss the AGs' complaint, and in both oral arguments before him, emphatically acknowledged that "the current status of the law provides very little support for the plaintiffs' coercion theory argument. Indeed . . . its entire underpinning is shaky."<sup>53</sup> He noted that "the courts of appeal that have considered the theory have been almost uniformly hostile to it." Vinson specifically rejected the AGs' claim that none of these negative rulings had addressed claims where the degree of financial pressure on state litigants was as intense as in the current case. In so doing, he cited a 1997 case brought by California challenging a Medicaid requirement that it extend emergency medical services to undocumented immigrants – a requirement with a \$400 million price-tag for the state. The state claimed that it had no choice because withdrawing from Medicaid altogether would mean "a collapse of its medical system." Vinson noted that the Ninth Circuit in that case "concluded that the state was merely presented with a 'hard political choice.'"<sup>54</sup>

Since there are literally no cases upholding a claim of coercion, and since the AGs' basis for their claim has been both murky and variable through the various phases of the litigation in the District Court so far, it is not possible to predict with confidence what the grounds for and scope of a holding in their favor would be. They have appeared to emphasize several points: (1) an alleged qualitative change in the conceptual basis and financial magnitude of the Medicaid program; (2) the magnitude of federal funding of Medicaid (\$251 billion nationally in 2010); (3) the proportion of the states' Medicaid budgets attributable to the federal funds they would lose if they withdrew from the program; (4) the proportion of the states' budgets attributable to the

<sup>52</sup> Center for Medicare and Medicaid Services, U.S. Department of Health and Human Services, Office of the Actuary, 2008 ACTUARIAL REPORT ON THE FINANCIAL OUTLOOK FOR MEDICAID, page 16, Table 3 (2008); Kaiser Family Foundation, Commission on Medicaid and the Uninsured, *A Timeline of Key Developments*, [http://www.kff.org/medicaid/medicaid\\_timeline.cfm](http://www.kff.org/medicaid/medicaid_timeline.cfm)

<sup>53</sup> Florida v. U.S. Dep't of Health and Human Services, No. 3:10-cv-91-RV/EMT, slip op. at 55 (N.D. Fla. Oct. 14, 2010). Judge Vinson noted that the source of the so-called "coercion theory," and one of the only two cases mentioning the concept, rejected a challenge to the Federal-state partnership arrangements of the first Federal unemployment compensation law, stating that "Nothing in the case suggests the exertion of a power akin to undue influence, if we assume that such a concept can ever be applied with the fitness to the relations between state and nation." *Id.* (emphasis in original) (citing *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937)).

<sup>54</sup> *Id.* at 54 (citing *California v. United States*, 104 F.3d 1086 (9th Cir. 1997)).

federal Medicaid contribution; and (5) the importance of the program, and the federal funds allocated to it, to states and their citizens. Each of these grounds for finding “coercion,” has been specifically rejected by one or more of the courts of appeal that had heard coercion claims.<sup>55</sup>

Despite thus acknowledging the chasm separating the AGs’ coercion claim from current case-law, Judge Vinson nevertheless declined to dismiss the claim because, he said, he was sympathetic to the states’ description of their plight, and because, in principle, there must be “a line somewhere between mere pressure and impermissible coercion.”<sup>56</sup> In his final decision, Judge Vinson reiterated his understanding that established law precludes granting the AGs’ claim, though he invited the Supreme Court to “revisit and reconsider its Spending Clause cases,” quoting libertarian scholar Lynn Baker’s suggestion that “the greatest threat to state autonomy is, and has long been, Congress’s spending power.”<sup>57</sup> In any event, it is clear from the account of current law provided by this judge, hardly sympathetic to the ACA, that upholding the AGs’ coercion claim would deliver a “jolt to the system,” as Chief Justice Roberts called reversals of precedent in his confirmation hearing, that would match or, more likely, surpass any such departures from precedent yet authored by the Roberts Court.

### III. Health Reform Opponents’ Claims Against the ACA Individual Mandate and Medicaid Expansion Provisions Potentially Threaten a Broad Array of Landmark Laws and Programs

Some health reform challengers downplay the significance of their claims, arguing that they necessitate no overturning of existing “post-New Deal constitutional cases and doctrine” and no damage to laws other than the ACA.<sup>58</sup> To be sure, most of these advocates have long histories of fervent and articulate opposition to the modern post-New Deal state, and to the constitutional regime that supports it.<sup>59</sup> The question is, how far would invalidation of the challenged provisions of the ACA move constitutional interpretation in the direction of that broad libertarian agenda? In the interest of provoking awareness and consideration of these prospects, this Part of the brief will specify the key doctrinal changes that reform opponents’ claims entail, and briefly identify examples of areas potentially vulnerable to collateral damage from those changes.

#### A. The New Doctrines Embedded in the Legal Theories Behind the ACA Challenges

The theories advanced by the health care reform challenges contravene, and in some cases, repudiate outright the above-sketched basic rules of the established constitutional regime. Based

<sup>55</sup> *Florida v. U.S. Dep’t of Health and Human Services*, supra note 53, *Reply in Support of Defendants’ Motion for Summary Judgment*, at page 22 (filed 12/06/2010).

<sup>56</sup> The Department of Justice responded to the AGs’ complaint that the Medicaid expansion provisions will “drive them off a cliff” financially, with multiple studies and statistics purporting to show that the overall financial impact of the ACA on the states would be very small at worst and, for some states at least, significantly positive.

<sup>57</sup> *Florida*, slip op. at 12.

<sup>58</sup> Randy Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate is Unconstitutional*, 6 N.Y.U. J.L. & LIBERTY (forthcoming 2011).

<sup>59</sup> See, e.g., Randy Barnett, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2004); Richard A. Epstein, *HOW PROGRESSIVES REWROTE THE CONSTITUTION* (CATO Institute, 2006).

on the arguments they assert in the litigations, in their place, the ACA challengers would introduce the following new rules:

- A categorical rule that a prerequisite to the imposition of Commerce Clause-based regulation is some form of “self-initiated activity.” Whatever scope subsequent decisions might give this vague and unprecedented concept, it cannot include foregoing or not carrying health insurance. Hence, personal decisions or conduct equivalent to foregoing health insurance must similarly be beyond the reach of Congress’ commerce power.
- A rule that regulatory measures that, standing alone, are not authorized by the Commerce Clause or other enumerated power cannot be authorized by the Necessary and Proper Clause on the ground that they are essential to achieving a valid statutory goal or to ensure the effectiveness of a broader, valid statutory program.
- A rule that, where a levy or exaction carries a “regulatory purpose,” it must be authorized by the Commerce Clause or another enumerated power, not by the broad term “general welfare” in the text of the tax-and-spend clause itself.
- A rule that laws sanctioned by the Commerce Clause or the General Welfare Clause (or, presumably, any other constitutional provision) must fail if they impinge on an individual liberty interest of comparable dimension to the interest in foregoing health insurance. This would replace the existing rule that legislation must be upheld if rationally related to a lawful objective except when conflict is asserted between the law and a “fundamental right.” In effect, this would reinstate the precise legal logic used by the pre-New Deal “Lochner” judiciary to strike down economic regulatory laws, but under the rubric of the Commerce Clause instead of the Due Process Clause of the Fifth Amendment.
- A rule that conditional funding programs (funding programs with strings attached) for state governments are unconstitutionally coercive under one or more of the following circumstances: if, *as a practical or political matter*, a state (or states generally) cannot exercise their legal right to reject funding and withdraw from a federal program because of: the absolute level of federal funding, the proportion of the federal funds in question to a state’s program to which they contribute, the proportion of the federal contribution to the state’s overall budget, or the political or other importance of the federal program to the state.
- A rule that neither Congress nor, presumably, administrative agencies can require states to accept changes in conditional spending programs that significantly increase costs or other burdens for participating states as a

condition of remaining in and continuing to receive funds from the program.

B. Areas of Law Vulnerable to Challenges Based on Reform Opponents' Claims

Given the broad sweep of the doctrines that invalidation of the ACA mandate would repudiate or call into question, and the entrenchment of those doctrines in constitutional jurisprudence and legal and governmental practice, it is difficult to predict the precise impact of such an outcome. At this juncture, some of the most far-reaching consequences may be the most hidden from view. For example, the status of the Necessary and Proper Clause as a facilitator of Congress' ability to choose efficacious ways, independent of its enumerated powers, to "carry [those powers] into execution," has been established since the earliest days of the Republic. For all that time, Congress has crafted legislation with the understanding that individual components of a regulatory scheme need not themselves be in or have a substantial connection to interstate commerce. Only rarely have the courts addressed challenges to such non-interstate commerce-connected pieces of broader programs, and thereby been compelled to reaffirm Chief Justice Marshall's rule. So it is difficult to find cases that could go the other way if that rule is overturned. But such challenges could proliferate, if the Supreme Court endorses Judge Hudson's new rule that "[b]ecause an individual's personal decision to purchase – or decline to purchase – health insurance from a private provider is beyond the historical reach of the Commerce Clause, the Necessary and Proper Clause does not provide a safe sanctuary."

Nevertheless, it is possible to identify at least some policy areas and statutes susceptible to being targeted or affected by the theories pressed by ACA challengers.

1. Benefit Programs – Medicare, Social Security, and Medicaid

Two elements of a decision to strike down the individual mandate provision could pose major threats to the nation's safety net. The first threat arises from the fact that the decision would effectively provide that a personal liberty interest can overcome a statute that is, indisputably, rationally related to and, apart from its conflict with the asserted liberty interest, justified under Congress' Commerce Clause authority. To be sure, opponents argue that the mandate regulates "inactivity," which, they assert, the Commerce Clause does not cover. But, as noted above, the inactivity/ activity distinction at best states a purely factual difference between the individual mandate provision and all other cases applying the Commerce Clause. The only basis for turning that factual difference into a legal standard is precisely the reason given by both Judge Hudson and Judge Vinson: namely, that the ACA mandate impairs a personal liberty interest, an individual's interest in freedom to choose not to purchase health insurance. Similarly, proponents have advanced the necessary but improper theory to strike the mandate, even though it is concededly "necessary" as prescribed by the Necessary and Proper Clause. But, again, the reason why they brand the mandate "improper," is because it violates the same asserted personal liberty interest.

So the question will arise, what is the nature of this liberty interest robust enough to invalidate a rationally based exercise of Congress' commerce power? ACA opponents generalize the principle at stake as the interest in not being compelled to purchase a privately

marketed product. ACA supporters see the issue differently and would characterize the interest at stake as an individual's interest in determining whether and how to pay for health care services, or whether to contribute to an insurance pool available to finance the individual's and others' purchases of health care services at affordable prices. Viewed through the latter lens, in terms of its impact on individual liberty, the ACA mandate is indistinguishable from Medicare or Social Security taxes. To libertarian theorists and advocates, forced contributions to public health and/or retirement programs are, in principle, not necessarily less objectionable than mandatory private insurance. Certainly, cases will be brought alleging that the principle on which a decision adverse to the ACA rests necessarily implicates Medicare and Social Security taxes as well, whether as a substantive due process claim or as a carve-out from the tax power. In the short term, it may seem extreme and untenable, at least politically, to apply the principle underlying a decision to strike down the ACA mandate to require Medicare and Social Security contributions to become voluntary. But just a year ago, most legal experts regarded the claims put forward in the health care reform cases as improbable, if not frivolous. Once such a principle has been embraced by the Supreme Court, political acceptance, not legal logic, will determine how far it will carry in the courts, and how fast it might travel.

In addition to this threat to Medicare and Social Security taxes, the AGs' attack on the ACA's Medicaid expansion provisions would cripple Medicaid – the entire, existing program financing health care for over 50 million Americans, not just Medicaid as it would be revised by the ACA – as well as other state-administered programs that are federally funded and supervised. Any of the criteria suggested by the AGs' counsel for branding the Medicaid expansion as coercion could effectively immunize the states from complying with federal requirements in exchange for accepting federal funds and convert Medicaid into a *de facto* block grant. The AGs' claims, if embraced by the Supreme Court, could effectively prevent Congress or the Department of Health and Human Services from modifying the program in ways to which states would object as adding financial or other burdens unforeseen when they first decided to participate in the program. The federal government could be significantly drained of its ability to ensure that the billions of tax dollars turned over to the states to administer are spent in accord with statutory purposes and requirements.

## 2. Civil Rights Protections

If ACA opponents' inactivity/ activity distinction is embraced and the individual mandate provision struck down, an obvious target area for copycat claims could be safeguards against discriminatory refusals to serve, sell or rent, or hire. Health care reform opponents distinguish these antidiscrimination laws on the ground that, prior to subjecting themselves to requirements to serve or employ or sell or rent to all, regardless of race or other protected status, hospitality providers, housing sellers or renters, or employers have "initiated" commercial activity. Once individuals have taken such a voluntary step, they say, the government may regulate them under the Commerce Clause (or, presumably, other applicable power).

At first blush, opponents' distinction may seem viable. But, especially when the complex realities of the health insurance and health care markets are considered, the line of demarcation becomes murky. To be sure, someone declining to enter into a commercial transaction with a prospective homebuyer or worker or restaurant customer may plausibly be characterized as

already having voluntarily entered the stream of commerce. But the same can just as plausibly be said for many uninsured persons. A substantial majority of those without insurance coverage at some point during any given year move in or out of coverage and have coverage at some other point within the same year, and 62.6% of the uninsured at a given point in time made at least one visit to a doctor or emergency room within the year.<sup>60</sup> The two models could be characterized as not all that categorically different, a point that will surely be made in court. Depending on the facts in particular cases, challengers can be expected to claim that it would be difficult to distinguish the ACA mandate from antidiscrimination laws that, arguably, require persons to enter into transactions or otherwise “engage in commerce.”<sup>61</sup>

A second set of vulnerable civil rights protections are antidiscrimination guarantees prescribed by conditional funding programs such as Title VI of the Civil Rights Act and Title IX of the Education Amendments of 1972, the Age Discrimination Act, the Rehabilitation Act, and the Individuals With Disabilities Education Act (IDEA). These requirements are responsible for such diverse and revolutionary changes as women’s sports facilities and teams nationwide and accommodation for people with disabilities by public universities and facilities. Among the most effective engines of equal opportunity on the nation’s lawbooks, these conditional funding safeguards could be threatened or obstructed by the Supreme Court’s embrace of the “coercion” theory the AGs have leveled at the ACA’s Medicaid expansion provisions. In any of its variations, the coercion theory means that the requirements of a conditional funding program could become unenforceable, precisely as funding levels reach a threshold sufficient to constitute an effective inducement. Otherwise stated, the more politically difficult it is for a state to turn away funding, the less power Congress has to impose conditions on that funding. In the case of antidiscrimination conditions, the reason that compliance has been so widespread over the decades since these laws were enacted is precisely that noncompliance could lead to the loss of federal funding for an entire institution (such as a state university), not just the individual program or facility where noncompliance occurs.<sup>62</sup>

<sup>60</sup> Florida v. U.S. Dep’t of Health and Human Services, supra note 53, *Memorandum in Support of Defendants’ Motion for Summary Judgment* 28 (citing Congressional Budget Office, *How Many Lack Health Insurance and For How Long* at 4,9 (2003); Thomas More Law Center et al. v. Barack Hussein Obama et al., Civil Case No. 10-11156, Amicus Curiae Brief of Majority leader Harry Reid et al. 13 (filed January 21, 2011) (citing Center for Health Statistics, *Health, United States, 2009*, at 318).

<sup>61</sup> Probably not coincidentally, supporters of the health care reform suits include opponents of government bans on private discrimination. They will presumably not be displeased if, following a decision adverse to the ACA mandate, the constitutional status of longstanding prohibitions on private discrimination comes under attack. New U.S. Senator Rand Paul created a stir during the 2010 campaign when he acknowledged this view. See <http://www.washingtonpost.com/wp-dyn/content/article/2010/05/20/AR2010052003500.html>.

<sup>62</sup> The institution-wide bite of Title VI and Title IX guarantees was secured by congressional override of a 1984 Supreme Court decision construing Title VI to restrict funding cut-offs for non-compliance narrowly to affected activities or programs only. *Grove City College v. Bell*, 465 U.S. 555 (1984). *Grove City* was overridden by the Civil Rights Restoration Act of 1988. [http://www.now.org/issues/title\\_ix/history.html](http://www.now.org/issues/title_ix/history.html) The Rehabilitation Act covers “all of the operations” of a “federally funded program or activity, such that if one part of a department or agency receives federal financial assistance, the whole entity is considered to receive federal assistance. 28 U.S.C.A. §794(b); *Schroeder v. City of Chicago*, 927 F.2d 957, 962 (7th Cir. 1991). Conservative members of the Court have shown hostility to conditional spending antidiscrimination protections on other occasions, see *Alexander v. Sandoval*, 532 U.S. 275 (2001), and, more generally, to enforcement of conditional spending protections. *Phirma v. Walsh*, 538 U.S. 644, 674-83 (dissenting opinions of Justices Scalia and Thomas) (2003); R. Bobroff, *Section 1983 and Preemption: Alternative Means of Court Access For Safety Net Statutes*, 10 LOYOLA JOURNAL OF PUBLIC INTEREST LAW 27, 75-80 (2009) *Arlington Central School District Board of Education v. Murphy*, 126 S. Ct. 2455.

### 3. Environmental Programs

Four aspects of the ACA opponents' case could pose threats to major environmental laws and programs. First, a new activity/ inactivity barrier to Commerce Clause-based regulation could spell trouble for the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), also known as the Superfund hazardous waste law, and, possibly, the Endangered Species Act and the Clean Water Act. CERCLA prescribes a strict liability regime for exacting contributions from property owners to pay for clean-up of underground toxic contaminants. Property owners, residential as well as commercial, are liable for clean-up of contamination far removed from the borders of their own land, as long as run-off or seepage from sources under their land could have contributed to targeted contamination, under quite loose standards of proof.<sup>63</sup> Judge Hudson dismissed an asserted analogy between the individual mandate provision and CERCLA on the ground that property owners at some point would have purchased the land before incurring liability, thereby engaging in a "self-initiated activity." But in reality, some cases of home or other real property ownership triggering CERCLA liability could show more tenuous and problematic connections to commercial activity than the case of many, uninsured individuals subject to the ACA individual mandate provision. Judge Hudson's dismissal of such a threat to Superfund requirements is unlikely to deter copycat litigants from challenging, nor excuse judges from determining, whether a new rule would require limits on CERCLA strict liability. Insofar as the Endangered Species Act, and/or the Clean Water Act impose restrictions without a prerequisite of "self-initiated activity" on the part of affected property owners, such measures would likewise face court scrutiny under a new rule.

Second, provisions of environmental laws and regulations could be put in play by a new rule that individual components of valid Commerce Clause regulatory programs must themselves be independently subject to Commerce Clause jurisdiction. To take one possible example, Commerce Clause challenges to the detailed mandates in the Surface Mining Control and Reclamation Act, summarily dismissed by a unanimous Supreme Court in 1981, could suddenly become viable 30 years later, by affirmance of Judge Hudson's December 13 ruling that the Necessary and Proper Clause provides no "sanctuary" for individual instrumental pieces of broader regulatory schemes.

Third, if opponents' claims, as embraced by Judges Hudson and Vinson, are embraced by the Supreme Court, resistance and challenges to applications of environmental laws could mushroom, simply because the Court has broken with decades of precedent and erected a categorical barrier to Congress' ability to regulate a major economic sector. This seems especially likely, given the level of hostility conservative justices have already shown to application of the Clean Water Act, for example, to allegedly intrastate targets.<sup>64</sup>

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2457-64 (2006), discussed in Simon Lazarus, *Federalism R.I.P.? Did the Roberts hearings Junk the Rehnquist Court's Federalism Revolution?* 56 DEPAUL L. REV. 1, 6-7 (2006).

<sup>63</sup> "One of the most troubling aspects of CERCLA liability is the burden placed upon landowners who did not contribute to the presence of hazardous substances on their property." Paul D. Taylor, *Comment: Liability of Past owners: Does CERCLA Incorporate a Causation-Based Standard?*, 35 S. TEX. L. REV. 535 (1994).

<sup>64</sup> See SWANCC v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001) and Rapanos v. United States, 547 U.S. 715 (2006). In SWANCC, a 5-4 majority narrowly construed the Clean Water Act to overturn an Army Corps of Engineers rule extending the statutory jurisdictional term "navigable waters of the United States" to include any

A fourth threat to environmental programs posed by a decision adverse to the individual mandate provision would flow from a determination that interference with a loosely defined personal liberty interest can be the basis for invalidating rationally related and otherwise lawful Commerce Clause (or General Welfare Clause) regulatory requirements. This *Lochnerian* logic could spawn challenges to provisions of environmental statutes and regulations, or to particular applications of them.

#### IV. Conclusion: Power to the Courts?

Perhaps more significant than specific changes to substantive law are procedural and other below-the-radar ways in which endorsement of the health care reform challenges will accelerate the Supreme Court majority's penchant for empowering itself and weakening Congress, as policy makers and political players. To begin with, that trend will be furthered by the hole such a decision will blow through doctrines of "rational basis" deference to Congressional policy and factual determinations. This particular display of judicial willingness to buck legislators' judgments will loom particularly portentous because of the political importance of the clash and centrality of the subject matter to Congress' constitutional authority to regulate the national economy.

In addition, a decision adverse to the ACA mandate, in particular, will scorn an elaborately conscientious effort by Congress to ensure, and to demonstrate with carefully drafted statutory findings, that the legislation squares with governing Supreme Court precedent. Rejecting the case for the legislation made in the statutory findings is not merely an affront to the drafters, nor cavalier disregard for the Court's own precedents. More importantly, shoving aside the findings will demonstrate indifference to Congressional *reliance upon* those precedents in crafting this historic legislation. This sort of "moving the goal posts" makes it hard or impossible for Congress to shape legislation with confidence that it will be sustained. Combined with the difficulties of re-mobilizing the support necessary to enact complex legislation like the ACA, such decisions, however remediable in theory, in practice can and do kill major legislative initiatives permanently.

The complexities and challenges inherent in the legislative process are the reasons why the New Deal Court adopted practices and doctrines essential to give Congress the running room it needs to discharge its constitutional role. Granting the claims of ACA opponents could severely undermine Congress' capacity to perform that role. That possibility should set off alarm bells, and not just for supporters of health care reform.

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habitat adopted by migratory birds. In *Rapanos*, four justices voted to erect a categorical rule that would, if adopted by a Court majority, significantly hamper Federal wetlands protection efforts, as discussed in Lazarus, *supra* note 65, 56 DEPAUL L. REV. at 6.



## STATEMENT OF SUPPORT FROM LEGAL SCHOLARS

**Over 100 Legal Scholars 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."

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Font Size: A A A**The New York Review of Books****Is Health Care Reform Unconstitutional?**

FEBRUARY 24, 2011

David Cole



Photo: Ken Cedeno/Associated Press  
Tea Party supporters protesting against the health care bill, Washington, D.C., March 2010

**I.**

Can Republicans defeat Obama's health care bill by persuading the courts that mandatory health insurance is unconstitutional? On December 13, 2010, Henry Hudson, a federal judge in Virginia, declared unconstitutional the central provision of the health care reform law. Judge Hudson reasoned that the law's command that citizens purchase health care insurance extended beyond Congress's authority to legislate. It has long been established that Congress may regulate citizens' economic activities, such as entering into contracts, producing or purchasing goods and services, or shipping goods across state lines. But it is entirely unprecedented, Judge Hudson said, for Congress to regulate "inactivity"—a failure to buy insurance.

Obama dismissed the opinion as just "one ruling by one federal district court." But to others, it came as a shock. Dahlia Lithwick, Slate's legal affairs correspondent, said that before Judge Hudson's decision, most experts thought the legal challenges would fail in the Supreme Court by a large margin, 8-1 or 7-2, but that after the ruling, the betting is



that the Court will split 5–4, with Justice Anthony Kennedy likely casting the decisive vote.<sup>1</sup>

It is easy to see why commentators might expect the case to be closely divided. Health care reform has been nothing if not intensely partisan. The Patient Protection and Affordable Care Act was passed without a single Republican vote, and Republicans in the House have already voted to repeal it. The fight over its enactment helped promote the rise of the Tea Party and the Republican victories in the midterm elections. Most of the state attorneys-general who have challenged the law’s constitutionality in court are Republicans. Several Democratic state attorneys-general have filed a brief supporting the law. So far, three judges have ruled on the merits of the challenges. Two, both appointed by Democratic presidents, upheld the act. Judge Hudson, the first to rule otherwise, is a Republican appointed by George W. Bush. Another Republican-appointed judge, Roger Vinson, has a similar case pending in Florida, and he is likely to side with Judge Hudson.<sup>1a</sup>

The roots of the ideological divide, moreover, run deep. The principal constitutional issue at stake—the extent of Congress’s authority to pass laws governing Americans’ lives—has separated conservatives and liberals since the beginning of the Republic. “States’ rights” was the South’s rallying cry in its effort to retain slavery before the Civil War, and to defend racial segregation from federal intervention thereafter. From the turn of the century through the early years of the New Deal, conservatives successfully invoked “states’ rights” to interpret Congress’s power over interstate commerce narrowly and thereby invalidate progressive federal laws designed to protect workers and consumers from big business. And the last two times that the Supreme Court struck down laws as reaching beyond Congress’s Commerce Clause power, in 1995 and 2000, the Court split 5–4, with Chief Justice William Rehnquist writing the majority decision, over dissents by Justices Stephen Breyer, David Souter, John Paul Stevens, and Ruth Bader Ginsburg.<sup>2</sup>

As Judge Hudson sees it, the health care reform law poses an unprecedented question: Can Congress, under its power to regulate “commerce among the states,” regulate “inactivity” by compelling citizens who are not engaged in commerce to purchase insurance? If it is indeed a novel question, there may be plenty of room for political preconceptions to color legal analysis. And given the current makeup of the Supreme Court, that worries the law’s supporters.

But the concerns are overstated. In fact, defenders of the law have both the better

argument and the force of history on their side. Judge Hudson's decision reads as if it were written at the beginning of the twentieth rather than the twenty-first century. It rests on formalistic distinctions—between “activity” and “inactivity,” and between “taxing” and “regulating”—that recall jurisprudence the Supreme Court has long since abandoned, and abandoned for good reason. To uphold Judge Hudson's decision would require the rewriting of several major and well-established tenets of constitutional law. Even this Supreme Court, as conservative a court as we have had in living memory, is unlikely to do that.

The objections to health care reform are ultimately founded not on a genuine concern about preserving state prerogative, but on a libertarian opposition to compelling individuals to act for the collective good, no matter who imposes the obligation. The Constitution recognizes no such right, however, so the opponents have opportunistically invoked “states' rights.” But their arguments fail under either heading. With the help of the filibuster, the opponents of health care reform came close to defeating it politically. The legal case should not be a close call.

## 2.

The provision that Judge Hudson struck down requires all Americans, unless exempted on religious or other grounds, to purchase health care insurance. (Most Americans are already covered through their employment or Medicare or Medicaid, so for them this law would have no impact.) Those who do not obtain insurance must pay a penalty in the form of a special tax.

The individual mandate is aimed at so-called “free riders”—people who fail to get insurance, and then cannot pay the cost of their own health care when they need it. Under our current system, in which hospitals must treat people regardless of ability to pay or insurance coverage, hospitals are able to recover only about 10 percent of the cost of treating uninsured individuals. That cost is ultimately borne by the rest of us. The federal government picks up much of the tab, and hospitals and insurers pass on the rest to their paying customers in higher fees. The Congressional Budget Office estimated that in 2008 the uninsured shifted \$43 billion of health care costs to others.

Without the individual mandate, the health care law's more popular reforms—such as the bar on insurance companies denying coverage because of “preexisting conditions”—would actually make the insurance crisis worse. Knowing that insurers could not deny coverage or charge more for preexisting conditions, people could wait to buy insurance until they were sick. But then more and more of the people insured would be the sickest,

defeating the very purpose of insurance—to spread the risk by creating a pool of funds that can be drawn on for payments. Premiums would skyrocket, meaning that even fewer people could afford insurance, and that would in turn induce still more people to opt out. As Wake Forest University Professor Mark Hall testified in Congress, “a health insurance market could never survive or even form if people could buy their insurance on the way to the hospital.”

This is not just an academic prediction. When in 1994 Kentucky enacted similar reforms regarding preexisting conditions, but without an individual mandate, insurance costs rose so steeply that they became untenable, and insurers pulled out of the market altogether. Kentucky was forced to repeal the reform. Initiatives in New York and New Jersey faced similar problems. In Massachusetts, by contrast, where health insurance reform was coupled with an individual mandate, the system has worked; since 2006, insurance premiums there have fallen 40 percent, while the national average has increased 14 percent.

Judge Hudson acknowledged, as do the law’s challengers, that Congress has power to regulate any economic activity that, in the aggregate, affects interstate commerce—no matter how minimal the activity’s effects are standing alone. But the decision not to buy health insurance, Hudson reasoned, is not “activity” at all. It is “inactivity.” Rather than setting rules for those who choose to engage in interstate commerce, the individual mandate compels a citizen who has chosen *not* to engage in commerce to do so by purchasing a product he does not want. If Congress can regulate such “inactivity,” Hudson warned, there would be no limit to its powers, contravening the bedrock principle that the Constitution granted the federal government only limited powers.

Judge Hudson’s reasoning is not without precedent—but the precedents that his rationale reflects have all been overturned. In the early twentieth century, the Supreme Court ruled that the Commerce Clause authorized Congress to regulate only “interstate” business, not “local” business; only “commerce,” not production, manufacturing, farming, or mining. The Court also ruled that Congress could regulate only conduct that “directly” affects interstate commerce, not conduct that “indirectly” affects interstate commerce. Like Judge Hudson, the Supreme Court warned that unless it enforced these formal categorical constraints, there would be no limit to Congress’s power. Thus, for example, in 1936, the Court struck down a federal law that established minimum wages and maximum hours for coal miners, reasoning that mining was local, not interstate; entailed production, not commerce; and had only “indirect” effects on interstate commerce.<sup>3</sup> Using this approach, the Court invalidated many of the laws enacted during the early

days of the New Deal.

Around 1937, however, the Court reversed course. It recognized what economists (and the Court's dissenters) had long argued, and what the Depression had driven home—that in a modern-day, interdependent national economy, local production necessarily affects interstate commerce, and there is no meaningful distinction between “direct” and “indirect” effects. In the local, agrarian economy of the Constitution's framers, it might have made sense to draw such distinctions, but in an industrialized (and now postindustrialized) America, the local and the national economies are inextricably interlinked.

As a result, Congress's power to regulate “interstate commerce” became, in effect, the power to regulate “commerce” generally. The Court rejected as empty formalisms the distinctions it had previously drawn, between local and interstate, between production and commerce, and between “direct” and “indirect” effects. Since 1937, the Supreme Court has found only two laws to be beyond Congress's Commerce Clause power. Both laws governed noneconomic activity—simple possession of a gun in a school zone and assaults against women, respectively—and were unconnected to any broader regulation of commerce.<sup>4</sup> But the Court has repeatedly made clear that Congress can regulate any economic activity, and even noneconomic activity where doing so is “an essential part of a larger regulation of economic activity.”

On this theory, the Supreme Court has upheld federal laws that restricted farmers' ability to grow wheat for their own consumption and that made it a crime to grow marijuana for personal medicinal use, even though in both instances the people concerned sought to stay out of the market altogether.<sup>5</sup> The Court reasoned that even such personal consumption affects interstate commerce in the aggregate by altering supply and demand, and that therefore leaving it unregulated would undercut Congress's broader regulatory scheme.

Under these precedents, a citizen's decision to forgo insurance, like the farmer's decision to forgo the wheat market and grow wheat at home, easily falls within Congress's Commerce Clause power. When aggregated, those decisions will shift billions of dollars of costs each year from the uninsured to taxpayers and the insured. As a practical matter, there is no opting out of the health care market, since everyone eventually needs medical treatment, and very few can afford to pay their way when the time comes. (Those who refuse all medical treatment for religious scruples are an exception, but they are exempt from the mandate.) That one might affix the label “inactivity” to a decision to shift one's

own costs to others does not negate the fact that such economic decisions have substantial effects on the insurance market, and that their regulation is “an essential part of a larger regulation of economic activity.”

### 3.

Another part of the Constitution, the “Necessary and Proper Clause,” provides even more well-established support for Congress’s action. That catch-all provision authorizes Congress to enact laws that, while not expressly authorized by the Constitution’s specific enumerated powers, are “necessary and proper” to the exercise of those powers. In one of the Court’s most important decisions, *McCulloch v. Maryland*, written by Chief Justice John Marshall nearly two hundred years ago, the Court unanimously ruled that this provision must be given a broad reading, permitting any laws that are “convenient” or “rationally related” to the furtherance of an express power.<sup>6</sup> In that case, the Court upheld Congress’s creation of a national bank, even though the authority to do so is nowhere expressly provided, because a national bank was rationally related to the exercise of Congress’s other powers, including the power to coin money and tax and spend. By the same token, because the individual mandate is rationally related to Congress’s conceded power to regulate health insurance, it is “necessary and proper.”



Shel Long/AP/Getty Images  
A protester at a Tea Party rally, Washington, D.C.,  
November 2010.

The wide reach of the Necessary and Proper Clause was reaffirmed just last year when, in a 7–2 decision joined by Chief Justice John Roberts and Justices Kennedy and Samuel Alito, the Supreme Court upheld a federal law authorizing civil commitment of federal prisoners who are sexual predators, even though no provision expressly authorizes Congress to do so.<sup>7</sup> The Court explained that as long as there is some initial link to an

explicitly enumerated power in the Constitution, the Necessary and Proper Clause authorizes actions many steps removed from that power. Thus, the Court reasoned, Congress may pass criminal laws “rationally related” to any of its other enumerated powers. It may then build prisons to house those convicted, enact rules to govern prisoners, and provide civil commitment to protect the community from those leaving federal prison—even though the Constitution expressly authorizes none of these actions.

If the Necessary and Proper Clause supports such an extended string of implied powers, there can be little dispute that it authorizes the individual mandate. Congress undoubtedly has the authority to regulate health insurance under the Commerce Clause, so the individual mandate is “necessary and proper” as long as it is “rationally related” or “convenient” to that larger project. It clearly passes that test, as it is integral to avoiding a very large increase in health insurance premiums. Judge Hudson concluded, however, that because in his view the mandate was not permissible under the Commerce Clause, it could not be authorized by the Necessary and Proper Clause. That approach renders the latter clause meaningless, and directly contravenes *McCulloch v. Maryland*.

Finally, the individual mandate is also sustainable under Congress’s independent power to tax. President Obama insisted on a Sunday talk show that the mandate was not a tax, but the Court has long ruled that the validity of a law turns not on what label is attached to it, but on what it does. The individual mandate collects revenue from individuals as part of their income tax. It is expected to generate \$4 billion annually, which will help the federal government defray the health care costs the uninsured fail to pay.

Judge Hudson deemed the law to be a penalty, not a tax, citing a 1922 decision that invalidated a federal tax on child labor on this ground.<sup>8</sup> But that case, which dates from the same pre-New Deal era when the Court was narrowly construing Congress’s Commerce Clause powers, rested on another formalist distinction, since rejected, between laws that collect revenues and laws that regulate behavior. As with the pre-New Deal Commerce Clause distinctions, the Court has since abandoned this distinction, recognizing that taxes inevitably have regulatory effects by increasing the cost of the activity that is taxed. Thus, according to modern constitutional jurisprudence, a tax law is valid if it raises revenue and its regulations are reasonably related to the exercise of the taxing power.

Congress plainly can tax for the purpose of providing health insurance. It does so already, through Medicare and Medicaid. Had it simply expanded these programs to provide universal care, there would be no question that its actions would be permissible

under the taxing power. Similarly, it indisputably could have granted tax credits to those who purchase health care, and withheld them from those who do not. Imposing the tax directly on free riders is no less an exercise of the taxing power.

Judge Hudson's concerns that upholding the law would lead to unlimited federal power are wildly exaggerated. A decision to sustain the individual mandate would not mean that Congress could require all Americans to exercise or eat only healthy food, as some have suggested. The individual mandate regulates an *economic* decision that is in turn an essential part of a comprehensive *economic* regulation of the interstate business of insurance. And health care is a unique commodity, in that virtually everyone will eventually need it; along with taxes and death, a trip to the doctor is one of life's inevitabilities. Thus, to say that Congress can require an individual to purchase insurance or pay a tax does not signal the end of all meaningful limits on federal power.

In short, Congress had ample authority to enact the individual mandate. Absent a return to a constitutional jurisprudence that has been rejected for more than seventy years, and, even more radically, an upending of Chief Justice Marshall's long-accepted view of the Necessary and Proper Clause, the individual mandate is plainly constitutional.

#### 4.

Near the end of his decision, Judge Hudson writes: "At its core, this dispute is not simply about regulating the business of insurance—or crafting a scheme of universal health insurance coverage—it's about an individual's right to choose to participate." Virginia Attorney General Ken Cuccinelli, who brought the suit, echoed that point the day the decision came down, insisting that "this lawsuit is not about health care. It's about liberty." But that is exactly what the case is not about. A decision that Congress lacks the power to enact the individual mandate says nothing about individual rights or liberty. It speaks only to whether the power to require citizens to participate in health insurance, a power that states indisputably hold, also extends to the federal government. The framers sought to give Congress the power to address problems of national or "interstate" scope, problems that could not adequately be left to the states. The national health insurance crisis is precisely such a problem. The legal question in the case is about which governmental entities have the power to regulate; not whether individuals have a liberty or right to refuse to purchase health care insurance altogether.

But Judge Hudson and Ken Cuccinelli's misstatements are nonetheless telling. Opposition to health care reform is ultimately not rooted in a conception of state versus federal power. It's founded instead on an individualistic, libertarian objection to a

governmental program that imposes a collective solution to a social problem. While Judge Hudson's reliance on a distinction between activity and inactivity makes little sense from the standpoint of federal versus state power, it intuitively appeals to the libertarian's desire to be left alone. But nothing in the Constitution even remotely guarantees a right to be a free rider and to shift the costs of one's health care to others. So rather than directly claim such a right, the law's opponents resort to states' rights.

In this respect, Judge Hudson and the Virginia attorney-general are situated squarely within a tradition—but it's an ugly tradition. Proponents of slavery and segregation, and opponents of progressive labor and consumer laws, similarly invoked states' rights not because they cared about the rights of states, but as an instrumental legal cover for what they really sought to defend—the rights to own slaves, to subordinate African-Americans, and to exploit workers and consumers.

Here, too, opponents of health care reform are not really seeking to vindicate the power of states to regulate health care. Rather, they are counting on the fact that if they succeed with this legal gambit, the powerful interests arrayed against health care reform—the insurance industry, doctors, and drug companies—will easily overwhelm any efforts at meaningful reform in most states. Unless the Supreme Court is willing to rewrite hundreds of years of jurisprudence, however, they will not succeed.

—January 27, 2011

#### LETTERS

*Is Health Care Reform Unconstitutional?: An Exchange* April 7, 2011

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1

It is not certain that Judge Hudson's decision will reach the Supreme Court. He found that Virginia had standing to sue because its legislature had enacted a law giving citizens the right not to buy health insurance, as part of a national campaign by health care reform opponents to create obstacles in the states. It is far from clear that a state can manufacture a dispute by enacting such a law, so it is possible that the case could be thrown out on appeal for failing to present a concrete controversy. However, at some point the health care law will plainly be subject to a constitutional challenge, at a minimum by any individual who objects to being required to purchase health insurance or pay the tax. So whether in this case or some other, the courts will eventually have to address the law's constitutionality. [e](#)



1a

On January 31, 2011, after this article went to press in the print edition, Judge Vinson issued his decision. Like Judge Hudson, he ruled unconstitutional the provision requiring individuals to purchase health insurance, because it regulates "inactivity." He went further than Judge Hudson, however, by declaring the entire health care reform law unconstitutional, not just the provision requiring individuals to purchase health insurance, because he concluded Congress would not have enacted the rest of the statute without the "individual mandate" provision. His decision, like Judge Hudson's will certainly be appealed. ↵

2

*United States v. Morrison* , 529 U.S. 598 (2000); *United States v. Lopez* , 514 U.S. 549 (1995). ↵

3

*Carter v. Carter Coal Co.* , 298 U.S. 238 (1936). ↵

4

See cases cited in note 2. ↵

5

*Gonzales v. Raich* , 545 U.S. 1 (2005); *Wickard v. Filburn* , 317 U.S. 111 (1942). ↵

6

*McCulloch v. Maryland* , 17 U.S. (Wheat.) 316 (1819). ↵

7

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

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*Child Labor Tax Case* , 259 U.S. 20 (1922). ↵

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February 7, 2011

## On Health Care, Justice Will Prevail

By LAURENCE H. TRIBE

Cambridge, Mass.

THE lawsuits challenging the individual mandate in the health care law, including one in which a federal district judge last week called the law unconstitutional, will ultimately be resolved by the Supreme Court, and pundits are already making bets on how the justices will vote.

But the predictions of a partisan 5-4 split rest on a misunderstanding of the court and the Constitution. The constitutionality of the health care law is not one of those novel, one-off issues, like the outcome of the 2000 presidential election, that have at times created the impression of Supreme Court justices as political actors rather than legal analysts.

Since the New Deal, the court has consistently held that Congress has broad constitutional power to regulate interstate commerce. This includes authority over not just goods moving across state lines, but also the economic choices of individuals within states that have significant effects on interstate markets. By that standard, this law's constitutionality is open and shut. Does anyone doubt that the multitrillion-dollar health insurance industry is an interstate market that Congress has the power to regulate?

Many new provisions in the law, like the ban on discrimination based on pre-existing conditions, are also undeniably permissible. But they would be undermined if healthy or risk-prone individuals could opt out of insurance, which could lead to unacceptably high premiums for those remaining in the pool. For the system to work, all individuals — healthy and sick, risk-prone and risk-averse — must participate to the extent of their economic ability.

In this regard, the health care law is little different from Social Security. The court unanimously recognized in 1982 that it would be "difficult, if not impossible" to maintain the financial soundness of a Social Security system from which people could opt out. The same analysis holds here: by restricting certain economic

choices of individuals, we ensure the vitality of a regulatory regime clearly within Congress's power to establish.

The justices aren't likely to be misled by the reasoning that prompted two of the four federal courts that have ruled on this legislation to invalidate it on the theory that Congress is entitled to regulate only economic "activity," not "inactivity," like the decision *not* to purchase insurance. This distinction is illusory. Individuals who don't purchase insurance they can afford have made a choice to take a free ride on the health care system. They know that if they need emergency-room care that they can't pay for, the public will pick up the tab. This conscious choice carries serious economic consequences for the national health care market, which makes it a proper subject for federal regulation.

Even if the interstate commerce clause did not suffice to uphold mandatory insurance, the even broader power of Congress to impose taxes would surely do so. After all, the individual mandate is enforced through taxation, even if supporters have been reluctant to point that out.

Given the clear case for the law's constitutionality, it's distressing that many assume its fate will be decided by a partisan, closely divided Supreme Court. Justice Antonin Scalia, whom some count as a certain vote against the law, upheld in 2005 Congress's power to punish those growing marijuana for their own medical use; a ban on homegrown marijuana, he reasoned, might be deemed "necessary and proper" to effectively enforce broader federal regulation of nationwide drug markets. To imagine Justice Scalia would abandon that fundamental understanding of the Constitution's necessary and proper clause because he was appointed by a Republican president is to insult both his intellect and his integrity.

Justice Anthony Kennedy, whom many unfairly caricature as the "swing vote," deserves better as well. Yes, his opinion in the 5-4 decision invalidating the federal ban on possession of guns near schools is frequently cited by opponents of the health care law. But that decision in 1995 drew a bright line between commercial choices, all of which Congress has presumptive power to regulate, and conduct like gun possession that is not in itself "commercial" or "economic," however likely it might be to set off a cascade of economic effects. The decision about how to pay for health care is a quintessentially commercial choice in itself, not merely a decision that might have economic consequences.

Only a crude prediction that justices will vote based on politics rather than principle would lead anybody to imagine that Chief Justice John Roberts or Justice Samuel Alito would agree with the judges in Florida and Virginia who have ruled against the health care law. Those judges made the confused assertion that what is at stake here is a matter of personal liberty — the right not to purchase what one wishes not to purchase — rather than the reach of national legislative power in a world where no man is an island.

It would be asking a lot to expect conservative jurists to smuggle into the commerce clause an unenumerated federal "right" to opt out of the social contract. If Justice Clarence Thomas can be counted a nearly sure vote against the health care law, the only reason is that he alone has publicly and repeatedly stressed his principled disagreement with the whole line of post-1937 cases that interpret Congress's commerce power broadly.

There is every reason to believe that a strong, nonpartisan majority of justices will do their constitutional duty, set aside how they might have voted had they been members of Congress and treat this constitutional challenge for what it is — a political objection in legal garb.

*Laurence H. Tribe, a professor at Harvard Law School, is the author of "The Invisible Constitution."*

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CHARLES FRIED **The Boston Globe**

## Health care law's enemies have no ally in Constitution

By Charles Fried  
May 21, 2010

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A RECENT 7-2 Supreme Court decision affirming the constitutional power of Congress to allow the indefinite detention of sexually dangerous child pornographers after the end of their federal sentences has the surprising effect of showing just how far-fetched are the constitutional objections to the new health care legislation.

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One objection holds that the Constitution's clauses giving Congress the power to regulate interstate commerce do not give Congress the power to impose a modest penalty (up to about \$700) on people who could — but do not — buy health insurance.

To see why this is a bad argument, consider the steps by which the Court held that Congress has the power to keep sexually dangerous child pornographers in confinement: The Constitution explicitly gives Congress the power to regulate interstate commerce. And it has long been the law that Congress can forbid commerce in things that might be harmful. Those who traffic (or possess, in the case of child pornography) such things can be prosecuted and imprisoned.

The recent Supreme Court ruling, *United States v. Comstock*, added that the power to imprison implies an obligation to protect the public from dangerous people even after they had served their sentences. There can be no doubt that insurance, and particularly health insurance, is commerce with interstate effects that Congress may regulate.

For the health regulation to work, though, it is “necessary and proper” — the clause explicitly in play in *Comstock* — to nudge (with the \$700 penalty) the young and healthy to enter the insurance pool, and not to wait until they are old and infirm. Insurance just won't work if you could wait until your house is on fire to buy it. But, say the objectors, this is not penalizing someone for doing something harmful; it's penalizing him for not doing something, and that's somehow different.

It is not. Congress has the power to enact the regulatory scheme and to design it

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in a way that is "necessary and proper" to its good functioning, and that means sweeping in the unwilling. But even granting Congress's power under the commerce and "necessary and proper" clauses, is it not an offense to constitutional liberty to impose the \$700 penalty? Is the mandate not independently constitutionally "improper"?

That objection would complain that such a mandate violates some constitutional liberty even if enacted by a state (as Massachusetts has done). Here again, Comstock is instructive. The convicted child pornographer claimed that he was deprived of his constitutional liberty by continued detention after he had served his sentence, but the Supreme Court had decided many years ago that Kansas could, with proper procedural safeguards, do just that. And if it violated no liberty for Kansas to do it, then neither did it violate any liberty for Congress to do it.

A more telling precedent is the Supreme Court's 1905 decision in *Jacobson v. Commonwealth*, which rejected a complaint against Massachusetts's compulsory vaccination law that it said infringed the "inherent right of every freeman to care for his own body and health in such way as seems to him best."

Whatever Jacobson's right to care for himself, he had none to impose risks on his fellow citizens. A healthy, young person who persists in staying out of the insurance pools imposes a burden on his fellow citizens also.

Finally there is the bogus complaint that the federal law unconstitutionally imposes financial and administrative burdens on unwilling states. The statute exempts unwilling states from participating, subjecting the citizens of those states to the federal scheme directly. There are sensible reasons for opposing the new federal health care system — for instance, it will add to the federal deficit and fail to control health care costs — but the Constitution is not one of them.

*Charles Fried teaches constitutional law at Harvard Law School.* ■

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# POLITICO

## Health care reform is constitutional

By: Ewin Chemerinsky  
October 23, 2008 04:59 AM EDT

Those opposing health care reform are increasingly relying on an argument that has no legal merit: that the health care reform legislation would be unconstitutional. There is, of course, much to debate about how to best reform America's health care system. But there is no doubt that bills passed by House and Senate committees are constitutional.

Some who object to the health care proposals claim that they are beyond the scope of congressional powers. Specifically, they argue that Congress lacks the authority to compel people to purchase health insurance or pay a tax or a fine.

Congress clearly could do this under its power pursuant to Article I, Section 8 of the Constitution to regulate commerce among the states. The Supreme Court has held that this includes authority to regulate activities that have a substantial effect on interstate commerce. In the area of economic activities, "substantial effect" can be found based on the cumulative impact of the activity across the country. For example, a few years ago, the Supreme Court held that Congress could use its commerce clause authority to prohibit individuals from cultivating and possessing small amounts of marijuana for personal medicinal use because marijuana is bought and sold in interstate commerce.

The relationship between health care coverage and the national economy is even

stronger and more readily apparent. In 2007, health care expenditures amounted to \$2.2 trillion, or \$7,421 per person, and accounted for 16.2 percent of the gross domestic product.

Ken Klukowski, writing in POLITICO, argued that "people who declined to purchase government-mandated insurance would

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not be engaging in commercial activity, so there's no interstate commerce." Klukowski's argument is flawed because the Supreme Court never has said that the commerce power is limited to regulating those who are engaged in commercial activity.

Quite the contrary: The court has said that Congress can use its commerce power to forbid hotels and restaurants from discriminating based on race, even though their conduct was refusing to engage in commercial activity. Likewise, the court has said that Congress can regulate the growing of marijuana for personal medicinal use, even if the person being punished never engaged in any commercial activity.

Under an unbroken line of precedents stretching back 70 years, Congress has the power to regulate activities that, taken cumulatively, have a substantial effect on interstate commerce. People not purchasing health insurance unquestionably has this effect.

There is a substantial likelihood that everyone will need medical care at some point. A person with a communicable disease will be treated whether or not he or she is insured. A person in an automobile accident will be rushed to the hospital for treatment, whether or not he or she is insured. Congress would simply be requiring everyone to be insured to cover their potential costs to the system.

Congress also could justify this as an exercise of its taxing and spending power.


Congress can require the purchase of health insurance and then tax those who do not do so in order to pay their costs to the system. This is similar to Social Security taxes, which everyone pays to cover the costs of the Social Security system. Since the 1930s, the Supreme Court has accorded Congress broad powers to tax and spend for the general welfare and has

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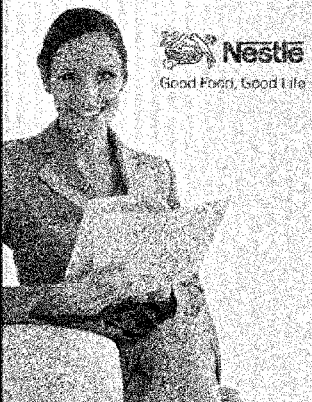
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left it to Congress to determine this.

Nor is there any basis for arguing that an insurance requirement violates individual liberties. No constitutionally protected freedom is infringed. There is no right to not have insurance. Most states now require automobile insurance as a condition for driving.

Since the 19th century, the Supreme Court has consistently held that a tax cannot be challenged as an impermissible take of private property for public use without just compensation. All taxes are a taking of private property for public use, but no tax has ever been invalidated on that basis.

Since the late 1930s, the Supreme Court has ruled that government economic regulations, including taxes, are to be upheld as long as they are reasonable. Virtually all economic regulations and taxes have been found to meet this standard for more than 70 years. There is thus no realistic chance that the mandate for health insurance would be invalidated for denying due process or equal protection.

Those who object to the health care proposals on constitutional grounds are making an argument that has no basis in the law. They are invoking the rhetorical power of the Constitution to support their opposition to health care reform, but the law is clear that Congress constitutionally has the power to do so. There is much to argue about in the debate over health care reform, but constitutionality is not among the hard questions to consider.

*Erwin Chemerinsky is dean and distinguished professor of law at the University of California, Irvine School of Law.*

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## Federalism is no bar to health care reform

By Robert A. Schapiro

8:54 a.m. Monday, November 2, 2009

Federalism serves as the latest rallying cry for critics of health care reform. The foes of current legislative proposals charge that Congress is overstepping its bounds and infringing on the prerogatives of the states.

The critics are right that federalism, the allocation of authority among the states and the national government, remains a fundamental principle of our constitutional system. But it is the advocates of reform, not their opponents, who are the true standard bearers of federalism. The health care plans build on the interaction of state and federal power that is central to federalism.

Critics of health care reform brandish federalism as a weapon to undermine democracy, to invite judges to control policy debates. But contrary to their claims, federalism serves to empower citizens, not judges.

The current target of faux federalists is the "individual mandate," the requirement that all Americans buy health insurance unless they cannot afford it. Friends and foes of health care legislation agree that the mandate is essential to all serious reform proposals. Currently, individuals can avoid paying health care premiums, secure in the knowledge that hospitals — and ultimately the citizens who do buy insurance — will be on the hook for expensive emergency procedures. In this way, taxpayers already provide insurance for people who could, but do not, pay the premiums.

Small groups of state lawmakers around the country are pressing for state constitutional amendments to prevent the mandate from applying within their states. These opponents seek a showdown in court.

Whatever one thinks of the wisdom of the individual mandate, or of health care reform generally, it would be surprising if the Constitution prohibited a democratic resolution of the issue. Happily, it does not.

Constitutional doctrine clearly gives Congress the authority to decide whether to enact the mandate. Congress has the power to regulate interstate commerce, which includes buying and selling insurance. In the *Raich* case in 2005, the U.S. Supreme Court clarified the scope of the commerce power and reaffirmed the core principle that dissident states cannot thwart national policy.

*Raich* concerned a California program that legalized the use of marijuana for medical purposes. The California plan clashed with a federal law that criminalized private possession. In *Raich*, the court upheld the congressional ban by a vote of 6-3.

Even Justice Antonin Scalia, no fan of expansive claims of federal power, voted to affirm Congress' authority. Justice Scalia explained, "Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce."

The court recognized that an effective national system of drug control required a comprehensive program that reached

into all the states. Nor could California secede from the national plan. The country experimented with secession once, and it did not go well.

The point is not whether it is good policy to ban the private use of marijuana for medical purposes. The question is whether the courts allow the people's representatives in Congress to make that judgment.

The parallels to health care reform are striking. National regulation of health insurance clearly falls within congressional authority. Therefore, so do necessary local elements of the plan. Indeed, requiring someone to purchase insurance falls much closer to the economic core of the commerce power than prohibiting marijuana use.

Even if current law does permit a mandate, though, one might ask whether it should. Did Justice Scalia's reasoning in *Raich* somehow pervert federalism?

What the critics' narrow arguments miss is the power of federalism illustrated by the health care reform efforts. Federalism promotes liberty and innovation by fostering a dialogue among local and national bodies, rather than by inviting courts to draw lines between them.



Massachusetts served as a laboratory with its own attempt to offer comprehensive health care, including an individual mandate. The federal government has learned from that experience. Moreover, the states will play an important role in implementing any national health care system.

What then should we make of state constitutional amendments purporting to bar a federal individual mandate? Such amendments show the value of federalism. State legislatures provide vital platforms for dissenting voices. Such amendments cannot block federal law. But the main point of federalism is to inform public debate, not to invite a court to terminate democratic dialogue.

The health care controversy demonstrates the continuing significance of federalism. Contrary to those impugning the constitutionality of mandates, though, it is a federalism of the people, by the people and for the people, not a federalism of the courts.

Robert Schapiro is a professor of law at Emory University School of Law and the author of "Polyphonic Federalism: Toward the Protection of Fundamental Rights."

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