

THE CONSTITUTIONALITY OF THE PATIENT PROTECTION AND AFFORDABLE CARE ACT: SWIMMING IN THE STREAM OF COMMERCE

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In March of 2010, Congress enacted the Patient Protection and Affordable Care Act¹—to which I will refer simply as “the Act”—to cope with what Congress believed was a crisis in the \$2.5-trillion healthcare industry, which accounts for about 17% of our GDP and covers an array of providers, consumers, supply chains, and financing schemes operating across state borders.

Congress viewed this situation as a crisis. Tens of millions of people have no health insurance. Some lack coverage because they cannot afford the premiums, others are denied coverage by restrictive industry practices, and still others are uncovered because they choose to gamble that they will never need healthcare beyond what they can pay for out of pocket. Yet virtually all of these people participate actively in the healthcare market, and many end up consuming healthcare services for which others pay, because a basic feature of American law and

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1. Pub. L. No. 111-148, 124 Stat. 119 (2010).

culture is that hospitals cannot turn away people who need emergency treatment. In this respect, the healthcare market is unlike any other in our society. The result is that uninsured patients end up inefficiently shifting well more than \$73 billion a year in healthcare costs to other market participants, raising the average family's annual insurance premium by about \$1000, making health insurance unaffordable for even more people, increasing taxpayers' health-related burdens by at least \$30 billion, and exacerbating the healthcare crisis.²

After extensive study, Congress addressed this vicious cycle through a comprehensive program of tax measures and market regulations. The Act builds on the existing nationwide system of employer-based health insurance by creating new tax incentives for businesses to pay for insurance for their employees. It provides for the creation of health-insurance exchanges through which individuals, families, and small businesses can leverage their collective buying power to obtain health insurance at more favorable rates; establishes federal tax credits to help households with incomes between one-and-one-third and four times the federal poverty level to buy insurance on those exchanges. The Act also expands Medicaid eligibility to those with incomes below one-and-a-third times the federal poverty level, with the federal government paying all of the added expense through 2016, and all but about 10% beyond 2020.³ The Act forbids insurance industry practices that have kept individuals from obtaining and maintaining health coverage because of preexisting medical conditions, and it requires that premiums be based on community-wide criteria rather than on a person's individual medical history.⁴ Finally, the Act amends the Internal Revenue Code in a manner that Congress expressly found essential to make these reforms of restrictive industry practices work.⁵

The Act does so by providing that any nonexempt individual who fails to maintain a minimum level of health insurance and who is not otherwise covered must pay a tax penalty calculated

2. See FAMILIES USA, HIDDEN HEALTH TAX: AMERICANS PAY A PREMIUM 2 (2009).

3. § 2001, 124 Stat. at 271.

4. See *id.* §§ 2701–03, 2705–06.

5. See, e.g., *id.* §§ 1101, 1311–12, 1322(h)(1), 1401, 1501, 2001, 2701–06.

as a percentage of household income, capped at the price of the foregone insurance coverage, reported on the individual's federal income tax return, and assessed and collected in the same way other assessable tax penalties are civilly collected under the Internal Revenue Code.⁶

The Congressional Budget Office estimated that imposing this tax penalty as part of the Act's comprehensive reforms will induce about 16 million otherwise uninsured people under the age of sixty-five to purchase health insurance without waiting until they need care,⁷ while raising about \$4 billion in tax revenue from people who opt to pay the penalty rather than purchase the required insurance.⁸ The other provisions, the Congressional Budget Office estimates, will reduce the number of uninsured people under the age of sixty-five by between 16 and 17 million, bringing to roughly 33 million the added number who will be insured.⁹

There are a number of excellent policy arguments both for and against the Act. But those policy concerns are not the issue here; the issue presented here is simply the constitutional one. The principal constitutional argument against the Act is that Congress has no affirmative authority to create this federal income tax incentive for the uninsured to buy coverage in advance of need: first, because the Act's mandate was not clearly labeled a tax, and it did not specify that those who pay the tax penalty rather than purchase insurance are acting legally; and second, because, viewed strictly as a regulation of when and how healthcare gets paid for, the Act operates in advance rather than at the time someone actually consumes healthcare.

The only circuit court to strike down the mandate, the Eleventh Circuit, conceded that when the uninsured consume healthcare, Congress may regulate their activity under the Commerce Clause by conditioning that consumption on their being insured or paying a penalty.¹⁰ So the obvious

6. *See id.* § 5000A.

7. Memorandum from Douglas W. Elmendorf, Director, Congressional Budget Office, to Nancy Pelosi, Speaker, U.S. House of Representatives 9 (March 20, 2010) (on file with the Congressional Budget Office).

8. *See id.* at tbl.4.

9. *See id.*

10. *See Florida ex rel. Attorney Gen. v. U.S. Dep't of Health & Human Servs.*, 648 F.3d 1235, 1295 (11th Cir. 2011), *cert. granted*, 132 S. Ct. 604 (U.S. 2011).

question is, why not a moment earlier? The theory is that a moment earlier the consumption of healthcare is merely a future probability, an economic forecast. But everyone is always at risk of needing healthcare at any instant. No one can predict when unusually costly healthcare will be needed and made available, even if one cannot pay. Aside from the elderly, the most costly medical procedures are the result of some unpredictable bolt-from-the-blue event, like a car accident or a stroke. We know these events will happen on average but cannot predict to whom, or when.

Clearly, no health insurance market could survive if people could wait until they are sick to purchase insurance or buy health insurance on the way to the emergency room and dump it the moment they leave the hospital—either of which they could do without any penalty under a system that prevents insurers from charging patients based on their medical situation or excluding patients based on preexisting conditions. But, as Judge Jeffrey Sutton of the Sixth Circuit observed when upholding the individual mandate, “[r]equiring insurance today and requiring it at a future point of sale amount to policy differences in degree, not kind, and not the sort of policy differences removed from the political branches by the [text of the Constitution].”¹¹

Judge Laurence Silberman of the D.C. Circuit, joined by Judge Harry Edwards, reached the same conclusion. He relied on an analysis that was, if anything, broader than that of Judge Sutton. He held that, “the power to require the entry into commerce is symmetrical with the power to prohibit or condition commercial behavior,”¹² reasoning that the power of Congress to regulate instances of ostensible inactivity inside a state is as broad as its power to regulate purely local conduct when the two are equally injurious to interstate commerce.¹³ Judge Silberman went on to explain why, in any event, drawing an activity-inactivity line would not preserve state sovereignty.¹⁴

11. *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 563 (6th Cir. 2011) (Sutton, J., concurring in part).

12. *Seven-Sky v. Holder*, 661 F.3d 1, 18 (D.C. Cir. 2011).

13. *See id.* at 19.

14. *See id.*

But, as Judge Silberman also observed, one need not go that far: “It suffices . . . to recognize . . . that the health insurance market is a rather unique one, both because virtually everyone will enter or affect it, and because the uninsured inflict a disproportionate harm on the rest of the market as a result of their later consumption of healthcare services.”¹⁵

Of course, the Constitution itself does not point to uniqueness as a factor when determining the constitutionality of a congressional act. But the unique structure of the healthcare market—in which people are left free to self-insure but are guaranteed access to healthcare even when they cannot pay, and access to health insurance at no increased cost even if they choose to wait until the need arises—provides a straightforward limiting principle that easily distinguishes this situation from that of the infamous broccoli hypothetical. Nobody’s decision to forego purchasing broccoli increases the prices others must pay for broccoli through this kind of adverse selection process. Moreover, except as applied to the most unusual circumstances, this mandate merely ensures that individuals do not finance the healthcare they will inevitably consume in ways that unfairly increase costs for others. The analysis applicable to the health insurance purchase mandate could not be applied to support a mandate to purchase healthy vegetables or General Motors cars. It is not as though everybody is bound to be in the market for vegetables or automobiles at some future point.

The argument that at least Judges Sutton and Silberman found persuasive is that the Act is a regulation of commercial activity in the health context precisely because the nature of human life is such that we are all going to need healthcare at unpredictable times and will all consume it regardless of our ability to pay. Consider the legal background: There are legal requirements and requirements in the medical profession to the effect that, if someone goes to an emergency room and does not have an affirmative answer when you ask whether the person can pay or is covered by insurance, one does not allow that person to bleed to death. That legal background is among the factors that render this market unique. We do not have the same

15. *Id.* at 18.

same requirement with respect to food, clothing, or housing. This uniqueness is relevant not because there is a word about uniqueness in Article I, Section 8 of the Constitution. Rather, uniqueness enables courts to reason that this is a regulation of commerce because the decision about how that commerce—which is going to take place anyway—gets paid for is itself an economic decision.

Opponents of the Act have responded to these quite compelling constitutional arguments by arguing that financially penalizing the failure to purchase insurance in advance is somehow akin to forbidding the possession of guns near schools—something we know Congress may not do.¹⁶ According to the law's challengers, although both have economic and interstate effects, remaining uninsured, like merely possessing a gun near a school, is not an economic activity.

This suggestion defies reality. Arranging how to finance one's eventual medical care and arranging to have other people bear the risk of financing it is an economic activity on its face. In any case, it seems to me that there is all the difference in the world, in terms of core principles of federalism, between using federal criminal law to ban gun possession near a school,¹⁷ or overlaying a federal cause of action on top of a state system for coping with gender violence,¹⁸ and simply adjusting someone's preexisting federal income tax liability to reflect the way in which that taxpayer makes the quintessential economic choice of financing the healthcare that the taxpayer, like everyone else, is constantly at risk of needing.

The contrary view depends on depicting a taxpayer's choice to remain without health insurance as noneconomic and describing a tax penalty for making that choice as a way to conscript the taxpayer into commerce rather than a way to regulate that taxpayer's economic behavior. Even if that were so, it would be constitutionally irrelevant. But it is not so. Increasing income tax liability for making choices that directly and immediately increase other people's premiums in the interstate health insurance market and raise other people's health-related taxes across the country does not involve conscripting people

16. See *United States v. Lopez*, 514 U.S. 549 (1995).

17. *Id.*

18. See *United States v. Morrison*, 529 U.S. 598 (2000).

into a stream of commerce to which they would otherwise be strangers. The conscription view is an optical illusion caused by focusing too narrowly on moments at which a healthy individual does not happen to be using healthcare services.

That “freeze-frame still, captured, like a photograph, in a single moment in time,” to quote Judge Marcus of the Eleventh Circuit,¹⁹ overlooks the way in which virtually all of us swim in that stream at some point and that most of us swim in it quite regularly. And it overlooks the fact that none of us, unless we are religious objectors—whom the Act exempts²⁰—can arrange never to swim in it. We can decide never to participate in the tributaries of commerce for things like annual medical checkups or gym memberships, or, for that matter, healthy foods like broccoli. The Act leaves us alone when we make those individual decisions. It does not intrude on anyone’s bodily integrity or compel anyone to adopt an unwanted lifestyle or to accept unwanted medical treatment, things that long-settled substantive due process principles protecting personal liberty rightly refuse to permit either Congress or the States to do. But virtually none of us can decide to remain permanently outside the broad stream of commerce for healthcare—and those able to prove that they can do so might be able to show that the mandate raises constitutional questions as applied to their unusual situation.

All the Act does, at bottom, is to regularize the economic arrangements by which the inevitable participation of the vast majority of us in that stream is to be funded, using the Internal Revenue Code to collect an income tax surcharge if we insist on making economic choices that burden our own families and others, driving up taxes and insurance premiums as though we were islands unto ourselves. But we are not islands unto ourselves, and the Constitution does not compel Congress to treat us as though we were.

Put differently, we are all swimmers in the broad stream of medical commerce. The only issue is whether we will swim uncovered rather than covered by insurance. And by requiring that we cover ourselves in advance with insurance or else pay

19. Florida *ex rel* Attorney Gen. v. U.S. Dep’t of Health & Human Servs., 648 F.3d 1235, 1337 (Marcus, J., concurring in part and dissenting in part).

20. See § 5000A(d)(2), 124 Stat. at 246.

our fair share of what swimming in the nude ends up on average costing other people, Congress is not crossing any line that constrains its constitutional authority. The Act's individual mandate is sustainable: first, as a Commerce Clause regulation of classically economic behavior with substantial interstate effects; second, as a regulation that is necessary and proper to making the rest of the Act's comprehensive structure work effectively and thus to implementing the Commerce Clause; third, as a provision that operates simply through adjusting people's federal income tax liability rather than invading or displacing a sovereign state function; and fourth, as a measure that fits comfortably within the zone in which the Framers saw a functional need to empower national action, given the systemic difficulties that beset efforts by individual states to cope with the problem at hand. Obviously, any state that tries to solve the problems of the uninsured on its own—whether by being more generous in terms of medical benefits or by imposing tighter restrictions on health insurance companies—risks turning itself into a magnet for the needy and dependent and prompting insurers to move to other states. That race to the bottom further distinguishes the problem that Congress chose to tackle at a national level in the Patient Protection and Affordable Care Act from the kinds of purely local problems which the Court held Congress could not address in *Lopez* and in *Morrison*.

Congress acted within its constitutional authority along these four distinct axes. As Judge Silberman observed last November, the Act's mandate may be novel, “[b]ut [its opponents’] proposed constitutional limitation is equally novel”²¹ He concluded, “the novelty cuts [the other] way . . . because we are interpreting the scope of a long-established constitutional power, not recognizing a new constitutional right.”²² And, even if the question were a close one, the judiciary's clear duty would be to defer to the hard-won results of the democratic process, not to substitute its policy judgment for that of the people's elected representatives in the political branches.

21. *Seven-Sky v. Holder*, 661 F.3d 1, 18 (D.C. Cir. 2011).

22. *Id.*

Let me now turn to some of former Solicitor General Paul Clement's arguments in opposition to the Act.²³ It is remarkable how much he and I agree. We both agree that the national government is a government of enumerated powers. I will start with the text of the Constitution. Congress has the power "[t]o regulate Commerce . . . among the several States . . ."²⁴ The question in this case is whether Congress is regulating such commerce. General Clement says that Congress is not regulating commerce, but creating commerce.²⁵ There is no philosophical difference. Chief Justice Marshall in *Gibbons v. Ogden* made it clear that the power to regulate commerce is the power to lay down a rule about commerce.²⁶ That might be why Judge Silberman said that there is a perfect symmetry between the power to forbid or condition entry into commerce and the power to demand it.²⁷ That is why, in *Wickard v. Filburn*, Justice Jackson said that the fact that the farmer is forced in everything but name to go onto the interstate market to buy what he could otherwise produce for himself—the fact that the law operates by stimulating and creating commerce and not by restricting or forbidding it—does not undermine its validity.²⁸

It is beyond doubt, therefore, that the Act is a regulation of commerce with a clear interstate dimension. Contrast the ban on guns near schools. There, Congress was not addressing an interstate problem; it was simply doing something that states and localities could as easily do for themselves.²⁹ They could say, "We demand gun-free school zones." Or, in the context of the Violence Against Women Act, piling an additional federal cause of action on top of the local causes of action was not solving a collective action problem at the national level. It was largely grandstanding. It showed that

23. See Paul Clement, *The Patient Protection and Affordable Care Act and the Breadth and Depth of Federal Power*, 35 HARV. J.L. & PUB. POL'Y 887 (2012).

24. U.S. CONST. art. 1, § 8, cl. 3.

25. See Clement, *supra* note 23, at 2.

26. See 22 U.S. (9 Wheat.) 1, 15–16 (1824).

27. See *Seven-Sky*, 661 F.3d at 18.

28. See 317 U.S. 111, 128–29 (1942).

29. See *United States v. Lopez*, 514 U.S. 549, 567 (1995).

the federal government believed seriously that violence against women was a problem.³⁰

It is rare that one can identify a serious interstate economic problem of the magnitude that the Patient Protection and Affordable Care Act confronted in the healthcare realm. Congress carefully demonstrated that the decision by many people to wait until the last minute to insure—or to forego insurance altogether—imposed severe burdens in higher premiums and higher taxes on other people.

Admittedly, it has been 200 years before this system seemed like the optimal solution. Congress did not, in fact, have the political capacity to do this through a single-payer plan or through a simple expansion of Medicare, which would have entailed more severe restrictions on liberty. It did have the political capacity to offer a finely tuned privately-based solution to a fundamental problem. The question here is not whether Congress has the constitutional authority to prevent insurance companies from discriminating against people with preexisting conditions and difficult medical histories. When Congress exercises that power, however, it creates a problem for the insurance industry because of the phenomenon of adverse selection. Congress decided to solve that problem by broadening the insurance pool through requiring individuals either to purchase and maintain insurance or pay a higher tax for not doing so.

The alternative straight-out tax solution, which General Clement says would be fine except for the problem of accountability,³¹ need not entail raising everyone's taxes and then giving them a rebate if they purchase insurance. Rather, as Judge Kavanaugh pointed out, one obvious alternative would be something that would not really change the Act politically.³² He said that a "minor tweak" to the current statutory language would establish the law's constitutionality under the Taxing

30. See *United States v. Morrison*, 529 U.S. 598, 627 (2000); see also Christopher James Regan, Note, *A Whole Lot of Nothing Going On: The Civil Rights "Remedy" of the Violence Against Women Act*, 75 NOTRE DAME L. REV. 797, 800 (1999) (explaining that although Congress estimated in 1993 that 4 million women were battered each year, in the five years after the Violence Against Women Act was passed, only forty reported cases refer to a suit under the its civil rights remedy).

31. See Clement, *supra* note 23, at 894.

32. *Seven-Sky*, 661 F.3d at 48 (Kavanaugh, J., dissenting as to jurisdiction and not deciding the merits).

Clause. Such a tweak would make clear—as this law implies functionally, although not in so many words—that anyone who chooses not to purchase the mandated insurance and instead pays the tax penalty is not acting unlawfully. If such language were included in the law, Judge Kavanaugh argues, “[it] would ensure that this provision operates as a traditional regulatory tax and readily satisfies the Taxing Clause.”³³ So, what is dressed up as a principled argument about limiting national power and preserving liberty and state sovereignty is really an attempt to take advantage of a linguistic quirk in the law, not the identification of any fundamental flaw in it.

Another point of agreement is this: If Congress operated this law to say that you do not need to get insurance in advance, but the moment you go to the hospital and receive care you must either be covered by insurance or pay a tax penalty, because then you have entered the second stream of commerce that General Clement is describing³⁴—the stream of commerce for healthcare—there is no question the law would be constitutional.

But does the Act become unconstitutional just because Congress is acting on probabilities, on a forecast, on the fact that you do not know exactly when you will suddenly get hit by a bolt of lightning or by a truck or have a stroke? The Act says we do not want insurance rates to go up; we want people to be insured in advance. In addition to the simple linguistic difference to which Judge Kavanaugh points, this forecasting is the whole difference between the hypothetical statute—which is inarguably constitutional—and the Patient Protection and Affordable Care Act. But that is simply a verbal trick. As Judge Sutton said, the only difference between acting in anticipation—which Congress does often—and acting at the moment you consume a commodity is a policy difference, not a constitutional one.³⁵ As Judge Silberman

33. *Id.* at 49 (providing possible tweaks to make the Act satisfy the Taxing Clause power).

34. See Clement, *supra* note 23, at 898.

35. See Thomas More Law Ctr. v. Obama, 651 F.3d 529, 563 (6th Cir. 2011) (Sutton, J., concurring) (“Requiring insurance today and requiring it at a future point of sale amount to policy differences in degree, not kind, and not the sort of policy differences removed from the political branches . . .”).

pointed out,³⁶ there are all kinds of situations in which someone is not yet engaged in commerce—for example, growing marijuana at home for home consumption³⁷ or consuming child pornography at home³⁸—into which Congress has reached its long federal arm. The Court has upheld Congress's ability to exercise national legislative power on the theory that that kind of activity can be reasonably forecast to have significant interstate economic impact.³⁹

I have already addressed the infamous “broccoli mandate” argument—that if the Court upholds the Act here, it would have to uphold a law requiring people to purchase broccoli. I think that if I were focusing on what the Court should do in upholding this hypothetical law, I would suggest that it should be upheld on the narrowest possible ground. But it may well be true that, if there were the political will to improve the situation of the broccoli industry by either requiring everyone either to buy a certain amount of broccoli or to pay a corresponding tax for not doing so, nothing in existing doctrine would get in the way. I think Professor Charles Fried could well be right about that.⁴⁰ To some extent, that is what Judge Silberman was saying when he said that the power to compel someone to engage in commerce, though it may look more dramatic than the power to prevent it, is every bit as broad when there is significant interstate impact.⁴¹

After all, a government that can prevent you from possessing any number of apples or any amount of broccoli on the theory that there is some effect on interstate commerce is probably also a government that could require you to purchase it or pay a tax. But the primary inhibition against such absurd exercises of the commerce power has always been political. It has always

36. See *Seven-Sky*, 661 F.3d at 17 (panel opinion).

37. See *id.* at 17 n.30 (citing *Gonzales v. Raich*, 545 U.S. 1, 19 (2005) (holding that the marijuana regulation was within Congress's Commerce Clause power under *Wickard*)).

38. See, e.g., *id.* (citing *United States v. Sullivan*, 451 F.3d 884, 891–92 (D.C. Cir. 2006) (applying principles in *Raich* to child pornography)); *United States v. Forrest*, 429 F.3d 73, 78 (4th Cir. 2005) (same).

39. E.g., *Raich*, 545 U.S. at 19.

40. See Avik Roy, *Harvard Law's Fried: A Broccoli Mandate is Constitutional*, FORBES, Feb. 2, 2011, <http://www.forbes.com/sites/aroy/2011/02/02/harvard-laws-fried-a-broccoli-mandate-is-constitutional/>.

41. *Seven-Sky*, 661 F.3d at 18.

been the fact that Congress cannot lightly get the required legislative majorities to do fanciful things like that.

This is not to say there are no limits on the government's ability to regulate interstate commerce. Congress cannot force us to buy a product without a showing that there is a serious national economic problem to which the failure to buy that product is an answer. It seems to me that this limitation is real. For example, although there is historic practice behind doing it, I do not think Congress could force us all to buy a gun to be well-armed so as to prevent burglaries.⁴² That is something that can be handled at a state and local level.

The limit on Congress's power is not a new limit. It is a limit that was elaborated in both *Morrison* and *Lopez* when the Court said that in regulating something other than the instrumentalities of commerce, or commerce itself, one is limited to regulating activity that is economic.⁴³ If the activity is economic, as the activity of deciding how to finance your inevitable purchase of healthcare is, then you can look at the activity's aggregate impact on interstate commerce. But if it is not economic activity, you cannot.

At bottom, there are certain problems that intrinsically and structurally cannot be handled purely at a state or local level, such as the problem of insurance companies imposing rules about preexisting conditions and charging for insurance on the basis of an individual's medical history rather than the community's history. If you regard that as a problem—and Congress is entitled to do so—it is a problem that cannot be resolved at the state or local level because of the race to the bottom. If one state alone decides to impose certain restrictions on the practices of its insurance industry to require more generosity to patients, it is going to lose part of that industry to other states.

That problem is one that concerned the Framers. That is why they gave the power to regulate commerce among the several States to the national government. They were concerned with

42. See Act of May 8, 1792, Ch. 33, § 1, 1 Stat. 271, 271 (“[E]very citizen, so enrolled [in the militia] and notified, shall, within six months thereafter, provide himself with a good musket or firelock . . .”).

43. See *United States v. Morrison*, 529 U.S. 598, 613 (2000); *United States v. Lopez*, 514 U.S. 549, 567 (1995).

the problem of spillover effects: situations that cannot be handled at a state or local level. Not only is Congress limited in regulating economic as opposed to noneconomic activity, but it may well be limited to tackling problems where there is a plausible showing that there is a need for national action, where it is not something that could be solved equally well by having many health insurance mandates in fifty different states.

The separation of powers is at least as important a value as federalism in this context. It is not up to the Supreme Court to decide that Congress did not know what it was doing or did not have the right experts before it when it made its empirical findings about the billions of dollars of uninsured costs that are shifted to other people. I think that Congress is entitled to have those findings taken at face value. It may be that the political question is a close one; I genuinely believe that the constitutional question is not.