

# THE PATIENT PROTECTION AND AFFORDABLE CARE ACT AND THE BREADTH AND DEPTH OF FEDERAL POWER

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It is an honor, especially for a graduate of Harvard Law School, to be in a debate with Professor Tribe. Professor Tribe and I certainly agree about much of the background of the Patient Protection and Affordable Care Act (the Act)<sup>1</sup>, although there certainly are some differences between us. I plan to make three points about the background of the Act and then lay out the relatively straightforward argument that the Act is unconstitutional.

First, this Act is hundreds of pages long. It is doubtful that any legislator who voted for or against it read the entire Act. There is undoubtedly at least one provision in the statute that is unconstitutional, maybe one that nobody has read yet, but it is out there. For the sake of convenience and brevity, however, I will focus on the individual mandate.

Second, it is important to understand how the individual mandate works. Some have argued that because provisions in the Act reference the tax code, it is therefore a tax provision. But the mandate and the penalty—which is used to enforce the mandate—are separate, and they operate separately. This

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

is clear because there are individuals who, under the Act, are subject to the mandate but are exempt from the penalty. For example, an individual with income below a certain threshold will not be penalized for failing to purchase health insurance, but the Act still mandates that such individuals purchase health insurance.<sup>2</sup>

The last thing I want to emphasize about the Act is that the mandate is not directed to the market for healthcare, but rather the market for healthcare *insurance*. This is a key distinction between the way Professor Tribe characterizes the mandate and the way I do. Professor Tribe believes this is all about the healthcare market, and the mandate merely regulates the timing of your participation in the healthcare market.<sup>3</sup> I do not believe that is true. The mandate forces you to buy insurance, regardless of whether you use that insurance when you enter the market for healthcare. Nothing in the statute requires you to use health insurance when you walk into the hospital. Thus, the mandate is about forcing people to buy health insurance—people who could otherwise consciously decide to make a rational economic choice not to buy health insurance. That is what the statute is about, and that gets to the nub of the argument concerning why it is unconstitutional.

The argument for its unconstitutionality is relatively simple. The place to start, as with any constitutional argument, is with the text of the Constitution. The Commerce Clause refers to the power to regulate commerce.<sup>4</sup> The fundamental problem with this Act is that forcing somebody to engage in commerce, so that the government can better regulate commerce, is not itself the regulation of commerce. When you force somebody to engage in commerce, you *create* commerce, and that is not what the Commerce Clause authorizes.

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2. 26 U.S.C. § 5000A(e)(1). The Act refers to all citizens and lawful residents who are neither imprisoned nor qualify for two narrow religious exemptions as “applicable individuals.” An act of Congress that refers to the people of United States as “applicable individuals” ought to raise concerns immediately.

3. Lawrence H. Tribe, *The Constitutionality of the Patient Protection and Affordable Care Act: Swimming in the Stream of Commerce*, 35 HARV. J.L. & PUB. POL’Y 873, 879–80 (2012).

4. U.S. CONST. art. I, § 8, cl. 3.

The challengers to the Act rely on, among other cases, *United States v. Lopez*<sup>5</sup> and *United States v. Morrison*<sup>6</sup>—the only cases in recent history to strike down federal legislation as exceeding Congress’s power under the Commerce Clause.<sup>7</sup> Part of the explanation for this is that beyond *Lopez* and *Morrison*, the breadth of the modern Commerce Clause as understood by the Supreme Court is quite broad. That might seem like a weakness for somebody making a Commerce Clause challenge, but it actually is not. It is important to understand the consequences of the argument that the mandate is constitutional. If it is constitutional, then Congress would have essentially a general police power. A ruling in favor of the mandate would combine the great *breadth* of the modern commerce power with a power of far greater *depth*. Congress has the power to regulate commerce already, but Congress also would have the power to force you to engage in all kinds of commerce so it can better regulate you. When you look at the breadth and the depth of the power asserted, there would be nothing outside Congress’s reach. It basically covers the waterfront.

If you think about the breadth of the modern Commerce Clause, it is fair to say that one of the few things a citizen can do to avoid the regulatory reach of the federal government is to refrain from engaging in commerce. Perhaps you can stay within a thousand feet of a school zone, like the defendant in *Lopez*,<sup>8</sup> but for the most part, if you want to avoid federal regulatory power, all you can do is simply exercise your right not to engage in commerce. If the mandate is constitutional, however, then you would not have that right either.

Professor Tribe suggests that the mandate is not so different from the federal government’s regulation of child pornography or marijuana, which can be prohibited because they can reasonably be predicted to have a substantial effect on interstate commerce.<sup>9</sup> The big difference is that in those cases you can still avoid the regulatory reach of the federal government. If

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5. 514 U.S. 549 (1995).

6. 529 U.S. 598 (2000).

7. See *Gonzales v. Raich*, 545 U.S. 1, 23 (2005).

8. See *Lopez*, 514 U.S. at 551–52 & n.1 (holding that Congress’s power to regulate commerce does not extend to possession of a gun in a school zone).

9. See Tribe, *supra* note 3, at 883–84.

you do not want to be subject to possible prosecution under the child pornography statute,<sup>10</sup> do not look at child pornography. If you do not want to be subject to prosecution under the Controlled Substances Act,<sup>11</sup> do not smoke marijuana. Indeed, those prohibitions have no effect on someone unless they had entered or wanted to enter into what the Court views as economic activity. But there is absolutely no way whatsoever to avoid the long reach of the federal government under this statute. Under the Act you must buy insurance, and you must buy it now.

In this sense, the breadth of the modern Commerce Clause is a blessing, not a curse, for the challengers to this law. Because the commerce power is so broad, it would be especially dangerous to combine it with the power to mandate that people also engage in commerce when they would otherwise refrain.

Some have pointed to the military draft to suggest that forcing people to engage in certain activity is nothing special.<sup>12</sup> The draft involves similar compulsion, and most people believe that the draft is perfectly constitutional. To see the difference between the draft and a mandate to engage in commerce, it is worth conducting a brief thought experiment: Imagine for a minute that the Framers of this great country actually conceived that we would have a Commerce Clause power that is as broad as the modern Commerce Clause, and then imagine for a moment that they thought that the Commerce Clause power included the power to force people to engage in commerce so that the federal government could better regulate that commerce. If that were the Framers' understanding of the Commerce Clause, how many provisions would there have been in the Bill of Rights? The Framers certainly would not have stopped at ten. There might have been twenty provisions, and ten of them specifically would have been directed at limiting the enormous, unbelievable power asserted by this new federal government. In contrast, because the Framers likely believed the draft was part of the power to raise a standing army, they did include specific amendments aimed at limiting this power: the Second and Third

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10. 18 U.S.C. § 2252 (2006).

11. 21 U.S.C. § 844 (2006).

12. See, e.g., Mark Dalton, *Insurance mandate? Try a military draft*, ALBANY TIMES UNION, Dec. 3, 2011, [www.timesunion.com/opinion/article/insurance-mandate-Try-a-military-draft-2342529.php](http://www.timesunion.com/opinion/article/insurance-mandate-Try-a-military-draft-2342529.php).

Amendments in the original Bill of Rights.<sup>13</sup> That power, because it perhaps included the power to compel, was a particularly dangerous power. In the same way, if you imagine a power as broad as the modern Commerce Clause that also included the power to compel, the Framers would have given us a much longer Bill of Rights, designed to place more affirmative limitations on that expansive power.

Turning now to the D.C. Circuit's opinion in *Seven-Sky v. Holder*,<sup>14</sup> the court's starting premise was essentially that there is no limiting principle for Congress's power to compel. The court "acknowledge[d] some discomfort with the Government's failure to advance any clear doctrinal principles limiting congressional mandates that any American purchase any product or service in interstate commerce."<sup>15</sup> Yet, despite this "discomfort," the D.C. Circuit did not find the lack of a limiting principle fatal.<sup>16</sup> But, as I will explain, the lack of a limiting principle is the key to the argument that the mandate is unconstitutional.

Professor Tribe, as any good advocate on his side of this issue would do, points to the uniqueness of the healthcare market.<sup>17</sup> But the problem with this argument is that uniqueness is not a limiting principle. Uniqueness might explain why this is the first time Congress has used this power, but it does not explain why, if this congressional power is upheld, it will be the last time that Congress will use this power—because it will not.

If Congress really had this power, it would be astonishing that it would have waited 220 years to exercise it because this asserted power is so amazing. Just think about recent legislation. Who needs "Cash for Clunkers" when you could just force people to buy cars? How much more efficient would that be? Think about *Wickard v. Filburn*.<sup>18</sup> Why fool around with limiting the production of wheat? Congress could have just forced people to buy wheat, which would have been much more effective at accomplishing the government's ob-

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13. U.S. CONST. amend. II; U.S. CONST. amend. III.

14. 661 F.3d 1 (D.C. Cir. 2011).

15. *Id.* at 18.

16. *See id.* at 20 (affirming district court ruling upholding Act).

17. *See* Tribe, *supra* note 3, at 876–79.

18. 317 U.S. 111 (1942).

jective of increasing the price of wheat. Think about flood insurance—one of many markets that work like the market for health insurance. How does the government try to get people to purchase flood insurance? It does so as a regulatory requirement for obtaining a federally backed mortgage.<sup>19</sup> Why would Congress use such indirect means when what it really wanted to do was make sure that everybody in the floodplain had flood insurance? If the healthcare mandate is upheld, it is doubtful that Congress would fool around with making the purchase of insurance a condition to mortgages in the future.

Professor Tribe has suggested one potential limiting principle, which is that perhaps there would need to be some showing that the mandate that the government adopts in a particular setting is necessary to solve a truly national problem—something that cannot be solved at the state level.<sup>20</sup> But in the Commerce Clause cases, the Court wrestles between two impulses. On the one hand, the Justices very much believe that, because the process of enumeration suggests some power not enumerated, there has to be a limiting principle.<sup>21</sup> The other thing they worry about, however, is administrability. The Justices want to come up with a rule that they can administer in a variety of cases.<sup>22</sup>

Professor Tribe's proposed limit—that the power to mandate economic activity only exists in cases where Congress is addressing a truly national problem—would be a very difficult line for courts to police. Courts probably would end up deferring to Congress's determination that something is a national problem. I advocate the simpler alternative. In 220-plus years, Congress never has forced people to engage in commerce. Holding the line here is something that courts can do. It is an easily administered test.

Even if uniqueness were a judicially administrable standard, it would not be an especially strong limiting principle,

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19. See 42 U.S.C. 4002 (2006).

20. See Tribe, *supra* note 3, at 884–85.

21. See *United States v. Lopez*, 514 U.S. 549, 566 (1995).

22. See *Florida v. U.S. Dep't of Health & Human Servs.*, 648 F.3d 1235, 1287 (11th Cir. 2011) (“Yet, confusing though [the Court’s] dichotomies and doctrinal vacillations have been, they appear animated by one overarching goal: to provide courts with meaningful, judicially administrable limiting principles by which to assess Congress’s exercise of its Commerce Clause power.”).

because the healthcare market is not actually unique. There are other markets where we take care of people who did not plan as well as we would have liked them to have planned. For example, we have a proud cultural tradition in this country of not letting people starve. We have a proud cultural tradition of not letting people walk around naked because they cannot afford clothing. We also have a proud national tradition of helping people whose houses are completely wiped out in a flood plain after a hurricane or some other disaster. We give them funds to rebuild their houses. In this respect, the healthcare market is not unique, and so uniqueness would not be a very strong limiting principle.

Ultimately, this discussion of uniqueness is beside the point: It does not matter that uniqueness *would be* a poor limiting principle because uniqueness *is not* a limiting principle under the Constitution. The Commerce Clause does not say that Congress has the power to regulate commerce in unique industries. It has the power to regulate commerce. So if the individual mandate can be defended, it can be defended on one of two rationales. It can be defended on the rationale suggested by the D.C. Circuit, which is that Congress has the power to compel entry into commerce, as that power is “symmetrical with the power to prohibit or condition commercial behavior . . . .”<sup>23</sup> But that rationale avowedly admits of no limiting principle.<sup>24</sup> Alternatively, the mandate could be defended on the principle that, if you aggregate all of the economic activity that the government is compelling, it has a substantial effect on commerce. That, too, lacks any limiting principle.

The lack of a limiting principle ultimately may doom the statute. There is a common thread to recent Commerce Clause cases in the Supreme Court: The federal government loses when it cannot articulate a limiting principle.<sup>25</sup> The Court is conscious that, as broad as the modern Commerce Clause power is, it cannot be the equivalent of a plenary power. The whole Court has recognized that the very process of enumerating powers assumes certain powers not enumerated. If the

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

24. See *id.*

25. See, e.g., *United States v. Lopez*, 514 U.S. 549 (1995).

Court converts the Commerce Clause into a plenary power without limits, then the whole process of enumeration has essentially been an empty exercise. That is why the government in this case will be asked repeatedly, “what is the limiting principle?” That is why the D.C. Circuit opinion in fact holds the key to why the government may not prevail at the end of the day—because the D.C. Circuit explicitly acknowledged that there is no limiting principle here.<sup>26</sup>

There are at least three reasons why there must be a limiting principle. First, the States in our constitutional system play a very important role, and one of the few things that defines their continuing role as distinct entities from the federal government is that, as Justice Kennedy has acknowledged on more than one occasion, the police power does not reside with the federal government.<sup>27</sup> Rather, the police power resides with the States. A case like this, in which the federal government asserts this kind of vast authority without a limiting principle, is when the federal government gets into trouble with the Court—in part because it empties the enumeration process of meaning, and in part because it is too threatening to the residual sovereignty and dignity of the States.

Second, as Justice Kennedy made clear for the Court just last Term in *Bond v. United States*,<sup>28</sup> federalism and the separation of powers exist not to protect the branches of government or the States alone, but to protect individual liberty.<sup>29</sup> This is about the best case imaginable for making that point: The power asserted here—to mandate individuals to engage in commerce—creates grave concerns for liberty. The D.C. Circuit suggested that this liberty interest seems like more of a substantive due process argument than a Commerce Clause or enumerated powers argument.<sup>30</sup> But that analysis views the

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26. See *Seven-Sky*, 661 F.3d at 18 (“We acknowledge some discomfort with the Government’s failure to advance any clear doctrinal principles limiting Congressional mandates that any American purchase any product or service in interstate commerce.”).

27. See, e.g., *United States v. Comstock*, 130 S. Ct. 1949, 1967 (2010) (Kennedy, J., concurring in the judgment); *Lopez*, 514 U.S. at 581 (1995) (Kennedy, J., concurring).

28. 131 S. Ct. 2355 (2011).

29. See *id.* at 2364.

30. See *Seven-Sky*, 661 F.3d at 19.



Bill of Rights as the only part of the Constitution that protects liberty. In fact, the federalism principles in the Constitution also protect liberty.

Finally, upholding this power would allow Congress to evade accountability. It has been argued that Congress could have done functionally the same thing if it had simply imposed a tax on people and then imposed a mandate on the insurers to provide coverage.<sup>31</sup> True, but Congress then would have to be accountable for that alternative policy. If the federal government raised taxes and imposed expensive mandates on insurance companies, then the citizenry and the insurance companies would have risen up in opposition, and this statute would not have passed. Instead, Congress attempted to do the same thing by imposing what amounts to a stealth tax. By forcing healthy people into the insurance market, Congress is simply giving money to the insurance companies. Professor Tribe calls this “broadening the base.”<sup>32</sup> His words, I believe, are well-chosen but a bit euphemistic. What is really going on here in terms of the insurance industry is not a mere broadening of the base. It is forcing people who would otherwise rationally decide to self-insure to buy health insurance that they do not want and likely will not use, for the benefit of the insurance companies. So by striking down the individual mandate, the Court would restore accountability to the system. It would force the government, if it really wants to take money from citizens and give it to insurance companies, to raise taxes and actually admit what it is doing.

Professor Tribe and I agree that there are other ways that Congress could constitutionally achieve its objective. But the fact that there are alternative ways to achieve this policy goal—if it is a desirable policy goal, which we both agree is eminently debatable<sup>33</sup>—actually suggests strongly that we should not lightly sacrifice our liberty in this way. I believe that if people were told that this reform was unambiguously a new tax, there would not be the political will to pass it. If I am

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31. See Tribe, *supra* note 3, at 882–83 (citing *Seven-Sky*, 661 F.3d at 48–49 (Kavanaugh, J., dissenting as to jurisdiction and not deciding the merits)).

32. Tribe, *supra* note 3, at 882.

33. See Tribe, *supra* note 3, at 875.

wrong, then so be it. That is the democratic process, and that is accountability. But this debate is really not about the policy. It is about the Constitution and whether a mandate to engage in commerce is an available means for Congress to achieve this objective.