

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

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

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

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

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

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

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

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

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

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

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

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

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

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