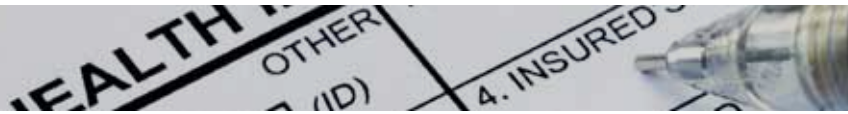




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WHY THE AFFORDABLE CARE ACT'S INDIVIDUAL PURCHASE MANDATE IS BOTH CONSTITUTIONAL AND INDISPENSABLE TO THE PUBLIC WELFARE

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Florida v. HHS — a suit brought on behalf of 26 states challenging the constitutionality of the Affordable Care Act (ACA)—represents a rare moment in America's history. The Supreme Court will determine whether the United States coalesces behind an historical health system reform providing near-universal coverage, or retreats from it.

Although *Florida v. HHS* raises four constitutional questions — the individual purchase mandate, Medicaid expansion, severability, and the Anti-Injunction Act — undoubtedly the mandate presents the most novel and consequential issue, with constitutional and social policy implications that are far reaching. Why is the constitutional question so original and meaningful in understanding the scope of Congress' powers? Why is the social policy question indispensable to the future of health care reform? And what is the inter-play between the constitutional and social policy questions?

NOVEL CONSTITUTIONAL QUESTIONS

Integral to the ACA's conceptual design is the individual purchase mandate, which requires most individuals to pay an annual tax penalty if they do not have health insurance by 2014. Despite the vociferous opposition, the mandate is the most "market-friendly" financing device because it relies on the private sector. Ironically, less market-oriented reforms such as a single-payer system clearly would have been constitutional.



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It is common sense for everyone to purchase health insurance and thus gain security against the potentially catastrophic costs of treating a serious illness or injury. However, Congress' method of ensuring that everyone has health insurance is actually novel. It appears that Congress has never before mandated that individuals enter into a contract with a private company. Although some scholars have pointed to precedents – such as the requirement that everyone pay into the Medicare system – these appear distinguishable— in the case of Medicare, for example, it is a public program, albeit with private aspects.

The very idea that Congress could exercise this unprecedented power has provoked mostly (but not only) conservatives to recite a parade of horrors, ranging from mandatory purchase of things that are good for individuals (buy broccoli, a fitness club membership) or good for society (buy electric cars to stimulate environmentally friendly industry sales). Fundamentally, critics believe that individuals have the right to be left alone— to opt out of commerce (buy no insurance) and self-insure or simply accept the consequences if they fall ill.

The Commerce Power

Even if this is a unique, or at least a rare, exercise of Congressional power, what are the constitutional arguments in its favor? The most obvious is that the mandate is a straightforward exercise of Congress' power to regulate commerce. The health insurance market has vast cumulative economic effects, with health care capturing >17 percent of the gross domestic product. Pharmaceuticals, medical equipment, electronic medical records, and insurance claims routinely move across state lines. The insurance industry, moreover, markets products, offers policies for sale, underwrites, and reimburses claims regionally and nationally. Out-of-pocket health care costs contribute to bankruptcies, unemployment, and reduced consumer spending— all of which impact interstate commerce.

Critics suggest that it would be alarming and unprecedented if the Court were to uphold the power of Congress to compel individuals to enter into a contract with a private health insurer. But the same could be said if the Court were to strike down the mandate. Since Franklin Delano Roosevelt's New Deal, the Court has almost invariably upheld Congress' commerce power, and a decision to strike down the mandate would itself be unprecedented.

The Supreme Court, principally the Rehnquist Court, has overturned federal statutes on commerce clause grounds in two cases, both of which entail Congressional attempts to regulate non-economic, social policy of a purely local character— making gun possession within a school zone a federal offense (*US v. Lopez, 1995*) and creating a private civil remedy to bring federal lawsuits against perpetrators of sexual violence (*US v. Morrison, 2000*).

In the ACA, Congress is clearly regulating economic activity with a broad interstate reach. The regulation of health insurance assuredly is not a non-economic activity of purely local significance.

If this is true, then the states will have to demonstrate that the mandate somehow does not



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regulate national economic activity. The only way they could do that would be to show that an individual decision not to buy health insurance is a non-economic, purely personal choice. This implies that there is a meaningful distinction between an act and omission (buying and not buying health insurance), which there is not. Uninsured individuals never really “do nothing,” but rather self-insure, rely on family, and cost-shift to hospitals, the insured, and taxpayers. In 2010, for example 8 percent of people with annual incomes >\$75,000 chose not to purchase health insurance, but most will require uncompensated care if they remain uninsured over time.

It is therefore a fundamental misapprehension to conclude that the mandate forces individuals to enter into the health care market. A more accurate characterization is that the mandate regulates the timing and manner in which individuals will pay for health services. The reality is that virtually everyone will need health care at some time in his or her life. Critics posit that there are hypothetical individuals who wish to stand aloof from the health care market— either because they will remain entirely healthy for their lives or they will simply self-insure or suffer the consequences of illness or injury.

This would be such a rare event that it could not possibly be the basis upon which the act's constitutionality depends. First, and most importantly, even if an individual never becomes ill or injured (which is exceedingly rare), it is impossible to know at the time of the insurance purchase whether this is such a rare individual. And there may be some who could self-insure, but the costs of catastrophic care are so high, that few could or would pay the cost themselves— even the rich. Everyone knows (and this is also a matter of state and federal law) that when a person does fall seriously ill or injured, they will be taken care of, often in an emergency department.

The Necessary and Proper Clause

Suppose that the Supreme Court goes against the clear weight of its post-New Deal jurisprudence and holds that Congress lacks the commerce power to mandate the purchase of health insurance. The United States still has a compelling argument under the “necessary and proper” clause, which permits Congress to employ all means reasonably appropriate to achieve the objectives of enumerated national powers.

The ACA fundamentally reforms the insurance market through three mechanisms that are clearly authorized under the commerce power: “guaranteed-issue” (requiring insurers to offer coverage to all applicants), “community-rating” (prohibiting insurers from charging differential premiums based on health status), and bans on annual and lifetime caps (barring dollar limitations on coverage). These ACA requirements are hugely popular, as they ensure that everyone can purchase health insurance at an affordable cost even if they have a debilitating prior condition, such as a birth defect, cancer, or cardiovascular disease.

The mandate is “necessary” for these reforms to work because it ensures that health insurance spreads the risk across the entire population. Risk pools function only if they include enough



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healthy individuals to keep overall expenditures lower than premium costs. The larger the pool, the more predictable and stable premiums will become. If individuals could gain health insurance at any time and at the same affordable price, why wouldn't they simply wait to buy insurance until they became seriously ill or injured? Without the mandate, all the incentives would be to delay entering the insurance pool, which would result in a spiral of increasing costs that are wholly unsustainable.

If the mandate is “necessary” for effective implementation of an enumerated power, then critics are left with a fairly weak argument—that the mandate, although necessary, is “improper.” This assumes that what is “proper” is a stand-alone requirement in the constitutional interpretation of the necessary and proper clause. But this argument is destined to fail and not only because the inquiry of what is “proper” has no objective meaning. How could the Court set clear, defensible criteria for what is “proper” as a stand-alone concept? And even assuming that “proper” can be injected with meaning, on its face, the mandate is appropriate and proportionate to its objectives because it gives individuals a fair choice. They may choose between purchasing insurance and paying a relatively modest tax penalty reaching the greater of \$695 (\$2,085 per family maximum) or 2.5% of household income. This is a modest penalty that is not arduous or intrusive, especially considering the externalities that the uninsured impose on all others in society.

The “Limiting Principle” Objection

Returning to the “broccoli” argument, critics claim that if the Court upheld the mandate there would be no “limiting principle.” That is, Congress would then have the power to mandate that individuals enter into all sorts of private contracts or purchase products of Congress' choosing.

To be sure, it is hard to find such a limiting principle, but the Court could, and arguably, should apply its ruling to the set of facts in the case, making clear that it would review other more intrusive mandates in the future. The Court retains its oversight of Congressional action, and it is politically doubtful that Congress would go too far. (After all, the ACA appears to be the only time in American history that Congress has sought the power to require individuals to enter into a contract. And it did so in a social context that is compellingly important and complex—health care access and cost.)

The Constitution, moreover, provides restraints on Congress well beyond the commerce power. If a mandate were to intrude on a truly private space, the Court has ample tools to strike it down, such as under the due process clause. For example, if Congress were to require individuals to eat healthy food, engage in physical exercise, or refrain from risky activities that did no harm to others, the Court could strike it down as a violation of a fundamental freedom. Just as the Court in *Cruzan v. Director, Missouri Department of Health*, 1990 found that individuals have a liberty interest in being free of unwanted treatment, so too could it limit government over-reaching into the personal sphere.



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CONSEQUENTIAL SOCIAL POLICY QUESTIONS

For almost a century, presidents have tried, and failed, to pass national health insurance reform— ranging from Franklin Roosevelt's exclusion of national insurance from the Social Security Act, to the failure of Presidents Nixon Carter, and Clinton's health care plans. Although President Obama may well have preferred a different course (e.g., a "single payer" or "Medicare for All"), it was not politically possible. And although Congress could have funded the reform through a broadly applicable tax (which would be unquestionably constitutional), again, it could not secure a political majority for that course.

So the President and Democratic Congressional leaders sought a "grand bargain" that would secure a package that was popular with the public and acceptable to the powerful insurance industry. That bargain was to require companies to cover everyone affordably (publicly popular, but deeply problematic to the industry) accompanied by a mandate (publicly unpopular, but the only way to get industry on board). (Recall how the industry torpedoed the Clinton reform with its "Harry and Louise" ads.) This issue, of course is also critically important to the severability argument because the industry would bristle at the idea that it could be forced to offer policies to everyone at the same cost, but that everyone also had the complete discretion to opt-out until their care was urgent and expensive.

This grand bargain is integral to the ACA's design, and essential for it to survive politically and economically. Absent the mandate, the "free-rider" and "cost-shifting" problems would have crushed the viability of the act. Even before the act, free riders (those who fail to buy insurance but later get uncompensated care) impose costs on everyone (\$62 billion in 2009) through higher taxes and insurance premiums. With "guaranteed issue," free riding and cost-shifting would have become intolerable. How can any health insurance system exist if everyone has an unfettered choice to opt out until the very moment that they need the care?

The legal, political, and policy stakes of the Supreme Court's decision are vast. The ACA will achieve near universal coverage, something that seemed unimaginable just a short time ago. Health reform envisages a social contract where everyone shares the cost, recognizing that all of us will become ill one day. The ACA, and its individual mandate, are not unjustified limits on freedom, but rather are vital to a decent society. If the social contract must be accomplished the "American way," i.e., through the private market, then the simple logic of insurance must prevail, which is to spread the risk among the rich and poor, healthy and sick, young and old alike. ●