



BY ROBERT A. LEVY

“The insurance mandate has been resurrected—an insidious federal power that can force Americans to purchase private goods they don’t want.”

Chairman’s Message

Taking Government to a Whole New Level

Imagine this conversation:

PRESIDENT OBAMA: “We need to bend the health care cost curve. I want the food industry to cut chocolate sales by 25 percent.”

INDUSTRY: “But we would lose \$100 million from the cut-back.”

OBAMA: “Just raise the price of celery to recoup the \$100 million.”

INDUSTRY: “Nobody will buy celery at the inflated price.”

OBAMA: “Not to worry. We’ll impose a fine on any family that doesn’t buy a sufficient quantity of celery.”

Sounds inconceivable, doesn’t it? Scandalously, it’s more than conceivable; it’s reality. Obamacare—temporarily frustrated by Massachusetts voters—doesn’t require the purchase of celery, but it does require the purchase of health insurance. Here’s (roughly) how Obama’s actual conversation with the industry unfolded:

PRESIDENT OBAMA: “A lot of sick people can’t get insurance. I want the industry to cover preexisting conditions.”

INDUSTRY: “But we would lose a fortune if we did.”

OBAMA: “Just raise premiums paid by healthy people and sell more policies to those who aren’t insured.”

INDUSTRY: “If we have to cover preexisting conditions, healthy people won’t buy policies until they’re sick.”

OBAMA: “Not to worry. We’ll impose a fine on any family that doesn’t buy a policy now.”

Whether it’s celery or health insurance, the federal mandate is a thinly disguised subsidy to special interests who agreed to play ball with the government. When similar legislation was considered in the context of Hillary-care in 1994, the Congressional Budget Office wrote: “The government has never required people to buy any good or service as a condition of lawful residence in the United States.”

Some legal scholars insist that the mandate is authorized under the all-encompassing Commerce Clause. Indeed, the infamous 1942 case *Wickard v. Filburn* vastly expanded the commerce power. Roscoe Filburn grew more wheat than allowed under FDR’s Agricultural Adjustment Act. Filburn didn’t sell the excess; he used it to feed his family and farm animals. Still, he was ordered to destroy the wheat or pay a fine. Understandably, Filburn protested that growing and eating his own wheat didn’t involve commerce and occurred within a single state. No matter, said the Supreme Court. By not buying and not selling, Filburn affected the supply and demand for wheat in interstate markets.

Fast forward nearly seven decades: Compulsory

health insurance is essential, we are told, for national health care regulation. According to *Wickard v. Filburn*, even an intrastate market can be regulated if failure to do so would undercut a federal regulatory scheme.

Well, not quite. Just because Congress could regulate Filburn’s wheat production doesn’t mean Congress can require consumers to purchase bread in order to subsidize wheat farmers. In the same fashion, even if Congress can regulate health care, that doesn’t mean Congress can require consumers to purchase insurance in order to subsidize insurance companies. The power to regulate interstate commerce does not extend to penalizing nonpurchase of health insurance—a product, by the way, that is barred by state laws from being sold across state lines.

Proponents of Obamacare have a fallback position. The insurance mandate, they contend, falls within Congress’s power to tax in order to provide for the general welfare. In *Helvering v. Davis* (1937), the Supreme Court cited that power in upholding the Social Security system. By extension, the Court would no doubt uphold Medicare. And if a mandate to buy insurance from a government insurer is constitutional, why not a similar mandate to buy from a private insurer?

Three points in response: First, private insurers under Obamacare are not mere government subcontractors. They are special interests who receive above-market prices for unwanted policies as a subsidy for covering preexisting conditions. Second, the General Welfare Clause is triggered by taxes; yet the penalty for not buying insurance is a fine, not a tax. It’s like the fine paid for speeding or violating other government edicts. That’s why the entire process is off-budget, exempt from the usual fiscal rules and oversight. Third, if the penalty were indeed a tax, it would be a direct tax, imposed on families, and must therefore be apportioned by population to be constitutional.

Despite those objections, the health bill looks like it will become the law of the land. Never mind the backroom deal that taxed Cadillac health plans, unless they were sponsored by labor unions. Never mind the Medicaid exemption for Nebraska that bought a 60th vote from Sen. Ben Nelson. Those deals are behind us. Now, through parliamentary shenanigans the insurance mandate has been resurrected—an insidious federal power that can force Americans to purchase private goods they don’t want. Beware the new role for government that the political class has put on the table.

Robert A. Levy