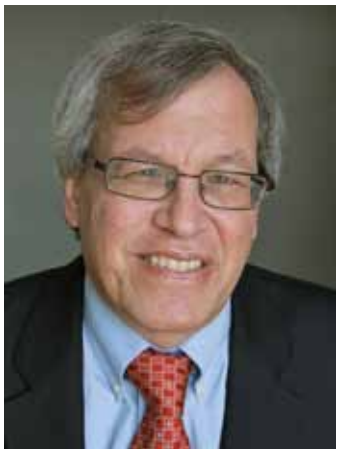
# Is the ACA Constitutional?

## Two scholars present their contrasting views

## The Health Care Law Will Be Upheld

**By Erwin Chemerinsky**



Under current constitutional law, the federal health care law is clearly constitutional. For the Supreme Court to declare it unconstitutional would require a major departure from precedent. I predict that the Court will uphold the act and that the decision will not be close.

It is important to note that none of the challengers to the health care law are claiming that the individual mandate is unconstitutional as infringing personal freedom. Conservative rhetoric attacking the law often is phrased in these terms, and the underlying basis for objection is likely that people should have the right to be uninsured without paying a penalty if they wish. But under post-1937 constitutional law, economic and social welfare legislation is upheld so long as it is reasonable. Rarely has any law been struck down as failing this "rational basis" test, and not even the law's fiercest critics challenge the constitutionality of the individual mandate on this basis.

One question before the Supreme Court is whether Congress has the authority to require that individuals either purchase health insurance or pay a penalty. This is constitutional under Congress's power, pursuant to Article I, Section 8 of the Constitution to regulate commerce among the states.

Since *United States v. Lopez* in 1995, the Court has used a three-part test for determining whether a federal law is constitutional under the commerce power. Under the third prong of this test, Congress may regulate economic activity that taken cumulatively across the country has a substantial effect on interstate commerce.

It is important to remember that the Supreme Court has said that all that is required is that Congress have a rational basis for believing that the regulated activity is economic activity that

## Obamacare Will Lose a Close Fight

**By Ilya Shapiro**

On March 23, 2010, President Obama signed into law the Patient Protection and Affordable Care Act ("Obamacare"), which is widely considered to be the most significant federal legislation since the enactment of Medicare and Medicaid in 1965.[1] That same day, Virginia and Florida filed lawsuits challenging the constitutionality of this law, with 12 states joining Florida's suit (eventually joined by 14 others, plus the National Federation of Independent Business and several individuals). Oklahoma later filed its own suit. Thus, we now have an incredible 28 states suing the federal government.

Contrary to many pundits' initial dismissal of these challenges as legally frivolous and political sour grapes—recall Nancy Pelosi's famous "are you serious?" response to a question about constitutional concerns—these were real lawsuits, with serious lawyers behind them. It was difficult to predict how courts would react, however, because the new law is unprecedented, both in its regulatory scope and its expansion of federal authority over states and individuals.

As the Congressional Budget Office said in 1994, "The government has never required people to buy any good or service as

[1] I use the term "Obamacare" because most people colloquially refer to it that way, in large part because it's much easier to say than "PPACA," "Affordable Care Act," or any other more technical term. While thought by some to be pejorative, I've never understood how that's the case. Even the leading academic supporters of the law's constitutionality, such as Yale law professors Akhil Amar and Jack Balkin, say "Obamacare." The one accurate criticism I've heard is that the law was mostly written by Congress, not the White House. But that just means it would be better to call it Pelosi-Reid-care, which is no more or less pejorative. In any event, that ship has sailed—though an even more realistic name for the law would be the Libertarian Legal Scholar Full Employment Act.

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has a substantial effect on interstate commerce. There are thus two questions in assessing whether the individual mandate is within the scope of the commerce power. First, could Congress reasonably believe that it was regulating economic activity? Second, if so, looked at in the aggregate, could Congress reasonably believe that there is a substantial effect on interstate commerce?

It is the former that opponents of the law, including judges who have struck it down, have focused on. They contend that people who do not wish to purchase health insurance are inactive and that Congress cannot regulate inactivity. They argue that it is unprecedented for Congress to require an economic transaction and that if Congress can require purchasing of health insurance, there is no stopping point in terms of what Congress can force people to buy.

The key flaw in this argument is its failure to recognize that literally everyone will at some point need to use the health care system. Children must be vaccinated to attend school. If a person contracts a communicable disease, the government can require that it be treated. If a person is in a car accident, the ambulance will take him or her to the nearest emergency room for treatment.

Therefore, everyone faces an economic choice: whether to purchase health insurance or whether to self-insure. Either is economic activity. Congress is regulating this economic choice by imposing a penalty on those who choose to self-insure in order to create a system where all can have access to the health care system. Opponents of the health care law say that if it is upheld, then the government can force people to buy an American car or to eat broccoli. But a person can opt not to drive or not to eat vegetables; no one realistically can opt out of health care.

The second question then becomes whether, taken cumulatively, the law has a substantial effect on interstate commerce. Health-related spending was $2.5 trillion in 2009, or 17.6 percent of the national economy. Health insurance is an $850 billion industry. In the last case to deal with the scope of Congress's commerce clause power, *Gonzales v. Raich* in 2005, the Court held that Congress constitutionally could criminally prohibit and punish cultivation and possession of a small amount of marijuana for personal medicinal use. If Congress has the

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power to prevent Angela Raich from growing a small amount of marijuana to offset the ill effects of chemotherapy, then surely it has the authority to regulate a two-trillion-dollar industry.

## Obamacare Will Lose a Close Fight (cont)

a condition of lawful residence in the United States." Nor has it ever said that everyone faces a civil penalty for declining to participate in the marketplace. Never have courts had to consider such a breathtaking assertion of raw power under the guise of regulating commerce—not even at the height of the New Deal, when the Supreme Court ratified Congress's regulation of wheat grown for home consumption on the awkward theory that such action, when aggregated nationally, affected interstate commerce. Even in that case, *Wickard v. Filburn*, the government claimed "merely" the power to regulate what farmers grew, not to *mandate* that people become farmers, much less to force people to buy wheat.

The state plaintiffs raised several other constitutional points, most notably that forcing states to expand Medicaid funding and bureaucracies was a coercive violation of federalism. In all, more than 30 lawsuits have been brought, triggering an intense legal and political debate about the first principles of our republic. Once the Virginia and multistate cases survived the government's motions to dismiss, Obamacare's supporters realized that they had a real fight on their hands; no respectable commentator any longer thinks that all this is frivolous. Indeed, of the district courts that have reached the constitutional claims, three struck down the individual mandate and three found it to be consistent with federal power. And on appeal four different courts have reached five different decisions.

The Supreme Court agreed to review the Eleventh Circuit ruling—which struck down the individual mandate, severed it from the rest of the law, and ruled for the government on the Medicaid-coercion issue—and set aside a historic *five-and-a-half hours* (now expanded to six hours) for argument. Here's my quick-and-dirty take, and prediction, on each issue before the Court:

### 1. Anti-Injunction Act

The AIA bars courts from enjoining "any tax" before that tax is assessed or collected. One would think that such a law would have no application to a fine levied for not buying health insurance. Accordingly, most of the courts to consider the issue have found the AIA to be inapplicable. Moreover, the government itself has long conceded that the AIA does not bar these suits. A Fourth Circuit majority and the dissenting Judge Brett Kavanaugh in the D.C. Circuit, however, reached a contrary conclusion, reasoning that the AIA applies to all exactions assessed under the Internal Revenue Code. But the words "any tax" in the AIA do not include "penalties" simply because they may be codified in the Code. The Supreme Court has always held that "taxes" and "penalties" are not interchangeable, and all of the relevant (lower court) cases concern penalties that have been statutorily defined as taxes or that enforced substantive tax provisions.

Prediction: The Court, probably unanimously, will find that the AIA does not bar suit.

### 2. Individual Mandate

Under modern doctrine, regulating intrastate *economic* activity

## The Health Care Law Will Be Upheld (cont)

Moreover, the Supreme Court has said that under the "necessary and proper clause" Congress can take any actions that are reasonably related to carrying out its authority. The individual mandate can be viewed as a means to regulating a significant part of commerce among the states. The Patient Protection and Affordable Care Act will provide health insurance for most of the 50 million individuals in the country who today are uninsured. The individual mandate is a crucial means to effectuating this.

**Since 1936, not one federal law has been declared unconstitutional as exceeding the scope of Congress's taxing and spending power and no spending program ever has been struck down because its conditions on the states are too onerous.**

A second major issue is whether the increased burden on the states for Medicaid funding violates the Tenth Amendment. This argument has been rejected by every court to consider it, and it is likely to do no better in the Supreme Court.

No state is required to participate in the federal Medicaid program. Any state that chooses to do so must meet many requirements in terms of coverage. The Affordable Care Act increases the burdens on the states but also provides additional resources. The key, though, is that any state can opt of Medicaid any time it chooses. Thus, no state is subjected to the type of coercion that the Supreme Court has found violates the Tenth Amendment.

The states argue, however, that there is great economic pressure on them to remain in the Medicaid program. But facing a hard choice is not the same as being coerced or commandeered, and it is only the latter that has been deemed to violate the Tenth Amendment. Since 1936, not one federal law has been declared unconstitutional as exceeding the scope of Congress's taxing and spending power, and no spending program ever has been struck down because its conditions on the states are too onerous.

Why then so much uncertainty surrounding what the Supreme Court will do? The reactions to the Affordable Care Act have been almost entirely defined by partisanship. Every Republican in Congress voted against it. With two exceptions, every federal judge appointed by a Republican president has voted to strike down the law, and with one exception, every federal judge appointed by a Democratic president has voted to uphold it.

But shouldn't we expect more of Supreme Court justices than this? I think the Court will uphold the law and do so in a 6-3 or 7-2 ruling. The Court will emphasize that it is not ruling on the wisdom of the law; that is for the political process to decide. The justices will emphasize that the health care crisis requires a national solution and the Affordable Care Act is a constitutional effort to do just this.

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can be a "necessary" means of carrying out Congress's regulatory authority if, in the aggregate, it has a substantial effect on interstate commerce. But regulating *noneconomic* activity cannot be "necessary," regardless of its economic effects. And a power to regulate *inactivity*—to compel activity—is even more remote from Congress's commerce power.

The government characterizes not being insured as the activity of making an "economic decision" of how to finance health care services, but the notion that probable future participation in the marketplace constitutes economic activity now pushes far beyond existing precedent. Further, that definition of "activity" leaves people with no way of avoiding federal regulation; at any moment, we are all not engaged in an infinite set of activities. Retaining the categorical distinction between economic and noneconomic activity limits Congress to regulating intrastate activities closely connected to interstate commerce—thus preserving the proper role of states and preventing Congress from using the Commerce Clause as a federal police power. The categorical distinction also provides a judicially administrable standard that obviates fact-based inquiries into the purported economic effects and the relative necessity of any one regulation, an exercise for which courts are ill-suited.

**Upholding the mandate would fundamentally alter the relationship of the federal government to the states and the people; nobody would ever again be able to claim plausibly that the Constitution limits federal power.**

Finally, the mandate violates the "proper" prong of the Necessary and Proper Clause in that it unconstitutionally commandeers the people—and in doing so, circumvents the Constitution's preference for political accountability. The Constitution permits Congress to intrude on state and popular sovereignty only in certain limited circumstances: when doing so is textually based or when it relates to the duties of citizenship. For example, Congress may require people to respond to the census or serve on juries. In forcing people to engage in transactions with private companies, the mandate allows Congress and the president to evade being held accountable for what would otherwise be a tax increase.

Upholding the mandate would fundamentally alter the relationship of the federal government to the states and the people; nobody would ever again be able to claim plausibly that the Constitution limits federal power.

Prediction: The Court will strike the mandate in a 5-4 vote hinging on Justice Kennedy.

### 3. Severability

On one hand, the Court should avoid striking down an entire law when only one small part is declared unconstitutional.

On the other, the Court cannot go provision-by-provision and execute some sort of judicial line-item veto. The analysis boils down to two questions: (1) Can the remainder "fully operate as law"? and (2) Would Congress have passed the remainder? The plaintiffs make a compelling case that Congress wouldn't have passed anything without the fundamental transformation of the national health care system that is predicated on the individual mandate. At the very least, Titles I and II—which contain all the key provisions relating to individual care—are inextricably tied to the mandate. Even the government concedes that the requirements that insurers cover people with preexisting conditions and that premiums be assessed by a "community rating" formula are inextricably tied to the mandate. Without an individual mandate, guaranteed-issue and community-rating provisions foster a "death spiral" because healthy people wait until they get sick or injured before buying underpriced insurance that they cannot then be refused, causing premiums to increase and costs to explode. In any case, there are many rings to this hell and many ways that the Court could go; the only indefensible position is the one the court below took, wholly severing the mandate.

Prediction: The Court will rule 5-4 (with Chief Justice Roberts as the limiting vote) that something more than the "core three" provisions but less than the whole law will fall.

### 4. Medicaid Coercion

States must accept a comprehensive reorganization of Medicaid or forfeit all federal Medicaid funding. But if Congress is allowed to attach conditions to spending that states cannot refuse in order to achieve an objective it could not outright mandate, the local/national distinction that is so central to federalism will be erased. *South Dakota v. Dole* prohibits such a coercive use of the spending power and recognizes that "in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" Indeed, the states' obligations, should they "choose" to accept federal funding and thus commit themselves to doing the government's bidding, are far more substantial than those the Supreme Court invalidated in *New York v. United States* and *Printz v. United States* (which prohibit federal "commandeering" of state officials). Moreover, the Congress that enacted the original Social Security Act, to which Medicare and Medicaid were added in the 1960s, recognized that social safety has always been the prerogative of the states and should continue to be done under state discretion. Medicaid itself was narrowly tailored to serve particularly needy groups. In short, if "Obamacaid" does not cross the line from valid "inducement" to unconstitutional "coercion," nothing ever will.

Prediction: This issue is the hardest to predict because the precedent is so scant, and I can see anything from a 5-4 pro-states ruling to 8-1 pro-government. I'll split the difference and say 6-3 pro-government, with extensive articulation of a new test for spending-power coercion.

**Ilya Shapiro** is a senior fellow in constitutional studies at the Cato Institute and Cato Supreme Court Review. He has filed ten amicus briefs in the ACA litigation, including four in the Supreme Court (one on each of the designated issues).