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Edited by Trevor Burrus

A CONSPIRACY AGAINST OBAMACARE

The Volokh Conspiracy and the Health Care Case

Foreword by Paul D. Clement

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Contents

Some posts in this volume have been slightly altered from their original form in order to avoid redundancy, increase clarity, and address issues with hyperlinks. Most of the original hyperlinks have been turned into endnotes.

Foreword

Paul D. Clement

The challenge to the Affordable Care Act (ACA) was a constitutional case like no other. That was true in many respects, but for purposes of this remarkable volume, four are particularly relevant.

First, the arc of the health care case that took it to the Supreme Court was quite unusual. Many great constitutional disputes involving congressional statutes present themselves as such from the very beginning. Take, for example, the constitutional challenge to the McCain-Feingold campaign finance statute, which culminated in the Supreme Court's decision in *McConnell v. FEC*.[1] In that case, the congressional debates were constitutional debates about the meaning, scope, and contemporary relevance of the First Amendment. First Amendment objections—and related policy and political arguments framed in First Amendment terms—had prevented earlier campaign finance proposals from becoming law. And when McCain-Feingold finally passed, First Amendment arguments before Congress transitioned almost seamlessly into First Amendment litigation before the courts. Indeed, the statute itself recognized the reality of imminent First Amendment litigation by including a provision for expedited Supreme Court review. Perhaps as a result, the First Amendment litigation over McCain-Feingold was taken very seriously from the outset.

Not so when it came to the constitutional challenge to the Affordable Care Act. The trajectory of the health care cases was entirely different. While the health care legislation was actively debated in Congress, it was a political and policy debate, not a constitutional one. Legislators hotly contested the wisdom of the individual mandate, but constitutional concerns about the mandate were not raised until the very end of deliberations and were neither central to the debate nor taken particularly seriously.

Thus, when a number of challengers—most prominently a number of states with Republican attorneys general—filed suit and attacked the law as unconstitutional, the challenges were near universally dismissed as frivolous. The suits were seen more as a continuation of the policy debate and derided as political stunts with little realistic prospects of success. Two things changed that: the decisions of two federal district courts and the contributions collected in this volume.

The official game changers were the decisions issued in rapid succession by Judges Henry Hudson of Virginia and Roger Vinson of Florida. Judge Hudson first issued an opinion striking down the individual mandate as unconstitutional.[2] Then in relatively short order, Judge Vinson did Judge Hudson one better and

struck down the health care law in its entirety.[3] Once these Article III judges accepted the arguments against the health care statute, and in one case invalidated it in toto, the challenges could no longer simply be dismissed as frivolous.

But there was an important caveat. While Judges Hudson and Vinson had embraced constitutional challenges to the law, other district court judges rejected similar challenges.[4] And commentators could not help but notice that the judges striking down the statute as unconstitutional were appointed by Republican presidents, while those upholding the law were appointed by Democratic presidents. This disparity received considerable media attention and fueled the perception that the constitutional challenge against the Affordable Care Act was more a matter of politics than a serious constitutional theory.

Enter the *Volokh Conspiracy* (VC). Founded by my friend Eugene Volokh, who clerked for Justice Sandra Day O'Connor the same year I clerked for Justice Antonin Scalia, the *Volokh Conspiracy* had long (at least in Internet terms) been a clearinghouse for serious constitutional analysis of contemporary issues with a particular focus on libertarian and conservative views. But if ever a legal blog and a constitutional moment were meant for each other, it was the *Volokh Conspiracy* and the challenge to the Affordable Care Act. Precisely because the constitutional challenge to the law came in like a lamb and not a lion and precisely because many were eager to dismiss the challenge as a political device rather than the manifestation of a serious constitutional theory, there was a need for pointed constitutional analysis and for voices ready to counter the cacophony of skepticism. And this need arose over and again.

Thus, the second distinguishing aspect of the health care case was the intensity and duration of the media focus. Unlike some of the contributors to the *Volokh Conspiracy*, I was not present at the creation of the case. I did not become involved until Judge Vinson's decision reached the court of appeals. By then, the challenge had grown to include over half the states in the Union. In the interview with members of the steering committee, I mentioned that I had experience with earlier high-profile cases involving everything from campaign finance to the war on terror to issues of race. Little did I know that the coverage of the health care case would eclipse all those other high-profile matters.

In many ways, the health care case was the perfect storm for media coverage. The impact on the economy in general and the health care sector in particular were undeniable. As a consequence, the press corps covering medicine, health care, and business issues were fully engaged in the case. In addition, for the talented corps of reporters who cover the Supreme Court, the health care case was a temporary reversal of fortune. In most outlets, Supreme Court reporters generally seem to have to fight for a few column inches to cover momentous cases. With the health care case, by contrast, editors seemed to have an almost insatiable appetite for stories exploring any angle. And, finally, there were the political reporters fascinated by the dynamic of the president's signature legislative accomplishment being evaluated by the Supreme Court in the midst of a reelection campaign.

This continual attention on the case from a still mostly skeptical media corps created an unprecedented need for continuing constitutional commentary. In most cases, the constitutional debate is confined to the briefs and perhaps a few

blog entries. And generally speaking, even a substantial constitutional case engenders coverage at the time of argument and the time of decision, and that is it. But with the health care case, every decision by multiple courts as the issue made its way to the Supreme Court, and every filing in the Supreme Court, engendered substantial commentary, criticism, and rebuttal. And the most penetrating of that continuing commentary is collected in this volume.

Third and relatedly, the health care case captured the public imagination like no other case in recent memory. Whether because of the saturation coverage, the political dynamic, the practical impact, or something else, many people who had never paid significant attention to a constitutional case were riveted by this one. As a result, the stakes could not have been higher. The case went beyond the precise issues before the Court to implicate the general public's confidence in the legal system as a whole.

Thus, the attention placed on the party of the president appointing the district court judges deciding the health care cases created the real prospect of the public viewing constitutional adjudication as nothing more than politics by other means. The seriousness and timeliness of the constitutional analysis collected here helped provide an antidote to that, as did the courts of appeals, where the results necessitated a more nuanced narrative. A number of prominent appellate court judges appointed by Republican presidents, such as Laurence Silberman of the D.C. Circuit and Jeffrey Sutton of the Sixth Circuit, voted to uphold the statute. But at roughly the same time, Judge Frank Hull, an appointee of President Clinton, was one of two Eleventh Circuit judges to strike down the law in the challenge brought by Florida and a growing number of states. The *Volokh Conspiracy* was there to discuss all of these developments in virtually real time and to emphasize that this more complicated pattern of judicial decisions both underscored the seriousness of the challenge and demanded a more nuanced discussion of the relationship between judicial philosophy and the political party of an appointing president.

Finally, the constitutional stakes in the health care case were and remain critically important. Much of the focus in the immediate aftermath of the decision understandably emphasized the chief justice's analysis of the taxing power and the practical reality that, although there were four votes to do so, the Court's majority did not invalidate the law in toto. But that should not obscure the reality that there are five votes to invalidate the mandate as exceeding Congress's power under the Commerce and Necessary and Proper Clauses, and a remarkable seven votes holding that the Medicaid expansion exceeded Congress's spending power.

When the case began, there were confident predictions that there would be seven or eight votes against the Commerce Clause challenge. Even on the eve of argument, seasoned commentators were still insisting that the constitutional challenge was frivolous. And these predictions were not merely wishful thinking. It was far from obvious that the new appointees of President George W. Bush would have the same enthusiasm for federalism as the justices they replaced. While former Chief Justice William Rehnquist and especially Justice O'Connor cut their teeth in the state courts and in state politics, both Chief Justice John Roberts and Justice Samuel Alito had their formative experiences in the executive branch of the federal government. There was a palpable sense in some circles that the health care case

could be the swan song for the federalism revival—marking the end of one of the signal doctrinal achievements of the Rehnquist Court.

Thus, the Court's decision was an important constitutional moment because it underscored the Court's continued willingness to pursue its ongoing project of identifying judicially enforceable limits on Congress's power. The comments collected in this volume are critically important to understanding that constitutional moment—in terms of both why it happened and what it means. The Constitution had its Federalist Papers, and the challenge to the Affordable Care Act had the *Volokh Conspiracy*.

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Notes

1. McConnell v. FEC, 540 U.S. 93 (2003).
2. Virginia v. Sebelius, 728 F. Supp. 2d 768 (E.D. Va. 2010).
3. Florida v. U.S. Dep't. of Health & Human Servs., 780 F. Supp. 2d 1256 (N.D. Fla. 2011).
4. See, e.g., Liberty Univ. v. Geithner, 753 F. Supp. 2d 611 (W.D. Va. 2010); Thomas More Law Ctr. v. Obama, 720 F. Supp. 2d 882 (E.D. Mich. 2010).

Acknowledgments

The contributors to this volume give special thanks to Eugene Volokh, creator of the *Volokh Conspiracy*, for inviting them to join that special community. We'd also like to thank the readers and commenters at the *Volokh Conspiracy*, without whom we would have little incentive to keep blogging.

Additionally, we'd like to thank Paul Clement for both contributing to this volume and for masterfully bringing the case to the Supreme Court. Paul and his team, as well as Mike Carvin and those at Jones Day, could not have done a better job in bringing *NFIB v. Sebelius* to the Court.

We'd also like to thank Brian O'Connor and Scarlet Neath at Palgrave Macmillan for believing in this project and effectively seeing it through.

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Trevor Burrus thanks Matt Gilliam for help gathering material, and Ilya Shapiro and Roger Pilon for giving him time to work on the project. Additional thanks go to Roger for offering him a job at the Cato Institute right as the Obamacare litigation was gaining momentum.

Introduction

The constitutional challenge to the Affordable Care Act (a.k.a. Obamacare; ACA) was the biggest Supreme Court case in decades. In the beginning, however, it was just the "little case that could," chugging along to get up a steep legal hill. Legal academics derided the challenge as hopeless. Pundits called it political posturing. At the *Volokh Conspiracy*, however, a group of legal academics were taking the case very seriously.

As you will see in the pages that follow, the bloggers at the *Volokh Conspiracy* helped popularize and refine the arguments behind the challenge. More important, they also influenced the arguments submitted to the courts—and eventually the Supreme Court. Never before had a legal academic *blog* influenced historic Supreme Court litigation.

For over a century, law reviews have been at the center of legal scholarship. During the early to mid-twentieth century, law professors were more likely to publish articles that helped practitioners, perhaps by clarifying difficult issues, explaining how new laws could be advantageously used, or advocating for coherently restructuring laws. The American Law Institute focused on clarifying the common law through the restatements and proposals such as the Model Penal Code. Treatises were written to help practitioners understand complex legal subjects. While these works were certainly not free of ideology, assisting the bar was still seen as one of law professors' paramount duties. Professor John H. Langbein wrote that American legal education in the 1960s "was distinctively practical and rigorous, reflecting its orientation on training and writing for the needs of practicing lawyers and judges."[1] Now, writes Langbein, "This vision of the mission of the national law school has largely vanished."[2] Or, in the words of Chief Justice John Roberts (a man who will play a prominent role in the narrative that follows), "Pick up a copy of any law review that you see, and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in 18th Century Bulgaria, or something, which I'm sure was of great interest to the academic that wrote it, but isn't of much help to the bar."[3]

The new medium of blogging, because of its current-events focus and ability to dynamically respond to events as they happen, can be more relevant to current legal issues than law review articles. The *Volokh Conspiracy* contributors' discussions on Obamacare were the bellwether for an emerging trend in legal scholarship.

This book collects those discussions over the course of the Obamacare saga, both before the law was passed and through the Supreme Court's fateful verdict. Its narrative arc plays out in real time as arguments get refined, modified, and discarded.

* * *

After months of intense debate, President Barack Obama signed the Affordable Care Act into law on March 23, 2010, radically transforming American health care for the worse.

Some argue that the inefficiencies of America's pre-ACA system demonstrated that free-market mechanisms do not work for health care. This is an odd thing to say about a system that essentially lacked two of the most important qualities of a market: meaningful prices and fluid consumer choice. Call your doctor and ask for the price of a basic procedure. At best, you'll wait a few hours, if not days, and then only get a vague and probably inaccurate answer. More likely, however, is that the receptionist will ask if you're serious. The predominance of the insurance model of health care, as well as the growth of Medicare and Medicaid, helped create a literally "priceless" system.[4]

The ACA took the dysfunctional parts of our former system—particularly the persistent, incorrect, and damaging belief that health insurance is the same as health care—and made them worse. The act tries to create the functional equivalent of a single-payer system—mandatory coverage for the sick at no extra cost to them with the extra funding coming from healthier citizens—and wrap it in the patina of a market. By using the trappings of a market, lawmakers got many bonuses. Not only were they able to sidestep the criticism of a "government takeover of health care," but they were able to hide the true cost of the ACA, an enormous political win.

The ACA rests on three pillars: (1) "community rating" price controls that force insurers to sell coverage to those with preexisting medical conditions at the same premiums they charge healthy people of the same age, (2) an "individual mandate" requiring essentially everyone purchase a qualifying health insurance plan, and (3) subsidies to keep people of modest means from walking away from the overpriced insurance the individual mandate forces them to buy. The second and third pillars are necessary to prop up the market under the weight of the first. Many people outside of the insurance market are younger, healthier, and do not consume much health care. To offset the cost increases from the first pillar, the individual mandate forces healthy people to buy coverage at much higher premiums than they would pay in a competitive market. By mandating that individuals make those payments to private insurance companies, and again by subsidizing insurers directly, Congress hoped to get insurers the needed funds to cover people with preexisting conditions.

The law's passage brought immediate lawsuits. Two cases were the most prominent. One was spearheaded by Virginia's Attorney General Ken Cuccinelli II. The other was led by the National Federation of Independent Business (NFIB); Pam Bondi, the attorney general of Florida; and 25 other states. The Florida/NFIB case eventually reached the Supreme Court.

The legal challenges mostly focused on the individual mandate, particularly whether Congress has the power, pursuant to the Commerce Clause and the Necessary and Proper Clause, to compel people to enter into commerce. A few academics argued that the taxing power justified the mandate, but that was a sideshow

to the commerce power argument. This, of course, would come back to haunt the challengers when Chief Justice John Roberts unexpectedly upheld the mandate's penalty as a "tax." The provision that induced states to drastically expand their Medicaid programs or risk losing federal funding for all Medicaid programs was also challenged.

Volokh Conspiracy bloggers were involved in the challenge to the Affordable Care Act from the beginning. Before he joined the NFIB's legal team, Randy Barnett joined the Cato Institute on amicus briefs filed in lower federal courts. Ilya Somin authored briefs on behalf of the Washington Legal Foundation, as did David B. Kopel on behalf of the Independence Institute. Very few people engaged with the challenge to the Affordable Care Act more than the bloggers featured in this book.

* * *

For many of the public, and for most legal academics, the case against the individual mandate seemed too clever by half. The arguments often focused on subtle distinctions and minute differences in wording in order to distinguish the individual mandate from the broad scope of Congress's commerce power.

But the case against the mandate was always more clear to me than those nuanced discussions. Effective lawyering requires careful language and subtle distinctions, but only because lawyers must play the hand the Court dealt us.

For me, the argument was, and is, simple: A pure "effects-based" theory of the commerce power has no limits. Congress's power must be limited by kind, not degree.

The Court accepted that argument in *United States v. Lopez*[5] and *United States v. Morrison*.[6] In those landmark cases, Chief Justice William Rehnquist decided that enough was enough. Since the New Deal, the government had won every challenge to the scope of Congress's commerce power, mostly with the argument that "everything affects everything else." Such limitless expansion of federal power had to stop. Chief Justice Rehnquist believed that if a limited national government is more than a forgotten lesson from civics class, that if the federal government is to be actually rather than theoretically limited, then the commerce power must not be a blank check based on Rube Goldberg–like connections to commerce. Thus, he ruled that having a gun in a school zone (*Lopez*) or committing violence against women (*Morrison*) were not the kind of quintessentially economic activities that fall under scope of the Commerce Clause and the Necessary and Proper Clause, regardless of their effects on interstate commerce. With the individual mandate, the government believed they could avoid running afoul of *Lopez* and *Morrison* by arguing that decisions not to purchase a product were economic in a way guns in school zones and violence against women are not.

But all purchases and nonpurchases, as well as all actions and nonactions, obviously affect commerce, and this would have been obvious to any Framer. If you walked into the Pennsylvania State House during the convention (or, better yet, joined the equally important after-hours discussions at the Indian Queen Tavern or at Benjamin Franklin's house), and argued that the inchoate Commerce Clause

could lead to "everything-affects-everything-else" reasoning, the Framers would've looked at you quizzically. Someone, perhaps Edmund Randolph, would've said, "Yeah, it *could* allow that, but who would make such a spurious argument, and why would the states ever accept such tenuous reasoning? They would revolt at such a usurpation, and rightly so. 'Commerce' is a *type of thing* we're giving Congress the power to regulate, not a zone of effects. If that were the nature of Congress's commerce power, why would we spend time listing any other powers?"

Some may chastise me for invoking the illegitimate specter of "Framer's intent," which was rightfully discarded from the most prominent theory of originalism decades ago. Yet I do not need to peer into the heads of the Framers to make my central point: Whatever "commerce" means, and whatever interpretive method you use to fill in that meaning, it must be a "type of thing" rather than a zone of effects. If "commerce" is merely a zone of effects without de minimis exceptions, then the Constitution ultimately fails in one of its central purposes: to ensure that the federal government does not have limitless power. Granting Congress limitless power violates any legitimate theory of constitutional interpretation.

Perhaps, to make my point clearer, it would be helpful to put the Constitution and the Framers' discussions into a modern context. The Founding Generation seems remote, and our post–Civil War, post–New Deal nation looks very different from the early United States.

Let's look at the European Union. The EU was mostly created to facilitate an economic union—that is, a free trade zone between the member states. The core powers of the EU are related to facilitating the free flow of people, goods, services, and capital across sovereign boundaries. Questions about manufacturing regulation, local agriculture, and other internal economic practices are largely left to the sovereign members under the correct theory that Germany, France, and the others are better situated, fully capable, and authorized to take care of local issues within their borders. If Brussels took jurisdiction over those local concerns, the member states would be rightly upset.

But what is truly "local?" The Netherlands's lax drug laws certainly affect the other nations, particularly those sharing its borders. Germany's labor laws and manufacturing regulations affect interstate commerce. France's limits on weekly working hours affect the economic intercourse with other nations.

The Netherlands, Germany, and France cannot dispute those effects. Instead, they must rely on the principle that drug laws, labor laws, and manufacturing regulations are not the type of thing the EU has power over. That will be the only useful argument if and when the centralizing forces in Brussels start to view local laws as impediments to their well-crafted schemes.

When that time comes to Europe, and in some subjects it already has, the issues will be the same as they were, and are, in America. Defenders of the sovereign powers of the member states will say that "manufacturing" is a type of thing that is not commerce, despite its obvious effects on commerce. Advocates of centralization will say that the distinction is arbitrary and that an "effects test" is necessary for Brussels to accomplish its goals. When they look to America for guidance, the defenders of limited government must say, "Don't give in. Give them an inch, they'll take a mile."

For us, the individual mandate was the last mile in a marathon we've been running since the New Deal.

Although I'm not here to remind you of lessons from high school civics, it might be worthwhile to keep these abstract concepts in mind as you read the pages that follow. The discussions between contributors to this volume may seem esoteric, but at the core they are talking about drawing lines—even if they're arguably arbitrary lines that only partially map onto our interconnected world. The Supreme Court once asked whether there is a meaningful line between "manufacturing" and "commerce" and decided that there wasn't. With the Affordable Care Act, we looked for a meaningful line between "action" and "inaction." Sure, these distinctions are nuanced, but should the lack of easily discernible lines make us throw up our hands and abandon our federal system altogether?

Even national borders are powerless against a pure, effects-based jurisdictional test. Yet if the United Nations began asserting jurisdiction over U.S. manufacturing laws based on the theory that the effects of our laws are not contained within our borders, we would boldly and confidently assert that our laws are none of their business. Our manufacturing laws certainly have extraterritorial effects, but they are not the type of thing the UN has power over.

Obviously the UN is a poor analog to our integrated federal system. Yet many of the reasons we don't want the UN running our health care also apply to reposing those personal choices in Washington, D.C.

Nevertheless, some regard these attitudes as philistine. For many, the course of human progress requires centralization, and those who stand in the way of Congress's attempts to solve problems of a national scale are reactionaries holding on to unenlightened theories no longer relevant to modern nations.

To this I say that it is hardly enlightened to require every group with deep convictions about health care—from Catholics to Jehovah's Witnesses to those who simply don't believe in Western medicine—to create lobbying organizations in Washington so they can defend their convictions in a tribal, yet dapper, Hobbesian war over what our "national health care plan" looks like.

Because of the synergistic effects of constitutional interpretation, the only way to resist such centralizing force is to stand against an illegitimate proposal *even if you think it is a good idea*. If you believe that the Constitution authorizes all good ideas, then you do not really believe in the Constitution—you just believe in good ideas.

With the legalization of marijuana in Colorado and Washington and the legal quagmires that have emerged due to the quirky fact that marijuana is simultaneously legal and illegal in those states, perhaps some champions of centralization are realizing the costs of an expansive federal government. The untenable situation in Washington and Colorado is a good indicator that the federal government has overstepped its constitutional boundaries. After all, whereas Congress once believed it lacked the power to prohibit alcohol without a constitutional amendment, they now prohibit drugs by statute. They do this based on the same Supreme Court cases—for example *Wickard v. Filburn*,[7] *NLRB v. Jones & Laughlin Steel Corp.*,[8] *United States v. Darby*[9]—that were the basis for the argument that Congress can force inactive people to purchase health insurance.

Much of this kvetching about ships that have long sailed and discussions of rudimentary constitutional analysis may seem simplistic and mostly irrelevant. Yet the purpose, structure, and principles of our Constitution have been forgotten by many. Most disturbingly, many people have forgotten the most important rule about power: every time you consider granting a new power to government you must first imagine that power in the hands of your most feared political opponents.

Due to the chief justice's unpredictable opinion, we are now likely stuck with a law that I fear will seriously damage the health of Americans. What's more, attempts to further centralize power will not stop at the individual mandate. When the law fails, as I predict it will, it will be said that the federal government lacked enough power to make it work. The chief justice's opinion gives people a real choice whether to comply with the requirement to purchase insurance or pay a "tax." Many people will not, and as the price of insurance goes up, more and more people will choose to remain uninsured. This will certainly be called a "loophole." Similarly, the Court also gave states a choice about whether to comply with the Affordable Care Act's Medicaid expansion. Another "loophole." Finally, the states that don't create health care exchanges will also throw wrenches in the law's overall scheme. "Loopholes" all around. Having freedom of choice in deeply personal health care decisions, however, is not a loophole.

When the time comes to revisit the Affordable Care Act, those choices by free, sovereign entities (citizens and states) will be blamed for the law's dysfunctions. To paraphrase philosopher Robert Nozick, liberty disrupts patterns. Free choice inevitably upsets the carefully crafted plans of Washington.

As a solution to the law's problems, more power will be proposed. A few voices, such as many who write for the *Volokh Conspiracy* and those of us at the Cato Institute, will strenuously argue that the problem is not a lack of power but a lack of freedom. I am not optimistic, however, that very many entrenched bureaucrats and politicians will locate the problem in the mirror rather than in the freedoms of the American people.

* * *

I am deeply grateful that Randy, Ilya, Dave K., Dave B., Orin, and Jonathan asked me to be a part of this exciting project. The conversations recorded here are truly historic, and I hope that this volume will be a valuable and novel contribution to Supreme Court history.

Trevor Burrus
Research Fellow
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Notes

1. John H. Langbein, "Scholarly and Professional Objectives in Legal Education: American Trends and English Comparisons," in *Pressing Problems in the Law, Volume 2: What Are Law Schools For?*, ed. Peter Birks (New York: Oxford University Press, 1996), 3.

2. *Id.* at 5.
3. "Annual Fourth Circuit Court of Appeals Conference," CSPAN, http://www.c-span.org/Events/Annual-Fourth-Circuit-Court-of-Appeals-Conference/10737422476–1.
4. For more on this theory, see John C. Goodman, *Priceless: Curing the Health Care Crisis* (Oakland, CA: Independent Institute, 2012), and David Goldhilll, *Catastrophic Care: How American Health Care Killed My Father—and How We Can Fix It* (New York: Knopf, 2013).
5. United States v. Lopez, 514 U.S. 549 (1995).
6. United States v. Morrison, 529 U.S. 598 (2000).
7. Wickard v. Filburn, 317 U.S. 111 (1942).
8. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).
9. United States v. Darby Lumber Co., 312 U.S. 100 (1941).

1

In the Beginning

From the moment he took office, President Barack Obama saw health care reform as one of his administration's top priorities. In February 2009, President Obama announced to a joint session of Congress that discussions on reforming American health care would move forward as a priority. Meetings were held with industry leaders, lobbyists, and influential senators and members of Congress over the next many months.

The discussions in this chapter occurred prior to the signing of the final version of the Affordable Care Act (ACA). As Congress, pundits, and average Americans debated health care reform, so too did the *Volokh Conspiracy* (VC) bloggers.

On November 7, 2009, the House of Representatives passed the "Affordable Health Care for America Act" by a 220–215 vote, with 39 Democrat votes against and 1 Republican vote in favor.

In the Senate, the road was more difficult. Senate Republicans vowed to filibuster, so any bill needed a filibuster-proof 60 votes. Having only 58 votes at the time (before Senator Al Franken (D-MN) won his recount and before Arlen Spector switched parties), Senate Democrats had to appease their more centrist colleagues. The Democrats were further stymied when, in late August, before the bill could come up for a vote, Senator Ted Kennedy (D-MA) succumbed to brain cancer.

Senate Democrats focused on getting the votes of their moderate colleagues, particularly Connecticut's Joe Lieberman and Nebraska's Ben Nelson. Lieberman would not support any bill that had a "public option"—that is, a government-run insurance program that competes with private insurers. In exchange for Lieberman agreeing to support the bill, Senate Majority Leader Harry Reid permanently shelved the public option provision, much to the anger of many Democrats and liberal pundits.

That left Nelson. During late-night negotiations, Reid approved several of Nelson's "concerns," the most famous being higher federal Medicaid payments to Nebraska, which would become known as the "Cornhusker Kickback." Whatever name people wanted to call it, Reid got Nelson's vote.

Early in the morning on December 24, 2009, Reid called the vote and the bill passed 60–39. All Democrats and two independents voted for; all Republicans voted against, with one abstention (Jim Bunning of Kentucky).

In January 2010, Republican Scott Brown was surprisingly elected to Ted Kennedy's seat. Senate Democrats had lost their filibuster-proof voting bloc, but they

still had the bill that was passed on Christmas Eve. It became clear that the most viable method to pass health care reform was for the House to abandon the "Affordable Health Care for America Act" and try to pass the Senate bill. Although House Majority Leader Nancy Pelosi got resistance from pro-life Democrats, on March 21, 2010, the House passed the Senate bill 219–212 despite opposition from all 178 Republicans and 34 Democrats. On March 23, 2010, President Obama signed the Patient Protection and Affordable Care Act.

The act is long and complex and, as is par for the course in modern legislation, contains many extraneous provisions. The core of the act, however, tries to expand quality health care to millions of Americans.

Insurance companies must now have a policy of "guaranteed issue," meaning that all who want health insurance can get it regardless of preexisting medical conditions. And insurance cannot be more expensive for someone because he or she has cancer, a chronic condition, or some other expensive malady. Under the "community rating" provision insurers can only vary the price based on a few limited criteria, for example age, geographic location, and tobacco use.

To support the increased costs that will come from the guaranteed issue and community rating provisions, the law includes a constellation of subsidies, mandates, and tax credits. The most important one is the "individual mandate," which requires essentially all Americans to purchase and maintain a qualifying health insurance plan. The mandate is backed up by a fine that is enforced by the IRS. That fact will ultimately be crucial to the outcome of this saga.

The individual mandate is a central character in this book, arguably the star. Although other aspects of the law were challenged, are being challenged, and will continue to be challenged, no challenged provision caught the public's attention like the individual mandate. Not only is it easy to understand and directly relevant to every American's life—"You mean I have to buy insurance even if I don't want it?"—but it also gnaws at the limited government sensibilities that are a constant part of American political culture.

As our story begins, the individual mandate takes center stage.

* * *

Is Obamacare Constitutional?

David B. Kopel
August 17, 2009

Independence Institute Senior Fellow (and University of Montana constitutional law professor) Rob Natelson suggests not.[1]

Natelson puts aside the question of whether it is constitutional under originalism (for which the answer is "obviously not"), and instead points to four problems under modern constitutional doctrine:

1. It is not based on any enumerated power of Congress, not even on a very expansive reading of the power to regulate interstate commerce.

2. It relies on excessive delegation of the type held unconstitutional in *Schechter Poultry Corp. v. United States*.[2]
3. It violates substantive due process and interferes with doctor-patient medical decisions to a vastly greater extent than did the laws declared unconstitutional in *Roe v. Wade*.[3]
4. It violates the Tenth Amendment by commandeering state governments.

There are a couple caveats: It's a blog post, not a law review article, so it just sketches out the previous points briefly. It's obviously written in the spirit of starting a public ~~dialogue~~ conversation. In the spirit of constructive dialogue, we promise not to say that we "don't want the folks who created the mess to do a lot of talking." (By "created the mess," I mean the people who created the legislation with little apparent consideration for constitutionality and who appear to have operated from the presumption that Congress can exercise powers that are not enumerated.)

Is Obamacare Unconstitutional?

Jonathan H. Adler
August 22, 2009

David Rivkin and Lee Casey argue that a federal mandate requiring all individuals to obtain health insurance would lie beyond the scope of Congress's enumerated powers.[4] Specifically, they argue that neither the power to "regulate commerce among the several states" nor the taxing and spending power could support such an all-encompassing mandate. Here is a taste of their argument:

> Although the Supreme Court has interpreted Congress's commerce power expansively, this type of mandate would not pass muster even under the most aggressive commerce clause cases. In *Wickard v. Filburn* (1942), the Court upheld a federal law regulating the national wheat markets. The law was drawn so broadly that wheat grown for consumption on individual farms also was regulated. Even though this rule reached purely local (rather than interstate) activity, the Court reasoned that the consumption of homegrown wheat by individual farms would, in the aggregate, have a substantial economic effect on interstate commerce, and so was within Congress's reach.
>
> The Court reaffirmed this rationale in 2005 in *Gonzales v. Raich*, when it validated Congress's authority to regulate the home cultivation of marijuana for personal use. In doing so, however, the justices emphasized that—as in the wheat case—"the activities regulated by the [Controlled Substances Act] are quintessentially economic." That simply would not be true with regard to an individual health insurance mandate.
>
> The otherwise uninsured would be required to buy coverage, not because they were even tangentially engaged in the "production, distribution or consumption of commodities," but for no other reason than that people without health insurance exist. The federal government does not have the power to regulate Americans simply because they are there. Significantly, in two key cases, *United States v. Lopez* (1995)

> and *United States v. Morrison* (2000), the Supreme Court specifically rejected the proposition that the Commerce Clause allowed Congress to regulate noneconomic activities merely because, through a chain of causal effects, they might have an economic impact. These decisions reflect judicial recognition that the Commerce Clause is not infinitely elastic and that, by enumerating its powers, the framers denied Congress the type of general police power that is freely exercised by the states.

As much as I oppose the various health care reforms promoted by the Obama administration and current congressional leadership (and as much as I would like to see a more restrictive Commerce Clause jurisprudence), I do not find this argument particularly convincing. While I agree that the recent Commerce Clause cases hold that Congress may not regulate noneconomic activity, as such, they also state that Congress may reach otherwise unregulated conduct as part of an overarching regulatory scheme, where the regulation of such conduct is necessary and proper to the success of such scheme. In this case, the overall scheme would involve the regulation of "commerce" as the Supreme Court has defined it for several decades, as it would involve the regulation of health care markets. And the success of such a regulatory scheme would depend upon requiring all to participate. (Among other things, if health care reform requires insurers to issue insurance to all comers and prohibits refusals for preexisting conditions, then a mandate is necessary to prevent opportunistic behavior by individuals who simply wait to purchase insurance until they get sick.)

Jack Balkin is similarly unconvinced.[5] I generally agree with his bottom line but would question some of his argument as well. First, he chides Rivkin and Casey for making an argument that would effectively invalidate the New Deal. I am not sure this is true. While some post-1937 programs might be at risk, one might also distinguish *Wickard* on the grounds that it involved a commodity sold in interstate commerce (wheat), whereas health insurance is a service. One might also argue that there is a difference between seeking to control the conditions of any commodity sale (its price, quantity, etc.) and mandating that a sale take place. This line would be similar to that embraced in some New Deal Commerce Clause cases that upheld federal regulations setting conditions on the manufacture of goods sold in interstate commerce while ostensibly leaving the manufacture of goods not sold in interstate markets untouched. If I recall correctly, this line was maintained until *Maryland v. Wirtz*[6] in 1968. So while The Rivkin-Casey argument is aggressive, I don't think it would completely overturn the New Deal.

Balkin also chides Rivkin and Casey for citing *Bailey v. Drexel Furniture*,[7] "a case from the *Lochner* Era,"[8] to make their case. Well, like it or not, *Bailey* has never been expressly overturned, and I think there's a good reason for that. In *Bailey*, the Court held that Congress could not use the taxing power to regulate behavior that would otherwise lie beyond the scope of the federal government's other enumerated powers. This may well be true. The problem with *Bailey*, then, is not its view of the taxing power but rather the *Bailey* court's restrained view of the federal commerce power. What makes *Bailey* and other cases largely irrelevant today is that there is so little that the federal government seeks to tax that it cannot otherwise regulate. I'd also note that it is not as if the Court is averse to relying upon

other cases with *Lochner v. New York*–era pedigrees. Indeed, *Meyer v. Nebraska*[9] and *Pierce v. Society of Sisters*[10] are still good law, and each is closer kin to *Lochner* than *Bailey*, as they relied upon *Lochner*'s substantive due process rationale.

Speaking of substantive due process, there may be other constitutional problems arising from national health care reform—but not of the enumerated powers variety. While the federal government may be able to require national health insurance coverage, could it require all individuals to purchase plans that cover certain procedures? What if the guidelines for acceptable plans include contraception, abortion, and certain types of end-of-life care? Could the federal government require devout Catholics to purchase such plans for themselves? Insofar as a new federal entitlement and regulatory scheme severely limits the ability of individuals to make fundamental health-related choices for themselves without undue federal interference, might it also run up against *Griswold v. Connecticut*,[11] *Cruzan v. Director, Missouri Department of Health*,[12] and other cases recognizing a right to privacy that extends to health-related matters? So long as individuals retain a choice of health care providers such concerns may be quite marginal, but were a "public plan" to become a de facto single-payer plan, the constitutional issue could grow. If limitations on abortion procedures must contain a health exception in order to be constitutional under *Planned Parenthood v. Casey*,[13] would this complicate efforts to control costs by excluding some potentially life-saving treatments under a single-payer system? Of course, these sorts of arguments are more likely to come from libertarians than conservatives, as the latter may be uncomfortable with expanding the scope of the Court's fundamental rights jurisprudence.

Is Obamacare Unconstitutional?: Part Deux

Jonathan H. Adler
September 18, 2009

David Rivkin and Lee Casey are back on the *Wall Street Journal* editorial page, arguing once again that current health care proposals are unconstitutional.[14] Specifically, they argue that an "individual mandate" would exceed the scope of congressional power under current precedent. Further, they argue that this limitation cannot be avoided by using the taxing power to impose a tax on those who fail to purchase a qualifying health care plan.

As with their last effort in this vein, I am unconvinced. I agree with them that an individual mandate would, in many respects, "expand the federal government's authority over individual Americans to an unprecedented degree," but I disagree that such a mandate would be unconstitutional under current precedent, particularly if adopted as part of a comprehensive health care reform plan.

There is a strong temptation to believe that every onerous or oppressive government policy is unconstitutional. Were it only so. Even were the federal government confined to those powers expressly enumerated in the text, it would retain ample ability to enact many bad ideas into law, and current precedent is far more permissive. Opponents of current health care reform proposals should defeat

them the old fashioned way, through the political process, and not depend upon salvation from the courts.

Is Mandatory Health Insurance Unconstitutional?

Randy E. Barnett
September 18, 2009

In *Politico's Arena*, we are debating Rivkin and Casey's *Wall Street Journal* op-ed piece,[15] which Jonathan notes previously. While my take on this issue differs somewhat from his, in my contribution, I respond to a rather catty post by Washington and Lee law professor Timothy Stoltzfus Jost. This is what I wrote:

> OK, let's be old fashioned and start with what the Constitution says. After the Preamble, the very first sentence of the Constitution says "All legislative powers *herein granted* shall be vested in a Congress of the United States. . . ." And again the Necessary and Proper Clause gives Congress the power "To make all laws which shall be necessary and proper for carrying into execution *the foregoing powers*, and all other powers *vested by this Constitution* in the government of the United States, or in any department or officer thereof." The Tenth Amendment is not required to see that Congressional power must be found somewhere in the document. ("Tenthers"? What's next? "Firsters"? "Necessary and Proper Clausers"? Enough with the derogatory labels, already.) So where in the document is the power to mandate that individuals buy health insurance?
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> The power "to regulate commerce . . . among the several states"? This clause was designed to deprive states of their powers under the Articles to erect trade barriers to commerce among the several states. It accomplished this by giving Congress the exclusive power over interstate sales and transport of goods (subject to the requirement that its regulations be both "necessary and proper"). It did not reach activities that were neither commerce, nor interstate. The business of providing health insurance is now an entirely intrastate activity.
>
> The "spending power"? There is no such enumerated power. There is only the enumerated power to tax. Laws spending tax revenues are authorized, again, if they are "necessary and proper for carrying into execution *the foregoing powers*." So we return to the previous issue: what enumerated end or object is Congress spending money to accomplish?
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> But following the text of the Constitution is so Eighteenth Century. Professor Jost tells us that "a basic principle of our constitutional system for the last two centuries has been that the Supreme Court is the ultimate authority on the Constitution, and the *Constitution the Court now recognizes* would permit Congress to adopt health care reform." So the Supreme Court gets to rewrite the written Constitution as we go along.
>
> Never mind *Dred Scott*, *Plessy*, *Korematsu* and other not-so-famous Supreme Court "mistakes." *The Constitution* was what the Supreme Court said it was—until it changed its mind. And the Supreme Court has certainly not limited either the enumerated commerce power or the implied spending power to the original meaning of the text.
>
> Fine. But has the Constitution of the Supreme Court been extended to include mandating that individuals buy insurance? Professor Jost admits "the absence of

a clear precedent." Really! So what has the Supreme Court's Constitution told us about the Commerce Clause power? Professor Jost cites the medical marijuana case of *Gonzales v. Raich*.

As Angel Raich's lawyer, who argued the case in the Supreme Court, I think the Court erred (6–3) in reading the interstate commerce power broadly enough to allow Congress to prohibit you from growing a plant in your back yard for your own consumption. By all accounts, however, this is the most far reaching interpretation of the commerce power ever adopted by a majority, exceeding the reach of the past champion, *Wickard v. Filburn*. But even the six Justices in the majority did not say that Congress had the power to mandate you grow a plant in your back yard. Do you think a majority would find that power today?

Perhaps. But under Professor Jost's approach to constitutional law, we must await the Supreme Court's ruling before we know what "the Constitution" requires or prohibits. Until then, the Supreme Court's First Amendment still gives even "two former Bush officials" the right to publish their opinion that the written Constitution delegates to Congress no such power, provided of course they are not trying to influence the outcome of a federal election. Maybe a bare majority will decide this matter by reviewing the text. Stranger things have happened. After all, without any precedent standing in their way, a majority of the Supreme Court decided to follow the original meaning of the text of the Second Amendment in *District of Columbia v. Heller*.

And when we are done examining Congress's power to mandate that you buy a particular service—or pay a fine, er "tax"—we can then consider its power to restrict the exercise of a person's fundamental right to preserve his or her life.[16]

Does a Federal Mandate Requiring the Purchase of Health Insurance Exceed Congress's Powers under the Commerce Clause?

Ilya Somin
September 20, 2009

I come late to the debate over whether a federal law requiring people to purchase health insurance exceeds Congress's powers under the Commerce Clause. In my view, the answer under current precedent is clearly "no." At the same time, I do think that such a law would be unconstitutional under the correct interpretation of the Commerce Clause—or any interpretation that takes the constitutional text seriously.

I. The Health Insurance Mandate under Current Supreme Court Precedent

Current Supreme Court precedent allows Congress to regulate virtually anything that has even a remote connection to interstate commerce so long as it has a "substantial effect" on it. The most recent major precedent in this field is *Gonzales v. Raich*, where the Court held that Congress's power to regulate interstate commerce was broad enough to uphold a ban on the use of medical marijuana that was never sold in any market and never left the confines of the state where it was grown. This regulation was upheld under the "substantial effects" rule

noted previously. As I describe in great detail elsewhere,[17] *Raich* renders Congress's power under the substantial effects test virtually unlimited in three different ways:

1. *Raich* holds that Congress can regulate virtually any "economic activity," and adopts an extraordinarily broad definition of "economic," which according to the Court encompasses anything that involves the "production, distribution, and consumption of commodities."
2. *Raich* makes it easy for Congress to impose controls on even "noneconomic" activity by claiming that it is part of a broader regulatory scheme aimed at something economic.
3. *Raich* adopts a so-called rational basis test as the standard for Commerce Clause cases, holding that "[w]e need not determine whether [the] activities [being regulated], taken in the aggregate, substantially affect interstate commerce in fact, but only whether a rational basis exists for so concluding." In legal jargon, a "rational basis" can be almost any noncompletely moronic reason for believing that a particular claim might be true.

Any of these three holdings could easily justify a federal requirement forcing people to purchase health insurance. The decision to purchase or not purchase health insurance is probably "economic activity," as *Raich* defines it, since it involves the distribution and consumption of commodities such as medicine. When you buy health insurance, you are contracting with the insurance company to provide you with medicine and other needed commodities should you get sick.

Even if the purchase of health insurance is "noneconomic" in nature, it could easily be upheld as part of a broader regulatory scheme aimed at economic activity—in this case regulation of the health care industry. As I discuss on pages 516–18 of my article on *Raich*, the Court makes it very easy to prove that virtually any regulation can be considered part of a broader regulatory scheme by not requiring any proof that the regulation in question really is needed to make the broader scheme work. Finally, even if a court concludes that the government was wrong to assume that the decision to buy health insurance is "economic activity" under *Raich*'s broad definition and wrong to believe that the mandatory purchase requirement was part of a broader regulatory scheme, the requirement could still be upheld because there was a "rational basis" for these ultimately mistaken beliefs.

II. Why Current Doctrine Is Wrong

For reasons laid out in my article, I think that *Raich* and other decisions interpreting the Commerce Clause very broadly were wrongly decided. I also agree with most of Randy Barnett's arguments to that effect in [his previous post]. Looking at the text of the Constitution, the Commerce Clause merely grants Congress the power to regulate "Commerce . . . among the several states." Choosing to purchase (or not purchase) health insurance is not interstate commerce, if only because nearly all insurance purchases are conducted within the confines of a single state. Obviously, the decision to purchase health insurance may well have an impact on

interstate commerce, and modern doctrine, even before *Raich*, allowed congressional regulation of any activities that have such a "substantial effect." However, this "effects" test is badly misguided. If the Commerce Clause really gave Congress the power to regulate any activity that merely affects interstate commerce, most of Congress's other powers listed in Article I of the Constitution would be redundant. For example, the very same phrase that enumerates Congress's power to regulate interstate commerce also gives it the power to regulate "Commerce with foreign Nations" and "with the Indian tribes." Foreign trade and trade with Indian tribes (which was a much more important part of the economy at the time of the founding than today) clearly have major effects on interstate trade. Yet these two powers are separately enumerated, which strongly suggests that the power to regulate interstate commerce doesn't give Congress the power to regulate any activity that merely has an effect—substantial or otherwise—on that commerce.

Be that as it may, it is highly unlikely that the Supreme Court would invalidate a major provision of the health care bill, should it pass Congress. In addition to requiring the overruling of *Raich* and considerable revision of other precedents, such a decision would lead to a major confrontation with Congress and the president. The Court is unlikely to pick a massive fight with a still-popular president backed by a large congressional majority. Of course, it is still possible that the Court could invalidate some minor portion of the bill on Commerce Clause grounds. But even that is unlikely so long as the majority of justices remain committed to *Raich*. Five of the six justices who voted with the majority in that case are still on the Court. The only exception—Justice David Souter—has been replaced by a liberal justice who is unlikely to be any more willing to impose meaningful limits on congressional power than Souter was.

Gonzales v. Raich and the Individual Mandate

Ilya Somin
October 5, 2010

The Supreme Court's 2005 decision in *Gonzales v. Raich* ruled that Congress's power to regulate interstate commerce gives it the power to ban the possession of medical marijuana that had never crossed state lines or been sold in any market anywhere. It was easily the broadest-ever Supreme Court interpretation of the Commerce Clause. When I first considered the question, I thought that *Raich*'s reasoning was expansive enough to justify the individual mandate. I still believed that the mandate was unconstitutional (primarily because I have always argued that *Raich* was a horrible decision). But I thought that it could probably go through under *Raich*. And the government has in fact relied heavily on *Raich* in its brief in the Virginia case challenging the mandate.

A closer look at *Raich*, however, led me to reconsider my initial view. I presented my revised position in the amicus brief (pp. 6–10) I recently wrote on behalf of the Washington Legal Foundation and a group of constitutional law scholars.[18] As I explain in my 2006 article on *Raich* and my September 2009 post on the individual

mandate, *Raich* gives Congress extremely broad power in three separate ways.[19] A closer look reveals that none of them actually requires lower courts to uphold the mandate.

I. The Court's Definition of "Economic Activity"

The Court's definition of economic activity in *Raich* is extremely broad, even ridiculously so. For example, it gives Congress the power to regulate your decision to eat dinner at home, since that decision entails the "consumption" of commodities such as food. Expansive as this definition may be, the mere status of being uninsured doesn't qualify. Choosing not to purchase health insurance involves neither production, nor distribution, nor consumption of commodities. Indeed, an individual who chooses not to purchase insurance has chosen *not* to consume or distribute the commodity in question. And, obviously, he or she is also not "producing" any commodity by refusing to purchase insurance. By contrast, the *Raich* defendants were engaged in "economic activity" since they were both producing and consuming marijuana.

II. The Broader Regulatory Scheme Rule

This rule too is very broad in the way it allows Congress to regulate even "non-economic" activity so long as there is even a remote connection to some sort of regulation of commerce. However, the power outlined by the Court applies only to the regulation of "*activity*." The Court itself repeatedly uses the term "activity" to describe the object of regulation. It does not cover regulation of inactivity or the refusal to engage in economic transactions. Angel Raich and Diane Monsen had not been inactive or merely refused to engage in some transaction. To the contrary, they were actively involved in the production and consumption of homegrown medical marijuana. The Court's logic *could* be extended to cover regulation of inactivity. But *Raich* itself doesn't do this.

III. The Rational Basis Test

This part of the Court's reasoning is harder to interpret than the two issues described previously. Still, it cannot be the case that the rational basis test is triggered by the mere invocation of the Commerce Clause by the government. If it were, then the Court would have had to overrule cases such as *United States v. Lopez* and *United States v. Morrison*, both of which failed to apply the rational basis test. Moreover, such an approach would give the federal government a virtual blank check for unlimited power, since all the government would have to do to get near-total judicial difference is claim that they were operating under the Commerce Clause. For these and other reasons, it is reasonable to conclude that the rational basis test applies only to regulations of activity rather than inactivity. I cover this admittedly more complex aspect of the case in greater detail in my brief.[20]

What changed my mind about *Raich's* relevance? Partly, it was coblogger Randy Barnett's insightful analysis of the issue in a December 2009 paper coauthored with Todd Gaziano and Nathaniel Stewart.[21] But even more important was the simple experience of carefully rereading *Raich* with this issue in mind. Once you look closely at the text of the Court's opinion, it's hard to avoid the conclusion that it simply doesn't address the possibility that Congress might try to regulate inactivity or force ordinary citizens to engage in economic transactions. Cynics will claim that I changed my mind because I dislike the Obama plan on policy grounds. Maybe so. But I was just as opposed to the plan when I held a different view on the relevance of *Raich*. What changed was not my view of Obamacare (which was always negative), but my view of the relevant legal doctrine.

Obviously, a court could try to extend *Raich* to cover forced economic transactions. If Congress has virtually unlimited power to regulate activity, why not regulate inactivity? Perhaps the Supreme Court will eventually do just that. But *Raich* itself doesn't compel any such result. To the contrary, the wording of the Court's opinion and the way in which it interacts with previous decisions such as *Lopez* and *Morrison* suggests that its logic is confined to regulation of activity. And, as I explain in the brief,[22] what is true of *Raich* is even more true of the Court's less expansive pre-*Raich* Commerce Clause decisions. If the government can't win the Commerce Clause issue using *Raich*, it can't win it under any other existing precedent either.

Could an Individual Mandate Violate Article I, Section 9?

Jonathan H. Adler
November 19, 2009

Most discussions about the constitutionality of an individual mandate in health care reform proposals have focused on whether such a mandate could be justified under the federal government's enumerated powers in Article I, Section 8. Some (including me) have opined that, under existing case law, an individual mandate would probably pass muster. For example, under existing precedent I think it likely that the Court would see an individual mandate as a necessary and proper incident of comprehensive regulation of health care markets, as a mandate is necessary to prevent other aspects of health care reform (such as a ban on refusing to cover preexisting conditions) from driving up health care markets. (Of course, were the Court to apply the original public meaning of the relevant provisions, an individual mandate would be out of bounds.) But in focusing on Article I, Section 8, I wonder whether we've ignored another potential constitutional problem with provisions of Article I, Section 9.

As I understand the current proposals, the individual mandate would operate as follows: a tax would be imposed on all individuals, and the tax would be offset by a credit for those who purchase or are otherwise covered by qualifying plans. The constitutional problem would arise if this tax is considered a "direct tax." Why? Because Article I, Section 9 provides, "No capitation, or other direct, Tax shall be