



The States, Health Care Reform, and the Constitution

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Introduction

Our Constitution creates a vibrant system of cooperative federalism that gives broad power to the federal government to act in circumstances in which a national approach is necessary or preferable, while reserving a significant role for the States to craft innovative policy solutions reflecting the diversity of America’s people, places, and ideas. Far from violating the principles of federalism in our Constitution, the Patient Protection and Affordable Care Act is a shining example of the federal-state partnership at its best.

The States have a long history of leadership on health care reform—indeed, Congress used a health reform plan signed into law by then-Massachusetts Governor Mitt Romney as one of its models. The Patient Protection and Affordable Care Act incorporated the valuable lessons learned from the experience of health care reform practices by our state and local governments, and preserves the role of our States as laboratories of democracy by giving States, for example, considerable flexibility to shape insurance exchanges.

Unfortunately, some anti-reform advocates have attacked the new health care law under the guise of protecting federalism and our Constitution. Just moments after President Obama signed the Patient Protection and Affordable Care Act into law, a handful of state Attorneys General filed lawsuits asking the federal courts to declare the Act—and, in particular, its requirement that all Americans who can afford to do so purchase health insurance, or pay a tax penalty—unconstitutional as a violation of State sovereignty or as an overextension of federal power. In addition, two States have passed laws that attempt to block key parts of the Act outright, something that is referred to as state “nullification” of federal law. Neither of these approaches has any merit under the Constitution.

The Constitution expressly grants Congress the authority to regulate interstate commerce, to tax and spend to “provide for the general Welfare of the United States,” and to enact legislation that is “necessary and proper” to carry out these express powers. The Constitution also makes clear that federal law “shall be the supreme Law of the Land,” which means that state nullification laws are trumped by federal law. Congress acted within its constitutional powers when it passed health care reform, and the misguided attempts by a small number of state politicians to challenge the Act are more political theater than genuine constitutional argument.

Health Care Reform Is Constitutional

Congress's power to enact the Patient Protection and Affordable Care Act comes from three fundamental provisions in the Constitution.

- *The Power to Regulate Interstate Commerce.* Article I, section 8 of the Constitution grants Congress the power to regulate "Commerce...among the several States."
- *The Power to Tax and Spend for the General Welfare.* Article I, section 8 of the Constitution grants Congress the power to tax and spend to provide for "the general Welfare of the United States."
- *The Power to Enact Necessary and Proper Enforcement Legislation.* Article I, section 8 of the Constitution grants Congress broad power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers."

Congress's Power to Regulate Interstate Commerce

Since the health care industry constitutes almost 20% of our Nation's economy, no one can genuinely dispute that Congress has the authority to regulate health care and the health insurance industries under its Commerce Clause power. Most critics therefore aim more narrowly at whether Congress has the power to require individuals who can afford it to purchase health insurance or pay a tax penalty if they refuse to do so. Those critics claim that not doing anything—that is, choosing to remain uninsured—cannot be considered an economic act.

This claim is incorrect. The decision not to buy health insurance is a profoundly economic act; the people who make it are making an economic choice to self-insure. That economic choice has significant financial consequences for everyone else. When the uninsured fall seriously ill or get into an accident, they go to the emergency room, where they run up medical bills they often cannot afford to pay without insurance. But someone pays: the American people, who not only foot those bills as taxpayers but also end up paying higher premiums of their own because the uninsured have opted out of the national risk pool. In short, the national economic consequences of individuals deciding to go without insurance are substantial.

Even if the choice not to buy insurance could be seen as a non-economic activity, Congress still has the power under the Commerce Clause to require the so-called individual mandate. As the Supreme Court has held, Congress can regulate non-economic activity that has a substantial effect on interstate commerce. For example, in the 2005 case of *Gonzales v. Raich*, the Supreme Court ruled that Congress, as part of its regulation of interstate commerce in illegal drugs, could prohibit a person from growing marijuana in her own backyard for

personal, medicinal use (in a State where doing so was legal under local law). Certainly if backyard, medicinal marijuana cultivation falls under Congress's Commerce Clause power, Congress can regulate the decision to be uninsured.

Congress's Power to Tax and Spend for the General Welfare

The individual mandate can also be easily justified under Congress's authority to tax and spend to promote the general welfare of the United States. The "individual mandate" does not in fact *require* individuals to purchase insurance; rather, if individuals choose to remain uninsured, they must pay a tax penalty. Congress is well within its power to determine that such a requirement is in the interest of the general welfare given the cost-savings that come from expanding the pool of insured individuals and reducing the uncovered costs of emergency room care, which would lead to an overall decrease in the total cost of health care borne by individual Americans. And ensuring affordable health care for all Americans—regardless of income, employment status, or preexisting conditions—certainly promotes the general welfare of the United States.

Congress's Power to Pass Necessary and Proper Laws

In addition to the specific powers listed in the Constitution, the Founders also wrote into our Nation's charter broad authority for Congress to make laws that are "necessary and proper" for carrying out the other powers granted by the Constitution. The great Chief Justice John Marshall explained in *McCulloch v. Maryland* (1817) that Congress should be shown significant deference regarding what laws it considered to be appropriate in carrying out its constitutional duties. When Congress legislates to carry out one of its constitutionally granted powers, it may use any appropriate means, so long as it does not run afoul of any other constitutional provision.

In the case of health care reform, Congress determined that the Act, including the individual mandate, was the appropriate means of regulating the health care and insurance markets. Since the Act does not run afoul of any other constitutional provision—there is no constitutional right to inflict uninsured health care costs on the American taxpayers—health care reform falls squarely within Congress's power to enact necessary and proper legislation to carry out its powers to regulate commerce and tax and spend for the general welfare.

State Attempts To Block Health Care Reform Lack Constitutional Support

State AGs' Lawsuits Have No Constitutional Merit

Before the ink was dry on President Obama's signature, thirteen state Attorneys General (AGs) filed suit in federal court in Florida seeking a judicial ruling that health care reform is

unconstitutional.¹ An hour or so later, Virginia’s Attorney General filed a separate suit in federal court in Virginia. The AGs’ embarrassingly weak claims are political grandstanding, not genuine constitutional arguments, and their lawsuits are a waste of both taxpayer money and judicial resources. In the [words of Charles Fried](#), who served as Solicitor General under President Ronald Reagan, these suits are “simply a political ploy and a pathetic one at that.”

Both lawsuits challenge Congress’s power to enact health care reform—particularly the individual mandate—under its constitutional authority to regulate commerce. For the reasons discussed above, this challenge has no merit. The health care industry is a substantial—and growing—part of our Nation’s economy. An individual’s decision not to buy health insurance is an economic one that has a significant impact on interstate commerce and, as such, falls within Congress’s Commerce Clause power to regulate. Even if that decision were considered non-economic, the argument that Congress has no power to require individuals to buy insurance or pay a tax penalty is unlikely to hold any sway in the Supreme Court, which just a few years ago ruled in favor of congressional authority to regulate non-economic activity that has a substantial effect on interstate commerce. Moreover, as discussed above, the Act’s requirement that individuals purchase health insurance or pay a tax penalty is constitutional under Congress’s power to make laws that are necessary and proper to carry into execution the powers vested by the Constitution in the U.S. Government, in this case, the power granted under the Commerce Clause.

The Florida suit adds an additional claim: that the Patient Protection and Affordable Care Act is “an unprecedented encroachment on the sovereignty of the states,” and thus a violation of the Constitution’s Tenth Amendment. This argument may produce good campaign slogans, but it is legally frivolous for the simple reason that States are entirely free to rid themselves of any burdens imposed by the Act by withdrawing from the federal Medicaid program. Indeed, the AGs candidly acknowledge this fact in their complaint filed in court, but assert that withdrawing from the Medicaid program would be politically unpopular because “Medicaid has, over the more than four decades of its existence become customary and necessary for citizens throughout the United States.” In other words, the AGs want to keep the popular Medicaid program and the billions of federal dollars that fund it, but want to avoid bearing the corresponding burdens of taking steps to reduce medical costs and expand health insurance coverage. There is no constitutional precedent for such an argument, and, unsurprisingly, the AGs do not cite a single case to support their view of the law.

The AGs in the Florida lawsuit also challenge the Act’s requirement that Americans who can afford health insurance buy it or pay a tax penalty as not within the authority of Congress to tax and spend for the general welfare. Putting aside serious questions about whether the AGs have “standing” to raise this issue on behalf of individuals in their states, this claim also has no constitutional basis, as more fully discussed above. The Act contains an individual mandate

¹ At the time of this writing, Indiana’s Attorney General has stated that he will soon join the Florida lawsuit, which would bring the total number of State plaintiffs in that case to fourteen.

for a very basic reason: if you don't push people who can afford it to get insurance, they impose costs on the rest of us. Uninsured medical costs are enormous in this country. According to statistics compiled by Families USA, in 2005, 48 million Americans were uninsured and they incurred \$43 billion in medical costs that they could not pay, an average of nearly \$900 per uninsured individual. This is considerably more than the tax penalty that the Act, in order to promote the general welfare, imposes on individuals who choose not to obtain insurance.

State Nullification Laws Are an Assault on the Constitution

Two States, Virginia and Idaho, have passed, and other States are considering, laws that attempt to block implementation of the Act outright, including the individual mandate. These efforts are known as state “nullification” of federal law.

The nullification acts passed by Virginia and Idaho, and contemplated by other States, are an attack on the Constitution. Congress has long passed, Presidents have long signed, and the Supreme Court has long upheld—often by unanimous votes—federal laws that regulate interstate markets for such things as health care, and that address national problems such as air and water pollution. Article VI of the Constitution expressly provides that these duly passed laws “shall be the supreme Law of the land.” Advocates who disagree with these laws are perfectly entitled to argue that these laws go beyond Congress’s enumerated powers, and even to bring lawsuits asking the courts to so hold, but when they take the extreme step of advocating for the nullification of federal law—in direct contradiction of the Supremacy Clause—they are dishonoring our Founders and the Constitution itself.

The Supremacy Clause renders these recent nullification efforts little more than symbolic. Our Constitution is clear that when Congress acts pursuant to its constitutionally granted powers, federal law trumps conflicting state law. That’s the way our Union works. But the States are treading on dangerous ground when they invoke nullification even for symbolic protest: State efforts to block implementation of federal law—most notably, State efforts to prevent enforcement of federal civil rights laws in the 1960s—are part of a dark chapter in our Nation’s history that none of us should want to reopen.

It is entirely appropriate for state political actors to object to federal actions they believe encroach upon state turf, whether it be in press statements or even in state legislative resolutions that are not meant to have the force of law. Our Constitution protects free speech, and dialogue between the States and the federal government is part of our healthy American democracy. But in urging state legislatures to “ignore” or “nullify” federal laws that are plainly constitutional according to the Constitution’s text and history as well as clearly established Supreme Court interpretations, anti-health reform advocates are urging state officials to violate the Constitution rather than honor it. States can use the political process as well as the courts to raise constitutional objections, but they cannot claim a unilateral right to nullify federal law.

The Health Care Reform Law Preserves Federalism

The irony of some States objecting to the Patient Protection and Affordable Care Act on federalism grounds is that the Act in truth reflects the best of American federalism.

Our federalism is founded in a Constitution that gives broad power to the federal government to act when a national solution is necessary or preferable, while preserving the role of State and local governments to create policy responsive to local needs and customs. States have also historically been leaders in policy innovations that better protect their citizens, resources, and environment. As Justice Brandeis famously wrote, under our federalism, “a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.” In this way, State and local governments are America’s cherished laboratories of democracy.

The Patient Protection and Affordable Care Act is a product of our vibrant cooperative federalism. The federal government learned from State experiences with health care reform, using Massachusetts’ plan signed into law by then-Governor Mitt Romney as a model for the federal bill. In turn, the Act preserves the States’ regulatory flexibility in several key ways:

- States have the discretion to form their own insurance exchange or join with other States to form a regional exchange.
- While States must provide individuals with the opportunity to buy four levels of health care plans on the exchange—platinum, gold, silver, and bronze plans, at declining expense—they have significant discretion. For example, States have the choice whether to offer plans that cover abortion on the state-run exchanges.
- States can also set up their own programs—with or without an individual mandate, or with a public option—under what has been called the “Empowering States to be Innovative” provision. States can obtain a waiver from the federal government releasing them from participating in the system set up by the Act—including the individual mandate—so long as the alternative system created by the State meets the coverage and cost containment requirements in the Act.

The Patient Protection and Affordable Care Act is appropriately respectful of principles of vibrant federalism. While the text of the bill may be lengthy, its constitutionality is clear.