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Paul Clement's Fake Constitution

3 False Claims in the Attorney's Anti-Health Care Brief

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The legal case against the Affordable Care Act has, in the words of conservative Judge Laurence Silberman, no basis "in either the text of the Constitution or Supreme Court precedent." Nevertheless, the plaintiffs challenging this law have hired a very skilled attorney—former U.S. Solicitor General Paul Clement—and Clement clearly believes he is so skilled that he can pull a fast one on the justices of the Supreme Court. His brief attacking the Affordable Care Act as unconstitutional is riddled with misrepresentations of precedent and inaccurate descriptions of what our Constitution says.

Here are three key examples of Clement's attempt to replace the U.S. Constitution with something completely different.

1. Clement's bad textualism

In the first section of his argument, Clement attempts to redefine the meaning of the Constitution's words empowering Congress to "regulate commerce … among the several states." In Clement's reconception of these words, the verb "regulate" does not include the ability to require "individuals to engage in commercial transactions," and thus the Affordable Care Act's requirement that most people carry health insurance is invalid.

But this novel reading of the word "regulate" is simply not accurate. In his opinion upholding the Affordable Care Act, Judge Silberman referred to an 18th-century dictionary to rebut Clement's claim. As Silberman explained:

> *At the time the Constitution was fashioned, to 'regulate' meant, as it does now, "[t]o adjust by rule or method," as well as "[t]o direct." To "direct," in turn, included "[t]o prescribe certain measure[s]; to mark out a certain course," and "[t]o order; to command." In other words, to "regulate" can mean to require action, and nothing in the definition appears to limit that power only to those already active in relation to an interstate market.*

Silberman's reading of the Constitution has a long pedigree. In 1824 Supreme Court Chief Justice John Marshall wrote in *Gibbons v. Ogden* that there is "no sort of trade" to

which the words "regulate Commerce" do not apply. Moreover, Marshall explained, the power to regulate something "implies in its nature full power over the thing to be regulated." As the United States explains in its reply brief, more recent Supreme Court decisions establish that the power to "regulate commerce" includes the power to "promote [commerce's] growth" and to "foster" it.

The Affordable Care Act regulates trade in health care services, and under Marshall's rule Congress has "full power" over all forms of trade—including the power to require people to take certain actions within the health care market. Clement's unprecedented reading of the Constitution is nothing less than an attempt to rewrite it.

2. Clement's hyperbole about limitless government power

Throughout this litigation Affordable Care Act opponents have rested on the false claim that if health reform is upheld, it will somehow result in Congress passing whatever laws it wants. In Clement's words, the only way for the Court to uphold the health reform law is to accept "boundless interpretations of the Commerce Clause" that would enable Congress to regulate anything at all.

Once again, this is false. The Constitution's words empowering Congress to "regulate commerce" imply that matters that are not commercial in nature rest outside of this grant of power. Thus, in *United States v. Lopez* the Supreme Court struck down a federal law banning guns in school zones because this law had little relationship to commercial matters. Likewise, in *United States v. Morrison* the Court struck down the Violence Against Women Act because the law was not economic in nature. Taken together, *Lopez* and *Morrison* established that economic regulation is well within the United States's authority, but noneconomic laws are far more constitutionally suspect.

Because the Affordable Care Act regulates the national health care market—or one-sixth of the nation's economy—this law is unquestionably commercial in nature. The same cannot be said about many noneconomic laws that would be beyond Congress's power to regulate commerce. In its brief, the United States lists "family law, general criminal law, or education" as examples of laws that exceed Congress's power to regulate commerce. Thus, a long list of laws ranging from federal murder laws, rape and assault laws, and federal truancy laws, to federal child neglect laws will still be unconstitutional for Congress to regulate after the Affordable Care Act is upheld.

3. Clement's Scalia problem

Even if Congress didn't have the power to enact an insurance coverage requirement under its power to regulate commerce, the Constitution's "Necessary and Proper Clause"—

which gives Congress the authority to make all laws necessary and proper to carry out its specifically granted powers under the Constitution—provides an alternative reason why the Affordable Care Act is constitutional. In *Gonzales v. Raich* the Supreme Court explained why it will not strike down a provision of law when that provision is an "essential part of a larger regulation of economic activity." As Supreme Court Justice Antonin Scalia explained in a concurring opinion, "where Congress has the authority to enact a regulation of interstate commerce, it possesses every power needed to make that regulation effective."

The Affordable Care Act fits comfortably within Justice Scalia's rule. The act prohibits insurers from denying coverage to patients with pre-existing conditions. This ban cannot function, however, if patients can enter and exit the insurance market at will. If patients can wait until they get sick to buy insurance, they will drain all the money out of an insurance plan that they have not previously paid into, leaving nothing for the rest of the plan's consumers. Thus, a requirement that most individuals obtain insurance before they become ill is an essential part of the act's overall regulation of the insurance industry—or, to use Scalia's words, it is needed to make the law's insurance regulations effective.

Clement tries to disarm this Scalia bomb by raising a completely irrelevant distinction. The Supreme Court permits two kinds of constitutional challenges to federal laws: facial challenges, which argue that the law must be effectively erased from the books; and as-applied challenges, which argue that the law is unconstitutional for some people and constitutional as applied to others. Clement argues that, because his lawsuit is a facial challenge, the Scalia rule somehow does not apply.

This argument, however, has no basis in Supreme Court precedent. Indeed, the United States cites four Supreme Court cases in its reply brief—*United States v. Lopez*, *FERC v. Mississippi*, *Hodel v. Indiana*, and *United States v. Darby*—where the Court applied the Scalia rule to a facial challenge. Clement simply cannot avoid longstanding constitutional law by relying on irrelevancies.

As an alternative theory, Clement tries to disarm the Scalia bomb by claiming that the Affordable Care Act runs afoul of a novel rule against "creating problems in need of extraconstitutional solutions." Clement argues that, because the insurance coverage requirement is only necessary to solve a problem created by Congress's regulation of the insurance industry, it somehow exceeds Congress's authority under the Necessary and Proper Clause of the Constitution.

But the Supreme Court rejected this argument just two years ago. In *United States v. Comstock*, the Court considered a law that permits federal prisons to detain "sexually dangerous" prisoners beyond the length of their sentences. In upholding the law, the Court explained that by transporting sex offenders to communities containing federal prisons, the federal government had created a potential danger to those local communities—and thus it could act to alleviate the danger it had created.

As Supreme Court Justice Anthony Kennedy wrote in a concurring opinion in *Comstock*, "[h]aving acted within its constitutional authority to detain the person, the National Government can acknowledge a duty to ensure that an abrupt end to the detention does not prejudice the States and their citizens."

Likewise, having acted within its constitutional authority to protect people with pre-existing conditions, the national government may also acknowledge a duty to ensure that these long-overdue protections do not endanger the national insurance market as a whole.

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