



Not Even Close

3 Reasons Why the Health Care Lawsuit Is an Easy Case

Ian Millhiser March 7, 2012

In the words of Judge Laurence Silberman, a leading conservative who received the Presidential Medal of Freedom from President George W. Bush, the lawsuits challenging the Affordable Care Act's requirement that most Americans have to either carry health insurance or pay slightly more income taxes have no basis "in either the text of the Constitution or Supreme Court precedent." Nevertheless, the U.S. Court of Appeals for the 11th Circuit broke with three other appeals courts to hold the law unconstitutional last August.

The 11th Circuit decision was wrong, and the Supreme Court will reject it. Here are the three reasons why.

Congress has broad power to regulate the national economy

Nearly 200 years of Supreme Court precedent establish that the Affordable Care Act's insurance coverage provision is constitutional. A provision of the Constitution known as the Commerce Clause gives Congress power to "regulate commerce ... among the several states." And many Supreme Court decisions hold that Congress has broad power to enact laws that substantially affect prices, marketplaces, or other economic transactions—including transactions in the national health care market.

As Chief Justice John Marshall explained in the 1824 case *Gibbons v. Ogden*, the very first decision to interpret the Commerce Clause, there is "no sort of trade" that the words "regulate Commerce" do not apply to. Moreover, the power to "regulate" something "implies in its nature full power over the thing to be regulated," and Congress's power to regulate commerce "among the several states" applies to all trade that "concern[s] more states than one."

Because the Affordable Care Act regulates the entire nation's trade in health care services—approximately 17 percent of the national economy—it clearly concerns more states than one. Moreover, because the power to regulate trade in health care includes "full power" over that trade, Congress may regulate it however it chooses, including by requiring people to carry health insurance. There is no plausible argument that this law is not constitutional under the Commerce Clause.

The minimum coverage provision holds the Affordable Care Act together

The Constitution also gives Congress the power "[t]o make all laws which shall be necessary and proper for carrying into execution" its power to regulate interstate commerce. As Supreme Court Justice Antonin Scalia

explains, this means “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 prohibits insurers from denying coverage to patients with pre-existing conditions. This ban cannot function, however, if patients are free to 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 left for the rest of the plan’s consumers.

Seven states enacted a pre-existing conditions law without also passing an insurance coverage requirement, and all seven states saw health insurance premiums spiral out of control. In some of these states, the individual insurance market collapsed.

There is a way out of this trap, however. Massachusetts enacted a minimum coverage provision in 2006 to go along with its pre-existing conditions provision and the results were both striking and immediate. The state’s premiums rapidly dropped by 40 percent.¹

In other words, because the only way to make the pre-existing conditions law effective is to also require individuals to carry insurance, that requirement easily passes Scalia’s test.

The link between the minimum coverage provision and the Affordable Care Act’s insurance regulations also sets this law aside from other hypothetical laws requiring individuals to purchase other goods or services. The national market for vegetables will not collapse if Congress does not require people to purchase broccoli, nor will Americans be unable to obtain automobiles absent a law requiring the purchase of cars from General Motors. Accordingly, a court decision upholding the Affordable Care Act would not provide a precedent enabling Congress to compel all Americans to purchase broccoli or cars, despite the law’s opponents’ claims to the contrary.

Congress has broad leeway in how it raises money

Congress also has the authority to “lay and collect taxes” under the Constitution. This power to tax also supports the minimum coverage provision, which works by requiring individuals who do not carry health insurance to pay slightly more income taxes. Taxpayers who refuse insurance must pay more in taxes while those who do carry insurance are exempt from this new tax. For this reason, the law is no different than dozens of longstanding tax exemptions, including the mortgage interest tax deduction, which allows people who take out home mortgages to pay lower taxes than people who do not.

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Endnotes

1 Jonathan Gruber, “The Senate Bill Lowers Non-Group Premiums: Updated for New CBO Estimates,” November 27, 2009, available at <http://econ-www.mit.edu/files/4894>.