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Defense of the Constitutionality of Health Care Reform

by Gillian Metzger

Along with the others, I want to thank David for organizing this panel. The great advantage of going last is that the terms of the debate over the Affordable Care Act's constitutionality have been established by the other panelists. As a result, I am going to target my remarks on a few key points, rather than walk through a full dress review of some of the arguments. Like the others, my focus is on existing doctrine. I completely agree with Dean Chemerinsky in thinking that the Supreme Court is not going to change the key parameters of existing analysis, but in any event, my point is that under existing doctrine the challenged provisions are constitutional.

Let me begin with the arguments for the constitutionality of the requirement that individuals purchase health insurance, and in particular, the tax power argument which we have heard reference to, but not too much discussion of, so far.¹²⁹ That is an argument that several courts have rejected in the litigation. My view, however, is that the tax power offers a strong basis for the minimum coverage provision and that emphasizing the tax power angle is important because it clarifies how the provision operates. The provision really operates as a tax. Failure to obtain health insurance is not made unlawful. The only consequence is that anyone who fails to purchase health insurance—and who is not exempt from the requirement or does not have insurance through another route—becomes liable for an additional amount on his or her annual tax return. There is no other enforcement. Further, this additional amount is hardly punitive. It is capped in a variety of ways, but the maximum it can ever be is basically the amount that it would cost you to buy minimal insurance on a health exchange for yourself and your family. So, at the most, it is equal to the cost individuals are avoiding by not purchasing insurance.

It is well established that the tax power is quite broad and was made intentionally so when the Constitution was drafted. The tax power represents an independent basis of constitutional authority, and the requirements the Court has imposed for what is a valid tax are quite

129. Greater elaboration of the tax power argument is provided in the briefs I have filed along with two other constitutional law professors in support of the constitutionality of the minimum coverage requirement. The latest version of the brief, filed in the Sixth Circuit, is available on the ACA Litigation Blog run by Bradley Joondeeph, at: <http://aca-litigation.wikispaces.com/file/view/Amicus+brief+on+constitutional+law+professors.pdf>.

minimal. To come under the tax power, a measure has to serve the general welfare, have some relationship to a revenue-raising purpose, be apportioned if a direct tax and uniform if an indirect tax, and not violate any independent constitutional prohibition. I think the minimum coverage provision meets these requirements.

The courts that have rejected the tax power argument have done so pretty much entirely on the grounds that Congress did not intend the provision to be a tax but instead intended it to be regulatory, a mechanism for forcing individuals to purchase insurance, and therefore, the tax power was not invoked. This conclusion is flawed in several ways.

First, this conclusion is at odds with governing doctrine. The fact that a measure has a primary regulatory purpose is simply not a sufficient basis to pull something outside of the end of the tax power. Even if the primary purpose of a measure is regulatory, it is still potentially a valid tax. No one disputes that the primary purpose of the minimum coverage provision is to encourage people to purchase insurance, but that alone cannot preclude it from being a tax. In addition, to the extent there are cases that have emphasized regulatory purposes to disqualify measures as taxes, those decisions go back to the *Lochner* era and, moreover, were instances in which a tax was being used to pull in a detailed scheme of regulation that was otherwise wholly outside of Congress's power. That is simply not the case here; instead, the detailed requirements imposed by the Affordable Care Act, even those that are closely connected to the minimum coverage provision, such as the prohibition on insurance companies taking preexisting conditions into account in providing coverage, are amply supported by Congress's commerce, spending, and tax powers.

Second, the argument that Congress did not intend to invoke the tax power represents a misreading of the record. There is actually a lot in the record suggesting that Congress did want to invoke a tax power. It is true that the amount due is called a penalty in the final version that was enacted. It had at other times been called a tax in the legislation, and other measures in the Act are called taxes. But the important point is that there is very well-established case law holding that in the tax area, labels are not determinative. Whether or not that should be the rule, whether we should put more emphasis on whether or not Congress calls a measure a tax, is a separate question. Given the case law, however, it is very hard to conclude from the labels Congress used that it did not intend to invoke the tax power because Congress had no basis on which to know that its choice of nomenclature would be determinative.

The bigger jurisprudential issue is that the courts are putting the burden on Congress to identify the basis on which it is enacting a provision. Although the district court in Florida expressly disavowed that it was imposing a clear statement requirement on Congress, I think that is the necessary lesson from rejecting the tax power argument on the grounds that Congress did not intend the minimum coverage provision to be a tax. Putting the burden on Congress is at odds with the ordinary presumption of constitutionality that congressional statutes enjoy and the assumption that Congress would intend to measure that in an act to be sustained under any available constitutional basis. The job of the courts is not to question Congress's motive in that regard, but to simply determine whether such a basis exists.

For these reasons, I think the tax power argument is strong. Most of the attention to date, however, has focused on Commerce and Necessary and Proper Clause arguments. Again, the terms of the debate have been nicely focused by the other panelists and the ongoing litigation. No one is denying that provision of health insurance generally, or health care services, represents economic activity that Congress can regulate. Instead, the claim is that Congress cannot regulate inactivity, and failure to purchase health insurance represents inactivity. I think both of those assertions are wrong. Although I agree with Dean Chemerinsky on Congress's ability to regulate inactivity, I want to focus on the assertion that the failure to purchase health insurance represents inactivity. A basic mistake with this assertion is that it assumes that the frame of analysis should center on the decision to purchase insurance or not in a given year, rather than the wider context of accessing health care services to which any decision to purchase insurance or not is intrinsically linked.

No one buys health insurance as a goal in and of itself. We buy it to access health care, and decisions to buy health insurance represent decisions about how and when to access health care services. The key point is that individuals who are foregoing health insurance are not foregoing health care services; on the contrary, they "actively" obtain health care services. Indeed, a big part of the problem is they are obtaining services that they often cannot pay for, with the costs of this uncompensated care then shifting costs onto the health insurance system as a whole and the government. A brief filed by health economists in the Florida case identifies 60% of individuals who do not have insurance as having used health care services in a given year. Plus, there are other economic activities connected to accessing health care that the uninsured engage in, like buying medicines over the counter.

In short, as soon as you widen the frame and realize that this provision is about accessing health care services, there is clearly activity

going on. The idea that this is about inactivity is simply a mistaken framing. More generally, realizing how easy it is to see activity at issue here calls into question whether the asserted distinction between activity and inactivity is a judicially-implementable or clear distinction. Instead, the distinction is quite artificial and manipulatable. For example, if Congress simply said, "Anyone in the past who has accessed health care services or who will in the next five years must purchase insurance," there would be no doubt Congress was targeting activity. In substance, I think that is not very different from what Congress did here, given the fact that it is quite uncertain whether any particular individual is going to need health care services in any given year.

Hence, the real question is not inactivity versus activity, it is who gets to determine the scope of congressional regulation for the purpose of a constitutional challenge. The plaintiffs are offering a very narrow framing. Congress adopted a broader framing; it focused on access to health insurance and health care services generally. That broader congressional framing is clearly rational, and the *Raich* case makes clear that courts should defer to Congress's rational determinations about the scope of regulation, as opposed to accepting the framing offered by the plaintiffs. I think that same principle applies. Once Congress's framing is accepted, the provision represents a regulation of economic activity that falls easily under the commerce power.

I have a couple of comments on the Necessary and Proper Clause. One point is that frame of analysis matters here, too. If you emphasize the Scalia concurrence in *Raich*, it makes clear that Congress can reach activities in areas that might fall outside of the commerce power when necessary to make effective a wider scheme of regulation. I do not think there is much dispute about the close relationship between the requirement that you purchase insurance and the problems of implementing the core access requirements of the Affordable Care Act, such as the requirements that insurers have to issue insurance without regard to pre-existing conditions and have to use community rating to set premiums rather than individuals' circumstances. All those provisions are very integrally related to the minimum coverage requirement, given the realities of adverse selection and what will happen to insurance pools without this requirement. Again, all those requirements fall under the commerce power, and the Necessary and Proper Clause should sustain the minimum coverage provision as a means of making those clear commerce regulations effective.

It is also important to note that there cannot be anything inherently improper about the idea of Congress regulating inactivity, even assuming that is what Congress is doing here. It is generally acknowledged that, in some other instances, Congress legitimately regulates

inactivity. It requires you to file tax returns, for example, and you can be required to register for the draft. Those are different enumerated powers, and these measures do not represent Commerce Clause legislation. The key point, however, is that in regulating inactivity in these instances, Congress is also relying on the Necessary and Proper Clause; requiring individuals to file tax returns is a mechanism for enforcing Congress's tax power legislation. So, if there is anything inherently improper about requiring activity when it did not exist before, those measures should also fail.

I want to strongly echo a point that Dean Chemerinsky mentioned, that animating these challenges is a particular vision of individual liberty as freedom from regulation. The enumeration of powers in the Constitution is also about protecting liberty. But the key question is which visions of individual liberty we should see as protected by the Constitution. As Dean Chemerinsky very well put it, we have long rejected the idea that freedom from regulation is a strongly protected liberty for purposes of the direct provisions of the Constitution. It makes little sense that we would build that protection from regulation into the scope of Congress's powers.

Let me say a couple of comments on the Spending Clause challenge to the Medicaid expansion. I think the claims of coercion are a very hard sell, in part because of atmospheric factors, such as the fact that the federal government came through with substantial—nearly a hundred percent for the first ten years—funding of the expansion of the Medicaid rolls, the fact that in the Medicaid Act there is clear notice of Congress's ability to change the terms, and the fact that Congress in the past has dramatically expanded Medicaid. All of these make the claim of coercion a hard one to win as a factual matter, but I also think it is hard as an analytic matter.

The problem is that it is very difficult to come up with a judicially-manageable standard for when changes to a spending program go too far and become coercive. For example, why is this expansion in Medicaid coercive, but not prior expansions, such as adding SSI or pregnant women and children above the poverty line? Should we measure coercion by the percentage of funding under a program that is put at risk, or the absolute amount of federal funds at issue? Or should we measure by the percentage of a state's budget that the funding represents? These are all valid alternative metrics that lead to different determinations about whether coercion exists. Of course, for some states that have already expanded their Medicaid programs to 130% of the poverty line, this expansion with the funding that came along with it was hardly coercive at all. It was actually quite supportive of their choices. And then there is the question of how to factor in the fact that

different states have different political choices when it comes to their budget. It is interesting that Florida and a number of states in the twenty-state challenge do not have a state income tax. That is a choice about how they want to fund their budgets, but how do we factor in those choices in terms of deciding whether or not it is the change in federal funds that is coercing them or their own political choices?

These problems are why the appellate courts and the Supreme Court have rejected coercion claims of this kind. I read the courts as sticking to a formalistic insistence on acceptance of conditional spending as voluntary no matter what the felt reality of the states is precisely because they do not see how they could implement a distinction between legitimate and illegitimate spending conditions. Instead, the courts have left that to political constraints, and I think they will do the same here.

The last thing I want to say goes to this question of political constraints. I think we have ignored the role that they played in the Affordable Care Act, particularly in terms of, among other things, ensuring that there would be adequate funding of the expansion of Medicaid, also in terms of how the health exchanges were structured. I disagree with the suggestion that the states were shut out of the legislative process. The states actually had their interests acceded to in a variety of ways. In fact, if you look at the Act beyond the challenged provisions, it actually contains some very interesting federalism reinforcing aspects that unfortunately have not gotten as much federalism attention, given the focus on the litigation. Thanks very much.

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