

By Mike Hammond

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SUMMARY

Let me make a prediction:

ObamaCare will be held unconstitutional by the Supreme Court so long as two things happen:

- * First, Roberts, Alito, Scalia, Thomas, and Kennedy remain on the court; and
- * Second, the states are not uniformly tricked into passing “technical” legislation accepting regulatory burdens of ObamaCare which cannot be constitutionally forced on them.

If the Supreme Court strikes down ObamaCare, it will be done, based on the court’s 1997 precedent of *Printz v. United States*, 521 U.S. 898 (1997).

But if Barack Obama is able to replace any of these Justices, ObamaCare will probably be upheld.

So, although this memorandum is not intended to give political advice to either party — at a time when Democrats are talking about politicizing the Supreme Court confirmation process by emphasizing the court’s actions “against ordinary Americans” -- it may be that the Republicans will want to point out that the next one or two Supreme Court nominees could be the deciding votes on whether ObamaCare is upheld.

It may also be that, as in 1990, Republicans will want to set the stage for their opposition to efforts to pack the court by, as a general matter of principle, blocking further legislative efforts on the Obama agenda until the American people have had an opportunity, in November, to cast their ballots on how they feel about what has been going on so far.

BACKGROUND

Those supporting ObamaCare have been generally dismissive of the chances it will be judicially overturned — just as they were dismissive of the arguments concerning the bill’s flaws while it was being considered.

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[Not surprisingly, studies and articles concerning those flaws began popping up — even in places like *The New York Times* — after the bill became law. See, e.g., the Robert Pear article asserting that Congress, in its haste to slam through legislation, inadvertently threw its own health insurance into limbo: Robert Pear, “Baffled by New Health Plan? Some Lawmakers Also Seem None Too Clear,” *The New York Times*, April 13, 2010, p. A14]

Under the Supremacy Clause of the Constitution, the federal government is “supreme,” they argue, so it can do just about anything it wants. Besides, they argue, the broad financial ramifications of health care make it clear that it is an activity which “affects commerce” — possibly citing the broad ruling in the 1942 case of *Wickard v. Filburn*, 317 U.S. 111 (1942), which upheld a 1941 amendment to the Agricultural Adjustment Act of 1938 which regulated a farmer growing his own wheat for his own consumption. The court held that that farmer was nevertheless the subject of federal regulation under the Commerce Clause because his activities, if replicated, would have a substantial impact on commerce.

Opponents, on the other hand, argue that, if the Commerce Clause allows the government to mandate that people, otherwise engaging in no economic activity, purchase a product, there is no limit to what the Commerce Clause can do.

This, in turn, generates debates over the significance of the court’s decision allowing the federal government to regulate medical marijuana [*Ashcroft v. Raich*, No. 03-1454 (2005)] — contrasted with the court’s subsequent refusal, two years later, to overturn Oregon’s assisted suicide laws on the basis of federal preeminence under the Commerce Clause.

There is no problem with this argument, as far as it goes — although it may fail to state the full scope of opponents’ case.

THE SUPREMACY CLAUSE

The beginning and end of most liberal arguments for constitutionality is, in effect, that the Supremacy Clause makes the federal government “supreme” — and this means it can do whatever it wants.

Well, not exactly.

What the Supremacy Clause means — and doesn’t mean — is an important distinction which has remained, in theoretical terms at least, more or less constant almost since the birth of the Republic. It means the states can’t prohibit the federal government from acting within its jurisdiction IF — and only if — the federal government is acting within its own jurisdiction — and not the states’. John Marshall, writing in *McCulloch v. Maryland*, 4 Wheat. (17 U.S.) 316, at 436 (1819), put it this way:

...the States have no power, by taxation or otherwise
to retard, impede, burden, or in any manner control,

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the operations of the constitutional laws enacted by Congress to carry into execution *the powers vested in the general government*. [Emphasis added]

If, for instance, under *EPA v. Massachusetts*, No. 05-1120 (2007), and the National Environmental Policy Act [NEPA], the EPA is held to be empowered to constitutionally regulate CO₂, Virginia can't say, "You can't regulate CO₂ in our jurisdiction." In other words, the states can't tell the federal government what to do within its own jurisdiction.

But, conversely, what the Supremacy Clause does not mean is that the federal government can order the states to take actions (with or without offering to compensate them) — even if those actions are within the jurisdiction of the federal government.

In *Printz v. United States*, which will be discussed in more detail in a subsequent section, the court overturned that portion of the Brady Law which required the states to perform checks on prospective gun buyers. This was notwithstanding the fact that the court would have presumably held, rightly or wrongly, that enactment of the Brady Law was within the federal government's jurisdiction.

This is why so much of the code of federal law consists of payments to the states — conditioned on the states acting in accordance with the federal government's whims. Whereas the government can't order a state to require seatbelt use within its jurisdiction, it can spend \$2-300,000,000,000 on highway construction and improvement and condition part of those funds on whether a state has seatbelt laws acceptable to it.

What does ObamaCare do? It requires every state to establish an "exchange." It partially compensates the states for the cost of the exchanges. But what is the sanction if the states refuse to set up an exchange? The answer is that the federal government will set up an exchange in that state instead.

And this means that the federal government, as the entity operating the exchange, will determine what insurers can and can't do business in that state — and what policies they may offer.

In other words, the federal government will take away the state's jurisdiction over what has traditionally been viewed as one of the central remaining powers within state purview — because the state refuses to serve as its regulatory vassal. Under *Printz*, this is something the federal government cannot do.

THE COMMERCE CLAUSE

Everyone is focused on the Commerce Clause. So I will spend less time on it than on less traveled areas.

A SHORT HISTORY □

Our current understanding of the Commerce Clause dates back to the 1942 case of *Wickard v. Filburn*.

Prior to 1942, the Supreme Court had invalidated a sizable portion of the New Deal, declaring unconstitutional the Live Poultry Code [*A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935)], the Agricultural Adjustment Act of 1933 [*United States v. Butler*, 297 U.S. 1 (1936)], the Bituminous Coal Conservation Act [*Carter v. Carter Coal Co.*, 298 U.S. 238 (1936)], and the Railroad Retirement Act [*Railroad Retirement Board v. Alton R. Co.*, 295 U.S. 330 (1935)].

In 1938, responding to the court's role in thwarting some of his efforts to expand government, Franklin Roosevelt proposed his famous "court-packing" plan — which would have expanded the size of the court to 15 members — six of which would be appointed by Roosevelt. The court-packing plan met bipartisan resistance in Washington, and was thought to have played a role in the Democrats' electoral losses in the 1938 elections.

Things, however, did change. Whether to avert Roosevelt's plans to play with the court — or, ultimately, because of Roosevelt's appointments of Stanley Reed (1938), William O. Douglas (1939), Felix Frankfurter (1939), Frank Murphy (1940), Robert Jackson (1941), James Byrnes (1941) and Wiley Rutledge (1943) to the nine-member court — the court became almost consistently amenable to the constitutionality of Roosevelt's programs after that.

The poster-child for the court's newly permissive approach to government expansion — and the case which has largely defined the breadth of the Commerce Clause up into the 21st Century — was *Wickard v. Filburn*. In that case, a farmer who grew wheat on his own land and consumed all of his own wheat was nevertheless held to be covered by the Commerce Clause because his activities, were they replicated by others, would have a severe impact on commerce.

Said the court:

It can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions. This may arise because being in marketable condition such wheat overhangs the market and, if induced by rising prices, tends to flow into the market and check price increases. But if we assume that it is never marketed, it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market.

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In the early 1990's, the court began to retrench, particularly with respect to the rights of states under the Ninth and Tenth Amendments. And it did finally reach the edge of the envelope with respect to the malleable Commerce Clause.

In 1995, in *United States v. Lopez*, 514 U.S. 549 (1995), the court found that the federal gun-free school zone legislation was not a valid regulation of "commerce" under congressional powers delegated by the Commerce Clause. [It is important to note that that statute was reenacted as a rider to an appropriations measure in 1996 by simply inserting the words "affecting commerce" — and the reconstituted statute is still on the books.]

Lopez is particularly interesting because, although the court, rightly or wrongly, on page 54 of *District of Columbia v. Heller*, 128 S.Ct. 2783 (2007), left open the possibility that the federal government might place some limits on gun ownership, *Lopez*

made it clear that some legislation can be so extreme and unrelated to commerce that it falls outside of the Commerce Clause, even though its general subject area would otherwise place it within the rubric of that provision. This should serve as a cautionary note to those who believe that, because the general area of health care has an impact on interstate commerce, therefore, Congress can do what it pleases in the area of health.

Recent cases show that the Supreme Court is looking carefully at limitations to Commerce Clause powers. In *United States v. Morrison*, 529 U.S. 598 (2000), the court used a four-part test to overturn parts of the sacrosanct Violence Against Women Act.

And in 2005, the court came close to doing something very, very extreme — effectively judicially legalizing marijuana (and possibly, by extension, other drugs as well) -- in order to demonstrate its interest in overturning *Wickard v. Filburn*.

In oral arguments on November 29, 2004, the court was invited, in *Ashcroft v. Raich*, No. 03-1454 (2005), to do just that -- effectively overturning *Wickard v. Fillburn*

— at the cost of upholding California's law decriminalizing medical marijuana. In a decision which split the court's conservative bloc, it declined.

Two years later, however, the court upheld an Oregon assisted suicide statute which was contested by the Bush administration as being contrary to federal law.

In *Gonzales v. Oregon*, 546 U.S. 243 (2006), the court upheld the Oregon Death With Dignity Act. The 6-to-3 ruling, writing by Kennedy, hung its hat on the proposition that the interpretive rule presumably banning the use of the drugs employed in Oregon's physician-assisted suicide procedures was outside the Attorney General's delegated authority. But the notion that federal controlled substance legislation had not given fairly plenary authority to the federal government in that area was a surprise to most observers.

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THE COMMERCE CLAUSE TODAY

Buoyed by the Supreme Court's apparent inclination to shrink *Wickard* — or, at the very least, not expand it — ObamaCare opponents argue that, if the Commerce Clause allows the government to mandate that people, otherwise engaging in no economic activity, purchase a product, there is no limit to what the Commerce Clause can do.

Georgetown Law Professor Randy E. Barnett, writing in *The Wall Street Journal*, put it this way:

In this way, the statute speciously tries to convert inactivity into the “activity” of making a decision. By this reasoning, your “decision” not to take a job, not to sell your house, or not to buy a Chevrolet is an “activity that is commercial and economic by nature” that can be mandated by Congress.

...

...the Court has never upheld a requirement that individuals who are doing nothing *must* engage in economic activity... [Emphasis original]

True, *Wickard* held that a wheat farmer could be regulated, notwithstanding his failure to sell his wheat in commerce. But that is a far cry from requiring him to sell the wheat.

We have been waiting for the liberal apologia to come back with ANY Supreme Court precedent that the Commerce Clause -- or the Commerce Clause coupled with the Necessary and Proper Clause -- can be used to force Americans to engage in prescribed economic transactions or face a penalty for inaction. The Congressional Research Service -- not a bastion of conservatism -- has opined, for what it's worth, that this is unprecedented.

The only real shot that I have seen by apologists is in an article published in the May 21, 2010, edition of *The Boston Globe* by a constitutional law professor at Harvard, Charles Fried.

Fried, with the characteristic requisite smugness, lectures US that, in 1905, the Supreme Court forced Massachusetts residents to obtain vaccinations, against their will -- and that this shows that Congress can use the Commerce Clause and the Necessary and Proper Clause to do ne'er well anything it wants -- particularly to "nudge" Americans to buy insurance with a "modest" \$700 [his estimate] penalty.

But hold on a minute.

Fried's analogy is dishonest -- to the point of being slimy -- for a number of reasons.

First, *Jacobson v. Commonwealth*, 197 U.S. 11 (1905), was not a Commerce Clause or Necessary and Proper Clause case --nor, with the STATE of Massachusetts as the respondent,

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could it be. Rather, it was a case dealing with the limits of the STATE police powers under the 14th Amendment, tinged with an element of the First Amendment's Free Exercise Clause. It does not stand for the proposition which Fried represents.

Second, coming nine years after the Supreme Court's "separate but equal" holding in *Plessy v. Ferguson*

163 U.S. 537 (1896), *Jacobson* doesn't come from an era of the law which can be assumed to be valid today. Since 1905, American jurisprudence -- particularly Commerce Clause jurisprudence -- has made two or three dramatic U-turns. And most observers believe that *Jacobson*

, especially in its Free Exercise implications, has been overturned. [See, e.g., *Sherbert v. Verner*, 374 U.S. 398 (1963).]

Third, if Fried believes that ObamaCare's impositions are "modest" and "necessary" -- compared to Massachusetts' disease outbreak -- perhaps ObamaCare's victims should send their penalty bills to Harvard, where they can be paid out of its bloated, taxpayer-subsidized endowment.

THE *PRINTZ* CASE

Little noticed through most of this debate is the case which may determine the fate of ObamaCare — *Printz v. United States*.

What is *Printz*? It was a case testing the Brady Law's requirements that, prior to the implementation of the InstantCheck, the chief law enforcement officers (CLEO's) of the states were required to perform background checks on prospective handgun purchasers.

In the 5-to-4 majority opinion written by Antonin Scalia, the court held that "[w]e ... conclude categorically, as we concluded in *New York*: 'The federal government may not compel the States to enact or administer a federal regulatory program.' ... The mandatory obligation imposed on CLEOs to perform background checks on prospective handgun purchasers plainly runs afoul of that rule."

The majority consisted of Scalia, Thomas, Kennedy, O'Connor, and Rehnquist, although it is pretty clear that Roberts and Alito would have voted the same way as O'Connor and Rehnquist, whose seats they now occupy.

This notion that the federal government's ability to run a regulatory state is severely circumscribed may seem counterintuitive in a world where the federal government seems to run every aspect of our lives.

Sometimes the federal government continues to wield power merely because states — and individual Americans — are unwilling to spend the millions of dollars necessary to take a case challenging government action all the way up to the Supreme Court.

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But, more often than not, the government procures compliance through the power of the purse:

-- "You won't enact primary seatbelt laws? We'll slash your highway funds."

-- "You won't allow the feds to micromanage your nursing homes? We'll cut your Medicaid funds."

And it is true that states that are free to turn up their noses at federal programs do become stuck once they choose to participate.

Regardless of how many snide liberal law professors look down their noses and proclaim that "Resistance is futile", the fact is that the rule is this: The federal government can bribe the states -- as it does with regularity. But "THE FEDERAL GOVERNMENT MAY NOT COMPEL THE STATES TO ENACT OR ADMINISTER A FEDERAL REGULATORY PROGRAM."
[Emphasis added]

So, what does ObamaCare do? To begin with, the statute requires the 50 states to set up "exchanges" -- lists of approved insurance policies which, basically, determine what options individuals have to satisfy the federal requirement that they purchase health insurance.

Is this a "federal regulatory program"? It sure is.

The question of what policies may or may not be listed on the "exchange" is very narrowly circumscribed by federal statute and regulation. To begin with, the act --

-- sets up, statutorily, the types of medical procedures that policies on the exchange are required to cover
[section 1302(a)];

-- gives the Secretary of Health and Human Services almost unfettered discretion to add to the statutory requirements for policies listed on an "exchange"
[section 1311(c)];

-- prohibits policies on an "exchange" from charging different rates based on preexisting conditions
[section 1101];

-- prohibits deductibles and copayments beyond statutory levels [section 1001]; and

-- gives the HHS Secretary extensive powers to supervise the exchanges [e.g., section 1104].

Unlike car insurance, this is a top-down requirement imposed on the states by the federal government.

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But ObamaCare's mandated insurance is different from car insurance in a whole lot of other ways:

First, "driving" — as we are repeatedly told — is a privilege. "Breathing," on the other hand, is a right, as is, in general, earning money. [This doesn't mean that income can't be taxed, or that some kinds of income-earning can't be regulated. But it does mean that the federal government can't require a license for earning money. And, by inference, it can't impose the sorts of requirements it can impose on those activities it licenses.]

Second, states may be able to do things within their spheres of jurisdiction which the federal government cannot — although I believe and hope the courts will ultimately overturn the Massachusetts program as well.

But third, and most important, "mandated insurance" is not really insurance. It is a tax — paid directly to private interests "licensed" by the government -- in order to fund a privately administered, but federally mandated welfare system. More about this, later.

So what does all this mean? It means that, unless a state adopts legislation which is being quietly pushed by the Obama administration — legislation which would delegate an official such as an insurance commissioner to carry out all the regulatory mandates which ObamaCare would impose on the state — the executive branch of the state is free to refuse to administer any or all of the statute.

This is different from a state declaration that, for example, the National Environmental Policy Act is inoperative within the state's jurisdiction.

And it is different from federal case law prohibiting state laws which affirmatively thwart federal legislation. [See, e.g., *Engine Manufacturers Association v. South Coast Air Quality Management District*, No. 02-1343 (2004), *Nixon v. Missouri Municipal League*, No. 02-1238 (2004), and *Bates v. Dow Agrosciences LLC*, No. 03-338 (2005).]

The inability of the states to affirmatively regulate a traditionally federally-regulated area because of federal preemption is a different proposition from the question of whether the federal government may conscript the states in its regulatory army. In fact, the propositions are pretty much the converse of one another.

So how does ObamaCare seek to turn the states into its regulatory vassals? Probably the most attackable provision is the requirement that the states set up "exchanges" (in accordance with copious federal standards) which tell their citizens what insurance policies they may or may not purchase. If a policy is not listed on the "exchange," an individual cannot use that policy to satisfy the federal mandate — and, assuming it is not a Medigap-type supplemental benefits policy, it may not even be legal to sell that policy in that state.

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ObamaCare does have a fund to help states finance their “exchanges.”

But what if a state decides not to accept the money and not to set up the exchange? The consequences go far beyond the loss of federal money — as when a state like New Hampshire chooses not to require its citizens to wear seatbelts.

Rather, if a state refuses to set up an “exchange,” the federal government will come into the state and set up its own exchange. This means that the federal government will have usurped the power to determine what insurance the residents of that state may or may not buy.

In effect, the deal is this: Do what we tell you, or we’ll take away all your authority to regulate in an area traditionally reserved for the states.

If the federal government could not tell Montana that it had to implement the Brady Law — with small and indeterminate consequences — can it strip states of major portions of their remaining jurisdiction as punishment for failing to be conscripted in its ObamaCare regulatory army? It’s a case without any real precedent — because the federal government has never before attempted something of such breathtaking scope. But, unless Obama can succeed in recrafting the composition of the Supreme Court, one would have to say the odds are against its constitutionality being upheld.

TAXATION

INTRODUCTION

Can Congress circumvent the Printz case and the limits on its Commerce Clause powers by claiming that ObamaCare is an exercise of its very broad powers to lay and collect taxes under Article I, Section 8, Clause 1?

The short answer is: “no.” Both the penalties for non-purchase of insurance and the premiums themselves probably ARE taxes. But this creates even more constitutional problems than the Commerce Clause.

There are two threshold questions here. And they’re not necessarily the same question:

- Are the penalties imposed for not purchasing government-approved insurance taxes?
- Are the premiums themselves taxes?

If the answer to either of these questions is “yes,” there are two further questions you have to ask in order to determine whether Congress has acted constitutionally:

- First, is it an “excise tax” (generally allowed by the Constitution) or a “direct tax” (which is

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generally prohibited)?

and

-- Second, if a "direct tax," is it nevertheless constitutional because either —

-- it is an "income tax" made constitutional by the 16th Amendment; or

-- it is apportioned by the census and is constitutional under Article I, Section 9, whether or not it is covered by the 16th Amendment?

IS IT A TAX?

There are certainly conservatives who would argue strongly that even the penalty, though administered by the Internal Revenue Service (IRS), is not a tax.

Georgetown's Barnett makes this case based on —

-- the lack of material in the findings of the bill, while the bill was actually being drafted, which mentioned taxation; and

-- the case law suggesting that the court won't look behind Congress' surface representations as to what the penalties are.

There are a lot of conservative scholars who have spent a lifetime contemplating the Commerce Clause, and a lot fewer who have thought a lot about "direct taxes" and their constitutionality. And it may be that there is a subconscious longing for this to be the seminal case narrowing New Deal-era Commerce Clause jurisprudence. It may also be that Commerce Clause scholars believe they have a "sure bet" by arguing that you can't invoke the Commerce Clause to penalize a failure to engage in commerce.

I have some experience in judicial "sure bets." I advised House Republican Whip Tom DeLay on opposing McCain-Feingold. And I watched with dismay as the Senate Republican manager, Mitch McConnell, fought less strenuously than he should have — based on his expectation that the Supreme Court would "clearly" overturn McCain-Feingold in a lawsuit with his name at the top.

At the time, I said that it was a dangerous exercise to risk an important legal principle on "what Sandra Day O'Connor had for breakfast." And, in *McConnell v. Federal Election Commission*,

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540 U.S. 93 (2003), the court, in fact, upheld the electioneering communications portions of McCain-Feingold.

It may be that, after a few years of ruminating on the issue, the Supreme Court has now reconsidered its earlier opinion. BUT the fact is that THERE ARE NO “SURE BETS” IN SUPREME COURT JURISPRUDENCE, and people who feel that ObamaCare is the most destructive legislation in American history need to be prepared to challenge it on the battlefield that Democrats have apparently selected: the congressional power to tax.

Proponents of ObamaCare, on the other hand, have also played a bit of a shell game with respect to exactly what premiums under the individual mandate are — and what the penalty is. The penalty was a tax — when they needed it to be. And, when that was inconvenient, it was not a tax.

As for the mandated premiums, Barack Obama famously proclaimed that the individual mandate was not a “tax” on the middle class — despite the massive additional government-mandated costs it imposed on those making less than \$250,000 a year and the large number of middle-class persons who would pay penalties to the IRS for not purchasing government-mandated insurance. And the sycophantic press dutifully went along with that decree.

On the other hand, Senate Finance Committee Chairman Max Baucus (D.-Mont.) was careful to categorize the penalties as tax penalties and to make the IRS the enforcement agent because —

-- claiming these were “taxes” opened the door to “reconciliation” because they were, as reconciliation required, “within [his] jurisdiction”;

-- claiming these were “taxes” allowed him to claim additional Finance Committee-generated deficit reductions;

-- claiming these were “taxes” allowed him to argue that he was acting under Congress’ Article I, Section 8, Clause 1, tax powers; and

-- claiming these were “taxes” allowed the Finance Committee to act in a sphere which might otherwise be within the jurisdiction of the Committee on Health, Education, Labor & Pensions.

Other congressional Democrats were less enamored with the “tax” theory.

But, despite the duality (or duplicity), it is much more likely than not that, not only are the tax penalties “taxes,” but the mandated premium payments are taxes as well.

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Black's law dictionary defines "tax" this way:

A charge, usually monetary, imposed by the government on persons, entities, transactions, or property to yield public revenues. Most broadly, the term embraces all governmental impositions on the person, property, privileges, occupations, and enjoyment of the people.

Black's goes on to state that, "[a]lthough a tax is often thought of as being pecuniary in nature, it is not necessarily payable in money."

At its core, then, a "tax" is:

- (1) a charge
- (2) imposed by the government
- (3) to yield public revenue.

or alternatively

- (1) a governmental imposition
- (2) on the person.

There is not much doubt that the IRS-administered penalties for failure to buy government-approved insurance is such a tax — imposed primarily on the middle class, notwithstanding campaign promises to the contrary. After thinking about it awhile, congressional Democrats produced a 157-page "technical explanation" which called it an "Excise Tax on Individuals Without Essential Health Benefits Coverage." [Whether or not it's an "excise tax" is something which will be discussed shortly.]

But what about the premiums themselves? This is a startling question only because this is the first time in American history that the government has mandated that Americans pay money to private parties in order to administer a welfare program.

The "individual mandate," in and of itself, has all of the attributes of a "tax." This is because the primary purpose of the mandate is not to provide health care to the "young [to middle-age] invincibles" who — with some last-minute qualifications -- are forced to buy government-approved policies. Rather, healthy Americans are the "cash cows" whose payments fund the very expensive medical care for those with preexisting conditions. On April 22, the *Associated Press* reiterated this point again in an article by Stephen Ohlmacher, stating that ObamaCare's proponents "point out that getting young, healthy Americans in the mandate pool will reduce costs for others."

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This is hardly news. Neither Obama nor the supporters of ObamaCare made it any secret why the creaky infrastructure needed a mandate: the healthy would be required to make payments which they would otherwise view as economic folly in order to pay for the immediate medical needs of those with more extensive health care requirements.

The Congressional Budget Office has quantified the magnitude of these transfer payments to some extent: In 2016, insurance premiums on the individual market under ObamaCare would be 10 to 13% more than if Congress did nothing. The employer-provided rates would be relatively static through 2016, but only because ObamaCare's regulatory behemoth will not have reached them by that time.

In addition, however, for millions of Americans, it is an obligation which will ultimately send the IRS knocking at their door. Compliance will be reported to the IRS on an individual's annual tax return — just as, for example, an individual would report deductions or estimated tax payments. And, like a reported failure to have made adequate estimated tax payments, it is the IRS which will notify the individual of his shortfall, collect the penalty, and take whatever steps are necessary to enforce that punishment.

A study, prepared by the Congressional Budget Office [CBO], found that nearly 4 million Americans would have to pay a mandate-penalty of, on the average, a little over \$1,000 a year once the ObamaCare system becomes fully implemented — beginning in 2014, but increasing until it gains steam in 2016. The penalty would be administered by the Internal Revenue Service, and would be paid to the IRS. The CBO also found that a large percentage of those who would be required to pay this penalty-tax would be middle-income Americans — in violation of Obama's campaign promise not to raise taxes on this group.

And, incidentally, while the Senate Finance Committee inserted cagey language which purports to insulate Americans from prison and liens as a result of non-purchase of insurance, it is not entirely clear that that protection extends to punishment for non-payment of penalties — an act which may invoke all of the consequences contained in, significantly, the Internal Revenue Code.

But why is this legally significant?

It is legally significant because it makes clear that mandated insurance is not really insurance at all, but rather an income-transfer welfare system tax — enforced under penalty of law by the Internal Revenue Service [IRS] — but administered by wholly private entities who, in turn, will determine the amount of the tax and, to some extent, the purposes to which it will be applied.

So, if a central objective of ObamaCare is to force, under penalty of law, those persons who would not otherwise buy insurance — and who would certainly not buy the newly-more-expensive insurance designed to pay for the medical care of others — do so in order to cover the present health costs of others, then it is unlike automobile insurance. It is, in fact, a federal welfare program, privately administered, with a scope determined by private companies.

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But, with respect to premiums, here's the rub: Article I, Section 8, gives Congress the power "to lay and collect taxes."

Except for very narrow ministerial functions — such as annually calculating cost of living adjustments [COLA's] based on economic data — neither the Executive Branch nor the Supreme Court nor any other party can, under Article I, Section 8, either set the amount of taxes or determine the corpus on which taxes are levied.

Barack Obama's health care legislation, on the other hand, gives massive discretion to federal bureaucrats, state bureaucrats, and private companies to determine exactly what the American people are required to pay for, under penalty of law, and how much it is going to cost based on what they decide to use it for.

Whether or not the mandated premiums constitute an "excise tax" or a "direct tax," they cannot survive constitutional muster under these circumstances.

True, you can currently reduce your tax burden by making charitable contributions which go to many of the same purposes of ObamaCare. But this is different from a mandate, coupled with a penalty:

-- You — rather than the government — currently choose whether you want to "save the whales," improve the schools, cure cancer, house the homeless, nourish the arts, or foster the Olympics -- whereas ObamaCare would mandate these policy decisions for you.

-- There are a much broader range of charities, currently, than there will be policies on the exchange, and a much broader range of social goals -- even within the area of health care — than the ObamaCare statutory and regulatory requirements would allow.

-- If you choose not to contribute to a charity, you simply pay the tax that you would otherwise owe — and are not "penalized" for your decision. In other words, you are rewarded, not penalized.

-- The charitable deduction is directly related to the amount you contributed, whereas the "penalty" is specifically designated as a "penalty" and is set at a level intended to punish you sufficiently to force desired behavior.

-- Most importantly, to the extent that taxes are reduced by a deduction, that is the decision of the taxpayer, rather than an Executive Branch employee or

a private party designated to set tax rates.

It is also true, as ObamaCare proponents argue, that there are provisions of the Internal Revenue Code which impose penalty-level taxation on affirmative bad behavior. The punitive taxes on gambling are a specific area which has been litigated and upheld by the Supreme Court, notwithstanding the argument that the “taxes” were nothing more than a disingenuous way for Congress to get its hands into the regulation of social policy. [*United States v. Kahriger*, 345 U.S. 22 (1953)] The court, in that case, specifically refused to look behind Congress’ surface contention with respect to its purpose of raising revenues.

But, of course, it was Congress that set the level of taxation in Kahriger, and the tax was on a commercial transaction, thereby clearly bringing it within the scope of “excise taxes,” rather than “direct taxes.”

And finally, of course, there are penalties for not filing a tax return — which is a non-action. However, there are no provisions in the Internal Revenue Code which penalize non-tax-related non-action.

This brings us back to the Constitution’s other provisions concerning taxes — how they may be levied, who may levy them, to whom they may go, and for what purposes they may be applied:

IS IT A “DIRECT TAX” OR AN “EXCISE TAX”?

If either the mandated premium or the penalty is a tax, the Constitution has another nasty surprise for the drafters of ObamaCare:

Article I, Section 9, Clause 4, states:

No Capitation, or other direct, Tax shall be laid,
unless in Proportion to the Census of Enumeration
herein before directed to be taken.

This means that, if either the premiums or the penalties constitute a “direct tax,” they are unconstitutional [assuming they are not “income taxes” and are not apportioned according to the census].

Traditionally, generally, taxes have been classified as either a “direct tax” or an “excise tax.” [Indirect taxes can also be levied, but only under the rule of uniformity.] The Supreme Court has upheld excise taxes, under Article I, Section 9, Clause 4, while overturning “direct taxes” in most instances.

What is an “excise tax”? What is a “direct tax”?

The clearest example of a “direct tax” is the income tax, which was held unconstitutional in 1895 [*Pollock v. Farmers’ Loan and Trust Co.*, 157 U.S. 429 (1895)] -- and is in effect today only

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because the 16th Amendment was passed to make it constitutional.

As a result of *Pollock*, Congress proposed and the states ratified the Sixteenth Amendment, which says: “The Congress shall have power to lay and collect taxes on incomes, from whatever source, derived, without apportionment among the several States, and without regard to any census or enumeration.”

If either the penalty for non-payment of premiums or the premiums themselves are direct taxes -- and they are not Congress-imposed “taxes on incomes” within the “safe harbor” of the 16th Amendment — then they are unconstitutional.

What, then, is an “excise tax”?

Webster’s Dictionary defines an “excise tax” as “1 an internal tax levied on the manufacture, sale, or consumption of a commodity within a country 2: any of various taxes on privileges often assessed in the form of a license or other fee.”

With respect to the second definition, you can license “driving,” but you can’t license “breathing.”

With respect to the first definition — a tax on commodities -- Supreme Court rulings have largely fallen along the same line: that an “excise tax” is a tax levied “because of ownership” or “upon property as such.”

In terms of case law, the court has held that the term “excise tax” includes a wide variety of taxes on property and economic transactions, including carriages [*Hylton v. United States*, 3 Dall. (3 U.S.) 171 (1796)], insurance company receipts [*Pacific Insurance Co. v. Soule*, 7 Wall. (74 U.S.) 433 (1869)], circulating notes of state banks [*Veazy Bank v. Fenno*, 8 Wall. (75 U.S.) 533 (1869)], real estate inheritances [*Scholey v. Rew*, 23 Wall. (90 U.S.) 331 (1875)], sales on business exchanges [*Nicol v. Ames*, 173 U.S. 509 (1899)], inherited property (imposed on heirs) [*Knowlton v. Moore*, 178 U.S. 41 (1900)], sales of stock certificates [*Thomas v. United States*, 192 U.S. 393 (1904)], and manufactured tobacco [*Patton v. Brady*, 184 U.S. 608 (1902)].

But it has never considered an “excise tax” to include a tax imposed on the person merely by virtue of “breathing” — without reference to any commercial transaction or the property held by that person. In fact, that is the dictionary definition of a “direct tax.”

So the fact is that, if there is an absence of case law concerning whether the Commerce Clause powers can reach a refusal to engage in an economic transaction, there is an abundance of

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case law that the power to lay and collect “excise taxes” does not extend to a situation where there is no property and no transaction. In fact, that is the centerpiece of the distinction between a “direct tax” and an “excise tax.”

IS IT AN INCOME TAX?

A direct tax which is imposed only on the uninsured is not an “income tax” for purposes of the Sixteenth Amendment and is therefore unconstitutional. And neither is a tax which is imposed as a punishment for failing to engage in a federally mandated economic transaction an “income tax” for purposes of the 16th Amendment.

This is why the sponsors, after thinking about it awhile, were careful to label the penalties “An Excise Tax on Individuals Without Essential Health Benefits Coverage” [emphasis added]. That said, calling it an “excise tax” does not make it so. And the notion that a tax imposed on a per person basis, without either property or an economic transaction to serve as the corpus, is an “excise tax” is, as we have seen, an unsustainable one.

True, if the premiums are held to be an apportioned direct tax, the court has held that a penalty can be imposed without apportioning it. [*De Treville v. Smalls*, 98 U.S. 517 (1879)] On the other hand, if the premium is a “direct tax,” it is almost certainly “unapportioned.” And the status of the penalty is the least of proponents’ worries.

IS IT APPORTIONED?

I think we know the answer to this question, definitively. Neither the premium nor the penalty is apportioned among the states in accordance with the census. To the contrary, their incidence falls on the basis of the extent to which Americans in the various states (1) are uninsured, and (2) refuse to buy government-approved insurance.

In the former case, the burden can be expected to fall disproportionately on those states with marginally-poor people earning over 133% of the poverty level, but not much more. In the latter case, the burden will probably be less in those states whose highly regulated populations have become used to complying with extensive government mandates — particularly Massachusetts.

At any rate, there is no serious argument that, if they are direct taxes and not income taxes, either the premiums or the penalties would be held constitutional.

SUMMARY

Proponents of ObamaCare seem to operate under the assumption that Congress’ taxing power represents a “safe haven” for them. But, if anything, treating premiums and/or penalties as a tax raises even more problems than treating them as regulation of commerce.

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THE RIGHT TO PRIVACY

The “right to privacy,” pulled by the Warren and Burger courts from the constitutional “penumbra,” was erroneously divined and politically applied. Nevertheless, it creates a major conundrum for a court which seems to be inclined to perpetuate *Roe v. Wade*, 410 U.S. 113 (1973), but now must reconcile that with government interference in the most private and important medical decisions that Americans make.

Practically speaking, the privacy doctrine had its birth in *Griswold v. Connecticut*, 381 U.S. 479 (1965) -- a Connecticut case where a majority of the court, rejecting reliance on substantive due process doctrine, held that a law prohibiting the sales of contraceptives was violative of the penumbral privacy rights of persons wishing to buy them.

This was followed up eight years later by *Roe v. Wade*, which held that that right to privacy extended, in most circumstances, to the right to have an abortion.

More recently, the court extended the concept -- and, by pretty clear implication, the doctrine of constitutional privacy protection -- to cover consensual homosexual acts. In *Lawrence v. Texas*, 539 U.S. 558 (2003), in a 5-to-3 decision written by Kennedy (with O'Connor concurring), the court invoked the 14th Amendment's Due Process Clause to overturn a Texas statute making it unlawful for persons of the same sex to engage in “certain intimate sexual conduct.”

Effectively overturning an earlier decision that “sodomy” was not a constitutionally protected act [*Bowers v. Hardwick*, 478 U.S. 186], the majority opinion went on to cite the abortion case of *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, in stating that there is “an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”

So all of this puts jurisprudential liberals in a bit of a bind. Faced with a health care law that allows the Secretary of Health & Human Services to administratively determine what an Obama-approved policy must contain — and, by inference, what medical procedures will, as a practical matter, be available to Americans — liberals are in a quandary.

And, incidentally, as we are beginning to see in Massachusetts, we can expect HHS, in time, to employ more and more draconian cost-cutting measures, such as Massachusetts’ new efforts to craft policies which will not allow residents to go to high-quality research hospitals which are more likely to cure them. If, as appears possible, nearly 50% of all doctors refuse to see patients covered by some or all of the programs created by ObamaCare, we are already there.

In fact, the ObamaCare statute does not prohibit government-mandated provisions in government-approved policies which will, in some way, tie reimbursement to “best practices” standards.

If liberals take the position that federal government intrusion into the most important,

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embarrassing, and private aspects of the relationship between a doctor and his patient is perfectly acceptable to them — so long as it does not involve abortions — they will have demolished their own hypocritical arguments in a way for all Americans to witness.

What they will be saying, in fact, is that their revered “constitutional right to privacy” is nothing more than a codeword for abortions and condoms. [Joomla SEO powered by JoomSEF](#)