



# Checkup: Health Care Reform

## AND THE CONSTITUTION

by David Cole and Elizabeth Price Foley



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### **Introduction**

Following a year of bitter partisan dispute, President Obama signed legislation on March 23, 2010, to overhaul the nation's health care system and extend medical insurance coverage to more than 30 million people.

The **Patient Protection and Affordable Care Act**, which was passed by Congress without a single Republican vote, was the most controversial legislative milestone of President Obama's first two years in office. States immediately filed challenges to it in federal courts, and Republicans across the country campaigned on a promise to repeal the law.

The legal challenges center on whether Congress has the authority under the Constitution's Commerce Clause and Necessary and Proper Clause to compel citizens to buy health insurance, in the interest of regulating an interstate economic market. Federal courts of appeal are divided on the question, which ultimately is likely to be decided by the U.S. Supreme Court.

In the essays that follow, David Cole makes the case for the constitutionality of the health care law; Elizabeth Price Foley argues that it violates constitutional limits on federal power.

### **A Note About This Series**

We live in a country of competing views. Our Constitution was framed in disagreement. And while the Constitution is a source of our most cherished and unifying political ideals, it also provokes some of our sharpest quarrels as its principles and protections are debated and applied to present circumstances.

At a time when corrosive partisanship distorts political dialogue, the Constitutional Spotlight Series provides a forum for civil debate. It is dedicated to the idea that robust and open dialogue is fundamental to America's constitutional legacy.

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# A Necessary and Proper Exercise of Congressional Power

By David Cole

In Congress and the public at large, the dispute over President Obama's health care insurance reform, the Patient Protection and Affordable Care Act, has been sharply divided along partisan lines. The bill passed by a single vote in Congress—and not a single Republican voted for it. Opposition to the health care reform law spurred the Tea Party movement, which in turn led to the Republicans gaining control of the House of Representatives in 2010. House Republicans promptly voted to repeal the law, though given Democratic control of the Senate and the presidency, they have no chance of succeeding through the political process.

Accordingly, health care reform opponents have taken their battle to court, filing multiple lawsuits claiming that the law is unconstitutional. Will the results there also be defined by partisan lines? Early indications suggested that they might be. Two district court judges appointed by Republicans ruled that the law's mandate that individuals purchase health insurance was beyond Congress' enumerated powers to legislate. At the same time, several district court judges appointed by Democrats ruled that the law was a constitutional exercise of Congress' power to regulate "interstate commerce" and to enact laws that are "necessary and proper" to further the regulation of national health insurance. Now pending in the court of appeals, the case is virtually certain to go to the Supreme Court—where Republican-appointed justices outnumber Democratic-appointed justices 5–4.

The first sign of a break in the partisan ranks within the judiciary came in June 2011, with a surprising result from the U.S. Court of Appeals for the Sixth Circuit—the first court of appeals to rule on the question. The three-judge panel that considered the challenge featured two Republican judges and a Democratic judge. But when the court ruled, it voted 2–1 to *uphold* the law. Most surprising of all, the deciding vote was cast by Judge Jeffrey Sutton, a Republican who was not only an appointee of President George W. Bush, a former law clerk of Supreme Court Justice Antonin Scalia, and an active member of the conservative Federalist Society, but had been the nation's leading states' rights Supreme Court advocate before he was appointed to the Sixth Circuit. The fact that Judge Sutton, as sympathetic a judge for states' rights claims as the challengers could ever hope for, did not see merit in the challenge bodes ill for their prospects in the Supreme Court, and suggests that the law may indeed lead judges to results that do not necessarily accord with their political preferences.

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In August 2011, a second court of appeals ruled on the issue, also by a divided 2–1 vote. This time, however, the Court of Appeals for the Eleventh Circuit ruled that the requirement that citizens purchase health care was beyond Congress' power under the Commerce Clause and the Necessary and Proper Clause. The judges in the majority were appointed by a Republican and a Democrat, while the dissenting judge was appointed by a Democrat. In the courts of appeals, then, the partisan lines appear to be breaking down.

## **The Commerce Clause Argument**

The challengers' principal claim is that Congress exceeded its powers by requiring citizens to purchase health care insurance. Congress' authority under the Commerce Clause to regulate "interstate commerce," they argue, must have some limits, and if Congress can employ that authority to require individuals to purchase something they would rather not, what is to stop Congress from requiring us to eat broccoli or join a health club?

It has long been settled that the Commerce Clause authorizes Congress to regulate citizens' economic activities, such as entering into contracts, producing or purchasing goods and services, or shipping goods across state lines. But it is entirely unprecedented, the challengers maintain, for Congress to regulate "inactivity"—the failure to buy insurance. As Judge Sutton reasoned, however, the distinction between activity and inactivity in this setting, where everyone eventually needs health care and almost no one can afford to pay for it himself, does not provide a workable line for limiting Congress' authority.

The provision under dispute is essentially a condition on a benefit. Everyone likes the benefit that the Affordable Care

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Act bestows: the right not to be denied insurance or charged higher rates because of a preexisting condition. But the challengers seek to avoid the condition: that they purchase health care insurance if they can afford to do so.

Congress' decision to grant protection to those with preexisting conditions means that individuals could wait to buy insurance until *after* they fall ill without any penalty. But that would defeat the purpose of insurance, which is to create a pool of money so as to spread the costs of health care among healthy as well as unhealthy people. As Wake Forest University Professor Mark Hall testified in Congress, "A health insurance market could never survive or even form if people could buy their insurance on the way to the hospital." Even without the Affordable Care Act's guarantee, many people do not buy insurance—and effectively shift the cost of their care to hospitals and the federal government (meaning we the taxpayers). The Congressional Budget Office estimated that in 2008 the uninsured shifted \$43 billion of health care costs to others.

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The challengers acknowledge that Congress may regulate any economic activity that, in the aggregate, affects interstate commerce—no matter how minimal the activity's effects are standing alone. But the decision not to buy health insurance, they maintain, is not "activity" at all. It is "inactivity." The individual mandate compels a citizen who has chosen *not* to engage in commerce to do so by purchasing a product he does not want.

### **Supreme Court Precedents**

The challengers' argument is not without precedent—but the precedents have all been overturned. In the early 20th century, the Supreme Court ruled that the Commerce Clause authorized Congress to regulate only "interstate" business, not "local" business; only "commerce," not production, manufacturing, farming or mining. And the Court ruled that Congress could regulate conduct that "directly" affects interstate commerce, but not conduct that "indirectly" affects interstate commerce. Using this approach, the Court invalidated many of the laws enacted during the early days of the New Deal. For example, in 1936 it struck down a federal law that established minimum wages and maximum hours for coal miners, reasoning that mining was local, not interstate; entailed production, not commerce; and had only "indirect" effects on interstate commerce.<sup>1</sup>

Around 1937, however, the Court reversed course. It recognized what economists (and dissenting justices) had long argued, and what the Depression had driven home—that in a modern-day, interdependent national economy, the terms of local production and manufacturing necessarily affect interstate commerce, and there is no meaningful distinction between "direct" and "indirect" effects. In the local, agrarian economy of the Constitution's Framers, it might have made sense to draw such distinctions, but in an industrialized (and now post-industrialized) America, the local and the national economies are inextricably intertwined.

As a result, Congress' power to regulate "interstate commerce" became, in effect, the power to regulate "commerce" generally. The Court rejected as empty formalisms the distinctions it had previously drawn, between local and interstate, between production and commerce, and between "direct" and "indirect" effects. Since 1937, the Supreme Court has found only two laws to be beyond Congress' Commerce Clause power. Both laws governed noneconomic

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activity—simple possession of a gun in a school zone and assaults against women, respectively—and were unconnected to any broader regulation of commerce.<sup>2</sup> But the Court has repeatedly made clear that Congress can regulate any economic activity, and even noneconomic activity where doing so is "an essential part of a larger regulation of economic activity."

Thus, the Supreme Court has upheld federal laws that restricted farmers' ability to grow wheat for their own consumption and that made it a crime to grow marijuana for personal medicinal use, even though in both instances the people concerned sought to stay out of the economic market altogether.<sup>3</sup> The Court reasoned that personal consumption affects interstate commerce in the aggregate by altering supply and demand, and that therefore leaving it unregulated would undercut Congress' broader regulatory scheme.

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Under these precedents, a citizen's decision to forgo insurance easily falls within Congress' Commerce Clause power. Since virtually everyone eventually needs health care, there is no real "opting out" of this market; the only question is whether one participates through buying insurance, or shifts his cost to others by failing to provide for his inevitable needs. When aggregated, those decisions shift billions of dollars of costs each year from the uninsured to taxpayers and the insured. As a result, regulating these decisions is "an essential part of a larger regulation of economic activity."

### **Necessary and Proper Clause**

Moreover, Congress' powers extend well beyond the Commerce Clause itself. The Constitution's "Necessary and Proper Clause" authorizes Congress to enact laws that, while not expressly authorized by the Constitution's specific enumerated powers, are nonetheless appropriate means to the exercise of those powers. In one of the Court's most important decisions, *McCulloch v. Maryland*, written by Chief Justice John Marshall, the Court unanimously ruled that this provision permits any laws that are "convenient" or "rationally related" to the furtherance of an express power.<sup>4</sup> In that case, the Court upheld Congress' creation of a national bank, even though the authority to do so is nowhere expressly provided, because a national bank was rationally related to the exercise of Congress' other powers, including the power to coin money, tax and spend. By the same token, because the individual mandate is rationally related to Congress' conceded power to regulate health insurance, it is "necessary and proper."

The Court reaffirmed the wide reach of the Necessary and Proper Clause just last year when, in a 7–2 decision joined by Chief Justice John Roberts and Justices Anthony Kennedy and Samuel Alito, it upheld a law authorizing civil commitment of federal prisoners who are sexual predators, even though no provision expressly authorizes Congress to regulate sexual assault or to impose civil commitment.<sup>5</sup> The Court explained that as long as there is some initial link to an explicitly enumerated power in the Constitution, the Necessary and Proper Clause authorizes measures many steps removed from that power. Thus, the Court reasoned, Congress may pass criminal laws "rationally related" to any of its other enumerated powers. It may then build prisons to house those who violate those laws, enact rules to govern those prisoners, and provide for civil commitment to protect the community from those leaving federal prison—even though the Constitution expressly authorizes none of these actions. If the Necessary and Proper Clause supports such an extended string of implied powers, there can be little dispute that it authorizes the individual mandate that is so central to Congress' regulation of health care insurance.

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Critics' claims that upholding the law would lead to unlimited federal power are wildly exaggerated. A decision to sustain the individual mandate would not mean that Congress could require all Americans to exercise or eat only healthy food, as some have suggested. The individual mandate regulates an *economic* decision that is in turn an essential part of a comprehensive *economic* regulation of the interstate business of insurance. And health care is a unique commodity, in that virtually everyone will eventually need it; along with taxes and death, a trip to the doctor is one of life's inevitabilities. Thus, to say that Congress can require an individual to purchase insurance does not signal the end of all meaningful limits on federal power.

### **Libertarianism in Federalist Clothing**

Near the end of one of the district court decisions invalidating the mandate, the district court judge wrote: "At its core, this dispute is not simply about regulating the business of insurance—or crafting a scheme of universal health insurance coverage—it's about an individual's right to choose to participate." Virginia Attorney General Ken Cuccinelli, who brought the suit, echoed that point by insisting that "this lawsuit is not about health care. It's about liberty." But that is exactly what the case is not about. A decision that Congress lacks the power to enact the individual mandate says nothing about individual rights or liberty. It speaks only to whether the power to require citizens to participate in health insurance, a power that states indisputably hold, also extends to the federal government. The Framers sought to give Congress the power to address problems of national or "interstate" scope, problems that could not adequately be left to the states. The national health insurance crisis is precisely such a problem. The legal question in the case is about whether the power to regulate should be exercised by federal or state legislatures; not whether individuals have a liberty or right to refuse to purchase health care insurance altogether.



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But the judge’s and the attorney general’s misstatements are nonetheless telling. Opposition to health care reform is ultimately not rooted in a conception of state versus federal power. It is founded instead on an individualistic, libertarian objection to a governmental program that imposes a collective solution to a social problem. The distinction between activity and inactivity intuitively appeals to the libertarian’s desire to be left alone. But nothing in the Constitution even remotely guarantees a right to be a free rider and to shift the costs of one’s health care to others. So rather than directly claim such a right, the law’s opponents resort to states’ rights.

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Opponents of health care reform are not really seeking to vindicate the power of states to regulate health care. Rather, they are counting on the fact that if they succeed with this legal gambit, the powerful interests arrayed against health care reform—the insurance industry, doctors and drug companies—will easily overwhelm any efforts at meaningful reform in most states. Unless the Supreme Court is willing to rewrite hundreds of years of jurisprudence, however, they will not succeed.

## An Assault on the Principle of Limited Government

By Elizabeth Price Foley

Health care reform is the modern battleground for defending the principle of limited and enumerated powers, one of the most important components of our constitutional architecture. The Affordable Care Act, dubbed “Obamacare,” transfers massive new power to the federal government. If the Supreme Court ultimately upholds the constitutionality of the new law, there’s arguably nothing off limits to Congress, turning the concept of limited government on its head. Health care reform is the last stand.

At the heart of the debate about the constitutionality of health care reform is the individual mandate, which forces everyone to buy private health insurance or face a hefty penalty. Inherent in the individual mandate is a disturbing rationale: We need to mandate the purchase of health insurance so that those who now forgo it—mostly young, healthy people—can contribute premium dollars, subsidizing the costs for older and sicker individuals.

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Individuals now outside the health insurance market will be forced inside it, taking away their freedom to decide how to spend their hard-earned dollars. The federal government will force everyone to buy health insurance, even if they would rather spend their money on food, housing, education, clothing, cars or electronics. Such nanny-state control over individual spending decisions regarding private goods and services is unprecedented. Whether it’s lollipops, broccoli, cell phones, life insurance or health insurance, the federal government has never before attempted to interfere with an individual’s liberty to decide what private products to buy or forgo.

The political left has been quick to dismiss the lawsuits challenging the constitutionality of the health reform law as “frivolous” and even “silly.” Yet well over half of the states have joined these lawsuits, and there have been several important victories for the challengers in federal courts in Virginia and Florida. Before getting into the details of the constitutional arguments raised by the litigation, let’s first address a common question: Aren’t we required to buy insurance all the time? We have to buy car insurance, for example, if we want to drive a car.

It’s important to realize, however, that it’s the *state* government, not the federal government, which mandates that you purchase car insurance. States aren’t bound by the principle of limited and enumerated powers—this is a principle that applies only to the federal government. As James Madison explained in *Federalist No. 45*, “The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.” The “numerous and indefinite” powers remaining in state governments

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include what's commonly referred to as the "police power," which, again in the words of *Federalist No. 45*, "extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State."

The police power is the most comprehensive power given to any government, allowing it to "police," or protect, the life, liberty and property of those within its borders. The Founders consciously and explicitly rejected the idea of giving the federal government a police power. State laws mandating the purchase of car insurance are the states' way of declaring that, to protect the lives and property of its people, having car insurance is a necessary prerequisite to being granted the privilege of obtaining a license to drive on the state's roads. By contrast, when a federal law like the Affordable Care Act mandates that citizens buy health insurance, there's no similar police power justification. The federal government simply doesn't have a police power. This also explains why states like Massachusetts can impose an individual mandate to buy health insurance without raising constitutional concerns. Massachusetts has a police power; the federal government does not.

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### **An Omnipotent Commerce Clause?**

It's critically important that Americans understand this distinction: The federal government doesn't have the power to do anything it wants to do. It's a government of limited and enumerated powers only, so the six million dollar constitutional question is this: Which of the enumerated powers could conceivably permit the federal government to mandate that citizens buy health insurance?

The chief enumerated power relied upon to justify health care reform is the "commerce power," which gives Congress power to "regulate commerce with foreign nations, and among the several States, and with the Indian tribes." While the Supreme Court has interpreted the Commerce Clause broadly since the New Deal, its use in the context of health

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reform is unprecedented. Not buying a private product (health insurance) isn't economic activity. Not buying something is inherently anti-commercial, anti-economic. Nothing is being bought or sold. Nothing of value is being exchanged. In fact, nothing is happening at all.

A harder question is whether failing to buy something has a "substantial effect" on interstate commerce—something the Supreme Court has endorsed in prior cases. But even these

substantial effect cases have always required some underlying "activity," such as growing wheat or growing and using marijuana. There has always been an underlying volitional act that, in the aggregate, has had a substantial effect on interstate commerce.

The Obama administration tries to get around this by claiming that the Commerce Clause reaches not only economic "activity," but also any economic "decision" with a substantial effect on commerce. A person who doesn't buy health insurance, the argument goes, may not be undertaking an "activity" but is surely making a "decision" that substantially affects interstate commerce. When an uninsured person gets sick, the cost of their care is ultimately borne by hospitals, doctors and other taxpayers. The "economic decision" to be uninsured impacts the market for health care by raising and shifting costs.

The administration's shift from economic "activity" to economic "decisions" is novel and breathtaking in scope. There's no Supreme Court precedent that has ever dared to go this far, endorsing the idea that merely *deciding* whether to do something should be the functional equivalent of *actually doing* something. Yet our decision about whether to buy something always affects—by definition—the market for that product. As federal trial judge Roger Vinson said in his opinion declaring the health reform law unconstitutional, "The decisions of whether and when (or not) to buy a house, a car, a television, a dinner, or even a morning cup of coffee also have a financial impact that—when aggregated with similar economic decisions—affect the price of that particular product or service and have a substantial effect on interstate commerce." He further concluded, "To be sure, it is not difficult to identify an economic decision that has a cumulatively substantial effect on interstate commerce; rather, the difficult task is to find a decision that does not."



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Such an omnipotent Commerce Clause is inherently incompatible with the principle of limited and enumerated powers. Realizing this, the Obama administration has been desperately trying to identify a limiting principle to assuage the courts that upholding health reform won't fundamentally alter our constitutional structure. The only thing they have come up with is the argument that health care is "unique." They claim that everyone will require health care at some point in their life. No one can completely "opt out" of the health care market, so the costs of health care for the uninsured are often shifted onto hospitals, doctors, taxpayers and those with health insurance.

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But this inevitability and cost-shifting rationale isn't unique to health care at all. People can't really opt out of the food market, the water market, the clothing market or even the housing market. Everyone has to have food, water, clothing and some sort of housing. And once they enter these markets, if they fail to pay for the food, water, clothing or housing they've received, the cost of the "bad debt" incurred by businesses that provided these goods will undoubtedly be passed along to other consumers in the form of higher costs.

Boiled down to its essence, the fight about the substantial effects doctrine of the Commerce Clause is whether the judiciary can be convinced that there's no real difference between "activity" and "inactivity." In classic Orwellian doublethink—where black becomes white—the Obama administration would have us believe that inactivity is really just a form of activity, since there's really is no such thing, in today's interconnected world, as "inactivity." Everything, in some way, has a substantial effect on the economy.

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This logic should frighten ordinary Americans. If it's accepted by the courts, the Commerce Clause becomes a police power, capable of reaching every decision we make. Congress can make us buy broccoli, American cars, gym memberships or anything else it wants in the name of supporting some commercial market. There's no discernible limiting principle to this theory. And without a discernible limiting principle, there can be no principle of limited government.

### **The Necessary and Proper Pretext**

Even if the Supreme Court doesn't buy the doublethink notion that inactivity is activity, there's one final and critically important additional constitutional argument it must address: the Necessary and Proper Clause. The Necessary and Proper Clause states that Congress has power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." As the language indicates, the Necessary and Proper Clause isn't a power source that stands alone. To use it, the government must identify one of the "foregoing powers" then convince the courts that the law is both a "necessary" and "proper" means for carrying out the enumerated power.

In the case of the health care law, the enumerated power is once again the Commerce Clause. Specifically, the government contends that the individual mandate is a "necessary and proper" means for effectuating the law's extensive health insurance reforms, a regulation of commerce. The law's insurance reforms include such things as forbidding insurers from excluding those with preexisting health conditions, eliminating lifetime caps on benefits, limiting premium variations and mandating coverage of children up to age 26 on parents' policies.

The difficulty is that an individual mandate isn't a "means" of regulating insurance. It's a regulation of the conduct of people, not the conduct of insurance companies. It says to citizens, "Thou shalt buy insurance." Such a command may indeed help the insurance market, especially since the health care law's market reforms have made health insurance a very expensive and risky thing to underwrite. But the individual mandate, by itself, isn't a "means" of achieving the otherwise legitimate end of regulating health insurance.

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Indeed, the act’s health insurance market reforms have rendered the health insurance market unstable, making it hard for insurers to accurately estimate risk, and consequently causing the cost of health insurance to spiral upwards. The individual mandate is supposedly “necessary” to offset these market reforms, thus sustaining the viability of the health insurance market itself. Under the guise of executing the power to regulate the health insurance market (commerce), the law imposes an individual mandate, attempting to accomplish a goal not entrusted to the government (forcing citizens to buy a private product). This is exactly the sort of pretextual invocation of the Necessary and Proper Clause condemned by Chief Justice John Marshall many years ago in *McCulloch v. Maryland*.

Supporters of the health reform law also occasionally fall back on the taxing power as a last ditch attempt to sustain the individual mandate. Yet every single court that has considered this argument thus far has rejected it. And on a purely pragmatic level, there’s something disturbing about the administration’s attempt to invoke the taxing power. Health care reform supporters, from the President on down, repeatedly and adamantly denied that they were going to tax people for failing to buy health insurance.

While there may have been a secret intent to impose taxes—and thus exercise the taxing power—courts can’t base their decisions on legislators’ secret intentions. Congress said it was imposing a “penalty,” not a tax, and treated the individual mandate quite differently from a tax. In a nutshell, the difference is simple: A tax raises money to support government programs, while a penalty punishes someone if they don’t do something. It should be patently obvious that a monetary fine imposed for failing to buy health insurance is a penalty, not a tax. If it walks like a penalty and quacks like a penalty, it’s a penalty.

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The lawsuits challenging health care reform are far from frivolous. They raise serious and legitimate constitutional questions that are critically important to maintaining the principle of limited government. If the law is sustained, there won’t be much of this principle remaining.

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# Discussion Questions

The Constitutional Spotlight Series is intended to provoke civic dialogue by providing different perspectives on constitutional issues. Now it's your turn to weigh in on this timely topic! Here are some questions to spark conversation in your classroom, book club or around the kitchen table.

1. Should all Americans be required to purchase health insurance?
2. What does each author say about the Constitution's Commerce Clause and Necessary and Proper Clause in relation to mandatory health insurance?
3. Do past Supreme Court decisions support or go against the constitutionality of the health care reform law?
4. Is there a difference between requiring people to purchase health insurance and mandating that they buy gym memberships, American cars and broccoli?
5. How does each author characterize the difference between economic "activity" and "inactivity"?

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# Notes

<sup>1</sup> *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

<sup>2</sup> *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995).

<sup>3</sup> *Gonzales v. Raich*, 545 U.S. 1 (2005); *Wickard v. Filburn*, 317 U.S. 111 (1942).

<sup>4</sup> *McCulloch v. Maryland*, 17 U.S. (Wheat.) 316 (1819).

<sup>5</sup> *United States v. Comstock*, 130 S. Ct. 1949 (2010)







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