

# Policy Focus

## ObamaCare and the Constitution

RECIPES FOR RATIONAL GOVERNMENT FROM THE INDEPENDENT WOMEN'S FORUM

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### WHAT YOU NEED TO KNOW

**E**ven before the Affordable Care Act (ObamaCare) became law, Constitutional law scholars and limited-government advocates were preparing to sue the federal government over the law's unconstitutional provisions. Across the country, more than 30 lawsuits were filed, three of them involving a total of 28 states as plaintiffs.

One of the cases, originally *Florida v. Department of Health and Human Services*, moved quickly and successfully to the Supreme Court level. A district court judge and an appellate circuit court sided with the law's challengers, ruling that the law's mandate requiring every American to buy health insurance was an overreach of federal power.

Now this issue and other related issues are before the Supreme Court. The Court will consider 1) whether the individual mandate can be considered a tax, 2) whether the individual mandate is a Constitutional exercise of Congress's commerce regulation power, 3) whether the individual mandate can be voided without voiding the rest of the law, and 4) whether the law's expansion of the Medicaid program is coercive to states. The justices will hear oral arguments in late March, and rule in June.

This is an issue of great national importance. Americans want to know with certainty what laws and regulations will shape our health care system. We don't want to see more time, energy and money wasted on what could be an unconstitutional law. And perhaps even more importantly, this court battle will determine the future of individual rights in America. If the Court upholds this overreach of federal government power, individuals and states will no longer have the rights guaranteed to them by the Constitution, and our system of governance will be forever changed.

## WHY YOU SHOULD CARE

**T**he fight over ObamaCare's Constitutionality affects us all. The Supreme Court's ruling will determine if government proceeds with implementing ObamaCare, which will radically change our health insurance and medical care system. This decision also has implications that go beyond health care, to the very question of the role of government in American life. Here are stakes of this case:

- **How Long Will We Have to Wait:** The Supreme Court will decide whether to rule on the mandate now—and provide Americans with much needed certainty about our health care system—or push back a potential lawsuit until 2014
- **A Limited Government:** If the government can force you to buy health insurance, what can't it force you to buy or do?
- **An Even More Dysfunctional Health Care System:** If parts of the law are voided, while other parts remain, ObamaCare will be even more dysfunctional and could mean the end of the insurance industry as we know it.
- **A Ruling on States' Rights:** If the federal government can force, or coerce, the states to expand the Medicaid program according to a new, federally-mandated eligibility standard, then few limits remain on how the federal government can influence the states. That's bad news for those who like the idea of local control and state sovereignty.

## MORE INFORMATION

# We Need an Answer, and Soon

**T**he first issue the Supreme Court will consider in the ObamaCare case is this: Is the requirement to buy health insurance - punishable by a monetary penalty - actually a tax? If the Court sees this penalty as a tax, the rest of the case will have to wait until 2014.

Here's why: The Tax Anti-Injunction Act, a law from 1867, prevents anyone from challenging a tax, until the tax assessments actually begin. This statute exists to ensure that the federal government can collect the revenues it needs without being delayed by the court system.

The Supreme Court is unlikely to consider ObamaCare's individual mandate a tax. In fact, only one appellate court has come to this conclusion in one case challenging the health care law (*Liberty University v. Geithner* in the Fourth Circuit).

President Obama and Congressional ObamaCare advocates went to great lengths during the law's creation to explain that the individual mandate is not a tax. Other courts have criticized the government's flip-flop. As one judge in Florida wrote:

Congress should not be permitted to secure and cast politically difficult votes

on controversial legislation by deliberately calling something one thing, after which the defenders of that legislation take an ‘Alice-in-Wonderland’ tack and argue in court that Congress really meant something else entirely.

In other words, lawmakers can’t have it both ways and declare the mandate is not a tax when it’s politically expedient, and then call it a tax to justify its constitutionality.

There are many reasons why the individual mandate is not a tax. Importantly, the Affordable Care Act itself does not call it a tax, even though the law includes numerous other provisions explicitly referred to as taxes. Furthermore, the individual mandate’s main goal is not to raise revenue, but to punish unlawful behavior. Raising revenue alone does not qualify the provision as a tax: Our IRS code, for example, includes numerous other revenue-raising provisions that are “penalties,” but not “taxes.”

If the Court makes the wrong decision and determines the individual mandate can be defended as a tax, a decision on the constitutionality of the individual mandate will be delayed for years. This could result in billions more of wasted tax dollars spent to implement a potentially unconstitutional law, and will continue to leave Americans guessing about the future of the health care system, discouraging business creation and economic growth.

## The Court Should Stand Up for Constitutionally Limited Government

The most well-known constitutional issue before the court involves the individual mandate. The government’s main defense of this provision has been the Commerce Clause (Article 1, Section 8, Clause 3 of the Constitution) which says: “[Congress shall have the power] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”

ObamaCare lawyers argue this clause gives Congress the power to mandate the purchase of health insurance, because failure to purchase insurance results in uncovered health care costs being passed along to others, affecting commerce.

But challengers of the law say this stretches Congress’s commerce-regulation powers too far, inviting Congress to justify any number of mandates that would violate our individual rights.

Congress has never before required citizens to purchase a certain private sector good, a precedent which could lead to other mandates requiring individuals to buy items that Congress believes are “good” for the people and impact other costs. Beyond mandating the purchase of certain items, if Congress has unlimited power to regulate any activity or decision that substantially affects commerce, then all kinds of other intrusions into private life become fair game for policymakers. For example, imagine if Congress could dictate that we all purchase healthy food, gym memberships,

solar panels or electric cars, all for the sake of some regulatory scheme that “substantially affects commerce.”

Americans recoil from such suggestions. And it seems clear that our founders understood that, regardless of national leaders’ good intentions, government should not attempt to solve society’s problems by controlling individual behavior, which is why the Constitution sets clear limits.

That’s why the Court’s ruling on the individual mandate’s constitutionality is so pivotal. The Supreme Court must strike it down to ensure that Americans in future generations have a government of laws, not of men, as our founders intended.

## The Mandate is Not Severable

If the Supreme Court decides that ObamaCare’s individual mandate is a violation of the Constitution, they will be faced with another issue: What happens to the rest of the law?

The Supreme Court has the authority to strike down the law in its entirety, but precedent shows that the Court could instead strike an individual provision or provisions, and leave the rest in place.

Importantly, the Affordable Care Act did not include a “Severability Clause,” which is usually included in long, complex pieces of legislation, to specify which provisions can be separated from others. An earlier draft of the bill did include such a clause, but it was removed in the final draft that became law.

Technicalities (important as they may prove to be) aside, there are real policy reasons that the individual mandate should not be eliminated alone.

Republicans and Democrats alike view the individual mandate as the lynchpin that holds ObamaCare together. The law is a national scheme of price controls and insurance regulations that cannot function without requiring all individuals to purchase insurance.

Health insurance costs are expected to rise if the entire law stays in place, but they will skyrocket if the individual mandate alone is struck down. Clearly, Congress would have never passed this legislation without this critical provision.

Therefore, the Supreme Court will have to carefully consider if certain parts of the law cannot be severed from the individual mandate -- or better yet, scrap the entire law.

## States’ Rights at Stake

ObamaCare dramatically alters the Medicaid system, requiring states to follow new, looser eligibility standards. States would receive additional federal aid during a brief transition period, but then would have to pay for millions of new beneficiaries in the program. Alternatively, states could “opt-out” of the program entirely and forfeit all federal funding for Medicaid.

States argue that the federal government is acting coercively and commandeering their political and budgetary sovereignty by giving them two

equally impossible choices: expanding Medicaid to the point of bankruptcy or opting out of Medicaid altogether.

So far, states have not seen success with this claim. The district court judge in Northern Florida, as well as the Eleventh Circuit in Atlanta, sided with the federal government. But states raise an important point by fighting back on the Medicaid expansion.

Many programs function as partnerships between the federal government and the states, and Congress has used its “power of the purse” to tempt states into compliance by offering federal money.

One example is the drinking age of 21 years. No federal law mandates a particular drinking age, but there is a federal law that withholds 10 percent of a state’s federal highway funding if the state allows for the sale of alcohol to people under 21. States have the option of complying, and the federal government offers additional financial support for those that do so.

The Medicaid expansion, however, puts states in a much more dire situation. The federal government’s defense centers on the states’ ability to “opt out” of Medicaid if they don’t like the new rules. But since 1965, states have become increasingly dependent on federal funding to meet the health insurance needs of impoverished citizens, and Medicaid typically accounts for about one-fourth of a state’s budget. For states to lose all federal Medicaid support now would be disastrous.

The Supreme Court’s ruling on this provision could be just as consequential as the individual mandate ruling, because every federal-state program could be reevaluated in light of whatever standard for “coercion” the Justices embrace.

### **Is the Law’s Medicare Rationing Board Constitutional**

Constitutional battles about ObamaCare may not end with the ruling in June. The Goldwater Institute filed a separate suit alleging that Congress is denied any meaningful oversight in the IPAB - the Independent Payment Advisory Board - created to cut Medicare spending. This case has not yet reached the Supreme Court.

Simply put, the Constitution designates Congress as the law-making body of the federal government. Voters elect representatives and then can hold them accountable for the positions they take and laws they pass while in Congress. Congress is not supposed to turn over law-making authority to bureaucracies that cannot be easily held to account by voters.

As the Goldwater Institute explains, “IPAB is not reform – it is Congress’s way of abdicating its duties to a centralized, unelected, unaccountable board.”

A ruling on IPAB will have a significant impact on health care policy: If this board is allowed to proceed as intended, it will decide what treatments are off-limits for millions of Americans. But beyond health care, a ruling will also determine the extent to which Congress can delegate its authority and imbue other federal entities with power.

## WHAT YOU CAN DO

It's important that citizens understand the weight of this issue!

- **Get Informed:** Learn more about the unconstitutionality of the health law:
  - Health Care Lawsuits  
([www.healthcarelawsuits.org](http://www.healthcarelawsuits.org))
  - The Independent Women's Forum  
([www.iwf.org](http://www.iwf.org))
  - Saving Our Health Care  
([www.savingourhealthcare.org](http://www.savingourhealthcare.org))
- **Talk to Your Friends:** Help your friends and family understand these important issues.

Sign the Repeal Pledge and encourage others to as well.

- **Become a Leader in the Community:** Get a group together each month to talk about a political/policy issue (it will be fun!). Write a letter to the editor. Show up at local government meetings and make your opinions known. Go to rallies. Better yet, organize rallies! A few motivated people can change the world.
- **Remain Engaged:** Too many good citizens see election time as the only time they need to pay attention to politics. We need everyone to pay attention and hold elected officials accountable. Let your Representatives know your opinions!

## ABOUT THE INDEPENDENT WOMEN'S FORUM

The Independent Women's Forum (IWF) is dedicated to building support for free markets, limited government, and individual responsibility.

IWF, a non-partisan, 501(c)(3) research and educational institution, seeks to combat the too-common presumption that women want and benefit from big government, and build awareness of the ways that women are better served by greater economic freedom. By aggressively seeking earned media, providing easy-to-read, timely publications and commentary, and reaching out to the public, we seek to cultivate support for these important principles and encourage women to join us in working to return the country to limited, Constitutional government.

We rely on the support of people like you! Please visit us on our website [www.iwf.org](http://www.iwf.org) to get more information and consider making a donation to IWF.

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