

On the Constitutionality of ObamaCare

Posted on [December 14, 2010](#) by [Timothy B Lee](#)

I get what [Julian](#), [Radley](#), and [Megan](#) are saying, and in principle I agree with them. A fair-minded reading of the constitution and the debates that surrounded its enactment makes it pretty clear that the founders' goal was to create a federal government of far more limited powers than the one we've got. But I'm finding it awfully hard to get excited about the federalist boomlet sparked by [Judge Hudson's ruling](#) that the ObamaCare insurance mandate is unconstitutional. I'm not a big fan of ObamaCare, and I wouldn't be too sad to see portions of it struck down by the courts. But the [rank opportunism](#) of the Republican position here is so obvious that I have trouble working up much enthusiasm.

There's nothing particularly outrageous about the health care mandate. The federal government penalizes people for doing, and not doing, any number of things. I'm currently being punished by the tax code for failing to buy a mortgage, for example. I'd love it if the courts embraced a jurisprudence that placed limits on the federal government's ability to engage in this kind of social engineering via the tax code. But no one seriously expects that to happen. The same Republican members of Congress who are applauding Hudson's decision have shown no qualms about using the tax code for coercive purposes.

The test case for conservative seriousness about federalism was [Raich v. Gonzales](#), the medical marijuana case. Justices Scalia and Kennedy flubbed that opportunity, ruling that a woman growing a plant in her backyard was engaging in interstate commerce and that this activity could therefore be regulated by the federal government. If Scalia and Kennedy now vote with the majority to strike down portions of ObamaCare, it will be pretty obvious that they regard federalism as little more than a flimsy pretext for invalidating statutes they don't like. Or, worse, for giving a president they don't like a black eye.

Now, to be clear, libertarians like [my colleagues at Cato](#) aren't guilty of hypocrisy on this score. But by jumping on a bandwagon driven by hypocrites and partisan hacks, I worry that they'll permanently damage the brand of constitutionally limited government.

