



# Obamacare Both Unnecessary and Improper

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## **About Trevor Burrus:**

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Congress exercised unprecedented and unbounded power in passing Obamacare. Although Congress has the power to regulate commerce between states, it does not have the power to order commerce into existence so it can regulate it. By compelling Americans to purchase health insurance, this is precisely what the individual mandate does.

The government's arguments focus on how the court has expanded Congress's commerce power through the Necessary and Proper Clause, which allows Congress to pass laws necessary and proper to regulating commerce. Too often it is forgotten that the Necessary and Proper Clause augments and limits congressional power.

What are those limits? Previous decisions based the Necessary and Proper Clause all concerned people who actively did something to enter Congress's jurisdiction. The uninsured, however, are inactive and have done nothing to come under Congress's power. This "activity/inactivity" distinction is crucial for two reasons: 1) it provides the limit of "necessity" on Congress's power; 2) it provides the limit of "propriety."

In two cases that defined the limits on what is "necessary" to Congress's power, the Supreme Court articulated a clear, judicially administrable line: Laws that do not touch "economic activity" are impermissible because they are not a "necessary" extension of the commerce power. The virtue of a clear limit based on "economic activity" is that it does not involve the courts in micromanaging Congress's decisions, something they cannot and should not do.

Now, the government asks the Supreme Court to do just that: to analyze Congress's determination that, in this special instance, the inactivity of not purchasing healthcare is an "economic activity." They argue that the decision not to purchase healthcare is equivalent to the economic activity of shifting the costs onto others. They say this despite conceding that only 37 percent of the uninsured's healthcare expenses are cost-shifted as "uncompensated care," or about 1.9 percent of our total healthcare economy.

Finally, this law is not only unnecessary, it is improper. The power to force someone to give businesses money is incredibly attractive and dangerous. Rather than suffering the political liability of raising taxes, Congress can force citizens to cross-subsidize each other. This is precisely what Congress did here: It avoided the above-the-board taxation and clear budgeting in order to hide the true costs of the law. For this reason, the law is an "improper" use of the congressional power that violates, in the words of Chief Justice John Marshall, "the letter and spirit of the constitution."

