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Obamacare vs. the United States Constitution

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Public support for ObamaCare legislation is dismal. According to a February 2 – 3 Fox News/Opinion Dynamics poll, among 900 registered voters surveyed, only 23 percent want it enacted. Fully 70 percent disagree. Among them, 47 percent would start over, and 23 percent would do nothing. (Margin of error: +/- 3 percent.)

Nonetheless, ObamaCare is like a quietly rumbling volcano -- dormant, but not yet dead. President Obama and Washington Democrats oscillate between tears over their stalled pet project and cheers that “We’re moving forward,” as Obama recently chirped. The White House’s February 25 bipartisan healthcare summit is a sulfurous puff of smoke that should worry ObamaCare opponents.

Consequently, those who want to stop this ruinous measure should keep highlighting its shortcomings until this initiative is extinct.

Consider, then, that ObamaCare flunks the first test of any potential federal law: It is not constitutional. ObamaCare critics deem the individual mandate unconstitutional, since Congress lacks the power to force Americans to buy anything, especially health insurance they wisely or foolishly may not want.

Congress’ legitimate power to regulate interstate commerce has been stretched like saltwater taffy. “It is one thing, however, for Congress to regulate economic activity in which individuals choose to engage; it is another to require that individuals engage in such activity,” Senator Orrin Hatch (R – Utah), former Ohio Secretary of State J. Kenneth Blackwell, and the American Civil Rights Union’s Kenneth Klukowski observed in the January 2 Wall Street Journal. “That is not a difference in degree, but instead a difference in kind.”

Beyond this lies another problem. The individual mandate would be enforced by penalizing Americans \$495 or 0.5 percent of Adjusted Gross Income, whichever is higher, if they do not acquire health insurance by 2014. Two years later, that fine

would rise to 2 percent of AGI, equal to \$640 today. Anticipated fines total some \$15 billion.

The IRS would collect these payments and require Americans to certify on their tax returns that they carry health coverage. This represents a “direct” tax on U.S. citizens, based solely on the status of living in America. This is not a tax on income. It is not an excise tax either, since there is no tax on any transaction; if one refuses to purchase insurance, there is no transaction on which to slap an excise tax.

As Senator John Ensign (R – Nevada) told his colleagues on the Senate floor: “Anything we have ever done, somebody actually had to have an action before we could tax or regulate it.”

“Without precedent, Congress is attempting to punish the non-purchase of a private product,” says Robert Levy, senior fellow for constitutional studies at the Cato Institute, which he chairs. “That would be an intolerable affront to the Constitution and personal autonomy.”

Nonetheless, the individual mandate’s IRS enforcement scheme operates, in essence, as a tax. The hitch is that Article I, Section 8 of the U.S. Constitution states: “The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises.” Section 9 adds that “No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.”

A penalty collected via the IRS would be a direct tax on individuals, independent of anything reflected in the Census or tied to enumeration of citizens among the states. As such, the individual mandate’s enforcement mechanism would fail Constitutional scrutiny. And a mandate without enforcement is just a suggestion.

If ObamaCare somehow re-erupts into active status, it likely would rely on this ultimately toothless individual suggestion, which many Americans gladly would ignore. Without Washington’s capacity to pressure Americans into submission, the number of participants in ObamaCare likely would fall well below projections, and this entire, glorious experiment would implode.

One of the most compelling arguments against ObamaCare is that it is self-defeatingly unconstitutional. That is yet another reason why this menacing monster must be silenced.

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