

The Volokh Conspiracy

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Pretending that no law professors question Obamacare

David Kopel • April 1, 2010 7:05 pm

Back in 1989, National Public Radio reporter Nina Totenberg attempted to portray the individual rights view of the Second Amendment as a fringe position with no academic support. She claimed that the National Rifle Association had been unable to provide her with names of any professors who thought the Second Amendment was an individual right.

According to the NRA, Ms. Totenberg was lying, and the NRA had given her three names: Robert Cottrol of George Washington, Joseph Olson of Hamline, and Sanford Levinson of Texas. The latter, of course, was (and is) well-known as the co-author of a major constitutional law textbook, and had just published an article in the *Yale Law Journal*, titled "The Embarassing Second Amendment," which stated that the arguments in favor of an individual right were very strong.

Indeed, the individual right arguments were so strong that when the Supreme Court finally got around to announcing a new Second Amendment decision, in *District of Columbia v. Heller*, all nine Justices readily agreed that the Second Amendment guarantees an individual right. There was a 5–4 split on the scope of the right, but all Justices recognized that the right belonged to individuals, not to states or to some "collective."

Earlier this week at the University of Washington Law School, a "debate" was held on the constitutionality of Obamacare. All four of the debaters said that the new law is unquestionably constitutional. According to moderator Hugh Spitzer, the reason that the "debate" featured only one side was that "we tried very hard to get a professor who could come and who thinks this is flat-out unconstitutional...But there are relatively few of them, and they are in great

demand.” The Center for American Progress touts this story as proof of the constitutionality of Obamacare, and the comments on the blog post are a self-congratulatory frenzy about the stupidity of anyone who doubts Obamacare.

Well, all I can say is that if I had some legal problem that required modestly diligent research, I sure wouldn't hire any of those Washington panel organizers.

My Cato Institute colleague Ilya Shapiro has just posted an offer to debate Obamacare anywhere, anytime. Besides working at Cato (where he edits the *Cato Supreme Court Review*, and helps manage Cato's extensive constitutional litigation program), he is also an adjunct professor of law at George Washington University.

Like Sanford Levinson, Randy Barnett, of Georgetown Law School, is also the author of a constitutional law textbook; Barnett has commented extensively on the unconstitutionality of Obamacare. Cato's Roger Pilon has written many legal scholarly articles, and is an adjunct at Georgetown, although he teaches Government, so perhaps he does not count. Another law professor skeptic is Richard Epstein, of the University of Chicago. Lee A. Casey, who is co-counsel for the 13-Attorneys-General lawsuit, is currently in private practice, but has been an adjunct law professor at George Mason.

Michael McConnell (Stanford) wrote an op-ed in the *Wall Street Journal* challenging the constitutionality of the mandate.

Writing in *USA Today*, Jonathan Turley (George Washington) suggested that Obamacare is a flagrant violation of federalism and the Tenth Amendment.

Hypothesizing that Barnett, McConnell, and Epstein were asked to participate in the UW and declined because of schedule conflicts, and that Casey doesn't count because he is not currently teaching, Shapiro avers that he was never contacted.

As VC readers know, I also think that Obamacare is unconstitutional. The *Wall Street Journal* excerpted some of my blog post on March 25. I teach Advanced Constitutional Law at Denver University Sturm College of Law. My most extensive article on the interstate commerce power is *Taking Federalism Seriously: Lopez and the Partial-Birth Abortion Ban*, 30 *Connecticut Law Review* 59 (1997). In that article, Glenn Reynolds (Law Professor, U. of Tenn.) and I argue that the post-Lopez interstate commerce power does not give Congress the power to regulate the particular technique that is used in abortions. [The plaintiffs in *Gonzales v. Carhart* did not raise this issue, but the concurrence by Justices Thomas and Scalia indicated that they might have voted against the federal ban, if the plaintiffs had raised the commerce clause.] *A fortiori*, at least as Glenn and I see things, the interstate commerce power does not include the power to compel every American to buy a congressionally-designed product.

CBS News noticed the prediction by Ilya Somin (George Mason Law, VC) that the Court would probably uphold the mandate, but “such a law would be unconstitutional under the correct interpretation of the Commerce Clause — or any interpretation that takes the constitutional text seriously.” That view would have added some intellectual diversity to a debate.

Another law professor who has raised constitutional questions about Obamacare is Rob Natelson (U. Montana; also my colleague as a Senior Fellow at the Independence Institute). However, Rob is pretty busy getting ready to retire and to move to Colorado, so perhaps he was not available.

With a few minutes of searching on the web, I also found

“It’s definitely going way beyond anything Congress has ever attempted before,” said Kris Kobach, a law professor at the University of Missouri-Kansas City and candidate for Kansas secretary of state. “There’s a very solid argument here.”

And:

Bruce La Pierre, a constitutional law professor at Washington University [St. Louis, not UW], noted that the court majority in the Raich medical marijuana case was a delicate one and left “little reason to be sanguine that health-care legislation will survive attack under commerce clause.” [La Pierre was not advocating for this position, just observing that it was entirely possible that the current Court would find that the mandate exceeds the interstate commerce power.]

I don’t know if Kurt Lash (Loyola LA) thinks Obamacare is unconstitutional, but he does think that Akhil Amar’s 14th Amendment argument in favor is incorrect.

Any VC readers who are law professors who think that Obamacare has constitutional problems and are willing to participate in a debate on the topic are welcome to identify themselves in the Comments below, or to email me. I will post the names of any volunteers. Professors need not take the firm position that the bill is definitely unconstitutional; professors who acknowledge that the bill raises serious and unresolved issues are also welcome.

Categories: Health Care

72 Comments

1. **B.D. says:**

I understand your frustration, but perhaps you shouldn’t take The Center for American Progress seriously.

Quote

April 1, 2010, 7:15 pm

2. **Mahan Atma says:**

A slightly different question, but:

Does any serious legal scholar think there’s a snowball’s chance in hell that an appellate court or SCOTUS will *actually find the bill unconstitutional*?

If not, aren’t the states’ attorneys general wasting their taxpayers’ money on a purely political endeavor?

Quote

April 1, 2010, 7:21 pm

3. **Brett Bellmore says:**

Indeed, the individual right arguments were so strong that when the Supreme Court finally got around to announcing a new Second Amendment decision, in *District of Columbia v. Heller*, all nine Justices readily agreed that the Second Amendment guarantees an individual right.

In the case of the minority, I suspect that had less to do with their perception of the strength of the arguments, than with their perception of the risks of pissing off that many armed people. Since the 'individual right' they supported was purely rhetorical in nature, no individual would ever plausibly be in a position to claim it. It was more a slap in the face to that position, than a concession to it.

Quote

April 1, 2010, 7:22 pm

4. **Steve says:**

Writing in USA Today, Jonathan Turley (George Washington) suggested that Obamacare is a flagrant violation of federalism and the Tenth Amendment.

This is a really funny sentence. People are free to believe the Constitution should be interpreted in any number of ways, but can there really be a "flagrant" violation of a provision as toothless in practice as the Tenth Amendment?

At any rate, I can't help but recall the time my law school decided to host a debate on the raging Clarence Thomas/Anita Hill controversy. They nearly had to call it off when they couldn't find a single member of the faculty willing to take his side. Gosh...

Quote

April 1, 2010, 7:23 pm

5. **Brett Bellmore says:**

Does any serious legal scholar think there's a snowball's chance in hell that an appellate court or SCOTUS will actually find the bill unconstitutional?

Well, I'm not a serious scholar, but I long ago stopped assuming that the Supreme court could be reliably predicted. There's at least a snowball's

chance in hell here, and that's more than zero.

Quote

April 1, 2010, 7:28 pm

6. ***PaperNuncio*** says:

Does any serious legal scholar think there's a snowball's chance in hell that an appellate court or SCOTUS will actually find the bill unconstitutional?

Uhh...I think that's sort of Kopel's point. A lot of people 30+ years ago might have said of the Second Amendment

"Does any serious legal scholar think there's a snowball's chance in hell that an appellate court or SCOTUS will actually find that the Second Amendment describes an individual right?"

Quote

April 1, 2010, 7:31 pm

7. ***Mahan Atma*** says:

Brett Bellmore: There's at least a snowball's chance in hell here, and that's more than zero.

One in a trillion is more than zero too.

By Kerr's estimation, it's less than 1%. Sounds about right to me.

Quote

April 1, 2010, 7:32 pm

8. ***Mahan Atma*** says:

PaperNuncio: A lot of people 30+ years ago might have said of the Second Amendment

Like who?

Quote

April 1, 2010, 7:33 pm

9. ***Gordo*** says:

It's a shame that 45,000 people have to die every year, and hundreds of thousands be unnecessarily sick and in pain, because

it is alleged that it is unconstitutional to do much about it.

But I guess that's real life, not the constitution.

Quote

April 1, 2010, 7:36 pm

10. **Gordo says:**

On a more substantive note:

1. Unlike the "collective rights" view of the 2nd amendment, which rested upon a very thin thread of the Miller decision, an expansive view of federalism, even after Lopez, Morrison, and SWANCC, is solidly ensconced in post-1937 case doctrine.

2. The "mandate" is, in fact, not a mandate — it's a tax penalty. Sort of like when I want to take out my retirement savings before I'm 59 1/2.

Quote

April 1, 2010, 7:38 pm

11. **Steve says:**

It's a shame that 45,000 people have to die every year, and hundreds of thousands be unnecessarily sick and in pain, because it is alleged that it is unconstitutional to do much about it.

Fortunately, the well-known trump card called "the Constitution is not a suicide pact," much favored by conservatives in recent years, can be deployed to cure any constitutional infirmity.

Quote

April 1, 2010, 7:38 pm

12. **Guy says:**

Akhil Amar argued it was Constitutional under Section 5 of the 14th Amendment? The balls on that man, seems about as likely a position to be adopted as his two-tiers theory of federal jurisdiction. In both cases it's not a textually unreachable position but it would require throwing out more than a century of case law to adopt either.

Quote

April 1, 2010, 7:39 pm

13. **Gordo says:**

As for the Tenth Amendment, Justice O'Connor did us the good favor of providing the glimmer of a resurrection in the New York vs. U.S. decision in 1990. But that involved the government ordering states around and mandating particular actions, not individuals. It should also be noted, as Senator Wyden of Oregon has done, that this law mandates a result of the states, but allows them to go their own way to achieve that result if they so choose independent of "Obamacare."

By the way, the Republican talking points now seem to be calling it "Demcare," so perhaps a correction to the post is in order.

Quote

April 1, 2010, 7:40 pm

14. ***PaperNuncio* says:**

Mahan Atma: Like who?

Well, go read Dave Hardy's posts about the first law reviews to start discussing the issue:

http://armsandthelaw.com/archives/2010/01/yet_another_tri.php
http://armsandthelaw.com/archives/2010/01/subsequent_hist.php

According to Hardy, his review article was the first ever to posit individual rights. Even he was skeptical when he started. From the first post, he writes, "

How it got started is rather funny, viewed from the standpoint of 2010. I wrote the article, over a period of months, on the subject of how gun control did not work — this became the second half of the article. My editor, Mark Collins, pointed out that this is a LAW review, and I really ought to have a section on legal issues ... how about the Second Amendment? I responded that there's nothing there — it's something that relates to national guard units and State government. In 1974 that was the "received wisdom" of the day. He said I ought to look into it, anyway. I did and started finding some incredible stuff. Much followed from that.

Quote

April 1, 2010, 7:42 pm

15. ***MQuinn* says:**

Jonathan Turley's article says:

Though the federal government has the clear advantage in such litigation, these challenges should not be dismissed as baseless political maneuvering. There is a legitimate concern for many that

this mandate constitutes the greatest (and perhaps the most lethal) challenge to states' rights in U.S. history.

While the original post isn't flat-out inaccurate, it is somewhat misleading:

Writing in USA Today, Jonathan Turley (George Washington) suggested that Obamacare is a flagrant violation of federalism and the Tenth Amendment.

Quote

April 1, 2010, 7:46 pm

16. **Steve says:**

Akhil Amar argued it was Constitutional under Section 5 of the 14th Amendment? The balls on that man, seems about as likely a position to be adopted as his two-tiers theory of federal jurisdiction.

Well, Section 5 was the winning argument in the FMLA case, so I don't know that it's as big a stretch as you suggest. Surely one could construct an argument that the status quo on health care disproportionately impacts women and minorities, or something of the sort.

A lot of peopl 30+ years ago might have said of the Second Amendment "Does any serious legal scholar think there's a snowball's chance in hell that an appellate court or SCOTUS will actually find that the Second Amendment describes an individual right?"

If we want to reframe the question to "is it possible that in 30 years, there will be a Supreme Court majority in favor of restoring the Lost Constitution?" then surely it's at least theoretically possible. But these lawsuits are being brought now.

Quote

April 1, 2010, 7:46 pm

17. **Cornellian says:**

If banning discrimination based on pre-existing conditions is only feasible if everyone's in the pool (because of the self-selection bias) then why isn't the individual mandate constitutional as a "necessary and proper" measure as that term is used in McCullough and in Raich?

Quote

April 1, 2010, 7:51 pm

18. **frankcross says:**

I thought McConnell's argument was about a method of passage (deeming) that wasn't used. Isn't it a misrepresentation to count him? Or am I unaware of another article of his?

Quote

April 1, 2010, 7:54 pm

19. **Bart says:**

Why would it matter whether a "legal scholar", "academic" or law professor had an opinion about a legal matter (e.g., the constitutionality "Obamacare" or "gun laws") or about what that opinion was?

If you have an opinion about a legal matter, great; explain it. If you are persuaded by someone else's argument, then that's fine too.

But if whether you believe that something is true is affected by whether "legal scholars", "academics" or law professors believe it (or in what relative numbers), then you're an idiot. Why waste our time with idiots who draw legal conclusions based on the existence or number of "legal scholars", "academics" or law professors on one or both sides of an issue?

Quote

April 1, 2010, 7:57 pm

20. **llamasex says:**

I am fairly sure it is constitutional. If you're sure it's not. Lets put some money on it. I'll go up to \$5k, we can see if Eugene or Orin will act as Escrow. Dead serious. I will even open the offer up to others.

Quote

April 1, 2010, 7:58 pm

21. **Guy says:**

Steve: Well, Section 5 was the winning argument in the FMLA case, so I don't know that it's as big a stretch as you suggest. Surely one could construct an argument that the status quo on health care disproportionately impacts women and minorities, or something of the sort.

Yes, but there Section 5 was only brought to "fill the gap" and apply to public employers if it was found that the Commerce Clause couldn't reach them, but this act goes much farther than regulating state action. Unless I misunderstand, Amar seems to tout section 5 as a general source of authority, maybe he meant he only relies on section 5 where regulation of

state action is concerned and he didn't mention it because he was writing for a lay audience, but it's a point that deserves to be made explicit if that's what he meant. Also it's extraordinarily disingenuous for him to talk about Congress having power to decide what rights are protected by the 14th amendment without even acknowledging the congruence and proportionality test.

Quote

April 1, 2010, 8:02 pm

22. **Stephen Lathrop says:**

According to the NRA, Ms. Totenberg was lying, and the NRA had given her three names: Robert Cottrol of George Washington, Joseph Olson of Hamline, and Sanford Levinson of Texas.

And what did Ms. Totenberg have to say? And what kind of a cite is, "According to the NRA"? Anyone there willing to own that assertion? Or maybe it's just the NRA talking, like the *Citizens United* decision says it can?

Quote

April 1, 2010, 8:05 pm

23. **therut says:**

All those long miserable years I heard Schumer, Kennedy, Feinstein and others(add Gore after a change of politics) say that it was a FACT that the 2nd amendment did not protect an individual right was SETTLED LAW makes me want to chuckle.

Quote

April 1, 2010, 8:07 pm

24. **Guy says:**

Incidentally, I should point out explicitly what you implicitly acknowledge, not agreeing with Amar's interpretation of Congress' Section 5 power in no way indicates a belief that the health care bill is unconstitutional. For example, I was surprised by the assertion although I think the act fits quite comfortably within the Commerce Clause power.

Quote

April 1, 2010, 8:36 pm

25. **Some Guy says:**

Hey, Gordo, why don't you set an example and open up YOUR wallet.

And health insurance means no one will die? Really?

Quote

April 1, 2010, 8:50 pm

26. **Strict says:**

Can we be clear what we mean here?

The legislation is big.

It's possible that certain **provisions** will be struck down, but impossible [literally zero, not one in a trillion] that the entire **bill** will be struck down.

Mr. Kopel seems to be talking about the "bill," but I think he must be referring to certain provisions.

Quote

April 1, 2010, 9:00 pm

27. **Strict says:**

Some Guy: "And health insurance means no one will die? Really?"

I don't think he was talking about simple deaths, but rather deaths relating to lack of insurance. Health insurance for all, for example, would not mean that no one dies, but it would mean that no one dies for lack of insurance.

Quote

April 1, 2010, 9:03 pm

28. **not my leg says:**

Given the people at the forum it's pretty clear that the pool of people contacted was basically professors at Seattle University and the University of Washington (where it was hosted). Professor Spitzer's remark was really more of an apology for not having someone than an attempt to make any claim about the merits of the lawsuit (he really was only moderating, except for a question on the Washington State Constitution, which is his area of expertise). He also was trying to be funny after the audience had listened to everyone basically argue for the constitutionality of the bill.

Without going too much into what people said, the at one point panel made

basically the same point as Bruce La Pierre; the Raich coalition was fragile, and could fall apart on this case. Especially given the fact that conservatives (not libertarians though) would be expected to support the illegality of marijuana, and that might have kept the Raich coalition together. The same force would not hold together a coalition in support of a liberal reform measure. They also considered the substantive arguments on each side; but for the cynical (or the realistic?) you should address the political motivations as well.

EDIT: Meant to add the link to the forum for anyone who wanted to see it.
<http://www.tvw.org/media/mediaplayer.cfm?evid=2010030169&TYPE=V&CFID=6431744&CFTOKEN=84800113&bhcp=1>

Quote

April 1, 2010, 9:05 pm

29. **Perseus says:**

Gordo:2. The "mandate" is, in fact, not a mandate — it's a tax penalty. Sort of like when I want to take out my retirement savings before I'm 59 1/2.

Not really since you are not required to have a tax-advantaged retirement account. A more appropriate analogy would be if the federal government nudged shoved you into setting up a retirement account by imposing a tax penalty if you failed to do so.

Quote

April 1, 2010, 9:08 pm

30. **Steve says:**

A more appropriate analogy would be if the federal government nudged shoved you into setting up a retirement account by imposing a tax penalty if you failed to do so.

Your government-mandated retirement account is called Social Security. Of course, as we all know, it's flagrantly unconstitutional.

Quote

April 1, 2010, 9:15 pm

31. **yao says:**

After reading this post, I am still left with the impression that "there are relatively few ["professor[s] who could come and who [think] this is flat-out unconstitutional"], and they are in great demand."

What I find especially ridiculous is this passage from the OP:

“Well, all I can say is that if I had some legal problem that required modestly diligent research, I sure wouldn’t hire any of those Washington panel organizers.

My Cato Institute colleague Ilya Shapiro has just posted an offer to debate Obamacare anywhere, anytime. Besides working at Cato (where he edits the Cato Supreme Court Review, and helps manage Cato’s extensive constitutional litigation program), he is also an adjunct professor of law at George Washington University.”

Nota bene: “has just posted”. Shapiro didn’t issue his offer until after the original article had run. Is failing to foretell the future now evidence of poor preparation?

Quote

April 1, 2010, 9:15 pm

32. **AF says:**

Can we all agree on two propositions?

1) That law professors have argued that a law is unconstitutional does not mean there is a plausible argument that it is unconstitutional under current law or that courts are minimally likely to hold it unconstitutional in the foreseeable future.

2) There is a far stronger textual and historical basis for finding an individual right to own guns in the Second Amendment than there is for finding a prohibition on health care reform in Article 1, Section 8 of the Constitution?

Quote

April 1, 2010, 9:18 pm

33. **Arthur Kirkland says:**

This thread (with its call to cavalry) reminds me of a tea party for law professors — same defiant energy, same result, but much better spelling.

Quote

April 1, 2010, 9:20 pm

34. **Bob Stump says:**

The courts should heed the words of Ilya Somin carefully with respect to the constitutionality of the Democare mandate: “Such a

law would be unconstitutional under the correct interpretation of the Commerce Clause."

The U.S. has built a dubious body of case law upon another Commerce Clause case, the 1873 Slaughterhouse decision by SCOTUS, now widely regarded as bad law.

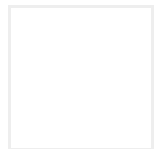
The issue nearly 140 years of stare decisis is causing all kinds of angst for the Fourteenth Amendment case of MacDonald v. Chicago related to the vector for incorporation of the Second Amendment to the States..

History may repeat itself, unfortunately. But if SCOTUS were to find the mandate constitutional, these two wrongs will most certainly not make a right.

Quote

April 1, 2010, 9:21 pm

35. ***Parable_of_the_rich_man_says:***



Just how many more boxes on my PAY STUB will they add to pay for Obumacare? Now I will provide funds to pay for gastric bypass's for the Obese, the lung transplants for smokers, the broken arms/legs and craniotomies for motorcyclists, the liver transplants for alcoholics and the penile implants for patients with HIV/AIDS.

Can you feel the love yet.....

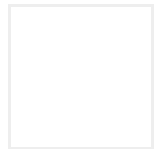
Say goodbye to the United States and hello to the United Socialist States of American.

I mourn for my country.

Quote

April 1, 2010, 9:30 pm

36. ***Jonathan H. Adler_says:***



FWIW, my view is fairly close to Ilya's. I expect challenges to the mandate to fail, largely due to Gonzales v. Raich, but I think Raich was wrongly decided.

I spelledout my views in this op-ed.

JHA

Quote

April 1, 2010, 9:32 pm

37. **Mahan Atma says:****PaperNuncio:**

Well, go read Dave Hardy's posts about the first law reviews to start discussing the issue:

I'm not sure what question you think you're answering, but I don't see any cite to legal scholars who said the SCOTUS would never find an individual right in the Second Amendment (much less any evidence that pretty much all legal scholars said so).

Quote

April 1, 2010, 9:34 pm

38. **byomtov says:**

you are not required to have a tax-advantaged retirement account. A more appropriate analogy would be if the federal government nudged shoved you into setting up a retirement account by imposing a tax penalty if you failed to do so.

Which is what the federal government does. A tax break for doing something is **exactly** the same thing as a penalty for not doing it. Is that really so hard to understand?

Quote

April 1, 2010, 10:09 pm

39. **J says:**

"a fringe position with no academic support"

Significant academic support would increase, not decrease the likelihood a given position was on the fringe. Unanimity would pretty much guarantee it.

Quote

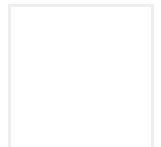
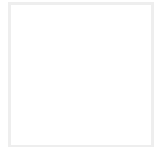
April 1, 2010, 10:27 pm

40. **Anonsters says:**

J: Significant academic support would increase, not decrease the likelihood a given position was on the fringe. Unanimity would pretty much guarantee it.

Because such pablum is always right.

Quote



April 1, 2010, 10:33 pm

41. ***Jamcleat*** » ***Blog Archive*** » ***Opinion On Obamacare Oh-Oh-Oh says:***

[...] link without additional [...]

April 1, 2010, 10:34 pm

42. ***David M. Nieporent*** says:

AF: Can we all agree on two propositions?

[...]

2) There is a far stronger textual and historical basis for finding an individual right to own guns in the Second Amendment than there is for finding a prohibition on health care reform in Article 1, Section 8 of the Constitution?

You're confused. Nobody thinks there is a "prohibition on health care reform in Article I, Section 8." Setting aside the minor error — that this is about the mandate, not about "health care reform" in toto — we come to the major error: the notion that the federal government is one of unlimited powers, subject only to explicit constitutional restraints. The claim is that there's no authorization for the mandate — and as such, it is unconstitutional — not that it is expressly prohibited.

Quote

April 1, 2010, 10:34 pm

43. ***John Martin*** says:

As they say: "the science is settled."

Quote

April 1, 2010, 10:39 pm

44. ***Perseus*** says:

Steve: *Your government-mandated retirement account is called Social Security. Of course, as we all know, it's flagrantly unconstitutional.*

That Ponzi scheme probably would have been deemed unconstitutional under the Lochner era Court. More to the point, as a constitutional matter, SS was sold as a tax on individuals and corporations, not as an individual mandate (even if it was sold popularly as "social insurance"). Benefits were deliberately kept distinct as a separate program for "the general welfare." See *Helvering v Davis*.

Quote

April 1, 2010, 10:39 pm

45. **Hannibal says:**

I think the point of the post was that UW didn't try very hard to find serious skeptics of Obamacare's constitutionality, but then presented their "debate" to the public as if that issue had been precluded somehow. The constitutionality of Obamacare is definitely questionable, and you don't have to be a law professor to see that. Its unlikely to me that the whole thing will be struck down, fairly likely that provisions of it will be struck down, and exceptionally likely that there will not be a unanimous Supreme Court decision on the issue.

Quote

April 1, 2010, 10:43 pm

46. **Guest12345 says:**

byomtov: Which is what the federal government does. A tax break for doing something is **exactly** the same thing as a penalty for not doing it. Is that really so hard to understand?

Well, yes it is. I mean, are you a robber because you don't give people money at every possible opportunity? Are you a murderer because you haven't donated every spare organ, bit of tissue and bodily fluid that might have saved someone's life? Are you a prostitute because you've had sex with someone who has ever given you a gift or bought you a drink or a meal? Are you an arsonist because you haven't gone and put out all the fires in the world? Apparently in your world, all those statements are true. Not to mention, you not killing me is the same thing as giving me life. I think you've got 18 years of back child support payments that you owe me. I'm surprised that a multiple murderer, serial robber, wanton prostitute, prolific arsonist, deadbeat parent such as yourself has access to the internet. One would think that The Man would have locked you up and thrown away the key.

Or maybe it's not just a matter of math, where you can flip the signs across the board and still get the same answer. Sometimes there are non-mathematic facts that have some relevance. In the United States there is this concept of individual ownership of property. The government not taking from me isn't the same thing as the government giving to me. And vice versa. It's not that difficult an idea to grasp, I'm sure that if you try you'll be able to get it.

Quote

April 1, 2010, 10:48 pm

47. **Mahan Atma says:**

Hannibal: The constitutionality of Obamacare is definitely questionable...

I think your assertion is definitely questionable. Can you back it up?

Quote

April 1, 2010, 10:56 pm

48. **mack says:**

Gordo:2. "The "mandate" is, in fact, not a mandate — it's a tax penalty.Sort of like when I want to take out my retirement savings before I'm 59 1/2."

Is it not a mandate — when the penalties for failure to comply can rise to felony status and years in prison?

- Section 7203 – misdemeanor willful failure to pay is punishable by a fine of up to \$25,000 and/or imprisonment of up to one year.
- Section 7201 – felony willful evasion is punishable by a fine of up to \$250,000 and/or imprisonment of up to five years.

Quote

April 1, 2010, 10:59 pm

49. **Anonsters says:**

mack: • Section 7203 – misdemeanor willful failure to pay is punishable by a fine of up to \$25,000 and/or imprisonment of up to one year.

- Section 7201 – felony willful evasion is punishable by a fine of up to \$250,000 and/or imprisonment of up to five years.

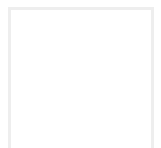
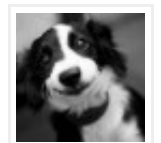
And those are sections of what?

Quote

April 1, 2010, 11:13 pm

50. **yankee says:**

byomtov: Which is what the federal government does. A tax break for doing something is exactly the same thing as a penalty for not doing it. Is that really so hard to understand?



I often hear this said, but I don't think it's quite right. There are two major differences between a tax credit/deduction for X and a tax on not-X:

1) If there's a tax break for X, it only benefits you up to the amount of tax you would otherwise owe. By contrast, a tax on not-X would apply whether or not you otherwise owed tax. The only way to make them equivalent is to define the "tax on not-X" in an almost absurdly gerrymandered way.

2) Many common deductions or credits would be virtually impossible to implement as taxes. How would you define a tax on not owning a home that produced precisely the same results as the home mortgage interest deduction? You'd have to define the "tax" on non-homeowners in terms of the amount of mortgage interest they're not paying; maybe there's some economic wizardry that will let you do that, but it would be an exceptionally complicated matter.

Quote

April 1, 2010, 11:19 pm

51. ***Sebastian the Ibis*** says:

Llamasex, I accept your wager so long as Randy Barnett and Ilya Shapiro judge it's constitutionality.

Quote

April 1, 2010, 11:21 pm

52. ***Octavian*** says:

How ironic that this nation successfully led the free world during the Cold War against a totalitarian government, only to see the Usurper morph our federal government into the very same totalitarian government that was vanquished 20 years ago.

Quote

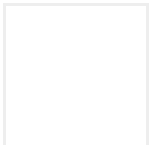
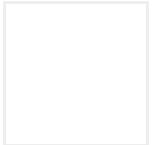
April 1, 2010, 11:23 pm

53. ***Anonsters*** says:

Octavian: How ironic that this nation successfully led the free world during the Cold War against a totalitarian government, only to see the Usurper morph our federal government into the very same totalitarian government that was vanquished 20 years ago.

Boring troll is boring.

Quote



April 1, 2010, 11:24 pm

54. **Mahan Atma says:**

mack Is it not a mandate — when the penalties for failure to comply can rise to felony status and years in prison?

- Section 7203 – misdemeanor willful failure to pay is punishable by a fine of up to \$25,000 and/or imprisonment of up to one year.
- Section 7201 – felony willful evasion is punishable by a fine of up to \$250,000 and/or imprisonment of up to five years.

Those are sections from Title 26, right?

On what basis do you claim these apply to a failure to buy health insurance?

Or is this your idea of a legal argument, to pluck sections from one area of federal statutes and blindly apply them to something completely inapplicable?

(Prof. Yoo, is that you?)

Quote

April 1, 2010, 11:26 pm

55. **Anonsters says:**

Mahan Atma: On what basis do you claim these apply to a failure to buy health insurance?



Particularly in light of H.R. 3590's § 1501, which adds to Subtitle D of the Internal Revenue Code § 5000A(g)(2):

'(g) Administration and Procedure—

'(2) SPECIAL RULES— Notwithstanding any other provision of law—

'(A) WAIVER OF CRIMINAL PENALTIES— In the case of any failure by a taxpayer to timely pay any penalty imposed by this section, such taxpayer shall not be subject to any criminal prosecution or penalty with respect to such failure.

'(B) LIMITATIONS ON LIENS AND LEVIES— The Secretary shall not—

'(i) file notice of lien with respect to any property of a taxpayer by reason of any failure to pay the penalty imposed by this section, or

'(ii) levy on any such property with respect to such failure.'

Quote

April 1, 2010, 11:33 pm

56. ***cubanbob*** says:

Anonsters:

Particularly in light of H.R. 3590's § 1501, which adds to Subtitle D of the Internal Revenue Code § 5000A(g)(2):

If that is ruled to be the case then the mandates mean nothing and the apparent motive is to eliminate private health insurance. Then the question is does the Congress have the authority to ban private health insurance covertly and if so, do the insurance companies have a takings clause claim?

Quote

April 1, 2010, 11:44 pm

57. ***The Volokh Conspiracy » Blog Archive » The Myth of an Expert Consensus on the Constitutionality of the Health Care Mandate Revisited*** says:

[...] as co-blogger David Kopel points out, it seems more such debunking is needed, as some are still trying to peddle the myth of an expert [...]

April 1, 2010, 11:59 pm

58. ***The Volokh Conspiracy » Blog Archive » A Better Question*** says:

[...] light of David K. and Ilya's posts on the constitutionality of the health care mandate, let me propose a better [...]

April 2, 2010, 12:15 am

59. ***Mike Hansberry*** says:

Mathematicians are unanimous, $2 + 2 = 5$

On which side of the looking glass are excise taxes levied on actions not done or items not purchased?

Quote

April 2, 2010, 12:24 am

60. ***David Sucher*** says:

If Republicans kill Obamacare, they will get the public option.

Quote

April 2, 2010, 12:30 am

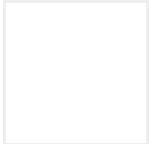
61. **Anonsters says:**

David Sucher: If Republicans kill Obamacare, they will get the public option.

In that case, I hope they kill Obamacare.

Quote

April 2, 2010, 12:32 am

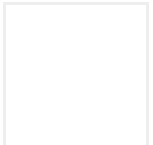
62. **Mike Hansberry says:**

Brett Bellmore: Since the 'individual right' they supported was purely rhetorical in nature, no individual would ever plausibly be in a position to claim it. It was more a slap in the face to that position, than a concession to it.

That is the beauty of it, the dissenters were too clever by half. The 9-0 count in favor of an individual right means it is not likely to be overturned. And the implausibility of the limited individual right theory embraced by the dissenters (a theory rejected out of hand by *Silveira*) is ripe for mockery.

Quote

April 2, 2010, 12:52 am

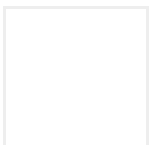
63. **rpt says:**

Octavian: How ironic that this nation successfully led the free world during the Cold War against a totalitarian government, only to see the Usurper morph our federal government into the very same totalitarian government that was vanquished 20 years ago.

US = USSR? "Usurper" not elected? Wow.

Quote

April 2, 2010, 12:55 am

64. **Evan Thomas says:**

"I don't think he was talking about simple deaths, but rather deaths relating to lack of insurance. Health insurance for all, for example, would not mean that no one dies, but it would mean that no one dies for lack of insurance."

Does having insurance save lives? That's the more interesting question.

Quote

April 2, 2010, 12:56 am

65. **Ryan A says:**

Steve: *A more appropriate analogy would be if the federal government nudged shoved you into setting up a retirement account by imposing a tax penalty if you failed to do so. Your government-mandated retirement account is called Social Security. Of course, as we all know, it's flagrantly unconstitutional.*

Social Security is a condition of employment not a government mandate applied to all citizens. It only applies to those with earned income.

Quote

April 2, 2010, 1:32 am

66. **Doctor Gator says:**

If the federal must buy health insurance "mandate" is constitutional, then a federal mandate that I must park the car I own that gets 20 mpg and buy a car that gets 35 mpg would be constitutional. Even if I don't want a car at all.

Quote

April 2, 2010, 2:00 am

67. ***Tweets that mention The Volokh Conspiracy » Blog Archive » Pretending that no law professors question Obamacare -- Topsy.com says:***

[...] This post was mentioned on Twitter by eindiansurance. eindiansurance said: The Volokh Conspiracy » Blog Archive » Pretending that no law ... <http://bit.ly/adui66> [...]

April 2, 2010, 2:22 am

68. **Norris Hall says:**

Oh my God!!

It's Happening!!!

I called my doctors office just one week after Health Care reform and I got a recorded message saying that due to the government takeover of health care he was no longer seeing private patients and was being forcibly move

to a huge government medical building. I called My insurance company the person on the phone whispered that private health insurance had been eliminated and from now on I would have to call a government health exchange for insurance...if there was any left.

Frantic, I called the Pharmacy at our local supermarket . The clerk who answered the phone said that the pharmacy had being forced to close in an morning raid by the DEA and that all the pharmacists and drugs had been taken to the big government health care building .lle

I called my local Catholic hospital. A nun answered . Weeping hysterically she said that they had been shut down, all the doctor and nurses had been forced onto busges and taken to the big government health care building. They were all being forced to become federal employees, And all the old patients in the hospital.....they had been wheeled out on gurneys and left in the street under the hot sun and shivering cold night to die. My God, Sarah was right!!

Just one week after Health care reform, Armageddon!!

Freedom is coming to an end.

Life as we know it is finished.

The Communists have taken over!!

Oh God!!!

Quote

April 2, 2010, 2:32 am

69. **Ken says:**

I agree that the individual mandate is likely unconstitutional, but something about the "Obamacare" label strikes me as wrong. It just sounds like something you'd hear at a Tea Party rally and not on an academic blog. I realize the term has been co-opted by some outlets in the mainstream media, but the negative connotation remains.

Why not just refer to "Obamacare" as the "health care plan," the "health care bill," etc.?

Quote

April 2, 2010, 2:33 am

70. **noahp says:**

Yep it is not fair to call it Obamacare since he didn't understand the bill. Either that or he is a cynical liar..take your pick.

Quote

April 2, 2010, 3:57 am

71. **S says:**

No one answered the call in the post? That's funny.

Quote

April 2, 2010, 6:23 am

72. ***Pretending that no law professors question Obamacare*** « ***Daniel Joseph Smith says:***

[...] Pretending that no law professors question Obamacare [...]

April 2, 2010, 7:56 am

