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## Health care act's rationale will cause its extinction

By: George Will – January 18, 2013

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WASHINGTON | A willow, not an oak. So said conservatives of Chief Justice John Roberts when he rescued the Affordable Care Act -- aka Obamacare -- from being found unconstitutional. But the manner in which he did this may have made the ACA unworkable, thereby putting it on a path to ultimate extinction.

This plausible judgment comes from professor Thomas A. Lambert of the University of Missouri Law School, writing in *Regulation* quarterly, a publication of the libertarian Cato Institute. The crucial decision, he says, was four liberal justices joining Roberts' opinion declaring that the ACA's penalty for not complying with the mandate to purchase health insurance is actually a tax on not purchasing it. With this reasoning, the court severely limited the ability of the new health care regime to cope with its own predictable consequences.

What was supposed to be, constitutionally, the dispositive question turned out not to be. Conservatives said the mandate -- the requirement that people engage in commerce by purchasing health insurance -- exceeded Congress' enumerated power to regulate interstate commerce.

Liberals ridiculed this argument, noting that since the judicial revolution wrought during the New Deal, courts have given vast deference to Congress regarding that power. The ridicule stopped when five justices, including Roberts, agreed with the conservative argument.

This did not, however, doom the ACA because Roberts invoked what Lambert calls "a longstanding interpretive canon that calls for the court, if possible, to interpret statutes in a way that preserves their constitutionality." Roberts did this by ruling that what Congress called a "penalty" for not obeying the mandate was really a tax on noncompliance. This must, Lambert thinks, have momentous -- and deleterious -- implications for the functioning of the ACA. The problems arise from the interplay of two ACA provisions -- "guaranteed issue" and "community rating."

The former forbids insurance companies from denying coverage because of a person's pre-existing health condition. The latter, says Lambert, requires insurers to price premiums "solely on the basis of age, smoker status, and geographic area, without charging higher premiums to sick people or those susceptible to sickness."

The point of the penalty to enforce the mandate was to prevent healthy people -- particularly healthy young people -- from declining to purchase insurance, or dropping their insurance, which would leave an insured pool of mostly old and infirm people. This would cause the cost of insurance premiums to soar, making it more and more sensible for the healthy to pay the ACA tax, which is much less than the price of insurance.

Roberts noted that a person earning \$35,000 a year would pay a \$60 monthly tax and someone earning \$100,000 would pay \$200. But the cost of a qualifying insurance policy is projected to be \$400 a month. Clearly, it would be sensible to pay \$60 or \$200 rather than \$400, because if one becomes ill, "guaranteed

issue" assures coverage and "community rating" means that one's illness will not result in higher insurance rates.

So, Lambert says, the ACA's penalties are too low to prod the healthy to purchase insurance, even given ACA's subsidies for purchasers. The ACA's authors probably understood this perverse incentive and assumed that once Congress passed the ACA with penalties low enough to be politically palatable, Congress could increase them.

But Roberts' decision limits Congress' latitude by holding that the small size of the penalty is part of the reason it is, for constitutional purposes, a tax. It is not a "financial punishment" because it is not so steep that it effectively prohibits the choice of paying it. And, Roberts noted, "by statute, it can never be more." As Lambert says, the penalty for refusing to purchase insurance counts as a tax only if it remains so small as to be largely ineffective.

Unable to increase penalties substantially, Congress, in the context of "guaranteed issue" and "community rating," has only one way to induce healthy people to purchase insurance. This is by the hugely expensive process of increasing premium subsidies enough to make negligible the difference between the cost of insurance to purchasers and the penalty for not purchasing. Republicans will ferociously resist exacerbating the nation's financial crisis in order to rescue the ACA.

Because the penalties are constitutionally limited by the reasoning whereby Roberts declared them taxes, he may have saved the ACA's constitutionality by sacrificing its feasibility. So as the president begins his second term, the signature achievement of his first term looks remarkably rickety.