

## 52. HEALTHCARE AND THE CONSTITUTION #4

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For Immediate Release

### Former Senator Schmitt Advocates Continued and Specific Constitutional Challenges to Obamacare's Nationalization of Healthcare

The "Patient Protection and Affordable Healthcare Act of 2010" (Obamacare) and many of its specific sections remain unconstitutional in spite of the recent Supreme Court decision in *National Federation of Independent Business v. Sebelius*. The Constitution is what it is; no Supreme Court decision can legitimately amend that fundamental document. The Amendment process remains as defined in Article V. Neither Article III (judicial power) nor *Marbury v. Madison* (Supreme Court determines constitutionality) gives the Court comparable amendment power. Nor does Article III confer the legislative power to the Court it assumes in changing an Act of Congress to read that a "penalty" is a "tax" and not a penalty.

The "Opinion of the Court" on Obamacare declares that the "individual mandate" to purchase health insurance or pay a penalty to the Internal Revenue Service creates a "tax" rather than an otherwise unconstitutional expansion of the Commerce Clause of Article I, Section 8. Section 8, Clause 1, gives Congress the "Power to lay and collect Taxes, Duties, Imposts and Excises". Elsewhere, the Constitution defines two forms of "Taxes" that Congress can levy as follows: "Capitation, or other direct, Tax" if "Proportional to the Census or Enumeration" (Section 9, Clause 4); and "in-

comes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration" (Article 16).

The Constitution nowhere enumerates that Congress can impose a tax on an American for not taking some action, in this case, for not buying insurance. The Founders would have recognized that such a tax would give the Federal Government unlimited power to restrict individual liberty. They had seen this abusive use of taxing power before with Parliament's 1766 "Stamp Act" and 1773 "Tea Act"; successfully fought a Revolution against such power; and specifically crafted the Constitution to limit the taxing power of Government. As James Madison put it, "...it is to be remembered that the general government is not to be charged with the whole power of making and administering laws. Its jurisdiction is limited to certain **enumerated** objects."

The Constitution of the United States enumerates no right to health or healthcare. Thus, on its face, Obamacare in its entirety is unconstitutional. Rather, preservation of health clearly lies with the people within the powers **not** enumerated as those of the Federal Government. The 9th and 10th Amendments, relative to such unenumerated powers, clearly give the people,

or through them, the States control of healthcare. The “unalienable rights” stated in the Declaration of Independence include “life” as well as “liberty and the pursuit of happiness.” “Life,” however, implies something very different than “health.” The right to life coexists with the “liberty” of individual choice of how life shall be lived in “the pursuit of happiness.” Further, the 10th Amendment gives the people or States and not Congress control of health policy.

Current Senate leadership, the President, far too many business cronies, and now five Justices of the Supreme Court remain intent on the impossible task of managing the 16 percent of the American economy we call “healthcare.” They argue that Congress’s power to “provide for the...general Welfare” found in Article I, Section 8, Clause 1, permits **any** form of federal legislation. The full Article I phrase, in fact, reads, “provide for the common Defence and general Welfare.” Following Clauses limit the specific powers of the Congress in regard to the common defense and general welfare, but none give Congress power to do anything it decides is politically or ideologically expedient. This “general welfare” phrase also must be viewed in the context of the more inclusive phrase “*promote* the general welfare” in the Preamble to the Constitution. That phrase in the Preamble sets out one of several basic reasons for the establishment of our form of government, and it subordinates the Article I Congressional power to other constitutional provisions. Of particular note in this regard are (1) the lack of any Section 8 enumeration of healthcare among other specifically stated areas for possible Congressional intervention and (2) the combined effect of the 5th and 14th Amendments that make unconstitutional the legislative imposition of reward or penalty on some and not on others, thereby depriving those others of “equal protection of the law.”

Some lawyers state that Article VI, Clause 2, the so-called Supremacy Clause, provides that federal law always trumps state law. Basically, this position maintains that the Congress, with the agreement of the President, can override any State law. The Founders would not have agreed [\[Essay 24\]](#). The relevant portion of the Clause actually reads, “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof... shall be the supreme Law of the Land...” The underlined phrases clearly indicate that only the Constitution and federal law made by virtue of Congress’s enumerated powers are supreme; however, those laws enacted by the States under their 10th Amendment powers lie beyond the reach of federal law so long as State laws honor the constitutional rights of the people.

In addition to the unconstitutionality of mandating health reform by selective prohibition and regulation, specific provisions of Obamacare add constitutional insult to injury and should not be part of any legislation. One provision, Sec. 5210 for example, raises a “Regular Corps and a Ready Reserve Corps” ostensibly for the dubious purposes of meeting “both routine public health and emergency response missions”. This “Obamacare Army” would be under direct command of the President and independent of the Department of Defense, the National Guard, or local enforcement agencies. Thirty-five million dollars were authorized for training this new army in fiscal years 2010 and 2011, and an additional \$52.5 million have been authorized for the next 3 fiscal years. Other provisions, enumerated further below, violate several Amendments to the Constitution, specifically, equal protection (5th and 14th), due process (5th), warrantless searches for papers (4th), criminal prosecution rights (6th), and the right for patients and physicians to associate (9th). Thus, the

“individual mandate” constitutes only the tip of the iceberg toward which American liberty is being steered.

**Insurance Mandate:** Congress has no specific or general welfare power under Article I, Section 8, to mandate that all Americans use their incomes to purchase anything, much less health insurance. Nor can the power of Congress to regulate interstate commerce under Clause 3 provide constitutional justification for federally regulated insurance unless it requires States to allow insurance companies to compete across state lines. Even then, regulation must be restrained to regulation of actual interstate “commerce” and not include unconstitutional mandates on the insured. Note that nothing in the “Opinion of the Court” relative to Obamacare limits Congress from trying again to extend the Commerce Clause to cover individual decision-making. The Chief Justice only expressed an opinion on this subject, an opinion not shared by the four liberal Justices who otherwise joined in the Opinion of the Court.

To make matters constitutionally worse, under Obamacare, those who do not wish to purchase insurance would be deprived of equal protection under the 5th and 14th Amendments. Further, the mandate would confiscate private property (money) without just compensation as also required under the 5th Amendment. Nor can a State mandate the purchase of insurance due to the same restrictions of the 5th and 14th Amendments.

**Criminalization of Non-Compliance:** Criminalization of both an individual’s lack of health insurance and the purchase of health insurance above a government imposed limit violates the 6th Amendment without providing for the extensive and far-reaching protections required for “all criminal prosecu-

tions.” Now, as a result of the Supreme Court *NFIB v. Sebelius* decision, the unlected bureaucrats and agents of the IRS will enforce this unconstitutional prosecution of non-compliance.

**Prosecutions:** Obamacare requires that private contracts between patient and insurer contain specific mandated coverage, violating the 4th Amendment right of the people “to be secure in their...papers...against unreasonable searches and seizures...”. Without a constitutionally valid warrant, the government has no constitutional power to access what is in a contract (paper or oral) between an American and his or her insurer.

**Tax Increases:** Obamacare imposes new sales taxes disguised as excise taxes on a targeted few producers, sellers, individuals, and families to subsidize insurance for others and to cover the vast administrative costs of government healthcare bureaucracies. These taxes will be passed on to some consumers as de facto sales taxes, violating, both directly and indirectly, equal protection under the 5th and 14th Amendments. In addition, under neither Article I nor the 16th Amendment, does there exist constitutional justification for an actual federal sales tax on visits to tanning salons. If allowed to stand, this specific sales tax could be used as a precedent for more such unconstitutional taxes. Further, the law applies a “before sale” sales tax if an individual or a company does not buy health insurance for themselves or their employees, respectively. This category of sales tax effectively constitutes a fine and runs afoul of the “due process” clause of the 5th Amendment, as the Obamacare new law provides no administrative or judicial appeal process.

Moreover, the Healthcare and Education Reconciliation Act of 2010, Sec. 1411, imposes a 3.8% tax on the net gain from the

sale of any disposable private property or on any net investment income beginning in 2013. This tax is in addition to any capital gains tax.

***Free Association:*** Obamacare tramples the rights to privacy and free association protected by the 9th Amendment [Essay 36] by inserting government review and control between a private patient and his or her doctor. The 9th Amendment states, “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” The “certain rights” referenced by this Amendment, clearly include those specified in the Bill of Rights. Those “others retained by the people” logically would embrace all naturally encompassing, or intensive, human rights of a free people, for example, the “unalienable rights of life, liberty, and the pursuit of happiness,” identified by the Declaration of Independence. Other such intensive rights include free association, as well as privacy, education, travel, communication, and thought, in other words, rights that inherently belong to humans as a species. Activities like seeking healthcare clearly would **not** be included as a “right” as they relate only to voluntary human activity in support of an intensive right to life.

***Mandated State Benefit Exchanges:*** The new law requires States to create and regulate health benefit exchanges to oversee insurers’ allocation of benefits to subsidized patients. Absent State action, the federal government would set up and manage an exchange for the State. This coercive mandate on the States violates both the nature of the federal system of government envisioned by the Founders and the specific rights of the States and the people spelled out in the 10th Amendment.

***Insurance Companies as Utilities:*** Directly and indirectly, Obamacare herds insurance companies into a stable of public utilities. In so doing, Congress not only illogically assumes that insurance constitutes a natural monopoly, like a local power company, but fails to provide for a market rate of return to the companies and their shareholders. The law would limit insurers as to what could be included in premiums as administrative costs rather than allowing the inclusion of actual costs. At the same time, the government would establish minimum standards of care over which the “insurance utility” would have no cost control, administrative or otherwise. In addition to the economic lunacy of this charade, the unconstitutionality of the provision lies in the 5th Amendment’s right of persons (shareholders) not to have “private property be taken for public use without just compensation.”

***Limitation on Drug and Device Costs:*** Obamacare also directly and indirectly mandates limitations on the costs of medical drugs and devices. Without the ability to recover the costs of development, testing, and regulatory approval, drug and device companies will be unable to continue vigorous research and development efforts that potentially benefit everyone. Congress has no enumerated constitutional power to impose restrictions of this nature on selected private entities, either in Article I or under the equal protection mandate of the 5th and 14th Amendments.

***Restrictions on Religious Liberty:*** Regulations issued under Obamacare mandate that employers offer health insurance plans that provide coverage of services related to contraception, sterilization and abortion-inducing drugs. “Employers” would, of course, include church-based entities for which such mandatory plans would be in direct contradiction of religious beliefs,

teachings and conscience. As should all other unconstitutional provisions of Obamacare, these regulations are being challenged in Federal Court, in this instance by Catholic dioceses and related organizations throughout the United States, as a direct violation of the 1st Amendment. That Amendment states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...” All organized religion should be concerned about this direct violation of the Bill of Rights.

The Constitution remains America’s primary defense against the usurpation of liberty in the name of “national healthcare reform.” Remember, Germany’s descent into national socialism began with the imposition of national healthcare under Bismarck in the 1880s [Essay 16]. The States must accelerate their 10th Amendment defenses against the imposition of federal regulatory mandates in areas of governance not enumerated in Article I or elsewhere in the Constitution. At the same time, individuals, businesses, and associations must challenge the constitutionality of federal jurisdiction over healthcare as well as question specific provisions of Obamacare.

On the other hand, the empirical bounds of the Constitution include everything necessary for Americans to have superior healthcare choices and delivery. To accomplish this goal, Americans only need to have broadly applicable income tax deductions for health insurance, and insurance providers need to be able to compete across state lines. Lower cost, competition-driven insurance coverage then could be purchased and tailored to individual needs, including income levels, pre-existing conditions, home health care, hospice care, and so on. Congress could further lower healthcare and insurance costs by requiring that the Courts limit tort awards in alleged malpractice cases to actu-

al, provable damages. Additionally, Congress should require that the loser in liability suits pay court costs and that attorneys bringing frivolous or fraudulent suits be fined substantially and/or disbarred.

Specific legislative provisions now enacted in the Patient Protection and Affordable Care Act of 2010 and its companion Health Care and Education Reconciliation Act should be contested in court, one by one. We must assume that the Federal Court System’s commitment to judicial re-writing of the Constitution has not gone so far that these challenges will prove futile. The alternative is a loss of the rule of law upon which a representative democracy ultimately depends.

Americans must stay forever on guard in the protection of both their liberty and specific Constitutional limitations on governmental power. The election of 2012, with a change of Presidents and large conservative majorities in the Congress, would permit full repeal of this massive intrusion into American liberties along with the removal of the blade of massive tax increases that hangs over the head of private growth and job creation.

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Elements of the current essay have been revised from [Essay 9](#) of February 15, 2010 and [Essay 17](#) of April 7, 2010.

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